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## COMMENT

### SUPPRESSING THE TRUTH: STATES’ PURPOSEFUL VIOLATION OF THE RIGHT TO NO CRUEL OR UNUSUAL PUNISHMENT IN LETHAL INJECTION EXECUTIONS

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## I. INTRODUCTION

Confidence in the use of lethal injection as the primary form of implementing the death penalty in the United States is rapidly declining.<sup>1</sup> The high occurrence of recent failed executions suggests a flawed procedure in need of revision.<sup>2</sup> These botched executions, coupled with a national shortage in lethal injection drugs, highlight concerns regarding the constitutionality of state secrecy laws protecting pharmaceutical entities from public scrutiny.<sup>3</sup>

Litigation regarding the constitutionality of a state's lethal injection procedures is not unheard of.<sup>4</sup> Inmates have challenged whether the

1. See RICHARD C. DIETER, DEATH PENALTY INFO. CTR., A CRISIS OF CONFIDENCE: AMERICANS' DOUBTS ABOUT THE DEATH PENALTY 1 (2007), <http://www.deathpenaltyinfo.org/CoC.pdf> (commenting on Americans' preference regarding punishments for heinous crimes has shifted to life without parole rather than death penalty); John Ericson, *Botched Execution Shows Perils of Lethal Injection Drug Shortage*, NEWSWEEK (Apr. 30, 2014), <http://www.newsweek.com/2014/05/16/states-go-great-lengths-find-lethal-injection-drugs-249154.html> (emphasizing a decline in public approval on capital punishment since the rate of approval is at its lowest ever with only 55% of Americans favoring execution).

2. See Ericson, *supra* note 1 (reporting Michael Lee Wilson's lethal injection experience as he felt his "whole body burning"); Matt Pearce et al., *Arizona Killer Takes 2 Hours to Die, Fueling Lethal-Injection Debate*, L.A. TIMES (July 23, 2014, 11:17 PM), <http://www.latimes.com/nationnow/la-na-nn-arizona-execution-20140723-story.html> (describing reporters' observations during death penalty proceedings as the inmate wheezed for hours after the procedure was initiated).

3. See Deborah W. Denno, *Lethal Injection Chaos Post-Baze*, 102 GEO. L.J. 1331, 1376 (2014) (suggesting states knowingly continue to use compounded drugs despite the heightened health risks associated with the non-FDA regulated substances, while "becoming increasingly less willing to share information about executions with the public").

4. See Casey Lynne Ewart, Note, *Use of the Drug Pavulon in Lethal Injections: Cruel and Usual?*, 14 WM. & MARY BILL RTS. J. 1159, 1168 (2006) (examining death penalty procedures for different states); see also Deborah W. Denno, *The Lethal Injection Debate: Law and Science*, 35 FORDHAM URB. L.J. 701, 708 (2008) (listing previous constitutional challenges to lethal injection methods including the

chemicals utilized in death penalty proceedings are inhumane, whether the presence of a licensed medical practitioner at an execution is required, and whether individuals participating in the execution process are qualified to administer lethal substances.<sup>5</sup> However, the 2008 Supreme Court decision in *Baze v. Rees*<sup>6</sup> made it substantially more difficult for petitioners to prevail in an Eighth Amendment challenge.<sup>7</sup> Recently, the sole domestic supplier for sodium thiopental, the initial anesthetic used to induce the inmate into an unconscious state,<sup>8</sup> ceased production in the United States assuring it would continue assembly at a later date in Europe.<sup>9</sup> That premise proved futile, due to foreign nations' refusal to export the drug.<sup>10</sup> The halt in domestic production in conjunction with foreign nations' anti-death penalty position have left death penalty states with a dwindling supply.<sup>11</sup> As a result, states are forced to adopt one of two options: 1) find alternative measures or 2) risk suspending the practice altogether.<sup>12</sup> Unfortunately, the sought-after alternative measures may not be the safest or most reliable substitutes.<sup>13</sup>

States are aware of the risks associated with relying on compounding

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position lethal injection concoctions must be approved by the FDA prior to administration).

5. See Denno, *supra* note 3, at 1348–51 (outlining the numerous challenges made by inmates and the precedential impact of *Baze*); Denno, *supra* note 4, at 702 (studying each constitutional challenge following the *Baze* opinion by number of cases and separating them into four distinct categories).

6. *Baze v. Rees*, 553 U.S. 35 (2008) (plurality opinion).

7. See *id.* at 51 (“[A] condemned prisoner cannot successfully challenge a State’s method of execution merely by showing a slightly or marginally safer alternative.”); Denno, *supra* note 3, at 1350 (noting “almost every court presented with a foreign-drug challenge found that the plaintiff did not have sufficient evidence to show that the use of a foreign-produced drug would be likely to create a substantial risk of unconstitutional harm”).

8. See Denno, *supra* note 3, at 1333 (identifying sodium thiopental as a barbiturate anesthetic that induces deep unconsciousness).

9. See Adam Lozeau, Note, *Obscuring the Machinery of Death: Assessing the Constitutionality of Georgia’s Lethal Injection Secrecy Law*, 32 LAW & INEQ. 451, 463–64 (2014) (noting the sole manufacturer of sodium thiopental ceased production due to shortages of a necessary ingredient); *EU’s Stance Forces U.S. Executioners to Improvise*, NEWSOK (Feb. 18, 2014), <http://newsok.com/eu-stance-forces-us-executioners-to-improvise/article/feed/652502> (acknowledging the British government’s enforcement of restrictions prohibiting distribution of sodium thiopental to the United States and discussing how these restrictions interfered with Hospira’s plans to commence production in Italy).

10. See *Germany: No Death Penalty Drug to U.S.*, FOX NEWS (Jan. 24, 2011), <http://www.foxnews.com/world/2011/01/24/german-doctors-sodium-thiopental> [hereinafter *Germany: No Death Penalty Drug*] (describing the United States’ lethal injection drug shortage and noting Europe’s exasperation of the dilemma by “bann[ing] exports of sodium thiopental for use in executions”).

11. Denno, *supra* note 3, at 1336.

12. *Id.*

13. *Id.* (discussing death penalty states’ reliance on compounding pharmacies for alternative compounded drugs, which are not subject to strict federal regulations).

pharmaceutical drugs as a method for continuing lethal injection practices.<sup>14</sup> However, to avoid public criticism and to provide safety assurances to compounding pharmacies, states are refusing to disclose the identity of their suppliers.<sup>15</sup> Several states are now enacting regulations that “exclude the death-penalty protocol from required disclosure.”<sup>16</sup> For example, then Texas Attorney General Greg Abbott announced, “[S]tate prison officials no longer have to tell the public where they obtain drugs to execute condemned criminals.”<sup>17</sup> Abbott based his decision on the common law exception to the Public Information Act (PIA) that was initially created in 1977 by Attorney General John Hill<sup>18</sup> and later codified.<sup>19</sup> The problem with state secrecy laws, such as those implemented by Texas, is they will “unnecessarily shield details of [states’] ultimate punishment and could cover up mistakes in executions.”<sup>20</sup> These mistakes are apparent in recent failed executions nationwide.<sup>21</sup>

While states contend withholding the identities of supplying companies is necessary to protect against “substantial threat of physical harm,”<sup>22</sup> actually it leads to a violation of the United States Constitution’s protection from cruel and unusual punishment.<sup>23</sup> Thus, disclosure

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14. *Id.* at 1376.

15. *See id.* at 1378 (discussing some death penalty states’ preference for confidentiality by adopting regulations that exclude death penalty protocols from required disclosure); Terri Langford, *AG: Prisons Can Keep Info About Execution Drugs Secret*, TEX. TRIB. (May 29, 2014), <http://www.texastribune.org/2014/05/29/ag-says-prisons-can-keep-execution-drugs-secret> (showing compounding pharmacies’ refusal to continue supplying death penalty drugs unless states guarantee the withholding of their identities).

16. *See* Denno, *supra* note 3, at 1377–78 (describing legislative efforts from Georgia, Arkansas, Tennessee, and South Dakota to implement secrecy laws protecting the identities of supplying drug manufacturers).

17. Mike Ward, *Abbott Switches Mind on Death Drug Secrecy*, HOUS. CHRON. (May 29, 2014), <http://chron.com/default/article/Abbot-switches-mind-on-death-drug-secrecy-5514843.php>.

18. *See* Tex. Att’y Gen. OR1977-0169 (noting only five exceptional circumstances to restrict public access to state employee information, one of which is an instance of “imminent threat of physical danger as opposed to a generalized and speculative fear of harassment or retribution”).

19. *See* TEX. GOV’T CODE ANN. § 552.101 (West 2012) (listing exceptions from the Public Information Act); *Tex. Dep’t of Pub. Safety v. Cox Tex. Newspapers, LP*, 343 S.W.3d 112, 118 (Tex. 2011) (creating a common law disclosure exception for the right to be free from physical harm).

20. Ward, *supra* note 17.

21. *See* Pearce et al., *supra* note 2 (noting the gasping of a prisoner for ninety minutes post injection illustrates flaws in lethal injection procedure after the sodium thiopental shortage).

22. Langford, *supra* note 15.

23. *See* U.S. CONST. amend VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”); *In re Kemmler*, 136 U.S. 436, 447 (1890) (“Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the constitution.”); Pearce et al., *supra* note 2 (reporting it took more than ninety minutes for Joseph Rudolph Wood III to die). *But see* *Trop v.*

regarding state protocols pertaining to lethal injection should be required, including the identity of supplying entities.<sup>24</sup>

Part II briefly explores the death penalty in U.S. history, including its origins and the alternative methods utilized prior to lethal injection proceedings. Part III examines the federal and state regulations that apply to death penalty proceedings with an emphasis on the *Baze* cruel and unusual challenge standard and the State of Texas's PIA. Lastly, Part IV conducts a thorough examination of the state secrecy laws and the Eighth Amendment consequences to inmates and their families, while advocating the constitutional rights of the affected individuals should outweigh the interests of the compounding pharmaceutical companies producing lethal injection drugs.

## II. BACKGROUND

### A. *A Brief History of the Death Penalty in the United States*

Today, a majority of states permit capital punishment as a form of sentencing.<sup>25</sup> However, the constitutionality of the death penalty was not always settled law.<sup>26</sup> The Supreme Court opinion in *Gregg v. Georgia*<sup>27</sup> reinstated the death penalty by holding Georgia's state statute, which imposed the death penalty for six morally inexcusable crimes,

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Dulles, 356 U.S. 86, 101 (1958) (holding constitutional amendments "must draw [their] meaning from the evolving standards of decency that mark the progress of a maturing society").

24. See Fernando J. Gaitan, Jr., *Challenges Facing Society in the Implementation of the Death Penalty*, 35 FORDHAM URB. L.J. 763, 784 (2008) ("If states continue to perform lethal injections, the protocol for performing these executions must be in writing, and ideally should be public information.").

25. See Denno, *supra* note 3, at 1343 (charting states use of various death penalty procedures and listing those that are not in favor of the death penalty); *Death Penalty Fast Facts*, CNN, <http://www.cnn.com/2013/07/19/us/death-penalty-fast-facts> (last updated Oct. 21, 2015, 2:52 PM) (noting thirty-one states have legalized capital punishment). The use of capital punishment as a form of sentencing originated from Britain, where hanging was utilized in limited circumstances, such as in times of war. *Part I: History of the Death Penalty*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/part-i-history-death-penalty#early> (last visited Mar. 12, 2016). However, America did not conduct its first execution until 1608, when Capitan George Kendall committed treason. *Id.*

26. See *Furman v. Georgia*, 408 U.S. 238, 238–40 (1972) (reversing the decision of the Supreme Court of Georgia and the Court of Criminal Appeals in Texas and holding the use of the death penalty is cruel and unusual), *revisited in* *Gregg v. Georgia*, 428 U.S. 153 (1976); *Death Penalty Fast Facts*, *supra* note 25 (noting more than 1,300 individuals have been executed since the death penalty was reinstated in 1976). The overriding decision in *Furman v. Georgia* was based on the convictions of three petitioners—two from Georgia on rape and murder charges and one from Texas on a rape charge—all of whom were sentenced to death by jury. *Furman*, 408 U.S. at 239–40.

27. *Gregg v. Georgia*, 428 U.S. 153 (1976).

constitutional under the Eighth Amendment.<sup>28</sup> Following this paramount decision, the United States has employed five methods of execution.<sup>29</sup> These methods include hanging, electrocution, lethal gas, firing squad, and lethal injection,<sup>30</sup> all of which are still acceptable forms in some states.<sup>31</sup>

Until the nineteenth century, hanging was the established practice for execution.<sup>32</sup> This common law practice was favored over other dated execution methods due to its quick and painless outcome.<sup>33</sup> The court in *Campbell v. Wood*<sup>34</sup> evaluated whether this traditional mode of execution was contrary to the Eighth Amendment.<sup>35</sup> The court employed two standards to determine constitutionality<sup>36</sup> but declined to find hanging “incompatible with evolving standards of decency simply because few states continue the practice.”<sup>37</sup> Thus, it was held constitutional because hanging did not create “unnecessary or wanton infliction of pain.”<sup>38</sup> However, the technique was not without its flaws since it required a high degree of knowledge and skill that executioners often lacked.<sup>39</sup> The

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28. *Id.* at 162–63 (holding the application of death penalty for “six categories of crime: murder, kidnaping for ransom or where the victim is harmed, armed robbery, rape, treason, and aircraft hijacking”); see also *Death Penalty Fast Facts*, *supra* note 25 (providing a timeline to illustrate the history of the death penalty in the United States).

29. See Ewart, *supra* note 4, at 1162–66 (providing a brief overview of previous execution methods).

30. *Id.*

31. See Denno, *supra* note 3, at 1343 (illustrating eleven choice states that allow variations in the method of capital punishment).

32. See Deborah W. Denno, *Getting to Death: Are Executions Constitutional?*, 82 IOWA L. REV. 319, 364 (1997) (“In 1853, hanging—the ‘nearly universal form of execution’—was used in forty-eight ‘states.’” (quoting *Campbell v. Wood*, 511 U.S. 1119, 1119 (1994) (Blackmun, J., dissenting))); Ewart, *supra* note 4, at 1162 (noting hanging was the primary form of execution in the United States until the mid-nineteenth century, when public opinion began to change); Jason D. Hughes, Comment, *The Trichemical Cocktail: Serene Brutality*, 72 ALB. L. REV. 527, 532–33 (2009) (showing over half of death penalty states relied on hanging as the mode for capital punishment).

33. Hughes, *supra* note 32, at 533.

34. *Campbell v. Wood*, 18 F.3d. 662 (9th Cir. 1994) (en banc).

35. *Id.* at 680–81 (deciding petitioner’s Eighth Amendment claim justiciable, notwithstanding his refusal to choose between the common law mode of execution or lethal injection).

36. See *id.* at 681–82 (evaluating whether the common law method of execution comports with the Eighth Amendment by inquiring whether it was “acceptable when the Bill of Rights was adopted” and whether it comports with “the evolving standards of decency that mark the progress of a maturing society” (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958))).

37. *Id.* at 682.

38. *Id.* at 683.

39. See Hughes, *supra* note 32, at 533 (stating the knot on the noose used in hanging proceedings needed to be positioned correctly or the condemned’s neck would not snap and “would be left to slowly strangle for up to a half an hour”); Meghan S. Skelton, *Lethal Injection in the Wake of Fierro v. Gomez*, 19 T. JEFFERSON L. REV. 1, 10 (1997) (discussing difficulties with long drop method utilized in hanging procedures, such as failure to generate an immediate break “in the spinal

display of botched hangings “fueled the search for a more humane method.”<sup>40</sup>

Death by firing squad was also utilized in the 1800s.<sup>41</sup> Typically, this dated execution method was used to punish military crimes, such as mutiny or desertion.<sup>42</sup> Prisoners who were condemned to death by firing squad were shot in the heart, despite the instantaneous death that would result from being shot in the head at close range.<sup>43</sup> Once the prisoner was shot, death resulted from a loss of blood.<sup>44</sup> Today, at least two states are considering utilizing death by firing squad in place of lethal injection.<sup>45</sup>

In 1888, New York became the first state to deviate from the common law execution method.<sup>46</sup> Its governor referred to hanging as “barbarous”;<sup>47</sup> thus, legislators sought to find a more “humane and

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cord”). The prolonged spinal cord break resulted in a drawn-out and painful death caused by the “dislocation of the upper cervical vertebrae and the separation of the spinal cord from the brain.” *Id.*

40. Hughes, *supra* note 32, at 533. However, there are two states that still employ the use of hanging as a form of capital punishment. See Denno, *supra* note 3, at 1343 (recognizing New Hampshire and Washington as choice states that allow lethal injection or hanging as a method to implement the death penalty).

41. See, e.g., *Wilkerson v. Utah*, 99 U.S. 130, 135 (1879) (implementing the firing squad as a mode of execution in certain circumstances).

42. See *id.* at 134 (proclaiming the use of a firing squad for military crimes, while utilizing the common law method of hanging for civil cases, treason, or murder without mutiny).

43. Skelton, *supra* note 39, at 6–7. The last known death by firing squad was in 2010 in the State of Utah. *Will Wyoming Turn to Firing Squads for Executions?*, CBSNEWS (May 22, 2014, 8:30 AM), <http://www.cbsnews.com/news/firing-squad-mulled-as-execution-backup-to-lethal-injection-in-wyoming> [hereinafter *Wyoming Firing Squads*]. Typically, five law enforcement officers group together and use .30 caliber rifles to execute the prisoner. See *Utah Lawmaker: Bring Back Firing Squad Executions*, USA TODAY (May 17, 2014), <http://www.usatoday.com/story/news/nation/2014/05/17/utah-lawmaker-firing-squad/9211225> [hereinafter *Utah Bring Back Firing Squad*] (describing the firing squad procedure in Utah).

44. See Skelton, *supra* note 39, at 7 (noting a prisoner’s death is caused by a “loss of blood due to rupture of the heart or a large blood vessel, or tearing of the lungs”).

45. See *Utah Bring Back Firing Squad*, *supra* note 43 (reporting one lawmaker’s agenda to bring back death by firing squad in light of the recent drug shortage for lethal injection procedures). If death by lethal injection and electrocution is ruled unconstitutional, Oklahoma permits death by firing squad as an alternative method of execution. OKLA. STAT. ANN. tit. 22, § 1014 (West Supp. 2015).

46. *Baze v. Rees*, 553 U.S. 35, 42 (2008) (plurality opinion); see also Ewart, *supra* note 4, at 1163 (noting New York’s status as the first state to employ electrocution as a method of execution).

47. *In re Kemmler*, 136 U.S. 436, 444 (1890); see Deborah W. Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind States Uses of Electrocution and Lethal Injection and What it Says About Us*, 63 OHIO ST. L.J. 63, 71–72 (2002) (explaining New York’s transition to electrocution “was a direct result of two major legislative events: (1) the Governor of New York’s 1885 message to the legislature decrying the barbarity of hanging; and (2) the Governor’s appointment of a Commission to investigate ‘the most humane and practical method known to modern science’” (quoting 1886 N.Y. Laws ch. 352, § 1)).

practical method” to execute capital offenders.<sup>48</sup> As a result, New York’s Code of Criminal Procedure was amended to allow execution by a “current of electricity [with] sufficient intensity to cause death.”<sup>49</sup> However, New York’s departure from use of a firing squad as its primary method of execution came with constitutional concerns. The Court in *In re Kemmler*<sup>50</sup> considered whether use of electrocution as a method of capital punishment fell within the constitutional safeguards of the Eighth Amendment.<sup>51</sup> Several courts examined the issue, and they all held the use of the electric chair constitutional.<sup>52</sup> Unfortunately, the execution of William Kemmler was unsuccessful.<sup>53</sup> Evidence suggested the initial application of electricity was enough to cause death; however, witnesses realized the prisoner was still alive.<sup>54</sup> A second round of electricity was given at a much higher dosage, and Kemmler was pronounced dead, though it appeared to be a painful death.<sup>55</sup>

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48. *In re Kemmler*, 136 U.S. at 444.

49. *Id.* at 445.

50. *In re Kemmler*, 136 U.S. 436 (1890).

51. See Hughes, *supra* note 32, at 533 (identifying William Kemmler as the first man to be executed by the electric chair in New York).

52. The county judge found William Kemmler had not met his presumption of constitutionality since he did not offer proof beyond a reasonable doubt that New York’s statute proscribing use of the electric chair was contrary to the Eighth Amendment. *In re Kemmler*, 136 U.S. at 442. Furthermore, the New York Supreme Court agreed with the lower court but stated there was sufficient evidence proving death by electrocution would be more humane and painless. *Id.* at 442–43. Lastly, the court of appeals looked to the language of the statute and the United States Constitution to determine if they were in conflict. *Id.* at 443. The Court in *In re Kemmler* failed to apply the Eighth Amendment when evaluating the constitutionality of the electric chair because it relied on the state legislature. Denno, *supra* note 47, at 71–73. Ultimately, the Supreme Court held the Eighth Amendment did not apply to the states; thus, it was unable to review the applicability of the electric chair under the federal Constitution or New York’s state constitution. See *Glass v. Louisiana*, 471 U.S. 1080, 1082 (1985) (Brennan, J., dissenting) (reviewing the decision in *In re Kemmler* since it was the first challenge to any state statute regarding the use of electrocution in the death penalty).

53. See Ewart, *supra* note 4, at 1163 (providing the gruesome details of the botched execution of William Kemmler); Hughes, *supra* note 32, at 533 (illustrating the problems surrounding the electrocution of William Kemmler, including two rounds of electricity, higher dosages, and ruptured blood vessels). Despite the botched electrocution of William Kemmler, other states continued to employ the electric chair as a viable method of capital punishment. See *Francis v. Resweber*, 329 U.S. 459, 464 (1947) (holding electrocution was not cruel or unusual despite it being petitioner’s subsequent execution); Skelton, *supra* note 39, at 17 (indicating the Court’s findings in *Francis* were not based on the use of electrocution). The Court in *Francis* examined the general application of the death penalty as a form of punishment and held the second attempt of electrocution for the petitioner constitutional since state prison officials did not act with malicious intent. *Id.* Today, some states continue to employ electrocution as a viable method for execution. See Denno, *supra* note 3, at 1343 (noting six states that allow death by lethal injection or electrocution).

54. Ewart, *supra* note 4, at 1163.

55. See *id.* at 1163 (describing the observations of witnesses present at William Kemmler’s

As botched executions continued to occur, states began changing their execution methods to alleviate constitutional challenges.<sup>56</sup> In 1921, Nevada became the first state to employ the gas chamber as its primary method of execution.<sup>57</sup> Typically, the condemned is isolated in a chamber with sodium cyanide capsules hovering above “a mixture of sulfuric acid and water.”<sup>58</sup> The sodium cyanide is released into the sulfuric acid and a deadly gas is discharged.<sup>59</sup> Once the prisoner inhales the toxic mixture, the outcome is death by asphyxiation.<sup>60</sup> Notably, implementation of lethal gas as the mode of execution raised constitutional challenges.<sup>61</sup> Despite these constitutional outcries, some states continue to allow lethal gas as a method of capital punishment.<sup>62</sup>

Notwithstanding the availability of the common law mode of execution, death by firing squad, gas chamber, and electrocution continued to be the

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execution proceedings as gruesome because the death chamber smelled of burnt human flesh).

56. See Denno, *supra* note 47, at 63 (emphasizing the state’s decision to change execution methods was primarily conducted to avoid constitutional challenges to the method that was currently being used).

57. See Hughes, *supra* note 32, at 534 (acknowledging Nevada was the first state of eleven to engage in the use of the gas chamber as a death penalty approach).

58. Skelton, *supra* note 39, at 8.

59. *Id.*

60. See Kristina E. Beard, Comment, *Five Under the Eighth: Methodology Review and the Cruel and Unusual Punishments Clause*, 51 U. MIAMI L. REV. 445, 463 (1997) (“Gas causes death by asphyxiation, and the pain inherent in the method has been described as similar to that of a heart attack.”); Skelton, *supra* note 39, at 8 (indicating the effect of death by use of gas chambers is comparable to heart attacks and drowning since the legal combination of sodium cyanide and sulfuric acid obstructs the cells from receiving oxygen). Death by gas chamber is not peaceful; eyewitnesses recall the prisoner’s eyes popping or rolling back, skin turning purple, and often the side effects lingered for more than ten minutes. Hughes, *supra* note 32, at 534.

61. See *Gray v. Lucas*, 710 F.2d 1048, 1058–59 (5th Cir. 1983) (advancing an Eighth Amendment challenge that use of the chamber “involves the unnecessary and wanton infliction of pain,” by submitting several affidavits from eyewitnesses of previous executions, attesting to the premise that use of the lethal gas chamber is opposite of painless and humane); *Calhoun v. State*, 468 A.2d 45, 63 (Md. 1983) (raising Eighth Amendment concerns that Maryland’s state statute provides a choice between life in prison or the death penalty, thus failing to provide a standard that initiates death); see also *Hunt v. Nuth*, 57 F.3d 1327, 1337–38 (4th Cir. 1995) (refusing to define lethal gas as cruel or unusual, despite the availability of more humane methods stating “the existence and adoption of more humane methods does not automatically render a contested method cruel and unusual”). But see *Fierro v. Gomez*, 77 F.3d 301, 309 (9th Cir.) (affirming the district court’s findings that lethal injection subjects the prisoner to cruel and usual punishment based on the likelihood of prolonged death and extreme pain), *vacated on other grounds*, 519 U.S. 918 (1996). The Supreme Court vacated the Ninth Circuit’s judgment based on California’s amendment to its penal code, which allows capital punishment by lethal injection unless the petitioner specifically requests death by gas chamber. *Gomez v. Fierro*, 519 U.S. 918, 919 (1996) (Stevens, J., dissenting).

62. See Denno, *supra* note 3, at 1343 (charting the 2014 execution methods by state and displaying California and Missouri as choice states that allow either death by lethal injection or the use of the gas chamber).

principal method of capital punishment for nearly a century.<sup>63</sup> However, the overriding decision in *Gregg v. Georgia*, prompted state officials to seek a more humane method of execution.<sup>64</sup>

B. *Lethal Injection: Primary Method of Execution*

In 1977, Dr. Stanley Deutsch conceived a new technique that would ultimately pave the way for new death penalty procedures.<sup>65</sup> He found a way to dispense fatal serums through an intravenous drip that would trigger a more peaceful and humane death.<sup>66</sup> Naturally, the idea of a more rapid, peaceful, and humane method of execution appealed to the states,<sup>67</sup> especially with recent, failed electrocutions.<sup>68</sup> Oklahoma became the first state to codify death by lethal injection in its state statute.<sup>69</sup> A day after Oklahoma announced its adoption of lethal injection, Texas followed suit and became the first state to impose the new method of execution on an inmate sentenced to death row.<sup>70</sup> By 2009, a majority of death penalty states replicated Oklahoma's lethal injection procedure.<sup>71</sup> The rapid

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63. *Baze v. Rees*, 553 U.S. 35, 42 (2008) (plurality opinion).

64. *Id.*; Denno, *supra* note 3, at 1339–40; *see also* Ewart, *supra* note 4, at 1166 (recognizing death by electrocution and lethal gas was excessively painful for prisoners, thus several states switched to an alternative form of execution).

65. *See* Skelton, *supra* note 39, at 8 (acknowledging Dr. Stanley as the physician to introduce lethal injection in the United States). During this time, Dr. Stanley oversaw the anesthesiology department at the College of Medicine in Oklahoma. *See Baze*, 553 U.S. at 42 (indicating Oklahoma's decision to introduce the first lethal injection bill was based on an initial consult with medical personnel from the University of Oklahoma College of Medicine).

66. Ewart, *supra* note 4, at 1166–67.

67. *See* Denno, *supra* note 3, at 1341 (charting a majority of death penalty states have adopted lethal injection as an option for executing death row prisoners).

68. *See* Denno, *supra* note 47, at 63 (commenting on states' change of execution methods to avoid constitutional challenges); Ewart, *supra* note 4, at 1163–64 (referencing attempted death penalty sentences carried out by the electric chair that did not go as planned between 1983 and 1991).

69. *Baze*, 553 U.S. at 42; Denno, *supra* note 3, at 1340; *see also* Ewart, *supra* note 4, at 1166–67 (detailing Oklahoma's search for a more humane method of execution). Prior to Oklahoma's adoption of lethal injection, New York and Great Britain considered implementing a similar form of lethal injection; however the proposal was rejected for various reasons. *See* Denno, *supra* note 3, at 1339–40 (relaying New York's and Great Britain's refusal to adopt lethal injection as a method of execution was based on the medical profession's reluctance to be associated with causing intentional death).

70. Ewart, *supra* note 4, at 1167. In 1982, Charlie Brooks became the first person to be executed by lethal injection. *Death Row Facts*, TEX. DEP'T CRIM. JUSTICE, [http://www.tdcj.state.tx.us/death\\_row/dr\\_facts.html](http://www.tdcj.state.tx.us/death_row/dr_facts.html) (last visited Mar. 12, 2016). He was charged and convicted for the kidnapping and murder of David Gregory, an auto mechanic in Fort Worth, Texas. *Id.*

71. *See* Denno, *supra* note 3, at 1342 (describing death penalty states' adoption of lethal injection as a domino effect following Oklahoma's initial implementation).

adoption of lethal injection by death penalty states is not surprising.<sup>72</sup> Not only does lethal injection resemble a medical procedure but also it produces a calm outward appearance, with no physical violence, bodily mutilation, or pain.<sup>73</sup> Thus, it became the most prevalent lethal execution method utilized by death penalty states today.<sup>74</sup>

Cumulatively, there are more than thirty states implementing lethal injection as the primary mode of execution.<sup>75</sup> Despite the overall adoption of the lethal injection procedure, there is no national standard.<sup>76</sup> For example, Texas enacted “a very brief and general death penalty statute.”<sup>77</sup> It only provides lethal injection executions must take place after six o’clock in the evening.<sup>78</sup> The statute does not specify the types of substances or the quantities that should be used.<sup>79</sup> Rather, it broadly states that officials of the Texas Department of Criminal Justice use “a lethal quantity sufficient to cause death.”<sup>80</sup> However, the Texas Department of Criminal Justice lists a single-drug protocol employing the pharmaceutical drug pentobarbital as its lethal injection formula.<sup>81</sup> Conversely, some states utilize either a two-drug protocol or three-drug

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72. Hughes, *supra* note 32, at 535.

73. See Teresa A. Zimmers & Leonidas G. Koniaris, *Peer Reviewed Studies Identifying Problems in the Design and Implementation of Lethal Injection for Execution*, 35 *FORDHAM URB. L.J.* 919, 921 (2008) (“[L]ethal injection gives the appearance of a medical procedure . . .”); see also Beard, *supra* note 60, at 465–66 (implying the use of lethal injection will not be held unconstitutional since it is painless and involves very little violence, despite risks of botched executions); Ewart, *supra* note 4, at 1159 (noting prisoners’ outward calm appearance is attributed to the pharmaceutical drug, pancuronium bromide, which is commonly used as a paralyzing agent).

74. Ewart, *supra* note 4, at 1159.

75. Denno, *supra* note 3, at 1341; see *State by State Lethal Injection*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/state-lethal-injection> (last visited Mar. 12, 2016) (charting states that adopt lethal injection as their capital punishment method).

76. See Denno, *supra* note 3, at 1342–44 (describing the execution methods adopted by states including single-method states, choice states, and those states that do not implement the death penalty); *State by State Lethal Injection*, *supra* note 75 (detailing the various methods utilized by death penalty states, including the use of a one-drug method, pentobarbital, and proprofol). See generally Ewart, *supra* note 4, at 1168–82 (providing a brief overview of individual death penalty procedures implemented by each state enforcing capital punishment).

77. Ewart, *supra* note 4, at 1180. Texas executes the most prisoners in the country with a massive record of 519 executions since the death penalty was reinstated by the paramount decision in *Gregg v. Georgia*. *State by State Database*, DEATH PENALTY INFO. CTR., [http://www.deathpenaltyinfo.org/state\\_by\\_state](http://www.deathpenaltyinfo.org/state_by_state) (last visited Mar. 12, 2016) (recording the number of executions each state has conducted before and after 1976); see also *Executed Offenders*, TEX. DEPT. CRIM. JUSTICE, [http://www.tdcj.state.tx.us/death\\_row/dr\\_executed\\_offenders.html](http://www.tdcj.state.tx.us/death_row/dr_executed_offenders.html) (last visited Mar. 12, 2016) (detailing each individual execution that took place in the Texas since 1982).

78. TEX. CODE CRIM. PROC. ANN. art. 43.14 (West Supp. 2014).

79. *Id.*

80. *Id.*

81. *Death Row Facts*, *supra* note 70.

protocol,<sup>82</sup> while others mandate the presence of a licensed medical professional during the injection.<sup>83</sup> Regardless of the inconsistencies between a state's implementation of the lethal injection procedure initiated by Oklahoma, lethal injection remains the foremost method utilized by death penalty states.<sup>84</sup>

C. *Inside the Lethal Injection Formula*

While codified state-by-state lethal injection procedures vary, most states use the same chemical sequence to impose death.<sup>85</sup> The typical formula contains sodium thiopental, pancuronium bromide, and potassium chloride.<sup>86</sup> Sodium thiopental is also known as pentothal and is used as a barbiturate sedative to induce unconsciousness.<sup>87</sup> Pancuronium bromide, otherwise known as pavulon, constrains muscular movements and halts respiration.<sup>88</sup> The last drug in the sequence, potassium chloride, induces cardiac arrest.<sup>89</sup>

Successful application of the first drug, sodium thiopental, is crucial for a humane and pain-free execution.<sup>90</sup> If the first drug is not administered properly, the next drug pancuronium bromide would cause the

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82. *State by State Lethal Injection*, *supra* note 75 (charting states that adhere to a one-drug protocol and stating whether pentobarbital is one of the drugs utilized).

83. *See* OKLA. STAT. ANN. tit. 22, § 1014 (West Supp. 2015) (stating a licensed medical practitioner is required to pronounce the prisoner dead as a result of lethal injection).

84. *See* Denno, *supra* note 3, at 1342–44 (illustrating statistics regarding the use of lethal injection among death penalty states, including effects of constitutional challenges on the amount of executions that took place between 2006–2008). While lethal injection is the primary method of death by execution today, it is not exempt from highly contentious litigation. *E.g.*, Heckler v. Chaney, 470 U.S. 821, 823 (1985) (exemplifying one of the many lawsuits brought in light of the shift to lethal injection as the mode of execution in the United States). Respondents urged the Court to mandate FDA inquiry into the use of sodium thiopental for lethal injection purposes since the drug has been approved for medical purposes but not for human executions. *Id.*

85. *See* Powell v. Thomas, 784 F. Supp. 2d 1270, 1278 (M.D. Ala.) (affirming at least thirty states relied on sodium thiopental, pancuronium bromide, and potassium chloride as the typical lethal injection formula), *aff'd*, 641 F.3d 1255 (11th Cir. 2011); Corinna Barrett Lain, *The Virtues of Thinking Small*, 67 U. MIAMI L. REV. 397, 400 (2013) (“Until recently, lethal injection was typically accomplished using a three-drug protocol that included a drug called sodium thiopental.”); *see also* Denno, *supra* note 4, at 702 (describing the typical tri-chemical formula that is expended in lethal injection proceedings).

86. Denno, *supra* note 4, at 702.

87. *Baze v. Rees*, 553 U.S. 35, 44 (2008) (plurality opinion).

88. *Id.*

89. *See* Ringo v. Lombardi, 677 F.3d 793, 795 (8th Cir. 2012) (reciting the effects of the typical three drugs used in lethal injection executions).

90. *Baze*, 553 U.S. at 44; *see also* Denno, *supra* note 3, at 1334 (noting the Court in *Baze* “agreed that if the sodium thiopental is ineffective, it would be reprehensible to inject the second and third drugs into a conscious person”).

condemned to endure excruciating pain and suffering because he would suffocate without the ability to express his discomfort.<sup>91</sup> In fact, unconsciousness from sodium thiopental is necessary to ensure an inmate does not feel the effects of pancuronium bromide, which is the “sensation of suffocation from paralysis.”<sup>92</sup> Without the proper application of sodium thiopental, the probability of agony is further increased when the last drug of the three-drug formula is administered.<sup>93</sup> This is due to potassium chloride’s “intense and unbearable burning.”<sup>94</sup>

As noted above, states differ in their application of the lethal injection procedure.<sup>95</sup> However, the typical dosage consists of “two to five grams of [sodium] thiopental,” followed by “sixty milligrams of pancuronium bromide,” and lastly, roughly “240 milliequivalents of potassium chloride, or less,” is inoculated into the inmate.<sup>96</sup> The successful effect of unconsciousness relies greatly on how the drug is administered, either through a single intravenous push or continuous intravenous infusion.<sup>97</sup> This distinction is important since “the drug’s effects are dependent on the circumstances under which it is being used and the makeup of the person being injected.”<sup>98</sup> Ultimately, the proper administration of the first drug, sodium thiopental, is imperative to the lethal injection process<sup>99</sup> and its absence would be disadvantageous.<sup>100</sup>

#### D. *A National Shortage of Lethal Injection Drugs*

In 2009, the United States encountered a nationwide deficiency in the

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91. See Denno, *supra* note 3, at 1334 (emphasizing a key issue in the *Baze* opinion was whether prison officials would be able to determine if an inmate sentenced to death was suffering excruciating pain since the second drug causes “such a powerful mask of emotions”).

92. Susi Vassallo, *Thiopental in Lethal Injection*, 35 FORDHAM URB. L.J. 957, 957 (2008).

93. Denno, *supra* note 3, at 1334.

94. *Id.* at 1334.

95. See *id.* at 1343 (illustrating the execution methods by state including single-method states, choice states, and those states that do not implement the death penalty); *State by State Lethal Injection*, *supra* note 75 (detailing the various methods utilized by death penalty states, including the use of a one-drug method, pentobarbital, and propofol); see also Vassallo, *supra* note 92, at 957 (noting a differentiation between states regarding how sodium thiopental is administered and the amount that should be injected into the condemned). See generally Ewart, *supra* note 4, at 1168–82 (providing a brief overview of individual death penalty procedures implemented by each state enforcing capital punishment).

96. Vassallo, *supra* note 92, at 957.

97. *Id.* at 960.

98. Denno, *supra* note 4, at 722.

99. *Baze v. Rees*, 553 U.S. 35, 44 (2008) (plurality opinion).

100. See Denno, *supra* note 4, at 712 (opining sodium thiopental’s role in the lethal injection process is to “protect witnesses from the inmate’s contractions, twitches, and grasps”).

barbiturate used initially in lethal injection proceedings.<sup>101</sup> Originally, the sole U.S.-based thiopental supplier temporarily ceased production of the pharmaceutical drug because of unforeseen difficulties when acquiring its active ingredients from raw material suppliers.<sup>102</sup> The thiopental supplier expected to resume production of the highly sought anesthesia agent in 2011; however, Europe's moral stance against capital punishment proceedings halted those plans.<sup>103</sup> On January 21, 2011, Hospira released a public statement indicating its exit from the sodium thiopental market.<sup>104</sup> The statement described its intention to resume production at an Italian plant, but discussions with Italian authorities foreclosed the possibility.<sup>105</sup> Italian officials demanded reassurance no product manufactured in Hospira's facilities would be used in capital punishment proceedings or it would risk being subjected to legal action.<sup>106</sup> Naturally, Hospira was reluctant to expose itself to potential liability since it could not "prevent the drug from being diverted to departments of corrections for use in capital punishment procedures."<sup>107</sup> Thus, threats of legal action and the inability to control product circulation forced Hospira to halt production of sodium thiopental, which is highly utilized by death penalty states and the medical community alike.<sup>108</sup>

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101. *Cook v. FDA*, 733 F.3d 1, 4 (D.C. Cir. 2013); see Denno, *supra* note 3, at 1360 (asserting the national shortage in sodium thiopental is due to the difficulty of Hospira, the sole domestic supplier, to obtain a key ingredient from an alternative source).

102. Denno, *supra* note 3, at 1360; see John Gever, *Hospira Dumps Thiopental in Row over Death Penalty*, MEDPAGE TODAY (Jan. 21, 2011), <http://www.medpagetoday.com/productalert/prescriptions/24464> (explaining the shortage in sodium thiopental is due to two unforeseen problems: 1) unspecified difficulties with suppliers; and 2) concerns with maintaining foreign relations and respecting Europe's stance on the death penalty in the United States).

103. Denno, *supra* note 3, at 1360–61; see also Gever, *supra* note 102 (echoing the notion that Hospira halted production of sodium thiopental due to Italian concerns regarding use of the drug in capital punishment proceedings).

104. Press Release, Hospira, Statement Regarding Its Halt of Production of Pentothal (Jan. 21, 2011), <http://www.deathpenaltyinfo.org/documents/HospiraJan2011.pdf>.

105. See *id.* (clarifying Hospira's stoppage in sodium thiopental production is directly related to their inability to provide a firm guarantee that the pharmaceutical drug would only be used in life saving practices).

106. See *id.* ("[W]e cannot take the risk that we will be held by the Italian authorities if the product is diverted for use in capital punishment."). Italian authorities sought Hospira's cooperation in eliminating access to sodium thiopental for death penalty use by requesting the pharmaceutical company monitor and control "the ultimate end user." *Id.*

107. See *id.* ("Exposing our employees or facilities to liability is not a risk we are prepared to take.").

108. See *id.* ("We regret that issues outside of our control forced Hospira's decision to exit the market, and that our many hospital customers . . . will not be able to obtain the product from Hospira."). Prior to halting production of the prescription drug, Hospira wrote to state correctional facilities informing them the use of the drug in life ending procedures was contrary to the company

As a result of Hospira's withdrawal from sodium thiopental production, death penalty states expanded their search for alternative sources abroad.<sup>109</sup> However, Europe's coalition against capital punishment proceedings continued to exacerbate the United States' shortage of lethal injection drugs.<sup>110</sup> For example, in 2011, states switched to pentobarbital as the leading drug in execution proceedings.<sup>111</sup> Lundbeck Inc., a Denmark-based company and the sole manufacturer of pentobarbital in the United States, announced the drug would not be available for capital punishment use.<sup>112</sup> To ensure the use of its product aligned with the company's core mission, Lundbeck established a unique "pharmacy drop ship program" that would refuse shipment to U.S. prisons.<sup>113</sup> Essentially, any purchaser of Nembutal, a form of pentobarbital, is required to attest it will not redistribute the drug to an outside source unless there is prior written permission from Lundbeck.<sup>114</sup> This "drop ship program" allows the pharmaceutical company to continue manufacturing the drug for medicinal purposes rather than following Hospira's lead and declining to produce pentobarbital altogether.<sup>115</sup>

To further aggravate the shortage, the primary pharmaceutical

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mission statement, which is to improve and save lives. See Letter from Keës Goenhout, V.P., Clinical Research & Dev., Hospira, Inc., to Ohio Dep't of Rehab. & Corr. (Mar. 31, 2010), <http://www.deathpenaltyinfo.org/documents/HospiraMarch2010Statement.pdf> (declaring Hospira's position against Ohio's use of its products in capital punishment proceedings).

109. *Germany: No Death Penalty Drug*, *supra* note 10.

110. See *Europe's Moral Stand Has U.S. States Running Out of Execution Drugs, Complicating Capital Punishment*, CBS NEWS (Feb. 18, 2014, 6:10 AM), <http://www.cbsnews.com/news/europe-moral-stand-us-states-running-out-of-execution-drugs-complicating-capital-punishment> [hereinafter *Europe's Moral Stand*] (noting the dearth in execution drugs is primarily due to Europe's moral opposition to the death penalty).

111. *Id.*

112. See *id.* (describing Lundbeck's decision to restrict the use of pentobarbital in capital punishment proceedings was largely due to public criticism and fear for its reputation).

113. Press Release, Lundbeck Inc., Lundbeck Overhauls Pentobarbital Distribution Program to Restrict Misuse (Jan. 7, 2011), <http://www.deathpenaltyinfo.org/files/LundbeckPR070111.pdf>.

114. See *id.* (explaining Lundbeck's position against the use of their drugs for capital punishment and requiring any purchaser to "sign a form stating the purchase of Nembutal is for its own use" to prevent and restrict prisons from accessing the drug).

115. See *id.* ("The company chose not to withdraw the product from the market because the product continues to meet an important medical need in the U.S."). Mirroring Hospira, the president of Lundbeck Inc. informed state correctional facilities that they were "adamantly opposed to the use of Nembutal . . . for the purpose of capital punishment" and urged the Ohio to discontinue use of the drug in lethal injection proceedings. See Letter from Staffan Schüberg, President, Lundbeck Inc., to Gary C. Mohr, Director, Dept. of Rehab. & Corr. (Jan. 26, 2011), <http://www.deathpenaltyinfo.org/documents/LundbeckLethInj.pdf> (reiterating Lundbeck's position against the use of their drugs in execution proceedings since its mission is to "provide therapies that improve people's lives").

companies and medical association in Germany stated publicly they would not permit exportation of sodium thiopental to the United States for lethal injection purposes.<sup>116</sup> This decision was based in part by “a call by the Health Ministry for German drug companies and distributors to reject U.S. requests for [sodium thiopental].”<sup>117</sup> As a result, German pharmaceutical companies producing sodium thiopental have all declined to export products to the United States based on their ethical responsibility to their community.<sup>118</sup> Thus, the influence of Europe’s moral stand against death penalty proceedings in foreign lands has created a widespread national shortage in lethal injection drugs.<sup>119</sup> This shortage has caused death penalty states to seek alternative measures, such as new drug mixtures, with unverified effectiveness.<sup>120</sup>

### III. APPLICABLE LAW: STATE AND FEDERAL

#### A. *State Secrecy Laws: Protecting the Identity of Pharmaceutical Companies*

A government open and transparent to the public is the core of American democracy.<sup>121</sup> Hence, most states have adopted some form of legislation favoring transparency.<sup>122</sup> For example, under Texas’s PIA, “each person is entitled, unless otherwise expressly provided by law, at all times to complete information about the affairs of [the] government.”<sup>123</sup> Typically, the PIA is “liberally construed in favor of granting a request for information.”<sup>124</sup> However, some exceptions apply.<sup>125</sup> Notwithstanding

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116. *Germany: No Death Penalty Drug*, *supra* note 10.

117. *Id.*

118. *Id.*

119. *See Europe’s Moral Stand*, *supra* note 110 (reciting the history of Europe’s coalition against the death penalty and its effects on lethal injection proceedings in the United States).

120. *See id.* (reporting states’ reliance on custom made drugs to fulfill their statutory duty of implementing the death penalty, including Missouri’s use of propofol).

121. *See* TEX. GOV’T CODE ANN. § 552.001 (West 2012) (“Under the fundamental philosophy of the American constitutional form of representative government . . . [the] government is the servant and not the master of the people.”); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569 (1989) (plurality opinion) (proclaiming “the importance of openness to the proper functioning of a trial” has long been recognized to be “an indispensable attribute” dating back to English common law); *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936) (declaring “informed public opinion is the most potent of all restraints upon misgovernment” and any “suppression or abridgement of the publicity” is a concern for the American justice system).

122. *See, e.g.*, GOV’T § 552.001 (taking the position that citizens of the Texas are entitled to government information unless it is exempted by law).

123. *Id.*

124. *Id.*

125. *See generally id.* §§ 552.101–108 (creating lawful exceptions to the Texas Public Information

the law, then Texas Attorney General Greg Abbott ruled the Texas Department of Criminal Justice was not required to disclose certain information pertaining to its execution protocol.<sup>126</sup> Abbott's ruling hinged on the exception contained in Section 552.101 and the "common-law physical safety exception."<sup>127</sup>

Section 552.101 of the Texas Government Code authorizes an exception to the PIA if the information is considered to be "confidential by law, either constitutional, statutory, or by judicial decision."<sup>128</sup> All exceptions to disclosure must be interpreted narrowly.<sup>129</sup> However, a special circumstances exception was created in 1977 by Texas Attorney General John Hill.<sup>130</sup> This exception permitted government information to be withheld if an "imminent threat of physical danger" was present.<sup>131</sup> Nonetheless, to qualify for the special circumstance exception, threat of imminent danger cannot be "generalized [or] speculative."<sup>132</sup> While the special circumstance exception allowed states to withhold specific information from public disclosure, it was not in conjunction with Section 552.101 of the Government Code and could be subject to

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Act for confidential information such as personal information, litigation or settlement negotiations, competition or bidding information, material regarding prices and locations of real property, some legislative documents, legal matters, and law enforcement information).

126. *See* Tex. Att'y Gen. OR2014-09184 (responding to a Texas Department of Criminal Justice open records request and ruling the department is not required to disclose information pertaining to the identity of its supplying pharmacy for lethal injection chemicals, which was pursuant to the confidential information exception listed in Section 552.101 and the "common-law physical safety exception").

127. *Id.* *But see* Tex. Att'y Gen. OR2012-07088 (opining the department's concerns regarding potential threats to revealing pharmaceutical companies does not fall within the exceptions outlined in Section 552.101 of the government code and case law, so the department was required to disclose information regarding the state's execution protocol). Texas is not the only state that has created laws shielding vital information pertaining to lethal injection protocols. *See* Denno, *supra* note 3, at 1376–78 (describing enacted legislation from Arkansas, Tennessee, and South Dakota intended to protect the identity of entities that supply states with their lethal injection drugs).

128. GOV'T § 552.101.

129. *Loving v. City of Houston*, 282 S.W.3d 555, 559 (Tex. App.—Houston [14th Dist.] 2009, no pet.).

130. *See* Tex. Att'y Gen. OR1977-0169 (creating a special circumstance exception for the Texas Open Records Act, which prevents disclosure if there is "an imminent threat of physical danger").

131. *See id.* (allowing the special circumstance exception to be applied in five limited situations); *see also* Tex. Att'y Gen. OR2008-03289 (permitting personal information of a Dallas Area Rapid Transit (DART) employee to be exempted from public disclosure based on the special circumstance exception because evidence illustrated that disclosing the requested information would subject the DART employee to imminent harm); Tex. Att'y Gen. OR2008-01570 (authorizing the city to withhold disclosure of certain security procedures based on the special circumstances exception); Tex. Att'y Gen. OR2004-10845 (allowing the identity of a victim to be withheld based on evidence that disclosing the requested information would subject the victim to physical danger).

132. Tex. Att'y Gen. OR1977-0169.

limitation.<sup>133</sup>

In 2011, the court in *Texas Department of Public Safety v. Cox Texas Newspapers, LP*<sup>134</sup> created a common law exception for physical safety.<sup>135</sup> The distinction between the special circumstances exception and the common law exception for physical safety is crucial.<sup>136</sup> The exceptions listed in the PIA do not apply to core public information.<sup>137</sup> Rather, a government action within the meaning of core public information is protected only if it is “expressly confidential under other law.”<sup>138</sup> “Other law” is construed to mean, “statutes, judicial decisions, and rules promulgated by the judiciary” as opposed to the PIA.<sup>139</sup> Thus, core public information can be withheld from the public based on “the common law right to be free from physical harm.”<sup>140</sup>

Recently, the Texas Legislature passed Senate Bill 1697, creating an exception to the PIA for identifying information from Section 552.101.<sup>141</sup> This exception specifically relates to “any person or entity that manufactures, transports, tests, procures, compounds, prescribes, dispenses, or provides a substance, or supplies used in an execution.”<sup>142</sup> Furthermore, the PIA excepts identifying information, such as names and addresses of manufacturing entities from disclosure under the Government Code.<sup>143</sup> Thus, information pertaining to the identities of compounding pharmaceutical companies that provide legal injection serums will not be released at the request of the public or the condemned’s family.

#### B. *The Baze Standard and its Implication on Lethal Injection Constitutionality*

Capital punishment is an embedded method of sentencing in the United

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133. See *Tex. Dep’t of Pub. Safety v. Cox Tex. Newspapers, LP*, 343 S.W.3d 112, 114 (Tex. 2011) (granting petition for review to inquire whether disclosure of certain government actions is “subject to reasonable limitation”).

134. *Tex. Dep’t of Pub. Safety v. Cox Tex. Newspapers, LP*, 343 S.W.3d 112 (Tex. 2011).

135. See *id.* at 118 (concluding the special circumstance exception, created in 1977 by Texas Attorney General John Hill, “appropriately describes the interest protected under the common law”).

136. See *id.* at 114 (emphasizing the PIA’s exceptions is subject to limitations since “the Legislature excluded certain categories of public information from the exceptions”).

137. See *id.* (reiterating core public information can only be withheld under certain circumstances, notwithstanding the exceptions in the Texas Government Code).

138. *Id.* (quoting *In re City of Georgetown*, 53 S.W.3d 328, 331 (Tex. 2001)).

139. *Id.*

140. *Id.* at 116.

141. Act of May 28, 2015, 84th Leg., R.S., ch. 552, § 1 (codified at TEX. GOV’T CODE ANN. § 552.1081 (West Supp. 2015)).

142. *Id.*

143. *Id.*

States.<sup>144</sup> Throughout our history, Eighth Amendment concerns were conveyed to the Court as states attempted to implement more novel and humane methods.<sup>145</sup> However, these challenges were futile since the Court rejected each challenge and found execution methods to be within constitutional safeguards.<sup>146</sup> The issue of whether lethal injection is a lawful method of execution is no exception.<sup>147</sup>

In *Baze v. Rees*, the Court upheld lethal injection as a form of capital punishment.<sup>148</sup> To determine the constitutional matter, the Court examined two different legal standards.<sup>149</sup> The petitioners argued Kentucky's protocol of lethal injection violated the Eighth Amendment because there was a likelihood of future harm.<sup>150</sup> However, the Court believed allowing such an action to prevail would threaten judicial efficiency.<sup>151</sup> The Court adopted respondents' contention that petitioners were required to comport with the "substantial risk standard," which is a

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144. See Ewart, *supra* note 4, at 1161–68 (providing an overview of death penalty history and the various methods utilized in the United States before the adoption of lethal injection).

145. See *In re Kemmler*, 136 U.S. 436, 443–44 (1890) (“The present mode of executing criminals by hanging has come down to us from the dark ages, and it may well be questioned whether the science of the present day cannot provide a means for taking the life of [those] condemned to die in a less barbarous manner.”); see also *Campbell v. Wood*, 18 F.3d. 662, 681–83 (9th Cir. 1994) (en banc) (illustrating Eighth Amendment challenges for the common law mode of execution and the electric chair).

146. See *Baze v. Rees*, 553 U.S. 35, 48–49 (2008) (plurality opinion) (noting the Eighth Amendment contains a broad framework, which allows states to utilize various capital punishment proceedings without contradicting the United States Constitution); see also *In re Kemmler*, 136 U.S. at 441–42 (finding death by electrocution to be within the safeguards of the United States Constitution); *Wilkerson v. Utah*, 99 U.S. 130, 132–35 (1879) (indicating firing squads do not fall within the meaning of cruel and unusual punishment under the Eighth Amendment); *Campbell*, 18 F.3d. at 683 (finding death by hanging, electrocution, and firing squad to be within the safeguards of the United States Constitution).

147. See *Baze*, 553 U.S. at 63 (reiterating the issue presented is not the constitutionality of the death penalty in general but whether a form of execution is lawful under the Eighth Amendment).

148. *Id.* at 62–63.

149. See *id.* at 47–48 (outlining petitioners' proposal for the Court to adopt an “unnecessary risk” of pain standard, which requires the Court to base its opinion on several factors).

150. See *id.* at 48–50 (identifying petitioners' constitutional claim hinged on future harm that would result from the misadministration of the initial drug sodium thiopental). Throughout the opinion, the Court referenced several death penalty standards. *Id.* at 48–53. For petitioners to prevail on an Eighth Amendment challenge based on future harm, they would need to provide evidence of something more than an “isolated mishap.” See *id.* at 49–50 (“To establish that such exposure violates the Eighth Amendment, however, the conditions presenting the risk must be ‘sure or very likely to cause serious illness and needless suffering,’ and give rise to ‘sufficiently imminent dangers.’” (quoting *Helling v. McKinney*, 509 U.S. 25, 33–34 (1993))).

151. See *id.* at 51 (“[A] condemned prisoner cannot successfully challenge a State's method of execution merely by showing a slightly or marginally safer alternative. Permitting an Eighth Amendment violation to be established on such a showing would threaten to transform courts . . .”).

high burden to meet.<sup>152</sup> Thus, to prevail on an Eighth Amendment lethal injection challenge, petitioners must show execution methods present a “substantial risk” when compared to available alternatives.<sup>153</sup>

Although the highly anticipated opinion was believed to end litigation regarding the lawfulness of lethal injection as an execution method, it fell short.<sup>154</sup> Rather, the comparative risk standard adopted by the Court would undoubtedly lead to an increase in lethal injection questions.<sup>155</sup> Furthermore, the Court in *Baze* could not have anticipated the lethal injection challenges that would surface as a result of the national drug shortages.<sup>156</sup> Based on this shift in lethal injection litigation, some may contend the *Baze* standard is inapplicable.<sup>157</sup> Notwithstanding these contentions, state secrecy laws protecting the identity of supplying pharmaceuticals and the refusal to disclose the chemical composition utilized in death penalty proceedings impose an Eighth Amendment violation under *Baze*.

#### IV. ANALYSIS

##### A. *States' Suppression of Vital Lethal Injection Protocol Creates a "Substantial Risk"*

The *Baze* opinion states, “[T]he Constitution does not demand the

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152. *Id.* at 50 (acknowledging an “isolated mishap” does not amount to a “substantial risk of serious harm” (quoting *Farmer v. Brennan*, 511 U.S. 825, 842 (1994))); *see also* Denno, *supra* note 3, at 1348 (commenting on the various standards alluded to in *Baze* but identifying the “substantial-risk standard” as the most cited). In determining the petitioners’ constitutional claim and whether the high burden was met, the Court relied heavily on Kentucky’s lethal injection protocols to safeguard against any violations. *Baze*, 553 U.S. at 55–56.

153. *See Baze*, 553 U.S. at 52 (noting the qualifications for alternative execution methods to be “feasible, readily implemented, and in fact significantly reduce a substantial risk of severe pain”). The Court further stated it would be an Eighth Amendment violation for a state to refuse to adopt alternative measures despite clear advantages, unless there is “a legitimate penological justification for adhering to its current method of execution.” *Id.* at 52.

154. *See id.* at 71 (“When we granted certiorari in this case, I assumed that our decision would bring the debate about lethal injection as a method of execution to a close. It now seems clear that it will not.”); *see also* Denno, *supra* note 3, at 1334–35; Denno, *supra* note 4, at 702–03 (opining the *Baze* opinion is limited and not a “definitive response to the issue of lethal injection’s constitutionality” since the Court failed to give clear guideline on how to compare other state capital punishment procedures with Kentucky’s).

155. *See Baze*, 553 U.S. at 104–05 (“[T]oday’s decision is sure to engender more litigation. At what point does a risk become ‘substantial’? Which alternative procedures are ‘feasible’ and ‘readily implemented’? When is a reduction in risk ‘significant’? What penological justifications are ‘legitimate?’”).

156. Denno, *supra* note 3, at 1336.

157. *Id.* at 1347.

avoidance of all risk of pain in carrying out executions.”<sup>158</sup> However, it does forbid inhumane execution methods that amount to torture and unnecessary cruelty.<sup>159</sup> Notably, the Court has formerly held “an isolated mishap alone” does not violate the Eighth Amendment,<sup>160</sup> and to constitute a “substantial risk,” the circumstances causing the risk must be “sure or very likely to cause serious illness and needless suffering” and ultimately lead to “sufficiently imminent dangers.”<sup>161</sup> However, inmates sentenced to death are unable to meet this high burden unless they are aware of the chemical composition of the drugs utilized in execution proceedings and the source of those drugs.<sup>162</sup> Thus, states’ attempt to conceal the identity of supplying pharmaceutical companies and the chemical composition of drugs employed in execution proceedings violates the Eighth Amendment, especially in light of recent botched executions.<sup>163</sup>

#### 1. Death Penalty States’ Uncontroverted Reliance on Capricious Compounded Drugs

Due to the national drug shortage caused by Hospira’s exit from sodium thiopental production, states are forced to use alternative drugs to fulfill their statutory obligation for implementing punishment by death.<sup>164</sup> For example, after the initial drug deficiency, states began bargaining and exchanging the remaining available sodium thiopental with each other.<sup>165</sup>

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158. *Baze*, 553 U.S. at 47.

159. *Wilkerson v. Utah*, 99 U.S. 130, 136 (1878).

160. *Baze*, 553 U.S. at 50.

161. *Helling v. McKinney*, 509 U.S. 25, 33–34 (1993).

162. *See* Brief for Writ of Certiorari at 2, *Trottie v. Livingston*, 766 F.3d 450 (5th Cir. 2014) (No. 14-6200) (asserting no prisoner condemned to death will be able to meet their burden of proof unless respondents disclose “meaningful and readily available information”).

163. Apart from Eighth Amendment violations, states’ concealment of vital lethal injection protocols also creates due process concerns. Telephone Interview with Maurie Levine, Lead Counsel for Lethal Injection Litigation in Texas (Nov. 11, 2014); *see also* Lozeau, *supra* note 9, at 452 (“A due process violation is possible because without knowledge of the composition and origin of the drugs used to execute a prisoner, there is no assurance that the execution will not be unconstitutionally lengthy or painful.”).

164. *See* Lozeau, *supra* note 9, at 465–66 (discussing the various methods states have relied on when acquiring sodium thiopental as a result of the national drug shortage, including switching to drugs that have never been tested for human execution, disregarding federal law and obtaining sodium thiopental from foreign suppliers, and fraudulently misrepresenting the purpose of the pharmaceutical drug to supplying companies to ensure delivery).

165. *See* *Powell v. Thomas*, 784 F. Supp. 2d 1270, 1275 (M.D. Ala.) (showing states have relied on alternative methods to proceed with lethal injection procedures since Tennessee transported sodium thiopental to Alabama in 2011), *aff’d*, 641 F.3d 1255 (11th Cir. 2011); Lozeau, *supra* note 9, at 465 (opining the states’ “drug swapping scheme” may be legally questionable). The exchanged

Other states undertook extreme measures by attempting to illegally acquire sodium thiopental.<sup>166</sup> Today, most death penalty states rely on compounding pharmacies to produce supplemental lethal injection drugs.<sup>167</sup> Due to constitutional concerns, the identity of supplying pharmaceutical companies is crucial because the effects of compounded drugs on an individual sentenced to death by lethal injection are inconsistent and unreliable.<sup>168</sup>

Use of compounded preparations in lethal injection proceedings has stirred controversy since compounding pharmaceutical companies are not subject to the strict regulations implemented by the Food and Drug Administration (FDA).<sup>169</sup> In fact, active FDA involvement in compounding pharmacies was subject to criticism and dismay.<sup>170</sup> Thus, compounding companies are subject to a lesser degree of scrutiny by states, apart from federal importation and exportation regulations.<sup>171</sup> The lack of strict regulation has led to severe repercussions.<sup>172</sup> In 2012, a Massachusetts compounding center produced compounded products that

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sodium thiopental between Alabama and Tennessee was later seized by the DEA on unspecified accounts. *Powell*, 784 F. Supp. 2d at 1275.

166. See Lozeau, *supra* note 9, at 465–466 (describing Nebraska's attempt to illegally obtain sodium thiopental that was later seized by the DEA). In a second attempt, Nebraska misrepresented the purpose of the drugs to the supplying pharmaceutical company. *Id.*

167. See Denno, *supra* note 3, at 1366 (“Given the impact of drug shortages on lethal injection procedures, it should come as no surprise that states are seeking help internally from local compounding pharmacies for the production of lethal injection drugs.” (footnote omitted)).

168. See Michael Muskal, *How Did Arizona Execution Go Wrong?*, L.A. TIMES (July 14, 2014, 1:10 PM), <http://www.latimes.com/nation/nationnow/la-na-arizona-execution-explained-20140724-story.html> (summarizing the problems that have resulted in the sodium thiopental shortage and noting Joseph's Rudolph Wood III execution was one of the longest in United States history, lasting almost two hours passed before death could be confirmed).

169. See Denno, *supra* note 3, at 1368–71 (outlining legislative response to the lack of FDA regulatory oversight).

170. See Jesse M. Boodoo, Note, *Compounding Problems and Compounding Confusion: Federal Regulation of Compounded Drug Products and the FDAMA Circuit Split*, 36 AM. J.L. & MED. 220, 233–34 (2010) (detailing the FDA's proposed Compliance Policy Guide, which listed nine circumstances that would warrant federal oversight and prosecution, including solicitation, duplication, the use of unapproved sources, and the failing to adhere to state regulations; however, the proposal left the pharmaceutical community confused and dismayed).

171. See Denno, *supra* note 3, at 1336 (expressing compounding pharmacies are subject to lax state regulations when compared to the strict FDA oversight subjected by commercial pharmaceutical manufacturers). See generally 21 U.S.C. § 381 (2012) (noting the FDA's responsibility for importation and exportation of goods into the United States).

172. Denno, *supra* note 3, at 1337; see also *The Meningitis Outbreaks and Health Care for Profit*, WSWs (Oct. 19, 2012), <http://www.wsws.org/en/articles/2012/10/pers-o19.html> (acknowledging the issues associated with the lack of regulation for compounding pharmacies, especially in light of the meningitis outbreak that took place in Massachusetts, which was fatal for over sixty persons and sickened hundreds).

were contaminated with fungal meningitis, which led to sixty-four deaths.<sup>173</sup> This fatal outcome led to a federal inquiry into compounding pharmacies operations, and the results were egregious.<sup>174</sup> Employee negligence and subpar sanitary conditions made it clear state regulatory schemes were insufficient.<sup>175</sup> In response to such findings, various legislative acts have been proposed in an attempt to prevent further misgivings.<sup>176</sup> New legislation will make it substantially more difficult for states to obtain lethal injection drugs, so states will have to seek yet another alternative source.<sup>177</sup>

Until the new legislation is in effect, states will continue utilizing compounding companies' drugs in their lethal injection proceedings. The identity of those compounding pharmacies is paramount to ensuring humane executions because drug reliability varies on a case-by-case basis.<sup>178</sup>

## 2. States' Hidden Truth: Use of Untested Alternative Drugs

As a consequence of the decreased supply of sodium thiopental, states began altering their execution protocols to allow for the use of substitute drugs.<sup>179</sup> Additionally, many states switched to a one-drug execution procedure, as opposed to the traditional three-drug practice.<sup>180</sup> However, this practice of using alternative drugs poses a risk to condemned inmates

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173. Denno, *supra* note 3, at 1370.

174. *See id.* at 1370–71 (“[U]nidentified black particles floating in vials . . . rust and mold in ‘clean rooms’ . . . technicians handling supposedly sterile products with bare hands; and employees wearing non-sterile lab coats.” (quoting Margaret A. Hamburg, *Proactive Inspections Further Highlight Need for New Authorities for Pharmacy Compounding*, FDA VOICE (Apr. 11, 2013), <http://blogs.fda.gov/fdavoice/index.php/2013/04/proactive-inspections-further-highlight-need-for-new-authorities-for-pharmacy-compounding>)).

175. *See* Denno, *supra* note 3, at 1371 (providing evidence of states' ineffective management of compounding pharmaceutical companies, such as inadequate record keeping, lack of safety and preventive precautions, and ignorance of other states' processes).

176. *See id.* at 1371–75 (detailing various proposed legislative reforms to “close the gap in FDA authority”). Ultimately, it was the “Drug Quality and Security Act” that was endorsed. *Id.* at 1374. Under this new legislation, “large-scale compounding manufacturers” will be subject to federal scrutiny beginning in 2015. *Id.* at 1374–75.

177. *See id.* at 1375–76 (describing the effects of new legislation on death penalty states since “a physician must specifically order a prescription for an identified, individual patient”).

178. *See* Brief for Writ of Certiorari, *supra* note 162, at 6–7 (explaining various factors that affect expiration dates on compounded chemicals, such as “the quality and sterility of the original ingredients, the proficiency of the compounders and the testing laboratory, and storage conditions”).

179. *See* Denno, *supra* note 3, at 1358–59 (charting execution drug protocol changes in states between the years 2009 and 2013).

180. *See id.* at 1358–59 (reporting at least ten states, including Texas, switched to a one-drug execution process).

because many of these substances have not been tested for use in executions.<sup>181</sup>

These risks became apparent when executions in various states led to highly controversial and gruesome deaths.<sup>182</sup> For example, in Oklahoma, Clayton Lockett was pronounced dead almost an hour after execution proceedings commenced.<sup>183</sup> Witnesses stated that, before curtains were closed to conceal the process, the inmate moaned and writhed.<sup>184</sup> The flawed execution also illustrates deficiencies in Oklahoma's lethal administration process as it took medical personnel almost an hour to locate a vein to insert the IV.<sup>185</sup> As a result of the highly debated execution, some states intentionally misrepresented their lethal injection protocol to avoid public scrutiny.<sup>186</sup>

In a separate state proceeding, a lab report revealed Texas intended to use a batch of pentobarbital that was tested five months before the scheduled execution.<sup>187</sup> Reliable testing of compounded chemicals is essential since various factors determine the viability of the drug.<sup>188</sup> Furthermore, the report revealed the state department relied on questionable authority to conduct its limited drug examinations.<sup>189</sup>

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181. *See id.* at 1362–63 (indicating one of the substituted drugs utilized by states, pentobarbital, has never been utilized for execution purposes and medical experts cautioned its use in such proceedings).

182. *See id.* at 1364 (discussing botched executions that took place in the Georgia as a result of using pentobarbital as a substitute drug for sodium thiopental); Katie Fretland & Jessica Glenza, *Oklahoma State Report on Botched Lethal Injection Cites Medical Failures*, *GUARDIAN* (Sept. 4, 2014), <http://www.theguardian.com/world/2014/sep/04/oklahoma-inquiry-botched-lethal-injection-clayton-lockett> (describing Clayton Lockett's botched execution, which occurred in Oklahoma). Lockett's execution was Oklahoma's first attempt using the drug midazolam in its three-drug protocol. Fretland & Glenza, *supra*. Despite being one of the most highly controversial executions, the Oklahoma Department of Public Safety labeled Lockett's death a success because the drugs worked and the prisoner was executed. *See id.* ("At the end of the day, the drugs we used to execute inmate Lockett for the crimes he committed worked.")

183. Fretland & Glenza, *supra* note 182.

184. *Id.*

185. *Id.*

186. *See, e.g., Missouri Inmates Were Given Controversial Drug Before Executions*, *DEATH PENALTY INFO. CTR.*, <http://www.deathpenaltyinfo.org/node/5876> (last visited Mar. 12, 2016) (announcing Missouri's deceit when using the highly controversial drug, midazolam, in its lethal injection procedures). Actually, prison officials would administer the drug before the execution began, outside the observation of witnesses. *Id.*

187. *See* Brief for Writ of Certiorari, *supra* note 162, at 4 (asserting the laboratory report provided by the state revealed the compounded pentobarbital was tested on March 17 and Mr. Trotter's execution was scheduled for September 10).

188. *See id.* at 6–7 ("[E]xpiration dates of compounded chemicals is not a fixed science[] [and] is dependent on factors.")

189. *See id.* at 11–12 (noting Texas's reliance on Eagle Laboratories, an independent contracting

Based on questionable state actions, such as those of Texas described above, state secrecy laws constitute a “substantial risk” since harm is “sure or very likely” to occur that will amount to “needless suffering.”<sup>190</sup> The recent botched executions caused by untested compounded drugs illustrate these are not isolated occurrences or mere accidents. Rather, in conjunction with state accountability and transparency, these fatal occurrences are preventable.<sup>191</sup>

B. *Proposed Alternative: Transparency*

To prevail in an Eighth Amendment violation challenge, petitioners must meet the high burden set forth in *Baze*.<sup>192</sup> Under *Baze*, it is essential for petitioners to establish the state’s protocol “creates a demonstrated risk of severe pain.”<sup>193</sup> While it is uncontroverted this “substantial risk” standard must be met,<sup>194</sup> there is speculation regarding the requirements for the proposed second prong.<sup>195</sup> The disputed prong mandates petitioners show “the risk is substantial when compared to the known and available alternatives.”<sup>196</sup> Notwithstanding the necessity of the proposed second prong, a state’s refusal to disclose the identity of companies supplying its lethal injection formula poses constitutional concerns, and full transparency is the only remedy.<sup>197</sup>

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lab, for lethal injection drug testing). In 2013, due to the meningitis outbreak in a local Massachusetts pharmacy, the FDA scrutinized independent contracting labs, questioning their reliability and testing procedures). See Kimberly Kindy, *Labs That Test Safety of Custom-Made Drugs Fall Under Scrutiny*, WASH. POST (Oct. 5, 2013), [http://www.washingtonpost.com/politics/labs-that-test-safety-of-custom-made-drugs-fall-under-scrutiny/2013/10/05/18170a9e-255f-11e3-b3e9-d97fb087acd6\\_story.html](http://www.washingtonpost.com/politics/labs-that-test-safety-of-custom-made-drugs-fall-under-scrutiny/2013/10/05/18170a9e-255f-11e3-b3e9-d97fb087acd6_story.html) (reporting surprise inspections by the FDA revealed unsanitary conditions and a lack of protocol).

190. *Helling v. McKinney*, 509 U.S. 25, 33–34 (1993).

191. See Denno, *supra* note 3, at 1379 (indicating state transparency is a feasible solution compared to the egregious consequences, resulting from state officials’ negligence).

192. See *id.* at 1347–48 (grouping cases citing *Baze* into categories based on opinion or standard that was utilized).

193. *Baze v. Rees*, 553 U.S. 35, 61 (2008) (plurality opinion).

194. See Ty Alper, *The Truth About Physician Participation in Lethal Injection Executions*, 88 N.C.L. REV. 11, 14 (2009) (“[T]o establish an Eighth Amendment violation, a petitioner must show that a state’s procedures present a ‘substantial risk of serious harm.’” (quoting *Baze*, 553 U.S. at 52)).

195. Telephone Interview with Mauric Levine, *supra* note 163; see also Brief for Writ of Certiorari, *supra* note 163, at 29–30 (taking the position the *Baze* opinion did not implement a new standard for Eighth Amendment challenges, making a proffered alternative method not required).

196. *Baze*, 553 U.S. at 61.

197. See *Gregg v. Georgia*, 428 U.S. 227, 232 (1976) (Marshall, J., dissenting) (emphasizing “the constitutionality of the death penalty” hinges “on the opinion of an informed citizenry”); *Furman v. Georgia*, 408 U.S. 238, 242 (1972) (Douglas, J., concurring) (“[T]he proscription of cruel and unusual punishments ‘is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice.’” (quoting *Weems v. United States*, 217 U.S. 349, 378 (1910))),

### 1. Texas's Common Law Right Fails to Protect Lethal Injection Protocol from Disclosure

The unwillingness of states to disclose who is supplying or administering the lethal injection chemicals is not unheard of.<sup>198</sup> From the common law execution method of hanging to electrocution, most modes of execution consisted of a hooded executioner.<sup>199</sup> Due to the stigma associated with execution proceedings, prison officials contend it would be challenging to find someone willing to take on the responsibilities unless anonymity is granted.<sup>200</sup> It is upon this premise states assert withholding pharmaceutical identities is warranted.<sup>201</sup>

In 2014, then Texas Attorney General Greg Abbott changed his stance on allowing the identity of supplying entities to be withheld.<sup>202</sup> Contrary to his previous opinions, Abbott relied on the common law physical safety exception in conjunction with Section 552.101 of the Texas Government Code to justify Texas's secrecy.<sup>203</sup> To qualify for the common law exception, there must be proof demonstrating disclosure will cause "an imminent threat of physical danger."<sup>204</sup> In its open records request, the Texas Department of Criminal Justice proffered a threat assessment from the Director of the Texas Department of Public Safety (DPS) as evidence supporting its claim.<sup>205</sup> Awarding deference to the DPS director's threat

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revisited in *Gregg*, 428 U.S. 227; *Trop v. Dulles*, 356 U.S. 86, 101 (1958) ("The Amendment must draw its meaning from the evolving standards that mark the progress of a maturing society.").

198. See Ellyde Roko, Note, *Executioner Identities: Toward Recognizing a Right to Know Who Is Hiding Beneath the Hood*, 75 FORDHAM L. REV. 2791, 2796 (2007) (noting various death penalty states have enacted statutes, which require executioner identities to remain confidential).

199. *Id.*

200. See *id.* at 2796–800 (asserting the duties of executioner are undesirable due to the stigma associated with the title thus securing someone willing to conduct the statutory duty would be difficult without the promise of anonymity).

201. See Denno, *supra* note 3, at 1378 ("Without guaranteed anonymity, states argue, companies and medical professionals would be disinclined to assist the state with its execution duties for fear of a blight on their personal or professional reputations, while executioners and correctional facilities might face threats from death-penalty opponents."); Ward, *supra* note 17 (reporting Abbott's decision to allow the Texas Department of Criminal Justice to withhold its lethal injection protocol from disclosure based on assertions of death threats).

202. Ward, *supra* note 17.

203. See Tex. Att'y Gen. OR2014-09184 (awarding deference to the Texas Department of Criminal Justice threat assessments, thus allowing the withholding of disclosure). *But see* Tex. Att'y Gen. OR2012-10208; Tex. Att'y Gen. OR2012-07088 (taking the position the Texas Department of Criminal Justice did not meet its burden when establishing whether the disclosure of vital lethal injection information would amount to "a substantial threat of physical harm").

204. Tex. Dep't of Pub. Safety v. Cox Tex. Newspapers, LP, 343 S.W.3d 112, 117 (Tex. 2011) (quoting Tex. Att'y Gen. OR1977-0169).

205. See Tex. Att'y Gen. OR2014-09184 ("[T]he department submits a threat assessment from

assessment, Abbott allowed the Texas Department of Criminal Justice to withhold vital lethal injection protocol from the public.<sup>206</sup> While the Supreme Court of Texas has held deference should be given to DPS officers, it also emphasized “vague assertions of risk” would not suffice.<sup>207</sup> Rather, the required proof to determine disclosure and restraint needs to contain “detailed evidence or expert testimony,” outlining the threatened harm revelation would instigate.<sup>208</sup> Apart from the threat assessment submitted by the Director of DPS and assertions of previous threats to past vendors, the Texas Department of Criminal Justice has failed to submit any real evidence documenting the danger of physical harm.<sup>209</sup> In addition, the Woodlands Compounding Pharmacy, which is the last known Texas supplier, has made no mention of perceived physical harm.<sup>210</sup> Instead, its departure was based on negative publicity as a result of its leaked identity, which interfered with business efficiency.<sup>211</sup>

To be exempt from disclosure under the common law physical safety exception and Government Code Section 552.101, there must be a strong indication revealing “threat of imminent physical danger.”<sup>212</sup> While Abbott sided with the Texas Department of Criminal Justice in shielding the identity of suppliers from public knowledge, no evidence supports his decision.<sup>213</sup> Abbott relied on vague assertions and exaggerated safety concerns that do not warrant exemption.<sup>214</sup> Thus, transparency is the only remedy to prevent mishaps and ensure state compliance with the Eighth Amendment’s safeguards because the identity of supplying entities

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the Director of the Texas Department of Public Safety (“DPS”) stating drug suppliers such as the pharmacy at issue face ‘a substantial threat of physical harm.’”).

206. *See id.* (“[T]his office must defer to the representations of DPS, the law enforcement experts charged with assessing threats to public safety.”); *see also Tex. Dep’t of Pub. Safety*, 343 S.W.3d at 119 (proposing some deference should be allotted to “DPS officers and other law enforcement experts about the probability of harm”).

207. *Tex. Dep’t of Pub. Safety*, 343 S.W.3d at 119.

208. *Id.*

209. Telephone Interview with Maurie Levine, *supra* note 163; *see also Tex. Att’y Gen. OR2014-09184* (outlining the evidence considered consisted of a threat assessment from DPS and assertions of previous threats to similar vendors).

210. *See Brandi Grissom, TDCJ Refuses to Return Execution Drugs to Pharmacist*, TEX. TRIB. (Oct. 7, 2013), <https://www.texastribune.org/2013/10/07/tdcj-refuses-return-execution-drugs-pharmacist> (reporting Dr. Jasper Lovoi’s decision to demand the return of supplied pentobarbital was based on the inconvenience that resulted from his leaked identity rather than physical threats).

211. *Id.*

212. *Tex. Dep’t of Pub. Safety*, 343 S.W.3d at 117 (quoting *Tex. Att’y Gen. OR1977-0169*).

213. Telephone Interview with Maurie Levine, *supra* note 163.

214. *See Tex. Dep’t of Pub. Safety*, 343 S.W.3d at 119 (indicating broad evidence of a threat of physical harm will not warrant exemption, even if it is presented by DPS); Roko, *supra* note 198, at 2813 (opining states must not implement regulations that exaggerate safety concerns).

is a matter of public record.<sup>215</sup>

## 2. The Public's Compelling Interests Outweigh the States'

States' aversion to transparency not only directly affects the inmate upon whom insurmountable pain is inflicted but also it disturbs the public's right to assess the constitutionality of lethal injection.<sup>216</sup> Furthermore, execution proceedings do not merely encompass the individual condemned to death but also the families involved.<sup>217</sup> Therefore, states should be compelled to disclose the drugs utilized in their execution protocol and the drug's source due to compelling public interest.<sup>218</sup>

The last known lethal injection drug supplier in Texas indicated its preference for secrecy due to the disturbance in business operations that resulted from release of its identity.<sup>219</sup> However, the mere fact the public may critique and vocally condemn any pharmaceutical company's involvement does not warrant withholding its identity.<sup>220</sup> The constitutionality of any execution procedure hinges on "the evolving standards of decency that mark the progress of a maturing society."<sup>221</sup> Thus, the public needs to be afforded access to all relevant information to determine whether "such procedures violate the evolving standards of decency."<sup>222</sup>

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215. See Denno, *supra* note 3, at 1379 (indicating states' attempts to conceal vital information from the public are due in large part to their "desire to conceal inconsistencies and incompetence"); Will Weissert, *Judge: Texas Should Reveal Execution Drug Supplier*, WASH. TIMES (Dec. 12, 2014), <http://www.washingtontimes.com/news/2014/dec/12/judge-texas-must-reveal-execution-drug-maker> (noting a Texas district court judge's recent decision to have the Texas Department of Criminal Justice disclose the source of its lethal injection drugs).

216. See *Cal. First Amendment Coal. v. Woodford*, 299 F.3d 868, 876 (9th Cir. 2002) ("An informed public debate is critical in determining whether execution by lethal injection comports with 'the evolving standards of decency which mark the progress of a maturing society.'" (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958))).

217. See Jeremy Fogel, *In the Eye of the Storm: A Judge's Experience in Lethal Injection Litigation*, 35 FORDHAM URB. L.J. 735, 759 (2008) (reflecting on a judge's experience in a highly controversial lethal injection case and recognizing the consequences were not only limited to the inmate but also extended to the victim's loved ones).

218. See Roko, *supra* note 198, at 2816 (indicating a constitutional interplay with the First and Eighth Amendment safeguards since public opinion plays a vital role in the constitutionality of the death penalty).

219. See Grissom, *supra* note 210 (stating the publication of a pharmaceutical's identity resulted in hate mail, possible lawsuits, and press inquiries).

220. See Roko, *supra* note 198, at 2815 ("Criticism of participation in a known controversial action does not rise to the level of endangering the individuals safety. Therefore, it cannot serve as justification for keeping information from the public.").

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

222. Roko, *supra* note 198, at 2817.

## V. CONCLUSION

The constitutionality of any execution method is centered on the public's opinion to determine whether it is fair and humane in light of current moral convictions.<sup>223</sup> To make this determination, the public must be afforded access to pertinent information such as the identity of entities supplying the chemical composition in lethal injection proceedings.<sup>224</sup> Currently, death penalty states are averting transparency through state secrecy laws, protecting vital information pertaining to the lethal injection protocol.<sup>225</sup> However, botched executions linked to the national shortage in lethal injection drugs raise questions regarding the constitutionality of laws protecting suppliers from public opinion.<sup>226</sup>

While previous Eighth Amendment challenges have been raised regarding lethal injection protocol,<sup>227</sup> it was the 2008 Supreme Court decision in *Baze v. Rees* that laid the groundwork for litigation regarding the constitutionality of lethal injection.<sup>228</sup> To prevail in an Eighth Amendment challenge under *Baze*, petitioners must demonstrate a risk will be “sure or very likely to cause serious illness and needless suffering,” and give rise to “sufficiently imminent dangers.”<sup>229</sup> Although the *Baze* Court could not have anticipated the lethal injection quandary that would ensue as a result of Hospira's withdrawal from the production of sodium thiopental,<sup>230</sup> states' secrecy laws nonetheless violate the Eighth Amendment under the *Baze* precedent. Their reliance on alternate measures, such as substances from compounded pharmacies, has resulted in numerous botched executions.<sup>231</sup> Despite the botched executions

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223. *See id.* at 2816–17 (commenting on the need for the public's independent scrutiny to determine whether a given execution method violates “the evolving standards of decency” (quoting *Trop*, 356 U.S. at 101)).

224. *Id.* at 2817.

225. *See, e.g.*, Tex. Att'y Gen. OR2014-09184 (allowing the Texas Department of Criminal Justice to withhold the identity of the pharmaceutical vendor supplying its lethal injection drugs based on a threat assessment submitted by the Department of Public Safety).

226. *See* Muskal, *supra* note 168 (linking botched executions to the national shortage of pentobarbital and mentioning states that utilize lethal injection as their primary mode of execution are relying on alternative and untested substances).

227. *See, e.g.*, *Heckler v. Chaney*, 470 U.S. 821, 823 (1985) (arguing lethal injection drugs need to be approved for human execution by the Food and Drug Administration before use in capital punishment proceedings).

228. *See* Denno, *supra* note 3, at 1333 (“The Court chose *Baze v. Rees*, a Kentucky case, to determine the future direction of lethal injection.”).

229. *Baze v. Rees*, 553 U.S. 35, 50 (2008) (quoting *Helling v. McKinney*, 509 U.S. 25, 33–34 (1993)).

230. Denno, *supra* note 3, at 1336.

231. *See* Muskal, *supra* note 168 (reporting the botched execution of Joseph Rudolph Wood III

occurring nationwide, states continue to withhold vital information, citing security concerns for the supplying entities.<sup>232</sup> However, apart from vague assertions of threats, there is no proof to indicate supplying pharmaceutical companies will be subjected to “substantial threat of physical harm” with disclosure.<sup>233</sup>

Notwithstanding the vague assertions of security threats offered by the states, their refusal to disclose the name of the drugs utilized in lethal injection procedures and the source of drugs is a violation of our constitutional safeguards under the Eighth Amendment. Thus, to ensure state compliance and to keep the public informed, transparency is required.<sup>234</sup>

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in Arizona and indicating previous botched executions took place in Ohio and Oklahoma)

232. *See* Tex. Att’y Gen. OR2014-09184 (indicating evidence was provided regarding threats made to previous pharmaceutical vendors).

233. *Id.* (quoting Tex. Dep’t of Pub. Safety v. Cox Tex. Newspapers, L.P., 343 S.W.3d 112, 118 (Tex. 2011)); *see also* Grissom, *supra* note 210 (reporting Dr. Jasper Lovoi’s assertions that the pharmacy’s withdrawal as a supplier was due to increased negative publicity).

234. *See* Denno, *supra* note 3, at 1379 (commenting on research findings revealing state’s resistance to transparency is due to their need to cover up discrepancies); Weissert, *supra* note 215 (“[T]he company’s name is a matter of public record, despite arguments from the Texas Department of Criminal Justice that disclosing it would be a safety risk.”).