

AN INTERVENTION FOR STATES' DRUG ADDICTION: REFORMING LETHAL INJECTION DRUG PRODUCTION

Dimonique McGruder

I. INTRODUCTION

Today is execution day. The small, poorly lit viewing room is full of the victim's family as well as the prisoner's family. Kyle, the brother of the victim, sits in the first row, directly in front of the viewing room window so that he can watch his sister's killer be put to death once and for all. One of the guards mentions to Kyle that executions are typically quick and it should only take ten to fifteen minutes for the prisoner to die. Ann, the prisoner's sister, sits down next to Kyle. Ann was not planning on attending her brother's execution but out of a sense of family loyalty, she came to see her brother one last time. The prison guards bring him in, John Morrison. John brutalized Kyle's sister by first raping her, then burying her alive before she eventually suffocated to death. The guards proceed to strap John down to the table and put IV's into his arms. Ten minutes pass and John seems to be sedated, as if death is soon to come. But thirty minutes pass, and he is still breathing. All of a sudden, John's body rises off the table and he appears to be groaning in pain. Both Ann and Kyle see John mouth the words, "man...I'm not...something's wrong." While John continues to gasp for air, the guards inject him with more drugs, but nothing seems to be working. Ann runs up to the viewing window, hoping that John will look over at her and see the love for him in her eyes. Seconds later, the guards draw the curtain across the window and direct Ann back to her seat. Kyle jumps up in protest; he wants to

Colorado Attorney; J.D., Valparaiso University Law School (2016); B.S., History, Truman State University (2013). Special thanks to Dean Susan Stuart, Prof. JoEllen Lind, Isaac Carr, Esq., Whitney Johnson, Esq., and Faith Alvarez, Esq. for pushing me to publish this piece and your belief in what it aims to stand for.

watch the execution continue. After nearly two hours of waiting, the warden enters the viewing room and announces that John Morrison is dead.¹

During 2014, a wave of botched executions washed over the United States and refueled the long-standing debate about capital punishment with particular focus on the process of administering lethal injection.² Many of these botched executions are the result of poor lethal injection protocols and procedures.³ Numerous states have been using lethal injection drugs from compounding pharmacies that operate like manufacturers; however these pharmacies are

¹ This scenario is based on conflicting information about the execution of Clayton D. Lockett on April 29, 2014 in the Oklahoma Department of Corrections and Joseph R. Wood III's execution in Arizona on July 23, 2014. The narrative was created by the author with mixed in facts from the following sources: Heide Brandes, *Oklahoma Releases Prison Log for Botched April Execution*, REUTERS (Aug. 28, 2014, 6:46 PM), <http://www.reuters.com/article/2014/08/28/us-usa-oklahoma-execution-idUSKBN0GS2M720140828> [http://perma.cc/A8JY-ADZF]; Tracy Connor, *Autopsy Says Drugs Killed Clayton Lockett in Oklahoma Execution*, NBC NEWS (Aug. 28, 2014, 3:57 PM), <http://www.nbcnews.com/storyline/lethal-injection/autopsy-says-drugs-killed-clayton-lockett-oklahoma-execution-n191376> [http://perma.cc/9KAJ-YT7F]; Erik Eckholm, *Arizona Takes Nearly 2 Hours to Execute Inmate*, THE NEW YORK TIMES (July 23, 2014), <http://www.nytimes.com/2014/07/24/us/arizona-takes-nearly-2-hours-to-execute-inmate.html> [http://perma.cc/LX37-4GF9]; Erik Eckholm, *One Execution Botched, Oklahoma Delays the Next*, THE NEW YORK TIMES (Apr. 29, 2014), <http://www.nytimes.com/2014/04/30/us/oklahoma-executions.html> [http://perma.cc/BVV5-RFRT]; Astrid Galvan, *Joseph Wood Received 15 Injections of Untested Drug Cocktail During Arizona Execution*, HUFFINGTON POST (Aug. 2, 2014, 8:30 PM), http://www.huffingtonpost.com/2014/08/01/joseph-wood-15-injections-arizona-execution_n_5643254.html [http://perma.cc/6SWA-924R]; Josh Levs, Ed Payne, & Greg Botelho, *Oklahoma's Botched Lethal Injection Marks New Front in Battle Over Executions*, CNN (Sept. 8, 2014, 7:16 AM), <http://www.cnn.com/2014/04/30/us/oklahoma-botched-execution/> [http://perma.cc/L62B-Z473]; David Schwartz, *Arizona Reveals Drug Dosage in Drawn-out Execution*, REUTERS (Aug. 1, 2014, 7:24 PM), <http://www.reuters.com/article/2014/08/01/us-usa-execution-arizona-idUSKBN0G157I20140801> [http://perma.cc/8U9H-PSU5].

² Mark Berman, *Weeks After Botched Oklahoma Execution, Multiple Executions Scheduled for 24-Hour Window*, THE WASHINGTON POST (June 18, 2014, 8:01 PM), <http://www.washingtonpost.com/news/post-nation/wp/2014/06/17/weeks-after-botched-oklahoma-execution-multiple-executions-scheduled-for-24-hour-window/> [http://perma.cc/3HAR-KL4T]; Levs, *supra* note 1; Tierney Sneed, *The Needle and the Damage Done in Arizona*, U.S NEWS (July 24, 2014, 11:50 AM), <http://www.usnews.com/news/articles/2014/07/24/apparently-botched-arizona-execution-fuels-lethal-injection-debate> [http://perma.cc/N75B-XD4F]; Viral Global News Reader, *Execution Scandal in Oklahoma Raises Legal Questions on Death Penalty*, VIRAL GLOBAL NEWS (July 1, 2014), <http://www.viralglobalnews.com/u-s-stories/execution-scandal-oklahoma-raises-legal-questions-death-penalty/10990/> [http://perma.cc/9CMG-8P3C].

³ See *supra* notes 1–2 and accompanying text; *infra* Part II.C (discussing the two most publicized botched executions of 2014 that reignited the capital punishment debate).

not regulated by the FDA, nor are their drugs approved by the FDA.⁴ As a result, the quality and strength of the drugs used for lethal injection is unclear.⁵

States refuse to reveal the identity of their lethal injection drug suppliers and as a consequence, several death row inmates have petitioned the courts for stays of their executions.⁶ These death row inmates are flooding the courts with lawsuits in an effort to gain information about the drugs that will be used to execute them.⁷ However, their lawsuits require time and money which cause the limited resources afforded to the court system to become more strained. Their ability to obtain reliable drug information is further hindered by states being allowed to buy lethal injection drugs from compounding pharmacies which are not FDA approved, leading

⁴ *Compounding Pharmacies and Lethal Injection*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/compounding-pharmacies> [<http://perma.cc/8MT7-XVKW>]; Wendy N. Davis, *States Keep Mum on Where Lethal Injection Drugs are Made*, ABA JOURNAL (Mar. 1, 2014, 10:19 AM), http://www.abajournal.com/magazine/article/states_keep_mum_on_where_lethal_injection_drugs_are_made/ [<http://perma.cc/95UK-C9K9>]; Mark Hansen, *States are Resorting to Elaborate Steps to Obtain Lethal Injection Drugs, Report Says*, ABA JOURNAL (Mar. 10, 2014, 7:33 PM), http://www.abajournal.com/news/article/states_taking_elaborate_steps_to_secure_lethal_injection_drugs_report_say/ [<http://perma.cc/Y6YU-XQLV>]; *State by State Lethal Injection*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/state-lethal-injection> [<http://perma.cc/9Q9C-73BX>].

⁵ U.S. Food and Drug Administration, *FDA Video-FDA and Pharmacy Compounding*, U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES, http://www.accessdata.fda.gov/scripts/video/drugs.cfm?vid=kif_rmtlQb0 [<http://perma.cc/SY53-EDSJ>].

⁶ *In re Lombardi*, 741 F.3d 903 (8th Cir. 2014) (holding that the issue of what pharmacy compounded the drugs for lethal injections in the state was not relevant to the prisoner's claim); *Wellons v. Comm'r, Ga. Dept. of Corr.*, 754 F.3d 1260, 1261 (11th Cir. 2014) (declaring that the district court did not abuse its discretion by denying Wellons a stay of execution based on the claim that the state's use of compounded pentobarbital violated the Eighth Amendment and the state's failure to provide information about drugs to be used in his execution did not violate Wellons' rights); *Owens v. Hill*, 758 S.E. 2d 794, 796 (Ga. 2014) (seeking declaratory and injunctive relief on the basis that the Georgia's execution participant confidentiality statute was unconstitutional).

⁷ *In re Lombardi*, 741 F. 3d 888, 897 (8th Cir. 2014) (holding that the issue of what pharmacy compounded the drugs for lethal injections in the state was not relevant to the prisoner's claim); *Wellons v. Commissioner, Ga. Dept. of Corrections*, 754 F. 3d 1260, 1261 (11th Cir. 2014) (declaring that the district court did not abuse its discretion by denying Wellons a stay of execution based on the claim that the state's use of compounded pentobarbital violated the Eighth Amendment and the state's failure to provide information about drugs to be used in his execution did not violate Wellons' rights); *Owens v. Hill*, 758 S.E. 2d 794, 796 (Ga. 2014) (seeking declaratory and injunctive relief on the basis that the Georgia's execution participant confidentiality statute was unconstitutional).

states to use inexpensive untested drug compounds to execute inmates.⁸ With this lack of transparency, states are undertaking an unnecessary risk for inflicting pain on prisoners, likely violating their due process rights and causing preventable botched executions.⁹

In order to address the specific issue of unregulated drugs used in executions, a federal regulation must be enacted to eliminate the production of lethal injection drugs by non-FDA approved compounding pharmacies.¹⁰ While there is a sea of issues surrounding lethal injection protocols, this change is not only the simplest to achieve and maintain, but it also implements the biggest impact. Instead of obtaining lethal injections from compounding pharmacies, states should be required to use a single FDA approved and regulated manufacturing plant, established within the United States, and regulated and overseen by the FDA.¹¹ In this way, states that want to administer lethal injections have a safe source to purchase tested drugs that conform to norms set by the FDA.¹²

Part II discusses the current state of lethal injection in the context of history, execution procedure, drug manufacturing, botched executions, state reactions, remedies, and legal

⁸ See Al Jazeera and The Associated Press, *Missouri Executes Herbert Smulls, Despite Question about Execution Drug*, ALJAZEERA AMERICA (Jan. 30, 2014, 12:00 AM), <http://america.aljazeera.com/articles/2014/1/29/missouri-executesherbertsmullsjewelrystorerobber.html> (explaining how Missouri has used untested and unregulated drugs from compounding pharmacies for executions like Herbert Smulls). In Missouri, a new drug for lethal injection was used on Herbert Smulls which was purchased from a compounding pharmacy. *Id.* The state refused to identify the pharmacy arguing that they are not required to do so. *Id.* Missouri felt compelled to purchase drugs from compounding pharmacy because their previous suppliers stopped selling the drugs required for executions. *Id.* Thus, Missouri switched over to compounding pharmacies. *Id.*

⁹ See *infra* Part III (arguing that both the Eighth Amendment and the Due Process Clause are being violated by the current application of lethal injection with compounded drugs).

¹⁰ See *infra* Part IV (recommending the implementation of a federal regulation that would ban compounding of lethal injection drugs and instead place the production of such drugs in the hands of the government).

¹¹ See *infra* Part IV (suggesting the establishment of a single manufacturing plant that would produce quality lethal injection drugs to the states).

¹² See *infra* Part IV (advocating for a safe avenue to obtain lethal injection drugs that would be tested and guaranteed to be used by state correction facilities).

challenges.¹³ Part III lays out two main arguments: that the current administration of executions through lethal injection is illegal and unconstitutional based on the Eighth Amendment and the Due Process Clause.¹⁴ Part IV describes a proposed federal regulation that would create a single FDA manufacturing plant for states to purchase regulated lethal injection drugs.¹⁵ This piece exposes the current problems with lethal injections and a solution through a federal regulation.

II. BACKGROUND

This section discusses the background of capital punishment using lethal injection drugs which have increasingly caused botched executions. This section is divided into five subsections: Part II.A provides a brief history of lethal injections; Part II.B discusses the compounding pharmacies that are manufacturing the lethal injection drugs; Part II.C examines two botched executions from lethal injections; Part II.D notes recent steps taken by states; and Part II.E describes legal challenges to capital punishment.¹⁶ Overall, this section points out how the current administration of lethal injection drugs is unsafe, leading to numerous botched executions.¹⁷

A. Brief History of Lethal Injection and How it is Administered Today

¹³ See *infra* Part II (examining the history of how lethal injection has gotten to the problematic situation it is currently in).

¹⁴ See *infra* Part III (arguing that the use of compounded drugs by state prisons is unconstitutional under the Eighth Amendment and the Due Process Clause).

¹⁵ See *infra* Part IV (establishing a new federal regulation that would eliminate the competitive market of lethal injection drugs and place the responsibility in the hands of the government and FDA).

¹⁶ See *infra* Parts II.A–II.E (discussing the history of lethal injection, how it’s administered today, what the results of its application are, and how the law has traditionally handled capital punishment).

¹⁷ See *infra* Part II.C (addressing the two most well known botched executions of 2014 that illustrate some of the major problems with lethal injection); see also Lawrence Hummer, *I Witnessed Ohio’s Execution of Dennis McGuire. What I Saw Was Inhumane*, THE GUARDIAN (Jan. 22, 2014, 6:51 PM), <http://www.theguardian.com/commentisfree/2014/jan/22/ohio-mcguire-execution-untested-lethal-injection-inhumane> [<http://perma.cc/4ZQP-JTY8>] (discussing a witness’s account of the first botched execution of 2014 of Dennis McGuire).

The most common method of carrying out capital punishment in the United States is by lethal injection.¹⁸ There are varying applications of lethal injection, but the most frequently used types are the three-drug, two-drug, and single dose methods.¹⁹ The common three-drug method begins with an anesthetic or sedative to reduce awareness, followed by a paralytic to numb the body, then a drug to stop the heart.²⁰ Execution methods have evolved over time, with each

¹⁸ L. KAY GILLESPIE, *INSIDE THE DEATH CHAMBER: EXPLORING EXECUTIONS* 69 (2003). When it comes to deciding whether to seek the death penalty, the ultimate choice is up to the prosecutor. *Death Penalty and Arbitrariness*, AMNESTY INTERNATIONAL USA, <http://www.amnestyusa.org/our-work/issues/death-penalty/us-death-penalty-facts/death-penalty-and-arbitrariness> [<http://perma.cc/GW8X-Q6ZR>]. Because the prosecutor is the sole decision-maker to pursue the death penalty, local politics, location of the crimes, and plea bargaining sways the decision. *Id.* Unsurprisingly, prosecutors seek the death penalty more frequently when the victim is white than if the victim is black or another race. *Id.* As imagined, most executions occur in the south as 82% of all executions since 1976 have taken place there (1090) with Texas and Virginia having the second most executions with 608. *Id.* While the United States still upholds the death penalty, two-thirds of the countries in the world have abolished it. *Death Penalty Facts*, AMNESTY INTERNATIONAL USA, (May 2012), <http://www.amnestyusa.org/pdfs/DeathPenaltyFactsMay2012.pdf> [<http://perma.cc/DXG9-FQKM>]. In 2010, a majority of known executions took place in five specific countries: China, Iran, North Korea, Yemen, and the United States. *Id.* Even though the rest of the world is doing away with lethal injection, the United States continues to eat the costs. *Id.* The greatest costs with death penalty cases occur prior to and during trial. *Id.* If post-conviction proceedings were eliminated, the death penalty would still be more expensive than other alternative sentences. *Id.* In Kansas, it is 70% more costly to seek the death penalty than to not to seek the death penalty. *Id.* The median cost in Kansas was \$1.26 million. *Death Penalty Facts*, *supra* note 18. In Maryland, an average death penalty case is \$3 million. *Id.* If California were to go to a system without the death penalty the cost would be \$11.5 million per year compared to the current system of \$137 million per year. *Id.* The United States military has its own death penalty statute. *Id.* The U.S. military has not carried out an execution since 1961. *Id.* There are six men on death row, four of them being African-Americans. *Id.* These six military death row inmates are held at the U.S. Disciplinary Barracks at Ft. Leavenworth in Kansas. *Death Penalty Facts*, *supra* note 18. *See generally* RAYMOND PATERNOSTER, ROBERT BRAME & SARAH BACON, *THE DEATH PENALTY: AMERICA'S EXPERIENCE WITH CAPITAL PUNISHMENT* 5–2.51 (2008) (taking a comprehensive look at capital punishment generally in the United States over the last few centuries); *THE FUTURE OF AMERICA'S DEATH PENALTY: AN AGENDA FOR THE NEXT GENERATION OF CAPITAL PUNISHMENT RESEARCH* 3–510 (Charles S. Lanier, William J. Bowers & James R. Acker, eds., 2009) (generally analyzing numerous dimensions of capital punishment from various scholars perspectives).

¹⁹ Lethal Injection, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/lethal-injection-moratorium-executions-ends-after-supreme-court-decision>. Eight states have used the one drug approach, a lethal dose of an anesthetic: Arizona, Georgia, Idaho, Missouri, Ohio, South Dakota, Texas, and Washington. *State by State*, *supra* note 4. While six states have plans to adopt the one-drug protocol in the future: Arkansas, California, Kentucky, Louisiana, North Carolina, and Tennessee. *Id.* Fourteen states have used the drug pentobarbital and five more plan to use it in the future. *Id.* Two states have used midazolam as the first drug in a three drug protocol, Florida and Oklahoma. *Id.* When Oklahoma used this drug, the result was Clayton Lockett's botched execution. *Id.* The two states that have midazolam in their executions are Ohio and Arizona. *Id.* Arizona's use resulted in Joseph Wood's botched execution.

²⁰ *Lethal Injection*, *supra* note 19. A common paralytic used in lethal injection executions is pancuronium bromide along with potassium chloride to stop the heart. *Id.* Potassium chloride within a minute of application will cause cardiac arrest. HUMAN RIGHTS WATCH, *SO LONG AS THEY DIE: LETHAL INJECTIONS IN THE UNITED STATES* 2–3 (2006). But without proper anesthesia, the drug acts like fire moving through the veins. *Id.* It is so painful that the American Veterinary Medical Association prohibits it for euthanasia unless the animal is placed by an anesthetic

method attempting to become more “humane” than the previous.²¹ The overwhelming state adoption of lethal injection came after problems with the electric chair; drugs were cheaper and seen as a more humane method of execution.²² On May 10, 1977, the first lethal injection bill was passed and became law in the state of Oklahoma, quickly followed by the state of Texas.²³

agent into a deep level of unconsciousness. *Id.* Pancuronium bromide paralyze voluntary muscles like the lungs and diaphragm. *Id.* Thus, if an inmate is not sufficiently anesthetized, he or she will feel himself suffocating but will be unable to draw a breath. *Id.* The pancuronium will also conceal the agony from an external view because of the potassium chloride. *Id.* Some call this phenomenon anesthetic awareness when a person is mentally alert while under full anesthesia. Gavin Lee, *A Painless Cocktail? The Lethal Injection Controversy*, in *THE DEATH PENALTY TODAY* 93, 106 (Robert M. Bohm ed., 2008). Under the anesthetic awareness state, a person is paralyzed because of the paralytic agent administered and anesthetic. *Id.* Thus, the person is painfully aware of the procedure but unable to speak about it. *Id.* Carol Weihr experienced this first hand when she had her right eye removed. *Id.* The anesthetic did not work but because of the paralytic agent used she was unable to alert the surgical team. *Id.* As a result, she was painfully aware of the entire procedure of removing her eye. *Id.* Weiher said that the potassium chloride felt like “fires of hell flowing through my veins.” *A Painless Cocktail*, *supra* note 20, at 106. Studies show that this occurs about 28,000 to 46,000 times per year in the United States when anesthetics are used in clinics or hospitals by trained medical professionals. *Id.* In the case of lethal injections where non-medical professionals are administering anesthetics, a study by *The Lancet* in 2005 found that forty-three out of forty-nine executed inmates blood showed that their anesthetic levels were conducive of suffering during the execution. *Id.* But lethal injection has not always been the method of choice. See GEOFFREY ABBOTT, *EXECUTION: THE GUILLOTINE, THE PENDULUM, THE THOUSAND CUTS, THE SPANISH DONKEY, AND 66 OTHER WAYS OF PUTTING SOMEONE TO DEATH*, 203–06 (2005) (explaining the sixty nine different ways to be executed: axe; bastinado; beaten to death; boiled alive; brazen bull; broken on the wheel; buried alive; buried alive upside-down; burned at the stake; burned internally; cannibalism; cauldron; cave of roses; crucifixion; cyphon; diece; drowning; dry pan; eaten by animals; eaten by crocodiles; electric chair; firing squad; flayed alive; fried to death; gas chamber; gibbet; gridiron; guillotine; gun powder; halifax; gibbet; hanged alive in chains; hanged at the yard-arm; hanged, drawn and quartered; hanging; hara-kiri; impaled by stakes; iron chair; iron maiden; keel-hauling; lethal injection; mannaia; mazzatella; mill wheel; nail through the ear; necklacing; over a cannon’s muzzle; pendulum; poison; pressed to death; rack; sawn in half; scaphismus; Scottish maiden; sewn in an animal’s belly; shot by arrows; Spanish donkey; starvation; stoned to death; strangulation; suffocation; sword; thousand cuts; throat slitting; thrown from a great height; tied in a sack with animals; torn apart between two trees; torn apart by boats; torn apart by horses; and twenty-four cuts).

²¹ HUMAN RIGHTS WATCH, *supra* note 20, at 9. Hanging was the standard methods of execution for centuries but because of difficulties with its use, the advent of electricity made electrocution the prefer method. *THE DEATH PENALTY: DEBATING THE MORAL, LEGAL, AND POLITICAL ISSUES* 15 (Robert M. Baird & Stuart E. Rosenbaum eds., 2011). But electrocution was not error proof either and thus poison gas became the preferred method over time. *Id.* Ultimately, lethal injection became the preferred method and since has had its’ own difficulties. *Id.* The main purpose for change and development of methods was achieving “a more humane, pain-free technique of execution.” *Id.* See *A Painless Cocktail*, *supra* note 20, at 93, 94 (discussing how states attempt at employing a humane method of capital punishment is not out of sympathy but because of the U.S. Supreme Court’s interpretation of the Eighth Amendment).

²² HUMAN RIGHTS WATCH, *supra* note 20, at 13; Deborah W. Denno, *The Future of Execution Methods*, in *THE FUTURE OF AMERICA’S DEATH PENALTY: AN AGENDA FOR THE NEXT GENERATION OF CAPITAL PUNISHMENT RESEARCH* 488–490 (Charles S. Lanier, William J. Bowers & James R. Acker, eds., 2009). Deborah Denno claims that states move to lethal injection reflected a growing reliance on medicine to philosophical, financial, and political pressures. Denno, *supra* note 22, at 488–490.

²³ Vince Beiser, *A Guilty Man [And the History of Lethal Injection]*, in *THE DEATH PENALTY: DEBATING THE MORAL LEGAL, AND POLITICAL ISSUES* 107, 107–112 (Robert M. Baird & Stuart E. Rosenbaum eds., 2011). The

The first execution by lethal injection occurred in 1982 in Texas, administered to inmate Charlie Brooks, Jr.²⁴ Quickly after Oklahoma's lethal injection statute was enacted, numerous states copied Oklahoma's law without doing any research or studies of their own about the procedure.²⁵ Since the late 1970s, lethal injection has grown into the preferred method because of the public perception that it is a humane method of execution designed to administer a less disturbing death.²⁶ However, lethal injections are generally carried out in a manner that contradicts this perception.

very next day, Texas enacted an almost identical version. *Id.* Ironically, Bill Wiseman hated capital punishment and did not believe executions deterred people from killing. *Id.* He felt that it was morally wrong to take a human life. *Id.* Wiseman only consulted medical examiner, Dr. Jay Chapman about how to develop the lethal injection statute for Oklahoma. HUMAN RIGHTS WATCH, *supra* note 20, at 14. Chapman gave Wiseman the idea for an execution that involved “[no] struggle, no stench, no pain—just a quick, merciful snuffing out of life.” Beiser, *supra* note 23, at 109. Chapman suggested using an intravenous saline drip in the inmate's arm to introduce a lethal mix of a barbiturate to put the person to sleep and a paralytic to stop the heart and lungs. *Id.* at 107–112. Years later, Human Rights Watch asked Chapman why you chose the drugs that he did, he stated “I didn't do any research. I just knew from having been placed under anesthesia myself, what we needed. I wanted to have at least two drugs in doses that would each kill the prisoner, to make if one didn't kill him, the other would.” HUMAN RIGHTS WATCH, *supra* note 20, at 15.

²⁴ Beiser, *supra* note 23, at 107–112. Charles Brooks was executed for murdering a mechanic after a test drive. ROBERT K. ELDER, *LAST WORDS OF THE EXECUTED 191* (2010). Brooks last statement before being executed was:

I, at this very moment, have absolutely no fear of what may happen to this body. My fear is for Allah, God only, who has at this moment the only power to determine if I should live or die.... As a devout Muslim, I am taught and believe that this material life is only for the express purpose of preparing oneself for the real life that is to come.... Since becoming Muslim, I have tried to live as Allah wanted me to live.

Id. at 191–92. The first woman to be executed by lethal injection was Margie Velma Barfield in 1984. ABBOTT, *supra* note 20, at 205. Barfield was executed for poisoning five people in order to gain money for drugs. *Id.* Barfield's last words were:

I want to say that I am sorry for all the hurt that I have caused. I know that everybody has gone through a lot of pain—all the families connected—and I am sorry, and I want to thank everybody who has been supporting me all these six years. I want to thank my family for standing with me through all this and my attorneys and all the support to me, everybody, the people with this prison department. I appreciated everything—their kindness and everything that they have shown me during these six years.

ELDER, *supra* note 24, at 194.

²⁵ HUMAN RIGHTS WATCH, *supra* note 20, at 12. *See also A Painless Cocktail*, *supra* note 20, at 100 (finding that after Oklahoma enacted lethal injection, other states simply copied Oklahoma's version and adopted it as their own).

²⁶ *Anything But Humane*, AMNESTY INTERNATIONAL USA, <http://www.amnestyusa.org/our-work/issues/death-penalty/lethal-injection> [<http://perma.cc/WA4H-C59C>].

Over the last few decades, access to lethal injection drugs has diminished.²⁷ Once European drug companies discovered that their products were being used to execute people in the United States, the European Union restricted exportation of drug agents used in lethal injections, including sodium thiopental, potassium chloride, pancuronium bromide, and sodium pentobarbital.²⁸ In 2011, major manufacturers within the United States, such as Hospira, also stopped selling similar drugs to states, objecting to their use in executions.²⁹ Lundbeck, a major Danish pharmaceutical company, publicly stated its' position of opposing capital punishment: "This is not what we make products for. We make drugs to help people, to save lives, not to end them."³⁰ Lundbeck directly expressed its intent to restrict drug supplies to the United States because they were being used to kill individuals.³¹ As a result of these restrictions, states have

²⁷ See *supra* note 4.

²⁸ *Controls on Torture Goods*, GOV.UK (Jan. 15, 2014), <https://www.gov.uk/controls-on-torture-goods> [<http://perma.cc/KMB4-39M9>]. Under Council Regulation (EC) No. 1236/2005 or the "Torture" Regulation, the European Union restricted the exportation of amobarbital, amobarbital sodium salt, pentobarbital, pentobarbital sodium salt, secobarbital, secobarbital sodium salt, thiopental, and thiopental sodium salt as a statement of direct opposition to use of their drugs to administer the death penalty. *Id.*

²⁹ *Hospira Position on Use of Our Products in Lethal Injections*, HOSPIRA, http://www.hospira.com/en/about_hospira/government_affairs/hospira_position_on_use_of_our_products/index [<http://perma.cc/3EDU-RMRJ>]. Hospira publicly stated their opposition to capital punishment and their goal of saving lives instead of destroying them. *Id.* Thus, when Hospira found out U.S. prisons were using their drugs for the unintended use of destruction, they restricted sale to the United States. *Id.* Not only did foreign manufacturers refuse to sell to the U.S. but also manufacturers within the U.S. like Hospira., headquartered in the U.S. *Our Locations*, HOSPIRA, http://www.hospira.com/en/about_hospira/careers/our_locations/ [<http://perma.cc/A7RU-T783>].

³⁰ Amy Goodman & Juan González, *Execution Chaos: Witnesses Say Executions are Botched as States Use Untested, Secret Drug Cocktails*, DEMOCRACY NOW! (Feb. 7, 2014), http://www.democracynow.org/2014/2/7/execution_chaos_witnesses_say_executions_are [<http://perma.cc/E43Q-ML2L>].

³¹ David Jolly, *Danish Company Blocks Sale of Drug for U.S. Executions*, THE NEW YORK TIMES, July 1, 2011, available at http://www.nytimes.com/2011/07/02/world/europe/02execute.html?_r=0 [<http://perma.cc/3UC4-9V8U>]. Missouri was one state affected by the Danish manufacturer's decision to refuse to sell. Davis, *supra* note 4. Even though Missouri was having problems finding drugs, Missouri still planned to execute serial killer Joseph Paul Franklin with a lethal dose of propofol as a substitute drug. *Id.* Propofol is the same anesthetic that killed Michael Jackson. *Id.* But Missouri was not in the clear because at the time the European Union threatened to limit shipments of propofol to the United States as a protest to capital punishment. *Id.* Governor Jay Nixon ordered the Missouri Department of Corrections to devise a different method of execution which the state decided to use pentobarbital from a compounding pharmacy. *Id.* State officials refused to release the identity of the pharmacy but Franklin was still execution for his murders. *Id.*

been scrambling to find manufacturers that will sell lethal injection drugs to them.³² A host of states have turned to compounding pharmacies for a solution in obtaining these drugs.³³ For example, one state sent prison officials to another state with \$11,000 in cash to purchase execution drugs.³⁴ The search for lethal injection drugs has turned into what some scholars call the “Wild West” in death penalty states.³⁵ A disturbing example of this “Wild West” commitment to lethal injection came in 2014 when high-level officials in Oklahoma sought drugs from Texas in exchange for 50-yard-line tickets to a football game, followed by a request to intentionally lose several games.³⁶

B. Where Lethal Injection Drugs Are Coming From

Most—if not all—of the lethal injection drugs in the United States today are purchased from compounding pharmacies.³⁷ Traditionally, “drug compounding” referred to a pharmacist combining, mixing, or altering various ingredients to create a custom drug, tailored to an

³² *Compounding Pharmacies*, DEATH PENALTY, <http://www.deathpenaltyinfo.org/compounding-pharmacies> [<http://perma.cc/8MT7-XVKW>].

³³ *Id.* These pharmacies do not have the same approval process like the large manufacturers states were previously buying from do. *Id.* The FDA does not approve the products of compounding pharmacies nor do they have to register or inform the FDA what drugs they are making. *Id.* This problem of states choosing to buy lethal injection drugs from compounding pharmacies will be discussed in more detail in the following subsections.

³⁴ Hansen, *supra* note 4. Two other examples of how states are buying lethal injection drugs include traveling to another state to exchange muscle relaxants for sedatives or using sedatives from veterinary schools. .

³⁵ *Id.*

³⁶ Katie Fretland, *Records Show Oklahoma Officials Wanted Perks for Helping Texas in Search for Scarce Lethal Injections*, THE COLORADO INDEPENDENT (Mar. 18, 2014), <http://www.coloradoindependent.com/146553/oklahoma-scrambles-to-find-lethal-injections-for-two-imminent-executions> [<http://perma.cc/6DPW-KMMR>]. In Responding to a request from Texas for advice on how to deal with the drug scarcity, Oklahoma Assistant Attorney General Seth Branham stated that Oklahoma might cooperate in exchange for 50-yard-line tickets to a rivalry football game between the University of Oklahoma and the University of Texas. *Id.* As a counter offer, Assistant Attorney General Stephen J. Krise said that for Oklahoma’s assistance Texas’s team should intentionally lose several games. *Id.*

³⁷ *State by State*, *supra* note 4. According to the Death Penalty Information Center, nine states, South Dakota, Missouri, Texas, Georgia, Ohio, Mississippi, Louisiana, Pennsylvania, Colorado, and Oklahoma, have openly used or intend to use compounding pharmacies to obtain lethal injection drugs.. This does not account for the states that may be buying from compounding pharmacies but refuse to disclose the information about where they get through drugs. *Id.* What has happened as a result of the use of these non-FDA approved drugs is the discussion laid out in subsection D. See *supra* notes 32–36 and accompanying text (discussing how compounding pharmacies do not abide by FDA procedures or practices).

individual's needs.³⁸ Drug compounding was regulated by the states prior to the enactment of the Food, Drug, and Cosmetic Act of 1938 (FDCA).³⁹ With that Act, specific definitions and parameters were placed on the practice of compounding by banning “new drugs” from being introduced into interstate commerce without FDA approval.⁴⁰ In order to gain FDA approval, there must be proof of effectiveness and safety by scientific clinical studies.⁴¹ However, compounding pharmacies were not required to obtain FDA approval because it was not considered medically practicable or economically feasible.⁴²

In 1992, the FDA's Compliance Policy Guide partly filled the lacuna in law regulating compounding pharmacies.⁴³ The Guide set out the FDA's authority and discretion to regulate compounding pharmacies.⁴⁴ In 1997, following the release of the Guide, the FDCA was amended by the Food and Drug Administration Modernization Act (FDAMA).⁴⁵ The goal of the FDAMA was to clarify that the FDA's oversight and regulatory authority over compounding pharmacies applied to those whose activities exceeded traditional practices—like large quantity drug manufacturing.⁴⁶ In the late 1990s, the FDA became concerned with regulating compounded drugs that were being produced on a large scale, similar to drug manufacturing, but

³⁸ Andrew Nolan, *Federal Authority to Regulate the Compounding of Human Drugs*, in DRUG COMPOUNDING PHARMACIES: RISKS AND OVERSIGHT ISSUES 1, 2 (Seth Sharpe ed., 2013). See *FDA Video*, *supra* note 5 (explaining pharmacy compounding and the FDA's involvement in the process. The short video describes how compounding was created to help people with drug allergies and allow pharmacists the ability to create and alter drugs according to a patient's needs.). Available at <https://www.fas.org/sgp/crs/misc/R43038.pdf>.

³⁹ Nolan, *supra* note 38, at 3.

⁴⁰ *Id.* at 3–4. The Food, Drug, and Cosmetic Act establishes minimum standards for the manufacturing, marketing, and distributing of drugs and authorizes the FDA to ensure that drugs are safe and effective for their intended uses. Jennifer Staman, *FDA's Authority to Regulate Drug Compounding: A Legal Analysis*, in DRUG COMPOUNDING PHARMACIES: RISKS AND OVERSIGHT ISSUES 19, 20–21 (Seth Sharpe ed., 2013). The Act further defines what a “new drug,” “adulterated” drug, and a “misbranded” drug are. Nolan, *supra* note 38, at 3–4.

⁴¹ Nolan, *supra* note 38, at 5.

⁴² *Id.*

⁴³ Edward J. Markey, *Compounding Pharmacies, Compounding Risk*, in DRUG COMPOUNDING PHARMACIES: RISKS AND OVERSIGHT ISSUES 81, 85–88 (Seth Sharpe ed., 2013).

⁴⁴ *Id.*

⁴⁵ Nolan, *supra* note 38, at 5.

⁴⁶ Markey, *supra* note 43.

were nevertheless trying to avoid complying with the “new drug” requirements of the FDCA.⁴⁷ In 2002, the FDA issued another Compliance Policy Guide, declaring the FDAMA invalid and establishing a new standard for assessing drug compounding.⁴⁸ This Guide stated that the FDA would enforce administrative action against compounding pharmacies found engaging in activities involving large-scale manufacturing.⁴⁹ The most recent change in compounding regulation came in 2013 with the Drug Quality and Security Act (DQSA) which allows large scale compounding pharmacies to register as “outsourcing facilities” and subject themselves to FDA regulation.⁵⁰ Ultimately, the regulation of compounding pharmacies is a combination of

⁴⁷ Staman, *supra* note 40, at 21.

⁴⁸ Nolan, *supra* note 38, at 7.

⁴⁹ Markey, *supra* note 43. The Guide set out nine specific circumstances that would have the potential for FDA enforcement:

1. Compounding of drugs in anticipation of receiving prescriptions, except in very limited quantities in relation to the amounts of drugs compounded after receiving valid prescriptions.
2. Compounding drugs that were withdrawn or removed from the market for safety reasons. Appendix A provides a list of such drugs that will be updated in the future, as appropriate.
3. Compounding finished drugs from bulk active ingredients that are not components of FDA approved drugs without an FDA sanctioned investigational new drug application (IND) in accordance with 21 U.S.C. § 355(i) and 21 CFR 312.
4. Receiving, storing, or using drug substances without first obtaining written assurance from the supplier that each lot of the drug substance has been made in an FDA- registered facility.
5. Receiving, storing, or using drug components not guaranteed or otherwise determined to meet official compendia requirements.
6. Using commercial scale manufacturing or testing equipment for compounding drug products.
7. Compounding drugs for third parties who resell to individual patients or offering compounded drug products at wholesale to other state licensed persons or commercial entities for resale.
8. Compounding drug products that are commercially available in the marketplace or that are essentially copies of commercially available FDA-approved drug products. In certain circumstances, it may be appropriate for a pharmacist to compound a small quantity of a drug that is only slightly different than an FDA-approved drug that is commercially available. In these circumstances, FDA will consider whether there is documentation of the medical need for the particular variation of the compound for the particular patient.
9. Failing to operate in conformance with applicable state law regulating the practice of pharmacy.

Id. at 86–87.

⁵⁰ *Compounding Pharmacies*, *supra* note 32. Even though the DQSA was enacted, registration by compounding pharmacies is voluntary and thus is not impacting the production of drug compounding in regards to lethal injection drugs.

oversight by the FDA and State Boards of Pharmacy depending on the given circumstances.⁵¹

Yet, over time, pharmacy compounding has evolved and the market for large quantity compounding has emerged.⁵²

C. *The Results of Lethal Injection Drugs Being Used By Prisons for Executions*

This subsection focuses on two of the most publicized botched executions of 2014, providing firsthand accounts of prisons using untested drug compounds.⁵³ The first execution discussed is that of Clayton Lockett in April 2014.⁵⁴ The second example is Joseph Wood's execution in July

⁵¹ Markey, *supra* note 43, at 90. State Boards of Pharmacy's role in regulation is focused on compliance with traditional pharmacy licensing, controlled substances, and other requirements; not enforcement actions that relate the safety or scope of compounding pharmacies. *Id.* at 91. The latter actions are how the FDA has regulated compounding pharmacies. *Id.*

⁵² *Id.* at 82. Compounding has even found an avenue on the internet by providing mail-order drugs without first examining patients. *Id.*

⁵³ See Brandes, *supra* note 1 (revealing Oklahoma's prison log of Lockett's execution); *Arizona Takes Nearly, supra* note 1 (summarizing Joseph Wood's botched execution that took nearly two hours and analogizing the execution to Lockett's execution that went wrong in Oklahoma); Erik Eckholm, *IV Mislplace in Oklahoma Execution, Report Says*, THE NEW YORK TIMES (Sept. 4, 2014), <http://www.nytimes.com/2014/09/05/us/oklahoma-report-on-clayton-lockett-execution.html> [<http://perma.cc/8JYW-74AK>] (revealing the official report of Lockett's execution which was conveniently done by an internal state investigator instead of an independent investigator); *One Execution Botched, supra* note 1 (giving a basic summary of the Clayton Lockett botched execution and the resulting delays on executions in the state); Galvan, *supra* note 1 (uncovering Joseph Wood's botched execution and revealing that it take the state of Arizona fifteen different injections of drugs and 600 gasps for breath to finally kill Joseph Wood); Adam Serwer, *Lethal Drugs Injected 15 Times in Botched Arizona Execution*, MSNBC (Aug. 4, 2014, 9:27 AM), <http://www.msnbc.com/msnbc/lethal-drugs-injected-15-times-botched-arizona-execution> [<http://perma.cc/PW3J-PJGK>] (corroborating Huffington Post discovery that Joseph Wood was injected fifteen different times with lethal injection drugs). According to Dale Baich, Wood's attorney, "Under the Arizona protocol, if the prisoner remains conscious, a backup set of drugs can be administered, but there's nothing in the protocol that permits fourteen additional doses to be administered when the prisoner is unconscious." Serwer, *supra* note 53. See also AUSTIN SARAT, GRUESOME SPECTACLES: BOTCHED EXECUTIONS AND AMERICA'S DEATH PENALTY, 179–210 (2014) (discussing the history of botched executions in America and listing the 276 botched executions that have occurred from 1890–2010). For example, the first recorded botched execution was in New York to William Kemmler in the form of electrocution. "After [the] first failed to kill Kemmler, the executioners administered a second jolt. Kemmler began to bleed, and the room was filled with the smell of burnet flesh and hair." *Id.* See also Michael L. Radelet, *Some Examples of Post-Furman Botched Executions*, DEATH PENALTY INFORMATION CENTER (July 24, 2014), <http://www.deathpenaltyinfo.org/some-examples-post-furman-botched-executions> [<http://perma.cc/P5C8-HD2F>] (giving examples of at least 46 botched executions from 1982 through the present. Note that this list is not a conclusive list and there are others).

⁵⁴ See *infra* Part II.C.1 (discussing death row inmate Clayton Lockett's botched execution and the role untested drugs had a part in it). Even though this Note is limited to the major problem with using compounding drugs in executions, there are other factors that are contributing to these horrific killings. Specifically, two other problems in the lethal injection protocols are the level of training for people administering the execution and the lack of a clear and standard drug protocol. Viral Global, *supra* note 2. The individuals actually administering the lethal injection drugs are not doctors or medical professional as every professional medical society forbids them from participating

2014.⁵⁵ These examples showcase the serious effects compounded drugs can have when used to execute prisoners in the United States.⁵⁶

expect for pronouncing the inmate as dead. Leigh Buchanan Bienen, *Anomalies: Ritual and Language in Lethal Injection Regulations*, in MURDER AND ITS CONSEQUENCES: ESSAYS ON CAPITAL PUNISHMENT IN AMERICA 59, 61–62 (2010). For example, the American Board of Anesthesiologists may revoke an anesthesiologist’s certification if they consult or participate in an execution. Gillian Mohney, *What We Don’t Know About Lethal Injection Drugs*, ABC NEWS (July 25, 2014, 5:18 PM), <http://abcnews.go.com/Health/dont-lethal-injection-drugs/story?id=24716774> [<http://perma.cc/G3J5-Z44B>]. The following medical bodies consider the participation in executions to be unethical: World Medical Association, World Psychiatric Association, International Council of Nurses, Standing Committee of European Doctors, American Medical Association, American Society of Anesthesiologists, American Nurses Association, American College of Physicians, American Public Health Association, National Association of Emergency Medical Technicians, American Psychological Association, and Society of Correctional Physicians. *Death Penalty Facts*, *supra* note 18. The general standard is that the person placing the IV is only required to have one year of experience. A related problem with administering the drug through an IV are that many inmates were previously addicted to drugs and their veins become small and difficult to locate. ABBOTT, *supra* note 20, at 204. With the state protocols, there are no specific amounts of the drugs that should be used or the specific methods of how they should be administered. HUMAN RIGHTS WATCH, *supra* note 20, at 11. A large amount of discretion is given to the correction officials to figure out for themselves these key aspects. *Id.* Leigh Buchanan Bienen argues that if states really wanted a more humane execution that was easy instead of trying to protect the viewers, states would authorize a large single dose of a fast-acting barbiturate. Bienen, *supra* note 53, at 73. Bienen calls states to a higher standard of administering lethal injection through sincere changes to lethal injection protocols that actually affect the execution instead of pretending to do so. *Id.*

The state must conduct itself—through its agents, institutions, and regulations—with respect for what it is doing, with dignity and respect for the person receiving the punishment, and with an acknowledgment of the manner in which it makes out death. For the highest court in a nation a of laws to ignore the current practice of lethal injections and to put a rubber stamp on these lethal injections protocols, which do not regulate or monitor state authorized punishment, but set out an imagined repetitive reassuring ritual is to condone state-authorized ineptitude, bungling, and deception. To turn a blind eye to such activities by state actors undermines the legitimacy of the state and all legal institutions, including the court itself.

Id. Because there is no universal protocol for states to conform to, many use a wide variety of language that results in ineffective protocols that are vague. *Id.* at 59–73. Many of the state protocols use pseudo-scientific terminology about the drugs and equipment to create the illusion that the protocol is scientifically valid and medically approve when in reality they are not. *Id.* at 63. The evidence is found in the botched executions that continue to occur across America. *Id.* at 63. “A lack of order and control is the reality. The protocols are a mask on chaos.” Bienen, *supra* note 53, at 63. The focus of many protocols are on the warden’s role, stating who will pronounce the dead, and who will handle the media as oppose to how much training the person administering the drugs should have or a plan of action in case of an emergency. *Id.* at 64. For example, Georgia’s protocol is pages of instructions about setting up the execution, designation of witnesses, when to turn the microphones on and off, when the curtain is to be closed, etc. but there are very few lines about how the execution itself is to be administered. *Id.* at 71. Sadly, lethal injection protocols have become more concerned about making the observers feel comfortable as opposed to limiting the pain of the inmate being executed and in process have contributed to the problem of botched executions in the United States. *Id.* at 72. As Leigh Buchanan Bienen puts it:

The protocols are window dressing, stage directions, the establishment of ritual, designed to create an illusion of an orderly, humane, dignified procedure for a controlled euthanasia. This illusion is important to those managing the killing because the appearance of order presented to the public provides protection if the execution does not proceed as portrayed.

Id.

⁵⁵ See *infra* Part II.C.2 (examining death row inmate Joseph Wood’s botched executions and how untested drugs contributed to his painful murder).

1. Clayton D. Lockett's Botched Execution

On April 29, 2014, Clayton Lockett was scheduled to be executed for the rape and murder of a woman in 1999.⁵⁷ For Lockett's execution, Oklahoma used the three-drug method for the first time.⁵⁸ First, Lockett was injected with a sedative to render him unconscious.⁵⁹ Second, vecuronium bromide, a paralyzing agent, was administered to stop his breathing.⁶⁰ Third, potassium chloride was pumped into his veins to stop Lockett's heart.⁶¹ At some point after the last two drugs were administered, witnesses say Lockett's body began to twitch and he started mumbling and gasping.⁶² One witness stated, "[i]t looked like torture."⁶³ Lockett's strapped down body tried to rise off the table as he was writhing in pain, which was when the corrections officials closed the curtain to the execution chamber.⁶⁴ Behind the curtain, prison officials quickly realized there was a problem with Lockett's IV as they saw the drugs had spilled out on

⁵⁶ See *infra* Part II.C.1–2 (explaining the two most important and publicized botched executions of 2014 that were caused partially by untested lethal injection drugs).

⁵⁷ *One Execution Botched*, *supra* note 1. See *Lockett v. State*, 53 P.3d 418, 421–22 (Okla. Crim. Ct. App. 2002) (describing the details of Lockett's crime of rape, assault, kidnapping, sodomy, and murder of a woman who was buried alive).

⁵⁸ Connor, *supra* note 1.

⁵⁹ *One Execution Botched*, *supra* note 1. The sedative that Lockett was injected with was midazolam. *Id.* Midazolam is one of the top new drugs used in the states experimentation of lethal injection drug cocktails. *State by State*, *supra* note 4. At 6.23pm, the execution began but Lockett did not appear immediately to fall unconscious. Katie Fretland, *Clayton Lockett Writhed and Groaned. After 43 Minutes, He was Declared Dead*, THE GUARDIAN (May 2, 2014, 3:55PM), <http://www.theguardian.com/world/2014/apr/30/clayton-lockett-oklahoma-execution-witness> [<http://perma.cc/A99Y-U68M>]. Beneath a white sheet pulled to his neck, Lockett was strapped down to the table. *Id.* At first, Lockett looked straight ahead, but after four minutes, he turned toward the witness area. *Id.* By 6.30pm, his eyes were closed and mouth slightly open, but when a prison guard stood over him, it became clear that something was wrong. *Id.*

⁶⁰ *State by State*, *supra* note 4.

⁶¹ *Id.*

⁶² *Id.* At 6.33pm, Lockett was declared sedated but in the minutes to follow, Lockett lurched forward in his restraints, writhing and attempting to speak. *Clayton Lockett Writhed*, *supra* note 59. "He strained and struggled violently, his body twisting, and his head reaching up from the gurney." *Id.* Sixteen minutes after the execution began and Lockett's violent reaction, Trammell, the prison warden, ordered the blinds closed. *Id.*

⁶³ *Id.* Another witness said, "This was botched, and it was difficult to watch." *Id.*

⁶⁴ *One Execution Botched*, *supra* note 1. "[I]n a gesture that seemed to echo Oklahoma's fierce commitment to secrecy in the way it carries out lethal injections, the curtains were drawn over the execution chamber, obscuring the gruesome spectacle from public view. Officials picked up prison phones and left the room." *Clayton Lockett Writhed*, *supra* note 59.

the floor of the chamber.⁶⁵ After approximately forty-five minutes, Clayton Lockett died.⁶⁶ It was only then that the warden announced to those in the viewing room that Lockett suffered from what “appears to be a massive heart attack.”⁶⁷ Lockett died inside the execution chamber, away from the eyes of witnesses.⁶⁸

Following the mess of Lockett’s execution, several investigations and autopsies sought to discover what went wrong.⁶⁹ An independent autopsy, aside from the public autopsy administered by the state of Oklahoma, found that part of the reason for Lockett’s botched execution was a failure to properly place the IV—which was placed in his groin.⁷⁰ The state of Oklahoma claimed that the drugs used in Lockett’s execution were purchased from a federally approved manufacturer, but the State refused to identify which manufacturer.⁷¹ Oklahoma is not the only state refusing to reveal such information.⁷² At least thirteen states have either enacted or amended secrecy or confidentiality laws making the identities of lethal injection drug suppliers

⁶⁵ Brandes, *supra* note 1.

⁶⁶ *One Execution Botched*, *supra* note 1.

After a few minutes, the corrections department director, Robert Patton, came to the viewing room. ‘We’ve had a vein failure in which the chemicals did not make it into the offender,’ he told the assembled group, which included lawyers for the condemned prisoner, as well as 12 journalists. He said the second execution—Charles Warner, who was convicted of the rape and murder of 11-month-old Adrianna Waller—would not go ahead that night. It was unclear whether Lockett was even dead.”

Clayton Lockett Writhed, *supra* note 59.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*; Trymaine Lee, *New Autopsy Report Finds Oklahoma at Fault for Botched Execution*, MSNBC (June 25, 2014, 5:07 PM), <http://www.msnbc.com/msnbc/oklahoma-executioner-clayton-lockett-what-went-wrong> [<http://perma.cc/XLF6-C9VM>].

⁷⁰ *New Autopsy Report*, *supra* note 69 (the state of Oklahoma originally put the blame on Lockett’s veins collapsing and blowing out, but in reality, the autopsy revealed that the execution team chose to use a riskier vein in Lockett’s groin than other easier access veins).

⁷¹ *One Execution Botched*, *supra* note 1.

⁷² *Id.*; OKLA. STAT. ANN. tit. 22, § 1015 (West 2014) (Oklahoma’s statute states: “The identity of all persons who participate in or administer the execution process and persons who supply the drugs, medical supplies or medical equipment for the execution shall be confidential and shall not be subject to discovery in any civil or criminal proceedings”).

confidential.⁷³ Ultimately, the autopsy revealed several factors that contributed to Clayton Lockett's forty-five minute execution on April 29, 2014, and poor lethal injection protocols and untested drugs were among the contributing factors.⁷⁴

2. Joseph Wood III's Botched Execution

On July 24, 2014, Joseph Wood III was executed in Arizona by lethal injection for a double murder.⁷⁵ Wood's execution began at 1:52 PM and he was pronounced dead at 3:49 PM.⁷⁶ Wood's execution was unique in Arizona because it took nearly two hours for him to die, while typical executions only take ten minutes.⁷⁷ Wood's execution took so long that his attorneys filed an emergency appeal while he was on the gurney to halt the execution and start life-saving treatment.⁷⁸ Their appeal alleged that the lethal injection procedure used on Wood violated the

⁷³ Tasneem Nashrulla, *What 13 States Aren't Telling You About How They Execute Prisoners*, BUZZFEED NEWS (June 16, 2014, 10:36 PM), <http://www.buzzfeed.com/tasneemnashrulla/what-13-states-are-not-telling-you-about-how-they-kill-people> [<http://perma.cc/SQ4A-XVNX>]; *Id.* (the 13 states that prevented the disclosure of the identity of lethal injection suppliers in some form are Alabama, Arizona, Florida, Georgia, Indiana, Mississippi, Missouri, North Carolina, Ohio, Oklahoma, South Carolina, Texas, and Virginia); *Cf.* GA. CODE ANN. § 42-5-36(d)(2) (West 2014) (explaining whose identity is confidential with great detail: "The identifying information of any person who participates in or administers the execution of a death sentence and the identifying information of any person or entity that manufactures, supplies, compounds, or prescribes the drugs, medical supplies, or medical equipment utilized in the execution of a death sentence shall be confidential and shall not be subject to disclosure under Article 4 of Chapter 18 of Title 50 or under judicial process. Such information shall be classified as a confidential state secret."), *with* S.D. CODIFIED LAWS § 23A-27A-31.2 (2014) (briefly stating whose identity is confidential with broad language: "The name, address, qualifications, and other identifying information relating to the identity of any person or entity supplying or administering the intravenous injection substance or substances under chapter 23A-27A are confidential. Disclosure of the foregoing information may not be authorized or ordered. Disclosure of confidential information pursuant to this section concerning the execution of an inmate under chapter 23A-27A is a Class 1 misdemeanor").

⁷⁴ *One Execution Botched*, *supra* note 1.

⁷⁵ *Arizona Takes Nearly*, *supra* note 1; *State v. Wood*, 881 P. 2d 1158, 1165-66 (Ariz. 1994) (describing in detail Wood's violent murder of his ex-girlfriend and her father at the family auto shop).

⁷⁶ David Schwartz, *Arizona Inmate Takes Nearly Two Hours to Die in Botched Execution*, REUTERS (July 24, 2014, 7:37 AM), <http://www.reuters.com/article/2014/07/24/us-usa-execution-arizona-idUSKBN0FS0TU20140724> [<http://perma.cc/6WR2-H3BD>].

⁷⁷ Sneed, *supra* note 2.

⁷⁸ *Arizona Reveals Drug*, *supra* note 1; Sneed, *supra* note 2 (prior to the execution, the Ninth Circuit had halted Wood's execution based on the First Amendment argument that the public has a constitutional right to the information surrounding execution practices as the state of Arizona was not willing to reveal the identity of the lethal injection supplier); *Id.* (nevertheless, the United States Supreme Court vacated the Ninth Circuit's stay and in effect upholding Arizona's secrecy policy).

constitutional prohibition on cruel and unusual punishment.⁷⁹ While the attorneys tried to reach the judge for a ruling, Wood's execution slowly moved on.⁸⁰ He was injected fifteen times with the state's new drug cocktail of hydromorphone and midazolam, a combination used in one-third of all executions with major problems occurring while the drug is being administered.⁸¹ Witnesses claimed Wood struggled and gasped for breath over 600 times.⁸² Eventually, the massive dosage of the drug cocktail killed Wood, but only after nearly a two hour struggle.⁸³

Immediately, the media attention turned to Wood's long drawn out execution and although the state refused to identify the compounding pharmacy, the governor of Arizona ordered a

⁷⁹ *Arizona Reveals Drug*, *supra* note 1; *see also* Sneed, *supra* note 2.

⁸⁰ *Arizona Reveals Drug*, *supra* note 1; *see Transcript Related to Joseph Wood Execution*, SCRIBD (July 23, 2014, 3:27 PM), <http://www.scribd.com/doc/234993495/Transcript-related-to-Joseph-Wood-execution> [<http://perma.cc/J9N9-ATYG>] (showing the full transcript of the conversation exchanged between the judge and Wood's attorney); Michael McLaughlin, *Lawyers and Judge Discussed Joseph Wood's Prolonged Execution in Emergency Call*, HUFFINGTON POST (July 24, 2014, 8:59 PM), http://www.huffingtonpost.com/2014/07/24/joseph-wood-execution-transcript_n_5618573.html [<http://perma.cc/P675-EXQY>] (revealing the transcript from Wood's attorney to the Judge about stopping the execution mid-way); McLaughlin, *supra* note 80 (Judge Wake, when we filed this motion 45 minutes ago when we got word he was gasping for over an hour, our request was to immediately stay the execution and perform lifesaving techniques. I'm not a medical professional,' Konrad said. 'Mr. Zick has said the situation has changed. Without any further information, I'm not sure what more to say other than we're requesting the stay of execution. I'm not sure if that's possible at this time); *Id.* (the judge appeared ready to rule against stopping the execution according to McLaughlin but by that time Wood was dead).

⁸¹ Serwer, *supra* note 53; *Arizona Reveals Drug*, *supra* note 1 (Wood was given a total of 750 mg each of midazolam and hydromorphone); Mohny, *supra* note 54 (according to Dr. Daniel Nyhan, the director of anesthesiology department at John Hopkins, midazolam and hydromorphone are not drugs that would expeditiously achieve death); *Id.* (further, Dr. David Waisel, an anesthesiologist at Boston Children's Hospital, says that it is uncertain that midazolam and hydromorphone in high doses will result in death); *Id.* (the effects of high doses of these drugs are uncertain but one thing that is known is that "twice as much medication does not mean twice the effect"; this is apparent from Wood's botched execution).

⁸² *Arizona Inmate*, *supra* note 76 (according to Mauricio Marin's account of the execution:

I continued to scribble on my state-issued notepad, counting the gulps and gasps of the man on the gurney. I counted 660. This went on for over an hour and a half. . . . What seemed like an eternity passed—20, 30, 45 minutes more, looking straight ahead—and finally the gulps and gasps started to slow, from about every five seconds or so, to about one per minute. Finally, the gulps and gasps stopped. A few minutes more went by. At last, the killing had stopped, too. A medical staff member checked Wood again one last time. Another few minutes still, and the warden pronounced the killer dead, at 3.49pm, one hour and 57 minutes after the execution had began); *see* Mauricio Marin, *Witness to a 2-hour Arizona Execution: Joseph Wood's Final 117 Minutes*, THE GUARDIAN (July 24, 2014, 12:35 PM), <http://www.theguardian.com/commentisfree/2014/jul/24/witness-arizona-execution-joseph-wood-died> [<http://perma.cc/C3MJ-YC2K>].

⁸³ Schwartz, *supra* note 1.

review of Arizona's lethal injection procedure.⁸⁴ It was also discovered that prior to Wood's execution, five death row inmates and Wood sued the state of Arizona, arguing that the secrecy surrounding the lethal injection drugs violated their civil rights.⁸⁵ In particular, Wood tried to obtain information about the source of his execution drugs, the qualifications of the officials performing the execution, and how the protocol was developed.⁸⁶ After these attempts failed and the Supreme Court overturned his stay of execution, Wood was left with no other legal recourse.⁸⁷ Ultimately, the drugs killed Wood, but it cost Arizona taxpayers the price of fifteen injections and at least two full doses of other "unknown drugs."⁸⁸

D. Aftermath: What is Being Done to Try to Remedy the Problem

In the aftermath of these botched executions, there has been a lot of movement within the states and courts.⁸⁹ States have enacted or amended various statutes about confidentiality as a

⁸⁴ *Id.* Even though Governor Jan Brewer order the review of the procedure she publicly stated that justice was served. *Id.* She stated:

While justice was carried out today, I directed the Department of Corrections to conduct a full review of the process. One thing is certain, however: Inmate Wood died in a lawful manner, and by eyewitness and medical accounts he did not suffer. This is in stark comparison to the gruesome, vicious suffering that he inflicted on his two victims—and the lifetime of suffering he has caused their family.

Schwartz, *supra* note 1.

⁸⁵ Schwartz, *supra* note 76.

⁸⁶ Serwer, *supra* note 53.

⁸⁷ Eckholm, *supra* note 1.

⁸⁸ Serwer, *supra* note 53; *see also* Schwartz, *supra* note 1. According to the Arizona Department of Corrections Statement of Review regarding Wood's execution:

the medical examiner reported to the department that in regards to the placement of the IVs, they were 'perfectly placed.' He further explained to the department that the catheters in each arm were completely within the veins and there was no leakage of any kind, and that anything that was put through the IVs went into the veins.

Department of Corrections Statement on Review of July 23 Execution, ARIZONA DEPARTMENT OF CORRECTIONS (July 24, 2014), <http://www.deathpenaltyinfo.org/documents/AZDOCStatementJosephWood.pdf> [<http://perma.cc/AKF2-L298>]. Thus, the problem that happened with the IV in Lockett's execution is not the same problem that occurred with Wood. It can be inferred that it was the drugs that caused Wood's nearly two hour long execution.

⁸⁹ *See* Davis, *supra* note 4 (discussing how Larry Flynt, publisher of *Hustler* magazine, went to court to protest the secrecy surrounding lethal injection drugs even though Flynt was shot by an inmate who would later be executed. American Civil Liberties Union represented Flynt with their concern on "transparency and the government not hiding what it's doing, especially when it comes to compounding drug.").

way to “protect” the identity of the drug suppliers from harassment.⁹⁰ Death row inmates are trying to ensure their safety by challenging these secrecy laws, but as a result are causing a flood of lawsuits into the court system.⁹¹ Some states have even halted all executions until death penalty protocols can be fully reviewed.⁹² For close to two months, there were no executions in the United States.⁹³

A few states, including Oklahoma, announced a new lethal injection protocol requiring more training for executioners along with contingency plans in the event any problems arise.⁹⁴ But such actions have not satisfied all; the American Civil Liberties Union and two news sources have filed suit against the state of Oklahoma for violating their First Amendment rights by

⁹⁰ Sneed, *supra* note 2.

⁹¹ See *In re Lombardi*, 741 F.3d 903 (8th Cir. 2014) (holding that the issue of what pharmacy compounded the drugs for lethal injections in the state was not relevant to the prisoner’s claim); *Wellons v. Commissioner, Ga. Dept. of Corrections*, 754 F. 3d 1260, 1261 (11th Cir. 2014) (declaring that the district court did not abuse its discretion by denying Wellons a stay of execution based on the claim that the state’s use of compounded pentobarbital violated the Eighth Amendment and the state’s failure to provide information about drugs to be used in his execution did not violate Wellons’ rights); *Owens v. Hill*, 758 S.E. 2d 794, 796 (Ga. 2014) (seeking declaratory and injunctive relief on the basis that the Georgia’s execution participant confidentiality statute was unconstitutional).

⁹² Berman, *supra* note 2. See Levs, *supra* note 1 (halting a death row inmate’s execution after Lockett’s botched execution in Oklahoma); Martha Neil, *Federal Judge Suspends Ohio Executions Until Aug. 15*, ABA JOURNAL (June 2, 2014, 3:55 PM), http://www.abajournal.com/news/article/federal_judge_suspends_ohio_executions_until/ [<http://perma.cc/L8YK-2467>] (suspending executions for two and a half months in Ohio after a lengthy execution occurred in January 2014).

⁹³ Berman, *supra* note 2; *id.* (following the two month hiatus from executions, between a 24-hour window, three executions took place); *id.* (the first was Marcus Wellons in Georgia who was the twenty-first person executed in 2014 for raping and murdering a fifteen year old girl in 1989); *id.* (even though Wellons’ attorneys argued that Wellons’ rights were violated by the state’s refusal to reveal information about where the drugs came from, this argument was rejected and Wellons was executed with one drug, pentobarbital); *id.* (the second inmate executed in that twenty-four window was John Winfield in Missouri for shooting and killing two women and blinding his ex-girlfriend); *id.* (Winfield’s case was similar to Wellons in that Winfield’s attorneys also made an argument about the secrecy surrounding the lethal injection process); Berman, *supra* note 2 (the final prisoner executed in the twenty-four hour window was John Henry in Florida for stabbing and killing his wife and son in 1985).

⁹⁴ Josh Sanburn, *Oklahoma Changes Lethal Injection Protocol, But Keeps Controversial Drug*, TIME (Oct. 1, 2014), <http://time.com/3453202/oklahoma-lethal-injection-drugs-protocol-midazolam/> [<http://perma.cc/YW68-AG4X>]; *id.* (on September 30, 2014, Oklahoma announced a new lethal injection protocol that requires more training for executioners and contingency plans if any problems arise); *id.* (also, the protocol reduces the number of media witnesses in the execution to five); *id.* (most importantly and controversial are the four different lethal injection combination options the state provides which involves midazolam, the drug used in the three biggest botched executions of 2014—McGrue, Lockett, and Wood; *id.* (the protocol calls for five times the dosage given to Lockett in his execution)).

closing the curtain during Lockett's execution.⁹⁵ Another lawsuit was filed by Lockett's Estate against Oklahoma's governor, corrections officials, the drug manufacturer, and a physician, claiming the doctor was engaging in "a program of biological experimentation on captive and unwilling human subjects."⁹⁶ Following the series of botched executions in 2014, there have been numerous stays of executions within the court system, as well as significant pressure from many advocacy groups pushing for reform in state policies and actions surrounding the death

⁹⁵ K. Querry & Chellie Mills, *Federal Lawsuit Filed After Botched Execution of Oklahoma Inmate, Alleges Violations*, KFOR.COM (Aug. 25, 2014, 10:44 AM), <http://kfor.com/2014/08/25/federal-lawsuit-filed-after-botched-execution-of-oklahoma-inmate-alleges-violations/> [<http://perma.cc/MRL6-V8YH>]; *id* (The Guardian, The Oklahoma Observer, and the ACLU have filed a federal lawsuit against the state of Oklahoma with the belief that the First Amendment "guarantees the right of the press to witness executions so the public can be informed about the government's actions and hold it accountable."); *id* (the complaint demands that reporters and other witnesses be allowed to view executions without interruption from the time the inmate walks in until he or she leaves); *id* (the ACLU's position is that executions should be carried out in an open fashion and not behind a wall of secrecy); *id* (the parties allege that the media and the Oklahoma public had no access to witness the IV insertion procedure and are unable to determine whether it was performed according to protocol because of the closed curtain policy); *id* (the plaintiffs argue that they are forced to rely on official reports by the state for critical details and are unable to give firsthand objective accounts about whether procedures were followed and to what extent Lockett experienced pain and suffering as a result).

⁹⁶ *See Lawsuit in Clayton Lockett Execution Claims "Biological Experimentation,"* CBS DENVER (Oct. 13, 2014, 7:25 PM), <http://denver.cbslocal.com/2014/10/13/lawsuit-in-clayton-lockett-execution-claims-biological-experimentation/> [<http://perma.cc/G3J3-W5TW>] (Lockett's brother gave his comments on the lawsuit: "I just believe that he died from suffering, and I don't believe it's right and I think they should pay."); *see also* Goodman, *supra* note 30 (Cheryl Pilate, one of the lead attorneys for Herbert Smulls, a man put to death in Missouri with an untested drug combination, explained that we [the United States] are basically seeing drug experimentation on human subjects).

penalty.⁹⁷ Whether these actions will cause significant change is unknown but one thing is clear: the current state of lethal injection is in flux.⁹⁸

E. How the Law Has Treated Capital Punishment

One of the most common legal challenges to capital punishment has been under the cruel and unusual punishment doctrine in the Eighth Amendment.⁹⁹ Since the reinstatement of capital punishment with *Gregg v. Georgia*, numerous inmates have brought several constitutional claims under the Eighth Amendment.¹⁰⁰ For example, in *Coker v. Georgia*, the petitioner claimed that the punishment of death for rape violated the Eighth Amendment.¹⁰¹ The Supreme Court

⁹⁷ See *ACLU of Oklahoma's Statement in Response to Tuesday Night's Botched Execution in Oklahoma*, ACLU, <https://www.aclu.org/capital-punishment/aclu-oklahomas-statement-response-tuesday-nights-botched-execution-oklahoma> (last visited Apr. 2, 2016) [<http://perma.cc/7D4V-BPLV>] (discussing the ACLU's position of an immediate moratorium on all executions pending a full and complete investigation on the execution process); *USA: Another 'botched' execution underscores call to abolish death penalty*, AMNESTY INTERNATIONAL, <https://www.amnesty.org/en/articles/news/2014/04/usa-another-botched-execution-underscores-call-abolish-death-penalty/> (last visited Apr. 2, 2016) [<https://perma.cc/3S3M-DMJ5>] (advocating for an immediate moratorium due to the recent botched executions that are in their opinion "inescapably cruel punishment"); Melissa Casanova, *Tortured to Death: A Report on the State of Lethal Injection in the USA*, MINISTRY AGAINST THE DEATH PENALTY, <http://www.sisterhelen.org/tortured-to-death/> (last visited Apr. 2, 2016) [<http://perma.cc/H3GM-WNSU>] (analyzing and advocating for the abolishment of the death penalty due to the experimental use of lethal injection drugs on death row inmates).

⁹⁸ See Faith E. Alvarez, *Capital Punishment: Indiana's Contribution in The Midst of National Chaos*, VALPO L. BLOG, <https://blogs.valpo.edu/law/capital-punishment-indianas-contribution-in-the-midst-of-national-chaos/> (last visited Apr. 2, 2016) (discussing Indiana's involvement in sharing its lethal injunctions).

⁹⁹ Deborah W. Denno, *For Execution Methods Challenges, the Road to Abolition is Paved with Paradox*, in *THE ROAD TO ABOLITION?: THE FUTURE OF CAPITAL PUNISHMENT IN THE UNITED STATES* 183, 184–186 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2009); see generally RAOUL BERGER, *DEATH PENALTIES: THE SUPREME COURT'S OBSTACLE COURSE* 29–58 (1982) (examining the history of the cruel and unusual punishment clause); Alison J. Nathan & Douglas A. Berman, *Baze-d and Confused: What's the Deal with Lethal Injection? A Debate*, in *THE DEATH PENALTY: DEBATING THE MORAL, LEGAL, AND POLITICAL ISSUES* 113, 113–130 (Robert M. Baird & Stuart E. Rosenbaum eds., 2011) (arguing both sides of the debate on cruel and unusual punishment pending *Baze*); MICHAEL E. PARRISH, *THE SUPREME COURT AND CAPITAL PUNISHMENT: JUDGING DEATH* 7–443 (2010) (explaining how the Supreme Court's decisions surrounding capital punishment has influenced American politics); Harvey Gee, *Eighth Amendment Challenges After Baze v. Rees: Lethal Injection, Civil Rights Lawsuits, and the Death Penalty*, 31 B.C. THIRD WORLD L.J. 217, 232–240 (2011) (discussing the problems with applying *Baze* within the court system); Katie Roth Heilman, *Contemplating "Cruel and Unusual": A Critical Analysis of Baze v. Rees in the Context of the Supreme Court's Eighth Amendment "Proportionality" Jurisprudence*, 58 AM. U. REV. 633, 647–649, 659–661 (2009) (discussing the *Baze* decision and its implications); Justin F. Marceau, *Lifting the Haze of Baze: Lethal Injection, the Eighth Amendment, and Plurality Opinions*, 41 ARIZ. ST. L.J. 159, 209–220 (2009) (discussing the *Baze* decision and the test for assessing lethal injection protocols and procedures).

¹⁰⁰ *Gregg v. Georgia*, 428 U.S. 153, 206–07 (1976).

¹⁰¹ *Coker v. Georgia*, 433 U.S. 584, 586 (1977) (the main charge against Coker was rape and armed robbery after escaping from a Georgia Correctional facility); *id.* at 587 (Coker entered a family's home late one night threatening

concluded that the death penalty was a grossly disproportionate and excessive punishment for the crime of rape and forbid its use under the Eighth Amendment as applied to a rape offense.¹⁰² In 2002, the scope of Eighth Amendment claims were narrowed to exclude the death penalty to people with mental disabilities, reasoning that such punishment was excessive.¹⁰³ Another example of the expansion of the Eighth Amendment protection came in *Roper v. Simmons*, where the Court deemed the use of the death penalty on offenders under the age of eighteen as cruel and unusual.¹⁰⁴ But the most significant challenge came in 2008 in *Baze v. Rees*, which established the substantial risk of harm standard.¹⁰⁵ *Baze* determined that when assessing a method of execution, the method must “create a substantial risk of wanton and unnecessary infliction of pain, torture, or lingering death.”¹⁰⁶ In order to prevail in a cruel and unusual Eighth Amendment claim, there not only must be a “substantial risk of serious harm” but an

them with a knife); *id.* (Coker took the family’s money and car after raping the wife); *id.* (Coker was convicted and the jury found that his act of rape warranted death by electrocution); *id.* at 591 (the Supreme Court concluded that the punishment of death for the crime of rape is grossly disproportionate and excessive and therefore its’ use on Coker would be cruel and unusual under the Eighth Amendment); *id.* (the Court reasoned that even though rape is a serious crime that deserves punishment, it does not compare with murder); *id.* at 598 (rape by itself does not include death or serious injury unlike murder which kills and ends the life of the victim); *id.*

¹⁰² *Id.* at 592.

¹⁰³ *Atkins v. Virginia*, 536 U.S. 304, 321 (2002). Atkins and another armed with guns abducted a man, robbed him of his money, drove him to an ATM to withdraw more money, and eventually took him to an isolated location and shot him eight times. *Id.* at 306. Atkins was convicted of abduction, armed robbery, and murder and sentenced to death even though Atkins was found to be mentally retarded. *Id.* The Supreme Court reversed the sentenced of death finding that such punishment was excessive. *Id.* at 320. The Court was not persuaded that the execution of mentally retarded would advance the deterrent or retributive purpose of the death penalty and held that death was not a suitable punishment for such a population of people. *Id.*

¹⁰⁴ *Roper v. Simmons*, 543 U.S. 551, 578-79 (2005).

¹⁰⁵ *Baze v. Rees*, 553 U.S. 35, 46 (2008). See *infra* note 106 and accompanying text.

¹⁰⁶ *Baze*, 553 U.S. at 46. The case involved two death row inmates, Ralph Baze and Thomas C. Bowling, who had been convicted of two counts of murder. *Id.* They made constitutional arguments under the cruel and unusual clause of the Eighth Amendment on the basis that the three-drug lethal injection method being administered by the State of Kentucky posed an unacceptable risk of significant pain. *Id.* at 41. The petitioners pointed out numerous aspects of the protocol that in their opinion created opportunities for error such as the improper administration of the first drug, sodium thiopental; the failure to establish a rate of injection which could lead to a failure in the IV; inadequate facilities and training; the state not having reliable means of monitoring the anesthetic depth of the inmate after the sodium thiopental was administered; and failure to use alternative procedures such as the one-drug method. *Id.* at 53–54. The Supreme Court rejected all of these contentions and found that the risks identified by the petitioners were not “so substantial or imminent” as to amount to Eighth Amendment violations. *Id.* at 56.

“objectively intolerable risk of harm.”¹⁰⁷ An isolated mishap alone does not constitute an Eighth Amendment violation; one event does not suggest cruelty and give rise to a “substantial risk of serious harm.”¹⁰⁸ The execution method cannot successfully be challenged by merely showing a slightly or marginally safer alternative.¹⁰⁹ Ultimately, the standard set out in *Baze* is how a person can make an appropriate Eighth Amendment challenge.¹¹⁰

Another common constitutional challenge against the death penalty is a due process argument. When considering a due process argument, the court looks at three factors as set out in *Mathews v. Eldridge*:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.¹¹¹

These factors are balanced together to determine whether the procedures administered constitute adequate due process.¹¹² By applying these two constitutional frameworks to the current situation of lethal injection, the argument can be made that change is a must in order to comply with the Constitution.

III. ANALYSIS

Taking into consideration all that has occurred in the last years, the sequence of how lethal injection drugs are being brought, sold, and used by states currently is violating constitutional

¹⁰⁷ Farmer v. Brennan, 511 U.S. 825, 842, 846 (1997).

¹⁰⁸ *Id.* at 842. Some risk of pain is inherent in any method execution no matter how humane. *Baze*, 553 U.S. at 47. Thus, the Constitution does not require an avoidance of all risk of pain in carrying out executions. *Id.*

¹⁰⁹ *Id.* at 51.

¹¹⁰ Denno, *supra* note 99, at 198.

¹¹¹ Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976).

¹¹² *Id.* at 335.

law.¹¹³ This section will center on two primary arguments: (1) the cruel and unusual punishment clause of the Eighth Amendment, and (2) the Due Process Clause of the Fifth and Fourteenth Amendments.¹¹⁴ Part III.A focuses on the Eighth Amendment and the application of the “substantial risk of harm” standard and how it applies to the current administration of lethal injection drugs.¹¹⁵ Part III.B focuses on due process and how states secrecy laws violate inmates’ due process rights.¹¹⁶ When considering all of these legal violations collectively, the need for a concrete solution will become apparent.¹¹⁷

A. Cruel and Unusual Punishment: “Substantial Risk of Harm” Through Lethal Injection

In order to succeed in an Eighth Amendment violation claim, the “substantial risk of harm” standard must be met. This subsection applies that standard to the current phenomenon facing

¹¹³ See *Abolitionist and Retentionist Countries*, DEATH PENALTY INFORMATION CENTER <http://www.deathpenaltyinfo.org/abolitionist-and-retentionist-countries> (distinguishing between countries that retain the death penalty and those that do not; the following countries have abolished the death penalty for all crimes: Albania, Andorra, Angola, Argentina, Armenia, Australia, Austria, Azerbaijan, Belgium, Bhutan, Bolivia, Bosnia-Herzegovina, Bulgaria, Burundi, Cambodia, Canada, Cape Verde, Colombia, Cook Island, Costa Rica, Cote d’Ivoire, Croatia, Cyprus, Czech Republic, Denmark, Djibouti, Dominican Republic, Ecuador, Estonia, Finland, France, Gabon, Georgia, Germany, Greece, Guinea-Bissau, Haiti, Holy See, Honduras, Hungary, Iceland, Ireland, Italy, Kiribati, Kyrgyzstan, Latvia, Liechtenstein, Lithuania, Luxembourg, Macedonia, Malta, Marshall Islands, Mauritius, Mexico, Micronesia, Moldova, Monaco, Montenegro, Mozambique, Namibia, Nepal, Netherlands, New Zealand, Nicaragua, Niue, Norway, Palau, Panama, Paraguay, Philippines, Poland, Portugal, Romania, Rwanda, Samoa, San Marino, Sao Tome and Principe, Senegal, Serbia, Seychelles, Slovakia, Slovenia, Solomon Islands, South Africa, Spain, Sweden, Switzerland, Timor-Leste, Togo, Turkey, Turkmenistan, Tuvalu, Ukraine, United Kingdom, Uruguay, Uzbekistan, Vanuatu, and Venezuela; the following countries administer the death penalty for ordinary crimes: Afghanistan, Antigua and Barbuda, Bahamas, Bahrain, Bangladesh, Barbados, Belarus, Belize, Botswana, Chad, China, Comoros, Congo, Cuba, Dominica, Egypt, Equatorial Guinea, Ethiopia, Gambia, Guatemala, Guinea, Guyana, India, Indonesia, Iran, Iraq, Jamaica, Japan, Jordan, North Korea, Kuwait, Lebanon, Lesotho, Libya, Malaysia, Nigeria, Oman, Pakistan, Palestinian Authority, Qatar, Saint Kitts & Nevis, Saint Lucia, Saint Vincent & Grenadines, Saudi Arabia, Singapore, Somalia, South Sudan, Sudan, Syria, Taiwan, Thailand, Trinidad & Tobago, Uganda, United Arab Emirates, United States, Vietnam, Yemen, and Zimbabwe); *Death Sentences and Executions 2013*, AMNESTY INT’L USA, <http://www.amnestyusa.org/research/reports/death-sentences-and-executions-2013> (table showing that in 2013, the top executing countries were China, Iran, Iraq, Saudi Arabia, and the United States).

¹¹⁴ See *supra* text accompanying notes 99-112; *infra* Part III.A–B (establishing the basic standards of Eighth Amendment and Due Process law).

¹¹⁵ See *infra* Part III.A (arguing that the Eighth Amendment applies to the current lethal injection problem making its current application unconstitutional).

¹¹⁶ See *infra* Part III.B (arguing that the Due Process Clause applies to the current lethal injection problem).

¹¹⁷ See *infra* Part IV (recommending the establishment of a federally-regulated manufacturing plant that only produces lethal injections).

lethal injection drugs and protocols by demonstrating how the actions of the states violate the Eighth Amendment standard discussed in *Baze v. Rees*.¹¹⁸ The Eighth Amendment argument is commonly made in the realm of capital punishment, but what is unique to the argument in this case is the new factual issues arising from the recent wave of botched executions.¹¹⁹ The Eighth Amendment is discussed briefly in order to lay the foundation for the main argument on how lethal injection drugs violate due process.¹²⁰

By applying the “substantial risk of harm” test to the current problem with lethal injection drugs, it becomes apparent that the Eighth Amendment argument is not obsolete but rather relevant due to intentional risks that states are choosing to take on. State prisons and corrections departments are creating a substantial risk by buying lethal injection drugs from compounding pharmacies. This specific action is a substantial risk because the inherent nature of how compounding operates is risky.¹²¹ First, not all pharmacies are equipped to compound in the correct way depending on the specific drug being compounded due to constraints on money, size, and geography.¹²² Second, compounding pharmacies are not subject to FDA regulations such as good manufacturing practices and do not have the same or appropriate quality controls in place like normal FDA regulated manufacturers.¹²³ Third, compounded drugs are not FDA approved

¹¹⁸ *Baze*, 553 U.S. at 46.

¹¹⁹ See Ben Crair, *2014 is Already the Worst Year in the History of Lethal Injection*, NEW REPUBLIC (Jul. 24, 2014), <http://www.newrepublic.com/article/118833/2014-botched-executions-worst-year-lethal-injection-history> (discussing the 2014 botched executions of Dennis McGuire, Clayton Lockett, and Joseph Wood).

¹²⁰ See *infra* Part III.B (arguing that how lethal injection drugs are acquired and used violates Due Process).

¹²¹ *FDA Video*, *supra* note 5 (describing pharmacy compounding as a way to manage individual drug allergies and other changes pursuant to patient needs).

¹²² *Id.*

¹²³ *Id.*

or guaranteed.¹²⁴ When previously approved drugs are altered and combined to make a new drug the composition of the drug shifts and with it the guarantee can no longer stand.¹²⁵

Once a drug is compounded, the pharmacy cannot guarantee that the drug is still intact in the form in which it was originally tested for.¹²⁶ Another component of FDA approval requires testing through clinical trials.¹²⁷ But this is not economically feasible and realistic for compounding pharmacies as it would defeat the purpose of providing specialized drugs to patients if they had to be put through long clinical testing.¹²⁸ The issue with not requiring clinical testing is that the compounded drugs are not tested for safety or effectiveness, which leaves the door open for complications like the 2012 meningitis outbreak due to a contaminated compounded drug.¹²⁹ Compounding has inherent risks when produced within the confines of small quantity production but when large scale manufacturing is utilized, the chance for problems significantly increases.¹³⁰

When drugs are altered through the process of compounding, an inherent risk is taken as compounding pharmacies mix separate drugs that have not been tested together.¹³¹ Because

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *FDA Video, supra* note 5.

¹²⁸ Nolan, *supra* note 38, at 5.

¹²⁹ *FDA Video, supra* note 5. A major complication of drug compounding was the bacterial fungal contamination of steroid injections that resulted in a 2012 meningitis outbreak, infecting over 700 people of whom at least sixty-three died. This outbreak led to a serious national debate over the safety of drug compounding. Nolan, *supra* note 38. The mass production of drugs by unaccredited pharmacies including, The Massachusetts Pharmacy and New England Compounding Center, was against the preferred method of small-scale compounding to meet individual needs. *See also Compounding Pharmacies, supra* note 4.

¹³⁰ *Id.*; *see generally* Markey, *supra* note 43, at 82-83 (analyzing media accounts and publicly available files to find that problematic compounding practices or adverse incidents had occurred in at least 34 states, including: the sale of drugs made with non-FDA approved ingredients or from substances recalled for safety reasons; violations of good manufacturing practices where facilities purported to be sterile but were visibly dirty and contamination of drug products was known to have occurred; and the manufacture of large quantities of drug products).

¹³¹ *FDA Video, supra* note 5. *See also* U.S. Food and Drug Admin., *Compounding*, U.S. DEP'T OF HEALTH & HUMAN SERVICES (2013), <http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/PharmacyCompounding/default.htm> (where

compounded drugs are not tested together, the results are catastrophic: unpredictable drug interactions, drugs inactivating each other, and/or drugs degrading more rapidly.¹³² These results are no different when it comes to compounded lethal injection drugs. Because the lethal injection drugs coming from compounded pharmacies are altered drugs compounded into forms that are outside their intended form, they become extremely risky.¹³³ The quality of the lethal injection drugs cannot be guaranteed when they are compounded, which increases the likelihood of a disaster.¹³⁴ What makes this risk substantial is that states have knowledge that compounding is risky and the drugs produced by the process are not FDA approved; yet, states willingly use them knowing their unpredictable quality.¹³⁵ States choose to use drugs that are untested and have not undergone clinical trials.¹³⁶ Given the unpredictable quality and nature of compounding, the voluntary risk that states take to secure lethal injection drugs is substantial under the “substantial risk of harm” test.

Looking more closely at the standard, the second distinct part that requires analysis is the “wanton and unnecessary infliction of pain” factor.¹³⁷ The conduct of the states has met this test when states chose to take the convenient route to buying lethal injection drugs. Instead of buying from drug manufacturers that are FDA regulated, states opted for the easy way out in “shady drug deals.”¹³⁸ Even though the European Union restricted exportation of sodium

a recent statute, Compounding Quality Act, was enacted to increase oversight of compounding drugs but does not extend far enough to remedy the current problem with the mass production of lethal injection drugs by compounding pharmacies).

¹³² *FDA Video*, *supra* note 5.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *See supra* text accompanying note 106 (discussing *Baze*).

¹³⁸ HANSEN, *supra* note 4 (prison officials have been caught exchanging muscle relaxers for sedatives; driving across state lines to pay for execution drugs with \$11,000 in cash; and one state has even considered buying sedatives from a veterinary school).

thiopental, potassium chloride, pancuronium bromide, and sodium pentobarbital, states are not out of options to obtain FDA approved lethal injection drugs.¹³⁹ Even in extreme circumstances where states are left with buying compounded drugs, there is still another, safer option available: a stay of execution until FDA regulated drugs can be obtained.¹⁴⁰ Instead, states meet the wanton and unnecessary infliction of pain standard by recklessly applying a cost-benefit analysis that places their convenience over individuals' Eighth Amendment rights and by buying unpredictable drugs from compounding pharmacies instead of finding legitimate FDA drug manufacturers.

Finally, it should be considered whether the way lethal injection drugs are being administered is creating an “objectively intolerable risk of harm.”¹⁴¹ One mishap alone does not constitute an intolerable risk.¹⁴² In the case of lethal injection, there is an “objectively intolerable risk of harm” by the states when they take on the unpredictable risk of compounded drugs and produce botched executions. The two primary examples of this can be seen in the two most publicized botched executions of 2014 in Arizona and Oklahoma; but these are only the tip of the iceberg.¹⁴³

Clayton Lockett's botched execution was not one isolated mishap.¹⁴⁴ Nor was Joseph Wood's execution.¹⁴⁵ The risk that states assume is intolerable because the results of that risk—

¹³⁹ *Controls on Torture Goods-Detailed Guidance*, *supra* note 28. Under Council Regulation (EC) No. 1236/2005 or the “Torture” Regulation, the European Union restricted the exportation of amobarbital, amobarbital sodium salt, pentobarbital, pentobarbital sodium salt, secobarbital, secobarbital sodium salt, thiopental, and thiopental sodium salt in direct opposition to use of their drugs to administer the death penalty. *Id.*

¹⁴⁰ *See Upcoming Executions*, DEATH PENALTY INFORMATION CENTER (Jan. 16, 2015, 3:53 PM), <http://www.deathpenaltyinfo.org/upcoming-executions#2015> (explaining why only eight executions had been stayed in the United States in 2015).

¹⁴¹ *Farmer v. Brennan*, 511 U.S. 825, 846 (1994).

¹⁴² *Id.*

¹⁴³ *See supra* Part II.C.1–2 (discussing the details of Clayton Lockett and Joseph Wood botched executions).

¹⁴⁴ *See supra* Part II.C.1 (explaining the gruesome details of Clayton Lockett's botched execution in Oklahoma).

¹⁴⁵ *See supra* Part II.C.2 (explaining the horrific botched execution of Joseph Wood in Arizona).

botched executions—continue to increase in number and frequency.¹⁴⁶ When major manufacturers stopped selling drugs to states because of their use in executions, state prisons were on notice that they needed to seek out other suppliers.¹⁴⁷ Instead of seeking out other FDA approved and regulated manufacturers, states voluntarily took on a substantial risk by buying drugs from non-regulated pharmacies, which in turn has resulted in serious harm; this is intolerable. Thus, states’ continued use of unpredictable drugs in administering the death penalty created a “substantial risk of serious harm” that is “objectively intolerable” and violates the Eighth Amendment.¹⁴⁸

B. How Secrecy Laws Violate Due Process

Not only do the actions of states violate the cruel and unusual punishment clause, but states’ actions violate due process as well. Under the Fourteenth and Fifth Amendments, the government cannot deny a person life, liberty, or property without due process of the law.¹⁴⁹

¹⁴⁶ Radelet, *supra* note 53. Prior to the three reported botched executions from lethal injection in 2014, there had not been a reported botched execution since 2010. *Id.* See generally *Execution List 2014*, DEATH PENALTY INFORMATION CENTER (Jan. 16, 2015, 3:53 PM), <http://www.deathpenaltyinfo.org/execution-list-2014> (listing thirty-four names of inmates executed in 2014 within United States; specifically showing that all thirty-four executions were carried by lethal injection in the following states Florida, Oklahoma, Ohio, Texas, Missouri, Georgia, Arizona; while of thirty-four only two were females and range of years inmates sat on death row prior to executions were anywhere from eight to thirty years); *Execution List 2015*, DEATH PENALTY INFORMATION CENTER (Jan. 16, 2015, 3:53 PM), <http://www.deathpenaltyinfo.org/execution-list-2015> (showing twenty eight executions carried out in United States in 2015 by lethal injection in the following states: Georgia, Florida, Oklahoma, Texas, Missouri, and Virginia); *Upcoming Executions*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/upcoming-executions#2016> (describing the various executions scheduled for 2016 according to each month: January: 9 scheduled, 5 stays granted, 1 reprieve granted; February: 4 scheduled, 1 reprieve granted; March: 7 scheduled, 1 stay granted, 1 stay likely to be granted; April: 3 scheduled, 1 reprieve granted; May: 1 scheduled but a reprieve has been granted; June: 2 scheduled, 1 reprieve granted; July: 1 scheduled in Ohio but a reprieve has been granted; August: 1 scheduled in Ohio but a reprieve has been granted; September: 1 scheduled in Ohio but a reprieve has been granted; October: 1 scheduled in Ohio but a reprieve has been granted; November: 1 scheduled in Ohio but a reprieve has been granted); *Executions Scheduled for 2017*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/upcoming-executions#2017> (listing the twelve executions scheduled for 2017 are all in the state of Ohio).

¹⁴⁷ See *supra* text accompanying notes 28–31 (explaining how many manufacturers refused to sell drugs to state prisons to be used in executions).

¹⁴⁸ *Farmer*, 511 U.S. at 846.

¹⁴⁹ U.S. CONST. amend. XIV, §1. The full text of section one states:

Generally, the three *Mathews* factors are considered when looking at due process analysis.¹⁵⁰ Based on those factors, this subsection will apply each factor to the case of the lethal injection drug problem and show how due process has been violated and will continue to be violated if action is not taken immediately.

Starting with the first factor, “the private interest that will be affected by the official action,” we must first define what is an official action.¹⁵¹ In this case, the official action was the states’ adoption and modification of information and secrecy laws which have a substantial impact on lethal injection protocols and procedures.¹⁵² For example, Georgia amended its confidential information statute to now include drug manufacturers, suppliers, and compounders.¹⁵³ Ultimately, the additions to confidentiality and public records laws are official actions that enable states to hide the truth. States hide behind the justification of protecting the identities of pharmacies and manufacturers as a way to avoid culpability for their illegal actions.¹⁵⁴ Pharmacies and manufacturers who produce lethal injection drugs, however, would not need to

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id.

¹⁵⁰ *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976).

¹⁵¹ *Id.*

¹⁵² See *supra* text accompanying notes 71–74 (discussing how several states enacted and amended their statutes in order to hide supplier identities).

¹⁵³ GA. CODE ANN. § 42–5–36 (West 2014). This statute took effect in 2013. *Id.*

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

Id.

¹⁵⁴ Nashrulla, *supra* note 73.

protect their identities if they were producing quality products. The justifications are neither persuasive nor compelling due to the resulting effect on prisoners' interests.

A prisoner's private interest is the second aspect of the first factor considered under due process analysis.¹⁵⁵ Even though death row inmates have committed heinous crimes, they retain private interests and rights under the law.¹⁵⁶ The private interest of capital punishment prisoners is the knowledge of how they will be executed and the knowledge that their respective states have taken all the necessary steps to prepare for a safely administered execution. But safely administered does not mean preparing for every single possible scenario that could occur during the execution. Rather, safely administered means being aware of the major potential problems and addressing them before they manifest. One of those major problems is acquiring lethal injection drugs. A prisoner's private interest extends to the knowledge of where the lethal injection drugs being used to kill them come from as a way to predict and guarantee their quality.

When states buy lethal injection drugs from compounding pharmacies that are not FDA regulated, the prison knows the risk they are taking on.¹⁵⁷ Prisons willingly purchase and use unpredictable and lower quality drugs in order to move death row along.¹⁵⁸ As a consequence of these efforts, prisoners' private interests in having a safe execution are compromised.¹⁵⁹ Because states choose to use unpredictable drugs that can result in botched executions as a way to protect themselves from liability or as the prisons like to call it, protect the manufacturers' and

¹⁵⁵ *Mathews*, 424 U.S. at 334–35.

¹⁵⁶ DAVID RUDOVSKY, ALVIN J. BRONSTEIN, EDWARD I. KOREN & JULIA CADE, *THE RIGHTS OF PRISONERS* 1–21 (4th ed. 1988).

¹⁵⁷ *See supra* Part II.B (explaining how compounding pharmacies function).

¹⁵⁸ *See supra* Part II.B (discussing how compounding pharmacies are being used differently than their original purpose).

¹⁵⁹ RUDOVSKY, *supra* note 156, at 12. Even though individuals are imprisoned they still retain certain liberty interests that cannot be deprived without due process. *Id.*

pharmacies' identities, prisoners are denied their right to due process of law.¹⁶⁰ Without the identity of the pharmacy or manufacturer that the prisons get their drugs from, inmates have no way of knowing if their execution will be carried out safely or in a manner that does not result in a "substantial risk of serious harm."¹⁶¹ Because of this denial of information, which is crucial to a prisoner's private interest and critical to due process, inmates are denied a fair procedure under due process.¹⁶² Consequently, the first factor of the due process analysis, "the private interest that will be affected by the official action," is met.¹⁶³

Turning to the second factor of due process analysis, "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards," when applied to the lethal injection drug tragedy, the factor is met.¹⁶⁴ The risk of erroneous deprivation is found in the prisons' use of unpredictable drugs for executions. States have notice and knowledge of the highly risky composition of compounded drugs and willingly choose to use them in the execution of death row inmates. The erroneous procedure employed by states is using compounding pharmacies as their suppliers for lethal injection drugs.¹⁶⁵ Such an error is not small, and its impact is grave. Joseph Wood's execution

¹⁶⁰ *States' Secrecy in Lethal Injections Challenged as Interference With Freedoms of Speech and Press*, DEATH PENALTY INFORMATION CENTER (Feb. 26, 2015, 9:11 PM), <http://www.deathpenaltyinfo.org/states-secrecy-lethal-injections-challenged-interference-freedoms-speech-and-press>.

¹⁶¹ *Farmer*, 511 U.S. at 846.

¹⁶² RUDOVSKY, *supra* note 156.

¹⁶³ *Mathews*, 424 U.S. at 334–35.

¹⁶⁴ *Id.*

¹⁶⁵ *State by State Lethal Injection*, *supra* note 4. At least in ten states, South Dakota, Missouri, Texas, Georgia, Mississippi, Ohio, Louisiana, Pennsylvania, Colorado, and Oklahoma, it has been uncovered that they used or intended to use drugs from compounding pharmacies. *Id.* For example, in March 2013, the Director of Colorado's Department of Corrections sought out 97 different compounding pharmacies in hopes of buying sodium thiopental for an upcoming execution. *Id.* Arguably there are many other states using compounded drugs but because of secrecy and confidential information laws enacted, any accurate number is difficult to calculate.

is a prime example of the effects of unpredictable, low quality drugs.¹⁶⁶ In order to kill Wood, the state of Arizona had to inject him with fifteen times the normal dosage of midazolam and hydromorphone.¹⁶⁷ One can make an educated theory as to why Wood had to be injected fifteen different times to die: cheap compounded drugs.¹⁶⁸ Had the State of Arizona bought their drugs from an FDA regulated manufacturer, the likelihood of Wood needing to be injected over a dozen times decreases, because anything that the FDA regulates must promote their mission of safe drugs and have the stamp of a guarantee.¹⁶⁹ The FDA is responsible for “protecting the public health by assuring safety, effectiveness, quality, and security of human and veterinary drugs.”¹⁷⁰ With the FDA’s obligation to assure safe drugs, it extends an approval of its products.¹⁷¹ Since compounding pharmacies are not regulated by the FDA, there is no guarantee of their products.¹⁷²

Finally, looking at the last half of the second factor, additional or substitute safeguards and their probative value, states have other options available to them when seeking out lethal injection drugs.¹⁷³ As discussed earlier, states may face a challenge since some of their previous legitimate suppliers like Hospira and Lundbeck will not sell to them; but there are still other manufacturers that are FDA regulated.¹⁷⁴ Even if there is not a single legitimate manufacturer

¹⁶⁶ *Arizona Takes Nearly*, *supra* note 1; Serwer, *supra* note 53; M. Alex Johnson, *Arizona Needed 15 Drug Doses to Execute Joseph Wood*, NBC NEWS (Jan. 10, 2015 2:26 pm), <http://www.nbcnews.com/storyline/lethal-injection/arizona-needed-15-drug-doses-execute-joseph-wood-n171071>.

¹⁶⁷ Serwer, *supra* note 53; Johnson, *supra* note 166.

¹⁶⁸ *See supra* Part II.C.2 (stating the facts of Joseph Wood’s botched execution).

¹⁶⁹ U.S. Food and Drug Administration, *About FDA*, U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES (Jan. 10, 2015 2:30 pm), <http://www.fda.gov/AboutFDA/Transparency/Basics/ucm192695.htm>.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *See supra* Part II.B (explaining what and how compounding pharmacies work and came to be).

¹⁷³ *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976).

¹⁷⁴ *Hospira Position*, *supra* note 29; *Lundbeck Overhauls Pentobarbital Distribution Program to Restrict Misuse*, LUNDBECK (Jan. 7, 2011), <http://www.deathpenaltyinfo.org/files/LundbeckPR070111.pdf> [<http://perma.cc/4CQC-9XDC>]. *See also* *Hikma Pharmaceuticals Strongly Objects to the Use of Its Products in Capital Punishment*,

that is willing to supply prisons, there is a solution available through the FDA by establishing a manufacturing plant and allowing that plant the sole authority over lethal injection drug production.¹⁷⁵ What is not acceptable under due process and the Eighth Amendment is what states are doing currently.¹⁷⁶ Prioritizing cycling through killings on time ahead of safety is unacceptable under the law. Hiding behind secrecy laws and confidentiality laws that result in a restriction of inmates' constitutional rights is unlawful.¹⁷⁷ Due process requires a fair procedure and that right is being denied by secrecy laws. An inmate cannot establish that prisons are upholding their duty to foresee and prevent major issues that arise when executing people. Without an avenue to access this information, inmates are not receiving what is "due" to them. The probative value of a substitute safeguard is so high in this case that requiring states to change their method of gaining lethal injection drugs is a necessity. Thus, the second factor of the risk of erroneous deprivation of an inmate's interest by the procedure used as applied to lethal injection drugs favors a violation of due process.¹⁷⁸

The final factor under the due process analysis is "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."¹⁷⁹ The key to this factor is the government's interest and

HIKMA PHARMACEUTICALS PLC (May 15, 2013), <http://www.hikma.com/en/media-center/news-and-press-releases/all-news/2013/15-05-2013.aspx?p=1> [<http://perma.cc/EV9V-JCWY>] (stating the company's position and objection to their products being used to execute people); *Par Pharmaceutical Statement on Brevital® Sodium*, PAR PHARMACEUTICAL (May 27, 2014), <http://pr.parpharm.com/phoenix.zhtml?c=81806&p=irol-newsArticle&ID=1935104&highlight=> [<http://perma.cc/PNQ3-CJ5A>] (explaining the company's position of no longer providing certain drug products).

¹⁷⁵ See *infra* Part IV (establishing the most feasible solution to the drug problem with lethal injection through a federal regulation).

¹⁷⁶ See *supra* Part II.C.1 and notes 34–36 (discussing Lockett's botched execution and the "shady" strategies used by prisons to obtain drugs from compounding pharmacies).

¹⁷⁷ See *supra* notes 32–33 (examining the several states that have enacted or amended state statutes in order to hide drug suppliers' identities). See *States' Secrecy*, *supra* note 160 (discussing Missouri's secrecy law which provides that anyone who publishes information about the pharmacy who supplies the drugs can be sued under the law).

¹⁷⁸ *Mathews*, 424 U.S. at 334–35.

¹⁷⁹ *Id.*

the cost and burden that would result by applying substitute procedures.¹⁸⁰ By utilizing legitimate manufacturers, states would actually save money by eliminating unnecessary lawsuits from death row inmates seeking stays of executions due to the identity of the suppliers being kept secret. Having met all of the *Mathews* factors, the current situation with lethal injection drugs calls for a feasible solution which is possible through a federal regulation as discussed in the next section.

IV. CONTRIBUTION

Currently, state correction facilities and compound pharmacies are afforded too much freedom in their ability to buy, sell, and produce compounded lethal injection drugs. States are not restricted by who they can buy drugs from while compounding pharmacies are not encouraged to participate in large-scale manufacturing but are not banned from engaging in such behavior either. In order to stop states from continuing to purchase unregulated lethal injection drugs from compounding pharmacies, the most feasible remedy to resolve the ongoing problem is through a federal regulation. The proposed regulation would restrict compounding pharmacies from producing and manufacturing drugs that are commonly used for lethal injection by establishing a FDA regulated facility that specifically manufactures lethal injection drugs that are FDA approved. Part IV.A describes the proposed regulation and explains its' benefits to the current lethal injection problem. Part IV.B discusses why the regulation is the most feasible and addresses unfounded concerns about the regulation.

A. Proposed Federal Regulation

¹⁸⁰ *Id.* at 348. “But the Government’s interest, and hence that of the public, in conserving scarce fiscal and administrative resources is a factor that must be weighed.” *Id.*

The following proposed federal regulation sets up a single manufacturing plant that solely produces lethal injection drugs. The facility would be run by the federal government and regulated by the FDA in order to secure drug quality. Under the regulation, state prisons are required to purchase lethal injection drugs from the facility in order to carry out any executions by way of lethal injection. The regulation also bans compounding pharmacies from produce any drugs that are commonly used to carry out lethal injection. The proposed federal regulation reads as follows:

*All facilities and pharmacies that compound drugs are banned from creating, altering, producing, manufacturing, and selling compounded drugs that are used or can be used in the administration of lethal injection. Drugs that are commonly used to administer lethal injection are as follows but are not limited to: sodium thiopental, pentobarbital, pancuronium bromide, Pavulon, potassium chloride, midazolam, hydrochloride, hydromorphone, propofol, and Diprivan. As a replacement, a manufacturing plant shall be established that is subject to FDA regulation and with the sole function of producing lethal injection drugs. The plant shall only produce FDA approved drugs and are only allowed to sell such drugs to federal and state prisons, departments, and correction facilities. To track states' compliance with the above provisions, states which purchase drugs from the plant shall be required to report their purchases to the FDA. If purchases by states cannot be linked back to the manufacturing plant, then the state shall be penalized on a gradual scale. The first non-compliance violation shall result in a fine of up to \$150,000. The second non-compliance violation shall result in a temporary suspension of the state's privilege of administering lethal injection for a set period of time to be determined by the FDA. On the third non-compliance violation, the state shall be banned for at least one year from administering lethal injection.*¹⁸¹

By centralizing the production of lethal injection drugs to one facility and banning compounding pharmacies from producing lethal injection drugs, the ability to use untested drugs

¹⁸¹ The proposed regulation is italicized and is the contribution of the author.

in executions is removed and replaced with a legally safe and more efficient method of obtaining lethal injection drugs. State correctional facilities would no longer need to resort to transactions with compounding pharmacies that resemble cocaine drug deals.¹⁸² Also, states would be able to rebuild their credibility with the public by not having to hide the identity of their drug suppliers.¹⁸³ As an incentive to comply with the regulation, a penalty scheme is implemented upon the states which reprimands them for non-compliance. Without this regulation, states will continue to buy untested drugs from compounding pharmacies in order to keep up with their death row schedules. As a result, inmates like Lockett and Wood will continue to find themselves being killed painfully.

B. Commentary

A federal regulation that bans production by compounding pharmacies, creates a single FDA regulated manufacturing plant that produces lethal injection drugs, and a penalty system for non-compliance is the appropriate and most feasible in order to eliminate the competitive market of lethal injection drugs and help guarantee that states are using quality drugs to execute inmates. Some critics will argue that banning compounded pharmacies from producing certain types of drugs is a restriction on the pharmacies right to sell and distribute goods. But this is not true for two reasons. First, the regulation is so narrowly tailored in this case that it only applies to drugs that are commonly used for lethal injection. Compounding pharmacies are not restricted from producing all drugs for legitimate purposes but rather it is limited to commonly used lethal injection drugs. Second, the government has allowed the monopolization of a specific area to a single entity under certain circumstances such as electricity or gas providers to a single company

¹⁸² See *supra* note 34 (revealing a “shady” example of how state prisons are buying drugs).

¹⁸³ See *supra* notes 32–36 (discussing the several states that have enacted or amended state statutes in order hide drug suppliers’ identities).

in a given area. Thus, limiting the production of lethal injection drugs to a single entity is well within the confines of law due to the highly important area of capital punishment.

Other critics will be concerned about how the plant will be funded. In order to initially get the plant started, the FDA would loan the money needed to pay for the start-up of the plant. Once states start to purchase drugs from the plant, the money received would be partially split up into paying back the loan to the FDA and the other half would be used for operation costs. Qualified individuals who are currently working for the FDA would be moved over to the plant in order to run it until the plant was making enough income to hire outside employees. This process is cost effective because the FDA employees are already being paid and covered by the FDA's payroll.

Still, other critics contend that the problem with lethal injection could be solved by using other methods of execution such as the electric chair or firing squad. Even though some states have considered this strategy, the problem is that those methods are no more humane than lethal injection. Also, such methods are unconstitutional in some jurisdictions while still available in others. Both the electric chair and firing squad methods have issues with having botched executions and would only move the problem from one method to the other. Thus, utilized an older method would not solve the problem but rather shift it onto another method.

Ultimately, the most feasible solution is through this federal regulation. By enacting this regulation, the quality of lethal injection drugs can be guaranteed and the risk of problems arising due to drug quality is minimal. By guaranteeing the quality of the lethal injection drugs, states can administer the appropriate amount of drugs according to each inmates body composition. Without the guarantee, states' use of untested drugs is a gamble and cannot precisely be determined. In the midst of botched executions, this proposed regulation is exactly what the

Constitution and American citizens' demand. With all of the numerous factors that make an execution run, the occurrence of botched executions will always be a potential result so long as capital punishment is being legally administered. The nature of killing a person even when performed correctly still has the risks of problems occurring due to an individual's body composition and its reaction to the method of death being utilized.¹⁸⁴ But one aspect of executions that can be controlled is the drugs used in lethal injection. Currently, there are inadequate measures in place to control lethal injection drugs. State departments and correction facilities are free to buy drugs for lethal injection from non-FDA approved compounding pharmacies. Therefore, enacting a federal regulation that restricts production to a single plant is the most realistic option.

V. CONCLUSION

Looking back at the beginning story of John's botched execution, if the proposed regulation had been enacted and taken effect prior to John's execution, the risk of Eighth Amendment and due process violations would be decreased. If the corrections facilities had been using FDA guaranteed drugs from the sole manufacturing plant for John's execution, then the long drawn out execution filled with gasping and pain would have likely not occurred. During 2014, a wave of botched executions like John's washed over the United States and has caused the country to take a hard look at lethal injection and capital punishment as a whole.¹⁸⁵ As can be seen through the botched executions in Oklahoma and Arizona, many of these botched executions are the result of poor lethal injection protocols and procedures.¹⁸⁶ Due to foreign and United States

¹⁸⁴ ABBOTT, *supra* note 20, at 204.

¹⁸⁵ See *supra* note 2 and accompanying text (discussing the reignited debate on capital punishment due to the recent botched executions).

¹⁸⁶ See *supra* notes 1–2 and accompanying text (addressing the numerous new articles about the controversial botched executions during 2014).

manufacturers refusing to supply the United States with lethal injection drugs, states have taken to finding drugs on their own terms.¹⁸⁷ Some states have been purchasing compounded drugs from non-FDA regulated compounding pharmacies.¹⁸⁸ Because the quality and strength of compounded drugs cannot be guaranteed by the FDA, states have sought to protect the producers and themselves by refusing to reveal the identity of their suppliers.¹⁸⁹ In an effort to gain that information and try to prevent an unnecessary risk of pain, death row inmates have been petitioning the courts for stays of executions.¹⁹⁰ Rightfully so, inmates are using the court system to try and prevent botched executions. By doing so, they are also simultaneously calling the United States to a higher standard of killing people that this country needs if it was going to continue to function as a leader in the world.

¹⁸⁷ See *supra* text accompanying notes 27–36 (discussing how manufacturers’ refusal to sell lethal injection drugs to the United States has led to states buying drugs from compounding pharmacies).

¹⁸⁸ See *supra* text accompanying note 138 (describing how states have chosen to buy lethal injection drugs from compounding pharmacies).

¹⁸⁹ See *supra* text accompanying notes 71–74 (showing what Oklahoma specifically has done to hide the identity of their suppliers as well as what other states are doing).

¹⁹⁰ See *supra* note 6 and accompanying text (showing how several death row inmates have brought claims in an effort to stay their respective executions).