

A DARK SHADOW: THE INTENSIFICATION AND EXPANSION OF LETHAL INJECTION DRUG SECRECY

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ABSTRACT

Over the last decade, many death penalty states in the United States have enacted secrecy laws shielding the identity of lethal injection drug suppliers and executioners. Death penalty defense lawyers, legislators, and scholars have examined the constitutionality and efficacy of these laws. However, little attention has been paid to the history of death penalty secrecy and its relationship to existing secrecy statutes. This article analyzes that history and relationship. It describes a surprising pattern of openness and transparency about the identities of executioners and others involved in America's capital punishment process. Current lethal injection secrecy laws break with that pattern and cast a virtually unprecedented shadow over the execution process. This article concludes by assessing the consequences of the recent intensification and expansion of execution secrecy.

KEYWORDS

Death Penalty, Secrecy Statutes, Executioners, Methods of Execution, Lethal Injection

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I. INTRODUCTION

On May 28th, 2014, the Arizona Supreme Court set an execution date for Joseph Wood. Later that same day, the Arizona Attorney General's office sent a letter to Wood's counsel with details about the execution, including the state's intention to use a two-drug cocktail (midazolam and hydromorphone) to put Wood to death. Just a few months earlier, Ohio had used those same drugs in the brutally botched execution of Dennis McGuire.¹ Witnesses reported that McGuire struggled to breathe and gasped loudly while making choking sounds for at least ten minutes. It took twenty-five minutes for McGuire to die, in a process that should normally take between five and eight minutes.²

The Arizona Attorney General's letter to Wood's lawyer also said that the Department of Corrections (DOC) was trying to procure a different drug, pentobarbital, for use in Wood's execution and would alert his attorneys if it could do so. Just over a week later, Wood's lawyers asked for specific information about the source or supplier of the midazolam and hydromorphone, and the DOC's search for pentobarbital. Charles L. Ryan, the director of Arizona's DOC, refused this request. He said only that the drugs were "domestically obtained" and "FDA approved,"³ and provided Wood's lawyers redacted copies of purchase orders, invoices, and order confirmations. On each document, the name of the drug supplier was also redacted.⁴ Ryan cited a state statute forbidding disclosure of the identity of anyone on the "execution team."⁵ Undaunted, Wood's counsel continued to press for additional information about the execution drugs, and Ryan and the DOC continued to deny those requests citing the same Arizona state secrecy statute.

On June 25th, Wood received final notice that he would be executed with midazolam and hydromorphone. A few days later, he filed a motion for a preliminary injunction seeking information about how the execution protocol was developed, the source and manufacturer of the drugs, and various other details about the drugs that would be used in his execution. On July 10th, a federal district court in Arizona denied this motion. Wood and his legal team appealed the district court's decision, and the Ninth Circuit Court of Appeals halted Wood's execution until he could receive information about the drugs.⁶

The court found that stopping the execution would not harm the state.⁷ It said that "The public enjoys a First Amendment right to view executions from the

¹ Wood v. Ryan, 759 F.3d 1076 (9th Cir. 2014).

² *Problems Arise as Ohio Tries New Execution Procedure*, DEATH PENALTY INFORMATION CENTER (Jan. 14, 2014), <https://deathpenaltyinfo.org/news/problems-arise-as-ohio-tries-new-execution-procedure>.

³ Wood v. Ryan, *supra* note 1.

⁴ *Id.*

⁵ Criminal Code, ARIZ. REV. STAT. §13-757 (2009).

⁶ Wood v. Ryan, *supra* note 1.

⁷ It came to this conclusion by applying the so-called *Press-Enterprise II* analysis, a test used to determine the public's right to access government proceedings. "Under the *Press-Enterprise II* First Amendment test, two "complementary considerations" inform the analysis: "(1) 'whether the place and process have historically been open to the press and general public []' and (2) 'whether public access plays a significant positive role in the functioning of the particular process in question.'" *California First Amend. Coal v. Woodford*, 299 F.3d 868, 875 (9th Cir. 2002) (quoting *Press-Enter. Co. v. Superior Ct. of California for Riverside Cnty.*, 478 U.S. 1, 8-9, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986)) (alteration in original).

moment the condemned is escorted into the execution chamber, including those ‘initial procedures’ that are inextricably intertwined with the process of putting the condemned inmate to death.”⁸ It affirmed the significance of public scrutiny of state execution practices and, in particular, of the media’s role in holding corrections officials accountable for what happens during executions.

However, the day before Wood’s execution, the United States Supreme Court lifted the Ninth Circuit’s injunction.⁹ On Wednesday, July 23rd, 2014, Joseph Wood was put to death. His execution took almost two hours, making it one of the longest executions in US history.¹⁰ During that time, officials injected Wood with a concentration of drugs 15 times greater than the amount allowed by Arizona’s execution protocol. He was awake over an hour into the execution and gasped and gulped for air over 600 times before he died.

Joseph Wood’s failed quest for information about the drugs that led to his botched to his botched execution was not an isolated event. Instead it provides a striking example of the connection between secrecy and problematic executions. Arizona is just one of many states that enacted statutes concealing the identity of drug manufacturers and information about the drugs they produce during the last decade. As we will show, their actions represent a significant departure from the practices that have governed executions throughout American history.

In what follows we argue that the United States has a longstanding, but not well understood, tradition of openness about executions, the identity of executioners, execution methods, and the people or organizations responsible for designing and supplying the instruments used to carry out executions. Existing scholarship does not discuss the way new lethal injection secrecy statutes fit into that history. We fill this gap in the literature by discussing the public’s historical right of access to information about executions. Contemporary drug secrecy statutes, we will argue, represent an unwarranted and problematic intensification and expansion of execution secrecy. Those laws cast a dark shadow over America’s death penalty.

II. THE HISTORY OF EXECUTION SECRECY

A. THE EXECUTIONER

Until 1936, executions in America were carried out in public. And even after they were moved behind prison walls, information about executions, executioners and execution methods was generally available to the public. In fact, states that now have secrecy statutes in the past often clearly identified who would carry out their executions.¹¹

To understand the traditions surrounding the identity of executioners, let’s start with the February, 1855 hanging of William Jung for murder by the state of

⁸ Wood v. Ryan, 759 F.3d 1076, 1082–83 (9th Cir.), vacated, 573 U.S. 976 (2014).

⁹ Indeed, on July 22, 2014—just one day before Wood’s planned execution—the Supreme Court vacated the Ninth Circuit’s preliminary injunction.

¹⁰ *Id.*

¹¹ This is not to say that secrecy has never been part of the execution process in the United States. From time to time states have made efforts to conceal the identity of the executioner. Michael Madow, *Forbidden Spectacle: Executions, the Public and the Press in Nineteenth Century New York*, 43 BUFF. L. REV. 461 (1995).

Louisiana. *The Daily Delta*, a local newspaper, reported on Jung's execution and noted that his executioner wore a mask.¹² In its coverage of Jung's execution, the *New York Times* also drew attention to the executioner's hidden identity. It said "The face of this wretched minion of the law was concealed by a horrible black mask which gave to the ghastly ceremonial an altogether unnecessarily revolting aspect."¹³

However, just a few months later, the identity of Jung's executioner was made public by *The South-Western*, a newspaper in Shreveport, Louisiana. The paper not only provided the executioner's name, but also gave details about his life, previous executions he carried out, and how he got the job.¹⁴

In the ensuing decades, newspapers regularly followed the example set by *The South-Western* and published executioners' names. In 1859, the *Richmond Daily Dispatch* reported on Virginia's hanging of the famous abolitionist John Brown and identified the man responsible for cutting the rope as Sheriff Campbell.¹⁵ A decade later in 1869, the *Idaho World* recounted Simeon Walters' execution and also published the name of his executioner.¹⁶ In 1879 in Indiana, John Achey was hanged and the *Fort Wayne Daily Gazette* once again identified the executioner.¹⁷ Each of these three states now has a statute prohibiting the identification of people on the execution team.

¹² *The Execution of Yung*, THE DAILY DELTA, Feb. 03, 1855, <https://www.newspapers.com/image/262115256>.

¹³ *Execution of Wilhelm Jung*, N.Y. TIMES, Feb. 12, 1855, https://timesmachine.nytimes.com/timesmachine/1855/02/12/76443290.pdf?pdf_redirect=true&ip=0.

¹⁴ *A Desperado*, THE SOUTH-WESTERN, June 20, 1855, <https://chroniclingamerica.loc.gov/lccn/sn83016483/1855-06-20/ed-1/seq-1/>:

"[William] Martin, alias Diego Bill, the notorious hangman, was yesterday brought before the court...A long time ago [Martin] was arrested on a charge of robbing a poor negro who was on his way to market...The sheriff came to the city in search of a hangman, and Diego Bill, in consideration of being furnished with a new suit of clothes and \$75 in cash, volunteered for the purpose. After performing the job, he returned to the city, committed another crime, and was again placed in jail. Frank Smith came up for hanging, and Diego Bill volunteered for the purpose. For this service he was again set at liberty—but was soon after arrested for robbery in the Third district. Here he remained until the execution of [William] Jung, when he was again released in consideration of his services as hangman."

¹⁵ *Execution of John Brown*, RICHMOND DISPATCH, Dec. 5, 1859, https://www.newspapers.com/image/?clipping_id=98005021&cfToken=: After previously identifying the sheriff as Sheriff Campbell, the article reads, "The Sheriff descended from the scaffold, and with one blow of his hatchet severed the cord, and the drop fell, landing John Brown into eternity. So perish all those who attempt insurrection, or invade the sovereignty of the State of Virginia."

¹⁶ *Execution of Simeon Walters*, THE IDAHO WORLD, Dec. 16, 1869, <http://www.newspapers.com/image/321355585/>.

The World wrote, "The Sheriff and his assistants placed the fatal noose upon his neck, adjusted the leather belt and straps for securing his limbs, drew the cap over his face, and all stepped back, leaving the unfortunate man standing alone on the drop... Sheriff Britten, who was standing with his watch in his hand, turned and starting down the steps, with a quick push of the lever sprung the bolts and Walters went down through the rap-way like a shot."

¹⁷ *The Gallows*, FORT WAYNE DAILY GAZETTE, Jan. 30, 1879, <https://www.newspapers.com/image/42900038/>: "At 12:20 p.m. Rev. Dr. Bayliss stepped back from the men, saying 'I commend you to the mercy of God.' Sheriff Pressly pulled the lever, and the souls of John Achey and Wm. Merrick were launched into eternity."

Occasionally executioners even achieved a kind of celebrity status. For example, later in the 19th century Arkansas's George Maledon was so well known that he was dubbed the "Prince of Hangmen."¹⁸ Throughout Maledon's career as a hangman, Arkansas newspapers regularly reported his identity and his role in executions. The *Arkansas Democrat* released Maledon's identity to the public in 1988 after one of his first hangings.¹⁹ A year later, the *Daily Arkansas Gazette* reported on Maledon's upcoming executions: "George Maledon, the expert hangman at Fort Smith, has been retained by Marshal Yoes. He will have five executions to make in one day next month, July 18th."²⁰

Toward the end of Maledon's career, the *Arkansas Democrat* once again wrote about "the Prince of Hangmen." "George Maledon," it said "slim, lithe, smileless, and 68 years old, the man who hanged eighty-eight men, Judge Parker's able lieutenant, 'the Prince of Hangmen,' as they picturesquely put it in the west, the most famous executioner of modern times, is another figure of 'Hell on the Border.'"²¹ A year later, the same paper announced Maledon's retirement in an article titled "George Maledon, the Celebrated Red Ax of Fort Smith, Returns to His Old Home." The article read, "Geo. J. Maledon, the once world famed character who achieved the notoriety of having hanged more men than any other hangman in the world, arrived here yesterday from Springdale, Ark, and will make his home in future with his Son Charles Maledon."²²

Yet during the same decade in which Maledon earned his title "the Prince of Hangmen," the identity of other executioners was occasionally protected by a veil of secrecy. For example, in 1896, Utah hanged Charles Thiede for murder. The executioner was hidden by a curtain and his identity never released to the public.²³ Departures from the tradition of openness were generally matters of local practice rather than being legally mandated.

However, newspapers did publicize the identities of other people who were involved in Thiede's execution: "Then active preparations for the last scene of the drama of death began. Deputy Sheriffs Montgomery, Neely, Johnson, and Gibbs stepped forward and in a few moments Thiede stood erect. His arms strapped to his thighs, which were strapped together. Another strap passed about his body, fastening his upper arms tightly."²⁴

¹⁸ *Prince of Hangmen*, NATIONAL PARKS SERVICE. U.S. DEPARTMENT OF THE INTERIOR, Apr. 10, 2015, <https://home.nps.gov/fosm/learn/historyculture/prince-of-hangmen.htm>.

¹⁹ *The Wages of Sin*, ARK. DEMOCRAT, Apr. 27, 1888, <http://www.newspapers.com/image/153438716/?terms=arkansas%20democrat&match=1>: "Captain Maledon, the hangman, had made final preparations before dawn and everything was in place long before the march to the scaffold began."

²⁰ *Especially for Arkansas*, DAILY ARK. GAZETTE, June 28, 1889, <http://www.newspapers.com/image/138026980/?terms=five%20executions&match=1>.

²¹ *An Old Story*, ARK. DEMOCRAT, July 12, 1899, <https://www.newspapers.com/image/149028560>.

²² *Arkansas at Large*, ARK. DEMOCRAT, Mar. 12, 1900, <http://www.newspapers.com/image/149100085/>.

²³ *Thiede Hung*, THE SALT LAKE TRIB., Aug. 8, 1896, <https://www.newspapers.com/image/12470536/>: "[A]t 10:30 1/2 Sheriff Hardy, by drawing his handkerchief from his pocket, gave the signal to the men behind the canvas screen. The lever was pulled and Thiede's body was jerked into the air."

²⁴ *Id.*

The turn of the 20th century saw the continuation of this same pattern of disclosure with most executioners identified and a few others not.²⁵ In Arizona's 1907 hanging of William Baldwin, the press clearly identified the executioner: "The sheriff was ordered to hang Baldwin until he is dead between the hours of 8 and 10 a.m. this morning at Solomonville ... Sheriff Anderson gave the word to fall back, sprung the trigger, and the black murderer was shot downward."²⁶ In contrast, in its reporting of Indiana's 1907 execution of George Williams, *The Times* wrote, "No one but those who are most nearly concerned in the execution know the identity of the person whose manipulation of the lever plunged Williams into eternity."²⁷

New methods of execution came on the scene in the late 19th and early 20th centuries, including the electric chair and the gas chamber. As was the case with hangings, newspapers continued reporting the names of those responsible for administering these new execution technologies.

For example, the day after North Carolina's first electrocution in 1910, newspapers published the identities of nearly everyone involved in the execution. *The News and Observer* of Raleigh told its readers that: "Physician McGeachy and Expert Davis with Warden Sale examined the sponge head-gear and leg strap that had been saturated with water... the condemned man appeared with prison guards N. S. Smith, K. B Ewing, W. R. Campbell and H. H Hunnicutt, two on either side."²⁸

The paper went on to identify the people who pulled the switch, "With Warden Sale immediately by his side, the inventor of the electric chair, E. F. Davis, of New York, assisted in throwing the switch that carried the death current."²⁹ And finally, it released the names of doctors who participated in the execution: "The shirt front was unfastened, and Drs. McGeachy and Riddick found the pulse faint and the heart still throbbing. 'Going mighty hard,' said Dr. McGeachy and Dr. Riddick confirming his opinion, the powerful current was again thrown into the body for a couple of seconds."³⁰

In some stories newspapers put identifying information about the executioner in the headlines: "Sheriff of Bladen County, Who Hanged Last Man in State, Opposed to Electrocution." The article, which focused on Sheriff J. M. Clarke's opposition to the electric chair, also reported that he presided over an execution just a week before the article was published.³¹ Similarly, newspapers in Nebraska reported the name of the person who was responsible for carrying out all of its

²⁵ *A Legal End*, WKLY. OR. STATESMAN, Feb. 6, 1900, <https://www.newspapers.com/image/79621172>: "Just at 10:14 he was led upon the gallows. Sheriff Van Orsdel and Elder Riggs leading the way. Magers was supported by Deputy Sheriff J. T. Ford and W. E Williams, of Airlie... Sheriff Van Orsdel pinioned his arms and legs, adjusted the black cap and noose, and stepping to the lever, sprung the trap."

²⁶ *Paid the Penalty*, GRAHAM GUARDIAN, July 12, 1907, <https://www.newspapers.com/image/42344857/>.

²⁷ *Negro Murderer Goes to His Doom*, THE TIMES, Feb. 8, 1907, <https://www.newspapers.com/image/303938612/>.

²⁸ *The First Electrocution Ends Walter Morrison's Life*, THE NEWS & OBSERVER, Mar. 19, 1910, <https://www.newspapers.com/image/650704718>.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*: "As a witness at the electrocution of Walter Morrison yesterday, was Sheriff J. M. Clarke, of Bladen county, who last week threw the trap that dropped into eternity the body of {Henry} Spivey, the last man to be legally hanged in North Carolina."

executions: “Warden T. W. Smith yesterday made arrangements with Detective Stryker of Omaha to take charge of the death-dealing machine. Stryker is coming to be recognized as the state executioner.”³²

However, a few states designed execution procedures to conceal the executioner’s identity. Arizona’s gallows included a number of buttons that would supposedly activate the trap door on which the condemned stood. One person was assigned to each button and the buttons were arranged so that no one could know which one actually sprung the trap. Everyone pressed their button at the same time so that the executioner’s identity was unknown.³³

The following decades are marked by a similar pattern of openness about the executioner’s identity with a few exceptions. In 1911, the executioners’ identities were kept secret in Nevada’s last hanging. However, newspapers named many of those performing ancillary tasks. For example one Nevada newspaper reported that

Hagerman placed the noose around the murderer’s neck, and as he tightened the rope the signal was given to raise the curtain. Captain Muller at the same time completed the adjustment of the straps about Casey’s body. He noticed the condemned man start to tremble, and, fearing that he would break down at the last minute, raised his arm as the signal to the three guards concealed behind the partition to the rear. Three knives slashed as many strings and the trap was sprung.³⁴

In 1913, Andriza Mircovich became the only inmate in Nevada history to be executed by firing squad.³⁵ Warden George W. Cowing distributed three rifles, two containing bullets, and one containing a blank cartridge, so the identity of the person who shot the condemned would not be known.³⁶ But the faces of the shooters were not hidden from the witnesses.

Three years later in Florida, *The Tampa Times* left no doubt about who Bennie Henson’s executioner would be: “The hanging of Bennie Henson for the murder of his wife, Ethel Henson, will be the seventh legal execution in Hillsborough country, and the first in which Sheriff Will Spencer has acted as hangman. The unpleasant duty of pulling the cord, releasing the death trap, falls on the sheriff, and will not be shirked by that official.”³⁷ This article also named people who had carried out

³² *Getting Ready for Death*, THE NEB. ST. J., Oct. 11, 1910, <https://www.newspapers.com/image/42111129>.

³³ *Jose Lopez was Hanged Today at Florence*, TUCSON CITIZEN, Jan. 5, 1910, <https://www.newspapers.com/image/580420091/>.

³⁴ *Murderer Casey Makes Short Speech from Gallows Asking Forgiveness for His Crime*, NEV. ST. J., Aug. 17, 1911, <https://www.newspapers.com/image/78752089/>.

³⁵ Espy, M. Watt, and Smykla, John Ortiz. Executions in the United States, 1608-2002: The ESPY File. Inter-university Consortium for Political and Social Research [distributor], 2016-07-20. <https://doi.org/10.3886/ICPSR08451.v5>.

³⁶ *Death Penalty by Shooting to be Inflicted upon NYE County Murderer at Carson Wednesday*, TONOPAH DAILY BONANZA, May 12, 1913, <https://www.newspapers.com/image/366594871/>.

³⁷ *Henson to Hang on February 27*, THE TAMPA TIMES, Jan 29, 1914, <https://www.newspapers.com/image/325754788>.

previous executions.³⁸

An Alabama state law, enacted in 1923, designated the warden of Kilby Prison as the state's executioner and also designated alternates if he were unavailable.³⁹ The law also confirmed the role sheriffs played in past executions: "[The] executioner as provided in this section shall receive for such service the same amount as is now paid by law to Sheriffs for the execution of criminals."⁴⁰ An almost identical statute, which also replaced hanging with electrocution as the state's method of execution, was enacted in Georgia in 1924.⁴¹ After declaring that executions must occur within the walls of the State Penitentiary in Milledgeville, Georgia, the statute requires, "That there shall be present at such execution the Warden of the Penitentiary, who shall serve as executioner."⁴²

Frank Owens was the last man hanged in Alabama. *The Birmingham News* reported the name of his executioner the day his 1926 execution took place.⁴³ In 1931, *The Atlanta Constitution* confirmed the executioner's identity for the last hanging in Georgia.⁴⁴ But that same year, the identities of the executioners in Oregon's last hanging were concealed: "Elaborate precautions were taken in the mechanical arrangement of the levers which sprung the trap so that nobody can ever name the man who started Kingsley into eternity."⁴⁵

Rainey Bethea was put to death in 1936 in what would turn out to be the last public execution in America and the last hanging in Kentucky. Before the execution,

³⁸ *Id.*: "The executions in Hillsborough county start with the hanging by Sheriff William Spencer, grandfather of the present sheriff, of William Buckley, a white man, for murder. The second hanging was of Harry Singleton, a negro, also for murder, and Sheriff T. K. Spencer, father of the present sheriff, was the executioner. Sheriff W. T. Lesley was in charge of the next, that of Mercer, the white rapist. Then come three during the terms of Sheriff R. A. Jackson, the first being a negro, Derry Taft, for murder, the second being a negro, Fowers, for rape, and the third being a negro, Anderson, for murder."

³⁹ Ala. Legislative Act, No. 587, (1923): "The warden of Kilby Prison at Montgomery or in case of his death, disability, or absence, his deputy shall be the executioner. In the event of the death or disability or absence of both the warden and deputy the executioner shall be that person appointed by the Board of Convict Supervisors from the county in which such convict is condemned to death or shall be the Deputy of such sheriff or in the absence or disability of such sheriff or his deputy, shall be such other person as may be appointed by the Board of Convict Supervisors for that purpose..."

⁴⁰ *Id.*

⁴¹ Acts and Resolutions of the General Assembly of the St. of Ga., No. 475. Section 1 (1924).

⁴² *Id.*

⁴³ *Negro Hanged in County Jail for Highway Robbery*, THE BIRMINGHAM NEWS, Sep. 24, 1926, <https://www.newspapers.com/image/573303458/?terms=>: "Frank Owens, negro, arrived at the foot of his gallows on the stroke of 11 Friday morning. The trap was sprung by Sheriff T. J. Shirley at 11:17 and he was pronounced dead by attending physicians 14 minutes later."

⁴⁴ *Last Legal Hanging in Georgia Set Today*, THE ATLANTA CONSTITUTION, June 12, 1931, <https://www.newspapers.com/image/397928744>: "Sheriff M. Gary Whittle is charged by law to release the rap on the scaffold."

⁴⁵ Sidney A. King, *Supreme Penalty Paid by Kingsley Himself*, THE EUGENE GUARD, Oct. 30, 1931, <https://www.newspapers.com/image/107685820/>.

Sheriff Florence Thompson announced that she planned to hang Bethea.⁴⁶ *The New York Times* noted that “Much as she abhors the job, Mrs. Florence Thompson, Daviess County’s woman sheriff, is going to spring the trap that sends Rainey Bethea, Negro murderer, to his death. . . . As she explained: ‘I could appoint the deputy sheriff or deputize any citizen to spring the trap, but to do that would inflict an unpleasant job — really my own hard task — upon someone else.’”⁴⁷

Although she insisted she would still pull the trap door, the sheriff hired a “consulting expert executioner,” Phil Hanna, to assist her.⁴⁸

In the weeks leading up to the execution, Sheriff Thompson received hundreds of letters offering to spring the trapdoor for her.⁴⁹ One such letter came from an army veteran and former Louisville policeman:

Dear Mrs. Thompson,
I am writing you this letter, offering you my services [for] free .
. . . for several reasons. . . . First you are a woman and have four
children, none of which I am sure would want you to spring the
trap that sends Rainey Bethea into eternity. Second, I wouldn’t
want my mother to be placed in such an unpleasant position.
Third, I am an ex-serviceman and served . . . in France in 1918
and 1919, and I know just how you would feel after the execution
if you went through with it. You may think it wouldn’t bother you,
after it is all over, but I know different. . . . Please do not give this
letter to anyone for publication. . . . I am not hunting for publicity.
I only want to help you.
Your friend,
L. Hash⁵⁰

Thompson accepted Hash’s offer. As the *Louisville Courier Journal* noted at the time: “[Sheriff Thompson] was reported at Louisville to have decided to deputize a resident of Daviess County not a member of her staff to spring the trap.”⁵¹ The *Owensboro Messenger-Inquirer* said that: “Sheriff Thompson contrived to set her public agog by coyly intimidating the she never would shirk her duty... at the last minute, however, she was sitting in a parked car beneath the gallows... The

⁴⁶ *The Last Hanging: There Was a Reason They Outlawed Public Executions*. N.Y. TIMES, May 6, 2001, <https://www.nytimes.com/2001/05/06/weekinreview/the-last-hanging-there-was-a-reason-they-outlawed-public.html>.

⁴⁷ *Id.*: The fact that a woman was going to conduct the hanging made international news. “I had a law school mate who was in Paris at the time all this was happening, and he sent me clippings from one of the Parisian newspapers dealing with the purported hanging to be done by the Lady Sheriff, and there was a picture of the lady in one of the newspapers.”

⁴⁸ *Judge Hamilton Grants Writ to Stay Execution*, THE PADUCAH SUN-DEMOCRAT, July 30, 1936, <https://www.newspapers.com/image/502108652/>: “Sheriff Mrs. Florence Thompson took charge of preparations for the execution. She intimated she would spring the trap herself, rather than ‘shirk her duty.’ G. Phil Hanna, Illinois consulting expert executioner, was engaged to supervise details.”

⁴⁹ *Execution of Bethea is Set for Sunrise*, THE COURIER-JOURNAL, Aug. 14, 1936, <https://www.newspapers.com/image/107744768/>.

⁵⁰ *The Last Hanging supra* note 46.

⁵¹ *Execution of Bethea is Set for Sunrise, supra* note 49.

trap was capably sprung at 4:20 C. S. T. by Hash, resplendent in a spotless white suit, working under the direction of ‘Uncle Phil’ Hanna, the well-known consultant executioner from White County, Illinois.”⁵²

An article in *The New York Times* took note of Hash’s attire:

Eyewitnesses say the press was immensely disappointed when Sheriff Thompson did not appear on the scaffold. In her place was the man described afterward by the local press as ‘the best-looking cop’ in Louisville: Arthur Hash. Despite his stated desire for anonymity, Mr. Hash wore an outfit guaranteed to draw notice and looked tipsy. Hash mounted the steps after the Negro . . . garbed in a white linen suit and white panama hat.⁵³

Whether executioners were famous or not, when hanging was America’s primary execution method their names were regularly, though not always, made public before or soon after executions took place.

During the first use of the gas chamber in Arizona, the executioner was hidden behind a curtain. A news article in the *Tucson Citizen* captured the scene by using the passive voice: “At 5:09 a cord concealed behind a white curtain was severed. Fifteen poison pellets contained in a mesh bag splashed gently into a container filled with acid and water at the condemned boys’ feet, and the death-dealing fumes surged toward them in a grim grey cloud.”⁵⁴

However, this same article named other members of the execution team: “The attending physicians—Dr. Hugh F Stanton, state epidemiologist, and Dr. H. B. Steward, prison physician—their eyes [glided] to the quivering countenances through a special observation window, and with elongated stethoscopes leading from the laboring chests to their ears, announced ‘it is over.’”⁵⁵

The *Arizona Republic* showed no reticence in speculating about the executioner’s identity. “The deadly 15 pellets,” it said “were dropped into the acid-water mixture at 5:09 a.m., presumably when Warden A. G. Walker cut a thin string which was suspending them above the mixture.”⁵⁶

In 1939, Pennsylvania newspapers published the identity and some personal details of the state’s electric chair executioner.⁵⁷ In bold lettering one article read, “Frank Lee Wilson, 37 Year Old Pittsburgh Electrical Engineer Receives \$450 For First Official Duties.”⁵⁸ The article goes on say that with “no apparent show of

⁵² Hazel Macdonald, *20,000 ‘Have a Good Time’ as Law Hangs a Slayer*, MESSENGER-INQUIRER, Aug. 14, 1936, <https://www.newspapers.com/image/376050013/>.

⁵³ *The Last Hanging supra* note 46.

⁵⁴ *Young Slayers Die in Lethal Gas Chamber*, TUCSON CITIZEN, July 6, 1934, <http://www.newspapers.com/image/580721182/>.

⁵⁵ *Id.*

⁵⁶ *Hernandez Brothers Die*, AZ. REPUBLIC, July 6, 1934, <http://www.newspapers.com/image/116818422/>.

⁵⁷ The electric chair was used beginning in the late 1800s and from then on access to the identity of the executioner was often identifiable. We begin after the last public hanging in America to continue the story of access to the executioner’s identity in America.

⁵⁸ *New Executioner Sends Three to Death in 14 Minutes at Rockview*, THE DANVILLE

nervousness” 37-year-old Frank Lee Wilson pulled the switch to electrocute three men.⁵⁹

Another newspaper published an article on the same day with the headline, “Executioner Goes Duck Hunting After Grim Job.”⁶⁰ It included details about Wilson’s personal and family life: “Frank Lee Wilson Jr., son of the electrician who early this morning completed his first assignment in the Rockview death chamber said: ‘My dad went to Linesville from Bellefonte for the opening of the duck season. He won’t be home until Wednesday night.’ Young Frank is a student at Perry High School.”⁶¹

When states used the electric chair, the identities of the execution team, not just the executioner, were typically disclosed.⁶² For example, one week after Louisiana electrocuted William Alleman, an *Abbeville Meridional* reporter recalled his experience as a witness. He named Grady Jarrett as the “authorized executioner of the State.”⁶³ This article also noted that: “Sixty-one men and a woman have looked in the almost kindly, benign face of Jarrett, and noted the calm blue eyes, as he checked the electrodes, and heard his voice, as their last on earth, bid them good-bye.”⁶⁴

Newspapers continued to regularly publish the names of executioners throughout the 1950s, 1960s, and 1970s and state law also disclosed their identities or their official positions. In 1953, Frank Lee Wilson retired as Pennsylvania’s executioner, and the *Gettysburg Times* noted that he had presided over 50 executions during his 14-year tenure.⁶⁵ In 1956, Georgia state law specified that the warden of the prison that housed its electric chair would serve as its executioner.⁶⁶ In Wyoming in 1965, the *Casper Star-Tribune* confirmed that Prison Warden Leonard Mecham

MORNING NEWS, Oct. 23, 1939, <http://www.newspapers.com/image/89210688/>.

⁵⁹ *Id.*

⁶⁰ *Executioner Goes Duck Hunting After Grim Job*, THE TIMES-TRIBUNE, Oct. 23, 1939, <https://www.newspapers.com/image/534352754>.

⁶¹ *Id.*

⁶² *Electric Chair Used by State for First Time*, THE TOWN TALK, Sep. 11, 1941, <https://www.newspapers.com/image/213447620>: “The first shock was applied by the official executioner from a portable generator at 12:09 p.m. and a second shock followed immediately, Johnson was declared dead at 12:12 p.m. by two physicians, Coroner Montgomery Williams and Dr. W. A. Sorenson. As Sheriff P. R. Erwin, supervising the execution, strapped the condemned man into the chair, he asked Johnson if he had anything to say and Johnson did not reply... The executioner’s identity was closely guarded, and his name was not announced, even after the execution.”

⁶³ Mac Crary, *The Execution of William Alleman*, ABBEVILLE MERIDIONAL, May 19, 1951, <https://www.newspapers.com/image/445771697>.

⁶⁴ *Grady Jarrett Has Killed Sixty Two Men and Women*, ABBEVILLE MERIDIONAL, May 19, 1951, <https://www.newspapers.com/image/445771697>.

⁶⁵ *Executioner Resigns Post*, THE GETTYSBURG TIMES, May 23, 1953, <https://www.newspapers.com/image/4622819>:

“Wilson now will devote his time to a job as superintendent of the Raphael Electric Co. He also will continue to teach night classes in electricity at South High School.”

⁶⁶ Acts and Resolutions of the General Assembly of the St. of Ga., No. 112, (1956): “There shall be present at such execution the warden of the penitentiary, or a deputy warden thereof, who shall serve as executioner.”

had pulled the lever which caused “a fish net bag containing cyanide pellets to plunge into a mixture of acid beneath the chair” holding Andrew Pixley.⁶⁷

In 1966, Mike Mayfield conducted Oklahoma’s last electrocution. James French was put to death for murdering another inmate while being held for a previous offense. Newspapers reported his executioner’s name with little fanfare. For example, the *Ada Weekly News* described the moment when French was executed as follows: “Seconds later, his executioner, prison guard Mike Mayfield, threw the switch and 2200 volts surged through French’s body.”⁶⁸

Five years later, the Jackson, Mississippi *Clarion Ledger* identified a man named T. B. Berry as the executioner in charge of the state’s gas chamber.⁶⁹ Also in 1971, an Alabama law mandated that the warden of the William C. Holmes Unit of Atmore Prison serve as its executioner.⁷⁰ In 1977, when Charlie Brooks became the first person in the United States to be executed by lethal injection,⁷¹ Texas newspapers identified James Estelle as the state’s executioner.⁷² The day after the Brooks execution, a local newspaper, the *Victoria Advocate*, reminded its readers that State Prison Director James Estelle had said he felt a “moral responsibility” to act as the executioner instead of delegating the task.⁷³ However, when reporters asked Estelle if he had kept that commitment he declined to comment.⁷⁴

During the 1980s newspapers also published the names of, or identifying information about, the people responsible for carrying out executions. On March 9, 1981 the Seymour, Indiana *Tribune* reported on the electrocution of Steven Judy.⁷⁵ It noted that Indiana state law called for Warden Jack Duckword “to pull the switch that triggers the lethal current.”⁷⁶

Other examples of the tradition of disclosure surrounding executions include an Alabama newspaper article confirming that Holman Prison Warden J.D. White

⁶⁷ Jack Fairweather & Bill Missett, *Pixley Put to Death Early This Morning*, CASPER STAR-TRIBUNE, Dec. 10, 1965, <https://www.newspapers.com/image/348011522/>.

⁶⁸ *French Dies in Chair*, THE ADA WKLY. NEWS, Aug. 11, 1966, <https://www.newspapers.com/image/36521105/>.

⁶⁹ Charles M. Hills, *Capitol Observers Trying to Forecast Waller Choice*, CLARION-LEDGER, Nov. 27, 1971, <https://www.newspapers.com/image/180756109>.

⁷⁰ Ala. Legislative Acts, Act No. 2360 (1971): “The warden of the William C. Holmes Unit of the prison system at Atmore, or in case of his death, disability or absence, his deputy shall be the executioner. In the event of the death or disability or absence of both the warden and deputy the executioner shall be that person appointed by the commissioner of corrections.”

⁷¹ *The History of the Death Penalty: A Timeline*, DEATH PENALTY INFORMATION CENTER (MAR. 31, 2011), <https://deathpenaltyinfo.org/stories/history-of-the-death-penalty-timeline>.

⁷² Amy Kidd, *Prison Head Believes in Death*, THE KILGORE NEWS HERALD, Nov. 16, 1977, <https://www.newspapers.com/image/611742232>: “But for [James] Estelle, the decision is an easy one - both on professional and philosophical grounds. His personal feelings don’t get in the way of his official job {as} state executioner.”

⁷³ George Kuempel, *Murderer’s Execution Carried Out*, VICTORIA ADVOCATE, Dec. 8, 1982, <https://www.newspapers.com/image/439217581/>.

⁷⁴ *Id.*

⁷⁵ *Joking Judy Blames Himself Before Death*, THE TRIBUNE, Mar. 9, 1981, <https://www.newspapers.com/image/178123545>.

⁷⁶ *Id.*, “However, Department of Corrections spokesperson Tom Hanlon refused to confirm to the paper who pulled the switch.”

pulled the switch for the 1983 execution of John Evans III.⁷⁷ Four years later, T. Berry Bruce was relieved of his duties as executioner after 30 years in charge of Mississippi's gas chamber.⁷⁸ Newspapers throughout the state reported the appointment of Charles Tate Rogers of Parchman as Bruce's replacement.⁷⁹ In 1995 an Indiana statute which made lethal injection the official execution method also stated that, "The warden of the state prison, or persons designated by the warden, shall serve as the executioner."⁸⁰

Departures from the tradition of disclosure of the kind seen in the Woods' execution began to appear in the 1990s when laws explicitly mandating secrecy about the identity of the executioner were introduced in several states. For example, in 1992 the Kentucky state legislature passed a statute that read, "The identity of an individual performing the services of executioner shall remain confidential and shall not be considered a public record."⁸¹ But it would be another two decades, propelled by difficulties in securing lethal injection drugs, before laws like Kentucky's became the norm in death penalty states.

B. THE MANNER AND METHOD OF EXECUTION

Like the executioner's identity, traditionally the public has had access to detailed information about the manner and method of execution.⁸² In the late 1800s and early 1900s, local newspapers frequently reported details about hangings, including the rope's price, manufacturer, and materials.⁸³ As the State of Virginia planned to hang the abolitionist John Brown, it conducted a public vetting process to select the particular kind of rope that would be used in Brown's execution. All of the ropes it considered were displayed for the public.⁸⁴

⁷⁷ Kathy Beasley, *Three Jolts of Electricity Needed to Kill John Evans*, THE MONTGOMERY ADVERTISER, Apr. 23, 1983, <https://www.newspapers.com/image/257686440>.

⁷⁸ Ron Harrist, *New Executioner Appointed by Allain*, SUN HERALD, May 17, 1987, <https://www.newspapers.com/image/743815852>.

⁷⁹ *Id.*, Strangely enough, a spokesman for the Governor stated that Rogers received his commission and accepted the position of executioner but refused to say whether or not he was a guard at the state penitentiary in Parchman.

⁸⁰ Ind. Code, §35-38-6-1, Sec 1. (c) (1995).

⁸¹ Ky. Laws, Ch. 496, S.B. 310, Section 20 (1990): However, remnants of the disclosure tradition were still present. In 1995 an Indiana statute which made lethal injection the official execution method also stated that, "The warden of the state prison, or persons designated by the warden, shall serve as the executioner." *See also*, 1995 §35-38-6-1 Sec. 1 (c).

⁸² Jonathan Peters, *The First Amendment Argument against Lethal-Injection Secrecy Laws*, COLUM. JOURNALISM REV. (May 12, 2014), https://www.cjr.org/united_states_project/the_first_amendment_argument_against_death_penalty_secrecy.php: "I'm aware of no practices or policies that shielded rope makers, bullet makers, or blade makers." *See also*, Kelly A. Mennemeier, *A Right to Know How You'll Die: A First Amendment Challenge to State Secrecy Statutes Regarding Lethal Injection Drugs Comments*, 107 J. OF CRIMINAL L. & CRIMINOLOGY 443 (2017).

⁸³ Chris Woodyard, *Enough Rope: The Hangman's Rope in the Press*, HAUNTED OHIO, Jan. 19, 2013, <https://ppubs.uspto.gov/pubwebapp/> (Cited in Wood v Ryan, *supra* note 1).

⁸⁴ JACK SHULER, THE THIRTEENTH TURN: A HISTORY OF THE NOOSE 107 (2014): "South Carolina's rope was made from cotton, of course. Kentucky's offering was sent by Zeb Ward (a former prison director) direct to Virginia Governor Wise. Ward wrote, 'I send

To take another example, newspaper coverage of Ohio's double hanging of Scott Jackson and Alonzo Walling in 1897 included details about the rope and identified the person who made it. As the *Cincinnati Enquirer* noted,

Each rope is 23 feet in length, and they were made to order in about a week's time from the giving of the order. They were made by Frank Vonderheide, the Main Street cordage dealer, and most of the work was done by Mr. Vonderheide himself. They are made of what is known as silver finish flax sewing twine, there being four strands of 110 threads each, or 440 threads in all.⁸⁵

Rope makers like Vonderheide often openly displayed and marketed their hanging ropes.⁸⁶ Additionally, the specifications and construction of the gallows were frequently discussed in the press.⁸⁷

you . . . this morning a rope made expressly for the use of John Brown & Co. Kentucky will stand pledged for its being an honest rope—I had it made in her behalf and send it to show we are willing and ready to aid our mother state in disposing of those who may attempt to destroy & overthrow her government. . . . The hemp of which it is made was grown in Missouri—a state that Brown had troubled much, and made at Frankfort, Kentucky. I had it made for the express purpose.' After testing, or so the story goes, the cordage from South Carolina and Missouri were deemed too weak, and Kentucky's entry won out. The victorious rope was displayed in the sheriff's office the week before the hanging."

John Brown Hanged with Kentucky Rope, NOTABLE KENTUCKY AFRICAN AMERICANS DATABASE, <https://nkaa.uky.edu/nkaa/items/show/1625> (last modified Dec. 2, 2022): "The rope used to hang abolitionist John Brown (1800-1859) came from Kentucky. Prior to his hanging, rope samples were submitted by South Carolina, Missouri, and Kentucky. The ropes were put on exhibit for the public to view. The ropes from South Carolina and Missouri were not used because it was thought that they were not strong enough, so the rope from Kentucky was selected."

⁸⁵ Woodyard, *Supra* note 83.

⁸⁶ SHULER, *Supra* note 84: "Kentucky's offering was sent by Zeb Ward (a former prison director) direct to Virginia Governor Wise. Ward wrote, 'I send you . . . this morning a rope made expressly for the use of John Brown & Co. Kentucky will stand pledged for its being an honest rope—I had it made in her behalf and send it to show we are willing and ready to aid our mother state in disposing of those who may attempt to destroy & overthrow her government. . . . The hemp of which it is made was grown in Missouri—a state that Brown had troubled much, and made at Frankfort, Kentucky. I had it made for the express purpose.' After testing, or so the story goes, the cordage from South Carolina and Missouri were deemed too weak, and Kentucky's entry won out. The victorious rope was displayed in the sheriff's office the week before the hanging."

⁸⁷ *Id.* at 196: "A local carpenter named David Cockerell constructed the gallows, finishing it by Wednesday. For the rest of the week it stood in the yard of the new Baptist church. One reporter noted that it was a typical gallows, nothing extraordinary, 'uprights, crossbeam, and trap.' The trap door was hinged and held up by a taut rope that, when cut, released the drop and killed the condemned." *Id.* at 248: "A Mankato paper reported that 'the gallows, constructed of heavy, square white oak timbers, is 24 feet square, and in the form of a diamond. It is about 20 feet high. The drop is held by a large rope, attached to a pole in the center of the frame, and the scaffold is supported by heavy ropes centering at this pole, and attached to the one large rope running down to and fastened at the ground.'"

Execution materials were also routinely collected as souvenirs by members of the public. Following hangings, spectators gathered small pieces of the rope or chipped pieces of the gallows as souvenirs.⁸⁸ Local museums and shows collected and displayed rope used in hangings,⁸⁹ and in some cases it was sold by hangmen following executions.⁹⁰

During the first use of the electric chair in William Kemmler's execution, extensive details were available to the press about the electric chair's construction and the number of volts used in the execution. While the New York State law authorizing use of the electric chair initially restricted media reporting on executions,⁹¹ two years later the legislature "repealed the section of the law that restricted press coverage and acknowledged that the press had a right and responsibility to report on executions." After that, it was routine for wardens to invite the press to send reporters or editors to act as official witnesses to executions.⁹² Later uses of the electric chair at the Sing Sing Correctional Facility had the voltmeter displayed,⁹³ and details about the electric chair's construction were also publicly available.⁹⁴

Edwin Davis, who built the electric chair used in Kemmler's execution, was designated as the "state electrician" for New York. Davis was approved for a patent

⁸⁸ OWENS DAVIES, & FRANCESCA MATTEONI, *EXECUTING MAGIC IN THE MODERN ERA: CRIMINAL BODIES AND THE GALLOWES IN POPULAR MEDICINE* 71 (2017): "The St. Louis Republican noted, in 1882, that 'if all the hangman's rope were taken from the pockets of the superstitious St. Louisians, they would form a rope of considerable length.'"; SCHULER *supra* note 84, at 265: "The ropes with which they were hung were seized by the bystanders and cut in little pieces as relics. Those who could not secure one of these, cut chips off the gallows."

⁸⁹ DAVIS & MATTEONI, *supra* note 88, at 72: "A month after the execution, in November 1887, of the four Haymarket 'anarchists', condemned to death after dynamite was thrown at police during a labour demonstration in Chicago, several dime museums around the country exhibited uncut ropes that were purported to be those that hanged the men."

⁹⁰ *Id.*: "Following the hanging of Richard Mckwayne in York, Pennsylvania, in 1908, 'the rope was hacked into bits for souvenirs. Some of these changed hands at as much as \$2 a piece.' There clearly was a trade in obtaining the rope for public display. In 1893, one journalist explained how hangmen often sold off their ropes, or pieces of it, to 'dime museum managers.'"

⁹¹ CRAIG BRANDON, *THE ELECTRIC CHAIR: AN UNNATURAL AMERICAN HISTORY* 167 (1999): "Because the electrical execution law outlawed reporting on executions, Durston was careful to point out that Mack and Bain had not been invited as reporters but as citizens of the state."

⁹² *Id.* at 203.

⁹³ *Id.* at 197: "MacDonald made some recommendations for future executions [...] The voltmeter should be located in the execution room, he said, and a competent person should take readings. The voltage should be between 1,500 and 2,000 volts and should be entered into the official record. Finally, MacDonald suggested that an official report be submitted to the governor after each execution."

⁹⁴ SCOTT CHRISTIANSON, *CONDEMNED: INSIDE THE SING SING DEATH HOUSE* 119 (2000): "J.J. Shanahan, Chief Engineer, April 10, 1942: The Control Equipment such as Voltage Regulators, Auto Transformers, Oil Circuit Breakers, Panel Board, etc., was designed by and supplied by General Electric Company. Prior to the Institution going to Alternating Current, a Consulting Engineer, Mr. G.M. Ogle aided the design of the Electric System. The design for the present system using the Institution supply of Alternating Current was by a Mr. H.M. Jalonack in 1931, an engineer employed by General Electric."

in 1897 for an early design of his “electrocution-chair.”⁹⁵ This patent contained a detailed drawing explaining all of the components of the electric chair apparatus and their function. Davis pioneered the development of electric chairs across America, and they have remained remarkably similar to his original design.⁹⁶

Not only did Davis construct the machine, but he also presided at 240 executions over the course of his career.⁹⁷ According to Stuart Banner, when Davis retired, “His position was taken by John Hulbert, another state prison electrician, who had been trained by Davis himself. Hulbert executed 120 more. Hulbert’s successor was Robert Elliott, who also became the official executioner in five other states that used the electric chair—New Jersey, Pennsylvania, Massachusetts, Vermont, and Connecticut.”⁹⁸

After the gas chamber was added to America’s execution arsenal in 1922,⁹⁹ Eaton Metal Products constructed almost all of the gas chambers that were used for capital punishment.¹⁰⁰ Its patent application, a public document, like the patent for Davis’ electric chair, also contains detailed drawings of the gas chamber’s components.¹⁰¹ The application also included elaborate descriptions about how each component functions, which gasses will be used and when, and how the chamber operates.

Informal notes on the particularities of other gas chambers were also readily available to the public. Fred Leuchter, who made part of his living repairing capital punishment devices, easily obtained information regarding the operation of gas chambers and electric chairs which he shared with the public any time he

⁹⁵ United States Patent Office, Edwin F. Davis, *Electrocution Chair*, SPECIFICATION forming part of Letters Patent No. 587,649, dated August 3, 1897.

⁹⁶ ANTHONY GALVIN, *OLD SPARKY: THE ELECTRIC CHAIR AND THE HISTORY OF THE DEATH PENALTY* 126 (2016): “Despite his oddities, Davis was conscientious about his job and determined to do his best to execute men cleanly and painlessly. He carried his own electrodes, which were always in immaculate condition, and he made several refinements to the chair to improve its efficiency. In fact, to this day he is the only person who has patents registered on the chair. It is very much old technology; it has not changed in over a hundred years.”

⁹⁷ STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY 194-5* (2003): “Electrocutions were supervised by a very small number of people. Within a few years after the first electrocution New York turned over all its executions to Edwin F. Davis, the electrician at Auburn and the man who had built the original electric chair in 1890. Davis executed 240 people before he retired in 1914.”

⁹⁸ *Id.* at 195.

⁹⁹ Chris Wilson, *Every Execution in U.S. History in a Single Chart*, TIME, July 24, 2014, <https://time.com/82375/every-execution-in-u-s-history-in-a-single-chart/>.

¹⁰⁰ STEPHEN TROMBLEY, *THE EXECUTION PROTOCOL: INSIDE AMERICA’S CAPITAL PUNISHMENT INDUSTRY* 15 (1992): “Most gas chambers are octagonal in shape and are made of steel, with glass panels held in place by airtight seals. All except Missouri’s, which was constructed by inmates, were manufactured by Eaton Metal Products of Salt Lake City.”; CHRISTIANSON, *THE LAST GASP*: *supra* note 94, 131. “Founded in 1919, Eaton Metal Products was a leading steel plate fabricator that manufactured gasoline tanks, grain bins, and other industrial items. It also had experience in working with cyanide, by virtue of its metal-processing work. Best worked closely with Eaton’s Denver plant superintendent, Earl C. Liston, to design a suitable apparatus. The Colorado gas chamber prototype would turn out to be a signature specialty item that would enable Eaton to enjoy worldwide dominance in that line of products for several years.”

¹⁰¹ United States Patent Office, Patent #2,802,462, August 13, 1957.

was interviewed.¹⁰² These details included everything from the engineering of gas chambers to details about his own ideas about electric chair design and how they would improve the electric chair's performance.

As was the case with the identities of executioners, there is a clear pattern of transparency about execution methods. However, there were some notable exceptions. Several states made efforts to limit media reporting on capital punishment in the late 1800s. They passed laws forbidding the press from writing about the details of executions because of the gruesome and sensational stories the press told.¹⁰³ But those short lived efforts were more the exception than the rule.¹⁰⁴

III. THE NEW SECRECY

Before the full flourishing of execution secrecy laws of the kind seen in the Joseph Wood case, several state protocols contained provisions for some limited degree of secrecy. In 1981, four years after Oklahoma became the first state to adopt lethal injection as its execution method, Jay Chapman, Oklahoma's Chief Medical Examiner and pioneer of the three-drug lethal injection cocktail, wrote to the Oklahoma Department of Corrections with suggested changes its the lethal injection protocol. One of his suggestions read:

[...] the warden shall choose one (1) person to administer the lethal agents. The first and second alternates shall also be chosen to serve in the event that the designated individual is unable for any reason to participate in the execution. The identities of these individuals shall not be disclosed.¹⁰⁵

As previously noted, a few death penalty states limited media access, prohibited photography or recording of executions, and even kept secret details about when

¹⁰² TROMBLEY, *supra* note 100.

¹⁰³ Stuart Banner discusses the development of these laws in several states: "New York enacted the first of these laws in 1888. The following year Colorado and Minnesota barred journalists from describing hangings. Similar laws were later enacted in Virginia, Washington, and Arkansas. These bans were widely flouted. In 1891, after a quadruple execution was lavishly recounted in the New York press, the city's district attorney obtained indictments against the editors of several papers, but the resulting criticism of the ban was so strong that the legislature repealed it soon after. Although newspaper editors in the affected states claimed to be confident that such censorship was inconsistent with freedom of the press, the newspapers lost their primary constitutional challenge when the Minnesota Supreme Court upheld the state's statute. (At the turn of the twentieth century the First Amendment and its state constitutional analogues were very rarely invoked and were interpreted more narrowly than they are today.) The statutes nevertheless remained largely unenforced, and the press continued to report the details of executions."

BANNER, *supra* note 97.

¹⁰⁴ *Id.*

¹⁰⁵ Letter From Chief Medical Examiner Dr. A. Jay Chapman to Dr. Armond Stuart of the Department of Corrections, with suggested revisions for execution protocol. June 24, 1981, https://drive.google.com/file/d/1CLDC54ZffRHsZSV5kLj_Ve0wgjRJv611/view?usp=sharing

and how the inmate was transported to the execution chamber.¹⁰⁶ In addition, a few protocols kept the identity of members of the execution team confidential.¹⁰⁷ The execution team was generally understood to include only individuals present and directly involved with executing the inmate, including the warden, executioner, escort officers, recorders, and supervisors.¹⁰⁸

Since 2010, fourteen states have enacted laws that extend and intensify secrecy surrounding executions.¹⁰⁹ Those laws have varying degrees of specificity, but all prohibit the disclosure of the identity of the executioner and others directly involved in carrying out executions. They also cover crucial details about the drugs themselves, including in some instances the type of drugs used in executions, details about the drugs' makeup, information about the drug cocktail or combination and how it was developed, and the identities of lethal injection drug suppliers.¹¹⁰

¹⁰⁶ Texas Department of Criminal Justice Execution Protocol (Sep., 2005): "No public announcement shall be made concerning the exact time, method, or route of transfer" (6). "No family or media visits allowed at the Huntsville Unit" (7); Tennessee Department of Corrections Execution Protocol (September 2013): "Representatives of the news media are not allowed inside the secure perimeter of the institution during the time of active Death Watch or during an execution for any purpose whatsoever, unless selected as a witness to the execution" (49). Photographic or recording equipment are prohibited at the execution site during the execution (93); Oklahoma Department of Corrections Execution Protocol (October 2010): "No cameras, tape recorders, or other recording devices will be allowed in the viewing area." (13).

¹⁰⁷ Oklahoma Department of Corrections Execution Protocol (October 2010): "The Warden of the Oklahoma State Penitentiary or designee will notify the executioners of an execution date in a timely manner. The identities of these individuals will remain confidential." (8); Tennessee Department of Corrections Execution Protocol (Sep. 2013): "The identity of the Execution Team is confidential" (50); Texas Department of Criminal Justice Execution Protocol 4/25/05: "Employee participants in the Execution Process shall not be identified or their names released to the public" (9). The execution team before the proliferation of drug secrecy statutes generally included individuals present and directly involved with executing the inmate, including the warden, executioner, escort officers, recorders, and supervisors.

¹⁰⁸ Tennessee Department of Corrections Execution Protocol, September 2013, "The execution team shall consist of: Warden, Deputy Warden, Executioner, Extraction Team, Death Watch Team, IV Team, Lethal Injection Recorder, Facility Maintenance Supervisor, MIS Security Systems Technician(s), and Escort Officer(s)." (7)

¹⁰⁹ Robin Konrad, *Behind the Curtain: Secrecy and the Death Penalty in the United States*, DEATH PENALTY INFORMATION CENTER (Nov. 20, 2018), <https://documents.deathpenaltyinfo.org/pdf/SecrecyReport-2.f1560295685.pdf>. "Since January 1, 2011, legislatures in thirteen states have enacted new secrecy statutes that prevent the public from obtaining important information about executions." The thirteen states that enacted secrecy statutes are Arkansas, Georgia, Indiana, Louisiana, Mississippi, North Carolina, Ohio, Oklahoma, South Dakota, Tennessee, Texas, Virginia, and Wyoming. In addition to the thirteen states the DPIC identifies, we also included Idaho, which passed a secrecy statute in 2022.

¹¹⁰ In *Wood v. Ryan*, *supra* note 1 and *Bray v. Lombardi*, 516 S.W.3d 839 (Mo. Ct. App. 2017): Plaintiffs were denied information such as concentration, pH, Osmolarity, expiration date, and lot numbers of drugs.

For example, Georgia’s 2013 statute¹¹¹ says that

[...] 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 [...] Such information shall be classified as a confidential state secret.¹¹²

Idaho’s secrecy law, which was passed in February 2022, makes the identities of

[a]ny person or entity who compounds, synthesizes, tests, sells, supplies, manufactures, stores, transports, procures, dispenses, or prescribes the chemicals or substances for use in an execution or that provides the medical supplies or medical equipment for the execution process” confidential and inadmissible as evidence in court.¹¹³

Of the death penalty states that have carried out lethal injection executions since 2010, all withheld some information about the execution process. Every state except one withheld information about the source of their execution drugs.¹¹⁴ The recent history of execution secrecy in the state of Texas exemplifies the changed nature of, and reasons for extending and intensifying, secrecy practices.

In 2015, Senator Joan Huffman authored Texas Senate Bill 1697, which amended Article 43.14 of the Code of Criminal Procedure. This amendment extended the veil of secrecy to include the “name, address, and other identifying information” of “any person or entity that manufactures, transports, tests, procures, compounds, prescribes, dispenses, or provides a substance or supplies used in an execution.”¹¹⁵ One of the amendment’s sponsors in the Texas House of Representatives offered the following explanation for this provision, “All we’re trying to do is protect individuals from threats of physical violence. And that’s really all the bill’s about.”¹¹⁶

¹¹¹ Konrad, *supra* note 109, at 14.

¹¹² Ga. Code Title, § 42-5-36, (2019).

¹¹³ Act of Idaho Legislature, H.B. 658 (2022). Arkansas is the only death penalty state with an exception in its new secrecy statute that allows disclosure of the identities of lethal injection drug producers and suppliers “in litigation under a protective order.” See Konrad, *supra* note 109.

¹¹⁴ *State-by-State Execution Protocols*, DEATH PENALTY INFORMATION CENTER, <https://deathpenaltyinfo.org/executions/methods-of-execution/state-by-state-execution-protocols> (last visited July 1, 2022).

¹¹⁵ Act of Texas Legislature, Ch. 209, S.B. 1697, Sec. 1, September 1st, 2015.: “The name, address, and other identifying information of the following is confidential and excepted from disclosure under Section 552.021, Government Code:

any person who participates in an execution procedure described by Subsection (a), including a person who uses, supplies, or administers a substance during the execution; and

any person or entity that manufactures, transports, tests, procures, compounds, prescribes, dispenses, or provides a substance or supplies used in an execution.”

¹¹⁶ 84th Tx. Leg., S.B. 1697 - Statement of Legislative Intent, May 19, 2015.

The sponsors offered no evidence of credible threats to any pharmacy. Nevertheless, they contended that if their identities were not protected “Almost none of the manufacturers or compounders will sell this drug to Texas or any other state right now.” References to vague threats of violence and intimidation and acknowledgement of the necessity of secrecy to help ensure the lethal drug supply have been common justifications for what we call “the new secrecy.”¹¹⁷

Some states have achieved similar enhancements of secrecy through administrative action rather than legislation. For example, the Alabama Department of Corrections treats the state’s lethal-injection protocol as confidential and “outside the purview of a public records request.”¹¹⁸ And the Utah Department of Corrections redacted execution protocol states that the “warden shall ensure completion of all arrangements necessary for security of executioners and protection of their identities.”¹¹⁹

Whether by legislation or administrative action, the last decade has witnessed a dramatic intensification and expansion of the regime of secrecy. It represents a clear departure from traditions of disclosure surrounding the execution process. The new secrecy laws conceal the identities of drug suppliers or expand the definition of the already confidential “execution team” to include them.

When challenged in court, judges have generally sided with the state and resisted calls for disclosure. For example, in 2014 Tennessee death row inmates filed suit seeking the names of officials involved in the lethal injection execution

¹¹⁷ Deb. surrounding 2014 La. H.B. 328, (Emily Lane, *Louisiana Lawmaker Removes Electric Chair Execution Option from Bill*, NOLA (Apr. 29, 2014), https://www.nola.com/news/politics/article_7a63c503-f5d7-5b0e-8740-38fb59ec7125.html); Deb. around Ind. Code § 36-38-6-1(e) and (f) (Olivia Covington, *Death Penalty ‘Secrecy Statute’ Now in Hands of Justices*, THE IND. LAWYER (June 10, 2020), <https://www.theindianlawyer.com/articles/death-penalty-secrecy-statute-now-in-hands-of-justices>; Rhonda Cook, *Lethal Injection Secrecy Bill Wins Approval*, THE ATLANTA JOURNAL-CONSTITUTION (Mar. 26, 2013), <https://www.ajc.com/news/state--regional-govt--politics/lethal-injection-secrecy-bill-wins-approval/MxDpXGXmwDhJZH6gmzxc8J/>; “DOC and the bill’s sponsor, Rep. Kevin Tanner, R-Dawsonville, said the state needed to shield those who participate in executions from being harassed or ostracized in the community. Tanner, a former Department of Corrections board member, said the companies that supply the drugs ‘are very reluctant to participate in this process because of harassment and threats.’ There has never been any genuine threat of violence toward a lethal injection drug supplier. The state only provides a few crude emails and sporadic complaints, none of which establish a clear and direct threat.”

Discussing the foolishness of these threat of violence claims, Judge Jane Stranch writes, “[a]s Sister Helen Prejean pointed out in her testimony for the Plaintiffs, anti-death penalty advocates seek to preserve the lives of even those convicted of serious crimes—hardly a group of activists likely to revert to violence against pharmacy employees.” In re: Ohio Execution Protocol Litigation, Case No. 2:11-cv-1016 (Jane Stranch Dissent). Mary Fan’s article *The Supply-Side Attack on Lethal Injection and the Rise of Execution Secrecy* is one of the few law review articles defending keeping suppliers’ identities secret. Similar to *Owens v. Hill*, 758 S.E.2d 794 (Ga. 2014), Fan claims that, “Suppliers whose identities are revealed have halted sales due to threats, hate mail, constant press inquiries, and lawsuits.” Mary D. Fan, *The Supply-Side Attack on Lethal Injection and the Rise of Execution Secrecy*, 95 Boston U.L. Rev. 427 (2015).

¹¹⁸ *Supra* note 114.

¹¹⁹ UTAH DEPARTMENT OF CORRECTIONS EXECUTION PROTOCOL (2010), https://files.deathpenaltyinfo.org/legacy/files/pdf/ExecutionProtocols/UtahProtocol_06.10.10.pdf.

process as well as details about the execution itself.¹²⁰ When the case reached the Tennessee Supreme Court, it refused to require such disclosure.

Writing for the majority, Justice Jeffrey Bivens pointed to statements made by Senator Mark Norris, who sponsored the secrecy legislation, as a signal of legislative intent:

There was a Court of Appeals decision two years ago, the Ray case, which interpreted our current statute more narrowly than we think is appropriate. In fact, so narrowly as only applying to persons that it has become difficult for the Department of Correction sometimes to obtain the materials that are needed because those who would provide the materials are afraid that they will be subject to some kind of exposure or liability. What this bill does is to clarify that persons and entities, persons or entities, have the same protections under the... exemptions from public disclosure.¹²¹

Justice Bivens also referenced the struggles that Departments of Corrections in Tennessee and elsewhere have had in obtaining drugs and other materials for execution, implicitly recognizing that suppliers would be reluctant to be involved in executions without secrecy.

Reflecting the same kind of argument used by proponents of execution secrecy in Texas and other states, Bivens noted that, “The reasons supporting nondisclosure of the identities of those involved in the execution of a death row inmate ‘are obvious, including avoiding the risk of harassment or some other form of retaliation [...]’”¹²² Indeed, this “risk of harassment or [...] retaliation” served as a central justification in a series of court decisions that kept the names of entities involved with lethal injection drugs.¹²³

IV. WHAT DIFFERENCE DOES THE NEW SECRECY MAKE

The existing literature on lethal injection drug secrecy identifies three consequences of the new secrecy.¹²⁴ First, drug secrecy laws by definition prevent the public from accessing information necessary to form informed opinions about execution by

¹²⁰ West v. Schofield, 460 S.W.3d 113 (TN S.C. 2015): “We conclude that Tennessee Code Annotated section 10–7–504(h) does not create a privilege that protects the identities of John Doe Defendants from pretrial discovery.”

¹²¹ *Id.*

¹²² *Id.*

¹²³ Landrigan v. Brewer, WL 4269559 (Az. D. 2010); In Re: Ohio Execution Protocol, 868 F.Supp.2d 625 (S.D. Ohio, 2012); Schad v. Brewer, 732 F.3d 946 (9th Cir. 2013); Wood v. Ryan, 759 F.3d 1076 (9th Cir. 2014); Owens et al. v. Hill, 295 Ga. 302 (GA S.C. 2014); Waldrip v. Owens, 014 WL 12496989 (Westlaw Citation) (Ga. N.D. 2014); Jordan v. Hall, WL 928871 (E.D. Missouri, 2015); West v. Schofield, 460 S.W.3d 113, (Tn. S.C. 2015); Guardian News and Media LLC, et al. v. Ryan, 225 F.Supp.3d 859, (Az., 2016).

¹²⁴ Drug secrecy involves attempts to shield information about the drugs used in lethal injection (identity of drug supplier, identity and aspects of drug themselves, drug protocol, how protocol was determined).

lethal injection.¹²⁵ Second, secrecy laws prevent death row inmates from exercising their constitutional rights and bringing legitimate legal challenges to the courts.¹²⁶ Third, these laws allow death penalty states to rely on minimally-regulated compounding pharmacies to obtain lethal injection drugs and circumvent federal regulations, pharmaceutical company policies, and international law.¹²⁷

¹²⁵ Mennemeier, *supra* note 82, at 443–92: (Secrecy statutes are unconstitutional because they limit the public’s right of access); Adam Lozeau, *Obscuring the Machinery of Death: Assessing the Constitutionality of Georgia’s Lethal Injection Secrecy Law*, 32 MINN. J. OF L. & INEQUALITY 451 (2014) (Secrecy laws violate the First Amendment, due process right of access to courts, and separation of powers principles);

Nathaniel Crider, *What You Don’t Know Will Kill You: A First Amendment Challenge to Lethal Injection Secrecy*, 48 COLUM. J. OF L. & SOC. PROBS. 1 (2014) (Public has qualified right of access to info about lethal injection drugs under 1A); Andrew Shi, *Reviewing Refusal: Lethal Injection, the FDA, and the Courts*, 168 U. PA. L. REV. 245 (2019) (Secrecy laws prevent people from evaluating efficacy of compounding pharmacy drugs, which are occasionally diverted to patient market); Clay Calvert et al, *Access to Information About Lethal Injections: A First Amendment Theory Perspective on Creating a New Constitutional Right*, 38 HASTINGS COMM. & ENT. L. J. 1 (2015) (1A theory demands public and inmate access to details of drugs, procedures, and personnel involved in executions); William W. Berry III, *Individualized Executions*, 52 U.C. DAVIS L. REV. 1779 (2019) (Courts should assess execution techniques on case-by-case basis to determine constitutionality to allow transparency, give inmates dignity and allow public to have debate/think of legitimate capital punishment); Nadine G. Rodriguez, *Suppressing the Truth: States’ Purposeful Violation of the Right of No Cruel or Unreal Punishment in Lethal Injection Executions Comment*, 47 ST. MARY’S L.J. 673 (2016); Maddy Gates, *Drawing Back the Curtain: Executions and the First Amendment*, HARV. C.R.-C. L. L. REV. (Oct. 24, 2019), <https://harvardcrcl.org/drawing-back-the-curtain-executions-and-the-first-amendment/>; Eric Berger, *Courts, Culture, and the Lethal Injection Stalemate*, 62 WILLIAM & MARY L. REV. 1 (2020).

¹²⁶ Eric Berger, *Lethal Injection Secrecy and Eighth Amendment Due Process*, 55 B.C. LAW REVIEW 1367 (2014); Nadine G. Rodriguez, *Suppressing the Truth: States’ Purposeful Violation of the Right of No Cruel or Unreal Punishment in Lethal Injection Executions Comment*, 47 ST. MARY’S L. J. 673 (2016); Gates, *supra* note 125; Jasmine Sharma, *Lethal Attack on Lethal Injection: A Proposal to End the Final Loophole in the Death Penalty Debate* 59 WASH. U. J. L. & POL’Y 301 (2019) (Secrecy laws should be lifted as they hinder constitutional rights of death row inmates); Harrison Blythe, ‘Laboratories of Democracy’ or ‘Machinery of Death’? *The Story of Lethal Injection Secrecy and a Call to the Supreme Court for Intervention*, 65 CASE W. RESV. L. REV. 1269 (2015) (Circularity problem, plaintiffs can’t find alternatives if they don’t have access; Unless SC intervenes, states primary interest in executing prisoners however they can will continue); Deborah W. Denno, *Lethal Injection Chaos Post-Baze*, 102 GEO. L. J. 1331 (2014) (Secrecy just hides problems with lethal injection, will be constantly bombarded with lawsuits until actual solutions are figured out instead of a temporary fix of secrecy); Leigh B. Bienen, *Anomalies: Ritual and Language in Lethal Injection Regulations*, 35 FORDHAM URB. L. J. 857 (2008) (Secrecy hides carelessness and potential violations of laws, pattern of secrecy with states botching executions and committing more executions); Julia Eaton, *Warning: Use May Result in Cruel and Unusual Punishment: How Administrative Law and Adequate Warning Labels Can Bring about the Demise of Lethal Injection Notes*, 59 B.C. L. REV. 355 (2018) (Secrecy laws effectively bar civil suits seeking to ban use of drugs and creates significant obstacles for inmates hoping to appeal their death sentence); Berry III, *supra* note 125 (Courts should assess execution techniques on case-by-case basis to determine constitutionality, allow for inmates to bring up extenuating circumstances to argue against the viability of certain methods).

¹²⁷ Berger, *supra* note 126.

With respect to the first of these consequences, some scholars argue that the new secrecy laws are incompatible with First Amendment values. Public debate requires access to relevant information. Without that information, speech becomes empty and ritualistic. Informed public consideration of the death penalty in general, and lethal injection in particular, requires public access to details surrounding the lethal injection process.¹²⁸ Other scholars contend that because details about executions have historically been open and accessible to the public and because states have not identified a compelling reason for withholding information, such statutes are indefensible.¹²⁹ Some even argue that transparency is necessary for the public to evaluate whether states' executions comport with "evolving standards of decency."¹³⁰

The new secrecy also creates a circularity problem for death row inmates. To make a legitimate claim of cruel and unusual punishment, inmates need complete information surrounding the lethal injection process. However, they cannot access this information unless they have a legitimate Eighth Amendment claim.¹³¹ As a result, there are few avenues through which inmates and their lawyers can gather the information necessary to support a successful constitutional challenge to state execution methods.¹³²

Many scholars have described the new secrecy laws as a kind of "band-aid," bury-your-head in the sand solution to a serious problem, barring inmates from discovering the causes of botched executions and preventing inmates from ensuring that their own executions are not botched. The more that states keep their execution procedures secret, the more the risk of unnecessary pain grows.¹³³ By limiting their ability to raise legal challenges to lethal injection, some believe secrecy statutes violate inmates' 14th amendment due process rights.¹³⁴ As Eric Berger writes, "By any measure, an inmate's Eighth Amendment right protecting him against an excruciating execution is 'weighty.' And whether one conceives of the inmate's Eighth Amendment right against an excruciating execution as a liberty interest or a 'residual life interest,' that interest is plainly within the Fourteenth Amendment's contemplation."¹³⁵

The new secrecy laws were enacted as a response to difficulties death penalty states encountered in obtaining supplies of lethal injection drugs, shielding¹³⁶ their

¹²⁸ Gates, *supra* note 125; Peters, *supra* note 82.

¹²⁹ Martin McKown, *Unconstitutional Killing: The Deadly Dilemma Surrounding Oklahoma's Lethal Injection Secrecy Statute*, 53 DUQ. L. REV. 611 (2015).

¹³⁰ Peters, *supra* note 128; Mennemeier, *supra* note 82; Crider, *supra* note 125.

¹³¹ Berger, *supra* note 126; Nadine G. Rodriguez, *Suppressing the Truth: States' Purposeful Violation of the Right of No Cruel or Unreal Punishment in Lethal Injection Executions Comment*, 47 ST. MARY'S L. J. 673 (2016); McKown, *supra* note 129.

¹³² *Civil Procedure — Lethal Injection Secrecy — Eleventh Circuit Denies Mississippi Death Row Prisoners Discovery by Creating a Federal Lethal Injection Secrecy Privilege. — Jordan v. Commissioner, Mississippi Department of Corrections*, 908 F.3d 1259 (11th Cir. 2018), 133 HARV. LAW REVIEW 715 (2019).

¹³³ Berger, *supra* note 126

¹³⁴ *Supra* note 132; Eric Berger, *Private: Botched Executions & the Problem of Lethal Injection Secrecy*, AM. CONST. SOC'Y (Jan. 29, 2015), https://www.acslaw.org/?post_type=acsblog&p=10685; Berger, *supra* note 126.

¹³⁵ Berger, *supra* note 126.

¹³⁶ James Gibson & Corinna B. Lain, *Death Penalty Drugs and the International Moral*

efforts to find new suppliers. In 2011 the European Union banned the exportation of execution drugs.¹³⁷ With expiring reserves of sodium thiopental and no company to replenish the supply, states either had to find new suppliers or change their protocols if they wanted to continue capital punishment. But domestic pharmaceutical companies soon prohibited the use of their drugs in executions.¹³⁸

In response, death penalty states have turned to compounding pharmacies.¹³⁹ Compounding pharmacies mix drugs to meet the needs of individual patients or operate as producers, creating large quantities of drugs that are near-replicas of mainstream products. Compounding pharmacies do not have to register with the FDA or inform the FDA what drugs they are making.¹⁴⁰ They have increasingly come under fire for failing quality tests and causing serious illness and even death due to contamination.¹⁴¹ Secrecy laws protect these questionable suppliers.

In addition, state officials have violated the law to obtain lethal injection drugs. We know about this only when regulatory agencies intervene or when pharmaceutical companies reveal it. Those drugs have been obtained from unregulated and unreliable sources, posing a great risk to inmates who are executed with them. In 2011, for example, the Drug Enforcement Administration (DEA) started seizing sodium thiopental from several state DOCs.¹⁴² The DEA first confiscated Georgia's supply in March because there were "questions about how the drug was imported to the U.S."¹⁴³ On April 1st 2011, the DEA took possession of sodium thiopental from Kentucky and Tennessee.¹⁴⁴ It later seized the imported drug from Alabama and South Carolina as well. States' new lethal injection secrecy statutes began to appear around the same time that state officials began procuring drugs illegally.

In April 2017, America's largest drug distributor accused Arkansas officials of illegally procuring lethal injection drugs. The company, McKesson Pharmaceuticals, said Arkansas fraudulently bought its drug, vecuronium bromide, a paralytic

Marketplace, 103 GEO. L.J. 1215 (2015).

¹³⁷ Matt Ford, *Can Europe End the Death Penalty in America?* THE ATLANTIC (Feb. 19, 2014), <https://www.theatlantic.com/international/archive/2014/02/can-europe-end-the-death-penalty-in-america/283790/>.

¹³⁸ Gibson & Lain, *supra* note 136.

¹³⁹ *Overview of Lethal Injection Protocols*, DEATH PENALTY INFORMATION CENTER (May 6, 2019), <https://deathpenaltyinfo.org/executions/lethal-injection/overview-of-lethal-injection-protocols>.

¹⁴⁰ "Compounding Pharmacies and Lethal Injection," DEATH PENALTY INFORMATION CENTER (Nov. 7, 2018), <https://deathpenaltyinfo.org/executions/lethal-injection/compounding-pharmacies>.

¹⁴¹ Center for Drug Evaluation and Research, *Compounding and the FDA: Q & A*, U.S. FOOD AND DRUG ADMINISTRATION (last modified June 29, 2022), <https://www.fda.gov/drugs/human-drug-compounding/compounding-and-fda-questions-and-answers>.

¹⁴² *New Records Handed Over by DEA Show Prison Officials May Have Broken Law When Importing Lethal Injection Drugs*, A.C.L.U. NORTHERN CA. (May 18, 2011), <https://www.aclunc.org/news/new-records-handed-over-dea-show-prison-officials-may-have-broken-law-when-importing-lethal>.

¹⁴³ Jabali-Nash & Naimah, *DEA Seizes Ga.'s Supply of Critical Lethal Injection Drug, All Executions Called Off*, CBS NEWS (Mar. 16, 2011), <https://www.cbsnews.com/news/dea-seizes-gas-supply-of-critical-lethal-injection-drug-all-executions-called-off/>.

¹⁴⁴ *Timeline for California's 'Secret Mission' for Lethal Injection Drugs*, A.C.L.U. NORTHERN CA. (Aug. 11, 2011), <https://www.aclunc.org/blog/timeline-california%E2%80%99s-secret-mission-lethal-injection-drugs>.

used in many three drug lethal injection protocols. According to McKesson’s lawyer, Arkansas’s prison system “never disclosed its intended purpose for these products.” In fact, Arkansas officials purchased the drugs using an account opened under the medical license of an Arkansas physician. McKesson’s lawyer argued that this deception “implicitly represented that the products would only be used for a legitimate medical purpose.”¹⁴⁵ The drugs were also shipped to an address that the state had previously used to receive therapeutic medical supplies such as stethoscopes and surgical gloves. Using McKesson’s drugs in executions violated the company’s commitment not to allow distribution of products which could be used for lethal injections.”¹⁴⁶

In October of 2020, *The Guardian* found an Arizona DOC order for 1,000 vials of pentobarbital sodium salt, another execution drug, to be shipped in “unmarked jars and boxes.”¹⁴⁷ Arizona and federal law make it a felony to dispense pentobarbital without a valid prescription. Licensed practitioners are not allowed to issue pentobarbital prescriptions for executions because they serve no therapeutic or medical purpose.¹⁴⁸ *The Guardian* asked Arizona’s Department of Corrections to explain its seemingly illegal purchase of pentobarbital. The department responded that it does not discuss how it obtains execution drugs and stressed that the information is “statutorily confidential.”¹⁴⁹ As we saw in the Joseph Wood execution, Arizona’s secrecy statute ensures the anonymity of anyone providing an “ancillary function(s) in the execution, including the source of the execution chemicals.”¹⁵⁰

¹⁴⁵ Alan Blinder, *Arkansas Judge Moves to Block Executions*, N.Y. TIMES (Apr. 15, 2017), <https://www.nytimes.com/2017/04/14/us/arkansas-is-accused-of-deception-in-buying-drug-used-in-executions.html>.

¹⁴⁶ *Id.*

¹⁴⁷ Ed Pilkington, *Revealed: Republican-Led States Secretly Spending Huge Sums on Execution Drugs*, THE GUARDIAN (Apr. 9, 2021), <https://www.theguardian.com/world/2021/apr/09/revealed-republican-led-states-secretly-spending-huge-sums-on-execution-drugs>.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ Az. Revised Statutes, A.R.S. § 13-757(C) (2009), State officials’ hiding behind secrecy to conceal misconduct is an ongoing trend. In a damning report, two newspapers revealed that Idaho officials hid the intended use of lethal injection drugs that they were buying, falsified official documents to hide their tracks, and “acted in bad faith to stonewall public records requests for execution-related information” over the course of the past decade. *Investigative Report: Idaho Records Reveal State’s Efforts to Conceal Ghost Purchase of Execution Drugs and Out-of-State Cash Payment to Pharmacy with Dubious Regulatory History*, DEATH PENALTY INFORMATION CENTER (Jan. 21, 2022.), <https://deathpenaltyinfo.org/news/investigative-report-idaho-records-reveal-states-efforts-to-conceal-ghost-purchase-of-execution-drugs-and-out-of-state-cash-payment-to-pharmacy-with-dubious-regulatory-history>.

In November 2011, the Idaho Department of Corrections (IDOC) employed a pharmacist to travel Salt Lake City and act as a front for the illegal purchase of pentobarbital from a Utah pharmacy. A former IDOC employee testified in a deposition that IDOC had paid “upward of \$10,000 in cash” for the out-of-state drug purchase. *Investigative Report: Idaho Records Reveal State’s Efforts to Conceal Ghost Purchase of Execution Drugs and Out-of-State Cash Payment to Pharmacy with Dubious Regulatory History*, DEATH PENALTY INFORMATION CENTER (Jan. 21, 2022.), <https://deathpenaltyinfo.org/news/investigative-report-idaho-records-reveal-states-efforts-to-conceal-ghost-purchase-of-execution-drugs-and-out-of-state-cash-payment-to-pharmacy-with->

The information such secrecy statutes protect is precisely the information that is necessary to identify state impropriety and deter such action in the future.¹⁵¹

V. CONCLUSION

This article documents a historically unprecedented intensification and expansion of the regime of execution secrecy. We argue that the new secrecy represents a significant departure from the longstanding tradition of openness about the identity of the executioner and the suppliers of execution methods. This departure is particularly consequential when lethal injection is the method of execution.

Kelly Mennemeier explains why this is the case. She argues that knowing the details about lethal injection drugs is more important than knowing details about past execution materials. As she notes, “The type of rope or gun or supplier of electricity or gas” does not “intimately impact” the result of executions. However, with lethal injection, “[I]mproper drug dosages or concentrations, expired drugs, and contaminated drugs risk [causing] the condemned prisoner excruciating pain.”

No one can properly evaluate those risks without knowing the identity of lethal injection drug suppliers and details about the drugs.¹⁵² And we know that, like the Joseph Wood execution, lethal injection executions are more frequently botched than other kinds of executions.¹⁵³ Instead of departing from the longstanding history of openness about executions, states carrying out lethal injection executions should reverse the recent intensification and expansion of secrecy. If the United States continues to execute, it should bring executions out of the shadows and provide more transparency, not less.

dubious-regulatory-history.

¹⁵¹ Some scholars provide solutions that could remedy problems associated with secrecy without repealing the secrecy statutes outright. See Berger, *supra* note 134.; Peters *supra* note 82.

¹⁵² Mennemeier, *supra* note 82: “However, the drugs and drug combinations used in lethal injections affect the condemned prisoner’s experience of dying to a much greater extent than other means of execution, where the type of rope or gun or supplier of electricity or gas does not intimately impact the resultant experience of dying and death. Insufficient sedatives, for instance, may leave a prisoner still conscious when the more painful, death-inflicting drugs enter the body. [...] With other forms of execution, knowing the method of execution was akin to understanding the method of execution. With lethal injection, however, additional information is required to understand the method of execution. [...] Improper drug dosages or concentrations, expired drugs, and contaminated drugs risk [can cause] the condemned prisoner excruciating pain.”

¹⁵³ *Botched Executions*, DEATH PENALTY INFORMATION CENTER (Nov. 17, 2011), <https://deathpenaltyinfo.org/executions/botched-executions>: Lethal Injection has a botched execution rate of 7.12%. Other common execution methods such as electrocution and hanging have botched execution rates of 1.92% and 3.12% respectively.