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Many states that still allow capital punishment have been facing shortfalls of the drugs used in lethal injections.[1] American companies have been increasingly unwilling to supply states with these drugs in the face of public pressure and negative publicity, and foreign pharmaceutical companies (particularly those in nations where the death penalty is outlawed) are almost universally unwilling to sell the drugs if they will be used to kill prisoners.[2] This shortage of lethal drugs has led to delays in executions and states scrambling to acquire these drugs as their stockpiles expire.[3] This has led to embarrassing situations for these states, such as when, in March 2011, the federal Drug Enforcement Agency (DEA) seized a shipment of drugs intended for the government of the state of Georgia for being illegally imported.[4] In response to this drug shortage (and likely to avoid public outcry), in March 2013, Georgia implemented a law making the composition and origin of drugs used in lethal injections a "state secret" and outlawing the disclosure of such information, even to judges.[5]

This Note will address the constitutional and prudential implications of such secrecy laws. These laws violate the First Amendment, the constitutional right to due process, and

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1. Ed Pilkington, *US Executions Delayed by Shortage of Death Penalty Drug*, THE GUARDIAN (Sept. 28, 2010, 1:56 PM), http://www.theguardian.com/world/2010/sep/28/us-executions-delayed-drug-shortage.

2. *Id.*; Josh Sanburn, *The Hidden Hand Squeezing Texas' Supply of Execution Drugs*, TIME (Aug. 7, 2013), http://nation.time.com/2013/08/07/the-hidden-hand-squeezing-texas-supply-of-execution-drugs/.

3. Pilkington, *supra* note 1.

4. Liliana Segura, *The Executioner's Dilemma*, THE NATION (May 12, 2011), http://www.thenation.com/article/160648/executioners-dilemma#.

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

constitutional separation of powers principles. A First Amendment violation is possible because these laws block information vital to the determination of the nature and efficacy of the drugs from disclosure by journalists and authorizes criminal sanctions for doing so. A due process violation is possible because, without knowledge of the composition and origin of the drugs used to execute a prisoner, there is no assurance that the execution will not be unconstitutionally lengthy or painful. Finally, the idea that state executive officers can shield vital details about the actions of law enforcement from judicial scrutiny implicates important separation of powers principles. Because the imposition of capital punishment is biased on the bases of race,[6] sex,[7] and sexual orientation,[8] racial minorities, men, and homosexuals are more likely to suffer the harms this law imposes if it is found to be valid.

Part I of this Note briefly describes the history of capital punishment in America, including tracing the search for "humane" forms of execution that comport with the requirements of the Eighth Amendment. Part II describes the history of the death penalty's discriminatory imposition. Part III discusses the growing shortage of lethal injection drugs in the United States, while Part IV describes the secrecy law that is the subject of this Note, including the context in which it was passed and a recent case challenging its validity. Part V argues that the secrecy law impermissibly denies death row prisoners a meaningful opportunity to challenge the constitutionality of their impending executions under the Eighth Amendment. Part VI argues that the law is also invalid because it violates essential separation of powers principles by disallowing judicial review of certain executive actions. Part VII argues that the law also violates the First Amendment's guarantee of free speech by impermissibly burdening protected speech. Finally, Part VIII presents possible alterations to the law to save its constitutionality while still achieving the government's interests.

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6. Lumumba Akinwole Bandele, *Racism and the Death Penalty: New Evidence*, EBONY (Mar. 13, 2013), http://www.ebony.com/news-views/racism-and-the-death-penalty-new-evidence-493#axzz2NWlR4FPu.

7. Steven F. Shatz & Naomi R. Shatz, *Chivalry is Not Dead: Murder, Gender, and the Death Penalty*, 27 BERKELEY J. GENDER L. & JUST. 64, 105–06 (2012).

8. *Citing Anti-Gay Bias, ACLU Asks Governor to Spare Missouri Man Set for Execution*, AM. CIV. LIBERTIES UNION (Feb. 5, 2001), https://www.aclu.org/lgbt-rights_hiv-aids/citing-anti-gay-bias-aclu-asks-governor-spare-missouri-man-set-execution.

I. History of the Death Penalty in the United States

A. *The Death Penalty in the Colonial and Revolutionary Period*

Execution has been used as a criminal punishment from the very earliest days of Anglo-Saxon governance in what is today the United States.[9] The first recorded execution in the colonial United States took place in Jamestown in 1608, when a prominent member of the colony's leadership was executed for treason and mutiny.[10] Though data is limited, scholars estimate that 1,578 individuals were executed in the American colonies between 1600 and 1800.[11] Typical colonial capital laws instituted the death penalty for a wide variety of offenses, including murder, manslaughter, and a variety of religious offenses,[12] though there is evidence that executions for religious offenses were rare in practice.[13] Some colonies did institute harsher laws than others. For instance, Virginia's 1612 "Divine, Moral, and Martial Laws" instituted the death penalty for crimes as minor as killing chickens and trading with Indians.[14] Important regional differences arose among the colonies, with the harshest capital codes enacted by the southern colonies seeking to maintain control

9. RAYMOND PATERNOSTER ET AL., THE DEATH PENALTY: AMERICA'S EXPERIENCE WITH CAPITAL PUNISHMENT 5 (2008).

10. *Id.* Captain George Kendall was executed by firing squad, in contrast to the standard of execution by hanging that would become typical in the years immediately following Kendall's death. *Id.*

11. *Id.* at 8. Though this rate of roughly eight executions per year may seem low, it is important to remember that it is estimated that the colonies' total population was around 100,000 people until 1670, and that by 1800 the U.S. population was still only roughly three million. *Id.*; *see also Estimated Population of American Colonies: 1610 to 1780*, VANCOUVER ISLAND U., http://web.viu.ca/davies/h320/population.colonies.htm (last visited Mar. 14, 2014).

12. *See* CAPITAL PUNISHMENT IN THE UNITED STATES: A DOCUMENTARY HISTORY 8–9 (Bryan Vila & Cynthia Morris eds., 1997) [hereinafter CAPITAL PUNISHMENT IN THE UNITED STATES] (describing the 1641 Capital laws of the Massachusetts Bay Colony, imposing the death penalty for the offenses of Idolatry, Witchcraft, Blasphemy, Murder, Manslaughter, Poisoning, Bestiality, Sodomy, Adultery, "Man-stealing" (theft of a slave), False Witness in Capital Cases, and Rebellion).

13. PATERNOSTER ET AL., *supra* note 9, at 6; *see also* CAPITAL PUNISHMENT IN THE UNITED STATES, *supra* note 12, at 2.

14. Michael H. Reggio, *History of the Death Penalty*, PBS FRONTLINE, http://www.pbs.org/wgbh/pages/frontline/shows/execution/readings/history.html#fn6 (last visited Oct. 29, 2013). Many of the most minor crimes were removed from the capital code seven years later by Virginia's governor over fears that such harsh laws were preventing colonists from moving to Virginia. *Id.*

over the large numbers of indentured workers and slaves residing there.[15]

Colonial governments relied largely on experience and religious scripture to justify their imposition of the death penalty. After all, executions had been commonplace in England for a wide variety of crimes[16] (and the colonists could even tell themselves that their capital laws were more humane than England's, which had a much higher number of capital offenses than most colonies).[17] Colonists also used instances of support for executions in the Christian Bible as justification for their own imposition of the death penalty.[18] Colonial executions were performed almost universally by hanging,[19] and these executions were performed publicly.[20] While the publicly-performed nature of executions in the colonies likely had a deterrent effect, contemporary accounts of early public executions focused not on deterrence rationale, but rather on retributive and religious concerns. Executions were performed publicly to emphasize the social and spiritual wrongness of the offender's conduct;[21] thus, contrary to modern popular conception, public executions were slow, solemn affairs.[22]

B. The Death Penalty in Early America

After the United States of America won its independence from England in the Revolutionary War in 1783, the new states continued the execution regimes they had in place during the colonial period. The accepting attitude of the new country towards the death penalty is demonstrated in the Fifth Amendment to the Constitution. That amendment, adopted as part of the Bill of Rights in 1791, provides for due process in the cases of "capital" crimes and provides that "no person shall be . . . deprived of

15. CAPITAL PUNISHMENT IN THE UNITED STATES, *supra* note 12, at 2.

16. *Id.*

17. *Id.*

18. *Id.*; *see also Genesis* 9:6 ("Whoever sheds human blood, by humans shall their blood be shed; for in the image of God has God made mankind."); *Leviticus* 24:17, 19–21 ("Anyone who takes the life of a human being is to be put to death. . . . Anyone who injures their neighbor is to be injured in the same manner: fracture for fracture, eye for eye, tooth for tooth. The one who has inflicted the injury must suffer the same injury. Whoever kills an animal must make restitution, but whoever kills a human being is to be put to death.").

19. PATERNOSTER ET AL., *supra* note 9, at 13. Roughly 96% of U.S. executions prior to 1890 were accomplished via hanging. The remaining 4% were accomplished via other methods, with firing squads and burning being the predominant methods. *Id.*

20. PATERNOSTER, *supra* note 9, at 12.

21. *Id.*

22. *Id.*

life . . . without due process of law."[23] This is not to say, however, that the transition from colonies to an independent country had no effect on the capital punishment laws of the United States. The capital crimes codes of most states saw a large reduction in the number of capital crimes after the transition to statehood.[24] This trend was in large part the result of religious crimes being abolished or made non-capital in the new United States,[25] but several states also undertook independent reforms in the late 18th century to lessen the range of crimes subject to capital punishment.[26] In response to arguments from prominent statesmen such as Thomas Jefferson[27] and Benjamin Rush,[28] whose conceptions of criminal justice centered more on Enlightenment ideas of proportionality and offender rehabilitation than on retribution, in 1794 Pennsylvania became the first state to strongly limit the imposition of the death penalty.[29] The 1794 Pennsylvania reformations introduced the concept of degrees of murder into its criminal code and abolished the death penalty for all crimes except first-degree (premeditated) murder.[30] Over the next two decades, many other states took a similar route, limiting imposition of the death penalty to only the most heinous crimes.[31]

The mid-19th century saw another important change in the administration of the death penalty. Whereas American executions had previously all been public affairs, the 1830s and 1840s saw executions begin to move to private state spaces, such as the now-familiar penitentiary execution room.[32] Pennsylvania was the first state to make the shift, holding America's first non-public execution in a prison yard in 1834.[33] By 1845, every state in New England and the mid-Atlantic region had transitioned to non-public executions.[34] Executions were moved to private penal spaces largely on the belief that public executions actually inflamed the violent passions of potential offenders, rather than

23. U.S. CONST. amend. V.

24. PATERNOSTER, *supra* note 9, at 9–10.

25. *Id.* at 10.

26. *Id.* at 10–11.

27. CAPITAL PUNISHMENT IN THE UNITED STATES, *supra* note 12, at 16–17.

28. *Id.* at 21 ("Murder itself is propagated by the punishment of death for murder.").

29. *Id.* at 25.

30. *Id.* at 25–26.

31. *Id.* at 25.

32. *Id.* at 33.

33. *Id.*

34. *Id.*

deterring them.[35] However, many death penalty abolitionists lamented the shift from public to private executions, believing that the shift was intended to make the taking of human life more palatable to civil society, thereby undermining the overall cause of abolition.[36] Death penalty abolitionists also argued that, when the state takes the extraordinary action of taking a life, republican ideals demand that it be done in full view of the public.[37]

C. The Death Penalty in 19th and 20th Century America: The Search for Humane Methods of Killing

Another major shift in death penalty implementation that occurred during the 19th century, and into the 20th century, concerned the method of killing employed by the state. While early American executions were done almost entirely by hanging, repeated gruesome episodes caused by inexperienced local gallows operators led state officials to search for more humane (or at least more humane-seeming) methods of execution.[38] In 1888, New York City introduced a new way of executing prisoners intended to be more humane than hanging—the electric chair.[39] This hope of a humane execution method was undermined, however, at the state's very first execution by electrocution, when the initial attempt to kill the prisoner by a seventeen-second jolt of electricity failed.[40] Attending doctors found a pulse and a heartbeat, and the chair was turned back on until "the smell of burnt flesh filled the

35. *Id.* at 33. The pseudo-science of phrenology, en vogue during the mid-1800s, contributed greatly to this idea. Phrenologists believed that some people had overdeveloped "destructive" brain regions that responded with delight to executions, encouraging them to commit their own acts of violence. *Id.* at 33–34.

36. *Id.* at 34.

37. *Id.* at 50–51 (quoting Thomas C. Upham: "a great anomaly this in a republican government! Our courts of justice must be open to the public; the deliberations of our legislatures must be public . . . but when life is to be taken, when a human being is to be smitten down like an ox, when a soul is to be violently hurled into eternity, the most solemn occasion that can be witnessed on earth, then the public must be excluded. . . . If business of this nature is done at all, it must be done in the light of day . . . .").

38. *See* PATERNOSTER ET AL., *supra* note 9, at 13–15. Botched hangings commonly failed to break the prisoner's neck, resulting in a slow death by strangulation over the course of twenty to thirty minutes, accompanied by the gasping and choking of the dying individual. *Id.* at 14. Less commonly, the executed individual's head snapped completely off. *Id.*

39. CAPITAL PUNISHMENT IN THE UNITED STATES, *supra* note 12, at 68. Before introducing the electric chair, New York considered executing prisoners via a lethal injection, but this possibility was rejected when New York's medical community expressed strong opposition to the use of a medical instrument to cause death. PATERNOSTER ET AL., *supra* note 9, at 15–16.

40. PATERNOSTER ET AL., *supra* note 9, at 19.

execution room" and the prisoner was dead.[41] Nonetheless, many states rushed to implement this "modern" form of execution, and from 1930 to 1967, at least 60% of executions in the United States were performed via electric chair.[42] Despite the electric chair's widespread use, some states, reacting to the often gruesome results of botched electrocutions, instituted a new, "humane" method of execution in the 1920s—the gas chamber.[43] Nevada was the first state to adopt lethal gas as its method of execution, and by 1955, ten states had adopted its use, with over 30% of executions performed via lethal gas between 1960 to 1969.[44] Despite its framing as a humane method of execution, however, witnesses to executions via lethal gas reported the executed individual spasming, seizing, and turning purple before death occurred within a few minutes.[45]

States finally decided to address the easily botched and obviously painful methods of execution they used in the 1980s and 1990s through the introduction of lethal injection.[46] In 1977, Oklahoma became the first state to allow, by statute, the use of lethal injection as a method of execution, justifying the legislation both by the humaneness of lethal injection and by the expense of fixing the state's malfunctioning electric chair.[47] Oklahoma sought assistance from the Oklahoma Medical Association in developing its lethal injection protocol, but the Association refused due to ethical concerns.[48] As a result, Oklahoma's lethal injection protocol was developed by the state's medical examiner and a professor at the University of Oklahoma's medical school.[49] These professionals recommended the administration of three drugs—

41. *Id.*

42. *Id.* at 32–33 & Figure 2.6.

43. *See id.* at 33–34.

44. *Id.* at 34–35.

45. *Id.* at 34.

46. *See id.* at 56–57. In 1983, the state of Alabama took fourteen minutes to electrocute John Louis Evans to death, with flames surging from the electrodes connected to his leg. *Id.* at 56. In the same year, the state of Mississippi put Jimmy Lee Gray to death with lethal gas; his death took at least eight minutes and was accompanied by Gray moaning, gasping, and banging his head against a pole in the gas chamber while convulsing. *Id.*

47. *See* HUMAN RIGHTS WATCH, SO LONG AS THEY DIE: LETHAL INJECTIONS IN THE UNITED STATES 10 & n.6 (2006), *available at* http://www.hrw.org/reports/2006/us0406/3.htm. Texas passed lethal injection legislation the next day. *Id.* at 10.

48. *Id.* at 13–14.

49. *See id.* at 14–15; *see also* Deborah W. Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What it Says About Us*, 63 OHIO ST. L.J. 63, 95–96 (2002) (describing the development of lethal injection in Oklahoma in more detail).

sodium thiopental (an anesthetic intended to put the prisoner to sleep), pancuronium bromide (a muscle relaxer intended to stop the prisoner's breathing), and potassium chloride (a drug that induces cardiac arrest).[50] An identical three-drug procedure was adopted by Texas, the first state to actually carry out a lethal injection,[51] and significantly, many other states' correctional departments have candidly admitted to simply copying the lethal injection procedures utilized by early adopting states like Oklahoma and Texas rather than consulting with medical experts to develop their own protocols.[52] Thus, the three-drug protocol became ubiquitous.[53] By 2006, thirty-seven of the thirty-eight death penalty states had lethal injection statutes.[54]

Once again, however, states came to realize that their newly-adopted method of execution was not quite as humane as they may have hoped. Often, prison medical technicians have a difficult time finding a usable vein on the prisoner, subjecting him to multiple incisions and a lengthy execution process.[55] Also, the combination of the first and third drugs in the typical protocol is troublesome: the "fast-acting" nature of sodium thiopental increases the risk that the anesthetic will wear off and the prisoner will regain consciousness during the dying process,[56] and potassium chloride causes excruciating pain if administered to conscious individuals.[57] Prisoners subject to lethal injection do not typically exhibit distress; however, this is a result of the administration of pancuronium bromide, which causes total

50. HUMAN RIGHTS WATCH, *supra* note 47, at 21; Denno, *supra* note 49 at 97–98.

51. *See* HUMAN RIGHTS WATCH, *supra* note 47, at 15–16; *see also* CAPITAL PUNISHMENT IN THE UNITED STATES, *supra* note 12, at 283 (indicating Texas first used lethal injection in 1982).

52. *See* HUMAN RIGHTS WATCH, *supra* note 47, at 11–13.

53. *See id.* at 11 ("Despite the variations in state statutory language authorizing lethal injections, thirty-six state corrections agencies today use the same three-drug sequence of sodium thiopental, pancuronium bromide and potassium chloride in their lethal injection drug protocols.").

54. *Id.* at 10.

55. PATERNOSTER ET AL., *supra* note 9, at 57 (describing an instance where it took about thirty-nine minutes for medical technicians to find a useable vein, and another that took thirty-three minutes for medical technicians to find a second useable vein); *see also* HUMAN RIGHTS WATCH, *supra* note 47, at 30–36 (describing the lethal injection procedure and training of the execution team).

56. *See* HUMAN RIGHTS WATCH, *supra* note 47, at 36–38 (describing the problems by a lack of a trained-in anesthesiologist during lethal injection); Denno, *supra* note 49, at 118 n.378 (referring to sodium thiopental as "fast-acting").

57. *See* HUMAN RIGHTS WATCH, *supra* note 47, at 22 ("While potassium chloride acts quickly, it is excruciatingly painful if administered without proper anesthesia.").

paralysis in the prisoner.[58] Even an individual suffering intensely would be unable to show signs of distress, and studies have suggested that a high percentage of inmates put to death via lethal injection may have regained consciousness at some point during the process.[59]

Many death penalty reformers have argued that the second and third drugs in the lethal injection protocol are unnecessary and that a lethal dose of an anesthetic would be sufficient to cause death and avoid the risks of intense pain presented by the introduction of the second and third drugs in the protocol.[60] To date, thirteen states have adopted a one-drug protocol, utilizing a lethal dose of an anesthetic (either sodium thiopental or pentobarbital).[61]

II. The Death Penalty in the United States: A Long Story of Discrimination

Throughout the history of its use, the death penalty has been applied on a discriminatory basis. Since the earliest days of America, racial minorities and men have been subject to disproportionate death sentences, and evidence indicates that sexual orientation has also been a factor in determining whether an individual will be sentenced to death.

The history of racial bias in the imposition of the death penalty is as clear as it is long. For instance, colonial governments

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58. *See* Denno, *supra* note 49, at 100 ("[P]ancuronium bromide serves no real purpose other than to keep the inmate still while potassium chloride kills [him or her].").

59. PATERNOSTER ET AL., *supra* note 9, at 57–58 (citing a study of 49 executed prisoners performed by the University of Miami Medical School and published in *The Lancet* indicating that, at the time of death, 88% of the prisoners had anesthetic levels below that required for surgery and almost 43% of the prisoners were likely conscious at the time of death).

60. *See* HUMAN RIGHTS WATCH, *supra* note 47, at 21–28 (describing the limitations of the three-drug protocol). Additionally, many anti-death penalty advocates argue that not only would the removal of pancuronium bromide and potassium chloride from lethal injection protocols decrease the risk of the prisoner suffering intense pain, the removal of pancuronium bromide would serve transparency interests by allowing execution witnesses to more readily ascertain whether the execution truly *was* humane, rather than whether it only *seemed* humane due to the prisoner's inability to express pain and distress. *See* Denno, *supra* note 49, at 100 ("[W]hen potassium chloride is used as an additional third chemical, pancuronium bromide serves no real purpose other than to keep the inmate still while potassium chloride kills. Therefore, pancuronium bromide creates the serene appearance that witnesses often describe of a lethal injection execution, because the inmate is totally paralyzed.").

61. *State by State Lethal Injection*, DEATH PENALTY INFO. CENTER, http://www.deathpenaltyinfo.org/state-lethal-injection (last updated Feb. 22, 2014).

in the 17th century enacted many capital laws applicable only to slaves,[62] and many southern states had laws on the books until the passage of the Fourteenth Amendment in 1868 that made the death penalty available for Blacks but not Whites who committed the same crime.[63] Statistical evidence shows that racial minorities have been disproportionately given death sentences during all eras of American history. From 1608 through 1929, 51% of all executed individuals were Black;[64] during that time period, Blacks never made up more than 22% of the population, and usually significantly less.[65] From 1930 through 1967, 50% of all executed individuals were Black, and during that same time period 89% of the death sentences given for rape were given to Blacks and non-Whites.[66] The 1987 Supreme Court decision in *McCleskey v. Kemp*[67] refused to recognize that Georgia's execution regime was racially biased, and declined to hold that any individual had acted with discriminatory intent.[68] Recently, a study of Harris County, Texas prosecutions demonstrated that prosecutors were three times as likely to seek the death penalty against Black defendants as they were against Whites.[69] The evidence for race being a critical factor in the death sentence determination is not solely statistically based. In the 1984 South Carolina case of Earl Matthews, the prosecutor argued for capital punishment for a Black man convicted of murder partially because he attributed the state's high crime rate to the "moral dissolution" of the state's Black community.[70]

While there is a clear bias against Black defendants in the imposition of capital punishment, there is an equally clear bias in favor of White victims. Evidence from North Carolina in the 1930s and 1940s indicates this bias was at work: while 69% of Black-on-White killings resulted in a capital charge, only 53% of Black-on-

62. CAPITAL PUNISHMENT IN THE UNITED STATES, *supra* note 12, at 2.

63. *See id.* at 65 ("[A]lthough the states made a token effort to comply with the [Fourteenth] Amendment by taking criminal statutes that punished [B]lacks more harshly than [W]hites off their books[,] . . . [i]t wasn't until more than a century after its adoption that the Fourteenth Amendment . . . became important in a number of legal challenges to existing capital sentencing procedures.").

64. PATERNOSTER ET AL., *supra* note 9, at 9 & Figure 1.2.

65. *See* BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970, at 9, 1168 (Bicentennial ed. 1975).

66. PATERNOSTER ET AL., *supra* note 9, at 185, Figures 8.1, 8.2 (noting that at that time, Blacks only made up about 12 to 15% of the population).

67. 481 U.S. 279 (1987).

68. *Id.* at 297–99, 313.

69. Bandele, *supra* note 6.

70. PATERNOSTER ET AL., *supra* note 9, at 210–11.

Black killings did so.[71] Studies examining sentencing trends in the late 1970s to 1990s also demonstrate that a defendant was significantly more likely to be sentenced to death if he killed a White victim than if he killed a non-White victim.[72] The aforementioned Earl Matthews case also provides explicit evidence of victim-race bias; a former employer of the prosecutor's office testified at trial that one of the prosecutors said that Matthews' case deserved less prosecutorial attention because the victim was "just a little old [B]lack man."[73]

The death penalty is also applied disproportionately on the basis of sex; specifically, men are much more likely to be sentenced to death than are women. From 1608 to 1929, over 96% of all individuals executed were men, and many of the executions of women came during the colonial period for religious offenses such as witchcraft.[74] From 1977 through 2005, 99% of those executed were men.[75] However, these extremely high percentages may be a bit misleading, since the vast majority of murders are committed by men.[76] Even taking men's higher murder rate into account, however, the death penalty is applied disproportionately. In the United States generally, men commit roughly 90% of murders while receiving roughly 98% of death sentences.[77] Recent studies have shown that, in California, women commit roughly 5% of death-penalty-eligible crimes, but receive only 1.2% of death sentences.[78]

As in the case of racial bias, sex bias can also be seen from the perspective of the sex of the victim. For instance, in a study of California capital cases, a death sentence was imposed in 10.9% of cases where a woman was the sole victim and only in 1.5% of cases

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71. *Id.* at 188 & Figure 8.1.

72. *See id.* at 206–07 (referencing one Maryland study and one California study which both found that those who killed White victims were more likely to be sentenced to death). The racial disparities in the imposition of the death penalty arise at both the charging and sentencing stages of the trial. *See id.* at 199–204 (describing studies of prosecutorial decisions from various states).

73. *Id.* at 210–11.

74. *Id.* at 10 & Figure 1.3.

75. *Id.* at 47 (stating only eleven women have been sentenced to death since 1977).

76. *See, e.g.*, Rob Barry et al., *Murder in America*, WALL ST. J., http://projects.wsj.com/murderdata/#view=all (last visited Mar. 2, 2014) (showing that of all solved homicides in the United States except Florida between 2000 and 2010, about 10% were committed by women, while 90% were committed by men). *See also id.* (indicating that of all murders in the United States except Florida between 2000 and 2010, in 26% of cases the sex of the killer was unknown).

77. *See* PATERNOSTER ET AL., *supra* note 9, at 208 & Box 8.2.

78. Shatz & Shatz, *supra* note 7, at 106.

where a man was the sole victim.[79] One reason for this disparity is that rape-murders have a higher rate of death sentences than other murders; even controlling for this factor, however, defendants are sentenced to death at a rate nearly three times greater when their victims were female rather than male.[80]

Finally, a defendant's sexual orientation may be relevant to whether a death sentence is imposed. While there are no comprehensive studies that prove the death penalty is applied disproportionately to homosexuals (likely due to a lack of sufficient information), in several cases a defendant's homosexuality was used to argue that imposition of the death penalty was appropriate. In 1985, Stanley Lingar was sentenced to death largely on the testimony of a co-conspirator; the prosecution was allowed to offer Lingar's homosexuality as an aggravating "character flaw" that justified imposition of the death penalty.[81] That same year, Calvin Burdine was sentenced to death; Burdine's counsel did not even object when the Texas prosecutor made several offensive references to Burdine's homosexuality, including the implication that life in prison was not an adequate punishment for Burdine since he would enjoy being raped in prison.[82] Though no studies definitively prove that the death penalty is disproportionately applied to homosexuals, trial evidence makes clear that sexual orientation has been one factor

79. *Id.* at 107; *see also id.* at 108–09 (presenting several studies with similar findings and arguing that such disparity results from "chivalrous" legal ideas that present women as weaker and more in need of protection than men). Traditional Anglo-American ideals of chivalry and patriarchy may also be responsible for the disparity apparent in imposition of the death penalty between male and female offenders; prosecutors and juries may be more likely to view even female violent criminals as needing protection, and thus be less likely to impose a harsh bodily punishment on them. *See id.* at 106. This inference is bolstered by the fact that women who are given death sentences are more likely to not fit "traditional" notions of femininity (either because of their status as a prostitute, homosexual, or woman of color or because their crime involves a crime against a child). *Id.*

80. *See id.* at 108 ("When rape-murders are excluded from consideration, the death-sentence rate in the current study for female victim cases is 4.9% compared to 1.5% in male victim cases.").

81. *Citing Anti-Gay Bias*, *supra* note 8; *see also* Richard Goldstein, *Queer on Death Row*, VILLAGE VOICE, Mar. 13, 2001, http://www.villagevoice.com/2001-03-13/news/queer-on-death-row/ (discussing same case).

82. *See* PATERNOSTER ET AL., *supra* note 9, at 235; Press Release, Am. Civ. Liberties Union, Slated Release of Gay Texas Inmate Further Reveals Death Penalty's Injustice, Merits Statewide Moratorium (Mar. 2, 2000) (https://www.aclu.org/lgbt-rights_hiv-aids/slated-release-gay-texas-inmate-further-reveals-death-penaltys-injustice-merits). During a later hearing regarding the effectiveness of his representation, the man who served as Burdine's counsel himself used offensive terms to refer to homosexuals. PATERNOSTER ET AL., *supra* note 9, at 235.

that prosecutors and juries consider in the imposition of the death penalty.

III. States' Decreased Access to Lethal Injection Drugs

As discussed above, lethal injection is by far the most common form of execution used in the United States today, and almost all states utilizing lethal injection use a three-drug protocol where an anesthetic (either pentobarbital or sodium thiopental) is administered at the outset to make the prisoner lose consciousness.[83] Thirteen states have abandoned the three-drug protocol in favor of a one-drug protocol that causes death solely by administering a lethal dose of anesthetic.[84] However, perhaps the greatest threat to the viability of these execution protocols, and thus to the implementation of the death penalty in these states, is the rapidly decreasing availability of anesthetic drugs to state correctional departments.

In 2010, Hospira, an Illinois-based company and the sole manufacturer of sodium thiopental, suspended its production of the drug due to shortages of an ingredient necessary to make the drug.[85] This suspension of production led to shortages of the drug

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83. *State by State Lethal Injection*, *supra* note 61.

84. *Id.* Eight states have actually used the single-drug protocol, while five have announced their intention to do so. *Id.* Ohio's protocol, until recently, called for a lethal dose of a single drug (pentobarbital). Josh Voorhees, *Did Ohio's New Lethal-Injection Cocktail Lead to a Cruel and Unusual Death for Dennis McGuire?*, SLATE (Jan. 16, 2014), http://www.slate.com/blogs/the_slatest/2014/01/16/dennis_mcguire_execution_did_ohio_s_new_lethal_injection_cocktail_lead_to.html. However, in response to a shortage of pentobarbital, Ohio used an untested two-drug combination of mydozolam and hydrocodone to execute Dennis McGuire. *Id.* This drug combination was described by a federal judge as an "experiment in lethal injection processes" and McGuire's lawyers claimed it was likely to cause painful and terrifying "air hunger." *Id.* Many witnesses to the execution, including journalists and priests, reported that McGuire did seem to be in intense distress during the twenty-four minutes it took McGuire to die. *Id;* Lawrence Hummer, *I Witnessed Ohio's Execution of Dennis McGuire. What I Saw Was Inhumane*, THE GUARDIAN, Jan. 22, 2014, http://www.theguardian.com/commentisfree/2014/jan/22/ohio-mcguire-execution-untested-lethal-injection-inhumane; *see also Prison Guards Say Executed Man Faked Symptoms of Suffocation During 'Agonizing' Death From New Drug After Being Coached by Lawyer*, DAILY MAIL ONLINE (Jan. 28, 2014), http://www.dailymail.co.uk/news/article-2547177/Prison-guards-say-executed-man-coached-attorney-fake-symptoms-suffocation-long-horrific-death.html. Prison guards claim that McGuire told them his attorney had coached him to "make a show of his death," but that he refused to do so. *Id.* McGuire's attorney's office investigated, denied the charge, and reiterated that McGuire was unconscious during most of his execution (which took longer to complete than any execution since Ohio re-instituted the death penalty). *Id.*

85. Pilkington, *supra* note 1. Some death penalty advocates have expressed doubt at the existence of the supply shortage, insinuating that the alleged shortage

in many states where it was used in executions, leading in turn to execution delays in those states.[86] The shortage was exacerbated by federal laws strictly regulating the importation of sodium thiopental,[87] and by United Kingdom and European Union actions prohibiting British and European companies from supplying the drug to the United States for use in executions.[88] In January 2011, Hospira decided to stop making sodium thiopental permanently after a bid to begin manufacturing the drug in Italy stalled because the Italian government forbade its use in executions and implied that the drug-maker could be held liable if any of its product ended up being used for that purpose.[89]

In response to the sodium thiopental shortage, many states changed their lethal injection protocols to allow for the use of pentobarbital, a different anesthetic, in place of sodium thiopental.[90] However, the American company that manufactured pentobarbital was purchased in 2009 by the Danish drug-maker Lundbeck,[91] and, partially in response to pressure from European anti-death penalty groups, Lundbeck sought to end the drug's use in U.S. executions.[92] In January 2011, when sodium thiopental became unavailable, Lundbeck sent letters to the governors and correctional departments in sixteen states telling them it did not want its drugs used to kill prisoners.[93] When this request went unheeded, Lundbeck took other measures to ensure its drugs would not be used in executions.[94] The company began refusing

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was in fact a pretext for Hospira to suspend manufacture of the drug. Hospira had previously made statements condemning the drug's use in executions, and the drug's sales constituted a very small percentage of Hospira's total income. *Id.*

86. *Id.*

87. John Schwartz, *Seeking Execution Drug, States Cut Legal Corners*, N.Y. TIMES (Apr. 13, 2011), http://www.nytimes.com/2011/04/14/us/14lethal.html?pagewanted=all&_r=1&.

88. Sanburn, *supra* note 2.

89. Chris McGreal, *Lethal Injection Drug Production Ends in the US*, THE GUARDIAN (Jan. 23, 2011), http://www.theguardian.com/world/2011/jan/23/lethal-injection-sodium-thiopental-hospira.

90. *See* Pam Belluck, *What's in a Lethal Injection 'Cocktail'?*, N.Y. TIMES (Apr. 9, 2011), http://www.nytimes.com/2011/04/10/weekinreview/10injection.html.

91. Timothy Bella, *New Lethal-Injection Drugs Raise New Health, Oversight Questions*, AM. ALJAZEERA (Oct. 14, 2013), http://america.aljazeera.com/watch/shows/america-tonight/america-tonight-blog/2013/10/14/new-lethal-injectiondrugsraisenewhealthoversightquestions.html.

92. Sanburn, *supra* note 2.

93. Kimberly Leonard, *Lethal Injection Drug Access Could Put Executions on Hold*, CTR. FOR PUB. INTEGRITY (July 11, 2011), http://www.publicintegrity.org/2012/04/04/8589/lethal-injection-drug-access-could-put-executions-hold.

94. *Id.*

orders from U.S. prisons and altered its contracts with distributors to prevent them from reselling the drug.[95]

Such refusals by pharmaceutical companies to sell drugs for use in U.S. executions left many death penalty states scrambling to replace stocks of drugs that had expired or were about to expire. For instance, Georgia's stock of pentobarbital expired in March 2013;[96] Ohio's supply of pentobarbital expired in September 2013;[97] and the pentobarbital supply of Texas, by far the nation's leader in lethal injections, expired in September 2013.[98] These expirations and shortages have led several states to take extraordinary measures to ensure access to the drugs they use to kill prisoners. Some states engaged in a legally questionable drug-swapping scheme to ensure they had enough lethal injection drugs to meet their needs.[99] Others hastily switched their drug protocols to use widely available anesthetics despite the fact such drugs had never before been administered in executions.[100] Other states' actions were even more egregious. For instance, in 2010 the state of Georgia, in contravention of federal law, imported sodium thiopental from a secondary drug distributor operating out of the back of a driving school in London, England.[101] In response, federal DEA agents raided the maximum-security prison where the drugs were stored and seized the illegally imported supply.[102]

Also in 2010, the state of Nebraska undertook two different illegal schemes to obtain sodium thiopental. First, it illegally

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

96. Ed Pilkington, *Georgia Scrambles for Fresh Supply of Drugs to Execute Death Row Inmate*, THE GUARDIAN (July 12, 2013), http://www.theguardian.com/world/2013/jul/12/georgia-drugs-execute-death-row-inmate.

97. *See Ohio Prisons Add 2nd Lethal Injection Drug Option, Keep Pentobarbital Despite Supply Expiring*, FOXNEWS.COM (Oct. 4, 2013), http://www.foxnews.com/us/2013/10/04/ohio-prisons-add-2nd-lethal-injection-drug-option-keep-pentobarbital-despite/.

98. Sanburn, *supra* note 2.

99. Schwartz, *supra* note 87 (describing a sodium thiopental swapping scheme involving Arkansas, Mississippi, Oklahoma, Tennessee, and Texas).

100. *See* Jim Salter, *Missouri Gov. Halts First US Execution by Propofol*, WASH. POST (Oct. 11, 2013), http://www.washingtonpost.com/politics/missouri-gov-halts-First-us-execution-by-propofol/2013/10/11/559e6af6-32d9-11e3-8627-c5d7de0a046b_story.html. Missouri had intended to switch the anesthetic used in its executions to propofol, a drug manufactured in Germany and the most widely-used anesthetic in American hospitals. *Id.* However, Missouri's governor halted the first execution intended to use propofol after a European Union threat to limit the drug's export to the United States generally if it were used in executions. *Id.*

101. Segura, *supra* note 4.

102. *Id.*

bought the drug through an Indian manufacturer's American agent, who was promptly fired by the manufacturer upon its learning of the improper sale.[103] The DEA later invalidated this sale.[104] Nebraska later bought a different supply of the same drug *from the same agent*, who this time obtained the drug by telling a Swiss company he wanted samples to supply to patients in Zambia; the agent, though, turned around and sold the samples to Nebraska.[105] Finally, many states have turned to compounding pharmacies to provide the anesthetics used in lethal injections.[106] While compounding pharmacies do not raise the same concerns about illegal importation, compounding pharmacies are not subject to FDA regulation, and therefore, the quality of drugs manufactured at compounding pharmacies cannot be assured.[107] A grim example of this lack of quality control occurred in the fall of 2012, when a compounding pharmacy in Massachusetts shipped over 17,000 vials of steroids contaminated with fungus, leading to a meningitis outbreak that killed 48 people and sickened over 700.[108]

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103. Brian Evans, *The Shady World of Execution Drug Trafficking*, AMNESTY INT'L HUMAN RIGHTS NOW BLOG (Dec. 14, 2011, 10:07 AM), http://blog.amnestyusa.org/deathpenalty/the-shady-world-of-execution-drug-trafficking/.

104. *Id.*

105. Anjali Puri, *Hawking Poison*, OUTLOOK INDIA (Dec. 5, 2011), http://www.outlookindia.com/article.aspx?279072. The pharmaceutical company, Naari, demanded that Nebraska return the fraudulently obtained drugs. *Id.* Nebraska, however, like any addict who searched high and low to get a fix, was not about to give up its drugs so easily. *See* Kevin O'Hanlon, *Federal Court Says Nebraska, Other States Can Keep Lethal Injection Drug*, LINCOLN J. STAR (July 23, 2013), http://journalstar.com/news/state-and-regional/nebraska/federal-court-says-nebraska-other-states-can-keep-lethal-injection/article_f4334851-eba7-5027-bc68-606e7c7024a7.html. The state was able to keep the drugs after a court found that the FDA could not retroactively order the drugs seized, though it could expressly bar future importations of the drug. *Id.*

106. Molly Hennessy-Fiske, *Texas Turns to Pharmacy for Custom-Made Execution Drug*, L.A. TIMES (Oct. 10, 2013), http://www.latimes.com/nation/nationnow/la-na-nn-texas-execution-20131010,0,3264275.story#axzz2j5cRh0qm.

107. *See* Andrew Pollack, *Checks Find Unsafe Practices at Compounding Pharmacies*, N.Y. TIMES (Apr. 12, 2013), http://www.nytimes.com/2013/04/12/health/unsafe-practices-found-at-compounding-pharmacies.html?_r=0.

108. Scott Pelley, *Lethal Medicine Linked to Meningitis Outbreak*, 60 MINUTES (Mar. 10, 2013, 7:01 PM), http://www.cbsnews.com/8301-18560_162-57573470/lethal-medicine-linked-to-meningitis-outbreak/. The compounding pharmacy that shipped the contaminated drugs was later shown to have known of over eighty instances of fungal and bacterial contamination on its premises, including in supposedly sterile "clean rooms." Lena H. Sun, *Compounding Pharmacy Linked to Meningitis Outbreak Knew of Mold, Bacteria Contamination*, WASH. POST (Oct. 26, 2012), http://articles.washingtonpost.com/2012-10-

IV. Implementation of and Challenges to Lethal Drug Supplier Secrecy Laws

In response to these recent shortages of lethal injection drugs, several states have taken action to attempt to ensure future access to such drugs. In early 2013, Arkansas, South Dakota, and Tennessee amended their states' public records laws to shield the identities of the suppliers of lethal injection drugs from disclosure under their public records acts.[109] A law enacted in March 2013 in Georgia went even further. The law, known as the "Lethal Injection Secrecy Act," states:

> 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.[110]

The bill's sponsor, Republican Representative Kevin Tanner, said the law was necessary to shield those who participate in lethal injections from "harassment and threats."[111]

The law did not stand long, though, before a state judge ruled the law invalid under both the federal Constitution and the Georgia State Constitution.[112] On July 15, 2013, lawyers for Warren Lee Hill, a cognitively disabled man scheduled to die by lethal injection that day, filed an emergency motion to enjoin Hill's execution.[113] Hill's lawyers argued that, though the state had informed Hill that pentobarbital would be used to execute him, the lack of disclosure of any other information about the drug or its source created a constitutionally impermissible risk of serious pain

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26/national/35501834_1_fda-report-meningitis-outbreak-methylprednisolone-acetate. There is no evidence the company took any measures to address this contamination prior to the meningitis outbreak. *Id.*

109. Raymond Bonner, *A Prolonged Stay: The Reason Behind the Slow Pace of Executions*, FACING SOUTH, http://www.southernstudies.org/2013/05/a-prolonged-stay-the-reason-behind-the-slow-pace-o.html (last visited Mar. 9, 2014).

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

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

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

113. *Id.*

and prolonged death.[114] The presiding judge delayed the execution, and just three days later, found the law unconstitutional under the Eighth Amendment of the federal Constitution and under the Separation of Powers Clause of the Georgia State Constitution.[115] The stay of execution is in effect until the Georgia Supreme Court rules on the constitutionality of the law.[116]

V. Georgia's Lethal Injection Secrecy Law Violates Prisoners' Due Process Right of Access to the Courts by Withholding Information Essential to a Constitutional Claim

The Eighth Amendment to the federal Constitution prohibits the government from inflicting "cruel and unusual punishment" upon those convicted of crimes.[117] Despite the fact that corporal punishments, once common in colonial and early American days, have been abandoned as unnecessarily cruel,[118] the Supreme Court has never ruled that the death penalty per se constitutes cruel and unusual punishment in violation of the Eighth Amendment.[119] However, the Court has also stated that the determination that a punishment is "cruel and unusual" is not a fixed, formal one, but rather a determination that should be made in accordance with "evolving standards of decency that mark the progress of a maturing society."[120]

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114. *See id.*

115. *See* Andrew Cohen, *How Georgia Just Spared the Life of a Man it Desperately Wants to Kill*, THE ATLANTIC (July 19, 2013), http://www.theatlantic.com/national/archive/2013/07/how-georgia-just-spared-the-life-of-a-man-it-desperately-wants-to-kill/277971/.

116. David Schick, *Warren Hill Case Rejected by U.S. Supreme Court*, FLAGPOLE MAGAZINE (Oct. 7, 2013, 4:19 PM), http://flagpole.com/blogs/in-the-loop/posts/warren-hill-case-rejected-by-u-s-supreme-court. The Georgia Supreme Court heard oral arguments on the secrecy law's validity on February 17, 2014. Bill Rankin, *State's Lethal Injection Secrecy Law Challenged*, ATLANTA J.-CONST. (Feb. 17, 2014), http://www.ajc.com/news/news/states-lethal-injection-secrecy-law-challenged/ndRc2/.

117. U.S. CONST. amend. VIII.

118. *See* John D. Bessler, *Tinkering Around the Edges: The Supreme Court's Death Penalty Jurisprudence*, 49 AM. CRIM. L. REV. 1913, 1916 n.27 (2012) (describing the 19th century abolition of corporal punishments such as whipping, branding, cropping of ears, and standing in stocks).

119. *See* Furman v. Georgia, 408 U.S. 238, 256–57 (1972) (holding that the death penalty violated the Eighth Amendment as then applied due to its arbitrary and capricious imposition); Gregg v. Georgia, 428 U.S. 153, 207 (1976) (holding that the development of procedural safeguards against arbitrary death penalty imposition remedied constitutional infirmities).

120. Trop v. Dulles, 356 U.S. 86, 101 (1958). This test has resulted in the Court finding some particular *types* of executions once deemed acceptable to violate the Eighth Amendment, such as executions imposed upon the mentally "retarded,"

The Supreme Court's most recent explication of the constitutionality of the death penalty (and of lethal injection in particular) came in *Baze v. Rees*, where the Court upheld the constitutionality of Kentucky's use of the common three-drug protocol in lethal injection executions.[121] In that case, the Court recognized that the actual infliction of suffering is not necessary for a state to violate the Eighth Amendment; rather, the Court said, "subjecting individuals to a *risk* of future harm . . . can qualify as cruel and unusual punishment."[122] However, the *Baze* Court also stated that a punishment violates the Eighth Amendment only if it presents a "substantial risk of serious harm" and further described this standard as being violated only when there exists "an objectively intolerable risk of harm that prevents prison officials from pleading that they were subjectively blameless."[123] The prisoners' argument was premised largely on the idea that the state's three-drug protocol violated the Eighth Amendment because of an impermissible risk the anesthetic would be improperly applied, resulting in consciousness at the time of painful death by administration of the third drug.[124] However, the Court stated that "[s]ome risk of pain is inherent in any method of execution—no matter how humane—if only from the prospect of error in following the required procedure" and held that Kentucky's execution protocol included enough procedural safeguards to render it constitutionally permissible.[125]

Baze's analysis focuses mainly on the qualifications and training of prison personnel assigned to perform executions. In *Baze*, both parties agreed that an execution "performed properly" under Kentucky's protocol would be "humane and

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Atkins v. Virginia, 536 U.S. 304 (2002), and executions imposed for non-lethal rapes, Coker v. Georgia, 533 U.S. 584 (1977).

121. 553 U.S. 35 (2008).

122. *Id.* at 49 (emphasis added).

123. *Id.* at 50 (internal quotation marks omitted). This analysis, holding that the Eighth Amendment is only violated in situations where prison officials can reasonably be seen as being subjectively blameworthy, echoes the Court's Eighth Amendment analysis in *McClesky v. Kemp*, 481 U.S. 279 (1987), where the Court held that though ample evidence had been presented that the death penalty was administered in a racially discriminatory way statewide, the prisoner was unable to demonstrate that discrimination was the cause of the imposition of the death penalty in his particular case, and thus his Equal Protection claim failed. *Id.* at 319.

124. *See Baze*, 553 U.S. at 54.

125. Such safeguards include a requirement of professional training for IV team members, a requirement that IV team members participate in execution "practice sessions" and the presence of execution observers to monitor signs of consciousness. *Id.* at 54–56.

constitutional,"[126] and the Court found Kentucky's procedural safeguards to be sufficient to ensure the execution would be properly performed.[127] However, the Court (and prisoners) in *Baze* took for granted that the drugs used in Kentucky's executions were properly manufactured.[128] Without disclosure of the source of the drugs used in executions, this is not an assumption a court can reasonably make. As more states move towards obtaining lethal injection drugs from largely unregulated compounding pharmacies,[129] courts should consider that drugs created by compounding pharmacies contain significant risks that drugs created by traditional manufacturers do not.[130] Compounding pharmacies are exempt from critical aspects of pharmaceutical regulation, including regulations meant to ensure safe and high-quality manufacturing practices.[131] This lack of regulation does not lead to merely speculative harms; such a lack of oversight leads to drugs created by compounding pharmacies to occasionally

126. *Id.* at 49.

127. *Id.* at 56.

128. In fact, the Court's entire analysis that the protocol does not present a significant risk of harm is premised on its finding that the anesthetic drug is likely to be properly administered, and that because of such proper administration the drug (assumed to be of high quality) will perform its function of fully anesthetizing the prisoner: "at the outset, it is important to reemphasize that a proper dose of thiopental obviates the concern that a prisoner will not be sufficiently sedated." *Id.* at 59.

129. Missouri, Texas, and South Dakota have all either executed or plan to execute inmates using compounded drugs, and other states, facing lethal injection drug shortages, plan to do the same. Emily Levy, *The Choking of America's Executioners*, VOCATIV (Nov. 7, 2013, 8:50 AM), http://www.vocativ.com/11-2013/choking-americas-executioners/.

130. Compounding pharmacies create small amounts of drugs, typically to provide customized drugs to patients who cannot take the mass-produced version of the drug, due to a difference in needed dosage, allergies, or other reasons. Jacque Wilson, *Meningitis Outbreak: What is a Compounding Pharmacy*, CNN (Oct. 11, 2012, 3:24 PM), http://www.cnn.com/2012/10/11/health/compounding-pharmacies-explainer/. However, recently compounding pharmacies have begun producing larger quantities of drugs for wide distribution, leading to problems like the meningitis outbreak described below. *Id.*

131. Levy, *supra* note 129. In late 2013, President Obama signed into law a bill instituting a regulatory scheme under which compounding pharmacies can voluntarily register to be subject to FDA inspection. *Obama Signs Bill Regulating Compounding Pharmacies*, NBC NEWS (Nov. 27, 2013), http://www.nbcnews.com/health/health-news/obama-signs-bill-regulating-compounding-pharmacies-f2D11665035. Proponents of the law hope this voluntary regulatory scheme will work if doctors and hospitals agree only to work with FDA-registered pharmacies. *Id.* Because of the voluntary nature of the scheme, though, this law does not allay the Eighth Amendment problems presented by the unregulated character of compounding pharmacies. Any compounding pharmacy can choose to remain unregulated, and correctional departments are free to continue obtaining drugs from such pharmacies. *See id.*

be non-sterile and contaminated with dust, fungus, or allergens, which can lead to unintended illnesses, extremely painful reactions, and a lack of potency.[132] For instance, an October 2012 report commissioned by Congressman Edward Markey concluded that, not counting the fungal meningitis outbreak attributed to the New England Compounding Center ("NECC"), contaminated drugs made by compounding pharmacies were responsible for at least twenty-three deaths and eighty-six illnesses over the prior decade.[133] This risk of harm was clearly seen in the execution context in South Dakota's October 2012 execution of Eric Roberts. Roberts was put to death using a compounded dose of pentobarbital.[134] During the execution, Roberts opened his eyes and appeared to choke—both signs he was potentially conscious during his death.[135] An examination of the compounded drugs later revealed that they were contaminated with fungus.[136] The realities of the lack of oversight and the far-too-common contamination of drugs created by compounding pharmacies demonstrate the possibility that drugs from compounding pharmacies generally create a constitutionally impermissible risk of serious harm. If compounding pharmacies are going to be used to supply lethal injection drugs, prisoners must have the ability to examine the track record and practices of the particular compounding pharmacy that will be supplying the drugs used to kill them.

However, because Georgia's lethal injection secrecy law prohibits disclosure of the identities or even qualifications of the companies supplying the state with lethal injection drugs, even through judicial process, death row prisoners are expressly denied information vital to assessing whether their execution will violate the Eighth Amendment. Such a denial represents an effective restriction on death row inmates' due process right to meaningful access to the courts.

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132. Pollack, *supra* note 107; Pelley, *supra* note 108.

133. THE OFFICE OF CONGRESSMAN EDWARD J. MARKEY, COMPOUNDING PHARMACIES COMPOUNDING RISK 3 (2012), *available at* http://interactive.snm.org/docs/Compounding%20Pharmacies%20-%20Compounding%20Risk%20FINAL_0.pdf. The 48 people killed and over 700 people sickened by the NECC's drugs were not counted in the report because, at the time of the report's publication, the full extent of the damage caused by NECC's drugs was not known. *Id.*

134. Donald Campbell, *South Dakota Covers Up Source of 'DIY' Death Penalty Drugs Ahead of Execution*, REPRIEVE (Oct. 30, 2012), http://www.reprieve.org.uk/press/2012_10_30_South_Dakota_execution_drugs/.

135. Levy, *supra* note 129.

136. Campbell, *supra* note 134.

In *Bounds v. Smith*,[137] the Supreme Court recognized that part of the constitutional guarantee of due process[138] includes a "fundamental right" to "adequate, effective, and meaningful" access to the courts.[139] Part of this requirement of meaningful access, which the Court has interpreted to impose many affirmative obligations upon the government,[140] includes "a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts."[141] The Supreme Court has recognized that the constitutionality of an execution (i.e., whether it presents an impermissible risk of serious harm) can turn on the qualifications of the executioner.[142] Thus, while the identities of executioners have traditionally been kept secret and not subject to disclosure laws, these identities have been revealed *in camera* through the judicial process and the executioners' testimony and qualifications have been fully available to prisoners and their attorneys, as well as on a limited basis to the press reporting on the case.[143] There is no logical reason that the identities of people administering drugs that will kill should be subject to less protection than the companies who make the drug that will kill, and denying prisoners the right to learn the identity and qualifications of the maker of an execution drug denies prisoners information vital to a possible constitutional claim. A law unilaterally prohibiting disclosure of these identities and qualifications, as Georgia's law does, thereby denies a death row inmate meaningful access to the courts in violation of the Constitution.

VI. Georgia's Lethal Injection Secrecy Law Violates Constitutional Separation of Powers Principles

The Georgia lethal injection secrecy law's absolute prohibition on revealing lethal injection drug-makers' identities and qualifications does more than deny prisoners their right to

137. 430 U.S. 817 (1977).

138. *See* U.S. CONST. amend. V (providing that no person "shall . . . be deprived of life, liberty, or property, without due process of law"); U.S. CONST. amend. XIV (extending the Fifth Amendment's due process protections to state actions).

139. *Bounds*, 430 U.S. at 822.

140. *Id.* at 824.

141. Lewis v. Casey, 518 U.S. 343, 351 (1996).

142. *See* Baze v. Rees, 553 U.S. 35, 54–56 (2008) (holding that executioners' training and qualifications reduced a lethal injection's risk to a constitutionally permissible level).

143. *See* Ellyde Roko, *Executioner Identities: Toward Recognizing a Right to Know Who is Hiding Beneath the Hood*, 75 FORDHAM L. REV. 2791, 2820–22 (2007).

meaningful access to the courts. It also undermines the power of the judiciary to review legislative and executive actions in violation of constitutionally mandated separation of powers principles.

The concept of separation of powers is a bedrock principle of American republican governance. This constitutional mandate is not explicitly stated in the Constitution, but has been inferred from its structure since the earliest days of the United States government.[144] American separation of powers doctrine seeks to diffuse power over three branches of government, and while the doctrine does not prohibit the co-equal branches from interacting or commingling functions, it does prohibit any branch from "appropriating or intruding upon the 'core functions'" of the other branches.[145] An essential feature of separation of powers doctrine is the authority of the judicial branch to review the actions of the legislature and executive officials, and invalidate those actions if they are unconstitutional or otherwise illegal.[146] This constitutionally mandated function of the judiciary was described in the seminal case *Marbury v. Madison*,[147] where Chief Justice Marshall asserted the right of the judiciary to review and invalidate executive actions and legislation.[148] While the structure of the federal Constitution describes the separation of powers within the federal government, separation of powers doctrine and judicial review apply to the actions of state governments as well.[149] Most state constitutions either explicitly authorize judicial review, or do so through conspicuous implication, such as by the explicit mandating of separation of powers.[150]

Georgia's lethal injection secrecy law violates core separation of powers principles by unilaterally withholding from judicial scrutiny important details of executive actions. Georgia's state

144. *See* Peter M. Shane, *Interbranch Accountability in State Government and the Constitutional Requirement of Judicial Independence*, 61 LAW & CONTEMP. PROB. 21, 25–30 (1998).

145. Adrian Vermeule, *The Judicial Power in the State (and Federal) Courts*, 2000 SUP. CT. REV. 357, 363 (2000).

146. *See* Marbury v. Madison, 5 U.S. 137, 177–78 (1803).

147. *Id.*

148. Shane, *supra* note 144, at 26.

149. *Id.* at 29 n.41.

150. *Id.* As Shane explains, even in states where judicial review and separation of powers are not explicitly mandated by the state constitution, the power of the judiciary to review legislative and executive actions can be inferred in several ways. First, Article IV's guarantee that all state governments maintain a republican form requires the separation of powers, whereas Article VI's Supremacy Clause and the Fourteenth Amendment's Due Process clause guarantee that legislative and executive actions are subject to constitutional review. *Id.* at 25.

constitution explicitly declares that its government is organized under separation of powers principles,[151] and also explicitly states that "all laws" of the state "shall be subject to judicial decision as to their validity."[152] As such, there can be no doubt that the Georgia Constitution assigns the judiciary the duty to review laws for constitutionality. However, as argued above, the U.S. Supreme Court has made clear that the qualifications of those participating in executions raise significant Eighth Amendment concerns,[153] but the Georgia law purports to deny the judiciary any ability to hear facts regarding the identity or qualifications of those supplying drugs used in executions. This bald attempt by the Georgia legislature to strip the judiciary of its power to review executive actions violates separation of powers principles, and it is the duty of courts to invalidate such laws.

One important argument to address in favor of the executive's ability to shield his or her actions from scrutiny involves the "state secrets privilege."[154] As the Georgia law defines drug-maker identities and qualifications as a "state secret," this privilege would seem to be implicated. However, the state secrets privilege applies in the Presidential context, allowing the President to unilaterally withhold information with the potential to damage "military matters," "national security," or "foreign relations," and is not a carte blanche privilege; it must be invoked by the President himself or herself.[155] Thus, the state secrets privilege does not apply in the context of the Georgia lethal

151. GA. CONST. art. 1, § 2, para. III ("The legislative, judicial, and executive powers shall forever remain separate and distinct").

152. GA. CONST. art. 11, § 1, para. II.

153. *Supra* Part V.

154. Lindsay Windsor, *Is the State Secrets Privilege in the Constitution? The Basis of the State Secrets Privilege in Inherent Executive Powers & Why Court-Implemented Safeguards are Constitutional and Prudent*, 43 GEO. J. INT'L L. 897 (2012).

155. *Id.* at 902–03. No state executive branch has successfully invoked a "state secrets" privilege to shield its actions entirely from judicial scrutiny; to do so would give a state executive agency more power to shield information than even the federal executive branch and the President possess in the "state secrets" context. *See* Louis Fisher, *The State Secrets Privilege: Relying on* Reynolds, 122 POL. SCI. Q. 385, 405–06 (describing the trial of Aaron Burr, where President Jefferson asserted a privilege to keep certain letters confidential from the judiciary, but nonetheless was required to disclose those portions "immediately and essentially applicable" to Burr's case to *in camera* review); *The State Secrets Privilege*, ELECTRONIC FRONTIER FOUND., https://www.eff.org/nsa-spying/state-secrets-privilege (last visited Dec. 2, 2013) (describing the Foreign Intelligence Surveillance Act, which requires that even if the executive branch asserts the state secrets privilege, any materials necessary to determine whether the government acted lawfully must be disclosed to the court to review *in camera*).

injection secrecy law, and does not justify withholding critical information from the judicial branch.

VII. Georgia's Lethal Injection Secrecy Law Violates the First Amendment by Impermissibly Burdening Speech

The First Amendment guarantees that "Congress shall make no law . . . abridging the freedom of speech, or of the press."[156] While these phrases have not been interpreted to mean that all speech is absolutely protected,[157] the amendment does stand as a significant bar to legislative and executive actions that seek to punish expression. In analyzing whether a particular statute impermissibly restricts freedom of speech, courts make a threshold determination of whether the statute is content-based or content-neutral.[158] In *Police Department of Chicago v. Mosley*,[159] a First Amendment case applying content-type analysis, the Supreme Court described the reason for analyzing content-based and content-neutral laws under different rubrics:

> [A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.[160]

Because of this suspicion of laws that attempt to prohibit speech based on its content, laws that are determined to be content-based are subjected to "strict scrutiny" (as opposed to the "intermediate scrutiny" to which content-neutral laws are subjected).[161] Strict scrutiny places upon the government the

156. U.S. CONST. amend. I. The free speech guarantee also applies to state governmental action through U.S. CONST. amend. XIV.

157. Several categories of speech have been found by the Supreme Court to be unprotected by the First Amendment. These categories include incitement to violence, obscenity, and fighting words, Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942), as well as malicious libel, New York Times Co. v. Sullivan, 376 U.S. 254 (1964), and child pornography, New York v. Ferber, 458 U.S. 747 (1982). However, statutes of the type analyzed in this Note cannot be plausibly argued to fall within an unprotected category, and thus they will analyzed as speech protected by the First Amendment.

158. *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

159. 408 U.S. 92 (1972).

160. *Id.* at 95–96 (internal citations and quotation marks omitted).

161. Republican Party of Minn. v. White, 536 U.S. 765, 774 (2002).

burden of proving that the challenged statute is "narrowly tailored, to serve . . . a compelling state interest."[162] The Court has further defined "narrowly tailored" to mean that a statute will not survive strict scrutiny if a statute less restrictive of protected speech would adequately serve the government's compelling interest.[163] Because content-based restrictions on speech must survive such exacting analysis, the Supreme Court has described content-based statutes as "presumptively invalid."[164]

Thus, in analyzing whether Georgia's lethal injection secrecy law violates the First Amendment's Freedom of Speech clause, a court must first determine whether the law is content-based or content-neutral. A law is considered to be content-neutral when the governmental interest animating the law is not "related to the suppression of free expression."[165] However, as the government is unlikely to baldly assert the suppression of expression as an interest justifying its law, courts must look more deeply into the government's asserted interests to determine whether the government's interest is related to speech suppression.[166] For instance, in *Texas v. Johnson*, where a law prohibiting desecration of the American flag was held to impermissibly burden free expression, the state's asserted interest in "preserving the flag as a symbol of nationhood and national unity" was found to be related to the suppression of expression, since the concern that a flag burning will undermine the flag as a symbol of nationhood

162. *Id.* at 774–75.

163. See *Boos v. Barry*, 485 U.S. 312, 329 (1988), where a District of Columbia ordinance prohibited signs near embassies if those signs tended to bring a foreign government into "public disrepute." The Supreme Court found the ordinance unconstitutional due to a lack of narrow tailoring; the government's compelling interest could have been served by a "less restrictive alternative" that proscribed only unprotected speech like intimidation and harassment. *Id; see also* White, 536 U.S. at 775 ("In order for respondents to show that the [challenged provision] is narrowly tailored, they must demonstrate that it does not unnecessarily circumscribe protected expression.") (internal quotation marks omitted).

164. R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992).

165. *See* Texas v. Johnson, 491 U.S. 397, 403 (1989) (citing U.S. v. O'Brien, 391 U.S. 367 (1968)).

166. John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1496 (1975) ("Restrictions on free expression are rarely defended on the ground that the state simply didn't like what the defendant was saying; reference will generally be made to some danger beyond the message . . . . The reference of *O'Brien*'s second criterion is therefore not to the ultimate interest to which the state is able to point, for that will always be unrelated to expression, but rather to the causal connection the state asserts.").

"blossom[s] only when a person's treatment of the flag communicates some message."[167]

A reviewing court would likely find Georgia's lethal injection secrecy law to be content-based, and thus would apply strict scrutiny in its analysis. Georgia Code section 42-5-36(d) prohibits the disclosure of "any records or information" that could be used to identify the maker of a lethal injection drug, up to and including the maker's "professional qualifications," and classifies such information as a "state secret."[168] The law on its face is plainly content-based; it prohibits the dissemination of information based on the subject-matter of that information. The Supreme Court has repeatedly held that, while reasonable restraints on an individual's *manner* of expression may be content-neutral, when speech is proscribed because of its "specified content," the law is content-based and must survive strict scrutiny.[169] Georgia's law thus burdens any speaker who wishes to divulge this information. While government employees can be kept from divulging such classified information as a condition of employment, this law seeks to criminalize disclosure of this information by *any* speaker—thus burdening the speech of individuals who come about the information in another capacity (an employee of the pharmacy, for instance) and even potentially impeding the right of the press to report this information.

A court applying strict scrutiny to the Georgia law would likely find it to be unconstitutional. As stated above, content-based laws are presumptively unconstitutional, and the government bears the heavy burden of proving not only that the law serves compelling government interests, but also that the law is narrowly tailored to serve that interest, such that no alternative less restrictive of speech would do so. First, the court must determine whether the government's asserted interests are "compelling" or merely strong or substantial; if they are anything short of compelling, the law will not survive strict scrutiny.[170] However, courts have typically been fairly deferential in making this determination; a wide variety of government interests have been found to be "compelling," including esoteric interests that on their face may seem less than compelling, such as "protecting the

167. *Johnson*, 491 U.S. at 410.

168. GA. CODE ANN. § 42-5-36(d) (West 2013). Another section of the Georgia Code makes divulging "any confidential state secret" as well as conspiracy to do so a misdemeanor. § 42-9-53(c).

169. *See* Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991).

170. *See* Republican Party of Minn. v. White, 536 U.S. 765, 774–75 (2002).

dignity of foreign diplomatic personnel"[171] and "ensuring that criminals do not profit from their crimes" by publishing memoirs about them.[172] Thus, it is likely that a reviewing court would in fact find Georgia's asserted interests—ensuring the timely administration of justice and protecting individuals and corporations involved in death penalty administration from harassment[173]—to survive the first prong of strict scrutiny.[174]

However, the second prong of strict scrutiny is much more difficult for the government to meet, and it is unlikely that Georgia's law would do so. The government must show that the regulation is "narrowly tailored" to serve the asserted interests; in other words, that the regulation is "necessary" to serve the interests[175] and that other regulations less restrictive of protected speech would not adequately serve the interests.[176] For instance, as to Georgia's claimed interest in assuring swift administration of justice (used in this context to mean avoiding lengthy delays once a prisoner is sentenced to die), Georgia could pass procedural regulations that would fast-track death penalty appeals, could manufacture execution drugs itself as the state of Missouri recently began doing,[177] or could identify and develop alternative humane means of execution that would not require the acquisition of drugs at all.[178]

Georgia's claimed interest in preventing harassment of executioners and drug-makers is a slightly closer case, as there are fewer obvious alternatives that would be effective at preventing harassment of executioners and drug-makers than obscuring their identities. However, in *Boos v. Barry*, the Supreme Court held the law banning signs that brought diplomats into public disrepute

171. *See* Boos v. Barry, 485 U.S. 312, 322 (1988).

172. *Simon & Schuster*, 502 U.S. at 119.

173. Order Granting Plaintiff's Emergency Motion for Preliminary Injunction at 3, 7, Hill v. Owens, No. 2013-CV-233771 (Superior Ct. of Fulton Cnty., July 18, 2013).

174. While it is very likely a court would find the state's interest in protecting *individuals* who participate in executions from harassment to be compelling, protecting pharmaceutical *corporations* from harassment may not rise to the level of a "compelling" interest. However, since courts have been widely deferential as to which interests are "compelling," this Note will assume that a court would find both of Georgia's asserted interests to satisfy strict scrutiny's first prong.

175. Burson v. Freeman, 504 U.S. 191, 197–98 (1992).

176. *Boos*, 485 U.S. at 329.

177. Levy, *supra* note 129.

178. Of course, these are only two examples of laws Georgia could pass to prevent lengthy execution delays. Many others are easily imaginable, and thus whether the lethal injection secrecy law serves this interest at all is debatable, since a multitude of other factors contribute to lengthy execution delays.

was not sufficiently "narrowly tailored" because the District of Columbia could have passed a similar ordinance that banned only unprotected speech, such as intimidation or threats.[179] Here, the state of Georgia can also achieve its stated interest by burdening only unprotected speech such as threats against executioners and drug-makers.[180]

Finally, the Court has recognized that, at least in some scenarios, the public has a First Amendment right to receive information—a right implicated by Georgia's law. In *Stanley v. Georgia*, the Supreme Court declared that the constitutional "right to receive information and ideas . . . is fundamental to our free society" and reversed a conviction for possession of obscene movies, even though obscenity is unprotected by the First Amendment.[181] Additionally, in *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, the Supreme Court rejected a "highly paternalistic" law banning the advertisement of prescription drug prices, holding that "the protection afforded [by the First Amendment] is to the communication, to its source and to its recipients both."[182] The Court recognized that both individuals and society as a whole have an interest in "the free flow of commercial information."[183] Finally, the Court has recognized that the press does have (at least a limited) constitutional right of access to criminal proceedings[184] and places of punishment,[185] particularly when part of the government's motive in limiting disclosure of

179. *Boos*, 485 U.S. at 334.

180. It is significant that the Georgia law seeks to prevent "harassment" of those involved with executions by suppressing constitutionally protected speech (the disclosure of drug-maker identities), in order to prevent other constitutionally protected speech (protest against companies whose drugs are used in executions). While unprotected speech, such as threats, may be constitutionally proscribed, core political speech, such as a protest against a company, may not. A foundational principle of First Amendment doctrine is that "a principal function of free speech under our system of government is to invite dispute," particularly on issues of public concern. Texas v. Johnson, 491 U.S. 397, 408 (1988) (internal quotation marks omitted).

181. 394 U.S. 557, 564 (1969).

182. 425 U.S. 748, 756 (1976).

183. *Id.* at 763. The Court's analysis in this case is directly relevant to analysis of the Georgia law, as disclosure of the names of drug-makers who supply execution drugs may be relevant to many consumers' choices when purchasing drugs. Though Georgia seeks to justify its law based on an interest in preventing harassment of drug-makers if their identities are divulged, the court in *Virginia Pharmacy* explicitly declared that the "choice . . . between the dangers of suppressing information, and the dangers of its misuse if it is freely available [is a choice] that the First Amendment makes for us" in rejecting the law. *Id.* at 770.

184. *See* Richmond Newspapers v. Virginia, 448 U.S. 555, 580 (1980).

185. *See* Pell v. Procunier, 417 U.S. 817, 830 (1974).

information is an attempt to conceal wrongdoing and limit the press' ability to investigate such wrongdoing.[186] In the particular context of the disclosure of identities of executioners, courts have held that even if the withholding of the identities of individual executioners serves a compelling interest, the press must retain the ability to examine the executioners' qualifications,[187] something the Georgia statute expressly disallows as to both human executioners and the makers of lethal injection drugs. Because the Georgia law is content-based and unable to survive strict scrutiny, a reviewing court should find that speakers do have the right under the First Amendment to divulge the identities and qualifications of the makers of lethal injection drugs and should vindicate the right of the public and press to receive such information by holding Georgia's lethal injection secrecy law invalid under the First Amendment.

Conclusion

Through its lethal injection secrecy law, the state of Georgia seeks to serve two important interests: ensuring the swift application of punishments imposed by its courts, and protecting those who implement the death penalty from harassment.[188] However, the means Georgia chose to vindicate these interests—making disclosure of the identities and qualifications of those involved in executions a crime, and shielding such information even from the judicial branch—are unconstitutional. The Georgia law impermissibly denies prisoners meaningful access to the courts by shielding from judicial scrutiny information vital to potential Eighth Amendment claims.[189] Such shielding also violates constitutional separation of powers principles by intruding on courts' core functions by stripping the judiciary of its power to review constitutional claims.[190] Finally, the law also likely violates the First Amendment's freedom of speech clause by being insufficiently narrowly tailored to meet its ends.[191]

However, two changes would both save the law's constitutionality while also serving the state's interests (not to mention protecting the constitutional rights of death row

186. *Id.*

187. Roko, *supra* note 143, at 2821.

188. Order Granting Plaintiff's Emergency Motion for Preliminary Injunction, *supra* note 173, at 7.

189. *Supra* Part V.

190. *Supra* Part VI.

191. *Supra* Part VII.

prisoners). First, Georgia could alter the law so that, rather than making divulging this information a misdemeanor, it simply classifies the information and exempts it from public freedom of information laws.[192] Such a change would mend the law's First Amendment infirmities. Second, Georgia should remove the clause stating that executioner and drug-maker information is not discoverable through judicial process. This alteration would satisfy the Due Process Clause and separation of powers principles, and would allow any Eighth Amendment concerns to be adjudicated in a court of law. Georgia's lethal injection secrecy law violates individual liberties and core constitutional principles in an effort to help the state mete out the ultimate punishment. However, a few simple changes would save the law's constitutionality and protect both the rights of the prisoners the state seeks to execute and the vital interest the state has in effective punishment of crime.

192. This would parallel existing valid laws exempting the identities of individual executioners from public freedom of information laws. *See* Roko, *supra* note 143, at 2809.