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## Masking the Executioner and the Source of Execution Drugs

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## **MASKING THE EXECUTIONER AND THE SOURCE OF EXECUTION DRUGS**

SANDRA DAVIDSON\* AND MICHAEL BARAJAS\*\*

### INTRODUCTION

The black hood once concealed the executioner's identity in the days when the condemned were greeted by crowds eager to watch the public spectacle. But today, now that the public has been excluded from witnessing capital punishment in the United States, the black hood is no longer needed to conceal identity—just a pen to black out the executioner's name.

How much information about executions should reporters and the general public have? A Missouri law that took effect on August 28, 2007, adds another wrinkle to the ongoing controversy over public access to information on the state's system of capital punishment. Missouri not only puts the names of executioners off limits, as do many states, but also adds a unique provision to its law: Missouri provides for actual and punitive damages against anyone who releases the executioner's name.<sup>1</sup>

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1. Section 546.720 of the Missouri Revised Statutes states:

1. The manner of inflicting the punishment of death shall be by the administration of lethal gas or by means of the administration of lethal injection. And for such purpose the director of the department of corrections is hereby authorized and directed to provide a suitable and efficient room or place, enclosed from public view, within the walls of a correctional facility of the department of corrections, and the necessary appliances for carrying into execution the death penalty by means of the administration of lethal gas or by means of the administration of lethal injection.
2. The director of the department of corrections shall select an execution team which shall consist of those persons who administer lethal gas or lethal chemicals and those persons, such as medical personnel, who provide direct support for the administration of lethal gas or lethal chemicals. The identities of members of the execution team, as defined in the execution protocol of the department of corrections, shall be kept confidential. Notwithstanding any provision of law to the contrary, any portion of a record that could identify a person as being a current or former member of an execution team shall be privileged and shall not be subject to discovery, subpoena, or other means of legal compulsion for disclosure to any person or entity, the remainder of such record shall not

As Missouri, like many death penalty states, alters its lethal injection protocol because of a nationwide shortage of execution drugs, it is no longer just the names of executioners that state officials attempt to conceal. In the fall of 2013, officials with the Missouri Department of Corrections began to broadly interpret this law as requiring the identity of pharmacies that compound drugs for the state's executions to be withheld, calling drug suppliers part of Missouri's "execution team."<sup>2</sup> In January 2014, two Missouri news organizations openly challenged the secrecy law by publishing the name of an Oklahoma-based compounding pharmacy believed to have provided the state with death penalty drugs.<sup>3</sup>

be privileged or closed unless protected from disclosure by law. The section of an execution protocol that directly relates to the administration of lethal gas or lethal chemicals is an open record, the remainder of any execution protocol of the department of corrections is a closed record.

3. A person may not, without the approval of the director of the department of corrections, knowingly disclose the identity of a current or former member of an execution team or disclose a record knowing that it could identify a person as being a current or former member of an execution team. Any person whose identity is disclosed in violation of this section shall:

- (1) Have a civil cause of action against a person who violates this section;
- (2) Be entitled to recover from any such person:
  - (a) Actual damages; and
  - (b) Punitive damages on a showing of a willful violation of this section.

4. Notwithstanding any provision of law to the contrary, if a member of the execution team is licensed by a board or department, the licensing board or department shall not censure, reprimand, suspend, revoke, or take any other disciplinary action against the person's license because of his or her participation in a lawful execution. All members of the execution team are entitled to coverage under the state legal expense fund established by section 105.711 for conduct of such execution team member arising out of and performed in connection with his or her official duties on behalf of the state or any agency of the state, provided that moneys in this fund shall not be available for payment of claims under chapter 287.

MO. REV. STAT. § 546.720 (2013).

2. Justin Juozapavicius & Tim Talley, *The Apothecary Shoppe, Oklahoma Pharmacy Won't Give Missouri Execution Drug*, HUFFINGTON POST (Feb. 18, 2014, 8:59 AM), [http://www.huffingtonpost.com/2014/02/18/apothecary-shoppe-missouri-execution-drug\\_n\\_4807800.html](http://www.huffingtonpost.com/2014/02/18/apothecary-shoppe-missouri-execution-drug_n_4807800.html) ("[Missouri] has refused to say where it obtains its execution drug, arguing that the source is part of the execution team and therefore shielded from public disclosure.").

3. Steve Vockrodt, *As Questions Linger About Missouri's Shadowy Lethal-Injection Protocol, the State Is Days Away from Killing Another Inmate*, THE PITCH (Jan. 21, 2014), <http://www.pitch.com/kansascity/herbert-smulls-allen-nicklasson-death-penalty-missouri-department-of-corrections/Content?oid=4094006>. Vockrodt details how public records in both Missouri and Oklahoma point to the Apothecary Shoppe, a compounding pharmacy in Tulsa, as being the likely source of pentobarbital for Missouri executions. *Id.* St. Louis Public Radio, as part of an ongoing series on the death penalty in Missouri, published a story on January 25, 2014, drawing similar conclusions and calling the Apothecary Shoppe the state's "likely supplier." Chris

Critical coverage by the *St. Louis Post-Dispatch* in 2006 of a doctor who assisted in executions played a major role in Missouri adding actual and punitive damages to its “execution team” secrecy law. The doctor’s alleged problems, such as dyslexia, were certainly relevant to questions about his abilities to oversee precise quantities of drugs used in lethal injection executions. Reporter Jeremy Kohler wrote in the *Post-Dispatch*:

From behind a screen in a Kansas City court June 5, the doctor who devised and supervises the state’s lethal injection procedure described it in terms so troubling to a federal judge that he ordered it halted.

The doctor testified anonymously that he is dyslexic. That he sometimes confused names of drugs. That he sometimes gave inconsistent testimony. That the lethal injection protocol was not written down, and that he made changes on his “independent authority.”

And that turns out not to be all.

. . . Two Missouri hospitals won’t allow him to practice within their walls. He has been sued for malpractice more than 20 times, by his own estimate, and was publicly reprimanded in 2003 by the state Board of Healing Arts for failing to disclose malpractice suits to a hospital where he was treating patients.

It is unclear how much U.S. District Judge Fernando Gaitan Jr. was told before he strongly questioned the doctor’s qualifications—and whether Missouri was delivering unconstitutionally cruel punishment in its death chamber.<sup>4</sup>

The *Post-Dispatch* was first to openly challenge Missouri’s 2007 secrecy law soon after it passed. Arguably, the provision violates the First Amendment of the U.S. Constitution, and the U.S. Supreme Court has ruled that one may violate a law and then defend by challenging that law’s constitutionality.<sup>5</sup> Thus, on January 13, 2008, the *Post-Dispatch* published the name of a member of Missouri’s execution team, a nurse, who had a criminal record.<sup>6</sup> But while

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McDaniel, *Federal Judges Rule Execution Drug Supplier Can Be Secret, but Documents Point to Likely Identity*, ST. LOUIS PUB. RADIO (Jan. 25, 2014, 9:03 PM), <http://news.stlpublicradio.org/post/federal-judges-rule-execution-drug-supplier-can-be-secret-documents-point-likely-identity>. See also Chris McDaniel & Veronique LaCapra, *Investigation: Missouri’s Execution Drug Source Raises Legal, Ethical Questions*, ST. LOUIS PUB. RADIO (Dec. 31, 2013, 12:54 AM), <http://news.stlpublicradio.org/post/investigation-missouris-execution-drug-source-raises-legal-ethical-questions>. St. Louis Public Radio and the *Beacon* cooperated on this story. *Id.*

4. Jeremy Kohler, *Behind the Mask of the Execution Doctor*, ST. LOUIS POST-DISPATCH, July 30, 2006, at A1.

5. See *Thornhill v. Alabama*, 310 U.S. 88, 93 nn.3–4, 95–102 (1940). On the other hand, the Court did rule in *Walker v. City of Birmingham* that one may not violate a court order and then defend by challenging the order’s constitutionality. 388 U.S. 307, 315, 321 (1967).

6. Jeremy Kohler, *Execution Nurse Had Criminal Past*, ST. LOUIS POST-DISPATCH, Jan. 13, 2008, at A1.

the newspaper's motives in violating the law were seemingly good, the nurse's criminal record arguably had little to do with his qualifications or ability as an executioner, muddying the debate.

This Article examines Missouri's law that provides for damages against anyone releasing the name of any member of the execution team, including the pharmacies that supply the state with lethal injection drugs. This Article concludes that Missouri is in the mainstream in using lethal injection, in conducting executions behind prison walls, and in saying that the names of executioners should be confidential. But Missouri's attempt to impose damages for releasing the names of executioners may violate the First Amendment based on legal precedents such as the U.S. Supreme Court's 2001 decision in *Bartnicki v. Vopper*.<sup>7</sup> However, the Missouri precedent of *Hyde v. City of Columbia*, which the U.S. Supreme Court let stand in 1983, throws a negligence element into the legal pot and could perhaps be used to weaken any First Amendment argument in court.

The threshold question of whether a state should execute anyone is simply beyond the scope of this Article.<sup>8</sup>

#### I. AN OBLIGATION TO KNOW AND TO REPORT?: THE CASE OF "DR. DOE"

Should the public ever be concerned about who performs executions? Is the source of drugs states use in lethal injections, or their efficacy, a public concern? When there is a legitimate public interest or concern, journalists arguably have a professional duty to inform the public—particularly, one might argue, when lives are being taken by the state in the name of the public. Furthermore, the U.S. Supreme Court protects such journalists. According to the Court in *Bartnicki*, "sanctions on the publication of truthful information of public concern" strike at the core of the First Amendment.<sup>9</sup>

If executions do not go as planned, and especially if executioners are at fault, then public interest should be triggered. As states switch to never-before-tried drugs for use in lethal injections, reporters and attorneys representing death row clients alike are hungry for information on state capital punishment procedures.

The controversy that surrounds evolving execution practices is inseparable from the debate over open access to information on the death penalty. This has been particularly evident in recent years as death row inmates and their

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7. *Bartnicki v. Vopper*, 532 U.S. 514, 525, 535 (2001).

8. Also beyond the scope of this Article is the final section of Section 546.720 of the Missouri Revised Statutes, which states that licensing boards may not censure, reprimand, suspend, revoke, or take any other disciplinary action against someone's license because of his or her participation in a lawful execution. MO. REV. STAT. § 546.720 (2013).

9. *Bartnicki*, 532 U.S. at 533–34.

attorneys challenge the constitutionality of the death penalty based on the drugs, protocols, and even doctors used in executions.

In 2007, *Taylor v. Crawford*<sup>10</sup> raised serious questions about the qualifications and competence of the Missouri doctor tasked with overseeing the state's executions. Taylor had challenged Missouri's three-chemical lethal injection protocol, claiming there was a significant risk that he would suffer pain.<sup>11</sup> Taylor received a death sentence after pleading guilty to abducting, abusing, and murdering a fifteen-year-old girl.<sup>12</sup> In reversing the district court's decision, the Eighth Circuit said, in part:

Our independent review of the State's written protocol and the record in this case leads us to the conclusion that the written protocol does not violate the Eighth Amendment . . . . The concerns that the district court noted and required to be modified do not rise to the level of creating a constitutionally significant risk of pain.

The experts agree that if a 5-gram dose of thiopental is successfully delivered, there is virtually no risk that an inmate will suffer pain through Missouri's three-chemical sequence.<sup>13</sup>

While the Eighth Circuit emphasized the importance of following the proper procedures and, implicitly, having executioners who are competent to follow those procedures, perhaps the overturned decision by U.S. District Judge Fernando J. Gaitan, Jr., in *Taylor v. Crawford* is most illustrative of the relationship between personnel following an established procedure and unnecessarily cruel punishment.<sup>14</sup> Judge Gaitan was concerned by the testimony of "John Doe 1,"<sup>15</sup> the doctor then in charge of Missouri executions. The judge opined:

After learning more about how executions are carried out in Missouri . . . . it is apparent that there are numerous problems. For example, there is no written protocol which describes which drugs will be administered, in what amounts and defines how they will be administered. John Doe I testified that he came up with the current protocol. John Doe I also testified that he felt that

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10. *Taylor v. Crawford*, 487 F.3d 1072 (8th Cir. 2007).

11. *Id.* at 1074.

12. *Id.*

13. *Id.* at 1083. The Eighth Circuit again upheld the legality of Missouri's lethal injection protocol in 2009. See *Clemons v. Crawford*, 585 F.3d 1119, 1122 (8th Cir. 2009). For commentary on these decisions, see Tanya M. Maerz, Note, *Death of the Challenge to Lethal Injection? Missouri's Protocol Deemed Constitutional Yet Again*, 75 MO. L. REV. 1323 (2010).

14. *Taylor v. Crawford*, No. 05-4173-CV-C-FJG, 2006 WL 1779035, at \*4-6 (W.D. Mo. June 26, 2006).

15. *Id.* at \*4. In line with the convention of "Mary Roe" and "John Doe" as substitutes for names in legal cases, and in line with *Taylor v. Crawford*, which called the doctor in question "John Doe 1," the doctor's name will appear here as "Dr. Doe."

he had the authority to change or modify the formula as he saw fit. . . . He has reduced the amount of thiopental given from 5.0 grams to 2.5 grams . . . .

. . . .

. . . [T]he Court also has concerns about John Doe I's qualifications. John Doe I readily admitted that he is dyslexic and that he has difficulty with numbers and oftentimes transposes numbers. . . . The Court . . . is gravely concerned that a physician who is solely responsible for correctly mixing the drugs which will be responsible for humanely ending the life of condemned inmates has a condition which causes him confusion with regard to numbers.<sup>16</sup>

After *Taylor* revealed troubling details about Dr. Doe, Missouri began to make national news. Under the headline, "After Flawed Executions, States Resort to Secrecy," *The New York Times*' Adam Liptak began his story:

A Missouri doctor who had supervised more than 50 executions by lethal injection testified last year that he sometimes gave condemned inmates smaller doses of a sedative than the state's protocol called for, explaining that he is dyslexic. "So it's not unusual for me to make mistakes," said the doctor, who was referred to in court papers as John Doe I.

The St. Louis Post-Dispatch identified him last July as Dr. [Doe], revealing that he had been a magnet for malpractice suits arising from his day job as a surgeon and that two hospitals had revoked his privileges. In September, a federal judge barred Dr. [Doe] from participating "in any manner, at any level, in the State of Missouri's lethal injection process."<sup>17</sup>

Indeed, the *Post-Dispatch*, in a story by Jeremy Kohler, first revealed the identity of "John Doe I."<sup>18</sup> The article presented a less than savory laundry list of allegations, including the following: Dr. Doe was dyslexic; he sometimes confused drug names; he changed the drug protocol on his "independent authority"; he was banned from practicing in two Missouri hospitals; and he had been sued over twenty times for malpractice.<sup>19</sup> In addition, Kohler reported that a woman had sued Dr. Doe, claiming that he had sex with her while treating her, had performed sex surgeries on her to "restore" her virginity, and had performed an abortion on her in a hotel room.<sup>20</sup>

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16. *Id.* at \*7.

17. Adam Liptak, *After Flawed Executions, States Resort to Secrecy*, N.Y. TIMES, July 30, 2007, at A9. An earlier story began this way: "On a warm spring day last June in Kansas City, a doctor identified only as John Doe No. 1 sat behind a screen to testify . . ." Elizabeth Weil, *The Needle and the Damage Done*, N.Y. TIMES MAG., Feb. 11, 2007, at 46 (recounting the *St. Louis Post-Dispatch* coverage of Dr. Doe).

18. Kohler, *supra* note 4.

19. *Id.*

20. *Id.*

The *Post-Dispatch* article did clarify that the doctor supervised lethal injections but did not “push the plunger.”<sup>21</sup> The article also said that the doctor’s assistance in lethal injections came as a result of prison authorities requesting his help in the wake of an execution of a drug addict that took over thirty minutes; executioners had problems inserting the IV line and ended up placing it in the prisoner’s thumb.<sup>22</sup> The doctor would eventually participate in fifty-four executions.<sup>23</sup>

The *Post-Dispatch* discovered the doctor not through any public records or court proceedings but through investigative reporting techniques. Indeed, by allowing Dr. Doe to testify while behind a screen, by using a protective order to seal the doctor’s identity, and by having the doctor’s name redacted from public records, Judge Fernando J. Gaitan, Jr., had tried to keep Dr. Doe’s identity confidential.<sup>24</sup> But the *Post-Dispatch* got the doctor’s name from three sources, including one named source, Gary B. Kempker, a former director of the Missouri Department of Corrections and former Jefferson City police chief.<sup>25</sup> As the article noted, “Though court records have cloaked his name, they left enough clues to identify [Dr. Doe].”<sup>26</sup>

The Missouri legislature quickly reacted to the *Post-Dispatch* article. Just before then-Missouri Governor Matt Blunt signed a revamped secrecy bill, a *Post-Dispatch* article concluded, “The bill was drafted in response to a *Post-Dispatch* article that identified [Dr. Doe] of Jefferson City as the doctor who supervised lethal injections in the state for more than a decade.”<sup>27</sup> The *St. Joseph News Press* also credited the *Post-Dispatch* story with precipitating the bill. The paper said:

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21. *Id.*

22. *Id.* The prisoner was Emmitt Foster, executed on May 3, 1995. *Id.*

23. Kohler, *supra* note 4.

24. *Id.*

25. *Id.* The paper identified the two other sources only as “men who had official roles at executions.” *Id.*

26. *Id.* For a longer article on how Kohler discovered Dr. Doe by using investigative reporting techniques and process of elimination, see Jeremy Kohler, *Deadly Doc: Supervisor of State’s Lethal Injections Has Questionable Professional Record*, IRE J., Nov.-Dec. 2006, at 25.

27. As Deron Lee wrote in the *Columbia Journalism Review*, the Kansas City *Pitch*’s Steve Vockrodt described in his January 21, 2014, article the “research and deductive reasoning he had used” to point to the likely identity of the compounding pharmacy supplying Missouri with its execution drug—“not unlike the way Kohler identified [Dr. Doe] nearly a decade earlier.” Deron Lee, *The First Amendment vs. Death Penalty Secrecy Laws*, COLUM. JOURNALISM REV. (Mar. 7, 2014, 7:00 AM), [http://www.cjr.org/united\\_states\\_project/under\\_the\\_hangmans\\_hood.php?page=all](http://www.cjr.org/united_states_project/under_the_hangmans_hood.php?page=all).

27. Tina Hesman Saey, *State Says Executioners Need Identity Shielded: But Bill’s Critics Raise First Amendment Issues*, ST. LOUIS POST-DISPATCH, May 22, 2007, at D5.

Confidentiality has always been part of the package, right?

Well, actually, no. Missouri completed more than 60 executions before the issue of confidentiality surfaced. It came up after the St. Louis Post-Dispatch ran a story last summer on the identity of Dr. [Doe] of Jefferson City. The good doctor had participated in dozens of executions . . .<sup>28</sup>

On June 30, 2007, Governor Blunt signed House Bill 820, repealing Section 546.720 of the Missouri Revised Statutes and enacting a new section that criminalizes the release of information.<sup>29</sup> The Missouri Department of Corrections argued that protecting the identities of executioners and their support staff was, in part, an issue of safety.<sup>30</sup> A Department of Corrections spokesman told the *Post-Dispatch* that the paper, in revealing Dr. Doe's identity, was "irresponsible" and left the doctor open to retaliation.<sup>31</sup>

As *The New York Times* noted in describing the reasoning behind the bill, "[C]orrections officials say that executioners will face harassment or worse if their identities are revealed, and that it is getting hard to attract medically trained people to administer lethal injections, in part because codes of medical ethics prohibit participation in executions."<sup>32</sup> The Missouri bill, as the *Times* pointed out, also prohibits disciplinary actions against doctors who assist executions.<sup>33</sup> According to the *Post-Dispatch*, however, Larry Crawford, the then-director of the Missouri Department of Corrections, credited the paper's July 2006 story identifying the doctor with helping Missouri recruit executioners.<sup>34</sup>

In trying to protect the doctor's identity in inmates' challenges outside of Missouri, attorneys and court records have referred to him simply as "John Doe" or "Protected Person."<sup>35</sup>

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28. Editorial, *Good Line Sells This One*, ST. JOSEPH NEWS-PRESS (July 12, 2007), <http://www.highbeam.com/doc/1P2-14724782.html>.

29. H.R. 820, 94th Gen. Assemb., 1st Reg. Sess. (Mo. 2007).

30. See *Governor Signs Bill Keeping Executioners' Identity Secret*, REPORTERS COMM. FOR FREEDOM OF THE PRESS (July 10, 2007), <http://www.rcfp.org/browse-media-law-resources/news/governor-signs-bill-keeping-executioners-identities-secret>.

31. Saey, *supra* note 27. The article continued: "[Department of Corrections spokesman Brian] Hauswirth said he was not aware of any specific threats against [Dr. Doe] but said confidentiality was important to protect the physical safety of the execution team." *Id.*

32. Liptak, *supra* note 17.

33. *Id.* See also MO. REV. STAT. § 546.720 (2013).

34. Jeremy Kohler, *Inmates Seek IDs of Executioners*, ST. LOUIS POST-DISPATCH, Jan. 20, 2008, at C1.

35. For example, the doctor was referred to as "Protected Person No. 2" by a brief for inmate attorneys in one case. Henry Weinstein, *Doctor Barred by State Helps in U.S. Executions*, L.A. TIMES (Nov. 15, 2007), <http://articles.latimes.com/2007/nov/15/nation/na-johndoe15>. Moreover, the doctor was referred to as "John Doe" in an amicus brief filed with the U.S. Supreme Court lethal injection case. See *Baze v. Rees*, 553 U.S. 35 (2008).

Dr. Doe would eventually become part of at least two other execution teams. According to the *Los Angeles Times*:

Last year [2006], U.S. District Judge Fernando J. Gaitan Jr. of Kansas City, Mo., banned [Dr. Doe] from participating “in any manner, at any level” in lethal injections in Missouri.

....

Federal officials, however, have made [Dr. Doe] part of the execution team at the federal prison in Terre Haute, Ind., according to court papers filed on behalf of several inmates there. All condemned federal prisoners are executed at that prison.<sup>36</sup>

The *Arizona Republic* later reported that Dr. Doe participated in at least one Arizona execution just “11 months after [his] Missouri lethal-injection procedure was ruled unconstitutional and eight months after [he] was prohibited from further executions in Missouri because of questions about his standards and competence.”<sup>37</sup>

On January 13, 2008, the *St. Louis Post-Dispatch* again knowingly violated Missouri’s new statute *on its front page*. In a note titled “To Our Readers,” Editor Arnie Robbins said:

In the accompanying article, we reveal that a licensed practical nurse from Farmington who has been involved in lethal-injection executions of death-row inmates in the Missouri and the federal prison systems has his own criminal history.

We reveal that state and federal officials were aware of that history and, in 2001, gave special permission for the nurse, who was under probation restrictions, to continue on their execution teams and even travel to Indiana for the execution of Oklahoma City bomber Timothy McVeigh.<sup>38</sup> We also reveal the name of the nurse.

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36. Weinstein, *supra* note 35.

37. Michael Kiefer, *Doctor Banned From Executions in Mo. Now in Ariz.*, ARIZ. REPUBLIC (July 24, 2008, 12:00 AM), <http://www.azcentral.com/arizonarepublic/news/articles/2008/07/24/20080724deathpenaltydoc0724.html>. Kiefer reported that Dr. Doe’s signature appeared below the flat line of an electrocardiogram tape that recorded the last heartbeats of Robert Comer, a death row inmate executed by the State of Arizona on May 22, 2007. *Id.* The signature, at the very least, suggests that Dr. Doe “monitored the murderer’s condition in his final moments.” *Id.* Kiefer further reported:

The doctor’s techniques appear to have influenced new Arizona procedures for execution by lethal injection, specifically a practice of administering the killing chemicals through a catheter in the groin instead of through an arm. It’s a method that some critics say is too complex and contributes to higher risks of error that could lead to undue suffering.

*Id.*

38. Perhaps the most famous federal execution was that of bomber Timothy McVeigh. He was sentenced to death after being convicted for eleven of the deaths caused by his bombing of the Alfred P. Murrah Federal Building in Oklahoma City. *See* United States v. McVeigh, 153

We do so knowing the state of Missouri seeks to protect the identity of its executioners. We do so because we believe the public benefit of lifting this cloak of secrecy outweighs privacy concerns.<sup>39</sup>

The editor's note did not, however, reveal the particulars of the "criminal history." The accompanying story did—starting in paragraph eighteen, after discussing that capital punishment was on hold in thirty-five states and rehashing the story about Dr. Doe.<sup>40</sup> The news story revealed that in 1998, the nurse was accused of both threatening a man who had a "relationship" with the nurse's estranged wife and vandalizing the man's property.<sup>41</sup> That man, not named but called the "victim" by the *Post-Dispatch*, told police about damage to his truck (smashed windshield and headlights, a scratch, and some spray paint), damage to his home (mailbox run over and windows smashed), and threatening messages such as, "I'll burn your (expletive) house down and blow your (expletive) head off!"<sup>42</sup> The nurse was charged with two different felonies—aggravated stalking and first-degree tampering with property.<sup>43</sup> Although he denied the charges in court, he pled no contest to misdemeanor stalking and tampering with property.<sup>44</sup> He paid \$750 and was placed on two years of supervised probation, but the judge also gave the nurse a suspended imposition of sentence so that the record of the conviction would be sealed when the probation ended.<sup>45</sup> Besides the sealed record, "He has no other known criminal record," the *Post-Dispatch* reported.<sup>46</sup>

The *Post-Dispatch* story said the newspaper had obtained memos stating that both state and federal officials knew of the nurse's "conviction and probation status and wanted to use him anyway."<sup>47</sup> A probation division supervisor had apparently become alarmed and checked the nurse's file in

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F.3d 1116, 1176 (10th Cir. 1998). The April 19, 1995, blast killed 168 people. *Id.* McVeigh's death by lethal injection came on June 11, 2001, in Terre Haute, Indiana. *See McVeigh Executed, Stoic as End Comes*, ATL. J.-CONSTITUTION, June 11, 2001, at A1. Reportedly, instead of making a statement, he simply handed a copy of the poem "Invictus" to prison officials and then died with his eyes open. *Id.* McVeigh was the first person executed by the federal government in thirty-eight years. *Id.* In addition to witnesses at the execution site, about 230 more witnessed his death via a closed-circuit feed to a wide-screen TV in Oklahoma City. *See Gene Curtis, Only in Oklahoma: McVeigh Execution Witnessed by Victims' Kin*, TULSA WORLD, June 6, 2007, at A4. Gene Curtis reported that about three dozen witnesses watched via viewing rooms in the penitentiary. *Id.*

39. Arnie Robbins, *To Our Readers*, ST. LOUIS POST-DISPATCH, Jan. 13, 2008, at A13.

40. Kohler, *supra* note 6.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. Kohler, *supra* note 6.

46. *Id.*

47. *Id.*

January 2001, finding out that the nurse had received approval to travel to Indiana five times in 2000.<sup>48</sup> The bottom line is that the nurse's 2001 request to travel to Indiana was approved even after being reviewed by Dora Schriro, then-director of the Missouri Department of Corrections.<sup>49</sup> The *Post-Dispatch* reported: "The paperwork reflects [the nurse's] explanation that he would be administering McVeigh's lethal injection. It is not clear whether he did, although his permits to travel to the Indiana prison included May 30 to June 30, 2001; McVeigh was executed that June 11."<sup>50</sup>

Larry Crawford, then-director of Missouri's Department of Corrections, told the *Post-Dispatch* that prison staff, not medical personnel, actually pushed plungers delivering the execution drugs.<sup>51</sup>

Before revealing the particulars about the nurse's criminal history, the newspaper story stated, "Unlike the situation with [Dr. Doe], no one has publicly questioned the competence of the nurse . . . as a member of the execution team. Memos from the probation and parole division describe his 'special knowledge, skills and abilities' as 'one of a kind.'"<sup>52</sup> The praise continued: "His nursing license is unblemished. . . . The memos show he was recommended by the warden at the Potosi Correctional Center for the federal execution team, put in place in 2000."<sup>53</sup>

Yet, State Representative Danielle Moore, then a member of the state committee overseeing the Department of Corrections and the one who had sponsored the state's revised law on executioners' names in the Missouri House of Representatives,<sup>54</sup> "seemed taken aback" when contacted, according to the *Post-Dispatch*.<sup>55</sup> The newspaper quoted her as saying, "I'm writing this down. A member of an execution team who was on probation for stalking. . . . If it is true, it would give me grave concern."<sup>56</sup>

The story ended with an odious note:

The Missouri probation and parole administrator who confirmed [the nurse's] request for travel obviously recognized the potential for controversy.

In one of the memos, she wrote, "It would be extremely problematic for [the nurse] and this department if the media got wind of this."<sup>57</sup>

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48. *Id.*

49. *Id.*

50. Kohler, *supra* note 6.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. Kohler, *supra* note 6.

56. *Id.*

57. *Id.*

Both criticism and praise immediately followed the *Post-Dispatch*'s decision to name the nurse, as reflected in letters to the editor published by the newspaper under the headline of "Post-Dispatch Sets Bad Example by Flouting Law."<sup>58</sup> The first letter questioned the newspaper's methods, as well as the relevance of outing the nurse in the first place.<sup>59</sup> The letter also asserted that using the nurse's name added nothing to the story but perhaps did endanger him, and it concluded that the newspaper's flouting of the law set a "bad example to the community."<sup>60</sup> Perhaps the most pointed jibe at the newspaper in the letter concerned the newspaper's alleged inconsistency:

It is interesting that the same paper whose editorial staff took a strong stance against the illegal political exposure of Valerie Plame as a CIA operative . . . has now chosen to expose, illegally and unnecessarily, a much more vulnerable local citizen who may not have Ms. Plame's ability to attract a crowd of admirers or a lucrative book contract.<sup>61</sup>

Another letter set a harsher tone. After questioning the relationship between a misdemeanor record and medical abilities, the writer opined: "Perhaps there are some journalists who could fill the need for executioners. Certainly, there cannot be too much of a difference between character assassination and execution."<sup>62</sup>

But the letter that followed thanked the newspaper for its "timely and revealing" piece and asserted: "The veil of secrecy that shrouds the legalized

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58. *Post-Dispatch Sets a Bad Example by Flouting Law*, ST. LOUIS POST-DISPATCH, Jan. 19, 2008, at A39. The first letter read in part:

[T]he Post-Dispatch dug into sealed records relating to alleged harassment by the nurse of a man having an affair with his estranged wife. This resulted in a misdemeanor conviction. The nurse paid the fine and served his probation. It is unclear how this embarrassing family incident and personal conduct translates into inappropriate actions on the nurse's part in starting intravenous lines for the execution process. No evidence was presented to suggest that the nurse carried out any of his duties with the Department of Corrections inappropriately.

John Holds, Letter to the Editor, ST. LOUIS POST-DISPATCH, Jan. 19, 2008, at A39.

59. Holds, *supra* note 58.

60. *Id.*

61. *Id.*

62. Ed Carty, Letter to the Editor, ST. LOUIS POST-DISPATCH, Jan. 19, 2008, at A39. Carty's letter questioned whether the story warranted front-page coverage. *Id.* Another letter also questioned the front-page placement:

The Jan. 13 lead story was as follows: Seven years ago, the execution team convened in Indiana for an Oklahoma mass-murderer included a practical nurse on probation in Missouri for two misdemeanors. No one has accused this person of professional misconduct in association with the execution or in any other aspect of his career. Does that strike anyone as news, much less front-page news?

Tom Albus, Letter to the Editor, ST. LOUIS POST-DISPATCH, Jan. 19, 2008, at A39.

killing process supposedly undertaken for the public's benefit needs to be shredded."<sup>63</sup>

The day after publishing the letters to the editor, the *Post-Dispatch* ran another editorial about its decision to name the nurse. It began: "In the grim history of capital punishment is this curious footnote: Executioners used to become celebrities as they traveled from jurisdiction to jurisdiction to practice their specialized trade."<sup>64</sup> But now, as the editorial noted, names of executioners usually remain private. As for the nurse:

The senior executives of the newspaper decided to disclose [the nurse's] name on Sunday, notwithstanding the recently enacted law, because his background is crucial to the public's understanding of how the death penalty is administered in the name of the people of Missouri. That the state would employ someone on probation for stalking to conduct executions and then seek to keep his identity secret suggests a measure of deception that subverts the public interest, rather than serving it.<sup>65</sup>

Fair enough. But in this instance, how was knowing the nurse's "background" critical for understanding how Missouri conducts executions? Is the state's keeping his identity secret truly a form of deception by the state? The same editorial had stated that the paper "decided to disclose Dr. [Doe's] identity in 2006 because questions about his competence struck to the heart of the constitutional issue about the lethal injection process."<sup>66</sup> The nexus between a doctor's competence as a professional and the issue of whether capital punishment, as practiced, violates the Eighth Amendment's ban on cruel and unusual punishment is obvious: If a doctor is incompetent, and that incompetence leads to a botched execution procedure that induces unnecessary pain, then one could argue that the death sentence as applied is cruel and unusual. But the nexus between the nurse's domestic violence problems and how Missouri administers lethal injection appears more tenuous.

Regardless of whether the nurse's criminal activity was relevant to his activity in the execution chamber, the *Post-Dispatch* story revealing his name did have immediate legal fallout—not against the newspaper for defying the law but from inmates hoping to capitalize on the situation.<sup>67</sup> Lawyers for five inmates, including Michael Taylor,<sup>68</sup> immediately filed requests in federal court in Kansas City to provide more information about execution teams.<sup>69</sup> The

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63. Maggie Hall, Letter to the Editor, ST. LOUIS POST-DISPATCH, Jan. 19, 2008, at A39.

64. Editorial, *For Hire: Executioner*, ST. LOUIS POST-DISPATCH, Jan. 20, 2008, at B2.

65. *Id.*

66. *Id.*

67. Kohler, *supra* note 34.

68. Taylor v. Crawford, 487 F.3d 1072, 1074 (8th Cir. 2007). See *infra* notes 95–98 and accompanying text.

69. Kohler, *supra* note 34.

*Post-Dispatch*'s story about the nurse raised concerns about the nurse's "temperament and suitability" to help with executions, the lawyers argued, as well as the procedures the state uses to screen executioners.<sup>70</sup>

While the lawyers said they were willing to use anonymous depositions in order to protect the names of executioners, they also argued that an inmate's right to information in a federal suit trumps Missouri's state law and that death row inmates and their attorneys should not be relegated to gaining information about executioners from news media.<sup>71</sup>

## II. *BAZE V. REES* AND THE CONSTITUTIONALITY OF LETHAL INJECTION

In April 2008, in *Baze v. Rees*, the U.S. Supreme Court upheld Kentucky's use of the then-standard three-drug protocol for lethal injections—sodium thiopental to anesthetize the condemned, pancuronium bromide to cause paralysis, and potassium chloride to stop the heart.<sup>72</sup> Defense attorneys for Ralph Baze and Thomas C. Bowling, each convicted of double murders,<sup>73</sup> argued that the state's lax lethal injection protocols created an unacceptable risk of cruel and unusual punishment and, therefore, violated the Eighth Amendment.<sup>74</sup> However, the Supreme Court ruled that the petitioners failed to show how Kentucky's three-drug cocktail created a "substantial risk of serious harm" or an "objectively intolerable risk of harm."<sup>75</sup> While *Baze* upheld the constitutionality of lethal injection as a method of execution, it also opened the door for attorneys representing death row inmates in other states to specifically challenge other states' methods.<sup>76</sup>

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70. *Id.*

71. *Id.* The story also reported that three Democratic legislators from St. Louis (Sen. Maida Coleman, Sen. Harry Kennedy, and Rep. Belinda Harris) who served on the committee overseeing the Missouri Department of Corrections were criticizing the department for letting someone who was on probation help with executions. *Id.* Harris, according to the *Post-Dispatch*, also questioned the need for the law protecting the identity of executioners. *Id.*

72. *Baze v. Rees*, 553 U.S. 35, 41, 44 (2008).

73. Linda Greenhouse, *Justices to Enter the Debate over Lethal Injection*, N.Y. TIMES, Sept. 26, 2007, at A24. Greenhouse writes of Baze and Bowling: "The two inmates were convicted of separate, unrelated crimes: Mr. Baze for killing a sheriff and deputy sheriff who were trying to serve him with a warrant, and Mr. Bowling for killing a couple whose car he had damaged in a parking lot." *Id.*

74. *Id.*

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

76. *Baze* and its impact produced much commentary. See, e.g., Eric Berger, *Lethal Injection and the Problem of Constitutional Remedies*, 27 YALE L. & POL'Y REV. 259 (2009) (covering *Baze*, pain, and lethal injection protocols); Harvey Gee, *Eighth Amendment Challenges After Baze v. Rees: Lethal Injection, Civil Rights Lawsuits, and the Death Penalty*, 31 B.C. THIRD WORLD L.J. 217 (2011); Alison J. Nathan & Douglas A. Berman, *Baze-D and Confused: What's the Deal with Lethal Injection?*, 156 U. PA. L. REV. PENNUMBRA 312 (2008), available at <http://www.pennlawreview.com/debates/index.php?id=14>; Courtney Butler, Comment, *Baze v.*

The issue now is that states have been forced to stray from the lethal injection protocol upheld under *Baze* because of a nationwide shortage of sodium thiopental.<sup>77</sup> The shortage dates back to 2009, when Hospira, Inc., the sole U.S. manufacturer of sodium thiopental, announced that one of its suppliers had stopped making a crucial ingredient in the drug.<sup>78</sup> An effective sedative is critical in humanely administering the three-drug cocktail; the second and third drugs, which paralyze the condemned and stop the heart, are said to cause suffocating pain without proper sedation.<sup>79</sup>

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Rees: *Lethal Injection as a Constitutional Method of Execution*, 86 DENV. U. L. REV. 509 (2009); Michelle Lynn Veronica Consiglio, Essay, *Intentionally Inflicted: The Baze Plurality Painfully "Executed" the Purpose of the Eighth Amendment*, 6 TENN. J.L. & POL'Y 261 (2010); Molly E. Grace, Note, *Baze v. Rees: Merging Eighth Amendment Precedents into a New Standard for Method of Execution Challenges*, 68 MD. L. REV. 430 (2009); Katie Roth Heilman, Comment, *Contemplating "Cruel and Unusual": A Critical Analysis of Baze v. Rees in the Context of the Supreme Court's Eighth Amendment "Proportionality" Jurisprudence*, 58 AM. U. L. REV. 633 (2009); Jerry Merrill, Comment, *The Past, Present, & Future of Lethal Injection: Baze v. Rees' Effect on the Death Penalty*, 77 UMKC L. REV. 161 (2008); Mark B. Samburg, Recent Development, *Cruel and Unusual? The Bifurcation of Eighth Amendment Inquiries After Baze v. Rees*, 44 HARV. C.R.-C.L. L. REV. 213 (2009).

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

78. *Id.*

79. *Id.* See also Kimberly Newberry, *Secrecy in Lethal Injection: How the Oklahoma Courts Are Supporting a Deadly Double Standard*, JURIST (June 1, 2014, 3:00 PM), <http://jurist.org/date-line/2014/06/kimberly-newberry-lethal-injection.php>.

Historically, most states used a three-drug cocktail: pentobarbital or sodium thiopental, barbiturates that put a person to sleep so they are unable to feel anything else; pancuronium bromide, a paralytic to stop muscular movement and prevent respiration; and potassium chloride, which stops the heart.

Many opponents to this cocktail concede that if the first drug is properly administered, there is little to no likelihood that the extreme pain associated with the second and third drugs is felt. The problem, however, has been the insufficient guarantee of proper administration: faulty IV lines; the inexperience of the execution team members, who oftentimes do not have medical degrees; and *questions surrounding the sources and purity of the drugs all lead to the possibility that the first drug will not work and the prisoner will feel everything else that happens. When the individual begins to experience pain, the second drug—a paralytic—will have already kicked in, making he or she unable to signal to anyone watching what is happening. By the time the executioners administer the third drug, the person will experience immense pain and feelings of suffocation or drowning. But nobody will know.*

*Id.* (emphasis added). *The Guardian* reported that a three year study in Texas showed that executions there are taking up to twenty minutes longer than they did before the EU ban on execution drugs caused the state to change its drug protocol. See Tom Dart & Ed Pilkington, *States Subjecting Death Row Inmates to Longer Deaths Amid Scramble for Drugs*, THE GUARDIAN (Jan. 31, 2014, 1:43 PM), <http://www.theguardian.com/world/2014/jan/30/death-row-inmates-longer-deaths-scramble-drugs>.

Hospira originally announced plans to resume production of sodium thiopental by moving operations to a plant in Italy, but the Italian government refused to allow the export of drugs bound for death chambers because of mounting pressure from the British human rights group Reprieve, which opposes the death penalty.<sup>80</sup> In January 2011, Hospira announced it would cease production of sodium thiopental altogether, leaving states scrambling for an alternate source.<sup>81</sup>

Records obtained by attorneys representing death row inmates would eventually show that states such as Georgia, California, and Arizona turned to foreign-based pharmaceutical wholesalers for their execution drugs.<sup>82</sup> Georgia attorney John Bentivoglio wrote a letter to U.S. Attorney General Eric Holder on behalf of his death row client in 2010, arguing that the Georgia Department of Corrections had violated the Federal Controlled Substances Act by ordering sodium thiopental directly from a British pharmaceutical wholesaler even though the law makes it illegal to “possess, manufacture, distribute or dispense” a controlled substance—which sodium thiopental is—without a registration from the Drug Enforcement Agency (DEA).<sup>83</sup> A few weeks after Bentivoglio’s letter, DEA agents raided the maximum-security prison in Jackson, Georgia, and seized the state’s supply of sodium thiopental.<sup>84</sup>

By December 2011, the European Commission had announced new restrictions banning European Union (EU) companies from exporting drugs to the United States for use in lethal injections, further exacerbating the crisis faced by death penalty states.<sup>85</sup> No EU countries allow capital punishment.<sup>86</sup>

Other states, such as Florida, Ohio, and Texas, rather than finding a new supply of sodium thiopental, simply changed their lethal injection protocols.<sup>87</sup> However, inmate challenges to state execution protocols that stray from the

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80. Segura, *supra* note 77.

81. *Id.* See also Gary Strauss, *Slow Execution Spurs Controversy: Ohio Lethal Injection Took 25 Minutes to End*, USA TODAY, Jan. 16, 2014, at A1.

82. Segura, *supra* note 77.

83. *Id.*

84. *Id.*

85. Ed Pilkington, *Europe Moves to Block Trade in Medical Drugs Used in US Executions*, THE GUARDIAN (Dec. 20, 2011, 1:27 PM), <http://www.theguardian.com/world/2011/dec/20/death-penalty-drugs-european-commission>. The European Commission Vice President Catherine Ashton said of the boycott, “The decision today contributes to the wider EU efforts to abolish the death penalty worldwide.” *Id.*

86. See, e.g., Christian Behrmann & Jon Yorke, *The European Union and the Abolition of the Death Penalty*, 4 PACE INT’L L. REV. ONLINE COMPANION 1, 3–4 (2013), available at <http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1038&context=pilronline>.

87. Manny Fernandez, *Executions Stall as States Seek Different Drugs*, N.Y. TIMES, Nov. 9, 2013, at A1.

three-drug cocktail approved under *Baze* continue to be rejected by the circuit courts.<sup>88</sup>

Concerns that new or untested execution protocols might cause physical pain and suffering are not merely theoretical. On January 16, 2014, Ohio prison officials executed Dennis B. McGuire, convicted of raping and murdering a woman in 1989, with a new and untested combination of drugs.<sup>89</sup> McGuire's execution lasted about twenty-five minutes, during which McGuire reportedly moved and made "gasping, snorting and choking sounds."<sup>90</sup> The execution prompted Ohio's governor to postpone the state's next scheduled execution for eight months.<sup>91</sup>

McGuire's was not Ohio's first botched execution. On May 24, 2007, the death of Christopher Newton took ninety minutes because a prison paramedic

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88. See *Towery v. Brewer*, 672 F.3d 650, 652–53 (9th Cir. 2012); *Valle v. Singer*, 655 F.3d 1223, 1224–26 (11th Cir. 2011). In *Towery*, the state gave notice that it would administer a one-drug protocol, using only pentobarbital, less than two days before *Towery*'s execution. *Towery*, 672 F.3d at 657. See also *Lopez v. Brewer*, 680 F.3d 1068, 1070, 1078 (9th Cir. 2012). One can sense frustration in the Ninth Circuit's May 2012 ruling upholding Arizona's protocol. In her opinion, Judge McKeown wrote: "We embark upon this opinion with *deja vu*, the feeling that we have been here before, but with the knowledge that we will likely be here again." *Id.* at 1070. Judge McKeown stated that no court had yet determined the constitutionality of Arizona's then-current death penalty protocol, which was adopted in January 2012, and yet the court had been asked to address individual provisions of the protocol in abstract "without a constitutionally firm base." *Id.* Further complicating matters, the procedures for individual executions had not been consistent and "there is uncertainty as to how the next execution will be carried out." *Id.* She continued:

The State continues to cling to its discretion, all the while urging us—during oral argument in the waning hours before execution—to trust that it will exercise its discretion in a constitutionally permissible manner. The State's insistence "on amending its execution protocol on an *ad hoc* basis—through add-on practices, trial court representation and acknowledgements, and last minute written amendments—leav[es] the courts with a rolling protocol that forces us to engage with serious constitutional questions and complicated factual issues in the waning hours before executions."

*Id.* at 1070–71 (quoting *Towery*, 672 F.3d at 653).

89. Erica Goode, *After a Prolonged Execution, Questions Over 'Cruel and Unusual,'* N.Y. TIMES, Jan. 18, 2014, at A12. Ohio, which had run out of its supply of pentobarbital, chose a combination of the anti-anxiety drug midazolam and the morphine-like narcotic hydromorphone. *Id.*

90. *Id.* See also Strauss, *supra* note 81.

91. Andrew Welsh-Huggins, *Ohio Governor Delays Inmate's Upcoming Execution*, ASSOCIATED PRESS (Feb. 7, 2014, 6:27 PM), <http://bigstory.ap.org/article/ohio-governor-de-lays-inmates-upcoming-execution>. Governor John Kasich granted an eight-month reprieve for Gregory Lott, who was sentenced to death for setting an eighty-two-year-old man on fire and leaving him to die. *Id.* Kasich's ruling stated that "circumstances exist justifying the grant of a temporary reprieve." *Id.*

had trouble attaching intravenous lines.<sup>92</sup> The executioners stabbed Newton with the needle at least ten times, and the process took so long that Newton got a bathroom break.<sup>93</sup> In 2009, Romell Broom's execution was halted after executioners tried and failed for two hours to get an intravenous line.<sup>94</sup>

In early 2013, lawyers for Missouri death row inmate Michael Taylor sued the Apothecary Shoppe, a Tulsa-based compounding pharmacy that was believed to be the state's source of the execution drug pentobarbital.<sup>95</sup> Attorneys for Taylor—who was sentenced to die for abducting, raping, and stabbing a fifteen-year-old Kansas City girl to death—argued that his civil rights would be violated because the pharmacy is not regulated by the federal government.<sup>96</sup> The lawsuit also pointed to several recent executions that used compounded pentobarbital.<sup>97</sup> The lawsuit alleged that, in light of such cases, Taylor risked “severe, unnecessary, lingering and ultimately inhumane pain” if executed with the drug.<sup>98</sup> Among the cases were the October 15, 2012, execution of Eric Robert in South Dakota and Oklahoma's January 9, 2014, execution of Michael Lee Wilson, who, upon receiving the execution drug, stated, “I feel my whole body burning.”<sup>99</sup>

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92. Alan Johnson, *Ohio Draws Criticism for Drawn-Out Executions: State's Lethal-Injection Process Seriously Flawed, Expert Says*, COLUMBUS DISPATCH, May 26, 2007, at A1.

93. See also Julie Carr Smyth, *Should Executioners Be Identified?*, GRAND RAPIDS PRESS, June 10, 2007, at A10. A year before in Ohio, paramedics had trouble executing Joseph Clark when his vein collapsed. See Johnson, *supra* note 92. For additional material on Ohio executions, see Elliott Garvey, Comment, *A Needle in the Haystack: Finding a Solution to Ohio's Lethal Injection Problems*, 38 CAP. U. L. REV. 609 (2010). Ohio was the first state to go with a one-drug protocol. *Id.* at 609. Many of the risks with the protocol involve the IV lines. *Id.* at 626–27. For a broader discussion of lethal injection procedures, see Jonathan Yehuda, Note, *Tinkering with the Machinery of Death: Lethal Injection, Procedure, and the Retention of Capital Punishment in the United States*, 88 N.Y.U. L. REV. 2319 (2013).

94. Goode, *supra* note 89.

95. See *Lawyers for Missouri Death Row Inmate Sue Pharmacy that Makes Execution Drug*, ST. LOUIS POST-DISPATCH (Feb. 12, 2014, 6:54 PM), [http://www.stltoday.com/news/local/crime-and-courts/lawyers-for-missouri-death-row-inmate-sue-pharmacy-that-makes/article\\_bb281de1-b8f2-5056-b20d-8f196d14e578.html](http://www.stltoday.com/news/local/crime-and-courts/lawyers-for-missouri-death-row-inmate-sue-pharmacy-that-makes/article_bb281de1-b8f2-5056-b20d-8f196d14e578.html).

96. *Id.* For more on compounding pharmacies, see *infra* notes 202–05 and accompanying text.

97. Tim Talley, *Execution Drug Supplier Won't Sell to Missouri*, ST. LOUIS POST-DISPATCH, Feb. 18, 2014, at A1.

98. *Id.*

99. *Id.* Robert reportedly “cleared his throat, gasped for air and then snored after receiving the lethal injection.” *Id.* Moreover, “[h]is skin turned a purplish color, and his heart continued to beat for 10 minutes after he stopped breathing.” *Id.* It took twenty minutes for authorities to declare Robert dead. *Id.*

In spring 2014, Oklahoma sought for the first time to execute prisoners using the sedative midazolam<sup>100</sup> as part of its lethal three-drug combination.<sup>101</sup> Two death row inmates sued when state officials refused to disclose details about the new drug, including the state's drug supplier.<sup>102</sup> After legal and political wrangling,<sup>103</sup> on April 29, 2014, the state proceeded with the execution of Clayton Lockett, who was convicted of shooting nineteen-year-old Stephanie Neiman and watching his accomplices bury her alive.<sup>104</sup>

Three minutes after Lockett was declared unconscious by an on-scene physician, Lockett began "breathing heavily, writhing, clenching his teeth and straining to lift his head off the pillow," according to an Associated Press

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100. Oklahoma was not the first state to use the drug. *See* Fernandez, *supra* note 87. *See also* Tamara Lush, *Testimony Gives Rare Details of Fla. Executions*, ASSOCIATED PRESS (Feb. 19, 2014, 5:03 PM), <http://bigstory.ap.org/article/testimony-gives-rare-details-fla-executions-0>. Death row inmate William Happ, sentenced to death for the 1986 rape and strangulation of an Illinois woman, was the first to be executed in Florida with midazolam. *Id.* Lush wrote: "An Associated Press reporter who had covered executions using the old drug cocktail wrote that Happ acted differently during the execution than those executed before him. It appeared Happ remained conscious longer and made more body movements after losing consciousness." *Id.*

101. Bailey Elise McBride & Sean Murphy, *Oklahoma Inmate Dies After Execution is Botched*, ASSOCIATED PRESS (Apr. 30, 2014, 1:09 AM), <http://bigstory.ap.org/article/oklaho-ma-prepares-execution-2-inmates>.

102. *Id.*

103. Katie Fretland, *Oklahoma Court Lifts Stay of Executions, Heading Off Confrontation with Governor*, THE GUARDIAN (Apr. 23, 2014, 9:48 PM), <http://www.theguardian.com/world/2014/apr/23/oklahoma-governor-mary-fallin-inmate-execution-proceed-supreme-court-stay>.

Oklahoma County District Judge Patricia Parrish had ruled that since she could not order the state to reveal its lethal injection drug supplier in court, the law mandating secrecy of the lethal injection procedure was unconstitutional. *See* Bailey Elise McBride, *Oklahoma's Execution Drugs Spark Concerns*, HUFFINGTON POST (Apr. 2, 2014, 10:59 AM), [http://www.huffingtonpost.com/2014/04/01/oklahoma-execution-drugs\\_n\\_5072783.html](http://www.huffingtonpost.com/2014/04/01/oklahoma-execution-drugs_n_5072783.html). The Oklahoma Department of Corrections appealed the ruling. *See id.* The Oklahoma Supreme Court halted the executions after two weeks of public sparring with the Oklahoma Court of Criminal Appeals over which legal body had the authority to grant a stay of execution. *See* Fretland, *supra*. In its own ruling, rendered the day after the Oklahoma Supreme Court stayed the executions, the Court of Criminal Appeals denied the request, chastising the inmates' petition to the Oklahoma Supreme Court as "litigation . . . intended to take advantage of our bifurcated system of justice." *See* Lockett v. Oklahoma, 329 P.3d 755, 759 (Okla. Crim. App. 2014). Oklahoma divides its appellate procedure into two channels, civil and criminal, as *Lockett* illustrates. *See also* Fretland, *supra*. Several state lawmakers responded by threatening to impeach the Oklahoma Supreme Court justices, and Governor Mary Fallin ignored the court's ruling, issuing an executive order directing state corrections officials to proceed with the executions. *Id.* The state's high court eventually backed down and dissolved the stay. *Id.*

104. Michael Winter, *Oklahoma Killer Dies After Botched Execution*, USA TODAY (Apr. 29, 2014, 10:19 PM), <http://www.wltx.com/story/news/nation/2014/04/29/killer-execution-dies-ok/8494897/>.

reporter who witnessed the execution.<sup>105</sup> Ziva Branstetter, an editor at the *Tulsa World* who also witnessed Lockett's execution, reported that Lockett began to roll his head from side to side.<sup>106</sup> "He again mumbles something we can't understand, except for the word 'man,'" she reported.<sup>107</sup> "He lifts his head and shoulders off the gurney several times, as if he's trying to sit up. He appears to be in pain."<sup>108</sup> Officials then closed the blinds and called off the execution.<sup>109</sup> They later announced that Lockett had died of a "massive heart attack" and postponed another execution that had been scheduled that same evening.<sup>110</sup> The headline of a *New York Times* editorial two days later blared: "State-Sponsored Horror in Oklahoma."<sup>111</sup> An independent autopsy commissioned by Lockett's attorneys eventually revealed that Lockett was not fully anesthetized during the attempted execution because of an improperly placed injection line in a vein in his groin.<sup>112</sup>

Meanwhile, even in light of Lockett's botched execution and the public outcry it sparked,<sup>113</sup> courts continued to reject inmates' attempts to stall executions and to learn more details about how states administer the death penalty.

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105. McBride & Murphy, *supra* note 101. Oklahoma corrections initially blamed the botched execution on a "blown" vein that kept the sedative from taking effect. *Id.* Lockett's defense attorney, David Autry, was skeptical of the claim, saying Lockett was "in very good shape" and "had large arms and very prominent veins." *Id.*

106. Ziva Branstetter, *Eyewitness Account: A Minute-by-Minute Look at What Happened During Clayton Lockett's Execution*, TULSA WORLD (May 1, 2014, 12:00 AM), [http://www.tulsaworld.com/news/state/eyewitness-account-a-minute-by-minute-look-at-what-happened/article\\_f7764efc-d036-11e3-af7e-0017a43b2370.html](http://www.tulsaworld.com/news/state/eyewitness-account-a-minute-by-minute-look-at-what-happened/article_f7764efc-d036-11e3-af7e-0017a43b2370.html).

107. *Id.*

108. *Id.*

109. *Id.*

110. Erik Eckholm & John Schwartz, *Oklahoma Vows Review in Botched Execution*, N.Y. TIMES, May 1, 2014, at A1.

111. Editorial, *State-Sponsored Horror in Oklahoma*, N.Y. TIMES, May 1, 2014, at A24.

112. Erik Eckholm, *Defense Reports Puncture Led to Botched Execution*, N.Y. TIMES, June 14, 2014, at A14. Eckholm wrote:

The finding contradicts the claim by Oklahoma prison officials that Mr. Lockett's vein had collapsed or "blown," as one described it. Instead, the new report indicates that Mr. Lockett's femoral vein, located deep below the surface of the groin, was punctured by inexpert probing and that the execution drugs were not pumped directly into the bloodstream.

*Id.*

113. See Michael Muskal, *Botched Oklahoma Execution Is 'Deeply Troubling,' Obama Says*, L.A. TIMES (May 2, 2014, 1:45 PM), <http://www.latimes.com/nation/nationnow/la-na-nn-botched-oklahoma-execution-20140502-dto-htlstory.html>. President Barack Obama called the episode "deeply troubling" and asked that U.S. Attorney General Eric H. Holder, Jr., undertake an analysis of how capital punishment is carried out in the United States. *Id.*

On May 19, 2014, the Georgia Supreme Court upheld the state's law allowing prison officials to conceal their source of execution drugs.<sup>114</sup> The decision also overturned the stay of execution previously granted to Warren Lee Hill, Jr., an inmate with an IQ of 70 who was sentenced to death for killing another prison inmate.<sup>115</sup>

In his dissent, Justice Robert Benham wrote, "I fear this State is on a path that, at the very least, denies Hill and other death row inmates their rights to due process and, at the very worst, leads to the macabre results that occurred in Oklahoma."<sup>116</sup> Benham continued:

There must be certainty in the administration of the death penalty. At this time, there is a dearth of certainty namely because of the scarcity of the lethal injection drugs. Georgia's confidential inmate state secret statute does nothing to achieve a high level of certainty. Rather, the law has the effect of creating the very secret star chamber-like proceedings in which the State has promised its citizens it would not engage. . . . The fact that some drug providers may be subject to harassment and/or public ridicule and the fact that authorities may find it more difficult to obtain drugs for use in executions are insufficient reasons to forgo constitutional processes in favor of secrecy, especially when the state is carrying out the ultimate punishment.<sup>117</sup>

On July 23, 2014, the execution of Joseph Wood in Arizona took one hour and fifty-seven minutes.<sup>118</sup> Witnesses reported up to 660 gasps by Wood before he finally died.<sup>119</sup> Arizona used the same drug protocol of midazolam

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114. *Owens v. Hill*, 758 S.E.2d 794, 796 (Ga. 2014). For the state's statutory language, see *infra* note 141 and accompanying text.

115. Alan Blinder, *Georgia Court Upholds Block on Details of State's Executions*, N.Y. TIMES, May 20, 2014, at A15.

116. *Owens*, 758 S.E.2d at 807 (Benham, J., dissenting).

117. *Id.*

118. See Mauricio Marin, *Witness to a 2-Hour Arizona Execution: Joseph Wood's Final 117 Minutes*, THE GUARDIAN (July 24, 2014, 7:35 AM), <http://www.theguardian.com/commentisfree/2014/jul/24/witness-arizona-execution-joseph-wood-died>. See also Mark Berman, *Arizona Execution Lasts Nearly Two Hours: Lawyer Says Joseph Wood Was 'Gasping and Struggling to Breathe'*, WASH. POST (July 23, 2014), <http://www.washingtonpost.com/news/post-nation/wp/2014/07/23/arizona-supreme-court-stays-planned-execution/>.

119. See, e.g., Berman, *supra* note 118; Marin, *supra* note 118. In a glass-half-full statement following Wood's execution, Arizona's Department of Corrections Director Charles Ryan said that parts of the execution went "perfectly." See Catherine Thompson, *Prison Chief: Parts of Arizona's Botched Execution Went 'Perfectly'*, TPM LIVEWIRE (July 25, 2014, 9:34 AM), <http://talkingpointsmemo.com/livewire/arizona-prison-chief-parts-of-botched-execution-went-perfectly>. He said that the medical examiner reported that the IV lines had been "perfectly placed." *Id.* Ryan also claimed that Wood remained unconscious during the execution, but he said Arizona would seek no execution orders until completion of the review of Wood's execution ordered by Arizona's governor, Jan Brewer. *Id.* See also Mark Berman, *Arizona Officials Say Execution Was Carried Out Properly*, WASH. POST (July 24, 2014), <http://www.washingtonpost.com/news/post-nation/wp/2014/07/24/arizona-officials-say-execution-was-carried-out-properly>.

and hydromorphone that Ohio had used in Dennis McGuire's botched execution.<sup>120</sup> Wood was executed for the 1989 shooting deaths of his estranged girlfriend, Debra Dietz, and her father.<sup>121</sup> Wood's First Amendment arguments, including that he should be told the amounts of the drugs to be used, the source of the drugs, and the qualifications of the executioners,<sup>122</sup> scored preliminary success in the Ninth Circuit; the court opined, "We, and the public, cannot meaningfully evaluate execution protocol cloaked in secrecy."<sup>123</sup> But, ultimately, all arguments failed to persuade the U.S. Supreme Court to stay Wood's execution.<sup>124</sup>

On August 6, 2014, Missouri performed the next U.S. execution. At 12:01 a.m., forty-three-year-old Michael Worthington received a single drug, pentobarbital, as punishment for the 1995 rape and strangulation murder of twenty-four-year-old Melinda Griffin.<sup>125</sup> At 12:11 a.m., he was pronounced dead.<sup>126</sup> His attorneys had appealed his execution on the grounds that "an unregulated compounded drug, from an undisclosed supplier, from unknown ingredients, and through unknown processes" would likely cause "substantial risk of . . . severe and unacceptable levels of pain and suffering"; they cited the previously botched executions in Ohio, Oklahoma, and Arizona.<sup>127</sup> The U.S. Supreme Court, 5-4, rejected Worthington's application for a stay of execution.<sup>128</sup>

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120. Berman, *supra* note 118; Max Ehrenfreund, *Dennis McGuire Executed in Ohio with New Combination of Lethal Drugs*, WASH. POST (Jan. 16, 2014), [http://www.washingtonpost.com/national/dennis-mcguire-executed-in-ohio-with-new-combination-of-lethal-drugs/2014/01/16/612e22a2-7ede-11e3-93c1-0e888170b723\\_story.html](http://www.washingtonpost.com/national/dennis-mcguire-executed-in-ohio-with-new-combination-of-lethal-drugs/2014/01/16/612e22a2-7ede-11e3-93c1-0e888170b723_story.html).

121. *Wood v. Ryan*, 759 F.3d 1076, 1078 (9th Cir. 2014), *vacated*, 83 U.S.L.W. 3083 (U.S. July 22, 2014) (No. 14A82).

122. *Id.*

123. *Id.* at 1087. The court continued, "It is in the public's interest that Wood's injunction be granted." *Id.* at 1088. The court was persuaded that "Wood has raised serious questions on the merits as to the positive role that access to lethal-injection drug information and executioner qualifications will have in the public debate on methods of execution." *Id.* at 1086. For the Ninth Circuit's discussion of Wood's First Amendment claims, see *id.* at 1080-88.

124. *Wood v. Arizona*, No. 14-5323(14A83), 2014 WL 3593088, at \*1 (U.S. July 22, 2014).

125. See Tasneem Nashrulla, *Missouri Puts to Death First Inmate Since Prolonged Arizona Execution*, BUZZFEED (Aug. 6, 2014, 1:22 AM), <http://www.buzzfeed.com/tasneemnashrulla/missouri-inmate-could-become-first-man-to-be-executed-since>. See also *Missouri Executes Michael Worthington*, THE GUARDIAN (Aug. 6, 2014, 2:19 AM), <http://www.theguardian.com/world/2014/aug/06/missouri-executes-michael-worthington>.

126. Nashrulla, *supra* note 125.

127. *Id.*

128. *Worthington v. Lombardi*, No. 14A141, 2014 WL 3841851, at \*1 (U.S. Aug. 5, 2014); Jess Bravin, *Divided Supreme Court Denies Stay of Execution in Missouri*, WALL ST. J. (Aug. 6, 2014, 6:24 PM), <http://online.wsj.com/news/articles/SB20001424052702303967904580074402663598756>.

On September 2, 2014, controversy over secrecy swirled again as St. Louis Public Radio reported that documents it obtained from the Department of Corrections showed that Missouri did use the controversial drug midazolam, not just pentobarbital, during executions—despite, for example, a deposition statement in January 2014 by Department of Corrections Director George Lombardi that Missouri had “no intention” to use midazolam in an execution.<sup>129</sup> Responding to the station’s allegations that Missouri officials had not been totally truthful about the state’s execution protocol, a Department of Corrections spokesperson said that midazolam was used as a sedative “prior to the actual execution” and not as “part of the actual execution.”<sup>130</sup>

Appeals based on these reports about use of midazolam proved unsuccessful for

Earl Ringo, Jr., executed on September 9, 2014, for the deaths of forty-five-year-old delivery man Dennis Poyser and twenty-two-year-old manager-trainee JoAnna Baysinger at a Ruby Tuesday restaurant in Columbia, Missouri.<sup>131</sup> The Missouri Department of Corrections said that Ringo received a lethal dose of pentobarbital at 12:22 a.m. and was pronounced dead at 12:31 a.m.<sup>132</sup> Three judges of the Eighth Circuit Court of Appeals would have granted a stay in the execution because of the midazolam reports.<sup>133</sup> The dissenting opinion also casts doubt on the truthfulness of the Missouri Department of Corrections.<sup>134</sup>

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129. Chris McDaniel, *Missouri Swore It Wouldn't Use a Controversial Execution Drug. It Did.*, ST. LOUIS PUB. RADIO (Sept. 2, 2014, 10:53 PM), <http://news.stlpublicradio.org/post/missouri-swore-it-wouldn-t-use-controversial-execution-drug-it-did>.

130. *Id.*

131. *Missouri Carries Out 8th Execution of 2014*, USA TODAY (Sept. 10, 2014, 2:26 AM), <http://www.usatoday.com/story/news/nation/2014/09/10/missouri-execution/15374243/>; Cassandra Vinograd, *Missouri Executes Earl Ringo, Convicted of Killing Two in 1998*, NBC NEWS (Sept. 9, 2014, 11:48 PM), <http://www.nbcnews.com/storyline/lethal-injection/missouri-executes-earl-ringo-convicted-killing-two-1998-n19976>.

132. Vinograd, *supra* note 131.

133. *Ringo v. Roper*, No: 14-3061, 2014 U.S. App. LEXIS 17568, at \*1–2 (8th Cir. Sept. 9, 2014) (stay denied), *aff'd*, 83 U.S.L.W. 3125 (U.S. Sept. 9, 2014) (No. 14-6169). In his dissent, Judge Bye, joined by Judges Murphy and Kelly, opined in part:

Recent revelations, disclosed for the first time in the last few days, indicate Missouri has been intravenously injecting large doses of the drug midazolam into its death row inmates before the time at which each inmate’s death warrant becomes valid.

. . . .

The unusually large doses of midazolam Missouri has intravenously injected into inmates in its last four executions—just minutes prior to the time when the death warrants become effective—is alarming with respect to the constitutional prohibition against executing a prisoner in a state of incompetency.

*Id.* at \*4–5.

134. Judge Bye further opined:

## III. KEEPING EXECUTIONERS MASKED

Missouri law, as of 2013, says:

The director of the department of corrections shall select an execution team which shall consist of those persons who administer lethal gas or lethal chemicals and those persons, such as medical personnel, who provide direct support for the administration of lethal gas or lethal chemicals. *The identities of members of the execution team, as defined in the execution protocol of the department of corrections, shall be kept confidential. Notwithstanding any provision of law to the contrary, any portion of a record that could identify a person as being a current or former member of an execution team shall be privileged and shall not be subject to discovery, subpoena, or other means of legal compulsion for disclosure to any person or entity, the remainder of such record shall not be privileged or closed unless protected from disclosure by law. The section of an execution protocol that directly relates to the administration of lethal gas or lethal chemicals is an open record, the remainder of any execution protocol of the department of corrections is a closed record.*<sup>135</sup>

Missouri is in the mainstream in saying that identities of execution-team members should be kept secret. A recent Associated Press survey of thirty-two death penalty states “found that the vast majority refuse to disclose the source of their execution drugs.”<sup>136</sup> Delaware, Nevada, Ohio, and Virginia, however, are exceptions to the drug secrecy rule.<sup>137</sup>

Some examples from other states’ statutes show the same intent as Missouri despite some variations in wording.

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Ringo further argues Missouri’s practice of using such large doses of midazolam in the minutes prior to an execution amounts to a de facto use of the drug as part of its actual execution protocol. I agree. I believe these new revelations need to be fully aired in court before Missouri continues executing inmates under its current practice.

Use of the drug midazolam as the actual lethal agent in states such as Ohio, Oklahoma, and Arizona has resulted in closer scrutiny of the execution protocols in those states following executions that have gone awry. All the while, Missouri has steadfastly maintained its execution protocol makes no use of the controversial drug. Yet the 6 mg doses of midazolam Missouri has used in the minutes prior to the executions of John Middleton and Michael Worthington approach the 10 mg dose of midazolam Ohio used as the actual lethal agent to execute Dennis McGuire. Missouri’s use of such large doses of midazolam, just minutes prior to an execution, indicate Missouri’s claim that the drug is not part of its actual execution protocol should be viewed with a healthy dose of judicial skepticism.

*Id.* at \*9–10.

135. MO. REV. STAT. § 546.720.2 (2013) (emphasis added).

136. Jim Salter & Andrew Welsh-Huggins, *Secrecy Surrounds Execution Drugs in Most States*, ASSOCIATED PRESS (Apr. 5, 2014, 11:53 AM), <http://bigstory.ap.org/article/secrecy-surrounds-execution-drugs-most-states>.

137. *Id.* See also DEL. CODE ANN. tit. 11, § 4209(f) (2014); NEV. REV. STAT. § 176.355 (2013); OHIO REV. CODE ANN. § 2949.22 (West 2014); VA. CODE ANN. § 53.1-234 (2014).

Arizona, for instance, says: “The identity of executioners and other persons who participate or perform ancillary functions in an execution and any information contained in records that would identify those persons is confidential . . . .”<sup>138</sup>

Florida includes as confidential “[i]nformation which identifies an executioner, or any person prescribing, preparing, compounding, dispensing, or administering a lethal injection.”<sup>139</sup> New Jersey and Illinois had similar laws on the books before abolishing capital punishment in 2007 and 2011, respectively.<sup>140</sup>

Similarly, Georgia’s law prohibits disclosing “identifying information of any person or entity who participates in or administers the execution of a death sentence,” including “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.”<sup>141</sup>

Oklahoma law states:

The identity of all persons who participate in or administer the execution process and persons who supply the drugs, medical supplies or medical equipment for the execution shall be confidential and shall not be subject to discovery in any civil or criminal proceedings.<sup>142</sup>

Kansas says: “The identity of executioners and other persons designated to assist in carrying out the sentence of death shall be confidential.”<sup>143</sup>

138. ARIZ. REV. STAT. ANN. § 13-757(C) (2012).

139. FLA. STAT. § 945.10(1)(g) (2012). This provision has come under attack by Florida newspapers. See, e.g., Sue Carlton, *A Hood Doesn't Mask Our Failures*, ST. PETERSBURG TIMES, July 27, 2007, at B1.

140. N.J. STAT. ANN. § 2C:49-7(a) (2000) (repealed 2007); 725 ILL. COMP. STAT. 5/119-5(e) (2003). Illinois’ law stated:

[T]he identity of executioners and other persons who participate or perform ancillary functions in an execution and information contained in records that would identify those persons shall remain confidential, shall not be subject to disclosure, and shall not be admissible as evidence or be discoverable in any action of any kind in any court or before any tribunal, board, agency, or person. In order to protect the confidentiality of persons participating in an execution, the Director of Corrections may direct that the Department make payments in cash for such services.

*Id.* However, the Illinois statute did permit disclosure of executioners’ names to the state’s Department of Professional Regulation in the event of a confidential investigation. *Id.*

141. GA. CODE ANN. § 42-5-36 (2013). Concerning the Georgia Supreme Court decision upholding the secrecy statute, see *supra* notes 114–17 and accompanying text. For commentary on Georgia’s law, see Adam Lozeau, *Obscuring the Machinery of Death: Assessing the Constitutionality of Georgia’s Lethal Injection Secrecy Law*, 32 LAW & INEQ. 451 (2014).

142. OKLA. STAT. tit. 22, § 1015(B) (2013).

143. KAN. STAT. ANN. § 22-4001(b) (2012).

Kentucky says: “The identity of an individual performing the services of executioner shall remain confidential and shall not be considered public record . . . .”<sup>144</sup>

Montana says: “The identity of the executioner must remain anonymous. Facts pertaining to the selection and training of the executioner must remain confidential.”<sup>145</sup>

While Texas, home to the nation’s busiest death chamber,<sup>146</sup> shields the identities of executioners, Texas law does not state whether prison officials must disclose the source of the state’s execution drugs.<sup>147</sup> Originally, Texas Attorney General Greg Abbott favored disclosing the source of drugs.<sup>148</sup> But in a May 29, 2014, letter, Abbott told prison officials to keep-secret information about pharmacies providing the state with execution drugs.<sup>149</sup>

144. KY. REV. STAT. ANN. § 45A.720 (West 2006).

145. MONT. CODE ANN. § 46-19-103(5) (2013).

146. See Jennifer Emily, *Kimberly McCarthy Put to Death in Texas’ 500th Modern Execution*, DALL. NEWS (June 27, 2013, 2:35 PM), <http://www.dallasnews.com/news/crime/headlines/20130626-kimberly-mccarthy-put-to-death-in-texas-500th-modern-execution.ece>. In June 2013, Kimberly McCarthy became the 500th inmate executed in Texas since the state reinstated the death penalty in 1982. See Sophia Rosenbaum, *Texas Carries Out Landmark 500th Execution*, NBC NEWS (June 26, 2013, 8:50 AM), [http://usnews.nbcnews.com/\\_news/2013/06/26/19152294-texas-carries-out-landmark-500th-execution?lite](http://usnews.nbcnews.com/_news/2013/06/26/19152294-texas-carries-out-landmark-500th-execution?lite). McCarthy killed and robbed a neighbor, a retired female college professor, even cutting off her victim’s finger while still alive to steal a wedding ring. *Id.*

147. Nomaan Merchant & Michael Graczyk, *Official: Texas Can Keep Lethal Drug Source Secret*, ASSOCIATED PRESS (May 29, 2014, 8:30 PM), <http://bigstory.ap.org/article/ag-texas-can-keep-execution-drug-source-secret>. Texas law states:

Whenever the sentence of death is pronounced against a convict, the sentence shall be executed at any time after the hour of 6 p.m. on the day set for the execution, by intravenous injection of a substance or substances in a lethal quantity sufficient to cause death and until such convict is dead, such execution procedure to be determined and supervised by the director of the correctional institutions division of the Texas Department of Criminal Justice.

TEX. CODE CRIM. PROC. ANN. art. 43.14 (West 2009).

148. Editorial, *Greg Abbott Switches Position on Death Row Drugs Sources*, STAR-TELEGRAM (June 1, 2014), <http://www.star-telegram.com/2014/06/01/5863837/editorial-greg-abbott-switches.html>. The *Star-Telegram* editorial board chided Abbott for his apparent change of heart. “If attorneys can’t learn all the facts, they can’t fully defend their clients,” the board wrote. *Id.* “That makes executions even more questionable than they are already.” *Id.* Since 2010, Abbott had three times ruled that Texas prison officials must disclose their source of execution drugs, arguing that transparency outweighed prison officials’ objections. *Id.*

149. *Id.* In his letter, Abbott argued that threats to execution drug suppliers had become serious enough to warrant secrecy. *Id.* At the time of Abbott’s letter, Texas prison officials were fighting the public records request from death row inmates Tommy Lynn Sells and Ramiro Hernandez-Llanas for more information on the state’s source of lethal injection drugs. The week before Abbott announced his ruling that state prison officials would not have to disclose the source of execution drugs, government-watchdog group Texans for Public Justice issued a report highlighting how compounding pharmacy owner J. Richard “Richie” Ray donated \$350,000 to

The conflict between ensuring transparent execution protocols and the need to protect executioners' identities is nothing new. As Ellyde Roko wrote in the *Fordham Law Review*: "This conflict between the need to protect the executioner's identity and the public's right to oversee the government's implementation of capital punishment has persisted as the method of execution has evolved from hanging to electrocution to lethal gas to lethal injection."<sup>150</sup>

Whether this type of confidentiality statute is legal depends on the answer to this question: Does the government *have* to supply the information? The answer is "no." In *Houchins v. KQED, Inc.*, the 1978 case in which the U.S. Supreme Court ruled that news media have no constitutional right to enter jails, the Court clearly said that government did not have to supply information.<sup>151</sup> The case arose after San Francisco TV station KQED was denied access to a jail where an inmate had committed suicide.<sup>152</sup> The Court praised the importance of news media within the context of providing information about prisons, yet still ruled against media access to information:

Penal facilities are public institutions which require large amounts of public funds, and their mission is crucial in our criminal justice system. Each person placed in prison becomes, in effect, a ward of the state for whom society assumes broad responsibility. It is equally true that with greater information, the public can more intelligently form opinions about prison conditions. Beyond question, the role of the media is important; acting as the "eyes and ears" of the public, they can be a powerful and constructive force, contributing to remedial action in the conduct of public business. They have served that

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Abbott's gubernatorial campaign between January 2013 and January 2014. See Mike Ward, *Abbott Campaign Donations From Drug Maker Draw Fire*, HOUS. CHRON. (May 23, 2014, 10:52 AM), <http://www.chron.com/news/houston-texas/houston/article/Abbott-campaign-donations-from-drug-maker-draw-5500732.php>. Ray, who heads Richie's Specialty Pharmacy, was Abbott's sixth-largest campaign donor for the reporting period. *Id.* In its report, Texans for Public Justice states, "The \$350,000 that Ray gave Abbott in the past year catapults him from obscurity into the ranks of this year's Governor's Cup." *Id.* See also Stephanie Mencimer, *This Pharmacist Is One of Greg Abbott's Biggest Donors. Here's Why.*, MOTHER JONES (May 28, 2014, 12:27 PM), <http://www.motherjones.com/mojo/2014/05/compounding-pharmacy-greg-abbott-texas>.

150. Ellyde Roko, Note, *Executioner Identities: Toward Recognizing a Right to Know Who Is Hiding Beneath the Hood*, 75 FORDHAM L. REV. 2791, 2793 (2007). Roko's article provides a detailed history of the executioner in the United States and examines the basis for a First Amendment right of access to information regarding executions, as well as when the courts have ruled that that access can be limited. *Id.* at 2795. Roko argues that the right of death row inmates and the public to know executioners' identities "outweighs the state and prison's speculative concerns on which the grounds for concealment are based." *Id.* Roko also points out that in *Taylor v. Crawford*, the lawsuit that resulted in testimony from Dr. Doe, death row inmates challenged Missouri's lethal injection protocol on the basis that incompetence of Missouri's execution team created an unnecessary risk of cruel and unusual punishment. *Id.* at 2799.

151. *Houchins v. KQED, Inc.*, 438 U.S. 1, 9 (1978).

152. *Id.* at 3-4.

function since the beginning of the Republic, but like all other components of our society media representatives are subject to limits.

. . . The public importance of conditions in penal facilities and the media's role of providing information afford no basis for reading into the Constitution a right of the public or the media to enter these institutions, with camera equipment, and take moving and still pictures of inmates for broadcast purposes. *This Court has never intimated a First Amendment guarantee of a right of access to all sources of information within government control.*<sup>153</sup>

If the Court had not already been clear, it drove its point home yet again: "There is an undoubted right to gather news 'from any source by means within the law,' but that affords no basis for the claim that the First Amendment compels others—private persons or governments—to supply information."<sup>154</sup>

The Supreme Court has stuck with its *Houchins* position. In 1999, in *Los Angeles Police Department v. United Reporting Publishing Corp.*, the Court considered a publishing company's facial challenge of a California law that placed restrictions on obtaining arrestees' addresses.<sup>155</sup> The Court ruled the California law did not violate the First Amendment. The Court opined: "California could decide not to give out arrestee information at all without violating the First Amendment."<sup>156</sup> Arguably, the Court would espouse the same opinion if asked whether a state could decide not to give out information about executioners.

#### A. *Wading into Muddy Legal Waters*

Although the U.S. Supreme Court in *Los Angeles Police Department* held that California did not have to give out arrestee information, the U.S. Supreme Court also said: "This is not a case in which the government is prohibiting a speaker from conveying information that the speaker already possesses."<sup>157</sup>

It is the issue of trying to restrict the media from disseminating information that is perhaps the Achilles' heel of Missouri's secrecy statute. The troubling portion of the law says:

A person may not, without the approval of the director of the department of corrections, knowingly disclose the identity of a current or former member of an execution team or disclose a record knowing that it could identify a person as being a current or former member of an execution team. Any person whose identity is disclosed in violation of this section shall:

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153. *Id.* at 8–9 (emphasis added).

154. *Id.* at 11 (quoting *Branzburg v. Hayes*, 408 U.S. 655, 681–82 (1972)).

155. *L.A. Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S. 32, 34 (1999).

156. *Id.* at 40.

157. *Id.*

- (1) Have a civil cause of action against a person who violates this section;
- (2) Be entitled to recover from any such person:
  - (a) Actual damages; and
  - (b) Punitive damages on a showing of a willful violation of this section.<sup>158</sup>

By saying that “[a] person may not, without the approval of the director of the department of corrections, knowingly disclose” the identities of “current or former” members of an execution team, the statute gives the director of the Missouri Department of Corrections the power to license speech but does not outline any standards by which the director should make this decision.<sup>159</sup> In short, the statute gives the director unbridled discretion to make arbitrary and capricious decisions if he or she chooses to do so. The director could decide to permit use of the information only on the third Tuesday following a blue moon if it rained—and nothing in the statute would prohibit such a decision. Or the director could decide to permit use of the information if the newspaper requesting it had published five editorials that he favored within the last month. Again, nothing in the statute would prohibit such a decision. Such unbridled discretion in the area of First Amendment freedom is constitutionally infirm.

As the U.S. Supreme Court has declared: “The First Amendment prohibits the vesting of . . . unbridled discretion in a government official.”<sup>160</sup> This is a doctrine that has persisted for many decades. In 1969, in *Shuttlesworth v. City of Birmingham*, the Supreme Court referred to “the many decisions of this Court over the last 30 years, holding that a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional.”<sup>161</sup> In 2007, in *Morse v. Frederick*, the Supreme Court again spoke against giving a “license to suppress speech,” saying it “strikes at the very heart of the First Amendment.”<sup>162</sup>

The portion of the law giving the director unbridled discretion also creates a problem in terms of the strict scrutiny test, which the U.S. Supreme Court requires when considering the constitutionality of a regulation that is content-

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158. MO. REV. STAT. § 546.720.3 (2013).

159. *Id.*

160. *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 133 (1992).

161. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150–51 (1969). The Court continued to state that “[i]t is settled by a long line of recent decisions of this Court that an ordinance which, like this one, makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.” *Id.* at 151 (internal quotation marks omitted) (quoting *Staub v. Baxley*, 355 U.S. 313, 322 (1958)).

162. *Morse v. Frederick*, 551 U.S. 393, 423 (2007) (Alito, J., concurring).

based.<sup>163</sup> Here, Missouri's regulation is clearly content-based: it regulates "the identity of a current or former member of an execution team."<sup>164</sup> In 1992, the Supreme Court said that "[c]ontent-based regulations are presumptively invalid."<sup>165</sup> A decade later, the Supreme Court used the same language, saying that a content-based regulation "would be considered presumptively invalid and subject to strict scrutiny."<sup>166</sup> The law is well-settled: the Supreme Court has consistently applied strict scrutiny to content-based regulations of speech.<sup>167</sup>

To pass the strict scrutiny test, government must show two things: (1) a compelling state interest and (2) narrow tailoring.<sup>168</sup> As Justice Kennedy has noted, "[e]xcept in instances involving well-settled categories of proscribable speech, strict scrutiny is the baseline rule for reviewing any content-based discrimination against speech."<sup>169</sup>

How, then, can the state of Missouri argue a compelling interest in keeping the identities of executioners, and the identities of "current or former member(s) of an execution team,"<sup>170</sup> secret? *The New York Times* points out another aspect of the law that raises questions about compelling interest:

Missouri contends that executioners need protection from retaliation. That is a flimsy argument and not sincerely held, since the state is not trying to extend that privacy shield to the many other government employees—judges, prosecutors, court officials, prison wardens—whose names are public and who are far likelier retribution targets.<sup>171</sup>

Even without the unbridled discretion given to the director to permit (or not) the knowing disclosure of identities, the statute is arguably fatally flawed. The Supreme Court does not favor permitting the government to punish journalists or anyone else for distributing information of public concern.<sup>172</sup> Here the brilliance and power of the First Amendment is truly something to

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163. *City of L.A. v. Alameda Books, Inc.*, 535 U.S. 425, 434 (2002). *See also* *R.A.V. v. City of St. Paul*, 505 U.S. 377, 403 (1992) (White, J., concurring).

164. MO. REV. STAT. § 546.720.3 (2013).

165. *R.A.V.*, 505 U.S. at 382 (majority opinion).

166. *Alameda Books, Inc.*, 535 U.S. at 425.

167. *See, e.g.*, *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 574 (2001) (Thomas, J., concurring); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994); *Sable Commc'n v. FCC*, 492 U.S. 115, 126 (1989).

168. *See, e.g.*, *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000) ("If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest."); *Boos v. Barry*, 485 U.S. 312, 321 (1988).

169. *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 800 (1996) (Kennedy, J., concurring) (citation omitted).

170. MO. REV. STAT. § 546.720.2 (2013).

171. Editorial, *The Executioner's Hood*, N.Y. TIMES, Aug. 6, 2007, at A18.

172. *Bartnicki v. Vopper*, 532 U.S. 514, 533–34 (2001).

behold. For example, Congress attempted to restrict dissemination of information, and the Supreme Court summarily blocked the attempt in *Bartnicki v. Vopper*.<sup>173</sup>

In 2001, in *Bartnicki*, the Supreme Court struck down part of the federal wiretap law.<sup>174</sup> Part “c” of 18 U.S.C. § 2511(1) said that it was a crime if anyone “intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication.”<sup>175</sup> But the Supreme Court struck down this portion of the wiretap law as a violation, under the circumstances, of the First Amendment.<sup>176</sup> The Court in *Bartnicki* quoted its language from a 1979 case, *Smith v. Daily Mail Publishing Co.*, that stated “state action to punish the publication of truthful information seldom can satisfy constitutional standards.”<sup>177</sup> In striking down part “c,” the Court concluded: “The enforcement of that provision in this case . . . implicates the core purposes of the First Amendment because it imposes sanctions on the publication of truthful information of public concern.”<sup>178</sup>

The Court in *Bartnicki* also made clear that “it would be quite remarkable to hold that speech by a law-abiding possessor of information can be suppressed in order to deter conduct by a non-law-abiding third party.”<sup>179</sup> Arguably, if Missouri’s new law that purports to sanction disclosure of

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173. *Id.* at 517–18.

174. *Id.*

175. 18 U.S.C. § 2511(1)(c) (2000).

176. *Bartnicki*, 532 U.S. at 517–18. In *Bartnicki*, a union, the Pennsylvania State Education Association, was representing teachers in collective-bargaining negotiations with the local school board. *Id.* at 518. The media, of course, was covering the contentious negotiations. *Id.* The union’s chief negotiator, Bartnicki, used the cell phone in her car to call the president of the union to discuss negotiations. *Id.* An unidentified person taped the call and gave a copy to Vopper, a radio commentator critical of the union. *Id.* at 518–19. The tape included the president of the union saying, “If they’re not gonna move for three percent, we’re gonna have to . . . blow off their front porches, we’ll have to do some work on some of those guys.” *Id.* Vopper aired the tape. *Id.*

177. *Id.* at 527 (internal quotation marks omitted) (quoting *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 102 (1979)). The Court continued: “More specifically, this Court has repeatedly held that ‘if a newspaper lawfully obtains truthful information about a matter of public significance, then state officials may not constitutionally punish publication of the information, absent a need . . . of the highest order.’” *Id.* at 527–28 (quoting *Smith*, 443 U.S. at 103.). See also *Florida Star v. B.J.F.*, 491 U.S. 524, 526 (1989); *Landmark Commc’ns v. Virginia*, 435 U.S. 829, 838 (1978).

178. *Bartnicki*, 532 U.S. at 533–34.

179. *Id.* at 529–30.

executioners' names were challenged, the same reasoning used in *Bartnicki* could be used to strike down Missouri's law.<sup>180</sup>

### B. *Fear and the First Amendment*

Can a provision based on fear that retaliation might occur, or that recruiting might be impeded, withstand review under the First Amendment?

Fear alone simply does not constitute grounds for suppressing speech. As the Supreme Court has said, "[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."<sup>181</sup>

However, some types of speech do not receive protection under the shield of freedom of expression. In 2003, the Supreme Court conducted a lengthy analysis of the proscribable types of speech in the case of *Virginia v. Black*.<sup>182</sup>

Looking back through the years, the Court said, "The protections afforded by the First Amendment . . . are not absolute, and we have long recognized that the government may regulate certain categories of expression consistent with the Constitution."<sup>183</sup> The first example the Court gives is "fighting words," proscribed by *Chaplinsky v. New Hampshire* in 1942 and defined as "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction."<sup>184</sup>

A second example is "incitement," discussed in the Supreme Court's decision in *Brandenburg v. Ohio*,<sup>185</sup> which said, "[C]onstitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."<sup>186</sup> The test for incitement can be boiled down to three requirements: intent, imminence, and likelihood.<sup>187</sup>

A third example is "true threats," defined in the following manner by the Court:

"True threats" encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. The speaker need

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180. *Bartnicki* is also in line with the Supreme Court cases striking down sanctions against the media for publishing names of rape victims. See *Florida Star*, 491 U.S. at 526–27; *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 471, 496–97 (1975).

181. *Tinker v. Des Moines Indep. Cnty. Sch. Dist.*, 393 U.S. 503, 508 (1969).

182. *Virginia v. Black*, 538 U.S. 343, 358–60 (2003).

183. *Id.* at 358.

184. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942); *Black*, 538 U.S. at 359.

185. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

186. *Id.*

187. See *id.* at 447–49.

not actually intend to carry out the threat. Rather, a prohibition on true threats “protects individuals from the fear of violence” and “from the disruption that fear engenders,” in addition to protecting people “from the possibility that the threatened violence will occur.” Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.<sup>188</sup>

But Missouri’s statute makes no mention of fighting words, incitement, or true threats. Fear alone could be the basis of the director saying that names of executioners may not be used, even though the Supreme Court rejects mere fear as a ground for suppressing speech.

One court has considered and struck down a statute with similarities to Missouri’s. In 2003, in *Sheehan v. Gregoire*,<sup>189</sup> U.S. District Judge John C. Coughenour struck down a Washington state statute that said:

A person or organization shall not, with the intent to harm or intimidate, sell, trade, give, publish, distribute, or otherwise release the residential address, residential telephone number, birthdate, or social security number of any law enforcement-related, corrections officer-related, or court-related employee or volunteer, or someone with a similar name, and categorize them as such, without the express written permission of the employee or volunteer unless specifically exempted by law or court order.<sup>190</sup>

Violators of the law could be sued for actual damages and attorney’s fees and costs.<sup>191</sup>

The plaintiff in *Sheehan*, who operated a website (www.justicefiles.org), took all the proscribed information off the website and then filed a facial challenge to the statute.<sup>192</sup> The judge characterized the plaintiff’s website as being “generally directed to the issue of police accountability” and thus as involving “legitimate public interest.”<sup>193</sup> The website “communicates truthful lawfully-obtained, publicly-available personal identifying information with respect to a matter of public significance.”<sup>194</sup> Part of the opinion in *Sheehan* dealt with “true threats.”<sup>195</sup> But the Washington statute, like the Missouri statute, did not purport to proscribe only true threats.<sup>196</sup>

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188. *Black*, 538 U.S. at 359–60 (citations omitted) (quoting *Watts v. United States*, 394 U.S. 705, 708 (1969); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992)).

189. *Sheehan v. Gregoire*, 272 F. Supp. 2d 1135, 1149–50 (W.D. Wash. 2003).

190. *Id.* at 1139 (quoting WASH. REV. CODE § 4.24.680 (2002)).

191. *Id.* at 1139 n.1.

192. *Id.* at 1139.

193. *Id.* at 1139 n.2.

194. *Sheehan*, 272 F. Supp. 2d at 1145.

195. *Id.* at 1141–43. The judge opined that “[i]f the statute actually purported to regulate true threats, it would be permissible to proscribe only true threats directed at law enforcement-related, corrections officer-related, or court-related employees so long as the statute did not discriminate

Judge Coughenour rejected Washington's argument that "testimony before the state legislature demonstrates the real and substantial harm that officers could face if their personal identifying information is released under improper circumstances."<sup>197</sup> To counter that argument, the judge turned to the U.S. Supreme Court, quoting this language: "[B]efore imposing such a significant burden on free expression, the government must do far more than merely speculating about the possibility of serious harms."<sup>198</sup> The very same reasoning arguably could be used if Missouri's secrecy statute were challenged.

Journalists have already challenged Missouri's law—both in court and in the court of public opinion.

The *St. Louis Post-Dispatch* railed: "Thanks to the Missouri Legislature, the next time the state hires a dyslexic doctor who gets his lethal chemicals mixed up in the state's death chamber, the public won't have to lose any sleep over who might have botched the execution."<sup>199</sup>

*The New York Times* said: "Under the new secrecy law, Missouri's capital punishment system may plunge deeper into incompetence and cruelty, and it will be harder for citizens to stop it."<sup>200</sup>

The American Civil Liberties Union (ACLU) and others who oppose executions argued that the example of Missouri's Dr. Doe gave new reason for seeking information about who is carrying out lethal injection executions.<sup>201</sup>

### C. *More Secrecy: Compounding Pharmacies*

By fall 2013, the Missouri Department of Corrections began to broaden its interpretation of Missouri's revised secrecy law. State corrections officials argued that the law encompassed pharmacies supplying the state with execution drugs as part of Missouri's "execution team," therefore allowing the state to shroud them in secrecy.<sup>202</sup> The information blackout applies even to loosely regulated compounding pharmacies that now supply the state with execution drugs.<sup>203</sup>

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based on the content of those threats." *Id.* at 1146 n.11 (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 384–92 (1992)).

196. *Id.* at 1141–42.

197. *Id.* at 1147 n.15 (internal quotation marks omitted).

198. *Id.* (internal quotation marks omitted) (quoting *Bartnicki v. Vopper*, 532 U.S. 514, 532 (2001)).

199. Opinion, *The Secret of Dr. X*, ST. LOUIS POST-DISPATCH, May 29, 2007, at B6.

200. *The Executioner's Hood*, *supra* note 171.

201. See, e.g., Julie Carr Smyth, *Fla. an Example in National Execution Debate*, FLA. ISSUES (June 4, 2007), <http://florida-issues.blogspot.com/2007/06/fla-example-in-national-execution.html>.

202. Juozapavicius & Talley, *supra* note 2.

203. *Id.*

Missouri's attempts to redefine the state's "execution team" to include suppliers of execution drugs shields elements of the state's lethal injection protocol from public scrutiny, even as the very drugs themselves are at the heart of the constitutional cruel-and-unusual punishment challenges being argued in the courts.<sup>204</sup> As state protocols shift, spurred in large part by a nationwide shortage of lethal injection drugs, death row inmates' lawyers have questioned what drugs are used, in what quantities, and with what safeguards, and even the origins of execution drugs.<sup>205</sup>

The push toward secrecy has sparked legal challenges from inmates facing execution. As noted earlier, two Oklahoma inmates in April successfully argued that they had a right to know about the drugs that would be used to execute them.<sup>206</sup>

A federal judge in Texas halted the scheduled execution of a serial killer after the state refused to disclose the supplier of a new batch of lethal injection drugs, as well as information on how those drugs were tested.<sup>207</sup> A federal appeals court threw out the ruling hours later, and Tommy Lynn Sells was executed after the U.S. Supreme Court declined to hear the case.<sup>208</sup>

On October 23, 2013, the ACLU of Missouri filed a First Amendment lawsuit challenging the constitutionality of the state's secrecy law.<sup>209</sup> As Columbia Journalism Review said:

The legal challenge puts Missouri at the forefront of a nationwide battle over transparency and secrecy in capital punishment, in which states, responding to

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204. On *Baze* and subsequent cases, see *supra* notes 72–77, 88 and accompanying text.

205. See *Lee*, *supra* note 26.

206. See *supra* notes 100–04 and accompanying text.

207. Salter & Welsh-Huggins, *supra* note 136.

208. *Id.* See also Michael Graczyk, *Serial Killer Executed with Texas' New Drug Supply*, ASSOCIATED PRESS (Apr. 3, 2014, 9:12 PM), <http://bigstory.ap.org/article/supreme-court-decide-texas-execution-drug-case>.

209. Verified Complaint at 1, *ACLU v. Lombardi*, No. 2:13-cv-4223 (W.D. Mo. filed Oct. 23, 2013). The lawsuit comes on the heels of another complaint the ACLU of Missouri filed against the Missouri Department of Corrections in state court on October 4, 2013, after the Missouri Department of Corrections failed to comply with a request for records concerning the state's supply of the lethal injection drug propofol. See *Petition, Abdullah v. Mo. Dep't of Corr.*, No. 13AC-CC00586 (Mo. Cir. Ct. filed Oct. 4, 2013). In discussing the complaint filed on October 4, Jeffrey Mittman, executive director of the ACLU of Missouri, declared that "[t] public has a right to know the details of how the state came into possession of this highly controlled drug." *Abdullah v. Missouri Department of Correction (Propofol)*, ACLU MO., <http://www.aclu-mo.org/legal-docket/abdullah-v-missouri-department-corrections-propofol/> (last visited Oct. 6, 2014). Mittman continued: "Propofol's makers have gone to great lengths to ensure their drug is not used for executions, so the DOC's plan to do so may jeopardize the U.S. supply of the drug, which is widely used as a safe and effective anesthetic." *Id.* Propofol was implicated in Michael Jackson's death. See, e.g., Nancy Dillon, *Michael Jackson's Body Riddled with Propofol When He Died: Toxicologist*, N.Y. DAILY NEWS (May 6, 2013, 5:03 PM), <http://www.nydailynews.com/news/national/jacko-body-riddled-propofol-article-1.1336508>.

gains made by death-penalty opponents, have increasingly moved to conceal execution protocols—or the identities of people who help in any way to carry them out—from public view. The trend has frustrated death-penalty opponents and lawyers for convicts sentenced to death. It has also raised alarm among champions of free speech.<sup>210</sup>

On April 3, 2014, U.S. District Judge Beth Phillips denied the Missouri Department of Corrections' motion to dismiss the ACLU's lawsuit.<sup>211</sup>

The first two Missouri media outlets to challenge the state's secrecy laws, as it pertains to the source of Missouri's execution drugs, were reportedly well aware of the legal issues at play. "Before publication we did consult an attorney about how we should handle it," the *Kansas City Pitch's* Steve Vockrodt told *Columbia Journalism Review*.<sup>212</sup> Vockrodt added: "Any time the government insists on secrecy, it should raise the hackles of the media."<sup>213</sup>

St. Louis Public Radio echoed the sentiment. "At its core, this is not a death-penalty story," said St. Louis Public Radio's Chris McDaniel.<sup>214</sup> "It's a story about government secrecy."<sup>215</sup>

On May 15, 2014, the Associated Press, the *Guardian*, the *Kansas City Star*, the *St. Louis Post-Dispatch*, and the *Springfield News-Leader* sued the Missouri Department of Corrections for refusing to disclose information about the drugs Missouri uses to execute condemned inmates.<sup>216</sup> A second lawsuit filed the very same day by St. Louis Public Radio reporter Chris McDaniel, the Reporters Committee for Freedom of the Press, and the ACLU of Missouri also challenged the state's refusal to turn over documents related to the state's execution drugs.<sup>217</sup>

210. Lee, *supra* note 26.

211. Jim Salter, *Judge: Lawsuit on Missouri Executions May Continue*, ASSOCIATED PRESS (Apr. 4, 2014, 5:24 PM), <http://bigstory.ap.org/article/judge-lawsuit-missouri-executions-may-continue>. The executive director of the ACLU of Missouri stated: "Since we filed this lawsuit, five people have been killed by the state of Missouri in a procedure that has been shrouded in secrecy." *Id.*

212. Lee, *supra* note 26.

213. *Id.*

214. *Id.*

215. *Id.*

216. *Guardian News & Media, LLC v. Dep't of Corr.*, No. 14AC-CC0251 (Mo. Cir. Ct. filed May 15, 2014).

See also Kristen Hare, *AP, Guardian, Missouri Papers Sue State over Secrecy Regarding Execution Drugs*, POYNTER (May 15, 2014, 5:42 PM), <http://www.poynter.org/latest-news/media-wire/252255/ap-guardian-missouri-papers-sue-state-over-secrecy-regarding-execution-drugs/>.

217. *Reporters Comm. v. Dep't of Corr.*, No. 14AC-CC00254 (Mo. Cir. Ct. filed May 15, 2014). See also Jeremy Kohler, *Reporter's Notebook: Legal Moves Before Execution Scheduled June 18*, ST. LOUIS POST-DISPATCH (June 6, 2014, 2:25 PM), [http://www.stltoday.com/news/local/crime-and-courts/reporter-s-notebook-legal-moves-before-execution-scheduled-june/article\\_2e6ecc8e-ffee-573e-b2c8-5245c061a8fd.html](http://www.stltoday.com/news/local/crime-and-courts/reporter-s-notebook-legal-moves-before-execution-scheduled-june/article_2e6ecc8e-ffee-573e-b2c8-5245c061a8fd.html); *Reporters Committee, ACLU and St. Louis Public Radio Reporter Sue Missouri Department of Corrections*, REPORTERS COMM. (May 15, 2014),

*D. A Cautionary Tale: Sandra Hyde*

Although the press generally may publish truthful information, a caveat must be made here. The press does not have unbridled freedom to use any information it possesses. The U.S. Supreme Court has shown care in this regard. For example, in *Florida Star v. B.J.F.*, the Supreme Court ruled in favor of a newspaper that printed a rape victim's name in violation of a strict-liability statute that prohibited "any instrument of mass communication" from doing so.<sup>218</sup> But while the Court held that "imposing damages on appellant for publishing B.J.F.'s name violates the First Amendment," the Court also specifically declined "to hold broadly that truthful publication may never be punished consistent with the First Amendment."<sup>219</sup>

The Court made clear in *Florida Star* that it would decide such cases on a case-by-case basis, carefully weighing the interests presented by each particular case: "We continue to believe that the sensitivity and significance of the interests presented in clashes between First Amendment and privacy rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case."<sup>220</sup>

Perhaps more importantly, in 1983, the U.S. Supreme Court denied certiorari to a Missouri case, *Hyde v. City of Columbia*, which allowed a negligence suit brought by Sandra Hyde against the *Columbia Daily Tribune*.<sup>221</sup>

According to Hyde, as she walked down the main street of Columbia, Missouri, after midnight in August 1980, a man with a red beard and red hair driving a red Mustang pulled alongside her.<sup>222</sup> He opened his door, leveled a sawed-off shotgun at her, ordered her to get in, and demanded, "You will do

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<http://www.rcfp.org/reporters-committee-aclu-and-st-louis-public-radio-reporter-sue-missouri-department-corrections>. Also, John Winfield's attorney challenged the secrecy of the source of lethal injection drugs as a violation of Missouri's public records laws, but instead of proceeding with a Sunshine Law suit, he sought a preliminary injunction. See *Winfield v. Lombardi*, No. 14AC-CC00263 (Mo. Cir. Ct. dismissed June 26, 2014). Cole County Circuit Judge Jone E. Beetem denied Winfield's request for an injunction. See *id.* On June 18, Missouri executed Winfield. See Mike Lear, *Missouri Executes John Winfield for 1996 Double Murder*, MISSOURINET (June 18, 2014), <http://www.missouri.net.com/?s=Missouri+Executes+John+Winfield>. See also *Chris McDaniel*, With Injunction Denied, Death-Row Inmate Faces Execution Before His Sunshine Law Case Is Heard, ST. LOUIS PUB. RADIO (June 6, 2014, 12:31 PM), <http://news.stlpublicradio.org/people/chris-mc-daniel>.

218. *Fla. Star v. B.J.F.*, 491 U.S. 524, 526–27, 541 (1989).

219. *Id.* at 532.

220. *Id.* at 533.

221. *Hyde v. City of Columbia*, 637 S.W.2d 251, 253 (Mo. Ct. App. 1982), *cert. denied*, 459 U.S. 1226 (1983). For commentary on the case, see Douglas O. Linder, *When Names Are Not News, They're Negligence: Media Liability for Personal Injuries Resulting from the Publication of Accurate Information*, 52 UMKC L. REV. 421 (1984).

222. *Hyde*, 637 S.W.2d at 254 n.2.

what I want you to do or I will blow your brains out.”<sup>223</sup> As he drove around a corner, Hyde jumped out and ran inside a nearby disco.<sup>224</sup>

Hyde reported the incident to the police and, of course, she gave her name and address—two facts her assailant did not have until a *Tribune* reporter got a copy of the report from the police and published her name and address.<sup>225</sup> Then, according to Hyde, the man started terrorizing her, stalking her at her home and workplace and making phone calls to leave messages such as, “I’m glad you’re not dead yet, I have plans for you before you die.”<sup>226</sup>

Hyde brought suit, alleging negligence by the city police in disclosing her name and address and negligence by the newspaper in printing them.<sup>227</sup> The defendants countered that the information disclosed was a public record under Missouri’s Sunshine Law.<sup>228</sup> The trial court ruled in favor of the defendants, accepting the public-record defense.<sup>229</sup> However, on appeal, the Court of Appeals for the Western District of Missouri ruled that Sandra Hyde did indeed have valid grounds to sue for negligence.<sup>230</sup>

The court of appeals concluded that “it was reasonably foreseeable that the publication of the name and address of the victim, while the assailant was still at large, was a temptation to [the assailant] to inflict an intentional harm upon the victim-plaintiff—a foreseeable risk the . . . defendants had a duty to prevent.”<sup>231</sup>

In rejecting the “Sunshine Law” defense, the court used the following *reductio ad absurdum* argument:

To construe the Sunshine Law to open *all* criminal investigation information to *anyone* with a request . . . courts constitutional violations of the right of privacy of a witness or other citizen unwittingly drawn into the criminal investigation process . . . Such a construction leads to the absurdity . . . that an assailant unknown as such to the authorities, from whom the victim has escaped, need simply walk into the police station, demand name and address or other personal information—without possibility of lawful refusal, so as to intimidate the victim as a witness or commit other injury.<sup>232</sup>

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223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.* at 254–55 n.2.

227. *Hyde*, 637 S.W.2d at 253. Hyde also sued another newspaper that published her name and address after the *Tribune*’s report. *Id.*

228. *Id.* at 254.

229. *Id.*

230. *Id.* at 273.

231. *Id.*

232. *Hyde*, 637 S.W.2d at 263.

To avoid what the court called an “absurd” conclusion, it held that “the name and address of a victim of crime who can identify an assailant not yet in custody is not a *public record* under the Sunshine Law.”<sup>233</sup>

In letting *Hyde* stand, the U.S. Supreme Court sent the message that newspapers could be found liable for printing a news story that exposed a specific victim to an unreasonable, foreseeable risk of harm.<sup>234</sup> Given this precedent, even if Missouri had no law purporting to impose sanctions on naming executioners, any newspaper or broadcaster who exposed a specific executioner to an unreasonable, foreseeable risk of harm would face a risk—a suit for negligence.

*Hyde* is in keeping with the general law of negligence that everyone—journalists, drivers, doctors—must, at least to some degree, be his brother’s (or her sister’s) keeper.<sup>235</sup> This law extends to protecting executioners who face an unreasonable, foreseeable risk of harm.

Corrections officials seeking to hide the names of pharmacies that supply their lethal injection drugs have indeed begun arguing that secrecy is a matter of safety. A Texas Department of Criminal Justice spokesman told the Associated Press the agency would not disclose the name of a new pharmacy supplying the state with pentobarbital “because of previous specific threats of serious physical harm made against businesses and their employees that have provided drugs used in the lethal injection process.”<sup>236</sup> According to the Associated Press, an attorney for the Texas Department of Criminal Justice further argued in a brief that someone “threatened to blow up a truck full of fertilizer outside a pharmacy that provides execution drugs for another state.”<sup>237</sup>

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233. *Id.*

234. A California appeals court cited *Hyde* when it let a woman sue the *Los Angeles Times* after the paper reported her name in connection with her discovery of the dead, nude body of her roommate who had been beaten, raped, and strangled. *Times Mirror Co. v. Superior Court*, 244 Cal. Rptr. 556, 558, 560, 564–65 (Cal. Ct. App. 1988). The reporter, a summer intern, had gotten the name through the coroner’s office. *Id.* at 558. Again, the court did not accept the public-record defense. *Id.* at 563–64.

235. *Hyde*, 637 S.W.2d at 255–57. See also BLACK’S LAW DICTIONARY 1061–62 (8th ed. 2004).

236. Michael Graczyk, *A.P. Newsbreak: Texas Finds New Execution Drug Supply*, ASSOCIATED PRESS (Mar. 19, 2014, 8:26 PM), <http://bigstory.ap.org/article/apnewsbreak-texas-finds-new-execution-drug-supply>. As Graczyk notes, the state’s new position in keeping execution drug suppliers anonymous appears to clash with previous Texas attorney general opinions ruling that the suppliers must be disclosed. *Id.* Other details Texas officials have refused to provide about the drugs include “how much the state has purchased and from where, and when the new drugs expire.” *Id.*

237. Salter & Welsh-Huggins, *supra* note 136. The Associated Press also notes that it “could find no evidence that any related investigation is underway in Texas.” *Id.*

Along with claiming that executioners and pharmacies supplying lethal drugs could face threats or retaliation, some state prison systems also have made a more practical argument; doctors, nurses, and pharmacies would refuse to participate in executions without anonymity and, thus, disclosure could become *de facto* abolishment. The Missouri Department of Corrections, for instance, has defended the practice of paying executioners in cash to avoid a paper trail.<sup>238</sup> The Georgia Department of Corrections got the following assist from the Georgia Supreme Court when it denied Warren Lee Hill, Jr., a stay of execution on May 19, 2014:

The reasons for offering such privacy are obvious, including avoiding the risk of harassment or some other form of retaliation from persons related to the prisoners or from others in the community who might disapprove of the execution as well as simply offering those willing to participate whatever comfort or peace of mind that anonymity might offer. Although the identity of the executioner who actually inflicts death upon the prisoner is the most obvious party in need of such protection, we believe that the same logic applies to the persons and entities involved in making the preparations for the actual execution, including those involved in procuring the execution drugs.

Second, without the confidentiality offered to execution participants by the statute, as the record and our case law show, there is a significant risk that persons and entities necessary to the execution would become unwilling to participate.<sup>239</sup>

#### IV. THE SEARCH FOR ALTERNATIVES AND TRANSPARENCY WHEN LETHAL-DRUG SUPPLIES DWINDLE

As previously discussed, lethal-drug supplies are dwindling.<sup>240</sup> How bad is the shortage? It led to one state becoming the supplier for another. In September 2013, the Virginia Department of Corrections, free of charge, sent two packages of pentobarbital to Texas a week before the execution of Arturo Diaz.<sup>241</sup> He had been convicted of robbing and stabbing to death a twenty-five-year-old man.<sup>242</sup>

Tennessee was the first state to respond to the dwindling drug supply with a change in its death penalty law. On May 22, 2014, Tennessee Governor Bill

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238. Marie French, *Department Head Defends Execution Protocols to Missouri Representatives*, ST. LOUIS POST-DISPATCH (Feb. 10, 2014, 6:30 PM), [http://www.stltoday.com/news/local/crime-and-courts/department-head-defends-execution-protocols-to-missouri-representatives/article\\_b9fd5a0d-d950-54d8-9f0b-fa39014e2b49.html](http://www.stltoday.com/news/local/crime-and-courts/department-head-defends-execution-protocols-to-missouri-representatives/article_b9fd5a0d-d950-54d8-9f0b-fa39014e2b49.html).

239. *Owens v. Hill*, 758 S.E.2d 794, 796, 805 (Ga. 2014). For Georgia's statutory language, see *supra* note 141 and accompanying text.

240. See *supra* notes 77–81 and accompanying text.

241. Fernandez, *supra* note 87.

242. David Carson, *Arturo Diaz*, TEX. EXECUTION INFO. CTR. (Sept. 27, 2013), <http://www.txexecutions.org/reports/505.asp>.

Haslam signed a bill mandating electrocution as the method of execution if no drugs are available for lethal injections.<sup>243</sup> The bill passed 23-3 in the Senate and 68-13 in the House.<sup>244</sup> Richard Dieter, executive director of the Death Penalty Information Center, said that the law “exposes inmates to the mandatory use of the electric chair. Tennessee would be the only state to impose one of these older methods of executions.”<sup>245</sup>

The law says, in part:

(e) For any person who commits an offense or has committed an offense for which the person is sentenced to the punishment of death, the method of carrying out the sentence shall be by lethal injection unless subdivision (e)(1) or (e)(2) is applicable. If subdivision (e)(1) or (e)(2) is applicable, the method of carrying out the sentence shall be by electrocution. The alternative method of execution shall be used if:

(1) Lethal injection is held to be unconstitutional by a court of competent jurisdiction . . . or

(2) The commissioner of correction certifies to the governor that one (1) or more of the ingredients essential to carrying out a sentence of death by lethal injection is unavailable through no fault of the department.<sup>246</sup>

The most recent electrocution in the United States, according to the Death Penalty Information Center, occurred in January 2013 in Virginia.<sup>247</sup> Virginia law provides that the condemned person may choose the method of execution, with lethal injection as the method if no choice is made.<sup>248</sup> Indeed, Robert

243. S. 2580, 108th Gen. Assemb., 2d Reg. Sess. (Tenn. 2014).

244. *Tennessee Gov. Bill Haslam Signs Bill to Bring Back Electric Chair Amid Lethal Injection Drugs Scarcity*, N.Y. DAILY NEWS (May 22, 2014, 10:36 PM), <http://www.nydailynews.com/news/national/tenn-bring-back-electric-chair-article-1.1802818>. See also Dan Barry, *A Specter of Past Executions Resurfaces in Tennessee*, N.Y. TIMES, May 24, 2014, at A13.

245. Gregg Zoroya, *Tennessee May Go Back to the Electric Chair*, USA TODAY (May 23, 2014, 6:11 PM), <http://www.usatoday.com/story/news/nation/2014/05/23/execution-lethal-injection-tennessee-electric-chair/9483835/>. He also called the law “a step backward in terms of states seeking more humane methods.” *Id.* See also Erik Schelzig, *Tenn. Governor Signs Bill to Allow Electric Chair if Injection Drugs Unavailable*, US NEWS & WORLD REP. (May 23, 2014, 3:19 AM), <http://www.usnews.com/news/us/articles/2014/05/22/apnewsbreak-tennessee-brings-back-electric-chair> (stating that Texas is the first state to enact a law to reintroduce the electric chair).

246. Tenn. S. 2580. One concern is that the law, on its face, applies retroactively because part “e” covers “any person who commits an offense or *has committed an offense for which the person is sentenced to the punishment of death.*” *Id.* (emphasis added). See also Zoroya, *supra* note 245 (noting that the law’s retroactive application to prisoners on death row may be unconstitutional).

247. *Execution List 2013*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/execution-list-2013> (last visited Oct. 6, 2014).

248. VA. CODE ANN. § 53.1-234 (2014) (“The method of execution shall be chosen by the prisoner. In the event the prisoner refuses to make a choice at least fifteen days prior to the scheduled execution, the method of execution shall be by lethal injection.”).

Gleason, Jr., chose electrocution in early 2013.<sup>249</sup> But, in the wake of execution drug shortages, the Virginia House of Delegates in January 2014 passed a bill that would rescind the ability to choose, making electrocution the default mode if lethal drugs are unavailable.<sup>250</sup> A Virginia Senate committee considered a similar bill.<sup>251</sup>

Arkansas has also been struggling with lethal injection drug shortages, and *The New York Times* reported that Arkansas Attorney General Dustin McDaniel said the electric chair was the state's fallback for executions.<sup>252</sup>

In Missouri, government officials have also responded to the shortage of execution drugs, in part by taking a harder look at the option of lethal gas. Missouri's execution law states, "The manner of inflicting the punishment of death shall be by the administration of lethal gas or by means of the administration of lethal injection."<sup>253</sup> The law does not specify who chooses the method.

Missouri's gas chamber was built in 1937 in Jefferson City.<sup>254</sup> The last execution by lethal gas occurred in Missouri in 1965.<sup>255</sup> In fact, Missouri lost the keys to its gas chamber in 2005 and issued a call for their return in June 2014.<sup>256</sup>

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249. Rachel Weiner, *Electric Chair May Make a Comeback*, WASH. POST, Jan. 22, 2014, at B5.

250. *Id.*

251. *Id.*

252. Fernandez, *supra* note 87.

253. MO. REV. STAT. § 546.720.1 (2013). For a detailed analysis of Missouri's death penalty process since 1977, see *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Missouri Death Penalty Assessment Report*, ABA (2012), [http://www.americanbar.org/content/dam/aba/administrative/death\\_penalty\\_moratorium/final\\_missouri\\_assessment\\_report.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/death_penalty_moratorium/final_missouri_assessment_report.authcheckdam.pdf).

254. *Gas Chamber*, MO. DEATH ROW, <http://missourideathrow.com/doc-history/gas-chamber/> (last visited Oct. 6, 2014).

255. Joseph J. Simeone, *The Legal History of the State of Missouri*, 43 ST. LOUIS U. L.J. 1395, 1401 (1999). The first executions by lethal gas occurred in 1938. *Id.* In 1965, Lloyd Leo Anderson was the last person executed by lethal gas in Missouri. *Id.* See also Ed Pilkington, *Missouri Threatens Return of Gas Chambers for Death Row Inmates*, THE GUARDIAN (July 5, 2013, 11:05 AM), <http://www.theguardian.com/world/2013/jul/05/missouri-gas-chamber-executions-lethal-drugs>.

256. *Historians Seek Missing Gas Chamber Keys*, WASH. TIMES (June 8, 2014), <http://www.washingtontimes.com/news/2014/jun/8/historians-see-missing-prison-gas-chamber-keys/?page=all>; *Historians Seek Missing Key to Missouri Gas Chamber Cells*, KAN. CITY STAR (June 8, 2014, 8:42 PM), <http://www.kansascity.com/news/state/missouri/article504559/Historians-see-missing-keys-to-Missouri-gas-chamber-cells.html>. These stories do contain an error on the date of the last gas-chamber execution in Missouri. The last execution by lethal gas in the United States occurred in 1999 in Arizona. *The Gas Chamber*, CAP. PUNISHMENT U.K., <http://www.capitalpunishmentuk.org/gascham.html> (last visited Oct. 6, 2014).

Concerned about both the supply of lethal-execution drugs and delays in executions caused by legal battles, Missouri Attorney General Chris Koster has hinted at reinstating death via the gas chamber at least since July 2013.<sup>257</sup> Likewise, Missouri Department of Corrections Director George Lombardi has pointed out that he must carry out death sentences; without lethal injection drugs, he would have no alternative other than the gas chamber—but Missouri does not have a working gas chamber.<sup>258</sup> The lack of a gas chamber, of course, does create a logistical difficulty.

In February 2014, a dozen representatives introduced a bill to reinstate the use of lethal gas in Missouri.<sup>259</sup> The bill says, “The manner of inflicting the punishment of death shall be by the administration of lethal gas or . . . lethal injection,” and it also authorizes the Department of Corrections to “provide a suitable and efficient room or place” for such executions.<sup>260</sup> The secrecy provisions of Missouri’s execution laws would be retained.<sup>261</sup>

More easily available than a gas chamber is a firing squad, and two Missouri representatives, Rick Brattin and Paul Fitzwater, introduced a bill early in 2014 to permit death by bullets.<sup>262</sup> The proposed legislation would have amended section 546.720 to say:

1. The manner of inflicting the punishment of death shall be by firing squad, the administration of lethal gas or by means of the administration of lethal injection. . . .

2. If the judgment of death is to be carried out by firing squad, the director of the department of corrections shall select a five-person firing squad consisting of licensed peace officers.<sup>263</sup>

Firing squads, however, have gone out of favor, with only two states, Utah and Oklahoma, permitting their use in some circumstances.<sup>264</sup> Gary Gilmore, famously executed by firing squad in Utah in 1977,<sup>265</sup> was the first person executed in this country after the Supreme Court called for a moratorium on

257. Fernandez, *supra* note 87; Pilkington, *supra* note 255.

258. French, *supra* note 238.

259. H.R. 1737, 97th Gen. Assemb., 2d Reg. Sess. (Mo. 2014). Representative Eric Burlison sponsored the bill. *Id.*

260. *Id.*

261. *Id.*

262. H.R. 1470, 97th Gen. Assemb., 2d Reg. Sess. (Mo. 2014).

263. *Id.* See also *Death Penalty States Mull Return of Firing Squads, Electric Chairs*, N.Y. DAILY NEWS (Jan. 28, 2014, 9:42 AM), <http://www.nydailynews.com/news/national/death-penalty-states-mull-return-firing-squads-electric-chairs-article-1.1593687>.

264. *Authorized Methods*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/methods-execution> (last visited Oct. 6, 2014) (detailing methods of execution permitted in states).

265. For a journalist’s account of Gilmore’s execution, see William Greider, ‘*Today . . . Gilmore Has Quiet*,’ WASH. POST, Jan. 18, 1977, at A1.

capital punishment in 1972 in *Furman v. Georgia*.<sup>266</sup> But Utah no longer permits use of the firing squad unless the prisoner chose that method prior to Utah's elimination of it in 2004,<sup>267</sup> or unless lethal injection is declared unconstitutional.<sup>268</sup> A Utah legislator, however, reportedly plans to introduce legislation reinstating the firing squad.<sup>269</sup> Oklahoma law says that firing squads will only be used if both lethal injection and electrocution are declared constitutionally infirm.<sup>270</sup>

In July 2014, in his opinion dissenting to a denial of rehearing en banc of the decision to conditionally stay Joseph Wood's execution in Arizona, Ninth Circuit Judge Alex Kozinski also questioned whether lethal injection should be abandoned for the surer execution method of the firing squad:

Using drugs meant for individuals with medical needs to carry out executions is a misguided effort to mask the brutality of executions by making them look serene and peaceful—like something any one of us might experience in our final moments. But executions are, in fact, nothing like that. They are brutal, savage events, and nothing the state tries to do can mask that reality. Nor should it. If we as a society want to carry out executions, we should be willing to face the fact that the state is committing a horrendous brutality on our behalf.

If some states and the federal government wish to continue carrying out the death penalty, they must turn away from this misguided path and return to more primitive—and foolproof—methods of execution. The guillotine is probably best but seems inconsistent with our national ethos. And the electric chair, hanging and the gas chamber are each subject to occasional mishaps. The firing squad strikes me as the most promising. Eight or ten large-caliber rifle bullets fired at close range can inflict massive damage, causing instant death every time. There are plenty of people employed by the state who can pull the trigger and have the training to aim true. The weapons and ammunition

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266. *Id.* See also *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972).

267. Matthew Pomy, *Utah Court Will Allow Death by Firing Squad*, JURIST (Feb. 12, 2012, 11:50 AM), <http://jurist.org/paperchase/2012/02/utah-court-will-allow-execution-by-firing-squad.php>. Michael Archuleta opted for the firing-squad option in 2012. *Id.* But then he sought and got a reprieve. See Josh Loftin, *Firing Squad Execution Halted for Utah Inmate*, DESERET NEWS (Apr. 3, 2012, 1:50 PM), <http://www.deseretnews.com/article/765565619/Firing-squad-execution-halted-for-Utah-inmate.html>.

268. UTAH CODE ANN. § 77-18-5.5 (West 2012). See also Mark Berman, *The Recent History of States Contemplating Firing Squads and Other Execution Methods*, WASH. POST (May 22, 2014), <http://www.washingtonpost.com/news/post-nation/wp/2014/05/22/the-recent-history-of-states-contemplating-firing-squads-and-other-execution-methods/> (noting that Utah banned firing squads as an execution method but still makes exceptions).

269. See Dan Solomon, *Should Texas Bring Back the Firing Squad?*, TEX. MONTHLY (May 19, 2014, 4:16 PM), <http://www.texasmonthly.com/daily-post/should-texas-bring-back-firing-squad> (noting Utah Representative Paul Ray plans to introduce legislation reinstating the firing squad).

270. OKLA. STAT. tit. 22, § 1014 (2013).

are bought by the state in massive quantities for law enforcement purposes, so it would be impossible to interdict the supply. And nobody can argue that the weapons are put to a purpose for which they were not intended: firearms have no purpose other than destroying their targets. Sure, firing squads can be messy, but if we are willing to carry out executions, we should not shield ourselves from the reality that we are shedding human blood. If we, as a society, cannot stomach the splatter from an execution carried out by firing squad, then we shouldn't be carrying out executions at all.<sup>271</sup>

Hanging might be another rather easily instituted option. Missouri has used hanging as an execution method in the past. In fact, the last public execution in the United States occurred in Galena, Missouri, in 1937 with the hanging of Roscoe Jackson.<sup>272</sup> He was sentenced to death for robbing and murdering a traveling salesman.<sup>273</sup>

Delaware mandates hanging as the fallback position if lethal injection is found unconstitutional.<sup>274</sup>

Under these circumstances of dwindling supplies and states turning to compounding pharmacies, Missouri Attorney General Chris Koster proposed in May 2014 that Missouri should make its own execution drugs.<sup>275</sup> He told the Bar Association of Metropolitan St. Louis, "For Missouri to maintain lethal injection . . . it is my belief the Legislature should remove market-driven participants and pressures from the system and appropriate funds to establish a state-operated, DEA-licensed, laboratory to produce the execution chemicals in our state."<sup>276</sup>

Perhaps this makes some sense. For one thing, the efficacy of drugs coming from compounding pharmacies is an issue. The U.S. Food and Drug Administration's (FDA) website defines "pharmacy compounding" as "a practice in which a licensed pharmacist combines, mixes, or alters ingredients in response to a prescription to create a medication tailored to the medical

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271. *Wood v. Ryan*, 759 F.3d 1076, 1102–03 (9th Cir. 2014) (Kozinski, J., dissenting) (citation omitted). For coverage of Wood's botched execution, see *supra* notes 118–20 and accompanying text.

272. Tim O'Neal, *Galena's Gruesome Claim to Fame*, ST. LOUIS POST-DISPATCH, Mar. 20, 2001, at E1.

273. *Id.*

274. DEL. CODE ANN. tit. 11, § 4209(f) (2007).

275. *Missouri Official Proposes State Drug Lab to Make Chemicals for Executions*, WASH. POST (May 29, 2014), [http://www.washingtonpost.com/politics/missouri-official-proposes-state-drug-lab-to-make-chemicals-for-executions/2014/05/29/d4b7f21a-e780-11e3-afc6-a1dd9407abcf\\_story.html](http://www.washingtonpost.com/politics/missouri-official-proposes-state-drug-lab-to-make-chemicals-for-executions/2014/05/29/d4b7f21a-e780-11e3-afc6-a1dd9407abcf_story.html); Tony Rizzo, *Attorney General Proposes that Missouri Make its Own Lethal Injection Chemicals*, KAN. CITY STAR (June 3, 2014, 10:17), <http://www.kansascity.com/news/state/missouri/article434130/Attorney-general-proposes-that-Missouri-make-its-own-lethal-injection-chemicals.html>.

276. *Missouri Official Proposes State Drug Lab to Make Chemicals for Executions*, *supra* note 275. The quote is attributed to a transcript provided by Koster's office. *Id.*

needs of an individual patient.”<sup>277</sup> But the FDA website also warns of potential dangers of compounding pharmacies, saying, “The emergence of firms with pharmacy licenses making and distributing drugs in a way that’s outside the bounds of traditional pharmacy compounding is of great concern to FDA.”<sup>278</sup> And, perhaps more chilling, the website reports: “Ilisa Bernstein, Pharm.D., acting director of [the Center for Drug Evaluation and Research’s (CDER)] Office of Compliance, says that poor compounding practices can result in contamination or in medications that don’t possess the strength, quality and purity required.”<sup>279</sup> The website also quotes the acting director of the Office of Unapproved Drugs and Labeling Compliance in CDER, Kathleen Anderson: “[C]onsumers need to be aware that compounded medications are not FDA-approved. . . . This means that FDA has not verified their quality, safety and effectiveness.”<sup>280</sup> In short, *caveat emptor*.

Radio station KBIA, the Columbia station licensed to the University of Missouri, reported that over the last decade the Missouri Board of Pharmacy found “that about one out of every five drugs made by compounding pharmacies didn’t meet standards.”<sup>281</sup>

Given the laxity of control over the products produced by compounding pharmacies and the potential of horrific results inside death chambers if the compounded drugs are inadequate, maybe the state could produce a better, more reliable drug stream than is currently available. Also, the state’s production would at least alleviate the problem of not knowing who was supplying the lethal injection drugs.

Still, questions of transparency concerning the drugs themselves and their quality could remain unless properly addressed. Other remaining questions include the timing of executions and the drug protocol used.

Eighth Circuit Court of Appeals Judge Kermit Bye criticizes the state’s haste to execute inmates *before* the appellate process runs its course. For example, Missouri executed Allen Nicklasson for the murder of a “Good

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277. *The Special Risks of Pharmacy Compounding*, FDA, <http://www.fda.gov/forconsumers/consumerupdates/ucm107836.htm> (last visited Oct. 6, 2014). For more on compounding pharmacies, see *Compounding Pharmacies and Lethal Injection*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/compounding-pharmacies> (last visited Oct. 6, 2014).

278. *The Special Risks of Pharmacy Compounding*, *supra* note 277.

279. *Id.*

280. *Id.* A 2013 federal law allows regulation by the FDA of companies that manufacturer drugs for compounding but leaves to states the regulation of traditional compounding pharmacies. See Martha Kessler & Adrienne Appel, *States Adopt Variety of Oversight Strategies in Wake of NECC Disaster*, BLOOMBERG BNA (Mar. 20, 2014), <http://www.bna.com/states-adopt-variety-n17179888981/>; McDaniel & LaCapra, *supra* note 3.

281. Chris McDaniel, *Missouri Lawmakers Call for Investigation into State’s Execution Method*, KBIA (Jan. 13, 2014), <http://kbia.org/post/missouri-lawmakers-call-investigation-states-execution-method>. While one in five compounding pharmacies did not meet standards, only one in 50 commercially regulated pharmacies did not. McDaniel & LaCapra, *supra* note 3.

Samaritan” who stopped alongside the road to help Nicklasson with his stalled car.<sup>282</sup> The timing of the execution brought a rebuke from Judge Bye:

At approximately 10:52 p.m. on December 11, 2013, Missouri executed Allen Nicklasson before this court had completed its review of Nicklasson’s request for a stay of his execution. . . . That bears repeating. Missouri put Nicklasson to death before the federal courts had a final say on whether doing so violated the federal constitution.<sup>283</sup>

Besides complaining about Missouri’s execution of prisoners “before the federal courts had completed their review of an active request for a stay,” Judge Bye complained about Missouri’s “current practice of using shadow pharmacies hidden behind the hangman’s hood, copycat pharmaceuticals, [and] numerous last-minute changes to its execution protocol.”<sup>284</sup>

In a later case, Judge Bye said, “Missouri shields these shadow pharmacies—and itself—behind the hangman’s cloak by refusing to disclose pertinent information to the inmates.”<sup>285</sup> He continued, “This Court is largely left to speculate as to the source and quality of the compounded pentobarbital—or whatever chemical cocktail *du jour* Missouri elects to serve this time around.”<sup>286</sup>

Likewise, U.S. District Judge Nanette Laughrey complained about the moving target that Missouri’s execution protocol had become. She declared, showing obvious frustration, that “litigation is not a game of chess.”<sup>287</sup> She explained, “Neither the Plaintiffs nor the Court have been able to address the merits of Plaintiffs’ claim that the Defendants have adopted an execution protocol that violates the U.S. Constitution, because the Defendants keep changing the protocol that they intend to use.”<sup>288</sup>

For some legislators, the major problem remains the broad interpretation of Missouri’s execution legislation that results in concealing the source of execution drugs. In mid-January, State Representative John Rizzo, who opined that Missouri’s secrecy statute “is intended for protecting the actual person that

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282. *Missouri Executes Man for 1994 “Good Samaritan” Killing*, CBS NEWS (Dec. 12, 2013, 11:47 AM), <http://www.cbsnews.com/news/missouri-state-executes-man-in-1994-good-samaritan-killing/>.

283. *Zink v. Lombardi*, No. 13-3664, 2013 U.S. App. Lexis 25479, at \*1–2 (8th Cir. Dec. 30, 2013) (Bye, J., dissenting). Justice Bye complained, “Missouri has a well-documented history of attempting to execute death row inmates before the federal courts can determine the constitutionality of the executions,” and he listed more examples. *Id.* at \*2–8.

284. *Id.* at \*20. See also *McDaniel & LaCapra*, *supra* note 3.

285. *Zink v. Lombardi*, 749 F.3d 744, 745 (8th Cir. 2014) (Bye, J., dissenting).

286. *Id.*

287. *Zink v. Lombardi*, No. 2:12-CV-4092-NKL, 2013 U.S. Dist. Lexis 167390, at \*20 (W.D. Mo. Nov. 19, 2013).

288. *Id.* See also *McDaniel & LaCapra*, *supra* note 3.

does the execution, not the people that provide the pharmaceuticals,”<sup>289</sup> introduced a bill that would establish the Commission on Lethal Injection Administration and place a moratorium on executions while that commission investigates where Missouri is getting its execution drugs.<sup>290</sup> In February, the Missouri House Committee on Government Oversight held a hearing at which the Department of Corrections director testified about buying drugs with cash payments to an Oklahoma compounding pharmacy.<sup>291</sup>

In late January and early February 2014, respectively, State Senator Rob Schaaf and State Representative Eric Burlison introduced bills that would remove some of this secrecy concerning executions.<sup>292</sup> Schaaf’s proposed legislation would prohibit the Department of Corrections from using cash payments to buy execution drugs and, thus, from shielding the identity of the supplying pharmacies.<sup>293</sup> The bill says flatly, “The department shall not purchase lethal gas or chemicals with paper money or coins,” and, “[t]he execution team shall not include any person who operates, owns, is an agent of, or is employed by a supplier of equipment or chemicals used in executions.”<sup>294</sup> Burlison’s proposed legislation would strip the Department of Corrections of the power to change execution protocol on its own, instead giving legislative oversight by placing such changes under the rule-making provisions of the Joint Committee on Administrative Rules.<sup>295</sup> “We owe it to the victims and to the public to make sure that our state is transparent in the process we use to execute our most violent criminals,” Burlison stated to *The Missouri Times*.<sup>296</sup>

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289. McDaniel, *supra* note 281.

290. H.R. 1409, 97th Gen. Assemb., 2d Reg. Sess. (Mo. 2014). For news accounts, see McDaniel, *supra* note 281; Gary Strauss, *Ohio Killer’s Slow Execution Raises Controversy*, USA TODAY (Jan. 16, 2014, 8:18 PM), <http://www.usatoday.com/story/news/nation/2014/01/16/ohio-killer-executed-with-new-lethal-drug-combo/4512651/>.

291. See Collin Reischman, *DOC Hearing Shows Legislative Action on Executions Likely*, MO. TIMES (Feb. 10, 2014), <http://themissouritimes.com/8173/doc-hearing-shows-legislative-action-executions-likely/>. See also *In Missouri, Testimony About Secret Cash Payments for Execution Drugs*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/missouri-testimony-about-secret-cash-payments-execution-drugs> (last visited Oct. 6, 2014).

292. S. 804, 97th Gen. Assemb., 2d Reg. Sess. (Mo. 2014); H.R. 1737, 97th Gen. Assemb., 2d Reg. Sess. (Mo. 2014).

293. Mo. S. 804.

294. *Id.*

295. Mo. H.R. 1737. See Jonathan Shorman, *State’s Execution Rules Need Legislative Oversight, Burlison Says*, NEWS-LEADER (Feb. 7, 2014, 2:22 PM), <http://www.news-leader.com/story/news/politics/2014/02/06/states-execution-rules-need-legislative-oversight-burlison-says-/5244201/>.

296. Collin Reischman, *In Wake of Execution, House Hears Bill Adding Oversight to DOC*, MO. TIMES (Feb. 26, 2014), <http://themissouritimes.com/8499/wake-execution-house-hears-bill-adding-oversight-doc/>.

In short, proposals abound to address the issues of availability of lethal injection drugs and the lack of transparency of their source and quality—from changing the execution method to electrocution, lethal gas, or even firing squads; to Missouri’s making its own lethal injection drugs; to declaring a moratorium on executions while a commission investigates where Missouri is procuring its drugs; to prohibiting cash payments for the drugs; to stripping the Department of Corrections of the ability to change execution protocol without legislative oversight.

This much seems certain: Controversy concerning lethal-execution drugs and the secrecy surrounding them will continue. And so long as the flow of lethal drugs to fill the demands is impeded, Missouri and other death penalty states will continue to scramble for solutions.

#### CONCLUSION

Missouri is damned if it does and damned if it does not when the issue is revealing executioners’ names or the sources of execution drugs.

To take the *damned if it does not* side first, Missouri’s statute criminalizing the naming of anyone involved in the execution process does a disservice to the public, not to mention those on death row. The public needs to know if those entrusted with the odious duty of extinguishing life are for some reason incapable, or at least diminished in their capacity, to do so. Likewise, the public needs to know if the drugs being used will be efficacious. Executioners take life in the name of the public. Criminalizing the naming of them unless the director of the Department of Corrections approves is arguably unconstitutional on First Amendment grounds.

Is the Missouri statute criminalizing the naming of executioners an unconstitutional prior restraint? Its spirit is certainly restraining. The U.S. Supreme Court, in the seminal prior restraint case of *Near v. Minnesota ex rel. Olson*,<sup>297</sup> refused to permit the state of Minnesota to shut down a newspaper through use of a statute that permitted “abatement, as a public nuisance, of a malicious, scandalous and defamatory newspaper, magazine or other periodical.”<sup>298</sup> The Supreme Court even gave the press what could be characterized as a pep-talk, saying:

[T]he administration of government has become more complex, the opportunities for malfeasance and corruption have multiplied, crime has grown

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297. *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 722–23 (1931).

298. *Id.* at 701–02 (internal quotation marks omitted). The Court permitted prior restraint in only four “exceptional cases”: obstruction of military recruitment; publishing sailing dates, the number, or location of troops; obscenity; and incitements to violent overthrow of government. *Id.* at 716. In *Nebraska Press Ass’n v. Stuart*, the Court added a fifth exceptional case: prior restraint in limited circumstances to protect a criminal defendant’s right to a fair trial. 427 U.S. 539, 570 (1976).

to most serious proportions, and the danger of its protection by unfaithful officials and of the impairment of the fundamental security of life and property by criminal alliances and official neglect, emphasizes the primary need of a vigilant and courageous press, especially in great cities.<sup>299</sup>

During the days of gangsters and corrupt officials, the Court did not want to cause a chilling effect when the press was trying to expose gangsters and corrupt officials.

Similarly, one could argue that Missouri should not want to cause a chilling effect when the press is attempting to expose incompetent, impaired, or otherwise unsuitable executioners, or expired or ineffective execution drugs. Botched executions should show the “need of a vigilant and courageous press.”

To criminalize naming of executioners, especially those who arguably could pose a risk of unnecessary pain during executions, can only leave the public more in the dark about what the state does in the public’s name behind closed doors. The statute does let in a crack of light, giving the director of the Department of Corrections the power to approve the naming. But that crack of light comes with its own negative—unbridled discretion—which does not pass constitutional muster.<sup>300</sup> Giving the director the power to approve naming executioners also makes questionable the statute’s ability to pass the strict-scrutiny test’s requirement of a compelling interest.<sup>301</sup> And in imposing sanctions on the publication of truthful information of public concern, the Missouri statute flies in the face of the First Amendment, as interpreted by the U.S. Supreme Court in *Bartnicki v. Vopper*. The policy of restricting information of public concern is unsound.<sup>302</sup>

On the other hand, Missouri could be *damned if it does* because of a foreseeable risk of harm to the physical safety of those involved in the execution process, including those supplying the drugs. The Sandra Hyde precedent stands as a warning that disseminating information that exposes others to a risk of foreseeable harm is negligent.<sup>303</sup> Even without that fear of liability for negligence, the state does have an arguably valid concern that, if those involved in executions know their identities will be revealed, they will be discouraged from becoming part of the execution process. Executioners and drug supplies might dry up—just like journalists’ confidential sources might dry up if the sources knew their identities would be revealed.

An unreasonable, foreseeable risk of harm arguably requires more than a vague fear that somebody *might* try to retaliate against an executioner. If fear alone were enough to impose sanctions for releasing names, judges who

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299. *Near*, 283 U.S. at 719–20.

300. *See supra* notes 159–62 and accompanying text.

301. *See supra* notes 163–69 and accompanying text.

302. *See supra* notes 174–80 and accompanying text.

303. *See supra* notes 221–33 and accompanying text.

impose death sentences should perhaps be first in line demanding protection. The director of the Department of Corrections perhaps should be next in line. Or maybe the arresting police officer. Or maybe any witnesses who testified against the condemned prisoner. Or even the prosecutor.

A slippery slope based on fear could soon be a well-populated landslide.

Missouri's attempt to impose sanctions for revealing names of executioners—or of anyone else the state considers part of the “execution team,” including suppliers of execution drugs—is flawed. Especially in a system of government that values openness in its criminal justice system, more transparency is necessary.

President Ronald Reagan spoke succinctly: “Trust but verify.”<sup>304</sup> Secrecy laws preclude that possibility. Instead, they leave government saying, in effect, “Trust us.” Arguably, when the state is carrying out a death sentence, the state is wielding its power to the maximum. That is not the time to impose a veil of secrecy and simply ask the public to trust that the drugs procured from an unknown source are adequate to perform their grim task.

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304. The Conservative Will, *Trust But Verify*, YOUTUBE (Mar. 7, 2008), <https://www.youtube.com/watch?v=As6y5eI01XE>.

