

Lethal Injections Gone Awry: Unmasking America's Capital Punishment System

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Abstract

For much of human history, capital punishment has been regularly conducted, usually reserved for the severest of criminal acts. While execution methods have evolved and changed over time, one factor has remained consistent – the occurrence of botched executions. Since 1982, when the first execution using lethal injection was carried out in Texas, executions in the United States have largely been carried out by lethal injection, a procedure that has faced controversy in recent years, especially as American states adopt new and experimental methods of lethal injection due to shortages of established lethal injection drugs. While prior research has typically focused on the social and judicial consequences of botched lethal injections, this paper focuses on the multitude of factors that have shaped the ongoing controversy surrounding lethal injections, providing context for the issues plaguing the legal and effective enforcement of the death penalty. Further, it traces the evolution of the procedures and controversies relating to lethal injections, allowing for a greater understanding of the complexities and controversies of the lethal injection procedure. The analysis provided by this paper demonstrates the shortcomings of the modern American capital punishment system while offering a critical discussion of the underlying political motivations that lead to partisan interference in the modern American death penalty system.

Introduction

In Stephen Trombley's 1993 book, *The Execution Protocol*, the author interviewed Lloyd Schlup, a convicted murderer on Missouri death row, for his thoughts on how the public perceived lethal injection, a newer method of execution that was rapidly being adopted at the time.¹ Lloyd commented, "They keep hearing about this electric chair and that electric chair, not getting it on the first try, and breaking down. And the gas... How you gasp for ten, fifteen minutes, or whatever, and go through all this agonizing pain... you know it's cruel and unusual... Putting a shot in your arm and just laying there, then a few minutes later, *that's it*, and supposedly no pain or suffering. That's how we do our dogs, you know... it's just too easy."²

The national media has given a great deal of attention to several executions performed with a lethal injection that has gone wrong within the past decade, such as the botched execution of Clayton Lockett that occurred in 2014.³ However, while much of the attention has focused on the deaths of the condemned, there has been little coverage of the greater implications of these executions.⁴ These bungled executions are significant because they uncover the flawed state of America's modern capital punishment system.

This paper focuses on the following issues that prove the faulty state of America's contemporary capital punishment system. Foremost, shortages of approved sodium thiopental have forced prisons to use ethically questionable methods to procure alternative drugs that are unsafe, unauthorized for use in executions, and that lack anesthetic properties. Largely, prisons facing shortages of sodium thiopental for anesthesia in lethal injections have turned to alternatives such as pentobarbital from less-regulated compounding pharmacies or midazolam, a drug with no proven value in preventing an unconstitutional degree of pain during executions.⁵ Furthermore, incompetence and oversight from all facets of state government have

¹ Trombley, Stephen, *The Execution Protocol* (London: Century, 1993), 14, 72, 329-330.

² *Ibid.*, 329-330.

³ Austin Sarat, "Botched Executions Are Just Part of a Broken System," U.S. News and World Report, last modified July 28, 2014, Accessed April 28, 2023.

<https://www.usnews.com/debate-club/do-botched-executions-make-the-case-for-abolishing-the-death-penalty/botched-executions-are-just-part-of-a-broken-system>.

⁴ *Ibid.*

⁵ Michael R. Merz, *DECISION AND ORDER ON MOTION FOR STAY OF EXECUTION AND PRELIMINARY INJUNCTION*, 147-148, January 14, 2019, Accessed February 25, 2022.

<https://drive.google.com/file/d/1jCgl50sVPEXvpZ6hbuBF31GrcLGwVnZm/view>.

contributed to the rising number of botched executions. The increasing politicization and political polarization of the death penalty have also impacted states' responses to botched executions. Facing political pressure and meddling, many states and courts of law have continued to administer the death penalty, while shielding it from criticism and examination by compromising judicial independence and limiting the free flow of information through secrecy laws.

Execution Drug Shortage

Before 2010, most states applying the death penalty had used a three-drug cocktail to execute condemned prisoners.⁶ This lethal injection drug cocktail consisted of:

- (1) sodium thiopental, a “fast-acting barbiturate sedative that induces a deep, comalike unconsciousness when given in the amounts used for lethal injection”;
- (2) pancuronium bromide, “a paralytic agent that inhibits all muscular-skeletal movements and... stops respiration”; and
- (3) potassium chloride, which “interferes with the electrical signals that stimulate the contractions of the heart, inducing cardiac arrest.”⁷

In 2010, the only company licensed to sell sodium thiopental in the United States, Hospira, had to shut down its manufacturing plant due to an issue at the plant.⁸ At the time, Hospira was the only company that the US Food and Drug Administration (FDA) approved to produce any legal forms of thiopental, including sodium thiopental.⁹ With Hospira halting all production of sodium thiopental, a shortage of the drug carpeted the entire United States.¹⁰ This prompted states to find alternative suppliers to procure sodium thiopental.¹¹

Many states, including Georgia, California, and Arizona, soon began to purchase and use sodium thiopental from Dream Pharma, a British company operated out of a driving academy.¹² Similarly,

⁶ *Glossip v. Gross*, 576 U. S. 863, 3 (2015)

⁷ *Ibid.*, 3.

⁸ Alper, Ty. “The United States Execution Drug Shortage: A Consequence of Our Values.” *The Brown Journal of World Affairs* 21, no. 1 (2014): 30, Accessed February 4th, 2022. <http://www.jstor.org/stable/24591028>.

⁹ *Ibid.*, 30.

¹⁰ *Ibid.*, 30.

¹¹ *Ibid.*, 30.

¹² Stern, Jeffrey E. “THE CRUEL AND UNUSUAL EXECUTION OF CLAYTON LOCKETT.” *The Atlantic*, June 2015, Accessed February 5, 2022. <https://www.theatlantic.com/magazine/archive/2015/06/execution-clayton-lockett/392069/>.

Nebraska purchased sodium thiopental from a Swiss pharmaceutical company called Naari, through a middleman in India.¹³ The middleman told Naari that he needed free samples of the anesthetic to test out in Zambia.¹⁴ Instead, he sold the free samples to Nebraska for \$5,411 to use in executions.¹⁵ Naari's CEO was "shocked and appalled" that drugs produced by his company had been obtained by prisons for use in executions.¹⁶ He told the Chief Justice of the Nebraska Supreme Court that Naari was "deeply opposed to the use of the drugs in executions."¹⁷ The CEO attempted to make Nebraska return the drugs; however, the drugs were never returned.¹⁸ In 2010, the British Government, and in 2011, the European Union, initiated controls on the exportation of sodium thiopental.¹⁹ These newly passed export controls halted the exportation of sodium thiopental from Europe to US prisons.²⁰

As this occurred, "the federal Drug Enforcement Administration (DEA) was about to start raiding prisons... Prisons had become... drug smugglers" due to their illegal importation of unapproved sodium thiopental.²¹ The FDA had never approved the imported sodium thiopental for use within the United States.²² Therefore, states were using unregulated and unapproved drugs in executions, a violation of US laws.²³ Later, in 2013, almost all global importation of sodium thiopental into the US was halted following a ruling by the US Court of Appeals for the District of Columbia Circuit which found that "the importation of unapproved thiopental from overseas was illegal."²⁴ However, in 2015, the FDA seized lethal injection drugs that Arizona, Texas, and Nebraska

¹³ Associated Press, "Swiss Company Demands Nebraska Return Drug Intended For Use In Lethal Injections," *Business Insider*, last modified November 30, 2011, Accessed April 29, 2023. <https://www.businessinsider.com/nebraska-swiss-naari-ag-sodium-thiopental-2011-11>.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ Alper, "The United States Execution Drug Shortage: A Consequence of Our Values." 34.

¹⁷ *Ibid.*, 34.

¹⁸ Eric Berger, "Lethal Injection Secrecy and Eighth Amendment Due Process," *Boston College Law Review* 55, no. 5 (November 25, 2014): 1381-1382, Accessed April 29, 2023. <http://lawdigitalcommons.bc.edu/bclr/vol55/iss5/2>.

¹⁹ Alper, "The United States Execution Drug Shortage: A Consequence of Our Values." 30.

²⁰ *Ibid.*, 30.

²¹ Stern, "THE CRUEL AND UNUSUAL EXECUTION OF CLAYTON LOCKETT."

²² *Ibid.*

²³ Alper, "The United States Execution Drug Shortage: A Consequence of Our Values." 30.

²⁴ *Ibid.*, 30.

still tried to smuggle into the US.²⁵ In October 2015, FDA spokesman Jeff Ventura reminded state governments that, “Courts have concluded that sodium thiopental for the injection in humans is an unapproved drug and may not be imported into the country...”²⁶

After Hospira shut down its manufacturing plant, some states also turned to a new drug, pentobarbital, to anesthetize inmates during lethal injection procedures.²⁷ Several states turned to a Danish company called Lundbeck for pentobarbital; however, in July 2011, Lundbeck announced that it would be implementing “comprehensive distribution controls” on its medicine to stop prisons from using it in executions.²⁸ Most other manufacturers of pentobarbital followed suit and implemented tight controls on their products, thereby restricting states’ access to pentobarbital.²⁹ This issue prompted several states, including Oklahoma, to switch to a new drug that was easier to obtain, called midazolam.³⁰ However, midazolam has faced controversies regarding its effectiveness, and scientific evidence, accepted by the legal system, does not support that it can effectively anesthetize inmates during executions.³¹

Other states, including Texas, turned to compound pharmacies to fulfill their need for pentobarbital because compounding pharmacies did not need to follow the same federal standards as large manufacturers of drugs.³² Drugs produced by these pharmacies do not need to be reviewed, tested, and approved by the FDA for safety and effectiveness.³³ Instead, statewide pharmacy boards are responsible for regulating their in-state compounding pharmacies, and regulations can

²⁵ Breyer, Stephen G., and John D. Bessler, *Against the Death Penalty* (Washington: Brookings Institution Press, 2016), 70.

²⁶ *Ibid.*, 70.

²⁷ Alper, “The United States Execution Drug Shortage: A Consequence of Our Values.” 30.

²⁸ *Ibid.*, 30-31.

²⁹ *Ibid.*, 31.

³⁰ Owen Dyer, “Botched Execution Could Lead to Legal Challenges in Death Penalty States,” *BMJ: British Medical Journal* 348 (2014): 1, Accessed February 24, 2022. <https://www.jstor.org/stable/26514619>.

³¹ Merz, *DECISION AND ORDER*, 147-148.

³² McDaniel, Chris. “Inmates Said The Drug Burned As They Died. This Is How Texas Gets Its Execution Drugs.” BuzzFeed News. Last modified November 28, 2018, Accessed February 14, 2022. <https://www.buzzfeednews.com/article/chrimcdaniel/inmates-said-the-drug-burned-as-they-died-this-is-how-texas>.

³³ “Compounding and the FDA: Questions and Answers,” Food and Drug Administration, Accessed April 28, 2023. <https://www.fda.gov/drugs/human-drug-compounding/compounding-and-fda-questions-and-answers>.

vary by state.³⁴ Simultaneously, many states have passed laws protecting compounding pharmacies from state regulatory boards when assisting in state-sanctioned executions.³⁵ However, after Texas started using compounded pentobarbital in executions, several controversial executions took place.³⁶ During the execution of Texas inmate Anthony Shore, he said: “I can feel that it does burn. Burning!”³⁷ Death row prisoner William Rayford also “writhed and shook on the gurney...”³⁸ Of the 11 Texas inmates executed through lethal injection in 2018, five of them said that they felt a burning sensation during their execution.³⁹ A 2016 affidavit written by Dr. David Waisel, a Harvard and Yale Medical School professor of anesthesia, explained that improperly compounded and inspected drugs could contain non-visible contaminants and particles that “can cause great irritation to the vein, resulting in extraordinary pain...” after injection.⁴⁰ Additionally, pentobarbital produced by compounding pharmacies can slowly degrade in potency and expire, thereby reducing its effectiveness, and putting death-row inmates “at risk of a painful death that would amount to torture.”⁴¹

One of the sources of pentobarbital for Texas executions was Greenpark Compounding Pharmacy in Houston whose license was on probation because it made the wrong drug for three children, causing one to be hospitalized.⁴² The pharmacy also was found to be using forged quality control documents.⁴³ From 2010 to 2018, FDA investigators cited Greenpark Pharmacy 48 times for quality control and sterility issues.⁴⁴ Furthermore, in 2021, the FDA cautioned healthcare providers to immediately quarantine and cease administration of products from Greenpark Compounding Pharmacy which was originally marked as sterile.⁴⁵ Moreover, government regulators have discovered

³⁴ Kelly A. Mennemeier, “A RIGHT to KNOW HOW YOU’LL DIE,” *The Journal of Criminal Law and Criminology* (1973-) 107, no. 3 (2017): 452, <https://www.jstor.org/stable/48572684>.

³⁵ Andrew Shi, “REVIEWING REFUSAL: LETHAL INJECTION, THE FDA, AND THE COURTS,” *University of Pennsylvania Law Review* 168, no. 1 (2019): 247, <http://www.jstor.org/stable/45389500>.

³⁶ McDaniel, “Inmates Said The Drug Burned As They Died. This Is How Texas Gets Its Execution Drugs.”

³⁷ Ibid.

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Food and Drug Administration. “FDA alerts patients and health care professionals not to use compounded products intended to be sterile from Prescription Labs Inc.

unsanitary conditions in compounding pharmacies nationally.⁴⁶ In September 2012, a fatal meningitis outbreak originated from a compounding pharmacy located in Massachusetts which infected at least 500 people.⁴⁷ After the outbreak, the FDA inspected thirty different compounding pharmacies and discovered unhygienic environments in all but one.⁴⁸

Similarly to Texas, Missouri also utilized compounded drugs in executions.⁴⁹ In three separate executions, Missouri utilized drugs from a compounding pharmacy that received 1,892 infringements of state guidelines.⁵⁰ State inspectors observed pharmacy employees arbitrarily modifying expiration dates on drugs and regularly storing medications in an Igloo cooler instead of the pharmacy's refrigerator, solely because the refrigerator was located in another room.⁵¹ This pharmacy, located in Oklahoma, was also “not licensed to do business in Missouri, and its interstate sale of controlled substances without a valid prescription may have violated both Missouri and federal law... To evade disclosure, Missouri also failed to file the required 1099 tax form with the Internal Revenue Service.”⁵²

Many states consistently turned to illegal, deceitful, and potentially dangerous methods to acquire execution drugs with diminished or unknown effectiveness, and that carry a high risk of contamination. States using these drugs have been unable to shield inmates from the pain that the other drugs in the lethal injection cocktail can cause, creating a constitutionally-incompatible environment for executions performed by lethal injection.⁵³ In its ruling in *Baze vs. Rees* in 2008, the Supreme Court found indisputably, “that absent a ‘proper dose of sodium thiopental,’ there would be a ‘substantial, constitutionally

dba Greenpark Compounding Pharmacy.” News release. September 29, 2021, Accessed February 16, 2022. <https://www.fda.gov/drugs/drug-safety-and-availability/fda-alerts-patients-and-health-care-professionals-not-use-compounded-products-intended-be-sterile>.

⁴⁶ Jennifer Gudeman et al., “Potential Risks of Pharmacy Compounding,” *Drugs in R&D* 13, nos. 1-8 (March 23, 2013): 4-5, Accessed April 29, 2023.

<https://doi.org/10.1007/s40268-013-0005-9>.

⁴⁷ *Ibid.*, 5.

⁴⁸ Stern, “THE CRUEL AND UNUSUAL EXECUTION OF CLAYTON LOCKETT.”

⁴⁹ Robin Konrad, *Behind the Curtain: Secrecy and the Death Penalty in the United States*, ed. Robert Dunham and Ngozi Ndulue, 40, November 20, 2018, Accessed April 29, 2023. <https://documents.deathpenaltyinfo.org/pdf/SecrecyReport-2.f1560295685.pdf>.

⁵⁰ Konrad, *Behind the Curtain*, 40.

⁵¹ *Ibid.*, 40.

⁵² *Ibid.*, 40.

⁵³ *Glossip*, 576 U. S. at 2.

unacceptable risk of suffocation from the administration of pancuronium bromide and pain from the injection of potassium chloride [the two other drugs commonly used in lethal injections].”⁵⁴ The absence of legal sodium thiopental for use in executions has created a predicament where executions are still being conducted despite previous Supreme Court rulings that the drugs used in them are not approved for use in constitutionally-tolerable executions.⁵⁵ These issues with execution drugs have undermined the implementation of safe, constitutional, and scientifically supported executions.

Negligence and Incompetence by Government Officials

After the supplier of pentobarbital, the barbiturate used for executions in Oklahoma decided to halt shipments following negative public attention, the Oklahoma Department of Corrections assigned their General Counsel, Mike Oakley, to find an alternative drug for use in executions.⁵⁶ Oakley had no formal medical training or experience in the field of medicine.⁵⁷ Oakley conducted research by looking at testimony given by expert witnesses during litigation related to executions using midazolam in Florida.⁵⁸ In 2013, Florida executed William Happ with midazolam.⁵⁹ Experts argued that midazolam could not induce a sufficient level of anesthesia for a painless execution.⁶⁰ A witness reported that during Happ’s execution, “Happ remained conscious longer and made more body movements after losing consciousness than other people executed recently by lethal injection.”⁶¹ Around the same time, in Ohio, witnesses reported that during the execution of Dennis McGuire using midazolam, he “snorted, heaved, clenched one of his fists, and gasped for air.”⁶² Later, Oakley recommended that Oklahoma utilize midazolam in the state’s upcoming

⁵⁴ *Ibid.*, 2.

⁵⁵ *Ibid.*, 2.

⁵⁶ Laura Finley, “Death Penalty as State Crime: Examining the Physical and Mental Health Concerns with Capital Punishment in the U.S.,” *In Factis Pax* 16, no. 1: 52, Accessed April 29, 2023. <http://www.infactispax.org/wp-content/uploads/2015/06/IFP-V-16-Laura-Finley.pdf>.

⁵⁷ *Ibid.*, 52.

⁵⁸ Stern, “THE CRUEL AND UNUSUAL EXECUTION OF CLAYTON LOCKETT.”

⁵⁹ Finley, “Death Penalty,” 52.

⁶⁰ Stern, “THE CRUEL AND UNUSUAL EXECUTION OF CLAYTON LOCKETT.”

⁶¹ Megan McCracken and Jennifer Moreno, “Through the Glass Darkly: What Oklahoma’s Lethal Injection Regime Tells Us about Secrecy, Incompetence, Disregard, and Experimentation Nationwide,” *Human Rights* 42, no. 2 (2017): 9, Accessed March 10, 2022. <http://www.jstor.org/stable/26423433>.

⁶² Finley, “Death Penalty,” 52.

executions after officials in Ohio, who had a conflict of interest in defending their usage of midazolam, informed him that McGuire's struggles were exaggerated by the media, and because midazolam was easily obtainable in the United States.⁶³

However, medical experts testified that midazolam was ineffective in keeping inmates sedated and anesthetized during executions. Midazolam had never been approved as an anesthetic by the FDA, and it had never been used "as the sole agent to produce insensation in a procedure that involves any noxious stimuli."⁶⁴ For example, in hospitals, midazolam had never been used as the only drug to ensure that patients were anesthetized for surgical procedures.⁶⁵ Furthermore, several studies conducted in 2000 and 2001, almost 15 years before Oakley began his research into midazolam, concluded that "Midazolam's limited effects mean that it cannot produce the level of unconsciousness of a general anesthetic."⁶⁶

In 2017, Judge Michael R. Merz ruled that the use of midazolam in Ohio's lethal injection process would "create a substantial and objectively intolerable risk of serious harm in violation of the Eighth Amendment."⁶⁷ In 2008, in *Baze vs. Rees*, the Supreme Court ruled that a capital punishment protocol would be considered unconstitutional if it posed a "substantial risk of serious harm" or an "objectively intolerable risk of harm."⁶⁸

Before Oklahoma switched to using midazolam following Oakley's recommendation, leaked email exchanges between state officials in Oklahoma, following a 2011 execution in which pentobarbital was used, suggested that state officials were aware that the prisoner had stayed conscious and experienced a high degree of pain throughout the execution, even after being declared unconscious.⁶⁹ Despite this information, a month after the email exchange, the same officials

⁶³ *Ibid.*, 52.

⁶⁴ Merz, *DECISION AND ORDER*, 66, 78.

⁶⁵ *Glossip*, 576 U. S. at 5.

⁶⁶ Merz, *DECISION AND ORDER*, 90.

⁶⁷ "Federal Magistrate Judge Rules Ohio Lethal Injection Protocol Unconstitutional," Death Penalty Information Center, last modified January 26, 2017, Accessed February 5, 2022. <https://deathpenaltyinfo.org/news/federal-magistrate-judge-rules-ohio-lethal-injection-protocol-unconstitutional>.

⁶⁸ *Glossip*, 576 U. S. at 2.

⁶⁹ Stern, "THE CRUEL AND UNUSUAL EXECUTION OF CLAYTON LOCKETT."

purchased \$10,400 worth of pentobarbital for Oklahoma prisons and spent another \$40,000 on pentobarbital a year later.⁷⁰

In 2014, Oklahoma performed the execution of Clayton Lockett using midazolam.⁷¹ Oklahoma execution protocol dictated that executions were to be performed with two IVs attached to the inmate, a primary and a backup line, in case of any issues with the main line.⁷² However, against state protocol, prison staff conducted Lockett's execution with only a single IV line.⁷³ During Lockett's execution, it was discovered that the single IV line had dislocated because Lockett's vein had "exploded."⁷⁴ After Lockett's vein blew, part of the injected solution escaped into his tissue or out of his body.⁷⁵ After waking up in the middle of his execution, Clayton Lockett took 43 minutes to die, while shaking so violently against his restraints that medical examiners later found that the restraints had left "blunt impact injuries" on his body.⁷⁶ Later, a state investigation revealed that the executioners were not provided with any training before Lockett's execution.⁷⁷ Furthermore, after the execution, the paramedic responsible for inserting Lockett's IV line was asked about her difficulties inserting the line.⁷⁸ The paramedic said, "People who are very fair complected [sic], their veins are deep because – I don't know why. And black people have small veins."⁷⁹ The paramedic's "race-based misconception" about human anatomy led to

⁷⁰ Ibid.

⁷¹ McCracken and Moreno, "Through the Glass," 7.

⁷² Oklahoma Department of Corrections, *Execution of Inmates Sentenced to Death*, 25, Accessed January 23, 2022.

<https://oklahoma.gov/content/dam/ok/en/doc/documents/policy/section-04/op040301.pdf>.

⁷³ Stern, "THE CRUEL AND UNUSUAL EXECUTION OF CLAYTON LOCKETT."

⁷⁴ Corinna Barrett Lain, "THE POLITICS OF BOTCHED EXECUTIONS," *Richmond Law Review* 49 (March 7, 2015): 832, Accessed February 23, 2022.

<https://lawreview.richmond.edu/files/2015/04/Lain-493.pdf>; Dyer, "Botched Execution," 1.; Stern, "THE CRUEL AND UNUSUAL EXECUTION OF CLAYTON LOCKETT."

⁷⁵ Lain, "THE POLITICS," 832.

⁷⁶ Dyer, "Botched Execution," 1.; Joseph I. Cohen, *Independent Autopsy Examination of Clayton Lockett (P14-0514)*, 1, June 12, 2014, Accessed February 24, 2022.

<https://s3.documentcloud.org/documents/1198181/clayton-lockett-autopsy.pdf>.

⁷⁷ Oklahoma Department of Public Safety, *The Execution of Clayton D. Lockett*, 22, Accessed January 23, 2022.

<https://files.deathpenaltyinfo.org/legacy/documents/LockettInvestigationReport.pdf>.

⁷⁸ Konrad, *Behind the Curtain*, 58.

⁷⁹ Ibid., 58.

questions about the selection process and qualifications of Oklahoma’s execution team.⁸⁰

A few months after Lockett’s botched execution, Oklahoma executed Charles Warner.⁸¹ On January 15th, 2015, execution personnel marked in their logs that they had injected Warner with 240 milliequivalents (mEq) of potassium chloride.⁸² However, execution personnel had injected Warner with an entirely different drug that had no role in lethal injection protocols.⁸³ Before he died, Warner was heard saying “It feels like acid.”⁸⁴ His last words were “My body is on fire.”⁸⁵ This oversight, which occurred again nine months later during Oklahoma’s next scheduled execution, when the state almost proceeded with using the wrong drug again under false advice from several prison officials, caused Oklahoma’s attorney general to order an investigation of the consistent issues plaguing Oklahoma executions.⁸⁶ The investigation reported that Oklahoma state officials “failed to perform their duties with the precision and attention to detail the exercise of state authority in such cases demands...” Its report detailed failures at every level and recommended that [Oklahoma Department of Corrections] again revise its execution procedures and follow the law and its’ protocol when performing executions.⁸⁷ A lack of oversight and general negligence on the part of government officials and execution personnel directly led to the botched execution of Charles Warner.⁸⁸

Similarly, in Arizona, during the July 2014 execution of Joseph Wood, the execution staff reported four minutes into the execution that he was sedated.⁸⁹ However, immediately after the executioner’s announcement, witnesses described Wood as “gasping for air, taking deep, long breaths ‘like he was drowning...’ It happened over 640

⁸⁰ Ibid., 58.

⁸¹ Breyer and Bessler, *Against the Death Penalty*, 6.

⁸² Oklahoma Department of Corrections, *Correctional Service Log*, report no. 5:14-cv-00665-F, 4, August 8, 2015, Accessed February 25, 2022. <https://s3.documentcloud.org/documents/2454045/223-3-exh-3-warner-exec-timeline.pdf>.

⁸³ Breyer and Bessler, *Against the Death Penalty*, 6.

⁸⁴ Ibid., 6.

⁸⁵ Ibid., 6.

⁸⁶ Mccracken and Moreno, “Through the Glass,” 7; MULTICOUNTY GRAND JURY, STATE OF OKLAHOMA, *INTERIM REPORT NUMBER 14*, report no. 14, 67, May 19, 2016, Accessed April 28, 2023. <https://files.deathpenaltyinfo.org/legacy/files/pdf/MCGJ-Interim-Report-5-19-16.pdf>.

⁸⁷ Ibid., 7; Ibid., 1.

⁸⁸ Breyer and Bessler, *Against the Death Penalty*, 6.

⁸⁹ Lain, “THE POLITICS,” 833.

times.”⁹⁰ Wood died almost two hours after he was pronounced unconscious, and execution records showed that Wood had received fifteen times the amount of lethal injection drugs that state protocol called for.⁹¹

Furthermore, in 2006, a United States Federal District Court found that the negligence of California’s execution team in handling executions violated the Eighth Amendment.⁹² The court discovered that the employee responsible for California’s execution drugs was previously punished for smuggling drugs into the prison and that the execution team leader was “diagnosed with and disabled by post-traumatic stress disorder” due to his work in the prison.⁹³ The execution team leader also felt that conducting executions was the “most stressful” job a prison worker could experience.⁹⁴ Furthermore, the judge found that almost none of California’s execution personnel knew the properties or risks of California’s execution drugs and that the execution team failed to keep complete or legible records of the sodium thiopental, some of which was taken for claimed use in training, but never returned, while members of the execution team claimed to not be given any training.⁹⁵ Questions also arose around whether inmates were fully anesthetized, as injection records were missing, and testimony disclosed that not all the necessary sodium thiopental was injected in several executions.⁹⁶ The court concluded that the execution teams’ “implementation of California’s lethal-injection protocol lack[ed] both reliability and transparency. In light of the substantial questions raised by the records of previous executions, the Defendants’ actions and failures to act have resulted in an undue and unnecessary risk of an Eighth Amendment violation. This is intolerable under the Constitution.”⁹⁷

As evidenced above, in recent years, states have had frequent issues with negligence and oversight when planning for, and conducting executions, and as a result, prisoners face improperly conducted executions that violate legal protocols, safety measures, and the Constitution. However, state governments have done little to bring themselves and their employees to accountability, instead shielding negligent employees and unconstitutional execution procedures through

⁹⁰ *Ibid.*, 833-834.

⁹¹ *Ibid.*, 834.

⁹² Michael Angelo Morales v. James E. Tilton (Fed. Cir.), Accessed April 29, 2023. <https://casetext.com/case/morales-v-tilton>.

⁹³ *Ibid.*

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

secrecy laws. The widespread negligence, disregard for the Constitution, and implementation of unsafe execution procedures, intentional or otherwise, exercised by both state governments and execution personnel, exposes the shortcomings of the modern American death penalty system as it cannot reliably conduct constitutional executions.

Secrecy Laws

As states turned to new and controversial execution procedures in the past few years, government officials in many states, such as governors and legislatures, have passed a multitude of secrecy laws, shrouding much of the execution process in secret.⁹⁸ Between January 2011 and November 2018, thirteen out of the seventeen states that actively conducted executions during this period passed new secrecy laws, and all seventeen states actively concealed information related to their executions.⁹⁹

Many states have adopted measures that conceal the identity of execution personnel, and other organizations and people involved in the execution process.¹⁰⁰ In Georgia, state law classifies the identity of execution personnel and any individual or organization related to the procurement of medical supplies for executions as a “confidential state secret.”¹⁰¹ In Missouri, a similar secrecy law was implemented after a court case in 2006.¹⁰² This court case revealed that Missouri’s supervisory doctor in fifty-four lethal injection procedures had faced over twenty malpractice suits, had his credentials revoked at two hospitals, and had admitted to suffering from dyslexia, “So it’s not unusual for me to make mistakes,” the doctor explained.¹⁰³ The doctor also admitted to “improvising” and administering a lower dosage of sodium thiopental during executions than state policy dictated.¹⁰⁴ After the doctor’s identity and previous controversies were published by the

⁹⁸ Konrad, *Behind the Curtain*, 4, 5.

⁹⁹ *Ibid.*, 4.

¹⁰⁰ *Ibid.*, 16.

¹⁰¹ Title 42 - Penal Institutions, Ga. Code Ann. §§ 42-5-36, Accessed April 29, 2023. <https://law.justia.com/codes/georgia/2022/title-42/chapter-5/article-2/section-42-5-36/>.

¹⁰² Ellyde Roko, “Executioner Identities: Toward Recognizing a Right To Know Who Is Hiding Beneath the Hood,” *Fordham Law Review* 75, no. 5 (2007): 2791-2792, Accessed April 29, 2023. <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=4272&context=flr>.

¹⁰³ Monica Davey, “Missouri Says It Can’t Hire Doctor for Executions,” *The New York Times* (New York City), July 15, 2006, Accessed April 29, 2023. <https://www.nytimes.com/2006/07/15/us/15lethal.html>.; Roko, “Executioner Identities,” 2791-2792.

¹⁰⁴ Davey, “Missouri Says,”.

media, Missouri was “prompted” to introduce secrecy laws concealing the identities of execution staff.¹⁰⁵ Secrecy laws allow states to conduct executions while keeping execution personnel and suppliers from being held responsible for their mistakes. Moreover, these laws prevent public knowledge and oversight of the full qualifications of execution staff.

States have also begun to limit recording and photography/ videography devices in execution chambers, with many states banning them outright.¹⁰⁶ In some states, the viewing of the execution is further restricted.¹⁰⁷ In Georgia, only a single media witness may view the inmate being led into the execution chamber and the initial IV insertion.¹⁰⁸ Other states completely prevent witnesses from viewing the execution chamber until the prisoner is on the gurney and the IV line is attached.¹⁰⁹ Furthermore, in most states, the executed prisoner is covered by a sheet, and many states also remove the microphone from the execution chamber.¹¹⁰ During the execution of Clayton Lockett, witnesses also reported that immediately after Lockett began to struggle on the execution gurney, execution staff closed the viewing room curtains, preventing witnesses from viewing the rest of the execution, including the last several minutes of Lockett’s life.¹¹¹

In 2002, in *California First Amendment Coalition v. Woodford*, the Ninth Circuit Court of Appeals established that “Independent public scrutiny – made possible by the public and media witnesses to an execution – plays a significant role in the proper functioning of capital punishment. An informed public debate is critical in determining whether execution by lethal injection comports with ‘the evolving standards of decency which mark the progress of a maturing society.’ *Trop v. Dulles*...”¹¹² However, the widespread implementation of state secrecy laws stands in opposition to this ruling.¹¹³ Moreover, according to a report from the Death Penalty Information Center, “Secrecy has enabled states to obtain drugs by any means necessary – sometimes

¹⁰⁵ Roko, “Executioner Identities,” 2791-2792.

¹⁰⁶ Oklahoma Department of Corrections, *Execution of Inmates*, 12.

¹⁰⁷ Konrad, *Behind the Curtain*, 22.

¹⁰⁸ *Ibid.*, 22.

¹⁰⁹ *Ibid.*, 22.

¹¹⁰ *Ibid.*, 22.

¹¹¹ *Ibid.*, 59.

¹¹² California First Amendment Coalition; Society of Professional Journalists, Northern California Chapter v. Jeanne Woodford (9th Cir.), Accessed April 29, 2023. <https://casetext.com/case/california-first-amendment-coal-v-woodford/case-summaries>.

¹¹³ “State-by-State Execution Protocols,” Death Penalty Information Center, Accessed April 29, 2023. <https://deathpenaltyinfo.org/executions/methods-of-execution/state-by-state-execution-protocols>.

illegally and sometimes in breach of contract – without checks and balances by legislatures, courts, or the public. States have used secrecy to avoid accountability for problematic executions... Ultimately, state secrecy laws have prevented the public from knowing the extremes to which its state governments are resorting to carrying out the most severe and irreversible punishment.”¹¹⁴

Secrecy laws make the job of journalists, lawyers, and watchdogs difficult, and help states and their personnel avoid public responsibility in all parts of the execution process, from the ordering of execution drugs to the final injection. A lack of accountability and transparency means that there is little pushback and few consequences for states, their drug suppliers, and their personnel if they conduct executions negligently, or hire unqualified staff. At the same time secrecy laws cause more botched and problematic executions.¹¹⁵ Secrecy laws discourage safe, effective, and constitutional executions by thwarting public accountability and transparency.

The Politics of Capital Punishment

Politicians and the courts have allowed partisan politics and public opinion to shape their views on the death penalty instead of science. According to Stephen Smith, Professor of Law at the University of Virginia and Notre Dame, and former Supreme Court clerk, politicians, prosecutors, and judges are all strongly incentivized to issue and conduct death sentences with greater frequency due to broad public support for capital punishment.¹¹⁶ For example, after 9/11, the Virginia Legislature passed a law making “murder in furtherance of terrorism” a capital crime.¹¹⁷ However, this new law ignored the fact that murders like the ones committed by the terrorists on 9/11 were already crimes punishable by death in Virginia.¹¹⁸ What mattered to the state legislators was that through this law, they could signal to their constituents that they were taking a tough stand against crime and terrorism through the death penalty.¹¹⁹

¹¹⁴ Konrad, *Behind the Curtain*, 24.

¹¹⁵ *Ibid.*, 6.

¹¹⁶ Stephen F. Smith, *The Supreme Court and the Politics of Death* (n.p.: Virginia Law Review, 2008), 94:294, <https://www.jstor.org/stable/25470560>.

¹¹⁷ *Ibid.*, 295.

¹¹⁸ *Ibid.*, 295-296.

¹¹⁹ *Ibid.*, 295-296.

In America's legal system, state judges can face immense pressure from their constituents and voters to impose the death penalty.¹²⁰ Many state judges have lost elections because their constituents perceived them as not being vigorous enough in applying the death penalty.¹²¹ Furthermore, state judicial campaigns involve large donors, and research shows that judges can be influenced by their donors, often interest groups or political parties, when making judicial decisions.¹²² Between 2015-2016, interest groups made up 40 percent of state supreme court election spending, while being "almost entirely nontransparent concerning their funding, maneuvering around lax state and federal laws to the point where they rarely disclose their donors."¹²³ An analysis of outside donors in state supreme court elections during the 2015-2016 election cycle found that "82 percent of all outside spending was nontransparent."¹²⁴ This opacity around judicial election donations makes it harder for public oversight of where judges get their campaign funding and allows non-neutral, partisan groups to more easily influence judicial rulings, with little public awareness.

Federal judges are also not immune to political pressure as politicians and partisan groups lobby for and appoint Federal Judges and Supreme Court Justices.¹²⁵ According to the Virginia Law Review, several candidates for federal judgeships have encountered issues during Senate confirmation proceedings for being seen as "soft" on capital punishment.¹²⁶

Moreover, statistics have shown a trend of judges handing out more death sentences in states where the death penalty enjoys high approval from the public.¹²⁷ In several states, trial judges can overrule a jury's ruling in cases, including when it comes to life sentences versus the death sentence.¹²⁸ In all but one of these "override" states, trial judges

¹²⁰ Jeffrey Fagan et al., *Getting to Death: Fairness and Efficiency in the Processing and Conclusion of Death Penalty Cases After Furman, Final Technical Report*, 64, February 2004, Accessed April 30, 2023. <https://www.ojp.gov/pdffiles1/nij/grants/203935.pdf>.

¹²¹ Smith, *The Supreme*, 94:329.

¹²² Douglas Keith, Patrick Berry, and Eric Velasco, *The Politics of Judicial Elections, 2017–18*, 1-2, December 11, 2019, Accessed April 29, 2023. <https://www.brennancenter.org/our-work/research-reports/politics-judicial-elections-2017-18>.

¹²³ *Ibid.*, 1-2, 10.

¹²⁴ *Ibid.*, 10.

¹²⁵ Gerard J. Fitzpatrick, "Appointing Federal Judges: Law, Politics, and Democracy," *Polity* 40, no. 3 (2008): 402, <http://www.jstor.org/stable/40213488>.

¹²⁶ Smith, *The Supreme*, 94:330.

¹²⁷ *Ibid.*, 330.

¹²⁸ Fagan et al., *Getting to Death*, 99.

are elected and capital punishment overrides are common.¹²⁹ For example, in Florida, a state that consistently polls highly in support of the death penalty, it was revealed that twenty percent of Florida's death-row inmates had their presiding judge override a recommendation of life imprisonment by the jury.¹³⁰ Furthermore, as pointed out by Jeffrey Fagan, a professor at Columbia Law School, and his co-authors, data shows that "the disproportionate use of jury override to impose death sentences" is more prominent in states with elected judges.¹³¹ Elected officials from all facets of government have considerable political incentives to conduct executions, and as pointed out by Smith, fighting against the death penalty, or calling out botched executions, can be "politically risky."¹³²

While conducting his search for new execution drugs to be used in Oklahoma's upcoming execution of Clayton Lockett, Mike Oakley eventually settled upon midazolam, a controversial drug that is not scientifically proven to effectively anesthetize inmates during executions.¹³³ During his research into midazolam, Oakley recalled being called many times a day by the attorney general, and both Oakley and his boss reported facing "political pressure."¹³⁴ Oklahoma's attorney general and Governor Fallin were both facing reelection and according to *The Atlantic*, "there were rumors that a Tea Party candidate might outflank Fallin on the right."¹³⁵ Oakley believed that the attorney general and Governor Fallin were worried about appearing to be "soft on crime" with elections coming up.¹³⁶ "The attorney general's office, being an elective office, was under a lot of pressure... there was a definite push to make the decision, get it done, hurry up about it," Oakley later recalled about the decision to use midazolam in Oklahoma executions.¹³⁷

In addition, before their executions, death row inmates Clayton Lockett and Charles Warner jointly filed a case challenging Oklahoma's

¹²⁹ Smith, *The Supreme*, 94:330.

¹³⁰ *Ibid.*, 330.

¹³¹ Fagan et al., *Getting to Death*, 100.

¹³² Smith, *The Supreme*, 94:319.

¹³³ Merz, *DECISION AND ORDER*, 66, 78.

¹³⁴ Katie Fretland, "Scene at botched Oklahoma execution of Clayton Lockett was 'a bloody mess,'" *The Guardian*, December 13, 2014, Accessed April 29, 2023.

<https://www.theguardian.com/world/2014/dec/13/botched-oklahoma-execution-clayton-lockett-bloody-mess>; Stern, "THE CRUEL AND UNUSUAL EXECUTION OF CLAYTON LOCKETT."

¹³⁵ Stern, "THE CRUEL AND UNUSUAL EXECUTION OF CLAYTON LOCKETT."

¹³⁶ *Ibid.*

¹³⁷ Fretland, "Scene at botched".

secrecy law.¹³⁸ The plaintiffs argued that state secrecy laws masking Oklahoma’s supplier of execution drugs were unconstitutional because it prevented them from knowing the types of execution drugs used in their executions and if the drugs were in compliance with the Eighth Amendment.¹³⁹ On April 21st, 2014, the Oklahoma Supreme Court granted the plaintiffs a stay of execution, voting 5-4 for the stay.¹⁴⁰ The Atlantic later reported that “The justices made clear that they intended to seriously contemplate the issues...” raised by the plaintiffs.¹⁴¹ However, hours later, Oklahoma Governor Mary Fallin announced through an executive order that her office “did not recognize the Oklahoma Supreme Court’s authority to grant the stay.”¹⁴² Governor Fallin’s executive order overturning a court’s ruling was unprecedented, and “It looked as though the state’s judicial system had collapsed.”¹⁴³ The day after the executive order, a Republican state lawmaker from Governor Fallin’s party filed articles of impeachment against all five of the Oklahoma Supreme Court justices who had voted to grant a stay to the plaintiffs.¹⁴⁴ The threats of impeachment put political pressure on the Oklahoma Supreme Court, and two days after voting for a stay to debate the constitutionality of the secrecy law, the Oklahoma Supreme Court changed course and ruled that the secrecy law was acceptable and lifted the stay of execution for Lockett and Warner.¹⁴⁵

By prioritizing political agendas, elected officials across the nation have permitted botched executions to occur under their watch. Courts have ruled in favor of execution protocols that have been constitutionally and scientifically controversial, in response to political pressure and partisan political interests.¹⁴⁶ State governments have also pressured the independent judiciary to conduct executions, as in the case of Oklahoma where the Governor’s party threatened Oklahoma Supreme Court Judges with impeachment if they did not lift Clayton

¹³⁸ Martin McKown, “Unconstitutional Killing The Deadly Dilemma Surrounding Oklahoma’s Lethal Injection Secrecy Statute,” *Duquesne Law Review* 53, no. 2 (2015): 611-612, Accessed April 29, 2023.

<https://dsc.duq.edu/cgi/viewcontent.cgi?article=1825&context=dlr>.

¹³⁹ *Ibid.*, 614.

¹⁴⁰ Katie Fretland, “Oklahoma high court stays executions amid questions over drug secrecy,” *The Guardian*, April 21, 2014, Accessed April 29, 2023.

<https://www.theguardian.com/world/2014/apr/21/oklahoma-stays-executions-questions-drug-secrecy>.

¹⁴¹ Stern, “THE CRUEL AND UNUSUAL EXECUTION OF CLAYTON LOCKETT.”

¹⁴² *Ibid.*

¹⁴³ *Ibid.*

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.*

¹⁴⁶ Fagan et al., *Getting to Death*, 68.

Lockett's stay of execution.¹⁴⁷ In addition, political intrusion in capital punishment has made it harder for negligence to be held accountable, as shown by the recent trend of botched executions where secrecy laws, drafted and passed by politicians, limit accountability and protect negligent staff and execution procedures from public oversight. Political concerns instead of ethical or legal concerns have been at the forefront of recent executions, and elected officials have considerable incentives to capitalize on the death penalty's popularity by conducting more executions.¹⁴⁸ According to Smith, capital punishment exists in a "politicized death penalty system in which the life-or-death decision is skewed in favor of death. Death is all too often used, not as the ultimate sanction, but rather as the ultimate slogan, a signal to voters of how 'tough' politicians, prosecutors, and elected judges can be on crime."¹⁴⁹

Conclusion

In conclusion, recent executions have highlighted alarming issues in the modern American death penalty system. Unsafe and unconstitutional executions have been conducted with unapproved foreign drugs, and many executions have also been carried out with ineffective drugs such as midazolam, or potentially contaminated drugs from compounding pharmacies. Moreover, incompetent execution staff and government personnel have been negligent and irresponsible during executions, creating an unconstitutional environment around executions. However, state governments have not acted to remove the risk of a botched or unconstitutional execution, and many states have instead limited the flow of information surrounding executions, through secrecy laws, shrouding the execution process in mystery, and shutting down public oversight and accountability. Government officials have played a large role in this issue by utilizing the capital punishment system for their political agendas in response to underlying political pressures. The analysis and consideration of these underlying political motivations in causing political intrusion into the capital punishment process is a unique contribution of this paper as this aspect is rarely discussed in existing publications. When the capital punishment system can no longer carry out legal, safe, and scientifically-supported executions, and instead relies on authoritarian and illegal measures to continue conducting unconstitutional executions, influenced by external political pressures, it has shown itself to be a flawed system.

¹⁴⁷ Stern, "THE CRUEL AND UNUSUAL EXECUTION OF CLAYTON LOCKETT."

¹⁴⁸ Stephen F. Smith, *The Supreme Court and the Politics of Death* (n.p.: Virginia Law Review, 2008), 94:294, <https://www.jstor.org/stable/25470560>.

¹⁴⁹ *Ibid.*, 334.

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