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## Making Executioners out of Pharmacists: Why South Carolina Should Not Adopt a Lethal Injection Secrecy Statute

Elizabeth T. French

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**MAKING EXECUTIONERS OUT OF PHARMACISTS: WHY SOUTH CAROLINA  
SHOULD NOT ADOPT A LETHAL INJECTION SECRECY STATUTE**

Elizabeth T. French\*

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## I. INTRODUCTION

Americans have long been concerned with executing justice through humane methods.<sup>1</sup> “Humane,” in the context of executions, is understood to mean “showing kindness, care, and sympathy toward others, especially those who are suffering[.]”<sup>2</sup> While Americans believe justice should be served, they are typically uncomfortable with inflicting unnecessary pain.<sup>3</sup> For many years, Americans assumed lethal injection was the most humane execution method because it contained “no blood and no screaming.”<sup>4</sup> Rather, inmates appeared to peacefully fall into a sleep from which they would not awake.<sup>5</sup> However, lethal injections now cause excruciating pain.<sup>6</sup>

In 2005, scientists performed a study that revealed many inmates executed by lethal injection in the United States may have suffered silently.<sup>7</sup> The study showed that, although a drug in the lethal injection mixture paralyzed inmates, the injection did not contain enough of the anesthetic drug to render the recipients unaware of their pain.<sup>8</sup> The researchers explained this severe oversight as a product of “[f]ailures in protocol design, implementation, monitoring and review . . . .”<sup>9</sup> Furthermore, “because participation of doctors in protocol design or execution is ethically prohibited, adequate anaesthesia cannot be certain.”<sup>10</sup> Additional research revealed the drug intended to stop the heart from beating was not always successful.<sup>11</sup> Instead, lethal injections likely caused inmates to die from suffocation.<sup>12</sup>

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1. See Zaria Gorvett, *The People Rethinking Methods of Execution*, BBC (June 6, 2018), <https://www.bbc.com/future/article/20180604-is-there-a-humane-way-to-kill-a-criminal> [<https://perma.cc/7VT3-E6LJ>].

2. *Humane*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/humane> [<https://perma.cc/2HED-NXNX>].

3. See Peter Moore, *Poll Results: Death Penalty*, YOU GOV (Jan. 21, 2014, 3:31 PM), <https://today.yougov.com/topics/politics/articles-reports/2014/01/21/poll-results-death-penalty> [<https://perma.cc/8WFW-23H4>] (finding that only 11% of Americans believe the death penalty should be as “slow and painful as possible”).

4. Gorvett, *supra* note 1.

5. See *id.*

6. Liliana Segura, *Ohio’s Governor Stopped an Execution over Fears It Would Feel like Waterboarding*, THE INTERCEPT\_ (Feb. 7, 2019, 7:55 AM), <https://theintercept.com/2019/02/07/death-penalty-lethal-injection-midazolam-ohio/> [<https://perma.cc/M5WF-C4PT>].

7. Leonidas G. Koniaris et al., *Inadequate Anaesthesia in Lethal Injection for Execution*, 365 LANCET 1412, 1414 (2005).

8. See *id.*

9. *Id.*

10. *Id.*

11. See Teresa A. Zimmers et al., *Lethal Injection for Execution: Chemical Asphyxiation?*, 4 PLOS MED. 646, 648 (2007).

12. *Id.* at 650.

Nevertheless, in 2008, the U.S. Supreme Court upheld Kentucky's lethal injection protocol as constitutional despite the Eighth Amendment's ban on cruel and unusual punishment.<sup>13</sup> In *Baze v. Rees*, the petitioners, two death row inmates in Kentucky, argued "there is a significant risk that the procedures will *not* be properly followed—particularly, that the sodium thiopental will not be properly administered to achieve its intended effect—resulting in severe pain when the other chemicals are administered."<sup>14</sup> The Court reasoned that "an isolated mishap alone does not violate the Eighth Amendment . . . because such an event, while regrettable, does not suggest cruelty or a 'substantial risk of serious harm.'"<sup>15</sup>

Despite the Court's ruling, *Baze* raised concern among pharmacists and pharmaceutical companies about the drugs provided and methods used for executions.<sup>16</sup> Some pharmacists wondered if the case raised "an opportunity for [them] to apply their knowledge and insights about medication alternatives to meet a stated objective."<sup>17</sup> Others objected to "members of their profession participating in this process" because "[a] profession dedicated to healing the sick has no place in the process of execution."<sup>18</sup> Now, each pharmaceutical manufacturer that creates FDA-approved drugs commonly used in lethal injections has implemented policies to keep its drugs from being used in executions.<sup>19</sup>

In response to pharmaceutical companies refusing to supply drugs for lethal injections, some states have adopted secrecy statutes—laws that withhold information about execution processes.<sup>20</sup> Most secrecy statutes prohibit "information about the source of . . . execution drugs."<sup>21</sup> While states claim secrecy statutes were enacted to protect drug-supplying pharmaceutical companies from public retribution,<sup>22</sup> in reality, the statutes "undermine

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13. *Baze v. Rees*, 553 U.S. 35, 62 (2008).

14. *Id.* at 49.

15. *Id.* at 50 (citing *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463–64 (1947)).

16. See Jesse C. Vivian et al., *Use of Legally Marketed Drugs for Lethal Injection*, U.S. PHARMACIST (Nov. 18, 2008), <https://www.uspharmacist.com/article/use-of-legally-marketed-drugs-for-lethal-injection> [https://perma.cc/QYX9-ABDE].

17. *Id.*

18. *Id.*

19. LETHAL INJECTION INFO. CTR., INDUSTRY OPPOSITION TO THE MISUSE OF MEDICINES IN EXECUTIONS 4 (2020), [https://lethalinjectioninfo.org/wp-content/uploads/2020/06/2020\\_06\\_10\\_PUB-Industry-Statements-Booklet.pdf](https://lethalinjectioninfo.org/wp-content/uploads/2020/06/2020_06_10_PUB-Industry-Statements-Booklet.pdf) [https://perma.cc/B32S-HL5W] [hereinafter INDUSTRY OPPOSITION].

20. ROBIN KONRAD, DEATH PENALTY INFO. CTR., BEHIND THE CURTAIN: SECRECY AND THE DEATH PENALTY IN THE UNITED STATES 4 (2018), <https://files.deathpenaltyinfo.org/documents/pdf/SecrecyReport-2.f1560295685.pdf> [https://perma.cc/9MU2-GZTT].

21. *Id.*

22. See, e.g., Jamie Lovegrove, *South Carolina Lacks Lethal Injection Drugs Needed to Execute Death Row Inmate*, POST & COURIER: PALMETTO POLITICS (Nov. 20, 2017),

pharmaceutical companies' efforts to protect the integrity of their products."<sup>23</sup> Further, secrecy statutes protect states from backlash arising from lightly-regulated pharmacies being used to compound lethal injection drugs that reputable pharmaceutical companies are unwilling to supply.<sup>24</sup>

South Carolina legislators are considering implementing a secrecy statute because they believe legitimate pharmaceutical companies will supply drugs for lethal injections if shielded from public scrutiny.<sup>25</sup> This belief is inaccurate. Secrecy statutes produce harmful effects, which include deceiving unwilling pharmaceutical companies into supplying drugs,<sup>26</sup> withholding drugs that could be used by hospitals for legitimate medical purposes,<sup>27</sup> and receiving poorly prepared drugs from compounding pharmacies.<sup>28</sup> If the legislature does not adopt a secrecy statute, South Carolina will likely turn to other methods of execution, such as electrocution, firing squad, or nitrogen hypoxia,<sup>29</sup> ultimately leaving South Carolina with two options: (1) using a method less humane than lethal injection to continue carrying out executions or (2) completely abolishing the death penalty. Because lethal injections and alternative execution methods are inhumane, South Carolina should abolish the death penalty.

Part II of this Note discusses pharmaceutical companies' desires not to supply lethal injection drugs; the Food and Drug Administration's (FDA) regulation of sodium thiopental, the anesthetic traditionally used in lethal injections; states' search for new drugs upon sodium thiopental's unavailability; and states' implementation of secrecy statutes. Part III considers South Carolina's use of lethal injection as the default execution method and further evaluates legislative proposals for the state to either adopt a secrecy statute or implement electrocution as its default execution method. By asserting that lethal injection mixtures containing drugs from illegitimate sources are inhumane, Part IV argues that South Carolina should not adopt a secrecy statute and should instead abolish the death penalty. Part V concludes by reiterating the major problems surrounding secrecy statutes and the reasons why South Carolina should not implement one.

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[https://www.postandcourier.com/politics/south-carolina-lacks-lethal-injection-drugs-needed-to-execute-death-row-inmate/article\\_195e1dee-ce24-11e7-b6f3-a31061a422c7.html](https://www.postandcourier.com/politics/south-carolina-lacks-lethal-injection-drugs-needed-to-execute-death-row-inmate/article_195e1dee-ce24-11e7-b6f3-a31061a422c7.html) [https://perma.cc/NA4A-ETDH].

23. KONRAD, *supra* note 20, at 11.

24. *See id.* at 39.

25. Lovegrove, *supra* note 22.

26. *See discussion infra* Section IV.B.1.

27. *See discussion infra* Section IV.B.2.

28. *See discussion infra* Section IV.A.

29. *See discussion infra* Section IV.B.4.

## II. BACKGROUND

*A. Pharmaceutical Companies Resist Supplying Drugs for Lethal Injection Mixtures*

The drugs typically used in lethal injections are sodium thiopental, pancuronium bromide, and potassium chloride.<sup>30</sup> Sodium thiopental was developed in 1936 to treat select mental diseases and for use in intravenous anesthesia.<sup>31</sup> Sodium thiopental slows brain and nervous system activity and, in medical settings, is typically injected before general anesthesia.<sup>32</sup> Pancuronium bromide “is a neuromuscular blocking agent” that “paralyzes the diaphragm and ultimately arrests breathing.”<sup>33</sup> Although pancuronium bromide paralyzes its recipient, the patient “is capable of hearing, seeing and feeling.”<sup>34</sup> In a medical setting, pancuronium bromide is used for a variety of purposes, such as allowing “critically ill and intensive care patients” to “breathe with a ventilator or respirator without exerting energy.”<sup>35</sup> Potassium chloride “is administered in the treatment of low potassium conditions (hypokalemia) caused by diuretics, diabetic ketoacidosis, severe diarrhea, and adrenal gland malfunction. It is also used to stop the heart from beating during heart surgery.”<sup>36</sup> Potassium chloride creates a burning feeling when injected and, if injected quickly, can cause the heart to stop beating.<sup>37</sup>

In 2001, Abbott Laboratories (Abbott), the sole manufacturer of sodium thiopental at the time, expressed its disdain for the use of sodium thiopental in capital punishment.<sup>38</sup> Abbott took measures to prevent sodium thiopental’s use in executions when it “communicated with departments of corrections in the United States to request that th[e] product not be used in capital punishment procedures.”<sup>39</sup> However, the company was unable to dictate how

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30. *Overview of Lethal Injection Protocols*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/lethal-injection/overview-of-lethal-injection-protocols> [https://perma.cc/W78Q-9RQG].

31. *Drug Companies and Their Role in Aiding Executions*, THE NAT’L COAL. TO ABOLISH THE DEATH PENALTY (2002), <https://www.prisonpolicy.org/scans/drugcompanies-dp.pdf> [https://perma.cc/P6F7-6TWW]; *Hospira, Inc. History*, FUNDINGUNIVERSE, <http://www.fundinguniverse.com/company-histories/hospira-inc-history/> [https://perma.cc/8A8K-F8YZ].

32. *Thiopental*, DRUGS.COM, <https://www.drugs.com/mtm/thiopental.html> [https://perma.cc/2UE9-DMB8].

33. *Drug Companies and Their Role in Aiding Executions*, *supra* note 31.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. INDUSTRY OPPOSITION, *supra* note 19, at 7.

39. *Id.*

its products were used because, although prisons purchased sodium thiopental under the guise that it would be used as a medical anesthetic, they instead used it for executions.<sup>40</sup> In 2010, Hospira, Inc., a branch of Abbott that took over as the sole producer of sodium thiopental in 2004, suspended production of the drug.<sup>41</sup> When this occurred, the company explained: “Hospira provides these products because they improve or save lives and markets them solely for use as indicated on the product labeling . . . . As such, we do not support the use of any of our products in capital punishment procedures.”<sup>42</sup> One year later, Hospira permanently halted production of sodium thiopental.<sup>43</sup>

At the time, “at least six states—Arizona, Arkansas, California, Georgia, Nebraska and Tennessee—obtained sodium thiopental overseas, with several of them citing Georgia as the trailblazer.”<sup>44</sup> In response to European companies exporting sodium thiopental to the United States, the European Union adopted a regulation that prohibited “exports and imports of equipment [that have] no practical use other than for the purpose of capital punishment or for the purpose of torture and other cruel, inhuman or degrading treatment or punishment.”<sup>45</sup> This regulation found it “also necessary to impose controls on exports of certain goods which could be used not only for the purpose of torture and other cruel, inhuman or degrading treatment or punishment, but

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40. See Justine Sharrock, *Undercutting Executions*, MOTHER JONES (Dec. 28, 2001), <https://www.motherjones.com/politics/2001/12/undercutting-executions/> [https://perma.cc/C7WD-6LAG].

41. See *Hospira, Inc. History*, *supra* note 31; Andrew Welsh-Huggins, *U.S. Drug Maker Discontinues Key Death Penalty Drug*, NBC NEWS (Jan. 21, 2011, 2:32 PM), <https://www.nbcnews.com/health/health-news/key-death-penalty-drug-discontinued-u-s-maker-fna1c9467323> [https://perma.cc/DU6R-B2E3].

42. Jim Edwards, *Why Hospira Should Stop Supplying Prisons with Lethal Injection Drugs*, CBS NEWS (Sept. 28, 2010, 11:32 AM), <https://www.cbsnews.com/news/why-hospira-should-stop-supplying-prisons-with-lethal-injection-drugs> [https://perma.cc/6EMA-7G3K] (internal quotation marks omitted).

43. Nathan Koppel, *Drug Halt Hinders Executions in the U.S.*, WALL ST. J. (Jan. 22, 2011), <https://www.wsj.com/articles/SB10001424052748704754304576095980790129692?st=37i1or4uduk20v9&> [https://perma.cc/2S78-QQ2Q]. Despite Hospira’s own concerns that the drug would be used in lethal injections, the company planned to move production of sodium thiopental to a plant in Italy, but the Italian Parliament barred the drug’s use in capital punishment. *Id.* Hospira could not assure Italian authorities that the distributors could “prevent the drug from being diverted to departments of corrections for use in capital punishment procedures,” so Hospira decided to end production altogether. Alexandria Pešić, *Hospira Kills Production of Death-Row Drug, Pentothol*, OUTSOURCING-PHARMA.COM (Jan. 25, 2011), <https://www.outsourcing-pharma.com/Article/2011/01/25/Hospira-kills-production-of-death-row-drug-Pentothol> [https://perma.cc/UH9D-7UZ2].

44. Greg Bluestein, *States Look Overseas for Scarce Execution Drug*, NBC NEWS (Mar. 25, 2011, 9:28 PM), [http://www.nbcnews.com/id/42278159/ns/us\\_news-crime\\_and\\_courts/t/states-look-overseas-scarce-execution-drug/#.X3doWGhKhPY](http://www.nbcnews.com/id/42278159/ns/us_news-crime_and_courts/t/states-look-overseas-scarce-execution-drug/#.X3doWGhKhPY) [https://perma.cc/BUK6-B85R].

45. Council Regulation 1236/2005, 2005 O.J. (L 200) 1 (EC).

also for legitimate purposes.”<sup>46</sup> British officials initially refused these prohibitions because the drug can be used for a legitimate medical purpose, but they ultimately passed the prohibitions when activists provided data showing U.S. prisons were purchasing the drug from European companies.<sup>47</sup>

Since 2011, over fifty pharmaceutical companies worldwide have implemented measures and made public statements to prevent their drugs and chemicals from being used in lethal injections.<sup>48</sup> Now, all pharmaceutical companies creating FDA-approved medicines oppose their drugs being used in lethal injections and have created protocols to prevent such use.<sup>49</sup> For instance:

Pfizer’s distribution restriction limits the sale of [fourteen drugs that have been part of, or could be considered by some states, for their lethal injection protocols] to a select group of wholesalers, distributors, and direct purchasers under the condition that they will not resell these products to correctional institutions for use in lethal injections. Government purchasing entities must certify that products they purchase or otherwise acquire are used only for medically prescribed patient care and not for any penal purposes.<sup>50</sup>

Similarly, medical professional associations have modified their policy manuals to address the ethical, fiscal, reputational, and legal risks that arise from executions.<sup>51</sup> For example, the American Pharmacists Association adopted a policy in 2015 that “discourage[d] pharmacist participation in executions on the basis that such activities are fundamentally contrary to the role of pharmacists as providers in health care.”<sup>52</sup> Some associations, such as the World Psychiatric Association, entirely prohibit their members from being involved in capital punishment.<sup>53</sup>

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46. *Id.*

47. Matt Ford, *Can Europe End the Death Penalty in America?*, THE ATLANTIC (Feb. 18, 2014), <https://www.theatlantic.com/international/archive/2014/02/can-europe-end-the-death-penalty-in-america/283790/> [https://perma.cc/EBW5-6JGE].

48. INDUSTRY OPPOSITION, *supra* note 19, at 4.

49. *Id.*

50. Laura Wagner, *Pfizer To Stop Selling Drugs For Use In Lethal Injections*, NPR (May 13, 2016, 8:21 PM), <https://www.npr.org/sections/thetwo-way/2016/05/13/478000084/pharmaceutical-company-pfizer-to-stop-selling-drugs-for-use-in-lethal-injections> [https://perma.cc/MJ8R-V8VQ].

51. *Professional Association Policies*, LETHAL INJECTION INFO. CTR., <https://lethalinjectioninfo.org/professional-associations-policies/> [https://perma.cc/J2G9-GZZK].

52. Am. Pharmacists Ass’n House of Delegates, *Report of the 2015 APhA House of Delegates*, 55 J. AM. PHARMACISTS ASS’N 364, 365 (2015).

53. *Professional Association Policies*, *supra* note 51.



*B. The Food and Drug Administration Cannot Regulate Sodium Thiopental*

In 2012, the United States District Court for the District of Columbia announced that states importing sodium thiopental were in fact importing a misbranded drug that was unapproved under the Federal Food, Drugs, and Cosmetic Act (FDCA).<sup>54</sup> The court further declared that sodium thiopental was prohibited from being “introduced or delivered for introduction into interstate commerce” and from being “imported into the United States.”<sup>55</sup> The court then ordered the FDA to “notify any and all state correctional departments which it ha[d] reason to believe [were] still in possession of any foreign manufactured thiopental that the use of such drug is prohibited by law and . . . that thiopental must be returned immediately to the FDA.”<sup>56</sup>

In 2015, the Texas Department of Criminal Justice challenged the ban after the FDA seized 1,000 vials of sodium thiopental being transported from Texas to Arizona.<sup>57</sup> The FDA claimed that the drugs could not be imported because they were unapproved and misbranded and ruled they had to be exported or destroyed.<sup>58</sup> Texas fought the ruling and requested that a federal judge declare the ban unlawful.<sup>59</sup>

Before the lawsuit was resolved, the Department of Justice published a slip opinion declaring that the FDA lacks authority to regulate drugs or other articles intended for use in capital punishment.<sup>60</sup> The Department reasoned that, because the FDCA’s regulatory framework does not apply to “electric chairs, gallows, gas chambers, [or] firearms used in firing squads,” it also does not apply to substances used in lethal injections.<sup>61</sup> It further concluded the “FDCA cannot be read as authorizing [the] FDA to effectively ban capital punishment[] because that reading would contravene or render moot a host of federal statutes that presuppose the lawfulness of capital punishment.”<sup>62</sup> Recognizing the controversy surrounding sodium thiopental, Texas

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54. Order, *Beatty v. FDA*, No. 1:11-cv-00289 (D.D.C. Mar. 27, 2012).

55. *Id.*

56. *Id.*

57. Jolie McCullough, *FDA Officially Bans Texas’ Attempted Import of Execution Drugs*, TEX. TRIB. (Apr. 20, 2017, 4:00 PM), <https://www.texastribune.org/2017/04/20/fda-rules-texas-attempted-import-execution-drugs/> [<https://perma.cc/86B9-YHQJ>].

58. *Id.*

59. Jolie McCullough, *Texas Fights Federal Ban on Import of Execution Drug*, TEX. TRIB. (Apr. 26, 2017, 5:00 PM), <https://www.texastribune.org/2017/04/26/texas-fights-fda-ruling-banning-import-execution-drugs/> [<https://perma.cc/6XCB-KRCP>].

60. Whether the Food & Drug Admin. Has Jurisdiction Over Articles Intended for Use in Lawful Executions, 43 Op. O.L.C. 26 (2019).

61. *Id.* at 10.

62. *Id.* at 16.

transitioned to a single-drug injection of pentobarbital that is still in use today.<sup>63</sup>

### C. States Seek Replacement Drugs

Because of sodium thiopental's unavailability, some states have begun using midazolam as a replacement in three-drug lethal injections.<sup>64</sup> Whereas sodium thiopental is a sedative, midazolam is only intended to "cause drowsiness and relieve anxiety."<sup>65</sup> In medical settings, midazolam is injected before surgery to calm patients, cause them to fall asleep, and remove any memory of the procedure.<sup>66</sup>

In 2014, midazolam replaced sodium thiopental in Clayton Lockett's execution.<sup>67</sup> To execute Lockett, an Oklahoma execution team administered 100 milligrams of midazolam.<sup>68</sup> Once the team determined Lockett was unconscious, it administered the paralytic agent and most of the heart-stopping agent.<sup>69</sup> When Lockett began moving and speaking, the team terminated the execution.<sup>70</sup> Lockett was pronounced dead approximately ten minutes later.<sup>71</sup>

In response to Lockett's unsuccessful execution, Oklahoma death row inmates brought suit in 2015, alleging Oklahoma's three-drug protocol violated the Eighth Amendment because midazolam would "not render them unable to feel pain associated with administration of the second and third drugs."<sup>72</sup> The Supreme Court held that the inmates failed to prove midazolam posed a more substantial risk than the risks posed by alternative execution methods.<sup>73</sup>

Since this decision, more executions using midazolam have gone awry.<sup>74</sup> In 2017, "more than 60% of the executions carried out with midazolam produce[d] eyewitness reports of an execution gone amiss, with problems

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63. McCullough, *supra* note 59.

64. See Polly Mosendz, *What Is Midazolam, the Lethal Injection Drug Approved by the Supreme Court*, NEWSWEEK (June 29, 2015, 12:51 PM), <https://www.newsweek.com/what-midazolam-lethal-injection-drug-supreme-court-defended-use-348175> [<https://perma.cc/J6MC-DKQY>].

65. *Id.*

66. *Midazolam Injection*, MEDLINEPLUS (Apr. 15, 2017), <https://medlineplus.gov/druginfo/meds/a609014.html> [<https://perma.cc/9SC8-LNVD>].

67. *Glossip v. Gross*, 576 U.S. 863, 871 (2015).

68. *Id.* at 872.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 863.

73. *Id.* at 878.

74. See KONRAD, *supra* note 20, at 5.

ranging from labored breathing to gasping, heaving, writhing, and clenched fists.”<sup>75</sup> That same year, in a particularly disturbing execution utilizing midazolam, witnesses observed Kenneth Williams “coughing, convulsing, jerking, and lurching, with sound that was audible even with the microphone turned off.”<sup>76</sup> Despite such common complications, many states claimed their executions were without difficulty.<sup>77</sup> Now, six states—Alabama, Arizona, Arkansas, Ohio, Oklahoma, and Tennessee—use midazolam as part of two- or three-drug protocols.<sup>78</sup>

Since 2010, fourteen states and the Federal Bureau of Prisons have implemented lethal injection protocols that use pentobarbital, rather than midazolam, to mitigate the issues caused by midazolam.<sup>79</sup> Pentobarbital, a drug “commonly used to euthanize pets,” is “a sedative that slows the activity of the brain and nervous system.”<sup>80</sup> Pentobarbital is utilized medically “as a depressant, or sedative, used short-term to treat insomnia. Pentobarbital is also used as an emergency treatment for seizures, and to cause patients to fall asleep for surgery.”<sup>81</sup> By July 2019, pentobarbital had been used “in over 200 executions, and federal courts, including the Supreme Court, have repeatedly upheld the use of pentobarbital in executions as consistent with the Eighth Amendment.”<sup>82</sup> The Justice Department, in announcing that the federal government would resume capital punishment using pentobarbital,

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75. *Id.*

76. *Id.* at 18 (internal quotation marks omitted).

77. *See id.* at 19–20.

78. *State-by-State Lethal Injection Protocols*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/lethal-injection/state-by-state-lethal-injection-protocols> [<https://perma.cc/F9LM-ZZ4S>].

79. Josiah Bates, *Why the Justice Department’s Plan to Use a Single Drug for Lethal Injections Is Controversial*, TIME (July 29, 2019, 7:01 PM), <https://time.com/5636513/pentobarbital-executions-justice-department/> [<https://perma.cc/U8VM-VFLS>]. The states that have implemented pentobarbital protocols are Alabama, Arizona, Delaware, Florida, Georgia, Idaho, Mississippi, Missouri, Ohio, Oklahoma, South Carolina, South Dakota, and Texas. *State-by-State Lethal Injection Protocols*, *supra* note 78. However, some of these states—Alabama, Arizona, Ohio, and Oklahoma—have used lethal injections containing midazolam more recently. *Id.* Furthermore, Delaware declared the death penalty unconstitutional in 2016. *Id.* Virginia recently abolished the death penalty on March 24, 2021. Hailey Fuchs, *Virginia Becomes First Southern State to Abolish the Death Penalty*, N.Y. TIMES (Mar. 24, 2021), <https://www.nytimes.com/2021/03/24/us/politics/virginia-death-penalty.html> [<https://perma.cc/4DPA-PCKY>].

80. Bates, *supra* note 79.

81. *Pentobarbital*, RxLIST, [https://www.rxlist.com/consumer\\_pentobarbital\\_nembutal/drugs-condition.htm](https://www.rxlist.com/consumer_pentobarbital_nembutal/drugs-condition.htm) [<https://perma.cc/4DDR-ACTV>].

82. Press Release, William P. Barr, Att’y Gen., U.S. Dep’t of Just., Federal Government to Resume Capital Punishment After Nearly Two Decade Lapse (July 25, 2019), <https://www.justice.gov/opa/pr/federal-government-resume-capital-punishment-after-nearly-two-decade-lapse> [<https://perma.cc/7HU9-JRXX>].

deliberately concealed the drug's manufacturer—seemingly to avoid backlash from anti-death penalty groups.<sup>83</sup>

#### *D. States Implement Secrecy Statutes*

Many states have enacted secrecy statutes that, in some way, keep the names of manufacturers and suppliers of lethal injection drugs confidential.<sup>84</sup> Alabama, Arizona, Idaho, Pennsylvania, and Wyoming have statutes that protect the identities of those involved in executions but do not specifically cover drug manufacturers and suppliers.<sup>85</sup> Despite lacking specificity, these statutes have been broadly interpreted to cover those entities and individuals.<sup>86</sup> Missouri and Tennessee have clarified their definitions of “execution team” and “person or entity[.]” respectively, to specifically include drug manufacturers and suppliers.<sup>87</sup> Finally, Arkansas, Florida, Georgia, Indiana, Mississippi, North Carolina, Ohio, Oklahoma, South Dakota, and Texas have specific provisions in their secrecy statutes that provide confidentiality to drug manufacturers and suppliers but do not include these entities and individuals within the definition of “execution team.”<sup>88</sup>

In states with secrecy statutes, “[a]ffected companies oppose secrecy and the misuse of medicines in executions.”<sup>89</sup> These statutes prevent companies from “effectively monitor[ing] the supply chain for restricted medicines and

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83. Bates, *supra* note 79.

84. See LETHAL INJECTION INFO. CTR., RESPECTING CORPORATE CONTRACTS: STATE-BY-STATE RISK INDEX 8 (2018), <https://lethalinjectioninfo.org/wp-content/uploads/2018/06/State-by-State-Risk-Index.pdf> [<https://perma.cc/4DDR-ACTV>] [hereinafter STATE-BY-STATE RISK INDEX].

85. *Id.* at 13–15, 18, 24, 28.

86. *See id.*

87. *Id.* at 19, 25.

88. *See id.* at 14–27; *see also* ARK. CODE ANN. § 5-4-617(i)(1) (West 2020); FLA. STAT. ANN. § 945.10(1)(g) (West 2020); GA. CODE ANN. § 42-5-36(d)(2) (West 2020); IND. CODE ANN. § 35-38-6-1(f) (West 2020); MISS. CODE ANN. § 99-19-51(6) (West 2020); N.C. GEN. STAT. ANN. § 132-1.2(7) (West 2019); OHIO REV. CODE ANN. § 2949.221 (West 2020); OKLA. STAT. ANN. tit. 22, § 1015(B) (West 2020); S.D. CODIFIED LAWS § 23A-27A-31.2 (West 2020); TEX. CODE CRIM. PROC. ANN. art. 43.14(b) (West 2019). Although Nebraska currently has a secrecy provision, the state's supreme court recently ruled that “prison officials cannot withhold public records that reveal where they purchased their supply of lethal injection drugs . . . .” Grant Schulte, *Nebraska Court Orders Disclosure of Execution Drug Records*, ASSOCIATED PRESS (May 15, 2020), <https://apnews.com/article/adeb45f8b5e7a51f839d6abbf998922d> [<https://perma.cc/KBN8-75DS>]; *see State ex rel. BH Media Grp., Inc. v. Frakes*, 943 N.W.2d 231 (Neb. 2020). Later in 2020, amendments to Virginia's secrecy provision went into effect, permitting the identification of facilities charged with supplying or compounding lethal injection drugs under the state's Freedom of Information Act; however, the addresses, contact information, and employee identities, among other things, remain confidential. *See* VA. CODE ANN. § 53.1-234 (West 2020).

89. STATE-BY-STATE RISK INDEX, *supra* note 84, *passim*.

ensur[ing] that distribution restrictions are working effectively.”<sup>90</sup> Many companies affected by secrecy statutes have contacted state governors, attorneys general, and correctional officials to request their drugs not be used for capital punishment and to confirm that their drugs have not been purchased for execution against their wishes.<sup>91</sup>

Because pharmaceutical manufacturers have made it difficult for states to obtain lethal injection drugs, some states have begun relying on compounding pharmacies to manufacture and supply necessary drugs.<sup>92</sup> Compounding pharmacies are those that “combine, mix, or alter drugs; traditionally[,] compounding is used to meet the specific needs of an individual patient in response to a prescription.”<sup>93</sup> These pharmacies “do not face the same approval process for their products that large manufacturers face, leading to concerns about the safety and efficacy of their products.”<sup>94</sup> Compounding pharmacies are required to “be licensed by their state’s pharmacy board[] but do not have to register with the FDA or inform the FDA what drugs they are making.”<sup>95</sup> So far, “[a]t least ten states have either used or intend to use compounding pharmacies to obtain their drugs for lethal injection.”<sup>96</sup> South Dakota, Missouri, Texas, Georgia, Colorado, Mississippi, Louisiana, and Pennsylvania have obtained, or have attempted to obtain, pentobarbital from compounding pharmacies.<sup>97</sup> Similarly, Oklahoma and Ohio have acquired midazolam from compounding pharmacies.<sup>98</sup>

### III. SOUTH CAROLINA CONSIDERS A SECRECY STATUTE

#### A. *Lethal Injection Is the Default Execution Method*

Since 1995, South Carolina has given death row inmates the choice to be executed by electrocution or lethal injection.<sup>99</sup> If inmates do not prefer a certain execution method, they will be put to death by lethal injection.<sup>100</sup> Currently, the only way inmates can be put to death by electrocution is if they

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90. *Id.*

91. *See id.* at 13–27.

92. *Compounding Pharmacies and Lethal Injection*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/lethal-injection/compounding-pharmacies> [<https://perma.cc/D95K-GYTY>].

93. *Id.*

94. *Id.*

95. *Id.*

96. *Overview of Lethal Injection Protocols*, *supra* note 30.

97. *See id.* Virginia also used compounded pentobarbital, which it obtained from the Texas Department of Criminal Justice. *Id.*

98. *See id.*

99. S.C. CODE ANN. § 24-3-530(A) (2007).

100. *Id.*

choose electrocution or if execution by lethal injection “is held to be unconstitutional by an appellate court of competent jurisdiction.”<sup>101</sup> Notably, in 2013, South Carolina’s lethal injection drugs expired and were returned to their manufacturers for disposal.<sup>102</sup> Since then, the state has been unable to obtain new drugs and no executions have occurred.<sup>103</sup>

### *B. Previous Attempts to Implement Secrecy Statutes Have Failed*

South Carolina law prohibits anyone from disclosing the identities of execution team members except “upon a court order under seal.”<sup>104</sup> However, the law does not define “execution team member” nor does it specify whether individuals or companies participating in the preparation and provision of lethal injection drugs are included in the term.

In 2015, South Carolina legislators introduced two nearly identical bills, Senate Bill 553 and House Bill 3853, to amend South Carolina Code § 24-3-580 and define “execution team.”<sup>105</sup> That definition included “any person or entity that prescribes, compounds, tests, uses, manufactures, imports, transports, distributes, supplies, prepares, or administers the drugs, medical supplies, or medical equipment utilized in the execution of a death sentence.”<sup>106</sup> These Bills also included provisions prohibiting any information that identified execution team members from being “subject to discovery, subpoena, or any other means of legal compulsion or process for disclosure.”<sup>107</sup> Neither Bill passed in its respective body.<sup>108</sup>

In response to this failure, South Carolina Department of Corrections Director Bryan Stirling wrote the Attorney General’s Office to inquire whether “[§] 24-3-580’s definition of the phrase ‘member of an execution team’ includes ‘an individual or company that provides, or an individual who participates in preparation of, chemical compounds intended for use by the Department of Corrections . . . in carrying out an order of execution by lethal

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101. § 24-3-530(C).

102. See Lovegrove, *supra* note 22; Michelle Liu, *SC Delays Execution, Citing Lack of Lethal Injection Drugs*, ASSOCIATED PRESS (Nov. 30, 2020), <https://apnews.com/article/south-carolina-courts-executions-931bae9dd612fe341f3c09b0bcd8ff91> [https://perma.cc/B3T9-FNGE].

103. See, e.g., Liu, *supra* note 102.

104. See § 24-3-580.

105. S. 553, 2015–2016 Gen. Assemb., 121st Sess. (S.C. 2016); H.R. 3853, 2015–2016 Gen. Assemb., 121st Sess. (S.C. 2015).

106. S. 553; H.R. 3853.

107. S. 553; H.R. 3853.

108. See *Policy Reform*, JUSTICE 360, <https://justice360sc.org/policy-reform> [https://perma.cc/Y9PK-6TCB].

injection.”<sup>109</sup> The office explained that “the phrase ‘member of an execution team’ must be broadly construed” and that the section’s “protections must be extended to the identities of individuals and companies involved in the process of preparing chemical compounds for use in an execution via lethal injection.”<sup>110</sup>

Section 24-3-580 has still not been amended to expressly protect individuals or entities that manufacture or supply lethal injection drugs.<sup>111</sup> Bills protecting pharmaceutical manufacturers and suppliers have continuously been reintroduced, presumably in hopes that those willing to supply lethal injection drugs will do so if protected from public scrutiny.<sup>112</sup> In 2018, Senate Bill 553 was reintroduced verbatim as Senate Bill 871, but it did not pass.<sup>113</sup> In 2019, House Bill 3354 was introduced to amend § 24-3-580 and protect the identities of lethal injection drug providers.<sup>114</sup> Although nearly identical to previous proposals, House Bill 3354 stated that “[identifying] information may be disclosed only upon a court order under seal for the proper adjudication of pending litigation.”<sup>115</sup> Once again, the Bill failed.<sup>116</sup>

### *C. Legislators Seek Alternative Execution Methods*

South Carolina has attempted to compensate for its lethal injection drug shortage by changing the default execution method. In 2015, the South Carolina House of Representatives introduced House Bill 4121 to amend § 24-3-530 and eliminate lethal injection as an execution method.<sup>117</sup> Although the Bill failed, if it had passed, South Carolina would have executed all death row inmates by electrocution.<sup>118</sup>

In 2018, despite House Bill 4615 and Senate Bill 872 being introduced to amend § 24-3-530, neither suggested eliminating lethal injections entirely.<sup>119</sup> Rather, the Bills would have allowed death row inmates to be executed by

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109. Letter from Brendan McDonald, Assistant Att’y Gen., Off. of the Att’y Gen., to Bryan P. Stirling, Director, South Carolina Dep’t of Corr. (July 27, 2015).

110. *Id.*

111. See Jeffery Collins, *Dad Sentenced to Die, But Executions Rare in South Carolina*, ASSOCIATED PRESS (June 14, 2019), <https://apnews.com/article/342d238989d845e48ccade3075cfa36d> [https://perma.cc/R6E6-YCSR].

112. Lovegrove, *supra* note 22.

113. S. 871, 2017–2018 Gen. Assemb., 122d Sess. (S.C. 2018).

114. H.R. 3354, 2019–2020 Gen. Assemb., 123d Sess. (S.C. 2019).

115. *Id.*

116. *Id.*

117. H.R. 4121, 2015–2016 Gen. Assemb., 121st Sess. (S.C. 2015).

118. *See id.*

119. *See* H.R. 4615, 2017–2018 Gen. Assemb., 122d Sess. (S.C. 2018); S. 872, 2017–2018 Gen. Assemb., 122d Sess. (S.C. 2018).

lethal injection “if it [was] available at the time of election.”<sup>120</sup> If lethal injection was unavailable, “then the manner of inflicting a death sentence [had to have been] electrocution regardless of the method elected by the person.”<sup>121</sup> Further, if the inmate waived the right to decide execution method, the default method would be electrocution rather than lethal injection.<sup>122</sup> While House Bill 4615 failed in the house,<sup>123</sup> Senate Bill 872 was more successful. It passed in the senate, was introduced in the house, and was referred to the judiciary committee but ultimately failed in the house.<sup>124</sup>

In 2019, three bills were introduced to amend § 24-3-530’s default execution method.<sup>125</sup> House Bill 3301 was similar to the previously proposed Senate Bill 872 in that it would allow lethal injection if available but would default to execution by electrocution.<sup>126</sup> Senate Bill 176 and House Bill 4417 contained the same substantive provisions but were more detailed in that they would require signatures, witnesses, and notarization when a convicted person elected to die by lethal injection.<sup>127</sup> They went a step further, however, by allowing inmates to elect execution by firing squad.<sup>128</sup> House Bill 3301 failed in the house, but Senate Bill 176 passed in the senate, was found favorable by the judiciary committee, and ultimately failed in the house.<sup>129</sup> In 2020, the senate pre-filed Senate Bill 200, which is identical to Senate Bill 176 in all relevant parts.<sup>130</sup> As of April 20, 2021, Senate Bill 200 has passed in the senate and is currently in the House Judiciary Committee.<sup>131</sup>

#### IV. ANALYSIS

##### *A. Drugs from Sources Other Than Pharmaceutical Companies Are Typically Inhumane*

Likely attempting to abolish the death penalty, pharmaceutical companies that have refused to supply states with lethal injection drugs are dooming most

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120. H.R. 4615; S. 872.

121. H.R. 4615; S. 872.

122. H.R. 4615; S. 872.

123. *See* H.R. 4615.

124. *See* S. 872.

125. *See* H.R. 3301, 2019–2020 Gen. Assemb., 123d Sess. (S.C. 2019); S. 176, 2019–2020 Gen. Assemb., 123d Sess. (S.C. 2020); H.R. 4417, 2019–2020 Gen. Assemb., 123d Sess. (S.C. 2019).

126. *See* H.R. 3301.

127. *See* S. 176; H.R. 4417.

128. S. 176; H.R. 4417.

129. *See* H.R. 3301; H.R. 4417; S. 176.

130. S. 200, 2021–2022 Gen. Assemb., 124th Sess. (S.C. 2020).

131. *Id.*



death row inmates more painful, inhumane deaths.<sup>132</sup> By refusing to supply lethal injection drugs, pharmaceutical companies slowed executions for a few years.<sup>133</sup> But despite some states abolishing the death penalty altogether,<sup>134</sup> others have grown anxious to renew executions and have begun using riskier methods.<sup>135</sup>

Even though the Supreme Court narrowly ruled that using midazolam in lethal injections is not cruel and unusual punishment,<sup>136</sup> witnesses to executions carried out with this drug heavily disagree.<sup>137</sup> A lethal injection comprised of reliable chemicals, such as sodium thiopental, and carried out by knowledgeable executioners “takes about five minutes, with death usually occurring less than two minutes after the final injection.”<sup>138</sup> When states began using midazolam from lightly regulated compounding pharmacies, many executions ranged from twenty minutes to multiple hours.<sup>139</sup> During these executions, witnesses reported inmates remaining conscious, moving around, and gasping for breath.<sup>140</sup> Further, experts disagree about the amount of midazolam necessary to effectively sedate inmates such that they will not “be aware of and experience air hunger . . . .”<sup>141</sup> When Dennis McGuire was executed with midazolam, “he grunted and fought for air, ‘snorting, gurgling and arching his back[.]’”<sup>142</sup> This execution was so harsh that a prison official mouthed “I’m sorry” to McGuire’s relatives who were witnessing the execution.<sup>143</sup>

Even in executions where using midazolam seemed to be successful and painless, concern arose that prisoners who did not outwardly manifest discomfort were experiencing excruciating pain while paralyzed by the

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132. See Deborah W. Denno, *Lethal Injection*, ENCYC. BRITANNICA (Sept. 11, 2013), <https://www.britannica.com/topic/lethal-injection> [<https://perma.cc/9J9W-BZWU>] (explaining that some states purchase alternative drugs from foreign companies, increasing the risk of prisoners suffering during execution due to impure, expired, or ineffective compounds).

133. See Manny Fernandez, *Delays as Death-Penalty States Scramble for Execution Drugs*, N.Y. TIMES (Oct. 8, 2015), <https://nyti.ms/1Npusyk> [<https://perma.cc/LC7N-S263>] (reporting death-penalty states found it difficult to carry out executions due to the limited supply of suitable drugs).

134. See Denno, *supra* note 132.

135. See Fernandez, *supra* note 133 (reporting that Ohio and Nebraska sought to buy a drug no longer available in the United States from overseas only to be told by the FDA that importing the drug is illegal).

136. See *Glossip v. Gross*, 576 U.S. 863 (2015).

137. Mosendz, *supra* note 64.

138. Denno, *supra* note 132.

139. See, e.g., Mosendz, *supra* note 64.

140. See, e.g., *id.*

141. *Id.*

142. Segura, *supra* note 6.

143. *Id.*

paralytic agent in the lethal injection compound.<sup>144</sup> Dr. Mark Edgar, a professor of pathology at Emory University School of Medicine, validated this concern after autopsying Robert Van Hook following Van Hook's execution by a three-drug lethal injection using midazolam on July 18, 2018.<sup>145</sup> Dr. Edgar found "significant abnormalities" in Van Hook's lungs; the lungs themselves were unusually heavy and they contained "a mix of blood and frothy fluid."<sup>146</sup> Dr. Edgar determined that, as Van Hook was dying, he suffered from pulmonary edema, "an accumulation of fluid in the lungs."<sup>147</sup> Pulmonary edema causes an individual to feel like they are drowning.<sup>148</sup> Dr. Edgar examined twenty-seven autopsy reports from previous injections including midazolam and found that twenty-three of the inmates suffered from pulmonary edema during death.<sup>149</sup> Despite mounting evidence that midazolam leads to a high rate of botched executions, courts across the country have continued to uphold its use.<sup>150</sup>

Pentobarbital, another drug now commonly used in lethal injections, has also been upheld despite its potential dangers.<sup>151</sup> One of those dangers is that, if pentobarbital is stored at too cold of a temperature, the chemical separates and clumps form.<sup>152</sup> Further, "[i]f the IV isn't placed in the vein as it's supposed to be, or it's injected too fast so that some of the medication leaks out of the vein, [pentobarbital] can cause actual chemical burns."<sup>153</sup> Many concerns have arisen because the pentobarbital used in executions is not obtained from legitimate pharmaceutical companies.<sup>154</sup> Akorn Pharmaceuticals (Akorn) is the only company with manufacturing rights for

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144. See Rick Rojas, *Why This Inmate Chose the Electric Chair Over Lethal Injection*, N.Y. TIMES (Feb. 19, 2020), <https://www.nytimes.com/2020/02/19/us/electric-chair-tennessee.html> [<https://perma.cc/Y4AL-P886>].

145. Segura, *supra* note 6.

146. *See id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *See* Press Release, William P. Barr, *supra* note 82.

152. *See* Erica Hunzinger, *Secret Sedative: How Missouri Uses Pentobarbital in Executions*, ST. LOUIS PUB. RADIO (Aug. 18, 2017, 4:56 AM), <https://news.stlpublicradio.org/government-politics-issues/2017-08-18/secret-sedative-how-missouri-uses-pentobarbital-in-executions> [<https://perma.cc/PU26-D28G>].

153. Molly Longman, *The Death Penalty Is Always Inhumane – And Lethal Injections Are No Exception*, REFINERY 29 (July 16, 2020, 10:26 AM), <https://www.refinery29.com/en-us/2020/07/9916101/lethal-injections-humane-death-penalty> [<https://perma.cc/E4N7-XNPK>].

154. *Statements from Drug Manufacturers and Medical Professionals*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/lethal-injection/statements-from-drug-manufacturers-and-medical-professionals> [<https://perma.cc/3TX7-7NEU>].

the drug.<sup>155</sup> When Akorn acquired these rights from Lundbeck, Lundbeck explained that “a distribution system meant to keep the drug out of the hands of prisons [would] remain in place.”<sup>156</sup>

As of July 2019, 143 executions were carried out using only pentobarbital.<sup>157</sup> Unlike executions using midazolam, most pentobarbital executions appeared to cause little—if any—pain.<sup>158</sup> Yet there have been cases of grisly, botched pentobarbital executions.<sup>159</sup> Take, for example, Michael Lee Wilson’s 2014 execution in Oklahoma. After receiving a three-drug lethal injection cocktail that contained pentobarbital, potassium chloride, and vecuronium bromide, Wilson said, “I feel my whole body burning.”<sup>160</sup> This same experience occurred when five Texas inmates were put to death in 2018, and another inmate writhed in agony on a gurney once the drugs were administered.<sup>161</sup> As Dr. Jonathan Groner observed, while “[w]e used to burn people at the stake, now we just do it chemically.”<sup>162</sup> Additionally, Dr. Edgar and Dr. Gail Van Norman determined that, like inmates who were executed with midazolam, most inmates executed by concoctions containing pentobarbital suffered pulmonary edema.<sup>163</sup>

Many of the dangers arising from the use of midazolam and pentobarbital stem from the compounding pharmacies that manufacture and distribute the drugs.<sup>164</sup> These pharmacies are highly distrusted because they “are not subject to the same stringent federal standards as large manufacturers, and the products they make have a significantly higher failure rate and shorter shelf

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155. See *id.*; Andrew Welsh-Huggins, *Danish Drug Maker Sells Drugs Used in US Executions*, FOX NEWS (Dec. 22, 2011), <https://www.foxnews.com/us/danish-drug-maker-sells-drug-used-in-us-executions> [<https://perma.cc/B2MR-72NT>].

156. See Hunzinger, *supra* note 152.

157. Bates, *supra* note 79.

158. See Hunzinger, *supra* note 152.

159. See Longman, *supra* note 153 (reporting that most inmates “executed using pentobarbital suffered flash pulmonary edema during their execution”).

160. Bates, *supra* note 79.

161. Chris McDaniel, *Inmates Said the Drug Burned as They Died. This Is How Texas Gets Its Execution Drugs.*, BUZZFEED NEWS (Nov. 28, 2018, 5:09 PM), <https://www.buzzfeednews.com/amphtml/chrismcDaniel/inmates-said-the-drug-burned-as-they-died-this-is-how-texas?> [<https://perma.cc/44WX-2QPG>].

162. Longman, *supra* note 153.

163. *Id.*; see Segura, *supra* note 6 (finding signs of pulmonary edema in a majority of midazolam executions).

164. See, e.g., KONRAD, *supra* note 20, at 39 (describing issues of quality and efficacy with drugs from compounding facilities, including an aborted execution in Georgia, “because the drugs manufactured and supplied by an anonymous compounding pharmacy were ‘cloudy’”); Manny Fernandez, *Executions Stall as States Seek Different Drugs*, N.Y. TIMES (Nov. 8, 2013), <https://nyti.ms/1hsxDFZ> [<https://perma.cc/PA7R-DM53>] (discussing how Texas prison officials purchased pentobarbital from a compounding pharmacy using a credit card and without a prescription, raising potential legal questions).

life, one measured in days, than conventionally manufactured drugs.”<sup>165</sup> Due to these short shelf lives, attorneys for death row inmates worry their clients are at an increased risk of being executed with degraded or expired drugs, which could result in “a painful death that would amount to torture.”<sup>166</sup>

Moreover, experts explain that improper compounding and testing can result in drugs containing fine, undetectable particles that could severely irritate inmates’ veins and cause them to experience extraordinary pain.<sup>167</sup> Yet when attorneys and experts raised concerns to the Texas Department of Criminal Justice, their claims were dismissed as “speculation upon speculation.”<sup>168</sup> Texas has executed more inmates than any other state and has obtained lethal injection drugs from compounding pharmacies since 2014.<sup>169</sup> The Texas inmates who felt burning sensations coursing through their veins during 2018 were executed with drugs allegedly obtained from Greenpark Compounding Pharmacy (Greenpark).<sup>170</sup> Greenpark has “[given] kids the wrong medicine[,] . . . forged documents[,] . . . [and had] employees [who] didn’t wash their hands adequately . . . .” Since 2010, Greenpark “has been cited for 48 violations . . . .”<sup>171</sup> While these types of violations seem shocking, they are typical for compounding pharmacies.<sup>172</sup>

Although compounding pharmacies are subject to some federal requirements, such as “the requirement that drugs not be prepared, packed, or held under insanitary conditions,” drugs that are “compounded by a licensed pharmacist in a state-licensed pharmacy . . . are exempt from compliance with [current good manufacturing practice] requirements.”<sup>173</sup> The FDA is permitted to “conduct surveillance and for-cause inspections of state-licensed [compounding] pharmacies,” but the “state boards of pharmacy have primary responsibility for the day-to-day oversight of state-licensed pharmacies that

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165. McDaniel, *supra* note 161.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *See id.* Greenpark has denied providing execution drugs. Keri Blakinger, ‘We Don’t Do It’: As Protesters Gather, Texas Pharmacy Owner Denies Providing Lethal Injection Drugs, CHRON (Dec. 3, 2018), <https://www.chron.com/news/houston-texas/houston/article/We-don-t-do-it-As-protesters-gather-13440688.php%20m> [<https://perma.cc/T5SE-CHM8>].

171. McDaniel, *supra* note 161.

172. *See Inspections, Recalls, and Other Actions with Respect to Firms That Engage in Animal Drug Compounding*, U.S. FOOD & DRUG ADMIN. (May 12, 2020), <https://www.fda.gov/animal-veterinary/animal-drug-compounding/inspections-recalls-and-other-actions-respect-firms-engage-animal-drug-compounding> [<https://perma.cc/P8TG-CEEM>] (listing compounding pharmacies cited by the FDA for violations of the Food, Drug, and Cosmetic Act).

173. *Compounding and the FDA: Questions and Answers*, U.S. FOOD & DRUG ADMIN. (June 21, 2018), <https://www.fda.gov/drugs/human-drug-compounding/compounding-and-fda-questions-and-answers#what> [<https://perma.cc/LFD7-6NGM>].

are not registered with the FDA as outsourcing facilities.”<sup>174</sup> Many states lack resources to perform day-to-day oversight, so unsanitary conditions and poor manufacturing practices may not be detected.<sup>175</sup>

Due to their exemption from FDA regulation, one compounding pharmacy, which was cited for “sterility failures[,]” rejected the FDA’s requests to recall its products.<sup>176</sup> The pharmacy’s owner asserted that the pharmacy is “compliant with every state guideline” and has “a sterile compounding license with the state . . . .”<sup>177</sup> The FDA responded that, although it was actively investigating the pharmacy, “it [could not] require a company to recall drug products.”<sup>178</sup> Because compounding pharmacies can refuse to recall dangerous drugs from the *public*,<sup>179</sup> the experts and attorneys who have raised concern that such pharmacies will produce dangerous chemicals for *death row inmates* do not offer “speculation upon speculation.”<sup>180</sup>

## *B. South Carolina Should Not Adopt a Secrecy Statute*

### *1. Secrecy Statutes Do Not Increase the Provision of Needed Drugs*

Secrecy statutes ideally allow pharmaceutical companies to freely provide humane lethal injection drugs to states without fear of public retribution.<sup>181</sup> South Carolina Department of Corrections Director Stirling stated, “Any time we started a conversation with a company that makes the drugs—a pharmacy, a compounding pharmacy, or anybody that would be involved in it—they asked how they would be protected, and we told them that there was no shield law.”<sup>182</sup>

The overwhelming evidence from states with secrecy statutes suggests that the statutes are unsuccessful in obtaining lethal injection drugs from reputable pharmaceutical companies.<sup>183</sup> Instead, pharmaceutical companies have begun strengthening their controls on distributors to ensure their drugs

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174. *Id.* An outsourcing facility is a type of compounding pharmacy that is “inspected by FDA according to a risk-based schedule and [is] subject to increased quality standards[.]” such as the current good manufacturing practice requirements. *Id.*

175. *See id.*

176. Jim Axelrod, *Why Compounding Pharmacy Downing Labs Rejected FDA’s Recall Request*, CBS NEWS (Feb. 24, 2015, 7:42 PM), <https://www.cbsnews.com/news/downing-labs-rejects-fdas-recall-request/> [https://perma.cc/CHL9-N5C4].

177. *Id.*

178. *Id.*

179. *See id.*

180. *See* McDaniel, *supra* note 161.

181. *See, e.g.,* Lovegrove, *supra* note 22.

182. *Id.*

183. *See, e.g.,* STATE-BY-STATE RISK INDEX, *supra* note 84, at 13–14.

are not distributed to prisons.<sup>184</sup> For example, Pfizer, which manufactures many of the drugs typically used in lethal injection cocktails,<sup>185</sup> has strengthened its distribution plan to restrict the sale of drugs “to a select group of wholesalers, distributors, and direct purchasers under the condition that they will not resell these products to correctional institutions for use in lethal injections.”<sup>186</sup>

Prisons have responded to strict controls by undermining pharmaceutical companies.<sup>187</sup> For instance, the Arkansas Department of Corrections (ADC) tricked McKesson Corporation into believing that vecuronium bromide, a paralytic agent,<sup>188</sup> was being used for legitimate medical purposes rather than for executions.<sup>189</sup> ADC understood that McKesson did not permit its drugs to be used for capital punishment, so to keep up the facade, ADC had McKesson send the vecuronium bromide to ADC’s administrative building—where orders for its healthcare facility were delivered.<sup>190</sup> Upon learning that the drugs had been improperly obtained, McKesson requested that ADC return the drugs in exchange for a full refund.<sup>191</sup> Despite claiming it would comply with the request, ADC retained the drugs, presumably for use in executions.<sup>192</sup>

Because departments of corrections are willing to deceive pharmaceutical companies, these companies have taken legal action to ensure their drugs are not used in lethal injections.<sup>193</sup> For example, in 2017, Fresenius Kabi USA and Sandoz, Inc. “filed a brief in support of litigation seeking disclosure of records that Ohio sought to keep confidential under its secrecy statute.”<sup>194</sup> The companies explained they “have a keen and important interest in knowing

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184. See *id.* at 6, 10; Matt Ford, *Pfizer v. Lethal Injections*, THE ATLANTIC (May 13, 2016), <https://www.theatlantic.com/politics/archive/2016/05/pfizer-lethal-injection-drugs/482811/> [https://perma.cc/PF5M-TL53].

185. Ford, *supra* note 184. Pfizer manufactures “the sedatives propofol, midazolam, and hydromorphone, the muscle relaxant pancuronium bromide and two variants of it, and potassium chloride, which is used to stop the inmate’s heart.” *Id.*

186. Wagner, *supra* note 50.

187. See STATE-BY-STATE RISK INDEX, *supra* note 84, at 6, 15.

188. Ben Bryant, *Life and Death Row: How the Lethal Injection Kills*, BBC: BBC THREE (Mar. 5, 2018), <https://www.bbc.co.uk/bbcthree/article/cd49a818-5645-4a94-832e-d22860804779> [https://perma.cc/3PNW-XU5C].

189. Verified Complaint for Emergency Injunctive Relief & Return of Illegally Obtained Property at 3, *McKesson Med.-Surgical Inc. v. Ark. Dep’t of Corr.*, No. 60CV-17-1921 (Ark. Cir. Ct. Apr. 14, 2017).

190. *Id.* at 4.

191. *Id.* at 12.

192. See Max Brantley, *Drug Distributor Says Arkansas Deceitful in Obtaining Execution Drug*, ARK. TIMES (Apr. 15, 2017, 12:03 AM), <https://arktimes.com/arkansas-blog/2017/04/15/drug-distributor-says-arkansas-deceitful-in-obtaining-execution-drug> [https://perma.cc/47JG-XJEF].

193. See KONRAD, *supra* note 20, at 26.

194. *Id.*

whether any department [sic] of corrections have obtained their drugs despite and in contravention of their distribution controls and contracts.”<sup>195</sup> Sandoz expressed concern, stating “[t]he uncertainty surrounding whether [its] products [had] been acquired by Ohio for these executions impede[d its] ability to enforce . . . company policies, protect [its] contractual rights, and preserve the integrity of [its] business relationships.”<sup>196</sup> However, like other states with secrecy statutes,<sup>197</sup> Ohio has ignored pharmaceutical companies’ pleas by using false pretenses to purchase drugs and subsequently hiding behind a secrecy statute.<sup>198</sup>

Because pharmaceutical companies are unwilling to produce drugs for lethal injections and because the FDA cannot ban the import of those drugs,<sup>199</sup> states should theoretically be able to receive lethal injection drugs from other countries.<sup>200</sup> The Department of Justice’s slip opinion holding that the FDA cannot regulate lethal injection drugs is unlikely “to have immediate effects” because “the FDA is still under an unrelated 2012 federal court ruling to ban the import of sodium thiopental.”<sup>201</sup> A spokesperson for the FDA explained that “the agency would ‘follow the conclusion of the opinion to the extent possible’ by the 2012 order.”<sup>202</sup>

Other nations have also banned the export of drugs that could be used in lethal injections.<sup>203</sup> For instance, in 2017, fifty-seven countries joined the European Union, Argentina, and Mongolia to form the Alliance for Torture-Free Trade, which “aims to stop the trade in goods used to carry out the death

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195. *Id.*

196. STATE-BY-STATE RISK INDEX, *supra* note 84, at 23–24.

197. *See id.* at 13–28 (listing eighteen states that have enacted legislation, implemented policies obscuring critical information relating to medicines purchased for the purposes of lethal injection, or both).

198. *Id.* at 24.

199. Whether the Food and Drug Admin. Has Jurisdiction Over Articles Intended for Use in Lawful Executions, 43 Op. O.L.C. 1, 26 (May 3, 2019) (concluding the FDA lacks jurisdiction to regulate drugs intended for use in capital punishment).

200. *But see* Sofia Sanchez Manzanaro & Lucía Riera Bosqued, *US Government Plans to Use Drug for Execution that Europe Banned Exporting to Them*, EURONEWS (July 29, 2019), <https://www.euronews.com/2019/07/29/us-government-plans-to-use-drug-for-execution-that-europe-banned-exporting-to-them> [<https://perma.cc/M7YS-9P89>] (reporting that the EU bans exports of “any equipment that could ‘contribute to torture or execution’”); Lincoln Caplan, *The End of the Open Market for Lethal-Injection Drugs*, NEW YORKER (May 21, 2016), <https://www.newyorker.com/news/news-desk/the-end-of-the-open-market-for-lethal-injection-drugs> [<https://perma.cc/ZMB9-QCZU>] (noting that the British government banned sale of sodium thiopental after several states, including South Carolina, acquired the drug from a London-based distributor).

201. Jolie McCullough, *In a Nod to Texas, U.S. Department of Justice Says FDA Can’t Regulate Execution Drugs*, TEX. TRIBUNE (May 14, 2019, 9:00 PM), <https://www.texastribune.org/2019/05/14/us-doj-fda-execution-drugs-texas/>.

202. *Id.*

203. *See* Caplan, *supra* note 200.

penalty and to commit torture.”<sup>204</sup> In June 2019, the United Nations General Assembly adopted a resolution titled “Towards torture-free trade: examining the feasibility, scope and parameters for possible common international standards.”<sup>205</sup> Eighty-one member countries voted in favor of the resolution, twenty voted against it, and forty-four abstained from voting.<sup>206</sup>

## 2. *States Stockpile Drugs and Create Public Health Concerns*

Because lethal injection drugs are difficult to obtain, some states—including Arkansas, Arizona, Mississippi, and Virginia—stockpile drugs when they receive them,<sup>207</sup> keeping the drugs from being “used in tens of thousands of potentially life-saving medical operations . . . .”<sup>208</sup> A study overseen by Dr. Joel Zivot, an anesthesiologist at Emory University Hospital, examined Arkansas, Arizona, Mississippi, and Virginia and found that these four states alone hoarded “sufficient stashes of medicines to treat 11,257 patients in surgeries and other possibly life-or-death procedures . . . .”<sup>209</sup> Due to the study only examining four out of the thirty-one states that had the death penalty at the time,<sup>210</sup> it is likely that, if the findings were “extrapolated to the rest of the country, the number of operations that could be supported by the drugs would reach into the tens of thousands.”<sup>211</sup>

At the time of the study, hospitals struggled to obtain the types of medication that states had stockpiled.<sup>212</sup> In April 2020, hospitals were still in desperate need of midazolam, vecuronium bromide, rocuronium bromide, and fentanyl as sedatives and paralytics were required to connect COVID-19

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204. *57 Countries Join Forces to Stop Trade in Goods Used for Torture and Death Penalty*, ALL. FOR TORTURE-FREE TRADE, <https://www.torturefreetrade.org/en/news.html?entry=3> [https://perma.cc/4NT7-RJXL].

205. G.A. Res. 73/304 (June 28, 2019).

206. *India Abstains from Voting on UNGA Resolution on Goods Used for Capital Punishment, Torture*, ECON. TIMES (June 29, 2019, 11:27 AM), <https://economictimes.indiatimes.com/news/politics-and-nation/india-abstains-from-voting-on-unga-resolution-on-goods-used-for-capital-punishment-torture/articleshow/69999314.cms> [https://perma.cc/T2K2-J557].

207. Ed Pilkington, *States Are Stockpiling Lethal Injection Drugs That Could Be Used to Save Lives*, THE GUARDIAN (Apr. 20, 2017, 11:23 AM), <https://www.theguardian.com/world/2017/apr/20/states-stockpiling-lethal-injection-drugs-arkansas-execution> [https://perma.cc/LSP6-QNWM].

208. *Id.*

209. *Id.*

210. *Id.*; see *States and Capital Punishment*, NAT’L CONF. OF STATE LEGISLATURES (Mar. 24, 2020), <https://www.ncsl.org/research/civil-and-criminal-justice/death-penalty.aspx> [https://perma.cc/7UQS-AVVF] (listing the twenty-seven states still authorizing capital punishment).

211. Pilkington, *supra* note 207.

212. *Id.*



patients to ventilators.<sup>213</sup> Patients being hooked up to ventilators without sedatives and paralytics “would be torture[d.]”<sup>214</sup> Public health experts pleaded with death penalty states to release the necessary drugs, explaining:

[T]he drugs currently stockpiled by your states could be used to treat hundreds of COVID-19 patients . . . . In this time of crisis, these risks have never been more acute, and our health system has never more desperately needed the medicines you currently hold for use in executions. Every last vial of medicine could mean the difference between life and death.<sup>215</sup>

Dr. Zivot further asserted that the stockpiled drugs were designed to save lives rather than end them, and while misusing medication in such a way has never been acceptable, it is now especially important that states use medicine to prioritize the health of their citizens over the death of their prisoners.<sup>216</sup> Secrecy statutes prevent healthcare providers from determining the precise amount of medicine death penalty states are hoarding.<sup>217</sup> However, based only on limited information from a few states, the stockpiled drugs could be used in treating more than 100 patients.<sup>218</sup>

Despite hospitals desperately requesting that prisons relinquish potentially life-saving drugs, many prisons were hesitant.<sup>219</sup> Alabama and Florida, for example, responded neither to requests nor to inquiries about those requests.<sup>220</sup> Arkansas, Texas, and Utah claimed they did not have the medications that were requested.<sup>221</sup> Tennessee neither confirmed nor denied it possessed the requested drugs; it did, however, indicate that “it has no plans to give any medications to a hospital.”<sup>222</sup> Oklahoma claimed it did not receive requests from state hospitals to turn over any drugs.<sup>223</sup> Even if these states did,

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213. *Medical Professionals Ask Death-Penalty States to Turn Over Execution Drugs Needed for Coronavirus Treatment*, DEATH PENALTY INFO. CTR. (Apr. 13, 2020), <https://deathpenaltyinfo.org/news/medical-professionals-ask-death-penalty-states-to-turn-over-execution-drugs-needed-for-coronavirus-treatment> [<https://perma.cc/T9T6-HFCC>] [hereinafter *Medical Professionals Ask for Drugs*].

214. Juan A. Lozano, *Doctors: Execution Drugs Could Help COVID-19 Patients*, ASSOCIATED PRESS (Apr. 21, 2020), <https://apnews.com/article/29719f13fe4c63b3625cc178fa1d0b50> [<https://perma.cc/9CAF-CLFD>].

215. *Medical Professionals Ask for Drugs*, *supra* note 213.

216. *Id.*

217. *Id.*

218. *Id.*

219. *See* Lozano, *supra* note 214.

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

in fact, have the necessary drugs, they were likely reluctant to hand them over for risk of difficulty obtaining replacements.<sup>224</sup> These prisons prioritize their execution drug supply over state citizens in the hospital fighting this vicious virus.<sup>225</sup>

### 3. *Electrocution Is Likely to Become the Default Execution Method*

Lethal injection has been the default execution method in South Carolina since 1995.<sup>226</sup> Several legislative efforts have sought to reinstate electrocution as the default method and protect the identities of drug suppliers and manufacturers.<sup>227</sup> So far, none of these efforts have been successful; however, Senate Bill 200—identical to its predecessor, Senate Bill 176—is currently pending before the House Judiciary Committee.<sup>228</sup> Even if a secrecy statute is adopted, pharmaceutical companies remain unwilling to provide drugs for lethal injections.<sup>229</sup> In response, South Carolina will likely follow other states to procure drugs from compounding pharmacies and thereby undermine legitimate pharmaceutical companies.<sup>230</sup> Nonetheless, because South Carolina is closer to implementing electrocution as the default execution method than it is to adopting a secrecy statute,<sup>231</sup> death row inmates in the state are much more likely to be executed by electrocution than any other method.

Electrocution has long been held to be a much more gruesome and painful execution method than lethal injection.<sup>232</sup> When inmates are put to death by electrocution, they are shaved and strapped into a wooden chair with belts securing their chest, arms, lap, and legs.<sup>233</sup> A sponge that is moistened, but not soaked, with saline is placed on the inmate's scalp with a "metal skullcap-shaped electrode" on top of the sponge.<sup>234</sup> Another electrode that is moistened with conductive jelly is attached to a shaved portion of the inmate's leg "to

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224. *Id.*

225. *Medical Professionals Ask for Drugs*, *supra* note 213.

226. Reid C. Toth, *Death Penalty*, S.C. ENCYC. (Sept. 14, 2016), <https://www.scencyclopedia.org/sce/entries/death-penalty/> [<https://perma.cc/P2DG-XNSW>].

227. *See* S. 176, 2019–2020 Gen. Assemb., 123d Sess. (S.C. 2020); S. 200, 2021–2022 Gen. Assemb., 124th Sess. (S.C. 2021); H.R. 3354, 2019–2020 Gen. Assemb., 123d Sess. (S.C. 2019).

228. S. 200, 2021–2022 Gen. Assemb., 124th Sess. (S.C. 2021).

229. *See* INDUSTRY OPPOSITION, *supra* note 19, at 4 (describing that, during the nine years before 2020, over fifty global pharmaceutical companies took action to prevent the misuse of their medicines in lethal injection executions).

230. *See* STATE-BY-STATE RISK INDEX, *supra* note 84, at 6.

231. *See* discussion *supra* Sections III.B–III.C.

232. *See* Denno, *supra* note 132; Gorvett, *supra* note 1.

233. *Description of Each Execution Method*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/methods-of-execution/description-of-each-method> [<https://perma.cc/58PB-T2EJ>] [hereinafter *Execution Descriptions*].

234. *Id.*

reduce resistance to electricity.”<sup>235</sup> The inmate is blindfolded as the executioner “pulls a handle to connect the power supply,” which administers 500 to 2,000 volts of electricity for about thirty seconds.<sup>236</sup> The inmate’s body relaxes and a doctor determines whether the inmate’s heart has stopped beating.<sup>237</sup> If the heart continues to beat, the executioner applies another jolt.<sup>238</sup> The imagery that electrocution witnesses describe is nauseating, even when the execution is performed properly and the inmate dies quickly.<sup>239</sup>

Senate Bill 176 received backlash due to the brutality of electrocution.<sup>240</sup> Opponents argued “electrocution is barbaric and South Carolina acknowledged that when it allowed lethal injection in 1995.”<sup>241</sup> Democrat Representative Justin Bamberg warned that, if the Bill passed, inmates would be treated worse than dogs—which are humanely euthanized by lethal injection.<sup>242</sup> He explained: “If you were to take that dog and throw it into a high voltage power line to electrocute it, you’d get hit with animal cruelty.”<sup>243</sup> Republican Representative Gary Clary, “a retired judge who presided over the trials of two current death row inmates and one who has been executed,” agreed with Representative Bamberg, stating: “Death by electrocution . . . is just a very cruel way to die.”<sup>244</sup>

Because lethal injections are now composed of unreliable drugs from unpredictable compounding pharmacies, lethal injections may be just as cruel as electrocution despite the sufferer’s excruciating pain and drawn-out death being disguised as a peaceful passing.<sup>245</sup> Lethal injections used to be considered more humane because they are “visibly calmer and less violent” than electrocution.<sup>246</sup> Anesthesiologist Dr. Zivot explained, “You just don’t see much . . . . You see a person lying there,” which “creates an impression that the inmates are simply falling asleep and dying.”<sup>247</sup> Instead, “the drugs can cause their lungs to fill with fluid, asphyxiating them, and mak[ing] them

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235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. For detailed descriptions of what typically happens to inmates’ bodies during electrocutions, see *id.*

240. See, e.g., Jeffrey Collins, *S Carolina Mulls Electric Chair as Only Option for Condemned*, ASSOCIATED PRESS (Mar. 3, 2020), <https://apnews.com/article/b4800595378a4de6b9b96620d877fca7> [<https://perma.cc/57FH-SVC2>].

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

245. See Rojas, *supra* note 144 (“[Tennessee inmates] are choosing electrocution because they fear being frozen in place and feeling intense discomfort while drugs work to kill them.”).

246. *Id.*

247. *Id.* (internal quotation marks omitted) (statement by Dr. Joel Zivot).

feel like they are burning.”<sup>248</sup> As “errors and problematic [lethal injection] executions” have become prominent, some states have paused or abandoned the death penalty to reduce “severe pain and needless suffering.”<sup>249</sup> Other states, including Tennessee and Oklahoma, have pressed forward to continue lethal injection executions despite numerous botched executions.<sup>250</sup>

In response to many lethal injection executions recently going awry, some inmates are electing to die by electrocution.<sup>251</sup> For instance, since 2018, five death row inmates in Tennessee have opted for electrocution, believing it would be less painful than lethal injection.<sup>252</sup> The inmates additionally feared that the pain felt in response to lethal injection would be “masked by a paralytic drug used in the procedure.”<sup>253</sup> When Tennessee inmates began choosing electrocution over lethal injection, former Chief Justice of the Tennessee Supreme Court Gary Wade stated: “I don’t think there’s anyone alive who can answer [the question of which method is the better way to die].”<sup>254</sup> While death by electrocution may not be “better” than death by lethal injection, it can be “equally horrific” and “maybe a bit more certain.”<sup>255</sup> Electrocution is faster than lethal injection.<sup>256</sup> Additionally, lethal injections appear to be botched more often than electrocution, as 3% of executions were botched from 1890 to 2010, “when hanging, electrocution or gas were the predominant modes of putting people to death,” while 7% are botched today, “in the era of lethal injection.”<sup>257</sup>

Even if South Carolina makes electrocution the default execution method, inmates will still be given an option between lethal injection and electrocution

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248. *Id.* (same).

249. *Id.* In 2019, Ohio paused executions while a new lethal injection protocol was being considered, and New Hampshire abandoned the death penalty altogether. *Id.*

250. *Id.*

251. See, e.g., Debra Cassens Weiss, *Some Tennessee Death-Row Inmates Opt for Electric Chair Over Lethal Injections*, ABA J. (Feb. 20, 2020, 12:29 PM), <https://www.abajournal.com/news/article/some-tennessee-death-row-inmates-opt-for-electric-chair-over-lethal-injections> [https://perma.cc/T32P-LDLB].

252. *Id.*

253. *Id.*

254. Shannon Smith, *Electric Chair vs. Lethal Injection: Which Is the Better Way to Die?*, WBIR 10 NEWS (Dec. 17, 2019, 1:50 PM), <https://www.wbir.com/article/news/crime/electric-chair-vs-lethal-injection-which-is-the-better-way-to-die/51-1688180e-1f14-4ebd-a703-901b3a36daac> (last visited May 3, 2021).

255. *Id.*

256. See *Firing Squad to Gas Chamber: How Long Do Executions Take?*, NBC NEWS (Mar. 25, 2015, 6:05 PM), <https://www.nbcnews.com/news/us-news/firing-squad-gas-chamber-how-long-executions-take-n329371> [https://perma.cc/J6RJ-A3XM] (noting that, while executions by lethal injection can take anywhere from five minutes to two hours, executions by electric chair usually take two to fifteen minutes).

257. See AUSTIN SARAT, GRUESOME SPECTACLES: BOTCHED EXECUTIONS AND AMERICA’S DEATH PENALTY 177 app. A (2014) (listing the number of botched executions by time period and execution method).

if lethal injection is available.<sup>258</sup> Further, assuming South Carolina does not enact a secrecy statute, inmates can learn about the origin of the drugs contained in lethal injection cocktails and make informed decisions about which execution method may cause less pain.<sup>259</sup> Because current law already protects the identities of lethal injection drug suppliers,<sup>260</sup> pharmaceutical companies would receive no additional protection under a formalized secrecy statute and would be just as resistant to providing drugs.<sup>261</sup> In response, the state will have to resort to obtaining lethal injection drugs from compounding pharmacies,<sup>262</sup> forcing inmates to decide which execution method they prefer without being fully informed about a drug's origin.<sup>263</sup>

#### 4. *South Carolina Should Find a More Humane Alternative to Lethal Injection*

As long as an inmate's punishment is not cruel and unusual, it can be carried out even if it is considered inhumane.<sup>264</sup> Supporters of Senate Bill 176 argued the Bill was necessary because, in light of lethal injections being currently unavailable, "victims and their friends and families deserve a chance to have [the death] sentence carried out."<sup>265</sup> However, there has been "a national evolution over the past two hundred years . . . to adopt arguably more humane means of capital punishment . . ."<sup>266</sup> As previously mentioned, electrocution and current lethal injection protocols are considered inhumane.<sup>267</sup> South Carolina acknowledged the barbarism of electrocution when it allowed lethal injection in 1995.<sup>268</sup> Now that lethal injection can be considered barbaric as well, the state should be open to adopting a more humane execution method.

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258. See discussion *supra* Section III.C.

259. Cf. KONRAD, *supra* note 20, at 6 ("Prisoners have a right to information about the execution process so that they can raise legitimate challenges to execution methods that may subject them to excruciating pain.").

260. Letter from Brendan McDonald to Bryan P. Stirling, *supra* note 109.

261. See KONRAD, *supra* note 20, at 25–26.

262. See *id.* at 39.

263. Cf. *id.* at 41 (explaining that, without information about the execution drugs, it is impossible for prisoners to meet the burden of proof to challenge executions as unconstitutionally cruel).

264. See *Cruel and Unusual Punishments*, CORNELL L. SCH., <https://www.law.cornell.edu/constitution-conan/amendment-8/cruel-and-unusual-punishments> [<https://perma.cc/7285-FPGU>].

265. Collins, *supra* note 240 (statement by U.S. Attorney for the District of South Carolina Peter McCoy).

266. *Cruel and Unusual Punishments*, *supra* note 264.

267. See Smith, *supra* note 254.

268. See Collins, *supra* note 240.

Other than lethal injection and electrocution, the execution methods currently available in the United States are firing squad and lethal gas.<sup>269</sup> In Oklahoma and Utah, execution by firing squad is authorized as an alternative if other methods are found to be unconstitutional or impractical.<sup>270</sup> When inmates are executed by firing squad, they are typically bound to a chair “in front of an oval-shaped canvas wall” and “surrounded by sandbags to absorb [their] blood.”<sup>271</sup> The inmates first have a black hood pulled over their head,<sup>272</sup> and then a doctor uses a stethoscope to locate their heart and “pin[] a circular white cloth target over it.”<sup>273</sup> Five marksmen are “armed with .30 caliber rifles loaded with single rounds,” with one marksman being given a blank round.<sup>274</sup> None of the marksmen know which of their rifles holds the blank round, ensuring that no one knows for sure if they fired the fatal shot.<sup>275</sup> Each marksman “aims his rifle through a slot in the canvas and fires at the inmate.”<sup>276</sup> The inmate eventually dies from blood loss.<sup>277</sup>

Because execution by firing squad consists of an inmates being strapped to a chair with a bag over their head while awaiting a bullet to the heart, Americans have low tolerance for this method.<sup>278</sup> Yet, due to recent complications with lethal injection, “state legislators, lower court judges[,] and . . . death row inmates have . . . proposed bringing back the firing squad.”<sup>279</sup> In 2017, Thomas Arthur, a death row inmate in Alabama, requested execution by firing squad rather than by one of the state’s allowed methods.<sup>280</sup> Arthur argued that lethal injection violates the Eighth Amendment and offered

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269. See *Execution Descriptions*, *supra* note 233. Delaware, Washington, and New Hampshire also included hanging as a method of execution. See *Methods of Execution*, CLARK CNTY. PROSECUTING ATT’Y, <http://www.clarkprosecutor.org/html/death/methods.htm> [https://perma.cc/Y8H9-WB5C]. However, by 2019, each of these states had abolished the death penalty. *State-by-State Lethal Injection Protocols*, *supra* note 78 (reporting that Delaware and Washington have declared the death penalty unconstitutional); Bill Chappell, *New Hampshire Abolishes Death Penalty as Lawmakers Override Governor’s Veto*, NPR (May 30, 2019, 12:24 PM), <https://www.npr.org/2019/05/30/728288240/new-hampshire-abolishes-death-penalty-as-lawmakers-override-governors-veto> [https://perma.cc/3WAY-H5HP].

270. See *Methods of Execution*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/methods-of-execution> [https://perma.cc/8EA3-5AXF].

271. *Execution Descriptions*, *supra* note 233.

272. *Id.*

273. *Id.*

274. *Id.*

275. *Firing Squad*, CRIME MUSEUM, <https://www.crimemuseum.org/crime-library/execution/firing-squad> [https://perma.cc/59R2-2DWM].

276. *Execution Descriptions*, *supra* note 233.

277. *Id.*

278. See Amelia Thomson-DeVeaux, *Is the Firing Squad More Humane than Lethal Injection?*, FIVETHIRTYEIGHT (Mar. 2, 2017, 7:02 AM), <https://fivethirtyeight.com/features/is-the-firing-squad-more-humane-than-lethal-injection/> [https://perma.cc/MYR4-7HRH].

279. *Id.*

280. *Id.* (Alabama offered lethal injection as the default method).

firing squad as an acceptable replacement.<sup>281</sup> The U.S. Supreme Court rejected Arthur's appeal, but Justice Sotomayor dissented, arguing death by firing squad may be the most humane execution method.<sup>282</sup> She explained that the method results in "near instant" death and "may also be comparatively painless."<sup>283</sup> She further argued that "[c]ondemned prisoners, like Arthur, might find more dignity in an instantaneous death rather than prolonged torture on a medical gurney."<sup>284</sup> However, it seems the general population's perception of the most humane method hinges on the imagery created by the execution.<sup>285</sup>

Although gas chambers have not been used in the United States since 1999,<sup>286</sup> they are available for inmates in Alabama, Missouri, and Wyoming.<sup>287</sup> Lethal gas was implemented as a more humane execution method than hanging.<sup>288</sup> Nevertheless, witnesses and medical experts have found lethal gas to be "the slowest and most painful method of execution."<sup>289</sup> Inmates are "strapped to a chair in an airtight chamber" with a bucket of sulfuric acid under the chair.<sup>290</sup> An executioner pulls a lever to release sodium cyanide crystals into the bucket, which combine with the sulfuric acid to create hydrogen cyanide gas—the same gas that killed millions in Nazi concentration camps in the 1940s.<sup>291</sup> The inmates do not immediately lose consciousness, and "there is evidence of extreme horror, pain, and strangling."<sup>292</sup> A defense attorney explained: "People think it is like dying of carbon monoxide poisoning, where you just sort of drift off, . . . [but i]t isn't like that at all. It is more like being strangled to death."<sup>293</sup> Ultimately, inmates eventually die from lack of oxygen to their brain.<sup>294</sup>

Because none of the currently available execution methods are considered humane, some states have begun contemplating nitrogen hypoxia as a new

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281. *Id.*

282. *Arthur v. Dunn*, 137 S. Ct. 725, 733 (2017) (Sotomayor, J., dissenting).

283. *Id.* at 734.

284. *Id.*

285. *See Thomson-DeVeaux*, *supra* note 278.

286. *Firing Squad to Gas Chamber: How Long Do Executions Take?*, *supra* note 256.

287. *Methods of Execution*, *supra* note 270.

288. Wiley A. Hall, *Execution by Lethal Gas Is Antiquated, Inhumane*, BALT. SUN (Sept. 30, 1993), <https://www.baltimoresun.com/news/bs-xpm-1993-09-30-1993273204-story.html> [https://perma.cc/Q6BX-UEZ5].

289. *Id.*

290. *Execution Descriptions*, *supra* note 233.

291. *Id.*; Jennifer Rosenberg, *Zyklon B, a Poison Used During the Holocaust*, THOUGHTCO (Jan. 24, 2020), <https://www.thoughtco.com/zyklon-b-gas-chamber-poison-1779688> [https://perma.cc/4BCD-7ZYA].

292. *Execution Descriptions*, *supra* note 233.

293. Hall, *supra* note 288 (statement by H. Mark Stichel).

294. *Execution Descriptions*, *supra* note 233.

method.<sup>295</sup> Nitrogen hypoxia would kill inmates by replacing oxygen with “a gas mixture of pure nitrogen.”<sup>296</sup> The lack of oxygen would cause the brain to stop producing brain waves after about thirty seconds, and after another two or three minutes, the heart would stop beating.<sup>297</sup> There is not yet a suggested protocol for administering nitrogen to inmates.<sup>298</sup> Still, it is likely inmates will be restrained and will either be placed into a gas chamber or will have some sort of mask or hood strapped onto their faces.<sup>299</sup> Nitrogen will then be pumped into the gas chamber or mask until the inmates die.<sup>300</sup>

Proponents for nitrogen hypoxia believe this method will be effective and painless.<sup>301</sup> Nitrogen hypoxia resulted in eighty-five industrial accidents between 1992 and 2002, killing eighty people and injuring another fifty.<sup>302</sup> Investigators explained: “Nitrogen is a silent killer . . . . You will not recognize you’re in trouble in time to take action to save yourself.”<sup>303</sup> Nitrogen hypoxia victims also do not experience anxiety or discomfort because they do not feel as though they are being strangled.<sup>304</sup> While lack of discomfort may lead to detrimental results in industrial settings,<sup>305</sup> it seems ideal for states that want to administer capital punishment without tormenting inmates.<sup>306</sup>

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295. See, e.g., Lauren Gill, *Using Nitrogen Gas for Executions Is Untested and Poorly Understood. Three States Plan to Do It Anyway.*, THE APPEAL (Oct. 25, 2019), <https://theappeal.org/using-nitrogen-gas-for-executions-is-untested-and-poorly-understood-three-states-plan-to-do-it-anyway/> [https://perma.cc/U69Q-C46V]. As of October 25, 2019, Oklahoma, Mississippi, and Alabama had authorized nitrogen hypoxia use in capital punishment, but the drug has not yet been used in an execution. *Id.*

296. Jack Shuler, *Can Executions Be More Humane?*, THE ATLANTIC (Mar. 20, 2015), <https://www.theatlantic.com/politics/archive/2015/03/can-executions-be-more-humane/388249> [https://perma.cc/2VUC-634A].

297. *Id.*

298. See Gill, *supra* note 295.

299. *Id.*; Ben Botkin, *How Nitrogen Executions Could Go Wrong*, OKLA. WATCH (Oct. 28, 2019), <https://oklahomawatch.org/2018/07/17/puzzle-of-nitrogen-execution-could-present-issues-for-state/> [https://perma.cc/V8LN-LXNX].

300. Botkin, *supra* note 299.

301. See *id.* (suggesting that inmates executed by nitrogen gas would lose consciousness and be oblivious to pain after a few breaths, with death following in four to five minutes).

302. Josh Cable, *Nitrogen: The Silent Killer*, EHS TODAY (Sept. 20, 2006), <https://www.ehstoday.com/industrial-hygiene/article/21909148/nitrogen-the-silent-killer> (last visited May 20, 2021).

303. *Id.*

304. Shuler, *supra* note 296 (statement of former Assistant Attorney General of Palau Michael Copeland).

305. See Cable, *supra* note 302.

306. See Gorvett, *supra* note 1.



Though proponents believe nitrogen hypoxia is “foolproof”<sup>307</sup> and “a perfect killing device,”<sup>308</sup> opponents worry there are many ways for nitrogen hypoxia to fail in executions.<sup>309</sup> First, although nitrogen hypoxia victims in the workplace do not experience discomfort or anxiety, inmates would likely “be in a state of panic” and could prolong the process by holding their breath.<sup>310</sup> If inmates are forced to wear a mask secured tightly around their faces, they may feel increased anxiety, which could lead to symptoms of suffocation.<sup>311</sup>

Second, for an effective execution by nitrogen hypoxia, oxygen must be unable to enter the mask or gas chamber and nitrogen must be unable to escape.<sup>312</sup> The nitrogen administered must be pure nitrogen, as diluted nitrogen could cause a delay in unconsciousness or death.<sup>313</sup> Because states that have adopted nitrogen hypoxia executions have not yet decided how to effectuate them,<sup>314</sup> it is unclear how executioners would ensure masks and gas chambers are sealed tight enough to prevent oxygen from coming in and nitrogen from going out.<sup>315</sup> Notably, nitrogen is odorless and tasteless, and if it escapes, it could kill executioners in close proximity.<sup>316</sup>

Even if states implement a perfect nitrogen hypoxia method that will not allow leaks and will execute inmates quickly and painlessly, the general public is not likely to accept nitrogen hypoxia as a viable execution method.<sup>317</sup> When Oklahoma declared it would begin using nitrogen hypoxia, opponents nationwide “compared the proposal to Nazi gas chambers.”<sup>318</sup> Due to this widespread distaste, Oklahoma struggled to find a manufacturer willing to sell a device that would pump nitrogen into an inmate’s body.<sup>319</sup> Oklahoma’s attorney general explained that, if the state is unable to obtain the necessary

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307. Gill, *supra* note 295.

308. Gorvett, *supra* note 1.

309. See Charles Blanke, *Death by Nitrogen Should Not Be America’s New Capital Punishment Method*, NEWSWEEK (June 1, 2018, 6:25 AM), <https://www.newsweek.com/death-nitrogen-should-not-be-americas-new-capital-punishment-method-opinion-940211> [<https://perma.cc/9JPB-C2FV>].

310. Gill, *supra* note 295.

311. See Blanke, *supra* note 309.

312. See Botkin, *supra* note 299.

313. *Id.*

314. See Gill, *supra* note 295.

315. Botkin, *supra* note 299.

316. *Id.*

317. See *id.*

318. *Id.*

319. Nolan Clay, *Executions by Gas Stalled Indefinitely While State Seeks Willing Seller of Device*, OKLAHOMAN (Jan. 27, 2019, 5:00 AM), <https://oklahoman.com/article/5621219/executions-by-gas-stalled-indefinitely-while-state-seeks-willing-seller-of-device> [<https://perma.cc/WVC4-88HD>].

equipment, it may build the equipment itself.<sup>320</sup> Assuming states successfully procure the necessary equipment, critics argue nitrogen hypoxia is an experiment such that inmates would be “human guinea pigs.”<sup>321</sup>

While nitrogen hypoxia may prove to be more humane than lethal injection, death penalty opponents argue “the death penalty is not a humane act.”<sup>322</sup> In 2019, South Carolina Senator Gerald Malloy introduced Senate Bill 58, which proposed removing the death penalty.<sup>323</sup> While this Bill initially failed, it was reintroduced as Senate Bill 52 and, as of April 20, 2021, has been referred to the Senate Judiciary Committee.<sup>324</sup> Perhaps the Bill will gain traction if the secrecy statute is not implemented. After all, when confronted with the idea that inmates are likely to be electrocuted, perhaps legislators will advocate for life in prison rather than such a “barbaric” execution method.

American citizens already support this trend. In 2019, 60% of survey respondents believed life imprisonment was a better punishment for murder than the death penalty, while only 36% felt the opposite.<sup>325</sup> This is in stark contrast to the 1980s and 1990s, when 60% of respondents believed the death penalty was a better punishment than life imprisonment.<sup>326</sup> Even in 2014, only 45% of respondents believed life imprisonment was a better punishment.<sup>327</sup> It seems that, as lethal injection drugs have become more scarce and torturous, public opinion on the preferred method has switched.<sup>328</sup>

## V. CONCLUSION

In its desperate attempt to carry out the death penalty after its nine-year hiatus, the South Carolina General Assembly proposed a secrecy statute and claimed it would allow legitimate pharmaceutical companies to provide properly made drugs for the state’s use in humane executions. However,

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320. *Id.*

321. *E.g.*, Stephen Cooper, *Sick and Shrouded in Secrecy: Alabama’s Contract to Gas Humans to Death*, COUNTERPUNCH (Nov. 5, 2019), <https://www.counterpunch.org/2019/11/05/sick-and-shrouded-in-secrecy-alabamas-contract-to-gas-humans-to-death/> [<https://perma.cc/KL L2-U8FK>].

322. Gorvett, *supra* note 1.

323. S. 58, 2019–2020 Gen. Assemb., 123d Sess. (S.C. 2019).

324. S. 52, 2021–2022 Gen. Assemb., 124th Sess. (S.C. 2021).

325. Jeffrey M. Jones, *Americans Now Support Life in Prison Over Death Penalty*, GALLUP (Nov. 25, 2019), <https://news.gallup.com/poll/268514/americans-support-life-prison-death-penalty.aspx> [<https://perma.cc/ZR8C-T667>]. South Carolinians tend to support the death penalty at a higher rate than the United States as a whole, as two-thirds of South Carolinians still supported the death penalty in 2018. *Latest Winthrop Poll Covers Trump, State Leaders and Economy*, WINTHROP UNIV. (Feb. 28, 2018), <https://www.winthrop.edu/news-events/latest-winthrop-poll-covers-trump-state-leaders-and-economy.aspx> [<https://perma.cc/5FFM-S6UR>].

326. *See* Jones, *supra* note 325.

327. *Id.*

328. *See id.*

nothing suggests South Carolina will deviate from the trends that follow these statutes: undermining pharmaceutical companies, enticing compounding pharmacies to create risky replacement drugs, or both. Further, if a secrecy statute is enacted, the state will become yet another source of stockpiling lethal injection drugs, keeping them out of the hands of sick hospital patients who desperately need them—particularly during a national pandemic that has devastated, and continues to devastate, South Carolina’s population and economy. In this way, the state will signal to innocent citizens that their lives are less important than the deaths of inmates.

If South Carolina does not enact a secrecy statute, electrocution may become the default execution method. However, because electrocution has long been considered barbaric and because Americans have an overall aversion to causing unnecessary pain through the death penalty, South Carolina should abolish the death penalty.