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## Courts, Culture, and the Lethal Injection Stalemate

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## COURTS, CULTURE, AND THE LETHAL INJECTION STALEMATE

ERIC BERGER\*

### ABSTRACT

*The Supreme Court's 2019 decision in Bucklew v. Precythe reiterated the Court's great deference to states in Eighth Amendment lethal injection cases. The takeaway is that when it comes to execution protocols, states can do what they want. Events on the ground tell a very different story. Notwithstanding courts' deference, executions have ground to a halt in numerous states, often due to lethal injection problems. State officials and the Court's conservative Justices have blamed this development on "anti-death penalty*

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*activists” waging “guerilla war” on capital punishment. In reality, though, a variety of mostly uncoordinated actors motivated by a range of distinct norms has contributed to states’ lethal injection woes. These actors, such as doctors, pharmaceutical companies, and institutional investors, follow their own professional incentives, usually unrelated to the morality of capital punishment.*

*States’ recent execution difficulties raise important questions about the future of the Eighth Amendment and the American death penalty. As certain lethal injection protocols and executions themselves become less common, future courts eventually might reconsider their deference in this area. The Eighth Amendment, after all, encompasses “evolving standards of decency,” which courts often measure with reference to changing state practices. Though constitutional doctrine has played only a bit part in the execution decline, that decline could eventually reshape constitutional doctrine.*

*This story also complicates long-accepted constitutional theories. While the traditional view is that federalism maximizes state policy choices so long as courts and Congress do not interfere, the lethal injection stalemate shows how nongovernmental actors, even uncoordinated ones, can undermine state policies. Courts and the political branches in some states stand united in support of capital punishment. It is, therefore, noteworthy that unorganized actors pursuing their own institutional objectives have obstructed executions and even cast new long-term doubt on previously entrenched penological practices.*

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## INTRODUCTION

For the third time in about a decade, the U.S. Supreme Court in 2019 upheld a state lethal injection protocol against an Eighth Amendment challenge. In *Bucklew v. Precythe*,<sup>1</sup> the Court, by a 5-4 vote, reiterated the great deference it extended to states in *Baze v. Rees*<sup>2</sup> and *Glossip v. Gross*.<sup>3</sup> The *Baze-Glossip-Bucklew* trilogy (or *Bucklew* trilogy) articulates an Eighth Amendment test that minimizes the potential for judicial interference in state lethal injection procedures.<sup>4</sup> The short takeaway is that states enjoy broad leeway to design and implement lethal injection protocols.<sup>5</sup> States can do what they want.

A glance at recent newspapers, however, tells a different story. Far from carrying out executions at will, many death penalty states are struggling to execute at all.<sup>6</sup> Lethal injection problems did not always interfere with executions so regularly.<sup>7</sup> *Bucklew* demonstrates that the judiciary's attitudes towards these issues have not changed. Nor has some states' resolve to carry out executions. Still, execution rates in the United States are at their lowest in decades.<sup>8</sup> While numerous factors have contributed to this sharp decline, problems with lethal injection are a big part of the story.

The question, then, is why states struggle to carry out executions when the Supreme Court has been so deferential in this area. Many states have the death penalty and want to use it. Usually, when neither the federal government nor courts interfere, states can carry out their preferred policies.<sup>9</sup> This maxim has not been true in the case of lethal injection.<sup>10</sup> Why has the *Bucklew* trilogy mattered so little?

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1. 139 S. Ct. 1112, 1125 (2019).

2. 553 U.S. 35, 50-51 (2008).

3. 135 S. Ct. 2726, 2737-38 (2015).

4. See *Bucklew*, 139 S. Ct. at 1125.

5. See *infra* Part I.A.

6. See *infra* Part I.B.

7. See *infra* Part I.B.

8. See *infra* Part I.B.1.

9. See *infra* notes 414-15 and accompanying text.

10. See *infra* Part III.B.1.

Various observers offer different theories for this turn of events, all incomplete. A majority of Supreme Court Justices blame the decline in executions on anti-death penalty “[a]ctivists”<sup>11</sup>—that is, persons whose primary ideological commitment is to obstructing and ultimately ending capital punishment.<sup>12</sup> At oral argument in *Glossip*, Justice Alito even accused these activists of waging “guerilla war against the death penalty.”<sup>13</sup> Some state officials, hoping to persuade courts to leave their execution plans alone, advance similar arguments.<sup>14</sup> This explanation carries some truth but is woefully incomplete.

Professors Gibson and Lain offer a more sophisticated and scholarly theory. They contend that European governments are largely responsible for states’ lethal injection problems.<sup>15</sup> These governments forbid pharmaceutical companies in Europe from distributing drugs that could end up in American death chambers, thus accomplishing abolitionist ends through the “international moral marketplace.”<sup>16</sup> Their admirable study sheds insightful light on an important development, but it too provides a single explanation for a phenomenon requiring a multifarious one.

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11. See *Glossip v. Gross*, 135 S. Ct. 2726, 2733 (2015) (blaming “[a]ctivists” for interfering with lethal injection executions in the United States).

12. See *Activism*, WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY (1986) (defining “activism” as “a doctrine or practice that emphasizes direct vigorous action (as a mass demonstration) in support of or opposition to one side of a controversial issue”).

13. See Transcript of Oral Argument at 14, *Glossip*, 135 S. Ct. 2726 (No. 14-7955) (question of Alito, J.) [hereinafter Transcript of Oral Argument] (“[I]s it appropriate for the judiciary to countenance what amounts to a guerilla war against the death penalty ... to make it impossible for the States to obtain drugs that could be used to carry out capital punishment with little, if any, pain?”).

14. See Juan A. Lozano, *Doctors: Execution Drugs Could Help COVID-19 Patients*, AP NEWS (Apr. 21, 2020), <https://apnews.com/29719f13fe4c63b3625cc178fa1d0b50> [<https://perma.cc/M9ZE-RTDT>] (noting that state officials complain that “guerilla warfare being waged by anti-death penalty activists” is interfering with lawful executions); *infra* note 176 and accompanying text. Even conservative think tanks have advanced this argument. See Erik Eckholm, *Pfizer Blocks the Use of Its Drugs in Executions*, N.Y. TIMES (May 13, 2016), <https://www.nytimes.com/2016/05/14/us/pfizer-execution-drugs-lethal-injection.html> [<https://perma.cc/2ZKA-UTSH>] (quoting a Heritage Foundation criminal justice expert as blaming execution drug shortage on “special interest groups”).

15. See James Gibson & Corinna Barrett Lain, *Death Penalty Drugs and the International Moral Marketplace*, 103 GEO. L.J. 1215, 1217 (2015) (“European governments are the true instigators here, using private firms as their agents in the international market for death penalty drugs.”).

16. *Id.*

In fact, the people and institutions whose actions have impeded executions in recent years are both numerous and diverse. They are motivated by a wide range of distinct, albeit related, norms, and they often do not take a position on the morality or wisdom of capital punishment.<sup>17</sup> Pharmaceutical corporations, institutional investors, doctors, nurses, medical associations, capital lawyers, foreign governments, federal drug regulators, reporters, academics, and others—including, yes, abolitionist activists—all play a part.<sup>18</sup> To be sure, some of these actors share a general aversion to the death penalty, but few of them are conspiring with the purpose of halting executions. To the contrary, each group has its own distinct motivations and goals, and they rarely coordinate with each other. Indeed, far from working together, these actors sometimes deliberately avoid collaborating, lest they compromise their own institutional interests.

To be clear, the norms driving these actors are nothing new. Capital lawyers, for instance, have worked on these issues for decades and even achieved some modest victories in the past.<sup>19</sup> For a variety of complicated reasons, though, over roughly the past dozen years, these many groups' collective actions have dramatically slowed the pace of executions. Past limited victories helped pave the way for more consequential developments. A few flames became a larger fire.

This fire has not, however, consumed capital punishment altogether. Pro-death penalty norms remain strong in parts of the country and have helped preserve the death penalty, even as numerous competing norms and forces have chipped away at it.<sup>20</sup> Ultimately, the collision of these conflicting norms has resulted in a lethal injection stalemate.

I use the word “stalemate” to describe the enduring struggle between death penalty supporters and opponents that has no victor in sight.<sup>21</sup> Capital punishment has suffered some serious blows in recent years, but it persists. The death penalty's supporters have

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17. *See infra* Part II.A.

18. *See infra* Part II.A.

19. *See infra* Part II.A.6; Part III.B.3.

20. *See infra* Part II.C.

21. *Cf. Stalemate*, WEBSTER'S, *supra* note 12 (defining “stalemate” as “a drawn contest: DEADLOCK”).

been unable to revive the practice, but its opponents also have not managed to kill it altogether. The status quo is an ugly draw.

Some basic facts illustrate the death penalty's decline. Twenty-eight states have the death penalty,<sup>22</sup> but only twelve have carried out an execution since the start of 2015.<sup>23</sup> Executions and capital sentences have declined steeply over the past decade.<sup>24</sup> Public support for the death penalty has also declined, as has the number of death penalty states.<sup>25</sup>

Still, it is premature for abolitionists to celebrate the death penalty's demise. Capital punishment is a state and local institution,<sup>26</sup> and public support for it remains strong in some states.<sup>27</sup> There are still over twenty executions annually in the United States,<sup>28</sup> and if some struggling death penalty jurisdictions are able to resume executions again, there could be many more. Of course, the U.S. Supreme Court could outlaw capital punishment, as it temporarily did in 1972 in *Furman v. Georgia*.<sup>29</sup> Given the Court's composition today, however, it is wishful thinking to imagine the current Court doing anything of the kind.

Today's stalemate does not satisfy anyone. Capital punishment's supporters lament the infrequency of executions and the long delays inherent in the system. Opponents lament that the practice

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22. See *State by State*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state> [https://perma.cc/SW26-RY42].

23. See *Execution Database*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/execution-database> [https://perma.cc/C3D9-FJZQ] (enter the date "01/01/2015" in the date box; then select "apply" to generate list).

24. See CAROL S. STEIKER & JORDAN M. STEIKER, *COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT* 193 (2016); *Death Sentences in the United States Since 1977*, DEATH PENALTY INFO. CTR. [hereinafter *Death Sentences*], <https://deathpenaltyinfo.org/facts-and-research/sentencing-data/death-sentences-in-the-united-states-from-1977-by-state-and-by-year> [https://perma.cc/85JD-WTW5]; *Executions by State and Region Since 1976*, DEATH PENALTY INFO. CTR. [hereinafter *Executions by State*], <https://deathpenaltyinfo.org/executions/executions-overview/number-of-executions-by-state-and-region-since-1976> [https://perma.cc/JB6B-RQQ8].

25. See BRANDON L. GARRETT, *END OF ITS ROPE: HOW KILLING THE DEATH PENALTY CAN REVIVE CRIMINAL JUSTICE* 8 (2017); STEIKER & STEIKER, *supra* note 24, at 193.

26. See Adam M. Gershowitz, *Statewide Capital Punishment: The Case for Eliminating Counties' Role in the Death Penalty*, 63 VAND. L. REV. 307, 309 (2010); Stephen F. Smith, *Localism and Capital Punishment*, 64 VAND. L. REV. EN BANC 105, 110-13 (2011) (discussing the role local authorities play in capital cases).

27. See *infra* notes 132-36 and accompanying text.

28. See *infra* note 106 and accompanying text.

29. 408 U.S. 238, 239-40 (1972).



continues at all and cite voluminous evidence of the system's arbitrariness and injustice. The opponents have certainly gained substantial ground in recent years, but given the strong support for the death penalty in many states, particularly in the South,<sup>30</sup> it seems unlikely that total abolition will occur in the foreseeable future.

Numerous factors help explain the death penalty decline; a couple of recent, excellent books address this topic.<sup>31</sup> A significant cause, though, is the narrower—and often misunderstood—lethal injection stalemate.<sup>32</sup> Some states have had difficulty obtaining drugs for their lethal injection protocols, resulting in serious delays. Other states have badly botched executions and then halted further executions for years as they tried to figure out their next move.<sup>33</sup> States themselves have often compounded their own problems, haphazardly throwing together new protocols that heighten the risk of botches and open the door to time-consuming litigation.<sup>34</sup>

These lethal injection problems, in turn, have helped undermine support for capital punishment more generally. The death penalty is exorbitantly expensive with or without executions.<sup>35</sup> In states where executions have slowed to a crawl, people have begun to question the point of having the system at all, especially given the alternative of life in prison without the possibility of parole.<sup>36</sup> Well-

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30. See *infra* notes 128-36 and accompanying text.

31. See generally GARRETT, *supra* note 25, at 79-105; STEIKER & STEIKER, *supra* note 24, at 193.

32. By one prominent scholar's count, lethal injection problems have put executions on hold in twelve states. See GARRETT, *supra* note 25, at 202.

33. See *infra* Part I.B.2.

34. See STEIKER & STEIKER, *supra* note 24, at 16.

35. See Kelly Phillips Erb, *Considering the Death Penalty: Your Tax Dollars at Work*, FORBES (May 1, 2014, 12:12 AM), <https://www.forbes.com/sites/kellyphillipserb/2014/05/01/considering-the-death-penalty-your-tax-dollars-at-work> [<https://perma.cc/Y3R6-8CC3>] (discussing the high cost of the death penalty); *Costs*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/policy-issues/costs> [<https://perma.cc/JV99-9Z7G>] (compiling studies about the cost of the death penalty in comparison to alternative punishments).

36. See, e.g., GARRETT, *supra* note 25, at 95-97; Bill Mears, *Death Penalty in the United States Gradually Declining*, CNN POLITICS (Dec. 19, 2013, 12:54 AM), <https://www.cnn.com/2013/12/19/politics/death-penalty-us/index.html> [<https://perma.cc/33R6-7CWL>] (noting that states and people are reconsidering capital punishment in light of recurring delays); Amber Widgery, *Executions Are Down, While State Attention to Capital Punishment Is Up*, NAT'L CONF. OF STATE LEGISLATURES (June 7, 2019), <https://www.ncsl.org/research/civil-and-criminal-justice/death-penalty-on-trial.aspx> [<https://perma.cc/Y29T-ZFBX>].

publicized problems with lethal injection have become a symbol of capital punishment's broader deficiencies, which include, among others, wrongful convictions, racial bias, arbitrary application, and cost.<sup>37</sup> These problems, in turn, likely help dissuade medical personnel and pharmaceutical companies from participating in executions. After all, as public support for capital punishment drops, private entities participate in the capital system at their own peril.<sup>38</sup>

It is also risky politics for state officials to pursue executions too zealously, at least in those states where support for capital punishment is only modest. State officials routinely claim they cannot get execution drugs.<sup>39</sup> Sometimes, this claim is probably correct, but some states continue to execute regularly,<sup>40</sup> so the drugs are not impossible to obtain. As criticisms of capital punishment mount, state officials in ambivalent death penalty states have an increased incentive to keep a low profile on the issue and not go to great lengths to resume executions.<sup>41</sup> In short, there is likely a feedback loop between the death penalty's well-publicized problems, the decline in death sentences, botched executions, other lethal injection problems, and the recent sharp execution decline.<sup>42</sup>

This story is a complicated one, with influences running in multiple directions. It is striking, however, that courts play only a bit part in the drama. To be sure, the judiciary is not altogether absent. Capital inmates frequently challenge lethal injection protocols, often on Eighth Amendment grounds.<sup>43</sup> Every now and then, those inmates even win (though only rarely on Eighth Amendment issues).<sup>44</sup> Usually, however, lower courts follow the U.S. Supreme Court's lead and defer to the states in these cases.<sup>45</sup> It turns out that

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37. See *Glossip v. Gross*, 135 S. Ct. 2726, 2756, 2759, 2764 (2015) (Breyer, J., dissenting); *infra* notes 337-39 and accompanying text.

38. See *infra* Parts II.A.3, 5.

39. See *infra* Part I.B.2.

40. See *infra* Part I.B.2.

41. See *infra* Part II.B.

42. See GARRETT, *supra* note 25, at 203.

43. See, e.g., cases cited *infra* notes 197-201 and accompanying text.

44. See cases cited *infra* notes 198-201 and accompanying text.

45. See, e.g., *Bucklew v. Precythe*, 139 S. Ct. 1112, 1125 (2019); *Glossip v. Gross*, 135 S. Ct. 2726, 2732 (2015); *Baze v. Rees*, 553 U.S. 35, 48 (2008) (plurality opinion) ("This Court has never invalidated a State's chosen procedure for carrying out a sentence of death as the infliction of cruel and unusual punishment."); *infra* Part I.A.

courts saying “yes” to executions does not much matter when so many others say “no.”

This Article adds three significant contributions to the scholarly literature in this area. First, the Article identifies the various actors obstructing lethal injection and illustrates the great variety of their motives and goals. Contrary to the Court’s assertions, anti-death penalty “activists” are hardly the only or even primary culprit behind states’ lethal injection difficulties.<sup>46</sup> Nor are European governments. To the contrary, many different institutions and people contribute to states’ problems.<sup>47</sup> These actors each respond to different motivations, sometimes unrelated to abolitionists’ categorical moral opposition to capital punishment. A closer study of these various actors and motives can help us better understand why so many states today struggle to carry out executions.

Second, this Article considers implications of these developments for the future of the death penalty and Eighth Amendment doctrine. Lethal injection problems are closely related to the death penalty’s broader problems. Deep flaws in the capital system have likely helped dissuade many people and institutions from assisting with lethal injection.<sup>48</sup> Consequently, many states cannot carry out executions.

These lethal injection problems, in turn, could have long-term consequences for the death penalty. As more states struggle to carry out executions, increasing numbers might conclude that capital punishment is too costly and unreliable to continue. Over the past thirteen years, ten states have abolished the death penalty, and another three have in place gubernatorial moratoria.<sup>49</sup> The way things are going, other states might abolish it as well.<sup>50</sup> If this phenomenon continues, it could prompt judges to reevaluate their approaches to Eighth Amendment cases. After all, if the death

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46. See Eric Berger, *Gross Error*, 91 WASH. L. REV. 929, 988-89 (2016) (discussing Justice Alito’s views); Transcript of Oral Argument, *supra* note 13, at 14, and accompanying text.

47. See *infra* Part II.A.

48. See *infra* note 345 and accompanying text.

49. See *State by State*, *supra* note 22.

50. See, e.g., *Several States Consider Repealing or Reforming Death Penalty Laws*, A.B.A. (Mar. 11, 2020), [https://www.americanbar.org/groups/committees/death\\_penalty\\_representation/project\\_press/2020/spring/state-repeal-efforts-2020/](https://www.americanbar.org/groups/committees/death_penalty_representation/project_press/2020/spring/state-repeal-efforts-2020/) [<https://perma.cc/4ZYY-KLKW>] (listing several states considering abolition or serious capital punishment reform).

penalty or particular execution methods become increasingly “unusual,”<sup>51</sup> courts might come to see capital punishment, or some features of it, as incompatible with “evolving standards of decency.”<sup>52</sup> Eighth Amendment doctrine has done little to shape the lethal injection stalemate, but, over the long haul, that stalemate might reshape Eighth Amendment doctrine.<sup>53</sup>

Third, this story complicates important constitutional and political theory. We are used to thinking that federalism maximizes state policy choices so long as courts and Congress do not interfere, but the lethal injection stalemate demonstrates that non-governmental and foreign actors can undermine state policies.<sup>54</sup> In several states, courts and the political branches stand united in support of capital punishment. Nevertheless, other actors pursuing their own institutional objectives have obstructed executions and even cast long-term doubt on previously entrenched penological practices.

The *Bucklew* trilogy, to be sure, is still good law, but judicial decisions are not the place to look if you want to understand lethal injection in the United States. Whereas some influential scholarship examines how popular arguments about constitutional meaning pave the way for changed constitutional interpretations,<sup>55</sup> the story here is how various actors have diminished judicial rulings’ significance. This development is especially striking given that the various actors frustrating the Court’s preferences are mostly working independently.<sup>56</sup> We typically think that coordinated interests are most successful in effecting policy reform and political change. In this case, however, there is minimal collaboration between the various relevant actors, and yet their policy impact has still been sizable.

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51. U.S. CONST. amend. VIII.

52. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

53. *See infra* Part III.A.

54. *See infra* Part III.B.1.

55. *See, e.g.*, BARRY FRIEDMAN, *THE WILL OF THE PEOPLE* 14 (2009) (“The [J]ustices recognize the fragility of their position, occasionally they allude to it, and for the most part (though, of course, not entirely) their decisions hew rather closely to the mainstream of popular judgment about the meaning of the Constitution.”).

56. *See infra* Part III.B.2.

Part I of this Article briefly examines *Bucklew* and the Court's other rulings in this area. It then explores the death penalty stalemate and the related but distinct lethal injection stalemate. Part II describes the many norms and actors that shape the lethal injection stalemate, focusing on the various forces that conspire to obstruct lethal injection executions. It then explains how the lethal injection stalemate and broader death penalty problems help reinforce each other. The Part then turns to pro-death penalty norms that help preserve the practice. Finally, Part III considers potential implications of these phenomena for the death penalty, Eighth Amendment doctrine, and constitutional theory more generally.

## I. THE LETHAL INJECTION LANDSCAPE

### A. A View from the Court

The U.S. Supreme Court has decided three Eighth Amendment method-of-execution challenges in little more than a decade: *Baze*, *Glossip*, and *Bucklew*. In each decision, the Court rejected the plaintiff's Eighth Amendment claim, upholding lethal injection procedures in Kentucky, Oklahoma, and Missouri, respectively.<sup>57</sup> Collectively, the cases erect steep hurdles for the lethal injection plaintiff.

It is beyond the scope of this Article to offer a close doctrinal analysis of these cases,<sup>58</sup> but a brief discussion will help set the stage. The *Bucklew* trilogy repeatedly emphasized that courts owe "a measure of deference to a State's choice of execution procedures."<sup>59</sup> The Court in these cases reasoned that "[t]he Constitution

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57. See *Bucklew v. Precythe*, 139 S. Ct. 1112, 1118-19 (2019); *Glossip v. Gross*, 135 S. Ct. 2726, 2731 (2015); *Baze v. Rees*, 553 U.S. 35, 41 (2008) (plurality opinion).

58. For closer readings of *Baze* and *Glossip*, see Eric Berger, *Lethal Injection and the Problem of Constitutional Remedies*, 27 YALE L. & POL'Y REV. 259 (2009); Berger, *supra* note 46; Deborah W. Denno, *Lethal Injection Chaos Post-Baze*, 102 GEO. L.J. 1331 (2014).

59. *Bucklew*, 139 S. Ct. at 1125 (internal quotation marks omitted) (quoting *Baze*, 553 U.S. at 51-52).

allows capital punishment,”<sup>60</sup> and that there must therefore be a way for states to carry out executions.<sup>61</sup>

To succeed on an Eighth Amendment lethal injection challenge, “a prisoner must show a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain and that the State has refused to adopt without a legitimate penological reason.”<sup>62</sup> The lethal injection plaintiff, thus, must not only demonstrate the dangers of the current execution method but also proffer an alternative method that would “significantly reduce” the risk of severe pain.<sup>63</sup> The inquiry, *Bucklew* emphasized, is “necessarily comparative.”<sup>64</sup> Hence, a court ought not invalidate even an obviously excruciating execution method unless the plaintiff proposes an alternative method that is “feasible and readily implemented.”<sup>65</sup>

*Bucklew* itself was a narrow case about one inmate’s as-applied claim that the State’s protocol would cause him excruciating pain due to his rare medical condition.<sup>66</sup> The Court, nevertheless, took the opportunity to ratchet up the Eighth Amendment standard further. Specifically, *Bucklew* added to *Baze* and *Glossip* the point that the Eighth Amendment’s primary concerns are methods of execution that “superadd[ ]” “terror, pain, or disgrace” to a sentence of death.<sup>67</sup> To the extent this language seems to permit non-gratuitous pain (as distinct from pain “superadded” atop a death sentence), *Bucklew* took a very deferential doctrine and made it even more deferential.

The Court justified these moves by emphasizing that sovereign states, not federal courts, should design execution protocols. “[T]he Eighth Amendment does not guarantee a prisoner a painless death,” *Bucklew* reminds us.<sup>68</sup> Consequently, the “Court has yet to hold that

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60. *Id.* at 1122.

61. *Baze*, 553 U.S. at 47; see also *Bucklew*, 139 S. Ct. at 1122-23.

62. *Bucklew*, 139 S. Ct. at 1125 (first citing *Glossip*, 135 S. Ct. at 2732-38; and then citing *Baze*, 553 U.S. at 52).

63. *Id.* (first citing *Glossip*, 135 S. Ct. at 2732-38; and then citing *Baze*, 553 U.S. at 52).

64. *Id.* at 1126.

65. *Id.* at 1125 (first citing *Glossip*, 135 S. Ct. at 2732-38; and then citing *Baze*, 553 U.S. at 52).

66. *Id.* at 1120.

67. *Id.* at 1123 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES \*370).

68. *Id.* at 1124.

a State's method of execution qualifies as cruel and unusual."<sup>69</sup> This approach affords a "measure of deference to a State's choice of execution procedures," lest courts become "boards of inquiry charged with determining 'best practices' for executions."<sup>70</sup>

The *Bucklew* trilogy erects several high hurdles for the lethal injection plaintiff. For example, it appears that if a court deems a plaintiff's proffered alternative not "readily implemented," a state may proceed with an execution, even if its method inflicts excruciating pain.<sup>71</sup> As Justice Sotomayor explained in her *Glossip* dissent, such a test would seem to permit the State in some circumstances to burn someone at the stake.<sup>72</sup> Such an outcome seems at odds with the Eighth Amendment's purpose and language, but, as Justice Sotomayor contended, it also seems to follow from the *Glossip* majority opinion.<sup>73</sup> Justice Alito, for his part, contested Justice Sotomayor's characterization but did not offer an alternative reading of his own *Glossip* opinion.<sup>74</sup>

The *Bucklew* trilogy has also required that plaintiffs prove that the challenged protocol is "sure or very likely to cause serious illness and needless suffering."<sup>75</sup> Under such a standard, protocols that cause agonizing suffering half the time would also seem to pass constitutional muster despite sharp tension with earlier Eighth Amendment doctrine.<sup>76</sup> It seems hard to believe that the Constitution would permit an execution method that inflicts excruciating suffering every other time, but the Court's "sure or very likely" language seems to require such an absurdly high standard.

Justice Kavanaugh's *Bucklew* concurrence did offer one bit of hope for plaintiffs. He explained that plaintiffs' proposed "alternative method of execution need not be authorized under current state law."<sup>77</sup> An inmate, therefore, can proffer a method of execution even

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69. *Id.*

70. *Id.* at 1125 (quoting *Baze*, 553 U.S. at 51-52 nn.2-3).

71. *Id.* at 1129.

72. *Glossip v. Gross*, 135 S. Ct. 2726, 2781, 2795 (2015) (Sotomayor, J., dissenting).

73. *Id.*

74. *See id.* at 2746 (discussing Justice Sotomayor's dissent).

75. *See id.* at 2737 (quoting *Baze*, 553 U.S. at 50).

76. *See Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463 (1947) (plurality opinion); *In re Kemmler*, 136 U.S. 436, 446-47 (1890); Berger, *supra* note 46, at 980-82.

77. *Bucklew v. Precythe*, 139 S. Ct. 1112, 1136 (2019) (Kavanaugh, J., concurring).



if that inmate's own state legislature has not yet authorized that method.

This point is something of a silver lining for inmate plaintiffs—but a very thin one. The *Bucklew* majority made clear that “choosing not to be the first to experiment with a new method of execution is a legitimate reason to reject it.”<sup>78</sup> As a result, inmates functionally gain nothing by proffering novel methods that have not been used before.

Moreover, even when inmates propose methods that another state has used, state officials no doubt would contend that in *their* state a proffered alternative would be too difficult to assemble. Such a method, according to these officials, could not be “readily implemented.” State officials similarly would insist that plaintiffs propose their alternative with great specificity.

Given courts' great deference in this area, the states' defenses are likely to win the day. In *Bucklew* itself, the majority, over a vigorous dissent, held that the plaintiff had not offered enough specifics about his proposed alternative (inhalation of nitrogen gas).<sup>79</sup> Even under the most generous reading, *Bucklew*, then, is hardly plaintiff friendly.

The *Bucklew* trilogy's cramped reading of the Eighth Amendment might reflect the Court's growing frustration at its own impotence in this area. Each time the Court gets a lethal injection case, it announces a little more fervently that states should be permitted to carry out executions without judicial interference.<sup>80</sup> After each decision, state executions have continued to stall.<sup>81</sup> No wonder Justice Alito seems frustrated. In an era of judicial supremacy, the Supreme Court is used to getting its way. It turns out, though, that there is a lot more to this area than judge-made law.

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78. *Id.* at 1130.

79. Compare *id.* at 1129 (faulting the plaintiff for not presenting evidence on whether the State should administer the nitrogen “using a gas chamber, a tent, a hood, [or] a mask”), with *id.* at 1143 (Breyer, J., dissenting) (contending that the majority's requirements “would amount to an insurmountable hurdle ... [that] could permit States to execute even those who will endure the most serious pain and suffering”).

80. See *id.* at 1124, 1123, 1125; Berger, *supra* note 46, at 932-34; cases cited *supra* notes 68-70 and accompanying text.

81. See *infra* Part I.B.



### B. Stalemates

Despite the *Bucklew* trilogy, many states' efforts to carry out executions have been stymied time and again. It has not always been this way. In 1977, shortly after the Supreme Court reinstated the death penalty in *Gregg v. Georgia*,<sup>82</sup> Oklahoma became the first state to adopt lethal injection.<sup>83</sup> Over the next quarter century, "thirty-seven states followed Oklahoma's lead."<sup>84</sup> Unsurprisingly, some people objected. Capital inmates challenged various facets of these procedures in court.<sup>85</sup> Medical associations issued statements opposing physician participation in lethal injection.<sup>86</sup> Nevertheless, these obstacles were surmountable. The number of annual executions and the proportion of executions by lethal injection each grew, slowly in the 1980s and much more rapidly in the 1990s.<sup>87</sup>

Things began to change in the new century. States started to run into serious lethal injection problems in the 2000s, as lower courts began to take seriously Eighth Amendment and other legal challenges to various states' execution procedures.<sup>88</sup> Between 2006 and 2008, courts granted stays of execution to at least forty capital

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82. 428 U.S. 153 (1976) (plurality opinion).

83. See Deborah W. Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*, 76 *FORDHAM L. REV.* 49, 65 (2007).

84. Eric Berger, *Lethal Injection Secrecy and Eighth Amendment Due Process*, 55 *B.C. L. REV.* 1367, 1376 (2014); see Deborah W. Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocutation and Lethal Injection and What It Says About Us*, 63 *OHIO ST. L.J.* 63, 90-120 (2002).

85. See Denno, *supra* note 84, at 100-05.

86. Denno, *supra* note 83, at 79-84.

87. See *Execution Database*, *supra* note 23 (select year 1999 under "year of execution"; then select "apply" to generate list). Executions by other methods (primarily electrocution) outnumbered those by lethal injection in the 1980s by 75 to 42 respectively. *Compare id.* (select the years 1980-1989 under "year of execution"; then select "lethal injection" under "method"; then select "apply" to generate list), *with id.* (select the years 1980-1989 under "year of execution"; then select "electrocution," "firing squad," "gas," and "hanging" under "method"; then select "apply" to generate list). In the 1990s, lethal injection became the overwhelmingly predominant method of execution. Lethal injection executions in the 1990s outnumbered all the other methods combined, 396 to 82. *Compare id.* (select the years 1990-1999 under "year of execution"; then select "more filters"; then select "lethal injection" under "method"; then select "apply" to generate list), *with id.* (select the years 1990-1999 under "year of execution"; then select "more filters"; then select "electrocution," "firing squad," "gas," and "hanging"; then select "apply" to generate list).

88. See cases cited *infra* notes 198-201 and accompanying text.

inmates who had brought lethal injection challenges.<sup>89</sup> Following the Supreme Court's grant of certiorari in *Baze*, courts granted stays in all lethal injection cases pending the Court's decision.<sup>90</sup>

Many observers expected that the Court's deferential decision in *Baze* would make things much easier for states to resume executions.<sup>91</sup> Almost immediately, however, states began encountering other serious lethal injection problems, such as prominent botched executions and difficulties procuring the necessary drugs. As we shall see, those problems and others have accelerated throughout the 2010s. Today, many death penalty states do not carry out executions at all and others do so only sporadically. To be sure, a few states conduct executions regularly. Texas, in particular, carries out several each year.<sup>92</sup> Nowadays, however, Texas is the exception.

The status quo is a stalemate. Numerous states have official lethal injection protocols, but only a few states are actually able to use them. Death penalty supporters cannot claim victory because many state execution systems have stalled. Death penalty opponents cannot claim victory either because some jurisdictions continue executions and others are attempting or even planning to do so.<sup>93</sup>

This Section documents the stalemate. It begins by summarizing the state of affairs with the death penalty more generally. While this Article focuses on lethal injection, a broader understanding of

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89. See *Baze v. Rees: Stays Granted*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/stories/baze-v-rees-stays-granted> [<https://perma.cc/JCN5-LHXW>].

90. See *id.*

91. See *Baze v. Rees*, 553 U.S. 35, 50-51 (2008) (plurality opinion); *supra* Part I.A. Some states, in fact, started scheduling executions within days of the *Baze* decision. See, e.g., Mike Rosen-Molina, *Georgia Schedules Execution After High Court Lethal Injection Ruling*, JURIST (Apr. 24, 2008, 12:25 PM), <https://www.jurist.org/news/2008/04/georgia-schedules-execution-after-high/> [<https://perma.cc/CWH8-FUN4>].

92. See *Executions by State and Year*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/executions-overview/executions-by-state-and-year> [<https://perma.cc/Z7SC-TGRV>] (indicating that Texas has conducted at least seven executions every year since 1996 and most years many more than seven).

93. As this Article went to press, the federal government carried out three executions, its first executions in seventeen years. See Hailey Fuchs, *For Third Time This Week, the Federal Government Carries out an Execution*, N.Y. TIMES (July 17, 2020), <https://www.nytimes.com/2020/07/17/7s/dustin-honken-federal-execution.html> [<https://perma.cc/6TCU-U7LQ>]; Carrie Johnson, *Federal Executions Set to Resume After 17 Years with 3 Deaths Scheduled Soon*, NPR (July 10, 2020, 9:28 AM), <https://www.npr.org/2020/07/10/889667257/federal-executions-set-to-resume-after-17-years-with-3-deaths-scheduled-soon> [<https://perma.cc/S7FN-PZTH>].

the state of capital punishment provides essential context. We then turn to the lethal injection stalemate, exploring the obstacles states are encountering.

### 1. *The Death Penalty Stalemate*

We are at a curious moment in the history of U.S. capital punishment. On the one hand, a majority of states still have the death penalty.<sup>94</sup> Several states carry out executions on a regular basis,<sup>95</sup> and several others hope to resume regular executions soon.<sup>96</sup> From that perspective, it would appear that the American death penalty is alive and well.

On the other hand, the death penalty is in clear decline and appears more vulnerable than it has been since the U.S. Supreme Court revived it in *Gregg* in 1976.<sup>97</sup> Death sentences are down dramatically in recent years, declining by more than two-thirds since 2000.<sup>98</sup> Between 1981 and 2000, the number of death sentences in the nation topped 223 every single year.<sup>99</sup> Between 1994 and 1996, there were at least 310 death sentences per year.<sup>100</sup>

Since 2000, the number of death sentences has fallen steeply.<sup>101</sup> Starting in 2001, the collective number of death sentences in any given year never came close to reaching 200.<sup>102</sup> The numbers have

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94. See *State by State*, *supra* note 22 (showing that twenty-eight states still have the death penalty).

95. See *Executions by State*, *supra* note 24.

96. See, e.g., Sean Murphy, *Attorney General Says Oklahoma to Resume Executions*, WCTI (Feb. 13, 2020), <https://wcti12.com/news/nation-world/attorney-general-says-oklahoma-to-resume-executions> [<https://perma.cc/FUF7-ZVB6>]; *Arizona to Resume Executions for First Time Since 2014 Lawsuit over Alleged Botched Lethal Injection*, CBS NEWS (July 26, 2019, 11:47 PM) [hereinafter *Arizona to Resume Executions*], <https://www.cbsnews.com/news/arizona-to-resume-executions-for-first-time-since-2014-lawsuit-announced-today-2019-07-26/> [<https://perma.cc/MPK9-USGM>].

97. See *Gregg v. Georgia*, 428 U.S. 153 (1976); STEIKER & STEIKER, *supra* note 24, at 255 (discussing the use of the death penalty since its revival in 1976).

98. GARRETT, *supra* note 25, at 79.

99. See *Death Sentences*, *supra* note 24.

100. *Id.*

101. See *id.* (showing a general decline in death penalties starting in 2001). The death penalty statistics discussed in this Article are current through the end of 2019, unless I indicate otherwise. *Id.*

102. See *id.* The highest number in any year since 2000 was 166 death sentences in 2002. *Id.*

continued to drop dramatically. Since 2010, the number of annual death sentences nationwide has not even reached 100. In the past five years, it has usually been well below fifty.<sup>103</sup>

Executions are also down dramatically. Once again, change began around the turn of the twenty-first century. There were ninety-eight U.S. executions in 1999.<sup>104</sup> The average (mean) number of executions per year over the next six years (between 2000 and 2005) was sixty-eight.<sup>105</sup> The number then dropped more precipitously. Since 2010, the total number of executions nationwide has not topped fifty and in the last five years of the decade, it has hovered in the twenties.<sup>106</sup>

There are also simply fewer states participating in capital punishment in recent years. Thirty-four different states plus three jurisdictions (the District of Columbia, the federal government, and the military) had no executions in the 2010s.<sup>107</sup> This list includes twenty-two states that do not have the death penalty, but it also includes numerous death penalty states.<sup>108</sup> Thirteen different jurisdictions that currently retain the death penalty (California, Indiana, Kansas, Kentucky, Louisiana, Montana, Nevada, North Carolina, Oregon, Pennsylvania, Utah, Wyoming, and the federal government) carried out no executions between 2011 and 2019.<sup>109</sup> Several states that did carry out executions during that span nevertheless failed to carry out any executions for substantial periods of time, including Arizona, Arkansas, Mississippi, Nebraska, Ohio, Oklahoma, Tennessee, South Carolina, and South Dakota.<sup>110</sup>

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103. *See id.* Between 2011 and 2019, the number of death sentences in the United States each year has been 85, 82, 83, 73, 49, 31, 39, 42, and 34. *Id.*

104. *Executions by State, supra* note 24.

105. *Id.*

106. *Id.* Between 2011 and 2019, the number of executions each year has been 43, 43, 39, 35, 28, 20, 23, 25, and 22. *Id.*

107. *See States with No Recent Executions*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/execution-overview/states-with-no-recent-executions> [<https://perma.cc/KTH4-DSFY>].

108. *See id.*

109. *Executions by State, supra* note 24; *State by State, supra* note 22.

110. *See* GARRETT, *supra* note 25, at 202-03; *Execution Database, supra* note 23 (select the years 2012-2019 under “year of execution”; then select “Mississippi” under “state”; then select “apply” to generate list); *id.* (select “Nebraska” under “state”; then select “apply” to generate list); *id.* (select the years 2009-2018 under “year of execution”; then select “Tennessee” under “state”; then select “apply” to generate list); *id.* (select the years 2011-2019 under “year of

On top of this, several states in recent years have rid themselves of capital punishment altogether. Since 2007, ten states (Colorado, Connecticut, Delaware, Illinois, Maryland, New Hampshire, New Jersey, New Mexico, New York, and Washington) have ended the death penalty by legislative or judicial action (or some combination).<sup>111</sup> Three more state governors (in California, Oregon, and Pennsylvania) issued moratoria between 2011 and 2019 placing executions on hold.<sup>112</sup>

Perhaps most remarkable is the diminishment of capital punishment where it was most frequent. Virginia had about fifty people on death row in the 1990s, but only three there at the start of 2020.<sup>113</sup> Virginia ranks second behind only Texas in executions carried out between 1976 and 2019,<sup>114</sup> and yet Virginia conducted a total of just eight executions in the past decade.<sup>115</sup> The Commonwealth also handed down no new death sentences between 2011 and 2017.<sup>116</sup>

Even in Texas, which accounts for over a third of the country's post-*Gregg* executions,<sup>117</sup> death sentences are down dramatically. In the 1990s, there were about thirty-four new death sentences

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execution"; then select "South Carolina" under "state"; then select "apply" to generate list); *id.* (select the years 2012-2018 under "year of execution"; then select "South Dakota" under "state"; then select "apply" to generate list).

111. *State by State*, *supra* note 22.

112. *Id.*

113. See *Death Row*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/death-row/overview> [<https://perma.cc/2L4L-NY4N>]; *Virginia Death Row Shrinks to 2 as Prosecutor Drops Death Penalty Against Mark Lawlor*, DEATH PENALTY INFO. CTR. (Mar. 18, 2020), <https://deathpenaltyinfo.org/news/virginia-death-row-shrinks-to-2-as-prosecutor-drops-death-penalty-against-mark-lawlor> [<https://perma.cc/U9PD-GLNK>]; see also GARRETT, *supra* note 25, at 4 ("Virginia is a microcosm of what is happening nationwide. After two decades of steady increases, the American death penalty is disappearing.").

114. See *Executions by State*, *supra* note 24.

115. See *id.*

116. See GARRETT, *supra* note 25, at 4.

117. Between the Court's 1987 *Gregg* decision and the end of 2019, there were 1,512 executions carried out in the United States and 564 in Texas. See *Execution Database*, *supra* note 23 (enter "January 1, 1977" as the start date and "December 31, 2019" as the end date; then select "apply" to generate list) (showing total executions in the United States); *id.* (enter "January 1, 1977" as the start date and "December 31, 2019" as the end date; then select "Texas" under "state"; then select "apply" to generate list) (showing total executions in Texas).

annually in Texas.<sup>118</sup> In 2015, there were two new death sentences in Texas.<sup>119</sup> In 2016, 2017, and 2019, there were four.<sup>120</sup>

Declining public support for the death penalty helps explain these dramatic changes.<sup>121</sup> In the 1990s, public support for the death penalty was between 70 percent and 80 percent.<sup>122</sup> In 2007, support for capital punishment was at 64 percent.<sup>123</sup> In 2013, it had dipped to 60 percent.<sup>124</sup> By 2016, it had dropped all the way down to 49 percent.<sup>125</sup> While support for capital punishment inched back above 50 percent in 2018,<sup>126</sup> the public clearly has much deeper concerns about the death penalty than it did two decades ago.<sup>127</sup>

Nevertheless, while the death penalty's decline is marked, it also ought not be overstated. The United States is not monolithic on death penalty policy. Enough states still use the death penalty that it is highly unlikely that capital punishment will disappear altogether anytime soon. As recently as 2013, popular support for the death penalty in Texas was at 75 percent,<sup>128</sup> and Texas accordingly continues to execute people regularly.<sup>129</sup> While the number of executions in Texas has dropped considerably since the 1990s, Texas still executed an average of about ten people per year between 2015

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118. *See Death Sentences*, *supra* note 24.

119. *Id.*

120. *Id.* In 2018, there were seven. *See id.*

121. *See* German Lopez, *9 Reasons the Death Penalty Is on the Decline in America*, VOX (June 29, 2015, 10:30 AM), <https://www.vox.com/2015/6/29/18093632/death-penalty-capital-punishment> [<https://perma.cc/87M8-25X8>].

122. *See* GARRETT, *supra* note 25, at 90.

123. J. Baxter Oliphant, *Public Support for the Death Penalty Ticks Up*, PEW RSCH. CTR. (June 11, 2018), <http://www.pewresearch.org/fact-tank/2018/06/11/us-support-for-death-penalty-ticks-up-2018/> [<https://perma.cc/H7LX-M8TQ>].

124. *See* GARRETT, *supra* note 25, at 90.

125. *See id.*; *Gallup Poll: Support for Death Penalty in U.S. Falls to a 45-Year Low*, DEATH PENALTY INFO. CTR. (Oct. 26, 2017) [hereinafter *Gallup Poll*], <https://deathpenaltyinfo.org/news/gallup-poll-support-for-death-penalty-in-u-s-falls-to-a-45-year-low> [<https://perma.cc/6KYG-7Q2U>].

126. *See* Mark Berman, *American Support for the Death Penalty Inches up, Poll Finds*, WASH. POST (June 11, 2018, 11:51 AM), <https://www.washingtonpost.com/national/2018/06/11/american-support-for-the-death-penalty-inches-up-poll-finds/> [<https://perma.cc/9JJL-DGRB>] (reporting 54 percent support according to a Pew Research Center Poll).

127. *See* Oliphant, *supra* note 123.

128. GARRETT, *supra* note 25, at 90.

129. *See Executions by State*, *supra* note 24.

and 2019.<sup>130</sup> Despite changing political demographics,<sup>131</sup> an abolition campaign today in Texas would likely fail.<sup>132</sup>

And Texas is not alone. In many states, especially in the South, support for capital punishment runs strong.<sup>133</sup> In Oklahoma, where executions have stalled for years due to mind-boggling official incompetence,<sup>134</sup> the public still overwhelmingly supports the death penalty.<sup>135</sup> Moreover, even outside the South, voters in states such as California and Nebraska backed the death penalty in 2016 ballot propositions.<sup>136</sup>

Finally, courts accept capital punishment's constitutionality. Notwithstanding Justice Breyer's dissent in *Glossip*,<sup>137</sup> the U.S. Supreme Court accepts the constitutionality of capital punishment.<sup>138</sup> As a result, lower courts do, too. To be sure, particular problems with capital punishment can raise serious, narrower constitutional questions, but given the Court's current composition, it is extremely unlikely that the Court will invalidate the death penalty across the board in the foreseeable future.<sup>139</sup>

This status quo pleases neither the death penalty's supporters nor its opponents. The opponents currently have the momentum, but,

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130. *See id.*

131. *See, e.g.*, Kirk Goldsberry, *What Really Happened in Texas*, FIVETHIRTYEIGHT (Nov. 14, 2018, 2:01 PM), <https://fivethirtyeight.com/features/how-beto-orourke-shifted-the-map-in-texas/> [<https://perma.cc/34EX-V9SE>] (discussing changing political demographics in Texas).

132. *See* STEIKER & STEIKER, *supra* note 24, at 256 (citing jurisdictions such as Texas and Alabama where legislative repeal of the death penalty "is simply a political nonstarter for the foreseeable future").

133. *See id.*

134. *See infra* notes 322-26 and accompanying text.

135. *See* Silas Allen, *Oklahoman: Changing Views on the Death Penalty?*, SOONER POLL.COM (Aug. 6, 2016), <https://soonerpoll.com/Oklahoman-changing-views-on-death-penalty/> [<https://perma.cc/C6HM-ZLHN>] (stating that three-quarters of Oklahomans polled support the death penalty).

136. Jon Herskovitz, *Death Penalty Gains New Support from Voters in Several U.S. States*, REUTERS (Nov. 9, 2016, 2:44 PM), <https://www.reuters.com/article/us-usa-election-execution/death-penalty-gains-new-support-from-voters-in-several-u-s-states-idUSKBN1343C7> [<https://perma.cc/TX6K-E725>].

137. *Glossip v. Gross*, 135 S. Ct. 2726, 2755-56 (2015) (Breyer, J., dissenting).

138. *See* *Bucklew v. Precythe*, 139 S. Ct. 1112, 1122 (2019) (asserting that the Eighth Amendment does not bar capital punishment); *Baze v. Rees*, 553 U.S. 35, 47 (2008) (plurality opinion).

139. *See* Kalvis Golde, *The Not-So-Modern Death Penalty*, SCOTUSBLOG (Sept. 26, 2019, 11:12 AM), <https://www.scotusblog.com/2019/09/the-not-so-modern-death-penalty> [<https://perma.cc/5M7W-DLBQ>].



as the Steikers observe, the death penalty has taken many unexpected turns.<sup>140</sup> The future is unpredictable.<sup>141</sup>

## 2. *The Lethal Injection Stalemate*

Parallel to this broader death penalty stalemate is a related, but distinct, lethal injection stalemate. Though the lethal injection stalemate is hardly the only cause of the death penalty stalemate, it is a significant one because it has stalled executions.<sup>142</sup> Lethal injection problems are a big reason why the number of executions nationwide has fallen from a high of ninety-eight in 1999 to fewer than thirty for every year since 2014.<sup>143</sup> As Professor Garrett reports, executions have been on hold in recent years in at least eleven different states due to problems with lethal injection.<sup>144</sup> There are numerous causes of the decline in executions, but states' inability to assemble and implement their lethal injection protocols is a significant one.<sup>145</sup>

Every U.S. jurisdiction with the death penalty lists lethal injection as the primary means of carrying out executions.<sup>146</sup> Some states do permit alternative methods, such as electrocution, lethal gas, or firing squad.<sup>147</sup> However, the vast majority of executions over the past few decades have been by lethal injection. Since 1976, lethal injection accounts for 88 percent of executions.<sup>148</sup> During the first two decades of the twenty-first century, that number increased

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140. STEIKER & STEIKER, *supra* note 24, at 5.

141. *Id.*

142. Manny Fernandez, *Delays as Death-Penalty States Scramble for Execution Drugs*, N.Y. TIMES (Oct. 8, 2015), <https://www.nytimes.com/2015/10/09/us/death-penalty-lethal-injection.html> [<https://perma.cc/6MAY-XPCD>].

143. *Executions by State*, *supra* note 24.

144. See GARRETT, *supra* note 25, at 202 (listing Arizona, Arkansas, California, Kentucky, Montana, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, and Washington).

145. See Deborah W. Denno, *Courting Abolition*, 130 HARV. L. REV. 1827, 1845 (2017) (reviewing STEIKER & STEIKER, *COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT* (2016)).

146. *Methods of Execution*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/methods-execution> [<https://perma.cc/REH6-EDW8>].

147. *Id.*

148. See *id.* (noting that there have been 1,517 executions since 1976, of which 1,337 have been by lethal injection).



to 98 percent (895 of 914 executions).<sup>149</sup> Unsurprisingly, then, problems with lethal injection have played a significant role in the sharp execution decline.

As noted above, judicial stays in response to lethal injection challenges slowed executions in the mid-2000s.<sup>150</sup> In the years since the Court's 2008 *Baze* decision, though, courts have played a smaller role. Instead, states' biggest lethal injection difficulty might be getting the drugs.<sup>151</sup> Large pharmaceutical companies have become increasingly opposed to the use of their products in executions. Starting in the early 2000s, Abbott Laboratories, which manufactured thiopental, objected to the use of its drug in lethal injection.<sup>152</sup> (Thiopental is a barbiturate anesthetic that was the first drug in the then-ubiquitous three-drug protocol.)<sup>153</sup> Eventually, other drug companies followed suit, and by the 2010s, many pharmaceutical companies and institutional investors holding their stock likewise objected on similar grounds.<sup>154</sup> While states likely exaggerate their difficulties obtaining drugs,<sup>155</sup> pharmaceutical companies' objections sometimes have interfered with execution plans.

When drug shortages arise, some states, impatient to resume executions, have made decisions that heightened the risk of problems. Some states have turned to compounding pharmacies for the drugs.<sup>156</sup> Compounding pharmacies typically mix small batches of drugs to order. This service is undoubtedly important, but compounding pharmacies often lack the infrastructure necessary to

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149. *Compare Execution Database*, *supra* note 23 (select the years 2000-2019 under "year of execution"; then select "more filters"; then select "lethal injection" under "method"; then select "apply" to generate list) (showing 895 executions via lethal injection), *with id.* (select the years 2000-2019 under "year of execution"; then select "apply" to generate list) (showing 914 executions total).

150. *See supra* notes 89-90 and accompanying text.

151. *See, e.g.*, Della Hasselle, *Executions in Louisiana on Hold Until at Least June*, LENS (Nov. 17, 2014), <https://thelensnola.org/2014/11/17/executions-in-louisiana-on-hold-until-at-least-june/> [<https://perma.cc/X6UD-XMQ8>] (discussing shortages of lethal injection drugs in Louisiana and other states that have forced states to delay executions and change execution protocols).

152. *See Industry Statements*, LETHAL INJECTION INFO. CTR., (2020) <https://lethalinjectioninfo.org/industry-statements/> [<https://perma.cc/8WGY-2F69>].

153. *See Baze v. Rees*, 553 U.S. 35, 44 (2008) (plurality opinion) (describing the three drugs in the protocol).

154. *See infra* Part II.A.3.

155. *See infra* notes 175-78 and accompanying text.

156. *See Berger, supra* note 84, at 1382.

produce the safe, sterile drugs necessary for lethal injection.<sup>157</sup> Additionally, because compounding pharmacies escape many FDA regulations, their products often escape evaluation for effectiveness and safety.<sup>158</sup> Some compounding pharmacies' safety standards, in fact, are seriously deficient.<sup>159</sup> For example, in 2015, the FDA and Oklahoma Board of Pharmacy found that an Oklahoma compounding pharmacy that had supplied execution drugs for Missouri had violated nearly two thousand state guidelines.<sup>160</sup>

Because of compounding pharmacies' inherent limitations, states' new reliance on them exacerbated the risk that executions could go badly awry. Executions with compounded pentobarbital in Oklahoma and South Dakota seemed to cause serious suffering.<sup>161</sup> Similarly, several Texas inmates called out that they felt "burning" as they died from the injection of compounded pentobarbital.<sup>162</sup>

Instead of purchasing from compounding pharmacies, other states explored the overseas gray market for drugs. For instance, Arizona, California, Georgia, South Carolina, and possibly others purchased or tried to purchase thiopental from Dream Pharma, a sketchy vendor operating out of a driving school in London.<sup>163</sup> Nebraska

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157. *Id.*

158. *See id.* at 1382-84; Jesse M. Boodoo, Note, *Compounding Problems and Compounding Confusion: Federal Regulation of Compounded Drug Products and the FDAMA Circuit Split*, 36 AM. J.L. & MED. 220, 230-34 (2010); Andrew Shi, Comment, *Reviewing Refusal: Lethal Injection, the FDA, and the Courts*, 168 U. PA. L. REV. 245, 248 (2019).

159. Boodoo, *supra* note 158, at 225-29.

160. *See* Corinna Barrett Lain, *Lethal Injection: Why We Can't Get It Right and What It Says About Us*, ch. 8, at 38 (unpublished manuscript) (on file with author); Chris McDaniel, *Missouri Fought for Years to Hide Where It Got Its Execution Drugs. Now We Know What They Were Hiding.*, BUZZFEED NEWS (Feb. 20, 2018, 5:55 AM), <https://www.buzzfeednews.com/article/chriscdaniel/missouri-executed-17-men-with-drugs-from-a-high-risk> [<https://perma.cc/PE58-RSV8>].

161. Berger, *supra* note 84, at 1385; *see also* Tony Rizzo, *Secrecy Around Missouri Execution Drug Is Drawing Criticism*, K.C. STAR (Nov. 9, 2013, 12:05 AM), <https://www.kansascity.com/news/local/article331367.html> [<https://perma.cc/EJF8-KJVG>].

162. *See* 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/article/chriscdaniel/inmates-said-the-drug-burned-as-they-died-this-is-how-texas> [<https://perma.cc/EDN9-7C4E>].

163. Owen Bowcott, *London Firm Supplied Drugs for U.S. Executions*, GUARDIAN (Jan. 6, 2011, 12:45 PM), <https://www.theguardian.com/world/2011/jan/06/london-firm-supplied-drugs-us-executions> [<https://perma.cc/SH97-GA9V>]; Ben Crair, *Lethal Entanglements*, NEW REPUBLIC (May 19, 2015), <https://newrepublic.com/article/121845/lethal-injection-has-become-testing-ground-toxic-drugs> [<https://perma.cc/55WZ-UHPS>]; Kathy Lohr, *Georgia May Have*

tried to purchase drugs from Harris Pharma, a salesman without a pharmaceutical background operating near Kolkata, India.<sup>164</sup> The State even sent \$54,400 to this salesperson, even though the drugs were illegal to import.<sup>165</sup> Of course, Nebraska never received them.<sup>166</sup>

Other states switched to entirely new, experimental drug protocols, which permitted executions to continue in the short term.<sup>167</sup> These experimental protocols, however, sometimes went awry, forcing states to halt executions altogether, sometimes for years. In 2014 alone, Arizona, Ohio, and Oklahoma badly botched executions using new protocols.<sup>168</sup> Shortly thereafter, each of those states stopped executions.<sup>169</sup> As of this writing, only Ohio was ever able to resume—and then only temporarily.<sup>170</sup>

Even when new protocols do not result in botches, states may not always have access to the necessary drugs. Once pharmaceutical companies realize states are using a new drug for executions, they

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*Broken Law by Importing Drug*, NPR (Mar. 17, 2011, 12:01 AM), <https://www.npr.org/2011/03/17/134604308/dea-georgia-may-have-broken-law-by-importing-lethal-injection-drug> [<https://perma.cc/ZD99-DEVX>].

164. Chris McDaniel & Tasneem Nashrulla, *This Is the Man in India Who Is Selling States Illegally Imported Execution Drugs*, BUZZFEED NEWS (Oct. 20, 2015, 2:54 PM), <https://www.buzzfeednews.com/article/chrimcdaniel/this-is-the-man-in-india-who-is-selling-states-illegally-imp> [<https://perma.cc/484A-EHBS>].

165. *Id.*

166. *Id.*

167. See STEIKER & STEIKER, *supra* note 24, at 142-43 (explaining that Oklahoma and Arizona proceeded with experimental protocols due to drug shortages).

168. *Id.* at 16 (explaining that four executions in 2014 were botched using new drug protocols).

169. See *Executions by State*, *supra* note 24 (showing zero executions in Arizona and zero executions in Ohio between 2014 and 2017, and Oklahoma for a substantial period starting in 2015); see also Bill Chappell, *Judge Halts Ohio Executions, Citing Drug Controversy*, NPR (May 29, 2014, 7:31 AM), <https://www.npr.org/sections/thetwo-way/2014/05/29/316990817/judge-halts-ohio-executions-citing-drug-controversy> [<https://perma.cc/93S3-P72U>]; Rick Green, *Oklahoma Governor Halts Executions While Officials Review Botched Lethal Injection*, OKLAHOMAN (May 1, 2014, 12:00 AM), <https://oklahoman.com/article/4744562/oklahoma-governor-halts-executions-while-officials-review-botched-lethal-injection> [<https://perma.cc/7PXK-5CST>]; *Arizona Halts Executions After Joseph Wood Case*, BBC NEWS (July 25, 2014), <https://www.bbc.com/news/world-us-canada-28444667> [<https://perma.cc/VG9W-P64X>]. Oklahoma recently announced it was set to resume executions. See *Oklahoma Set to Resume Executions After Death-Chamber Mishaps*, NBC NEWS (Feb. 13, 2020, 10:38 PM), <https://www.nbcnews.com/news/crime-courts/oklahoma-set-resume-executions-years-after-death-chamber-mishaps-n1136821> [<https://perma.cc/QC9Z-R7DD>].

170. See *infra* notes 316-20 and accompanying text.

typically try to cut off the supply of that drug for executions.<sup>171</sup> State efforts to “solve” their drug-supply problem, therefore, sometimes result only in temporary fixes.

On top of the drug problem, many death penalty states have faced chronic problems assembling a competent execution team.<sup>172</sup> Execution teams sometimes display a woeful ignorance about the drugs and their risks.<sup>173</sup> Execution personnel also sometimes lack the expertise to set the catheter properly in the inmate’s veins, to monitor the inmate’s anesthetic depth before the injection of manifestly excruciating drugs, and to recognize problems that arise during the execution.<sup>174</sup> The lack of qualified personnel further heightens the risk of botched executions. When these botches occur, they make it more difficult for states to continue with executions moving forward.

Of course, the fact that many states have had difficulty carrying out executions in recent years should not obscure the fact that executions do still continue.<sup>175</sup> State officials often highlight the drug-shortage narrative to persuade courts to leave them alone.<sup>176</sup> The argument seems to be that states have enough trouble carrying out executions without additional judicial interference.<sup>177</sup> Officials use this same story to lobby state legislatures for lethal injection secrecy laws, which make it easier to assure providers that they can sell states their execution drugs without fear of repercussions.<sup>178</sup>

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171. See, e.g., *Industry Statements*, *supra* note 152 (quoting Alvogen, Inc., as saying that the company “is working to ensure that its distributors and wholesalers do not resell, either directly or indirectly, [Alvogen products] to prison systems or departments of corrections”).

172. See Berger, *supra* note 58, at 268 (discussing the problem of untrained and unqualified personnel in lethal injection).

173. See *id.*

174. See Denno, *supra* note 58, at 1357 (explaining that during Kenneth Biros’s execution in 2009, the executioners required half an hour and nine attempts to find a vein to place an IV catheter).

175. See *Execution List 2020*, DEATH PENALTY INFO. CTR. (Mar. 5, 2020), <https://deathpenaltyinfo.org/executions/2020> [<https://perma.cc/MR7Y-MDBN>].

176. See, e.g., Brief for Respondent at 3, *Glossip v. Gross*, 135 S. Ct. 2726 (2015) (No. 14-7955).

177. Because of state secrecy laws, it is often impossible to know precisely how difficult it actually is for states to obtain their lethal injection drugs.

178. See DEATH PENALTY INFO. CTR., *BEHIND THE CURTAIN: SECRECY AND THE DEATH PENALTY IN THE UNITED STATES 14-20* (2018), <https://files.deathpenaltyinfo.org/documents/pdf/SecrecyReport-2.f1560295685.pdf> [<https://perma.cc/W2GV-8CE9>] [hereinafter *SECRECY REPORT*].

These same secrecy laws also help states conceal their own incompetence and malfeasance.<sup>179</sup>

States' narrative that they cannot get the drugs has some truth,<sup>180</sup> but it is also probably overstated. Several states, after all, are continuing lethal injection executions, so they must still be getting drugs,<sup>181</sup> whether from compounding pharmacies,<sup>182</sup> the foreign gray market,<sup>183</sup> deception, or some other source.<sup>184</sup> States also sometimes share drugs and advice with each other,<sup>185</sup> so a state that really wanted drugs could turn to other states for guidance. The same secrecy laws for which officials lobby usually makes it difficult to identify the source of these drugs, but the mere fact of continuing executions demonstrates that resourceful states have their ways.

Texas is a case in point. It alone carried out 120 executions during the 2010s, all by lethal injection.<sup>186</sup> Secrecy laws protect Texas's drug source,<sup>187</sup> but some reporting asserts that the State obtained its drugs for three and a half years from a Houston compounding pharmacy.<sup>188</sup> Whether or not this report is accurate, Texas is getting its drugs from somewhere.

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179. *See id.* at 32-45 (discussing how secrecy laws try to hide incompetent executioners, the illegal importation of drugs, questionable compounding pharmacy practices, state misrepresentations to try to obtain drugs, and other ethically and legally questionable drug purchasing practices).

180. *See, e.g.,* Berger, *supra* note 84, at 1380-81 (discussing states' difficulties obtaining thiopental in early 2010s).

181. States cannot rely on preexisting stockpiles of drugs for too long because the drugs expire. *See* Mark Berman, *With Lethal Injection Drugs Expiring, Arkansas Plans Unprecedented Seven Executions in 11 Days*, WASH. POST (Apr. 7, 2017, 1:56 PM), <https://www.washingtonpost.com/news/post-nation/wp/2017/04/07/with-lethal-injection-drugs-expiring-arkansas-plans-unprecedented-seven-executions-in-11-days/> [<https://perma.cc/WLN8-C6UA>].

182. *See supra* notes 156-60 and accompanying text.

183. *See supra* notes 163-66 and accompanying text.

184. *See Lethal Injection*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/lethal-injection> [<https://perma.cc/6LSE-J7F5>] (explaining that recently passed laws prevent the public from learning the source of state lethal injection drugs).

185. *See* Corinna Barrett Lain, *The Virtues of Thinking Small*, 67 U. MIA. L. REV. 397, 402-03 (2013).

186. *Execution Database*, *supra* note 23 (enter "January 1, 2010" as the start date, "December 31, 2019" as the end date, and "Texas" under "state"; select "apply" to generate list).

187. *See* McDaniel, *supra* note 162.

188. *See id.*

And Texas is not alone. During the 2010s, thirteen different states carried out four or more executions (mostly by lethal injection).<sup>189</sup> Sometimes lethal injection problems delayed executions for years, only for a state then to carry out a rapid succession of executions when it was able to get the drugs. Arkansas, for instance, went a dozen years without executing anyone but then deceived a pharmaceutical provider into thinking it would use the drugs for medical purposes.<sup>190</sup> The State then hastily planned to execute seven inmates in April 2017 before its drugs expired.<sup>191</sup> It managed to carry out four of those executions, all in about a week.<sup>192</sup>

There were 324 total U.S. executions in the 2010s.<sup>193</sup> 317 of them were by lethal injection.<sup>194</sup> Admittedly, those numbers are much lower than the 1990s and 2000s, but they are still substantial.<sup>195</sup>

We then have a stalemate, a struggle in which neither side plausibly can expect total victory for the foreseeable future. Problems with lethal injection have played an important part in reducing the numbers of executions nationwide, but executions still continue in significant numbers. This culture war persists.

## II. NORMS UNDERLYING THE LETHAL INJECTION STALEMATE

Courts have played a diminishing role in the lethal injection stalemate, especially over the past dozen years. Following the U.S. Supreme Court's lead,<sup>196</sup> courts since *Baze* usually reject litigation

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189. See *Execution Database*, *supra* note 23 (select the years 2010-2019 under "year of execution"; then select "apply" to generate list) (showing the following states executed at least four people between 2010 and 2019: Alabama, Arizona, Arkansas, Florida, Georgia, Mississippi, Missouri, Ohio, Oklahoma, South Dakota, Tennessee, Texas, and Virginia).

190. See SECRECY REPORT, *supra* note 178, at 43.

191. Berman, *supra* note 181 (explaining that Arkansas planned to execute seven inmates in eleven days, the first executions in Arkansas in twelve years).

192. See *Execution List 2017*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/execution-list-2017> [<https://perma.cc/T3U7-98NP>].

193. See *Execution Database*, *supra* note 23 (select the years 2010-2019 under "year of execution"; then select "apply" to generate list).

194. See *id.* (select the years 2010-2019 under "year of execution"; then select "more filters"; then select "lethal injection" under "method"; then select "apply" to generate list).

195. See *id.* (select the years 1990-1999; then select "apply" to generate list); *id.* (select the years 2000-2009; then select "apply" to generate list).

196. See *supra* Part I.A.



attacks on lethal injection protocols.<sup>197</sup> This is not to say courts play *no* role—lower courts occasionally do rule against states in these cases. Occasionally, those rulings are on the merits of an Eighth Amendment challenge to a lethal injection procedure.<sup>198</sup> More

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197. See, e.g., *In re Ohio Execution Protocol Litig.*, 937 F.3d 759, 762-63 (6th Cir. 2019) (rejecting a constitutional challenge to lethal injection protocol); *Whitaker v. Collier*, 862 F.3d 490, 495 (5th Cir. 2017) (holding that changes to state lethal injection protocol did not restart the statute of limitations for purposes of challenging constitutionality of protocol); *Garcia v. Collier*, No. H-18-4521, 2018 WL 6266917, at \*3 (S.D. Tex. Dec. 1, 2018) (denying stay of execution that would have permitted lethal injection challenge to move forward), *aff'd*, 744 F. App'x 231 (5th Cir. 2018); *McGehee v. Tex. Dep't of Crim. Just.*, No. H-18-1546, 2018 WL 39996956, at \*1, \*13 (S.D. Tex. Aug. 21, 2018) (rejecting an Arkansas inmates' discovery request inquiring into Texas lethal injection protocol to try to establish that an alternative proffered in Arkansas was readily available); *Arthur v. Dunn*, 195 F. Supp. 3d 1257, 1268-69 (M.D. Ala. 2016) (dismissing claim because plaintiff failed to meet pleading requirements established by *Glossip* and *Baze*), *aff'd sub nom. Arthur v. Comm'r*, 840 F.3d 1268 (11th Cir. 2016); *Moore v. Rees*, 138 F. Supp. 3d 860, 864, 869 (E.D. Ky. 2015) (holding that *Baze* established that Kentucky's protocol did not violate the Eighth Amendment); *Zink v. Lombardi*, No. 2:12-cv-4209-NKL, 2012 WL 12828155, at \*8 (W.D. Miss. Nov. 16, 2012) (granting in part and denying in part twenty-one death row inmates' challenge to execution protocols); *Cook v. State*, 281 P.3d 1053, 1054 (Ariz. Ct. App. 2012) (denying claim challenging Arizona's execution protocol on separation of powers grounds); *Sims v. Kernan*, 241 Cal. Rptr. 3d 300, 302 (Cal. Ct. App. 2018) (rejecting challenge to Arizona's execution protocol on separation of powers grounds); *Delaware v. Stanley*, 644 A.2d 411, 413 (Del. Super. Ct. 1994) (upholding the constitutionality of Delaware's lethal injection statute), *aff'd*, 648 A.2d 423 (Del. 1994); *Muhammad v. State*, 132 So. 3d 176, 197 (Fla. 2013) (upholding Florida's lethal injection protocol); *Diaz v. State*, 945 So. 2d 1136, 1143, 1145 (Fla. 2006) (per curiam) (rejecting post-conviction challenge of Florida's lethal injection statute on separation of powers grounds and Eighth Amendment grounds); *Sims v. State*, 754 So. 2d 657, 663-65 (Fla. 2000) (per curiam) (holding that death row inmate could be executed by lethal injection despite being sentenced to death by electrocution); *State v. Osborn*, 631 P.2d 187, 201 (Idaho 1981) (rejecting separation of powers argument against lethal injection but reversing death sentence); *Ward v. Carter*, 90 N.E.3d 660, 661 (Ind. 2018) (holding that Indiana's lethal injection protocol is not subject to the State's Administrative Rules and Procedures Act); *Griffith v. Neb. Dep't of Corr. Servs.*, 934 N.W.2d 169, 172 (Neb. 2019) (rejecting challenge to procedures for adopting lethal injection protocol for lack of standing); *State v. Ellis*, 799 N.W.2d 267, 305 (Neb. 2011) (rejecting constitutional challenges to Nebraska's lethal injection statute); *Abdur'Rahman v. Parker*, 558 S.W.3d 606, 625 (Tenn. 2018) (holding that plaintiff failed to carry the burden of showing availability of proposed alternative method of execution); *Ex parte Granviel*, 561 S.W.3d 503, 515 (Tex. Crim. App. 1978) (en banc) (holding that Texas's lethal injection statute is constitutional); *Brown v. Vail*, 237 P.3d 263, 273-74 (Wash. 2010) (en banc) (upholding Washington's one-drug lethal injection protocol); *Alexandra L. Klein, Nondelegating Death*, OHIO ST. L.J. (forthcoming 2020) (manuscript at 5 n.5) (on file with author) (collecting cases rejecting arguments that states have unconstitutionally delegated too much authority over execution protocols to state departments of corrections).

198. See, e.g., *Harbison v. Little*, 511 F. Supp. 2d 872, 903 (M.D. Tenn. 2007), *vacated*, 571 F.3d 531 (6th Cir. 2009); *Taylor v. Crawford*, No. 05-4173-CV-C-FJG, 2006 WL 1779035, at \*7-8 (W.D. Mo. June 26, 2006), *rev'd*, 487 F.3d 1072 (8th Cir. 2007); *Morales v. Hickman*, 415

frequently, courts grant death row inmates more modest victories. In some cases, courts grant a preliminary injunction or a stay of execution to permit the court to hear the merits of an inmate's claim, though sometimes appellate courts vacate those stays.<sup>199</sup> In other cases, courts vindicate claims that raise not Eighth Amendment issues but rather related problems with execution protocols involving state administrative procedures, FOIA requirements, or other state legal regimes.<sup>200</sup> These victories are usually narrow, involving, for instance, additional discovery into a state's procedures or the requirement that a state follow its own administrative procedural rules when adopting new execution protocols.<sup>201</sup> Even when courts do halt executions for significant periods of time, it is sometimes after state officials have already encountered serious

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F. Supp. 2d 1037, 1046 (N.D. Cal. 2006), *aff'd*, 438 F.3d 926 (9th Cir. 2006); *Morales v. Tilton*, 465 F. Supp. 2d 972, 974 (N.D. Cal. 2006).

199. *See, e.g.*, *Johnson v. Precythe*, 901 F.3d 973, 980 (8th Cir. 2018) (concluding that the plaintiff pleaded a plausible claim for relief under Eighth Amendment), *vacated*, 139 S. Ct. 1546 (2019); *In re Fed. Bureau of Prisons' Execution Protocol Cases*, No: 19-mc-145 (TSC), 2020 WL 4004474, at \*11 (D.D.C. July 13, 2020) (granting plaintiffs' motion for preliminary injunction), *vacated*, *Barr v. Lee*, 2020 WL 3964985 (July 14, 2020); *Jordan v. Fisher*, No. 3:15cv295, 2015 WL 13119074, at \*3-4 (S.D. Miss. Aug. 26, 2015) (granting plaintiffs' request for temporary injunctive relief), *vacated*, 823 F.3d 805 (5th Cir. 2016).

200. *See, e.g.*, *McGehee v. Neb. Dep't of Corr. Servs.*, No. 4:18CV3092, 2019 WL 1227928, at \*3, \*6 (D. Neb. Mar. 15, 2019) (ordering the State to produce documents relating to its efforts to obtain lethal injection drugs with the identity of the pharmacy redacted); *Ark. Dep't of Corr. v. Shults*, 529 S.W.3d 628, 633 (Ark. 2017) (finding that the identity of execution drug manufacturers is not protected); *Hobbs v. Jones*, 412 S.W. 3d 844, 854 (Ark. 2012) (holding that the Arkansas legislature had "abdicated its responsibility" when it delegated to the Department of Corrections "unfettered discretion" over execution protocol); *Toomey v. Ind. Dep't of Corr.*, No. 49C01-1501-PL-3142, at \*23 (Marion Cnty. Ct., Ind. Nov. 29, 2018) (rejecting the Corrections Department's motion to amend summary judgment order); *Nebraska ex rel. Miller v. Frakes*, No. CI-17-4283, at \*4-5 (Dist. Ct. Lancaster Cnty., Neb. June 18, 2018) (ordering disclosure of information regarding drug source); *Lockett v. Evans*, 356 P.3d 58, 61 (Okla. 2014) (upholding stay of execution due to the secrecy of the drugs to be used in execution); *Death Penalty in Flux*, DEATH PENALTY INFO. CTR., <https://archive.deathpenaltyinfo.org/death-penalty-flux> [<https://perma.cc/TL8P-UB5W>]. For an interesting discussion of nondelegation challenges, see generally Klein, *supra* note 197.

201. *See Morales v. Cal. Dep't of Corr. & Rehab.*, 85 Cal. Rptr. 3d 724, 726, 733 (Cal. Ct. App. 2008) (finding the lethal injection procedure invalid under California administrative law); *Evans v. State*, 914 A.2d 25, 34 (Md. 2006) (rejecting Maryland lethal injection procedure under Maryland administrative law).



problems and stopped executions themselves.<sup>202</sup> Moreover, in many states executions have stopped without judicial intervention.<sup>203</sup>

Instead of judges, we can trace the stalemate to a variety of non-judicial actors driven by different motivations. These uncoordinated actors motivated by their own institutional concerns are primarily responsible for states' difficulties carrying out executions. Contrary to Justice Alito's theory, most of these individuals and organizations are not abolitionists mounting a "guerilla war against the death penalty."<sup>204</sup> Though some true activists do try to persuade other actors, like drug manufacturers, to renounce their role in the death penalty, most of the other players in this drama follow incentives unconnected to the politics of capital punishment.

Many of these actors also keep their distance from each other. Lawyers representing capital inmates in lethal injection challenges, for instance, often try to avoid contact with abolitionists.<sup>205</sup> Capital lawyers have an ethical commitment to their clients and often must make arguments implicitly conceding the constitutionality of capital punishment.<sup>206</sup> By contrast, abolitionists, focusing on the entire capital system rather than an individual client, make broader arguments directed not at judges but the court of public opinion.<sup>207</sup> Abolitionists also often try to persuade pharmaceutical companies not to provide drugs for executions. Capital lawyers usually cannot engage in such advocacy for fear that interfering with states' supply

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202. See, e.g., Graham Lee Brewer & Manny Fernandez, *Oklahoma Botched 2 Executions. It Says It's Ready to Try Again.*, N.Y. TIMES (Feb. 13, 2020), <https://www.nytimes.com/2020/02/13/us/oklahoma-executions.html> [<https://perma.cc/3LDW-TKZD>] (noting that a federal court ordered Oklahoma to stop executions only after two botches and after Governor Fallin announced the state would delay all executions).

203. See *Death Penalty in Flux*, *supra* note 200 (listing jurisdictions with the death penalty on hold, most of which were not resulting from formal court order).

204. See Transcript of Oral Argument, *supra* note 13, at 14.

205. See *infra* notes 333-36 and accompanying text.

206. See *Bucklew v. Precythe*, 139 S. Ct. 1112, 1126 (2019) (requiring that inmate plaintiff propose method for his own execution).

207. See, e.g., Ty Alper, *The Truth About Physician Participation in Lethal Injection Executions*, 88 N.C. L. REV. 11, 18 (2009) (arguing that abolitionists, who do not represent individual clients, are "unburdened" by responsibilities to the client and therefore are free to make arguments that lawyers for death row inmates often cannot make); *Death Penalty*, REPRIEVE, <https://reprieve.org.uk/topic/death-penalty/> [<https://perma.cc/53D9-X2CB>] ("We are on the frontline, investigating cases, tracking down evidence and witnesses—then our lawyers take action in the courts. We combine this legal action with public pressure from people all around the world who stand with us to oppose the death penalty.").

chains would alienate the judge hearing their case.<sup>208</sup> In short, the abolitionist and capital attorney may share an aversion to capital punishment, but their goals, tactics, and ethical commitments are very different.

After discussing the various groups and norms behind the lethal injection stalemate, this Part examines the relationship between the lethal injection stalemate and the broader death penalty stalemate. This Part ends by briefly examining norms on the pro-death penalty side. Because these norms are relatively static and do not explain the decade of frustration death penalty states have encountered, this discussion is much shorter. The arguments in favor of the death penalty, however, are nevertheless important because they help explain why capital punishment continues despite mounting problems and opposition.

Finally, it is worth noting that different people can embrace the same norm for different reasons. For example, some people oppose capital punishment for religious reasons, while others oppose it for secular ones. The same, of course, is true of retributivist norms favoring the death penalty. The point here is not to offer a comprehensive account of the underlying ethical, religious, philosophical, political, and other factors that might shape a person's views about the death penalty. Instead, it is to underline that states' lethal injection problems stem from numerous uncoordinated cultural contributors acting with distinct motivations.

### *A. The Great Variety of Norms and Actors Obstructing Lethal Injection*

#### *1. Abolitionism*

While Justice Alito and state officials exaggerate their importance, anti-death penalty activists do play a role in the current

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208. It is also possible, though unlikely, that a capital lawyer's interference with state drug supply chains could raise professional responsibility concerns. *See, e.g.*, MODEL RULES OF PROFESSIONAL CONDUCT r. 3.7 (AM. BAR ASS'N 2011) (forbidding a lawyer from acting as an advocate at trial in matter in which the lawyer may be necessary as a witness); RESTATEMENT (THIRD) OF THE LAW GOVERNING L.S. § 125 cmt. c (AM. L. INST. 2000) (noting that a conflict may arise from "a lawyer's deeply held religious, philosophical, political, or public-policy beliefs"). I thank Kristen Blankley for this observation.

lethal injection stalemate. Unlike most other actors examined below, these activists' primary commitment is to oppose capital punishment. In the short term, abolitionists seek to obstruct executions. In the longer run, they hope to end the death penalty altogether.

The most important recent abolitionist group is probably Reprieve, a London-based human rights group that fights capital punishment around the world, including in the United States.<sup>209</sup> Its website asserts "[t]he death penalty is cruel, inhuman and degrading and a violation of human rights. Reprieve works to end the death penalty worldwide."<sup>210</sup> Part of Reprieve's strategy involves trying to disrupt executions in the United States by pressuring drug companies to stop providing execution drugs.<sup>211</sup> Towards this end, it has created a website to act as "a hub for manufacturers, distributors, and stakeholders interested in preventing the misuse of medicines in lethal injections."<sup>212</sup> It similarly collects and posts pharmaceutical industry statements to signal to other companies that the drug industry should try to "prevent their medicines being misused in lethal injection executions."<sup>213</sup>

Reprieve believes, likely with some justification, that its efforts have made a difference. Its website notes that "2016 saw [U.S.] public support for the death penalty fall to under 50%, death sentences drop to a record low and every FDA-approved pharmaceutical company oppose the misuse of medicines in lethal injections, causing many states to put executions on hold."<sup>214</sup> Maya Foa, Reprieve's director, boasts, "I have worked with and consulted for almost every global pharmaceutical company on lethal injection issues."<sup>215</sup> Reprieve's U.S. affiliate explains further that its "Stop

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209. *About*, REPRIEVE, <https://reprieve.org.uk/about/> [<https://perma.cc/9T5W-TQP2>].

210. *Death Penalty*, REPRIEVE, <https://reprieve.org.uk/topic/death-penalty/> [<https://perma.cc/53D9-X2CB>].

211. *Lethal Injection*, REPRIEVE, <https://reprieve.org.uk/topic/lethal-injection/> [<https://perma.cc/MJC4-CLRM>] ("Reprieve helps manufacturers break their links with the execution drug trade, supports export regulators in preventing foreign medicines being sold to death rows, and seeks to debunk the myth of the 'humane execution.'").

212. *Id.*

213. *Industry Statements*, *supra* note 152.

214. *Which Countries Execute the Most People?*, REPRIEVE, <https://reprieve.org.uk/death-penalty-around-world/the-facts/which-countries-execute-most/> [<https://perma.cc/H2CK-JVDH>].

215. Maya Foa, *A New OECD Gold Standard for Lethal Injection Drugs*, PHARMATIMES

Lethal Injection Project ... has already led to actions by more than a dozen pharmaceutical companies to prevent the sale of their drugs for lethal injection.”<sup>216</sup>

Clearly, Reprieve’s abolitionist work has been a factor in the lethal injection stalemate, especially in encouraging pharmaceutical companies to rethink their attitudes towards providing drugs for executions. In this sense, Justice Alito, state officials, and others are correct that anti-death penalty activists have played a role in slowing executions.<sup>217</sup> As we shall see, though, to the extent the explanation focuses on abolitionists alone, it ignores many other actors and cultural norms contributing to states’ lethal injection problems. Anti-death penalty activists are just one piece of a much larger puzzle.

## 2. Foreign Governmental Norms

European governments largely share abolitionists’ categorical anti-death penalty norms. European Union ambassadors well captured this sentiment when they recently “reiterate[d] [their] strong and principled opposition to the death penalty as a cruel, inhumane and degrading punishment.”<sup>218</sup> As Professors Gibson and Lain have demonstrated, European governments not only embrace these abolitionist values but also have effectively wielded them to disrupt the American death penalty.<sup>219</sup>

In particular, these foreign governments have successfully pressured drug companies to stop supplying drugs to states for use in executions.<sup>220</sup> For example, the Italian government refused to license a drug-manufacturing plant until it received assurances that

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ONLINE (Oct. 20, 2017), [http://www.pharmatimes.com/web\\_exclusives/a\\_new\\_oecd\\_gold\\_standard\\_for\\_lethal\\_injection\\_drugs\\_1209066](http://www.pharmatimes.com/web_exclusives/a_new_oecd_gold_standard_for_lethal_injection_drugs_1209066) [<https://perma.cc/5RLA-GK46>].

216. *Lethal Injection*, REPRIEVE U.S., <https://reprieve.org/lethal-injection/> [<https://perma.cc/82ER-ACQT>].

217. *E.g.*, *supra* notes 11-14 and accompanying text.

218. EU Ambassadors, *EU Ambassadors Against Death Penalty*, TOLONews (Oct. 28, 2019), <https://tolonews.com/opinion/eu-ambassadors-against-death-penalty> [<https://perma.cc/TRZ6-CKBN>].

219. Gibson & Lain, *supra* note 15, at 1236-37.

220. *See id.* at 1240-45 (providing several examples of European governments successfully pressuring U.S. companies to stop providing lethal injection drugs).

drugs made there would not be used in executions.<sup>221</sup> That plant, operated by Hospira, manufactured thiopental.<sup>222</sup> Hospira later exited the thiopental market altogether, substantially contributing to a 2010 thiopental shortage. This shortage, in turn, resulted in delayed executions and was one of the early signs that states would encounter serious difficulties getting execution drugs.<sup>223</sup>

Similarly, around the same time, the United Kingdom placed export restrictions on all thiopental shipments to the United States.<sup>224</sup> In so doing, it expressly proclaimed the British government's "moral opposition to the death penalty in all circumstances."<sup>225</sup> The British government later further expanded that export ban to include pancuronium bromide and potassium chloride, other drugs commonly used in executions.<sup>226</sup>

Other European governments also soon realized the market's potential to further abolitionist goals and interfere with the U.S. death penalty.<sup>227</sup> Germany's human rights commissioner, for instance, asked for export controls on thiopental and recommended that the European Union impose an export ban on all lethal injection drugs.<sup>228</sup> The European Union ultimately followed this instruction, imposing export controls on eight such drugs.<sup>229</sup> In doing so, it asserted that "the European Union opposes the death penalty under all circumstances."<sup>230</sup> Thus, it intended its export controls to "contribute[ ] to the wider EU efforts to abolish the death penalty worldwide."<sup>231</sup>

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221. *Id.* at 1240.

222. *See* Denno, *supra* note 58, at 1333.

223. Berger, *supra* note 84, at 1380-81; Gibson & Lain, *supra* note 15, at 1240-41.

224. Gibson & Lain, *supra* note 15, at 1241.

225. Dominic Casciani, *US Lethal Injection Drug Faces UK Export Restrictions*, BBC NEWS (Nov. 29, 2010), <https://www.bbc.com/news/uk-11865881> [<https://perma.cc/99UP-K52D>].

226. Gibson & Lain, *supra* note 15, at 1242.

227. *See id.* (explaining that the campaign started with one-off confrontations with suppliers but blossomed into a larger effort to use the market to interfere with capital punishment in the United States).

228. *Id.* ("Not even a personal plea from the U.S. Secretary of Commerce could shake loose a shipment of thiopental from Germany.").

229. *Id.*

230. European Commission Press Release IP/11/1578, Commission Extends Control over Goods Which Could Be Used for Capital Punishment or Torture (Dec. 20, 2011).

231. Gibson & Lain, *supra* note 15, at 1242.

In 2017, numerous countries—including the EU, Argentina, and Mongolia—created the Alliance for Torture-Free Trade “to make it significantly more difficult to obtain products intended for carrying out the death penalty.”<sup>232</sup> Foreign governments have thus made it even more difficult for states to get their drugs from overseas.<sup>233</sup> As Gibson and Lain put it, the international moral marketplace successfully transmitted foreign abolitionist norms into the United States.<sup>234</sup>

### *3. Pharmaceutical Company Ethics and Institutional Investor Concerns*

Responding in part to pressure from anti-death penalty activists,<sup>235</sup> pharmaceutical companies increasingly *have* decided to place distribution restrictions on drugs to make it harder for states to use them in executions.<sup>236</sup> It is important to recognize, though, that these businesses do not share the abolitionists’ or European governments’ broader objective of bringing down capital punishment altogether. As corporate entities, they likely do not care one way or another, so they are not abolitionists as such.

Quite simply, drug companies are uncomfortable participating in capital punishment. The Danish pharmaceutical company Lundbeck, for example, sent a letter to the Ohio Department of Rehabilitation and Correction “adamantly oppos[ing]” the state’s use of its product in executions.<sup>237</sup> It ultimately altered its standard distribution system to try to exert more control over the ultimate end users of its drugs.<sup>238</sup> A Swiss company took even more aggressive steps,

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232. *What We Want*, ALLIANCE FOR TORTURE-FREE TRADE, <http://www.torturefreetrade.org> [<https://perma.cc/SYY8-UZMY>].

233. See Lain, *supra* note 160, ch. 8, at 7.

234. See Gibson & Lain, *supra* note 15, at 1274.

235. See *supra* notes 209-16 and accompanying text.

236. See, e.g., *infra* notes 242-49 and accompanying text.

237. Berger, *supra* note 46, at 990; Letter from Staffan Schüberg, President, Lundbeck Inc., to Gary C. Mohr, Dir., Ohio Dep’t of Rehab. & Corr. (Jan. 26, 2011), in DEATH PENALTY INFO. CTR., <https://files.deathpenaltyinfo.org/legacy/documents/LundbeckLethInj.pdf> [<https://perma.cc/X7D7-N7RC>] (stating that the use of Lundbeck’s pentobarbital in executions “contradicts everything we are in business to do”).

238. Gibson & Lain, *supra* note 15, at 1228.

trying to claw back thiopental from Nebraska after that state obtained it through back channels.<sup>239</sup>

Gibson and Lain emphasize the European governments' role in these developments, noting that companies like Lundbeck "grew a moral backbone only after European governments had made it clear that they had to toe the line."<sup>240</sup> They are clearly correct that governmental pressure played a role. However, just as abolitionist activism is not the whole story, nor is governmental action.

In particular, pharmaceutical companies, both foreign and domestic, recognize that providing death penalty drugs is in sharp tension with their healing mission. As early as 2001, well before European governments got involved, Abbott Laboratories told state departments of corrections that their products should not be used in executions.<sup>241</sup> More recently, Pfizer, a New York-based American pharmaceutical company, banned the use of its products in lethal injection.<sup>242</sup> As the company explained, "Pfizer makes its products to enhance and save the lives of the patients we serve."<sup>243</sup> The company, therefore, "strongly object[ed] to the use of its products as lethal injections for capital punishment."<sup>244</sup>

In taking this position, Pfizer and other U.S. drug companies wanted to avoid the bad public relations that would come with selling drugs for use in executions.<sup>245</sup> Though some pro-death penalty critics lamented that Pfizer was "caving in to special interest groups,"<sup>246</sup> Pfizer could plausibly claim that it was not taking a position on the death penalty one way or another. Rather, it just did not want *its* drugs used for executions.<sup>247</sup> The provision of

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239. *Naari AG Wants Nebraska to Return Lethal Injection Drug*, BIOSPACE (Nov. 30, 2011), <https://www.biospace.com/article/releases/naari-ag-wants-nebraska-to-return-lethal-injection-drug-/> [<https://perma.cc/Q36H-YR6H>].

240. Gibson & Lain, *supra* note 15, at 1244.

241. *Industry Statements*, *supra* note 152.

242. Eckholm, *supra* note 14; see also *Pfizer's Position on Use of Our Products in Lethal Injections for Capital Punishment*, PFIZER (Feb. 2017), [https://www.pfizer.com/files/b2b/Global\\_Policy\\_Paper\\_Lethal\\_Injection\\_02.03.17.pdf](https://www.pfizer.com/files/b2b/Global_Policy_Paper_Lethal_Injection_02.03.17.pdf) [<https://perma.cc/GV5P-K5WE>] [hereinafter *Pfizer's Position*].

243. See *Pfizer's Position*, *supra* note 242.

244. *Id.*

245. Eckholm, *supra* note 14.

246. *Id.* (noting that an expert from the conservative Heritage Foundation criticized Pfizer's new stance and argued that it was not in the public interest).

247. See *Pfizer's Position*, *supra* note 242 (noting that Pfizer protests "the use of *its*



execution drugs conflicted with the company's healing mission to "advance medical care and improve patient outcomes."<sup>248</sup> From a purely instrumental viewpoint, selling execution drugs was horrible public relations.

Significantly, domestic institutional investors, with these concerns in mind, had started pressuring other drug companies to stop supplying drugs for executions.<sup>249</sup> For instance, the state comptroller for the New York State pension fund asserted that "[a] company in the business of healing people is putting its reputation at risk when it supplies drugs for executions.... The company is also risking association with botched executions, which opens it to legal and financial damage."<sup>250</sup> The same office sent another letter to Mylan Inc., informing the company of other pharmaceutical companies' policies "to prevent their products from being utilized for lethal injections," and requesting that the company issue a report describing its position on aiding executions.<sup>251</sup>

These letters were not just idle threats. A different financial firm ultimately pulled a \$70 million investment in Mylan because the drug company could not guarantee that its products would not be used for executions.<sup>252</sup> The firm explained, "[I]f clients find out we have shares in companies that supply that drug, we have problems with our clients."<sup>253</sup>

Unlike abolitionists and European governments, these institutional investors were not motivated primarily by opposition to capital punishment. Rather, they wanted to protect shareholders' wealth and recognized the obvious tension inherent in using

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products" (emphasis added).

248. *Our Purpose*, PFIZER, <https://www.pfizer.com/purpose> [<https://perma.cc/L5ZK-44EF>].

249. Eckholm, *supra* note 14.

250. *Id.*

251. Letter from Patrick Doherty, Dir. of Corp. Governance, Off. of the State Comptroller of the State of New York, to Joseph F. Haggerty, Exec. Vice President, Chief Legal Officer, and Corporate Secretary, Mylan Inc. (Nov. 7, 2014), in *LETHAL INJECTION INFO. CTR.*, <https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2015/nycommonretirementfund030415-14a8.pdf> [<https://perma.cc/8WVG-Q64U>].

252. *Drug Maker Mylan Takes \$70 Million Hit in Battle over Lethal Injection*, NBC NEWS (Oct. 21, 2014, 10:42 AM), <https://www.nbcnews.com/storyline/lethal-injection/drug-maker-mylan-takes-70-million-hit-battle-over-lethal-n230051> [<https://perma.cc/WNZ5-3V4N>].

253. *Id.*



medicines to kill people.<sup>254</sup> The investors' primary concerns were not moral but pecuniary.<sup>255</sup>

Pfizer may be the most prominent company to announce it would not sell execution drugs, but most of the industry has taken similar steps.<sup>256</sup> Collectively, more than twenty American and foreign drug companies have adopted such restrictions.<sup>257</sup> Johnson & Johnson, another major U.S. pharmaceutical company, categorically stated that it “discovers and develops medical innovations to save and enhance lives” and it “do[es] not condone the use of [its] medicines in lethal injections for capital punishment.”<sup>258</sup>

Just as major pharmaceutical companies oppose the use of their products in executions, so too do many compounding pharmacies. As states' access to pharmaceutical companies' drugs dried up in the early 2010s, many states turned to compounding pharmacies to get their lethal injection drugs.<sup>259</sup> Many compounding pharmacies, however, share major pharmaceutical corporations' opposition to the use of their products in executions. The International Academy of Compounding Pharmacies adopted a statement “discourag[ing] its members from participating in the preparation, dispensing, or distribution of compounded medications for use in legally authorized executions.”<sup>260</sup> So too did the American Pharmacists Association,

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254. See, e.g., Letter from Patrick Doherty, *supra* note 251.

255. See, e.g., *id.*

256. See Foa, *supra* note 215 (arguing that the pharmaceutical sector has now reached “[u]niversal consensus” in its opposition to distributing drugs for use in executions).

257. Eckholm, *supra* note 14; *Industry Statements*, *supra* note 152; *SECRECYREPORT*, *supra* note 178, at 79 n.222 (“Companies that have issued statements opposing the use of their products in executions include: Abbott Laboratories; AbbVie Inc.; Akorn; Alvogen Inc.; American Regent, Inc.; AmerisourceBergen Corp; Athenex; AuroMedics Pharma LLC; Baxter International; B. Braun Melsungen; Custopharm; Fresenius Kabi; Ganpati Exim Pvt Ltd; Gland Pharma Limited; GlaxoSmithKline; Hikma Pharmaceuticals; Jangsui Hengrui; Johnson & Johnson; Jonakayem Pharma Formulation (OPC) Pvt. Ltd.; Lilly Healthcare; Lundbeck; McKesson Corporation; Mylan Pharmaceuticals Inc; Naari Pharma Pvt. Ltd.; Par Pharmaceutical; Pfizer; Renaissance Lakewood, LLC; Roche Holding AG; Sagent Pharmaceuticals; Sandoz; Shrenik Pharma Limited; Sun Pharmaceutical Industries Ltd; Tamarang Pharmaceuticals; Teva Pharmaceutical Industries; X-Gen Pharmaceuticals Inc.”).

258. David Crow, *Johnson & Johnson Unit Speaks out at Planned Death Row Drug Use*, *FIN. TIMES* (Aug. 21, 2017), <https://www.ft.com/content/0e0aeb8-8694-11e7-bf50-e1c239b45787> [<https://perma.cc/526L-E2ZU>].

259. See *supra* notes 156-60 and accompanying text.

260. *IACP Adopts Position on Compounding of Lethal Injection Drugs*, *PHARMACY TIMES* (Mar. 24, 2015, 1:34 AM), <https://www.pharmacytimes.com/news/iacp-adopts-position-on-compounding-of-lethal-injection-drugs> [<https://perma.cc/BQ7M-R5A6>].

which stated, “Pharmacists are health care providers and pharmacist participation in executions conflicts with the profession’s role on the patient health care team.”<sup>261</sup>

In light of compounding pharmacies’ concerns, state secrecy laws try to protect the identities of those pharmacists who do supply drugs for executions.<sup>262</sup> Just sell us your drugs, the states seem to say. No one needs to know.

Some compounding pharmacies seem willing to take the risk. Executions, after all, continue. Secrecy laws make it nearly impossible to ascertain the identity of states’ drug providers, but in many cases compounding pharmacies are probably the best bet. Major corporations probably are not willing to risk associating with state departments of corrections, but compounding pharmacies, whose revenues are more modest, might be.

Nevertheless, though some compounding pharmacies apparently are willing to break ranks and provide executions drugs, many are not. Indeed, the very fact of these secrecy laws suggests that states recognize that drug suppliers, including compounding pharmacies, fear that their businesses could suffer if the public learns that they willingly provide execution drugs. Were anti-death penalty norms limited to only fringe activists and foreign governments, drug compounders who *do* sell drugs for executions probably would not be as concerned with hiding their identities. The reputational damage from selling execution drugs would likely be minimal if most people did not care.

Pharmaceutical companies’ and compounders’ policy changes, therefore, are likely connected to cultural changes in broader public sentiment about capital punishment. It is probably no accident that domestic pharmaceutical companies started objecting to the use of drugs in executions after a marked decline in public support for the

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261. M. Spinnler, *APhA House of Delegates Adopts Policy Discouraging Pharmacist Participation in Execution*, AM. PHARMACIST ASS’N (Mar. 30, 2015), <https://www.pharmacist.com/press-release/apha-house-delegates-adopts-policy-discouraging-pharmacist-participation-execution> [<https://perma.cc/9E95-8H84>].

262. See SECRECY REPORT, *supra* note 178, at 9, 13 (discussing the historic shroud of secrecy surrounding the identity of executioners that has been extended to suppliers of drugs used in lethal injection); Berger, *supra* note 84, at 1388-92; Denno, *supra* note 83, at 95 (“States likely withhold crucial details because, almost invariably, the more data states reveal about their lethal injection procedures, the more those states demonstrate their ignorance and incompetence.”).

death penalty. Americans' support for capital punishment dipped below 50 percent in 2016—the same year Pfizer announced it would no longer supply drugs for executions.<sup>263</sup> This is not to say that Pfizer and other companies were responding directly to changes in public opinion. Nor is it to discount the role that abolitionist groups like Reprieve played in calling corporate attention to these issues.<sup>264</sup> However, there is likely a connection between changes in public opinion and these companies' attitudes. In the 1990s, when the death penalty enjoyed much higher levels of public support, pharmaceutical companies did not object to the use of their drugs in executions.<sup>265</sup> Abolitionist groups existed then too, but they did not manage to persuade others that they should not assist executions.<sup>266</sup> Dramatic changes in public opinion likely encouraged those companies and their investors to reconsider their practices.

#### *4. Federal Law, Import Controls, and the Mission to Ensure Safe Drugs*

Federal controls preventing states from importing drugs from foreign sources have exacerbated states' difficulties getting lethal injection drugs. The two primary actors here are the Drug Enforcement Agency (DEA) and the Food and Drug Administration (FDA).<sup>267</sup> In neither case did Congress or the relevant administrative agency design the legal regimes with the death penalty in mind. Rather, the lawmakers had other regulatory concerns, primarily ensuring safe drugs for the American public.<sup>268</sup> Given the

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263. See Oliphant, *supra* note 123 (reporting that support for the death penalty had fallen to 49 percent).

264. See *supra* Part II.A.1.

265. See Matt Stroud, *As Drug Companies Back Away from Death Row, Who Will Fill the Gap?: Texas and Other States Fight to Get Their Fix*, VERGE (Oct. 11, 2013, 12:11 PM), <https://www.theverge.com/us-world/2013/10/11/4827396/killshot-can-doctors-and-drug-makers-do-no-harm-from-death-row> [<https://perma.cc/34QE-YLQZ>] (noting that in the 1980s, lethal injection was considered “the beginning of a new age” and that drug manufacturer objections only began to mount “in recent years”).

266. See John D. Bessler, *The Abolitionist Movement Comes of Age: From Capital Punishment as a Lawful Sanction to a Peremptory, International Law Norm Barring Executions*, 79 MONT. L. REV. 7, 30-32 (2018) (discussing Amnesty International and other abolition groups' efforts in the twentieth century).

267. See SECRECY REPORT, *supra* note 178, at 35.

268. See *infra* notes 271-76 and accompanying text.

uncompromising language of the relevant statutes and regulations, however, federal officials and courts often have concluded that those same rules must apply also to lethal injection drugs.

The Controlled Substances Act, for example, requires that entities importing covered drugs obtain an import permit from the DEA.<sup>269</sup> As a result, states seeking to import thiopental for use in executions need to obtain that permit. States, however, did not do so. As a result, the DEA in 2011 ended up confiscating imported thiopental from at least six state departments of corrections, all of which had failed to obtain the proper import permits.<sup>270</sup> States, quite simply, had violated preexisting federal law.

Similarly, FDA regulations promulgated pursuant to the Food, Drug, and Cosmetic Act (FDCA) stipulate that “no drug may be legally imported unless it is both properly listed with the FDA and comes from a properly registered foreign drug establishment.”<sup>271</sup> In 2013, the D.C. Circuit held that these provisions applied to thiopental, which state officials were trying to import for use in executions.<sup>272</sup> The court explained that “[t]he FDCA imposes mandatory duties upon the [FDA]” and that the FDA had “acted in derogation of those duties by permitting the importation of thiopental, a concededly misbranded and unapproved new drug, and by declaring that it would not in the future sample and examine foreign shipments of the drug despite knowing they may have been prepared in an unregistered establishment.”<sup>273</sup> The D.C. Circuit thus required the FDA to enforce the FDCA’s import provisions as applied to thiopental, thereby further cutting off a potential supply of what was then an important execution drug.<sup>274</sup>

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269. See 21 U.S.C. § 812(b)(3), (c), sched. III(b)(1); 21 C.F.R. § 1308.13(b) (2019); Lain, *supra* note 160, ch. 8, at 17.

270. See Denno, *supra* note 58, at 1361 & n.186; Crair, *supra* note 163 (noting that the DEA confiscated thiopental from Georgia, Arkansas, South Carolina, Kentucky, Alabama, and Tennessee, all of whom had failed to register for a DEA import license).

271. *Beaty v. FDA*, 853 F. Supp. 2d 30, 34 (D.D.C. 2012), *aff’d in part, vacated in part by* Cook v. Food & Drug Admin., 733 F.3d 1 (D.C. Cir. 2013); see also 21 C.F.R. § 314.410(a)(1) (2008).

272. *Cook*, 733 F.3d at 12.

273. *Id.*

274. See Lain, *supra* note 160, ch. 8, at 16-17; Michael Kiefer, *Arizona Again Tries to Illegally Import Execution Drug*, REPUBLIC (Oct. 17, 2017, 7:05 PM), <https://www.azcentral.com/story/news/arizona/investigations/2015/10/22/arizona-corrections-import-thiopental-illegal-execution-drug/74406580/> [<https://perma.cc/S8TF-WMYX>].

Though the D.C. Circuit's decision remains good law, the Trump Administration's Office of Legal Counsel issued a memorandum in May 2019 arguing that the FDA does not have jurisdiction over lethal injection drugs.<sup>275</sup> There are questions about whether this OLC memo is binding on the FDA, but the memo might invite courts to revisit the issue.

Regardless of how this plays out, the point remains that for the past decade federal regulatory controls have been another barrier to state executions. These regulations have made it harder for states to import drugs from overseas, especially from gray market suppliers like Dream Pharma in London and Harris Pharma in Kolkata.<sup>276</sup> Unlike major European pharmaceutical companies, these gray market suppliers were willing to provide execution drugs despite European governmental restrictions. Consequently, several death penalty states tried to get drugs through these gray market sources—until federal agencies intervened. In the early part of the 2010s, for example, the FDA put holds on thiopental shipments from Dream Pharma to Arizona, South Carolina, and California.<sup>277</sup>

Quite obviously, these obstacles also have little to do with abolitionism. The DEA's mission is to “enforce the controlled substances laws and regulations of the United States.”<sup>278</sup> The FDA is responsible for “protecting the public health by assuring the safety, effectiveness, quality, and security of human and veterinary drugs.”<sup>279</sup> These agencies' missions exist entirely independent from capital punishment.<sup>280</sup>

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275. Whether the Food and Drug Admin. Has Jurisdiction over Articles Intended for Use in Lawful Executions, 43 Op. O.L.C. 1, 26 (2019) (concluding “that articles intended for use in capital punishment by a State or the federal government cannot be regulated as ‘drugs’ or ‘devices’ under the FDCA” and that the FDA therefore lacks jurisdiction to regulate lethal injection drugs).

276. See *supra* notes 163-66 and accompanying text.

277. See Crair, *supra* note 163.

278. *DEA Mission Statement*, DEA, <https://www.dea.gov/mission> [<https://perma.cc/6S7P-RWKM>].

279. *FDA Fundamentals*, FDA, <https://www.fda.gov/about-fda/fda-basics/fda-fundamentals> [<https://perma.cc/W76K-MBU9>].

280. While some might contend that the notion of “safe” execution drugs is oxymoronic, contaminated or otherwise flawed drugs greatly increase the risk of an excruciating execution. To this extent, though Congress did not create the DEA and FDA with the death penalty in mind, these agencies' efforts reduce the chances that states will conduct executions with flawed drugs.

Of course, inmates' lawyers and enterprising reporters may call attention to states' illegal efforts to import death penalty drugs.<sup>281</sup> However, the underlying regulations themselves are not about the death penalty. Similarly, the judges and public officials enforcing these rules do so not with the intention of undermining capital punishment but rather simply to enforce existing federal law.

### 5. Medical Professional Ethics

Just as drug companies refuse to sell drugs for use in executions, so too do many doctors and medical professionals refuse to take part in executions for different but related reasons.<sup>282</sup> The Hippocratic Oath forbids doctors from doing harm,<sup>283</sup> and many interpret that oath to include participating in executions, even if their presence could minimize the risk of pain.<sup>284</sup> In response to the argument that participation in executions is not technically "practicing medicine," one doctor explained, "Physicians are bound by medical ethics when using medical knowledge and skills and therefore must not participate in executions, whether or not participation is deemed medical practice."<sup>285</sup>

It is not just individual doctors refusing to participate. Numerous medical groups have issued statements strongly opposing doctor and

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281. See, e.g., Crair, *supra* note 163.

282. See Tanya Albert Henry, *AMA to Supreme Court: Doctor Participation in Executions Unethical*, AMA (Aug. 22, 2018), <https://www.ama-assn.org/delivering-care/ethics/ama-supreme-court-doctor-participation-executions-unethical> [<https://perma.cc/AD6T-TLTX>] (explaining that physician assistance for executions violates physician ethics and jeopardizes the patient-physician relationship); Atul Gawande, *The Excellent Execution: Why Physicians Participate in Lethal Injection of Prisoners*, EDMOND J. SAFRA CTR. FOR ETHICS (Feb. 27, 2006), <https://ethics.harvard.edu/event/excellent-execution-why-physicians-participate-lethal-injection-prisoners> [<https://perma.cc/BHY3-83BE>] (discussing physician refusal to participate in the execution of Michael Morales).

283. *Greek Medicine*, U.S. NAT'L LIBR. OF MED., [https://www.nlm.nih.gov/hmd/greek/greek\\_oath.html](https://www.nlm.nih.gov/hmd/greek/greek_oath.html) [<https://perma.cc/YSW3-NPST>] (containing the original Hippocratic Oath, which states, "I will not give a lethal drug to anyone if I am asked").

284. See Ben Crair, *Doctors in the Death Chamber*, DAILY BEAST (Oct. 22, 2009, 8:30 PM), <https://www.thedailybeast.com/doctors-in-the-death-chamber> [<https://perma.cc/T2CC-KCVS>] (discussing the dilemma created by having untrained individuals carry out executions and the barriers for doctor participation).

285. Lee Black & Robert M. Sade, *Lethal Injection and Physicians: State Law vs. Medical Ethics*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/stories/lethal-injection-and-physicians-state-law-vs-medical-ethics> [<https://perma.cc/XYE9-SW4D>].



nurse participation in executions.<sup>286</sup> The American Medical Association Code of Medical Ethics issued an opinion flatly asserting that “a physician must not participate in a legally authorized execution.”<sup>287</sup> Numerous other organizations at the national level have issued similar statements, including the American Academy of Physician Assistants;<sup>288</sup> American Board of Anesthesiology;<sup>289</sup> American College of Correctional Physicians;<sup>290</sup> American College of Physicians;<sup>291</sup> American Correctional Health Services Association;<sup>292</sup> American Nurses Association;<sup>293</sup> American Pharmacists Association;<sup>294</sup> American Psychiatric Association;<sup>295</sup> American Public Health

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286. See *Professional Association Policies*, LETHAL INJECTION INFO. CTR., <https://lethalinjectioninfo.org/professional-associations-policies> [<https://perma.cc/3PZ9-5CD9>] (collecting statements from numerous medical organizations); see also SECRECY REPORT, *supra* note 178, at 79 n.221 (listing organizations that have made statements).

287. *Capital Punishment*, AMA, <https://www.ama-assn.org/delivering-care/ethics/capital-punishment> [<https://perma.cc/GL4S-5XK4>] (listing the Code of Medical Ethics Opinion 9.7.3).

288. *Guidelines for Ethical Conduct for the PA Profession*, AAPA (2013), <https://aapa.org/wp-content/uploads/2017/02/16-EthicalConduct.pdf> [<https://perma.cc/BSZ4-BS7T>] (“PAs, as health care professionals, should not participate in executions because to do so would violate the ethical principle of beneficence.”).

289. *Anesthesiologists and Capital Punishment*, AM. BD. OF ANESTHESIOLOGY (Apr. 2, 2010), <https://files.deathpenaltyinfo.org/legacy/documents/CapitalPunishmentCommentary.pdf> [<https://perma.cc/CK4Q-ELUG>] (statement from the American Board of Anesthesiology that, in order to be certified by the ABA, anesthesiologists may not participate in capital punishment).

290. *Non-Participation in Executions*, AM. COLLEGE OF CORR. PHYSICIANS (July 8, 2014), [https://accpmed.org/non-participation\\_in\\_execution.php](https://accpmed.org/non-participation_in_execution.php) [<https://perma.cc/F6YC-CM49>] (“The AMA’s opinion emphasizes the inherent conflict between a physician’s duty to heal and participation in a person’s death, even while that participation may not be active.”).

291. Lois Snyder Sulmasy & Thomas A. Bledsoe, *American College of Physicians Ethics Manual*, 172 ANNALS INTERNAL MED. S1, S20 (Supp. 2019) (“Participation by physicians in the execution of prisoners except to certify death is unethical.”).

292. *Mission and Ethics Statement*, AM. CORR. HEALTH SERVS. ASS’N, <https://www.achsa.org/mission-ethics-statement/> [<https://perma.cc/9ZYK-ZXG2>] (“The correctional health professional should ... [n]ot be involved in any aspect of execution of the death penalty.”).

293. *Nurses’ Role in Capital Punishment*, DEATH PENALTY INFO. CTR. (Jan. 28, 2010), <https://files.deathpenaltyinfo.org/legacy/documents/NursePartic.pdf> [<https://perma.cc/RV6B-ZCLF>] (statement from the ANA Committee on Ethics stating that “[p]articipation in executions, either directly or indirectly, is viewed as contrary to the fundamental goals and ethical traditions of the nursing profession”).

294. Spinnler, *supra* note 261.

295. AM. PSYCHIATRIC ASS’N, THE PRINCIPLES OF MEDICAL ETHICS 4 (2009), <https://www.umassmed.edu/contentassets/b191115defec4b23a56c66a04af907e7/psychiatric-principles-of-medical-ethics.pdf> [<https://perma.cc/Q48A-WFAZ>] (“A psychiatrist should not be a participant in a legally authorized execution.”).



Association;<sup>296</sup> American Society of Anesthesiologists;<sup>297</sup> and National Association of Emergency Medical Technicians.<sup>298</sup> Numerous state and international medical associations have also issued statements along these lines.<sup>299</sup> The overwhelming consensus in the medical community that medical ethics prohibits healthcare providers from participating in any way makes it more difficult for states to find medical personnel to assist with lethal injection, even when such participation could reduce the risk of a botched execution.<sup>300</sup>

Admittedly, medical ethics likely play a smaller role in the lethal injection stalemate than pharmaceutical company norms. Some doctors (like some compounding pharmacies) do break ranks and participate in state executions.<sup>301</sup> State secrecy laws can make it difficult to determine the qualifications of execution team members,<sup>302</sup> but clearly some states have been able to find medical personnel to participate in their executions.<sup>303</sup> Moreover, states can

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296. *Participation of Health Professionals in Capital Punishment*, AM. PUB. HEALTH ASS'N (Jan. 1, 2001), <https://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2014/07/28/13/02/participation-of-health-professionals-in-capital-punishment> [<https://perma.cc/79UW-57CZ>] (“[H]ealth professional participation in executions or pre-execution procedures is a serious violation of ethical codes.”).

297. *Statement on Physician Nonparticipation in Legally Authorized Executions*, AM. SOC'Y OF ANESTHESIOLOGISTS (Oct. 26, 2016), <https://www.asahq.org/standards-and-guidelines/state-statement-on-physician-nonparticipation-in-legally-authorized-executions> [<https://perma.cc/HA29-72W7>] (“ASA strongly discourages participation by anesthesiologists in executions.”).

298. *New Position Statement Opposes EMS Participation in Executions*, NAEMT (Feb. 18, 2010), [https://www.naemt.org/WhatsNewALLNEWS/10-02-18/New\\_Position\\_Statement\\_Opposes\\_EMS\\_Participation\\_in\\_Executions.aspx](https://www.naemt.org/WhatsNewALLNEWS/10-02-18/New_Position_Statement_Opposes_EMS_Participation_in_Executions.aspx) [<https://perma.cc/5CXF-5R92>].

299. See *Professional Association Policies*, *supra* note 286.

300. See, e.g., James K. Boehnlein, *Should Physicians Participate in State-Ordered Executions?*, AMA J. ETHICS (Mar. 2013), <https://journalofethics.ama-assn.org/article/should-physicians-participate-state-ordered-executions/2013-03> [<https://perma.cc/MK2E-67YD>] (“Physician participation is central to execution by lethal injection because medical knowledge and skills are integral to conducting the procedure effectively.”).

301. See Alper, *supra* note 207, at 44; Deborah W. Denno, *Physician Participation in Lethal Injection*, 380 NEW ENG. J. MED. 1790 (2019); Sandeep Jauhar, *Why It's O.K. for Doctors to Participate in Executions*, N.Y. TIMES (Apr. 21, 2017), <https://www.nytimes.com/2017/04/21/opinion/why-its-ok-for-doctors-to-participate-in-executions.html> [<https://perma.cc/4QVD-JKM9>].

302. See, e.g., SECRECY REPORT, *supra* note 178, at 33 (“Missouri legislators responded to media attention and public criticism concerning the state’s use of a clearly unqualified execution doctor not by enacting reforms, but by prohibiting disclosure of the identities of the execution team.”).

303. See Alper, *supra* note 207, at 44-45.

and do conduct lethal injection without the participation of doctors and nurses.<sup>304</sup> Doctors and nurses make lethal injection safer, but states can still elect to carry out executions without them. By contrast, lethal injection is simply impossible without the drugs.

That said, medical ethics still play some role in the stalemate. The overwhelming view of national, state, and international medical associations is that participation in executions is unethical. This norm has certainly made it more difficult for states to find qualified personnel to help design and implement lethal injection protocols.<sup>305</sup> Some state laws require the participation of medical personnel,<sup>306</sup> so if those states are unable to find willing participants, they cannot conduct executions until they do.

When states do proceed without medical personnel, they increase the risk of botches. Botched executions make future executions more difficult because states often put executions on hold for years to reevaluate their procedures.<sup>307</sup> The increased risk of botches also creates an Eighth Amendment issue, which in turn fuels further litigation.<sup>308</sup> Thus, medical ethics coupled with norms favoring humane executions make it more difficult for states to carry out safe executions and therefore to carry out executions at all.

### 6. *The Anesthetic Eighth Amendment*

A related norm is what we might call the “anesthetic Eighth Amendment”—that is, a concern for the inmate’s dying experience. Some lethal injection protocols create a significant risk that the inmate will suffer an excruciating death, an outcome that many believe violates the Eighth Amendment’s prohibition against cruel and unusual punishments. Unlike the others explored here, this norm is rooted primarily in the Constitution.

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304. See Berger, *supra* note 46, at 938.

305. Stephanie Mencimer, *State Executioners: Untrained, Incompetent, and “Complete Idiots,”* MOTHER JONES (May 7, 2014), <https://www.motherjones.com/politics/2014/05/death-penalty-lethal-injections-untrained-doctors/> [<https://perma.cc/9VHP-Z2K8>] (discussing the requirements for serving on an execution team and the difficulty states have in finding doctors to participate); see Crair, *supra* note 284.

306. See Jauhar, *supra* note 301.

307. See *supra* notes 168-70 and accompanying text.

308. See cases cited *supra* notes 198-99 and accompanying text.

Capital lawyers try to protect the anesthetic Eighth Amendment by challenging the constitutionality of state lethal injection protocols. These lawyers often feel an ethical obligation to tell their clients that they have made every effort to ensure as humane an execution as possible.<sup>309</sup> They also may hope that a victory, even a partial one, can help delay their clients' executions. Lower courts sometimes agree with these lawyers that a particular state protocol is dangerous.<sup>310</sup> In the interim, courts sometimes put executions on hold while they review a lethal injection protocol.<sup>311</sup> To this extent, lower court judges do play some role in the lethal injection stalemate. Given the *Bucklew* trilogy, however, courts do less to protect this norm than they otherwise might.<sup>312</sup> Indeed, lower court rulings invalidating state execution protocols on Eighth Amendment grounds almost never hold up on appeal.<sup>313</sup>

Interestingly, though, other nonjudicial public actors are also responsive to the anesthetic Eighth Amendment. Importantly, state officials sometimes halt executions because they worry that things might go awry.<sup>314</sup> Of course, it is not always clear whether this concern is due to a genuine sympathy for the condemned. States, instead, may want to avoid litigation or the bad publicity associated with a botched execution. Whatever their motives, though, states realize that they should not be inflicting visible pain during their executions.<sup>315</sup> The anesthetic Eighth Amendment matters.

For example, in January 2019, an Ohio magistrate judge found that the State's three-drug protocol beginning with midazolam

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309. See Alper, *supra* note 207, at 18 (noting that capital lawyers "have an additional obligation to seek a humane execution for their clients should that become an inevitability").

310. See *supra* notes 198-200.

311. See, e.g., *Jordan v. Fisher*, No. 3:15cv295, 2015 WL 13119074, at \*4 (S.D. Miss. Aug. 26, 2015) (granting temporary injunctive relief), *vacated*, 823 F.3d 805 (5th Cir. 2016); *Lockett v. Evans*, 356 P.3d 58, 61 (Okla. 2014) (upholding stay of execution); cases cited *supra* note 199 and accompanying text.

312. See *Bucklew v. Precythe*, 139 S. Ct. 1112, 1125 (2019) (stating the Eighth Amendment does not demand a painless execution and the chosen procedure of the states should be given deference).

313. See *supra* Part I.A.

314. See, e.g., GARRETT, *supra* note 25, at 202.

315. Some states' decision to retain a paralytic in their protocols may reflect their concern with *visible* suffering. See Eric Berger, *The Executioners' Dilemmas*, 49 RICH. L. REV. 731, 744 (2015).

created a great risk of suffering.<sup>316</sup> The judge upheld the protocol anyway because the plaintiffs had failed to demonstrate the availability and feasibility of an alternative method of execution, as required by the Supreme Court.<sup>317</sup> However, shortly after the court's decision, Ohio Governor Mike DeWine postponed an execution so that the state could reassess its lethal injection procedure.<sup>318</sup> Even though the court had permitted the State to proceed, Governor DeWine had concerns about the possibility of a botched execution and took steps to avert one.<sup>319</sup>

Other states halt executions after botched executions to avoid further botches. Arizona has not attempted executions since botching its execution of Joseph Wood in July 2014.<sup>320</sup> Ohio similarly botched Dennis McGuire's execution in January 2014 and did not conduct another execution for more than three and a half years.<sup>321</sup> Most prominently, Oklahoma's executions have been on hold since 2015 after a series of mishaps.<sup>322</sup> In April 2014, the State badly botched Clayton Lockett's execution.<sup>323</sup> Initially undeterred, the State executed Charles Warner—using, it turns out, a wrong

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316. See *In re Ohio Execution Protocol Litig.*, No. 2:11-cv-1016, 2019 WL 244488, at \*65 (S.D. Ohio Jan. 14, 2019) (finding of fact on a motion for stay of execution and preliminary injunction), *aff'd*, 937 F.3d 759 (6th Cir. 2019).

317. *Id.* at \*66-70 (concluding that the plaintiff had not satisfied the second prong of the Supreme Court's opinion in *Glossip v. Gross*).

318. Jeremy Pelzer, *Gov. Mike DeWine Delays Killer's Execution, Orders Review of Lethal-Injection Drugs*, CLEVELAND.COM (Jan. 25, 2019), <https://www.cleveland.com/politics/2019/01/gov-mike-dewine-delays-killers-execution-orders-review-of-lethal-injection-drugs.html> [<https://perma.cc/8C4D-BLMN>] (explaining the governor's decision).

319. See, e.g., Liliana Segura, *Ohio's Governor Stopped an Execution over Fears It Would Feel Like Waterboarding*, INTERCEPT (Feb. 7, 2019, 7:55 AM), <https://theintercept.com/2019/02/07/death-penalty-lethal-injection-midazolam-ohio/> [<https://perma.cc/4NVN-R3RA>] (summarizing autopsy reports indicating that twenty-three of twenty-seven autopsies of inmates executed with midazolam showed evidence of pulmonary edema, which creates a drowning sensation).

320. See *Arizona to Resume Executions*, *supra* note 96 (explaining Arizona's effort to resume executions for the first time since a botched execution in 2014).

321. See *Executions by State*, *supra* note 24 (select the years 2014-2017 under "year of execution"; select "Ohio" under "state"; select "apply" to generate list) (showing that Ohio did not carry out any executions between January 2014 and July 2017).

322. See Murphy, *supra* note 96.

323. See Jeffrey E. Stern, *The Cruel and Unusual Execution of Clayton Lockett*, ATLANTIC (June 2015), <https://www.theatlantic.com/magazine/archive/2015/06/execution-clayton-lockett/392069/> [<https://perma.cc/3D7A-FEAK>].

drug.<sup>324</sup> These errors prompted a wave of critical news stories,<sup>325</sup> and the State waited until February 2020 to announce that it would attempt lethal injection executions again.<sup>326</sup> While one would hope, of course, that states take serious steps to avoid botches *before* they happen, these episodes help demonstrate that states are concerned enough with the anesthetic norm to change their behavior after they violate it.

These episodes help illustrate that the anesthetic Eighth Amendment plays an important role in the lethal injection stalemate, even when courts decline to intervene. Presumably, if states believed that the public did not care about painful executions, they would continue scheduling executions even after botches or other public embarrassments. The public, however, seems to disapprove of visible suffering.<sup>327</sup> As Professor Garland argues, the very purpose of lethal injection—with its paralytics and medicalized setting—is “to minimize the sights, sounds, and smells of suffering.”<sup>328</sup> Botches, thus, matter, even in states like Oklahoma where public support for the death penalty is high.<sup>329</sup> Indeed, badly botched executions, like Lockett’s, may affect public support for capital punishment more generally.<sup>330</sup>

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324. Matt Ford, *An Oklahoma Execution Done Wrong*, ATLANTIC (Oct. 8, 2015), <https://www.theatlantic.com/politics/archive/2015/10/an-oklahoma-execution-done-wrong/409762/> [<https://perma.cc/8B26-LGLH>] (explaining that Oklahoma used potassium acetate instead of potassium chloride).

325. See, e.g., *id.*; Chris McDaniel, *Oklahoma Officials Told of Execution Drug Mix-Up Months Earlier than Previously Known*, BUZZFEED NEWS (Apr. 13, 2016, 7:12 PM), <https://www.buzzfeednews.com/article/chrimcdaniel/oklahoma-officials-told-of-execution-drug-mix-up-months-earl> [<https://perma.cc/PRG2-54S5>]; Josh Sanburn, *Oklahoma’s Lethal Injection Problems Go from Bad to Worse*, TIME (Oct. 8, 2015, 3:33 PM), <https://time.com/4067071/oklahoma-lethal-injection-wrong-drug-charles-warner/> [<https://perma.cc/8A3K-7RBF>].

326. Murphy, *supra* note 96.

327. See Emily Swanson, *Americans Favor the Death Penalty, but Few Want the Executed to Suffer*, HUFFPOST (Jan. 25, 2014, 8:54 AM), [https://www.huffpost.com/entry/death-penalty-poll\\_n\\_4661940?guccounter=1](https://www.huffpost.com/entry/death-penalty-poll_n_4661940?guccounter=1) [<https://perma.cc/MT8J-GN5Y>].

328. DAVID GARLAND, PECULIAR INSTITUTION: AMERICA’S DEATH PENALTY IN AN AGE OF ABOLITION 53 (2010).

329. See Andrew Cohen, *Three States to Watch if You Care About the Death Penalty*, MARSHALLPROJECT (Oct. 19, 2016, 10:00 PM), <https://www.themarshallproject.org/2016/10/19/three-states-to-watch-if-you-care-about-the-death-penalty> [<https://perma.cc/3ZWV-HG57>] (noting that support for life without parole is rising even in Oklahoma, which has “ardent supporters of capital punishment”).

330. See Corinna Barrett Lain, *The Politics of Botched Executions*, 49 RICH. L. REV. 825, 838 (2015) (“States’ responses to botched executions have given critics even more to

Though some judges and commentators casually lump together all anti-death penalty actors, it is important to note that the anesthetic norm discussed here is quite distinct from abolitionism. Capital lawyers attacking lethal injection procedures on Eighth Amendment grounds do not challenge the legitimacy of their clients' death sentences or of capital punishment writ large. Lawyers usually bring these challenges as civil rights actions under 42 U.S.C. § 1983.<sup>331</sup> As such, they challenge not the legitimacy of the death sentence (as a habeas petition might), but rather the safety of a state's particular execution protocol.<sup>332</sup> A successful § 1983 suit does nothing to alter the inmate's death sentence.

Indeed, though capital lawyers may often share abolitionists' antipathy toward the death penalty, they must limit their challenge to the way the state plans to carry out the sentence (rather than attacking the sentence itself) so as not to trigger strict habeas gatekeeping procedures under the Antiterrorism and Effective Death Penalty Act (AEDPA).<sup>333</sup> Therefore, these capital lawyers necessarily must invoke narrower arguments than abolitionists. As we have seen, they must also proffer an alternative method of execution as part of their pleading.<sup>334</sup> To be sure, lawyers wielding this norm can delay executions and, to that extent, accomplish ends sympathetic to abolitionism. That said, these lawyers have different roles and objectives than abolitionists. As a result, they often decide to keep their distance from abolitionist groups like Reprieve, lest a judge accuse them of seeking to sabotage the entire capital system.<sup>335</sup>

The anesthetic norm is also distinct from the institutional norms dissuading drug companies and doctors from participating in executions. In fact, the norms can be quite at odds. If a person supports capital punishment but opposes painful executions, she

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criticize."); *infra* notes 402-06 and accompanying text.

331. See, e.g., *Hill v. McDonough*, 547 U.S. 573, 576 (2006); *Nelson v. Campbell*, 541 U.S. 637, 639 (2004).

332. See *Hill*, 547 U.S. at 579-80.

333. See 28 U.S.C. § 2254(b); *Hill*, 547 U.S. at 579-80; *Heck v. Humphrey*, 512 U.S. 477, 479-80 (1994).

334. See *Bucklew v. Precythe*, 139 S. Ct. 1112, 1125 (2019).

335. See HERBERT H. HAINES, *AGAINST CAPITAL PUNISHMENT* 118-20 (1996) (noting that policy activists and lawyers differ in their responsibilities, and that lawyers worry that activists may damage their legal strategies).

might encourage pharmaceutical companies to provide barbiturates like thiopental or pentobarbital, both of which could help accomplish a painless execution. She might similarly encourage physician participation in capital punishment. Many state officials in death penalty states implicitly embrace this combination of positions.

Of course, there likely is substantial overlap in the views held by the different anti-death penalty groups examined here. For example, the capital lawyer presenting arguments about the anesthetic Eighth Amendment may privately celebrate the abolitionist movement's successes, even though she officially distances herself from those efforts. However, the numerous values, motives, arguments, and tactics behind the lethal injection stalemate are analytically distinct, and we cannot understand that stalemate unless we recognize that diversity.

*B. The Connections Between Death Penalty Problems and the Lethal Injection Stalemate*

The various norms and actors operating to undermine lethal injection must be understood in the broader context of death penalty opposition. Increased attention to capital punishment's deep problems is both a cause and result of the lethal injection stalemate. Growing objections to the death penalty discourage skilled experts from participating in lethal injection executions, which makes it harder for states to carry out executions safely. The resulting delayed and botched executions further increase scrutiny of capital punishment, deepening the perception that it is a broken system.<sup>336</sup>

To understand this feedback loop, one must recognize that numerous critics beyond abolitionists bemoan American capital punishment's deep flaws. Whereas many abolitionists insist that the death penalty is categorically immoral, some other critics argue not that capital punishment is inherently wrong but rather that the American death penalty is hopelessly flawed due to various deep systemic problems, such as arbitrariness, error, racial bias, delay, and cost.<sup>337</sup> To be sure, some of these same critics may also believe

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336. See *supra* notes 35-36 and accompanying text.

337. See *Glossip v. Gross*, 135 S. Ct. 2726, 2756, 2759, 2764 (2015) (Breyer, J., dissenting) (focusing on death penalty's unreliability, arbitrariness, and long delays); GARRETT, *supra*



capital punishment to be immoral, but the American death penalty's flaws are so deep that they alienate some who support the practice in theory.<sup>338</sup>

Indeed, these more pragmatic and procedural criticisms have the potential to sway capital punishment supporters. Even people who do not find the death penalty inherently immoral might object strenuously to an expensive, arbitrary system infected with error and racial bias. Numerous actors, including academics,<sup>339</sup> reporters,<sup>340</sup> lawyers,<sup>341</sup> and even some judges,<sup>342</sup> have emphasized these kinds of problems in their recent discussions.

These factors have long been a focus of expert critiques of the death penalty, but now they are seeping into public opinion and the mainstream media. Public opinion polls documenting declining support for the death penalty have identified issues such as cost, arbitrary application, delay in executions, and risks of executing the innocent as leading factors for declining public support for capital punishment.<sup>343</sup> The Black Lives Matter movement, while focusing

note 25, at 203.

338. See, e.g., David Dolinko, *How to Criticize the Death Penalty*, 77 J. CRIM. L. & CRIMINOLOGY 546, 546 (1986) (distinguishing between “procedural arguments” focusing on “irremediable flaws” in the death penalty and “substantive arguments” that capital punishment is “morally wrong”).

339. See generally GARRETT, *supra* note 25; STEIKER & STEIKER, *supra* note 24.

340. Countless news reports, including many cited in this Article, also expose serious problems with the death penalty. For an example, see Jamelle Bouie, *Bloody Mary*, SLATE (May 7, 2014, 8:07 PM), <https://slate.com/news-and-politics/2014/05/mary-fallin-is-responsible-for-clayton-locketts-botched-execution-the-oklahoma-governor-wanted-his-death.html> [<https://perma.cc/DE4U-7TPJ>] (noting that the death penalty is “saturated with racial bias ... and has claimed the lives of innocent people”).

341. Numerous capital lawyers file cases challenging the death penalty on numerous grounds. See, e.g., Ed Pilkington, *Landmark U.S. Case to Expose Rampant Racial Bias Behind the Death Penalty*, GUARDIAN (Aug. 25, 2019, 10:17 AM), <https://www.theguardian.com/world/2019/aug/24/landmark-us-case-to-expose-rampant-racial-bias-behind-the-death-penalty> [<https://perma.cc/EMZ9-HN3E>] (quoting one of the lawyers on the case as stating “[w]e are taking an unprecedented look at whether the courts will tolerate proven racial bias in the death penalty”).

342. See, e.g., *Glossip*, 135 S. Ct. at 2755-56 (Breyer, J., dissenting) (identifying death penalty's flaws); *State v. Bush*, 423 P.3d 370, 402-03 (Ariz. 2018) (Winthrop, J., concurring in part and dissenting in part) (“The actual costs of administering capital punishment ... are staggering.... Moreover, given the continued reports that demonstrate defendants may be sentenced to death because of jurors' inherent bias, ... the death penalty [does not] outweigh[] the societal benefit.”).

343. See *Less Support for Death Penalty, Especially Among Democrats*, PEW RSCH. CTR. (Apr. 16, 2015), <https://www.pewresearch.org/politics/2015/04/16/less-support-for-death->

primarily on police brutality and misconduct, has also prompted commentators to argue that “the struggle for racial justice also requires abolition of the death penalty.”<sup>344</sup>

Interestingly, some of these arguments are resonating with not only liberal but also conservative commentators. For instance, given the fact that the death penalty (with or without executions) is far more expensive than a system of life in prison without parole, more people are concluding that capital punishment is not worth the cost, especially now that every state (except Alaska) gives juries the option to sentence a convicted murderer to life in prison without the possibility of parole.<sup>345</sup> Republicans still support the death penalty in significant numbers, but those numbers have been falling, often because of the cost.<sup>346</sup>

The death penalty’s broader defects are analytically distinct from lethal injection’s problems, but the issues affect each other. After all, pharmaceutical companies, compounding pharmacies, doctors, nurses, and others will probably be less willing to participate in executions as support for capital punishment decreases.<sup>347</sup> Even if an individual person or company does not object to the death penalty, the professional risks of participation increase as popular support for the practice decreases.

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penalty-especially-among-democrats/ [https://perma.cc/GCY4-NZBN] (citing risk that innocent person will be executed); *Poll Shows Growing Support for Alternatives to the Death Penalty; Capital Punishment Ranked Lowest Among Budget Priorities*, DEATH PENALTY INFO. CTR. (Nov. 16, 2010, 9:00 AM), <https://deathpenaltyinfo.org/stories/dpic-2010-public-opinion-poll> [https://perma.cc/A3L5-X39S].

344. See Bharat Malkani, *Why the Fight for Racial Justice in the US Requires the Abolition of the Death Penalty*, CONVERSATION (June 23, 2020, 10:51 AM), <https://theconversation.com/why-the-fight-for-racial-justice-in-the-us-requires-the-abolition-of-the-death-penalty-140681> [https://perma.cc/3N5E-B7RG].

345. See GARRETT, *supra* note 25, at 203; Peter A. Collins & Aliza Kaplan, *The Death Penalty Is Getting More and More Expensive. Is It Worth It?*, CONVERSATION (Mar. 30, 2017, 10:00 PM), <https://theconversation.com/the-death-penalty-is-getting-more-and-more-expensive-is-it-worth-it-74294> [https://perma.cc/922Z-XP5Y] (linking increasing costs of death penalty to the decline in public support for it).

346. See Amber C. Strong, *The Cost of Death: Conservatives Take a Fresh Look at the Death Penalty*, CBN NEWS (Oct. 29, 2017), <https://www1.cbn.com/cbnnews/us/2017/october/the-cost-of-death-conservatives-take-a-fresh-look-at-the-death-penalty> [https://perma.cc/PLT8-72SA] (documenting conservative concern that a death sentence is far more expensive for taxpayers than a life sentence); DEATH PENALTY INFO. CTR., *supra* note 125 (noting a Gallup poll showing a decline in Republicans’ support for death penalty from 82 percent to 72 percent over a short period).

347. See *supra* Parts II.A.3, 5.

Moreover, declining support for the death penalty might prompt politicians to approach the issue cautiously. To be sure, political support for capital punishment remains strong in several states,<sup>348</sup> and public officials there have the political incentive to take steps towards executions, such as procuring the necessary drugs.<sup>349</sup> But the political climate surrounding capital punishment is far more ambivalent in many states,<sup>350</sup> and politicians there might thread the political needle by supporting the death penalty in theory without working too hard to help make executions possible.

In other words, greater public attention to the death penalty's larger problems likely encourages officials in some states to keep a low profile on the issue. This phenomenon may in turn help explain why more states do not work harder to get the drugs. If an official in an ambivalent state takes the trouble to buy the drugs, it may energize anti-death penalty voters (and possibly risk a botched execution). Such an official might consider it safer politics to issue bland statements about supporting capital punishment while trying to avoid direct engagement with the issue.

In fact, some state officials might claim that they cannot obtain lethal injection drugs, even if, with some effort, they probably could. As noted above, the mere fact of over twenty executions every year demonstrates that some states *can* get the drugs.<sup>351</sup> To the official in an ambivalent state, however, it might be shrewd politics to claim that the drugs are unavailable, even if the official has not thoroughly investigated possible drug suppliers. Such officials can hide behind state secrecy laws, which make it difficult to know not only where states get their drugs but also whether states have done their

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348. See, e.g., *State Polls and Studies*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/facts-and-research/public-opinion-polls/state-polls-and-studies> [https://perma.cc/2Y5N-SDJE] (collecting state polls and studies involving the death penalty, including a study from Arkansas showing 73 percent support for death penalty in late 2017); *Support for the Death Penalty*, TEX. POL. PROJECT (June 2018), <https://texaspolitics.utexas.edu/set/support-death-penalty-june-2018> [https://perma.cc/4B36-X5G6] (showing that 38 percent of Texans strongly support the death penalty and 27 percent somewhat support the death penalty).

349. See generally Berger, *supra* note 315.

350. See Patrik Jonsson, *Amid Arkansas Death Penalty Debate, Concern for the Executioners*, CHRISTIAN SCI. MONITOR (Apr. 14, 2017), <https://www.csmonitor.com/USA/Justice/2017/0414/Amid-Arkansas-death-penalty-debate-concern-for-the-executioners> [https://perma.cc/XQ4C-7EEQ] (noting Americans' general ambivalence about the death penalty).

351. See *supra* Part I.B.2.

due diligence before claiming drugs are unavailable.<sup>352</sup> In a curious way, then, secrecy laws can help protect both officials who try to get the drugs and those who do not.

Ambivalent officials may partially explain the dearth of executions in numerous states, especially those with sizable death row populations that have not come close to putting together a viable execution protocol in years.<sup>353</sup> Roughly half the states with capital punishment have not executed anyone in over a decade, even as other states execute regularly.<sup>354</sup> Growing awareness of the capital system's deep flaws, therefore, likely contributes to states' lethal injection woes because it discourages officials in some states from doing too much to restart executions.

Even in states where the political support for executions is stronger, lethal injection problems might affect long-term support for the death penalty. States determined to carry out lawfully imposed death sentences sometimes scramble to throw together new lethal injection protocols, but without safe drugs and the participation of professionals, these states are more likely to botch executions.<sup>355</sup> Botched executions, in turn, can prompt harsh criticism of the death penalty, thereby deepening the death penalty's long-term problems. As we have already seen, botches also can cause states to put executions on hold, which can diminish support for the death penalty further.<sup>356</sup> These influences, then, can reinforce each other.

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352. See *supra* notes 176-78.

353. See *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/EP63-B29D>].

354. See *Executions by State and Year*, *supra* note 92.

355. See Lain, *supra* note 330, at 831-34; Meredith Gallen, *Two Botched Executions Put Spotlight on Lethal Injection Process and State Secrecy*, ABA (June 1, 2014), [https://www.americanbar.org/groups/committees/death\\_penalty\\_representation/project\\_press/2014/summer/two-botched-executions-put-spotlight-on-lethal-injection-process/](https://www.americanbar.org/groups/committees/death_penalty_representation/project_press/2014/summer/two-botched-executions-put-spotlight-on-lethal-injection-process/) [<https://perma.cc/U6N8-ACJX>] (discussing botched executions using experimental protocols in Arizona and Oklahoma); Michael Muskal, *Ohio Execution: New Drug Protocol, but 15 Minutes to Die*, L.A. TIMES (Jan. 16, 2014, 1:42 PM), <https://www.latimes.com/nation/nationnow/la-na-nn-ohio-execution-drug-protocol-20140116-story.html> [<https://perma.cc/K458-L3DT>] (discussing a botched execution in Ohio using a new two-drug protocol).

356. See Sarah Childress, *Why the Death Penalty Is on the Decline*, PBS (Dec. 18, 2014), <https://www.pbs.org/wgbh/frontline/article/why-the-death-penalty-is-on-the-decline/> [<https://perma.cc/F8C7-99VX>] (explaining that unpredictable delays in executions were part of the reason why a California judge declared the death penalty unconstitutional); Alan Greenblatt, *Why the Death Penalty Has Lost Support from Both Parties*, GOVERNING (Apr. 16,

It is worth pointing out that one of capital punishment's many deep problems—arbitrary administration—applies to both lethal injection and the death penalty writ large. Indeed, lethal injection problems mirror—and may have come to symbolize—the haphazard nature of capital punishment more generally. Several states have designed and implemented their lethal injection protocols with minimal care and expertise,<sup>357</sup> sometimes resulting in grisly botched executions.<sup>358</sup> Some states' incompetence has been astonishing, such as when Oklahoma used the wrong drug in the execution of Charles Warner and when Missouri entrusted its protocol to a ludicrously casual doctor who boasted that because he was dyslexic, he did not know how much of the drugs he was mixing.<sup>359</sup> Even state secrecy laws, which are designed to shield lethal injection from public scrutiny, may backfire in the long run, implicitly conceding that states have something to hide.<sup>360</sup> These botches, secrecy laws, and related high-profile problems have also resulted in even more litigation and delay in the system. Lethal injection problems, therefore, both highlight and exacerbate the chaos of the capital system more generally.

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2019), <https://www.governing.com/topics/public-justice-safety/gov-death-penalty-states-new-hampshire.html> [<https://perma.cc/K55Y-W42E>] (explaining that one reason support for the death penalty is down on both sides of the aisle is that the legal process is expensive with very few executions).

357. See Eric Berger, *In Search of a Theory of Deference: The Eighth Amendment, Democratic Pedigree, and Constitutional Decision Making*, 88 WASH. U. L. REV. 1, 59-61, 64-65 (2010); Eric Berger, *Individual Rights, Judicial Deference, and Administrative Law Norms in Constitutional Decision Making*, 91 B.U. L. REV. 2029, 2038-40 (2011) [hereinafter Berger, *Individual Rights*].

358. See, e.g., Kent Faulk, *Alabama Death Row Inmate Ronald Bert Smith Heaved, Coughed for 13 Minutes During Execution*, AL.COM (Mar. 7, 2019), [https://www.al.com/news/birmingham/2016/12/alabama\\_death\\_row\\_inmate\\_is\\_se.html](https://www.al.com/news/birmingham/2016/12/alabama_death_row_inmate_is_se.html) [<https://perma.cc/DAE6-9TSA>]; Dana Ford & Ashley Fantz, *Controversial Execution in Ohio Uses New Drug Combination*, CNN (Jan. 17, 2014, 1:01 PM), <https://www.cnn.com/2014/01/16/justice/ohio-dennis-mcguire-execution/index.html> [<https://perma.cc/EB3L-MUKS>] (explaining that Dennis McGuire's execution took twenty-four minutes while he gasped and appeared to be choking); Stern, *supra* note 323 (describing the botched execution of Clayton Lockett).

359. Berger, *supra* note 58, at 269; Ford, *supra* note 324 (explaining that Oklahoma used potassium acetate instead of potassium chloride); McDaniel, *supra* note 325 (explaining that Oklahoma executed Charles Warner with the wrong drug and nearly executed Richard Glossip with the same wrong drug a few months later).

360. See SECRECY REPORT, *supra* note 178, at 24.

### C. Pro-Death Penalty Norms

It is important for students of the death penalty to realize that pro-death penalty norms are also powerful. After all, it is the collision of norms for and against the death penalty that produces the stalemate. Without these norms, we would not have a stalemate but a rout.

The death penalty is in decline, but it is not dead yet, in large part because many members of the public support it.<sup>361</sup> Pro-death penalty norms are stronger in some states than others, but they remain powerful in enough places that total U.S. abolition remains highly unlikely for the foreseeable future. A majority of Justices on the U.S. Supreme Court also seem to support capital punishment, making it unlikely that the current Court would invalidate capital punishment across the board or even chip away at it in substantial ways. It is beyond this Article's scope to explore these norms in detail, but they are worth identifying to understand the values that help perpetuate capital punishment.

An important pro-death penalty norm is retribution. Many state officials and members of the general public believe that the death penalty serves an important penological purpose in expressing society's disgust at the most heinous crimes. That norm is strongest in many southern states, where public officials often invoke retributive language.<sup>362</sup> Following the gruesome botched execution of Clayton Lockett, Oklahoma Governor Mary Fallin proclaimed, "The people of Oklahoma do not have blood on their hands. They saw Clayton Lockett for what he was: evil."<sup>363</sup> Oklahoma Representative Mike Christian echoed this sentiment: "I realize this may sound harsh, but as a father and former lawman, I really don't care if it's by lethal injection, by the electric chair, firing squad, hanging, the guillotine, or being fed to the lions."<sup>364</sup>

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361. See, e.g., *Gallup Poll*, *supra* note 125 (showing that public support for the death penalty has been declining); GARRETT, *supra* note 25, at 90 (reporting strong support for the death penalty in Texas, for example).

362. See, e.g., Bouie, *supra* note 340.

363. *Id.*

364. Scott Christianson, *How Oklahoma Came to Embrace the Gas Chamber*, NEW YORKER (June 24, 2015), <https://www.newyorker.com/news/news-desk/how-oklahoma-came-to-embrace-the-gas-chamber> [<https://perma.cc/2HKM-3FAV>].



Another pro-death penalty norm is incapacitation—that is, the desire to ensure that the “worst of the worst” will not be able to harm more people.<sup>365</sup> In her defense of Lockett’s botched execution, Governor Fallin made this point, stating, “His execution means he will never again harm or terrorize another person.”<sup>366</sup> Of course, it is far from clear that incapacitation is a persuasive argument in favor of capital punishment because life in prison without parole also incapacitates criminals from inflicting further harm (except on persons in prison, but capital inmates can inflict harm in prison too). Nevertheless, Governor Fallin’s statements reflect the belief that the death penalty serves both retributive and incapacitation purposes.

Death penalty supporters sometimes also assert that capital punishment deters violent crime.<sup>367</sup> Such as the incapacitation argument, this one rests on suspect grounds. Impartial researchers have concluded that the evidence does not persuasively indicate a deterrent effect (or, for that matter, the lack of a deterrent effect).<sup>368</sup> Nevertheless, while the evidence on this issue is so far inconclusive, the myth of deterrence helps explain continuing support for capital punishment.

A political deference norm also helps preserve the death penalty. State officials, under this view, should respect the democratically enacted laws of the state. When state officials allow executions to proceed, they frequently appeal to the will of the people and the need to follow the laws of the state.<sup>369</sup> When he was Governor of Texas, George W. Bush said on the eve of an execution, “My

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365. See Bouie, *supra* note 340.

366. *Id.*

367. See, e.g., David Muhlhausen, *The Death Penalty Deters Crime and Saves Lives*, HERITAGE FOUND. (June 27, 2007), <https://www.heritage.org/testimony/the-death-penalty-deters-crime-and-saves-lives> [<https://perma.cc/RH23-4AUM>].

368. See, e.g., NAT’L RSCH. COUNCIL OF NAT’L ACADS., DETERRENCE AND THE DEATH PENALTY 2 (2012) (“The committee concludes that research to date on the effect of capital punishment on homicide is not informative about whether capital punishment decreases, increases, or has no effect on homicide rates.”); Jeffrey D. Kubick & John R. Moran, *Lethal Elections: Gubernatorial Politics and the Timing of Executions*, 46 J.L. & ECON. 1, 2 & n.2 (2003) (noting the “absence of any consensus on the deterrent effects of capital punishment”).

369. See, e.g., Amy Forliti, *Death Penalty Decree Could Be a Quandary for US Politicians*, AP NEWS (Aug. 6, 2018), <https://apnews.com/63c0124a63a141249d6cbfd81eec13e9> [<https://perma.cc/AV8W-NKNR>] (quoting Nebraska Governor Pete Ricketts as stating that “capital punishment remains the will of the people”).



responsibility is to ensure our laws are enforced fairly and evenly without preference or special treatment.”<sup>370</sup> Arkansas Governor Asa Hutchinson expressed similar views when he defended his decision to push forward with executions, explaining, “I have a duty as governor to faithfully execute the laws of our state.”<sup>371</sup> Like many politicians, these governors justified executions on the grounds that they were simply carrying out the law.

Of course, this deference norm is significant, but it is not inviolable. Governors in California, Colorado, Oregon, Pennsylvania, and Washington have all imposed moratoria on executions in recent years, thus displacing otherwise applicable state law.<sup>372</sup> That said, the deference principle is predictably stronger in states where capital punishment enjoys more robust public support. Unsurprisingly, the moratoria did not occur in any southern states, where support for the death penalty is usually strongest.

Judges follow a distinct but related deference norm. This norm reflects courts’ beliefs that they ought not intrude on the political branches, which enjoy superior democratic legitimacy.<sup>373</sup> For their part, state judges, many of whom are subject to election, often respond to the same political pressures that motivate prosecutors and governors to support capital punishment. Federal judges are obviously not directly susceptible to such political pressures, but many are acutely aware of their democratic deficit and worry about displacing the will of the people.<sup>374</sup> The Supreme Court itself has emphasized these concerns, explaining in *Bucklew* that, “[u]nder our

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370. Jim Yardley, *Bush and the Death Penalty; Texas' Busy Death Chamber Helps Define Bush's Tenure*, N.Y. TIMES (Jan. 7, 2000), <https://www.nytimes.com/2000/01/07/us/record-bush-death-penalty-texas-busy-death-chamber-helps-define-bush-s-tenure.html> [<https://perma.cc/XA48-H6QD>].

371. Lindsey Millar, *Governor Hutchinson Meets the Press to Talk Capital Punishment*, ARK. TIMES (Apr. 13, 2017, 8:15 PM), <https://arktimes.com/arkansas-blog/2017/04/13/governor-hutchinson-meets-the-press-to-talk-capital-punishment> [<https://perma.cc/8QBR-GALW>].

372. See *State by State*, *supra* note 22; *Statements from Governors of California, Pennsylvania, Washington, Colorado, and Oregon Halting Executions*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/stories/statements-from-governors-imposing-moratoria-on-executions> [<https://perma.cc/66SW-7LAL>].

373. See Berger, *Individual Rights*, *supra* note 357, at 2034.

374. See generally ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (2d ed. 1986).

Constitution, the question of capital punishment belongs to the people and their representatives, not the courts, to resolve.”<sup>375</sup>

It is worth noting that death penalty supporters can also point to the text of the Constitution for support.<sup>376</sup> The Due Process Clauses of both the Fifth and Fourteenth Amendments forbid the government from depriving a person of “*life, liberty, or property, without due process of law.*”<sup>377</sup> This language implies that the government *can* deprive a person of life, provided that it comply with due process requirements. The Fifth Amendment, moreover, stipulates that “[n]o person shall be held to answer for a *capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.*”<sup>378</sup> The identification of capital crimes strongly suggests the possibility of capital punishment. To be sure, these textual arguments do not necessarily undermine arguments that the death penalty we actually have is so flawed as to be unconstitutional,<sup>379</sup> as Justice Breyer asserted in his *Glossip* dissent.<sup>380</sup> Still, the Constitution’s plain text creates a presumption in favor of capital punishment’s constitutionality, lending an important legal legitimacy to the practice.

Finally, returning to the issue of lethal injection, we must remember that though free-market norms permit drug manufacturers to refuse to sell drugs to states, related norms make it hard for those companies to claw back drugs that fall into states’ hands.<sup>381</sup> Pharmaceutical companies can refuse to sell drugs to states directly, but the pharmaceutical market is complicated, and those companies cannot always control where drugs end up. To this extent, states rarely have to relinquish death penalty drugs, even if they used shady methods to obtain them. Norms unrelated to capital punishment, then, can both obstruct and enable executions.

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375. *Bucklew v. Precythe*, 139 S. Ct. 1112, 1134 (2019).

376. *Id.* at 1122 (“The Constitution allows capital punishment.”).

377. U.S. CONST. amend. V (emphasis added); *id.* amend. XIV (emphasis added).

378. *Id.* amend. V (emphasis added).

379. *See supra* Part II.A.6.

380. *See Glossip v. Gross*, 135 S. Ct. 2726, 2755-56 (2015) (Breyer, J., dissenting) (“Today’s administration of the death penalty involves three fundamental constitutional defects: (1) serious unreliability, (2) arbitrariness in application, and (3) unconscionably long delays that undermine the death penalty’s penological purpose.”).

381. *See, e.g., Fresenius Kabi USA, LLC v. Nebraska*, 733 F. App’x 871, 871-73 (8th Cir. 2018).

## III. IMPLICATIONS

A. *Implications for the Eighth Amendment and Capital Punishment*

Though Eighth Amendment doctrine has played only a small part in the lethal injection stalemate, that deadlock may affect future interpretations of the Eighth Amendment.<sup>382</sup> Eighth Amendment doctrine historically incorporates “evolving standards of decency.”<sup>383</sup> Though the Supreme Court has yet to invalidate an execution protocol, mounting evidence of some lethal injection protocols’ dangers could alter the calculus. This evidence is especially powerful in cases about the three-drug protocol, which greatly heightens the risk of excruciating pain by including drugs that both cause and conceal terrible suffering.<sup>384</sup>

Admittedly, such an about-face is unlikely with the current Court, which, in *Bucklew*, continued the hyper-deferential approach to method-of-execution challenges.<sup>385</sup> But *Bucklew* and *Glossip* were each 5-4 cases,<sup>386</sup> so the Court’s attitude could change as its composition does. It is even possible that additional botched executions or other lethal injection mishaps would provide enough evidence to prompt a member of the current *Bucklew* majority to reconsider the facts, especially in a case about the three-drug protocol.

While this may seem unlikely given the Justices involved, there is reason to think that *Bucklew* and *Glossip* are already out of step with cultural norms. Lethal injection, for all its deep flaws, reflects our desire for sanitized, peaceful executions.<sup>387</sup> We now know that

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382. See, e.g., *Glossip*, 135 S. Ct. at 2755 (Breyer, J., dissenting).

383. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

384. See Eric Berger, *Evolving Standards of Lethal Injection*, in *THE EIGHTH AMENDMENT AND ITS FUTURE IN A NEW AGE OF PUNISHMENT* 234, 237-40 (Meghan J. Ryan & William W. Berry III eds., 2020).

385. See *supra* Part I.A.

386. See *Bucklew v. Precythe*, 139 S. Ct. 1112, 1118 (2019); *Glossip*, 135 S. Ct. at 2730-31.

387. See GARLAND, *supra* note 328, at 53; Lain, *supra* note 160, intro., at 3 (“Lethal injection does do something especially well—it hides the brutality of the death penalty, replacing the image of a violent death with a peaceful one—and that, in turn, has worked to make executions more palatable and the idea of the death penalty more abstract.”).

some, possibly many, lethal injection executions are not painless, but because many include a paralytic, they often seem like they are.<sup>388</sup> While the public in many states supports capital punishment, only a small minority of Americans support painful executions.<sup>389</sup> To the extent the Supreme Court majority seems largely untroubled by a history of botched executions, its Eighth Amendment approach seems out of step with societal views.<sup>390</sup>

Even if the Supreme Court does not alter its approach, the spate of botched executions could persuade lower courts to invalidate dangerous lethal injection protocols, despite the *Bucklew* trilogy.<sup>391</sup> One avenue might be for inmates to bring state constitutional challenges, inviting state courts to interpret their own state constitutions' "cruel and unusual punishment" provisions differently from the Eighth Amendment.<sup>392</sup> Though state courts have often construed their state analogues to the Eighth Amendment to track the U.S. Supreme Court's interpretation of that amendment, they choose to develop their own state-specific standards.<sup>393</sup>

Lower courts interpreting the Eighth Amendment itself, of course, must follow Supreme Court precedent. They are free, nevertheless, to make their own factual findings based on the evidence before them. For example, as discussed above, a federal magistrate judge in Ohio found that the State's three-drug protocol beginning with midazolam "cannot prevent the physical pain known to be caused by

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388. See *In re Ohio Execution Protocol Litig.*, No. 2:11-cv-1016, 2019 WL 244488, at \*65 (S.D. Ohio Jan. 14, 2019) (finding of fact on a motion for stay of execution and preliminary injunction), *aff'd*, 937 F.3d 759 (6th Cir. 2019).

389. See Swanson, *supra* note 327.

390. I thank Corinna Lain for this observation.

391. See, e.g., *In re Ohio Execution Protocol Litig.*, 2019 WL 244488, at \*65 (decision and order on motion for stay of execution and preliminary injunction), *aff'd*, 937 F.3d 759, 762-63 (6th Cir. 2019) (stating in dictum that the lower court had erred in finding that the plaintiff had met his burden in establishing that Ohio's protocol was constitutionally problematic).

392. See, e.g., *State v. Mata*, 745 N.W.2d 229, 261-62, 279-80 (Neb. 2008) (striking down Nebraska's electrocution procedure as unconstitutional under Nebraska's Constitution); JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 1 (2018) ("[V]irtually all of the foundational liberties that protect Americans originated in the state constitutions and to this day remain independently protected by them.").

393. See Elisabeth A. Archer, Note, *Establishing Principled Interpretation Standards in Iowa's Cruel and Unusual Punishment Jurisprudence*, 100 IOWA L. REV. 323, 353-56 (2014) (surveying Eighth Amendment counterparts in state constitutions).

injection of the paralytic and the potassium chloride.”<sup>394</sup> Though the Supreme Court in *Glossip* had upheld a very similar three-drug Oklahoma protocol that used midazolam, the Ohio court pointed out that its job was to rule based on the facts before it, not the facts the Supreme Court reviewed.<sup>395</sup> The facts before courts matter.<sup>396</sup> As public norms continue to make it difficult for states to get drugs, some states likely will continue to use dangerous protocols, which may prompt other courts to view those protocols skeptically.

More importantly, lethal injection problems present a dilemma for state officials supporting capital punishment. If states forego executions, public support for the death penalty might dwindle.<sup>397</sup> Capital punishment is expensive, and, if executions are not even carried out, it hardly seems worth the high cost.<sup>398</sup> But when states take shortcuts to resume executions, such as purchasing unregulated compounded or foreign gray market drugs or resuming executions without qualified personnel, they heighten the risk of botched executions.<sup>399</sup> Part of the point of lethal injection is “to make executions palatable” for a “squeamish public.”<sup>400</sup> When lethal injection goes visibly and horribly wrong, the public may become more uncomfortable with capital punishment. As such, actions taken in the short-term to continue executions might actually undermine the long-term viability of the death penalty.

Botched executions and related lethal injection problems, then, can change the terms of future death penalty debates. After all, these serious problems expose the violence inherent in capital

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394. *In re Ohio Execution Protocol Litig.*, 2019 WL 244488, at \*63 (decision and order on motion for stay of execution and preliminary injunction).

395. *See id.* at \*64 (“[T]he task of this Court is not to reweigh the *Glossip* evidence ... but rather to weigh all the evidence now in the record here.”).

396. Admittedly, the Sixth Circuit, in affirming the magistrate judge’s ruling, disagreed in dictum with the lower court’s conclusion that the plaintiff had met his burden in establishing that Ohio’s protocol was constitutionally problematic. *See In re Ohio Execution Protocol Litig.*, 937 F.3d at 762-63. The point remains, however, that lower courts have leeway to judge execution protocols based on the facts before them.

397. *See supra* notes 35-36, 42 and accompanying text.

398. *See supra* note 35 and accompanying text.

399. *See* VA. CODE ANN. § 53.1-234 (2016) (“[T]he compounding of drugs necessary to carry out an execution by lethal injection.... is not subject to the jurisdiction of the Board of Pharmacy, the Board of Medicine, or the Department of Health Professions; and ... is exempt from [state drug regulations.]”); Lain, *supra* note 160, ch. 8, at 30.

400. *See* Lain, *supra* note 160, intro., at 4.

punishment.<sup>401</sup> Occasionally, these events even cast a national spotlight on these issues. After the botched Lockett execution, President Obama took the unusual step of calling the events “deeply troubling.”<sup>402</sup> The President went even further, stating that the death penalty was problematic in other respects as well, such as racial bias and error.<sup>403</sup>

This was an extraordinary development: a botched execution led the President of the United States to state publicly that there are “significant questions about how the death penalty is being applied.”<sup>404</sup> Because the death penalty is a *state* institution, the President has little direct influence on death penalty practices. Nevertheless, this episode indicates that lethal injection problems can shine a national spotlight on capital punishment’s many other difficulties.

Increased awareness of these difficulties is leading more states to abandon capital punishment. Since just 2015, Colorado, Delaware, New Hampshire, and Washington have ended their death penalties, and Pennsylvania and California governors have imposed moratoria.<sup>405</sup> Since the start of 2011, thirty-two states have carried out no executions, and many of those states have not even tried.<sup>406</sup>

Over the long run, these developments could affect other states’ practices and, perhaps ultimately, judicial interpretations. For example, states that retain but rarely use the death penalty might look at states that have abolished it and decide to follow suit. If many states that execute infrequently follow that path, capital punishment could become an outlier practice in perhaps ten states, mostly in the South. Given the Eighth Amendment’s attention to

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401. Gibson & Lain, *supra* note 15, at 1258.

402. *Botched Execution ‘Deeply Troubling,’ Says Barack Obama*, GUARDIAN (May 3, 2014, 2:33 AM), <https://www.theguardian.com/world/2014/may/03/botched-execution-deeply-troubling-says-barack-obama> [<https://perma.cc/ED5V-6V3F>].

403. *Id.*

404. *Id.*

405. *State by State*, *supra* note 22.

406. See *Execution Database*, *supra* note 23 (select the years 2011-2020 under “year of execution” and the following items under “state”: Alaska, California, Colorado, Connecticut, Hawaii, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oregon, Pennsylvania, Rhode Island, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming).

“evolving standards of decency,”<sup>407</sup> such a strong trend against the death penalty could cast new constitutional doubt on the entire practice.<sup>408</sup> In that case, Justice Breyer’s *Glossip* dissent could become a template for future judicial reconsideration of the constitutionality of capital punishment.<sup>409</sup>

More modestly, the lethal injection stalemate is prompting some states to transition to new methods of execution.<sup>410</sup> A number of states authorize alternative methods of execution, including electrocution, lethal gas, hanging, and the firing squad.<sup>411</sup> In recent years, some states have turned to those alternative methods. For example, in 2018 and 2019, Tennessee carried out four of its six executions by electrocution<sup>412</sup> because inmates there chose the electric chair, believing it to be more humane than lethal injection.<sup>413</sup>

Were numerous states to replace lethal injection with a different method, that change too could have broader constitutional implications. Most obviously, a broad transition in this direction would cast Eighth Amendment doubt on some remaining lethal injection

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407. See Corinna Barrett Lain, *The Unexceptionalism of “Evolving Standards,”* 57 UCLA L. REV. 365, 368-69 (2009) (“[T]he Supreme Court routinely—and explicitly—determines constitutional protection based on whether a majority of states agrees with it.”).

408. See William W. Berry III, *Evolved Standards, Evolving Justices? The Case for a Broader Application of the Eighth Amendment*, 96 WASH. U. L. REV. 105, 118-29 (2018) (discussing “Eighth Amendment Majoritarianism”).

409. See *Glossip v. Gross*, 135 S. Ct. 2726, 2755-56 (2015) (Breyer, J., dissenting).

410. See, e.g., Quinton Chandler, *Oklahoma to Use Nitrogen Gas for Executions*, NPR (Mar. 16, 2018, 5:09 AM), <https://www.npr.org/2018/03/16/594199515/oklahoma-to-use-nitrogen-gas-for-executions> [<https://perma.cc/3CJJ-3SUA>] (explaining that after botched executions, Oklahoma adopted nitrogen gas as a new execution method); *Tennessee Executes Another Inmate by Electric Chair After Supreme Court Battle*, GUARDIAN (Dec. 6, 2018, 9:58 PM), <https://www.theguardian.com/us-news/2018/dec/06/tennessee-execution-electric-chair-david-earl-miller> [<https://perma.cc/T5NF-YN23>] (explaining that two inmates in Tennessee chose to be executed by electric chair rather than by lethal injection).

411. See *Methods of Execution*, *supra* note 146 (listing nine states that allow at least one alternative method of execution, as well as an additional nine states that authorize alternatives if other methods are found to be unconstitutional or are unavailable or impracticable).

412. *Execution Database*, *supra* note 23 (select the years 2018-2019 under “year of execution” and select “Tennessee” under “state”).

413. See *Zagorski v. Haslam*, 139 S. Ct. 20, 21 (2018) (Sotomayor, J., dissenting from denial of application for stay and denial of certiorari) (noting that Edmund Zagorski’s decision to be executed by electric chair was “not because he thought that it was a humane way to die, but because he thought that the three-drug cocktail that Tennessee had planned to use was even worse”).



protocols, especially the dangerous three-drug protocol. After all, if many states switched away from lethal injection due to its dangers, courts might view some remaining lethal injection protocols more skeptically.

A switch to other methods might also affect public support for the death penalty, especially if the transition were to more overtly violent methods, such as electrocution or the firing squad. The common use of paralytics in lethal injection masks the brutality of executions. It is possible that a change in execution methods could help unmask that brutality, further undermining public support for the death penalty.

Of course, much of this is speculative. The death penalty is unpredictable. That said, it should be clear that public norms, state death penalty practices, and judicial interpretations of the Eighth Amendment can all affect each other. Cumulatively, these phenomena may threaten the long-term viability of capital punishment.

### *B. The Surprising Implications for Constitutional Theory*

The lethal injection stalemate also complicates the common wisdom in constitutional theory on several fronts. To be clear, it does not undermine these theories so much as suggest collectively that theories are often contextual; theories that explain one area of constitutional law may operate somewhat differently in another. This Subsection summarizes those implications.

#### *1. Corporate Values and the Subversion of Federalism's Choice Maximization*

Federalism is a dominant value in American constitutional law. In many spheres, we leave it to states to adopt policies that work for them. So long as those policies do not violate the U.S. Constitution and are not preempted by federal law, states can enact and implement their own policies.<sup>414</sup> On this account, federalism maximizes local policy choices, creating “a diversity of jurisdictions,

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414. See U.S. CONST. art. VI, cl. 2; Steven Ferrey, *The Supreme Court's Constitutional "Bright Line": Preempting Authority of 47 of 50 States*, 10 NE. L. REV. 143, 153 (2018).

[which] allows a better matching of preferences and policies.”<sup>415</sup> Thus, some states have capital punishment and others do not, and that is exactly how federalism does and should work.

The story told here complicates that model. Many states have the death penalty, but are unable to execute. Twenty-eight states currently have capital punishment,<sup>416</sup> but since 2015, only twelve have carried out executions.<sup>417</sup> Some of these dormant death penalty states are ambivalent about capital punishment and not really making serious efforts to resume executions.<sup>418</sup> In other states, though, problems with lethal injection explain the inability to carry out executions. Arizona,<sup>419</sup> Mississippi,<sup>420</sup> and Oklahoma,<sup>421</sup> for example, all were active death penalty states until lethal injection problems derailed them. Arkansas was unable to carry out an execution between 2005 and 2017, again due substantially to lethal injection problems.<sup>422</sup>

The common narrative in constitutional law circles is that when states cannot carry out democratically elected policies, it is because a court or the federal government has interfered. With some modest exceptions, though, courts have mostly followed the Supreme Court’s deferential approach in lethal injection cases and refused to invalidate state execution protocols.<sup>423</sup> It has mostly not been the judiciary frustrating the states’ intentions. Rather, as we have

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415. J. Robert S. Prichard with Jamie Benedickson, *Securing the Canadian Economic Union: Federalism and Internal Barriers to Trade*, in *FEDERALISM AND THE CANADIAN ECONOMIC UNION* 17-18 (Michael J. Trebilcock et al. eds., 1983); see also Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 *J. POL. ECON.* 416, 418 (1956).

416. *State by State*, *supra* note 22.

417. *Execution Database*, *supra* note 23 (select the years 2015-2020 under “year of execution”; then select “apply” to generate list) (listing Alabama, Arkansas, Florida, Georgia, Missouri, Nebraska, Ohio, Oklahoma, South Dakota, Tennessee, Texas, and Virginia).

418. See *supra* notes 107-10 and accompanying text.

419. See *supra* notes 168-69 and accompanying text.

420. Arielle Dreher, *Cruel & Unusual? The Death Penalty’s Trials in Mississippi*, *JACKSON FREE PRESS* (Mar. 22, 2017, 12:27 PM), <https://www.jacksonfreepress.com/news/2017/mar/22/cruel-unusual-death-penaltys-trials-mississippi/> [<https://perma.cc/3DWX-TJUA>].

421. See, e.g., Mark Berman, *Oklahoma Lethal Injection Process Muddled by Inexcusable Failure*, *Grand Jury Finds*, *WASH. POST* (May 19, 2016, 5:00 PM), <https://www.washingtonpost.com/news/post-nation/wp/2016/05/19/oklahoma-grand-jury-says-lethal-injection-process-muddled-by-inexcusable-failure/> [<https://perma.cc/5RSP-YVAY>]; Brewer & Fernandez, *supra* note 202.

422. Berman, *supra* note 181.

423. See *supra* notes 45, 196-97 and accompanying text.

already seen, a variety of other actors have interfered or refused to cooperate.

Perhaps this development should not be surprising. After all, one important justification for Supreme Court deference generally is respect for democratic norms; the Court is acutely aware of the counter-majoritarian problem.<sup>424</sup> But democracy norms matter less to private actors, especially companies and medical professionals who must worry about their reputations. These actors usually do not actively try to subvert democratic preferences, but nor are they going to prioritize state policy goals over their own interests.

The role of corporate values in this story casts a curious light on some Justices' evident outrage that "guerilla" activists are obstructing capital punishment. As we have already noted, pharmaceutical companies are not making their decisions with the intention of bringing down capital punishment; in their eyes, they are not waging a war at all.<sup>425</sup> Nor do they qualify as guerillas who stealthily attack and then hide. To the contrary, these companies announce their values transparently on corporate websites and in press releases.<sup>426</sup> In so doing, the companies are simply protecting their business interests. This Supreme Court typically supports business interests but here apparently find them irksome.<sup>427</sup>

Of course, the anti-death penalty activists who encourage pharmaceutical companies and other actors to renounce their role in capital punishment are motivated by principle, not money. To this extent, they really are trying to undermine democratically enacted policies. However, most of their tactics amount simply to the exercise of free speech to denounce capital punishment and lobby others not to participate in executions. Unlike real guerilla warfare, which relies on sporadic violence and sabotage, this activity is perfectly legal. Indeed, the current Supreme Court usually strongly favors free speech rights.<sup>428</sup> Here, however, it appears

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424. See BICKEL, *supra* note 374, at 16-23.

425. See *supra* Part II.A.3.

426. See, e.g., *Pfizer's Position*, *supra* note 242.

427. See, e.g., Lee Epstein, William M. Landes & Richard A. Posner, *When It Comes to Business, The Right and Left Sides of the Court Agree*, 54 WASH. U. J.L. & POL'Y 33, 36 (2017) (summarizing empirical findings that both Democratic- and Republican-appointed Justices support business at record levels).

428. Joel M. Gora, *Free Speech Matters: The Roberts Court and the First Amendment*, 25

frustrated that such speech has so effectively undermined both its own deferential doctrine and state policy preferences.

Interestingly, in addition to subverting a standard account of federalism, this story also complicates the common stereotype that corporations are primarily or exclusively concerned with wealth maximization. In the lethal injection sphere, private corporations' concerns with their social identities have driven corporate behavior.<sup>429</sup> Companies are turning down potential sales to make a statement about their identities.

Of course, pecuniary concerns also figure into these corporate decisions. Drug companies presumably do not want to participate in executions in part because the resulting bad publicity might ultimately affect their revenue and scare away institutional investors. Ethical concerns are thus intertwined with economic ones. This model of the corporation as a norm entrepreneur is not unique to the lethal injection sphere,<sup>430</sup> but it nevertheless is striking the degree to which corporate norms have subverted states' policy preferences here.

## 2. *The Surprising Effectiveness of Uncoordinated Actors*

We are used to thinking that coordinated actors are more likely to achieve policy outcomes they desire because they can marshal resources, share information, lobby lawmakers, and collectively persuade the public of the justness of their cause.<sup>431</sup> As Neil

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J.L. & POL'Y 63, 64 (2016).

429. See Eckholm, *supra* note 14; see also *Pfizer's Position*, *supra* note 242.

430. See Arthur Acevedo, *Corporate Ethics: Approaches and Implications to Expanding the Corporate Mindset of Profitability*, 49 LOY. U. CHI. L.J. 637, 638-39 (2018) (discussing the connection between corporate ethics and profitability). See generally David L. Engel, *An Approach to Corporate Social Responsibility*, 32 STAN. L. REV. 1 (1979); Anthony J. Fejfar, *Corporate Voluntarism: Panacea or Plague? A Question of Horizon*, 17 DEL. J. CORP. L. 859 (1992) (discussing Engel's theory of corporate social responsibility and altruism).

431. See NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* 53-97 (1994). Perhaps the quintessential example of coordinated actors are political parties, see, for example, SETH E. MASKET, *NO MIDDLE GROUND: HOW INFORMAL PARTY ORGANIZATIONS CONTROL NOMINATIONS AND POLARIZE LEGISLATURES* 41 (2009) (explaining "a theory of parties that accounts for the coordination of various actors both inside and outside the government"); Kathleen Bawn, Martin Cohen, David Karol, Seth Masket, Hans Noel & John Zaller, *A Theory of Political Parties: Groups, Policy Demands and Nominations in American Politics*, 10 PERSPS. ON POL. 571, 571 (2012) (arguing that parties

Komesar has persuasively argued, in many political situations, law and policy reflect a pronounced minoritarian bias because well-organized and funded minority groups consistently outperform disorganized majorities.<sup>432</sup> In our political system, coordination is key.

The lethal injection stalemate, however, illustrates that uncoordinated groups working mostly independently can also reshape public policy, even when the executive, legislative, and judicial branches are all seemingly united. Indeed, sometimes these uncoordinated groups deliberately refuse to collaborate with each other and still frustrate the policy goals of people in power. Coordinated action still is usually the better bet in U.S. politics, but the lethal injection stalemate helps demonstrate that even the most insightful models cannot capture all the possible variables in our complicated legal system. Even (mostly) uncoordinated groups that act (mostly) for their own self-interest rather than on behalf of a common goal can still produce an effect roughly comparable to that of a mass movement.

Several points help explain the success of uncoordinated actors in the lethal injection arena. First, the states' choice of a complicated method of execution has left them especially vulnerable to the whims of other actors. In particular, because lethal injection is a quasi-medical procedure requiring specialized expertise, states need the willing participation of a variety of expert actors to carry out executions.<sup>433</sup> Scientific expertise and proper facilities are necessary to produce the drugs.<sup>434</sup> Medical expertise is necessary to implement the protocols safely.<sup>435</sup> When most specialized persons with technical expertise decide it is not in their own interest to participate, the consequences on the capital system can be far reaching.

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"are best understood as coalitions of interest groups and activists seeking to capture and use government for their particular goals"). Other coordinated actors, of course, can also accomplish political goals.

432. See KOMESAR, *supra* note 431, at 55 (explaining why "small, concentrated interest groups have substantially greater political influence than groups larger in number but with smaller per capita stakes even though the total stakes for the larger group may significantly exceed that for the smaller").

433. See Berger, *supra* note 58, at 268.

434. See *supra* Part II.A.3.

435. Boehnlein, *supra* note 300.

Relatedly, the selection of lethal injection also introduces into the picture other complications, such as regulatory regimes and professional organization norms. Even if states could find foreign suppliers willing to supply drugs, they would still have FDA and DEA restrictions to worry about.<sup>436</sup> Similarly, even if an individual doctor does not personally believe participation in executions is immoral, she must consider whether her participation, in violation of widely accepted medical ethics, might carry professional consequences she is unwilling to risk.<sup>437</sup>

Second, uncoordinated groups can effect change in this area because they are interfering with an existing regime rather than trying to erect a new one. It is especially challenging for uncoordinated groups to effect change requiring legislative or executive action because they have to persuade democratically accountable officials to act.<sup>438</sup> By contrast, undermining the status quo requires fewer political victories.<sup>439</sup> It is usually easier to throw down roadblocks than to construct new legal structures.

Third, and relatedly, federalism might also make it easier for uncoordinated groups to undermine the current legal regime. Each state has to get death penalty drugs for itself, and any disruption in the supply chain can derail executions in that state for months or years.<sup>440</sup> While states do sometimes share drugs and advice with each other,<sup>441</sup> they too are mostly uncoordinated, so they cannot band together to figure out a long-term solution.

Moreover, most states lack the resources or wherewithal to devise a long-term game plan to keep executions going. As we have already seen, most states are amateurs at lethal injection.<sup>442</sup> Their surreptitious efforts to import drugs illegally from the foreign gray market

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436. See *supra* Part II.A.4.

437. See *supra* Part II.A.5.

438. See KOMESAR, *supra* note 431, at 65-72.

439. Cf. *id.* at 70-73 (discussing factors that can affect the political influence of concentrated minorities).

440. See *supra* Part I.B.2.

441. See STEIKER & STEIKER, *supra* note 24, at 143; Andrew Welsh-Huggins, *FDA Quietly Helped States Obtain Lethal-Injection Drugs: Shortage Has Disrupted Executions Around the Country*, NBC NEWS (Jan. 1, 2011, 4:42 PM), [http://www.nbcnews.com/id/41025962/ns/us\\_news-crime\\_and\\_courts/t/fda-quietly-helped-states-obtain-lethal-injection-drugs](http://www.nbcnews.com/id/41025962/ns/us_news-crime_and_courts/t/fda-quietly-helped-states-obtain-lethal-injection-drugs) [<https://perma.cc/4CRP-VP2D>].

442. See *supra* Part I.B.2.

more resemble a teenager trying to score illegal narcotics than a professional government responsibly addressing a solemn policy issue. Similarly, many states' haphazard protocols hardly suggest careful, expert design and implementation.<sup>443</sup> States' own lack of professionalism, then, likely makes it easier for outside actors to undermine the states' efforts, notwithstanding those actors' own lack of coordination.

Furthermore, and still relatedly, because the various actors discussed here are mostly uncoordinated, there is not an easy target against whom death penalty supporters can retaliate. This diffusion of responsibility for the stalemate might actually strengthen anti-death penalty resistance. After all, there is just so much that death penalty states and supporters can say in response to medical professionals and pharmaceutical companies who prefer not to participate in executions. States and the Supreme Court may be mad about stalled executions, but they cannot compel doctors or pharmaceutical companies to assist with executions. Indeed, it is partially because many of the groups behind the stalemate are not only numerous but also legally unassailable that their collective actions have had such an impact on the death penalty nationwide.

### *3. Changing Norms and Judicial Irrelevance*

An important narrative in constitutional history and scholarship is that changes in popular culture can help reshape courts' attitudes towards contentious constitutional questions.<sup>444</sup> To cite just a few famous examples, Supreme Court decisions vindicating the rights of African Americans, women, and same-sex couples all followed

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443. See STEIKER & STEIKER, *supra* note 24, at 142-43.

444. Some classics from this rich and extensive literature include FRIEDMAN, *supra* note 55; MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004); LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004). See also Richard H. Pildes, *Is the Supreme Court a "Majoritarian" Institution?*, 2010 SUP. CT. REV. 103, 116 (summarizing the "current majoritarian[...]" school of constitutional scholarship as "present[ing] the Court as so tightly cabined in by 'majoritarian forces' as to be little more than a reflection of preexisting majoritarian preferences").



significant changes in popular opinion.<sup>445</sup> As popular norms on civil rights changed, the Court changed doctrinal course.<sup>446</sup>

The lethal injection stalemate also involves courts and culture, but the Court so far is not following cultural trends as they evolve. In response to rising opposition to the death penalty, the Supreme Court has not altered its approach to Eighth Amendment method-of-execution cases. To the contrary, it has issued a trio of deferential rulings.<sup>447</sup> Of course, the country is about evenly divided on the wisdom of capital punishment,<sup>448</sup> so perhaps the change in cultural norms has not been dramatic enough to merit a change in judicial approach. On the other hand, the public seems largely united in its opposition to painful executions,<sup>449</sup> so, from that perspective, the *Bucklew* trilogy is out of step with contemporary norms.<sup>450</sup> Moreover, there remained substantial opposition to the norms the Court vindicated in cases like *Brown v. Board of Education* and *Obergefell v. Hodges*, and the Court was still willing to strike down democratically enacted laws in those cases.<sup>451</sup>

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445. See TOMIKO BROWN-NAGIN, *COURAGE TO DISSENT: ATLANTA AND THE LONG HISTORY OF THE CIVIL RIGHTS MOVEMENT* 220 (2011); KLARMAN, *supra* note 444, at 6 (discussing how changes in public opinion on racial issues paved the way for *Brown v. Board of Education*); CHRISTOPHER W. SCHMIDT, *THE SIT-INS: PROTEST AND LEGAL CHANGE IN THE CIVIL RIGHTS ERA* 83-84 (2018) (ebook).

446. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015) (holding that state bans of same-sex marriage violated the Equal Protection and Due Process clauses of the Fourteenth Amendment); *United States v. Virginia*, 518 U.S. 515, 534 (1996) (holding that maintaining a military college exclusively for males violated the Equal Protection Clause of the Fourteenth Amendment); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (holding that miscegenation statutes violated the Equal Protection and Due Process clauses of the Fourteenth Amendment); *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (holding that segregation of public schools on the basis of race violated the Equal Protection Clause of the Fourteenth Amendment).

447. See *supra* Part I.A.

448. See *supra* notes 125-27 and accompanying text.

449. See Swanson, *supra* note 327.

450. It is interesting to note that the Supreme Court has been more willing to rule against the state in other kinds of death penalty cases not involving the method of execution. See, e.g., *Kennedy v. Louisiana*, 554 U.S. 407, 412-13 (2008) (invalidating the death penalty for child rape); *Roper v. Simmons*, 543 U.S. 551, 578-79 (2005) (invalidating the death penalty for crimes committed by persons under the age of eighteen); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (invalidating the death penalty for the mentally disabled). One possible explanation for the disparate treatment is some Justices' (probably exaggerated) fear that invalidating a method of execution would effectively end capital punishment by rendering states unable to carry out executions in the future.

451. See KLARMAN, *supra* note 444, at 291 (noting that southern racial practices in the early 1950s remained deeply opposed to integration); MICHAEL J. KLARMAN, *FROM THE CLOSET*

Prominent scholars are persuasive that the Supreme Court often follows rather than causes social changes. Nevertheless, the Court's opinions often play an important role in embodying and consolidating those changes. *Brown* and *Obergefell* were possible because societal attitudes towards race and same-sex marriage had already transformed significantly, but those decisions also came to symbolize successful social movements.<sup>452</sup> To this extent, observers sometimes link the success of social movements to prominent Supreme Court decisions.<sup>453</sup> Changes in attitudes about race helped make *Brown* possible,<sup>454</sup> but the landmark decision also carried tremendous symbolic importance and probably helped pave the way for subsequent legislative reforms, such as the Civil Rights Act of 1964 and the Voting Rights Act of 1965.<sup>455</sup> Even if courts in these cases were following cultural developments, they still played a significant role in the transformative story.

By contrast, in the lethal injection area, judicial rulings amount to a "sideshow."<sup>456</sup> Attitudes towards the death penalty have changed, but the Court has not—at least, not yet. Nor does the *Bucklew* trilogy seem to be reshaping the death penalty debate. *Bucklew* will not prompt pharmaceutical companies to start selling execution drugs again. Indeed, it is hard to imagine pharmaceutical companies would willingly do so under any circumstances, at least without a significant increase in public support for capital punishment. Nor does *Bucklew* alter the calculations of the state official who has decided that it is safer politics to announce that the drugs are unavailable without searching too hard for potential sellers.

To be sure, it would be a mistake to contend that judicial decisions do not matter at all. They clearly matter for the capital inmate whose life depends on a judge's ruling. They also can

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TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE 89-118, 143-155 (2013) (discussing backlash to same-sex marriage litigation in years leading up to *Obergefell*).

452. See Ellen Ann Andersen, *Transformative Events in the LGBTQ Rights Movement*, 5 IND. J.L. & SOC. EQUAL. 441, 471-72 (2017); Mark Tushnet, *Some Legacies of Brown v. Board of Education*, 90 VA. L. REV. 1693, 1713-14 (2004).

453. See Andersen, *supra* note 452, at 471-72; Tushnet, *supra* note 452, at 1694-95.

454. See KLARMAN, *supra* note 444, at 6.

455. See, e.g., Tushnet, *supra* note 452, at 1706, 1713-15 ("*Brown* was an important statement of American ideals.").

456. See Gibson & Lain, *supra* note 15, at 1218.

“inflame[ ] the losing side, mobilizing the death penalty’s supporters or else its opponents.”<sup>457</sup> Even if the doctrine from the *Bucklew* trilogy has not effectively removed obstacles to executions, those decisions, along with the Court’s other opinions in the area, have been part of a larger cultural conversation. Judicial decisions, especially from the U.S. Supreme Court, matter, though not always in the ways the majority Justices intend.

These observations do not challenge the great research examining the role of popular norms in shaping courts’ constitutional decisions.<sup>458</sup> They do suggest, however, that the precise relationship between culture, courts, and the Constitution is contextual and will change based on the particulars of each situation. The lethal injection stalemate, therefore, is a useful case study on alternative ways in which popular norms and public policy can inform each other. Whereas several famous examples suggest that changing popular norms shape judicial decisions that in turn may consolidate those changing norms,<sup>459</sup> the story here leaves courts mostly out of the loop, at least so far. Perhaps in time, the Court will come around and take a stand against painful executions. Or perhaps support for capital punishment will increase so that the public’s attitude matches the Court’s. It is also possible, though, that the stalemate will continue regardless of what the judiciary does or does not do.

The Court itself seems frustrated by its impotence in this area, a point that might help explain the *Bucklew* trilogy’s reactionary tone. With each lethal injection decision, the Court ratcheted up the deference a bit, as though it were complaining that its past decisions had not mattered.<sup>460</sup> When Justice Alito asked whether the Court should “countenance what amounts to a guerilla war against the death penalty,” he evinced his frustration that forces were conspiring to derail executions, notwithstanding the Court’s repeated support for the death penalty.<sup>461</sup> Justice Alito was obviously correct that forces *were* conspiring to obstruct executions, but his question, as phrased, betrayed his aggrandized view of the Court’s role in this

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457. GARLAND, *supra* note 328, at 287.

458. *See, e.g., supra* note 446.

459. *See generally* FRIEDMAN, *supra* note 55 (explaining “[h]ow [p]ublic [o]pinion [h]as [i]nfluenced the Supreme Court and [s]haped the [m]eaning of the Constitution”).

460. *See supra* Part I.A.

461. Transcript of Oral Argument, *supra* note 13, at 14-15.

saga. For better or worse, whether the Court “countenances” the current situation matters little. The actors at issue will continue to do their thing and pay little heed to the Court’s preferences.

#### 4. *Constitutional Norms at the Periphery of Public Attention*

Many of the battlegrounds at the center of constitutional studies dominated their eras. The civil rights movement, for instance, was the defining moral and political issue of its time.<sup>462</sup> By contrast, disagreements over lethal injection are occurring more at the periphery of public attention.<sup>463</sup> The death penalty is an important issue for some voters, but it typically is not at the center of our national discourse.<sup>464</sup> Recent surveys and polls do not list the death penalty as among voters’ core issues.<sup>465</sup>

To be sure, in some states, capital punishment can be a prominent election year issue at times, especially when it appears on state ballots.<sup>466</sup> That said, the death penalty is not quite as central to our recent culture wars as other constitutionally salient issues, such as abortion, religious liberty, gay rights, immigration, and the scope of federal power.<sup>467</sup> Nevertheless, popular constitutional norms still matter, even when an issue is not quite at the center of public debate.

So too does the lethal injection stalemate have constitutional implications, even though most of the actors behind it do not

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462. See KLARMAN, *supra* note 444, at 436.

463. See Alan Greenblatt, *Death Penalty Fades as Hot-Button Issue*, NPR (May 2, 2014, 7:03 AM), <https://www.npr.org/sections/itsallpolitics/2014/05/02/308710317/death-penalty-fades-as-hot-button-issue> [<https://perma.cc/2LPH-BPGL>].

464. See *id.*

465. See Bradley Jones, *Republicans and Democrats Have Grown Further Apart on What the Nation’s Top Priorities Should Be*, PEW RSCH. CTR. (Feb. 5, 2019), <https://www.pewresearch.org/fact-tank/2019/02/05/republicans-and-democrats-have-grown-further-apart-on-what-the-nations-top-priorities-should-be/> [<https://perma.cc/Q3MT-QFX8>]; Frank Newport, *Top Issues for Voters: Healthcare, Economy, Immigration*, GALLUP (Nov. 2, 2018), <https://news.gallup.com/poll/244367/top-issues-voters-healthcare-economy-immigration.aspx> [<https://perma.cc/5N28-GPF9>].

466. See, e.g., Kubick & Moran, *supra* note 368, at 1; Herskovitz, *supra* note 136.

467. Damon Linker, *In Search of a New Center in the Culture War*, WEEK (Mar. 7, 2019), <https://theweek.com/articles/827449/search-new-center-culture-war> [<https://perma.cc/9XYT-GEYF>] (discussing the culture wars surrounding abortion, same-sex marriage, and immigration).

directly invoke the Constitution. Typically, when public norms shape the Constitution, it is because people are explicitly debating constitutional meaning. The civil rights and women's rights movements leaned heavily on the Fourteenth Amendment's Equal Protection Clause.<sup>468</sup> The movement for same-sex marriage similarly invoked equality and liberty norms.<sup>469</sup> The gun rights movement has repeatedly invoked the Second Amendment.<sup>470</sup> In each case, these social movements and their constitutional arguments helped shape the Supreme Court's interpretation of the Constitution.

By contrast, while the Eighth Amendment figures into the death penalty debate, it usually rests at the margins of those conversations. Public discourse, however, does not need to focus on the Constitution to affect public policy and, ultimately, constitutional discourse. The European governments seeking to export their anti-death penalty norms think that capital punishment is morally wrong and contrary to international human rights norms.<sup>471</sup> Questions of U.S. constitutional law do not much interest them. As Professors Gibson and Lain point out, here it is the international moral marketplace, rather than U.S. law, that is constraining domestic death penalty practices.<sup>472</sup>

Similarly, pharmaceutical companies' refusal to let states use their drugs in executions has little to do with the Constitution. Even if these companies' managements privately dislike capital punishment, their professional objection is to the use of *their* drugs.<sup>473</sup> Doctors and nurses refusing to participate in executions

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468. See KLARMAN, *supra* note 444, at 341; Ruth Bader Ginsburg, *Sexual Equality Under the Fourteenth and Equal Rights Amendments*, 1979 WASH. U. L.Q. 161, 161 (1979).

469. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2593, 2604-05 (2015) (citing the principles of equality and liberty in holding that state bans of same-sex marriage violate the Constitution); Brief for Petitioners at 24, 34, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (No. 14-556) (citing landmark decisions regarding liberty and equality, such as *Loving* and *Lawrence v. Texas*, in support of argument that same-sex marriage bans violate the Constitution).

470. See Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 238 (discussing the role of the gun rights movement in shaping Justice Scalia's view of the Second Amendment).

471. See Gibson & Lain, *supra* note 15, at 1217 ("Turns out, the best way for Europe to export its anti-death-penalty norms was to stop exporting its drugs.")

472. See *id.* at 1245; Harold Hongju Koh, *How Is International Human Rights Law Enforced?*, 74 IND. L.J. 1397, 1409-11 (1999).

473. See *supra* Part II.A.3.

similarly are responding to their own medical ethics, not the Eighth Amendment.<sup>474</sup>

Nevertheless, it would be a mistake to think that the Constitution is not in play here. Most obviously, there *are* some participants on both sides of the debate who couch their arguments in constitutional terms. Death penalty supporters cite the Constitution's text to defend the practice.<sup>475</sup> On the other side, capital lawyers sometimes challenge the constitutionality of a particular lethal injection protocol on Eighth Amendment grounds.<sup>476</sup> More generally, a variety of academics, abolitionists, capital lawyers, and other actors contend that the death penalty per se violates the Constitution.<sup>477</sup> These arguments take different forms, but the gist is that the death penalty's deep flaws amount to a constitutional defect. Justice Breyer's lengthy *Glossip* dissent helps demonstrate that some of the policy arguments about the death penalty's flaws have potential constitutional salience.<sup>478</sup>

Even when not framed in constitutional terms, the norms underlying the lethal injection stalemate can have constitutional implications. As noted above, the lethal injection stalemate and surrounding debates could potentially shape future interpretations of the Eighth Amendment.<sup>479</sup> Perhaps surprisingly, the stalemate may end up shaping the Eighth Amendment more than the Eighth Amendment has shaped the stalemate.

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474. See *supra* Part II.A.5.

475. See *supra* notes 376-80 and accompanying text.

476. See *supra* Part II.A.6.

477. See Tim Arango, *California Death Penalty Suspended; 737 Inmates Get Stay of Execution*, N.Y. TIMES (Mar. 12, 2019), <https://www.nytimes.com/2019/03/12/us/california-death-penalty.html> [<https://perma.cc/4ZBY-TBMJ>] (discussing the California Governor's decision to place a moratorium on capital punishment due to his own personal beliefs); Lincoln Caplan, *A Strong Argument Against Capital Punishment*, NEW YORKER (Aug. 14, 2015), <https://www.newyorker.com/news/news-desk/a-strong-argument-against-capital-punishment> [<https://perma.cc/SX7E-T6FB>] (discussing an opinion by the Connecticut Supreme Court that "held that 'the death penalty now fails to satisfy any legitimate penological purpose'").

478. See *Glossip v. Gross*, 135 S. Ct. 2726, 2755-56 (2015) (Breyer, J., dissenting).

479. See *supra* Part III.A.

## CONCLUSION

The Court's 2019 *Bucklew* decision, following earlier cases, makes it difficult for lethal injection plaintiffs to prevail in Eighth Amendment challenges. Nonetheless, executions have stalled around the country. Conservative Justices have blamed these problems on anti-death penalty activists, but their account is very incomplete. In reality, a variety of people and organizations, acting independently and motivated by a variety of distinct norms, are the culprits.

The lethal injection stalemate is an interesting case study of multiple independent actors and norms dulling the effects of judicial decisions. Whereas most popular constitutional scholarship focuses on courts consolidating changing public opinion, here public norms are frustrating judicial intentions. The result is that most states have difficulty carrying out executions.

If this state of affairs continues, it could have long-term implications not just on the death penalty but also on courts' Eighth Amendment interpretations. Those courts are not doing much to affect events on the ground right now, but it is quite possible that in the long run, events on the ground may reshape those Eighth Amendment interpretations. And even if not, the lethal injection stalemate will continue to affect the American death penalty.