

Lethal Injection Then and Now: A Topsy-Turvy Moment for the Abolition Movement

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At first glance, *how* states execute prisoners is an entirely unattractive question for those who think that states should not be executing prisoners at all. Indeed, one might reasonably take the position that discussions about how states execute presume that executions can be carried out in ways that are acceptable and unacceptable, which is antithetical to the very core of the abolitionist position. As the renowned Henry Schwarzschild—longtime director of the ACLU’s Capital Punishment Project and founder of the National Coalition to Abolish the Death Penalty—wrote in 1980, “The worst sin of all is to do well that which should not be done at all.”¹

But that was then—back in 1980, when lethal injection held the promise of being the most humane execution method ever devised. In those early days, lethal injection was declared “as humane as any form of death you can find.”² “It is a method where you can literally put the prisoners to sleep . . . in five to ten seconds,” one proponent claimed,³ while another stated assuringly “The guy just goes to sleep. That’s all there is to it . . . he breathes a sigh, and he’s gone.”⁴

Now we know that none of that is true. Lethal injection does not do executions “well,” and in fact, it never did. Science has shown that prisoners have been dying slow, torturous deaths at the hands of the state for the past five decades.⁵ We just haven’t known it (or at least been able to show it).

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¹ Henry Schwarzschild, *Lethal Injection and the Death Penalty*, 10 HASTINGS CTR. REP. 4, 4 (1980). For more about this remarkable abolition leader, see generally Thomas M. Hilbink, *A Moralist in a Legalist World: A Memorial Essay for Henry Schwarzschild*, 23 N.Y.U. REV. L. & SOC. CHANGE 199 (1997).

² Greg Mitchell, *How Lethal Injections Became the Go-To Method for Executions in America*, THE NATION (May 9, 2014, at 3:02 PM ET), <https://web.archive.org/web/20140620110037/http://www.thenation.com:80/blog/179777/how-lethal-injections-became-go-method-executions-america> [https://perma.cc/6XMK-HC32].

³ Jonathan I. Groner, *The Hippocratic Paradox: The Role of the Medical Profession in Capital Punishment in the United States*, 35 FORDHAM URB. L. J. 883, 889 (2008).

⁴ STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 297 (2002).

⁵ Noah Caldwell, Alisa Chang & Jolie Myers, *Gasping for Air: Autopsies Reveal Troubling Effects of Lethal Injection*, NAT’L PUB. RADIO (Sep. 21, 2020, at 7:00 AM ET), <https://www.npr.org/2020/09/21/793177589/gasping-for-air-autopsies-reveal-troubling-effects-of-lethal-injection> [https://perma.cc/PZK3-AUPP].

Back in the early days, the danger of lethal injection was what it did well. Abolitionists understood that lethal injection was designed to save the death penalty—to hide the brutality of state killing by making it look like something else.⁶ In most people’s mind (including mine, before I knew better), lethal injection was not so different from putting down a beloved pet. That’s what made it so sinister from the abolition viewpoint: it gave people a vision of prisoners just drifting off to forever-sleep, which made it harder to think about the brutality of state killing, and indeed, harder to think about state killing at all. As criminologist David Garland has powerfully shown, the death penalty in America is a highly symbolic issue whose value lies more in tribal politics than crime control.⁷ For most Americans, support for the death penalty is support in the abstract.⁸ Lethal injection keeps the death penalty abstract. It allows the political uses to flourish while hiding the brutality that executions entail. That is why, for abolitionists, even when lethal injection was good, it was bad.

Now, just the opposite is true. Lethal injection is bad (it was always bad, but now we know it) and it is *hard*. States can’t get the drugs they need to conduct the executions. They can’t get the medical professionals they need to carry it out competently. And all too often, they can’t get the IV access they need to inject the drugs, in part because death row prisoners have notoriously weak veins. At least for the abolition movement, there is a certain satisfaction—a “good” one might say—in the fact that the very thing that was designed to save the death penalty has instead

⁶ THE DEATH PENALTY IN AMERICA 18 (Hugo Adam Bedau eds., 3rd ed. 1982) (“Humane and effective or not, relative to other lawful methods of execution, lethal injection is undeniably attractive to a society that wants to keep the death penalty but does not want its executions to repel those who must authorize, administer, and witness them, lest it thereby turn those officials (as it has so often their predecessors) into fervent abolitionists.”). See also Austin Sarat et al., *Botched Executions and the Struggle to End Capital Punishment: A Twentieth-Century Story*, 38 L. & SOC. INQUIRY 694, 697 (2013) (“An execution is meant to be a meticulously choreographed routine that serves not only to extinguish the life of the condemned, but also to reaffirm the legitimacy of the lethal power exercised by the state.”).

⁷ See generally DAVID GARLAND, *PECULIAR INSTITUTION: AMERICA’S DEATH PENALTY IN AN AGE OF ABOLITION* (2012). In this regard, it is no accident that the death penalty is reserved exclusively for the underclass and inflicted disproportionately upon Black and Brown bodies. The status of those who receive the death penalty, as opposed to those who are eligible for it, is an important part of the death penalty story—it’s just not the part of the story that I tell here.

⁸ Amelia Thomson-DeVeaux, *Americans Support the Death Penalty, At Least in the Abstract*, PUB. RELIGION RSCH. INST. (Sep. 21, 2011) <https://www.prii.org/spotlight/americans-support-the-death-penalty-at-least-in-the-abstract/> [<https://perma.cc/S3QR-3ARB>] (“Our data shows that Americans support the death penalty in the abstract . . . After all, it’s one thing to authoritatively declare that the death penalty is morally wrong, and quite another to untangle how capital punishment should be implemented.”); see also THE DEATH PENALTY PROJECT, *PUBLIC OPINION AND THE DEATH PENALTY* 4 (2022) (“Support for the death penalty exists in the abstract. Support for the death penalty in the abstract is not inevitably sustained when people are asked to consider specific realistic cases. Scenarios which provide context about an offender’s mitigating circumstances, for example, produce much lower rates of support for capital punishment.”).

brought the death penalty to its knees. History has turned the conventional narrative on its head.

In some ways, the upside of lethal injection's downsides is intuitive. The avalanche of problems with lethal injection in recent years has not only slowed executions as a practical matter but also provided fodder for an unprecedented number of legal challenges, which have slowed executions on their own. As Dick Dieter, then executive director of the Death Penalty Information Center, said back in 2008, lethal injection challenges "have already held up more executions, and for a longer time than appeals involving such broad issues as race, innocence, and mental competency."⁹ And that was fifteen years ago. Those words are even more true today, as states are reeling from over a decade of delays. Lethal injection has made the death penalty vastly harder to carry out and more costly to maintain, throwing fistfuls of sand into what Justice Blackmun famously called "the machinery of death."¹⁰

Yet there are other, less intuitive—or at least less direct—ways that lethal injection has inadvertently helped the abolition movement, and this symposium essay will sketch the contours of what I see as the top three.¹¹ One goes to the salience of the death penalty in the American consciousness, one goes to the trustworthiness of the state that executes in our name, and one goes to allies in the abolition fight. Each is a testament to the irony of lethal injection: what once worked *for* the death penalty is now working against it, creating a topsy-turvy moment for the abolition movement.

I. SALIENCE OF THE DEATH PENALTY

The fact that lethal injection makes killing people look like putting down a beloved pet is not happenstance. As I have detailed elsewhere, the legislative history of lethal injection in a number of states reveals a curious theme: advocates of lethal injection were worried about how executions *looked*.¹² Considered in historical context, this comes as no surprise. In 1977, when lethal injection was first adopted, the country had seen only one execution in ten years—Utah's January 1977 execution by firing squad of Gary Gilmore, which at the time was viewed as unacceptably bloody and *sui generis* to Utah—and the electric chair (the main

⁹ Richard C. Dieter, *Methods of Execution and Their Effect on the Use of the Death Penalty in the United States*, 35 *FORDHAM URB. L.J.* 789, 789 (2008). Most legal challenges are situationally dependent; they are based on the facts of a particular prisoner's case. Lethal injection is a challenge that most any condemned prisoner can make.

¹⁰ *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting) ("From this day forward, I shall no longer tinker with the machinery of death.").

¹¹ For an in-depth discussion, albeit not framed in the way I do here, see generally CORINNA BARRETT LAIN, *SECRETS OF THE KILLING STATE: THE UNTOLD STORY OF LETHAL INJECTION* (2025). There, my focus is detailing the problems with lethal injection. Here, my focus is how those problems, broadly described, have worked in favor of the abolition movement.

¹² See LAIN, *supra* note 11, at 38–39.

execution method at the time) was widely viewed as barbaric and inhumane.¹³ Legislators had serious doubts about whether the public could stomach executions that entailed visible suffering,¹⁴ and a federal court had just recognized the right to televise executions (it wouldn't last, but no one could have known that).¹⁵ Viewed against this backdrop, lethal injection is merely the latest in a long line of state efforts to remove executions from public view when they become problematic, to minimize opposition to the death penalty by minimizing how much people think about it at all.¹⁶ *Out of sight, out of mind.*

But if that was lethal injection's objective, it has been a miserable failure. Whether it's media coverage of botched executions, or drama over the drugs, or state malfeasance that ends in grand jury investigations and mass resignations (looking at you, Oklahoma)¹⁷—lethal injection has made the death penalty *more* salient in the public's consciousness, not less. As *Politico Magazine* put the point, lethal injection

¹³ Before the Gilmore execution, the last execution due to a litigation-based moratorium occurred in 1967. See *The History of the Death Penalty: A Timeline*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/stories/history-of-the-death-penalty-timeline> [<https://perma.cc/JR39-53WM>] (last visited Mar. 29, 2025); see also *Glass v. Louisiana*, 471 U.S. 1080, 1093 (Brennan, J., dissenting) (“Several state legislatures have abandoned electrocution in favor of lethal injection for these very reasons; one of the architects of this change has emphasized that it resulted precisely from the recognition that the electric chair is ‘a barbaric torture device’ and electrocution a ‘gruesome ritual.’”).

¹⁴ See The Ed. Bd., *The Secret Shame of the Death Penalty*, N.Y. TIMES (May 22, 2014), <https://www.nytimes.com/2014/05/23/opinion/the-secret-shame-of-the-death-penalty.html> [<https://perma.cc/V38F-R284>] (“[D]eath by lethal injection became the standard method only because earlier methods—from hanging to the firing squad to the electric chair—were deemed too ‘barbaric,’ not because the state was taking a human life, but because the method of execution offended the sensitivities of the public in whose name the killing is carried out.”); see also THE DEATH PENALTY IN AMERICA, *supra* note 6, at 18 (“[L]ethal injection is undeniably attractive to a society that wants to keep the death penalty but does not want its executions to repel those who must authorize, administer, and witness them, lest it thereby turn those officials (as it has so often their predecessors) into fervent abolitionists.”).

¹⁵ See *Garrett v. Estelle*, 556 F.2d 1274 (5th Cir. 1977), *rev'd*, 556 F.2d 1274 (1977), *cert. denied*, 438 U.S. 915 (1978).

¹⁶ See Jacob Weisberg, *This Is Your Death*, NEW REPUB., July 1, 1991, at 23, 27 (“Through the eighteenth century, executions were atavistic spectacles performed in full public view. In the nineteenth they were moved inside the prison yard and witnessed by only a few. In the twentieth century, executions moved deeps inside the bowels of prisons, where they were performed ever more quickly and quietly to attract minimal notice. American death penalty opponents in the 1800s supported the abolition of public executions as a way-station to ending all execution The reform had the opposite effect, however. Invisible executions shocked the sensibilities of fewer people, and dampened the momentum of the reform movement.”). For an extended discussion, see *generally* LOUIS P. MASUR, RITES OF EXECUTION: CAPITAL PUNISHMENT AND THE TRANSFORMATION OF AMERICAN CULTURE (1989).

¹⁷ See LAIN, *supra* note 11, at 224–28 (discussing “Oklahoma’s date with the grand jury”).

is in-your-face proof of an indisputable truth: “America is terrible at killing people legally.”¹⁸

I first noticed lethal injection’s amplifying effect on the salience of the death penalty ten years ago, writing in 2015:

For decades now, America’s death penalty has been beset by serious problems in its administration, but what has finally gotten the public’s attention is a spate of botched executions in the first half of 2014 With fallout from botched executions named one of the “Top 10 Stories of 2014,” there can be little doubt: the death penalty is once again in the spotlight, and botched executions are what put it there.¹⁹

What I didn’t know then was that the notoriously botched executions of 2014 would be followed by explosive coverage of Oklahoma injecting the wrong drug in 2015.²⁰ And that would be followed by national coverage of Pfizer’s announcement in 2016 of distribution controls specifically designed to keep its drugs out of executioners’ hands.²¹ As the last major manufacturer to adopt such controls, Pfizer closed the only remaining avenue for executing states to (legally) obtain Big Pharma’s drugs.²² States’ lethal injection drug woes were about to get worse.

In the ensuing years, major media stories on lethal injection would continue unabated. In 2017, the story that garnered national attention was Arkansas’ unprecedented plan to execute seven prisoners in eleven days because its drugs were

¹⁸ Andrew Cohen, *America Is Terrible at Killing People Legally*, POLITICO (Feb. 7, 2014), <https://www.politico.com/magazine/story/2014/02/america-is-terrible-at-killing-people-legally-103243> [<https://perma.cc/Y82N-UK4Z>].

¹⁹ Corinna Barrett Lain, *The Politics of Botched Executions*, 49 U. RICH. L. REV. 825, 825 (2015).

²⁰ See, e.g., Eyder Peralta, *Oklahoma Used the Wrong Drug to Execute Charles Warner*, NAT’L PUB. RADIO (Oct. 8, 2015, at 10:53 AM ET), <https://www.npr.org/sections/thetwo-way/2015/10/08/446862121/oklahoma-used-the-wrong-drug-to-execute-charles-warner> [<https://perma.cc/K4NT-4R4N>]; Tracy Connor, *Autopsy Shows Oklahoma Used Wrong Drug to Execute Man in January*, NBC NEWS (Oct. 8, 2015, at 12:58 AM EDT), <https://www.nbcnews.com/storyline/lethal-injection/autopsy-shows-oklahoma-used-wrong-drug-execute-man-january-n441046>; [<https://perma.cc/JH2G-Y2Y2>]; Mark Berman, *Oklahoma May Have Used the Wrong Drug to Execute an Inmate This Year*, WASH. POST (Oct. 8, 2015), <https://www.washingtonpost.com/news/post-nation/wp/2015/10/08/oklahoma-may-have-used-the-wrong-drug-to-execute-an-inmate-this-year/> [<https://perma.cc/7K6P-RUQN>]; MSNBC NEWS, *Oklahoma Used Wrong Drug In Execution* (YouTube, Oct. 8, 2015), <https://www.youtube.com/watch?v=ycqmQdLADG8> [<https://perma.cc/AKE7-Z28W>].

²¹ See, e.g., 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/X5QF-W977>].

²² *Id.* (“With Pfizer’s announcement, all FDA-approved manufacturers of any potential execution drug have now blocked their sale for this purpose,” said the London-based abolition group Reprieve.”).

about to expire.²³ In 2018, it was Alabama’s failed attempt to execute an aging, ailing prisoner by lethal injection, making him the third person in the modern era to survive his own execution.²⁴ In 2019, it was Ohio’s announcement that it would pause executions entirely because of concerns that lethal injection inflicted a torturous death.²⁵ In 2020, it was a national study reporting that 84% of autopsies from executions by lethal injection showed acute pulmonary edema—prisoners drowning in their own fluids, akin to being waterboarded to death.²⁶ In 2021, it was the federal government’s announcement of a moratorium on executions to study the risk of pain and suffering from its lethal injection protocol.²⁷ In 2022, it was the fact that a third of all executions by lethal injection were botched (with Alabama’s three-hour execution of Joe Nathan James setting a new record for the longest execution in US history), resulting in 2022 being dubbed “the year of the botched execution.”²⁸ In

²³ See, e.g., Mark Berman, *With Lethal Injection Drugs Expiring, Arkansas Plans Unprecedented Seven Executions in 11 Days*, WASH. POST (Apr. 7, 2017), <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/P6P7-U7KD]; Megan McCracken & Jennifer Moreno, *Arkansas’s Cruel and Unusual Killing Spree*, N.Y. TIMES (Mar. 20, 2017), <https://www.nytimes.com/2017/03/20/opinion/arkansas-cruel-and-unusual-killing-spree.html> [https://perma.cc/VZH9-YGTG]; Ed. Bd., *Arkansas’s State-sponsored Killing Spree*, WASH. POST (Apr. 10, 2017), https://www.washingtonpost.com/opinions/arkansas-state-sponsored-killing-spree/2017/04/10/d486d5a0-1e22-11e7-ad74-3a742a6e93a7_story.html [https://perma.cc/N8ZS-MZ4Z].

²⁴ See, e.g., Tracy Connor, *Doyle Lee Hamm Wished for Death During Botched Execution, Report Says*, NBC NEWS (Mar. 5, 2018, at 8:19 PM EST), <https://www.nbcnews.com/storyline/lethal-injection/doyle-lee-hamm-wished-death-during-botched-execution-report-says-n853706> [https://perma.cc/45NZ-AYE7]; Sandee LaMotte, *Death Row Inmate Sues After ‘Botched’ Execution*, CNN (Mar. 7, 2018, at 6:31 PM EST), <https://www.cnn.com/2018/03/07/health/alabama-execution-lawsuit/index.html> [https://perma.cc/FD5R-JKMW].

²⁵ See, e.g., Liliana Segura, *Ohio’s Governor Stopped an Execution over Fears It Would Feel Like Waterboarding*, INTERCEPT (Feb. 7, 2019, at 7:55 AM), <https://theintercept.com/2019/02/07/death-penalty-lethal-injection-midazolam-ohio/> [https://perma.cc/4LCH-8YAC].

²⁶ See Caldwell, Change & Myers, *supra* note 5.

²⁷ See Attorney General Merrick B. Garland Imposes a Moratorium on Federal Executions; *Orders Review of Policies and Procedures*, U.S. DEPT. JUST. (July 1, 2021), <https://www.justice.gov/archives/opa/pr/attorney-general-merrick-b-garland-imposes-moratorium-federal-executions-orders-review> [https://perma.cc/F75D-BPSX]. For coverage, see, e.g., Katie Benner, *Merrick Garland Pauses Federal Executions a Year After His Predecessor Resumed Them*, N.Y. TIMES (July 1, 2021), <https://www.nytimes.com/2021/07/01/us/politics/executions-pause-merrick-garland.html> [https://perma.cc/X7SG-EDPV]; Sarah N. Lynch & Eric Beech, *U.S. Attorney General Imposes Moratorium on Federal Executions*, REUTERS (July 1, 2021, at 8:28 PM EDT), <https://www.reuters.com/world/us/us-attorney-general-imposes-moratorium-federal-executions-2021-07-01/> [https://perma.cc/2GCJ-76HQ].

²⁸ See, e.g., Ed Pilkington, *‘Surreal Spectacle’: US Botched 35% of Execution Attempts This Year*, GUARDIAN (Dec. 16, 2022), <https://www.theguardian.com/world/2022/dec/15/us-death-penalty-data-execution-attempts-botched> [https://perma.cc/GR5T-HAE6] (“As 2022 draws to a close, a new grim distinction can be attached to it: in America it was the year of the botched execution.”); Juliana Kim, *More Than a Third of Executions in 2022 Were ‘Botched,’ a Report Finds*, NAT’L PUB. RADIO

2023, it was Alabama’s announcement that the problems with lethal injection would lead it to start executing by nitrogen gas.²⁹ And in 2024, it was Alabama’s horrific execution by nitrogen gas—the first in the world³⁰—which overshadowed Arizona’s scandalous dismissal of the retired federal judge it had hired to conduct an independent review of its lethal injection procedure, terminating the review before it was complete and after the judge had raised serious concerns about the state’s execution protocol.³¹

That’s an exceptionally bad record for an execution method aiming for *out of sight, out of mind*. Lethal injection was supposed to be a way for condemned prisoners to go quietly into the night. Instead, it is loud, causing controversy at every turn and reminding us in the starkest of terms that the death penalty is not just some abstract idea that people support or don’t. States are actually killing people, on purpose, and they appear to be not very good at it. If, as some have claimed, one obstacle to death penalty abolition is that executions are “socially invisible” events that have largely escaped public scrutiny,³² abolitionists can thank lethal injection for singlehandedly—and entirely inadvertently—making great strides in rectifying that deficiency.

Thus far, my point has been the *fact* of media attention and how it has increased the salience of the death penalty in the public’s consciousness. But it’s not just press that lethal injection has received. It’s *bad* press. As in, epically bad—the kind of

(Dec. 21, 2022, at 5:42 PM ET), <https://www.npr.org/2022/12/21/1144188268/executions-2022-botched-lethal-injection> [<https://perma.cc/5MDA-UD94>]; Nicholas Bogel-Burroughs, *Death Penalty Researches Call 2022 ‘Year of the Botched Execution,’* N.Y. TIMES (Dec. 16, 2022), <https://www.nytimes.com/2022/12/16/us/death-penalty-botched-executions.html> [<https://perma.cc/6KPU-53YL>]; Ramon Antonio Vargas, *Alabama Subjected Prisoner to ‘Three Hours of Pain’ During Execution—Report*, GUARDIAN (Aug. 15, 2022, at 9:09 AM EDT), <https://www.theguardian.com/us-news/2022/aug/15/alabama-joe-nathan-james-jr-execution> [<https://perma.cc/JM3C-CXZC>].

²⁹ See, e.g., Ed Pilkington, *‘Astonishingly Cruel’: Alabama Seeks to Test Execution Method on Death Row ‘Guinea Pig,’* GUARDIAN (Sep. 2, 2023, at 5:00 AM EDT), <https://www.theguardian.com/world/2023/sep/02/alabama-execution-nitrogen-kenneth-smith> [<https://perma.cc/Z9JN-K7L8>]; Devon M. Sayers & Emma Tucker, *Alabama Sets a Date to Execute a Death Row Inmate by Nitrogen Gas, Governor Says, a Method Never Used in the US*, CNN (Nov. 9, 2023, at 9:14 AM EST), <https://www.cnn.com/2023/11/08/us/alabama-first-execution-nitrogen-gas-2024/index.html> [<https://perma.cc/A8EK-K6NF>].

³⁰ See, e.g., *Kenneth Eugene Smith: Alabama Carries Out First Nitrogen Gas Execution*, BBC NEWS (Jan. 26, 2024), <https://www.bbc.com/news/world-us-canada-68085513> [<https://perma.cc/8PDX-4KCE>]; Kim Chandler, *What Happened at the Nation’s First Nitrogen Gas Execution: An AP Eyewitness Account*, ASSOC. PRESS (Jan. 27, 2024, at 2:28 PM EST), <https://apnews.com/article/death-penalty-nitrogen-gas-alabama-kenneth-smith-54848cb06ce32d4b462a77b1bb25e656> [<https://perma.cc/Z7DD-AQRH>].

³¹ See, e.g., Kenneth Wong & Nicole Krasean, *Former Head of Arizona’s Death Penalty Review Speaks Out Following Dismissal by Gov. Hobbs*, FOX 10 PHX. (Dec. 1, 2024, at 5:03 PM MST), <https://www.fox10phoenix.com/news/former-head-arizonas-death-penalty-review-speaks-out-following-dismissal-gov-hobbs> [<https://perma.cc/4RS4-V6JX>].

³² DAVID GARLAND, PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY 186 (1990).

shocking revelations that raise their own questions about whether states can be trusted to execute in our name. That point is next.

II. CAN STATES BE TRUSTED TO EXECUTE IN OUR NAME?

The viability of the death penalty has always come with an important proviso: executions cannot offend the sensibilities of the people in whose name they are being conducted. Historically, we have seen this proviso play out in the evolution of execution methods over time. When a method of execution becomes known for inflicting a torturous death, the public turns against it and states move on to something else.³³ This is the moment we find ourselves with lethal injection.

But an execution method can offend sensibilities in numerous ways, and lethal injection is a master class in the variety of ways that can happen. Indeed, one might describe lethal injection as a lesson in all the ways that states cannot be trusted with the power to kill, and all the ways they have tried to cover that up.³⁴ For the abolition movement, lethal injection arguably provides the most serious indictment of the killing state since the revelation of innocents on death row in the late 1990s and early 2000s.³⁵

Where, for example, do states get the drugs they need for lethal injection? Missouri bought its drugs from a compounding pharmacy that had over 1,800 regulatory violations.³⁶ Arizona bought its drugs from a drug “distributor” that turned out to be two desks and a filing cabinet in the back of a London driving school.³⁷ Nebraska bought its drugs from a company in India called Harris Pharma, which was just a guy named Chris Harris who had misappropriated another company’s drugs and then sold them on the sly as his own.³⁸ Texas and Arizona bought drugs from Harris Pharma too, despite Nebraska’s experience and the FDA’s warning that they would be violating federal law if they did (the drugs were intercepted at the border).³⁹ And Ohio, along with several other states, surreptitiously bought its drugs using straw purchases. “When you call them to see

³³ See *supra* note 14. As psychiatrist Robert Jay Lifton put the point, “For all the fervor among death penalty adherents, they are curiously squeamish about how the thing is to be done.” ROBERT J. LIFTON & GREG MITCHELL, *WHO OWNS DEATH? CAPITAL PUNISHMENT, THE AMERICAN CONSCIENCE, AND THE END OF THE DEATH PENALTY* 44 (2000).

³⁴ See LAIN, *supra* note 11, at 273–74.

³⁵ See Corinna Barrett Lain, *Deciding Death*, 57 DUKE L.J. 1, 43–54 (discussing actual innocence movement of the early 2000s).

³⁶ See LAIN, *supra* note 11, at 165–66 (discussing Apothecary Shoppe in Oklahoma, which was found to have 1892 regulatory violations, to be exact).

³⁷ See *id.* at 142–43 (discussing Dream Pharma). They say a picture is worth a thousand words, and here it is true. For the visual, see Kathy Lohr, *Georgia May Have Broken Law by Importing Drug*, NAT’L PUB. RADIO (Mar. 17, 2011, at 12:01 AM ET), <https://www.npr.org/2011/03/17/134604308/dea-georgia-may-have-broken-law-by-importing-lethal-injection-drug> [<https://perma.cc/8SPE-TFHU>].

³⁸ See LAIN, *supra* note 11, at 153–56 (discussing Harris Pharma).

³⁹ See *id.*

if they will sell to us, make sure you say we are the Department of Mental Health, do not mention anything about corrections in the phone call or what we use the drug for,” one Ohio corrections department official instructed in an email about the sale.⁴⁰

Revelations of who states are getting to conduct these executions are equally alarming. Missouri hired a doctor who had been sued for medical malpractice over twenty times and had his hospital privileges revoked at two hospitals.⁴¹ “I sometimes transpose numbers,” he said, “so it’s not unusual for me to make mistakes.”⁴² Arizona hired a nurse who had his nursing license suspended, which may or may not have had to do with the fact that he had been arrested multiple times, including three times in ten days for DUI.⁴³ The federal government hired a nurse who needed permission to cross state lines to conduct the execution—turns out, he had been charged with felony aggravated stalking and tampering with property, and was on active probation after pleading guilty to the misdemeanor versions of those charges.⁴⁴ California used an executioner who had been disciplined for smuggling drugs into San Quentin before joining the execution team (and yes, drugs did disappear on his watch).⁴⁵ And back when Maryland had the death penalty, it used an executioner who had been fired by the local police department and charged with poisoning several neighborhood dogs.⁴⁶ This is just a sampling of the executioners we know. Most we don’t.

States have responded to such scandalous revelations by doubling-down on secrecy. It is no coincidence, for example, that Missouri passed its secrecy statute just after its chief executioner was found to be a malpractice-ridden doctor.⁴⁷ Or that Georgia passed its secrecy statute just after its source of drugs was found to be the back-office London distributor that was supplying Arizona.⁴⁸ Or that Idaho passed its secrecy statute just after revelations of prison officials chartering a plane to take them on a stealth trip out of state, where they exchanged \$15,000 in cash for drugs, allegedly in a Walmart parking lot.⁴⁹ States have secretized their troubled processes

⁴⁰ *Id.* at 173.

⁴¹ *See id.* at 126 (discussing Dr. Alan Doerhoff).

⁴² *Id.*

⁴³ *See id.* at 127–28 (discussing Arizona’s “Medical Team Member #3”).

⁴⁴ *See id.* at 129 (discussing unidentified executioner-nurse and facts supporting felony aggravated stalking and felony tampering with property charges).

⁴⁵ *See id.* at 129 (discussing unidentified execution team member and disappearance of sodium thiopental that was ostensibly taken from the prison pharmacy for training purposes but never used and never returned, prompting a federal court to note that the incident “may warrant investigation by an appropriate law-enforcement agency”).

⁴⁶ *See id.* at 130 (discussing unidentified execution team member).

⁴⁷ *See id.* at 127, 257 (discussing timing of Missouri’s passage of secrecy statute).

⁴⁸ *See id.* at 257 (noting timing of Georgia’s passage of secrecy statute).

⁴⁹ *See id.* at 168, 257 (discussing incident and noting timing of Idaho’s passage of secrecy statute). Idaho denied that the exchange was made in a Walmart parking lot, calling the claim “absurd

to hide lethal injection's flaws, but that too has backfired. In so doing, they have given the public yet another reason for outrage, and litigators yet another claim to litigate.

"The accumulation of this kind of evidence can shake the public's confidence, not only about particular execution methods but also about the death penalty itself," law professor Deborah Denno observes of the work that lethal injection has inadvertently done for the abolitionist cause.⁵⁰ In the name of lethal injection, states have broken state and federal laws. They have deliberately breached private contracts and misled sellers with straw purchases. They have sacrificed not only the integrity of their executions, but also their professed commitment to important values—government transparency, regulatory compliance, freedom of contract, respect for the rule of law, and the utmost care in the most solemn of duties. Lethal injection was designed to hide what was wrong with state executions. Instead, it has shown all that is wrong with the killing state.

III. ABOLITION MOVEMENT ALLIES

If all lethal injection did was bring attention to the death penalty and show how states cannot be trusted with the power to kill, that alone would be enough to make it the unsung hero of the abolition movement. But lethal injection has done something else terribly important as well. It has empowered abolition allies and brought new allies into the fight.

Consider, for example, Europe's anti-death penalty stance. The continent that suffered through two world wars under bloodthirsty leaders like Hitler and Mussolini has long taken the stance that "[e]very human being has the inherent right to life."⁵¹ Today, this shared view lies at the heart of the law of the European Union. Protocol No. 6 to the European Convention on Human Rights, which a nation must

and false." But flight records show that the plane did not arrive at the airport until 5:15 p.m., and the pharmacy's hours of operation end at 5:30 p.m., so the pharmacy would have been closed and there is in fact a Walmart parking lot near the pharmacy. So, who knows what actually happened, but it tracks. See Kevin Fixler, *Idaho Found Lethal Injection Drugs for an Execution. Here's How Much They Cost Taxpayers*, IDAHO STATESMAN (Dec. 15, 2023, at 5:53 AM), <https://www.idahostatesman.com/news/northwest/idaho/article281926143.html> [<https://perma.cc/AQG4-LS4L>].

⁵⁰ Deborah Denno, *For Executions Methods Challenges, the Road to Abolition is Paved with Paradox*, in *THE ROAD TO ABOLITION? THE FUTURE OF CAPITAL PUNISHMENT IN THE UNITED STATES* 183, 202 (Austin Sarat & Charles J. Ogletree, Jr. eds., 2009); see also Deborah Denno, *Courting Abolition*, 130 HARV. L. REV. 1827, 1875 (2016) ("This drug fiasco has raised doubts about the humaneness and effectiveness of lethal injection, thus fostering a legal, cultural, and scientific story that will continue to have a devastating effect on the lethal injection process and, perhaps, on the death penalty as a whole.").

⁵¹ International Covenant on Civil and Political Rights art. 6, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976); see also American Convention on Human Rights art. 4, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 ("Every person has the right to have his life respected.").

ratify for admission to the EU, provides for abolition of the death penalty.⁵² Indeed, the EU has embraced worldwide abolition as a core component of its human rights policy, stating in a 1998 declaration that it would “work towards [the] universal abolition of the death penalty as a strongly held policy view agreed by all EU member states.”⁵³

In past decades, European governments did all they could to convince the United States to see the error of its executing ways. They passed human rights protocols, resolutions, declarations, and the like.⁵⁴ They refused to extradite accused murderers without explicit assurances that they would not be put to death.⁵⁵ They filed amicus briefs in high-profile death penalty cases pending before the US Supreme Court.⁵⁶ And they petitioned state governors and parole boards to stop

⁵² See Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty art. I, *opened for signature* Apr. 28, 1983, C.E.T.S. No. 114 (entered into force Mar. 1, 1985) (“The death penalty shall be abolished.”); Eur. Parl. Ass., *Resolution 1044: On the Abolition of Capital Punishment*, 25th Sess., Doc. No. 7154 (1994) (making ratification of Protocol No. 6 a prerequisite for membership in EU Council of Europe); see also *EU Statement on the Death Penalty*, EU EXTERNAL ACTION SERV. (July 8, 2020), https://www.ecas.europa.eu/ecas/eu-statement-death-penalty_en [<https://perma.cc/J5YF-M6L5>] (discussing abolition of death penalty as requirement for admission to EU).

⁵³ COUNCIL OF THE EU, GUIDELINES TO EU POLICY TOWARDS THIRD COUNTRIES ON THE DEATH PENALTY 2 (1998), <http://www.refworld.org/docid/4705f3d12.html> [<https://perma.cc/S3UR-TKUJ>] (“The EU will make these objectives known as an integral part of its human rights policy.”).

⁵⁴ Protocol No. 13 of the European Convention on Human Rights, which entered into force in 2002, declared that abolition of the death penalty was essential “for the full recognition of the inherent dignity of all human beings.” Human Rights Resolution 2005, adopted by the UN Commission on Human Rights, called upon nations “[t]o abolish the death penalty completely and, in the meantime, to establish a moratorium on executions.” And UN Resolution 62/149, adopted by the UN General Assembly in 2007, stated that “the death penalty undermines human dignity” and called upon states to establish a moratorium on executions with a view toward abolition. See Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty in All Circumstances, *opened for signature* May 3, 2002, C.E.T.S. No. 187 (entered into force July 1, 2003); Commission on Human Rights Res. 2005/59, The Question of the Death Penalty, 61st Sess., Apr. 20, 2005, U.N. Doc. E/CN.4/RES/2005/59 (Apr. 20, 2005); Moratorium on the Use of the Death Penalty, G.A. Res. 62/149, U.N. Doc. A/RES/62/149 (Dec. 18, 2007).

⁵⁵ See *International Perspectives on the Death Penalty: A Costly Isolation for the US*, DEATH PENALTY INFO. CTR (Oct. 1, 1999), <http://www.deathpenaltyinfo.org/international-perspectives-death-penalty-costly-isolation-us#costs> [<https://perma.cc/6S56-J7F8>] (“Countries such as England, France, Canada, Mexico, Italy, the Dominican Republic, and Germany have refused or delayed the extradition of people charged with murder in the U.S. in order to secure assurance from the prosecution that the death penalty will not be sought.”); Model Treaty on Extradition, G.A. Res. 45/116, U.N. Doc. A/RES/45/116 (Dec. 14, 1990) (providing for refusal to extradite “[i]f the offence for which extradition is requested carries the death penalty under the law of the requesting State, unless that State gives such assurance as the requested State considers sufficient that the death penalty will not be imposed or, if imposed, will not be carried out”).

⁵⁶ See Brief for the European Union and Members of the International Community as Amici Curiae Supporting Respondent, *Roper v. Simmons*, 543 U.S. 551 (2005) (No. 03-633) (advocating against execution of those who committed crime as a minor); Brief for the European Union as Amicus Curiae Supporting Petitioner, *Atkins v. Virginia*, 536 U.S. 304 (2002) (No. 008727) (advocating against execution of those who are intellectually disabled).

various executions, and protested when their pleas were ignored.⁵⁷ All these efforts had one thing in common: they were patently ineffective, making no difference in US practices at all. Indeed, most Americans didn't even know that Europe's strong opposition to the death penalty existed.⁵⁸

Fast forward to 2010, when the sole domestic manufacturer of sodium thiopental (one of the drugs in the traditional three-drug lethal injection protocol) moved its production plant to Italy in response to an FDA inspection that had revealed numerous deficiencies at its aging North Carolina facility.⁵⁹ Italian officials refused to license the plant without guarantees that the drugs made there would not be used in executions, and even threatened to hold the company liable for its part in what Americans called capital punishment and Europeans called state-sponsored murder.⁶⁰ The same year, Great Britain learned that a London business was supplying sodium thiopental to executioners in the US and banned the export of sodium thiopental to the US entirely. "The only trade we were doing on this drug was for capital punishment," a government spokesperson stated. "Our government is completely against capital punishment."⁶¹ As Britain's business secretary told the press: "This country opposes the death penalty. We are clear that the state should never be complicit in judiciary executions through the use of British drugs in lethal injections."⁶²

And so it came to be that by early 2011, two European governments had shut down two suppliers of lethal injection drugs for US executions. Both moves were purely reactive, a response to revelations that businesses operating on their (abolitionist) soil were supplying executioners in the United States. But that gave rise to an idea: Why not impose a European Union export ban on drugs used in executions more broadly? In December 2011, that is exactly what the EU did.⁶³ "I

⁵⁷ See Matt Ford, *Can Europe End the Death Penalty in America?*, ATLANTIC (Feb. 18, 2014), <http://www.theatlantic.com/international/archive/2014/02/can-europe-end-the-death-penalty-in-america/283790> [<https://perma.cc/A85V-CP9A>].

⁵⁸ See Jim Gibson & Corinna Barrett Lain, *Death Penalty Drugs and the International Moral Marketplace*, 103 GEO. L.J. 1215, 1239, 1254–55 (2002); see also Int'l Comm'n of Jurists, *Administration of the Death Penalty in the United States*, 19 HUM. RTS. Q. 165, 188 (1997) (noting "a general lack of awareness on the part of State officials—and even amongst judges, lawyers, and teachers—of the obligations [relating to capital punishment] undertaken by the US Government under international instruments that the country has ratified").

⁵⁹ See Gibson & Lain, *supra* note 58, at 1240.

⁶⁰ See *id.*

⁶¹ Emma Marris, *Death-Row Drug Dilemma*, NATURE (Jan. 27, 2011), <https://www.nature.com/articles/news.2011.53> [<https://perma.cc/22KY-VFE5>].

⁶² Juliette Jowit, *UK to Ban Export of Drug Approved for Use in US Executions*, GUARDIAN (July 10, 2012, at 3:00 PM EDT), <https://www.theguardian.com/world/2012/jul/10/uk-ban-export-drug-us-executions> [<https://perma.cc/M723-E487>].

⁶³ See Commission Regulation 1352/2011, art. 12(2) of Dec. 20, 2011, amending Council Regulation (EC) No. 1236/2005 of June 27, 2005, Concerning Trade in Certain Goods Which Could Be Used for Capital Punishment, Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment, 2011 O.J. (L 338/31) (criteria for granting export authorizations).

wish to underline that the European Union opposes the death penalty in all circumstances,” the spokesperson who announced the ban stated.⁶⁴ After decades of doing everything it could possibly do to disrupt the death penalty in the United States, the EU finally found a way to get our attention. Turns out, the best way to stop executions in the US was for Europe to stop selling executioners its drugs. As one article on the death drugs drama put the point, “Let’s remember why we are here.”⁶⁵ We are here because for the first time *ever*, lethal injection made the US death penalty vulnerable to abolitionists abroad.

Big Pharma is another example. Selling drugs for executions is, and always has been, against pharmaceutical companies’ corporate core values.⁶⁶ And for those who say these companies don’t actually care about their corporate core values—it’s all about the bottom line—that may or may not be true, but supplying drugs for lethal injection turns out to be bad for business too. “A company in the business of healing people is putting its reputation at risk when it supplies drugs for executions,” the manager of one state pension fund stated, adding: “The company is also risking association with botched executions, which opens it to legal and financial damage.”⁶⁷ Tellingly, one major pharmaceutical company, Mylan, had \$70 million divested when it couldn’t guarantee investors that its products wouldn’t end up in executioners’ hands. (It can now.)⁶⁸ “If clients find out we have shares in companies that supply that drug [for executions],” a spokesperson for the investment firm that divested the shares explained, “we have problems with our clients.”⁶⁹

Before 2010, when the sole domestic manufacturer of sodium thiopental moved its plant to Italy, no one was paying attention to where executing states were getting their drugs. Pharmaceutical companies were objecting to states using their products

⁶⁴ European Commission Press Release IP/11/1578, Comm’n Extends Control Over Goods Which Could Be Used for Capital Punishment or Torture (Dec. 20, 2011), http://europa.eu/rapid/press-release_IP-11-1578_en.htm. [<https://perma.cc/RJ95-UV2Z>].

⁶⁵ Diann Rust-Tierney, *‘My Whole Body Is Burning’: Double Execution in Oklahoma*, HUFFINGTON POST (Apr. 29, 2014, at 4:37 PM EDT), http://www.huffingtonpost.com/diann-rusttierney/my-whole-body-is-burning_b_5228342.html [<https://perma.cc/QV5J-JLD6>].

⁶⁶ As an example, back in 2001—before anyone was paying attention—the pharmaceutical mogul Abbott Laboratories wrote to state corrections departments to say that its drugs were not to be used for lethal injection. Abbott’s motto is “A Promise for Life,” and it’s hard to imagine a more perverse use of “promise for life” drugs than using them to cause people to promptly die. See *Industry Statements*, LETHAL INJECTION INFORMATION CENTER, <https://lethalinjectioninfo.org/industry-statements/> [<https://perma.cc/UA24-2FS7>] (last visited Mar. 24, 2025, at 2:08 PM EST. (Abbott Laboratories, December 2001: “Abbott does not support the use of Pentothal [sodium thiopental] in capital punishment. In fact, [we] communicated with departments of corrections in the United States to request that this product not be used in capital punishment procedures.”)).

⁶⁷ Eckholm, *supra* note 21.

⁶⁸ See *Drug Maker Mylan Takes \$70 Million Hit in Battle over Lethal Injection*, NBC NEWS (Oct. 21, 2014, at 10:26 AM EDT), <https://www.nbcnews.com/storyline/lethal-injection/drug-maker-mylan-takes-70-million-hit-battle-over-lethal-n230051> [<https://perma.cc/4955-FGZP>].

⁶⁹ *Id.*

eight days, and it did so with McKesson's illegally obtained drugs.⁷⁷

Suits against Nevada and Nebraska followed in 2018, and for brevity, I'll just discuss the suit against Nevada, which was filed by the pharmaceutical mogul Alvogen. Alvogen's suit claimed that Nevada "intentionally defrauded Alvogen's distributor" into selling a drug for lethal injection, demanding the return of its "illegally obtained property."⁷⁸ State officials knew that Alvogen had distribution controls in place to prevent its products' use in executions, the company alleged, yet they concealed the intended use of the drug and "implicitly made the false representation that they had a legitimate therapeutic rationale" for buying it—even going so far as to have the drug shipped to a location over 200 miles from the state penitentiary "to further the implication that the [drug] was for a legitimate medical purpose."⁷⁹

Once again, the trial court sided with the company, finding that Nevada had acted in "bad faith disregard for Alvogen's rights," using "subterfuge" to obtain Alvogen's product for lethal injection in direct contravention of the distribution controls that it knew the company had in place to prevent such use.⁸⁰ In fact, the court noted, the purchasing pharmacy's first move when the state got caught was to ask the prison director whether he wanted to order more of the drug because they were about to be "cut off." The court further found that Alvogen had shown irreparable harm from the shady sale, including reputational damage, lost sales, and potential divestitures by investors, resulting in an order that prohibited Nevada from using Alvogen's drugs in an upcoming execution. Nevada appealed, but the case soon became moot, as the prisoner to be executed committed suicide and the drugs expired before they could be used.

In 2021, a "cease and desist" letter from Hikma Pharmaceuticals revealed that the Nevada Department of Corrections (NDOC) was at it again. "NDOC's purchase and intended use of Hikma's products for capital punishment is in violation of state and federal law, in knowing violation of Hikma's property and proprietary interests in its products, and these actions will cause significant damage to Hikma's business

⁷⁷ See LAIN, *supra* note 11, at 175. When asked about the lawsuit, the Arkansas Attorney General told the press, "Pharmaceutical companies are trying to circumvent the rule of law by using eleventh-hour litigation tactics to stall these lawful executions." *Id.* "It's not clear what "rule of law" the state AG thought was being circumvented, but we can safely say that it wasn't contract law because that dubious distinction goes to Arkansas—the state that purposely breached the terms of McKesson's distributor contract and then for good measure passed a secrecy statute in 2019 to cover its tracks in the future."

⁷⁸ Complaint for Emergency Injunctive Relief and Return of Illegally-Obtained Prop. at 24, *Alvogen, Inc. v. Nevada*, 2018 Nev. Dist. LEXIS 966 (Nev. Dist. Ct. July 10, 2018) (No. A-18-777312-B), <https://www.courthousenews.com/wp-content/uploads/2018/07/Alvogen.pdf> [<https://perma.cc/ZHS4-7HCG>]; *id.* at 9 (alleging that Nevada "leveraged the Nevada Chief Medical Officer's license to surreptitiously, evasively, illicitly, and by subterfuge obtain the Alvogen midazolam product").

⁷⁹ *Id.* at 9, 24.

⁸⁰ Findings of Fact and Conclusions of Law at 37–39, *Alvogen, Inc., v. Nevada*, 2018 Nev. Dist. LEXIS 966 (Nev. Dist. Ct. Sep. 28, 2018) (No. A-18-777312-B), <https://lethalinjectioninfo.org/wp-content/uploads/2018/10/Alvogen-v-Nevada-Order.pdf> [<https://perma.cc/KFJ8-UEAW>].

reputation and the interests of its investors,” Hikma stated, demanding the return of its drugs.⁸¹ “This is not Hikma’s first rodeo with NDOC on this issue,” the letter added, noting that the NDOC was “well aware of Hikma’s long history of opposing the purchase and misuse of its life-saving products for capital punishment.”⁸² Nevada’s repeated violations of Hikma’s contractual rights “is nothing less than shocking, and embarrassing for the State of Nevada,” the letter alleged.⁸³ In the end, Nevada’s supply of Hikma’s drugs expired before further action was taken.

Granted, the companies that comprise Big Pharma are technically just opposed to states using their products for executions, not the death penalty per se. But states are intentionally breaking the restricted-use provisions of these companies’ sales contracts, and that is getting them sued, which in turn is adding more costs and more litigation delays. How much does this matter? Consider what the attorney for Nevada told a court in the Alvogen suit: “If third-party business interests can file these lawsuits, the death penalty is effectively dead.”⁸⁴ It’s hard to say which concession in that statement is more astounding—that maintaining the death penalty requires states to be able to fraudulently breach private contracts, or that a company’s ability to sue to enforce its contractual provisions could take down the death penalty itself. Either way, the vulnerability is plain. Executing states have picked a fight with Big Pharma, and lethal injection is once again to blame.

The medical profession is yet another example. It should come as no surprise that the medical profession is strongly opposed to physician participation in lethal injection.⁸⁵ The fifth-century BC Hippocratic Oath contains the sacred command “above all, do no harm,” and using the healing arts to kill violates that command in the most egregious of ways. Asking doctors to help the state kill is like “asking a lifeguard to advise people on how to drown better,” one doctor says.⁸⁶ It is asking someone to help do something that their occupation is devoted to preventing from happening at all.

Yet even when doctors don’t participate, there is a strong sense within the medical profession that lethal injection is nevertheless bad for the profession—an

⁸¹ Letter from Josh Reid, Dir., Fennemore, to Hon. Aaron D. Ford, Attorney General, State of Nev. (June 24, 2021), https://nevadacurrent.com/wp-content/uploads/2021/06/18543312_1Hikma-Pharmaceuticals-USA-Inc-6-24-21-NDOC-Demand-and-Preservation-Letter.pdf [<https://perma.cc/AV7K-U9YK>].

⁸² *Id.* at 2.

⁸³ *Id.*

⁸⁴ David Ferrara, *Nevada AG: If Drug Maker Lawsuits Continue, 'Death Penalty Is Dead,'* L.V. REV. J. (Dec. 28, 2018, at 3:39 PM), <https://www.reviewjournal.com/crime/nevada-ag-if-drug-maker-lawsuits-continue-death-penalty-is-dead-1560863/> [<https://perma.cc/48AZ-VP AJ>].

⁸⁵ This is not to deny that there are dissenting voices. See LAIN, *supra* note 11, at 199–204 (discussing minority view favoring physician participation in lethal injection, and the reasons supporting it).

⁸⁶ Joel B. Zivot, *The Slippery Slope from Medicine to Lethal Injection*, TIME (May 2, 2014, at 3:55 PM EDT), <https://time.com/86310/the-slippery-slope-from-medicine-to-lethal-injection/> [<https://perma.cc/B5HA-4M2V>].

inevitable consequence of the fact that lethal injection cannot be divorced from its medical context. “Even without physician participation, the lethal injection process so closely mimics medical practice that the entire medical community is tied to the death chamber,” one oft-cited medical journal article states.⁸⁷ Lethal injection isn’t medicine, but it repurposes medicine, and thus implicates the medical profession whether doctors are a part of it or not.

Within the medical profession discourse, the harms of lethal injection are referred to as *corruption* and *exploitation*.⁸⁸ Lethal injection corrupts the medical profession by denigrating its moral stature. As one medical journal article puts the point: “The public may like executions, but no one likes executioners.”⁸⁹ At the same time, lethal injection exploits the medical profession by leveraging its cultural cache to give legitimacy to a practice directly opposite of the values that the profession has vowed to protect.⁹⁰

This is why many in the medical profession are against not only physician participation in lethal injection, but also lethal injection itself. “Speaking as a physician, I just want to say: *Leave my stuff alone. Leave my profession out of it,*” says Dr. Joel Zivot, an outspoken critic of lethal injection.⁹¹ Granted, here again, the medical profession’s problem is not with the death penalty itself. The problem is with lethal injection. But that’s the point. Lethal injection has given rise to concerted opposition to executions by the medical profession that simply did not exist before. It has created new allies with the abolition movement.

In this regard, at least one more entity merits mention: the press. As lethal injection’s problems have become more apparent, states have increasingly turned to secrecy and obfuscation to cover them up, and that has brought the press into the fight. “One of the primary purposes of a free and independent press is to perform a watchdog function over government activities,” a lawyer in one media suit says.⁹²

⁸⁷ Jonathan I. Groner, *The Hippocratic Paradox: The Role of the Medical Profession in Capital Punishment in the United States*, 35 *FORDHAM URB. L.J.* 883, 906 (2008); see also Jonathan Groner, *Lethal Injection: A Stain on the Face of Medicine*, 325 *BMJ* 1026, 1028 (Nov. 2, 2002) (“Even without doctors’ participation, lethal injection—with its intravenous lines, electrocardiograph monitors, and anesthetic drugs—has a deeply corrupting influence on medicine as a whole.”).

⁸⁸ For the landmark article first articulating these harms, see generally William J. Curran & Ward Casscells, *The Ethics of Medical Participation in Capital Punishment by Intravenous Drug Injection*, 302 *NEJM* 226 (Jan. 24, 1980).

⁸⁹ Atul Gawande, *When Law and Ethics Collide—Why Physicians Participate in Executions*, 354 *NEJM* 1221, 1228 (Mar. 23, 2006).

⁹⁰ See, e.g., Travis Cade Armstrong, Comment, “*Veneer of Medical Respectability*”: *How Physician Participation in Lethal Injections Perpetuates the Illusion of a Humane Execution*, 51 *S. TEX. L. REV.* 469, 487 (2009) (arguing that lethal injection “deceptively places the physician’s stamp of approval on an act that runs counter to the most basic values of the medical profession”).

⁹¹ Owen Dyer, *The Slow Death of Lethal Injection*, 348 *BMJ* 16, 16–17 (Apr. 29, 2014) (quoting Joel Zivot).

⁹² Ed Pilkington, *Missouri Ordered to Reveal Pharmacies That Supplied Its Execution Drugs*, *GUARDIAN* (Mar. 22, 2016, at 11:48 AM EDT), <https://www.theguardian.com/us->

The press has clearly served that function here. After all, it was investigative journalism that exposed Missouri's use of a malpractice-ridden doctor, unearthed the ugly truth about Harris Pharma, and revealed the troubled compounding pharmacies supplying lethal injection drugs to various states.⁹³

State secrecy statutes burden the press' ability to perform this critically important function, not only by making information about lethal injection exponentially harder to access, but at times also by making it unlawful (criminal, even) to then share it. For example, Missouri's secrecy statute prohibits knowingly disclosing the identity of a current or former member of an execution team and authorizes punitive damages for violations.⁹⁴ Arkansas' secrecy statute goes further yet, making reckless disclosure of the identity of companies whose drugs are used for lethal injection a felony punishable by up to six years in prison and a \$10,000 fine.⁹⁵ *We're not only going to breach manufacturers' contracts, we're going to make a felon out of anyone who dares get in our way.*

Press organizations are not taking this sitting down. They are suing. "The people of Nevada have a right to know if the state performs its executions humanely, and the press has a First Amendment right and responsibility to report it," the executive director of the Nevada Press Association (NPA) told the press.⁹⁶ As the NPA stated in its 2021 lawsuit, "We should know what the state is doing in our name."⁹⁷ Other members of the media echo the point. "These laws are unconstitutional, even immoral," one legal journalist explains, "because they seek to hide from the American people material information about the means and manner of some of the most controversial aspects of capital punishment."⁹⁸

Here again, these press associations aren't against the death penalty per se. Their problem is the secrecy that lethal injection requires. But whatever their reason,

news/2016/mar/22/missouri-pharmacies-execution-drugs-death-penalty-lawsuit [https://perma.cc/QS7X-8TNU]; see also FREEDOM FORUM, <https://www.freedomforum.org/freedom-of-press/the-medias-role-as-watchdogs/> [https://perma.cc/LEG2-W9YP] (last visited Oct. 27, 2025) ("An independent news media uses its watchdog role to investigate and report on government overreach and wrongdoing and hold those in power accountable for their actions. You can't have democracy without a free press.").

⁹³ See *supra* notes 36–42 and accompanying text.

⁹⁴ MO. REV. STAT. § 546.720 (2007).

⁹⁵ ARK. CODE ANN. § 5-4-617 (2024); ARK. CODE ANN § 5-4-201 (2024); ARK. CODE ANN § 5-4-401 (2024).

⁹⁶ Michael Lyle, *ACLU, NV Press Association Sue to Assure NDOC Transparency at Execution*, NEV. CURRENT (July 26, 2021, at 4:43 PM), <https://nevadacurrent.com/briefs/aclu-nv-press-association-sue-to-assure-ndoc-transparency-at-execution/> [https://perma.cc/U87P-V9HR].

⁹⁷ See Ken Ritter, *Nevada Press Ass'n Sues to Ensure Access to Execution*, ASSOC. PRESS (July 28, 2021), <https://apnews.com/article/nevada-executions-74e411774c5aeb32091268448b323eb3> [https://perma.cc/WB9U-D7VR]; see also Complaint for Temporary Restraining Order and Preliminary Injunction at 12–13, *Nevada Press Ass'n. v. Daniels*, 3:21CV00317 (D. Nev. 2002)

⁹⁸ Deron Lee, *The First Amendment vs. Death Penalty Secrecy Laws*, COLUM. JOURNALISM REV. (Mar. 7, 2014), https://www.cjr.org/united_states_project/under_the_hangmans_hood.php [https://perma.cc/ZW92-28QR].

whatever their angle, the result for the abolition movement is the same—yet another powerful entity fighting against state execution practices, again rendering lethal injection remarkably good for an execution method long viewed as intrinsically bad.

CONCLUSION

How we execute is not typically a topic for discussion among those who think we should not be executing at all. But perhaps it should be. In a topsy-turvy way, lethal injection has arguably done more for the abolition movement than any other development since the actual innocence movement of the early 2000s. How ironic—and telling—that the execution method adopted to save the death penalty has become yet another reason to abandon it.

