RULES FOR THEE, NOT FOR ME: THE U.S. GOVERNMENT'S UNFETTERED QUEST TO KILL BEHIND THE SHIELD OF SECRECY

Francesca Patetta[*]

ABSTRACT

In Owens v. Stirling, the South Carolina Supreme Court confronted the constitutionality of various execution methods and the use of "secrecy" or "shield" statutes to protect the identities of those involved in providing the drugs used for lethal injection executions. These ever-expanding, far-reaching secrecy statutes and shield laws—purported to safeguard individuals and manufacturers involved in lethal injection executions—are a grave threat to the Fifth and Fourteenth Amendment due process rights of individuals facing death at the hands of the government. Ultimately, secrecy statutes are now being extended to shield federal and state actors' lawless, unethical conduct in their unfettered attempts to procure the drugs needed to carry out lethal injection executions.

This Note argues that the use of secrecy statutes in lethal injection cases, exemplified by Owens v. Stirling, is not just a matter of protecting trade secrets or ensuring the safety of drug suppliers, but rather a deliberate effort by the government to cover up lawless behavior in the quest for drugs required for executions. The increasing reliance on secrecy surrounding the death penalty in the United States is a symptom of a deeper systemic issue —namely, the government's willingness to sidestep legal and ethical constraints in its pursuit of carrying out capital punishment. In doing so, the government evades accountability while undermining public trust in the legal system's commitment to transparency, justice, and upholding the law.

TABLE OF CONTENTS

INTRODUCTION 284
I. OVERVIEW: METHODS OF CAPITAL PUNISHMENT IN THE UNITED STATES 286
A. Brief Literature Review 286
B. United States Supreme Court Framework 288

* J.D., Rutgers School of Law, 2026.

II. EXAMINING *OWENS V. STIRLING* 292
A. Case Background and Procedural History 292
B. The South Carolina Supreme Court's Analysis 294
III. EVALUATION OF *OWENS V. STIRLING* 297
A. Timeliness / Significance of Execution Issues 298
B. The Myth of Lethal Injection as a Humane Means of Execution 302
C. The Constitutional Implications of Shield Statutes 306
D. Inadequate Approaches Implicating Due Process Concerns 312
IV. PROPOSED SOLUTIONS / RECOMMENDATIONS 312
A. Capital Punishment Across the United States: Abolition or Moratorium 312
B. Defendants and Defense Attorneys Must Have Access to Details about the Lethal Injection Drugs 313
CONCLUSION 314

INTRODUCTION

As warned by the attorney for death row inmate Freddie Owens, and without regard to the pattern of openness and transparency throughout the history of the death penalty,[1] "[n]o inmate in the country has ever been put to death with such little transparency about how he or she would be executed."[2] In *Owens v. Stirling*, the South Carolina Supreme Court confronted the constitutionality of various execution methods and the use of "secrecy" or "shield" statutes to protect the identities of those involved in providing the drugs used for lethal injection executions.[3] These ever-expanding, far-reaching secrecy statutes and shield laws—purported to safeguard individuals and manufacturers involved in lethal

1. *See generally* Austin Sarat, Theo Dassin & Aidan Orr, *A Dark Shadow: The Intensification and Expansion of Lethal Injection Drug Secrecy*, 12 BRIT. J. AM. LEG. STUD. 1, 3–17 (2023) (detailing the history and development of secrecy in the execution context).

2. Jeffrey Collins, *South Carolina Supreme Court Rules Death Penalty Legal, Opening Door to Restart Executions After 13 Years*, PBS NEWS (July 31, 2024, at 14:41 ET), https://www.pbs.org/newshour/nation/south-carolina-supreme-court-rules-state-death-penalty-legal-opening-door-to-restart-executions-after-13-years [https://perma.cc/V7JG-HKR4]. *See generally* Chiara Eisner, *Five States Planning to Execute Prisoners this Week Despite Federal Moratorium*, NPR (Sep. 19, 2024, 17:47 ET), https://www.npr.org/2024/09/19/nx-s1-5117830/five-states-planning-to-execute-prisoners-this-week-despite-federal-moratorium [https://perma.cc/6ST7-KR5B] (explaining that Lindsey Vann, who said this, represented Khalil Allah—formerly known as Freddie Owens).

3. *See* 904 S.E.2d 580, 587 (S.C. 2024).

injection executions—are a grave threat to the Fifth[4] and Fourteenth Amendment[5] due process rights of individuals facing death at the hands of the government. Ultimately, secrecy statutes are now being extended to shield federal and state actors' lawless, unethical conduct in their unfettered attempts to procure the drugs needed to carry out lethal injection executions.

This Note argues that the use of secrecy statutes in lethal injection cases, exemplified by *Owens v. Stirling*, is not just a matter of protecting trade secrets or ensuring the safety of drug suppliers, but rather a deliberate effort by the government to cover up lawless behavior in the quest for drugs required for executions. The increasing reliance on secrecy surrounding the death penalty in the United States is a symptom of a deeper systemic issue —namely, the government's willingness to sidestep legal and ethical constraints in its pursuit of carrying out capital punishment. In doing so, the government evades accountability while undermining public trust in the legal system's commitment to transparency, justice, and upholding the law.

Part I sets the stage by providing background information on different methods of executions and an overview of the current legal landscape molded by the United States Supreme Court as it relates to execution methods and secrecy laws across the country. The discussion in Part II of this Note is twofold. First, the procedural history in *Owens v. Stirling* is discussed, laying a foundation for the following Section, which delves into the South Carolina Supreme Court's analysis of this case. Further, an evaluation of the *Owens* court's analysis is conducted, including a detailed, critical look at the due process concerns implicated by the court's endorsement of antiquated methods of execution, compounded by the court's expansion of secrecy/shield statutes related to lethal injection drugs. This Note analyzes the South Carolina Supreme Court's opinion in *Owens v. Sterling* as it relates to these due process concerns.[6] Part III proposes recommendations and suggestions to ensure that due process is guaranteed as well as it may be under the circumstances of capital punishment, particularly in lethal injection executions. Part IV summarizes the discussion and concludes with a plea to legal advocates, calling on them to continue challenging these execution methods and secrecy statutes while placing pressure on

4. U.S. CONST. amend. V.

5. U.S. CONST. amend. XIV, § 1.

6. The exceedingly brief Due Process analysis is found at *Owens*, 904 S.E.2d at 604–05.

government officials to implement a moratorium on the death penalty across America.

I. OVERVIEW: METHODS OF CAPITAL PUNISHMENT IN THE UNITED STATES

A. Brief Literature Review

As it stands today, almost every state that authorizes capital punishment utilizes lethal injection as its default method of execution.[7] Before the development of lethal injection, courts in early America employed various methods of execution, as "the death penalty was . . . a commonplace punishment for criminal recidivism in early America."[8] These methods included hangings (which often took place in public), the electric chair, and asphyxiation (i.e., pumping poisonous gas into a gas chamber).[9] Although capital punishment was historically less controversial, as it was more widely accepted and utilized, the support for capital punishment hit a then-record low of forty-two percent in 1966.[10] Less than a decade later, in 1972, the United States Supreme Court decided *Furman v. Georgia*, which held that the death penalty violated both the Eighth and Fourteenth Amendments of the United States Constitution because the application of capital punishment was discretionary, haphazard, and racially discriminatory against minority groups—predominately Black men.[11] *Furman v. Georgia* suspended capital punishment in the United States until its reinstatement in 1976 with the Court's decision in *Gregg v. Georgia*.[12]

Lethal injection was first adopted as a method of execution in 1977 in response to state legislators' search for a cheaper and more humane alternative to the other methods of capital punishment—i.e., the electric

7. *See Authorized Methods by State*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/executions/methods-of-execution/authorized-methods-by-state [https://perma.cc/5T8A-6X4N] (last visited Oct. 29, 2025).

8. Sheherezade C. Malik & D. Paul Holdsworth, *A Survey of the History of the Death Penalty in the United States*, 49 U. RICH. L. REV. 693, 694 (2015).

9. *See id.* at 696–700. It should be noted that what is often characterized as execution by "hangings" in retellings of early American history can be more accurately described as racially motivated lynching. *See New Report: U.S. Death Penalty is Rooted in Lynching Past*, INNOCENCE PROJECT (Feb. 20, 2015), https://innocenceproject.org/new-report-u-s-death-penalty-is-rooted-in-lynching-past/ [https://perma.cc/XWP8-9LMJ].

10. Malik & Holdsworth, *supra* note 8, at 701.

11. *See* Furman v. Georgia, 408 U.S. 238, 240–57 (1972) (Douglas, J., concurring); *see also* Malik & Holdsworth, *supra* note 8, at 700–03 (giving the context of *Furman* starting from 1955 and tracking its immediate aftermath).

12. *See* Gregg v. Georgia, 428 U.S. 153, 169 (1976).

chair and the gas chamber.[13] The wave of initial legislation authorizing lethal injection protocols for executions provided for no oversight; the then-widely-adopted three-drug protocol was developed by a medical examiner in Oklahoma who conducted no research and had no background in anesthesia or pharmacology.[14] The absence of medical testing performed on this three-drug protocol left lethal injection procedures and regulations in most states "replete with medical and scientific inaccuracies, and padded with irrelevant statements and descriptions of imagined events."[15] Further, in the rare instance that medical professionals are consulted for advice about the method of execution, their guidance is typically ignored.[16]

Comments by William Lloyd, a member of the Tennessee Department of Corrections lethal injection protocol committee, exemplify the lack of consideration officials give to the degree of suffering inflicted on the individual. As he unabashedly admitted, "We didn't discuss pain and suffering." [17] Most state legislatures have adopted specific lethal injection protocols solely based on the fact that they were utilized by other states.[18] Texas was the first state to copy Oklahoma's lethal injection protocol as a means of capital punishment, with other states quickly following.[19] At the outset, states failed to record data on their lethal injection protocols and executions, and did not demonstrate any effort to ensure that the drugs and protocols employed were humane.[20] The majority of states and the federal government then shifted from using the three-drug lethal injection execution protocol to utilizing a single drug, pentobarbital,[21] or,

13. *See* Malik & Holdsworth, *supra* note 8, at 704; *see also* Teresa A. Zimmers et al., *Lethal Injection for Execution: Chemical Asphyxiation?*, 4 PLOS MED. 646, 647 (2007) ("The origin of lethal injection protocol can be traced to legislators in Oklahoma searching for a less expensive and potentially more humane alternative to the electric chair.").

14. *See* Zimmers et al.*, supra* note 13, at 648–49; HUMAN RIGHTS WATCH, SO LONG AS THEY DIE: LETHAL INJECTIONS IN THE UNITED STATES 13–15 (James Ross & Iain Levine eds., 2006), https://www.hrw.org/reports/us0406webwcover.pdf [https://perma.cc/ME2M-FBQR].

15. Leigh B. Bienen, *Anomalies: Ritual and Language in Lethal Injection Regulations*, 35 FORDHAM URB. L.J. 857, 860 (2008).

16. *See id.*

17. HUMAN RIGHTS WATCH, *supra* note 14, at 1.

18. *See id.* at 2.

19. *Id.*

20. *See* Nathaniel A.W. Crider, *What You Don't Know Won't Kill You: A First Amendment Challenge to Lethal Injection Secrecy*, 48 COLUM. J.L. & SOC. PROBS. 1, 8–9 (2015); Sean Philpott, *Execution by Lethal Injection: Illegal Research?*, 44 HASTINGS CTR. REP. 11, 11–12 (2014).

21. *See* Casey Smith, *What is Pentobarbital? More Questions than Answers Surround Indiana's New Execution Drug*, IND. CAP. CHRONICLE (July 5, 2024, at 07:00 ET),

in the alternative, resorted to antiquated methods of capital punishment like the firing squad.[22] Several death penalty scholars have continuously expressed concerns that the lethal injection protocols developed by states are so grossly inadequate and plagued with a pattern of carelessness that they are incompatible with the United States Constitution.[23]

B. United States Supreme Court Framework

Although execution methods—particularly lethal injection execution protocols—have been the subject of several Eighth Amendment challenges litigated in the United States Supreme Court, the Court has never held any method of execution to be unconstitutional or incompatible with the Eighth Amendment's prohibition on the infliction of cruel and unusual punishment by the government.[24] The United States Supreme Court's decisions concerning capital punishment—specifically in cases involving execution by lethal injection—have largely shaped the legal landscape surrounding lethal injection executions, secrecy statutes, and the burden imposed on death row inmates seeking to challenge execution methods. Further, the Court's rulings in *Baze v. Rees*,[25] *Glossip v. Gross*,[26] and *Bucklew v. Precythe*[27] illustrate the judiciary's continued deference to states in their pursuit of the death penalty, and its simultaneous erosion of the constitutional protections of the condemned.

Most of the recent United States Supreme Court decisions concerning the death penalty involved allegations of the infliction of cruel and unusual punishment, and thereby purported violations of the Eighth Amendment.[28] In *Baze*, the Supreme Court upheld Kentucky's three-drug lethal injection protocol, ruling that it did not violate the Eighth Amendment.[29] The *Baze* majority dismissed concerns about the lack of scientific expertise involved in lethal injection procedures and endorsed

https://indianacapitalchronicle.com/2024/07/05/what-is-pentobarbital-more-questions-than-answers-around-indianas-new-execution-drug/ [https://perma.cc/9XVM-ZYJH] (explaining that Pentobarbital is a barbiturate and a sedative which has commonly been used to euthanize pets).

22. *See* Owens v. Stirling, 904 S.E.2d 580, 603, 608 (S.C. 2024).

23. *See, e.g.*, Eric Berger, *The Executioners' Dilemma*, 49 U. RICH. L. REV. 731, 731 (2015).

24. Christian Witte, *The Clock is Ticking: Legal Barriers in § 1983 Execution Protocol Challenges*, 89 MO. L. REV. 1385, 1387 (2024).

25. *See* 553 U.S. 35, 62–63 (2008) (per curiam).

26. 576 U.S. 863, 867 (2015).

27. 587 U.S. 119, 122–23 (2019).

28. *See, e.g.*, *Bucklew*, 587 U.S. at 125–126; *Glossip*, 576 U.S. at 867; *Baze,* 553 U.S. at 46–47.

29. *See* 553 U.S. at 47.

the three-drug protocol for lethal injection executions in the face of mounting evidence of the risk of severe pain and suffering.[30] The Court articulated that an execution method is unconstitutional only if it presents a "substantial risk of serious harm" or "'an objectively intolerable risk of harm' that prevents prison officials from pleading that they were 'subjectively blameless for purposes of the Eighth Amendment.'"[31] This decision placed the burden of persuasion on the condemned prisoner to prove that a method of execution is cruel and unusual,[32] and set an impossibly high bar for death row inmates challenging execution methods.

Seven years later, *Glossip v. Gross* cemented the Supreme Court's pattern of shifting the burden of proof onto those facing execution.[33] In *Glossip*, Oklahoma death row inmates challenged the use of midazolam, a sedative used in lethal injection protocols, arguing that it failed to reliably induce unconsciousness before the administration of excruciatingly painful lethal drugs.[34] The Court refused to scrutinize the efficacy of the drug and ruled against the death row inmates, holding that they must not only prove the method of execution was unconstitutional, but also identify a "known and available alternative" that would significantly reduce the risk of pain.[35] This decision effectively insulated state execution procedures from any meaningful review by forcing death row inmates—who already possess limited resources—to propose legally and logistically viable alternative methods to execute them.

Additionally, the *Glossip* Court stayed silent on the state's right to shield execution drug suppliers under secrecy statutes, exacerbating concerns about the lack of transparency in the lethal injection process.[36] As a result, states were able to continue using unreliable drugs, often

30. *See id.* at 117 (Ginsburg, J., dissenting) (explaining that the development of the lethal injection protocol in Kentucky was left to the Department of Corrections, whose officials "were 'given the task without the benefit of scientific aid or policy oversight.' . . . [The state] 'did not conduct any independent scientific or medical studies or consult any medical professionals concerning the drugs and dosage amounts to be injected into the condemned.'").

31. *Id.* at 50 (quoting Farmer v. Brennan, 511 U.S. 825, 842, 846 & n.9 (1994)). Further, the *Baze* Court opined, "Some risk of pain is inherent in any method of execution—no matter how humane—if only from the prospect of error in following the required procedure. It is clear, then, that the Constitution does not demand the avoidance of all risk of pain in carrying out executions." *Id.* at 47.

32. *See id.* at 47.

33. *See* 576 U.S. at 881.

34. *Id.* at 882–83.

35. *See id.* at 877–78.

36. *See id.* (highlighting the issues to be discussed and failing to include the state's right to shield drug suppliers).

sourced from unregulated or foreign suppliers, without disclosing critical information about their efficacy or safety.[37] Moreover, the *Glossip* majority opinion left death row inmates "exposed to what may well be the chemical equivalent of being burned at the stake."[38]

The Supreme Court further restricted challenges to execution methods in 2019 when it held that even if an execution method causes extreme suffering, it does not violate the Eighth Amendment unless the prisoner can present a feasible alternative.[39] In *Bucklew v. Precythe*, death row inmate Russel Bucklew brought an as-applied challenge to the state of Missouri's lethal injection protocol, arguing that it "would cause *him* severe pain because of his particular medical condition."[40] The *Bucklew* Court confirmed that *Baze* and *Glossip* govern all Eighth Amendment challenges alleging that a method of execution produces unconstitutionally cruel and unusual pain.[41] Further, although the dissent importantly pointed out that Bucklew cited evidence to support that "executing him by lethal injection will cause the tumors that grow in his throat to rupture during his execution, causing him to sputter, choke, and suffocate on his own blood for up to several minutes before he dies,"[42] the majority found that Bucklew could be executed in this way, despite his rare medical condition.[43] Thus, the majority held that the lethal injection execution protocol to be utilized in this case comported with the United States Constitution.

In *Smith v. Hamm,* the most recent United States Supreme Court decision involving the constitutional soundness of a method of execution, Justice Sotomayor provided an illuminating dissenting opinion, in which she highlighted her trepidations about secrecy laws:

> Consistent with Alabama's "familiar veil of secrecy over its capital punishment procedures," it has released only a "heavily redacted" version of that protocol. Smith should be allowed to complete discovery and litigate the merits of his claims challenging this new protocol in the ordinary course. That

37. *See* discussion *infra* Section III.C.

38. 576 U.S. at 949 (Sotomayor, J., dissenting).

39. *See* Bucklew v. Precythe, 587 U.S. 119, 138 (2019) ("To determine whether the State is cruelly superadding pain, our precedents and history require asking whether the State had some other feasible and readily available method to carry out its lawful sentence that would have significantly reduced a substantial risk of pain.").

40. *Id.* at 126.

41. *See id.* at 127.

42. *Id.* at 154 (Breyer, J., dissenting).

43. *See id.* at 148–49.

> information is important not only to Smith, who has an extra reason to fear the gurney, but to anyone the State seeks to execute after him using this novel method.[44]

In 2024, the Supreme Court only issued one opinion in a capital case on its regular docket.[45] Out of 148 inmates on death row requesting the Court to review constitutional claims or grant a stay of execution, only three requests were granted.[46] In the two instances where state actors requested the Court to hear a capital appeal, both requests were granted.[47]

In recent years, there have been several noteworthy trends concerning lethal injection executions that implicate various constitutional concerns: governments' inability to obtain lethal injection drugs[48] and their accompanying newfound reliance on compounding pharmacies,[49] the rising number of "botched" executions,[50] and the expansion of secrecy/shield laws.[51] Almost all of the above-mentioned

44. Smith v. Hamm, 144 S. Ct. 414, 416 (2024) (Sotomayor, J., dissenting from the denial of application for stay and denial of certiorari) (citation omitted).

45. DEATH PENALTY INFO. CTR., THE DEATH PENALTY IN 2024: DEATH SENTENCES AND EXECUTIONS REMAIN NEAR HISTORIC LOWS AMID GROWING CONCERNS ABOUT FAIRNESS AND INNOCENCE 34 (2024), https://dpic-cdn.org/production/documents/DPI-2024-Year-End-Report.pdf [https://perma.cc/DNW5-RVQ9].

46. *Id.* Two of these requests stemmed from the same case. *Id.*

47. *Id.*

48. *See* Laurel Wamsley, *With Lethal Injections Harder to Come By, Some States Are Turning to Firing Squads*, NPR (May 19, 2021, at 05:00 ET), https://www.npr.org/2021/05/19/997632625/with-lethal-injections-harder-to-come-by-some-states-are-turning-to-firing-squad [https://perma.cc/7SLG-Y2W8].

49. *See* Chiara Eisner, *Unmarked Cars and Secret Orders: How a Pharmacy Prepared Drugs for Texas' Executions*, NPR (July 10, 2024, at 16:20 ET), https://www.npr.org/2024/07/10/g-s1-9016/unmarked-cars-and-secret-orders-how-a-pharmacy-prepared-drugs-for-texas-executions [https://perma.cc/499C-7TMY].

50. *See* AUSTIN SARAT, GRUESOME SPECTACLES: BOTCHED EXECUTIONS AND AMERICA'S DEATH PENALTY 177–78 (2014).

51. *See* Leah Roemer, *New Resource: In Era of Secrecy, States Increasingly Restrict Media Access to Executions*, DEATH PENALTY INFO. CTR. (Mar. 14, 2025), https://deathpenaltyinfo.org/new-resource-in-era-of-secrecy-states-increasingly-restrict-media-access-to-executions [https://perma.cc/W46R-5TYZ] (using these laws to restrict media access to executions); Renuka Rayasam, *States Try to Obscure Execution Details as Drugmakers Hinder Lethal Injection*, USA TODAY (Mar. 29, 2023, at 08:38 ET), https://www.usatoday.com/story/news/health/2023/03/29/states-obscure-execution-details-drugmakers-hinder-lethal-injection/11550570002/ (on file with the Rutgers U. L. Rev.) (using these laws to restrict public access to information about the procurement of lethal injection drugs, among other things).

concerns, among others, were recently highlighted in the South Carolina Supreme Court case *Owens v. Stirling*.[52]

II. EXAMINING *OWENS V. STIRLING*

Owens v. Stirling arose from a constitutional challenge against the state's execution methods brought by four death row inmates in South Carolina: Freddie Eugene Owens, Brad Keith Sigmon, Gary DuBose Terry, and Richard Bernard Moore.[53] Their legal argument initially centered around section 24-3-530 of the South Carolina Code, which was amended by the state in 2021 to provide three execution options: electrocution, firing squad, or lethal injection, *if available*.[54] Although the inmates did not contend that this section violated the United States Constitution, they argued violations of the South Carolina Constitution: specifically, provisions that mirror the Eighth Amendment's prohibition against cruel and unusual punishment, as well as analogues to the Fifth and Fourteenth Amendments' guarantees of due process rights.[55]

A. Case Background and Procedural History

Historically, South Carolina appears to have revised its execution methods in response to changing societal and legal standards surrounding capital punishment. South Carolina used hanging as the predominant means of execution until 1912, when it transitioned to electrocution as part of the broader, national movement to adopt less visibly violent execution methods.[56] Following in the footsteps of other states, South Carolina's "1995 version of section 24-3-530 made lethal injection the default method of execution" unless the condemned opted for electrocution.[57] However, like other states, South Carolina ultimately encountered considerable challenges in acquiring the necessary drugs for lethal injection due to pharmaceutical companies refusing to supply them for executions.[58] In *Glossip v. Gross*, the Supreme Court attributed this refusal to the pressure placed on pharmaceutical companies by "anti-

52. *See generally* 904 S.E.2d 580 (S.C. 2024) (incorporating discussion of these recent trends into its holding).

53. *Id.* at 580. Each petitioner was convicted of murder and sentenced to death. *See id.* at 585.

54. *See id.* at 586.

55. *See id.* at 585, 603–04.

56. *See id.* at 585.

57. *See id.* at 586.

58. *Id.* ("[F]or almost a decade, [South Carolina was] unable to obtain the drugs necessary to carry out an execution by lethal injection.").

death penalty advocates."[59] Because lethal injection was the default method of execution in South Carolina, the state's inability to obtain lethal injection drugs had stalled capital punishment in South Carolina since 2009.[60]

The drug shortage prompted the South Carolina legislature to revise this law in 2021. As mentioned previously, the 1995 South Carolina statute allowed a condemned inmate to elect between lethal injection and electrocution, with lethal injection as the default if no election was made.[61] The 2021 amendments not only changed the default method of execution to electrocution, but also introduced the firing squad as an alternative, contingent upon availability as determined by the South Carolina Department of Corrections ("SCDC") director.[62] Following these amendments to South Carolina's death penalty statute, the petitioners in *Owens v. Stirling*—each convicted of murder and sentenced to death—initiated a declaratory judgment action challenging the constitutionality of section 24-3-530.[63]

One issue in the circuit court was the state's inability to acquire the drugs necessary to carry out lethal injection executions. The circuit court denied the petitioners' discovery request for information regarding the state's attempts to acquire these drugs, but the South Carolina Supreme Court reversed that ruling and remanded on the issue.[64] Subsequently, like many other states navigating significant difficulties in acquiring the necessary drugs for lethal injections due to pharmaceutical companies refusing to supply them, South Carolina ultimately responded by attempting to incentivize drug manufacturers to work with them by passing a "secrecy" or "shield" statute.[65] The bill was passed by both chambers of the South Carolina legislature and signed by Governor Henry McMaster,[66] and functioned to conceal the identities of lethal injection drug suppliers and execution team members.[67] Unsurprisingly, only a few months after the shield statute was enacted, the Governor and

59. *Id.* (quoting Glossip v. Gross, 576 U.S. 863, 869–71 (2015)).
60. *Id.* at 586.
61. *Id.* at 585–86.
62. *Id.* at 586–87.
63. *Id.* at 587.
64. *Id.*
65. *Id.* The court describes South Carolina's shield statute as having the effect of "forbid[ding] the disclosure of any information regarding the State's acquisition of drugs for use in carrying out an execution by lethal injection." *Id.* The constitutional implications of this statute and its analogues in other states are discussed in more detail below. *See infra* Section II.C.
66. *See Owens*, 904 S.E.2d at 587.
67. S.C. CODE ANN. § 24-3-580 (2025).

the SCDC were able to obtain lethal injection drugs to carry out executions.[68]

Following the enactment of the South Carolina shield statute and the SCDC's acquisition of lethal injection drugs, petitioners raised another challenge in advance of their executions, contending that the terms of section 24-3-530 "require the Director to 'disclos[e] some basic facts about the drug's creation quality, and reliability,' or . . . the drugs' 'potency, purity, and stability.'"[69]

B. The South Carolina Supreme Court's Analysis

The South Carolina Supreme Court agreed to hear the *Owens v. Stirling* case to address the constitutionality of various execution methods under the state's death penalty statute.[70] The inmates challenged both electrocution and the firing squad as methods of execution, arguing that they were unconstitutional under Article I, Section 15, of the South Carolina Constitution, which prohibits cruel, corporal, or unusual punishment.[71] They also challenged the SCDC's practice of withholding information about the sources of its lethal injection drugs, arguing that this lack of transparency violated their due process rights by depriving them of the ability to challenge the constitutionality or efficacy of the drugs used in their executions.[72] The state refused to disclose the names of the drug manufacturers, citing the South Carolina lethal injection shield statute.[73] In justifying the law's passage, lawmakers had argued that anonymity was necessary to protect the suppliers from potential harm or harassment.[74]

One aspect of the South Carolina Supreme Court's decision in *Owens v. Stirling* focused on whether the execution methods enumerated in section 24-3-530—namely, electrocution and firing squad—violated the South Carolina Constitution's prohibition on "'cruel,' 'corporal,' or

68. *See South Carolina*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/south-carolina [https://perma.cc/5KJT-XLUZ] (last visited Oct. 4, 2025).

69. *Owens*, 904 S.E.2d at 604.

70. *See generally id.* (addressing the constitutionality of electrocution, firing squad, and lethal injection under South Carolina's death penalty statute).

71. *Id.* at 589–90.

72. *See id.* at 604.

73. *See id.*. at 587.

74. James Pollard, *S. Carolina Bill Shielding Death Penalty Drugmakers Advances*, S.C. PUB. RADIO (Feb. 2, 2023, at 17:37 ET), https://www.southcarolinapublicradio.org/sc-news/2023-02-02/s-carolina-bill-shielding-death-penalty-drugmakers-advances [https://perma.cc/4A33-LV9N].

'unusual' punishment."[75] The court reviewed historical and legal precedent, scientific evidence, and society's evolving standards of decency to determine the constitutionality of these execution methods.[76]

The *Owens* court examined the meaning of "cruel" in Article I, Section 15 of the South Carolina Constitution, tracing its origins to the 1790 state constitution, which prohibited cruel punishments in a manner similar to the Eighth Amendment of the U.S. Constitution.[77] Relying on United States Supreme Court precedent, including *In re Kemmler* (1890) and *Baze v. Rees* (2008), the court reaffirmed that punishment is cruel when it involves torture or unnecessary suffering beyond "the mere extinguishment of life."[78] The court further reiterated that while the legislature determines punishment, all forms of criminal punishment must comply with constitutional limits.[79]

Despite acknowledging that the use of electrocution has significantly declined both in South Carolina and nationally—in large part due to new information about electrocution uncovered by the medical and scientific communities—the court upheld the practice as a constitutional execution method.[80] In part, the court reasoned that the current version of the South Carolina Constitution's prohibition on cruel punishment was adopted in 1971, when electrocution was the state's only way of carrying out death sentences.[81] Thus, the court contended that the framers of the South Carolina Constitution's prohibition on cruel punishment could not possibly have conceived of electrocution as cruel under the state constitution.[82] The majority rejected the argument that electrocution constitutes cruel or unusual punishment merely because it has fallen out of favor, reasoning that its infrequent use does not equate to constitutional invalidity.[83] While some evidence suggested electrocution could cause severe burns, charring, and prolonged suffering, the majority found no definitive proof that it imposes unnecessary pain beyond what is inherent in the death penalty, and thus the practice can neither be considered cruel nor be barred by the South Carolina Constitution.[84] Further, the court stated, "[t]he inescapable reality that an execution by

75. *Owens*, 904 S.E.2d at 591.
76. *See id.* at 589–604.
77. *Id.* at 592–98; *see* S.C. CONST. of 1790, art. IX, § 4.
78. *Owens*, 904 S.E.2d at 592–94 (quoting *In re Kemmler*, 136 U.S. 436, 447 (1890)).
79. *See id.* at 591.
80. *Id.* at 597–99.
81. *Id.* at 594.
82. *Id.*
83. *Id.* at 597–99.
84. *See id.* at 596, 598.

any method may not go as planned—that it will be 'botched'—does not render the method 'cruel' under the constitution."[85]

A key point of debate was whether electrocution causes instantaneous and painless death.[86] The state presented expert testimony that the high-voltage current immediately renders the individual insensate, preventing the perception of pain.[87] However, Chief Justice Beatty, in the dissenting portion of his opinion, cited medical evidence suggesting that electrocution may not always be immediate or painless, leading to concerns about its compatibility with evolving standards of decency and humane execution.[88]

The court also upheld the firing squad as a constitutionally permissible method of execution.[89] It noted that while rare in modern civilian executions, the firing squad has been historically recognized as a reliable and effective means of capital punishment.[90] The majority reasoned that the firing squad causes near-instantaneous death with minimal suffering, particularly when compared to botched lethal injections.[91]

With respect to the firing squad, Justice Kittredge argued in a partially dissenting opinion that this method should be deemed "unusual" given its long-standing disuse in South Carolina.[92] Justice Kittredge emphasized that the state had never used this method before the 2021 amendment and that other states have largely abandoned it.[93] Further, Chief Justice Beatty warned in his opinion that both the firing squad and electrocution—but particularly electrocution—are increasingly likely to be viewed as unconstitutional as societal and legal norms and standards continue to evolve.[94] The Chief Justice expressed concerns that the firing squad, by its nature, involves excessive physical trauma and visible brutality, making it inconsistent with evolving standards of decency.[95]

85. *Id.* at 598 (citing Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 462–63 (1947)).
86. *Id.* at 595–96.
87. *Id.* at 595.
88. *Id.* at 628–30 (Beatty, C.J., concurring in part and dissenting in part).
89. *Id.* at 601, 603 (majority opinion).
90. *See id.* at 601–03.
91. *Id.* at 601.
92. *Id.* at 636 (Kittredge, J., concurring in part and dissenting in part).
93. *Id.* at 639–40.
94. *See id.* at 617–31 (Beatty, C.J., concurring in part and dissenting in part).
95. *Id.* at 622–24.

The majority emphasized that determining execution methods is primarily a legislative function.[96] Since the law requires courts to defer to legislative findings, and the legislature found these execution methods appropriate, the court could not overturn this statute absent a finding of clear error.[97] The state argued that inmates bear the burden of proposing an alternative execution method if they challenge an existing one, a position consistent with the United States Supreme Court precedent of *Bucklew v. Precythe*, with which the court agreed.[98] However, the Chief Justice countered that requiring inmates to devise their own execution methods is an unreasonable burden and that the state must ensure its chosen methods do not violate constitutional protections.[99]

In sum, the South Carolina Supreme Court reversed the circuit court's discovery ruling, ultimately upholding the state's execution methods and finding that neither electrocution nor the firing squad violated the South Carolina Constitution.[100] The ruling reaffirmed the State's authority to determine execution methods but left open questions about the evolving nature of humane standards of capital punishment.

III. EVALUATION OF *OWENS V. STIRLING*

The South Carolina Supreme Court's decision in *Owens v. Stirling* presents several issues relating to the constitutionality of shield statutes and the government's acquisition of drugs for lethal injection executions, on both the state and federal levels. Notably, the *Owens* case highlights the tension between the government's desire to shield suppliers from public scrutiny and the condemned's constitutional right to access information about lethal injection drugs that is essential to challenging the constitutionality or humanity of their execution.[101] Further, with the South Carolina Supreme Court's endorsement of alternative execution methods, including the firing squad and electrocution, the door is open for other states to follow as a means of expediting executions. This is

96. *See id.* at 588–89 (majority opinion).

97. *Id.*

98. *Id.* at 605–07; *see also* Bucklew v. Precythe, 587 U.S. 119, 136 (2019) (quoting Glossip v. Gross, 567 U.S. 863, 867 (2015)) ("To decide whether the State has cruelly 'superadded pain' to the punishment of death isn't something that can be accomplished by examining the State's proposed method in a vacuum, but only by 'compar[ing]' that method with a viable alternative.").

99. *Owens*, 904 S.E.2d at 615 n.30 (Beatty, C.J. concurring in part and dissenting in part).

100. *Id.* at 608.

101. *See supra* Part II.

especially true in the wake of a new presidential administration with capital punishment remaining at the forefront of its agenda. Conversations about the constitutionality of different methods of execution are of utmost importance.

A. Timeliness/Significance of Execution Issues

Discussions around capital punishment in the United States have intensified throughout 2024 and into 2025, with both sides of the political spectrum taking harsh stances during the last election season. Although former President Joe Biden failed to deliver on his initial campaign promise of abolishing the federal death penalty,[102] he shocked the nation[103] in the last month of his presidency when he commuted the sentences of thirty-seven of the forty individuals on federal death row to sentences of life in prison without the possibility of parole.[104] With respect to the three federal inmates who remained on death row, a press release explained that Biden believes the United States must eliminate the use of the death penalty at the federal level, with the exception of cases involving "terrorism and hate-motivated mass murder—which is why [this] action[] appl[ies] to all but those cases."[105] In then-President Biden's statement, he closed with:

102. Michael Tarm, *Biden's Inaction on Death Penalty May Be a Top Campaign Issue as Trump and DeSantis Laud Executions*, AP NEWS (Aug. 4, 2023, at 15:35 PT), https://apnews.com/article/death-penalty-biden-trump-desantis-presidential-election-13f20efcec6494885b8d7a987e97dcd3 [https://perma.cc/79CQ-PJPA].

103. *See* Will Weissert & Darlene Superville, *Biden Gives Life in Prison to 37 of 40 Federal Death Row Inmates Before Trump Can Resume Executions*, AP NEWS (Dec. 23, 2024, at 15:11 PT), https://apnews.com/article/biden-death-row-commutations-trump-executions-f67b5e04453cd1aa6383c516bc14f300 [https://perma.cc/WBA6-J4W3].

104. Statement on Federal Death Row Commutations, 2024 DAILY COMP. PRES. DOC. 1 (Dec. 23, 2024). The three federal death row inmates whose sentences were not commuted by Biden include Dylann Roof (convicted of murdering nine Black parishioners in a racially motivated attack), Robert Bowers (convicted of killing eleven worshipers in an antisemitic attack), and Dzhokhar Tsarnaev (convicted of carrying out the Boston Marathon bombings with terroristic motives). Nicholas Bogel-Burroughs, *The Three Death Row Prisoners Biden Chose Not to Spare*, N.Y. TIMES (Dec. 23, 2024), https://www.nytimes.com/2024/12/23/us/death-row-biden-commutation.html (on file with Rutgers U. L. Rev.). All three remaining death row inmates were convicted and sentenced to death by a federal jury. *Id.*

105. *FACT SHEET: President Biden Commutes the Sentences of 37 Individuals on Death Row*, THE WHITE HOUSE (Dec. 23, 2024), https://bidenwhitehouse.archives.gov/briefing-room/statements-releases/2024/12/23/fact-sheet-president-biden-commutes-the-sentences-of-37-individuals-on-death-row/ [https://perma.cc/9SMB-X7VN].

> But guided by my conscience and my experience as a public defender, chairman of the Senate Judiciary Committee, Vice President, and now President, I am more convinced than ever that we must stop the use of the death penalty at the Federal level. In good conscience, I cannot stand back and let a new administration resume executions that I halted.[106]

These federal death sentence commutations provoked a wide range of reactions from the American people, organizations, politicians (including those of the incoming Trump administration), and the federal death row inmates themselves.[107] The ACLU praised Biden and described this action as taking "an unequivocal stand against one of the most flawed and inhumane mechanisms of the U.S. criminal legal system."[108] In contrast, days after Biden's controversial commutations, President-elect Trump pledged to seek the death penalty for various federal criminal defendants.[109] On the Truth Social platform, Trump posted, "As soon as I am inaugurated, I will direct the Justice Department to vigorously pursue the death penalty to protect American families and children from violent rapists, murderers, and monsters."[110]

President Trump made good on his promise to "vigorously pursue the death penalty" almost immediately upon his entrance to the White House for a second term. On January 20, 2025, the day of his inauguration, President Trump signed dozens of executive orders, one of which was

106. Statement on Federal Death Row Communications, *supra* note 104.

107. *See* Erik Ortiz, *Two Death Row Inmates Reject Biden's Commutation of Their Life Sentences*, NBC NEWS (Jan. 6, 2024, at 14:31 PT), https://www.nbcnews.com/news/us-news/two-death-row-inmates-reject-bidens-commutation-life-sentences-rcna186235 [https://perma.cc/RLS2-JH2T] (explaining that two federal death row inmates are seeking an injunction to block the commutation by Biden because "[t]he men believe that having their sentences commuted would put them at a legal disadvantage as they seek to appeal their cases based on claims of innocence."); Jeffrey Collins & Ali Swenson, *Relief, Defiance, Anger: Families and Advocates React to Biden's Death Row Commutations*, AP NEWS (Dec. 23, 2024, at 15:16 PT), https://apnews.com/article/biden-death-row-commutations-trump-executions-ce7763faf93bc77773bfb635dd8c51d7 [https://perma.cc/9AYE-D5HT] (describing criticism from Republicans).

108. *ACLU Celebrates President Biden's Historic Federal Death Row Commutations*, ACLU (Dec. 23, 2024, at 00:00 ET), https://www.aclu.org/press-releases/aclu-celebrates-president-bidens-historic-federal-death-row-commutations [https://perma.cc/8LBC-LXMN].

109. Louis Casiano, *Trump Pledges to Bring Back Federal Executions After Biden Commutes Death Sentences for 37 Inmates*, FOX NEWS (Dec. 24, 2024, at 15:26 ET), https://www.foxnews.com/politics/trump-pledges-bring-back-federal-executions-after-biden-commutes-death-sentences-37-inmates.amp [https://perma.cc/EP6X-UB7T].

110. *Id.*

titled "Restoring the Death Penalty and Protecting Public Safety."[111] As part of this executive order, the President directed the Attorney General to "take all necessary and lawful action to ensure that each state that allows capital punishment has a sufficient supply of drugs needed to carry out lethal injection."[112] Additionally, with respect to federal capital punishment:

> (a) The Attorney General shall pursue the death penalty for all crimes of a severity demanding its use.
>
> (b) In addition to pursuing the death penalty where possible, the Attorney General shall, where consistent with applicable law, pursue Federal jurisdiction and seek the death penalty regardless of other factors for every federal capital crime involving:
>
> (i) The murder of a law-enforcement officer; or
> (ii) A capital crime committed by an alien illegally present in this country.[113]

This executive order mirrors the Trump administration's position on the death penalty during his first administration. In his first term as President, Trump's administration carried out thirteen federal executions by lethal injection.[114] Notably, "no president in more than 120 years had overseen as many federal executions."[115] These federal executions occurred in the midst of the coronavirus pandemic, with at least two inmates testing positive for COVID-19 only a month before they were executed.[116]

Furthermore, the South Carolina Supreme Court's decision in *Owens v. Stirling* has seemingly opened the door for the state (and arguably others) to regress to antiquated, corporal methods of capital punishment, including the firing squad, as an alternative to lethal injection. Since the 2024 decision, a South Carolina death row inmate was executed by firing

111. Exec. Order No. 14164, 90 Fed. Reg. 8463, 8463 (Jan. 30, 2025) (executive order of January 20, 2025).
112. *Id.* at 8464.
113. *Id.* at 8463.
114. Michael Tarm & Michael Kunzelman, *Trump Administration Carries Out 13th and Final Execution*, AP NEWS (Jan. 16, 2021, at 01:20 PT), https://apnews.com/general-news-28e44cc5c026dc16472751bbde0ead50 [https://perma.cc/YR4K-VTBU].
115. *Id.*
116. *Id.*

squad,[117] and Idaho has become the first and only state to prefer the firing squad as its default method of execution.[118] A firsthand account of the firing squad execution of Brad Sigmon, which occurred on March 7, 2025, was provided by a media witness.[119] The reporter, who had previously watched eleven men be put to death at the hands of the government, said none of those executions could have prepared him for watching this particular execution.[120] He describes a terrifying, corporal sequence of events:

> The firing squad is certainly faster—and more violent—than lethal injection. It's a lot more tense, too. My heart started pounding a little after Sigmon's lawyer read his final statement. The hood was put over Sigmon's head, and an employee opened the black pull shade that shielded where the three prison system volunteer shooters were.
>
> About two minutes later, they fired. There was no warning or countdown. The abrupt crack of the rifles startled me. And the white target with the red bullseye that had been on his chest, standing out against his black prison jumpsuit, disappeared instantly as Sigmon's whole body flinched.[121]

This firsthand account depicting the carnage of the firing squad as a method of lethal injection raises grave Eighth Amendment concerns.

117. Jeffrey Collins, *A South Carolina Man Executed by Firing Squad is the First U.S. Prisoner Killed This Way in 15 Years*, AP NEWS (Mar. 7, 2025, at 19:28 PT), https://apnews.com/article/firing-squad-execution-south-carolina-sigmond-c998f11ecd3fcbf117d55b682ce3604a [https://perma.cc/D9QX-N2W9].

118. Kyle Pfannenstiel, *Idaho Will Be Only State with Firing Squad as Main Execution Method, After Governor Signs Bill*, IDAHO CAP. SUN (Mar. 12, 2025, at 17:41 ET), https://idahocapitalsun.com/2025/03/12/idaho-will-be-only-state-with-firing-squad-as-main-execution-method-after-governor-signs-bill/ [https://perma.cc/NG36-EUKG]; *see also* H.R. 37, 68th Leg., Reg. Sess. (Idaho 2025) (indicating "[t]his act shall be in full force and effect on and after July 1, 2026").

119. Jeffrey Collins, *Violent and Sudden. What a Firing Squad Execution Looked Like Through My Eyes*, AP NEWS (Mar. 7, 2025, at 20:20 PT), https://apnews.com/article/south-carolina-firing-squad-eyewitness-account-sigmon427cccb55be58954af4434e89bcc41d8 [https://perma.cc/W4RP-KKHH].

120. *Id.*

121. *Id.*

B. The Myth of Lethal Injection as a Humane Means of Execution

One grave mistake that the *Owens* Court made was describing South Carolina's 1995 decision to join the national trend toward lethal injection as an effort "to make executions less inhumane."[122] In doing so, the court reinforced the false narrative that lethal injection is more humane than other methods of execution despite the existence of no data to support this.[123] In fact, the data available suggests the opposite—that lethal injection inflicts an immense, unimaginable amount of pain on a defendant,[124] albeit most are unable to express this pain due to the routine use of paralytic agents in the execution procedure.[125]

The misleading depiction of lethal injection as a humane means of execution is an attempt at legitimizing the government's use of the death penalty in a society where public support for capital punishment is waning.[126] Further, scholars have argued that the continued use of the death penalty in the United States can be traced to "procedural exceptionalism."[127] Procedural exceptionalism refers to the idea that Americans, as well as the American judicial system, have so much confidence in the procedural protections around lethal injection as a means of capital punishment, specifically that it is more humane and that the procedures of lethal injection are being perfected (or can be perfected).[128] The universal reference to lethal injection executions as a more humane alternative to former means of capital punishment by courts perpetuates procedural exceptionalism, and thus contributes to the persistence of the death penalty in the United States.[129]

122. Owens v. Stirling, 904 S.E.2d 580, 585 (S.C. 2024).

123. *See* Philpott, *supra* note 20, 11–12.

124. HUMAN RIGHTS WATCH, *supra* note 14, at 1.

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

126. *See generally Gallup Poll: Public Support for the Death Penalty Lowest in a Half-Century*, DEATH PENALTY INFO. CTR. (Mar. 14, 2025), https://deathpenaltyinfo.org/gallup-poll-public-support-for-the-death-penalty-lowest-in-a-half-century [https://perma.cc/LF8V-5CDP] (explaining that "public support for the death penalty is at its lowest level in a half-century, with opposition higher than any time since 1966, according to the 2020 annual Gallup poll on Americans' attitudes about capital punishment").

127. Jonathan Yehuda, *Tinkering with the Machinery of Death: Lethal Injection, Procedure, and the Retention of Capital Punishment in the United States*, 88 N.Y.U. L. REV. 2319, 2321 (2013) (citing William W. Berry III, *American Procedural Exceptionalism: A Deterrent or a Catalyst for Death Penalty Abolition?*, 17 CORNELL J.L. & PUB. POLY 481 (2008)).

128. *Id.*

129. *See id.*

Although the United States Supreme Court has noted that a claim alleging that unqualified personnel might botch the administration of lethal injection execution drugs will fail to rise to the level of an Eighth Amendment violation,[130] it is still relevant to examine what other factors might contribute to a "botched" execution. An execution is considered botched when "there is a breakdown in, or departure from, the 'protocol' for a particular method of execution."[131] Between 1890 and 2010, approximately three percent of all executions in the United States were botched.[132] After lethal injection was introduced as a means of capital punishment, the number of lethal injection executions that were botched between 1980 and 2010 had grown to seven percent, in a sample size of 1,054.[133] A variety of factors contribute to botched executions, including the lethal injection drug protocol, which may cause intense pain to the individual being executed.[134] Along with the drug protocol used in the lethal injection execution, the quality of the drug(s) itself can also contribute to botched executions.[135] Several of the botched executions in recent years have been attributed to the use of expired or contaminated drugs.[136] For example, "if pentobarbital isn't stored at a proper temperature, the drug can expire and should not be used."[137] Of course, not all lethal injection executions are characterized as "botched." However, it seems as if the overwhelming and disproportionate infliction of pain and suffering experienced by the condemned during lethal injection executions is a feature rather than a bug.

Although states continue to pay excessive amounts of money for lethal injection drugs,[138] there is growing evidence that these drugs are not performing as intended. A study of forty-nine toxicology reports of inmates executed by the state in Arizona, Georgia, North Carolina, and South Carolina found that 88% of executed prisoners had levels of

130. *See* Baze v. Rees, 533 U.S. 35, 54–56 (2008) (explaining that even if unqualified personnel are employed to calculate and mix an adequate dose, if the manufacturers' instructions are followed, there would be an unlikely risk of improper mixing).

131. SARAT, *supra* note 50, at 5.

132. *Id.*

133. *Id.* at 120, 177.

134. *See id.* at 120. This implicates Eighth Amendment concerns about whether the executed individual is subject to cruel and unusual punishment. *Id.* at 121.

135. Smith, *supra* note 21.

136. *Id.*

137. *Id.*

138. *See, e.g.*, Hayley Bedard, *$200,000 Spent on Lethal Injection Drugs in Idaho Since 2023 Now Unusable*, DEATH PENALTY INFO. CTR. (May 15, 2025), https://deathpenaltyinfo.org/200-000-spent-on-lethal-injection-drugs-in-idaho-since-2023-now-unusable [https://perma.cc/D46X-5VJE].

anesthetic that were lower than the levels required to perform surgery.[139] It also found that 43% of those executed had levels that were consistent with awareness, meaning they were able to experience pain and suffering.[140] Still, the pancuronium bromide given as part of the lethal injection protocol immobilizes the individuals, so they cannot express emotion.[141] In addition to this, a 2020 report examined and analyzed 200 autopsies of inmates executed by lethal injection.[142] In doing so, it found that autopsies showed significant signs of pulmonary edema in approximately 84% of cases.[143] The 2016 report upon which this update was based found that the lungs of individuals executed by lethal injection weighed twice the size of the average human lung, indicating that they were filled with fluid, likely containing blood and plasma.[144] Pulmonary edemas induce feelings of suffocation or drowning, which may explain why there have been several instances of inmates gasping for air while being executed.[145] The theory that lethal injection executions may cause extreme pain and suffering to prisoners—unable to express these feelings due to the paralytic agent injected—is undeniably cruel and unusual, implicating Eighth Amendment concerns.

Aside from potential issues involving the adequacy of the drug or the drug protocol, there is often human error by the team of executioners that causes pain and suffering to the prisoner being executed. There have been several instances of human error at all stages of the lethal injection execution procedure, which have contributed to botched executions.[146] Examples include improperly fastening the straps on a gurney, not checking the anesthesia machines and equipment, not monitoring the prisoner's level of anesthesia before administering the other drugs, and incorrectly inserting the I.V., among other things.[147]

The execution of Clayton Lockett is a tragic example of the human error that can contribute to botched lethal injection executions, which

139. Koniaris, *supra* note 125, at 1412.
140. *Id.*
141. *See id.*
142. Noah Caldwell, Alisa Chang & Jolie Myers, *Gasping for Air: Autopsies Reveal Troubling Effects of Lethal Injection*, NPR (Sep. 21, 2020, at 07:00 ET), https://www.npr.org/2020/09/21/793177589/gasping-for-air-autopsies-reveal-troubling-effects-of-lethal-injection [https://perma.cc/3MNU-AVNC].
143. *Id.*
144. *Id.*
145. *Id.*
146. *See* HUMAN RIGHTS WATCH, *supra* note 14, at 4–6.
147. *Id.* 35–36, 47–48.

causes great pain to the individual being executed.[148] Lockett's execution took place on April 29, 2014, in the Oklahoma State Penitentiary.[149] The paramedic responsible for inserting the I.V. stuck Lockett with the needle more than ten times over the course of an hour; she tried to insert the I.V. in his arms, his neck, his foot, and his groin.[150] After a doctor was finally able to insert the I.V., the I.V. became dislodged, causing the lethal injection drugs to enter Lockett's tissue rather than his bloodstream.[151] After the anesthetic was administered, a doctor determined that Lockett was unconscious, and the remaining two drugs of the protocol were subsequently injected.[152] Following this, Lockett began to writhe in pain on the gurney until he was eventually pronounced dead at 7:06 PM, forty-three minutes after he was sedated.[153]

While the Clayton Lockett execution remains one of the most infamous botched lethal injections, there have been several other high-profile failures, including the cases of Joseph Wood[154] and Doyle Hamm.[155] These cases highlight systemic failures in the administration of lethal injection and raise significant legal and ethical questions regarding the continued use of flawed protocols. The persistent recurrence of such failures stands in stark contrast to state arguments that lethal injection is a "humane" method of execution.

148. 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/ (on file with Rutgers U. L. Rev.).

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. Michael Winter, *Defiant Lockett Tasered Hours Before Execution*, USA TODAY (May 1, 2014, at 18:59 ET), https://www.usatoday.com/story/news/nation/2014/05/01/oklahoma-clayton-lockett-execution/8570625/ [https://perma.cc/TV78-CNNY].

154. *Expert Calls Arizona's First Execution in Eight Years 'Botched' After Witnesses Report Problems Inserting IV*, DEATH PENALTY INFO. CTR. (Mar. 14, 2025) [hereinafter DEATH PENALTY INFO. CTR., *Arizona Botched Execution*], https://deathpenaltyinfo.org/witnesses-report-problems-inserting-iv-in-arizonas-first-execution-in-eight-years [https://perma.cc/VCC2-FYT7] (commenting that during Arizona's execution of Joseph Wood in 2014, "he reportedly gasped and snorted more than 640 times as executioners injected him with fifteen doses of the two drugs used at the time").

155. Sam Roberts, *Doyle Hamm, Who Survived a Bungled Execution, Dies in Prison at 64*, N.Y. TIMES (Nov. 29, 2021), https://www.nytimes.com/2021/11/29/us/doyle-hamm-dead.html (on file with the Rutgers U. L. Rev.). Despite doctors' warnings to the execution team that Hamm's veins were inaccessible due to his previous intravenous drug use and treatment for cancer and hepatitis C, "an execution team struggled for nearly three hours, puncturing him at least 11 times in his legs, ankles and groin and apparently injuring several organs before giving up at 11:27 p.m. because the legal death warrant expired at midnight." *Id.*

The botched executions of Lockett, Wood, Hamm, and others lend support to the findings from research about the issues with lethal injection drug protocols, particularly regarding inadequate levels of anesthesia. As such, the condemned's need for information about the drugs to be used in lethal injection executions is increasingly critical in terms of challenging the constitutionality of an execution to prevent a cruel and unusual death. Moreover, the *Owens* court's deference to the South Carolina shield statute preventing inmates' access to details concerning the lethal injection drugs for their executions should be considered a violation of the petitioners' Fifth and Fourteenth Amendment due process rights, as they were denied access to the information necessary to challenge the adequacy of the drugs and/or protocol. As discussed in greater detail below, the South Carolina Supreme Court's opinion in *Owens v. Stirling* provides further dangerous opportunities for error in carrying out capital punishment.[156]

C. The Constitutional Implications of Shield Statutes

Shield statutes, like the one at issue in *Owens v. Stirling*, are increasingly common in states that still employ lethal injection.[157] These laws are ostensibly designed to protect the identity of execution drug suppliers, who are purportedly at risk of facing threats, harassment, and public backlash due to the controversies surrounding capital punishment.[158] However, these laws present their own set of challenges and dangers, as there are no safeguards in place to prevent government officials from using this secrecy to prevent scrutiny of their own lethal injection protocols or even legal action against them.[159]

Notably, the adoption of secrecy or shield statutes almost always coincides with a state's inability to obtain lethal injection drugs due to growing opposition from pharmaceutical companies.[160] In the last decade, several large-scale domestic pharmaceutical companies stopped

156. *See* 904 S.E.2d 580, 598 (S.C. 2024) ("The inescapable reality that an execution by any method may not go as planned—that it will be 'botched'—does not render the method 'cruel' under the constitution.").

157. *See* ROBIN KONRAD, BEHIND THE CURTAIN: SECRECY AND THE DEATH PENALTY IN THE UNITED STATES 4 (Robert Dunham & Ngazi Nudlue eds., 2018), https://files.deathpenaltyinfo.org/documents/pdf/SecrecyReport-2.f1560295685.pdf [https://perma.cc/7L5S-9SR7].

158. *See* Rayasam, *supra* note 51.

159. *See* Crider, *supra* note 20, at 21–24.

160. *See, e.g.*, *Owens*, 904 S.E.2d at 587.

providing lethal injection drugs to states.[161] When states sought lethal injection drugs overseas, several nations—including India and the United Kingdom—placed a ban on exporting drugs to state prison authorities.[162] The shortage of drugs used for lethal injection executions has caused some states to turn to extreme and arguably unethical measures to obtain them. Some states have used or announced plans to use compounding pharmacies to obtain lethal injection drugs despite the known risks surrounding these pharmacies.[163] Compounding pharmacies present several risks: They are not regulated by the Food and Drug Administration ("FDA"), their products are not routinely evaluated for safety before consumption, and they commonly use mislabeled ingredients.[164] One study revealed that the FDA was aware of at least 240 cases of serious illness or death associated with drugs obtained from compounding pharmacies between 1990 and 2005.[165] Nevertheless,

161. *See* Mary D. Fan, *The Supply-Side Attack on Lethal Injection and the Rise of Execution Secrecy*, 95 B.U. L. REV. 427, 438–39 (2015).

162. *Id.* at 439–40; *see also* Hayley Bedard, *NPR Investigation Reveals Supplier of Texas Execution Drugs Has Multiple Drug Enforcement Agency Violations; Questions Remain Regarding Drug Acquisition in Other States*, DEATH PENALTY INFO. CTR. (Mar. 14, 2025), https://deathpenaltyinfo.org/npr-investigation-reveals-supplier-of-texas-execution-drugs-has-multiple-drug-enforcement-agency-violations-questions-remain-regarding-drug-acquisition-in-other-states [https://perma.cc/6Q9R-WPXG] ("Texas officials previously attempted to purchase sodium thiopental for lethal injection executions from an India-based organization with no pharmaceutical experience. In 2015, the Food and Drug Administration seized those shipments before they reached Texas, as they were mislabeled and violated federal law.").

163. *Compounding Pharmacies*, DEATH PENALTY INFO. CTR. [hereinafter DEATH PENALTY INFO CTR., *Compounding Pharmacies*], https://deathpenaltyinfo.org/executions/lethal-injection/overview-of-lethal-injection-protocols [https://perma.cc/SQX2-LDNC] (last visited Sep. 27, 2025); *see also* Bedard, *supra* note 162 ("Rite Away, a small chain of pharmacies located around San Antonio and Austin, Texas, compounded and provided pentobarbital for the Texas Department of Criminal Justice (TDCJ) between 2019 and late 2023 to carry out lethal injection executions.").

164. Crider, *supra* note 20, at 14–19; *see also John Oliver's "Last Week Tonight" Criticizes Execution Secrecy Laws and "Sketchy" Procurement of Pentobarbital by Federal Government*, DEATH PENALTY INFO. CTR. (Mar. 14, 2025), https://deathpenaltyinfo.org/john-olivers-last-week-tonight-criticizes-execution-secrecy-laws-and-sketchy-procurement-of-pentobarbital-by-federal-government [https://perma.cc/Q96X-S8R2] ("Recent reporting by The Intercept and Last Week Tonight with John Oliver identified Connecticut-based Absolute Standards as the source of the pentobarbital used in 13 federal executions in 2020 and 2021. Reporting did not confirm if the company also supplied to specific states, including Indiana."). Prior reporting indicated several citations against Absolute Standards alleging violations and/or inadequacies with respect to their production of drugs. *Id.*

165. Crider*, supra* note 20, at 16–17.

states are still obtaining drugs from these sources to execute individuals by lethal injection, albeit now behind a veil of secrecy.[166]

As lethal injection drug shortages have increased, the price of these drugs has also risen rapidly. A 2016 report indicated that Virginia prison officials paid a compounding pharmacy approximately $66,000 for lethal injection drugs to execute two inmates.[167] Though there is plenty of research examining the risks of compound pharmacies, no research has been conducted to examine whether states that utilize compound pharmacies for lethal injection drugs have higher rates of botched executions. This gap is likely due to the secrecy laws making it impossible to pinpoint the source of the drugs.[168] As the executive director of the Death Penalty Information Center correctly points out:

> "States have been hiding this information behind secrecy statutes in an effort to avoid answering difficult questions about their execution protocols. These are elected officials. They are using government funding, and they are saying they are conducting an official function," Maher said. "And all of that means they should be honest and transparent about what they're doing and why. The fact that they have shrouded everything in secrecy in an attempt to avoid answering these questions is not something that we should simply be accepting."[169]

As an example, in the summer of 2024, Indiana obtained pentobarbital to carry out a lethal injection execution for the first time in fifteen years.[170] Further, "Indiana's last execution, in 2009, was carried out with a three-drug protocol beginning with sodium thiopental; this would be the state's first attempt at an execution with a one-drug protocol."[171] Nevertheless, when asked where the state's Department of Correction obtained the pentobarbital for the execution, and how much

166. *See* DEATH PENALTY INFO. CTR., *Compounding Pharmacies*, *supra* note 163.

167. Alanna Durkin Richer, *Execution Costs Spike in Virginia; State Pays Pharmacy $66K*, AP NEWS (Dec. 12, 2016, at 09:53 PT), https://apnews.com/general-news-7879b7bd0e7a400ea23136b32d7ba64d [https://perma.cc/E4T4-WEGQ]; *cf.* DEATH PENALTY INFO. CTR., *Arizona Botched Execution*, *supra* note 154 ("In April 2021, a heavily-redacted invoice obtained by *The Guardian* showed that, in October 2020, Arizona ordered 1,000 vials of pentobarbital. Each one-gram vial cost the state $1,500, for what the newspaper described as a 'jaw-dropping' total of $1.5 million.").

168. *See* Smith, *supra* note 21.

169. *Id.*

170. Bedard, *supra* note 162.

171. *Id.*

the state paid for the drug, Governor Holcomb claimed "he 'can't go into those details, by law.'"[172]

While the Supreme Court confirmed the constitutionality of lethal injection as a method in *Baze v. Rees*,[173] it also underscored the necessity of transparency in evaluating execution protocols. Moreover, the Court emphasized that states must adopt feasible measures to minimize pain and suffering during executions.[174] This issue came to the forefront in *Owens*, where South Carolina sought to carry out executions using lethal injection drugs whose origins were kept secret.[175] This lack of transparency prevented the petitioners from investigating the drug's potential risks, including whether they might be improperly compounded or whether they might cause severe pain during the execution process.[176] Such information is critical to determining whether the execution violates the Eighth Amendment's prohibition on cruel and unusual punishment.

State secrecy statutes have also recently begun to encroach upon media witnesses' rights to view executions.[177] This encroachment is alarming because, generally, states already prohibit citizens from attending executions.[178] Thus, journalists are ultimately responsible for providing imperative, objective information concerning how the government implements the law and utilizes taxpayer funds.[179] Although circuit courts of appeals have ruled on the issue of media witness access to executions,[180] the United States Supreme Court has yet to provide any related opinion or guidance, and other courts' opinions implicating the issue have only created confusion. As one attorney explained, "[w]ithout journalists seeing and hearing every step of the process, the public can only rely on official state accounts, which often refuse to acknowledge

172. Smith, *supra* note 21.
173. *See* 553 U.S. 35, 61–63 (2008).
174. *Id.* at 52.
175. *See* Owens v. Stirling, 904 S.E.2d 580, 604 (S.C. 2024).
176. *See id.* at 599.
177. Roemer, *supra* note 51.
178. *Id.*
179. *Id.*
180. *See, e.g.*, Cal. First Amend. Coal. v. Woodford, 299 F.3d 868, 876 (9th Cir. 2002). The Ninth Circuit Court of Appeals held that the media has a "First Amendment right to view the condemned as the guards escort him into the chamber, strap him to the gurney, and insert the intravenous lines." *Id.*

problems regardless of the evidence." [181] With respect to executions, "the media becomes the public's watchdog."[182]

As detailed throughout this Note, lethal injection secrecy laws implicate profound constitutional concerns. At their core, these laws challenge the fundamental principles of transparency, due process, and accountability central to the American criminal legal system. The Eighth Amendment to the U.S. Constitution prohibits cruel and unusual punishments, and courts have consistently held that executions must be conducted in a manner that is humane and transparent enough to ensure that the condemned can challenge the constitutionality of the methods used.[183] By shielding the identity of lethal injection drug suppliers, states create a situation where condemned individuals cannot meaningfully challenge the execution process, thereby depriving them of their constitutional rights.

As the South Carolina Supreme Court stated, "[t]he inmates' statutory interpretation claim is that the terms of section 24-3-530 require the Director to 'disclos[e] some basic facts about . . . the drugs' 'potency, purity, and stability.' As we already explained, we agree with this argument. There is a Due Process Clause component to our analysis of this claim . . . ."[184]

In the court's lackluster resolution to the petitioner's due process concerns, it explained:

> We illustrate the scope of this requirement with two extreme examples. First, if the Director certified in the affidavit he made the determination the drugs were sufficient by accepting the word of an unnamed person with unknown qualifications—which we are sure Stirling would not do—the determination would be clearly insufficient. On the other hand, if the Director certified in the affidavit that scientists at the Forensic Services Lab of the South Carolina Law Enforcement Division (SLED), whose experience and qualifications were verified by the Director and the Chief of SLED, recently performed testing according to widely accepted testing protocols and found the drugs were not only

181. Roemer, *supra* note 51 (providing an example where journalists reported "that [an Alabama death row inmate] was 'jerking and shaking' and lifting his head off the gurney as he gasped for breath for over five minutes during his September 26 execution by nitrogen gas," while Alabama officials offered "incredulous assurance that the execution went 'as planned' and was 'humane and effective'").

182. *Id.*

183. *See, e.g.*, Nance v. Ward, 597 U.S. 159, 162–65 (2022).

184. Owens v. Stirling, 904 S.E.2d 580, 604 (S.C. 2024).

> stable, but of a clearly acceptable degree of purity, then we doubt there could be any legitimate legal basis on which to mount a challenge.[185]

In addition to the South Carolina Supreme Court's refusal to articulate any particular standards for the director's explanation, it ultimately deferred to the director to decide what information to include in his explanation.[186] Further, the court stated: "We reiterate that the director must comply with the shield statute. However, he must explain in the affidavit how he determined the drugs were of sufficient 'potency, purity, and stability' to carry out their intended purpose."[187] Finally, the court ensured that any challenges to the director's explanation for "how he determined the drugs were of sufficient 'potency, purity, and stability'" to carry out the execution will be decided "promptly."[188] In a system wrought with wrongful convictions,[189] and in a society where one of the most long-standing, fundamental legal principles provides that no government can arbitrarily deprive another person of their life, liberty, or property without due process of law,[190] the court's concern over resolving any challenges to the director's explanation *in a prompt manner* while human life is at stake is troubling.

The use of secrecy statutes also allows for potential violations of state and federal law to go unchecked. As previously discussed, in some cases, the drugs used in lethal injections may be sourced from foreign suppliers that do not adhere to U.S. regulatory standards.[191] The legal ambiguity surrounding the procurement of execution drugs creates an environment in which the government can evade scrutiny over whether the drugs were obtained through illicit or unethical means. In this context, secrecy statutes function as a shield not only for the identity of suppliers, but also for the government's potential illegal actions in procuring drugs through covert or ethically questionable channels.

185. *Id.* at 605.
186. *See id.*
187. *Id.*
188. *Id.*
189. *See* Alyxaundria Sanford, *The Injustice of Death Row: The Profound Tragedy of Marcellus Williams and the Fight to Save Robert Roberson*, INNOCENCE PROJECT (Oct. 9, 2024), https://innocenceproject.org/the-injustice-of-death-row-the-profound-tragedy-of-marcellus-williams-and-the-fight-to-save-robert-roberson/ [https://perma.cc/LS2C-4WU8] ("Since 1973, at least 200 people sentenced to death have been exonerated in the U.S.—people who were wrongfully convicted and narrowly escaped execution.").
190. *See* U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.
191. *See* discussion *supra* Section III.C.

D. Inadequate Approaches Implicating Due Process Concerns

Some have argued against the supply-side attacks on lethal injection drug suppliers and even suggest that confidentiality serves an important interest in safeguarding licensed sources of lethal injection drugs.[192] This approach is extremely dangerous, especially during a time of increasingly botched executions.[193] Further, considering the emerging evidence of states turning to compounding pharmacies for lethal injection execution drugs,[194] the restriction of death row inmates' access to information that directly pertains to the adequacy and efficacy of such drugs invites an increased risk of botched executions where the condemned are without adequate recourse.

Further, the Supreme Court opined in *Baze v. Rees* that by moving from methods like the firing squad, hanging, the electric chair, and the gas chamber to lethal injection as the primary means of execution, "[o]ur society has nonetheless steadily moved to more humane methods of carrying out capital punishment."[195] Yet these regressive methods of execution were recognized to be valid, constitutional alternatives to lethal injection by the South Carolina Supreme Court in *Owens v. Stirling*.[196]

IV. PROPOSED SOLUTIONS / RECOMMENDATIONS

A. Capital Punishment Across the United States: Abolition or Moratorium

As more than seventy percent of countries around the world have abolished capital punishment, the United States remains the last Western democracy to use the death penalty.[197] The United States Supreme Court's increasingly high bar for defendants challenging methods of execution and the application of the death penalty across the

192. *See* Fan, *supra* note 161, at 456–59.

193. *See* Willow Van Skyhawk, *Lethal Injections: Protocol Plagued with Secrecy and Flaws Ushering in the New Era of Botched Executions*, 11 LINCOLN MEM'L U. L. REV. 69, 80–82 (2023).

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

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

196. *See* Owens v. Stirling, 904 S.E.2d 580, 603, 608 (S.C. 2024).

197. Insha Rahman, *Ending the Death Penalty Is a Step Toward Racial Justice*, VERA INST. OF JUST. (Mar. 11, 2021), https://www.vera.org/news/ending-the-death-penalty-is-a-step-toward-racial-justice [https://perma.cc/K4ZQ-D9YN]; *see also* Yehuda, *supra* note 127, at 2322 (highlighting the United States' divergence from the rest of the West regarding abolishment of capital punishment).

United States has been continuously criticized as both racially discriminatory and cruel and unusual, thereby violating a number of constitutional protections: the Fifth Amendment's right to due process, the Eighth Amendment's prohibition on cruel and unusual punishment, and the Fourteenth Amendment's right to equal protection under the law.

If the United States Supreme Court remains unwilling to strike down the use of capital punishment as unconstitutional, state courts and legislatures should be urged to, at minimum, place a moratorium on capital punishment in their jurisdictions. In the meantime, the Supreme Court must review and reject the unconstitutional nature and application of shield statutes that prevent death row inmates from obtaining vital information about their executions for purposes of challenging its constitutionality.

B. Defendants and Defense Attorneys Must Have Access to Details about the Lethal Injection Drugs

Defendants and their attorneys must be able to access extensive information about the lethal injection drugs used and—if appropriate—present a legal challenge thereof, especially where the drugs and protocols are approved through purely internal review processes within the Department of Corrections, and where the director has almost complete control over what information to include in his affidavit of the drug's adequacy. This is essential to ensuring that a death row inmate's due process rights are protected. At a minimum, the director of the South Carolina Department of Corrections should be required to perform testing of the lethal injection drugs in a third-party lab rather than one owned and operated by the state (i.e., the Forensic Services Lab of the South Carolina Law Enforcement Division), which the South Carolina Supreme Court endorsed in *Owens v. Stirling*.[198]

Alternatively, while controversial on its face, strong arguments have been made in favor of the FDA being granted some level of jurisdiction over the regulation of lethal injection drugs, which would allow the Agency to review these drugs for adequacy and efficacy prior to distribution and administration.[199] This would lessen the likelihood of

198. *See* 904 S.E.2d at 605.

199. *See* Patricia J. Zettler & Seema K. Shah, *Broader Implications of Eliminating FDA Jurisdiction over Execution Drugs*, 111 AM. J. PUB. HEALTH 1764, 1764, 1766 (2021) (arguing that "[a]llowing states and the federal government to source lethal injection substances from outside the regulated supply chain not only exposes individuals being

botched executions occurring and minimize the potential that the execution involves torture or unnecessary suffering beyond the mere extinguishment of life, as barred by the Eighth Amendment's prohibition against cruel and unusual punishment. Moreover, a proposal for state governments to conduct their business in accordance with the same rules and regulations that they prescribe for their constituents, especially in the control of life and death, should hardly be considered radical or groundbreaking.

CONCLUSION

The increasing opacity in capital executions, largely facilitated by state secrecy statutes, raises alarms signaling that governments and execution teams have something to hide—something that cannot be scrutinized for fear that it may be deemed unlawful, unethical, or unconstitutional and impede their ability to inflict the death penalty. As demonstrated by *Owens v. Stirling*, secrecy and shield statutes serve as a mechanism for the government to cover up its lawless behavior in the pursuit of drugs for lethal injection executions. Rather than merely protecting suppliers from harassment, these laws allow the government to evade accountability for its actions in obtaining execution drugs from questionable and/or unregulated sources. This lack of transparency, embraced by the South Carolina Supreme Court in *Owens v. Stirling*, deprives the condemned of their constitutional right to challenge the methods of their execution and ultimately undermines public trust in the criminal legal system.

The American government's reliance on secrecy statutes is not merely a practical solution to obtain drugs to carry out lethal injection executions, but instead an attempt to conceal deeper problems with the death penalty. Capital punishment and lethal injection protocols, specifically, are increasingly operated in the shadows, without sufficient oversight and with minimal regard for constitutional concerns. As such, courts, attorneys, policymakers, legislatures, and American society at large must critically re-evaluate the use of capital punishment in the United States, especially at a time when states are reverting to violent, undignified, and antiquated methods of executions—such as electrocution and the firing squad. After all, "[a] government whose primary function is to protect life should not be in the business of ending it, especially given the United States Constitution protects the accused

executed to uncertain and unnecessary risks but also may enable a broader unregulated market for these drugs.").

from cruel and unusual punishment. There is no more cruel punishment than putting someone to death . . . ."[200]

200. Smith, *supra* note 21.