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Cover Page Footnote

J.D. Candidate, 2008, Fordham University School of Law; Bachelor of Science in Journalism, 2003, Northwestern University, Medill School of Journalism. I am incredibly grateful to Professor Deborah W. Denno for her invaluable guidance, support, and encouragement on this Note. I also would like to thank Professor Abner Greene and Dr. Mark Heath for their feedback on earlier drafts, and Bill Fish, Karen Kaiser, and Karl Olson for their assistance in obtaining documents.

EXECUTIONER IDENTITIES: TOWARD RECOGNIZING A RIGHT TO KNOW WHO IS HIDING BENEATH THE HOOD

*Ellyde Roko**

INTRODUCTION

The doctor had more than twenty malpractice suits filed against him.[1] Two hospitals had revoked his privileges.[2] He testified that he had dyslexia and sometimes confused drug dosages.[3] This same doctor also supervised the lethal injections of fifty-four inmates in Missouri over a decade.[4]

For ten years, the public, the press, and the condemned inmates themselves did not know about the supervising executioner's qualifications in Missouri.[5] In a federal lawsuit challenging the state's implementation of lethal injection, the Department of Corrections refused to reveal any information about execution team members until a magistrate judge issued a protective order and required team members to answer interrogatories.[6] Once the case reached the district court, the judge did not allow testimony because of time constraints.[7] The doctor whose problem-plagued history

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1. Jeremy Kohler, *Behind the Mask of the Execution Doctor: Revelations About Dr. Alan Doerhoff Follow Judge's Halt of Lethal Injections*, St. Louis Post-Dispatch, July 30, 2006, at A1.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. Taylor v. Crawford, 445 F.3d 1095, 1097 (8th Cir. 2006) (mentioning that the state objected to interrogatories seeking the identity of the doctor and nurse who had attended previous executions, but that the judge issued a protective order that required the state to disclose "the qualifications of any medical personnel who have participated in executions, without disclosing their identities or any confidential information"). In subsequent disputes over the scope of discovery, the court noted that "[t]he State argues that disclosure of the identity of these individuals would be inappropriate because of security concerns for the prison and for these individuals." Taylor v. Crawford, 05-4173-CV, 2006 WL 1236660, at *2 (W.D. Mo. May 5, 2006).

7. *Taylor*, 445 F.3d at 1098-99 (noting that the condemned inmate asserted that the district court's expedited and shortened hearing denied him due process, and that the district

the newspaper revealed—referred to in court as "John Doe Number One"—almost did not testify at all.[8] After hearing Dr. Doe's testimony, the district judge found that the doctor contributed to the unconstitutionality of the state's lethal injection procedure and banned the doctor from participating in any further executions.[9] The revelation of such troubling details—prompted in part by the judge's intense questioning of Dr. Doe regarding his qualifications—and the confirmation of the doctor's identity from Department of Corrections pay records, led the *St. Louis Post-Dispatch* to investigate and identify the doctor.[10] The situation also apparently prompted the introduction of Missouri legislation that would keep the identities of execution team members confidential.[11]

In a similar lethal injection challenge in California during the same period in 2006, discovery revealed that one execution team member handling the lethal chemicals had been disciplined for smuggling illegal drugs into the prison.[12] The leader of that execution team suffered from post-traumatic stress disorder, yet still supervised the team.[13] During testimony in the case, when asked to explain the source of botched executions, an anonymous execution team member testified that "s[---] does happen, so."[14] The judge found that the state had failed to ensure that execution team members were qualified to do their jobs and ruled in a memorandum of intended decision that the protocol as implemented was unconstitutional.[15]

The importance of executioners to the constitutionality of the death penalty has become more pronounced in the past several years. Courts have not recognized the right of the public to know the identity of the executioner. Yet the idea that such a right might exist did not originate with lethal injection. Rather, newspapers, the American Civil Liberties Union, and other interested parties have sought an executioner's identity in the

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court abused its discretion by not permitting him to call medical witnesses, including the anonymous doctor who supervised the state's executions).

8. *Id.* (remanding the case because the truncated hearing did not allow the condemned inmate to develop the necessary record).

9. Taylor v. Crawford, No. 05-4173-CV (W.D. Mo. Sept. 12, 2006), *available at* http://www.law.berkeley.edu/clinics/dpclinic/Lethal%20Injection%20Documents/Missouri/Taylor/2006.09.12%20order.pdf (order rejecting the state's revised protocol); Taylor v. Crawford, No. 05-4173-CV, 2006 WL 1779035, at *8 (W.D. Mo. June 26, 2006); *see also* Jeremy Kohler, *Judge Ousts State Execution Doctor*, St. Louis Post-Dispatch, Sept. 14, 2006, at B5.

10. *See* Kohler, *supra* note 1.

11. *See* S.B. 258, 94th Gen. Assem., 1st Reg. Sess. (Mo. 2007) (requiring that the identities of execution team members remain confidential and stating that any record that could identify a team member is privileged).

12. Morales v. Tilton, Nos. C 06 219, C 06 926, 2006 WL 3699493, at *6 (N.D. Cal. Dec. 15, 2006) (memorandum of intended decision and request for response from defendants) (noting that a registered nurse responsible for mixing and preparing one of the drugs used in the execution procedure testified that "[w]e don't have training, really").

13. *Id.*

14. *Id.* at *10 n.8.

15. *Id.* at *8.

context of other execution methods, such as hanging.[16] In 1989, the *Seattle Times* filed a request with the Washington Department of Corrections seeking to obtain the qualifications of the hangman hired to conduct the hanging of Charles Campbell.[17] The newspaper first sought to know the identity of the hired hangman, but later dropped that request after the Department of Corrections went to court to prevent the newspaper from accessing identifying information.[18] In denying the request for the executioner's qualifications, the Department of Corrections stated that it had checked the hangman's qualifications and that he was qualified.[19] The newspaper editor countered that the state's residents needed such information to assess whether the person hired to act as the hangman—for the first hanging in the United States in twenty years—was qualified for the job.[20]

This conflict between the need to protect the executioner's identity and the public's right to oversee the government's implementation of capital punishment has persisted as the method of execution has evolved from hanging to electrocution to lethal gas to lethal injection. In *Taylor v. Crawford*,[21] the lawsuit that resulted in testimony from Dr. Doe, and *Morales v. Tilton*,[22] which revealed the incompetence of execution team members, death row inmates challenged the state's lethal injection protocol as creating an unnecessary risk of cruel and unusual punishment.[23] Judges in both cases ruled that lethal injection—as performed—would be unconstitutional.[24] And both courts recognized that the constitutionality of the execution can depend on who performs it.[25]

Inmates have lodged similar challenges in courts across the country, and botched executions have highlighted the relevance of such claims.[26] For instance, in Maryland, the failure of execution team members to administer properly the intravenous line that delivered the lethal drugs caused the chemicals to leak onto the execution chamber floor.[27] The Court of Appeals of Maryland since has halted executions because the adoption of

16. *See, e.g.*, David Gering, *State Rejects Query on Hangman: Qualifications Are Exempt from Disclosure Laws, Newspaper Is Told*, Seattle Times, Mar. 29, 1989, at A4.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. No. 05-4173-CV, 2006 WL 1779035 (W.D. Mo. June 26, 2006).

22. Nos. C 06 219, C 06 926, 2006 WL 3699493 (N.D. Cal. Dec. 15, 2006).

23. *See id.* at *1-2; *see also* Taylor v. Crawford, 445 F.3d 1095, 1097 (8th Cir. 2006). The challenges argued that the maladministration of the drugs could cause the inmates to suffer excruciating pain before dying.

24. *Morales*, 2006 WL 3699493, at *8; *Taylor*, 2006 WL 1779035, at *8.

25. *Morales*, 2006 WL 3699493, at *1; *Taylor*, 2006 WL 1779035, at *8.

26. *See generally* Michael L. Radelet, Death Penalty Information Center, Some Examples of Post-Furman Botched Executions, http://www.deathpenaltyinfo.org/article.php?scid=8&did=478 (last visited Feb. 20, 2007). *See* Human Rights Watch, So Long as They Die: Lethal Injections in the United States 46-50 (2006) (referencing a list of thirty-six botched lethal injections from 1982 to 2003).

27. Oken v. Sizer, 321 F. Supp. 2d 658, 667 n.7 (D. Md. 2004).

the protocol did not comport with state administrative procedure.[28] In Ohio, an execution team with paramedics (but without any doctors or nurses) took twenty-two minutes to find a vein for the catheter.[29] When the chemicals entered the inmate's tissue instead of his bloodstream, causing his hand to swell, the team took another thirty minutes to find a different vein to use.[30] Previously in California, executioners spent eleven minutes trying to gain access to a vein, during which time the inmate asked them if they knew what they were doing.[31] On the same day that the federal court in California ruled the state's protocol unconstitutional, Florida Governor Jeb Bush halted executions and established a committee to investigate the state's lethal injection protocol after an inmate took thirty-four minutes to die—significantly longer than the time it typically takes an inmate to die from lethal injection.[32]

In 2006 alone, eight states halted individual executions because of concerns about the administration of the lethal chemicals.[33] The parallel success of challenges in these states does not mean, however, that lethal injection will not eventually be used in the future to execute another person in those states where executions now are halted. While the Missouri judge banned Dr. Doe from participating in any future executions after hearing his testimony, the state has appealed the judge's ruling still requiring the state to use a doctor in any future execution.[34] The judge in California determined that the implementation of capital punishment was broken, but could be fixed.[35] The protocol in Maryland could pass the state

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28. Evans v. State, 914 A.2d 25, 80-81 (Md. 2006). A Kentucky court also halted executions because officials have failed to follow the proper administrative procedure in adopting the protocol, even after the circuit court found lethal injection constitutional, but the judge later reversed himself, finding that "the regulatory process would become nothing but a series of collateral attacks precluding capital punishment." Bowling v. Ky. Dep't of Corr., No. 06-CI-00574, at 8 (Ky. Cir. Ct. Dec. 27, 2006), *available at* http://www.law.berkeley.edu/clinics/dpclinic/Word%20docs/Kentucky%20LI%20docs/admin%20pro.%20LI%20motion%20summary%20judgment%20recons.pdf (order reconsidering and denying a motion for summary judgment).

29. Adam Liptak, *Trouble Finding Inmate's Vein Slows Lethal Injection in Ohio*, N.Y. Times, May 3, 2006, at A16.

30. *Id.*

31. Kevin Fagan, *The Execution of Stanley Tookie Williams: Eyewitness: Prisoner Did Not Die Meekly, Quietly*, S.F. Chron., Dec. 14, 2005, at A12. During the execution of Stanley Tookie Williams, cofounder of the dangerous Crips gang, the medical technician poked at Williams for so long trying to find a vein that Williams asked "[y]ou guys doing that right?" while lying on the execution table. *Id.*

32. Adam Liptak & Terry Aguayo, *After Problem Execution, Governor Bush Suspends the Death Penalty in Florida*, N.Y. Times, Dec. 16, 2006, at A11.

33. Death Penalty Info. Ctr., The Death Penalty in 2006: Year End Report 2 (Dec. 2006), http://www.deathpenaltyinfo.org/2006YearEnd.pdf. Those state were Arkansas, California, Delaware, Maryland, Missouri, New Jersey, Ohio, and South Dakota. *Id.*

34. Brief of Appellants at 51, Taylor v. Crawford, No. 06-3651 (8th Cir. Dec. 4, 2006), *available at* http://www.law.berkeley.edu/clinics/dpclinic/Lethal%20Injection%20Documents/Missouri/Taylor/2006.12.04%20Appellants%27%20Brief%20After%20Remand.pdf.

35. Morales v. Tilton, Nos. C 06 219, C 06 926, 2006 WL 3699493, at *1 (N.D. Cal. Dec. 15, 2006).

administrative enactment procedures, and the potential impact of the Florida committee's report remains to be seen. When executions resume, the states will be responsible for finding someone qualified to carry out the execution.

These recent examples highlight concerns over whether states should be allowed to keep executioner identities confidential. Various interests come into play: the First Amendment rights of the public and press to know the qualifications of the person carrying out the publicly sanctioned punishment; the right of the public and of the inmate to know that the punishment will be carried out in a humane manner; the authority of the prison to maintain order and security; and the responsibility of the state to protect the executioner. As the U.S. Court of Appeals for the Ninth Circuit stated in a 2002 case regarding the scope of the public's access in viewing lethal injections,

> [t]he issues presented involve the balance between the State's ability to carry out executions in a safe and orderly manner and the public's right to be informed about how the State and its justice system implement the most serious punishment a state can exact from a criminal defendant—the penalty of death.[36]

Part I of this Note briefly looks to the history of the executioner in the United States and then examines the basis for a First Amendment right of access and when that right can be limited. Part II highlights how this right applies in the context of the lethal injection executioner. Part II first focuses on the justification for concealing the executioner's identity before exploring why the public and the inmate have a right to know the identity. Part III argues that the right of the inmate and public to know the identity outweighs the state and prison's speculative concerns on which the grounds for concealment are based. Part III initially advocates that an executioner's name and qualifications should be revealed but then argues, in the alternative, that if states provide substantiated justification for concealing an executioner's identity, then the identity can be concealed, but specific qualifications of the executioner should be revealed.

I. THE RIGHT TO KNOW THE IDENTITY OF THE EXECUTIONER

This part examines the background of the public's right to know who executes an inmate condemned to die. Part I.A looks at the historical trend to hide the executioner from public view. Part I.B focuses on the public's rights under the First Amendment, first examining access to judicial proceedings, then looking to limits placed on access to correctional facilities, and finally explaining how these standards apply specifically in the context of executions.

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36. Cal. First Amendment Coal. v. Woodford, 299 F.3d 868, 873 (9th Cir. 2002).

A. *The History of the Executioner*

Although the method of execution has changed in the United States since the inception of capital punishment, each method has required an executioner. Generally, the stigma associated with the job of the executioner has made the position undesirable.[37] Therefore, throughout history, the executioner has been hooded—both literally and figuratively.[38] Some states even have statutes that explicitly require that the identities of executioners remain confidential.[39] While the practice of maintaining the anonymity of executioners has persisted, the skills required to perform an execution have changed as the method of execution has evolved.

Originally, the dominant method of execution in the United States was hanging.[40] In the case of hanging, the executioner would tie the rope and release the trap.[41] "It required no equipment beyond a rope and a high structure sturdy enough to support the weight of a human body. It called for no expertise apart from the ability to tie a knot."[42] Sometimes the process might have called for someone with knowledge of math or basic physics.[43] But, typically, "[t]he technology of hanging was simple, so

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37. Stuart Banner, The Death Penalty: An American History 39 (2002) ("There was a tension between . . . the approval of death as a punishment and a strong reluctance to carry out the distasteful steps necessary to put that punishment into practice."); *see also* Austin Sarat, *The Cultural Life of Capital Punishment: Responsibility and Representation in* Dead Man Walking *and* Last Dance, 11 Yale J.L. & Human. 153, 157 n.24 (1999) ("The anonymous executioner is, at once, a stand-in for the community in whose name the execution was carried out and a sign of the 'shame' attached to those who turn our bloodlust into blood-thirsty deeds.").

38. John D. Bessler, Death in the Dark: Midnight Executions in America 25 (1997) ("The only thing that was sometimes kept secret at early American executions was the executioner's identity. At some executions, professional executioners wore disguises or hideous masks or had their faces blackened . . . ."); *see also* Lesley Clark, *State Will Keep Black-Hooded Executioner*, Miami Herald, Feb. 16, 2000, at 7B (noting that executioners arrived at Florida State Prison already wearing a black hood with eye slits).

39. *See* Bessler, *supra* note 38, at 151 (stating that statutes protect the identities of executioners in many states, including Florida, Illinois, Montana, New Jersey, and New York). The Illinois statute, for example, states, "[T]he identity of executioners . . . and information contained in records that would identify those persons shall remain confidential, shall not be subject to disclosure, and shall not be admissible as evidence or be discoverable in any action of any kind in any court or before any tribunal, board, agency, or person." 725 Ill. Comp. Stat. Ann. 5/119-5(e) (West 2003).

40. *See* Banner, *supra* note 37, at 31-32.

41. *Id.* at 45; *see also* Ann Japenga, *Mystery Hangman Sets Off a Washington Controversy*, L.A. Times, Apr. 12, 1989, at 1.

42. Banner, *supra* note 37, at 44.

43. *See* Campbell v. Wood, 18 F.3d 662, 684-85 (9th Cir. 1994) (describing the need to use the right type of rope, position the knot in the right place, and calculate the correct length of the drop); *see also* Japenga, *supra* note 41 ("[P]rison authorities sought 'a technically proficient individual' to serve as hangman, said [a] spokesman for the Washington state penitentiary . . . . A hanging is 'a math problem,' he said, involving 'momentum, weight and distance. We don't want a decapitation or a strangulation.'"). Recently, the decapitation of one of Saddam Hussein's half-brothers resulted because "the hangmen's calculations of weight, gravity and the momentum needed to snap their necks—a grim science that has produced detailed 'drop charts' used for decades in hangings around the world—appeared . . . to have gone seriously awry." John F. Burns, *Second Hanging Also Went Awry,*

simple that nearly anyone could conduct a hanging, even of him- or herself."[44]

With electrocution, the executioner had to start the flow of the electrical current.[45] One supporter of the method urged its adoption because flipping the switch required no expertise and, therefore, an untrained individual could perform the execution.[46] In practice, the method required more technical proficiency with electricity, and the position turned into a profession of sorts, relegated to a small number of trained individuals with the requisite expertise.[47]

Currently the majority of states that have the death penalty use lethal injection as the sole method of execution, with a few states offering a choice between lethal injection and some other method.[48] Since 1976, when the death penalty was reinstated nationwide, states have executed 897 condemned inmates by lethal injection.[49] In 2005, states employed lethal injection in all sixty executions that year.[50] In 2006, states used lethal injection to execute fifty-two people while one inmate opted to die by electrocution.[51]

In part, states moved toward lethal injection because of its seemingly more humane nature.[52] However, recent rulings that lethal injection, if

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Iraq Tape Shows, N.Y. Times, Jan. 16, 2007, at A1. It also should be noted that hundreds of Iraqis volunteered to execute Saddam Hussein, although no one knows how many of the volunteers—if any of them—were qualified. *See* Kirk Semple, *Iraqis Line up to Put Hussein in the Noose*, N.Y. Times, Dec. 9, 2006, at A1.

44. Banner, *supra* note 37, at 46.

45. *Id.* at 179.

46. *Id.*

47. *Id.* at 194; *see also* Robert J. Cottrol, *Finality with Ambivalence: The American Death Penalty's Uneasy History*, 56 Stan. L. Rev. 1641, 1656-57 (2004) (book review) ("Electrocutions had to be carried out by professionals, by men who were familiar with electricity and knew how to deliver enough power to kill the prisoner, without, it should be added, killing others who were present at the event. This called for a professionalization of the executioners' job: the hiring of skilled electricians as executioners.").

48. Death Penalty Information Center, Methods of Execution, http://www.deathpenaltyinfo.org/article.php?scid=8&did=245 (last visited Mar. 3, 2007). Of the thirty-eight states with the death penalty (including New York, although the state's death penalty statute was found unconstitutional in 2004), only Nebraska does not employ lethal injection. *Id.* Nebraska uses electrocution. *Id.* In addition to lethal injection, states have executed by firing squad and by lethal gas. *See* Deborah W. Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What It Says About Us*, 63 Ohio St. L.J. 63, 82 (2002).

49. Death Penalty Information Center, Execution Database http://www.deathpenaltyinfo.org/executions.php (last visited Mar. 14, 2007) (select "Lethal Injection" under "Method of Execution").

50. U.S. Dep't of Justice, Bureau of Justice Statistics, Capital Punishment, 2005 at 1 (2006), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/cp05.pdf; Capital Punishment Statistics, U.S. Department of Justice, Bureau of Justice Statistics, http://www.ojp.usdoj.gov/bjs/cp.htm [hereinafter Capital Punishment Statistics] (last visited Feb. 20, 2007).

51. Capital Punishment Statistics, *supra* note 50.

52. *See generally* Denno, *supra* note 48, at 91-92 ("[L]egislatures favored lethal injection because it appeared more humane and palatable relative to other methods . . . .").

ineptly administered, can be unconstitutional have called that presumption of humaneness into question.[53] The qualifications of the people administering the drugs and monitoring the inmate's level of consciousness have played an important role in this debate.[54] The executioners in lethal injections are responsible for much more than flipping a switch; they must establish an IV line, induce and monitor unconsciousness, and administer the paralyzing and heart-stopping drugs.[55]

Initially, some states tried to avoid finding those individuals with the skill needed to perform a lethal injection by using a machine to inject the chemicals.[56] Operation of the machine simply required two people to press buttons simultaneously to start the flow of the lethal chemicals.[57] The machine also allowed executioners to feel less directly involved in the killing process.[58] The machine fell out of use, however, after questions arose regarding the qualifications of the machine's inventor.[59]

With each progressive method of execution came increasingly more specific qualifications for the executioners.[60] However, the increasing importance of the role of the executioner did not result in increased public

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53. *See* Morales v. Tilton, Nos. C 06 219, C 06 926, 2006 WL 3699493 (N.D. Cal. Dec. 15, 2006); Taylor v. Crawford, No. 05-4173-CV, 2006 WL 1779035 (W.D. Mo. June 26, 2006).

54. *See, e.g.*, *Morales*, 2006 WL 3699493. Dr. Mark Heath testified in *Morales* on September 27, 2006 that execution team members were not qualified to monitor anesthetic depth. *See* Testimony of Dr. Mark Heath at 492-93, *Morales*, C 06 0219, 2006 WL 3699493, *available at* http://www.law.berkeley.edu/clinics/dpclinic/Lethal%20Injection%20Documents/California/Morales/Morales%20Dist%20Ct/Evidentiary%20Hearing/2006.09.27%20Morales%20Evidentiary%20Hearing.txt.

55. Dr. Mark Heath, who has testified as an expert witness in numerous lethal injection challenges, described the process as follows:

> There are four main stages to [a lethal injection]. The first stage is the achieving of the intravenous access. The second stage is the administration of general anesthesia, and that's important because the third and fourth stages would be extremely painful if that second stage, the general anesthesia stage, was not properly performed. And then the third stage is the administration of a paralyzing drug that ensures that the procedure appears serene and peaceful. And then the fourth stage is the administration of the actual drug that kills the prisoner, stops the heart.

Testimony of Mark Heath at 14, *Taylor*, 2006 WL 1779035, *available at* http://www.law.berkeley.edu/clinics/dpclinic/Lethal%20Injection%20Documents/Missouri/Taylor/June%202006%20Hearing/TAYLOR1.TXT.

56. Banner, *supra* note 37, at 299.

57. *Id.*

58. *Id.*

59. *See* Denno, *supra* note 48, at 114.

60. *See* Banner, *supra* note 37, at 169-70 (noting that by the middle of the 1900s specialists conducted executions as opposed to ordinary people); *see also* Cottrol, *supra* note 47, at 1658 ("If the nineteenth-century American hangman was an amateur and the twentieth-century American executioner a skilled technician familiar with the safe and lethal handling of electricity or poison gas, the twenty-first-century American executioner is a person with some, indeed probably a considerable amount of, medical training. Administering lethal injections requires people with medical or paramedical training, though professional associations representing doctors and nurses have taken stands against members using their professional skills in the role of executioners.").

scrutiny of the executioner's qualifications.[61] In fact, state statutes do not list qualifications of executioners.[62] A 2001 survey of state execution statutes and protocols found that "[f]ourteen states—or approximately 39% of all the states" with the death penalty—"mention 'training' or 'competency' or 'preparation' or 'practice' for the executioners. Moreover, even among those states that mention some training, there is little to no indication of what kind of preparation the department of corrections offers."[63] Additionally, state statutes do not indicate a process for selecting qualified executioners.[64]

Current litigation questions whether lethal injection protocols as performed create an unnecessary risk of pain.[65] Initial indications from judges considering such challenges question whether the lethal injection procedure can be performed humanely without using doctors.[66] Missouri, for instance, has ruled that the state must use a doctor in executions.[67] However, the American Medical Association,[68] American Nurses'

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61. *See, e.g.*, Clark, *supra* note 38 ("Florida may be abandoning its electric chair, but not its black-hooded, anonymous executioner. The state will still rely on a private citizen, not a prison employee, to perform the final function of death—plunging eight syringes, six of them loaded with a deadly dose of chemicals, into an intravenous line connected to the condemned inmate's arm.").

62. *See, e.g.*, Denno, *supra* note 48, at 111. In Texas, for instance, "there was no information specifying the nature and extent of the qualifications that executioners should have in order to perform an execution." *Id.* "Georgia is now the most pronounced example of the problems that can result when executioners are ignorant and inexperienced." *Id.* at 112.

63. *Id.* at 121.

64. *Id.* at 122. In states that advise of troubleshooting procedures should a problem occur during a lethal injection, "[c]riteria for selecting or training executioners . . . appear to be nonexistent." *Id.* "In eight states, the executioners are anonymous department of corrections staff members, whereas in five states, the warden or commissioner selects executioners without specifying if they are staff members." *Id.* An additional five states merely mention the number of people on an execution team or that such a team exists. *Id.*

65. *See, e.g.*, *supra* note 33 and accompanying text. Additionally, because such challenges are brought under 28 U.S.C. § 1983, which authorizes challenges to conditions of confinement, the inmate cannot challenge lethal injection as unconstitutional per se. *See* Hill v. McDonough, 126 S. Ct. 2096, 2102 (2006); Nelson v. Campbell, 541 U.S. 637, 647-48 (2004). For an overview of recent challenges, see generally Note, *A New Test for Evaluating Eighth Amendment Challenges to Lethal Injections*, 120 Harv. L. Rev. 1301 (2007).

66. *See, e.g.*, Taylor v. Crawford, No. 05-4173-CV, 2006 WL 1779035, at *8 (W.D. Mo. June 26, 2006) ("A board certified anesthesiologist shall be responsible for the mixing of all drugs which are used in the lethal injection process. If the anesthesiologist does not actually administer the drugs through the IV, he or she shall directly observe those individuals who do so."); *see also* Morales v. Tilton, Nos. C 06 219, C 06 926, 2006 WL 3699493, at *10 (N.D. Cal. Dec. 15, 2006) (declining to require a doctor for lethal injections but noting that the participation of a medical professional would tend to ensure the inmate received proper anesthesia).

67. *Taylor*, 2006 WL 1779035, at *8.

68. Code of Ethics E-2.06 (Am. Med. Ass'n. 2000), *available at* http://www.ama-assn.org/ama/pub/category/8419.html ("A physician, as a member of a profession dedicated to preserving life when there is hope of doing so, should not be a participant in a legally authorized execution.").

Association,[69] American Society of Anesthesiologists,[70] and National Commission on Correctional Health Care[71] all have ethics guidelines that oppose participation in lethal injections.[72] For that reason, many medical professionals do not want to take part in lethal injections.[73] Given the importance of the qualifications of execution team members, states might choose to protect the anonymity of executioners whose actions would be considered violations of professional guidelines, with some states mandating that professional organizations not reprimand or revoke the licenses of those individuals whose actions might violate ethics guidelines.[74] Regardless of whether the personnel injecting the execution drugs are medical professionals, prison officials have voiced concerns that identifying the execution team members would make it difficult to find anyone willing to take on the job.[75]

At the end of the day, the executioner is responsible for carrying out the will of the people, in whose name the execution takes place. States have tried to limit this burden by, for instance, dividing the responsibility.[76] With execution by firing squad, at least one triggerman fires blanks instead of bullets, so no one knows who fired a real bullet.[77] With lethal injection, the process is divided into discrete duties, so no one person bears full

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69. Am. Nurses Association, Ethics and Human Rights Position Statements: Nurses' Participation in Capital Punishment, http://nursingworld.org/readroom/position/ethics/prtetcptl.htm (last visited Apr. 1, 2007) ("The American Nurses Association (ANA) is strongly opposed to nurse participation in capital punishment. Participation in executions is viewed as contrary to the fundamental goals and ethical traditions of the profession.").

70. Message from Orin F. Guidry, President, Am. Soc'y of Anesthesiologists, Observations Regarding Lethal Injection (June 30, 2006), *available at* http://www.asahq.org/news/asanews063006.htm (stating that the American Society of Anesthesiologists had adopted the American Medical Association's (AMA's) code of ethics regarding capital punishment in 2001).

71. Standards for Health Services in Prisons P-I-08 (Nat'l Comm'n on Corr. Health Care 2003) (on file with the Fordham Law Review) ("The correctional health services staff do not participate in inmate executions.").

72. This Note does not attempt to address the controversy regarding whether such medical professionals should participate in executions or whether courts can or should require such medical professionals to participate in executions.

73. *See* Neil Farber et al., *Physicians' Attitudes About Involvement in Lethal Injection for Capital Punishment*, 160 Archives of Internal Med. 2912, 2913 (2000) (finding that 43% of doctor survey respondents indicated approval for injecting the lethal drugs).

74. *See, e.g.*, Human Rights Watch, *supra* note 26, at 42.

75. Bessler, *supra* note 38, at 150 ("Executioners, who have worn masks or hoods for centuries to prevent their recognition, have been universally despised throughout history."); *see also Hangman's Name Can be Kept Secret*, Seattle Times, May 4, 1990, at C2 (noting that in a challenge to the anonymity of a hangman, the hangman said he would not participate if his identity were revealed and, therefore, revealing his identity would prevent the execution from occurring).

76. *See* Bessler, *supra* note 38, at 149 ("Executioners themselves are oftentimes absolved from personal responsibility for executions. A blank is put in one of the firing squad guns, an unknown executioner stands behind a one-way mirror, or only one of two buttons—pushed by different individuals—activates the lethal injection machine.").

77. *Id.*

responsibility for causing death.[78] Nonetheless, the executioners ultimately complete the final steps of the state's death sentence.

B. *First Amendment Rights: How Far the Public's Right to Know Extends*

1. The Historic Right of Access to Judicial Proceedings

A string of U.S. Supreme Court decisions established the scope of the public's and the press's right of access[79] to judicial proceedings, ranging from pretrial hearings to sentencing.[80] Although the Supreme Court long had recognized a right of access to criminal proceedings, the direct question did not come before the Court until *Richmond Newspapers, Inc. v. Virginia*.[81] In that case, a Virginia judge had closed his courtroom during a murder trial.[82] The case already had resulted in three mistrials.[83] Yet the Supreme Court held that the closure violated the public's First Amendment rights and formally recognized that a criminal trial presumptively would be open to the public.[84] "To work effectively, it is important that society's criminal process 'satisfy the appearance of justice,' and the appearance of justice can best be provided by allowing people to observe it."[85]

Two years later, the Court examined the scope of its *Richmond Newspapers* decision in *Globe Newspaper Co. v. Superior Court*.[86] In *Globe Newspaper*, a newspaper challenged a Massachusetts statute that closed the courtroom during the testimony of a rape victim under the age of eighteen.[87] The statute required a blanket closure, regardless of the wishes

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78. *See* Banner, *supra* note 37, at 299 (describing how states created elaborate protocols for lethal injection so "[e]ach prison employee could think of himself as a mere link in a long chain that led to the condemned person's death").

79. This Note does not attempt to distinguish between the right of access of the public and that of the press.

80. *See, e.g.*, Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606-07 (1982) (finding that the public and press have a right of access to criminal trials and that the state must show that a compelling government interest justifies closure and that the closure is narrowly tailored to serve that interest); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (finding that criminal trials must be open to the public absent an overriding interest).

81. *Richmond Newspapers*, 448 U.S. at 563-64.

82. *Id.* at 559-60.

83. *Id.* at 559.

84. *Id.* at 580. The court noted that civil trials, though not at issue in the case, also carried a tradition of access. *Id.* at 580 n.17.

85. *Id.* at 571-72 (citation omitted) (quoting Offutt v. United States, 348 U.S. 11, 14 (1954)); *see also* Archibald Cox, *Foreword: Freedom of Expression in the Burger Court*, 94 Harv. L. Rev. 1, 10 (1980) ("[T]he first amendment gives not only a right to publish but, at least under some circumstances, a right to acquire for publication ideas and information pertaining to the conduct of government."); Anthony Lewis, *A Public Right to Know About Public Institutions: The First Amendment as Sword*, 1980 Sup. Ct. Rev. 1, 2 (describing the right as that of the public to access the information it needs to hold the government accountable).

86. Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982).

87. *Id.* at 598-99.

of the defense counsel, prosecutors, or victims themselves.[88] In this situation, the Court described the role of the press as "permit[ting] the public to participate in and serve as a check upon the judicial process—an essential component in our structure of self-government."[89] Massachusetts argued that it had a compelling interest in protecting victims under age eighteen from additional embarrassment and trauma, and in encouraging such victims to testify.[90] The Court, however, held that these interests did not require a mandatory closure and, therefore, that the statute was not narrowly tailored.[91] Rather, the Court ruled that situations needed to be evaluated on a case-by-case basis.[92] The Court reiterated the holding from *Richmond Newspapers*, which "suggested that individualized determinations are *always* required before the right of access may be denied."[93] In *Globe Newspaper*, the Court established a standard that required the state to show a compelling reason for denying the public access and to demonstrate that the denial is narrowly tailored to serve that interest.[94] In doing so, the Court took particular notice of the role that public scrutiny plays in safeguarding the judicial processes.[95]

Two years after *Globe Newspaper*, the Supreme Court again expanded the formal scope of the rights of the public under the First Amendment in *Press-Enterprise Co. v. Superior Court* (*Press-Enterprise I*).[96] In holding that the public had a right of access to voir dire proceedings, the Court found that the lower court had not met the narrow tailoring requirement of *Globe Newspaper*.[97] Closure must be "essential to preserve higher values and . . . narrowly tailored to serve that interest."[98] To meet this threshold, "[t]he interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered."[99] The Court revisited the standard two years later, when it further

88. *See id.* at 599-600. The relevant statute stated, "[T]he presiding justice shall exclude the general public from the court room . . . ." *Id.* at 598 n.1.

89. *Id.* at 606; *see also* Cox, *supra* note 85, at 24 (noting that government officials often are the primary—or only—source of information for citizens and are to serve at the will of the public).

90. *Globe Newspaper Co.*, 457 U.S. at 607.

91. *Id.* at 607-08. The court noted that the trial court could make the determination of whether the state's interest warranted closure on a case-by-case basis. *Id.* at 609. "Such an approach ensures that the constitutional right of the press and public to gain access to criminal trials will not be restricted except where necessary to protect the State's interest." *Id.*

92. *Id.*

93. *Id.* at 608 n.20.

94. *Id.* at 606-07.

95. *Id.* at 606.

96. 464 U.S. 501 (1984).

97. *See id.* at 513 ("[N]ot only was there a failure to articulate findings with the requisite specificity but there was also a failure to consider alternatives to closure and to total suppression of the transcript. The trial judge should seal only such parts of the transcript as necessary to preserve the anonymity of the individuals sought to be protected.").

98. *Id.* at 510.

99. *Id.*

elaborated in *Press-Enterprise Co. v. Superior Court* (*Press-Enterprise II*)[100] that the closure of preliminary hearings also had to be narrowly tailored and justified by an overriding interest.[101] Such an interest must be proven by specific facts.[102] In its holding, the Court established two prerequisites for finding a First Amendment right: whether a historic right of access has existed and "whether public access plays a significant positive role in the functioning of the particular process in question."[103]

This line of decisions relies on an interpretation of the First Amendment that views the role of the public as overseeing the government.[104] To serve effectively in that role, the public must have the information that it needs to make judgments about whether the representative government is doing its job to the satisfaction of the people. Although the right of access of the press is coextensive with that of the public, the press acts as a surrogate for the public by serving as the source of this information.[105]

2. The Historic Right to Limit Access to Penal Institutions

While a general First Amendment right of access to criminal proceedings exists, correctional facilities historically have been able to limit access granted to the press and the public to preserve order in the prisons. The Supreme Court recognized this limitation in *Richmond Newspapers*: "[P]enal institutions . . . by definition, are not 'open' or public places. Penal institutions do not share the long tradition of openness . . . ."[106] Just as the Supreme Court established the scope of the public's right of access to criminal proceedings through a string of cases, several key cases defined the boundaries limiting the public's right of access to prisons.[107]

In 1974, in *Pell v. Procunier*, the Court limited the right of the press to conduct interviews and the rights of inmates to be interviewed.[108] Three journalists and four prisoners challenged a prison regulation prohibiting

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100. 478 U.S. 1 (1986). *Press Enterprise Co. v. Superior Court* (*Press-Enterprise II*) involved a nurse charged with killing twelve patients by giving them massive doses of lidocaine. The defendant argued that pretrial publicity would violate his right to a fair trial. *Id.* at 3-4.

101. *Id.* at 13-14.

102. *Id.* at 14 (holding that the preliminary hearing should be closed only if the court makes a specific finding not only that prejudice would result, but also that no reasonable alternatives to closure existed).

103. *Id.* at 8.

104. *See* Lewis, *supra* note 85, at 3 ("'The principle of the freedom of speech springs from the necessities . . . of self-government.'" (quoting Alexander Meiklejohn, Political Freedom: The Constitutional Powers of the People 27 (1960))).

105. *See, e.g.*, *id.* at 20 (predicting that access lawsuits will be brought by members of the press, serving as the public's surrogate and based in the public's right of access).

106. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 576 n.11 (1980); *see also* Cox, *supra* note 85, at 26 (pointing out the inconsistency between *Richmond Newspapers* and earlier Supreme Court decisions limiting the right of access to prisons).

107. *See generally* Turner v. Safley, 482 U.S. 78 (1987); Pell v. Procunier, 417 U.S. 817 (1974); Saxbe v. Wash. Post Co., 417 U.S. 843 (1974).

108. *Pell*, 417 U.S. at 820-21, 835.

face-to-face interviews with specifically requested inmates.[109] The Court found that "central to all other corrections goals is the institutional consideration of internal security within the corrections facilities themselves."[110] Such security concerns, combined with the existence of alternative means of communication (such as written correspondence), justified the regulation.[111] The Court nevertheless had to consider whether such a restriction could be placed on an outsider—someone not incarcerated in the prison.[112] The Court allowed the regulation of outsiders seeking face-to-face contact with inmates to stand, again citing prison officials' need to maintain security.[113] Because the press's right of access is no larger than the public's right of access, members of each group were equally restricted.[114]

For the past twenty years, courts have analyzed the need for a certain prison regulation in light of the necessity for correctional facility security under the test the Supreme Court articulated in *Turner v. Safley*.[115] In *Turner*, inmates challenged prison regulations restricting inmate-to-inmate correspondence and inmate-to-inmate marriage.[116] The case concerned inmates' rights to communicate with each other—an area where prison officials had the authority to limit the rights of prisoners—not the public's right to access information.[117] However, the Ninth Circuit subsequently used the *Turner* test to analyze the public's right to view executions, applying the *Turner* factors to outsiders for the first time.[118]

In analyzing the inmates' First Amendment rights in *Turner*, the Supreme Court used four factors to determine if the regulations were "reasonably related to legitimate penological interests."[119] First, "there must be a 'valid, rational connection' between the prison regulation and the legitimate

109. *Id.* at 819.

110. *Id.* at 823; *see also* Hewitt v. Helms, 459 U.S. 460, 473 (1983) ("The safety of the institution's guards and inmates is perhaps the most fundamental responsibility of the prison administration.").

111. *Pell*, 417 U.S. at 827-28.

112. *Id.* at 827.

113. *Id.* Similarly, in *Saxbe v. Washington Post Co.*, the court upheld a statute prohibiting face-to-face interviews between a specific inmate and a member of the press as controlled by *Pell*. 417 U.S. 843, 848 (1974). Again, the Court found that the regulation was not an attempt "to conceal from the public the conditions prevailing in federal prisons." *Id.* In a dissenting opinion, Justice Lewis Powell emphasized that discussion of governmental affairs needed to be uninhibited and informed. *Id.* at 862-63 (Powell, J., dissenting).

114. *Pell*, 417 U.S. at 831 n.8; *see also* Houchins v. KQED, Inc., 438 U.S. 1 (1978) (holding that the media had no special right of access). But see *Houchins* for the idea that the press serves as the public's "eyes and ears." 438 U.S. at 8.

115. 482 U.S. 78 (1987).

116. *Id.* at 81-84.

117. *Id.*

118. Cal. First Amendment Coal. v. Woodford, 299 F.3d 868, 878 (9th Cir. 2002).

119. *Turner*, 482 U.S. at 89; *see also* Beard v. Banks, 126 S. Ct. 2572, 2577 (2006) (applying the *Turner* test to a prison regulation depriving certain inmates of magazines, newspapers, and photographs).

governmental interest put forward to justify it."[120] On this prong, officials must apply the regulation in a neutral manner.[121] Second, courts must look at whether other means of exercising the right exist, similar to the alternate channels analysis in *Pell v. Procunier*.[122] When such alternative means exist, courts "should be particularly conscious of the 'measure of judicial deference owed to corrections officials . . . in gauging the validity of the regulation.'"[123] The third factor courts must take into account is the potential ramifications that accommodating the right will have on the prison population and staff.[124] Again, if such consequences would be great, the court must give particular deference to the discretionary judgments of corrections staff.[125] Finally, the Court noted that the absence of adequate alternatives to the regulation tends to show the reasonableness of the regulation, but "the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an 'exaggerated response' to prison concerns."[126] The regulation need not be the least restrictive manner in which to address the prison's interest.[127] However, evidence of an alternative that would fully accommodate the inmate's rights at negligible cost to the valid penological interests can serve as an indication that the regulation does not satisfy the reasonableness standard.[128] The Supreme Court, in analyzing the prison regulations in light of these factors, found that inmate-to-inmate correspondence could be limited, as it was reasonably related to legitimate security interests.[129] Yet the Court held the marriage restriction unconstitutional.[130]

In general, therefore, courts give particular deference to the judgments of corrections officials to promulgate regulations relating to legitimate penological interests.[131] The deference is limited only in that regulations must be the result of legitimate responses by corrections officials.

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120. *Turner*, 482 U.S. at 89 (quoting Block v. Rutherford, 468 U.S. 576 (1984)). In *Block*, the Supreme Court held that courts in general should defer to correctional officials on matters of facility security, finding "no dispute that internal security of detention facilities is a legitimate governmental interest." 468 U.S. at 586.

121. *Turner*, 482 U.S. at 90.

122. *Id.*

123. *Id.* (quoting Pell v. Procunier, 417 U.S. 817, 827 (1974)); *see also* Entm't Network, Inc. v. Lappin, 134 F. Supp. 2d 1002, 1018 (S.D. Ind. 2001) ("When a measure is taken or a measure is limited by recognition of this fact, and in so doing promotes the security of the prison . . . it is difficult to gainsay the judgment of prison administrators.").

124. *Turner*, 482 U.S. at 90.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* at 91.

129. *Id.* at 93.

130. *Id.* at 97.

131. *See supra* notes 120-25 and accompanying text.

3. The Right of Access to Executions

While courts typically have applied the *Turner* test to regulations limiting the rights of prisoners, the Ninth Circuit expanded the application of *Turner* to regulations restricting the viewing of executions, which take place within prison walls.[132] In *California First Amendment Coalition v. Woodford*,[133] the Ninth Circuit applied the *Turner* test in examining whether reporters had a First Amendment right to view the entire lethal injection process, starting from before the executioners inserted the intravenous line.[134] In applying the test, the court noted that "[t]he Supreme Court has never applied *Turner* in a case . . . where the regulation promulgated by prison officials is centrally concerned with restricting the rights of outsiders rather than prisoners."[135] State capital punishment statutes often confer a right of access on outsiders by providing for the presence of a number of witnesses at executions, and specifically for the presence of media witnesses.[136] At the same time, these statutes often place limitations on access to executions, such as restricting the number of witnesses permitted or what witnesses can view.[137]

Before applying the *Turner* test, the Ninth Circuit in *California First Amendment Coalition* confirmed that a historic right of access to view executions existed in California.[138] The court then went on to define broadly what the right of access encompassed.[139] In doing so, the court struck down the limitations in the state's procedure as an "exaggerated, unreasonable response to prison officials' legitimate concerns about the safety of prison staff [which] thereby unconstitutionally restrict[ed] the public's First Amendment right to view executions from the moment the condemned is escorted into the execution chamber."[140] The court noted that the Department of Corrections had failed to show a need for such restrictions during two days of evidentiary hearings.[141] Therefore, the "well-settled" precedent of the string of First Amendment cases guaranteeing the public and press access to governmental proceedings dictated that the state could not limit what witnesses viewed.[142]

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132. *See infra* notes 135-37 and accompanying text.

133. 299 F.3d 868 (9th Cir. 2002).

134. *Id.* at 880-83.

135. *Id.* at 878.

136. *See* Denno, *supra* note 48, app. 1, at 170 tbl.18 (showing that states require the presence of witnesses and media witnesses).

137. *Id.* For instance, some states specifically mention that a curtain concealing the inmate will be opened or closed at certain points of the process. *See id.* app. 1, at 170 tbl.18.

138. *Cal. First Amendment Coal.*, 299 F.3d at 871.

139. *Id.* at 874; *see also* Denno, *supra* note 48, at 106 (describing the Ninth Circuit's holding in *California First Amendment Coalition* regarding the scope of the public's right to view executions as a "striking statement").

140. *Cal. First Amendment Coal.*, 299 F.3d at 870-71.

141. *Id.* at 872, 880.

142. *Id.* at 873, 886; *see also* Reno Newspapers, Inc. v. Nevada, No. 3:06-CV-00223, 2006 WL 1496612, at *4 (D. Nev. Apr. 19, 2006) (relying on *California First Amendment*

Courts, however, have recognized limitations on the right to view executions. In 1890, in dicta, the Supreme Court declined to recognize a right of the media to view executions.[143] In recent years, courts have upheld bans on recording or photographing the execution.[144] The Ninth Circuit also found that courts should give corrections administrators deference with regard to potential "ripple effect[s] on fellow inmates or on prison staff" when such effects can be shown.[145]

The three areas of law discussed in Part I—the public's right of access to judicial proceedings, the state's power to limit access to prisons, and the public's right of access to view executions—provide a framework for analyzing whether the right to know an executioner's identity exists. Such a determination requires not only the use of all three lines of analysis, but also the incorporation of Eighth Amendment standards and the intersection of these First Amendment-based rights with the Eighth Amendment.

II. DOES THE PUBLIC HAVE A RIGHT TO KNOW THE IDENTITY AND QUALIFICATIONS OF AN EXECUTIONER?

Challenges to policies concealing the identities and qualifications of executioners did not start with lethal injection.[146] As the method of execution has changed, however, concerns about the qualifications of executioners have become increasingly relevant, especially given the elaborate and complex nature of lethal injection protocols. This part examines the tension between the public's right to know and the state's ability to conceal executioner identities and qualifications in the context of lethal injection. First, this part focuses on the department of corrections' need to conceal the identities and qualifications of executioners. Second, this part highlights the competing public interests, which militate in favor of a right for the public to know the identities and qualifications of executioners.

Coalition and holding that the Division of Corrections could not restrict viewing until after technicians already had established the intravenous lines); Or. Newspaper Publishers Ass'n. v. Or. Dep't of Corr., 988 P.2d 359, 364 (Or. 1999) (invalidating on statutory grounds rules limiting access to the viewing of executions as too restrictive).

143. *See* Holden v. Minnesota, 137 U.S. 483, 491 (1890).

144. *See* Rice v. Kempker, 374 F.3d 675, 679 (8th Cir. 2004) ("Courts presented with the specific question of whether video cameras may be banned from the execution chamber have consistently held that such bans do not violate the First Amendment."); Garrett v. Estelle, 556 F.2d 1274, 1279 (5th Cir. 1977) (finding the First Amendment does not encompass the right to film an execution); Entm't Network, Inc. v. Lappin, 134 F. Supp. 2d 1002, 1017-18 (S.D. Ind. 2001) (applying the *Turner* test to deny an Internet Service Provider from broadcasting the execution of Timothy McVeigh, but allowing a closed-circuit broadcast for the numerous victims and family members); *see also* John D. Bessler, *Televised Executions and the Constitution: Recognizing a First Amendment Right of Access to State Executions*, 45 Fed. Comm. L.J. 355, 373-83 (1993).

145. *Cal. First Amendment Coal.*, 299 F.3d at 884 (internal quotation marks omitted).

146. *See supra* notes 16-20 and accompanying text.

A. *The Right to Conceal Executioner Identities*

1. Security of Correctional Facilities

Courts have given great deference to correctional facilities to promulgate policies to maintain the security of correctional institutions.[147] With regard to executions, corrections officials justify the concealment of executioner identities by arguing that an executioner's identity must remain confidential to maintain prison security, particularly because death row inmates are considered the "worst of the worst." Security concerns relating to executions, therefore, are intertwined with maintaining the heightened security of the facility.[148]

In *Bryan v. State*,[149] the Florida Supreme Court examined an exemption to public disclosure law for executioners based upon the assumption that revealing such information could endanger the security of the prison.[150] It held the exemption valid.[151] "It is mandatory that prisons function as effectively, efficiently, and as nonviolently as possible. To release the exempted information to the public or to provide inmates with the information . . . would severely impede that function and would jeopardize the health and safety of those within and outside the prison system."[152]

The Supreme Court of California recognized a legitimate need to protect the security of the correctional facility in a death penalty case in 2001.[153] In *Thompson v. Department of Corrections*, a condemned inmate wanted his personal spiritual adviser to stay with him until twenty-five minutes before his execution.[154] The California Supreme Court did not hear the case until after the man, Thomas M. Thompson, already had been executed.[155] The court nevertheless heard the challenge because of its nature as "'capable of repetition, yet evading review.'"[156] The court ruled that Thompson did not have a right to have his spiritual adviser remain by his side, in part because he could have a prison-appointed spiritual adviser, but also in part because of the need to maintain order in the correctional facility.[157] Had Thompson's spiritual adviser been permitted to stay with

147. *See supra* notes 120-25 and accompanying text.

148. *See, e.g., Entm't Network, Inc.*, 134 F. Supp. 2d at 1018 (noting that the issue of access to executions cannot be separated from the fact that execution takes place in a maximum security prison).

149. 753 So. 2d 1244 (Fla. 2000).

150. *Id.* at 1251.

151. *Id.*; *see also* Provenzano v. State, 761 So. 2d 1097 (Fla. 2000) (holding valid the exclusion of the testimony from execution team members under the exemption).

152. *Bryan*, 753 So. 2d at 1250 (citation omitted).

153. Thompson v. Dep't of Corr., 18 P.3d 1198 (Cal. 2001).

154. *Id.* at 1199.

155. *Id.* at 1200.

156. *Id.* (quoting S. Pac. Terminal Co. v. ICC, 219 U.S. 498, 515 (1911), and noting that questions like this one, which arise only just before an execution, typically do not leave ample time for review).

157. *Id.* at 1207-08.

Thompson, she would have been privy to the procedures the prison employs just prior to the execution and could learn executioner identities.[158] The court found that such a claim—that the spiritual adviser's presence could threaten the security of the correctional facility—need not be proven.[159] In applying the *Turner* test, the court emphasized that the prison official's concerns about security need only be rational.[160] The court dismissed the idea of any higher standard:

> Plaintiffs argue that defendants have not shown that permitting a spiritual adviser of choice to remain until a prisoner's departure for the execution chamber has caused security problems in other jurisdictions. But defendants need not make such a showing. [I]t does not matter whether we agree with the defendants or whether the policy in fact advances the jail's legitimate interests. *The only question that we must answer is whether the defendants' judgment was 'rational,' that is, whether the defendants might reasonably have thought that the policy would advance its interests* . . . .[161]

The court evaluated the four factors of the *Turner* test, but deference to prison officials' security concerns proved determinative.[162] The dispositive nature of the deference afforded to prison officials is a common thread among those cases where a limitation on the public's access is held valid.

2. Safety of the Executioner

Specifically, with regard to the anonymity of an executioner, several states have statutes that prohibit identifying the person.[163] Very few challenges to such policies exist. In large part, state correctional facilities justify the nondisclosure of the names of executioners on the grounds of protecting the individuals who participate in executions.[164] Legislatures also rely in part on concerns for the safety of executioners in designing the statutes that protect the executioner's identities.[165]

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158. *Id.* at 1207 (citing the declaration of the warden, which explained that "the identity of the correctional staff who comprise the execution team must be kept as confidential as possible for the security of the institution, and for the safety of the officers and their families").

159. *Id.*

160. *Id.*

161. *Id.* (citations and internal quotation marks omitted).

162. *Id.* at 1207-08.

163. *See, e.g.*, Conn. Gen. Stat. Ann. §1-210(b)(18) (West 2000) (exempting from disclosure information that would result in a threat to safety); Fla. Stat. Ann. § 945.10(1)(g) (West Supp. 2007) (exempting from the state freedom of information law "[i]nformation which identifies an executioner, or any person prescribing, preparing, compounding, dispensing, or administering a lethal injection.").

164. *See, e.g.*, *Thompson*, 18 P.3d at 1207; Bryan v. State, 753 So. 2d 1244, 1251 (Fla. 2000).

165. *See, e.g.*, 1998 Fla. Laws 76 ("The Legislature finds that the disclosure of information identifying a person administering a lethal injection for purposes of death sentence execution . . . would jeopardize the person's safety and welfare by exposing that person to potential harassment, intimidation, and harm and would constitute an unwarranted

When the Supreme Court of Florida denied the condemned inmate's challenge in *Bryan*, it also found that protecting the safety of the executioner justified the exemption.[166] The relevant statute exempted information that "would jeopardize the person's safety and welfare by exposing that person to potential harassment, intimidation, and harm."[167] The court deferred to the department's judgment that such harm would occur and that such harm would outweigh the benefit to the public that would result from revealing the identity.[168]

The same reasoning held true in *Thompson*, in which safety and security concerns combined to justify a limitation on access. In *Thompson*, the court found a need to remove non-prison officials from the facility in part to protect the identities of execution team members.[169] "Defendants' fear that members of the execution team and their families could be subject to retaliation if their identities became known to a wider circle of people, including the prison's inmates, certainly is a 'legitimate governmental interest.'"[170]

Similarly, when a newspaper reporter from *The Hartford Courant* challenged Connecticut's exemption for executioners in 2005, the Department of Corrections argued that non-disclosure was necessary to protect the safety of the executioner.[171] The department claimed that executioner identities were exempt from disclosure under the state freedom of information law because identifying execution team members could pose a safety threat to those involved.[172] As a result, the newspaper withdrew its request seeking the identities of execution team members.[173] The state Freedom of Information Commission therefore declined to reveal executioner names, but required the disclosure of documents with information identifying executioners redacted.[174]

Indeed, some anecdotal evidence shows that executioners might be harassed, although not physically threatened, if their identities are revealed. When the American Civil Liberties Union challenged the Washington

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invasion into the person's privacy. The release of this information would not benefit the public or aid it in the effective operation of government or the orderly imposition of capital punishment. Therefore, the Legislature finds that it is a public necessity that this information be kept confidential and exempt from disclosure under public records law."); *see also* Lesley Clark, *Anonymity Clause Expires in October*, Miami Herald, Mar. 7, 2003, at 5B ("'There's been a tradition of not letting the name of the executioner out, and we want to continue that tradition,' said [a state senator]. 'The job is tough enough without them being identified and possibly threatened.'"); Clark, *supra* note 38.

166. Bryan v. State, 753 So. 2d at 1251.

167. *Id.* (citing Turner v. Safley, 482 U.S. 78, 89 (1987)).

168. *Id.* at 1250-51.

169. *Thompson*, 18 P.3d at 1207.

170. *Id.*

171. Struzzi v. Conn. Dep't of Corr., No. FIC 2005-019 (Conn. Freedom of Information Comm'n May 11, 2005), *available at* http://www.state.ct.us/foi/2005FD/20050511/FIC2005-019.htm.

172. *Id.*

173. *Id.*

174. *Id.*

Department of Corrections' ability to conceal the identity and qualification of the executioner selected for the state's first hanging in twenty-four years, prison officials cited concern for the safety of the executioner.[175] In an interview with a retired hangman—conducted with the promise of anonymity—the man stated that he preferred not to have his identity revealed.[176] In the context of lethal injections, medical professionals who participate in spite of the ethics guidelines might be particularly susceptible to harassment. For instance, one doctor has filed complaints with medical licensing boards after learning the names of doctors who had participated in executions.[177] More dramatically, "one [doctor], after having to give a deposition in a court challenge to a lethal injection, came to work one day to find a sign on his clinic door that read, 'The Killer Doctor.'"[178]

3. Employing Executioners

Even if the harassment does not rise to the level of threatening the safety of execution team members, prison officials need to protect the reputation of such individuals to guarantee the willing participation of execution team members.[179] Membership on an execution team is voluntary, and team members do not necessarily receive substantial compensation.[180] Historically, the job of executioner has been shunned. For instance, in England, the stigma associated with being the hangman at times forced officials to turn to the prison population to find someone to take on the job.[181] The same proved true in colonial America, where a sheriff who

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175. *See* Japenga, *supra* note 41.

176. *Id.* ("A retired Topeka, Kan., hangman who sprang the trap on 64 men claims his job never caused him to lose even one night's sleep. But what would disturb his dreams, he said, is if people knew his name: 'We got too many idiots out here in this world. I don't want a bunch of midnight callers.'").

177. Jennifer McMenamin, *Lethal Practice: In Maryland and Across the Nation, the Role of Physicians in Executions Has Become an Issue Among Medical Professionals and in the Courts*, Balt. Sun, Oct. 22, 2006, at 1C (noting that a New York psychiatrist and clinical professor reported doctors who were publicly identified as execution participants for ethics violations).

178. *Id.*

179. *See* Cal. First Amendment Coal. v. Calderon, 88 F. Supp. 2d 1083, 1086 (N.D. Cal. 2000) (noting that prison officials contended that, in addition to safety concerns, "fear of public disclosure might deter prison personnel from participating in the executions, making it more difficult for California to carry out death sentences").

180. *See* Denno, *supra* note 48, app. 1, at 156 tbl.17; *see also* Affidavit of Terry Moore, Taylor v. Crawford, No. 05-4173-CV (W.D. Mo. July 14, 2006), *available at* http://www.law.berkeley.edu/clinics/dpclinic/Lethal%20Injection%20Documents/Missouri/Taylor/July%2014%20Filings/1983%20PR%20Doc%20No%20198%20Exh%20B%20Affidavit%20of%20Terry%20Moore%20c%20Sample%20Ltr.pdf (noting that letters to 298 anesthesiologists in the state yielded no volunteers for the execution team); Clark, *supra* note 38 (reporting that execution team members in Florida in 2000 received $150 in cash); Kohler, *supra* note 1 (reporting that the doctor who supervised executions in Missouri received a check for $2000 "a few weeks to a few months" after each execution).

181. *See* Banner, *supra* note 37, at 37; *see also* Cottrol, *supra* note 47, at 1649 ("English crowds may have attended executions in large numbers, but the professional hangman there, like executioners elsewhere in Europe, was often a pariah.").

"could find no one willing to carry out the work for money and drink . . . might induce another condemned prisoner to do the job in exchange for a reprieve."[182] When a state statute names an executioner—such as the sheriff or superintendent of prisons—the state has allowed the official to delegate the responsibility of executing the inmate to unnamed executioners.[183]

During the recent spate of litigation concerning lethal injection, some doctors who have had to testify have been identified.[184] One of the doctors identified had "The Killer Doctor" sign placed on his door.[185] After he testified, someone reported him to the state medical board for violating the American Medical Association's ethics guidelines, which he had not known he was violating.[186] Although the majority of the doctor's patients supported his participation in the executions and the state allowed him to keep his medical license, the doctor decided not to participate in any more executions.[187]

Another doctor involved in executions kept his participation hidden even from those close to him. "His wife knew about his involvement from early on, but he could not bring himself to tell his children until they were grown. He has let almost no one else know. Even his medical staff is unaware."[188] This doctor stated that he still participates in executions.[189] But as the interviewer of these doctors states in his article, "The public may like executions, but no one likes executioners."[190]

This fear that no one—not prison inmates, not death penalty opponents, not individuals potentially qualified for the job—likes executioners has driven the desire to conceal executioner identities. Such logic supports the notion that safety, security, and stigma concerns necessitate the concealment of executioner identities. Yet because courts have given substantial deference to the judgment of corrections officials on these issues, only a skeletal record supporting these reasons exists.

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182. Banner, *supra* note 37, at 37 (noting that although sheriffs did not have the power to grant the reprieves, the courts and governors, who did have such authority, cooperated with the sheriffs).

183. *See, e.g.*, North v. Chapman, 74 So. 2d 787, 789 (Fla. 1954) (holding that the statute naming the "first assistant engineer" as the executioner did not create a right to know who else participated in the execution procedure).

184. *See supra* Introduction.

185. Atul Gawande, *When Law and Ethics Collide: Why Physicians Participate in Executions*, 354 New Eng. J. Med. 1221, 1225 (2006).

186. *Id.*

187. *Id.* ("Ninety percent of his patients supported him, he said, and the state medical board upheld his license under a law that defined participation in executions as acceptable activity for a physician. But he decided that he wanted no part of the controversy anymore and quit. He still defends what he did. Had he known of the AMA's position, though, 'I never would have gotten involved,' he said.").

188. *Id.* at 1226.

189. *Id.* at 1225.

190. *Id.* at 1228.

B. *The Right to Know Executioner Identities*

1. The Exaggeration of Safety and Security Concerns

Typically, courts have deferred to the judgments of prison officials on matters of safety and security.[191] To be considered legitimate, a restriction must have a valid justification. One key factor in the Supreme Court's test articulated in *Turner v. Safley* was that security concerns justifying prison regulations must not be exaggerated.[192] In that case, Justice John Paul Stevens, referring in his dissent to restrictions on inmates receiving mail, would go so far as to require prison officials to show that they "would be unable to anticipate and avoid any security problems," even if some problems might arise.[193]

Recently, in the context of executions, courts have found that safety and security concerns are speculative.[194] In its ruling in *California First Amendment Coalition v. Woodford*, the Ninth Circuit found no reason for hiding executioners from the public's view.[195] The court did not accept the government's argument that the need to protect executioner identities necessitated restricting public access to portions of the execution.[196] The Ninth Circuit noted that "the notion of retaliation is pure speculation. No execution team member has ever been threatened or harmed by an inmate or by anyone outside the prison because of his participation in an execution."[197] In further support of the speculative nature of safety concerns, the Ninth Circuit pointed to the lack of evidence of retaliation against those more directly responsible for the death sentence, such as judges, prosecutors, and the governor.[198] "[R]etaliation is at least as likely to be directed against these decision makers as against low level execution staff."[199] Additionally, the court found that concerns over the safety of the executioner are misguided because the state cannot compel anyone to serve as an executioner.[200]

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191. *See supra* notes 119-20 and accompanying text.

192. Turner v. Safley, 482 U.S. 78, 90 (1987).

193. *Id.* at 105 (Stevens, J., dissenting).

194. *See, e.g.*, Cal. First Amendment Coal. v. Woodford, 299 F.3d 868, 880 (9th Cir. 2002).

195. *Id.*

196. *Id.* at 881.

197. *Id.* at 882.

198. *Id.* ("[A]s the district court pointed out, there are also 'many high-profile individuals whose participation in the implementation of executions is essential, including the warden, the governor and judges of the courts who reject the condemned's appeals.'").

199. *Id.*

200. *See generally* Denno, *supra* note 48, app. 1, at 156 tbl.17 (noting that some state statutes specifically refer to execution team volunteers); *see also* Cal. First Amendment Coal. v. Woodford, No. C-96-1291, 2000 WL 33173913, at *3 (N.D. Cal. July 26, 2000) (finding that "[a]lthough all staff members were informed that they would be observed by the witnesses and were afforded the opportunity to withdraw from the execution team, none refused to participate in the execution").

In *Travaglia v. Department of Corrections*,[201] a Pennsylvania inmate requested certain information about the state's lethal injection protocol and the state's previous two lethal injections under Pennsylvania's Right-to-Know Act.[202] The Pennsylvania Department of Corrections denied the inmate's requests, but the Commonwealth Court of Pennsylvania on appeal held that some of the information could be disclosed.[203] In particular, the court found that the Department of Corrections had to reveal the names of witnesses, even though the department had argued that death penalty opponents would harass witnesses and try to intimidate future witnesses.[204] The court rejected the department's argument for two reasons: first, because no one is required to witness an execution and, second, because the Department of Corrections did not claim it could offer proof of a threat by violent death penalty opponents against witnesses.[205] The court noted that the Department of Corrections' "speculation concerning the behavior of opponents of capital punishment is wholly unsupported."[206]

The court in *Travaglia* also rejected the Department's contention that the personal reputation exception to the Right-to-Know Act would protect the information from disclosure.[207] The Department argued that those individuals who witness an execution needed protection from "denunciation, ridicule and opprobrium from opponents of capital punishment," as such actions would harm the reputations of witnesses in their communities.[208] In rejecting this assertion, the court called the claims "unsupported speculation" on which an exception could not be based.[209] Rather, "[i]t is presumed that witnesses to executions are aware of the controversial nature of capital punishment."[210] This same reasoning applies to those individuals who participate in executions as members of the execution team. In fact, departments of corrections employ execution team members, and the First Amendment protects the right of citizens to criticize the actions of government officials.[211] Some states specify that volunteers comprise the pool of potential executioners.[212] And anyone taking part in the lethal injection procedure would have knowledge of the controversial nature of the job they have chosen to do.

Indeed, the actions of state and prison officials are inconsistent with the serious safety and security concerns that they claim exist. In California,

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201. 699 A.2d 1317 (Pa. Commw. Ct. 1997).
202. *Id.* at 1319-20.
203. *Id.* at 1319, 1323.
204. *Id.* at 1323.
205. *Id.*
206. *Id.* at 1323 n.5.
207. *Id.* at 1323.
208. *Id.*
209. *Id.*
210. *Id.*
211. *See, e.g.*, N.Y. Times v. Sullivan, 376 U.S. 254, 272-73 (1964). "Criticism of [government officials'] official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputations." *Id.* at 273.
212. *See* Denno, *supra* note 48, app. 1, at 156 tbl.17.

executioners participating in the state's lethal injection procedure in 2002 did not mask their identities at all.[213] Witnesses could see the execution team members for several minutes as they worked to establish intravenous access.[214] Some state statutes name the prison warden as the executioner.[215] In one instance, the state heralded the potential hiring of a new "chief executioner," which resulted in a front-page story in a major newspaper.[216] The newspaper article named—and quoted—the chief executioner.[217] Ironically, the names of the members of the execution team were kept confidential.[218]

At times, execution team members have revealed themselves.[219] Carlo Musso, who worked on the execution team in the state of Georgia, said he chose to reveal his identity because he was not ashamed of his role in the executions.[220]

> Unlike most other physicians who participate in U.S. executions, Musso [chose] not to hide his identity—even after anti-execution activists sought to have his predecessor's medical license revoked. He said he has exposed himself to criticism from death-penalty foes, but that he has also received letters from medical students commending his bravery.[221]

Criticism of participation in a known controversial action does not rise to the level of endangering the individual's safety. Therefore, it cannot serve as justification for keeping information from the public.

2. Public Scrutiny of Capital Punishment

In its *Richmond Newspapers* decision, the Supreme Court found that "the First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw."[222] Such logic,

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213. *See* Cal. First Amendment Coal. v. Woodford, 299 F.3d 868, 882 (9th Cir. 2002).

214. *See id.* at 871; Cal. First Amendment Coal. v. Woodford, No. C-96-1291, 2000 WL 33173913, at *3 (N.D. Cal. July 26, 2000) ("[W]hile this court's injunction (allowing the public to view the entire procedure) was in effect, no attempt was made to conceal the identities of the execution team members.").

215. *See generally* Denno, *supra* note 48, app. 1, at 156 tbl.17.

216. Michael James, *Chief Executioner Chosen for Thanos*, Balt. Sun, Apr. 22, 1994, at 1A.

217. *Id.* (stating that the named executioner would be in charge of the execution team comprising correctional employees who would conduct the actual execution).

218. *Id.*

219. *See, e.g.*, Bessler, *supra* note 38, at 151 (noting that Louisiana officials dismissed an executioner who gave television interviews and who was profiled in a magazine).

220. Jeremy Kohler, *Diagnosis: Death*, St. Louis Post-Dispatch, Aug. 13, 2006, at B1 ("'When it comes to your profession, either you don't try to hide what you do or you choose not to do it,' [Carlo Musso] said. 'I've made my choice to speak out about my participation and to get involved in the debate over the ethical and moral choices we make.'").

221. *Id.*

222. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 575-76 (1980) (quoting First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 783 (1978)); *see also* Cass R. Sunstein, *Government Control of Information*, 74 Cal. L. Rev. 889, 896-97 (1986) (describing as

when applied in the context of lethal injection, leads to a right of access to the identities and qualifications of executioners. In *Procunier*, the Court upheld the access restriction in part because it was not an attempt to conceal prison conditions or impede the press's efforts to investigate and report on those conditions.[223] Not only do no alternative means of evaluating the qualifications of executioners exist, but maintaining the confidentiality of executioner identities also serves to conceal their qualifications and thus frustrates the press's investigation of executioners.[224]

a. *The Intersection of the First and Eighth Amendments*

Justice Thurgood Marshall, dissenting from the majority opinion in *Gregg v. Georgia*,[225] which resulted in the resurgence of the death penalty, emphasized that the constitutionality of the death penalty depends "on the opinion of an informed citizenry."[226] In the context of executions, courts have recognized the interplay between First Amendment and Eighth Amendment rights.[227] As important as it is for the inmates to know the qualifications of their executioners, it is equally important for the public to have access to this information. The Ninth Circuit, in *California First Amendment Coalition*, articulated a significant reason for revealing the identity of executioners: "Independent public scrutiny—made possible by the public and media witnesses to an execution—plays a significant role in the proper functioning of capital punishment."[228] Courts have recognized the "watchdog" role that the press plays, particularly in relation to the death

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advantageous the disclosure of government information because it results in citizen deliberation, provides a check on government, and serves as a deterrent for illegitimate motives).

223. *See* Pell v. Procunier, 417 U.S. 817, 830 (1974); *see also* Leonard G. Leverson, *Constitutional Limits on the Power to Restrict Access to Prisons: An Historical Re-Examination*, 18 Harv. C.R.-C.L. L. Rev. 409, 455 (1983) (concluding that official examinations of prisons proved inadequate to protect against abuses, but that prison access granted to the public and press resulted in the uncovering of abuses and attempts to correct them).

224. *See* Cal. First Amendment Coal. v. Woodford, No. C-96-1291, 2000 WL 33173913, at *8 (N.D. Cal. July 26, 2000) (noting that the regulation restricting the viewing of the procedure was adopted in part to limit what witnesses could see and that no alternative means of obtaining such information exists).

225. 428 U.S. 153, 231 (1976) (Marshall, J., dissenting).

226. *Id.* at 232. Marshall also noted that "the opinions of an informed public would differ significantly from those of a public unaware of the consequences and effects of the death penalty." *Id.*

227. *See id.* at 231-32; *see also Cal. First Amendment Coal.*, 2000 WL 33173913, at *7-8 (pointing out that "death is different" and that the only nongovernment witness to the proceeding who could tell of abuses during execution is the condemned inmate, who obviously cannot communicate any abuses after he is executed); Bessler, *supra* note 144, at 418-19 (noting that the two amendments do not complement each other on the face, but that the Supreme Court's standard for determining what constitutes cruel and unusual punishment requires an informed public).

228. Cal. First Amendment Coal. v. Woodford, 299 F.3d 868, 876 (9th Cir. 2002).

penalty, as "a prison official's perception of the execution process may be vastly different—and markedly less critical—than that of the public."[229]

The Supreme Court in *Louisiana ex rel. Francis v. Resweber*[230] articulated that the "infliction of unnecessary pain in the execution of the death sentence" would violate the Eighth Amendment's ban on cruel and unusual punishment.[231] Courts determine the constitutionality of a method of execution and capital punishment itself from "'the evolving standards of decency which mark the progress of a maturing society.'"[232] Because the public plays a role in determining the constitutionality of a particular method of execution, the public must have all the facts available to it on which to base a conclusion.[233] Recent challenges to lethal injection have questioned its constitutionality based on who prepares the injection, establishes intravenous access, monitors the inmate, and injects the chemicals, as well as the qualifications of those individuals.[234] For the public to assess whether such procedures violate the evolving standards of decency, the public must have the knowledge necessary to make that determination.[235]

Although history indicates that executioner identities have been closely guarded, that was not always the case. Ironically, as executioner qualifications became more pertinent, the identities became increasingly confidential.[236] In part, this resulted from the named executioner's increasing delegation of responsibility.[237] The level of expertise required for lethal injections is high, as "[t]here [is] no dispute that if an inmate is not sufficiently anesthetized when the potassium chloride is administered, it will cause excruciating pain . . . . The inmate, however, would be unable to show that he was experiencing discomfort due to the paralyzing effects of the pancuronium bromide."[238] In a protective order issued by the U.S.

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229. *Id.* at 884.

230. 329 U.S. 459 (1947).

231. *Id.* at 463.

232. *Cal. First Amendment Coal.*, 299 F.3d at 876 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).

233. *See id.* ("To determine whether lethal injection executions are fairly and humanely administered, or whether they ever can be, citizens must have reliable information about the 'initial procedures,' which are invasive, possibly painful and may give rise to serious complications.").

234. *See supra* note 36 and accompanying text.

235. *See Cal. First Amendment Coal.*, 299 F.3d at 876; *see also* Cal. First Amendment Coal. v. Woodford, No. C-96-1291, 2000 WL 33173913, at *9 (N.D. Cal. July 26, 2000) ("If there are serious difficulties in administering lethal injections, society may cease to view it as an acceptable means of execution . . . .").

236. Florida, for example, has revised the executioner exemption to its public disclosure law, codified in Fla. Stat. Ann. § 945.10 (West Supp. 2007), three times: in 1998, 2000, and 2003. *See* 1998 Fla. Laws 76; 2000 Fla. Laws 1; 2003 Fla. Laws 2810.

237. *See* North v. Chapman, 74 So. 2d 787, 789 (Fla. 1954) (holding that the identities of those individuals to whom the named executioner delegated responsibility need not be revealed).

238. Taylor v. Crawford, No. 05-4173-CV, 2006 WL 1779035, at *3 (W.D. Mo. June 26, 2006).

District Court for the Northern District of California in the *Morales* litigation, the court recognized this link between the competence of executioners and the constitutionality of lethal injection:

> The issue in the present action is not, as argued by Defendants, "merely . . . the narrow question of whether the combination of drugs used by California in a lethal injection results in the infliction of cruel and unusual pain." Indeed, it is undisputed that the combination of drugs used by Defendants should *not* cause such pain if properly administered. However, the Court has found that the records of recent executions raise substantial questions as to whether the drugs are in fact being administered properly. Under these circumstances, Plaintiff must be given a reasonable opportunity, in a manner that will not jeopardize the safety of prison personnel, to explore possible answers to these substantial questions, including answers that relate to the background, training, and experience of the members of the execution team.[239]

While the court found it necessary to evaluate executioner qualifications to determine the constitutionality of the lethal injection process, the parties in the case initially tried to conceal some of this pertinent information from the public.[240] Yet, it is the public's job to set the standard by which courts analyze what constitutes cruel and unusual punishment.

b. *The Stark Consequences of Unqualified Executioners*

Court cases and media reports indicate that a significant number of noticeably botched executions have occurred since the implementation of lethal injection.[241] Botched executions might be the result of executioner error or lack of qualifications, as opposed to an uncontrollable risk.[242] For instance, in *Oken v. Sizer*,[243] the district court of Maryland characterized

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239. Protective Order, Morales v. Woodford, Nos. C 06 219, C 06 926 (N.D. Cal. Apr. 3, 2006) (omission in original) (quoting the defendants' arguments).

240. *See generally* Joint Pre-Hearing Conference Statement, *Morales*, Nos. C 06 219, C 06 926, *available at* http://www.law.berkeley.edu/clinics/dpclinic/Lethal%20Injection%20Documents/California/Morales/Morales%20Dist%20Ct/2006.09.03%20joint%20prehearing%20statement.pdf. The parties filed two pre-hearing conference statements, restoring redacted information regarding executioner qualifications in the second filing. *Compare id.*, *with* Amended Joint Pre-Hearing Conference Statement, Morales, Nos. 06 219, C 06 926, *available at* http://www.law.berkeley.edu/clinics/dpclinic/Lethal%20Injection%20Documents/California/Morales/Morales%20Dist%20Ct/2006.09.15%20refiled%20joint%20prehearing%20stmt.pdf.

241. *See, e.g.*, Fagan, *supra* note 31 (noting that the condemned inmate questioned whether the execution team member knew how to insert an IV when it took eleven minutes to establish an IV line); Human Rights Watch, *supra* note 26, at 46-50 (referencing a list of thirty-six botched lethal injections from 1982 to 2003 and describing a number of them); Liptak, *supra* note 29 (describing how it took more than twenty minutes to establish an IV line, how the condemned inmate raised his head off the gurney and said "It's not working," and how the execution lasted ninety minutes).

242. *See* Fagan, *supra* note 31; Liptak, *supra* note 29.

243. 321 F. Supp. 2d 658 (D. Md. 2004).

Steven Howard Oken's civil rights challenge as whether the state's lethal injection protocol,

> allegedly designed to prevent the barbiturate from leaking all over the death chamber floor, as occurred during the last lethal injection administered in the State, establishe[d] an Eighth Amendment violation in that an unreasonable risk exists that Oken's executioners lack the requisite proficiency in establishing and maintaining an IV line capable of introducing all the barbiturate necessary to successfully produce his unconsciousness and that his executioners are deliberately indifferent to this critical requirement.[244]

During the *Oken* litigation, the Division of Correction conceded that in Maryland's last execution, six years earlier, "the IV in fact was maladministered and dripped."[245]

Current litigation raises the same concern about executioner qualifications. In Maryland, this time in *Evans v. Saar*, expert witnesses criticized the qualifications of the individuals administering the lethal injection.[246] Experts have given similar testimony in lethal injection challenges around the country.[247] Notably, the expert in the *Morales* case, who became intimately familiar with the specific details of execution team members' qualifications, including any details that might not have been revealed to the public,[248] filed a post-trial declaration stating that the California Department of Corrections had "performed no meaningful screening of execution team members" and noting that "at least two former team leaders have medical conditions or problematic histories that lead [him] to question the wisdom of placing them on the execution team."[249] The expert, who has testified in several other such lethal injection challenges and spent hundreds of hours researching the procedure,[250]

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244. *Id.* at 659-660 (quoting the complaint).

245. *Id.* at 667 n.7.

246. *See* McMenamin, *supra* note 177 ("Expert medical witnesses testifying for Evans have characterized the nursing assistant and her execution team colleagues as unqualified and poorly trained for the jobs they carry out on execution nights. The pair of physicians criticized execution team members' understanding of intravenous systems and of signs that an inmate being put to death might be conscious, and one doctor concluded that some don't even comprehend their individual responsibilities.").

247. *See, e.g.*, Testimony of Dr. Mark Heath at 492, Morales v. Tilton, C 06 0219 (N.D. Cal. Sept. 27, 2006), *available at* http://www.law.berkeley.edu/clinics/dpclinic/Lethal%20Injection%20Documents/California/Morales/Morales%20Dist%20Ct/Evidentiary%20Hearing/2006.09.27%20Morales%20Evidentiary%20Hearing.txt (testifying that execution team members in California were not qualified to monitor anesthetic depth).

248. Protective Order, *supra* note 239.

249. Post-Trial Declaration of Dr. Mark Heath at 2, Morales v. Tilton, Nos. C 06 219, C 06 926 (N.D. Cal. Nov. 9, 2006), 2006 WL 3761222, *available at* http://www.law.berkeley.edu/clinics/dpclinic/Lethal%20Injection%20Documents/California/Morales/Morales%20Dist%20Ct/November%20filing/Heath%20Post-Trial%20Decl.pdf.

250. Declaration of Dr. Mark Heath at 2, Morales v. Hickman, No. C 06 0219 (N.D. Cal. Jan. 12, 2006), *available at* http://www.law.berkeley.edu/clinics/dpclinic/Lethal%20Injection%20Documents/California/

emphasized that the lack of adequate screening of executioners is not unique to California.[251] He noted that Missouri also had failed to ensure that the executioner was qualified to perform the job.[252] "Both institutions have been willing to place on their execution teams people who are willing to remain ignorant of how the procedure works, or who are willing to deviate from the protocol in fundamental ways."[253]

In California, evidence of such clear disregard for the qualifications of executioners resulted, in part, in the court's declaring lethal injection in the state unconstitutional.[254] The judge cited five "critical deficiencies" with the state's lethal injection protocol, all of which related in some way to the state's selection of executioners and the asserted interest in keeping the identities confidential.[255] First, the judge found that the Department of Corrections used "[i]nconsistent and unreliable" methods to screen executioners.[256] The court noted that the department had disciplined one execution team member for smuggling illegal drugs into the prison facility, and another prison guard who headed up the execution team had been diagnosed with posttraumatic stress disorder.[257] As the expert witness pointed out, "clearly, asking someone if they would be willing to serve on the execution team, without more, does not come close to constituting effective screening."[258] Additionally, the court cited the executioners' "[i]nconsistent and unreliable record-keeping," "[i]mproper mixing, preparation, and administration" of the lethal drugs, and inadequate lighting (which the state had argued was necessary to conceal executioner identities) as contributing to the unconstitutionality of the protocol.[259]

3. Executioner Testimony in Lethal Injection Litigation

While courts have declined to recognize a right to know the identity of an executioner as discussed in the earlier portions of this Note, the standard for concealing the identity changes when execution team members testify in litigation. Even if the department of corrections can conceal the identities of executioners on a day-to-day basis, the standard used to evaluate such anonymity changes when execution team members become witnesses in litigation challenging a lethal injection protocol: Any limit on the public's ability to know the identity of the witness and hear the testimony—or any restriction on court records—must be narrowly tailored to serve a

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Morales/Morales%20Dist%20Ct.Cp/Ex%20C%20to%20TRO%20Motion%20(Heath%20Decl).pdf.

251. Post-Trial Declaration of Dr. Mark Heath, *supra* note 249, at 2-3.

252. *Id.*

253. *Id.* at 3.

254. Morales v. Tilton, Nos. C 06 219, C 06 926, 2006 WL 3699493, at *6 (N.D. Cal. Dec. 15, 2006).

255. *Id.* at *6-7.

256. *Id.* at *6.

257. *Id.*

258. Post-Trial Declaration of Dr. Mark Heath, *supra* note 249, at 4.

259. *Morales*, 2006 WL 3699493, at *6 (emphasis omitted).

compelling interest.[260] Because the public has a presumptive right of access, there must exist no less restrictive way to serve that interest.[261] As such, courts recently have found alternatives to courtroom closure that accommodate the right of the public to hear the testimony of an executioner, for instance, by using a closed-circuit audio feed.[262]

Specifically, courts have recognized the public's right to know the qualifications of the executioner even if the identity must remain confidential. In several recent cases involving challenges to lethal injections, newspapers have challenged protective orders seeking to exclude the public from the courtroom during the testimony of executioners.[263] Newspapers sought alternatives to court closure to gain access to the testimony of the execution team members.[264] In *Evans v. Saar*, *The Baltimore Sun* challenged the closure of the courtroom during the testimony of execution team members.[265] The judge ordered a live audio feed of the witness's testimony into another room so the public could hear the testimony without revealing the witness's identity.[266]

In *Morales*, newspaper intervenors sought access to information redacted from a joint statement of facts filed in the case.[267] "Even if a party to this action could have justified sealing *any* records—and no such showing has

260. *See* Press Enter. Co. v. Superior Court, 464 U.S. 501, 509-10 (1984).

261. *Id.* at 510.

262. Jennifer McMenamin, *Uncertainty on Execution Team: 2 Members Testify in Evans Suit They're Unsure of Some Procedures*, Balt. Sun, Sept. 21, 2006, at 1B (describing how the audio from live testimony was piped into another courtroom).

263. *See, e.g.*, Notice of Motion and Motion of Non-Party Press Org. L.A. Times Commc'ns, LLC, S.F. Chron. and McClatchy Newspapers, Inc, for Leave to Intervene and to Unseal Records; Opposition to Closure or Relocation of Hearing, Morales v. Woodford, C 06 219, C 06 926 (N.D. Cal. Sept. 13, 2006) [hereinafter Motion of Press Intervenors]; Letter from Karen Kaiser, Senior Counsel, Tribune Co., to Hon. Benson E. Legg, U.S. District Judge, District of Md. (Sept. 15, 2006) (on file with the Fordham Law Review).

264. *See, e.g.*, Letter from Karen Kaiser to Judge Benson Legg, *supra* note 263. The letter sought access for a *Baltimore Sun* reporter to hear the testimony during the case of *Evans v. Saar* of individuals who participated in previous lethal injections, stating,

> The Sun respectfully submits that its right of access here requires the consideration of less restrictive means than closing off the courtroom during the testimony of these witnesses. The Sun respectfully requests that the testimony of the witnesses be held in open court, and that other means be employed to prevent disclosure of their identities. Such other methods could include the use of a disguise, or allowing for testimony from behind a darkened screen. Such methods are often used in cases of confidential informants, and would provide a less restrictive method of achieving the intended result, than closing off the public's access to the proceedings altogether. Alternatively, should the Court determine that a closed courtroom is the most appropriate means of preventing the disclosure of their identities, The Sun respectfully requests that it be provided with a live audio feed of the testimony, so that it can report on this case.

Id.; *see also* Motion of Press Intervenors, *supra* note 263.

265. *See* Letter from Karen Kaiser to Judge Benson Legg, *supra* note 263.

266. *See* McMenamin, *supra* note 262 ("With the courtroom closed, its windows covered with white paper and the voices of the people inside being piped into a room four floors below, two members of Maryland's execution team testified yesterday in federal court about their understanding of the lethal injection procedures they carry out.").

267. *See* Motion of Press Intervenors, *supra* note 263, at 10.

been made—the sealing in this case is overbroad .... Even assuming, arguendo, that specific identifying information could be redacted ... the sealing of several pages of the [document] does not meet the 'narrowly tailored' requirement."[268] The judge already had recognized the importance of revealing the qualifications of execution team members in relation to botched executions.[269] In an order issued to protect any identifying information of executioners, the judge permitted the investigation of execution team members because of questions about whether they could perform lethal injections properly.[270] As such, the *Morales* court held that the plaintiffs and press were entitled to all information about execution team members except

> the name, address, date and place of birth, Social Security number, rank, job description (to the extent that it is not directly related to being a member of the execution team), race, color, religion, ethnicity, sex, age, sexual orientation, gender, physical description, and any other identifying information of any member of the execution team.[271]

Because the restriction on the information available to the public must be the least restrictive method capable of serving the compelling interest, the judge attempted to protect the execution team members' identities while allowing public access to the information on executioner qualifications.[272]

Giving such deference to speculative safety concerns, however, still withholds too much information from the public. Supreme Court precedent indicates courtroom closure must be justified by specific facts.[273] A statute requiring a blanket closure violates the public's presumptive First Amendment right of access, even in sensitive areas such as the testimony of minor rape victims.[274] Restricting access to executioner testimony in such a way therefore gives voluntary, government-paid executioners more protection than victims of rape under the age of eighteen, whose testimony the Supreme Court has held must be open to the public unless specific, proven facts justify closure.[275] As the newspaper intervenors in *Morales* noted, "If trials are not automatically closed during the testimony of minor sex offense victims, then surely the testimony of current or former members of the execution team—presumably made of sterner stuff—can take place in a public courtroom."[276] Given that the public has a heightened interest in hearing the testimony of executioners because of society's role in evaluating the death penalty, such significant testimony should be subject to

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268. *Id.*
269. *See* Protective Order, *supra* note 239.
270. *Id.*; *see also supra* note 239 and accompanying text.
271. Protective Order, *supra* note 239.
272. *See, e.g.*, *Ex-Execution Official Testifies about Injection*, Balt. Sun, Oct. 13, 2006, at 4B (noting that the courtroom was closed during the testimony of the lead executioner, who was referred to as "Mr. Z.").
273. *See supra* note 99 and accompanying text.
274. Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606-10 (1982).
275. *Id.* at 610.
276. *Motion of Press Intervenors*, *supra* note 263, at 11-12.

public scrutiny. The information revealed by such testimony has served only to underscore the importance of hearing it.

III. THE PUBLIC'S NEED TO KNOW THE IDENTITY OF THE EXECUTIONER OUTWEIGHS THE REASONS FOR CONCEALING EXECUTIONER IDENTITIES

After the *St. Louis Post-Dispatch* revealed the identity of the execution doctor discussed in the Introduction of this Note, the newspaper started a blog[277] for readers to respond to the story.[278] Much of the conversation focused on the legitimacy of the death penalty itself.[279] Some posters questioned the newspaper's motivations for printing the story.[280] For instance, one reader wrote that "[t]he attempt here is to disgrace this guy when in fact he is doing a great service to society by ridding it of the filth that blemishes the role of mankind."[281] But some readers who posted a message on the blog applauded the newspaper's effort:

> Well, at least now we know why the state went to such lengths to hide this man's identity. He is a public employee and the public has a right to know who he is, what his credentials are, and how much he is paid. Period. If you don't want the public to know that information, then you don't take a government job. It now looks like the state was covering up the ugliness of the doc's past. The significant professional problems he has had are important because it stresses the fact that a skilled and successful doctor would not have anything to do with executions. Pretending that executions are sane, humane, or rationale [sic] does not fly when looking at the actual facts. The unhinged response to this and other articles highlights the lack of rationality involved.[282]

Rather than responding with violent retaliation against the execution doctor, readers expressed either sympathy for his plight or understanding for the gravity of the situation. The information allowed broader public scrutiny of the death penalty as a whole.

This part advocates the revealing of executioner identities and qualifications based on the public's First Amendment right of access. Part III.A argues that both executioner qualifications and executioner identities

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277. The *St. Louis Post-Dispatch* blog allowed readers to post comments on an online discussion board.

278. Missouri's Execution Doctor Unmasked: What's Your Reaction?, http://www.stltoday.com/blogs/news-talk-of-the-day/2006/07/missouris-execution-doctor-unmasked-whats-your-reaction/all-comments/#comments, (last visited Feb. 20, 2007).

279. *Id.*

280. *Id.*

281. Posting of The Avenger to http://www.stltoday.com/blogs/news-talk-of-the-day/2006/07/missouris-execution-doctor-unmasked-whats-your-reaction/all-comments/#comments (July 30, 2006, 08:17 CST).

282. Posting of tony to http://www.stltoday.com/blogs/news-talk-of-the-day/2006/07/missouris-execution-doctor-unmasked-whats-your-reaction/all-comments/#comments (Aug. 1, 2006, 13:46 CST). The article elicited ninety-seven comments on the weblog during the month following the article, with only a few relating to the revelation of the doctor's identity and most relating to feelings on capital punishment in general.

should be revealed. Part III.B argues that, at the very least, executioner qualifications need be revealed. While both positions address the same concerns, disclosing executioner identities in addition to qualifications allows for independent investigation.

A. *Executioner Identities and Qualifications Should Be Revealed*

1. Disclosing the Identity Allows for Independent Public Scrutiny of Executioner Qualifications

Because the public must serve as a check on the system and force the state to take responsibility for the level of skill possessed by execution team members, the public needs to know the identities of the executioners. Revealing the qualifications of executioners but not their identities thwarts attempts to further investigate such individuals. States have entirely shirked the responsibility to employ a qualified executioner, thereby emphasizing the importance of independent public investigation.

States typically do not publicize any requirements for execution team members.[283] Florida, for instance, showed concern for the qualifications of executioners only after an obviously botched execution caused the governor to take action in December 2006.[284] The report that resulted from the inquiry into execution practices in Florida, published in March 2007, found execution team members did not have the requisite training to perform a lethal injection.[285] The report stated, however, that the obligation to conceal executioner identities had hampered the investigation.[286]

In Missouri, the Attorney General's Office, which fought to keep the doctor's identity a secret, also oversaw the earlier disciplinary measures taken against the doctor.[287] Similarly, in California, the Department of Corrections attempted to conceal embarrassing details about execution team members' capacities to serve on the team.[288] Even when states have known about the disastrous consequences that unskilled execution team members can cause, they have refused to correct the problem. In Maryland, for instance, the state admitted that execution team members had maladministered the lethal cocktail, but the testimony of execution team members six years later revealed their incompetence.[289] The state

283. *See supra* notes 62-64 and accompanying text.

284. *See supra* note 32 and accompanying text.

285. *See* Governor's Comm'n on Admin. of Lethal Injection, Final Report with Findings and Recommendations 8 (2007) (noting also that the intravenous access was "improperly maintained and administered"). The report recommended the implementation of a screening process to ensure execution team members "are suitably qualified and trained." *Id.* at 9.

286. *Id.* at 5 (noting that "the executioners' desire for anonymity under Florida Statutes and a number of medical personnel requests to maintain their anonymity" further complicated the inquiry).

287. *See* Kohler, *supra* note 1.

288. *See infra* notes 313-19 and accompanying text.

289. *See supra* note 245 and accompanying text.

apparently had made no effort to address the issue. As the Ninth Circuit stated in finding a right for witnesses to view the entire execution process, "Prison officials simply do not have the same incentives to describe fully the potential shortcomings of lethal injection executions."[290]

Even in the face of litigation, corrections officials will not release the names and qualifications of executioners. In both California and Missouri, the state attempted to hide behind safety concerns. In Missouri, for instance, the Department of Corrections argued that Dr. Doe's identity needed to remain confidential because revealing his identity would jeopardize prison security and the doctor's personal safety.[291] That case initially centered on the Department of Corrections' refusal to reveal any information about the executioners.[292] Only when the magistrate judge instituted a protective order did the department release some relevant information.[293] Still, the constraints of the judicial system nearly failed to bring to light the executioner doctor's shortcomings when time constraints initially prevented him from testifying.[294]

Making executioner identities and qualifications subject to scrutiny would provide an incentive for prison officials to screen adequately potential executioners. The information revealed when executioner qualifications have been disclosed has been startling. Preventing the public and press from knowing who the executioner is prevents them from doing a background check—e.g., from checking for lawsuits filed against the individual, from checking the individual's education and credentials, and from checking the individual's level of experience.[295] "The death penalty more than anything else must be subject to public scrutiny: 'The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is done in a corner or in any covert manner.'"[296] Therefore, the public—with the press acting as its surrogate—must serve as a check on the government to ensure that execution team members have the requisite skills and experience for the position.

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290. Cal. First Amendment Coal. v. Woodford, 299 F.3d 868, 884 (9th Cir. 2002).

291. Defendants' Motion to Apply Oct. 31, 2005, Protective Order to Deposition of John Doe I at 1, Taylor v. Crawford, No. 05-4173-CV (W.D. Mo. June 2, 2006) ("Any such disclosure could adversely impact both security at Missouri prisons and the security and privacy interests of John Doe I. If the identity of John Doe I is disclosed, this could well lead to him/her being targeted for harassment or even physical retaliation by offenders, their families, their friends, or others opposed to the death penalty.").

292. Taylor v. Crawford, 445 F.3d 1095, 1097 (8th Cir. 2006).

293. *Id.* "[T]he State objected to certain interrogatories that sought the identity of the doctor and nurse who had attended previous executions. [The judge] issued a protective order requiring the State to provide . . . the qualifications of any medical personnel who have participated in executions, without disclosing their identities or any confidential information." *Id.*

294. *See supra* note 7 and accompanying text.

295. *See supra* notes 1-5 and accompanying text.

296. Motion of Press Intervenors, *supra* note 263, at 12 (quoting Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 571 (1980)).

At the same time, revealing the executioner's identity and not simply the qualifications is warranted simply because arguments in favor of continuing to conceal the identities of executioners fail. Concerns for the safety of execution team members are speculative and exaggerated.[297] The position of executioner is voluntary, meaning that those individuals who do not want the controversial job need not take it.[298] The absence of a compelling justification for concealing executioner identities weighs in favor of disclosing execution team member identities, particularly given the strong arguments supporting such disclosure.

2. Public Scrutiny Would Lead to More Precautions in Selecting Executioners, Decreasing the Possibility of Botched Executions and Increasing the Humaneness of Lethal Injection

Courts have found, and media reports document, that relying on unqualified executioners can result—and has resulted—in botched executions.[299] Judges in both Missouri and California have relied on information about unqualified executioners to hold the states' lethal injection protocols unconstitutional.[300] The public should be allowed to investigate the link between executioner qualifications and botched executions. Even the man who conceived the first lethal injection protocol assumed that the executioners would be qualified.[301] He stated, "The question [of the drugs] being administered properly, that never came up in my mind. I never knew we would have complete idiots injecting these drugs. Which we seem to have."[302]

The Ninth Circuit in *California First Amendment Coalition* found that the press provided the best venue for gathering the information needed to determine whether executioners "fairly and humanely administered" the lethal injection.[303] In the Missouri case, the *St. Louis Post-Dispatch* uncovered the identity of the doctor involved in the state's lethal injection

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297. *See generally* Part II.B.1.

298. *See supra* note 212 and accompanying text.

299. *See supra* Part II.B.2.b.; *see also* Denno, *supra* note 48, at 66 ("Of course, the media is allowed, if not required, to record whether the execution process is humane . . . .").

300. *See* District Court Order Rejecting State's Revised Protocol at 3, Taylor v. Crawford, No. 05-4173-CV (W.D. Mo. Sept. 12, 2006), *available at* http://www.law.berkeley.edu/clinics/dpclinic/Lethal%20Injection%20Documents/Missouri/Taylor/2006.09.12%20order.pdf ("The State's proposed use of 'medical personnel' is rejected to the extent they propose the use of paramedics and/or emergency medical technicians. However, the supervising physician previously referred to may employ medical personnel whom he or she believes are necessary to assist the physician . . . . The State shall select a physician who is in good standing with their State's licensing board. The physician selected shall not have any disciplinary action taken against them by their State's licensing authority.").

301. Human Rights Watch, *supra* note 26, at 14, 33.

302. *Id.* at 31.

303. Cal. First Amendment Coal. v. Woodford, 299 F.3d 868, 876 (9th Cir. 2002) ("This information is best gathered first-hand or from the media, which serves as the public's surrogate.").

execution when a condemned inmate challenged the execution process.[304] That article revealed that the doctor had more than twenty malpractice suits filed against him and that two hospitals had banned him from practicing there.[305] But this doctor had supervised fifty-four lethal injections before the judge banned him from participating in executions.[306] As the Missouri case demonstrates, merely stating an executioner's education and experience—the doctor now banned from participating in executions *was*, after all, a doctor—provides an inadequate measure of the person's competency to perform the requisite tasks.

In fact, the priority given to concealing the identities of executioners makes it less likely the execution will proceed seamlessly. In California, the execution room is dimmed to make sure the executioners are not identifiable.[307] In Missouri, the execution team members who inject the drugs must do so by flashlight.[308] Favoring the hiding of executioner identities over the safety of the procedure increases the risk that execution team members will not be able to see what they are doing or properly monitor the inmate.[309] Such problems with execution protocols would decrease if executioner identities were revealed, as there would be no need to conceal the physical appearance of team members.

B. *Alternatively, If Proven Justifications for Concealing Executioner Identities Exist, the Specific Qualifications of Executioners Should Be Revealed*

Some states have revealed vague information about the qualifications of the execution team members.[310] In the event that courts and legislatures continue to defer to arguments about the safety of the executioner, states should disclose execution team members' specific qualifications. That way, the state still will need to take additional precautions in selecting executioners to show the public that the person is qualified. Even this limited information will better enable the public to judge whether the implementation of lethal injection violates public scruples.

In Connecticut, a Freedom of Information Commission decision resulted in access to the redacted versions of documents relating to the lethal injection procedure without revealing the names or identifying information of the executioners.[311] Such a ruling fits with the *Turner* analysis, because

304. *See* Kohler, *supra* note 1.

305. *Id.*

306. *See supra* note 4, 9 and accompanying text.

307. *See supra* note 259 and accompanying text.

308. Taylor v. Crawford, No. 05-4173-CV, 2006 WL 1779035, at *5 (W.D. Mo. June 26, 2006) ("John Doe I stated that ' . . . the people who do the injections are nonmedical and they're in the dark so they have a small flashlight . . . .'").

309. *See id.*; *see also supra* note 259 and accompanying text.

310. Human Rights Watch, *supra* note 26, at 34 (noting that Pennsylvania, Colorado, and Georgia use Emergency Medical Technicians (EMTs), Ohio uses an EMT and phlebotomist, Tennessee uses two paramedics to insert the IVs, and Oklahoma uses a phlebotomist).

311. *See supra* notes 171-74 and accompanying text.

the public's right to know is accommodated at de minimis cost.[312] The judge in the *Morales* case in the Northern District of California took a similar approach. First, the judge allowed all information released except specifically identifying information such as name, age, and race.[313] Then, when the two sides in that case filed a joint pre-hearing conference statement, the parties redacted information about execution team members.[314] Certain points were entirely blacked out.[315] A brief filed on behalf of newspaper intervenors argued that "to the extent redactions are based upon an asserted need to keep from the public information about the background, training and experience of execution team personnel, the proposed sealing sweeps too broadly."[316] Indeed, "[i]f the possible disclosure of top-secret military plans does not justify secrecy, then the background, qualifications and experience of execution team members—matters of great public interest going to the substantial questions at the heart of this case—should not be sealed either."[317] Because of the resulting order, the parties refiled the document twelve days after the newspapers moved to have the information unredacted.[318] The unredacted document revealed disciplinary proceedings against one execution team member who had brought narcotics into the correctional facility.[319] Another execution team member had a drunk driving conviction.[320] Yet another—the team member in charge of mixing the sodium thiopental—took medication for clinical depression.[321] The court, however, allowed some information to remain redacted, information that likely would have more specifically identified the execution team member and fallen within the bounds of the protective order.[322]

Such an approach would adequately protect the identities of executioners while giving the public some of the information it needs to know to evaluate the individual's qualifications. Because the names would not be revealed, execution team members would not have to worry for their safety.[323] Concerns about the security of correctional institutions also would be allayed, as the execution team members inside the facility still

312. *See supra* note 128 and accompanying text.

313. *See supra* notes 269-70 and accompanying text.

314. Joint Pre-Hearing Conference Statement, *supra* note 240.

315. *Id.* at 2-6, 17.

316. Motion of Press Intervenors, *supra* note 263, at 3. "While the press does not object to keeping the actual identity of certain execution team personnel confidential, the press strongly objects to sealing or redacting information about team members' background, training, and experience, etc., as those matters . . . [are] vital to public scrutiny of the parties' contentions." *Id.* at 3 n.2.

317. *Id.* at 9.

318. Amended Joint Pre-Hearing Conference Statement, *supra* note 240.

319. *Id.* at 3.

320. *Id.* at 4.

321. *Id.* at 5.

322. *See id.* at 6, 12, 16-17; Protective Order, *supra* note 239; *see also* note 269 and accompanying text.

323. *See supra* Part II.A.2.

would be nameless and faceless.[324] Department of corrections officials would not have any additional difficulty finding individuals to participate in executions because no additional stigma would be added to the job.[325]

At the same time, states would not be able to hide the qualifications of execution team members behind a blanket exemption from disclosure.[326] As a result, the officials would be more accountable for the quality of personnel participating in executions.[327] Such accountability likely would result in more qualified execution team members and fewer botched executions.[328] The courts, the public, and condemned inmates would have more confidence that lethal injection—the seemingly most humane method of execution—is carried out as humanely as possible.[329]

CONCLUSION

Historically, executioners have hidden beneath a hood—both literally and figuratively. Much has changed, however, since the early days of the death penalty. Lethal injection, a far more complex procedure requiring specially trained individuals, has replaced simpler methods of execution. States have refused to make the changes needed to guarantee that qualified personnel carry out the state-sanctioned killing. Recently, courts have found that unqualified executioners contribute to the unconstitutionality of lethal injection. Revealing executioner identities would allow the public to hold the state accountable for the qualifications of executioners and, as such, would result in more precautions in selecting executioners and increase the probability of a more humane execution that does not violate the mandates of the Constitution.

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324. *See supra* Part II.A.1.
325. *See supra* Part II.A.3.
326. *See supra* note 93.
327. *See supra* Part II.B.2.
328. *See supra* Part II.B.2.a.
329. *See supra* Part II.B.2.b.