

a. Overview Paragraph

This paper will be designed as an advocacy report for an organization opposed to the death penalty, with the particular focus on curbing the availability of lethal injection cocktails. Death penalty cocktails have traditionally consisted of a three drug cocktail including odium thiopental, pancuronium bromide, and potassium chloride, which are injected in a precise sequence. Shortages of these lethal injection drugs began around 2005 when the EU began to ban the export of these drugs to United States in an effort to facilitate the abolition of the death penalty. The EU completely banned selling pentobarbital and other lethal injection drugs in 2011. What has resulted is a complex web of regulatory blind spots and loopholes through which compounding pharmacies and overseas drug companies have sought to re-establish the supply. Prisons in states that have not banned the death penalty have also engaged in interstate sharing of these drugs.

In light of generally unfavorable case law, can this fight be won in the court of law, or must it be won in the regulatory space, through political advocacy and efforts to shift public opinion? This paper will discuss what advocates need to know about how legal and regulatory challenges to lethal injection have fared, and ways in which we can educate the public and organize around the issue.

b. Key Questions

- 1) What roles do the FDA and DEA respectively play in the regulation of manufacturing, transportation, and use of death penalty drugs?
- 2) What is the current legal landscape as it relates to the challenges to the use of traditional death penalty lethal injection drugs and their substitutes? Specifically, what approaches have been successful and unsuccessful in challenging the supply and use of lethal injection drugs?
- 3) How should advocates focus their energy moving forward? What is the most promising set of levers?

c. Proposed Outline

Executive Summary

Background/Introduction

- A brief history of death penalty mechanisms from electrocution, to firing squad, to lethal injection
- Stakeholders, social and political context informing the lethal injection debate
- The rationale for lethal injection as opposed to other methods of exacting the death penalty. Briefly, why that rationale does not reflect reality. Include illustrations from recent botched executions.

Drug Law and Policy  
Final Paper Proposal

- Our position: challenge the rationale, highlighting implementation problems and broader ethical and legal objections to lethal injection. This practice must stop.
- Report Roadmap: to survey the work done to date in regulatory, legal, and other areas to curb this practice, and to outline the most promising set of efforts to reach our goal.

Regulatory Efforts

- A brief history of provision of lethal injection drugs, and how these supply chains were disrupted by EU policies
- The role of FDA: On what grounds has the FDA refused to regulate death penalty drugs? What role has the DEA played in regulation of the drug via interstate trading and overseas importing?
- General domestic regulatory schemes governing compounding pharmacies and role of compounding pharmacies and other suppliers in provision of death penalty cocktails following the shortage of 2005. Outline levers used to date to try to restrict supply. Has it worked?
- States that have/ are in the process of enacting secrecy laws around lethal injection drugs, the rationale behind these secrecy laws regarding protection of compounding agencies that are making the death penalty cocktails
- Summary: the benefits and drawbacks of regulatory approaches to date

Legal Challenges

- Legal challenges to the use of lethal injection drugs. What arguments have been presented? Have they been successful?
- Legal challenges to secrecy laws. Are secrecy laws unconstitutionally prohibitory of an incarcerated individual's 8<sup>th</sup> amendment right to challenge execution on cruel and unusual punishment grounds?
- Summary: the benefits and drawbacks of legal approaches to date

Strategic Analysis

- What have been successful approaches in states that have abolished the death penalty by lethal injection? What has not worked?
- How do we get there from here?

Conclusion (1 page)

Tables and Figures

Sources Cited

d. Preliminary Sources and Key Informants

*Preliminary Sources*

Websites:

- American Civil Liberties Union
- Amnesty International
- Antideathpenalty.org
- National Coalition to Abolish the Death Penalty
- Southern Center for Human Rights

Journals/Other:

- Journal of Law & Policy (4 J.L. & Pol'y 161): Death-Defying Feats: State Constitutional Challenges to New York's Death Penalty
- Yale Law Journal (111 Yale L.J. 681): Regulating Death: Capital Punishment and the Late Liberal State
- Journal of Law and Health (17 J.L. & Health 217): A Death by Any Other Name: The Federal Government's Inconsistent Treatment of Drugs Used in Lethal Injections and Physician-Assisted Suicide
- American Jurisprudence, Second Edition (21A Am. Jur. 2d Criminal Law s 888), General principles, limitations, prohibition against cruel and unusual punishment, law reviews and case listings

Cases:

- *Heckler v. Chaney* (104 S. Ct. 1649) – foundational case re: FDA refusal to regulate
- *State of Nebraska, v. Michael W. Ryan* (2013 WL 6850927), Supplemental Brief of Appellant – challenge to foreign supplied Sodium Thiopental as a misbranded and unapproved substitute for Odium Thiopental, an anesthetic.

*Key Informants*

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