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A LACK OF TRANSPARENCY: THE RESTORING PROPER JUSTICE ACT AS A NEW MOURNING VEIL FOR EXECUTION PROCEDURES

BRANDON KONECNY¹

In 2015, Connecticut's highest court abolished the death penalty within its borders.² That same year, however, just six-hundred miles southward, North Carolina's legislature reached the opposite conclusion on the matter.³ After having not executed a prisoner since 2006, North Carolina passed the Restoring Proper Justice Act (RPJA).⁴ It contains two particularly controversial provisions: (1) the elimination of the required presence of a licensed physician and (2) the exemption of information about execution drugs (and their manufacturers) from the State's public record.⁵ These provisions have contracted many brows and inspired lively discussion on both sides of the political aisle.⁶ However, the discourse surrounding this topic has been narrow, at best. Despite the substantial debate on the

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2. Ray Sanchez & Lorenzo Ferrigno, *Connecticut's highest court overturns its death penalty*, CNN (Aug. 14, 2015), <http://www.cnn.com/2015/08/13/us/connecticut-death-penalty/>.

3. Rachel Sereix, *N.C. legislators working to restart capital punishment*, Duke Chronicle (Sept. 9, 2015), <http://www.dukechronicle.com/article/2015/09/n-c-legislators-working-to-restart-capital-punishment>.

4. *Id.*

5. *Id.*

6. Compare Chris Fitzsimon, *Another offensive reform of the machinery of death*, NC Policy Watch (Jul. 30, 2015), <http://www.ncpolicywatch.com/2015/07/30/another-offensive-reform-of-the-machinery-of-death/> (discussing the negative effects of the legislation), with Mark Creech, *2015 LEGISLATIVE WRAP-UP*, Christian Action League of NC (Oct. 13, 2015), <http://christianactionleague.org/news/2015-legislative-wrap-up/> (citing the RPJA as a favorable piece of legislation).

issue, little has been said about the ideological mechanisms afoot in this recent legislation. It is, therefore, this dimension of the RPJA which this comment seeks to address.

To adequately explore this topic, this comment takes three lines of action. First, it will discuss the motivations for these amendments. Second, it will demonstrate how the RPJA furtively circumvents both of these impediments. Finally, this comment will take a theoretical turn to briefly configure the RPJA within a larger history of capital punishment and its adaptability. The work of Michel Foucault will be of particular use here, as his theories of power illustrate the various ways that power has adapted itself from the times of public executions to the present. Because of his scarcity in the legal field, this comment will provide a brief overview of one of his most notable works, *Discipline and Punish*. This comment will then consider the implications of the RPJA in light of the theories traced in Foucault's seminal work. Ultimately, it is this comment's position that the RPJA represents an increasing move toward making state-sanctioned executions a private affair, depriving prisoners of public empathy and rendering the practice a mere legal abstraction.

I. CAPITAL PUNISHMENT'S POTENTIAL DEATH SENTENCE

To understand the peculiarities of the RPJA, it is necessary to analyze some of the motivations for its creation. The most notable of these are the North Carolina Medical Board's (Medical Board) adoption of the American Medical Association's (AMA) opinion regarding doctors' participation in state-sanctioned executions and drug manufactures' reticence to supply execution drugs. This comment does not discount the possibility of other factors which may have contributed to the RPJA's creation. However, for the sake of brevity, it will only focus on the aforementioned two motivations.

The Medical Field

Physician's assisting with state-sanctioned executions has long been a debated topic in the medical community, seen by many as a contradiction in the aims of the profession.⁷ The AMA responded by

7. See generally Jonathan I. Groner M.D., *The Hippocratic Paradox: The Role of the Medical Professional in Capital Punishment in the United States*, 35 *FORDHAM*

issuing Opinion 2.6, which cautioned medical professionals from taking part in legal executions.⁸ The opinion provides, in relevant part, that 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.”⁹ Attention to this language is necessary for two reasons. First, the opinion explicitly states that the AMA views the practice of medicine to be inherently contradictory to legal execution. Hence, the AMA propounds that any doctor who participates in such activities acts contrary to the aim of the medical profession. Second, the opinion makes use of the modal adverb “should” followed by the negative “not,” which suggests that physicians are strongly advised against, though not prohibited from, engaging in these activities. Despite this permissive language, the opinion makes clear that the AMA believes that these activities are irreconcilable with the ethics of the medical profession.

The opinion continues by enumerating activities that constitute physician-assisted executions. It delineates these activities into three categories:

1. An action which would directly cause the death of the condemned
2. An action which would assist, supervise, or contribute to the ability of another individual to directly cause the death of the condemned
3. An action which could automatically cause an execution to be carried out on a condemned prisoner.¹⁰

The opinion narrows these categories by stating that physician participation in an execution “includes . . . attending or observing an execution as a physician [and] rendering technical advice regarding execution.”¹¹ As to the method of execution, the AMA further clarifies its point by writing that “prescribing, preparing, administer-

URB. L.J. 883 (2008) (discussing the moral quandaries involved in physician assisted executions).

8.Am. Med. Ass’n., Code of Medical Ethics, E-2.06: Capital Punishment, available at <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion206.page> (last visited Dec. 28, 2015).

9.*Id.* (emphasis added).

10.*Id.*

11.*Id.*

ing, or supervising lethal injection drugs or their doses or types” constitutes physician participation in an execution.¹² Therefore, besides advising against physicians’ participation in legal executions, the AMA specifies what activities it believes constitutes such participation as well as clarifies its disdain for participating in lethal injections.

It is important to note that, by itself, the AMA’s opinion is not binding on medical professionals in the United States, since the AMA is a voluntary association of physicians.¹³ It may become binding, however, when states’ medical board adopts the AMA’s opinions.¹⁴ This was the case in North Carolina, when the Medical Board adopted the AMA’s position in 2007.¹⁵ The Medical Board issued a Position Statement that prohibited “physicians licensed to practice medicine in North Carolina, under the threat of disciplinary action, from any participation other than certifying the fact of the execution and simply being present at the time of execution.”¹⁶ Physicians then began declining to participate in legal executions, which caused a “de facto moratorium on executions” in the State.¹⁷

Tensions came to a head in *N.C. Dept. of Correction v. N.C. Medical Bd.* In that case, the North Carolina Department of Correction (Department of Correction) brought suit against the Medical Board, seeking, among other things, a declaratory judgment “delineating the rights and obligations of the Department of Correction and the Medical Board with regards to executions.”¹⁸ In particular, the Department of Corrections contended that, because of physicians’ unwillingness to be present at executions, it was unable to perform its statutory duties under N.C.G.S. 15-190, which requires the presence of a physician.¹⁹ The Medical Board countered that the

12.*Id.*

13.Ty Apler, *The Truth about Physician Participation in Lethal Injection Executions*, 88 N.C. L. REV. 11, 23 (2009).

14.*Id.*

15.*N.C. Dep’t of Corr. v. N.C. Med. Bd.*, 363 N.C. 189, 193, 675 S.E.2d 641, 644-5 (2009).

16.*Id.* at 191, 675 S.E.2d at 643.

17.*Id.*

18.*Id.* at 191, 675 S.E.2d at 643-4.

19.*Id.* at 195, 675 S.E.2d at 646.

physician-presence requirements runs counter to its medical ethics.²⁰ The North Carolina Supreme Court found the Medical Board's argument unpersuasive.²¹ In a 4-3 decision,²² the court held that "N.C.G.S. 15-190, by its plain language, envisions physician participation in executions in some professional capacity."²³ Thus, the Medical Board exceeded its authority by issuing its Position Statement that impermissibly contravened the specific requirement of physician presence under the statute.²⁴ Consequently, the court held the Position Statement to be invalid.²⁵ Despite this ruling, the Medical Board still maintains that physician participation in state-sanctioned executions is a departure from the aim of the medical profession.²⁶

A. The Drug Companies

The second impediment to streamlining the execution process in North Carolina is the shortage of execution drugs, and it is an issue which implicates both the global and national drug market. On the global front, European drug companies are refusing to provide the United States with drugs used in legal execution.²⁷ This especially is the case with member countries of the European Union (EU), which mandates the abolishment of the death penalty for all countries seeking to join it.²⁸ This has resulted in European countries imposing "export controls on a range of execution drugs in a bid to force

20.*Id.* at 197, 675 S.E.2d at 647.

21.*Id.* at 204-5, 675 S.E.2d at 651.

22. Bruce Mildwurf, *Court: Physicians can take part in executions*, WRAL (May 1, 2009), <http://www.wral.com/news/local/story/5063064/>.

23. *NC Dept. of Corrections*, 363 N.C. at 204-5, 675 S.e.2d at 651.

24.*Id.*

25.*Id.*

26. Rose Hoban, *Bill Addresses Doctors & the Death Penalty*, N.C. HEALTH NEWS (May 24, 2013), <http://www.northcarolinahealthnews.org/2013/05/24/bill-addresses-doctors-the-death-penalty/>.

27. Jon Stone, *America is Running out of lethal injection drugs because of a European embargo to end the death penalty*, INDEPENDENT (Mar. 13, 2015), <http://www.independent.co.uk/news/world/americas/america-is-running-out-of-lethal-injection-drugs-because-of-a-european-embargo-to-end-the-death-10106933.html>.

28.*Id.*

American states to stop killing prisoners.”²⁹ The United Kingdom, for example, “unilaterally restricted the export of death penalty drugs to the United States in 2010 under the direction of the Business Secretary Vince Cable.”³⁰ It is clear, then, that as the European continent gradually rids itself of the death penalty, many of its drug companies are now reluctant or forthrightly against providing the United States with lethal-injection drugs, sometimes as a deliberate attempt to impede its execution process.³¹

On the national front, these European efforts have had some success, particularly in delaying state scheduled executions. For instance, as of October 2015, Ohio put a moratorium on its executions until at least 2017.³² This moratorium came in response to Ohio’s inability “to replenish supplies after European pharmaceutical firms began blocking the use of their drugs in U.S. executions.”³³ Similarly, in Louisiana, a drug shortage “prompted it to seek the opioid hydromorphone from a local hospital in 2014.”³⁴ Oklahoma also faced a shortage of execution drugs in 2014, when it “postponed two executions because it lack[ed] the drugs required to put prisoners to death.”³⁵ With these instances of delayed executions, states have instated moratoriums on executions or, in dire cases, sought alternative supplies for execution drugs.

These two impediments, in aggregate, put a hold on several executions across the United States, including North Carolina, which

29.*Id.*

30.*Id.*

31.*Id.*

32.Headline, *Ohio Halts Executions for 2 Years amid Drug Shortage*, DEMOCRACY NOW (Oct. 20, 2015), http://www.democracynow.org/2015/10/20/headlines/ohio_halts_executions_for_2_years_amid_drug_shortage.

33.*Id.*

34.*U.S. Judge Extends Ohio Execution Ban; Louisiana Sought Execution Drug from Hospital*, DEMOCRACY NOW (Aug. 12, 2014), <http://www.democracynow.org/2014/8/12/headlines>.

35. “*Team Pentobarbital*”: *OK Officials Joked About Seeking Football Tix for Help with Execution Drugs*, DEMOCRACY NOW (Mar. 20, 2014), http://www.democracynow.org/2014/3/20/team_pentobarbital_ok_officials_joked_about.

has experienced a nine-year de facto moratorium on executions.³⁶ The medical community's reluctance to participate in state-sanctioned executions, coupled with the European drug companies refusal to provide the U.S. with execution drugs, brought North Carolina's executions to a halt.

II. ENTER THE RESTORING PROPER JUSTICE ACT

Relief to those who supported North Carolina's use of the death penalty arrived with the passing of the Restoring Proper Justice Act (RPJA). It passed 33-16, thus having bipartisan support, and Governor Pat McCrory signed it into law on August 5, 2015.³⁷ North Carolina House Representative Leo Daughtry, who sponsored the RPJA, "described the changes to the execution process as an antidote to the de facto moratorium that occurred after 2006."³⁸ Considering the provisions of the RPJA, Daughtry's description appears apt. Therefore, an analysis of the RPJA demonstrates that it responded to the above-mentioned challenges in two ways, each of which will be addressed in turn.

First, the RPJA removes the requirement for physicians to be present during executions.³⁹ This is a peculiar move given the prior version of the law. In its previous version, N.C.G.S. § 15-190(a) provided, in pertinent part, that at an "execution there shall be present the warden or deputy warden or some person designated by the warden in the warden's place, and a licensed physician."⁴⁰ In other words, the prior version of the law required that, along with the warden or someone he or she empowers, a licensed physician must be present at the execution. To circumvent the AMA's discontent with state-sanction executions, the RPJA made the following revision to N.C.G.S. § 15-190(a):

36.Sereix, *supra*, note 2.

37.Anne Blythe, *Senate votes to hide execution details; doctors out of death chamber*, NEWS & OBSERVER (Jul. 27, 2015), <http://www.newsobserver.com/news/politics-government/state-politics/article29074642.html>.

38.*Id.*

39.Restoring Proper Justice Act, 2015 N.C. Sess. Laws 198, § 1 (amending N.C. G.S. §15-190(a) (West 2013)).

40.N.C. Gen. Stat. Ann. §15-190(a) (West 2015).

At [an] execution there shall be present . . . a licensed physician, or a medical professional other than a physician, to monitor the injection of the required lethal substances and certify the fact of the execution. If licensed physician is not present at the execution, then a licensed physician shall be present on the premises and available to examine the body after the execution and pronounce the person dead.⁴¹

As the statutory language makes clear, the RPJA jettisons the requirement that doctors be present for the execution, thus eliminating any fear that doctors will *en masse* refuse to supervise such activities. Thus, this provision fulfills Daughtry's intention for the bill—"to protect the doctor or the pharmacist from people going there and harassing them [sic]."⁴²

Second, and perhaps most controversially, the RPJA allows the state to withhold the contents of its lethal-injection drugs.⁴³ Again, a consideration of the prior version of the relevant statute with the revised statutory language is necessary. The prior version of N.C.G.S. § 15-187, governing death by the administration of lethal drugs, stated that "[a]ny person convicted of a criminal offense and sentenced to death shall be executed *only by the administration of a lethal quantity of an ultrashort acting barbiturate in combination with a chemical paralytic agent.*"⁴⁴ Thus, this statutory language explicitly stated, albeit in generalized terms, the components of the execution drugs.

The RPJA obscures the contents of the execution drugs. N.C.G.S. § 15-187, as it currently stands, reads as follows: "Any person convicted of a criminal offense and sentenced to death shall be executed *in accordance with G.S. 15-188 and the remainder of this article.*"⁴⁵ The RPJA, therefore, eliminates the above generalized description of the execution drugs' contents and, instead, refers the reader to G.S. 15-188. Reference to this statute is further

41. *Id.*

42. Rachel Goodling, *North Carolina House Bill 774: Restoring Proper Justice or Resuming Retrogressive Punishment?*, CAMPBELL LAW OBSERVER (May 25, 2015), <http://campbelllawobserver.com/north-carolina-house-bill-774-restoring-proper-justice-or-resuming-retrogressive-punishment/>.

43. Restoring Proper Justice Act, 2015 N.C. Sess. Laws 198, § 5 (amending N.C. Gen. Stat. §15-187 (West 2013)).

44. N.C. Gen. Stat. § 15-187 (West 2015) (emphasis added).

45. *Id.* (emphasis added).

illuminative. Under N.C.G.S. § 15-188, “[i]n accordance with G.S. 15-187, the mode of executing a death sentence must in every case be by administering to the convict or felon an intravenous injection of a substance or substances in a lethal quantity sufficient to cause death and until the person is dead.”⁴⁶ The statute, thus, no longer provides any description about the particularities of the execution drug. It goes no further than informing readers that the drug, whatever its contents may be, must be administered intravenously and in sufficient doses to cause death.

Besides the vagary of execution procedures, the RPJA obfuscates the particularities of the execution drugs by inserting section seven into G.S. § 132-1.2.⁴⁷ It reads, in relevant part, that a public agency may not disclose any information that “[r]eveals name, address, qualifications, and other identifying information of any person or entity that manufactures, compounds, prepares, prescribes, dispenses, supplies, or administers the drugs or supplies obtained for any purpose authorized by Article 19 of Chapter 15 of the General Statutes.”⁴⁸ There is much that can be said about this provision, but two observations quickly present themselves. First, and perhaps most apparently, the statute explicitly protects the identities of any persons or companies who provide any of the execution drugs.⁴⁹ This, in turn, protects such companies from the public’s growing discontent with state-sanctioned executions.

Second, the addition of § 7 curiously protects this information by including it in a statute that, when referencing the rest of the statute, is commonly used to protect various forms of intellectual property rights and account numbers for electronic payments.⁵⁰ For instance, N.C.G.S. § 132-1.2(1) prevents the disclosure of trade secrets which, among other things, are “disclosed or furnished to the public agency in connection with the owner’s performance of a public contract or in connection with a bid, application, proposal, industrial development project, or in compliance with laws . . . the United States, the State,

46.N.C. Gen. Stat. Ann. §15-188 (West 2015).

47.Restoring Proper Justice Act, 2015 N.C. Sess. Laws 198, § 6.

48.N.C. Gen. Stat. Ann. §1 32-1.2(7) (West 2015).

49.*Id.*

50. § 132-1.2(1-2).

or political subdivisions of the State.”⁵¹ When considered in light of the other information protected under this statute, the details of executions drugs’ inclusion among the other statutory categories appears most curious.

III. MICHEL FOUCAULT AND *DISCIPLINE AND PUNISH* (1977)

This comment will now turn to the thought of Michel Foucault, whose work focused on the means by which the mechanisms of power assert themselves in the social sphere. Given his preoccupation with the operation of power, particularly through its operation as law,⁵² Foucault seems to be ripe for legal scholars’ consideration. Unfortunately, this has not been the case. To be sure, there has been some legal consideration of Foucault’s work, as in, for example, Alan Hunt and Gary Wickham’s now-dated *Foucault and Law: Towards a Sociology of Law as Governance* (1994) and a handful of academic articles.⁵³ Overall, however, his work’s relevance to the contemporary legal landscape remains a *terra incognita*. As such, a brief overview of his work is necessary, with a particular emphasis on one of his most well-known works, *Discipline and Punish* (1977).⁵⁴

In general, *Discipline and Punish* “trace[s] how imprisonment emerged as the dominant form of punishment contemporaneously with the refinement and spread of a number of techniques for watching, training, tracking, and managing people.”⁵⁵ To facilitate this project, Foucault begins by elucidating a grim history of legal violence on the bodies of condemned persons, encompassing scenes of public torture, legal executions, and the gradual concealment of

51. § 132-1.2(1).

52. Alan Hunt & Gary Wickham, *Foucault and Law: Towards a Sociology of Law as Governance* 40 (1994).

53. See generally Isaak Dore, *Foucault on Power*, 78 *UMCK L. REV.* 737 (2010) (discussing Foucault’s project regarding power and its relevance to the legal field); Justin Woolhandler, *Toward a Foucauldian Legal Method*, 76 *U. Pitt. L. Rev.* 131 (2014).

54. MICHEL FOUCAULT, *DISCIPLINE AND PUNISH* (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977).

55. Ascanio Piomellia, *Foucault’s Approaches to Power: Its Allure and Limits for Collaborative Lawyering*, 2004 *UTAH L. REV.* 395, 412 (2004).

such procedures.⁵⁶ He proceeds to parlay this history into a complex theory of how this power is now administered in more furtive ways, particularly through the development of the modern prison system, panopticism, and clinical psychology.⁵⁷ Although the totality of his project is fascinating, Foucault's discernment of the State's general trend toward suppressing penal transparency is of more import for present purposes. Interestingly, this implication of this observation remains largely unexplored, even by Foucault, who proceeded from this principle to develop his theory of discipline described above.⁵⁸ Thus, two of his arguments will be the focus of the comment's inquiry into Foucault: (1) the trend of the public's growing discontent with the death penalty, and (2) the State's response by making the practice a private affair.

As to the first concern, the openness of such execution became an increasing threat to the survival of the execution enterprise. In a telling passage, Foucault writes that because of the public nature of these nineteenth-century executions, "the people never felt closer to those who paid the penalty than in those rituals intended to show the horror of the crime and the invincibility of power; never did the people feel more threatened, like them, by a legal violence exercised without moderation or restraint."⁵⁹ Such public empathy for the condemned person occasionally resulted in riots.⁶⁰ This practice, Foucault argues, presented a danger to such state-sanctioned violence; and it "was the breaking up of this solidarity that was becoming the aim of penal and police repression."⁶¹ Therefore, Foucault's historical inquiry unearths a trend of public outcry in

56. See generally FOUCAULT, *supra* note 57 (beginning the book with gruesome details of public executions, followed by periods of penal reform).

57. *Id.* (discussing the ways in which public execution moved to more economic forms of managing populations, such as imprisonment, internalized forms of discipline in the domestic sphere, and clinical psychiatry).

58. See generally Michael Meranze, *The Death Penalty: Between Law, Sovereignty, and Biopolitics*, in *America's Death Penalty: Between Past and Present* 72, 81-2 (David Garland et al. ed., 2011) (briefly discussing how despite the State's minimization of the death penalty, the practice persists in society as a vestige of the logic of the sovereign in earlier centuries).

59. FOUCAULT, *supra* note 57

60. *Id.*

61. *Id.*

response to public displays of torture or execution. At times, this public display evoked toward the practice derision and anger, which jeopardized the means by which the State could continue its practice.

This obstacle leads Foucault to his second observation: that to preserve the practice of execution, the State insulated the procedures from public knowledge by suppressing the details of the execution from the public's sight. Such concealment took several forms over the years. In an 1836 execution, for instance, Foucault writes that crowds witnessed a new addition to penal death: a mourning veil.⁶² He states that “[t]he condemned man was no longer to be seen . . . [o]nly the reading of the sentence on the scaffold announced the crime—and that crime must be faceless.”⁶³ The state-sanctioned executions continued to take on an increasingly private appearance. After the French Revolution, for example, the public spectacle of the guillotine was pushed behind closed doors:

It had to be removed to the Barrière Saint-Jacques; the open cart was replaced by a closed carriage; the condemned man was hustled from the vehicle straight to the scaffold; hasty executions were organized at unexpected times. In the end, the guillotine had to be placed inside prison walls and made inaccessible to the public . . . by blocking the streets leading to the prison in which the scaffold was hidden . . . Witnesses who described the scene could even be prosecuted, thereby ensuring that the execution should cease to be a spectacle and remain a strange secret between the law and those it condemned.⁶⁴

In light of this history, Foucault's history suggests that penal systems' modes of execution are adaptable to various cultural climates. It is this comment's position that where executions become ineffective or outcry becomes too severe, penal systems will adapt the procedures of the death penalty to ensure its longevity and mollify the masses with new means of secrecy, be it by a mourning veil or prison walls.

62.*Id.*

63.*Id.*

64.*Id.* at 15.

IV. THE RPJA AND FOUCAULT: A COMPARISON

The above analysis of *Discipline and Punish* proves fruitful for our present purposes. Specifically, this comment divined two principles from the relevant portion of *Discipline and Punish*: First, the mounting discontent of the public toward state-sanctioned executions; and, second, in response to such popular outcry, the state sought to preserve the enterprise through various legal means, often resulting in an increasing concealment of executions. With these two concepts in hand, the comment will now turn to the RPJA. By applying these concepts to the provisions of the RPJA, the comment will demonstrate that it is not an isolated incident of a state's reluctance to abolish the execution enterprise, but rather a part of historical lineage of the adaptability of the legal execution.

First, the increasing scrutiny of public executions in the eighteenth century evinces a striking parallel with the current cultural landscape, to which the RPJA is addressed. In the present, much like those who stormed scaffolds to prevent the public execution of the condemned, licensed physicians' increasing refusal to participate in executions, together with pharmaceutical firms' reticence or outright refusal to provide States with execution drugs, has contributed to the nine-year moratorium on executions in North Carolina. In this sense, although there are no longer public executions against which crowds may revolt, we see a growing discontent with the death penalty in both the medical and corporate sphere. In this light, the RPJA addresses the same situation the sovereign did in the eighteenth century.

This brings us to our second observation. To counter this phenomenon, the governments described above gradually abolished the practice of public executions. In its place, these governments developed prison systems and asylums; and for those sentenced to death, they performed executions within the confines of the prisons. This, in effect, made state-sanctioned executions a private affair, depriving the practice of its transparency. Although public executions are no longer practiced in North Carolina, the RPJA can be thought to perform a similar function to that of suppressing state-sanctioned executions by eliminating the transparencies of its workings. For instance, now rather than divulge the contents of the execution drugs, the RPJA seeks to incentivize corporate cooperation with the practice

by protecting the identities of those entities which contribute to its function. Further, rather than mollify the medical field's skepticism over the practice, the RPJA entirely eliminates this impediment by allowing those other than licensed physicians to supervise the proceedings. In fact, under the RPJA, even nurses, physician assistants, or paramedics may supervise the execution process.⁶⁵

These provisions, when considered under the rubric of Foucauldian thought, evidence the State's attempt to revitalize executions by eliminating its transparency. It does so by protecting the particularities of the execution drugs from public disclosure and allowing other medical professionals to supervise executions, rather than actual licensed physicians. Foucault's writing, therefore, proves prophetic. It allows us to see the RPJA for what it is: a new placement of the guillotine "inside prison walls and made inaccessible to the public."⁶⁶

V. CONCLUSIONS

Foucault's insight into the RPJA is two-fold. First, it reveals a striking parallel between the public's outrage against public execution in earlier centuries and the European pharmaceutical firms and the medical community's reluctance to participate in contemporary legal executions in any fashion. Second, and perhaps most importantly, the application of Foucault's thought configures the RPJA into a larger history of state-sanction executions. It demonstrates that no matter the form of resistance, governments will often adapt execution procedures to ensure its continuation, often through means of concealment. Thus, by removing the presence of doctors and suppressing information regarding the contents of execution drugs, the RPJA pushes the details of execution further into the shadows. The public is, therefore, given even less of an opportunity to empathize with the condemned person, no matter how repugnant his or her crime. In effect, he or she is transformed into a mere legal abstraction, rather than a concrete entity.

At the time of this writing, no case has arisen involving the RPJA. In view of this void, it is necessary for those who oppose the practice

65. Goodling, *supra* note 41.

66. FOUCAULT, *supra* note 54, at 15.

of legal executions in North Carolina to contemplate new ways to counter its operation. This challenge is profound, a fact which did not escape Foucault's attention. When considering this matter, he stated that "the way in which the death penalty is done away with is at least as important as the doing away. The roots are deep. And many things will depend on how they are cleared out."⁶⁷ Indeed, the roots of the death penalty are deep in North Carolina. Hence, the fact that no case has arisen to challenge the RPJA should be viewed as a fertile opportunity, for it is in this empty space that opponents of legal executions can formulate new strategies to clear these well-entrenched roots out of North Carolina's judicial future.

67. Michel Foucault, *Against Replacement Penalties, in Power* (The Essential Works of Foucault, 1954-1984, Vol. 3) 459 (James D. Faubion ed., 2000).

