

Abstract

With the case of *Baze v. Rees*, which challenges the standard lethal injection protocol, before the Supreme Court this term, America is at an interesting crossroads in lethal injection jurisprudence, the outcome of which could have far-reaching consequences for capital punishment in general. In the course of this very semester, the case will have been argued before the Court, examined by the media and academics, and ultimately decided. In selecting a capstone topic, the undeniable relevance of this issue made it impossible to overlook.

The project begins with a brief history of the evolution of the death penalty, with a focus on the evolving methods by which condemned inmates have been executed. Culminating in lethal injection, that procedure is described in further detail, introducing the three drug cocktail that has come to the forefront in the case at hand. From there, an examination of the criticisms that lethal injection has elicited commences, including a thorough inspection of the modern critiques, especially the debate surrounding physician participation in lethal injections.

Following that discussion is a judicial history of the constitutionality of the death penalty with an added focus on lethal injection, including the recent case, *Hill v. McDonough*, which allowed *Baze v. Rees* to reach its current position in the judicial system. The paper then addresses the apparent ideological rift between legal and judicial professionals and their corrections counterparts, believed by many to be the root cause of the difficulty in implementing changes to the lethal injection protocol. An analysis of the *Baze v. Rees* arguments follows, including both the oral arguments, as they commenced on January 7, 2008, as well as the arguments presented in the amicus briefs put forth on behalf of both the petitioners and respondents.

As a core facet of the project is an examination of the degree to which the issues at stake have been exaggerated, the paper takes a deeper look at exactly which of the issues raised in the lethal injection debate actually hang in the balance pending the *Baze v. Rees* decision. The media's role in the misperception of these issues is then explored. Finally, the author makes a recommendation to the Supreme Court, dictating his opinion of where the decision should fall and the justifications for that position.

Early History

The history of lethal injection's rise to prominence as the foremost method by which the state executes its condemned inmates is long and multi-faceted with roots stemming from the late Nineteenth Century. Lethal injection was first considered as early as 1886 in New York as part of a commission by its governor, David B. Hill, but was rejected in favor of electrocution, which was widely regarded as a more humane procedure.¹ Although nearly a century would pass between this initial exploration of lethal injection as a possible method of capital punishment and the first documented lethal injection in America, the debate over its potential implementation did not cease.

The issue gained popularity in the United Kingdom in light of that country's 1949-1953 Royal Commission Inquiry on Capital Punishment, which sought to explore alternatives to hanging.² In an interesting foreshadowing of the debate that would commence in the United States decades later, the evidence set forth by medical professionals discouraged the adoption of the new procedure. The issue of who would administer the injection stood at the forefront of the debate. The British Medical Association "made it clear that their members would be prohibited

¹ Kaufman-Osborne, Timothy V. *From Noose to Needle: Capital Punishment and the Late Liberal State*. (Ann Arbor: University of Michigan Press, 2002), p. 180

² Trombley, Steven. *The Execution Protocol: Inside America's Capital Punishment Industry*. (New York: Crown Publishers, 1992), p.72.

from doing so.”³ That dilemma was further compounded by the fact that lethal injections require an intravenous, as opposed to intramuscular injection, a procedure that requires a considerably greater degree of skill and practice. Finally, because standard procedure dictates that physicians operate with the goal of promoting life, most were at a loss when asked which drugs were appropriate and what would constitute the necessary dose of each.⁴

Meanwhile, in America, where executions by hanging, lethal gas and, primarily, electrocution were being conducted, a shift in the public’s perception of capital punishment began to take hold. Public opinion of capital punishment began to drop rather sharply beginning in the early 1950’s. In 1953, a Gallop poll found that sixty-eight percent of Americans expressed approval of the death penalty for convicted murderers, a figure that declined to fifty-three percent in 1960, before reaching an all time low of forty-two percent in 1966.⁵ Both the number of inmates executed and cases in which the death penalty was sought reflected this shift in public opinion, experiencing similar downturns over the same period. Public opinion began to reverse course again, this time in favor of the death penalty, before the United States Supreme Court handed down its decision in the nation’s first case of death penalty jurisprudence in the modern era, 1972’s *Furman v. Georgia*.⁶

In actuality, a de-facto moratorium on the death penalty was instituted in 1967, five years prior to the *Furman* decision, the result of a concerted effort by the NAACP Legal Defense Fund to “halt executions by raising every possible constitutional claim in every death row inmate’s case in an effort to clog up the court system.”⁷ This movement resulted in a pileup of death row inmates as civil-rights attorneys waged their federal cases, the ultimate result of which was

³ Ibid.

⁴ Ibid.

⁵ Paternoster, Raymond. *Capital Punishment in America*. (New York: Lexington Books, 1991,) p. 19.

⁶ Ibid. p. 20

⁷ Sorenson, Jon and Rocky Leann Pilgrim. *Lethal Injection: Capital Punishment in Texas during the Modern Era*. (Austin: University of Texas Press, 2006,) p. 2.

Furman v. Georgia. *Furman* was, in essence, three cases in one, consolidating the case of William Henry Furman, who was convicted of capital murder and sentenced to death, with those of *Jackson v. Georgia* and *Branch v Texas*, both of which involved the imposition of a death sentence in a rape case⁸.

The Supreme Court, in a five to four decision, ruled that the imposition of the death penalty in these cases constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. The justices delivered a per curiam opinion, in which each articulated his individual reasoning. Only two justices, William Brennan and Thurgood Marshall, “opposed the death penalty as cruel and unusual in all situations.”⁹ Others, stopping short of making such a claim, held that it was arbitrarily and capriciously applied. One such justice, Potter Stewart, focusing on the fact that many other rape cases were equally gruesome but did not result in a death sentence, argued that “the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.”¹⁰ More than six hundred inmates were removed from death row as a result of the Court’s holding.¹¹ Due in large part to the variety of opinions put forth by the Court, however, the *Furman* decision resulted in widespread confusion as to whether or not it signaled the decisive end of the death penalty in America.¹²

Ultimately, because the majority could only settle on the fact that the death penalty was unconstitutional as then imposed, the Supreme Court allowed state legislatures the opportunity to remedy previous defects and align their death penalty statutes with the Constitution.¹³ State

⁸ Ibid. p.2.

⁹ Ibid. p.3.

¹⁰ *Furman v. Georgia* 408 U.S. 238 (1972).

¹¹ Sorenson, Jon and Rocky Leann Pilgrim. *Lethal Injection: Capital Punishment in Texas during the Modern Era*. (Austin: University of Texas Press, 2006,) p. 3.

¹² Ibid. p.3.

¹³ Paternoster, Raymond. *Capital Punishment in America*. (New York: Lexington Books, 1991,) p. 19.

legislatures spent the next four years doing so and in 1976, the Supreme Court decided another landmark death penalty case, *Gregg v. Georgia*.¹⁴ The Court held that “capital punishment for the offense of murder was acceptable under guided discretion statutes.”¹⁵ In commenting on the Georgia statute in question, Justice Stewart’s plurality opinion highlighted three such procedural reforms, which he deemed to have satisfied the necessary level of review. These included, “a bifurcated proceeding where the sentencing authority can hear testimony relevant to deserved penalty, statutory mitigating and aggravating factors to guide the jury in its decision making, and automatic appellate review of all death sentences to ensure consistency and proportionality.”¹⁶

The Rise of a New Method - Theoretical Rationales

The decision in *Gregg v. Georgia*, by affirming the constitutionality of capital punishment, effectively set the stage for lethal injection to ascend to its prominent role in American criminal justice. The discussion surrounding the possibility of lethal injection as a means of execution resurfaced in 1977, with two Southern States leading the charge, Oklahoma and Texas. Faced with its first execution in over a decade, a federal district judge’s ruling that the execution would be televised, and its pre-*Furman* method of execution, the electric chair, still lingering, Texas’ legislature took up the issue. Legislation that would change the default method of execution to lethal injection was introduced in both Texas’ House and Senate.¹⁷

Advocates of the new method called the electric chair “an inhumane relic of a previous era,” arguing that “death is pretty final. That’s enough of a penalty.”¹⁸ Other proponents took a more practical approach, fearing that a public execution by electrocution would “send the wrong message, possibly making a hero or martyr of the condemned...This would not vindicate the

¹⁴ *Gregg v. Georgia* 428 U.S. 153 (1976).

¹⁵ Paternoster, Raymond. *Capital Punishment in America*. (New York: Lexington Books, 1991,) p. 21.

¹⁶ Paternoster, Raymond. *Capital Punishment in America*. (New York: Lexington Books, 1991,) p. 65.

¹⁷ Sorenson, Jon and Rocky Leann Pilgrim. *Lethal Injection: Capital Punishment in Texas during the Modern Era*. (Austin: University of Texas Press, 2006,) p. 9.

¹⁸ *Ibid.* p. 9.

murdered victim, nor...prevent others from committing murder.”¹⁹ The bill’s primary opponents cited that lethal injection would “make it too easy for the public to accept the taking of life,” motivated not by a desire to benefit the condemned but rather, “for the benefit of the affluent white majority which kills blacks. The bill passed and was signed into law on May 12, 1977, one day after Oklahoma became the first state to officially switch its execution method to lethal injection. Due to legal challenges, the first lethal injection was not performed until December 7, 1982.”²⁰

Since its passage as a legal means by which the state can execute condemned inmates, lethal injection has enjoyed great popularity. States were somewhat slow, however, in their initial adoption of the procedure. Of the 117 executions carried out in the 1980’s, a relatively small number to begin with in light of the legal challenges that continued to mount against the death penalty, just thirty-six percent were performed by lethal injection. In the 1990’s, by contrast, eighty-three percent of the nation’s 478 executions employed lethal injections. Finally, all sixty-five of the executed inmates in 2003 were put to death by lethal injection.²¹ Currently, of the thirty-seven states with active death penalty statutes on their books, all thirty-seven use lethal injection as their primary method. Up until February, 2008 Nebraska use the electric chair as its default method. Four other states offer the electric chair as an alternate option.²²

The many opinions presented as to why state governments and the public alike overwhelmingly favor lethal injection as their preferred execution method are largely complimentary and tend to boil down to the same central focus. The legislative rationale, many feel, and as briefly aforementioned, is grounded in the potential for further legal challenges. It is

¹⁹ Ibid. p. 9.

²⁰ Ibid. p. 12.

²¹ Sorenson, Jon and Rocky Leann Pilgrim. *Lethal Injection: Capital Punishment in Texas during the Modern Era*. (Austin: University of Texas Press, 2006,) p. 16.

²² Totenberg, Nina. “Supreme Court Takes Up Lethal Injection.” *National Public Radio* 15 Feb. 2008.

widely regarded to be in the best interest of legislatures to adopt a procedure that “would be less unsightly and thus less susceptible to graphic journalistic descriptions that could elicit new charges of cruelty and inhumane punishment.”²³ With the line so finely drawn following *Furman* and *Gregg*, states do not have much room to maneuver between the courts on one hand, and pleasing the public on the other.

Similarly, Stephen Trombley, author of *The Execution Protocol: Inside America's Capital Punishment Industry*, notes that, “lethal injection has become popular not so much because it works better than other methods of execution...but because it is, first and foremost, a medical procedure that has the appearance of being more scientific than shooting, hanging, gassing, or electrocution. It is clinical.”²⁴ Trombley goes on to note that lethal injection's legislative appeal is also a likely result of the widespread public approval of its practice. When compared to the other legally permissible forms of execution, he argues, lethal injection appears relatively benign and therefore sits better with the average layperson. In executions by lethal injection, “there is no obvious damage to the inmate. The theory is that the inmate simply goes to sleep.”²⁵

Yet another related theory is proffered by Timothy V. Kaufman-Osborn, author of *From Noose to Needle: Capital Punishment and the Late Liberal State*, who observes that lethal injection appears to solve one of the key dilemmas inherent to the establishment of a majority-pleasing method of execution, “the troublesome role of the human body in contemporary capital punishment.” The hangman's noose often results in a corpse that bears “telltale traces” of the harm it has suffered. The lethal injection machinery, by contrast, “does not gesture toward a

²³ Marquart, James W., Sheldon Ekland-Olson, and Jonathan R. Sorensen. *The Rope, the Chair, and the Needle: Capital Punishment in Texas, 1923-1990*. (Austin: University of Texas Press, 1994,) p. 132

²⁴ Trombley, Steven. *The Execution Protocol: Inside America's Capital Punishment Industry*. (New York: Crown Publishers, 1992), p. 71.

²⁵ Ibid. p. 72.

specific body part that, in being hurt, is to serve as the proximate cause of death.”²⁶ As human beings, we are not well-equipped to classify an injury that bears no trace of visible suffering as being the result of violence. Accomplishing the death of an individual deemed worthy of such an outcome “via the injection of therapeutic drugs” allows us to view it through the lens of humanitarianism.²⁷

Raymond Paternoster, author and Professor of Criminal Justice at the University of Maryland College Park, would argue that the seemingly overwhelming degree of support for lethal injection is entirely misleading. He asserts that lethal injection, like capital punishment as a whole, appears to have such ardent followers because poll questions do not give them adequate choices. The popular Gallop poll so often used to gauge public support for the death penalty, asks potential respondents to express whether or not they “support the death penalty for murderers.”²⁸ Paternoster points out that although between seventy and eighty percent of respondents indicate that they support the death penalty, “fewer than one third do so when compared with the option to select an alternative penalty, life without the possibility of parole with restitution.”²⁹ In his opinion, the preference of one execution method over another is moot, as the public would prefer different sentencing practices altogether.

Robert Johnson, a legal scholar and noted authority on capital punishment, presents another alternate view. He finds the aforementioned rationale underlying the apparent popularity of lethal injection, its relative painlessness, to be particularly disturbing. Johnson is alarmed by modern society’s willingness to equate the physical pain of a given practice with that practice’s relative degree of humanity. He argues to the contrary, that “the impersonality of the modern

²⁶ Kaufman-Osborne, Timothy V. *From Noose to Needle: Capital Punishment and the Late Liberal State*. (Ann Arbor: University of Michigan Press, 2002), p. 182

²⁷ Ibid. p. 182.

²⁸ Paternoster, Raymond. *Capital Punishment in America*. (New York: Lexington Books, 1991,) p. 275

²⁹ Ibid. p. 276.

death penalty makes it distinctively brutal.”³⁰ He argues that at present, society has a “largely clandestine bureaucracy to carry out death sentences, and we use technologically sophisticated modes of execution. The changes are telling. Slowly but inexorably, we have distanced ourselves from the reality of the death penalty. We now kill efficiently, and, above all, impersonally.”³¹ Therefore, modern executions do not, as they were designed to do, “involve or affirm the community” that has been wronged, but “smack of a mechanized, mindless nihilism.”³²

Johnson asserts, with a considerable degree of support from other experts, that the societal reliance on painlessness as an indicator of the humane nature of lethal injection is especially troubling in light of the fact that the painlessness determination is entirely speculative. “It is chilling to think,” he states, “that the very measures we have used to assure ourselves that modern executions are tame and hence painless may in fact be profoundly misleading.”³³ Firsthand accounts of complications from lethal injection procedures are best understood when viewed in the context of the standard procedure by which a lethal injection is carried out.

Lethal Injection Protocol

While “lethal injection protocols differ from state to state,” cross state analyses indicate that no one state’s practices can be said to be atypical.³⁴ In Arizona, for example, the day leading up to the execution is marked by a medical examination of the inmate in order to assess his physical condition, specifically the accessibility of his veins. A blood test is administered to detect the presence of any drugs that may jeopardize the effectiveness of the three drugs

³⁰ Johnson, Robert. *Death Work: A Study of the Modern Execution Process*. (Belmont, CA: Wadsworth Publishing Company, 1998,) p. 50.

³¹ Ibid. p. 44.

³² Ibid. p. 47.

³³ Ibid. p. 45.

³⁴ Kaufman-Osborne, Timothy V. *From Noose to Needle: Capital Punishment and the Late Liberal State*. (Ann Arbor: University of Michigan Press, 2002), p. 180.

administered in the procedure as well as any infectious disease that might pose a threat to members of the execution team. The lethal injection equipment is inspected, the necessary chemicals inventoried, and a practice session conducted.³⁵ As the precise time of execution nears, the inmate is moved from the holding cell to the death chamber, placed on a gurney, and restrained. Catheter needles are inserted into each arm and, “at a signal from the superintendant, a person who, hidden behind a door equipped with a one-way mirror” activates the three-drug sequence.³⁶ Once the machine is activated, everything is automatic.³⁷

The first of the three drugs is sodium thiopental, the anesthetic, which renders the inmate unconscious. The second drug, pancuronium bromide, paralyzes the muscles, including those of the respiratory system, resulting in suffocation. Finally, the third drug, potassium chloride, induces cardiac arrest and eventually stops the heart.³⁸ Several measures have been implemented to modify the process, including the introduction of backup systems in the event of the primary system’s failure. The sequence by which the drugs are released is timed by a stopwatch, “and if the lights don’t come on at the right time,” indicating that at least one of the syringes has not been activated, three electrical switches, one for each of the three drugs, are triggered by three members of the execution team at the appropriate intervals. Only if that fails, signaling a problem with the facility’s electrical system, do the drugs get administered manually.³⁹ Furthermore, Fred Leuchter, who was first commissioned by New Jersey, then by several other states to update lethal injection machinery, modified the devices in 1989 to include a set of

³⁵ Ibid. p. 180.

³⁶ Ibid. p. 181.

³⁷ Trombley, Steven. *The Execution Protocol: Inside America’s Capital Punishment Industry*. (New York: Crown Publishers, 1992), p. 153.

³⁸ *Current Events*, 22 Oct. 2007.

³⁹ Trombley, Steven. *The Execution Protocol: Inside America’s Capital Punishment Industry*. (New York: Crown Publishers, 1992), p. 154.

duplicate controls. These controls “insure that the identity of the person actually inflicting the lethal substance is unknown even to the person himself.”⁴⁰

Early Critiques

Those who called the constitutionality of lethal injection into question cited the use of drugs as the primary causes of concern. Some, including the lawyers who represented death row inmates Larry Chaney and Doyle Skillern, argued that the employment of the lethal injection drugs for the purpose of an execution violates FDA regulations because that is not a purpose for which they have been “deemed safe and effective.” They stated that this was the same provision guiding the regulation of experimental clinical trials by inmates and should therefore apply to lethal injections as well.⁴¹ The FDA refuted these claims, arguing that the purview of their regulatory authority falls short of lethal injections, in part because such an application of the drugs does not pose a threat to public health, as the affected group is so specific.

Once executions by lethal injections commenced, tales of “botched” execution by lethal injection became the primary arsenal of lethal injection opponents. The first ever execution performed by lethal injection in the United States appeared to go off without a major glitch. Behind the scenes, however, the execution team ran into some difficulty. The three drugs “coagulated to form a jelly-like substance.”⁴² The modified procedure, by which the drugs are released in succession, solved this problem but others persisted. On May 24, 1989, Steven McCoy’s reaction to the lethal injection drugs induced “violent choking, gasping, and writhing on the gurney,” a physical response that was described as being so visually displeasing that it caused a witness to pass out.⁴³ During another injection, excessive pressure applied to a plunger

⁴⁰ Kaufman-Osborne, Timothy V. *From Noose to Needle: Capital Punishment and the Late Liberal State*. (Ann Arbor: University of Michigan Press, 2002), p. 109.

⁴¹ *Ibid.* p. 201.

⁴² Sorenson, Jon and Rocky Leann Pilgrim. *Lethal Injection: Capital Punishment in Texas during the Modern Era*. (Austin: University of Texas Press, 2006,) p. 15.

⁴³ Marquart, James W., Sheldon Ekland-Olson, and Jonathan R. Sorensen. *The Rope, the Chair, and the*

“caused the lethal injection line to dislodge from the condemned’s arm and spray witnesses who had come to view the execution.”⁴⁴

Modern Critiques and Defenses

More modern studies allude to similar, yet equally fundamental problems inherent to the current lethal injection protocol. The most popular criticisms of the practice involve the three-drug cocktail that is now used, in nearly identical doses, by every state with active lethal injection statutes. More specifically, the use of the anesthetic thiopental, the first drug in the sequence, in conjunction with the paralytic pancuronium bromide, the second, has come under heavy fire. Critics insist that executions by lethal injection may be excruciatingly painful, but that the paralytic agent renders a physical or vocal expression of pain impossible. In two peer-reviewed papers, surgical oncologist and researcher Dr. Leonidas Koniaris and his colleagues report on the current protocol’s potential to result in an unnecessarily painful death. Their article in *The Lancet* finds that upon the completion of a post-mortem study of forty-nine executed inmates, forty-three, or eighty-eight percent, had thiopental “concentrations consistent with awareness.”⁴⁵ This signifies that based on the level of anesthetic present, there is an increased likelihood that the condemned is conscious, thus able to feel the physical effects of the subsequent drugs. Koniaris and his colleagues used postmortem data because it is the best available measure of the actual thiopental level at the time of the execution. Because the executioners are not trained to administer anesthetics and the drugs are administered remotely, as previously mentioned, there is no monitoring for the depth of anesthesia while the procedure is in progress.⁴⁶

Needle: Capital Punishment in Texas, 1923-1990. (Austin: University of Texas Press, 1994,) p. 147.

⁴⁴ Sorenson, Jon and Rocky Leann Pilgrim. *Lethal Injection: Capital Punishment in Texas during the Modern Era.* (Austin: University of Texas Press, 2006,) p. 15.

⁴⁵ Koniaris, Leonidas G., Teresa A. Zimmers, David A. Lubarsky, and Jonathan P. Sheldon. “Inadequate anaesthesia in lethal injection for execution.” *The Lancet*. Vol. 365, 16 Apr. 2005. p. 1412.

⁴⁶ *Ibid.* p. 1412.

The researchers found that a dose of two grams of thiopental is administered, an amount deemed by the state to be more than adequate, as the standard clinical dosage is significantly lower, lying somewhere in the range of 240-450 milligrams per minute for a two hundred pound man. In reality, however, Koniaris argues that this line of reasoning is overly simplistic. Foremost among the reasons he cites for making this claim is the fact that when one considers the average length of a lethal injection, from the time the first drug is administered to the time of death, the two gram total averages out to be nearly identical to the clinical dose. This dilemma is further compacted by three additional factors. First, poorly trained executioners may make procedural errors that result in a failure to administer the proper dose. Second, inmates with a history of substance abuse may have a heightened tolerance for hypnotics and thus require a higher dose of the anesthetic. Finally, “a person anticipating execution would be fearful and anxious” and therefore “would need a higher dose of thiopental than would a premedicated surgical patient.”⁴⁷

Koniaris and colleagues’ article in *PLoS Medicine* presents similar findings, holding that the lowest doses of thiopental used in some jurisdictions are near clinical levels. Put simply, these doses are routinely utilized for surgical procedures and as such are not intended to be lethal. Looking at execution data from two states, North Carolina and California, as well as published clinical, laboratory, and veterinary reports, the researchers found that the dosage scaling of the thiopental, when examined between species, indicates that the dose administered in lethal injection “might not be fatal and might be insufficient to induce surgical anesthesia for the duration of the execution.” Furthermore, evidence suggests that if such an inadequate dose of anesthesia is administered, the third and final drug in the protocol may be rendered useless. In such cases, the “potassium chloride...does not reliably induce cardiac arrest”. Rather, because of

⁴⁷ Ibid. p. 1412.

the inadequate dose of the anesthetic, “potentially aware inmates could die through pancuronium-induced asphyxiation” resulting from muscle paralysis.⁴⁸ Such a scenario would indeed undermine the premise on which lethal injection is founded, the idea that it presents a humane way in which society can carry out its retributive role.

The medical community, however, does not unanimously adopt this line of thinking. Dr. Mark Dershwitz, professor and vice-chair of Anesthesiology at the University of Massachusetts, takes issue with the use of the postmortem thiopental concentrations previously cited. Dershwitz acknowledges that an overwhelming majority of medical professionals, himself included, accept the view that “the administration of lethal doses of pancuronium and/or potassium chloride to a conscious person would result in extreme suffering.”⁴⁹ He concedes that there is inherent value in the practice of obtaining postmortem blood samples, but adds that “it is crucial to obtain the blood sample properly and that means drawing it soon after the inmate’s death, preferably within a few minutes and definitely within an hour.”⁵⁰ Too often, in his view, samples from executed inmates are improperly obtained and as such are subject to inaccurate interpretation. Dershwitz argues that thiopental undergoes postmortem redistribution, meaning that the “blood concentration of thiopental continues to decrease even after the inmate’s death and the cessation of circulation.”⁵¹ Therefore, if extracted more than an hour after the inmate’s death, the thiopental concentration will not accurately reflect the amount present at the time of the

⁴⁸ Koniaris, Leonidas G., Teresa A. Zimmers, Jonathan Sheldon, David A. Lubarsky, Francisco López-Muñoz, Linda Waterman, and Richard Weisman. “Lethal Injection for Execution: Chemical Asphyxiation?” *PLoS Medicine* Vol. 4, Iss. 4. p.0646.

⁴⁹ Dershwitz, Mark. “The Pharmacokinetics and Pharmacodynamics of Thiopental as Used in Lethal Injection.” *The Lethal Injection Debate: Law and Science*. Fordham University Law School. New York, 7 Mar. 2008.

⁵⁰ Ibid.

⁵¹ Ibid

execution. Pharmacology and anesthesiology texts, he notes, describe thiopental as an “ultra-short-acting sedative or hypnotic agent.”⁵²

Critics of this argument put forth by Dershwitz and other like-minded individuals take a two-pronged approach to undermining the aforementioned findings. They not only point to technical flaws in Dershwitz’s reasoning, refuting that thiopental redistribution would alter its concentration so drastically, but also note that the debate he initiates is largely unnecessary. A determination of the adequate dose of thiopental to render the inmate unconscious before the subsequent drugs are administered need not be made if states adopt a less controversial one-drug protocol. In their opinion, such a procedure, in which a higher dose of the anesthetic alone is employed to induce death, eliminates the divisive pancuronium bromide from the equation entirely. This arm of the critique, in light of its suggestion that a less painful alternative exists, raises an issue that has come to the forefront of the modern debate, the degree of constitutionally permissible pain.

Ty Alper, associate director of the Death Penalty Clinic at the University of California at Berkeley School of Law, seeks to highlight this issue, drawing parallels between the veterinary history of the lethal injection drugs and human executions. This relationship, in his view, lends credence to the belief that a one-drug protocol constitutes the “readily available, safer alternative” that has become a centerpiece of the debate⁵³. Alper suggests that the initial adoption of the three-drug protocol avoided public scrutiny because the lethal injection statutes do not mention specific names or quantities of the drugs to be used. Those details are left to prison officials. As such, “the automatic transparency that typically attends legislative action was absent, and, because lethal injection was generally assumed to be safe and humane, few paid

⁵² Ibid.

⁵³ Alper, Ty. “The Problem with Curare: Animal Euthanasia and Lethal Injection.” *The Lethal Injection Debate: Law and Science*. Fordham University Law School. New York, 7 Mar. 2008.

attention to what little legislative activity there was.”⁵⁴ What was overlooked in the “rush to adopt the three-drug formula was that the particular combination of drugs makes no sense at all.”⁵⁵ In Alper’s view, pancuronium bromide, while offering the appearance of a peaceful death, does nothing to affect consciousness or pain. It’s “only anesthetic purpose is to anesthetize the public conscience.”⁵⁶

Alper notes that pancuronium bromide is classified in the curare family of drugs, which, at their outset, were used in hunting. The drugs were put in the tips of hunting arrows and found to be especially useful in shooting animals out from high treetops. The paralyzing agent caused the animals to lose their grip on the branches. The drugs were also used in vivisection, a highly controversial procedure in which animals are dissected alive in order to study bodily parts processes in a living organism.⁵⁷ Because of the controversial nature of this practice, most animal rights groups specifically forbid the use of paralyzing agents in euthanizing animals, preferring an anesthetic-only protocol. Forty-one states have statutory regulations that either implicitly or explicitly outline such a protocol. As such, based on national execution data, 97.6 percent of the 929 lethal injections that have taken place since 1976 have employed methods that the state would forbid if the condemned was an animal.⁵⁸ Alper argues that animal euthanasia bears relevance to the lethal injection debate, providing affirmative answers to the core questions of whether or not there is reason to believe that the three-drug protocol causes pain and suffering and whether or not a readily available, safer alternative exists.

⁵⁴ Alper, Ty. “What do Lawyers Know About Lethal Injection?” *Harvard Law and Policy Review*. Retrieved 4 Mar. 2008. <http://www.hlpronline.com>.

⁵⁵ Ibid.

⁵⁶ Alper, Ty. “The Problem with Curare: Animal Euthanasia and Lethal Injection.” *The Lethal Injection Debate: Law and Science*. Fordham University Law School. New York, 7 Mar. 2008.

⁵⁷ Ibid.

⁵⁸ Ibid.

The drawing of parallels between animal euthanasia and lethal injection has proven troublesome for many. Among them is Joshua Marquis, District Attorney of Clatsop County, Oregon, who notes that animal euthanasia and lethal injections are very different on a multitude of levels. In his view, the animal euthanasia versus lethal injection argument boils down to an argument of “good deaths” versus “bad deaths”. This argument is problematic from the outset, he argues, as many would argue that death at the hands of another, in this case the State, is fundamentally incapable of being “good.”⁵⁹

Further complicating the use of veterinary data is the fact that no provision of the Constitution guarantees a pain-free execution. Even if a less painful alternative is found to be readily available, as Ty Alper suggests, the State is not necessarily obligated to implement it. Marquis poses a hypothetical question in which he asks if there is something inherently wrong with a society that advocates putting convicted murderers to death in the same way it advocates for its beloved family members and pets to die. Marquis concedes that empathy is a sign of an evolved society but begs the question, “What do killers deserve?”⁶⁰

Part of Marquis’ hesitation to answer that question in the same fashion as others in the medical and legal community lies in his belief concerning those individuals’ underlying motives. He feels that many “capital punishment opponents and lawyers who represent death row inmates are being disingenuous about their reasons for challenging lethal injection methods,” using such challenges as a backdoor method to abolish the death penalty.⁶¹ Marquis is not satisfied with the

⁵⁹ Marquis, Joshua. “Cruel or Kind: State Sanctioned Death.” *The Lethal Injection Debate: Law and Science*. Fordham University Law School. New York, 7 Mar. 2008.

⁶⁰ *Ibid.*

⁶¹ Tamber, Caryn. “‘Cruel and Unusual Punishment’ Concerns in Morales Execution Case.” *The Daily Record (Baltimore)*. 25 Feb. 2006.

premise that the risk of pain justifies the abolition of a penalty that has been repeatedly deemed appropriate for “the worst of the worst” offenders.⁶²

Robert Blecker, professor of law at New York Law School and noted death penalty supporter, shares a similar reservation. He remarks that “by definition, pain and punishment have been insufferably related. Those seeking painless punishment seek a contradiction.”⁶³ Blecker points out what he considers to be a fatal flaw in the logic of those who equate retribution with revenge in their critiques of lethal injection and its current protocol, noting that unlike revenge, retribution is only carried out to the extent that it is deserved.⁶⁴ Like Marquis, he feels that the way that society kills those it detests should in no way reflect the way it kills those it loves, adding that the pain inflicted may be a reflection of moral judgment. Blecker feels that it is time for society to realize the relationship between crime and punishment and punishment and pain.⁶⁵

Speaking to a similar, yet more practical issue is Ron Angelone, former Director of the Virginia Department of Corrections, who feels that the attempts to challenge the current lethal injection protocol amount to little more than a desire for a backdoor abolition of the death penalty. Viewing this issue from the corrections perspective, Angelone worries about the implications of such an outcome. Of death eligible inmates, Angelone notes, “They’re not people that accidentally killed somebody. These are people that went out with the express purpose of killing somebody.”⁶⁶ A sentence of life imprisonment without the possibility of parole may well result in a situation in which the inmate “knows the rest of his life he’s in prison

⁶² Marquis, Joshua. “Cruel or Kind: State Sanctioned Death.” *The Lethal Injection Debate: Law and Science*. Fordham University Law School. New York, 7 Mar. 2008.

⁶³ Blecker, Robert. “Killing Them Softly: The Painful Death of Painful Death.” *The Lethal Injection Debate: Law and Science*. Fordham University Law School. New York, 7 Mar. 2008.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ Angelone, Ron. Personal interview 28 Mar. 2008.

and that he can play on anybody in there and kill any other inmate or kill a staff person and know that he's not going anywhere but right where he is."⁶⁷

Of the more than one hundred executions over which he presided, the most of any Department of Corrections Director in the United States, Angelone contends that lethal injection is the most humane method by which the State executes its condemned inmates. Recalling these executions, he says, "I watch them, I see how they start snoring. I see how their breathing is almost sub-normal because they're mentally asleep and they're not feeling anything. By the time the second one goes in there, you know, it's cutting off their air supply, but they're going out."⁶⁸ Angelone therefore rebuts the argument that the three-drug protocol introduces the danger of inflicting unnecessary pain, noting that based on his experience and close proximity to the condemned, the anesthetic induces such a deep state of unconsciousness that pain cannot be registered from the introduction of the subsequent drugs. Alluding to the popular comparison between lethal injections and clinical medical procedures, Angelone observes that the same barbiturate anesthetic is used by both executioners and medical doctors. He argues that "people are under the knife everyday in our hospitals and sodium pentothal is administered, and they're out cold and they don't feel any pain and they get their bodies torn apart and a new heart put in. They don't feel pain. And neither do the people who get executed."⁶⁹

Dilemma Surrounding the Role of Physicians

Regardless of the drug or drugs used, as long as lethal injection remains a legal avenue by which the state puts its condemned to death, the individual charged with its immediate administration serves as another contentious issue at the heart of the debate. The role of doctors, or lack thereof, in the lethal injection process has attracted the attention of medical and legal

⁶⁷ Ibid.

⁶⁸ Ibid.

⁶⁹ Ibid.

professionals and the courts alike. Dr. Jonathan Groner, Associate Professor of Clinical Surgery at the Ohio State University College of Medicine first became interested in the phenomenon he calls the “Hippocratic Paradox,” referring to the Hippocratic Oath in which doctors agree to “do no harm,” when he served as a witness for the prosecution in a capital murder trial. When presented with a written account of the Arkansas lethal injection protocol, Groner was struck by the similarities between it and the protocol for outpatient surgery from a “hospital’s procedure policy manual.”⁷⁰ Upon further exploration, Dr. Groner found more aspects of the lethal injection procedure to be, or at least give the appearance of being, medical in nature.

This marriage of medicine and lethal injection without the direct participation of medical professionals, he argues, has several potential pitfalls. First, thiopental, the anesthetic, is “manufactured as a powder and must be mixed before use.”⁷¹ Furthermore it can precipitate with other drugs, a process by which the previously liquid mixture forms into a solid in the tubing that is supposed to deliver it to the inmate. With regard to the tubing itself, its relatively long length makes the detection of back pressure nearly impossible. Finally, the injection site is “not monitored during infusion,” nor is the “anesthetic depth assessed before the injection of paralyzing or painful drugs.”⁷² In light of these potential pitfalls and the courts’ awareness of them, several states, among them North Carolina and California, have mandated the participation of medical professionals or technology in some capacity.

Dr. Groner considers these mandates to be particularly problematic. The “medicalization of killing,” as he refers to them, encompasses the processes by which the condemned is “treated as a patient,” the procedure “simulates a medical practice,” medical professionals “must play a

⁷⁰ Groner, Jonathan. “The Hippocratic Paradox: The Role of the Medical Profession in Capital Punishment in the United States.” *The Lethal Injection Debate: Law and Science*. Fordham University Law School. New York, 7 Mar. 2008.

⁷¹ *Ibid.*

⁷² *Ibid.*

direct role,” and, ultimately, state sanctioned killing “becomes acceptable to the public.”⁷³ These practices, according to Groner, are evocative of Nazi Germany, in which physicians were pivotal in the implementation of its genocide program. The relationship to such a horrific historical occurrence, if even on a lesser scale, has the potential to undermine societal trust in the medical community. Thus the paradox is presented: whereas it may be illegal for physicians to refuse participation in lethal injection in certain jurisdictions, it is also unethical for them to participate.⁷⁴ On the institutional level, the American Medical Association, in a press release by President William G. Plested III, utters a similar sentiment. Plested expresses his unease with the rigid courts and legislatures that refuse to respect a doctor’s unique societal role as preserver of life, arguing that “the use of a physician's clinical skill and judgment for purposes other than promoting an individual's health and welfare undermines a basic ethical foundation of medicine.”⁷⁵

Dr. Susi Vasallo, Clinical Assistant Professor in the Department of Emergency Medicine at New York University’s School of Medicine, adopts a somewhat divergent view. While she admits that she would not make the personal choice to be in the death chamber, neither would she opt to sanction those who do. She argues that for those individuals, making the choice to partake in a lethal injection may very well be an act of humanity. They may feel that as long as the state sanctions the practice of lethal injection, they have an obligation to do everything in their power to assure that the procedure is carried out properly.⁷⁶ Vasallo resents the allusion to the Nazi practices of eugenics and genocide, asserting that one could easily make the case that an

⁷³ Ibid.

⁷⁴ Ibid.

⁷⁵ Plested III, William G (17 Jul. 2006). “AMA: Physician Participation in Lethal Injection Violates Medical Ethics.” *American Medical Association Press Release*. Retrieved 4 Mar. 2008. <http://www.ama-assn.org>.

⁷⁶ Vasallo, Susi. “Physicians and the Death Penalty.” *The Lethal Injection Debate: Law and Science*. Fordham University Law School. New York, 7 Mar. 2008.

individual who chooses to stand by while someone is suffering and not do anything, even though he or she may be qualified to do so, is more akin to Nazism than the alternative.⁷⁷

In recounting his twenty-seven year tenure as executioner of the Virginia State Penitentiary and South Carolina's Greenville Correctional Center, Jerry Givens lends credence to Dr. Vasallo's claims. Givens notes that although a physician's ethical code proscribes against causing harm, he "was not qualified" to perform lethal injections, noting that he "doesn't have a degree." Givens also stated that despite his extensive experience, should the current protocol continue unaltered, he cannot think of a solution that would reconcile the two divergent schools of thought.⁷⁸

Modern Litigation – Setting the Stage

In examining the oppositional arguments raised against lethal injection, despite the obvious similarities between the new generation of issues raised and their predecessors, a vital element has been altered that makes lethal injection claims far more susceptible to judicial scrutiny and, consequently, legislative change. In 2006, the Supreme Court handed down a decision in *Hill v. McDonough*, a case involving convicted murderer Clarence E. Hill of Florida, who sought to challenge that state's three-drug lethal injection protocol. Since "Federal law opens two main avenues to relief on complaints related to imprisonment: a petition for habeas corpus and a complaint under the Civil Rights Act of 1871," the Court was faced with the question of whether or not Hill's challenge had to be brought about as a habeas corpus claim, just as a challenge to the sentence itself would, which would amount to one of the petitioner's automatic appeals.⁷⁹

⁷⁷ Ibid.

⁷⁸ Givens, Jerry. "Another Day is Not Promised...Make the Best of the One You Have." The Lethal Injection Debate: Law and Science. Fordham University Law School. New York, 7 March 2008.

⁷⁹ *Hill v. McDonough* 547 U.S. 573 (2006).

Handing down a unanimous decision, the Supreme Court held that a challenge to a particular method of execution does not amount to a federal habeas corpus petition. As such, a condemned inmate may challenge the execution method independently of other habeas corpus appeals, including a circumstance under which those appeals have already been exhausted. Justice Kennedy, who delivered the opinion, highlighted the fact that, “Hill’s action, if successful would not necessarily prevent the State from executing him by lethal injection.” The complaint “seeks instead only to enjoin the respondents from executing Hill in the manner they currently intend.”⁸⁰

One of the foremost cases of this newest era in capital punishment, and one that may very well invoke the right set forth by *Hill*, involves Michael Morales, a death-row inmate from California, convicted of capital murder for the killing of seventeen-year-old Terri Winchell. The Honorable Jeremy Fogel, a United States District Court Judge from the Northern District of California, is presiding over Morales’ legal challenge at the state level and spoke about the case at a symposium on lethal injection sponsored by Fordham University’s Urban Law Journal. Fogel points to two highly publicized executions in California that induced a shift within that state, resulting in its willingness to hear Morales’ case following the rejection of two others, those of Stanley “Tookie” Williams and Clarence Allen.

The former took place in 2005 and attracted a large following because of Williams’ notoriety as a founder of the infamous Crips gang. In carrying out his lethal injection, the execution team did not follow protocol, failing to hook up a backup intravenous line. The latter, a 2006 execution, involved a seventy-six-year-old condemned inmate, the second-oldest ever to be executed. The Allen case stirred public opinion, for many believed that in light of his age, he no longer posed a threat to society. Furthermore, the initial dose of the potassium chloride was

⁸⁰ Ibid.

insufficient to stop Allen's heart and required the administration of a second dose. Judge Fogel went on to say that in more than half of execution cases, an anomaly of some form occurs, usually the presence of a heartbeat when none should exist or breathing that is inconsistent with unconsciousness.⁸¹

In light of these developments, Fogel was sufficiently convinced that Morales had met his legal burden and agreed to an evidentiary hearing. A "lengthy, undisputed statement of facts" ensued, in which it was made clear that the execution team does not receive proper training and does not mix drugs in accordance with manufacturer protocol. Fogel ruled that California has to "take a serious look" at its execution protocol and has two choices if executions are to continue in the interim while that process is ongoing. Lethal injections must either follow a single drug protocol or they must involve medical professionals.⁸² This is where the case currently stands, and as such, where Judge Fogel must cease his discussion so as to not discuss the merits of the case.

A Fundamental Ideological Difference?

Stopping short of violating his ethical obligations, Fogel raises a point that appears to be central not only to the lethal injection debate, but a more expansive debate that has raged for decades surrounding capital punishment in general. He argues that an understanding of the disconnect between legal professionals and corrections professionals is central to a judge's ability to adjudicate death penalty cases and the ability of others to fully grasp the degree of disparity between "the way the legal culture views the issue versus the way the corrections culture implements it in real life."⁸³ In California for example, when faced with the two aforementioned choices, the corrections department opted to include medical professionals in the

⁸¹ Fogel, Hon. Jeremy. "In the Eye of the Storm: A Judge's Experience in Lethal Injection Litigation." The Lethal Injection Debate: Law and Science. Fordham University Law School. New York, 7 March 2008.

⁸² Ibid.

⁸³ Ibid.

lethal injection process. However, they interpreted the mandate in a more general fashion than Fogel had intended, deeming mere observation by anesthesiologists, rather than their direct involvement, to be sufficient. He asserts that corrections culture views a successful execution as one in which the “inmate ends up dead.”⁸⁴

Different individual research and findings present a somewhat hazy picture of the validity of the belief that corrections officials are most concerned with the outcome and less so with the legality of the means that achieve it. Oklahoma death row warden Cameron Haverick, while taking part in a documentary interview with death penalty proponent Robert Blecker, expresses that no one execution that he has been a part of has been particularly memorable. He notes that the execution team understands that their job is not to punish, but to carry out the law. Speaking for himself, Haverick remarks that he takes neither satisfaction nor regret from executions, adding that he has “no problem getting to sleep at night.”⁸⁵

Former Virginia and South Carolina executioner Jerry Givens, on the other hand, recalling the sixty-two executions over which he presided, always wondered if any of the inmates were innocent or not given a fair trial. In each case, however, he did adopt the prevailing corrections professionals’ logic that the judgment of guilt had already been made and his duty was to assure that the execution was carried out properly. Yet lethal injection as a method of execution remained troublesome for Givens, who states that “from the first lethal injection I witnessed, I knew I wasn’t going to like that method.”⁸⁶ When he first began working as an executioner, electrocution was the only method Virginia employed. When Virginia passed its lethal injection statute, the execution team was sent to Texas to observe that

⁸⁴ Ibid

⁸⁵ Haverick, Cameron. Interview by Robert Blecker. “Old Painless and the Pizza Man,” *The Lethal Injection Debate: Law and Science*. Fordham University Law School. New York, 7 March 2008.

⁸⁶ Givens, Jerry. “Another Day is Not Promised...Make the Best of the One You Have.” *The Lethal Injection Debate: Law and Science*. Fordham University Law School. New York, 7 March 2008.

state's standard operating procedure. In the execution that Givens witnessed, the condemned "almost finished the entire hymn 'Amazing Grace' from the time the first drug was injected until he went unconscious."⁸⁷ Furthermore, Givens and his fellow team members would be strapped to the gurney as part of the test run the day before scheduled executions. This compounded his distaste for the procedure, as he "hated the feeling," calling it "uncomfortable and painful."⁸⁸

John Vanyur, retired assistant director of the Federal Bureau of Prisons, presents a similar view, asserting that, at least in the context of the federal system, "if you were to ask every corrections guy if they want to be part of that execution or is this something that the Bureau of Prisons would like to be in, every one of them would tell you 'no'."⁸⁹ That said, he does feel that lethal injection is the most humane method of execution on the books. Although the federal system did not execute any inmates during Vanyur's tenure as assistant director, he was notified by colleagues that in previous executions, the inmate "was dead by the time the second drug was in," adding that many victims' families "complained that it was too sterile and too painless, given what the victims had gone through."⁹⁰ He does note, however, that the federal system is largely open to modifications, often borrowing successful methods from other states. As such, Vanyur feels that the federal system would be willing to adopt a different method if it was found to be more effective with improved procedural safeguards.⁹¹

Recalling his personal participation in the test runs cited by Jerry Givens, Vanyur notes that the execution team would get together periodically, once every four or six months, and run non-stop simulated executions for two days at a time.⁹² However, in contrast to Givens' displeasure with the practice, Vanyur contends that it was beneficial for the team members,

⁸⁷ Ibid.

⁸⁸ Ibid.

⁸⁹ Vanyur, John. Personal interview. 21 Mar. 2008.

⁹⁰ Ibid.

⁹¹ Ibid.

⁹² Ibid.

serving to underscore the gravity of the task they were entrusted to undertake. The process of getting strapped to the gurney built empathy, in his view, which in turn drastically reduced the likelihood that a team member would engage in dehumanizing practices, such as the intentional infliction of pain, in the case of an actual execution.⁹³

Baze v. Rees

The debate and its resulting judicial decisions seemed to culminate on September 25, 2007, when the United States Supreme Court granted a writ of certiorari to *Baze v. Rees*, a case concerning Kentucky's lethal injection protocol. The case involves two Kentucky inmates, Ralph Baze and Thomas C. Bowling, the former convicted of the 1992 murders of a sheriff and deputy sheriff and the latter of the 1992 double murder of a married couple, whose two-year-old son he also wounded. Both were sentenced to death but neither has been assigned an execution date. Furthermore, each has exhausted the "legitimate state and federal means for challenging their convictions and the propriety of the death sentences."⁹⁴ Instead, and in light of the *Hill* decision, petitioners opted to challenge lethal injection as a method of execution. Their challenge was unsuccessful at both the trial and state level, and an appeal to the Supreme Court was submitted.

Petitioners Baze et al. submitted a brief to the United States Supreme Court in which they raised four distinct questions regarding Kentucky's current lethal injection protocol. First, petitioners question whether the Eighth Amendment prohibits means for carrying out an execution that create an unnecessary risk of pain and suffering, as opposed to only a substantial risk of the wanton infliction of pain.⁹⁵ Next, they question whether or not a given execution method violates the Eighth Amendment if there is "a showing that readily available alternatives

⁹³ Ibid.

⁹⁴ Ralph Baze and Thomas C. Bowling v. Jonathan D. Rees et al. 2005-SC-0543-MR (Ky. 2006).

⁹⁵ *Baze et al. v Rees et al.* Brief for Petitioners p.2

that pose less risk of pain and suffering could be used.”⁹⁶ Third, the petitioners ask whether the three drugs presently employed by the state, either “individually or together, violate the cruel and unusual punishment clause of the Eighth Amendment because lethal injections can be carried out by using other chemicals that pose less risk of pain and suffering.”⁹⁷ Finally, the petitioners inquire as to whether or not substantive due process obligates a state to have a medical team on hand during lethal injections to intervene in the event that an execution starts but must be stopped due to a court stay.⁹⁸ The Court agreed to consider the first three of the aforementioned constitutional questions.

The petitioners argue that *In re Kemmler*, a case in which electrocution was deemed to be more humane than hanging, established a standard under which "the infliction of 'unnecessary' pain in the course of carrying out a death sentence" is an "evil of the most immediate concern to the Eighth Amendment."⁹⁹ Additionally, and according to the precedent set in *Roper v. Simmons*, a Supreme Court case that struck down the imposition of capital sentences for individuals who committed the crime in question before they were eighteen years of age, "by protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons."¹⁰⁰ Although the methods the framers had in mind when drafting the Eighth Amendment involved mutilation and other overtly barbarous acts, *Weems v. United States* established that the Amendment was never "intended to prevent only an exact repetition of history."¹⁰¹ They argue that Kentucky's protocol, by adhering to a method that is subject to multiple errors, each of which may result in extreme pain, is obligated to impose

⁹⁶ Ibid. p. 2

⁹⁷ Ibid. p. 2.

⁹⁸ Denniston, Lyle. "Court Drops One Issue on Lethal Injection" SCOTUS Blog. 3 Oct. 2007.

⁹⁹ *Baze et al. v Rees et al.* Brief for Petitioners p. 41.

¹⁰⁰ Ibid. p. 41.

¹⁰¹ Ibid. p.41.

"adequate, practicable safeguards against those errors."¹⁰² A failure to do so flies directly in the face of *Gregg v. Georgia*'s declaration that execution methods "must not involve the unnecessary and wanton infliction of pain"¹⁰³

The petitioners' argument places a primary focus on the concept of "unnecessary" pain. Citing the 1947 Supreme Court case *Louisiana ex rel. Francis v. Resweber*, they note that "the traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence." As further outlined in *Roper v. Simmons*, "unnecessary" must be defined in light of evolving standards of decency.¹⁰⁴ This invokes the dissent authored by Justice Powell in *Furman v. Georgia*, in which he stated that "no court would approve any method of implementation of the death sentence found to involve unnecessary cruelty in light of presently available alternatives."¹⁰⁵ This line of reasoning naturally segues to their argument questioning the legality of Kentucky's administration of lethal injection and the three drugs used therein. The petitioners cite the 1969 Tenth Circuit Court of Appeals case *Bethea v. Crouse*, in which two inmates claimed that prison officials' failure to prevent beatings by other inmates constituted Eighth and Fourteenth Amendment violations, to argue that "cruel and unusual punishment may be inflicted by the inhumane execution of a permissible penalty."¹⁰⁶ This reference serves to clarify the petitioners' argument that lethal injection can be a humane execution method, given that it is administered properly and by the least painful means available.

Regarding Kentucky's protocol, the petitioners argue that the state failed to subject its procedure to the appropriate constitutional test, interpreting the Eighth Amendment to "protect against only 'substantial' risks rather than unnecessary ones" and, furthermore, failing to

¹⁰² Ibid. p. 41.

¹⁰³ Ibid. p.42.

¹⁰⁴ Ibid. p. 44.

¹⁰⁵ Ibid. p. 45.

¹⁰⁶ Ibid. p.45.

consider the record's illustration of the "magnitude and nature of the risk imposed" by its lethal injection protocol.¹⁰⁷ They assert that as the magnitude of the pain in question increases, degree of risk that may be tolerated must decrease. Considering Kentucky's protocol, the resultant pain may be extreme, as "the two drugs give rise to the danger that even if inmates are insufficiently anesthetized and consequently experience the pain of potassium, all evidence of that suffering will go completely unnoticed and uncorrected."¹⁰⁸ Kentucky's Department of Corrections, in outlining its protocol, has, in the petitioners' opinion, created "a setting in which botched executions are not only possible but highly likely."¹⁰⁹

Finally, and alluding to their previous argument regarding unnecessary pain, the petitioners note that readily available alternatives would nearly eliminate the high risk that is inherent in Kentucky's current procedure. "By omitting pancuronium and potassium and relying instead on a lethal dose of an anesthetic," they contend, "the Department of Corrections would virtually eliminate the risk of pain," adding that it is universally accepted that the pancuronium bromide is not necessary to induce death. Rather, the purpose it serves in the context of executions is solely aesthetic.¹¹⁰ To further reduce the risk of pain, Kentucky has another readily available alternative at its disposal, a mandate requiring the presence of a medical professional to measure anesthetic depth.¹¹¹ Concluding their argument, the petitioners contend that the risks created by implementing Kentucky's protocol do not advance any reasonable penalogical interests. For this and the other aforementioned reasons, all of which are supported by existing case law, the Court should reverse or remand the ruling of the Kentucky Supreme Court.¹¹²

¹⁰⁷ Ibid. p.52.

¹⁰⁸ Ibid. p. 56.

¹⁰⁹ Ibid. p. 60.

¹¹⁰ Ibid. p. 63.

¹¹¹ Ibid. p. 68.

¹¹² Ibid. p. 71

In their brief, the respondents, John Rees et al., offer answers to the three constitutional questions raised and in doing so respond to each of the petitioners' claims. Their argument commences with the assertion that the Kentucky Supreme Court was correct in evaluating petitioners' claim under the "substantial risk" test, despite their claim to the contrary. The respondents contend that "the application of the Eighth Amendment to the mere *risk* of pain and suffering is a relatively new development, prompted by the recent proliferation of method-of-execution challenges." The Eighth Amendment, by contrast, has been historically applied with regard to the pain and suffering that actually result from a method of execution.¹¹³ The decision in *Gregg v. Georgia*, which holds that "the punishment must not involve the unnecessary and wanton infliction of pain," illustrates this point.¹¹⁴

According to the respondents, the petitioners' reliance on the unprecedented "unnecessary risk" standard "places the states under a continuing obligation to adopt the 'least risk' alternatives reasonably available at any given time."¹¹⁵ Such a standard would result in an Eighth Amendment challenge "any time alternatives became available to reduce the risk of pain or suffering further, even if the risk was already insignificant." Pointing once again to the *Gregg* decision, the respondents allege that such a standard is at odds with the principle put forth in that case. *Gregg* established that the courts "may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved."¹¹⁶

The respondents' brief then turns to the petitioners' claim that once an improvement to the current protocol becomes available, a failure to implement it amounts to "foreseeable risk," a factor that would distinguish this case from those in which other execution methods withstood

¹¹³ *Baze et al. v Rees et al.* Brief for Respondents, p. 39.

¹¹⁴ *Ibid.* p. 39.

¹¹⁵ *Ibid.* p. 42.

¹¹⁶ *Ibid.* p. 42.

constitutional scrutiny. As stated in *Louisiana ex rel. Francis v. Resweber*, the respondents argue, “if a protocol as written involves no inherent substantial risk of the wanton infliction of pain, any risk that the procedure will not work as designated in the protocol is merely a risk of accident which is insignificant in our constitutional analysis.”¹¹⁷

They then focus on Kentucky’s specific protocol, arguing first that deference must be granted to the two lower courts that heard the case, each of which made factual findings indicating that Kentucky’s protocol eliminates the substantial risk of unnecessary pain or suffering. They point out that *Hernandez v. New York* held that “in the absence of exceptional circumstances, we would defer to state-court factual findings, even when those findings relate to a constitutional issue.”¹¹⁸ At trial, petitioners’ own expert witness conceded that a three gram dose of thiopental would render the recipient unconscious within sixty seconds and is sufficient to “insure a quick, humane, pain-free death.”¹¹⁹

Because it is almost universally accepted that the dose of thiopental administered under Kentucky’s protocol is adequate to eliminate the risk of pain, the only remaining contention, according to the respondents, surrounds the issue of whether or not the protocol creates a significant risk that the thiopental will not enter the condemned’s circulatory system. They argue that it does not, citing the safeguards that Kentucky has incorporated into its procedure to prevent such errors. The most significant safeguards, they assert, relate to “the specifications for qualifications and training of the execution team personnel who are responsible for placing the IVs into the condemned.”¹²⁰ The record states that such individuals must have at least one year of experience as a certified medical assistant, phlebotomist, emergency medical technician, paramedic, or military corpsman. Furthermore, the execution team must run practice sessions at

¹¹⁷ Ibid. p. 44.

¹¹⁸ Ibid. p. 49.

¹¹⁹ Ibid. p. 50.

¹²⁰ Ibid. p. 52.

least ten times per calendar year.¹²¹ To safeguard against IV failure after the execution team has “established venous access,” Kentucky employs both a primary and backup IV line. Finally, “the warden and deputy warden are physically inside the execution room with the condemned watching for signs of IV failure due to problems with IV tubing or infiltration.”¹²² Cumulatively, these safeguards eliminate the risk that the three grams of thiopental will not reach the inmate’s circulatory system.

The respondents next argue that the petitioners fail to prove that alternate drugs pose less risk than those currently administered under Kentucky’s protocol. Speaking to the petitioners’ suggestion that a one-drug protocol would be equally effective and pose less of a risk, the respondents assert that “Baze and Bowling failed to raise this argument before the Kentucky Supreme Court.”¹²³ Regardless of this fact, the argument must be rejected on the grounds that it lacks merit, as it is untested, and fails to account for constitutional issues that the new protocol might raise. This evokes their earlier claim of the dangerous implications of the petitioners’ uncharted “unnecessary risk” standard. They claim that the “petitioners’ belief that Kentucky’s lethal injection protocol is unconstitutional, in light of this scant evidence of risk reduction, underscores the havoc that application of their ‘unnecessary risk’ standard would wreak on the states’ good-faith efforts to humanely enforce lawful sentences of death by means of lethal injection.”¹²⁴ The Court’s acceptance of their argument, according to the respondents, would allow death-row inmates to mount repeated challenges to every adopted protocol.

With respect to the pancuronium bromide, the most controversial drug in the sequence, the respondents claim that it serves a number of legitimate functions in the execution process.

First, it prevents involuntary muscle contractions “that would otherwise result from

¹²¹ Ibid. p. 52.

¹²² Ibid. p. 54.

¹²³ Ibid. p. 67.

¹²⁴ Ibid. p. 60.

administration of the other lethal injection chemicals.”¹²⁵ Such muscle contractions may give the appearance of a painful death or interfere with the intravenous line. Secondly, the pancuronium bromide contributes to the cessation of respiration. Finally, the drug “contributes to the dignity of the death process.”¹²⁶ These justifications supporting the use of pancuronium bromide allude to the *Gregg* principle that constitutionally punishments must respect “the dignity of man, which is the basic concept underlying the Eighth Amendment.”¹²⁷ For this reason and those aforementioned, the respondents urge the Court to affirm the judgment of Kentucky’s Supreme Court.

Agreeing to consider only the first three issues raised in the petitioners’ brief, the Supreme Court granted the writ of certiorari and oral arguments commenced on January 7, 2008. Donald B. Verrilli, who appeared on behalf of the petitioners, opened the oral arguments and was almost immediately faced with a query from Chief Justice John Roberts. The Chief Justice notes that the petitioners’ claim rests heavily on improper administration of the protocol, prompting him to ask Verrilli if he agrees with the statement that “if the protocol is properly followed, there is no risk of pain.”¹²⁸ Verrilli argued that there is no way that proper administration of the protocol can be guaranteed, just as proper administration of the same anesthetic cannot be guaranteed in a clinical setting.¹²⁹

Verrilli cites this inherent uncertainty as the factor that necessitates the inclusion of a professional trained in monitoring the anesthetic. When questioned by Justice Scalia concerning the conflict that this poses, in light of the American Medical Association’s condemnation of physician participation in lethal injection, Verrilli points out that the one-drug protocol serves as

¹²⁵ Ibid. p. 63.

¹²⁶ Ibid. p. 63.

¹²⁷ Ibid. p. 65.

¹²⁸ *Baze v Rees*, United States Supreme Court Case 07-5439, Oral Argument, p.3, lines 19-22.

¹²⁹ Ibid. p. 4, lines 10-15.

“another alternative...which solves that problem.”¹³⁰ The justices expressed a reluctance to accept this facet of the petitioners’ argument, citing that an alternative protocol was not raised in the Kentucky Court proceedings and was only mentioned once at the trial court level, in which an expert testified that an “alternative chemical poses less risk”¹³¹ Verrilli argues that experts for both the petitioners and respondents testified that, “thiopental is a barbiturate and by definition will inflict death painlessly,” and that a three gram dose is guaranteed to do so.¹³²

The justices, specifically Chief Justice Roberts, then turned to the issue of future challenges to a one-drug protocol, as it has never been utilized in the context of lethal injections. He asks what the Court should do when the next case arises, this one arguing that the involuntary muscle contractions induced by the anesthetic-only protocol compromise the dignity of the condemned.¹³³ Verrilli contends that no Eighth Amendment claim would exist in such a case, as the barbiturate cannot inflict a painful death, even in cases of maladministration. As he goes on to note following a later inquiry, this one dealing with the potential for improper mixing of the anesthetic under the one-drug protocol, “if there’s an error at that stage in the process and the execution proceeds, there may be a problem that needs to be fixed, but it will not be a problem that causes any pain, and that’s the critical difference.”¹³⁴ Absent any pain, he asserts, there can be no cruel and unusual punishment.

Given the justices’ feeling that the one-drug alternative was presented too late in the judicial process, the argument shifted again to the issue of adequate monitoring. Verrilli refuted Justice Breyer’s suggestion that a mandate guaranteeing the participation of medically trained professionals amounts to a backdoor attempt to abolish lethal injections in their entirety, a claim also raised by many of the aforementioned experts. He argues that this is precisely where the one-drug protocol comes into play; the petitioners’ recommendation of such a procedure in effect proves that abolition

¹³⁰ Ibid. p. 6, lines 6-10.

¹³¹ Ibid. p. 7, lines 9-14.

¹³² Ibid. p. 8, lines 6-11.

¹³³ Ibid. p. 11, lines 5-13.

¹³⁴ Ibid. p. 20, lines 21-25.

is not their goal.¹³⁵ Consequently, Verrilli adds that given the deficiencies in the previous court records, in which there were no “factual findings on a whole range of issues with respect to the difficulties of constituting the proper dose, the risk of catheter placement, the risk of blowouts, the risk of mixing up syringes, and the adequacy of the monitoring,” the Court would be justified in remanding the case for further fact-finding.¹³⁶

In light of this statement, Justice Scalia expressed a concern of a more practical nature, arguing that a remand of the case may result in a nationwide cessation of executions while the trial court goes about its fact-finding, a process that could take years. His more provocative suggestion, however, is that the oral arguments thus far were carried out in a way that presupposes a constitutional right to an execution by the least painful means, a provision that simply does not exist. As proof that there is no such guarantee in place, Scalia remarks that the State has approved both electrocution and the firing squad as execution methods.¹³⁷ Verrilli notes that a finding of the least painful method is not necessary. Rather, the petitioners’ claim in this case rests on two core principles: the Eighth Amendment guarantee against torturous deaths and the Supreme Court’s standard of whether or not “the means of execution inflicts unnecessary pain.”¹³⁸

Scalia voiced his disagreement with the applicability of these standards in this case. First, the issue of torture does not apply, in his opinion, because torture, by definition, involves the intentional infliction of pain. It cannot be said that the states, in adopting their lethal injection protocols, were seeking to inflict pain. To the contrary, “they introduced it presumably because they, indeed, think it is a more humane way” to execute an inmate, when viewed in light of the available alternatives. The second principle does not apply because the standard holds that the pain must be unnecessary *and* wanton to be both cruel and unusual, according to Scalia.¹³⁹ Verrilli maintains that the pain inflicted

¹³⁵ Ibid. p. 13, lines 7-9.

¹³⁶ Ibid. p. 14, line 13 – p. 15, line 3.

¹³⁷ Ibid. p. 21, lines 3-13.

¹³⁸ Ibid. p. 22, lines 8-12.

¹³⁹ Ibid. p. 22, lines 1-7, p. 25, lines 9-12.

when the current protocol “goes wrong is torturous, excruciating pain under any definition. We're not talking about a slight increment difference. We're talking about the infliction of torturous pain.”¹⁴⁰

He concludes by pointing out that some of the most influential Supreme Court decisions on the death penalty, including the three separate cases decided under *Gregg v. Georgia*, have not required a showing of intent.¹⁴¹

Roy T. Englert spoke on behalf of the respondents. His argument commenced with the concession that if not properly administered, the current lethal injection protocol has the potential to cause extreme suffering. Furthermore, he admits that if this suffering occurred at every execution, it would constitute a violation of the Eighth Amendment.¹⁴² However, where Englert diverges from the petitioners is on his next point, that the potential for the infliction of pain requires a greater focus on the safeguards in place to guarantee that the first drug is administered properly. He contends that “Kentucky uses what is probably literally the best qualified human being in the Commonwealth of Kentucky to place the IV line. It uses a phlebotomist who in her daily job works with the prison population.” Such a professional is not a medical doctor, but undergoes “a certain amount of learning followed by on the job training” and performs approximately thirty injections within the prison population per day, thus rendering the individual familiar with the “problems of compromised veins we have in the inmate population specifically.”¹⁴³

When Justice Ginsburg expressed her concern regarding the lack of training of the individual charged with operating the syringe, the actual executioner, Englert highlights the fact that while Kentucky has performed just one execution by lethal injection since 1998, when it adopted the method, it has performed over one hundred practice sessions. Speaking to the issue of whether or not the corrections officials in the chamber know what to look for should a mistake occur or other

¹⁴⁰ Ibid. p. 23, lines 6-10.

¹⁴¹ Ibid. p. 26, lines 1-17.

¹⁴² Ibid. p. 27, lines 7-14.

¹⁴³ Ibid. p. 28, lines 9-17.

problem arise, Englert notes that Kentucky has in place an additional safeguard under which unconsciousness must be proven before the second and third drugs are administered. As the most common error in lethal injections involve the insertion of the intravenous line into tissue rather than a vein, this added safeguard almost guarantees a painless execution. The inmate would not fall unconscious if the line had not reached a vein. To the contrary, “he would be awake and screaming,” as Dr. Dershwitz testified, a spectacle that the warden or deputy wardens present would certainly take notice of.¹⁴⁴

Englert then turns to the one-drug protocol highlighted in the petitioners’ oral argument, noting that petitioners’ expert, Dr. Heath, admitted that a three-gram dose of the thiopental alone would not guarantee death. In light of an inquiry by Justice Stevens, who suggested that more thiopental be administered until the desired outcome is reached, Englert notes that “the human body can’t take more than a certain amount of the barbiturates, so it actually becomes problematic to go past five grams, which is why nobody goes higher than five grams.”¹⁴⁵ He agrees that the paralytic, pancuronium bromide, is not necessary to effectuate death, but disagrees that its sole purpose is cosmetic, arguing that “it does bring about a more dignified death, dignified for the inmate, dignified for the witnesses.”¹⁴⁶ When faced with Justice Stevens’ subsequent question of whether the dignity of the process outweighs the risk of excruciating pain, Englert replies, noting that while “the risk of pain can be avoided by single drug protocol, there’s not a certain death with one drug protocol,” adding that death by such a method would likely be extremely lengthy.¹⁴⁷

Justice Stevens raises yet another difficult question, asking Englert what he feels is at stake in this case, the constitutionality of the three-drug protocol in general or merely Kentucky’s application of it. Noting that the record leans in the respondents’ favor, Stevens wonders if such a finding leaves

¹⁴⁴ Ibid. p. 30, lines 13-25.

¹⁴⁵ Ibid. p. 32, 17-31.

¹⁴⁶ Ibid. p. 33, lines 19-21.

¹⁴⁷ Ibid p. 34, lines 13-15.

the door open to future claims challenging the use of the second drug. Englert expresses his belief that there is good reason to hold that the use of the second drug is permissible, not the least of which is that the petitioners themselves acknowledge that if administered properly, the three-drug protocol can be constitutional. Aside from this, he argues that “every state that has publicly said what it uses, uses the three-drug protocol. It would be very strange to hold that that is cruel and punishment.”¹⁴⁸

Which Issues are at Stake and Which are Not?

Ginger Anders, a member of the legal team that represented the petitioners before the Supreme Court in *Baze v. Rees*, is quick to note that the issues at stake in the *Baze* case are far narrower than many would suggest. Chiefly, despite the national attention that it is garnering, this case deals specifically with Kentucky’s lethal injection procedure.¹⁴⁹ Anders does agree with Dr. Teresa Zimmers, co-director of the Surgical Oncology Lab at the University of Miami, who claims that states cite other states’ protocols in creating and upholding the constitutionality of their own, a point exemplified by John Vanyur’s depiction of the federal system. However, she also asserts that it is important not to lose sight of the fact that a finding in favor of the petitioners would not amount to the death knell of the death penalty, or even lethal injection, on the national scale.¹⁵⁰ Rather, the case seeks to determine what standard ought to be used in weighing a given execution procedure against the Eighth Amendment protection against cruel and unusual punishment and, furthermore, how that standard applies to Kentucky’s current protocol. Put more specifically, at issue in *Baze*, according to Anders, is whether or not the state’s execution procedure is unconstitutional if it subjects inmates to a significant and unnecessary risk of severe pain and whether or not the existence of a potentially less dangerous

¹⁴⁸ Ibid. p. 42, lines 4-7.

¹⁴⁹ Anders, Ginger. “*Baze v Rees* and Other Lethal Injection Litigation,” The Lethal Injection Debate: Law and Science. Fordham University Law School. New York, 7 March 2008.

¹⁵⁰ Zimmers, Teresa. “The Problems with the Implementation of Lethal Injection,” The Lethal Injection Debate: Law and Science. Fordham University Law School. New York, 7 March 2008

alternative should be accounted for in determining such a risk. Also at issue is the role of intent in a state's execution protocol. If the state intends for its method to be humane, does the potential for danger matter?¹⁵¹

Lawyer Jonathan Sheldon espouses a similar view, pointing to the challenges to lethal injections that fall entirely outside of the *Baze* case. One such issue involves so called "cut downs," procedures in which the individual appointed to administer the intravenous line must dig far below the skin in order to find an accessible vein. This process is relatively common, given the high incidence of past or present intravenous drug use among death-row inmates.¹⁵² Additionally, and as indicated at the end of oral arguments, the precise drugs used do not fall within *Baze*'s scope, as the case, according to Sheldon, places its focus on inadequate administration. Finally, the case does not encompass the methods by which the state can seek to change the protocol. Citing two examples, Sheldon points to the federal Administrative Procedures Act, 1946 legislation which established avenues by which federal courts may directly review agency decisions, and ethical considerations stemming from extensive research as two potential catalysts for the imposition of such a change.¹⁵³

Media Influence

Judge Fogel echoes the sentiments of both Anders and Sheldon, pointing out that "as far as the public is concerned, it comes down to whether or not the death penalty is per se unconstitutional."¹⁵⁴ As such the debate within the public arena boils down to two camps, one of which consists of individuals who think the death penalty is never constitutional, and the other,

¹⁵¹ Anders, Ginger. "*Baze v Rees* and Other Lethal Injection Litigation," The Lethal Injection Debate: Law and Science. Fordham University Law School. New York, 7 March 2008.

¹⁵² Sheldon, Jonathan. "Legal Challenges to Lethal Injection," The Lethal Injection Debate: Law and Science. Fordham University Law School. New York, 7 March 2008.

¹⁵³ Ibid.

¹⁵⁴ Fogel, Hon. Jeremy. "In the Eye of the Storm: A Judge's Experience in Lethal Injection Litigation." The Lethal Injection Debate: Law and Science. Fordham University Law School. New York, 7 March 2008.

made of people who feel that “the defendant is an animal and should be killed in the same way his victims were.”¹⁵⁵ Fogel notes that media coverage likely plays a role in this extreme polarization, as sensationalist coverage is more effective with the public than a dry, strictly factual approach. However, he does give credit to the media, which, in his opinion, has gotten better at being engaging while factually complete and accurate.¹⁵⁶

Henry Weinstein, legal affairs writer for *The Los Angeles Times*, defends the media’s coverage of the lethal injection cases. Noting that in the context of the modern debate, people first started becoming interested in lethal injection in 2000 when George W. Bush, then governor of Texas, the state with the most recorded executions, was seeking his first presidential term. Also around that time, Dr. Clay Griffiths, a psychiatrist who has come to be known as “Dr. Death,” testified in his 145th capital case, all of which resulted in death sentences.¹⁵⁷ Unfortunately for journalists, however, this newfound interest was difficult to cover, as there is a great deal of secrecy in the way lethal injection cases are litigated. The primary source of such secrecy is the degree of deference is given to corrections officials in such cases. For example, the anonymity of corrections officers and executioners is always protected. Also, the drugs that have become a centerpiece of the *Baze* case were kept under wraps for a long time, a measure whose legality was consistently upheld in light of the fear that inmates would make an anecdote if the drugs were mentioned by name.

Linda Greenhouse, the Supreme Court correspondent for *The New York Times*, largely agrees with Weinstein’s claims regarding the deference granted to corrections departments, expressing her surprise that *Baze v. Rees* was granted a writ of certiorari in the first place. She sees this measure as the Court’s attempt to ease the backlog of federal courts around the country,

¹⁵⁵ Ibid.

¹⁵⁶ Ibid.

¹⁵⁷ Weinstein, Henry. “Lethal Injection in the Media: A Discussion with the Press,” *The Lethal Injection Debate: Law and Science*. Fordham University Law School. New York, 7 March 2008.

each of which is cluttered with cases raising the same issues as those raised in *Baze*.¹⁵⁸ In her coverage of the case, Greenhouse observed that the justices seem “very uninterested in the degree of pain” that the current protocol may illicit, further noting that this disinterest splits into two factions, each characterized by the ideological inclinations of the respective justices therein. The conservative justices are hostile toward the substantial risk of pain challenge, in Greenhouse’s view, because they view a determination of unconstitutionality on this basis as an opening of the proverbial floodgates. The next method would almost certainly be challenged and the cycle would be never-ending. The liberals, on the other hand, cite a lack of workable scientific data to make a determination of a substantial risk of pain.¹⁵⁹

Greenhouse concludes that it is unlikely that the Supreme Court will “grant a thumbs up or thumbs down to lethal injection.” In her opinion, it is far more likely that the Court will articulate a standard for review of lethal injection challenges. Kentucky’s current protocol will either be found to meet that standard or the case will be remanded back to the lower courts, a notion raised by Justice Souter at oral argument and confirmed as a legitimate option by petitioners’ counsel Donald Verrilli. According to Greenhouse, the decision will also likely put an end to the current moratorium on lethal injections implemented in response to the pending Supreme Court litigation. Regardless of the outcome, she notes, the *Baze* case has demonstrated “both the power and the limits of litigation.”¹⁶⁰

Recommendations

In considering the totality of evidence on the topic, it is my recommendation that the Supreme Court remand the case for an evidentiary hearing. In my view, the issue at stake is not whether the current three-drug protocol creates a substantial risk of harm, but whether the debate

¹⁵⁸ Greenhouse, Linda. “Lethal Injection in the Media: A Discussion with the Press,” *The Lethal Injection Debate: Law and Science*. Fordham University Law School. New York, 7 March 2008.

¹⁵⁹ *Ibid.*

¹⁶⁰ *Ibid.*

therein can be summarily avoided by adopting a one-drug protocol. An evidentiary hearing's findings would likely put to rest the aforementioned concerns of all of the justices on this matter, regardless of their seeming ideological leanings.

Such information would clearly alleviate Justice Stevens' reservations regarding the use of pancuronium bromide on the grounds that it appears to be purely cosmetic, as a finding of fact would either confirm or deny his initial unease. Furthermore, Chief Justice Roberts' concern that challenges to a one-drug protocol would ensue following the adoption of such a method would likely evaporate in light of the findings, which would provide proof of the length of time that such a procedure takes and the degree of unconsciousness that it induces. Finally, although Justice Scalia expressed concern over the length of time that such a process would require, his greater concern seems to involve the acceptable degree of pain. His argument that a determination of cruel and unusual punishment requires a finding that the punishment is wantonly and intentionally applied would be settled by an evidentiary hearing. Many would argue that continuing a practice in the face of evidence that a less painful alternative exists constitutes intentional affliction of pain.

However, to appease Justice Scalia's concerns regarding the state of executions in the interim, I would borrow Robert Johnson's reasoning and mandate the direct involvement of a medical professional not bound by the Hippocratic Oath. Johnson suggests a nurse, nurse practitioner, or nurse anesthetist.¹⁶¹ Such a professional has adequate knowledge not only of medical procedures, but also possesses the ability to monitor the effects of the anesthesia and the relative consciousness or unconsciousness of the condemned. Furthermore, I would elaborate this mandate to a greater degree than Judge Fogel did in the *Morales* case, so as to avoid the

¹⁶¹ Johnson, Robert. Personal interview. 19 Mar. 2008.

resulting error in which it is interpreted too broadly and executions continue in a fashion that is essentially identical to the current protocol.

Endnote

On April 16, 2008, the United States Supreme Court found in favor of the respondents, Rees et al. By a margin of 7-2, the majority held that Kentucky's protocol does not violate the Eighth Amendment to the United States Constitution.

Appendix A – Interview with John Vanyur, retired Assistant Director of the Federal Bureau of Prisons, March 21, 2008

Q. How specific may I get when referencing you in the paper? May I use your name or is there a title you prefer?

A. Yeah, you can use my name, certainly. Let me give you my full name; it's John Vanyur and I have a Ph.D. after my name and the best title to use would be retired Assistant Director of the Federal Bureau of Prisons. That's going to be the most relevant title to what you want to talk about.

Q. How does your work during that time relate to lethal injection? Did you ever witness a lethal injection?

A. In two ways: In the job I was in as Assistant Director, I was basically in charge of all inmate security and operations for the whole Federal Bureau of Prisons. My title was actually Assistant Director of Correctional Programs Division, but basically if anything had to do with an inmate or inmate security, anything like that, I had policy oversight, policy oversight in general over the whole death row, execution process. But more specifically, I was part of what they call the execution protocol team. There was a team of employees who practiced the execution protocol, which is the process of how they execute people and I was a member of that team. They would put senior managers in the lead role, and I'm sure we'll get more into what that role would be. So I not only got into policy issues, I had hands-on, team experience. Now I never participated in an actual execution because there were no executions done in the two years that I was on the protocol team. But every, at least six months, and sometimes every four months, the team would get together and literally run non-stop simulated executions for two days.

Q. I was at a symposium last weekend and spoke with an executioner who was part of a similar team and he mentioned that he was actually strapped to the gurney...

A. Yeah, the team members would actually take turns being strapped to the gurney and I did it one time. We made every team member do it at least once because we wanted them to sort of have a sense of what the inmate felt like, because one of the big things in the federal system is, you know, it's not a pleasant thing to execute somebody, you really don't want to dehumanize the person that's being executed so to sort of build empathy if you will, and so that we do it professionally and we treat the person right, the team members would take turns getting strapped in, because it really gives you an appreciation, not of the level the inmate is at, but a pretty deep level.

Q. Did it seem like a humane method? At the center of the case I'm studying is pain, more specifically the acceptable level of pain. I'm wondering if, in your opinion, lethal injection falls within that acceptable limit of pain and furthermore, whether you feel that it is the most humane of the available alternatives.

A. Yeah, I feel that it is and you know, some of the people I worked with had been involved in a number of executions, including Timothy McVeigh, which was the first big federal execution in, I don't know, forty years, because there hadn't been one since the early sixties, and everyone I talked to completely agreed that it's the most humane way to go. The first drug, and I'm sure you're familiar with this, in the three-drug cocktail or whatever you want to call it, the first shot of that sodium, it's not pentothal, it's a derivative, but it's so powerful and there's so much going in to the individual that they are literally snoring and unconscious. Now, I have to say that, you know, one of the issues that I'm sure you're aware of is how the drugs are being administered. In the federal system they're administered through a very large vein in the groin. And so, the drugs are entering the system at a huge velocity. And so, the guys I talked to, and some of them were sort of paramedic types, with the procedure we had used, the sodium pentothal was really just knocking the guy out. There was no way the guy was feeling any pain. And they'll tell you that if you waited long enough he would die from the sodium pentothal, that's how much was going into him. Now, you know, some of the states where it was going in through the arm, and in Florida where they screwed it up, pumping the drug into the guy's muscle, they missed the vein, I'm sure you're familiar with that hideous case study, you know, that's going to be a different story. But if the protocol is right, and if it's administered properly, I believe there's not going to be any pain and you're not going to find a more humane way to execute somebody. You know a lot of the victims from McVeigh, a lot of them sort of complained that it was too sterile and too painless, given what the victims had gone through.

Q. Now I know you're not a medical expert, nor am I by any stretch, but I'm wondering if you think, to eliminate some of the controversy, sticking with that first drug but just in an extremely higher dose would eliminate some of the divisiveness of the issue.

A. Yeah, you know there may be better cocktails out there that would have less pain. I really don't know. It really is a medical question and I've read some of the reports from when they've

gone back and looked at tissues. The problem is the guy is dead so you can't ask him how much pain he felt, so it's always going to be a mystery. You know, I think that if there's somebody out there who could make it better that systems would be open to it. It's not like the guy's got to be dead within five minutes, like someone is there with a stopwatch, like you've got to get it over with, you know what I mean? So I think you're right. If you could inject huge amounts, and I don't know enough about it, could you inject huge amounts of morphine? You know, there may be other ways that could be less painful. Now the guys I've talked to will tell you that other than McVeigh, all the other executions were dead by the time the second drug was in. They didn't even need the third drug, the poison, really. McVeigh is the only one who survived that and he was kind of like the physical specimen, you know what I mean? So they'll tell you that you might not even need the third drug, or maybe you could skip over the second drug, because the paralytic is the one, I guess that they claim is causing all of the problems, because the guy can't express his reaction. So I think that the federal system, which is a pretty open system, they would be open to it if some doctor could come up with a better way. The problem you're having now is that you've got the AMA which has come out and basically said "we're going to revoke the medical license of any medical doctor that's involved in an execution." And then you have courts ruling that because it's a medical procedure, you can't have the procedure unless it's done by a medical doctor. So these prison systems are getting caught in between and so, you know, part of the problem is that if you could have quality medical doctors involved in the process it would probably get better, but they're fearful of losing their license.

Q. I was actually going to ask you about that issue in my next question. I've heard stories about, you know, the cut-down procedure, especially when the inmate has used intravenous drugs. Do you think that members of the corrections community are qualified to administer the lethal injection? Put another way, if medical professionals are indeed bound by their ethical code, can corrections officials keep carrying them out?

A. Well, I think you need somebody with a medical background, whether it be an M.D. or what they call a mid-level practitioner like a nurse practitioner or a physician's assistant. It's a medical procedure. It requires some level of medical expertise so I don't think you can, I don't think corrections people with a little bit of training would be appropriate to pull it off, to be blunt about it. I think the medical profession has to be involved some way somehow. Like I said, it doesn't have to be an M.D. Now we had an M.D. but the way we structured the protocol nobody really knew his identity. That was highly protected but at the end of the day, I think you need somebody with a medical background.

Q. Another aspect of the case that I am looking at is the divide that seems to exist between the legal and medical professions on one end and the corrections professions on the other. One judge was quoted as saying that the corrections community considers a successful lethal injection to be one in which the inmate ends up dead. In other words, they are more

concerned with the outcome than the legality of the means that brought about that outcome. In your observations, has this proven to be true?

A. Well, I would disagree with that and it's probably going to vary by the different prison systems, you know what I mean? You know you've got fifty-one prison systems in this country and they're all very different. So, and I don't want to stereotype it, but in Texas or Virginia where they, they seem to execute people at the drop of the hat, and I'm going to be honest with you, those are two states that don't particularly treat their inmates very well. They'll tend to be pretty dehumanizing and forget the execution guys, the average inmates are not treated like men, and so you might get that sense when you talk to them. I know in the Federal Bureau of Prisons, if you were to ask every corrections guy if they want to be part of that execution or is this something that the Bureau of Prisons would like to be in, every one of them would tell you "no." But you have to do what you are told. You have an order to execute a guy, so in that sense you're right, you know, your main job is to get the guy executed and get him executed according to whatever means the law will allow, so in one sense you're right, the corrections guys are concerned with getting the guy dead, because that's what they're told to do. They have a court order to do such. But I think whether they're just flippant about it and they don't really care about the process and legalities, I don't think that's fair to the vast majority of corrections people.

Q. Jumping back to the issue of pain, proponents of the death penalty and those who support the continuance of the current lethal injection protocol point out that nowhere in the Constitution is there a guarantee of a pain-free execution. After all, the death penalty society is carrying out its retributive role: "you have been deemed to do something wrong, this is your punishment." I'm wondering where you fall on the issue of the constitutionally permissible level of pain.

A. Well, that's sort of a philosophical question. The first issue is whether or not the state has a right to execute them in the first place and you can argue that all day. My opinion is that if you are going to execute them, then they are entitled to the most humane way to be executed. I mean, I think that this bravado talk of inflicting pain or "you should die the same way you killed your victim," that sounds good on the surface, but I think that in a civilized society, how you treat the worst people in your society is a sign of just how civilized and mature the society is. My opinion is that it should be the least painful way. You're taking somebody's life, there's no more significant punishment.

Q. Just to make sure I'm understanding you right, if the literature suggests that there is an alternative that would be more humane, which is at issue now in *Baze v. Rees* out of Kentucky, you feel that protocol should be changed.

A. Yeah, yeah, it should be. And I'll tell you, it's a weird deal. Just to give you an example, I was in the chamber in Utah, and they still have two or three guys left on death row that are firing squad guys, okay? Utah changed their law, was forced to change their law when they got the Olympics, but prior to that. So in this death chamber, whatever you want to call it, you've got a typical lethal injection setup and then you've got a firing squad setup, where they strap a guy to a chair, put a hood over his head, he has a target right over his heart, and five people fire a weapon at him from fairly close range. And it's interesting; the Utah guys will tell you that that's actually more humane.

Q. That's actually what I've heard from quite a few people, that if they had their choice, the two main ones seem to be electrocution or firing squad.

A. Yeah, they'll tell you it's all over in one second and he's dead. So, but it sounds barbaric, but I think that the correctional systems, with the exception of, and again I don't want to stereotype, Texas and a couple of other states that are a little out there – now when we looked at our protocol, this is the feds, we looked at what other states did. It's not like we just made this up, we stole from the best parts of what we saw from all around – and I think anybody in corrections, when you get them out of “bar talk” and “man talk” will tell you that if you can come up with a less intrusive, less painful way to get the job done, they would go for it.

Q. It's actually interesting that you mention borrowing the methods from other states because one person I heard from said that the implications of the *Baze* case, the case I'm studying, are not as far-reaching as they may seem because they are limited to Kentucky. Do you think that based on the way that your system adopted its methods, that if the protocol is deemed unconstitutional in this case, that the foundation of the protocols in other states will begin to crumble as well?

A. It's, um, I don't know. That's really a legal question. The Supreme Court, when they make their ruling, it will be – you know how those rulings can be. Sometimes they're very broad and sometimes they're very narrow and so, it will depend on how the ruling goes and the Bureau of Prisons will have to go back and change or not change. Unfortunately, when you get stuff at the Supreme Court, you'll get prohibitions but you won't get proscriptions, so they're not going to say, “Look at the Bureau of Prisons, if you all did it like that, we would declare it legal.” It would be great if they would do something like that but that's not what they do, so what I'm concerned about is that even after this ruling, you're not going to get a lot of satisfaction. If it's narrow enough, then everybody will tweak the cocktail or move it from the arm to the leg or whatever it may be, but that's not really getting to the fundamental issue.

Q. Is there anything else that I have not covered that you feel is important to a discussion on this topic?

A, Well, you know, the whole process is fascinating, and I don't know exactly what your thesis is on, if it's more about the legality or the pain issues and so forth, but the whole process of moving the inmate out to a different facility and then managing the victims' families, and the families of the inmate, and the media, the actual process of an execution is extremely complicated and extremely organized. So if you get a chance to look beyond the last three minutes of the process and look at the two days leading up to the process, it's actually pretty fascinating.

Appendix B – Interview with Ron Angelone, former Director of the Virginia Department of Corrections, March 28, 2008

Q. May I use your name in the paper or would you prefer that I use your job title.

A. No, you can use it, just put a footnote or something in there that I was the former Director of the Virginia Department of Corrections.

Q. How did your job in that capacity relate to lethal injection? Have you ever witnessed one?

A. I was the director in charge of executions in Virginia, which number over one hundred. And I was present, I have to present at every one of them, by law.

Q. Are you familiar with the case before the Supreme Court, *Baze v. Rees*?

A. The cruel and unusual punishment case, yes, somewhat.

Q. Okay, I guess I'm just wondering, given the close proximity that you had to executions, if anything was indicative of any kind of pain to the inmate that would lend credence to the criticisms of the current protocol.

A. Well, of the hundred I did, I think four or five were electrocutions, and the rest were lethal injections, so, you can tell from that that -- I've seen both executions done by lethal injections and electrocution and with lethal injection there was no pain that I saw whatsoever because people are given three different drugs. Usually they're given valium before they go in to the chamber so that when they're in there, they're not as scared or -- knowing that they're going to their death, so I've never seen that. You know, lawyers are going to talk about that all they want because they're just trying to keep their client from being executed and they'll use anything and everything to say so.

Q. I was actually going to mention that, because a lot of the critics of this case are saying that it really just amounts to a backdoor way to abolish lethal injection, and therefore the death penalty in general.

A. Yes, that's how I see it. Obviously, you know, anytime you put somebody to death, uh, it's a very solemn and, how do you want to say it, tough experience for everybody to go through, those witnessing it for the state, victim's witnesses, those who see that the final court decree is carried out, the individual being executed of course is worried and tense, the people doing the execution want to make sure it's done professionally, but at no time do you see anything in there other than somebody who says that they're against the death penalty no matter what the reason is, would come up with any finding that says that people being executed go through horrific pain.

Q. Switching gears a little bit, another issue that has come to the forefront of this case deals with the personnel who administer the current protocol and whether or not a doctor or similar medical professional would be better suited to do so. I'm wondering if, with your experience, you think that a corrections official is capable of carrying out the job.

A. Well, all I can say is that -- and I've got to be very careful with how I speak because there's a lot of things I know about that are not public information, even though I'm not part of the Department anymore -- but, the people that administer the needles into the arm are all medical people. At least in the cases I was involved in, and I was involved in more cases as Director than anybody else in the United States.

Q. Another huge but more philosophical issue in this case is the level of pain that is constitutionally permissible. In your opinion, and I've seen some pretty varied opinions on this, if it is found that a different protocol is found to be less painful, is the State obligated to implement it?

A. That's definitely a question but I think it needs to be expressed from the other side as well. Us in the Department of Corrections and all professionals in the Department of Corrections and all those in the Department of Corrections that have the responsibility to be in the death chamber executing an individual, at no time look for how much pain they can provoke into somebody, so the answer is obvious from all sections, from anybody across the country involved in the Department of Corrections, if there's a better way to do it, fine. We're not there to inflict pain. We are there to take the life of the individual because a court order says to do so. So there's never a moment -- the problem I have is no one can say to me, can look me in the eye and say that lethal injection is a painful method in which to execute people. I've done them all, I mean I haven't done all of them, some people have done hanging, firing squad, gas chambers, I've done electrocution and lethal injection and neither one of them, I felt, at any time provoked pain more than what you'd obviously get from knowing that you're dying, that you're going to die in a few

seconds. Everyone thinks electrocution is terrible. Done correctly, and most states always have – when you’re executing people there are always going to be mistakes people are going to make, they’re going to use non-organic sponges, which will not be conducive to the current. Now, of course, problems, I think that happened in Alabama, they didn’t know, I mean, they didn’t do it on purpose. The ones that I did, it’s just like when you stick your finger in an electric socket, and everybody has at one time or another been jolted by electricity, it is so fast, so spontaneous, that by the time you pull your finger back, the pain has already hit you, you know electric shock, by the time you pull your finger back it’s gone. The same is true of the person sitting in the electric chair. The first jolt kills them, I mean a split second and the person is dead, that’s how quick. We all know how quickly electricity goes through the body, so that is not as excruciating as people that are anti-death penalty would like to express it to be. But when we look at lethal injection, you know, these folks can say they heard, they feel, they think this person went through pain. How can you go through pain when you’re first getting sodium pentothal? And people are under the knife everyday in our hospitals and sodium pentothal is administered, and they’re out cold and they don’t feel any pain and they get their bodies torn apart and a new heart put in. They don’t feel pain. And neither do the people who get executed. They are out. I watch them, I see how they start snoring. I see how their breathing is almost sub-normal because they’re mentally asleep and they’re not feeling anything. By the time the second one goes in there, you know, it’s cutting off their air supply, but they’re going out. And then the third one seals up their blood vessels so that it doesn’t pump through the heart. At no time do you see any pain, do you see any movement, do you see any clenching of the fist, do you see any movement on the face, and I’d stand in court or in a debate with anybody and say, tell me how, with all of the hundreds and hundreds of executions across the United States, one or two might get too much sodium pentothal and their stomach might vibrate a little because they’re taking, you know, they’re breathing, they took too much in, they were being overly protective of the person and gave them more than they should. But when you use the correct dosage that states have been using in execution after execution, you don’t see that.” Newspapers would be printing it because they’re all witnesses in the execution chamber. They don’t print that. They don’t see it. There is no pain being inflicted in the person. Now luckily, we’re a, you want to say more humane country, and I know people who are anti-death penalty would snicker at something like that, but when you look back at how the Egyptians would do executions, they would find someone guilty of a crime that deserved them to lose their life, and they would tie their wrists to their ankles, put them in a burlap bag, then put a wild animal in the burlap bag, tie the burlap bag, and throw it in the river, so that when the animal knew that he was dying, he would still bite the human to death and the human, who would not be able to defend himself, would know that he was dying either by the wild animal inside the burlap bag or by drowning. That’s pain. So, yes, we’ve evolved from those types of things and what we do now is very humane. I mean you’ve got to remember what these people did to even get the death penalty. They’ve committed such a horrific crime that twelve people sat in a jury box, found him guilty, went back to deliberate whether he or she should spend their life in prison or they should be executed, and then twelve people from all

walks of life say, “Yes, this person should.” That’s how bad, how evil their crime registered with everyday citizens. So taking their life, people will always find that horrific that are against the death penalty, and they’ll look for any little gimmick that they can come up with to say that the death penalty is cruel and unusual. Well it’s not cruel and unusual when a guy stands over a seventy-six year old man and puts five bullets in the back of his head and leaves his family destitute, they lose everything because the breadwinner is dead now and nobody is taking care of them, nobody wants to reflect on how evil these people were, they were so evil that I said, twelve people would say to take their life. So, taking someone’s life is a, the hardest thing in the world for people to do, but we do it.

Q. I’m glad you brought up the crime and punishment aspect of the debate because that seems to get lost in the fray sometimes.

A. Yeah, and you can, people can stand and argue that they should be put in prison and this is what a humane society does. That’s bull. Someone who is that evil, I do not want in my prison system where I know he knows the rest of his life he’s in prison and that he can play on anybody in there and kill any other inmate or kill a staff person and know that he’s not going anywhere but right where he is. And these are people that look to kill. They’re not people that accidentally killed somebody. These are people that went out with the express purpose of killing somebody, so I don’t want them in a prison system where they can keep killing.

Q. I guess my last question deals with one of the issues I’m addressing in my paper, which is the ideological differences between the legal community and the corrections community, which I think you’ve alluded to.

A. No, let’s not put all lawyers saying that they do not believe in the death penalty, please. Do not say that. You can say there is a small portion. There are a lot of lawyers that believe in the death penalty. There are a lot of defense lawyers that would believe in the death penalty, but they get paid to defend someone, that’s their job, that’s their vocation, and when they’re expected to defend someone, they’re expected to defend them to the best methods that them and the law allow. Now I wouldn’t say that all of them believe the death penalty is a bad thing. I know lawyers that do not believe the death penalty is a bad thing. So I take offense to someone saying the legal community and the corrections community. You’ve got nine former lawyers sitting on the Supreme Court. They were all lawyers and at least five of them believe in the death penalty and five throughout history, except for a short period of time, believed in the death penalty. So it’s not always the lawyers. There are a certain number of people in all walks of life, there are correctional people who do not believe in the death penalty that I know. Trust me, there are people in corrections that were Directors of Corrections that would not go to an execution because they just didn’t believe in executions and I can understand that, but there are lawyers that I’ve talked to that believe in the death penalty, that are defense attorneys. So it’s not everybody. It’s an individualized choice among people.

Q. So do you think the current case before the Court will result in the continuance of the current protocol?

A. You know it's not mine to, I feel that the death penalty should be continued, and of course the reason why is because of what I stated earlier. You know, my biggest fear, and I'm pausing for a minute, is that people are going to say, "Oh, we can just lock them up." They're not going to change their behavior. These are sworn killers. These are not people who are going to go into prison and say, "Thank you, thank you, you didn't take my life so I'm going to be a very good inmate." These are people that are known are going to kill people. There are no weapons in prison, so that gives them an even better opportunity to kill more people. I don't want to see anybody kill anybody. I've always believed that when you've crossed the line that society considers so distasteful that you should be put to death, the ultimate finding that someone could give somebody, that you should be put to death, I think that should never be taken off the books. There's just no reason to keep filling prisons with people that have murdered individuals on sprees, that have no care for human life, have no care for the human life that they're housed with or that they live in the community of the prison with, so that at any time when they feel the need to strike out and take someone's life, the opportunity is right there for them. And there is no penalty on it, what are you going to do, give them another life sentence? So yes, I think it would definitely be the worst thing that could ever happen in society to take the death penalty away.