

# METHODS OF EXECUTION AND THEIR EFFECT ON THE USE OF THE DEATH PENALTY IN THE UNITED STATES

*Richard C. Dieter\**

## INTRODUCTION

The legal controversy surrounding lethal injections as a method of execution has profoundly affected the use of the death penalty in the United States in recent years. Unlike previous attacks on various methods of executions, the latest challenges to lethal injection have already held up more executions, and for a longer time than appeals involving such broad issues as race, innocence, and mental competency. These delays, and the incompetence with which some states carry out lethal injections, may also have a broader effect on the public's acceptance of capital punishment.

This Article examines the direct effect of this debate on executions, on death penalty legislation to date, and on the public's perception of the death penalty in the past few years. Part I of this Article briefly examines how the choice of earlier methods of execution affected the country's perception of the death penalty. Each fundamental change in the method of execution has signaled a change in the underlying purpose of the death penalty and in how people view the state in its role as executioner. Part II concentrates on the pivotal time when the challenges to lethal injections began to limit the number of executions and precipitated changes in the laws that governed the performance of those executions. Previous challenges to the death penalty delayed executions for days, and few, if any, changes to procedure were required. The current challenges, such as *Baze v. Rees*,<sup>1</sup> however, have resulted in executions being placed on hold for nearly six months. Some states have already reacted to these challenges by changing their procedures, and further changes may follow.

Part III offers an analysis of what has made the current debate different from those in previous eras, and examines the ways in

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\* Executive Director of Death Penalty Information Center located in Washington, D.C. and Adjunct Professor at the Catholic University School of Law. This Article was presented at the Fordham *Urban Law Journal* Symposium in New York City on March 7, 2008.

1. *Baze v. Rees*, No. 04-CI-01094, 2005 WL 5797977 (Ky. Cir. Ct. Jul. 8, 2005), cert. granted, 128 S. Ct. 372 (U.S. Oct. 3, 2007) (No. 07-5439).

which the practice of the death penalty has already been altered in important and lasting ways. Part IV discusses the impact that the lethal injection controversy has had on the death penalty itself. Finally, the Article concludes by examining whether the lethal injection issue could undermine support for the death penalty itself.

### I. THE IMPACT OF EARLIER METHODS OF EXECUTIONS ON THE DEATH PENALTY

For much of the history of the United States, the primary method of execution was hanging.<sup>2</sup> Hanging took place in the center of town using a rope thrown over a tree or scaffold. Americans probably favored this method because of its simplicity as well as its role in sending a strong message to the entire community about the consequences of crime. Hanging required no central facility and allowed for public punishment in front of the community affected by the crime. Even the most rural areas of the country always had access to a rope and a tree. Punishment was for all in the community to see, imparting a moral message along with its death sentence.<sup>3</sup> Citizens thinking of committing a crime might hesitate after seeing a horse thief or runaway slave swinging at the end of a rope.

Hangings became popular spectacles, much like human sacrifices or the games in ancient Rome. Tens of thousands of people attended some hangings, and preachers delivered sermons.<sup>4</sup> Families with children made excursions to see the human drama.<sup>5</sup> But the public nature of hangings was also their drawback. Spectacles do not always produce the desired results, as illustrated by the proliferation of ballads and storytelling about those being hanged and reports of pick-pocketers working during hangings.<sup>6</sup>

Although hangings and the accompanying crowds continued well into the twentieth century, the state of New York took a radical step away from this common form of execution when it carried out

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2. See STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 24 (2002).

3. *Id.* (describing town hangings as comparable to a “church service”).

4. See generally *id.* at 24-52; see also ELIZA STEELWATER, *THE HANGMAN’S KNOT: LYNCHING, LEGAL EXECUTION AND AMERICA’S STRUGGLE WITH THE DEATH PENALTY* 43 (2003).

5. See BANNER, *supra* note 2, at 28.

6. See, e.g., PETER LINEBAUGH, *THE LONDON HANGED: CRIME AND CIVIL SOCIETY IN THE EIGHTEENTH CENTURY* 216 (1992).

the first electrocution in the United States in 1890.<sup>7</sup> New York not only introduced a new method of execution, but also changed public perception of the death penalty. Given the novelty of this technology and the uncertainty over even what form of current would be used to carry out the electrocution,<sup>8</sup> it is doubtful that the choice of this new method was intended solely to provide a more dignified and less painful method of death for the accused. More likely, this innovation served state interests of minimizing the unruliness and sometimes sympathetic nature of hangings.<sup>9</sup> Electrocution brought executions under one roof with relatively few witnesses.

This new method of execution also changed the image of the death penalty in the mind of the public.<sup>10</sup> The electric chair required sophisticated machinery, specialized knowledge, and careful preparation. New York executions were no longer public. Officials conducted electrocutions inside the penitentiary with witnesses chosen by the prison.<sup>11</sup> Common criminals were no longer hanged in the town commons, but in a location outside the community.

The different style of execution reflected a shifting purpose behind the death penalty, from one where the state was sending a warning to the community to one where the state enacted retribution on the offender. Stuart Banner, in his recounting of the history of the American death penalty, noted that hangings failed to convey the message intended: “[T]he execution ceremony, by focusing attention on the qualities of the person being hanged, produced as much pity as condemnation.”<sup>12</sup> In electrocutions, the criminal’s life was now extinguished with the most advanced and lethal technology available. “Technology would make the death penalty more humane by making it less human.”<sup>13</sup> The state’s power was dominating and the defendant’s demise was ignominious. Instead of a festive crowd and the possibility of being

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7. See RICHARD MORAN, EXECUTIONER’S CURRENT: THOMAS EDISON, GEORGE WESTINGHOUSE, AND THE INVENTION OF THE ELECTRIC CHAIR 3 (2002).

8. *Id.* at 36-62 (noting the debate between the use of alternating and direct current in the electric chair).

9. See BANNER, *supra* note 2, at 148 (“staging of public hangings could turn criminals into heroes”).

10. See CRAIG BRANDON, THE ELECTRIC CHAIR: AN UNNATURAL AMERICAN HISTORY 47-48 (1999) (stating that a compromise group was seeking a “better way” to execute because scaffolds, nooses, and hangmen seemed “out of place”).

11. *Id.* at 181-82 (noting that even the media was barred from attending the first electrocution, a vast difference from the public nature of hangings).

12. See BANNER, *supra* note 2, at 148.

13. *Id.* at 184.

remembered in song, the execution was now carried out under the warden's careful eye, out of sight of even the other prisoners.

In wielding such power, the government could nevertheless claim that it was being humane, as electrocution promised to be a swifter method of execution than hanging. Of course, this new method had the added advantage that if anything went wrong (as it frequently did),<sup>14</sup> it was not on display for everyone to see.

Almost ninety years later, the shift to lethal injections signaled not only another bow to technology, but also a change in public perception of the death penalty. This shift came after a period of uncertainty for the continuation of the death penalty in general. For the first time in United States history, the Supreme Court halted executions for an extended period in 1972.<sup>15</sup> Anticipation of a Supreme Court ruling on the constitutionality of the death penalty, followed by the Court's striking down of all existing statutes and death sentences in 1972, resulted in a nearly ten-year moratorium on executions.<sup>16</sup> Electric chairs and gas chambers sat unused and began to appear antiquated and risky. To begin using them once again would require refurbishing equipment that had no other use in society. Some states chose this moment to introduce a technological innovation that would reinforce the state's power while attempting to balance it with compassion and dignity.<sup>17</sup>

## II. THE IMPACT OF CHALLENGES TO EARLIER METHODS OF EXECUTION

Methods of execution had been challenged before the introduction of lethal injection, but the challenges rarely resulted in delays of more than a few days, and no method of execution was found unconstitutional.<sup>18</sup> There are a number of reasons for the ineffec-

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14. See BRANDON, *supra* note 10, at 205 ("Many of those executions, like Kemmler's, were botched . . ."); see also *id.* at 204-43. R

15. See generally MICHAEL MELTSNER, *CRUEL AND UNUSUAL PUNISHMENT: THE SUPREME COURT AND CAPITAL PUNISHMENT* (1973) (discussing why executions were stopped).

16. See *Furman v. Georgia*, 408 U.S. 238, 292-93 (1972). Executions stopped in 1967 and resumed in 1977. See *id.*; BANNER, *supra* note 2, at 275. R

17. Although Justice William Brennan's views on the unconstitutionality of the death penalty ultimately did not prevail in the Supreme Court, his concurrence in *Furman v. Georgia*, 408 U.S. 238, 257 (1972), and his dissent in *Gregg v. Georgia*, 428 U.S. 153, 227 (1976), emphasized the requirement that punishments must always respect the dignity of human beings. See also *Trop v. Dulles*, 356 U.S. 86, 100 (1958).

18. See Deborah Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*, 76 FORDHAM L. REV. 49, 103-04 (2007) [hereinafter Denno, *The Lethal Injection Quandary*].

tiveness of these earlier challenges. First, it was not until 1962 that the Eighth Amendment's cruel and unusual punishments clause was found to apply to the states.<sup>19</sup> Prior to that time, only two punishments in the history of the country had been held to be in violation of the Eighth Amendment.<sup>20</sup>

The Court did review certain aspects of execution, but the challenges were usually heard quickly and without significant delay to the individual execution, much less to the whole death penalty system. The story of William Kemmler and the first electrocution illustrates how quickly the Court could move, even when a completely new method of execution was introduced. After the New York courts denied relief, Kemmler's attorney filed a petition to the U.S. Supreme Court on May 5, 1890 challenging the new method of electrocution.<sup>21</sup> The court heard arguments on May 20 and denied Kemmler relief on May 23. He was executed on August 6, just three months after his appeal was filed.<sup>22</sup>

The Court took longer to decide whether subjecting a person to electrocution twice constituted a cruel and unusual punishment, but still did not prevent such executions. Willie Francis was first placed in the electric chair in Louisiana on May 3, 1946, but the electricity applied failed to kill him.<sup>23</sup> He was returned to his cell and his appeals eventually reached the U.S. Supreme Court.<sup>24</sup> On January 13, 1947, the Court held that any added pain that Francis would suffer as a result of being subjected to a second electrocution was an unforeseeable consequence of the first attempt and, thus, did not rise to the level of cruel and unusual punishment.<sup>25</sup> He died in the electric chair four months later on May 9, 1947.<sup>26</sup>

In 1878, the Supreme Court also allowed the execution by firing squad of Wallace Wilkerson in the Utah territories.<sup>27</sup> Although the

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19. *See Robinson v. California*, 370 U.S. 660, 675 (1962).

20. In 1910, the Supreme Court held that a sentence of twelve years in hard labor was disproportionate for the crime of fraud committed by a government worker in the U.S. territory of the Philippines. *Weems v. United States*, 217 U.S. 349 (1910). Almost fifty years later, the Court held that stripping a soldier of his citizenship for going absent without leave during World War II was both disproportionate to the offense and not in keeping with the dignity that the Eighth Amendment requires. *See Trop*, 356 U.S. at 122.

21. MORAN, *supra* note 7, at 203.

22. *Id.* at 206-12.

23. *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 460 (1947).

24. *Id.* at 460-61.

25. *Id.* at 464 (plurality opinion).

26. *See BRANDON*, *supra* note 10, at 234-35.

27. *See Wilkerson v. State of Utah*, 99 U.S. 130, 134-35 (1878) ("Cruel and unusual punishments are forbidden by the Constitution, but the authorities referred to are

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Court upheld the method of execution, Wilkerson was not executed until over a year later in May 1879. There was at least some public dissent about the process, as evidenced by one of the daily newspapers:

The execution of Wallace Wilkerson at Provo yesterday affords another illustration of the brutal exhibitions of inquisitorial torture that have of late disgraced . . . the country and which have in some States so shocked the natural sensibilities of the people that extreme punishment has been abrogated from pure disgust excited by the sickening spectacles of rotten ropes, ignorantly or carelessly adjusted nooses or inexperienced marksmen. These disgusting scenes are invariably ascribed to accidental causes, but they have become so horrifyingly frequent that some other method of judicial murder should be adopted. The French guillotine never fails. The swift falling knife flashes in the light, a dull thud is heard and all is over. It is eminently more merciful to the victim than our bungling atrocities, and the ends of justice are as fully secured.<sup>28</sup>

Even after the Court affirmed both the constitutionality of the death penalty itself and the statutes of some states that implemented it in 1976,<sup>29</sup> executions did not resume in great numbers because the law was still being clarified. The death penalty for rape was struck down in 1977.<sup>30</sup> The death penalty for felony murder, where the defendant had been only indirectly involved in a murder committed by someone else in the course of a felony, was restricted in 1982.<sup>31</sup> The role of mit-

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quite sufficient to show that the punishment of shooting as a mode of executing the death penalty for the crime of murder in the first degree is not included in that category, within the meaning of the eighth amendment.”).

28. L. KAY GILLESPIE, *THE UNFORGIVEN: UTAH'S EXECUTED MEN* 13 (1991) (citing *DAILY OGDEN JUNCTION*, May 17, 1879).

29. See *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (concluding that the death penalty in Georgia is not unconstitutionally severe); *Proffitt v. Florida*, 428 U.S. 242, 247 (1976) (rejecting argument that the death penalty is cruel and unusual punishment); see also *Jurek v. Texas*, 428 U.S. 262, 268 (1976) (rejecting that the death penalty in this case constitutes cruel and unusual punishment).

30. *Coker v. Georgia*, 433 U.S. 584, 592 (1977).

31. See *Enmund v. Florida*, 458 U.S. 782, 797 (1982).

Although the judgments of legislatures, juries, and prosecutors weigh heavily in the balance, it is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty on one such as Enmund who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force be employed. We have concluded, along with most legislatures and juries, that it does not.

igating and aggravating factors was also parsed out in greater detail.<sup>32</sup>

Although appeals in execution cases began to take an increasingly longer amount of time, this delay did not result in a closer evaluation of the methods of execution that states used. Rather, it stimulated some legislators to attempt to speed up the process. The U.S. Supreme Court issued a series of opinions restricting habeas corpus and Chief Justice Rehnquist appointed a panel to study streamlining the process.<sup>33</sup> Congress eventually passed the Anti-Terrorism and Effective Death Penalty Act (“AEDPA”) of 1996, which set time limits on the filing of habeas petitions and restricted the issues that could be raised.<sup>34</sup> Executions started to increase in the late 1980s and reached a peak of almost one hundred executions in 1999.

In this atmosphere of heightened support and accelerated executions, challenges to the constitutionality of lethal injection failed to make an impact. Complaints about the methods of execution were considered “frivolous” and regarded as mere delay tactics.<sup>35</sup> It took a series of embarrassing exonerations of death row inmates and the advent of DNA testing to change the way the death penalty was viewed. These cases of innocence revealed with sharp clarity that states were making serious errors in their administration of the death penalty. Death sentences declined, executions dropped, public support waned, and cases began to be reviewed with greater scrutiny.<sup>36</sup>

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*Id.*; cf. *Tison v. Arizona*, 481 U.S. 137, 158 (1987) (“We simply hold that major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement.”).

32. See, e.g., *Eddings v. Oklahoma*, 455 U.S. 104, 113-15 (1982) (finding that sentencer must consider all mitigating evidence).

33. See Larry Yackle, *A Primer on the New Habeas Corpus Statute*, 44 *BUFF. L. REV.* 381 (1996) (discussing Supreme Court developments, the Powell Commission, and AEDPA).

34. The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

35. See Deborah Denno, *Getting to Death: Are Executions Constitutional?*, 82 *IOWA L. REV.* 319, 333 (1997) [hereinafter Denno, *Getting to Death*].

36. See RICHARD DIETER, *DEATH PENALTY INFORMATION CTR., INNOCENCE AND THE CRISIS IN THE AMERICAN DEATH PENALTY* (2004), <http://www.deathpenaltyinfo.org/article.php?scid=45&did=1149>.

### A. Challenges to Methods of Execution with the Death Penalty under Closer Scrutiny

As the death penalty bogged down, a series of electrocutions in Florida again raised the question of whether a particular method of execution could be found unconstitutional. On March 25, 1997, during the electrocution of Pedro Medina, a crown of foot-high flames shot from his headpiece during the execution.<sup>37</sup> Thick smoke filled the execution chamber, gagging the two dozen official witnesses.<sup>38</sup> The state claimed that this execution was an aberration that could be avoided by technological improvements, but the governor later asked for a review of execution procedures.<sup>39</sup>

Two years later, on July 8, 1999, however, Allen Lee Davis was also executed by electrocution in Florida, this time using a new electric chair. Before he was pronounced dead, blood from his nose poured onto the collar of his white shirt, and blood spread across his chest.<sup>40</sup> Later, when Florida's electric chair was challenged in state court, Florida Supreme Court Justice Leander Shaw described Davis's execution and noted, "[t]he color photos of Davis depict a man who—for all appearances—was brutally tortured to death by the citizens of Florida."<sup>41</sup> The majority of the Florida Court, however, upheld the constitutionality of electrocutions.<sup>42</sup>

The U.S. Supreme Court eventually granted certiorari to review the constitutionality of electrocution as practiced in Florida.<sup>43</sup> Florida immediately called a special session of its legislature and changed its method of execution to lethal injection.<sup>44</sup> The U.S. Supreme Court then dismissed the writ of certiorari as "improvidently granted,"<sup>45</sup> and Florida was able to proceed with executions. The effect of the challenge was still significant, as the state legislature abandoned mandatory electrocution.<sup>46</sup>

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37. See Michael L. Radelet, *Some Examples of Post-Furman Botched Executions*, DEATH PENALTY INFORMATION CTR., May 24, 2007, <http://www.deathpenaltyinfo.org/article.php?scid=8&did=478>.

38. See *id.*

39. See Ron Word, *Flames Burst From Executed Man*, WASH. POST, Mar. 25, 1997.

40. Rick Bragg, *Florida's Messy Executions Put the Electric Chair on Trial*, N.Y. TIMES, Nov. 18, 1999, at A14.

41. *Provenzano v. Moore*, 744 So. 2d 413, 440 (Fla. 1999) (Shaw, J., dissenting).

42. *Id.* at 416.

43. *Bryan v. Moore*, 528 U.S. 960 (1999) (granting writ of certiorari).

44. *Bryan v. Moore*, 528 U.S. 1133 (2000) (dismissing writ of certiorari in light of Florida changing its execution method).

45. *Id.*

46. *Id.*

A somewhat similar scenario played out in California, where the gas chamber had been the principal means of execution. The U.S. Court of Appeals for the Ninth Circuit ruled that California's use of lethal gas was unconstitutional because it constituted a cruel and unusual punishment.<sup>47</sup> The California legislature then changed the state's method of execution to lethal injection.<sup>48</sup> The Supreme Court vacated the judgment of the Ninth Circuit and remanded the case for reconsideration in light of the changed statute.<sup>49</sup>

Georgia had also changed its method of execution to lethal injection around the same time.<sup>50</sup> The legislation that incorporated that change still subjected inmates sentenced to death prior to the effective date of the law to electrocution.<sup>51</sup> A group of Georgia inmates successfully challenged this provision.<sup>52</sup> The Georgia Supreme Court upheld their challenge, reasoning that the electric chair had become cruel and unusual both because of its decreasing use and because the state legislature had confirmed that a more humane alternative (lethal injection) was available and was thus required for future executions.<sup>53</sup>

Perhaps the last blow to electrocution occurred in 2008 when the Supreme Court of Nebraska ruled that the state's only method of execution was forbidden under Nebraska's state constitution.<sup>54</sup> Referring to the state's ban on cruel and unusual punishments, the court held that electrocution inflicts "intense pain and agonizing suffering," and "[c]ondemned prisoners must not be tortured to death, regardless of their crimes."<sup>55</sup>

## B. Lethal Injections

Challenging the electric chair as it was on its way out clearly benefited from its "unusual" character, as noted in the Eighth Amendment.<sup>56</sup> The chair had become antiquated, and in some states relegated to a museum.

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47. *Fierro v. Gomez*, 77 F.3d 301, 309 (9th Cir. 1996), *vacated on other grounds*, 519 U.S. 918 (1996).

48. *See Denno, Getting to Death*, *supra* note 35, at 442.

49. *Gomez v. Fierro*, 519 S. Ct. 918 (1996).

50. Deborah Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What It Says About Us*, 63 OHIO ST. L.J. 63, 86 (2002) [hereinafter Denno, *When Legislatures Delegate Death*].

51. *Id.*

52. *Id.* at 87.

53. *Dawson v. State*, 554 S.E.2d 137, 143-44 (Ga. 2001).

54. *Nebraska v. Mata*, 745 N.W.2d 229, 279-80 (Neb. 2008).

55. *Id.*

56. U.S. CONST. amend. VIII.

Lethal injection was another matter entirely. This method was far from unusual, being the predominant method of the post-*Furman* era. Since the start of 2000, ninety-eight percent of the country's executions have been carried out by lethal injection.<sup>57</sup> Additional states adopted it as a more humane alternative to the electric chair and the gas chamber.<sup>58</sup> Even though some lethal injections were botched, these were seen as aberrations, similar to the mistakes in the electrocution of William Kemmler in 1890 or of Willie Francis in 1947.<sup>59</sup> Lethal injection was the modern equivalent of electrocution: innovative, humane, and symbolic of a new way of looking at the death penalty.

The symbolism embodied in lethal injections is probably still emerging. Hangings were a public warning, intended to impress the local community with the consequences of crime.<sup>60</sup> When hangings became more of a spectacle, their symbolism was partly lost and they eventually faded from use.<sup>61</sup> Electrocutions were much less public and their dominant image was of a powerful state, centrally in control, but able to use sophisticated technology to punish in a more orderly and humane way.<sup>62</sup> When electrocutions were exposed as dangerous and unpredictable, they too had to be replaced. Lethal injections introduced an era that attempted to show that the state could be compassionate as it exercised its control. Now, that "compassion" is coming under increasing scrutiny.

With lethal injections, offenders are put to sleep, and dispatched with as much decorum as putting down a long-valued animal. Lethal injections were not meant to be spectacles or to horrify the offender. States even passed laws to allow victims' families to view the execution, along with the family of the defendant.<sup>63</sup> The state was confident that witnesses would report seeing a peaceful death.

Of course, not all executions went so smoothly.<sup>64</sup> Most disturbing perhaps were those lethal injections where the guards were not able to find a suitable vein for insertion of the IV.<sup>65</sup> Not only did this prolong what was supposed to be a quick and painless

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57. See Death Penalty Information Ctr., Execution Database, <http://www.deathpenaltyinfo.org/executions.php> (last visited Apr. 17, 2008) [hereinafter DPIC, Execution Database].

58. See Denno, *The Lethal Injection Quandary*, *supra* note 18, at 90-92.

59. *Id.*

60. See BANNER, *supra* note 2, at 24.

61. *Id.*

62. See *id.* at 184.

63. See Denno, *The Lethal Injection Quandary*, *supra* note 18, at 123.

64. See Radelet, *supra* note 37.

65. See, e.g., *id.* (execution of Stephen Morin in 1985 in Texas).

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death, it involved the possibility of having to cut open an inmate's leg or neck to find a more suitable location for the deadly chemicals.<sup>66</sup> This presented a quandary for states: either this cut-down procedure would have to be performed by non-medical personnel, raising the risk of further mistake, delay and invasive meddling, or the process would involve doctors in an area that raised immediate ethical concerns.<sup>67</sup> The American Medical Association has stated that doctors should not participate in executions.<sup>68</sup>

One of the subtexts of the lethal injection process is that it was essentially a medical procedure, borrowed from operating rooms with the tacit approval of at least some of the medical community.<sup>69</sup> The medical community's rebellion, and their desire to distance themselves from the process, would not enhance the image of the compassionate executioner.

### III. OBSTACLES TO CHALLENGES TO METHODS OF EXECUTION

At first, challenges to problems with lethal injections seemed doomed by the legal system's stringent restrictions on the appeal process. The typical avenue for relief in the federal courts for death penalty inmates was through the writ of habeas corpus,<sup>70</sup> but AEDPA greatly curtailed that avenue.<sup>71</sup>

Habeas corpus required the exhaustion of state remedies for every issue raised in federal court.<sup>72</sup> Inmates seeking to challenge lethal injection had to start that process years earlier in their appeal, somehow anticipating the problems that might occur with lethal injection. AEDPA allowed for some exceptional claims outside the normal rules if accompanied by a proof of innocence, but lethal injection challenges had nothing to do with an inmate's underlying conviction or possible innocence.<sup>73</sup> Hence, lethal injection claims were usually dismissed on procedural grounds without a review of their merits.<sup>74</sup>

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66. See *Nelson v. Campbell*, 541 U.S. 637, 641 (2004).

67. Gregory D. Curfman, Stephen Morrisey & Jeffrey M. Drazen, *Physicians and Execution*, 358 NEW ENG. J. MED. 403-04 (2008), available at <http://content.nejm.org/cgi/content/full/358/4/403>.

68. Council on Ethical & Jud. Affairs, Am. Med. Ass'n, Council Rep., *Physician Participation in Capital Punishment*, 270 JAMA 365, 365 (1993).

69. See Denno, *The Lethal Injection Quandary*, *supra* note 18, at 63-64. **R**

70. 28 U.S.C. § 2254 (2006).

71. See AEDPA, Pub. L. No. 104-132, 110 Stat. 1214.

72. See 28 U.S.C. § 2254.

73. See *id.* § 2244.

74. See, e.g., Denno, *The Lethal Injection Quandary*, *supra* note 18, at 103-04. **R**

### A. The Civil Rights Route

Some attorneys attempted an alternative approach through section 1983 of the Civil Rights Act.<sup>75</sup> The challenge to California's gas chamber, for example, *Fierro v. Gomez*, was a civil rights suit.<sup>76</sup> Such actions can be pursued separately from one's death penalty appeal and hence are not subject to AEDPA's restrictions, which require filing within one year of completing one's state appeal and allow only one petition.<sup>77</sup>

Although some lower federal courts judged such suits to be an end-run around the habeas corpus restrictions, the U.S. Supreme Court recognized that inmates challenging lethal injection were not necessarily challenging their death sentences per se. Instead, the Court reasoned that such claims were similar to a prisoner's conditions-of-confinement suit. When a prisoner claims that he or she is being deprived of some basic right, that claim creates a civil rights question independent of the inmate's conviction or sentence.<sup>78</sup>

In Alabama, for example, David Nelson was in need of just such an alternative appellate route so he could block a potentially painful and risky cut-down procedure that the state wanted to perform on him prior to his lethal injection. He sued under the civil rights law, stating that he objected neither to lethal injection nor to his death sentence. He merely wanted to avoid the prospect of a non-medical prison employee cutting open his leg or neck in order to find a suitable vein for a lethal injection.<sup>79</sup>

The Eleventh Circuit dismissed his claim, holding that this was actually an attack on his death sentence and had to be included in his habeas corpus challenge, which was already exhausted.<sup>80</sup> Hence, the court concluded that it would not consider the merits of his concerns about the cut-down procedure because it should have been raised years ago when his appeal was working its way through Alabama and the federal courts.<sup>81</sup> The U.S. Supreme Court granted certiorari on the eve of Nelson's execution.<sup>82</sup> The issue presented was not the merits of whether the cut-down procedure constituted cruel and unusual punishment, but rather whether it

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75. See 42 U.S.C. § 1983 (2006).

76. See *Fierro v. Gomez*, 77 F.3d 301, 306 (9th Cir. 1996).

77. See AEDPA, Pub. L. No. 104-132, 110 Stat. 1214.

78. See Denno, *Getting to Death*, *supra* note 35, at 331.

79. See *Nelson v. Campbell*, 541 U.S. 637, 639 (2004); see also Gina Holland, *Court Rules Killer Can Fight Death by Injection As Cruel*, CHI. TRI., May 25, 2004, at 11.

80. See *Nelson*, 541 U.S. at 640, 642-43.

81. See *id.*

82. *Nelson v. Campbell*, 540 U.S. 1046, 1046 (2003).

was proper for the federal courts to consider such a claim as a civil rights matter, separate from any habeas appeal that Nelson might raise.<sup>83</sup>

Although most inmates facing lethal injection do not require a cut-down procedure, or at least not one similar to the process employed in Alabama, the outcome of *Nelson* would have a widespread impact on the death penalty in the United States. The Court unanimously ruled that Nelson properly raised this issue in federal court as a civil rights suit because it was similar to a prisoner's suit challenging deliberate indifference to his health needs: "We see no reason on the face of the complaint," the Court wrote, "to treat petitioner's claim differently solely because he has been condemned to die."<sup>84</sup>

Nelson still has not been executed four years later as his case works its way through the courts.<sup>85</sup> The national significance of this decision became apparent two years later when another inmate raised a challenge to lethal injection through a civil rights suit. In Florida, Clarence Hill claimed that his state's lethal injection practice violated his civil rights under the Eighth Amendment. Again, the Florida courts and the lower federal courts all rejected the suit on procedural grounds.<sup>86</sup> Those courts held that Hill should have included his objections to lethal injection in his normal death penalty appeal.<sup>87</sup> At a minimum, he should have raised this issue shortly after Florida switched from the electric chair to lethal injection. Instead, Hill waited until his execution date of January 24, 2006 was near before bringing the alternative civil suit that avoided the time and issue restrictions of the habeas corpus law. Again, the Supreme Court granted certiorari at the eleventh hour before Hill's scheduled execution, agreeing to hear the procedural issue of how challenges to lethal injection procedures may be brought.<sup>88</sup> As in *Nelson*, the Court unanimously ruled that the petitioner had properly raised the issue as a civil rights matter.<sup>89</sup>

Obviously, the Court was aware that virtually all executions in the country were being carried out by lethal injection and that the procedures used in all states were similar. Hence, if Hill could challenge the way this method was being employed, so could most

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83. *Nelson*, 541 U.S. at 643-44.

84. *Id.* at 645.

85. See DPIC, Execution Database, *supra* note 57.

86. *Hill v. McDonough*, 547 U.S. 573, 576 (2006).

87. See Denno, *When Legislatures Delegate Death*, *supra* note 50, at 105-06.

88. *Id.*

89. *Hill*, 547 U.S. at 584 (relying on *Nelson v. Campbell*, 541 U.S. 637).

of the over 3000 people on death row. Probably with this in mind, the Court's opinion closed with the observation that they were not sanctioning stays of executions in every case solely because an inmate had raised a civil rights objection to lethal injection.<sup>90</sup> These suits would have to be pursued even as the execution clock was ticking under the usual appeals process. If an inmate waited until the last minute to raise such a claim and the court hearing the claim believed it was being used only as a delaying tactic, then that court could refuse to grant a stay to allow time to pursue the civil rights matter.<sup>91</sup> "A court considering a stay must also apply 'a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay.'"<sup>92</sup>

Hill was among the first victims of this warning from the Court. Although he had won a unanimous ruling from the U.S. Supreme Court, on remand the District Court ruled that his claim had been raised too late and was being used mainly to gain more time.<sup>93</sup> The U.S. Court of Appeals for the Eleventh Circuit upheld the District Court's decision and refused to stay his execution.<sup>94</sup> The Supreme Court also denied a stay and Hill was executed just three months after his victory.<sup>95</sup> He never received a hearing on the lethal injection matter that the Court said merited review under the Civil Rights Act.<sup>96</sup>

Although Hill could not escape execution, similar suits were being filed all over the country and other federal courts reacted differently than the Eleventh Circuit.<sup>97</sup> Some circuit courts had recognized these suits as legitimate civil rights matters even before the Supreme Court acted in *Hill*. For example, executions had been stayed and civil hearings held in federal courts in California, Missouri, and Maryland.<sup>98</sup> In other states, suits were filed but no stays or hearings were granted. For example, executions continued without delays in Texas and other states.<sup>99</sup> The split among the

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90. *Id.* at 583-84.

91. *Id.* at 584 (citing *Gomez v. U.S. Dist. Ct. for N. Dist. of Cal.*, 503 U.S. 653, 654 (1992)).

92. *Id.*

93. See *Hill v. McDonough*, No. 4:06-CV-032-SPM, 2006 WL 2556938, at \*3-4 (D. Fla. Sept. 1, 2006).

94. *Hill v. McDonough*, 464 F.3d 1256, 1257 (11th Cir. 2006).

95. See *Clarence Hill Executed in Florida*, ASSOCIATED PRESS, Sept. 20, 2006.

96. *Id.*

97. See Denno, *When Legislatures Delegate Death*, *supra* note 50, at 105-16.

98. See *id.*

99. See *infra* notes 100-01 and accompanying text.

circuit courts made a Supreme Court ruling on the issue increasingly likely. Considering what was at stake, some judges, as indicated below, found the inconsistency in rulings on the lethal injection issue itself to be a constitutional violation. The different rulings, sometimes within the same federal circuit, revealed the arbitrariness with regards to whom was executed and whom was spared.

In dissenting from a Sixth Circuit refusal to grant a stay based on a lethal injection challenge to Tennessee inmate Sedley Alley, Judge Boyce Martin, Jr., wrote:

[T]he dysfunctional patchwork of stays and executions going on in this country further undermines the various states' effectiveness and ability to properly carry out death sentences. We are currently operating under a system wherein condemned inmates are bringing nearly identical challenges to the lethal injection procedure. In some instances stays are granted, while in others they are not and the defendants are executed, with no principled distinction to justify such a result.<sup>100</sup>

Similarly, U.S. District Court Judge Gregory Frost wrote:

[T]his Court is now confronted with two different unreported decisions by two different appellate panels, both concerned with the same issues of law and both reaching wholly opposite, unexplained results. . . . This Court's inability to discern the appellate rationale for denying or granting a stay does not promote confidence in the system, does not promote consistency in court decisions, and does not promote the fundamental value of fairness that underlies any conception of justice.<sup>101</sup>

Slowly, the lethal injection issue evolved from an obscure legal technicality to one that reflected badly on the reliability of the criminal justice system to provide a fair hearing with consistent results. Ultimately, the Supreme Court chose a case from Kentucky as the vehicle to explore challenges to the lethal injection procedures.<sup>102</sup> Kentucky seemed an unlikely state to select for such a review since it has had only two executions since the death penalty was reinstated, and only one of these executions was by lethal injection.<sup>103</sup> Moreover, the suit brought by the petitioners had not

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100. Alley v. Little, 447 F.3d 976, 977 (6th Cir. 2006) (Martin, J., dissenting from denial of a rehearing *en banc*).

101. Cooley v. Taft, No. 2:04-CV-1156, 2006 WL 3526424, at \*3 (S.D. Ohio Dec. 6, 2006) (dissenting from a denial of a stay for John Spirko in Ohio).

102. Baze v. Rees, 128 S. Ct. 34 (2007).

103. See DPIC, Execution Database, *supra* note 57, at 4.

been subjected to the thorough federal hearings conducted in similar cases that were under way in California and Missouri.<sup>104</sup> The hearings in Kentucky were instead held in state court, and considered only Kentucky's procedures, not the vast array of problems that had arisen in other states.<sup>105</sup> Despite these differences, the case did involve broad principles of Eighth Amendment interpretation, including: what standards should state and federal courts use in evaluating these kinds of claims? Must states avoid the unnecessary risk of severe pain when administering these drugs, or should the burden on the states be lighter, requiring only the avoidance of substantial risks of the wanton infliction of pain?

On September 25, 2007, the same day that certiorari was granted in *Baze*, Texas carried out an execution by lethal injection, despite an attempt to raise a challenge similar to the challenge raised in *Baze*.<sup>106</sup> But the short window to file and the refusal by the Texas chief appellate judge to wait for the coming appeal meant that the Supreme Court had no lower court opinion to review. It declined to grant a stay and Michael Richard became the last person executed in the U.S. in 2007.<sup>107</sup> The callousness of the Texas court in closing the door on a man who was about to die and who would have been spared had his execution date been one day later, further undermined public confidence in administration of the death penalty system.<sup>108</sup>

Since September 26, 2007, the remaining executions have been stayed by either the U.S. Supreme Court, federal, or state courts. The Supreme Court did not issue a blanket moratorium on executions, but the net effect has been the same.<sup>109</sup> Executions have not taken place for over six months. Prior to *Baze*, the country had not seen a six-month period without a single execution since executions resumed following the moratorium caused by the *Furman* decision over twenty-five years ago.<sup>110</sup> Even when the Court was consider-

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104. See *supra* notes 97-98 and accompanying text.

105. See *Baze v. Rees*, 217 S.W.3d 207, 209-11 (Ky. 2006).

106. See Ralph Blumenthal, *Texas Judge Draws Outcry for Allowing an Execution*, N.Y. TIMES, Oct. 25, 2007, at A22.

107. See Diane Jennings & Michael Grabell, *Arlington Killer Granted Reprieve*, DALLAS MORNING NEWS, Oct. 3, 2007 (noting that Richard's execution went forward).

108. See Blumenthal, *supra* note 106.

109. See Death Penalty Information Ctr., *Lethal Injection: National Moratorium on Executions Emerges after Supreme Court Grants Review*, <http://www.deathpenaltyinfo.org/article.php?did=1686&scid=64> (last visited Apr. 17, 2008) [hereinafter DPIC, *National Moratorium*] (listing stays of executions granted).

110. See DPIC, Execution Database, *supra* note 57.

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ing the fundamental issue of race and the death penalty in *McCleskey v. Kemp*<sup>111</sup> in 1987 and the question of innocence in *Herrera v. Collins*<sup>112</sup> in 1993, executions were not stayed as they have been during the *Baze* deliberations.

### B. Impact Due to Stays

A long moratorium period can affect the death penalty system in many ways. For over ten years, the country had become accustomed to an average of at least one execution per week, and suddenly, after *Baze* there were none. Stays give attorneys for death row inmates the opportunity to uncover new evidence, or to take advantage of new changes in the law. The public can step back from the question of whether a particular inmate deserves to be executed and consider the broader question of whether the death penalty is worth keeping at all. The press can play a major role in this process. Editorials in major papers have encouraged just such a review.<sup>113</sup> Further, at the state level, legislators now have the opportunity to consider broader questions about continued administration of the death penalty. For example, New York and New Jersey recently abandoned the death penalty after extensive periods with no executions.<sup>114</sup> In Illinois, a temporary moratorium to study the system has now been extended to its eighth year.<sup>115</sup>

Despite the current lull, at some point executions will likely resume, and with the backlog of cases now accumulating, there may well be a sharp increase in the rate of executions compared to recent years. While a regular pattern of executions draws little public attention, a spate of executions in a short time may generate increased concern, which could ultimately lead to a more permanent decline in executions. For example, following a period of three months in 1987 in which Louisiana conducted eight executions, it has reverted to a pace of barely one execution per year.<sup>116</sup> In 1999, Virginia had fourteen executions, but since then the number of ex-

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111. See generally *McCleskey v. Kemp*, 481 U.S. 279 (1987).

112. See generally *Herrera v. Collins*, 506 U.S. 390 (1993).

113. See, e.g., *Perspectives*, SCIENTIFIC AM., July 2007, at 36 (calling for renewed public discussion of all aspects of the death penalty, including the method of execution).

114. See DEATH PENALTY INFORMATION CTR., THE DEATH PENALTY IN 2007: YEAR END REPORT 1 (2007), <http://www.deathpenaltyinfo.org/2007YearEnd.pdf>.

115. See Art Barnum, *Lawyers for Man Charged in Nicarico Slaying File Motions Opposing Death Penalty*, CHI. TRIBUNE, April 10, 2008.

116. See DPIC, Execution Database, *supra* note 57.

ecutions has fallen sharply, with no executions in 2007.<sup>117</sup> If there are many executions in a short time, the public may express concerns about how the death penalty is being implemented generally.

*Baze v. Rees* is a narrow case, and because the argument in *Baze* at the Supreme Court level was limited by a sparse record and by the particular protocol that exists in Kentucky,<sup>118</sup> it is possible that the Court's decision will allow executions to resume in some states in 2008. But this issue has opened many new doors for litigation and has changed the way the death penalty is viewed. The Supreme Court's decision will only partially affect this debate.

### C. Problems and Incompetence Revealed

Even before the Court's grant of certiorari in *Baze*, twenty-nine executions had been stayed due to lethal injection challenges in eleven states.<sup>119</sup> As shown below, some of the eventual rulings related to those stays exposed deep problems in the way that states were administering lethal injections, which raised the profile of a formerly obscure issue. Many of these cases have been put on hold in light of *Baze*. Once the Supreme Court has made its decision, however, these issues at the state level will again appear at the forefront. For example, in California, a U.S. District Court found the state's lethal injection process to be unconstitutional, pending changes to the methods used.<sup>120</sup> This ruling came after extensive hearings involving national experts and personal visits to the death chamber by the judge.<sup>121</sup> A new lethal injection chamber has been constructed and the protocols have been revised, but final judgment on these changes has been postponed pending the *Baze* ruling.<sup>122</sup>

According to the U.S. District Court's memorandum in the California case, the state's response to the problems identified in the execution process have been inadequate.<sup>123</sup> Instead, the state only "tweaked" some of the chemical aspects of the protocol and then contended that no more changes were required.<sup>124</sup> This resistance

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117. *Id.*

118. Execution of Death Sentence, K.Y. REV. STAT. ANN. § 431.220.

119. See DPIC, *National Moratorium*, *supra* note 109 (listing stays lasting beyond the stated execution date).

120. *Morales v. Tilton*, 465 F. Supp. 2d 972, 974 (N.D. Cal. 2006).

121. *Id.* at 978.

122. See *id.*; Order Following Grant of Certiorari in *Baze v. Rees* (Sept. 26, 2007), available at <http://www.lethalinjection.org>.

123. *Morales*, 465 F. Supp. 2d at 979-80.

124. *Id.* at 977.

to changing the lethal injection process was maintained despite the fact that the state's own medical expert testified that it would be "terrifying" and "unconscionable" to be awake and injected with the contemplated dosage of the drugs prescribed in the protocol.<sup>125</sup> The judge concluded that the "evidence is more than adequate to establish a constitutional violation" and that the state's lack of professionalism was "deeply disturbing."<sup>126</sup> The responsibility for the flaws "falls squarely upon the Defendants."<sup>127</sup>

In Missouri, a similar review led to a finding that the state was carrying out lethal injections in an unconstitutional and careless manner.<sup>128</sup> There, the federal district court found many problems in Missouri after reviewing the chemical dispensary logs, the videotape of the execution chamber, and the interrogatories submitted to state officials.<sup>129</sup> For example, the protocol was not carried out consistently and was subject to change because there was no written protocol describing the kinds of drugs, the amounts of the drugs used, or the methods of administering the drugs for the executions.<sup>130</sup> The court concluded that Missouri's lethal injection procedure subjects condemned inmates to an unnecessary and unconstitutional risk of suffering when the lethal injection drugs are administered.<sup>131</sup> The Eighth Circuit reversed the district court's ruling, but a final resolution is awaiting the *Baze* decision.<sup>132</sup>

In Tennessee, a federal judge ruled that Tennessee's new lethal injection procedures were cruel and unusual, a decision which halted executions in the state.<sup>133</sup> The judge stated that Tennessee's new lethal injection protocols, released in April 2007, present "a substantial risk of unnecessary pain" and violated death row inmate Edward Jerome Harbison's constitutional protections under the Eighth Amendment.<sup>134</sup> Further, the court found that Tennessee's protocols do not adequately ensure that inmates are properly anesthetized during lethal injections, a problem that could "result in a terrifying, excruciating death."<sup>135</sup> The decision noted that

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125. *Id.* at 978.

126. *Id.* at 980.

127. *Id.*

128. Taylor v. Crawford, No. 05-4173-CV-C-FJG, 2006 WL 1779035 (W.D. Mo. June 26, 2006).

129. *Id.* at \*7.

130. *Id.*

131. *Id.* at \*8.

132. Taylor v. Crawford, 487 F.3d 1072, 1085 (8th Cir. 2007).

133. Harbison v. Little, 511 F. Supp. 2d 872, 903 (M.D. Tenn. 2007).

134. *Id.*

135. *Id.* at 883.

State Department of Corrections Commissioner George Little adopted the new guidelines despite having knowledge about the remaining risks of excessive pain for inmates.<sup>136</sup>

In other states, a more indirect approach also produced stays of execution. In 2004, a group of death penalty activists challenged New Jersey's lethal injection protocol because it had not been subject to proper hearings and review.<sup>137</sup> A state appellate judge ordered the state to conduct public hearings and to explain why the state had chosen the existing protocol.<sup>138</sup> Executions were put on hold until this administrative procedure was completed.<sup>139</sup> No hearings were held on this issue and instead, the legislature voted for a moratorium on the death penalty while it considered a whole range of potential problems with the death penalty unrelated to lethal injection.<sup>140</sup> Ultimately, the New Jersey legislature voted to abolish the death penalty and the governor concurred on December 17, 2007.<sup>141</sup> Similar rulings on procedural issues have occurred in California, Maryland, North Carolina, and Kentucky.<sup>142</sup>

#### IV. THE IMPACT OF THE LETHAL INJECTION CONTROVERSY ON THE DEATH PENALTY ITSELF

The controversy regarding lethal injections did not arise out of public concern with the methods of execution. Unlike the broader public reaction to issues such as innocence and race, lethal injections have remained obscure to the average citizen, and the issue is not a prominent reason for questioning the death penalty. Indeed, public support for the death penalty has remained fairly constant while this issue has risen in legal importance.<sup>143</sup>

Defense attorneys, however, had been challenging this method of execution ever since it was established in 1977.<sup>144</sup> For the most part, these challenges were dismissed as delay tactics and without

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136. *Id.* at 879.

137. *See In re* Readoption with Amendments of Death Penalty Regulations N.J.A.C. 10A:23, 242 A.2d 207, 209 (N.J. Super. 2004).

138. *See id.* at 210-11.

139. *See id.*

140. *See* 2005 N.J. Laws 321.

141. Tom Hester, *New Jersey Bans Death Penalty*, TULSA WORLD, Dec. 18, 2007, at A9.

142. *See* Denno, *When Legislatures Delegate Death*, *supra* note 50, at 107-17. R

143. *See* Frank Newport, *Sixty-Nine Percent of Americans Support the Death Penalty: Majority Say Death Penalty Is Applied Fairly*, GALLUP, Oct. 12, 2007, <http://www.gallup.com/search/default.aspx?q=death+penalty&s&b=SEARCH>.

144. *See* Denno, *Getting to Death*, *supra* note 35, at 375-77. R

merit.<sup>145</sup> However, advancements in the science of anesthesiology and criticisms about the use of the typical three-drug cocktail by doctors have helped move this controversy from the fringes to the mainstream. Judges began to take serious note once medical personnel added their testimony to the largely ad hoc and sporadic eyewitness accounts of “botched” executions.<sup>146</sup>

As physicians became more involved in the lethal injection challenges, discussions and research regarding lethal injections began to appear in such journals as the *Lancet*,<sup>147</sup> the *Public Library of Science*,<sup>148</sup> *Scientific American*,<sup>149</sup> and the *New England Journal of Medicine*.<sup>150</sup> The American Medical Association (“AMA”) reiterated its ethical prohibition against doctors participating in executions and associations of nurses and emergency medical technicians took similar stands.<sup>151</sup> Even the American Association of Veterinary Medicine indicated that it did not recommend the chemicals being frequently used in lethal injections of humans for the euthanasia of animals.<sup>152</sup>

These statements and criticisms put the lethal injection discussion in a new light. Doctors are one of the most trusted groups of professionals in the country, and if physicians wanted to distance themselves from the practice of lethal injection, it would cast a pall over the system. This was made clear to the public when the execution of Michael Morales in California was stayed and then tentatively allowed to go forward once the state assured the presiding judge that two doctors would participate in the execution to avoid unnecessary pain and mistakes.<sup>153</sup> However, at the last minute, both doctors declined to participate once it became clear that they

145. See Denno, *When Legislatures Delegate Death*, *supra* note 50, at 70 (noting that “while the court continually recognizes the Eighth Amendment hazards associated with prison conditions, it has never reviewed evidence on the constitutionality of execution conditions despite repeated, horrifying, and entirely preventable mishaps”).

146. See Denno, *The Lethal Injection Quandary*, *supra* note 18, at 104-05 (discussing impact of *Lancet* study).

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

148. Teresa Zimmers et al., *Lethal Injection for Execution: Chemical Asphyxiation?*, 4 *PLOS MED.* 0001 (2007).

149. *Perspectives*, *supra* note 113.

150. Atul Gawande et al., *Physicians and Execution—Highlights from a Discussion of Lethal Injection*, 358 *NEW ENG. J. MED.* 448 (2008).

151. See American Medical Association, *supra* note 68.

152. See Am. Veterinary Med. Ass’n, *2000 Report of the AVMA Panel on Euthanasia*, 218 *J. AM. VETERINARY MED. ASS’N* 669, 680 (2001).

153. See Maura Dolan & Henry Weinstein, *The Chaos Behind California Executions*, *L.A. TIMES*, Oct. 2, 2006, at 1.

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would be more than spectators.<sup>154</sup> The execution was stayed and no executions have occurred in California since that debacle.<sup>155</sup>

Once the U.S. Supreme Court affirmed that challenges to lethal injection could be raised as a civil rights issue, the door was opened for evidentiary hearings and formal discovery of state protocols pursuant to civil suits. For years, many states have veiled their execution procedures in a cloak of secrecy. That veil has been partially lifted as a result of the litigation, and courts have discovered far more problems than just the names and dosages of the drugs being used. Some of these findings were widely reported in the media.

Several different sources have questioned the consistency and reliability of lethal injection in California. For example, the *Los Angeles Times* published an article which sets out in detail California's procedures for executions by lethal injection. Witnesses to the procedure describe the executions as "almost haphazard events," and medical experts acknowledge the possibility that "one or more inmates had been conscious and experienced an excruciating sensation of drowning or strangulation before death."<sup>156</sup> The article explains:

[L]ethal injection is performed in a dark, cramped room by men and women who know little, if anything, about the deadly drugs they inject under extreme stress. . . . After the IVs are set up, the chamber's heavy, solid steel door is shut and locked, and the inmate is left alone. A prison employee leans into the door to seal it, an apparent holdover from the days when the prison had to ensure toxic gas would not escape.<sup>157</sup>

Next, the "execution team retires to an adjacent room, where members insert the execution drugs by syringe into IV lines that run through the wall and into the inmate's arms."<sup>158</sup> The anteroom to the execution chamber is often "packed with state officials, prosecutors and other government visitors."<sup>159</sup> Former San Quentin Warden Steven W. Ornoski explained that the anteroom was so

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154. *Id.*

155. See DEP'T OF CORRECTIONS & REHABILITATION, CONDEMNED INMATES WHO HAVE DIED SINCE 1978 2-3 (2008), [http://www.cdcr.ca.gov/Reports\\_Research/docs/CIWMD.pdf](http://www.cdcr.ca.gov/Reports_Research/docs/CIWMD.pdf) (indicating that the last execution in California occurred on January 17, 2006).

156. See Dolan & Weinstein, *supra* note 153.

157. *Id.*

158. *Id.*

159. *Id.*

crowded that he once had to ask a doctor to leave.<sup>160</sup> In fact, “[a] nurse working in the jammed room said she had to pass syringes to an outstretched hand whose owner she could not see. The same nurse said she did not know the origins of a document with instructions for the drugs. She had simply found it ‘in the gas chamber.’”<sup>161</sup>

In addition, the execution rooms are illuminated only by a red light, to prevent executioners from being seen or identified by witnesses.<sup>162</sup> “A doctor who filled out execution records said the room was so dark he had to use a flashlight to see what he was writing.”<sup>163</sup> Finally, the article explained concerns about the functioning of the IV lines. Dr. Mark Heath, a Columbia University anesthesiologist and expert witness for Morales explained that the IV bags hung so high that it would be impossible to determine if they were functioning properly.<sup>164</sup> Doctors did not necessarily set up the IV lines—a member of the execution team said she believed “‘the janitor’ helped set up the bags.”<sup>165</sup>

The Associated Press reported that an investigation of Tennessee’s “Manual for Execution” on lethal injections contains conflicting instructions and mixes new procedures with old guidelines for carrying out electrocutions.<sup>166</sup> The manual instructs prison officials to shave the condemned prisoner’s head prior to an execution, as if preparing him for electrocution, and orders that they have a fire extinguisher nearby.<sup>167</sup> It also provides instructions for controlling the voltage flowing to an electric chair, and instructs the facility manager to disconnect the electrical cables in the rear of the chair before a doctor checks whether the lethal injection was successful.<sup>168</sup> The governor described the manual as a “cut-and-paste” job.<sup>169</sup>

*The St. Petersburg Times* reported that Florida’s governor halted all executions in the state until a commission could investigate and report what went wrong with the lethal injection of Angel Nieves

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160. *See id.*

161. *See id.*

162. *See id.*

163. *Id.*

164. *See id.*

165. *See id.*

166. *See* Erik Schelzig, *Execution Manual is a ‘Cut-and-Paste Job’*, ST. LOUIS POST-DISPATCH, Feb. 11, 2007.

167. *See id.*

168. *See id.*

169. *See id.*

Diaz on December 13, 2006.<sup>170</sup> Diaz's execution took more than twice as long as normal and required two rounds of the lethal chemicals.<sup>171</sup> Witnesses stated that Diaz appeared to be squinting his eyes, tightening his jaw, and gasping for air.<sup>172</sup> "I'm at a loss to explain all those occurrences," said Dr. Rafael Miguel, a University of South Florida professor who is president of the Florida Society of Anesthesiologists. "It just makes it hard to make any conclusion about what happened."<sup>173</sup>

In Maryland, sworn testimony from members of the state's execution team was shown at a lethal injection hearing. The tape was intended to show the team's lack of knowledge and training, which Dr. Heath called "grossly inadequate."<sup>174</sup> In one videotaped segment, the doctor who was responsible for declaring that executed inmates were dead expressed surprise that the state had also designated her as the person who would slice into an inmate's limb to insert a catheter in a deeper vein if the team's nursing assistant could not start a standard IV.<sup>175</sup> Asked whether she would "feel comfortable" performing such a task—called a "cut-down procedure"—the doctor responded, "I do not do cut-down procedures. Period."<sup>176</sup> In another clip, the retired state trooper responsible for injecting lethal doses of three drugs into IV lines said he had never before seen the Maryland Execution Operations Manual.<sup>177</sup>

On May 2, 2006, the execution of Joseph Clark in Ohio was delayed ninety minutes because the execution team was unable to find a suitable vein to deliver the lethal chemicals.<sup>178</sup> After the team tried repeatedly to find a vein, Clark called out, "It's not working, it's not working."<sup>179</sup> The guards closed the curtains to block witnesses from viewing the execution chamber.<sup>180</sup> Witnesses

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170. Chris Tisch, *Gov. Bush Halts Executions*, ST. PETERSBURG TIMES, Dec. 16, 2006, at 1A.

171. See Chris Tisch, *Executed Man Takes 34 Minutes to Die*, ST. PETERSBURG TIMES, Dec. 13, 2006.

172. *Id.*

173. Chris Tisch, *Bush Orders In-Depth Look at Diaz Execution*, ST. PETERSBURG TIMES, Dec. 15, 2006, at 1A.

174. See Jennifer McMenamin, *Lethal Injection Training Faulted: Those Carrying Out Executions in MD Are Unqualified*, BALTIMORE SUN, Sept. 20, 2006.

175. See *id.*

176. See *id.*

177. See *id.*

178. Jim Provance & Christina Hall, *Problems Bog Down Execution of Clark*, THE TOLEDO BLADE, May 3, 2006.

179. See *id.*

180. See *id.*

then heard Clark moaning and groaning from behind the curtain.<sup>181</sup> The curtain later reopened after the execution team managed to find a vein in Clark's left arm.<sup>182</sup> He was then put to death.<sup>183</sup>

In Missouri, a court order finding the lethal injection process unconstitutional, recounted the deposition testimony of a doctor, referred to as John Doe I, who assisted with executions.<sup>184</sup> When John Doe I was asked why he did not initially recall preparing a smaller dose of thiopental, the doctor responded:

But I am dyslexic . . . . [s]o, it's not unusual for me to make mistakes. . . . and that is the reason why there are inconsistencies in my testimony. That's why there are inconsistencies in what I call drugs. I can make these mistakes, but it's not medically crucial in the type of work I do as a surgeon."<sup>185</sup>

When asked to describe how the drugs are administered, John Doe I explained that "the people who do the injections are non-medical and they're in the dark."<sup>186</sup> The people doing the injections must work quickly using a small flashlight, and "changing the number of syringes or the order of syringes was an unnecessary risk."<sup>187</sup> When asked if he monitors anesthetic depth, John Doe I testified that "the only thing that can be monitored is facial expression."<sup>188</sup> Consequently, John Doe I assessed whether the inmate was unconscious by watching an inmate's face, claiming "you can judge when the effect of the drug is accomplished, and that can be seen from across a room through a window."<sup>189</sup>

Such evidence of incompetence on the part of the state in carrying out executions can leave the public with a lack of confidence that the process of sentencing and putting people to death is being conducted carefully and competently.

## V. CONCLUSION: THE IMPACT OF INCOMPETENCE

In the 1990s, every aspect of the death penalty was showing signs of strength and expansion. Executions and the size of death row

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181. *See id.*

182. *See id.*

183. *See id.*

184. *See Taylor v. Crawford*, No. 05-4173-CV-C-FJG, 2006 WL 1779035, at \*5-6 (W.D. Mo. June 26, 2006) (emphasis in court order).

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

were increasing.<sup>190</sup> Public support reached an all-time high, and the number of states using the death penalty expanded when New York and Kansas reinstated the punishment.<sup>191</sup>

Since 1999, attitudes toward the death penalty in the U.S. have dramatically changed. Throughout the late 1990s, repeated instances of death row inmates being exonerated were reported in the media, many of the exonerations were confirmed by DNA testing, and a moratorium on executions was declared in Illinois.<sup>192</sup> As a result, not only did the use of the death penalty dramatically decline, so did death sentences, executions, the number of prisoners on death row, and public support for the death penalty.<sup>193</sup> Today, executions are down over fifty percent since 1999 and the number of death sentences has declined even further.<sup>194</sup> Public opinion still indicates support for the death penalty in theory, but the support for the alternative—life-without-parole sentences—has increased, surpassing support for the death penalty for the first time in the 2006 Gallup poll.<sup>195</sup>

It is unlikely that concerns about the unreliability and torturous effects of lethal injection will have the same dramatic impact as the exoneration of 127 inmates from death row,<sup>196</sup> but it seems that the present evaluation of the death penalty has shifted. In the calculus of what makes good public policy, all of the costs and benefits of a program must be weighed. Lethal injection was originally seen as a

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190. See Death Penalty Information Ctr., *Executions By Year*, Sept. 28, 2007, <http://www.deathpenaltyinfo.org/article.php?scid=8&did=146> [hereinafter DPIC, *Executions by Year*].

191. See Joseph Carroll, *Americans and the Death Penalty*, GALLUP, Dec. 15, 2004, <http://www.gallup.com/poll/14371/Americans-Death-Penalty.aspx> (reporting that in 1994 support for the death penalty reached an all-time high of eighty percent, the highest level of approval since reinstatement of the death penalty in 1976).

192. See FRANK R. BAUMGARTNER ET AL., *THE DECLINE OF THE DEATH PENALTY AND THE DISCOVERY OF INNOCENCE* 54-99 (2008).

193. See *id.* at 7-8; see also Death Penalty Information Ctr., *Execution News and Developments 2004-1998*, <http://www.deathpenaltyinfo.org/article.php?&did=2134> (last visited Apr. 19, 2008).

194. See DPIC, *Executions by Year*, *supra* note 190 (reporting ninety-eight executions in 1999; the number of executions declined to forty-two in 2007); see also BAUMGARTNER, *supra* note 192, at 7-8 (noting the decline in death sentences).

195. See, e.g., DEATH PENALTY INFORMATION CTR., *THE DEATH PENALTY IN 2007: YEAR END REPORT*, <http://www.deathpenaltyinfo.org/2007YearEnd.pdf>; DEATH PENALTY INFORMATION CTR., *THE DEATH PENALTY IN 2006: YEAR END REPORT*, <http://www.deathpenaltyinfo.org/2006YearEnd.pdf>; DEATH PENALTY INFORMATION CTR., *THE DEATH PENALTY IN 2005: YEAR END REPORT*, <http://www.deathpenaltyinfo.org/YearEnd05.pdf>.

196. For a list and description of each of the 127 cases, see Death Penalty Information Ctr., *Innocence and the Death Penalty*, <http://www.deathpenaltyinfo.org/article.php?did=412&scid=6> (last visited Apr. 20, 2008).

benefit: the state had developed a method of execution that appeared painless and humane, and the state could be in control while simultaneously compassionate. Now lethal injections are viewed by many as a process replete with error, state mismanagement, and as a potential violation of human rights.<sup>197</sup>

Recent research has shown that the public is becoming more skeptical of the efficacy of the death penalty. Nearly forty percent of the public believes that they would not be allowed to serve on a death penalty jury. Over fifty-eight percent believes that a moratorium on executions should be put in place.<sup>198</sup> Forty out of the fifty states conducted no executions in 2007.<sup>199</sup> These numbers reflect the increasing irrelevance of capital punishment within the criminal justice system in the eyes of much of the public. The lethal injection controversy has reminded the public of the unpredictable nature of the death penalty system, and resulted in a nationwide stay on executions that may continue for months to come.

Moreover, the controversy regarding this method of execution has already increased the financial costs and emotional burden on the families of victims, as executions are stayed, further hearings are conducted, and the procedure remains uncertain. Just as there is no way to ensure the infallibility of judges, juries, and prosecutors, there appears to be no guarantee that the lethal injection process will be humane and painless. The more the public becomes aware of the potential problems and seeks increased accountability, the more the involvement of medical professionals is required. Yet for many of those professionals participating in lethal injection poses an ethical quandary which dissuades their participation.<sup>200</sup>

By itself, risky lethal injections might be a minor problem that could be patched over and ignored. But as part of a growing concern that capital punishment represents a series of unfixable problems with no end in sight, it adds to public frustration. The state of New Jersey recently voted to abolish the death penalty.<sup>201</sup> Though the lethal injection issue contributed to the halt in executions, arguably it was the conclusion drawn by many citizens origi-

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197. See Lethal Injection.org, Articles and Media Coverage, <http://www.law.berkeley.edu/clinics/dpclinic/LethalInjection/LI/bazemedia.html> (last visited Apr. 20, 2008) (listing over forty articles regarding *Baze v. Rees*).

198. See Richard Dieter, *A Crisis of Confidence: American's Doubts about the Death Penalty*, DEATH PENALTY INFORMATION CTR., 2007, <http://www.deathpenaltyinfo.org/CoC.pdf>.

199. See DPIC, *Execution Database*, *supra* note 57.

200. See, e.g., Curfman, Morrisey & Drazen *supra* note 67.

201. See Hester, *supra* note 141.

nally in support of the death penalty that the system was never going to be functional that ultimately brought about its abolishment. The lethal injection controversy may be making the same contribution to the national debate.