

IN THE EYE OF THE STORM: A JUDGE'S EXPERIENCE IN LETHAL-INJECTION LITIGATION

*The Honorable Jeremy Fogel**

INTRODUCTION

The case of *Morales v. Tilton*,¹ which challenges the constitutionality of California's lethal-injection protocol for executions, is unique among the many thousands of disputes over which I have presided in more than twenty-six years as a federal and state judge. It has demanded the most from me—intellectually, emotionally, and spiritually—of any matter that ever has appeared on my docket. While I may not comment on the merits of the case because it is still pending before me,² I am hopeful that those who read this Article will find my personal experience of interest, as a commentary on the workings of our legal system, a meditation on being a judge, and a reflection upon the potency of the death penalty as an issue in our society.

This Article focuses on five aspects of my personal experience. Part I reviews the history of my involvement with lethal-injection litigation—beginning in 2004 with the case of *Cooper v. Rimmer*³—and how what I initially viewed as a far-fetched, entirely hypothetical argument about the potential risks of lethal injection came to concern me enough that I enjoined an execution. Part II discusses the cultural divide between the judiciary and the state bureaucracy that is responsible for carrying out executions, and the ways in which that divide has affected both the *Morales* case in particular and California's efforts to address questions concerning its lethal-injection protocol generally. Part III concerns the role and re-

* Judge, United States District Court, Northern District of California. I am very grateful for the invaluable assistance of George O. Kolombatovich, one of the Court's three death-penalty staff attorneys, both with this Article and throughout the *Morales* litigation.

1. 465 F. Supp. 2d 972 (N.D. Cal.) and *prelim. inj. conditionally denied sub nom. Morales v. Hickman*, 415 F. Supp. 2d 1037 (N.D. Cal.), *aff'd*, 438 F.3d 926 (9th Cir. 2006).

2. Code of Conduct for United States Judges Canon 3(A)(6) (2000), available at <http://www.uscourts.gov/guide/vol2/ch1.html#3>.

3. No. 5-4-cv-436-JF, 2004 WL 231325 (N.D. Cal. Feb. 6, 2004) (den. TRO & *prelim. inj.*), *aff'd*, 379 F.3d 1029 (9th Cir. 2004), *dismissed sub nom. Cooper v. Woodford*, No. 5-4-cv-436-JF (N.D. Cal. Oct. 14, 2004).

sponse of the news media in *Morales* and other lethal-injection cases. This Part also describes the anomalous experience of being a central figure in a major news story while at the same time being unable for ethical reasons to make any substantive comment about it.⁴ Part IV discusses the reaction of the non-lawyer public to the lethal-injection controversy, and how the deep differences within public opinion about the death penalty overshadow and skew any discussion of the issues that legal challenges to lethal injection actually present. Part V discusses the ways in which *Morales* has affected my understanding of myself as a judge and as a person.

I. HISTORY

A. *Cooper v. Rimmer*⁵

Kevin Cooper was a convicted multiple-murderer who for many years had been pursuing habeas corpus proceedings based on a claim of innocence.⁶ His habeas case had attracted significant media attention and was the latest flashpoint in California's ongoing debate about capital punishment.⁷ On February 2, 2004, eight days before his scheduled execution date, Cooper filed a civil-rights claim under 42 U.S.C. § 1983, claiming that California's lethal-injection protocol was unconstitutional because it created an undue risk that the person being executed would experience excruciating pain.⁸ Cooper sought a temporary restraining order to prevent his execution.⁹ Because all executions in California are carried out at San Quentin State Prison, which is located in the Northern District of California, Cooper filed the case in our court. I drew the case by random assignment.

My immediate reaction to Cooper's claims was extremely skeptical. Having been a judge for so long in a state in which capital punishment has been so controversial that three justices of the state supreme court were voted out of office because of their per-

4. As of this writing, *Morales* remains a pending case, and further proceedings with respect to the state's most recent revisions to its lethal-injection protocol are anticipated. Accordingly, this Article is based entirely upon past events. Any reference to my opinions as to legal or factual issues involves matters already in the public record and is made solely to provide historical context for the Article. Nothing in the Article is intended to suggest my view of the merits of any pending legal or factual issue in *Morales* or any other case.

5. 2004 WL 231325.

6. *Id.* at *1.

7. *Id.* at *4.

8. *Id.* at *1.

9. *Id.*

ceived bias against the death penalty,¹⁰ I instinctively questioned the timing and context of Cooper's suit. In more than a decade of unending litigation since his conviction, Cooper had never challenged the constitutionality of California's method of execution. Further, because a serious inquiry into the factual basis of his lethal-injection claims could not possibly be completed within eight days, a decision even to conduct such an inquiry would require a stay of execution. Virtually all of the public statements made on Cooper's behalf focused on his claim of innocence, not the means by which he would be executed.¹¹ Even though Cooper's argument concerning lethal injection was well articulated by capable counsel, the factual premise of that argument—that a massive dose of sodium thiopental might be insufficient to ensure Cooper's unconsciousness prior to the administration of two other (potentially pain-causing) drugs—made little intuitive sense.¹² As I noted in denying Cooper's request for a temporary restraining order,

[w]hile the stated objective of the present action is to address alleged deficiencies in California's lethal injection protocol, the timing of its filing reasonably suggests that an equally important purpose of the action is to stay Plaintiff's execution so that Plaintiff may continue to pursue claims going to the validity of his conviction.¹³

10. California holds retention elections for justices of its appellate courts in which the justices' names appear periodically on the ballot for a "yes" or "no" vote. In 1986, Chief Justice Rose Bird and Associate Justices Joseph Grodin and Cruz Reynoso received a majority of "no" votes after death-penalty supporters mounted a statewide campaign accusing the three of consistently refusing to affirm death sentences because of their personal opposition to capital punishment rather than on the merits of the cases involved. See Herbert M. Kritzer, *Law Is the Mere Continuation of Politics by Different Means: American Judicial Selection in the Twenty-first Century*, 56 DEPAUL L. REV. 423, 444 n.93 (2007) (citing various commentators who discuss the campaign against these three justices, including JOSEPH R. GRODIN, IN PURSUIT OF JUSTICE: REFLECTIONS OF A STATE SUPREME COURT JUSTICE (Univ. Cal. Press 1989); John H. Culver & John T. Wold, *Rose Bird and the Politics of Judicial Accountability in California*, 70 JUDICATURE 81 (1986); Joseph R. Grodin, *Judicial Elections: The California Experience*, 70 JUDICATURE 365 (1987); John T. Wold & John H. Culver, *The Defeat of the California Justices: The Campaign, the Electorate, and the Issue of Judicial Accountability*, 70 JUDICATURE 348 (1987)).

11. See Save Kevin Cooper, <http://www.savekevincooper.org/background.html> (last visited Apr. 10, 2008).

12. The protocol calls for the injection of a sequence of three drugs into the person being executed: sodium thiopental, a barbiturate sedative, to induce unconsciousness; pancuronium bromide, a neuromuscular blocking agent, to induce paralysis; and potassium chloride, to induce cardiac arrest. The state subsequently stipulated that it would be unconstitutional to inject a conscious person with the quantity of either pancuronium bromide or potassium chloride specified by the protocol.

13. *Cooper*, 2004 WL 231325, at *2 n.1.

Although the Ninth Circuit affirmed my ruling,¹⁴ Cooper was not executed because the court accepted his successive habeas petition and ordered further proceedings in the district court that had considered his federal habeas claims.¹⁵ While there was no legal impediment to his doing so, Cooper chose not to pursue his lethal-injection challenge, which eventually was dismissed without prejudice for failure to exhaust administrative remedies.¹⁶

B. *Beardslee v. Woodford*¹⁷

A year later, another death-row inmate, Donald Beardslee, filed a nearly identical challenge to California's lethal-injection protocol.¹⁸ Because it raised substantially the same issues as *Cooper*, Beardslee's case was assigned to me under our court's related-case procedures.¹⁹ Unlike Cooper, Beardslee did not assert his innocence of the underlying crime, and thus his lethal-injection challenge was his last realistic hope of avoiding execution. In addition, Beardslee filed his challenge approximately a month before his scheduled execution date, which permitted at least a preliminary examination of the merits of his claims without the necessity of a stay.²⁰

Even under these circumstances, I had a very difficult time finding substance in Beardslee's arguments. The pharmacological evidence seemed overwhelming: there was virtually no risk that a person receiving the quantity of sodium thiopental provided under the execution protocol would be conscious when the two drugs with the potential for inflicting pain were injected.²¹ While there were ambiguous notations in several execution logs, it did not appear that any previous execution by lethal injection in California had gone seriously awry. Beardslee's argument that the paralytic

14. *Cooper v. Rimmer*, 379 F.3d 1029 (9th Cir. 2004). Significantly, in light of the subsequent debate as to the proper standard of review for lethal-injection challenges, the court concluded that Cooper had failed to show "that he is subject to an unnecessary risk of unconstitutional pain or suffering." *Id.* at 1033.

15. *Cooper v. Woodford*, 358 F.3d 1117 (9th Cir. 2004) (en banc).

16. *Cooper v. Woodford*, No. 5-4-cv-436-JF (N.D. Cal. Oct. 14, 2004).

17. No. 5-4-cv-5381-JF, 2005 WL 40073 (N.D. Cal. Jan. 7, 2005) (den. TRO & prelim. inj.), *aff'd*, 395 F.3d 1064 (9th Cir. 2005).

18. *Beardslee*, 2005 WL 40073, at *2. Beardslee also claimed that the use of pancuronium bromide to induce paralysis violates the First Amendment because it prevents a person being executed from speaking in the event that the sodium thiopental fails to induce unconsciousness. *See id.* at *3; *Beardslee*, 395 F.3d at 1076.

19. N.D. CAL. CIV. L.R. 3-12.

20. *Beardslee*, 2005 WL 40073, at *2.

21. *Id.*

effects of pancuronium bromide would have masked any failure to induce unconsciousness struck me as creative but ultimately without real substance; in the absence of an actual risk of inadequate anesthesia, there could be nothing to mask. As I had in *Cooper*, I denied relief, finding that Beardslee had failed to show a reasonable likelihood of success on the merits of his claims.²² Following an unsuccessful appeal to the Ninth Circuit²³ and petition for certiorari to the Supreme Court,²⁴ Beardslee was executed, apparently without incident.

C. *Morales v. Tilton*²⁵

In April 2005, a British medical journal, *The Lancet*, published a study of autopsy data from forty-nine lethal-injection executions.²⁶ The study found that forty-three percent of the executed inmates whose autopsy records were reviewed had concentrations of sodium thiopental in their blood that were consistent with awareness, apparently lending at least some credence to the questions about the three-drug combination that had been raised by Cooper and Beardslee in California and by others in similar cases around the country.²⁷ The next two California executions raised additional concerns, even though neither of the inmates involved asserted a lethal-injection challenge. The first case involved Stanley “Tookie” Williams, the founder of the “Crips” street gang, whose death sentence and claims of both innocence and post-conviction rehabilitation attracted international interest.²⁸ The execution team members responsible for inserting the catheters into Williams’s veins were unable to set one of the two catheters required by the execution protocol and eventually gave up trying to do so.²⁹ Williams was executed, but the procedure took nearly twice as long as

22. *Id.* at *3-4.

23. *Beardslee*, 395 F.3d 1064.

24. *Beardslee v. Woodford*, 543 U.S. 1096 (2005).

25. 465 F. Supp. 2d 972 (N.D. Cal.) and *prelim. inj. conditionally denied sub nom. Morales v. Hickman*, 415 F. Supp. 2d 1037 (N.D. Cal.), *aff’d*, 438 F.3d 926 (9th Cir. 2006).

26. Leonidas G. Koniaris et al., *Inadequate Anaesthesia in Lethal Injection for Execution*, 365 LANCET 1412 (2005).

27. The methodology of the study later was criticized even by critics of lethal injection, and it was not relied upon by Morales’s expert witnesses at subsequent hearings.

28. See Tookie’s Corner, http://www.tookie.com/nobel_news_links.html (last visited Apr. 10, 2008).

29. *Morales*, 465 F. Supp. 2d at 979.

expected.³⁰ The second case involved Clarence Ray Allen, a septuagenarian inmate whose execution drew attention because of his age and his extremely fragile medical condition, which included advanced heart disease.³¹ While the problems experienced in the Williams execution were not repeated, it took twice the designated dose of potassium chloride to make Allen's heart stop beating.³² When asked why it was necessary to double a dosage that was intended and sufficient to cause almost instantaneous death in the healthiest of persons, San Quentin's warden suggested that "this guy's heart has been beating for 76 years, and it took awhile for it to stop."³³

It was against this background that Michael Morales, who had been on death row for nearly twenty-five years for a particularly heinous rape and murder, brought a new challenge to California's lethal-injection protocol in January 2006.³⁴ Once again, the case was assigned to me under the court's related-case procedures.³⁵ Because he filed his case even before his execution date was formally set by the state trial court, Morales was able to obtain expedited fact discovery prior to a hearing on his motion for a preliminary injunction. As I later noted, "the record in the present action [thus was] substantially more developed than the record in *Cooper* or *Beardslee*."³⁶ For the first time, that record contained all of the logs and other documentation for each of the eleven executions by lethal injection at San Quentin, including the recent executions of Williams and Allen.³⁷

By early February 2006, I had reached the conclusion that an independent factual inquiry into California's administration of its lethal-injection protocol was warranted. In the two years since *Cooper*, an issue that I had dismissed as a desperate, transparent ploy to postpone an inevitable execution had begun to seem serious and substantial. The documented problems with the Williams and Allen executions heightened my concerns. Given the virtual certainty that the dosage of sodium thiopental prescribed by the

30. Kevin Fagan, *The Execution of Stanley Tookie Williams: Eyewitness: Prisoner Did Not Die Meekly, Quietly*, S.F. CHRON., Dec. 14, 2005, at A12.

31. Kevin Fagan, *Reporter's Eyewitness Account of Allen's Execution*, S.F. CHRON., Jan. 17, 2006, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2006/01/17/MNG37GOHD715.DTL>.

32. *Id.*

33. *Id.*

34. *Morales*, 465 F. Supp. 2d 972.

35. N.D. CAL. CIV. L.R. 3-12.

36. *Morales v. Hickman*, 415 F. Supp. 2d 1037, 1043 (N.D. Cal. 2006).

37. *See id.* at 1043-46; *Morales*, 465 F. Supp. 2d at 975 n.3.

protocol was sufficient to cause virtually everyone to stop breathing within one minute, why did a majority of the execution logs reflect the presence of “respirations” well after that minute had passed? Why were the heart rates of several of the inmates elevated rather than slowed after the injection of such a massive amount of sedative? Why did Allen require a second injection of potassium chloride when the first should have been sufficient to kill a healthy horse, let alone a frail seventy-six-year-old man with a long history of heart disease? With well over 600 inmates on California’s death row, did it not make sense to resolve these and similar questions as definitively as possible in order to limit future litigation?

I gave serious consideration to issuing a stay of execution and setting an evidentiary hearing, but in the end I felt compelled to find a way to permit the execution to proceed even in light of my concerns. Morales had been awaiting execution for more than twenty-five years, and even in comparison to those of other capital defendants, his crimes were particularly repugnant.³⁸ There was no doubt about his guilt; in fact, he had admitted his actions, and his arguments throughout his many years of appeals and habeas petitions had focused almost entirely on the appropriateness of his sentence.³⁹ The victim had lived in a relatively small agricultural community in California’s Central Valley, and her family and loved ones, as well as members of the community, were particularly vocal in support of the execution. Thus, I decided to give the state a choice: it could modify the execution protocol to reduce or eliminate the possibility that Morales would be conscious during the administration of pain-inducing drugs, or the execution would be postponed pending discovery and an evidentiary hearing. If the state chose to proceed, it either could execute Morales using only sedatives (which would eliminate the risk of excessive pain entirely),⁴⁰ or it could designate a person or persons with training in anesthesia to monitor Morales’s level of consciousness during the

38. Morales murdered 17-year-old Terri Winchell at the request of his cousin, who was involved in a love triangle with the victim and another man. He attempted to strangle the victim with a belt, bludgeoned her with a hammer, raped her, and stabbed her to death with a knife, then left her exposed body in a vineyard. *See generally* Morales v. Woodford, 388 F.3d 1159, 1163 (9th Cir. 2004).

39. Morales’s cousin received a sentence of life without the possibility of parole.

40. Of the three drugs in the lethal-injection protocol, only the third—potassium chloride—will cause excessive pain if the inmate is not unconscious. The second drug—pancuronium bromide—does not cause significant pain in itself but rather masks the pain caused by the potassium chloride by inducing paralysis.

execution and take appropriate steps in the event Morales was not unconscious when the second and third drugs were injected.⁴¹ In either case, even if Morales was executed, I urged state officials to conduct a “thorough review” of all aspects of its protocol going forward.⁴² Two days later, the state chose the second option, designating two board-certified anesthesiologists to attend the execution.⁴³

Considering that physician involvement in executions itself has become a controversial issue, it is significant that prior to this point neither party had raised any concern about medical ethics. Morales himself had argued that California’s lethal-injection protocol was flawed in large part *because* the members of the execution team lacked sufficient training to monitor condemned inmates’ level of consciousness, and that only a trained medical professional could do so.⁴⁴ While the anesthesiologists enlisted by the state requested and were promised anonymity, neither of them expressed any ethical concern at that time about what they understood to be their role. As soon as I issued an order allowing the execution to proceed, however, there was a loud, immediate reaction from the organized medical community.

Ultimately, Morales was not executed.⁴⁵ My order had provided that in that event, an evidentiary hearing on the lethal-injection protocol would occur within ninety days, but it soon became apparent that it would take considerably longer for the parties to complete discovery and submit appropriate briefing. The hearing eventually was postponed by stipulation until late September 2006, and required four full days rather than the two days originally contemplated. By the time of the hearing, the parties had submitted thousands of pages of documents, deposition transcripts, expert declarations, and other materials to be considered along with the live testimony presented at the hearing.⁴⁶

On March 30, 2006, at the invitation of the state attorney general’s office, I visited San Quentin and, along with counsel, conducted an inspection of the execution chamber and the adjacent area. We took numerous measurements and photographs and also

41. *Morales*, 415 F. Supp. 2d at 1047-48.

42. *Id.* at 1046.

43. *Morales v. Hickman*, No. 5-6-219-JF-RS (N.D. Cal. Feb. 16, 2006) (final order re defs.’ compliance with conditions).

44. *See, e.g.*, Complaint for Equitable and Injunctive Relief at 6–10, *Morales v. Tilton*, 415 F. Supp. 2d 1037 (N.D. Cal. 2006) (No. 5-6-cv-219-JF-RS).

45. *See infra* Part II.

46. *Morales v. Tilton*, 465 F. Supp. 2d 972, 978 (N.D. Cal. 2006).

had an on-the-record interview with the prison employee who then served as the head of the execution team.⁴⁷ In September, I heard hours of expert and percipient-witness testimony about every aspect of the lethal-injection protocol, from the selection and training of the execution team to the pharmacology and pharmacokinetics of the chemicals involved.⁴⁸ On December 15, the same day that Governor Jeb Bush suspended executions in Florida following evident problems in the execution of Angel Diaz,⁴⁹ I issued a Memorandum of Intended Decision indicating that unless California made substantial revisions to its protocol, I would declare it unconstitutional.⁵⁰ Among other things, I suggested that the state consider eliminating the use of pain-inducing drugs and develop a protocol that uses only sedatives.⁵¹

When I recall my dismissive reaction to the lethal-injection claim in *Cooper* in light of everything that has happened since, I am reminded of how imperfect an adjudicative process can be. The constitutional issue raised by lethal-injection cases is not simply explained or easily understood. Compared to earlier methods of execution, lethal injection may appear to be nothing like the “cruel and unusual punishments” prohibited by the Eighth Amendment.⁵² Understanding the claim requires knowledge of the physical effects of each of the chemicals used, the ways in which the execution process is subject to human error and the points at which there is a non-speculative potential for such error, and the medical significance of data obtained from the bodies of condemned inmates during and after their executions. Despite my desire to be as thorough and conscientious as possible, the skeptical lens through which I viewed lethal-injection claims initially made it more difficult for me to recognize the nature and significance of what I was being asked to decide.

47. *Id.* at 977-78.

48. *Id.* at 978.

49. Adam Liptak & Terry Aguayo, *Florida Governor Halts the Death Penalty*, N.Y. TIMES, Dec. 16, 2006, at A1.

50. *Morales*, 465 F. Supp. 2d at 974.

51. *Id.* at 983. On May 15, 2007, the state filed a lengthy response addressing each of the areas in which I had identified deficiencies: selection and screening of members of the execution team, training, record-keeping, preparation and administration of the drugs, and the physical conditions in which executions take place. Because this document is the subject of pending litigation, I will not comment on it here.

52. U.S. CONST. amend. VIII.

II. A CULTURAL DIVIDE

A. An Execution Is Halted

After I issued the conditional order permitting his execution, Morales appealed to the Ninth Circuit. Morales argued that it was too late for the state to revise its execution protocol and that despite the specific language in a subsequent order requiring the anesthesiologists to use their professional judgment “not merely to observe the execution but to *ensure* that Plaintiff is and remains unconscious”⁵³ before and during the administration of the second and third drugs, he still faced an unacceptable risk of an Eighth Amendment violation. The Ninth Circuit rejected these arguments in an opinion issued the day before the execution was to proceed, emphasizing that the anesthesiologists’ role was not merely to observe the execution, but also to take appropriate action in the event a problem arose during the execution.⁵⁴ The Supreme Court subsequently denied relief.⁵⁵

Morales’s execution was scheduled for 12:01 a.m. on February 21, 2006. At approximately 10:00 p.m. on the evening of February 20, my death-penalty staff attorney contacted me at home and indicated that the anesthesiologists had concerns about the language of the Ninth Circuit’s opinion and now were unwilling to participate. The state’s attorney requested that I issue a brief order clarifying the anesthesiologists’ responsibilities; Morales’s counsel objected strenuously to my doing anything other than staying the execution; and the three members of the Ninth Circuit panel that had considered Morales’s appeal were on telephone standby waiting to review whatever I did. I was told that the anesthesiologists had not understood that they might have to do something more than simply observe the execution until they read the Ninth Circuit’s opinion earlier that day, a statement that I found extremely perplexing. The parties had briefed and vigorously argued that very question in the proceedings before me, and the Ninth Circuit opinion simply had emphasized what I had said unambiguously in my own order four days earlier. There is no clear answer in the public record as to what the anesthesiologists were told by the state officials who recruited them, and why they apparently understood what they actually were expected to do so late in the day.

53. *Morales v. Hickman*, No. 5-6-cv-219-JF-RS, slip op. at 5 (N.D. Cal. Feb. 16, 2006) (final order re defs.’ compliance with conditions).

54. *Morales v. Hickman*, 438 F.3d 926, 931 (9th Cir. 2006).

55. *Morales v. Hickman*, 546 U.S. 1163 (2006) (mem.) (den. cert.).

After several hours of telephone conferences, faxes, and e-mails, the anesthesiologists announced that they would not proceed. The state attorney general's office indicated that it would seek an order later that day (now February 21) permitting Morales's execution using only sodium thiopental, which I had proposed in my conditional order as an alternative to having a qualified professional present.⁵⁶ I scheduled a hearing to consider the state's request, received what briefing I could, and heard about an hour of oral argument. I concluded that because there had been virtually no time to consider any issues or potential problems that might arise with such an execution (a situation that likely would have been avoided had the state chosen the single-drug option initially), the execution could go forward only if the sedative were injected directly by someone trained and licensed to do so.⁵⁷ Late that afternoon, the state indicated that it would not proceed with the execution.⁵⁸

B. Corrections Officials Respond

As noted earlier, I had suggested that whether or not Morales was executed, the state needed to conduct a "thorough review" of its lethal-injection protocol to address the substantial questions Morales had raised.⁵⁹ On February 28, 2006, there was a meeting at the Governor's Office attended by the Governor's legal-affairs secretary, lawyers from the state attorney general's office, one of the anesthesiologists who had been at San Quentin for the execution, and a number of representatives of California's Department of Corrections and Rehabilitation. According to testimony and documents offered at the evidentiary hearing in September, the anesthesiologist recommended eliminating the second and third drugs from the execution protocol and conducting future executions using only a sedative. After that recommendation was rejected, a decision was made to revise the protocol slightly, primarily by reducing the initial dosage of sodium thiopental and adding a second intravenous line that would provide a continuing flow of that drug while the other two drugs were injected. The meeting lasted

56. Under California law, a death sentence may be executed only on the date specified in the order of commitment. CAL. PENAL CODE § 1227 (West 2006); CAL. R. CT. 4.315.

57. No. 5-6-cv-219-JF-RS, slip op. at 3 (N.D. Cal. Feb 21, 2006) (order on defs.' mot. to proceed with execution under alternative condition to order den. prelim. inj.).

58. The parties dispute whether the state was unable to find a qualified person or chose not to do so.

59. *Morales v. Hickman*, 415 F. Supp. 2d 1037, 1046 (N.D. Cal. 2006).

approximately one and a half hours.⁶⁰ No further review of the protocol took place.⁶¹

Deposition testimony and undisputed evidence presented at the evidentiary hearing showed that execution team members received minimal and inconsistent training,⁶² apparently made no effort to comply with the manufacturer's directions for mixing the sodium thiopental used in executions, and in fact were directed by the execution protocol to proceed in a manner contrary to those directions.⁶³ In addition, execution team members kept irregular and sometimes illegible records of condemned inmates' vital signs.⁶⁴ When asked about the problems with the Williams execution in December 2005, one of the members of the execution team responded by saying, "shit does happen, so."⁶⁵ Asked at his deposition what would qualify as a "successful execution," the warden of San Quentin responded that it was one in which "the inmate ends up dead at the end of the process."⁶⁶

The Memorandum issued following the evidentiary hearing identified five areas in which I had concluded that California's implementation of its lethal-injection protocol was deficient.⁶⁷ One of these areas was the physical environment in which executions were carried out, as to which I found as follows:

The execution chamber was not designed for lethal-injection executions; San Quentin officials simply made slight modifications to the existing gas chamber, such as drilling holes in the chamber wall for intravenous lines and installing a metal hook at the top of the chamber from which the bags containing the lethal drugs are suspended. The bags are too high to permit the execution team to verify whether the equipment is working properly. The lighting is too dim, and execution team members are too far away, to permit effective observation of any unusual or unexpected movements by the condemned inmate, much less to determine whether the inmate is conscious; this is exacerbated by the fact that the chamber door is sealed shut during executions as if lethal gas were being disseminated, rendering it virtually impossible to hear any sound from the chamber. For some executions, the small anteroom from which the execution team in-

60. *Morales v. Tilton*, 465 F. Supp. 2d 972, 977 (N.D. Cal. 2006).

61. *Id.*

62. *Id.* at 979.

63. *Id.* at 980.

64. *Id.* at 979.

65. *Id.* at 979 n.8.

66. *Id.* at 983 n.14.

67. *Id.* at 979-80.

2008]

EYE OF THE STORM

747

jects the lethal drugs has been so crowded with prison officials and other dignitaries that even simple movement has been difficult.⁶⁸

The Memorandum directed the state to respond to my findings, indicating whether or not it intended to implement changes to the protocol, within thirty days.⁶⁹ Three days later, the Governor issued a press release stating that he had directed California's corrections officials to address each of the deficiencies identified in the Memorandum.⁷⁰ On January 16, 2007, the state filed its formal response, indicating that it would submit a full report to the Court by May 15, 2007.⁷¹ Nowhere in the Memorandum did I order, nor have I ever ordered, that the state take any specific remedial measure.

On March 5, 2007, without notice to the state legislature or apparently even to the Governor's Office, the Department of Corrections and Rehabilitation began construction of a new lethal-injection chamber at San Quentin. The project became a matter of general public knowledge only after the cost exceeded the amount California state agencies may spend without prior legislative approval. When asked by a legislative oversight committee why the construction had commenced without its knowledge, a corrections official responded on behalf of San Quentin's warden that the Court had ordered that a new chamber be built.⁷² When it was pointed out that the Memorandum contained no such requirement, the warden (a named party in *Morales*) admitted that he had not read the Memorandum.⁷³ The Governor subsequently suspended construction of the new chamber pending legislative authorization, which ultimately was given in August 2007.⁷⁴

68. *Id.* at 980.

69. *Id.* at 984.

70. Press Release, Office of the Governor of Cal., Governor Schwarzenegger Orders Administration to Amend Implementation of Lethal Injection Protocol (Dec. 18, 2006), <http://gov.ca.gov/press-release/4940> [hereinafter Schwarzenegger Press Release].

71. Response by Governor's Office to Court's Mem. Intended Decision & Defs.' Response to Mem. Intended Decision, *Morales*, 465 F. Supp. 2d 972 (No. 5-6-cv-219-JF-RS).

72. *Findings of S. Public Safety Comm. Informational Hearing on San Quentin Death Chamber*, 2007–08 Sess. (Cal. 2007).

73. *Id.*

74. Press Release, Cal. Dep't of Corr. & Rehab., CDCR Resumes Construction of Lethal Injection Facility at San Quentin State Prison (Aug. 30, 2007), http://www.cdcr.ca.gov/News/2007_Press_Releases/Press20070830.html.

C. Lessons Learned

I have asked myself many questions about the actions of California's Department of Corrections and Rehabilitation over the past two years. How could those supervising Morales's execution at San Quentin have misunderstood a specific order regarding the role of the anesthesiologists? How could departmental officials have considered a brief meeting in the Governor's Office to be a "thorough review" of the execution protocol? How could they not train the execution team to follow the simple mixing instructions for sodium thiopental, which because it induces unconsciousness is the critical drug in the context of legal challenges to lethal injection? How could they have begun construction of a new execution chamber on the basis of non-existent language in a court order they had never read?⁷⁵

It would be inappropriate for me to speculate about the subjective motives of individuals. Indeed, the more I have thought about them, the more I think that my questions arise not from the actions of individual persons but from the more fundamental fact that the legal system and the corrections bureaucracy are different cultures in which the same words and events often have different implications and consequences. As with any cultural differences, effective communication requires an understanding not only of content but also of context.

While in the judicial context, every word concerning the role of the anesthesiologists was the subject of briefing and argument by counsel and hopefully careful drafting on my part, in the context of prison officials preparing for an execution, the overriding points were that the anesthesiologists would be there in the first place and that the purpose of their presence would be to monitor the execution to ensure that everything proceeded as planned. The questions of role and responsibility, along with all of the complex medical and legal issues attendant to those questions, likely were secondary if they were considered at all.

Similarly, while I never ordered state officials to build a new execution chamber, I did make a number of specific findings about the inadequacies of the existing facility,⁷⁶ and the Governor indicated in his press conference that the state intended to address each of

75. Because it is likely to be the subject of future proceedings, I will not discuss the state's official response, filed May 15, 2007, to the Memorandum of Intended Decision.

76. *Morales v. Tilton*, 465 F. Supp. 2d 972, 979-80 (N.D. Cal. 2006).

the deficiencies I had identified.⁷⁷ In the bureaucratic context, perhaps these facts were understood as an implicit direction to address the Court's concerns by the construction of a new chamber.

The relevant lesson for judges involved in cases such as *Morales* is that context is important. While our obligation to be meticulous in our legal analysis and legally coherent in our orders and decisions remains the same, we also have to consider the dynamics of the institution in which our orders and decisions will be implemented. Institutions have their own customs, perspectives, and ways of initiating or resisting change. Especially when we are dealing with processes that involve a large number of people and moving parts—such as execution by lethal injection—we have to be mindful of such institutional differences if we expect our orders to have their intended effect.

III. THE MEDIA

A. Coverage of the *Morales* Case

Because the death penalty has been such a powerful political issue in California, and perhaps also because actual executions have been so rare,⁷⁸ every imminent execution has received extensive media coverage. Even in *Cooper* and *Beardslee*, the brief hearings I conducted drew numerous reporters. In *Cooper*, the great majority of media interest focused on Cooper's claims of innocence—the lethal-injection challenge typically was mentioned only in passing if at all—and perhaps because *Beardslee* never attracted the high-profile supporters many condemned inmates have had, the publicity surrounding his execution was surprisingly muted.

The Williams execution on December 13, 2005, was another matter. Williams had international notoriety—he even had been nominated for the Nobel Peace Prize for his post-conviction efforts to discourage inner-city youth from joining street gangs—and his execution was particularly controversial. There were demonstrations featuring national political figures and Hollywood celebrities in the days leading up to the execution. Thus, even though Williams did not file a lethal-injection challenge, the fact that there were apparent difficulties in executing him was well-publicized.⁷⁹ *Morales* was filed while public debate about the Williams case was still ongoing

77. See Schwarzenegger Press Release, *supra* note 70.

78. See *Morales*, 465 F. Supp. 2d at 975 n.3.

79. The state attorney general's office later acknowledged these difficulties. See, e.g., *California: Official Admits Execution Was Bungled*, N.Y. TIMES, Sept. 27, 2006, at A21.

and while the curious circumstances surrounding the subsequent execution of Clarence Allen, who required a second injection of potassium chloride to stop his heart, still were recent news. In addition, as noted earlier, the facts of Morales's crime had particular resonance. As a result, when it became apparent in early February 2006 that I was considering enjoining Morales's execution because of questions arising from an examination of the records from California's eleven previous executions by lethal injection—including the executions of Williams and Allen—media interest grew significantly.

Not surprisingly, many news articles framed the issue in the case as whether lethal injection in the abstract is cruel and unusual punishment.⁸⁰ Others characterized the case as concerning whether it is constitutional for a condemned inmate to suffer *any* pain at all, including the pain anyone would suffer upon insertion of a needle.⁸¹ Few focused on the actual question presented by the case, which was whether California's execution protocol, as implemented, in fact was functioning as intended. None, so far as I know, mentioned the state's admission in its pleadings that in the absence of anesthesia, the level of pain caused by potassium chloride would violate Eighth Amendment standards.

As discussed earlier, I had given the state the option of executing Morales using only sedatives or having qualified persons present at the execution to insure that Morales remained unconscious during the administration of the second and third drugs in the execution protocol.⁸² After the state chose the latter option, the news media in general reported that I had ordered the state to have doctors assist in the execution.⁸³ This in turn led to a spate of articles about the ethical implications of such an order.⁸⁴ The fact that the state had elected to have the anesthesiologists participate rather than having been ordered to do so, and that neither party had briefed or

80. See, e.g., David Kravets, *Lethal Injection of Murderer-Rapist Could be Blocked*, SAN DIEGO UNION-TRIB., Feb. 10, 2006, at A4 ("A federal judge said yesterday that he might block a murderer and rapist's Feb. [sic] 21 execution to provide enough time to determine whether lethal injection is cruel and unusual punishment.").

81. See, e.g., Debra J. Saunders, *Inartful Execution*, S.F. CHRON., Feb. 23, 2006, at B9; cf. Kelsy Chauvin, *Experts Discuss Ethics of Lethal Injections*, COLUM. UNIV. RECORD, Feb. 14, 2008, at 6.

82. *Morales v. Hickman*, 415 F. Supp. 2d 1037, 1047-48 (N.D. Cal. 2006).

83. See, e.g., Dahlia Lithwick, *Wal-Mart and the Death Penalty*, WASH. POST, Feb. 26, 2006, at B3.

84. See, e.g., Atul Gawande, *When Law and Ethics Collide—Why Physicians Participate in Executions*, 354 NEW ENG. J. MED. 1221 (2006).

argued potential issues of medical ethics, did not appear in media reports. When the anesthesiologists declined to proceed with the execution, most of the relevant news articles cited the doctors' ethical concerns but did not explain why they had agreed to participate initially and what had changed in the interim to cause them to withdraw.⁸⁵

After a brief firestorm surrounding the postponement of the execution, subsequent media coverage of *Morales* became more substantive.⁸⁶ Pursuant to a pooling arrangement, two reporters were part of the group that visited San Quentin in March 2006.⁸⁷ Several lengthy pieces in the print media discussed the history of lethal injection and the factual and legal issues underlying lethal-injection challenges around the country.⁸⁸ During and following the September evidentiary hearing, most media coverage described the issues in the case as involving California's actual implementation of its particular protocol rather than the constitutionality of lethal injection itself.⁸⁹ The public received relatively detailed information about the effects of the drugs involved and the evidence offered by both sides with respect to lethal-injection claims.⁹⁰

This trend continued following the issuance of the Memorandum of Intended Decision that December. While a few articles stated that I had declared lethal injection itself (or any pain suffered by a condemned inmate) to be cruel and unusual,⁹¹ the great majority reported my findings with respect to specific deficiencies in California's implementation of its execution protocol.⁹² Subsequent media reports focused on the potential impact that *Morales* and Governor Bush's almost simultaneous order imposing a morato-

85. See, e.g., *California Execution Delayed After Doctors Refuse to Witness*, KHALEEJ TIMES (Dubai), Feb. 21, 2006, available at http://www.khaleejtimes.com/DisplayArticle.asp?xfile=data/theworld/2006/February/theworld_February578.xml§ion=theworld.

86. See, e.g., Bob Egelko, *Lethal-Injection Method on Trial Across the U.S.*, S.F. CHRON., Feb. 23, 2006, at A1.

87. Howard Mintz, *Judge Gets Execution Site Tour: San Quentin Visit Is Prelude to May Death Penalty Hearing*, SAN JOSE MERC. NEWS, Mar. 31, 2006, at A1.

88. See, e.g., Cheryl Clark, *Lethal-Injection Controversy Shifts Focus to Medical Details*, SAN DIEGO UNION-TRIB., Mar. 25, 2006, at A1.

89. See, e.g., Maura Dolan & Henry Weinstein, *The Chaos Behind California Executions: Trial Testimony Paints Lethal Injection Methods as Haphazard, with Little Medical Oversight*, L.A. TIMES, Oct. 2, 2006, at A1.

90. See *Morales v. Tilton*, 465 F. Supp. 2d 972, 981 n.10 (N.D. Cal. 2006).

91. See, e.g., Al Knight, *In California, the Death Penalty Takes Yet Another Hit*, DENV. POST, Dec. 22, 2006, at B7.

92. See, e.g., Adam Liptak & Terry Aguayo, *Florida Governor Halts the Death Penalty*, N.Y. TIMES, Dec. 16, 2006, at A1.

rium on executions in Florida would have on the future of lethal injection nationally.⁹³ Again, most of these reports explained the effects of the drugs and the specific nature of the claims.⁹⁴

B. Life in the Fishbowl

While the same ethical rule that requires judges to “avoid public comment on the merits of a pending or impending action” also expressly permits judges to make public statements explaining court procedures,⁹⁵ it clearly does not permit them to argue with the media about the meaning, significance, or wisdom of a ruling. While judges must expect criticism, judges handling controversial cases often find themselves in situations where a ruling has been mischaracterized in the press—as a result of which they are criticized—yet they are ethically constrained from correcting the record, at least at the time.

Although I have handled a significant number of high-profile cases, none has involved media interest anything like that in *Morales*. While the case has been pending, my chambers has received requests for interviews from journalists from all over the world. Producers of radio and television talk shows, many of whom I assume are unfamiliar with the ethical restrictions on public comment by judges, have called to ask if I would participate in live debates about lethal injection and the death penalty. Reporters profiling me as part of their coverage of the case repeatedly have asked for my views on capital punishment, the propriety of physician participation in executions, and other issues about which it clearly would be inappropriate for me to comment.

Like judges, reporters often face a steep learning curve when dealing with issues that are simultaneously controversial and complex. Having presided over both *Cooper* and *Beardslee* and having spent many hours immersing myself in execution logs and forensic medical testimony before even considering whether to enjoin or impose conditions on Morales’s execution, I cringed when I read news accounts suggesting that I was considering whether lethal injection is unconstitutional because a condemned inmate might suffer “some” pain. I had gone to great lengths in my factual findings to distinguish the evidence of how sodium thiopental works when it

93. See, e.g., *id.*

94. See, e.g., *id.*

95. Code of Conduct for United States Judges Canon 3(A)(6) (2000), available at <http://www.uscourts.gov/guide/vol2/ch1.html#3>.

is properly delivered⁹⁶ from the circumstantial evidence in the execution logs that it may *not* have been properly delivered in a number of cases,⁹⁷ and had given the state alternative ways of proceeding with Morales's execution. Thus, I was discouraged to read stories stating that I had ordered the state to hire doctors, and that I had done so because I was concerned about the infinitesimal possibility that Morales might not be unconscious even after receiving an effective administration of five grams of sodium thiopental.

However, after the emotions around the delayed execution abated and as the case evolved, I noticed a subtle but steady shift in the media's coverage. Given time to learn about the issues, the majority of reporters began to describe *Morales* and other cases as fact-specific challenges to a particular method of execution as it was being carried out in practice.⁹⁸ I realized that like many judges, many members of the news media initially see stories through the lens of their own previous experience, and that it is only over time that unconscious distortions and blind spots in that lens give way to a more accurate understanding of the actual situation. Although it was frustrating not to be able to answer questions about my decision publicly, it was comforting to discover that, over time, the media gained a broader perspective, and their portrayal of the case and of the issues involved became more complete. This also reminded me that it is in our interest as judges to write decisions in which our reasoning is as transparent as possible. While our focus properly is on the law, the facts, and the claims of the parties, I see significant value in acknowledging and addressing expressly the extent to which a particular decision affects a matter of public interest.⁹⁹

IV. THE PUBLIC DEBATE

Like abortion, illegal immigration, and other issues that have divided our society in recent years, capital punishment stirs powerful passions. While scholars marshal data about deterrence and cost

96. *Morales v. Hickman*, 415 F. Supp. 2d 1037, 1043-44 (N.D. Cal. 2006).

97. *Id.* at 1044-46.

98. *See, e.g., Dolan & Weinstein, supra* note 89.

99. Given the propensity of much of the electronic media to describe issues in "sound bites," this often is not an easy task. At the same time, I believe that public confidence in the judiciary depends at least to some extent on our ability to explain clearly in non-technical language the reasoning underlying our decisions, as well as the ways in which legal decision-making necessarily differs from the political processes with which the public generally is more familiar.

effectiveness, and religious and political leaders argue about retributive justice and the sanctity of life, I suspect that most people's views about the death penalty ultimately are visceral, a product of how they see and experience the world. Every horrific crime evokes an emotional response, and every execution brings people with deeply felt yet profoundly different views of justice into direct conflict with each other. The legal issues in a particular case often are of little significance in the public debate.

Although I presided over portions of several capital cases as a state-court judge, *Cooper* was my first case that directly involved a pending execution, and it gave me a brief glimpse of what was to come in terms of the public's reaction. While most of the public attention focused on Cooper's claim of innocence and the Ninth Circuit's consideration of his successive habeas petition, my hearing on Cooper's separate lethal-injection challenge drew a full courtroom. Shortly after I denied Cooper's request for a temporary restraining order,¹⁰⁰ but before the Ninth Circuit granted Cooper's separate application to file a successive habeas petition and stayed the execution,¹⁰¹ I received a long, articulate letter from a death-penalty opponent who had been present at the hearing excoriating me for not doing everything in my power to prevent the execution of an innocent man. There was not a word about Cooper's claims concerning lethal injection or any apparent recognition that the question of Cooper's innocence was not before me.

When *Beardslee* appeared on my docket a year later, I expected more controversy, but for reasons that are not entirely clear to me—perhaps because Beardslee never claimed to be innocent and because the crimes of which he was convicted, though certainly heinous enough to warrant the death penalty under California law, did not evoke a particularly strong response among death-penalty supporters—most of the heat was generated by Beardslee's defense team and the established advocacy groups that weigh in on every execution. At the same time, I knew that the lull would be temporary.

The Williams execution added claims of innocence, racism, and post-offense rehabilitation—juxtaposed with Williams's past as the founder of the Crips and the brutality of the multiple murders of which he was convicted—to the ongoing argument about the death penalty itself. The Allen execution raised issues arising from Al-

100. *Cooper v. Rimmer*, No. 5-4-cv-436-JF, 2004 WL 231325 (N.D. Cal. Feb. 6, 2004).

101. *Cooper v. Woodford*, 358 F.3d 1117 (9th Cir. 2004) (en banc).

len's age and poor health. And, as discussed earlier, although neither Williams nor Allen chose to assert a challenge to California's lethal-injection protocol, the unexpected difficulties that accompanied each of these executions helped to lay the groundwork for Morales's lethal-injection claim only a few weeks later.

Morales's crimes were horrific,¹⁰² and according to the record, he showed very little remorse. The victim's family, friends, and community were devastated by the murder and had been waiting for almost twenty-five years while Morales's appeals and habeas petitions worked their way through the legal system. Once the federal habeas process had been exhausted, Morales's lethal-injection challenge was his last meaningful hope of avoiding execution.

Almost from the inception of the proceedings, I was aware of an unusual amount of public interest. When I granted expedited discovery so that Morales could obtain execution records from San Quentin prior to the hearing on his motion for a preliminary injunction, I received letters from people in the victim's community detailing Morales's crimes and urging me to reject his claims. I received more letters when I took the motion for preliminary injunction under submission and indicated that I would give serious consideration to the issues and evidence that had been presented. Most of the letters were reasonably courteous, but the basic message was that Morales should die and that nothing should be allowed to stand in the way. To the extent that any of the letters mentioned the issues concerning lethal injection at all, they said essentially that the manner of Morales's death should be no better than that of his victim.

When I issued a conditional order permitting the state to go forward with the execution, the atmosphere changed entirely. Instead of receiving pleas to permit the execution and dire warnings about what would happen if I didn't, I was told that involving doctors in executions was reminiscent of the practices of Nazi Germany¹⁰³ and that it was my moral duty to outlaw the death penalty. While a few people still suggested that Morales was getting much better treatment than he deserved, the outcry from execution supporters for the most part abated. When the Ninth Circuit affirmed the conditional order on February 19, 2006, there was a day of relative quiet from both sides. Then, following the strange events of February 20 and 21, 2006—the eleventh-hour withdrawal of the anes-

102. See generally *Morales v. Woodford*, 388 F.3d 1159, 1163 (9th Cir. 2004).

103. This accusation had a particular irony in my case as numerous members of my extended family died in the Holocaust.

siologists and the state's brief effort to proceed with the execution using a single drug—all hell broke loose.

I did not actually count them, but I would estimate that within the first several days following the postponement of the execution, I received nearly 100 e-mails and perhaps two dozen letters, nearly all of them extremely critical. The basic theme was the same as that of the letters I had received earlier, which was that Morales had committed horrible crimes and deserved to die. In contrast to that of the earlier communications, the tone of most of these e-mails and letters was angry and bitterly personal. I was accused of caring more about a murderer than about his victim, of being utterly lacking in intelligence or common sense, of being more concerned about legal technicalities than about justice, and so on. As had been the case before, there was little discussion of lethal injection itself, other than an occasional comment that the suffering of the victim was far greater than any pain Morales might suffer during his execution. Eventually, the hostile communications slowed to a trickle and then stopped.

I have noticed a similar pattern in other lethal-injection cases around the country. As an execution date approaches, there is intense focus on the facts of the crime, the character of the defendant, and the broader arguments about capital punishment. Concerns about lethal injection itself, while mentioned, clearly are secondary to the fundamental question of whether death is the appropriate penalty for the crime in question. In the numerous recent cases in which stays have been granted as a result of the Supreme Court's order granting certiorari in *Baze v. Rees*,¹⁰⁴ much of the public comment has tracked almost word-for-word the messages I received when the Morales execution was postponed.

Although there was significant media coverage of our visit to San Quentin in March 2006 and the subsequent evidentiary hearing, and there has been a great deal of national and international media attention in light of *Baze*, recent public discussion of *Morales* has been relatively sparse. As the information available to the public through the media has focused more on the details of the legal issues surrounding lethal injection and less on a specific crime, victim, and execution, emotions apparently have cooled, at least for now. When I issued my Memorandum in December 2006, knowing that its practical effect was that there would be no executions in California for some time, I fully expected another wave of

104. 217 S.W.3d 207 (Ky. 2006), *cert. granted*, 128 S. Ct. 34, *amended by* 128 S. Ct. 372 (2007).

angry e-mails and letters, yet there were fewer than half a dozen. In fact, most of the negative comments I received came from death-penalty opponents who objected to my having given the state an opportunity to cure the deficiencies in its execution protocol and having suggested ways that it might do so. In terms of the issues it actually presents, lethal-injection litigation is rather dry. The factual basis of the claims cannot be explained in a sound bite. The Eighth Amendment legal standard is uncertain and is the primary question before the Supreme Court in *Baze*,¹⁰⁵ and resolution of factual disputes typically requires a laborious review of expert testimony and prison records. For obvious legal reasons, the plaintiffs cannot ask for what they ultimately seek: abolition of capital punishment or a permanent stay of execution. For most ardent supporters of the death penalty, the method of execution is a far less important concern than seeing that an execution in fact is carried out. For those who fervently oppose the death penalty, the question of how much pain a condemned inmate suffers while being put to death is largely beside the point.

Yet every lethal-injection case, because it has the potential to delay an execution, exposes our society's deeper disagreements about crime and punishment. Regardless of how often judges state that the legal merits of a lethal-injection challenge must be evaluated independently of those disagreements,¹⁰⁶ public opinion in general does not reflect these lawyerly distinctions. The challenge for judges in such an environment is to keep our balance, to be aware of the differences between the way we approach lethal-injection cases and the way they are perceived by the non-lawyer public while at the same time remaining faithful to the law and the legal process.

V. PERSONAL IMPACT

Becoming a federal judge is as much about timing as it is about talent. Of course it helps if the legal community thinks well of

105. In *Baze*, the Kentucky Supreme Court held that the constitutional threshold for a lethal-injection challenge is a "substantial risk of wanton and unnecessary infliction of pain." 217 S.W.3d at 209. In *Cooper*, the Ninth Circuit described the applicable standard as "an unnecessary risk of unconstitutional pain or suffering." *Cooper v. Rimmer*, 379 F.3d 1029, 1033 (9th Cir. 2004). A district court in Indiana adopted the "deliberate indifference" standard used in prison-conditions cases. *Timberlake v. Buss*, No. 1-6-cv-1859-RLY-WTL, 2007 WL 1280664, at *8 (S.D. Ind. May 1, 2007) (citing *Farmer v. Brennan*, 511 U.S. 825 (1994)). Among other things, the petitioners in *Baze* have asked the United States Supreme Court to clarify the standard.

106. See, e.g., *Morales v. Tilton*, 465 F. Supp. 2d 972, 972-74 (N.D. Cal. 2006).

one's intellect and judicial temperament, but there are many fine lawyers who never reach the federal bench because there is not a vacancy when their appointment is politically feasible, or there are other, better-qualified or better-connected candidates when a vacancy does occur. I always have felt both deeply honored and extremely fortunate to be a United States District Judge. As each year has passed, I also have realized ever more fully the importance of my responsibilities and of giving the very best of myself to my job.

Although I am not fond of philosophical labels, I am a firm believer in legal process and the common law. One of my historical role models is Learned Hand, who at different points in his celebrated judicial career frustrated both liberals and conservatives by his insistence on deciding controversial cases on the basis of legal principles rather than a social agenda. I try to avoid deciding issues unnecessary to the resolution of a case, and I do my best to respect the separation of powers and defer to the prerogatives of the other branches of government. As an experienced mediator, I also tend to think about the interests underlying the legal positions taken by parties.

In large part because I have been a judge for most of my adult life, I never have taken a public position with respect to the death penalty. When asked during my confirmation process whether I had any opinions or beliefs that would prevent me from following the law with respect to capital punishment, I truthfully answered no. I denied stays of execution to Kevin Cooper and Donald Beardslee in connection with their lethal-injection challenges,¹⁰⁷ and shortly thereafter Beardslee was executed. Cooper would have been executed but for a stay issued in his separate habeas action. Until the state indicated that it would not proceed with his execution on the afternoon of February 21, 2006, I assumed that Michael Morales would be executed as well.

Judges typically are at least somewhat removed from the actual consequences of their decisions. The judge who issues an eviction order in a landlord-tenant dispute is not present when the tenants are evicted and doesn't endure the consequences of the eviction. The judge who decides a contested child-custody case does not see what happens when a child's life is disrupted and rearranged. And normally, a judge who denies a stay of execution in a capital case is

107. See *supra* Part I.A-B.

2008]

EYE OF THE STORM

759

not called upon to deal with the practical details of the execution or its emotional impact on the various people involved.

All of that changed for me late in the evening of February 20, 2006. For much of that night and the next day, I was engaged in the most intense discussions and hearings imaginable about the precise conditions under which Michael Morales was to be put to death. Other than my being a member of the execution team, it is hard to imagine how there could have been less distance between my judicial actions and their intended consequences.

Nor were the consequences limited to whether Morales lived or died. From the outset of the case, I had thought about the victim's family and loved ones and their long wait for finality. Regardless of one's opinion about the death penalty, a legal system that requires a family that has lost a child to endure twenty-five years of uncertainty as to her murderer's fate is seriously dysfunctional. Members of the family had come to San Quentin to witness the execution, and as a result of the circumstances that caused the execution to be delayed and ultimately postponed, they were going home after many grueling hours with nothing resolved other than the certainty of more delay. I knew that they would be deeply upset and that they would blame me—at least in part, if not entirely—for what had happened, and that I could not speak to them directly to tell them how badly I felt for them.

Although I had received occasional nasty letters and e-mails at various times in my judicial career, nothing prepared me for the communications I received in the days after the Morales execution was postponed. At some level, I realized that 100 or so angry missives from members of the public in a state with a population of thirty-four million hardly constituted a flood, and I received thoughtful support from colleagues, friends, and family. But having tried so hard to do the right thing, to have taken my best shot at understanding the record, applying the law, and fashioning a remedy, the venom expressed by many of those who wrote was difficult to absorb.

One of the purposes of the visit to San Quentin was to inspect the execution chamber and its immediate environs and take measurements and photographs. As part of that process, I entered the chamber itself and observed the various items of hardware used in executions. The chamber used for executions by lethal injection, with a few minor modifications, was the same one that had been used for executions by lethal gas, and it was impossible to be in that space without thinking about what had taken place there in

the past. The evidentiary hearing in September 2006 was a further journey into the technical minutiae of lethal-injection executions, with experts explaining the pharmacokinetics of different drugs and arguing about the significance or insignificance of data in the logs of past executions.

I knew that I was facing the greatest professional challenge, and one of the greatest personal challenges, of my life. As a matter of both philosophy and temperament, I typically try to resolve problems in a way that acknowledges the interests of all concerned. Despite the fact that I have had a very public career, a major part of which has been making decisions with which one or more parties disagree, I have tended to be very cautious in handling controversial cases. But it was evident from my first days with the *Morales* case that no matter what I did, I would make a lot of people very angry. When the plans for the execution began to unravel on the evening of February 20, I went to bed knowing that the following days would be among the most stressful I ever would have to endure.

During those days, and since, I have drawn strength from three distinct sources. Because I am not an outwardly religious person, the first is difficult for me to describe, but in the end the best word for it is faith. I have faith that things happen for a reason, and that if one does one's best to act with integrity, things usually will work out in the end. I often have looked back at various points in the proceedings and wondered what I could or should have done differently, and I have asked myself repeatedly whether my analysis of certain legal or factual issues was correct. I know that there are thoughtful people of good will who disagree with me, and that there are things I could have done better, but I also know that I did the best job I was able to do at the time. For someone who has struggled with perfectionist tendencies all my life, this is an important realization, one that is both humbling and empowering.

The second source of strength is the people around me. I am blessed with a loving family, a circle of long-time and caring friends, and many kind colleagues both within my own court and in the legal community generally. I have no idea whether they would have made the same calls I did or handled the case in the same way, but their support for me as a person has made a world of difference.

Finally, and most relevant for purposes of this Article, I have derived enormous strength from the rule of law and the legal process itself. Even in a case that touches upon one of our society's

most divisive issues and has generated so much emotion, the process has moved the debate forward. Numerous states, including California, have decided to review their procedures for carrying out executions. As I write these concluding words, I am on my way back to California after watching, as a member of the public, the Supreme Court oral argument in *Baze*.¹⁰⁸ Of course, I cannot comment publicly on the substance of the argument or its likely outcome. But regardless of whether the Court uses *Baze* to announce a national standard for Eighth Amendment review of execution protocols, or considers the mechanics of the current three-drug combination, or simply decides the case on its own particular facts and leaves one or both of these issues for another day, the argument was a remarkable event.

For the first time in more than a century, the Court engaged in a focused examination of the way our society carries out executions.¹⁰⁹ Together with ongoing reviews of other aspects of capital punishment, including among other things, the need to provide defendants with adequate counsel and the related problem of reducing the intolerable delays in post-conviction review of capital cases, the lethal-injection controversy has contributed to a renewed national dialogue about the death penalty itself. Whatever the ultimate outcome, and irrespective of one's own views, I think that this debate is healthy for our society. For all the ways in which *Morales v. Tilton* has affected and will continue to affect my life, I am glad to have played a small role in furthering that dialogue.

108. Lead counsel for Morales and for the state also attended the argument.

109. The only Supreme Court case to address directly the constitutionality of a method of execution was *In re Kemmler*, 136 U.S. 436 (1890) (upholding constitutionality of execution by firing squad).

