

CHALLENGES FACING SOCIETY IN THE IMPLEMENTATION OF THE DEATH PENALTY

*The Honorable Fernando J. Gaitan, Jr.**

Recent legal challenges to the commonly-used method of lethal injection have raised the question of how much pain is considered too much under the U.S. Constitution. While the Constitution does not mandate a pain-free death, the implementation of the death penalty should comport with the Eighth Amendment's prohibition of cruel and unusual punishment.¹ In my nearly twenty-seven years as a judicial officer, there are few issues I have handled that have caused more anxiety. It would be easy—and, as some have said, appropriate—for those convicted of heinous crimes to receive the same fate as their victims. Those holding that opinion would argue that pain and suffering during execution is not only acceptable, but just.

Neither point of view, however, may represent the prevailing law on this subject. The Eighth Amendment requires, at a minimum, that executions not be cruel and unusual. The meaning of that phrase has evolved over time based upon perceptions of “evolving standards of decency.”

I believe most would agree that the Eighth Amendment forbids torture in the implementation of a death sentence—that is, the known infliction of excruciating pain. The result may be that we treat the condemned better than they treated their victims. That notion alone creates great anxiety for many of us because most, if not all, victims of capital crimes were subject to torture.

As judges, the principle of law must be our focus. We cannot be guided by the heinous acts of the condemned in considering the issue of whether lethal injection is constitutionally valid. That is an irony of the law. The law must be fair in its application. If we were

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1. U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

to change it for each individual, fairness would then be suspect. This is especially true when considering lethal injection and execution. Some crimes may seem less heinous than others; yet both cause extreme pain and suffering to the victims and their families.

At the execution stage, we are no longer concerned about the actions of the condemned's crimes. That ship has sailed. The condemned was tried by a jury and determined to be guilty. In the penalty phase, the jury heard the aggravating and mitigating factors about the victim, the defendant, and the crime. They determined death to be the appropriate sentence. Thereafter, the task is to implement that sentence within Eighth Amendment constraints.

While the firing squad, hanging, the gas chamber, and the electric chair have been means of execution, I believe our "evolving standards of decency" have brought us to lethal injection. On its face, lethal injection eliminates the appearance of torture. We have learned, and are learning, however, that torture may be alive and well within the "three-drug protocol" if it is not carried out properly.

Thus, the question now arises: what is to be done in light of these concerns? I do not believe that it is necessary to eliminate the method of lethal injection altogether. Rather, I believe lethal injection can survive as a method of execution if important safeguards are implemented.

Many of our citizens and those elected to represent them hold different viewpoints on this issue. Some death penalty proponents believe any concession to constitutional guarantees puts the death penalty opponents closer to a ban on capital punishment. However, according to the latest Gallup Poll completed in October 2007, sixty-nine percent of Americans are in favor of the death penalty for persons convicted of murder.² Thus, it is clear that society still views capital punishment as an acceptable form of punishment. It is the "how to," or method of execution which presents the recurring problem.

Our society faces real challenges here. How does society view capital punishment in light of "evolving standards of decency"? If we can accomplish execution without the potential for excruciating pain, are we obligated to do so under the Eighth Amendment? Does simply knowing that there are flaws in the implementation of the three-drug protocol and not taking precautions to address those flaws amount to an intent to inflict torture?

2. Gallup, *Death Penalty* (Oct. 4-7, 2007), <http://www.gallup.com/poll/1606/Death-Penalty.aspx> (last visited Apr. 15, 2008).

As I considered the issues in *Taylor v. Crawford*,³ both before and during the initial handling of this case, I made certain assumptions. Those assumptions did not withstand the rigors of discovery and examination. The assumptions were: first, that the state of Missouri had a written execution protocol; second, that it had been subjected to due diligence before implementation; third, that this protocol was approved by either the legislative and/or executive (Department of Corrections) branches of the Missouri government; and fourth, that trained medical personnel implemented it properly and consistently. None of these assumptions proved to be true. This litigation forced the state of Missouri, and perhaps other states, for the first time to scrutinize their execution protocols and ensure that they fell within the framework of the Eighth Amendment.

It is unclear whether the judiciary is the most appropriate forum to resolve these difficult questions. It was the state legislatures, after all, which adopted the various methods of executions used over the years, including lethal injection. Should the courts serve as a check on the legislature's adoption of these methods? Or rather should society, through elected officials, determine what is humane according to society's evolving standards of decency? Of course, there are no clear answers. Certainly, in our history, the courts have played a pivotal role in helping to shape and determine what constitutes cruel and unusual punishment under the Constitution, but courts should not be the primary source that examines these important issues.

Currently, of the thirty-eight states that have adopted the death penalty, lethal injection is the only method of execution used in twenty-eight states,⁴ and is one of two methods of execution used in nine states.⁵ No state uses electrocution as its sole method of execution.⁶ In addition, no states provide for lethal

3. No. 08-4173-CV-C-FJG, 2006 WL 1779035, at *8 (W.D. Mo. June 26, 2006).

4. Deborah W. Denno, *The Lethal Injection Quandary: How Medicine has Dismantled the Death Penalty*, 76 *FORDHAM L. REV.* 49, 59 (2007) [hereinafter Denno, *The Lethal Injection Quandary*].

5. *Id.*

6. *Id.* Up until recently, Nebraska was the only state that used electrocution as its only method. However, on February 8, 2008, the Nebraska Supreme Court ruled in a 6-1 opinion that electrocution presented a substantial risk of unnecessary pain and held it unconstitutional under the Eighth Amendment. *See generally* Nebraska v. Mata, 745 N.W.2d 229 (Neb. 2008). In light of the court's decision, Nebraska currently has no execution method. The State's Attorney General said he would move to the legislative process to get a new method of execution passed. *See* Adam Liptak, *Electrocution is Banned in Last State to Rely on It*, N.Y. TIMES, Feb. 9, 2008, at A9,

gas, hanging, or the firing squad as the sole method of execution.⁷

As our standards of decency have developed, the pattern has been that one method of execution has been abandoned in favor of a more humane method. Thus, “a penalty that was permissible at one time in our Nation’s history is not necessarily permissible today.”⁸ This pattern has allowed the death penalty to survive in America even when particular methods of execution have been challenged as inhumane or found unconstitutional.

Part I of this Article discusses the development of lethal injection. Part II analyzes the constitutionality of the three-drug protocol, the method of lethal injection currently being administered in most states. It also discusses the basis for the legal challenges to the protocol and the standards that have been applied by various courts. Part III examines whether the three-drug protocol should continue to be used to execute inmates in light of its challenges and problems, and will consider the alternatives to using this protocol.

I. THE DEVELOPMENT OF LETHAL INJECTION⁹

While lethal injection as a method of execution has been in effect for less than thirty years, execution by a chemical injection was not a groundbreaking or novel idea when it was first adopted in

available at <http://www.nytimes.com/2008/02/09/us/09penalty.html>; see also Nate Jenkins, *Court: Nebraska Electric Chair Not Legal*, ASSOCIATED PRESS, Feb. 9, 2008, available at <http://abcnews.go.com/US/wireStory?id=4262834>. Nebraska Governor Dave Heineman’s spokeswoman, Jen Rae Hein, said he was considering introducing a bill that would replace electrocution with lethal injection. *Id.*

7. Some states, however, offer these methods as options in their respective death penalty statutes. Deborah W. 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, 69 (2002) [hereinafter Denno, *When Legislatures Delegate Death*].

8. *Furman v. Georgia*, 408 U.S. 238, 329 (1972) (placing a moratorium on the death penalty because there was no degree of consistency in its application) (Marshall, J., concurring).

9. For a more complete history of the different methods of execution used prior to lethal injection, see Deborah W. Denno, *Getting to Death: Are Executions Constitutional?*, 82 IOWA L. REV. 319, 435 (1997) [hereinafter Denno, *Getting to Death*] (discussing eyewitness accounts of lethal injections and other forms of executions). See also generally Denno, *When Legislatures Delegate Death*, *supra* note 7; Julian Davis Mortenson, *Earning the Right to be Retributive: Execution Methods, Culpability Theory, and the Cruel and Unusual Punishment Clause*, 88 IOWA L. REV. 1099 (2003).

1977.¹⁰ The idea of executing an inmate by lethal injection was considered as early as 1888 by a panel commissioned by the State of New York.¹¹ The panel rejected lethal injection as a method of execution and concluded that electrocution was the preferable method,¹² primarily because the medical profession expressed concerns that the public would begin to associate the practice of medicine with death.¹³

Now some one hundred twenty years later, the concerns of the medical profession have not changed and are as true today as they were in 1888. The American Medical Association (“AMA”) Council on Ethical and Judicial Affairs clearly set out its opposition to physician participation in all executions in Ethical Opinion 2.06. The AMA expressed concerns about the public perception of the medical profession similar to those expressed in 1888. The AMA stated in relevant part:

The use of a physician’s clinical skill and judgment for purposes other than promoting an individual’s health and welfare undermines a basic ethical foundation of medicine—first, do no harm. Therefore, requiring physicians to be involved in executions violates their oath to protect lives and erodes public confidence in the medical profession.¹⁴

10. See Ellen Kreitzberg & David Richter, *But Can it Be Fixed? A Look at Constitutional Challenges to Lethal Injection Executions*, 47 SANTA CLARA L. REV. 445, 450 (2007) [hereinafter Kreitzberg & Richter, *But Can it be Fixed?*].

11. Deborah W. Denno, *Is Electrocution an Unconstitutional Method of Execution? The Engineering of Death over the Century*, 35 WM. & MARY L. REV. 551, 571-72 (1994); see also Kreitzberg & Richter, *But Can it be Fixed?*, *supra* note 10, at 451.

12. See Kreitzberg & Richter, *But Can it Be Fixed?*, *supra* note 10, at 451.

13. See James W. Garner, *Infliction of the Death Penalty by Electricity*, 1 J. AM. INST. CRIM. L. & CRIMINOLOGY 626, 626 (1910).

14. AM. MED. ASS’N, ETHICAL OPINION 2.06: CAPITAL PUNISHMENT (July 1980), available at <http://www.ama-assn.org/ama/pub/category/2498.html> (follow “Current Opinions” hyperlink; then follow “E-2.00 Opinions on Social Policy Issues”; then follow “E-2.06 Capital Punishment” hyperlink). Ethical Opinion 2.06 also states in relevant part:

An individual’s opinion on capital punishment is the personal moral decision of the individual. A physician, as a member of a profession dedicated to preserving life when there is hope of doing so, should not be a participant in a legally authorized execution. Physician participation in execution is defined generally as actions which would fall into one or more of the following categories: (1) an action which would directly cause the death of the condemned; (2) an action which would assist, supervise, or contribute to the ability of another individual to directly cause the death of the condemned; (3) an action which could automatically cause an execution to be carried out on a condemned prisoner.

Physician participation in an execution includes, but is not limited to, the following actions: prescribing or administering tranquilizers and other

In 1953, the British government also considered using lethal injection as a means of execution, and also rejected it.¹⁵ The Report of the Royal Commission on Capital Punishment pointed to three specific reasons why lethal injection was rejected.¹⁶ First, the Commission concluded that certain physical abnormalities of the condemned might make the procedure impossible.¹⁷ An inmate's height, weight, age, and even whether the inmate is a drug user can affect carrying out the lethal injection procedure.¹⁸ Even normal veins can make the procedure difficult as veins can become flattened due to nervousness or cold temperatures, which are typical of an execution room.¹⁹ Second, the Commission thought the inmates would not cooperate by refusing to remain still—and if the subject moves around too much it makes lethal injection very difficult.²⁰ These concerns are still as relevant today as they were when the commission met. Lastly, the Commission also recognized that medical skills were required to carry out the procedure effectively.²¹ However, the medical profession in Britain, just like the medical profession in the United States, was unwilling to participate and bring medicine into the process of execution.²²

Twenty-five years after the British Commission's findings, the United States once again took up the issue of lethal injection, following the Supreme Court's decision in *Gregg v. Georgia* in 1976.²³ *Gregg* upheld the constitutionality of a state death penalty statute and essentially ended the moratorium on executions that began

psychotropic agents and medications that are part of the execution procedure; monitoring vital signs on site or remotely (including monitoring electrocardiograms); attending or observing an execution as a physician; and rendering of technical advice regarding execution.

In the case where the method of execution is lethal injection, the following actions by the physician would also constitute physician participation in execution: selecting injection sites; starting intravenous lines as a port for a lethal injection device; prescribing, preparing, administering, or supervising injection drugs or their doses or types; inspecting, testing, or maintaining lethal injection devices; and consulting with or supervising lethal injection personnel.

15. REPORT OF THE ROYAL COMM'N ON CAPITAL PUNISHMENT 1949-1953, 261 (Greenwood Press 1980) (1953) [hereinafter REPORT].

16. *Id.* at 258-60.

17. *Id.* at 258-59; see also Denno, *The Lethal Injection Quandary*, *supra* note 4, at 64-65.

18. See REPORT, *supra* note 15, at 258.

19. *Id.*

20. *Id.* at 258-59.

21. *Id.*

22. *Id.*

23. 428 U.S. 153 (1976).

with *Furman v. Georgia*.²⁴ Again, interest arose in the use of lethal injection, primarily because legislatures thought lethal injection appeared more humane than other methods of execution used at the time, such as electrocution and lethal gas.²⁵ There were concerns about televised executions at the time, as there had been several attempts by the press to cover executions in states such as Texas and New York.²⁶ Since many believed that lethal injection was more humane, if a reporter covered a lethal injection execution as opposed to lethal gas, it would appear less cruel.²⁷ Additionally, there were concerns about botched electrocutions and gassings.²⁸ Thus, the need for a more humane method became essential. Lethal injection seemed to address many of these concerns.²⁹ For example, in 1973, then California Governor Ronald Reagan compared the lethal injection process to euthanasia of animals.³⁰ Reagan stated:

Being a former farmer and horse-raiser, I know what it's like to try to eliminate an injured horse by shooting him. Now you call the veterinarian and the vet gives it a shot and the horse goes to sleep—that's it. I myself have wondered if maybe this isn't part

24. 408 U.S. 238 (1972) (per curiam). The *Furman* Court held that the death penalty violated the Eighth and Fourteenth Amendments because the application of the penalty had become too discretionary and haphazard. It was also racially discriminatory in that, in the relatively small number of cases in which it was applied, it was directed mainly against minority groups. See, e.g., *id.* at 249-52 (Douglas, J., concurring).

25. See Daniel C. Hoover, *Injection Death Bill Endorsed by House*, NEWS & OBSERVER, June 29, 1983, at 1A. After the Great Depression in 1935, lethal gas became the preferred method of execution even though electrocution was used by more states. See Denno, *Getting to Death*, *supra* note 9, at 366-67. By 1955, eleven states used lethal gas and twenty-two states used electrocution. *Id.* at 367.

26. See Denno, *Getting to Death*, *supra* note 9, at 374; see also Jef I. Richards & R. Bruce Easter, *Televising Executions: The High-Tech Alternative to Public Hangings*, 40 UCLA L. REV. 381, 386-89 (1992); see also generally Michael Madow, *Forbidden Spectacle: Executions, the Public and the Press in Nineteenth Century New York*, 43 BUFF. L. REV. 461 (1995) (for an account of attempts by the press to cover executions in New York).

27. JAMES W. MARQUART ET AL., *THE ROPE, THE CHAIR, AND THE NEEDLE: CAPITAL PUNISHMENT IN TEXAS 1923-1990*, 132 (1994) (noting that at the time lethal injection was passed by the Texas legislature, a reporter had filed suit seeking to film executions and it was believed that lethal injection would appear less cruel).

28. See Denno, *Getting to Death*, *supra* note 9, at 374 n.319 (citing Susan Headden, *Unlikely Coalition Gives Death Sentence to Lethal Injection*, INDIANAPOLIS STAR, Feb. 5, 1983, at 9).

29. See generally Ward Casscells & William J. Curran, *Doctors, the Death Penalty, and Lethal Injection*, 307 NEW ENG. J. MED. 1532 (1982).

30. See Denno, *When Legislatures Delegate Death*, *supra* note 7, at 91.

of our problem [with capital punishment], if maybe we should review and see if there aren't more humane methods now.³¹

Economics also played a role. It was simply far cheaper to administer lethal injections than electrocution or lethal gas. For example, when Oklahoma contemplated the method of executions it would use, it adopted lethal injection in large part because it would cost \$62,000 for the repair of its electric chair and roughly \$300,000 for a new gas chamber.³² In contrast, the use of drugs in lethal injection would cost around \$70 per use.³³ Oklahoma was the first state to introduce and adopt lethal injection executions with the assistance of Dr. Stanley Deutsch, the head of the Department of Anesthesiology at the University of Oklahoma Health Sciences Center.³⁴ Deutsch had initially developed a cost-effective proposal with the State to perform lethal injection executions using an ultra short-acting barbiturate combined with a neuromuscular blocking drug.³⁵

Due to these humanitarian and economic concerns, this proposal was introduced to Oklahoma's legislature.³⁶ The legislature quickly passed the proposal without any committee hearings, research, or expert testimony.³⁷ In passing the bill, the Oklahoma legislature did not identify the particular drugs that would be used, nor did it provide specific details about what dosage would be applied.³⁸ Rather, Oklahoma's Chief Medical Examiner, Dr. Jay Chapman, suggested using a three-drug protocol: "sodium thiopental as the barbiturate sedative, to induce unconsciousness; pancuronium bromide as a neuromuscular blocking agent, to in-

31. See Henry Schwarzschild, *Homicide by Injection*, N.Y. TIMES, Dec. 23, 1982, at A15 (cited in Denno, *When Legislatures Delegate Death*, *supra* note 7, at 91 n.180).

32. See Denno, *Getting to Death*, *supra* note 9, at 374 nn.320-21; Denno, *When Legislatures Delegate Death*, *supra* note 7, at 95.

33. Affidavit of Michael P. Bowen, Exhibit 4 of Petition for Post Conviction Writ of Habeas Corpus, Ex Parte Sam Felder Jr., No. 227815-B (Tex. Crim. App. May 12, 1994) (petition denied) (citing INSTIT. DIV., TEXAS DEPT. OF CRIMINAL JUSTICE, PROCEDURES FOR THE EXECUTION OF INMATES SENTENCED TO DEATH.)

34. See Denno, *Getting to Death*, *supra* note 9, at 375; Kreitzberg & Richter, *But Can it Be Fixed?*, *supra* note 10, at 453.

35. See Denno, *When Legislatures Delegate Death*, *supra* note 7, at 95 n.207 (quoting Letter from Stanley Deutsch, Ph.D., M.D., Professor of Anesthesiology, Univ. of Okla. Health Sci. Ctr. to the Honorable Bill Dawson, Okla. State Senator (Feb. 28, 2007)).

36. OKLA. STAT. ANN. tit. 22, § 1014(A) (West 2003); see also Scott Christianson, *Corrections Law Developments: Execution by Lethal Injection*, 15 CRIM. L. BULL. 69, 72 (1979) (asserting that Oklahoma passed the lethal injection statute at least in part due to its economic benefits).

37. See Kreitzberg & Richter, *But Can it Be Fixed?*, *supra* note 10, at 453.

38. See *id.* at 453-54.

duce paralysis; and potassium chloride, to induce cardiac arrest.”³⁹ When Dr. Chapman was asked about his selection of these drugs, he commented:

I didn’t do any research. I just knew from having been placed under anesthesia myself, what we needed. I wanted to have at least two drugs in doses that would each kill the prisoner, to make sure if one didn’t kill him, the other would. . . . You just wanted to make sure the prisoner was dead at the end, so why not just add a third lethal drug? . . . I didn’t do any research Doctors know potassium chloride is lethal. Why does it matter why I chose it?⁴⁰

Oklahoma’s lethal injection statute took effect on May 10, 1977. For similar humanitarian reasons, Texas passed a similar bill the next day,⁴¹ with Idaho and New Mexico following soon thereafter.⁴²

This unquestioned method of the three-drug protocol was enacted without any scientific study or expert testimony. This untested three-drug protocol is the same method being used today.

II. IS THE THREE-DRUG PROTOCOL CONSTITUTIONAL?

A. What Constitutional Standard Should Courts Use?

The Eighth Amendment provides: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”⁴³ In *Gregg v. Georgia*, the United States Supreme Court stated that the framers of the Constitution were mainly concerned with proscribing “torture” and other “barbarous” methods of punishment.⁴⁴ The Court noted that over the years the Eighth Amendment had been interpreted in a “flexible

39. *See id.*; *see also* HUMAN RIGHTS WATCH, SO LONG AS THEY DIE: LETHAL INJECTIONS IN THE UNITED STATES 14-15 (2006), available at <http://hrw.org/reports/2006/us0406>.

40. *See* Kreitzberg & Richter, *But Can it Be Fixed?*, *supra* note 10, at 454. In 2007, Dr. Chapman expressed concerns with the three-drug protocol when he stated to CNN: “It may be time to change it [three-drug protocol]. There are many problems that can arise. Given the concerns people are raising with the protocol it should be re-examined.” Elizabeth Cohen, *Lethal Injection Creator: Maybe it’s time to change formula*, CNN.COM, Apr. 30, 2007, <http://www.cnn.com/2007/HEALTH/04/30/lethal.injection/index.html>. Dr. Chapman suggested newer drugs might be more effective today. *Id.*

41. *See id.*; TEX. CODE CRIM. PROC. ANN. art. 43.14 (Vernon 2006).

42. *See* IDAHO CODE ANN. § 19-2716 (West 2008); N.M. STAT. ANN. § 31-14-11 (West 2008).

43. U.S. CONST. amend VIII.

44. 428 U.S. 153, 170 (1976).

and dynamic manner.”⁴⁵ Earlier cases observed that the Amendment “is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.”⁴⁶ The Supreme Court has opined that the Amendment prohibits punishments that are “incompatible with the ‘evolving standards of decency that mark the progress of a maturing society.’”⁴⁷ As to executions, it prohibits “the unnecessary and wanton infliction of pain”⁴⁸ as well as methods involving “torture or a lingering death.”⁴⁹ The Court has also held that “[t]he cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely.”⁵⁰ Additionally, as the Ninth Circuit noted in *Campbell v. Wood*, “[t]he risk of accident cannot and need not be eliminated from the execution process in order to survive constitutional review.”⁵¹

Despite these various pronouncements regarding the death penalty, the Court has not settled upon one standard to analyze different forms of executions, and to determine whether lethal injections are constitutional. Additionally, the lower courts have come up with varying standards concerning what a plaintiff must prove in order to establish an Eighth Amendment violation. In *Morales v. Hickman*,⁵² the court stated the test as determining whether the plaintiff was subject to an “unnecessary risk of unconstitutional pain or suffering.”⁵³ In *Taylor v. Crawford*, I determined that Missouri’s lethal injection protocol subjected inmates to an “unacceptable risk of suffering unconstitutional pain and suffering.”⁵⁴ The Eighth Circuit in *Taylor* observed that the United States Supreme Court, in *Hill v. McDonough*, quoted the petitioner’s statement of his claim that “[t]he specific objection is that the anticipated protocol allegedly causes ‘a foreseeable risk of . . . gratuitous and unnec-

45. *Id.* at 171.

46. *Weems v. United States*, 217 U.S. 349, 378 (1910).

47. *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

48. *Gregg*, 428 U.S. at 173.

49. *In re Kemmler*, 136 U.S. 436, 447 (1890).

50. *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 464 (1947) (emphasis added).

51. 18 F.3d 662, 687 (9th Cir. 1994).

52. 415 F. Supp. 2d 1037 (N.D. Cal.), *aff’d*, 438 F.3d 926 (9th Cir.), *cert. denied*, 546 U.S. 1163 (2006).

53. *Id.* at 1039.

54. No. 08-4173-CV-C-FJG, 2006 WL 1779035, at *8 (W.D. Mo. June 26, 2006).

essary' pain."⁵⁵ The Eighth Circuit stated, "[w]hile we do not imply that the [Supreme] Court thereby adopted a new constitutional standard, we do observe that the Court expressed no dissatisfaction with that statement of the issue, and further, we find it to be consistent with settled Eighth Amendment jurisprudence."⁵⁶ The Eighth Circuit held that it was "assessing whether Missouri's lethal injection protocol amounts to cruel and unusual punishment, involving a substantial foreseeable risk of the wanton infliction of pain."⁵⁷ In *Harbison v. Little*, a federal district court determined that Tennessee's protocol presented a risk of "unnecessary and wanton infliction of pain."⁵⁸ In *Lightbourne v. McCollum*, the Florida Supreme Court noted that other courts have used other standards, such as "substantial risk," "an undue and unnecessary risk," a "foreseeable risk," and a "constitutionally significant risk."⁵⁹ The Florida Court also noted that other courts had relied on the "deliberate indifference" standard, but noted that the United States Supreme Court had used that standard more in connection with prison condition cases, and not with regard to method of execution cases.⁶⁰

In addition to disagreement over the constitutional standard, courts have disagreed over what the components of the analysis should be. In *Harbison*, Judge Trauger stated that the Sixth Circuit had adopted the Supreme Court's test in *Estelle* for unnecessary and wanton infliction of pain.⁶¹ The *Estelle* analysis requires that the plaintiff satisfy both an objective and a subjective component.⁶² The objective component requires that the pain be serious.⁶³ The subjective component requires that the conduct on the part of the prison official be wanton, which requires a showing of deliberate indifference.⁶⁴ However, in *Taylor v. Crawford*, the Eighth Circuit held that the plaintiff did not have to demonstrate deliberate indifference on the part of prison officials, because this was not a typical

55. 487 F.3d 1072, 1079 (8th Cir. 2007) (quoting *Hill v. McDonough*, 547 U.S. 573, 580 (2006)).

56. *Id.* at 1079.

57. *Id.* at 1082.

58. 511 F. Supp. 2d 872, 880 (M.D. Tenn. 2007) (quoting *Parrish v. Johnson*, 800 F.2d 600, 604 (6th Cir. 1986)).

59. 969 So. 2d 326, 338-39 (Fla. 2007).

60. *Id.* at 339.

61. 511 F. Supp. 2d at 880.

62. *Id.*

63. *Id.*

64. *Id.*

confinement of conditions claim and did not involve the actions of a particular officer.⁶⁵ The Court stated:

The propriety of this proposed protocol in the first instance (that is, whether it achieves the goal of carrying out the punishment in a humane manner or in fact uses torturous methods), therefore, depends upon whether the protocol as written would inflict unnecessary pain, aside from any consideration of specific intent on the part of a particular state official.⁶⁶

Thus, it is obvious that the lower courts have come to varying definitions of the standard and also disagree about what the plaintiff must prove in order to establish a violation.

B. Basis for Challenges to the Three-drug Protocol

1. Challenge to the Types and Dosages of Drugs Used

Almost all of the states that use lethal injection use some variation of the three-drug protocol that was first adopted in Oklahoma in 1977.⁶⁷ The drugs are administered through an intravenous line (“IV”) placed in a vein. The drugs consist of sodium pentothal (also known as Thiopental), a barbiturate anesthetic that is supposed to render the inmate unconscious. The second drug is pancuronium bromide, a paralytic agent that paralyzes the inmate’s muscles. This prevents inmates from indicating that they are suffering pain and obscures any visible signs of distress. The third drug, potassium chloride, induces cardiac arrest. It is undisputed that if potassium chloride is administered to a conscious person, it causes excruciating pain. A saline flush normally follows the administration of each drug. Various challenges have been made to the amounts of the drugs given. For example, inmates have argued that if an insufficient dosage of sodium pentothal is administered, they will not be sufficiently anesthetized and will feel excruciating pain when the potassium chloride is administered. Other arguments challenge the use of pancuronium bromide. Inmates have argued that the administration of this drug is unnecessary and serves only to give spectators and witnesses the assurance that their deaths are quick and painless.

65. 487 F.3d 1072, 1080-81 (8th Cir. 2007).

66. *Id.* at 1081.

67. See Denno, *Getting to Death*, *supra* note 9, at 375; see also Kreitzberg & Richter, *But Can it be Fixed?*, *supra* note 10, at 453-54.

2. *Challenges to the Process*

Inmates have also raised various challenges to the process by which lethal injections are administered. Challenges have been raised regarding how the drugs are prepared, what vein is used for access, and how the vein is accessed. Challenges have also been made to the qualifications and training of execution personnel, how and whether the IV site is monitored while the drugs are injected, the facilities where executions are conducted, whether the individuals who are injecting the drugs can see the inmate's face, the length of the IV tubing, and whether the execution personnel ensure unconsciousness before the second and third drugs are administered.

C. Overview of Most Recent Challenges

The following is just a brief sampling of some of the most recent challenges that have been raised around the country.

1. *Missouri: Taylor v. Crawford*

In this case, the petitioner challenged both the combination of drugs and the protocol used by Missouri. After conducting discovery, it was learned that Missouri did not have any formal, written protocol for lethal injections.⁶⁸ Additionally, the physician who oversaw the procedure revealed that he did not keep a written log of the exact amount of drugs administered.⁶⁹ He sometimes altered the amounts administered.⁷⁰ The physician testified he had dyslexia, which sometimes caused him to transpose letters and numbers. Further, he believed that he had the independent authority to change the procedure at will.⁷¹ I determined that Missouri's procedures presented an unnecessary risk that an inmate would suffer unconstitutional pain during the lethal injection process.⁷² I identified several concerns and ordered the state to submit a written protocol that complied with the court's order. The state submitted a revised protocol, but I found that it still did not comply with the provisions of the previous order.⁷³ The state appealed that

68. *Taylor v. Crawford*, No. 08-4173-CV-C-FJG, 2006 WL 1779035, at *3-4 (W.D. Mo. June 26, 2006).

69. *Id.* at *4.

70. *Id.* at *7.

71. *Id.* at *4.

72. *Id.* at *8.

73. *Taylor v. Crawford*, No. 08-4173-CV-C-FJG, Doc. No. 213, slip op. at 2-3 (W.D. Mo. Sept. 12, 2006) (unpublished order).

decision to the Eighth Circuit, which reversed, finding that the revised protocol did not violate the Eighth Amendment.⁷⁴ Additionally, there is another challenge currently pending in Missouri relating to the identity, training, and qualifications of the execution team members.⁷⁵

2. *Florida: Lightbourne v. McCollum*⁷⁶

On December 13, 2006, Angel Nieves Diaz was executed in Florida. There were problems and the execution took “thirty-four minutes, which was substantially longer than any other previous lethal injection in Florida.”⁷⁷ The next day, Ian Lightbourne and other death row inmates filed an emergency all writs petition. They requested that the Florida Supreme Court,

(1) address whether Florida’s lethal injection procedures violate the Eighth Amendment; (2) enjoin Diaz’s autopsy and order that the autopsy be conducted by an independent medical examiner or with petitioners’ independent expert present; (3) order the production of all records previously requested by Lightbourne; and (4) appoint a special master to hear and receive evidence regarding the pain suffered during lethal injection.⁷⁸

Shortly after the Diaz execution, Florida Governor Jeb Bush stayed all executions and issued an executive order creating a Governor’s Commission on Administration of the Lethal Injection.⁷⁹ The Commission held hearings and submitted a report. The Commission found that the execution team failed to follow its protocols, failed to ensure successful IV access, failed to provide adequate training, and failed to have guidelines in place for handling complications.⁸⁰

In spite of these failures, however, the Commission concluded that the state, following revised procedures, could carry out an execution in a constitutional manner using the three drug combination.⁸¹ The Florida Department of Corrections (“DOC”) also

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

75. *See Clemons v. Crawford*, No. 07-4129-CV-C-FJG, 2008 WL 732183 (W.D. Mo. Mar. 17, 2008) (order granting and denying in part plaintiff’s motion to compel discovery).

76. 969 So. 2d 326 (Fla. 2007).

77. *Id.* at 328-29 (quoting GOVERNOR’S COMM’N ON ADMINISTRATION OF LETHAL INJECTION, FINAL REPORT WITH FINDINGS AND RECOMMENDATIONS 8 (2007)).

78. *Id.* at 329.

79. *Id.* at 329-30.

80. *Id.* at 330.

81. *Id.*

created a task force and issued revised recommendations for its lethal injection procedures. On September 10, 2007, the trial court entered an order lifting the temporary stay, denying the relief sought, and finding that the revised procedures were not unconstitutional.⁸² Lightbourne appealed to the Florida Supreme Court. On November 1, 2007, the Florida Supreme Court affirmed the trial court, finding that, “Lightbourne had failed to show that Florida’s current lethal injection procedures, as actually administered through the DOC, are constitutionally defective in violation of the Eighth Amendment of the United States Constitution.”⁸³

3. *California: Morales v. Tilton*⁸⁴

Death row inmate Michael Morales brought a 42 U.S.C. § 1983 challenge against California’s Department of Corrections challenging the state’s lethal injection procedure. Hearings were held and Federal District Judge Jeremy Fogel submitted detailed questions to the parties. On December 15, 2006, Judge Fogel found that the implementation of the protocol was broken, but could be fixed.⁸⁵ On May 15, 2007, California proposed a revised protocol.⁸⁶ Hearings on the revised protocol have been postponed in light of the Supreme Court’s grant of certiorari in *Baze v. Rees*.⁸⁷ However, on October 31, 2007, a California trial judge invalidated the state’s new protocol because it had not been subjected to a period of public notice and comment as required by state law.⁸⁸

4. *Tennessee: Harbison v. Little*⁸⁹

Edward Jerome Harbison brought a 42 U.S.C. § 1983 action alleging that Tennessee’s newly adopted lethal injection protocol violated his Eighth Amendment rights. On February 1, 2007, Tennessee’s Governor revoked the current protocols so that the Commissioner of Corrections could complete a comprehensive review of the manner in which death sentences were carried out in

82. *Id.* at 331.

83. *Id.* at 353.

84. 465 F. Supp. 2d 972 (N.D. Cal. 2006).

85. *See id.* at 982.

86. *See* DEP’T OF CORRECTIONS & REHABILITATION, STATE OF CAL., LETHAL INJECTION PROTOCOL REVIEW (2007), <http://www.deathpenaltyinfo.org/CAlethInject.pdf>.

87. *See infra* notes 93-94 and accompanying text.

88. *See* Bob Egelko, *Marin Judge Rules Lethal Injection Procedures Invalid*, S.F. CHRON., Nov. 1, 2007, at B-3, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2007/11/01/BA49T444S.DTL>.

89. 511 F. Supp. 2d 872 (M.D. Tenn. 2007).

Tennessee. After the review, the Commissioner was directed to provide the Governor with new protocols and procedures for administering death sentences by both lethal injection and electrocution. The judge found that Tennessee's new protocol posed a

substantial risk that Mr. Harbison will not be unconscious when the second and third drugs are administered. Under the new protocol, due to lack of training and other issues . . . there is a significant risk that he will not receive the intended five grams of sodium thiopental before the injection of pancuronium bromide. Further, and perhaps most importantly, because there is no check for consciousness, such a mistake may never be discovered.⁹⁰

In addition to not checking for consciousness, the court also found that Tennessee failed to select adequately trained executioners, and failed to properly monitor the administration of the drugs.⁹¹ The court enjoined the defendants from executing Harbison under the new protocol stating, “[t]he new protocol presents a substantial risk of unnecessary pain; that risk was know[n] to Commissioner Little, and yet disregarded.”⁹²

D. *Baze v. Rees*

On September 25, 2007, the Supreme Court agreed to consider the constitutionality of lethal injections as carried out by the state of Kentucky.⁹³ The Supreme Court has granted certiorari on three questions:

- (1) Does the Eighth Amendment prohibit means for carrying out a method of execution that create an unnecessary risk of pain and suffering as opposed to only a substantial risk of the wanton infliction of pain?
- (2) Do the means for carrying out an execution cause an unnecessary risk of pain and suffering in violation of the Eighth Amendment upon a showing that readily available alternatives that pose less risk of pain and suffering could be used?
- (3) Does the continued use of sodium thiopental, pancuronium bromide, and potassium chloride, individually or together, violate the cruel and unusual punishment clause of the Eighth

90. *Id.* at 884.

91. *See id.* at 886-92.

92. *Id.* at 903.

93. *See Baze v. Rees*, 128 S.Ct. 372 (2007) (granting certiorari).

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Amendment because lethal injections can be carried out by using other chemicals that pose less risk of pain and suffering?⁹⁴

Hopefully, the Supreme Court will provide the lower courts with much needed guidance on not only the correct standard to apply when analyzing lethal injection challenges, but also on the protocol which the majority of states have adopted for carrying out lethal injections. Oral arguments in this case were held in January 2008.

III. SHOULD THE THREE-DRUG PROTOCOL BE CONTINUED? ANALYSIS OF THE CONSTITUTIONALITY OF THE THREE-DRUG PROTOCOL AND ALTERNATIVES

This Article will not discuss the propriety of the decisions of other courts in examining lethal injection, referenced above. Instead, it will examine methods by which the three-drug protocol may be used so that its implementation does not violate the Constitution. It will further examine other alternatives to the three-drug protocol and actions that may be taken by the states to ensure that their execution protocols do not violate the Eighth Amendment.

A. Medical Professional Involvement

Medical professionals are necessary participants in lethal injections utilizing the three-drug combination that is used by most states. Without the participation of medical professionals, the use of the three-drug protocol would create an unnecessary and unacceptable risk of unconstitutional pain and suffering.

Professional monitoring of anesthetic depth is critical to the three-drug protocol approach; if professional monitoring is not used, the three-drug protocol could result in excruciating pain and suffering for the condemned. If the condemned is professionally monitored after being administered sodium pentothal, he or she will be adequately protected from excessive pain. If proper anesthetic depth is achieved, the second drug, pancuronium bromide (also known as pavulon) will not simply serve to mask the prisoner's pain when the third drug, potassium chloride, is administered. Instead, pancuronium bromide will serve its intended purpose, to prevent the prisoner from making involuntary move-

94. *Baze v. Rees*, No. 07-5439, slip op. at 1-2 (U.S. Oct. 3, 2007), available at <http://www.supremecourtus.gov/qp/07-05439qp.pdf> (listing questions presented on certiorari).

ments and to hasten death by paralyzing the muscles involved with respiration.⁹⁵

There are other potential problems in performing lethal injections using the three-drug combination without the participation of medical professionals. One is that care needs to be taken in flushing the IV lines with a saline solution between the administration of each drug. For instance, if the IV line is not flushed properly between the administration of sodium pentothal and pancuronium bromide, a precipitate could form that could clog the IV line.⁹⁶ Further, sodium pentothal comes in powdered form and must be dissolved in a solution close in time to the execution.⁹⁷ If someone without a medical background mixes the drugs, he or she may not prepare the sodium pentothal solution in the proper concentration to ensure unconsciousness for the duration of the execution.⁹⁸ Another major problem is the difficulty in finding veins suitable for injecting the drugs, as many of the condemned have a history of intravenous drug use, which can cause damage to a person's veins.⁹⁹ This problem becomes even more serious if non-medical personnel are attempting to find a suitable vein and then insert an IV line into that vein.

The involvement of an anesthesiologist or other physician in administering lethal injections may be necessary to address these concerns, but it also may create an ethics concern for those physicians. The AMA prohibits member physicians from participating in lethal injections:

95. See, e.g., Casey Lynne Ewart, Note, *Use of the Drug Pavulon in Lethal Injections: Cruel and Unusual?*, 14 WM. & MARY BILL RTS. J. 1159, 1167 (2006) (citations omitted) [hereinafter Ewart, *Use of the Drug Pavulon*] (noting that pancuronium bromide paralyzes the body and creates an inability to breathe that would lead to death in approximately ten minutes).

96. Transcript of Testimony of Mark Dershwitz, M.D. at 12, Taylor v. Crawford, No. 05-4173-CV-C-FJG (W.D. Mo. Jan. 30, 2006).

97. *Id.* at 13-14.

98. Notably, the American Pharmacists Association ("APhA") has issued a policy statement that indicates opposition to (1) "the use of the term 'drug' for chemicals when used in lethal injections," and (2) "laws and regulations which mandate the participation of pharmacists in the process of execution by lethal injection." CURRENT APhA POLICIES RELATED TO THE PRACTICE ENVIRONMENT & QUALITY OF WORKLIFE ISSUES (2002), http://www.pharmacist.com/AM/Template.cfm?Section=Search1§ion=Control_Your_Practice1&template=/CM/ContentDisplay.cfm&ContentFileID=267. However, unlike many other professional medical associations, APhA has placed no ethical restrictions on its members from participation in executions.

99. See Denno, *When Legislatures Delegate Death*, *supra* note 7, at 109-10 (noting also that the condemned may have other conditions, including diabetes, heavily pigmented skin, obesity, or extreme muscularity, that may interfere with finding an appropriate vein for lethal injection).

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The AMA's Council on Ethical and Judicial Affairs has defined physician participation in executions to include three categories of actions: (1) actions that "directly cause the death of the condemned," such as administering the lethal injection itself; (2) actions that "assist, supervise, or contribute to the ability of another individual to directly cause the death of the condemned," such as prescribing the necessary drugs; and (3) actions that "could automatically cause an execution to be carried out on a condemned prisoner," including determinations of death during an execution.¹⁰⁰

Also, notably, the American Nurses Association,¹⁰¹ the American Public Health Association,¹⁰² and the National Association of Emergency Medical Technicians¹⁰³ have released statements prohibiting members from participating in executions.¹⁰⁴ Although the AMA's guidelines posit that it is unethical for physicians to participate in executions, "a survey of American physicians found that nineteen percent would inject lethal drugs, and forty-one percent said they would take part in at least one action prohibited by the AMA guidelines."¹⁰⁵ Nonetheless, it is unlikely that physicians will participate in executions if state medical licensing boards treat the violation of the AMA's ethical guidelines regarding execution as sanctionable behavior. The participation of physicians is therefore necessary, but also problematic.

100. James R. Wong, Note, *Lethal Injection Protocols: The Failure of Litigation to Stop Suffering and the Case for Legislative Reform*, 25 TEMP. J. SCI. TECH. & ENVTL. L. 263, 282-83 (2006) [hereinafter Wong, *Lethal Injection Protocols*] (citing COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS, AM. MED. ASS'N, COUNCIL REPORT: PHYSICIAN PARTICIPATION IN CAPITAL PUNISHMENT, 270 JAMA 365 (1993)).

101. AMERICAN NURSES ASS'N, POSITION STATEMENT: NURSES' PARTICIPATION IN CAPITAL PUNISHMENT (Dec. 8, 1994), <http://www.nursingworld.org/MainMenuCategories/HealthcareandPolicyIssues/ANAPositionStatements/EthicsandHumanRights.aspx>.

102. AM. PUBLIC HEALTH ASS'N, POLICY STATEMENT ON PARTICIPATION OF HEALTH PROFESSIONALS IN CAPITAL PUNISHMENT (Jan. 1, 2001), <http://www.apha.org/advocacy/policy/policysearch/default.htm?id=264>.

103. NAEMT POSITION STATEMENT ON EMT AND PARAMEDIC PARTICIPATION IN CAPITAL PUNISHMENT (June 9, 2006), <http://www.naemt.org/aboutNAEMT/capitalpunishment.htm>.

104. See Kreitzberg & Richter, *But Can it Be Fixed?*, *supra* note 10, at 501-02.

105. See Wong, *Lethal Injection Protocols*, *supra* note 100, at 283. Mr. Wong further argues that physician participation in execution would make the process more humane, and ought to extend to such activities as (1) examining the condemned and his or her medical records and noting if any conditions may interfere with the normal execution process; (2) preparing syringes, locating appropriate veins, and inserting the catheters; and (3) administering and monitoring the lethal injection solution and the vital signs of the condemned. *Id.*

The opposition to medical participation in executions creates a catch-22. Without physician involvement, it may be impossible to ensure a lethal injection execution that is not cruel and unusual punishment. Thus, the position of the AMA is inconsistent with a desire for a humane lethal injection death under constitutional precepts.¹⁰⁶

The state should not support different positions on capital punishment; if capital punishment is state-sanctioned, physicians should not be punished by the state's agencies for participating in executions. Again, in my opinion, if lethal injection executions using the three-drug protocol are to be humanely carried out, health-care professionals are needed. The AMA policy leads to a situation where animals are treated more humanely in veterinary euthanasia than humans who are executed via lethal injection.¹⁰⁷ In my opinion, state medical licensing boards (as state agencies) should not impose discipline for the violation of the AMA guidelines on execution where the executions are state-sanctioned and court-ordered.¹⁰⁸ The state should not support different positions on capi-

106. Along these same lines, an interesting conflict has been noted by one commentator on my decisions in *Taylor v. Crawford*. My September 12, 2006 Order mandated that the physician selected by the state to help develop and implement the lethal injection procedure must be "in good standing with their State's licensing board," and should "not have any disciplinary action taken against them by their State's licensing authority." *Taylor v. Crawford*, No. 08-4173-CV-C-FJG, Doc. No. 213, slip op. at 3 (W.D. Mo. Sept. 12, 2006) (unpublished order). However, participation in the execution process itself could be a violation of a physician's ethics that could subject him or her to disciplinary action. See Daniel N. Lerman, Note, *Second Opinion: Inconsistent Deference to Medical Ethics in Death Penalty Jurisprudence*, 95 GEO. L.J. 1941, 1960-61 (2007) (further arguing that under my rulings, "even doctors from states that do not explicitly exclude participation in execution from the practice of medicine would appear to be immunized from sanction by their own state medical boards, thereby further weakening the power of such boards to police unethical medical conduct").

107. See Denno, *The Lethal Injection Quandary*, *supra* note 4, at 76. Notably, the AMA's policy regarding another topic of ethical concern, abortion, is more nuanced, giving its member physicians more of an opportunity to comport their practice to their own moral beliefs. The AMA's policy on abortion is:

The issue of support of or opposition to abortion is a matter for members of the AMA to decide individually, based on personal values or beliefs. The AMA will take no action which may be construed as an attempt to alter or influence the personal views of individual physicians regarding abortion procedures.

AM. MED. ASS'N POLICY ON ABORTION H-5.990, http://www.ama-assn.org/apps/pf_new/pf_online (enter "H-5.990" in "Enter search term" field and click "Search") (last visited Apr. 15, 2007).

108. Several states have already anticipated this concern, and have enacted legislation providing that participation in a lethal injection execution does not constitute the practice of medicine. See FLA. STAT. ANN. § 922.105(6) (West 2005); IDAHO CODE ANN. § 19-2716 (West 2008); OR. REV. STAT. ANN. § 137.476(3) (West 2005); S.D.

tal punishment; if capital punishment is state-sanctioned, physicians should not be punished by the state's agencies for participating in executions. Again, in my opinion, if lethal injection executions using the three-drug protocol are to be humanely carried out, health-care professionals are needed.

B. Other Options

There are other options open to the states. Instead of the three-drug combination, states could use an overdose of a single barbiturate,¹⁰⁹ an oral dose of a barbiturate, similar to that used in assisted suicides in Oregon,¹¹⁰ or injection of the three-drug combination in a muscle instead of a vein.¹¹¹ These options could work without the utilization of physician or medical professional assistance;¹¹² however, these options come with their own problems. The difficulty with an oral dose of barbiturate is that one would essentially be asking the inmate to commit suicide in taking the dose.¹¹³ Further, intramuscular injections take longer to work than injections in veins, increasing the risk that the inmate could suffer a lingering death that might violate the Eighth Amendment.¹¹⁴

Another alternative suggested by other commentators is a method that has been used by Dr. Jack Kevorkian, carbon monoxide poisoning.¹¹⁵ Although it may take ten minutes or longer for this method to work, the effects may not be painful.¹¹⁶

States may also wish to consider other methods of execution besides lethal injection. One major issue in determining what method of execution should be used is whether we wish the execution to be relatively painless for the viewer as well as the condemned. Other commentators suggest the guillotine could be used, noting that it is

CODIFIED LAWS § 23A-27A-32 (West 2008); WYO. STAT. ANN. § 7-13-904(a) (West 2007).

109. Amy L. Mottor, Note & Comment, *Morales and Taylor: The Future of Lethal Injection*, 6 *APPALACHIAN J.L.* 287, 305 (2007) (citations omitted) [hereinafter Mottor, *Morales and Taylor*]. Note that a single dose of the barbiturate sodium pentobarbital is used by veterinarians when euthanizing animals. See Ewart, *Use of the Drug Pavulon*, *supra* note 95, at 1187.

110. Mottor, *Morales and Taylor*, *supra* note 109, at 305.

111. *Id.*

112. See *id.* at 310-11.

113. See *id.* at 309 (citing a quotation from Deborah Denno found within Denise Grady, *Doctors See Way to Cut Risks of Suffering in Executions*, N.Y. TIMES, June 23, 2006, at A1).

114. See *id.*

115. See Ewart, *Use of the Drug Pavulon*, *supra* note 95, at 1187.

116. *Id.* at 1188.

quick, reliable, and causes little or no pain.¹¹⁷ Others suggest the method used by the Chinese government, a single gunshot to the back of the head. This gives the prisoner a quick death, but may be more messy to the observers.¹¹⁸ While these methods may not be as painful for the condemned, they may still be problematic. Under our country's evolving standards of human decency, these methods may be found to be gruesome and may evoke a more brutal form of government.¹¹⁹ Of course, the person who we must be concerned about in Eighth Amendment jurisprudence is the condemned, not the viewer of the execution. I believe it is not unconstitutional for the state to sanitize the execution process so that the viewers do not have a disturbing experience in viewing the execution. This should not, however, be at the expense of the condemned experiencing significant pain while being executed.

Another problem with lethal injection protocols is the possibility of lengthy litigation regarding the method of execution.¹²⁰ Depending on the United States Supreme Court's decision in *Baze*, there could be many more years of challenges to execution procedures in the various state and federal court systems. This adds to the already lengthy appeals process undergone by most of those sentenced to death.

C. Transparency & Oversight

If states continue to perform lethal injections, the protocol for performing these executions must be in writing, and ideally should be public information. This written protocol must allow for detailed monitoring of the drugs' application to ensure a humane exe-

117. See generally Chris Fisher, *From the Guillotine to Lethal Injections: Evolution of Execution*, 21 CHI. B. ASS'N REC., Sept. 2007, at 40 (further noting that decapitation is likely more of a problem for witnesses, whereas lethal injection looks peaceful to witnesses).

118. See Ewart, *Use of the Drug Pavulon*, *supra* note 95, at 1188.

119. On the other hand, for the survivors of victims of crime, it could be argued that it would be more satisfying to view an execution where it appears that the condemned has undergone more than a simple anesthetic coma; viewing the bloody death of the person that harmed their loved one may be more of a cathartic experience than viewing what appears to be a peaceful death for the person that caused them so much pain.

120. See generally John Gibeaut, *It's All in the Execution: Prosecutors Fear Limitless Civil Rights Complaints Over Lethal Injection Procedures*, 92 A.B.A. J., Aug. 2006, at 17 (noting that prosecutors can expect a 42 U.S.C. § 1983 challenge with each death penalty appeal, and may even have to contemplate multiple challenges from the same prisoner regarding different execution protocols).

cution.¹²¹ If a written protocol is not in place, the state may be abdicating its responsibility to ensure that the execution of a given defendant does not violate the Constitution.¹²² This can lead to instances where an inmate is subjected to a procedure that is not in compliance with the state's protocol. Furthermore, given that pancuronium bromide causes paralysis, it is easy to imagine a situation where an improper dose of sodium pentothal could be given which could lead to undetected, unconstitutional pain and suffering.¹²³ The risk of unconstitutional pain and suffering increases with a lack of supervision or oversight.¹²⁴

This potential variance in the treatment of the condemned is unacceptable when the courts are asked to examine the constitutionality of lethal injections. The representations of a state official regarding the state's lethal injection protocol are meaningless without a written protocol imposing checks and balances. Although a written protocol may not eliminate all variances between the executions of condemned persons,¹²⁵ it would certainly provide a more reliable means of informing the courts, the public, and the condemned. If a written protocol included means for monitoring the actions of the execution team, the likelihood of an executioner acting independently would be significantly reduced.

121. See *Taylor v. Crawford*, No. 08-4173-CV-C-FJG, 2006 WL 1779035, at *3-4 (W.D. Mo. June 26, 2006) (noting that the state's representations as to the lethal injection protocol turned out to be incorrect, as physician John Doe I believed he had the independent authority to change the dose based on his medical judgment).

122. In Missouri, the state essentially put all of its trust and discretion into the actions of one individual. See *id.* This created a situation where there was virtually no oversight of his actions or inactions. In fact, the state argued (based on the representations of Terry Moore, Director of Adult Institutions for the Missouri Department of Corrections) that the protocol involved the administration of five grams of sodium pentothal, when in fact, for the previous execution and the one prepared for use at the execution of plaintiff, physician John Doe I had decreased the amount of thiopental used to 2.5 grams. See *id.*

123. Without a written protocol with checks and balances imposed upon members of the execution team, moreover, no one may know when an unconstitutional lethal injection procedure has taken place. Even if no one alive knows that an unconstitutional lethal injection procedure was performed, that should not be an excuse for the state to provide less information and guidance about its lethal injection procedures.

124. Lack of a written protocol could likely lead to a situation where there is an increased likelihood of lack of meaningful oversight of the execution process. Notably, Missouri is not the only state that has had differences between the stated protocol and the applied protocol. As discussed by Professor Denno, Ohio, Florida, California, and North Carolina have had issues of failure to comply with their state's protocols. See Denno, *The Lethal Injection Quandary*, *supra* note 4, at 121-22.

125. A written protocol would not necessarily prevent a rogue government employee from employing unconstitutional conduct.

The written protocol also should provide that the conditions are such that the personnel giving the lethal injection can observe the prisoner while the injection is taking place. If the personnel are in another room, the inmate should face the room where the personnel are located. Additionally, adequate lighting should be supplied, and the view should not be obstructed by blinds or other materials. The personnel administering the drugs should be able to clearly see which drugs they are injecting into the condemned.

If states choose to modify their lethal injection protocols to include only a single overdose of a barbiturate, the level of monitoring of the condemned person would likely be lessened. Furthermore, it would be unnecessary to require specific room conditions if a single overdose of barbiturate was used, as monitoring the condemned for anesthetic depth would be unnecessary if the condemned did not receive the second and third drugs of the three-drug protocol. These are decisions that should be made by legislative action, if at all possible.

Interestingly, certain states do not have a written lethal injection execution protocol at all.¹²⁶ Further, in certain states that do have written information about their lethal injection protocols, those protocols often lack specificity as to the procedures used.¹²⁷

Additionally, several states have indicated that they have a lethal injection protocol, but that protocol is “confidential.”¹²⁸ When challenged in court, these “confidential” or unwritten protocols may be made public; however, it should not require a court challenge for the public to be informed about a particular execution protocol. We should strive to make public as many details of the executions as possible, so that the condemned can know what to expect and the public can know what the state is doing. In examining the evolving standards of decency, we cannot expect the pub-

126. See Denno, *The Lethal Injection Quandary*, *supra* note 4, at 96. These states are New Hampshire and Wyoming.

127. See *id.* at 96 nn.316-17 (noting that eight states provide limited information about their protocols [Arizona, Arkansas, Kansas, Louisiana, Maryland, Oklahoma, Tennessee, and Virginia] and two states provide somewhat limited information [California and Florida]).

128. *Id.* at 96 n.313. Professor Denno notes that the fifteen states claiming confidentiality were Alabama, Delaware, Idaho, Illinois, Indiana, Kentucky, Mississippi, Missouri, Montana, Nevada, North Carolina, Ohio, Pennsylvania, Texas, and Utah. She further notes, therefore, that eighteen of the states that currently allow lethal injection do not allow non-litigation evaluation of their protocol, as the information is either confidential or non-existent. *Id.* Notably, since Professor Denno’s study, Missouri and North Carolina (as well as California) have been ordered to provide new protocols. *Id.* at 100.

lic's standards to evolve if the public is unaware of what procedures are actually performed upon the condemned. With public awareness of the details of executions, the court can more easily focus on examining whether lethal injection comports with evolving standards of decency instead of imposing its own views of the death penalty.

Although I directed the state of Missouri to provide a written protocol in my June 2006 order,¹²⁹ ideally the state legislatures and/or state prison officials should examine their lethal injection policies and procedures and should provide more specific written protocols. This would significantly ease the burdens on the courts and litigants in any further § 1983 litigation regarding lethal injection procedures.

IV. CONCLUSION

In examining lethal injection execution, we must answer whether this method of execution comports with our evolving standards of decency. We must also address the reality of whose interest is paramount: the condemned or the viewers of the execution. There clearly are ways to make execution painless for the condemned without using lethal injection. These methods, however, may be less time-sensitive and may appear more painful or gruesome to the eyes of the viewers. The Constitution does not require a pain-free death, nor should it. The method of capital punishment chosen by the state, however, must not constitute cruel and unusual punishment. By the time this Article is published, the Supreme Court may have already spoken to the issue of what constitutes unconstitutional pain and suffering in the context of lethal injection execution.

Those who want death with a certain degree of torture may have found a safe haven in the three-drug protocol. Clearly, if the thio-pental is not given in a proper dosage and the required anesthetic depth is not attained, excruciating pain will result. The medical experts are in general agreement that the introduction of pancuronium bromide and potassium chloride would guarantee undetectable torture and pain if proper anesthetic depth is not reached. Many variables must be assessed to determine anesthetic depth, and the variables are different depending on the medical history of the condemned. This assessment requires medical judg-

129. See *Taylor v. Crawford*, No. 08-4173-CV-C-FJG, 2006 WL 1779035, at *8 (W.D. Mo. June 26, 2006).

ment. If the flaws in this three-drug protocol are not addressed, this procedure will not result in the peaceful death it portrays.

Given the dimensions of this issue, state legislatures should consider re-examining their current lethal injection protocols. Their determination must focus on what would constitute an appropriate humane protocol. The legislative branch is in a better position than the courts to examine the three-drug protocol and other potential means of execution. Legislative examination of this issue may provide more guidance to the courts. Otherwise, the courts may continue to fashion their own remedies on a case by case basis.

It is my hope that this Article will provoke thought by legal professionals and the public about this very important issue.