

What Do Lawyers Know About Lethal Injection?

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In this Essay, I make the radical suggestion that various states' lethal injection protocols should be developed with input from relevant experts in full view of the people in whose name they will be implemented. I further suggest that, in the wake of a number of court challenges that have forced states to go back to the drawing board with respect to lethal injection, these execution procedures should not be tinkered with, in secret, by lawyers and prison officials whose expertise in subjects like anesthesiology and pharmacokinetics is just as limited as one would expect it to be. Yet that is exactly what has been happening, and it is an under-reported aspect of the lethal injection debate that deserves a little sunlight.¹

I. A Rash of Tinkering

The three-drug lethal injection formula used by virtually every state that practices capital punishment is the product of a history that is not so much sordid as it is skimpy. We know that it was "developed" (a generous term in this context) in 1977 in Oklahoma by a medical examiner named Jay Chapman, who gave the matter about as much thought as you might put into developing a protocol for stacking dishes in the dishwasher.² "Good enough for Government work," every other death penalty state apparently said, as, one by one, they eventually adopted a version of Oklahoma's protocol. Some began using it even before Oklahoma did.³

Notably, the initial adoption of the three-drug formula in the various states entirely avoided public scrutiny. Most lethal injection statutes did not, and do not, specify the drugs to be used, or in what sequence or quantity. Those "details"

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¹ An alliance between the American Civil Liberties Union (ACLU) and the conservative Rutherford Institute provided some such sunlight in the *Baze v. Rees* case currently pending in the Supreme Court. These two organizations joined forces to file an *amicus* brief in *Baze* exposing several aspects of the secrecy in which the entire lethal injection process is shrouded. *See generally* Brief of the American Civil Liberties Union et al. as Amicus Curiae in Support of Petitioners, *Baze v. Rees*, No. 07-5439, 2007 WL 3353105 (Nov. 8, 2007) [hereinafter "ACLU/Rutherford Brief"]; *see also* Henry Weinstein, *High Court Takes Up Lethal Injection; States Have Kept the Execution Process Shrouded in Secrecy*, L.A. TIMES, Jan. 7, 2008, at A1 (discussing the lengths to which state have gone to hide the details of their lethal injection procedures).

² As a medical examiner, Dr. Chapman had no relevant expertise for this task. When approached for his advice, his first response was that he "was an expert in dead bodies but not an expert in getting them that way." Deborah W. Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*, 76 FORDHAM L. REV. 49, 66 (2007). He went on to hastily dictate a lethal injection procedure on the spot, and his off-the-cuff musings formed the basis for lethal injection protocols in most states. *Id.* at 66-78.

³ Six different states conducted 52 lethal injection executions before Oklahoma conducted its first lethal injection execution in 1990. *See* Death Penalty Information Center, *Searchable Database of Executions*, <http://www.deathpenaltyinfo.org/executions.php> (last visited Mar. 2, 2008) (on file with the Harvard Law and Policy Review).

were delegated to prison officials. As a result, the automatic transparency that typically attends legislative action was absent, and, because lethal injection was generally assumed to be safe and humane, few paid attention to what little legislative activity there was.

What was missed in the rush to adopt the three-drug formula was that the particular combination of drugs makes no sense at all. The formula involves, in this order, a barbiturate anesthetic (thiopental), a paralyzing drug (pancuronium bromide) that also suffocates the inmate, and an excruciatingly painful heart-stopping drug (potassium chloride). The paralyzing drug does not affect consciousness or sensation. It thus allows the inmate to feel pain (if, for example, executioners do not properly administer the anesthetic), but renders him unable to move, cry out, or indicate in any way that he is suffering. That is why almost every state prohibits the use of paralyzing drugs in animal euthanasia.⁴ (Animal shelter workers, who euthanize literally millions of animals a year, use a simple, anesthetic-only procedure that is essentially an overdose of a barbiturate similar to the first drug used in human lethal injections.)

Why did the states rush to adopt this formula for executing death row inmates, when it was untested by medical or scientific experts, destined to lead to inhumane executions, and ignored readily-available, safer alternatives? The question can be difficult to answer because of the ad hoc manner in which prison officials adopted the protocols in various states; there are no records or administrative proceedings to review. Instead, lawyers currently challenging lethal injection have had to call these officials into court and piece together what happened from individual testimony. Such were the proceedings in *Baze*, where the Commissioner of the Kentucky Department of Corrections testified that he was involved in the original adoption of the three-drug protocol, but that he still, to this day, does not know why these particular drugs are used – other than that they are also used by every other state.⁵ Ignorance of what the drugs are and how they work appears to account for their adoption by so many states. As the trial judge in *Baze* put it, there is “scant evidence that ensuing States’ adoption of lethal injection was supported by any additional medical or scientific studies that the adopted form of lethal injection was an acceptable alternative to other methods. Rather, . . . the various States simply fell in line relying solely on Oklahoma’s protocol”⁶

If ignorance is responsible for the adoption of the three-drug formula, it may be prison officials’ gradual education that has entrenched their commitment to the procedure. The more prison officials learn about the drugs and how they work, the more they appear to be enamored with one drug in particular: pancuronium bromide, the paralyzing drug. After all, the paralytic has served a useful function for the states, as it ensures that virtually every lethal injection

⁴ See Ty Alper, *The Problem with Curare: Lethal Injection and Animal Euthanasia*, 35 FORDHAM URB. L. J. ____ (forthcoming 2008) (counting 41 states as either explicitly or implicitly banning the use of paralyzing drugs in animal euthanasia).

⁵ Joint Appendix, vol. I, at *257, *Baze v. Rees*, No. 07-5439, 2007 WL 4790796 (Nov. 5, 2007).

⁶ *Baze v. Rees*, No. 04-CI-01094, 2005 WL 5797977, at 2 (Ky. Cir. Ct. July 8, 2005).

execution looks peaceful and “dignified,”⁷ regardless of whether that is actually the case.

No state or prison official has yet admitted to caring only about appearances.⁸ To the contrary, the states have taken the public position that ensuring a humane execution is a top priority.⁹ But the states’ insistence on paralyzing inmates before killing them at least justifies skepticism, and raises the question whether states are even trying to administer lethal injection in a way that does not inflict extreme pain and suffering during the process.

There is an opening now for us to find out the answer, because many states have recently begun to tinker with their lethal injection protocols, either because judges have ordered them to do so or because they have felt compelled to do so to defend their procedures before courts and the public.¹⁰ Judges have lately started asking questions, ordering discovery, and hearing from experts. What these judges have learned, in states as diverse as California, Missouri, and Tennessee, has led them to halt executions, send prison officials back to the drawing board, and, in several cases, suggest that switching to an anesthetic-only procedure would solve the Eighth Amendment problems.¹¹

Presented with this opportunity to make up for their lemming-like adoption of Oklahoma’s ill-conceived execution formula, the states have by and large passed on real reform. Tinkering with the protocols has yielded only cosmetic changes; no state has yet abandoned the paralyzing agent.¹² But now, unlike when states originally adopted the three-drug formula, there is considerable public interest in the revision process. We know the *outcome* of the process. But how did the states decide to retain the paralytic? Did they consult experts this time? Did they review medical and scientific literature? Did they consult with veterinary experts who have long used an anesthetic-only procedure for animal euthanasia?

The answers to these questions will reveal much about the real intent of the states when it comes to devising execution protocols. The answers should tell us whether there is any real effort to ensure that executions are humane, or

⁷ Counsel for the State of Kentucky, during the *Baze* oral argument, justified the use of the paralytic on the ground that it “does bring about a more dignified death, dignified for the inmate, dignified for the witnesses.” Transcript of Oral Argument, *Baze v. Rees*, No. 07-5439, 2008 WL 63222, at *33 (Jan. 7, 2008).

⁸ A warden in California came close, when he testified in a deposition that the only thing that defined a “successful” execution was that the inmate ended up dead. See *Morales v. Tilton*, 465 F. Supp. 2d 972, 983 n.14 (N.D. Cal. 2006).

⁹ See Brief for Respondents, *Baze v. Rees*, No. 07-5439, 2007 WL 4244686, at *33 (Dec. 3, 2007) (“Respondents have always been committed to conducting all executions in a humane manner.”).

¹⁰ See Denno, *supra* note 2, at 94-101 (noting that as many as thirteen states have revised their lethal injection protocols within the past couple of years).

¹¹ See, e.g., *Harbison v. Little*, 511 F. Supp. 2d 872, 895 (M.D. Tenn. 2007) (stating that adopting an anesthetic-only procedure “would have greatly mitigated the plaintiff’s risk of pain”); *Morales*, 465 F. Supp. 2d. at 983 (noting that switching to an anesthetic-only procedure “would eliminate any constitutional concerns, subject only to the implementation of adequate, verifiable procedures to ensure that the inmate actually receives a fatal dose of the anesthetic”).

¹² See Denno, *supra* note 2, at 99-101.

whether appearances are all that matter. And the answers to these questions will also give us insight into how prison officials will administer these procedures in the future: will they establish a careful and professional system or will they attempt to go back to their old practices? The problem is, when lawyers litigating challenges to lethal injection have asked these questions, the answer has consistently been, "It's a secret."

II. The "Stick a Lawyer in the Room" Strategy

The desire for secrecy is not new, but the tactics have changed. In the past, states succeeded in keeping secret the details of their protocol drafting process by delegating the task to prison officials who are, in many ways, unaccountable to the public and whose work is largely unreviewable by the public.¹³ But with the recent attention focused on lethal injection, states know that their revision processes may be subject either to discovery during litigation or scrutiny under state open records laws.¹⁴ Given that the inattention of the 1970s and the 1980s is a thing of the past, what is a state to do in its quest for secrecy? The answer has been to turn to its lawyers to invoke one of the most well-entrenched, important privileges in our legal system. In state after state, prison officials and their lawyers are refusing to disclose draft protocols and contents of their deliberations on the grounds that they are protected by the attorney-client privilege and work product doctrine.

For example, in Missouri, where the state revised its protocol but left the three-drug procedure intact, lawyers for several death row inmates have recently sought disclosure of draft protocols and correspondence among prison officials that would shed light on how those officials decided to retain the three-drug formula, and with whom they consulted. The State has refused, claiming attorney-client privilege, because its lawyers were involved in those discussions.¹⁵ The same issue has arisen in California, where the state is refusing to turn over hundreds of documents generated during the revision of California's protocol on the grounds that some of the documents were drafted by its legal counsel.¹⁶ In Delaware, prison officials have invoked the attorney-client privilege when refusing to answer questions, during depositions, about why they made certain decisions in the promulgation of their new lethal injection protocol.¹⁷

¹³ ACLU/Rutherford Brief, *supra* note 2, at 14-18.

¹⁴ See, e.g., Jared Allen, *DOC: No Lethal Injection Challenges*, THE NASHVILLE CITY PAPER, May 1, 2007, available at <http://www.nashvillecitypaper.com/news.php?viewStory=55943> (describing a successful lawsuit by a local paper to gain access to "documents that may shed light on how [Tennessee] went about revising its execution protocol").

¹⁵ See Defendants' Response to Motion to Compel Discovery, *Clemons et al. v. Crawford, et al.*, No. 07-4129-CV-C-FJG (Dec. 3, 2007 W.D. Mo.), at 11-14.

¹⁶ See Memorandum in Support of Plaintiff's Third Motion to Compel Discovery, *Morales v. Tilton, et al.*, No. 06-cv-00219-JF (Oct. 10, 2007 N.D. Cal.), at 24-26.

¹⁷ See Letter Brief, *Jackson v. Danberg*, No. 06-cv-300 (Sept. 19, 2007 D. Del.), at 2.

I do not know much about corporate law, but I do know this: making a lawyer your corporate secretary does not make your board meetings private.¹⁸ Likewise, copying your lawyer on an otherwise non-legal email does not protect the email from discovery.¹⁹ And for good reason. While the attorney-client privilege is essential to any lawyer's ability to provide honest and uninhibited advice to her client, some clients in the corporate world have attempted to misuse it by trying to extend the privilege beyond its purpose (protecting legal advice) to cover the client's day-to-day dealings. Courts have rightly seen through that ploy, because, extended mindlessly, the privilege would thwart the ability to find out the truth through litigation.

The states appear to be taking their cues from the corporations that have tried this tactic, and it is too soon to tell whether it will be successful in the lethal injection context. The courts have not resolved the issue yet as a legal matter.²⁰ As a policy matter, though, the verdict is clear: it is a bad idea. If states successfully invoke attorney-client privilege here, it could provide immunity from any kind of meaningful discovery into the protocol revision process. As a result, the public will never know how and why a particular state made the decisions it did. And the answers to those questions matter. The public has a right to know whether prison officials are cavalierly ignoring readily available, and safer, alternative methods of execution in favor of a method that looks good but risks the infliction of excruciating pain.

Tennessee is an example of a state that did not shield its lethal injection deliberations in total secrecy, and paid the price. In that state, the protocol revision process was initiated by the media's embarrassing disclosure of the lethal injection protocol that was then in use, which was essentially the protocol for the electric chair, with "lethal injection" cut and pasted over the references to "electrocution."²¹ In light of this disclosure, the Governor of Tennessee hastily convened an executive commission to review the protocol and recommend changes. After consultation with multiple anesthesiologists, the executive commission recommended that the state use a one-drug, anesthetic-only method similar to that used in animal euthanasia, to obviate the risk of conscious suffering during lethal injections and make the procedure easier for personnel to

¹⁸ See, e.g., *Uphohn Co. v. United States*, 449 U.S. 383, 395 (1981) ("The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney."); *United States v. Construction Products Research, Inc.*, 73 F.3d 464, 473 (2d Cir. 1996) (holding that "[t]o invoke the attorney-client privilege, a party must demonstrate that the communication between client and counsel was 'made for the purpose of obtaining or providing legal advice'").

¹⁹ See, e.g., *U.S. Postal Service v. Phelps Dodge Refining Corp.*, 852 F. Supp. 156, 163-64 (E.D.N.Y. 1994) ("A corporation cannot be permitted to insulate its files from discovery simply by sending a 'cc' to in-house counsel.").

²⁰ Some courts have indicated that the result may turn on what legal standard governs the Eighth Amendment challenge, an issue that the Supreme Court will likely resolve in *Baze*. See, e.g., *Teleconference, Jackson v. Danberg*, No. 06-cv-300 (Sept. 18, 2007 D. Del.), at 54-55 (presiding judge stating that whether she allows inquiry into the protocol drafting process may depend on under which standard she is reviewing the case).

²¹ See Sheila Burke, *Tennessee Will Lift Ban on Executions*, THE TENNESSEAN, May 1, 2007, at 1A.

administer. The Commissioner of the Department of Corrections, however, rejected the recommendation – not because he had any medical expertise that contradicted the unanimous advice he had received, but because he did not want “Tennessee to be at the forefront of making the change” to an anesthetic-only formula, and because he thought the adoption of such a formula could lead to “political ramifications.”²² So the state stuck with its three-drug formula.

The fact that experts and the commission had recommended an anesthetic-only formula, and that the state had rejected it for specious reasons, factored heavily in a federal judge’s decision to reject the new protocol as unconstitutional. Had the commission’s deliberations been kept secret, the judge never would have known that “Commissioner Little knowingly disregarded an excessive risk of pain” to inmates subjected to Tennessee’s procedure.²³

If Tennessee is typical (and there is no reason to think it is not), the states have a lot to hide, which may explain why they have been so keen to put lawyers in charge of the process and then claim privilege. There is another problem with entrusting the revision of lethal injection protocols to the state’s lawyers, though, which is that they are not the appropriate people to be devising humane execution procedures. These lawyers are no more knowledgeable about the drugs involved or how they work than the Commissioner in Tennessee who rejected the anesthetic-only formula. And, importantly, they do not view their role as policymakers. In revising the protocols, they are not seeking out neutral experts in an effort to devise the “best” protocol. They are not career government officials who happen to be attorneys; they are litigators acting as advocates on behalf of their clients, the prison officials. They likely see their job as protecting their clients’ litigation interests and positions, not as determining how to conduct executions in the most humane, responsible way possible.

In California, for example, the state put the Governor’s Legal Affairs Secretary in charge of the protocol revision process after available evidence raised concerns about whether inmates previously executed in California had been conscious when injected with the second two drugs, the ones that cause suffocation and excruciating pain.²⁴ In light of that evidence, the presiding federal judge had recommended the state undertake “a thorough review” of its lethal injection procedures.²⁵ Notes turned over in discovery revealed the following, as found by the judge:

On February 26, 2006, the Governor’s Office hosted a meeting lasting approximately an hour and a half at which potential changes to [the lethal injection protocol] were discussed. Although more significant modifications were proposed by some of the participants, the Governor’s Legal Affairs Secretary concluded that the only change that would be undertaken at that time was what was described as a “tweak” of the chemical aspects of the protocol. . . . There is no indication from the record that the participants in the

²² *Harbison v. Little*, 511 F. Supp. 2d 872, 879, 896 (M.D. Tenn. 2007).

²³ *Id.* at 895.

²⁴ *Morales v. Hickman*, 415 F. Supp. 2d 1037, 1045 (N.D. Cal. 2006).

²⁵ *Id.* at 1046.

meeting addressed or considered issues related to the selection and training of the execution team, the administration of the drugs, the monitoring of executions, or the quality of the execution logs and other pertinent records.²⁶

This finding should not have come as a surprise. The state's lawyers are motivated to change as little as possible, because their clients, having used the same procedures for years, are strongly opposed to any change. Moreover, the lawyers are attuned to litigation interests and hence have no desire to develop a new strategy to defend a new procedure. Indeed, one of the primary reasons that California rejected the "significant modifications" proposed by the experts was that its lead litigation attorney resisted, insisting that he would be able to defend the existing three-drug combination in court.²⁷

III. Conclusion

When notes from the meeting in California were revealed in court, the presiding judge drily observed that "it seems unlikely that a single, brief meeting primarily of lawyers, the result of which is to 'tweak' [the protocol], will be sufficient to address the problems identified in this case."²⁸ Indeed. Putting the state's litigators in charge of a process to address the constitutional infirmities of that state's lethal injection procedures is not a recipe for good public policy. Nor does it allow for an appropriate level of public scrutiny of what should be a fully transparent process.

²⁶ *Morales v. Tilton*, 465 F. Supp. 2d. 972, 977 (N.D. Cal. 2006). Although the State fought the disclosure of these notes, the court held that the privilege was waived because the state's testifying expert was present at the meeting. This is another example, like in Tennessee, where public disclosure of the state's protocol-drafting process materially damaged the state's litigation position.

²⁷ See Joint Exhibit 71, Notes of Bruce Slavin, *Morales v. Tilton*, No. 06-cv-00219 (N.D. Cal. 2006). In these notes, Bruce Slavin, a lawyer for the Department of Corrections and Rehabilitation, quotes the State's expert anesthesiologist as asking lead counsel, "Why not use narcotic to completely eliminate pain?" According to the notes, lead counsel responded, "Because all three drugs currently used [have been] upheld by courts."

²⁸ *Morales*, 465 F. Supp. 2d. at 983.