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ARTICLE

LETHAL INJECTIONS: PROTECTING A NATIONAL ETHOS OVER THE RIGHTS OF INMATES

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On March 9th, 2018, a death row inmate left a failed lethal injection procedure with overlapping wounds and a bruised body.¹ The 3-hour execution attempt was due to a technician's inability to locate a proper blood vessel to administer Alabama's lethal drug cocktail. In July, the inmate's attorney argued that the administration of a lethal injection would be difficult and painful, since the inmate's veins had been compromised by lymphoma and drugs. The procedure continued, leading the technician to breach level IV access into the inmate's groin and left the inmate's body perforated with 11 puncture wounds. The supposed painless technique had the inmate pleading for the execution, and his life, to end.² This recent horrid event is not a stand-alone situation. Since 2004, inmates have challenged the known unknown that accompanies the capital

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TUMCA Law & Policy Review is a platform for current undergraduate moot court participants and TUMCA (Texas Undergraduate Moot Court Association) Alumni to engage in legal scholarship. Each issue centers on a topic that article submissions must discuss in some form. The topic of this issue concerned any legal issues that arise due to prison conditions.

¹ *Bruised Covered Body of Death Row Killer Left After Botched Lethal Injection Left him begging to die*, Mirror (Mar. 9, 2018), <https://www.mirror.co.uk/news/us-news/bruise-covered-body-death-row-12158758>.

² See *id.*

punishment paradox.³ The term 'known unknown' derives from the tense realization that the only people who truly know whether a lethal drug cocktail causes an agonizing death are the ones it kills.⁴ This same condition-related risk has led to a rise of death row inmates wishing to seek legal redress, and no federal courts differing from the bounded rationale of capital punishment in the United States.

In 2014, the state of Missouri used a compounded pentobarbital in its lethal injection procedure.⁵ The defendant's lawyers alleged that "compounding injectable pentobarbital outside an FDA-approved facility poses a substantial risk that the purity, efficacy, and sterility of the drug will be compromised such that a tortuous death will result".⁶ However, Missouri Governor, Jay Nixon, announced that the State would proceed with said inmate's execution anyway. Nixon refused to specify the drugs his State would use, but he cryptically suggested that Missouri had access to lethal chemicals from another source.⁷ The state of Missouri and its courts' approach to this case were hardly abnormal. On the contrary, in recent years, states have become increasingly secretive about their lethal injection procedures.⁸ Although states typically make some information available, they often withhold vital details that directly affect the likelihood that the inmate will suffer excruciating pain. Courts, for their part, often turn a blind eye to these state practices, usually rejecting inmates' requests to learn this crucial information.

This is paired with the courts unawareness of botched execution data that belie their common assumption that lethal injections are unproblematic. A Stanford University study collected the botched execution rate for every method of execution in the United States. The report shows that over the years, 8,776 people have been executed and 276 of those executions (3.15%) went wrong in some way. However, when looking at the consensus of the 1,045 people that were killed by lethal injections the percentage of botched executions rises to 7.12%.⁹ Stanford professor, Austin Sarat, describes the evolution of new methods of execution, lethal injections in particular, and the rhetoric advanced to support changes from one method to another: "With each development in the technology of execution, the same promises have been made, that each new technology was safe, reliable, effective and humane. Those claims have not

³ *The Known Unknowns of Lethal Injections*, the Atlantic (Mar. 9, 2018),

<https://www.theatlantic.com/politics/archive/2015/01/the-known-unknowns-of-lethal-injection/384589/>

⁴ *See Id.*

⁵ *See* Assoc. Press, *Tulsa Pharmacy Agrees Not to Provide Execution Drug*, CBSNEWS.COM (Feb. 17, 2014), <http://www.cbsnews.com/news/oklahoma-pharmacy-agrees-not-to-provide-drug-for-execution/>

⁶ *See Id.*

⁷ *See Id.*

⁸ *See* Deborah W. Denno, *Lethal Injection Chaos Post-Baze*, 102 GEO. L.J. 1331, 1376 (2014).

⁹ *See* Austin Sarat, *"Gruesome Spectacles: Botched Executions and America's Death Penalty"* (Stanford Univ. Press 2014).

been fulfilled."¹⁰ Lethal injection's history shows that the method was never subjected to medical and scientific study, much less held to the standards for animal euthanasia.¹¹ When compared to the combined percentage of botched executions through firing squads, hanging, and lethal gas still does not mean the high percentage found in the lethal injection procedure.

Aside from state's chemical secrecy and the extant data on botched executions from lethal injections, lies the largest concern for inmates on death row, the unknowingness of the administrators. As a death row inmate, you are most likely to be executed under the administration of a junior prison physician. With minimal information on the inmates (gender, neck size, blood pressure), they are asked to determine whether an inmate sentenced to death is likely to suffer. The problem rests on the fact that the American Medical Association's code of ethics bars members from participating in executions.¹² This creates a troubling contradiction: The people most knowledgeable about the process of lethal injection-doctors, particularly anesthesiologists, are often reluctant or unable to impart their insights and skills in these proceedings. Without an expert in the room, states often rely on executioners who don't know what they're doing. As one anesthesiologist told *Slate* magazine, "the executioners are fundamentally incompetent. They have neither the technical skill nor the cognitive ability to do this properly."¹³ Another anesthesiologist added, "In medicine, the burden of proof is on the doctor to show that something is safe. We would never give a new drug to a patient until it's been tested, approved by the FDA, etc. With the death penalty, the burden of proof has been inverted. These compounds, which are clearly causing patients to suffer, are deemed safe until proven otherwise. Yet the department of corrections prevents the release of information pertaining to how the lethal injection is carried out, making it impossible for a lawyer to make a strong case that this method is cruel and unusual."¹⁴

Despite the clear existence of Eighth Amendment protections to the risks of harms caused by state-secrecy, botched execution data, and ill-equipped administration, federal courts have repeatedly denied inmates' requests to detain or at the minimum to be informed of important details surrounding the procedure. The first Supreme Court

¹⁰ See *Id.*

¹¹ See Am. Veterinary Med. Ass'n, 2000 Report of the AVMA Panel on Euthanasia, 218 J. Am. Veterinary Med. Ass'n 669, 680 (2001).

¹² See Matt McCarthy, *What's the Best Way to Execute Someone?*, *Slate Magazine* (Mar. 27, 2014), http://www.slate.com/articles/health_and_science/medical_examiner/2014/03/death_penalty_drugs_lethal_injection_executions_are_so_bad_that_it_s_time.html

¹³ See *Id.*

¹⁴ See *Id.*

case to examine the conditions of a lethal injection procedure was *Nelson v. Campbell*.¹⁵ The Court sided with petitioner and death-row inmate, David Nelson. However, the Court did not rule on the constitutionality of conditions, but rather on a technicality in his form of appeal. Several years after winning his case in the Supreme Court, David Nelson passed away in the prison infirmary, his case for conditions was never reviewed. Two years later in *Hill v. McDonough*, the petitioner raised a general challenge to the three-drug protocol used to execute death row inmates in Florida. The Supreme Court reversed the decision, holding that Hill (and consequently other death-row prisoners) could properly challenge the method of execution in a civil-rights lawsuit. Florida still set Hill's execution date, despite Hill's victory in the U.S. Supreme Court. The Supreme Court denied a stay and Hill was executed.¹⁶ Hill's constitutional question for execution was later enforced in 2008 by the decision in, where the Court ruled that Kentucky's three-drug protocol for carrying out lethal injections did not amount to cruel and unusual punishment under the Eighth Amendment.¹⁷ *Baze v. Rees* is not pivotal as precedent for the scrutiny of lethal injection cases, but rather more pertinent as evidence of the divided opinion of capital punishment among the Supreme Court. The 7-2 decision was made at a time that thirty-five of the thirty-six states with the death penalty and the federal government used lethal injection as their primary method of execution. Seven Justices wrote opinions in the case, indicating that the Court was far from a consensus about how to resolve additional challenges that were and are likely to arise.

While this article cannot address all the separate conditions that inmates on death row have scrutinized and tried to repeal, it is evident through the conditions listed and case petitions, that there are paradoxical motivations behind legislative changes in execution methods. Paradoxically, the seemingly serene and medically pristine application of lethal injection satisfies both friends and foes of the death penalty because it fuels the death penalty process for those who want it to continue, but also makes the process seem more humane for those who would like it to end.¹⁸ At least that is how the national body perceives it, yet, executions have become increasingly hidden from the public and therefore more politically acceptable, they have not become more humane, only more difficult to monitor.

Atkins v. Virginia stated that the pattern of change against a cruel and unusual punishment is what marks a society moving away from a form a punishment, not the magnitude.¹⁹ Ideally, the trend of inmates seeking remedies for lethal injection

¹⁵ *Nelson v. Campbell*, 541 U.S. 637 (2004)

¹⁶ *Hill v. McDonough*, 547 U.S. 573 (2006)

¹⁷ *Baze v. Rees*, 553 U.S. 35 (2008)

¹⁸ See Deborah W. Denno, *When Legislatures Delegate*, supra note 15, at 98.

¹⁹ *Atkins v. Virginia*, 536 U.S. 304 (2002)

procedures would allow the court to extract this substantial risk protected by the Eighth Amendment and deem it unconstitutional. However, the trend only addresses the country moving away from a form of punishment. Meaning that if states that continually sentence prisoners to death, see capital punishment as a legal form of punishment that does not strip the dignity of man or is free of substantially harmful risks, then it is legal. The inmate that was enlisted to pass on March 9th, 2018, brutally murdered a man in an armed robbery. By national legal consensus, states may deem his sentence just.²⁰ Despite retribution, the point here is not to invoke disdain for inmates, but rather to scrutinize the process by which lethal injections are being executed and the inconsistencies surrounding it. This dangerous allocation of conditions and clandestineness in prisons, which the United States' continuously neglects.

The effects of these conditions and rulings have led to alternative effects. In the state of Arizona, prisons now ask inmates to provide their own methods and concoctions of chemicals to avoid a painful death.²¹ Inmates in that same state asked in 2015 to be sent to the electric chair, instead of being at the hands of a technician who would only have one medical seminar before administering a lethal injection.²² As inmates across the country await capital punishment, they are met with an inescapable contradiction of sciolism on the lethal injection process and no form of physical or legal relief. Until this paradox is addressed, instead of ignored, lethal injection will remain constitutionally vulnerable. Inmates will continue to challenge the implementation of the method; states will continue to make uninformed changes to ensure the death penalty survives. Only by conducting a thorough study of the method will society be able to acknowledge that lethal injections do not meet constitutional mandates. The United States must acknowledge that there is no humane or immaculately medically effective way to pursue the death penalty, and if there is, it is certainly not by lethal injection.

²⁰ *Id.* at 39.

²² *See Id.* at 68.