Lethal Indifference: Tinkering with the machinery of death

On 7 January 2008 the case of *Baze v Rees*[1] reached the United States Supreme Court. It is the latest "method of execution" constitutional challenge to reach the court, and has brought with it a de facto, if not de jure, moratorium on all executions by lethal injection, as individual states await the Supreme Court's decision.

Over the years various forms of capital punishment have been examined by the US courts and been found to fall foul of the 8th Amendment's bar on "cruel and unusual" punishment. Hangings, lethal gas, firing squad and electrocution have all but disappeared from the penal toolbox and for nearly 30 years lethal injection has proceeded unquestioned as the executioner's preferred method. The apparent humane efficiency of this mimicked medical procedure, adopted and favoured in 37 of the 38 retentionist states and by the Federal government, finds itself in crisis as it is subjected to the rigour of constitutional analysis.

The current litigation is not, however, directed at the constitutionality of lethal injection *per se* but focuses on whether the chemicals employed, and the protocols that govern their application, ensure that executions do not "involve the unnecessary and wanton infliction of pain"[2] nor "involve torture or lingering death"[3] but are carried out in accord with the "evolving standards of decency"[4] that lies at the core of 8th Amendment analysis.

While the minutia of procedures and dosages will be undergo judicial scrutiny, at the heart of the litigation lies the clash between law and medicine as doctors have been and will continue to be called upon to kill in the name of the state.

[1] *Baze et al. v Rees et al.* No. 07-5439
[2] *Gregg v Georgia*, 428 U.S. 153, 173 (1976)
[3] *In Re Kemmler*, 136 U.S. 436, 447 (1890)
[4] *Trop v Dulles* 356 U.S. 86, 101 (1958)

The casual advent of Lethal Injection

By the 1970s serious doubts had been raised about the continued use of death by electrocution. Accounts of inmates being set on fire, the stench of burning flesh and blood soaked images of the condemned had horrified death penalty proponents and legislators alike, to the extent that several were encouraged to seek a more acceptable and discreet method of execution to maintain public confidence.

William J. Wiseman, an Oklahoma State legislator, was one of them. In 1976, his legislative instinct led him to approach a doctor for assistance in order to replace the controversial, violent brutality of electrocution with the serene marriage of modern medicine and technology.

In discussion with Dr Jay Chapman, the state's Medical Examiner, Wiseman casually jotted down on a yellow legal pad, what would become the first legislative step for lethal injection: "An intravenous saline drip shall be started in the prisoner's arm, into which shall be introduced a lethal injection consisting of an ultra-short acting barbiturate in combination with a chemical paralytic."

The nonchalant, ad hoc, unscientific development of lethal injection comfortably accommodated a third lethal drug, potassium chloride, being added to the original cocktail, as prescribed by the statute. When asked why Chapman had done so, he simply replied, "why not?"[5] Chapman, who was not an anesthesiologist, further confessed that he had conducted no research in formulating the combination of drugs, but noted that all three drugs in sufficient dosages were lethal, and if one failed another would succeed.

The cheap and apparently uncontroversial method proved popular. Texas, the modern era's most prolific executioner, followed legislative suit the very next day after

[5] Human Rights Watch Interview with Dr Jay Chapman, March 23 2006

Oklahoma's enactment, again with little thought to the constitutionality of the method. Lethal injection had arrived.

The advantages of lethal injection were too substantial to ignore and triumphed over the simmering objections and concerns about the complicity of the medical establishment in executions and the inherent conflict between medical ethics and the medical oversight necessary for a responsible, "civilised," and constitutional execution procedure.

The Drugs

While all three drugs in the modern lethal injection are fatal in high enough doses, each has a discrete function in the way they are commonly administered. The prisoner is first injected with an anaesthetic (an ultra-short acting barbiturate, commonly sodium thiopental) that is designed to render the inmate unconscious; second, pancuronium bromide (a neuromuscular blocking agent) is introduced to paralyse the inmate's voluntary muscles and it is that drug which provides the medically sterile aura of painless death; finally, potassium chloride induces cardiac arrest and causes death.

This sequence of drugs exposes the prisoner to a high risk of severe pain and suffering. If he is not appropriately anaesthetised, he will be awake when he is paralysed and will experience suffocation as he will be unable to expand his lungs and breathe. If anaesthesia remains insufficient, he will experience the severe, even excruciating, pain of potassium chloride burning his veins.

The use of a paralysing chemical serves no medical purpose, but does provide the requisite "chemical veil" that characterises the 'humane' execution. Its application not only suffocates the inmate but also masks the indicators that are relied upon to assess a patient's "depth of anaesthesia". While sodium thiopental rapidly induces unconsciousness, it also wears off quickly. Due to the paralysing agent, an inmate is unable to express to his executioners the immense pain of dying by potassium chloride.

Set against a background of reluctance by the American Veterinary Medical Association to become involved in the debate, board-certified veterinary anaesthesiologists have provided affidavits, in a number of lethal injection cases[6], describing how the manner in which the combination of drugs is administered to prisoners fails to meet the minimum standards for the humane killing of animals.

The Protocols

Lawyers seeking to challenge the constitutionality of lethal injection have necessarily sought disclosure of the protocols that govern lethal injections, to understand what procedures are in place to ensure that inmates are properly anaesthetised when they are executed.

Disclosures of protocols, evidentiary hearings and public records requests have unearthed a disturbing picture regarding the mechanics of State killing. The failure to conduct any research into the action of the drugs; the use of medically unqualified persons (usually prison officers) to mix, prepare, handle and administer the chemicals; the absence of properly trained personnel to correctly canulate the prisoners – all contribute to the secrecy of the process. The absence of skilled anaesthesiologists to administer and monitor the inmates and the IV delivery system represent, moreover, a sample of the inadequate measures that increase the risk that the inmate is subjected to unconstitutional levels of pain and suffering.

In addition to attempts to obtain the protocols, lawyers and their clients have confronted fierce obstacles, as States have attempted to deny access to the workings of the death chamber. State-guaranteed anonymity for executioners; denial of access to autopsy data; and failure to provide execution logs and prison communications have further shrouded the process in secrecy. This pattern correlates closely with the historical trend of withdrawing the ultimate deterrent from public view and concealing State killing behind closed doors, late at night with minimal publicity.

[6] Amicus curiae filed in case of Clarence E. Hill v McDonough in US Supreme Court No. 05-8794

The Executioners: The role of medical practitioners

On the night of 13 December 2006 Angel Diaz was executed in Florida. Events that night now shape much of the current debate over lethal injection. The lethal injection was not properly administered and Diaz had to be administered a second round of the lethal drugs. The whole process took about 34 minutes (the process usually takes approximately 9 minutes), and Diaz was seen to be moving and mouthing words after the first set of drugs. The autopsy later revealed that a needle had punctured the back wall of his vein and the drugs had been injected in to the surrounding tissue (a process known as 'infiltration'). Although his body would have eventually absorbed the chemicals, the error significantly increased the likelihood that he was not properly anaesthetised when he was paralysed and his heart was stopped.

By this stage the respected medical journal, the Lancet, had already made a significant stride into the lethal injection debate. An article published on 16 April 2005[7] examined autopsy data from 49 executions across four states[8]. It revealed that "most of the executed inmates had [post mortem] concentrations [of sodium thiopental] that would not be expected to produce a surgical plane of anaesthesia, and 21 (43%) had concentrations consistent with consciousness". The authors concluded that "it is possible that some of these inmates were fully aware during their executions" – and consequently subjected to unconstitutional suffering.

Since then, Federal District Judge Jeremy Fogel has judicially recognised the need for skilled medical involvement in executions, by prohibiting the State of California from executing Michael Morales unless anaesthesiologists were present to monitor his "depth of anaesthesia"[9]. The requirement provoked the most public of clashes between medicine

[7] *Inadequate anaesthesia in lethal injection for execution* – Leonidas G Koniaris et al – Lancet 2005; Vol 365:1412 - 14

[8] Arizona, Georgia, North Carolina and South Carolina

[9] Judge Fogel conducted an exhaustive review of lethal injection in California and on Dec 15 2006 issued a *Memorandum of Intended Decision 5:06-cv-00219-JF*, which concluded that "lethal injection is broken, but can be fixed"

and law. The two chosen anaesthesiologists refused to attend the execution, when they discovered they would be required to intervene if problems arose, rather than simply observe, as they had initially believed. Their ethical concerns, encapsulated in the Hippocratic Oath, would not permit their participation.

Their personal decision is strongly endorsed by the American Medical Association whose position is unambiguous: — "requiring physicians to participate in executions violates their oath to protect lives and erodes public confidence in the medical profession". This, however, does not bar the involvement of all doctors, since many do not belong to medical associations that restrict their participation.

Disturbingly, the protocols in most States – as developed by the State Departments of Corrections – do not effectively regulate the qualification of those 'medically' involved in executions. In Missouri, this led to Dr Doerhoff, a doctor with no formal training in anaesthesiology, to halve the dose of anaesthetic during execution. He admitted that his dyslexia made transposition of numbers difficult and that he had had to "improvise" when the drugs came in new packaging. In evidentiary hearings, he conceded, "it is not unusual for me to make mistakes." Further disclosure revealed that he had been sued for malpractice 20 times and publicly reprimanded by the State Board of Healing Arts for concealing the malpractice suits. The State had been aware of this fact and was content to sign off on the discipline of Dr Doerhoff and fight to keep his identity a secret.

The debate surrounding physician-involvement in executions has also heightened tensions within the medical profession itself. In Georgia, doctors filed suit against the State Board of Medical Examiners for injury to professional reputation caused by the failure to investigate and discipline those practitioners who had partaken in executions and who had consequently contravened their professional code of ethics[10].

[10] *Zitrin v Ga. Composite State Board of Medical Examiners*, A07A0916, Court of Appeals of Georgia – Action dismissed, inter alia, due to lack of standing

Conclusion:

Following oral argument in *Baze*, it would appear that the Supreme Court has little desire to tinker significantly with lethal injection and the way it is administered. Its concerns focus on stemming a flood of constitutional challenges to various State execution protocols. It is unlikely that the Court will explicitly ban or require physician-participation in executions, leaving unresolved the broader questions of medical involvement in executions.

Before judgment is handed down, however, the justices may wish to consider the words of Professor Norval Morris – the eminent criminologist – taken from a lecture. In reaction to a question posed by a friend of William Wiseman – who unbeknown to Morris sat nearby – regarding Wiseman's lethal injection bill, Morris answered, "It's a notion worthy of Nuremburg" [11]. Many in the audience didn't understand the reference to Hitler's Nuremberg laws, which led to the Final Solution, but Wiseman did, and "went away sorrowful." The decision in *Baze* will at least give us an insight into what the US Supreme Court deems to be its constitutional solution. The death penalty, however, will no doubt continue to disfigure the criminal justice and penal systems of the US.

[11] *Inventing Lethal Injection* – William Wiseman Jr – Christian Century, 20 June 2001

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[12] See www.exoneratejack.org for details