

Professor Dow was quoted in a Wall Street Journal article concerning the debate over whether or not alternate approaches to lethal injection should be taken when executing prisoners.

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### **Lethal Injection Draws Scrutiny in Some States**

Constitutional Questions Raised Over Death-Penalty Procedures, but Some See Concern for Condemned Murderers as 'Absurd'

By NATHAN KOPPEL and CHRIS HERRING

Despite the many arguments over whether criminals should be put to death, states thought they had settled at least one matter: the best way to carry out an execution.

Largely gone are the electric chairs, firing squads and hangman's nooses of yore. Most of the 35 states where capital punishment is legal require the use of lethal injection -- a combination of chemicals inserted intravenously. In a handful of states, condemned inmates can request that another method, in most cases electrocution, be used.

But a recent botched execution has triggered debate over whether alternative approaches to injections should be considered.

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"Lethal injection became the preferred method, because of the notion that it is easy and painless," says David Dow, a professor at the University of Houston Law Center, an opponent of the death penalty who has defended more than 100 death-row inmates. "What has been revealed over the last several years is that it is neither."

But many supporters of the death penalty reject the notion that pain or discomfort caused during execution is grounds to change the process.

"I think most prosecutors feel the way I do -- that it's an absurdity to hear that someone is in too much pain from having a needle stuck in their arm when we're talking about someone who's on death row for inflicting a great deal of pain," says Steven Stewart, the prosecuting attorney for Clark County, Ind. "For a defendant to argue that it's cruel because they feel a little pain during the execution process is absurd."

Executions in general have been challenged over the years on the grounds that they violate the Eighth Amendment prohibition against cruel and unusual punishment. Some of those challenges have been successful. The Supreme Court in 2002 ruled that executions of the mentally retarded violated the Eighth Amendment. But the high court generally has held that the death penalty itself and the use of lethal injection is constitutional.

The three-stage drug injection used by states can result in a lingering and sometimes painful death. And prison staffs, not medical personnel, sometimes are responsible for inserting the needles that carry the lethal chemicals -- a factor, critics say, that can contribute to botched execution efforts.

Some experts say states have bypassed the most reliable execution methods to save face with the public. Deborah Denno, a Fordham University law professor who has written articles on capital punishment, believes firing squads comprised of professional shooters could handle executions more quickly and flawlessly, though she concedes that cultural distaste with firing squads means it is unlikely to be widely adopted. "We've known for a long time that there are better methods, but states don't want to look bad and horrifying," she says. The last firing squad execution took place in Utah in 1996.

In Ohio last month, the state tried unsuccessfully to execute Romell Broom, who was convicted of raping and murdering a 14-year-old girl in 1984. Execution team officials tried for about two hours to access a vein, according to court documents later filed by Mr. Broom's attorneys. The inmate eventually was stuck 18 times with a needle, including once inadvertently in a bone near his ankle, causing him to cry out in pain, according to court documents.

Ohio Gov. Ted Strickland has granted Mr. Broom a temporary reprieve while the Ohio Department of Rehabilitation and Correction reviews the execution. The state shouldn't execute him, "unless its procedures are changed to allow for a more dignified form of execution," says his attorney, Timothy Sweeney, who has asserted in court filings that a second execution attempt would violate Mr. Broom's Eighth Amendment rights.

"What occurred in Broom is a rare and exceptional circumstance," says Julie Walburn, a spokeswoman for the Ohio corrections department. Still, she says the governor also has issued a temporary reprieve to two other inmates who were scheduled to be executed after Mr. Broom so that the state can devise a "contingency plan" should problems recur with attempted lethal injections.

Maryland has suspended its use of the death penalty while a state commission reviews whether lethal injection causes undue pain and whether prison staff are sufficiently trained to carry out the process. Executions fall to correctional employees because physicians refuse to participate, citing their oath to "save lives, not take lives," says Democratic state Sen. Paul Pinsky, co-chairman of the commission and an opponent of the death penalty. Two other states, California and North Carolina, also have suspended lethal injection while the procedure is reviewed, effectively imposing a moratorium on the death penalty in those states.

In one of the most well-known electric-chair failures, a first attempt to execute Willie Francis in 1956 failed. After the Supreme Court ruled a second try constitutional, he was executed the following year on May 9.

Prior to the adoption of lethal injection beginning in 1977, electrocution was the common method of execution in the U.S. But it wasn't always effective. In perhaps the most well-known electric-chair failure, Willie Francis of Louisiana was put in the chair in 1946, but didn't die. His lawyer argued, among other things, that it would be cruel and unusual to attempt to execute Mr. Francis again. But the U.S. Supreme Court rejected the claim, and Mr. Francis was put to death the following year.

Death-penalty opponents grew hopeful when the U.S. Supreme Court in 2007 agreed to consider whether lethal injection constitutes cruel and unusual punishment. In a case brought

by two Kentucky death-row inmates, the high court looked at the use of pancuronium, the paralyzing agent used by most states to immobilize an inmate while poison is administered. If not done properly, a defense lawyer in the case argued, pancuronium induces "terrifying conscious paralysis and suffocation."

All states halted executions for a few months beginning in September 2007 pending a decision in the case, but the Supreme Court ultimately ruled that Kentucky's lethal-injection procedure doesn't constitute cruel and unusual punishment.

The Nebraska Supreme Court in 2008 equated electrocution with torture, striking down the state's lone method of execution in a 6-1 opinion. "Condemned prisoners must not be tortured to death, regardless of their crimes," Judge William Connolly wrote for the majority. "There is abundant evidence that prisoners sometimes will retain enough brain functioning to consciously suffer the torture high voltage electric current inflicts on a human body," he wrote.

But Nebraska legislators implemented a law in September that allows the state to execute by lethal injection.

Electrocution remains in use in a few states. South Carolina was the last state to use the electric chair, in 2008. Arizona used lethal gas to execute an inmate in 1999.

As some states study how executions are carried out, experts say they likely will struggle to find a less wrenching method than lethal injections. "I don't think that exists. And that's the challenge," says Douglas Berman, a capital-punishment expert and law professor at Ohio State University. "It's not easy to kill someone in a way where no one is going to be upset about it."