

Controversy Over Lethal Injection Procedures Implicates Complicated Questions of Pain Assessment

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On Friday, December 15, two significant events regarding capital punishment in the U.S. took place. First, the execution of a convicted killer in Florida went “awry.”¹ “Dr. William Hamilton, medical examiner in Alachua County, Fla., said yesterday that the needle with the lethal chemicals that should have gone directly into Mr. Diaz’s veins punctured the veins before entering soft tissue. It took a second dose and 34 minutes for him to die.”² A subsequent examination reported that the inmate, Angel Nieves Diaz, “had chemical burns on both arms.”³ Jonathan Groner, a surgeon at Ohio State Medical School who is a vocal opponent of the death penalty, stated that “[i]t really sounds like he was tortured to death’ . . . ‘My impression is that it would cause an extreme amount of pain.’”⁴

Florida administered the same three drugs to Diaz that all 35 states that use the lethal injection procedure employ: “one to deaden pain, [one to] paralyze the body, and [one to] cause a fatal heart attack.”⁵ In California, where a debate over the constitutionality of the lethal injection procedure has been ongoing for some time,⁶ both parties to one of the cases making its way through the federal courts agreed that “that it would be unconstitutional to inject a conscious person with either or both of the second two chemicals. The paralyzing agent would leave the inmate conscious while he suffocated, and potassium chloride is extremely painful.”⁷

Following Diaz’s execution, Florida Governor Jeb Bush issued a moratorium on the administration of the death penalty in Florida.⁸ Florida Executive Order No. 06-260 also establishes a Governor’s Commission on Administration of Lethal Injection.⁹ The purpose of the Commission, which will be composed of attorneys, scientists, physicians, and law enforcement specialists, is to review the protocols for administration of lethal

¹ Adam Liptak & Terry Aguayo, *After Problem Execution, Governor Bush Suspends the Death Penalty in Florida*, N.Y. TIMES, Dec. 16, 2006, at A11.

² *Id.*

³ MSNBC, *Botched Execution Likely Painful, Doctors Say*, <http://www.msnbc.msn.com/id/16241245/> (last visited Dec. 21, 2006).

⁴ *Id.*

⁵ *Id.*

⁶ *See, e.g.*, Daniel S. Goldberg, *Controversy Swirls Around Lethal Injection Amidst Concerns Over Adequacy of Anesthesia*, Health Law Perspectives, [http://www.law.uh.edu/healthlaw/perspectives/2006/\(DG\)lethalinjection.pdf](http://www.law.uh.edu/healthlaw/perspectives/2006/(DG)lethalinjection.pdf) (last visited Dec. 21, 2006).

⁷ Liptak & Aguayo, *supra* note 1, at A10.

⁸ *See* Fl. Exec. Order No. 02-260 (Dec. 15, 2006). Florida does not appear to maintain a state Register in which Executive Orders are published, but a PDF copy of the Order is available on the Governor’s web site at http://sun6.dms.state.fl.us/eog_new/eog/orders/2006/December/06-260-lethalinjection.pdf (last visited Dec. 21, 2006).

⁹ *Id.* at § 1.

injections in the state of Florida to determine whether those protocols comport with state and federal law as to “humanity, constitutional imperative, and common sense”¹⁰ The Order directs the Commission to issue a report of their preliminary findings and recommendations by February 1, 2007, followed by issuance of their final report by March 1, 2007.¹¹ Finally, the Order provides that “no further death warrants shall be signed...[u]ntil the Commission has issued its findings and recommendations”¹²

Within hours of the issuance of the Order, a federal district court in California issued a long-awaited Memorandum of Intended Decision¹³ in which Judge Jeremy Fogel indicated his intention to find the current lethal injection regime in California unconstitutional.¹⁴ Judge Fogel was careful to frame the question presented narrowly: “does California’s lethal-injection protocol—as actually administered in practice—create an undue and unnecessary risk that an inmate will suffer pain so extreme that it offends the Eighth Amendment?”¹⁵ He answered this question affirmatively for multiple reasons:

- inconsistent and unreliable screening of execution team members;
- a lack of meaningful training, supervision, and oversight of the execution team;
- inconsistent and unreliable record-keeping;
- improper mixing, preparation, and administration of sodium thiopental¹⁶ by the execution team; and
- inadequate lighting, overcrowded conditions, and poorly designed facilities in which the execution team must work.¹⁷

However, Judge Fogel left the door open for the state to revise its practices so as to render the process constitutional: “Defendants’ implementation of lethal injection is broken, but it can be fixed.”¹⁸ He noted that the worst problems were not necessarily the protocols themselves, but in the manner in which those procedures were carried out:

assuming that sodium thiopental is delivered properly, there should be virtually no risk that an inmate will suffer an unconstitutional level of pain. However, the record in this case, particularly as it has been developed through discovery and the evidentiary hearing, is replete with evidence that in actual practice [the protocol] does not function as intended.¹⁹

¹⁰ *Id.* at § 2.

¹¹ *Id.* at § 5.

¹² *Id.* at § 8.

¹³ *See Morales v. Tilton*, ___ F. Supp. 2d ___, Nos. C 06 219 JF RS, C 06 926 JF RS, 2006 WL 3699493 (N.D. Cal. Dec. 15, 2006). Copies of the Memorandum are available in PDF form on the Internet at <http://www.latimes.com/media/acrobat/2006-12/26909037.pdf> (last visited Dec. 21, 2006).

¹⁴ *Morales*, *supra* note 13, at *1.

¹⁵ *Id.*.

¹⁶ Sodium thiopental is the anesthetic administered to the inmate first (to deaden pain). *Id.* at *2.

¹⁷ *Id.* at *6-7.

¹⁸ *Id.* at *1.

¹⁹ *Id.* at *5.

Both the California litigation and court cases in Missouri and North Carolina have suggested that the constitutional concerns can be ameliorated by having an anesthesiologist certify that the inmate has been sufficiently anesthetized.²⁰ This prompted the president of the American Society of Anesthesiologists (“ASA”) to publish a letter on the ASA website urging members to refuse participation in administration of the death penalty for a variety of reasons, including the notion that a physician is ethically obligated to avoid participating in any procedure intended to take a life.²¹ Interestingly, a similar rationale is often proffered by physicians who oppose physician-assisted suicide and/or euthanasia.²²

Deborah Denno, a law professor at Fordham University and an expert on the lethal injection controversy, notes a disturbing irony about the inadequacies of lethal injection practices that animated the Florida and California developments.

During the late 1990s and early 2000s, many states, including Florida, abandoned the use of electrocution as the method of execution in favor of lethal injection precisely “because it appears more humane. For this reason, some proponents feel that injection can save the death penalty from abolition while some opponents believe injection can save inmates from torture.”²³ The grotesque irony, of course, is that “the very method that seems most appealing in the eyes of the public is also one of the most unjustifiably cruel. In their all-consuming haste to perpetuate the death penalty, legislatures and courts promote an uncontrolled brutality that should have no place in society or the law.”²⁴

As the above suggests, this latest controversy over lethal injection procedure is really about pain. Judge Fogel expressly states as much when he presents the question as whether inmates in California are subject to “an undue and unnecessary risk that an inmate will suffer pain so extreme that it offends the Eighth Amendment?”²⁵ The connection between pain and capital punishment is, however, hardly novel in Anglo-American law.²⁶ Moreover, there may be a connection between the overwhelming body of evidence showing that pain is consistently undertreated in a wide variety of inpatient and outpatient settings,²⁷ and the current controversy over pain and lethal injection: pain is notoriously difficult to assess. In other words, a significant part of the problem is epistemic in nature: where pain is subjective, how can the relevant authorities *know* that

²⁰ See Goldberg, *supra* note 6, at 1-2.

²¹ *Id.* at 1 & nn.7-8.

²² *Id.* at 1 & n.8.

²³ 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, 65-66 (2002) (footnotes omitted).

²⁴ *Id.* at 66.

²⁵ See note 13 *supra*.

²⁶ See generally Austin Sarat, PAIN, DEATH, AND THE LAW (2001); see also Irene Merker Rosenberg & Yale L. Rosenberg, *Of God's Mercy and the Four Biblical Methods of Capital Punishment: Stoning, Burning, Beheading, and Strangulation*, 78 TUL. L. REV. 1169, 1170-1174 (2004); Michel Foucault, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (Alan Sheridan trans. 1995).

²⁷ See, e.g., Ben A. Rich, *The Politics of Pain: Rhetoric or Reform*, 8 DEPAUL J. HEALTH CARE L. 519, 519 (2005).

pain is being adequately managed?²⁸ As California and Florida, among other states, scramble to provide adequate responses to this age-old problem, further scrutiny is warranted.

January 2007

²⁸ Of course, it should go without saying that different levels of pain might be adequate in lethal injection practices as compared to that which would be deemed adequate in physician-patient treatment relationships. The latter is supposed to be therapeutic, which is the entire reason the failure to manage pain is ethically problematic. The issue with lethal injection practices – which are, to put it mildly, punitive rather than therapeutic – is whether the inmate is suffering a constitutionally unacceptable amount of pain, as Judge Fogel notes. *See Morales, supra* note 13 at *1 (noting that the case is not “about whether the Constitution requires that executions be painless: binding precedent holds that the Eighth Amendment prohibits only “the unnecessary and wanton infliction of pain’ . . . and procedures that create an ‘unnecessary risk’ that such pain will be inflicted”), *citing* *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (plurality opinion), and *Cooper v. Rimmer*, 379 F.3d 1029, 1033 (9th Cir. 2004).