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Of Mice and Men: Legal Issues For The Lethal Injection of Animals And Humans

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Abstract

Members of the medical profession are constrained by the Hippocratic Oath and ethical considerations from offering medical testimony on the issue of how to terminate life in a manner that does not constitute cruel and unusual punishment. However, this paper suggests that veterinarians have expertise that may be helpful in this debate on how capital punishment is currently administered.

Introduction

The Eighth Amendment to the United States Constitution states "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."¹ This amendment was passed and added with the first group of additions entitled the "Bill of Rights," and has been referred to as a "fundamental right" by the United States Supreme Court. Even though, it was set down in what was thought to be plain language, as with most amendments, much controversy exists over the meaning of the words used. Most of the cases struggling to elaborate and explain this amendment taken up by the Supreme Court have dealt with meaning of the last phrase: "nor cruel and unusual punishments inflicted."² The Supreme Court has tried to give clear definitions as to what is being proscribed, especially throughout the latter half of the twentieth century. In *Furman v. Georgia*, a four-part definition was given: a punishment that by its severity is degrading to human dignity; a severe punishment that is obviously inflicted in a wholly arbitrary fashion; a severe punishment that is clearly and totally rejected throughout society; and a severe punishment that is patently unnecessary.³ Later cases would try to clarify these definitions and sometimes add a new one.⁴ Specifically for capital punishments, the Court stated "[the] fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character, record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."⁵ While the Eighth Amendment only directly restricts the Federal Government, states must also heed these definitions because the Eighth Amendment is so applied to the state and local governments through the conduit of the Due Process Clause of the Fourteenth Amendment.⁶ Also, since state governments perform most of the capital punishment sentences, the cases arguably have more applicability to state governments than to the federal government.

The compelling issue at present is how this "cruel and unusual punishment" prohibition affects the most common method of administering capital punishment, namely, lethal injection. While the challenge itself to the death penalty is not novel, stemming from a long line of cases, it is more pointed now. At present most states, Texas included, have lethal injection as the sole legal method of execution.

This comment will discuss: (i) the current factual situation regarding lethal injection; (ii) the history of the legal challenge to it in the courts; (iii) the current situation and how veterinarians are involved; (iv) an analysis of the arguments; and finally, (v) a look towards a pending case before the Supreme Court.

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¹ U.S. Const. Amend. VIII.

² *id.*

³ 408 U.S. 238 (1972).

⁴ See *Gregg v. Georgia*, 428 U.S. 153 (1976) (unnecessary and wanton infliction of pain).

⁵ *Roberts v. Louisiana*, 431 U.S. 633, 636 (1977).

⁶ *Robinson v. California*, 370 U.S. 660 (1962).

The Factual Situation

Texas seems to be known around the country for its use of the death penalty. According to the Texas Department of Criminal Justice, Texas leads the nation in the number of executions since the death penalty was reinstated in 1976.⁷ The State has never hesitated from releasing information about its criminal justice system, perhaps only adding to the stereotype. What has not aided this perception is that some states have started to abolish the death penalty as a form of punishment. As of December 31, 1999, the death penalty was authorized by only 38 states and the Federal Government.⁸ According to the Federal Bureau of Justice, 53 persons in 14 States were executed in 2006; all but one were of the method of lethal injection.⁹ The challenge that is now before the Supreme Court is not surprising because by the end of 2005, there were 3,254 prisoners who were on death row.¹⁰ Because this is not an area of Federal Preemption yet, each state may make its own laws and procedures regarding lethal injection; however, most are substantially the same.

Texas adopted lethal injection as means of capital punishment in 1977.¹¹ The first prisoner executed using this method was Charlie Brooks, who was convicted of kidnapping and murdering a Fort Worth auto mechanic on December 7, 1982.¹² Since that time Texas has used that same "cocktail" of drugs for the procedure. Texas was actually the first state to use this particular combination of the three drugs during that first procedure.¹³ The three drugs used are Sodium Thiopental, Pancuronium Bromide, and Potassium Chloride. Sodium Thiopental is used as an anesthetic to sedate the prisoner with a lethal dose administered at the beginning of the procedure.¹⁴ Pancuronium Bromide is a muscle relaxant which collapses the diaphragm and lungs.¹⁵ Potassium Chloride is the drug which actually stops the beating of the heart.¹⁶ It takes an average of 7 minutes after the first injection for the prisoner to be pronounced dead and the cost per inmate is calculated at \$86.08.¹⁷

The Legal Challenge

While this has been the method of lethal injection in Texas and around the country for close to three decades, a constitutional challenge to this method has not been granted a hearing in either the Texas Court of Criminal Appeals or the United States Supreme Court. The common claim being made is a violation of the Eighth Amendment, cruel and unusual punishment, with a specific focus that the procedure and drug combination currently used posed an extreme risk of inflicting great pain and suffering, going back to early language from the United States Supreme Court. There is an argument for each of the three drugs.

Sodium Thiopental

This drug, also known as sodium pentothal, is a very short-duration acting agent, used for an anesthetic effect lasting only minutes.¹⁸ This, under normal circumstances, would allow the patient to re-awaken and breath on their own power, especially if complications arose during insertion of a breathing tube pre-surgery.¹⁹ This fact leads to doubts about the drug providing an anesthetic effect that will last through the entire process. The argument expands with the work of Dr. Mark Heath, Professor of Clinical Anesthesia at Columbia University, who has authored several affidavits in cases around the country.²⁰ He testifies that the sodium thiopental has the risk of losing effect when it comes into contact with another drug in the system, such as pancuronium bromide.²¹ Specifically, when such contact occurs the sodium thiopental starts to

⁷ Tx. Dept. Crim. J. available at <http://www.tdcj.state.tx.us/stat/drowfacts.htm>

⁸ Id. Those without the death penalty include Alaska, District of Columbia, Hawaii; Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, Vermont, West Virginia, Wisconsin.

⁹ Fed. B. J. available at <http://www.ojp.usdoj.gov/bjs/pub/html/cp/2006/cpO6st.htm#2006tables>

¹⁰ Id.

¹¹ Tx. Dept. Crim. J. available at <http://www.tdcj.state.tx.us/stat/drowfacts.htm>

¹² Id.

¹³ Baze v. Rees, Brief for Petitioner (2007). ¹⁴ Tx. Dept. Crim. J.

¹⁵ Id.

¹⁶ Id.

¹⁷ Id.

¹⁸ Hines, et al. v. Johnson, et al., Plaintiff-Appellants' Brief and Request for Preliminary Injunction (5th Cir. Houston 2003), Pg 10.

¹⁹ Id.

²⁰ Id.

²¹ Texas v. Jesus Flores, No. 977,994, Affidavit of Dr. Mark Heath; Oken v. Sizer, et al., Affidavit of Mark J.S. Heath, M.D., Board Certified Anesthesiologist, Pg 3.

crystallize.²² The crystallization then allows for the drug to precipitate out of the solution flowing through the blood stream.²³ Because such a process will then dilute the effects of the anesthetic, there is a risk of

unnecessary pain because no one medically examines the inmate to ensure unconsciousness before the Pancuronium Bromide is injected.²⁴

Another argument against the procedure is the dosage amount. Many different factors can cause a subject's body to react differently to chemicals injected into the body, whether it is a medical injection or a lethal injection.²⁵ The process does not account for these factors; it instead proscribes the same amount regardless of the inmate, causing the risk that the prisoner will not be unconscious when the latter two drugs are administered to increase.²⁶

Pancuronium Bromide

Also known as Pavulon, Pancuronium Bromide is used as a neuromuscular blocking agent, or basically a drug which will paralyze the muscles of the person injected.²⁷ This drug has been referred to as the "chemical veil" of lethal injection because the paralyzing effect includes the facial muscles.²⁸ It is argued to cause an unnecessary risk of pain and suffering because it masks the typical indicators physicians look for in determining whether the patient has remained unconscious. Some inmates have even argued that this masking result is the sole reason for use of this drug during the procedure.²⁹ Since the third drug, potassium chloride, stops the heart and will ensure death, there is no medical need for a paralytic. It only poses to mask the inmate showing pain to those administering the procedure, as well as the audience present, and even has potential to cause pain associated with suffocation.³⁰

Potassium Chloride

Potassium Chloride is used to stop the heart. A main argument against its use is that it is not the best alternative drug currently on the market for the intended effect.³¹ It is immediately diluted when it enters the blood stream, and there is no calculated dosage for a specific inmate to ensure that it will not become too diluted. Citing to James J. Ramsey, some briefs have argued that the procedure of administration for this particular drug alone is so antithetical to surgical use as to be a violation of the Eighth Amendment.³² There are three main differences in protocol: "[First, in lethal injections, it is] not directed into the coronary arteries. [Second, in lethal injections, the drug is] directed only in an antegrade fashion, and [third, at the time of injection, it] is as normothermia (37 degrees Celsius, not at five degrees Celsius)."³³ Because there is no following of surgical procedure, there can be no assurance that the drug will achieve its maximum intended effect. If an ineffectual amount is administered, it would only arrest the pulmonary system, resulting in oxygen not being delivered to the entire body. This process ultimately stops the heart, but only due to the lack of oxygen.³⁴ The potassium chloride alone would not cause an inmate to immediately lose consciousness.³⁵ If conscious, the subject would experience "excruciating pain as [the drug] traveled through the venous system to the heart."³⁶ The prisoner in effect really dies of suffocation, experiencing great pain and suffering because death is not immediate.

Shortcomings and the Need for Veterinarians

The most obvious problem with having medical doctors testify as to the effects of euthanasia on a patient is that they are bound by ethical rules and are not permitted to perform such procedures. Veterinarians, on the

²² Oken v. Sizer, et al., Affidavit of Mark J.S. Heath, M.D., Board Certified Anesthesiologist, Pg 3.

²³ Id. at 4.

²⁴ Id. at 3.

²⁵ Id. at 4. Such Factors include size, weight, and drug tolerance.

²⁶ Id.

²⁷ Hines, et al. v. Johnson, et al., Plaintiff-Appellants' Brief and Request for Preliminary Injunction (5th Cir. Houston 2003), Pg 12.

²⁸ Id.

²⁹ Id. at 13.

³⁰ Id.

³¹ Id. at 15.

³² Id. James R. Ramsey is a certified perfusionist at Vanderbilt Medical Center in Nashville, Tennessee.

³³ Id. (emphasis omitted).

³⁴ Id.

³⁵ Oken v. Sizer, et al., Affidavit of Mark J.S. Heath, M.D., Board Certified Anesthesiologist, Pg 6.

³⁶ Id.

other hand, do perform such procedures and on a variety of different animals. While doctors sometimes testify about a veterinary procedure, that testimony could potentially be excluded from evidence. Dr. Heath, M.D. in several affidavits submitted refers to veterinary protocol, relying on his "research" into the field.³⁷

In his affidavit he submitted that veterinary guidelines prohibit the use of pancuronium bromide for household pets and concludes ". . . it is an accepted matter of medical and veterinary certainty that conscious paralysis and suffocation by curariform drugs such as pancuronium bromide is inhumane for any of these species [referring to dogs, cats, and humans]." ³⁸ Of course, in this opinion, a medical doctor is testifying to something that is arguably out of his range of experience. It is precisely this type of argument that inmates wish for the Supreme Court to hear, and it is an argument best made by a veterinarian.

A Veterinarian's Code

All veterinarians licensed by the American Veterinary Medical Association (AVMA) work under both policy statements as issued by the AVMA and special euthanasia guidelines. ³⁹ These guidelines are revisited and revised at least once every ten years by a panel selected by the AVMA. ⁴⁰ In the introduction, the guidelines state:

In the context of these guidelines, euthanasia is the act of inducing humane death in an animal. It is our responsibility as veterinarians and human beings to ensure that if an animal's life is to be taken, it is done with the highest degree of respect, and with an emphasis on making the death as painless and distress free as possible. Euthanasia techniques should result in rapid loss of consciousness followed by cardiac or respiratory arrest and the ultimate loss of brain function. In addition, the technique should minimize distress and anxiety experienced by the animal prior to loss of consciousness. The panel recognized that the absence of pain and distress cannot always be achieved. These guidelines attempt to balance the ideal of minimal pain and distress with the reality of the many environments in which euthanasia is performed. A veterinarian with appropriate training and expertise for the species involved should be consulted to ensure that proper procedures are used.⁴¹

A veterinarian taking an animal's life is considered an important procedure to be performed only by those licensed to do so and by those who will perform such in the most humane way possible. In evaluating which procedure should be used, the AVMA panel looks at many factors, including:

- (1) ability to induce loss of consciousness and death without causing pain, distress, anxiety, or apprehension;
- (2) time required to induce loss of consciousness;
- (3) reliability;
- (4) safety of personnel;
- (5) irreversibility;
- (6) compatibility with requirement and purpose;
- (7) emotional effect on observers or operators;
- (8) compatibility with subsequent evaluation, examination, or use of tissue;
- (9) drug availability and human abuse potential;
- (10) compatibility with species, age, and health status;
- (11) ability to maintain equipment in proper working order; and
- (12) safety for predators/scavengers should the carcass be consumed.⁴²

The panel uses these factors to explain how several types of methods either fit with the policy statement or do not. Methods include inhalant drugs, ⁴³ non-inhalant pharmaceutical drugs,⁴⁴ and physical methods. The report presents the advantages, disadvantages, and recommendations for each method mentioned.⁴⁶

³⁷ Oken v. Sizer, et al., Affidavit of Mark J.S. Heath, M.D., Board Certified Anesthesiologist, Pg 5.

³⁸ Id. at 6 (emphasis added).

³⁹ AVMA Guidelines on Euthanasia (Formerly Report of the AVMA Panel on Euthanasia), June 2007, available at http://www.avma.org/issues/animal_welfare/euthanasia.pdf

⁴⁰ Id. at 1.

⁴¹ Id.

⁴² Id. at 3.

⁴³ Id. at 6-10.

⁴⁴ Id. at 11-12.

⁴⁵ Id. at 12-18.

⁴⁶ See generally AVMA Guidelines on Euthanasia.

Alongside the discussion of other types of drugs, the panel does discuss the types of drugs which are also being used in lethal injections.⁴⁷ For the anesthetizing agent, veterinarians recommend barbiturates that are "potent, long-acting, stable in solution, and inexpensive."⁴⁸ It is postulated that Sodium Pentobarbital is the best drug available for this purpose. The guidelines go on to state: "A combination of pentobarbital with a neuromuscular blocking agent is not an acceptable euthanasia agent."⁴⁹ In several separate statements, the AVMA makes clear that the use of potassium chloride on an anaesthetized animal is "unacceptable and absolutely condemned."⁵⁰

A Veterinarian's Experience

In practice, veterinarians deal regularly with recognizing the pain of animals who can never speak to them, and therefore are accustomed to recognizing non-verbal indicators of pain. Euthanasia is a basic procedure used by all veterinarians on occasion.⁵¹ There are several licensed euthanasia medications that veterinarians may choose to use in their personal practice, one of which is Beuthanasia-D Special (Euthanasia Solution).⁵² This drug may be bought by veterinarians as an already mixed cocktail and then administered to the canine in one injection. The pharmaceutical company responsible for the drug provides relevant information on the effects as well as several warnings regarding the procedure. Notably, that the drug is "[f]or use in dogs for humane, painless and rapid euthanasia."⁵³ The medicine indicates that it is licensed for and has the sole use of euthanasia, which is something that cannot be attributed to the current cocktail being used in lethal injections. Another difference is that Beuthanasia-D Special is regulated under Federal law and may only be administered by or under order of a licensed veterinarian, opposed to medical doctors neither administering nor ordering lethal injection.⁵⁴ The drug packaging does note that the effects of the drug may be delayed in dogs that have severe cardiac or circulatory deficiencies, stemming from the slowed movement of the drug from injection to the site of effect.⁵⁵ Also, it advises that some involuntary reflex actions are occasional, ". . . however, an unconscious animal does not experience pain because the cerebral cortex is not functioning."⁵⁶ The only mention of pain is that which is caused by use of restraint, if necessary [i.e. if the animal had a broken leg and needed to be stabilized before the procedure], and advises that a tranquilizer made be used prior to administration of Beuthanasia-D Special. It also recommends the use of a tranquilizer or immobilizing agent if there is extreme anxiety in the animal.⁵⁷

The nonsterile solution itself contains two active ingredients: pentobarbital-sodium and phenytoin-sodium, as well as a red dye so that the drug may be differentiated from others in the veterinary lab, earning it the nickname "The Purple Passion."⁵⁸ The former drug is used as a rapid anesthetic producing unconsciousness in thirty seconds to a minute.⁵⁹ In a lethal dose, it causes depression of vital medullary respiratory and vasomotor centers.⁶⁰ The former drug "produces toxic signs of cardio-vascular collapse and/or central nervous system depression."⁶¹ The final effect of euthanasia is a culmination of cerebral death, respiratory arrest, and circulatory collapse.⁶² The pharmaceutical company asserts that "[c]erebral death occurs prior to cessation of cardiac activity."⁶³ Because the brain dies before the body, before the heart stops beating, there can be no pain or conscious knowledge of the effects of the body.⁶⁴

⁴⁷ See id at 11-12.

⁴⁸ Id. at 12.

⁴⁹ Id.

⁵⁰ Id.

⁵¹ Dr. Larence M. Landsford, Jr., D.V.M., Texas A&M University, 1980, personal communication.

⁵² Id.

⁵³ Beuthanasia-D Special (Euthanasia Solution), package insert, Schering-Plough Animal Health Corp, 2003.

⁵⁴ Id.

⁵⁵ Id.

⁵⁶ Id.

⁵⁷ Id.

⁵⁸ Id. Dr. Larence M. Lansford, Jr., D.V.M. ⁵⁹ Dr. Larence M. Lansford, Jr., D.V.M.

⁶⁰ Schering-Plough Animal Health Corp, 2003.

⁶¹ Id.

⁶² id.

⁶³ Id.

⁶⁴ Dr. Larence M. Lansford, Jr., D.V.M.

The process takes an average of three minutes from first injection to a pronouncement of death.⁶⁵ After injection, the animal will fall asleep and physically collapse within a few seconds.⁶⁶ This will progress into a deep surgical anesthetic state.⁶⁷

In the context of these guidelines, euthanasia is the act of inducing humane death in an animal. It is our responsibility as veterinarians and human beings to ensure that if an animal's life is to be taken, it is done with the highest degree of respect, and with an emphasis on making the death as painless and distress free as possible. Euthanasia techniques should result in rapid loss of consciousness followed by cardiac or heart attack.

This is a key difference from the process of lethal injection. The distinction comes in the anesthetic drug being used: pentobarbital-sodium (used in animal euthanasia) is a longdurational anesthetic that if given alone in proper doses could be followed by a surgical procedure.- There can be no pain or conscious sensation on the part of the animal.⁶⁸ This is in direct contrast to Sodium Thiopental (used in lethal injection) which is a short-durational anesthetic. The phenytoin-sodium only affects the animal after it is in an anesthetic state brought on by the pentobarbital-sodium.⁶⁹ After the animal is asleep, "breathing stops due to depression of the medulary respiratory center [and] encethalographic activity becomes isoelectric, indicating cerebral death. ."⁷⁰ Finally, the heart stops beating.⁷¹ At the time of death, there is no sensation from the medulla in the brain to restart breathing or heart beating because of brain death before these effects.⁷² There are several other distinctions between this procedure and the one currently being used for lethal injection. One is the cost of the drugs. A cost to the animal owner for such an injection is around \$40.00.⁷³ If an extra tranquilizer is needed, there is an additional charge of around \$35.00. A second distinction is the dosage itself. Where lethal injection is not calculated individually for each inmate, the same amount is used for each execution. Veterinary euthanasia is individually calculated before each procedure. Each milliliter of the total solution contains 390 milligrams of pentobarbital-sodium and 50 milligrams of phenytoin-sodium.⁷⁴ The dose ratio is then calculated at one milliliter of solution for each ten pounds of body weight, ensuring that the drug will work in its intended order with the intended effects.⁷⁵

As medical doctors, including Dr. Heath, have pointed out and to which veterinarians will be called to testify, veterinarians have mostly stopped using the chemicals being used today in lethal injection for several reasons. The first is that a longer acting anesthetic is needed to ensure unconsciousness throughout the procedure. Also, the paralytic drugs risk conscious suffocation which while leading to death is unacceptable in both physical, and mental pain. These pain issues are compounded because the prisoner, being paralyzed, cannot show or speak of the pain the other drugs are causing, especially the burning sensation of Potassium Chloride as it travels through the veins.⁷⁶ However, because of the rules of evidence, medical doctors are not in a place to testify as to the uses of veterinary medicine or practice, much less with a "reasonable degree of veterinary medical probability," to which experts must base their opinions.

An Example of Veterinarian Testimony Already Being Used

One of the first cases in Texas to cite veterinary testimony was Hines v. Johnson.⁷⁷ Dr. Dennis Geiser, D.V.M. is quoted several times throughout the brief argument.⁷⁸ In regards to the sodium thiopental, he

⁶⁶ Schering-Plough Animal Health Corp, 2003.

⁶⁷ Id.

⁶⁸ Dr. Larence M. Lansford, Jr., D.V.M.

⁶⁹ Schering-Plough Animal Health Corp, 2003.

⁷⁰ Id.

⁷¹ Id.

⁷² Dr. Larence M. Lansford, Jr., D.V.M.

⁷³ Id. This does not take into account any office-call or disposal fees which might be incurred.

⁷⁴ Schering-Plough Animal Health Corp, 2003.

⁷⁵ Dr. Larence M. Lansford, Jr., D.V.M.

⁷⁶ Infra at II.

⁷⁶ Infra at II.

⁷⁷ Hines, et al. v. Johnson, et al., Plaintiff-Appellants' Brief and Request for Preliminary Injunction (5th Cir. Houston 2003), Pg 10.

⁷⁸ Dr. Geiser is the chairman of the Department of Large Animal Clinical Sciences at the College of Veterinary Medicine at the University of Tennessee.

testifies that the drug does not meet the AVMA standards of being "potent, long acting, stable in solution, and inexpensive."⁷⁹ He takes the position that sodium pentobarbital better fulfills the standards as outlined than sodium thiopental does.⁸⁰ Along AVMA standards, Geiser also emphasizes the importance of dosage and effect on the subject. Dosage should depend not only on the size of the subject, but also the subject's physical condition.⁸¹ Compounded on this is that the drug needs to be administered correctly.⁸² Geiser further testified regarding pancuronium bromide. He stated that that use of this drug is solely to paralyze the skeletal muscles, which includes the diaphragm. The drug, however, has no effect on consciousness or the physical sensory of pain.⁸³ He was quoted as saying that the risk taken here is that if the anesthetic drug was to not work or wear off, the result is "like being tied to a tree, having darts thrown at you, and feeling the pain without any ability to respond."⁸⁴

An Analysis of the Arguments

The Argument that it is Cruel and Unusual

The basic premise here is simple: the state is using medicine on humans that would not pass the standards to be used on an animal. Not only is this a catchy argument, it is a valid point. There is not a drug which is licensed for use to euthanize a human. Meanwhile, veterinary medicine does have such "licensed" use. More testimonial emphasis needs to be placed with those who have the most practical experience with the subject matter. The calling of veterinarians as experts in the field of euthanasia is the strongest form of evidence possible.

A caveat aimed at just overturning the current cocktail was argued in a brief for Hines, et al. v. Johnson, et al.⁸⁵ Here, the criminal defendants argued to the Fifth Circuit, Houston Division, that even if "the Plaintiffs [the inmates] prevailed, Texas would have still been free to execute the Plaintiffs by lethal injection."⁸⁶ It continued that the only change to procedure would be that ". . . the State of Texas would have been required to employ a more humane chemical mixture that would eliminate the unnecessary infliction of pain and, perhaps, meet the American Veterinary Medical Association's ("AVMA") standards for euthanizing animals."⁸⁷ The cry is simply that the standards should be brought up to those required by the licensing process to be used on a pet.

The negative side of this argument is that veterinarians could also be called to rebut testimony of it being "cruel and unusual." While an argument cannot be made that the drugs are licensed, one can testify that the cocktail currently being used, if used in a certain manner, would result in no pain to the individual. A rebuttal to this argument is that because the drugs are not so licensed, and the chance for such physical and mental pain exists, the continued use amounts to a type of infliction of punishment.

Another possible drawback for making such an argument is that the AVMA has expressed that it does not wish to become involved in this debate⁸⁸

In policy statements they specifically express that:

Caution - The AVMA Guidelines on Euthanasia (formerly the 2000 Report of the AVMA Panel on Euthanasia) have been widely misinterpreted.

⁷⁹ Hines, et al. v. Johnson, et al., Plaintiff-Appellants' Brief and Request for Preliminary Injunction (5th Cir. Houston 2003), Pg 10.

⁸⁰ Id.

⁸¹ Id. at 11.

⁸² See *Infra* FN 26 and adjoining text for Veterinary standard. See also Abu-Ali Abdur' Rahaman v. Bell, 226 F.3d 696 (6th Cir. 2000, affidavit of Dr. Dennis Geiser).

⁸³ Hines, et al. v. Johnson, et al., Plaintiff-Appellants' Brief and Request for Preliminary Injunction (5th Cir. Houston 2003) at 13.

⁸⁴ Id.

⁸⁵ Hines, et al. v. Johnson, et al., Plaintiff-Appellants' Brief and Request for Preliminary Injunction (5th Cir. Houston 2003).

⁸⁶ Id. at 2.

⁸⁷ Id.

⁸⁸ AVMA available at <http://www.avma.org/issues/policy/default.asp>

Please note the following:

- * The guidelines are in no way intended to be used for human lethal injection.
- * The application of a barbiturate, paralyzing agent, and potassium chloride delivered in separate syringes or stages [the common method used for human lethal injection] is not cited in the report.
- * The report never mentions pancuronium bromide or Pavulon, the paralyzing agent used in human lethal injection.⁸⁹

A Look Ahead: Baze v. Rees

In October, 2007, the United States Supreme Court granted cert on *Ralph Baze, et al. v. John D. Rees, et al.* out of Kentucky.⁹¹ Many executions, including some in Texas were immediately stayed for the outcome.

April 16, 2008, the Court ruled in a 7 – 2 vote that Kentucky's lethal injection procedure is legal; other states' lethal injection procedures and histories were not adjudicated.⁹²

The Petitioner's Brief

The Petitioners argued that four main questions arise from the Kentucky Supreme Court's disposition of the case.⁹³

First, "Does the Eighth Amendment to the United States Constitution prohibit means for carrying out a method of execution that create an unnecessary risk of pain and suffering as opposed to only a substantial risk of the wanton infliction of pain?"⁹⁴ On the appeals level, the petitioner had argued that the appropriate test would be "unnecessary risk" of pain and suffering.⁹⁵ The trial court based its denial of relief on the legal standard that the chemicals must inflict unnecessary physical pain.⁹⁶ The Kentucky Supreme Court then decided that the appropriate legal standard was "whether the procedure for execution creates a substantial risk of wanton and unnecessary infliction of pain, torture, or lingering death."⁹⁷ The petitioners argue that there is not yet an advised standard causing lower courts to make dispositive rulings using differing standards, and in those rulings, lower courts spend effort and time deciding which standard to apply.⁹⁸ In praying for certiorari, the petitioners claim that the different standards being applied now are distinct enough to result in the difference of being executed in violation of the Eighth Amendment or not.⁹⁹ The brief points out that the United States Supreme Court has not addressed the constitutionality of a method being used for execution of criminals since 1878.¹⁰⁰

Second, "Do the means for carrying out an execution cause an unnecessary risk of pain and suffering in violation of the Eighth Amendment upon a showing that readily available alternatives that pose less risk of pain and suffering could be used?"¹⁰¹ Arguments in lower appellate court proceedings submitted that the answer was "yes". At the trial court level, evidence was introduced to show that each chemical used had at least one alternative.¹⁰² Based on the reasons and standards above, the lower courts ruled that such

⁸⁹ AVMA Guidelines on Euthanasia, available at <http://www.avma.org/issues/animalwelfare/euthanasia.pdf>

⁹⁰ Moritz, John, Veterinarians Find-Selves in Death Penalty Debate, Star-Telegram, available at http://www.star-teleuam.com/state_news/story/259745.htm

⁹¹ *Baze v. Rees*, Brief for Petitioner (2007).

⁹² No. 07-5439, 553 US ____ 2008 (April 16, 2008)

⁹³ *Id.*

⁹⁴ *Id.* at ii.

⁹⁵ *Id.* at 6.

⁹⁶ *Id.*

⁹⁷ *Id.* at 7.

⁹⁸ *Id.* at 8.

⁹⁹ *Id.* at 18.

¹⁰⁰ *Id.* at 8, 12.

¹⁰¹ *Id.* at ii.

¹⁰² *Id.* at 6.

evidence did not establish a violation of the Eighth Amendment.¹⁰³

Third, "Does the continued use of sodium thiopental, procuronium bromide, and potassium chloride, individually or together, violate the cruel and unusual punishment clause of the Eighth Amendment because lethal injections can be carried out by using other chemicals that pose less risk of pain and suffering?"¹⁰⁴ This question is a direct attack on the specific cocktail, claiming the unconstitutional nature of the cocktail under either standard the Supreme Court may wish to rule is the appropriate rule. Though this case is still in the briefing stage, this is where veterinarian testimony would be most effective, comparing the two procedures and giving the veterinary process as a humane and painless alternative.

The final question presented was "When it is known that the effects of the chemicals could be reversed if the proper actions are taken, does substantive due process require a state to be prepared to maintain life in case a stay of execution is granted after the lethal chemicals are injected?"¹⁰⁵ In the lower court proceedings, the petitioners argued that the Due Process clause does require affirmative action to maintain life once a stay is granted after either the first or second drug is administered.¹⁰⁶ The trial court denied relief stating that while the Kentucky method does recognize necessary steps for revival, it did not decide if such were being implemented.¹⁰⁷ The Kentucky Supreme Court noted the findings at the trial level but did not address the issue further. Petitioners claim that a stay being granted after only the first or second drug is administered but before the final one is a foreseeable event, and the prisons should be prepared to maintain the life of the inmate in such an event.¹⁰⁸

In summary, the petitioners argued that the Supreme Court has not set a standard to determine whether a method of execution violates the Eighth Amendment, and therefore lower courts are split on how to decide. Second, under any standard the court may provide, the petitioners argued that the current 3-drug cocktail is a violation of the Eighth.

Oral Argument

Oral argument was presented to the court on January 7, 2008.¹⁰⁹ The advocates for all three parties were given a total time of one hour in front of the Supreme Court.¹¹⁰

Donald Verrilli, Jr. argued for the petitioners; Roy Englert, Jr. argued on the behalf of the respondents; and Gregory Garre, who is the Deputy Solicitor General of the Department of Justice, argued as amicus curiae for the United States supporting the Respondents.)¹¹¹

Mr. Verrilli sought change on several grounds, the cocktail and the procedure. While discussing a need for trained personnel to be on-hand to possibly make the procedure constitutional, Justice Scalia was the first to mention that Medical Doctors could not be used for such procedures because of the Code of Ethics of the American Medical Association.¹¹² Justice Breyer was the first to mention animals. He, not accepting the argument, pressed to hear more about how doctors should handle euthanasia, rather than ". . . look at what [veterinarians] do with animals."¹¹³

¹⁰³ Id. at 6-7. See also *infra*, Parts 11 and 111.

¹⁰⁴ Id. at iii.

¹⁰⁵ Id. at iii.

¹⁰⁶ Id. at 7.

¹⁰⁷ Id.

¹⁰⁸ Id. at 23

¹⁰⁹ United States Supreme Court Docket, 2007-2008 Term. Summary of background information available from Medill Journalism at Northwestern University at <http://docket.medill.northwestern.edu/archives/004624.php>; See also Supreme Court Preview for pdf files of all of the briefs filed for this case, available at http://www.abanet.org/publiced/preview/briefs/J*anO8.shtml#baze.

¹¹⁰ See Transcript of Oral Argument, Alderson Reporting Company, available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/07-5439.pdf

¹¹¹ Id. at 1.

¹¹² Id. at 6.

¹¹³ Id. at 9.

The argument was accepted more readily by Justices Stevens and Souter. "They use a single drug protocol for animals because it's more humane than the three drug protocol."¹¹⁴ When Mr. Englert tried to explain the situation as solely veterinary procedure, Chief Justice Roberts asked if Kentucky Law had done anything for the euthanasia of animals besides adopt the AVMA Guidelines of Euthanasia. These considerations were all that Mr. Englert could attribute to such a law being passed. Justice Souter expounded on the need for veterinary testimony: ". . . [W]hat evidence [do] we have here for a finding somewhere that we can take into consideration that there is a comparative benefit under the, under the veterinary practice as distinct from the [current lethal injection] protocol which has been devised. . ."¹¹⁵ Building on the veterinary background, Mr. Garre argued that ". . . no one has ever tried the one drug alternative [on a human]."¹¹⁶

In his rebuttal, Mr. Verrilli clung to the veterinary argument. He asked why the State of Kentucky allowed a procedure to be used on an inmate which would not be ". . . tolerated with animals."¹¹⁷ He stressed the training that veterinarians must have before performing euthanasia and the lack of like training within the prison system. "[I]t's the danger of the anesthesia going wrong there can be a torturous pain inflicted that has led veterinarians to say you have to have somebody in the process who is trained in monitoring anesthetic death. . ."¹¹⁸

Supreme Court Decision

Chief Justice Roberts wrote the majority opinion for the Court and was joined by Justices Alito and Kennedy; Justices Stevens (joined by J. Breyer) wrote a concurring opinion; Justices Thomas and Scalia each wrote concurring opinions; Justices Ginsburg (joined by J. Souter) wrote a dissenting opinion. The result of Court's opinion is that the plaintiffs had failed to show that the way the drugs were administered could be unconstitutionally cruel nor that a safe, painless alternative procedure is available. Chief Justice Roberts noted the Kentucky officials have at least 10 practice runs a year and have safeguards to ensure that the second (paralyzing) drug is effective. Kentucky has held only one actual execution using the challenged three (3) drug procedure. Thus, further challenges are likely for states such as Missouri and California where problems have been documented.

Conclusion

After years of silence on the subject, the Supreme Court had the potential to drastically effect the use of lethal injection as a form of punishment in this country. Under the rules of evidence, lawyers on both sides are searching for the most solid legal arguments they can make, which have led them to veterinarians. The use of veterinary testimony was clearly used by several sides and considered by the Justices. It could play a vital role in deciding future cases. Veterinarians are opening up the viable arguments to be made, even though officially the AVMA will not take a position.

The lynchpin, that the current cocktail being used (Sodium Thiopental, Pancuronium Bromide, and Potassium Chloride) would not pass the veterinary standards for euthanasia of an animal, will most likely win the day. The Supreme Court has been so protective of human rights that treating a human as less than a pet will not go unanswered. There is the chance this current method and cocktail will be declared unconstitutional for being "cruel and unusual" under the Eighth Amendment. There have been many advances in medical technology since the early 1980s, and the veterinary method provides an alternative which provides a much lesser risk of unnecessary pain and suffering. Also, the AVMA's long standing research and continued development of a humane, licensed procedure will provide much insight into what is being overlooked in the justice system regarding the administration of such drugs. Under precedent, however, the use of execution and capital punishment in this country has a long and standing tradition. Because a majority of states, as well as the federal government, sanction such a punishment, the Court will probably not overturn its use in total. If such a decision is handed down, because that is the only issue before the Court, the opinion will most likely stop there and not outline what would be an acceptable method of capital punishment, leaving the states to guess and another prisoner to challenge until a more definitive answer is handed down.

¹¹⁴ Id. at 34 (Justice Stevens).

¹¹⁵ Id. at 36.

¹¹⁶ Id. at 50.

¹¹⁷ Id. at 54-55.

¹¹⁸ Id. at 55.

A famous lawyer once said that society and its moral progress can be measured by the way it treats its animals.¹¹⁹ This statement has more significance now in history than ever before. This is the first time that litigants have claimed a Constitutional Amendment violation by asking to be treated as well as animals. Such an argument will not go unnoticed. Even though the Supreme Court found Kentucky's procedure legal, the argument will only amass supporters for future state challenges before the Court.

¹¹⁹ Attributed to Mahatma Gandhi.