

## Ten Myths About the Needle

Lethal injection isn't 'obviously unsound,' and other spurious claims.

BY ROY T. ENGLERT JR.

**N**owadays, with rare exception, executions in the United States are carried out by lethal injection using three drugs. Sodium thiopental anesthetizes the inmate, pancuronium bromide paralyzes his muscles, and potassium chloride stops his heart.

In a *Legal Times* commentary last week ("Please Ignore the Pain," Jan. 7, Page 36), Professor Alison J. Nathan asks rhetorically, "How can this three-drug protocol be so obviously unsound when all but one death penalty state has adopted it over the last 30 years?" On Jan. 7, the Supreme Court heard the case of *Baze v. Rees*, which involves a similar argument: that lethal injection as practiced is unconstitutional because of problems with the three-drug protocol.

Both the question and the argument are based on a false premise: that the three-drug protocol is obviously unsound. No one should be misled by this premise or a number of subsidiary factual assertions commonly raised by critics of lethal injection. Here are 10 of them.

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### Myth 1: The states have never studied the three-drug protocol or obtained medical advice.

In fact, when the three-drug protocol was being devised in 1977 in Oklahoma, the first state to provide for lethal injection, state legislators consulted with Dr. Stanley Deutsch, chairman of the anesthesiology department of Oklahoma University Medical School.

After other states also adopted lethal injection and hundreds of executions using the three-drug protocol had been carried out, commissions in Florida and Tennessee conducted extensive studies. Among other things, these commissions sought advice from anesthesiologists and analyzed what had gone wrong in a few executions. In both states, responsible officials then decided to retain the three-drug protocol.

### Myth 2: The three-drug protocol has produced many botched executions.

This requires a very generous understanding of the word "many." On Jan. 5, while preparing to argue for Kentucky state officials in *Baze v. Rees*, I visited the Web site of the Death Penalty Information Center, an organization that opposes capital punishment. That site listed 28 examples of "botched" executions using lethal injection, out of more than 900 conducted in the United States between 1982 and 2007. That suggests that the "botching" rate may be as low as 3 percent.

Even a 97 percent success rate might be disturbingly low (as a policy matter, though not necessarily a constitutional matter) if all these "botched" executions resulted in excruciating pain or if there were an obviously better alternative. Death penalty opponents advance both these propositions, but they, too, are wrong.

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### Myth 3: Every botched execution is one in which the inmate may have felt excruciating pain.

Of the 28 "botched" lethal injections on the Death Penalty Information Center's list, the majority (15) involved only this stumble: that for a period of time, execution personnel could not find a vein into which to inject the lethal chemicals. (Many death row inmates are former drug abusers whose veins are in poor condition.) The Web site's descriptions do not suggest in any of those instances that the first drug—the anesthetic intended to prevent all pain and certain to do so unless misdelivered—was not, in fact, successfully delivered after a vein was found.

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### Myth 4: An execution in which the inmate is seen to move after administration of the anesthetic is a botched execution and probably involved excruciating pain.

In five more examples on the Death Penalty Information Center list, the only explanation given as to why the execution is described as “botched” is that the inmate was seen to convulse or otherwise move during the procedure. In one instance, a lay witness with no apparent medical expertise concluded that the death was “agonizing” simply because the inmate convulsed.

But death penalty opponents can’t have it both ways. A major argument being made in *Baze v. Rees* is that the second drug—which prevents involuntary muscle movements—is unnecessary because lay witnesses can be educated *not* to misinterpret movement as necessarily indicating pain.

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**Myth 5: An execution in which the anesthetic does not take effect right away must involve excruciating pain.**

Some executions by lethal injection have involved more severe problems. A notorious example is the 2006 execution of Joseph Clark, during which the inmate verbally informed Ohio’s execution personnel that the anesthetic was not working. Such incidents are regrettable, and the states should do everything they can to prevent them.

Nevertheless, when execution personnel know that the first drug is not working, they can delay the second and third drugs (the ones that could cause pain) until they have made a second, successful attempt to deliver the anesthetic. In Kentucky, the protocol provides that the execution may not proceed until the warden determines that the inmate has become unconscious within 60 seconds of delivery of the anesthetic. If that does not happen, a second full dose of the anesthetic must be delivered. Even opponents of lethal injection concede that the anesthetic, when successfully delivered in the amounts used in executions, prevents all pain.

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**Myth 6: Some botched executions in which we know the inmate suffered excruciating pain could have been prevented by a better protocol.**

Seven executions listed on the Death Penalty Information Center site involved problems more severe than delay in finding a vein, movement by the inmate, or an initial failed attempt to deliver the anesthetic. All apparently involved human error. At least some, including the notorious Angel Diaz execution in Florida in 2006, involved clear violation of a state’s protocol. And *none* necessarily involved pain (although the possibility cannot be entirely ruled out).

Moreover, those “botched” executions constituted fewer than 1 percent of all lethal injections carried out in the United States. In few, if any, human endeavors is it possible to ensure a greater than 99 percent rate of success.

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**Myth 7: Sound scientific evidence proves that some inmates have felt pain during lethal injection.**

A research note published in 2005 in the British medical journal *The Lancet* claimed that the levels of certain chemicals found at autopsy in the bodies of executed inmates proved that they had felt pain. As Justice Stephen Breyer noted during the oral argument in *Baze v. Rees*, that article has been scientifically discredited. The *Baze* plaintiffs and their supporting amici didn’t even rely on the *Lancet* article in their briefs.

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**Myth 8: Experience with surgery proves that some inmates will suffer excruciating pain during lethal injection.**

When given a surgical dose of anesthesia—one-tenth the dose used by Kentucky in executions—an estimated 0.2 percent to 0.5 percent of patients will feel excruciating pain, which observers may not notice if the patient has also received a paralytic drug. Not one known case of such “awareness under anesthesia” exists, however, at the three-gram dosage level used in Kentucky executions. Even the expert witness for the inmates who brought *Baze v. Rees* conceded that this phenomenon simply does not occur if the three-gram dose is successfully delivered.

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**Myth 9: The states don’t even try to prevent human error.**

The Florida and Tennessee commissions both recommended improvements to the states’ protocols to reduce the risk of human error. In Kentucky, officials met with counsel for death row inmates in the summer of 2004, before *Baze v. Rees* was filed, and asked for their recommendations on how to improve the state’s procedures. The lawyers refused to make any recommendations. Nonetheless, since then Kentucky has made numerous improvements to its protocol to reduce the risk of human error.

Among other things, the Kentucky protocol that Professor Nathan asserts “allowed a poorly trained executioner to insert catheters right into an inmate’s neck” has been changed. The protocol originally did provide for the possibility of inserting a catheter into a vein in the neck if no other appropriate vein could be found after numerous tries. But it never actually happened. A trial judge ordered Kentucky to remove that option from its protocol, and the state honored the order and did not appeal.

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**Myth 10: There’s clearly a better way.**

The proposed one-drug protocol—a massive overdose of an anesthetic—has never been used to carry out the death penalty on a human being in the United States (though some animals have been euthanized in that manner). As Professor Nathan’s own amicus brief in *Baze v. Rees* points out, untested execution methods that were adopted in the belief that they would be more humane have often proved otherwise in practice.

Even in theory, it’s quite debatable whether a one-drug

protocol is preferable to a three-drug protocol where there are adequate safeguards against human error. If a paralytic drug is not used to prevent involuntary convulsions, the inmate may suffer a less dignified death. The fact that the prospect of such a death is upsetting to the dying person himself is presumably why pancuronium bromide is used in assisted suicides in the Netherlands, where euthanasia is lawful. An undignified death may also be upsetting to onlookers. In Kentucky, witnesses to an execution include the victims' families, the inmates' families, and the media. Anti-death penalty advocates themselves, as noted, have decried executions in which the inmate exhibited any muscle movements.

It is perhaps *arguable* that some states should try the one-drug protocol anyway. It is perhaps *arguable* that any risk

of pain, however minuscule, should outweigh the possible indignity of convulsions. Weighing these competing interests, however, is not a task for the courts. It is a task for the policy-making branches of government.

The Eighth Amendment prohibits only the infliction of "cruel and unusual punishments." Given the lengths to which states have gone to make lethal injection painless, the Constitution gives the courts no license to supplant the near-unanimous policy judgment of the states.

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