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## Death of the Challenge to Lethal Injection - Missouri's Protocol Deemed Constitutional Yet Again

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## NOTE

# Death of the Challenge to Lethal Injection? Missouri's Protocol Deemed Constitutional Yet Again

*Clemons v. Crawford*, 585 F.3d 1119 (8th Cir. 2009).

TANYA M. MAERZ\*

### I. INTRODUCTION

Lethal injection is currently the predominant form of execution nationwide.<sup>1</sup> Most proponents of this method cite the convenience and the humanity of this procedure over past methods of execution.<sup>2</sup> However, lethal injections are fraught with problems such as the specificity and safety of the written procedures themselves, implementation of such procedures, and whether lethal injection and executions in general are constitutional. Most often, prisoners file constitutional challenges to lethal injections under the Eighth Amendment, which prevents imposing cruel and unusual punishment on an American citizen.<sup>3</sup>

One of the more recent cases in Missouri cited such a challenge to the implementation of Missouri's lethal injection guidelines.<sup>4</sup> Missouri revised its guidelines in 2006, under a court order to include more specificity and to solidify the process in writing to guarantee uniformity in application of the

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1. John D. Bessler, *Revisiting Beccaria's Vision: The Enlightenment, America's Death Penalty, and the Abolition Movement*, 4 NW. J.L. & SOC. POL'Y 195, 295 (2009).

2. Jonathan S. Abernethy, *The Methodology of Death: Reexamining the Deterrence Rationale*, 27 COLUM. HUM. RTS. L. REV. 379, 408 (1996); Megan Greer, Recent Development, *Legal Injection: The Supreme Court Enters the Lethal Injection Debate: Hill v. McDonough*, 126 S. Ct. 2096 (2006), 30 HARV. J.L. & PUB. POL'Y 767, 772 (2007).

3. U.S. CONST. amend. VIII.

4. *Clemons v. Crawford*, 585 F.3d 1119, 1122 (8th Cir. 2009).

protocol.<sup>5</sup> Despite the fact that the U.S. Court of Appeals for the Eighth Circuit ultimately upheld the constitutionality of Missouri's new procedure,<sup>6</sup> prisoners continue to challenge its legality in hopes of someday bringing a fruitful claim. Aside from the constitutional questions, lethal injection raises a host of other concerns, most notably the ethical dilemma of including medical personnel on the execution team. The interpretation of these statutes and society's perception of the circumstances surrounding the death penalty and lethal injections remain to be seen as courts continue to examine these issues.

## II. FACTS AND HOLDING

Eight Missouri prisoners filed suit against the State of Missouri through its prison officials, alleging Missouri's lethal injection protocol was unconstitutional.<sup>7</sup> The plaintiffs were condemned to await execution on death row.<sup>8</sup> The prisoners brought a claim under 42 U.S.C. § 1983,<sup>9</sup> claiming that the manner in which Missouri conducts lethal injection executions violates the Eighth Amendment.<sup>10</sup> Specifically, the prisoners alleged that previous lethal injection proceedings demonstrated that Missouri failed to take the requisite care and consideration to refrain from imposing cruel and unusual punishment on prisoners.<sup>11</sup>

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5. Taylor v. Crawford, 487 F.3d 1072, 1077-78 (8th Cir. 2007).

6. *Id.* at 1083; *Clemons*, 585 F.3d at 1128-29.

7. *Clemons*, 585 F.3d at 1122. The prisoners brought suit against the State of Missouri, but, more specifically, their action was directed at the officers of the prison, including Larry Crawford, James Purkett, and Terry Moore. *Id.*

8. *Id.* The opinion actually indicates that eleven plaintiffs brought this action against the State of Missouri through its prison officials. *Id.* at 1122. These eleven listed plaintiffs consisted of eight plaintiffs, Reginald Clemons, Richard D. Clay, Jeffrey R. Ferguson, Roderick Nunley, Michael Anthony Taylor, Martin Link, Mark Christeson, and William L. Rousan, who originally filed this action. *Id.* at 1119. The other three plaintiffs who moved to intervene in the action subsequent to its filing included John Charles Middleton, Russell Earl Bucklew, and Earl Ringo, Jr. *Id.* When the court, and this Note, refers to the "prisoners," this term includes the eight original plaintiffs. The three prisoners who motioned to intervene were never officially declared plaintiffs in this action, because their motion to intervene was denied by the district court. *Id.* at 1122, 1129.

9. 42 U.S.C. § 1983 (2006). Section 1983 allows a private citizen to bring suit against government officials who, acting in their official capacity, violate the constitutional rights of that private citizen. *Id.*

10. *Clemons*, 585 F.3d at 1122; see U.S. CONST. amend. VIII.

11. *Clemons*, 585 F.3d at 1122. The previous lethal injections took place years prior to this litigation and involved an unwritten execution procedure, a procedure that the court later required Missouri to amend. *Id.* at 1122-23. Since that time, Missouri initiated a written execution procedure, the constitutionality of which is the subject of this litigation. *Id.* at 1123.

Since 2006, Missouri has followed a written execution protocol, detailing the parameters of each lethal injection execution.<sup>12</sup> Prior to this time, Missouri followed an unwritten execution protocol that required medical professionals to administer three drugs, in a specific order, to complete the lethal procedure.<sup>13</sup> These drugs were administered into a vein on the patient's arm through an intravenous line (IV).<sup>14</sup> The procedure began with five grams of sodium pentothal, which causes the prisoner to lose consciousness.<sup>15</sup> Then, sixty milligrams of pancuronium bromide were injected, which paralyzes the muscles in the prisoner's body.<sup>16</sup> Lastly, a doctor injected 240 milliequivalent of potassium chloride into the prisoner's IV tube, thereby stopping his or her heart and resulting in the death of the prisoner.<sup>17</sup> When Missouri was ordered to outline its procedures in written form, the procedure remained substantially the same, including the amounts of each drug administered to the patient and the order in which the drugs were injected.<sup>18</sup>

In the complaint, the prisoners alleged that Missouri had "a 'well-documented history of employing incompetent and unqualified personnel to oversee [the] crucial element[s] of executions by lethal injection.'"<sup>19</sup> This statement referred to previous executions in which Missouri employed a medical professional who admitted that he did not keep accurate logs of the lethal injections he administered.<sup>20</sup> This medical professional was named "John Doe I" or "Dr. Doe" for purposes of this litigation.<sup>21</sup> Dr. Doe was a licensed and experienced medical professional, yet the prisoners claimed he did not conform to the high standards of the medical profession.<sup>22</sup> In prior litigation involving a similar issue, Dr. Doe admitted that he believed he had the authority, independent of that of the State of Missouri, to change the doses of each chemical administered to the prisoner.<sup>23</sup> He said that he chose the dosage of each chemical based upon "his medical judgment" and the prisoner's appearance during the execution.<sup>24</sup> Dr. Doe claimed he monitored the prison-

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12. *Id.* at 1123-24.

13. *Id.* at 1122.

14. *Id.*

15. *Id.* The drug, sodium pentothal, is sometimes referred to as thiopental. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at 1123-24. The major differences between the two procedures are the specificity and detail with which the written protocol describes the procedure as well as the qualifications of the medical professional administering the drugs. *Id.*

19. *Id.* at 1122 (alteration in original) (citing the prisoner's complaint).

20. *Id.* at 1123.

21. *Id.*

22. *Id.*

23. *Id.* Dr. Doe admitted that he not only changed the dosage of the drugs but he also failed to notify any of the prison officials of his actions, including the director who oversaw the proceedings. *Id.*

24. *Id.*

er's progress throughout the execution "by observing the prisoner's facial expression through a window which was partially obstructed by blinds."<sup>25</sup> In addition to these problems, the prisoners in the instant case primarily accosted Dr. Doe's "medical licensure problems."<sup>26</sup> They also complained of the inadequate assistance of the nurse (Nurse Doe), claiming she was unqualified because she was unable to tell that Dr. Doe routinely altered the dosages of each chemical.<sup>27</sup>

To remedy these problems, the court demanded that Missouri implement a new policy that eventually resulted in its current written protocol.<sup>28</sup> Apposite cases have found Missouri's current execution guidelines consistent with constitutional requirements.<sup>29</sup> The prisoners did not challenge these cases, nor did they challenge the constitutionality of the outlined procedures themselves.<sup>30</sup> Instead, the prisoners claimed that Missouri's history of employing unqualified and inept medical "professionals" meant that the State would "continue to employ such incompetent and unfit personnel for future executions."<sup>31</sup> The prisoners argued that there remained an unjust and substantial risk that prison officials and medical personnel would not follow the constitutional, written protocol.<sup>32</sup> They claimed that failure to follow the written protocol could result "in the condemned prisoners being insufficiently anesthetized and suffering extreme pain before their deaths."<sup>33</sup> Due to the uncertainty based on previous actions, the prisoners contended that Missouri's lethal injection protocol violated the Eighth Amendment.<sup>34</sup>

Missouri moved for a judgment on the pleadings, claiming that the protocol was constitutional and that any speculation as to implementation was insufficient to sustain the prisoners' claim.<sup>35</sup> Initially, the district court denied Missouri's motion, but it later revisited the motion *sua sponte* and granted it.<sup>36</sup> The plaintiffs appealed this ruling to the Eighth Circuit, which

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25. *Id.* (referring to the court's words in *Taylor v. Crawford*, 487 F.3d 1072, 1075 (8th Cir. 2007)). *Taylor* directly preceded *Clemons* and addressed similar issues. For more on *Taylor*, see *infra* Part III.B.

26. *Clemons*, 585 F.3d at 1123. These problems included the fact that Dr. Doe did not always accurately measure chemicals, arbitrarily changed the dosage at times, and had dyslexia, which the prisoners cited as cause for concern. *Id.*; see also *Taylor*, 487 F.3d at 1075.

27. *Clemons*, 585 F.3d at 1123.

28. *Id.*

29. *Id.*; see also *Taylor*, 487 F.3d at 1085.

30. *Clemons*, 585 F.3d at 1122.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*; see U.S. CONST. amend. VIII.

35. *Clemons*, 585 F.3d at 1122.

36. *Id.*

affirmed the district court's decision.<sup>37</sup> After the original eight petitioners filed suit in the district court, three other condemned prisoners sought to intervene as plaintiffs in the action.<sup>38</sup> The district court denied the motions of these three potential plaintiffs, prompting an appeal of the ruling.<sup>39</sup> The Eighth Circuit rejected the interveners' contentions on appeal and affirmed the district court's denial of their motions.<sup>40</sup> The Eighth Circuit also affirmed the district court's ruling that Missouri's written protocol is a constitutional execution procedure and that any contention that the procedure *might* be implemented incorrectly is too speculative to maintain a constitutional challenge.<sup>41</sup>

### III. LEGAL BACKGROUND

#### A. *The United States*

In the late 1960s, the United States experienced a moratorium on capital punishment as a result of the Supreme Court's decision in *Furman v. Georgia*.<sup>42</sup> *Furman* was a review of three cases, one involving a conviction of murder and the other two examining convictions of rape.<sup>43</sup> All three defendants received death sentences and appealed, citing violations of the Eighth<sup>44</sup> and Fourteenth<sup>45</sup> Amendments to the Constitution.<sup>46</sup> Upon review, a five-to-four decision of the Supreme Court found the states' current use of the death

37. *Id.* at 1122, 1129.

38. *Id.* at 1122.

39. *Id.*

40. *Id.* at 1129.

41. *Id.* at 1122, 1128-29.

42. 408 U.S. 238 (1972) (per curiam).

43. *Id.* at 239. The cases were *Furman v. State*, 167 S.E.2d 628 (Ga. 1969) (conviction of murder), *rev'd sub nom. Furman*, 408 U.S. 238, *Jackson v. State*, 171 S.E.2d 501 (Ga. 1969) (conviction of rape), *rev'd sub nom. Furman*, 408 U.S. 238, and *Branch v. State*, 447 S.W.2d 932 (Tex. Crim. App. 1969) (conviction of rape), *rev'd sub nom. Furman*, 408 U.S. 238.

44. The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII (emphasis added).

45. The relevant portion of the Fourteenth Amendment states:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

46. *Furman*, 408 U.S. at 239.

penalty unconstitutional.<sup>47</sup> It ultimately ruled that the state statutes prescribing executions violated the Eighth Amendment's ban on cruel and unusual punishment.<sup>48</sup> This decision cast doubt on the constitutionality of the way all states implemented the death penalty.<sup>49</sup>

After the Supreme Court's decision, it was unclear whether creating statutes with more specificity would remedy the problem or if executions as a form of punishment were *de facto* unconstitutional.<sup>50</sup> Over the next few years, states tried to amend their statutes to comport with the requirements alluded to in *Furman*, while the Supreme Court attempted to elucidate acceptable procedures.<sup>51</sup> Statutes upheld as constitutional gave considerable discretion to juries, limited the categories of eligible defendants, and clearly defined the aggravating and mitigating factors.<sup>52</sup>

While states amended current death penalty statutes, legislators also became interested in new methods of execution. Originally, some states hanged prisoners sentenced to death.<sup>53</sup> When public sentiment expressed distaste for this method, many states invoked the electric chair, which offered a more "humane" way to die through a quick jolt of electricity.<sup>54</sup> However, frequent botched executions horrified prison officials, prisoners, and the public alike.<sup>55</sup> As such, some states shifted to employing the gas chamber as the preferred method; other states used a firing squad to execute prisoners.<sup>56</sup> Public acceptance of these procedures eventually waned, causing wardens and legislators

47. *Id.* at 240.

48. *Id.* at 239-40.

49. *Id.*

50. *See* *Gregg v. Georgia*, 428 U.S. 153, 168-69 (1976). The Supreme Court acknowledged the ambiguity created by the *Furman* decision, stating that four justices believed capital punishment was not *per se* unconstitutional, two justices believed the death penalty was unconstitutional, and three justices held the state statutes invalid but did not opine as to the ultimate fate of the death penalty. *Id.* at 169 & nn.13-15.

51. *Id.* at 162; *Proffitt v. Florida*, 428 U.S. 242, 247-48 (1976); *Roberts v. Louisiana*, 428 U.S. 325, 328 (1976); *Jurek v. Texas*, 428 U.S. 262, 269 (1976).

52. *Compare* *Gregg*, 428 U.S. at 193-95, and *Proffitt*, 428 U.S. at 250-51, and *Jurek*, 428 U.S. at 276-77, with *Roberts*, 428 U.S. at 334-36.

53. *See generally* Robert J. Sech, Note, *Hang 'Em High: A Proposal for Thoroughly Evaluating the Constitutionality of Execution Methods*, 30 VAL. U. L. REV. 381, 390-91 (1995).

54. RICHARD MORAN, EXECUTIONER'S CURRENT: THOMAS EDISON, GEORGE WESTINGHOUSE, AND THE INVENTION OF THE ELECTRIC CHAIR 69 (2002); *see also* Jason D. Hughes, Comment, *The Tri-Chemical Cocktail: Serene Brutality*, 72 ALB. L. REV. 527, 532-35 (2009).

55. RANDALL COYNE & LYN ENTZEROTH, CAPITAL PUNISHMENT AND THE JUDICIAL PROCESS 8-9 (1st ed. 1994).

56. Hughes, *supra* note 54, at 532-36; Death Penalty Information Center, Methods of Execution, <http://www.deathpenaltyinfo.org/methods-execution> (last visited Oct. 18, 2010) [hereinafter Death Penalty Information Center].

alike to look for a new direction.<sup>57</sup> In 1977, Dr. Stanley Deutsch refined the procedure known as the lethal injection.<sup>58</sup> Lethal injection is now the prescribed method of execution in the majority of states.<sup>59</sup>

### B. Missouri

Missouri originally enacted its capital punishment law in 1939.<sup>60</sup> Missouri amended its law in 1977<sup>61</sup> and again in 1988, when the legislature formally adopted procedures relatively similar to those still in place today.<sup>62</sup> The Missouri statute declares that “[t]he manner of inflicting the punishment of death shall be by the administration of lethal gas or by means of the administration of lethal injection.”<sup>63</sup> When the capital punishment statute was enacted, lethal injection was viewed as the most civilized form of capital punishment, especially compared to the seemingly barbaric methods of past centuries, such as hanging or firing squad.<sup>64</sup> However, prisoners quickly found apparent flaws with those procedures and sued to declare those methods cruel and unusual punishment.<sup>65</sup>

Missouri’s law authorizing lethal injection was challenged most notably in 2007.<sup>66</sup> In *Taylor v. Crawford*, a Missouri inmate challenged the lethal

57. Hughes, *supra* note 54, at 532-36.

58. COYNE & ENTZEROTH, *supra* note 55, at 10.

59. Death Penalty Information Center, *supra* note 56.

60. See MO. REV. STAT. § 546.720 (Supp. 2009) (originally enacted as MO. REV. STAT. § 4112 (1939)).

61. In 1977, Governor Joseph P. Teasdale signed a revised version of Missouri’s capital punishment law after confirming that it met the standards held constitutional by the Supreme Court in other decisions, including those referred to *supra*, notes 50-52. Missouri’s Death Row: History of Capital Punishment in Missouri, <http://websolutions.learfield.com/deathrow/gestalt/go.cfm?objectId=3A12D3FB-A0BD-4FEB-84E25902C29AC622> (last visited Oct. 18, 2010).

62. Compare H.R. 1340, 84th Gen. Assem., 2d Reg. Sess. (Mo. 1988), and H.R. 1348 § A, 84th Gen. Assem., 2d Reg. Sess. (Mo. 1988), with MO REV. STAT. §§ 546.680, .710, .730, .750 (2000). The statute prescribing the method of execution, section 546.720, was also repealed and reenacted in 1990 and amended in 2007. See MO. REV. STAT. § 546.720 (Supp. 2009).

63. MO. REV. STAT. § 546.720.1 (Supp. 2009).

64. See Deborah W. Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*, 76 *FORDHAM L. REV.* 49, 61-78 (2007).

65. See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 169 (1976); *Proffitt v. Florida*, 428 U.S. 242, 247 (1976); *Roberts v. Louisiana*, 428 U.S. 325, 331 (1976); *Jurek v. Texas*, 428 U.S. 262, 268 (1976).

66. See *Taylor v. Crawford*, 487 F.3d 1072, 1078 (8th Cir. 2007). Following a hearing including testimony from the Missouri Department of Corrections Director, Larry Crawford, the court found numerous shortcomings in the unwritten procedure followed by Missouri for many years. *Id.* at 1077-78. Some of the problems included the lack of consistency in administration of the protocol, total discretion put in the



injection proceeding as unconstitutional under the Eighth Amendment.<sup>67</sup> Taylor claimed that the procedure was unconstitutional because it presented a significant risk that he would “suffer the wanton infliction of pain” if the procedure failed.<sup>68</sup> Initially, the district court concluded that the procedure survived constitutional scrutiny; however, on remand from the appellate court’s affirmation of the decision, the district court allowed the parties to engage in additional discovery.<sup>69</sup> During this discovery, records revealed that the Department of Corrections lacked the necessary oversight of the medical professionals to ensure against any undue harm to prisoners.<sup>70</sup> After receiving expert testimony from doctors and scholars on capital punishment, the court concluded that the current procedure “present[ed] an unnecessary risk that an inmate [would] suffer unconstitutional pain during the lethal injection process.”<sup>71</sup> The court ordered the Department of Corrections to generate written guidelines and procedures that would uniformly apply to ensure that all executions were conducted constitutionally.<sup>72</sup> The district court then stayed all pending executions until the protocol passed judicial scrutiny.<sup>73</sup>

The Department of Corrections initially released its revised procedure in July 2006, but the procedure was rejected after Taylor alleged and the court decided it was still unconstitutionally vague.<sup>74</sup> The State appealed, claiming the procedure was specific enough to sustain constitutional muster.<sup>75</sup> After closely analyzing the written protocol, the Eighth Circuit concluded that Missouri’s written procedure did guarantee enough protections for prisoners.<sup>76</sup> Despite the Eighth Circuit’s ruling, inmates, such as Clemons, continually challenge the lethal injection proceedings.

The focus of suits challenging the lethal injection procedures has been (1) the substantial risk of unnecessary pain and suffering caused by the se-

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hands of the doctors and nurses, and the lack of departmental oversight during the procedure. *Id.*

67. *Id.* at 1074.

68. *Id.* Taylor cited potential harms stemming from an improper or incomplete administration of the three successive chemicals that, in theory, prevent undue pain or suffering. *Id.* He claimed that allowing nonmedical personnel to prepare these drugs and inject them intravenously created that risk of harm. *Id.*

69. *Id.* at 1074-75.

70. *Id.* at 1075-77.

71. *Id.* at 1077.

72. *Id.* at 1077-78. Specifically, the court required that the Department of Corrections employ a board-certified anesthesiologist, use at least a five-gram dose of thiopental (the first drug administered and used to induce unconsciousness), certify that the prisoner has reached “sufficient anesthetic depth” before continuing with the final two drugs, and allow the anesthesiologist to determine the best method and location for injecting the chemicals. *Id.* at 1078.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 1083.

quence of the drugs and (2) a substantial risk of unnecessary pain and suffering resulting from (a) untrained or inexperienced medical professionals and (b) non-uniform implementation of the protocols.<sup>77</sup> Missouri attempted to rectify these problems, and, in 2007, the Eighth Circuit held that it did.<sup>78</sup>

Prisoners have experienced an even harder time bringing claims against lethal injection proceedings since 2008, when the Supreme Court decided *Baze v. Rees*.<sup>79</sup> In *Baze*, Kentucky prisoners filed a suit claiming the successive administration of the same three drugs used in Missouri was unconstitutional because of a risk that improper administration of the drugs would cause the prisoner pain and suffering.<sup>80</sup> Specifically, the prisoners alleged that Kentucky's law allowing unqualified employees to mix the initial doses of thiopental, the first drug in the sequence, created a substantial risk that the drug would be ineffective.<sup>81</sup> The Court rejected this claim because thiopental was easy to measure and mix and, therefore, a medical degree was not required.<sup>82</sup> Kentucky's lethal injection protocol also incorporated various safeguards, including experience requirements, licensing, and backup lines of drugs in case of emergency.<sup>83</sup> The protocol provided for additional personnel to watch the progress of the execution to ensure that the IV lines were inserted properly and the drugs had the desired effect.<sup>84</sup> The Supreme Court was so confident in Kentucky's procedure that it declared a "State with a lethal injection protocol substantially similar to [Kentucky's] . . . would not create a risk" of pain and suffering rising to the level of an Eighth Amendment violation.<sup>85</sup> This declaration has forced plaintiffs challenging lethal injection proceedings to think of creative and innovative challenges to these protocols now that precedent clearly establishes the baseline safeguards required for a constitutional lethal injection protocol.

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77. See, e.g., *Baze v. Rees*, 553 U.S. 35, 41 (2008); *Clemons v. Crawford*, 585 F.3d 1119, 1122 (8th Cir. 2009); *Taylor*, 487 F.3d at 1074, 1077-78.

78. See *Taylor*, 487 F.3d at 1082-83.

79. 553 U.S. 35 (2008).

80. *Id.* at 41, 44.

81. *Id.* at 49-50. The petitioners suggested that not requiring medical professionals to prepare the thiopental could result in an improper mixture that would fail to render the prisoner unconscious. *Id.* at 53-54.

82. *Id.* at 54. Mixing thiopental is a simple procedure requiring the individual to inject liquid into a vial of powder and shake it until it dissolves. *Id.*

83. *Id.* at 55.

84. *Id.* The Court noted that the warden and deputy warden were often the officials entrusted with this responsibility. *Id.* at 56. Despite their lack of medical training, this type of responsibility is suitable for even the average person. *Id.* Even to the untrained eye, problems would become obvious due to the swelling that would occur from an improperly placed IV line. *Id.*

85. *Id.* at 61.

## IV. INSTANT DECISION

In *Clemons*, the Eighth Circuit reaffirmed the constitutionality of Missouri's written execution protocol, despite allegations that it constituted cruel and unusual punishment in violation of the Eighth Amendment.<sup>86</sup> The circuit court acknowledged that previous decisions made by the State of Missouri and its prison officials may have been insufficiently humane, but that subsequent court mandates remedied the situation.<sup>87</sup>

The *Clemons* opinion outlined the written procedure approved by the Missouri legislature and courts.<sup>88</sup> Missouri follows substantially the same procedure as it did prior to the written protocol but now includes more specific details as well as safeguards to ensure the accurate and humane administration of the lethal injections.<sup>89</sup> Doctors first administer a total of five grams of thiopental to render the prisoner unconscious.<sup>90</sup> Then the doctors and other medical personnel "physically examine the prisoner to confirm that he is unconscious."<sup>91</sup> In cases where the initial five grams of thiopental is insufficient to render the prisoner unconscious – a prerequisite to continue with the procedure – an additional five grams of thiopental is administered.<sup>92</sup> Once the medical personnel determine that the prisoner is indeed unconscious, they inject sixty milligrams of pancuronium bromide, prohibiting any movement by the prisoner.<sup>93</sup> Finally, the doctors inject the prisoner with 240 milliequivalents of potassium chloride to stop the prisoner's heart.<sup>94</sup> The doctors and nurses monitor an electrocardiogram showing the electrical activity of the prisoner's heart and pronounce him dead when all activity has ceased.<sup>95</sup>

Missouri emphasized that the proper administration of the thiopental "ensures the condemned prisoner will not experience any pain caused by the

86. *Clemons v. Crawford*, 585 F.3d 1119, 1129 (8th Cir. 2009).

87. *Id.* at 1123.

88. *Id.* at 1123-24; *see also* *Taylor v. Crawford*, 487 F.3d 1072, 1082-83 (2007).

89. *Clemons*, 585 F.3d at 1123-24.

90. *Id.* at 1123. The five grams of thiopental are administered through four syringes containing the thiopental in a 200 cc (cubic centimeter) solution. *Id.* After the injection of thiopental, the doctors flush out the prisoner's system with a saline rinse administered through an IV tube. *Id.*

91. *Id.* The doctors use standard clinical tests, including looking for movement, whether the prisoner's eyes are open, "pupillary responses or diameters, and response to verbal commands and physical stimuli." *Id.*

92. *Id.* It is unlikely that the initial dose of thiopental will not render the prisoner unconscious given that "[a] dose of 2.5 grams of thiopental would be sufficient to induce a state of deep anesthesia and . . . 'the average adult [undergoes surgery] with a 0.28-gram dose.'" *Id.* at 1123 n.5 (quoting *Taylor*, 487 F.3d at 1076).

93. *Id.* at 1123. The sixty milligrams of pancuronium bromide is administered in a sixty cc solution, followed by another saline flush of the prisoner's system. *Id.*

94. *Id.* at 1123-24.

95. *Id.* at 1124.

'potassium chloride, which indisputably will cause an excruciating burning sensation as it travels through [the condemned prisoner's] veins.'"<sup>96</sup> The medical personnel must meet stringent procedural requirements to administer lethal injections.<sup>97</sup> For example, a physician, nurse, or pharmacist must prepare all the chemicals and label them clearly and accurately.<sup>98</sup> No medical doctor or nurse may change the quantities of any chemical without prior approval by the director of the Department of Corrections.<sup>99</sup> Additionally, the doctors must keep a "Chemical Log," detailing the chemicals and their quantities for each lethal injection.<sup>100</sup>

In the instant case, the prisoners challenged Missouri's protocol under the Eighth Amendment "because of the substantial risk the protocol may be improperly administered by incompetent or unqualified medical personnel."<sup>101</sup> They alleged that due to the prior employment of Dr. Doe and Nurse Doe, Missouri created "'a grave risk that [the prisoners] will experience unconstitutional pain and suffering' during their future executions."<sup>102</sup> Essentially, the prisoners attempted to emphasize the State's past infractions and use them as an accurate predictor of future behavior.<sup>103</sup> The prisoners also disregarded the apparent constitutionality of the written practices, claiming that "the written protocol 'will have little effect when ignored or bungled by incompetent or unfit personnel.'"<sup>104</sup>

The Eighth Circuit approached the instant case by analyzing the Eighth Amendment and its application to the states.<sup>105</sup> The Eighth Amendment prevents the federal government and state governments, through incorporation via the Fourteenth Amendment, from subjecting any citizen to cruel and unusual punishment.<sup>106</sup> According to the court, many cases have upheld the constitutionality of capital punishment, including different techniques for administering the punishment.<sup>107</sup> As such, the court stated, "[i]t necessarily follows that there must be a means of carrying it out."<sup>108</sup> The court argued that these cases do not require that states or entities refrain from any sort of pain or discomfort while administering the capital punishment; rather, they

96. *Id.* (alteration in original) (citing *Taylor*, 487 F.3d at 1074).

97. *See id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 1125.

102. *Id.* (alteration in original) (quoting the prisoners' complaint).

103. *Id.*

104. *Id.* (quoting the prisoners' complaint).

105. *Id.*; see U.S. CONST. amend. VIII. The court also pointed out that the Eighth Amendment was applied to the states via the Fourteenth Amendment's Due Process Clause. *Clemons*, 585 F.3d at 1125; see U.S. CONST. amend. XIV.

106. U.S. CONST. amends. VIII, XIV.

107. *Clemons*, 585 F.3d at 1125 (citing cases).

108. *Id.* (quoting *Baze v. Rees*, 553 U.S. 35, 47 (2008)).

require reasonable measures of due care.<sup>109</sup> In fact, to successfully raise an Eighth Amendment claim, the court found that the petitioners must allege conditions or procedures that present a “substantial risk of serious harm,”<sup>110</sup> and are “‘sure or very likely to cause . . . needless suffering,’ and give rise to ‘sufficiently imminent dangers.’”<sup>111</sup> The court resolved that even though the execution procedure may cause the prisoner some pain during the process, it is insufficient to find an Eighth Amendment violation.<sup>112</sup>

The court then analogized the instant case to *Baze v. Rees*.<sup>113</sup> In *Baze*, the petitioners proffered similar arguments as to the constitutionality of Kentucky’s lethal injection proceedings.<sup>114</sup> The Eighth Circuit noted that the Supreme Court did not find the *Baze* petitioners’ arguments persuasive and specifically found no substantial risk of serious harm in the written procedures outlined by the State of Kentucky.<sup>115</sup> The *Clemons* court also remarked that the safeguards implemented by Missouri “are similar to, and in many ways more stringent than, Kentucky’s.”<sup>116</sup> The court noted that Missouri’s procedure specifically prohibited medical personnel to alter the amount of drugs given to the prisoner without prior approval of the director.<sup>117</sup> This provision directly addressed one of the most important and significant faults with the prior procedure, suggesting that Missouri took the recommendations in *Taylor v. Crawford*<sup>118</sup> seriously. Missouri’s attempts to “minimize any risk that the chemicals would be improperly prepared or administered” assured the *Clemons* court there was no substantial risk of serious harm.<sup>119</sup>

Moreover, the court found that the prisoners failed to allege any specific factor disqualifying the doctors or nurses employed by the State from admi-

109. *Id.*

110. *Baze*, 553 U.S. at 36 (quoting *Farmer v. Brennan*, 511 U.S. 825, 842 (1994)).

111. *Id.* at 49-50 (quoting *Helling v. McKinney*, 509 U.S. 25, 33 (1993)).

112. *Clemons*, 585 F.3d at 1125.

113. 553 U.S. 35 (2008).

114. *Id.* at 46-47; *Clemons*, 585 F.3d at 1125.

115. *Clemons*, 585 F.3d at 1126; *see also Baze*, 553 U.S. at 53-55. In *Baze*, the Supreme Court analyzed Kentucky’s lethal injection procedures and determined that there was no substantial risk of serious harm. *Baze*, 553 U.S. at 53-55. Kentucky’s protocol contained even less specific procedures and medical safeguards than does that of Missouri. *See id.* at 54-56.

116. *Clemons*, 585 F.3d at 1126. Missouri requires that a doctor, a nurse, or a pharmacist prepare the chemicals, as opposed to a layperson. *Id.* Missouri also requires that medical personnel, rather than a warden of the prison, watch over the medical progress of the prisoner throughout the procedure. *Id.* There are backup chemicals already prepared in case something goes wrong during the procedure, including additional dosages of thiopental to ensure that the prisoner is unconscious and unable to feel any pain before being injected with pancuronium bromide. *Id.* at 1123, 1126.

117. *Id.* at 1126-27.

118. 487 F.3d 1072, 1078 (2007).

119. *Id.* at 1127 (citing *Taylor*, 487 F.3d at 1084).

nistering the lethal injection.<sup>120</sup> To sufficiently allege the incompetence of the employed medical professionals, the court determined that a petitioner must specifically identify disqualifying characteristics that demonstrate the professional is untrained or unfit to hold the position.<sup>121</sup> The prisoners failed to allege this in the complaint, which, according to the court, undermined their argument for a violation of the Eighth Amendment.<sup>122</sup> The court found that by relying on the employment history of Dr. Doe and Nurse Doe instead of focusing on current policy, the prisoners' allegation that Missouri "will employ 'incompetent' and 'unqualified' personnel in the future" was unfounded.<sup>123</sup> Under the instant court's ruling, any complaint that does not allege a substantial risk of serious harm or imminent danger in its implementation fails to state a violation of the Eighth Amendment.<sup>124</sup>

## V. COMMENT

Lethal injection, and more broadly the death penalty itself, is a hotly contested issue among Americans, regardless of sex, race, political affiliation, or socioeconomic status. According to a 2009 Gallup poll, 65% of Americans favor the death penalty for certain prescribed offenses.<sup>125</sup> The same poll indicates that support for the death penalty has fluctuated over time, reaching an all-time high of 80% in 1994.<sup>126</sup> Furthermore, Gallup indicates that 49% of Americans believe the death penalty should be imposed more often and over 50% believe that the death penalty is a fair punishment for atrocious crimes.<sup>127</sup> Most people who support the death penalty, including lethal injection, do so only for competent adults, not for the mentally handicapped or

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120. *Id.*

121. *Id.*

122. *Id.* at 1127-28. According to the court, the facts and claims set forth by the prisoners were completely devoid of any factual allegations as to the incompetence of currently employed medical professionals. *Id.* at 1127. The court noted that nothing in the record suggested that a current medical professional employed by the State would deviate from or ignore the written procedures outlined and followed by the State of Missouri. *Id.*

123. *Id.* at 1128.

124. *Id.*

125. *Death Penalty*, GALLUP, <http://www.gallup.com/poll/1606/death-penalty.aspx> (last visited Oct. 18, 2010). The poll contains annual information as recent as October 2009 and dating back to December 1936. *Id.*; see also Frank Newport, *In U.S., Two-Thirds Continue to Support Death Penalty*, GALLUP, Oct. 13, 2009, <http://www.gallup.com/poll/123638/In-U.S.-Two-Thirds-Continue-Support-Death-Penalty.aspx>.

126. *Death Penalty*, *supra* note 125; Newport, *supra* note 125.

127. *Death Penalty*, *supra* note 125; Newport, *supra* note 125. These numbers indicate American sentiment as of October 2009, the most current date reflected on the website. Newport, *supra* note 125.

juveniles.<sup>128</sup> Irrespective of one's view of the death penalty, the predominant method of execution remains lethal injection, which presents its own predicaments, including moral, constitutional, social, and economic concerns.<sup>129</sup>

### A. Zero Risk of Harm Is Not Required

An especially influential reason for the courts to uphold lethal injection guidelines is the absence of complaints alleging a substantial risk of serious harm. The plaintiffs in *Clemons*, similar to most complainants alleging Eighth Amendment violations, alleged remote and speculative claims of improper implementation of otherwise constitutional procedures.<sup>130</sup> However, the Eighth Circuit found that past actions could not be used to predict future conduct.<sup>131</sup> Despite the continuing trend of courts upholding the constitutionality of such challenged protocols, prisoners nationwide continue to bring these challenges in hopes that one day a court will set a precedent in their favor.<sup>132</sup> These suits fail to recognize that a procedure guaranteeing perfect implementation of constitutional procedures every time is not required. Evidently, these plaintiffs, and opponents of the death penalty or lethal injection process, desire a process that guarantees the absence of any potential harm to those executed. Unfortunately, this is not only improbable, but also likely impossible.

Courts have continuously emphasized that the Eighth Amendment only requires that a punishment lack a *substantial* likelihood of *serious* harm, not that punishments exhibit no risk of harm at all.<sup>133</sup> Conversely, plaintiffs have implored courts to analyze these cases using a higher standard that would guarantee a process free from unnecessary risk of harm.<sup>134</sup> Recently, the

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128. *Death Penalty*, *supra* note 125. The American Bar Association, in concert with the American Psychiatric Association, the American Psychological Association, and the National Alliance for the Mentally Ill, adopted a resolution exempting those with severe mental illnesses from the death penalty on August 8, 2006. A.B.A. Res. 122A (2006). This resolution is consistent with the Supreme Court's opinion in *Atkins v. Virginia*, which held that the execution of mentally retarded individuals violates the Eighth Amendment's ban on cruel and unusual punishment. 536 U.S. 304 (2002). In 2005, the Supreme Court held that imposing the death penalty upon those who had committed crimes while under the age of eighteen amounted to cruel and unusual punishment and was therefore prohibited by the Eighth Amendment. *Roper v. Simmons*, 543 U.S. 551 (2005).

129. *See* Bessler, *supra* note 1 and accompanying text; *see also* Death Penalty Information Center, *supra* note 56.

130. *Clemons v. Crawford*, 585 F.3d 1119, 1124-25 (8th Cir. 2009).

131. *Id.* at 1128.

132. *See, e.g., Baze v. Rees*, 553 U.S. 35 (2008); *Clemons*, 585 F.3d at 1119; *Taylor v. Crawford*, 487 F.3d 1072 (8th Cir. 2007).

133. *Baze*, 553 U.S. at 50.

134. *See id.* at 47.

Supreme Court addressed this issue, handing down what appeared to be a definitive answer.<sup>135</sup> In *Baze v. Rees*, the Court conceded that despite its best efforts, “[s]ome risk of pain is inherent in any method of executions – no matter how humane.”<sup>136</sup> Accordingly, the Court upheld the lethal injection procedures because the risk of pain was not violative of the Constitution.<sup>137</sup> In reality, “the Constitution does not demand the avoidance of all risk of pain.”<sup>138</sup> Instead, the constitutional standard is whether the execution method presents a “‘substantial risk of serious harm,’ an ‘objectively intolerable risk of harm.’”<sup>139</sup> The Court espoused the substantial risk of harm standard, rejecting the petitioners’ claim that the proper standard was the “unnecessary risk of pain.”<sup>140</sup> The petitioners claimed that such a standard was properly supported by “common sense,”<sup>141</sup> yet it ran afoul of most precedent established in the federal circuits.<sup>142</sup>

Legal precedent and “common sense” clearly support the Supreme Court’s denial of the standard proposed by the *Baze* petitioners. A vague standard such as the “unnecessary risk of pain” would not appropriately protect prisoners from a risk of harm, nor would it be feasible for a court to properly analyze a proposed lethal injection procedure for compliance with the Eighth Amendment. Though the terms “substantial” or “objectively intolerable” imply a more fluid standard, a case-by-case analysis using consistent standards is necessary to accommodate the different circumstances across cases. Moreover, this standard allows for potential changes to the science and technology used in lethal injection procedures. Scientists continue to conduct research to develop more humane execution methods and improve upon the implementation of those procedures already in use.<sup>143</sup>

In addition, some risk of harm is inherent in any execution procedure due to the inability to guarantee uniform reactions to the administration of chemicals. Many lethal injection protocols now contain a requirement for the

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135. *Id.* at 62-63.

136. *Id.* at 47.

137. *Id.* at 63.

138. *Id.* at 47.

139. *Id.* at 50 (quoting *Farmer v. Brennan*, 511 U.S. 825, 842, 846 & n.9 (1994)).

140. *Id.* at 51; see Brief for Petitioners at \*31-40, *Baze v. Rees*, 553 U.S. 35 (2007) (No. 07-5439), 2007 WL 3307732.

141. Brief for Petitioners, *supra* note 140, at \*38-39.

142. See, e.g., *Farmer*, 511 U.S. at 834 (holding that inmates challenging their death sentences must show that the incarceration is “posing a substantial risk of serious harm” (citing *Helling v. McKinney*, 509 U.S. 25, 35 (1993))); *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (holding that death sentences “could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary or capricious manner”).

143. See, e.g., *supra* notes 53-59 (describing the evolution of death penalty methods).



uniform administration of the drugs,<sup>144</sup> but there is no way to guarantee uniform reactions from prisoners. These protocols contain safeguards to ensure that prison officials minimize the risk of harm, including having a second set of drugs readily available and relying on the professional opinion of medical personnel regarding the status of the prisoner.<sup>145</sup> The fact that such safeguards exist demonstrates the impossibility of ensuring perfect implementation of procedures each time, but as courts have previously held, this certainty is not required to pass constitutional muster.

## B. Ethical Considerations

### 1. Social Ethics

The use of executions as a form of punishment presents many ethical questions for proponents and opponents alike. Throughout history, prisons and medical personnel have continuously developed, researched, and implemented new measures that claim to be “more humane” than the last.<sup>146</sup> However, many opponents contend that there is no humane way to take the life of another.<sup>147</sup> The prisoners who bring the constitutional claims seem to concur with this viewpoint. They complain that despite attempts at safeguards, there is a chance that the personnel can botch the lethal injection procedure.<sup>148</sup> Opponents to lethal injection executions lay fault with the court systems by alleging that the system infringed upon the prisoner’s right to a fair trial,<sup>149</sup> that the lawyer made a mistake,<sup>150</sup> or that the court erred.<sup>151</sup>

144. *See, e.g.*, Taylor v. Crawford, 487 F.3d 1072, 1082-83 (8th Cir. 2007) (citing Missouri’s revised procedures, including a provision requiring uniform administration of drugs, with approval).

145. MO. REV. STAT. § 546.720 (Supp. 2009); Clemons v. Crawford, 585 F.3d 1119, 1123-24 (8th Cir. 2009); Taylor, 487 F.3d at 1084.

146. *See supra* notes 53-59 and accompanying text.

147. *See, e.g.*, Editorial, *There is No ‘Humane’ Execution*, N.Y. TIMES, Dec. 14, 2009, at A30; Vincent Warren, *The Death Penalty is Human Rights Abuse*, HUFFINGTON POST, Oct. 11, 2010, [http://www.huffingtonpost.com/vincent-warren/the-death-penalty-is-a-hu\\_b\\_757004.html](http://www.huffingtonpost.com/vincent-warren/the-death-penalty-is-a-hu_b_757004.html).

148. *See, e.g.*, Baze v. Rees, 553 U.S. 53, 53 (2007); Clemons, 585 F.3d at 1124-25.

149. *See, e.g.*, James C. McKinley, Jr., *Judge-Prosecutor Affair, But No New Trial in Texas Death Penalty Case*, N.Y. TIMES, Sept. 17, 2009, at A19; Mark White, Opinion, *Death Penalty Process Must be Fair*, NAT’L L.J., Mar. 29, 2010, [http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202446811927&Death\\_penalty\\_process\\_must\\_be\\_fair&hblogin=1](http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202446811927&Death_penalty_process_must_be_fair&hblogin=1).

150. *See, e.g.*, Ed Pilkington, *Alabama Plans Death Penalty Despite Paperwork Mix-up*, GUARDIAN, Jan. 8, 2010, <http://www.guardian.co.uk/world/2010/jan/08/death-row-appeal-mistake>.

151. *See, e.g.*, Timberly Ross, *Man Convicted of Killing Nebraska Girl Fights Death Penalty*, JOURNALSTAR, Aug. 6, 2010, <http://journalstar.com/news/state-and->

Executions are frequently justified by citing the deterrent effect impressed upon other criminals.<sup>152</sup> Many recent studies demonstrate a slight decrease in the amount of homicides directly following an execution.<sup>153</sup> Some researchers also speculate “executions not only deter murder, but they also increase the deterrent effects of other punishments.”<sup>154</sup> Despite this evidence, other statistical research questions whether the death penalty has any significant deterrent effect.<sup>155</sup> Many of the studies are localized, leaving the question of the true national influence of executions unanswered.<sup>156</sup>

In addition to the questionable statistical support of deterrence, it can be posited that society’s quest for a “humane” method of execution may affect its deterrent effect. Though there does not appear to be any studies focusing specifically on the deterrent effect of each method of execution used over the last few centuries, researchers speculate deterrence increases when the consequences are more severe.<sup>157</sup> Logic dictates that criminals are rational and will refrain from engaging in conduct that will produce unpleasant results. However, it is not true that all criminals are rational, nor is it true that all criminals

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regional/article\_19fe61de-a175-11df-8e88-001cc4c03286.html; Channing Turner, *Appeals Court Criticizes Prosecutors for Death Penalty Misstep*, MAIN JUSTICE, Jul. 7, 2010, <http://www.mainjustice.com/2010/07/07/appeals-court-criticizes-prosecutors-for-death-penalty-misstep/>.

152. See generally John J. Donohue, III & Justin Wolfers, *Estimating the Impact of the Death Penalty on Murder*, 11 AM. L. ECON. REV. 249 (2009) (summarizing and analyzing the major studies that examine the deterrent effect of the death penalty).

153. See *id.* at 273-83; Kenneth C. Land et al., *The Short-Term Effects of Executions on Homicides: Deterrence, Displacement, or Both?*, 47 CRIMINOLOGY 1009 (2009); Paul R. Zimmerman, *Statistical Variability and the Deterrent Effect of the Death Penalty*, 11 AM. L. ECON. REV. 370, 384 (2009).

154. See Jeffrey Fagan, *Death and Deterrence Redux: Science, Law and Causal Reasoning on Capital Punishment*, 4 OHIO ST. J. CRIM. L. 255, 2558 (2006).

155. See generally *id.* (arguing that “the new deterrence studies are fraught with numerous technical and conceptual errors”); Land et al., *supra* note 153 (finding “modest, short-term reductions” in crimes after executions, but calling for additional studies); Zimmerman, *supra* note 153 (finding “the ‘overall’ evidence for a deterrent effect of capital punishment . . . ‘mixed’ at best”). It is important to note that the majority of the studies, including those cited here, compare the deterrent effect of the death penalty to homicides only. Homicides are often chosen because perpetrators of such crimes are most often the ones sentenced to punishment by death. For a complete list of crimes eligible for death penalty sentences, see Death Penalty Information Center, *Crimes Punishable by the Death Penalty*, <http://www.deathpenaltyinfo.org/crimes-punishable-death-penalty> (last visited Oct. 31, 2010).

156. See *supra* notes 152-55 and sources cited therein.

157. See FRANKLIN E. ZIMRING & GORDON J. HAWKINS, *DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL* 194 (1973) (“Since the power of a legal threat to function as a simple deterrent comes from the unpleasantness of the consequences threatened, one natural strategy for increasing the deterrent efficacy of threats would appear to be an increase in the severity of those consequences.”).

will be deterred from engaging in unlawful conduct despite the accompanying consequences.

Moreover, the deterrent effect of lethal injections may be mitigated when it is touted as the “humane” method of execution. Over the years, scientists, courts, and prison officials have elected for procedures tending to minimize the risk of harm inflicted on a prisoner during the execution.<sup>158</sup> The death penalty has evolved from hanging or a firing squad to a new medical procedure designed to protect the prisoner from feeling the effects of death.<sup>159</sup> When all those involved are attempting to minimize the harm imposed upon a prisoner who has committed a heinous crime, can we really say that this type of death will effectively deter criminals from committing similar crimes in the future? Though some studies demonstrate a small decrease in homicides,<sup>160</sup> the lack of conclusive evidence as to the deterrent effect of the death penalty remains a prominent concern for those opposed to the death penalty and lethal injection.

With regard to the proper administration of justice in the court system, it is true that society may sometimes disagree with a court’s decision. Even so, a court system is not designed to regulate society’s moral compass, nor does it function to ensure that morality is protected in every instance. Perhaps Judge Learned Hand said it best when he reminded Mr. Justice Holmes that the role of the judiciary is not to “do justice” but to apply the law and hope that justice is done.<sup>161</sup> This statement should remind citizens that the court may not always do what is popular or what society considers “right”; rather, courts should always apply the law to the facts of the specific case and simply hope that in doing so it serves justice. This is the critical distinction that must be made between society’s view of what is right and wrong and the courts’ application of the law.

## 2. Medical Ethics

In addition to societal concerns with lethal injections, physicians also encounter a dilemma. There is an inherent conflict between the tenets by which physicians must abide and the act of injecting someone with chemicals to induce death. Physicians are guided by the Hippocratic Oath and the guidelines proposed by many medical organizations, including the American Medical Association (AMA). Specifically, the AMA’s Council on Ethical and Judicial Affairs announced in its Code of Medical Ethics, Opinion 2.06, that a doctor *should* not participate in a legal execution but *may* make a de-

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158. See *supra* notes 53-59 and accompanying text.

159. This issue is addressed in the discussion *supra*, Part III.

160. See *supra* notes 152-55 and sources cited therein.

161. THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND 306-07 (Irving Dillard ed., 3d ed. Alfred A. Knopf, Inc. 1960) (1952).

termination or certify that the prisoner is dead.<sup>162</sup> The Code also begins by stating that an individual's opinion on capital punishment is his own and not that of the medical profession or the AMA.<sup>163</sup> These seemingly contradictory guidelines present challenges to physicians when approached by prison personnel for assistance with a lethal injection execution.

Some critics allege that doctors who participate in these types of procedures "violate the most fundamental tenet of medical ethics."<sup>164</sup> Doctors opposed to such involvement contend that participation in executions should result in revocation of medical licenses or even legal charges against the physician.<sup>165</sup> Moreover, some lawyers see this as an opportunity to bring claims against doctors and are investigating physicians nationwide hoping that a viable case will present itself.<sup>166</sup> Fear of litigation, medical censure, or license revocation discourages many qualified doctors from even remotely assisting in any execution procedure.<sup>167</sup>

On the other hand, such medical expertise is arguably required to ensure the humane aspect advocated by lethal injection.<sup>168</sup> Though the AMA's Code of Ethics forbids doctors to perform various acts during the execution process, many doctors are willing to participate in some aspects of the execution procedure to prevent unnecessary harm to the prisoner.<sup>169</sup> Many court cases, including a Supreme Court opinion, highlight a desire for the oversight

162. AMA Code of Med. Ethics, Op. 2.06 (1980), available at <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion206.shtml>. The Opinion also specifically defines what constitutes "physical participation" in the execution as well as what is permissible activity related to such a procedure. *Id.*

163. *Id.* The American Nurses Association (ANA) espouses similar, and in some ways more stringent, viewpoints to the AMA. Specifically, the ANA "is strongly opposed to nurse participation in capital punishment. Participation in executions . . . is viewed as contrary to the fundamental goals and ethical traditions of the profession." American Nurses Association, Ethics and Human Rights, <http://www.nursingworld.org/MainMenuCategories/HealthcareandPolicyIssues/ANAPositionStatements/EthicsandHumanRights.aspx> (last visited Oct. 9, 2010).

164. Adam Liptak, *Should Doctors Help with Executions? No Easy Ethical Answer*, N.Y. TIMES, June 10, 2004, at A16.

165. *Id.*; see also George J. Annas, *Toxic Tinkering – Lethal-Injection Execution and the Constitution*, 359 NEW ENG. J. MED. 1512, 1515-17 (2008), available at <http://www.nejm.org/doi/pdf/10.1056/NEJMhle0804933>; Gregory D. Curfman et al., *Physicians and Executions*, 358 NEW ENG. J. MED. 403, 404 (2008), available at <http://www.nejm.org/doi/pdf/10.1056/NEJMe0800032>.

166. Liptak, *supra* note 164.

167. See generally *id.* (discussing the consequences for doctors who participate in executions).

168. See *id.*; Adam Liptak, *After Flawed Executions, States Resort to Secrecy*, N.Y. TIMES, July 30, 2007, at A9 (noting that executioners must insert catheters, prepare three chemicals, and inject those chemicals in a particular dosage and sequence).

169. Liptak, *supra* note 164.

of medical professionals to ensure the constitutionality of the lethal injection procedure.<sup>170</sup> In *Nelson v. Campbell*, Justice Sandra Day O'Connor wrote that the Alabama procedure lacked procedural safeguards, because, among other things, "[t]here was no assurance that a physician would perform or even be present for the procedure."<sup>171</sup> Additionally, the Sixth Circuit noted that "[t]he presence of a supervising or attending physician at an execution by lethal injection undoubtedly could help to ensure that executions proceed as smoothly and painlessly as possible."<sup>172</sup> Notably, Missouri's written procedures require that "medical personnel" test the intravenous lines prior to use, supervise the injection, and document the chemicals and amounts administered.<sup>173</sup> The statute itself states that the medical personnel must "provide direct support for the administration of . . . lethal chemicals."<sup>174</sup> The lethal injection procedure is a complicated combination of doses and chemicals arguably requiring medical expertise to locate the correct vein, administer the drugs, and make judgment calls when necessary.<sup>175</sup>

Recognizing the ethical predicament in which doctors find themselves, many states, including Missouri, have included provisions protecting the identity and liability of physicians assisting with lethal injections and other executions.<sup>176</sup> The Missouri law makes it unlawful to "knowingly disclose the identity . . . or disclose a record knowing that it could identify a person as being a current or former member of an execution team."<sup>177</sup> The statute also prevents licensing boards from initiating disciplinary actions including censure, reprimand, suspension, and license revocation against such doctors should their identities be revealed.<sup>178</sup> These laws were put into place because courts and prison officials sought qualified medical professionals and worried that the potential ramifications would deter the physicians or nurses from

170. *See, e.g.*, *Nelson v. Campbell*, 541 U.S. 637 (2004).

171. *Id.* at 641.

172. *Cooley v. Strickland*, 589 F.3d 210, 226 n.4 (6th Cir. 2009).

173. MO. REV. STAT. § 546.720(2) (Supp. 2009); *Clemons v. Crawford*, 585 F.3d 1119, 1123-24 (8th Cir. 2009); *Taylor v. Crawford*, 487 F.3d 1072, 1082-83 (8th Cir. 2007).

174. MO. REV. STAT. § 546.720(2).

175. *See Clemons*, 585 F.3d at 1123-24; *Taylor*, 487 F.3d at 1082-83.

176. *See, e.g.*, MO. REV. STAT. § 546.720(3); *see also* Liptak, *supra* note 168.

177. MO. REV. STAT. § 546.720(3). The statute further provides that violation of this law may result in a civil action giving rise to the opportunity to recover actual and punitive damages against the perpetrator. *Id.* This was especially necessary after the identity of a Missouri doctor, referred to in *Taylor* and *Clemons* as "Dr. Doe," was disclosed, giving rise to malpractice suits and possible legal sanctions. *See* Liptak, *supra* note 168; *see also Clemons*, 585 F.3d at 1123; *Taylor*, 487 F.3d at 1075.

178. MO. REV. STAT. § 546.720(4). The members of the execution team are further covered by Missouri's legal expense fund for conduct related to or arising out of their membership on such a team. *Id.*

participating.<sup>179</sup> Moreover, the legislature and prison officials wanted to prevent disclosure of the identities of these doctors and nurses out of fear that the professionals would be subject to harassment or physical harm.<sup>180</sup>

Not everyone, however, shares these same concerns over protecting the identity of medical professionals assisting lethal injections. Some opponents of these laws cite past incidents, such as those in Missouri involving “Dr. Doe”<sup>181</sup> or failed executions in Ohio,<sup>182</sup> as evidence that states need to identify these “professionals” to hold them accountable for wrongful actions.<sup>183</sup> In addition, one California court maintained that the fear of retaliation or harassment of doctors is not justified and is “supported only by questionable speculation.”<sup>184</sup> The California court also suggested that other personnel involved in the execution, including guards, the warden, and court officials, are clearly visible to the public and have never been threatened or harassed because of their participation in such procedures.<sup>185</sup>

Ultimately, physicians have a very difficult time weighing the decision between violating ethical codes, which many view as the cornerstone of the medical profession, and assisting non-medical personnel in a complicated and ethically challenging procedure. Some doctors and nurses have elected to serve on the execution teams of various states, regardless of the ethical dilemma presented, while others strictly adhere to the Hippocratic Oath, requiring that doctors “will do no harm.”<sup>186</sup>

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179. See Liptak, *supra* note 168; see also Annas, *supra* note 165, at 1513-14; Curfman et al., *supra* note 165, at 403.

180. See Liptak, *supra* note 168.

181. *Taylor*, 487 F.3d at 1074-76.

182. See Ariane de Vogue & Dennis Powell, *Ohio Killer Executed in First Use of Single-Drug Lethal Injection*, ABC NEWS, Dec. 8 2009, <http://abcnews.go.com/Politics/lethal-injection-ohio-perform-execution-single-drug/story?id=9277599> (describing the botched execution of Romell Broom in Ohio); see also *infra* notes 187-91.

183. For a more detailed analysis regarding this argument, see Ellyde Roko, Note, *Executioner Identities: Toward Recognizing a Right to Know Who Is Hiding Beneath the Hood*, 75 *FORDHAM L. REV.* 2791 (2007).

184. *Cal. First Amendment Coal. v. Woodford*, 299 F.3d 868, 880 (9th Cir. 2002).

185. *Id.* at 882.

186. The Hippocratic Oath, [http://www.nlm.nih.gov/hmd/greek/greek\\_oath.html](http://www.nlm.nih.gov/hmd/greek/greek_oath.html) (last visited Sept. 29, 2010).

### C. Recent Developments and Future Endeavors

#### 1. Single-Drug Execution

On December 8, 2009, Ohio became the first state to execute a man using a single-drug lethal injection procedure.<sup>187</sup> Ohio implemented this untested procedure after the failed execution of Romell Broom on September 15, 2009.<sup>188</sup> During Broom's attempted execution, medical personnel were able to locate his veins initially, but the veins collapsed when a saline solution was injected.<sup>189</sup> Broom later stated that he experienced significant pain as the medical officials attempted to find another vein, sticking him eighteen times with a needle.<sup>190</sup> After two hours of attempting to execute Broom, an unprecedented amount of time, Ohio ceased the execution.<sup>191</sup> Ohio became concerned over the efficacy of its procedure, and, to avoid any future constitutional challenges or civil suits, Ohio prison officials explored numerous other options including different injection sites and alternative drugs to use during the procedure.<sup>192</sup> Ultimately, Ohio used death row inmate Kenneth Biros as a "guinea pig" on December 8, 2009 for the newly proposed single-drug injection procedure, which proved successful.<sup>193</sup>

In March 2010, Washington followed Ohio's lead and adopted the single-drug execution method.<sup>194</sup> Washington changed its procedure in light of expert opinions given to its Department of Corrections.<sup>195</sup> Though the State changed its official lethal injection procedure to the single-drug method, the traditional three-drug method is still available if inmates specifically request

187. de Vogue & Powell, *supra* note 182.

188. Ian Urbina, *Ohio Finds Itself Leading the Way to a New Execution Method*, N.Y. TIMES, Nov. 18, 2009, at A25.

189. Stephen Majors, *Ohio Considering Bone, Muscle for Lethal Injection*, SEATTLE TIMES, Oct. 6, 2009, [http://seattletimes.nwsourc.com/html/nationworld/2010010609\\_apusdeathpenaltyohio.html](http://seattletimes.nwsourc.com/html/nationworld/2010010609_apusdeathpenaltyohio.html).

190. *Id.* Broom signed an affidavit complaining that some of the eighteen attempts hit his muscle and bone, resulting in more pain. *Id.* Ohio also had difficulties locating veins in prisoners in at least two other cases. *Id.*

191. *Id.* Romell Broom walked away from the execution and is currently fighting the state's attempt to execute him a second time. Associated Press, *Federal Judge Rules that Inmate who Underwent Botched Execution Attempt can Fight 2nd Try*, CLEVELAND.COM, Aug. 27, 2010, [http://blog.cleveland.com/metro/2010/08/federal\\_judge\\_rules\\_that\\_inmat.html](http://blog.cleveland.com/metro/2010/08/federal_judge_rules_that_inmat.html).

192. Majors, *supra* note 189.

193. de Vogue & Powell, *supra* note 182.

194. Associated Press, *Washington Follows Ohio with One-Drug Execution Method*, CLEVELAND.COM, Mar. 3, 2010, [http://www.cleveland.com/nation/index.ssf/2010/03/washington\\_state\\_follows\\_ohio.html](http://www.cleveland.com/nation/index.ssf/2010/03/washington_state_follows_ohio.html).

195. *Id.*

it.<sup>196</sup> On September 10, 2010, Cal Coburn became the first Washington inmate executed using the new single-drug injection.<sup>197</sup>

This new single-drug method may actually subject states to *more* legal scrutiny, running contrary to their attempts to lessen the potential complications arising from administration of three different drugs. In *Baze v. Rees*, the Supreme Court upheld the constitutionality of Kentucky's lethal injection procedure, implying that procedures mirroring those of Kentucky would also withstand constitutional scrutiny.<sup>198</sup> Since *Baze* was decided, many states seem reluctant to change their protocols for fear of another challenge. Given that the Supreme Court has already spoken on the three-drug method of lethal injection, it might not approve this new method, thereby rendering Ohio and Washington's research and innovation moot and unusable. The constitutionality of this method remains to be debated at the Supreme Court level. However, it is worthwhile to note that Biros challenged the constitutionality of Ohio's new single-drug procedure prior to his execution, and the Sixth Circuit struck down his challenge.<sup>199</sup> Biros asserted that the risk of improper implementation of an untested procedure presented a risk of cruel and unusual punishment in violation of the Eighth Amendment.<sup>200</sup> Ultimately, the court concluded the procedure outlined sufficient safeguards to allow the execution to proceed as scheduled.<sup>201</sup>

## 2. Missouri

The *Clemons* decision renders Missouri's lethal injection procedures constitutional, but it is unclear when, if ever, these procedures will be implemented. Since October 2005, Missouri has executed only one man, Dennis J. Skillicorn, on May 20, 2009.<sup>202</sup> Missouri originally halted all executions for

196. *Id.* Washington also permits inmates to request hanging rather than a lethal injection form of execution. *Id.*

197. Jennifer Sullivan, *Washington State Says New Execution Method was Carried Out 'Humanely'*, SEATTLE TIMES, Sept. 10, 2010, [http://seattletimes.nwsources.com/html/localnews/2012866400\\_execution11m.html](http://seattletimes.nwsources.com/html/localnews/2012866400_execution11m.html).

198. 553 U.S. 35, 63 (2008).

199. *See* Cooley v. Strickland, 589 F.3d 210, 223-25 (6th Cir. 2009) (holding that Ohio's new single-drug protocol did not violate the Constitution). Biros was an intervening plaintiff in the *Cooley* case, where the court upheld his scheduled date of execution because the procedures were constitutional. *Id.* at 232.

200. *Id.* at 216.

201. *Id.* at 228.

202. Tony Rizzo, *Execution Protocol Passes Test; 13 More on Death Row in Missouri*, KAN. CITY STAR, May 21, 2009 at A1. Skillicorn was convicted of first-degree murder in Missouri for killing a man who had stopped to assist him on the side of the road. *Id.*; *see also* Skillicorn v. Roper, No. 00-MC-8002-CV-W-NKL, 2009 WL 1406974, at \*1 (W.D. Mo. May 19, 2009). Skillicorn's execution date was not affected by the pending Eighth Circuit opinion of *Clemons v. Crawford* because Skil-



almost four years after the constitutionality of its procedures came under scrutiny and the court ordered revision of the procedures.<sup>203</sup> Scholars are calling for a moratorium on Missouri's executions in light of the botched executions occurring around the country, in addition to the legal and ethical concerns.<sup>204</sup>

Reginald Clemons, the named plaintiff in the instant case, was originally scheduled for execution on June 17, 2009.<sup>205</sup> On June 5, 2009, the Eighth Circuit granted a stay of execution pending its decision in *Clemons*.<sup>206</sup> Since that time, the Eighth Circuit appointed a Special Master, Jackson County Circuit Judge Michael Manners, to hear additional evidence regarding Clemons' case and recommend a new course of action.<sup>207</sup> The fate of Reginald Clemons and his fellow co-plaintiffs is not yet determined, but the Eighth Circuit's decision regarding the constitutionality of the lethal injection execution process seems to be settled law. However, death row inmates will probably continue to file constitutional challenges in hopes of avoiding or delaying their inevitable executions.

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licorn did not challenge the constitutionality of the lethal injection proceeding. *Id.* Instead, Skillicorn challenged procedural requirements including the inclusion of uncorroborated evidence and an improper basis for sentencing. *Id.* The U.S. District Court for the Western District of Missouri denied Skillicorn's fifth petition for clemency on May 19, 2009. *Id.* at \*5. Just a few hours later, Skillicorn was executed in the prison of Bonne Terre at 12:34 a.m. Rizzo, *supra*.

203. See Taylor v. Crawford, No. 05-4173-CV-C-FJG, 2006 WL 1779035 (W.D. Mo. June 26, 2006); see also Rizzo, *supra* note 202. Taylor's original constitutional challenge, filed on June 3, 2005, and subsequently amended on September 12, 2005, served as the basis for Missouri's ban on executions. Taylor, 2006 WL 1779035, at \*1, \*9.

204. Paul Parker & Wayne A. Yocum, *A Time to Delay Killing: Evidence for a Death Penalty Moratorium in Missouri*, 70 UMKC L. REV. 983 (2002) (calling for a moratorium on executions in Missouri, similar to that which then-Governor George Ryan instituted in Illinois in January 2000).

205. Scott Lauck, *Judge William Ray Price Jr. 'Open to Listening' to Missouri Plan Changes*, MO. LAW. WKLY., June 23, 2009.

206. *Id.*

207. Cheryl Wittenauer, *Special Master to Investigate Innocence Claims in 1991 Murder Case*, COLUMBIA MISSOURIAN, June 30, 2009, <http://www.columbiamissourian.com/stories/2009/06/30/special-master-appointed-mo-death-penalty-case/>. The Missouri Attorney General's office also sent a letter to Judge Manners, the Jackson County Circuit Judge hearing the case, acknowledging the existence of previously undisclosed evidence in the *Clemons* case. Letter from Stephen D. Hawke, Habeas Unit Chief, Pub. Safety Div., Mo. Attorney Gen. Office, to the Honorable Michael Manners, Circuit Judge, Jackson County (Mar. 8, 2010), available at [http://ago.mo.gov/newsreleases/2010/pdf/Clemons\\_v\\_state.pdf](http://ago.mo.gov/newsreleases/2010/pdf/Clemons_v_state.pdf). Though this presents a unique twist in this particular case, it does not affect the underlying conclusion that Missouri's lethal injection protocol has been deemed constitutional in all respects.

## VI. CONCLUSION

The death penalty remains an area of contention among most Americans, some harboring very clear opinions on the issue. Though lethal injection is undoubtedly more humane than previous execution methods, such as hanging or a firing squad, problems remain in its implementation. The new protocols, outlined by states such as Kentucky and Missouri, represent an awareness of the potential risks involved in improper implementation of these procedures. Safeguards have been put into place to ensure that the prisoners will not be subjected to any undue harm. It is impossible to guarantee against all harms, but it is sufficient that there are procedural steps to prevent any substantial risk of harm, rendering them unconstitutional under the Eighth Amendment. New procedures, such as the single-drug lethal injection, promise to address some of the implementation issues mentioned, and the effect these ideas will have on lethal injections remains to be seen. It is clear that some states have botched executions in the past, but past behavior is not always an indication of future conduct. Until state and federal supreme courts have spoken and declare that these methods violate the Constitution, states will continue to implement these protocols and carry out the sentencing decided by a jury of the prisoner's peers.

