



It's Time States Were Transparent About Lethal Injection Drugs

By: Trevor Burrus
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In 1890, William Kemmler, the first person to be executed by electric chair, took eight minutes to die in a gruesome spectacle of burst blood vessels and singed skin. Although it declined to stop his execution as a violation of the Eighth Amendment's prohibition on "cruel and unusual punishments," the Supreme Court observed in his case that "punishments are cruel when they involve torture or a lingering death." As for the humaneness of Kemmler's execution, one observer to the event, George Westinghouse, commented that "they would have done better using an axe."

A recent spate of botched executions by the supposedly "humane" lethal injection method has many people wondering, perhaps cynically, the same thing as Westinghouse. The consistent problems with obtaining the proper drugs and administering them humanely means that the Supreme Court should step in and end lethal injections in states that cannot demonstrate that they have a sufficient amount of approved drugs.

Execution chambers now look like hospital rooms, but perhaps we're only masking the cruelty in order to avert our eyes from the realities of state-sponsored execution. During the 20th century, states continually looked for more humane methods to accomplish what is actually a savage event. Lethal injection was pioneered by Oklahoma in the 1970s (although the first death by lethal injection was done in Texas in 1982), and today every state that administers the death penalty uses lethal injection as the primary method.

Oddly, although lethal injections seem like a sure bet for accomplishing the task, the error rate is significantly higher than many more "traditional" methods that are now thought of as primitive. According to Prof. Austin Sarat, lethal injection has a failure rate of 7 percent, higher than electrocution (2 percent), hanging (3 percent), or the gas chamber (5 percent).

In America, this failure rate is legally significant. In 2007, the Supreme Court held that Kentucky's lethal injection system did not violate the Eighth Amendment. The petitioners in that case conceded that a properly administered lethal injection cocktail would be a humane death. Instead, they argued that the possibility of maladministration of the drugs created a likelihood that the punishment would be cruel and unusual. The court ruled that, despite the possibility of

error, lethal injection did not create a “substantial risk of wanton and unnecessary infliction of pain, torture, or lingering death.”

In light of changes in drug availability, it is time to revisit this question. For the justices in 2007, the known effects of the identifiable drugs used in executions were crucial in their decision. “[P]roper administration of the first drug, sodium thiopental, eliminates any meaningful risk that a prisoner would experience pain from the subsequent injections,” wrote Chief Justice John Roberts. If the justices were told, however, that the “first drug” was possibly not sodium thiopental, and that some states refuse altogether to say what drugs they are using, then the decision would almost assuredly have been different.

The death penalty is still popular, but painful executions are certainly not. It is time for the Supreme Court to step in and ensure that the constitutionally approved cocktail of drugs is being administered, and that states are being transparent about which drugs are being used.

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