LB 36: A Shot In The Arm For Lethal Injection

On May 28, 2009, the Nebraska Legislature passed LB 36, a statute instituting lethal injection as the method of executing death sentences. The bill was introduced in December 2008 by Attorney General Jon Bruning in response to *State v. Mata*, a Nebraska Supreme Court case that declared the state's electrocution procedure via the electric chair unconstitutional in February of that year. The bill suggests a preference for what is commonly known as a three-drug "cocktail" to be used in the execution of death row inmates. The cocktail was originally created in Oklahoma in 1977, and has been widely adopted by several states across the nation.[1]

The first drug, sodium pentothal, is used as an anesthetic to render the inmate unconscious. The second drug, pancuronium bromide, is administered within a few minutes of the first. This drug is intended to paralyze the inmate and halt respiration. It is supposed that the inmate is already unconscious when this notoriously painful drug enters the bloodstream. Finally, potassium chloride is administered to cause cardiac arrest in the inmate and officially stop the heartbeat.

Courts around the country have recognized that there is a significant risk of excruciating pain to the inmate if the drugs are not administered properly—specifically if the anesthetic has not taken effect before the second and third painful drugs are injected.[2] Constitutional considerations have been raised as to possible violations of an inmate's eighth amendment right to be free from cruel and unusual punishment. Additionally, the cloud of secrecy surrounding the procedures of how some of these drugs are administered has called into question the potentially flawed, and dangerous methods used to carry out executions by lethal injection.

Part I of this article examines concerns raised by state governments and constitutional scholars across the nation, and will analyze how Nebraska's statute resembles those scenarios. Part II will

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[1] Eric Berger, *Thoughts on LB 36: Problems with the Proposed Bill to Institute Lethal Injection in Nebraska*, 1 Neb. L. Rev. Bull. 14 (2009), http://lawreview.unl.edu/?p=405.
[2] *Id*. at 15.

discuss potential consequences to Nebraska's law based on what has been held in other states with similar statutes on the books.

Part I: Lethal Injection on a National Stage

Lethal injection has been a contentious issue in many states. Federal courts in California, Missouri and Tennessee have found existing lethal injection procedures to be unconstitutionally dangerous. Meanwhile, executions in Arizona, Delaware, Florida, Maryland, North Carolina, Ohio, Oklahoma, and Virginia have been halted or delayed due to botched executions, administrative reviews, and constitutional challenges.[3]

University of Nebraska College of Law Professor Eric Berger recently published an article outlining the common concerns surrounding lethal injection based on his testimony on LB 36 before the Nebraska Legislature in January 2009. Professor Berger worked closely on the *Taylor v. Crawford*[4] case in Missouri, where the district court found the state's unwritten protocol for lethal injection executions to be unconstitutional—largely in part because of the state's initial failure to adequately consider the protocol. After substantial changes were made, and the protocol was put into writing in 2006, the Eighth Circuit Court of Appeals overruled the district court and held the Missouri protocol no longer violated the eighth amendment.[5]

Professor Berger's primary concern with Nebraska law was the lack of transparency of the procedure and those involved. He stated that the current system is "undermining open government in Nebraska."[6] In *Taylor*, Missouri's statutes prior to 2006—like Nebraska's current law—exclusively authorized the director of the department of corrections to create and carry out the lethal injection

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[3] *Id.*
[4] *Taylor v. Crawford*, 487 F.3d 1072 (8th Cir. 2007).
[5] *Taylor v. Crawford*, 487 F.3d 1072 (8th Cir. 2007).
[6] *Berger, supra* note 1.

procedures.[7] However, the director had no medical experience and was simply delegating this task to an incompetent surgeon.[8] There was no supervision of the surgeon as to how he designed and performed the executions.[9] The district court took note of this massive oversight, which, had it been remedied, could have caught the incompetence of the surgeon earlier and prevented improper executions. Ultimately, the court in *Taylor* was concerned about the amount of secrecy and lack of medical competence connected to carrying out lethal injections. Nebraska Law LB36 presents identical issues.[10]

Other states have had similar concerns with secrecy surrounding the implementation of executions by lethal injection. California's lethal injection protocol was held unconstitutional because it lacked "professionalism" and an "open, deliberative, and thorough review."[11] Tennessee's protocol failed the constitutional test—even though a committee consulted experts and proposed significant changes to the state's lethal injection method— because the commissioner of corrections for the state ignored the recommendations made by the committee with no valid explanation as to why.[12] Several states—including California, Delaware, Oklahoma and Texas—have since mitigated the state's concerns by posting their protocols for lethal injection on the internet.[13]

The apprehension surrounding the secrecy of lethal injection protocols would be less severe if what was being kept secret did not harm anyone. Unfortunately, however, the "three-drug cocktail" administered during lethal injection is "generally understood to create a significant risk of excruciating pain, especially if they are not carefully administered in a well-designed procedure by qualified medical personnel."[14] LB 36, Professor Berger noted, gives no indication of how execution team members may

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[7] *Taylor*, 487 F.3d 1072.
[8] *Id.* at 1076.
[9] *Berger, supra* note 1.
[10] *Id*. at 16 (citing *Taylor v. Crawford*, 487 F.3d 1072 (8th Cir. 2007)).
[11] *Berger, supra* note 1, at 17 (citing *Morales v. Tilton*, 465 F.Supp.2d 972, 980 (N.D.Cal. 2006)).
[12] *Harbison v. Little*, 511 F.Supp.2d 872, 895-898 (M.D.Tenn. 2007).
[13] *Berger*, *supra* note 1, at 18.
[14] *Id.*, at 15.

be selected or requirements for their qualifications, competence or training.[15] This lack of any qualified medical personnel, and the nonexistence of supervision during the procedure, greatly increases the risk for mistakes in the administration of the drugs, as the district court noted in *Taylor*.[16]

The main cause for pain in lethal injection executions comes from an incorrect dose of the first drug, the anesthetic. This drug is supposed to knock the inmate unconscious so he does not feel the painful second and third drugs as they enter his system.[17] However, if not enough anesthetic is given to the inmate, he may regain consciousness before the procedure is complete, or not lose consciousness at all.[18] The second drug is a paralytic. Once administered, the paralyzed inmate has no way to move or communicate with the execution team to let them know if he is awake.[19] If the inmate never lost consciousness, or regains consciousness during the administration of the third and final drug, the inmate will feel everything. The potassium chloride meant to stop the inmate's heart can feel like fire racing through the veins, causing intense and excruciating pain that the, now-paralyzed, inmate is powerless to stop.[20]

Capital punishment itself is constitutional; however, if the procedure is "sure or very likely to cause . . . needless suffering," and give rise to "sufficiently imminent dangers," it can be a violation of the Eighth Amendment.[21] The mere fact, however, that an execution method may result in pain is not enough to violate the eighth amendment, and the Supreme Court has yet to invalidated a state's chosen execution method due to an eighth amendment violation.[22] Still, whether each state's protocol is constitutional is highly circumstantial and depends on how the protocol is implemented. This can turn

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[15] *Berger*, *supra* note 1, at 18.
[16] *Id.*; *Taylor v. Crawford*, 2006 WL 1779035 at *8 (W.D.Mo. 2006).
[17] *Taylor*, 487 F.3d at 1074.
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Baze v. Rees*, 553 U.S. 35, 128 S.Ct. 1520, 1529, 1531 (2008) (*citing Gregg v. Georgia*, 428 U.S. 153, 177 (1976) (plurality opinion); *Helling v. McKinney*, 509 U.S. 25, 33-34 (1993)).
[22] *Clemons v. Crawford*, 585 F.3d 1119, 1125 (8th Cir. 2009); *Baze*, 128 S.Ct. at 1530.

heavily on a number of factors, including training and competence of execution team members and whether the process for determining their qualifications is reasonable and competent.[23] In *Taylor*, the court held constitutionality was based on "whether the protocol as written would inflict unnecessary pain, aside from any consideration of specific intent on the part of a particular state official."[24] If the written protocol is not unconstitutional on its face, "any risk that the [lethal injection] procedure will not work as designated in the protocol is merely a risk of accident, which is insignificant in . . . constitutional analysis."[25]

The Eighth Circuit Court of Appeals has twice upheld the lethal injection protocols of Nebraska's neighboring states; first in *Taylor* and then in *Nooner v. Norris*,[26] which involved Arkansas's lethal injection statute. In *Taylor*, as discussed above, the court found the unwritten protocol prior to 2006 unconstitutional on its face for lack of oversight, transparency, and minimum requirements of execution team members.[27] Only after substantial changes were made, and the protocol was put into writing in 2006, was it found to be constitutional.[28] In *Nooner*, the court did not find similar problems.[29] The court was pleased with the "numerous safeguards" contained in the Arkansas protocol, amended in 2005, to ensure the inmate was completely unconscious before administering the second and third drugs.[30] The protocol lists specific signs for the deputy director to watch for in order to ensure the inmate is unconscious, such as; movement, opened eyes, eyelash reflex, and response to verbal commands and physical stimuli.[31] After a three-minute waiting period, the deputy director can direct the executioners to administer back-up doses of the anesthetic if necessary to render the inmate

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[23] *Berger, supra* note 1, at 20.
[24] *Taylor*, 487 F.3d at 1081.
[25] *Id*. at 1080.
[26] *Nooner v. Norris*, 594 F.3d 592 (8th Cir. 2010).
[27] *Taylor*, 487 F.3d 1072.
[28] *Id.*
[29] *Nooner*, 594 F.3d 592.
[30] *Id.*
[31] *Id.* at 598.

unconscious.[32] Officials are also required to monitor the IV infusion sites and follow a contingency plan to address infusion problems.[33]

Along with statutory language, the requirements for the personnel carrying out the execution are also spelled out in the Arkansas protocol.[34] The deputy director must be "healthcare trained, educated, and/or experienced in matters related to the establishment and monitoring of IVs."[35] An IV team member must have at least two years of professional experience as an emergency medical technician, nurse, physician assistant or physician.[36] If the IV team cannot establish access through traditional methods, a "trained, educated and experienced person" must be summoned to establish a central venous line.[37] This person is required to be "a licensed physician who is credentialed to establish such lines."[38] Any cut-down procedures— cutting through the skin to gain access to the vein in order to administer the drugs— must also be made by a credentialed licensed physician.[39]

The safeguards and requirements found in the Arkansas protocol are similar to the updated protocol passed in Missouri in July 2006. Due to its thoroughness, the protocol in both states has withstood constitutional challenges from the judiciary.[40] *Nooner* defined the purpose of lethal injection protocol when it held that the protocol was designed "to avoid the needless infliction of pain, not to cause it"[41] and thus, any problems in the procedures would be "merely a risk of accident, which is insignificant in our constitutional analysis."[42]

Part II: Nebraska Law and Lethal Injection

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[32] *Id.* at 601.
[33] *Id*. at 602.
[34] *Id.*
[35] *Id*. at 605.
[36] *Id*.
[37] *Id.*
[38] *Id*. at 604.
[39] *Id*.
[40] *Taylor v. Crawford*, 487 F.3d 1072 (8th Cir. 2007); *Nooner*, *supra*.
[41] *Id*. at 608.
[42] *Id*. at 603.

Despite the potential constitutional violations and room for error, lethal injection was enacted in Nebraska last year.[43] However, several concerns listed by Professor Berger and authorities outside Nebraska remain. Namely, the law's lack of transparency and its silence on the issue of the three-drug cocktail's potential for pain.[44] In addition, some constitutional concerns still exist as well.

In his article, Professor Berger noted that a giant flaw in the Nebraska statute is its veil of secrecy.[45] Section 83-965 ¶4 of the statute exempts the execution protocol from the requirements of the Administrative Procedure Act, meaning that Nebraskans are not privy to information about the creation and amendments of the executive protocol.[46] Professor Berger recalled similar problems with the Missouri law in the *Taylor* case, and the fact that the unwritten protocol was pronounced unconstitutional in the district court partly because the execution procedure was hidden from the public.[47] Similarly, ¶5 of the statute states that execution protocol "shall not be made available" to anyone without express authorization by the director of correctional services or a good-cause order from the Lancaster County District Court.[48]

Professor Berger's point seemed to fall on deaf ears with the Nebraska Legislature. LB 36 was not amended to allow Nebraskans the chance to review or even see the creation of the execution protocol before the bill was passed. Nebraskans also cannot gain access to the protocol without the express consent of correctional services or the court. As a result, problems with the protocol are more difficult to unearth. Without this express consent or a judicial order, concerned citizens are not able to discover how the protocol for execution is created, who created it, how it is changed, how often it is changed, or reasons for the decisions made in relation to the protocol. This secrecy makes the state of

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[43] NEB. REV. STAT. § 83-964 (Reissue 2008).
[44] *Berger*, *supra* note 1, at 14.
[45] *Id*. at 16.
[46] *Id*.
[47] *Id*. (citing *Taylor v. Crawford*, 487 F.3d 1072 (8th Cir. 2007)).
[48] *Berger, supra* note 1, at 17.

Nebraska appear as though it has something to hide, and suggests that operations within the department of correctional services may not be on the "up and up." This same lack of transparency has caused problems in other states. Indeed, in Missouri, California, and Tennessee execution protocols have been held unconstitutional, at least in part, due to secrecy.[49]

The upside, for opponents of LB 36, is that this lack of transparency can be used as ammunition in lawsuits challenging lethal injection in Nebraska. As Professor Berger noted in his article, litigants have a right under the Federal Rules of Civil Procedure to obtain full discovery on an execution method—which would include the protocol itself and any related documents or testimony.[50] In addition, Professor Berger argues there is a constitutional due process right for inmates challenging the method of execution as a violation of their eighth amendment rights to see the protocol and how it is administered.[51] Thus, while it appears the statute can be successfully challenged in court based on its lack of transparency, it places a burden on concerned citizens of Nebraska to seek answers through the complicated, lengthy and often expensive gauntlet that is litigation.

Another secrecy concern deals specifically with the identities of the execution team members. The provision in the statute concerning this issue is overly broad and forbids the disclosure of not only the team members' identities, but also "any information reasonably calculated to lead to the identities" of the team members.[52] Bob Houston, the director of the department of corrections, stated to the Omaha World-Herald in June 2010 that the IV team consists of two members and the "escort" team consists of eight members.[53] He explained that the group had already done some training and would continue to train as executions neared.[54] He also claimed that "nearly half of the execution team" has been involved

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[49] *Id*. at 16-18.
[50] *Id*. at 18.
[51] *Id*.
[52] NEB. REV. STAT. § 83-967 (Reissue 2008).
[53] Paul Hammel, *Lethal Injection Table Ready*, OMAHA-WORLD HERALD (June 30, 2010) http://www.omaha.com/article/20100630/NEWS01/706309915.
[54] *Id*.

in executions before, and calls them "a very experienced group."[55] These few, general statements were the extent of the information Houston provided on the execution team.[56]

While Professor Berger sympathized with the need for confidentiality in relation to the identities of the members of the execution team, he worries that the broad provision prevents holding the state accountable for hiring truly qualified personnel.[57] Information reasonably calculated to lead to the identities of team members could be construed several differently ways, and is, in a sense, a blanket statement covering almost all information related to team members that could be crucial in determining their competency.[58] For example, Professor Berger explained, the state could refuse to disclose if a team member had ever been disciplined or had a medical license revoked on the grounds that it could lead to the identity of a team member, even if no identifying information was released. As a result, this could weaken the state's incentive to find and properly train competent execution team members.[59]

Another concern for LB 36 is that it failed to address the potential for pain caused by negligent administration of the three drug cocktail. In fact, the bill did not even require qualified personnel to administer the drugs, despite the well-known fact that the three-drug protocol can cause excruciating pain if not administered properly.[60] The statute recognizes that the inmate must be unconscious, but vaguely states that the determination of the level of consciousness must simply be "reasonably sufficient."[61] Because qualified personnel are not required to administer the drugs, it stands to reason that a non-qualified person is also monitoring the level of consciousness of the inmate.

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[55] *Id*.
[56] *Id*.
[57] *Berger, supra* note 1, at 19.
[58] *Id.*
[59] *Id*.
[60] *Id.* at 18 (citing Mark Dershwitz & Thomas K. Henthorn, *The Pharmacokinetics and Pharmacodynamics of Thiopental as Used in Lethal Injection*, 35 FORDHAM URB. L.J. 931, 931 (2008); Frank Romanelli et. al., *Issues Surrounding Lethal Injection as a Means of Capital Punishment*, 28 PHARMACOTHERAPY 1429, 1433 (2008)).
[61] NEB. REV. STAT. § 83-965(3).

Professor Berger noted in his article that evidence from many states show written protocols have been implemented in a "careless, unprofessional, and haphazard fashion, thus strongly suggesting the possibility of a constitutional violation."[62] A similar problem could arise in Nebraska if the protocol is hidden from public review. Professor Berger opined that lethal injection can only be properly performed—and thus avoid a constitutional violation—with; "expert input, a comprehensive protocol, qualified and well-trained personnel, defined contingency plans, careful recordkeeping, and a level of professionalism." [63]

Essentially, the requirements in the Arkansas and Missouri lethal injection protocols that were factors when the Eighth Circuit Court of Appeals upheld them as constitutional are missing from Nebraska's statute. Perhaps the biggest concern for LB 36 is that we cannot say for sure whether Nebraska's protocol avoids eighth amendment violations, because we do not know if the same requirements for verifying unconsciousness or proper IV injections exist. Nebraska lacks professional requirements for personnel involved in the execution. This lack of transparency as to who is performing the execution and how they are qualified is alarming. The director of correctional services has the sole power to create, modify, and maintain a written execution protocol that no one is allowed to see without his authorization or a court order.[64] The director designates his own team, and qualifies them under the terms of the protocol that he himself wrote.[65] He also has the authority to decide who is allowed to witness the execution and where it will be held.[66] With such uncertainty in the protocol, and little supervision overseeing it, it is difficult to ever determine which procedures are proper and which procedures cross the line into constitutional violations.

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[62] *Berger, supra* note 1, at 16.
[63] *Id*.
[64] NEB. REV. STAT. § 83-965.
[65] NEB. REV. STAT. § 83-967.
[66] NEB. REV. STAT. § 83-970.

Conclusion: An Uncertain Future for LB 36

The lack of certainty and clarification on the issues surrounding LB 36 could create trouble for the Nebraska law. While the law is on the books for now, there is plenty of potential for lawsuits challenging it. Professor Berger noted that the nearly certain litigation expected to arise from the implementation of this protocol will delay executions and prove to be very costly to Nebraska taxpayers.[67] Nebraskans Against the Death Penalty has indicated that it intends to challenge the new laws, and the twelve men on death row are expected to file appeals as well.[68]

As of June 30, 2010, the death chamber at the Nebraska State Penitentiary has been remodeled, the drugs for the lethal injection cocktail have been ordered, and the electric chair has been placed in storage. But how soon the chamber and drugs will be used will depend on the outcome of future litigation.[69] The way the Nebraska lethal injection statutes are currently written, it likely would not pass through the Missouri or Arkansas courts. While the Eighth Circuit Court of Appeals has not blocked any lethal injection statutes at this point, it has also not dealt with statutes that are as vague and ambiguous as LB 36. Based on the decisions of other states, Nebraska's law will require extensive revision and the inclusion of much more detail and transparency if it wishes to withstand a constitutional challenge. If Nebraska has nothing to hide, it has no reason to veil its procedure and personnel from the public in a cloud of secrecy.

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[67] *Berger, supra* note 1, at 16.
[68] Paul Hammel, *Lethal Injection Table Ready*, OMAHA-WORLD HERALD (June 30, 2010) http://www.omaha.com/article/20100630/NEWS01/706309915.
[69] *Id*.