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Thoughts on LB 36: Problems with the Proposed Bill to Institute Lethal Injection in Nebraska

By Eric Berger*

Introduction

In February 2008, the Nebraska Supreme Court held in *State v. Mata* that Nebraska's electrocution procedure violated the Nebraska constitution's prohibition against cruel and unusual punishment.¹ *Mata* left Nebraska in the curious position of having the death penalty on the books without a constitutional method of executing death sentences. In December 2008, Nebraska Attorney General Jon Bruning submitted a report to the Governor recommending that Nebraska adopt lethal injection as a new means to carry out a sentence of death. General Bruning's report included LB 36, a proposed statute that would institute lethal injection in Nebraska.

On January 29, 2009, the Judiciary Committee of the Nebraska legislature conducted hearings about LB 36 and LB 306, a competing bill that proposed repealing the death penalty in Nebraska and replacing it with life imprisonment without the possibility of parole. Several lawyers, doctors, professors, and other citizens (including former Nebraska Senator Ernie Chambers) testified on either or both bills. I was among the people who testified on LB 36 (the lethal injection bill). Specifically, I argued that LB 36 contained several provisions that would insulate Nebraska's lethal injection procedure from democratic review and would therefore risk creating a flawed, dangerous procedure. I am attaching here my written testimony from that day.²

Written Testimony to the Judiciary Committee

January 29, 2009

Re: Opposition to LB 36
Lethal Injection

Members of the Judiciary Committee:

My name is Eric Berger, and I am an Assistant Professor of Law at the University of Nebraska College of Law here in Lincoln. Before I moved to Nebraska a year and a half ago to

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¹ *State v. Mata*, 275 Neb. 1, 67, 745 N.W.2d 229, 278 (2008).

² Minor stylistic and citation edits have been made to my original written testimony.

teach at the Law College, I was a practicing attorney at a law firm in Washington, D.C. During my time there, I was a member of the legal team representing Michael Taylor in his challenge to the constitutionality of Missouri's lethal injection procedure. I also worked on *Hill v. McDonough*,³ a United States Supreme Court case holding that death row inmates could challenge the lethal injection procedure by which they would be executed under a provision of the Civil Rights Act known as 42 U.S.C. § 1983. Since coming to the Law College, much of my research has focused on lethal injection, including an article being published this May in the *Yale Law and Policy Review*.

Since moving to Nebraska, I have been struck by this state's proud tradition of open government. Nebraska, more so than most states in my experience, prides itself on transparent and deliberate governance. These important values are reflected, among other places, in its Criminal History Information Act, its Public Records Laws, and its Open Meetings Act.⁴ While I would like to commend the sponsors of LB 36 and this committee for this hearing, I believe LB 36 undermines those important values.

Recent inquiry into some lethal injection procedures' poor design and implementation demonstrates that lethal injection is not the humane and simple method of execution many people have assumed it to be. To the contrary, the commonly used drugs (sodium pentothal, pancuronium bromide, and potassium chloride) are now 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. Due to these risks, executions are or have been on hold in multiple jurisdictions across the country as courts, legislatures, and governors reevaluate current procedures. Indeed, federal courts in California, Missouri, and Tennessee have found that existing lethal injection procedures are unconstitutionally dangerous. Botched executions, administrative reviews, and constitutional challenges have also halted or significantly delayed executions in numerous other states including Arizona, Delaware, Florida, Maryland, North Carolina, Ohio, Oklahoma, and Virginia.

Many of the problems at issue in those cases and identified by those courts result from the legal and administrative process by which lethal injection protocols have been designed and implemented. Like many complex government undertakings, the administrative process used to adopt lethal injection protocols helps determine the quality of the resulting execution procedures. But in most states lethal injection has not been adopted through careful study and deliberation, but rather by mimicking other states' procedures in almost total secrecy. The widespread three-drug protocol was initially developed in Oklahoma in 1977 and has since been adopted by numerous states without sufficient understanding of the drugs and their risks. Rather than consulting with experts, seeking public opinion, and engaging in considered analysis, states have thoughtlessly copied Oklahoma's three-drug approach. This almost blind adoption of the Oklahoma protocol is ironic, given that the creator of that protocol today expresses shock that it

³ 547 U.S. 573 (2006).

⁴ See NEB. REV. STAT. §§ 29-3501 to -3528 (Reissue 2008); NEB. REV. STAT. §§ 84-712 (Reissue 2008); NEB. REV. STAT. §§ 84-1408 to -1414 (Reissue 2008).

is not performed by doctors but by individuals with little understanding of the dangers posed by the drugs.⁵

Respectfully, I submit that LB 36 replicates many of the mistakes made in these other states. The veil of secrecy obscuring the lethal injection protocol in LB 36 is contrary to Nebraska's commitment to open government and risks creating a dangerous and unconstitutional execution procedure. Additionally, the bill's numerous flaws will almost certainly generate prolonged litigation that will delay executions and cause great expense to Nebraska taxpayers.

Problematic Provisions in LB 36 Undermining Open Government in Nebraska

Section 83-965 ¶ 4 (exemption from APA requirements)

This provision exempts the execution protocol from the requirements of the Administrative Procedure Act. In so doing, this provision not only denies Nebraskans important information about how their government carries out its most solemn task, but also likely will result in a flawed execution procedure. To be performed properly, lethal injection requires expert input, a comprehensive protocol, qualified and well-trained personnel, defined contingency plans, careful recordkeeping, and a level of professionalism absent in many states. The deliberative processes fostered by the Administrative Procedure Act are essential to ensure that execution procedures possess these necessary attributes.

From my own experience litigating the *Taylor v. Crawford* case in Missouri, I can testify firsthand to the problems that arise when a state designs and implements a protocol in secret. When my colleagues and I litigated *Taylor*, Missouri's lethal injection procedure operated in near-total secrecy. The state had delegated the entire matter to the Director of the Department of Corrections, just as LB 36 proposes to do.⁶ However, the director had no medical background and knew nothing about the drugs involved. He therefore delegated the procedure to a surgeon, but he did not oversee that surgeon to keep himself apprised of how executions were carried out. The *Taylor* court found that the surgeon had arbitrarily and dangerously lowered the dose of anesthetic given to inmates and that he was incompetent to perform executions. Moreover, because the state had delegated complete authority to him, the court expressed concern that "there are no checks and balances or oversight" over the execution procedure.⁷ Significantly, the court concluded that Missouri's procedure was unconstitutional in large part because of the state's failure to give careful consideration to its protocol in the first place. By hiding its execution procedure from the public and exempting it from normal APA processes, LB 36 makes the same kind of mistakes that got Missouri into trouble.

⁵ See Deborah W. Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*, 76 *FORDHAM L. REV.* 49, 68-69 (2007).

⁶ See LB 36, § 83-965, ¶ 2, 101st Leg., 1st Sess. (Neb. 2009) ("The Director shall create, modify, and maintain a written execution protocol . . .").

⁷ *Taylor v. Crawford*, No. 05-4173-CV-C-FJG, 2006 WL 1779035, at *7 (W.D. Mo. June 26, 2006).

Unsurprisingly, courts also cite this lack of deliberation as reason to give less deference to state execution procedures. For instance, when California “tweaked” its execution protocol to try to comply with a federal court’s concerns, the reviewing court focused on the superficial nature of the revision process. Unsurprisingly, the court found California’s mere “tweak” to be an insufficient substitute for an open, deliberative, and thorough review. In other words, the court found that the failure to carefully deliberate was evidence of the “pervasive lack of professionalism” that plagued California’s lethal injection procedure.⁸ As a result, the court explained:

a thorough review of the lethal-injection protocol, including, *inter alia*, the manner in which the drugs are injected, the means used to determine when the person being executed has lost consciousness, and the quality of contemporaneous records of executions, such as execution logs and electrocardiograms, likely will be necessary. To be meaningful, such a review may require consultation with independent experts and with other jurisdictions, and it must be undertaken with an openness to the idea of making significant improvements in the ‘infrastructure’ of executions.⁹

In short, the “meaningful” review contemplated by the court is precisely the type of deliberative process that states try to foster in Administrative Procedure Acts.

Along similar lines, a Tennessee federal court found that state’s lethal injection procedure unconstitutional, in part because the Commissioner of Corrections ignored recommendations of a committee that had consulted experts and proposed significant changes to Tennessee’s protocol. Given that this commissioner had not consulted his own experts or offered credible reasons for rejecting the recommendation of a panel that had given the matter substantial attention, the court determined that the procedure the commissioner insisted on retaining deserved no judicial deference.¹⁰ A Nebraska execution protocol adopted without the benefit of administrative procedures would similarly be undeserving of judicial deference.

Section 83-965 ¶ 5 (execution protocol “shall not be made available”)

This provision continues the policy of concealment by stipulating that no part of the execution protocol shall be made available to any person without the express authorization of the Director of Correctional Services or an order from the Lancaster County District Court issued for good cause. Just like the APA provision, this provision hides the execution protocol from public view, thereby making it more likely that it will be poorly designed and administered.

An execution protocol specifies the state’s intended procedures for carrying out death sentences and therefore is a matter of public importance. Many states have attempted to keep their protocols secret, but courts frequently order that they be made public, at least for litigation

⁸ *Morales v. Tilton*, 465 F. Supp. 2d 972, 980 (N.D. Cal. 2006).

⁹ *Id.* at 983 (internal quotation marks and citations omitted).

¹⁰ *See Harbison v. Little*, 511 F. Supp. 2d. 872, 895-98 (M.D. Tenn. 2007).

purposes. Indeed, reviewing courts have condemned the states' insistence on secrecy.¹¹ Moreover, in the face of heightened public concern over lethal injection, some states' protocols, including California, Delaware, Oklahoma, and Texas's, appear on the internet. Given Nebraska's commitment to open government and sunshine, I respectfully suggest that if Nebraska does adopt a new method of execution, it make its own execution protocol similarly available.

One lesson from litigation around the country is that the safety (and therefore the constitutionality) of execution procedures hinges not only on the four corners of the written protocol, but also on how the protocol is administered. In several states there is evidence that the written protocols have been implemented in a careless, unprofessional, and haphazard fashion, thus strongly suggesting the possibility of a constitutional violation. LB 36's efforts to hide not just the creation but also the implementation of the protocol from public view will threaten to create similar problems here in Nebraska.

Indeed, in addition to making it look like Nebraska has something to hide, this provision would likely be ineffective. In most circumstances, litigants challenging a lethal injection procedure in federal court would have the right under the Federal Rules of Civil Procedure to obtain full discovery into an execution method. The United States Supreme Court's recent decision in *Baze v. Rees* itself contemplates this discovery by requiring an inquiry into whether a given state's procedure is "substantially similar" to Kentucky's.¹² Moreover, because death row inmates possess an Eighth Amendment right protecting them against excruciating executions, they likely also have an interrelated due process right to know how they will be executed. This makes sense, because without knowing the method of execution, the inmate would have no way of protecting his Eighth Amendment right.

Section 83-965 ¶ 3, et seq. (no provision for qualified personnel)

As noted above, the safety and constitutionality of lethal injection hinges largely on the quality of the people administering it. It is undisputed that the three-drug protocol causes excruciating pain if it is not administered properly,¹³ so it is essential that the state use qualified personnel to administer these drugs.¹⁴ LB 36, once again, hides the ball, by offering no indication of how the execution team members might be selected or what their qualifications, competence, or training might be.

¹¹ See, e.g., *Oken v. Sizer*, 321 F.Supp. 2d 658, 664 (D. Md. 2004) ("Fundamental fairness . . . requires that the execution protocol that will regulate an inmate's death be forwarded to him in prompt and timely fashion.").

¹² *Baze v. Rees*, 128 S. Ct. 1520, 1537 (2008).

¹³ 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).

¹⁴ Other methods of lethal injection would also need to be properly implemented by qualified personnel. Because the Attorney General's Report seems to anticipate the adoption of the three-drug method, my discussion focuses on that method.

To give just one example, § 83-965 ¶ 3 provides no indication what level of training will be required (if any) for the person who does the consciousness check. (It only vaguely states that “a determination sufficient to reasonably verify that the prisoner is unconscious be made before the administration of any additional substances.”) But consciousness can only reliably be checked by a person with training in anesthesiology.¹⁵ LB 36’s consciousness check is therefore inadequate without assurance that it will be performed by a qualified person. Indeed, because LB 36 hides so much of the design and implementation of the protocol from public view, there is no way to know whether any steps of the procedure will be performed by competent personnel. This lack of assurance itself is likely to generate litigation.

Section 83-967 (confidentiality of participants)

I am very sympathetic to the state’s need to protect the identity of the execution team members. If Nebraska does adopt a new method of execution, I agree entirely that the state can and should protect the executioners’ identities. That being said, § 83-967 as currently drafted is so vague and overbroad as to likely violate the First Amendment.

Paragraphs 2 and 3 in particular forbid not only disclosure of the identity of execution team members, but also the disclosure of “any information reasonably calculated to lead to the identities” of the execution team members. Paragraph 3 goes so far as to criminalize such disclosure. In so doing, it violates the First Amendment’s freedom of speech. It would be almost impossible for somebody to know in advance what would constitute “information reasonably calculated to lead to the identities” of execution team members. That language could mean one thing to one person and another thing to someone else. It could also be used to prosecute, for instance, members of the media for truthfully reporting on lawfully obtained information about execution team competence, even if such a report disclosed no one’s identifying information, such as name, address, or employer. Such vagueness and overbreadth likely violate the First Amendment, because they chill constitutionally protected speech.¹⁶

In addition to raising serious constitutional concerns, these provisions are also bad policy. If the provisions are interpreted broadly, they could insulate from disclosure even the most basic information about execution personnel’s training and qualifications. Missouri, for instance, refused to disclose whether a team member had ever been disciplined or had a medical license revoked on the ground that it was identifying information—but obviously such information is directly relevant to the safety of the execution procedure. Collectively, then, these provisions further insulate the most important details of the execution procedure from public view. If most information about the execution team members were secret, the public would have no way to learn of executioner malfeasance, and the state would have less incentive to find and properly train competent people.

¹⁵ See, e.g., Dershwitz & Henthorn, *supra* note 13, at 949.

¹⁶ See, e.g., *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971); *Florida Star v. B. J. F.*, 491 U.S. 524, 530-41 (1989).

It is important to emphasize that litigants and the public in general can receive important information without learning the names, addresses, or other identifying information about the execution team members. This was the case in Missouri. Under the court's supervision, we were able to learn about the surgeon's incompetence and misconduct without ever receiving any identifying information, such as his name, address, or place of work. Discovery agreements and protective orders in other states also have ensured that the executioners' identities remain anonymous while litigants still get the information they need. In the event that Nebraska does adopt a new method of execution, it would be constitutionally permitted to protect the identity of its execution team members. However, as currently drafted, § 83-967 is so vague and overbroad that it offends the First Amendment and invites needless litigation.

The Problem of Pancuronium

Though LB 36 does not specify the drugs that will be used, the Attorney General's Report suggests a preference for the three-drug protocol. The second drug in this protocol is pancuronium bromide, which completely paralyzes the inmate. The use of pancuronium in executions contributes to the lack of transparency and openness, because it conceals all suffering from witnesses, including the execution team itself. Additionally, the use of pancuronium greatly complicates litigation challenging lethal injection, because the plaintiff can always point to the pancuronium as the reason why apparently peaceful past executions might still have been painful. The inclusion of pancuronium, then, not only greatly increases the risk that the inmate will suffer undetected pain, but also increases the likelihood that time-consuming litigation will stall executions at significant expense to the state.

The Limited Scope of Baze v. Rees

Before concluding, it is worth emphasizing that the Supreme Court's decision in *Baze v. Rees* resolved only the constitutionality of the Kentucky procedure at issue in that case. While it did set a legal Eighth Amendment standard against which all lethal injection protocols will be judged, the constitutionality of a given state's procedure depends on how that state implements its own protocol. As noted above, this turns heavily on the details of implementation, including the training and competence of the execution team members. Significantly, the plaintiff's lawyers in *Baze* had failed to gather virtually any important information about how the Kentucky protocol actually worked in practice.¹⁷ *Baze* was therefore an easy case, because there was no evidence of malfeasance or maladministration. It would be a mistake, though, to assume that litigation in all other states using the same drugs would necessarily be resolved the same way.

Because the constitutionality of each state's procedure is fact specific, litigation is ongoing in numerous states, and courts are permitting discovery into the details of those states' procedures. Discovery into the implementation of lethal injection protocols has been ongoing recently in challenges to the lethal injection procedures in Arizona, Ohio, Oklahoma, and the federal government. It is therefore important to understand that merely trying to copy the

¹⁷ See *Baze*, 128 S.Ct at 1527-28.

Kentucky procedure approved in *Baze* is no guarantee to avoiding litigation or to ensuring a humane execution procedure. Indeed, if there is a lesson to be learned from the litigation thus far, it is that the details of implementation determine an execution procedure's humaneness and constitutionality as much as the written protocol does.

Conclusion

In closing, I respectfully submit that it would be imprudent for Nebraska to pass a lethal injection statute now. Litigation is still pending in several states around the country, and discovery into those states' actual practices may well uncover constitutional problems, like those already found in California, Missouri, and Tennessee. Until that litigation is resolved, any new statute adopting lethal injection as a method of execution is almost certain to provoke extended and costly litigation. I therefore respectfully suggest that this legislature study closely both the facts and the costs of such litigation (and the significant financial costs of the death penalty more generally) before voting on LB 36.

Thank you for your consideration.

Sincerely,

Eric Berger
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University of Nebraska College of Law

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