



REGULATING DEATH IN THE LONE STAR STATE:

Texas Law Protects Lizards From Needless
Suffering, But Not Human Beings

REGULATING DEATH IN THE LONE STAR STATE:

Texas Law Protects Lizards from Needless Suffering, But Not Human Beings

A Report by

The American Civil Liberties Union (ACLU) of Texas
The American Civil Liberties Union Foundation Capital
Punishment Project and Human Rights Program, and
The Center for International Human Rights,
Northwestern University School of Law

March 2011

INTRODUCTION

As Texas prepares to execute Cleve Foster on April 5, 2011, disturbing new facts have emerged in relation to Texas' lethal injection protocol. The Texas Department of Criminal Justice (TDCJ) has recently announced its intention to begin using a new drug in the lethal injection process, without allowing for any expert analysis or public scrutiny of the suitability of the new drug—pentobarbital. In fact, there is no evidence that Texas has ever engaged in a meaningful assessment of whether the drug can or should be used in combination with the other two drugs administered in lethal injections, pancuronium bromide and potassium chloride. This lack of assessment and transparency is even more troubling given the concerns of prominent anesthesiologists about the efficacy of pentobarbital in the execution of human beings and the risk that the three drugs used in combination could lead to an excruciatingly painful death.

Texas' lax attitude regarding the taking of human life contrasts sharply with its enactment of detailed regulations to ensure that animals suffer no pain when they are euthanized. Animal euthanasia laws provide strict certification requirements for euthanasia technicians and regulate acceptable methods of intravenous euthanasia down to the correct dosage per kilogram of an animal's body weight. By

IN SEARCH OF ACCOUNTABILITY: RULES, REGULATIONS AND THE CORRECTIONAL INSTITUTIONS DIVISION

The Texas Health and Safety Code provides, “A person may euthanize a dog or cat in the custody of an animal shelter only by administering sodium pentobarbital or commercially compressed carbon monoxide.”¹ All other shelter animals, “including birds and reptiles,” may be euthanized “only in accordance with the applicable methods, recommendations, and procedures set forth in the 2000 Report of the American Veterinary Medical Association Panel on Euthanasia as modified or superseded by a subsequent report of the American Veterinary Medical Association Panel on Euthanasia that is approved by the board.”² The American Veterinary Medical Association (“AVMA”) produces its Guidelines on Euthanasia with the participation of a panel of scientists, which

¹ TEX. HEALTH & SAFETY CODE ANN. § 821.052 (West 2009). Other states have similar regulations. See ARIZ. REV. STAT. ANN. § 11-1021(B) (2011) (stating that animals may be euthanized only by injection of sodium pentobarbital or a derivative, or by T-61 euthanasia solution or its generic equivalent); IND. CODE § 35-48-3-2(a)(1) (West 2011) (authorizing the use of “[S]odium pentobarbital to euthanize injured, sick, homeless, or unwanted domestic pets and animals”); TENN. CODE ANN. § 44-17-303(a) (West 2010) (acceptable methods of euthanasia are lethal injection of sodium pentobarbital, and solution or powder added to food); ALA. CODE § 34-29-131(a) (2010) (indicating that

/P <</MCID 5 >>BDC 11.0j 0. 11.011.14258.5011 2 Tm

entrench euthanasia procedures firmly in the legislative process, and violations of these laws can result in prosecution for a class B misdemeanor.⁸

In contrast, the Texas Code of Criminal Procedure states only that a death sentence shall be carried out “by intravenous injection of a substance or substances in a lethal quantity sufficient to cause death” and that the procedure is “to be determined and supervised by the director of the correctional institutions division of the Texas Department of Criminal Justice (“TDCJ”).”⁹ The current director of the Correctional Institutions Division is Rick Thaler, a former corrections officer and director of the Manufacturing and Logistics Division of

⁸ TEX. HEALTH & SAFETY CODE ANN. § 821.056 (West 2009). See also OHIO REV. CODE ANN. § 4729.99(F) (West 2011) (violation is a first degree misdemeanor); TENN. CODE ANN. § 44-17-303(j) (West 2010) (violation is a Class A misdemeanor).

⁹ TEX. CODE CRIM. PROC. ANN. art. 43.14 (West 2009). Some states have adopted a similar approach. See IND. CODE § 35-38-6-1(a) & (d) (2011) (“The department of correction may adopt rules under [§ 4-22-2] necessary to implement” the execution, which “shall be inflicted by intravenous injection of a lethal substance or substances into the convicted person: [] in a quantity sufficient to cause the death of the convicted person; and [] until the convicted person is dead.”); TENN. CODE ANN. § 40-23-114(a) & (c) (West 2010) (“The department of correction is authorized to promulgate necessary rules and regulations to facilitate the implementation of this section,” which determines that “the method for carrying out [a death] sentence shall be by lethal injection.”); ARIZ. REV. STAT. ANN. § 13-757(A) (2011) (“The penalty of death shall be inflicted by an intravenous injection of a substance or substances in a lethal quantity sufficient to cause death, under the supervision of the state department of corrections.”); OHIO REV. CODE ANN. § 2949.22(A) (West 2011) (“[A] death sentence shall be executed by . . . a lethal injection of a drug or combination of drugs of sufficient dosage to quickly and painlessly cause death. . . . The warden of the correctional institution in which the sentence is to be executed or another person selected by the director of rehabilitation and correction shall ensure that the death sentence is executed.”).

TDCJ¹⁰ with a master’s degree in business administration from Sam Houston State University.¹¹ Absent from Mr. Thaler’s resume is any training or experience in anesthesiology, pharmacology, public health or science. Nevertheless, he has the authority to change everything from the type and dosage of the drugs to the qualifications and identity of the executioners.¹² While the AVMA is required to convene a panel of experts to revise euthanasia guidelines, the procedures for execution of people by lethal injection “are not the product of any kind of scientific or medical review.”¹³ In a recent press conference, a spokesperson for the TDCJ explained, “[i]t’s in the state statute that changes in chemical and dosages may be made at the discretion of the institutional division director.”¹⁴

In Texas, the three-drug protocol used for lethal injection consisted until recently of sodium thiopental, an anesthetic or sedative drug; pancuronium bromide, a neuromuscular paralytic; and potassium chloride to stop the

¹⁰

heart.¹⁵ On March 16, 2011, the TDCJ—acting through Rick Thaler—responded to a shortage of sodium thiopental by announcing that it would replace sodium thiopental with pentobarbital, a drug untested scientifically for efficacy in lethal injections, in its three-drug lethal injection protocol.¹⁶ As Dr. David Waisel, an expert anesthesiologist and Harvard Medical School professor, testified in an Oklahoma lawsuit challenging the use of pentobarbital in executions,

Maurie Levin, Foster’s attorney, expressed

The use of pentobarbital as an agent to induce anesthesia has no clinical history and is non-standard. Because of these significant unknowns, and a lack of clinical history related to using pentobarbital to induce anesthesia, using pentobarbital as part of a 3-drug lethal injection protocol puts the inmate at an undue risk of suffering.¹⁷

Without laws and regulations in place that provide effective oversight of the transition from sodium thiopental to pentobarbital, neither the prisoners nor the public can be assured that the new execution process protects condemned men and women from a painful and protracted death.

One Texas inmate, Cleve Foster, is scheduled for execution on April 5, 2011—less than three weeks after Texas announced its adoption of this new lethal injection protocol.¹⁸

¹⁵ Texas Department of Criminal Justice, Correctional Institutions Division, Execution Procedure § VI(B) (May 2008).

¹⁶ Michael Graczyk, Shortages Force Texas to Switch Execution Drug, HOUSTON CHRONICLE, Mar. 16, 2011, <http://www.chron.com/disp/story.mpl/metropolitan/7474406.html>.

¹⁷ Pavatt v. Jones, No. CIV0-141-F (W.D. Okla. Oct. 29, 2010) (Expert Report of David B. Waisel, MD).

¹⁸ Texas Department of Criminal Justice, Scheduled Executions,

SUBSTANCES IN A LETHAL QUANTITY: CHOICE AND ADMINISTRATION OF DRUGS

In states such as Texas, the three-drug lethal injection protocol is administered by staff who are not trained anesthesiologists. Moreover, Texas law fails to set forth dosage-to-weight guidelines for the administration of anesthesia, and does not require effective measures to ensure prisoners are anesthetized at the moment of death. These circumstances give rise to a real risk that the anesthesia will fail to produce unconsciousness at the time the second and third drugs are administered.

The second drug in the three-drug protocol is pancuronium bromide, a paralytic that causes asphyxiation, which is both painful and terrifying to a conscious person.²¹ The nature of the paralysis induced by pancuronium bromide means that members of a lethal injection drug team with limited medical training will find it almost impossible to know if the anesthesia is working. TDCJ procedures allow drug team members to proceed immediately with the administration of potassium chloride “if the condemned individual exhibits no visible sign of being awake,”²² a test that makes little sense if the individual is paralyzed and unable to move or even blink. Worse, the paralytic effects of the pancuronium bromide would mask the suffering felt by a conscious prisoner during the administration of the final drug in the protocol, potassium chloride, which causes cardiac arrest and is excruciatingly painful when injected intravenously.²³

As Professor Ty Alper explains in his article Anesthetizing the Public Conscience: Lethal Injection and Animal Euthanasia,

The pain and suffering that an inmate would experience if not properly anesthetized is extreme. Because pancuronium is a paralytic that restricts the ability of the respiratory muscles to contract, it causes asphyxiation. The third drug, potassium chloride, causes excruciating pain that has been likened to the feeling of having one’s veins set on fire. Experts who have testified in lethal injection cases have unanimously agreed that it would be unconscionable to inject either drug into a person who is

²¹ See Alper, *supra* note 14, at 819, 820.

²² TDCJ Execution Procedure §VII(J), emphasis added.

²³ Alper, *supra* note 14, at 819, 820.

treatment, or unnecessary pain, shall be inflicted upon a prisoner to be executed under the sentence of the law.”²⁶ Nevertheless, Texas continues to run the risk that inmates will be conscious when the potassium chloride reaches their veins.

Although pentobarbital is often used in the euthanasia of cats and dogs, the AVMA Guidelines on Euthanasia explicitly state that “a combination of pentobarbital with a neuromuscular blocking agent is not an acceptable euthanasia agent.”²⁷ As a result, veterinarians in Texas are prohibited from using the combination of drugs that the Texas Department of Criminal Justice has deemed suitable for the execution of human beings.²⁸

Professor Alper writes,

The crucial difference between the three-drug procedure used in lethal injections in humans and the anesthetic-only procedure used in animal euthanasia is the absence of the second and third drugs in the latter procedure. These are the two drugs that cause the pain and suffering if the first drug does not take.

MA 16 Oct 07 2:07 PM vs 2485 (D) (Pret) (en) <M4Bdu9e2fw.153the121(a)en>T38.5830tsv10(8f

“AT LEAST ONE MEDICALLY CERTIFIED INDIVIDUAL”: TRAINING AND OVERSIGHT OF PERSONNEL

Section 522.900 of Title 21 of the Code of Federal Regulations covers the administration of sodium pentobarbital injections for euthanizing dogs, and notes that the drug may only be used “by or on the order of a licensed veterinarian.”³⁴ Similarly, the U.S. Food and Drug Administration’s compliance guidelines relating to the use of animal euthanasia drugs note that animal control agencies operated by state and local governments, or by government-sanctioned non-governmental organizations, may allow the use of animal euthanasia drugs by lay persons only “if there is a staff or consulting veterinarian who obtains the drugs and the drugs are used under his general supervision and authority.”³⁵ The federal regulations that apply to the euthanasia of animals in federal chimpanzee sanctuaries state that euthanasia drugs will be administered “only by properly trained personnel under the direction of the Facility Veterinarian.”³⁶

Under the Texas Health and Safety Code, only licensed veterinarians and euthanasia technicians may euthanize animals.

The Code also notes that the Department of Health “must approve the sponsors and curriculum” of the required training course.³⁹

By contrast, anesthesiologists and other doctors do not participate in executions because to do so would violate the ethical codes of their professions.⁴⁰ According to the American Medical Association, participation encompasses “(1) an action which would directly cause the death of the condemned; (2) an action which would assist, supervise, or contribute to the ability of another individual to directly cause the death of the condemned; (3) an action which could automatically cause an execution to be carried out on a condemned prisoner.”⁴¹ This

Data Sheet Regulations. (4) Euthanasia stress management. (5) Proper disposal of euthanized animals.”); OHIO REV. CODE ANN. § 4729.532(B) (West 2011) (requiring a sixteen hour course, which must include information concerning at least: “(1) The pharmacology, proper administration, and storage of euthanasia solutions; (2) Federal and state laws regulating the storage and accountability of euthanasia solutions; (3) Euthanasia technician stress management; (4) Proper disposal of euthanized animals”); FLA. STAT. ANN. § 828.058(4)(a) (West 2010) (requiring a sixteen hour course, which “must include, at a minimum, the pharmacology, proper administration, and storage of euthanasia solutions; federal and state laws regulating the storage and accountability of euthanasia solutions; euthanasia technician stress management; and proper disposal of euthanized animals.”); KY. REV. STAT. ANN. § 321.207(4) (West 2010).

³⁹ TEX. HEALTH & SAFETY CODE ANN. § 821.055 (West 2009).

⁴⁰ Some states specifically grant immunity from professional penalties for participating in an execution. S0.05>BDC 6ASS

CONCLUSION

The Texas legislature's hands-off approach to the taking of human life stands in marked contrast to its proactive approach to the taking of animal life. Texas statutes subject the animal euthanasia process to rigorous oversight, regulation, and training requirements in order to make the procedures more humane. Condemned human beings in the state must rely on a procedure implemented by bureaucratic fiat to safeguard their rights and prevent needless pain and suffering during the execution process. In sum, the manner in which Texas carries out the execution of human beings is riskier, less transparent, and has less oversight than the euthanasia of cats, dogs, birds, and lizards. We call on the Texas Board of Pardons and Paroles, Governor Rick Perry, and the courts to stay pending executions until the legislature enacts measures that provide at least the same protections to human beings condemned to die as are provided to sick or unwanted animals. At the same time, the Texas legislature and judiciary should require TDCJ to subject its lethal injection protocol to public scrutiny and expert assessment to ensure that executions are carried out in such a way as to minimize human suffering.