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## Death Bed

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Deborah W. Denno\*

## Death Bed

I am sitting in the witness stand of a courtroom in Frankfort, Kentucky, facing David, a young defense lawyer at Kentucky's Department of Advocacy. David is standing at a podium questioning me. It is April 18, 2005. We have been waiting for this moment for a very long time. I am the first of a dozen expert witnesses to testify in *Baze et al. v. Rees et al.*,<sup>1</sup> a bench trial concerning the constitutionality of Kentucky's lethal injection protocol. Lethal injection is this country's most widely used method of executing death row inmates. I am testifying on behalf of the plaintiffs, Ralph Baze and Thomas Bowling, two condemned inmates who are claiming that the Kentucky protocol constitutes cruel and unusual punishment under the Eighth Amendment of the United States Constitution and Section 17 of the Kentucky Constitution. The three defendants involved in this trial are most responsible for how Kentucky's executions are handled. They are the Commissioner of the Kentucky Department of Corrections, the Warden of the Kentucky State Penitentiary, and the Governor of the Commonwealth of Kentucky.

For months, David and his colleagues have been preparing for this trial. I am here because I have studied lethal injection, indeed all of this country's execution methods, for nearly fifteen years while a professor at Fordham University School of Law in New York City. The topic of execution methods has so troubled me that I have continued to follow it during my entire legal career, in spite of other professional interests and commitments. To me, the problem with execution methods symbolizes

nearly everything that has gone astray with the death penalty in this country.

This courtroom scenario in Frankfort is not what people typically think of when they hear the word “trial” in the popularized television sense of that word. Everything about the setting projects smallness and understatement. Frankfort, the state capital, has a population of less than 30,000 people. The city’s courthouse is a miniature of all the ones I have ever seen. There are only two courtrooms in the entire building. There is no Starbucks. Most certainly, this is no place for a *Boston Legal* episode where trials seem like packed fish bowls viewed by hundreds. As I sit in this courtroom, however, I am continually reminded that some of the most significant cases ever decided in this country started in locales that many Americans would consider quaint. We merely watch, not experience, *Law & Order* lives.

A civil bench trial is also very different from a criminal jury trial. In a civil bench trial, there is no direct involvement of the inmates’ peers by way of a jury vote. A prosecutor and defense attorney do not battle over the guilt or innocence of the inmates. There is little interest in the original facts of the case. The inmates have already been convicted of murder and sentenced to death. They are not appealing their sentences and are not even present in the courtroom. Indeed, because this bench trial is a civil matter and a lawsuit, the inmates, who were previously called defendants in their criminal case, are now called plaintiffs.

Regardless, the “how” of Kentucky’s executions is the heart of the plaintiffs’ case. The constitutionality of execution methods is also of burgeoning significance throughout the country as medical investigations continually reveal the troubling, and all too latent, aspects of lethal injection. The concern is highly democratic within the death row inmate population. The risks of an inhumane lethal injection affect every inmate equally, no matter their color, their class, the quality of their legal representation or the purported social value of their victim. Each inmate has been designated by the state to die in the same way. In this bench trial, we are wrangling over how exactly that death will occur.

David and I both believe that lethal injection is not what the public and many lawmakers think it is—a serene and soothing way to die, like putting a sick animal to sleep. We think the process is inhumane and tortuous, the result of medical folly, political compromise. We want to convince the Kentucky judge of this. The attorneys representing the Commonwealth of Kentucky want to convince the judge that we are

wrong. They claim that lethal injection is in fact a humane and suitable way to die.

This trial will be a battle of experts, but also a battle of words, said and unsaid. All exchanges will take place within predetermined legal limits. The challenge is, how can we convey our arguments within the imposed structure of this hearing and its rules?

The message that will unfold cannot be imparted like a standard story. Rather, it must reveal itself within the context of three parts: a series of questions that David will ask me and the other experts on direct examination, what the Commonwealth's attorney will then ask us under cross examination, and then what David may want to clarify during redirect examination. This procedure enables the admission of evidence, rules that have been set out and refined over hundreds of years of tradition in the British-American legal system. The process is exciting for me, an academic, accustomed to the hallowed Socratic method, in which I, as Professor of Law, relentlessly question my students. Now, I am in the role of answering questions, not asking them. I relish this role.

In the past few years, there have been a number of evidentiary hearings on lethal injection across the country. From lethal injection's inception in 1977, the method of execution has been continually under constitutional attack. Yet, lawyers have also always had a great deal of difficulty finding out the specifics of how a lethal injection is conducted and what protocols or guidelines have been and are used to ensure that executions are conducted humanely. The lack of information has made it impossible to have a thorough challenge to the method's constitutionality. Over the years, however, a committed group of academics, lawyers, and doctors have chipped away at the shell of secrecy, releasing forward a bounty of new information on a wide range of issues. This 2005 trial in Kentucky brings a fresh message: it is the fullest and most sophisticated investigation of lethal injection ever conducted.

### A Note on the Lethal Injection Process

In most states, including Kentucky, lethal injection involves having an executioner syringe three chemicals into the body of an inmate sentenced to death: *sodium thiopental*, an "ultrashort" acting barbiturate intended to put the inmate to sleep; *pancuronium bromide*, a paralytic agent used to immobilize the inmate; and *potassium chloride*, a toxin that induces cardiac arrest and hastens the inmate's death. These injections

are to occur sequentially, while the inmate is strapped to a gurney, a padded stretcher typically used for transporting hospitalized patients. There have been photos of the execution gurney so artfully shot that the gurney does indeed look like a bed, an inviting place where a person would want to stretch out if not for the fact it is to be used for a killing.

I use the term “death bed” to depict this execution scenario even though these words have not been applied in this context before, either by legal practitioners or academics. Typically, deathbed connotes the last few hours of a dying person’s life or the place from which a dying person makes a final statement. An inmate on an executioner’s gurney, however, is strapped down, not free, and is dying not because of failed health but because the state has determined the inmate should be punished to death.

In 2002, I published an article in a symposium issue of the *Ohio State Law Journal* focusing on the problems associated with lethal injection. The article contended that lethal injection was unconstitutional under the United States Supreme Court’s interpretation of the Eighth Amendment’s Cruel and Unusual Punishment Clause for a range of reasons: the procedure involved the “unnecessary and wanton infliction of pain,” the “risk” of such pain, “physical violence,” the offense to “human dignity,” and the contravention of “evolving standards of decency.”

My conclusions were supported by a large study I conducted of the most up-to-date protocols for administering lethal injection in all thirty-six states, which, at that time, used anesthesia for state executions. The study focused on a number of factors that are critical to conducting a lethal injection humanely, such as: the types and amounts of chemicals that are injected; the selection, training, preparation, and qualifications of the lethal injection team; the involvement of medical personnel; the presence of witnesses, including media witnesses; as well as details on how the procedure is conducted and how much of it witnesses can see. The fact that executions are not typically conducted by doctors, but by execution technicians, is a critical aspect of the process.

In the article, I argued that many of the problems with lethal injection could be attributed to vague lethal injection statutes, uninformed prison personnel, and skeletal or inaccurate lethal injection protocols. When some state protocols provide details, such as the amount and type of chemicals that executioners inject, they often reveal striking errors, omissions, and ignorance about the procedure. Such inaccurate or missing information heightens the likelihood that a lethal injection will be botched and suggests that states are not capable of executing an inmate without violating the prohibition against cruel and unusual punishment.

Over the decades, there have been many drawbacks associated with lethal injection, all of which contradict the public's perception that injection is a peaceful way to die. First, evidence suggests that some inmates are given insufficient amounts of the initial chemical, sodium thiopental, and therefore regain consciousness while being injected with the second and third chemicals. In this situation, the inmate will suffer extraordinary pain while the second chemical, pancuronium bromide, takes its paralytic effect, preventing the inmate from moving or communicating in any way. Then when the third chemical, potassium chloride, is administered to cause death, the paralyzed inmate will experience a burning sensation likened to a hot poker inserted into his arm, which spreads over his entire body until it causes the heart to stop. It is striking that the American Veterinary Medical Association has condemned the use of pancuronium bromide and potassium chloride for the euthanasia of animals because the paralyzing effect of the pancuronium bromide would mask the excruciating pain that the animal was experiencing from the potassium chloride. These chemicals are too horrifying for killing animals but they are routinely used to execute human beings.

The vagueness of the protocols also results in executioners often ignoring an inmate's particular physical characteristics (such as age, body weight, drug use), factors that have a major impact on an individual's reactions to chemicals and the condition of their veins. Physicians have problems finding suitable veins for injection among individuals who are diabetic, obese, or extremely muscular. Heavy drug users, who constitute a significant portion of the death row population, present particularly difficult challenges because of their damaged veins and resistance to even high levels of lethal injection chemicals.

All of these difficulties are compounded for untrained executioners, who are the ones typically carrying out the protocols. For example, executioners having trouble finding a vein because of obesity or drug use may insert a catheter into a sensitive area of the body, such as a groin or hand. In some cases, if a vein can still not be found, executioners will perform a "cut-down" procedure, which requires an incision to expose the damaged vein. The cut-down procedure is used with disturbing frequency in lethal injection executions, while it is only a memory to modern day anesthesiologists, who have far more feasible alternatives. The cut-down problem has even caught the eye of the Supreme Court. In May 2004, in *Nelson v. Campbell*,<sup>2</sup> the Court unanimously held that an Alabama death row inmate could file a civil rights suit to challenge the

state's proposal to execute him with a cut-down procedure. *Nelson* is the first case where the Court has addressed the lethal injection issue. While the *Nelson* case did not concern the merits of lethal injection, it appears the Court may have already come to terms with the broader aspects of the procedure because the Court was willing to call into question one aspect of it.

### The Kentucky Trial's Rules and Constraints

This backdrop puts perspective on the bench trial in Frankfort and the issues concerning the lethal injection protocol in Kentucky. Three days before the trial, I flew to Lexington, Kentucky, to stay at the home of my friend and colleague, Roberta Harding, a professor at the University of Kentucky School of Law. Roberta and I had met some years ago while working together on a death penalty issue and she was closely involved with some of the cases handled by the Kentucky Department of Advocacy. My early arrival in Lexington gave me the opportunity to prepare, to confer with Roberta who would also be attending the trial, as well as to have a few moments to take in the Kentucky countryside.

The rolling hills of bluegrass were never more glorious than during our Monday morning drive to Frankfort, timed so that Roberta and I could reach the courthouse sufficiently early to touch base with the attorneys beforehand. Although the drive was only forty-five minutes, it was an amazingly refreshing trip given the abundance of greenery and the burst of a spring season that had not quite yet arrived in New York. The city of Frankfort was surrounded by all things rural, and I could not help but envy its residents.

The state capital since 1792, Frankfort has a charming, small town feel. Its buildings and homes are gorgeously historic, a snapshot of the early architectural wonder of our country. The Frankfort courthouse is an aptly elegant structure for holding such an important trial. But my feelings of awe in this setting were quickly marred by the reality of the circumstances of our visit—as though the city's gentility was on a collision course with the ugliness of our purpose for being there. To me, the death penalty and lethal injection in particular were reminders of all the damage that people can do to one another no matter what the blessings of their surroundings. It was as though we as a society felt that we did not quite deserve such harmony, such beauty, and therefore had to go and foil it in some way by scavenging for our more brutal natures. Were

we truly meant to be such two-sided beings or did we simply fail to appreciate what we had been given? No matter. Brutality seemed to be abounding that day. I had no time to pick apart my thoughts. We had work to do. Up the courthouse steps we went.

Of course, the outcome of a bench trial is heavily dependent on the judge. I had heard good things about Judge Roger L. Crittenden, the Circuit Court judge whose courtroom demeanor and decisions would be so important to our case. Judge Crittenden, a registered Democrat and graduate of the University of Kentucky School of Law, was a Franklin District Court judge from 1980-1991, before becoming a Franklin Circuit Court judge in 1992. With over 25 years total on the bench, he seemed to have a solid foundation for evaluating the evidence. But this was a case with political overtones. At the time of the trial, Judge Crittenden was one of three candidates Kentucky's governor was considering to fill a vacancy on the heavily Republican Kentucky Supreme Court. Ultimately, Kentucky's governor selected a Republican nominee for the vacancy, an outcome that the press viewed as predictably political. At the time of this writing, Judge Crittenden had expressed "disappointment" with not being asked to take the post but had not yet indicated that he would seek election to the Kentucky Supreme Court in 2006.

It was difficult to tell if these circumstances would have any impact on the outcome of the bench trial. In news reports, Judge Crittenden has characterized his decisions as more conservative than liberal. A number of commentators had noted, however, that Judge Crittenden does not show a clear discernible pattern in his voting record. Judge Crittenden himself had stated that he approached all issues on a case-by-case basis. This reputation made the outcome in our case seem even less predictable.

I learned before my travels to Frankfort about the constraints on the substance of my testimony. These rules inhibit an expert's language, the specific words they can use, and the ways their statements can be phrased. And, such restrictions make the process of testifying somewhat more difficult.

David detailed the constraints the Commonwealth's attorneys specifically requested for my testimony. First, I cannot talk about the Eighth Amendment's Cruel and Unusual Punishment Clause or how it is to be interpreted or has been interpreted. This is understandable. The judge decides the law, not the expert.

Second, I am forbidden to give a medical opinion about the chem-



icals used in a lethal injection execution. Again, this limitation makes sense. I am not a medical doctor and have no experience working with these chemicals, even though I have read a great deal about them. Any discussion of cut-down procedures is also barred, presumably for the same reason.

Next, I am prohibited from mentioning Fred Leuchter. I find this request most perplexing. Until 1990, Leuchter was the creator of most of this country's execution machinery. I had written earlier about Leuchter's grip on the execution methods industry and long ago, I had even had a lengthy discussion with him. But Leuchter's story involved far more than just execution methods. He was an unrelenting public speaker who denied the existence of the Holocaust and was obsessed with the revisionist movement.

Leuchter's controversial side garnered him a spotlight. Jewish groups took notice, discovering that Leuchter was not the "engineer" he claimed he was but rather only the holder of a bachelor's degree in history—in other words, no more educationally qualified to build execution equipment than the typical arts and sciences graduate, no matter how self-taught in the area he professed to be. Leuchter told me the revelation destroyed his business. No warden would go near him publicly although privately wardens still called him for advice because there was simply no one else available with Leuchter's execution methods expertise. Further, no person or corporation was rushing to fill the gaping hole in such a socially repellant enterprise.

There is so much more I could say about Leuchter and his false representations that my account of him here is a sugarcoating. I suppose that the Commonwealth's attorneys thought that Leuchter's well-documented revisionist antics would be highly prejudicial, that his purported pro-Nazi leanings would distract from the merits of the lethal injection arguments. Of course, I have always thought that Leuchter exemplified in his own bizarre way the true underbelly of the execution methods business. Directly or indirectly, he is responsible for how the great majority of inmates in this country have been executed and how they will be executed. The fragile state of the execution methods industry is highlighted by the fact that wardens continued to depend on Leuchter despite all that has been exposed about him.

Lastly, I could not discuss the topic of electrocution. Again, this seems to make sense to me although I can see how the topic could creep into this trial on grounds of relevancy. On March 31, 1998, the Kentucky legislature voted to switch the state's method of execution from

electrocution to lethal injection. However, like a number of other state legislatures that voted to change from electrocution to lethal injection, the legislature did not entirely eliminate electrocution as a method of execution for some inmates. If the condemned inmate was sentenced to death before the March 31, 1998 date, he can still be executed by electrocution if he makes it an affirmative choice. Under the principles of *ex post facto*, a state legislature may decide to leave an option available so that an inmate may not be worse off by any legislature's enacted change after the date of his crime. There are still nearly thirty Kentucky inmates remaining who can choose between electrocution or lethal injection.

Still, it is one of the many contradictions in this area that Kentucky or any state allows such a choice between execution methods for some inmates but not for others, based upon the date when the newer and presumably more humane method was legislated and the date of the commission of the inmate's crime. This compromise tactic is not atypical, however. And, for some states, the situation can get even more complicated. For example, South Carolina has a unique choice provision with no apparent purpose apart from some odd compromise based upon statutes in other states. As of June 8, 1995, all inmates in South Carolina can choose between electrocution and lethal injection as a method of execution no matter when they were sentenced to death. The differences come for those inmates who fail to choose either method, and therefore are assigned by default the method prescribed by statute. Those inmates sentenced to death before June 8, 1995, are executed by electrocution if they do not choose lethal injection; those inmates sentenced to death after June 8, 1995, are executed by lethal injection if they do not choose electrocution. While this statutory scheme is one of the more weirdly convoluted, in a very basic way, all the schemes are.

One reason for such a peculiar approach to selecting execution methods is a concern that all state legislatures have when it comes to the death penalty: If the legislatures introduce a new method of execution, such as lethal injection, the old method, typically electrocution, will be presumed unconstitutional. Some state statutes go so far as to make certain that the old method of execution (such as electrocution) is not rendered unconstitutional simply because lethal injection has been introduced. With this kind of statutory jig, state legislatures attempt to ensure that no method of execution will ever become unconstitutional, thereby barring any suggestion that the death penalty in general is vulnerable to constitutional attack. Like all death penalty ju-

risprudence, the topic of execution methods is rife with irony, double-think, irrationality, and obfuscation. Thus, it is endlessly fascinating.

### The Kentucky Trial Begins

With these and other constraints in place, the trial begins. Because I am the first witness, I must wait outside in the hallway during the initial proceedings, until the judge calls my name and a bailiff comes to get me.

I am sitting in a chair near the water fountain, yearning to testify. I feel as though two inmates' lives are hanging in the balance along with potentially every other death row inmate in the country. I believe that much of this trial is about how death penalty politics get in the way of justice and, in this particular case, even common sense.

But I am not the only one waiting in the hallway. There are several other witnesses lined up to be called. Out of curiosity, I try to overhear their conversations as a group of them stand in the corner to the right of me. I think that they are prison administrators, most likely there to be questioned about the lethal injection procedures during their earlier tenure at the Kentucky State Penitentiary.

In the corner to my left, a reporter is questioning a pastor about the death penalty. The pastor clearly thinks lethal injection is unconstitutional and is telling the reporter his views with great passion. I turn once again to my right and look at one of the prison administrators who is speaking the loudest in the group. I believe he says to his colleagues that he did not want to come to the trial this morning. In a way, I can understand his line of thinking. He was delegated a role he should never have been given. The legislatures make such important decisions initially about the death penalty, only to pass on the actual implementation of their choices, such as what execution method to use, to prison personnel who have no training or expertise to carry them out. This process does not seem fair to those on the lowest level of the political hierarchy, much less to the inmates who bear the brunt of such an irresponsible degree of delegation.

The door to the courtroom opens and I look up expecting to see a bailiff. Instead, I see one of the defense attorneys who is coming out in the hallway to drink from the water fountain. He looks at me and chuckles, "Now I get to see a law professor on the stand." It is a funny comment for this setting, and I grin in response to it. Of course, the attorney is referring to the fact that the tables are turned. I represent

“every law professor” who has ever administered the Socratic method to a student in class—an experience all law students abhor, no matter their veil of seeming arrogance when questioned, no matter how kind the law professor attempts to be.

Modern-day law professors no longer try to emulate the famously sadistic Professor Kingsley in *One-L*, Scott Turow’s poignant account of first year law school. We make an effort to be gentle, realizing that no good, and certainly no pedagogic value, derives from embarrassment. The rewards of such professorial concern, however, have an airtight cap. It is the experience itself that students fear—that perilous verbal test before dozens of their peers—that marks their intellectual reputation in class and provides life-long fodder for the inevitable law school yarns. Everyone who has been a law student knows those Socratic professor nightmares; they never go away.

Oddly, these thoughts spur my desire to get into the courtroom with the hope of setting the record straight. I have the Socratic method down. Being grilled does not concern me. The door opens once again and the bailiff calls me in.

I walk into the courtroom for the second time that morning. I had wanted to see the room before I testified, so that I would have my bearings, no atmospheric surprises. The courtroom is sunny and relatively modern, obviously refurbished from its original appearance. At my first viewing, I was crushed to see that it looked so new and cheap, from the synthetic paneling of the jury box to the institutional beige walls and rugs to the moveable video cameras off to the side. I had wanted to see the original structure, thinking how magnificent it must have been at one point. I had envisioned, say, mahogany walls, an antique gold clock, intricate weaves. Now the scene appears Wal-Mart-like, a jarring contrast to the historic loveliness of the city around it.

I cannot help but think that this redone setting will have an effect on the outcome of the case, as though it is not just the architecture that was covered in bland courtroom “modernese” but our ideals and values as well. There is something very unnerving about the sterile, medicalized, guise of lethal injection that makes it seem as though it is progressive, when in fact it is anything but that. Rather, it is medical technology gone awry, used for a goal that was never intended. From this perspective, then, perhaps the decor of this courtroom is actually much more appropriate for the subject matter of this bench trial than the grand design of yonder years. After all, it does seem as though our criminal justice system has become covered in thick ugly plastic.

I am surprised at how many people are sitting in the courtroom gallery and by the sizeable number of reporters who have appeared. It is clear that a contingent of individuals is very interested in this issue, and I sense that they share my side. After all, lethal injection advocates need not make the effort to attend such a trial. They are still winning this war.

The bailiff is kind and makes sure that I am seated before he leaves my side. As I turn to take the oath, Judge Crittenden greets me with a nod and smile before swearing me in. I appreciate the gestures. I am not accustomed to such cordiality in this context. I have testified as an expert before and, when judges have already made up their minds, they can make it clear that your presence is not wanted.

### Questions and Answers

I glance up and there is David, looking very serious. It is only the second time I have ever seen him. As with all hearings, David's questions start with addressing my qualifications. *What is your current profession? How long have you been a professor of law? Where have you previously testified in court concerning lethal injection?*

My answers are short and clipped, basically one-liners. They have to be. In 1997, I had testified in two evidentiary hearings on lethal injection. One hearing was in Texas (the first such hearing in the country), the other in Connecticut, which, in 1997, had not yet executed anyone by lethal injection. During the Kentucky trial, I knew that it was considered relevant only to say the names of the states and the years. But I wanted to have been able to say more.

I would have liked to have noted that the Texas and Connecticut hearings occurred eight years ago and that a great deal more information and more scientific data on lethal injection had emerged since that time. Only those individuals studying the process for many years would realize this evolution. The opinions from the 1997 hearings were not openly published, so no outsider would ever know about them or the dearth of knowledge then before the courts. Looking back on the first hearing in Texas, I realize in retrospect how little we knew about lethal injection. Modern evidence has only confirmed our earlier statements about the worrisome application of the chemicals, and has revealed even more problems.

The next set of questions David asks me concern what I have written on the topic and for how long. *As a law professor, have you researched*

*lethal injection? When did you begin to research lethal injection? How many texts or articles on lethal injection have you published?*

I give the titles of five publications. David asks me to go through each of them and discuss what they are about. Unfortunately for the purposes of my testimony, each article has a substantial analysis of the Eighth Amendment and how the doctrine may apply to execution methods. The Eighth Amendment was one of the areas I was prohibited from mentioning in my testimony. When I briefly gloss over the substance of this discussion, the Commonwealth's attorney immediately objects, reminding me that I cannot reference the Eighth Amendment. I find out by virtue of his objection that I cannot even *mention* that I discussed the Eighth Amendment in an article. It is as though the topic is profane.

My statements are strictly confined to repeating some of the more technical aspects of my articles, most particularly my 2002 *Ohio State Law Journal* publication on the survey of lethal injection protocols. Although my 2002 article has been introduced into the record, one purpose of my testimony is to demonstrate how Kentucky in particular fares relative to other states as well as to emphasize aspects of the article that are particularly relevant to this bench trial.

The Eighth Amendment cap in the trial reminds me of how rarely the substance of the amendment is addressed, even in the professional, legal literature. The Eighth Amendment is widely applied in practice, but peculiarly skirted in academia. For example, the principles of the Eighth Amendment are typically not examined in detail in mainstream constitutional law or criminal procedure books. The doctrine also falls through the cracks in law school classes unless a professor specifically focuses on the death penalty, which is usually covered in a seminar. A comparable kind of neglect is shown when state and federal cases apply the amendment, as they commonly do in a range of circumstances. In the execution methods context in particular, citations to legal doctrines arising from the Eighth Amendment—or the phrase “Cruel and Unusual Punishment”—are commonly truncated and often inaccurate and incomplete.

David now focuses on my 2002 publication, which examined the results of my survey of lethal injection protocols. *How did you go about researching and reviewing execution protocols, procedures, and the chemicals used in lethal injections?*

I explain that at the time the survey was conducted, thirty-six states had statutes authorizing anesthesia for a state execution. My research

assistant first checked to see if the protocols for these thirty-six states were publicly available, that is in public venues beyond what was designated in a state statute, such as information set out in Web sites, described in court cases, or provided in some other kind of hard copy documentation. For those protocols that were not publicly available, my assistant would usually call the state's department of corrections or another state agency to gather necessary information, particularly details on the types of chemicals used and the qualifications and training of executioners. State officials would provide us with all or some part of this information we were seeking, either over the phone or by e-mail.

I point out that for seven states, the information on lethal injection chemicals was declared unavailable. Officials in four states said that the information was confidential (Nevada, Pennsylvania, South Carolina, and Virginia); three additional states said the information did not exist (Kansas, Kentucky, and New Hampshire). I hone in on the following point that particularly distinguished Kentucky's "nonexistent" information. When my assistant called Kentucky's Department of Corrections, he was told that while there was a statute that describes the use of the death penalty, Kentucky did not have a protocol or policy to implement executions by lethal injection. My assistant was informed that the protocol would be applied on a case-by-case basis. This fact has great relevance to the reasons for this trial.

Of course, David is trying to show that even though Kentucky now has a somewhat publicly available protocol, none existed in the fall of 2001, when I conducted my survey. Indeed, the Department of Corrections' representative told my assistant over the phone that "[t]he protocol would be dictated by each case as it comes up." This procedure screamed out an absence of care and planning on the part of the Department of Corrections. There was no documented format for an attorney to investigate or challenge.

David's next series of questions tie this information about Kentucky to the broader history and procedure of lethal injection, focusing specifically on the kinds of chemicals Kentucky now says it will use in the future. *How many states currently have the death penalty?*

I say, 37 states, noting that New York recently abolished the death penalty.

How many states currently use lethal injection as a method of execution?

I say, 36 states, excluding New York. What I do not say is that Nebraska is the only state left that does not use lethal injection. The

Nebraska legislature has, however, considered a number of bills proposing that the state switch to lethal injection from electrocution, now the state's only legalized method of execution.

With the next series of questions, David planned to delve into the history of lethal injection and how it began to be used in this country. *Which state was the first to adopt lethal injection?* I say, Oklahoma. In what year? 1977. *How did Oklahoma go about adopting lethal injection as a method of execution?*

My answer to this question is deceptively short out of necessity and deference to the boundaries that are imposed upon me by the proceedings. In the trial I tell how in 1977, the now-deceased Senator Bill Dawson of Oklahoma asked Dr. Stanley Deutsch, then head of the Department of Anesthesiology at the University of Oklahoma Health Sciences Center, to recommend a manner of executing inmates by way of an injection of lethal chemicals. Senator Dawson was concerned about the high cost of fixing the electric chair that Oklahoma already had or building a new gas chamber, which could cost thousands of dollars. Besides, Dr. Deutsch had informed him that lethal injection was a viable means of execution. In a short, typo-ridden, letter to Senator Dawson dated February 28, 1977, Dr. Deutsch made some recommendations for how a lethal injection might take place. His recommendations included the use of two different kinds of chemicals for an injection.

That is where the story ends for purposes of the trial but there was far more to tell about how Oklahoma's lethal injection statute was written. What I had to leave out of my testimony was that in May, 1977, three months after Dr. Deutsch had sent his letter to Senator Dawson, Oklahoma adopted a lethal injection statute based in large part on Dr. Deutsch's letter suggesting employment of two types of chemicals. Indeed, Oklahoma's lethal injection statute, which has been copied by many other states, repeats nearly verbatim the terms that Dr. Deutsch wrote in his letter to Senator Dawson.

Dr. Deutsch's letter stated that unconsciousness and then "death" would be produced by "[t]he administration . . . intravenously . . . in [specified] quantities of . . . an ultra-short-acting barbiturate (for example, sodium thiopental) in "combination" with a "neuormuscular [sic] blocking drug[ ]" (for example, pancuronium bromide) to create a "long duration of *paralysis*." Oklahoma's lethal injection statute, which tracks the language of Dr. Deutsch's letter almost word for word, states that "[t]he punishment of death must be inflicted by continuous, *intravenous*



*administration of a lethal quantity of an ultra-short-acting barbiturate in combination with a chemical paralytic agent until death is pronounced by a licensed physician according to accepted standards of medical practice.” It is a disturbing thought indeed that a statute of such extraordinary significance for people’s lives, and deaths, is based on such a short and informal correspondence.*

David’s next few questions probe more specifically into how Oklahoma came up with the particular types of chemicals that the state’s Department of Corrections selected for its protocol. Since the publication of my 2002 statewide study of lethal injection protocols, lawyers have been able to acquire, through the Freedom of Information Act, Oklahoma’s initial 1978 protocol, as it was originally written.

*What chemicals did Oklahoma use in its first lethal injection protocol? I say, sodium thiopental and a paralytic agent. There was more information I could not divulge because it was not relevant for the purposes of answering this particular question. Oklahoma’s 1978 protocol specifically mentions sodium thiopental as the ultra-short-acting barbiturate, but includes a possible choice of three paralytic agents: “either tubocurarine or succinylcholine chloride or potassium chloride.” Dr. Deutsch’s letter mentions “succinylcholine” but not tubocurarine or potassium chloride.*

This revelation about the choices of three paralytic agents in Oklahoma’s 1978 protocol is astonishing. It has always been a mystery how potassium chloride ever became the third chemical to be employed in a lethal injection procedure. Potassium chloride’s inclusion as a paralytic agent in Oklahoma’s protocol, and the fact that this formula was then unthinkingly copied in other states, is one possible explanation.

In order to emphasize the fact that it was problematic for the Oklahoma Department of Corrections to select these chemicals, David uses the next set of questions to establish that at no time was any research conducted on the effects of any of these drugs on the human body in the context of an execution. The lack of any kind of study has always been one of the more shocking discoveries about the lethal injection procedure. Of course, it is impossible to test directly a mechanism for killing people. Further, the kind of experimentation that was carried out in the 1800s on animals to determine the effectiveness of electrocution on humans would most likely be prohibited today. At the same time, it is clear that more thorough research could have been attempted on the potential impact of these lethal injection chemicals on the human body given what we know about their use for other purposes.

*Did your research reveal the reason why these particular chemicals [sodium thiopental and pancuronium bromide] were to be used [by Oklahoma]?* My answer: Other than Dr. Deutsch's letter and its recommendations, my research revealed no other basis for Oklahoma to have chosen these particular chemicals.

*What if any medical or scientific studies on the effects of these chemicals when used for a lethal injection were conducted before Oklahoma adopted the chemicals for lethal injection?* My answer: No such studies were ever conducted.

*What if any medical or scientific studies on whether these chemicals caused pain when used for a lethal injection were conducted before Oklahoma adopted the chemicals for lethal injection?* My answer: My research revealed no such studies were conducted.

*What if any medical or scientific studies were conducted before Oklahoma adopted lethal injection to determine whether other chemicals could be used?* My answer: No such studies were conducted.

*Oklahoma became the first state to adopt lethal injection as a method of execution in 1977. How many states since have adopted lethal injection as a method of execution?* My answer: 36 states.

*Out of the 36 states, from how many have you reviewed execution protocols or other information concerning their lethal injection procedures?* My answer: 28 states.

*Why did you not review the protocols of all 36 states?* My answer: At the time of my study in 2001, Alabama had not yet adopted lethal injection. And seven states, as I mentioned, either informed me that the information about protocols was confidential or that it did not exist. In sum, 28 states (with lethal injection) + 1 state (Alabama, which did not have lethal injection) + 7 states (with missing information) = 36 states.

*How many of these states use the two chemicals originally adopted in Oklahoma?* My answer: 27 states. Also, there may be others since seven states did not disclose their procedures or protocols.

*Which states follow Oklahoma?* My answer: Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Louisiana, Maryland, Mississippi, Missouri, Montana, New Mexico, New York, North Carolina, Ohio, Oregon, South Dakota, Tennessee, Texas, Utah, Washington, and Wyoming.

*Based on your research, what if any medical or scientific studies on the effects of these chemicals were conducted before these states adopted the chemicals for lethal injection?* My answer: There were no studies conducted.

*What about whether the chemicals cause pain?* My answer: There were no studies conducted.

*What about other chemicals that could be used?* My answer: There were no studies conducted.

At this point, David starts focusing on the third chemical, potassium chloride, as well as on the two states that deviate from the typical three-chemical lethal injection pattern. The purpose of this line of questioning is to highlight the peculiar origins of the use of potassium chloride and how it too has questionable applicability to an execution by lethal injection.

*Which, if any, states do not use sodium thiopental and pancuronium bromide?* My answer: New Jersey.

*What does New Jersey use?* My answer: The applicable statute indicates that sodium thiopental and potassium chloride are to be administered. What I do not say because it is not deemed relevant to this line of questioning is that the New Jersey Department of Corrections has noted consistently over the years that when it does execute an inmate, it plans to use three drugs, including one to stop breathing. This tactic suggests that state statutes may not reflect the actuality of an execution when decision-making power is delegated to prison personnel. In the case of New Jersey, contrary to statute, prison officials have said that they actually plan to inject pancuronium bromide or a paralytic agent that is similar to it.

*How did potassium chloride come to be used in lethal injections?* My answer: There are three plausible sources. First, Oklahoma's original 1978 protocol mentioned potassium chloride under its list of potential paralytic agents to be employed in an execution. Second, advising doctors, some of whom were involved in developing state execution protocols, such as New Jersey's, added potassium chloride although it is not clear when or why. Third, Fred Leuchter may have suggested including potassium chloride.

My answer about Leuchter is short because it had been stipulated that I not mention him. Yet, his role was clearly relevant to answering the question that David asked me. What I did not say was that, according to Leuchter, the New Jersey doctors agreed with his recommendation that potassium chloride be included as the third chemical in the lethal injection machine that Leuchter had created for New Jersey's executions in the early 1980s. Because the medical literature did not specify what dosages of the chemicals were adequate to be lethal, Leuchter said that he relied on information that was avail-

able for the slaughtering of pigs and estimated the dosages accordingly.

*Which states use sodium thiopental, pancuronium bromide, and potassium chloride in lethal injections?* My answer: The 27 states mentioned previously, apart from North Carolina, which injects only sodium thiopental and potassium chloride.

*Which, if any, of these states conducted any scientific or medical studies on the effects of these three chemicals when used in combination for lethal injection?* As I started to answer this question, the Commonwealth's attorney objected, explaining that this same kind of question had already been asked. The judge agreed and David moved on.

The next line of David's questioning concerned North Carolina, which was apparently one of the states officials at the Kentucky Department of Corrections investigated to develop the protocol that Kentucky had at the time of the bench trial in Frankfort. During the four-year period between when I examined Kentucky's protocol in my 2001 survey and the time of the 2005 bench trial, Kentucky officials had developed a protocol. The reason why David mentioned North Carolina in his questions was because North Carolina was one of the nine states in my 2001 survey that disclosed the exact dosages for chemicals executioners injected into the inmate. The dosage of sodium thiopental was of particular interest because of evidence that executioners did not inject sufficient amounts of it in order to successfully anesthetize inmates. Therefore, an inmate would still be conscious while he was paralyzed by the pancuronium bromide and thus be unable to express pain. In the Kentucky protocol, officials listed that inmates be administered three grams of sodium thiopental, two grams less than the amount North Carolina said it administered in my survey. David was attempting to document this strange discrepancy in amounts between North Carolina and Kentucky.

*Did you review North Carolina's execution protocol in preparing your 2002 article?* Yes.

*What anesthetic do they use?* Sodium thiopental.

*At the time of your article, what quantity of anesthetic did North Carolina administer?* Five grams.

*In preparation for your testimony today, have you reviewed Kentucky's lethal injection protocol?* Yes.

*According to the protocol, what chemicals are administered in a lethal injection execution in Kentucky?* Sodium thiopental, pancuronium bromide, and potassium chloride.

*Are the first two chemicals used in Kentucky's lethal injections the same chemicals that were originally adopted in Oklahoma? My answer: Yes.*

This ended the direct examination. Of course, it is only a very small part of the whole lethal injection story. A cross examination of my testimony also followed but, it is too lengthy and uninformative to recount here. As it turns out, with respect to my testimony, Judge Crittenden's final opinion primarily relied on the evidence revealed during my direct examination. Because of the inadequacy of the cross examination, this outcome did not surprise me.

### The Aftermath

As soon as I finish testifying, I leave the courtroom and speak briefly with some reporters in the hallway who are writing stories about the bench trial. I then head back into the courtroom, this time to listen to the testimony of two of the prison administrators who were waiting in the hallway with me beforehand. The administrators' ignorance of the lethal injection procedure and their lack of documentation of how the technique was developed seem very clear to me as they speak. At the same time, both witnesses are articulate and straightforward about how they conducted their duties. I am impressed by them. Again, I cannot help but feel that they and their counterparts in other states are the victims of legislatures' statewide romance with lethal injection—the details of which are left to the imagination of ill-informed prison personnel.

I would like nothing more than to hear the next four days of testimony by the remaining expert witnesses. However, I must catch a plane back to New York that afternoon. I am sorry to leave the tranquility of Frankfort. And I hope to return to the city, but only as a delighted tourist.

The next day I read news coverage of the Frankfort trial. I can already tell that the topic of the trial affects people very emotionally. In the course of a few hours, three strangers have e-mailed me their opinions about my testimony (see the Appendix). They are critical of what I said and what they think I am trying to achieve. Facets of all three e-mails represent standard views in this country toward the death penalty and lethal injection specifically.

What is most striking, however, is the extent to which the e-mails go beyond the issues at hand. For example, I would expect the commentators to emphasize typical pro-death penalty themes: the percep-

tion that the victims and their families are neglected, that inmates are coddled and will be set free, and that people testifying against lethal injection are simply against the death penalty in general. But e-mailer #1 uses comparisons to Hitler to emphasize how he feels about my views, claiming that “[t]he skilled American Judiciary creates more individual horror than Adolph Hitler could possibly imagine. . . . [W]ith the predominance of maggot mentality on both sides of the bench that exist in contemporary judicial circles, I fear the worst!” In turn, e-mailer #2 presumes that “people like [Professor Denno] would claim they [the inmates] have been rehabilitated, and should be returned to society.” Of course, this subject had nothing to do with the bench trial and has never been a topic I have addressed publicly. E-mailer #3 analyzes my views on the death penalty in the context of his strong political leanings and even his opinions toward gay marriage: “When my president George Bush keeps appointing more conservative justices to the courts during the remaining [sic] of his administration the liberal groups will find great difficulty if not impossible [sic] to change certain laws concerning the death penalty and gay marriage.” Likewise, “[a]s our population [sic] the baby boomers ages they become more conservative and a huge voting block to be reckon [sic] with. Remember it’s the ‘Red States’ that count!”

I am not surprised by these kinds of sentiments. As a death penalty researcher, I have received heatedly negative correspondence before. I have no fruitful way to respond to those who write, except to thank them for expressing their views, because I believe the mailers’ perspectives deal with a conglomerate of matters often having no direct relevance to the death penalty. What concerns me most, however, is how similar types of more publicly voiced opinions may affect the outcome of death penalty cases—perhaps even the bench trial that I just attended in Frankfort.

### The Final Opinion

On July 8, 2005, Judge Crittenden released his decision. With one exception, he upheld the constitutionality of Kentucky’s lethal injection procedure. I was very disappointed with this outcome, of course. But I also thought the press accounts of this bottom line conclusion belied the details and true significance of all that Judge Crittenden actually wrote. For those of us in the death penalty trenches, a close read of the opin-

ion reveals some extraordinary and unprecedented statements about the flaws of the lethal injection procedure, as well as recommendations for how it should be improved.

It is remarkable, for example, that Judge Crittenden states that one part of Kentucky's protocol was indeed unconstitutional. He held that it was cruel and unusual for the Kentucky protocol to allow Department of Corrections personnel to insert a catheter into the condemned's neck. No judge has ever made such a finding about lethal injection. Judge Crittenden appeared to be particularly influenced by the testimony of a medical doctor with the Kentucky Department of Corrections. That doctor stated that he would refuse to perform the neck injection procedure and that those who would be performing it are insufficiently trained to do so. Judge Crittenden's perspective on this matter is very clear: "The Plaintiffs have demonstrated by a preponderance of the evidence that the procedure where the Department of Corrections attempts to insert an intravenous catheter into the neck through the carotid artery or jugular vein does create a substantial risk of wanton and unnecessary infliction of pain, torture or lingering death." (pp. 12-13)

Judge Crittenden also made novel findings of fact in response to a number of important points raised during the bench hearing that I think will be critical in future litigation on lethal injection, or it should be. First, Judge Crittenden fully accepted arguments that two of the chemicals (sodium thiopental and pancuronium bromide) used in lethal injection executions derived directly from Dr. Deutsch's recommendations to then-Senator Bill Dawson in 1977. Further, the opinion emphasized that there was "scant evidence" that any of the states that have since adopted lethal injection, including Kentucky, engaged in any research on lethal injection to justify their decision to follow Oklahoma's lead. "Rather, it is this Court's impression that the various States simply fell in line relying solely on Oklahoma's protocol from Dr. Deutsch in drafting and approving a lethal injection protocol. Kentucky is no different." (p. 2)

Likewise, Judge Crittenden accentuates the lack of research and study in other aspects involved in the creation of lethal injection protocols. He notes, for instance, that "[t]hose persons assigned the initial task of drafting the [Commonwealth of Kentucky's] first lethal injection protocol were provided with little to no guidance on drafting a lethal injection protocol and were resolved to mirror protocols in other states, namely Indiana, Virginia, Georgia, and Alabama." (p. 6) For example, Department of Corrections personnel "did not conduct any indepen-

dent or scientific or medical studies or consult any medical professionals concerning the drugs and dosage amounts to be injected into the condemned.” (p. 6) Such reluctance to seek expertise continues to the present day, a revelation that was made especially noteworthy when the Kentucky Department of Corrections decided to up its dosage level of sodium pentathol. As Judge Crittenden explains, “[n]or were any medical personnel consulted in 2004 when the lethal injection protocol dosage of sodium thiopental . . . was increased from 2 grams to 3 grams.” (pp. 6–7)

Judge Crittenden’s decision also makes clear that the Kentucky Department of Corrections instituted three major improvements in its lethal injection process in preparation for the Frankfort bench trial. These kinds of changes demonstrate that the Department of Corrections was well aware that aspects of its protocol were vulnerable to constitutional attack, particularly since Judge Crittenden makes a point of rewarding the Department for these three alterations. “[D]uring the course of this litigation the protocol has been amended by the Department of Corrections to increase the dosage of the short acting barbiturate, to drop one procedure (the cut-down), and the Department’s medical personnel have agreed that any injection in the neck is inappropriate. The unilateral actions by the Department are commendable.” (p. 12)

To the unknowing death penalty observer, such preemptory moves on the part of the Kentucky Department of Corrections may seem minor, even expected. However, in the context of over a quarter century of litigation on lethal injection, these changes are amazingly substantial and revealing. There is no evidence that the department would have taken such extreme steps to implement these protective measures had the Frankfort bench trial not taken place. The department’s behavior also acknowledges its awareness of Judge Crittenden’s concern that important safeguards for lethal injection be instituted. Thus, it becomes apparent that inmates’ challenges against execution methods can have an impact irrespective of how a court finds the method’s overall constitutionality.

But Judge Crittenden’s expectations for lethal injection safeguards do not stop with these three alterations. His opinion also spotlights his belief that Kentucky’s protocol should be made public so that it can be scrutinized. As Judge Crittenden emphasizes, “[t]he citizens of this Commonwealth are entitled to know the method and manner for implementing their public policy.” (p. 13) Likewise, Judge Crittenden notes



that the reasons the Department of Corrections had previously used to justify the “confidential nature” of the protocol no longer exist. (p. 12) Therefore, “[t]he Department of Corrections should amend the current protocol to eliminate the need to protect its contents from public view.” (p. 12) In particular, “[s]ince the nature of the drugs used and the method for administering those drugs during an execution have been discussed publicly in this action, there seems to be little reason why the Department of Corrections cannot publish a lethal injection protocol that does not compromise the security of the institution or the personnel involved.” (p. 13) I feel particularly vindicated by this aspect of Judge Crittenden’s decision. During the time of my lethal injection survey, my assistant and I had made a concerted attempt to acquire Kentucky’s protocol and were unable to do so. We felt there was something very wrong about a procedure that could never be known, and therefore never be judged.

I did think Judge Crittenden’s decision rang of naiveté in some places. He seemed to put more medical trust than is warranted in the Department of Corrections personnel, despite his recognition of their lack of qualifications. For example, Judge Crittenden noted that “the current lethal injection protocol requires the Warden . . . [t]o reconstitute the Sodium Thiopental into solution form prior to injection [and] [t]he Warden has no formal training on reconstituting the drug” (p. 7); yet, Judge Crittenden did not consider this medical ignorance on the Warden’s part to be problematic. Judge Crittenden stated that the drug manufacturer’s instructions are sufficiently straightforward to follow and “there would be minimal risk of improper mixing [of the drugs], despite converse testimony that a layperson would have difficulty performing this task.” (p. 7) Likewise, Judge Crittenden acknowledges that sodium thiopental and pancuronium bromide can precipitate and clog the tubes distributing the chemicals to the inmate’s body and also that the Department of Corrections provides no device to monitor the level of an inmate’s consciousness. Again, however, he states that the risks of these occurrences are minimal. I think he is wrong. Such seemingly minor indications of ignorance concerning the lethal injection procedure have been linked to major lethal injection botches in this country. I have confidence that another court will address these kinds of problems in the future.

Overall, however, Judge Crittenden provided an impressive opinion. I do think the holding would have been more consistent with the other points and clarifications Judge Crittenden makes had he declared lethal injection unconstitutional. Regardless, Judge Crittenden’s deci-

sion is a far bolder declaration than the press seems to have realized and its conclusions make great progress in the direction of reforming the lethal injection procedure.

### Departing Comments

Of course, I want lethal injection to be abolished as quickly as possible. Since 1976, there have been 973 executions in the United States. A total of 805 (83 percent) of those executions, the great majority, have been carried out by lethal injection. In my mind, nearly every inmate who is to be executed in this country risks facing a torturous death.

Pro-death penalty commentators often say that critics of lethal injection are just using this issue as a ploy to eliminate the death penalty entirely (recall, for example, the comments of e-mailer #2 labeling me a hypocrite for this very reason). Yet, there is no basis for such an accusation. Regardless, that characterization does not apply to me. In theory I do not oppose the death penalty. I can envision how the punishment of death may make a socially worthy statement when applied to those whose existence is clearly too despicable for us to even consider them human.

But I do question whether the criminal justice system can ever select out those who deserve death in a fair, bias-free way and then execute them according to the standards of the Eighth Amendment. Indeed, there is no evidence that the death penalty can be inflicted in a consistently constitutional manner. In sharp contrast, there is a great deal of evidence showing the brutality and incompetence of the lethal injection procedure, so much so that I cannot comprehend anyone condoning it, no matter what their views on capital punishment.

Both Justices Harry Blackmun and Lewis Powell ultimately concluded that the death penalty should be abolished because it could never be administered equitably or meaningfully under any set of rules. I feel the same way. And if people find this approach hypocritical then I suppose those people and I do not share the same vocabulary. As I mentioned previously, death penalty issues involve a battle of words, both said and unsaid. Perhaps this is the time to say less—and do more—in order to bring meaning to how we define justice.

## Appendix

E-mailer #1: I am appalled at your endeavors to obliterate lethal injection as a means of execution. How is it that those who kill people in the most brutal ways possible are deserving of painless death in the most humane way possible? Perhaps if you were forced to suffer the maceration of the most intimate part of your body and then forced to endure death by strangulation, what I have stated might have significance.

The skilled American Judiciary creates more individual horror than Adolph Hitler could possibly imagine. Consider for a moment, the level of compassion and consideration a child molester has for a young victim he has just raped and then killed by choking him or her to death. How is it that those individuals are entitled to years of adjudication [over] victim expense? I am hoping that the Courts will reject your case. However, with the predominance of maggot mentality on both sides of the bench that exist in contemporary judicial circles, I fear the worst!

E-mailer #2: You might consider the cruel and unusual punishment meted [sic] out to the two police officers and their families and the two robbery victims and their families before you complain about their murderers suffering for a brief period from a lethal [sic] injection. Your client's pain will be momentary, the families' pain is perpetual.

You obviously oppose capital punishment, but to base that opposition on the pain a murderer might suffer is specious, to say the least. Make your case against capital punishment on honest grounds, not this hypocrisy [sic].

Incidentally, I would like to see these two spend the rest of their lives behind the walls, since death is too easy and too quick. My only concern is that after a few years people like you would claim they have been rehabilitated, and should be returned to society. No one ever seems to care about the victims or their families, do they?

E-mailer #3: I read with interest about you trying to have the death penalty as we know it in this country overturned, especially lethal injection. I am an avid supporter of the death penalty. Lethal injection is the most humane way to end a condemned persons [sic] life. The laws in this country are a derivative of the Judeo Christian ethics and law. I also believe that executing a condemn [sic] person is not a deterrent for future crime, but it does provide supreme closure for the victims [sic]

family to the extent that this evil person will never ever again do another evil atrocity. I truly believe you are supporting a loss [sic] cause, with the public news media broadcasting more heinous crimes to gain television ratings every day the [sic] will be an ever increasing public cry for more stiffer punishment including the death penalty. When my president George Bush keeps appointing more conservative justices to the courts during the remaining [sic] of his administration the liberal groups will find great difficulty if not impossible [sic] to change certain laws concerning the death penalty and gay marriage.

If you believe that lethal injection is inhumane, lets [sic] try [the] firing squad or a public hanging for the public broadcast networks to air, especially in high definition. Now that in and of itself could be a vast deterrent for future heinous crime. Prisons are full and taxpayers that have been paying the tab for lifetime incarceration [and] angry. As our population [sic] the baby boomers ages they become more conservative and a huge voting block to be reckon [sic] with. Remember it's the "Red States" that count! I respect your opinion just as you respect mine.

### Afterward: For Further Reading

- Deborah W. Denno, "When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What It Says about Us," 63 *Ohio State Law Journal* 63–260 (2002).
- Deborah W. Denno, "Getting to Death: Are Executions Constitutional?" 82 *Iowa Law Review* 319–464 (1997).
- Deborah W. Denno, "Is Electrocution an Unconstitutional Method of Execution? The Engineering of Death over the Century," 35 *William and Mary Law Review* 551–692 (1994).
- Linda L. Emmanuel & Leigh B. Bienen, "Physician Participation in Executions: Time to Eliminate Anonymity Provisions and Protest the Practice," 135 *Annals of Internal Medicine* 922–924 (2001).
- Neil J. Farber et al., "Physicians' Willingness to Participate in the Process of Lethal Injections for Capital Punishment," 135 *Annals of Internal Medicine* 884–890 (2001).
- Roberta M. Harding, "The Gallows to the Gurney: Analyzing the (Un)constitutionality of the Methods of Execution," 6 *The Boston University Public Interest Law Journal* 153–178 (1996).
- Jacob Weisberg, "This Is Your Death," *The New Republic*, July 1, 1991, pp. 23–27.

### Notes

1. *Baze et al. v. Rees et al.*, No. 04-CI-1094, Franklin Circuit Court, Kentucky (July 8, 2005), was a bench trial because it was a civil matter. The two condemned inmates, who are plaintiffs, brought a suit challenging the constitutionality of lethal injection as a method of execution in Kentucky. The defendants are the Commissioner of the Kentucky Department of Corrections, the Warden of the Kentucky State Penitentiary, and the Governor of the Commonwealth of Kentucky. The remedy sought was a declaratory judgment. Before the trial started, a preliminary injunction had already been granted by Judge Crittenden, barring the use of lethal injection.

2. *Nelson v. Campbell*, 541 U.S. 637 (2004), was an unanimous opinion delivered by Justice Sandra Day O'Connor.

### Acknowledgments

\* I am most grateful for the helpful comments provided by Daniel Auld, Leigh Bienen, and Roberta Harding. I thank David Barron for the questions asked during the testimony.