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TOO SICK TO BE EXECUTED: SHOCKING PUNISHMENT AND THE BRAIN

Joel Zivot*

INTRODUCTION

On February 12, 1994, Ernest Johnson, born August 20, 1960, killed three employees of a Columbia, Missouri convenience store during a robbery.¹ The victims, Mary Bratcher (age forty-six), Fred Jones (age fifty-eight), and Mabel Scruggs (age fifty-seven), died from head injuries inflicted with a hammer that was found covered in blood at the scene.² On June 20, 1995, Johnson was sentenced to death.³ Johnson has a lifelong history of intellectual disability.⁴ He likely suffers from fetal alcohol syndrome,⁵ as his mother was known to have consumed alcohol excessively during her pregnancy.⁶ Johnson was the victim of sexual abuse on multiple occasions and suffered at least two traumatic head injuries during his childhood.⁷ Intellectually, Johnson withdrew from formal education after the ninth grade and has a history of chronic poor academic performance.⁸ On August 28, 2008, Johnson underwent surgery on his brain to remove a tumor, referred to as a parafalcine meningioma.⁹ The surgical procedure was unable to remove the tumor and small remnants remain.¹⁰ Magnetic

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1. See *State v. Johnson*, 968 S.W.2d 686, 689–90 (Mo. 1998) (en banc).

2. *Id.* at 690.

3. *Ernest Lee Johnson*, MURDERPEDIA, <http://murderpedia.org/male/J/j/johnson-ernest-lee.htm> (last visited Oct. 16, 2016) [<https://perma.cc/YW9W-L3ZD>].

4. See *Johnson*, 968 S.W.2d at 700.

5. See generally Keshav K. Gupta et al., *An Update on Fetal Alcohol Syndrome-Pathogenesis, Risks, and Treatment*, 40 ALCOHOLISM 1594 (2016), <http://onlinelibrary.wiley.com/doi/10.1111/acer.13135/epdf> [<https://perma.cc/RQU7-JRSK>].

6. See Brief for Respondent, *Johnson*, 968 S.W.2d 686 (No. SC90582), 2010 WL 4875200, at *34.

7. See *Johnson*, 968 S.W.2d at 696, 700.

8. See *id.* at 700.

9. See *Meningioma Brain Tumor*, UCLA HEALTH, <http://neurosurgery.ucla.edu/meningioma-brain-tumor> (last visited Oct. 16, 2016) [<https://perma.cc/GU2C-QLE9>].

10. See *Johnson v. Lombardi*, 809 F.3d 388, 390 (8th Cir.), *cert. denied*, 136 S. Ct. 601 (2015).

resonance imaging (MRI) of Johnson's brain on April 18, 2011, and July 9, 2015, revealed a consistent finding of a small bony defect in the top of his skull and a large area of missing brain tissue in the region responsible for movement and sensation in the legs.¹¹

Capital punishment, to be lawfully delivered, must occur without needless cruelty.¹² Cruelty, defined in the setting of punishment, will naturally evolve with the maturation of civil society.¹³ Cruel punishment will always be a relative standard, and punishment cannot exceed what is morally shocking. In the setting of public executions, observers and victims share an aspect of the experience of punishment. The inmate has little opportunity to evaluate and report back on cruelty in the moments before death. Once dead, the inmate is necessarily silent on the matter. Empathy allows observers to evaluate punishment as cruel or not. Attempts by the state to block unfettered observation of all aspects of an execution deny Eighth Amendment protection, which stipulates that inflicted punishment shall not be cruel and unusual.¹⁴ Observation necessarily involves more than what a casual observer can surmise. Execution, as a form of killing, is a technical matter and, as such, requires more than casual knowledge of the details of that killing. Lethal injection is now the standard method of execution¹⁵ and while never a medical act, co-opts the tools of the medical trade and engenders comment. Ethically, professional medical societies, including the American Medical Association¹⁶ and the American Board of Anesthesiology,¹⁷ object to physician participation in lethal injection. As a consequence, physicians find themselves caught on the horns of a dilemma: How can the balance be struck between the benefit of some sort of technical evaluation that would reduce cruelty in executions, while refraining from instructing the state on how to kill without cruelty?

I. A PRISONER HAS A RIGHT TO HEALTHCARE

After *Estelle v. Gamble*,¹⁸ indifference to prisoner health constitutes cruel and unusual punishment and, therefore, violates the Eighth Amendment.¹⁹ We now interpret this to mean that a prisoner has a right to health care and that the warden is under a legal duty to provide it up until the prisoner dies a natural death.²⁰ If death occurs as a consequence of the execution, at

11. See E. Johnson MRIs performed by Dr. Zivot on Apr 18, 2011 and July 9, 2015 [hereinafter E. Johnson MRIs] (on file with the author).

12. See *Baze v. Rees*, 553 U.S. 35, 50 (2008).

13. See *id.* at 62.

14. U.S. CONST. amend. VIII.

15. See *Baze*, 553 U.S. at 44.

16. *AMA Code of Medical Ethics Chapter 9.7.3*, AM. MED. ASS'N, <https://download.ama-assn.org/resources/doc/code-medical-ethics/code-2016-ch9.pdf?cb=1473808459&retrieve=yes> (last visited Oct. 16, 2016) [<https://perma.cc/VQ78-EHBB>].

17. J. Jeffrey Andrews, *Anesthesiologists and Capital Punishment*, AM. BOARD ANESTHESIOLOGY, INC. (May 2014), <http://www.theaba.org/PDFs/BOI/CapitalPunishmentCommentary> [<https://perma.cc/Z8RD-5JLK>].

18. 429 U.S. 97 (1976).

19. See *id.* at 104.

20. See *id.* at 104–05.

what moment during the execution is this right to health care set aside, if ever? Death by execution is not instantaneous; methods of execution have been set aside as cruel because they have lasted for an uncomfortable duration.²¹ Lethal injection, as the preferred method of execution, has also begun to unravel as a consequence of drug shortages.²² States seek execution drugs from questionable sources and respond to suppliers' and participants' demands for details by passing secrecy laws.²³ Prisoners condemned to death cannot be executed by stealth or neglect.²⁴ Capital punishment cannot be brought about as a consequence of withholding necessary health care.²⁵ Nor can it occur by the infliction of sublethal injuries that, in the course of time, are expected to worsen and cause death.²⁶ Analytically, a death brought about nearly instantaneously would eliminate a prisoner's subjective unnecessary cruelty. An inmate who survives an execution but suffers sublethal injuries that, without treatment, will or may lead to death or disability is again entitled to health care, and the warden is under a duty to provide it.²⁷ A warden's failure to provide adequate medical care in these circumstances may be a criminal offense in some states, separate from any Eighth Amendment constitutional violation.²⁸ If an inmate survives an execution attempt, the constitutional duty requiring the delivery of necessary health care, if ever set aside, would now certainly be revived.

Practically, the state would be under an obligation to resuscitate and restore to life an inmate injured, but not killed, in the setting of an execution. As a pointed example, when the State of Oklahoma killed Clayton Lockett, it is important to understand that Lockett's death was not the result of execution.²⁹ By all accounts, Clayton Lockett survived the state's attempt to execute him.³⁰ If a physician was in the execution chamber, and Clayton Lockett was alive after an execution attempt, that physician would have a duty to try to revive him. Clayton Lockett received

21. See *LaGrand v. Stewart*, 173 F.3d 1144, 1149 (9th Cir. 1999) (quoting *Fierro v. Gomez*, 77 F.3d 301, 308–09 (9th Cir.), *vacated*, 519 U.S. 918 (1996)).

22. See Maurice Chammah & Tom Meagher, *How the Drug Shortage Has Slowed the Death-Penalty Treadmill*, MARSHALL PROJECT (Apr. 12, 2016, 5:29 PM), <https://www.themarshallproject.org/2016/04/12/how-the-drug-shortage-has-slowed-the-death-penalty-treadmill#.5sDGiYkA1> [<https://perma.cc/LFR3-RBKD>].

23. See Deborah W. Denno, *Lethal Injection Chaos Post-Blaze*, 102 GEO. L.J. 1331, 1377–81 (2014).

24. See *Estelle*, 429 U.S. at 104.

25. See *id.*; see also *Wilkerson v. Utah*, 99 U.S. 130, 136 (1879).

26. See *In re Kemmler*, 136 U.S. 436, 447 (1890).

27. See Craig A. Conway, *A Right of Access to Medical and Mental Health Care for the Incarcerated*, HEALTH L. PERSP. (June 2009), [https://www.law.uh.edu/healthlaw/perspectives/2009/\(CC\)%20Prison%20Health.pdf](https://www.law.uh.edu/healthlaw/perspectives/2009/(CC)%20Prison%20Health.pdf) [<https://perma.cc/5K3H-EY88>].

28. See *id.*

29. See Jeffrey E. Stern, *The Cruel and Unusual Execution of Clayton Lockett: The Untold Story of Oklahoma's Botched Lethal Injection—and America's Intensifying Fight Over the Death Penalty*, ATLANTIC (June 2015), <http://www.theatlantic.com/magazine/archive/2015/06/execution-clayton-lockett/392069/> [<https://perma.cc/T4T6-L4DM>].

30. See *id.*

no such care and, having survived his execution, died slowly over the next forty minutes while others watched.³¹

II. TOO SICK TO BE EXECUTED

Missouri death row inmate Russell Bucklew was to be executed on May 21, 2014.³² On March 21, 1996, Bucklew shot and killed Michael Sanders in a jealous rage over a former girlfriend.³³ Bucklew is plagued by the presence of large, blood-filled, vascular tumors in his face and throat known as cavernous angioma.³⁴ These vascular tumors have been present since birth and will continue to grow.³⁵ They are resistant to definitive treatment and will eventually obstruct Bucklew's airway and kill him by self-strangulation, if he is not executed first.³⁶ I was asked to examine him and gave an opinion for his Eighth Amendment stay application, which concluded he had a substantial risk of "suffering grave adverse events during the execution, including hemorrhaging, suffocating, and experiencing excruciating pain."³⁷ On May 21, 2014, Justice Samuel A. Alito restored a stay granted by a 2–1 vote of a panel of the Eighth Circuit, which had been overturned by a 7–4 vote of the participating judges of the entire circuit.³⁸ If Bucklew then sought medical treatment, a physician would be conflicted because treatment now could render Mr. Bucklew potentially able to be punished and was not for the restoration of health. Ethically, the doctrine of the double effect intends to draw a distinction between what is intended and what is foreseen.³⁹ A physician may claim treatment is intended only to improve immediate symptoms, setting aside the foreseeable medical fitness to execute question.⁴⁰ As a consequence of these airway tumors, Bucklew cannot lie flat because gravity tugs on the tumors and blocks his breathing.⁴¹ Execution by administration of lethal injections, for physiological efficacy, requires a prisoner to lie flat. If Bucklew were to be executed, he would have to be sitting up. In lethal injection, chemicals used by the state would worsen his breathing before rendering him unconscious.⁴² It was these considerations of Bucklew's confounding medical condition that led the U.S. Supreme Court and the

31. *See id.*

32. Warrant of Execution at 2, *State v. Bucklew*, 973 S.W.2d 83 (Mo. Apr. 9, 2014) (No. SC80052).

33. *State v. Bucklew*, 973 S.W.2d 83, 86–87 (Mo. 1998).

34. *Cavernous Angioma*, UCLA HEALTH, <http://neurosurgery.ucla.edu/cavernous-angioma> (last visited Oct. 16, 2016) [<https://perma.cc/PBA5-J8NB>].

35. *See Bucklew v. Lombardi*, 783 F.3d 1120, 1124 (8th Cir. 2015).

36. *See id.*

37. *Id.* at 1126.

38. *See Bucklew v. Missouri*, 134 S. Ct. 2333, 2333 (2014); *Bucklew*, 783 F.3d at 1120.

39. *Doctrine of Double Effect*, STAN. ENCYCLOPEDIA PHIL. (Sept. 23, 2014), <http://plato.stanford.edu/entries/double-effect/> [<https://perma.cc/QY5G-N5EG>].

40. *See id.*

41. *See Bucklew*, 783 F.3d at 1125.

42. *See id.* at 1125–26.

Eighth Circuit panel to grant the last minute stay of his execution.⁴³ Bucklew remains alive and the matter continues to be litigated.

Recall that Johnson, discussed in the Introduction, suffers from seizures, likely as a result of prior brain trauma and his parafalcine meningioma resection.⁴⁴ A seizure is the result of electrical hypersynchronization of networks of neurons within the cerebral cortex.⁴⁵ In the most striking cases, seizures manifest as violent and rhythmic muscle contractions associated with a loss of consciousness.⁴⁶ During a seizure, an individual may involuntarily urinate.⁴⁷ Seizures occur in a variety of settings. In the case of Johnson, structural brain defects caused by prior head trauma and brain tumor surgery are very likely seizure triggers. Medications exist that can reduce seizure events and can be prescribed to an individual suffering from recurrent seizures.⁴⁸ These medications have varying degrees of effectiveness, affected by coexisting health conditions and drug-to-drug interactions. Broadly, medications may be categorized as pro- or antiseizure, and some medications can both promote and inhibit seizure occurrences, depending on dosage and other factors.⁴⁹

III. PENTOBARBITAL: NOT FIT FOR THE PURPOSE

Pentobarbital, a drug in the barbiturate class,⁵⁰ is now the single chemical used to cause death in the State of Missouri's lethal injection protocol.⁵¹ Prior to the execution event, inmates may receive varying quantities of the drug midazolam, here intended to reduce anxiety.⁵² Midazolam is a drug in the benzodiazepine class.⁵³ Barbiturates are used as medical therapy and treatment for intractable seizures.⁵⁴ Sodium thiopental, another drug in the

43. See *Bucklew*, 134 S. Ct. at 2333; *Bucklew*, 783 F.3d at 1120.

44. See *Meningioma Brain Tumor*, *supra* note 9 and accompanying text.

45. Robert S. Fisher et al., *Epileptic Seizures and Epilepsy: Definitions Proposed by the International League Against Epilepsy (ILAE) and the International Bureau for Epilepsy (IBE)*, 46 *EPILEPSIA* 470, 470–72 (2005).

46. See *id.*

47. See *Epilepsy Signs and Symptoms*, UCSF MED. CTR., https://www.ucsfhealth.org/conditions/epilepsy/signs_and_symptoms.html (last visited Oct. 16, 2016) [<https://perma.cc/9BCQ-ADLX>].

48. See Steven C. Schachter, *Antiseizure Drugs: Mechanism of Action, Pharmacology, and Adverse Effects*, UPTODATE, <http://www.uptodate.com/contents/antiseizure-drugs-mechanism-of-action-pharmacology-and-adverse-effects> (last visited Oct. 16, 2016) [<https://perma.cc/LSP7-FMVM>].

49. See generally Hannah R. Cock, *Drug-Induced Status Epilepticus*, 49 *EPILEPSY & BEHAV.* 76, 76–82 (2015).

50. *Pentobarbital*, DRUGS.COM, <https://www.drugs.com/ppa/pentobarbital.html> (last visited Oct. 16, 2016) [<https://perma.cc/KED3-MYU5>].

51. See, e.g., *Clayton v. Lombardi*, 780 F.3d 900, 903 (8th Cir. 2015).

52. See Chris McDaniel, *Missouri Used Midazolam in Its Most Recent Execution*, ST. LOUIS PUB. RADIO (Jan. 22, 2015), <http://news.stlpublicradio.org/post/missouri-used-midazolam-its-most-recent-execution#stream/0> [<https://perma.cc/6492-NEVG>].

53. *Midazolam*, DRUGS.COM, <https://www.drugs.com/mtm/midazolam.html> (last visited Oct. 16, 2016) [<https://perma.cc/3THU-45QG>].

54. See *Barbiturate Anticonvulsants*, DRUGS.COM, <https://www.drugs.com/drug-class/barbiturate-anticonvulsants.html> (last visited Oct. 16, 2016) [<https://perma.cc/5LRZ-9Q2G>].

barbiturate class, is no longer available worldwide as a consequence of a prior association with executions.⁵⁵ Sodium thiopental used to be a standard drug administered at the commencement of an anesthetic in the setting of surgery.⁵⁶ Hospira, the last remaining manufacturer of sodium thiopental, discontinued production of the drug to avoid a European Union sanction that proscribes drug manufacturing if that drug could be used in executions.⁵⁷ Barbiturates, as a class, possess two properties worth noting: First, although barbiturates are used to treat seizures, drugs in this class may also produce seizures. Second, barbiturates do not produce pain relief.⁵⁸ Barbiturates are described as “anti-algesic,” meaning they worsen pain symptoms.⁵⁹

CONCLUSION

On November 3, 2015, the Supreme Court effectively issued a temporary stay of execution for Johnson that overturned the lower court’s decision to dismiss based on failure to state a claim.⁶⁰ Johnson contended that his medical condition would lead to a seizure at the time of his execution, resulting in cruel punishment in violation of the Eighth Amendment.⁶¹ Johnson remains alive on death row. I appended MRI images of Johnson’s brain structure to my affidavit in this case, which showed his brain defect.⁶² These images were, arguably, persuasive in the final decision. MRI imaging is distinguishable because it creates imaging of extremely high fidelity.⁶³ With minor explanation, nonmedical individuals can understand the significance of these images. In Johnson’s case, the brain defect is easily observed and dramatic.⁶⁴

In the setting of a planned execution, Johnson’s coexisting neurological medical condition creates an unusual problem for courts and for the medical system. For courts, execution must not violate the Eighth Amendment.⁶⁵ The use of lethal injection as the method for execution creates a circumstance not intended to be a medical act but nonetheless impinges

55. See Ralph Ellis et al., *Pfizer Moves to Block Its Drugs from Being Used in Lethal Injections*, CNN (May 14, 2016, 6:12 AM), <http://www.cnn.com/2016/05/13/health/pfizer-death-penalty-drugs/> [https://perma.cc/HQ3B-ESB3].

56. See *Thiopental Sodium*, DRUGS.COM, <https://www.drugs.com/ppa/thiopental-sodium.html> (last visited Oct. 16, 2016) [https://perma.cc/CA2K-Q2ZX].

57. *Statement from Hospira Regarding Its Halt of Production of Pentothal (Sodium Thiopental)*, DEATH PENALTY INFO. CTR. (Jan. 21, 2011), <http://www.deathpenaltyinfo.org/documents/HospiraJan2011.pdf> [https://perma.cc/K6G4-3D3J].

58. See J. Clutton-Brock, *Pain and the Barbiturates*, 16 ANAESTHESIA 80, 80 (1961).

59. See *id.*

60. See *Johnson v. Griffith*, 136 S. Ct. 444, 444 (2015).

61. *Johnson v. Lombardi*, No. 2:15-CV-4237-DGK, 2015 WL 6501083, at *2 (W.D. Mo. Oct. 27, 2015), *appeal dismissed*, 815 F.3d 451 (8th Cir. 2016).

62. See E. Johnson MRIs, *supra* note 11.

63. One note of caution: other brain-imaging technologies, if aimed at ongoing brain function as opposed to the brain structure shown by MRI, can result in vagueness and uncertainty.

64. See E. Johnson MRIs, *supra* note 11.

65. See U.S. CONST. amend. VIII.

enough that it demands medical consideration. For medicine, the problem is the opposite. Lethal injection is not a medical act but approximates it to a sufficient degree that it compels the involvement of doctors. If a doctor comments or advises on aspects of execution, he or she risks being sanctioned or reprimanded by professional medical societies.⁶⁶ From a medical practice perspective, the doctor-patient relationship is predicated on consent as expressed and evaluated by a person at liberty. Prisoners have concerns about health that can be fundamentally different than individuals at liberty. It may be in the interest of a prisoner to reject medical care, if that care would make them fit for execution. In the circumstance when a prisoner lacks capacity, a substitute decision maker would be required to consider treatment, or the rejection of it, in the same fashion as the prisoner. The Supreme Court seems to agree that Johnson was likely too sick to be executed, setting the matter aside for the lower courts to decide. Owing to prolonged periods of delay faced by the average death row prisoner facing execution, coexisting medical problems are likely to occur. If the state continues to use lethal injection in some form, the medical questions cannot be easily set aside. Between the interests of the state and the interests of the medical profession, lethal injection does not offer an ethical, halfway compromise.

66. See, e.g., *AMA Code of Medical Ethics Chapter 9.7.3*, *supra* note 16.