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ANOMALIES: RITUAL AND LANGUAGE IN LETHAL INJECTION REGULATIONS

*Leigh B. Bienen**

The state lethal injection protocols do not regulate lethal injections, but instead describe hypothetical rituals meant to reassure the reader—whomever that might be—that a controlled and orderly process, in accordance with the rule of law, will take place. The protocols are public relations documents, not legitimate legal regulations. Their status of “non-legal” documents, provisions without legal authority is evident from the fact that apparently they are not governed by state administrative procedure acts.

Epigraph: Culture, in the sense of the public, standardized values of a community, mediates the experience of individuals. It provides in advance some basic categories, a positive pattern in which ideas and values are tidily ordered. And above all, it has authority, since each is induced to assent because of the assent of others. But its public character makes its categories more rigid. . . . Any given system of classification must give rise to anomalies, and any given culture must confront events which seem to defy its assumptions. It [the culture] cannot ignore the anomalies which its scheme produces, except at risk of forfeiting confidence.¹

I.

When a horse, a cow, a dog, or a grizzly bear is killed under the authority of the government, or by a private party in a planned euthanasia, the veterinarian performing the execution will follow euthanasia guidelines adopted by the American Veterinary Medical Association (“AVMA Guidelines”) for the method of euthanasia to be used, including any drugs, restraints, and anesthetics

* Senior Lecturer, Northwestern University School of Law. Without the important and innovative work of Professor Deborah W. Denno at Fordham University School of Law and her students, these regulations would never have been published or subject to scrutiny. Special thanks also goes to Laura Weizeorick, my research assistant; Marcia Lehr and Pegeen Bassett, Librarians, Northwestern University School of Law; Juana Haskin, Faculty Assistant, Northwestern University School of Law; Leslie Bienen, DVM; and the Northwestern University School of Law faculty research funds for their continued and much appreciated support.

1. MARY DOUGLAS, *PURITY AND DANGER* 40 (1984).

required, so that the pain to the animal is minimized.² The AVMA Guidelines are directed to the humane death of animals:

It is our responsibility as veterinarians and human beings to ensure that if an animal's life is to be taken, it is done with the highest degree of respect, and with an emphasis on making the death as painless and distress free as possible. Euthanasia techniques [for animals] should result in rapid loss of consciousness followed by a cardiac or respiratory arrest and ultimate loss of brain function. In addition, the technique should minimize distress and anxiety experienced by the animal prior to loss of consciousness.³

The AVMA Guidelines provide a technical description of stimuli, neural pathways, receptors, feedback, and other scientific topics and terminology before focusing on a description of the anticipated pain for the animal and its prevention. The Guidelines explain that the sensation of pain "results from nerve impulses reaching the cerebral cortex via ascending neural pathways."⁴ Therefore, the Guidelines continue, to the best of our knowledge, pain is perceived only under certain circumstances:

On the basis of neurosurgical experience in humans, it is possible to separate the sensory-discriminative components from the motivational-affective components of pain.

For pain to be experienced, the cerebral cortex and subcortical structures must be functional. If the cerebral cortex is not functional because of hypoxia, depression by drugs, electric shock, or concussion, pain is not experienced. Therefore, the choices of the euthanasia agent or method is less critical if it is to be used on an animal that is anesthetized or unconscious, provided that the animal does not regain consciousness prior to death.⁵

2. See AM. VETERINARY MED. ASS'N, AMERICAN VETERINARY MEDICAL ASSOCIATION GUIDELINES ON EUTHANASIA 1 (2007), available at http://www.avma.org/issues/animal_welfare/euthanasia.pdf [hereinafter AVMA GUIDELINES]. In another anomaly, the Animal Welfare Act, which governs the humane treatment of animals by the federal government, notably excludes rats, mice, and birds, the animals most often used in medical experiments, from its protocols for euthanasia. See 7 U.S.C. §§ 2131(1), 2132(g) (2007).

3. AVMA GUIDELINES, *supra* note 2, at 1.

4. *Id.*

5. *Id.* at 2 (internal footnote omitted). The AVMA cautions that: [1.] The guidelines are in no way intended to be used for human lethal injection. [2.] The application of a barbiturate, paralyzing agent, and potassium chloride delivered in separate syringes or stages (the common method used for human lethal injections) is not cited in the report. [3.] The report never mentions pancuronium bromide or Pavulon, the paralyzing agent used in human lethal injection.

“The AVMA is fully committed to the concept that, whenever it becomes necessary to kill any animal for any reason whatsoever, death should be induced as painlessly and quickly as possible.”⁶ The AVMA Guidelines “summarize contemporary scientific knowledge on euthanasia in animals and call attention to the lack of scientific reports assessing pain, discomfort, and distress in animals being euthanatized.”⁷ The AVMA only cites well-supported sources.⁸ Therefore, “[m]any reports on various methods of euthanasia [that] are either anecdotal, testimonial narratives, or unsubstantiated opinions” are not included in their list.⁹

Attached to the AVMA Guidelines are four appendices categorizing types of euthanasia for animals.¹⁰ For example, Appendix One lists barbiturates, potassium chloride in conjunction with general anesthesia, and penetrating captive bolt as agents and methods acceptable for large mammals, such as horses and swine.¹¹ The AVMA Guidelines state outright that euthanasia of animals by in-

Id. at title page.

6. *Id.* at 22.

7. *Id.* The Guidelines contain a detailed annotation of 223 scientific sources, such as: “[a]nesthesia for reptiles” (No. 198); “[a] humane killing trap for lynx (*Felis lynx*): the Conibear 330 with clamping bars” (No. 159); and “[t]he use of a shotgun for emergency slaughter or euthanasia of large mature pigs” (No. 117). *Id.* at 23-27 nn.117, 159 & 198.

8. *Id.* at 22.

9. *Id.*

10. *See id.* at 28-36. “Appendix 1—Agents and methods of euthanasia by species,” distinguishes between “acceptable” (those that consistently produce a humane death when used as the sole means of euthanasia) and “conditionally acceptable” methodologies. *Id.* at 28-29. “Appendix 2—Acceptable agents and methods of euthanasia,” classifies agents, such as barbiturates and carbon dioxide, according to “Mode of Action,” “Rapidly,” “Ease of performance,” “Safety for personnel,” “Species suitability,” and “Efficacy and comments.” *Id.* at 30-31. “Appendix 3—Conditionally acceptable agents and methods of euthanasia,” classifies agents and methods, such as chloral hydrate and electrocution, according to the same categories as Appendix 2. *Id.* at 32-34. Finally, “Appendix 4—Some unacceptable agents and methods of euthanasia,” lists agents or methods along with comments as to why the agent is unacceptable, such as: “Air embolism may be accompanied by convulsions, opisthotonos [a muscle spasm causing the head, neck, and spine to be arched backwards], and vocalization. If used it should be done only in anesthetized animals”; and “[C]yanide poses an extreme danger to personnel and the manner of death is aesthetically objectionable.” *Id.* at 35-36.

11. *Id.* at 28-29. The Code of Federal Regulations defines penetrating captive bolt as “[a] stunning instrument” which “delivers bolts of varying diameters and lengths through the skull and into the brain.” 9 C.F.R. §§ 301.2, 313.15 (2007). The Food Safety and Inspection Service (“FSIS”), an agency of the United States Department of Agriculture (“USDA”) has approved the penetrating or non-penetrating captive bolt as an accepted humane practice for the slaughtering of livestock intended for human consumption. *See id.*

jection of a paralytic agent without anesthetic is prohibited because it causes too much pain to the animal.¹² Likewise electrocution is not recommended, because the animal may be conscious for a period of time before death.¹³ The AVMA Guidelines discourage the use of contested and unapproved products for animal euthanasia. Only drugs and methods that have been studied under scientific protocols can be justified.¹⁴ In fact, the AVMA recommends convening "a panel of scientists at least once every ten years to review all literature that scientifically evaluates methods and potential methods of euthanasia for the purpose of producing AVMA Guidelines on Euthanasia."¹⁵

II.

The protocols and regulations issued by states for lethal injection of humans who have been sentenced to death by a state trial court and are to be killed under the authority of the state are indirect, incomplete, replete with medical and scientific inaccuracies, and padded with irrelevant statements and descriptions of imagined events. When medical doctors are asked for their opinion on the present lethal injection methods, some doctors recommend the three-drug method be replaced with a single large injection of barbiturates.¹⁶ Their advice has been in large part ignored.¹⁷ Prior to abolishing the death penalty, New Jersey was the only state not to include a paralytic drug in its lethal injection protocols.¹⁸ The state protocols for the lethal injection of humans put their emphasis on: the decoration of the rooms where the executions take place, when the curtain should be pulled, the existence and number of syringes, and other miscellaneous paraphernalia and random annotations about equipment.¹⁹ In sharp contrast to the guidelines for animals,

12. See AVMA GUIDELINES, *supra* note 2, at 12, 36.

13. *Id.* at 15.

14. *Id.* at 22.

15. *Id.* at 1.

16. See Brief for Michael Morales, Michael Taylor, Vernon Evans, Jr., and John Gary Hardwick, Jr., as Amici Curiae Supporting Petitioners at *21, *Baze v. Rees*, 2007 WL 3407042 (Ky. Nov. 13, 2007) (No. 07-5439).

17. For example, a Tennessee state commission, relying on medical expert Dr. Mark Dershwitz, recommended replacing its present three-drug practice of lethal injection with a single large dose of a barbiturate. Its advice went unheeded. *Id.*

18. See, e.g., 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 ST. L.J. 63, 233 (2002) [hereinafter Denno, *Legislatures*].

19. See, e.g., *id.* at 207-60.

the preparation for lethal injections and the procedures afterwards often take more space than the instructions for the act itself.²⁰

Presumably, Department of Corrections personnel, aided perhaps by other officials, such as the Attorney General of the state, write these protocols. The details are distasteful even to read. It is not surprising then that state officials have typically resisted their disclosure.²¹ Only recently have these regulations been subject to public scrutiny.²² Professor Deborah Denno of the Fordham University School of Law conducted the first and only comprehensive study in 2001 collecting written protocols of states with public protocols and obtaining information by telephone and e-mail from states with partially private or private protocols.²³

The protocols are generally addressed not to doctors, but to others who carry out or witness the execution. Every professional medical society has forbidden doctors to participate in executions performed by the state.²⁴ The American Society of Anesthesiologists has put a statement on its website stating that anesthesiologists should not facilitate or participate in executions.²⁵ Despite

20. See, e.g., *id.* at 249-52. South Dakota has more than two pages of protocols, but only a few lines apply to the actual killing as opposed to the various preparations (mostly relating to the person to be killed) and the disposal of the body after the killing. *Id.* The enumeration of who may witness the execution is also a focus of South Dakota's protocol. *Id.* at 250; see also S.D. CODIFIED LAWS § 23A-27A-35 (2007).

21. See Denno, *Legislatures*, *supra* note 18, at 116-17; Deborah W. Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*, 76 *FORDHAM L. REV.* 49, 95 (2007) [hereinafter Denno, *Quandary*].

22. See generally Denno, *Legislatures*, *supra* note 18.

23. *Id.* at 207. Without the persistence of Professor Denno and her students, the protocols would never have come to light.

24. *Id.* at 113-14; Linda L. Emanuel & Leigh B. Bienen, Editorial, *Physician Participation in Executions: Time to Eliminate Anonymity Provisions and Protest the Practice*, 135 *ANNALS INTERNAL MED.*, 922, 922-24 (2001), available at <http://www.annals.org/cgi/reprint/135/10/922.pdf>. The first oath of a doctor is the Hippocratic Oath: "In whatsoever houses I enter, I will enter to help the sick, and I will abstain from all intentional wrongdoing and harm." ROBERT JAY LIFTON, *THE NAZI DOCTORS: MEDICAL KILLINGS AND THE PSYCHOLOGY OF GENOCIDE* vii (1986). The question of with whom the medical doctor at an execution has the doctor-patient relationship raises a dozen more questions of what the doctor's role is, could be, or should be in the state's administration of death. See Atul Gawande, *When Law and Ethics Collide: Why Physicians Participate in Executions*, 354 *NEW ENG. J. MED.* 1221, 1229 (2006), available at <http://content.nejm.org/cgi/reprint/354/12/1221.pdf>.

25. Leigh B. Bienen, *Not Wiser After Thirty Five Years of Contemplating the Death Penalty*, 42 *STUD. IN L. POL. & SOC'Y* 42 (2008). Dr. Orin F. Guidry, President of the American Society of Anesthesiologists, recommends that the 40,000 members of his organization become well-informed on the subject of lethal injection and then "steer clear" of any participation in those executions. "The legal system has painted itself into this corner, and it is not our obligation to get it out." *Id.* at 42 n.61 (citing Orin F.

these admonitions, doctors do participate openly in executions in a number of states, at least to pronounce death, and often in other ways as well.²⁶ The professional competence of those doctors who have been involved has been questioned.²⁷ Some states go to elaborate lengths to assure their citizens that doctors are not performing the executions.²⁸

In spite of the fact that doctors are not usually the writers or readers of these protocols, they often adopt a pseudo-scientific diction and format. For example, Professor Denno notes that the South Dakota regulations declare:

Any pharmacist . . . is authorized to dispense the substance[s] . . . without prescription [and that] . . . [t]he chemicals will be kept in a secured location. The chemicals to be used are Sodium Thiopental ([a] lethal dose – [to] sedate [the] person), Pancuronium Bromide ([a] muscle relaxant – [to] collapse [the] diaphragm and lungs), and Potassium Chloride ([to] stop[] [the] heart beat). In between each dose of the prescribed chemical, a

Guidry, *Message from the President: Observations Regarding Lethal Injection*, AM. SOC'Y ANESTHESIOLOGISTS, June 30, 2006, available at http://www.asahq.org/news/asa_news063006.htm.

26. Denno, *Quandary*, *supra* note 21, at 82-88. In the event that there is not an institutional physician willing to participate in an execution, New Jersey's former protocol allowed for a doctor to be hired on a contractual basis. Denno, *Legislatures*, *supra* note 18, at 229.

27. It took a court order in Missouri to bar executions from being carried out by a doctor who had been banned from practice and sued for malpractice twenty times. See Brief for Michael Morales, Michael Taylor, Vernon Evans, Jr., and John Gary Hardwick, Jr., as Amici Curiae Supporting Petitioners, *supra* note 16, at *13-16. This doctor, who admitted to being dyslexic and to mixing up dosages, had carried out fifty-four executions in Missouri. *Id.* at *14. Missouri is not the only jurisdiction that relied on his incompetence. This is the person the federal government chose to consult when designing its execution method. *Id.* at *15-16.

28. Denno, *Quandary*, *supra* note 21, at 89; see also GA. CODE ANN. § 17-10-38 (West 2007) (stating "no state agency, department, or official may, through regulation or otherwise, require or compel a physician to participate in the execution of a death sentence"); S.D. CODIFIED LAWS § 23A-27A-32 (2008) ("The person administering the intravenous injection need not be a physician, registered nurse, licensed practical nurse, or other medical professional licensed or registered under the laws of this or any other state."). Moreover, Alabama, Delaware, Florida, Georgia, New Hampshire, New Jersey, Oregon, and South Dakota have statutes that explicitly "provide that lethal injections do not constitute the practice of medicine." Denno, *Quandary*, *supra* note 21, at 89; see ALA. CODE § 15-18-82.1(f) (2007) ("[P]rescription, preparation, compounding, dispensing, and administration of a lethal injection shall not constitute the practice of medicine, nursing, or pharmacy."); see also DEL. CODE ANN. tit. 11, § 4209(f) (2007); FLA. STAT. ANN. § 922.105 (West 2007); GA. CODE ANN. § 17-10-38 (West 2006); N.H. REV. STAT. ANN. § 630:5 (2007); N.J. STAT. ANN. § 2C:49-3 (*repealed by* L.2007, c. 204, § 7, effective Dec. 17, 2007); OR. REV. STAT. ANN. § 137.4732 (West 2007); S.D. CODIFIED LAWS § 23A-27A-32 (2008).

saline solution will be run through the I.V. line(s) to ensure that the lines are kept free from any blockage.²⁹

The reference to “secured location” in South Dakota’s protocols is just one example of how the regulations imply order and control, but in actuality, camouflage carelessness, a lack of attention to relevant detail, or, even worse, avoidance of the law.

New Mexico has over six pages of protocols, according to Professor Denno’s study, including a pre-execution inventory and equipment check which requires the injection team to inspect the expiration and/or sterilization dates of all applicable items—replacing outdated items immediately, detailed set up procedures, and a requirement that death be pronounced by a physician after the completion of the injections.³⁰ One might ask why sterile instruments and materials are required since no post-operative infection is possible.³¹ If the procedure undergone is successful, then the recipient of the injection will be dead.

Missouri initially had no written lethal injection protocol.³² The state public information office informed Professor Denno that the chemicals Missouri used were sodium pentothal, pancuronium bromide, and potassium chloride.³³ Prior to calling a halt to its lethal injections in 2007, Missouri had one of the highest numbers of executions, along with Texas, Virginia, and Oklahoma.³⁴ Later in 2007, Missouri said that its protocols were confidential and could

29. Denno, *Legislatures*, *supra* note 18, at 251; *see* S.D. CODIFIED LAWS § 23A-27A-32.

30. Denno, *Legislatures*, *supra* note 18, at 234-40. The “set-up procedure” provides an entire page of instructions which includes the placement of clamps near the “Y” injection site, “the flow of solution to be controlled by the Flo-Trol clamp,” and the standard drugs used (saline solution, potassium chloride, Pavulon, and sodium pentothal). *Id.* at 237.

31. The concern with sterilization is part of the obsession with “cleanliness” seen in some of these protocols.

There are two notable differences between our contemporary European ideas of defilement and those, say, of primitive cultures. One is that dirt avoidance for us is a matter of hygiene or aesthetics and is not related to our religion. . . . The second difference is that our idea of dirt is dominated by the knowledge of pathogenic organisms. The bacterial transmission of disease was a great nineteenth-century discovery. It produced the most radical revolution in the history of medicine. So much has it transformed our lives that it is difficult to think of dirt except in the context of pathogenicity.

DOUGLAS, *supra* note 1, at 36.

32. Denno, *Legislatures*, *supra* note 18, at 226.

33. *Id.*

34. Death Penalty Information Center, Number of Executions by State and Region Since 1976 (Sept. 28, 2007), <http://www.deathpenaltyinfo.org/article.php?scid=8&did=186>.

not be revealed.³⁵ It is a typical pattern that the states who have executed the most people have been least forthcoming with their written regulations.³⁶

Montana's protocols filled an entire page in Denno's study for an "[e]quipment and [m]aterial [c]hecklist" of thirty-nine items for "[e]xecution by [i]njection" including: "40 needle (sic), 18 Ga., 1 1/2; . . . 18 angiocath; . . . 4 boxes of alcohol preps; . . . 16 rolls of Kling; 4 adhesive tape; . . . 4 scissors, bandage; . . . 3 batteries, flashlight (spares)."³⁷

In Montana's Policy No. DOC 3.6.1, the state describes its method of execution:

[T]he punishment of death must be inflicted by administration of a continuous intravenous injection of a lethal quantity of an ultra fast acting barbiturate in combination with a chemical paralytic agent, until a coroner pronounces that the offender is dead according to accepted standards of medical practice. . . . The identity of the executioner and alternate executioner(s) shall remain confidential.³⁸

The language of medical equipment, which includes many specific details about ports, tubes, and other technical equipment to ensure a sterile environment, is mixed with the listing of ordinary items such as scissors, "Kling" (the brand name of a commercial wrapping paper), and "bandages."³⁹ The contrast between the litany of technical terms and language of everyday items emphasizes the internal contradictions in the protocols. The ordinary items are a reassuring add-on. The state's pseudo-scientific specification of drugs and technical equipment is often without indication of dosage, or with an incorrect dosage, and without assurance that the drug will be administered by appropriately trained persons.⁴⁰

By reciting the technical terms and adopting a tone of certainty, the protocols create the illusion that a "scientifically validated," approved "medical" procedure is taking place, even if competent doctors or trained or competent non-medical personnel are not present or performing medical procedures such as giving an injection.⁴¹ The repeated history of botched executions and the facts

35. Denno, *Quandary*, *supra* note 21, at 95-96.

36. Denno, *Legislatures*, *supra* note 18, at 116-17; *see also* Denno, *Quandary*, *supra* note 21, at 95-98.

37. Denno, *Legislatures*, *supra* note 18, at 227.

38. *Id.* at 226.

39. *Id.* at 227.

40. *Id.* at 226.

41. *Id.*

that have emerged from court inquiries give away the lie.⁴² A lack of order and control is the reality. The protocols are a mask on chaos.

The protocols governing the killing of humans mix together the mundane and the technical. There is a haphazard nature to what is included or excluded,⁴³ although the protocols may be pages long with many lists.⁴⁴ The purpose is to reassure their readers, including perhaps prospective participants or monitors, that all will be performed in an orderly manner, consistent with the rule of law of which the execution is an expression. And yet the only systematic examination of these protocols to date concluded: “the criteria set out in many of the protocols were far too vague to allow for adequate assessment. When the protocols did offer details, such as the amount and type of chemicals that executioners inject, they often revealed striking errors and a shocking level of ignorance about the procedure.”⁴⁵ *Morales v. Tilton*,⁴⁶ the 2006 case in California, has brought to light the impropriety that has surrounded many lethal injection procedures.⁴⁷ Dr. Robert C. Singler, a state medical expert, examined the official logs and records of lethal injections in California and testified during the trial to the disappearance of some of the controlled addictive substances and other improprie-

42. See Denno, *Legislatures*, *supra* note 18, at 137 tbl.8 (listing thirty-one problematic executions).

43. “Uncomfortable facts which refuse to be fitted in, we find ourselves ignoring or distorting so that they do not disturb these established assumptions. . . . An anomaly is an element which does not fit in a given set or series.” DOUGLAS, *supra* note 1, at 38.

44.

So ritual focuses attention by framing; it enlivens the memory and links the present with the relevant past. In all this it aids perception. Or rather, it changes perception because it changes the selective principles. So it is not enough to say that ritual helps us to experience more vividly what we would have experienced anyway. *It is not merely like the visual aid which illustrates the verbal instructions for opening cans and cases. If it were just a kind of diagrammatic map or diagram of what is known it would always follow experience. But in fact ritual does not play this secondary role. It can come first in formulating experience.* It can permit knowledge of what otherwise would not be known at all. It does not merely externalize experience, bringing it out into the light of day, but it modifies experience in so expressing it. This is true of language. There can be thoughts which have never been put into words. Once words have been framed the thought is changed and limited by the very words selected. So speech has created something, a thought which might not have been the same.

Id. at 65 (emphasis added).

45. Denno, *Quandary*, *supra* note 21, at 92.

46. 465 F. Supp. 2d 972, 979 (N.D. Cal. 2006).

47. See Denno, *Quandary*, *supra* note 21, at 56; *Morales*, 465 F. Supp. 2d at 979.

ties and malfeasance.⁴⁸ The lethal injection procedure depends in large part upon precision as to the type and amount of drugs used in the injections. The mismanagement of the drugs is another example of the lack of competent oversight and the absence of training. In short, as Judge Fogel stated in *Morales*, instead of order and control, there exists “a pervasive lack of professionalism.”⁴⁹

Texas has executed more people than any other state since *Gregg v. Georgia*⁵⁰ was decided in 1976.⁵¹ Its protocol lists the drugs used and announces without documentation or evidence that “the offender is usually pronounced dead approximately [seven] minutes after the lethal injection begins.”⁵² This statement is neither a rule, documented fact, the result of “research,” a specification, nor protocol. Presumably this statement is intended to reassure the reader of the protocols that the executions by lethal injection are swift and therefore lawful and “humane.” In fact, Texas has had several botched executions by lethal injection in which death did not occur in seven minutes.⁵³

The Texas regulations detail how the Warden’s office shall serve as a command post and that a “medically trained individual (not to be identified) shall insert the intravenous catheter.”⁵⁴ The Texas regulations serve to reassure someone, perhaps the author of the protocols and those who are going to observe or participate, that all is being done according to plan and in accordance with imagined law.

48. *Morales*, 465 F. Supp. 2d at 978-81; see also Henry Weinstein, *Ruling Halts State Method of Execution; A Judge Says California’s Injection Procedure Is Cruel and Unusual*, L.A. TIMES, Dec. 16, 2006, at A1. The court in *Morales* found “inconsistent and unreliable record-keeping.” 465 F. Supp. 2d at 979. There existed “no contemporaneous records showing that all of the sodium thiopental in the syringes was actually injected.” *Id.* Testimony revealed that in at least several executions some of the sodium thiopental was not injected. *Id.* Moreover, large doses of sodium thiopental (an addictive substance) are unaccounted for as they were purportedly taken for training exercises; however, the exercises were unreliably documented and the substance was not returned to the pharmacy. *Id.* at 979 n.9. Team members admitted their inability to follow simple directions provided by the manufacturer of sodium thiopental, among other failures. *Id.* at 980.

49. *Morales*, 465 F. Supp. 2d at 980.

50. 428 U.S. 153 (1976) (holding that the death penalty does not automatically violate the Eighth Amendment).

51. Denno, *Legislatures*, *supra* note 18, at 139 tbl.9; see also Death Penalty Information Center, <http://www.deathpenaltyinfo.org> (last visited on Mar. 31, 2008).

52. Denno, *Legislatures*, *supra* note 18, at 256.

53. *Id.* at 139-41 tbl.9. It took Stephen Peter Morin eleven minutes to die. *Id.* at 139. Justin Lee May’s death took nine minutes. *Id.* at 140.

54. *Id.* at 255.

The Texas protocols also state how the warden will handle the public and the announcement of death.⁵⁵ Such statements are not law, nor do they regulate or guide the behavior of state officials when performing an execution. They are public relations text to orchestrate an event for the media and other interested persons. Furthermore, the references to the warden and the centrality of his role in the process, as portrayed in the protocols, strongly suggest that the Warden's office wrote the protocols for its own public relations purposes. The South Dakota protocols also contain a strong public relations focus in their concern with ancillary matters such as preparations of surroundings and dress.⁵⁶

Georgia's more than four pages of regulations wear the mantle of extreme technicality. Again, like the protocols in Texas, the following "statements" in Georgia's protocols are descriptions of "what happens next," an orchestration, not an instruction or declaration of "law":

16.3.18 The execution is carried out.

16.3.18.1 Three (3) designated staff members inject lethal solution into intravenous tubing leading to ports in the condemned's arm.

16.3.18.2 After ten (10) minutes have elapsed, or the heart monitor shows a 'flat line' display, the condemned will be checked by two (2) physicians to determine if death had supervened.

16.3.18 If condemned shows residual life signs, repeat 16.3.18.1 and 16.3.18.2.⁵⁷

If formality and precision are what is being conveyed by the three digit designations, note that the numbering system is illogical. The regulation instructing to repeat the procedure if there is a botch, or the "condemned" does not die, has the same number, 16.3.18, as the first regulation: "[t]he execution is carried out."⁵⁸ If the precise sequencing and orderly progression is the purpose of the numbering system, then the next number should be either

55. *Id.* Similarly, the Tennessee protocols instruct the warden to announce that "[t]he sentence of _____ has been carried out. Please exit to the rear at this time." *Id.* 56. *See, e.g., id.* at 249-50.

Senior ranking officers should do the actual strapping of the inmate to the gurney. An IV will be put in both arms, with one intended as a back-up. . . . The inmate will not be sedated before hand. The inmate can wear regular inmate clothing or "dress outs" if they can obtain them. The inmate will wear shoes. . . . Curtains or blinds should be in place.

Id. (emphasis added).

57. *Id.* at 218-19.

58. *Id.*

"16.3.18.3" or "16.3.19".⁵⁹ The numbered precision simulating order and control is nothing more than a sham. It makes no sense.

III.

The killing of people masked by the trappings of medical procedure is not new. In Auschwitz from 1941 onward, an injection of phenol was the preferred method of killing prisoners quickly by doctors, including the notorious Dr. Mengele.⁶⁰ "When patients became debilitated or a medical block was considered overcrowded the SS doctor in charge selected a row of prisoners who were immediately . . . killed by phenol injections."⁶¹ The 'injection procedure' was very much like a medical ceremony.⁶² "Initially, phenol was injected into a victim's vein, maximizing the medical aura of the entire procedure."⁶³ "A *patient* was brought to a *treatment room* and there was administered a *drug* by a *physician* or (in most cases) his assistant, who wore a white coat and used a syringe and needle for the injection."⁶⁴

59. In New York, the regulation stating that the procedure should be "done over" if it fails has its own number: C.13(b). *Id.* at 245. "If the inmate is still alive, the physician will inform the security supervisor that the inmate is still alive. The security supervisor will announce to the witnesses that the inmate is still alive and that in accordance with the law, the lethal injection procedure shall be repeated." *Id.*

60. LIFTON, *supra* note 24, at 254-60. "The choice of killing substance and the injection technique had a specific development in Auschwitz. There was considerable experimentation with other substances—benzine, gasoline, hydrogen peroxide, evipan, prussic acid (cyanide), and air—all injected into the vein." *Id.* at 257. Later the gas chamber and the crematoria supplanted phenol injections for mass killings. *Id.*

61. *Id.* at 256 (internal quotations omitted).

62. *Id.* at 254. "They were so careful to keep the full precision of a medical process—but with the aim of killing. That was what was so shocking." *Id.* (quotation attributed to an Auschwitz prisoner doctor).

63. *Id.* at 257.

64. *Id.* at 254.

A Polish non-Jewish prisoner doctor, Marek P., vividly described how deadly injections were given in the same hospital room where he routinely assisted with surgical operations: This time there was a table prepared with syringes. The phenol was in a bottle. There was cotton—everything you needed for an injection. There was also alcohol, as with ordinary injections—and rubber tourniquets. There was just one table . . . and the right hand [of the victim] was put out on a kind of support table [to hold the arm steady], as with a regular intravenous injection, [and] the rubber tourniquet on the arm to apply the pressure to make the vein visible—all in the usual way. . . . Mengele [who performed this killing] then rubbed alcohol on the spot, just under the elbow, that he was using for the injection, and then injected the phenol. . . . He did it as though he were performing regular surgery.

Id. at 257-58 (ellipses in original).

The technique was later changed to injecting the phenol directly into the heart. Some thought it was a response to the fact that prisoners' veins were often hard to locate, but the actual reason seems to have been greater efficiency.⁶⁵ Patients injected by vein might linger for minutes or even an hour.⁶⁶ Injections into the heart gave almost immediate results.⁶⁷

The executioners used to boast about their records. "Three in a minute. . . ." And they did not wait until the doomed person really died. During his agony he was taken from both sides under the armpits and thrown into a pile of corpses in another room opposite. And the next took his place on the stool.

There was also substantial mechanization. . . . Approximately fifty people could be killed during one and a half to two hours. Thus, an average of two minutes and [twenty-two] seconds sufficed to murder one prisoner.⁶⁸

This testimony describing the manner in which these executions were carried out was not revealed by the government ordering the executions, but only in the postwar trials of German officials and doctors for genocide and war crimes. As lethal injection procedures in the United States are challenged and are scrutinized by courts, many states have responded by providing less, not more, information.⁶⁹ State officials seem to be overwhelmingly con-

65. *Id.* at 258.

66. *Id.*

67. *Id.* "The concentrated aqueous solution of phenol that was developed proved inexpensive, easy to use, and absolutely effective when introduced into the heart ventricle . . . caus[ing] death within fifteen seconds. . . . The execution was performed by driving the long needle into the fifth [rib] space." *Id.* (internal quotations omitted). Attention to cost is a matter of concern in the United States as well. North Carolina's regulations note the cost of each item in the execution supply list, concluding that the total is \$346.51. Denno, *Legislatures*, *supra* note 18, at 246.

68. LIFTON, *supra* note 24, at 259 (ellipses in original).

At that point two Jewish prisoner assistants brought a victim into the room (sometimes victims were brought in two at a time) and positioned him or her on a footstool, usually so that the right arm covered the victim's eyes and the left arm was raised sideways in a horizontal position. Sometimes one's right hand was at the back of one's neck, with the left behind the shoulder blade; and sometimes victims were blindfolded with a towel. The idea was for the victim's chest to be thrust out so that the cardiac area was maximally accessible for the lethal injection, and for him or her to be unable to see what was happening. (There is also mention of a position in which the right arm was placed so that the hand was in one's mouth, not over the eyes, so that one stifled one's own cries.)

Id. (parentheticals in original).

69. Denno, *Quandary*, *supra* note 21, at 95.

States have never been forthcoming about how they perform lethal injections; remarkably, however, unless prompted by litigation, they now reveal

cerned with protecting and providing reassurance to the state actors issuing the regulations and the state employees carrying out the executions by lethal injection. Their focus is on the appearance of the execution and carrying on when the execution goes badly. The records of the botched executions show confusion and panic at the scene.

The execution of Saddam Hussein illustrates the behavior of a state authority desperate to give the impression that the hanging of a feared and former notorious dictator was carried out in a calm, controlled environment appropriate to a killing undertaken in a principled manner by a legal authority.⁷⁰ President Bush remarked, "Saddam Hussein received a fair trial. This would not have been possible without the Iraqi people's determination to create a society governed by the rule of law."⁷¹ In the end, however, the execution came with terrible political swiftness less than two months after his sentence.⁷² Hussein's lawyers were not allowed to see their client, nor were they informed of the details of his execution.⁷³ The details, however, have been saved for posterity. The execution was filmed as a historical record and to provide proof for those who may have doubted it occurred.⁷⁴

The attention to the rituals before a state execution, especially of a notorious criminal, is not new.⁷⁵ Historically, in the United States, the executions of high-profile defendants have been public

less than ever before. States likely withhold crucial details because, almost invariably, the more data states reveal about their lethal injection procedures, the more those states demonstrate their ignorance and incompetence. The result is a perpetual effort by states to maintain secrecy about all aspects of the execution.

Id. (internal footnote omitted).

70. See Marc Santora et al., *Dictator Who Ruled Iraq with Violence Is Hanged for Crimes Against Humanity*, N.Y. TIMES, Dec. 30, 2006 (stating that Saddam Hussein's "hanging was carried out with such haste that an ad hoc air at times overshadowed the historical import" of the event).

71. Sudarsan Raghavan, *Saddam Hussein Is Put to Death: Former Iraqi President Hanged Before Dawn in Baghdad to Divided Reaction*, WASH. POST, Dec. 30, 2006, at A1.

72. See Santora et al., *supra* note 70.

73. See *id.*

74. See *id.*

75. During the Inquisition, the preparations, ceremonies, and celebration of Mass associated with executions were known as the "auto da fé." See JOSEPH PÉREZ, *THE SPANISH INQUISITION: A HISTORY 154-67* (Janet Lloyd trans., Yale Univ. Press 2002). An integral part of this historical public event was for large crowds to stay up all night and then follow those to be executed to a special location, where they were garroted and then burned alive. *Id.*

occasions. When the four Haymarket defendants⁷⁶ were executed in Chicago on November 11, 1887, a special scaffold was built in the alley next to the Cook County jail.⁷⁷ Before their hangings, the inmates heard the noise of the saw and hammer as the scaffolding was being built all night long.⁷⁸ Their movements and conversations that night were well documented.⁷⁹

In a highly ritualized proceeding, the four men to be hanged had a thick leather belt placed around their chests with their arms pinned just above the elbows and their hands handcuffed behind their backs.⁸⁰ Their bodies were then draped in a white muslin shroud, and they were marched through the jail to the gallows rising outside at the closed end of the alley and bordered by the bare whitewashed walls of the jail.⁸¹ In front of the gallows, seated on rows of benches, were the 170 chosen witnesses, more than fifty of whom were reporters, as well as the governor's son, doctors, and jurors, but not all of the wives of those to be executed.⁸²

76. August Spies, Michael Schwab, Samuel Fielden, Albert R. Parsons, Adolph Fischer, George Engel, Louis Lingg, and Oscar W. Neebe were found guilty of the murder of Mathias J. Degan on May 4, 1886, in the city of Chicago. *Spies v. People (The Anarchists' Case)*, 12 N.E. 865 (Ill. 1887). Neebe was sentenced to fifteen years, and the other prisoners were sentenced to death. *Id.* Spies, Parsons, Engel, and Fischer were executed in Chicago on November 11, 1887. PAUL AVRICH, *THE HAYMARKET TRAGEDY* 388-92 (1984). Lingg committed suicide a day before the executions occurred. *Id.* at 375-78. Governor Altgeld pardoned Schwab, Neebe, and Fielden on June 26, 1893. *Id.* at 421-23.

77. AVRICH, *supra* note 76, at 388-92. The convictions for homicide-by-conspiracy and the sentences of death imposed by the criminal court of Cook County had been upheld in a long and unprecedented opinion by the Illinois Supreme Court. *See Spies*, 12 N.E. at 865. Counsel for the defendants petitioned the United States Supreme Court on a writ of error to review the judgment of the Supreme Court of Illinois. AVRICH, *supra* note 76, at 335. After two days of hearing arguments, the United States Supreme Court handed down a unanimous decision that it lacked jurisdiction in the case because no federal issue was presented. *Ex parte Spies*, 123 U.S. 131, 181 (1887).

78. AVRICH, *supra* note 76, at 381, 388.

79. *Id.*

80. *Id.* at 392.

81. *Id.*

82. *Id.* The line drawing of the execution scene shows the four men on the scaffold plus six other people: one woman, two uniformed officers, and three others standing beside those about to be executed. *Id.* at illus. 30. Descriptions of preparations for the hangings and the hangings themselves, including drawings and reports of the last words and movements of those executed, were widely reported by national and local newspapers for whom special seats were set aside. *Id.* at 392. Similarly, under present protocols, places for the press are typically reserved among the "witnesses." *See, e.g., Denno, Legislatures, supra* note 18, at 250 (citing South Dakota protocols which allow for at least one member of the news media).

Straps were placed around their ankles, the hangman's noose placed around their necks and tightened, and the shrouds open at the back fastened.⁸³ "Then white caps, gathered by a string at the neck, were put on, completely hiding the head and face."⁸⁴ Their last words were widely reported but interrupted when the signal for the drop was given, and the four fell downwards together.⁸⁵ One of the condemned, Spies, writhed, twitched, and repeatedly drew up his legs, with the convulsions continuing for some time.⁸⁶ Then the bodies of Parsons and Fischer began to move and jerk.⁸⁷

Beside each body stood a physician who announced, as time elapsed, the pulse of the hanged man.⁸⁸ The audience was silent.⁸⁹ "At 12:15 p.m. the bodies were cut down from the gallows and placed in wooden coffins. . . . The necks of none of the men had been broken by the fall. They had all died from slow strangulation."⁹⁰

IV.

British and continental rituals and traditions surrounding state executions illustrated by the Haymarket executions continue to be observed today in a sporadic and haphazard manner in the United States. These holdovers from European practices are reflected in many state protocols: statements regarding the prisoner's choice of his method of death, his choice of his final meal, the visit of the religious figure, the solicitation of repentance, the reporting of the prisoner's last words, and the donning of ceremonial clothes.⁹¹ For

83. AVRICH, *supra* note 76, at 392-93.

84. *Id.* at 393.

85. *See id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. Runners carried the news of their deaths from the jail to specially prepared bulletin boards and to the newspaper offices on Dearborn Street, announcing: "the law [is] vindicated." *Id.* at 394. The anticipated riot and civil disorder after the executions did not occur. *Id.* at 383-85.

91. *See, e.g.,* Denno, *Legislatures*, *supra* note 18, at 213 (Florida protocols provide general procedures for the prisoner's last meal and his last statement); *id.* at 245 (North Carolina protocols provide for the inmate to be given the opportunity to speak and pray with the chaplain and to record a final statement). The Texas Department of Criminal Justice maintains an elaborate web site for the public on its death row population. Texas Department of Criminal Justice, Executed Offenders (Sept. 26, 2007), <http://www.tdcj.state.tx.us/stat/executedoffenders.htm>. The last words of those executed are one of the details included. *Id.* Many like Gary Graham have maintained their innocence until the end. *Id.*

example, the California protocols specify that the inmate is to be given a new pair of denim trousers and a blue work shirt to wear thirty minutes before the execution.⁹²

The white shrouds at the Haymarket executions had dual purposes. Besides being ceremonial, the shrouds served to shield the audience from the sight of faces and bodies expressing agony, as well as to contain bodily fluids and excretions during the execution.⁹³ When death occurs all muscles relax, and the contents or fluids in the bowels, the bladder, and the mouth are let go. Absent the paralytic agent used today, the observers and the administrators would be confronted with the same uncontrolled biological mess. Of course this issue could be addressed otherwise, but under the present procedures it is the paralytic agent which accomplishes an easy death for the viewer and the administrators. Unfortunately it is the inept application of the paralytic agent in the three-drug method which is most likely to make the execution torturous for the condemned, especially when injected incompetently.⁹⁴

The state protocols' concern with cleanliness, unexpired drugs, the insistence upon the color white (white sheets, white walls, and white coats for the technicians), and requirements regarding sterility are analogous to primitive rules governing purity at sites where spirits or evil forces are to be expunged.⁹⁵ This attention to sterility both promotes the medical illusion and affirms the primitive need for rituals to purify the place where a controlled death or sacrifice will occur.

The state protocols never use the word "kill." Instead, the language is: "[t]he technician will start the flow of chemicals";⁹⁶ or "the injection team shall administer the chemical agents."⁹⁷ Lethal injection regulations often adopt the passive voice and maintain a

92. Denno, *Legislatures*, *supra* note 18, at 208.

93. AVRICH, *supra* note 76, at 393. The line drawing of the hanging scene shows the shrouds tied at the bottom like modern body bags. *Id.* at illus. 30.

94. See discussion *supra* notes 59-68 and accompanying text.

95.

Danger lies in transitional states, simply because transition is neither one state nor the next, it is undefineable. The person who must pass from one to another is himself in danger and emanates danger to others. The danger is controlled by ritual which precisely separates him from his old status, segregates him for a time and then publicly declares his entry to his new status. . . .

The whole repertoire of ideas concerning pollution and purification are used to mark the gravity of the event and the power of ritual to remake a man. DOUGLAS, *supra* note 1, at 97. In the case of lethal injection, the transition to death occurs when the condemned is executed, which creates fear in those present.

96. Denno, *Legislatures*, *supra* note 18, at 246.

97. *Id.* at 209.

narrow focus on a fractured series of minute actions. This introduces a false solemnity and masks the fact that lethal injection, if performed competently, is an act of euthanasia, the painless killing of a person by medical means, which is illegal in every state.⁹⁸ The slowing down of the action in its description in the protocols implies that great care will be taken.

The New Jersey protocol in place until the repeal of the death penalty in December of 2007, carefully described how the drugs should be administered, but never mentioned to whom they were administered: “[t]he condemned shall be covered from the waist down with a white sheet and provided with a pillow for the head . . . [then] the institution team physician shall administer the appropriate dosage.”⁹⁹ The protocol continues in the same manner, referring to arms, veins, buttocks, deltoid muscle, heart rate, and pulse, without attaching any of these to a person.¹⁰⁰ The one exception is its reference to a television monitor which is positioned to permit the executioner to view the condemned’s head, chest and intravenous insertion site.¹⁰¹

Veterinarians, on the other hand, are explicit about what they are doing, for example when discussing methods:

Barbiturate overdose is an acceptable procedure for euthanasia of many species of animals raised for fur. The drug is injected intraperitoneally and the animal slowly loses consciousness. It is important that the death of each animal be confirmed following barbiturate injection. Barbiturates will contaminate the carcass; therefore the skinned carcass cannot be used for food.¹⁰²

State legislators could create an exception for lethal injection to the state’s prohibition of euthanasia. If executions were done without inflicting pain or suffering of the condemned then they would essentially be acts of euthanasia committed without the person’s consent. The regulations accompanying the Oregon Death with Dignity Act, for example, explicitly exempts involved professionals from liability under other statutes such as the ones prohibiting eu-

98. See, e.g., CAL. PROB. CODE § 4653 (West 2007); 755 ILL. COMP. STAT. ANN. 35/9(f) (West 2007); KY. REV. STAT. ANN. § 311.639 (West 2007). No statement as to whom the protocol is administered is given. Similarly, states have carefully crafted their statutes and regulations to distinguish an advanced medical directive for the removal of life support from euthanasia or assisted suicide. See, e.g., KY. REV. STAT. ANN. § 311.637 (West 2007); N.J. STAT. ANN. § 26:2H-77(a) (West 2007).

99. Denno, *Legislatures*, *supra* note 18, at 230.

100. *Id.* at 230-31.

101. *Id.* at 231.

102. AVMA GUIDELINES, *supra* note 2, at 21.

thanasia.¹⁰³ A similar provision could be created for lethal injection.

There is a distinction to be made between aspects of suffering by the executed person which are held to be unconstitutional¹⁰⁴ and the perception of pain and suffering of the person being executed which is distasteful or unpleasant to those watching or carrying out the executions. There is no constitutional violation of the rights of the person watching the execution or participating in the execution when a botch causing suffering occurs. Yet complaints by observers of the gore produced by death by firing squad, the smell of burning flesh during electrocutions, and the distastefulness of seeing parts of people's faces being burned, or the twitching of the hanged, seem to have influenced the legislature's choice of the method of execution as well as the structure of the state protocols.¹⁰⁵

Another variation on the continental tradition of the anonymous executioner is the avoidance of direct references to the three executioners, who are placed behind a screen or curtain and none of whom are to know who actually operated the syringe with the lethal drug. Not only does this conceal the identity of the executioner from the public, but it also removes the responsibility for the act from those performing the killing.¹⁰⁶ The traditional hooding or masking of the executioner in Europe was to conceal his identity from the community so that the executioner would not be an outcast, a pariah, or the object of fear or retaliation.¹⁰⁷ The current lethal injection method takes the historical practice of concealment one step further. Now, not even the execution technicians know which of the three of them is responsible for the actual killing.¹⁰⁸

103. OR. REV. STAT. ANN § 411-365-0260(2)(i) (West 2007).

104. See U.S. CONST. amend. VIII.

105. Historically, the United States has replaced its various capital punishment methods (hanging, the gas chamber, the electric chair) because of public perceptions of unnecessary cruelty associated with each method. See, e.g., Allen Huang, *Hanging, Cyanide Gas, and the Evolving Standards of Decency: The Ninth Circuit's Misapplication of the Cruel and Unusual Clause of the Eighth Amendment*, 74 OR. L. REV. 995 (1995); Annalla Linders, *The Execution Spectacle and State Legitimacy: The Changing Nature of the American Execution Audience, 1833-1937*, 36 LAW & SOC'Y REV. 607 (2002).

106. See generally Ellyde Roko, Note, *Executioner Identities: Toward Recognizing a Right to Know Who Is Hiding Beneath the Hood*, 75 FORDHAM L. REV. 2791 (2007).

107. See *id.*

108. For example, New Jersey's former protocol stated "[t]he team nurse shall not, under any circumstances, advise any person other than the Commissioner of the Department of Corrections of the identity of the syringe carrying the lethal medication." Denno, *Legislatures*, *supra* note 18, at 232.

V.

The form and content of the protocols are a grim parody of “real” laws and regulations. They neither define penalties for prohibited behavior (as criminal statutes do) nor establish a relationship of duty and responsibility (as civil regulations do). Instead, state protocols are excruciatingly detailed descriptions of imagined events. The performance of minor tasks and the orchestrations of the “event” are set out in slow motion with ludicrous precision. See, for example, the Indiana protocols:

(3.) Shortly after midnight, the inmate is escorted from the holding cell, and placed on a gurney, secured to the gurney and moved to execution room.

(4.) Curtains are only closed when the offender is brought to the holding cell.

(5.) After all preparatory work has been completed, the witnesses are moved into area, seated, and the blinds are opened. *The process begins and ends.* The blinds are closed and the physician then makes pronouncement of death.¹⁰⁹

“The process begins and ends” in the above protocol is not a statement of law or a direction as to how to proceed. It is a description of an imagined event in the future. If the regulations were instructions, such as those for unlocking a door or setting a clock, they would simply set out what to do. They would look more like the guidelines for killing animals set out by the AVMA.

Even in the most extreme situation of a completely botched and tortuous execution, the failure to follow the protocols would not result in liability for state actors, nor would there be any penalty imposed upon the executioners for the botch.¹¹⁰ The liability and responsibility for state actors is created by the Eighth Amendment to the United States Constitution, which purports to protect an individual against the imposition of cruel and unusual punishment by the state.¹¹¹ The penalty for professional incompetence in a state job is generally to be fired. Yet in reality, some states have explic-

109. *Id.* at 221 (emphasis added).

110. A lawsuit has recently been filed by the mother of a prisoner who was executed in a botched procedure that lasted for eighty-six minutes. See Erica Blake, *Family Sues Over Botched Ohio Execution: 2006 Procedure Lasted 86 Minutes*, THE BLADE (Toledo, Ohio), July 3, 2007, available at <http://toledoblade.com/apps/pbcs.dll/article?AID=/20070703/NEWS02/707030342/-1/NEWS>.

111. U.S. CONST. amend. VIII.

itly held that the protocols for lethal injection are exempt from review under administrative procedures acts.¹¹²

The bizarre attention to minute, irrelevant detail—the ceremonial opening and closing of the curtain, the tolling of midnight, the precise details of the imagined time frame—are pure pronouncements of ritual. Care is not directed to whether the person being executed will suffer unnecessarily. The protocols are stage directions to ensure the reader, whomever that may be, that the execution will proceed in a controlled and orderly manner, even if it does not.

Note that the Indiana protocol states: “The time frame between escorting the offender from the holding cell to the pronouncement of death is approximately one (1) hour, twenty (20 minutes) [sic]. The time frame from the time the IV is inserted to the time of pronouncement of death is approximately twenty-five (25) minutes.”¹¹³ Does this imply that a longer time frame, one that exceeds “twenty-five minutes” for the insertion of the IV until the pronouncement of death, would be too long, perhaps even suggesting an Eighth Amendment violation? If the entire procedure takes more than one hour and twenty minutes, is that a violation of procedures, leading to a claim? Is a writ of mandamus a possibility? Such questions highlight the actual non-functionality of the legal limbo of the protocols.

The measurement of how long it takes to die during an execution is a historic part of the ritual and the factual record.¹¹⁴ It is also often a crucial detail in reports of alleged botched executions.¹¹⁵ Twenty-five minutes is a long time for a drug that stops the heart to take effect. Death should occur within a few seconds or minutes, if a barbiturate is administered competently. It is the administration of the other drugs, including the controversial paralytic agent, which takes longer. If the drugs are administered incompetently, death will take longer or not occur.¹¹⁶ Does the reference to timing in the protocols imply that the administrators of the lethal injec-

112. Apparently, in Kentucky the protocols for lethal injection are exempt from review under the state’s administrative procedures act. See Denno, *Quandary*, *supra* note 21, at 115; *Bowling v. Ky. Dep’t of Corr.*, No. 06-CI-00574, slip op. at 8 (Ky Cir. Ct. Dec. 27, 2006) (stating that public review would create a substantial obstacle to capital punishment). It is not clear what legal implications follow from that ruling.

113. Denno, *Legislatures*, *supra* note 18, at 220.

114. See, e.g., AVRICH, *supra* note 76, at 393 (noting the presence of a physician with a clock for each of the persons hanged in the Haymarket executions).

115. See, e.g., Blake, *supra* note 110.

116. In several of the botches it was clear the drugs were not reaching their destinations. See Denno, *Legislatures*, *supra* note 18, at 139 tbl.9.

tions are waiting to see when the paralytic drug takes effect before injecting the heart-stopping drug?

Georgia's protocol is highly ritualistic and includes pages of instructions for setting up the place of execution, the designation of the witnesses, the "communications checks," and other incidental preparations which occur one hour before execution.¹¹⁷ In contrast, the execution itself is accorded only a few lines.¹¹⁸ The detailed instructions even continue after the execution is completed. The protocol states the "[m]icrophone is turned on—the fact of death is then announced to the witnesses by the warden . . . —the microphone is turned off. The curtains . . . are then closed."¹¹⁹ What is the purpose of these specifications? Would the warden be reprimanded or sanctioned if the microphone is not turned off at the "correct" time, or not turned on at all? Or is the protocol's purpose to ensure that the death rattle, breathing, or thrashing of the person being executed will not be heard by the witnesses?

Another kind of anomaly is seen in the phenomenon of the "ghost" regulations: elaborate protocols for imposing lethal injections in states where executions are unlikely to occur, or will never occur.¹²⁰ For example, New Jersey abolished the death penalty in December 2007, yet it had one of the most elaborate sets of regulations.¹²¹ Even before abolition it was not likely New Jersey would have executed anyone in the near future. Before repeal the trial courts had sentenced few to death and the state high court had overturned twenty-seven death sentences before upholding one.¹²²

117. *Id.* at 214-19.

118. *Id.* at 218-19. The regulations do specify that the drugs are to be prepared by a contract physician. *Id.* at 218.

119. *Id.* at 219.

120. See, for example, Connecticut, a state with few on death row and where a challenge to capital punishment is in process; the state has detailed protocols for executions which are unlikely to ever happen. Denno, *Legislatures*, *supra* note 18, at 210-12; see also Thomas Kaplan & Alison Leigh Cowan, *Arguing Against the Death Penalty, in a Gym Near Connecticut's Death Row*, N.Y. TIMES, Dec. 14, 2007, at B1 (Connecticut's death row inmates claim that Connecticut's death penalty discriminates against minorities).

121. See N.J. STAT. ANN. § 2C:49-1 (West 2007) (*repealed by* L.2007, c. 204, § 7, effective Dec. 17, 2007); Denno, *Legislatures*, *supra* note 18, at 229-34. This is the first repeal of a death penalty statute in more than fifty years. Governor Jon S. Corzine, Remarks on Eliminating Death Penalty in New Jersey (Dec. 17, 2007), available at <http://www.newjersey.gov/governor/news/news/approved/20071217b.html>.

122. Leigh B. Bienen, *The Proportionality Review of Capital Cases by State High Courts After Gregg: Only "The Appearance of Justice?"*, 87 J. CRIM. L. & CRIMINOLOGY 130, 209 (1996) (providing a general history of the death penalty in New Jersey).

The state had executed no one since 1963.¹²³ Nonetheless, New Jersey published a highly detailed series of lethal injection protocols: “[t]o ensure proper dispatch of the intent of the legislature and to ensure the integrity of the Department [of Corrections], death by lethal injection must be executed in a manner befitting the solemnity of such an act.”¹²⁴

VI.

To point out the discrepancies or lack of logic in the protocols, however, is to fall into the trap of ceding that the regulations are logical or that they may perform the function of imposing the law. The fact that a protocol addresses when the curtain (or the blinds) are to be closed or opened gives the game away. The protocols are window dressing, stage directions, the establishment of ritual, designed to create an illusion of an orderly, humane, dignified procedure for a controlled euthanasia. This illusion is important to those managing the killing because the appearance of order presented to the public provides protection if the execution does not proceed as portrayed.

When regulations are created to govern the painless killing of an animal, they don't fill pages with instructions about curtains, or the last meal, or how the witnesses shall be seated or escorted and what they will see or not see. The first concern is limiting the pain to the animal.¹²⁵ The question of the stress or difficulty for the actors performing the killings is addressed, but only as incidental to concerns for the animal.¹²⁶

The lethal injection protocols attempt to overlay the execution with a civilized veneer. If the condemned screams or struggles with the catheter, that may make the observers uncomfortable.¹²⁷ The

123. David Von Drehle, *New Jersey: A Death Penalty Trend?*, TIME, Dec. 17, 2007, available at <http://www.time.com/time/nation/article/0,8599,1695334,00.html>.

124. Denno, *Legislatures*, *supra* note 18, at 229. To its credit, New Jersey required a medical team for the procedure (including two state physicians and a registered nurse), specified for the use of morphine and a sedative forty-five minutes prior to the execution, and was the only state not to include a paralytic drug in its protocols. *Id.* at 292-32; *see also supra* notes 21-29, 59-68 and accompanying text for a discussion on the use of paralytic drugs.

125. AVMA GUIDELINES, *supra* note 2, at 11.

126. *Id.*

127. Being executed, like being murdered, is the ultimate non-act where the person subjected to it has no control, and in the case of lethal injection is immobilized and prone, rendered completely passive. Thus, the repeated references to the person being strapped down and prevented from speaking or moving go to control. As an example, New Mexico procedures bizarrely require the condemned to lie down on a table on his back and then be strapped down at the ankle, wrist, chest, below and

portentousness of the moment, crafted by the clock, the white sheets, the false solemnity of the staging, the authority of the lab coats and uniforms, would be undermined or destroyed by signs of suffering.

Execution by lethal injection as practiced must be intended to be punishment. If the state legislators authorizing the method for lethal injection simply intended to be humane, to bring about an easy death, they would write regulations authorizing a large single dose of a fast-acting barbiturate. The present inclusion of the paralytic drug, so that the colon, the lungs, and face are frozen, so that the person being executed won't scream or thrash, vomit or defecate, undermines the legitimacy of the death penalty and the rule of law itself.

If states continue to insist upon these semi-public executions, if the American commitment to the death penalty is so entrenched that society cannot give up these killings and their rituals, at the least we should admit, for our own self respect, as well as out of respect for those sentenced to death, that the gurney, the white sheets, the curtains, the lab coats, are cultural trappings, stage craft, for the comfort and satisfaction of the observers and the peace of mind of the actors. The law owes to itself and its practitioners that honesty, that acknowledgment.

A murderer is executed because his acts defy moral, social, and cultural principles and have, in the judgment of the law, warranted the taking of his life. The person being executed has been deemed by the law to be unfit to live in a civilized society. It is the state who has made that judgment and who must carry out the killing under the authority of its laws.

The state must conduct itself—through its agents, institutions, and regulations—with respect for what it is doing, with dignity and respect for the person receiving the punishment, and with an acknowledgment of the manner in which it metes out death.¹²⁸ For the highest court in a nation of laws to ignore the current practice of lethal injections and to put a rubber stamp on these lethal injection protocols, which do not regulate or monitor state authorized punishment, but set out an imagined repetitive reassuring ritual, is

above the knees, and across the stomach. See Denno, *Legislatures*, *supra* note 18, at 240.

128. The evolving standards of decency now incorporated in the jurisprudence of the Eighth Amendment to the United States Constitution encompass the social and cultural aspects of the death penalty. The kind of public celebrations and bodily defilements associated with lynching and hangings in our past would be as unacceptable today as the lynching and hangings themselves.

to condone state-authorized ineptitude, bungling, and deception. To turn a blind eye to such activities by state actors undermines the legitimacy of the state and all legal institutions, including the court itself.

