Let the Zoo Animals Rest in Peace: The Unfounded Arguments Against the Lethal Injection Drug Pancuronium Bromide

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I. INTRODUCTION

It comes as no surprise that the death penalty is once again being targeted. This time the chemicals used during a lethal injection are on trial. Specifically, the American Civil Liberties Union (hereinafter “ACLU”) is pointing its erroneous finger. The ACLU states that the death penalty is one of “the greatest denials of civil liberties,” and that the use of lethal injection constitutes “cruel and unusual” punishment under the Eighth Amendment.¹

This paper analyzes why the ACLU’s arguments against the chemicals used during a lethal injection are simply baseless, as well as the effects of what will happen if the wishes of the ACLU are granted by the United States Supreme Court in 2008 by holding the three-drug lethal injection cocktail unconstitutional in Baze v. Rees.

II. A BRIEF HISTORY OF THE DEATH PENALTY

The Eighth Amendment of the United States Constitution provides, “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”²

A. Introduction

The first established death penalty laws date as far back as the Eighteenth Century B. C. which codified the death penalty for 25 different crimes, including boiling to death, slow slicing, disembowelment, crucifixion, impalement, crushing, stoning, execution by burning, dismemberment, or sawing.³

B. **Challenging the Death Penalty**

In the early Nineteenth Century, while some U.S. states began abolishing the death penalty, most states held onto capital punishment, especially for offenses committed by slaves. additionally, in 1838, a few states began enacting discretionary death penalty statutes, instead of the prior mandatory death sentencing.

After the Civil War, new developments in the means of executions emerged. The electric chair was first introduced in 1888 in New York; and in 1890, the execution of William Kemmler, the first person executed by this method, took place.

From 1907 to 1917, six states completely outlawed the death penalty and three limited it to the rarely committed crimes of treason and first degree murder of a law enforcement official. However, this was short-lived. When “the U.S. [entered World War I, [ there were intense class conflicts as socialists mounted the first serious challenge to capitalism. As a result, five of the six abolitionist states reinstated their death penalty by 1920.”

In 1958, the Supreme Court in *Trop v. Dulles* added to the requirements for when the death penalty can be given. In *Trop*, the Court held that the Eighth Amendment contained a measure that in order for the death penalty to be constitutional, it must meet an “evolving

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6 Id.
7 Id.
8 Id.
9 Id.
10 Id.
11 Id.
12 Id.
standard of decency [which] mark[s] the progress of a maturing society.”

If such a standard is not met then even if the penalty is not seen as “cruel and unusual,” the death penalty is no longer constitutional at that period of time.

During the 1960’s, there were again challenges brought regarding the legality of the death penalty. Before then, the 5th, 8th, and 14th Amendments were interpreted as permitting the death penalty. However, in the early 1960s, it was suggested for the first time that the death penalty was a "cruel and unusual" punishment, and therefore unconstitutional under the Eighth Amendment.

In 1971, the Supreme Court addressed the problems associated with the role of jurors and their discretion in capital cases in *McGautha v. California.* There, the defendants argued it was a violation of their Fourteenth Amendment right to give jurors unfettered discretion in deciding whether the defendants should live or die. They further argued that such discretion would result in arbitrary and capricious sentencing, as well as the fact that it was unconstitutional to have their guilt and sentence determined in one set of deliberations. “The Court, however, rejected these claims, and stated that guiding capital sentencing discretion was ‘beyond present human ability.’”

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13 Id.
14 Id.
15 Id.
16 Id.
17 Id.
18 Id.
19 Id.
20 Id.
C. Suspending and Reinstating the Death Penalty

Capital punishment was suspended in the United States in 1972 as a result of the Supreme Court's decision in Furman v. Georgia. In Furman, the Supreme Court held that a punishment is "cruel and unusual," and in violation of the 8th Amendment, if it is too severe for the crime, if it is arbitrary, if it offends society's sense of justice, or if it is not more effective than a less severe penalty. In a per curiam opinion, and by a vote of 5 to 4, the Court held that Georgia's death penalty statute, which gave the jury complete sentencing discretion, could result in arbitrary sentencing. The Court held that the scheme of punishment under the statute was therefore "cruel and unusual" and violated the Eighth Amendment. Thus, on June 29, 1972, "the Supreme Court effectively voided 40 death penalty statutes, thereby commuting the sentences of 629 death row inmates around the country and suspending the death penalty because existing statutes were no longer valid."

Despite Furman, 37 states enacted new death penalty statutes. In order to address the unconstitutionality of unfettered jury discretion addressed in Furman, some states removed all discretion given to jurors by mandating capital punishment for those convicted of certain capital crimes. However, in 1976, this practice was held unconstitutional in Woodson v. North

21 Id.
23 Id.
24 Id.
25 Id.
26 Id.
Other states also sought to limit the amount of discretion given by providing sentencing guidelines for the judge and jury to follow when deciding whether to impose death.\textsuperscript{29} The guidelines allowed for the introduction of aggravating and mitigating factors in determining sentencing.\textsuperscript{30} This practice was found to be constitutional also in 1976 with the Supreme Court’s decision in \textit{Gregg v. Georgia}, which upheld a procedure requiring that trials of capital crimes be bifurcated into guilt and sentencing phases.\textsuperscript{31}

The moratorium on executions ended on January 17, 1977, with the execution of Gary Gilmore by a firing squad in Utah.\textsuperscript{32} That same year, Oklahoma became the first state to adopt lethal injection as a means of execution, though it was not until December of 1982 that the first person was executed by lethal injection.\textsuperscript{33}

\section*{D. Recent Developments in the Death Penalty\textsuperscript{34}}

Trends in most of the world have been to move toward less painful, more humane ways of execution.\textsuperscript{35} In the U.S., the electric chair and the gas chamber were introduced as more humane alternatives to hanging, but have been almost entirely superseded by lethal injection, which in turn has been criticized as being too painful.\textsuperscript{36} In addition, the federal government has also employed capital punishment for certain federal offenses, such as murder of a government

\textsuperscript{28} \textit{Id. See also} \textit{Woodson v. North Carolina}, 428 U.S. 280 (U.S. 1976) (holding that the North Carolina statute that “mandated the death penalty for all persons convicted of first degree murder violated the Eighth and Fourteenth Amendments).

\textsuperscript{29} \textit{Id.}


\textsuperscript{31} \textit{Id.}


\textsuperscript{33} \textit{Id.}


\textsuperscript{35} \textit{Id.}

\textsuperscript{36} \textit{Id.}
When the Supreme Court struck down state death penalty statutes in *Furman*, the federal death penalty statutes suffered from the same constitutional infirmities that the state statutes did.\textsuperscript{38}

In 1994, President Clinton signed the Violent Crime Control and Law Enforcement Act which expanded the federal death penalty to 60 crimes; 3 of which do not involve murder (espionage, treason, and drug trafficking in large amounts).\textsuperscript{39} Two years later, President Clinton signed the Anti-Terrorism and Effective Death Penalty Act of 1996.\textsuperscript{40} The Act, “restricts review in federal courts by establishing tighter filing deadlines, limiting the opportunity for evidentiary hearings, and…allowing only a single habeas corpus filing in federal court.”\textsuperscript{41} Additionally, “due in part to the expedited federal habeas corpus procedures embodied in the Act, the pace of executions has picked up.”\textsuperscript{42} As a result, since the death penalty was reinstated in 1976, 1,029 people have been executed; Texas accounts for over a third of the executions (“385 as of March 8, 2007”); and California has the greatest number of prisoners on death row, but has held few executions.\textsuperscript{43}

In April 1999, the United Nations Human Rights Commission passed the Resolution Supporting Worldwide Moratorium On Executions.\textsuperscript{44} This Resolution calls on countries which have not abolished the death penalty to restrict its use of the death penalty.\textsuperscript{45} Ten countries,

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{37} Id.
\item \textsuperscript{38} Id.
\item \textsuperscript{39} Id.
\item \textsuperscript{40} Id.
\item \textsuperscript{41} Id.
\item \textsuperscript{43} Id.
\item \textsuperscript{45} Id.
\end{itemize}
\end{footnotesize}
including the United States voted against the resolution.\textsuperscript{46} Presently, more than half of the countries in the international community have abolished the death penalty completely.\textsuperscript{47} However, over 78 countries retain the death penalty, including the United States, China, Iran, and Vietnam all of which rank among the highest for international executions in 2003.\textsuperscript{48}

III. CURRENT LITIGATION

A. \textit{Baze v. Rees}

On September 25, 2007, The Supreme Court granted certiorari to hear the case of \textit{Baze v. Rees}.\textsuperscript{49} This case involves two defendants, Ralph Baze and Thomas Bowling, both of whom were convicted of double murders, and each sentenced to death.\textsuperscript{50}

In January 1992, Baze shot two officers three times each in the back with an assault rifle when the officers were attempting to serve five felony fugitive warrants from Ohio on Baze--a twice convicted felon.\textsuperscript{51} The Ohio warrants were, \textit{inter alia}, for felonious assault of a police officer with a deadly weapon, bail jumping, and receiving stolen property.\textsuperscript{52} Sheriff Bennett was killed first when Baze shot him from the cover of a large brush pile near his secluded cabin.\textsuperscript{53} Baze then turned his attention toward Deputy Briscoe who was pinned down by the rifle fire from Baze.\textsuperscript{54} The officer crouched down and returned fire from across the hood of the police cruiser.\textsuperscript{55} Briscoe fired two full clips from his pistol as Baze was walking towards the officer,

\begin{thebibliography}{9}
\bibitem{46} Id.
\bibitem{47} Id.
\bibitem{48} Id.
\bibitem{49} \textit{Baze v. Rees}, 217 S.W.3d 207 (Ky. 2006).
\bibitem{50} \textit{Id.} at 209.
\bibitem{51} \textit{Baze v. Commonwealth}, 965 S.W.2d 817 (Ky. 1997).
\bibitem{52} Id.
\bibitem{53} Id.
\bibitem{54} Id.
\bibitem{55} Id.
\end{thebibliography}
firing as he proceeded.\textsuperscript{56} With his weapon empty, Deputy Briscoe turned and tried to run away, but before he could run even ten feet, he was shot in the back twice.\textsuperscript{57} Baze pursued the officer, stood over him and fired his rifle into the back of the Deputy's head.\textsuperscript{58} After his arrest Baze told the police, "‘I shot him in the back of the head. I understand I was killing the man. There was no doubt in my mind. . . . You tell them that you have got the right man. I’m the one that killed them son of a bitches.’"\textsuperscript{59} Despite Baze arguing that the shootings were done in self defense, after 2 days of jury deliberation, he was sentenced to death.\textsuperscript{60}

Bowling was convicted of the intentional murders of Eddie and Tina Earley.\textsuperscript{61} Sometime around 7 a.m. on April 9, 1990, while the victims sat in their car in a parking lot outside of a dry cleaning establishment, Bowling shot and killed the two adults and wounded their two-year-old son.\textsuperscript{62} The victims' car was stopped in the parking lot when the right front of Bowling's car crashed into the driver's side of the Earleys' vehicle.\textsuperscript{63} A witness testified that he saw Bowling fire into the automobile, return to his own car, and then go back to check the victims before once again returning to his own car and fleeing the scene.\textsuperscript{64} Bowling was sentenced to death for the murders and to twelve months in jail for the assault on their son.\textsuperscript{65}

Upon a writ of certiorari to the United States Supreme Court, the defendants argued that the lethal injection protocol that would be used during their execution, violates their rights to be

\begin{footnotes}
56 \textit{Id.}
57 \textit{Id.}
58 \textit{Id.}
59 \textit{Id.}
60 \textit{Id.}
61 \textit{Bowling v. Commonwealth}, 873 S.W.2d 175, 176 (Ky. 1993).
62 \textit{Id.}
63 \textit{Id.}
64 \textit{Id.} at 177.
65 \textit{Id.} at 176.
\end{footnotes}
free from cruel and unusual punishment.\textsuperscript{66} Because both defendants have refused to select a
method of execution (electrocution or lethal injection) as provided by the state statute, the
statutory option allows a default of lethal injection as punishment.\textsuperscript{67}

In April 2005, the trial judge began a bench trial to determine the sole issue of the
propriety of Kentucky’s lethal injection protocol.\textsuperscript{68} Seventeen depositions and nearly three
months later the trial judge ruled against the defendants.\textsuperscript{69} The Court of Appeals affirmed,
holding that there was no abuse of discretion by the trial court, and that all the trial judge’s
findings were clearly supported.\textsuperscript{70}

In its decision, the Court of Appeals reiterated the famous rule of \textit{Gregg v. Georgia}.\textsuperscript{71}
Specifically, it held that a “method of execution is considered to be cruel and unusual
punishment under the Federal Constitution when the procedure for execution creates a
substantial risk of wanton and unnecessary infliction of pain, torture or lingering death.”\textsuperscript{72}
Additionally, “in reviewing whether the method of execution is a constitutional violation, courts
must consider whether it is contrary to evolving standards of decency that mark the progress of a
maturing society.”\textsuperscript{73}

In 2008, the High Court’s decision in \textit{Baze v. Rees} will be historic. The reasons set forth
below show, not only, why the arguments for holding that the three-drug cocktail used in lethal
injection is unconstitutional are unfounded, but also the serious consequences which will arise if
the Court were to find that the three drugs used are violative of the Eighth Amendment.

\textsuperscript{66} Id.
\textsuperscript{67} Id.
\textsuperscript{68} Id. at 209
\textsuperscript{69} Id.
\textsuperscript{70} Id. at 210.
\textsuperscript{71} \textit{Baze}, 217 S.W.3d at 209 (citing \textit{Gregg v. Georgia}, 428 U.S. 153, 162 (1976)).
\textsuperscript{72} Id.
\textsuperscript{73} Id. (citing \textit{Trop v. Dulles}, 356 U.S. 86, 94 (1958)).
It seems as though there are two main arguments circling the lethal injection debate, both of which involve only one of the three drugs used. The first argument is that because pancuronium bromide, the second drug, acts as a paralytic over all voluntary muscles, that if an insufficient dosage is used, one would not be able to tell if the inmate was in pain, thus violating the Eighth Amendment. The second argument follows by saying that the drug acts as a “chemical curtain,” by hiding any [possible] harmful effects caused by the use of pancuronium bromide on the condemned inmate, as well as unconstitutionally prohibiting the Press from reporting such negative effects to the public. Each of these arguments will be taken in turn.

IV. SAN QUENTIN OPERATIONAL PROCEDURE 770

The three-drug cocktail questioned in Baze v. Rees, is the exact mixture that is employed by thirty-seven out of the thirty-eight states that allow for lethal injection. As such, the Kentucky procedure will be synonymized with the procedure used in California: San Quentin’s Operation Procedure 770 (hereinafter “Procedure 770”).

Procedure 770 is the lethal injection protocol that was adopted in 1992 which provides for the injection of three separate chemicals into the bloodstream of the condemned inmate through the use of two intravenous lines, one inserted into each arm of the inmate. Specifically, the Procedure provides for, in part: (1) Five grams of sodium pentathol, a barbiturate sedative, which renders the inmate unconscious, and, therefore, unable to experience any pain; (2) Fifty milligrams of pancuronium bromide which paralyzes all voluntary muscles and causes breathing

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73 Id.
to cease; and (3) Fifty milliequivalents of potassium chloride which causes a rapid death through cardiac arrest.\textsuperscript{76} Significantly, each drug is lethal, in and of itself.\textsuperscript{77}

V. \textit{PNS V. WOODFORD}

A. The Facts

On March 8, 2006 the ACLU of Northern California filed a complaint on behalf of the Pacific News Service (hereinafter “PNS”) against the Department of Corrections and San Quentin State Prison, alleging that pancuronium bromide, the second drug used, could cause a death so painful that it would violate the Eighth Amendment’s prohibition against “cruel and unusual” punishment, and that such drug is equivalent to a “chemical curtain” which unnecessarily abridges the press’ First Amendment Right to observe and report to the public on the inner workings of an execution.\textsuperscript{78}

B. Analysis

The ACLU argues that Procedure 770 not only unnecessarily impacts the press’ right to report on executions under the First and Fourteenth Amendments, but that pancuronium bromide unnecessarily causes the inmate pain that cannot be seen due to the paralytic function of the drug.\textsuperscript{79} However, these arguments are flawed for four reasons: (1) the purpose of sodium pentothal, or the first drug, is to prevent the subject from experiencing pain, making any effect of pancuronium bromide virtually nonexistent; (2) the use of pancuronium bromide does not offend “evolving standards of decency,” thus, not violating the "Cruel and Unusual Punishment” Clause

\textsuperscript{76} \textit{Morales v. Hickman}, 415 F. Supp. 2d 1037, 1039 (D. Cal. 2006).
\textsuperscript{77} \textit{Id}.
\textsuperscript{79} \textit{Id}.
of the Eighth Amendment; (3) as set forth by CFAC v. Woodford, the press’ right to report on executions is qualified; and (4) even with pancuronium bromide included, the press is, nonetheless, able to physically be at the execution, and report what they see on face value. As such, each of these arguments will be taken in sequence.

VI. PANCURONIUM BROMIDE DOES NOT VIOLATE THE EIGHTH AMENDMENT’S CRUEL AND UNUSUAL PUNISHMENT CLAUSE

A. When Used with the Other Two Drugs, There are No Negative Effects of Pancuronium Bromide on the Inmate

First, the ACLU’s argument is negated by Beardslee v. Woodford, in which the State’s medical expert testified that “over 99.9999999999999% of the population would be unconscious within sixty seconds of the start of the administration of the 5 grams of sodium pentothal.” This 5 gram dosage is 12.5 times the normal amount used in a surgical dosage, which would render “all but an infinitesimally small number of people” unconscious for at least 13 hours, and that such a dose would “cause an inmate to be unconscious in about five seconds and that the inmate would never regain consciousness and would feel no pain prior to dying.” However, like any drug there is always a chance that the dosage given will not perform as expected. Nonetheless, the statistics cannot be ignored that 27 out of 37 states that employ lethal injection administer the same three drugs, and that no court in any state has ever found these drugs to be constitutionally infirm. Further, in 2006, the court in Morales v. Hickman stated that a general

80 CFAC v. Woodford held “that Procedure 770 is an exaggerated, unreasonable response to prison officials' legitimate concerns about the safety of prison staff and thereby unconstitutionally restricts the public’s First Amendment right to view executions from the moment the condemned is escorted into the execution chamber.”
81 Id.
82 Beardslee v. Woodford, 395 F.3d 1064, 1075 (9th Cir. 2005).
83 Id. (emphasis added).
84 Bredesen, 181 S.W.3d at 308.
85 Beardslee, 395 F.3d at 1072 (emphasis added).
anesthesiologist could be present at the request of the inmate to ensure that throughout all three injections, the inmate remains completely unconscious.86 Thus, the extraordinarily minor .00000000001% chance that the inmate might feel pain, cannot be construed to mean that such a chance is considered “cruel and unusual” under the Eighth Amendment.87

B. Pancuronium Bromide is in Accordance with Society’s “Evolving Standards of Decency”

“Nearly one hundred years ago, the United States Supreme Court recognized that the cruel and unusual punishment clause ‘is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice.’”88 The Court has explained that the Eighth Amendment “‘draws its meaning from the evolving standards of decency that mark the progress of a maturing society.’”89

As such, the issue arises whether the lethal injection protocol used by thirty-seven out of thirty-eight states comports with contemporary standards of decency. “In ascertaining contemporary standards of decency, a court must look to objective evidence of how our society views a particular punishment today.”90 In answering this question, the Supreme Court has repeatedly held that “‘the clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures.’”91 There are four reasons why lethal injection is in accordance with society’s evolving standards of decency.

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86 Morales, 415 F. Supp. 2d at 1039.
87 Id.
88 Bredesen, 181 S.W.3d at 305 (citing Weems v. United States, 217 U.S. 349, 378 (1910)).
89 Id. (citing Trop, 356 U.S. at 100-101).
90 Id. (citing Van Tran v. Tennessee, 66 S.W.3d 790, 800 (Tenn. 2001)).
91 Id. at 306 (quoting Penry v. Lynaugh, 492 U.S. 302 (1989)).
First, the fact that thirty-seven out of thirty-eight states is evidence, in and of itself, that lethal injection is widely and commonly used.\textsuperscript{92} Additionally, considering that only one state still employs the electric chair, and that all other methods of execution have been outlawed, it is apparent that lethal injection is also considered to be the most humane form of execution.\textsuperscript{93}

Second, there is very established evidence that the three-drug cocktail is consistent with the “overwhelming majority of lethal injection protocols used by other states and the federal government.”\textsuperscript{94} Specifically, the Department of Corrections formed a committee just for establishing the lethal injection protocol currently used, and then studied the protocols used by the thirty-eight states around the country that also utilize lethal injection.\textsuperscript{95} As a result, the committee based its protocol on the protocols used by other states and by the federal government.\textsuperscript{96}

Third, with regard to legislation, the lethal injection protocols employed in every jurisdiction stem from legislation, created by legislators whom the people have elected, that have fashioned lethal injection as the main method of execution. Furthermore, “legislative bodies, state referenda and the juries. . . do not support the contention that evolving standards of decency require total abolition of capital punishment.”\textsuperscript{97} It is also equally, if not more, significant that such protocols have remained intact without legislative revision.\textsuperscript{98}

\textsuperscript{92} \textit{Id.} at 306.
\textsuperscript{93} \textit{Id.}
\textsuperscript{94} \textit{Id.} at 307.
\textsuperscript{95} \textit{Id.}
\textsuperscript{96} \textit{Id.}
\textsuperscript{97} \textit{Furman v. Georgia}, 408 U.S. 238, 442 (1972) (Powell, J., dissenting).
\textsuperscript{98} \textit{Bredesen}, 181 S.W.3d at 307.
Finally, and perhaps the strongest evidence of all, is that no court has ever held that lethal injection is cruel and unusual punishment in violation of the Eighth Amendment.\textsuperscript{99} This fact certainly cannot be ignored, nor can it be explained in any way other than the logical conclusion that if the three-drug cocktail has not been found in violation of the Constitution, then not only does it remain perfectly constitutional, but similarly, that society sees them as such.

“Despite the continuing debate over the morality and utility of capital punishment, dating as far back as the Nineteenth century, it is now evident that a large proportion of American society continues to regard it as an appropriate and necessary criminal sanction.”\textsuperscript{100} Consequently, and in light of the overwhelming evidence above, it would be difficult to regard the lethal injection cocktail as anything other than being in accordance with society’s evolving standards of decency.

VII. PANCURONIUM BROMIDE DOES NOT CAUSE A “CHEMICAL CURTAIN” OVER THE INMATE, AND THUS DOES NOT INFRINGE ON THE PRESS’ FIRST AMENDMENT RIGHT TO REPORT

A. The Press’ Right to Report on Executions is Qualified, at Best

The right of the press as guaranteed under the First Amendment of the Constitution is only qualified. Although this right to gather news and information is substantial, this protection is not without limits;\textsuperscript{101} “[t]he right to speak and publish does not carry with it the unrestrained right to gather information.”\textsuperscript{102} Further, the Supreme Court has never flatly held that the press

\textsuperscript{99} Id.
\textsuperscript{101} Enlm’t Network, Inc. v.Lappin 134 F. Supp. 2d 1002, 1009 (D. Ind.2001).
\textsuperscript{102} Id.
has no independent First Amendment right to view events inside prison walls; only that such a right is coextensive with the publics’ right to the same information.\textsuperscript{103}

The use of pancuronium bromide during executions is to, “conceal the harsh reality of executions from the public.”\textsuperscript{104} Because the warden of the prison is allowed to invite up to twelve members of the press to attend the execution, and because the inmate’s family members are also allowed to attend,\textsuperscript{105} the use of the drug is patently obvious. Protecting the family from the emotional trauma of seeing the harsh effects of the drugs on their loved ones body is more than enough to supersede a qualified right of the press. While the press believes that there is a need to fully inform the public of these effects during the execution, “[t]he inmates. . . are not like animals in a zoo to be filmed and photographed at will by. . . media reporters, however ‘educational’ the process may be for others.”\textsuperscript{106} To not only see a loved one for the last time, but to see such unforgiving effects of the drug, although the inmate may not personally feel them, is a significant enough of a policy to limit the press’s right to report on executions to that which is viewed by the family. Accordingly, because the Constitution does not require the government to provide the press special access to information not shared by members of the public generally,\textsuperscript{107} unimpaired access to view such things that have a great potential of causing emotional trauma should not be allowed.

\textsuperscript{103} CFAC v. Woodford, 299 F.3d 868, 874 (9th Cir. 2002).
\textsuperscript{104} Id. at 880.
\textsuperscript{105} Cal. Penal Code Ann. § 3605(b) (West 2004).
\textsuperscript{106} Houchins v. KQED, 438 U.S. 1, 5 (1978).
\textsuperscript{107} Woodford, 299 F.3d at 874.
B. The Press is Still Able to be Physically at the Execution, and Still Able to Report

The final flaw in the ACLU’s argument is that even if a “chemical curtain” were present, it is not the sole doing of pancuronium bromide. The fact is that the press cannot report completely on the chemical because they can't physically experience the chemical for themselves. Therefore, there is no difference with the other chemicals involved. The press can only report on the face value of the effects of sodium pentathol and potassium chloride, chemicals one and three, respectively. So if a "chemical curtain" did exist, it would exist for all three chemicals. However, this curtain exists for observation and reporting of all events. It is not a curtain that denies the press their right to observe and report, but it is one that denies a complete experience to report on any event. Thus, this is a universal curtain that is reflected in all informational reporting, and to analyze such as to just include one part of the execution process is to unnecessarily narrow the Constitution.

The fact that Supreme Court precedent expressly provides that the First Amendment right of the press does not extend beyond what the Amendment provides for the general public, as well as the fact that nowhere in the Constitution does it explicitly provide an unrestrained right of the press to freely report on what they want, when they want, leaves little room for argument. Such an unrefined right of the press would abolish not only the idea that freedom of press does not extend beyond the borders of the public’s right to the same information, but also the penological interest of limiting viewings of executions that not only the San Quentin State Prison, but the entire United States prison system maintain.108 To hold otherwise is to unconstitutionally broaden the meaning of the First Amendment.

VIII. THE FORGOTTEN MEANING OF “LEX TALIONIS”

While it is known that the law is supposed to be based on reason and fact, and not emotion, it seems as though one important, commonsensical, aspect has been forgotten in the wake of the lethal injection controversy: retribution. The phrase “an eye for an eye,” quoted from Exodus 21:23-27 of the Bible, imposes this idea through the use of lex talionis, Latin for “law of retaliation.”\footnote{Wikipedia: The Free Encyclopedia, An Eye for an Eye, available at: http://en.wikipedia.org/wiki/An_eye_for_an_eye (last visited October 14, 2007).}

How a prisoner is put to death says a great deal about society. The majority of Americans would not tolerate drawing and quartering prisoners, disembowelment, and other "primitive" methods of execution. These methods are too barbaric and inflict too much pain on the condemned person.

However, lethal injection today is far removed from the rack and the screw. It is an effort at the most humane method of execution to date. While lethal injection is considered the most humane method, by definition, death, in every instance, cannot be washed clean of all traces of pain. Whatever pain the inmate suffers is merely retribution. Capital punishment is an expression of society's moral outrage at particularly offensive conduct. This function is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help, vigilante justice, and lynch law to vindicate their wrongs.\footnote{Gregg, 428 U.S. at 183.}

What it comes down to is that the defendant lying on the execution table with an I.V. in his arm is going to die. While it has already been shown above that the defendant would actually not feel any pain at all from the drugs, it seems as though, with the idea of retribution in mind, that it would not matter even if he did.
This idea has been overlooked amidst the lethal injection controversy. Retribution is an important argument. If the defendant who premeditatedly killed someone does not feel any of the pain that the innocent victim experienced moments before death, then it is almost as if their life was taken in vain. To ensure such safeguards for a convicted killer, seems to oversimplify the true meaning of retribution and an “eye for an eye.”

The Court in *Gregg v. Georgia* sets out the fundamental idea that “when a life has been taken deliberately by the offender, we cannot say that the punishment is invariably disproportionate to the crime.”111 Simply stated, “[t]hese cases are here because offenses to innocent victims were perpetrated.”112 This fact, coupled with the terror that occasioned it, and the fear that stalks the streets of many of our cities today perhaps deserve not to be overlooked.113

From *Gregg* forward, retribution has been the most important rationale for the death penalty. Executing a convicted killer, by its nature, cannot be entirely free from pain. If the pain endured by the prisoner is not grossly disproportionate to the crime, then there is no Eighth Amendment violation.

Consequently, not only is the retributive argument a strong and well-founded one, but the fact cannot be ignored that even the Supreme Court has championed the idea. In Justice Marshall’s well written concurring opinion in *Furman v. Georgia*, he stated that the number one purpose “served by capital punishment [is] retribution.”114

111 *Gregg*, 428 U.S. at 187
112 *Furman*, 408 U.S. at 414 (Blackmun, J., dissenting).
113 *Gregg*, 428 U.S. at 187.
114 *Furman*, 408 U.S. at 342 (Marshall, J., concurring).
IX. CONSEQUENCES OF THE SUPREME COURT HOLDING LETHAL INJECTION UNCONSTITUTIONAL IN BAZE V. REES

The Supreme Court’s review, next year, of the constitutionality of the three-drug lethal injection cocktail will be the first time the High Court has examined a method of execution since 1879, when the Court upheld the use of a firing squad as a constitutional measure of execution.\footnote{Mintz, Howard, Supreme Court justices to take up lethal injection: High court ruling could provide road map for California, available at: http://www.law.berkeley.edu/clinics/dpclinic/LethalInjection/Public/Articles/Baze/2007.09.26.SupremetoTake.SJMcerc.pdf (last visited October 27, 2007).}

The three questions the Justices will deliberate over include: (1) “Does the Eighth Amendment to the United States Constitution prohibit means for carrying out a method of execution that create an unnecessary risk of pain and suffering as opposed to only a substantial risk of the wanton infliction of pain?”\footnote{Defendants petition for a Writ of Certiorari to the United States, available at: http://www.scotusblog.com/movabletype/archives/07-5439_pet.pdf (last visited October 28, 2007).} (2) “Do the means for carrying out an execution cause an unnecessary risk of pain and suffering in violation of the Eighth Amendment upon a showing that readily available alternatives that pose less risk of pain and suffering could be used?”\footnote{Id.} and (3) “Does the continued use of sodium thiopental, pancuronium bromide, and potassium chloride, individually or together, violate the cruel and unusual punishment clause of the Eighth Amendment because lethal injections can be carried out by using other chemicals that pose less risk of pain and suffering?”\footnote{Id.}

Since the granting of Certiorari in Baze v. Rees, a “near-moratorium” has occurred on executing more than 3,300 death row inmates across the country until the Supreme Court makes a final ruling on the case by June 2008.\footnote{Id. However, because it is more than unlikely that any}
decision by the Court will put an end to the death penalty,\textsuperscript{120} the general consensus among legal experts, attorneys, and many judges is that “the court will provide guidelines for what states must do to ensure that executions are carried out humanely, whether in the types of drugs they use or in the safeguards put in place during executions.”\textsuperscript{121} Legal experts also predict that the Supreme Court will follow the approach used in 2002 when the Court decided \textit{Atkins v. Virginia}.	extsuperscript{122} There, the Court held that it is unconstitutional to execute mentally retarded inmates, and rather than lay out a rigid protocol, the Justices left it to the individual states and the lower courts to set the standards for what exactly meets “mental retardation in capital cases.”\textsuperscript{123} Additional experts say that the Supreme Court, instead of prohibiting lethal injection permanently, can simply clarify the standard for what amounts to a “cruel and unusual execution and the obligations of states to administer the fatal drugs with proper safeguards.”\textsuperscript{124}

X. CONCLUSION

All things being considered, it is unlikely that the Court will hold that execution by lethal injection is violative of the ban on cruel and unusual punishment, and thus unconstitutional. Because the Court has so widely discussed the need for a method of execution that fit’s within society’s “evolving standards of decency,” and having decided that the death penalty\textsuperscript{125} and the

\begin{itemize}
\item \textsuperscript{121} Id.
\item \textsuperscript{122} \textit{Atkins v. Virginia}, 536 U.S. 304 (2002).
\item \textsuperscript{124} Id.
\item \textsuperscript{125} \textit{See Gregg}, 428 U.S. 153.
\end{itemize}
three-drug cocktail used in lethal injection do fit within such a standard,\textsuperscript{126} any decision holding otherwise would simply be contrary to stare decisis.

\textsuperscript{126} See Section VI (b), supra.