

## jurisprudence

### Barely Lethal

How both sides have staked out the worst position in the lethal-injection fight.

By Dahlia Lithwick

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We are witnessing a strange new controversy in this country over whether lethal injection is too cruel and unusual to be used to kill unusually cruel people. A [California judge](#) recently stayed an execution to investigate allegations that the condemned suffer excruciating pain before death, and Gov. Jeb Bush has [stayed all Florida](#) executions pending a [Supreme Court decision](#) touching on this issue. A [British medical journal](#) raised concerns last year about the suffering that goes along with death by lethal injection. Reports this week of another [horribly botched execution](#) made national headlines, as did a study revealing that a possibly [innocent Texas man](#) died by lethal injection.\*

There are basically two responses to the examples cited above. Opponents of the death penalty find it ludicrous to seek a tender and loving way to execute people. Supporters of the death penalty find it preposterous to fret about the suffering of someone who has committed vicious and heinous crimes. Both sides seem to agree then, that this new national drive to create what I'll call—for lack of a better term—the "Happy Death Box" is absurd on its face.

Members of the U.S. Supreme Court voiced the same concerns over the cruelty of death by lethal injection in a recent oral argument about the death penalty in Florida—a case that touched only tangentially on the substantive problems with these executions but that captured the court's imagination. Justice John Paul Stevens [observed](#) that the "cocktail" of drugs that Florida now uses "would be prohibited if applied to dogs and cats," and Justice David Souter added, "I don't know why the state doesn't have the obligation to not execute without causing gratuitous pain." Justice Antonin Scalia [pointed out](#), on the other hand, that the framers had no problem with even the most painful executions, noting that, "Hanging was not a quick and easy way to go."

Both sides are right. The Constitution prohibits gratuitous government cruelty, even where the prisoner in question richly deserves some. But the Founding Fathers also accepted the fact that the death penalty would necessarily involve pain and suffering. The real problem with these new debates about the amount of pain involved in death by lethal injection is not, however, that both sides are right. It's that each side is dead wrong.

The problem for opponents of the death penalty is that their outrage is strategic. They want their fight to outlaw this procedure to grow into an effort to abolish executions altogether. They are thus no different than abortion opponents who want to outlaw emergency contraception, or opponents of legalized drugs who want to hone in on medicinal marijuana. The hope of the anti-capital-punishment camp is that while their best arguments about the racial, regional, and class biases that taint our capital-punishment system—as well as the growing number of [shocking exonerations](#) of innocent dead men—may not move the American public, the sheer "ick" factor of botched executions might.

Certainly it's disturbing to hear reports of inmates thrashing about mid-execution and hollering—as did an Ohio killer earlier this week—"it don't work" before [the curtain was pulled](#) and the assembled witnesses were prevented from watching the extraordinary 90-minute effort to kill him. But by emphasizing the cruelty of the *means* of execution, opponents of capital punishment tacitly concede to its basic rightness; they accept that if these small logistical stumbling blocks can be overcome, then capital punishment might be OK.

That is precisely the wrong message for death-penalty opponents to be pushing, a point made recently by David Elliot, communications director for the National Coalition to Abolish the Death Penalty, who rightly [dismisses the debate](#) over lethal injection as "tinker[ing] with the machinery of death." Driving toward the Happy Death Box, or even the mild overdose of barbiturates, is precisely the wrong strategy.

The reason modern executions have "evolved" from hangings, to gas chambers and firing squads (and other creepy vestiges of black-and-white movies), to modern lethal injection, is not for the ease and comfort of those being executed, but for the ease and comfort of the American public. Everything we as a society have done to sterilize and medicalize capital punishment—from secret midnight killings to swapping the hangman for a technician in a lab coat—has served to mitigate the outrageousness of the state taking a human life. If today's death-penalty opponents win the battle and achieve their perfectly painless execution (a [sweet slumber](#) resulting from a [single overdose of barbiturates](#)), they will have lost the larger war against government-sanctioned murder.

At the same time, supporters of capital punishment are misguided in their opposition to finding a less cruel method of execution. Supporters of the death penalty are frequently heard insisting that death by lethal injection is actually too good for the cruel and ruthless killers who merit it. As [Ronald Bailey](#) recently argued online in *Reason*, "As harsh as it sounds, if lethal injection is good enough to end the suffering of a beloved pet, it's probably too good for a pre-meditated murderer."

Supporters of the death penalty further take the line that objections to lethal injection are just one more cheap effort at delay; one more of a thousand stalling tactics that eat up the courts' time and the taxpayers' dollars. Justice [Scalia scornfully observed](#) at the oral argument in the recent Supreme Court case that, "You'd challenge that and another few years go by."

But supporters of the death penalty shouldn't let their frustration with the capital appeals system lead them down the road of advocating less due process or gratuitously crueler executions. They should accept that it's in their best interest to acknowledge that death is a serious and irrevocable punishment that should be meted out with exacting scrutiny, and always with the deepest respect for human dignity. The party line should not be that more capital punishment is necessarily better than less, or that more brutal killings bring about greater justice. The party line should be that this is a solemn pronouncement reserved for the worst criminals alone.

The great irony, then, is just this: Opponents of the death penalty would see their interests best served by reinstating a regime of violent and gruesome public hangings at high noon; a return to a system that would shock and horrify Americans into understanding what state-sanctioned murders really are. Whereas supporters of capital punishment would gain far greater support from advocating a system that metes out executions only for the most deserving and appears to the public like nothing more than a very long nap. Those wishing to abolish the death penalty lose ground with each attempt to make it prettier. And those who support it win nothing at all by making it more appalling. Perhaps lethal injection—to which absolutely everyone seems to object so strenuously—is not such a bad compromise after all.

*A version of this article also appears in the Outlook section of the Sunday Washington Post.*

**Correction, May 8, 2006:** *The article originally suggested that a new Innocence Project study revealed that a Texas man executed by lethal injection was conclusively innocent. The study in fact suggests that he may have been. ([Return to the corrected sentence.](#))*

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