



## **REGULATING DEATH IN THE LONE STAR STATE:**

Texas Law Protects Lizards From Needless  
Suffering, But Not Human Beings

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## Texas Law Protects Lizards from Needless Suffering, But Not Human Beings

A Report by

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## INTRODUCTION

As Texas prepares to execute Cleve Foster on April 5, 2011, disturbing new facts have emerged in relation to Texas' lethal injection protocol. The Texas Department of Criminal Justice (TDCJ) has recently announced its intention to begin using a new drug in the lethal injection process, without allowing for any expert analysis or public scrutiny of the suitability of the new drug—pentobarbital. In fact, there is no evidence that Texas has ever engaged in a meaningful assessment of whether the drug can or should be used in combination with the other two drugs administered in lethal injections, pancuronium bromide and potassium chloride. This lack of assessment and transparency is even more troubling given the concerns of prominent anesthesiologists about the efficacy of pentobarbital in the execution of human beings and the risk that the three drugs used in combination could lead to an excruciatingly painful death.

Texas' lax attitude regarding the taking of human life contrasts sharply with its enactment of detailed regulations to ensure that animals suffer no pain when they are euthanized. Animal euthanasia laws provide strict certification requirements for euthanasia technicians and regulate acceptable methods of intravenous euthanasia down to the correct dosage per kilogram of an animal's body weight. By contrast, the Texas legislature has failed to enact any legislation to ensure that the individuals responsible for extinguishing human life are properly trained and qualified, and that the drugs they administer are both effective and humane. Instead, the legislature has left the lethal injection protocol to the discretion of the director of the Correctional Institutions Division of the TDCJ – a prison official with no medical training. In Texas, men and women are put to death not under the supervision of doctors and anesthesiologists—or even licensed veterinarians—but at the hands of a prison

lethal injection team whose medical training is limited. It is no exaggeration to say that Texas regulates the euthanasia of reptiles more strictly than the execution of human beings.

## IN SEARCH OF ACCOUNTABILITY: RULES, REGULATIONS AND THE CORRECTIONAL INSTITUTIONS DIVISION

The Texas Health and Safety Code provides, “A person may euthanize a dog or cat in the custody of an animal shelter only by administering sodium pentobarbital or commercially compressed carbon monoxide.”<sup>1</sup> All other shelter animals, “including birds and reptiles,” may be euthanized “only in accordance with the applicable methods, recommendations, and procedures set forth in the 2000 Report of the American Veterinary Medical Association Panel on Euthanasia as modified or superseded by a subsequent report of the American Veterinary Medical Association Panel on Euthanasia that is approved by the board.”<sup>2</sup> The American Veterinary Medical Association (“AVMA”) produces its Guidelines on Euthanasia with the participation of a panel of scientists, which

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<sup>1</sup> TEX. HEALTH & SAFETY CODE ANN. § 821.052 (West 2009). Other states have similar regulations. *See* ARIZ. REV. STAT. ANN. § 11-1021(B) (2011) (stating that animals may be euthanized only by injection of sodium pentobarbital or a derivative, or by T-61 euthanasia solution or its generic equivalent); IND. CODE § 35-48-3-2(a)(1) (West 2011) (authorizing the use of “[S]odium pentobarbital to euthanize injured, sick, homeless, or unwanted domestic pets and animals”); TENN. CODE ANN. § 44-17-303(a) (West 2010) (acceptable methods of euthanasia are lethal injection of sodium pentobarbital, and solution or powder added to food); ALA. CODE § 34-29-131(a) (2010) (indicating that sodium pentobarbital or its derivative are acceptable injectable agents for euthanizing dogs and cats).

<sup>2</sup> TEX. HEALTH & SAFETY CODE ANN. § 821.052 (West 2009). *See also* KAN. STAT. ANN. § 47-1718(a) (West 2010) (also referencing the AVMA Panel on Euthanasia Report); KY. REV. STAT. ANN. § 258.095(12) (West 2010) (same); MO. STAT. ANN. § 578.005(7) (West 2010) (same).

meets at least once every ten years to conduct a thorough review of scientific methods for euthanasia.<sup>3</sup> Any interim revisions to the Guidelines “are based on a thorough evaluation of the available science and require Executive Board approval.”<sup>4</sup>

The Texas Health and Safety Code also states that the Texas Board of Health “shall establish the requirements and procedures for administering sodium pentobarbital to euthanize an animal in the custody of an animal shelter.”<sup>5</sup> Those requirements, found in the Texas Administrative Code, reiterate the provisions in the Health and Safety Code and provide additional protections for the procedure, regulating everything from the lighting in the room to the dosage of the drugs.<sup>6</sup> Animal euthanasia drugs are subject to further regulations issued by the U.S. Food and Drug Administration, which even specify the exact formula to be used, and the amount to be used according to body weight.<sup>7</sup> The final procedures, then, are the result of a thorough review by scientists and experts in veterinary medicine and become binding law in the Health and Safety Code and the regulations of the Department of Health. All of these provisions

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<sup>3</sup> American Veterinary Medical Association, *Guidelines on Euthanasia (Formerly Report of the AVMA Panel on Euthanasia)*, 1 (June 2007) [hereinafter “AVMA Guidelines”], *available at* [http://www.avma.org/issues/animal\\_welfare/euthanasia.pdf](http://www.avma.org/issues/animal_welfare/euthanasia.pdf).

<sup>4</sup> *Id.*

<sup>5</sup> TEX. HEALTH & SAFETY CODE ANN. § 821.053 (West 2009). *See also* ALA. CODE § 34-29-131 (2010); OHIO REV. CODE ANN. § 4729.532 (West 2011); TENN. CODE ANN. § 44-17-303 (West 2010).

<sup>6</sup> 25 TEX. ADMIN. CODE § 169.84 (2011).

<sup>7</sup> *See* 21 C.F.R. § 522.900 (2011) (stating that euthanasia solution is for “humane, painless and rapid euthanasia” and is restricted “to use by or on the order of a licensed veterinarian”). *See also* 21 C.F.R. § 522.810 (2011) (another solution used for euthanasia, also restricted “to use by or on the order of a licensed veterinarian”).

entrench euthanasia procedures firmly in the legislative process, and violations of these laws can result in prosecution for a class B misdemeanor.<sup>8</sup>

In contrast, the Texas Code of Criminal Procedure states only that a death sentence shall be carried out “by intravenous injection of a substance or substances in a lethal quantity sufficient to cause death” and that the procedure is “to be determined and supervised by the director of the correctional institutions division of the Texas Department of Criminal Justice (“TDCJ”).”<sup>9</sup> The current director of the Correctional Institutions Division is Rick Thaler, a former corrections officer and director of the Manufacturing and Logistics Division of

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<sup>8</sup> TEX. HEALTH & SAFETY CODE ANN. § 821.056 (West 2009). See also OHIO REV. CODE ANN. § 4729.99(F) (West 2011) (violation is a first degree misdemeanor); TENN. CODE ANN. § 44-17-303(j) (West 2010) (violation is a Class A misdemeanor).

<sup>9</sup> TEX. CODE CRIM. PROC. ANN. art. 43.14 (West 2009). Some states have adopted a similar approach. See IND. CODE § 35-38-6-1(a) & (d) (2011) (“The department of correction may adopt rules under [§ 4-22-2] necessary to implement” the execution, which “shall be inflicted by intravenous injection of a lethal substance or substances into the convicted person: [] in a quantity sufficient to cause the death of the convicted person; and [] until the convicted person is dead.”); TENN. CODE ANN. § 40-23-114(a) & (c) (West 2010) (“The department of correction is authorized to promulgate necessary rules and regulations to facilitate the implementation of this section,” which determines that “the method for carrying out [a death] sentence shall be by lethal injection.”); ARIZ. REV. STAT. ANN. § 13-757(A) (2011) (“The penalty of death shall be inflicted by an intravenous injection of a substance or substances in a lethal quantity sufficient to cause death, under the supervision of the state department of corrections.”); OHIO REV. CODE ANN. § 2949.22(A) (West 2011) (“[A] death sentence shall be executed by . . . a lethal injection of a drug or combination of drugs of sufficient dosage to quickly and painlessly cause death. . . . The warden of the correctional institution in which the sentence is to be executed or another person selected by the director of rehabilitation and correction shall ensure that the death sentence is executed.”).

TDCJ<sup>10</sup> with a master’s degree in business administration from Sam Houston State University.<sup>11</sup> Absent from Mr. Thaler’s resume is any training or experience in anesthesiology, pharmacology, public health or science. Nevertheless, he has the authority to change everything from the type and dosage of the drugs to the qualifications and identity of the executioners.<sup>12</sup> While the AVMA is required to convene a panel of experts to revise euthanasia guidelines, the procedures for execution of people by lethal injection “are not the product of any kind of scientific or medical review.”<sup>13</sup> In a recent press conference, a spokesperson for the TDCJ explained, “[i]t’s in the state statute that changes in chemical and dosages may be made at the discretion of the institutional division director.”<sup>14</sup>

In Texas, the three-drug protocol used for lethal injection consisted until recently of sodium thiopental, an anesthetic or sedative drug; pancuronium bromide, a neuromuscular paralytic; and potassium chloride to stop the

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<sup>10</sup> The Manufacturing and Logistics Division is in charge of warehousing, freight management, and prison work and job skills training programs. See Texas Department of Criminal Justice, *Manufacturing and Logistics Division*, <http://www.tdcj.state.tx.us/manufacturing-logistics/manufact-home.htm> (last visited Mar. 31, 2011).

<sup>11</sup> Texas Department of Criminal Justice Agency News, *Rick Thaler Named Correctional Institutions Division Director*, [http://www.tdcj.state.tx.us/mediasvc/connections/SeptOct2009/agency\\_v17no1.html](http://www.tdcj.state.tx.us/mediasvc/connections/SeptOct2009/agency_v17no1.html) (last visited Mar. 26, 2011).

<sup>12</sup> Texas Department of Criminal Justice, Correctional Institutions Division, *Execution Procedure* § VI(B) (Mar. 2011) [hereinafter “TDCJ Execution Procedure”].

<sup>13</sup> Ty Alper, *Anesthetizing the Public Conscience: Lethal Injection and Animal Euthanasia*, 35 *FORDHAM URB. L.J.* 817, 834 (2008).

<sup>14</sup> CBS Dallas/Fort Worth, *Shortage Forces Texas to Switch Execution Drug*, Mar. 16, 2011, <http://dfw.cbslocal.com/2011/03/16/shortage-forces-texas-to-switch-execution-drug/>.

heart.<sup>15</sup> On March 16, 2011, the TDCJ—acting through Rick Thaler—responded to a shortage of sodium thiopental by announcing that it would replace sodium thiopental with pentobarbital, a drug untested scientifically for efficacy in lethal injections, in its three-drug lethal injection protocol.<sup>16</sup> As Dr. David Waisel, an expert anesthesiologist and Harvard Medical School professor, testified in an Oklahoma lawsuit challenging the use of pentobarbital in executions,

*The use of pentobarbital as an agent to induce anesthesia has no clinical history and is non-standard. Because of these significant unknowns, and a lack of clinical history related to using pentobarbital to induce anesthesia, using pentobarbital as part of a 3-drug lethal injection protocol puts the inmate at an undue risk of suffering.*<sup>17</sup>

Without laws and regulations in place that provide effective oversight of the transition from sodium thiopental to pentobarbital, neither the prisoners nor the public can be assured that the new execution process protects condemned men and women from a painful and protracted death.

One Texas inmate, Cleve Foster, is scheduled for execution on April 5, 2011—less than three weeks after Texas announced its adoption of this new lethal injection protocol.<sup>18</sup>

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<sup>15</sup> Texas Department of Criminal Justice, Correctional Institutions Division, *Execution Procedure* § VI(B) (May 2008).

<sup>16</sup> Michael Graczyk, *Shortages Force Texas to Switch Execution Drug*, HOUSTON CHRONICLE, Mar. 16, 2011, <http://www.chron.com/disp/story.mpl/metropolitan/7474406.html>.

<sup>17</sup> *Pavatt v. Jones*, No. CIV-10-141-F (W.D. Okla. Oct. 29, 2010) (Expert Report of David B. Waisel, MD).

<sup>18</sup> Texas Department of Criminal Justice, Scheduled Executions,

Maurie Levin, Foster’s attorney, expressed grave doubts about the process behind the new procedure:

*To permit less than three weeks for these matters to be vetted undermines any faith we can have in TDCJ’s concern for deliberate process, accountability, or the constitutionality of the new procedures. Moreover, Texas is rushing to carry out an execution using an entirely new protocol, but they refuse to fully disclose basic information, such as whether any medical authorities were consulted regarding the incorporation of a new drug; the source of the pentobarbital; and the training of personnel who will implement the new procedure for the first time.*<sup>19</sup>

This lack of transparency exacerbates concerns regarding the source and quality of the new drug. The Food and Drug Administration states that it “does not review or approve products for the purpose of lethal injection,” and that it will not review shipments of lethal injection drugs “to determine their identity, safety, effectiveness, purity, or any other characteristics.”<sup>20</sup> Without any meaningful federal or state oversight, and at the mercy of an institution that has provided no evidence that its execution protocol minimizes the risk of human suffering, death row inmates appear to have fewer rights than domesticated animals.

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<http://www.tdcj.state.tx.us/stat/scheduledexecutions.htm> (last visited Mar. 26, 2011).

<sup>19</sup> Press Release, Maurie Levin, Statement from Attorney for Cleve Foster in Response to Change in Texas Execution Protocol (Mar. 16, 2011) (on file with authors).

<sup>20</sup> Press Release, Food and Drug Administration, Statement from the FDA Regarding Oversight of Lethal Injection Drugs and Release of Shipments to States (Jan. 4, 2011), available at <http://www.deathpenaltyinfo.org/statement-fda-concerning-importation-lethal-injection-drugs>.



## SUBSTANCES IN A LETHAL QUANTITY: CHOICE AND ADMINISTRATION OF DRUGS

In states such as Texas, the three-drug lethal injection protocol is administered by staff who are not trained anesthesiologists. Moreover, Texas law fails to set forth dosage-to-weight guidelines for the administration of anesthesia, and does not require effective measures to ensure prisoners are anesthetized at the moment of death. These circumstances give rise to a real risk that the anesthesia will fail to produce unconsciousness at the time the second and third drugs are administered.

The second drug in the three-drug protocol is pancuronium bromide, a paralytic that causes asphyxiation, which is both painful and terrifying to a conscious person.<sup>21</sup> The nature of the paralysis induced by pancuronium bromide means that members of a lethal injection drug team with limited medical training will find it almost impossible to know if the anesthesia is working. TDCJ procedures allow drug team members to proceed immediately with the administration of potassium chloride “if the condemned individual exhibits no *visible* sign of being awake,”<sup>22</sup> a test that makes little sense if the individual is paralyzed and unable to move or even blink. Worse, the paralytic effects of the pancuronium bromide would mask the suffering felt by a conscious prisoner during the administration of the final drug in the protocol, potassium chloride, which causes cardiac arrest and is excruciatingly painful when injected intravenously.<sup>23</sup>

As Professor Ty Alper explains in his article Anesthetizing the Public Conscience: Lethal Injection and Animal Euthanasia,

*The pain and suffering that an inmate would experience if not properly anesthetized is extreme. Because pancuronium is a paralytic that restricts the ability of the respiratory muscles to contract, it causes asphyxiation. The third drug, potassium chloride, causes excruciating pain that has been likened to the feeling of having one’s veins set on fire. Experts who have testified in lethal injection cases have unanimously agreed that it would be unconscionable to inject either drug into a person who was not anesthetized.*<sup>24</sup>

The lack of trained personnel and absence of effective measures to ensure anesthetization, combined with an inherently risky and untested three-step drug protocol, could therefore devolve into a nightmarish situation where the inmate is conscious and suffering throughout his execution, but paralyzed and unable to signal his distress.

The situation described above is not mere speculation. One study, which reviewed the autopsies and toxicology reports of inmates executed by lethal injection, found that 43% of those executed showed signs of awareness at the time of death.<sup>25</sup> Such findings are particularly troubling in light of the possibility that pancuronium bromide and potassium chloride could cause acute pain and suffering as they cause death.

Pain and suffering of this degree violates article 43.24 of the Texas Code of Criminal Procedure, which states, “No torture, or ill

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<sup>21</sup> See Alper, *supra* note 14, at 819, 820.

<sup>22</sup> TDCJ Execution Procedure §VII(J), emphasis added.

<sup>23</sup> Alper, *supra* note 14, at 819, 820.

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<sup>24</sup> *Id.*

<sup>25</sup> L.G. Koniaris et al., *Inadequate Anesthesia in Lethal Injection for Execution*, 365 THE LANCET 1412 (2005).

treatment, or unnecessary pain, shall be inflicted upon a prisoner to be executed under the sentence of the law.”<sup>26</sup> Nevertheless, Texas continues to run the risk that inmates will be conscious when the potassium chloride reaches their veins.

Although pentobarbital is often used in the euthanasia of cats and dogs, the AVMA Guidelines on Euthanasia explicitly state that “a combination of pentobarbital with a neuromuscular blocking agent is not an acceptable euthanasia agent.”<sup>27</sup> As a result, veterinarians in Texas are prohibited from using the combination of drugs that the Texas Department of Criminal Justice has deemed suitable for the execution of human beings.<sup>28</sup>

Professor Alper writes,

*The crucial difference between the three-drug procedure used in lethal injections in humans and the anesthetic-only procedure used in animal euthanasia is the absence of the second and third drugs in the latter procedure. These are the two drugs that cause the pain and suffering if the first drug does not take. On the contrary, if the injection of the anesthetic fails to achieve its desired effect during an animal euthanasia, the animal feels no pain; the solution is to*

*simply administer a second dose of the anesthetic.*<sup>29</sup>

The implementing regulations issued by the Texas Department of Health also regulate the dosage of euthanasia drugs. The Administrative Code provides that, for euthanasia by sodium pentobarbital, “A dose of sodium pentobarbital appropriate for the animal’s weight shall be administered to that animal.”<sup>30</sup> According to the regulations, even fish, amphibians and reptiles executed with pentobarbital must receive 60 to 100 milligrams of the substance per kilogram of body weight.<sup>31</sup> A dosage per weight requirement is used in animals to ensure that the euthanizing agent is effective. However, no similar dosage-to-body-weight requirement is required or used for lethal injection. In fact, no calculations are made whatsoever to account for body weight, heightened adrenaline and metabolism of the inmate, previous drug use, or other factors that can affect the efficacy of the anesthesia.<sup>32</sup> Researchers have suggested that this may be a factor in the high number of lethal injections where they found indicia of consciousness at the time of death.<sup>33</sup>

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<sup>26</sup> TEX. CODE CRIM. PROC. ANN. art. 43.24 (West 2009).

<sup>27</sup> AVMA Guidelines, *supra* note 14, at 11.

<sup>28</sup> Alper writes, “[W]hile eight states are silent on the issue, forty-two states have enacted statutes and/or regulations that either implicitly or explicitly ban the use of neuromuscular blocking agents, such as pancuronium, in animal euthanasia. Stated another way, virtually all (97.6 %) lethal injections in this country have taken place in states that have either implicitly or explicitly banned, for use in animal euthanasia, the same drugs that are used in those states during human executions.” Alper, *supra* note 14, at 844.

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<sup>29</sup> Alper, *supra* note 14, at 836.

<sup>30</sup> 25 TEX. ADMIN. CODE § 169.84 (2011).

<sup>31</sup> AVMA Guidelines, *supra* note 4, at 20.

<sup>32</sup> Koniaris et al., *supra* note 25, at 1412-13.

<sup>33</sup> *See id.*



## “AT LEAST ONE MEDICALLY CERTIFIED INDIVIDUAL”: TRAINING AND OVERSIGHT OF PERSONNEL

Section 522.900 of Title 21 of the Code of Federal Regulations covers the administration of sodium pentobarbital injections for euthanizing dogs, and notes that the drug may only be used “by or on the order of a licensed veterinarian.”<sup>34</sup> Similarly, the U.S. Food and Drug Administration’s compliance guidelines relating to the use of animal euthanasia drugs note that animal control agencies operated by state and local governments, or by government-sanctioned non-governmental organizations, may allow the use of animal euthanasia drugs by lay persons only “if there is a staff or consulting veterinarian who obtains the drugs and the drugs are used under his general supervision and authority.”<sup>35</sup> The federal regulations that apply to the euthanasia of animals in federal chimpanzee sanctuaries state that euthanasia drugs will be administered “only by properly trained personnel under the direction of the Facility Veterinarian.”<sup>36</sup>

Under the Texas Health and Safety Code, only licensed veterinarians and euthanasia technicians may euthanize animals.<sup>37</sup> Training

requirements for euthanasia technicians include a curriculum in:

- (1) the pharmacology, proper administration, and storage of euthanasia solutions;
- (2) federal and state law regulating the storage and accountability of euthanasia solutions;
- (3) euthanasia technician stress management;
- (4) proper restraint and handling of an animal during euthanasia;
- (5) the procedures for administering commercially compressed carbon monoxide to an animal;
- (6) techniques for verifying an animal’s death; and
- (7) the proper disposal of a euthanized animal.<sup>38</sup>

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131(c) (2010) (“Euthanasia shall be performed only by a licensed veterinarian or an employee or agent of a facility approved by the board . . . [who] has successfully completed a euthanasia technician certification course.”); OHIO REV. CODE ANN. § 4729.532(B) (West 2011) (requiring animal euthanasia by lethal injection be performed by a registered veterinary technician or a euthanasia technician); TENN. CODE ANN. § 44-17-303(d) (West 2010) (“Euthanasia shall be performed only by a licensed veterinarian, Tennessee veterinarian medical technician or an employee or agent” of an animal shelter or similar facility, who “has successfully completed a euthanasia-technician certification course.”); FLA. STAT. ANN. § 828.058(4)(a) (West 2010) (“Euthanasia shall be performed only by a licensed veterinarian or an employee or agent” of an animal shelter or similar facility who “has successfully completed a 16-hour euthanasia technician certification course.”).

<sup>38</sup> TEX. HEALTH & SAFETY CODE ANN. § 821.055 (West 2009). Such requirements have been introduced by other States, as well. *See, e.g.*, ALA. CODE § 34-29-131(c) (2010) (requiring the course to include information concerning, “at a minimum, all of the following: (1) The pharmacology, proper administration, and storage of euthanasia solutions. (2) Federal and state laws regulating the storage and accountability of scheduled drugs. (3) OSHA Safety and Material Safety

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<sup>34</sup> 21 C.F.R. § 522.900(d)(3) & 810(c)(3) (2011).

<sup>35</sup> U.S. Food and Drug Administration Compliance Policy Guides § 650.100, *Animal Drugs for Euthanasia*, <http://www.fda.gov/ICECI/ComplianceManuals/CompliancePolicyGuidanceManual/ucm074715.htm> (last visited Mar. 26, 2011).

<sup>36</sup> 42 C.F.R. § 9.6 (2011).

<sup>37</sup> TEX. HEALTH & SAFETY CODE ANN. § 821.055 (West 2009). Other States have adopted similar legal restrictions *See* ARIZ. REV. STAT. ANN. §§ 11-1021(C), 3-1213 (2011) (euthanasia must be performed by a licensed veterinarian or by a person authorized under procedures established by “[t]he state veterinarian, in consultation with the director.”); ALA. CODE § 34-29-

The Code also notes that the Department of Health “must approve the sponsors and curriculum” of the required training course.<sup>39</sup>

By contrast, anesthesiologists and other doctors do not participate in executions because to do so would violate the ethical codes of their professions.<sup>40</sup> According to the American Medical Association, participation encompasses “(1) an action which would directly cause the death of the condemned; (2) an action which would assist, supervise, or contribute to the ability of another individual to directly cause the death of the condemned; (3) an action which could automatically cause an execution to be carried out on a condemned prisoner.”<sup>41</sup> This

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Data Sheet Regulations. (4) Euthanasia stress management. (5) Proper disposal of euthanized animals.”); OHIO REV. CODE ANN. § 4729.532(B) (West 2011) (requiring a sixteen hour course, which must include information concerning at least: “(1) The pharmacology, proper administration, and storage of euthanasia solutions; (2) Federal and state laws regulating the storage and accountability of euthanasia solutions; (3) Euthanasia technician stress management; (4) Proper disposal of euthanized animals”); FLA. STAT. ANN. § 828.058(4)(a) (West 2010) (requiring a sixteen hour course, which “must include, at a minimum, the pharmacology, proper administration, and storage of euthanasia solutions; federal and state laws regulating the storage and accountability of euthanasia solutions; euthanasia technician stress management; and proper disposal of euthanized animals.”); KY. REV. STAT. ANN. § 321.207(4) (West 2010).

<sup>39</sup> TEX. HEALTH & SAFETY CODE ANN. § 821.055 (West 2009).

<sup>40</sup> Some states specifically grant immunity from professional penalties for participating in an execution. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-757(D) (2011) (“If a person who participates or performs ancillary functions in an execution is licensed by a board, the licensing board shall not suspend or revoke the person's license as a result of the person's participation in an execution.”).

<sup>41</sup> AMERICAN MEDICAL ASSOCIATION, AMA CODE OF MEDICAL ETHICS § 2.06 (1980, updated June 2000 based on the report “Defining Physician Participation in State Executions” adopted June 1998).

prevents doctors from monitoring vital signs and preparing, administering, or supervising lethal injection drugs or their doses or types.<sup>42</sup>

Further, state law fails to mandate a minimum level of training for executioners. The Texas Code of Criminal Procedure states only, “the director of the Texas Department of Criminal Justice shall designate an executioner.”<sup>43</sup> Currently, the director specifies that the drug team “shall have at least one medically certified individual,” which can include a [phlebotomist or military corpsman] with as little as one year of professional experience.<sup>44</sup> A phlebotomist is a member of a clinical laboratory team whose main function is to draw a patient’s blood samples through venipuncture.<sup>45</sup> There is no single national oversight and certification organization for the profession – there are three bodies that issue recommendations on accreditation, training, and certification. These bodies provide numerous routes by which phlebotomists can be certified, and in many cases require no more than a high school diploma and completion of an accredited 6-month training course in the practice of

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<sup>42</sup> *Id.*

<sup>43</sup> TEX. CODE CRIM. PROC. ANN art. 43.18 (West 2009). *See also* ALA. CODE §§ 15-18-82(c), 15-18-82.1(a) & (f) (2010) (“[T]he warden . . . may designate an employee of the unit to administer the lethal injection.”); IND. CODE ANN. § 35-38-6-1(c) (West 2011) (“The superintendent of the state prison, or persons designated by the superintendent, shall designate the person who is to serve as the executioner.”); OHIO REV. CODE ANN. § 2949.22(A) (“The warden of the correctional institution in which the sentence is to be executed or another person selected by the director of rehabilitation and correction shall ensure that the death sentence is executed.”).

<sup>44</sup> TDCJ Execution Procedure § IV.

<sup>45</sup> National Phlebotomy Association NPA Goals, *About Phlebotomy and Our Goals*, <http://www.nationalphlebotomy.org/230374.html> (last visited March 31, 2011).

drawing blood.<sup>46</sup> Moreover, certification by any of these bodies is not required by law in forty-eight states, including Texas. Military corpsman have varied responsibilities, and their training can cover widely disparate topics in the medical field, from the skills necessary to be an operating room technician to those needed to help construct dental crowns and bridges.<sup>47</sup> Navy Hospital corpsman receive training that can later translate into careers as dental laboratory technicians, emergency medical technicians (EMTs), nuclear medical technologists, physical therapist's assistants, or medical records clerks, among others.<sup>48</sup>

Under the Texas execution protocol, the members of the execution team receive little training. Before new team members can participate in executions “without the direct supervision of existing team members,” they have to “follow[] the drug team through at least two executions” and participate in “at least two executions under the direct supervision of existing team members.”<sup>49</sup>

The lack of rigorous training requirements for members of the execution team, who are not required by law to have any prior experience in the administration of anesthesia, is remarkable when contrasted with the strict provisions governing the training of technicians and veterinarians involved in animal euthanasia. In

short, men and women may die at the hands of an executioner who lacks the training and experience to minimize suffering or even determine if the anesthesia is working.

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<sup>46</sup> *Id.*; American Society for Clinical Pathology, *Technician Certification*, <http://www.ascp.org/FunctionalNavigation/certification/GetCertified/TechnicianCertification.aspx> (last visited March 31, 2011); American Society of Phlebotomy Technicians, *Phlebotomy Certification*, <http://www.aspt.org/phlebotomy.html> (last visited March 31, 2011).

<sup>47</sup> U.S. Navy Careers and Jobs, *Medical Support*, <http://www.navy.com/careers/healthcare/medical-support.html> (last accessed March 31, 2011).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

## CONCLUSION

The Texas legislature's hands-off approach to the taking of human life stands in marked contrast to its proactive approach to the taking of animal life. Texas statutes subject the animal euthanasia process to rigorous oversight, regulation, and training requirements in order to make the procedures more humane. Condemned human beings in the state must rely on a procedure implemented by bureaucratic fiat to safeguard their rights and prevent needless pain and suffering during the execution process. In sum, the manner in which Texas carries out the execution of human beings is riskier, less transparent, and has less oversight than the euthanasia of cats, dogs, birds, and lizards. We call on the Texas Board of Pardons and Paroles, Governor Rick Perry, and the courts to stay pending executions until the legislature enacts measures that provide at least the same protections to human beings condemned to die as are provided to sick or unwanted animals. At the same time, the Texas legislature and judiciary should require TDCJ to subject its lethal injection protocol to public scrutiny and expert assessment to ensure that executions are carried out in such a way as to minimize human suffering.