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The Paradox of Healing and Harm: Physician Participation in Lethal Injection Executions in the United States

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Abstract

This paper examines the legal and ethical complexities surrounding physician participation in judicial executions in the United States. Despite the medicalization of execution methods, physicians face potential professional misconduct charges for participating in a process often mandated by death penalty statutes. This conflict arises from ambiguities within state legislation, creating a dilemma for medical professionals obligated to uphold both medical ethics and legal requirements.

This paper argues that resolving this conflict necessitates legislative reform that balances the needs of the condemned, the public, and the medical profession. By examining the historical involvement of physicians in shaping execution methods, the paper contextualizes the contemporary debate surrounding their role. Ethical, policy, and legal arguments for and against physician participation are analyzed, revealing the need for a nuanced approach. Current legislative attempts to address this issue are critiqued, and the paper proposes a more comprehensive legislative solution to bridge the gap between death penalty statutes and medical practice acts.

Key words: Medicalization, Physician participation, death penalty, etc.

Introduction

In United States of America, various acts currently applicable to medical practice make physicians liable for professional misconduct for participating in the execution process despite the fact that most death penalty statutes overtly not only provide for such participation but even require them to do so.[1] Although the methods of judicial execution are becoming more and more medicalized,[2] however, the negative effect of the threat of such sanctions and restrictions keeps on increasing. Now, it has become mandatory for the states to cure such statutory ambiguities, if

[1]Deborah Denno, "The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*"* 76*FLR.*49 1032007.
[2] *Id* at 56

physicians are required to contribute their part in the judicial executions. Even though several states have implemented a range of legislative measures to this end,[3] however, all this is futile as none of these address the dilemma adequately. Combination of both, permissive death penalty legislations allowing the participation of physicians in the execution process along with the medical practice acts protecting them from any kind of disciplinary action for such participation are required to resolve this disparity. These kinds of legislations will not only protect the medical profession as a whole but will also take care of the needs of condemned persons and the public, in best possible manner.

The scholar will be clarifying exactly what kind of participation in judicial executions is contemplated for physicians, and then provide a brief history of the medical establishment's involvement in the evolution and implementation of capital punishment. From the guillotine to the electric chair to the lethal injection, physicians have played a consistent and integral role in shaping the face and character of executions. Perhaps as a result of this professional involvement, capital punishment has increasingly moved away from more barbaric forms and taken on the appearance which is more humane, through medical procedures.

It is against this backdrop that we must frame the current debate regarding the appropriate role of the physician in the death penalty. Scholar also surveys the major ethical, policy and legal considerations surrounding physician participation in executions. Arguments for and against such participation are analyzed within the dimensions of rationality, consistency and empirical support.

The scholar also analyzes the various legislative approaches that some states have employed to resolve the conflict between death penalty statutes and medical practice acts. Although well intentioned, the scholar finds all such approaches problematic and insufficient to appropriately remedy the dilemma. Finally, a more appropriate alternative legislative response is proposed.

I. What is "Participation"?

Prior to the discussion that whether or not physicians must take part in the judicial mode of execution through lethal injection and other form of judicial executions, it's important to define first what exactly "participation" means within this framework. In context of this chapter, physician's participation points only towards those events which happen in the actual process of the judicial execution as against the involvement of physicians in the former phases of the criminal justice system, like trials and sentencing hearings. The events clarifying the kind of participation a physician is supposed to do in the execution process through lethal injection are envisioned in this chapter, however the particulars are neither exhaustive nor inflexible and moreover the details will necessarily depend on the circumstances involved. First and foremost are the preliminary steps taken prior to the date of scheduled execution, like the examination of the convict to find out whether there exists any prior medical condition that might impede the process of execution, examination of the convict's medical records so that an appropriate lethal pharmacological regimen may be prescribed and taking charge of the medical supplies to be arranged for the execution. Next are the steps required to be taken immediately prior to the execution, such as making the syringes ready with lethal chemicals, directing the attachment of heart monitor to the condemned person's heart, locating the correct veins for insertion of catheters required for delivering the lethal chemicals. Then followed by the direct or supervisory steps needed to be taken in the actual process of execution, like commencement of the flow of lethal chemicals, monitoring the flow and the consequent vital signs of the of the convict. Lastly, immediately after the entire process of execution is complete, conclusionary actions, like pronouncing the death of the convict.[4]

II. History of Physician Participation in Executions

Participation of physicians in the execution process is not novel. Conversely, involvement of the medical institution in the implementation as well as evolution of the methods of the execution process has had a long and storied history.[5] Although, initially their participation may seem to be macabre, however, the thrust for physicians

[3] Michael L. Radelet, Some Examples of Post-Furman Botched Executions, Death penalty information CTR., *available at*: http://www.deathpenaltyinfo. org/article.php?scid=8&did=478 (Visited on May 6 2017).

[4] Deborah Denno, "*When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What It Says About Us"* 63 *OSTLJ* 86 2002.

[5] Gregory D. Curfman, Stephen Morrisey& Jeffrey M. Drazen, Physicians and Execution*,* 358 New Eng. J. Med. 403-04

who choose their involvement in the execution process has been only to minimize the convict's suffering.

During the French Revolution, nearly at the end of the eighteenth century, it was Dr. Joseph Ignace Guillotine, who with the sole objective of humanizing and civilizing the practice of capital punishment, developed the method named guillotine.[6] Being a dedicated and respected physician, Dr. Guillotine was a prominent challenger of the capital punishment, and he strongly believed that his invention was quicker, moderately painless and exceedingly effective, hence more humane substitute of other contemporary methods like hanging.[7] Dr. Antoine Louis, a French surgeon, had similar concerns of making the death penalty more egalitarian and humane, hence made the shape of the blades diagonal from crescent, thereby improvising upon the guillotine's method consequently resulting in cleaner incision.[8]

Likewise, an American physician's commission, in 1887, lobbied in favour of electrocution over hanging, alleging hanging to be humiliating, imprecise and unreasonably unpleasant for convicts, hence claiming electrocution to be more humane.[9] In fact, the first use of electric chair as a method of execution was supervised by Dr. Carlos MacDonald and Dr. E.C. Spitzka, both American physicians.[10] Moreover, currently, lethal injection as a new form of judicial execution owes its adoption and acceptance to physicians only.[11] In addition to this, first performance of judicial execution through lethal injection was actively supervised by physicians only.[12]

It's perhaps because of these reasons that modes of execution have taken more medicalized forms with lethal injection becoming either mandatory or optional mode of judicial execution in most of the American states.[13] Adoption of lethal injection as a mode of judicial execution is a bold step towards a more humane form of execution which further incorporates what is otherwise known as a standard medical procedure as its foundation.[14]

What is debatable is whether such kind of adaptation of medical tools in the dimension of death penalty is useful or not, if so, to whom. This question has been further addressed in this chapter.

III. Arguments for and Against Physician Participation in Executions

Distinct and significant ethical, policy and legal arguments are raised by the subject of physician's participation in the execution process. Clarity is sought through consistency, rationality and pragmatic support on these issues which are analyzed and explored in this part of the chapter.

IV. i. Ethical Arguments against Physician Participation

Doctors being the healers, hence their active participation in the judicial execution process is completely irreconcilable with their basic ethical code, is the chief contention of the opponents of such participation of the physicians.[15] Public strongly believe and think that it's the inherent duty of the medical profession to use its sills and tools only and only for the betterment of the public health. However, usage of such curative skills to act as the harbinger of death is completely in contravention of medicine's first and foremost goal, moreover it clearly violates a physician's fiduciary duty to serve the patient's interest in the best possible manner.[16]

In modern as well as ancient medical ethics, a substantial support exists for such a stand and position.[17] Over 2000 years old, the Hippocratic Oath, still exists as the most potent weapon and repeatedly cited foundation of professional

(2008), *available at:* http://content.nejm.org/ cgi/content/full/358/4/40(last visited Apr. 17 2017).

[6] *Ibid*.

[7] Council on Ethical & Jud.Affairs, Am. Med. Ass'n, Council Rep., "Physician Participation in Capital Punishment",270 *JAMA* 365 1993.

[8] *Supra* note 2, at 126

[9] J. Mount Bleyer, "Best R Method of Executing Criminals" 5*MLJ* 425 1887.

[10] *Ibid*.

[11] *Nelson* v. *Campbell*, 541 U.S. 637, 641 (2004).

[12] *Ibid*.

[13]Death Penalty Information Center, Authorized Methods of Execution by State, *available at*: http://www.deathpenaltyinfo.org/methods.html (last visited April. 8, 2017).

[14] *Ibid*.

[15] Jack C. Schoenholtz et al., "The Legal Abuse of Physicians in Deaths in the United States: The Erosion of Ethics and Morality in Medicine", 42 *WLR*1507 1996.

[16] *Supra* note 2

[17] *Supra* note 3.

ideals for practicing physicians.[18] Any action taken by the physician with intent of causing any direct or indirect harm or death is broadly condemned by the overt language of the oath. The relevant text reads as, "I will prescribe regimen for the good of my patients according to my ability and my judgment and never do harm to anyone. To please no one will I prescribe a deadly drug, nor give advice which may cause his death."[19]

Analogous restrictions are imposed by the modern ethical treatments of medical practice on the physician's actions that consciously pose harm or contribute to the patient's death. Current bioethical ideology still upholds this sentiment as is embodied by the principle of non maleficence.[20] The very authoritative political group within the profession, the American Medical Association, persists to counter the active role of physicians in the judicial execution process.[21] With respect to the ethics of physician participation in judicial execution process, the AMA's Council in its statement on Ethical and Judicial Affairs (CEJA) stated: "A physician, is a member of an occupation only loyal to preserving life when there is hope of doing so, should not participate in any legally authorized execution."[22]

Physicians and human rights organizations together published an in-depth review and ethical analysis of participation of a physician in an execution in the year 1994, which concluded that, beyond the Hippocratic Oath's and the AMA's general prohibitions, proscription of physician participation is justified on many grounds that outweighs its potential beneficial effects.

The participation of physicians in some instances may help possibly reduce pain, but there exist many countervailing arguments as well. Firstly, the purpose of medical involvement through a physician should not be to reduce pain or suffering, but to help save life and humanity. Secondly, the presence of a physician also serves to give an aura of medical legality to the whole procedure of death penalty. Thirdly, in a broader perspective, the physician is taking over some of the responsibility for executing the punishment, makes the physician handmaiden of the state as an executioner. The benefit for possible reduction of pain by the physician who is in fact acting under the control of the state, rather lawfully does harm.[23]

Opponents of the physician participation strongly claim that participation of non-physician will surely be an apt substitute, while acknowledging the fact that overseeing the technical medical aspects of the judicial execution is a must.[24] They further add that all medical technicalities involved in the judicial execution process like administration of lethal injections,[25]inserting intravenous lines, administration of drugs through those lines and finally pronouncement of death, are not technically difficult and requires moderate training in basic blood-drawing and monitoring. Hence, they conclude that this role could easily and efficiently be played by other associated health officials, like physician assistants (PAs) or nurses, or some other group of medical technicians duly trained for such procedures in particular, thereby, letting the physicians to execute only their ethical obligations as emphasized by the relevant oath.[26]

IV. ii. Ethical Arguments for Physician Participation

The ethical ideal which should be aspired by physicians is; "The task of medicine is to cure sometimes, to relieve often, to comfort always."[27] Deepest obligation of physicians is to take utmost care of the interest and wishes of their patients. Although the preservation of life remains the supreme maxim of medical profession, however, as always, it's neither the chief ethical value nor in the best interest of the patients. Therefore, at times the preservation of life must give way to other goals of medical profession like the cure of extreme sufferings.[28]This is the reasonable logic that backs the ethical approval to withhold and withdraw life-sustaining treatment in order to relieve pain and suffering.[29] As a result, doing so does

[18] *Id* at 23.
[19] *Supra* note 3.
[20] *Supra* note 10.
[21] *Washington* v. *Glucksberg*, 521 U.S. 702, 731 (1997)
[22]*Id* at 54.
[23]*Supra* note 2 at 38.
[24] *Supra* note 11.
[25] James L.J. Nuzzo, "M.D., Independent Prescribing Authority of Advanced Practice Nurses: A Threat to the Public Health?"53 *FDLJ* 35 1998.
[26] *Supra* note 2, at 229
[27] *Supra* note 2, at 301.
[28] *Supra* note 17, at 139–52
[29] *Id* at 42.

accelerate and questionably even results in death. However, the medical condition of some patient's is such that the only alternative in their best interest is to welcome death rather than to wait for a slowly deteriorating life of agony. By and large, the Double Effect Doctrine is sanctioned by both, medical ethics as well as contemporary legal theory, which contemplates that measures carried on for beneficial purposes, like minimizing the sufferings, may be allowed morally even if they foreseeably lead to death.[30] Hippocratic tradition backed by ethical ideologies, unconditionally rules out any action of the physician that could lead to death and clearly fails to understand and appreciate this distinction, hence, thereby misses the mark.

For numerous other reasons as well, it seems quite unreasonable to completely rely upon the rigid Hippocratic Oath as the last and final source of ethical guidance. Firstly, one of the leading historians has concluded that the Oath was never the representative of the current notion in the medical ethics, and more over, it was never intended to make the oath a supreme regulator for medical conduct.[31] Actually, the oath was possibly the outcome of a nontraditional, minute sect of Greek Pythagorean physicians.[32] Moreover, apart from the function and role of the Oath in ancient medical practice, largely its authorizations not only further make it outdated but also adverse to modern medical ethics and practice. For instance, it confines the medicine practice to men,[33] overtly prohibits abortions,[34] and explicitly forbids breach of patient confidentiality by physicians,[35] whatsoever the circumstances may be, notwithstanding the modern day well established principle obligation of physicians to do so in exceptionally demanding situations.[36] The Oath indirectly acts against the public and patient interest by blindly and unreasonably sticking to it's "Do no harm" ideology in the face of various irrelevant proclamations without analyzing its justifications critically.[37]

Primarily, it is erroneous to envisage such medical ethics which is driven by a sole necessity of "Preserving life" or "Doing no harm." Contrary to this, it involves numerous independent variables, objectives and interests. At times, the entirety of the situation may call for and require preservation of life or at times contrary to it. By and large, speeding up death is contrary to medical ethics and always against the patient's best interest, however, there do exist some exceptional cases wherein it's the only compassionate act that could be carried out in the best interest of patient.[38] Being a healing and compassionate endeavor, the practice of medicine, beyond the myopic goal of simply preserving life, is committed to further uphold human dignity and overall wellbeing of the public and patients.[39] Then the pertinent issue changes to; what should the therapeutic physician do to best soothe the convict being executed?

Now considering this reality, vagueness still exists as to whether the physician participation in judicial execution is contrary to the doctor's ethical obligations imposed by the Hippocratic Oath or the interest of the patient. As is categorically stated by AMA that a physicians being components of a profession which is fully committed to save life whenever there exists hope of doing so, hence must forbid themselves from participating in any kind of judicial execution.[40]However, the situation is entirely different in case of a judicial execution, wherein the patient (convict) is surely going to die; hence, there exists no such hope of life. After exhaustion of last appeal by the convict, an execution date is assigned by the Court and it's only after that physicians are supposed to act in the actual execution process.

With the exception of any intercession by the Supreme Court or the President, the death of the convict is an inevitable conclusion. For all practical purposes, convicted death row inmates are incurably ill patients; hence deserve to be treated in similar manner.[41] In this regard, physicians being the members of a compassionate endeavor must do their bit for the dying patient, like, supervise the condemned's last minutes of life for the sole purpose of maximizing his comfort and minimizing the suffering and complications until the end of his life. Physicians who dessert their patients in the final moments of life by failing to provide the desired comfort and care, are the ones who actually defy the professional ethical code; which is further antithetical to beneficent ideals of medical practice.

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[30] *Id* at 129.
[31] *Supra* note 15 at 64.
[32] *Ibid.*
[33] Stedman's med. Dictionary 822 (27th ed. 2000).
[34] *Ibid.*
[35] Hugo Adam Bedau, *The Death Penalty in America* (N.Y.: Oxford University Press, 1982).
[36] *Ibid*.
[37] Sherwin B. Nuland, "Physician-Assisted Suicide and Euthanasia in Practice" 342 *NEJM*583 2000
[38] *Id* at 21.
[39] Sherwin B. Nuland, "Physician-Assisted Suicide and Euthanasia in Practice" 342 *NEJM*583 2000.
[40] *Supra* note 19.
[41] *Supra* note 2, at 1348.

Physicians can not only ensure that the drugs are injected in the correct order but also prescribe and arrange a lethal pharmacological procedure which is in tune with the unique medical condition of the condemned, thus wiping out all possibilities of any unfortunate incident that could occur during the lethal injection procedure, like; the condemned may regain consciousness and undergo the unimaginable trauma of conscious asphyxiation.[42] The condemned will also not suffer the humiliation and pain as a result of multiple needle pricks by incompetent medical technicians as the physicians can insert the catheters correctly after locating the appropriate veins.[43] Physician participation negates any irreversible brain damage condition by closely monitoring the vital signs during the entire procedure, thereby guaranteeing death.

The patient-centered theory of medical ethics is consistent with the sole principle derived from the classic ethics barring the physician from participating in the judicial execution process which is as under: If the physician participation is against the wishes of the patient, he must not participate, whether voluntary or involuntary, in the death of that patient. Any principle other than this essentially promotes discrimination, irrationality and is total exit from the foundational tenets of medical ethics. It's not only the individual physician who should act independently and freely to choose to participate or not in the judicial execution but the condemned must also have a free will to request or refuse physician oversight.[44] However, the condemned patients must not be deprived of their last human right to choose and physicians from carrying out that wish merely because, it's based on same flawed conceptions of ethical practice or political beliefs, this is something that medical profession must take care of.

Moreover, past incidents have proven that in absence of compassionate physician oversight and under the supervision of less trained personnel; sometimes the condemned patients have to undergo an unimaginable trauma and unnecessary pain. Media reports have accounted for various occurrences wherein even basic medical procedures were botched by poorly trained execution technicians consequently resulting in unnecessary sufferings and excruciating pain for the condemned.[45]There seems to exist a great possibility that the procedures involved in the entire process are either more complicated than they appear or the pressure and stress of the situation leads to procedural errors. Despite the urgency and emergency of the case, as compared to any other category of medical profession, physicians possess more extensive training and experience to act under the pressure of imminent death. Undoubtly, the likelihood of protection of the condemned against unnecessary mishaps is increased by participation of skilled physician.[46]Moreover, the assertion that Personal Assistants or nurses could play this role, and it's inappropriate for a physician to do so, largely lacks any reasonable backing. Ironically, the question that arises is, are similar ethical constraints not applied to them.[47]

IV. iii. Policy Arguments against Physician Participation

One of the chief arguments of the challengers of physician participation in judicial execution process is that the public's trust in the medical profession will be eroded.[48] As per this argument, actions taken by the professional members that directly conflict with the central mission of the profession are deemed to undermine the credibility of the profession. The world will turn inside out, if the healing hand turns into the hand inflicting wound, as is stated by Mr. James Todd, M.D., as former AMA Executive Vice President.[49] If the line between healer and executioner is blurred, the patients will definitely question the loyalties and motives of their physicians.

Washington *v.* Glucksberg, a recent physician-assisted suicide case cited by the opponents of physician participation, wherein the United States Supreme Court categorically stated that protecting the ethics and integrity of the medical profession is one of the primary interests of the states.[50]Presumably, such an interest arises from the obligation of the state to promote the well-being and safety of its citizens. In furtherance of this interest, opponents of physician participation might argue that, explicit prohibition on physicians from getting involved in such actions like, participation in the judicial executions must be done by the legislatures; as such participation has the potential of jeopardizing the physician-public relationship.

Moreover, the opponents further argue that just to legitimize the non-beneficial objectives of the State, physicians should

[42] *Supra* note 18.
[43] Michael L. Radelet, Post-Furman Botched Executions, *available at*: http://www.deathpenaltyinfo.org/ botched.html (last visited Nov. 8, 2016)
[44] *Supra* note 85.
[45] Deborah W. Denno, "Getting to Death: Are Executions Constitutional?"82*ILR* 4281997.
[46] *Ibid.*
[47] *Supra* note 43.
[48] *Supra* note 2 at 37–38.
[49] *Supra* note 2 at 38.
[50] 521 U.S. 702, 731 (1997).

not prostitute medical skills and knowledge.[51]In addition, they also claim that pro-death penalty groups are altering the entire perception of the capital punishment because the medical profession has started lending its credibility to the execution process and various modes of judicial execution such as lethal injection are being medicalized. Consequently, the whole procedure becomes no less inhumane but surely more palatable. Few opponents go so far as to argue that such an involvement of the physicians in furtherance of the criminal justice system of the state is extremely evocative of, and similarly inappropriate as, the atrocities of the Holocaust were rationalized and covered up by the crucial role played by Nazi physicians.[52]

IV.iv. Policy Arguments for Physician Participation

An in-depth reflection on the merits of the preceding policy arguments casts serious doubts. The ever existing trust between the medical profession and the public is not at all undermined by the physician participation. Primarily, if properly conceived physician participation in judicial execution is not incompatible with his role as a compassionate healer, in contrary to an enthusiastic advocate of the preservation of life under all circumstance. Secondly, there exists no empirical data to back the conclusive argument that the physician participation in judicial execution is contrary to the public's best interest.

Even though, it was declared by the Glucksberg Court that one of the significant interests of the states is to protect the ethics and integrity of the medical profession. However, the Court stopped there and categorically recognized the view articulated by certain people claiming that some actions taken by the physicians like to assist suicide may damage the image of medical community and even harm the public.[53] Court made it further clear that it was not its own view and sated concrete reasons thereto.

The claim that public's trust in the medical profession is eroded and hence the physician participation in judicial execution is extremely harmful for the public is not only overstated but unsupported as well. The obvious question that arises here is that is the public's trust in the church eroded by the presence of a priest at a parishioner's execution. Definitely not. Nothing, neither about the church's nor priest's feelings regarding the capital punishment has been stated by the mere involvement of a priest in the judicial execution process. The distinction that the intention of the clergy's presence is not to contribute to the sentence but to minimize the pain and sufferings of the convict, is well understood and recognized by the public, thereby not wavering the public's trust in the said institution. Why can't be the same principle made applicable to the physicians as well irrespective of their direct involvement in the execution process?

Physicians participating in the judicial execution process do not blur the line existing between harming and healing, as they do not make any political statement about the capital punishment, like the clergy. Contrary to that, their involvement further emphasizes upon the unbiased compassionate side of the medical profession towards all human beings including even those convicted and sentenced to death. Their supervision of the execution process further ensures that medicalized executions are carried out as painlessly and humanely as possible, thereby complying with their ethical obligation as well.

Actually, by refusing to oversee the judicial execution process, physicians are more likely to shatter the public trust rather than by supervising it; and it can be logically argued against the opponent claims. Abandonment of a convict in his/her last crucial hours of life, by the physicians could further tarnish the public image of medical field. This view becomes more relevant when there already exists a doctor-patient relationship between the penitentiary staff physicians and the condemned. On the basis of human rights, Convicts too deserve competent and compassionate medical care.

As mentioned in the earlier part of this chapter, since ages medical enterprises have played a pivotal role in humanizing the methods of capital punishment and hence have been called upon to oversee the state ordered judicial executions.[54] As a result, there was intertwining of medicine and death penalty, however, consequently, we never witness any sort of deterioration in the doctor-public relation. On the same lines, physician participation in lethal injection is in furtherance of the comfort and compassion that is promised by the profession to the public irrespective of any discrimination. Court of appeals in California while deliberating upon this question categorically stated and concluded that there exists no credible evidence to believe that the trusting quality of the doctor-patient relationship is affected in any manner by such a conduct of the physicians.[55]

Moreover, the similarities drawn between the role of Nazi doctors in the Holocaust and the physicians in America are

[51] *Supra* note 2 at 1348

[52] Stuart Banner, *The Death Penalty*: *An American History* 24 (The New York press 2002)..

[53] *Ibid.*

[54] *Id* at 586.

[55] *Ibid*.

completely baseless, illogical and irrational, as the opponents miserably fail to understand the crucial distinction that exists between the two situations. Primary leading difference that exists is between the natures of the government systems, as American govt. system is democratic in nature contrary to the dictatorial political environment of Nazi Germany. Capital punishment is democratically chosen by the American citizens and its application is continuously supported by the majority citizens.[56] Carrying out the will of the people without undermining it, is the primary objective of the state. Secondly, under the American Constitution, an all round protection is guaranteed to the victims, like due process[57] and the right to a trial by an impartial jury[58] in fourteenth and sixth amendment respectively. However, no such safeguards were available to the holocaust victims. In United States, person to be executed is not arbitrarily chosen.[59]

On the same line, Indian citizens also democratically chose death penalty, and majority of the citizens continue to support it's use and Indian Constitution has Article 21 which is the counterpart of the procedural due process in America,[60] guaranteeing that, "No person shall be deprived of his life or personal liberty except according to procedure established by law." Here the procedure established by law means a procedure which is just, fair and reasonable and in furtherance of the principles of Natural Justice. Moreover, independence of the judiciary is the essential part of Indian Constitution and fair trial is a fundamental right which flows from article 21 of the Constitution. This principle can be said to have emerged from the principle of natural justice '*nemo judex in causa sua*' which means no one can be a judge in his own cause. Thus, a trial is said to be fair if it is done before an independent, impartial and a competent judge. In furtherance of this, Section 479 of the Code of Criminal Procedure explicitly prohibits any judge or magistrate to trial any case in which he is a party or personally interested and also prohibits to entertain any appeal from any order or judgment made by him.

Thirdly, it's already made clear in this chapter that the physician participation depends entirely upon the will of the convict. Physicians cannot on their own force their entry in the execution chambers. Since decision as to the participation of physician completely lies with the convict, any similarity drawn with the Nazi physician participation is fundamentally unfounded and exaggerated.

The democratic government system gives every right to the physicians to oppose death penalty itself, either on moral or philosophical grounds. Like, a person opposing capital punishment can support the legislation/bill and the candidate opposing the same.[61] Hence physicians who are against the application of capital punishment should oppose the same democratically, however, should not on professional grounds refuse to participate in the judicial execution. As doctors are healers and as long as capital punishment continues to exist in the statute books, it's their primary ethical duty to supervise such executions in order to make these as humane and painless as possible.

IV.v. Legal Arguments against Physician Participation

In some states medical practice acts may get violated by the participation of physicians in judicial execution process, is one of the chief legal arguments of the opponents. Various grounds are established for physicians by the medical practice acts; to be either disciplined or de-licensed. "Dishonorable" or "unprofessional" conduct is time and again listed as a ground for professional sanction by these acts.[62]Moreover, several medical practice acts incorporate actions, which are against the ethical norms existing within the profession, into their definitions of "unprofessional" or "dishonorable" conduct.[63] It's quite possible that various state medical boards may take disciplinary action against physicians for such judicial execution participation, as several medical lobbying groups have stood in opposition to such participation, including the AMA. Although, no such disciplinary action for defying these ethical norms[64] has been undertaken by the state boards till date, however, the possibility still remains.

IV.vi. Legal Arguments for Physician Participation

Despite the fact that physician participation is strictly prohibited by several medical practice acts, the capital punishment

[56] Alfred M. Freedman & Abraham L. Halpern, "The Erosion of Ethics and Morality in Medicine: Physician Participation in Legal Executions in the United States" 41 *NYLSLR* 169 1996.
[57] *Ibid*.
[58] *Id* at 32.
[59] David C. Baldus et al., "Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience" 74 *JCLC* 661 1983.
[60] *Maneka Gandhi* v. *Union of Indian (1978)2 S.C.R. 621 at 658.*
[61] *Id* at 660.
[62] *Furman* v. *Georgia*, 408 U.S. 238, 292-93 (1972)..
[63] *Ibid*.
[64] *Trop* v. *Dulles,* 356 U.S. 86, 100 (1958).

statutes of most states either permit or call for some sort of such physician participation.[65]It's worth mentioning that such physician participation is allowed by the federal execution protocol, however, the same is not called for by the protocol.[66] Apparently, it seems that there exists a latent legislative disagreement between the capital punishment statutes and medical practice acts. Established rules of interpretation and construction of statutes state and suggest that the medical practice acts should be superseded by the capital punishment statues for two reasons.

Firstly, the rule of "last in time" is usually followed by the courts in case of conflicting statutes.[67] In case of a conflict between two statutes, whether actual or perceived, the last enacted statute is allowed to override the one enacted earlier with respect to the conflicting provisions only, for the obvious and commonly accepted logic of being more accurate reflection and description of the prevailing will of people through the legislature.[68] The ruling should definitely be in favour of the death penalty statutes being more recent in time as compared to the medical practice acts.

Secondly, as per another rule of statute construction, the statute which is specific in nature (deals directly with the subject matter) must prevail over the general one (does not deal with the subject matter directly), as the specific statutes provide more accurate and clear guidelines for the appropriate course of legal action.[69] With regard to the present conflict, since the capital punishment statutes explicitly deal with the issue by directly addressing the same, which the medical practice acts fail to do, hence the capital punishment statutes are bound to prevail over their corresponding medical acts.

Moreover, physician participation in judicial executions is possibly required by the American Constitution. Eighth Amendment to the Constitution has put an absolute bar on granting excessive bail, excessive imposition of fine and ultimately on inflicting cruel and unusual punishments.[70] The Supreme Court of America, in 1972, categorically declared and held certain executions unconstitutional on the basis of involved procedures and processes constituting unusual and cruel punishments.[71] On the other hand, in 1976, in Florida, Georgia, and Texas, in a series of cases, the Court upheld the imposition of capital punishment as constitutional, because these states had incorporated more humane modes of execution as contrary to the precious ones which comprised of cruel and unusual procedures.[72] Now the obvious question arises, what constitutes unusual and cruel punishment? Is it the absence of supervision by physician that makes the execution method cruel and unusual?

Specifically in this context, for the Eighth Amendment purposes, the Court in Trop *v.* Dulles noted that what constitutes unusual and cruel punishment is entirely based on the ever evolving standards of human decency which ultimately mark the progress of a maturing society.[73] The Court further emphasized that punishments which cause unnecessary suffering and pain or cause needless torture (mental/physical) or slow/prolonged death are unacceptable and excessive in nature.[74]

Bearing in mind the fact that most of the capital punishment statutes either allow or call for the presence and supervision of physicians along with the wide wave to consider lethal injection as the humane mode of judicial execution, in this backdrop the ever evolving standards of human decency will now necessitate a physician to oversee the entire process of judicial execution through lethal injection.[75]With the evolution and humanization of capital punishment, lethal injection supervised by physician is considered to be the most humane and hence acceptable method of execution. It has gradually become the standard of decency. Prohibition of physician participation will surely lower the standard and consequently constitute cruel and unusual punishment as explained in Trop. Moreover, as mentioned previously, States have already learnt bitter lessons by carrying out intravenous lethal injection executions in absence of well trained and skilled physicians often leading to unfortunate and unnecessary suffering and pain; and intermittently to lingering death.[76]

Taken as a whole, key ethical, policy and legal arguments supporting and opposing the participation of trained physicians in

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[65] *Weems* v. *United States*, 217 U.S. 349 (1910).
[66] *Id* at 46.
[67] *Louisiana ex rel. Francis* v. *Resweber*, 329 U.S. 459, 460 (1947).
[68] *Supra* note 11.
[69] *Supra* note 40.
[70] *Ibid*.
[71] *Furman* v. *Georgia*, 408 U.S. 238 (1972)
[72] *Gregg* v. *Georgia*, 428 U.S. 153 (1976)
[73] 356 U.S. 86, 101 (1958).
[74] *In re Kemmler*, 136 U.S. 436, 447 (1890).
[75] *McCleskey* v. *Kemp*, 481 U.S. 279, 300 (1987)
[76] *Supra* note 33.

intravenous lethal injection judicial executions; point towards a clear single conclusion that deliberations favoring the participation strongly overshadow the ones against it. By now, we are clear as to how the policy and ethical arguments are wrongly based on mistaken belief as to the ethical role of physicians and the kind of mutual trust between the medical profession and public at large. In fact, physicians will be guilty of gross professional misconduct by refusing to oversee the executions and taking care of the condemned prisoners in their last crucial hours, thereby neglecting their ethical responsibility to minimize the suffering and maximize the comfort. Moreover, the legal questions raised by the medical practice acts are adequately invalidated by potential deliberations of Eighth Amendment and the legal rules of statutory construction.

V. Conclusion suggestions

Subsequent to a thorough analysis as to the likelihood of suffering and pain that is caused to the condemned person in several modes of judicial execution of capital punishment like intravenous lethal injection, hanging, shooting, stoning, electrocution, beheading, gassing, etc., the scholar reasonably reaches to the conclusion that all the judicial modes discussed above have the potential to cause severe pain and suffering in one form or the other, with only intravenous lethal injection as a possible exception. Apparently, the usual signs of intense pain seem absent, generally because these are being masked by the kind of procedures involved or because the physical restraint of the convict does not let him/her to demonstrate the same. Hence, lack of adequate evidence due to absence of signs of intense suffering and pain, leads to indecisiveness as to it's occurrence. Nevertheless, evidence offered by the science of physiology and derived from comparisons with emergency and accidental medicine, makes it clear that almost all the procedures involved in judicial executions have the potential to cause severe pain and suffering to the condemned. However, in spite of the evidence shown and discussed above, it's extensively emphasized that processes involved in judicial executions are painless and humane,[77] even though no evidence proving this has been published till date.

On the other hand, some social conventions suggest more intuitive and polemical responses as compared to death penalty. The involuntary annihilation of human life is final and permanent. And an automatic massive opposition exists as to healer's participation. However, a more probing analysis is required for a theory of medical ethics which is patient-centered.

Physicians need to fulfill their role as caregivers by actively participating in the implementation and development of lethal injection as the most humane mode of judicial execution. Additionally, prevailing ambiguity in medical statues as to the physician participation must be removed by the competent legislatures, thereby, explicitly allowing physicians to supervise the whole execution procedure. Such rulings will not only benefit the convicts but the society at large. Supervision of judicial executions by competent medical professionals will not only ensure that the botched executions are minimized as much as possible but also protect the human rights of dyeing convicts by maintaining the standards of decency.

Declaration

The author hereby declares that there is absence of any conflict of interest in this work.

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