

LEGAL ANALYSIS AND COMMENTARY FROM JUSTIA

The Dreadful Failure of Lethal Injection

23 MAR 2021 | AUSTIN SARAT



POSTED IN: CRIMINAL PROCEDURE

Editor's Note: This column is the product of a research collaboration with five Amherst College students, Mattea Denny, Nicolas Graber-Mitchell, Greene Ko, Rose Mroczka, and Lauren Pelosi.

America's death penalty continues to fall out of favor, a well-known fact. When the year started, eight executions **were scheduled** for February and March in five different states. But all of them are now on hold, and two of the three executions that were set for April already have been halted.

While advocacy for the end of the death penalty has played some role, it is the decomposition of the lethal injection paradigm that has truly driven down execution numbers. We have now seen a decade of chaos and experimentation as death penalty jurisdictions tried to find reliable sources of drugs to carry out executions. States rolled out new drugs, but things did not go smoothly. The number of mishaps associated with lethal injection increased substantially.

From 2010-2020, an already problematic method of execution became even more unreliable.

From its earliest adoption by the state of Oklahoma in 1999 through 2009, **lethal injection meant one thing, death by a standard three-drug cocktail**: sodium thiopental, an “ultrashort-acting barbiturate” to anesthetize the inmate; pancuronium bromide, a “chemical paralytic” to asphyxiate the inmate; and potassium chloride, to stop the heart. By 2009, every death penalty state used this same drug combination.

A decade later, none **was employing it**. Instead, they were executing people with a wide variety of novel drug combinations.

Ohio was the **first state to abandon the traditional three-drug cocktail**. In its place, it chose a single large dose of sodium thiopental. Thirteen other states quickly followed that example. But, just as Ohio’s one-drug protocol began to spread, states encountered new difficulties in obtaining that drug.

Bowing to pressure from abolitionist groups, many drug manufacturers decided **to limit** the distribution of sodium thiopental. Following these decisions, states turned to drugs like pentobarbital. In fact, in 2011 alone, thirteen states held pentobarbital executions.

However, **the switch to pentobarbital did not alleviate supply pressures**. Soon other drugs, midazolam, etomidate, rocuronium bromide, potassium acetate, diazepam, fentanyl, cisatracurium besylate, and potassium chloride, were being tried. By the end of 2020, at least ten distinct drug protocols were used in American executions.

Today, **lethal injection no longer means one thing**. After many years of experimentation, all that remains of the original paradigm is a needle in the inmate's arm, which might deliver any one or any combination of several drugs, and a declaration of death.

My research collaborators and I have examined every American execution during the last decade. We found that as the paradigm decomposed, the number of problems encountered during executions by lethal injection multiplied.

Of all the techniques used to put people to death in the United States during the 20th and into the 21st century, by 2010 lethal injection **already had shown itself to be the most problematic**. Since then things have only gotten worse

First, during the last decade, in more than eight percent of lethal injections, executioners struggled to find suitable veins to set IVs.

One of most notorious examples of these difficulties occurred in the **2014 execution of Clayton Lockett**. Once Lockett had been strapped to a gurney, a paramedic tried repeatedly and failed to place an intravenous line in his arms or feet. After three attempts, she asked a doctor on hand—who was ostensibly there only to check for consciousness and pronounce the time of death—to assist her. Fifty-one minutes after starting to place the IV, the two

successfully placed the IV line in Lockett's groin in a painful and invasive procedure.

We also found that the lethal injection process itself does not always produce painless death. In almost five percent of the last decade's lethal injections, inmates gave some verbal indication that they were experiencing pain during their execution.

One such inmate was Anthony Shore, who was **executed in Texas** on January 18, 2018. Soon after his execution by pentobarbital began, Shore cried, "Ohh weeee, I can feel that it does burn. Burning!" He then shook on the gurney and struggled to breathe, before dying 13 minutes later.

The burning sensation that Shore reported occurs with surprising frequency in lethal injections. This particular kind of mishap may result from the fact that states recently have increased the amount of the drugs that they inject into inmates.

For example, **Virginia revised its drug protocol** to double the dose of potassium chloride it uses as its final drug, from 120 mEq to 240 mEq. Similarly, Oklahoma's execution protocol has changed: it used 100 mg of midazolam during the Lockett execution, but soon after, the state **increased the amount five-fold**. Such massive doses push lethal injection far outside the realm of standard pharmaceutical practice.

In another sign of lethal injection's inhumanity, a September 2020 **NPR investigation** found signs of pulmonary edema—fluid filling the lungs—in 84 percent of the 216 post-lethal injection autopsies it reviewed. Inmates' lungs had filled with fluid while they continued to breathe, which would cause them to feel as if they were drowning and suffocating.

As states switched drug cocktails, putting someone to death by lethal injection became a more extended affair, providing another possible form of harm to the dying inmate. The average time from the first administration of lethal drugs to death was just over nine minutes in 2010. A decade later, the average time was over 20 minutes.

The cause of that slowdown is the drugs now in use. Sedative combination protocols, involving midazolam, etomidate, or diazepam in combination with other drugs, which were commonly used in the latter half of the last decade, take more than twice as long to kill as barbiturate combination protocols (involving sodium thiopental, pancuronium bromide, and potassium chloride or pentobarbital, rocuronium bromide, and potassium chloride) which were predominately used previously.

In total, our research suggests that from 2010-2020, 3.7 percent of barbiturate combination executions were botched in comparison with more than 22 percent of sedative combination executions.

The recent history of lethal injection **echoes the longer history of the death penalty**. In earlier periods, when states encountered problems with previous methods of execution, they first attempted to address them by tinkering with the existing method. When tinkering failed, they adopted allegedly more humane execution methods. When they ran into difficulty with the new methods, state actors often scrambled to cover up those problems by increasing the secrecy of executions. Death penalty states have followed this same playbook during the era of lethal injection.

Over the last decade, new drugs and drug cocktails may have allowed the machinery of death to keep running. New procedures may have given the

increasingly jerry-rigged lethal injection process a veneer of legitimacy. But none of those changes **has resolved its fate or repaired its vexing problems.**

By now we should have learned that little can be done to change lethal injection's status as America's least reliable and most problematic death penalty method.

POSTED IN: **CRIMINAL PROCEDURE**

TAGS: **DEATH PENALTY, LETHAL INJECTION**

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