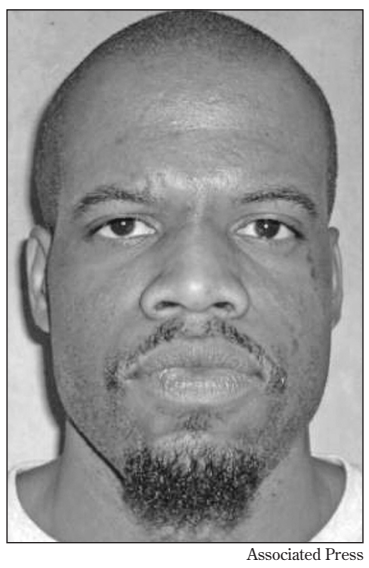
Why Oklahoma matters in California

By Elisabeth Semel



Associated Press

Clayton Lockett in a photo the Oklahoma Department of Corrections, June 29, 2011.

Associated Press

The gurney in the execution chamber at the Oklahoma State Penitentiary is pictured in McAlester, Okla., April 15, 2008.

Those who are chomping at the bit for California to resume executions would do well to pay heed not only to last week's debacle in Oklahoma but also to the botched executions that took place in other states over the past few months. They would be wise to recall U.S. District Judge Jeremy Fogel's conclusion in December 2006, that there were "substantial questions" about whether six of the 11 men executed at San Quentin were conscious when they were injected with the paralytic and heart-stopping drugs.

Last week, the state of Oklahoma rushed to carry out an execution it was in no way prepared to perform, despite vigorous opposition by Clayton Lockett's lawyers about the secrecy surrounding the procedures and the use of an untested combination of drugs. The result of the state's experiment was a failed and gruesome execution. Mr. Lockett died under circumstances that remain unclear.

It does appear that, long after Mr. Lockett was supposed to be unconscious, execution team members recognized that he was not, and that the IV was not delivering the drugs into Mr. Lockett's circulatory system. They then closed the curtains to the execution chamber.

What happened in Oklahoma has particular relevance for California because the immediate cause of the horrific botch may well have been incompetent administration of the protocol. Newly released information, including a letter from the director of the Oklahoma Department of Corrections, reveals that a doctor established IV access in Mr. Lockett's femoral vein in his groin, because the phlebotomist was unable to locate a usable peripheral vein. It appears, though, that this femoral IV was not properly inserted — a procedure that requires specialized medical expertise — and the three drugs were injected directly into Mr. Lockett's flesh, not into his veins. We may never know whether, as happened in Dennis McGuire's botched execution in Ohio, Mr. Lockett's agonizing death was also brought about by the use of chemicals from unknown sources. But it seems clear that, as in California, the personnel on hand to execute Mr. Lockett were not capable of doing so in a manner that complies with the Constitution.

Some proponents of resuming executions in California are not just in favor of speed, they want more secrecy. They support a ballot initiative that would exempt the California Department of Corrections and Rehabilitation (CDCR) from the public rulemaking requirements of the state's Administrative Procedures Act (APA), giving the CDCR unfettered discretion to design and implement every aspect of the execution process with no public oversight. If we take away nothing else from the execution of Clayton Lockett and the extensive litigation in state and federal courts in California regarding CDCR's lethal injection protocols, it should be that secrecy — whether about the source and particulars of the drugs, the execution procedures, or the qualifications and training of the execution team or execution itself — amplifies the likelihood of disastrous outcomes.

A recap of California's lethal injection execution history demonstrates that the impetus for speed and secrecy is wrongheaded. Currently, the state does not have an execution protocol. In December of 2006, a federal district court, after taking extensive evidence, concluded that the CDCR's three-drug protocol and the department's conduct during executions demonstrated "major flaws," including "unreliable screening," "lack of meaningful training, supervision, and oversight of the execution team," poor record keeping, and the execution team's "improper mixing, preparation, and administration" of the first-drug in the three-drug protocol. The federal judge criticized both "the lack of reliability and transparency" in the way California carried out executions.

It then fell to the CDCR to produce a new execution protocol, which it did in 2007. That set of procedures, however, was invalidated by a state court of appeal last year. The appellate court agreed with a trial judge's findings that the department "substantially failed to comply" with the APA, including the CDCR's critical failure to respond to public comments that proposed reasonable alternatives to the three-drug protocol and their own expert's recommendation of a single-drug procedure. The opinion debunks the notion that the department's omissions were trivial. Indeed, a court may not invalidate an agency's regulation based on "technical" violations of the APA. The court of appeal emphasized that the purpose of the APA is to ensure "meaningful public participation in the rulemaking process," which it found the department's conduct had "undermined."

Since 2006, when California last carried out an execution, the anesthetic thiopental, which every state used in lethal injection executions, has become unavailable. The same is now true for FDA-approved pentobarbital, which initially became the substitute drug. Contrary to accusations by some, the unavailability of FDA-approved anesthetic drugs is not the result of what some have called intimidation of pharmaceutical companies. Rather, these corporations do not want their products used in executions and have been asking states to cease doing so for over a decade. The states ignored them. Eventually, the companies took matters into their own hands, halting the production of some drugs and altering their distribution systems so that corrections departments could not purchase others.

As a result, departments of corrections have been buying made-to-order pentobarbital from compounding pharmacies whose drugs are not FDA-approved. Under state law, a compounded drug requires a physician's prescription for a specific patient. Some states, in violation of the law, have obtained their compounded drugs without a prescription or used a prescription written by a doctor, not for treatment, but for the "patient's" execution. Other corrections departments have turned to new drugs, including midazolam and hydromorphone. Not surprisingly, several states, such as Georgia, Louisiana and Missouri, have adopted new secrecy regulations or laws to prevent defense lawyers and courts from scrutinizing the drugs and the suppliers. Mr. Lockett's execution, for example, was carried out after the state supreme court, under intense and improper political pressure from the governor and the Oklahoma House of Representatives, dismissed a stay of execution that would have required a review of the secrecy law and Mr. Lockett's claims.

There are sound reasons why California has a long-standing statutory tradition of open government and why, in 2004, more than 80 percent of the electorate approved the "Sunshine Amendment" to the state constitution, declaring that the "people have the right of access to information concerning the conduct of the people's business." The APA is also vital to governmental accountability, ensuring that the public has a voice in reviewing the means by which California carries out its most severe penalty.

It bears mention that in November 2012, California voters came within four percentage points of repealing the death penalty. Though capital punishment remains the law in this state, the closeness of the election evidences a widespread dissatisfaction with capital punishment to which the speed-up initiative's proponents appear oblivious.

Finally, criticisms of lethal injection as "medicalized" executions fail to take into account that whatever method the government adopts, the execution must comport with the Eighth Amendment. If the history of legal challenges to California's lethal injection protocols left any doubts about the need for transparency and accountability in all aspects of executions, last week's events in Oklahoma should obliterate them.

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Executions could resume with leadership

By Kent S. Scheidegger

The vast majority of the American people believe the death penalty is the right and just punishment for the worst murderers. When the question is asked correctly, polls regularly show support for the death penalty swamping opposition by margins as high as two or three to one, even in very liberal states such as Connecticut and California.

At the same time, most Americans do not believe that the death penalty should be carried out in a way that causes extreme pain or even carries a substantial risk of extreme pain. The history of methods of execution in this country is a history of changes designed to reduce or even eliminate pain in execution. Lethal injection was adopted to replace the gas chamber and electric chair after attorneys for the condemned murderers attacked those methods as needlessly painful, arguing that all the experts agreed that lethal injection was so much better. Justice John Paul Stevens made this the basis of his dissent in the case involving California's first execution of the post-1976 era, Robert Alton Harris. See *Gomez v. District Court*, 503 U.S. 563 (1992).

There is no mystery on how to bring about a painless death. Veterinarians do it every day. A single overdose of pentobarbital produces rapid sleep followed by painless death.

In California, there are 15 murderers whose well-deserved sentences have been thoroughly reviewed and whose executions are being held up solely by the lethal injection issue. They include Tiequon Cox, who slaughtered an entire family; Albert Brown, who kidnapped, raped and murdered a 15-year-old girl and then called her mother to taunt her; and Michael Morales, who ambushed a 17-year-old girl from behind, strangled her with a belt, bashed her head with a hammer, raped her, and then stabbed her to death. The families of these victims have already waited for decades for justice, and they are forced to wait longer while California dithers about a problem with a well-known and readily available solution.

> The Legislature could easily exempt execution protocols from the burdensome Administrative Procedure Act and provide the necessary transparency in a more streamlined manner.

When lethal injection was first used in the U.S., all states using it adopted a three-drug method. A powerful dose of a barbiturate was followed by a paralytic and then potassium chloride to stop the heart. This method is virtually painless when properly administered, but concerns that the barbiturate may not be properly administered in all cases before the painful drugs are administered produced a temporary halt in executions until the U.S. Supreme Court rejected the argument in *Baze v. Rees*, 553 U.S. 35 (2008).

Beginning in 2009, the state of Ohio led the way in improving lethal injection. Ohio replaced the three-drug method with a single overdose of a barbiturate and replaced the sodium thiopental previously used with pentobarbital. This method poses nearly zero risk of significant pain, and executions carried out with this method have been routinely carried out without significant incident.

Pentobarbital is manufactured in the U.S., eliminating the problems with importation of drugs, but at the time it started to be used for lethal injections the manufacturer was a European company, Lundbeck. Under pressure from Europe, Lundbeck imposed "end user agreements" on its distributors requiring them to agree not to resell to state corrections departments for use in lethal injection. Lundbeck has since sold the facility, but it required the buyer to maintain this policy.

The problem could be easily solved if the persons responsible would demonstrate the necessary leadership. California's Department of Corrections and Rehabilitation can adopt a barbiturate-only method as other states have done and as the federal judge hearing the case approved eight years ago. The Legislature could easily exempt execution protocols from the burdensome Administrative Procedure Act and provide the necessary transparency in a more streamlined manner. Bills to do this have been introduced over the last several years and summarily killed in committee. Resale restrictions on pentobarbital should be outlawed as an illegal restraint of trade. The U.S. should not put up with European pressure telling us how to punish our criminals.

Further delay of justice for a problem so easily solved is a travesty. It is past time for our leaders to show some leadership and fix it.

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