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The Nation

Concerns About Pain Put Lethal Injection on Trial

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A flurry of litigation challenging the constitutionality of lethal injection has placed a spotlight on growing evidence that condemned inmates may not be properly anesthetized and therefore experience excruciating pain during executions.

Although it has become the predominant method of execution around the country, lethal injection was initially adopted three decades ago without scientific or medical studies, on the recommendation of an Oklahoma state legislator who wanted a more humane procedure.

Since then, objections have arisen in many of the 37 other states that adapted Oklahoma's procedures, including California, where a federal judge has scheduled a two-day hearing next week on altering or even eliminating the state's lethal injection methods.

So far this year, executions have been delayed in California, Florida, Maryland and Missouri -- and in three federal cases -- because of litigation challenging the use of lethal injections. Cases from Kentucky, Louisiana and Tennessee are pending, and unsuccessful challenges have been waged in Indiana, North Carolina, Ohio, Oklahoma and Texas.

Although it offends some death penalty proponents that the state is obliged to limit inmates' suffering during execution, the Supreme Court in its 1976 decision reinstating the death penalty cautioned that officials must avoid "the unnecessary and wanton infliction of pain." The problem with the three-stage lethal injection drug procedure is that it may mask rather than prevent pain, critics contend.

The first drug administered, the sedative sodium thiopental, is meant to deaden pain, the second, a paralytic, to immobilize the prisoner and the third, potassium chloride, to stop the heart.

However, sedative dosages, especially as administered by untrained prison personnel, have been found inadequate to anesthetize inmates, according to testimony in some of the cases. And the paralytic prevents them from expressing the intense pain of the heart-stopping chemical, physicians say.

In a study to be released today, Human Rights Watch reported on more than a dozen executions in which inmates appeared to suffer.

For example, in North Carolina in 2003, a prisoner started to convulse, sat up and gagged during his execution. He appeared to be choking and his arms seemed to struggle under the sheet, the report said.

In a 2001 execution, again in North Carolina, an inmate appeared to lose consciousness and then began convulsing and opened his eyes, the report said. A witness said the inmate tried to catch his breath as his chest heaved.

Earlier this year, lawyers for a condemned inmate in California presented evidence from six recent California executions in which the inmates were still breathing minutes after receiving massive doses of anesthetic, a possible sign that the drug was not working as intended.

The legal assault on lethal injection has been building for several years. A Human Rights Watch report, entitled "So Long as They Die," highlights admissions from prison officials in several states that no medical professionals were involved in developing their lethal injection procedures and that prison personnel are simply not versed in administering drugs.

For example, when asked in a 2003 court hearing about what considerations went into the development of Louisiana's lethal injection protocol, Annette Viator, former chief counsel for the state penitentiary, said, "The only thing that mattered was that the guy ended up dead." Asked how the state chose the chemicals it used, Donald Courts, the pharmacy director at the prison, said, "it wasn't a medical decision. It was based on the other states that had all used a similar dose."

Similarly, a judge in Kentucky noted last year that officials there "did not conduct any independent scientific or medical studies or consult any medical professionals concerning the drugs and dosage amounts to be injected into the condemned. Kentucky appears to be no different from any other state."

Dr. Jay Chapman, the former Oklahoma medical examiner who played a key role in developing the original lethal injection procedure, told a Human Rights Watch researcher, "I never knew we would have complete idiots injecting these drugs. Which we seem to have."

Critics say the only way to ensure the sedative dosage is adequate is to have trained medical personnel on hand to administer the drug and monitor its levels. That, however, would violate the canons of medical ethics forbidding doctors, nurses and other medical professionals from participating in a killing.

"There are smarter drug cocktails to use where you have less concern [about suffering], but the problem is compounded by people who have no idea what they are doing," said Dr. Leonidas Koniaris, a University of Miami physician who has done research on lethal injections.

As an alternative, critics have suggested shifting to an overdose of a single sedative. Dr. Mark Dershwitz, a professor of anesthesiology at the University of Massachusetts Medical Center, who has testified on behalf of several states defending their lethal injection procedures,

told Human Rights Watch that if a large dose of pentobarbital were used it certainly would kill an inmate but that it might take "more than half an hour. Everyone involved will have to wait a very long time for the heart to stop."

Dershwitz said no state official had decided to switch, even after hearing that pentobarbital would be less painful. Asked why, the report's coauthors Jamie Fellner and Sarah Tofte quoted Dershwitz as follows: "It's not about the prisoner. It's about public policy. It's about the audience [at the execution] and prison personnel who have to carry out the execution. It would be hard for everybody to have to sit and wait for the EKG activity to cease so they can declare the prisoner dead."

U.S. District Judge Jeremy Fogel will conduct a two-day hearing on California's procedure beginning May 2. In late February, California officials delayed Michael A. Morales' execution after saying that they could not get a licensed medical professional to inject the lethal chemicals as Fogel had ordered. Morales is on death row for the 1981 murder of a Lodi high school student.

No court has found lethal injection unconstitutional. The U.S. Supreme Court has permitted some delays, but allowed other lethal injection executions to go forward, including that of Willie Brown Jr. in North Carolina on Friday.

A federal judge initially blocked Brown's execution for the 1983 slaying of a convenience store clerk. But he relented after prison officials agreed to use a bispectral index monitor, a device the state said could monitor Brown's level of consciousness.

Defense anesthesiology experts warned that the machine was useless in the absence of trained professionals who could intervene if Brown awoke, but the judge disagreed.

Dr. Mark Heath, an assistant professor of clinical anesthesiology at Columbia University in New York, said in a declaration submitted in the Morales case that California's "selection of potassium chloride to cause cardiac arrest needlessly increases the risk that a prisoner will experience excruciating pain prior to execution."

Last October, the American Society of Anesthesiologists issued an advisory warning that the risk of experiencing awareness during surgery increases when the patient has a history of substance abuse and when the anesthesia is administered intravenously, an action noted in the Human Rights Watch report.

Anesthesia is administered intravenously during executions, and many condemned inmates have histories of drug use. Surgery patients who received neuromuscular blocking agents with inadequate anesthesia have told of extreme suffering while being unable to alert the anesthesiologist, according to court testimony in a lethal injection case in Louisiana.

In a brief submitted to the U.S. Supreme Court last week, Tennessee physicians wrote that "achieving and maintaining an appropriate anesthetic depth is an extraordinarily complex endeavor that requires specialized training, procedures and equipment."

Physicians already are involved in executions, but mostly on the periphery. In California, a physician must fit a heart monitor on the condemned prisoner and check its readings, according to Human Rights Watch. Twenty-eight states require a physician to determine or pronounce death during an execution, the report said.

Attorneys for the state have steadfastly maintained that the amount of the sedative sodium thiopental administered by death row personnel at San Quentin State Prison will quickly render an inmate unconscious and that the inmate will remain in that condition while the other drugs are delivered.

Since Morales' execution was stayed in late February, California has changed its protocol slightly. Attorneys for the state maintain that they are acting well within the bounds of the law.

But Heath said the state's procedures don't even meet guidelines set by the American Veterinary Medical Assn. for the euthanasia of animals.

At least 30 states ban the use of paralytics in animal euthanasia, and the veterinary association says using a neuromuscular blocking drug with an anesthetic is unacceptable for animals.

"They are using '70s technology for animals 35 years later in people, and the vets have moved away from those protocols," Koniaris said.

Dr. Willie Reed, one of the authors of a veterinary association study on euthanasia, said Michigan State University's veterinary clinic euthanizes animals with pentobarbital, a long-lasting sedative. The dosage is adjusted for the weight of the animal.

Doctors say the drug would probably work just as effectively in humans, but medical ethics prevent them from proposing a means of execution, even if it is more humane than the process currently used.

Contrary to the position taken by Dershwitz, the anesthesiology professor, some physicians and veterinarians say pentobarbital's effects are rapid.

"The animal dies almost instantaneously, within a few seconds of the injection, probably less than a minute," said Reed, director of a veterinary research center at the university. "It is used on cattle every week."