



## USA: ANOTHER KILLING IN A LONG-SINCE FAILED EXPERIMENT

*The penalty of death differs from all other forms of criminal punishment, not in degree, but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity*

Justice Byron White, US Supreme Court, *Furman v. Georgia*, 29 June 1972

The State of Ohio has carried out the latest killing in the USA's experiment within an experiment. The wider experiment is the death penalty system. The sub-experiment is the actual killing method employed.

As an abolitionist organization, Amnesty International unconditionally opposes resort to the death penalty by any state anywhere, regardless of how that state chooses to end the life of the prisoner.

Since resuming judicial killing 37 years ago on 17 January 1977, US executioners have used gas, hanging, electricity, firing squad, and lethal injection to kill 1,362 men and women. Lethal injection was used in 87 per cent of these executions, but in recent years states have run into [serious problems](#) with procuring drugs to use for this method of state-sanctioned killing.

Three days before Ohio state employees strapped down death row prisoner Dennis McGuire to kill him on the morning of 16 January 2014, a federal judge wrote:

“There is absolutely no question that Ohio's current protocol presents an experiment in lethal injection processes. The science involved, the new mix of drugs employed at doses based on theory but understandably lacking actual application in studies, and the unpredictable nature of human response make today's inquiry at best a contest of probabilities. To pretend otherwise, or that either of the experts or this Court truly knows what the outcome of that experiment will be, would disingenuous”.

Denying a stay of execution, Judge Gregory Frost said that the evidence before him had failed to prove that there was “a substantial risk that McGuire will experience severe pain” during execution, which would be conducted using two drugs, the sedative midazolam and the painkiller hydromorphone. Judge Frost added that “this is not to say that the Court is convinced that the execution will be pain free or even complication free. There is always a possibility of human error or unfortunate misadventure”.

According to those who witnessed the subsequent execution, Dennis McGuire appeared to gasp several times and snort loudly after the lethal injection began and it was more than 20 minutes before he was pronounced dead. His lawyer described the episode as “a failed, agonizing experiment”.

This would be [far from the first time](#) that there has been “an unfortunate misadventure” during the killing of a condemned prisoner in the USA, whether by electrocution, asphyxiation, or lethal injection using the “traditional” three-drug protocol.

What should not get lost in all the attention on what happens in the execution chamber is that the death penalty itself is a deeply flawed exercise in state power, irrevocable in outcome, inconsistent and discriminatory in application. The cruel and brutalizing effects of the death penalty do not begin with

execution. Holding someone under a threat of death – for years or even decades – can hardly be described as the conduct of a state adopting a progressive approach to criminal justice or human rights in the 21<sup>st</sup> century.

More than a century ago, the US Supreme Court recognized that “when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it.” In 1972, a Supreme Court Justice wrote: “We know that mental pain is an inseparable part of our practice of punishing criminals by death, for the prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death.” Dennis McGuire had been on death row for almost two decades before he was killed.

“No paradox is more persistent”, wrote the late US historian Arthur Schlesinger in 1983, “than the historic tension in the American soul between an addiction to experiment and a susceptibility to ideology”. On the one hand, Schlesinger suggested, “Americans are famous for being a practical people, preferring fact to theory, finding the meaning of propositions in results, regarding trial and error, not deductive logic, as the path to truth”. On the other hand, he continued, “they also show a recurrent vulnerability to spacious generalities”.

The USA's attachment to the death penalty carries [echoes](#) of Schlesinger's paradox. The facts on the ground say abolish, but an idealised notion of capital punishment says continue. Today, the USA's reluctance to let go of judicial killing sets it apart from a clear majority of countries.

Surely, however, with arbitrariness, discrimination, error and cruelty among its hallmarks, the USA's death penalty experiment has failed, to use the words of another US Supreme Court Justice, Harry Blackmun, written almost exactly 20 years ago. In his now famous February 1994 dissent, Justice Blackmun vowed that after two decades of struggling to fashion a capital justice system that would be consistent, fair and error-free, he would no longer “tinker with the machinery of death”. No combination of rules or regulations, he wrote, could ever save capital punishment from its inherent flaws.

Nevertheless, the USA has continued with its dead-end experiment, refusing to give up what Justice Blackmun suggested was the “delusional” notion that the death penalty can be made to work.

The death penalty assumes the absolute perfection of the criminal justice system, and the absolute imperfection of the people it condemns to death. It assumes that human beings can decide – free from error or inequity – which of their fellow human beings convicted of certain crimes should live and which should die. It assumes that even if discrimination has not yet been eradicated in society, it can be overcome in the course of capital justice. Finally, whatever its record in other policy areas, the state is somehow assumed to be imbued with infallibility when it turns its hand to executions.

If these assumptions are *not* made, and the imperfection of the justice system and the fallibility of government are accepted, then those advocating the death penalty must also accept the inevitability of executing the wrongfully convicted or the unfairly sentenced. One cannot have it both ways. The method chosen to kill the prisoner has no impact on this equation. The myth of capital justice that is “humane” or “fair” is laid bare whether the prisoner is hanged, shot, gassed, electrocuted or injected with this, that or the other chemical, or a combination of all three.

Even as executions continue, the USA assures the rest of the world of its commitment to human rights. In 2010, for example, the Obama administration [told](#) the United Nations Human Rights Council that:

“The story of the United States of America is one guided by universal values shared the world over – that all are created equal and endowed with inalienable rights. In the United States, these values have grounded our institutions...to come ever closer to realizing these ideals... The American experiment is a human experiment; the values on which it is based, including a commitment to human rights, are clearly engrained in our own national conscience, but they are also universal.”

Yet the USA remains way behind the global abolitionist curve. Some 140 countries have abolished the death penalty in law or practice. What the USA should be asking itself is, “why haven't we?”