

The Death Penalty in Oklahoma: Nitrogen Gas as a Means of Execution

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Nitrogen is often associated with soils and crop-talk. "If nitrogen taken up early by the crop is sufficient for yield," goes a piece from the Sidney Herald (MT) from May 5, 2012, "then it will get redistributed to help produce grain protein. In high yielding years, the in-season nitrogen addition could be decreased or omitted, resulting in substantial fertilizer cost savings."

Riveting stuff. Take-up rates; stem-elongation; crop yields; fertilization. Not, and here, the step becomes a leap, one of execution. Nitrogen, in the customary sense, supposedly encourages yields. But Oklahoma took a rather different pathway in effectively re-introducing the gas chamber. The murderous protagonist here, instead of previously used hydrogen cyanide, is nitrogen.

This would involve sealing the victim in an airtight chamber filled with nitrogen gas. In the absence of oxygen, nitrogen goes to work, producing a range of effects. These might, for instance, entail the "raptures of the deep," a term used in the context of deep-sea divers exposed to an excess of nitrogen (*Slate*, May 22, 2014). There might even be a sensation of euphoria.

Proponents for nitrogen's use, in speaking on behalf of the putative condemned prisoner, claim that the person would suffer nothing abnormal, would endure no pain, and would not, strictly speaking, suffocate, given that carbon dioxide build-up, rather than an absence of oxygen, is the culprit at hand.

Much of this was put forth when cyanide gas fell foul of the Eight Amendment in 1994. Oakland technology consultant Stuart Creque was the dark knight of the moment, coming to the rescue of head-scratching executioners. Writing in 1995 for the *National Review*, Creque argued that nitrogen "would cause neither pain nor physical trauma, require no medical procedure (other than pronouncing death), and no hazardous chemicals."

The governor of Oklahoma, Mary Fallin, had signed legislation permitting execution by nitrogen gas, provided drugs for lethal injection or the method itself, was deemed illegal. Last month, Fallin stayed the execution of Richard Glossip for 37 days over questions "about Oklahoma's execution protocol and the chemicals used for lethal injection." [1] He was scheduled to be executed on November 6, but this was in turn stayed indefinitely.

Humanitarian arguments are often sham ones, standard bearers for the worst form of moral charlatanism. They are attached to missile tips; they are aligned with arguments on how best to kill human beings for broader causes. We might not like the death penalty, but at

least we can be assured that convicts are killed humanely. “You can oppose the death penalty and still see the merit in making executions more humane,” argues Tom McNichol (*Slate*, May 22, 2014). Lawrence Gist II, an attorney and professor of business law at Mount St. Mary’s College, similarly extols the virtues of more humane methods in the death industry, having become something of a propagandist for nitrogen-based killing. “If we’re going to take a life, then we should do so in the most humane, civilized manner as is possible.”

This is a false choice, bedded on some nasty logic. The oxymoronic dialogue on the death penalty is one of the more insidious ones in the lethal complex that sees states identify how best to dispatch their convicts. Death penalty advocates and those against the death penalty tend to find themselves at one on this. It is a form of tacit collusion: we will accept the death penalty, but we will be kind and strictly professional about it.

Absolutists against the death penalty are taken to task by such commentators as Boer Deng and Dahlia Lithwick for inciting officials to actually endorse substandard methods and techniques in killing. This is dangerous nonsense. Either the sanctity of human life, irrespective of how grizzly that human being might be, matters, or it does not. It is hardly preserved by killing the subject with professionally thought through methods.

The legal authorities have also been complicit in creating a fantasy of compassion behind killing. In 2008, the Supreme Court ruled that Kentucky’s three-drug protocol behind lethal injections abided by the constitution. But such sanitised rationales of lethality ignored human incompetence in the administering process. The death of Clayton Lockett in April 2014 was not merely vicious in its outcome but in its application. (He remained alive for forty-three minutes after the injections began.) As Justice Sonia Sotomayor observed during oral arguments, the protocol may have entailed “burning a person alive who’s paralysed.”

Then came the stay offered for Russell Bucklew last year, similarly taking issue with the needle. The court rationale from 2008 was looking unsteady. “Every age,” writes Nichol, “seems to feature a new and improved method of capital punishment, billed as more efficient and humane.” Killing can, according to such thinking, be progressive.

Scientific killings, state sanctioned murder theorised and then applied, has been a central feature of the modern State. The State’s monopoly on violence manifests itself as fury in cases when private citizens start appropriating such powers. The death penalty is a statement of sovereign selfishness, jealously guarded. Using nitrogen fittingly embraces the industrial complex, furthermore so given that the gas chamber, as a death delving device, was pioneered in the United States. Nazi Germany would duly take note and kill with even more zeal.

The internal inconsistencies of the death penalty arguments were always going to be evident with such constitutionally enshrined terms as “cruel and unusual punishment” as outlined in the Eight Amendment. Such wording has been interpreted by means various and exotic, always allowing for capital punishment. None have proven convincing, with the exception of Justice Stephen Bryer’s dissent in *Glossip v Gross* which argued that rather than trying “to patch up the death penalty’s legal wounds one at a time,” we should accept “that the death penalty violates the Eight Amendment.”[2]

The death penalty remains sadistically expressive, and its cruelty should be emphasised

beyond a shadow of doubt. If it is to remain on the books, it should be exemplified, not lulled. Saudi Arabia, China and similar countries admit that suffering is fundamental behind having such a penalty. What, then, would be the point?

Bring in US-made beheadings. Bring in firing squads. Let the blood flow. Film it. Stream it. Demonstrate humanity's inhumanity to itself. As the sponsor of the nitrogen execution bill Mike Christian, Republican member of the Oklahoman House of Representatives explained with crude honesty, humanitarianism has nothing to do with it. "I realize this may sound harsh, but as a father and a former lawman, I really don't care if it's by lethal injection, by the electric chair, firing squad, hanging, the guillotine, or being fed to the lions." [3] To embrace a supposedly kinder form of killing sanitises murder, encouraging a hypocrisy that salves the bleeding conscience.

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Notes

[1] <http://www.cnn.com/2015/09/30/us/oklahoma-richard-glossip-midazolam-execution/>

[2] http://www.supremecourt.gov/opinions/14pdf/14-7955_aplc.pdf

[3] <http://www.newyorker.com/news/news-desk/how-oklahoma-came-to-embrace-the-gas-chamber>

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