BAZE v. REES
No. 07-5439
Supreme Court of United States
April 16, 2008
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OPINION: CHIEF JUSTICE ROBERTS/KENNEDY/ALITO…Like 35 other States and the Federal Government, Kentucky has chosen to impose capital punishment for certain crimes. As is true with respect to each of these States and the Federal Government, Kentucky has altered its method of execution over time to more humane means of carrying out the sentence. That progress has led to the use of lethal injection by every jurisdiction that imposes the death penalty.

Petitioners in this case — each convicted of double homicide — acknowledge that the lethal injection procedure, if applied as intended, will result in a humane death. They nevertheless contend that the lethal injection protocol is unconstitutional under the Eighth Amendment's ban on "cruel and unusual punishments" because of the risk that the protocol's terms might not be properly followed, resulting in significant pain. They propose an alternative protocol, one that they concede has not been adopted by any State and has never been tried…[P]etitioners have not carried their burden of showing that the risk of pain from maladministration of a concededly humane lethal injection protocol, and the failure to adopt untried and untested alternatives, constitute cruel and unusual punishment. The judgment below is affirmed…We granted certiorari to determine whether Kentucky's lethal injection protocol satisfies the Eighth Amendment. We hold that it does.

…We begin with the principle, settled by *Gregg*[1], that capital punishment is constitutional. It necessarily follows that there must be a means of carrying it out. Some risk of pain is inherent in any

[1]Case 8A-CUP-11 on this website.

method of execution—no matter how humane—if only from the prospect of error in following the required procedure. It is clear, then, that the Constitution does not demand the avoidance of all risk of pain in carrying out executions.

Petitioners do not claim that it does. Rather, they contend that the Eighth Amendment prohibits procedures that create an "unnecessary risk" of pain. Specifically, they argue that courts must evaluate "(a) the severity of pain risked, (b) the likelihood of that pain occurring, and (c) the extent to which alternative means are feasible, either by modifying existing execution procedures or adopting alternative procedures." Petitioners envision that the quantum of risk necessary to make out an Eighth Amendment claim will vary according to the severity of the pain and the availability of alternatives, but that the risk must be "significant" to trigger Eighth Amendment scrutiny.

Kentucky responds that this "unnecessary risk" standard is tantamount to a requirement that States adopt the "least risk" alternative in carrying out an execution, a standard the Commonwealth contends will cast recurring constitutional doubt on any procedure adopted by the States. Instead, Kentucky urges the Court to approve the "substantial risk" test used by the courts below…

Petitioners claim that there is a significant risk that the procedures will not be properly followed—in particular, that the sodium thiopental will not be properly administered to achieve its intended effect—resulting in severe pain when the other chemicals are administered. Our cases recognize that subjecting individuals to a risk of future harm—not simply actually inflicting pain—can qualify as cruel and unusual punishment. To establish that such exposure violates the Eighth Amendment, however, the conditions presenting the risk must be "sure or very likely to cause serious illness and needless suffering" and give rise to "sufficiently imminent dangers." *Helling v. McKinney* (1993). We have explained that to prevail on such a claim there must be a "substantial risk of serious harm," an "objectively intolerable risk of harm" that prevents prison officials from pleading that they were "subjectively blameless for purposes of the Eighth Amendment." *Farmer v. Brennan* (1994).

Simply because an execution method may result in pain, either by accident or as an inescapable consequence of death, does not establish the sort of "objectively intolerable risk of harm" that qualifies as cruel and unusual. *Louisiana ex rel. Francis v. Resweber*[2]…

Permitting an Eighth Amendment violation to be established on such a showing would threaten to transform courts into boards of inquiry charged with determining "best practices" for executions, with each ruling supplanted by another round of litigation touting a new and improved methodology. Such an approach finds no support in our cases, would embroil the courts in ongoing scientific controversies beyond their expertise, and would substantially intrude on the role of state legislatures in implementing their execution procedures—a role that by all accounts the States have fulfilled with an earnest desire to provide for a progressively more humane manner of death. Accordingly, we reject petitioners' proposed "unnecessary risk" standard, as well as the dissent's "untoward" risk variation.

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[2]Case 8A-CUP-4 on this website.

Instead, the proffered alternatives must effectively address a "substantial risk of serious harm." *Farmer*. To qualify, the alternative procedure must be feasible, readily implemented, and in fact significantly reduce a substantial risk of severe pain. If a State refuses to adopt such an alternative in the face of these documented advantages, without a legitimate penological justification for adhering to its current method of execution, then a State's refusal to change its method can be viewed as "cruel and unusual" under the Eighth Amendment…

The dissent would continue the stay of these executions (and presumably the many others held in abeyance pending decision in this case) and send the case back to the lower courts to determine whether such added measures redress an "untoward" risk of pain. But an inmate cannot succeed on an Eighth Amendment claim simply by showing one more step the State could take as a failsafe for other, independently adequate measures. This approach would serve no meaningful purpose and would frustrate the State's legitimate interest in carrying out a sentence of death in a timely manner...

The judgment below concluding that Kentucky's procedure is consistent with the Eighth Amendment is, accordingly, affirmed. It is so ordered.

CONCURRENCE: JUSTICE ALITO…[Not Provided.]

CONCURRENCE: JUSTICE STEVENS…In sum,…I have relied on my own experience in reaching the conclusion that the imposition of the death penalty represents "the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State is patently excessive and cruel and unusual punishment violative of the Eighth Amendment."

The conclusion that I have reached with regard to the constitutionality of the death penalty itself makes my decision in this case particularly difficult. It does not, however, justify a refusal to respect precedents that remain a part of our law. This Court has held that the death penalty is constitutional, and has established a framework for evaluating the constitutionality of particular methods of execution. Under those precedents, whether as interpreted by THE CHIEF JUSTICE or JUSTICE GINSBURG, I am persuaded that the evidence adduced by petitioners fails to prove that Kentucky's lethal injection protocol violates the Eighth Amendment. Accordingly, I join the Court's judgment.

CONCURRENCE: JUSTICE SCALIA/THOMAS…I join the opinion of JUSTICE THOMAS concurring in the judgment. I write separately to provide what I think is needed response to JUSTICE STEVENS' separate opinion.

JUSTICE STEVENS concludes as follows: "The imposition of the death penalty represents the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State is patently excessive and cruel and unusual punishment violative of the Eighth Amendment."

This conclusion is insupportable as an interpretation of the Constitution, which generally leaves it to democratically elected legislatures rather than courts to decide what makes significant contribution to social or public purposes. Besides that more general proposition, the very text of the document

recognizes that the death penalty is a permissible legislative choice. The Fifth Amendment expressly requires a presentment or indictment of a grand jury to hold a person to answer for "a capital, or otherwise infamous crime," and prohibits deprivation of "life" without due process of law. The same Congress that proposed the Eighth Amendment also enacted the Act of April 30, 1790, which made several offenses punishable by death. Writing in 1976, Professor Hugo Bedau—no friend of the death penalty himself—observed that "until fifteen years ago, save for a few mavericks, no one gave any credence to the possibility of ending the death penalty by judicial interpretation of constitutional law." There is simply no legal authority for the proposition that the imposition of death as a criminal penalty is unconstitutional other than the opinions in *Furman v. Georgia*[3] which established a nationwide moratorium on capital punishment that JUSTICE STEVENS had a hand in ending four years later in *Gregg*.

What prompts JUSTICE STEVENS to repudiate his prior view and to adopt the astounding position that a criminal sanction expressly mentioned in the Constitution violates the Constitution? His analysis begins with what he believes to be the "uncontroversial legal premise" that the "extinction of life with only marginal contributions to any discernible social or public purposes…would be patently excessive and violative of the Eighth Amendment." Even if that were uncontroversial in the abstract (and it is certainly not what occurs to me as the meaning of "cruel and unusual punishments"), it is assuredly controversial (indeed, flat-out wrong) as applied to a mode of punishment that is explicitly sanctioned by the Constitution. As to that, the people have determined whether there is adequate contribution to social or public purposes, and it is no business of unelected judges to set that judgment aside. But even if we grant JUSTICE STEVENS his "uncontroversial premise," his application of that premise to the current practice of capital punishment does not meet the "heavy burden [that] rests on those who would attack the judgment of the representatives of the people." That is to say, JUSTICE STEVENS' policy analysis of the constitutionality of capital punishment fails on its own terms.

According to JUSTICE STEVENS, the death penalty promotes none of the purposes of criminal punishment because it neither prevents more crimes than alternative measures nor serves a retributive purpose. He argues that "the recent rise in statutes providing for life imprisonment without the possibility of parole" means that States have a ready alternative to the death penalty. Moreover, "despite 30 years of empirical research in the area, there remains no reliable statistical evidence that capital punishment in fact deters potential offenders." Taking the points together, JUSTICE STEVENS concludes that the availability of alternatives, and what he describes as the unavailability of "reliable statistical evidence," renders capital punishment unconstitutional. In his view, the benefits of capital punishment—as compared to other forms of punishment such as life imprisonment —are outweighed by the costs.

These conclusions are not supported by the available data…According to a "leading national study," "each execution prevents some eighteen murders, on average. If the current evidence is even roughly

[3]Case 8A-CUP-10 on this website.

correct…then a refusal to impose capital punishment will effectively condemn numerous innocent people to death."

Of course, it may well be that the empirical studies establishing that the death penalty has a powerful deterrent effect are incorrect, and some scholars have disputed its deterrent value. But that is not the point. It is simply not our place to choose one set of responsible empirical studies over another in interpreting the Constitution. Nor is it our place to demand that state legislatures support their criminal sanctions with foolproof empirical studies, rather than commonsense predictions about human behavior. "The value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with the legislatures, which can evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts." *Gregg*. Were JUSTICE STEVENS' current view the constitutional test, even his own preferred criminal sanction—life imprisonment without the possibility of parole—may fail constitutional scrutiny, because it is entirely unclear that enough empirical evidence supports that sanction as compared to alternatives such as life with the possibility of parole.

But even if JUSTICE STEVENS' assertion about the deterrent value of the death penalty were correct, the death penalty would yet be constitutional (as he concedes) if it served the appropriate purpose of retribution. I would think it difficult indeed to prove that a criminal sanction fails to serve a retributive purpose—a judgment that strikes me as inherently subjective and insusceptible of judicial review. JUSTICE STEVENS, however, concludes that, because the Eighth Amendment "protects the inmate from enduring any punishment that is comparable to the suffering inflicted on his victim," capital punishment serves no retributive purpose at all. The infliction of any pain, according to JUSTICE STEVENS, violates the Eighth Amendment's prohibition against cruel and unusual punishments, but so too does the imposition of capital punishment without pain because a criminal penalty lacks a retributive purpose unless it inflicts pain commensurate with the pain that the criminal has caused. In other words, if a punishment is not retributive enough, it is not retributive at all. To state this proposition is to refute it, as JUSTICE STEVENS once understood. "[T]he decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death." *Gregg*.

JUSTICE STEVENS' final refuge in his cost-benefit analysis is a familiar one: There is a risk that an innocent person might be convicted and sentenced to death—though not a risk that JUSTICE STEVENS can quantify, because he lacks a single example of a person executed for a crime he did not commit in the current American system…

But of all JUSTICE STEVENS' criticisms of the death penalty, the hardest to take is his bemoaning of "the enormous costs that death penalty litigation imposes on society," including the "burden on the courts and the lack of finality for victim's families." Those costs, those burdens, and that lack of finality are in large measure the creation of JUSTICE STEVENS and other Justices opposed to the death penalty, who have "encumbered it…with unwarranted restrictions neither contained in the text

of the Constitution nor reflected in two centuries of practice under it"—the product of their policy views "not shared by the vast majority of the American people." *Kansas v. Marsh*.[4]

But actually none of this really matters. As JUSTICE STEVENS explains, "objective evidence, though of great importance, [does] not wholly determine the controversy, for the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." "I have relied on my own experience in reaching the conclusion that the imposition of the death penalty" is unconstitutional.

Purer expression cannot be found of the principle of rule by judicial fiat. In the face of JUSTICE STEVENS' experience, the experience of all others is, it appears, of little consequence. The experience of the state legislatures and the Congress—who retain the death penalty as a form of punishment—is dismissed as "the product of habit and inattention rather than an acceptable deliberative process." The experience of social scientists whose studies indicate that the death penalty deters crime is relegated to a footnote. The experience of fellow citizens who support the death penalty is described, with only the most thinly veiled condemnation, as stemming from a "thirst for vengeance." It is JUSTICE STEVENS' experience that reigns over all.

I take no position on the desirability of the death penalty, except to say that its value is eminently debatable and the subject of deeply, indeed passionately, held views—which means, to me, that it is preeminently not a matter to be resolved here. And especially not when it is explicitly permitted by the Constitution.

CONCURRENCE: JUSTICE THOMAS/SCALIA…Although I agree that petitioners have failed to establish that Kentucky's lethal injection protocol violates the Eighth Amendment, I write separately because I cannot subscribe to the plurality opinion's formulation of the governing standard. As I understand it, that opinion would hold that a method of execution violates the Eighth Amendment if it poses a substantial risk of severe pain that could be significantly reduced by adopting readily available alternative procedures. This standard—along with petitioners' proposed "unnecessary risk" standard and the dissent's "untoward risk" standard—finds no support in the original understanding of the Cruel and Unusual Punishments Clause or in our previous method-of-execution cases; casts constitutional doubt on long-accepted methods of execution; and injects the Court into matters it has no institutional capacity to resolve. Because, in my view, a method of execution violates the Eighth Amendment only if it is deliberately designed to inflict pain, I concur only in the judgment…

The evil the Eighth Amendment targets is intentional infliction of gratuitous pain, and that is the standard our method-of-execution cases have explicitly or implicitly invoked…

[F]ar from putting an end to abusive litigation in this area, and thereby vindicating in some small measure the States' "significant interest in meting out a sentence of death in a timely fashion," today's decision is sure to engender more litigation. At what point does a risk become "substantial"? Which

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[4]Case 8A-CUP-22 on this website.

alternative procedures are "feasible" and "readily implemented"? When is a reduction in risk "significant"? What penological justifications are "legitimate"? Such are the questions the lower courts will have to grapple with in the wake of today's decision. Needless to say, we have left the States with nothing resembling a bright-line rule…

CONCURRENCE: JUSTICE BREYER… I cannot find…sufficient evidence that Kentucky's execution method poses the "significant and unnecessary risk of inflicting severe pain" that petitioners assert…

DISSENT: JUSTICE GINSBURG/SOUTER…[When the first drug is not properly administered,] it is undisputed that the second and third drugs used in Kentucky's three-drug lethal injection protocol, pancuronium bromide and potassium chloride, would cause a conscious inmate to suffer excruciating pain…The constitutionality of Kentucky's protocol therefore turns on whether inmates are adequately anesthetized by the first drug in the protocol, sodium thiopental. Kentucky's system is constitutional, the plurality states, because "petitioners have not shown that the risk of an inadequate dose of the first drug is substantial." I would not dispose of the case so swiftly given the character of the risk at stake. Kentucky's protocol lacks basic safeguards used by other States to confirm that an inmate is unconscious before injection of the second and third drugs. I would vacate and remand with instructions to consider whether Kentucky's omission of those safe-guards poses an untoward, readily avoidable risk of inflicting severe and unnecessary pain…