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'The pointless and needless extinction of life'

USA should now look beyond lethal injection issue to wider death penalty questions

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Yesterday's US Supreme Court ruling in *Baze v. Rees* upholding the constitutionality of Kentucky's lethal injection procedures will in all likelihood be followed by moves in various US jurisdictions to resume executions, although the ruling is unlikely to stop litigation on this issue.

Executions in the USA have been suspended since late September 2007 as states waited for the Supreme Court's decision. A majority of the 36 death penalty states, and the federal government, use the same three-drug combination as Kentucky to anesthetize, paralyze and kill the condemned prisoner. Officials in a number of states, including Florida, Georgia, Arizona and Ohio, have already suggested that the *Baze* decision should clear the way to a resumption of executions in their jurisdictions, and the likelihood of execution dates being set soon in states such as Texas and Alabama is high.

Amnesty International opposes the death penalty in all cases, unconditionally, regardless of the method chosen to kill the condemned prisoner. There is no such thing as a humane, fair, reliable or useful death penalty system.

Chief Justice Roberts indicated that in future cases a stay of execution on the lethal injection issue would likely only be granted if "the condemned prisoner establishes that the State's lethal injection protocol creates a demonstrated risk of severe pain. He must show that the risk is substantial when compared to the known and available alternatives." A state with a lethal injection protocol "substantially similar" to Kentucky's "would not create a risk that meets this standard". Justice Stevens, in an opinion concurring in the judgment, nevertheless wrote:

> "I assumed that our decision would bring the debate about lethal injection as a method of execution to a close. It now seems clear that it will not. The question whether a similar three drug protocol may be used in other States remains open, and may well be answered differently in a future case on the basis of a more complete record. Instead of ending the controversy, I am now convinced that this case will generate debate not only about the constitutionality of the three-drug protocol, and specifically about the justification for the use of the paralytic agent, pancuronium bromide, but also about the justification for the death penalty itself."

Justice Stevens wrote that his experience has led him to 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". He suggested that the current decisions to retain the death penalty taken by state legislatures, US Congress, and the Supreme Court itself "are the product of habit and inattention rather than an acceptable deliberative process that weighs the costs and risks of administering that penalty against its identifiable benefits, and rest in part on a faulty assumption about the retributive force of the death penalty." Over the past three decades, he continued, the state purposes of

the death penalty – incapacitation, deterrence and retribution – have all been called into question. On deterrence, for example, Justice Stevens wrote that "despite 30 years of empirical research in the area, there remains no reliable statistical evidence that capital punishment in fact deters potential offenders".

Justice Stevens pointed to other aspects of the application of the death penalty that concern him, including "rules that deprive the defendant of a trial by jurors representing a fair cross section of the community". The procedures for obtaining a jury in a death penalty case, he wrote, have the "purpose and effect of obtaining a jury that is biased in favour of conviction". He also raised the risk of "discriminatory application of the death penalty", which the Supreme Court has allowed "to continue to play an unacceptable role in capital cases". On the risk of wrongful conviction in capital cases ("the irrevocable nature of the consequences is of decisive importance to me"), Justice Stevens pointed out that the risk of executing the innocent "can be entirely eliminated" by abolishing the death penalty.

Justice Breyer also pointed to the wider concerns about the death penalty, beyond the issue of any risks associated with lethal injections:

> "The death penalty itself, of course, brings with it serious risks, for example, risks of executing the wrong person, risks that unwarranted animus (in respect, e.g., to the race of victims), may play a role, risks that those convicted will find themselves on death row for many years, perhaps decades, to come... But the lawfulness of the death penalty is not before us."

Chief Justice Roberts said that "nothing in our opinion undermines or remotely addresses the validity of capital punishment". The comments of Justices Stevens and Breyer nevertheless serve to bring attention back to the bigger picture. That bigger picture is this: No amount of examining or tinkering with the machinery of death can free the death penalty of its inherent flaws. A clear majority of countries have given up trying, and the USA should now look to do the same.

Amnesty International emphasizes that to end the death penalty is to abandon a destructive, diversionary and divisive public policy that is not consistent with widely held values. A recent indicator of this was the landmark UN General Assembly resolution in late 2007 calling for a worldwide moratorium on the death penalty. To use the words of Justice Stevens in the *Baze* opinion: "State-sanctioned killing is becoming more and more anachronistic".

The death penalty not only runs the risk of irrevocable error, it is also costly – to the public purse, as well as in social and psychological terms. It has not been proved to have a special deterrent effect. It tends to be applied discriminatorily on grounds of race and class. It denies the possibility of reconciliation and rehabilitation. It promotes simplistic responses to complex human problems, rather than pursuing explanations that could inform positive strategies. It prolongs the suffering of the murder victim's family, and extends that suffering to the loved ones of the condemned prisoner. It diverts resources that could be better used to work against violent crime and assist those affected by it. It is a symptom of a culture of violence, not a solution to it. It is an affront to human dignity. It should be abolished.

For further information, see

USA: The experiment that failed. A reflection on 30 years of executions, AI Index: AMR 51/011/2007, http://www.amnesty.org/en/library/info/AMR51/011/2007/en.

USA: Breaking a lethal habit: A look back at the death penalty in 2007, AI Index: AMR 51/197/2007, http://www.amnesty.org/en/library/info/AMR51/197/2007/en.

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