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The Death Penalty in America

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Few public policy issues have inflamed passions as consistently and as strongly as the debate over capital punishment. Religious communities have been deeply involved on both sides of the issue, drawing on teachings and traditions that define justice and the dignity of human life. The debate over the death penalty has been complicated in recent years by such concerns as the fairness of the criminal justice system, the role of doctors in carrying out executions, and the possibility of reform and rehabilitation among death row inmates.



Now, as the Supreme Court prepares to hear arguments in a case challenging the use of lethal injection, another aspect of the death penalty debate is being thrust into the national spotlight. At issue in the case, *Baze v. Rees*, is whether lethal injection as currently performed in most states amounts to cruel and unusual punishment and thus violates the Eighth Amendment to the U.S. Constitution. The court's ruling could be very significant since lethal injection is the method of execution used by the federal government and by all but one of the 37 states with death penalty statutes.

By taking the *Baze* case, which will be argued on Jan. 7, 2008, the court has forced states to delay scheduled executions until a ruling is handed down, probably sometime in the late spring or early summer. This de facto moratorium on lethal injections has encouraged death penalty opponents, who hope that a victory in the upcoming case will make it harder for states to continue using lethal injection, and possibly lead to an end to capital punishment in at least some jurisdictions. Opponents' desire to end capital punishment is driven by different arguments, including the belief that the government should not be in the business of taking human life and the concern that the death penalty is inherently unfair because it is disproportionately used on minority and lower-income felons.

On a more practical level, many opponents of the death penalty contend that it does not deter violent crime¹. And even if it did, they argue, profound flaws in the criminal justice system ensure that the government cannot be confident that each person who goes to the death chamber is actually guilty of the crime for which he or she has been convicted. Indeed, they point out, the development of sophisticated DNA testing has resulted in the release of hundreds of death row inmates in the last 15 years.

Many supporters of capital punishment, on the other hand, believe some crimes are so brutal and heinous that execution is the only sentence that can ensure justice. Supporters also point to several recent statistical studies that they say show that capital punishment, even though rarely used, does in fact deter violent crime². Moreover, supporters say, modern technology (such as the use of ballistics and DNA evidence) and the lengthy appeals process in most capital cases make it nearly impossible to mistakenly send an innocent person to the death chamber.

Death penalty supporters also point out that a solid majority of the American people have long favored the use of capital punishment. Recent support for the death penalty reached its peak in the late 1980s and early 1990s, when, according to Gallup polls, the number of people in favor of executing convicted murderers climbed as high as 80 percent. Today, 62 percent of the public supports capital punishment for people convicted of murder, according to a 2007 poll by the Pew Forum on Religion & Public Life and the Pew Research Center for the People & the Press³. Although religious groups in the U.S. have helped to lead the fight against the death penalty, not all religious bodies oppose its use⁴. For instance, although the Catholic Church and most mainline Protestant denominations, such as United Methodists and Episcopalians, officially oppose capital punishment, many evangelical churches, including Southern Baptists, support the death penalty.

The Role of the Courts

While capital punishment laws in the U.S. fall under the states' purview, the Supreme Court has played a major role in shaping the use of the death penalty in this country. In the 1930s, for example, the Supreme Court intervened on a number of occasions to overturn death sentences it believed could have been the result of racial discrimination. And in a landmark 1972 decision, *Furman v. Georgia*, the high court ruled 5-4 that the death penalty, as it was being applied at the time by the states, violated both the Eighth Amendment's prohibition of cruel and unusual punishment and the 14th Amendment's guarantee of equal protection under the law.

The majority decision in *Furman* was highly fractured, and each of the five justices issued a separate opinion. Still, the general thrust of the opinions was that existing state death penalty statutes were too arbitrary to guarantee the fair and uniform application of capital punishment. One of the five justices, Potter Stewart, famously wrote that "these death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual." More specifically, the court in *Furman* found that state-mandated instructions to juries during the sentencing phase in capital punishment cases were too vague and inevitably led to vastly different results, even in cases involving the same type of crime.

As a result of the *Furman* decision, all death penalty statutes were effectively overturned, and 633 death row inmates in 32 states had their sentences commuted to life in prison. But while the court had essentially invalidated all death penalty statutes, it did not rule that capital punishment itself was unconstitutional. As a result, many state legislatures redrafted their laws to address the criticisms contained in the *Furman* decision. By 1976, 35 states had new capital punishment laws on the books, and more than 500 inmates were on death row.

Following the *Furman* ruling and the subsequent enactment of new state death penalty statutes, many thought it was a question of *when*, rather than *if*, the court would revisit the issue. That opportunity arrived just four years after *Furman* in a series of five related decisions involving different state statutes. In these decisions, most significantly *Gregg v. Georgia* (1976), the court ruled that death penalty sentencing statutes must contain a set of objective criteria to guide judges and juries in determining whether a death sentence is warranted. In *Gregg* and two other cases, the court ruled that death penalty statutes in Florida, Georgia and Texas had met these criteria and thus were constitutional. However, the court struck down two other statutes (in North Carolina and Louisiana) that automatically imposed the death penalty when someone was convicted of first-degree murder. (These are known as mandatory death sentencing laws.) In these two cases, the court ruled that some discretion must be left to judges and juries to determine whether the death penalty is appropriate.

Since 1976, more than 1,000 inmates have been executed. At the same time, there also have been a number of important high court decisions that have imposed new limits on capital punishment. In *Atkins v. Virginia* (2002), for instance, the Supreme Court ruled that states could not execute mentally retarded offenders. Three years later, in *Roper v. Simmons*, the court barred the use of the death penalty for juvenile offenders.

Lethal Injection and the *Baze* Case

Although the constitutionality of the death penalty, or even of lethal injection, is not directly at issue in the *Baze* case, the Supreme Court's decision in this case could have a significant impact on states' ability to employ lethal injection as a method of execution. In the case, the high court will consider whether the Kentucky Supreme Court used the proper standard of review when it ruled in 2006 that the state's method of lethal injection did not violate the Eighth Amendment's prohibition on cruel and unusual punishment.⁵

In most states, the process of executing an inmate by lethal injection involves the use of a three-drug combination. First, the inmate is rendered unconscious with sodium thiopental, a sedative used as an anesthetic. Next, pancuronium bromide is used to induce paralysis throughout the body. Finally, sodium chloride is injected to stop the heart from beating.

Ironically, lethal injection was developed in the late 1970s as a more humane alternative to electrocution, which had been the predominant method of execution in the United States for more than 70 years. In the ensuing 30 years, lethal injection has become the sole method of execution for the federal government and for all but one of the 37 states that currently have death penalty statutes; only Nebraska still uses the electric chair.

Opponents of lethal injection argue that far from being humane, the procedure actually can cause excruciating pain. In particular, they say, the anesthetic can wear off prior to death, making inmates conscious and susceptible to pain when the third, heart-stopping drug is injected. At the same time, they argue, an inmate who has regained consciousness may not be able to alert authorities to any pain or suffering due to the total paralysis caused by the second drug.

Ralph Baze and Thomas C. Bolling, the two Kentucky death row inmates who initiated the litigation in *Baze*, have argued that the courts in their state failed to adequately consider the risk of significant pain when ruling on the constitutionality of lethal injection.

Inmates in other states have made similar legal claims. Thus *Baze* gives the Supreme Court an opportunity to craft a standard that lower courts throughout the country can use in determining whether their states' methods of execution violate the Eighth Amendment. If the Supreme Court creates a very demanding standard, it could make it more difficult - though not impossible - for states to use lethal injection in the future.

[Read the full report including links to other studies and resources.](#)

Notes

¹ See Jeffrey Fagan, "[Death and Deterrence Redux: Science, Law and Causal Reasoning on Capital Punishment.](#)"

² See Paul R. Zimmerman, "[Estimates of the Deterrent Effect of the United States: 1978-2000.](#)"

³ See "[An Enduring Majority: Americans Continue to Support the Death Penalty.](#)"

⁴ See "[Religious Groups' Official Positions on Capital Punishment.](#)"

⁵ See "Lethal Injection on Trial: An Analysis of the Arguments Before the Supreme Court in [Baze v. Rees.](#)"