The Supreme Court Upholds the Constitutionality of Death Penalty – For Now! An Assessment of the Judgement in *Glossip v. Gross*

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On the face of it, the much-anticipated Supreme Court judgement in *Glossip v. Gross* delivered a huge blow to the anti-death penalty movement. The decision affirmed the constitutionality of Oklahoma's latest lethal injection protocol, which uses midazolam as the first drug in a three-drug combination. However, the two dissenting judgements mark a radical shift in thinking about the death penalty since the Court last considered this issue.[1] Most remarkably, Justice Breyer's dissent concludes that the entire death penalty system is likely unconstitutional.

Oklahoma, along with Florida, introduced midazolam into executions after drug shortages made unavailable previously used anaesthetics -- sodium thiopental, and later pentobarbital. After midazolam was implicated in a spate of botched executions, four prisoners with impending executions in Oklahoma sought a preliminary injunction.

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In December 2014 the federal district court held a 3-day evidentiary hearing, where petitioners argued that midazolam is inadequate as an anaesthetic. It is long-established that if not preceded by an effective anaesthetic, administration of the second and third drug causes an inmate to experience a constitutionally unacceptable level of pain -- asphyxiation from the paralytic agent and internal burning from the potassium chloride. However, the district court denied the motion, and the Tenth Circuit Court of Appeals affirmed that decision.

The four prisoners then filed for certiorari to the Supreme Court, as well as an application to stay their impending executions. The Court denied the latter and one of the petitioners -- Charles Warner -- was executed on 15 January 2015. The Court subsequently granted certiorari to determine whether the use of midazolam violates Eighth Amendment protections against "cruel and unusual punishments."

The Justices were split 5-4, with Justice Kennedy fulfilling his usual role as the deciding swing vote. The Court's majority opinion was delivered by Justice Alito. It upheld the lower court's conclusion that the motion failed both limbs of a two-strand test set out in *Baze v. Rees.*[2] Firstly, prisoners failed to identify "a known and available alternative method of execution that entailed a lesser risk of pain."[3] Secondly, prisoners failed to establish that Oklahoma's use of midazolam "entails a substantial risk of severe pain."[4]

Much of the Court's deliberation centred on the first strand of this test -- the failure of petitioners to demonstrate an alternative method for their own execution. Petitioners argued that according to the pre-*Baze* decision of *Hill v. McDonough*[5] they were not required to identify such an alternative. However, as the majority opinion stated, "*Baze* . . . made clear that the Eighth Amendment requires a prisoner to plead and prove a known and available alternative."[6]

However, in her dissent Justice Sotomayor -- joined by Justices Ginsburg, Breyer and Kagan -- disagreed. She determined that this was a "wholly novel requirement"[7] and derided the Court's decision as "legally indefensible."[8] She noted that the argument made by prisoners in *Baze* was distinguishable from this case, as there it had

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been argued that the lethal injection protocol in question had breached the Eighth Amendment *in comparison* to an available and more harmful method: "Nowhere did the plurality suggest that *all* challenges to a State's method of execution would require this sort of comparative-risk analysis."[9]

She was scathing in her critique of the Court's decision, noting that: "under the Court's new rule, it would not matter whether the State intended to use midazolam, or instead to have petitioners drawn and quartered, slowly tortured to death, or actually burned at the stake."[10] A method of execution that is "barbarous" or "involves torture or a lingering death," she argued, does not become less so because it is the only method currently available to the state.[11]

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In response the majority opinion asserted that this dissent simply resorts to "outlandish rhetoric" to hide the "the weakness of its legal argument."[12] However, Sotomayor's argument raises a profound and important question -- should the availability of alternative methods of execution have any bearing on the constitutionality of a particular method of execution? To answer yes suggests a desire to implement the death penalty at any cost. Perhaps this is reflected in the Supreme Court's opening remark that it is now settled that "capital punishment is constitutional," so it necessarily follows that "there must be a constitutional means of carrying it out."[13]

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In concluding that petitioners had failed to identify available alternatives, the Court was quick to lay the blame with anti-death penalty activists for rendering previously used methods of execution unavailable. For instance, the Court noted that pentobarbital is no longer available because anti-death penalty activists pressured "pharmaceutical companies to refuse to supply the drugs used to carry out death sentences."[14]

Their anger is palpable. Justice Alito, for instance, asked during oral argument: "is it appropriate for the judiciary to countenance what amounts to a guerrilla war against the death penalty?"[15] Yet, as Justice Sotomayor pointed out, petitioners in this case "had no part in creating the shortage of execution drugs," so "it is odd to punish them for the actions of pharmaceutical companies and others who seek to disassociate themselves from the death penalty."[16]

Justice Sotomayor in her dissent also alluded to the peculiarity of forcing an inmate to choose his own poison. It is certainly a strange burden to place on an inmate, particularly given the recent tendency of states to shroud in secrecy the sources from which they purchase lethal injection drugs. Justice Sotomayor made clear her disagreement with such a position, stating: "certainly the condemned has no duty to devise or pick a constitutional instrument of his or her own death."[17]

The second strand of the test revolved around midazolam's ability to perform as an anaesthetic. The Court's decision begins by noting that some risk of pain is inherent in any method of execution and that the Eighth Amendment does not require the avoidance of all risk of pain.[18] To do so, they say, would effectively outlaw the death penalty altogether.[19] What must be proven is that the state's use of midazolam in executions entails "a substantial risk of severe pain."[20]

While it was agreed that midazolam might be able to induce unconsciousness, the real dispute came over whether it could maintain that once the other two pain-producing drugs are injected. Petitioners highlighted that midazolam is not commonly used as an anaesthetic and is not FDA-approved for that purpose. Instead, it is a sedative usually used to alleviate anxiety before operations or during less intrusive operations such as colonoscopies.

The Court rejected petitioners' arguments. They agreed with the district court, which found that "a 500-miligram dose of midazolam would make it a virtual certainty that any individual would be at a sufficient level of unconsciousness to resist the noxious stimuli which could occur from the application of the second and third drugs."[21]

This finding continues the trend of Supreme Court deference to state proposed methods of execution. As the majority opinion points out, the Court has never before found an execution method to breach the Eighth Amendment. For instance, the Court has previously affirmed the constitutionality of execution by firing squad,[22] as well as by electric chair despite Louisiana having botched the first attempt to execute a prisoner by electrocution.[23]

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Justice Sotomayor's dissent also takes the opposite view to the Court on this limb of the test. She highlights that the latter two drugs act in "a torturous manner, causing burning, searing pain"[24] and suggests that midazolam is insufficient to prevent an inmate from feeling this. She states that the Court's judgement "leaves petitioners exposed to what may well be the chemical equivalent of being burned at the stake."[25]

To evidence the fact that midazolam is not fit for purpose, petitioners highlighted the recent spate of botched executions using midazolam. Particularly gruesome was the execution of Clayton Lockett, who regained consciousness shortly after being declared unconscious. As Sotomayor notes in her dissent: "various witnesses reported that Lockett began to writhe against his restraints, saying this shit is fucking with my mind,"...and "the drugs aren't working."[26] She suggests: "when Lockett awoke and began to writhe and speak, he demonstrated the critical difference between midazolam's ability to render an inmate unconscious and its ability to maintain the inmate in that state."[27]

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However, the Court rejected this claim. They note that only 100 milligrams of midazolam had been used in Lockett's execution, whereas Oklahoma's protocol stipulates that 500 milligrams be used. They also noted that the IV access point was faulty, [28] and that "on the morning of the execution, Lockett cut himself twice at the bend of the elbow"[29] The implication of the Court's latter comment is clear: that Lockett was at least in some respect to blame for his own fate, his own botched execution.

Further reference is made to the horribly botched execution of Joseph Wood. Justice Sotomayor, for instance, highlighted that: "despite being administered 750 milligrams of midazolam, Wood had continued breathing and moving for nearly two hours."[30] In this execution, midazolam was paired with the drug hydromorphone, instead of the usual paralytic and potassium chloride. However, Sotomayor suggests that this does not appear to have any relevance, other than the probability that Wood did not experience the same degree of searing pain as an inmate executed under Oklahoma's protocol.[31]

The Court disagreed, noting that Wood's execution did not involve the protocol at issue here as he did not receive a single dose but rather received 15 50-milligram doses over the span of two hours.[32] When all of the circumstances are considered, they Court concludes, "the Lockett and Wood executions have little probative value for present purposes."[33]

Perhaps the most pivotal moment in this case came in the form of Justice Breyer's dissent, in which he is joined by Justice Ginsburg. His dissent goes much further than the narrow issue of any particular method of execution. Instead, he presents an eloquent and comprehensive account of the fundamental flaws of prohibited "cruel and unusual punishment."[34] the death penalty system as a whole. He concludes that the death penalty, in and of itself, now likely

constitutes a legally Justice Breyer's dissent, joined by Justice Ginsburg, concludes that the death penalty in and of itself, now likely constitutes a legally prohibited "cruel and unusual punishment." This is in stark contrast to the majority decision of the Court, which is prefaced on the notion that the constitutionality of the death penalty has long been settled.[35]

In his dissent, Justice Breyer highlights four fundamental constitutional defects in the modern administration of the death penalty.[36] The first of these is the serious unreliability of its application. He notes: "researchers have found convincing evidence that, in the past three decades, innocent people have been executed."[37] Among many other cases, he highlights the case of Cameron Todd Willingham, who was convicted, and ultimately executed in 2004, for "the apparently motiveless murder of his three children as a result of invalid scientific analysis of the scene of the house fire that killed his children."[38]

He also highlights the "disturbing" number of instances in which individuals have been sentenced to death but later exonerated -- a total of 115 since 2002.[39] A couple of these exonerees deserve a particular mention. Henry Lee McCollum, for instance, was previously held up by Justice Scalia as the ultimate example of an individual deserving of the death penalty. "How enviable a quiet death by lethal injection" when compared to the heinous crime McCollum committed, Scalia famously declared.[40] McCollum was subsequently exonerated after DNA evidence implicated another man. He had spent 30 years on death row for a crime he did not commit.

Glenn Ford also spent 30 years on death row before being exonerated. He was subsequently released from prison but then died of lung cancer, just hours before the decision in this case was announced. The prosecutor in his case has since admitted that he was partly responsible for Ford's wrongful conviction as, he confessed, he was "not as interested in justice as he was in winning."[41]

In his dissent Justice Breyer elucidates why the death penalty system so often gets it wrong. He point to factors such as the mandatory death qualification of juries resulting in juries more inclined to vote for guilt and death.[42] He highlights that forensic testimony can often be flawed; the FBI recently acknowledged that almost every expert in a hair testing unit gave inaccurate testimony in criminal trials.[43] Justice Breyer concludes that the death penalty is so unreliable in application that it constitutes a "cruel punishment" as banned by the Eighth Amendment.

The same is true, he argues, of the second constitutional defect that he mentions - that the death penalty is imposed arbitrarily. He begins by pointing out: "the arbitrary imposition of punishment is the antithesis of the rule of law.[44] He then highlights the studies which show individuals accused of murdering white victims, as opposed to black victims, are much more likely to receive the death penalty. He concludes that "the imposition of the death penalty seems capricious, random, indeed, arbitrary. From a defendant's perspective, to receive that sentence, and certainly to find it implemented, is the equivalent of being struck by lightning."[45]

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The third constitutional defect he highlights is a product of the first two problems -- the need to ensure fairness and reliability means that individuals spend excessively long periods of time on death row, "alive but under sentence of death."[46] This "subjects death row inmates to decades of especially severe, dehumanising conditions of confinement."[47] Almost all states keep inmates in isolation, which has been proven again and again to cause a variety of mental health problems. This is exacerbated by the uncertainty as to whether a death sentence will be carried out. "Several inmates have come within hours or days of execution before later being exonerated."[48]

Lengthy delays also undermine the penological rationale of the death penalty -- to deter future crimes and to satisfy society's need for retribution.[49] He points to a mounting consensus that the death penalty fails to act as a deterrent:[50] "An offender who is sentenced to death is two or three times more likely to find his sentence overturned or commuted than be executed; and he has a good chance of dying

from natural causes before any execution can take place."[51] Therefore, because executions are "rare" it is unlikely that individuals are deterred from committing crimes out of fear that they will be punished by execution.

So what about retribution? The death penalty is often heralded as a victim's right to retribution: to help them find closure and overcome the horrors that were inflicted upon loved ones. However, Justice Breyer asks "whether a "community's sense of retribution" can find vindication in "a death that comes," if at all, "only several decades after the crime was committed.""[52] He notes: "sometimes repentance, even forgiveness can restore meaning to lives once ruined."[53] He concludes: "this Court has said that, if the death penalty does not fulfil the goals of deterrence or retribution, "it is nothing more than the purposeless and needless imposition of pain and suffering and hence an unconstitutional punishment.""[54]

Finally, Justice Breyer sets out a fourth constitutional defect which falls within the Eighth Amendment's prohibition on "unusual" punishments -- the decline in the use of the death penalty. He notes that in 2014, only seven states carried out an execution.[55] He purports that in more than 60% of states there is "effectively no death penalty" and in an additional 18% "an execution is rare and unusual."[56] He points out that several states have recently abolished the death penalty, such as Nebraska, and other states have come close to doing so. This, he declares, is indicative of a nationwide trend towards abolishing the death penalty. This trend, he claims, is reflective of evolving public opinion.

While Justice Breyer is by no means the first Supreme Court Justice to conclude that the death penalty is unconstitutional,[57] his dissent may nevertheless present a unique moment for the death penalty. This is largely as a result of his final point: that the death penalty is in decline. Public opinion across America has never before been so receptive to the idea of ending their bloody affair with the death penalty. As he points out: "a majority of Americans, when asked to choose between the death penalty and life in prison without parole, now choose the latter."[58] It is also no longer impossible to think that there could be five votes on the Supreme Court in favour of abolition of the death penalty. Justice Breyer is currently in the minority when he concludes: "I believe it highly likely that the death penalty violates the Eighth Amendment."[59] However, his invitation for "a full briefing on the basic question"[60] will no doubt lead to more challenges by inmates on death row. It is not unthinkable that one such challenge could put the final nail in the death penalty coffin.

Justice Scalia's response to this dissent is scathing, denouncing Justice Breyer's argument as "full of internal contradictions and gobbledy-gook."[61] In a melodramatic (and rather nonsensical) concluding statement, Justice Scalia declares that "by arrogating to himself the power to overturn" the decision to leave this issue in the hands of the people, "Justice Breyer does not just reject the death penalty, he rejects the Enlightenment."[62] Justice Scalia rejects the argument by the minority that "things have changed radically."[63] Instead, he suggests that this is an old and worn-out debate: "welcome to Groundhog Day," he quips.[64] Familiar is the scene, he suggests, of the "vocal minority of the Court, waving over their heads a ream of the most recent abolitionist studies as though they have discovered the lost folios of Shakespeare" insisting "that *now*, at long last, the death penalty must be abolished for good."[65]

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Justice Scalia can always be counted on to mount an ardent defence of the death penalty. His opinion is clear when he says, "perhaps Justice Breyer is more forgiving -- or more enlightened -- than those who, like Kant, believe that death is the only just punishment for taking a life. I would not presume to tell parents whose life has been forever altered by the brutal murder of a child that life imprisonment is punishment enough."[66]

He is particularly disparaging of Justice Breyer's critique that the death penalty is beset with delays. "His invocation of the resultant delay as grounds for abolishing the death penalty calls to mind the man sentenced to death for killing his parents, who pleads for mercy on the ground that he is an orphan."[67] In Justice Scalia's eyes, any delay in executing individuals is caused entirely by frivolous challenges to the

death penalty by those very same individuals. The Court is mistaken, he suggests, when it interprets the Eighth Amendment according to "evolving standards of decency that mark the progress of a maturing society."[68]

Justice Thomas, in a separate concurring opinion is even more explicit on this point. He suggests that the Court misinterpreted the Eighth Amendment when it banned executions of juveniles,[69] the "mentally retarded"[70] and those accused of rape.[71] He recounts the grizzly details of the crimes committed as justification that these types of cases, too, deserve the death penalty. "I doubt anyone would disagree that each of these crimes was egregious enough to merit the severest condemnation that society has to offer."[72] What he is advocating is a return to the days where children, or those with the mental age of children, can be executed by the state. Rather than end the death penalty, he concludes that the solution to the problems laid out by Justice Breyer is "for the Court to stop making up Eighth Amendment claims in its ceaseless quest to end the death penalty through undemocratic means."[73]

These remarks illustrate just how irreconcilable the death penalty debate has now become. The Supreme Court found itself at loggerheads and the judgement was nothing short of fireworks. It was perhaps inevitable that a case which on the face of it was about the efficacy of a particular drug should become a battleground for the various camps determined to either abolish or maintain the death penalty. It will certainly be interesting to see which side of the divide will emerge victorious.

1 *Baze v. Rees,* 553 U.S. 35 (2008).
2 *Id.*
3 *Glossip v. Gross,* 576 U.S. (2015) at 1.
4 *Id.*
5 547, U.S. 573 (2006).
6 *Glossip v. Gross*, 576 U.S. (2015) at 2.
7 *Glossip v. Gross*, 576 U.S. (2015) (Sotomayor, J., joined by Ginsburg, J., Breyer, J. and Kagan, J., dissenting) at 1.
8 *Id.,* at 23.
9 *Id.,* at 26.
10 *Id.,* at 28.
11 *Id.,* at 27.
12 *Glossip v. Gross*, 576 U.S. (2015) (Alito, J., joined by Roberts, J., Scalia, J., Kennedy, J. and Thomas, J., concurring in the judgment) at 29.
13 *Id.,* at 1.
14 *Id.,* at 4.
15 *Glossip v. Gross*, oral argument before Supreme Court, 29 April 2015 at 14.
16 *Supra* footnote 7 at 29.
17 *Id.,* at 28.
18 *Supra* footnote 1 at 2.
19 *Supra* footnote 12 at 4.
20 *Supra* footnote 1 at 2.
21 *Supra* footnote 12 at 10.
22 *Wilkerson v. Utah,* 99 U.S. 130 (1879) at 134-135
23 *In re Kemmler,* 136 U.S. 436 (1890) at 447-449. See also, *Louisiana ex rel. Francis v. Resweber,* 329 U.S. 459, 463-464 (1947).
24 *Supra* footnote 7 at 1.
25 *Id.,* at 2.
26 *Id.,* at 3.
27 *Id.,* at 19.
28 *Supra* footnote 12 at 7.
29 *Id.,* at 6.
30 *Supra* footnote 7 at 7.
31 *Id.,* at 20.
32 *Supra* footnote 12 at 28.
33 *Id.,* at 29.
34 *Glossip v. Gross*, 576 U.S. (2015) (Breyer, J., joined by Ginsburg, J., dissenting) at 2.
35 *Gregg v. Georgia,* 428 U.S. 153, 177.
36 *Supra* footnote 32 at 2.
37 *Id.,* at 3.
38 *Id.,* at 3.
39 *Id.,* at 4.
40 *Callins v. Collins,* 510 U.S. 1141 (1994)
41 *Supra* footnote 32 at 6.
42 *Id.,* at 7.
43 *Id.*
44 *Supra* footnote 32 at 9.
45 *Id.,* at 14. Referencing Potter Stewart, J. in *Furman v. Georgia* 408 U.S. at 309-310.
46 *Id.,* at 17.
47 *Id.,* at 19.
48 *Id.,* at 21.
49 *Id.,* at 24.
50 *Id.*
51 *Id.,* at 26.
52 *Id.,* Referencing *Valle v. Florida*, 564 U.S. (2011)
53 *Id.,* at 27.
54 *Id.,* at 28. Referencing *Atkins*, 536 U.S.., at 319 quoting *Enmund v. Florida,* 458 U.S., 782, 798 (1982)
55 *Id.,* at 33.
56 *Id.,* at 36.
57 For instance, Harry Blackmun, J. declared "I shall no longer tinker with the machinery of death" in *Callins v. Collins*, 510 U.S. 1141 (1994), dissenting.
58 *Supra* footnote 32 at 38.
59 *Id.,* at 41
60 *Id.,*
61 *Glossip v. Gross*, 576 U.S. (2015) (Scalia, J., joined by Thomas, J., concurring) at 2.
62 *Id.,* at 7.
63 *Id.*
64 *Id.,* at 1
65 *Id.,* at 1-2
66 *Id.,* at 5.
67 *Id.,* at 6.
68 *Id.,* Referencing *Trop v. Dulles*, 356 U.S. 81 at 106 (1958).
69 *Roper v. Simmons,* 543 U.S. 551 (2005).
70 *Atkins v. Virginia,* 536 U.S. 304 (2002).
71 *Kennedy v. Louisiana,* 554 U.S. 407 (2008).
72 *Glossip v. Gross*, 576 U.S. (2015) (Thomas, J., joined by Scalia, J., concurring) at 9.
73 *Id.,* at 10.