SUPREME COURT OF THE UNITED STATES

No. 07–5439

RALPH BAZE AND THOMAS C. BOWLING, PETITIONERS *v.* JOHN D. REES, COMMISSIONER, KENTUCKY DEPARTMENT OF CORRECTIONS, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

[April 16, 2008]

JUSTICE STEVENS, concurring in the judgment.

When we granted certiorari in this case, 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.

I

Because it masks any outward sign of distress, pancuronium bromide creates a risk that the inmate will suffer excruciating pain before death occurs. There is a general understanding among veterinarians that the risk of pain is sufficiently serious that the use of the drug should be proscribed when an animal's life is being termi-

nated.[1] As a result of this understanding among knowledgeable professionals, several States—including Kentucky—have enacted legislation prohibiting use of the drug in animal euthanasia. See 2 Ky. Admin. Regs., tit. 201, ch. 16:090, §5(1) (2004).[2] It is unseemly—to say the

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[1] The 2000 Report of the American Veterinary Medical Association (AVMA) Panel on Euthanasia stated that a "combination of pentobarbital with a neuromuscular blocking agent is not an acceptable euthanasia agent." 218 J. Am. Veterinary Med. Assn. 669, 680 (2001). In a 2006 supplemental statement, however, the AVMA clarified that this statement was intended as a recommendation against mixing a barbiturate and neuromuscular blocking agent in the same syringe, since such practice creates the possibility that the paralytic will take effect before the barbiturate, rendering the animal paralyzed while still conscious. The 2007 AVMA Guidelines on Euthanasia plainly state that the application of a barbiturate, paralyzing agent, and potassium chloride delivered in separate syringes or stages is not discussed in the report. Several veterinarians, however, have filed an *amici* brief in this case arguing that the three-drug cocktail fails to measure up to veterinary standards and that the use of pancuronium bromide should be prohibited. See Brief for Dr. Kevin Concannon et al. as *amici curiae* 16–18. The Humane Society has also declared "inhumane" the use of "any combination of sodium pentobarbital with a neuromuscular blocking agent." R. Rhoades, The Humane Society of the United States, Euthanasia Training Manual 133 (2002); see also Alper, Anesthetizing the Public Conscience: Lethal Injection and Animal Euthanasia, 35 Fordham Urb. L. J. ___, ___ (forthcoming 2008), online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1109258 (all Internet materials as visited Apr. 10, 2008, and available in Clerk of Court's case file) (concluding, based on a comprehensive study of animal euthanasia laws and regulations that "the field of animal euthanasia has reached a unanimous consensus . . . that neuromuscular blocking agents like pancuronium have no legitimate place in the execution process").

[2] See also, *e.g.*, Fla. Stat. §828.058(3) (2006) ("[A]ny substance which acts as a neuromuscular blocking agent . . . may not be used on a dog or cat for any purpose"); N. J. Stat. Ann. §4:22–19.3 (West 1998) ("Whenever any dog, cat, or any other domestic animal is to be destroyed, the use of succinylcholine chloride, curare, curariform drugs, or any other substance which acts as a neuromuscular blocking agent is prohibited"); N. Y. Agric. & Mkts. Law Ann. §374(2–b) (West 2004) ("No

least—that Kentucky may well kill petitioners using a drug that it would not permit to be used on their pets.

Use of pancuronium bromide is particularly disturbing because—as the trial court specifically found in this case—it serves "no therapeutic purpose." App. 763. The drug's primary use is to prevent involuntary muscle movements, and its secondary use is to stop respiration. In my view, neither of these purposes is sufficient to justify the risk inherent in the use of the drug.

The plurality believes that preventing involuntary movement is a legitimate justification for using pancuronium bromide because "[t]he Commonwealth has an interest in preserving the dignity of the procedure, especially where convulsions or seizures could be misperceived as signs of consciousness or distress." *Ante*, at 19. This is a woefully inadequate justification. Whatever minimal interest there may be in ensuring that a condemned inmate dies a dignified death, and that witnesses to the execution are not made uncomfortable by an incorrect belief (which could easily be corrected) that the inmate is in pain, is vastly outweighed by the risk that the inmate is actually experiencing excruciating pain that no one can detect.[3] Nor is there any necessity for pancuronium bro-

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person shall euthanize any dog or cat with T–61, curare, any curariform drug, any neuro-muscular blocking agent or any other paralyzing drug"); Tenn. Code Ann. §44–17–303(c) (2007) ("Succinylcholine chloride, curare, curariform mixtures . . . or any substance that acts as a neuromuscular blocking agent . . . may not be used on any non-livestock animal for the purpose of euthanasia"). According to a recent study, not a single State sanctions the use of a paralytic agent in the administration of animal euthanasia, 9 States explicitly ban the use of such drugs, 13 others ban it by implication—*i.e.,* by mandating the use of nonparalytic drugs, 12 arguably ban it by reference to the AVMA guidelines, and 8 others express a strong preference for use of nonparalytic drugs. Anesthetizing the Public Conscience, *supra*, at ____, and App.1.

[3] Indeed, the decision by prison administrators to use the drug on

mide to be included in the cocktail to inhibit respiration when it is immediately followed by potassium chloride, which causes death quickly by stopping the inmate's heart.

Moreover, there is no nationwide endorsement of the use of pancuronium bromide that merits any special presumption of respect. While state legislatures have approved lethal injection as a humane method of execution, the majority have not enacted legislation specifically approving the use of pancuronium bromide, or any given combination of drugs.[4] And when the Colorado Legisla-

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humans for aesthetic reasons is not supported by any consensus of medical professionals. To the contrary, the medical community has considered—and rejected—this aesthetic rationale for administering neuromuscular blocking agents in end-of-life care for terminally ill patients whose families may be disturbed by involuntary movements that are misperceived as signs of pain or discomfort. As explained in an *amici curiae* brief submitted by critical care providers and clinical ethicists, the medical and medical ethics communities have rejected this rationale because there is a danger that such drugs will mask signs that the patient is actually in pain. See Brief for Critical Care Providers et al. as *amici curiae*.

[4] Of the 35 state statutes providing for execution by lethal injection, only approximately one-third specifically approve the use of a chemical paralytic agent. See Ark. Code Ann. §5–4–617 (2006); Idaho Code §19–2716 (Lexis 2004); Ill. Comp. Stat., ch. 725, §5/119–5 (West 2006); Md. Crim. Law Code Ann. §2–303 (Lexis Supp. 2007); Miss. Code Ann. §99–19–51 (2007); Mont. Code Ann. §46–19–103 (2007); N. H. Rev. Stat. Ann. §630:5 (2007); N. M. Stat. Ann. §31–14–11 (2000); N. C. Gen. Stat. Ann. §15–187 (Lexis 2007); Okla. Stat., Tit. 22, §1014 (West 2001); Ore. Rev. Stat. §137.473 (2003); Pa. Stat. Ann., Tit. 61, §3004 (Purdon 1999); Wyo. Stat. Ann. §7–13–904 (2007). Twenty of the remaining States do not specify any particular drugs. See Ariz. Rev. Stat. Ann. §13–704 (West 2001); Cal. Penal Code Ann. §3604 (West 2000); Conn. Gen. Stat. §54–100 (2007); Del. Code Ann., Tit. 11, §4209 (2006 Supp.); Fla. Stat. §922.105 (2006); Ga. Code Ann. §17–10–38 (2004); Ind. Code §35–38–6–1 (West 2004); Kan. Stat. Ann. §22–4001 (2006 Cum. Supp.); Ky. Rev. Stat. Ann. §431.220 (West 2006); La. Stat. Ann. §15:569 (West 2005); Mo. Rev. Stat. §546.720 (2007 Cum. Supp.); Nev. Rev. Stat. §176.355 (2007); Ohio Rev. Code Ann. §2949.22 (Lexis 2006); S. C. Code Ann.

ture focused on the issue, it specified a one-drug protocol consisting solely of sodium thiopental. See Colo. Rev. Stat. Ann. §18–1.3–1202 (2007).[5] In the majority of States that use the three-drug protocol, the drugs were selected by unelected Department of Correction officials with no specialized medical knowledge and without the benefit of expert assistance or guidance. As such, their drug selections are not entitled to the kind of deference afforded legislative decisions.

Nor should the failure of other state legislatures, or of Congress, to outlaw the use of the drug on condemned prisoners be viewed as a nationwide endorsement of an unnecessarily dangerous practice. Even in those States where the legislature specifically approved the use of a paralytic agent, review of the decisions that led to the adoption of the three-drug protocol has persuaded me that they are the product of "'administrative convenience'" and a "stereotyped reaction" to an issue, rather than a careful analysis of relevant considerations favoring or disfavoring a conclusion. See *Mathews* v. *Lucas,* 427 U. S. 495, 519, 520–521 (1976) (STEVENS, J., dissenting). Indeed, the trial court found that "the various States simply fell in line" behind Oklahoma, adopting the protocol without any critical analysis of whether it was the best available alter-

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§24–3–530 (2007); S. D. Codified Laws §23A–27A–32 (Supp. 2007); Tenn. Code Ann. §40–23–114 (2006); Tex. Code Crim. Proc. Ann., Art. 43.14 (Vernon 2006 Supp. Pamphlet); Utah Code Ann. §77–18–5.5 (Lexis Supp. 2007); Va. Code Ann. §53.1–234 (Lexis Supp. 2007); Wash. Rev. Code §10.95.180 (2006).

[5] Colorado's statute provides for "a continuous intravenous injection of a lethal quantity of sodium thiopental or other equally or more effective substance sufficient to cause death." §18–1.3–1202. Despite the fact that the statute specifies only sodium thiopental, it appears that Colorado uses the same three drugs as other States. See Denno, The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty, 76 Ford. L. Rev. 49, 97, and n. 322 (2007).

native.[6] App. 756; see also *post,* at 5 (GINSBURG, J., dissenting).

New Jersey's experience with the creation of a lethal injection protocol is illustrative. When New Jersey restored the death penalty in 1983, its legislature "fell in line" and enacted a statute that called for inmates to be executed by "continuous, intravenous administration until the person is dead of a lethal quantity of an ultrashort-acting barbiturate in combination with a chemical paralytic agent in a quantity sufficient to cause death." N. J. Stat. Ann. §2C:49–2 (West 2005). New Jersey Department of Corrections (DOC) officials, including doctors and administrators, immediately expressed concern. The Capital Sentencing Unit's chief doctor, for example, warned the Assistant Commissioner that he had "'concerns . . . in regard to the chemical substance classes from which the lethal substances may be selected.'" Edwards, New Jersey's Long Waltz With Death, 170 N. J. L. J. 657, 673 (2002).[7] Based on these concerns, the former DOC Commissioner lobbied the legislature to amend the lethal injection statute to provide DOC with discretion to select more humane drugs: "'[We wanted] a generic statement, like "drugs to be determined and identified by the commis-

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[6] Notably, the Oklahoma medical examiner who devised the protocol has disavowed the use of pancuronium bromide. When asked in a recent interview why he included it in his formula, he responded: "'It's a good question. If I were doing it now, I would probably eliminate it.'" E. Cohen, Lethal injection creator: Maybe it's time to change the formula, http://www.cnn.com/2007/HEALTH/04/30/lethal.injection/index.html.

[7] Officials of the DOC had before them an advisory paper submitted by a group of New York doctors recommending sodium thiopental "'without the addition of other drugs,'" and the supervisor of the Health Services Unit was informed in a memo from a colleague that pancuronium bromide "'will cause paralysis of the vocal chords and stop breathing, and hence could cause death by asphyxiation.'" Edwards, 170 N. J. L. J., at 673.

sioner, or the attorney general, or the Department of Health"'. . . . 'Who knew what the future was going to bring?'" *Ibid.* And these concerns likely motivated the DOC's decision to adopt a protocol that omitted pancuronium bromide—despite the legislature's failure to act on the proposed amendment. See Denno, When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What It Says About Us, 63 Ohio St. L. J. 63, 117–118, 233 (2002) (explaining that the New Jersey protocol in effect in 2002 called for use of a two-drug cocktail consisting of sodium thiopental and potassium chloride).

Indeed, DOC officials seemed to harbor the same concerns when they undertook to revise New Jersey's lethal injection protocol in 2005. At a public hearing on the proposed amendment, the DOC Supervisor of Legal and Legislative Affairs told attendees that the drugs to be used in the lethal injection protocol were undetermined:

> "Those substances have not been determined at this point because when and if an execution is scheduled the [DOC] will be doing research and determining the state-of-the-art drugs at that point in time . . . . We have not made a decision on which specific drugs because we will have several months once we know that somebody is going to be executed and it will give us the opportunity at that point to decide which would be the most humane.
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> "And things change. We understand that the state-of-the-art is changing daily so to say we are going to use something today when something may be more humane becomes known later wouldn't make sense for us." Tr. of Public Hearing on Proposed Amendments to the New Jersey Lethal Injection Protocol 36 (Feb. 4, 2005).

It is striking that when this state agency—with some

specialized medical knowledge and with the benefit of some expert assistance and guidance—focused on the issue, it disagreed with the legislature's "stereotyped reaction," *Mathews,* 427 U. S., at 520, 521 (STEVENS, J., dissenting), and specified a two-drug protocol that omitted pancuronium bromide.[8]

In my view, therefore, States wishing to decrease the risk that future litigation will delay executions or invalidate their protocols would do well to reconsider their continued use of pancuronium bromide.[9]

II

The thoughtful opinions written by THE CHIEF JUSTICE and by JUSTICE GINSBURG have persuaded me that current decisions by state legislatures, by the Congress of the United States, and by this Court to retain the death penalty as a part of our law 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.

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[8] Further, concerns about this issue may have played a role in New Jersey's subsequent decisions to create a New Jersey Death Penalty Study Commission in 2006, and ultimately to abolish the death penalty in 2007.

[9] For similar reasons, States may also be well advised to reconsider the sufficiency of their procedures for checking the inmate's consciousness. See, *post,* at 5–10 (GINSBURG, J., dissenting).

JUSTICE ALITO correctly points out that the Royal Dutch Society for the Advancement of Pharmacy recommends pancuronium bromide "as the second of the two drugs to be used in cases of euthanasia." *Ante*, at 7 (concurring opinion). In the Netherlands, however, physicians with training in anesthesiology are involved in assisted suicide. For reasons JUSTICE ALITO details, see *ante*, at 2–4, physicians have no similar role in American executions. When trained medical personnel administer anesthesia and monitor the individual's anesthetic depth, the serious risks that concern me are not presented.

In *Gregg* v. *Georgia*, 428 U. S. 153 (1976), we explained that unless a criminal sanction serves a legitimate penological function, it constitutes "gratuitous infliction of suffering" in violation of the Eighth Amendment. We then identified three societal purposes for death as a sanction: incapacitation, deterrence, and retribution. See *id.,* at 183, and n. 28 (joint opinion of Stewart, Powell, and STEVENS, JJ.). In the past three decades, however, each of these rationales has been called into question.

While incapacitation may have been a legitimate rationale in 1976, the recent rise in statutes providing for life imprisonment without the possibility of parole demonstrates that incapacitation is neither a necessary nor a sufficient justification for the death penalty.[10] Moreover, a recent poll indicates that support for the death penalty drops significantly when life without the possibility of parole is presented as an alternative option.[11] And the available sociological evidence suggests that juries are less likely to impose the death penalty when life without parole is available as a sentence.[12]

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[10] Forty-eight States now have some form of life imprisonment without parole, with the majority of statutes enacted within the last two decades. See Note, A Matter of Life and Death: The Effect of Life-Without-Parole Statutes on Capital Punishment, 119 Harv. L. Rev. 1838, 1839, 1841–1844 (2006).

[11] See R. Dieter, Sentencing For Life: Americans Embrace Alternatives to the Death Penalty (Apr. 1993), http://www.deathpenaltyinfo.org/article.php?scid=45&did=481.

[12] In one study, potential capital jurors in Virginia stated that knowing about the existence of statutes providing for life without the possibility of parole would significantly influence their sentencing decision. In another study, a significant majority of potential capital jurors in Georgia said they would be more likely to select a life sentence over a death sentence if they knew that the defendant would be ineligible for parole for at least 25 years. See Note, 119 Harv. L. Rev., at 1845. Indeed, this insight drove our decision in *Simmons* v. *South Carolina*, 512 U. S. 154 (1994), that capital defendants have a due process right to require that their sentencing juries be informed of their ineligibility

The legitimacy of deterrence as an acceptable justification for the death penalty is also questionable, at best. Despite 30 years of empirical research in the area, there remains no reliable statistical evidence that capital punishment in fact deters potential offenders.[13] In the absence of such evidence, deterrence cannot serve as a sufficient penological justification for this uniquely severe and irrevocable punishment.

We are left, then, with retribution as the primary rationale for imposing the death penalty. And indeed, it is the retribution rationale that animates much of the remaining enthusiasm for the death penalty.[14] As Lord Justice Denning argued in 1950, "'some crimes are so outrageous that society insists on adequate punishment, because the wrong-doer deserves it, irrespective of whether it is a deterrent or not.'" See *Gregg,* 428 U. S., at 184, n. 30. Our Eighth Amendment jurisprudence has narrowed the class of offenders eligible for the death pen-

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for parole.

[13] Admittedly, there has been a recent surge in scholarship asserting the deterrent effect of the death penalty, see, *e.g.,* Mocan & Gittings, Getting Off Death Row: Commuted Sentences and the Deterrent Effect of Capital Punishment, 46 J. Law & Econ. 453 (2003); Adler & Summers, Capital Punishment Works, Wall Street Journal, Nov. 2, 2007, p. A13, but there has been an equal, if not greater, amount of scholarship criticizing the methodologies of those studies and questioning the results, see, *e.g.,* Fagan, Death and Deterrence Redux: Science, Law and Causal Reasoning on Capital Punishment, 4 Ohio St. J. Crim. L. 255 (2006); Donohue & Wolfers, Uses and Abuses of Empirical Evidence in the Death Penalty Debate, 58 Stan. L. Rev. 791 (2005).

[14] Retribution is the most common basis of support for the death penalty. A recent study found that 37% of death penalty supporters cited "an eye for an eye/they took a life/fits the crime" as their reason for supporting capital punishment. Another 13% cited "They deserve it." The next most common reasons—"sav[ing] taxpayers money/cost associated with prison" and deterrence—were each cited by 11% of supporters. See Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics 147 (2003) (Table 2.55), online at http://www.albany.edu/sourcebook/pdf/t255.pdf.

alty to include only those who have committed outrageous crimes defined by specific aggravating factors. It is the cruel treatment of victims that provides the most persuasive arguments for prosecutors seeking the death penalty. A natural response to such heinous crimes is a thirst for vengeance.[15]

At the same time, however, as the thoughtful opinions by THE CHIEF JUSTICE and JUSTICE GINSBURG make pellucidly clear, our society has moved away from public and painful retribution towards ever more humane forms of punishment. State-sanctioned killing is therefore becoming more and more anachronistic. In an attempt to bring executions in line with our evolving standards of decency, we have adopted increasingly less painful methods of execution, and then declared previous methods barbaric and archaic. But by requiring that an execution be relatively painless, we necessarily protect the inmate from enduring any punishment that is comparable to the suffering inflicted on his victim.[16] This trend, while appropriate and required by the Eighth Amendment's prohibition on cruel and unusual punishment, actually under-

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[15] For example, family members of victims of the Oklahoma City bombing called for the Government to "'put [Timothy McVeigh] inside a bomb and blow it up.'" Walsh, One Arraigned, Two Undergo Questioning, Washington Post, Apr. 22, 1995, pp. A1, A13. Commentators at the time noted that an overwhelming percentage of Americans felt that executing McVeigh was not enough. Linder, A Political Verdict: McVeigh: When Death Is Not Enough, L. A. Times, June 8, 1997, p. M1.

[16] For example, one survivor of the Oklahoma City bombing expressed a belief that "'death by [lethal] injection [was] "too good" for McVeigh.'" A. Sarat, When the State kills: Capital Punishment and the American Condition 64 (2001). Similarly, one mother, when told that her child's killer would die by lethal injection, asked: "Do they feel anything? Do they hurt? Is there any pain? Very humane compared to what they've done to our children. The torture they've put our kids through. I think sometimes it's too easy. They ought to feel something. If it's fire burning all the way through their body or whatever. There ought to be some little sense of pain to it." *Id.,* at 60 (emphasis deleted).

mines the very premise on which public approval of the retribution rationale is based. See, *e.g.,* Kaufman-Osborn, Regulating Death: Capital Punishment and the Late Liberal State, 111 Yale L. J. 681, 704 (2001) (explaining that there is "a tension between our desire to realize the claims of retribution by killing those who kill, and . . . a method [of execution] that, because it seems to do no harm other than killing, cannot satisfy the intuitive sense of equivalence that informs this conception of justice"); A. Sarat, When the State Kills: Capital Punishment and the American Condition 60–84 (2001).

Full recognition of the diminishing force of the principal rationales for retaining the death penalty should lead this Court and legislatures to reexamine the question recently posed by Professor Salinas, a former Texas prosecutor and judge: "Is it time to Kill the Death Penalty?" See Salinas, 34 Am. J. Crim. L. 39 (2006). The time for a dispassionate, impartial comparison of the enormous costs that death penalty litigation imposes on society with the benefits that it produces has surely arrived.[17]

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[17] For a discussion of the financial costs as well as some of the less tangible costs of the death penalty, see Kozinski & Gallagher, Death: The Ultimate Run-On Sentence, 46 Case W. Res. L. Rev. 1 (1995) (discussing, *inter alia*, the burden on the courts and the lack of finality for victim's families). Although a lack of finality in death cases may seem counterintuitive, Kozinski and Gallagher explain:

"Death cases raise many more issues, and far more complex issues, than other criminal cases, and they are attacked with more gusto and reviewed with more vigor in the courts. This means there is a strong possibility that the conviction or sentence will be reconsidered—seriously reconsidered—five, ten, twenty years after the trial. . . . One has to wonder and worry about the effect this has on the families of the victims, who have to live with the possibility—and often the reality—of retrials, evidentiary hearings, and last-minute stays of execution for decades after the crime." *Id.,* at 17–18 (footnotes omitted).

Thus, they conclude that "we are left in limbo, with machinery that is immensely expensive, that chokes our legal institutions so they are impeded from doing all the other things a society expects from its

III

"[A] penalty may be cruel and unusual because it is excessive and serves no valid legislative purpose." *Furman* v. *Georgia*, 408 U. S. 238, 331 (1972) (Marshall, J., concurring); see also *id.,* at 332 ("The entire thrust of the Eighth Amendment is, in short, against 'that which is excessive'"). Our cases holding that certain sanctions are "excessive," and therefore prohibited by the Eighth Amendment, have relied heavily on "objective criteria," such as legislative enactments. See, *e.g., Solem* v. *Helm,* 463 U. S. 277, 292 (1983); *Harmelin* v. *Michigan*, 501 U. S. 957 (1991); *United States* v. *Bajakajian*, 524 U. S. 321 (1998). In our recent decision in *Atkins* v. *Virginia,* 536 U. S. 304 (2002), holding that death is an excessive sanction for a mentally retarded defendant, we also relied heavily on opinions written by Justice White holding that the death penalty is an excessive punishment for the crime of raping a 16-year-old woman, *Coker* v. *Georgia,*

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courts, [and] that visits repeated trauma on victims' families . . . ." *Id.,* at 27–28; see also Block, A Slow Death, N. Y. Times, Mar. 15, 2007, p. A27 (discussing the "enormous costs and burdens to the judicial system" resulting from the death penalty).

Some argue that these costs are the consequence of judicial insistence on unnecessarily elaborate and lengthy appellate procedures. To the contrary, they result "in large part from the States' failure to apply constitutionally sufficient procedures at the time of initial [conviction or] sentencing." *Knight* v. *Florida*, 528 U. S. 990, 998 (1999) (BREYER, J., dissenting from denial of certiorari). They may also result from a general reluctance by States to put large numbers of defendants to death, even after a sentence of death is imposed. Cf. Tempest, Death Row Often Means a Long Life; California condemns many murderers, but few are ever executed, L. A. Times, Mar. 6, 2006, p. B1 (noting that California death row inmates account for about 20% of the Nation's total death row population, but that the State accounts for only 1% of the Nation's executions). In any event, they are most certainly not the fault of judges who do nothing more than ensure compliance with constitutional guarantees prior to imposing the irrevocable punishment of death.

433 U. S. 584 (1977), and for a murderer who did not intend to kill, *Enmund* v. *Florida,* 458 U. S. 782 (1982). In those opinions we acknowledged that "objective evidence, though of great importance, did 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.'" *Atkins,* 536 U. S., at 312 (quoting *Coker*, 433 U. S., at 597 (plurality opinion)).

Justice White was exercising his own judgment in 1972 when he provided the decisive vote in *Furman*, the case that led to a nationwide reexamination of the death penalty. His conclusion that death amounted to "cruel and unusual punishment in the constitutional sense" as well as the "dictionary sense," rested on both an uncontroversial legal premise and on a factual premise that he admittedly could not "prove" on the basis of objective criteria. 408 U. S., at 312, 313 (concurring opinion). As a matter of law, he correctly stated that the "needless extinction of life with only marginal contributions to any discernible social or public purposes . . . would be patently excessive" and violative of the Eighth Amendment. *Id.,* at 312. As a matter of fact, he stated, "like my Brethren, I must arrive at judgment; and I can do no more than state a conclusion based on 10 years of almost daily exposure to the facts and circumstances of hundreds and hundreds of federal and state criminal cases involving crimes for which death is the authorized penalty." *Id.,* at 313. I agree with Justice White that there are occasions when a Member of this Court has a duty to make judgments on the basis of data that falls short of absolute proof.

Our decisions in 1976 upholding the constitutionality of the death penalty relied heavily on our belief that adequate procedures were in place that would avoid the danger of discriminatory application identified by Justice Douglas' opinion in *Furman, id.,* at 240–257 (concurring

opinion), of arbitrary application identified by Justice Stewart, *id.,* at 306 (same), and of excessiveness identified by Justices Brennan and Marshall. In subsequent years a number of our decisions relied on the premise that "death is different" from every other form of punishment to justify rules minimizing the risk of error in capital cases. See, *e.g., Gardner* v. *Florida,* 430 U. S. 349, 357–358 (1977) (plurality opinion). Ironically, however, more recent cases have endorsed procedures that provide less protections to capital defendants than to ordinary offenders.

Of special concern to me are rules that deprive the defendant of a trial by jurors representing a fair cross section of the community. Litigation involving both challenges for cause and peremptory challenges has persuaded me that the process of obtaining a "death qualified jury" is really a procedure that has the purpose and effect of obtaining a jury that is biased in favor of conviction. The prosecutorial concern that death verdicts would rarely be returned by 12 randomly selected jurors should be viewed as objective evidence supporting the conclusion that the penalty is excessive.[18]

Another serious concern is that the risk of error in capital cases may be greater than in other cases because the facts are often so disturbing that the interest in making sure the crime does not go unpunished may overcome residual doubt concerning the identity of the offender. Our former emphasis on the importance of ensuring that decisions in death cases be adequately supported by reason rather than emotion, *Gardner,* 430 U. S. 349, has been undercut by more recent decisions placing a thumb on the

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[18] See *Uttecht* v. *Brown*, 551 U. S. 1, ___ (2007) (slip op., at 1) (STEVENS, J., dissenting) (explaining that "[m]illions of Americans oppose the death penalty," and that "[a] cross section of virtually every community in the country includes citizens who firmly believe the death penalty is unjust but who nevertheless are qualified to serve as jurors in capital cases").

prosecutor's side of the scales. Thus, in *Kansas* v. *Marsh*, 548 U. S. 163 (2006), the Court upheld a state statute that requires imposition of the death penalty when the jury finds that the aggravating and mitigating factors are in equipoise. And in *Payne* v. *Tennessee*, 501 U. S. 808 (1991), the Court overruled earlier cases and held that "victim impact" evidence relating to the personal characteristics of the victim and the emotional impact of the crime on the victim's family is admissible despite the fact that it sheds no light on the question of guilt or innocence or on the moral culpability of the defendant, and thus serves no purpose other than to encourage jurors to make life or death decisions on the basis of emotion rather than reason.

A third significant concern is the risk of discriminatory application of the death penalty. While that risk has been dramatically reduced, the Court has allowed it to continue to play an unacceptable role in capital cases. Thus, in *McCleskey* v. *Kemp*, 481 U. S. 279 (1987), the Court upheld a death sentence despite the "strong probability that [the defendant's] sentencing jury . . . was influenced by the fact that [he was] black and his victim was white." *Id.,* at 366 (STEVENS, J., dissenting); see also *Evans* v. *State,* 396 Md. 256, 323, 914 A. 2d 25, 64 (2006), cert. denied, 552 U. S. ___ (2007) (affirming a death sentence despite the existence of a study showing that "the death penalty is *statistically* more likely to be pursued against a black person who murders a white victim than against a defendant in any other racial combination").

Finally, given the real risk of error in this class of cases, the irrevocable nature of the consequences is of decisive importance to me. Whether or not any innocent defendants have actually been executed, abundant evidence accumulated in recent years has resulted in the exoneration of an unacceptable number of defendants found guilty of capital offenses. See Garrett, Judging Innocence, 108

Colum. L. Rev. 55 (2008); Risinger, Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate, 97 J. Crim. L. & C. 761 (2007). The risk of executing innocent defendants can be entirely eliminated by treating any penalty more severe than life imprisonment without the possibility of parole as constitutionally excessive.

In sum, just as Justice White ultimately based his conclusion in *Furman* on his extensive exposure to countless cases for which death is the authorized penalty, 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." *Furman*, 408 U. S., at 312 (White, J., concurring). [19]

IV

The conclusion that I have reached with regard to the constitutionality of the death penalty itself makes my

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[19] Not a single Justice in *Furman* concluded that the mention of deprivation of "life" in the Fifth and Fourteenth Amendments insulated the death penalty from constitutional challenge. The five Justices who concurred in the judgment necessarily rejected this argument, and even the four dissenters, who explicitly acknowledged that the death penalty was not considered impermissibly cruel at the time of the framing, proceeded to evaluate whether anything had changed in the intervening 181 years that nevertheless rendered capital punishment unconstitutional. *Furman*, 408 U. S., at 380–384 (Burger, C.J., joined by Blackmun, Powell, and Rehnquist, JJ., dissenting); see also *id.,* at 420 ("Nor are 'cruel and unusual punishments' and 'due process of law' static concepts whose meaning and scope were sealed at the time of their writing") (Powell, J., joined by Burger, C.J., and Blackmun and Rehnquist, JJ., dissenting). And indeed, the guarantees of procedural fairness contained in the Fifth and Fourteenth Amendments do not resolve the substantive questions relating to the separate limitations imposed by the Eighth Amendment.

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.