IDEAS

Unusual Cruelty at the Supreme Court

Justice Neil Gorsuch warmly embraces state killing—even if the state knowingly inflicts agony in the process.

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REUTERS

In 2006, then-Judge Neil Gorsuch wrote a book-length study "to propose and defend an exceptionless norm against the intentional taking of human life." In furtherance of that idea, Gorsuch denounced legal reforms that allow terminal patients, with the aid of a willing physician, to end their lives painlessly.

But Gorsuch included a very big exception to the "exceptionless" norm; after "human life," Gorsuch added, "by private persons." Capital punishment, and war—organized state killing, in other words—"raise unique questions all their own," he explained, without elaboration.

He gave an answer to some of those "unique questions" on Monday. In the 5–4 majority opinion for a case called *Bucklew v. Precythe,* the author of *The Future of Assisted Suicide and Euthanasia* did not simply tolerate but warmly embraced state killing—even if the state knowingly inflicts agony in the process.

As judicial attitudes go, this is the stuff of nightmares.

[Garrett Epps: The machinery of death is back on the docket]

Bucklew was an appeal by a condemned inmate, Russell Bucklew, in Missouri. Bucklew is a thoroughly evil killer. He assaulted his former girlfriend, shot a man who tried to intervene and left him to bleed to death, kidnapped his ex, and raped her. Later he broke out of jail, broke into the ex's home and attacked her mother with a hammer.

Bucklew also suffers from an exceedingly rare disease called "cavernous hemangioma," which produces blood-filled tumors around his body. Even rarer, his tumors are on his head and in his oral cavity. The tumors are inoperable and fragile; if they break, they might flood his throat with blood. He cannot, for example, sleep lying flat, or else he will choke. For this reason, he argued to the Court, Missouri's execution procedures will likely cause him to choke to death on his own blood.

Five years ago, Bucklew filed a challenge to Missouri's lethal-injection procedures. The Supreme Court in a 2008 case had approved lethal injection in general, holding that it does not violate the Eighth Amendment's ban on "cruel and unusual punishments." A mode of execution, the majority said, need not be entirely pain-free: "Because some risk of pain is inherent in any method of execution … the Constitution does not require the avoidance of all risk of pain."

Then, in a 2015 case called *Glossip v. Gross*, a 5–4 majority held that prisoners challenging a state's lethal-injection system must themselves produce a "known and available alternative" method that would cause less suffering. After *Glossip,* the lower federal courts held that Bucklew had not passed this test.

[Garrett Epps: Is it cruel and unusual to execute a man with dementia?]

The first important thing to understand about Bucklew's appeal is that it was what lawyers call an "as applied" challenge. Constitutional challenges come in two

types: "facial" and "as applied." A facial challenge argues that the law is just flat unconstitutional across the board without regard to specific facts. For example, many state laws require voters to show certain state-approved IDs to vote. Depending on how hard the IDs are to get, courts have often found such laws *facially* valid—that is, they aren't unconstitutional infringements of the *general* right to vote. But some citizens might lack the money to pay for an ID, or might lack needed documents, or might live so far from state offices that they can't realistically get there to obtain an ID. Those citizens can argue that the ID law is unconstitutional *"as applied" to people like them*—that the Constitution requires an exception in their case.

Remember now that *Glossip* requires inmates challenging a method to produce an alternative. That requirement was the first issue in *Bucklew*. Bucklew argued that *"as applied" to his particular case*, the burden to produce a "known and available" method of death was unconstitutional. His case is rare or even unique. There are almost no scientific or medical data that would tell a court whether an alternative method would be less agonizing than the state's method. The burden in such cases, he suggests, should more properly fall on the state to show that it can execute him without inflicting undue pain.

Gorsuch brushed aside this claim as "foreclosed by precedent"; the words *all Eighth Amendment claims* in *Glossip,* he wrote, mean that no "as applied" appeal can ever be heard. Such an aggressive reading of one word—*all*—is at best sloppy judging. *Glossip* didn't decide the "as applied" question or even, really, refer to it. Bucklew's claims might be wrong, but they were not "foreclosed."

There's a second problem: Bucklew *had*, in fact, identified an alternative method that, he argued, would be more humane—execution by nitrogen gas. The idea of a "nitrogen chamber" might seem outlandish; no state has yet used nitrogen in an execution. But four states have now legally adopted it as an alternative or primary means of execution—and one of those states is Missouri. So, in fact, Bucklew's alternative was a method *specifically authorized by Missouri law*.

[Read: The cruel and unusual execution of Clayton Lockett]

The question, then, was whether gas would produce less pain than lethal injection would. What's the answer? Bucklew was asking for a trial on that issue; the Supreme Court denied him that day in court.

Beyond the "less painful" issue, the majority said, Bucklew had not shown that gas was a "known and available alternative" to injection. Even though nitrogen was approved by state law, the majority said, Bucklew should have been able to tell the state:

> how nitrogen gas should be administered (using a gas chamber, a tent, a hood, a mask, or some other delivery device); in what concentration (pure nitrogen or some mixture of gases); how quickly and for how long it should be introduced; or how the State might ensure the safety of the execution team, including protecting them against the risk of gas leaks.

This seems like a questionable assignment of the burden—an indigent inmate, locked 24 hours a day in a solitary cell, has fewer means of acquiring information than the state does. Beyond that, it is the state that wants to kill Bucklew, and gas is the state's designated alternative. Is it really so unreasonable to ask the state to take some responsibility for making it work?

Gorsuch's opinion has two even more important malignant flaws. For at least 60 years, the Supreme Court has consistently held that the ban on "cruel and unusual punishments" is not limited to the ideas prevalent in the 18th century (when crimes were sometimes punished by hanging, whipping, branding, and even mutilation). Instead, in a 1958 case called *Trop v. Dulles*, the Court said that "the words of the Amendment are not precise, and … their scope is not static"; instead, it "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." This is a hugely important precedent, invoked dozens of times since then. It has led to such decisions as forbidding execution for rape (employed in the South into the 1960s) and execution of those who commit crimes as children or who become mentally ill while waiting to die. It is nothing less than vital to protecting American society from the growing clamor for barbaric treatment of the powerless.

[Ta-Nehisi Coates: The inhumanity of the death penalty]

But the majority opinion pretended that *Trop* did not exist, instead turning to a repellent discussion of how much it hurt to be hanged in the 18th century (rather a lot, apparently) and whether drowning in your own blood is really all that much worse.

In the next section of the opinion, Gorsuch suggested that the real problem with death-penalty jurisprudence is those pesky people who just won't get aboard the gurney. The Court's inconvenient involvement in death cases, he wrote, could be reduced if the federal courts begin "invoking their equitable power to dismiss or curtail suits that are pursued in a 'dilatory' fashion or based on 'speculative' theories."

Justice Stephen Breyer in dissent pointed out Gorsuch's misuse of the record; Gorsuch seemed rather nettled by the criticism, and even explained once again why the Court was right in February to allow Alabama to execute a Muslim inmate without a spiritual adviser the state would have provided if he were Christian. The truculent tone suggests the new conservative majority will tolerate no more back talk on this death business.

Back talk it got, however, from Justice Sonia Sotomayor, who dissented separately: "There are higher values than ensuring that executions run on time," she wrote.

One might expect the author of Gorsuch's book to agree with that. That Gorsuch was big on human values. "All persons *innately* have dignity and are worthy of respect without regard to some perceived value based on some instrumental scale of usefulness or merit," that Gorsuch wrote.

That Gorsuch was not on the bench Monday.

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