Judicial Incoherence, Capital Punishment, and the Legalization of Torture: A response to *Glossip v. Gross* and *Bucklew v. Precythe*

GUUS DUINDAM*

This brief essay responds to the Supreme Court's recent decision in Bucklew v. Precythe. *It contends that the argument relied upon by the Court in that decision, as well as in* Glossip v. Gross, *is either trivial or demonstrably invalid. Hence, this essay provides a nonmoral reason to oppose the Court's recent capital punishment decisions. The Court's position that petitioners seeking to challenge a method of execution must identify a readily available and feasible alternative execution protocol is untenable, and must be revisited.*

I. INTRODUCTION

When the State of Missouri executes Russel Bucklew later this year by way of lethal injection, the tumors which riddle his head, neck, and throat will likely rupture.[1] If they do, Bucklew will die coughing and choking on his own blood.[2] An expert witness testified that "beginning with the injection . . . and ending with Mr. Bucklew's death *several minutes to as long as many minutes* later, Mr. Bucklew would be highly likely to experience feelings of 'air hunger' *and the excruciating pain of prolonged suffocation*."[3] According to the Supreme Court, this punishment is neither cruel nor unusual.[4] The Eighth Amendment, it held, "does not demand the avoidance of all risk of pain in carrying out executions."[5] Bucklew's challenge failed because, according to the majority, he did not identify a "feasible and readily implemented alternative" by which the state could have executed him.[6]

---

* Guus Duindam is a J.D. / Ph.D. Candidate in Philosophy and Law at the University of Michigan, Ann Arbor. The author would like to thank Anna Aguillard, Dale Robinson, and Emily B. Mills for their excellent editing and cite checking work during the publication process.

[1] *See* Bucklew v. Precythe, 139 S. Ct. 1112, 1138 (2019) (Breyer, J., dissenting) (reviewing the evidence presented by Bucklew regarding the likely effects of his lethal injection); Petition for Writ of Certiorari, *Bucklew*, 139 S. Ct. 1112, at 8–12 (No. 17-8151) (reviewing Bucklew's medical condition and the likely effects of the lethal injection).

[2] *Bucklew,* 139 S. Ct. at 1138 (2019) (Breyer, J., dissenting).

[3] *Id.* at 1139 (Breyer, J., dissenting) (emphasis in original).

[4] *See id.* at 1133 (majority opinion) (holding that the State was entitled to summary judgment on Bucklew's Eighth Amendment claim).

[5] *Id.* at 1125.

[6] *Id.* at 1133.

Readers who have followed the Court's recent capital punishment jurisprudence would not have been surprised at the *Bucklew* holding. In *Glossip v. Gross*, the Court added the macabre requirement that death-row prisoners cannot challenge an execution protocol unless they come up with a "known and available alternative method of execution" *and* establish that this method would be less painful than the existing method.[7] In *Arthur v. Dunn* and *Irick v. Tennessee*, the Court refused even to consider challenges to execution protocols on grounds of unconstitutional cruelty, despite petitioners in both cases amassing significant evidence that their executions would involve "intolerable and needless agony"[8]—and despite the pleaded "known and available" alternatives: execution by firing squad[9] and single-drug lethal injection.[10]

These decisions are evidence of an extraordinary shift in the Court's thinking—away from its long-held view that the "basic concept underlying the Eighth Amendment" is "the dignity of man."[11] This move presents clear moral and legal challenges. But my aim here is not to relitigate these moral issues. They are already well covered by the extensive literature on executions and torture. Instead, this brief essay responds to the central argument relied upon by the Court to justify its holdings in *Glossip* and *Bucklew*, and demonstrates that it is invalid. Other recent critiques of the Court's capital punishment jurisprudence risk preaching to the choir by appealing to broad anti-death-penalty arguments.[12] In contrast, this essay concludes that the Court's decisions must be opposed on simple logical grounds.

---

[7] Glossip v. Gross, 135 S. Ct. 2726, 2731 (2015). The Court alluded to this requirement—that petitioners provide a known and available alternative method of execution and establish that it would be less painful—earlier in *Baze v. Rees*, 553 U.S. 35, 47 (2008), and in *Bucklew* the Court refers to it as the "*Baze-Glossip* test." 139 S. Ct. at 1126. Nevertheless, I will focus in this essay only on the test as it is used in *Glossip* and its progeny because (1) the test in *Baze* is less stringent than the one in *Glossip*, and (2) the essential holding in *Baze* does not depend on this requirement, whereas the holdings of *Glossip* and *Bucklew* fully depend on it.

[8] Arthur v. Dunn, 137 S. Ct. 725, 725 (2017) (Sotomayor, J., dissenting); *see also* Irick v. Tennessee, 139 S. Ct. 1, 1 (2018) (Sotomayor, J., dissenting) (noting that Tennessee's lethal injection would "cause [Irick] to experience sensations of drowning, suffocating, and being burned alive from the inside out").

[9] *Arthur*, 137 S. Ct. at 725 (Sotomayor, J., dissenting).

[10] *Irick*, 139 S. Ct. at 4–5 (Sotomayor, J., dissenting).

[11] Gregg v. Georgia, 428 U.S. 153, 173 (1976) (citing Trop v. Dulles, 356 U.S. 86, 100 (1958)).

[12] *See, e.g.*, Dan Markel, *Executing Retributivism:* Panetti *and the Future of the Eighth Amendment*, 103 NW. U. L. REV. 1163, 1164 (2009) (arguing that the Court's defense of the death penalty is no longer viable); Thomas E. Robins, *Retribution, the Evolving Standard of Decency, and Methods of Execution: The Inevitable Collision in Eighth Amendment Jurisprudence*, 199 PENN ST. L. REV 885, 889 (2015) (arguing that the Court's defense of the death penalty is internally inconsistent).

II. THE CENTRAL ARGUMENT IN *GLOSSIP* AND *BUCKLEW* IS INVALID

The *Glossip* majority argues that "because it is settled that capital punishment is constitutional, it necessarily follows that there must be a constitutional means of carrying it out."[13] It then concludes, claiming to be guided by this inference,[14] that petitioners cannot succeed in Eighth Amendment challenges unless they identify a readily available alternative method of execution.[15]

There are two basic ways in which one could read the inference at the core of the Court's recent death penalty decisions. The first is valid but trivial, and therefore meaningless. The second is plainly invalid. The first, trivial version can be summarized as follows:

> P1: Capital punishment does not invariably violate the Eighth Amendment.
>
> P2: If a punishment does not always violate the Constitution, there must be at least one conceivable means of carrying it out that is not unconstitutional.
>
> C1: Therefore, there is at least one conceivable means of carrying out the death penalty that is not unconstitutional.

This argument is valid (the conclusion necessarily follows from the premises) and sound (the premises are all true). The first premise is explicitly affirmed in *Gregg v. Georgia.*[16] And the second premise is true by definition: to say that there is *no* conceivable constitutional means of carrying out a punishment is just another way of saying that the punishment is not constitutional. Thus, the argument is sound. For much the same reason, it is only trivially valid. After all, to say that "not all executions are unconstitutional" (P1) is simply *equivalent* to the conclusion that "at least one execution is not unconstitutional" (C1). If the second phrase were false—that is, if there were no conceivable methods of execution that would not violate the constitution—then the first one would also be false—that is, all executions would be unconstitutional. The conclusion is just a repetition of the first premise; the argument has not moved the discussion forward. An argument whose conclusion simply repeats its first premise is no argument

---

[13] *Glossip*, 135 S. Ct. at 2732–33 (citing Baze v. Rees, 553 U.S. 35, 47 (2008)) (internal quotations and alterations omitted).
[14] *Id.*
[15] *Id.* 135 S. Ct. at 2737 ("prisoners must identify an alternative that is 'feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain.'") (citing Baze v. Rees, 553 U.S. 35, 52 (2008)).
[16] *Gregg*, 428 U.S. at 169 ("We now hold that the punishment of death *does not invariably violate the Constitution*.") (emphasis added).

at all. Therefore, the Court could not have been guided by this first version of the argument in *Glossip* and *Bucklew*. By imposing new requirements on petitioners, those decisions go significantly beyond *Gregg*'s holding that capital punishment is not "invariably" unconstitutional.[17]

The second argument is nontrivial but fallacious. The Court explicitly endorsed this version of the argument,[18] and it can be summarized as follows[19]:

> P1*: Capital punishment does not invariably violate the Eighth Amendment.
>
> P2*: If a punishment does not always violate the Constitution, there must be at least one *available* means of carrying it out that is constitutional.
>
> C1*: Therefore, there must always be at least one available and constitutional means of carrying out a death sentence.
>
> C2*: Therefore, in order to successfully show that the state's proposed method of execution is unconstitutional, a petitioner must show that there is another available method that would be better. Otherwise, all available methods of carrying out her execution would be unconstitutional. But this, by C1*, could never be the case because there must always be at least one constitutional means of executing her. Hence a petitioner's challenge can only succeed if she can prove that there is a better available means of execution.

It is hard to overstate the importance of this line of argument in the Court's recent death penalty decisions. It is the *sole* justifying reason for the Court's new requirement that petitioners propose their own alternative methods of execution. That standard is not otherwise justified by the Court's earlier capital punishment decisions.[20] It explains why *Glossip* and *Bucklew* require that petitioners provide a "known and available" method of execution. By the Court's logic, if there is no "known and available"[21] method, then this necessarily rules out the possibility that the state's chosen

---

[17] *Id.*

[18] *Glossip*, 135 S. Ct. at 2732–33, 2739; *see also Bucklew v. Precythe*, 139 S. Ct. 1112, 1140 (2019) (Breyer, J., dissenting) (commenting on the Court's reasoning in *Glossip*).

[19] Asterisks distinguish references to premises and conclusions in this version of the argument from those referring to premises and conclusions in the first version of the argument.

[20] It is discussed in *Baze*, but there justified by appeal to the same reasoning: "We begin with the principle, settled by *Gregg*, that capital punishment is constitutional. It necessarily follows that there must be a means of carrying it out." Baze v. Rees, 553 U.S. 35, 47 (2008) (internal citations omitted).

[21] *Bucklew*, 139 S. Ct. at 1125 (citing *Glossip*, 135 S. Ct. at 2738).

method is unconstitutional. After all, the alternative would be to hold that there is no "available" method of execution that would be permissible under the Constitution, and the Court takes itself to have conclusively ruled out this possibility.

Once this argument is isolated from its disturbing context, its failings are evident. Where the inference in P2 is trivially valid, the inference in P2* is plainly invalid. Nothing about the bare constitutionality of capital punishment as much as suggests the conclusion that the best *available* method is always constitutional. P1* provides us with precisely *no reason at all* for thinking this.

If the problem with P2* is not immediately obvious, imagine a judge who believes executions are constitutional if and only if they are painless. This judge affirms P1* and the decision in *Gregg*: she accepts that painless executions are constitutional, hence she accepts that not all executions are unconstitutional. (Put another way, she accepts that the death penalty does not "invariably" violate the Constitution.[22]) But this certainly does not commit her to the claim that there must always be a constitutional way to carry out a death sentence. To the contrary. If a state does not have any painless execution protocols on offer, it will, on this view, be incapable of carrying out a constitutional execution until it discovers or develops such a method. The crucial inference in P2* is simply indefensible.

Because P2* is false and the trivial alternative, P2, does not help us get to C1* and C2*, the Court's conclusions in *Glossip* and *Bucklew* (and their denials of certiorari in *Arthur* and *Irick*) were entirely unwarranted. Crucially, this is true regardless of one's moral convictions about the death penalty or painful executions.

III. THE *GLOSSIP* TEST AND THE EIGHTH AMENDMENT

Suppose now that what I have said so far is wrong. Suppose that it is a feature of the Eighth Amendment (albeit an until-recently-undiscovered feature) that inferences from holdings of the form "x is not invariably unconstitutional" to "there must always be at least one available constitutional means of imposing x" are valid. This would have extraordinary consequences for the structure of our entire penological system.

Consider some of the newly validated arguments we could now make. Imprisonment is not always unconstitutional. Therefore, there must always be an available and constitutional means of imprisonment. Therefore, it does not matter how bad conditions in our prisons get, for the best one will necessarily be constitutional. (Prison inspections are, as it turns out, merely

[22] Gregg v. Georgia, 428 U.S. 153, 169 (1976).

supererogatory.) The same would hold *mutatis mutandis* for every other mode of punishment. This is absurd. It could not possibly follow from any halfway plausible reading of the Eighth Amendment.

This brief exercise illustrates the unreasonableness of the Court's requirement that petitioners and their lawyers devise their own alternative methods of executions. Suppose that all prisons in a state became overcrowded. Next, a newly imprisoned inmate challenges his prison sentence in his overcrowded prison under the Eighth Amendment. No court, surely, would require the *inmate* to find himself a better prison. Unquestionably, it would be incumbent on the state government to find another accommodation or to improve conditions in the current prison.[23] I can see no reason why this ought to work any differently in the context of capital punishment. If a prisoner has a credible claim that the conditions of his imprisonment are intolerably cruel, then it is irrelevant whether the state has better conditions available. What is at issue is *only* whether the conditions to which this prisoner is being subjected are "cruel and unusual." This is how the Court reasons in every Eighth Amendment case *except* capital punishment cases since *Baze* and *Glossip*. In these recent capital punishment cases, it has justified a refusal to engage in serious inquiry about the meaning of "cruel and unusual" in the context of executions by placing what ought to be the state's burden on petitioners. As I hope now to have shown, the Court's reasoning does not begin to justify this extraordinary step.

IV. CONCLUSION

It is hard to imagine an argument with higher stakes. Every time the Court affirms the requirements of *Glossip*, it enables state execution practices which cause potentially torturous deaths. Such a jurisprudence has real victims: Billy Irick, Thomas Arthur, and Russel Bucklew are but prominent examples. This brief essay has argued that the Court's justifications for its holdings in *Glossip* and *Bucklew* are invalid and indefensible. This point is not grounded in political or moral principles. Whatever one thinks of the kinds of executions the Court has decided to tolerate, decisions like *Glossip* and *Bucklew* are grounded in a guiding principle that cannot possibly be correct. They should be roundly rejected.

[23] Indeed, this is how the Court has handled such challenges in the past. *See, e.g.*, Hutto v. Finney, 437 U.S. 678, 685–88 (1978).