The Jurisprudence of Justice John Paul Stevens: Leading Opinions on the Death Penalty

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Summary

Justice Stevens's position on the death penalty has undergone a thorough transformation during his tenure on the Court. Although Stevens initially supported the imposition of the death penalty in accordance with adequately protective state enacted guidelines, over the next 35 years the Justice has voted to narrow the application of the death penalty as he has become more skeptical of the punishment's underlying rationale and the states' ability to protect the rights of capital defendants. In 2008, Justice Stevens's death penalty jurisprudence may have culminated with his concurring opinion in *Baze v. Rees*, in which the Justice unequivocally expressed his ultimate conclusion that the death penalty is itself unconstitutional.

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Shortly before Justice Stevens's appointment, the U.S. Supreme Court, in *Furman v. Georgia*, established what amounted to a moratorium on the imposition of the death penalty.[2] The 1972 decision invalidated the capital punishment systems of Georgia and Texas along with the systems of "no less than 39 states and the District of Columbia," holding that the inherently arbitrary and discriminatory nature of the states' application of the death penalty violated both the prohibition against cruel and unusual punishment of the Eighth Amendment and the due process guarantees of the Fourteenth Amendment.[3] Following the *Furman* case, capital punishment essentially ceased to exist anywhere in the United States.

However, less than six months after Justice Stevens took his seat on the Supreme Court, and four years after *Furman*, Stevens cast an essential, if not deciding,[4] vote in favor of reviving the death penalty. In the *Gregg* cases, the Supreme Court, in a series of decisions, upheld a number of re-enacted state capital punishment schemes that had been tailored to remedying the constitutional deficiencies identified in *Furman*.[5] *Gregg*, and its companion cases issued that same day, have been characterized as representing the "resurrection" of capital punishment.[6] At the time, Justice Stevens had confidence that the states could indeed provide adequate procedural safeguards—with guidance from a continued re-examination of capital sentencing procedures by the Court—that would successfully eliminate the constitutional concerns associated with the states' earlier use of the death penalty.[7]

Justice Stevens's "Narrowing Jurisprudence"

In the decades following *Gregg*, Justice Stevens's death penalty jurisprudence was governed by his belief in "fundamental fairness" and the notion that the death penalty, as the ultimate punishment, must be treated differently from any other lesser form of punishment.[8] The "qualitative difference" between death and any other form of punishment, wrote Justice Stevens,

[1] 553 U.S. 35 (2008) (Stevens, J., concurring).

[2] 408 U.S. 238 (1972).

[3] *Id.* at 417-18.

[4] Elisabeth Semel, *Reflection on Justice John Paul Stevens's Concurring Opinion in Baze v. Rees: A Fifth Gregg Justice Renounces Capital Punishment*, 43 U.C. Davis L. Rev. 783, 787 (2010) ("[Justice Stevens's] vote was indispensable to the Court's revival of the death penalty in 1976.").

[5] 428 U.S. 153 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. Florida 428 U.S. 242 (1976).

[6] Semel, *supra* note 4, *citing* Stuart Banner, The Death Penalty: An American History 267 (2002).

[7] Gardner v. Florida, 430 U.S. 349, 357 (1977).

[8] William W. Berry III, *Powell, Blackmun, Stevens, and the Pandora's Box theory of Judicial Restraint, available at* http://www.ssrn.com; *see, e.g.*, Jacobs v. Scott 513 U.S. 1067, 1067 (1994) ("In my opinion it is fundamentally unfair …").

leads to a "corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."[9]

In case after case, Stevens has voted to narrow the application of the death penalty through limiting the class of individuals that was eligible for the punishment, or by increasing procedural protections for capital defendants. Justice Stevens, often in dissent, has voted to prohibit judges from overriding a jury's decision on the imposition of the death penalty;[10] limit the use of emotional victim impact statements;[11] ensure adequate legal representation for capital defendants;[12] prohibit the use of the death penalty on the mentally retarded;[13] prohibit the use of the death penalty on minors;[14] alter the composition of jury pools in capital cases to include those who object on moral grounds to the imposition of the death penalty;[15] prohibit substantially delayed executions;[16] overturn convictions that "present an unacceptable risk that race played a decisive role in [the defendant's] sentencing";[17] and prohibit states from punishing the crime of rape, or rape of a child, with the death penalty.[18] Perhaps the opinion that is most representative of Justice Stevens's attempts at narrowing the application of the death penalty, and one in which Stevens was able to draw five other justices to his position, was his majority opinion in the 2002 case *Atkins v. Virginia*.[19]

Atkins v. Virginia: A National Consensus

A landmark case, *Atkins v. Virginia* highlights two key aspects of Justice Stevens's death penalty jurisprudence. The opinion illustrates the Justice's reliance on state-by-state trends in assessing societal views on what qualifies as "cruel and unusual."[20] Additionally, the opinion discusses Stevens's growing skepticism of the accepted justifications for capital punishment.

In *Atkins*, the Court considered the constitutionality of imposing the death penalty on the mentally retarded.[21] The mentally retarded defendant in the case had been found guilty of abduction, armed robbery, and capital murder and sentenced to death by a jury under Virginia law.[22] Writing for the majority, Justice Stevens overturned the sentence on the grounds that the punishment was

[9] McClesky v. Kemp, 481 U.S. 279, 366 (1987) (Stevens, J., dissenting). Justice Stevens recently reiterated that his concern over wrongful convictions has played a role in shaping his views on the death penalty, noting that "the risk of an incorrect decision has increased" and that DNA testing makes us "more aware of the risk [of wrongful conviction] than we might have been before." Joan Biskupic, *Stevens, Risk of Wrongful Sentences Higher*, USA Today, May, 6 2010.

[10] Spaziano v. Florida, 468 U.S. 447 (1984) (Stevens, J., concurring in part and dissenting in part).

[11] Payne v. Tennessee, 501 U.S. 808 (1991) (Stevens, J., dissenting)

[12] Lockhart v. Fretwell, 506 U.S. 364 (1993).

[13] Atkins v. Virginia, 536 U.S. 304 (2002).

[14] Roper v. Simmons, 543 U.S. 551 (2005) (Stevens, J., concurring).

[15] *See*, Baze v. Rees, 553 U.S. 35 (2008) (Stevens, J., concurring).

[16] *See*, Thompson v. McNeil, 129 S. Ct 1299 (2009).

[17] McClesky v. Kemp, 481 U.S. 279 (1987) (Stevens, J., dissenting).

[18] Coker v. Georgia, 433 U.S. 584 (1977); Kennedy v. Louisiana, 128 S.Ct. 2641 (2008).

[19] 536 U.S. 304 (2002).

[20] *Id.* at 312-316.

[21] *Id.* at 306.

[22] *Id.* at 307.

disproportionate to the crime and therefore in violation of the prohibition on cruel and unusual punishment of the Eighth Amendment.[23]

Justice Stevens began by summarizing the Court's Eighth Amendment jurisprudence, noting that at its core, the amendment's prohibition on excessive punishment demands that "punishment for crime should be graduated and proportioned to the offense."[24] Known as the proportionality principle, whether a punishment is excessive in relation to the crime is judged not by the views that prevailed when the Bill of Rights was adopted, but by the "evolving standards of decency that mark the progress of a maturing society."[25] Stevens went on to cite long-standing Court precedent in concluding that the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislature."[26] The Court, both before and after *Atkins*, has utilized the actions of the state legislatures as a barometer of society's acceptance of the death penalty in a given scenario.[27]

In considering how state legislatures have approached the issue of imposing the death penalty on the mentally retarded, Justice Stevens identified a clear trend towards prohibiting the practice. Although a majority of states had not yet prohibited the use of capital punishment on the mentally retarded, Stevens noted "it is not so much the number of these states that is significant, but the consistency of the direction of change."[28] After showing the clear trend among the states towards prohibiting the practice over the previous decade, Stevens concluded that imposing the death penalty on the mentally retarded had "become truly unusual, and it is fair to say that a national consensus has developed against it."[29] As a Justice, Stevens typically placed greater weight on current trends, rather than simply deferring to the position adopted by a majority of state legislatures.[30]

Stevens's opinion also determined that the social purposes served by the death penalty—retribution and deterrence—were not adequate to justify the execution of a mentally retarded criminal. Retribution, argued Stevens, is directly associated with culpability. As the "severity of the appropriate punishment necessarily depends on the culpability of the defendant," the Court has reserved the imposition of the death penalty for only the most serious crimes and the most culpable defendants.[31] Stevens concluded that the lesser degree of culpability, due to cognitive and behavioral impairments associated with the mentally retarded defendant, "surely does not merit that form of retribution."[32] As to deterrence, Stevens noted that the diminished ability of the mentally retarded to "engage in logical reasoning, or to control impulses," defeated the purpose of

[23] *Id.* at 321.

[24] *Id.* at 311 (quoting Weems v. U.S., 217 U.S. 349, 367 (1910)).

[25] *Id.* at 312 (quoting Trop v. Dulles, 356 U.S. 86, 100-01 (1958)).

[26] *Id.* at 312.

[27] *See*, Penry v. Lynaugh, 492 U.S. 302, 331 (1989) (stating that "the clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures."); Roper v. Simmons, 543 U.S. 551, 568 (2005) ("A majority of States have rejected the imposition of the death penalty on juvenile offenders under 18 …"). *See also*, Kennedy v. Louisiana, 128 S.Ct. 2641 (2008).

[28] *Atkins*, 536 U.S. at 315.

[29] *Id.* at 316.

[30] For example, Justice Stevens voted to prohibit the use of the death penalty on juveniles even though a majority of states allowed the practice. *Roper*, 543 U.S. 551 (2005).

[31] *Atkins*, 536 U.S. at 319.

[32] *Id.*

creating a deterrent as it was less likely that mentally retarded individuals could "process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information."[33]

Stevens then concisely summarized his "narrowing" view of the death penalty, developed over more than 30 years of experience on the Court, in concluding: "[T]hus pursuant to our narrowing jurisprudence, which seeks to ensure that only the most deserving of execution are put to death, an exclusion for the mentally retarded is appropriate."[34]

The Culmination of Justice Stevens's Evolving Death Penalty Jurisprudence

In 2008, Justice Stevens abandoned his three-decade endeavor of attaining a narrowed, fair, and non-discriminatory capital punishment system. Rather, Stevens's position on the death penalty came full circle in *Baze v. Rees* as he cited back to the Court's decision in *Furman* in asserting that capital punishment was "patently excessive and cruel and unusual punishment violative of the Eighth Amendment."[35]

In *Baze*, the Court heard an Eighth Amendment challenge to Kentucky's multi-drug lethal injection procedure.[36] Although a majority of the Court voted to uphold Kentucky's method of execution, including Justice Stevens, it was Stevens's concurring opinion that drew the most attention. Picking up where he left off in *Atkins*, Stevens questioned the accepted rationales underlying the death penalty.[37] His opinion openly attacked the legitimacy of the deterrence and retribution rationales, arguing that the value of both had dwindled and must now be "called into question."[38] With respect to deterrence, Stevens noted that "despite 30 years of empirical research in the area, there remains no reliable statistical evidence that capital punishment in fact deters potential offenders."[39] As to retribution, he pointed out that the relatively painless methods of execution required under the Eighth Amendment "actually undermine the very premise on which public approval of the retribution rationale is based"—that the offender suffer a punishment comparable to the suffering experienced by his victim.[40]

In confronting the Court's decisions, and his vote in the *Gregg* cases, Justice Stevens admitted that the Court "relied heavily on our belief that adequate procedures were in place that would avoid the danger of discriminatory application identified … in *Furman*."[41] Stevens then pointed to three key failures of the Court's death penalty jurisprudence. First, juries in capital cases do not represent a fair cross section of the community; rather, eliminating jurors who oppose the death

[33] *Id.* at 320.

[34] *Id.* at 319.

[35] 553 U.S. 35, 86 (2008) (Stevens, J., concurring).

[36] *Id.* at 40.

[37] *Id.* at 78-82.

[38] *Id.* at 78.

[39] *Id.* at 79.

[40] *Id.* at 81.

[41] *Id.* at 83.

penalty on moral grounds "is really a procedure that has the purpose and effect of obtaining a jury that is biased in favor of conviction."[42] Second, the emotional impact of capital offenses and the often disturbing facts associated with those crimes leads to a greater risk of error in capital cases because "the interest in making sure the crime does not go unpunished may overcome residual doubt concerning the identity of the offender."[43] Third, Justice Stevens highlighted the continued risk of a discriminatory application of the death penalty, noting that the Court has continued to allow race to play an "unacceptable role" in capital cases.[44]

Given what he considered the now unpersuasive rationales for the death penalty, and the inability of the Court and the states to cooperatively establish adequate procedural protections in capital cases, Justice Stevens, relying on his "own experience" and "extensive exposure" to death penalty cases, quoted the Court's decision in *Furman* in unequivocally concluding that 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."[45]

Notwithstanding his clear position that the death penalty itself was unconstitutional, Stevens voted to uphold the Kentucky lethal injection statute. Citing a "respect [for] precedents that remain a part of our law," Stevens deferred to the Court's long-standing framework for evaluating the death penalty in light of the Eighth Amendment, and joined the Court in concluding that, under the existing framework, the evidence failed to show that the Kentucky statute was unconstitutional.[46]

Stevens's Legacy

From casting a vote that resurrected the use of the death penalty to becoming the only Justice thus far on the Roberts Court to formally question the death penalty's *per se* constitutionality, Justice Stevens's position on capital punishment has undergone significant changes during his tenure on the Court. However, his jurisprudence has been consistently guided by his belief in "fundamental fairness" and his recognition that, due to its special risks and irrevocable nature, "death is different." Although Stevens initially had hopes that the Court, working in cooperation with the states, could correct the imperfections of capital punishment, after more than 30 years of experience with death penalty cases, and a declining acceptance of the proffered justifications for the death penalty, Justice Stevens ultimately has questioned whether sentencing a defendant to death can ever be consistent with the Eighth Amendment's prohibition on "cruel and unusual" punishment. With his retirement imminent, the Court faces the loss of its most vocal death penalty opponent.

[42] *Id.* at 84.

[43] *Id.* at 84-5.

[44] *Id.* at 85.

[45] *Id.* at 86 (quoting Furman v. Georgia, 408 U.S. 238, 312 (1972) (White, J., concurring)).

[46] *Id.* at 87.

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