

COMMENTARY



ON POINT By Catherine McClure

Evolving standards of decency should determine constitutionality of executions

When the Supreme Court granted their third stay of execution on October 30 to a Mississippi prisoner scheduled to die that evening, the Court finally sent a definitive signal that they intend to block all executions until they decide the case of *Baze v. Rees*, currently scheduled for oral argument in January. The *Baze* case challenges the constitutionality of the lethal injection method of execution based on research studies and anecdotal evidence that suggest a high incidence of error in administering the drugs, resulting in excruciating pain for the inmate sentenced to die. The death row inmates petitioning the Court contend that lethal injection is therefore cruel and unusual punishment prohibited by the Constitution.

The importance of the *Baze* case goes far beyond the issue of whether lethal injection is a humane method for implementing the death penalty, however. It has been over one hundred years since the Supreme Court ruled on the constitutionality of a method of execution. As a result, there is no clear standard for determining when a particular execution method amounts to cruel and unusual punishment under the Eighth Amendment. In creating such a rule, the Court must reject an originalist construction of the meaning of 'cruel and unusual' grounded only in the mores of the time of the Founders. Instead, the Court should recognize that this constitutional concept, by its very terms, requires a fluid analysis reflecting contemporary society's sensibilities, customs and vision of decency and humanity.

The last time the Court directly addressed the constitutionality of a method of execution was in the late 1800s when it upheld the use of a firing squad, ruling that punishments are cruel under the Eighth Amendment only when they involve torture or a lingering death, as happens with crucifixion or burning at the stake. Since then, the Court's interpretation of cruel and unusual punishment has come from cases largely unrelated to execution methods, where the Court has ruled that punishments must not amount to "wanton and unnecessary infliction of pain or torture," must not be "excessive and disproportionate to the crime," but in all events must "accord with the dignity of man, which is the basic concept underlying the Eighth Amendment." The Court in each case focused its analysis on "evolving standards of decency that mark the progress of a maturing society."

No matter what the ultimate rule of *Baze*, the case will highlight the philosophical rift among the current Justices regarding the correct methodology for interpreting the Constitution. On the one hand, Justices Breyer, Stevens, Souter and Ginsburg consistently advocate for a 'living' Constitution, contending that this body of law, as others, should grow and change with time to meet the needs of a changing nation. They argue that particularly where the Constitution is drafted in broad terms, the Framers themselves

intended the document to be interpreted dynamically, to reflect the necessarily changing circumstances of civilized society. These Justices can be counted on to follow current Court precedent and create a standard for evaluating execution methods which is grounded in contemporary society's evolving sense of decency and humanity, given scientific and technological advances. Under such an analysis, the humane and laudable goal of avoiding unnecessary cruelty will inform the constitutional inquiry.

Originalists such as Justices Antonin Scalia and Clarence Thomas, on the other hand, argue that the language of the Constitution should be interpreted according to how the text was originally understood. Their focus is on the original meaning of the terms used rather than on their current meaning, because, they argue, the authority of the Constitution stems from its ratification, and therefore it is the meaning of the Constitution at the time of ratification which should govern both then and now. We can expect Justices Scalia and Thomas to reject out of hand past precedent requiring the Court to look to "evolving standards of decency" in setting the bar for cruel and unusual execution methods. The fear here of course is that anything short of burning at the stake may be deemed constitutional.

Yet even under an originalist interpretation of the cruel and unusual prohibition, one can argue that the standard by its very terms requires a flexible, changing analysis, dependent on current societal conditions. The term 'unusual,' meaning not common or customary, definitionally hinges on prevailing sensibilities and customs at the place and time of punishment. The Framers' use of that parameter arguably requires that any analysis of the constitutionality of punishment under the Eighth Amendment be informed by the circumstances and sensibilities of the day, including the scientific and other advances in our society which impact our vision of decency and humanity.

In this particular constitutional prohibition there should be, therefore, no room for philosophical disagreement between originalists and those who believe in a 'living' Constitution. And in that event, whatever the standard arising from *Baze*, it will reflect the constraints of current day moral imperatives which require that if we must impose death on the worst of our own, we do it in the most humane way possible for our time.

Catherine McClure is an Ann Arbor-based legal affairs writer who practiced law with major firms in Los Angeles, Chicago, and Ann Arbor. She has also served as a professor of law in the business schools of Michigan State University and the University of Michigan. McClure received a B.A. and M.A. from the University of Michigan, and her law degree from the University of California, at Berkeley. She can be reached at mcclur@umich.edu.

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"I REALIZED I WAS OVERWHELMED WHEN I STARTED DREAMING IN E-MAIL..."

Cost of Windows Vista extends beyond retail price

BY HARRY CENDROWSKI

Amid much anticipation, Microsoft released its latest operating system, Windows Vista, on January 30, 2007, replacing Windows XP. For professional service organizations, such as CPA or legal firms, the release of the latest operating system from Microsoft elicits an interesting conundrum. When should a company upgrade, and what will be the total cost?

According to Microsoft, the software boasts upgrades over XP in areas such as: security; graphics; search and organization tools; multimedia; improved system tools for backups; and many others. Just as XP superseded Windows 98, Vista's replacement of XP is unavoidable, but deciding when to upgrade is ultimately management's decision.

There are many issues that management must consider before deciding when to make the switch. There are obvious issues such as price, cost to implement the operating system and employee training needed to maximize the system's capabilities. But there are also unforeseen costs associated with upgrading to Vista, which management could easily overlook.

Many currently installed PCs do not meet minimum hardware requirements for Windows Vista or Vista Premium. This could prove to be a very significant barrier for companies to overcome in adopting the new operating system. Hardware shortfalls include video card incompatibility, high processor speed requirements, and low amounts of available system memory, RAM. In fact, a recent study by Softchoice Corp. revealed that 94 percent of currently installed business PCs do not meet the minimum hardware requirements for Vista Premium.

Aside from hardware incompatibility, Microsoft has not released a list of Vista-incompatible programs. Management considering a switch to Vista can visit Microsoft.com and download Windows Vista Upgrade Advisor 1.0 for free, which assists users in



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determining whether their hardware is Vista-ready. However, in IT forums, some have opined that issues have occurred post-Vista upgrade, as the advisor does not help users identify incompatible software. This has left some users thinking their PC will fully support Vista, when in actuality some programs are incompatible.

Small to midsize firms that provide professional services first need to determine if their third party software is compatible with the new Vista operating system. For example, while ProSeries maintains its software will be compliant with Vista, the ProSeries 2006 Tax Software includes features that are not compatible with the operating system, resulting in users having to run the software in "admin mode" for the best performance.

If users are in admin mode, certain security features may be overridden, thereby potentially creating weaknesses in the system. These types of issues can occur in a variety of software applications across all industries and should be considered when deciding to upgrade to Vista.

Management's decision to upgrade to Vista could be based on the system's increased security features; however, if the firm is only able to run its software applications with users in admin mode, the system may not be as secure as

its predecessor. Furthermore, if management maintains absolute reliance on Vista's security features while users are in admin mode, the widespread vulnerability of the system will not be known.

Malware attacks, usually in the form of worms, viruses, trojans, or spyware, can take over a system running in admin mode, a threat that can be minimized in user mode. In addition to wreaking havoc on a system, confidential data can be compromised in malware attacks.

As of July 11, 2007, Microsoft ended support for Windows 98. Any PCs still running Windows 98 are officially obsolete, pending an upgrade to XP. If companies are unsure about whether or not a switch to Vista is necessary, understand that Windows XP is destined to share the same fate as its predecessor. Many software manufacturers are no longer backdating software for compatibility as they did with XP. As more users begin operating Windows Vista, the new operating system will ultimately become the standard. An additional point of consideration: any new computers your entity purchases will be loaded with Vista.

Recognizing when a company should switch to Vista is a complex question with no all-encompassing answer. The most important issue management should consider: when is a switch to Vista right for our organization and those companies we service? Management is best suited by doing its homework and making a decision based on the interests and needs of the company before deciding when to upgrade to Vista.

Harry Cendrowski is the managing officer of Cendrowski Selecky and a founding member of Cendrowski Corporate Advisors and Prosperitas. In addition to serving as an expert witness at various courts and administrative agencies in the United States and United Kingdom, he is a co-author of the book "The Fraud Deterrence Handbook" published by John Wiley & Sons, Inc.



OFF THE PRESS

Trial lawyer and author Michael Tigar's new book, "About Terrorism: The Threat to Civil Liberties in Times of National Emergency," written in response to "Not a Suicide Pact," by Judge Richard Posner, U.S. Court of Appeals for the Seventh District, examines the responses of governments throughout history to terrorist threats, including those in our own nation's history. Tigar focuses specifically on the effects of governmental action on the liberties and constitutional protections enjoyed by the people.

In "Thinking About Terrorism" Tigar creates a framework for analyzing the government's responses to the terrorist attacks of 9/11 – the now familiar litany of Guantanamo, extraordinary rendition, telephone and e-mail spying, and the like – and for balancing these responses with rights guaranteed under the Constitution, such as the right to be free of searches and seizures and the right to privacy.

Posner came down squarely on the side of the current administration in defending the govern-

ment's responsibility to keep the people safe at nearly all costs. Tigar demonstrates exactly what those costs have been, historically and recently, and makes the case that subversion of the fragile civil rights of Americans is in fact an undermining of the very basis of the republic.

Tigar has been on the front lines of major legal battles since the late 1960s. Over the past 40 years he has represented such defendants as Angela Davis, John Demjanjuk, Terry Nichols (the Oklahoma City bombing co-conspirator), and, most recently, Lynne F. Stewart. He is the author of several trial practice handbooks and his autobiography, "Fighting Injustice." He teaches at American University and the University of Texas law schools.

"Thinking About Terrorism: The Threat to Civil Liberties in Times of National Emergency," ABA Publishing, is 238 pages in paperback and costs \$34.95 for ABA members and \$39.95 for non-members.

To order the book call (800) 285-2221 and request product code 1610161.

REQUEST FOR PROPOSAL

The Third Circuit Court has issued its REQUEST FOR PROPOSAL FOR THE PROVISION OF FRIEND OF THE COURT SERVICES. The general purpose of this RFP is to solicit proposals from any interested entity to establish a single contract, pursuant to which the successful vendor would provide all functions performed by the Court's Friend of the Court (the "FOC"), especially those that relate to Title IV-D funding, except as otherwise expressly excluded therein or by subsequent agreement, with the primary goals of performing FOC functions more effectively and meeting or exceeding establishment and collection rates set by Michigan and Federal guidelines, and enhancing the efficiency of the Court's processing of domestic relations cases. The complete text of the REQUEST FOR PROPOSAL FOR THE PROVISION OF FRIEND OF THE COURT SERVICES, along with any FAQs that are posted, may be obtained on_line at <http://www.3rdcc.org>. Proposals shall be sent, via certified mail, to the Executive Court Administrator, Third Circuit Court, Room 711 Coleman A. Young Municipal Center, Two Woodward Avenue, Detroit, Michigan 48226. The deadline for submission is November 12, 2007.

THIRD CIRCUIT COURT NOTICE – DETROIT, MI

Effective January 1, 2007, any voucher submitted for any services rendered more than sixty (60) days from the case disposition on criminal matters will be denied in accordance with the Local Administrative Order 2006-08, Plan for Assignment of Counsel in the Third Judicial Circuit. This includes payment requests for either regular or extraordinary services.

Bernard J. Kost
Executive Court Administrator
Third Judicial Circuit

COMMENTARY PAGE

The Legal News will be presenting a weekly Commentary Page.

Anyone interested in contributing on an occasional or weekly basis to future commentary pages should contact Tom Kirvan, editor-at-large, at tkirvan@legalnews.com.

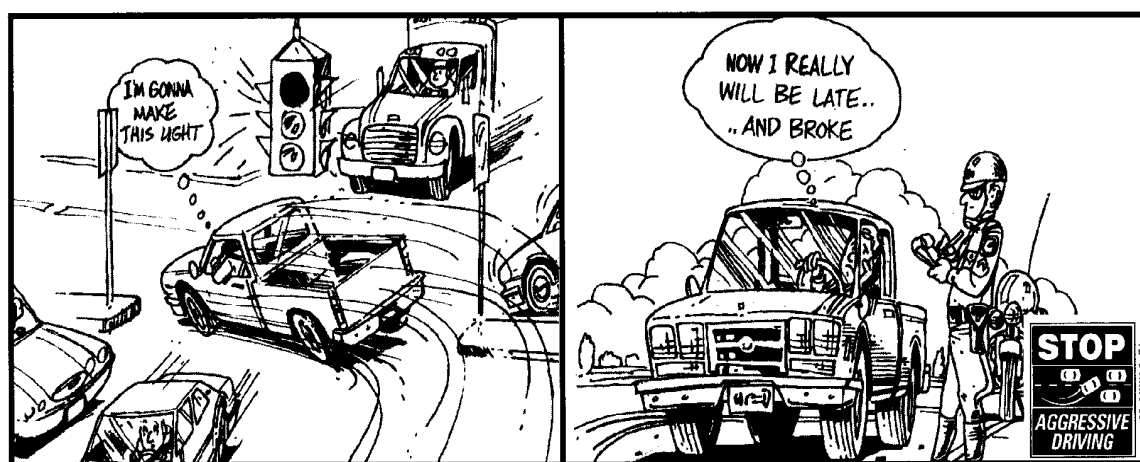
To submit calendar events for publication, fax to:

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The Detroit Legal News



Running Into Trouble by The National Highway Traffic Safety Administration



Heart Attack **STROKE** **Kidney Failure**

Next time you joke about high blood pressure... Laugh these off!

Uncontrolled high blood pressure may lead to all of the above. 50 million Americans have high blood pressure and half don't even know it. Get your blood pressure checked regularly and call for more information.

NKF National Kidney Foundation