Cruel and Unusual? The Bifurcation of Eighth Amendment Inquiries After *Baze v. Rees*

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I. Introduction

In Louisville, Kentucky, on May 3, 2008, thoroughbred racing filly Eight Belles sustained compound fractures in both of her front ankles after running a close second behind new Kentucky Derby champion Big Brown.[1] In the moments after she fell to the track, the on-site veterinary team euthanized her, recognizing that her injuries were far too severe to attempt any sort of treatment.[2] Although precise information is not publicly available, it is likely that Eight Belles was killed by a single large dose of a barbiturate, ensuring a quick and painless death.[3] Veterinarians can state with complete confidence that Eight Belles did not suffer any pain whatsoever in her death,[4] but no such assurances can be made in the case of convicted criminals executed in accordance with execution protocols like Kentucky's. It is due to the risk of pain that pancuronium bromide, the second drug administered in Kentucky's execution protocol, is illegal for use in animal euthanasia in at least twenty-three states—including Kentucky.[5]

In 1977, Oklahoma became the first state to adopt lethal injection as its method of execution, codifying a three-drug sequence still in use in various forms throughout the United States—including in Kentucky.[6] As of this writing, however, the only person actually executed in Kentucky under the state's lethal injection protocol was Edward Lee Harper, executed on May 25, 1999 for a 1982 double murder.[7] Kentucky law requires corrections offi-

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[1] Associated Press, *Favorite Big Brown Dusts Field; Runner-Up Eight Belles Euthanized,* ESPN.com, May 4, 2008, http://sports.espn.go.com/sports/horse/news/story?id=3380081.

[2] *Id.*

[3] Am. Vet. Med. Ass'n, AVMA Guidelines on Euthanasia 18 (2007), *available at* http://www.avma.org/issues/animal_welfare/euthanasia.pdf. As described in the AVMA report, it is also possible that Eight Belles was killed by a barbiturate following injection of a paralytic agent; if that were the case, there would still have been no risk of pain caused by the euthanasia itself.

[4] *Id.*

[5] Brief for Dr. Kevin Concannon et al. as Amici Curiae in Support of Petitioners at 16-18, Baze v. Rees, 128 S. Ct. 1520 (2008) (No. 07-5439).

[6] Findings of Fact and Conclusions of Law by the Franklin Circuit Court, Baze v. Rees, Civ. A. No. 04-CI-01094 (Franklin Cir. Ct. July 8, 2005), 2007 WL 4790797 at *754, *755-56.

[7] *See* Death Penalty Info. Ctr., State by State Information, http://www.deathpenaltyinfo.org/state (last visited Oct 4, 2008) (indicating that since 1976, Kentucky has executed only two people); CNN, *Kentucky Executes First Prisoner by Lethal Injection*, CNN.com, May 26,

cials to adhere to a strict execution protocol.[8] The first step in the protocol calls for "the availability of a therapeutic dose of diazepam if it is requested."[9] Following this, the protocol prescribes compulsory procedures. In order to allow for the injection of chemicals, certified phlebotomists and emergency medical technicians have up to an hour to insert all necessary needles and IV lines into the inmate's body. The injections themselves begin with three grams of sodium thiopental,[10] administered, like all the drugs during execution, intravenously. Sodium thiopental is a rapid barbiturate which renders the inmate deeply unconscious. Following the administration of the sodium thiopental, the IV injection line is flushed to remove any residue. Once the line is clear, fifty milligrams of pancuronium bromide[11] are administered in order to cause total paralysis and suspension of all muscular movements in the inmate—including respiration.

After this second injection, the line is once again cleared in preparation for the final injection, 240 milligrams of potassium chloride. Potassium chloride disrupts the electrical signals required to sustain a regular heartbeat and induces cardiac arrest in the inmate. The successful administration of potassium chloride is determined by an electrocardiogram, at which point the inmate's death is verified by a doctor and a coroner.[12]

In theory, the three-drug protocol is designed to minimize the possibility of pain for the inmate. The initial administration of a barbiturate should induce total unconsciousness in the inmate in every case when it is properly administered. Assuming its successful injection, this procedure completely eliminates any risk of physical pain in the course of the execution. The purpose of the third drug in the protocol, potassium chloride, is similarly basic: it is the drug that ultimately kills the inmate. The Eighth Amendment challenge posed in the recent Supreme Court case *Baze v. Rees* does not object to the use of either of these drugs *per se*, but instead contends that the paralysis induced by the second drug, pancuronium bromide, could mask consciousness, thereby creating a risk of physical pain in the course of an execution under Kentucky's protocol.[13]

1999, http://www.cnn.com/US/9905/26/kentucky.execution (describing Harper's execution and mentioning a 1997 Kentucky execution by electrocution).

[8] Baze v. Rees, 217 S.W.3d 207, 212 (Ky. 2006) (providing a detailed description of the Kentucky execution protocol—this is the source for all descriptions of the protocol herein).

[9] *Id.* ("Diazepam, commonly referred to as Valium, is an anti-anxiety agent used primarily for the relief of anxiety and associated nervousness and tension.").

[10] Sodium thiopental is more widely referred to by its brand name, Sodium Pentathol.

[11] Pancuronium bromide is widely known by its brand name, Pavulon.

[12] Although a doctor does confirm the death of the inmate, no doctor participates in the actual execution, with the exception of a "medical doctor present [to]. . . assist in any effort to revive" a prisoner in the event of a stay of execution after the execution had commenced. Findings of Fact and Conclusions of Law by the Franklin Circuit Court, Baze v. Rees, Civ. A. No. 04-CI-01094 (Franklin Cir. Ct. July 8, 2005), 2007 WL 4790797 at *754, *764.

[13] Brief for Petitioners at 44-45, Baze v. Rees, 128 S. Ct. 1520 (2008) (No. 07-5439) (arguing that the use of pancuronium bromide would cause a conscious individual to "appear peaceful and relaxed, even while experiencing the terror and agony" caused by the administration of both pancuronium bromide and potassium chloride).

Baze v. Rees held that the Kentucky execution protocol, and specifically its use of pancuronium bromide as a paralytic agent, did not violate the Eighth Amendment's prohibition of cruel and unusual punishment.[14] In validating the Kentucky three-drug execution method, the Supreme Court essentially provided a new standard for determining whether an execution protocol is cruel and unusual. This new test joins the pre-existing "evolving standards of decency" approach, thereby bifurcating the inquiry needed to determine the constitutionality of any given execution method.[15]

The Supreme Court's decision was a highly fractured one, mirroring the newly fractured face of Eighth Amendment jurisprudence. The decision has complicated future challenges to lethal injection protocols, but even with that new complexity, the prospects of such challenges remain largely the same. It is extremely unlikely that Eighth Amendment challenges to these death penalty mechanisms will find any more success in courts applying the old standard than it will in courts operating under the law of *Baze*. The law makes clear that successful judicial challenges to lethal injection protocols under either theory of Eighth Amendment jurisprudence will have to be preceded by significant legislative change in execution protocols.

II. Legal Background and Procedural History

The existing body of American law regarding the constitutionality of different methods of execution is remarkably thin. In 1878, the Supreme Court upheld the constitutionality of Utah's use of firing squads in executing condemned prisoners.[16] In light of the pervasive nature of firing squads in that period—including, most notably, to carry out decisions by military tribunals—and the fact that such executions did not constitute a "punishment . . . of torture . . . [or] other [punishment] of unnecessary cruelty,"[17] the Court found that the Utah statute did not violate the Eighth Amendment. The Court also upheld an electrocution statute as constitutional in 1889.[18] With the exception of these two cases, and *Baze*, the Supreme Court has never considered the constitutionality of an execution method.

Until recent years, the Supreme Court has generally been reluctant to invalidate any form of punishment or execution on Eighth Amendment grounds.[19] As part of a new trend in Eighth Amendment jurisprudence, certain punishments or criminal procedures—although not any execution proto-

[14] Baze v. Rees, 128 S. Ct. 1520 (2008).

[15] *Id.*

[16] Wilkerson v. Utah, 99 U.S. 130 (1878).

[17] *Id.* at 136.

[18] *See In re* Kemmler, 136 U.S. 436 (1890).

[19] *See* Doyle Horn, *Lockyer v. Andrade: California Three Strikes Law Survives Challenge Based on Federal Law that is Anything but "Clearly Established"*, 94 J. Crim. L. & Criminology 687, 718 (2004) ("Instances of the Supreme Court overruling legislatively sanctioned sentences . . . are exceedingly rare.").

cols—have been invalidated as cruel and unusual.[20] With this trend has come a heavy emphasis on "evolving standards of decency" in Eighth Amendment jurisprudence.[21]

A. The Baze *Case*

In 1993, Thomas C. Bowling was convicted and sentenced to death for the 1990 murders of a married couple sitting in their car outside a dry cleaner in Lexington, Kentucky.[22] In 1997, a Kentucky state trial court sentenced Ralph Baze to death after finding him guilty of the 1993 murders of two law enforcement officers who had attempted to serve Baze with several warrants.[23] Following a number of standard post-conviction appeals, both Baze and Bowling had "completely exhausted all of the legitimate state and federal means for challenging their convictions and the propriety of the death sentences."[24] Both plaintiffs, who were at the time incarcerated at the Kentucky State Penitentiary in Eddyville, Kentucky, filed suit against John D. Rees, the Commissioner of Kentucky's Department of Corrections, in the Kentucky State Franklin Circuit Court.[25]

In their original lawsuit against Rees, the plaintiffs sought a declaratory judgment and injunctive relief against Kentucky's lethal injection protocol, claiming violations of the Eighth Amendment of the United States Constitution and § 17 of the Kentucky State Constitution.[26] In 2005, Judge Roger L. Crittenden of the Franklin Circuit presided over a trial that included testimony from over twenty witnesses and issued his "Findings of Fact and Conclusions of Law."[27] In the final order, the trial court held that the plaintiffs had failed to demonstrate that Kentucky's execution protocol constituted cruel and unusual punishment by a preponderance of the evidence.[28]

In response to the five separate allegations of Eighth Amendment violations presented by the plaintiffs, the trial court found that only one element of the protocol was cruel and unusual.[29] Specifically, the trial court found

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[20] *See, e.g.*, Roper v. Simmons, 543 U.S. 551 (2005) (holding that execution of juveniles tried as adults constitutes cruel and unusual punishment); Trop v. Dulles, 356 U.S. 86 (1958) (holding that cancellation of an individual's U.S. citizenship, when imposed as punishment, violated the Eighth Amendment's prohibition on cruel and unusual punishment).

[21] *See* William C. Heffernan, *Constitutional Historicism: An Examination of the Eighth Amendment Evolving Standards of Decency Test*, 54 Am. U. L. Rev. 1355 (2005), for an overview of the application of "evolving standards of decency" jurisprudence since its 1958 inception.

[22] Bowling v. Commonwealth, 163 S.W.3d 361, 364 (Ky. 2005).

[23] Baze v. Commonwealth, 953 S.W.2d 914, 916 (Ky. 1997).

[24] Baze v. Rees, 217 S.W.3d 207, 209 (Ky. 2006).

[25] Findings of Fact and Conclusions of Law by the Franklin Circuit Court, Baze v. Rees, Civ. A. No. 04-CI-01094 (Franklin Cir. Ct. July 8, 2005), 2007 WL 4790797 at *754, *756.

[26] *Id.*

[27] *Baze*, 217 S.W.3d at 209.

[28] Findings of Fact and Conclusions of Law by the Franklin Circuit Court, Baze v. Rees, Civ. A. No. 04-CI-01094 (Franklin Cir. Ct. July 8, 2005), 2007 WL 4790797 at *754, *769.

[29] *Id.* at *765-67.

that the plaintiffs had failed to demonstrate that Kentucky's protocol constituted a deviation from contemporary norms and societal standards; that the plaintiffs had failed to demonstrate that the protocol offended the dignity of prisoners or society as a whole; that the protocol did not inflict unnecessary physical or psychological pain upon the condemned; and that the protocol did not deny condemned inmates their due process rights in the event of a stay.[30] The trial court did agree with the plaintiffs, however, that the portion of the execution protocol calling for the insertion of an intravenous catheter in the inmate's neck did create "a substantial risk of wanton and unnecessary infliction of pain,"[31] and was therefore unconstitutional. The Kentucky Department of Correction had, by the time of the trial court's ruling, already modified their execution protocol to remove that element of the procedure.[32]

The trial court's final judgment heavily emphasized that, in comparison to other forms of execution, lethal injection—and specifically the three-drug protocol used in Kentucky—was "extremely humane."[33] Providing a brief summary of the history of lethal injection as a form of execution, however, the trial court noted that following Oklahoma's 1977 decision to become the first state to adopt lethal injection, Kentucky, like many other states, followed suit without "any additional medical or scientific studies that the adopted form of lethal injection was an acceptable alternative to other methods."[34]

Baze and Bowling appealed to the Kentucky State Supreme Court. Despite the court's observation that Kentucky law would prohibit punishment as cruel and unusual if it violated federal standards for Eighth Amendment violations, or if "it shock[ed] the moral sense of reasonable men as to what is right and proper under the circumstances,"[35] the court affirmed the trial court in a brief decision on November 22, 2006.[36] This decision described the history of execution and lethal injection before finding that the trial court had avoided clear error in their findings of fact, and summarily accepted the trial court's conclusions of law.[37]

III. The Supreme Court Decision

The Supreme Court of the United States affirmed the lower courts' judgments upholding the constitutionality of Kentucky's execution protocol.[38] The decision encompassed seven separate opinions: Chief Justice

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[30] *Id.*
[31] *Id.* at *754, *767.
[32] *Baze*, 217 S.W.3d at 211.
[33] Findings of Fact and Conclusions of Law , 2007 WL 4790797 at *754, *755.
[34] *Id.* at *755-56.
[35] *Baze*, 217 S.W.3d at 211.
[36] The Kentucky Supreme Court's ruling spans fewer than seven pages in the West Kentucky Reporter.
[37] *Baze*, 217 S.W.3d at 213.
[38] Baze v. Rees, 128 S. Ct. 1520 (2008).

Roberts announced the judgment of the Court in an opinion joined by Justices Alito and Kennedy. Justices Alito, Stevens, and Breyer each wrote a separate concurrence. Justices Scalia and Thomas each wrote a concurring opinion, joining each other's concurrences as well. Finally, Justice Ginsburg wrote a dissenting opinion which was joined by Justice Souter.

OPINION	**JUSTICES**
Plurality Judgment	Roberts, C.J., joined by Alito and Kennedy, JJ.
Concurrence #1	Alito, J.
Concurrence #2	Stevens, J.
Concurrence #3	Scalia, J., joined by Thomas, J.
Concurrence #4	Thomas, J., joined by Scalia, J.
Concurrence #5	Breyer, J.
Dissenting Opinion	Ginsburg, J., joined by Souter, J.

Table 1.1, Opinions of the United States Supreme Court in Baze v. Rees.[39]

The Supreme Court's actual holding was incredibly narrow—the only proposition with which five Justices clearly agreed was the result, namely that the Kentucky protocol did not violate the Eighth Amendment. No group of more than three Justices agreed on the appropriate inquiry, though a majority could be considered to agree that an Eighth Amendment challenge would be meritless, without, *at a minimum,* a feasible alternative that would substantially reduce the risk of severe pain—though some of that majority would not consider such an alternative sufficient.[40]

A. The Roberts Opinion

Writing for himself, Justice Alito, and Justice Kennedy, Chief Justice Roberts wrote that a method of execution could be established as cruel and unusual by way of a comparative analysis. To prevail on a cruel and unusual challenge, an inmate would have to "show that the risk [of severe pain] is substantial when compared to the known and available alternatives."[41] Furthermore, "the alternative procedure must be feasible, readily implemented, and in fact significantly reduce a substantial risk of severe pain."[42] Failure

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[39] *Id.* at 1520.

[40] Justices Roberts, Alito, and Kennedy all agree on the standard of inquiry laid out in Roberts's opinion, while Justices Scalia and Thomas explicitly favor a standard which is considerably more stringent. *See id.*; *id.* at 1556 (Thomas, J., concurring). All five Justices, therefore, could be seen as holding that the Roberts standard provides the *minimum* hurdle for a challenged execution method to constitute cruel and unusual punishment.

[41] *Baze*, 128 S. Ct. at 1537 (plurality opinion).

[42] *Id.* at 1532.

to adopt such an alternative, absent "a legitimate penological justification"[43] would, according to Roberts, constitute cruel and unusual punishment under the Eighth Amendment.

Perhaps most importantly, however, Roberts rejected the petitioner's suggestion that the existence of any remediable risk in an execution protocol constitutes cruel and unusual punishment. He observed that the Court's historical failure to invalidate a single method of execution as cruel and unusual had not prevented society "from taking the steps they deem appropriate in light of new developments, to ensure humane capital punishment,"[44] and explicitly declined "to transform courts into boards of inquiry charged with determining 'best practices' for executions."[45] Roberts chose to trust state legislatures to continue to act upon their "earnest desire to provide for a progressively more humane manner of death."[46] It is significant, Roberts argued, that the practice of lethal injection—specifically three-drug protocols similar to Kentucky's—are "widely tolerated,"[47] meaning that, at least superficially, such protocols are consistent with "evolving standards of decency."[48]

B. The Alito Concurrence

Alito's concurrence largely emphasized one of the most important points of the Roberts opinion: "that a modification [to a death protocol] would result in some reduction in risk is insufficient" to render that protocol cruel and unusual.[49] In order for an inmate to succeed on such a challenge, Alito wrote, the reduction in the risk of pain must be significant, and fairly unambiguous; "an inmate challenging a method of execution should point to a well-established scientific consensus" supporting the validity of her claims.[50] This standard, according to Alito, is a clear one, which will prevent the opening of "the gates for a flood of litigation that would go a long way toward bringing about the end of the death penalty as a practical matter,"[51] a concern prompted in large part by Stevens' concurrence.

C. The Stevens Concurrence

According to Stevens, the Supreme Court's fractured opinion "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,

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[43] *Id.*
[44] *Id.* at 1538.
[45] *Id.* at 1531.
[46] *Id.*
[47] *Id.* at 1532.
[48] Trop v. Dulles, 356 U.S. 86, 101 (1958).
[49] *Baze*, 128 S. Ct. at 1540 (Alito, J., concurring).
[50] *Id.*
[51] *Id.* at 1542.

pancuronium bromide, but also about the justification for the death penalty itself."[52]

Stevens focused first on Roberts's claims of prevalence—the argument that by virtue of the nearly ubiquitous status of lethal injection and the three-drug protocol, the procedure could not violate the Eighth Amendment. This particular assumption underpinned much of Roberts's and Alito's opinions, as both extensively discussed the standards for execution and euthanasia in the United States and abroad, attempting to demonstrate the existing protocol's acceptability and the unfamiliarity of the petitioner's proposed alternatives.[53] Deferring directly to the trial court, however, Stevens suggested that in many cases, and certainly in the case of Kentucky, the adoption of the protocol arose from "administrative convenience,"[54] relying unquestioningly on the recommendations of an Oklahoma medical examiner, rather than reflecting any societal standard. While thirty-five other states allow for lethal injection and use methods similar to the three-drug protocol in Kentucky, Stevens pointed out that in two-thirds of the states that use the three-drug protocol, the choice to use pancuronium bromide or a similar paralytic agent was a decision made by "unelected Department of Correction officials with no specialized medical knowledge and without the benefit of expert assistance or guidance."[55]

Furthermore, Stevens suggested, careful consideration of the use of paralytic agents since the implementation of lethal injection in executions has consistently yielded results that weigh against the inclusion of such chemicals. The medical examiner who originally designed a three-drug method of execution has since revised his opinion, commenting of pancuronium bromide that he "would probably eliminate it."[56] Stevens also discussed New Jersey's lethal injection protocol—which originally called for the use of "a chemical paralytic agent."[57] Following the enactment of the law calling for the use of such a chemical, Department of Correction officials asked the legislature to revise the statute to enable greater discretion for the department to devise a precise formula of chemicals for executions.[58] After close examination of the issues presented by the use of paralytic agents, the New Jersey Department of Corrections adopted a protocol which does not include any such chemicals.[59]

Moving away from his discussion of the Kentucky execution protocol, Stevens then turned to the institution of capital punishment. Citing *Gregg v. Georgia*,[60] Stevens observed that the Supreme Court has held that capital

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[52] *Id.* at 1542-43 (Stevens, J., concurring).
[53] *See id.* at 1520 (plurality opinion); *id.* at 1540 (Alito, J., concurring).
[54] *Id.* at 1545.
[55] *Id.*
[56] *Id.*
[57] N.J. Stat. Ann. § 2C:49-2 (West 2005) (repealed 2007).
[58] *Baze*, 128 S. Ct. at 1545 (Stevens, J., concurring).
[59] *Id.* at 1545-46.
[60] Gregg v. Georgia, 428 U.S. 153 (1976).

punishment violates the Eighth Amendment unless it serves one or more of the "three societal purposes for death as a sanction: incapacitation, deterrence, and retribution."[61] Stevens went on to argue that incapacitation can no longer serve as a justification for execution due to "the recent rise in statutes providing for life imprisonment without the possibility of parole."[62] Given the severity of capital punishment, Stevens further argued, the penalty cannot be justified for the purposes of deterrence absent far more clear and consistent results demonstrating a correlative relationship between the existence of the death penalty and effective criminal deterrence.[63] Turning finally to retribution, Stevens suggested that the fulfillment of our obligation to "protect the inmate from enduring any punishment that is comparable to the suffering inflicted on his victim"[64] has led us to undermine the retributive effect of our justice system, essentially eliminating retribution as a possible justification for the continued use of the death penalty. Stevens continued to discuss briefly some of the potential harms and dangers of execution in general,[65] finally concluding that the death penalty is "patently excessive and cruel and unusual punishment violative of the Eighth Amendment."[66]

Finally, and briefly, Stevens wrote that his opinion regarding the constitutional status of the death penalty *per se* did not allow him a "refusal to respect precedents that remain a part of our law."[67] Given the constitutionality of the death penalty as indicated and compelled by the principle of *stare decisis*, therefore, Stevens wrote "that the evidence adduced by petitioners fails to prove that Kentucky's lethal injection protocol" was unconstitutional.[68]

D. The Scalia Concurrence

Justice Scalia explicitly announced at the beginning of his concurrence that he was writing to provide a response to Justice Stevens's concurrence.[69] Scalia took issue with Stevens's conclusions regarding the unconstitutionality of the death penalty. In arguing that capital punishment is not unconstitutional *per se*, Scalia referred to several clauses—most notably the Fifth Amendment's mention of "capital . . . crime"[70] and protection of "life"[71] by guaranteed due process of law.

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[61] *Baze,* 128 S. Ct. at 1546-47 (Stevens, J., concurring) (discussing holding of *Gregg*, 428 U.S. at 183).
[62] *Id.* at 1547.
[63] *Id.*
[64] *Id.* at 1548.
[65] *Id.* at 1549-51.
[66] *Id.* at 1551.
[67] *Id.* at 1552.
[68] *Id.*
[69] *Id.* at 1552 (Scalia, J., concurring).
[70] *Id.*

Scalia also challenged Stevens's conclusion on several other levels—especially his premise that capital punishment does not provide significant societal benefits in its exercise and application. It is not the role of courts, Scalia declared, to make such determinations; judgments of that nature are deliberately left to "*the people*" and the states' legislatures.[72] Similarly, Scalia argued, Stevens overstepped judicial propriety in his consideration of empirical data that is concededly controversial—it is not, according to Scalia, the Court's "place to choose one set of responsible empirical studies over another in interpreting the Constitution."[73]

E. The Thomas Concurrence

Justice Thomas concurred in the judgment, joined by Scalia, but wrote separately to express his belief that the plurality's standard for identifying cruel and unusual punishment was too restrictive. Rather than finding that an execution method would be cruel and unusual "if it poses a substantial risk of severe pain that could be significantly reduced by adopting readily available alternative procedures,"[74] Thomas proposed that "a method of execution violates the Eighth Amendment only if it is deliberately designed to inflict pain."[75]

In support of his position, Thomas provided a substantial history of capital punishment at the time of the framers, discussing several particularly brutal methods of execution that "were purposely designed to inflict pain and suffering beyond that necessary to cause death."[76] These punishments would certainly be proscribed under Thomas's standard, and he argued that "there is good reason to believe the Framers" would also have found such punishments cruel and unusual.[77]

This standard, in addition to being historically and constitutionally based, would, according to Thomas, eliminate the need for subjective determinations. It is difficult, for instance, to determine "[a]t what point . . . a risk become[s] 'substantial.' "[78] Additionally, and as Scalia argued previously, Thomas suggested that any effort by the judiciary to apply a subjective standard in determining the constitutionality of a given execution protocol would "require courts to resolve medical and scientific controversies that are beyond judicial ken."[79] Given his proposed standard, the constitutionality of Kentucky's execution protocol is, at least for Thomas, "an easy

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[71] *Id.*
[72] *Id.* at 1553.
[73] *Id.* at 1554.
[74] *Id.* at 1556 (Thomas, J., concurring).
[75] *Id.*
[76] *Id.* at 1557.
[77] *Id.*
[78] *Id.* at 1562.
[79] *Id.*

case."[80] Insofar as Kentucky did not try to add gratuitous pain through its adoption of the three-drug protocol, but in fact intended quite the contrary result, its method of execution cannot, according to Thomas, be cruel and unusual.

F. The Breyer Concurrence

According to Justice Breyer, the proper inquiry into the constitutionality of a given method of execution is, as Ginsburg's dissent later suggests, "whether the method creates an untoward, readily avoidable risk of inflicting severe and unnecessary suffering."[81] Despite operating from the same premise regarding his inquiry, Breyer ultimately arrived at the opposite conclusion from Ginsburg. Believing that the review of an execution protocol must "turn not so much upon the wording of an intermediate standard of review as upon facts and evidence,"[82] Breyer found no "sufficient evidence that Kentucky's execution method poses" a significant risk of either untoward or unnecessary pain.[83] In reaching this conclusion, Breyer considered a number of empirical studies and counterclaims to those studies.[84]

G. The Ginsburg Dissent

Like the plurality, Ginsburg believed that the inquiry into whether a given method of execution constitutes cruel and unusual punishment must consider "the degree of risk, magnitude of pain, and availability of alternatives."[85] Where the plurality requires a "substantial risk"[86] of pain, however, Ginsburg would not establish a threshold level for any one factor, considering them to be interrelated such that "a strong showing on one reduces the importance of the others."[87] Conceding that the risk of misadministration under the Kentucky protocol is indeed small, Ginsburg nevertheless suggested that since the consequences of such a mistake would be "horrendous and effectively undetectable after injection of the second drug,"[88] the "critical question" is the availability of a feasible alternative.[89]

Starting with that premise, Ginsburg proceeded to canvass lethal injection protocols from a number of other states, noting the safeguards that some have put in place to ensure that the inmate is in fact unconscious following the administration of the sodium thiopental. Some of these precautions in-

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[80] *Id.* at 1563.
[81] *Id.* (Breyer, J., concurring).
[82] *Id.*
[83] *Id.*
[84] *Id.* at 1564-66.
[85] *Id.* at 1568 (Ginsburg, J., dissenting).
[86] *Id.*
[87] *Id.*
[88] *Id.* at 1569.
[89] *Id.*

clude a requirement that the warden call the inmate's name and touch her eyelashes while a medical expert continues to monitor closely the inmate's face and IV point on closed circuit television,[90] mandatory time lapses and examinations,[91] pinching,[92] and more.[93] Such precautions are, Ginsburg argued, "simple and essentially costless to employ,"[94] and virtually eliminate the risk of an inmate's consciousness during the administration of pancuronium bromide.

Observing that Kentucky provided no justification in the record for failing to take such "elementary measures,"[95] Ginsburg suggested several possible reasons that the administration of sodium thiopental could be improperly performed without the execution team's knowledge or awareness.[96] Given these risks, Ginsburg would remand to determine whether the Kentucky protocol—especially its failure to include any substantial safeguards to ensure the inmate's unconsciousness prior to the administration of pancuronium bromide—"creates an untoward, readily avoidable risk of inflicting severe and unnecessary pain."[97]

IV. How Best to Challenge Death Penalty Protocols

In the wake of *Baze*, Eighth Amendment law is fundamentally different, especially as it pertains to challenging specific execution protocols. Going forward, however, the arguments advanced by both sides in the *Baze* litigation may prove instructive as to potential future challenges. It is important to note that both parties agree that if the sodium pentathol is properly administered at the beginning of an execution, there is no risk of pain; but it is equally significant that all parties agree that the improper administration of sodium pentathol would almost certainly cause excruciating pain for the inmate. Additionally, even the petitioners agree that there would be no risk

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[90] *Id.* at 1570-71 (citing Lightbourne v. McCollum, 969 So. 2d 326, 346-47 (Fla. 2007)).

[91] *Id.* at 1571 (citing Taylor v. Crawford, 487 F.3d 1072, 1083 (8th Cir. 2007)) (discussing Missouri's execution protocol).

[92] *Id.* (citing Respondent's Opposition to Callahan's Application for a Stay of Execution at 3, Callahan v. Allen, 128 S. Ct. 1138 (2008) (No. 07A630)) (describing Alabama's execution protocol).

[93] Because, as Ginsburg points out, "most death-penalty States keep their protocols secret," it is impossible to know the full range of precautions taken by all states in lethal injection protocols to ensure unconsciousness. *Baze*, 128 S. Ct. at 1570. Other known precautions taken in execution protocols include brushing the inmate's eyelashes and shaking her (California), and calling the inmate's name and exposing her to ammonia tablets to confirm unconsciousness (Indiana). *Id.* at 1571.

[94] *Id.*

[95] *Id.*

[96] Kentucky claimed that pain would be caused by an injection of sodium thiopental which accidentally entered tissue, rather than the circulatory system—and that such pain would be sufficient to provoke a reaction from the inmate which would alert the execution team to the improper administration. Ginsburg questioned this claim, and further suggested that it is possible for an inmate to receive a sufficient quantity of the barbiturate to superficially appear unconscious without achieving an appropriate surgical plane of anesthesia. *Id.* at 1571-72.

[97] *Id.* at 1572.

of undetected improper administration absent the presence of pancuronium bromide in the execution protocol.[98]

Justice Stevens and counsel for the petitioners both advanced the argument that pancuronium bromide could simply be removed from the protocol—effectively eliminating any risk of cruel and unusual punishment.[99] In response to this suggestion, both counsel for Kentucky and Chief Justice Roberts point to two specific purposes for the drug's administration. First, it is suggested that pancuronium bromide, "by paralyzing the diaphragm, stops respiration."[100] Both common sense and Justice Stevens address this argument effectively—given that the potassium chloride administered immediately subsequent to the pancuronium bromide causes fatal cardiac arrest, the inmate's continued respiration is, in the interim, wholly irrelevant.[101] Secondly, however, and far more importantly, both Kentucky and Roberts believe that there is a "legitimate penological justification"[102] served by the pancuronium bromide—namely its role in "prevent[ing] involuntary physical movements during unconsciousness,"[103] thereby "preserving the dignity of the procedure."[104]

A. Any Avoidable Risk of Pain?

It is readily apparent that any risk of severe pain, and therefore, any risk of the Kentucky protocol constituting cruel and unusual punishment, could be eliminated by the removal of pancuronium bromide from the execution protocol. The mere feasibility and ease of such an alternative is not, however, enough for the plurality of the Court: such a choice carries, at least in the eyes of the plurality, a cost.[105] More importantly, however, the Court would argue that a state is not obligated to avoid any avoidable risk of pain—they are not even, under the law of the plurality, obligated to avoid risk which could be mitigated by a less costly alternative protocol.[106]

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[98] Transcript of Oral Argument at 3-5, Baze v. Rees, 128 S. Ct. 1520 (2008) (No. 07-5439).

[99] *Baze*, 128 S. Ct. at 1544 (Stevens, J., concurring) ("Nor is there any necessity for pancuronium bromide to be included in the cocktail . . . ."); Brief for Petitioners at 51, Baze v. Rees, 128 S. Ct. 1520 (2008) (No. 07-5439) (arguing that by omitting pancuronium and "relying . . . on a lethal dose of an anesthetic . . . the [Department of Corrections] would virtually eliminate the risk of pain").

[100] *Baze*, 128 S. Ct. at 1527 (plurality opinion).

[101] *Id.* at 1544, (Stevens, J., concurring).

[102] *Id.* at 1532 (plurality opinion).

[103] *Id.* at 1535.

[104] *Id.*

[105] *Id.* (discussing the Commonwealth's "interest in preserving the dignity of the procedure").

[106] *Id.* at 1531 ("a condemned prisoner cannot successfully challenge a State's method of execution merely by showing a slightly or marginally safer alternative"). It is theoretically possible for a situation to arise—the present situation in Kentucky may even qualify—in which a less costly execution mechanism would pose less risk of pain than would an existing system, but where the accompanying reduction in risk would not be *substantial.* Under the

There are two specific ways that the risk presented by the pancuronium bromide could be eliminated from the Kentucky execution protocol. First, the drug could be eliminated in its entirety—changing the three-drug protocol to either a one-drug protocol consisting solely of an enormous dose of sodium thiopental, or a two-drug protocol consisting of sodium thiopental followed by potassium chloride.[107] Whether less or least risky alternatives are feasible, however, the Court still believes that it would be inappropriate to require states to adopt any specific protocol.[108] The plurality is quite clear that they will not require states to adopt a specific protocol based upon purported reduction in risk, especially when that reduction is "not so well established."[109]

The plurality is concerned, and rightly so, with the prevalence of Kentucky's proposed execution protocol. Because the use of a single or double-drug protocol is not widespread, it seems reasonable to conclude that "evolving standards of decency" do not require the adoption of such a protocol. By the same logic, however, the adoption of an alternative approach to avoiding the risk posed by pancuronium bromide may be indicated by evolving standards of decency. Although the plurality and concurrences discuss the widespread use of three-drug protocols *similar to* Kentucky's,[110] they do not discuss the widespread nature of protocols *identical to* Kentucky's, because very few—if any—such protocols exist. Other three-drug execution methods include *explicitly in the instructions of the protocol* various types of checks and tests to ensure the inmate's unconsciousness prior to the administration of pancuronium bromide or its analog.[111]

In the wake of the *Baze* decision, there are now two basic standards by which a method of execution can be found to violate the Eighth Amendment: the new *Baze* standard, based upon the existence of a feasible alternative that would "significantly reduce a substantial risk of severe pain"[112] and the old test of "evolving standards of decency," which the Court applied in *Kennedy v. Louisiana*[113] several weeks after the *Baze* decision. While the

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plurality, a substantial reduction of risk would be required for the existing execution protocol to be invalidated—meaning that even where safer, feasible, and less costly execution methods exist, they are not necessarily constitutionally required.

[107] *See generally* Deborah W. 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, 117-18, 233 (2002). In *Baze*, however, two-drug protocols were not discussed at length by either party or by the Court.

[108] *Baze*, 128 S. Ct. at 1531 (plurality opinion) (expressing reluctance to "substantially intrude on the role of state legislatures in implementing their execution procedures").

[109] *Id.* at 1535.

[110] *See, e.g.*, *id.* at 1527 (plurality opinion) ("[A]t least 30 [states] . . . use the same combination of three drugs in their lethal injection protocols.").

[111] *See id.* at 1570-71 (Ginsburg, J., dissenting).

[112] *Id.* at 1532 (plurality opinion).

[113] 128 S. Ct. 2641, 2649 (2008). Approximately six weeks after *Baze*, the Supreme Court invalidated a Louisiana statute authorizing capital punishment for child rapists who had not killed their victims. Justice Kennedy's opinion relied on "evolving standards of decency" jurisprudence to find the statute cruel and unusual under the Eighth Amendment.

newer test is difficult to satisfy, if only for the ambiguity of its terms, demonstrating that an execution method is out of keeping with evolving standards of decency is substantially easier.

In the case of the Kentucky protocol, such a demonstration would not be particularly difficult. Baze and Bowling advanced several possible safeguards that could be implemented to eliminate the risk of consciousness during the administration of the protocol's latter two drugs. Among these suggestions were the possible use of a "BIS monitor, blood pressure cuff, or EKG" to ensure unconsciousness.[114] The plurality rejected these suggestions as excessive or too radical for use in execution procedures.[115] Whether that finding was correct is open to debate, but the absence of any active monitoring or effort to determine the consciousness of the inmate is significantly out of step with other lethal injection protocols.

Roberts may be correct that the addition of active measures to ensure unconsciousness would not "materially decrease the risk of administering the second and third drugs before the sodium thiopental has taken effect,"[116] but the absence of such tests renders the protocol inconsistent with the modern standards of decency as indicated by similar injection protocols in other jurisdictions. An Eighth Amendment challenge seeking the addition of active measures to ensure unconsciousness—more than passive observation, though less than the use of medical apparatuses—could likely succeed in invalidating the current Kentucky protocol as inconsistent with evolving standards of decency.

B. How to Challenge Other Death Protocols

1. What Can be Done Now

Neither Baze nor Bowling stood to avoid their execution had their challenge succeeded; Kentucky would undoubtedly have overhauled its protocol in order to ensure that it was in complete compliance with the constitutional prohibition on cruel and unusual punishment. Despite the relative inevitability of their executions, however, challenges to specific death protocols have the potential for several discrete benefits to death penalty abolitionism. First, the elimination of cruel and unusual methods of execution is, in and of itself, beneficial. From the perspective of a death penalty abolitionist, a successful challenge which produces a more humane method of execution is certainly better for any inmate who actually is executed.

Second, and perhaps more importantly to those who oppose the death penalty, when it became clear that the appeals of Baze and Bowling would

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[114] Brief for Petitioners, supra note 99, at 58. A BIS monitor is a Bispectral Index Monitor, a standard anesthesia device used to monitor electroencephalograms to determine consciousness levels.

[115] *Baze*, 128 S. Ct. at 1536 (plurality opinion).

[116] *Id.*

be heard by the Supreme Court, states with similar execution protocols to Kentucky's ceased their own executions pending the decision. Such an informal moratorium not only prevents executions for some period of time, but provides death penalty opponents with a potentially valuable reprieve to challenge individual sentences or systems.[117]

The unfortunate reality for death penalty opponents is that the vast majority of states' execution methods are, in the wake of the *Baze* decision, now safe from Eighth Amendment challenges.[118] The seven Justices who concurred in the judgment in *Baze v. Rees* would most likely find every single extant lethal injection protocol to be consistent with the demands of the Eighth Amendment, regardless of which test is applied—though there may be a potential argument regarding the possible unconstitutionality of those protocols which call for two grams of sodium thiopental, rather than three or more.[119]

Even Justices Ginsburg and Souter would most likely uphold the constitutionality of the majority of lethal injection protocols; they are mentioned favorably in the dissent,[120] and analysis of such methods suggests that they would be consistent with the standards laid out in the dissent as well. By taking more or less every reasonable safeguard to ensure the unconsciousness of the inmate before administering any chemical that could cause pain, such methods have essentially eliminated any risk of untoward pain in the execution process.

In the wake of *Baze*, challenges to execution methods besides lethal injection may now have a higher chance of success. Although there is only limited data on the risk of pain associated with electrocution and execution by firing squad, both methods of execution seem as though they should carry a higher risk of severe pain than lethal injection. There would certainly be a value to death penalty opponents in ensuring that these particular forms of

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[117] The grant of certiorari in this case began a de facto moratorium on executions in the United States. Following the September 25, 2007, writ of certiorari, no prisoner in the United States was executed until May 6, 2008, approximately three weeks after the Supreme Court's decision, as compared to twenty-seven executions during the period from September 25, 2006 to May 6, 2007. *See* Death Penalty Info. Ctr., Executions in the United States in 2006, http://www.deathpenaltyinfo.org/article.php?did=2154 (last visited Nov. 7, 2008); Death Penalty Info. Ctr., Executions in the United States in 2007, http://www.deathpenaltyinfo.org/article.php?did=1666 (last visited Nov. 7, 2008); Death Penalty Info. Ctr., Executions in the United States in 2008, http://www.deathpenaltyinfo.org/article.php?&did=2707 (last visited Nov. 7, 2008). Numerous stays were granted by courts at all levels after September 25, 2007—including, unusually, the United States Supreme Court. John Gramlich, *Lethal Injection Moratorium Inches Closer*, STATELINE.ORG, Oct. 18, 2007, http://www.stateline.org/live/details/story?contentId=249581.

[118] A possible exception is an "evolving standards of decency" challenge to protocols in Kentucky and other states that fail to provide any codified assurance of an inmate's unconsciousness.

[119] Such a challenge would more likely succeed under a theory that protocols calling for the lesser amount of the barbiturate are out of keeping with evolving standards of decency. It is unclear whether there is a "substantial" risk of pain caused by this reduction in dosage.

[120] *Baze*, 128 S. Ct. at 1570-71 (Ginsburg, J., dissenting).

execution were permanently abandoned, but success on these challenges would be unlikely to contribute to any meaningful delay or interruption of executions; of the states that still allow other methods of execution, all nine specify lethal injection protocols as the default method of execution in their respective corrections systems.[121] Interestingly, and not unimportantly for such challenges, the Supreme Court of Nebraska, the last state to permit executions solely by electrocution or any other non-injection method, recently invalidated the use of the electric chair as cruel and unusual under the state constitution.[122]

2. *What Must Happen for Subsequent Challenges to Lethal Injection Protocols to Succeed*

In order for future challenges to lethal injection protocols to succeed, the situations at issue will obviously need to be significantly different from the protocol and background in *Baze*. As discussed above, there now seem to be two distinct ways that an execution protocol can be challenged under the Eighth Amendment: either through the *Baze* standard, as compared to the availability of alternatives, or through the original standard, as compared to the contemporary societal standards of decency.

In order for any challenges to succeed under the former test, some substantial risk of severe pain would need to be shown to exist in the challenged lethal injection protocols. Unless lethal injection protocols become less humane, which seems unlikely given Roberts's acknowledgement that "[o]ur society has . . . steadily moved to more humane methods of carrying out capital punishment,"[123] this would require the discovery of some currently unknown or unrecognized risk of pain. This possibility is unlikely, meaning that the best chance for future challenges to execution protocols would probably arise under evolving standards of decency challenges.

When evaluating whether specific punishments comport with evolving standards of decency, the Court has traditionally considered the challenged punishment in the context of contemporary punishments.[124] In order for such a challenge to prevail, the challenged punishment must be inconsistent with the standards of humanity and decency which pervade and govern the society at the time of the challenge. Such an inquiry is inherently dependent upon the dominant beliefs and practices within a society—the more humane

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[121] Four states—Alabama, Florida, South Carolina, and Virginia—allow for execution by electrocution. *See* ALA. CODE §§ 15-18-82.1 (2008); FLA. STAT. § 922.105 (2008); S.C. CODE ANN. § 24-3-530 (2007); VA. CODE ANN. § 53.1-234 (2008). New Hampshire and Washington both allow hanging. *See* N.H. REV. STAT. ANN. § 630:5 (2008); WASH. REV. CODE § 10.95.180 (2008). The use of lethal gas is still permitted in California and Missouri. *See* CAL. PENAL CODE § 3604 (West 2008); MO. REV. STAT. § 546.720 (2008). In Idaho, execution can still be conducted by firing squad. IDAHO CODE ANN. § 19-2716 (2008).

[122] *See* State v. Mata, 745 N.W.2d 229 (Neb. 2008).

[123] *Baze*, 128 S. Ct. at 1538 (plurality opinion).

[124] *See*, *e.g.*, *In re* Kemmler, 136 U.S. 436, 436 (1890).

and civilized the society, the more restrictive the evolving standards of decency inquiry will become. It is only when society moves forward without prodding from the courts that the courts are able to use such an analysis to move forward as well. Though the impetus for change and progress must come from states and their legislatures, "[t]he broad framework of the Eighth Amendment has accommodated this progress towards more humane methods of execution,"[125] and the Eighth Amendment's concern with "evolving standards of decency" serves to ensure that such judicial progress will always track society's steps towards greater humanity. In the present moment, lethal injection protocols with sufficient checks to ensure the unconsciousness of the inmate define the standard of decency with regard to execution—anything less is cruel and unusual. As society progresses and science improves, any individual state may, "if its citizens choose, serve as a laboratory"[126] to push its executions towards greater humanity, perhaps even abandoning capital punishment altogether. Until that time, relief for those who wish to challenge individual execution methods or the death penalty itself will not lie in the courts.

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[125] *Baze*, 128 S. Ct. at 1538 (plurality opinion).

[126] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).