
COMMENTS

CONTEMPLATING “CRUEL AND
UNUSUAL”: A CRITICAL ANALYSIS
OF *BAZE V. REES* IN THE CONTEXT OF THE
SUPREME COURT’S EIGHTH AMENDMENT
“PROPORTIONALITY” JURISPRUDENCE

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INTRODUCTION

On May 2, 2006, Joseph Lewis Clark was executed by lethal injection in Ohio for the 1984 murder of David Manning, a twenty-three-year-old gas station attendant.¹ After prison personnel spent twenty-five minutes searching for a suitable vein, an "agitated" Clark raised his head and declared, "It don't work," five times.² During a second attempt, which spanned thirty minutes, witnesses reported hearing Clark moan and cry out.³ At one point, Clark requested that prison officials give him "something by mouth to end this."⁴ Finally, nearly ninety minutes after the procedure was initiated, Clark was pronounced dead.⁵ An autopsy report later revealed alarming evidence that Clark had been punctured with the needle nineteen times and had not been properly injected with the lethal drugs.⁶

The botched execution of Joseph Lewis Clark illustrates the modern legal controversy surrounding the administration of lethal injection in the United States.⁷ In recent years there has been a

1. John Provance & Christina Hall, *Clark Execution Raises Lethal-Injection Issues*, BLADE, May 4, 2006, at A1.

2. *Id.*

3. Adam Liptak, *Trouble Finding Inmate's Vein Slows Lethal Injection*, N.Y. TIMES, May 3, 2006, at A16; see also MICHAEL L. RADELET, DEATH PENALTY INFO. CTR., SOME EXAMPLES OF POST-FURMAN BOTCHED EXECUTIONS (2008), available at <http://www.deathpenaltyinfo.org/some-examples-post-furman-botched-executions> (providing examples of botched executions, including Joseph Clark's).

4. Andrew Welsh-Huggins, *IV Fiasco Led Killer To Ask for Plan B*, COLUMBUS DISPATCH, May 12, 2006, at E1.

5. RADELET, *supra* note 3 ("[W]itnesses later reported that they heard 'moaning, crying out and guttural noises.'") (citing Alan Johnson, *'It Don't Work,' Inmate Says During Botched Execution*, COLUMBUS DISPATCH, May 3, 2006, at 1A).

6. See Seema Shah, *How Lethal Injection Reform Constitutes Impermissible Research on Prisoners*, 45 AM. CRIM. L. REV. 1101, 1107 (2008) ("Misplacing the drugs in this manner would minimize the effectiveness of the anesthesia and make it much more likely that Mr. Clark was aware of the severe pain associated with awareness of the heart-stopping action of the final drug in the sequence."); see also Jim Provance, *Victim's Relative Sides with Killer's Kin*, BLADE, May 30, 2007, at A3 (discussing how Clark's execution was so disturbing that Manning's brother, a witness to the execution, publicly denounced the procedure as excessively cruel).

7. Clark's botched execution was one of at least twenty-nine botched lethal injection executions over the past three decades. See RADELET, *supra* note 3

significant increase in litigation challenging the constitutionality of lethal injection, as new evidence has ignited concerns that the process by which it is administered may subject inmates to an excruciating death.⁸ This controversy culminated in the United States Supreme Court's April 16, 2008, decision in *Baze v. Rees*.⁹ In *Baze*, the Court rejected a constitutional challenge to Kentucky's three-drug lethal injection protocol, which two death row inmates argued created an "unnecessary risk' of pain," in violation of the Eighth Amendment's prohibition on cruel and unusual punishment.¹⁰ In fact, the Supreme Court has never held an execution method unconstitutional.¹¹ *Baze* marked only the second time in history that the Supreme Court considered such a challenge;¹² the first was in 1878, when it upheld the constitutionality of the firing squad.¹³

The Supreme Court decided *Baze* the same day it heard oral arguments in *Kennedy v. Louisiana*,¹⁴ a case challenging the constitutionality of a Louisiana statute authorizing the death penalty for the rape of a child.¹⁵ The petitioner, Patrick Kennedy, was convicted of the aggravated rape of his eight-year-old stepdaughter in a crime so brutal that the Court found it impossible to describe "in a way sufficient to capture in full the hurt and horror inflicted on his victim or . . . the revulsion society, and the jury that represents it, sought to express by sentencing [Kennedy] to death."¹⁶ The Supreme Court struck down Louisiana's statute as unconstitutional under the Eighth Amendment, reasoning that a national consensus and the Court's own informed judgment reflected a determination that death

(cataloging, in a non-exhaustive list, the forty-one best known botched executions since 1982, including many in which lethal injection was the method of execution).

8. See, e.g., *Taylor v. Crawford*, 487 F.3d 1072 (8th Cir. 2007); *Cooper v. Rimmer*, 379 F.3d 1029 (9th Cir. 2004); *Cooley v. Taft*, No. 2:04-cv-1156, 2007 U.S. Dist. LEXIS 65480 (S.D. Ohio Sept. 5, 2007); *Morales v. Tilton*, 465 F. Supp. 2d 972 (N.D. Cal. 2006); *Walker v. Johnson*, 448 F. Supp. 2d 719 (E.D. Va. 2006); *Evans v. Saar*, 412 F. Supp. 2d 519 (D. Md. 2006); *Brown v. Beck*, No. 5:06CT3018, 2006 WL 3914717 (E.D.N.C. Apr. 7, 2006); *State v. Deputy*, 644 A.2d 411 (Del. 1994); *Bieghler v. State*, 839 N.E.2d 691 (Ind. 2005); *Abdur'Rahman v. Bredesen*, 181 S.W.3d 292 (Tenn. 2005).

9. 128 S. Ct. 1520 (2008).

10. *Id.* at 1529.

11. *Id.* at 1530.

12. See John Gibeaut, *Tinkering with Lethal Injection: An Eighth Amendment Challenge Comes Before the High Court*, 94 A.B.A. J. 18, 18 (2008) (discussing the buzz among members of the capital litigation bar when the Supreme Court granted certiorari in *Baze*).

13. *Wilkerson v. Utah*, 99 U.S. 130 (1878).

14. 128 S. Ct. 2641 (2008).

15. *Id.* at 2646.

16. *Id.*

was a disproportionate punishment for the crime of rape where the victim did not die.¹⁷

Kennedy continues a series of cases decided over the past several decades through which the Supreme Court has gradually narrowed the types of crimes and classes of offenders a state may punish by death.¹⁸ In recognition of the “evolving standards of decency that mark the progress of a maturing society,” a standard first articulated in *Trop v. Dulles*,¹⁹ the Court has held death to be a disproportionate penalty for the crimes of rape of an adult woman,²⁰ felony murder,²¹ and murder committed by a juvenile²² or mentally retarded defendants.²³ This Comment will argue that, while the Court’s modern Eighth Amendment jurisprudence has gradually reduced the circumstances under which the death penalty may be imposed, this trend is inconsistent with the Court’s unwillingness to critically examine the specific procedures states use to execute, even in the face of growing concerns over the humaneness of such procedures.

Part I of this Comment gives a historic overview of the Court’s limited method-of-execution jurisprudence, followed by a review of the Court’s recent line of rulings on challenges to the death penalty’s proportionality. This Comment then examines the evolution of execution methods leading to the near universal use of lethal

17. *Id.* at 2649–64 (explaining that a “proportionality” analysis under the Eighth Amendment includes considering whether a particular punishment is “graduated and proportionate to [the] offense” (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910)) (alterations in original). Louisiana petitioned the Supreme Court for a rehearing in September 2008, arguing that a military law authorizing the death penalty for the rape of a child had been overlooked by both parties and the Court. *Kennedy v. Louisiana*, 129 S. Ct. 1 (2008). The State claimed this oversight undermined the Court’s conclusion that there was no national consensus favoring capital punishment for child rape. *Id.* at 3. The Court denied the petition for rehearing on October 1, 2008. *Id.* at 2 (“[A]uthorization of the death penalty in the military sphere does not indicate that the penalty is constitutional in the civilian context.”).

18. See *Kennedy*, 128 S. Ct. at 2654 (citing the Court’s earlier determination in *Gregg v. Georgia*, 428 U.S. 153, 187 (1976), that death, because of its “severity and irrevocability,” must be limited to the most grievous crimes). But see FRANKLIN E. ZIMRING, *THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT* 184 (2003) (suggesting that the Court’s recent willingness to limit the imposition of the death penalty may be attributable to a reaction by the Court’s moderate Justices against its conservative stance on the death penalty as compared to the legal community as a whole, and citing *Atkins v. Virginia*, 536 U.S. 304 (2002), as “the most prominent example of this trend”).

19. 356 U.S. 86 (1958). In *Trop*, the Court held that denationalization for the crime of desertion offended the “principle of civilized treatment guaranteed by the Eighth Amendment” and was thus unconstitutional. *Id.* at 99–101.

20. *Coker v. Georgia*, 433 U.S. 584 (1977).

21. *Enmund v. Florida*, 458 U.S. 782 (1982).

22. *Roper v. Simmons*, 543 U.S. 551 (2005).

23. *Atkins v. Virginia*, 536 U.S. 304 (2002).

injection in the United States. Finally, Part I discusses *Baze*'s significance in light of the lack of a uniform constitutional standard for reviewing method-of-execution challenges,²⁴ and then evaluates the Court's splintered ruling.

Part II analyzes *Baze* within the broader context of the Court's Eighth Amendment proportionality jurisprudence. Specifically, it argues that the Court's gradual restriction of the administration of the death penalty with respect to certain classes of offenders and categories of crimes is inconsistent with its near indifference to the specific procedures states use to execute. Part III discusses the implications of the *Baze* decision and concludes with recommendations for states going forward with lethal injection and courts reviewing method-of-execution challenges.

I. BACKGROUND

A. A Historic Overview of Method-of-Execution Challenges

In drafting the Eighth Amendment, which prohibits the infliction of “cruel and unusual punishments,”²⁵ the Framers of the Constitution “were primarily concerned . . . with proscribing ‘tortures’ and other ‘barbarous’ methods of punishment.”²⁶ At the time, capital punishment was authorized in every state.²⁷

24. See, e.g., Deborah W. Denno, *Getting to Death: Are Executions Constitutional?*, 82 IOWA L. REV. 319, 333–48 (1997) [hereinafter Denno, *Executions*] (discussing the “scant guidance” the Court has offered for reviewing method-of-execution challenges and how the Court often dismisses such cases on procedural grounds); Deborah W. Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocutation and Lethal Injection and What It Says About Us*, 63 OHIO ST. L.J. 63, 67, 69–77 (2002) [hereinafter Denno, *Legislatures*] (“The United States Supreme Court[] [has shown a] complete constitutional disregard for how inmates are executed, irrespective of a century-long pattern of horrifying, and entirely preventable, mishaps linked to all execution methods.”).

25. U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

26. *Gregg v. Georgia*, 428 U.S. 153, 169–71 (1976) (describing the history of the Cruel and Unusual Punishments Clause and its application in early Supreme Court cases that focused on the constitutionality of specific execution methods); see also Anthony F. Granucci, “*Nor Cruel and Unusual Punishments Inflicted:*” *The Original Meaning*, 57 CAL. L. REV. 839, 852–65 (1969) (discussing the adoption of the “cruel and unusual punishments” clause by the Framers of the U.S. Constitution from the English Bill of Rights of 1689); Roberta M. Harding, *The Gallows to the Gurney: Analyzing the (Un)constitutionality of the Methods of Execution*, 6 B.U. PUB. INT. L.J. 153, 155–56 (1996) (“The English adopted this prohibition [on cruel and unusual punishments] in response to the Stuart regime’s frequent use of torture and other barbaric measures against English subjects. These concerns followed the colonists across the Atlantic to the New World.”) (citation omitted).

27. See *Gregg*, 428 U.S. at 176–77 (asserting that capital punishment was considered an acceptable form of punishment by the Framers of the Constitution).

Prior to its decision in *Baze*, the last time the Supreme Court squarely considered the constitutionality of a specific execution method was in *Wilkerson v. Utah*.²⁸ Wilkerson was convicted of first degree murder in the Utah territory and challenged his sentence of death by public shooting.²⁹ Noting the difficulty of defining the precise parameters of the Eighth Amendment's ban on "cruel and unusual punishments," the Supreme Court held that death by firing squad was not constitutionally proscribed.³⁰ According to the Court, drawing and quartering, public dissecting, burning alive and disemboweling, and other circumstances where "terror, pain or disgrace were . . . superadded," would constitute cruel and unusual punishment.³¹ However, the Court reasoned that death by firing squad did not fall within this category because it was the common method used to punish military offenses at the time,³² and concluded that Wilkerson's sentence was constitutional.³³

Since its ruling in *Wilkerson*, the Supreme Court has only addressed the constitutionality of execution methods indirectly. In *In re Kemmler*,³⁴ the Supreme Court rejected a constitutional challenge to New York's electrocution statute, concluding that the Eighth Amendment was not incorporated against the states,³⁵ and deferred

and that its existence was contemplated by the Fifth Amendment, and subsequently, the Fourteenth).

28. 99 U.S. 130 (1878).

29. *Id.* at 130–31.

30. *Id.* at 134–36.

31. *Id.* at 135.

32. *See id.* at 135 ("Soldiers convicted of desertion or other capital military offenses are in the great majority of cases sentenced to be shot, and the ceremony for such occasions is given in great fulness by the writers upon the subject of courts-martial.").

33. *Id.* at 136. Incidentally, as Wilkerson's sentence was carried out, he moved just enough for the bullets to miss his heart. He bled to death for twenty-seven minutes in front of a stunned crowd. *See* Gilbert King, Op-Ed, *Cruel and Unusual History*, N.Y. TIMES, Apr. 23, 2008, at A21 (criticizing the *Baze* decision and the Court's Eighth Amendment jurisprudence generally for ignoring a history of botched executions).

34. 136 U.S. 436 (1890). William Kemmler was the first prisoner sentenced to death by electrocution. *See* Harding, *supra* note 26, at 158–60 (discussing how the *Kemmler* decision demonstrated the limitations of the historical interpretation test of evaluating execution methods in the face of advancing technology).

35. *Kemmler*, 136 U.S. at 447–49. This proposition was later overturned by the Court in *Robinson v. California*, 370 U.S. 660 (1962). *Robinson* held that a California law criminalizing narcotics addiction, even where the defendant was not engaged in illegal conduct at the time of his arrest and where there was no evidence he had ever used a narcotic in the state, constituted cruel and unusual punishment under the Eighth and Fourteenth Amendments. *Id.* at 666.

to the legislature’s finding that electrocution was humane.³⁶ Though holding on incorporation grounds, the Court stated that under the Eighth Amendment “[p]unishments are cruel when they involve torture or a lingering death[,]” and “[‘cruel’] implies . . . something inhuman and barbarous,—something more than the mere extinguishment of life.”³⁷ Following *Kemmler*, states proceeded with executions by electrocution, many of which were “grotesque failures, including William Kemmler’s.”³⁸

Fifty-seven years later, in *Louisiana ex rel. Francis v. Resweber*,³⁹ the Supreme Court held that it would not be “cruel and unusual” to execute “Lucky” Willie Francis, whose first execution by electrocution was botched due to a mechanical malfunction.⁴⁰ The Court reasoned that an “unforeseeable accident” did not amount to “the wanton infliction of pain” barred by the Eighth Amendment.⁴¹ Francis was executed by electrocution four months later.⁴²

The Supreme Court addressed the constitutionality of the death penalty generally in *Furman v. Georgia*,⁴³ in which it struck down Georgia’s death penalty statute because it could result in arbitrary sentencing,⁴⁴ effectively invalidating all death penalty laws then in

36. See *Kemmler*, 136 U.S. at 447 (“[I]t was for the legislature to say in what manner sentence of death should be executed . . . [and] this act was passed in the effort to devise a more humane method of reaching the result . . .”).

37. *Id.*

38. See Denno, *Executions*, *supra* note 24, at 336 n.92 (referring to Kemmler’s execution as a “well-publicized technical and medical bungle”); see also Denno, *Legislatures*, *supra* note 24, at 73–74 (“Kemmler’s mishap was a blight on the memory of state legislatures . . . [yet e]lectrocution quickly became a popular means of execution in other states, despite comparable reports of mishaps and botches.”).

39. 329 U.S. 459 (1947).

40. See *id.* at 464 (rejecting the argument that forcing Francis to go through the “psychological strain” of preparing for electrocution a second time would subject him to a lingering and unnecessarily cruel death); see also King, *supra* note 33 (discussing Francis’s case as “[p]erhaps the most egregious” capital punishment case to come before the Supreme Court).

41. *Francis*, 329 U.S. at 463–64. But see *id.* at 471 (Frankfurter, J., concurring) (agreeing with the judgment but acknowledging the possibility that a “hypothetical situation” involving a “series of abortive attempts at electrocution or even a single, cruelly willful attempt” might lead to a different outcome).

42. See Richard C. Dieter, *Methods of Execution and Their Effect on the Use of the Death Penalty in the United States*, 35 *FORDHAM URB. L.J.* 789, 792–93 (2008) (citing *Francis* as an example of the ineffectiveness of early constitutional challenges to methods of execution).

43. 408 U.S. 238 (1972) (per curiam).

44. See *id.* at 255–57 (“[W]e know that the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, and lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position.”).

place nationwide.⁴⁵ The Court later upheld Georgia's revised death penalty statute in *Gregg v. Georgia*,⁴⁶ reasoning that the Eighth Amendment's meaning is informed by society's "evolving standards of decency" and that the punishment must not be "excessive."⁴⁷ The Court described "excessive" as involving "the unnecessary and wanton infliction of pain" and being "grossly out of proportion to the severity of the crime."⁴⁸ The *Gregg* decision signaled an end to post-*Furman* suspension of executions;⁴⁹ states began to enact new death penalty statutes to conform to *Gregg*'s constitutional requirements.⁵⁰

B. *Constitutional Challenges to the Death Penalty's Proportionality*

During the thirty-two years since *Gregg*, the Supreme Court, in a series of rulings addressing the death penalty's proportionality, has progressively limited the circumstances under which states may administer capital punishment.⁵¹ Considering "the evolving standards of decency that mark the progress of a maturing society,"⁵² the Court

45. See ZIMRING, *supra* note 18, at 69–70 (discussing the effect of the *Furman* decision as "implying a new set of federally determined principles that state death penalty laws would have to satisfy to conform to the requirements of the Eighth Amendment," and signaling a departure from the historic autonomy states enjoyed with respect to capital punishment procedures).

46. 428 U.S. 153 (1976). In *Gregg*, the Court considered Georgia's revised capital sentencing procedures, which required that the judge or jury find, beyond a reasonable doubt, at least one of ten statutory aggravating circumstances before imposing a death sentence. *Id.* at 196–97.

47. *Id.* at 173 (quoting *Trop v. Dulles*, 356 U.S. 81, 99 (1958)) (internal quotation marks omitted).

48. *Id.*

49. See ZIMRING, *supra* note 18, at 49–50 (discussing the resumption of executions following *Gregg* as a "critical event" in the transformation of American's image with respect to capital punishment).

50. *Id.* at 76.

51. See *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2659 (2008) (discussing the "tension" in the Court's Eighth Amendment jurisprudence between establishing bright-line rules and considering the circumstances of each individual case, to which the Court has responded by narrowing the circumstances under which capital punishment may be imposed).

52. The Supreme Court first articulated this phrase in the 1958 case of *Trop v. Dulles*, 356 U.S. 86, 101 (1958), in which it opined that the exact meaning of the Eighth Amendment is "not static." This was not an entirely new concept as the Court had earlier stated in *Weems v. United States*, 217 U.S. 349, 378 (1910), that the cruel and unusual punishments clause "is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice." This enduring phrase has informed the Court's modern Eighth Amendment jurisprudence. See *Stanford v. Kentucky*, 492 U.S. 361, 369–70 (1989) ("In determining what standards have 'evolved,' . . . we have looked not to our own conceptions of decency, but to those of modern American society as a whole This approach is dictated both by the language of the Amendment—which proscribes only those punishments that are both 'cruel and unusual'—and by the 'deference we owe to the decisions of the state legislatures under our federal

has looked to objective indicators to determine whether a challenged punishment is in line with contemporary values.⁵³

In *Coker v. Georgia*,⁵⁴ the Supreme Court considered whether the death penalty was a disproportionate punishment for the crime of the rape of an adult woman.⁵⁵ Applying the principles of its earlier ruling in *Gregg*, the Court looked for “objective evidence of the country’s present judgment concerning the acceptability of rape of an adult woman”⁵⁶ by reviewing public opinion, legislative judgments, and the response of juries.⁵⁷ In addition to considering these objective factors, the Court determined that its own judgment would “be brought to bear on the question of” whether a punishment is unconstitutional.⁵⁸ In light of both the objective evidence and its own informed judgment, the Court found “a sentence of death [to be] grossly disproportionate and excessive punishment for the crime of rape.”⁵⁹

The Court reflected this line of reasoning in *Enmund v. Florida*,⁶⁰ where it held that the Eighth Amendment does not permit the imposition of a death sentence for the crime of felony murder.⁶¹ Enmund was convicted of first degree murder for his participation in a robbery in which a murder was committed, even though he “himself did not kill or attempt to kill.”⁶² In reaching its conclusion the Court again deferred to the judgment of a majority of state legislatures that death was an excessive punishment, this time for the crime of felony murder.⁶³

More recently, in *Atkins v. Virginia*⁶⁴ and *Roper v. Simmons*,⁶⁵ the Court held the death penalty to be a disproportionate punishment

system.” (quoting *Gregg v. Georgia*, 428 U.S. 153, 176 (1976)), *overruled by Roper v. Simmons*, 543 U.S. 551 (2005).

53. *Gregg*, 428 U.S. at 173.

54. 433 U.S. 584 (1977).

55. *Id.* at 592.

56. *Id.* at 593.

57. *See id.* at 593–97 (asserting that the fact that Georgia is the only jurisdiction allowing the death penalty for rape when the victim is an adult woman militates in favor of a finding that such a punishment is disproportionate).

58. *Id.* at 597.

59. *Id.* at 592.

60. 458 U.S. 782 (1982).

61. *Id.* at 788.

62. *Id.* at 798.

63. *Id.* at 801. *But see* *Tison v. Arizona*, 481 U.S. 137, 146–58 (1987) (distinguishing *Enmund* and holding that death may be imposed for the crime of felony murder where the defendants did not themselves kill the victims, but where their participation in the events leading up to the murders was active, recklessly indifferent, and substantial).

64. 536 U.S. 304 (2002) (overruling *Penry v. Lynaugh*, 492 U.S. 302 (1989)).

65. 543 U.S. 551 (2005) (overruling *Stanford v. Kentucky*, 492 U.S. 361 (1989)).

for crimes committed by the mentally retarded or juveniles, respectively. Previously, in *Penry v. Lynaugh*,⁶⁶ the Court refused to find that two states' prohibition on executing individuals suffering from mental illness constituted national consensus.⁶⁷ In *Atkins*, however, after discussing the change in the legislative landscape since its earlier ruling, the Court opined that the growing number of states prohibiting execution of the mentally ill reflects a strong national consensus against authorizing the death penalty for such offenders.⁶⁸ Likewise in *Roper*, the Court overruled its 1989 decision in *Stanford v. Kentucky*⁶⁹ and found significant evidence of a national consensus against executing juveniles because thirty states prohibited the death penalty for juveniles, and in the states without a formal prohibition, the execution of juveniles was rare.⁷⁰ Finally, in *Kennedy v. Louisiana*, the Supreme Court recently held that death is a disproportionate punishment for the crime of the rape of a child when the victim does not die.⁷¹

*C. Toward a More Humane Method of Execution:
The Use of Lethal Injection in the United States*

The evolution of execution methods in the United States reflects a historical trend toward finding more humane methods of execution.⁷² This trend has culminated in the near universal use of lethal injection

66. 492 U.S. 302, 302 (1989) (finding that evidence showing that only two states prohibited a sentence of death for a mentally retarded offender was insufficient to demonstrate a national consensus), *overruled by* *Atkins v. Virginia*, 536 U.S. 304 (2002).

67. *Id.*

68. See *Atkins*, 536 U.S. at 314–15 (noting that thirty states proscribe the death penalty for the mentally ill, and stating that this number is less significant than “the consistency of the direction of change”).

69. 492 U.S. at 361 (finding a lack of a national consensus against executing juveniles because twenty-two of the thirty-seven death penalty states permit it for sixteen-year-old offenders, and twenty-five permit it for seventeen-year-olds).

70. See *Roper*, 543 U.S. at 565–66 (explaining the slower pace of change as compared to *Atkins* as the result of the earlier recognition by states of the impropriety of executing juveniles).

71. 128 S. Ct. 2641, 2651–58 (2008) (reasoning that only six states permit the death penalty for the crime of child rape, with no sign this number is growing, and pointing out that no one has been executed for the rape of a child since 1964).

72. See *Baze v. Rees*, 128 S. Ct. 1520, 1526–27 (2008) (discussing the use of hanging in the nineteenth century, followed by electrocution, then lethal gas, and ultimately lethal injection). *But see* Denno, *Legislatures*, *supra* note 24, at 65 (“[L]egislatures typically change an execution method only to stay one step ahead of a looming constitutional challenge to that method because the acceptability of the death penalty process itself therefore becomes jeopardized.”).

as the preferred method of execution among states administering capital punishment.⁷³

Support for lethal injection gained momentum in the wake of *Gregg* as legislatures began to reexamine the death penalty and execution procedures.⁷⁴ Lethal injection was attractive to policymakers both for its apparent humaneness⁷⁵ and for its relative low cost compared to other methods of execution.⁷⁶

Lethal injection was first adopted by Oklahoma in 1977.⁷⁷ "No committee hearings, research, or expert testimony was presented prior to final passage of the bill," and the exact combination and quantities of drugs to be used were not identified.⁷⁸ The three-drug protocol was later developed by Oklahoma's Chief Medical Examiner, Dr. Jay Chapman.⁷⁹ Chapman had no relevant expertise, did not consult any other medical professionals, and later expressed concern about the protocol's proper administration.⁸⁰ When applying the

73. See Death Penalty Information Center, Lethal Injection: Drugs Used in Various States, <http://www.deathpenaltyinfo.org/lethal-injection-moratorium-executions-ends-after-supreme-court-decision#drugs> (last visited Nov. 15, 2008) [hereinafter *Drugs Used in Various States*] (noting that thirty-five of the thirty-six death penalty states authorize lethal injection executions); see also Dieter, *supra* note 42, at 798 ("Since the start of 2000, ninety-eight percent of the country's executions have been carried out by lethal injection.").

74. See ZIMRING, *supra* note 18, at 50–51 (describing how states resuming capital punishment faced "image problems" associated with antiquated execution mechanisms and "needed . . . a new method of execution that could appear to be both humane and efficient, a symbol of scientific progress in the service of modern capital punishment," and that lethal injection was viewed as the solution); cf. Deborah W. Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*, 76 *FORDHAM L. REV.* 49, 64 (2007) [hereinafter Denno, *Quandary*] (discussing how lethal injection was first examined as a possible execution method by a New York state commission in 1888, but was ultimately passed over in favor of electrocution, partly out of concern by the medical community that the public would associate the medical profession with death).

75. See Dieter, *supra* note 42, at 798 ("With lethal injections, offenders are put to sleep, and dispatched with as much decorum as putting down a long-valued animal. Lethal injections were not meant to be spectacles or to horrify the offender The state was confident that witnesses would report seeing a peaceful death.").

76. See Fernando J. Gaitan, Jr., *Challenges Facing Society in the Implementation of the Death Penalty*, 35 *FORDHAM URB. L.J.* 763, 770 (2008) (discussing the role of economics in the decision by Oklahoma legislators to adopt lethal injection, as the state's electric chair required \$62,000 in repairs and the cost of a new gas chamber was projected at \$300,000, while lethal injection was estimated to cost only \$70 to administer).

77. See Ellen Kreitzberg & David Richter, *But Can It Be Fixed? A Look at Constitutional Challenges to Lethal Injection Executions*, 47 *SANTA CLARA L. REV.* 445, 452–54 (2007) (discussing the origins of the first lethal injection protocol and statute).

78. *Id.* at 453.

79. See Denno, *Quandary*, *supra* note 74, at 65–68 (explaining that Oklahoma legislators approached Chapman after medical societies refused to offer assistance).

80. See *id.* at 66–69 ("By all accounts, . . . Chapman was the major, if not the primary, creator of lethal injection. At the same time, he remains shocked by reports

three-drug protocol, lethal injection administrators use sodium thiopental, pancuronium bromide, and potassium chloride.⁸¹ The first drug, a fast-acting barbiturate, induces unconsciousness; the second, a paralytic agent, inhibits all movement, including breathing; the third stops the heart by inducing cardiac arrest.⁸²

Over time, other states adopted lethal injection.⁸³ In 1982, Texas became the first state to carry out an execution by lethal injection when it executed Charles Brooks, Jr., “in a botched procedure.”⁸⁴ Thirty-five of the thirty-six death penalty states now use lethal injection,⁸⁵ which is commonly considered the most humane method of execution.⁸⁶ While protocols vary across jurisdictions, thirty of the thirty-five states with lethal injection use the same combination of drugs challenged by the petitioners in *Baze*.⁸⁷

Lethal injection came under fire following a 2005 study published in a British medical journal, *The Lancet*.⁸⁸ This study discussed the risk that if the sodium thiopental anesthetic were improperly administered, the drug could wear off too quickly, leaving the inmate in excruciating pain during the execution as the effects of the potassium chloride were felt, but unable to cry out as the pancuronium bromide-induced paralysis set in.⁸⁹ In comparison,

that lethal injection generally is not performed by doctors but rather by individuals with little to no familiarity with the procedure.”) (citations omitted).

81. *Baze v. Rees*, 128 S. Ct. 1520, 1527 (2008).

82. *Id.*

83. See Denno, *Quandary*, *supra* note 74, at 78 (describing how, from 1977 to 2002, states began to adopt lethal injection in a “fast-moving cascade of multistate clusters”); see also Ty Alper, *What Do Lawyers Know About Lethal Injection?*, 1 HARV. L. & POL’Y REV., Mar. 3, 2008, at 2 (2008), <http://www.hlpronline.com/Alper.pdf> (“[T]here is ‘scant evidence that ensuing states’ adoption of lethal injection was supported by any additional medical or scientific studies that the adopted form of lethal injection was an acceptable alternative to other methods. Rather, . . . the various states simply fell in line relying solely on Oklahoma’s protocol” (quoting *Baze v. Rees*, No. 04-CI-01094, 2005 WL 5797977, at *2 (Ky. Ct. App. July 8, 2005), *aff’d*, 217 S.W.3d 207 (Ky. 2006), *aff’d*, 128 S. Ct. 1520 (2008))).

84. Denno, *Executions*, *supra* note 24, at 375; see also Dieter, *supra* note 42, at 798 (discussing how botched executions were considered “aberrations” and lethal injection was largely thought to be an “innovative, humane, and symbolic” method of execution).

85. *Drugs Used in Various States*, *supra* note 73 (noting that Nebraska uses the electric chair). *But see* State v. Mata, 745 N.W.2d 229, 279 (Neb. 2008) (holding that electrocution as a method of execution violates the Nebraska constitution), *cert. denied*, 129 S. Ct. 228 (2008).

86. *Baze*, 128 S. Ct. at 1537.

87. See *id.* at 1532–33 (discussing the “probative” value of the consensus among states in favor of the three-drug lethal injection protocol).

88. Leonidas G. Koniaris et al., *Inadequate Anaesthesia in Lethal Injection for Execution*, 365 LANCET 1412 (2005).

89. See *id.* at 1412–14 (finding executioners in Texas and Virginia had no anesthesia training, and that forty-three percent of the executed inmates tested in

most states prohibit the use of paralyzing drugs in animal euthanasia.⁹⁰ Although the findings reported in the *Lancet* are considered controversial,⁹¹ the study generated concerns over the humaneness of lethal injection and provided fuel to the increase in method-of-execution challenges over the past several years.⁹²

*D. Cruel and Unusual Punishments Jurisprudence and the Struggle
for a Uniform Constitutional Test*

In a series of procedural rulings that allowed death row inmates to challenge methods of execution in federal courts through § 1983 civil rights actions,⁹³ the Supreme Court opened the floodgates to lethal injection litigation over the past several years.⁹⁴ The volume of this litigation has led to confusion as lower courts have applied a variety of different Eighth Amendment standards for reviewing method-of-

the study had such low concentrations of anesthesia as to be consistent with awareness).

90. See Ty Alper, *Anesthetizing the Public Conscience: Lethal Injection and Animal Euthanasia*, 35 *FORDHAM URB. L.J.* 817, 844 (2008) (noting forty-two states ban the use of paralyzing drugs in animal euthanasia, while the rest are silent on the issue); see also Denno, *Quandary*, *supra* note 74, at 76 (discussing the “shocking inconsistency” in how procedures for euthanizing animals demand “substantially more medical consultation and concern for humaneness” than those used to execute humans). But see *Baze*, 128 S. Ct. at 1535 (“[C]omparison to animal euthanasia . . . overlooks the States’ legitimate interest in providing for a quick, certain death.”).

91. See *Baze*, 128 S. Ct. at 1532 n.2 (noting that seven medical researchers criticized the reliability of the study in peer responses).

92. See Douglas A. Berman, *Finding Bickel Gold in a Hill of Beans, 2005–2006 CATO SUP. CT. REV.* 311, 315 (“*The Lancet* article . . . became the focal point for new court challenges by death row defendants . . . assert[ing] that [it] provided new and compelling evidence that the standard three-drug lethal injection protocol violated the Eighth Amendment’s prohibition on cruel and unusual punishment.”). Evidence of numerous botched executions suggests the risks analyzed by the *Lancet* study have indeed been realized. See, e.g., Denno, *Quandary*, *supra* note 74, at 56–57 (revealing some of the “disturbing details” exposed during lethal injection challenges, such as the subjection of a Kentucky prisoner to untrained executioners who inserted catheters into his neck, the apparent suffocation of an Ohio prisoner during the course of an almost two-hour execution, admissions by a doctor charged with monitoring a North Carolina prisoner’s level of consciousness that he had not done so, and the execution of a “tormented, conscious prisoner” in Florida).

93. See 42 U.S.C. § 1983 (2006) (authorizing suits in federal court against state and local governments where a plaintiff alleges that someone violated one of the plaintiff’s constitutional rights while acting under color of state law); see also *Hill v. McDonough*, 547 U.S. 573 (2006) (reiterating *Nelson v. Campbell* in holding that Clarence Hill had an action to challenge Florida’s lethal injection procedure under § 1983); *Nelson v. Campbell*, 541 U.S. 637 (2004) (ruling unanimously that a challenge to the constitutionality of an execution method could be brought as a civil rights claim under § 1983); Kreitzberg & Richter, *supra* note 77, at 463–67 (detailing the procedures for challenging lethal injection protocols under § 1983).

94. See Berman, *supra* note 92, at 317–18 (discussing the “profound nationwide ripple effect” the Court’s decision in *Hill* had on lethal injection litigation, particularly after the United States Court of Appeals for the Eighth Circuit had ignored *Nelson* in reviewing Clarence Hill’s claim).

execution challenges.⁹⁵ Some courts have applied a “substantial risk” standard,⁹⁶ while others have applied a more stringent “unnecessary risk” standard.⁹⁷ As one legal commentator has observed, this inconsistency is problematic because these “are two very different standards that could lead to disparate results.”⁹⁸

The lack of guidance from the Supreme Court and the differing legal standards applied by lower federal courts in the face of increased challenges to execution protocols reflected a growing need for a uniform constitutional test.⁹⁹ On September 25, 2007, the Supreme Court granted certiorari to hear an appeal from the decision of the Supreme Court of Kentucky in *Baze v. Rees*.¹⁰⁰

Death row inmates Ralph Baze and Thomas Clyde Bowling, Jr., both convicted of murder in Kentucky and sentenced to death, argued before the United States Supreme Court that the appropriate standard to determine whether an execution method is constitutional is whether the method poses an “unnecessary risk” of pain and suffering.¹⁰¹ They argued that flaws in the lethal injection process¹⁰²

95. See *Alley v. Little*, 447 F.3d 976, 977 (6th Cir. 2006) (Martin, J., dissenting) (“[T]he dysfunctional patchwork of stays and executions going on in this country further undermines the various states’ effectiveness and ability to properly carry out death sentences. We are currently operating under a system wherein condemned inmates are bringing nearly identical challenges to the lethal injection procedure. In some instances stays are granted, while in others they are not and the defendants are executed, with no principled distinction to justify such a result.”).

96. See, e.g., *Taylor v. Crawford*, 487 F.3d 1072, 1082 (8th Cir. 2007) (applying a “substantial foreseeable risk of the wanton infliction of pain” standard to uphold Missouri’s lethal injection execution protocol); *Walker v. Johnson*, 448 F. Supp. 2d 719, 722 (E.D. Va. 2006) (dismissing a challenge to Virginia’s lethal injection protocol, finding that it did not involve an “objective substantial risk of harm”).

97. See, e.g., *Cooper v. Rimmer*, 379 F.3d 1029, 1033 (9th Cir. 2004) (rejecting a challenge to California’s lethal injection method of execution as falling short of demonstrating an “unnecessary risk of unconstitutional pain”); *Cooley v. Taft*, No. 2:04-cv-1156, 2007 U.S. Dist. LEXIS 65480, at *15–19 (S.D. Ohio Sept. 5, 2007) (applying an “unnecessary risk” standard and granting a stay of execution); *Morales v. Tilton*, 465 F. Supp. 2d 972, 974–82 (N.D. Cal. 2006) (finding California’s lethal injection protocol created an “undue and unnecessary risk” of pain and directing the executive branch to address its numerous “critical deficiencies”).

98. Alison Nathan, *Pausing the Machinery of Death: The Supreme Court Takes Baze*, JURIST, Sept. 27, 2007, <http://jurist.law.pitt.edu/forumy/2007/09/pausing-machinery-of-death-supreme.php>.

99. *Id.*

100. 217 S.W.3d 207 (Ky. 2006).

101. See Brief for Petitioners at 30–33, *Baze v. Rees*, 128 S. Ct. 1520 (2008) (No. 07-5439) (arguing the Court’s Eighth Amendment jurisprudence has consistently recognized that a punishment may not involve “the infliction of ‘unnecessary’ pain”) (citing *Gregg v. Georgia*, 428 U.S. 153 (1976), *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947), *In re Kemmler*, 136 U.S. 436 (1890), and *Wilkerson v. Utah*, 99 U.S. 130 (1878)).

102. See *id.* at 10–24 (identifying historical problems with Kentucky’s three-drug protocol, process problems with the State’s administration of the protocol—

create a foreseeable risk of agonizing pain that the State could easily reduce or eliminate by adopting a different procedure.¹⁰³ Kentucky argued the “substantial risk” test used by the courts below is the correct standard, and that the “unnecessary risk” standard would unduly burden states by forcing them to constantly fine-tune their procedures, no matter how minimal the risks associated with the current protocols were.¹⁰⁴ The Supreme Court’s grant of certiorari led to a nationwide de-facto moratorium on executions, as courts began staying executions pending the high court’s decision and further clarification on the appropriate Eighth Amendment standard.¹⁰⁵

E. The Supreme Court’s Splintered Ruling in Baze

While seven Justices agreed that Kentucky’s lethal injection protocols are constitutional, the Court was sharply divided as to the appropriate standard for evaluating the constitutionality of lethal injection.¹⁰⁶ Six Justices who concurred in the judgment wrote separate opinions.¹⁰⁷ The splintered ruling left some commentators,¹⁰⁸ and even some Justices themselves,¹⁰⁹ predicting that the decision will ultimately result in renewed efforts to challenge the way the death penalty is administered.

Chief Justice Roberts, joined by Justices Kennedy and Alito, asserted that an execution procedure may not involve a “substantial

including lack of proper training of execution team members and inadequate facilities—and evidence of botched executions in other states).

103. See *id.* at 24–25 n.12 (arguing that administration of a single dose of a thiopental or other barbiturate would be less prone to error, and noting veterinarians favor this method for animal euthanasia “because of its simplicity and humaneness”).

104. Brief for Respondents at 29–35, *Baze*, 128 S. Ct. 1520 (No. 07-5439).

105. See Dieter, *supra* note 42, at 804 (discussing the impact of the Supreme Court’s grant of certiorari in *Baze* as marking the first time since *Furman v. Georgia*, 408 U.S. 238 (1972), that the United States has experienced a six-month period without a single execution).

106. *Baze*, 128 S. Ct. at 1568 (Ginsburg, J., dissenting) (highlighting that no clear standard for determining the constitutionality of a method of execution emerged from the plurality’s ruling).

107. *Id.* at 1525–38 (Roberts, C.J.); *id.* at 1538–42 (Alito, J., concurring); *id.* at 1542–52 (Stevens, J., concurring); *id.* at 1552–56 (Scalia, J., concurring); *id.* at 1556–63 (Thomas, J., concurring); *id.* at 1563–67 (Breyer, J., concurring).

108. See Adam Liptak, *Moratorium May Be Over, but Hardly the Challenges*, N.Y. TIMES, Apr. 17, 2008, at A26 (reporting predictions that the Court’s decision in *Baze* will cause increased litigation).

109. See *Baze*, 128 S. Ct. at 1562 (Thomas, J., concurring) (predicting that the plurality’s decision will result in an increase in future lethal injection litigation, because “we have left the States with nothing resembling a bright-line rule”).

risk of serious harm.”¹¹⁰ The risk of pain from an improper administration of the sodium thiopental, and Kentucky’s failure to adopt the purportedly safer alternatives, were not sufficient, a plurality of the Court held, to show that the challenged protocols were “objectively intolerable.”¹¹¹ Roberts suggested that a state would be immune from challenges to its lethal injection protocols as long as the protocols were “substantially similar” to Kentucky’s, in light of available alternatives.¹¹² “[T]he proffered alternatives,” under this standard, “must be feasible, readily implemented, and in fact significantly reduce a substantial risk of severe pain.”¹¹³

In a separate opinion, Justices Thomas and Scalia argued that an execution method is constitutional unless it is “deliberately designed to inflict pain.”¹¹⁴ Justices Stevens and Breyer both agreed that Kentucky’s method was constitutional but took issue with Chief Justice Roberts’ rationale.¹¹⁵ Justice Stevens, denouncing capital punishment for the first time,¹¹⁶ suggested that states should reconsider their continued use of pancuronium bromide,¹¹⁷ the

110. *Id.* at 1529, 1532 (plurality opinion) (noting at the outset that the death penalty is constitutional, and that “the Constitution does not demand the avoidance of all risk of pain in carrying out executions”) (internal quotation marks omitted).

111. *Id.* at 1537 (internal quotation marks omitted); *see also id.* at 1533–35 (noting first that Kentucky has implemented numerous safeguards to prevent the improper administration of thiopental, including a requirement that members of execution-by-lethal-injection teams have at least one year of professional experience; second, that no other state uses the one-drug method advanced by the petitioners, “the comparative efficacy” of which has not been conclusively established; and third, that the states have a “legitimate interest in providing for a quick, certain death”).

112. *Id.* at 1537 (contesting Justice Stevens’s dissenting characterization of the plurality’s opinion as creating uncertainty as to future disposition of other Eighth Amendment cases).

113. *Id.* at 1532.

114. *Id.* at 1556 (Thomas, J., concurring) (arguing that the standard articulated by the plurality is unsupported by the original understanding of the Eighth Amendment and the Court’s method-of-execution precedent).

115. *See id.* at 1552 (Stevens, J., concurring in the judgment) (declining to depart from the Court’s precedent upholding the constitutionality of the death penalty, and finding the petitioners’ evidence insufficient to prove that Kentucky’s protocol violates the Eighth Amendment); *see also id.* at 1563 (Breyer, J., concurring) (agreeing with the standard articulated by the dissent but concluding that on the record before the Court, Kentucky’s protocol did not constitute cruel and unusual punishment).

116. *Id.* at 1551–52 (Stevens, J., concurring in the judgment) (acknowledging his respect for precedent establishing the constitutionality of the death penalty and a framework for addressing method-of-execution challenges, but expressing his view that “the death penalty represents ‘the pointless and needless extinction of life with only marginal contributions to any discernible or social purposes’” (quoting *Furman v. Georgia*, 408 U.S. 238, 312 (1972) (White, J., concurring))); *see also* Linda Greenhouse, *After a 32-Year Journey, Justice Stevens Renounces Capital Punishment*, N.Y. TIMES, Apr. 18, 2008, at A22 (discussing the historical significance of Justice Stevens’s repudiation of the death penalty).

117. *Baze*, 128 S. Ct. at 1544 (Stevens, J., concurring in the judgment).

paralytic agent that has generated much of the controversy surrounding lethal injection.¹¹⁸ Justices Ginsburg and Souter dissented on the grounds that they were not convinced Kentucky had taken all the safeguards necessary to prevent an “untoward, readily avoidable risk of inflicting severe and unnecessary pain.”¹¹⁹ Although no clear standard emerged from the splintered decision, the “substantial risk” test appears to be the prevailing rule.¹²⁰

II. THE SUPREME COURT’S UNWILLINGNESS TO CRITICALLY EXAMINE METHOD-OF-EXECUTION CHALLENGES IS INCONSISTENT WITH ITS PROPORTIONALITY JURISPRUDENCE

The Supreme Court’s proportionality precedents discussed in Part I demonstrate that the Court is willing to hear death penalty cases and gradually narrow the circumstances under which states may authorize the death penalty. The Court’s steady review of proportionality cases stands in stark contrast to its limited review of method-of-execution challenges.¹²¹ This inconsistency is significant because the Court has repeatedly emphasized that the meaning of the Eighth Amendment changes as society evolves.¹²² Interpreting the Eighth Amendment’s meaning in light of contemporary values should not be limited to questions of whether the penalty of death is disproportionate to a particular crime; rather, a proper interpretation demands an additional inquiry into the methods used to carry out such penalty.¹²³

118. See *supra* notes 88–92 and accompanying text.

119. *Baze*, 128 S. Ct. at 1567 (Ginsburg, J., dissenting).

120. See *Emmett v. Johnson*, 532 F.3d 291, 298 n.4 (4th Cir. 2008) (applying the “substantial risk” standard to a Virginia inmate’s constitutional challenge to execution by lethal injection, asserting that the plurality opinion authored by the Chief Justice in *Baze* “represents the controlling opinion of the Court”) (internal quotation marks omitted).

121. This is not the only inconsistency in the Court’s Eighth Amendment jurisprudence. See Denno, *Executions*, *supra* note 24, at 321–22 (arguing the Court’s avoidance of method-of-execution Eighth Amendment challenges is in “striking contrast” with its frequent consideration of the constitutionality of prison conditions under the Cruel and Unusual Punishments Clause).

122. See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (“[A]n assessment of contemporary values concerning the infliction of a challenged sanction is relevant to the application of the Eighth Amendment.”); *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (“The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”); *Weems v. United States*, 217 U.S. 349, 378 (1910) (“[The Cruel and Unusual Punishments Clause] is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice.”).

123. *But see* Dwight Aarons, *The Abolitionist’s Dilemma: Establishing the Standards for the Evolving Standards of Decency*, 6 PIERCE L. REV. 441, 460 (2008) (discussing the presumption among courts and commentators that the “evolving standards of decency” proportionality standard should be applied to assess method-of-execution

In *Gregg*, the Court asserted that “an assessment of contemporary values . . . requires . . . that we look to objective indicia that reflect the public attitude toward a given sanction.”¹²⁴ Thus, in evaluating challenges to the death penalty’s proportionality, the Court has carefully analyzed objective factors to determine whether a national consensus exists favoring the restriction of the death penalty for certain offenses or offenders.¹²⁵ In *Baze*, however, the Court’s examination of objective measures of national consensus was comparatively cursory¹²⁶ and ultimately unpersuasive.¹²⁷ Further, the inconsistency in the Court’s Eighth Amendment jurisprudence is more troubling when considered in light of the Cruel and Unusual Punishments Clause’s original purpose in proscribing torture.¹²⁸ While a possible explanation for this incongruity may be the Court’s reluctance to grapple with complex medical and scientific issues that are perhaps better resolved legislatively, a survey of the Court’s Eighth Amendment cases reveals that it has been willing to address such issues under other circumstances.¹²⁹

A. *The Supreme Court’s Claimed National Consensus Favoring Lethal Injection Is Illusory*

The Court’s argument in *Baze*, that a national consensus favors the use of lethal injection, is unconvincing. Chief Justice Roberts, writing for the plurality, suggested that Kentucky’s three-drug lethal injection protocol reflected a “broad consensus” favoring this method of execution, in light of the fact that it is used by a vast majority of states administering capital punishment, as well as the Federal Government, and is “believed to be the most humane [method-of-

challenges, but arguing that the two are not completely analogous: looking to contemporary norms is more appropriate when the “touchstone” of the inquiry is moral culpability, unlike method-of-execution challenges in which the “inquiry is more practical and focused on physical pain”) (internal quotation marks omitted).

124. *Gregg*, 428 U.S. at 173.

125. See, e.g., Aarons, *supra* note 123, at 444–45 (discussing the six factors measuring “substantive proportionality” the Court has traditionally applied in examining whether a death penalty practice is within the evolving standards of decency: (1) history, (2) judicial precedent, (3) statutes, (4) jury sentencing, (5) penological goals, and (6) international and comparative law).

126. See *infra* Part II.A (detailing the *Baze* decision’s shallow analysis).

127. See *infra* Part II.B (analyzing the lack of synchrony between the *Baze* decision and other Supreme Court precedent).

128. See *supra* Part I.A (describing the historical impetus behind the Cruel and Unusual Punishments Clause); *infra* Part II.C.

129. See *infra* Part II.D (revealing the Court’s inconsistency by providing examples of its willingness to adjudicate highly technical and medical cases in other circumstances).

execution] available.”¹³⁰ By citing legislative statistics as evidence of a national consensus, the Court tacitly drew from the approach it used when it evaluated the death penalty’s proportionality in view of “evolving standards of decency” in *Coker*, *Edmunds*, *Roper*, *Atkins*, and later, *Kennedy*.¹³¹ In each of these cases, the Court looked to the number of states authorizing or proscribing the death penalty for the specific offense or offender at issue to reach its conclusion.¹³²

Absent from the *Baze* opinion was a critical analysis of any other factors indicating that the three-drug lethal injection protocol comported with society’s current “standards of decency.”¹³³ Yet, in its modern Eighth Amendment jurisprudence interpreting the Cruel and Unusual Punishments Clause, the Court has looked beyond trends reflected in state legislation to other factors reflecting contemporary values, such as public opinion,¹³⁴ sentencing juries,¹³⁵ and the laws and practices of other countries.¹³⁶

130. See *Baze v. Rees*, 128 S. Ct. 1520, 1532–37 (2008) (plurality opinion) (noting “at the outset that it is difficult to regard a practice as ‘objectively intolerable’ when it is in fact widely tolerated,” and pointing out all thirty-six states that authorize the death penalty use lethal injection, and of these, thirty use some combination of sodium thiopental, pancuronium bromide, and potassium chloride).

131. See, e.g., *Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (“[T]he ‘clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures.” (quoting *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989), *overruled by Atkins*, 536 U.S. 304)).

132. See *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2653 (2008) (“[O]nly six . . . jurisdictions authorize the death penalty for rape of a child.”); *Roper v. Simmons*, 543 U.S. 551, 564 (2005) (“[Thirty] States prohibit the juvenile death penalty”); *Atkins*, 536 U.S. at 314–15 (discussing how the execution of the mentally impaired is banned in thirty states); *Enmund v. Florida*, 458 U.S. 782, 789 (1982) (stating that eight jurisdictions had authorized the death penalty for participation in a robbery during which an accomplice committed murder); *Coker v. Georgia*, 433 U.S. 584, 595–96 (1977) (“Georgia is the sole jurisdiction in the United States at the present time that authorizes a sentence of death when the rape victim is an adult woman.”).

133. See *Baze*, 128 S. Ct. at 1568 (Ginsburg, J., dissenting) (citing *Atkins*, 536 U.S. at 311–12, for the proposition that the age of the Court’s only three method-of-execution cases—*Wilkerson*, *Kemmler*, and *Resweber*—diminishes their utility because the Eighth Amendment “must draw its meaning from the evolving standards of decency”).

134. See *Coker*, 433 U.S. at 592 (“[A]ttention must be given to the public attitudes concerning a particular sentence—history and precedent . . . are to be consulted.”).

135. See *Enmund*, 458 U.S. at 794 (finding American juries’ unwillingness to sentence felony murderers to death reflected a broader societal consensus that the Eighth Amendment prohibits death for such crimes). However, although a jury can be a reliable indicator of contemporary values, jury sentences are not applicable in the method-of-execution context because they have no role in determining how states carry out executions. See, e.g., *Nelson v. Campbell*, 541 U.S. 637, 644 (2004) (explaining that an Eighth Amendment challenge to a method of execution brought by a prisoner convicted by a jury and sentenced to death does not directly call into question the validity of the sentence itself).

136. See, e.g., *Roper*, 543 U.S. at 575 (asserting that its conclusion that the juvenile death penalty is excessive is validated by the “stark reality” that no other country in the world allows it); *Atkins*, 536 U.S. at 316 n.21 (noting the overwhelming

In *Atkins*, for example, the Court cited additional factors that it argued “reflect[ed] a much broader social and professional consensus” as support for its conclusion that executing mentally retarded offenders was unconstitutional.¹³⁷ The Court considered opposition from several social and professional organizations, including the American Psychological Association, the shared views of “widely diverse religious communities in the United States,” and polling data revealing a broadly held belief among Americans—including supporters of the death penalty—that execution of mentally retarded criminals was wrong.¹³⁸

In response to the Court’s grant of certiorari in *Baze*, several medical, religious, and ethical organizations expressed grave concerns about the current administration of lethal injection in the United States.¹³⁹ One legal commentator has argued that the medical community’s refusal to participate in executions—particularly those by lethal injection—“bear[s] on the standards of decency factor.”¹⁴⁰ Although the plurality in *Baze* acknowledged the current controversy surrounding lethal injection, it concluded that it would be inappropriate for the Court to involve itself in a “best practices”

disapproval by the world community of the execution of mentally impaired individuals); *Enmund*, 458 U.S. at 796 n.22 (“It is thus worth noting that the doctrine of felony murder has been abolished in England and India, severely restricted in Canada and a number of other Commonwealth countries, and is unknown in continental Europe.”); *Coker*, 433 U.S. at 596 n.10 (“[T]he climate of international opinion concerning the acceptability of a particular punishment . . . is . . . not irrelevant.”). *But see Roper*, 543 U.S. at 628 (Scalia, J., dissenting) (arguing that foreign law has no place in the Court’s reasoning and asserting that the majority’s reliance on it is inconsistent and serves only to “‘affirm’ . . . the Justices’ own notion of how the world ought to be”).

137. *Atkins*, 536 U.S. at 316 n.21.

138. *Id.*

139. *See, e.g.*, Brief of Amici Curiae Critical Care Providers and Clinical Ethicists in Support of Petitioners at 11, *Baze v. Rees*, 128 S. Ct. 1520 (2008) (No. 07-5439) (arguing against the use of pancuronium bromide in the “end-of-life context” for medical and ethical reasons, since it masks any outward signs of stress or pain); Brief of the American Ass’n of Jewish Lawyers and Jurists (“AAJLJ”) as Amicus Curiae in Support of Petitioners at 7, *Baze*, 128 S. Ct. 1520 (No. 07-5439) (asserting that the “substantial risk” standard is unacceptable under Jewish Law, which requires the administration of the method of execution involving the least amount of pain and suffering); Brief for the Fordham University School of Law, Louis Stein Center for Law and Ethics as Amicus Curiae in Support of Petitioners at 13, 34, *Baze*, 128 S. Ct. 1520 (No. 07-5439) (arguing that the current lethal injection protocol was not the product of reasoned consideration, and discussing aspects of the adoption of lethal injection which have led to continued suppression of public scrutiny of the procedure and its administration).

140. *See Denno*, *Executions*, *supra* note 24, at 385 (stating the American Medical Association Council on Ethical and Judicial Affairs’ position that physicians are not allowed to participate in executions).

debate, deferring instead to state legislatures to decide the manner in which they administer the death penalty.¹⁴¹

While the Court has looked to statistical evidence of a reduced incidence of capital punishment for certain crimes in contemplating the death penalty’s excessiveness, it was unwilling to consider evidence of a high incidence of botched executions in reviewing a method-of-execution challenge in *Baze*.¹⁴² For example in *Kennedy*, the Court looked to execution statistics from other states authorizing capital punishment for child rape and found that in each no one had been executed for the crime of raping a child since 1964, reinforcing the Court’s determination that imposing the death penalty for the crime of child rape contradicts contemporary values.¹⁴³ The *Baze* plurality, however, did not acknowledge the statistical evidence of numerous botched executions that have taken place over the past several decades in other states administering lethal injection,¹⁴⁴ even though the petitioners argued that Kentucky’s protocols exposed them to the risk of pain in the event of an improper administration of the lethal drugs.¹⁴⁵ The Court only indirectly addressed the risk of a botched execution, drawing on *Resweber*¹⁴⁶ to assert that an “isolated mishap alone does not give rise to an Eighth Amendment violation.”¹⁴⁷

Further, while Chief Justice Roberts’s assertion regarding lethal injection’s near universal use in death penalty states is of course factually correct, it is difficult to maintain that modern lethal injection procedures comport with contemporary standards of decency when there is very little the public actually knows about them.¹⁴⁸ Although recent botched executions, like that of Joseph

141. *Baze*, 128 S. Ct. at 1531–32 (internal quotation marks omitted).

142. See *infra* notes 143–147 and accompanying text.

143. *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2657–58 (2008); see *Roper v. Simmons*, 543 U.S. 551, 564–65 (2005) (pointing out that only six states have executed juveniles since the decision in *Stanford*); see also *Atkins*, 536 U.S. at 316 (stating that in states with no express prohibition on capital punishment for mentally impaired offenders, only five such executions have taken place since 1989).

144. See RADELET, *supra* note 3.

145. *Baze*, 128 S. Ct. at 1530–31.

146. 329 U.S. 459, 463–64 (1947) (rejecting the petitioner’s claim that “because he once underwent the psychological strain of preparation for electrocution, [requiring] him to undergo this preparation again subjects him to a lingering or cruel and unusual punishment”). See *supra* notes 39–41 and accompanying text (discussing the Court’s refusal in *Resweber* to find an Eighth Amendment violation given the instant facts).

147. *Baze*, 128 S. Ct. at 1531 (citing *Resweber*, 329 U.S. at 463–64, in response to the petitioners’ claim that Kentucky’s lethal injection protocol exposes prisoners to the risk of “severe pain” if the drugs are not properly administered).

148. See Alper, *supra* note 83, at 1–2 (discussing lethal injection’s “sordid” and “skimpy” history and the fact that, because people presumed lethal injection was safe

Lewis Clark, have attracted media attention and shed more light on the procedures states use to administer capital punishment, there is still a significant lack of transparency attending the lethal injection process.¹⁴⁹

Some commentators attribute the secrecy surrounding lethal injection first to a concern by states that public awareness of their execution protocols will expose them to increased capital punishment litigation,¹⁵⁰ and, second, to “blissful ignorance” on the part of the public to the practical realities of specific execution mechanisms.¹⁵¹ Regardless, this lack of information complicates efforts to review the constitutionality of lethal injection protocols.¹⁵² Thus, even if the Court had attempted to gauge public opinion, by, for example, considering polling data similar to that it relied upon in *Atkins*, such an analysis would be of questionable probative value given that the public is largely ill-informed.¹⁵³ Moreover, it is perhaps easier for the public to understand and make a judgment as to which criminals deserve to be executed than about the medically complex procedures used to carry out those executions.

and humane, little attention was paid to its adoption and “the automatic transparency that typically attends legislative action was absent”). *But see Baze*, 128 S. Ct. at 1527 n.1 (acknowledging the three-drug lethal injection protocol was adopted by states “without significant independent review,” but arguing that the move to this method of execution was “motivated by a desire to find a more humane alternative to then-existing methods”).

149. *See Denno, Quandary, supra* note 74, at 95–96 (detailing the limited public availability of states’ specific lethal injection protocols); *see also* Douglas A. Berman & Alison J. Nathan, Debate, *Baze-D and Confused: What’s the Deal with Lethal Injection?*, Debate, 156 U. PA. L. REV. PENNUMBRA 312, 316–17 (2008), <http://www.pennumbra.com/debates/pdfs/lethalinjection.pdf> (discussing the three reasons for the limited public awareness of lethal injection procedures: (1) the paralytic agent masks any outward, physical signs of suffering, causing the media witnessing executions to convey a “sanitized version” to the public, (2) specific lethal injection protocols are developed by prison officials and often exempted from administrative review, and (3) states “tenaciously guard[] the information as secret and nonpublic”).

150. *See Berman & Nathan, supra* note 149, at 322 (“State officials believe, quite justifiably, that any information-sharing good deed will be punished through new rounds of litigation brought by death row defendants and death penalty opponents.”).

151. *See id.* at 323.

152. *See id.* at 328 (arguing that the national consensus analysis is frustrated in the method-of-execution context because of the lack of transparency and public knowledge due to states’ refusal to release information about lethal injection protocols and procedures, and asserting that it is up to the Supreme Court to “probe the[se] troubling realities”).

153. *See supra* notes 149–152 and accompanying text (detailing the lack of information that is available to the public regarding lethal injection procedures).

B. *Legislation Is Unreliable as an Objective Indicator of Lethal Injection’s Acceptability*

The plurality’s reliance on state legislation as the sole indicator that Kentucky’s lethal injection protocol is “objectively []tolerable”¹⁵⁴ raises several concerns. While legislation is generally considered the strongest indicator of a national consensus,¹⁵⁵ it is less persuasive in the context of method-of-execution challenges than in cases assessing proportionality. This is because most states with lethal injection enacted generalized legislation to implement it, meanwhile delegating development of the specific execution protocols to untrained prison personnel.¹⁵⁶ As Justice Stevens acknowledged in his concurring opinion in *Baze*, “[i]n the majority of States that use the three-drug protocol, the drugs were selected by unelected Department of Correction officials with no specialized medical knowledge and without the benefit of expert assistance or guidance.”¹⁵⁷ Thus, while decisions of democratically-elected bodies concerning punishments are considered presumptively valid in the face of a constitutional challenge,¹⁵⁸ Stevens argued that the “drug selections [adopted by states using lethal injection] are not entitled to the kind of deference afforded legislative decisions.”¹⁵⁹

154. *Baze v. Rees*, 128 S. Ct. 1520, 1532 (2008) (internal quotation marks omitted).

155. See *Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (“[The] clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures.”) (quoting *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989), overruled by *Atkins*, 536 U.S. 304).

156. See Denno, *Legislatures*, *supra* note 24, at 116–23 (explaining the vagueness of most lethal injection statutes, the majority of which fail to list the quantity of the various chemicals used or specify information on the quality or training of execution officials).

157. See *Baze*, 128 S. Ct. at 1545 (Stevens, J., concurring in the judgment) (pointing out that only a third of the states with lethal injection expressly authorize the use of a chemical paralytic agent, such as pancuronium bromide, arguing that the failure of states or Congress to prohibit its use should not be considered “a nationwide endorsement of an unnecessarily dangerous practice,” and asserting that pancuronium bromide’s specific authorization by some state legislatures was more the product of a “stereotyped reaction” than “a careful analysis of relevant considerations favoring or disfavoring” its adoption) (citing *Mathews v. Lucas*, 427 U.S. 495, 520–21 (1976) (Stevens, J., dissenting)).

158. See *Gregg v. Georgia*, 428 U.S. 153, 175–76 (1976) (“[I]n assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity. . . . And a heavy burden rests on those who would attack the judgment of the representatives of the people. . . . The deference we owe to the decisions of the state legislatures under our federal system is enhanced where the specification of punishments is concerned, for ‘these are peculiarly questions of legislative policy.’” (citation omitted) (quoting *Gore v. United States*, 357 U.S. 386, 393 (1958))).

159. *Baze*, 128 S. Ct. at 1545 (Stevens, J., concurring in the judgment).

Moreover, state legislation, when used as an indicator of national consensus, should be considered within the broader context of the information and time for in-depth inquiry available to states at the time of its passage.¹⁶⁰ The suggestion of a national consensus favoring Kentucky's three-drug protocol as the preferred method of execution is difficult to substantiate when viewed in light of the haphazard way lethal injection was developed—without medical or scientific study¹⁶¹—and the budget concern justifications for its adoption in many states.¹⁶² The questionable reliability of legislation alone as a reflection of societal values concerning lethal injection weakens the *Baze* plurality's conclusion that Kentucky's execution protocol is “widely tolerated” nationally.¹⁶³

*C. The Court's Limited Review of Method-of-Execution Challenges Is
Contrary to the Original Understanding of the Cruel and Unusual
Punishments Clause*

The inconsistency in the Supreme Court's limited review of method-of-execution challenges as compared to its more critical proportionality jurisprudence is also at odds with the Eighth Amendment's original purpose. The drafters of the Constitution “were primarily concerned . . . with proscribing ‘tortures’ and other ‘barbarous’ methods of punishment.”¹⁶⁴ Indeed, the Framers intended that the Cruel and Unusual Punishments Clause would be adopted to “prohibit[] certain *methods* of punishment”¹⁶⁵ and was not expanded to encompass disproportionate punishments until the 1910 case of *Weems v. United States*.¹⁶⁶ As Justice White argued in his dissent in *Weems*, “it may not be doubted, and indeed is not questioned by

160. See Aarons, *supra* note 123, at 449 (arguing that legislation is not always a sound indicator of public values because “[l]egislators often face stark policy choices and frequently compromise to resolve their differences”).

161. See Denno, *Quandary*, *supra* note 74, at 70 (describing the development of lethal injection by two Oklahoma legislators and the state's Chief Medical Examiner).

162. See Denno, *Executions*, *supra* note 24, at 374 (discussing economics as a “major impetus” behind the adoption of lethal injection because it was significantly less expensive than electrocution and lethal gas).

163. *Baze*, 128 S. Ct. at 1532–33 (plurality opinion).

164. See *Gregg v. Georgia*, 428 U.S. 153, 170 (1976) (attributing this fact to statements made by Patrick Henry at Virginia's constitutional convention, as well as similar concerns raised at the Massachusetts convention) (citation omitted).

165. Granucci, *supra* note 26, at 842 (emphasis added).

166. 217 U.S. 349 (1910); see *id.* at 383 (White, J., dissenting) (holding that a sentence of twelve years hard labor was disproportionate to the crime of falsifying official public records and therefore “repugnant to the Bill of Rights”); Granucci, *supra* note 26, at 842–43 (explaining the history of the Cruel and Unusual Punishments Clause).

anyone, that the cruel punishments against which the Bill of Rights provided were the atrocious, sanguinary, and inhuman punishments which had been inflicted in the past upon the persons of criminals.”¹⁶⁷ This interpretation of the Eighth Amendment was also echoed by Justice Thomas in his concurring opinion in *Baze*, when he argued that the Framers’ intention in adopting the Eighth Amendment—to prevent “torturous modes of punishment”—has “permeated” the Court’s method-of-execution jurisprudence.¹⁶⁸

A consideration of the Eighth Amendment’s original understanding suggests that avoiding painful executions is more aligned with preventing torture, the purpose of the Cruel and Unusual Punishments Clause, than with limiting the death penalty’s reach.¹⁶⁹ It would thus seem that evidence pointing to the possibility of an excruciatingly painful death would attract as much, if not more, exacting scrutiny by our nation’s highest Court—in an effort to be faithful to the purpose and intent of the Eighth Amendment—than the more general analysis of the types of crimes and criminals eligible for death.

Indeed, original intent has been an important component of the Supreme Court’s analysis in other areas of its jurisprudence, particularly the Second Amendment.¹⁷⁰ In *District of Columbia v. Heller*,¹⁷¹ a case decided just a few months after *Baze*, the Supreme Court struck down a District of Columbia gun control law, holding that it violated the Second Amendment’s protection of an individual’s right to bear arms.¹⁷² The Court relied heavily on the Second Amendment’s original understanding to reach its conclusion, including analyzing the meaning of the phrases “keep arms” and “bear arms” at use during the period that the Amendment was

167. *Weems*, 217 U.S. at 390 (White, J., dissenting).

168. *See Baze*, 128 S. Ct. at 1556, 1556–59 (Thomas, J., concurring in the judgment) (discussing the Framers’ debates and early commentary on the Constitution as evidence that the Eighth Amendment was originally understood as prohibiting “torturous punishments,” and arguing that the plurality’s “substantial risk” standard was inconsistent with this original understanding).

169. *See supra* notes 164–168 and accompanying text (discussing the Framers’ concern with prohibiting types of punishment and distinguishing it from the Court’s current concern with who can be exposed to the death penalty).

170. U.S. CONST. amend. II (“A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”).

171. 128 S. Ct. 2783 (2008).

172. *Id.* at 2822–23. *Heller* was significant in that it marked the first time in history that the Supreme Court invalidated a gun control law on the grounds that it violated the Second Amendment. *See* Cameron Desmond, Comment, *From Cities to Schoolyards: The Implications of an Individual Right To Bear Arms on the Constitutionality of Gun-Free Zones*, 39 MCGEORGE L. REV. 1043, 1044 (2008).

adopted, the Amendment's legislative history, and commentary by legal scholars immediately following the Amendment's ratification.¹⁷³ Thus, the *Baze* plurality's failure to give weight to the Eighth Amendment's original purpose stands in contrast to the Court's critical analysis of original intent in interpreting other controversial constitutional questions.

*D. Medical and Scientific Considerations Do Not Offer
a Compelling Justification for the Court's Reluctance To Critically Analyze
Execution Methods*

One possible explanation for the Court's reluctance to critically address method-of-execution challenges, in contrast to its proportionality jurisprudence, is a sense by the Court that a more exacting review of execution protocols would involve complex medical and scientific judgments, which are perhaps better left to states to resolve legislatively. Indeed, the *Baze* plurality argued as much when it rejected the petitioners' submission that evidence of a "slightly or marginally safer alternative" method would be enough to prove Kentucky's three-drug protocol violated the Eighth Amendment.¹⁷⁴

This reasoning is inconsistent with the Court's willingness to make medical and scientific judgments in earlier cases in which it reviewed Eighth Amendment challenges to the death penalty's proportionality.¹⁷⁵ In *Atkins*, for example, the Court examined various clinical measures of mental retardation, including medical definitions, psychological assessments, and the results of intelligence tests to assess the defendant's criminal culpability.¹⁷⁶ Similarly, the Court in *Roper* drew on social science research findings that juveniles are more predisposed to reckless behavior than adults and less able to appreciate the negative consequences of their actions as support for its conclusion that juveniles should not be subjected to death, which it argued should only be reserved for the "worst offenders."¹⁷⁷ Thus, the Court has demonstrated the ability in other areas of its Eighth

173. *Heller*, 128 S. Ct. at 2792–805.

174. See *Baze v. Rees*, 128 S. Ct. 1520, 1531 (2008) (plurality opinion) (arguing that it would be ill-advised for the Court to become "embroil[ed] . . . in ongoing scientific controversies beyond their expertise"); see also *id.* at 1562 (Thomas, J., dissenting) ("[C]omparative-risk standards . . . require courts to resolve medical and scientific controversies that are largely beyond the judicial ken.").

175. See *infra* notes 176–178 and accompanying text (discussing the Court's use of scientific evidence in the determination to disallow the use of the death penalty for the mentally retarded and juveniles).

176. *Atkins v. Virginia*, 536 U.S. 304, 308–09 nn.3–5 (2002).

177. *Roper v. Simmons*, 543 U.S. 551, 569–70 (2005).

Amendment jurisprudence to engage in scientific debates exceeding its expertise, particularly in cases where such evidence supported its conclusion.¹⁷⁸ The *Baze* plurality, however, acknowledged the controversy surrounding the *Lancet* study,¹⁷⁹ but declined to “take sides in this dispute.”¹⁸⁰

This inconsistency is troubling in light of the fact that a thorough consideration of the constitutionality of methods of execution must be informed by medical and scientific judgments.¹⁸¹ By avoiding a more critical examination of the available medical and scientific evidence, the Court has made it less clear how lower courts should analyze what specifically amounts to a “risk of severe pain” or what protocols would be considered “substantially similar” to Kentucky’s.¹⁸²

III. IMPLICATIONS OF THE *BAZE* DECISION

The constitutional standard for reviewing method-of-execution challenges that the Court articulated in *Baze* was borrowed from an earlier ruling in *Farmer v. Brennan*,¹⁸³ a case involving an Eighth Amendment challenge to prison conditions. The petitioner in *Farmer* was a transsexual prisoner projecting female characteristics who was beaten and raped after being transferred to an all-male state penitentiary known for its violence and history of assaults.¹⁸⁴ The petitioner argued that federal prison officials were aware of the petitioner’s vulnerability under these circumstances and acted with “deliberate indifference” to the petitioner’s safety in violation of the

178. See, e.g., *id.* at 569–71 (noting that sociological studies detailing juveniles’ “lack of maturity and . . . underdeveloped sense of responsibility” supported the Court’s conclusion that juveniles should not face the death penalty); *Atkins*, 536 U.S. at 318–19 (relying on clinical definitions to determine that mentally retarded defendants have a reduced culpability and consequently should not be subjected to the death penalty); *Thompson v. Oklahoma*, 487 U.S. 815, 835, 835 n.42 (1988) (utilizing a professional report, which discussed the psychological conditions of juveniles on death row, to support the contention that juveniles are less culpable).

179. See *supra* notes 88–91 and accompanying text (discussing the *Lancet* study as an illustration of the problems with the use of the three-drug lethal injection protocol).

180. *Baze v. Rees*, 128 S. Ct. 1520, 1532 n.2 (2008) (plurality opinion).

181. See *id.* at 1570 n.3 (Ginsburg, J., dissenting) (“Considering that the constitutionality of Kentucky’s protocol depends on guarding against the . . . risk [of consciousness during otherwise painful procedures], the plurality’s reluctance to consider medical practice is puzzling. No one is advocating the wholesale incorporation of medical standards into the Eighth Amendment That medical professionals consider such [additional safeguards] important enough to make it the standard of care in medical practice, I remain persuaded, is highly instructive.”).

182. See Liptak, *supra* note 108 (discussing the uncertainty created by the Court’s “fractured decision” in *Baze* and the likelihood of increased capital litigation).

183. 511 U.S. 825 (1994).

184. *Id.* at 831.

Eighth Amendment.¹⁸⁵ The Court held that a prison official violates the Eighth Amendment “for denying humane conditions of confinement only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it.”¹⁸⁶

Arguably, a “substantial risk” of inmate assault—while indeed grave—is different from that of an excruciatingly painful execution. The main concern with this standard, however, is that it is subjective. It is not clear exactly what the *Baze* plurality meant by “substantial risk” and “serious harm” in the context of administering capital punishment.¹⁸⁷ This is problematic because, preferably, courts should rely on objective factors as much as possible in considering an Eighth Amendment challenge.¹⁸⁸

The Court’s decision to use the challenge by the Kentucky petitioners in *Baze* to clarify the constitutional standard for method-of-execution challenges also has implications for future judicial review of state execution protocols. The record in Kentucky was not developed—there had been only one execution by lethal injection at the time *Baze* was decided¹⁸⁹—making *Baze* an arguably poor test case for considering the constitutionality of lethal injection as it is currently administered.¹⁹⁰ The Court’s splintered ruling not only

185. *Id.*

186. *Id.* at 847.

187. See Liptak, *supra* note 108 (noting worries that “[t]he court is giving different messages” in regards to Eighth Amendment jurisprudence).

188. See *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (“Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices; judgment should be informed by objective factors to the maximum possible extent.”).

189. Kentucky carried out its second execution by lethal injection on November 21, 2008, when it executed convicted child-killer Marco Allen Chapman. Jason Riley, *Chapman Executed for '02 Slayings*, THE COURIER-JOURNAL (Louisville, Kentucky), Nov. 22, 2008, at 1A.

190. See Dieter, *supra* note 42, at 803–04 (“[T]he suit brought by the petitioners had not been subjected to the thorough federal hearings conducted in similar cases that were under way in California and Missouri. The hearings in Kentucky were instead held in state court, and considered only Kentucky’s procedures, not the vast array of problems that had arisen in other states.”); see also Shah, *supra* note 6, at 1141 (arguing that it is paradoxical that Kentucky, a state with minimal experience administering lethal injection and which proscribes physician involvement in executions, “is to serve as the model for states with far more experience in this area and prior physician involvement”). Moreover, because the plurality suggested that states whose execution protocols were “substantially similar” to Kentucky’s would survive constitutional review, see *Baze v. Rees*, 128 S. Ct. 1520, 1537–38 (2008) (“A State with a lethal injection protocol substantially similar to the protocol we uphold today would not create a risk that meets this standard.”), states defending against challenges to their execution methods could simply alter their protocols to avoid judicial scrutiny. Such a response could potentially impede a more critical analysis of whether a state’s protocol involves a “substantial risk of serious harm.”

makes increased lethal injection litigation more likely,¹⁹¹ it also creates uncertainty as to how the Court might resolve a hypothetical future challenge to another state’s protocol in which there is more documented evidence on execution procedures, including possible evidence of botched procedures.¹⁹² The sparse documented evidence available in *Baze* and the lack of a clear, objective constitutional standard is legally problematic because it means that states preparing for or responding to method-of-execution challenges are left with limited insight into how courts might resolve the issue going forward.¹⁹³

IV. RECOMMENDATIONS

The Supreme Court’s decision in *Baze*, despite its historical significance, did not conclusively resolve the confusion surrounding constitutional challenges to methods of execution. Thus, states going forward with lethal injection should develop objective criteria to ensure their protocols do not pose a “substantial risk” of unnecessary pain in light of feasible alternatives.

States should evaluate medical evidence on the risk of pain involved,¹⁹⁴ documentation on botched executions, and medical and scientific testimony on the feasibility and safety of alternative methods to determine whether their protocols pass constitutional muster. Further, recognizing the limitations of individual federal judges’ ability to review complicated medical data on a case-by-case

191. See *supra* notes 108–109 and accompanying text (noting concern that the Court’s ruling will lead to increased litigation).

192. See Joan Biskupic, *Ky. Ruling Leaves Room for Future Tests of Issue*, USA TODAY, Apr. 17, 2008, at 7A, available at http://www.usatoday.com/news/washington/judicial/2008-04-16Lethalinside_N.htm (discussing how the chances of success for lethal injection challengers may increase long-term with more developed evidence of botched executions and other problems with lethal injection).

193. Challenges to the constitutionality of lethal injection procedures are already under way in several other states, and this trend will likely continue. See *Emmett v. Johnson*, 532 F.3d 291, 302, 308 (2008) (applying the Supreme Court’s reasoning in *Baze* to reject a challenge to Virginia’s three-drug lethal injection protocol, arguing that the petitioner failed to demonstrate that Virginia’s protocol posed a “substantial or objectively intolerable risk of severe pain” and did not show that the alternative one-drug protocol was “feasible or readily implemented”); see also Adam Liptak & Adam B. Ellick, *Judge Orders Ohio To Alter Its Method of Execution*, N.Y. TIMES, June 11, 2008, at A16 (discussing an Ohio judge’s order that the state’s execution protocols be changed, conceding that current procedure would fail under *Baze*); Sean O’Sullivan, *Judge Continues Death Penalty Stay for Delaware*, NEWS J., May 15, 2008, at 1B (explaining a decision by a federal judge in Delaware to suspend executions pending a hearing on the similarities between the Delaware and Kentucky procedures).

194. See Kreitzberg & Richter, *supra* note 77, at 478 (suggesting that states should consider the “period of time it takes for unconsciousness to occur” to better understand the risk of pain accompanying lethal injection).

basis,¹⁹⁵ states charged with ensuring the constitutionality of their protocols should conduct legislative hearings or appoint task forces to develop specific guidelines for their execution protocols, relying on the objective factors discussed above. States should not defer to prison personnel to develop and carry out procedures that implicate important constitutional questions.¹⁹⁶ Indeed, Chief Justice Roberts, concluding his plurality opinion in *Baze*, hinted that the outcome of this case signals an opportunity for states to engage in a thoughtful debate over and examination of execution protocols to ensure that lethal injection is carried out as humanely as possible.¹⁹⁷

In addition, courts reviewing the constitutionality of execution procedures and lawyers litigating such challenges should insist on transparency and demand that state lethal injection protocols are made available to the public.¹⁹⁸ As one federal judge pointed out in a recent law review article, “[i]n examining the evolving standards of decency, we cannot expect the public’s standards to evolve if the public is unaware of what procedures are actually performed upon the condemned.”¹⁹⁹ This could be achieved by states releasing the findings of legislative committees or task forces and, ultimately, enacting more specific legislation giving explicit directives to prison officials on how executions are to be carried out.

CONCLUSION

In recent decades, the Supreme Court has demonstrated a gradual willingness to limit the classes of crimes and criminals eligible for

195. See, e.g., Berman *supra* note 92, at 327 (arguing that federal courts are ill-equipped to “sort[] through alternative execution technologies, debatable medical evidence, and the administrative issues that states face in carrying out scheduled executions” and are more effective in serving as “watch-dog[s]” to prevent against the use of questionable execution methods).

196. See *supra* notes 156–159 and accompanying text (noting how most specific lethal injection procedures are not determined by elected officials).

197. See *Baze v. Rees*, 128 S. Ct. 1520, 1538 (2008) (plurality opinion) (“The broad framework of the Eighth Amendment has accommodated this progress toward more humane methods of execution, and our approval of a particular method in the past has not precluded legislatures from taking the steps they deem appropriate, in light of new developments, to ensure humane capital punishment. There is no reason to suppose that today’s decision will be any different.”).

198. Attorneys for Ralph Baze and Thomas Bowling have initiated another challenge in Kentucky state court, this time arguing the State’s lethal injection protocol should be made public. See Dave Spencer, *Two Death Row Cases Back in Kentucky Supreme Court*, Oct. 16, 2008, WTK.COM, <http://www.wkyt.com/home/headlines/31129604.html>.

199. See Gaitan, *supra* note 76, at 786–87 (discussing recommendations for improved transparency and oversight of lethal injection, including detailed and public written protocols, which he argues would “significantly ease the burdens on the courts and litigants” in future lethal injection litigation).

capital punishment. The Court has prohibited the death penalty for juveniles and the mentally retarded and held capital punishment unconstitutional for the crime of rape, felony murder where the defendant did not kill or intend to kill, and child rape.²⁰⁰ This trend in the Court’s Eighth Amendment jurisprudence is inconsistent with its historical reluctance to critically examine the specific procedures states use to carry out the death penalty.

The Court’s less rigorous review of method-of-execution challenges was demonstrated by its splintered ruling upholding Kentucky’s lethal injection mechanism in *Baze*.²⁰¹ The *Baze* plurality did not thoroughly analyze relevant evidence of whether lethal injection, as it is carried out today, is objectively tolerable to our society. Yet the Court’s Eighth Amendment precedent mandates that determinations of what constitutes “cruel and unusual punishment” be consistent with our contemporary values.²⁰² While the Court based its conclusion in part on the fact that the vast majority of States with capital punishment use the three-drug protocol at issue in *Baze*, this analysis is less persuasive in this context, given the manner in which states adopted lethal injection and the public’s limited understanding of the issue. In addition, this incongruity raises further constitutional questions in light of the Eighth Amendment’s original purpose of preventing tortuous punishments. Finally, while the Court in *Baze* seemed to justify its conclusion by arguing that the judicial branch is ill-suited to make determinations on complex medical and scientific judgments, this reasoning is inconsistent with the Court’s willingness to engage in the debate over controversial medical and scientific issues in making determinations as to the death penalty’s excessiveness.

The Supreme Court’s ruling in *Baze* in some ways seemed to raise as many constitutional questions as it answered. In light of the lack of a clear standard set forth by the Supreme Court, states facing renewed constitutional challenges to their execution methods in the wake of *Baze* would do well to take a hard look at their execution protocols and, drawing on objective evidence to the fullest extent possible, consider ways in which they might be strengthened.

200. *See supra* notes 14–23 and accompanying text (discussing the development of cases that began determining which defendants and which crimes warranted the death penalty).

201. *Baze*, 128 S. Ct. at 1571–72 (Ginsburg, J., dissenting) (commenting on the Court’s acceptance of Kentucky’s protocol despite the procedure’s failure to include many safety measures).

202. *See supra* notes 130–132 (noting the Court’s reliance on public opinion in justifying the allowance of certain lethal injection methods).