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Note

BAZE V. REES: MERGING EIGHTH AMENDMENT PRECEDENTS INTO A NEW STANDARD FOR METHOD OF EXECUTION CHALLENGES

MOLLY E. GRACE*

In *Baze v. Rees*,¹ the Supreme Court of the United States considered whether Kentucky's three-drug lethal injection protocol violated the Eighth Amendment to the United States Constitution.² The Court upheld the protocol as constitutional, holding that the risk of pain from improper administration of the protocol and Kentucky's failure to implement proposed alternatives did not constitute cruel and unusual punishment.³ Led by Chief Justice Roberts, a plurality of the Court concluded that a method of execution is unconstitutional if (1) it presents a "substantial risk of serious harm" or an "objectively intolerable risk of harm"; or (2) a state refuses to adopt alternative procedures that are "feasible, readily implemented," and will "significantly reduce a substantial risk of severe pain."⁴ In separate opinions, Justice Thomas and Justice Ginsburg proposed alternative tests,⁵ while Justice Stevens advocated an end to the death penalty.⁶

In creating its test, the plurality merged three lines of the Court's Eighth Amendment jurisprudence by adopting part of its conditions of confinement test, reinterpreting language from its method of execution cases, and implicitly invoking its evolving standards of decency doctrine.⁷ While the Court's decision to uphold Kentucky's protocol

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1. 128 S. Ct. 1520 (2008).

2. *Id.* at 1529 (plurality opinion).

3. *Id.* at 1526; *id.* at 1552 (Stevens, J., concurring); *id.* at 1552 (Scalia, J., concurring); *id.* at 1563 (Thomas, J., concurring); *id.* at 1567 (Breyer, J., concurring).

4. *Id.* at 1530–32 (plurality opinion) (citations and internal quotation marks omitted).

5. Justice Thomas proposed that a method of execution was not cruel and unusual unless it was intentionally designed to cause pain. *Id.* at 1556 (Thomas, J., concurring). Justice Ginsburg argued that a method could be unconstitutional if a state failed to adopt "readily available measures" that could "materially increase the likelihood that the protocol will cause no pain," *id.* at 1569 (Ginsburg, J., dissenting), thus creating an "untoward, readily avoidable risk of inflicting severe and unnecessary pain," *id.* at 1567.

6. *Id.* at 1548–49 (Stevens, J., concurring).

7. See *infra* Part IV.A–B.

will promote more uniformity among lower courts, the plurality's standard will also help guide the judiciary to ensure that the executive and legislative branches of state governments continue to create more humane lethal injection protocols in the future.⁸

I. THE CASE

Petitioners Ralph Baze and Thomas C. Bowling were both convicted of double homicide and sentenced to death by lethal injection, Kentucky's default method of capital punishment.⁹ Baze and Bowling challenged Kentucky's three-drug protocol as cruel and unusual punishment.¹⁰

A. *The Petitioners*

Kentucky courts sentenced petitioners Baze and Bowling to death for their respective double homicide convictions.¹¹ Ralph Baze was convicted of murdering two police officers, Sheriff Steve Bennett and Deputy Sheriff Arthur Briscoe, after he shot each officer three times with an SKS assault rifle on January 30, 1992.¹² Baze murdered the officers when they attempted to serve him, a twice-convicted felon, with five felony fugitive warrants from Ohio.¹³ Baze first shot Bennett three times in the back from his hidden position behind a stump and pile of brush.¹⁴ Then, Baze pursued Briscoe as Briscoe attempted to flee.¹⁵ After delivering two shots into Briscoe's back, Baze stood over Briscoe and fired a third shot into Briscoe's head.¹⁶ The Supreme

8. *See infra* Part IV.C.

9. *Baze*, 128 S. Ct. at 1528–29 (plurality opinion). Both petitioners could have chosen either lethal injection or electrocution since they were sentenced before 1998, but each failed to override the state's default method. *Id.* at 1528. *See* KY. REV. STAT. ANN. § 431.220(1)(b) (West 2006).

10. *Baze*, 128 S. Ct. at 1529.

11. *Id.* at 1528–29. Baze was convicted and sentenced in Rowan County. *Baze v. Parker*, 371 F.3d 310, 317 (6th Cir. 2004). Bowling was convicted and sentenced in the Fayette Circuit Court. *Bowling v. Commonwealth*, 981 S.W.2d 545, 547 (Ky. 1998).

12. *Baze v. Commonwealth*, 965 S.W.2d 817, 819–20 (Ky. 1997), *cert. denied*, 523 U.S. 1083 (1998). Baze admitted to the murders, saying, “You tell them that you have got the right man. I’m the one that killed them son of a bitches.” *Id.* at 819.

13. *Id.* at 819–20. The warrants were for “felonious assault of a police officer with a deadly weapon, bail jumping, receiving stolen property and flagrant nonsupport.” *Id.* at 820.

14. *Id.* at 819.

15. *Id.*

16. *Id.*

Court of Kentucky confirmed Baze's conviction and sentence,¹⁷ and the Supreme Court of the United States denied certiorari.¹⁸

Thomas C. Bowling was convicted of double homicide after he murdered Eddie and Tina Earley as they and their two-year-old son sat in their car outside a dry cleaning store on the morning of April 9, 1990.¹⁹ Bowling fired the fatal shots after he crashed into the driver's side of the Earleys' parked car.²⁰ Despite Bowling's arguments that he was under extreme emotional distress at the time of the shooting because his wife left him, he was unemployed, and he showed pre-shooting signs of suicide,²¹ the Kentucky Supreme Court found no evidence that "Bowling's judgment was overcome" or that "he acted uncontrollably or as a result of anything other than an evil or malicious purpose."²² Thus, the court affirmed his conviction and sentence,²³ and the Supreme Court of the United States denied certiorari.²⁴

B. *Kentucky's Lethal Injection Protocol*

Kentucky adopted lethal injection as its preferred method of capital punishment in 1998, replacing electrocution.²⁵ Kentucky Department of Corrections officials developed a written protocol to comply with the requirements of Kentucky's death penalty statute.²⁶ When the petitioners' case reached the Supreme Court, that protocol also called for the injection of three drugs in the following order: (1) 3 grams of sodium thiopental (a barbiturate sedative) to cause unconsciousness; (2) 50 milligrams of pancuronium bromide (a paralytic agent) to restrain all muscular movement and to stop respiration; and

17. *Id.* at 826.

18. *Baze v. Kentucky*, 523 U.S. 1083 (1998).

19. *Bowling v. Commonwealth*, 873 S.W.2d 175, 176 (Ky. 1993), *cert. denied*, 513 U.S. 862 (1994). Bowling was also convicted of fourth-degree assault for injuring the Earleys' son. *Id.*

20. *Id.* at 176-77.

21. *Id.* at 177, 179.

22. *Id.* at 179.

23. *Id.* at 182.

24. *Bowling v. Kentucky*, 513 U.S. 862 (1994).

25. *Baze v. Rees*, 128 S. Ct. 1520, 1527 (2008). Kentucky's death penalty statute states that "every death sentence shall be executed by continuous intravenous injection of a substance or combination of substances sufficient to cause death." KY. REV. STAT. ANN. § 431.220(1)(a) (West 2006). Thirty-six states and the federal government have adopted lethal injection as the sole or preferred execution method since 1977. *Baze*, 128 S. Ct. at 1526-27; Findings of Fact & Conclusions of Law at 2, *Baze v. Rees*, 2005 WL 5797977 (Ky. Cir. Ct. July 8, 2005) (No. 04-CI-01094), *aff'd*, 217 S.W.3d. 207 (Ky. 2006), *cert. granted*, 128 S. Ct. 34 (2007), *aff'd*, 128 S. Ct. 1520 (2008).

26. *Baze*, 128 S. Ct. at 1528.

(3) 240 milliequivalents of potassium chloride to induce cardiac arrest by interfering with the electrical signals that stimulate heart contractions.²⁷ The protocol called for saline injections between each drug to prevent clogging.²⁸ The first drug, properly administered, would prevent the inmate from experiencing any pain from the effects of the other drugs.²⁹ At least thirty states and the federal government have protocols with the same three drugs in various dosages.³⁰

According to Kentucky's protocol, qualified personnel with at least one year of professional experience have one hour to insert both a primary and secondary intravenous ("IV") catheter into an inmate's arm, hand, leg, or foot.³¹ While the execution team dispenses the drugs through five feet of IV tubing from a control room, the warden and deputy warden stay with the prisoner to watch for IV problems.³² If the warden and deputy warden determine by visual inspection that the inmate is still conscious within sixty seconds of the first drug's delivery, they must ask the execution team to deliver a second three-gram dose of that drug to the secondary IV site before proceeding.³³ No problems were reported during Kentucky's one prior execution by lethal injection.³⁴

27. *Id.* at 1527–28. While the original protocol required only two grams of sodium thiopental, the Kentucky Department of Corrections increased that amount to three grams as a result of this litigation. *Id.* at 1528. Upon request, the condemned can also receive an injection of Valium before the injection of sodium thiopental. Findings of Fact & Conclusions of Law at 7, *Baze*, 2005 WL 5797977 (No. 04-CI-01094).

28. *Baze*, 128 S. Ct. at 1528.

29. *Id.* at 1527. The use of sodium thiopental "is the 'humane' component of Kentucky's lethal injection protocol." Findings of Fact & Conclusions of Law at 8, *Baze*, 2005 WL 5797977 (No. 04-CI-01094). However, if the sodium thiopental was administered incorrectly and did not take effect, a conscious inmate would suffocate and feel "substantial" pain as a result of the administration of the other two drugs. *Baze*, 128 S. Ct. at 1533. Certain safeguards, such as following the manufacturer's instructions to minimize the risk of improperly mixing the sodium thiopental, help to protect against this danger. *Id.*

30. *Baze*, 128 S. Ct. at 1532. Like other states, Kentucky's drafters followed the protocol first adopted by Oklahoma in 1977. *Id.* at 1569 (Ginsburg, J., dissenting). The drafters had little or no help from the legislature, did not perform scientific or medical studies, and did not confer with professionals. *Id.*

31. *Id.* at 1528 (plurality opinion). Kentucky currently uses a certified phlebotomist and an emergency medical technician to insert the IV catheters into inmates. *Id.*

32. *Id.*

33. *Id.* Kentucky does not use any other tools—such as an electrocardiogram or a blood pressure cuff—or procedures—such as calling the inmate's name, shaking the inmate, brushing the inmate's eyelashes, or applying a noxious stimulant—to check for consciousness. *Id.* at 1569–70 (Ginsburg, J., dissenting).

34. *Id.* at 1528 (plurality opinion). Eddie Lee Harper was executed by lethal injection on May 25, 1999. Findings of Fact & Conclusions of Law at 3, *Baze*, 2005 WL 5797977 (No. 04-CI-01094).

C. *The Petitioners' Challenge to Kentucky's Lethal Injection Protocol*

After unsuccessfully appealing their convictions, the petitioners sued jointly for declaratory judgment and injunctive relief against three state officials in the Franklin Circuit Court of the Commonwealth of Kentucky, claiming that their pending executions threatened their rights under the Eighth Amendment of the United States Constitution and Section 17 of the Kentucky Constitution.³⁵ At the time, the petitioners were both death sentence inmates at the Kentucky State Penitentiary in Eddyville, Kentucky.³⁶

The petitioners claimed that Kentucky's lethal injection protocol constituted cruel and unusual punishment because it (1) used pancuronium bromide, (2) called only for a low dose of sodium thiopental, and (3) lacked "adequate execution procedures."³⁷ They also argued that Kentucky's drug combination caused more than a constitutionally acceptable level and risk of pain and should be replaced with "readily available alternatives" that presented a lower risk of pain and suffering.³⁸

The Franklin Circuit Court upheld the lethal injection protocol,³⁹ finding minimal risk of its improper administration⁴⁰ and noting that a method of execution violates the Eighth Amendment only when it "creates a substantial risk of wanton and unnecessary infliction of pain, torture or lingering death"⁴¹ in light of "[']evolving standards of decency that mark the progress of a maturing society."⁴² The court added that as long as the execution method "is not cruelly inhumane," the judiciary cannot require legislative or executive officials to choose "the least severe penalty possible."⁴³ Although it would have liked Kentucky to have based its protocol on more independent medical or scientific studies—even though neither the State nor Federal

35. Findings of Fact & Conclusions of Law at 3, *Baze*, 2005 WL 5797977 (No. 04-CI-01094). They sued Kentucky Department of Corrections Commissioner John D. Rees, Kentucky State Penitentiary Warden Glenn Haeberlin, and Governor Ernie Fletcher. *Id.* at 4.

36. *Id.* at 3.

37. *Id.*

38. *Id.* at 3–4.

39. *Id.* at 13. The court, however, enjoined Kentucky officials from using the part of the protocol that allowed an injection into an inmate's neck. *Id.*

40. *See id.* at 7, 9 (finding a minimal risk of improper mixing of the sodium thiopental if the instructions were followed and of formation of a clog in the IV line that could cause the injection of inadequate drug dosages).

41. *Id.* at 5 (citing *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)).

42. *Id.* (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

43. *Id.* at 11 (citing *Gregg*, 428 U.S. at 175).

Constitution required such studies⁴⁴—the circuit court held that the petitioners failed to show by a preponderance of the evidence that Kentucky’s protocol departed from the current social standards of execution, insulted the prisoners’ or society’s dignity, or inflicted unnecessary physical or psychological pain upon the condemned.⁴⁵

The Kentucky Supreme Court used the same standards to affirm on appeal.⁴⁶ It agreed that “[a] method of execution is considered to be cruel and unusual punishment under the Federal Constitution when the procedure for execution creates a substantial risk of wanton and unnecessary infliction of pain, torture or lingering death.”⁴⁷ In addition, the Kentucky Supreme Court noted that courts must ponder whether an execution method contradicts evolving standards of decency,⁴⁸ follows current societal norms, insults the dignity of society or the condemned, or causes unnecessary physical or psychological pain.⁴⁹ In evaluating Kentucky’s lethal injection method under these standards, the Kentucky Supreme Court found that the circuit judge was “not clearly erroneous” in his findings of fact and was correct in his conclusions of law.⁵⁰

The Supreme Court for the United States granted certiorari to determine whether Kentucky’s lethal injection protocol was constitutional under the Eighth Amendment.⁵¹ Specifically, the Court limited its grant of certiorari to three questions:

- I. Does the Eighth Amendment to the United States Constitution prohibit means for carrying out a method of execution that create an unnecessary risk of pain and suffering as opposed to only a substantial risk of the wanton infliction of pain?
- II. Do the means for carrying out an execution cause an unnecessary risk of pain and suffering in violation of the Eighth Amendment upon a showing that readily available alternatives that pose less risk of pain and suffering could be used?
- III. Does the continued use of sodium thiopental, pancuronium bromide, and potassium chloride, individually or together, violate the cruel and unusual punishment clause

44. *Id.* at 13.

45. *Id.* at 10–11.

46. *Baze v. Rees*, 217 S.W.3d 207, 211, 213 (Ky. 2006), *cert. granted*, 128 S. Ct. 34 (2007), *aff’d*, 128 S. Ct. 1520 (2008).

47. *Id.* at 209 (citing *Gregg*, 428 U.S. 153).

48. *Id.* at 210–11 (citing *Trop v. Dulles*, 356 U.S. 86 (1958)).

49. *Id.* at 211 (citation omitted).

50. *Id.* at 213. The court also mentioned that various state and federal courts have “regularly rejected” Eighth Amendment claims against lethal injection. *Id.* at 212.

51. *Baze v. Rees*, 128 S. Ct. 1520, 1529 (plurality opinion).

of the Eighth Amendment because lethal injections can be carried out by using other chemicals that pose less risk of pain and suffering.⁵²

II. LEGAL BACKGROUND

The Eighth Amendment to the United States Constitution states that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”⁵³ Prior to *Baze*, the Supreme Court had interpreted the Eighth Amendment in the context of cases involving (1) methods of execution, (2) excessively harsh punishments, and (3) prison conditions.⁵⁴ Because, prior to *Baze*, the Supreme Court had not yet specifically addressed methods of lethal injection, state and federal courts drew from these various precedents to formulate their own diverse tests for the constitutionality of lethal injection methods.⁵⁵ In the wake of the *Baze* Court’s ruling, lower courts have begun to reshape the lethal injection challenge query by comparing the protocols at issue with the one upheld in *Baze*.⁵⁶

A. *The Court Has Applied the Eighth Amendment Primarily in Three Different Contexts: Method of Execution Cases, Excessively Harsh Punishment Cases, and Conditions of Confinement Cases*

The Court’s Eighth Amendment jurisprudence can be divided into three different types of cases. In the method of execution context, the Court has heard only three cases on the merits and has rejected recent opportunities to examine the way in which a state carries out death sentences.⁵⁷ In contrast, the Court has often considered whether the death penalty or another sentence is an excessive punishment when carried out for the commission of certain offenses or against certain offenders.⁵⁸ Finally, in a recent line of Eighth Amend-

52. *Baze v. Rees*, 128 S. Ct. 372, 372 (2007); Petition for a Writ of Certiorari at ii–iii, *Baze*, 128 S. Ct. 1520 (No. 07-5439).

53. U.S. CONST. amend. VIII. The Eighth Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment. See *Robinson v. California*, 370 U.S. 660, 666–67 (1962).

54. See *infra* Part II.A.

55. See *infra* Part II.B.

56. See *infra* Part II.C.

57. See *infra* Part II.A.1.

58. See *infra* Part II.A.2.

ment cases, the Court has prohibited certain risks of future harm in prisons.⁵⁹

1. *The Court Has Only Heard Method of Execution Claims on the Merits Three Times*

Prior to *Baze*, the Court consistently declined to find methods of execution unconstitutional each time it heard such a case on the merits. The Court first heard an execution method claim in 1879, when, in *Wilkerson v. Utah*,⁶⁰ it upheld a territorial court's sentence of death by a firing squad because it was a common method of execution, particularly in the military.⁶¹ Although the *Wilkerson* Court noted that it would be hard to "define with exactness" the scope of the Eighth Amendment, it found it safe to distinguish the firing squad from "torture" and other punishments involving "unnecessary cruelty"—such as emboweling, beheading, and quartering—which were unconstitutional.⁶²

The Court followed the same logic a few years later in *In re Kemmler*⁶³ when it considered a challenge to New York's method of execution, electrocution.⁶⁴ While the *Kemmler* Court held that the Eighth Amendment did not apply to the states,⁶⁵ it stated that cruelty entailed "torture or a lingering death . . . something inhuman and barbarous . . . more than the mere extinguishment of life."⁶⁶ At the same time, the *Kemmler* Court acknowledged the state court's finding that New York adopted electrocution as a result of its search for "a more human method" of execution.⁶⁷

59. See *infra* Part II.A.3.

60. 99 U.S. 130 (1879).

61. *Id.* at 134–37.

62. *Id.* at 135–36.

63. 136 U.S. 436 (1890).

64. *Id.* at 439, 441.

65. *Id.* at 447–49. The *Kemmler* Court decided instead that the execution did not "abridge[] the privileges or immunities of the petitioner, [n]or deprive[] him of due process of law" under the Fourteenth Amendment. *Id.* at 449. Cf. *Furman v. Georgia*, 408 U.S. 238, 284 (1972) (Brennan, J., concurring) ("[I]n *Kemmler*, the Court held that the [Cruel and Unusual Punishments] Clause did not apply to the States." (citing *Kemmler*, 136 U.S. at 447–49) (footnote omitted)); *McElvaine v. Brush*, 142 U.S. 155, 158–59 (1891) ("We held in the case of *Kemmler* . . . that the enactment of the statute was in itself within the legitimate sphere of the legislative power of the State . . . and that as the legislature of the State of New York had determined that it did not inflict cruel and unusual punishment, and its courts had sustained that determination, we were unable to perceive that the State had thereby abridged the privileges or immunities of petitioner or deprived him of due process of law.").

66. *Kemmler*, 136 U.S. at 447. The Court gave burning, crucifixion, and breaking on the wheel as examples of cruelty. *Id.* at 446.

67. *Id.* at 447.

Finally, the Court upheld a second electrocution attempt after a mechanical problem foiled the first try in *Louisiana ex rel. Francis v. Resweber*.⁶⁸ In doing so, the Court claimed the Eighth Amendment prohibits “cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely.”⁶⁹ Therefore, the “unforeseeable accident” that was not intended to cause nor involved any “unnecessary pain” did not make the method of execution cruel.⁷⁰ Justice Frankfurter’s concurrence echoed the *Resweber* majority’s reasoning when he opined that a different situation would have ensued if “a series of abortive attempts at electrocution or even a single, cruelly willful attempt” had occurred instead.⁷¹

The Court has rejected recent opportunities to examine a state’s method of execution. For instance, the Court passed on a challenge to electrocution in *Glass v. Louisiana*⁷² even though Justice Brennan argued that it was time to judge electrocution in light of modern Eighth Amendment doctrine, including “whether a particular means of carrying out the death penalty is ‘barbaric’ and unnecessary in light of currently available alternatives.”⁷³ Observing that other states had chosen the more humane options of lethal gas or lethal injection,⁷⁴ Justice Brennan criticized electrocution as “the contemporary technological equivalent of burning people at the stake”⁷⁵ and noted that it “inflicts pain and indignities far beyond the ‘mere extinguishment of life.’”⁷⁶

The Court also refused to consider the constitutionality of lethal gas executions in *Gomez v. United States District Court for the Northern District of California*,⁷⁷ even though Justice Stevens argued that the

68. 329 U.S. 459, 464 (1947) (plurality opinion). See also *id.* at 469–70 (Frankfurter, J., concurring) (concurring on Fourteenth Amendment grounds).

69. *Id.* at 464 (plurality opinion).

70. *Id.* See also *id.* at 463 (observing that “[t]he traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain,” and that the “[p]rohibition against the wanton infliction of pain has come into our law from the Bill of Rights of 1688”).

71. *Id.* at 471 (Frankfurter, J., concurring) (suggesting also that the Court should defer to the states regarding execution decisions).

72. 471 U.S. 1080 (1985).

73. *Id.* at 1081, 1084 (Brennan, J., dissenting) (citing *Furman v. Georgia*, 408 U.S. 238, 420, 430) (1972) (Powell, J., dissenting)).

74. *Id.* at 1093.

75. *Id.* at 1094.

76. *Id.* at 1086 (citing *In re Kemmler*, 136 U.S. 436, 447 (1890)).

77. 503 U.S. 653, 653–54 (1992) (per curiam).

method is cruel and unusual according to current standards because it causes a painful death and because only three states still used it.⁷⁸

Similarly, Justice Blackmun dissented from the Court's denial of certiorari of an application for a stay of an execution of a death sentence by hanging in *Campbell v. Wood*,⁷⁹ arguing that hanging was unconstitutional since forty-six out of the forty-eight states that once used hanging had abandoned it, many doing so because the method was considered to be cruel and unusual.⁸⁰

Recently, the Supreme Court heard two cases relating to the procedural aspects of method of execution cases—*Nelson v. Campbell*⁸¹ and *Hill v. McDonough*⁸²—but did not examine the constitutionality of the methods of execution involved.

2. *The Court Has Narrowed Its Application of the Death Penalty and Other Harsh Punishments to Account for Societal Standards of Proportionality and Decency*

In another set of cases, the Supreme Court has struck down applications of the death penalty and other harsh punishments because they violated contemporary standards of proportionality and decency. The Court first used the Eighth Amendment to strike down a punishment in *Weems v. United States*⁸³ where it concluded that the imprison-

78. *Id.* at 655, 657–58 (Stevens, J., dissenting) (noting that the extreme pain and suffering caused by execution by gas lasts for eight to ten minutes).

79. 511 U.S. 1119, 1119 (1994).

80. *Id.* at 1119–20, 1122–23 (1994) (Blackmun, J., dissenting) (noting that it risks strangulation and decapitation and thus great pain).

81. 541 U.S. 637 (2004). The *Nelson* inmate challenged the state's use of a cut-down procedure to access his veins so that he could be executed by lethal injection, claiming that it was "cruel and unusual punishment and deliberate indifference to his serious medical needs in violation of the Eighth Amendment." *Id.* at 641 (citation omitted). The *Nelson* Court held that 42 U.S.C. § 1983 was "an appropriate vehicle for petitioner's Eighth Amendment claim seeking a temporary stay and permanent injunctive relief." *Id.* at 639. While the *Nelson* Court did not reach the method of execution issue, it recognized:

Respondents at oral argument conceded that § 1983 would be an appropriate vehicle for an inmate who is not facing execution to bring a "deliberate indifference" challenge to the constitutionality of the cut-down procedure if used to gain venous access for purposes of providing medical treatment. We see no reason on the face of the complaint to treat petitioner's claim differently solely because he has been condemned to die.

Id. at 644–45 (citations omitted).

82. 547 U.S. 573 (2006). The *Hill* petitioner challenged the constitutionality of Florida's lethal injection protocol under 42 U.S.C. § 1983, claiming that it "cause[d] 'a foreseeable risk of . . . gratuitous and unnecessary' pain." *Id.* at 576, 580 (alteration in original) (citation omitted). The *Hill* Court held that, like challenges to prison conditions, the inmate's claim could be brought under § 1983. *Id.* at 579–80.

83. 217 U.S. 349 (1910).

ment of a man for over twelve years in chains combined with hard labor for falsifying a public document in the Philippine Territory⁸⁴ was unconstitutional because it was “excess[ive].”⁸⁵ Almost fifty years later, the *Trop v. Dulles*⁸⁶ Court held that the punishment of denationalization—which was imposed upon the petitioner for “his conviction by court-martial for wartime desertion”⁸⁷—violated the Eighth Amendment because “[t]he civilized nations of the world . . . virtual[ly] unanim[ously]” opposed “the total destruction of the individual’s status in organized society” that “statelessness” brought about.⁸⁸ Only four years later, the Court in *Robinson v. California*⁸⁹ held that a state law that imprisoned a person for being addicted to narcotics “inflict[ed] a cruel and unusual punishment” in violation of the Eighth and Fourteenth Amendments in “the light of contemporary human knowledge.”⁹⁰

More recently, the Court has focused considerably on the proportionality and excessiveness of punishments in the death penalty context. In 1972, the Supreme Court considered the validity of the death penalty in *Furman v. Georgia*.⁹¹ Although its splintered nine-Justice opinion cast doubt on the death penalty’s validity,⁹² the Court later held in *Gregg v. Georgia*⁹³ that the death penalty was not unconstitutional *per se*.⁹⁴ It did so after noting that thirty-five states and the federal government had death penalty statutes and that juries’ infrequent imposition of death implied that it was an “extreme,” but constitutional, sanction.⁹⁵ In addition, the *Gregg* plurality consolidated its prior Eighth Amendment precedents into a succinct rule: The Eighth Amendment, interpreted in light of evolving standards of decency,

84. *Id.* at 357, 366.

85. *Id.* at 377.

86. 356 U.S. 86 (1958).

87. *Id.* at 87 (plurality opinion). The *Trop* petitioner was convicted of desertion after he escaped from the United States Army for less than a day. *Id.* at 87–88.

88. *Id.* at 101–02.

89. 370 U.S. 660 (1962).

90. *Id.* at 666–67.

91. 408 U.S. 238, 239–40 (1972) (per curiam).

92. The *Furman* Court concluded that the statutes at issue constituted cruel and unusual punishment because they resulted in the discriminatory, capricious, and arbitrary imposition of the death penalty. *See id.* at 256–57 (Douglas, J., concurring); *id.* at 309–10 (Stewart, J., concurring); *id.* at 314 (White, J., concurring). Two Justices argued that the death penalty was unconstitutional *per se*. *Id.* at 305 (Brennan, J., concurring); *id.* at 370–71 (Marshall, J., concurring).

93. 428 U.S. 153 (1976).

94. *Id.* at 187 (plurality opinion); *id.* at 226 (White, J., concurring); *id.* at 227 (Blackmun, J., concurring).

95. *Id.* at 179–82 (plurality opinion).

forbids “excessive” punishments that either (1) “involve the unnecessary and wanton infliction of pain” or (2) are “grossly out of proportion to the severity of the crime.”⁹⁶

After *Gregg*, the Supreme Court used the second prong—that the Eighth Amendment forbids disproportionate punishments—to begin narrowing the application of the death penalty to certain offenders for certain serious crimes.⁹⁷ For instance, in *Coker v. Georgia*,⁹⁸ the Court struck down the imposition of the death penalty on a man convicted of raping an adult woman as “grossly disproportionate and excessive.”⁹⁹ In doing so, the *Coker* plurality stated that objective evidence—that Georgia was the only jurisdiction that imposed death for the rape of an adult woman and that at least ninety percent of juries in Georgia voted against the death sentence—corroborated “[its] own judgment” on the matter.¹⁰⁰

Similarly, the Court in *Enmund v. Florida*¹⁰¹ looked at the objective evidence of state legislation and jury decisions to conclude that it was unconstitutional to execute a person who did not kill, intend to kill, or attempt to kill another person.¹⁰² The *Enmund* Court observed that only eight jurisdictions allowed capital punishment solely for participating in a robbery where an accomplice commits murder,¹⁰³ that two-thirds of jurisdictions would not allow such a participant to be executed,¹⁰⁴ and that juries in the United States also “overwhelming[ly] . . . repudiated imposition of the death penalty” for such crimes.¹⁰⁵

96. *Id.* at 173 (citations omitted).

97. *See, e.g., Kennedy v. Louisiana*, 128 S. Ct. 2641, 2650 (“[C]apital punishment must be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution.” (citation and internal quotation marks omitted)), *modified on denial of reh'g*, 129 S. Ct. 1 (2008) (modified by a small addition to a footnote in the majority opinion and by a few small changes to the dissenting opinion).

98. 433 U.S. 584 (1977).

99. *Id.* at 592 (plurality opinion). *See also id.* at 601–02 (Powell, J., concurring in part and dissenting in part) (agreeing that the death penalty is “ordinarily . . . [a] disproportionate punishment for the crime of raping an adult woman” but disagreeing with the scope of the plurality’s decision). Justices Brennan and Marshall each adhered to their belief that the death penalty was unconstitutional *per se*. *See id.* at 600 (Brennan, J., concurring); *id.* at 600–01 (Marshall, J., concurring).

100. *Id.* at 595–97 (plurality opinion).

101. 458 U.S. 782 (1982).

102. *Id.* at 787–89. *See also id.* at 801 (Brennan, J., concurring) (arguing that the death penalty is unconstitutional *per se*).

103. *Id.* at 789 (majority opinion).

104. *Id.* at 792.

105. *Id.* at 794.

The Court next held that it was “excessive” and thus unconstitutional to execute a mentally retarded person in *Atkins v. Virginia*.¹⁰⁶ The *Atkins* Court relied on the “national consensus [that] . . . developed against [executing mentally retarded persons]”¹⁰⁷ in doing so, noting that the federal government and states had consistently banned such executions since 1988 with “overwhelming[]” support in the legislatures, while no state had enacted legislation expressly providing for the practice.¹⁰⁸ Moreover, those states that continued to legalize the practice infrequently executed mentally retarded individuals.¹⁰⁹ The objective evidence that “society view[ed] mentally retarded offenders as categorically less culpable than the average criminal”¹¹⁰ supported the *Atkins* Court’s conclusion that the “diminish[ed] . . . personal culpability” of mentally retarded offenders¹¹¹ made their execution unconstitutional.¹¹²

In *Roper v. Simmons*,¹¹³ the Court outlawed the use of the death penalty on offenders under the age of eighteen.¹¹⁴ Similar to the Court’s reasoning in *Atkins*, the *Roper* Court noted that objective evidence—that thirty states prohibited a juvenile death penalty (twelve that completely rejected the death penalty and eighteen that excluded juveniles from the death penalty), that juveniles were infrequently executed in states that still allowed execution of juveniles, and that states had consistently moved toward abolition of the practice¹¹⁵—indicated that “society views juveniles . . . as ‘categorically less culpable than the average criminal.’”¹¹⁶ Agreeing that “juvenile offenders cannot with reliability be classified among the worst offenders,”¹¹⁷ the *Roper* Court concluded that the penalty should be banned because the execution of juveniles did not satisfy the justifications for the death penalty.¹¹⁸

106. 536 U.S. 304, 321 (2002).

107. *Id.* at 316.

108. *Id.* at 313–16.

109. *Id.* at 316.

110. *Id.*

111. *Id.* at 318.

112. *Id.* at 321. The Court further observed that the execution of mentally retarded individuals did not support the justifications for the death penalty and also subjected those individuals to a heightened risk of improper execution. *Id.* at 317–21.

113. 543 U.S. 551 (2005).

114. *Id.* at 567–68.

115. *Id.* at 564–67.

116. *Id.* at 567 (quoting *Atkins*, 536 U.S. at 316). The *Roper* Court also recognized the international rejection of the juvenile death penalty. *Id.* at 575.

117. *Id.* at 569.

118. *Id.* at 568–73.

Finally, the Court held in *Kennedy v. Louisiana*¹¹⁹ that it was unconstitutional to execute child rapists when the crime neither resulted in nor was intended to result in the victim's death,¹²⁰ in part because forty-four states and the federal government prohibited the practice, even though six states recently adopted it.¹²¹ Moreover, no jurisdiction in the United States had executed any individual for adult or child rape since 1964 or for any nonhomicide offense since 1963, and only two individuals—both in Louisiana for child rape—were currently on death row for a nonhomicide offense.¹²² In finding differences between “intentional first-degree murder . . . and nonhomicide crimes against individual persons, even including child rape,” the *Kennedy* Court concluded that “the death penalty should not be expanded to instances where the victim's life was not taken.”¹²³ Finally, because the Court decided that it was questionable whether the practice satisfied the penological justifications for the death penalty, it held that the death penalty was a disproportionate punishment for child rape.¹²⁴

3. *The Court Has Prohibited Certain Risks of Future Harm in Prison Condition Cases*

In prison condition cases, the Supreme Court has used the Eighth Amendment to prohibit inmate exposure to certain risks of future harm. The Court's conditions of confinement strand of Eighth Amendment jurisprudence is rooted in *Estelle v. Gamble*,¹²⁵ where the Court considered an inmate's allegations of Eighth Amendment violations arising out of inadequate medical care after he was injured during a prison work assignment.¹²⁶ After reasoning that the disregard of medical needs could produce “physical torture or a lingering death” or “unnecessary suffering” that was “inconsistent with contemporary standards of decency as manifested in modern legislation,”¹²⁷ the *Estelle* Court held that “deliberate indifference to serious medical needs of prisoners constitute[d] the ‘unnecessary and wanton infliction of

119. 128 S. Ct. 2641 (2008).

120. *Id.* at 2650–51.

121. *Id.* at 2651–53. The *Kennedy* Court noted that the six statutes making child rape a capital offense did not “indicat[e]” enough of “a trend or change in direction” to counteract the “national consensus” against it. *Id.* at 2657.

122. *Id.* at 2657.

123. *Id.* at 2659–60.

124. *Id.* at 2261–64.

125. 429 U.S. 97, 103 (1976) (noting that Eighth Amendment standards establish the government's duty to provide medical care to those in prison).

126. *Id.* at 98, 101.

127. *Id.* at 103 (citations and internal quotation marks omitted).

pain' proscribed by the Eighth Amendment."¹²⁸ However, unintentional inadequate medical care was neither "'an unnecessary and wanton infliction of pain' [n]or . . . 'repugnant to the conscience of mankind.'"¹²⁹ Therefore, the Court rejected the inmate's claim against the medical staff since he had been seen by medical personnel seventeen times during three months and because the doctors diagnosed and treated his back injury.¹³⁰

The Court reiterated that certain prison conditions could violate standards of decency in *Hutto v. Finney*.¹³¹ The *Hutto* Court considered an Eighth Amendment challenge to "punitive isolation" conditions in Arkansas's prisons in which inmates received less than 1,000 calories per day, were crowded into tiny windowless cells, and slept on random mattresses each night even though some prisoners had hepatitis and venereal diseases.¹³² Noting that the Eighth Amendment prohibits punishments that are "physically barbarous," "grossly disproportionate to the offense," or which "transgress today's broad and idealistic concepts of dignity, civilized standards, humanity, and decency,"¹³³ the Court upheld the conclusion that the conditions violated the Eighth Amendment.¹³⁴

The Court emphasized the objective part of its inquiry a few years later when it heard an Eighth Amendment challenge to "double ceiling," the practice of placing two inmates in a single cell, in *Rhodes v. Chapman*.¹³⁵ Since "double ceiling" did not deny basic food, medical care, or sanitation; did not increase inmate violence; and only slightly diminished educational and job opportunities, the Court held that it did not violate the Eighth Amendment.¹³⁶

Ten years later, the Court highlighted the subjective element of the test—that an inquiry into the prison official's state of mind is required in the prison confinement context—in *Wilson v. Seiter*.¹³⁷ The *Wilson* petitioner complained that his conditions of confinement violated the Eighth Amendment due to spacing, noise, climate, ventila-

128. *Id.* at 104 (citing *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (plurality opinion)).

129. *Id.* at 105–06. The Court relied on its opinion in *Resweber* to highlight the notion that accidents alone do not constitute the "wanton infliction of unnecessary pain," even though they might cause suffering. *Id.* at 105 (emphasis added).

130. *Id.* at 107.

131. 437 U.S. 678 (1978).

132. *Id.* at 680–83.

133. *Id.* at 685 (citations and internal quotation marks omitted).

134. *Id.* at 687.

135. 452 U.S. 337, 339–40 (1981). The Court noted that Eighth Amendment decisions should be based as much as possible on "objective factors." *Id.* at 346 (citation omitted).

136. *Id.* at 348.

137. 501 U.S. 294, 299 (1991).

tion, and sanitation concerns.¹³⁸ The *Wilson* Court reasoned that the mental state requirement stems from the fact that the pain the prison official inflicts “is not formally meted out *as punishment* by the statute or the sentencing judge.”¹³⁹ Noting that “the offending conduct must be *wanton*,”¹⁴⁰ the Court held that an official must be “‘deliberate[ly] indifferen[t]’” to the harm inflicted to violate the Eighth Amendment.¹⁴¹

The Court extended the objective and subjective elements together to cover the risk of future harm in *Helling v. McKinney*¹⁴² when the Court considered whether the risk to an inmate’s health caused by his involuntary exposure to environmental tobacco smoke violated the Eighth Amendment.¹⁴³ Noting that the Eighth Amendment protected against future harm under *Hutto*,¹⁴⁴ the *Helling* Court held that it would be cruel and unusual for a prison official, with deliberate indifference, to expose an inmate to levels of environmental tobacco smoke that posed an unreasonable risk of harm to the inmate’s future health in light of contemporary standards of decency.¹⁴⁵ Therefore, a prison official would be unable to ignore a condition “that is *sure or very likely* to cause serious illness and needless suffering” without violating the Eighth Amendment.¹⁴⁶

The Court clarified this rule in *Farmer v. Brennan*,¹⁴⁷ holding that prison officials violated the Eighth Amendment if they denied an inmate “humane conditions of confinement” despite knowing that an inmate faces “a substantial risk of serious harm” and failing to reason-

138. *Id.* at 296.

139. *Id.* at 300.

140. *Id.* at 302. The meaning of “wantonness . . . must be determined with ‘due regard for differences in the kind of conduct against which an Eighth Amendment objection is lodged.’” *Id.* (quoting *Whitley v. Albers*, 475 U.S. 312, 320 (1986)). For instance, an official who perceives risks to inmate and prison staff safety must inflict harm while “acting ‘maliciously and sadistically for the very purpose of causing harm’” to violate the Eighth Amendment. *Id.* (quoting *Whitley*, 475 U.S. at 320–21).

141. *Id.* at 303 (quoting *LaFaut v. Smith*, 834 F.2d 389, 391–92 (4th Cir. 1987)) (noting that because there is “no significant distinction between claims alleging inadequate medical care and those alleging inadequate ‘conditions of confinement,’” the Court should adopt *Estelle’s* requirement of “‘deliberate indifference’”).

142. 509 U.S. 25 (1993).

143. *Id.* at 27–28.

144. *Id.* at 33 (citing *Hutto v. Finney*, 437 U.S. 678, 682 (1978)).

145. *Id.* at 35–36. Justice Thomas, joined by Justice Scalia, dissented, opposing in part the use of the Eighth Amendment to include a “mere *risk* of injury.” *Id.* at 37 (Thomas, J., dissenting).

146. *Id.* at 33 (majority opinion) (emphasis added).

147. 511 U.S. 825 (1994).

ably attempt to decrease that risk.¹⁴⁸ First, the inmate must allege that a denial is “objectively, ‘sufficiently serious’”¹⁴⁹ such that the official caused a “denial of ‘the minimal civilized measure of life’s necessities.’”¹⁵⁰ If the inmate claims that the official failed to avert harm, he or she must demonstrate that the conditions under which the inmate is being imprisoned present “a substantial risk of serious harm.”¹⁵¹ Second, because the Eighth Amendment protects “only the unnecessary and wanton infliction of pain,” there is no constitutional violation unless the prison official is “deliberate[ly] indifferen[t]” to inmate health or safety.¹⁵²

B. In the Absence of Supreme Court Guidance, Lower Courts Created Myriad Tests to Judge the Constitutionality of State Lethal Injection Protocols

In the years leading up to the Supreme Court’s grant of certiorari in *Baze v. Rees*, courts around the country developed various standards to measure the constitutionality of lethal injection procedures. Many attempted to define the level of risk a lethal injection procedure could pose before it violated the Eighth Amendment.¹⁵³ While some courts adopted a substantial or unnecessary risk test, others followed the prison conditions standard, a “wanton and unnecessary” pain standard, or an inherent cruelty test.¹⁵⁴

1. Substantial Risk Standard

Some courts used a substantial risk standard to determine the constitutionality of a lethal injection protocol. For example, the Kentucky Supreme Court used this standard in *Baze v. Rees* to hold that a lethal injection procedure must create “a *substantial* risk of wanton

148. *Id.* at 847. The Court also stated that there could be an “objectively intolerable risk of harm.” *Id.* at 846. Justice Blackmun concurred, noting that the Court tried to make sure that prison conditions satisfy current decency standards. *Id.* at 858 (Blackmun, J., concurring).

149. *Id.* at 834 (majority opinion) (quoting *Wilson v. Seiter*, 501 U.S. 294, 298 (1991)).

150. *Id.* (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)).

151. *Id.* (citation omitted).

152. *Id.* (quoting *Wilson*, 501 U.S. at 297) (internal quotation marks omitted). To qualify as deliberate indifference, an official must “know[] of and disregard[] an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.” *Id.* at 837.

153. See *Lightbourne v. McCollum*, 969 So.2d 326, 338 (Fla. 2007) (per curiam) (“State and federal courts have used an array of standards in gauging what constitutes a sufficient risk such that the protocol for lethal injection violates the Eighth Amendment’s prohibition against cruel and unusual punishment.”), *cert. denied*, 128 S. Ct. 2485 (2008).

154. See *infra* notes 155–173 and accompanying text.

and unnecessary infliction of pain, torture or lingering death” to be unconstitutional.¹⁵⁵ Similarly, the United States Court of Appeals for the Eighth Circuit in *Taylor v. Crawford*¹⁵⁶ held that a state’s protocol did “not present any *substantial* foreseeable risk that the inmate will suffer the unnecessary or wanton infliction of pain.”¹⁵⁷ The United States District Court of Maryland likewise required a finding of a “*substantial*” and “unnecessary risk of unconstitutional pain or suffering” in *Evans v. Saar*.¹⁵⁸

2. *Unnecessary Risk Standard*

Other jurisdictions, such as the Ninth Circuit, adopted an “unnecessary” risk standard. For instance, in *Cooper v. Rimmer*,¹⁵⁹ the Ninth Circuit held that an inmate failed to show that he would suffer “an *unnecessary* risk of unconstitutional pain or suffering” during his execution by lethal injection under California’s protocol¹⁶⁰ after noting that the Eighth Amendment forbids punishments “involv[ing] the unnecessary and wanton inflictions of pain, or that are inconsistent with evolving standards of decency that mark the progress of a maturing society.”¹⁶¹

3. *Conditions of Confinement Standard*

Some courts used the two-prong conditions of confinement standard that requires (1) an objective or substantial risk of harm and (2) a prison official’s deliberate indifference in allowing pain to be inflicted.¹⁶² For instance, the United States District Court for the Eastern District of Virginia held in *Walker v. Johnson*¹⁶³ that the inmate did

155. *Baze v. Rees*, 217 S.W.3d 207, 209 (Ky. 2006) (emphasis added) (citation omitted), *cert. granted*, 128 S. Ct. 34 (2007), *aff’d*, 128 S. Ct. 1520 (2008). See also *supra* note 47 and accompanying text.

156. 487 F.3d 1072 (8th Cir. 2007), *cert. denied*, 128 S. Ct. 2047 (2008).

157. *Id.* at 1085 (emphasis added).

158. 412 F. Supp. 2d 519, 524 (D. Md. 2006) (emphasis added) (citation omitted).

159. 379 F.3d 1029 (9th Cir. 2004) (per curiam).

160. *Id.* at 1033 (emphasis added). See also *Morales v. Hickman*, 415 F. Supp. 2d 1037, 1047–48 (N.D. Cal.) (questioning whether the use of California’s protocol “create[d] an undue risk [of] . . . excessive pain” and deciding to stay the execution unless California used a barbiturate-only protocol or agreed to involve anesthesiologists in the execution), *aff’d*, 438 F.3d 926 (9th Cir.), *cert. denied*, 546 U.S. 1163 (2006); *Morales v. Tilton*, 465 F. Supp. 2d 972, 981 (N.D. Cal. 2006) (holding that the implementation of California’s lethal injection protocol created “an undue and unnecessary risk of an Eighth Amendment violation”).

161. *Cooper*, 379 F.3d at 1032 (citations omitted).

162. See, e.g., *Walker v. Johnson*, 448 F. Supp. 2d 719, 722 (E.D. Va. 2006); *Harbison v. Little*, 511 F. Supp. 2d 872, 903 (M.D. Tenn. 2007).

163. 448 F. Supp. 2d 719.

not satisfy either element since (1) the chance of error in an execution did not constitute a “substantial risk of harm”¹⁶⁴ and (2) the Virginia Department of Corrections officials took great measures to add various safeguards to diminish any risk of error during the procedure.¹⁶⁵ The United States District Court for the Middle District of Tennessee used the same standard to enjoin Tennessee Department of Corrections officials from executing an inmate in *Harbison v. Little*,¹⁶⁶ noting that the protocol (1) “present[ed] a substantial risk of unnecessary pain” which (2) was “know[n] . . . yet disregarded” by the State Commissioner of Corrections.¹⁶⁷

4. *Unnecessary and Wanton Infliction of Pain Standard*

In contrast, the Tenth Circuit in *Hamilton v. Jones*,¹⁶⁸ relied on the “controlling standard” in execution method cases, “that such procedures [do] ‘not involve the unnecessary and wanton infliction of pain.’”¹⁶⁹ In upholding Oklahoma’s protocol, the *Hamilton* court found that “the risk inherent in the lethal-injection procedure” was too “attenuated” to satisfy “the minimal requirements imposed by the Eighth Amendment on executions.”¹⁷⁰

5. *Inherently Cruel with Substantial, Foreseeable, or Unnecessary Risk of Pain Standard*

In *Lightbourne v. McCollum*,¹⁷¹ the Florida Supreme Court argued that no Eighth Amendment violation arose “simply because there is a

164. *Id.* at 722.

165. *Id.* at 723–24. The *Walker* Court used this test because it believed that the Supreme Court “defined a § 1983 challenge to the procedure used in an execution as a ‘conditions of confinement’ claim.” *Id.* at 722 (quoting *Nelson v. Campbell*, 541 U.S. 637, 643–45 (2004)). See also *supra* note 81.

166. 511 F. Supp. 2d 872, 880–81, 893, 903. The *Harbison* court doubted whether it had to inquire into the defendants’ state of mind in the method of execution context—since lethal injection “does purport to be an official penalty,” whereas the official’s conduct does not in prison confinement cases—but applied the test in the absence of Sixth Circuit guidance. *Id.* at 893–95. Other courts refused to apply this inquiry for similar reasons. See, e.g., *Taylor v. Crawford*, 487 F.3d 1072, 1080–81 (8th Cir. 2007) (same), *cert. denied*, 128 S. Ct. 2047 (2008); *Lightbourne v. McCollum*, 969 So.2d 326, 339 (Fla. 2007) (per curiam) (noting that the Supreme Court’s “case law demonstrates that [the deliberate indifference] phrase has been used in connection with prison condition cases, not method of execution cases”), *cert. denied*, 128 S. Ct. 2485 (2008).

167. *Harbison*, 511 F. Supp. 2d at 903.

168. 472 F.3d 814 (10th Cir. 2007) (per curiam), *cert. denied*, 549 U.S. 1158 (2007).

169. *Id.* at 816 (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)).

170. *Id.* at 817.

171. 969 So.2d 326.

mere possibility of human error in the process.”¹⁷² In doing so, it upheld Florida’s lethal injection protocol because it caused neither “inherent” cruelty nor a “substantial, foreseeable or unnecessary risk of pain” when carried out.¹⁷³

C. *Many Lower Courts After Baze Have Reformulated Their Lethal Injection Queries to Use Kentucky’s Protocol as a Constitutional Baseline*

Since the Supreme Court issued *Baze* on April 16, 2008, many courts have begun to evaluate the constitutionality of various lethal injection protocols.¹⁷⁴ Although at least one court has commented upon *Baze*’s “narrow holding” and “splintered opinion,”¹⁷⁵ many others have focused on the constitutional issue by determining whether the challenged protocol is “substantially similar” to that which the *Baze* Court upheld.¹⁷⁶

For instance, in *Emmett v. Johnson*,¹⁷⁷ the Fourth Circuit heard a suit very similar to that in *Baze* involving an Eighth Amendment challenge to Virginia’s lethal injection protocol.¹⁷⁸ The *Emmett* court recognized the *Baze* plurality’s standard—that “condemned inmates must demonstrate a substantial risk of serious harm, or an objectively intolerable risk of harm” to make a successful Eighth Amendment claim¹⁷⁹—as the law and also noted that a protocol would be upheld if

172. *Id.* at 351. See also *Abdur’Rahman v. Bredesen*, 181 S.W.3d 292, 308 (Tenn. 2005) (noting that courts cannot “solely” consider “speculation as to problems or mistakes that might occur” when judging the constitutionality of a lethal injection protocol).

173. *Lightbourne*, 969 So.2d at 352–53.

174. See *infra* notes 175–194 and accompanying text.

175. *Henyard v. State*, 992 So.2d 120, 130 (Fla. 2008) (per curiam), *cert. denied*, 129 S. Ct. 28 (2008).

176. See *infra* notes 177–194 and accompanying text. In an interesting and unusual case, an Ohio trial court used its interpretation of the Ohio lethal injection statute to distinguish *Baze* and the Kentucky statute at issue in order to mandate the use of a one-drug, barbiturate-only lethal injection protocol. Judgment Entry at 5–9, *State v. Rivera*, 2008 WL 2784679 (Ohio Ct. Com. Pl. June 10, 2008) (No. 04CR065940).

177. 532 F.3d 291 (4th Cir. 2008).

178. *Id.* at 296–97 (claiming that Virginia’s lethal injection protocol posed an “unacceptable risk” of “severe pain” from pancuronium bromide and potassium chloride after the misadministration of sodium thiopental and that Virginia should instead adopt a barbiturate-only protocol).

179. *Id.* at 298 (quoting *Baze v. Rees*, 128 S. Ct. 1520, 1531 (2008)) (internal quotation marks omitted). The *Emmett* court also recognized as law the plurality’s second holding, that an Eighth Amendment violation could occur if a state failed to implement an “alternative procedure” that is “feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain.” *Id.* at 299 (quoting *Baze*, 128 S. Ct. at 1532) (internal quotation marks omitted).

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it was “substantially similar to the protocol upheld in *Baze*.”¹⁸⁰ The court upheld Virginia’s protocol because it was “substantially similar to Kentucky’s protocol” and, “like Kentucky’s, include[d] a number of safeguards designed to ensure that the lethal chemicals are properly administered intravenously in a quick, humane fashion.”¹⁸¹ In doing so, the *Emmett* court focused on the fact that Virginia Department of Corrections officials, like those in Kentucky, supervise the procedure carried out by “experienced, well-trained personnel.”¹⁸²

Although the two-judge *Emmett* majority dismissed several differences between the two protocols,¹⁸³ dissenting Judge Gregory found these differences to be very significant, especially in light of the *Baze* plurality’s Kentucky-focused, “extremely narrow holding.”¹⁸⁴ Arguing that Virginia’s and Kentucky’s protocols are “significantly differ[ent] with respect to the safeguards Kentucky takes to guarantee the proper administration of that essential first drug”¹⁸⁵ that ensures the inmate feels no pain,¹⁸⁶ Judge Gregory highlighted the following differences: (1) Virginia’s lower amount of the initial dose of thiopental, (2) Virginia’s “rapid flow” drug administration method, (3) Virginia’s lack of a second dose of sodium thiopental if the inmate is not rendered unconscious by the first dose, and (4) Virginia’s lack of a mandatory second dose of thiopental any time during the procedure.¹⁸⁷

180. *Id.* at 299 (quoting *Baze*, 128 S. Ct. at 1537) (internal quotation marks omitted). *See also* Porter v. Commonwealth, 661 S.E.2d 415, 432 (Va. 2008) (noting that “[a] State with a lethal injection protocol substantially similar to [Kentucky’s] protocol . . . would not create a [constitutionally cognizable] risk” under *Baze* and that Virginia’s protocol should be upheld as a result (quoting *Baze*, 128 S. Ct. at 1537)).

181. *Emmett*, 532 F.3d at 299–300 (concluding that “*Emmett* . . . failed as a matter of law to demonstrate a substantial or objectively intolerable risk that he will receive an inadequate dose of thiopental, particularly in light of the training and safeguards implemented by Virginia prior to and during the execution process”).

182. *Id.* at 299–300, 308. The court noted that (1) IV team members are medically qualified and trained for IV insertion during the execution process by a licensed physician, (2) the execution team has monthly practice sessions, (3) department officials oversee the entire process, (4) the executioner watches the IV site for swelling and monitors injections for resistance, and (5) the director stays with the inmate to watch for “obvious signs of problems or failures.” *Id.* at 300. In addition, the *Emmett* court (like the *Baze* Court) rejected the argument that Virginia should adopt a one-drug protocol because *Emmett* did not show that it was “feasible or readily implemented.” *Id.* at 307–08 (citation omitted).

183. *Id.* at 300.

184. *Id.* at 309 (Gregory, J., dissenting) (noting that the trial court never heard this issue).

185. *Id.*

186. *Id.* at 310.

187. *Id.* at 309–10.

Other courts have undertaken similar inquiries. For instance, when the Court of Criminal Appeals of Texas in *Ex Parte Chi*¹⁸⁸ held that the inmate's Eighth Amendment challenge failed, the majority noted that Kentucky's lethal injection protocol—which “[t]he United States Supreme Court in *Baze* clearly and unambiguously upheld”—was “materially indistinguishable from Texas’[s] lethal-injection protocol.”¹⁸⁹ As the concurring opinion pointed out, both Texas and Kentucky used similar doses of the three drugs, used experienced personnel to insert IVs, had personnel observe the procedure to ensure that there were no problems with the IV, and inserted a secondary IV line to deliver additional chemicals if the inmate failed to lose consciousness within sixty seconds.¹⁹⁰ However, a dissenting judge observed that because Texas’s and Kentucky’s protocols differ in other ways, including the amount of each drug used, whether Texas’s safeguards are at least as good as Kentucky’s should be litigated.¹⁹¹

Similarly, after considering Arkansas’s dosage of sodium thiopental, its IV team qualifications, its monitoring of IV sites, and its protocol’s back-up plan in case an inmate is not rendered unconscious after the first dose of sodium thiopental, the United States District Court for the Eastern District of Arkansas in *Nooner v. Norris*¹⁹² dismissed the complaint, finding that “Arkansas’[s] lethal injection protocol is substantially similar to the protocol[] approved in . . . *Baze*.”¹⁹³ However, the United States District Court for the District of South Dakota noted that discovery was necessary since the statutes and the record failed to “reveal whether South Dakota’s lethal injection protocol is ‘substantially similar’ to the protocol approved in *Baze*” in *Moeller v. Weber*.¹⁹⁴

188. 256 S.W.3d 702 (Tex. Crim. App. 2008).

189. *Id.* at 703–04.

190. *Id.* at 705 n.5 (Cochran, J., concurring). Texas amended its protocol to make it even more like Kentucky’s. *Id.* For instance, Texas now requires the drug team to have “at least one medically trained individual . . . [who] shall at least be certified or licensed as a certified medical assistant, phlebotomist, emergency medical technician, paramedic, or military corpsman” and who has “one year of professional experience.” *Id.* (citation and internal quotation marks omitted) (alterations in original). It also requires a back-up set of drugs and saline to be prepared and a second dose of sodium thiopental be administered if the inmate does not lose consciousness after the first dose. *Id.* at 706 n.5. *See also Ex parte Alba*, 256 S.W.3d 682, 692 (Tex. Crim. App. 2008) (Cochran, J., concurring) (“I can find no constitutionally relevant dissimilarities between the two protocols [in Kentucky and Texas].”).

191. *Ex Parte Chi*, 256 S.W.3d at 715–16 (Johnson, J., dissenting).

192. No. 5:06CV00110 SWW, 2008 WL 3211290, at *7, *12–*14 (E.D. Ark. Aug. 5, 2008).

193. *Id.* at *15.

194. No. Civ. 04-4200, 2008 WL 1957842, at *4 (D.S.D. May 2, 2008). Other courts have undertaken similar, but more abbreviated inquiries. *See, e.g., Wellons v. Hall*, No. 07-13086, 2009 WL 17933, at *18 (11th Cir. Jan. 5, 2009) (rejecting petitioner’s claims against the constitutionality of Georgia’s application of its three-drug lethal injection protocol as “fore-

III. THE COURT'S REASONING

In *Baze v. Rees*,¹⁹⁵ the Supreme Court of the United States affirmed the judgment of the Supreme Court of Kentucky, holding that the risk of pain from improper administration of Kentucky's lethal injection protocol and its failure to adopt proposed alternatives did not constitute cruel and unusual punishment under the Eighth Amendment.¹⁹⁶ The seven Justices who wrote separate opinions advocated three different tests to determine the constitutionality of a method of execution. The plurality argued that an execution method could violate the Eighth Amendment if it posed a "substantial risk of serious harm" or an "objectively intolerable risk of harm," or if a state refused to adopt alternative procedures that are "feasible, readily implemented," and would "significantly reduce a substantial risk of severe pain."¹⁹⁷ Justice Thomas argued that an execution method is unconstitutional "only if it is deliberately designed to inflict pain."¹⁹⁸ Justice Ginsburg proposed that a method of execution could be unconstitutional if a state failed to adopt "readily available measures" that could "materially increase the likelihood that the protocol will cause no pain,"¹⁹⁹ thus presenting "an untoward, readily avoidable risk of inflicting severe and unnecessary pain" upon the condemned.²⁰⁰ While Justice Stevens believed that the petitioners' claim

closed by *Baze v. Rees*" because the Supreme Court "upheld a similar three-drug lethal injection protocol"); *Walker v. Epps*, 287 F. App'x. 371, 376 (5th Cir. 2008) (noting that "Mississippi's lethal injection protocol appears to be substantially similar to Kentucky's protocol"), *aff'd*, 550 F.3d 407 (5th Cir. 2008); *Ex parte Belisle v. State*, No. 1061071, 2008 WL 4447593, at *15 (Ala. Oct. 3, 2008) (noting that the *Baze* dissent pointed out that Alabama's procedures were better than Kentucky's); *Schwab v. State*, 995 So.2d 922, 933 (Fla. 2008) (per curiam) ("Schwab has not demonstrated that the Florida protocol is not substantially similar to the one approved by the United States Supreme Court or that this protocol creates a demonstrated risk of severe pain."), *petition for cert. filed*, No. 08-5020 (June 30, 2008); *State v. Frazier*, No. L-07-1388, 2008 WL 4408645, at *13 ¶ 64 (Ohio Ct. App. Sept. 30, 2008) (noting that it could not find that Ohio's protocol violates the Eighth Amendment because "[s]everal Ohio courts . . . found that Ohio's lethal injection procedure is substantially similar to the one considered in *Baze*").

195. 128 S. Ct. 1520 (2008).

196. *Id.* at 1533-34 (plurality opinion); *id.* at 1552 (Stevens, J., concurring); *id.* at 1552 (Scalia, J., concurring); *id.* at 1563 (Thomas, J., concurring); *id.* at 1567 (Breyer, J., concurring).

197. *Id.* at 1531-32 (plurality opinion) (citations omitted). Justice Alito wrote a separate concurring opinion to explain his view of the holding. *Id.* at 1538 (Alito, J., concurring).

198. *Id.* at 1556 (Thomas, J., concurring).

199. *Id.* at 1569 (Ginsburg, J., dissenting).

200. *Id.* at 1567.

could not satisfy either the plurality's or the dissent's standard,²⁰¹ he argued, in opposition to Justice Scalia, for an end to the death penalty.²⁰²

A. *The Plurality's Two-Part Holding Was Based Upon a "Substantial Risk of Serious Harm" Standard*

Writing for the plurality, Chief Justice Roberts established a two-part test to judge the constitutionality of methods of execution. Under this test, a method of execution is unconstitutional if it presents a "substantial risk of serious harm" or an "objectively intolerable risk of harm."²⁰³ The same method can also be unconstitutional if a state refuses to adopt alternative procedures that are "feasible, readily implemented," and will "significantly reduce a substantial risk of severe pain."²⁰⁴ Using these standards, the plurality upheld Kentucky's three-drug lethal injection protocol on the basis that the risk of pain from improper administration of the protocol and Kentucky's failure to implement proposed alternatives did not constitute cruel and unusual punishment.²⁰⁵

The Chief Justice opened his argument by asserting that the Constitution does not require that a valid execution be free of all risk of pain.²⁰⁶ Rather, "[s]ome risk of pain is inherent in any method of execution—no matter how humane—if only from the prospect of error in following the required procedure."²⁰⁷ Noting that the Court had never invalidated a State's method of execution, the Chief Justice observed that the Court had previously stated that the Eighth Amendment prohibits punishments that intentionally inflict pain through torture and other inhumane acts.²⁰⁸

201. *Id.* at 1552 (Stevens, J., concurring). Justice Stevens did not comment on whether it could meet the standard supported by Justices Thomas and Scalia.

202. *Id.* at 1546–51.

203. *Baze*, 128 S. Ct. at 1531 (plurality opinion) (quoting *Farmer v. Brennan*, 511 U.S. 825, 842, 846 & n.9 (1994)) (internal quotation marks omitted).

204. *Id.* at 1532.

205. *Id.* at 1526.

206. *Id.* at 1529. The Chief Justice also noted that the death penalty is constitutional. *Id.* (citing *Gregg v. Georgia*, 428 U.S. 153, 177 (1976)).

207. *Id.*

208. *Id.* at 1530 (citing *Wilkerson v. Utah*, 99 U.S. 130 (1879); *In re Kemmler*, 136 U.S. 436 (1890)). The plurality acknowledged the *Wilkerson* Court's safe opinion that "'punishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden' by the Eighth Amendment." *Id.* (quoting *Wilkerson*, 99 U.S. at 136 (alterations in original)). It also noted that the *Kemmler* Court embellished upon these principles when it stated in dicta that cruelty "'implies . . . something inhuman and barbarous, something more than the mere extinguishment of life'" but that the electrocution statute at issue

In response to the petitioners' claim regarding the risk of maladministration of Kentucky's lethal injection procedure, the plurality noted that the Court has acknowledged that the exposure of an individual to a risk of future harm, as opposed to the actual infliction of pain, can constitute cruel and unusual punishment when "a 'substantial risk of serious harm,' [or] an 'objectively intolerable risk of harm'" is present.²⁰⁹ In other words, "the conditions presenting the risk must be 'sure or very likely' to cause serious illness and needless suffering, and give rise to 'sufficiently imminent dangers.'"²¹⁰ The plurality explained that a benign, "isolated mishap" would not imply cruelty or present a substantial risk of harm.²¹¹

In analyzing this issue, the Chief Justice pointed out that it is hard to claim that lethal injection is "objectively intolerable" when (1) thirty-six states and the federal government approve it as the favored method of execution and (2) Kentucky, twenty-nine other states, and the federal government use the same three drugs in varying dosages.²¹² Because Kentucky's protocol included safeguards to ensure adequate administration of the first drug, the risk that an inmate would feel pain during an execution was not substantial or imminent enough to violate the Eighth Amendment.²¹³

Furthermore, the plurality opined that a state may violate the Eighth Amendment if it fails to implement an alternative to its protocol that is (1) "feasible," (2) "readily implemented," and (3) will "in fact significantly reduce a substantial risk of severe pain" without having "a legitimate penological justification" for keeping its current method.²¹⁴ Noting that this rule will allow courts to avoid "scientific controversies beyond their expertise" and state legislatures to carry

"was passed in the effort to devise a more humane method of" execution. *Id.* (quoting *Kemmler*, 136 U.S. at 447).

209. *Id.* at 1530–31 (quoting *Farmer v. Brennan*, 511 U.S. 825, 842, 846 & n.9 (1994)). The plurality offered *Resweber*, in which the Court upheld a second electrocution attempt after an accidental malfunction, as an illustration. *Id.* at 1531 (citing *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 462–64 (1947)).

210. *Id.* at 1530–31 (quoting *Helling v. McKinney*, 509 U.S. 25, 33, 34–35 (1993)).

211. *Id.* at 1531. For instance, a situation of several failed electrocution attempts—as suggested in Justice Frankfurter's *Resweber* concurrence—would give rise to the requisite risk of harm. *Id.* (citing *Resweber*, 329 U.S. at 471 (Frankfurter, J., concurring)).

212. *Id.* at 1532 (citations omitted).

213. *Id.* at 1533–34. Such safeguards included the minimal risk of improper mixing of sodium thiopental, the IV team's professional experience, and the fact that the warden and deputy watch for IV problems and ask for a second round of the first drug if the inmate is still conscious within sixty seconds. *Id.* The plurality cited three of Kentucky's medical experts who confirmed the obviousness of IV filtration to an average person. *Id.* at 1534 (citations omitted).

214. *Id.* at 1532.

out executions without unnecessary intrusion,²¹⁵ the plurality concluded that Kentucky's decision not to adopt the alternatives to its protocol did not violate the Eighth Amendment.²¹⁶

In doing so, the plurality rejected the petitioners' proposed one-drug method of sodium thiopental or another barbiturate, explaining in part that no state has used that alternative and that none of the proffered studies testified to its equal effectiveness.²¹⁷ In addition, the plurality relied on the trial court's findings that pancuronium bromide is useful because it both hastens death by stopping respiration and effectuates the state's interest in providing a dignified, certain death.²¹⁸ Finally, the plurality added that the sufficient sedation of an inmate made the use of other equipment (such as a blood pressure cuff or an electrocardiogram) or "rough and ready tests" (such as calling the inmate's name) unnecessary.²¹⁹ As the plurality noted, "showing one more step the State could take as a failsafe for other, independently adequate measures . . . would serve no meaningful purpose and would frustrate the State's legitimate interest in carrying out a sentence of death in a timely manner."²²⁰

In conclusion, the plurality argued that, contrary to Justice Stevens's concerns regarding the uncertainty of future cases, lethal injection protocols "substantially similar" to Kentucky's would not present a risk that meets the plurality's standard.²²¹ In addition, it believed that its decision would not stop states from moving toward more humane execution methods.²²²

Justice Alito joined the plurality, but also wrote separately to explain his views regarding the implementation of the plurality's holding with regard to alternative execution protocols.²²³ Justice Alito

215. *Id.* at 1531.

216. *Id.* at 1537–38. The plurality believed that (1) the threshold requirement in their standard—the "substantial risk of serious harm" or the "objectively intolerable risk of harm"—and (2) the "substantive requirements in the articulated standard" successfully responded to Justice Thomas's concerns regarding courts' lack of authority and expertise "to function as boards of inquiry determining best practices for executions." *Id.* at 1532 n.3 (citations omitted).

217. *Id.* at 1534–35.

218. *Id.* at 1535. The plurality opined, in response to Justice Stevens, that Kentucky's precautions made the risk of harm from pancuronium bromide "insignificant." *Id.* at 1535 n.5 (citation omitted).

219. *Id.* at 1536 (highlighting that all experts agreed "that a proper dose of thiopental obviates the concern that a prisoner will not be sufficiently sedated").

220. *Id.* at 1537.

221. *Id.*

222. *Id.* at 1538.

223. *Id.* (Alito, J., concurring) (noting that this proper understanding will prevent Justice Thomas's misgivings regarding continuing litigation in state courts).

prefaced his argument by noting that because the death penalty is assumed to be constitutional, a constitutional means of carrying it out—such as lethal injection—must exist.²²⁴ First, Justice Alito pointed out that an alternative is not “feasible” or “readily available” if it requires the help of those (such as doctors, nurses, and emergency medical technicians) whose professional ethics would impede their participation, even though their participation in the anesthetization of prisoners would minimize the risk of pain.²²⁵ Second, he clarified that a state must only change its procedure if the alternative is supported by a “well-established scientific consensus,”²²⁶ not just by one or two experts or by “judicial findings of fact based on such testimony.”²²⁷ Finally, Justice Alito noted that the “vague and malleable” standard supported by the dissent and Justice Breyer would cause endless litigation that would practically lead to the death penalty’s end because “untoward” risks are presumably those that are inopportune or that involve problems or discontent.²²⁸

B. Justice Thomas Proposed an Originalist Standard

Justice Thomas, joined by Justice Scalia, took an originalist approach, arguing in light of (1) the practices that prompted the Framers to author the Eighth Amendment²²⁹ and (2) the Court’s method of execution precedents that point out that a method is unconstitutional only if it intentionally inflicts pain.²³⁰ Noting that the Court had never invalidated a method “because it involve[d] a risk of pain” that another procedure could minimize,²³¹ Justice Thomas argued

224. *Id.* (citing *Gregg v. Georgia*, 428 U.S. 153, 175 (1976), for the proposition that courts must “presume [the] validity” of a punishment chosen by the legislature).

225. *Id.* at 1539–40 (noting the quandary caused in California when, after the state made plans for two anesthesiologists to participate in executions, a federal district court declared that their medical ethics precluded their participation (citing *Morales v. Tilton*, 465 F. Supp. 2d 972, 976 (N.D. Cal. 2006))).

226. *Id.* at 1540.

227. *Id.* at 1541–42. Justice Alito pointed out that the evidence regarding the defects of lethal injection protocols and benefits of alternatives “is strikingly haphazard and unreliable.” *Id.* at 1540.

228. *Id.* at 1542.

229. *Id.* at 1556–59 (Thomas, J., concurring) (including punishments that intended to cause additional pain, such as burning at the stake, “gibbeting”—in which the prisoner was hanged in a cage and left to decay in front of the public—and emboweling alive, beheading, and quartering).

230. *Id.* at 1559–60 (citing *Wilkerson v. Utah*, 99 U.S. 130 (1879); *In re Kemmler*, 136 U.S. 436 (1890); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947)).

231. *Id.* at 1560. For instance, Justice Thomas argued that the *Resweber* Court allowed Louisiana to subject the condemned to the risk of pain caused by error or malfunction of the electric chair a second time because there was no malicious or intentional aim to cause needless pain. *Id.* at 1561.

that the plurality erroneously created a standard that would embroil the courts in endless litigation in attempts to determine the best method of execution.²³² Moreover, he claimed that the plurality's standard would "cast substantial doubt on every method of execution other than lethal injection," require courts to resolve scientific matters, and inhibit states' abilities to administer executions.²³³ Because Kentucky wanted to make executions more humane and because death would be "swift and painless" if the protocol was properly performed, Justices Thomas and Scalia voted to uphold the protocol.²³⁴

C. *The Dissent's Untoward Standard Focused on the Availability of Alternatives*

In dissent, Justice Ginsburg, joined by Justice Souter, argued that the Court should disregard the method of execution precedents since (1) they offered no clear standard and are out-dated and (2) the Eighth Amendment must be construed in light of "'evolving standards of decency that mark the progress of a maturing society.'"²³⁵ Although Justice Ginsburg agreed with the petitioners and the plurality that the Court must consider the risk of harm, amount of pain, and accessibility of an alternative method of execution, she criticized the plurality's failure to consider the "interrelated[ness]" of these elements.²³⁶ Believing that the plurality erroneously set a "fixed threshold" with its substantial risk test, Justice Ginsburg argued that one element's strong presence could tip the balance in favor of unconstitutionality.²³⁷ Because this protocol's degree of risk was low but its risk of pain was high, Justice Ginsburg believed that the Court should have focused on the availability of alternatives.²³⁸

Justice Ginsburg proposed an alternative test under which a state would fail to adhere to evolving standards of decency if it did not adopt "readily available measures [that] can materially increase the likelihood that the protocol will cause no pain."²³⁹ Justice Ginsburg criticized Kentucky for creating a protocol without medical or legisla-

232. *Id.* at 1560.

233. *Id.* at 1561–62.

234. *Id.* at 1563. As an aside, Justice Thomas noted that any comparative element should be confined to whether the disputed method "inherently inflicts significantly more pain than traditional modes of execution such as hanging and the firing squad." *Id.*

235. *Id.* at 1568 (Ginsburg, J., dissenting) (quoting *Atkins v. Virginia*, 536 U.S. 304, 311–12 (2002)).

236. *Id.* at 1568.

237. *Id.*

238. *Id.* at 1569.

239. *Id.*

tive support, relying on the visual observation of the medically untrained warden and deputy to ensure that the inmate is unconscious, and failing to use either basic tests (such as shaking the inmate) or medical equipment (such as an electrocardiogram) to determine the sodium thiopental's effectiveness.²⁴⁰ She argued that these tests were feasible, would lower the risk of great pain, and have been implemented by other states.²⁴¹ Claiming that the lower courts had not addressed the petitioners' argument that Kentucky's protocol did not compel the executioners to check for consciousness before injecting the second and third drugs, Justice Ginsburg would have remanded to determine whether Kentucky's failure to include readily available safeguards "creates an untoward, readily avoidable risk of inflicting severe and unnecessary pain."²⁴²

Justice Breyer agreed with the dissent's standard but failed to find in the record or in the available literature sufficient grounds to believe that Kentucky's method was unconstitutional under that standard.²⁴³ For instance, Justice Breyer noted that a study, which found that the level of thiopental in the bloodstream of forty-three percent of executed individuals several hours after death was consistent with consciousness, might have been "seriously flawed."²⁴⁴ In addition, he argued that there was a "shadow of uncertainty" regarding the availability of suggested alternatives.²⁴⁵

D. Justice Stevens Argued for the Abolition of the Death Penalty

Justice Stevens found that the petitioners' claim failed under both the plurality's and dissent's standards.²⁴⁶ However, he criticized the use of and the plurality's justification for the second drug, claiming that because the second drug masked any sign of pain, the risk of pain was much greater than the need to ensure the dignity of the procedure.²⁴⁷ Moreover, he reasoned that the Department of Corrections officials who selected the second drug deserved no deference,

240. *Id.* at 1569–70.

241. *Id.* at 1570–71.

242. *Id.* at 1572.

243. *Id.* at 1563–64 (Breyer, J., concurring).

244. *Id.* at 1564.

245. *Id.* at 1565.

246. *Id.* at 1552 (Stevens, J., concurring). Justice Stevens did not address the standard set forth by Justice Thomas.

247. *Id.* at 1543–44. Among his reasons, Justice Stevens criticized Kentucky for using a drug that is (1) banned by the State in animal euthanasia, (2) unnecessary in light of the quick death that the third drug causes, and (3) not used by the medical community because it masks pain. *Id.* at 1543–44 & n.3. He also agreed with Justice Ginsburg that states should reassess their consciousness-checking procedures. *Id.* at 1546 n.9.

especially because they lacked medical knowledge and expert help.²⁴⁸ Justice Stevens also predicted that the Court's decision would spur continued debate about the constitutionality of three-drug lethal injection procedures, the use of pancuronium bromide, and the death penalty.²⁴⁹

Finally, Justice Stevens argued for an end to the death penalty.²⁵⁰ Calling its continued presence “the product of habit and inattention,”²⁵¹ Justice Stevens opined that the three justifications for the death penalty noted in *Gregg v. Georgia*—incapacitation, deterrence, and retribution—were no longer legitimate.²⁵² Justice Stevens observed that “there are occasions when a Member of this Court has a duty to make judgments on the basis of data that falls short of absolute proof”²⁵³ and thus pointed out several concerns regarding the death penalty.²⁵⁴ These included juries that are biased toward conviction, risks of error in making emotional judgments, risk of a discriminatory imposition of a death sentence, and the irreversible nature of the result.²⁵⁵ As a result, Justice Stevens relied on his own experience to conclude that the death penalty is a “patently excessive and cruel and unusual punishment violative of the Eighth Amendment.”²⁵⁶

Justice Scalia, joined by Justice Thomas, responded that the Constitution recognizes the death penalty as a valid punishment and that legislatures determine the death penalty's legitimacy.²⁵⁷

IV. ANALYSIS

In *Baze v. Rees*, a divided Supreme Court held that the risk of pain from a chance of improper administration of, and the failure to implement changes to, Kentucky's lethal injection protocol did not violate the Eighth Amendment.²⁵⁸ In proposing a new “substantial risk of serious harm” standard, the plurality merged pieces from the

248. *Id.* at 1545. Additionally, he noted that most state legislatures have not approved the use of the second drug. *Id.* at 1544.

249. *Id.* at 1542–43.

250. *Id.* at 1546–51.

251. *Id.* at 1546.

252. *Id.* at 1546–48.

253. *Id.* at 1550.

254. *Id.* at 1550–51.

255. *Id.*

256. *Id.* at 1551 (quoting *Furman v. Georgia*, 408 U.S. 238, 312 (1972) (White, J., concurring)) (internal quotation marks omitted).

257. *Id.* at 1552–53 (Scalia, J., concurring).

258. *Id.* at 1533 (plurality opinion); *id.* at 1552 (Stevens, J., concurring); *id.* at 1552 (Scalia, J., concurring); *id.* at 1563 (Thomas, J., concurring); *id.* at 1567 (Breyer, J., concurring).

Court's three predominant lines of Eighth Amendment jurisprudence²⁵⁹ to rebalance the Court's constitutional standard for method of execution cases.²⁶⁰ In doing so, the plurality preserved language from the Court's past method of execution cases²⁶¹ within the context of a new framework comprised of a shrouded evolving standards of decency test²⁶² and a revived concern for state autonomy.²⁶³ While the Court's majority stance will produce more uniformity among lower courts—as it provided a constitutionally approved model lethal injection protocol—the plurality's comparative risk standard will also help to ensure that lethal injection protocols continue to become more humane by preserving a role for judicial review.²⁶⁴

A. *Before the Supreme Court Granted Certiorari in Baze v. Rees, it Had Developed Three Distinct Lines of Eighth Amendment Cases*

The Supreme Court's Eighth Amendment jurisprudence was historically based in originalism under the view that the Eighth Amendment banned torture and other intentionally cruel punishments.²⁶⁵ As early as 1910, the Court moved away from a strict originalist interpretation of the Eighth Amendment to incorporate evolving standards of decency.²⁶⁶ Under its more recent evolving standards of decency

259. See *infra* Part IV.A.

260. See *infra* Part IV.B.

261. See *infra* Part IV.B.1.

262. See *infra* Part IV.B.2.a.

263. See *infra* Part IV.B.2.b.

264. See *infra* Part IV.C.

265. This view was reflected in the Court's method of execution cases. See *infra* Part IV.A.1.

266. See, e.g., *Weems v. United States*, 217 U.S. 349, 378 (1910) (noting that the words cruel and unusual “may be . . . progressive, and [are] not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice”); *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958) (plurality opinion) (stating that the Eighth Amendment’s words are neither “precise” nor “static” in “scope,” that the Eighth Amendment “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society,” and that “the dignity of man” is “[t]he basic concept underlying the Eighth Amendment”); *Robinson v. California*, 370 U.S. 660, 666 (1962) (judging a penalty “in the light of contemporary human knowledge”); cf. *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 469 (1947) (Frankfurter, J., concurring) (arguing that “a State may be found to deny a person due process by treating even one guilty of crime in a manner that violates standards of decency more or less universally accepted”). When the Court confirmed the validity of the death penalty in *Gregg v. Georgia*, 428 U.S. 153, 187 (1976), a plurality of the Court accounted for both the historical and evolving standards views, holding that the Eighth Amendment, interpreted in light of evolving standards of decency, forbids “excessive” punishments that either (1) “involve the unnecessary and wanton infliction of pain” or (2) are “grossly out of proportion to the severity of the crime,” *id.* at 173 (citations omitted).

test, the Court examines primarily objective factors, but also incorporates subjective criteria to determine the appropriate current standards of decency.²⁶⁷ The Supreme Court has varied its use of the historic and evolving standards of decency standards in its application of three different tests in three lines of Eighth Amendment cases.²⁶⁸

1. *The Court's Three Method of Execution Cases Reflect an Originalist Approach to the Eighth Amendment's Ban on Cruel and Unusual Punishment*

The Supreme Court relied on an originalist interpretation of the Eighth Amendment—rather than focusing on evolving decency standards—in its three method of execution cases to suggest that the Eighth Amendment was intended to ban torture and other intentionally cruel punishments.²⁶⁹ For instance, when the Supreme Court first considered the meaning of “cruel and unusual” punishment in *Wilkinson v. Utah*, it stated that the Eighth Amendment banned “torture”

267. See, e.g., *Gregg*, 428 U.S. at 173 (noting that courts must look at “objective indicia that reflect the public attitude toward a given sanction” and must decide whether the punishment “accord[s] with the ‘dignity of man’” (quoting *Trop*, 356 U.S. at 100)). Under this view, the judiciary must first look to legislative judgments because legislatures “respond to the will and consequently the moral values” of their constituents. *Id.* at 175 (citation and internal quotation marks omitted). Legislative deference is particularly warranted when courts evaluate the “specification of punishments,” which are “peculiarly questions of legislative policy.” *Id.* at 176 (citation and internal quotation marks omitted). Thus, a “heavy burden” is required to overturn a presumptively valid legislative decision, and a court cannot demand that a legislature choose “the least severe penalty possible” as long as its chosen penalty “is not cruelly inhumane or disproportionate to the crime.” *Id.* at 175. This deference will encourage judicial restraint and will help maintain the proper balance of federalism. See *id.* at 175, 186–87. Courts also look to jury decisions because juries “maintain a link between contemporary community values and the penal system.” *Id.* at 181 (citation and internal quotation marks omitted). Although “limited,” the Court also plays a significant role in assessing Eighth Amendment claims, *id.* at 174, as it must decide whether a disputed sanction “comports with the basic concept of human dignity,” and is not “so totally without penological justification that it results in the gratuitous infliction of suffering,” *id.* at 182–83 (citations omitted). On the proper judicial role in this inquiry, compare *Furman v. Georgia*, 408 U.S. 238, 260–61 (1972) (Brennan, J., concurring), arguing that the Framers intended the Eighth Amendment to be “a ‘constitutional check’” on Congress, with *id.* at 431 (Powell, J., dissenting), stating that “[w]hen asked to encroach on the legislative prerogative . . . [Justices] are well counseled to proceed with the utmost reticence.”

268. See *infra* Parts IV.A.1 (method of execution cases), IV.A.2 (death penalty cases), IV.A.3 (conditions of confinement cases).

269. See *Gregg*, 428 U.S. at 170 (noting that the Court in *Wilkinson v. Utah*, 99 U.S. 130 (1879), *In re Kemmler*, 136 U.S. 436 (1890), and *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947), assessed the constitutionality of execution methods by their “similarity to ‘torture’ and other ‘barbarous’ methods,” which is what the Eighth Amendment’s drafters intended to prohibit).

and other punishments involving “unnecessary cruelty.”²⁷⁰ In doing so, the *Wilkerson* Court distinguished punishments considered historically cruel—such as emboweling, beheading, and quartering²⁷¹—with the firing squad, and upheld the latter as constitutional.²⁷² The Court followed this sentiment a few years later in *In re Kemmler* when it considered a challenge to electrocution.²⁷³ Giving historically cruel punishments—such as burning, crucifixion, and breaking on the wheel—as examples of unconstitutional execution methods, the *Kemmler* Court clarified that the cruelty that the Eighth Amendment was intended to prohibit was “torture or a lingering death . . . something inhuman and barbarous . . . more than the mere extinguishment of life.”²⁷⁴ While the *Kemmler* Court held that the Eighth Amendment did not apply to the states, it approved the state court’s finding that New York adopted electrocution to find “a more humane method” of execution²⁷⁵ and thus implicitly distinguished electrocution from the above-noted cruel punishments.

The Court’s most recent method of execution case is also rooted in an originalist philosophy. In *Louisiana ex rel. Francis v. Resweber*, the Court upheld a second electrocution attempt after a mechanical failure thwarted the first try because, as a plurality of the Court reasoned, the Eighth Amendment prohibits “cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely.”²⁷⁶ While observing that “[t]he traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence,” the Court echoed the originalist position in *Wilkerson* and *Kemmler* when it stated that the “[p]rohibition against the wanton infliction of pain has come into our law from the Bill of Rights of 1688.”²⁷⁷ Moreover, Justice Frankfurter’s differentiation of the accidental malfunction from “a series of abortive attempts at electrocution or even a single, cruelly willful attempt”²⁷⁸ reflected the plurality’s conclusion that an “unfore-

270. *Wilkerson*, 99 U.S. at 136. The Court noted that it would be hard to exactly define the scope of the Eighth Amendment, but found it “safe to affirm” the point stated above. *Id.* at 135–36.

271. *Id.* at 135–36.

272. *Id.* at 134–37.

273. *In re Kemmler*, 136 U.S. at 439, 441.

274. *Id.* at 446–47.

275. *Id.* at 447–49.

276. *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 464 (1947) (plurality opinion). See also *id.* at 469–72 (Frankfurter, J., concurring) (concurring on Fourteenth Amendment Due Process grounds).

277. *Id.* at 463 (plurality opinion) (emphasis added).

278. *Id.* at 470–71 (Frankfurter, J., concurring).

seeable accident” that neither intended to cause nor involved any “unnecessary pain” did not make the method cruel.²⁷⁹

2. *The Court Has Moved to the Evolving Standards of Decency Test to Narrow the Death Penalty’s Application in its Death Penalty Cases*

Rather than rely most heavily on the historical underpinnings of the death penalty, the Court has broadened its interpretation of the Eighth Amendment in its death penalty cases by looking to continuously evolving standards of decency in order to narrow the application of the death penalty to certain offenders for certain crimes.²⁸⁰ This test has enabled the Court to ensure that punishments accord with the “basic ‘precept of justice that punishment for [a] crime should be graduated and proportioned to [the] offense.’”²⁸¹ In each instance, the Court has determined whether death is an excessive punishment by using current social norms based upon the objective criteria of legislative and jury decisions, the Court’s precedents, and the Justices’ “own understanding and interpretation of the Eighth Amendment’s text, history, meaning, and purpose.”²⁸²

For instance, in *Coker v. Georgia*, a plurality of the Court agreed that the sentence of death was excessive for those who rape adult wo-

279. *Id.* at 464 (plurality opinion). When the Court upheld the death penalty’s constitutionality in *Gregg*, a plurality of the Court took this historical approach into account, noting that the Eighth Amendment, in part, forbids “excessive” punishments that “involve the unnecessary and *wanton* infliction of pain.” *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (emphasis added) (citing *Wilkerson v. Utah*, 99 U.S. 130, 136 (1879)) (other citations omitted). Before *Baze*, the Court rejected other opportunities to examine a state’s method of execution. See *supra* notes 72–80 and accompanying text.

280. See, e.g., *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2649–50 (2008) (detailing examples where the Court prohibited the death penalty’s application). The evolving standards of decency test grew out of a series of cases that struck down excessively harsh punishments under the Eighth Amendment. See *Weems v. United States*, 217 U.S. 349, 357, 366, 377–78 (1910) (holding that imprisonment of over twelve years in chains combined with hard labor for falsifying a public document in the Philippine Territory was unconstitutionally excessive, and noting that the words cruel and unusual “may be . . . progressive, and [are] not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice”); *Trop v. Dulles*, 356 U.S. 86, 87, 100–02 (1958) (plurality opinion) (holding that denationalization imposed upon the petitioner for wartime desertion was unconstitutional, and noting that the Eighth Amendment, whose words are neither “precise” nor “static” in “scope,” “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society”); *Robinson v. California*, 370 U.S. 660, 666–67 (1962) (holding that a state law imprisoning a person for being addicted to narcotics “inflict[ed] a cruel and unusual punishment” in violation of the Eighth and Fourteenth Amendments “in the light of contemporary human knowledge”).

281. *Kennedy*, 128 S. Ct. at 2649 (quoting *Weems*, 217 U.S. at 367) (alterations in original).

282. *Id.* at 2649–50 (citations omitted).

men after observing that (1) Georgia was the only jurisdiction at the time that made this a capital offense and (2) at least ninety percent of Georgia juries voted against the death sentence in that context.²⁸³ Similarly, when the Court in *Enmund v. Florida* held that it was unconstitutional to execute a person who did not take the life of nor intend or attempt to kill another person,²⁸⁴ it noted that only eight jurisdictions imposed the death penalty for a person who only participated in a robbery where another person committed murder,²⁸⁵ that two-thirds of American jurisdictions would never allow such a person to be executed,²⁸⁶ and that juries also “overwhelming[ly]” rejected the death penalty for such crimes.²⁸⁷ The Court has also agreed with a “national consensus” when it held that it was cruel and unusual to execute a mentally retarded person,²⁸⁸ a juvenile offender under the age of eighteen,²⁸⁹ and one who raped a child when the crime neither resulted nor was intended to result in the victim’s death.²⁹⁰

3. *The Court Has Also Used the Historical and Evolving Standards of Decency Tests in Conditions of Confinement Cases to Develop a Two-Part Test that Prohibits an Inmate’s Exposure to Certain Risks of Future Harm*

In cases regarding prison conditions, the Court has drawn from both the historical and the evolving standards of decency tests to develop a different two-part test that prohibits the exposure of an inmate to certain risks of future harm.²⁹¹ To establish an Eighth Amendment violation in this context, (1) an inmate must be exposed to conditions posing “a substantial risk of serious harm” and (2) a prison official

283. *Coker v. Georgia*, 433 U.S. 584, 596–97 (1977) (plurality opinion).

284. *Enmund v. Florida*, 458 U.S. 782, 787–88, 801 (1982).

285. *Id.* at 789.

286. *Id.* at 792.

287. *Id.* at 794.

288. *Atkins v. Virginia*, 536 U.S. 304, 316, 321 (2002).

289. *Roper v. Simmons*, 543 U.S. 551, 567–68 (2005).

290. *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2650–51 (2008).

291. *See Estelle v. Gamble*, 429 U.S. 97, 102–03 (1976) (noting that these Eighth Amendment principles “establish the government’s obligation to provide medical care for those whom it is . . . incarcerat[ing]”); *see also Hutto v. Finney*, 437 U.S. 678, 685 (1978) (evaluating prison conditions according to the standard that punishments cannot be “physically barbarous” or “grossly disproportionate to the offense,” and cannot “transgress today’s broad and idealistic concepts of dignity, civilized standards, humanity, and decency” (citations and internal quotation marks omitted)).

must have acted with “deliberate indifference to inmate health or safety.”²⁹²

The first factor—the objective component—grew out of both the historical and evolving standards of decency approaches. For instance, when the *Estelle* Court held that “deliberate indifference to serious medical needs of prisoners constitute[d] the ‘unnecessary and wanton infliction of pain,’”²⁹³ it noted that this disregard could produce either “physical ‘torture or a lingering death’”²⁹⁴ or “unnecessary” pain and suffering “inconsistent with contemporary standards of decency.”²⁹⁵

More recent cases have relied heavily on the evolving standards of decency reasoning, rather than on the Eighth Amendment’s historic meaning, when evaluating the objective component. For instance, when the Court in *Rhodes v. Chapman* held that double-celling did not violate the Eighth Amendment because it did not deny basic food, medical care, or sanitation, did not increase inmate violence, and only slightly diminished educational and job opportunities,²⁹⁶ it grounded its analysis on the evolving standards of decency test²⁹⁷ and emphasized that Eighth Amendment decisions should be based as much as possible on “‘objective factors.’”²⁹⁸ Furthermore, as the Court noted in *Helling v. McKinney*, in a risk-based claim, a court must (1) determine “whether society considers the risk . . . to be so grave that it violates contemporary standards of decency to expose *anyone* unwillingly to such a risk” and (2) inquire into the seriousness and likelihood of the harm.²⁹⁹ While the Court’s clarification of the standard in *Farmer v. Brennan* did not explicitly use the evolving standards lan-

292. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (citations and internal quotation marks omitted). *See also id.* at 846 (stating that an “objectively intolerable risk of harm” could also satisfy the first part of the test).

293. *Estelle*, 429 U.S. at 104 (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)).

294. *Id.* at 103 (quoting *In re Kemmler*, 136 U.S. 436, 447 (1890)).

295. *Id.*

296. *Rhodes v. Chapman*, 452 U.S. 337, 348 (1981).

297. *See id.* at 345–46 (noting that “the Eighth Amendment ‘must draw its meaning from the evolving standards of decency that mark the progress of a maturing society’” (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958))).

298. *Id.* at 346 (quoting *Rummel v. Estelle*, 445 U.S. 263, 274–75 (1980)). The *Rhodes* Court also noted that the treatment must deprive an inmate of “the minimal civilized measure of life’s necessities.” *Id.* at 347.

299. *Helling v. McKinney*, 509 U.S. 25, 36 (1993).

guage,³⁰⁰ Justice Blackmun noted that the *Farmer* Court tried to ensure that prison conditions satisfied current decency standards.³⁰¹

The subjective prong is also rooted in both the originalist and non-originalist precedents. For instance, in determining that a prison official must be “deliberate[ly] indifferen[t]” to raise an Eighth Amendment claim,³⁰² the *Estelle* Court relied on the Court’s originalist-based execution-method decision in *Resweber* to emphasize that accidents alone do not constitute the “wanton infliction of unnecessary pain,” even though they might cause suffering.³⁰³ However, the *Estelle* Court also noted that “only such indifference . . . can offend evolving standards of decency in violation of the Eighth Amendment.”³⁰⁴ In addition, the Court has echoed the method of execution cases in emphasizing that the state of mind requirement stemmed from the fact that the Eighth Amendment protects against “only the unnecessary and wanton infliction of pain.”³⁰⁵

B. *The Baze Plurality Struck a Balance When it Adopted the Conditions of Confinement Standard While Also Preserving Pieces of its Prior Eighth Amendment Precedents*

In *Baze*, the Court attempted to provide guidance to the federal and state courts that had devised many different tests to determine the constitutionality of methods of execution in the absence of a clear

300. *Farmer v. Brennan*, 511 U.S. 825, 847 (1994) (holding that prison officials violated the Eighth Amendment if they denied an inmate “humane conditions of confinement” despite knowing that an inmate faces “a substantial risk of serious harm” and failed “to take reasonable measures to abate” that risk). However, the *Farmer* Court noted that the “prison official’s act or omission must result in the denial of ‘the minimal civilized measure of life’s necessities,’” *id.* at 834 (quoting *Rhodes*, 452 U.S. at 347), and that in previous cases, the Court has held that prison conditions must “square[] with ‘evolving standards of decency,’” *id.* at 833 (quoting *Estelle v. Gamble*, 429 U.S. 97, 102 (1976)).

301. *Id.* at 858 (Blackmun, J., concurring).

302. *Estelle*, 429 U.S. at 104.

303. *Id.* at 105 (emphasis added). Thus, since unintentionally giving inadequate medical care is neither “an unnecessary and wanton infliction of pain” nor “repugnant to the conscience of mankind,” it did not constitute an Eighth Amendment violation. *Id.* at 105–06 (internal quotation marks omitted). See also Stacy Lancaster Cozad, Note, *Cruel But Not So Unusual: Farmer v. Brennan and the Devolving Standards of Decency*, 23 PEPP. L. REV. 175, 180 (1995) (discussing how *Resweber* “paved the way for the intent requirement” of the Eighth Amendment in the prison-condition context).

304. *Estelle*, 429 U.S. at 106 (internal quotation marks omitted).

305. See, e.g., *Farmer*, 511 U.S. at 834 (quoting *Wilson v. Seiter*, 501 U.S. 294, 297 (1991)) (internal quotation marks omitted). While the *Wilson* Court noted that the “offending conduct must be *wanton*” in the prison confinement context, it reasoned that an officer needed to have a certain mental state when inflicting pain in this context because the pain he or she inflicts “is not formally meted out as *punishment* by the statute or the sentencing judge.” *Wilson*, 501 U.S. at 300, 302.

Supreme Court rule.³⁰⁶ The *Baze* plurality adopted the objective component of the conditions of confinement test—the *Farmer* “substantial risk of serious harm” rule—to create a new standard regarding (1) the type *and* risk of pain involved in a method of execution and (2) when a state must adopt alternative execution procedures.³⁰⁷ In doing so, the plurality chose not to use any prison condition cases to explicitly justify its extension of this standard into the execution method context. Rather, the *Baze* plurality updated its Eighth Amendment jurisprudence in the execution context by (1) reinterpreting language from its method of execution precedents³⁰⁸ and (2) implicitly evoking the evolving standards of decency test through its concerns with the objective indicia of the humaneness of lethal injection and with federalism.³⁰⁹ As a result, the *Baze* plurality found an optimal balance: Not only did it provide lower courts with guidance by approving the Kentucky protocol as a benchmark,³¹⁰ but it also subtly encouraged states to investigate and implement more humane methods of execution by opening the door to future methods of execution jurisprudence that expands beyond strict originalism to also incorporate evolving standards of decency and increased deference to state legislatures.³¹¹

1. *The Court Did Not Abandon its Method of Execution Cases but Rather Preserved Their Spirit by Reinterpreting Them Within a New Framework*

Although the plurality seemed to separate previous method of execution precedents from its analysis in lieu of adopting a risk-based standard,³¹² it in fact preserved a link to these precedents by reinter-

306. See *supra* Part II.B. (discussing many different tests that lower courts developed before the Supreme Court granted certiorari in *Baze*); see generally Deborah W. Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*, 76 FORDHAM L. REV. 49, 102–16 (2007) (describing the rise in lethal injection litigation after *Nelson v. Campbell* and *Hill v. McDonough* and noting that *Baze* gave the Court a chance to provide guidance on the issue); Fernando J. Gaitan Jr., *Challenges Facing Society in the Implementation of the Death Penalty*, 35 FORDHAM URB. L.J. 763, 772–74 (2008) (describing many of the different standards courts devised in the absence of Supreme Court guidance).

307. See *Baze v. Rees*, 128 S. Ct. 1520, 1530–32 (2008) (plurality opinion).

308. See *infra* Part IV.B.1.

309. See *infra* Part IV.B.2.

310. See *infra* Part IV.C.

311. See *infra* Part IV.B.2–C.

312. See *Baze*, 128 S. Ct. at 1530. The *Baze* plurality mentioned the *Wilkerson* Court’s opinion that torturous punishments and those that intentionally inflict pain were unconstitutional, *id.* (citing *Wilkerson v. Utah*, 99 U.S. 130, 135–36 (1879)), and the *Kemmler* Court’s statement that punishments are unconstitutional when they “involve torture or a lingering death,” *id.* (quoting *In Re Kemmler*, 136 U.S. 436, 447 (1890)). However, the plurality seemed to dismiss these cases from its discussion by explaining that the petition-

preting *Resweber* and by infusing language from the Court's previous method of execution cases into parts of its new framework of analysis. The plurality's decision to justify its new risk of harm standard by reinterpreting the *Resweber* Court's reasoning to explain the plurality's rule—rather than by explicitly using prison confinement cases to do so—connotes a willingness to preserve the spirit of the method of execution cases.³¹³ Using *Resweber*, the plurality concluded that “isolated mishap[s]” do not violate the Eighth Amendment.³¹⁴ Thus, pain that results during an execution from an “accident or as an inescapable consequence of death” would not meet the requisite “objectively intolerable risk of harm” standard³¹⁵ because “such an event, while regrettable, does not suggest *cruelty*, or that the procedure at issue gives rise to a ‘substantial risk of serious harm.’”³¹⁶ Although the plurality seemed to reject a standard based on the intentional infliction of pain,³¹⁷ its *Resweber*-based reasoning preserves the piece of the method of execution tradition that excepts from the Eighth Amendment's prohibition non-intentional mishaps that occur during the administration of a protocol designed to end life humanely.

ers did not argue that Kentucky's protocol would “constitute the cruel or wanton infliction of pain” if it was administered appropriately because they admitted that Kentucky's protocol was designed to cause a humane death. *Id.* In doing so, the plurality did not adopt “the unnecessary and wanton infliction of pain” standard that the *Gregg* Court developed when integrating the evolving standards of decency reasoning with the method of execution tradition and on which the lower courts relied. *See Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (citation omitted); *Baze v. Rees*, 217 S.W.3d 207, 209 (Ky. 2006) (noting that a lethal injection protocol violated the Eighth Amendment when it created “a substantial risk of wanton and unnecessary infliction of pain, torture or lingering death (citing *Gregg*, 428 U.S. 153)), *cert. granted*, 128 S. Ct. 34 (2007), *aff'd*, 128 S. Ct. 1520 (2008). *See also Baze*, 128 S. Ct. at 1559–61 (Thomas, J., concurring) (arguing that the *Baze* Court should have based its analysis on the Court's three method of execution precedents, which lacked a comparative analysis and which suggest that “[t]he evil the Eighth Amendment targets is intentional infliction of gratuitous pain”). *Cf. Gregg*, 428 U.S. at 170–71 (using *Wilkerson*, *Kemmler*, and *Resweber* to explain how the Court has examined methods of execution).

313. *See Baze*, 128 S. Ct. at 1531 (plurality opinion) (arguing that accidents do not give rise to the risk set out in the plurality's new standard because the *Resweber* Court upheld a second attempt at electrocution after a mechanical failure foiled the first try on the grounds that “‘an accident, with no suggestion of malevolence’ did not give rise to an Eighth Amendment violation” (quoting *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463 (1947) (plurality opinion))).

314. *Id.*

315. *Id.* (internal quotation marks omitted). In contrast, the situation noted by Justice Frankfurter regarding several unsuccessful execution attempts would give rise to a constitutionally unacceptable risk. *Id.* (citing *Resweber*, 329 U.S. at 471 (Frankfurter, J., concurring)).

316. *Id.* (quoting *Farmer v. Brennan*, 511 U.S. 825, 842 (1994)) (emphasis added).

317. *See supra* note 312 and accompanying text.

The *Baze* plurality also maintained a link to the earlier execution method precedents by merging the substantial risk of serious pain test with the language regarding the prohibition of wanton pain.³¹⁸ For instance, the plurality noted that the Eighth Amendment bans the “wanton exposure to ‘objectively intolerable risk[s],’ not simply the possibility of pain.”³¹⁹ Moreover, the plurality concluded that “Kentucky’s decision to adhere to its protocol . . . [could not] be viewed as probative of the *wanton* infliction of pain under the Eighth Amendment” because the state chose a “humane” procedure that would “result in a painless death” if it was “administered *as intended*” and also minimized the danger of maladministration of the procedure by adding several safeguards.³²⁰

Furthermore, the fact that the substantial risk test is rooted in the wanton infliction of pain standard also supports the notion that the plurality did not entirely depart from its previous method of execution tradition. The two conditions of confinement cases on which the plurality relied in adopting its substantial or objective risk test—*Helling* and *Farmer*³²¹—stem from the Court’s holding in *Estelle* that the “deliberate indifference to serious medical needs of prisoners constitute[d] the ‘unnecessary and wanton infliction of pain.’”³²² Just as the *Baze* plurality relied on *Resweber* to support its new test, so too did the *Estelle* Court when it observed that the accidental or unintentional giving of medical care would not violate the Eighth Amendment.³²³ Moreover, the *Farmer* Court noted that the deliberate indifference standard grew out of the Eighth Amendment’s prohibition against “only the unnecessary and wanton infliction of pain.”³²⁴ Even though the *Baze* plurality chose not to adopt the subjective (deliberate indifference) component of the conditions of confinement test,³²⁵ its view

318. The Court’s previous method of execution cases had described forbidden punishments using the word *wanton* or words with a similar meaning. See *supra* Part IV.A.1.

319. *Baze*, 128 S. Ct. at 1537 (quoting *Farmer*, 511 U.S. at 846 & n.9) (emphasis added).

320. *Id.* at 1537–38 (emphasis added).

321. *Id.* at 1530–31 (citing *Helling v. McKinney*, 509 U.S. 25, 33, 34–35 (1993); *Farmer*, 511 U.S. at 842, 846, & n.9).

322. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)). See also *supra* notes 125–130, 142–152, 291–305 and accompanying text.

323. *Estelle*, 429 U.S. at 105–06.

324. *Farmer*, 511 U.S. at 834 (citation omitted).

325. The *Baze* Court probably did so because the Court added this element in the prison condition context to satisfy the Eighth Amendment’s requirement of protecting against *punishment*. See *Wilson v. Seiter*, 501 U.S. 294, 299–300 (1991) (“If the pain inflicted is not formally meted out *as punishment* by the statute or the sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify.”); *Taylor v. Crawford*, 487 F.3d 1072, 1081 (8th Cir. 2007) (noting that the state of mind inquiry is required “only where the official conduct does not purport to be part of the official penalty for the

that an accident during the implementation of a humanely designed lethal injection protocol does not violate the Eighth Amendment suggests that whether pain was intentionally or accidentally inflicted continues to play a role in the constitutional analysis of execution methods.

2. *The Plurality Implicitly Evoked the Evolving Standards of Decency Test by Focusing on Objective Indicia of Lethal Injection's Humaneness and on Federalism*

Although the plurality did not explicitly adopt the evolving standards of decency approach,³²⁶ it implicitly invoked this standard when it focused on objective indications that lethal injection in general and the three-drug protocol in particular were designed to cause a painless death.³²⁷ However, the plurality broadened this principle by extending the deference normally given to legislatures to an executive branch decision regarding the death penalty's implementation.³²⁸ The plurality's federalism-based justification for doing so mirrors one of the policy justifications behind the evolving standards of decency test as the plurality's high standard will enable and encourage state legislative and executive branches to continue to devise humane lethal injection protocols.³²⁹

crime" (citing *Wilson*, 501 U.S. at 302)), *cert. denied*, 128 S. Ct. 2047 (2008). While the plurality did not explicitly adopt the deliberate indifference standard, Justice Alito's interpretation of the plurality's standard hints at the concept. *See Baze*, 128 S. Ct. at 1540 (Alito, J., concurring) ("Only if a State refused to change its method in the face of a [well-established scientific consensus] would the State's conduct be comparable to circumstances that the Court has previously held to be in violation of the Eighth Amendment." (citing *Farmer*, 511 U.S. at 836)).

326. *See Baze*, 128 S. Ct. at 1568 (Ginsburg, J., dissenting) (criticizing the plurality for failing to consider more current standards of decency). The Court has used this test to decide if there was an Eighth Amendment violation in many cases, including *Gregg v. Georgia*, *Atkins v. Virginia*, and those on which the plurality relied to create its "substantial risk" test: *Helling v. McKinney* and *Farmer v. Brennan*. *See supra* notes 266–267, 280–305 and accompanying text.

327. *See infra* Part IV.B.2.a.

328. *See Atkins v. Virginia*, 536 U.S. 304, 312 (2002) ("We have pinpointed that 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))); *Gregg v. Georgia*, 428 U.S. 153, 176 (1976) (noting that "deference . . . to . . . state legislatures under our federal system is enhanced where the specification of punishments is concerned" (citations omitted)).

329. *See infra* Part IV.B.2.b.

a. *The Plurality Implicitly Invoked the Evolving Standards of Decency Test by Focusing on Objective Indicia of the Humaneness of Lethal Injection*

The plurality hinted that the evolving standards of decency test was an underlying—though explicitly unmentioned—theme throughout its analysis by focusing on objective indications of the method’s humaneness. The plurality highlighted this concern by opening and closing its opinion with mention of the broad consensus in the United States that lethal injection is the most humane method of execution available. For instance, the *Baze* plurality opened its discussion by recognizing that the decision by Kentucky, thirty-five other states, and the federal government to “alter[] [their] methods of execution over time to more humane means of carrying out the sentence” constitutes “progress [that] has led to the use of lethal injection by every jurisdiction that imposes the death penalty.”³³⁰ Moreover, it noted that thirty-six states and the federal government used lethal injection as the sole or preferred method of execution, that at least thirty states use the same three-drug combination, and that the procedure would cause a painless death if properly administered.³³¹ In conclusion, the *Baze* plurality observed that “society[’s] . . . stead[y] move[ment] to more humane [execution] methods” has “culminat[ed] in today’s consensus on lethal injection.”³³² By attributing this trend to “[t]he broad framework of the Eighth Amendment,”³³³ the plurality implicitly invoked the language found in such foundational evolving standard of decency cases such as *Trop v. Dulles* and *Weems v. United States*.³³⁴

Furthermore, the plurality’s decision to inject an objective component into both parts of its substantial risk standard also based its analysis on an implicit evolving standards of decency test.³³⁵ First, in

330. *Baze*, 128 S. Ct. at 1525–26 (plurality opinion).

331. *Id.* at 1526–27 & n.1.

332. *Id.* at 1538.

333. *Id.*

334. See *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958) (plurality opinion) (“[T]he words of the Amendment are not precise, and . . . their scope is not static. 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 clause of the Constitution . . . may be therefore progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.”). See also *supra* note 266 and accompanying text.

335. See *Baze*, 128 S. Ct. at 1531–32. Although the plurality only used the phrase “substantial risk of serious harm” in laying out its test for when a failure to adopt alternative methods can be unconstitutional, it seemed to use “substantial risk of serious harm” and “objectively intolerable risk of harm” interchangeably throughout its opinion. See, e.g., *id.* at 1532 n.3.

determining whether Kentucky's lethal injection protocol posed an unconstitutional risk of harm, the *Baze* plurality noted "at the outset that it is difficult to regard a practice as 'objectively intolerable' when it is in fact widely tolerated," in terms of both the method and the specific three-drug combination.³³⁶ Second, in determining whether Kentucky violated the Eighth Amendment for failing to use a one-drug protocol, the Court noted that Kentucky's "continued use of the three-drug protocol cannot be viewed as posing an 'objectively intolerable risk' when no other State has adopted the one-drug method and petitioners proffered no study showing that it is an equally effective manner of imposing a death sentence."³³⁷

b. *The Plurality's Concern with Federalism Also Invoked the Evolving Standard of Decency Test and Preserved State Autonomy in Making Decisions about Execution Procedures*

The plurality's federalism-based justification for deferring to the Kentucky Department of Corrections officials who wrote the three-drug protocol³³⁸ mirrors one of the original policies behind the objective basis for the evolving standards of decency test. In *Gregg*, the Court noted that the judiciary should defer to state legislative death penalty decisions when considering evolving standards of decency, in part because doing so preserves the proper balance of power between state and federal governments.³³⁹ Similarly, the *Baze* plurality's view

336. *Id.* at 1532.

337. *Id.* at 1535. *See also id.* at 1532–33 (noting that the fact that "[n]o State uses or has ever used the alternative one-drug protocol belatedly urged by petitioners . . . is probative but not conclusive with respect to that aspect of the alternatives proposed by petitioners").

338. *See id.* at 1535, 1537 (noting, for instance, that Kentucky has "an interest in preserving the dignity of the procedure" and "in carrying out a sentence of death in a timely manner"). *But see id.* at 1569 (Ginsburg, J., dissenting) (implicitly suggesting that Kentucky Department of Corrections officials did not deserve such deference by highlighting that Kentucky did not conduct independent studies but rather followed other states in adopting a three-drug protocol).

339. *Gregg v. Georgia*, 428 U.S. 153, 186–87 (1976) ("Considerations of federalism, as well as respect for the ability of a [state] legislature to evaluate . . . the moral consensus concerning the death penalty and its social utility as a sanction, require us to conclude . . . that the infliction of death as a punishment for murder . . . is not unconstitutionally severe.") *Cf. Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 470–71 (1947) (Frankfurter, J., concurring) ("Short of the compulsion of . . . a principle [of justice rooted in the traditions and conscience of our people], this Court must abstain from interference with State action no matter how strong one's personal feeling of revulsion against a State's insistence on its pound of flesh." (citation and internal quotation marks omitted)); Corinna Barrett Lain, *Deciding Death*, 57 DUKE L.J. 1, 70–74, 76–78 (2007) (noting that federalism concerns *sometimes* influence Justices' decision making in death penalty cases). *But see* Charles Hobson, *Atkins v. Virginia, Federalism, and Judicial Review*, 11 WIDENER L. REV. 23, 35–42 (2004)

that an Eighth Amendment violation can arise only if a state refuses to adopt alternative procedures that are “feasible” and “readily implemented” and which will “significantly reduce a substantial risk of severe pain” without “a legitimate penological justification”³⁴⁰ also evinces a concern for federalism, which will allow and encourage state legislative and executive branches to create more humane lethal injection procedures.³⁴¹

The plurality demonstrated its deference for state decisions by requiring a “heavy burden” of proof to show that a lethal injection procedure is “cruelly inhumane.”³⁴² Under the plurality’s test, an inmate cannot effectively attack a state’s chosen execution method “merely by showing a slightly or marginally safer alternative.”³⁴³ Letting an inmate prevail “simply by showing one more step the State could take as a failsafe for other, independently adequate measures . . . would serve no meaningful purpose and would frustrate the State’s legitimate interest in carrying out a sentence of death in a timely manner.”³⁴⁴ Additionally, the plurality justified this deference by noting that the states have performed their task of carrying out the execution procedures “with an earnest desire to provide for a progressively more humane manner of death.”³⁴⁵ The plurality also pointed out that its decision to uphold Kentucky’s method will not impede states from continuing to choose more humane methods of capital punishment in the future.³⁴⁶

These federalism concerns allowed the plurality to defend Kentucky’s failure to adopt several alternative measures to its lethal injection

(discussing the way in which the evolving standards of decency test can actually work to erode federalism by failing to let states impose their desired punishments).

340. *Baze*, 128 S. Ct. at 1532 (plurality opinion).

341. *See infra* notes 342–350, 366–372.

342. *Baze*, 128 S. Ct. at 1533 (quoting *Gregg*, 428 U.S. at 175) (internal quotation marks omitted).

343. *Id.* at 1531.

344. *Id.* at 1537 (citations omitted).

345. *Id.* at 1531 (citing *Bell v. Wolfish*, 441 U.S. 520, 562 (1979), for the notion that “[t]he wide range of ‘judgment calls’ that meet constitutional and statutory requirements are confided to officials outside of the Judicial Branch of Government”). *See also* *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 462 (1947) (plurality opinion) (assuming in the absence of further evidence that “the state officials [who tried to execute an inmate during a failed electrocution attempt] carried out their duties under the death warrant in a careful and humane manner”).

346. *Baze*, 128 S. Ct. at 1538. In doing so, the plurality created an interesting balance: While allowing states a measure of choice in their execution protocols, it subtly hinted that their methods may be judged in the future, at least in part, by public acceptance of the adopted methods. *Cf. id.* at 1532 (holding that an Eighth Amendment violation can arise if a state refuses to adopt alternative procedures that are “feasible, readily implemented” and that will “significantly reduce a substantial risk of severe pain”).

tion protocol. For instance, the plurality noted that the consensus on the three-drug protocol as opposed to the as-of-yet-unused one-drug method helped to establish the state's right to continue to use the three-drug method if it so desires.³⁴⁷ Moreover, in response to the argument that Kentucky should stop using the paralytic agent pancuronium bromide, the plurality noted that the state had an interest in providing a dignified, definite death, "especially where convulsions or seizures could be misperceived as signs of consciousness or distress."³⁴⁸ This concern with "the States' legitimate interest in providing for a quick, certain death" also prompted the plurality to disregard the argument that pancuronium bromide should be outlawed because twenty-three states, including Kentucky, prohibit the use of similar drugs in the euthanasia of animals.³⁴⁹

Finally, the plurality exhibited this deference when it gave the states one last out, allowing them to avoid an Eighth Amendment violation if they have "a legitimate penological justification" for maintaining their protocols instead of adopting "feasible, readily implemented" alternatives that would "significantly reduce a substantial risk of severe pain."³⁵⁰

C. *While the Court's Majority Stance Will Provide More Uniformity Among Courts in the Near Future, the Plurality's Comparative Risk Standard Will Allow the Judiciary to Help Ensure that Lethal Injection Protocols Continue to Become More Humane*

While the *Baze* Court might have hoped to stop the flood of lethal injection litigation in lower courts, there is no indication this will hap-

347. *Id.* at 1535.

348. *See id.* *But see id.* at 1544–45 (Stevens, J., concurring) (arguing that there is no national consensus about the use of the second drug that deserves "any special presumption of respect" because most states with a three-drug protocol allowed Department of Corrections officials to select the drugs "with no specialized medical knowledge and without the benefit of expert assistance or guidance").

349. *See id.* at 1535 (plurality opinion).

350. *See id.* at 1532. *But see id.* at 1562 (Thomas, J., concurring) (noting that lower courts will have to "grapple" with this issue and that judges have no "penological training"). This query is especially difficult since the Court tends to disagree about which penological justifications are valid and which entity gets to decide the issue. *Compare* *Atkins v. Virginia*, 536 U.S. 304, 318–21 (2002) (analyzing the retributive and deterrent value of executing mentally retarded individuals), *with id.* at 349–52 (Scalia, J., dissenting) (criticizing the majority's analysis and arguing that it should also consider incapacitation). *Cf.* Carrie A. Dannenfeler, Note, *Burch v. State: Maintaining the Jury's Traditional Role as the Voice of the Community in Capital Punishment Cases*, 60 MD. L. REV. 417, 433–35 (2001) (describing four policies—rehabilitation, incapacitation, deterrence, and retribution—in light of the jury's role in capital cases).

pen in the near future. Not only has at least one court and many commentators pointed out several shortfalls of the *Baze* decision that could provide avenues for those bringing lethal injection claims,³⁵¹ but also the Justices upholding Kentucky's protocol disagreed as to the decision's effect: While the plurality hoped that its opinion would provide a workable standard for lower courts,³⁵² Justices Stevens and Thomas disagreed.³⁵³ Despite the uncertainty of the precedential value of the *Baze* plurality's standard,³⁵⁴ many courts have begun to apply the plurality's test to other lethal injection challenges.³⁵⁵

351. See, e.g., *Henyard v. State*, 992 So.2d 120, 130 (Fla. 2008) (per curiam) (pointing out that *Baze's* holding was "narrow" and that the opinion was "splintered"), *cert. denied*, 129 S. Ct. 28 (2008). Professor Deborah Denno has pointed out several reasons why litigation will continue post-*Baze*, some of which focused on the failures of the *Baze* opinion, including its "splintered" nature, its "narrow[] confine[ment] to just Kentucky and its particular protocol," the opinion's lack of guidance on what it means to be "substantially similar" to Kentucky's protocol, and its limited record due to Kentucky's lack of experience in conducting executions. Deborah W. Denno, *Introduction*, 35 *FORDHAM URB. L.J.* 701, 702–03 (2008) (internal quotation marks omitted). Other reasons for continued litigation focus on more traditional lethal injection issues, such as the effects of and justification for the second drug, pancuronium bromide. *Id.* at 702. See also Adam Liptak, *Moratorium May Be Over, but Hardly the Challenges*, *N.Y. TIMES*, Apr. 17, 2008, at A26 (discussing several commentators responses to the *Baze* opinion and the various debates between the Justices). One other court's method of circumventing *Baze* by a narrow interpretation of its state lethal injection statute suggests another potential limitation of the opinion. See Judgment Entry at 8–9, *State v. Rivera*, 2008 WL 2784679 (Ohio Ct. Com. Pl. June 10, 2008) (No. 04CR065940) (striking language from the Ohio lethal injection statute to mandate a barbiturate-only lethal injection protocol).

352. See *Baze*, 128 S. Ct. at 1537 (plurality opinion) (noting that "substantially similar" protocols would be constitutional).

353. See *id.* at 1542–43 (Stevens, J., concurring) (arguing that a similar case with "a more complete record" might come out differently and that *Baze* will produce more litigation concerning the three drug protocol, pancuronium bromide, and the death penalty); *id.* at 1562 (Thomas, J., concurring) (predicting a potential increase in litigation over the scope of the plurality's standard).

354. See generally Ken Kimura, Note, *A Legitimacy Model for the Interpretation of Plurality Decisions*, 77 *CORNELL L. REV.* 1593, 1600–04 (1992) (discussing alternative approaches to the interpretation of plurality decisions). The Supreme Court has recognized the "narrowest grounds model" of interpretation, which "recognizes a binding legal rule only when one of the concurring opinions is 'narrower' than the other" because "[t]he Justices supporting the broader legal rule must necessarily recognize the validity of the narrower legal rule." *Id.* at 1603. See also *Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds. . . .'" (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (plurality opinion))). But see James A. Bloom, Note, *Plurality and Precedence: Judicial Reasoning, Lower Courts, and the Meaning of United States v. Winstar Corp.*, 85 *WASH. U. L. REV.* 1373, 1373, 1377–79 & nn.22, 31 (2008) (discussing the Court's and commentators' criticism of plurality decisions in general and the *Marks* approach more specifically).

355. See, e.g., *Emmett v. Johnson*, 532 F.3d 291, 308 (4th Cir. 2008) (upholding Virginia's execution protocol because the inmate failed to show "a 'substantial' or 'objectively

However, and perhaps more importantly, the *Baze* Court's agreement to uphold Kentucky's protocol has allowed lower courts to use Kentucky's procedure as a constitutional bar that other protocols must meet in order to be upheld.³⁵⁶ Many lower court opinions in the wake of *Baze* have put credence into Chief Justice Roberts's statement that "[a] State with a lethal injection protocol substantially similar to the protocol we uphold today would not create a risk that meets [its] standard"³⁵⁷ and have consequently tested the constitutionality of other protocols by comparing them with Kentucky's.³⁵⁸ These cases suggest that litigation will continue in an even more fact-intensive way than before, but now with a consistent benchmark, leaving lower courts to determine what constitutes "substantially similar."³⁵⁹

intolerable' risk of harm during his execution"). *See also infra* notes 358–365 and accompanying text.

356. *Cf.* Liptak, *supra* note 351 (noting that one potential litigation strategy post-*Baze* is "to overcome the high evidentiary bar Chief Justice John G. Roberts Jr. set for all challenges to methods of execution").

357. *Baze*, 128 S. Ct. at 1537 (plurality opinion).

358. *See, e.g., Emmett*, 532 F.3d at 308 (concluding that that Virginia's protocol is "substantially similar to that approved by the Supreme Court in Kentucky"); *Nooner v. Norris*, No. 5:06CV00110 SWW, 2008 WL 3211290, at *15 (E.D. Ark. Aug. 5, 2008) (upholding Arkansas's protocol because it "[wa]s substantially similar to the protocol[] approved in . . . *Baze*" and because it presented no "constitutionally significant risk of pain"); *Moeller v. Weber*, No. Civ. 04-4200, 2008 WL 1957842, at *4 (D.S.D. May 2, 2008) (noting that more discovery was needed to determine if South Dakota's lethal injection method was "substantially similar" to Kentucky's (internal quotation marks omitted)); *Ex parte Chi*, 256 S.W.3d 702, 703–04 (Tex. Crim. App. 2008) (upholding Texas's lethal injection protocol because it was "materially indistinguishable" from that which the Supreme Court "clearly and unambiguously upheld"); *Porter v. Commonwealth*, 661 S.E.2d 415, 432 (Va. 2008) (rejecting the lethal injection challenge because it was conceded that "Virginia's protocol was 'materially similar' to the Kentucky protocol").

359. *Cf. Baze* 128 S. Ct. at 1562 (Thomas, J., concurring) (listing questions that the plurality's standard left lower courts to "grapple with" by leaving them "with nothing resembling a bright-line rule"). However, several lower courts have relied heavily on *Baze* to reject challenges on this basis without delving into much analysis. *See, e.g., Wellons v. Hall*, No. 07-13086, 2009 WL 17933, at *18 (11th Cir. Jan. 5, 2009) ("[Petitioner's] claims [against the use of Georgia's three-drug lethal injection protocol] have been foreclosed by *Baze v. Rees* . . . in which the United States Supreme Court upheld a similar three-drug lethal injection protocol."); *Walker v. Epps*, 287 F. App'x 371, 376 (5th Cir. 2008) ("Mississippi's lethal injection protocol appears to be substantially similar to Kentucky's protocol."); *aff'd*, 550 F.3d 407 (5th Cir. 2008); *Ex parte Belisle v. State*, No. 1061071, 2008 WL 4447593, at *15 (Ala. Oct. 3, 2008) (noting that the *Baze* dissent recognized that Alabama's procedures were more protective than Kentucky's (citation omitted)); *Schwab v. State*, 995 So.2d 922, 933 (Fla. 2008) (per curiam) (finding that the inmate failed to show that Florida's protocol "is not substantially similar" to Kentucky's or that it "creates a demonstrated risk of severe pain"), *petition for cert. filed* No. 08-5020 (June 30, 2008); *State v. Frazier*, No. L-07-1388, 2008 WL 4408645, at *13 ¶ 64 (Ohio Ct. App. Sept. 30, 2008) (upholding Ohio's lethal injection protocol because "[s]everal Ohio courts . . . found that . . . [it] is substantially similar to the one considered in *Baze*").

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Some of the recent lethal injection decisions suggest that this issue will take time for the courts to fully work out. For instance, the majority and dissenting opinions in *Emmett v. Johnson* sharply disagreed as to the essential facts in such a comparative analysis: While the *Emmett* two-judge majority focused on the safeguards that Virginia used to ensure proper administration of the lethal injection drugs,³⁶⁰ such as the fact that Virginia Department of Corrections officials supervise the procedure, which is carried out by “experienced, well-trained personnel,”³⁶¹ the dissenting judge highlighted several differences between the two protocols, including Virginia’s lower dose of sodium thiopental, Virginia’s faster administration of drugs, and the lack of a Virginia procedure to administer a second round of sodium thiopental if an inmate is not unconscious after the first injection.³⁶² Similarly in Texas, different judges focused on different factors: While a concurring judge in *Ex parte Chi* highlighted similarities in the drugs, the IV teams, the observations of IV lines to check for malfunctions, and the presence of secondary IV lines to direct more chemicals in case inmates remain conscious after sixty seconds,³⁶³ a dissenting judge pointed out that the protocols called for different amounts of each drug.³⁶⁴ Moreover, the concurring judge noted that Texas decided to change its protocol to be even more similar to Kentucky’s, suggesting another avenue a state may take to ensure that its protocol passes constitutional muster.³⁶⁵

While the plurality’s opinion may engender future litigation, its willingness to accept a comparative risk standard gave the judiciary a role in ensuring that lethal injection procedures keep up with current standards of decency.³⁶⁶ If the *Baze* Court had adopted Justice

360. *Emmett*, 532 F.3d at 299–300.

361. *Id.* at 308. See also *id.* at 300 (noting that the IV team members are medically qualified and trained for the execution process by a licensed physician, that the execution team has monthly practice sessions, that two IV lines are prepared, that department officials oversee the entire process, that the executioner watches the IV site for swelling and monitors the injections for resistance, and that the director also stays with the inmate to watch for “any obvious signs of problems or failures that might occur”).

362. *Id.* at 309–10 (Gregory, J., dissenting) (emphasizing these facts in light of *Baze*’s “extremely narrow holding” concerning “Kentucky’s written protocol regarding the administration of sodium thiopental”).

363. *Ex parte Chi*, 256 S.W.3d at 705 n.5 (Cochran, J., concurring). See also *Ex parte Alba*, 256 S.W.3d 682, 692 (Tex. Crim. App. 2008) (Cochran, J., concurring) (finding “no constitutionally relevant dissimilarities” between the Kentucky and Texas protocols for the reasons given in *Chi*).

364. *Ex parte Chi*, 256 S.W.3d at 715 (Johnson, J., dissenting).

365. *Id.* at 705–06 n.5 (Cochran, J., concurring).

366. *Cf. Baze v. Rees*, 128 S. Ct. 1520, 1532 (2008) (plurality opinion) (noting that a state can violate the Eighth Amendment if it fails to adopt an “alternative procedure” that

Thomas's bright-line test that would uphold a lethal injection protocol as long as it was not "deliberately designed to inflict pain,"³⁶⁷ the Court would have effectively closed the door on all challenges to lethal injection protocols since state legislatures presumably do not intend to torture inmates when they adopt lethal injection as their method of execution.³⁶⁸ Instead, if a "well-established scientific consensus"³⁶⁹ develops in favor of a barbiturate-only protocol or against the use of pancuronium bromide, or should many states adopt either of these (or other) methods,³⁷⁰ a court under the plurality's standard has the ability to determine whether the availability and feasibility of those methods reduce such a substantial amount of pain as to make a state's current method unconstitutional.³⁷¹ Thus, the plurality's standard will enable the judiciary to ensure that the executive and legislative branches continue to create more humane lethal injection protocols in the future.³⁷²

V. CONCLUSION

In *Baze v. Rees*, the Supreme Court properly held that Kentucky's lethal injection protocol satisfied the Eighth Amendment.³⁷³ In doing so, the plurality updated its method of execution standard by combining elements of three lines of Eighth Amendment jurisprudence: It

is "feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain" without having "a legitimate penological justification" for doing so).

367. *See id.* at 1556 (Thomas, J., concurring).

368. *See id.* at 1562–63 (opining that this was an "easy case" under his proposed standard because "[i]t is undisputed that Kentucky adopted its lethal injection protocol in an effort to make capital punishment more humane, not to add elements of terror, pain, or disgrace to the death penalty" and because the method would cause "a swift and painless death" if "administered properly"). Since lethal injection has been "hailed . . . as *the* humane alternative" to other methods of execution, it would seem that most—if not all—lethal injection cases would "not" be "situation[s] where the State has any intent (or anything approaching intent) to inflict unnecessary pain." *Id.* (citation and internal quotation marks omitted).

369. *See id.* at 1540 (Alito, J., concurring).

370. *Cf. id.* at 1532–33 (plurality opinion) (noting that the consensus on the three-drug protocol and the failure of any state to use a one-drug protocol is "probative" with respect to the alternative method prong of the analysis).

371. *See id.* at 1540 (Alito, J., concurring). The Honorable Fernando J. Gaitan Jr. has listed various alternatives that states could implement, such as the lethal injection or oral overdose of a barbiturate, the use of medical professionals in a system in which the state medical licensing boards do not impose sanctions for violation of the American Medical Association guidelines, the use of carbon monoxide, and a single gunshot to the back of the head. *See Gaitan supra* note 306, at 779–84.

372. *Cf. Baze*, 128 S. Ct. at 1538 (plurality opinion) (noting that legislatures will in all likelihood continue to "tak[e] the steps they deem appropriate, in light of new developments, to ensure humane capital punishment").

373. *Id.* at 1526.

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adopted the objective component of the conditions of confinement standard, recast language from the method of execution cases, and implicitly invoked the evolving standards of decency test.³⁷⁴ While the *Baze* Court's agreement to uphold Kentucky's protocol will allow lower courts to use Kentucky's protocol as a constitutional bar in the near future, the plurality's comparative standard will enable the judiciary to ensure that the development of lethal injection protocols or other methods of execution continue to evolve in a humane way.³⁷⁵

374. *See supra* Part IV.A–B.

375. *See supra* Part IV.C.

