Kentucky's Lethal Injection Protocol Satisfies the Eighth Amendment's Prohibition against Cruel and Unusual Punishment: Baze v. Rees

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**CONSTITUTIONAL LAW — EIGHTH AMENDMENT — CRUEL AND UNUSUAL PUNISHMENT — DEATH PENALTY — METHOD OF EXECUTION** — The United States Supreme Court found that the risk of improper administration of Kentucky’s method of execution does not constitute cruel and unusual punishment because it does not impose an objectively intolerable risk to the condemned inmate.


Petitioners, Ralph Baze and Thomas C. Bowling, were independently sentenced to death after each was separately convicted of double homicide.¹ The Kentucky Supreme Court subsequently upheld their convictions and sentences on direct appeal.² Baze and Bowling then sued state officials in the Franklin Circuit Court for the Commonwealth of Kentucky, attempting to have Kentucky’s lethal injection protocol declared unconstitutional on the basis that the procedures utilized would present them with an unnecessary risk of harm.³

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1. *Baze v. Commonwealth of Kentucky*, 965 S.W.2d 817, 819 (Ky. 1997), aff’d, 217 S.W.3d 207, 207-12 (Ky. 2006); *Bowling v. Commonwealth of Kentucky*, 873 S.W.2d 175, 176 (Ky. 1993), aff’d, 217 S.W.3d 207, 207-12 (Ky. 2006).


3. *Baze v. Rees*, 217 S.W.3d 207, 208 (Ky. 2006) (hereinafter “*Baze I*”). This was the first case of *Baze v. Rees* heard in the Kentucky Supreme Court on appeal from the Franklin Circuit Court. *Id.*
After Kentucky adopted lethal injection as a method of execution, the Commonwealth's Department of Corrections formulated a written protocol to comply with the statutory requirements. The protocol outlines the sequential intravenous administration of three drugs. The initial drug, sodium thiopental (Pentathol), is a fast-acting barbiturate sedative that induces unconsciousness. The second drug is pancuronium bromide (Pavulon), a paralytic agent that inhibits all voluntary muscle movement, including respiration. The final drug, potassium chloride, stops the heart by interfering with the cardiac electrical impulses and causing a cardiac arrest. In addition, Kentucky's protocol features several inherent safeguards, including the requirements (1) that intravenous (IV) catheters be initiated only by qualified emergency medical technicians (EMTs) or phlebotomists having a minimum of twelve months of proficiency; (2) that both a primary and an alternative IV site be successfully established prior to the start of the execution procedure; (3) that both the warden and deputy warden be present in the execution chamber with the prisoner to observe the IV site for potential problems, including infiltration; and (4) that the warden orders the flow of chemicals to be redirected to the backup IV site if the prisoner does not lose consciousness within one minute after the thiopental is administered.

Throughout the proceedings, all parties agreed that the condemned inmates would experience a painless death if Kentucky's lethal injection protocol were properly implemented. The petitioners were concerned, however, that a risk existed that the protocol might be improperly administered and that unnecessary, excruciating pain would result. Accordingly, petitioners claimed that this risk was a violation of their Eighth Amendment right against cruel and unusual punishment. In turn, they argued that, when reviewing the constitutionality of the method of execution, the court must consider the followings factors: (1) the inten-

5. Id.
6. Id.
7. Id.
8. Id.
10. Baze v. Rees, 128 S. Ct. 1520, 1537 (2008) (hereinafter "Baze II"). This was the Baze v. Rees case to which the United States Supreme Court granted certiorari.
sity of the pain, (2) the chance of that pain occurring, and (3) the availability of possible alternative means.\textsuperscript{13} The Commonwealth responded by arguing that the petitioners’ proposed minimal-risk standard would force states to engage in a constant review of the constitutionality of their method of execution to rebut each and every novel argument presented by a defendant in a capital case.\textsuperscript{14}

After a bench trial, the trial court upheld the procedure, finding that there was only a \textit{minimal risk} of the improper implementation of the method of execution and that such minimal risk was not a violation of the Eighth Amendment because it did not create a substantial likelihood that pain would occur.\textsuperscript{15} On appeal, the Kentucky Supreme Court upheld the decision of the lower court declaring 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.”\textsuperscript{16} Baze and Bowling then appealed to the United States Supreme Court, which granted certiorari to decide whether Kentucky’s method of execution complies with the Eighth Amendment.\textsuperscript{17}

The petitioners’ claim depended upon the inappropriate administration of the initial drug.\textsuperscript{18} Both parties conceded that failing to effectively administer an adequate dose of thiopental to render the prisoner unconscious creates a significant risk of suffocation from the subsequent administration of pancuronium bromide and that this situation would rise to the level of cruel and unusual punishment.\textsuperscript{19} Additionally, petitioners contended that numerous aspects of the lethal injection protocol permitted opportunities for error.\textsuperscript{20} Petitioners claimed that the Commonwealth could, in the

\begin{itemize}
  \item \textsuperscript{13} \textit{Baze II}, 128 S. Ct. at 1529.
  \item \textit{Id.}
  \item \textit{Id.} The bench trial lasted a week with numerous witnesses and experts testifying. \textit{Id.}
  \item \textit{Baze I}, 217 S.W.3d at 209 (citing Gregg v. Georgia, 428 U.S. 153 (1976)).
  \item \textit{Baze II}, 128 S. Ct. at 1529.
  \item \textit{Id.} at 1533.
  \item \textit{Id.}
  \item \textit{Id.} Petitioners alleged the following risks are inherent in Kentucky's lethal injection protocol: (1) that the thiopental will not be satisfactorily administered to achieve its necessary sedative effect; (2) that further monitoring by experienced personnel is necessary to ensure that thiopental has been adequately administered; (3) that the Commonwealth's adoption of a one drug protocol which eliminates the use of pancuronium and potassium would also eliminate any potential risk of pain; (4) that the thiopental would be improperly prepared because Kentucky uses unqualified personnel to reconstitute a sufficiently effective dose; (5) that the IV line will not be properly inserted causing the first drug to be ineffectively administered; (6) that infiltration of the drugs would go unrecognized because the personnel are not medically trained; (7) that pancuronium serves no therapeutic purpose while eliminating muscle contractions and potentially masking pain and suffering; and (8)
\end{itemize}
alternative, adopt a one-drug protocol, using a single dose of barbiturate.\textsuperscript{21}

Chief Justice Roberts delivered the plurality opinion,\textsuperscript{22} noting first that the United States Supreme Court has never declared a state’s method of execution as violative of the Eighth Amendment.\textsuperscript{23} To determine the historical basis for the inclusion of the Eighth Amendment in the Constitution, the Chief Justice cited \textit{Wilkerson v. Utah},\textsuperscript{24} which examined several cases from England involving the sanctioning of cruel and unusual punishment during executions.\textsuperscript{25} In addition, several other cases were also reviewed.\textsuperscript{26} After this analysis, the plurality concluded that, traditionally, the essential elements that constituted a method of execution as cruel “involved torture or a lingering death.”\textsuperscript{27} The Court explained further that, to establish a violation of the Eighth Amendment, the methods used by the Commonwealth must be likely to cause “needless suffering”\textsuperscript{28} and rise to a level of “sufficiently imminent dangers.”\textsuperscript{29}

Chief Justice Roberts then stressed the incongruity of announcing lethal injection as “objectively intolerable”\textsuperscript{30} when it is, in fact, tolerated by thirty-six states, as well as the federal government.\textsuperscript{31} Furthermore, he observed that the vast majority of states used the same three-drug protocol as Kentucky and that no state uses the alternative one-drug protocol suggested by petitioners.\textsuperscript{32} The plurality then noted that neither isolated mistakes nor the mere potential for pain during an execution renders it “objectively intoler-
able." Thus, a convict is unable to legally challenge a state's execution procedure by simply demonstrating a minimally safer alternative that would reduce or eliminate insubstantial risks of pain. Adopting the petitioners' unworkable standard, the Court reasoned, would convert the judiciary into review boards responsible for characterizing and prescribing optimal guidelines for executions, with each opinion superseded by another round of litigation espousing an innovative or allegedly improved contextual analysis. Rather, the suggested alternatives must be practical, readily enforceable, and adequately address a "substantial risk of serious harm" that can be significantly reduced; the petitioners' proposed methods, which served to lessen only minimal risks, failed to meet these threshold requirements.

Moreover, the Chief Justice rebutted the dissent's belief that examining the inmate for consciousness by saying his name, stroking his eyelashes, or furnishing him with a potent noxious stimulus could effectively lessen the risks associated with the administration of the subsequent drugs before the thiopental achieved its sedative effect. This alleged danger, the plurality declared, is already mitigated because Kentucky's protocol has structured procedural safeguards to ensure the adequate administration of the thiopental. Notably, the plurality asserted, the scheme the dissent postulates involves the inmate achieving a level of unconsciousness described as adequate to elude detection of the improper administration of the thiopental but not sufficient enough to prevent harm. There is no intimation that any of these proposed additional tests could realistically characterize that distinction.

Accordingly, the plurality held that Kentucky's lethal injection protocol complies with the requirements of the Eighth Amendment because what that amendment forbids is the malicious or unjustifiable exposure to "objectively intolerable risk." The risks of improper administration alleged by petitioners cannot be char-

33. Id. at 1531.
34. Id.
35. Baze II, 128 S. Ct. at 1531.
36. Id. at 1532.
37. Id.
38. Id. at 1536.
39. Id.
40. Baze II, 128 S. Ct. at 1536.
41. Id.
42. Id. at 1538.
43. Id. at 1537 (citing Farmer v. Brennan, 511 U.S. 825 (1994)).
acterized as rationally unendurable, nor can they be recognized as proof of the deliberate imposition of an "objectively intolerable risk." Consequently, the Court concluded that a prisoner will not succeed on an Eighth Amendment challenge by merely demonstrating an additional step the State could implement to insure other independently sufficient processes, and it rejected petitioners' proposed "unnecessary risk" standard, as well as the dissent's "untoward risk" analysis.

Justice Alito's concurring opinion focused on considerations of objections to lethal injection protocols within the milieu of practical restraints and the ethical rules of medical professionals. He opined that a challenge to a method of execution should be supported by a majority of scientific opinion, and only then, if a state declined to amend its method in light of such evidence, would that state's action be equivalent to conditions that the Court has, on prior rulings, determined to be violative of the Cruel and Unusual Punishments Clause.

The thrust of petitioners' main argument was that Kentucky's procedure violates the Eighth Amendment by failing to employ a one-drug protocol; petitioners cited expert testimony presented to the trial court justifying that a three-gram dose of barbiturate would cause death within several minutes. Justice Alito observed, however, that there is not widespread belief in the accuracy of that declaration. Additionally, there is published advice against adopting this single drug protocol by the medical community in the Netherlands, where physician assisted suicide is legal. Justice Alito then contrasted this finding with the recom-

44. Id.
45. Baze II, 128 S. Ct. at 1537.
46. Id. at 1538-42 (Alito, J., concurring).
47. Id. at 1540. See Farmer v. Brennan, 511 U.S. 825, 836 (1994).
49. Id.
50. Id. (citing Robert D. Troug, Perspective Roundtable: Physicians and Executions-Highlights from a Discussion of Lethal Injection, 358 NEW ENG. J. MED. 448 (2008)). Paraphrasing Dr. Robert D. Troug, Professor of Medical Ethics and Anesthesiology at Harvard Medical School: many experts have stated that several grams of barbiturate are completely lethal. Id. In this country, however, we do not have a lot of experience with these dosages. Id. In Holland, where euthanasia is legal, we reviewed 535 cases of euthanasia from a study in 2000. Id. In 69% of those cases, a paralytic was given. Id. I think what the Dutch realize is that it's actually quite difficult to kill a person with just a large dose of barbiturate. Baze II, 128 S.Ct. at 1541 (citing Robert D. Troug, Perspective Roundtable: Physicians and Executions-Highlights from a Discussion of Lethal Injection, 358 NEW ENG. J. MED. 448 (2008)). Additionally, they reported that in 6% of those cases, where a single drug was given, there were problems with completion. Id. And in five of those instances, the patient actually woke up from their barbiturate induced coma. Id.
mendation from the Royal Dutch Society for the Advancement of Pharmacy, and he concluded that governmental action regarding capital punishment cannot be prompted by the attestations of a single expert or by judicial interpretations based on such affirmations.

Justice Alito emphasized that the controversy over the constitutionality of the method of execution presented here should remain distinct from the disputatious issue of capital punishment itself. He further articulated that the Court should not construct a de facto moratorium on the death penalty by embracing "method-of-execution rules" that prohibit the mobilization of litigation.

The concurring opinion written by Justice Breyer cited a 2005 Lancet article, its subsequent rebuttal, as well as an article that appeared in the 2002 edition of the Ohio State Law Journal. He addressed petitioners' contention that the use of pancuronium to euthanize animals is contradictory to standards of veterinary practice in the United States, and its use for human euthanasia is encouraged in the Netherlands.

While Justice Breyer agreed that the pertinent elements of the "degree of risk," the "magnitude of pain," and the "availability of alternatives" are complementary and that each factor must be evaluated, he simultaneously concluded that the virtue of the legal

51. Id. at 1541 (Alito, J., concurring). Pancuronium is recommended as part of a euthanasia protocol by the Royal Dutch Society for the Advancement of Pharmacy. Id.
52. Id. at 1541-42.
54. Id.
55. Id. at 1564 (Breyer, J., concurring). An article by Dr. Leonidas G. Koniaris and others was published in the April 16, 2005 issue of Lancet where the authors reviewed toxicology autopsy results from 49 executions in various states. Leonidas G. Koniaris, et al., Inadequate Anaesthesia in Lethal Injection for Execution, 365 Lancet 1412 (2005). This study focused on the efficacy of the barbiturate in sedating the condemned. Id. It reported that several states used 2 grams of thiopental (Kentucky uses 3 grams) which was several times the dose given in routine surgical procedures. Id. The researchers noted that the level of barbiturate measured from the blood hours after death was less than the level expected during surgery. Id. They asserted that 43% of the specimens had barbiturate concentrations compatible with consciousness. Id. But this study may be significantly misleading; in its issue from September 24, 2005, the Lancet published several rebuttals to this data explaining that a barbiturate can readily diffuse from the blood into adjacent tissues after death. Jonathan I. Groner, Inadequate Anaesthesia in Lethal Injection for Execution, 366 Lancet 1073 (2005).
56. Baze II, 128 S. Ct. at 1565 (Breyer, J., concurring) (citing Deborah W. Denno, When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What It Says About Us, 63 Ohio St. L.J. 63 (2002)). Professor Denno analyzed lethal injection execution data from three dozen states that use thiopental. Id. She reported 31 executions occurring over a 25 year period where there was some type of problem or difficulty noted during the procedure. Id.
57. Id. at 1565-66.
issue commenced must ultimately hinge upon the proof presented.\textsuperscript{58} He found inadequate evidence in both the transcript and in the pertinent literature that the Commonwealth's execution method represents a "significant risk of unnecessary suffering."\textsuperscript{59}

Joined by Justice Scalia, Justice Thomas authored an opinion concurring only in the Court's judgment and took the position that "a method of execution violates the Eighth Amendment only if it is deliberately designed to inflict pain."\textsuperscript{60} He briefly explored the history of capital punishment\textsuperscript{61} and determined that the Court has defined the characteristics of exacerbated forms of the death penalty as those which would threaten and oppress the felonious and were constructed to "inflict pain and suffering" beyond that which is required for death.\textsuperscript{62}

Justice Thomas believed that the Court has consistently interpreted the Cruel and Unusual Punishments Clause according to the original intention of the Framers: "to prohibit torturous modes of punishment akin to those that formed the historical backdrop of the Eighth Amendment."\textsuperscript{63} Furthermore, Justice Thomas stated that the Court has never implied that, under an Eighth Amendment analysis, a method of execution is deemed to be cruel and unusual merely because it associated with some risk of pain, regardless of whether that risk is "substantial," "unnecessary," "untoward," or amendable to mitigation through surrogate procedures.\textsuperscript{64} He additionally opined that the standard the Court has unambiguously inferred is that the Eighth Amendment forbids the "intentional infliction of gratuitous pain."\textsuperscript{65}

Within the emulous paradigms articulated by the plurality and the dissent, the only difference, according to Justice Thomas, between a method of execution that conforms to the Eighth Amendment and one that does not may be determined by something as

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\textsuperscript{58} Id. at 1563 (Breyer, J., concurring).
\textsuperscript{59} Id.
\textsuperscript{60} Id. at 1556 (Thomas, J., concurring).
\textsuperscript{61} \textit{Baze II}, 128 S. Ct. at 1556-57. Hanging was the usual means of execution. Id. at 1556. However, a death sentence could be intensified by other methods such as burning at the stake, hanging the prisoner in a metal enclosure and allowing the body to decompose publicly, beheading, and disemboweling. Id. at 1556-57.
\textsuperscript{62} Id. at 1557-58.
\textsuperscript{63} Id. at 1559.
\textsuperscript{64} Id. at 1560.
\textsuperscript{65} Id. at 1560. No analogous inquiry of death by firing squad versus hanging was required in \textit{Wilkerson}. Id. In addition, the Court did not exam the particular procedures used by a firing squad in order to ascertain whether or not they involved risks of pain that could be mollified by implementing variant protocols. Id.
innocuous as the stroking an eyelash.\textsuperscript{66} He avowed that the Court has neither the sovereignty nor the proficiency to regulate the states' implementation of the capital punishment with such a consuetude.\textsuperscript{67}

Consequently, Justice Thomas rebuffed as both unorthodox and impracticable any archetype necessitating that the courts harmonize the utility and handicaps of different methods of execution.\textsuperscript{68} Instead, he would circumscribe the Court to weighing only whether the challenged method was axiomatic in exposing the inmate to "significantly more pain than traditional modes of execution."\textsuperscript{69}

Justice Thomas reiterated that the Commonwealth's lethal injection protocol will result in a precipitous and pain-free death if properly administered.\textsuperscript{70} Accordingly, the challenge that the Kentucky's pain-avoidance procedure might inadvertently fall short because the executioners may error during administration, does not rise to the level that would support an Eighth Amendment claim.\textsuperscript{71} Therefore, Thomas concluded, the petitioners' argument must fail because "Kentucky's lethal injection protocol is designed to eliminate pain rather than to inflict it."\textsuperscript{72}

Justice Stevens authored an additional concurring opinion focusing on the use of pancuronium, the constitutionality of the three-drug protocol, and the justification for the death penalty itself.\textsuperscript{73} He also observed that pancuronium establishes a risk that the condemned will suffer agonizing pain prior to death.\textsuperscript{74} Because of such potential risk, a consensus exists among veterinarians in the United States that the use of the drug should be prohibited for animal euthanasia.\textsuperscript{75} Moreover, the use of pancuronium was especially alarming to Justice Stevens because, in this case,
the trial court found that it "served no therapeutic purpose." Consequently, he stated, it is not medically necessary that the Commonwealth use pancuronium in the protocol when it is subsequently followed by potassium chloride, which will stop the inmate's heart and cause imminent death. In his analysis, Justice Stevens cited Gregg v. Georgia, and he explained that, unless a criminal punishment occasions a valid penological action, it comprises "a gratuitous infliction of suffering" violative of the Eighth Amendment. He observed, at that time, the Court had identified three societal purposes for sentencing an inmate to death: "deterrence," "incapacitation," and "retribution." He stated that our society has incrementally moved away from distasteful retribution towards more compassionate forms of capital punishment. However, by demanding that an execution be virtually painless, society inevitably safeguards the inmate from enduring any penalty that is commensurate with the anguish imposed upon his victim.

He continued that the Court's previous treatment of this issue indicates that a sanction may be "cruel and unusual because it is excessive and serves no valid legislative purpose." Justice Stevens noted that Supreme Court cases holding certain sanctions as excessive—and therefore in violation of the Eighth Amendment—"relied heavily on 'objective criteria,' such as legislative enact-

76. Baze II, 128 S. Ct. at 1543. According to the state trial court, pancuronium inhibits involuntary muscle movements during the procedure and causes the cessation of respiration. Id. at 1535.
77. Id. at 1544-45. There is no national recommendation of the use of pancuronium that deserves any unique deference. Id. at 1544. Most legislators have not specifically enacted legislation endorsing the use of pancuronium. Id. Justice Stevens is convinced that in those states where the issue was specifically addressed, they were formulaic or the product of legislative accommodation, rather than a cautious resolution of pertinent deliberations. Id. at 1545.
80. Id. at 1547. Incapacitation, which may have been rational in 1976, is no longer justifiable because current laws provide for life imprisonment without the possibility of parole. Id. Recent opinions intimate that support for the death penalty wanes when presented with the alternative of life without the possibility of parole. Note, A Matter of Life and Death: The Effect of Life-Without-Parole Statutes on Capital Punishment, 119 HARV. L. REV. 1838, 1864 (2006). In spite of three decades of research, there remains no decisive statistical evidence that the death penalty inhibits criminals. Mocan & Gittings, Getting Off Death Row: Commuted Sentences and the Deterrent Effect if Capital Punishment, 46 J.L. & ECON. 453 (2003). Retribution remains as the foremost rationale for prescribing the death penalty. Baze II, 128 S. Ct. at 1547.
81. Baze II, 128 S. Ct. at 1548.
82. Id. This progression actually attenuates the very hypothesis on which public support of the retribution rationale is positioned. Id.
83. Id. at 1549 (quoting Furman v. Georgia, 408 U.S. 238 (1972)).
ments." However, in those opinions, he observed, the Court acknowledged that objective evidence is not completely determinative of the controversy because the Constitution envisions that the Court's own judgment will be inextricably linked to the examination of the capital punishment question under the Eighth Amendment.

Justice Stevens was also uneasy with the rules that would vest a defendant of a trial by impartial jurors representing a fair nonpartisan segment of the populace. He asserted that disputes concerning jury challenges were really just a process of acquiring a tendentious "death qualified" jury. Accordingly, Justice Stevens opined, any chance of executing innocent defendants can be completely mitigated by holding the death penalty as unconstitutional.

However, Justice Stevens also observed that the Court has asserted that the death penalty is constitutional and further opined that the Court has an established foundation for assessing the constitutionality of this method of execution. Respecting those precedents, Justice Stevens declared that the unavailing evidence submitted by petitioners could not prove that Kentucky's method of execution violated the Eighth Amendment, and he reluctantly agreed with the plurality.

Justice Scalia's concurring opinion was written in direct response to Justice Stevens's concurring opinion. Finding that the very text of the Constitution recognizes that the capital punish-

84. Id. (citing Solem v. Helm, 463 U.S. 277 (1983) (holding that the Eighth Amendment prohibits not only torturous penalties but also sentences that are disproportionate to the crime committed); Harmelin v. Michigan, 501 U.S. 957 (1991) (holding that mandatory penalties may be cruel); United States v. Bajakajian, 524 U.S. 321 (1998) (holding that The Excessive Fines Clause limits the government's power to extract payments, as punishment for an offense); Atkins v. Virginia, 536 U.S. 304 (2002) (holding that death is an excessive sanction for a mentally retarded defendant); Coker v. Georgia, 433 U.S. 584 (1977) (holding that the death penalty is an excessive punishment for the crime of raping a 16 year old girl); Enmund v. Florida, 458 U.S. 782 (1982) (holding the death penalty not applicable to a murderer who did not intend to kill his victim)).

85. Id. at 1549-50.

86. Baze II, 128 S. Ct. at 1550.

87. Id. at 1550. There is an inference that the death penalty would be infrequently issued by 12 randomly chosen jurors. Id. Justice Stevens argues that such a presumption supports the conclusions that the death penalty is extreme. Id.

88. Id. at 1551. Justice Stevens reflected on his own judicial experience in concluding that the constraint of the death penalty represented the groundless termination of life with negligible contributions to any tangible social scheme. Id. (citing Furman, 408 U.S. at 312) (White, J., concurring).

89. Id. at 1552.

90. Id.

91. Baze II, 128 S. Ct. at 1552-56 (Scalia, J., concurring).
ment is a legitimate legislative option, Justice Scalia argued that Justice Stevens's inferences were insupportable within the meaning of the Constitution. Additionally, Justice Scalia asserted that it is the legislature, elected through the democratic process, rather than judiciary that decides what constitutes a meaningful contribution to society.

Moreover, Scalia reasoned that the Fifth Amendment demands a presentment or indictment by a grand jury to charge an individual with a capital offense and it prohibits the taking of life without due process of law. Justice Scalia further commented that the same Congress that contemplated the Eighth Amendment also promulgated the Act of April 30, 1790, which made several violations punishable by execution. In addition, Justice Scalia asserted that no judicial authority supported the theory that the charge of death penalty was unconstitutional other than *Furman v. Georgia*, which established a moratorium on the death penalty that ended four years later in *Gregg* with the very assistance of Justice Stevens.

Justice Scalia opined that legal execution may be the befitting punitive measure in extreme cases as an assertion by the community that certain crimes are so horrendous that the only reasonable response is the imposition of the death penalty. In addition, he declared that the societal value of capital punishment, as a deterrent to crime, is a multifaceted factual issue deciphered best by the legislatures, who can appraise the results of statistical studies with a type of flexibility that is unavailable to the judiciary.

Justice Scalia also noted that, according to Justice Stevens, the death penalty promotes no societal purpose because it is allegedly neither preventative nor retributive. In interpreting the Constitution, Justice Scalia felt that it is was not the Court's prerogative to adopt "one set of responsible empirical studies over another."

92. *Id.* at 1552.
93. *Id.*
94. *Id.* (quoting U.S. CONST. amend. V).
95. 1 STAT. 112, 1st Cong., 2d Sess. (1790). This act prescribed the sentence of death for treasonous acts against the United States. *Id.*
96. *Baze II*, 128 S. Ct. at 1552 (Scalia, J., concurring) (citing 1 STAT. 112).
97. 408 U.S. 238 (1972).
98. *Baze II*, 128 S. Ct. at 1552-53 (Scalia, J., concurring). The people have decided that there is sufficient contribution to society from the death penalty and that judgment should not be disturbed by unelected judges. *Id.*
99. *Id.* at 1554 (citing *Gregg*, 428 U.S. at 184).
100. *Id.* (citing *Gregg*, 428 U.S. at 186).
101. *Id.* at 1553.
102. *Id.* at 1554.
Moreover, he opined that the Court should not require that state legislatures justify their criminal penalties with infallible research rather than realistic forecasts regarding human comportment.\(^{103}\) Justice Scalia asserted that Justice Stevens relied on his own experience in concluding that the death penalty is unconstitutional.\(^{104}\) According to Justice Scalia, this conclusion is a quintessential expression of “rule by judicial fiat.”\(^{105}\)

Justice Ginsburg’s dissent\(^{106}\) declared that the constitutionality of Kentucky’s execution procedure hinged on whether prisoners are sufficiently anesthetized by the sodium thiopental.\(^{107}\) She concluded that Kentucky’s protocol lacked the basic safeguards implemented by other states to confirm the prisoner’s unconsciousness prior to the injection of the subsequent drugs.\(^{108}\)

In addition, Justice Ginsberg reviewed the Court’s prior cases and found that no concise definitive legal standard had emerged “for determining the constitutionality of a method of execution.”\(^{109}\) Moreover, she articulated that “the age of the opinions” limited their appropriateness for resolving the present-day dispute because the Eighth Amendment must be analyzed in relation to the maturing standards of a society.\(^{110}\) She drew further analysis from more recent judicial decisions.\(^{111}\)

While Justice Ginsberg was in agreement with the plurality regarding the issues under consideration, she disagreed with Chief Justice Roberts to the extent that his significant risk test established a threshold for the first of the factors, arguing instead that

\(^{103}\) *Baze II*, 128 S. Ct. at 1554.

\(^{104}\) Id. at 1555.

\(^{105}\) Id. Legislatures and the Congress are inattentive and react out of habit rather than truly deliberating. Id. Research in support of a deterrent effect for the death penalty is minimized. Id. Those that support capital punishment are characterized as vengeful. Id. Justice Stevens’ experience predominates over all other considerations. Id.

\(^{106}\) Id. at 1567-72 (Ginsberg, J., dissenting). Justice Souter joined the opinion. Id.

\(^{107}\) Id. at 1567.

\(^{108}\) *Baze II*, 128 S. Ct. at 1567. “[O]ther States have adopted safeguards not contained in Kentucky’s protocol.” Id. at 1570. Florida pauses between injections to ascertain unconscious in the prisoner. Id. (citing Lighthorne v. McCollum, 969 So.2d 326, 346 (Fla. 2007)). Kentucky’s protocol does not include any such measure, or any other tests to determine whether the inmate is properly sedated Id. at 1569. There is no touching of the inmate or calling his name. Id. In Missouri, the prisoner must be examined to confirm unconsciousness. *Baze II*, 128 S. Ct. at 1571 (quoting Taylor v. Crawford, 487 F.3d 1072, 1083 (8th Cir. 2007)). In California, the inmate’s eyelashes are stroked. Id. In Alabama, the inmate’s name is called. Id. In Indiana, the injection site is inspected after the thiopental is administered. Id. Ammonia tablets are then used to gauge a response. Id.

\(^{109}\) Id. at 1568.

\(^{110}\) Id. at 1568 (quoting Atkins v. Virginia, 536 U.S. 304, 311-312 (2002)).

\(^{111}\) Id. (citing *Gregg*, 428 U.S. at 153). Death penalty sentencing may not be imposed in any manner which is considered arbitrary and capricious. Id.
the three factors of risk, pain, and alternatives are interdependent and a major emphasis on one reduces the consequence of the others. Additionally, Justice Ginsberg asserted that the decisive factor is "whether a feasible alternative exists." As infrequent as errors may occur, the consequences of a mistake regarding the prisoner's consciousness are appalling and effectively rendered indiscernible after the injection of pancuronium. She noted that, if readily available measures can objectively increase the probability that the protocol will be painless, then a state that refuses to implement such measures fails to conform to the modern standards of decency. Justice Ginsberg would have remanded the case with instructions to consider whether the failure to implement the readily available protective measures, confirming unconscious after the injection of sodium thiopental, "creates an untoward, readily avoidable risk of inflicting severe and unnecessary pain."

Over the last several decades, commentators have categorized the Eighth Amendment limitations into five broad interrelated types: (I) means of punishment, (II) proportionality, (III) power to criminalize, (IV) conditions of confinement, and (V) procedural due process. Since the ratification of the Eighth Amendment, the Supreme Court decided only three cases under Category I that dealt specifically with the constitutionality of a method of execution. Moreover, in these early cases, the constitutionality of the death penalty itself was not at issue.

I. MEANS OF PUNISHMENT (METHOD OF EXECUTION)

In Wilkerson v. Utah, the Court held that a firing squad, as a mode of enforcing the death penalty, was not cruel and unusual...
punishment forbidden by the Constitution.\textsuperscript{121} In \textit{In re Kemmler},\textsuperscript{122} the Court asserted that the decision of the highest court of New York, upholding death by electricity as not a cruel and unusual punishment within the meaning of the Constitution, was not examinable by the Supreme Court.\textsuperscript{123} Subsequently, in \textit{Louisiana ex rel. Francis v. Resweber},\textsuperscript{124} the Court ruled that carrying out an execution of a convicted inmate after the first execution attempt failed because of mechanical defects in the electric chair would not constitute double jeopardy amounting to a denial of due process nor constitute cruel and unusual punishment forbidden by the Eighth Amendment.\textsuperscript{125}

\section*{II. PROPORTIONALITY}

In \textit{Trop v. Dulles},\textsuperscript{126} Chief Justice Warren declared that the meaning of the Eighth Amendment should be determined by the current standards of decency.\textsuperscript{127} In addition, the penalty imposed must comport with the "dignity of man."\textsuperscript{128} This interpretation means that "the punishment must not involve the unnecessary and wanton infliction of pain"\textsuperscript{129} and that it "must not be grossly out of proportion to the severity of the crime" for which the defendant was convicted.\textsuperscript{130}

\begin{thebibliography}{99}
\bibitem{121} \textit{Id.} at 134-35.
\bibitem{122} 136 U.S. 436 (1890).
\bibitem{123} \textit{Id.} The death penalty prescribed by Laws N.Y. 1888, c.489 provided that "punishment of death must in every case be inflicted by causing to pass through the body of the convicted a current of electricity of sufficient intensity to cause death." \textit{Id.}
\bibitem{124} 329 U.S. 459 (1947). Petitioner Willie Francis was properly convicted of murder and sentenced to death. \textit{Id.} On May 3, 1946, he was placed in the electric chair of the State of Louisiana. \textit{Id.} When the executioner threw the switch, death did not result, presumably due to some mechanical problem. \textit{Id.} He was then returned to prison and a new death warrant was issued for May 9, 1946. \textit{Id.} Resweber was the Sheriff of the Parish of St. Martin, \textit{La. Louisiana ex rel. Francis,} 329 U.S. at 459. A suit \textit{ex rel.} is typically brought by the government upon the application of a private party (called a 	extit{relator}) who is interested in the matter. \textit{BLACK'S LAW DICTIONARY} 603 (8th ed. 2004).
\bibitem{125} \textit{Id.} at 463.
\bibitem{126} 356 U.S. 86 (1958). Albert Trop had lost his citizenship after being convicted of wartime desertion. \textit{Id.} If a statute imposes a restriction for punishment purposes it is considered to be penal. \textit{Id.} at 96. A nonpenal statute would be aimed at other legislative purposes. \textit{Id.} The Court had to decide if the Constitution permitted Congress to use a criminal punishment to strip an individual of his citizenship. \textit{Id.} at 99. The Court found that Congress could not punish in this manner. \textit{Trop,} 356 U.S. at 103.
\bibitem{127} \textit{Id.} at 101.
\bibitem{128} \textit{Id.} at 100.
\bibitem{129} \textit{Gregg,} 428 U.S. at 173 (citing \textit{Furman v. Georgia,} 408 U.S. 238, 392-93 (1972)).
\bibitem{130} \textit{Id.} (citing \textit{Trop,} 356 U.S. at 100).
\end{thebibliography}
Examined under this proportionality analysis, two types of power were limited. First, the legislature’s power to authorize the death penalty as a punishment for a nonfatal crime, such as rape, was curtailed. Second, the legislature’s power to promulgate capital punishment for a particular category of defendant, such as the insane or juvenile offenders, was similarly restricted.

III. POWER TO CRIMINALIZE

Before its 1962 incorporation into the Due Process Clause of the Fourteenth Amendment, the Cruel and Unusual Punishments Clause was discussed in only nine cases in the Supreme Court. The substantive limits of the power to criminalize under the Eighth Amendment were articulated in Robinson v. California, where the Court held a state statute criminalizing the status of being a drug addict as unconstitutional. Additionally, in Powell v. Texas, the Court articulated that “the entire thrust of Robinson’s interpretation of the Cruel and Unusual Punishments Clause is that criminal penalties may be inflicted only if the accused has committed some act, has engaged in some behavior, which society has an interest in preventing, or perhaps in historical common law terms, has committed some actus reus.”

133. Denno, supra note 117, at 330 (citing Radin, supra note 132, at 993); Ford v. Wainwright, 477 U.S. 399, 405-10 (1985) (holding that the Eighth Amendment prohibits state from inflicting the penalty of death upon a prisoner who is insane); Thompson v. Oklahoma, 487 U.S. 815, 821-38 (1988) (holding that Eighth and Fourteenth Amendments prohibited execution of defendant convicted of first-degree murder for offense committed when defendant was 15 years old).
134. Robinson v. California, 370 U.S. 660, 662 (1962). These cases include: Trop v. Dulles, 356 U.S. 86 (1958); Louisiana ex rel. Francis v. Reasenberg, 329 U.S. 459 (1947); Badders v. United States, 240 U.S. 391 (1916); Weems v. United States, 217 U.S. 349 (1910); Howard v. Fleming, 191 U.S. 126 (1903); O’Neil v. Vermont, 144 U.S. 323 (1892); In re Kemmler, 136 U.S. 436; Wilkerson v. Utah, 99 U.S. 130 (1878); and Pervear v. Commonwealth, 72 U.S. (5 Wall.) 475 (1866)). In O’Neil v. Vermont, 144 U.S. 323 (1892), the question was raised but not decided. As a Federal question, it has always been ruled that the Eighth Amendment of the U.S. Constitution did not apply to the States. O’Neil, 144 U.S. at 332 (citing Pervear v. Com., 5 Wall. 475, (1866)).
136. 392 U.S. 514 (1968)
137. Powell v. Texas, 392 U.S. 514, 533 (1968). There, the Supreme Court held that conviction for public drunkenness of one who was to some degree compelled to drink did not
Later cases focused on the applicability of the Eighth Amendment to the prisoner's claims of cruel confinement. In Gates v. Collier, prison inmates sued, arguing that a Mississippi prison's administrative, maintenance, and operating practices—as well as prison conditions themselves—were unconstitutional. The Fifth Circuit held that prisoners were entitled to relief under the Eighth Amendment when they proved threats to their personal safety from exposed electrical wiring, the mingling of inmates with serious contagious diseases, and deficient firefighting measures. In DeShaney v. Winnebago County Department of Social Services, the Court asserted that when the State takes a prisoner into its custody, the Constitution imposes upon it a corresponding duty to assume some responsibility for the inmate's general well-being and safety.

In Estelle v. Gamble, the Court ruled that accidental or inadvertent failure to provide adequate medical care to an inmate would not be violative of the Eighth Amendment, but deliberate indifference to significant medical requirements of prisoners would constitute the gratuitous infliction of pain contrary to the contemporary standards of decency.

Notably, in Wilson v. Seiter, the Court declared that prisoners' Eighth Amendment claims regarding their confinement required an inquiry into the prison official's state of mind. In Hel-

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138. See Gates v. Collier, 501 F.2d 1291 (5th Cir. 1974).
139. Gates, 501 F.2d at 1291.
140. Id. Moreover, in Youngberg v. Romeo, 457 U.S. 307 (1982), the Court stated that it was cruel and unusual punishment to hold an inmate in unsafe conditions.
141. Id. The Court of Appeals found defendants were implementing racially discriminatory practices; that the prison's conditions which deprived inmates of basic hygiene, adequate medical treatment, conditions of solitary confinement, and the prison's failure to provide sufficient protection against physical assaults by inmates constituted cruel and unusual punishment; and that the practice of censoring all incoming and outgoing mail was unconstitutional. Id.
143. DeShaney, 489 U.S. at 199-200.
144. 429 U.S. 97 (1976).
145. Estelle, 429 U.S. at 103-04, 105-06.
147. Wilson, 501 U.S. at 299. Whether characterizing the treatment received by the inmate, the conditions of confinement, or the failure to adequately address medical needs, the appropriate review entails application of the deliberate indifference standard opined in Estelle. Id. at 297.
a prisoner brought an Eighth Amendment challenge based upon possible future harm to him by exposure to environmental tobacco smoke ("ETS"). The Court required McKinney to prove both the subjective and objective elements necessary to sustain an Eighth Amendment violation. The objective factor would only be proved if McKinney showed that he was personally at risk, due to an exposure to extraordinarily high ETS levels. Furthermore, this objective factor "requires a court to assess whether society considers the risk that the prisoner complains of to be so grave that it violates contemporary standards of decency to expose anyone unwillingly to such a risk." The Court considered legislation enacted by the country's legislatures as the best evidence of these evolving standards. Additionally, the Court required McKinney to satisfy the subjective factor by showing that the prison officials acted with "deliberate indifference" to the prisoners' well-being.

In Farmer v. Brennan, a transsexual prisoner brought a suit alleging that, by placing him in the general prison population, the prison officials acted with deliberate indifference to his safety. In this case, the Court further refined the definition of deliberate indifference and predicated a prison official's liability, under the Eighth Amendment analysis, only upon those officials who knowingly disregarded a substantial risk to the prisoner's safety or health. Additionally, the official must have cognizance of the fact that the potential risk of serious harm exists, and he must conclusively form that supposition. The Court asserted that the "subjective recklessness" standard developed in criminal law was both a recognizable and workable standard and endorsed it as the test for "deliberate indifference" under the Eighth Amendment.

149. *Helling*, 509 U.S. at 27.
150. *Id.* at 35.
151. *Id.*
152. *Id.* at 36.
157. *Id.* at 837.
158. *Id.*
159. *Id.* at 839-40.
V. PROCEDURAL DUE PROCESS

The procedural due process limitation on the death penalty was discussed in *Furman v. Georgia*, where the Court first asserted that death is a peculiarly extreme penalty in its irrevocability and rankness, and therefore required heightened safeguards. Moreover, the Court opined that the legislatures, rather than the courts, were best constituted to respond to the will and moral values of the people in a democratic society. The Justices could not overrule a class of penalties merely because the judiciary deemed lesser forms of discipline sufficient to meet penological needs. The Court concluded, however, that the penalty of death may not be imposed in an arbitrary or capricious manner but can be met by a carefully drafted statute that ensures sufficient information and guidance is given to the sentencing authority.

In *Gregg v. Georgia*, the Court noted that, in the United States, the mandate of execution for the conviction of murder was a traditional penalty. Also, it was evident from the text of the Constitution that capital punishment was adopted by the Framers. Moreover, the simultaneous ratification of the Fifth Amendment excogitated this punitive interdiction. Finally, the Fourteenth Amendment—affirmed some seventy-five years later—provided that "no State shall deprive any person of life, liberty, or property without due process of law." The Court also commented that the states' legislative reaction to *Furman* was the most conspicuous attestation of society's endorsement of capital punishment.

162. *Id.* at 383. "The paucity of judicial decisions invalidating legislatively prescribed punishments is powerful evidence that in this country legislatures have in fact been responsive-albeit belatedly at times-to changes in social attitudes and moral values." *Id* at 384.
163. *Id* at 451.
164. *Id* at 249-257.
166. *Gregg*, 428 U.S. at 176-77.
167. *Id.* at 177. The First Congress of the United States enacted legislation authorizing the death penalty for specific crimes. See 1 STAT. 112 (1790).
168. *Gregg*, 428 U.S. at 177. The Fifth Amendment imposed certain limitations on the prosecution of capital cases: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury . . . ; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . . nor be deprived of life, liberty, or property, without due process of law . . . ." *Id*.
169. *Id*.
In the present case, essentially three standards of review were articulated by the Justices. First, the plurality held that a method of execution would violate the Eighth Amendment if it posed an "objectively intolerable risk" that could be significantly reduced by adopting readily available alternative procedures.171 Second, Justice Thomas opined that a method of execution violated the Eighth Amendment only if it was "deliberately designed to inflict pain."172 Third, Justice Ginsberg asserted that any "untoward risk" to the condemned would be violative of the Eighth Amendment.173

While Chief Justice Roberts believed that the plurality's standard would prevent future litigation, let us closely examine those variables: What is an objectively intolerable risk? What is severe pain? What is a significant reduction? What is readily available? By adopting this loosely defined standard for method of execution cases, the Court has blurred the conventional rule that once defined the parameters of cruel and unusual punishment. Ambiguity breeds litigation.

Traditionally, the death penalty was "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."174 This tradition is the bright-line test articulated by Justice Thomas, and that test appears to be the most pragmatic, consistent, and reproducible strategy for analyzing a method-of-execution case. Was there a wanton and willful infliction of unnecessary pain or suffering? If the answer is no, the Eighth Amendment requirements should be satisfied.

During oral arguments for this case, Justice Scalia offered this query: if the state is not using the least painful way to execute an inmate, is the state thereby inflicting unnecessary pain?175 However, the Eighth Amendment's concern is with unnecessarily cruel punishment—the intentional infliction of pain (unnecessary and wanton)—not suffering incidentally necessary to carry out the death sentence.176

If Justice Ginsberg's definition were adopted, the Court would become embroiled in the micromanagement of the states' methods.

172. *Id.* at 1556.
173. *Id.* at 1572.
of execution. Inmates would continually argue that their executions could be made a little safer by implementing an additional step here or there, such as stroking the eyelashes or pinching the inmates' arms to ascertain their levels of consciousness. Protocols would simply have no endpoint. Adoption of this standard would create another moratorium on capital punishment.

Petitioners alleged that numerous problems with Kentucky's lethal injection protocol existed. Each assertion was dismissed by the Court. In reviewing the protocol, Kentucky had implemented several measures to minimize the inmate's risk of pain and suffering. The protocol mandated the involvement of experienced personnel, frequent practice sessions, redundant IV access, observation of the condemned by the warden, and an alternative plan if the inmate did not lose consciousness within sixty seconds of administration of the thiopental.

As a physician, I believe that the most crucial aspect of the lethal injection protocol is the initiation of a fully functioning IV site. This process usually involves placing a tourniquet around the subject's arm to permit venous engorgement. The site chosen for access is usually in the hand, forearm, or near the antecubital fossa, though an area in the leg or foot could be used as an alternative in patients who have sclerosed veins, such as in some intravenous drug abusers. Once the vein is observed or pal-

177. Id. at 1533.
178. Id. at 1533-34.
179. Id. at 1534.


182. Editor's Note: "Sclerosis," as defined by Stedman's Online Medical Dictionary, means "[i]nduration" or "[t]he process of becoming extremely firm or hard, or having such physical features ." Stedman's Online Medical Dictionary, http://www.stedmans.com/ (last visited May 1, 2009). Merriam-Webster Medical Dictionary defines "sclerosis" as "a pathological condition in which a tissue has become hard and which is produced by overgrowth of fibrous tissue and other changes (as in arteriosclerosis) or by increase in interstitial tissue and other changes (as in multiple sclerosis)." Merriam-Webster Medical Dictionary, http://www.merriam-webster.com/cgi-bin/mwmednlm (last visited April 26, 2009).
pated, and the area prepped, the IV needle is inserted into the
vein and a flashback of blood is noted in the plastic catheter. The
needle is then withdrawn while the catheter is simultaneously
threaded into the vein. A rubber-tipped cap is secured onto the
catheter, and the tourniquet is released. Subsequently, the cathe-
ter is flushed with a syringe of saline to ensure correct placement.
While this flushing occurs, the site is carefully observed for swell-
ing, which, if present, would indicate that the IV has infiltrated
(lost function). If, however, the saline flush flows freely, without
resistance and or noticeable swelling, the IV is presumed to be
open and unobstructed. The catheter then will be secured in its
present place and attached to an IV line. A layman could easily
recognize any swelling. Careful observation of this IV site by the
warden and deputy warden at the time of thiopental injection into
the inmate is, in my medical opinion, within their capabilities and
the most important safeguard in Kentucky's lethal injection proto-
col to ensure adequate administration of the drug and proper se-
dation of the condemned prior to instilling paralysis with the Pa-
vulon.

Alternatively, petitioners argued that Kentucky should adopt a
single barbiturate drug protocol even though no other state has
implemented one.183 They noted that paralytics are forbidden to
be used for euthanizing animals in veterinary practice, while such
single drug protocols are used routinely in that field.184 However,
other methods approved by veterinarians for euthanasia include
pithing, exsanguination, stunning the animal or using a captive
bolt to penetrate the skull.185 Clearly, these methods indicate that
veterinary practice standards for animals should not be extrapo-
lated to humans.186 Interestingly, some of the data from the Neth-
erlands study on euthanasia suggested that it was very difficult to
euthanize patients using a single "lethal" dose of barbiturate, with
several of these patients reportedly waking up from their barbitu-
rate-induced coma.187

Furthermore, in its 2000 Report on Euthanasia, a panel of the
American Veterinary Medical Association ("AVMA") condemned
the use of neuromuscular blockers by themselves as a method for

184. Id. at 1535.
185. 2000 Report of the AVMA Panel on Euthanasia, 218 J. AM. VETERINARY ASS'N 669,
681 (Mar. 1, 2001).
187. Id. at 1541.
euthanizing animals. Additionally, the updated June 2007 AVMA Guidelines on Euthanasia advised several cautions. Neither report ever evaluated pancuronium bromide or Pavulon, the paralyzing agent used in human lethal injection. In regards to neuromuscular blocking agents, the revised fourth appendix of the guidelines, entitled "Some unacceptable agents and methods of euthanasia," had identical language to the 2000 report. The chief mischaracterization came from the body of the guidelines in a comment under the heading of Pentobarbital Combinations—referring to a single product made up of more than one type of drug. Here, the guidelines stated, "a combination of pentobarbital with a neuromuscular blocking agent is not an acceptable euthanasia agent." This combination described a very different set of circumstances. When a single syringe delivers intravenously both the barbiturate and the paralytic simultaneously, it is theoretically possible that the animal (or person) could become paralyzed prior to becoming fully anesthetized and unconscious, which would result in the awareness of suffocation and extreme pain. Death penalty opponents have seized upon this ambiguous language to decry lethal injection protocols. They believed that states were

188. 2000 Report of the AVMA Panel on Euthanasia, 218 J. AM. VETERINARY ASS'N 669, 681 (Mar. 1, 2001). The agents listed in Appendix 4 included nicotine, magnesium sulfate, potassium chloride [sic], and all curariform agents. The recommendations of this report were mischaracterized in Beardslee v. Woodford, 395 F.3d 1064, 1071 (Ca. 2005). Also, in the William & Mary Bill of Rights Journal article of February 2006 entitled "Use of the Drug Pavulon in Lethal Injections: Cruel and Unusual?" where the article attributed the following information to the 2000 AVMA report: when used alone or in combination with sodium pentobarbital, neuromuscular blocking agents - a category that includes pavulon - "cause respiratory arrest before loss of consciousness, so the animal may perceive pain and distress after it is immobilized." 14 WM. & MARY BILL RTS. J. 1184 (2005-2006). This statement does not reflect the actual wording of the cite, Appendix 4. Pavulon is not specifically mentioned in the report. 2000 Report of the AVMA Panel on Euthanasia. The body of the report reads, "A combination of pentobarbital with a neuromuscular blocking agent is not an acceptable euthanasia agent." Id. at 680.

189. AVMA Guidelines on Euthanasia, (Formerly Report of the AVMA Panel of Euthanasia), June 2007. The AVMA Guidelines on Euthanasia have been widely misinterpreted. Id. Please note the following: "The guidelines are in no way intended to be used for human lethal injection." Id. "The applications of a barbiturate, paralyzing agent, and potassium chloride delivered in separate syringes or stages (the common method used for human lethal injection) is not cited in this report. Id. (emphasis added).

190. Id.

191. Supra notes 188 and 189. Both appendices state, "When used alone, these drugs all cause respiratory arrest before loss of consciousness, so the animal may perceive pain and distress after it is immobilized." Id. (emphasis added).

192. Supra note 188.

193. Id.
executing humans in violation of the AVMA policy guidelines for euthanizing animals.\textsuperscript{194} This belief was simply incorrect.

Notably during oral arguments, Chief Justice Roberts opined that appearance equated with dignity for the three-drug protocol—if a single drug protocol was mandated, then future litigants would argue that an inmate must be forced to die an undignified death, referring to the Netherlands study where there were reports of myoclonus (involuntary jerking movements) and vomiting in some patients who did not receive the paralytic.\textsuperscript{195} Summarizing the petitioners' argument, the Supreme Court noted that petitioners asked the Court to invalidate a method of execution that all parties agreed would be entirely pain-free when followed correctly and to order the Commonwealth of Kentucky to adopt a method of lethal injection protocol that had never been used in any execution and that is inconsistent with the laws and practice in every death penalty jurisdiction in the United States.\textsuperscript{196} In this sense, the correct decision was made, but I believe that the wrong standard of review was adopted.

Additionally, the opinion by Justice Stevens deserves some comment. He asserted that capital punishment serves no legitimate penological purpose and recommended that the death penalty be declared unconstitutional.\textsuperscript{197} Justice Scalia appropriately described this remark as the clearest example of "rule by judicial fiat."\textsuperscript{198} Capital punishment is a decision best left to the legislatures, not the judiciary. Consider the response to \textit{Furman}, where the majority of states rewrote their death penalty statutes to comply with the arbitrary-or-capricious standard articulated by the Court.\textsuperscript{199} How could a non-elected Justice have the audacity to presume to know more than the legislatures, the will of the people, or a plain textual reading of the Constitution?

Moreover, some polls show that seventy percent or more of people favor the death penalty for persons convicted of murder.\textsuperscript{200} Assuming these results are somewhat credible, the capital punishment issue illustrates an important exercise in the way the

\begin{itemize}
  \item \textsuperscript{194} Beardslee v. Woodford, 395 F.3d 1064, 1073 (Ca. 2005).
  \item \textsuperscript{195} Transcript of Oral Argument at 10-11, \textit{Baze II}, 553 U.S. ___ (No. 07-5439).
  \item \textsuperscript{196} \textit{Baze II}, 128 S. Ct. at 1535, 1537.
  \item \textsuperscript{197} \textit{Id.} at 1551.
  \item \textsuperscript{198} \textit{Id.} at 1555.
  \item \textsuperscript{199} \textit{Id.} at 1552-53.
\end{itemize}
Constitution can hinder the will of the majority.\textsuperscript{201} There is currently a determined minority of the population who choose to effectively challenge the majority's resolution of the capital punishment issue, primarily based upon moral grounds.\textsuperscript{202} This situation leaves the death penalty in a nebulous state.

In an effort to identify the costs associated with death penalty cases, the ACLU of Northern California obtained documents relating to reimbursements to smaller counties for homicide trials from 1996 through 2005.\textsuperscript{203} The three most expensive cases were the Charles Ng trial ($10.9 million),\textsuperscript{204} the Donald Bowcutt case ($5 million),\textsuperscript{205} and the Scott Peterson trial ($3.2 million).\textsuperscript{206} From 1988 through 1994, approximately 25% of all the rulings by the Supreme Court of California involved death penalty issues.\textsuperscript{207} Yet, since 1976, California has executed only 13 inmates.\textsuperscript{208}

These consequences amount to the worst possible scenario. Though the Supreme Court already demands that the federal government and the states antithesize amongst the caliber of convicted murderers who merit the death penalty and those who do not, such dictates have been arduously realized.\textsuperscript{209} Moreover, the average lapse time between sentencing and execution in the United States has grown steadily from 4.25 years during a period of 1977 to 1983, to an average of 12.75 years in 2007.\textsuperscript{210} In Cali-

\begin{itemize}
    \item \textsuperscript{201} Id. at 28.
    \item \textsuperscript{202} Id at 21, 28. "Killing human beings is an act so awesome, so destructive, so irremediable that no killer can be looked upon with anything but horror, even when that killer is the state." Id. (citing RAOUl BERGER, DEATH PENALTIES: THE SUPREME COURT'S OBSTACLE COURSE 175 n.1 (1982)).
    \item \textsuperscript{203} CALIFORNIA COMMISSION ON THE FAIR ADMINISTRATION OF JUSTICE, FINAL REPORT, 129 (June 30, 2008), www.ccfaj.org.
    \item \textsuperscript{204} Id. The Ng trial costs included $1.24 million for court expenses, $2.2 million for prosecution expenses, and $6.42 million for defense expenses. Id.
    \item \textsuperscript{205} Id. The Bowcutt reimbursement was an advance payment of $5 million for the anticipated costs. Id. Actual costs were not documented. Id.
    \item \textsuperscript{206} Id. The Peterson trial reimbursement included $1.4 million for prosecution expenses and $1.4 million to the City of Modesto for their police expenses. Id. Defense expenses were not reimbursed because Peterson had retained counsel. Id.
    \item \textsuperscript{207} Kozinski, supra note 200, at 7 (citing Gerald F. Uelman, The Lucas Court's Seventh Year: Achieving a Balanced Menu, L.A. DAILY J., June 8, 1994, at 8 tbl.1).
    \item \textsuperscript{208} Death Penalty Information Center, http://www.deathpenaltyinfo.org (last visited April 21, 2009).
    \item \textsuperscript{209} Kozinski, supra note 199, at 30. See Maynard v. Cartwright, 486 U.S. 356, 358-59 (1988) (imposing the death penalty after determining that the aggravating circumstances outweighed the mitigating factors) and Godfrey v. Georgia, 446 U.S. 420, 426 (1980), cert. denied, 456 U.S. 919 (1982) (imposing the death penalty after specifying that the aggravating factors were "outrageously or wanton vile, horrible and inhuman.").
    \item \textsuperscript{210} Death Penalty Information Center, supra note 208.
\end{itemize}
fornia, that average is currently 17.2 years. A recent study by Senior Judge Arthur Alarcon of the U.S. Court of Appeals for the Ninth Circuit described the significant periods of delay that account for California exceeding the national average. They include appointing counsel to handle the direct appeal; 3 to 5 years, scheduling the hearing after the submission of all briefs; 2 years, appointing counsel for the state habeas corpus petition; 8-10 years, and awaiting final decisions in federal habeas corpus petitions; 6 years.

Due to these tremendous financial commitments and time constraints, the pro-death-penalty majority must come to the realization that, as a society, we may be capable of carrying out fifty executions a year, but we cannot do several hundred. Once that notion is countenance, subsequent procedures should establish where and how we should dedicate our prosecutorial assets. Obviously, there is no clear solution, but one suggested approach would focus state resources on the most heinous of murderers, such as assassins, terrorists, or serial killers.

Moreover, Justice Stevens too readily dismissed some of the literature that tended to show that capital punishment has a deterrence factor. For example, a well-known analysis proposed that every execution may avert a median of eighteen murders. If this data is accurate, based upon consequentialist theories of punishment, the death penalty is actually morally obligatory; this

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211. CALIFORNIA COMMISSION ON THE FAIR ADMINISTRATION OF JUSTICE, FINAL REPORT, 122 (June 30, 2008), www.ccfaj.org. Lead counsel must have ten years of criminal litigation experience, including at least two murder cases tried to conclusion. Id. Associate counsel must have three years of criminal litigation experience, including three serious felony cases tried to conclusion. Id.

212. Id. at 122 (citing Arthur L. Alarcon, Remedies for California's Death Row Deadlock, 80 S. CAL. L. REV. 697 (2007)).

213. Id. at 122-23.


215. Id.

216. Id. at 31.


218. Sunstein, supra note 217, at 706-07. Consequentialism is a theory asserting that actions are right or wrong according to their balanced good or bad consequences. TOM AND CHILDRESS, PRINCIPLES OF BIOMEDICAL ETHICS, 340-41 (5th ed. 2001). The "right" act in any set of circumstances is the one that produces the greatest overall result, as determined
notion of morality is based on the assumption that capital punishment counts as an action by the state, while the refusal to impose it counts as an omission.\footnote{Sunstein, supra note 217, at 727.}

Between 1972 and 1976, the Supreme Court effectively produced a moratorium on the death penalty.\footnote{Id. at 712.} Using state-level data from 1977 to 1999, researchers made before-and-after comparisons on the murder rate in each state before and after the death penalty was suspended and reinstated.\footnote{Id. at 711-12 (citing Dezhbakhsh, supra note 211, at 3-4).} The data indicate that murder rates increased immediately after the moratorium and decreased immediately after the moratorium was suspended.\footnote{Id. at 712.} It is possible that capital punishment saves lives, even if it has no deterrent effect. It may do so by incapacitating people who would otherwise kill again, either in prison or in the community after parole.\footnote{Id. at 715-16.}

Conversely, from a deontologist’s perspective, the state-sanctioned death penalty is morally wrong and that wrongfulness is not dependent on any actions that produce a net benefit to society.\footnote{Sunstein, supra note 217, at 718.} This perspective condemns the active imposition of state-sponsored capital punishment but not passive inaction.\footnote{Id. at 719.} Some theorists argue that capital punishment is justified only if and when a rational policy assessment would demonstrate that no alternative approaches could do as much to diminish murder rates.\footnote{Id. at 732.} This construct is analogous to a strict scrutiny standard, but the Supreme Court has not embraced it as a matter of constitutional law.\footnote{Dennis v. United States, 341 U.S. 494, 525 (1951).}

Certainly, the relationship—if one actually exists—between deterrence and the death penalty is multifaceted and may deserve further exploration.

from an objective perspective that gives equal weight to the interests of all the affected parties.\footnote{Deontology is often referred to as Kantian because it is largely based upon the works of Immanuel Kant. Tom, supra note 218, at 352. He argued that certain actions are impermissible regardless of the consequences. Id.}

\footnote{Dennis v. United States, 341 U.S. 494, 525 (1951).}
Since our country’s founding, inmates have been executed by hanging, firing squad, the gas chamber, and electrocution. Surely lethal injection is the most humane technique currently available for accomplishing a mandated execution. However, it is conceivably rational to argue that, as a society, we have evolved to the point where we no longer feel compelled to execute our citizens, even when they commit horrendous crimes. And if that is the case, then juries should find for the alternative punishment of life in prison. But the goal of eliminating the death penalty, however noble, could be more effectively accomplished by efforts aimed at changing the consensus of American society rather than constantly demanding the courts to rule on innumerable trite legal arguments and languid constitutional technicalities.