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BAZE V. REES: LETHAL INJECTION AS A CONSTITUTIONAL METHOD OF EXECUTION

INTRODUCTION

In the realm of capital punishment, method-of-execution challenges have become more common.¹ In *Baze v. Rees*,² the United States Supreme Court considered whether Kentucky's lethal injection protocol satisfied the Eighth Amendment.³ The Court held that the risk of pain from potential maladministration of such a humane method of execution, and Kentucky's refusal to adopt untested alternative methods, did not constitute cruel and unusual punishment.⁴ The plurality developed a three-step process for determining when a method of execution violates the Eighth Amendment.⁵ When there is a "substantial risk of serious harm" and "feasible, readily implemented" alternatives exist, a state violates the Eighth Amendment if it fails to adopt such alternatives, unless it has a "legitimate penological justification" for such failure.⁶

As this Comment presents, the plurality's approach solved some problems associated with method-of-execution challenges, but other troubles remain. By implementing a purposive test in the creation of its "substantial risk" standard, the Court eliminated some of the subjective problems associated with the "evolving standards of decency" test.⁷ However, the Court did not perform a proper pain analysis, practically ignoring scientific testing and medical evidence surrounding lethal injection.⁸ Without such an inquiry, there is no guarantee that the use of lethal injection will comport with the Eighth Amendment.⁹

Part I of this Comment reviews the history of methods of execution and the creation of lethal injection. Part II provides an overview of the plurality, concurring, and dissenting opinions. Part III analyzes lethal injection in light of the plurality opinion. Part III suggests that the plurality integrated a purposive test for constitutionality into the objective "evolving standards of decency" test, thus comporting with the penological goals of society and creating stronger precedent. Part III also argues,

1. See, e.g., Deborah W. Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*, 76 *FORDHAM L. REV.* 49, 107 (2007).

2. 128 S. Ct. 1520 (2008).

3. *Id.* at 1529.

4. *Id.* at 1526.

5. *Id.* at 1532.

6. *Id.*

7. *Id.* at 1531; see William W. Berry III, *Following the Yellow Brick Road of Evolving Standards of Decency: The Ironic Consequences of "Death-is-Different" Jurisprudence*, 28 *PACE L. REV.* 15, 17-25 (2007).

8. See *Baze*, 128 S. Ct. at 1533.

9. See Denno, *supra* note 1, at 121.

however, that the Court should perform an extensive pain analysis, including both scientific testing and medical opinion evidence, in order to ensure that lethal injection complies with the Eighth Amendment. Finally, Part III concludes by proposing methods by which society can assure the constitutionality of lethal injection as the least severe method of execution.

I. BACKGROUND

A. *A History of Methods of Execution and Oklahoma's Creation of Lethal Injection*

The Eighth Amendment provides that "cruel and unusual punishments [shall not be] inflicted."¹⁰ Capital punishment has not traditionally been considered cruel and unusual, provided that the methods of execution are not excessive and comport with "evolving standards of decency."¹¹

As society's view of humane punishment has changed, so have its methods of execution.¹² Hanging was the principal form of punishment both before and after the enactment of the Eighth Amendment.¹³ Occasionally, death sentences were intensified through the use of "superadded" punishments, but by the late eighteenth century such violent modes of execution were considered both cruel and unusual.¹⁴ In 1888, New York became the first state to consider electrocution as a more humane form of punishment.¹⁵ While some states used the firing squad and lethal gas as their methods of execution at one time, electrocution remained the predominant method for nearly a century.¹⁶ Eventually, botched electrocutions gave rise to intense scrutiny of the execution method, and the public began to view lethal injection as a safer, more humane alternative.¹⁷

In 1977, Oklahoma became the first state to implement lethal injection.¹⁸ Chief medical examiner A. Jay Chapman, while clear about his lack of expertise, nonetheless agreed to develop a lethal injection formula.¹⁹ Chapman created a vague standard that originally provided for the injection of two drugs, sodium thiopental (still used in modern lethal

10. U.S. CONST. amend. VIII.

11. *See, e.g.,* *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

12. *See Baze*, 128 S. Ct. at 1538.

13. *Id.* at 1556.

14. *Id.* at 1557-58.

15. *Id.* at 1526.

16. *Id.*

17. *See, e.g.,* *Denno*, *supra* note 1, at 62-64.

18. *Id.* at 65 ("At each step in the political process, concerns about cost, speed, aesthetics, and legislative marketability trumped any medical interest that the procedure would ensure a humane execution.")

19. *Id.* at 66.

injections) and chloral hydrate.²⁰ However, Chapman later modified the protocol to include a third drug, potassium chloride.²¹ Concern about a lack of testing stalled the lethal injection bill during the legislative debate.²² However, on March 2, 1977, Oklahoma voted to adopt lethal injection as the state's execution method.²³ In doing so, Oklahoma created a lethal injection template, which other states quickly implemented, usually without further analysis.²⁴

B. United States Supreme Court Precedents Regarding Methods of Execution

The United States Supreme Court has issued three key opinions regarding methods of execution. In *Wilkerson v. Utah*,²⁵ the Court upheld the constitutionality of firing squads.²⁶ In *Wilkerson*, the Court held that only punishments involving "unnecessary cruelty" violated the Eighth Amendment.²⁷ These unnecessarily cruel punishments included exotic tortures such as emboweling alive or beheading.²⁸ The Court took a historical approach in its analysis, citing cases from England in which pain or terror were "superadded" to the punishment of death.²⁹ The Court stated that the Eighth Amendment prohibits punishments involving torture and any other unnecessarily cruel punishments.³⁰ However, the Court pointed out that this category did not include the firing squad as a method of execution.³¹

In *In re Kemmler*,³² the Court carried the method of execution analysis further. Although the Court actually decided the case on a "question of jurisdiction," *Kemmler* allowed electrocution as a more humane method of execution.³³ In dicta, the Court stated that "punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel . . . [A cruel punishment] implies there something inhuman and barbarous, something more than the mere extinguishment

20. *Id.* at 67.

21. *Id.* at 74.

22. *Id.* at 70.

23. *Id.*

24. *Id.* at 78-79.

25. 99 U.S. 130 (1878).

26. Julian Davis Mortenson, *Earning the Right to be Retributive: Execution Methods, Culpability Theory, and the Cruel and Unusual Punishment Clause*, 88 IOWA L. REV. 1099, 1108 (2003).

27. *Wilkerson*, 99 U.S. at 136.

28. *Id.* at 135.

29. *Id.* (stating that superadded punishments included public dissection, burning or emboweling alive, beheading, and quartering).

30. *Id.* at 136.

31. *Id.* at 134-135.

32. 136 U.S. 436 (1890).

33. Mortenson, *supra* note 26, at 1108.

of life."³⁴ The Supreme Court routinely cites this "negligible pain" standard in its application of the Eighth Amendment.³⁵

In *Louisiana ex rel. Francis v. Resweber*,³⁶ a plurality of the Court upheld a second attempt to execute a prisoner after the first attempted electrocution failed due to a mechanical malfunction.³⁷ The Court concluded that a mere accident did not violate the Eighth Amendment because there was no "purpose to inflict unnecessary pain nor any unnecessary pain involved."³⁸ The Constitution only protected an inmate from cruelty inherent in the method of execution, not any suffering involved in death.³⁹

In sum, method of execution challenges began with *Wilkerson*, in which the Court determined that "unnecessarily cruel" punishments violated the Eighth Amendment.⁴⁰ In *Kemmler*, the Court carried the analysis further. It developed the "negligible pain standard," determining that the punishment of death itself was not cruel, but that a method of execution cannot inflict unnecessary or wanton pain.⁴¹ Finally, in *Resweber*, the Court decided that where there was no purpose to inflict pain, there was no Eighth Amendment violation; thus, a mere accident would comport with the Eighth Amendment.⁴² Current Supreme Court method-of-execution jurisprudence uses these famous cases as its basis.⁴³

II. *BAZE V. REES*⁴⁴

A. Facts

Petitioners Ralph Baze and Thomas C. Bowling were each convicted of double homicide and sentenced to death in Kentucky.⁴⁵ Baze and Bowling sued, seeking to have Kentucky's lethal injection protocol declared unconstitutional under the Eighth Amendment.⁴⁶ While petitioners conceded that lethal injection, if applied as intended, would result in a humane death, they contended that Kentucky's lethal injection pro-

34. *Kemmler*, 136 U.S. at 447.

35. Mortenson, *supra* note 26, at 1108 (noting that the Supreme Court regularly looks to *Kemmler* for the proposition that capital punishment cannot "involve the unnecessary and wanton infliction of pain").

36. 329 U.S. 459 (1947).

37. *Baze v. Rees*, 128 S. Ct. 1520, 1531 (2008).

38. *Resweber*, 329 U.S. at 464.

39. *Id.*

40. *Wilkerson v. Utah*, 99 U.S. 130, 136 (1878).

41. *In re Kemmler*, 136 U.S. 436, 447 (1890).

42. *Resweber*, 329 U.S. at 464.

43. *See Baze v. Rees*, 128 S. Ct. 1520, 1530-31 (2008).

44. 128 S. Ct. 1520 (2008).

45. *Id.* at 1528-29.

46. *Id.* at 1529.

tol was unconstitutional because of a risk of severe pain if the protocol was not properly followed.⁴⁷

1. Objective Review of Kentucky's Lethal Injection Protocol

Kentucky's protocol consists of the injection of three drugs.⁴⁸ The first is sodium thiopental, a barbiturate anesthetic that induces unconsciousness, thus preventing the prisoner from feeling any pain.⁴⁹ The second drug is pancuronium bromide, which causes paralysis and stops respiration.⁵⁰ Kentucky specifies potassium chloride as the third and final drug.⁵¹ Potassium chloride induces cardiac arrest, ultimately causing the prisoner's death.⁵²

In addition to identifying the three drugs to be used in the execution, the Kentucky protocol also specifies the procedures to be followed.⁵³ It requires qualified personnel with at least one year of professional experience to insert the IV catheters, but only the warden and deputy warden remain in the execution chamber.⁵⁴ The execution team administers the drugs from the control room through five feet of IV tubing.⁵⁵ If visual inspection by the warden demonstrates that the prisoner is still conscious within sixty seconds of delivery of the sodium thiopental, another dose of the drug is administered.⁵⁶ A physician is present to attempt to revive the prisoner in the event of a stay of execution at the last minute.⁵⁷ An electrocardiogram verifies death.⁵⁸

2. Challenges to Kentucky's Protocol

Petitioners raised several challenges to Kentucky's lethal injection protocol. First, petitioners alleged that there was a danger of unnecessary pain if the executioners used an inadequate dosage of sodium thiopental, the first drug.⁵⁹ If the execution team administered the sodium thiopental properly, the condemned prisoner would feel no pain when the pancuronium bromide and potassium chloride were added.⁶⁰ However, if the dosage of sodium thiopental was inadequate, the administration of the second and third drugs would cause the prisoner to slowly suffocate

47. *Id.* at 1526.

48. *Id.* at 1528.

49. *Id.* at 1527.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 1528.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 1533.

60. *See id.* at 1536.

to death, thus experiencing excruciating pain.⁶¹ Petitioners claimed that there was a risk of an improper dosage because Kentucky employed untrained executioners and because of potential problems with Kentucky's injection practices.⁶²

Next, petitioners challenged the use of pancuronium bromide.⁶³ As a paralyzing agent, pancuronium bromide could prevent any indication that the prisoner was experiencing a painful death because he or she would be unable to move or cry out.⁶⁴ The drug would also mask any other visible signs of pain.⁶⁵ Petitioners argued that, in light of these dangers, the use of pancuronium bromide was unnecessary, because it served no therapeutic purpose while masking signs of possible distress.⁶⁶

Potential problems also exist with the use of potassium chloride.⁶⁷ If administered to a conscious person, potassium chloride could cause an excruciating, burning pain.⁶⁸ Thus, if the execution team did not administer a proper dosage of sodium thiopental, the first drug, the inmate would die an extremely painful death.⁶⁹ However, petitioners' argument focused on the dangers associated with sodium thiopental and pancuronium bromide, ignoring the dangers of potassium chloride.⁷⁰

Because of the potential problems associated with Kentucky's three-drug protocol, petitioners proposed a new one-drug protocol, which has never been tried or adopted by any state.⁷¹ Petitioners' one-drug protocol consisted only of the injection of a barbiturate such as sodium thiopental.⁷² They argued that such a protocol is regularly used by veterinarians during animal euthanasia, and that many states actually forbid veterinarians to use paralytic agents such as pancuronium bromide.⁷³

61. Teresa A. Zimmers & Leonidas G. Koniaris, *Peer-Reviewed Studies Identifying Problems in the Design and Implementation of Lethal Injection for Execution*, 35 FORDHAM URB. L.J. 919, 921 (2008).

62. *Baze*, 128 S. Ct. at 1533 (noting that these problems included possible difficulties with the IV lines, inadequate facilities and training, and the fact that Kentucky had no reliable way to monitor a prisoner's "anesthetic depth").

63. *Id.* at 1535.

64. Deborah W. Denno, *Introduction*, 35 FORDHAM URB. L.J. 701, 702 (2008). "Even a slight error in dosage or administration can leave a prisoner conscious but paralyzed while dying, a sentient witness of his or her own slow, lingering asphyxiation." *Chaney v. Heckler*, 718 F.2d 1174, 1191 (D.C. Cir. 1983).

65. The Honorable Fernando J. Gaitan, Jr., *Challenges Facing Society in the Implementation of the Death Penalty*, 35 FORDHAM URB. L.J. 763, 774 (2008).

66. *Baze*, 128 S. Ct. at 1535.

67. See Gaitan, *supra* note 65, at 774.

68. *Id.*

69. *Id.*

70. *Baze*, 128 S. Ct. at 1533-35.

71. *Id.* at 1526.

72. *Id.* at 1534.

73. *Id.* at 1535.

Finally, petitioners alleged that Kentucky's protocol lacked a method to monitor the "anesthetic depth" of the inmate.⁷⁴ They suggested that Kentucky use a variety of measures to verify that the prisoner was indeed unconscious before injecting the final two drugs.⁷⁵

B. Procedural Posture

After extensive hearings, the Kentucky trial court recognized the absence of satisfactory methods of execution for those who oppose the death penalty but concluded nonetheless that Kentucky's protocol complied with the Eighth Amendment.⁷⁶ The Kentucky Supreme Court affirmed, holding that a method of execution violates the Eighth Amendment when it "creates a substantial risk of wanton and unnecessary infliction of pain, torture, and lingering death."⁷⁷ Kentucky's protocol did not violate this standard.⁷⁸

C. Opinion

The United States Supreme Court granted certiorari to determine whether Kentucky's lethal injection protocol violated the Eighth Amendment.⁷⁹ The plurality opinion, written by Chief Justice Roberts and joined by Justices Kennedy and Alito, affirmed the Kentucky Supreme Court's decision.⁸⁰ The Court held that the risk of pain from the three-drug protocol, and Kentucky's failure to adopt the untested one-drug method, did not constitute cruel and unusual punishment under the Eighth Amendment.⁸¹

The plurality created a three-step test to determine whether a method of execution was cruel and unusual.⁸² First, the plurality rejected both petitioners' "unnecessary risk" standard and the dissent's "untoward risk" standard, adopting instead a "substantial risk of serious harm" standard and describing such a risk as an "objectively intolerable risk of harm."⁸³ Under this standard, the mere possibility of pain would not establish a risk of harm that would qualify as cruel and unusual under the Eighth Amendment.⁸⁴ Second, it was not enough that the condemned prisoner suggested a slightly safer alternative.⁸⁵ Rather, any proffered alternative would have to be "feasible, readily implemented, and in fact

74. *Id.* at 1536.

75. *Id.*

76. *Id.* at 1526.

77. *Id.* at 1529.

78. *Id.*

79. *Id.*

80. *Id.* at 1526.

81. *Id.*

82. *Id.* at 1531-32.

83. *Id.*

84. *Id.* at 1531.

85. *Id.*

significantly reduce a substantial risk of severe pain.”⁸⁶ Third, the state needed a legitimate penological justification for the refusal to adopt a feasible alternative.⁸⁷ If the state did not have a legitimate justification, its refusal to alter its method of execution violated the Eighth Amendment.⁸⁸

In applying its newly-described standard, the plurality opinion rejected petitioners’ claims.⁸⁹ First, lethal injection could not be “objectively intolerable” because a majority of the states and the federal government have adopted both the method of execution and the three-drug combination.⁹⁰ Second, petitioners did not show a substantial risk of an inadequate dose of sodium thiopental being administered, especially in light of the safeguards that Kentucky employed.⁹¹ Kentucky required experience and training for the members of its execution team, mandated the presence of the warden and deputy warden in the execution chamber to monitor the inmate’s consciousness, and established a backup line in case the primary injection failed.⁹² Furthermore, as long as the team followed the manufacturer’s instructions regarding the handling of sodium thiopental, there was minimal risk of improper application, even if a layperson injected the drug.⁹³ Thus, while petitioners argued that an improper dose of the drug would result in a substantial risk of suffocation from the pancuronium bromide and pain from the potassium chloride, they failed to show that the risk of an inadequate dose was substantial.⁹⁴

Third, the plurality rejected the adoption of the untested one-drug protocol.⁹⁵ No other state has adopted such a method, and there was nothing to indicate that it was an equally effective method of lethal injection.⁹⁶ The plurality rejected petitioners’ claims that pancuronium bromide served no therapeutic purpose and suppressed movements that might indicate consciousness.⁹⁷ According to the plurality, pancuronium bromide was necessary because it not only prevented involuntary spasms during unconsciousness once the potassium chloride was injected, thus ensuring that the procedure retained its dignity, but it also stopped respiration.⁹⁸ The Eighth Amendment, therefore, did not forbid Kentucky

86. *Id.* at 1532.

87. *Id.*

88. *Id.*

89. *Id.* at 1537-38.

90. *Id.* at 1532 (indicating that thirty-six states and the federal government had adopted lethal injection as their method of execution, while thirty states and the federal government employed the three-drug protocol used in Kentucky).

91. *Id.* at 1533.

92. *Id.* at 1533-34.

93. *Id.* at 1533.

94. *Id.*

95. *Id.* at 1535.

96. *Id.*

97. *Id.*

98. *Id.*

from using the drug in its execution procedure.⁹⁹ Additionally, although veterinary medicine guidelines prohibit veterinarians from using such a paralytic agent during animal euthanasia, the plurality pointed to the fact that the states have a legitimate interest in preserving the inmates' dignity that is not present in animal euthanasia.¹⁰⁰ Moreover, the Netherlands allows physician-assisted suicide, and that country recommends the use of such a drug in order to prevent an undignified death.¹⁰¹

Fourth, the Court rejected petitioners' argument that the Kentucky protocol lacked a method to monitor the "anesthetic depth" of the inmate.¹⁰² The Court stated that, because a proper dosage of sodium thiopental would result in a satisfactory anesthetic depth, the risks of consciousness during the procedure were not substantial.¹⁰³ Furthermore, Kentucky implemented satisfactory safeguards in its protocol; consequently, the addition of further steps would still not be sufficient to entirely ensure a painless process.¹⁰⁴

Finally, pointing to the fact that the three previous method-of-execution challenges were also rejected in *Wilkerson*, *Kemmler*, and *Resweber*, the plurality suggested that society has nonetheless moved toward more humane methods of execution, currently settling on lethal injection.¹⁰⁵ The plurality stated that its decision would not prevent the legislatures from taking any steps they deem necessary to ensure humane methods of execution, just as they had done in the past.¹⁰⁶

D. Concurring Opinions

Five concurring opinions indicated the wide range of views surrounding method-of-execution challenges.¹⁰⁷ First, Justice Alito argued that because ethical guidelines prohibit medical professionals from participating in executions, requiring their participation in such a procedure could not be a "feasible" alternative under the plurality's standard.¹⁰⁸ Justice Alito then argued that proof of a well-established scientific consensus should accompany any method-of-execution challenge,¹⁰⁹ and he concluded by reminding the Court that the issue in this case was the constitutionality of a *method* of execution, not the death penalty itself.¹¹⁰

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 1536.

103. *Id.*

104. *Id.*

105. *Id.* at 1538.

106. *Id.*

107. *Id.* at 1538, 1542, 1552, 1556, 1563.

108. *Id.* at 1540 (Alito, J., concurring).

109. *Id.*

110. *Id.* at 1542.

Justice Stevens lamented that the plurality's decision left open questions surrounding the constitutionality of the three-drug protocol and the justification for the death penalty itself.¹¹¹ First, Justice Stevens questioned each of the three rationales commonly cited in support of the death penalty.¹¹² Quickly rejecting both incapacitation and deterrence as justifications, Justice Stevens focused on the retributive rationale, arguing that this rationale is undermined by society's insistence on more humane forms of punishment that protect an inmate from suffering pain comparable to that which he inflicted on his victim.¹¹³ Second, Justice Stevens relied on his own subjective experience to conclude that the imposition of the death penalty is excessive and thus violates the Eighth Amendment.¹¹⁴ However, because *stare decisis* required him to adhere to precedent, Justice Stevens concurred in the plurality's judgment.¹¹⁵

Justice Scalia, joined by Justice Thomas, responded to Justice Stevens, basing his argument in favor of the death penalty on the text of the Presentment and Due Process Clauses of the Fifth Amendment.¹¹⁶ Justice Scalia's strongest attack against Justice Stevens rested on the retributive rationale of the death penalty.¹¹⁷ Justice Scalia pointed out the major flaw in Justice Stevens's reasoning: Justice Stevens proposed that any punishment that inflicts pain violates the Eighth Amendment, but punishment must inflict pain proportionate to that of the offender's crime in order to be properly retributive.¹¹⁸ Justice Scalia concluded by accusing Justice Stevens of ruling by judicial fiat in taking his experience into account over, and indeed at the expense of, the experience of all others.¹¹⁹

Justice Thomas, joined by Justice Scalia, looked to history and Supreme Court precedent to suggest that a method of execution violates the Eighth Amendment only if it is "deliberately designed to inflict pain."¹²⁰ Justice Thomas argued that Kentucky did not intend to inflict pain but instead adopted its protocol in an effort to make its executions more humane.¹²¹ Justice Thomas also disagreed with the plurality's formulation of the governing standard, worrying that the plurality's decision would require the Court to resolve controversies beyond its expertise.¹²²

111. *Id.* at 1542-43 (Stevens, J., concurring).

112. *Id.* at 1547.

113. *Id.* at 1547-48.

114. *Id.* at 1551.

115. *Id.* at 1552.

116. *Id.* (Scalia, J., concurring).

117. *Id.* at 1554.

118. *Id.*

119. *Id.* at 1555.

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

121. *Id.* at 1563.

122. *Id.* at 1562.

Justice Breyer agreed with Justice Ginsburg's dissent regarding the proper standard.¹²³ However, after a review of the related literature, Justice Breyer concluded that the adoption of more thorough measures of consciousness would not make a noteworthy difference in the safety of lethal injection.¹²⁴ Thus, Justice Breyer concluded that Kentucky's protocol did not violate the Eighth Amendment because it did not create "a significant risk of unnecessary suffering."¹²⁵

E. Dissenting Opinion

Justice Ginsburg, joined by Justice Souter, proposed "untoward, readily avoidable risk of inflicting severe and unnecessary pain" as the appropriate pain standard.¹²⁶ Justice Ginsburg would have inquired into whether Kentucky's omission of basic safeguards regarding unconsciousness violated this standard.¹²⁷ Citing a string of practices in other states, Justice Ginsburg proposed a variety of safeguards beyond mere visual inspection to ensure unconsciousness after the injection of the first drug.¹²⁸ These measures included calling the inmate's name, shaking him, brushing his eyelashes, or presenting him with a noxious stimulus.¹²⁹ Justice Ginsburg argued that the degree of risk, magnitude of pain, and availability of alternatives are interrelated factors, and a strong showing of one reduces the significance of the others.¹³⁰ Justice Ginsburg proposed that a state fails to adhere to "contemporary standards of decency" if it does not employ "readily available" method-of-execution alternatives that will decrease the potential for pain.¹³¹ Finally, Justice Ginsburg would require Kentucky to conduct scientific studies and consult with medical professionals regarding lethal injection instead of merely falling "in line" behind Oklahoma.¹³²

III. ANALYSIS

In *Baze v. Rees*, the Court attempted to redefine the test of constitutionality surrounding methods of execution. While it succeeded to some degree by integrating a purposive test into the objective aspects of the "evolving standards of decency" test, its analysis did not go far enough. Extensive scrutiny of the potential for pain caused by botched lethal injections, including an evaluation of scientific tests and medical opinion evidence, would more fully guarantee compliance with the Eighth

123. *Id.* at 1563 (Breyer, J., concurring).

124. *Id.* at 1566.

125. *Id.*

126. *Id.* at 1567 (Ginsburg, J., dissenting).

127. *Id.*

128. *Id.* at 1569-71 (including Oklahoma, Florida, California, Alabama, and Indiana).

129. *Id.* at 1569.

130. *Id.* at 1568.

131. *Id.* at 1569.

132. *Id.*

Amendment.¹³³ Furthermore, while beyond the scope of *Baze*, the use of a national litigation strategy accompanied by a constitutional tort and more transparent lethal injection protocols would help to ensure the constitutionality of lethal injection.¹³⁴

A. *Integration of a Purposive Test with the “Evolving Standards of Decency” Test*

Courts use the “evolving standards of decency” doctrine to determine whether a punishment is “excessive.”¹³⁵ Originally, any death penalty practice needed to comport with “evolving standards of decency” in order to comply with the Eighth Amendment.¹³⁶ However, the subjective aspect of the “evolving standards of decency” test presents several problems.¹³⁷ In an attempt to solve these problems, the Court in *Baze* integrated a “purposive” test into the “evolving standards of decency” analysis.¹³⁸ By focusing on the state’s penological purpose, the purposive test corrects many of the problems associated with the subjective aspects of the “evolving standards of decency” test.¹³⁹

1. The “Evolving Standards of Decency” Test

The Eighth Amendment’s prohibition of cruel and unusual punishment includes the right to be free from excessive sanctions.¹⁴⁰ It thus incorporates the concept of proportionality, requiring that the degree of punishment for the offense fit the seriousness of the crime.¹⁴¹ Considering that the death penalty is irreversible and extremely severe, the proportionality analysis has particular importance in death penalty cases.¹⁴² In order to determine whether a punishment is disproportional and therefore excessive, the Court looks to currently prevailing societal norms and values rather than the standards in place when the Eighth Amendment was adopted.¹⁴³ Accordingly, the Eighth Amendment “draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society.”¹⁴⁴

In evaluating the Eighth Amendment in light of society’s “evolving standards of decency,” the Court looks to objective factors whenever

133. See *Denno*, *supra* note 1, at 121.

134. See *Mortenson*, *supra* note 26, at 1162-63; see also Dwight Aarons, *The Abolitionist’s Dilemma: Establishing the Standards for the Evolving Standards of Decency*, 6 *PIERCE L. REV.* 441, 466-67 (2008); Gaitan, *supra* note 65, at 784.

135. See *Atkins v. Virginia*, 536 U.S. 304, 311-312 (2002).

136. Aarons, *supra* note 134, at 444.

137. See, e.g., *Berry*, *supra* note 7, at 22-24.

138. See *id.* at 19.

139. See *id.* at 31.

140. *Atkins*, 536 U.S. at 311.

141. See *Weems v. United States*, 217 U.S. 349, 367 (1910).

142. See *Roper v. Simmons*, 543 U.S. 551, 568 (2005).

143. *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2649 (2008).

144. *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958).

possible.¹⁴⁵ Originally, courts used six objective factors to determine the contemporary values indicative of “evolving standards of decency.”¹⁴⁶ The most significant of these factors are: 1) statutes enacted by the nation’s legislatures and 2) jury verdicts. These two factors are immensely important because they reflect public opinion on contemporary norms and values.¹⁴⁷ Courts will rarely have a better sense of the Nation’s views on a particular topic than the members of the legislature, elected by the American people, or the members of a jury, comprised of the American people.¹⁴⁸

In *Baze*, the plurality implemented this objective “evolving standards of decency” test by looking to four of the six objective factors.¹⁴⁹ The Court began its analysis with a review of the history of methods of execution.¹⁵⁰ It determined that because society has steadily moved toward more humane execution methods, ultimately settling on lethal injection, lethal injection must be consistent with society’s standards of decency.¹⁵¹ Next, the Court studied judicial precedent, concluding that the Court has never invalidated a chosen method of execution when challenges have arisen.¹⁵² Third, the Court looked to the practice of state legislatures and the federal government to determine whether lethal injection was “objectively intolerable.”¹⁵³ In light of the number of states using the three-drug combination in their protocols, and considering that no state had implemented a one-drug protocol, the Court determined that Kentucky’s lethal injection protocol did not violate the Eighth Amendment.¹⁵⁴ Finally, the Court looked to international practices in order to rebut the claim that the states should implement a one-drug protocol.¹⁵⁵ The Court indicated that the Netherlands, a country that allows physician-assisted suicide, uses a muscle relaxant in addition to sodium thiopental in order to prevent an undignified and painful death.¹⁵⁶ Thus, in its analysis, the *Baze* Court implemented four of the six “evolving stan-

145. See *Berry*, *supra* note 7, at 21-22 (quoting *Atkins*, 536 U.S. at 312).

146. *Aarons*, *supra* note 134, at 445 (stating that the objective factors were: (1) history; (2) judicial precedent; (3) statutes; (4) jury verdicts; (5) penological goals; and (6) international and comparative law).

147. *Id.*

148. *Atkins*, 536 U.S. at 341 (Scalia, J., dissenting); see also *id.* at 323 (Rehnquist, J., dissenting).

149. See *infra* notes 150-56.

150. *Baze v. Rees*, 128 S. Ct. 1520, 1526-27 (2008).

151. *Id.* at 1538. “[I]n moving to lethal injection, the states were motivated by a desire to find a more humane alternative to then-existing methods.” *Id.* at 1527 n 1.

152. *Id.* at 1530 (analyzing *Wilkerson v. Utah*, 99 U.S. 130 (1879) and *In re Kemmler*, 136 U.S. 436 (1890)).

153. *Baze*, 128 S. Ct. at 1532.

154. *Id.* “Of these 36 states [using lethal injection as their primary means of execution], at least 30 (including Kentucky) use the same combination of three drugs in their lethal injection protocols.” *Id.* at 1527.

155. *Id.* at 1535.

156. *Id.*

dards of decency” factors to determine that Kentucky’s lethal injection protocol did not violate the Eighth Amendment.¹⁵⁷

2. The Subjective Element of “Evolving Standards of Decency” and Its Problems

While the objective factors are still important in the “evolving standards of decency” inquiry, recent Supreme Court decisions add a subjective element to that test.¹⁵⁸ Consequently, objective evidence is no longer entirely determinative of whether a death penalty practice is “excessive.”¹⁵⁹ Instead, courts are now required to balance objective evidence of contemporary values with their own judgment in deciding whether the Eighth Amendment has been violated.¹⁶⁰

The incorporation of subjective factors into the “evolving standards of decency” analysis is potentially problematic.¹⁶¹ A court’s use of its own subjective judgment in making Eighth Amendment decisions gives it the opportunity to override the views of the American people and their elected legislators regarding contemporary norms and values.¹⁶² Eighth Amendment challenges are thus decided by the “*feelings and intuition*” of the justices rather than by the people themselves.¹⁶³ This poses a problem because the Eighth Amendment reflects society’s “evolving standards of decency”; in order to determine those standards, the court must look to the legislatures, elected by the people, and to juries, representatives of the people, rather than prescribe the standards itself.¹⁶⁴ As Justice Scalia emphasized in his *Baze* concurrence, the subjective “evolving standards of decency” test opens the door to “rule by judicial fiat,”¹⁶⁵ creating a situation in which precedent might easily be overturned and in which the “evolving standards of decency” determination is no longer a reflection of the contemporary values of the American people.¹⁶⁶

157. See *supra* notes 150-56.

158. Aarons, *supra* note 134, at 448; see also *Roper*, 543 U.S. at 551; *Atkins*, 536 U.S. at 312 (“[I]n the end [the Justices’] own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.” (quoting *Coker v. Georgia*, 433 U.S. 584, 597 (1977))). *Atkins* looked to only three of the six objective factors in its decision, while *Roper* used only four.

159. *Atkins*, 536 U.S. at 312.

160. *Roper v. Simmons*, 543 U.S. 551, 605 (2005) (O’Connor, J., dissenting).

161. Berry, *supra* note 7, at 24 (stating that the use of subjective factors “creates the perception that the Court’s interpretation of the objective standards is merely a pretext for the expression of their subjective views.”).

162. *Atkins*, 536 U.S. at 313.

163. *Id.* at 348-49 (Scalia, J., dissenting).

164. *Roper*, 543 U.S. at 616 (Scalia, J., dissenting) (“By what conceivable warrant can nine lawyers presume to be the authoritative conscience of the Nation?”).

165. *Baze v. Rees*, 128 S. Ct. 1520, 1555 (2008) (Scalia, J., concurring).

166. See Aarons, *supra* note 134, at 452; see also Berry, *supra* note 7, at 28 (“[I]f the Court’s imposition of restrictions on the use of the death penalty is tied to . . . the subjective views of its members, then its decisions are merely written in pencil, waiting to be rewritten.”); *Gregg v. Georgia*, 428 U.S. 153, 175-76 (1976) (“In a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people.” (quoting *Furman v. Georgia*,

3. To Correct These Problems with Subjectivity, *Baze* Adopts the Purposive Test¹⁶⁷

A “purposive test of constitutionality” solves the problem presented by the subjective factors in the “evolving standards of decency” test.¹⁶⁸ Under the purposive test, as developed by William W. Berry III,¹⁶⁹ if a court finds a method of execution to be both “degrading in its severity” (cruel) and “wantonly imposed” (unusual), the burden will switch to the states to show that the same penological goal could not be achieved by a less severe punishment.¹⁷⁰ Originally, only methods of punishment similar to torture were considered “degrading in severity” and thus cruel.¹⁷¹ However, the Court later expanded the phrase to prohibit any type of degradation, potentially even the “the cruelty of pain.”¹⁷² The Court interpreted the prohibition against “unusual” punishments to mean one of two things.¹⁷³ It can refer to either a method of punishment that is rare, or a method of punishment that is “arbitrary and discriminatory” (“wantonly imposed”).¹⁷⁴ If the method of punishment is found to be both “degrading in its severity” and “wantonly imposed,” the state has the burden of justifying the imposition and severity of the chosen method of execution.¹⁷⁵ If the state cannot justify the method it selected, it must implement a less severe method of execution in order to comply with the Eighth Amendment.¹⁷⁶

Accordingly, the purposive test looks at the *purpose* of the state’s method of execution.¹⁷⁷ The test focuses on the “potential abuse of state power” by assessing the state’s intention in implementing its chosen execution method.¹⁷⁸ The test evaluates a method of execution by asking whether the state’s purpose is to inflict pain as punishment, or whether the purpose is to inflict the least amount of pain necessary to execute.¹⁷⁹

408 U.S. 238, 383 (1972) (Burger, C. J., dissenting) (internal marks omitted)); *Roper*, 543 U.S. at 616 (Scalia, J., dissenting) (“Juries ‘maintain a link between contemporary community values and the penal system’ that this Court cannot claim for itself.” (quoting Gregg, 428 U.S. at 181)).

167. See Berry, *supra* note 7, at 17-18.

168. See *id.*

169. *Id.*

170. *Id.* at 18-19.

171. *Id.* at 18; see also Arthur J. Goldberg & Alan M. Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1785 (1970).

172. *Weems v. United States*, 217 U.S. 349, 366 (1910); see also Berry, *supra* note 7, at 18; Goldberg, *supra* note 171, at 1786.

173. Berry, *supra* note 7, at 19.

174. *Id.*; see also Goldberg, *supra* note 171, at 1790-91.

175. Goldberg, *supra* note 171, at 1784, 1794.

176. *Id.* at 1794.

177. See Jeffrey Waincymer, *Commentary: Reformulated Gasoline Under Reformulated WTO Dispute Settlement Procedures: Pulling Pandora Out of a Chapeau?*, 18 MICH. J. INT’L L. 141, 172 (1996) (“To speak of ‘means’ can be linguistically suggestive of a purposive test.”).

178. See Lisa Kern Griffin, *Circling Around the Confrontation Clause: Redefined Reach but not a Robust Right*, 105 MICH. L. REV. FIRST IMPRESSIONS 16, 19 (2006), www.michiganlawreview.org/firstimpressions/vol105/griffin.pdf.

179. See generally Berry, *supra* note 7; see also Griffin, *supra* note 178. The purposive test is used in a wide variety of contexts (see Christian M. De Vos, *Mind the Gap: Purpose, Pain, and the*

The purposive test seeks to protect “the dignity of man,” a concept inherent in the Eighth Amendment, by forbidding excessive punishment.¹⁸⁰ Although originally proposed in the context of the death penalty itself,¹⁸¹ the test can also be applied to methods of execution. It is a systematic approach to analyzing whether a method of punishment is cruel and unusual.¹⁸²

a. The Purpose of Lethal Injection is to Inflict the Least Amount of Pain Necessary to Execute

The issue of whether a state’s purpose should be to inflict pain as punishment or to inflict the least amount of pain necessary to execute is highly contentious.¹⁸³ It is clear that the Constitution “does not require a pain free death, nor should it.”¹⁸⁴ However, it is also clear that the Eighth Amendment prohibits the implementation of the “unnecessary and wanton infliction of pain.”¹⁸⁵ Arguments are heated as to where the purpose of lethal injection fits between these two boundaries.¹⁸⁶

Retributivists argue that a punishment involving too little pain undermines the retributive function of the death penalty.¹⁸⁷ They suggest that the most atrocious killers deserve to die an extremely painful death.¹⁸⁸ Supporters of this view claim that the ideas of “punishment” and “pain” cannot be separated, because in order for punishment to be punishment, it must be painful.¹⁸⁹ However, even extreme retributivists admit that while society inflicts pain on criminals because they deserve it, such pain may only be inflicted to an extent that is proportional to the crimes committed.¹⁹⁰ The problem with lethal injection under the retributivist view is that, by not distinguishing between the very violent and

Difference Between Torture and Inhuman Treatment, 14 No. 2 HUM. RTS. BRIEF 4 (2007) (human rights); Eloise Scotford, *Trash or Treasure: Policy Tensions in EC Waste Regulation*, 19 J. ENVTL. L. 367 (2007) (environmental law); Seth D. Harris, *Conceptions of Fairness and the Fair Labor Standards Act*, 18 HOFSTRA LAB. & EMP. L.J. 19 (2000) (employment law)), but at the time of publication there were no cases directly on point regarding use of the purposive test in this context.

180. Berry, *supra* note 7, at 17.

181. *Id.* at 18.

182. Goldberg & Dershowitz, *supra* note 171, at 1784.

183. See Robert Blecker, *Killing Them Softly: Meditations on a Painful Punishment of Death*, 35 FORDHAM URB. L.J. 969, 980-81 (2008) (indicating that, during oral argument in *Baze*, counsel for the condemned and Justice Scalia found common ground only in the idea that the “Constitution permitted a risk-free punishment of painless death, while it forbade the intentional infliction of painful death.”).

184. Gaitan, *supra* note 65, at 787.

185. *Gregg v. Georgia*, 428 U.S. 153, 173 (1976).

186. See Blecker, *supra* note 183, at 970-74 (revealing the two extremes of the debate by discussing retributivist and utilitarian views); see also Gaitan, *supra* note 65, at 764 (adopting a utilitarian view and focusing not on the condemned’s crimes but on whether the sentence will comport with the Eighth Amendment).

187. See Denno, *supra* note 64, at 731.

188. Blecker, *supra* note 183, at 970.

189. *Id.* at 971-72.

190. *Id.* at 973 (“The Biblical ‘eye for an eye,’ originally understood as no more than an eye for an eye, exemplifies retribution as a restriction on pain as much as justification of punishment.”).

barbarous murderers and those who inflicted relatively little pain on their victims, the states seem willing to arbitrarily expose *all* murderers to the excruciating pain inherent in a botched lethal injection.¹⁹¹ Therefore, even retributivists occasionally condemn lethal injection, not because it has the potential to cause pain, but because it arbitrarily breaks the connection between crime and punishment that is necessary to avoid an Eighth Amendment violation.¹⁹²

In contrast, utilitarians believe that physical pain can never be used as an “instrument of justice” if the punishment is to be humane, even if some degree of pain may be inherent in the punishment.¹⁹³ Pain cannot be inflicted for the “sake of the past”; rather, the purpose of punishment is to deter others.¹⁹⁴ Consequently, punishments should offer the strongest impressions in the minds of witnesses while subjecting the criminal to the least amount of pain possible.¹⁹⁵ Supporters of the utilitarian view argue that the mere act of killing inflicts enough pain on the condemned to “balance the scales” of justice.¹⁹⁶ While utilitarians acknowledge the potential for pain in any method of execution, they also urge that the process be as painless as possible.¹⁹⁷

Supreme Court precedent developed in the direction of the utilitarian approach.¹⁹⁸ In *Kemmler*, the Court stated that the Eighth Amendment prohibits the “unnecessary and wanton infliction of pain.”¹⁹⁹ In *Resweber*, the Court explained that the Constitution protects against punishments that are inherently cruel, not against any pain that may be involved in a humane execution method.²⁰⁰ The contention in many method-of-execution challenges is that the “evolving standards of decency” test requires that executioners use a method of execution that brings “as little physical pain as possible to the condemned.”²⁰¹ In other words, an execution should be so painless that the punishment is reduced to nothing more than death itself.²⁰² Similarly, Supreme Court precedent defines the states’ purpose in executions as inflicting the least amount of pain necessary to execute rather than as inflicting pain as punishment in itself.²⁰³

191. *Id.* at 997.

192. *Id.* at 998.

193. *Id.* at 993.

194. *Id.* at 972.

195. *Id.*

196. *Id.* at 970.

197. *Id.* Both retributivists and utilitarians agree, however, that “gratuitous pain and suffering” is never allowed under the Eighth Amendment. *Id.* at 974.

198. See *In re Kemmler*, 136 U.S. 436, 447 (1890); see also *La. ex rel. Francis v. Resweber*, 329 U.S. 459, 464 (1947).

199. *Kemmler*, 136 U.S. at 447.

200. *Resweber*, 329 U.S. at 464.

201. Aarons, *supra* note 134, at 461.

202. Mortenson, *supra* note 26, at 1137.

203. See *Kemmler*, 136 U.S. at 437; see also *Resweber*, 329 U.S. at 464.

To a certain degree, the *Baze* plurality followed precedent by implementing this utilitarian approach. While the Court indicated that some pain may be inherent in capital punishment, it also suggested that the state's purpose should be to inflict only an amount of pain that would not pose a "substantial risk" of harm.²⁰⁴ The Court never discussed whether an appropriate punishment might actually *require* a painful death.²⁰⁵ Instead, it focused on the fact that a method of execution could inflict some pain, as long as it did not present an "objectively intolerable risk of harm."²⁰⁶ In fact, the Court offered the opportunity for a condemned inmate to show that an alternative method of execution existed that "reduce[d] a substantial risk of severe pain."²⁰⁷ It could hardly be inferred that the Court would allow the state to purposely inflict pain; otherwise, it would not have presented the opportunity to develop a procedure that reduces the risk of pain. Accordingly, the *Baze* plurality indicated that the state's purpose was not to inflict pain for pain's sake, but rather to inflict *only* the amount of pain falling below a "substantial pain" threshold that would be sufficient to execute.²⁰⁸ It developed its purposive standard in light of this purpose.

b. The Integration of the Purposive Test Solves Many of the Problems Inherent in the "Evolving Standards of Decency" Test

Perhaps in an attempt to rid itself of the problems associated with the subjective elements of the "evolving standards of decency" test, the *Baze* plurality implemented a purposive test. First, the Court's "substantial risk of serious pain" standard mirrored the "degrading severity" prong of the purposive test because it looked to whether the method of execution created such a substantial risk of pain that it is exceedingly cruel.²⁰⁹ Second, the plurality incorporated the "wantonly imposed" prong of the purposive test in its requirement of a "legitimate penological justification" for the method of execution.²¹⁰ If there is no legitimate justification, the method of execution would be "wantonly imposed," or unusual.²¹¹ Finally, the plurality's requirement of a "feasible and readily available" alternative method of execution was a reflection of the purposive test's analysis of whether the same penological goal could have been achieved by a less severe punishment.²¹² If such an alternative existed, and the state refused to implement it without a "legitimate penological

204. See *Baze v. Rees*, 128 S. Ct. 1520, 1531 (2008).

205. Denno, *supra* note 63, at 731.

206. *Baze*, 128 S. Ct. at 1530-31.

207. *Id.* at 1531-32.

208. See *id.* at 1530-32.

209. See *id.* at 1531.

210. See *id.* at 1532.

211. See *id.*; see also Berry, *supra* note 7, at 19 (suggesting that "unusualness" included punishments that were "arbitrary and discriminatory").

212. See *Baze*, 128 S. Ct. at 1532; see also Berry, *supra* note 7, at 19.

justification,” then the state’s refusal could be a violation of the Eighth Amendment under the purposive test.²¹³

By creating its “substantial risk” test as a purposive test, the *Baze* plurality avoided some of the problems associated with the subjective “evolving standards of decency” test. Under its new standard, the Court first looks to objective “evolving standards of decency” factors, as indicated above.²¹⁴ Then, the Court performs a subjective evaluation of the method of execution, using its newly-developed purposive test. Unlike the subjective element found in the “evolving standards of decency” test, however, the subjective evaluation of the purposive test “ties the use of the death penalty to the penological goals of the states.”²¹⁵ Instead of merely subjecting method of execution challenges to the whims of the justices, the purposive test analyzes the method of execution’s purpose in light of the state’s penological goals.²¹⁶ Because those goals are often espoused by the state legislature, which is composed of representatives of the people, the purposive test is less subject to the whims and fancies of judges who may not be popularly elected.²¹⁷ By requiring the courts to consider the state’s purpose for the method of execution, the purposive test promotes consistency in court decisions, eliminating the chances of decisions being overturned and more closely reflecting the values and norms of the people.²¹⁸

However, while the *Baze* plurality determined that Kentucky’s current lethal injection protocol withstands this purposive test,²¹⁹ the inquiry is not finished. While lethal injection itself is not unusual, it may very well be considered cruel under a proper pain analysis.²²⁰ Furthermore, it is likely that the death penalty itself would be considered both cruel and unusual under the first two prongs of the purposive test.²²¹ Consequently, future challenges will likely focus on whether the lethal injection protocol is the least severe method by which a state can accomplish its penological objectives.²²² A proper pain analysis is the key to solving this issue. If lethal injection truly assures a painless death, then it might comport with the “dignity of man” and might be judged, not as the “wanton infliction of pain,” but as a humane method of execution under the

213. *Baze*, 128 S. Ct. at 1532.

214. *See supra* Part III.A.1.

215. Berry, *supra* note 7, at 31.

216. *Id.*

217. *See id.* at 22. In fact, “penological goals” is considered an objective factor under the “evolving standards of decency” test. Aarons, *supra* note 133, at 445.

218. *See Berry, supra* note 7, at 31.

219. *See Baze v. Rees*, 128 S. Ct. 1520, 1526 (2008).

220. *See Denno, supra* note 1, at 102 (stating that problems concerning medical complications surrounding lethal injection have never been so pronounced); *see also Mortenson, supra* note 26, at 1161 (“Our system is constructed in such a way that it knowingly puts inmates through agony every year they are killed.”).

221. Berry, *supra* note 7, at 30.

222. *Id.*

purposive test.²²³ However, a proper pain analysis is likely to indicate that lethal injection is by no means a truly humane option for execution, at least as it is currently implemented.²²⁴

B. The Court Must Perform an Extensive Pain Analysis in Order to Ensure Compliance with the Eighth Amendment

While the *Baze* plurality succeeded in implementing an improved test for analyzing methods-of-execution challenges, its proposed standard is not entirely flawless. In failing to perform an extensive pain analysis, the *Baze* plurality did not sufficiently adhere to *Kemmler*'s "negligible pain" standard in evaluating Kentucky's lethal injection protocol.²²⁵ The *Kemmler* approach looks at the inmate's experience of death itself rather than the execution method as a whole.²²⁶ Such an approach is appropriate because the Eighth Amendment focuses on the individual experience of pain during punishment rather than the tool used to punish.²²⁷ However, the *Baze* plurality not only clearly stated that the potential for pain does not violate the Eighth Amendment, but it also almost entirely ignored the lack of testing and evaluation surrounding lethal injection.²²⁸ In order for lethal injection to remain free from constitutional challenges, the Court must perform a more comprehensive pain analysis, focusing on the individual's experience of pain and including proper scientific testing and medical advice.

1. Conservative Versus Empirical Approaches to Methods of Execution

There are two schools of thought regarding a challenge to a method of execution: the conservative school and the empirical school.²²⁹ The conservative school compares the challenged execution method to previous methodologies or other currently available methods.²³⁰ However, this approach rarely takes into account the actual operation of the execu-

223. Zimmers & Koniaris, *supra* note 61, at 920.

224. See Mortenson, *supra* note 26, at 1104 (stating that even with advanced methods of execution, more than seven percent of executions continue to be botched, "inflicting . . . extraordinary pain on the condemned prisoners as they die."); see also Denno, *supra* note 1, at 51 (indicating that six of the eleven inmates lethally injected in California might have been conscious during the procedure, "potentially creating an 'unnecessary risk of unconstitutional pain or suffering' in violation of the Eighth Amendment.").

225. See *In re Kemmler*, 136 U.S. 436, 443 (1890).

226. Mortenson, *supra* note 26, at 1109.

227. *Id.* at 1138 ("The same paddle could be used to spank [a misbehaving] child in very different ways. A drunk . . . parent might genuinely hurt the child . . . in a way that would universally be considered cruel It makes more sense to describe the spanking (rather than the paddle) as cruel.").

228. *Baze v. Rees*, 128 S. Ct. 1520, 1529 (2008) ("Some 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. It is clear, then, that the Constitution does not demand the avoidance of all risk of pain in carrying out executions.").

229. Mortenson, *supra* note 26, at 1107.

230. *Id.* at 1112.

tion method.²³¹ Thus, many conservative courts view pain as simply part of the death experience itself rather than looking at the individual experience of a “lingering” or “torturous” death.²³²

In contrast, the empirical approach looks first to scientific and medical evidence that indicates pain inherent in the execution method.²³³ Only if such evidence is not sufficient for a finding of unconstitutionality does the Court consider legislative trends.²³⁴ By reviewing legislative trends “as only one element of a more complex analysis” and by focusing instead on the infliction of pain, the empirical approach better complies with *Kemmler*’s “negligible pain” principle.

In following the conservative approach, the *Baze* plurality performed a comparative analysis. It analyzed prior method-of-execution cases and took into account the consensus among the states and federal government surrounding lethal injection.²³⁵ However, in order to adhere to *Kemmler*, the Court should have adopted the empirical approach. The Court first should have looked to evidence of pain in Kentucky’s lethal injection protocol, as indicated by scientific and medical evidence. Only after such an analysis should it have turned its attention to legislative trends and prior cases. By performing a pain analysis, the Court would have been properly informed of both the dangers and the benefits of lethal injection.

2. Scientific Testing of Lethal Injection

Neither courts nor legislatures appear to place sufficient focus on scientific studies concerning the potential for pain involved in lethal injections. In developing its lethal injection protocol, Oklahoma virtually ignored the potential for pain.²³⁶ Because most lethal injection states followed Oklahoma’s lead in developing their own protocols, most now follow a procedure implemented over thirty years ago.²³⁷ This procedure has not been significantly updated and was not properly based on scientific study.²³⁸

Because a relatively constant number of executions are botched annually, scientific analysis of the potential for pain in any lethal injection

231. *Id.*

232. *Id.* at 1110-11, 1116.

233. *Id.* at 1113.

234. *Id.* The Ninth Circuit has proposed a pain analysis under the empirical approach, consisting of the following steps: first, a review of “objective evidence of pain involved in the challenged method”; second, a determination of the length of time the condemned inmate will consciously suffer pain in a “typical” execution, free from botches or failures; and third, a determination of the risk that a botched execution will occur and cause pain worse than that in a “typical” case. *Id.* at 1113-14.

235. *Baze v. Rees*, 128 S. Ct. 1520, 1530-32 (2008).

236. *Denno*, *supra* note 1, at 65.

237. *Id.* at 78-79.

238. *Id.*

is important.²³⁹ Lethal injection is constructed in such a way that it can create problems when performed incorrectly.²⁴⁰ Even a slight error in dosage or administration of the first drug can leave an inmate conscious when the second and third drugs are administered, but paralyzed and thus prevented from giving any indication of pain.²⁴¹ Additionally, intense pain can result if the drugs are injected in the wrong direction in the veins or the muscle.²⁴² Although such painful executions are “inherently unjustified and inherently unjustifiable,”²⁴³ executioners still use the same formula invented years ago because courts have not required extensive scientific studies on the potential for pain.²⁴⁴

The *Baze* Court did not appear concerned with performing a pain analysis. While Justice Ginsburg’s dissent called for more extensive scientific studies regarding the potential pain inherent in lethal injection,²⁴⁵ the plurality did not require further testing.²⁴⁶ Instead, it proposed that an execution method is not cruel and unusual merely because it may result in pain.²⁴⁷ However, because severe pain beyond that inherent in death itself is possible during any lethal injection, the Court must at least provide for more extensive scientific testing if it wishes to ensure that lethal injection protocols are in accord with the Eighth Amendment.²⁴⁸

3. Lethal Injection and the Medical Profession

“[M]edicine is the key to understanding the problems of lethal injection.”²⁴⁹ However, an unfortunate paradox exists: ethical guidelines prohibit participation by those who are the most qualified to ensure that the procedure is performed humanely and constitutionally.²⁵⁰ The American Medical Association clearly forbids doctor participation in executions, worrying that lethal injection will come to be associated with the medical profession.²⁵¹

239. Mortenson, *supra* note 26, at 1104 (noting that seven percent of executions are botched each year); *see also* Denno, *supra* note 1, at 51 (noting that of the eleven inmates lethally injected in California, six may have been conscious and suffering severe pain).

240. Mortenson, *supra* note 26, at 1124.

241. *Id.*

242. *Id.* at 1124-25.

243. *Id.* at 1160.

244. *See* Denno, *supra* note 1, at 78-79.

245. *See Baze v. Rees*, 128 S. Ct. 1520, 1569 (2008) (Ginsburg, J., dissenting).

246. *See id.* at 1532-34 (plurality opinion).

247. *Id.* at 1531.

248. *See* Denno, *supra* note 1, at 120.

249. *Id.* at 55.

250. *Id.* at 53.

251. *Id.* at 80-81 (quoting Code of Ethics E-2.06 (Am. Med. Ass’n 2000)) (noting that the American Medical Association guidelines provide that “[a] physician, as a member of a profession dedicated to preserving life when there is hope of doing so, should not be a participant in a legally authorized execution.”).

Yet, physician involvement in lethal injection could be a solution to the problems associated with the procedure.²⁵² Many execution team members are improperly prepared to perform lethal injections; they have no formal training or knowledge of the drugs used or the risks posed.²⁵³ In contrast, medical professionals, especially anesthesiologists, have the expertise and knowledge to perform lethal injections safely and accurately.²⁵⁴ There is evidence that a surprising number of physicians participate in executions despite the existence of ethics rules.²⁵⁵ Some physicians do so because they want the condemned inmates to have the most competent and humane lethal injection possible; others believe that physicians are not deciding who gets the death penalty, but rather ensuring that the procedure is performed accurately and competently.²⁵⁶

Not only do many medical professionals participate in executions despite the ethical considerations put forth by the medical associations, but also the vast majority of lethal injection states include physician requirements in their statutes.²⁵⁷ The presence of such statutory language illustrates that medical association requirements may not have had their desired effect.²⁵⁸

In light of the growing number of physicians who participate in lethal injections, it appears that medical opinions regarding lethal injection are changing.²⁵⁹ Even the American Medical Association Ethics Council admitted that doctors can make executions more humane.²⁶⁰ The presence of a medical professional at a lethal injection can eliminate the risk of severe pain, thus ensuring compliance with the Eighth Amendment.²⁶¹ Additionally, physician presence would eliminate the lack of training and knowledge that permeates nearly every lethal injection execution.²⁶² The incorporation of rules regarding physician presence at executions into lethal injection statutes is a step in the right direction; perhaps it is also time for medical association guidelines to change as well. This is not to suggest that physicians should be *required* to participate in executions, in light of the strong divergence in public opinion surrounding the death

252. See *id.* at 77.

253. *Id.* at 56.

254. See *id.* at 58.

255. *Id.* at 83-84, 86 (citing as evidence "Missouri's 'Dr. Doe,' who began performing lethal injections in the mid-1990s," and results from the Breach Report).

256. *Id.* at 86-87 ("Angel of mercy, not agent of harm, is the role inmates seek for the doctor. Palliative care from a doctor to prevent unnecessary suffering . . . is not unprofessional or unethical.").

257. *Id.* at 88. While Illinois' statute explicitly states that doctors cannot participate in executions, twenty states mention the presence of a doctor at a lethal injection execution, sixteen provide that a doctor should pronounce or certify death, and eight specifically provide that lethal injections are not the practice of medicine. *Id.* at 88-89.

258. *Id.* at 89.

259. See *id.* at 121-22.

260. *Id.* at 121.

261. *Id.*

262. See *id.* at 57.

penalty. However, if medical associations allowed their members to make their own decisions on whether or not to participate, the risks associated with lethal injection would decrease, and the method would be more likely to comply with the Eighth Amendment.²⁶³

C. Solutions to Ensure a Humane Lethal Injection

The past few years have seen an increase in lethal injection challenges.²⁶⁴ A constitutional tort may be one way to offer a proper remedy to the petitioners in these challenges.²⁶⁵ Such a tort would provide for “the fact that the government has intentionally created a system under which it knows, *ex ante*, that some proportion of executed inmates will suffer agonizing deaths.”²⁶⁶ The possibility of being liable in tort for botched or painful executions would create an incentive for the government either to develop safer and more reliable methods of execution or to improve the training and research involved in existing execution methods.²⁶⁷ Additionally, it would serve as a formal admission of wrongdoing and would provide some measure of compensation to the inmates’ families.²⁶⁸

However, a constitutional tort is not by itself a sufficient way to ensure the continuous prevention of excessively painful executions. To do so, attorneys and death penalty abolitionists should implement a national legal strategy that incorporates method-of-execution cases.²⁶⁹ Under such a coordinated legal strategy, attorneys and abolitionists could work together to decide which cases and issues should be brought before the Court.²⁷⁰ This approach would build on past successes and minimize adverse rulings, thus helping the courts properly define the pain standards necessary in lethal injections.²⁷¹ While *Baze* cemented the use of lethal injection as a method of execution,²⁷² if a proper pain analysis were performed, even lethal injection, the most “humane” method of execution, might be viewed as inflicting substantial pain. A coordinated legal strategy would assist the courts in this analysis.

Supreme Court decisions based on method-of-execution cases might also help prompt the legislative branches to take action. Supreme Court decisions have occasionally brought legislative and executive attention to the death penalty.²⁷³ By coordinating a national litigation strategy fo-

263. *See id.* at 91.

264. *Id.* at 107.

265. *See* Mortenson, *supra* note 26, at 1121.

266. *Id.*

267. *Id.* at 1162.

268. *Id.* at 1105, 1163.

269. Aarons, *supra* note 134, at 464.

270. *See id.*

271. *Id.*

272. *Baze v. Rees*, 128 S. Ct. 1520, 1526 (2008).

273. Aarons, *supra* note 134, at 442.

cused on lethal injection cases, abolitionists and attorneys could prompt state legislatures to extensively review their protocols using valid and accurate scientific research, implement regulations requiring adequate training and knowledge, and allow physician participation. This legislation would help to create a humane lethal injection protocol that passes constitutional muster.

Furthermore, lethal injection protocols with greater transparency and oversight would help to ensure compliance with the Eighth Amendment.²⁷⁴ In addition to challenges regarding the three-drug protocol, many lethal injection challenges have arisen regarding, *inter alia*, the method in which the drugs are prepared, the qualifications of execution personnel, facilities where the executions occur, and whether the execution team properly ensures unconsciousness before the injection of the second and third drugs.²⁷⁵ Additionally, many lethal injection protocols are incomplete and filled with scientific inaccuracies.²⁷⁶ They are written merely to reassure witnesses that the process is orderly and subject to controls.²⁷⁷ Moreover, states have withdrawn their protocols from public scrutiny.²⁷⁸ This likely occurred because public protocols expose the states' ignorance and incompetence.²⁷⁹ This lack of public information surrounding the protocols makes it difficult to evaluate their constitutionality.²⁸⁰ Additionally, because state lethal injection protocols are similar to one another, when a prisoner challenges one state's protocol, courts can point to the similar protocols of the other states to show that none have been held unconstitutional.²⁸¹

In order to ensure that lethal injection comports with the Eighth Amendment, states must revise their protocols. A protocol should be in writing, and it should specify the conditions of the lethal injection procedure so that the prisoner can be properly monitored for consciousness.²⁸² Most importantly, the protocol should be public information.²⁸³ By opening the state protocols to public viewing, the condemned inmates will know what to expect, and, most importantly, the public will be able to monitor the state's lethal injection process.²⁸⁴ Consequently, the state will not be able to hide the inaccuracies and potential problems inherent in any improperly developed protocol. By developing a written and public protocol, the states will provide more transparency in their lethal in-

274. See Gaitan, *supra* note 65, at 784.

275. *Id.* at 774-75.

276. Denno, *supra* note 64, at 713-14.

277. *Id.* at 713.

278. Denno, *supra* note 1, at 95-96.

279. *Id.* at 95.

280. *Id.* at 96.

281. *Id.* at 101-02.

282. Gaitan, *supra* note 65, at 785-86.

283. *Id.* at 786.

284. *Id.*

jection process, helping to ensure compliance with the Eighth Amendment.²⁸⁵

CONCLUSION

The struggle confronting the courts regarding the constitutionality of lethal injection is clear after *Baze*. While *Baze* integrated a purposive test of constitutionality into the already-existing objective “evolving standards of decency” test, it did not incorporate scientific testing and medical evidence into its pain analysis. Until the Court performs an extensive pain analysis on the dangers of lethal injection, it cannot ensure that challenged lethal injection protocols comply with *Kemmler’s* “negligible pain” standard and thus comport with the Eighth Amendment.²⁸⁶

Perhaps it is because of a fear of what they will discover that neither courts nor legislatures are willing to perform an extensive pain analysis regarding lethal injection. Lethal injection, rightly or wrongly, is considered the most humane method of execution.²⁸⁷ If it is deemed unconstitutional due to its capacity to inflict severe pain, the courts would be presented with a challenge to the death penalty itself. This is a type of challenge they are not yet ready to consider.²⁸⁸

However, the fear of the unknown is no reason to ignore the problems associated with lethal injection. Scientific testing and medical opinions need to be taken seriously to determine the extent of pain a botched lethal injection might inflict.²⁸⁹ Future debate will likely center on whether there is a less severe alternative to lethal injection. The Court will be well-prepared for these challenges if it has previously engaged in an extensive, objective pain analysis regarding lethal injection as a method of execution.

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285. See *id.* at 786-87 (“In examining the evolving standards of decency, we cannot expect the public’s standards to evolve if the public is unaware of what procedures are actually performed upon the condemned.”).

286. See Mortenson, *supra* note 26, at 1108.

287. Denno, *supra* note 1, at 65.

288. See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 168-69 (1976); see also *Baze v. Rees*, 128 S. Ct. 1520, 1529 (2008).

289. See Denno, *supra* note 1, at 121; see also Mortenson, *supra* note 26, at 1119-20.

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