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# Lethally Injected:
# What Constitutes Cruel and Unusual Punishment?

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## INTRODUCTION

Throughout the nation's history, criminals have been convicted for some of the most heinous crimes such as murder, rape, and treason. Individuals convicted of these egregious capital crimes are sentenced to death in many states, by somewhat differing methods of execution. Historically, a wide variety of execution methods – ranging from firing squads, to hanging, to lethal gas, to electrocution – have been employed. Today, over two-thirds of the United States authorize capital punishment, and roughly three-quarters of those states require death by lethal injection.[1]

The imposition of capital punishment, along with the methods by which it is achieved, leads to a great deal of public controversy.[2] Although many legal challenges make their way through the court system, the institutional role of the courts is necessarily limited. As recently clarified by the Kentucky Supreme Court:

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[1] *Baze v. Rees*, 128 S. Ct. 1520, 1525 (2008).

[2] See sources cited in the closing section of this article for a more detailed discussion of the potential for extreme (and unobservable) suffering during death by lethal injection, and the growing concern over use of this method.

> It is not the role [of the courts] to investigate the political, moral, ethical, religious, or personal views of those on each side of this issue. The [relevant state legislatures have] given due consideration to these matters.
>
> [Judges] are limited in deciding only whether the [methods specified by these legislatures survive] constitutional review.[3]

The Eighth Amendment to the United States Constitution serves to protect individuals, including those convicted of capital crimes, from "cruel and unusual punishment."[4] The application of this language to execution *methods* has received little attention from the Supreme Court over the years, leading to confusion over the standard lower courts must use when a constitutional challenge does arise.

Resolution of this confusion calls out for greater legislative involvement and clarification, particularly because human suffering is at stake in these cases. Meanwhile, the legal standard that courts must use to judge the constitutionality of various state execution methods warrants careful consideration.

*Baze v. Rees*, a case recently heard by the Supreme Court, provides an example of the continuing disagreement between jurists over application of the Eighth Amendment when it comes to execution methods. First, this article describes the background facts of the *Baze* case and the petitioners' challenge to Kentucky's practice of execution by lethal injection. The relevant constitutional standard is then presented, as well as past cases in which the standard has been applied to various methods of execution.

Next, a return to the *Baze* case highlights the ongoing conflict between what might be considered realistic, as opposed to idealistic, methods of execution. Further analysis will demonstrate that although the *Baze* Plurality's decision may be considered more practical, Justice Ginsburg's dissent raises important aspirations and concerns as well. Given that potential human suffering is at stake, these concerns cannot be overlooked.

[3] *Baze v. Rees*, 217 S.W.3d 207, 211 (Ky. 2006).

[4] U.S. Const. amend. VIII.

## BACKGROUND

In 1994, Thomas C. Bowling was convicted by a jury and sentenced to death for murdering a husband and wife as they sat in their car outside a Kentucky dry cleaning shop.[5] In a similar case in 1997, Ralph Baze was convicted by a jury and sentenced to death for shooting two law enforcement officers while they were trying to serve him with five felony fugitive warrants.[6] According to Kentucky state law, prisoners sentenced before 1998 had the option of electing death by electrocution or by lethal injection.[7] Since Baze and Bowling did not request electrocution, they were scheduled for lethal injection by default.[8]

As their execution dates approached, Baze and Bowling filed suit against the Kentucky Department of Corrections. They claimed that Kentucky's lethal injection protocol violated their constitutional right to be free from cruel and unusual punishment.[9] The issue before the courts did not concern whether the death penalty itself was constitutional; rather, the issue was whether the Kentucky protocol for lethal injection constituted a "cruel and unusual" *method* of execution.

At this point in time, 36 states had adopted lethal injection as the primary means of implementing the death penalty. Kentucky, along with at least 29 other states, used the same specific three-drug combination in its protocol.[10]

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

[6] *Id*.

[7] The Kentucky statute provided that "every death sentence [performed by lethal injection] shall be executed by continuous intravenous injection of a substance or combination of substances sufficient to cause death." *Baze*, 128 S. Ct. at 1528 (citing Ky. Rev. Stat. Ann. § 431.220(1)(a) (West 2006)).

[8] Lethal injection was the statutory default if a prisoner refused to make a choice between injection and electrocution at least 20 days before the scheduled execution. *Baze*, 217 S.W.3d at 209.

[9] *Id*.

[10] Kentucky's three-drug protocol consists of "a therapeutic dose of diazepam… an anti-anxiety agent used primarily for the relief of anxiety and associated nervousness and tension, three grams of sodium thiopental … a fast acting barbiturate that renders the inmate unconscious [and] fifty milligrams of pancuronium bromide … [which] causes paralysis." *Baze*, 128 S. Ct. at 1527. Officials working for the Kentucky

– First, the protocol called for the injection of 2 grams of sodium thiopental. Sodium thiopental (hereafter, the "Sedative") is a fast-acting barbiturate that induces a deep, coma-like unconsciousness when given in the amounts used for lethal injection.[11]

– Next, the Kentucky protocol called for injection of 50 milligrams of pancuronium bromide. Pancuronium bromide (hereafter, the "Paralytic") inhibits all muscular-skeletal movements, paralyzes the diaphragm, and thereby stops respiration.[12]

– Finally, the Kentucky protocol called for injection of 240 millequivalents of potassium chloride. Potassium chloride (hereafter, the "Cardiac-Arrester") interferes with the electrical signals that stimulate the contractions of the heart, inducing cardiac arrest and killing the inmate.[13]

Baze and Bowling conceded that if the Sedative was properly administered, then the inmate would not experience any pain from the effects of the Paralytic or the Cardiac-Arrester.[14] However, they argued that the Kentucky protocol did not reasonably *ensure* that the Sedative would be properly administered, and if not, the resulting (unobservable[15]) pain from the Paralytic and the Cardiac-Arrestor would be excruciating and cruel in nature.

The only certified technicians to take part in the Kentucky procedure were a certified phlebotomist and an emergency medical technician, who inserted the catheters for the injections. All other mixing and loading of the three drugs into syringes was carried out by other Department of Corrections

Department of Corrections developed a written protocol for administering the drugs in order to comply with the requirements of Kentucky's statute on lethal injection. *Id*. at 1528.

[11] *Id*. at 1527.

[12] *Id.*

[13] *Id.*

[14] As a result of the litigation, the Department of Corrections chose to increase the amount of sodium thiopental from 2 grams to 3 grams. *Id.* at 1528.

[15] Baze and Bowling argued that if the Sedative failed, no one other than the dying inmate would know because the Paralytic would prevent him from moving or screaming. *Id*. at 1533.

personnel.[16] Although a physician would be at hand to revive the prisoner in the event of a last-minute stay of execution, the physician was prohibited by law from participating in the "conduct of an execution."[17]

Kentucky's protocol was conducted in facilities that included an execution chamber, a control room (separated from the execution chamber by a one-way window), and a witness room.[18] The personnel administering the drugs were located in the control room, and the drugs traveled into the execution chamber through five feet of IV tubing.[19] The warden and deputy warden were to remain in the execution chamber to visually inspect the injection catheters and the IV tubing. If the warden and deputy warden determined the prisoner was not unconscious within 60 seconds after receiving the Sedative, they were to order another 3-gram dose before the process continued.[20]

When Baze and Bowling filed their challenge, only one such execution had been conducted in Kentucky.[21] No incidents had been reported during that execution; however, Baze and Bowling argued that due to the effects of the Paralytic, there was no real way to know whether that inmate had experienced excruciating pain or not.

Baze and Bowling's challenge to the Kentucky protocol made its way through the Kentucky state court system. The trial court considered a great deal of testimony, and ultimately held that the protocol did *not* violate the Eighth Amendment's ban on cruel and unusual punishment.[22] The Kentucky Supreme Court affirmed. Because the issue involved application of principals stemming from the federal Constitution, The U.S. Supreme Court then agreed to review the case.

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[16] *Id.* at 1528. Kentucky law did not require that this step be conducted by these certified professionals. The statute merely called for "qualified personnel" having at least one year of experience. *Id*.

[17] *Id*.

[18] *Id.*

[19] *Id*.

[20] *Id*.

[21] *Id*.

[22] *Id*. at 1529.

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## LEGAL STANDARD

### *General Legal Standard*

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted*.[23]

This language is generally interpreted to mean that punishments involving torture or unnecessary cruelty are prohibited.[24] Thus, a punishment (in this case, a method of execution) could be considered cruel and unusual, and therefore unconstitutional, when it has the potential to create unnecessary suffering beyond the mere extinguishment of life.[25] Courts may therefore be called upon to determine whether a particular form of execution includes this element of "unnecessary suffering."[26]

### *Application of Legal Standard in Other Cases*

#### *Wilkerson v. Utah*

One of the first execution cases to address interpretation of the Eighth Amendment was *Wilkerson v. Utah*. In 1879, Wilkerson was convicted by a Utah jury of a willful, malicious, and premeditated first degree murder.[27] At this time, organized Territories such as Utah had the power to convict criminals, and to set the "punishment of the offenders, subject to the prohibition

[23] U.S. Const. amend. VIII (emphasis added).

[24] See, e.g., *Wilkerson v. Utah*, 99. U.S. 130, 135 (1890).

[25] *Id*. at 136.

[26] The Framers of the Constitution were no doubt aware of punishments historically used in England and other countries that included extra elements of "terror, pain, or disgrace," where the condemned prisoner might have been "emboweled alive, beheaded, … [publicly] dissected, [or burned] alive." See, e.g., *Baze*, 128 S. Ct. at 1530 (quoting *Wilkerson*, 99 U.S. at 135).

[27] The Territory of Utah defined murder as "the unlawful killing of a human being with malice aforethought, and the provision is that such malice may be express or implied." As a result of this conviction, Wilkerson was sentenced to death in accordance with the law of the Territory which stated, "[W]hen any person shall be convicted of any crime the punishment for which is death, … he shall suffer death by being shot, hung, or beheaded, as the court may direct." *Wilkerson*, 99 U.S. at 132 (citing Sess. Laws Utah, 1852, p. 61; Comp. Laws Utah, 1876, 564).

of the [United States] Constitution that cruel and unusual punishments shall not be inflicted."[28] Under Utah's statutory regulations, death by shooting, hanging or beheading were all acceptable forms of capital punishment.[29] In open court, the judge sentenced Wilkerson to "be taken from [his] place of confinement to some place within [the] district, and … publicly shot until dead."[30] The Supreme Court of the Territory of Utah affirmed the sentence.

Wilkerson filed a writ of error to the U.S. Supreme Court, claiming that death by firing squad violated the Eighth Amendment.[31] The Supreme Court applied the language of the Eighth Amendment to the facts of Wilkerson's case. The Court reasoned that cruel and unusual punishments were forbidden by the Constitution, but that execution by firing squad was "not included in that category, within the meaning of the Eighth Amendment."[32] According to Justice Clifford, writing on behalf of the Court:

> Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted; but it is safe to affirm that punishments of *torture* … and all others in the same line of *unnecessary cruelty*, are forbidden by that amendment to the Constitution.[33]

The Court then measured the term *unnecessary* cruelty based on whether death by firing squad would constitute torture in addition to death. The Court compared Wilkerson's sentence to historical execution methods such as hanging and burning at the stake, and reasoned that in comparison death by firing squad did not provide any extra element of torture.[34] As such, the Court ruled that death by firing squad did not violate the Eighth Amendment.

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[28] *Id*. at 133.

[29] *Id*. at 132.

[30] *Id*. at 131.

[31] A "Writ of Error" is defined as "a Writ issued by a chancery court, at the request of a party who was unsuccessful at trial, directing the trial court either to examine the record itself or to send it to another court of appellate jurisdiction to be examined, so that some alleged error in the proceedings may be corrected." Black's Law Dictionary 1642 (8th ed. 2004).

[32] *Wilkerson*, 99 U.S. at 134-35.

[33] *Id*. at 135-36 (emphasis added).

[34] *Id*. at 135.

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*In re Kemmler*

In 1885, the New York legislature appointed a commission to investigate and report on the most humane and practical method of execution in death sentences.[35] According to this commission's findings, execution by electrocution was deemed the most humane, practical, and appropriate method available at the time.[36] Based on this report, the New York Code of Criminal Procedure was amended to state that any death sentence was to be carried out by passing through the convict's body "a current of electricity of sufficient intensity to cause death, and the application of such current must be continued until such convict is dead."[37]

In 1889, William Kemmler was convicted of first degree murder and sentenced to death. The electrocution amendment applied to Kemmler's case because it had been enacted the year prior to his sentencing. Roger B. Sherman challenged the law on behalf of Kemmler, asserting that death by electrocution violated the Eighth Amendment as well as the New York Constitution.[38] The case ultimately worked its way up to the U.S. Supreme Court.

As to the Eighth Amendment, the Court turned to the *Wilkerson* precedent.[39] Building upon the *Wilkerson* Court's finding that death by firing squad did not violate the Eighth Amendment, the *Kemmler* Majority reasoned that the electrocution amendment to the New York Criminal Code was passed in order to support a more humane method of execution, and that the judiciary should assume the legislature was informed in its decision.[40]

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[35] *In re Kemmler*, 136 U.S. 436, 444 (1890).

[36] *Id*.

[37] *Id*. at 444-45 (citing N.Y. Crim. Proc. § 505 (1888)).

[38] "Section 5, Article 1 of the constitution of the State of New York, provides that 'excessive bail shall not be required, nor excessive fines imposed, *nor shall cruel and unusual punishments be inflicted*, nor shall witnesses be unreasonably detained.'" *Id.* at 445 (emphasis added).

[39] The *Wilkerson* Majority had stated that "[d]ifficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted; but it is safe to affirm that punishments of torture … and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the Constitution." *Wilkerson*, 99 U.S. at 135-36.

[40] *Kemmler*, 136 U.S. at 447.

In considering Kemmler's case, Justice Fuller articulated the Court's standard for identifying cruel and unusual punishments as follows:

> Punishments are cruel when they involve *torture* or a *lingering death*; but the punishment of death [in and of itself] is not cruel, within the meaning of that word as used in the Constitution. [The Eighth Amendment implies] something inhuman and barbarous, something more than the mere extinguishment of life.[41]

In other words, the *Kemmler* Court reasoned that a punishment would be considered "cruel" if the method used added an element of torture or prolonged suffering to death. According to the *Kemmler* Court, a method of capital punishment should do no more than simply end the inmate's life. Applying this standard to the facts of Kemmler's case, the Court noted (in dicta[42]) that death by electrocution was an acceptable method for extinguishing life, without adding an unnecessary element of cruelty in the process.[43]

Justice Fuller also emphasized that if the Eighth Amendment threshold had been satisfied, it was up to the legislature, not the judiciary, to determine how death sentences were to be carried out. He conceded that death by electrocution was not foolproof, but found that it was reasonably considered the most humane method of execution available at the time.

*Louisiana ex rel. Francis v. Resweber*

Death by electrocution was again at issue in the case of Willie Francis, who had been convicted of murder and sentenced to death by electrocution in 1945. A few months later, Francis was placed in an official Louisiana electric

[41] *Id*. (emphasis added).

[42] "Dicta" is defined as "opinions of a judge which do not embody the resolution or determination of the court. [These represent expressions] in the court's opinion which go beyond the facts before [the] court and therefore are … not binding in subsequent cases as legal precedent." Black's Law Dictionary 313 (6th abridged ed. 1991).

[43] The *Kemmler* case was actually decided on other grounds; the Court ruled that the language of the Eighth Amendment did not apply to the states. Since that time, the Supreme Court has ruled otherwise, finding that the Eighth Amendment *does* apply to both state and federal governments. *Baze*, 128 S. Ct. at 1567 (quoting *Kemmler*, 136 U.S. at 448-49).

chair among the company of witnesses.[44] Presumably due to a mechanical malfunction in the chair, the process did not result in his death. Francis was then taken from the chair and returned to prison. The Governor of Louisiana issued a new death warrant to be fulfilled by electrocution six days later.[45]

Francis challenged the new death warrant, claiming that the second procedure would violate his Eighth Amendment rights.[46] Francis contended that he had already undergone psychological strain when he prepared for the first execution. Subjecting him to such mental strain again, he asserted, would force him to undergo a lingering, cruel, and unusual punishment. The Supreme Court of Louisiana denied Francis' claim, and the U.S. Supreme Court agreed to review the case.[47]

In applying the Eighth Amendment to the facts of the case, the *Francis* Plurality assumed that the state officials had followed the electrocution protocol in a "careful and humane manner," and stated that "[a]ccidents happen for which no man is to blame."[48] The Court also cited the *Kemmler* Majority's standard as a basis for its reasoning,[49] and found that even though Francis had already been subjected to a current of electricity in the first attempt at his execution, this did not make a second attempt "any more cruel and unusual in the constitutional sense than any other execution."[50]

In ruling on this case, the *Francis* Plurality summarized the Eighth Amendment as follows:

> The cruelty against which the Constitution protects a convicted man is cruelty inherent in the *method of punishment*, not the

[44] *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 460 (1947).

[45] *Id*. at 460-61.

[46] Francis also claimed violations of his Fifth and Fourteenth Amendment rights. Those claims are beyond the scope of this article.

[47] *Id*. at 465.

[48] *Id*. at 462.

[49] The *Kemmler* Majority had stated that "[p]unishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life." *Kemmler*, 136 U.S. at 447.

[50] *Francis*, 329 U.S. at 464.

> necessary suffering [that would be] involved in any method employed to extinguish life humanely.[51]

Applying this definition of cruel and unusual punishment, the Court reasoned that Francis' sentence was not carried out promptly, due to an unforeseeable accident.

According to the Court, this accident did *not*, however, add any element of cruelty to the second execution. Because there was no evidence of an *intent* to inflict unnecessary pain, the Court held that the need for a second attempt to complete the electrocution process did not violate Francis' Eighth Amendment rights.[52]

### *Application of Legal Standard in the Baze Case*

#### *Chief Justice Roberts' Plurality Opinion* [53]

In *Baze v. Rees*, the U.S. Supreme Court ruled that Baze and Bowling's Eighth Amendment rights were not violated by Kentucky's lethal injection protocol. Although no one could guarantee that Baze and Bowling would be free from pain under Kentucky's three-drug protocol, a plurality of justices cited cases such as *Wilkerson* and *Francis* as precedents for the proposition that Kentucky's execution method was not cruel and unusual.

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[51] *Id*. (emphasis added).

[52] *Id*.

[53] Chief Justice Roberts was joined by Justice Alito and Justice Kennedy in his opinion. Justice Alito also filed a separate concurring opinion, and several other members of the Court filed separate opinions as well. Because more members of the Court joined the Roberts opinion than any of the other concurring or dissenting opinions, the Roberts opinion is referred to as the *Baze* "Plurality" opinion. (See, e.g., Black's Law Dictionary 800 (6th abridged ed. 1991) (a "plurality" opinion is distinguished from a "majority" opinion; the former implies that more justices joined the opinion in question than any other (i.e., most support overall), while the latter implies that a larger number of justices joined the opinion than not (i.e., supported by more than half the group))).

Since several members of the Court joined in the outcome, but not all the reasoning, of the Roberts Plurality opinion, the specific extent of its role as precedent for future cases is called into question. Further examination of the point is beyond the scope of this article.

First, the *Baze* Plurality reasoned that the only methods of execution forbidden by the Eighth Amendment were those that deliberately inflicted "pain for the sake of pain" through "torture and the like."[54] The plurality considered the precedent found in *Wilkerson v. Utah* to support its reasoning, noting that the Court had never deemed a state's procedure for carrying out a death sentence unconstitutional under the Eighth Amendment.[55] The plurality was unconvinced that the Kentucky lethal injection protocol had been designed, or would be administered, for the sake of inflicting pain or torture.[56]

The *Baze* Plurality also referenced the standard set forth in the *Francis* case to support its reasoning. According to the *Francis* Court, "[a]ccidents happen for which no man is to blame," and such "an accident, with no suggestion of malevolence," was not grounds for an Eighth Amendment violation.[57] Using this reasoning, the *Baze* Plurality concluded that although Kentucky's protocol may cause accidental pain when administered improperly, this was not grounds to establish the "'objectively intolerable risk of harm' that qualifies as cruel and unusual" punishment.[58]

Baze and Bowling had argued that the Kentucky protocol may not involve *intentional* torture, but that the possibility for misapplication of the Sedative created a systematic, rather than merely accidental, risk of significant pain and torture. The *Baze* Plurality rejected this argument, carrying the principles of *Wilkerson* further, as had been done in *Kemmler*, by stating that a punishment is only considered cruel and unusual when "something more than the mere extinguishment of life" is involved, and the procedure creates a "substantial risk of serious harm," or an "objectively intolerable risk of harm."[59]

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[54] *Baze*, 128 S. Ct. at 1531.

[55] *Id*.

[56] In a concurring opinion, Justice Thomas argued that the *Baze* Court should end its analysis here. In his view, the Court could ferret out unconstitutional methods of punishment that had been "deliberately designed to inflict pain," but exceeded its institutional capacity if it attempted to embark in further examination as to the relative merits of differing methods of execution that might cause unintended suffering. *Id.* at 1556 (Thomas, J., concurring).

[57] *Id*. at 1531 (plurality opinion).

[58] *Id*.

[59] *Id*.

Chief Justice Roberts, writing the lead opinion for the *Baze* Plurality, went on to say that in order to prove a particular execution method rises to this cruel and unusual level, the challenger must identify an *alternative* that is:

(1) feasible,

(2) readily implemented, *and*

(3) capable of significantly reducing a substantial risk of severe pain.[60]

In other words, Roberts was willing to take a relative approach, measuring the current method of execution against the possible (and readily available) alternatives. Baze and Bowling had proposed a single-drug alternative to Kentucky's three-drug lethal injection protocol.[61] However, Roberts did not find that the alternative met the requirements of this new three-part test.

As to *feasibility* (factor 1), Roberts did not dispute the possibility that a single-dose form of lethal injection might also cause death. However, he remained unconvinced that the single-dose method served the same purposes as Kentucky's three-drug protocol. Roberts cited the trial court's findings that the Paralytic (Kentucky's second drug) served two purposes: first, it prevented unconscious physical movements that may result from the third injection, and second, it stopped respiration, which helped hasten death.[62] Thus, he seemed skeptical that the proposed single-drug alternative could induce death as effectively as Kentucky's current method.

As to *implementability* (factor 2), Baze and Bowling argued that any method of lethal injection – either their proposed method or Kentucky's *current* method – could not be implemented without an unacceptable risk of suffering unless qualified anesthesiologists were brought in to participate in the process. Without these professionals to administer the Sedative (the first drug), Kentucky could not ensure that the inmate was anesthetized from the horrifying effects of the remaining drugs.

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[60] *Id*. at 1532. Justice Thomas, in his concurring opinion, expressed concern with the lack of historical precedent for this new, 3-part "risk-based" test. See, e.g., *id.* at 121-23 (Thomas, J., concurring). In his own concurring opinion, Justice Breyer also expressed some concerns with the second and third factors of this newly-articulated test. See, e.g., *id.* at 134-36 (Breyer, J., concurring).

[61] The petitioners contended that the three-drug protocol should be replaced with a one-drug protocol that used a single dose of sodium thiopental or another barbiturate. *Id.* at 1534 (plurality opinion).

[62] *Id*. at 1535.

Roberts reasoned that this argument was merely an attempt to halt the entire lethal injection process, given that professional anesthesiologists were forbidden from participating in executions by both Kentucky law and the American Society of Anesthesiologists' ethical guidelines.[63] Furthermore, Roberts concluded that the presence of these professionals was *not* necessary to "avoid a substantial risk of suffering" (overlapping somewhat with factor 3).[64]

Finally, Roberts found overall that Baze and Bowling had failed to prove their alternative procedure would *significantly* reduce a *substantial* risk of *severe* pain (factor 3). He did not directly dispute that failed administration of the Sedative might lead to *severe* pain. However, expert witnesses had testified at trial that converting the powder form of the Sedative into an injectable solution was "[n]ot difficult at all."[65] Based on this testimony, Roberts reasoned that there were sufficient safeguards in place within Kentucky's protocol to rule out a *substantial* risk of improper administration.[66] With these safeguards in place, Roberts seemed satisfied that there was no *substantial* risk to be reduced, either *significantly* or otherwise.

Overall, the *Baze* Plurality found that Kentucky's protocol for lethal injection did not constitute cruel and unusual punishment under the Eighth Amendment. Baze and Bowling had failed to prove that Kentucky's three-drug protocol created an "objectively intolerable risk of harm," and their proposed alternative procedure did not pass muster under Justice Roberts' newly articulated three-factor test. Therefore, Kentucky was free to continue using its current three-drug protocol for capital executions.[67]

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[63] Justice Alito raised a similar concern in his concurring opinion regarding the institutional barriers to bringing in medical professionals. See, e.g., *id.* at 1539-40.

[64] *Id*. at 1536.

[65] *Id*. at 1533.

[66] *Id*. at 1533-34. These safeguards included: (1) the protocol's requirement that members of the IV team must have at least one year professional experience as a medical assistant; (2) the protocol's requirement that the team establish backup lines for the Sedative in case the primary line failed; (3) the fact that the IV team was "highly qualified"; and (4) the fact that the warden and deputy warden were present in the execution chamber to watch for signs of IV failure. *Id.*

[67] Justices Scalia and Stevens also wrote concurring opinions, in which they digressed from the issue at hand and instead engaged in a disagreement with one another over the constitutionality of the death penalty in general. Their specific arguments are beyond the scope of this article.

*Justice Ginsburg's Dissenting Opinion*

Justice Ginsburg, joined by Justice Souter, delivered a dissenting opinion. According to Ginsburg, it was undeniable that Kentucky's second and third drugs – the Paralytic and the Cardiac-Arrester – would cause a *conscious* inmate to undergo "excruciating pain."[68] The primary question, she argued, was whether Kentucky's first drug – the Sedative – would always be properly administered under the Kentucky protocol, thereby alleviating this potential form of torture.[69]

Like the plurality, Justice Ginsburg considered the *Wilkerson*, *Kemmler*, and *Francis* cases, but she concluded that this small handful of precedents provided "[n]o clear standard for determining the constitutionality of a method of execution."[70] She agreed with the plurality that "the degree of risk, magnitude of pain, and availability of alternatives must be considered."[71] However, rather than building a three-part test, under which each factor must be proven unequivocally, she argued that "a strong showing on [one of the factors] reduces the importance of others."[72] In other words, if a proposed alternative makes a significant difference in reducing a risk of unnecessary pain, then the Court should insist that the State seek out the alternative, regardless of whether or not it happens to be easily implemented.

As to the specifics of Kentucky's three-drug protocol, Justice Ginsburg argued that the State did not even take "elementary measures" to provide a proper degree of assurance the Sedative would be properly administered.[73] She was particularly concerned by the possibility that: (1) Kentucky's use of the Paralytic would not allow the inmate to scream, even if he was experiencing excruciating pain; and (2) the inmate may receive enough of the Sedative to prevent him from showing consciousness when he might, in fact, still be conscious enough to fully experience the painful effects of the Paralytic or the

[68] *Id*. at 1567 (Ginsburg, J., dissenting).

[69] *Id*.

[70] *Id*. at 1568.

[71] *Id*.

[72] *Id*.

[73] *Id*. at 1571. In his concurring opinion, Justice Breyer expressed similar concerns by stating that "Kentucky should require more thorough testing as to unconsciousness" to test whether alternatives, if any, would make a significant difference in the pain an inmate faced before undergoing unconsciousness. *Id.* at 1566 (Breyer, J., concurring).

Cardiac-Arrester.[74] Ginsburg seemed to suggest that putting an inmate through this silent form of torture, even through the negligent failure to explore alternative procedures, was tantamount to the barbary referenced in the early Eighth Amendment cases. She argued that the Court should have remanded the case for further consideration as to whether these unaddressed shortcomings in Kentucky's protocol created an "untoward, readily avoidable risk of inflicting severe and unnecessary pain."[75]

## ANALYSIS

The Eighth Amendment to the United States Constitution prohibits the use of cruel and unusual punishments in carrying out death sentences. Over the last two centuries, the Supreme Court has continued to build upon its definition of cruel and unusual punishment with increasing emphasis on the concept of unnecessary torture. Despite the Court's general consistency in prohibiting torture, however, Chief Justice Roberts' *Baze* opinion signals a dangerous, and unnecessary, departure from that precedent.

### *Roberts vs. Ginsburg: Realism vs. Idealism*

In *Baze*, Chief Justice Roberts states that a punishment may be deemed cruel or unusual only if it provides an "objectively intolerable risk" that substantial harm will occur. Roberts tests for this risk by establishing three factors to determine whether the failure to improve upon a state's current method of execution violates the Eighth Amendment:

(1) the availability of a *feasible* alternative,

(2) the potential for the alternative to be readily *implemented*, and

(3) the potential for the alternative to *significantly* reduce a *substantial* risk of *severe* pain.[76]

[74] *Id*. at 1571-72 (Ginsburg, J., dissenting).

[75] *Id*. at 1571. For instance, Justice Ginsburg suggested that a simple test such as brushing an inmate's eyelashes could verify whether the inmate was conscious or not. An expert witness testified during the case that "a conscious person, if you touch their eyelashes very lightly, will blink; an unconscious person typically will not."

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

This test suggests that current methods of execution are acceptable until an alternative that passes all three of these factors presents itself. Roberts' approach seems to be grounded in realism; i.e., current methods of execution should be considered reasonably humane whenever no other feasible, implementable, and significant alternatives exist. Under the Roberts approach, a state should not be prevented from continuing executions when a proposed alternative method of execution cannot be readily implemented.

On the other hand, Justice Ginsburg's approach seems more grounded in idealism. She puts stronger emphasis on whether an alternative could significantly reduce severe pain, even if that alternative method is not readily implementable.[77] Furthermore, Ginsburg seems to suggest that a method of punishment is "cruel and unusual" if the state intentionally ignores avoidable risks by disregarding potential alternatives.[78] In this regard, Justice Ginsburg aims to avoid risks of severe pain by insisting that potential alternatives be explored, regardless of any current roadblocks to implementation.

The opinions expressed by Justices Roberts and Ginsburg are both subject to important criticisms. The "implementability" factor of Roberts' test sets an inappropriate threshold to determine whether an alternative method of execution should be used. Even if the alternative is technologically feasible, and it significantly reduces a substantial risk of severe pain, it can still be rejected if its implementation provides some challenges. Ginsburg's approach, on the other hand, can be viewed as somewhat too idealistic. States simply may not have the authority or the resources to break through some of the barriers to implementation blocking a particular alternative; this should not be used as an excuse to prevent capital punishment all together.

Additionally, both approaches require the courts to determine whether a proposed alternative "significantly reduces a substantial risk of severe pain."[79] This factor forces courts to make subjective decisions regarding medical matters that are certainly beyond the scope of the judiciary's institutional capacity. While it is imperative to respect the constitutional values protected

[77] *Id*. at 1569 (Ginsburg, J., dissenting).

[78] For example, if the State knew of a more humane method of execution but ignored it because it deemed the method "infeasible" under the Roberts test, then the State would be *intentionally* torturing criminals, thereby violating the Eighth Amendment.

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

by the Eighth Amendment, federal judges have neither the resources nor the expertise to evaluate these complex scientific questions.

Since both Roberts' realism and Ginsburg's idealism fail to provide a perfect solution when it comes to considering alternative methods of execution, a return to past case precedent may be in order. The three important cases in which the Supreme Court defined "cruel and unusual" forms of execution were *Wilkerson*, *Kemmler*, and *Francis*. The *Wilkerson* Court determined that death by firing squad was constitutional, and ruled that punishments that included torture or "unnecessary cruelty" are forbidden by the Constitution.[80] The *Kemmler* Court reaffirmed the *Wilkerson* definition of "cruel and unusual," and agreed that "[p]unishments are cruel when they involve torture or a lingering death [because it] implies something inhuman and barbarous, something more than the mere extinguishment of life."[81]

When the *Francis* case was decided, the Court clarified that *intentional* torture was forbidden by the Eighth Amendment. The *Francis* Court ruled that a new electrocution, following a failed attempt, may subjectively seem tortuous to the inmate. However, it would not, as an objective matter, represent *intentional* cruelty on the part of the state. From this perspective, unintentional "accidents" during an otherwise humane method of execution do not violate the Eighth Amendment.[82] The *Francis* Court did not speak in terms of an acceptable or unacceptable level of "risk" of accidents when analyzing the constitutionality of an execution method.

The *Baze* decision, therefore, breaks somewhat from this trend. Chief Justice Roberts does look at the concept of risk. He finds that risking pain is permissible if the alternatives, as feasible as they might be, are not readily implementable or the reduction of risk is not substantial. In this sense, he is not simply excusing the unexpected accident; he is also excusing the failure to prevent a systematic risk of pain that might otherwise be prevented. Justice Ginsburg, on the other hand, speaks more in terms of the concept of intentional cruelty as presented in cases like *Wilkerson* and *Francis*. She seems to view the act of ignoring an alternative which significantly reduces the risk of pain as *intentionally* cruel and, thus, constitutionally impermissible.

[80] *Wilkerson*, 99 U.S. at 135.

[81] *Kemmler*, 136 U.S. at 447.

[82] *Francis*, 329 U.S. at 464.

Despite the previously-discussed flaws with each approach, Justice Ginsburg's seems most reflective of past case precedent. She takes the concept of torture and unnecessary cruelty as the animating force behind the Eighth Amendment, and in her effort to preserve the Amendment's values, she aspires toward the highest standard of humanity. By treating an intentional (or merely negligent) failure to explore viable alternatives as a form of torture in and of itself, she calls upon the states to take a more active role in pressing for new breakthroughs in their methods of extinguishing life without causing unnecessary pain and suffering. Chief Justice Roberts' approach may be more practical, but in the long run, he provides no deterrent to this suffering.

*Recommendation*

Advocating for Justice Ginsburg's more idealistic Eighth Amendment standard certainly leads to questions of implementation. Careful attention must be paid to research regarding alternative methods of execution to ensure that the most humane approach is being used. However, as many members of the *Baze* Court cautioned, realistic limits on medical technology and institutional concerns over judicial capacity must be taken into account as well.

First, as Chief Justice Roberts and several other members of the Court noted, it is beyond the scope of judicial capacity to research and determine the best practices for executions.[83] The Court's role in this process is to determine whether a particular protocol violates the Eighth Amendment. The Court does not, however, possess the resources to compare alternative chemicals, methods, or protocols to determine whether they provide significant improvements over current methods. Even the rare jurist who might have the scientific background to make such an evaluation cannot, and should not, be out in the field looking at cutting edge research and data to measure the best methods of execution.

On the other hand, the courts could, instead, defer this task to the state legislatures. As discussed in *Kemmler,* this was done in 1885 when the New York legislature appointed a commission to search for the most humane,

[83] Justice Thomas touched upon this issue in his concurrence, which is largely beyond the scope of this article. In general, he argued that Roberts had proposed a "comparative risk" standard that would "require courts to resolve medical and scientific controversies" far beyond the scope of the judiciary's power. *Baze*, 128 S. Ct. at 1562 (Thomas, J. concurring).

technologically feasible method of execution available at the time.[84] Once the commission deemed electrocution as the most humane method, the State legislature then amended the New York Code of Criminal Procedure to adopt electrocution as its protocol. When Kemmler challenged the electrocution protocol in 1890, the Supreme Court deferred to the authority and expertise of New York's legislature and treated execution by electrocution as constitutional.[85] The fact that the Court deferred to the authority of the state's commission of experts illustrates the benefit of bringing legislative resources into the process.

Of the 36 states that had adopted lethal injection as the primary means of implementing the death penalty when Baze and Bowling filed their challenge, Kentucky and at least 29 other states were using the same three-drug combination in their lethal injection protocols.[86] Each of these states could commission similar expert committees to provide expert reports on the feasibility and value of alternative execution protocols, rather than leaving it to individual litigants (with little or no resources) to marshal such evidence on a case-by-case basis.

Better still, these states, as a group, could agree to call upon the expertise of researchers and medical professionals by assembling a nation-wide "Multi-State Commission of Authority." This multi-state commission could then research the most recent innovations in technology, chemicals, and methods best suited for execution protocol. Each state legislature, in turn, could agree to defer to the multi-state commission, and to alter its execution protocols when the commission identified a viable and clearly beneficial alternative.

Meanwhile, courts could also defer to the commission as to the current preferred methods of execution, rather than conducting lengthy trials and making potentially inconsistent rulings on an ad hoc basis. Delegating this important task to a well-qualified body of experts would ensure that the Eighth Amendment is upheld to the fullest extent possible.

[84] *Kemmler*, 136 U.S. at 444.
[85] *Id*. at 447.
[86] *Baze*, 128 S. Ct. at 1526-27.

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## CONCLUSION

The concept of capital punishment has been a source of much debate and controversy in society. Assuming that capital punishment is constitutional, in and of itself, the legal standard for determining what makes a certain form of execution unconstitutionally "cruel and unusual" has become increasingly unclear as well.

This article has compared four different cases in which the Supreme Court took on this task. In *Wilkerson v. Utah*, the Court defined cruel and unusual as punishments as those involving *torture* by stating that "punishments of torture … and all others in the same line of unnecessary cruelty, are forbidden by [the Eighth Amendment] to the Constitution."[87] In the *Kemmler* case, the Court took this definition one step further to include punishments involving *lingering death* by stating that "there is something inhuman and barbarous [involved when the punishment constitutes] more than the mere extinguishment of life."[88] The Court also provided some leeway for innocent accidents in the *Francis* case, clarifying that the Eighth Amendment speaks only to actual "cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely."[89] Finally, in the recent *Baze* decision, several members of the Court wrestled in separate opinions with the concept of defining an "objectively intolerable risk of harm."[90] Concerns over realism and idealism divided the justices in their recommendations, with a plurality of the Court ultimately allowing Kentucky to continue its inherently risky three-drug protocol for lethal injection.

The *Baze* case highlights several relevant concerns over this Nation's current method for execution. Commentators speak of a "growing consensus" that this three-drug process of lethal injection, even when properly administered, can cause extraordinary and unnecessary pain and suffering.[91]

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[87] *Wilkerson*, 99 U.S. at 135.

[88] *Kemmler*, 136 U.S. at 447.

[89] *Resweber*, 329 U.S. at 464.

[90] *Baze*, 128 S. Ct. at 1531.

[91] See, e.g., Edward Lazarus, *The Upcoming Supreme Court Lethal Injection Death Penalty Case: How it Will Likely Illustrate the Serious Ideological Divisions that Continue to Separate the Justices*, September 27, 2007, http://writ.lp.findlaw.com/lazarus/20070927.html (last visited April 7, 2008).

This concern is amplified as the public is exposed to graphic descriptions of the risk involved:

> Pancuronium bromide is generally the second of three drugs administered to the condemned, following the barbiturate-anesthetic and preceding potassium chloride, which causes cardiac arrest. A problem arises when the inmate receives insufficient anesthesia to maintain unconsciousness throughout the process. This problem is exacerbated by the fact that while the prisoner suffocates and then experiences a horrific burning sensation in his veins, his induced paralysis makes him unable to convey, through words or even facial expressions, the horrific suffering that he is experiencing. Instead, his face looks serene and relaxed, a "mask" concealing his agony.[92]

These sources suggest that even the American Veterinary Medial Association has rejected the use of a paralytic combined with a barbiturate for euthanizing animals, because the paralytic may counteract the effects of the anesthesia when the two drugs combine. Such concerns raise important questions as to whether the Eighth Amendment's prohibition on "cruel and unusual" punishment speaks from an idealist, or a realistic, perspective. Given that current medical standards prohibit many trained medical professionals from participating in executions, members of the Supreme Court remain divided in their views.

This article has provided a potential remedy for eliminating the institutional impediments to resolution of these complex questions. Legislative bodies should be turning to medical experts in the quest to decide when an inmate will face unnecessary, objectively intolerable, and avoidable pain. It is important for the courts to maintain a consistent standard as to what the Eighth Amendment prohibits – namely, intentional infliction of torture or a needlessly painful death. The courts can remain consistent in applying this legal standard, but only with the practical assistance of legislative bodies and neutrally commissioned medical experts. Through mutual cooperation, these branches of government can work together to ensure that the overarching ideals found in the Eighth Amendment can be realistically implemented now, and throughout all the technological breakthroughs yet to come.

[92] Sherry F. Colb, *Lethal Injection and Animal Euthanasia: A Fair Comparison?* April 2, 2008, http://writ.lp.findlaw.com/colb/20080402.html (last visited April 4, 2008).