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STUDENT ESSAY

**INTENTIONALLY INFLICTED:  
THE *BAZE* PLURALITY PAINFULLY “EXECUTED”  
THE PURPOSE OF THE EIGHTH AMENDMENT**

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**I. Introduction**

On April 16, 2008, the United States Supreme Court addressed the constitutionality of lethal injection as a method of execution. In its analysis, the Court recognized, as it had in prior cases, that the government’s choice of a particular method of execution did not violate the Eighth Amendment’s ban on cruel and unusual punishment. As a result, the Court upheld the constitutionality of lethal injection in *Baze v. Rees*,<sup>2</sup> rendering a seven-to-two plurality decision.<sup>3</sup>

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<sup>2</sup> *Baze v. Rees*, 128 S. Ct. 1520 (2008).

<sup>3</sup> *Id.* at 1521 (noting that Chief Justice Roberts authored the plurality opinion with Justices Kennedy and Alito joining). Justice Alito also filed a concurring opinion. *Id.* at 1538. Justice Stevens filed an opinion concurring in the judgment. *Id.* at 1542. Justice Scalia filed an opinion concurring in the judgment, which Justice Thomas joined. *Id.* at 1552. Justice Thomas filed an opinion concurring in the judgment, which Justice Scalia joined. *Id.* at 1556. Justice Breyer filed an opinion concurring in the judgment. *Id.* at 1563. Justice Ginsberg filed a dissenting opinion, which Justice Souter joined. *Id.* at 1567; *see also* *Harbison v. Little*, No 07-6225, 2009 U.S. App. LEXIS 14742, at \*8 (6th Cir. July 2, 2009) (“The Court issued several opinions in that case, including Chief Justice Roberts’s plurality opinion (writing for two

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Because no single rationale explaining the result gained the assent of five justices, “the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .”<sup>4</sup> In other words, because the plurality opinion does not act as authority, no controlling principle or justification for the ultimate decision emerged from the case. Nonetheless, because the rationale behind the decision was a point of contention among the justices, it warrants exploration here. Lastly, issues surrounding the death penalty have been analyzed and debated for centuries; however, an important distinction must be noted between the general death penalty debate and the instant matter: the issue presented in *Baze* concerned the execution *method* of lethal injection and not the controversial issue of the existence of the death penalty itself.<sup>5</sup>

In *Baze*, the Court addressed the issue of whether lethal injection as a method of execution is unconstitutional under the Eighth Amendment’s ban on “cruel and unusual punishments.”<sup>6</sup> According to the two Petitioners, Ralph Baze and Thomas Bowling, a chance existed that the method’s protocol might not be followed or administered correctly, thus resulting in the infliction of pain during their executions.<sup>7</sup>

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other justices), one concurring opinion, four other opinions concurring in the judgment, and one dissenting opinion. Under those circumstances, Chief Justice Roberts’s plurality opinion is controlling.”) (citations omitted).

<sup>4</sup> *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976).

<sup>5</sup> *See Baze*, 128 S. Ct. at 1542 (Alito, J., concurring).

<sup>6</sup> U.S. CONST. amend. VIII.

<sup>7</sup> *Baze*, 128 S. Ct. at 1526. The Supreme Court of the United States granted certiorari to the Supreme Court of Kentucky’s decision on the issue, stating the constitutionality of the method of lethal injection. *Baze v. Rees*, 217 S.W.3d 207 (Ky. 2006). The only issue decided by the Supreme Court of Kentucky was the manner in which the Commonwealth of Kentucky can carry out the death sentences on all

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The *Baze* decision is currently important and relevant because thirty-six jurisdictions (thirty-five states and the Federal Government) have adopted lethal injection as their primary or exclusive means of carrying out a sentence of death. Accordingly, lethal injection is “by far the most prevalent method of execution in the United States.”<sup>8</sup> Further, thirty of the thirty-six jurisdictions that use lethal injection, including Kentucky (where *Baze* originated) and the Federal Government, employ a three-drug protocol.<sup>9</sup> In *Baze*, the Court analyzed the

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convicts. *Id.* at 209. The convicts argued that the lethal injection method was cruel and unusual punishment, making it unconstitutional under the Eighth Amendment to the U.S. Constitution and Section 17 of the Kentucky Constitution. *Id.* The Court explained that “[p]rior interpretation of Section 17 of the Kentucky Constitution provides that a method of punishment is cruel and unusual if it shocks the moral sense of reasonable men as to what is right and proper under the circumstances.” *Id.* at 210 (citations omitted). After analyzing the findings and conclusions of the trial court and examining the history of executions in Kentucky, the Court stated that “[t]he prohibition [of the Eighth Amendment and Section 17 of the Kentucky Constitution] is against cruel punishment and *does not require a complete absence of pain.*” *Id.* at 212 (emphasis added). The Court ultimately held that “[t]he lethal injection method used in Kentucky is not a violation of the Eighth Amendment to the United States Constitution or Section 17 of the Kentucky Constitution’s ban on cruel and unusual punishment.” *Id.*

<sup>8</sup> *Baze*, 128 S. Ct. at 1526–27, 1527 n.1 (citing statutes from the twenty-seven of thirty-six states that require the use of lethal injection as the sole method of execution) (citations omitted).

<sup>9</sup> *Workman v. Bredeesen*, 486 F.3d 896, 902 (6th Cir. 2007) (citation omitted). The three drugs used in the protocol are sodium thiopental, pancuronium bromide, and potassium chloride, administered in that order. *Id.* (citation omitted).

The dose of sodium thiopental, a barbiturate that “reduced oxygen flow to the brain and causes respiratory depression” . . . quickly anesthetizes the inmate and *is sufficient to cause death in the absence of the two additional chemicals in the protocol.* Pancuronium bromide is a “muscle paralytic” that

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constitutionality of lethal injection in the context of this particular method<sup>10</sup> and held that Kentucky's execution method satisfied the Eighth Amendment.<sup>11</sup>

The Court's grant of certiorari in this case garnered national attention and subsequently brought about an unofficial national moratorium on executions pending the Court's consideration of the Eighth Amendment issue.<sup>12</sup> Therefore, in analyzing the constitutionality of lethal injection, the Court sought to provide clarity and to

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“assist[s] in the suppression of breathing and ensure[s] death.” The amount of pancuronium bromide that the State administers also proves fatal on its own, and the State selected the drug because it hastens death, and “prevents involuntary muscular movement that may interfere with the proper functioning to the IV equipment,” thus “contribut[ing] to the dignity of the death process.” Potassium chloride, a salt, interferes with heart function, causing “cardiac arrest and rapid death.” *If administered properly, the sodium thiopental anesthetizes inmates before they receive the remaining two drugs.*

*Id.* (emphasis added) (citations omitted).

<sup>10</sup> Originally, the dosage was “2 grams of sodium thiopental, 50 milligrams of pancuronium bromide, and 240 milliequivalents of potassium chloride.” *Baze*, 128 S. Ct. at 1528. Now, Kentucky's protocol consists of 3 grams of sodium thiopental, 50 milligrams of pancuronium bromide, and 240 milliequivalents of potassium chloride. *Id.* (citation omitted).

<sup>11</sup> *Id.* at 1538.

<sup>12</sup> Linda Greenhouse, *Justices Uphold Lethal Injection in Kentucky Case*, N.Y. TIMES, Apr. 17, 2008, at A1 (“Dozens of executions have been delayed around the country in recent months. . . . The Supreme Court itself had not imposed a general moratorium, instead granting individual stays of execution in cases that reached the court.”); Adam Liptak, *Does Death Penalty Save Lives? A New Debate*, N.Y. TIMES, Nov. 18, 2007, at A32 (“The Supreme Court now appears to have once again imposed a moratorium on executions as it considers how to assess the constitutionality of lethal injections.”).

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establish a workable standard for the lower courts to apply to the influx of litigation challenging lethal injection.

In his plurality opinion, Chief Justice John Roberts distinguished the petitioners' claim of an "unnecessary risk" standard<sup>13</sup> from the stated "substantial risk" standard<sup>14</sup> as the standard that must be met in order for an execution method to violate the Eighth Amendment. Time and time again, the Court had opportunities to rule on the constitutionality of a state's chosen method of execution.<sup>15</sup> Each time, however, the Court refused to take what would have amounted to an unprecedented step because the justices did not perceive such a determination to be within the purview of the Court's role in the justice system.<sup>16</sup>

The *Baze* plurality determined that Kentucky's lethal injection protocol not only conformed with Eighth Amendment requirements but also recognized that the "substantial risk" standard acted as an acknowledged

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<sup>13</sup> See *Baze*, 128 S. Ct. at 1529.

[Petitioners] contend that the *Eighth Amendment* prohibits procedures that create an "unnecessary risk" of pain. Specifically they argue that courts must evaluate "(a) the severity of pain risked, (b) the likelihood of that pain occurring, and (c) the extent to which alternative means are feasible, either by modifying existing execution procedures or adopting alternative procedures."

*Id.* (citations omitted).

<sup>14</sup> *Id.* at 1531 ("We have explained that to prevail on such a claim there must be a 'substantial risk of serious harm' . . .") (citations omitted).

<sup>15</sup> *Id.* at 1530 ("This Court has never invalidated a State's chosen procedure for carrying out a sentence of death as infliction of cruel and unusual punishment."). In support of this contention, the Court discussed its previous decisions on the matter. See *id.* Such cases will be described in detail later in the Case Note.

<sup>16</sup> *Id.* at 1562 (Thomas, J., concurring) ("We have neither the authority nor the expertise to micromanage the States' administration of the death penalty in this manner.").

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limitation on the Court's ability to dictate execution methods to the states. Nevertheless, it can be argued that the substantial risk standard that the Court established in this case is not the governing Eighth Amendment standard. Instead, as set out in previous majority opinion cases, the test is much more direct: A method of execution violates the Eighth Amendment if it intentionally inflicts or enhances pain. This note will show that although the *Baze* plurality was correct in its ultimate judgment, the plurality opinion complicated the underlying intent of the Eighth Amendment by asserting a questionable and historically unsupported risk-based standard as the test of determining the constitutionality of a method of execution.

### II. Case Summary of *Baze v. Rees*

*Baze* arose in Kentucky after two death row inmates, Ralph Baze and Thomas Bowling, "completely exhausted all of the legitimate state and federal means for challenging their convictions and the propriety of [their] death sentences."<sup>17</sup> Baze was convicted by a jury on two counts of murder for shooting two law enforcement officers with an assault rifle as the officers attempted to serve him with five felony fugitive warrants.<sup>18</sup> Bowling was likewise convicted by a jury on two counts of murder for killing a husband and wife as they sat in their automobile outside a dry cleaning store.<sup>19</sup>

The convicted felons first filed suit in the Franklin County Circuit Court in Kentucky, seeking a declaratory judgment that the lethal injection method of execution violated their state and federal constitutional rights because

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<sup>17</sup> *Baze*, 217 S.W.3d at 209.

<sup>18</sup> *Id.* (citing *Baze v. Commonwealth*, 965 S.W.2d 817 (Ky. 1997)).

<sup>19</sup> *Baze*, 217 S.W.3d at 209 (citing *Bowling v. Commonwealth*, 873 S.W.2d 175 (Ky. 1997)).

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such a method was cruel and unusual punishment.<sup>20</sup> After a thorough bench trial, consisting of seventeen depositions and twenty witnesses, the Circuit Court denied relief, after which the defendants appealed to the Kentucky Supreme Court.<sup>21</sup> After “careful review of this matter,” that tribunal determined that there was “no reason to believe that the circuit judge was clearly erroneous in any of his findings of fact,” ruling, “the decision of the trial judge was not clearly erroneous nor was there any abuse of discretion.”<sup>22</sup> The court stated that “[a] method of execution is considered to be cruel and unusual punishment under the Federal Constitution when the procedure for execution creates a *substantial risk* of wanton and unnecessary infliction of pain, torture, or lingering death.”<sup>23</sup> Using that standard, and after a detailed examination of lethal injection as a method of execution, the court held that “[t]he lethal injection method used in Kentucky is not a violation of the Eighth Amendment to the United States Constitution or

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<sup>20</sup> *Baze*, 217 S.W.3d at 209 (citing *Woods v. Commonwealth*, 142 S.W.3d 24 (Ky. 2004)).

<sup>21</sup> *Id.* The Supreme Court of Kentucky briefly summarized the conclusions of the trial judge: 1) the inmates did not show by a preponderance of the evidence that the lethal injection method was not normal in capital punishment; 2) the method was not shown by a preponderance of the evidence to degrade the dignity of the felons; 3) no evidence proved that lethal injection inflicted unnecessary pain and suffering; 4) no evidence supported the contention that lethal injection caused unnecessary psychological suffering; 5) the method does not deprive the prisoners of their due process rights; and 6) the actual physical administration of the method did not create a substantial risk of unnecessary infliction of pain and suffering to violate the Eighth Amendment. *See id.* at 210–11 (citations omitted).

<sup>22</sup> *Baze*, 217 S.W.3d at 210.

<sup>23</sup> *Id.* at 209 (emphasis added) (citing *Gregg v. Georgia*, 428 U.S. 153 (1976)).

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Section 17 of the Kentucky Constitution’s ban on cruel and unusual punishment.”<sup>24</sup>

The United States Supreme Court granted certiorari and affirmed the Kentucky Supreme Court’s decision.<sup>25</sup> The Court first confirmed that “capital punishment is constitutional”<sup>26</sup> and pointed out that there must be some means of carrying out such punishment.<sup>27</sup> Further, the Court agreed that “the Constitution does not demand the avoidance of all risk of pain in carrying out executions”<sup>28</sup> and, likewise, the petitioners did not claim that all pain must be avoided.<sup>29</sup> Rather, the petitioners contended that “the Eighth Amendment prohibits procedures that create an ‘unnecessary risk’ of pain.”<sup>30</sup> The petitioners argued that the courts must consider “(a) the severity of pain risked, (b) the likelihood of that pain occurring, and (c) the extent to which alternative means are feasible, either by modifying existing execution procedures or adopting alternative procedures.”<sup>31</sup>

The Court, however, rejected this contention and explained that the petitioners failed to meet their “heavy burden,”<sup>32</sup> stating that “to prevail on such a claim there must be a ‘substantial risk of serious harm,’ an ‘objectively intolerable risk of harm’ [by the current procedure]. . . .”<sup>33</sup>

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<sup>24</sup> *Baze*, 217 S.W.3d at 212. “Baze and Bowling have not met their burden of proof by a preponderance of the evidence as necessary in a declaratory judgment action. The findings of fact by the trial judge are not clearly erroneous. The conclusions of law are correct.” *Id.* at 212–13.

<sup>25</sup> *Baze v. Rees*, 128 S. Ct. at 1529 (citation omitted).

<sup>26</sup> *Id.* (citing *Gregg*, 428 U.S. at 177).

<sup>27</sup> *Baze v. Rees*, 128 S. Ct. at 1529.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* (citation omitted).

<sup>32</sup> *Baze v. Rees*, at 1533 (citing *Gregg*, 428 U.S. at 175).

<sup>33</sup> *Baze v. Rees*, at 1531 (citation omitted).



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Accordingly, the Court asserted that “a condemned prisoner cannot successfully challenge a State’s method of execution merely by showing a slightly or marginally safer alternative.”<sup>34</sup> To be successful, a challenger must not only prove that “the State’s lethal injection protocol creates a demonstrated risk of severe pain [but must also] show that the risk is substantial *when compared* to the known and available alternatives.”<sup>35</sup>

The petitioners argued that the actual protocol for administering the three-drug combination could create opportunities for error, which was a claim that relied on the improper administration of the first drug, sodium thiopental.<sup>36</sup> The Court, however, found that the petitioners did not prove that the risk of administering an inadequate dose was a substantial risk of serious harm.<sup>37</sup> The Court

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<sup>34</sup> *Id.*

<sup>35</sup> *Baze v. Rees*, 128 S. Ct. at 1537 (emphasis added).

<sup>36</sup> *Id.* at 1533.

Petitioners contend that there is a risk of improper administration of thiopental because the doses are difficult to mix into solution form and load into syringes; because the protocol fails to establish a rate of injection, which could lead to a failure of the IV; because it is possible that the IV catheters will infiltrate into surrounding tissue, causing an inadequate dose to be delivered to the vein; because of inadequate facilities and training; and because Kentucky has no reliable means of monitoring the anesthetic depth of the prisoner after the sodium thiopental has been administered.

*Id.* (citing Brief for Petitioners at 12–20, *Baze v. Rees*, 128 S. Ct. 1520 (2008)).

<sup>37</sup> *Baze v. Rees*, 128 S. Ct. at 1533.

We cannot say that this finding is clearly erroneous, particularly when that finding is substantiated by expert testimony describing the task of reconstituting

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also established that “Kentucky’s failure to adopt Petitioners’ proposed alternatives” did not “demonstrate that the Commonwealth’s execution procedure [was] cruel and unusual.”<sup>38</sup> This view rejected the petitioners’ contention that Kentucky could switch to a one-drug protocol “by using a single dose of sodium thiopental or other barbiturate.”<sup>39</sup> The Court concluded that “the Commonwealth’s continued use of the three-drug protocol cannot be viewed as posing an ‘objectively intolerable risk’ when no other State has adopted the one-drug method and petitioners proffered no study showing that it is an equally effective manner of imposing a death sentence.”<sup>40</sup>

In summation, the holding of the Court indicated that the Eighth Amendment sets a rigorous requirement, even when using a risk-based standard: “Simply because an execution method may result in pain, either by accident or as an inescapable consequence of death, *does not establish* the sort of ‘objectively intolerable risk of harm’ that qualifies as cruel and unusual” under the Eighth Amendment.<sup>41</sup>

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powder sodium thiopental into solution form as “[n]ot difficult at all . . . You take a liquid, you inject it into a vial with the powder, then you shake it up until the powder dissolves and, you’re done. The instructions are on the package insert.” Likewise, the asserted problems related to the IV lines do not establish a sufficiently substantial risk of harm to meet the requirements of the Eighth Amendment. Kentucky has put in place several important safeguards to ensure that an adequate dose of sodium thiopental is delivered to the condemned prisoner.

*Id.* (citations omitted).

<sup>38</sup> *Id.* at 1534.

<sup>39</sup> *Id.* (citation omitted).

<sup>40</sup> *Baze v. Rees*, 128 S. Ct. at 1535 (citation omitted).

<sup>41</sup> *Id.* at 1531 (emphasis added).

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**III. Development of the Law**

The United States Supreme Court considered challenges to the methods and circumstances of implementation of executions. Each time the Court rejected the challenge, holding that either the method of execution or circumstances surrounding its imposition did not violate the Eighth Amendment. As in *Baze*, the constitutionality of the death penalty itself was not at issue in any of the preceding cases. Rather, the Court focused on the constitutionality of specific methods and circumstances surrounding the implementation of capital sentences.<sup>42</sup> Before proceeding, recall that the “cruel and unusual punishments” provision for the Eighth Amendment was not “incorporated” in the Fourteenth Amendment and thus applied to the States until 1962.<sup>43</sup> Therefore, prior to that time, all Supreme Court cases arising from the States focused on the Due Process Clause of the Fourteenth Amendment in assessing cruelty, and not on the Eighth Amendment’s provision.

First, in *Wilkerson v. Utah*, the Court addressed whether the Federal Territory of Utah’s method of death by firing squad violated the Eighth Amendment.<sup>44</sup> A jury convicted the prisoner of first-degree murder, and he was sentenced to death.<sup>45</sup> At the time, Congress provided that

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<sup>42</sup> See *Gregg v. Georgia*, 428 U.S. 153, 170 (1976).

<sup>43</sup> See *Robinson v. California*, 370 U.S. 660 (1962) (holding that a California statute making it a criminal offense to be addicted to the use of narcotics constituted cruel and unusual punishment within the meaning of the Eighth and Fourteenth Amendments to the Constitution).

<sup>44</sup> *Wilkerson v. Utah*, 99 U.S. 130 (1879). Also, for historical reference, the Supreme Court was referring to the Federal Territory of Utah and not the current State of Utah. *Id.* Utah was not admitted to the Union until 1896; therefore, no issue of incorporation of the Eighth Amendment into the Fourteenth Amendment appears in *Wilkerson*. *Id.*

<sup>45</sup> *Id.* at 132.

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“[d]uly organized Territories are invested with legislative power, which extends to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States.”<sup>46</sup> Further, “Congress organized the Territory of Utah on the 9th of September, 1850, and provided that the legislative power and authority of the Territory shall be vested in the governor and legislative assembly.”<sup>47</sup> In accordance with Congress’s grant of power to the territories, the Compiled Laws of the Territory of Utah stated that “‘when any person shall be convicted of any crime the punishment of which is death . . . he shall suffer death by being shot, hung, or beheaded, as the court may direct,’ or as the convicted person may chose.”<sup>48</sup> The Court recognized that the laws of the Territories must not violate the Constitution, analyzing the comments of several prominent authors on the meaning and application of cruel and unusual punishment.<sup>49</sup> After such consideration, the Court concluded that it would be difficult 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 [the Eighth Amendment] to the Constitution.”<sup>50</sup> Describing its understanding of the meaning of “cruel and unusual punishments” as instances where pain was “superadded,”<sup>51</sup> the Court referenced cases “where the prisoner was drawn or dragged to the place of execution; or where he was emboweled alive, beheaded, and quartered . . . .”<sup>52</sup> In light of its statements, the Court

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<sup>46</sup> *Id.* at 130 (citing Rev. Stats., sect. 1851).

<sup>47</sup> *Id.* (citing 9 Stat. 454).

<sup>48</sup> *Id.* (quoting 1852 Utah Laws 61; 1856 Utah Laws 564)).

<sup>49</sup> See generally *Wilkerson*, 99 U.S. at 134–37.

<sup>50</sup> *Id.* at 135–36 (citations omitted).

<sup>51</sup> *Id.* at 135.

<sup>52</sup> *Id.*

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did not conclude that death by firing squad was “unnecessary cruelty,”<sup>53</sup> rather it held that Territory of Utah’s method of execution did not inflict cruel and unusual punishment.<sup>54</sup>

Second, in *In re Kemmler*,<sup>55</sup> the Court, without hesitation, refused to declare New York’s execution method of electrocution unconstitutional.<sup>56</sup> The petitioner challenged the execution method on Fourteenth Amendment due process grounds, meaning that the Court did not specifically reach the issue of Eighth Amendment interpretation.<sup>57</sup> Instead, in light of *Wilkerson*, the Court simply examined the meaning of “cruel” in the Eighth Amendment, stating 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 the word used in the Constitution. It implies there is something *inhuman and barbarous, something more than the mere extinguishment of life*.”<sup>58</sup> Because such extreme punishments would be cruel and this distinction was “common knowledge,”<sup>59</sup> the Court did not assume that electrocution was “cruel” in this instance because “it was for the legislature to say in what manner a sentence of death should be executed.”<sup>60</sup> The Court determined that the decision to use electrocution as its means of execution did not violate “any title, right, privilege, or immunity specially set up or claimed by the petitioner under the Constitution of

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<sup>53</sup> *Id.* at 136 (citation omitted).

<sup>54</sup> *Wilkerson*, 99 U.S. at 136 (“Concede all that, and still it by no means follows that the sentence of the court in this case falls within that category, or that the Supreme Court of the Territory erred in affirming the judgment of the court of original jurisdiction.”)

<sup>55</sup> *In re Kemmler*, 136 U.S. 436 (1890).

<sup>56</sup> *Id.* at 449.

<sup>57</sup> *Id.* at 446.

<sup>58</sup> *Id.* at 447 (emphasis added).

<sup>59</sup> *Id.*

<sup>60</sup> *Kemmler*, 136 U.S. at 447.

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the United States.”<sup>61</sup> Therefore, the decision as to which method should be used “was almost wholly confided”<sup>62</sup> in the legislature of the State. The Court further clarified the role of the judiciary in determining the constitutionality of an execution method by stating that “if the punishment prescribed . . . were manifestly cruel and unusual, *as burning at the stake, crucifixion, breaking on the wheel, or the like*, it would be the duty of the courts to adjudge such penalties to be within the constitutional prohibition.”<sup>63</sup> Such was not the case in *Kemmler*, and the Court rejected the Fourteenth Amendment challenge to electrocution because “the legislature of the State of New York determined that [electrocution] did not inflict cruel and unusual punishment, and its courts have sustained that determination.”<sup>64</sup> Therefore, the Court could not “perceive that the State has thereby abridged the privileges or immunities of the petitioner, or deprived him of due process of law.”<sup>65</sup>

Lastly and in a different context (circumstances of the actual implementation of the death penalty) in *Louisiana ex rel. Francis v. Resweber*,<sup>66</sup> a plurality of the Court refused to find that a second attempt at electrocution violated the due process clause of the Fourteenth Amendment “on the ground that an execution under the circumstances detailed would deny due process to [the petitioner] because of . . . the cruel and unusual punishment provision of the Eighth Amendment.”<sup>67</sup> The Court reasoned, however, that because the first attempt was an

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 446.

<sup>63</sup> *Id.* (emphasis added).

<sup>64</sup> *Id.* at 449.

<sup>65</sup> *Kemmler*, 136 U.S. at 449.

<sup>66</sup> *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947).

<sup>67</sup> *Id.* at 461.

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“unforeseeable accident”<sup>68</sup> and a second attempt would not “add an element of cruelty.”<sup>69</sup> The initial attempt failed because “[t]he executioner threw the switch but, presumably because of some mechanical difficulty, death did not result.”<sup>70</sup> Although it was not the holding of the case, the plurality explained its interpretation of the intention of the Eighth Amendment in light of the Fourteenth Amendment Due Process Clause: “[t]he cruelty against which the Constitution protects a convicted man is *cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely.*”<sup>71</sup> The plurality used such an interpretation to support its decision that the second attempt at the execution did not violate the petitioner’s Fourteenth Amendment due process rights because of cruelty because “*no purpose to inflict unnecessary pain*” existed.<sup>72</sup>

Although *Wilkerson* and *Kemmler* represent precedent-setting cases that distinctively addressed the constitutionality of specific methods of execution, it must be noted that by no means are those cases the only Supreme Court cases addressing the issue of the death penalty. A plethora of cases have been argued before the Court regarding the different aspects of the death penalty and its interplay with the Eighth Amendment. For example, although not dealing with specific methods of execution, the Court, in *Gregg v. Georgia*,<sup>73</sup> discussed the meaning of “cruel and unusual” as an evolving concept, warranting interpretation in “a flexible and dynamic manner.”<sup>74</sup> The Court rendered the *Gregg* decision when the tide of public

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<sup>68</sup> *Id.* at 464.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 460.

<sup>71</sup> *Resweber*, 329 U.S. at 464 (emphasis added).

<sup>72</sup> *Id.* at 464-65 (emphasis added).

<sup>73</sup> *Gregg v. Georgia*, 428 U.S. 153 (1976).

<sup>74</sup> *Gregg*, 428 U.S. at 171.

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opinion seemed to be shifting back in support of the death penalty, following an unofficial moratorium on the death penalty from 1967-1976.<sup>75</sup> During the nine-year moratorium, the courts and much of society grappled with the question of whether “the U.S. reached the point at which the death penalty affronts the basic standards of decency of contemporary society.”<sup>76</sup> Although the ultimate answer to that question was “No,” the debate and its resulting court decisions had a broad impact on the nation.

As evidence of the effect of that debate, the Court issued an opinion during the moratorium years that continues to be considered by many, especially by anti-death penalty activists, as the landmark decision on the issue: *Furman v. Georgia*.<sup>77</sup> The Court held that the imposition and implementation of the death penalty in cases where it is used in a discriminatory manner upon racial minorities “constitute[s] cruel and unusual punishment in violation of the Eighth and Fourteenth

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<sup>75</sup> See The Clark County (Indiana) Prosecuting Attorney, *Capital Punishment Timeline*, <http://www.clarkprosecutor.org/html/death/timeline.htm> (last visited January 17, 2010) (“1966: Support for the death penalty reaches an all time low. Gallup Poll shows nationwide death penalty support only at 42%.”); Gallup, <http://www.gallup.com/poll/1606/death-penalty.aspx> (last visited Mar. 17, 2010) (showing a 42% approval rating in 1966 by poll participants to the following question: “Are you in favor of the death penalty for a person convicted of murder?”); see also The Clark County (Indiana) Prosecuting Attorney, *Capital Punishment Timeline*, <http://www.clarkprosecutor.org/html/death/timeline.htm> (last visited January 17, 2010) (“1967: After Luis Jose Monge is executed in the gas chamber at Colorado State Penitentiary, an unofficial moratorium on executions begins.”). Luis Jose Monge was convicted for the 1963 first-degree murders of his wife and three of his ten children. He was the seventy-seventh person to be executed in Colorado. *THE NATION: Colorado: No. 77*, TIME, June 9, 1967 at 33.

<sup>76</sup> Jose M. Ferrer, III, *The Death Penalty: Cruel and Unusual?*, TIME, Jan. 24, 1972 at 54.

<sup>77</sup> *Furman v. Georgia*, 408 U.S. 238 (1972).



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Amendments.”<sup>78</sup> The *Furman* decision itself was a one-paragraph statement that invalidated the death penalty as it was to be administered on the three petitioners.<sup>79</sup> Despite this Eighth Amendment ruling, no uniform and decisive argument emerged from the decision because each of the five justices in the majority wrote his own concurring opinion, with no justice joining any other concurring opinion.<sup>80</sup> Also, no uniform standard was established

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<sup>78</sup> *Furman*, 408 U.S. at 239–240 (Prisoners successfully challenged the imposition of the death penalty because the punishment had been applied in Georgia in an overly discretionary and discriminatory manner).

<sup>79</sup> *Id.*

Petitioner in No. 69-5003 was convicted of murder in Georgia and was sentenced to death pursuant to Ga. Code Ann. § 26-1005 (Supp. 1971) (effective prior to July 1, 1969). . . . Petitioner in No. 69-5030 was convicted of rape in Georgia and was sentenced to death pursuant to Ga. Code Ann. § 26-1302 (Supp. 1971) (effective prior to July 1, 1969). . . . Petitioner in No. 69-5031 was convicted of rape in Texas and was sentenced to death pursuant to Tex. Penal Code, art. 1189 (1961). *Certiorari was granted limited to the following question: “Does the imposition and carrying out of the death penalty in [these cases] constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments?”* [. . .] *The Court holds that the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. The judgment in each case is therefore reversed insofar as it leaves undisturbed the death sentence imposed, and the cases are remanded for further proceedings.*

*Id.* (emphasis added) (citations omitted).

<sup>80</sup> *Id.*; Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflecting on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 362 (1995).

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because two of the five justices in the majority favored outright invalidation of the death penalty<sup>81</sup> and the other three left the door open on the issue.<sup>82</sup> Further, each of the four dissenting justices wrote his own dissenting opinion, although unlike the justices in the majority, some of the dissenting justices joined the opinions of other dissenters.<sup>83</sup>

As a result, despite the length of the *Furman* decision (the longest decision ever to appear in the U.S. REPORTS), lower courts have not been able to identify the precedent *Furman* intended to advance and ultimately have not used the opinion to deem the death penalty unconstitutional.<sup>84</sup> Nonetheless, *Furman* did have a broad impact on the country: “[t]he practical effect of the decision was to strike down existing statutes in all states, and removing approximately 629 inmates from death row [. . .] 35 states responded immediately by enacting new death penalty statutes, providing either for a mandatory death sentence, or carefully guided jury discretion.”<sup>85</sup> Although officials reconsidered and restructured death penalty laws on both national and state levels in order to accommodate the concerns stated in *Furman*,<sup>86</sup> the amended statutes that emerged did not lighten the amount of death penalty litigation. Because problems arose with

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<sup>81</sup> *Furman*, 408 U.S. at 305–06 (Justice Brennan’s concurrence and reasoning for invalidation of the death penalty); *Id.* at 371 (Justice Marshall’s concurrence and opposition to the implementation of the death penalty).

<sup>82</sup> *Furman*, 408 U.S. at 257 (Justice Douglas’s concurrence); *Id.* at 310 (Justice Stewart’s concurrence); *Id.* at 314 (Justice White’s concurrence).

<sup>83</sup> See generally *Furman*, 408 U.S. at 375–470 (exhibiting all the dissenting opinions).

<sup>84</sup> Steiker, *supra* note 73, at 362.

<sup>85</sup> The Clark County (Indiana) Prosecuting Attorney, *Capital Punishment Timeline*, <http://www.clarkprosecutor.org/html/death/timeline.htm> (last visited January 17, 2010).

<sup>86</sup> Steiker, *supra* note 73, at 363 (citation omitted).

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the wording in a number of the new statutes, litigation ensued to determine whether the new statutory constructions should be upheld or struck down.<sup>87</sup>

Although the litigation leading up to and including *Furman* demonstrated changing times and a temporary surge toward the complete abolition of the death penalty, the pendulum started to move the other way in *Gregg*. Chief Justice Warren expanded upon the notion that interpretation of the Eighth Amendment should be fluid by stating in a pre-*Furman* case that “[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”<sup>88</sup> In *Gregg*, the Court agreed generally, stating that “an assessment of contemporary values concerning the infliction of a challenged sanction is relevant to the application of the Eighth Amendment.”<sup>89</sup> However, the Court continued and ultimately stated that the power to determine these “evolving standards of decency”<sup>90</sup> is limited because “in a democratic society, legislatures, not courts, are constituted

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<sup>87</sup> See *Gregg v. Georgia*, 428 U.S. 153 (1976) (challenging the imposition of the death penalty under the amended, post-*Furman* laws of Georgia, but ending with the Court upholding Georgia’s statutes); *Roberts v. Louisiana*, 428 U.S. 325, 331, 336 (1976) (striking down a statute that allowed for a mandatory death penalty in various situations); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (also striking down a mandatory death penalty statute); *Jurek v. Texas*, 428 U.S. 262, 276–77 (1976) (upholding a statute that provided sentencer discretion through the use of “special issues”); *Proffitt v. Florida*, 428 U.S. 242, 259–60 (1976) (upholding a statute that guided sentencer discretion through the use of mitigating factors.).

<sup>88</sup> *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (highlighting the general notion that the Constitution is a living document, although *Trop* is not a death penalty case).

<sup>89</sup> *Gregg*, 428 U.S. at 173.

<sup>90</sup> *Trop*, 356 U.S. at 101.

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to respond to the will and consequently the moral values of the people.”<sup>91</sup>

Therefore, in assessing a punishment selected by a democratically elected legislature against the constitutional measure, *we presume its validity*. We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. And a *heavy burden* rests on those who would attack the judgment of the representatives of the people.<sup>92</sup>

As evidenced above, the Court has varied on the extent to which it will review the punishment selected by the States in cases that do not deal directly with specific *methods* of execution. However, when indeed faced with determining the constitutionality of specific methods of execution, as it was charged to do in *Baze*, the Court has historically confined its powers and arguably remained within established bounds of judicial review.<sup>93</sup>

### IV. Current Policy

History supports a conclusion that methods of execution and circumstances surrounding the implementation of execution have been challenged for centuries; with each challenge, a precedent was set.<sup>94</sup>

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<sup>91</sup> *Gregg*, 428 U.S. at 175–76 (quoting *Furman*, 408 U.S. at 383 (1972) (Burger, C.J., dissenting)).

<sup>92</sup> *Id.* at 175 (emphasis added).

<sup>93</sup> See *Kemmler*, 136 U.S. at 449; *Wilkerson*, 99 U.S. at 136–37.

<sup>94</sup> *Wilkerson* upheld death by firing squad as a constitutional method of execution. *Wilkerson*, 99 U.S. at 136–37. See also *Kemmler*, 136 U.S. at 449 (upholding electrocution as a constitutional method of execution); *Resweber*, 329 U.S. at 464 (upholding the constitutionality

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Likewise, *Baze* set a standard, albeit in a plurality opinion, for a judicial challenge of the method of lethal injection, undoubtedly affecting current policy on the subject. Oklahoma, in 1977, was the first state to adopt lethal injection,<sup>95</sup> but the United States Supreme Court did not directly address the method in light of the Eighth Amendment until *Baze*. Numerous states voluntarily issued moratoriums on executions by lethal injection while the Supreme Court considered *Baze*. Several states quickly resumed executions after the release of the decision.<sup>96</sup>

Since *Baze* and as of June 1, 2009, sixty-six convicted felons have been executed by lethal injection in the United States.<sup>97</sup> Such executions went forward because

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under the Eighth Amendment of a second attempt of death by electrocution).

<sup>95</sup> See The Clark County (Indiana) Prosecuting Attorney, *Methods of Execution*, <http://www.clarkprosecutor.org/html/death/methods.htm> (last visited July 20, 2009) (“In 1977, Oklahoma became the first state to adopt lethal injection.”).

<sup>96</sup> See Bill Mears, *Inmates in Two States Have Dates with Executioner*, CNN, May 2, 2008, <http://www.cnn.com/2008/CRIME/05/02/execution.preview/index.html> (“Mississippi and Georgia plan executions next week, moving quickly after the Supreme Court ruled April 16 that Kentucky’s lethal injection procedures were constitutional.”); Bill Mears, *Georgia Killer Executed After Lethal Injection Moratorium*, CNN, May 6, 2008, <http://www.cnn.com/2008/CRIME/05/06/georgia.execution/index.html> (“William Earl Lynd was the first inmate to die by injection since September, when the U.S. Supreme Court agreed to consider whether the three-drug combination represented cruel and unusual punishment.”).

<sup>97</sup> See generally Associated Press, *Ohio Performs 1,000 Execution in U.S.*, FOX NEWS, July 21, 2009, <http://foxnews.com/story/0,2933,534254,00.html> (reporting the 1000th execution in the United States since the death penalty was reinstated in 1976); The Clark County (Indiana) Prosecuting Attorney, *U.S. Executions since 1976*, <http://www.clarkprosecutor.org/html/death/usexecute.htm> (last visited July 20, 2009) (providing a chronologically organized chart with the names of convicts executed since 1976 and by what method the executions were carried out).

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most of the states that employ lethal injection as the method of execution follow the three-drug protocol addressed in *Baze*.<sup>98</sup> The Court specifically commented on its probable treatment of future challenges to methods that mirror Kentucky's protocol: "A State with a lethal injection protocol substantially similar to the protocol we uphold today *would not create a risk* that meets this standard."<sup>99</sup> "This standard" refers to what a convict must prove to successfully show that a lethal injection protocol violates the Eighth Amendment: that the method "creates a demonstrated risk of severe pain. He must show that the risk is substantial when compared to the known and available alternatives."<sup>100</sup>

The most recent decision that applied *Baze* came from the Sixth Circuit Court of Appeals on July 2, 2009, in *Harbison v. Little*.<sup>101</sup> Harbison, a death row inmate, argued that "the lethal injection protocol utilized by [Tennessee] violates his Eighth Amendment rights because it involves the unnecessary and wanton infliction of pain."<sup>102</sup> However, the Sixth Circuit rejected the argument because Tennessee, like Kentucky, employs a three-drug protocol for carrying out lethal injection.<sup>103</sup> As a result, the court held:

Given the direction in *Baze* that a protocol substantially similar to Kentucky's would not

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<sup>98</sup> *Baze v. Rees*, 128 S. Ct. 1520, 1527 (2008) (noting that "at least 30 [States] (including Kentucky) use the same combinations of three drugs in their lethal injection protocols") (citation omitted).

<sup>99</sup> *Id.* at 1537 (emphasis added).

<sup>100</sup> *Id.*

<sup>101</sup> *Harbison v. Little*, No 07-6225, 2009 U.S. App. LEXIS 14742, at \*1 (6th Cir. July 2, 2009).

<sup>102</sup> *Id.* at \*3.

<sup>103</sup> *Id.* at \*4 ("The three drugs utilized are sodium thiopental, pancuronium bromide, and potassium chloride.") (citation omitted). Kentucky uses the same three drugs.

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create a risk that violates the constitutional standard set forth in the Court's opinion, Tennessee's protocol must be upheld because *Baze* addressed the same risks identified by the trial court, but reached the conclusion that they did not rise to the level of a constitutional violation.<sup>104</sup>

The Sixth Circuit's actions demonstrate the policy impact of *Baze*. Like many other states that halted and examined lethal injection protocols while *Baze* was pending, Tennessee ultimately retained its three-drug protocol because the method did not violate the Eighth Amendment ban on "cruel and unusual punishments."<sup>105</sup> As this recent action demonstrated, the lower courts have employed *Baze* to uphold the lethal injection protocols used by the states, building on the foundation of policy that has historically recognized the states' abilities to choose a specific procedure for carrying out death sentences.

### V. Analysis and Evaluation<sup>106</sup>

The Court in *Baze* correctly held that the lethal injection method of execution did not violate the Eighth Amendment. However, the substantial risk standard approved by the plurality significantly broadened the original intent of cruel and unusual punishments because no substantial risk standard is stated within the text of the Constitution nor has one been previously contemplated by

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<sup>104</sup> *Id.* at \*11–12. The court referred to the Supreme Court's statement in *Baze*: "A State with a lethal injection protocol substantially similar to the protocol we upheld today would not create a risk that meets this standard." *Id.* at \*8–9 (citation omitted).

<sup>105</sup> *See id.* at \*5

<sup>106</sup> Before proceeding to the Analysis Section, I want to state that the analysis is based upon my research and understanding on the topic as a first-year law student. The conclusions stated in this section reflect my opinion.

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the Court. As a result, the addition of a substantial risk assessment (requiring the petitioner to prove that “the State’s lethal injection protocol creates a demonstrated risk of severe pain [and] . . . that the risk is substantial when compared to the known and available alternative”)<sup>107</sup> only complicates the purpose and intention of the Eighth Amendment and adds an unnecessary and arbitrary element of analysis. Further, the establishment of a substantial risk standard departs from the holdings of previous cases that sustained other methods of execution.<sup>108</sup> Those holdings were direct and to the point, concisely explaining the purpose of the Eighth Amendment’s ban on cruel and unusual punishments.<sup>109</sup> In summary, the basic purpose of the Eighth Amendment is simple and was accurately and succinctly stated by Justice Thomas in his concurring opinion: “[A] method of execution violates the *Eighth Amendment* only if it is *deliberately designed to inflict pain.*”<sup>110</sup>

As an example of this simple purpose, in *Wilkerson*, the Court rejected the argument that death by firing squad violated the Fourteenth Amendment’s Due Process Clause protection from cruelty because it did not fall into the category of punishment in which pain and suffering were “superadded” to the execution.<sup>111</sup> Similarly, the Court explained in *Kemmler* that the meaning of “cruel,” as used in the Eighth Amendment, referred to punishment involving “torture or lingering death.”<sup>112</sup>

In both of these precedent-setting cases, the Court relied on Fourteenth Amendment Due Process to declare the methods of execution constitutional and consistently

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<sup>107</sup> *Baze v. Rees*, 128 S. Ct. 1520, 1537 (2008).

<sup>108</sup> See *Kemmler*, 136 U.S. at 449; *Wilkerson*, 99 U.S. at 136-37.

<sup>109</sup> See *Kemmler*, 136 U.S. at 449; *Wilkerson*, 99 U.S. at 136-37.

<sup>110</sup> *Baze*, 128 S. Ct. at 1556 (Thomas, J., concurring) (emphasis added).

<sup>111</sup> *Wilkerson*, 99 U.S. at 135.

<sup>112</sup> *Kemmler*, 136 U.S. at 447.



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understood the Eighth Amendment as “forbidding *purposely* tortuous punishments.”<sup>113</sup> Interestingly, the plurality opinion in *Baze* briefly cited those important cases in the context of its discussions of the purpose of the Eighth Amendment: the prohibition against cruel and unusual punishments intended to guard against the infliction of additional pain. The plurality, however, did not actually incorporate the Court’s previous holdings and instead left the discussion as an isolated historical overview on the subject.<sup>114</sup> Had the Court truly used the cases for its examinations of the Eighth Amendment, the Court would have realized that the establishment of a substantial risk assessment scheme could not be reconciled with the analysis in these long-revered and respected cases.<sup>115</sup> Therefore, just as Justice Thomas reasoned in his concurrence, the substantial risk standard has no basis in the historical understanding of the Eighth Amendment or in the applicable method-of-execution cases previously discussed.<sup>116</sup>

The Eighth Amendment originated from a similar provision in the English Bill of Rights of 1688,<sup>117</sup> and its subsequent history can be succinctly described as follows:

The path by which the phrase “cruel and unusual punishments” has come into our law is well known. It first appeared in the English Bill of

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<sup>113</sup> *Baze*, 128 S. Ct. at 1560 (Thomas, J., concurring) (emphasis added).

<sup>114</sup> See *Baze*, 128 S.Ct. at 1530.

<sup>115</sup> See *Kemmler*, 136 U.S. at 436, 449; *Wilkerson*, 99 U.S. at 130, 136-37.

<sup>116</sup> *Baze*, 128 S. Ct. at 1556 (“This standard . . . finds no support in the original understanding of the Cruel and Unusual Punishments Clause or in previous method-of-execution cases . . .”).

<sup>117</sup> *Resweber*, 329 U.S. at 463. See generally William H. Danne, Jr., Annotation, *Prison Conditions as Amounting to Cruel and Unusual Punishment*, 51 A.L.R.3d 111, 130–34 (1973) (reviewing the history of “cruel and unusual punishments”).

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Rights of 1688. It formed a part of the Virginia Declaration of Rights adopted in 1776. James Madison placed it in the constitutional amendments he drafted in 1789 and it was approved by Congress with little debate. It was incorporated into the Constitution in 1791 as part of the eighth amendment.<sup>118</sup>

Although there appeared to be little debate on the amendment, the Framers of the Constitution intended to use the Eighth Amendment to limit legislative bodies from imposing torturous punishments.<sup>119</sup> “Like other parts of the Bill of Rights, this amendment was intended to allay the doubts of those who feared that the new federal government, unchecked by specific constitutional limitations, might ride roughshod over personal liberties.”<sup>120</sup> Therefore, the inclusion of the amendment in

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<sup>118</sup> Joseph E. Browdy & Robert J. Saltzman, Note, *The Effectiveness of the Eighth Amendment: An Appraisal of Cruel and Unusual Punishment*, 36 N.Y.U. L. REV. 846 (1961) (footnotes omitted).

<sup>119</sup> *Baze*, 128 S. Ct. at 1557–58 (Thomas, J., concurring).

<sup>120</sup> Browdy, *supra* note 111, at 846 (footnote omitted); see also James S. Campbell, *Revival of the Eighth Amendment: Development of Cruel-Punishment Doctrine by the Supreme Court*, 16 STAN. L. REV. 996 (1964).

That the eighth amendment prohibits, at a minimum, the infliction of “inhuman and barbarous” punishments is clear from the few clues we now have about the purpose of including it in the Bill of Rights . . . . At the Massachusetts convention Mr. Holmes pointed out that under the Constitution the Congress was “nowhere restrained from inventing the most cruel and unheard-of punishments and annexing them to crimes; and there is no constitutional check on them, but that *racks* and *gibbets* may be amongst the most mild instruments of discipline.”

*Id.* at 997 (footnotes omitted).

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the Constitution had the specific purpose of curtailing the torturous and barbarous punishments that were inflicted upon the people by English monarchs.<sup>121</sup>

Accordingly, “[e]xpressions in the first congress confirm the view that the cruel and unusual punishments clause was directed at prohibiting certain *methods* of punishment.”<sup>122</sup> These were to be prohibited because they were unquestionably torturous and clearly meant to inflict unnecessary pain and suffering. No risk assessment scheme was contemplated as a necessary part of the analysis because the prohibition of cruel and unusual punishments was simply implemented by the Framers of the Constitution to prohibit “that which is excessive.”<sup>123</sup>

Returning to the plurality’s opinion in *Baze*, the cases that the plurality cited in support of its substantial risk standard do not address the constitutionality of the execution methods; rather, the cases discuss the Eighth Amendment in relation to the risk of injury to an inmate while imprisoned.<sup>124</sup> Although such situations warrant the application of the Eighth Amendment, the deprivation of water or food differs significantly from the slight prick of a sterile needle during the administration of lethal injection. The plurality made no attempt at distinguishing the two situations, but instead simply stated that “[o]ur cases recognize that subjecting individuals to a risk of future harm—not simply actually inflicting pain—can qualify as cruel and unusual punishment.”<sup>125</sup> In neglecting to distinguish the situations, the plurality delivered a decision

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<sup>121</sup> See Anthony F. Granucci, “*Nor Cruel and Unusual Punishments Inflicted*”: *The Original Meaning*, 57 CAL. L. REV. 839, 840–41 (1969).

<sup>122</sup> *Id.* at 842 (emphasis added).

<sup>123</sup> *Id.* (citing *O’Neil v. Vermont*, 144 U.S. 323, 340 (1892) (Field, J., dissenting)).

<sup>124</sup> See *e.g.*, *Farmer v. Brennan*, 511 U.S. 825 (1994); *Helling v. McKinney*, 509 U.S. 25 (1993).

<sup>125</sup> *Baze*, 128 S. Ct. at 1530.

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with an unsupported and unjustified substantial risk standard because the cases used to support the standard do not coincide with the situation in which the standard will actually be applied (during the implementation of the death penalty). In essence, the Court compared apples to oranges. Because the plurality then proceeded to establish a standard based on these incompatible scenarios, the substantial risk standard is neither correct nor appropriate.

To further show how the plurality supported the substantial risk standard, consider the main case cited: *Helling v. McKinney*.<sup>126</sup> The case concerned an inmate's exposure to tobacco smoke and the potential health risk caused to the inmate by such exposure.<sup>127</sup> The Court held that a claim for relief for this health risk could be sought under the Eighth Amendment.<sup>128</sup> However, to apply the concept of substantial risk to the instant matter, the Court banked on the statement in *Helling* statement that a risk must be "*sure or very likely* to cause serious illness and needless suffering."<sup>129</sup> The standard, as applied to the *prison condition* situation in *Helling*, adequately resolved the issue. When applied to the method-of-execution context, however, the holding expands the original intent of the Eighth Amendment. It does so because it requires the courts to assess the execution methods of states for *any potential risk* of harm.

The difficulty with using *Helling* is that the case made reference to a *condition* of confinement, not to the

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<sup>126</sup> *Helling*, 509 U.S. 25 (1993).

<sup>127</sup> *Id.* at 27–28.

<sup>128</sup> *Id.* at 35 (“We affirm the Court of Appeals that McKinney states a cause of action under the Eighth Amendment by alleging that petitioners have, with deliberate indifference, exposed him to levels of ETS that pose an unreasonable risk of serious damage to his future health.”).

<sup>129</sup> *Baze*, 128 S. Ct. at 1531 (quoting *Helling*, 509 U.S. at 33) (emphasis in original).

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punishment of confinement itself.<sup>130</sup> This is problematic when one recalls that the Eighth Amendment bans cruel and unusual *punishments*, not *conditions* of punishments.<sup>131</sup> “At the time the Eighth Amendment was ratified, the word ‘punishment’ referred to the penalty imposed for the commission of a crime.”<sup>132</sup> “Punishments” include fines, penalties, confinement, and sentences imposed.<sup>133</sup> No historical evidence indicates that the Framers of the Constitution intended to consider anything other than punishments for Eighth Amendment purposes.<sup>134</sup> Therefore, no evidence proves that the Framers considered conditions as a possible subject of cruel and unusual punishments.<sup>135</sup>

In this context, the Court’s application of such a standard is troublesome, especially considering that the instant matter involved a method of execution, not a condition of confinement or even confinement itself. In essence, the Court disregarded the simple intent of the Eighth Amendment, as alluded to in the prior method-of-execution cases: “[T]he Eighth Amendment is aimed at *methods of execution purposely designed to inflict pain.*”<sup>136</sup>

Further, because of the plurality’s opinion, two conflicting standards to assess the constitutionality of methods of execution now arguably exist: 1) An assessment of whether punishments clearly involve a purposeful infliction of pain or “something more than the

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<sup>130</sup> *Helling*, 509 U.S. at 37–38 (Thomas, J., dissenting) (citations omitted).

<sup>131</sup> *Id.* (Thomas, J., dissenting).

<sup>132</sup> *Id.* at 38 (Thomas, J., dissenting) (citations omitted).

<sup>133</sup> *See id.* (Thomas, J., dissenting) (quoting BLACK’S LAW DICTIONARY 1234 (6th ed. 1990)).

<sup>134</sup> *See id.* at 38–39 (Thomas, J., dissenting) (citations omitted).

<sup>135</sup> *Helling*, 509 U.S. at 38–39 (Thomas, J., dissenting) (citations omitted).

<sup>136</sup> *Baze*, 128 S. Ct. at 1559 (Thomas, J., concurring) (emphasis added).

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mere extinguishment of life”<sup>137</sup> as described in historical case law and 2) the “substantial risk” assessment as stated in *Baze*. The task of assessing whether a method *purposely* inflicts pain is completely different from determining whether a method of execution “creates a substantial *risk* of wanton and unnecessary infliction of pain, torture, or lingering death”<sup>138</sup> or provides “a ‘substantial *risk* of serious harm,’ an ‘objectively intolerable *risk* of harm.’”<sup>139</sup> This second method only serves to confuse and complicate an assessment that was intended by the Framers of the Constitution to be simple.

Further, an assessment of a “substantial risk” of harm is far from an objective standard because one person’s definitions of both “substantial” and “risk” will almost always differ from the next person’s definition. On the other hand, a determination of whether a method of execution purposefully inflicts unnecessary and excessive pain is much more black and white. In fact, it could be argued that lethal injection itself was designed for the very reason of ensuring that the convicted felon would not feel any pain during the execution process, thereby eliminating the argument that any purposeful or unnecessary pain is inflicted.

Finally on this point, the plurality in *Baze* admitted that some levels of pain are inherent with various execution methods.<sup>140</sup> The plurality also said that this inherent possibility (a “risk” of pain) is not grounds for qualifying

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<sup>137</sup> *In re Kemmler*, 136 U.S. 436, 447 (1890).

<sup>138</sup> *Baze v. Rees*, 217 S.W.3d 207, 209 (Ky. 2006) (emphasis added).

<sup>139</sup> *Baze*, 128 S. Ct. at 1531 (citation omitted) (emphasis added).

<sup>140</sup> *Id.* at 1529 (“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.”)

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an execution method as cruel and unusual.<sup>141</sup> Therefore, that very admission by the plurality severely complicates, if not completely contradicts, its substantial risk assessment scheme.

Additionally, the plurality opinion in *Baze* may only exacerbate the lethal injection debate as it will most likely give rise to yet more litigation on the subject.<sup>142</sup> The opinion inadvertently opens the door for frivolous claims from convicts for the possible causes of substantial risk, including human error, lingering death, and the actual act of administering lethal injection. In essence, the creation of a substantial risk standard complicated the much simpler standard established by previous cases and litigation will quickly ensue to take advantage of the expanded standard. The substantial risk standard unwarrantedly confuses the original purpose of the Eighth Amendment, which is simply to prohibit punishments that are clearly excessive.<sup>143</sup>

Further, the *Baze* plurality gave no definition of “substantial,” nor did the plurality give any instruction on how to address such inquiries.<sup>144</sup> As a result, if the standard is followed, the lower courts will have to establish their own definitions for the substantial risk standard, actions which will undoubtedly be challenged by yet more litigation.

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<sup>141</sup> *Id.* at 1531 (“Simply because an execution method may result in pain, either by accident or as an inescapable consequence of death, does not establish the sort of ‘objectively intolerable risk of harm’ that qualifies as cruel and unusual.”).

<sup>142</sup> *See id.* at 1562 (Thomas, J., concurring).

<sup>143</sup> Granucci, *supra* note 121, at 842 (citing *O’Neil v. Vermont*, 144 U.S. 323, 340 (1892) (Field, J., dissenting)).

<sup>144</sup> *Baze*, 128 S. Ct. at 1562 (Thomas, J., concurring); *see also* *Farmer v. Brennan*, 511 U.S. 825, 834 n.3 (1994) (referring to *Helling’s* holding regarding the risk of injury, this subsequent case said that “[a]t what point a risk of inmate assault becomes sufficiently substantial for Eighth Amendment purposes is a question this case does not present, and we do not address it”).

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Consequently, rather than following the precedents set out in *Wilkerson* and *Kemmler*, the Court stretched an obscure, risk-based standard and forced it to fit the method-of-execution issue in *Baze*. The plurality almost seemed to intentionally avoid writing a simple opinion that would express the true, concise, and historically established standard of analysis used to determine whether a punishment is cruel and unusual. That standard simply prohibits the purposeful infliction of pain. As a result, the plurality's substantial risk standard does nothing more than open the door to future litigation on methods of execution and the implementation of the death penalty in general, "encumber[ing] [the death penalty] with unwarranted restrictions neither contained in the text of the Constitution nor reflected in two centuries of practice under it."<sup>145</sup>

### VI. Conclusion

*Baze* correctly held that Kentucky's lethal injection protocol did not violate the Eighth Amendment. The plurality's implementation of a substantial risk standard for measuring a violation of the Eighth Amendment, however, severely complicates the Eighth Amendment's intent to prohibit torture and "inhuman and barbarous"<sup>146</sup> punishments that involve "something more than the mere extinguishment of life."<sup>147</sup> Although the plurality opinion in *Baze* is not authoritative and did not infringe on the states' abilities to choose a specific procedure for administering a method of execution, the opinion will undoubtedly affect the method of execution policy decisions of the states.

Thus, the substantial risk standard adds unnecessary elements to the analysis of the constitutionality of a method

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<sup>145</sup> *Baze*, 128 S. Ct. at 1555 (Scalia, J., concurring) (citation omitted).

<sup>146</sup> *Kemmler*, 136 U.S. at 447.

<sup>147</sup> *Id.*



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of execution, requiring the courts to assess any proffered alternative procedure and further justify the reasons for adhering to any current method of execution.<sup>148</sup> The *Baze* plurality effectively diluted the standard of cruel and unusual punishments as intended by Framers of the Constitution, stated in the text of the Eighth Amendment and supported by the Court's previous decisions in method-of-execution cases. Simply, punishments must be intentionally designed to inflict pain worse than death itself in order to violate the Eighth Amendment. In consideration of this straightforward purpose, a more complicated standard only misinterprets the Framers' original intention for the amendment, opening the door to a never-ending influx of unnecessary and costly litigation.

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<sup>148</sup> See *Baze*, 128 S. Ct. at 1532.

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