Perfect Execution:

Abolitionism and the Paradox of Lethal Injection

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I. Introduction

The U.S. Supreme Court’s ruling in *Baze v. Rees*, which affirmed the constitutionality of Kentucky’s lethal injection protocol, represented a setback, if not an outright defeat, for foes of the death penalty in the United States. Most obviously, the plurality opinion rejected the petitioners’ proposed standard, which contended that the Eighth Amendment prohibits execution methods that pose an “unnecessary risk of pain” in light of available alternatives.¹ Instead, Chief Justice Roberts declared that in order to constitute cruel and unusual punishment a protocol must “create[s] a demonstrated risk of severe pain,” and there must exist “feasible” and “readily available” alternatives whose use will “significantly reduce a substantial” measure of such harm.² While this more stringent standard does not preclude challenges to the procedures employed by other states, it renders their success less likely, especially given Roberts’ express declaration that any protocol that is “substantially similar”³ to that employed in Kentucky will pass constitutional muster. In addition, for many members of the public, headlines such as “Justices Uphold Lethal Injection Procedure”⁴ are likely to alleviate if not eliminate worries that may have arisen in recent years about the alleged humanity of what is now effectively the sole method of execution employed in the United States. Moreover, the effort to challenge Kentucky’s protocol required an enormous expenditure of time, labor, and money on the part of various segments of the abolitionist community; and, with the benefit of hindsight, those scarce resources might have been more profitably deployed to contest other problematic aspects of the death penalty. Lastly, and perhaps most important, with the lifting of the national stay that was effectively imposed when the Court first agreed to hear *Baze*, several states quickly announced
that they would move to resume and, if unstopped by the courts, to accelerate the pace of executions.⁵

Members of the anti-death penalty community responded to the ruling in Baze by putting on a brave face,⁶ and they were not entirely without reason in doing so. Sotte voce, many no doubt breathed a sigh of relief upon learning that the opinions of Justices Thomas and Scalia, which would have generated a standard finding a protocol unconstitutional only if it was deliberately designed to inflict gratuitous pain, had not prevailed. More positively, given the fractured character of the six opinions written in favor of the 7-2 ruling, in which only two other justices signed on to Roberts’ plurality opinion, it would appear that the Court remains of several minds on the exact standard to be employed in assessing the constitutionality of lethal injection protocols; and, no doubt, future suits will seek to exploit this apparent absence of consensus, especially given the thinness of the available record in Kentucky, where only one execution by lethal injection had been conducted prior to Baze.⁷ In addition, although advanced in a concurring opinion, some solace was no doubt derived from Justice Stevens’ announcement of his full-fledged conversion to the abolitionist cause, at least in part because one of the principal justifications for the death penalty, retribution, is undermined by a method of execution that seems to inflict little if any pain on the condemned.

Given the untidiness of the nearly one hundred pages of Baze, perhaps all that one can conclude with confidence is that Justice Thomas was correct in predicting that the Court’s ruling will encourage those opposed to capital punishment in their efforts “to embroil the States in never-ending litigation concerning the adequacy of their execution procedures.”⁸ Although Thomas disparages such efforts, attorneys representing those on death row would be negligent if they were to fail to do what they can to delay the killing of their clients, and, when that proves no
longer possible, to seek to ensure that their executions are conducted as humanely as possible. Acknowledgment of this professional obligation, though, should not foreclose critical inquiry into the strategic wisdom as well as the larger political import of attacking the death penalty via challenges to the protocols that regulate the administration of lethal injections. Indeed, from this vantage point, however paradoxical it may sound, it is arguable that the least desirable outcome in *Baze* would have been not a majority opinion authored by Thomas or Scalia, but a victory for the petitioners. There are good reasons, that is, to worry that judicial mandates requiring states to tinker with the machinery of lethal injection, to paraphrase Justice Blackmun, may have the unintended effect of entrenching the death penalty in the United States by encouraging states to perfect the techniques that appear to cause death absent an act of taking life. While Justice Stevens may be correct to suggest that such perfection undermines the retributive rationale that sustains support for the death penalty today, it is equally true that the success of these same efforts may attenuate the conviction that the death penalty, because qualitatively different from all other forms of punishment, demands extraordinary justification.

**II. The Impossible Dream**

Recent debates over lethal injection are haunted by the dream of a perfect execution. This ideal has never been expressly affirmed as a constitutional imperative; indeed, it has been explicitly repudiated by justices, like Scalia and Thomas, who insist that the Eighth Amendment is satisfied so long as tortuous methods of inflicting death are disallowed. However, the very fact that Thomas finds it necessary to deny that the Constitution requires what he labels an “anesthetized death” testifies to the presence of this dream, however ill-formed, in the penumbra of the contemporary debate over execution methods. The alleged failure of lethal injection to meet the imperatives of this ideal, as that question was debated in the briefs submitted in *Baze*, is
the subject of the next section of this essay, whereas the present section provides an abbreviated account of its history and content. That history includes, first, a cursory review of various states’ transformation of their execution methods, beginning in the mid to late nineteenth century and continuing throughout much of the twentieth; and, second, an equally cursory look at the concurrent but very spare articulation of Eighth Amendment doctrine by the U.S. Supreme Court regarding the methods of execution that were adopted as part of this experimentation.

In his account of New York State’s shift from hanging to electrocution as its method of execution in the late nineteenth century, Michael Madow contends that the infliction of death sentences in much of the United States, but especially in the Northeast, was transformed in three interconnected ways, which he labels “privatization,” “rationalization,” and “medicalization:”

First, capital punishment was relocated from public spaces to prison interiors, and the number of permitted witnesses was sharply restricted [privatization]. Next, executions were progressively stripped of their ritualistic and religious aspects, and converted into hurried technical routines [rationalization]. Lastly, as Americans developed a keen dread of physical pain, medical professionals teamed up with electrical engineers to devise a purportedly ‘painless’ method of administering the death penalty: electrocution [medicalization]. By the end of the century, capital punishment in New York had already become ‘death work.’ The condemned man, previously the central actor in a public theater of justice, had now become simply the object of medico-bureaucratic techniques—his body read closely for signs of pain, but his voice muffled and barely audible.¹²

To clarify each of these transformations in turn, first, in the early nineteenth century, executions were typically conducted in places of open assembly, often drawing thousands of
spectators and sometimes taking on the appearance of rowdy carnivals. By the close of the century, Madow explains, in most but not all states, executions were privatized in the sense that they were moved from outdoor spaces to the interior of walled and well-guarded prisons to which only a few were permitted access. This removal did not entirely purge executions of their character as performances, but it did entail a significant transformation in the composition of its audiences. Whereas before, in principle, no one from any social class was excluded from the crowd, witnesses to death sentences inflicted within penitentiaries became increasingly homogeneous in composition, drawn chiefly from the ranks of government officialdom, the press, and, often, the medical profession. Unlike the often less predictable and more impassioned participants in executions that took the form of public spectacles, as a rule, the witnesses to privatized executions, especially those attending in the name of professional obligation, could be counted on to respond to state killings with appropriate affective restraint and with the refined sensibilities suitable to an age of self-proclaimed progress. This shift in audience composition, Annulla Linders points out, entailed a correlative adjustment in the “evaluation criteria to be applied to the execution, now derived from science rather than passion…The professionalized audience might tolerate the ghastliness of death itself, but not incompetence and mismanagement.” By the mid-nineteenth century, “brutality had become a liability and visible pain a sign of failure.”

Second, in the early nineteenth century, the typical execution took shape as what Madow calls a “richly ceremonial civico-religious spectacle.” Designed at least in part to affirm the authority of church and political figures, these events included considerable moral and religious discourse about, for example, the power of God to redeem the sinful as well as the slippery slope that carried men and women from small vices to vile crimes. By the end of the century, however,
the infliction of death sentences had been rationalized in the sense that they were “almost entirely de-ritualized and secularized—emptied of visible moral purpose, shorn of imagery and symbolism, stripped of passion and emotional content.”\textsuperscript{16} As the goal of retribution came to supplant that of redemption, executions came to be construed as technical tasks governed by the instrumental norms appropriate to such matters. As such, increasingly, they came to be conducted in accordance with elaborately-articulated protocols, including precise timetables, careful specification of the equipment to be employed, and detailed plans outlining the division of labor among those whose specialized assignments were to be exactly coordinated in order to ensure efficient completion of the matter at hand. As with its performative dimension, this transformation did not entirely purge executions of ritual, as indicated, for example, by retention of the customary granting of a “last meal” as well as the opportunity to utter “final words;” but it did mean that such elements increasingly appeared as relics folded awkwardly, even anachronistically, into operating procedures governed by the very different logic of managerial expertise.

Third, and intertwined with the first two transformations, in the early nineteenth century, Madow argues, executions were chiefly construed as punishments that served larger purposes of political, moral, and religious edification. For this reason, a member of the clergy was indispensable to the proceedings, and his principal concern was the soul of the condemned. Leaving aside denominational peculiarities, as a rule, bodily pain was understood as a sign of the punishment endured by an irremediably diseased soul, trapped in the carnal envelope that is the body, and deserved in virtue of the primal sin of Adam and Eve. By the end of the century, however, the conduct of executions came to be informed by major shifts in the practice of professional medicine. Prompted in part by the isolation of morphine, the invention of the
hypodermic syringe, and, above all, the discovery of inhalation anesthesia, physicians began to entertain the ideal of alleviating, if not eliminating, most bodily pain. As such, suffering came to be considered a contingent as opposed to an inexorable feature of the human condition; and, to an ever greater extent, the central question asked of an execution was not whether the condemned had confessed prior to expiration, but whether he or she had experienced pain and, if so, why and for how long. In sum, in time, more encompassing theological understandings of suffering gave way to the secular construction of pain as a nociceptive event produced in the peripheral and central nervous system by noxious stimuli, and most adequately explicated via the causal categories of modern medical science.

While it would misrepresent the jagged character of historical change to claim that execution by lethal injection was somehow the necessary teleological terminus of the transformations identified by Madow, adoption of this method is certainly a development that is intelligible in terms of its trajectory. Leaving no mark on the body’s surface, doing its work behind a wall of flesh that is as opaque as those surrounding a penitentiary, the lethal needle consummates the privatization of capital punishment, as the violence necessary to kill, once visually available to all who chose to attend, is now hidden even from the eyes of the carefully selected witnesses to an execution. Drawing its legitimacy from modernity’s most respected form of authority, that of science, lethal injection perfects the rationalization of the death penalty, as the clergy and its sacraments are displaced by civil servants trained in the secular proficiencies of penological expertise. Finally, by promising a quick and painless death, one that does not occasion any visible suffering, lethal injection perfects the medicalization of capital punishment, as the accomplishment of death via the injection of chemicals associated with the conduct of
surgery supplants the cruder technologies definitive of the firing squad, the gallows, the gas chamber, and the electric chair.

Given that these reformations in the conduct of inflicting death sentences occurred when they did, it is perhaps not coincidental that the United States Supreme Court made its initial forays into execution methods in the last quarter of the nineteenth century; nor, given this history, is it surprising that as it did so it became increasingly preoccupied with the question of the intensity and duration of pain suffered by the condemned. The earliest case, Wilkerson v. Utah, decided in 1879, involved a challenge to a sentence to death by firing squad imposed by a territorial court. The Court ruled that this method of execution was not cruel and unusual, chiefly because it was not among the forms of punishment deemed intolerable by the Constitution’s framers, especially in light of the 1689 English Bill of Rights, which furnishes the basic template for the Eighth Amendment. However, after noting the “difficulty” that “would attend the effort to define with exactness the extent of the [Eighth Amendment],” the Court did allow for the possibility of a modest expansion beyond the confines of this strict historicist reading when it affirmed that “punishments of torture,” including public disemboweling, beheading, drawing and quartering, and burning alive, “and all others in the same line of unnecessary cruelty, are forbidden.”

The second execution methods case decided by the U.S. Supreme Court, In re Kemmler, involved an 1890 challenge to a New York statute changing its method of inflicting the death penalty from hanging to electrocution. Although not decided under the Eighth Amendment, which had not yet been deemed applicable to the states, Kemmler did include dicta that have often been cited by contemporary courts in their efforts to clarify the meaning of the prohibition against cruel and unusual punishment in the context of capital punishment. Echoing Wilkerson,
the Court stated that punishments such as “burning at the stake, crucifixion, breaking on the wheel, or the like” are “manifestly cruel and unusual.” However, in explaining its conclusion about what constitutes cruelty, the Court began to shift, albeit subtly, away from Wilkerson’s reliance on a doctrine of original intent, which privileges questions of pain’s deliberate infliction as well as the body’s visible mutilation, and toward an assessment of the condemned’s subjective experience of death’s infliction: “Punishments 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.”

Concerned among other things with the duration of killing, the Court hinted that in principle infliction of the penalty of death should be confined to the austere cancellation of life, its “mere extinguishment,” and, by implication, that any suffering not strictly necessary to the accomplishment of that end is at least potentially constitutionally suspect.

The shift intimated by Kemmler was amplified in Louisiana ex rel. Francis v. Resweber (1947) when the Court considered its third and final pre-Baze methods challenge, brought in this instance by an inmate who had been placed in an electric chair, but, apparently because of a mechanical problem, was not killed. In considering whether the state of Louisiana could engage in a second attempt to execute Francis, the plurality opinion began by insisting, absent reference to deliberate intent, that “the traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence.” However, providing fodder for the position advanced by Scalia and Thomas in Baze, the Court immediately went on to state that in the instant case there “is no purpose to inflict unnecessary pain nor any unnecessary pain involved in the proposed execution,” and, on that basis, it authorized Louisiana to try again. One consequence of Resweber was to set the stage for later courts,
including that which decided Baze, to dismiss the constitutional import of executions that can be subsumed beneath the category of the “accidental” on the ground that, by definition, such events are outside the domain of that which can be foreseen and hence prevented.22 At the same time, however, Resweber’s prohibition of “unnecessary pain” effectively invited the question of whether legislatures, in order to avoid the charge of cruelty, have a constitutional obligation to adopt whatever method of execution is at that time calculated to inflict the least amount of pain possible, and, as petitioners in Baze argued, whether administrative officers to whom legislatures delegate the particulars of carrying out executions have an obligation to do the same.

Justice Ginsburg is probably the most intellectually honest member of the Court when, in Baze, she acknowledges that “no clear standard for determining the constitutionality of a method of execution” emerges from these three cases, and that “the age of the opinions limits their utility as an aid to resolution of the present controversy.”23 While Ginsburg is correct to suggest that these decisions offer no unambiguous rule, it would be a mistake to conclude that they or their differences, however erratic, are irrelevant to contemporary constitutional disputation about execution methods. Their cumulative relevance, I would suggest, is best appreciated when they are read retrospectively in relation to the Court’s insistence that the meaning of the cruel and unusual punishment clause is neither static nor bound by specific historical practices. First articulated in 1910, in a case dealing with a sentence of fifteen years of incarceration and hard labor for the crime of falsifying a public document, the Court held that the Eighth Amendment “is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.”24 This principle was extended in a 1958 case holding that denationalization as a punishment for desertion during wartime violates the Eighth Amendment: “The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a
maturing society." \(^{25}\) That this reading of the cruel and unusual punishment clause applies to
assessment of the constitutionality of capital punishment was made clear in *Gregg v. Georgia*. There, in authorizing the states to resume the death penalty following the hiatus imposed in 1972
by *Furman*, the Court affirmed that this clause must be “interpreted in a flexible and dynamic
manner,” and, consequently, that “an assessment of contemporary values concerning the
infliction of a challenged sanction is relevant to the application of the Eighth Amendment.” \(^{26}\)

The terrain on which the battle over lethal injection has recently been fought is well-understood by reading *Wilkerson*, *Kemmler*, and *Resweber* in light of the progressive narrative
affirmed in *Gregg* and in relation to the story told by Madow about the reform of execution
practices since the late nineteenth century. More specifically, if *Wilkerson* is read as a prohibition
of the forms of public mutilation that defined the conduct of many early modern European
executions, if violence visibly inflicted on the body runs the risk of being branded a form of
torture and so a reversion to barbarism, lethal injection negates this allegation because in
principle its administration entails little more than a pin prick. If *Kemmler* stands at least in part
for the proposition that death must not be “lingering,” lethal injection appears to fit the bill well
because the infliction of death is relatively quick, and, more important, because the precise
moment of death is concealed from witnesses by the fact that its achievement is indistinguishable
from the unconsciousness induced by anesthesia. If *Resweber* signifies that capital punishment,
in order to be deemed legitimate, must involve as little pain as is necessary to bring about death,
and never any pain that is “gratuitously” or “wantonly” inflicted, this condition would appear to
be well-satisfied by a method that claims to ward off all conscious suffering. Finally, if *Weems*
and *Trop*, as applied to capital punishment in *Gregg*, express a commitment to ever greater
realization of the claims of humanitarianism, lethal injection would appear to offer proof of the
death penalty’s progressive subjection to the norms of civilization, which, in being respected, assures us of the distance we have traveled from forms of savagery animated by a rough desire for private vengeance.

When the trajectory intimated by these cases is located within a broader historical context that animates and reinforces the curve of this path, it becomes apparent why, today, death penalty proponents and opponents alike, as well as the courts, are haunted by the ideal of a death sentence whose infliction is so imperceptible that it effectively elides the act of killing. Key elements of that ideal are intimated in Justice Burton’s dissent in *Resweber*, which made explicit the desideratum implicit in *Kemmler’s* reference to the “mere extinguishment of life: “The all-important consideration is that the execution shall be so instantaneous and substantially painless that the punishment shall be reduced, as nearly as possible, to no more than that of death itself.”

Pressured by the forward thrust inherent in the phrase “evolving standards of decency,” the dynamics of rationalization, medicalization, and privatization project an ideal that cannot help but trouble both sides to the death penalty debate precisely because it can never quite be realized. It can never be perfectly realized, that is, so long as those condemned to die remain beings whose recalcitrant bodies resist extermination and so require violence, no matter how well sterilized and/or concealed, in order to kill them.

As such, this ideal assumes the character of a phantasm, which, although formally unacknowledged, is not for that reason absent from the contemporary debate about the death penalty. A hint regarding this phantasm’s ultimate but impossible end was unwittingly provided by a spokesperson for the Florida Department of Corrections who, shortly after that state completed its first two executions by lethal injection, explained that the point is to render such killings “as uneventful as possible.” In order to fully satisfy the normative expectations
engendered by our collective squeamishness about deliberate killing as a form of criminal punishment, ideally, an execution will assume the form of something akin to a non-event, an occurrence that never quite happens. It is the seductive allure of this aspiration that explains why efforts to reform the protocols governing the conduct of lethal injections are likely to continue after Baze. But, at the same time, and as the next section indicates, it is the inability to guarantee reliable achievement of a death that appears to involve no killing that explains why to date states have refused to alter the specific chemicals employed in lethal injections, even though this has proven the most controversial and legally vulnerable ingredient of such protocols.

III. The Haunting of Baze v. Rees

As heirs to the political and legal history outlined above, both parties to Baze v. Rees are haunted by the dream of a perfect execution. Albeit for different reasons, both find it necessary to avow as well as to disavow its imperatives, which entails that the arguments advanced in their respective briefs to the Supreme Court are often disingenuous, albeit in different ways. In this section, to show how these competing imperatives operate, I deploy Madow’s overlapping categories of rationalization, medicalization, and privatization to interpret those briefs as a prelude to the essay’s final section, where I ask about possible implications of the Supreme Court’s ruling in Baze for the future of the death penalty in the United States.

A. On rationalization

Although unacknowledged, both parties to Baze share considerable common ground. The lay of that land can be indicated by recalling Madow’s appropriation of Max Weber’s concept of “rationalization.” The concept of rationalization signals the transformation of a given domain of practice, in this case, the execution of death sentences, in accordance with the standards of
instrumental rationality. Instrumental rationality has a normative dimension insofar as, above all else, it prizes technical efficiency in the accomplishment of any given end, and that in turn entails placing a premium on the values of reliability, predictability, calculability, and comprehensibility, where the criteria of intelligibility are those furnished by the causal logic of modern science. Or, to put this point in reverse, from the vantage point of instrumental rationality, what is most disvalued are practices, which, in whole or in part, remain unreliable, unpredictable, incalculable, and so opaque to the epistemic categories of modern science.

The transformation of execution practices in accordance with the imperatives of instrumental rationality is what Madow alludes to when he states that by the end of the nineteenth century the infliction of death sentences, especially in the Northeast, had been largely stripped of their ritualistic, theo-ethical, and affective content. A measure of our departure from that era can be indicated by imagining the response that would be evoked if either brief were to appeal to the notion of sin in explaining the deeds of Ralph Baze and Thomas Bowling, or to the eternal damnation awaiting those who commit deeds of their ilk. Nor would we find it persuasive if either side were to appeal to the authority of immemorial tradition in articulating its position on the constitutionality of Kentucky's protocol. For both parties, adoption of the criteria appropriate to instrumental rationality is mandated by transformation of execution into a task that is not a form of political theater conducted in order to demonstrate the consequences of disobedience to spectators assembled in a public square, nor a form of religious drama aimed at revealing the divine wrath wrought upon those who dare defy God's law, but a matter, to quote Madow again, of technological expertise aimed at "getting the man dead' as quickly, smoothly, efficiently, and impersonally as possible."
To point out this common terrain is not to say that differences of legal opinion disappear in consequence. But it is to say that these disputes take place almost entirely on the narrow band of turf designated by the term “rationalization,” which in turn considerably restricts the sorts of arguments that will be deemed intelligible and plausible. To see the point, consider the centrality of the question of risk in the *Baze* briefs. This question was not a part of the political or legal calculus when, as in early modern Europe (think of the opening pages of Foucault’s *Discipline and Punish*), executions assumed the form of spectacular ceremonials through which an injured sovereign reaffirmed the absolutism of state authority by deliberately reducing an offender to the status of a mere body in pain. However, when the permissibility of intentionally-inflicted torture has been rejected, and when even the suffering unintentionally inflicted by any given execution method has become a source of collective anxiety, the question of pain’s risk becomes pivotal. The language of “risk,” in sum, designates those elements of the practice of inflicting death sentences that have yet to be subordinated to the imperatives of instrumental rationality, thereby thwarting realization of the ideal of a perfect execution.\(^{31}\)

In *Baze*, petitioners and respondents alike agree that one of the key questions in this case is how much risk is permissible, which is legally parsed in terms of the distinction between “substantial” and “significant.”\(^{32}\) Respondents contend that, if adopted, petitioners’ less demanding standard, which would find unconstitutional any risk of pain that is “unnecessary” in light of “reasonably available alternatives,”\(^{33}\) will impose an intolerable burden on the state. On their account, this standard does so because “once an alleged improvement to the protocol has been identified or becomes available, any potential risks arising out of a state’s failure to immediately adopt the alleged improvement are deemed ‘foreseeable’ and thus, in petitioners’ view, avoidable, without regard to the magnitude of the risk.”\(^{34}\) In other words, albeit not in these
terms, respondents recognize that the brief submitted by petitioners tacitly summons the progressive logic of rationalization in order to hold out the prospect of an execution practice that perfectly fulfills the norms of instrumental rationality, and, in doing so, eliminates all possible risk.\textsuperscript{35} Yet, in order to immunize their proposed standard against the claim that it effectively mandates abolition of what the Constitution has been held to permit, petitioners cannot openly confess that they seek the universal and unqualified elimination of risk, and so, as respondents insist, they must acknowledge the constitutional acceptability of some measure of risk. But because respondents too are in the grip of the normative expectations generated by the ideal of rationalization, they must in turn insist that the current protocol, especially as voluntarily modified by the state in order to provide still greater safeguards, “poses no substantial risk of unnecessary pain or suffering” and so “ensure[s] a quick, humane, pain-free death.”\textsuperscript{36}

As a strictly legal matter, the differences between the arguments advanced in the two briefs, and the competing legal standards they advance, are neither insignificant nor unsubstantial. My point, though, is that the centrality of the question of risk to this case is indicative of its construction in the terms dictated by the logic of rationalization, and that both parties at least in principle are beguiled by the prospect of a legal order in which all events are perfectly controllable and so predictable. Neither can nor will contend that creation of this order is constitutionally mandated. But nor is either likely to acknowledge, as did the physicians who served on the Governor’s Commission on Administration of Lethal Injection in Florida, that “the inherent risks and therefore the potential unreliability of lethal injection cannot be fully mitigated.”\textsuperscript{37} Petitioners will not do so because this would sully the ideal they project in order to render their challenge rhetorically persuasive, and respondents will not do so because this would come close to conceding the impossibility of devising an execution protocol that satisfies
contemporary standards of decency. “Risk,” in sum, is the signifier that must be affirmed in order to acknowledge the limits of rationalization but, at the same time, denied in order to assuage the uneasiness generated by any apparent failure to satisfy the ideal projected by the appeal to rationalization.

B. On medicalization

The points of controversy in the Baze briefs highlighted by the category of “medicalization” are largely situated on the turf defined by rationalization and the ideal it insinuates (although, for reasons I indicate below, correspondence between the imperatives of rationalization and of medicalization is not complete). If the language of risk is the way in which the parties to this case frame the residue left behind by imperfect rationalization, the terminologies of suffering and incompetence are the ways they frame the residue left behind by imperfect medicalization. Although they overlap, for the most part, I will fold my account of the parties’ discussion of suffering, specifically in the form of physical pain, into my discussion of “privatization.” Here, instead, I will focus on the briefs’ consideration of the competence of the personnel involved in executions in performing the technical tasks required of them.

How this issue is framed turns on a prior question that lurks in the briefs, as well as in the oral argument before the Supreme Court, but is never conclusively resolved: What exactly is a lethal injection? Is it a medical procedure, in which case, as one physician has recommended, the person undergoing this procedure should be designated a “patient?” Or is it a form of criminal punishment, in which case the person undergoing this procedure should be designated as the “condemned?” Or as Mark Heath, an anesthesiologist who often testifies at lethal injection hearings, has recently suggested, is it a procedure that can be logically segmented into several different steps, some of which are medical because they serve “therapeutic” ends, while others
are punitive insofar as their purpose is to kill, in which case it would appear that the person undergoing this procedure is, at successive moments, the “patient” and then the “condemned.” 39

Furthermore, how are the chemicals employed in a lethal injection to be categorized? Is the American Society of Anesthesiologists correct to insist, as it does in the amicus brief it submitted in conjunction with Baze, that although these same drugs are commonly used in conjunction with surgery they are not to be identified with those employed in medical practice? 40 If that is so, does it follow that these chemicals are best regarded as instrumentalities of state killing, something akin to the noose, the bullet, and the cyanide pellet? Or, can they too be subdivided into those that are therapeutic and those that are punitive? But how can that be if each, administered in a dose that far exceeds the amount typically employed in surgery, is itself (probably) lethal?

With good reason, making the most of the opportunities offered by these ambiguities, petitioners do what they can to frame lethal injection as a medical procedure. This is perhaps most apparent in their contention that the virtually universal adoption of lethal injection by death penalty states, as well as “contemporary standards of decency,” articulate a consensus in favor of “anesthetized death” 41 (which, recall, is precisely the characterization that Justice Thomas insists is not constitutionally mandated). To the extent that petitioners can render this representation persuasive, it would appear to follow that executions can and should measure up to the standards of surgical practice. Specifically, on this construction, those participating in the conduct of executions should demonstrate the same forms of expert proficiency that are routinely expected of certified anesthesiologists; the reliability of drugs and the equipment employed to dispense them in the death chamber should equal those employed in the surgical theater; and the protocols that govern the relationship between executioners and their technologies should be as exacting as those that govern the best practices of medicine.
However, and although the logic of their argument clearly presses them in this direction, petitioners cannot openly insist on the participation of certified physicians in executions (although they come very close to doing just that when they cite California rulings requiring “a qualified individual” or an “anesthesia professional”). They cannot do so because they know that this requirement would run afoul of an advisory of the American Medical Association, which declares that a physician, “as a member of a profession dedicated to preserving life when there is hope of doing so, should not be a participant in a state execution.” And they cannot do so because this would establish a condition that the Department of Corrections cannot meet given Kentucky’s death penalty statute, which, unlike those of most other states, expressly prohibits the participation of physicians in executions “except to certify the cause of death provided the condemned is declared dead by another person.” Were petitioners to argue on behalf of a requirement of physician involvement, they would open themselves to the charge that they thereby violate the conditions of their own suit, which, as a complaint filed under 42 U.S.C. § 1983, is limited to the proposal of protocol reforms that are not merely desirable, but also feasible. In sum, petitioners must do everything possible to imply the indispensability of certified medical professionals while, at the same time, denying that they seek to do just that.

To forestall the import of the medical model, respondents contend that petitioners are in error when they seek to “transform the execution chamber into a surgical suite, complete with anesthesiologist and monitoring equipment.” The obvious implication is that execution by lethal injection is not a medical procedure, for it is aimed neither at enhancing health nor at preserving life. It is not clear, though, that respondents can afford to affirm, as does the amicus brief filed on their behalf by the Criminal Justice Legal Foundation, that “standards of medical practice for surgery have no direct relevance to punishment.” Nor can they afford to endorse
the call, advanced by at least one physician, to replace current procedures and personnel with those “that are clearly representative of the legal system and clearly distinguished from representing medical care.” To make either of these claims is to invite the response that executions conducted absent observance of the best practices of medicine risk gratuitous pain, thereby contravening what the Eighth Amendment requires. In short, respondents must do everything possible to deny that lethal injections are required to meet the standards of established medical practice while, at the same time, intimating that the present protocol already ensures just that.

The issue posed by the question of physician involvement in lethal injections is indicative of a broader tension in the relationship between the imperatives of rationalization and those of medicalization. Especially since the late nineteenth century the conduct of medicine has been substantially transformed in accordance with the imperatives of instrumental rationality. For example, as indicated above, pain is now understood in terms of the causal logic of modern science (as opposed to God’s punishment for sin); the practice of medicine is organized as a profession that upholds norms of expert proficiency; and the conduct of medicine is ever more tied to a secular imperative of progress that expects, even demands, ever more technical mastery in eliminating the forms of distress that fall within its purview. Reconstruction of the practice of medicine by the desiderata of rationalization is complicated, however, by the fact that the formal norms of efficiency, certainty, and reliability are constrained by the substantive commitment of this profession to the Hippocratic oath and, more particularly, its injunction to do no harm. Granted, the precise import of this norm has become more vexed in recent years as doctors have grappled with the issue of physician-assisted suicide on the part of the terminally ill; and, granted, the willingness of physicians to abide by the AMA’s advisory is qualified at best (as
evidenced by a recent study indicating that a surprisingly large percentage of physicians (41%) are willing to participate in lethal injections in ways that extend beyond the certification of death. That said, were the formal imperatives of rationalization entirely exhaustive of the claims of medical rationality, leaving aside whatever personal reservations they might have, in principle, physicians could unproblematically lend their expertise to the accomplishment of death as efficiently as possible in light of the profession’s present knowledge and technical capacity.

The conundrum posed for both sides by the disjunction between the claims of formal and substantive rationality is well-illustrated by an editorial published in The New England Journal of Medicine shortly before the ruling in Baze was announced. That editorial stated that “without the involvement of physicians and medical professionals with special training in the use of anesthetic drugs, it is unlikely that lethal injection will ever meet a constitutional standard of decency.” However, it then immediately proceeded to insist that “physicians and other health care providers should not be involved in capital punishment, even in an advisory capacity. A profession dedicated to healing the sick has no place in the process of execution.” For petitioners, this editorial bolsters their claim that lethal injection protocols must be reformed to meet the standards of medical practice, but also indicates why those best equipped to do so cannot be expected to participate in formulating or administering these reforms. For respondents, this editorial bolsters their claim that lethal injection protocols cannot be expected to conform fully to the standards of medical practice, but also indicates why executions are likely to continue to go awry so long as those involved in executions do not have appropriate forms of professional training and expertise.

The controversy over whether medical standards should be imported into the death chamber is yet another illustration of the ambiguity noted by Simon Cole and Jay Aronson when,
in this volume, they argue that the appeal to various modalities of scientific rationality in the 
debate over capital punishment has proven to be a two-edged sword. On the one hand, the fact 
that lethal injections bear significant resemblance to medical procedures confuses the punitive 
with the therapeutic, thereby helping to legitimate executions in the eyes of the public, including 
those who serve as witnesses. On the other hand, this very resemblance engenders an ideal that 
invites legal challenges when lethal injections fail to conform to medical imperatives, and, in 
doing so, recalls the punitive and, more particularly, the retributive purpose of executions. It is 
precisely this tension that leads Justice Stevens in his concurring opinion in *Baze* to conclude 
that “state-sanctioned killing” becomes ever more “anachronistic” when we require that the 
inmate be protected “from enduring any punishment that is comparable to the suffering inflicted 
on his victim.”51 Whether this divergence will “generate debate…about the justification for the 
death penalty itself,”52 as Stevens predicts, or merely encourage additional increments of formal 
rationalization that ultimately turn attention away from this substantive question is the issue I 
take up in this essay’s closing section.

C. On privatization

What troubles the logic of rationalization and the image of perfection it projects is the 
specter expressed via the terminology of risk. What troubles the logic of medicalization and the 
image of perfection it projects is the specter expressed via the terminology of incompetence. The 
forms of privatization that are unique to lethal injection answer the anxieties occasioned by these 
twin specters. Privatization, that is, responds to the elements of executions that continue to elude 
the combined imperatives of rationalization and medicalization, however imperfect their union 
may be.
Recall that the move from hanging to electrocution as the dominant method of execution, beginning in the late nineteenth century, was accompanied by a shift in the locus of executions from public places to the interior of penitentiaries, and that this in turn was accompanied by a change in execution audiences from a randomly-constituted crowd to a pool of carefully selected witnesses consisting, for the most part, of those with professional credentials. Against this backdrop, the contemporary presence of spectators lacking any claim to certified expertise (e.g., relatives of the condemned as well as of the victim) may be read as a vestige of an era when the condemned’s head was hooded (and sometimes that of the executioner), but all else was visibly available to the members of a heterogeneous public. The contemporary impetus to privatize executions can be understood in terms of the relationship between the problem posed by such spectators, on the one hand, and, on the other, the allure of an ideal that always beckons but whose realization cannot be consistently or fully guaranteed.

Perhaps the foremost element of concern in *Baze* is the form of suffering that is cognizable as physical pain. Indeed, in *Baze*, the question of pain often appears to crowd out all others, which is not surprising given the late nineteenth century shift of Supreme Court attention away from *Wilkerson*’s concern with the kinds of bodily mutilation gathered together beneath the rubric of “torture” and toward its preoccupation, first anticipated in *Kemmler*, with the subjective experience of the condemned during an execution. Formally, although petitioners do not and cannot seek a guarantee that executions will be painless, they are more than eager to invoke *Kemmler*’s phantasm of an execution that involves nothing but the “mere extinguishment of life.” How they present this phantasm as a constitutional challenge to their opponents is indicated by noting the logical leaps involved in moving from the first to the last of the following three sentences from their brief: “Advancements in science have made it possible to carry out a death
sentence in a nearly painless manner. And the States that impose death sentences have, with near unanimity, adopted lethal injection in order to make executions painless to the condemned person...Thus, there is today an undeniable ‘national consensus’ that executions must be essentially painless.”53 The second sentence takes the predictive claim registered in the first and transforms it into a claim about legislative intent, while the third transforms the claim about intent into a vital precondition of establishing a constitutional requirement. The presuppositions that permit these leaps to be made are those tacitly present in Justice Powell’s declaration in Furman that “no court would approve any method of implementation of the death sentence found to involve unnecessary cruelty in light of presently available alternatives.”54 Arguably, in light of the progressive narrative implied by the logic of rationalization, this declaration mandates that courts, and perhaps legislatures as well, engage in an ongoing search for more “humane” alternatives, where “humanity” is measured chiefly by the amount of pain a particular method inflicts and where the logical terminus of this search is discovery of one that ensures its total absence.

Respondents, of course, must formally reject this claim, as they do. However, because they too are gripped by the vision of a perfect death, one that evinces no evidence of suffering, they find themselves pressed to contradict, or, at the very least, to render effectively irrelevant, the argument they made earlier about the constitutional acceptability of the risk that some measure of pain will be suffered during an execution. A clear medical consensus, they argue, indicates that administration of the chemicals specified in the Kentucky protocol will “eliminate any of the pain that petitioners frequently discuss in their argument,” and “ensure[s] an immediate and certain death.”55 In sum, at least in principle, both parties appear to share the ideal of eliminating all pain, or, more carefully, the risk of any pain, during the infliction of death.
sentences. Given this shared substantive end, it is perhaps all the more surprising that the most bitter issue of disagreement between the two parties is on the face of it a question of formal rationalization, and, more specifically, a question of what technical modifications to the chemical mix employed by Kentucky, if any, are best-suited to achieve the end of a pain-free death.

Why this question proves so divisive can be understood by situating it within the context of the quest to privatize executions; and, as a preface to doing that, a brief pharmacological digression is necessary. In the twenty-nine states for which this information is available, lethal injections employ the same (or virtually the same) three chemicals, and, in all probability, this same “cocktail” is employed in the states that do not divulge this information. The first is sodium thiopental, which, although once routinely employed during the induction phase of anesthesia prior to surgery, has now for the most part been replaced by propofol. In a surgical setting, a dose of three to five milligrams per kilogram of body weight is typically employed, whereas the Kentucky protocol specifies administration of a dose of three grams. The second is pancuronium bromide, a curare-derived agent which paralyzes all muscles by blocking the action of acetylcholine at the motor end-plate of the neuromuscular junction, but has no effect on awareness, cognition, or sensation. In a surgical setting, a standard dose is 0.2 milligrams per kilogram of body weight, whereas the Kentucky protocol calls for 50 milligrams. The final chemical, potassium chloride, is an electrolyte that is commonly prescribed by physicians in response to hypokalemia (insufficient potassium in the blood). The usual intravenous dose is ten to twenty milliequivalents per hour, whereas the Kentucky protocol calls for 240 milliequivalents, which is intended to disrupt the electrical signaling of the heart and so cause cardiac arrest.
Because of its role in securing the unconsciousness that is indispensable to the achievement of a painless death, the intravenous injection of the initial drug, sodium thiopental, requires particular attention in order to ensure, among other things, that the catheter is properly set and so does not migrate, that the vein is not perforated in the process, that the tubing does not leak, that the intended amount is successfully injected into the bloodstream (as opposed to, say, subcutaneously), and so forth. These and other possible misadventures are likely to transpire with some regularity, petitioners argue, given that executions by lethal injection are typically conducted by paramedics, emergency medical technicians, or prison staff who have little if any formal medical training. Should any of these mishaps occur, the condemned may never become completely unconscious or may regain partial or total consciousness at some point prior to or coincident with injection of pancuronium bromide and/or potassium chloride; and, should that occur, because pancuronium bromide is a paralytic, the condemned will prove unable to give voice to the respiratory arrest induced by this second chemical and the intense burning sensations, massive muscle cramping, and the violent heart attack that follow injection of potassium chloride. In short, and in a unique twist on executions botched by other means, under these circumstances, the condemned will prove powerless to articulate his or her agonies, whether by crying out, grimacing, writhing, or offering any of the other signs we conventionally regard as expressions of acute physical distress; and, for this same reason, witnesses to an execution will prove oblivious to the reality of the pain suffered by an inmate who is both mute and immobile, but neither insentient nor unaware. The experience of suffering is thereby utterly privatized, as the philosopher’s nightmare of radical solipsism is perfectly realized in practice.

As they must, petitioners argue that it is in light of currently available alternatives that they are in a position to contend that the Kentucky protocol poses an unnecessary risk of pain,
and especially the sort of agony indicated by this ghoulish scenario. In part, they indicate how such risk might be reduced by recommending that the equipment employed be improved, that the training of personnel be enhanced, and that the death chamber be modified so as to ensure better monitoring of the condemned throughout an execution. Even more central to their argument, however, is their recommendation that pancuronium bromide and potassium chloride be removed from the execution protocol, and that a barbiturate be exclusively employed in order to cause death. Assuming it is competently administered, they insist, exclusive reliance on an anesthetic agent will by definition eliminate the possibility of pain. Removal of potassium chloride, moreover, will eliminate the possibility that the condemned will experience the pain associated with severe cardiac arrest. And, finally, in addition to eliminating the danger of conscious suffering that is masked by paralysis, removal of pancuronium bromide will enable prison officials to know when intervention is necessary in order to correct a lethal injection that has gone awry, thereby enabling a more complete realization of the ideal that both parties invoke when it serves their purposes to do so.

Not surprisingly, given that their task is to defend the state, respondents reject the proposal to shift to a single chemical on the ground that the current protocol satisfies the requirements of the Eighth Amendment, and that the proposed alternative is speculative insofar as the record “is devoid of proof that any alternative drugs identified by petitioners pose substantially less risk than the drugs currently used.” Doing so, the Kentucky Department of Corrections echoes its counterparts in Florida, California, and Tennessee, all of which have recently rejected or failed to act on recommendations advanced by either court or commission to shift to a one or, should potassium chloride or its equivalent be retained, a two drug protocol. While this decision may at first seem puzzling given what at first blush seem to be the obvious
gains of such a reform, defense of the current chemical mix, and retention of pancuronium bromide in particular, becomes comprehensible when understood as a response to the felt need to render invisible and in that sense privatize those elements of an execution that serve to recall the inconvenient fact that infliction of a death sentence still requires an act of taking life.

The state of Kentucky, according to petitioners, “presented no legitimate rationale for using pancuronium.” By this, presumably, they mean to contend that any given ingredient of a lethal injection can be justified legally only if it can be shown to contribute to accomplishment of a death that conforms to constitutional imperatives. Pancuronium bromide, they argue, does not meet this test. Its sole and impermissible purpose is to prevent “muscular movements in the condemned, involuntary or otherwise, that may result from the subsequent injection of [p]otassium,” movements which might be read by witnesses unversed in medical science as indicators of conscious suffering. But that, on petitioners’ account, contributes not to the achievement of a humane death, but to protection of the state from the (possibly) mistaken interpretations of witnesses who, upon seeing these convulsions, twitches, or spasms, may conclude that an execution has been accompanied by pain. On that basis, in turn, they may then conclude that the state is inept, when measured against the ideal projected by its rationalization, or that it is barbaric, when measured against the ideal projected by capital punishment’s medicalization.

Respondents cannot grant this argument, or, more carefully, they cannot acknowledge it when it is framed in these terms. Accordingly, they contend that pancuronium bromide can be justified as a means to the end of inflicting a death sentence because it contributes to the cessation of respiration (although their admission that this is a “secondary function” concedes that some other purpose is primary). In much the same vein, they argue that the administration of
a paralytic, by reducing the risk of involuntary muscle contractions, minimizes the likelihood of movements that “could disrupt an execution by interfering with an IV”\(^6^1\) (although this seems less than compelling given that one of the purposes of strapping an inmate to a gurney is precisely to prevent such movement).

The dubiousness of these arguments was placed in relief when, during oral argument before the U.S. Supreme Court, counsel for respondents granted that within the context of a lethal injection pancuronium bromide “serves no therapeutic purpose.”\(^6^2\) This concession seems to imply that this drug cannot be understood in terms of the logic of medicalization, and that in turn may go far toward admitting the truth of petitioners’ contention that its purpose is unrelated to, if not at odds with, the achievement of a humane execution. To neutralize this threat, respondents cite *Gregg* to the effect that the Eighth Amendment forbids punishments “that are not in accord with “the dignity of man,” and then argue that the use of pancuronium bromide facilitates the dignity of death imposed by lethal injection. In the terminology of this essay’s argument, this may be read as an attempt to subordinate the claims of formal rationalization to a substantive end, or, more specifically, to derive a justification for a technical means, in this case, pancuronium bromide, by demonstrating its contribution to a value, in this case, dignity, that is of intrinsic worth.

But how exactly does pancuronium do so? When the Court advanced this proposition in *Gregg* in 1976, it stated that respect for the value of “dignity” prohibits punishment that is “excessive,” which in turn involves consideration, first, of whether it involves “the unnecessary and wanton infliction of pain” and, second, whether it is “grossly out of proportion to the severity of the crime.”\(^6^3\) In their *Baze* brief, however, respondents appropriate a claim about what it means to respect the dignity of the condemned and transmute it into a constitutional validation
of the vulnerable sensibilities of spectators: “Petitioners argue that involuntary muscle
contractions have no bearing on the dignity of condemned, since the administration of thiopental
renders the inmate impervious to pain. However, petitioners’ argument ignores the impact on
family members and other witnesses who view the involuntary contractions.” Echoing this
claim in Baze, Justice Roberts claims that the state has “in interest in preserving the dignity of
the procedure,” which one might take to refer to, or at least to encompass, the respect owed to
the condemned were it not for the fact that Roberts immediately thereafter specifies that this
interest arises when “convulsions or seizures could be misperceived as signs of consciousness or
distress.” Here, in a troubling extension of the victim impact appeals that are now so central to
the sentencing phase of capital trials, the uneducated witnesses to an execution are represented as
its potential casualties; the condemned is relegated to the role of a silenced body whose inertness
must be guaranteed in order to ensure that these innocents are not psychologically harmed; and
the state appears as the guardian of proper decorum, which, of course, is not incidental to its
perceived legitimacy. As Justice Stevens states in his concurring opinion, even if one accepts this
construction of “dignity,” this is “a woefully inadequate justification” since whatever minimal
interest the state has here is “vastly outweighed by the risk that the inmate is actually
experiencing excruciating pain that no one can detect.”

Somewhat feebly, petitioners respond to the argument from dignity by suggesting that
were potassium chloride and pancuronium bromide to be removed from the mix witnesses might
be given rudimentary training in what, during the 2005 evidentiary hearings in Baze, was given
the neologistic but apt title of “necrokinetics.” That is, amateur spectators might be taught not
to “mistake unconscious movements for evidence of pain...by informing them about the nature of
the movements they might see.” Such movements, they might be told, are merely agonal
reflexes (e.g., the accumulation of respiratory secretions in the throat that sometimes give rise to what is colloquially known as the “death rattle,” or the involuntary respirations caused by cerebral ischemia), and, as such, should not be read as signs of conscious suffering. Respondents, though, have good reason to find naïve an Enlightenment appeal to the efficacy of such education, especially in a nation that loves the idea of punishment (witness the forms of “harsh justice” analyzed by Michael McCann and David Johnson in this volume), but grows fastidious when confronted with graphic evidence that threatens to unsettle self-congratulatory narratives about our collective aversion to cruelty.

If petitioners are correct in their reading of the work accomplished by pancuronium bromide, then its employment may be figured as something akin to a modernized analogue of the hood that was customarily placed over the condemned’s head during executions by lethal gas, firing squad, electrocution, and the noose. This cloaking device, though, is far more insidious because it is itself unseen. As Mark Heath explains: “Because pancuronium bromide is an invisible chemical veil and not a physical veil like a blanket or hood that is easily identifiable, the use of pancuronium bromide in lethal injection creates a double veil. It disguises the fact that there is a disguise over the process.” 69 What we find here, in other words, is an effort to “save the appearances,” even if the net effect is to increase the likelihood that executions will violate established constitutional standards of decency by causing pain akin to that experienced during torture. Ironically, though, to the extent that this pharmaceutical veil does its job well, only the dead will ever be in a position to testify to the truth of what is likely to be dismissed as so much unverified and, indeed, unverifiable, speculation.

In a declaration completed in conjunction with a recent § 1983 challenge to California’s death penalty protocol, Heath provided expert testimony in support of petitioners’ argument that
“use of the drug pancuronium bromide serves no rational or legitimate purpose.” From a medical perspective, this claim is almost certainly correct. From a political perspective, however, this claim is almost certainly wrong. “It’s not about the prisoner,” explained another anesthesiologist, Mark Derschwitz, who often testifies on behalf of states whose lethal injection protocols are under challenge: “It’s about public policy. It’s about the audience and prison personnel who have to carry out the execution.” In part, what is going on here is a simple matter of duplicity. That, I take it, is what a judge in Tennessee meant to get at when he stated that the use of pancuronium bromide “taps into every citizen’s fear that the government manipulates the setting and gilds the lily.” But an account confined to these terms fails to capture the element of hypocritical self-deception that is at work as well. Responding to a question about how much she knew about sodium thiopental, presumably in order to learn whether she understood that an inmate may regain consciousness prior to administration of the other two chemicals, a registered nurse with primary responsibility for mixing the chemicals employed in California’s lethal injections stated: “I don’t study. I just do the job. I don’t want to know about it.” By applying what Heath has called a “cosmetic” to the act of killing, thereby ensuring that executions will conform to appropriate aesthetic standards, the mix of chemicals authorized by the Supreme Court in Baze renders it quite unnecessary for this nurse, or anyone else for that matter, to step beyond this condition of willed ignorance.

V. The Better as the Enemy of the Best

In the post-Greg era, with little hope of securing outright abolition, opponents of the death penalty have sought to increase the effective cost of administering the machinery of capital punishment and to reduce the frequency with which death sentences are imposed or inflicted, principally, although not exclusively, by appealing to the courts. Among others, efforts to chip
away at the death penalty have included narrowing the sorts of crimes that are death eligible, eliminating certain categories of persons from the scope of the death penalty, and using DNA evidence to secure the release of those erroneously convicted and sentenced to die. Adoption of strategies aimed at circumscribing rather than eradicating the death penalty is certainly understandable given the impact of the Antiterrorism and Effective Death Penalty Act of 1996, which considerably restricted the scope of habeas appeals in capital cases; the current political climate, which renders it hazardous for most office-holders to oppose the death penalty, even if it is rarely executed and so of primarily symbolic import; and the current composition of the U.S. Supreme Court, which is unlikely any time soon to conclude that the states have now demonstrated their inability to meet Furman’s requirement that the death penalty be administered in a way that precludes its arbitrary and capricious application. At the same time, and while perhaps not a “manifest failure,”75 these strategies have proven of ambiguous political import. As several students of the death penalty have argued, to the extent that these incremental victories have succeeded in creating the perception that fair processes govern administration of capital punishment, that this punishment is indeed limited to the worst of the worst, that those who cannot be ascribed full legal culpability are exempt from this punishment, and that the innocent will in time be exonerated, such strategies may well have the unintended effect of rationalizing and so legitimating the death penalty, thereby rendering it more resistant to de jure or de facto abolition.76

Much the same argument may be made of recent lethal injection challenges. Here, too, the abolitionist community has turned to the courts in order to undermine the death penalty; and here too this litigation has taken the form not of a frontal assault, which again is understandable given the many precedents affirming the constitutionality of this method of execution, but,
instead, of additional efforts to refine its administration via § 1983 challenges to state execution protocols. The upshot of these suits, culminating in *Baze*, provides an opportune moment to raise questions about the long-term wisdom of pursuing abolitionist ends via methods challenges. Specifically, we should ask whether progressive refinement of the death sentence’s infliction may serve to legitimize capital punishment, thereby rendering it more immune to challenge; and, *pace* Justice Stevens, we may want to ask whether executions conducted in accordance with more refined protocols, precisely because they fail to satisfy the retributive desires that currently sustain public support for capital punishment, may encourage the adoption and extension of other forms of harsh justice, such as life imprisonment without parole, in related domains of the carceral order.

Although the Supreme Court in *Baze* affirmed the constitutionality of the current Kentucky protocol on the basis of a legal standard that renders it more difficult to challenge those of other states, as the improbable due of Justices Thomas and Stevens predicted, there is every reason to expect that additional suits will be forthcoming, whether because of the wiggle room inherent in the new standard, because of the lack of a clear majority on the Court in favor of this standard, because of the insufficiency of the record in Kentucky, and, finally, because of the unacknowledged but very real pressure exerted on states by the combined forces of rationalization, medicalization, and privatization as well as the ideal they collectively project. Because no fundamentally new execution technology appears in the offing, states that elect to alter their protocols either in anticipation of or in response to such suits will find it necessary to tinker with the particulars of lethal injection, including improved training for executioners, refinement of the equipment employed, and, perhaps most urgently, adoption of various ways of ensuring that the condemned is and remains unconscious throughout an execution. From the
vantage point of abolitionism, as with judicially-mandated alterations in the conduct of capital
trials, whether in the guilt or sentencing phase, such reforms represent so many two-edged
swords. On the one hand, they may reduce the risk of botched executions and so unnecessary
suffering on the part of the condemned; to the extent that they do so, although perhaps not a
cause for celebration, they are to be welcomed. On the other hand, and at the same time, such
reforms may bring us one step closer to fulfilling the imperatives of the perfect execution; to the
extent that they enable executions that more fully approximate the ideal of a non-event, they may
impede achievement of the ultimate goal of abolitionism.

This argument, as well as the strategic conundrum posed by Baze for death penalty
opponents, can be illustrated by returning to the claim that in one way the most problematic
outcome in this case might have been a victory for petitioners, and, more particularly, the Court’s
adoption of a standard that would have effectively required or encouraged states to adopt the
principal protocol reform they proposed. The switch to a single drug method of execution,
although perhaps less likely at present than reforms of less controversial elements of state
protocols, is not foreclosed by the ruling in Baze; and, indeed, Justice Roberts appeared to leave
open the possibility that this question may be re-adjudicated at some later date when, neither
endorsing nor denying the objections raised by the state, he noted that at present “the
comparative efficacy of a one-drug method of execution is not so well established that
Kentucky’s failure to adopt it constitutes a violation of the Eighth Amendment.”77 Should this
alternative become sufficiently “well established” at some point in the future, or should one or
more states accept Justice Stevens’ contention that those “wishing to decrease the risk that future
litigation will delay executions or invalidate their protocols would do well to reconsider their
continued use of pancuronium bromide,”78 what might follow for abolitionism from adoption of
an execution protocol, which, especially if combined with other technical refinements, relied exclusively on a single anesthetic, whether sodium thiopental, propofal, or perhaps, following the lead of veterinarians, sodium pentobarbital?

A hint is provided by Mark Heath who, while testifying against the state of California in its most prominent § 1983 challenge, was asked whether it would be feasible to proceed with an execution using only sodium thiopental:

Removal from the execution protocol of the unnecessary and potentially painful drugs pancuronium and potassium would greatly reduce the possibility that the execution would be cruel and inhumane. The administration of sufficient thiopental will, as the CDCR [California’s Department of Corrections and Rehabilitation] and its expert have stated, with certainty cause death, because in the doses planned by the CDCR thiopental will ablate all respiratory activity. Thiopental itself cannot cause pain if it is properly injected into the venous system, and instead will act as a powerful anesthetic to render the prisoner deeply unconscious…The use of thiopental as the sole agent in the lethal injection procedure would represent an enormous and easily-taken step toward minimizing the risk of an excruciatingly painful execution.79

To paraphrase Heath in the terms employed in this essay, adoption of this reform would secure a more complete rationalization of executions, in the sense of risk reduction, by decreasing the number of chemicals employed and so minimizing the complications posed thereby, including their possible administration out of order as well as their possible precipitation in intravenous catheters. In addition, this reform would secure a more complete medicalization of executions, in the sense of pain elimination, by removing the use of chemicals that can cause pain and/or mask
its occurrence. And, finally, by eliminating potassium chloride and the convulsions it may occasion, it would go some considerable distance toward eliminating the need to secure the form of privatization presently accomplished via pancuronium bromide.

Even if accompanied by improvements in training, equipment, and monitoring, however, adoption of a single drug protocol is likely to generate new dilemmas that could undercut other desiderata implicit in the ideal execution. For example, although medical consensus on this question is not perfect, it appears likely that reliance on a single barbiturate would protract the period of time before death can be pronounced, especially should the effects of this drug include electromechanical dissociation, a condition in which there is no pulse perceptible by means of a stethoscope, but the heart continues to emit electrical impulses measurable by an electrocardiogram (whose employment, incidentally, is required by the Kentucky protocol). As counsel for respondents maintained during oral argument, the result of reliance on a single drug formula might be to delay the official declaration of death by as long as half an hour; and that in turn might compromise what Justice Roberts labeled the “states’ legitimate interest in providing for a quick, certain death” as well as Kemmler’s Eighth Amendment concerns about a “lingering death.” Additionally, for the reasons indicated by Jürgen Martschukat in this volume, any departures from the ideal of instantaneity that is projected by the norm of life’s “mere extinguishment” may occasion discomfort on the part of executioners and, possibly, raise new concerns about the humanity of executions on the part of untrained spectators. Finally, even in the absence of potassium chloride, given that vital organs actively resist their extinguishment, even when the body is fully unconscious, there is no guarantee that all movements that might be interpreted as evidence of bodily pain will be obviated (although their likelihood may be
reduced, if only because the number of causal mechanisms of death will be decreased from three to one).

In light of these complications, given present pharmacological knowledge, it may prove impossible to satisfy simultaneously all of the various criteria inherent in the ideal of a perfect execution, i.e., one that is certain, painless, immediate, and untroubling to witnesses, amateur as well as professional. If that is so, then this ideal may remain a phantasm that continues to haunt parties to future challenges because, given the current state of medical science, it harbors contradictory imperatives, each of which presses equally insistent demands. And if that is so, then awkward choices about which criteria are most pressing may have to be made by both parties to this debate, although my special concern here is with the choices to be made by death penalty opponents.

For example, if no state elects to move in this direction without prompting, attorneys for those on death row may elect to continue to press for protocol reforms, such as the shift to a one drug method, that reduce the risk of suffering, but, in doing so, sacrifice some measure of speed. While this choice is defensible and perhaps even required in light of professional and ethical norms, it is short-sighted to do so without considering its possible cost to the overall goal of abolitionism. That cost can be indicated by citing a prediction advanced in petitioners' reply brief in *Baze*: “To the extent that States adopt a barbiturate-only approach,…it is difficult to envision future Eighth Amendment challenges because administration problems would not result in the infliction of pain.” If this prediction is correct, it is so because the perfection of lethal injection will go a long way toward closing the semantic gap, which, under present protocols, enables one to ask whether any given execution involved the infliction of unnecessary (but masked) pain and so possibly violated the Eighth Amendment. Granted, the cunning of pancuronium bromide is
that it renders invisible any pain that *may* be endured; but the term “may” also leaves open the possibility of wondering whether pain *might* have been suffered, and it is that possibility that would be largely foreclosed via adoption of an execution method that relies exclusively on a single anesthetic. The space for such questioning will then largely be confined to the temporal gap left open by the fact that executions are not now and are unlikely to become instantaneous. The existence of that gap is not irrelevant in promoting the cause of abolitionism, but, as a way of animating public or legislative opposition to the death penalty, it carries far less weight than do claims about eliminable and so gratuitous pain.

A cynic might claim that the present pursuit of reforms to execution protocols involves little more than “a bit of tinkering intended to salve the national conscience regarding the infliction of pain.” While this is no doubt true in part, such fine-tuning is potentially far more consequential than any of the earlier qualitative shifts from one method to another (e.g., from hanging to electrocution or lethal gas), all of which left open the possibility of advancing plausible claims about the experience of pain on the basis of its sensible signs, whether that be moaning, writhing, choking, or whatever. If, on the one hand, pancuronium bromide is retained while other protocol refinements are adopted in order to ensure the achievement and maintenance of unconsciousness, epistemologically speaking, the effect will be to render us less prone to the forms of uncertainty that give rise to speculation about the possible experience of pain. If, on the other hand, this paralytic is eliminated in favor of a single anesthetic, and should this reform be combined with technical rationalization of the procedures employed to administer this drug and monitor its effects, epistemologically speaking, the effect will be to make it more difficult to recognize that what takes place in an execution is not a non-event, but an act of killing. Either way, the situation now confronting abolitionists is paradoxical, if not
tragic, for there is no path that is not substantially compromised: Abolitionists can abandon challenges to current lethal injection protocols, recognizing that to do so entails accepting the real risk, indeed the likelihood, of gratuitous suffering on the part of the executed. Or, alternatively, they can press on with these challenges, recognizing that any victory entails complicity in the state’s effort to accomplish the sort of anesthetized death that fosters collective amnesia about the violence of capital punishment.

Notes


3 Ibid., at 1537.


6 For example, Jordan Steiker, a contributor to this volume, was quoted as follows in Adam Liptak, “Moratorium May Be Over, But Hardly the Challenges,” New York Times, April 17, 2008, A26: “We will end up largely where we were before Baze...It has set us on a course in which there will be continuing challenges, efforts to document botched executions and efforts to continue to explore alternative protocols.”

7 See, for example, Baze v. Rees, 128 S. Ct. 1520, 1542 (2008) (Stevens, J., concurring): The question of “whether a similar three-drug protocol may be used in other States remains open, and may well be answered differently in a future case on the basis of a more complete record.”


9 In Timothy V. Kaufman-Osborn, “A Critique of Contemporary Death Penalty Abolitionism,” Punishment & Society 8 (July 2006): 365-83, I indicate my more general concerns about the ways in which contemporary abolitionist claims are commonly framed and, more specifically, the ways in which they may inadvertently reinforce
the practices they mean to condemn. The present essay may be read as an application of that argument to lethal injection challenges.

10 Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of cert.): “From this day forward, I no longer shall tinker with the machinery of death.”

11 See, e.g., Baze v. Rees, 128 S. Ct. 1520, 1561-62 (2008) (Thomas, J., concurring): “But the notion that the Eighth Amendment permits only one mode of execution, or that it requires an anesthetized death, cannot be squared with the history of the Constitution.”


15 Madow, “Forbidden Spectacle,” 479.

16 Ibid., 482.

17 Wilkerson v. Utah, 99 U.S. 130, 135-36 (1879).

18 In re Kemmler, 136 U.S. 436, 446 (1890).

19 Ibid., 447.


21 Ibid., 463-64.

22 Baze v. Rees, 128 S. Ct. 1520, 1531 (2008) (plurality): “(A)n isolated mishap alone does not give rise to an Eighth Amendment violation, precisely because such an event, while regrettable, does not suggest cruelty.”

23 Baze v. Rees, 128 S. Ct. 1520, 1568 (Ginsburg, J., dissenting). Although Resweber was the last case to focus explicitly on a method of execution prior to Baze, several subsequent opinions have included dicta on methods of execution. See, for example, Furman v. Georgia, 408 U.S. 238, 430 (1972) (Powell, J., dissenting) (“No court would approve any method of implementation of the death sentence found to involve unnecessary cruelty in light of presently available alternatives.”); and Coker v. Georgia, 433 U.S. 584, 592 (1977) (plurality) (stating that a punishment is unconstitutional if it "makes no measurable contribution to acceptable goals of punishment and hence


28 Indeed, and although the point cannot be elaborated in this context, I would argue that it is this method’s apparent realization of a death that involves no violence that goes a long way toward explaining why it proved immune to successful court challenge for a quarter century or so; and, correlatively, it is growing evidence of this method’s failure to fulfill the terms of this ideal that explains why such challenges, culminating in Baze, were able to secure some measure of traction in lower courts over the course of the past half decade or so.

29 C.J. Drake, quoted in “Lethal Injections More Secretive Than By Chair,” Sarasota Herald-Tribune, March 3, 2000, ZB.

30 Madow, “Forbidden Spectacle,” 482.

31 For a different but related manifestation of the felt need to rationalize the death penalty, consider the report submitted in 2004 by the Massachusetts Governor’s Council on Capital Punishment. That document, which is reproduced as “Report of the Governor’s Council on Capital Punishment,” Indiana Law Journal 80 (Winter 2005), offers a set of ten proposals, which, “if adopted in their entirety, can allow creation of a fair capital punishment statute for Massachusetts that is as narrowly tailored, and as infallible, as humanly possible” (2). The proposals include the requirement that “conclusive scientific evidence” be produced “as a prerequisite to the imposition of the death penalty,” and that the jury “find that there is ‘no doubt’ about the defendant’s guilt of capital murder” (19-20). Both of these proposals may be read as efforts to perfect the rationalization of capital punishment by effectively reducing to nil the risk that an innocent person might be sentenced to die.


33 Reply Brief of Petitioners, at 2.

34 Brief of Respondents, at 18.

35 Indeed, on occasion, petitioners appear to argue that the end of risk management will be fully secure only when it
is guaranteed and accomplished without exception, thereby collapsing any meaningful distinction between risk and
accident. See, for example, Brief of Petitioners, at 35: “The foreseeable infliction of unnecessary pain on some
condemned inmates cannot be any more tolerable under the Eighth Amendment than the infliction of unnecessary
pain on all condemned inmates…Therefore, the Eighth Amendment obligates the government to carry out
executions in a manner that avoids creating an unnecessary risk of pain with respect to individual inmates.”

36 Brief of Respondents, at 12-13, 36-37.

Commission on Administration of Lethal Injection, Tallahassee, Florida, March 1, 2007 (available at
pdf), emphasis added.

38 See David Waisel, “Physician Participation in Capital Punishment,” Mayo Clinic Proceedings 82 (September,
2007): “I conceptualize physician participation in capital punishment as an altruistic practice of medicine. The future
patient should request physician participation, and the physician should be licensed to practice medicine in that
state” (1079).

39 Mark Heath, “Revisiting Physician Involvement in Capital Punishment: Medical and Nonmedical Aspects of


41 Brief of Petitioners, at 39.

42 For the requirement of a “qualified individual,” see Morales v. Hickman, 415 F. Supp. 2d 1037, 1047 (Cal. N.D.
2006). For the requirement of an “anesthesia professional,” see Morales v. Hickman, 438 F.3d 926, 931 (9th Cir.
2006).

See Kentucky Revised Statute § 431.220(3): “No physician shall be involved in the conduct of an execution except to certify the cause of death provided the condemned is declared dead by another person.”

In Nelson v. Campbell, 541 U.S. 637 (2004), the Court ruled that the administration of a cut-down procedure, i.e., an incision employed to secure access to a vein as a preface to a lethal injection, could be raised as a complaint under 42 U.S.C. § 1983, which creates a cause of action against state officials for the violation of “any rights, privileges, or immunities secured by the Constitutions and laws [of the United States],” rather than as a habeas petition, which can only be employed to contest the legality of an inmate’s conviction or sentence. In Hill v. McDonough, 126 S. Ct. 2096 (2006), the scope of that ruling was expanded when the Court held that challenges to lethal injection protocols, including the chemicals specified by those protocols, could be similarly raised. Given the strict rules governing the filing of successive habeas claims, as set forth in the Antiterrorism and Effective Death Penalty Act (1996), the cumulative effect of these two decisions was to make it considerably easier for inmates sentenced to death by lethal injection to seek injunctive relief in order to correct a constitutional violation. However, in doing so, those sentenced to die cannot employ a methods challenge to contest the death penalty itself.

Brief of Respondents, at 49.


52 Ibid., at 1543.

53 Brief of Petitioners, at 31, 39 (emphasis added).


55 Brief of Respondents, at 9-10.

56 Brief of Respondents, at 44.

57 For the recommendation to explore the possibility of eliminating pancuronium bromide from the Florida protocol, see Final Report with Findings and Recommendations, The Governor’s Commission on Administration of Lethal Injection, Tallahassee, Florida, March 1, 2007 (available at http://www.flgov.com/pdfs/20070301-lethalinjection.pdf): The Commission urged “that the Governor have the Florida Department of Corrections on an ongoing basis explore other more recently developed chemicals for use in a lethal injection execution with specific consideration and evaluation of the need of a paralytic drug like pancuronium bromide in an effort to make the lethal injection procedure less problematic” (p. 13). The revised lethal injection protocol, which became effective on May 9, 2007, gives no indication that this recommendation was given consideration and retains pancuronium bromide, without explanation, as one of the three chemicals to be administered (see http://www.deathpenaltyinfo.org/FlorLethInject.pdf). For the judicial recommendation to remove potassium chloride and pancuronium bromide from the California protocol, see Morales v. Tilton, 465 F. Supp. 2d 972, 983 (N.D. Cal. 2006): “Removal of [pancuronium bromide and potassium chloride] from the lethal-injection protocol, with the execution accomplished solely by an anesthetic, such as sodium pentobarbital, would eliminate any constitutional concerns, subject only to the implementation of adequate, verifiable procedures to ensure that the inmate actually receives a fatal dose of the anesthetic.” For the rejection of that recommendation, see State of California, Lethal Injection Protocol Review, May 15, 2007 (available at http://www.cdcr.ca.gov/Communications/docs/ReportToCourt.pdf), at 19: “A one-chemical protocol was considered. Five grams of sodium thiopental would be expected to cause death. The use of only one chemical, sodium thiopental, has the advantages of being simpler to administer and virtually eliminates the potential for pain. However, the use of only one chemical has disadvantages. Since no other jurisdiction currently uses only one chemical, the protocol remains untested. The use of only a barbiturate would likely result in involuntary muscle movement, with unpredictable consequences. Finally, the execution would take an extended period of time.” For an
account of the recommendation to shift to a single chemical protocol in Tennessee, as well as the ultimate rejection of that recommendation by the commissioner of the department of corrections because he did not want “Tennessee to be at the forefront of making the change from the three-drug protocol to the one-drug protocol,” and because he thought adoption of a one-drug protocol could lead to “political ramifications,” see Harbison v. Little, 511 F. Supp. 2d. 872 (2007), at 874-81.

58 Brief of Petitioners, at 51.

59 Brief of Petitioners, at 52.

60 Brief of Respondents, at 50.

61 Brief of Respondents, at 51.


64 Brief of Respondents, at 51.


67 Transcript of evidentiary hearings, Baze and Bowling v. Rees et al., Civil Action No. 04-CI-01094, Franklin Circuit Court, Commonwealth of Kentucky (May 2, 2005), at 1063.

68 Brief of Petitioners, at 53.

69 Heath, quoted in Complaint for Declaratory Judgment and Injunctive Relief at 21, Baze v. Rees, CJ-KY-0002-0005, Franklin Circuit Court, Commonwealth of Kentucky (August 2004).

70 Declaration of Dr. Mark Heath at 21, Morales v. Woodford, Case No. 06-219, United States District Court, Northern District of California (June 12, 2006).


Baze v. Rees, 128 S. Ct. 1520, 1535 (plurality).

Baze v. Rees, 128 S. Ct. 1520, 1546 (Stevens, J., concurring). It is not entirely apparent, incidentally, on what basis states might predicate a specifically scientific justification for altering the mix of chemicals prescribed by current lethal injection protocols. As Seema Shah notes in “How Lethal Injection Reform Constitutes Impermissible Research on Prisoners,” American Criminal Law Review 45 (April 2008) (forthcoming), if the systematic collection of data aimed at determining the ideal mix of chemicals qualifies as research, it may conflict with state regulations and policies, and/or norms of professional ethics, that govern the conduct of experimentation on prisoners.

Declaration of Dr. Mark Heath at 2,4, Morales v. Woodford, Case No. 06-219, United States District Court, Northern District of California (February 14, 2006).

Transcript of oral argument, at 37. In their brief, by way of contrast, petitioners argue that “a three-gram does of thiopental would cause death within three minutes to fifteen minutes” (at 54, n. 16).


For a more detailed argument about the epistemological difficulties posed by any effort to ground legal arguments in claims about the reality of pain, see Timothy V. Kaufman-Osborn, “Silencing the Voice of Pain,” in From Noose to Needle: Capital Punishment and the Late Liberal State (Ann Arbor, MI: University Michigan Press, 2002).