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Lethal Injection and the Problem of Constitutional Remedies

Eric Berger

University of Nebraska College of Law, eric.berger@unl.edu

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YALE LAW & POLICY REVIEW

Lethal Injection and the Problem of Constitutional Remedies

*Eric Berger**

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In the interest of full disclosure, I should note that I was a member of the litigation teams representing Michael Taylor in his Eighth Amendment challenge before the trial and appellate courts and Clarence Hill in his U.S. Supreme Court case. The views expressed herein are solely my own and should not be read to reflect the views of the other lawyers participating in those or other lethal injection cases.

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INTRODUCTION

Death row inmates around the country have challenged the constitutionality of the lethal injection procedures by which they will be executed. This litigation often turns up serious problems, which create a significant risk that the inmate will suffer an excruciating death in apparent violation of the Eighth Amendment's prohibition against "cruel and unusual punishment."¹ With a few notable exceptions, however, courts have been reluctant to intervene, explicitly deferring to state officials responsible for these procedures and upholding the execution protocols.

Judicial reluctance to strike down states' lethal injection procedures is closely tied to judges' anxieties about issuing an appropriate remedy should they find a constitutional flaw. Judges' decisions upholding current procedures, in other words, often reflect less about those procedures' safety and more about the difficulty of identifying a workable remedy. There are, of course, some lethal injection plaintiffs who are unable to identify plausible dangers.² In such cases, judges are justified in upholding state procedures (assuming that the plaintiff has had access to the relevant records during discovery). But other lawsuits identify serious flaws, and courts still decline to interfere. Fearful that any remedy would appear to usurp the political branches' province and exceed judges' core competence, these courts let remedial concerns color their findings on the merits.

Several recent cases reflect these remedial anxieties. In the Supreme Court's 2008 splintered decision in *Baze v. Rees*, for instance, the three-Justice plurality explicitly required the lethal injection plaintiff to proffer a "feasible, readily implemented" alternative as part of his affirmative case.³ It, therefore, conditioned the Eighth Amendment right on the existence of a workable remedy.

The plurality then drew further on remedial concerns, warning that judicial involvement in states' lethal injection procedures would "threaten to transform courts into boards of inquiry charged with determining 'best practices' for exe-

1. U.S. CONST. amend. VIII.

2. By "danger," I mean a condition creating a significant risk of excruciating pain.

3. *Baze v. Rees*, 128 S. Ct. 1520, 1532 (2008) (plurality opinion).

cutions.”⁴ The plurality argued that such a remedy—requiring states to adopt the “best practice”—would immerse the judiciary in an area best left to the political branches.⁵ But the plurality overstated the intrusion, ignoring the fact that a court finding an Eighth Amendment violation need not require the “best practice.” To the contrary, more modest remedies can cure a lethal injection procedure’s risks without interfering so much with the state’s prerogative. The Court, therefore, misconstrued the remedial issue and then used those remedial concerns to narrow the scope of the underlying Eighth Amendment right.

Lower courts have also cited and misconstrued remedial issues. One court identified serious flaws in a state’s lethal injection procedure but nevertheless declined to find a formal violation and issue a remedy because “under the doctrines of comity and separation of powers, the particulars of [a state’s] lethal-injection protocol are and should remain the province of the state’s executive branch.”⁶ Even confronted with the state procedure’s manifest problems, the court’s overriding concern was to “permit Defendants to proceed with Plaintiff’s execution as scheduled.”⁷ And that court at least did identify serious problems. More often, courts presented with lethal injection cases avoid engaging with the details of the procedure, explaining instead that the judicial “role is not to micromanage the executive branch in fulfilling its own duties relating to executions.”⁸

Remedial concerns then shift the Eighth Amendment’s focus in method-of-execution cases from the inmate’s risk of pain to the difficulty the state might have reforming its method. Of course, some attention to remedy is appropriate, because the words “cruel and unusual” invite a comparative inquiry. Courts, however, have distorted this remedial inquiry, drawing false assumptions about remedial options and concluding that *any* remedy would necessarily be inappropriate. This distortion gives states incentives not to reform broken procedures but instead to argue that doing so would be too cumbersome. It also allows courts to uphold procedures that are not only dangerous but also the product of serious political process failures undeserving of judicial deference. Indeed, several states have given little attention to these procedures’ design, delegated the procedure to unqualified personnel, failed to consult experts, concealed the details of the procedure from the public, and obdurately refused to reconsider their practices even as serious problems have come to light.

In giving so much attention to remedial concerns and so much deference to the political branches, courts are often not distinguishing between disingenuous

4. *Id.* at 1531.

5. *Id.*

6. *Morales v. Tilton*, 465 F. Supp. 2d 972, 975-76 (N.D. Cal. 2006) [hereinafter *Morales II*] (quoting *Morales v. Hickman*, 415 F. Supp. 2d 1037, 1046 (N.D. Cal. 2006) [hereinafter *Morales I*]).

7. *Id.* at 975 (quoting *Hickman*, 415 F. Supp. 2d at 1047).

8. *Lightborne v. McCollum*, 969 So. 2d 326, 351 (Fla. 2007).

suits manufactured to delay the inevitable execution and legitimate complaints identifying serious flaws with a state's method of execution. Courts, in other words, are adopting a blanket deference that makes it more difficult for even the strongest cases to get a fair hearing. Given some states' lack of care and transparency in this area, such deference is unwarranted.

Part I of this Article introduces the three-drug lethal injection procedure used in most states. Specifically, it explains how haphazard practices and untrained, unqualified personnel greatly heighten the risk that the procedure will cause an excruciating death. It then summarizes the Supreme Court's 2008 decision in *Baze v. Rees* upholding Kentucky's three-drug protocol.⁹ Seven different Justices wrote separately in *Baze*, and no opinion garnered more than three votes. This Part explores the state of the law in light of this fractured decision.

Part II argues that remedial concerns figure prominently in recent lethal injection decisions, including *Baze*, and in fact often drive the outcome. Courts both explicitly and implicitly shape the scope of the Eighth Amendment right by looking to whether there might be appropriate remedies. In so doing, courts often incorrectly assume that any remedy would greatly burden the state. The remedial inquiry, then, is colored by a general reluctance to tell the political branches what to do, which grows out of more general discomfort with institutional remedies, particularly structural reform injunctions. While most courts do not explicitly equate lethal injection suits with structural reform litigation, lethal injection actions do inquire into the structure—the personnel, architecture, and processes—of states' execution procedures. Accordingly, deep-seated judicial attitudes about invasive structural injunctions color courts' approaches to lethal injection suits.

Part III argues that this judicial reluctance to impose remedies against the government is misplaced. Many states have not given much thought to the details of their lethal injection procedures. While respect for democracy might be an appropriate reason for courts to decline to intervene in some instances, it is not here, where there has been nothing democratic, deliberative, or transparent about the creation of execution protocols. Quite to the contrary, where states have delegated responsibility for their procedures to unelected, unqualified execution team members and then concealed the details of that procedure from the public, judicial interference is entirely appropriate.

Given that judicial intervention is necessary, Part IV argues that viable lethal injection remedies are more workable and less intrusive than many courts seem to assume. This Part suggests particular remedies that would help cure an execution protocol's difficulties. It then contends that such remedies would be relatively modest compared with many public law injunctions and would not unduly burden the political branches. Calls for judicial deference, then, are overstated in this area.

This Article concludes that some courts have not been sensitive enough to the distinctions between different types of public law litigation. They have blindly assumed that any suit seeking an injunction to reform state practices is

9. 128 S. Ct. 1520 (2008).

inherently intrusive. Courts should recognize that some injunctions reshaping public practices can be relatively unintrusive and wholly appropriate. Indeed, because remedial concerns often figure heavily in courts' articulation of the constitutional right itself, it is crucial that judges appreciate these nuances in the early stages of an action. This appreciation is all the more important in the lethal injection context as courts address the scope of the Eighth Amendment right in light of the muddled *Baze* decision. In failing to account for these factors thus far, some courts have blessed dangerous state practices and surrendered their own constitutional responsibility to oversee the other branches.

I. AN OVERVIEW OF LETHAL INJECTION

A. *The Three-Drug Protocol*

Over the past few years, litigation has uncovered numerous flaws in states' lethal injection procedures.¹⁰ Lawyers typically bring these constitutional challenges under the Eighth Amendment, which reads, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."¹¹ Lethal injection plaintiffs typically do not claim that the death penalty is unconstitutional or that lethal injection is unconstitutional *per se*, but rather that the particular lethal injection procedure administered in a given jurisdiction violates the Eighth Amendment.¹²

Courts agree that if a method of execution causes excruciating pain or the significant risk of such pain, it violates the Eighth Amendment whenever a fea-

10. An expert anesthesiologist has also identified numerous flaws in the federal lethal injection procedure, which is the subject of ongoing litigation. *See, e.g.*, Heath Declaration, *Roane v. Gonzales* (D.D.C.) (No. 05-2337) [hereinafter *Heath Roane Decl.*] (recounting several problems with the federal lethal injection procedure). Challenges to federal and state procedures present similar factual and legal issues, although obviously federalism concerns differ. For ease of presentation, this Article refers to the defendants collectively as "states."

11. U.S. CONST. amend. VIII. Current Eighth Amendment jurisprudence consists of roughly four categories of cases: (1) the prohibition of certain punishments deemed to be painful and inhumane; (2) punishments that are unconstitutional because they are disproportionate to the crimes for which they are imposed; (3) "death is different" cases, which require special due process rules for death sentences; and (4) inhumane prison conditions cases. Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 678-79 (2005). This Article focuses on the first category.

12. Note that while most method-of-execution challenges arise under the U.S. Constitution, some have been decided under state constitutional law or state statutory law. *See State v. Mata*, 745 N.W.2d 229, 261-62 (Neb. 2008) (holding Nebraska's form of electrocution unconstitutional under the Nebraska constitution); *Ohio v. Rivera*, No. 04-65940, slip op. at 10 (Ohio Ct. Com. Pl. June 10, 2008) (holding that Ohio's lethal injection procedure violated a state statute requiring that lethal injection be completed "quickly and painlessly").

sible alternative exists.¹³ Despite early Supreme Court cases reviewing the constitutionality of various methods of execution,¹⁴ the legal standard for such an Eighth Amendment lethal injection claim was unclear before the Court's recent decision in *Baze v. Rees* and arguably remains unclear today. Nevertheless, although pre-*Baze* cases sometimes disagreed about the precise legal standard, parties and courts generally focused on whether a lethal injection procedure created an unnecessary risk of pain.¹⁵ This inquiry is unconcerned with the risk of unforeseeable accident.¹⁶

Lethal injection is the sole or primary method of execution in thirty-six of the country's thirty-seven death penalty states and for the federal government.¹⁷

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13. See *Baze v. Rees*, 128 S. Ct. 1520, 1531-32 (2008) (requiring a substantial risk of harm and a viable alternative for an Eighth Amendment violation); see also *Evans v. Saar*, 412 F. Supp. 2d 519, 524 (D. Md. 2006) (asking "whether an inmate facing execution has shown that he is subject to an unnecessary risk of unconstitutional pain or suffering") (internal quotation marks omitted); *Cooley v. Taft*, 430 F. Supp. 2d 702, 708 (S.D. Ohio 2006); *Morales v. Tilton*, 465 F. Supp. 2d 972, 974 (N.D. Cal. 2006). The law recognizes and tolerates, however, that "[s]ome risk of pain is inherent in any method of execution—no matter how humane—if only from the prospect of error in following the required procedure." *Baze*, 128 S. Ct. at 1529.
 14. See *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 464 (1947) ("The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely. The fact that an unforeseeable accident prevented the prompt consummation of the sentence cannot, it seems to us, add an element of cruelty to a subsequent execution."); *In re Kemmler*, 136 U.S. 436, 447 (1890) ("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."); *Wilkerson v. Utah*, 99 U.S. 130, 134-37 (1878) (upholding constitutionality of execution by firing squad); see also *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (holding that Eighth Amendment bars punishments "incompatible with the 'evolving standards of decency that mark the progress of a maturing society'" (quoting *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958))); *Furman v. Georgia*, 408 U.S. 238, 430 (1972) (Powell, J., dissenting) (citing commentary which stated that "no court would approve any method of implementation of the death sentence found to involve unnecessary cruelty in light of presently available alternatives"); *Weems v. United States*, 217 U.S. 349, 378 (1910) (stating that the Eighth Amendment is "progressive, and is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice").
 15. See generally *Harbison v. Little*, 511 F. Supp. 2d 872, 880 (M.D. Tenn. 2007) (noting that the Eighth Amendment "forbids the infliction of unnecessary pain in the execution of the death sentence" (quoting *Resweber*, 329 U.S. at 67)); *Taylor v. Crawford*, No. 05-4173, 2006 WL 1779035, at *8 (W.D. Mo. June 26, 2006) (same).
 16. *Resweber*, 329 U.S. at 464; *Taylor v. Crawford*, 487 F.3d 1072, 1080 (8th Cir. 2007); *Campbell v. Wood*, 18 F.3d 662, 687 (9th Cir. 1994).
 17. See *Baze*, 128 S. Ct. at 1526-27 & n.1 (2008). Nebraska is the only death penalty state specifying electrocution as the sole method of execution, but the Nebraska Su-

The federal government and at least thirty states use the same three-drug sequence.¹⁸ The first of these drugs, thiopental (otherwise known as sodium pentothal), is an ultra-short-acting barbiturate anesthetic. The second drug, pancuronium bromide (Pavulon), is a paralytic that inhibits muscle movement, including that of the diaphragm. The third drug, potassium chloride, induces cardiac arrest.¹⁹

It is undisputed that if a full dose of thiopental is successfully delivered to the inmate's veins, that inmate will be fully anesthetized within two-and-a-half minutes.²⁰ It is also undisputed that if the thiopental fails to take effect, the potassium chloride will cause excruciating pain as it sears its way through the inmate's veins on the way to stopping his heart.²¹ If that were to happen, the inmate's pain could be masked by the pancuronium. An inmate, then, could lie paralyzed, suffocating and experiencing intense burning in his veins, and yet appear peaceful.²²

preme Court recently found its electrocution procedure cruel and unusual under the Nebraska Constitution. See *State v. Mata*, 745 N.W.2d 229, 261-62 (Neb. 2008). As of March 19, 2009, the Nebraska Legislature's Judiciary Committee was debating a bill that would institute lethal injection as a new method of execution. See Paul Hammel, *Legislative Panel Fails To Advance Lethal Injection Bill*, OMAHA WORLD HERALD, Mar. 19, 2009, available at http://www.omaha.com/index.php?u_page=2798&u_sid=10589642.

18. See, e.g., *Baze*, 128 S. Ct. at 1527. It would be inaccurate to say that states use the same procedure, because the safety of the procedure turns in large part on how the drugs are administered. States using the same drugs can still have very different procedures.

The words "protocol" and "procedure" in the lethal injection context are often used interchangeably. To the extent their meanings differ, "protocol" generally refers to the written document specifying the steps the State should take to administer the drugs, while "procedure" generally refers to the steps they actually take, including departures (either intentional or unintentional) from the written protocol.

19. Mark Dershwitz & Thomas K. Henthorn, *The Pharmacokinetics and Pharmacodynamics of Thiopental as Used in Lethal Injection*, 35 FORDHAM URB. L.J. 931, 931 (2008); Teresa A. Zimmers et al., *Lethal Injection for Execution: Chemical Asphyxiation?*, 4 PLOS MED. 0646, 0646 (2007), <http://medicine.plosjournals.org/perlserv/?request=getdocument&doi=10.1371/journal.pmed.0040156>.
20. Henthorn Expert Report ¶ 24, *Taylor v. Crawford*, No. 05-4173, 2006 WL 1236660 [hereinafter Henthorn Report] (expert anesthesiologist explaining speed with which thiopental takes effect); Dershwitz & Henthorn, *supra* note 19, at 933, 936.
21. *Harbison v. Little*, 511 F. Supp. 2d 872, 880 (M.D. Tenn. 2007); Dershwitz & Henthorn, *supra* note 19, at 931; Frank Romanelli et al., *Issues Surrounding Lethal Injection as a Means of Capital Punishment*, 28 PHARMACOTHERAPY 1429, 1433 (2008).
22. See *Baze*, 128 S. Ct. at 1527; *Harbison*, 511 F. Supp. 2d at 883-84; Suzanne C. Beyea, *Addressing the Trauma of Anesthesia Awareness*, 81 AORN J. 603, 603 (2005); Leonidas G. Koniaris et al., *Inadequate Anaesthesia in Lethal Injection for Execution*, 365 LANCET 1412, 1414 (2005).

If properly performed, the three-drug protocol will fully anesthetize the inmate for the duration of the execution. Such an execution would therefore be constitutional.²³ The key question presented in these cases, then, is whether the first drug does take effect. The answer cannot be determined, however, by witnesses or execution personnel watching the inmate. First, there are different planes of anesthesia, and a partially anesthetized person may be unresponsive to light stimuli, like gentle shaking, but still be able to feel stronger stimuli, like excruciating pain.²⁴ Only a medical professional with training in anesthesiology sitting at a person's elbow can accurately determine whether a person has reached a deep enough plane of anesthesia to be unresponsive to excruciating pain.²⁵ Most states neither employ a professional with such training nor position their personnel so close to the inmate.²⁶ Second, the administration of pancuronium paralyzes the inmate so that he looks serene even if he is not anesthetized.²⁷ Lethal injection challenges thus often focus on the probability that the inmate will receive the full dose of thiopental in his veins and be fully anesthetized before the delivery of the second and third drugs.

That likelihood hinges on how the three-drug procedure is carried out in each state. Because pancuronium masks pain and because many states do not take toxicology reports measuring thiopental blood levels immediately after death, there is no reliable data on how many inmates have suffered painful deaths. But as details about various states' procedures emerge, it seems increasingly probable that some states' procedures have caused and will continue to cause torturous pain.²⁸

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23. *Baze*, 128 S. Ct. at 1530 (plurality opinion). A properly performed three-drug procedure might still involve pain from the insertion of the IV catheter into the inmate's veins, but assuming that no unusually painful measures are needed to insert the catheter, such as a cut-down procedure, that degree of pain would not amount to a constitutional violation. *See id.* (stating that an Eighth Amendment violation requires "something inhuman and barbarous, something more than the mere extinguishment of life" (quoting *In re Kemmler*, 136 U.S. 436, 447 (1890))).
 24. Henthorn Report, *supra* note 20, ¶ 9; Colin A. Shanks et al., *A Pharmacokinetic-Pharmacodynamic Model for Quantal Responses with Thiopental*, 21 J. PHARMACOKINETICS & BIOPHARMACEUTICS 309, 316 (1993).
 25. *See, e.g.*, Taylor Trial Transcript at 71, *Taylor v. Crawford*, No. 05-4173, 2006 WL 1236660 [hereinafter Taylor Trial Transcript] (testimony of expert anesthesiologist); Dershwitz & Henthorn, *supra* note 19, at 949; Atul Gawande et al., *Physicians and Execution—Highlights from a Discussion of Lethal Injection*, 358 NEW ENG. J. MED. 448, 450 (2008).
 26. *See, e.g., Harbison*, 511 F. Supp. 2d at 884-86; *Taylor v. Crawford*, No. 05-4173, 2006 WL 1779035, at *7-9 (W.D. Mo. June 26, 2006).
 27. *See, e.g., Beyea*, *supra* note 22, at 603; Koniaris et al., *supra* note 22, at 1414.
 28. It is beyond the scope of this Article to provide a detailed summary of all the problems that have been uncovered in various states. For a more detailed discussion, see Professor Denno's excellent articles. *See generally* Deborah W. Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*,

As an initial matter, it is important to note that death by lethal injection need not involve this combination of three drugs. The American Veterinary Medical Association (AVMA), for example, will not use the three-drug protocol when euthanizing animals, because the risk of pain is too great. Instead, it favors an overdose of the barbiturate pentobarbital that eliminates the risk of pain.²⁹ If the injection of barbiturate fails to kill the animal, the veterinarian simply administers a second dose.³⁰ Paralytics like pancuronium therefore play no role in animal euthanasia, and, indeed, have actually been statutorily banned in several states that nevertheless use those same drugs during the execution of humans.³¹ As Professor Alper puts it, “virtually all (97.6%) lethal injections in this country have taken place in states that have either implicitly or explicitly banned, for use in animal euthanasia, the same drugs that are used in those states during human executions.”³² Moreover, whereas veterinary consensus has resulted from decades of study, lethal injection procedures are not the products of any scientific review.³³ To the contrary, they are often haphazardly conceived

76 FORDHAM L. REV. 49 (2007) [hereinafter Denno, *Quandary*] (examining how states ended up with constitutionally suspect lethal injection procedures); Deborah W. Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocuting and Lethal Injection and What It Says About Us*, 63 OHIO ST. L.J. 63, 90-120 (2002) [hereinafter Denno, *Paradox*] (questioning presumption that lethal injection is a constitutional method of execution).

I should emphasize that I am not suggesting that all lethal injection claims are necessarily meritorious. Although several states’ procedures are problematic, some may well be safe and painless.

29. Ty Alper, *Anesthetizing the Public Conscience: Lethal Injection and Animal Euthanasia*, 35 FORDHAM URB. L.J. 817, 836-37 (2008).

30. *Id.* at 836.

31. *See id.* at 841-42 (noting that nine states—Florida, Georgia, Maine, Maryland, Massachusetts, New Jersey, New York, Oklahoma, and Tennessee—explicitly ban the use of neuromuscular blocking agents in animal euthanasia, that another twenty-eight states implicitly ban the use of such drugs by mandating a particular method of euthanasia, and that many of these same states use pancuronium in their lethal injection procedures).

32. *Id.* at 844.

33. *See id.* at 834 (explaining that the AVMA updates its guidelines at least once every ten years by reviewing all scientific literature evaluating methods and potential methods of euthanasia); Denno, *Quandary*, *supra* note 28, at 70 (explaining that lethal injection procedures were never studied); Ellen Kreitzberg & David Richter, *But Can It Be Fixed? A Look at Constitutional Challenges to Lethal Injection Executions*, 47 SANTA CLARA L. REV. 445, 459 (2007) (explaining that there has never been “critical re-evaluation” of a lethal injection procedure “to assess whether modern medical or scientific knowledge could improve the existing protocol”).

and performed, and this general lack of care creates the substantial risk that something will go wrong and cause severe pain.³⁴

Probably the most serious and complicated problem with many states' lethal injection procedures is the use of untrained and unqualified personnel.³⁵ The California District Court, for example, found that "[t]he [execution] team members almost uniformly have no knowledge of the nature or properties of the drugs that are used or the risks or potential problems associated with the procedure."³⁶ Such ignorance about the drugs is common. When executions take longer than expected in Virginia, the execution team inexplicably administers more pancuronium and potassium, but not more thiopental.³⁷ In other words, Virginia re-administers not anesthetic, but the drugs that mask and cause pain. In Missouri, the executioners injected the drugs as quickly as possible,³⁸ mistakenly believing that thiopental renders a person fully unconscious within fifteen seconds.³⁹ In reality, it may take up to two and a half minutes for thiopental to take full effect.⁴⁰ Compounding these problems, states do not adequately train their execution teams to make up for these deficiencies or even require their teams to read the execution protocol.⁴¹

Such ignorance places special importance on the ostensible team leader. In Missouri, for instance, the only team member who claimed to understand the procedure was Dr. Alan Doerhoff (referred to in the litigation as "John Doe I"),

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34. See, e.g., Denno, *Quandary*, *supra* note 28, at 56-58 (summarizing haphazard and "disturbing" details about states' lethal injection procedures).
 35. This discussion mostly characterizes the procedures as they existed in states during recent litigation. Some states have changed their procedures recently, although most such changes are minor.
 36. *Morales v. Tilton*, 465 F. Supp. 2d 972, 979 (N.D. Cal. 2006); see also *Harbison v. Little*, 511 F. Supp. 2d 872, 888-90 (M.D. Tenn. 2007) (finding execution team members "largely ignorant" of the drugs' risks).
 37. *Emmett v. Johnson*, 532 F.3d 291, 296-97 (4th Cir. 2008).
 38. See Deposition of Larry Crawford, *Taylor v. Crawford* at 129-31, 2006 WL 1779035 (W.D. Mo. May 23, 2006) (No. 05-4173) (containing explanation by DOC Director that drugs are injected in rapid succession).
 39. Deposition of Dr. John Doe at 20, *Taylor*, 2006 WL 1779035 (W.D. Mo. June 5, 2006) (No. 05-4173) [hereinafter *Doe Deposition*].
 40. See Henthorn Report *supra* note 20, ¶ 24.
 41. See, e.g., *Morales II*, 465 F. Supp. 2d at 979 ("[W]e don't have training, really."); GOVERNOR'S COMM'N ON ADMIN. OF LETHAL INJECTION, FINAL REPORT WITH FINDINGS AND RECOMMENDATIONS 8 (2007) [hereinafter *FLORIDA COMMISSION REPORT*] (finding "[f]ailure of the training of the [Florida] execution team members"); 11/27/2006 Am. Joint Pre-Hr'g Conf. Statement at 55, *Morales* (No. 06-0219) (indicating that California team members had never read the protocol).

the doctor heading the procedure.⁴² Doerhoff turned out to be incompetent or callous, lowering the amount of the thiopental and making other changes to the procedure without consulting any Department of Corrections (DOC) authorities.⁴³ These actions belied Missouri's public representations throughout litigation that it used five grams of thiopental during all executions.⁴⁴ In reality, the DOC's chemical log showed that Doerhoff sometimes prepared only 2.5 or fewer grams.⁴⁵ When asked about the discrepancy, Doerhoff admitted that he was dyslexic and never knew how much thiopental he mixed.⁴⁶ The log therefore represented only his very rough approximations.⁴⁷

Dyslexia was hardly Doerhoff's only problem. His deposition revealed several false assertions about a variety of medical issues, casting serious doubt on his professional competence.⁴⁸ Additionally, Doerhoff's surgical training gave him no background in the anesthesiological tasks crucial to the procedure.⁴⁹ To

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42. Dr. Doerhoff's identity was published several weeks after the trial by the *St. Louis Post-Dispatch*. See Jeremy Kohler, *Behind the Mask of the Mo. Execution Doctor*, ST. LOUIS POST-DISPATCH, July 29, 2006, at A-1.
43. See *Taylor v. Crawford*, 2006 WL 1779035, at *7 (W.D. Mo. June 26, 2006); Doe Deposition, *supra* note 39 at 96.
44. See, e.g., Def. Crawford's 9/12/2005 Answers to Plaintiff's First Interrogatories at 8-9, *Taylor v. Crawford*, No. 05-4173; Defs' 5/17/06 Letter to J. Gaitan at 1, *Taylor v. Crawford*, No. 05-4173.
45. Defs' 5/17/06 Letter to J. Gaitan, *Taylor v. Crawford*, No. 05-4173 (apologizing for the State's misstatements to the court about the thiopental dose). Successfully administering either 5 or 2.5 grams of thiopental would be sufficient to fully anesthetize an inmate for the duration of an execution. See *Taylor v. Crawford*, 487 F.3d 1072, 1076 (8th Cir. 2007). Missouri's careless approach to its doses nevertheless is troubling, because it demonstrates that the State does not follow its own procedures. Moreover, a 2.5 gram dose leaves less margin for error in the event of a leak, infiltration, or some other error.
46. See *Taylor*, 2006 WL 1779035, at *7 ("John Doe I also testified that he felt that he had the authority to change or modify the formula as he saw fit. It is apparent that he has changed and modified the protocol on several occasions in the past."); Doe Deposition, *supra* note 39, at 25 ("I am dyslexic and so . . . it's not unusual for me to make mistakes.").
47. See Doe Deposition, *supra* note 39, at 25; *Taylor*, 2006 WL 1779035, at *4-6 (discussing the Doerhoff deposition).
48. See, e.g., *Taylor*, 2006 WL 1779035, at *7 (court indicating it was "gravely concerned" about Doerhoff's competence); *Taylor* Trial Transcript, *supra* note 25, at 29-57 (medical expert testifying that Doerhoff made several "100% backward," "false," and "very troubling" medical statements).
49. See *Taylor*, 2006 WL 1779035, at *7 (noting that facility with numbers may not be necessary for surgery, but "is critical when one is mixing and dissolving chemicals for a lethal injection"); *Taylor* Trial Transcript, *supra* note 25, at 29-43 (anesthesiologist expert testifying that it is not "conceivable" than an anesthesiologist would make the mistakes Doerhoff made).

make matters worse, Missouri then lacked a written protocol, meaning that Doerhoff possessed “total discretion” for the procedure and that the whole team looked entirely to him for its responsibilities.⁵⁰

Unqualified personnel also create problems setting the intravenous (IV) catheter. If the catheter is improperly set, the drugs will not all be delivered successfully into the vein. Instead, they will infiltrate, spilling into surrounding tissues. Infiltration itself is painful, but, even more alarming is the possibility that it will result in inadequate anesthesia. For example, during the Florida execution of Angel Diaz, inadequate anesthesia resulted in the inmate writhing and gasping on the gurney for thirty-four minutes before dying.⁵¹ An autopsy later revealed infiltration at his IV site.⁵² Placing the IV catheter can often be one of the procedure’s most difficult steps, especially because some condemned inmates are obese or former intravenous drug users, and yet, some states rely on unqualified personnel to perform this critical task.⁵³

Other problems result from the execution chambers’ architecture. To conceal the identity of their executioners, many states place the inmate on a gurney in an execution chamber and staff in an adjacent execution support room where they are hidden from witnesses. After team members place the catheter in the inmate’s veins, they exit the room, leaving the inmate alone for the duration of the execution. The execution team then remotely administers the drugs,

50. *Taylor*, 2006 WL 1779035, at *7-8.

51. See FLORIDA COMMISSION REPORT, *supra* note 41, at 8; Phil Long & Marc Caputo, *Lethal Injection Takes 34 Minutes To Kill Inmate*, MIAMI HERALD, Dec. 14, 2006, at 5B. Diaz’s is not the only execution to have visible problems. See, e.g., Kevin Fagan, *The Execution of Stanley Tookie Williams*, S.F. CHRON., Dec. 14, 2005, at A12 (noting that the execution took “36 agonizing minutes”).

52. Mark J. Heath, *Revisiting Physician Involvement in Capital Punishment*, 83 MAYO CLINIC PROC. 115, 116 (Jan. 2008) (“Diaz slowly died of the gradual absorption of infiltrated thiopental, pancuronium, and potassium. During a 34-minute interval, he gasped like a fish out of water.”) (internal quotation marks omitted).

It is important to emphasize that because of the pancuronium, the absence of visible pain during other executions is no indication that those executions were problem free. For example, paralysis is possible even where infiltration results in inadequate anesthesia. Although the thiopental dose is usually more than necessary to anesthetize the inmate, the overdoses of pancuronium are usually even larger. See, e.g., ATUL GAWANDE, *BETTER: A SURGEON’S NOTES ON PERFORMANCE* 134 (2007). As a result, infiltration might result in too little thiopental for anesthesia but enough pancuronium for paralysis and prolonged death by suffocation.

53. *Morales v. Tilton*, 465 F. Supp. 2d 972, 979 (N.D. Cal. 2006) (finding that the State’s personnel are “not adequately prepared to deal with” complications associated with setting the IV line); GAWANDE, *supra* note 52, at 136, 146 (describing a state prison warden who claimed that he did not need medical personnel to assist with executions and that he would start the IVs himself, even though he had never started one before).

which travel in tubes from the support room through the wall into the execution chamber, up or down onto the gurney, and finally into the catheter.⁵⁴

The particulars of remote administration significantly heighten the risk of error that will lead to pain. For example, execution team members sometimes work in the dark to protect their identities. This precaution makes it harder for team members to identify which syringes contain which chemicals, therefore increasing the risk that they will administer them in the wrong order.⁵⁵ Additionally, extra-long tubing is necessary to run from the plungers in the support room to the prisoner in the execution chamber. Such tubing can and has leaked, disconnected, or kinked.⁵⁶ Furthermore, because such tubing generally runs through a hole in the wall, team members cannot see most of it and therefore will not know whether it has been compromised.⁵⁷ Similarly, because a sheet usually covers the inmate, team members cannot see the catheter site and whether the IV has become dislodged.⁵⁸

Nor can the personnel tell whether the inmate has been sufficiently anesthetized before the second and third drugs are administered. Execution personnel often view the inmate through a window with partially drawn Venetian blinds. It is, therefore, “almost impossible” to observe the inmate’s anesthetic depth.⁵⁹ Of course, even if the window afforded the execution team a better view of the inmate, judging anesthetic depth would be virtually impossible because anesthetic depth can only be measured competently at a patient’s elbow

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54. See *Harbison v. Little*, 511 F. Supp. 2d 872, 889 (M.D. Tenn. 2007) (describing difficulties of remote administration); *Morales II*, 465 F. Supp. 2d at 980 (identifying the challenges of remote administration).
55. See Taylor Trial Transcript, *supra* note 25, at 83 (expert anesthesiologist testifying that working in the dark is “ridiculous” and exacerbates the risk of complications).
56. See *id.* at 78 (expert explaining that extra-long tubing is prone to more problems); Romanelli et al., *supra* note 21, at 1433; Heath *Roane* Decl., *supra* note 10, at 19 (referencing leaking IV lines in Maryland).
57. See, e.g., *Morales II*, 465 F. Supp. 2d at 980 (explaining that tubes go through holes in walls and that IV bags hang from hooks, but that the execution team cannot verify if the equipment is properly working); Taylor Trial Transcript, *supra* note 25, at 78 (expert explaining that the “full extent of the IV tubing [should be] completely visible and laid out in a neat fashion so that [the team] can clearly see that the conduit through which the drugs will flow is working properly”); Gawande et al., *supra* note 25, at 450.
58. See *Harbison*, 511 F. Supp. 2d at 888 (noting that the State’s expert conceded that sometimes catheters fail and that the IV site should therefore be monitored); Taylor Trial Transcript, *supra* note 25, at 82 (explaining that the sheet covers the view of the catheter).
59. *Taylor*, 2006 WL 1779035, at *8. “Anesthetic depth” refers to the plane of anesthesia—that is, the degree to which a person is anesthetized. See *supra* note 24 and accompanying text.

by medical professionals with training in anesthesiology.⁶⁰ Pancuronium-induced paralysis further exacerbates these difficulties.

Finally, some states have failed to adopt consistent, predictable procedures, leading to inconsistent behavior and recordkeeping.⁶¹ Poor recordkeeping, of course, makes it harder for the team to develop predictable patterns of behavior. That haphazardness, in turn, can create deviations from the standard procedure, make errors more likely, and render it harder to learn from past errors. And even if the team somehow were to discover problems, some states have no contingency plans to deal with them.⁶²

Of course, current procedures do further certain goals. They protect the executioners' anonymity (e.g., the remote administration) and show the witnesses a serene execution (e.g., the pancuronium). The inmate's pain, though, is a background issue to which many states have given only minimal thought.

Federal courts in California, Missouri, and Tennessee have found serious flaws with their states' lethal injection procedures and required changes.⁶³ More often, courts have granted minimal or no relief, despite some or many of the aforementioned problems.⁶⁴ Still others have entered stays to learn more about apparently problematic procedures only to be reversed on other grounds.⁶⁵ Litigation is still pending elsewhere.⁶⁶

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60. See, e.g., Taylor Trial Transcript, *supra* note 25, at 71 (expert anesthesiologist explaining that anesthesiologists monitoring anesthetic depth during executions must “be physically in contact with the patient, standing right by their head and able to test various reflexes” and that because the Missouri doctor observed only through a window from an adjacent room and lacked important equipment, he could not “make any meaningful determination of anesthetic depth”); Dershwitz & Henthorn, *supra* note 19, at 949.
61. See Taylor, 2006 WL 1779035, at *3 (noting that Missouri was still trying to understand error in its own recordkeeping); Morales II, 465 F. Supp. 2d at 979 (describing California's erratic recordkeeping).
62. See Taylor, 2006 WL 1779035, at *9 (ordering that Missouri put in place contingency plans in case problems develop during an execution); Heath Roane Decl., *supra* note 10, at 25 (explaining that federal protocol “made no provisions whatsoever for the foreseeable contingency of IV access failure”).
63. See Harbison, 511 F. Supp. 2d at 903; Taylor, 2006 WL 1779035, at *9; Morales II, 465 F. Supp. 2d at 978-84. The Missouri decision was subsequently reversed on appeal, and the case was subsequently dismissed on remand. See Taylor v. Crawford, 487 F.3d 1072, 1085 (8th Cir. 2007); Taylor v. Crawford, No. 07-4129, slip op. at 4-5 (W.D. Mo. July 15, 2008).
64. See, e.g., Brown v. Beck, No. 06-3018, slip op. at 6-7 (E.D.N.C. Apr. 17, 2006), *aff'd* 445 F.3d 752 (4th Cir. 2006) (permitting state to proceed with executions with minimal revision); Emmett v. Johnson, 511 F. Supp. 2d 634 (E.D. Va. 2007) (granting state's motion for summary judgment), *aff'd*, 532 F.3d 291 (4th Cir. 2008); State v. Schwab, 995 So. 2d 922, 932 (Fla. 2008) (upholding Florida's procedure).
65. See Boltz v. Jones, 182 Fed. App. 824, 825 (10th Cir. 2006) (vacating a stay issued by the Oklahoma district court due in part to the “State's interest in the timely effec-

B. *The Supreme Court's Fractured Decision in Baze v. Rees*

The outcomes of these pending cases will depend in part on how courts interpret the United States Supreme Court's 2008 decision in *Baze v. Rees*.⁶⁷ *Baze* was the Supreme Court's first case directly addressing the constitutionality of a state's lethal injection procedure. The Court had already held in *Nelson v. Campbell* and *Hill v. McDonough* that death row inmates could bring an action under 42 U.S.C. § 1983 to challenge a state's execution procedures and that such actions were not subject to habeas corpus's more rigorous procedural gatekeeping requirements.⁶⁸ But *Baze* was the Court's first foray into the Eighth Amendment legal standard governing lethal injection cases.

Baze considered the constitutionality of Kentucky's version of the three-drug protocol. Litigation in Kentucky had not revealed systemic problems of the sort discovered in Missouri, California, and Tennessee. Kentucky, in fact, had conducted only one execution by lethal injection, so the record was sparse.⁶⁹ Moreover, the plaintiff received incomplete discovery, so there was no

tuation of its final criminal judgments"); *McNair v. Allen*, 06-695, 2007 WL 4463489, at *3 (M.D. Ala. Dec. 14, 2007) (noting "substantial but disputed evidence" that Alabama's protocol contains "constitutional deficiencies in the monitoring of the procedure, the training of certain participants, and the use of potentially unconstitutionally painful drugs" and staying the execution), *rev'd*, 515 F.3d 1168, 1172 (11th Cir. 2008) (vacating the stay on statute of limitations grounds).

66. See, e.g., *Jones v. Bradshaw*, No. 07-3766 (6th Cir. Jan. 30, 2009) (order remanding case back to Ohio district court for discovery); Plaintiffs' Surreply, *Roane v. Gonzales*, No. 05-2337 (D.D.C. Aug. 15, 2008) (arguing that court should resolve case on merits after full discovery); Motion for Summary Judgment, *Dickens v. Napolitano*, No. 07-1770 (D. Ariz. Jan. 9, 2009).

67. 128 S. Ct. 1520 (2008).

68. Under the Anti-Terrorism and Effective Death Penalty Act (AEDPA), "second or successive" habeas petitions must be dismissed, except in narrow circumstances. See 28 U.S.C. § 2244(b). Prior to the Supreme Court's decisions in *Hill* and *Nelson*, some lower courts had dismissed lethal injection claims by treating them as "successive" habeas petitions, even though they had been filed as § 1983 actions. See, e.g., *Hill v. Crosby*, 437 F.3d 1084, 1085 (11th Cir. 2006) ("It is clear to us that the district court lacked jurisdiction to consider appellant's [lethal injection] claim because it is the functional equivalent of a successive habeas petition and he failed to obtain leave of this court to file it."), *rev'd sub nom.* *Hill v. McDonough*, 547 U.S. 573 (2006). The Supreme Court made clear in *Hill* that because a lethal injection claim does "not challenge the lethal injection sentence as a general matter but seeks instead only to enjoin the respondents from executing [plaintiff] in the manner they currently intend," it can be brought under 42 U.S.C. § 1983 and is therefore exempt from AEDPA's stringent gatekeeping provisions. *Hill*, 547 U.S. at 580 (internal quotation marks omitted); see also *Nelson v. Campbell*, 541 U.S. 637, 647 (2004).

69. *Baze*, 128 S. Ct. at 1528.

evidence that Kentucky had ever had any problems with its procedure.⁷⁰ There was no smoking gun—no equivalent of Missouri’s dyslexic doctor or Florida’s writhing inmate—and, in fact, little evidence at all. The limited record did indicate that Kentucky takes precautionary measures absent in other states, such as using a phlebotomist to insert the catheters, thus decreasing the risk of infiltration.⁷¹ Kentucky also requires wardens to remain in the execution chamber with the prisoner to watch for IV problems, including infiltration.⁷² Additionally, it requires its team to participate in at least ten practice sessions a year.⁷³ In short, in comparison to other states, the Kentucky record was decidedly clean.⁷⁴

The Supreme Court’s decision upholding the procedure was extremely fractured; seven different Justices wrote opinions, and no single opinion garnered more than three votes. Chief Justice Roberts wrote the plurality opinion, which was joined by Justices Kennedy and Alito. In upholding the Kentucky procedure, the plurality tried to clarify the Eighth Amendment standard for method-of-execution claims. It required the plaintiff to establish both (1) that the current lethal injection procedure poses “a substantial risk of serious harm”⁷⁵ and (2) that the state has refused to adopt a “feasible, readily implemented” alternative “significantly” reducing that risk.⁷⁶ The plurality, thus, agreed with petitioners that the availability of a safer procedure was constitutionally relevant but emphasized that “a condemned prisoner cannot suc-

70. For example, the plaintiffs’ attorneys were unable to depose the executioners. See Reply Brief for Petitioners at 16, *Baze* (No. 07-5439). Despite this limited record, the plaintiff represented in his petition for certiorari that the record was, in fact, uniquely complete in comparison to other lethal injection cases. See Petition for Writ of Certiorari at 24, *Baze* (No. 07-5439) (“[T]his case presents the most succinct and complete record for this Court to address the important legal issues raised by challenges [to lethal injection.]”).

71. *Baze*, 128 S. Ct. at 1533-34. A phlebotomist is an individual trained to draw blood and insert catheters into veins. At oral argument, the State contended that this phlebotomist “is probably literally the best qualified human being in the Commonwealth of Kentucky to place the IV line.” Transcript of Oral Argument at 28, *Baze* (No. 07-5439).

72. *Baze*, 128 S. Ct. at 1534.

73. *Id.*

74. See *id.* at 1542 (Stevens, J., concurring) (noting that the question of whether the three-drug protocol can be practiced in other states could be answered differently in a state with a “more complete record”); *id.* at 1566 (Breyer, J., concurring) (indicating that the record in Kentucky provided “too little reason” to believe that additional safeguards were necessary); *id.* at 1567 (Ginsburg, J., dissenting) (favoring remand for additional factfinding).

75. *Id.* at 1531 (plurality opinion) (quoting *Farmer v. Brennan*, 511 U.S. 825, 842 (1994)).

76. *Id.* at 1532.

cessfully challenge a State's method of execution merely by showing a slightly or marginally safer alternative."⁷⁷ Instead:

the alternative procedure must be feasible, readily implemented, and in fact significantly reduce a substantial risk of severe pain. If a State refuses to adopt such an alternative in the face of these documented advantages, without a legitimate penological justification for adhering to its current method of execution, then a State's refusal to change its method can be viewed as "cruel and unusual" under the Eighth Amendment.⁷⁸

An inmate challenging a method of execution, then, must demonstrate both the shortcomings of the state's existing procedures and the relative merits of an alternative.

The Kentucky plaintiffs failed to make either showing. Whereas plaintiffs in other states had uncovered problems that greatly heightened the risk that thiopental delivery would be compromised, the plaintiffs in Kentucky presented no such evidence. Indeed, they were not even permitted to depose the execution personnel, a denial of discovery that made it difficult to gather evidence about the true nature of the Kentucky procedure.⁷⁹ Instead of evidence about how the procedure was carried out in practice, the Kentucky record included mostly details about the written protocol, which demonstrated that Kentucky had adopted particular safeguards to ensure successful thiopental delivery. The three-Justice plurality, therefore, rejected petitioners' argument that they might not receive an adequate dose of thiopental.⁸⁰

Nor did the Kentucky plaintiffs convince the Court that the use of pancuronium bromide to paralyze the inmates was itself problematic. Even though pancuronium makes it almost impossible to tell whether an inmate has been properly anesthetized (particularly given that laypeople often monitor anesthetic depth), the plurality concluded that the pancuronium prevented involuntary physical movements, and that the state "has an interest in preserving the dignity of the procedure, especially where convulsions or seizures could be misperceived as signs of consciousness or distress."⁸¹

77. *Id.* at 1531.

78. *Id.* at 1532.

79. Reply Brief for Petitioner at 16 n.2, *Baze* (No. 07-5439) (arguing that trial court's denial of depositions was "inexplicable").

80. *Baze*, 128 S. Ct. at 1533-34 (plurality opinion).

81. *Id.* at 1535. The plurality also argued that Kentucky's continued use of the three-drug protocol could not be seen as posing an "'objectively intolerable risk' when no other State has adopted the one-drug method." *Id.* at 1535; *see also id.* at 1532 (noting that "it is difficult to regard a practice as 'objectively intolerable' when it is in fact widely tolerated"). It is not clear why a widespread practice should be considered presumptively valid, since a method of execution can cause excruciating pain but still be widespread. To be sure, a widespread practice might not be "unusual," but the Eighth Amendment surely does not permit excruciating execution

Significantly, the Kentucky plaintiffs also had failed to present to the trial court evidence about an alternative protocol. This failure left the Supreme Court “without any findings on the effectiveness of petitioners’ barbiturate-only protocol.”⁸² Given the plurality’s explicitly comparative approach—that is, given that the lethal injection plaintiff must demonstrate the existence of a “feasible, readily implemented” alternative procedure that “in fact significantly reduce[s] a substantial risk of severe pain”⁸³—the absence of findings demonstrating the superiority of the one-drug protocol or another alternative necessarily doomed the Kentucky plaintiffs.

As for future plaintiffs in different states with different evidence, *Baze* leaves the door open for lethal injection challenges alleging that a state has refused to change its method of execution notwithstanding a feasible, readily implemented, significantly safer alternative procedure.⁸⁴ The Justices, however, disagreed about just how open the door remains. Chief Justice Roberts wrote that an inmate “must show that the risk [of severe pain] is substantial when compared to the known and available alternatives. A State with a lethal injection protocol *substantially similar* to the protocol we uphold today would not create a risk that meets this standard.”⁸⁵ One question in future cases, then, will be whether a given state’s procedure is “substantially similar” to Kentucky’s.⁸⁶

procedures so long as they are widespread. Reliance on the fact that a procedure is “widely tolerated” then unduly tempts courts to ignore the major political process failures that have caused flawed procedures to become widespread in the first place. *See infra* Part III.

82. *Baze*, 128 S. Ct. at 1534 (plurality opinion). The plurality also noted that Tennessee had rejected a proposal to adopt a one-drug protocol, thus demonstrating that the “comparative efficacy of a one-drug method of execution is not so well established.” *Id.* at 1535. Whether misinformed or disingenuous, this argument misses the mark, because a single Tennessee bureaucrat rejected the recommendation of a one-drug protocol presented by a committee charged with re-evaluating the State’s lethal injection policy. *See infra* notes 265-270 and accompanying text.
83. *Baze*, 128 S. Ct. at 1532.
84. *Id.*
85. *Id.* at 1537 (emphasis added).
86. Another reading of the plurality’s “substantially similar” language is that it refers only to the standard needed to obtain a stay. *See id.* at 1537 (explaining that “[a] stay of execution may not be granted on grounds such as those asserted here unless the condemned prisoner establishes that the State’s lethal injection protocol creates a demonstrated risk of severe pain” and, adding two sentences later, that a “substantially similar” protocol would not meet this standard). Under this reading, a court only need inquire whether a given state’s procedure is “substantially similar” to Kentucky’s if the inmate plaintiff would need a stay of execution for his litigation to continue.

The plurality suggests that *Baze* resolves many challenges.⁸⁷ But it is virtually impossible to know before discovery whether another state's procedures are "substantially similar" to Kentucky's. It is true that at least thirty states use the same three drugs Kentucky does.⁸⁸ Two execution procedures, though, can hardly be deemed "substantially similar" merely because they use the same drugs.⁸⁹ As litigation has demonstrated, the procedure's safety hinges on *how* the drugs are administered. And while a state's written protocol can lend some insight into that state's practices, some states do not follow their own written protocols. Kentucky's procedure was easy to uphold, because there was minimal evidence about how Kentucky's procedures actually worked. "Only one Kentucky prisoner . . . has been executed since the Commonwealth adopted lethal injection," and there were "no reported problems" at that execution.⁹⁰ By way of contrast, serious problems have been documented in other states.

Given that the safety of a method of execution depends not just on the four corners of the written protocol but on the details of administration, a state's procedure could not be deemed "substantially similar" to Kentucky's without discovery into that state's actual practices—the training and qualifications of its execution team, the suitability of the equipment, the architecture of the execution facilities, and so on. In other words, the "substantially similar" inquiry is necessarily a question of fact and, like all questions of fact, cannot be answered without fact-finding. Indeed, given states' efforts to conceal the details of their procedure, discovery in lethal injection cases often requires particularly attentive judicial supervision.⁹¹

Whether *Baze* will, in fact, be interpreted this way is less certain. Justice Alito's concurrence emphasized that the plurality had erected a high hurdle for these claims and contended that Justices Stevens and Thomas were incorrect in

87. See *id.* at 1537 (plurality opinion) (arguing that the plurality decision "resolves more challenges than [Justice Stevens] acknowledges"); *id.* at 1542 (Alito, J., concurring).

88. *Id.* at 1527 n.1.

89. See *Emmett v. Johnson*, 532 F.3d 291, 311 (4th Cir. 2008) (Gregory, J., dissenting) ("Merely using identical drugs, but in varying amounts and at varying times in the procedure, hardly yields 'largely identical' lethal injection protocols.").

90. *Baze*, 128 S. Ct. at 1528 (plurality opinion).

91. See, e.g., *Morales v. Tilton*, 465 F. Supp. 2d 972, 982 (N.D. Cal. 2006) (noting that California had not fulfilled its discovery obligations despite court orders to do so); *Oken v. Sizer*, 321 F. Supp. 2d 658, 663 (D. Md. 2004) (noting that the State's refusal to disclose execution protocol denied plaintiff a "minimal hearing"); Denno, *Quandary*, *supra* note 28, at 95 (explaining that "states never have been forthcoming about how they perform lethal injections" and adding that some states recently have retreated into "greater secrecy").

perceiving that the decision would lead to substantial litigation.⁹² Emphasizing that the opinion must be read so as to avoid “litigation gridlock” and “a grave danger of extended delay,”⁹³ Justice Alito would have set an especially low bar for finding another state’s procedure “substantially similar” to Kentucky’s. Justice Stevens’s concurrence disagreed, arguing that “[t]he question 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.”⁹⁴ Justice Thomas, joined by Justice Scalia,⁹⁵ agreed with Justice Stevens that more litigation was certain to follow,⁹⁶ but, relying on his interpretation of the original understanding of the Eighth Amendment, would have found a constitutional violation only if the method of execution “is deliberately designed to inflict pain.”⁹⁷

The three remaining Justices—Souter, Ginsburg, and Breyer—all agreed on yet another Eighth Amendment standard: “whether the method creates an untoward, readily avoidable risk of inflicting severe and unnecessary suffering.”⁹⁸ This standard would consider three interrelated factors—the degree of

92. *Baze*, 128 S. Ct. at 1538 (Alito, J., concurring). Of course, it is notable that the Chief Justice did not feel compelled to incorporate Justice Alito’s concerns into the plurality opinion.

93. *Id.* at 1542 (Alito, J., concurring).

94. *Id.* at 1542 (Stevens, J., concurring). Justice Stevens’s concurrence received significant attention, because even though he voted to uphold the Kentucky procedure, he also announced his conclusion that “the death penalty represents the ‘pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes.’” *Id.* at 1551 (Stevens, J., concurring) (quoting *Furman v. Georgia*, 408 U.S. 238, 312 (1972) (White, J., concurring)).

95. Justice Scalia, joined by Justice Thomas, also wrote his own dissent objecting to Justice Stevens’s views about the death penalty more generally. *See id.* at 1552-56 (Scalia, J., concurring).

96. *Id.* at 1563 (Thomas, J., concurring) (describing the plurality standard as “unworkable”).

97. *Id.* at 1556 (Thomas, J., concurring). Because of the attention to “evolving standards of decency,” history informs Eighth Amendment doctrine less than it does other constitutional areas. *See Atkins v. Virginia*, 536 U.S. 304, 311-12 (2002) (stating that the Eighth Amendment “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society”) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)). Consequently, a method of execution that was once acceptable might be unconstitutional today, either because new evidence demonstrates that it creates a previously unknown unacceptable risk of excruciating pain or because new values reject that kind of punishment as inhumane. Justice Thomas’s reliance on history, while consistent with interpretation of other constitutional provisions, *see, e.g., District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), is therefore mostly anomalous in Eighth Amendment jurisprudence.

98. *Baze*, 128 S. Ct. at 1563 (Breyer, J., concurring); *see also id.* at 1572 (Ginsburg, J., dissenting).

risk, magnitude of pain, and availability of alternatives. “[A] strong showing on one reduces the importance of the others.”⁹⁹ However, whereas Justice Breyer could not find “sufficient evidence that Kentucky’s execution method poses” an unconstitutional risk of severe pain,¹⁰⁰ Justice Ginsburg, joined by Justice Souter, would have vacated and remanded for further fact-finding.¹⁰¹

Because *Baze* relied on an incomplete record and resulted in seven different opinions, it is difficult to know what the law is.¹⁰² It is true that “[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.’”¹⁰³ Even to the extent, though, that the three-Justice plurality’s opinion may be viewed as the holding, it offers incomplete clarification. For instance, the plurality, citing a prison health case, stated that to amount to an Eighth Amendment violation, “the conditions presenting the risk [of pain] must be ‘sure or very likely to cause serious illness and needless suffering,’ and give rise to ‘sufficiently imminent dangers.’”¹⁰⁴ This articulation appears to set an extremely high standard for a violation. Taken in isolation, this sentence implies that an execution procedure that more likely than not caused excruciating pain would not violate the Eighth Amendment unless pain were “very likely.” Although courts have never quantified Eighth Amendment risk, this passage

99. *Id.* at 1568 (Ginsburg, J., dissenting); *see also id.* at 1563 (Breyer, J., concurring). By way of contrast, the plurality appears to have put particular weight on the degree of risk. *See id.* at 1532 (plurality opinion) (“[T]he proffered alternatives must effectively address a ‘substantial risk of serious harm’” (quoting *Farmer v. Brennan*, 511 U.S. 825, 842 (1994))).

100. *Id.* at 1563-64 (Breyer, J., concurring).

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

102. It is also difficult to know why the Court granted certiorari at all. One explanation is that the Court took Mr. Baze’s attorneys at their word when they claimed to have a complete record and granted certiorari before examining the record carefully. *See supra* note 70. Another theory is that *Baze* was an unfriendly grant, in which four pro-death penalty Justices deliberately selected a case with an undeveloped record, because such a case would make it easier to uphold the procedure and articulate a stricter legal standard. This theory is further bolstered by the fact that when the Court granted certiorari in *Baze*, it also had before it a petition for certiorari from the Eighth Circuit in *Taylor*. Notwithstanding the Eighth Circuit’s reversal of the district court and Mr. Baze’s claims to the contrary, *Taylor* unquestionably presented more evidence suggesting an Eighth Amendment violation. *See supra* notes 37-50 and accompanying text.

103. *Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)).

104. *Baze*, 128 S. Ct. at 1531 (plurality opinion) (quoting *Helling v. McKinney*, 509 U.S. 25, 33 (1993)). *Baze*’s reliance on *Helling* is surprising, because courts typically treat method-of-execution and prison conditions challenges as separate doctrinal lines.

would seem to say that 95% chance of pain would amount to a constitutional violation, but 51% chance of pain would not.

Yet it is almost impossible to believe that five Justices on the Court would consciously approve a procedure they know causes excruciating pain more than half the time. Indeed, *Helling v. McKinney*, the case upon which the plurality relied to offer such a suggestion, held that a prisoner states a viable cause of action under the Eighth Amendment by alleging exposure to health risks (such as secondary smoke) that very well may never result in illness or pain.¹⁰⁵ *Helling*, then, does not seem to stand for the proposition that conditions need to be “sure or very likely” to cause suffering to trigger an Eighth Amendment violation. Moreover, the plurality’s further discussion suggests that it was *not* thinking in these terms, for, later on, it announced that a state violates the Eighth Amendment if it refuses to adopt an alternative procedure that “significantly reduce[s] a substantial risk of severe pain.”¹⁰⁶ Phrased this way, the standard seems to focus less on the original procedure’s degree of risk and more on whether the alternative would significantly reduce that risk, so long as that initial risk is itself “substantial.” But “substantial” is a mushy word, so this language might well allow the finding of a violation for a state that refuses to switch from a procedure creating, for example, a 20% risk of pain to a procedure that would lower that risk of pain to 1%.¹⁰⁷ In short, this muddle does little to provide guidance to lower courts.

II. REMEDIAL ANXIETIES AND LETHAL INJECTION

A. *How Remedy Constrains the Right*

Generally speaking, courts before and after *Baze* have been reluctant to engage with lethal injection issues. In rejecting these claims, judges often employ the kind of rhetoric commonly used to criticize the imposition of constitutional remedies, sounding in themes of judicial restraint, federalism, and separation of powers. Many lower courts never reach the remedial issue as a formal matter, because they decline to find a violation at all. But although courts are imprecise about exactly how and why remedial concerns should limit the Eighth Amendment right, the problem of what remedy to impose nonetheless significantly

105. *Helling*, 509 U.S. at 33. It is also worth noting that prison health cases require a finding of deliberate indifference not required in method-of-execution challenges. Compare *id.* at 33 (requiring deliberate indifference in a prison health challenge), with *Baze*, 128 S. Ct. at 1525-38 (not requiring a finding of deliberate indifference).

106. *Baze*, 128 S. Ct. at 1532 (internal quotation marks omitted).

107. Of course, it is impossible to quantify precisely the risk of pain in these cases, but such a discussion helps identify ambiguities and inconsistencies in the plurality’s approach.

colors these courts' rulings.¹⁰⁸ Courts, thus, move the focus from the right-holder—the plaintiff whose rights have been allegedly violated—to the defendant against whom the remedy would be imposed.¹⁰⁹

It is worth noting that some attention to potential alternatives is justifiable. After all, the Eighth Amendment's prohibition on "cruel and unusual punishment"¹¹⁰ implicitly asks if the practice at issue creates a significant risk of pain compared to available alternatives.¹¹¹ An Eighth Amendment standard premised on unnecessary risk of pain must consider, then, whether a different method could plausibly remove that risk. If not, the risk might be necessary.

That being said, painless methods of execution *do* exist,¹¹² so the remedial inquiry should rarely be dispositive in cases in which the plaintiff has demonstrated a real risk of pain.¹¹³ Courts, however, typically have not thought through precisely what role the remedial inquiry plays in the larger Eighth Amendment analysis. To the contrary, many courts have failed to explore in detail the relative merits of different methods of execution. Instead, they have often sidestepped that important question to assert the danger of any judicially imposed remedy, regardless of the details.¹¹⁴

It is odd to think that the possibility of *any* judicially imposed remedy should dispositively militate against finding an Eighth Amendment violation. As a formal matter, the primary focus at the rights stage should be (and prior to *Baze* often was) whether the execution procedure subjects the inmate to a significant or unnecessary risk of excruciating pain.¹¹⁵ Courts' remedial inquiry,

108. Of course, remedies are not the only factor driving courts' behavior here, but they are significant and overlooked in the scholarship.

109. See Susan Poser, *Termination of Desegregation Decrees and the Elusive Meaning of Unitary Status*, 81 NEB. L. REV. 283, 323-24 (2002) (arguing that the remedial question changes depending on whether the court focuses on the plaintiff's rights or steps the defendant has taken to comply with its legal duty).

110. U.S. CONST. amend. VIII.

111. See, e.g., Timothy K. Kuhner, *The Foreign Source Doctrine: Expanding the Role of Foreign and International Law in Interpreting the Constitution*, 75 U. CIN. L. REV. 1389, 1412 (2007) ("'Cruel and unusual' is a comparative phrase" begging the question "'cruel and unusual compared to what?'").

112. See *infra* Subsection IV.A.1.

113. The exception might be a case in which the plaintiff has refused to proffer an alternative. See *infra* note 123 and accompanying text.

114. See *infra* Section IV.A (arguing that courts have incorrectly assumed that any remedy would necessarily be onerous, intrusive, and therefore inappropriate); Subsections II.A.1, II.A.2 (arguing that courts have used remedial concerns to avoid engaging with the details of the challenged procedures, even when confronted with evidence of the procedures' dangers).

115. See, e.g., *Cooper v. Rimmer*, 379 F.3d 1029, 1033 (9th Cir. 2004) (holding that the Eighth Amendment protects against "an unnecessary risk of unconstitutional pain and suffering"); *Morales v. Tilton*, 465 F. Supp. 2d 972, 973 (N.D. Cal. 2006)

then, has changed the very nature of the right, distracting attention away from the question of whether the existing method of execution is potentially painful.¹¹⁶

In a seminal article, Professor Levinson explains how undesirable remedial consequences can prompt courts to limit or extinguish rights to avoid those consequences.¹¹⁷ Constitutional rights, Levinson explains, “are inevitably shaped by, and incorporate, remedial concerns.”¹¹⁸ Rights are dependent on remedies not just for their real world application, but for their scope and “very existence.”¹¹⁹ Thus, as Professor Gewirtz explains, “[t]he prospect of actualizing

(same); *Evans v. Saar*, 412 F. Supp. 2d 519, 524 (D. Md. 2006) (same); Fernando J. Gaitan, Jr., *Challenges Facing Society in the Implementation of the Death Penalty*, 35 *FORDHAM URB. L.J.* 763, 784 (2008) (“The person who we must be concerned about in Eighth Amendment jurisprudence is the condemned.”). This focus on the right possessor’s pain also makes sense given that the Eighth Amendment in the method-of-execution context is almost always thought to confer an individual right, rather than a structural protection. *Cf.* AKHIL REED AMAR, *THE BILL OF RIGHTS* 104-08 (1998) (suggesting that a jury right might not be an individual right but rather a structural provision).

116. It is true that constitutional inquiries sometimes balance state interests against the asserted right. In the Fourth Amendment context, for instance, courts seek to balance the right of privacy against the need for law enforcement and safety. *See, e.g., Terry v. Ohio*, 392 U.S. 1, 30 (1968) (allowing an exception to the exclusionary rule for a revolver found during a reasonable search of the suspect). Such constitutional balancing, though, may only encroach so far on a constitutional right’s core. *See, e.g., District of Columbia v. Heller*, 128 S. Ct. 2783, 2821 (2008) (explaining that even though constitutional rights are not absolute, the Second Amendment “surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home”). In the Eighth Amendment method-of-execution context, that core protects the inmate against excruciating pain and should be protected in the absence of overwhelming contrary interests.
117. Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 *COLUM. L. REV.* 857, 885 (1999) (arguing that “the threat of undesirable remedial consequences [can] motivat[e] courts to construct the right in such a way as to avoid those consequences”).
118. *Id.* at 873. *But see* Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 *HARV. L. REV.* 1274, 1314-17 (2006) (arguing that Levinson’s “pragmatic” model is “unduly reductionist” and that the “pragmatist must deny the possibility of right answers to constitutional questions”).
119. Levinson, *supra* note 117, at 858. Levinson calls this phenomenon “remedial equilibration.” *Id.* at 884-85. He explains that remedial equilibration usually involves the redefinition of rights and remedies “in an iterated process” in which a series of cases gradually hash out the appropriate remedy for the violation of a constitutional right. *Id.* at 874. In this way, the right itself is redefined. *Id.* at 873-74. Lethal injection challenges typically do not spawn this kind of a series of cases, but, at a more basic level, Levinson’s insights still highlight the extent to which courts shape the content of a constitutional right in response to remedial anxieties.

rights through a remedy—the recognition that rights are for actual people in an actual world—makes it inevitable that thoughts of remedy will affect thoughts of right, that judges’ minds will shuttle back and forth between right and remedy.”¹²⁰ In other words, remedial concerns shape constitutional rights even if courts, as a formal matter, are not reaching the remedial inquiry and are making false assumptions about the remedial issues.

1. Remedial Concerns in *Baze*

In articulating a stringent Eighth Amendment standard, the Supreme Court in *Baze* relied heavily on arguments about the remedy. The second prong of the plurality’s standard required the plaintiff to show the existence of a “feasible, readily implemented” remedy that would “significantly reduce a substantial risk of severe pain.”¹²¹ The right, in other words, explicitly incorporates a remedial inquiry.

Given that the Eighth Amendment’s words “cruel” and “unusual” seem to invite this kind of comparative examination,¹²² the plurality’s mention of alternative methods is unsurprising and appropriate.¹²³ What is more noteworthy, however, is how the Chief Justice addressed the remedial issues. Given the gaps in the record and particular safeguards adopted by Kentucky, the plurality easily concluded that “the risks identified by petitioners are [not] so substantial or imminent as to amount to an Eighth Amendment violation.”¹²⁴ Having found that the plaintiff failed to satisfy the first “substantial risk” prong of the standard, the plurality could have ended the case or merely articulated the second prong—the showing of a significantly better alternative. But not only did the plurality require this second prong, it explained at length why a rigorous remedial showing was essential. Specifically, the plurality argued that the finding of “an Eighth Amendment violation” without the showing of a significantly better alternative procedure “would threaten to transform courts into boards of inquiry charged with determining ‘best practices’ for executions, with each rul-

120. Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 679 (1983).

121. *Baze v. Rees*, 128 S. Ct. 1520, 1532 (2008) (plurality opinion); see *supra* notes 75-78 and accompanying text (summarizing the plurality’s two-prong standard).

122. See *supra* notes 110-111 and accompanying text.

123. In addition to implementing the Eighth Amendment’s comparative inquiry, the plurality’s requirement that the plaintiff proffer an alternative method also guards against disingenuous plaintiffs who challenge the current method with every intention of challenging any replacement method, no matter how safe. It is appropriate for courts to guard against such disingenuous litigation. However, to the extent these concerns seem to drive the plurality’s approach, the plurality seems not to trust lower courts’ abilities to distinguish between genuine actions challenging dangerous procedures from disingenuous ones challenging safe procedures. See *infra* notes 195-196 and accompanying text.

124. *Baze*, 128 S. Ct. at 1534 (plurality opinion).

ing supplanted by another round of litigation touting a new and improved methodology.¹²⁵

The plurality thus tied the Eighth Amendment standard to remedial issues in different ways. First, the plurality insisted that the plaintiff must proffer an alternative method of execution that is more than “slightly or marginally safer” than the current method.¹²⁶ It then rejected the Kentucky plaintiffs’ suit, because their affirmative case lacked that remedial presentation.¹²⁷ Regardless of the safety of the Kentucky procedure, then, the plaintiffs would have lost for failing to present a remedial showing that, prior to *Baze*, had not been clearly required. The plaintiffs, however, had suggested alternative approaches in the proceedings below and had extensively developed the one-drug protocol’s advantages in their Supreme Court brief.¹²⁸ The plurality ignored the one-drug proposal, finding that it had not been adequately developed in the lower courts.¹²⁹ It is understandable that the plurality did not want to adopt a remedy on which there were only limited trial court findings, but it then proceeded to denigrate that same remedy’s viability.¹³⁰ It thus made it harder for future plaintiffs to propose that remedy. In other words, the plurality used the absence of trial court factual findings on the plaintiff’s proposed remedy to dismiss the claim on the merits. It then sought to discredit that same remedial proposal, despite the inadequacy of the record below and extensive expert testimony in other cases that its advantages are significant.¹³¹

Second, the plurality warned that finding for plaintiff would force courts to issue a remedy requiring that the state replace its old method with the safest method available—that is, with the “best practice.”¹³² In other words, the plural-

125. *Id.* at 1531.

126. *Id.*

127. *Id.* at 1534.

128. See Petitioners’ Brief at 51-57, *Baze* 128 S. Ct. 1520 (No. 07-5439) (explaining the merits of the one-drug protocol).

129. *Baze*, 128 S. Ct. at 1534-35 & n.4.

130. See *id.* at 1535-36 (raising concerns about one-drug alternative); *id.* at 1538 (concluding with the observation that the one-drug alternative “has problems of its own”). But see *infra* Subsection IV.A.1 (explaining why the one-drug protocol remains viable after *Baze*).

131. See *infra* note 286 and accompanying text. The point is not that the plurality should have drawn different conclusions about the one-drug protocol, but that it should not have suggested that it had “problems of its own,” given the absence of “any findings” about it. See *Baze*, 128 S. Ct. at 1534, 1538. A more appropriate disposition would have been either to dispose of the case without the lengthy remedial inquiry or to remand for further factfinding, especially given that the plaintiff prior to *Baze* did not know that the Eighth Amendment standard required a remedial showing as part of the affirmative case. See *id.* at 1572 (Ginsburg, J., dissenting) (“I would therefore remand.”).

132. *Baze*, 128 S. Ct. at 1531 (plurality opinion).

ity feared that whenever a court struck down a lethal injection procedure, it would have had to “intrude on the role of state legislatures in implementing” the safest possible replacement procedure.¹³³ To drive home the point, the Chief Justice cited *Bell v. Wolfish*, in which the Court reversed a structural injunction in a prison conditions case, thus reiterating that the “wide range of ‘judgment calls’ that meet constitutional and statutory requirements are confided to officials outside of the Judicial Branch of Government.”¹³⁴ The plurality, therefore, emphasized that executive and legislative officials, not judges, should design states’ lethal injection procedures. Allowing lower courts to require the state to adopt the “best practice” (and then allowing them to do so repeatedly, as the “best practice” changed) would shift too much authority from the political branches to the judiciary.

Here the plurality once again contracted the Eighth Amendment right by drawing false assumptions about remedial issues. Contrary to the plurality’s arguments, the finding that a lethal injection procedure created a significant or unnecessary risk of pain would not require the state to institute the “best practice.” Of course, the “best practice” alternative would be one remedial option, but a court could also require that the state merely find a better, rather than the best, practice.¹³⁵ The district court recognized this possibility in *Morales* when it offered the state two remedial options.¹³⁶ The court did not care which remedy was best because both would have significantly reduced the risks posed by the status quo and almost certainly resulted in painless executions. Thus, even if a court decided that the risks of the three-drug protocol amounted to a constitutional violation, that court, even before *Baze*, need not have required the “best practice.” For example, if another alternative would significantly reduce the risk of pain (but not by as much as the best practice), a court may well be justified in requiring that other alternative, particularly if it were comparatively inexpensive, unintrusive, and easy to implement. Similarly, courts could issue a negative injunction allowing a state to craft its own remedy.¹³⁷ In fact, contrary to the plurality’s representations, the petitioners never argued that they were entitled to a “best practice” remedy.¹³⁸ Instead, they merely contended that the one-drug alternative was readily available and significantly preferable to the three-drug approach.¹³⁹

133. *Id.*

134. *Id.* at 1531-32 (quoting *Bell v. Wolfish*, 441 U.S. 520, 562 (1979)).

135. *See infra* Section IV.A.

136. *See Morales v. Hickman*, 415 F. Supp. 2d 1037, 1047-48 (N.D. Cal. 2006).

137. *See infra* Subsection IV.A.2.

138. *See generally* Petitioners’ Brief at 51-59, *Baze* (No. 07-5439) (arguing that the adoption of “available alternatives” could reasonably prevent the risk of pain).

139. *See Reply Brief for Petitioners* at 19, *Baze* (No. 07-5439) (contending that a properly administered single dose of a barbiturate is “both lethal and far less dangerous than the three-drug” protocol).

Relatedly, the three-Justice plurality also emphasized that the “best practices” remedy would “embroil the courts in ongoing scientific controversies beyond their expertise,” thus “substantially intrud[ing] on the role of state legislatures in implementing their execution procedures.”¹⁴⁰ These contentions are misplaced because the political branches have demonstrated no scientific understanding that courts lack and because many state legislatures have played virtually no role in designing execution procedures.¹⁴¹ It is worth emphasizing here that these arguments suggest that courts lack the institutional competence to consider a remedy at all. Concluding that it would be “substantially” intrusive for courts to entertain such remedial issues, the plurality then reasoned backwards that the Eighth Amendment standards proposed by the petitioner and dissent were improper and that a narrower legal standard was preferable.¹⁴² In reality, neither the petitioner’s nor the dissent’s standards would have “substantially intrude[d] on the role of state legislatures”¹⁴³ or required courts to impose a “best practice.”¹⁴⁴

What is perhaps most striking about the plurality’s approach is that this articulation of a difficult legal standard was unnecessary to the resolution of *Baze* itself. *Baze* was an easy case on the merits. Nevertheless, driven by its concern that courts in other cases not become “best-practices” boards of inquiry, the plurality chose not merely to affirm the lower court on the case’s limited record but also to articulate a legal standard that raised the bar for future lethal injection plaintiffs. By going further than it needed to in deciding this case, the plurality highlighted the extent to which it was uncomfortable with any court intruding on states’ prerogatives to design their own procedures.

2. Remedial Concerns in Other Lethal Injection Cases

Lower courts addressing these issues pre-*Baze* also allow a distorted view of the remedial issues to shape their approaches to the cases. This approach is most justifiable when a court actually finds serious problems with a procedure and therefore engages in a direct discussion of potential remedies. After all, courts imposing remedies on states ought to consider the impact those remedies will have and whether they might create new problems. The Northern District of California explored remedial issues in two different opinions in the

140. *Baze*, 128 S. Ct. at 1531 (plurality opinion).

141. *See infra* Section IV.B.

142. *See Baze*, 128 S. Ct. at 1531-32 (plurality opinion) (“Accordingly, we reject petitioners’ proposed ‘unnecessary risk’ standard, as well as the dissent’s ‘untoward’ risk variation.”); *supra* Section I.B (discussing the *Baze* plurality’s standard).

143. *Baze*, 128 S. Ct. at 1531 (plurality opinion).

144. *See id.* at 1569 (Ginsburg, J., dissenting) (agreeing with the plurality that proof of a slightly safer alternative is insufficient and arguing that the standard should ask whether “readily available measures can materially” reduce the risk of pain); *infra* Part IV.

Morales case. Both times it warned against judicial encroachment and indicated that the dangers of the procedure could be addressed without placing an undue burden on the state. In his first order, Judge Fogel permitted California to proceed with its execution of Michael Morales provided that it either execute him with a dose of a single barbiturate or agree to allow a trained medical professional in anesthesiology to monitor the inmate's consciousness before the delivery of the pancuronium and potassium chloride.¹⁴⁵ California chose the latter option and secured the participation of two anesthesiologists.¹⁴⁶

Even as he required the state to change its practices, Judge Fogel took great pains to find a solution that would “place a substantially lesser burden on the State’s strong interest in proceeding” with the execution.¹⁴⁷ Indeed, the district court explained that “under the doctrines of comity and separation of powers, the particulars of California’s lethal-injection protocol are and should remain the province of the State’s executive branch.”¹⁴⁸ *Morales* is often cited as one of the few successful lethal injection challenges, but in fact, the court went to significant lengths to let the state carry out its sentence. It both declined to stay the execution and deliberately “fashioned a remedy that was intended to permit Defendants to proceed with Plaintiff’s execution as scheduled.”¹⁴⁹

When the issue returned to him, Judge Fogel once again found serious problems with California’s procedure.¹⁵⁰ But instead of formally finding a violation and imposing a remedy, he “respectfully suggest[ed] that Defendants conduct a thorough review of the lethal-injection protocol.”¹⁵¹ He continued:

Because California’s next execution is unlikely to occur until the latter part of this year, the State presently is in a particularly good position to address these issues and put them to rest . . . [U]nder the doctrines of comity and separation of powers, the particulars of California’s lethal-injection protocol are and should remain the province of the State’s executive branch. A proactive approach by Defendants would go a long

145. *Morales v. Hickman*, 415 F. Supp. 2d 1037, 1047 (N.D. Cal. 2006).

146. The anesthesiologists subsequently balked when they realized what was being asked of them, and the State was unable to carry out its execution. *Morales v. Tilton*, 465 F. Supp. 2d 972, 976-77 (N.D. Cal. 2006).

147. *Morales I*, 415 F. Supp. 2d at 1047.

148. *Id.* at 1046.

149. *Morales II*, 465 F. Supp. 2d at 975 (discussing *Morales I*); see also *Taylor v. Crawford*, No. 05-4173, slip op. at 1 (W.D. Mo. July 25, 2006) (explaining that an injunction against the State “was never intended to unreasonably delay Missouri’s execution of death row inmates”).

150. See *Morales II*, 465 F. Supp. 2d at 982 (explaining that the Court was “prepared to issue formal findings of fact and conclusions of law with respect to the deficiencies in the administration of California’s current lethal-injection protocol that have been brought to light in this case” but not doing so yet).

151. *Id.* at 975 (quoting *Morales I*, 415 F. Supp. 2d at 1046).

way toward maintaining judicial and public confidence in the integrity and effectiveness of the protocol.¹⁵²

So powerful was the court's sense of judicial restraint that it allowed the state to proceed with executions on its own schedule. Indeed, Judge Fogel assured the state that "despite its critical assessment of Defendants' performance to date, this Court has no intention of interfering with or delaying California's implementation of a constitutional execution protocol. California's voters and legislature repeatedly have expressed their support for capital punishment. This case thus presents an important opportunity for executive leadership."¹⁵³ Writing about his ruling later, Judge Fogel reiterated, "[n]owhere in the Memorandum did I order, nor have I ever ordered, that the state take any specific remedial measure."¹⁵⁴

At least Judge Fogel's approach acknowledged the California procedure's flaws.¹⁵⁵ By contrast, other courts relying on similar remedial concerns have not only failed to find fault with their states' procedures but also articulated legal standards higher than necessary to resolve the given case. In rejecting a plaintiff's lethal injection claim, in *Emmett v. Johnson*, the Eastern District of Virginia, for example, stated that "it is not the office of a federal court to dictate to the Commonwealth of Virginia the precise methodology it should employ in carrying out a lawful death sentence."¹⁵⁶ Accordingly, it was up to the Virginia General Assembly—not a court—to determine "[w]hether or not the procedure used should conform to prevailing medical standards of care, or whether there is a more humane execution procedure."¹⁵⁷

One might think that to determine whether a constitutional violation has occurred, one should look at the facts and legal standard, while concerns about "dictating" a methodology to state government figure more heavily at the remedial stage. But the court used this deferential language to reject the plaintiff's claim on the merits, as though merely considering the procedure's constitutionality was just too meddlesome.¹⁵⁸ Indeed, the court argued that the plaintiff had offered an "expansive interpretation" of the Eighth Amendment by arguing that the execution team's training and qualifications were inadequate.¹⁵⁹ The

152. *Id.* at 975-76 (quoting *Morales I*, 415 F. Supp. 2d at 1046-47).

153. *Id.* at 981-82.

154. Jeremy Fogel, *In the Eye of the Storm: A Judge's Experience in Lethal-Injection Litigation*, 35 *FORDHAM URB. L.J.* 735, 747 (2008).

155. *Morales II*, 465 F. Supp. 2d at 978-81.

156. *Emmett v. Johnson*, 511 F. Supp. 2d 634, 639 (E.D. Va. 2007), *aff'd*, 532 F.3d 291 (4th Cir. 2008).

157. *Id.*

158. *Cf. Younger v. Harris*, 401 U.S. 37, 41 (1971) (citing comity concerns and declining to interfere in state judicial proceedings).

159. *Emmett*, 511 F. Supp. 2d at 641.

plaintiff, of course, had good reason to link the safety of the procedure to the competence of the execution team members, but, from the court's perspective, a ruling for the plaintiff would require the state to hire professionals with medical training, and this remedy was just too much to ask of Virginia.¹⁶⁰

The outcome in this case may well be correct; the *Emmett* plaintiffs arguably failed to present enough evidence for a court to find a violation. Nevertheless, the court's articulated concerns reflected less about the evidence presented and more about its own remedial anxieties. In emphasizing these concerns, the court, much like the Supreme Court in *Baze*, created an onerous Eighth Amendment standard that was unnecessary for the resolution of the instant case.¹⁶¹

Remedial concerns have also prompted some courts to backtrack on rulings finding serious constitutional problems. In North Carolina, a federal district court identified serious problems with the lethal injection procedure and conditioned the next execution on a qualified medical professional's monitoring of anesthetic depth.¹⁶² The state responded instead by proposing a revised protocol using a bispectral index (BIS) monitor, a machine that some anesthesiologists use to help monitor a patient's anesthetic depth.¹⁶³ The plaintiff presented extensive, virtually un rebutted evidence that, although a BIS monitor may be helpful in assessing the effectiveness of anesthesia, it is not suitable as the sole indicator of level of consciousness.¹⁶⁴ The district court, however, did not stand by its initial order. In "clarify[ing]" its ruling, the court did not alter its original findings that the state's procedure was flawed but instead emphasized that the inclusion of an anesthesiologist to monitor an aesthetic depth was just too burdensome.¹⁶⁵ A BIS monitor, the court decided, cured the procedure's flaws. In other words, the court decided that the remedy it had initially imposed asked too much of the state, even though it had not analyzed whether procuring

160. See *id.* (arguing that the Eighth Amendment does not require that the execution team consist of medical professionals).

161. *Id.* at 642 (explaining that it would be too intrusive to require the States to observe "medical norms").

162. See *Brown v. Beck*, No. 06-3018, 2006 WL 3914717, at *8 (E.D.N.C. Apr. 7, 2006) (permitting execution to proceed "on the condition that there are present and accessible to Plaintiff throughout the execution personnel with sufficient medical training to ensure Plaintiff is in all respects unconscious *prior to* and *at the time of* the administration" of the lethal drugs).

163. See, e.g., DAVID E. LONGNECKER ET AL., *ANESTHESIOLOGY* 85 (2007).

164. *Brown v. Beck*, 445 F.3d 752, 754-55 (4th Cir. 2006) (Michael, J., dissenting) (recounting extensive evidence that the use of a BIS monitor in isolation is inappropriate and that the State had offered "scant evidence" to rebut plaintiff's compelling proffer).

165. See *Brown v. Beck*, No. 06-3018, slip op. at 4-5 (E.D.N.C. Apr. 17, 2006) (accusing plaintiff of trying to "force a conflict of medical ethics" and accepting the State's proposed remedy instead of the court's initial order).

the services of an anesthesiologist would, in fact, be difficult. Instead, it accepted a manifestly inferior remedy that, on its own, did not correct the dangers the court itself had identified.

Even though federalism concerns are heightened when federal courts review state procedures, such remedial anxieties are not limited to federal courts reviewing state execution procedures. Like the North Carolina district court in *Beck*, a Florida state court issued a remedy against the state only to change its mind. The lower court initially expressed concern that Florida's revised lethal injection procedure did not "adequately address the events that took place during the Diaz execution."¹⁶⁶ The court ordered the state to revise its lethal injection procedures in numerous ways, such as improving training, including contingency plans, and periodically reviewing DOC procedures.¹⁶⁷ When Florida objected and submitted a protocol with only superficial revisions, the court backed down and approved it.¹⁶⁸ Indeed, the court backtracked on its initial factual assertions and denied that the Diaz execution had been botched, notwithstanding its previous ruling that the state had not adequately addressed the problems that had arisen during that execution.¹⁶⁹ As in *Beck*, the court did not explain why the state's minor revisions obviated the need for the remedy the court had initially ordered. Yet, by accepting the state's suggested remedy and abandoning its own initial order, the court effectively limited the value of the Eighth Amendment right.

In affirming, the Florida Supreme Court emphasized the burden any court ordered remedy would impose. Rejecting the plaintiff's argument that Florida's training of personnel was inadequate, the court stated that its "role is not to micromanage the executive branch in fulfilling its own duties relating to executions."¹⁷⁰ Lest the court be tempted to supplant the political branches' judgment with its own, it adopted a "presumption of deference" that "the methodology and the chemicals to be used are matters best left to the Department of Corrections."¹⁷¹ In other words, remedial concerns were so powerful that the court presumptively deferred to the DOC without any evidence about the execution protocol itself. Such language indicated to future courts that judicial involvement in this area is presumptively illegitimate and that even future claims with more compelling evidence of serious risks and viable alternatives should be similarly dismissed.

Federal appellate courts also sometimes focus on remedial issues. After holding Missouri's procedure unconstitutional, the district court in *Taylor* required that the state employ an anesthesiologist to monitor the inmate's anes-

166. See *Florida v. Lightbourne*, No. 81-170, slip op. at 3 (Fla. Cir. Ct. July 31, 2007).

167. *Id.* at 3-4.

168. See *id.* at 5 (denying relief).

169. *Id.* at 3.

170. *Lightbourne v. McCollum*, 969 So. 2d 326, 351 (Fla. 2007).

171. *Id.* at 352 (quoting *Sims v. State*, 754 So. 2d 657, 670 (Fla. 2000)).

thetic depth.¹⁷² The theory was that an anesthesiologist would know if an inmate has been sufficiently anesthetized before the administration of the pancuronium and potassium, thus protecting him from errors that might occur during the procedure.¹⁷³ In imposing this remedy, the district court was *not* claiming that the Eighth Amendment always required the participation of an anesthesiologist. Instead, it reasoned that the state's haphazard approach to lethal injection created a significant risk of excruciating pain and that the inclusion of a trained professional was a reasonable requirement to protect the inmate from pain, especially given the misadventures of Dr. Doerhoff and the other unqualified, untrained team members. The remedy arose not directly from the Eighth Amendment but from the court's remedial discretion, which was triggered by particular facts giving rise to the constitutional violation.

The Eighth Circuit reversed, emphasizing the state's "broad discretion" to design execution procedures.¹⁷⁴ Executions, the Eighth Circuit reminded the district court, are not medical procedures, and "no State can carry out an execution in the same manner that a hospital monitors an operation."¹⁷⁵ Thus, the Eighth Circuit explained, the requirement that Missouri use an anesthesiologist during its executions went far beyond what the Constitution required.¹⁷⁶

In emphasizing that the Constitution did not require the remedy imposed by the district court, the Eighth Circuit was stating a correct proposition of constitutional law, but it was also ignoring the applicable standard of review and the district court's reasoning. In the Eighth Circuit and elsewhere, remedies imposed by trial courts are reviewed for an abuse of discretion,¹⁷⁷ a standard of review the court of appeals did not mention once. In opting not to cite or follow the applicable standard of review, the Eighth Circuit not only indicated its determination to reverse the district court but also missed the point. Remedies imposed to correct constitutional violations are rarely constitutionally required in the abstract. To the contrary, trial courts exercise discretion to fashion

172. Taylor v. Crawford, No. 05-4173, 2006 WL 1779035, at *8 (W.D. Mo. June 26, 2006).

173. *Id.* at *7-8.

174. Taylor v. Crawford, 487 F.3d 1072, 1084-85 (8th Cir. 2007) (citing *McKenzie v. Day*, 57 F.3d 1461, 1469 (9th Cir. 1995)) (internal quotation marks omitted).

175. *Id.* at 1084 (citation omitted) (internal quotation marks omitted).

176. *Id.*; see also *Workman v. Bredesen*, 486 F.3d 896, 910 (6th Cir. 2007) (stating that the Constitution does not require the State to hire an anesthesiologist for each execution); *McKenzie*, 57 F.3d at 1469 ("[W]e are aware of no authority for the proposition that the prisoner is entitled, for example, to have a lethal injection administered by a physician."); *Hamilton v. Jones*, 472 F.3d 814, 816 (10th Cir. 2007) (same).

177. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971); *Smith v. Ark. Dep't of Corr.* 103 F.3d 637, 644 (8th Cir. 1996).

remedies based on the nature of the violation.¹⁷⁸ In other words, the anesthesiologist requirement might be inappropriate in a different state with different facts, but the district court determined that it made sense in Missouri. The Eighth Circuit ignored this argument, focusing instead on the correct but legally irrelevant proposition that the district court's chosen remedy was not constitutionally required.

Interestingly, the Eighth Circuit transitioned from its rejection of the remedy to its *factual* conclusion that "Mr. Taylor has not adduced evidence at any stage of this litigation that carries his burden of proving a constitutional violation."¹⁷⁹ In reaching this conclusion, the Eighth Circuit nowhere explained why it found the district court's factual conclusions unconvincing and *again* evaded the standard of review.¹⁸⁰ Indeed, after perfunctorily citing in its introduction the "clear error" standard for a district court's factual findings after a bench trial, the Eighth Circuit did not refer to it again. Instead, it leapt from its discussion of the district court's *remedy* immediately to its single-paragraph announcement that the district court's *factual findings* were wrong and that there was therefore no Eighth Amendment violation. This cursory discussion, however, ignored the district court's actual findings, particularly its extensive analysis of the dangers posed by Dr. Doerhoff and his unqualified execution team. The court of appeals, thus, reversed the lower court by glossing over the very facts that had given rise to a violation.¹⁸¹

This is questionable legal analysis, but it is also instructive, because it illustrates the extent to which remedial concerns inform courts' rulings on the constitutional right. In this regard, the Eighth Circuit's approach is hardly unusual. The Eighth Circuit felt that the remedy imposed by the district court was too burdensome on the state, and its discussion of the remedy necessarily colored its view of the right itself.¹⁸² Its leap from remedy to right may have been inart-

178. See, e.g., *Hutto v. Finney*, 437 U.S. 678, 686-87 (1978) (emphasizing that the district court has "ample authority" to fashion remedies based on the "severity" of established violations); *Swann*, 402 U.S. at 15 ("Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.").

179. *Taylor*, 487 F.3d at 1085.

180. See, e.g., *Robinson v. GEICO Gen. Ins. Co.*, 447 F.3d 1096, 1101 (8th Cir. 2006) (articulating a clear error standard of review of the trial court's factual findings).

181. The court focused instead on the written protocol's vague assurance of a qualified team, even though the State never indicated it was adding qualified personnel to the team the lower court had already deemed unqualified. See *Taylor*, 487 F.3d at 1082-85 (arguing that the "written protocol" does not present unconstitutional risk of pain but ignoring facts about Missouri's execution team).

182. Cf. *Rutherford v. McDonough*, 466 F.3d 970, 974 (11th Cir. 2006) ("[F]ederal courts considering equitable relief must be 'sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts . . .'" (quoting *Hill v. McDonough*, 547 U.S. 573, 584 (2006))).

ful, but its conflation of the two was nothing extraordinary, sharply limiting the value of the Eighth Amendment in practice, without actually claiming to eviscerate the right. In short, “the threat of undesirable remedial consequences motivate[d] [the] court[] to construct the right in such a way as to avoid those consequences.”¹⁸³

3. Concerns About Delay

Closely related to remedies is the problem of delay. Sometimes § 1983 actions challenging the method of execution force a stay delaying the date of execution while the court hears the case.¹⁸⁴ Courts are usually extremely sensitive to this concern. Telling the state to wait to carry out its sentence seems almost as invasive as ordering it to reform its institutional practices. Similarly, just as a court draws on its equitable powers in crafting a remedy, so too do equitable concerns guide its decision of whether or not to issue a stay delaying an execution.¹⁸⁵ Predictably, then, just as courts are reluctant to exercise their equitable powers to impose a remedy telling states what to do, they are also cautious about issuing any order interfering with the expeditious execution of a death sentence.¹⁸⁶

Courts, though, are not precise about exactly what—the lawsuit itself, the contemplated remedy, or something else—would trigger the delay. Some suggest that merely permitting the litigation to go forward is itself a form of relief.¹⁸⁷ These courts assume that the litigation’s sole or primary goal is to prolong the inmate’s life—particularly when the suit has been filed relatively soon before a scheduled execution—and they dismiss the case accordingly.¹⁸⁸ This

183. Levinson, *supra* note 117, at 885.

184. *See, e.g.*, Taylor v. Crawford, No. 06-1397 (8th Cir. Feb. 1, 2006) (en banc) (granting Taylor’s rehearing petition and application for stay); Morales v. Tilton, 465 F. Supp. 2d 972, 974-78 (N.D. Cal. 2006) (recounting the case’s history including execution stay).

185. *See* Nelson v. Campbell, 541 U.S. 637, 649 (2004) (“A stay is an equitable remedy, and [e]quity must take into consideration the State’s strong interest in proceeding with its judgment and . . . attempt[s] at manipulation.” (quoting Gomez v. United States Dist. Court for N. Dist. of Cal., 503 U.S. 653, 654 (1992))).

186. *See, e.g.*, Baze v. Rees, 128 S. Ct. 1520, 1531 (2008) (plurality opinion) (arguing that the finding of a violation would require endless rounds of litigation “touting a new and improved methodology”); McNair v. Allen, 515 F.3d 1168, 1172 (11th Cir. 2008) (expressing concern over federal court involvement in state-administered executions); Jones v. Allen, 483 F. Supp. 2d 1142, 1150 (M.D. Ala. 2007) (states have a “significant interest in meting out a sentence of death in a timely fashion” (quoting Nelson v. Campbell, 541 U.S. 637, 644 (2004))).

187. *See, e.g.*, Thompson v. Wainwright, 714 F.2d 1495, 1506 (11th Cir. 1983) (“Each delay, for its span, is a commutation of a death sentence to one of imprisonment.”).

188. *See, e.g.*, Berry v. Epps, 506 F.3d 402, 404 (5th Cir. 2007) (“Our precedent requires the dismissal of ‘eleventh hour’ dilatory claims”); Grayson v. Allen, 491 F.3d

dismissal can effectively make it impossible for inmates to protect themselves against dangerous execution methods. It is true that these suits can cause delay, but death row inmates cannot realistically challenge their method of execution far in advance. Indeed, when inmates have tried to do so, the state has argued persuasively that such early challenges should be dismissed as unripe, because the state may change its own protocol before the plaintiff's execution date.¹⁸⁹ Plaintiffs thus confront a catch-22: early claims can be dismissed as unripe, later claims as dilatory.

Delay does impose costs on states, both financial (resulting primarily from renewed litigation) and political (resulting from the inability to execute a lawfully-imposed sentence). Given these costs, it is understandable that courts weigh delay when determining whether to grant relief, especially when inmates file claims just weeks or even hours before their scheduled executions. Nevertheless, courts often assume that these claims are disingenuous and treat them as though their sole or primary purpose is to delay. While this assumption may sometimes be correct, some courts seem to assume this motive before they look closely at the evidence. As a result, courts sometimes over-emphasize the significance of delay, treating it like a decisive factor rather than one cost to be

1318, 1326 (11th Cir. 2007) ("If Grayson truly had intended to challenge Alabama's lethal injection protocol, he would not have deliberately waited to file suit until a decision on the merits would be impossible without entry of a stay or an expedited litigation schedule."); *Harris v. Johnson*, 376 F.3d 414, 418 (5th Cir. 2004) ("By waiting as long as he did, Harris leaves little doubt that the real purpose behind his claim is to seek a delay of his execution . . .").

There is some truth to the view that such litigation is sometimes a delaying tactic, but many lethal injection claims are brought by lawyers who are genuinely concerned about the protocols and appalled that the States have taken so few measures to understand or improve their methods. Indeed, the fact that several law firms have chosen to enter these cases in recent years lends credence to this position; law firms have little interest in expending valuable pro bono resources by pursuing delay for the sake of delay.

189. See *Alley v. Little*, 452 F.3d 621, 625 (6th Cir. 2006) (Martin, J., dissenting) ("Had [plaintiff] attempted to challenge his method of execution before the method had been chosen, or before he had even been presented with the choice under the State's procedure, his challenge would clearly have faced issues of ripeness."); *Worthington v. State*, 166 S.W.3d 566, 583 n.3 (Mo. 2005) (finding that, because "it is unknown what method, if any, of lethal injection may be utilized by the State . . . [when] execution date and method are set, it is premature for this Court to consider whether a particular method of lethal injection violates the Eighth Amendment"); *Gallo v. State*, 239 S.W.3d 757, 780 (Tex. Crim. App. 2007) (holding that a lethal-injection challenge was not "ripe," because there was no execution date and the "method in which lethal injection is currently administered is not determinative of the way it will be administered at the moment of appellant's execution"); cf. FED. R. CIV. P. 11(b)(3) (requiring that factual contentions have likely evidentiary support); Defs' 11/8/2006 Motion To Strike, *United States v. Higgs* (D. Md. 2006) (No. 98-0520) (U.S. government arguing that plaintiff's method-of-execution challenge was unripe because execution was not imminent).

weighed equitably.¹⁹⁰ To the extent that delay sometimes obstructs a court from ever considering the merits of a constitutional claim, this outcome is troubling: it is odd to think that such equitable concerns should necessarily trump constitutional ones. However, when courts dismiss lethal injection claims because of the delay they create without examining the extent of or reason for the delay or the potential merits of the action, they subordinate the Eighth Amendment right to non-constitutional equities. In so doing, courts dismiss potentially meritorious claims with barely a glance at the relevant facts and law.¹⁹¹

Similarly, courts' instinct to blame the plaintiff for any delay ignores the extent to which fault often lies with the state.¹⁹² As Justice Stevens pointed out, "[s]tates wishing to decrease the risk that future litigation will delay executions . . . would do well to reconsider their continued use of pancuronium bromide."¹⁹³ Stevens's advice stems from the fact that, without the paralytic, it would be much easier to determine during an execution whether inmates were suffering pain. Pancuronium makes it probable that problems during an execution will go undetected. Without it, states could win these cases much more quickly by pointing to apparently peaceful executions as indication of unproblematic procedures.

Indeed, as Judge Fogel summarized, were states' main objective to resume executions, "their unwillingness to see the situation for what it is and to be proactive is self-defeating."¹⁹⁴ Basic protocol changes would have avoided much litigation. The one-drug protocol, for example, is painless and therefore comparatively immune from a colorable Eighth Amendment challenge and its ac-

190. See, e.g., *Berry*, 506 F.3d at 404 (requiring dismissal for "eleventh hour" claim regardless of the merits or reasons for delay).

191. It is true that equitable concerns frequently guide courts' approaches to cases (constitutional or otherwise), so it is understandable and appropriate that concerns about delay would be part of courts' calculus and would even be decisive in the case of some last-minute actions. It is harder to understand, though, why an equitable factor like delay should receive so much weight that constitutional claims are treated sometimes as presumptively bogus, even in cases where the suit was not filed at the last minute or could not have been filed earlier, such as when an inmate challenges a recently adopted or revised execution procedure. See *Lightbourne v. McCollum*, 969 So. 2d 326, 328 n.2, 352 (Fla. 2007) (adopting the presumption that lethal injection claims are invalid in a case with no outstanding death warrant challenging Florida's procedure after the State implemented changes to its execution protocol following the botched Diaz execution).

192. See, e.g., *Cooey v. Taft*, No. 2:04-cv-1156, 2007 WL 2607583, at *4 (S.D. Ohio Sept. 5, 2007) ("Any argument that the granting of an injunction would harm the State's interest in fulfilling the judgment . . . in a timely manner is somewhat disingenuous, considering that but for the State's interlocutory appeal, many if not all of the underlying issues would in all likelihood have been resolved by now.").

193. *Baze v. Rees*, 128 S. Ct. 1520, 1546 (2008) (Stevens, J., concurring).

194. See *Morales v. Tilton*, 465 F. Supp. 2d 972, 982 n.13 (N.D. Cal. 2006).

companying delays.¹⁹⁵ Death row inmates could, of course, challenge even this procedure, but such suits would probably be dismissed quickly. A bogus challenge to a painless procedure would take much less time than a serious challenge to the far more complicated and dangerous three-drug procedure.¹⁹⁶ Many courts, however, seem to fear that, were they to intervene, they would be blamed for stopping executions.¹⁹⁷ They therefore treat any delay as an unacceptable interference in state affairs, akin to constitutional remedies stipulating the specific allocation of state resources. In so doing, they implicitly limit the practical value of the underlying constitutional right.

B. The Structural Injunction's Shadow over Lethal Injection

To make sense of why remedial concerns have so influenced courts in these cases, it is helpful to situate them in the broader context of public law litigation. Many judges today are acutely sensitive to accusations that courts tread too heavily on the democratic branches. This sensitivity is, in part, a result of a backlash against what has been seen as excessive judicial intervention in structural reform litigation and also a reflection of more restrained judicial values generally.

The structural reform suit is “one in which a judge, confronting a state bureaucracy over values of constitutional dimension, undertakes to restructure the organization to eliminate a threat to those values posed by the present institutional arrangements.”¹⁹⁸ Structural reform litigation, then, often seeks to revamp the practices of large state bureaucracies. School desegregation and prison conditions actions are archetypal structural reform cases.¹⁹⁹

Lethal injection cases are not structural reform suits, and most courts do not say that they are. (Most courts do not reach the remedial stage of lethal injection litigation, so they are also not terribly precise about exactly how remedial concerns affect their decision-making.) There are, nevertheless, features of lethal injection actions that bring to mind courts' concerns in more

195. Even skeptics of the one-drug protocol do not allege that it causes pain. *See, e.g., Baze*, 128 S. Ct. at 1541 (Alito, J., concurring) (raising concerns about the one-drug protocol, but not that it causes pain); *infra* notes 313-314 and accompanying text.

196. *See infra* Subsection IV.A.1 (discussing the one-drug alternative).

197. *See McNair v. Allen*, 515 F.3d 1168, 1172 (11th Cir. 2008) (“The Supreme Court has repeatedly admonished courts regarding their obligation to guard against litigation brought solely for the purpose of delay.”); *Emmett v. Johnson*, 489 F. Supp. 2d 543, 551-52 (E.D. Va. 2007) (“To unsettle these expectations [in timely disposition of sentences] is to inflict a profound injury to the powerful and legitimate interest in punishing the guilty” (quoting *Calderon v. Thompson*, 523 U.S. 538, 556 (1998))) (internal quotations and citations omitted).

198. Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 2 (1979).

199. *See JOHN C. JEFFRIES, JR. ET AL., CIVIL RIGHTS ACTIONS: ENFORCING THE CONSTITUTION* 849-51 (2d ed. 2007).

sweeping structural reform actions. For example, executions take place in prisons, a context in which courts usually are especially deferential because institutional security should be left to prison officials, not unknowledgeable judges.²⁰⁰ Additionally, the scientific and medical angle of lethal injection is far outside judges' expertise.²⁰¹ Although structural reform cases do not necessarily implicate scientific issues, they frequently do involve complicated policy determinations that, like scientific inquiries, are deemed beyond judicial expertise.²⁰² There is also the aforementioned concern that the litigation will delay executions, thus interfering with the state's substantive and democratic decision to have the death penalty. Furthermore, like much structural reform litigation, many lethal injection actions have multiple plaintiffs since all death row inmates in a state are affected by the litigation.²⁰³ Some inmates have sought to intervene in ongoing lethal injection cases,²⁰⁴ while others have even banded together to file a class action.²⁰⁵

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200. See, e.g., *Rhodes v. Chapman*, 452 U.S. 337, 362 (1981) (“[C]ourts have been especially deferential to prison authorities in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.”) (internal quotation marks omitted); *Bell v. Wolfish*, 441 U.S. 520, 547 (1979) (same); *Procunier v. Martinez*, 416 U.S. 396, 404-05 (1974) (“[F]ederal courts have adopted a broad hands-off attitude towards problems of prison administration [T]he problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree. Most require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government.”).
201. See *Baze v. Rees*, 128 S. Ct. 1520, 1531 (2008) (plurality opinion) (dismissing a judicial approach that would “embroil the courts in ongoing scientific controversies beyond their expertise”); cf. *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983) (explaining that in examining an agency determination “at the frontiers of science . . . a reviewing court must generally be at its most deferential”).
202. See William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 *YALE L.J.* 635, 641 (1982).
203. See, e.g., *Baze*, 128 S.Ct. at 1520; *Walker v. Epps*, No. 07-176, 2008 WL 2095704 (N.D. Miss. May 16, 2008); *Cooley v. Strickland*, No. 2:04-cv-1156, 2008 WL 471536 (S.D. Ohio Feb. 15, 2008); *Bowling v. Haas*, No. 07-cv-07, 2007 WL 403875 (E.D. Ky. Jan. 31, 2007); *Anderson v. Evans*, No. 05-0825, 2006 WL 83093 (W.D. Okla. Jan. 11, 2006); *Complaint, Roane v. Gonzales*, No. 05-2337 (D.D.C. Dec. 6, 2005).
204. See, e.g., *Clemons v. Crawford*, No. 07-4129, slip op. at 1 (W.D. Mo. Sept. 4, 2007) (granting motion to intervene).
205. See *Jackson v. Danberg*, 240 F.R.D. 145, 147-49 (D. Del. 2007) (granting plaintiffs' motion to be certified as a class action for their lethal injection suit); see also 2 DAN B. DOBBS, *THE LAW OF REMEDIES: DAMAGES, EQUITY, RESTITUTION* 350 (2d ed. 1993) (describing structural reform cases as tending to involve more parties).

Finally, and most importantly, lethal injection litigation, like structural injunction suits, seeks to reform the way a state carries out its duties and thus intrudes on the state's policy-making prerogative.²⁰⁶ These cases implicate personnel, training, drugs, architecture, drug administration apparatuses, monitoring, recordkeeping, and contingency plans. Given lethal injection's complicated design, some courts finding problems have retained jurisdiction to ensure compliance, a tactic commonly employed by courts in structural reform actions.²⁰⁷ To this extent, lethal injection suits implicate structural concerns, seeking to revise the very structures and processes by which the state carries out the death penalty. Thus, even though courts rarely suggest that lethal injection actions are a form of structural reform litigation, the judiciary's general reluctance to impose structural injunctions in recent decades likely plays into its similar remedial anxieties in lethal injection cases. Indeed, as concerns about judicial involvement in public affairs have increased, there has been an increased tendency to regard with suspicion *any* constitutional remedy against the state.²⁰⁸

This increased suspicion grows out of the large scope of many structural reform cases. The typical structural injunction case seeks to remedy alleged constitutional violations by reforming the everyday workings of large public institutions such as schools, prisons, or mental health hospitals.²⁰⁹ As then-Professor Fletcher explains, this litigation tends to be sprawling with many parties, and the finding of a constitutional violation is usually only a prelude to a prolonged, complicated process of devising an order directing the state to reform its institutions.²¹⁰ Sometimes these remedial decrees are extremely detailed and stipulate, for example, the precise staffing ratios or types and quantities of food to be served in a prison.²¹¹ It is then easy to see why judicial involvement would at-

206. See 2 DOBBS, *supra* note 205, at 349 (describing structural injunction cases as civil rights cases in which the plaintiffs attempt to halt wrongful practices by reforming social institutions).

207. See *Taylor v. Crawford*, No. 05-4173, 2006 WL 1779035, at *9 (W.D. Mo. June 26, 2006) ("The Court will retain jurisdiction over the State's implementation of the lethal injection protocol for the next six executions or until the Court is satisfied that the protocol is being administered in a consistent fashion."); *Morales v. Tilton*, 465 F. Supp. 2d 972, 984 (N.D. Cal. 2006) (ordering California to advise the court within thirty days how long it will take to review and revise execution protocol); see also 2 DOBBS, *supra* note 205, at 350 (noting that structural injunctions often involve ongoing judicial administration).

208. See Poser, *supra* note 109, at 298 ("[T]hose who contend that courts should not be involved in institutional reform litigation, whether for capacity or legitimacy reasons, focus on the remedial phase of the litigation, as this is where judicial involvement strays from its traditional role.").

209. Fletcher, *supra* note 202, at 636.

210. *Id.* at 638.

211. *Id.* at 639.

tract criticism; such decrees intrude greatly into the daily operations of a public institution and judges have little to guide them beyond their own intuition with respect to such operations. This role moves the judge “far beyond the normal competence and authority of a judicial officer, into an arena where legal aspirations, bureaucratic possibilities, and political constraints converge, and where ordinary legal rules frequently are inapplicable.”²¹²

Unsurprisingly, then, by the late 1970s, many scholars, politicians, and judges began openly questioning whether decrees of this nature were within the scope of legitimate judicial power.²¹³ Considered especially problematic was judicial intervention in “polycentric” problems, which are “complex problem[s] with a number of subsidiary problem centers, each of which is related to the others, such that the solution to each depends on the solution to all the others.”²¹⁴ Polycentric problems often involve non-legal elements with consequences that extend far beyond the litigation and reach thousands of people. For example, litigation challenging the constitutionality of state prison conditions presumably seeks a judicial order requiring improvements to the prison system. But improvements cost money, and additional money spent on prisons necessarily siphons off money that might otherwise be spent elsewhere.²¹⁵ Such judicial involvement is problematic in part because judges’ remedial decrees usually are guided by their sense of how to remedy the constitutional wrong, not by other non-legal problems that might arise from the imposition of a particular remedy.²¹⁶ Even if sensitive to these concerns, a judge is unlikely to account for all of the different interests and expenses. That task is better left to the political branches, which, after all, manage the budget not just for prisons but for all social institutions.

There are, thus, good reasons for courts to exercise restraint issuing institutional decrees, and judges have become increasingly skeptical about the merits of structural reform litigation.²¹⁷ In practice, this awareness has meant not only an increased reluctance to impose structural reform injunctions but also often a limitation of the right itself. If a court focuses on the plaintiffs’ rights, the remedial question becomes whether the defendant has taken the necessary steps to cure the constitutional violation. But “if the court focuses more on the remedial

212. *Id.* at 640-41.

213. *See, e.g.*, Paul J. Mishkin, *Federal Courts as State Reformers*, 35 WASH. & LEE L. REV. 949, 973 (1978) (calling for “heightened judicial sensitivity” to the implications of the “proliferation and regularization of broad institutional relief” issued by courts).

214. Fletcher, *supra* note 202, at 645 (internal quotation marks omitted).

215. *Id.* at 646; *see also* Mishkin, *supra* note 213, at 965 (“An institutional remedy inevitably involves allocation of state resources, at times in major amounts.”).

216. Fletcher, *supra* note 202, at 647.

217. John C. Jeffries Jr. & George A. Rutherglen, *Structural Reform Revisited*, 95 CAL. L. REV. 1387, 1410 (2007).

issue, it will conceive of a remedy in terms of the duty and then consider it implemented when the defendants can demonstrate implementation, or at least a good faith effort to implement it as far as possible.”²¹⁸ The remedy, then, has become “part of the definition of the right.”²¹⁹ Indeed, the more courts focus on remedial difficulties, the more likely it is that the underlying right will be constrained so that a finding of a violation will become less likely.

Of course, remedy can constrain right in numerous ways, and, in structural reform litigation, there was often an iterative process in which a series of judicial decisions fleshed out what a constitutional principle required of state actors.²²⁰ As we have seen, lethal injection cases have usually proceeded along a different track: remedial concerns limit the scope of the right in the first instance so that judges never find violations. This limitation is significant because when courts refer generally to remedial concerns in declining to find a constitutional violation, they are not being precise about exactly why there is no violation. Remedy, then, constrains the right by muddying courts’ analyses, inviting judges to point vaguely to remedial obstacles rather than to particular facts that might or might not create a significant risk of pain.²²¹

One should not overstate the importance of structural reform litigation’s history on lethal injection suits. Although some commentators conclude that structural reform litigation is “something that is over and done with,”²²² the more accepted view is that structural reform injunction these days is not so much dead as different—narrower and less intrusive.²²³ To be sure, some courts have noted the similarities between lethal injection suits and structural reform suits,²²⁴ but for most courts, the backlash against structural reform injunctions provides not a direct analogy but a culture in which they approach public law litigation. Courts these days are hesitant to reach remedial questions, particu-

218. Poser, *supra* note 109, at 323-24.

219. Levinson, *supra* note 117, at 881.

220. *See id.* at 874-84 (discussing school desegregation, prison conditions, and apportionment cases).

221. *See supra* Section II.A.

222. ROSS SANDLER & DAVID SCHOENBROD, *DEMOCRACY BY DECREE 10* (2003) (citing scholars holding this view).

223. *See* Myriam Gilles, *An Autopsy of the Structural Reform Injunction: Oops . . . It’s Still Moving!*, 58 U. MIAMI L. REV. 143 (2003) (arguing that despite the decline of structural reform litigation, lawsuits seeking judicial decrees governing the admissions criteria of state-run educational institutions resemble such litigation); Margo Schlanger, *Civil Rights Injunctions over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550, 602-04 (2006) (arguing that reports of the death of the structural reform injunction are greatly exaggerated).

224. *See, e.g.,* *Baze v. Rees*, 128 S. Ct. 1520, 1531-32 (2008) (citing *Bell v. Wolfish*, 441 U.S. 520, 562 (1979)); *supra* Section II.A (discussing court decisions expressing reluctance to interfere with State execution procedures).

larly in politically charged cases, such as those involving the death penalty.²²⁵ As we shall see, however, to the extent these factors have dissuaded judicial involvement, courts have misunderstood these cases and the remedial issues they present.

III. POLITICAL PROCESS FAILURES AND THE NEED FOR JUDICIAL INTERVENTION

If states took more care in designing their lethal injection procedures, courts' inclination to defer to the political branches would have a great deal more merit. But many states have given little to no consideration to the method by which they carry out their most solemn duty.²²⁶ To the contrary, many states have haphazardly slapped together a procedure, blindly following other states, who themselves failed to give real thought to it in the first place. While these and related shortcomings do not themselves amount to an Eighth Amendment violation, they collectively result in a political process failure undeserving of judicial deference.²²⁷

225. To some extent, this reluctance may be because some courts have not internalized the extent to which structural reform injunctions today can be “less intrusive . . . [t]ypically avoid[ing] the ‘kitchen sink’ approach to institutional reform in favor of orders that identify goals the defendants are expected to achieve . . .” Jeffries & Rutherglen, *supra* note 217, at 1411-12; *see also* Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1016, 1019 (2004) (arguing that a new experimental injunction “combines more flexible and provisional norms with procedures for ongoing stakeholder participation and measured accountability”).

226. The following discussion summarizes common ways in which State governments have enacted lethal injection procedures; it does not argue that each State's behavior conforms exactly to the general approaches summarized here.

227. By “political process failure,” I refer collectively to a series of legislative, executive, and administrative failings, including democratically elected legislative and executive officials' failure to participate in the design of the procedure; delegation by those elected officials to unelected DOC officials; further delegation by unelected DOC officials to unelected, unqualified, and untrained execution team members; a failure by both elected and unelected officials to consult experts; a lack of oversight by both elected and unelected officials; a lack of transparency, including a refusal to share the details of the procedure with either litigants or the general public; harm to a “discrete and insular” minority group lacking political power; and a refusal to reconsider the protocol and subject it to normal administrative procedures, even as serious problems have come to light. I am, in other words, using the term “political process failure” in a broader way than it is used when referring to voting rights and other election-related issues.

It is also worth noting that while my discussion of “political process failures” exceeds the precise terms of footnote four of *Carolene Products*, *see* *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938), some lethal injection procedures arguably would receive heightened scrutiny under any of footnote four's theories. First, the procedures trigger a specific provision of the Bill of Rights (the Eighth Amendment). Second, while some of the legislative and administrative

The basic narrative of the development of lethal injection in the United States is now well known. In 1977 Oklahoma became the first state to adopt lethal injection. State legislators consulted with Jay Chapman, the chief medical examiner for Oklahoma. Even though Chapman's "first response was that [he] was an expert in dead bodies but not an expert in getting them that way," he quickly changed course and declared, "[t]o hell with them: let's do this thing."²²⁸ Chapman and two legislators then quickly drafted the statute, which focused on the types of drugs to use, not the details of administration. The resulting protocol did not require execution teams to include trained personnel. Nor was it ever scientifically studied.²²⁹ Chapman today expresses shock that lethal injection is not performed by doctors but by individuals with little understanding of the dangers posed by the drugs.²³⁰ As he now puts it, "it never occurred to me when we set this up that we'd have complete idiots administering the drugs."²³¹

The Oklahoma legislature passed the bill, and it was then copied—first by Texas and then by other states.²³² From 1977 to 2002, thirty-seven state legislatures adopted Oklahoma's brand of lethal injection, but they did so without conducting their own evaluation of the procedure's risks. Instead, they delegated the procedure to unelected officials who mimicked Oklahoma's choices without actually examining the advantages and disadvantages of the procedure.²³³ As Dr. Zimmers and Dr. Koniaris argue, "no research whatsoever—clinical, veterinary, medical literature search, or other—was ever performed" at

failings I discuss are likely not fully encompassed by the footnote's concern with legislation restricting political processes, the States' deliberate lack of transparency does render it unlikely that usual political processes could be expected to identify, much less fix, the problems. Third, the procedures uniquely burden a "discrete and insular" minority (death row inmates) that would be unlikely to protect itself through normal political processes. *See id.*

228. Denno, *Quandary*, *supra* note 28, at 66 (quoting E-mail from A. Jay Chapman, Forensic Pathologist, Santa Rosa, Cal., to Deborah W. Denno, Professor of Law, Fordham Law Sch. (Jan. 18, 2006)); William J. Wiseman, Jr., *Confessions of a Former Legislator*, CHRISTIAN CENTURY, June 20-27, 2001, at 7.

229. Denno, *Paradox*, *supra* note 28, at 90-120; Denno, *Quandary*, *supra* note 28, at 70. Of course, the protocol could not be *tested* on humans, but States could have studied the dangers associated with each of the drugs.

230. *See* HUMAN RIGHTS WATCH, SO LONG AS THEY DIE: LETHAL INJECTIONS IN THE UNITED STATES 33 (2006).

231. *Harbison v. Little*, 511 F. Supp. 2d 872, 875 (M.D. Tenn. 2007) (quoting E-mail from A. Jay Chapman, Forensic Pathologist, Santa Rosa, Cal. to Deborah W. Denno, Professor of Law, Fordham Law Sch. (Jan. 18, 2006)).

232. Denno, *Quandary*, *supra* note 28, at 78.

233. *Id.* at 79.

any level of government when states adopted lethal injection.²³⁴ As one trial court summarized, “there is scant evidence that ensuing States’ adoption of lethal injection was supported by any additional medical or scientific studies Rather . . . the various States simply fell in line relying solely on Oklahoma’s protocol”²³⁵

Some states’ statutes reflect this haphazard adoption, failing even to state accurately the actual drugs used. Several state statutes, for instance, refer only to a barbiturate and paralytic, leaving out reference to potassium chloride, even though the protocol in practice does include potassium.²³⁶ Other state statutes vaguely authorize the use of lethal drugs without specifying which ones.²³⁷ South Dakota recently rewrote its statute along these lines to make it vaguer so as to give its corrections department more flexibility.²³⁸ When the legislature deliberately makes a statute vaguer in order to punt authority entirely to unelected prison officials, who themselves are unqualified and not inclined to seek expert advice,²³⁹ courts should not defer to that same legislature merely because it has been democratically elected. In such instances, *Baze*’s warning that a judicially imposed remedy “would substantially intrude on the role of state legislatures in implementing their execution procedures”²⁴⁰ rings hollow.

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

235. *Baze v. Rees*, No. 04-CI-01094, slip op. at 2 (Ky. Cir. Ct. July 8, 2005), *aff’d*, 217 S.W.3d 207 (Ky. 2006), *aff’d*, 128 S. Ct. 1520 (2008); *see also* Denno, *Quandary*, *supra* note 28, at 78-79 (providing a history of the development and spread of lethal injection in the United States).

236. *See, e.g.*, ARK. CODE ANN. § 5-4-617(a)(1) (2006) (“The punishment of death is to be administered by a continuous intravenous injection of a lethal quantity of an ultra-short-acting barbiturate in combination with a chemical paralytic agent until the defendant’s death is pronounced.”); IDAHO CODE ANN. § 19-2716 (2008) (same); MD. CODE ANN., [CORR. SERVS.] § 3-905 (West 2008) (same); MISS. CODE ANN. § 99-19-51 (2007) (same); MONT. CODE ANN. § 46-19-103 (2007) (same); N.M. STAT. § 31-14-11 (2008) (same); N.C. GEN. STAT. § 15-187 (2007) (same); OKLA. STAT. tit. 22, § 1014(A) (2003) (same); Denno, *Quandary*, *supra* note 28, at 94 & n.306.

237. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-704 (2009) (“The penalty of death shall be inflicted by an intravenous injection of a substance or substances in a lethal quantity sufficient to cause death, under the supervision of the state department of corrections.”); DEL. CODE ANN. tit. 11, § 4209(f) (2008) (proscribing similar guidelines); GA. CODE ANN. § 17-10-38 (2008) (proscribing similar guidelines); TEX. CODE CRIM. PROC. ANN. art. 43.14 (Vernon 2009) (proscribing similar guidelines).

238. *See* S.D. CODIFIED LAWS § 23A-27A-32 (2006) (amended 2007); Denno, *Quandary*, *supra* note 28, at 94 & nn.304 & 307 (discussing South Dakota’s revised statute).

239. *See infra* notes 270-272 and accompanying text.

240. *Baze v. Rees*, 128 S. Ct. 1520, 1531 (2008) (plurality opinion).

Many states' refusal to disclose the details of their own procedures compounds the problem. As recently as October 2007, only six lethal injection states provided what Professor Denno termed "complete" public protocols,²⁴¹ and even those protocols did not give details about important information such as the qualifications and training of the execution team members. This lack of transparency makes it nearly impossible for the public to understand a lethal injection procedure's risks, thereby insulating it from democratic revision.²⁴²

Relatedly, states also routinely resist discovery in an effort to divulge as little information about the method by which they plan to execute the plaintiff.²⁴³ Courts are often complicit, reluctant to impose discovery burdens on states and sensitive to concerns about the executioners' anonymity.²⁴⁴ While executioner anonymity is certainly a legitimate state interest, it is not a sound reason for denying plaintiffs' discovery requests, since sensitive material can be redacted and subject to protective orders forbidding the public disclosure of information that might reveal an executioner's identity.²⁴⁵

When details do come to light, the record often highlights the failed processes and delegations by which the protocol was adopted and retained. In some states, neither elected politicians nor DOC officials played a role in designing

241. Denno, *Quandary*, *supra* note 28, at 95. The States Denno cites are Colorado, Connecticut, Georgia, New Mexico, Oregon, and Washington. *Id.*

242. *Id.* at 96; *see also* Adam Liptak, *After Flawed Executions, States Resort to Secrecy*, N.Y. TIMES, July 30, 2007, at A9 ("In the wake of several botched executions around the nation, often performed by poorly trained workers, you might think that we would want to know more, not less, about the government employees charged with delivering death on behalf of the state.").

243. *See supra* notes 79-80, 91 and accompanying text.

244. *See, e.g.*, *Moeller v. Weber*, No. 04-4200, 2008 WL 1957842 (D.S.D. May 2, 2008) (denying in part plaintiff's motion to compel discovery); *Timberlake v. Donahue*, No. 06-1859, 2007 WL 141950, at *3 (S.D. Ind. Jan. 16, 2007) (ordering that execution team members testify in a manner to preserve anonymity, and that "plaintiff will endeavor to eliminate or reduce the desired need for any such testimony"); *Moore v. Rees*, No. 06-22, 2007 WL 1035013, at *10 (E.D. Ky. Mar. 30, 2007) (granting plaintiff's motion to depose the execution team, but noting defendant's "strong interest in preserving the safety, and hence anonymity" of the team members); *Taylor v. Crawford*, No. 05-4173, 2006 WL 1236660, at *3 (W.D. Mo. May 5, 2006) (denying plaintiff's motion to reconsider denial of discovery request for depositions and limit access to only six of sixty-six past execution records); *Hill v. McDonough*, No. 06-032, 2006 WL 2556938, at *2 n.5 (N.D. Fla. Sept. 1, 2006) (suggesting that because Florida State Court had already ruled on a lethal injection challenge in 2000, plaintiff was not entitled to discovery about the procedure as it existed in 2006).

245. *See* FED. R. CIV. P. 26(c) (stating that court may issue protective orders); *see also* *Moeller*, 2008 WL 1957842, at *4 (allowing State to submit sensitive materials for *in camera* review); *Taylor v. Crawford*, No. 05-4173 (W.D. Mo. Oct. 31, 2005) (granting protective order).

the procedure, and yet often those same officials fought vigorously to retain the status quo. In Missouri, for example, Dr. Doerhoff boasted that he was responsible for the entire procedure because the DOC director “has no background” in either medicine or corrections and was therefore “totally dependent on me advising him what could and should and will be done.”²⁴⁶ Furthermore, because Missouri had no written protocol, there were “no checks and balances or oversight” on Doerhoff’s capricious judgment.²⁴⁷ Doerhoff, an independent contractor, thus had complete discretion to change the procedure “at a moment’s notice.”²⁴⁸ This discretion included the authority to lower the thiopental doses, even though his dyslexia rendered him unable to calculate dosages accurately.²⁴⁹ The Missouri legislature then delegated the matter to the DOC director, who in turn delegated it to Dr. Doerhoff. At no step along the way did Missouri inquire whether it was delegating the issue to someone with the requisite expertise.

Despite these serious problems and the accompanying lack of accountability, Missouri fought vigorously to retain its existing lethal injection procedure and never took the initiative to improve it. Even after Judge Gaitan required Missouri to submit a revised protocol, the new protocol was conceived not by DOC officials, execution team members, or medical experts, but by legal counsel.²⁵⁰ This approach reflects Missouri’s concern with secrecy over safety. By turning over the new protocol to lawyers, Missouri did not consult experts in a meaningful way, but it could claim that the details regarding the new procedure’s adoption were subject to attorney-client privilege.²⁵¹

Predictably, although the new product did include some improvements (at least it was in writing), it did not remove the fundamental flaws that had prompted the court to find a violation in the first place.²⁵² Most bafflingly, Missouri refused to cut ties with Doerhoff, despite his admitted dyslexia, his unapologetic *sua sponte* changes to the procedure, and a public reprimand for failing to disclose more than twenty malpractice suits against him.²⁵³ Instead, the state actually argued that it should be permitted to keep Doerhoff, reiterating its

246. Doe Deposition, *supra* note 39, at 63-64. DOC officials confirmed that they “depended on [Doerhoff] heavily.” Taylor Trial Transcript, *supra* note 25, 367-68.

247. *Taylor*, 2006 WL 1779035, at *4, *7.

248. *Id.* at *7.

249. *See id.* at *5 (citing Doe Deposition, *supra* note 39); *supra* Section I.A.

250. Defendants’ 9/11/2007 Responses to Plaintiffs’ Interrogatories, *Clemons v. Crawford*, No. 07-4129 (W.D. Mo. May 1, 2008).

251. *Id.*

252. *See Taylor v. Crawford*, No. 05-4173, slip op. at 2 (W.D. Mo. Sept. 12, 2006) (noting that Eighth Amendment standards can be met in various ways but that State’s revised protocols “fall short of those standards”).

253. *See Missouri Proposed Execution Protocol 1* (July 14, 2006) (discussing execution team members and not renouncing Doerhoff); Kohler, *supra* note 42.

full “confidence” in his “capabilities.”²⁵⁴ When the DOC finally relented months later and announced that it would comply with the court’s ruling barring Doerhoff’s participation, it made no effort to find qualified people to take his place, even though the record made clear that nobody else on the Missouri execution team knew “anything about” the procedure.²⁵⁵ It would be a perverse theory of democracy that would afford the state deference under these circumstances.

California has a similar record, only ostensibly addressing problems that have come to light.²⁵⁶ After the state failed to set an intravenous line properly during one execution, it assured the district court that it had learned its “lesson” and that that error “will never occur again.”²⁵⁷ As the court later pointed out, though, California “did not take steps sufficient to ensure that a similar or worse problem would not occur,” choosing instead to “tweak” its procedure rather than engage in substantive revisions.²⁵⁸ The result was that “the questions [about the procedure’s safety] have become even more substantial.”²⁵⁹ The California execution team’s obdurate attitudes are perhaps best summed up by one team member’s reaction after an apparently botched execution: “shit does happen, so.”²⁶⁰ And yet its “tweaks” provided the illusion of real revision, thereby helping to protect the procedure from democratic review.

Indeed, even legitimate efforts to improve the procedure were made in secrecy without democratic deliberation. Following the court’s rulings, the California DOC began erecting a new execution chamber to correct some of its procedure’s problems. (California uses its old lethal gas chamber for lethal injection, creating unique architectural difficulties, such as IV bags placed too

254. See Taylor Trial Transcript, *supra* note 25, at 353, 356, 360, 387-89 (testimony of DOC officials); Brief of Petitioner-Appellant at 45, Taylor v. Crawford, 487 F.3d 1072 (8th Cir. 2007) (No. 06-1397).

255. See Taylor v. Crawford, No. 05-4173, slip op. at 2 (W.D. Mo. Sept. 12, 2006) (barring Doerhoff); Letter from G. Anders to M. Gans, Clerk of Court, U.S. Court of Appeals for the Eighth Circuit (April 24, 2008) (discussing the State’s removal of Doerhoff without finding new personnel with medical qualifications); Doe Deposition, *supra* note 39, at 22.

Despite Judge Gaitan’s ruling barring Dr. Doerhoff from participation in Missouri executions, Doerhoff has continued to participate in federal and Arizona executions. See Michael Kiefer, *Doctor Banned from Executions in Mo. Now in Az.*, ARIZ. REPUBLIC, July 24, 2008, available at <http://www.azcentral.com/arizonarepublic/news/articles/2008/07/24/20080724deathpenaltydoco724.html>; Henry Weinstein, *Doctor Barred by State Helps in U.S. Executions*, L.A. TIMES, Nov. 16, 2007, at A17 [hereinafter Weinstein, *Doctor Barred*].

256. See *supra* Section I.A.

257. Morales v. Tilton, 465 F. Supp. 2d 972, 979 (2006).

258. *Id.* at 977-79.

259. *Id.* at 980.

260. *Id.* at 979 n.8.

high on walls for the execution team to verify whether the equipment is properly working.²⁶¹) But the DOC never informed the state legislature of these plans and expenses. When the legislature found out, it complained that it had not been informed, halting work on the new facility.²⁶² Even if the DOC deserves some commendation for seeking to build an improved facility, its decision to keep secret its plans and bypass the California legislature further demonstrates that these procedures escape the usual democratic processes. In fact, it was not even clear that the newly designed facility would cure the problems identified by the district court.²⁶³ Judge Fogel, for his part, sought to address the transparency problem by placing responsibility with Governor Schwarzenegger, who promptly insisted on reviewing the protocol in secrecy.²⁶⁴

Even when states agree to review their entire approach to executions, those efforts have often been cynical. In Tennessee, for instance, Governor Bredesen revoked apparently-problematic lethal injection protocols so that the Commissioner of Corrections could examine Tennessee's three-drug procedure. Commissioner Little appointed a Protocol Committee, which consulted with two anesthesiologists, including Dr. Mark Dershwitz, a lethal injection expert who has testified as the states' expert in several cases around the country.²⁶⁵ The Protocol Committee later presented a report summarizing the relative merits of different approaches and stressing the one-drug protocol's simplicity and reduced chance of error.²⁶⁶ Emphasizing physician unanimity on the one-drug protocol's appropriateness and the three-drug protocol's dangers, the committee recommended that Tennessee switch to the one-chemical protocol.²⁶⁷

Commissioner Little rejected this proposal "within a day or two," concluding that he did not want "Tennessee to be at the forefront of making the change

261. *Id.* at 980.

262. See Henry Weinstein, *New Execution Protocol Proposed*, L.A. TIMES, May 16, 2007, at B1.

263. See, e.g., *Testimony Before the California State Senate Public Safety Committee 5* (statement of Professor Ty Alper) (May 8, 2007) ("Despite the fact that a great deal of money has already been spent on the new construction, it is also not at all clear whether the new execution chamber even satisfies Judge Fogel's concerns about the execution facilities, because the design plans for the partially-constructed chamber have not been made public.").

264. See Denno, *Quandary*, *supra* note 28, at 122. Judge Fogel denied the Governor's efforts to keep deliberations about the protocol secret. *Id.*

265. See *Harbison v. Little*, 511 F. Supp. 2d 872, 875 (M.D. Tenn. 2007) (recounting the creation of the committee).

266. *Id.* at 876 (citing the Protocol Committee's report).

267. *Id.* at 876-78.

from the three-drug protocol to the one drug protocol.”²⁶⁸ If Tennessee’s three-drug protocol were declared unconstitutional, it could then consider making the change. Commissioner Little, an unelected state official, thus rejected the proposal of a committee that had closely studied the relative merits of the different options. In so doing, he even chose not to add a step that would monitor the inmate’s consciousness, even though the committee had stressed that the three-drug protocol would likely require such a measure.²⁶⁹

The Tennessee story is a perfect example of why courts should intervene. An unelected state official summarily vetoed the recommendations of a committee that had consulted experts and given careful thought to the matter. Moreover, he did so without consulting his own experts or offering any alternative theory of the evidence. Under such circumstances, none of the usual reasons for deferring to the political branches apply.²⁷⁰ Delegation to unelected officials is not necessarily inappropriate—legislatures delegate authority to administrative agencies all the time—but typically delegation promises some degree of agency expertise.²⁷¹ Where unelected officials lack such expertise and fail to consult experts themselves, the delegation itself becomes problematic.²⁷²

268. *Id.* at 879-80 (quoting Commissioner Little). Little initially denied that the Protocol Committee had recommended a one-drug protocol, but he ultimately admitted that it had. *Id.*

269. *Id.* at 877, 886.

270. Even given the deference afforded to the policy determinations of administrative agencies, courts will engage in a “hard look” to ensure that such decisions were based on proper considerations. *See Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (“Normally, an agency rule would be arbitrary and capricious if the agency . . . failed to consider an important aspect of the problem”); *Citizens To Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971) (holding that court must make a “searching and careful” inquiry to ensure that an agency “decision was based on a consideration of the relevant factors”).

271. *See, e.g., Hampton v. Mow Sun Wong*, 426 U.S. 88, 115 (1976) (stating that an administrative agency “has an obligation to perform its responsibilities with some degree of expertise”); STEPHEN G. BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* 61 (1993) (explaining that expertise is a virtue of bureaucracy and that agencies therefore typically should “understand th[e] subject matter at least well enough to communicate with substantive experts, to identify the better experts, and to determine which insights of the underlying discipline can be transformed into workable administrative practices”); Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399, 419-21 (2007) (explaining the central role of agency expertise in defining the deferential judicial role in administrative law).

272. *See Baze v. Rees*, 128 S. Ct. 1520, 1545 (2008) (Stevens, J., concurring) (arguing that DOC officials do not deserve deference when they lack expertise and fail to seek expert assistance).

Even when states are ordered to reform flawed procedures, they sometimes adopt half-measures that purport to fix real problems but in fact do no such thing and, thus, compound the lack of transparency. As noted above, one trial court found that North Carolina needed to revise its protocol to provide an anesthesiologist to monitor the inmate.²⁷³ The state responded by buying a BIS monitor.²⁷⁴ The state's action created the impression that it was addressing the problem, but anesthesiologists agree that BIS monitors should only be used in conjunction with, not instead of, other methods.²⁷⁵ Indeed, the BIS monitor is only useful if it is interpreted by a medical professional with training in anesthesia, which North Carolina did not employ.²⁷⁶ By purchasing a BIS monitor, then, North Carolina only appeared to address the trial court's concern that the inmate may be insufficiently anesthetized. As Professor Denno argues, its objective was to approve a new protocol quickly as opposed to addressing the old procedure's real problems.²⁷⁷ Yet, the illusion was convincing enough that the Fourth Circuit, without comment, let the execution proceed.²⁷⁸ Moreover, this illusion furthered the political process failure by creating the false impression that the state was carefully adjusting its procedure to mitigate dangers coming to light.

Even a state's use of pancuronium to paralyze inmates contributes to the political process failure, as it creates the appearance of serenity, even where there is a torturous death.²⁷⁹ As a result, legislators and other state officials are far less likely to recognize problems that need to be corrected. Similarly, witnesses at executions usually report that the inmate died serenely.²⁸⁰ Pan-

273. See *Brown v. Beck*, No. 5:06-CT-3018, 2006 WL 3914717, at *8 (E.D.N.C. Apr. 7, 2006).

274. See *supra* notes 163-164 and accompanying text.

275. See Third Affidavit of Dr. Heath at 4, *Brown v. Beck*, No. 5:06-CT-3018 (E.D.N.C. Apr. 7, 2006) [hereinafter Third Heath Affidavit] ("It is virtually universally accepted and understood by all anesthesiologists that the BIS monitor and other brain function monitors cannot be used as the sole method for assessing anesthetic depth."); Robert Steinbrook, *New Technology, Old Dilemma—Monitoring EEG Activity During Executions*, 354 *NEW ENG. J. MED.* 2525, 2526 (2006).

276. Third Heath Affidavit, *supra* note 275, at 3.

277. Denno, *Quandary*, *supra* note 28, at 119.

278. See *Brown v. Beck*, 445 F.3d 752, 752 (4th Cir. 2006). Such half-hearted reforms are hardly limited to the States discussed in the text. See, e.g., Denno, *Quandary*, *supra* note 28, at 101 ("Florida's nonexistent turnaround time in creating a revised protocol implicates the State's lack of care and consideration of its execution process."); *id.* at 100 (explaining that Ohio did not adopt changes it promised following a botched execution).

279. See, e.g., Beyea, *supra* note 22, at 603; Koniaris et al., *supra* note 22, at 1414.

280. See, e.g., Adam Buckman, *Ted Koppel Saw a Man Executed and Thought . . . How Humane, How Painless, How Easy, How Simple . . . It Should Be Shown on TV*, N.Y. POST, June 10, 2001, at 113 ("[W]hen it was over, I was shocked and horrified that

curonium thus creates a false impression about the procedure's safety that is difficult to dispel. The resulting misconceptions make it less likely that a state legislature or even DOC would bother revising the procedure; why would government officials fix something that few people perceive is broken?²⁸¹

From this perspective, pancuronium not only protects this particular method of lethal injection from attack but also helps preserve the death penalty itself. The general public pays little attention to lethal injection procedures, in part because they usually appear uneventful. One might surmise that if the procedure did not appear peaceful—if all inmates were to convulse and gasp as Diaz did—public support for the death penalty might suffer.²⁸² As with certain kinds of speech restrictions, judicial intervention here could be viewed more as correcting political process failures rather than substantive meddling.²⁸³ Were the pancuronium to minimize the risk of pain or even hasten death, its inclusion in the protocol might be justifiable, but it does not.²⁸⁴ As Justice Stevens argued, states' asserted interest in "preserving the dignity of the procedure" is "woefully inadequate" and "vastly outweighed by the risk that the inmate is actually experiencing excruciating pain that no one can detect."²⁸⁵

it had been so clinical and so smooth and so easy and that I was less affected by it than I feared I would be."); Dara Kam, *Victim's Parents Watch Killer Die*, PALM BEACH POST, July 2, 2008, at 1-A (describing an inmate "slip[] away tranquilly"); Brian Witte, *Triple Murderer in Maryland Executed After Supreme Court Rejects Last-Ditch Appeals*, ASSOCIATED PRESS WIRE, June 18, 2004 ("Witnesses described the procedure . . . as peaceful and uneventful.").

281. Misconceptions about the safety's procedure also need to be overcome by plaintiffs litigating these claims. Even the most fair-minded judges are skeptical that a seemingly peaceful death is potentially torturous. See Fogel, *supra* note 154, at 736 (recounting by the judge that, when he first was assigned a lethal injection case, his immediate reaction was "extremely skeptical").
282. Of course, it is impossible to say precisely how public attitudes towards the death penalty would change, but grotesque convulsions probably would affect at least some people's views.
283. Cf. STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 3-16 (2006) (proposing that the judicial role is to interpret the Constitution to further "active liberty" and to intervene most readily during political process failures); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 111 (1980) ("Where the evil the state is seeking to avert is one that is thought to arise from the particular dangers of the message being conveyed . . . the hazards of political distortion and judicial acquiescence are at their peak.").
284. See, e.g., *Baze v. Rees*, 128 S. Ct. 1520, 1543 (2008) (Stevens, J., concurring) (citing the *Baze* trial court).
285. *Id.* at 1544 (Stevens, J., concurring). In other words, the "dignity of the procedure" should not constitute a "legitimate penological justification," see *id.* at 1532 (plurality opinion), for refusing to adopt an alternative method in the face of documented advantages over the status quo.

Given experts' general agreement that the three-drug protocol as implemented in many states poses unnecessary risks of pain, the question must be asked why states cling so stubbornly to the status quo.²⁸⁶ It is impossible to answer this question with certainty, but I can speculate. Perhaps some state officials do not like being told what to do, and their reflexive impulse is to litigate rather than reform. Perhaps some want death row inmates to suffer a painful death and even believe there is a democratic mandate for that position.²⁸⁷ More likely, perhaps officials fear that if they change their procedure, inmates will simply challenge the new method, resulting in endless rounds of litigation.²⁸⁸ Along similar lines, in some states, officials may fear that a changed procedure would require time-consuming legislative revision.²⁸⁹ Another possibility is that state officials, like most people, do not like giving too much thought to killing people. Some executioners, in fact, have admitted that their role in executions has taken a significant psychological toll.²⁹⁰

Whatever the reasons, some states have failed to engage carefully with the complicated procedure they put in place. This failure, of course, creates the risk that condemned inmates will die an excruciating death, but it also raises serious concerns about how government behaves when it acts outside public view. The collective abrogation of responsibility—elected officials' utter inattention to the protocol's design; the delegation to unelected, unqualified personnel; the lack of transparency and related preference for illusory fixes over real revisions; the refusal to seek expert advice—amounts to a serious political process failure meriting judicial attention. As Justice Stevens argued in his *Baze* concurrence, “[i]n the majority of States that use the three-drug protocol, the drugs were selected by unelected Department of Correction officials with no specialized medical

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286. See *Harbison v. Little*, 511 F. Supp. 2d 872, 876 (M.D. Tenn. 2007) (noting that the State's expert, Dershwitz, recommended the one-drug protocol); Deposition of Dr. Mark Dershwitz at 52-53, 277-79, *Jackson v. Danberg*, 06-300 (D. Del. Sept. 10, 2007) (reporting from the State's expert that a one-drug protocol would impose less risk on the condemned than a three-drug protocol); *infra* Subsection IV.A.1. Dr. Dershwitz's opinions in favor of the one-drug protocol are especially significant because he has testified consistently as the States' expert.
287. See, e.g., Robert Blecker, *But Did They Listen? The New Jersey Death Penalty Commission's Exercise in Abolitionism: A Reply*, 5 RUTGERS J.L. & PUB. POL'Y 9, 25 (2007) (arguing that the retributive justification for the death penalty “inflicts justified pain upon a person who earlier inflicted unjustified pain”).
288. *But see supra* notes 194-197 and accompanying text.
289. For instance, in some states, the use of a paralytic in combination with a barbiturate is prescribed by statute, so a change in procedure would require legislative action. See, e.g., ARK. CODE ANN. § 5-4-617 (2009); MISS. CODE ANN. § 99-19-51 (2008); OKLA. STAT. ANN. tit. 22, § 1014 (West 2008).
290. See, e.g., *Morales v. Tilton*, 465 F. Supp. 2d 972, 979 (N.D. Cal. 2006) (noting that one execution team member was diagnosed and disabled with post-traumatic stress disorder and found his experience on the execution team to be “the most stressful responsibility a prison employee ever could have”).

knowledge and without the benefit of expert assistance or guidance. As such, their drug selections are not entitled to the kind of deference afforded legislative decisions.”²⁹¹ Quite simply, the states’ practices do not deserve judicial deference where, as here, “they are the product of ‘administrative convenience’ and a ‘stereotyped reaction’ to an issue, rather than a careful analysis of relevant considerations favoring or disfavoring a conclusion.”²⁹²

Despite all these problems, courts both explicitly and implicitly treat these procedures as the province of the political branches and immune from judicial meddling. This approach is misguided, because some states consistently have proven unwilling and unable to engage with the details of their own procedures. As Professor Chayes explained, although public law litigation can be intrusive in that it commands affirmative action of political officers, it ordinarily merely adjusts the manner in which policy is carried forward. In this regard, its target is generally administrative rather than legislative, focusing on areas where usual political processes have failed.²⁹³ Such failure, Chayes observes, is more likely where the victims are prisoners or inmates of mental institutions, literally disenfranchised persons with no access to normal legislative processes.²⁹⁴ Death row inmates, whatever one thinks of them, have no access “to the levers of power in the system”²⁹⁵ and yet bear the entire burden of the political process failures that have resulted in a broken process.

Indeed, death row inmates’ lack of political power helps explain the political process failure here. In part because inmates lack power, states have designed their procedures with primary attention to other interests, such as execu-

291. *Baze v. Rees*, 128 S. Ct. 1520, 1545 (2008) (Stevens, J., concurring).

292. *Id.*

293. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1315 (1976).

294. *Id.*; see also *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938) (suggesting that laws burdening “discrete and insular minorities” require a higher level of judicial scrutiny); Fiss, *supra* note 198, at 6 (discussing *Carolene Products* footnote 4 and arguing that judicial involvement is particularly appropriate when there is legislative failure such as the victimization of a discrete and insular minority).

295. Chayes, *supra* note 293, at 1315; see also Erwin Chemerinsky, *The Constitution in Authoritarian Institutions*, 32 SUFFOLK U. L. REV. 441, 459 (1999) (“Those in the military, in prisons, and in schools are classic discrete and insular minorities, who have little political power.”); Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; Or, Why Don’t Legislatures Give a Damn About the Rights of the Accused?*, 44 SYRACUSE L. REV. 1079 (1993) (offering a public choice critique of why legislatures fail to attend to the rights of those in the criminal justice system); James E. Robertson, *Psychological Injury and the Prison Litigation Reform Act: A “Not Exactly,” Equal Protection Analysis*, 37 HARV. J. ON LEGIS. 105, 157 (2000) (arguing that prisoners as a class should be treated as a “discrete and insular minority”).

tioner anonymity and the witnesses' experience.²⁹⁶ These are legitimate interests, but, unlike the inmate's interest in a painless execution, they are not constitutional interests. Of course, courts often consider non-constitutional interests in striking the proper balance for a constitutional rule,²⁹⁷ but where the right-holder (in this case, the condemned) lacks access "to the levers of power" and where the state practice threatening the constitutional right is the result of serious political process failures, courts should not automatically defer to non-constitutional interests over constitutional ones. Excessive judicial deference is even more troubling here, because modest revisions could yield much safer protocols.²⁹⁸ In other words, where the right-holder seeks changes that would place a minor burden on the state and yet yield significant protection to the constitutional right, non-constitutional interests should not trump constitutional ones absent extraordinary circumstances not present here.

Given many lethal injection states' failings, there is a lack of an effective alternative to judicial intervention.²⁹⁹ Writing about *Taylor v. Crawford*, Judge Gaitan explained that he knew he would need to intervene when he realized that the state, contrary to his initial assumptions, had taken no reasonable measures in designing the procedure.³⁰⁰ Interrelated institutional concerns such as federalism, separation of powers, and judicial competence are certainly important and legitimate, but not when judges invoke them to avoid confronting constitutional problems that will otherwise be ignored because the state actors have abdicated their responsibilities, concealed the details of the relevant policy, and applied that policy to a population lacking political power.³⁰¹ Again, in the normal operation of divided government, norms of judicial restraint serve as crucial checks on judicial power, but, when taken too far, they inhibit judges from redressing violations of constitutional norms even when the political

296. See *supra* text accompanying note 62.

297. See *supra* note 116 and accompanying text.

298. See *infra* Part IV.

299. See Jeffries & Rutherglen, *supra* note 217, at 1422 (arguing that constitutional remedies are most justified by the "absence of effective alternatives").

300. Judge Gaitan explained he had assumed "first, that the state of Missouri had a written execution protocol; second, that it had been subjected to due diligence before implementation; third, that this protocol was approved by either the legislative and/or executive (Department of Corrections) branches of the Missouri government; and fourth, that trained medical personnel implemented it properly and consistently. None of these assumptions proved to be true." Gaitan, *supra* note 115, at 765.

301. See, e.g., Lawrence G. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1217-18 (1978) (arguing that federal courts are sometimes overly concerned with institutional concerns such as federalism and separation of powers and therefore are inhibited from redressing constitutional violations). *But see* Levinson, *supra* note 117, at 924 (arguing that, under Sager's theory, all constitutional rights are under-enforced).

process cannot be trusted to do so. Of course, the political process failures recounted here do not amount to a constitutional violation, but they do belie arguments that courts should defer to the political branches in these cases.³⁰²

Finally, it is worth emphasizing that courts' deference to the political branches is particularly problematic in the Eighth Amendment context, because the Eighth Amendment's legal standard explicitly incorporates other states' practices.³⁰³ Judicial deference to the political branches in an Eighth Amendment case, then, actually encourages those political process failures to perpetuate elsewhere. Confronted with a decision about whether to revise its execution procedure, a state is likely to copy the common practice rather than to study the relative merits of the options. Consequently, courts' unwillingness to confront the shoddy legislative and administrative procedures by which lethal injection has been adopted greatly compounds the political process problem, because it becomes more likely that other states will merely mimic a procedure that, although carelessly adopted, has already received court approval.³⁰⁴

IV. THE MODESTY OF LETHAL INJECTION REMEDIES

The failed political processes of many states, then, give good reason for judicial intervention. This Part explores the related issue of why that intervention would be modest and not overly intrusive. Section A discusses particular remedies that courts could impose. In light of these available remedies, Section B argues that courts' general reluctance to reach the remedial stage in lethal injection actions is misplaced, because these remedies are modest and respectful of the states. Judicial deference is, therefore, inappropriate—not just because of

302. See Fletcher, *supra* note 202, at 694 (“The only legitimate basis for a federal judge to take over the political function in devising or choosing a remedy in an institutional suit is the demonstrated unwillingness or incapacity of the political body.”).

303. See *Baze v. Rees*, 128 S. Ct. 1520, 1532 (2008) (noting “that it is difficult to regard a practice as ‘objectively intolerable’ when it is in fact widely tolerated”).

304. One could argue that the prevalence of a given procedure should instead cut in favor of additional judicial deference, especially given the Eighth Amendment's incorporation of common practices. See *id.* But even if headcounting retains an important place in Eighth Amendment jurisprudence, it should not substitute for review of a method's safety. To allow a mere headcount of states to confirm the constitutionality of a painful practice would effectively deny plaintiffs the benefit of new evidence, suggesting that methods once thought safe are now understood to cause pain. To this extent, “evolving standards of decency,” see *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (citation omitted), must include more than the day's most common practice. Compare *Roper v. Simmons*, 543 U.S. 551, 563 (2005) (“[T]he Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.” (quoting *Atkins v. Virginia*, 536 U.S. 304, 312 (2002))), with *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989) (“The clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.”).

the aforementioned political process failures, but also because of the relative modesty of the potential remedies.

A. Remedial Options

Should a court find that a lethal injection procedure runs afoul of the Eighth Amendment, it would have a substantial number of remedial possibilities from which to choose. For the judge in this position, these options are, of course, worth examining. But because courts determine the scope of the right in light of potential remedies, judges should also think about the remedial options at the outset of the case. It is, therefore, worth emphasizing that the remedial alternatives discussed here would not require wholesale revisions of existing procedures but rather modest adjustments, which would allow states to keep much of their existing processes in place.

1. Affirmative Injunctions

Affirmative injunctions order the offending government or official to take specific action to correct the violation. They are, therefore, generally seen as more intrusive than negative injunctions, which instead forbid the actor from continuing the unconstitutional practice. Whereas the negative injunction leaves it to government officials to decide how to correct the violation, affirmative injunctions dictate precise measures the officials must take.³⁰⁵

Affirmative injunctions, though, have their advantages and have been used recently by some courts finding Eighth Amendment violations.³⁰⁶ In states where officials have purported to correct flawed procedures by adopting inadequate, superficial revisions, an affirmative injunction may actually better serve the state's interest, because it provides concrete requirements and potentially expedites the creation of a constitutional procedure with which the state can resume executions.

There are two especially feasible lethal injection affirmative injunctions: (1) the one-drug protocol and (2) anesthesiologist monitoring. The one-drug protocol would replace the current three-drug procedure with a single, massive dose of a barbiturate like pentobarbital. (Experts agree that pentobarbital is a

305. See Fletcher, *supra* note 202, at 649-54 (discussing affirmative and negative injunctions).

306. Though affirmative injunctions have been historically disfavored, the distinction between negative and affirmative injunctions has less practical importance today, given courts' willingness to grant affirmative decrees where some injunctive relief is warranted. *Id.* at 649-50; see also Sabel & Simon, *supra* note 225, at 1067-73 (describing new "experimentalist tendency" in courts' approach to public law remedies). Additionally, to the extent that *Baze* requires the plaintiff to proffer an alternative, see *Baze*, 128 S. Ct. at 1532, the plurality contemplates that a court finding a violation could affirmatively order that that alternative be implemented.

better suited barbiturate for lethal injection than thiopental.³⁰⁷) The major advantage of a one-drug procedure is that it would eliminate the possibility of excruciating pain.³⁰⁸ Whereas the barbiturate in the three-drug procedure theoretically anesthetizes the inmate so that he will not suffer pain from the other drugs, in a one-drug protocol, the barbiturate is the only drug. Even if something goes wrong, the inmate will not experience pain, because barbiturates do not cause pain. Of course, even a one-drug procedure would need to be properly administered, but the procedure would be much easier to administer and the consequences of maladministration far less severe. In short, the one-drug procedure significantly reduces both the chance of error and the pain suffered in the event of error without requiring many other changes from the state.

Some courts have already recognized the one-drug protocol's advantages. The district court in *Morales* offered it as one of two possible remedies from which California could choose.³⁰⁹ In *Harbison*, the trial court faulted Tennessee for not taking more seriously its own committee's recommendation of a one-drug procedure.³¹⁰ And, most recently, an Ohio state court found that Ohio's three-drug procedure failed to comply with the state's statutory requirement that lethal injection be completed "quickly and painlessly" and ordered that the state's "protocol employ the use . . . of a single, anesthetic drug."³¹¹

A switch to the one-drug procedure would also not unduly burden states. States would have to make minor adjustments to accommodate the one-drug approach, but in so doing, they would greatly simplify executions. Such a

307. See, e.g., *Hankins v. Quarterman*, No. 4:04-cv-875-Y, 2007 WL 959040, at *20 (N.D. Tex. 2007) (citing expert testimony that a long-acting pentobarbital is the preferred barbiturate in veterinary euthanasia); *Morales v. Tilton*, 465 F. Supp. 2d 972, 983 (N.D. Cal. 2006) (citing pentobarbital as the preferable drug for the one-drug protocol); Amy L. Mottor, Note, *Morales and Taylor: The Future of Lethal Injection*, 6 APPALACHIAN J.L. 287, 307 (2007) (discussing the advantages of pentobarbital); Susi Vassallo, *Thiopental in Lethal Injection*, 35 FORDHAM URB. L.J. 957, 960-67 (2008) (discussing the disadvantages of thiopental).

308. See, e.g., *Harbison v. Little*, 511 F. Supp. 2d 872, 879 n.4 (M.D. Tenn. 2007) ("No medical testimony supports the proposition that the one-drug protocol causes any suffering . . ."); *Morales II*, 465 F. Supp. 2d at 983 ("[R]emoval of [pancurium 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."); Dershwitz & Henthorn, *supra* note 19, at 956 (anesthesiologists arguing that a large dose of barbiturate poses "no risk whatsoever" of pain).

309. See *Morales v. Hickman*, 415 F. Supp. 2d 1037, 1047 (N.D. Cal. 2006) (giving the State the option of using "only sodium thiopental or another barbiturate or combination of barbiturates in Plaintiff's execution").

310. See *Harbison*, 511 F. Supp. 2d at 896; see also *supra* notes 265-269 and accompanying text.

311. *Ohio v. Rivera*, No. 04-65940, slip op. at 9 (Lorain County Ct. June 10, 2008).

change would result in a safer, more easily administered procedure that would probably require less training and practice. Moreover, most states would not need to change their execution facilities or basic drug delivery systems.³¹²

Notwithstanding these obvious advantages, *Baze* does somewhat complicate the matter. Although no Justice questioned the central point that the one-drug procedure is painless, some justices did raise concerns about it. Justice Alito pointed to one commentator suggesting that it is difficult to kill someone using a barbiturate and that a small percentage of such attempts resulted in “problems with completion.”³¹³ Three separate opinions also noted that a muscle relaxant or paralytic is often used for lawfully assisted euthanasia in the Netherlands, thereby suggesting that the inclusion of pancuronium was defensible and possibly even desirable.³¹⁴

These concerns do not foreclose the one-drug procedure so much as indicate that trial court factual findings would be needed before it could be judicially imposed. Given that the *Baze* record contained minimal evidence about the relative merits of the one-drug approach,³¹⁵ the Justices’ comments on it were dicta. Moreover, Justice Alito’s concern that a single barbiturate had failed to kill a tiny percentage of euthanasia patients in the Netherlands is scant reason to reject this alternative.³¹⁶ When euthanasia patients fail to die from the administration of a single barbiturate, it is because the drug has been improperly administered; properly administered, a large enough dose of a barbiturate will be fatal.³¹⁷ In effect, Justice Alito is merely pointing out that a one-drug protocol could be improperly administered. He fails to explain, however, that the three-drug protocol can also be maladministered and with far graver consequences. He also fails to point out that by removing the second and third drugs, the state would be simplifying the procedure and minimizing the risk of problems of any sort. Similarly, he does not note that the largest thiopental dose used in the Netherlands is often only two grams, and that it is therefore not surprising that

312. By way of contrast, even though carbon monoxide poisoning would probably be another painless alternative, *see* Gaitan, *supra* note 115, in most states it likely would require a new airtight facility and therefore probably would be more intrusive and expensive.

313. *Baze v. Rees*, 128 S. Ct. 1520, 1541 (2008) (Alito, J., concurring).

314. *Id.* at 1535 (plurality opinion); *id.* at 1541 (Alito, J., concurring); *id.* at 1566 (Breyer, J., concurring).

315. *See id.* at 1534 (explaining that one-drug protocol was not proposed to state courts below).

316. *See id.* at 1541 (Alito, J., concurring) (noting that 5 out of 535 patients woke up).

317. *See, e.g., Harbison*, 511 F. Supp. 2d at 879 n.4 (“No medical testimony supports the proposition that the one-drug protocol causes any suffering or that it prolongs the pronouncement of death.”); *Morales v. Tilton*, 465 F. Supp. 2d 972, 983 (N.D. Cal. 2006) (noting that execution by anesthetic like pentobarbital need only ensure that the inmate “actually receives a fatal dose”).

such use was not always lethal.³¹⁸ Finally, Justice Alito also fails to explain that were an inmate to survive an initial dose of a barbiturate, the contingency plan would simply be to administer another dose.³¹⁹ The possibility that a painless drug would need to be re-administered in a small fraction of cases is hardly a sound reason not to use that method to replace an approach that creates a real risk of excruciating pain.

The Justices' discussion of the one-drug procedure also glosses over some important distinctions. In particular, the comparison to euthanasia in the Netherlands is inapposite, because it is a different kind of procedure from lethal injection. Crucially, doctors take part in euthanasia in the Netherlands.³²⁰ It is, therefore, far more likely in the Netherlands that any pain masked by the pancuronium would be detected.³²¹ By way of contrast, laypersons frequently administer American lethal injection procedures, and they are incapable of making such detections. Moreover, even where doctors are present during executions, they usually watch from an adjacent room and would not be able to detect pain from that distance. Additionally, Dutch euthanasia does not include the use of potassium chloride, which is the three-drug protocol's painful chemical. The use of pancuronium in the Netherlands, therefore, poses far less danger of masking excruciating pain.

Of course, for a court to impose a one-drug protocol as a remedy, significant evidence of that procedure's advantages and disadvantages would need to be developed at trial, and it is possible that problems will become more apparent. But assuming that current experts' preference for the one-drug protocol continues to appear well-founded, this alternative offers courts an affirmative injunction that greatly reduces the risk of pain and simultaneously makes the state's job easier.

318. Dershwitz & Henthorn, *supra* note 19, at 954.

319. *Cf. Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 464 (1947) (holding that it is not cruel and unusual punishment to attempt to execute a person after the first execution attempt failed); Alper, *supra* note 29, at 836 (explaining the second-dose contingency plan in animal euthanasia).

320. See Agnes van der Heide et al., *End-of-Life Practices in the Netherlands Under the Euthanasia Act*, 356 NEW ENG. J. MED. 1957, 1958 (2007) ("In the Netherlands, euthanasia is defined as death resulting from medication that is administered by a physician with the explicit intention of hastening death at the explicit request of the patient."). Assisted suicide, in which patients self-administer fatal drugs prescribed by a physician, also exists in the Netherlands but is far less common. *Id.* at 1958-61.

321. Justice Alito also neglects to mention that the same expert he cites to argue that American doctors lack experience killing people with an overdose of a barbiturate states in the same article that the use of a paralytic like pancuronium is "completely inappropriate" in executions. *Compare Baze*, 128 S. Ct. at 1541 (Alito, J., concurring) (discussing views of Dr. Truog), with Gawande et al., *supra* note 25, at 448 (Dr. Truog discussing, *inter alia*, dangers of pancuronium in lethal injection).

Courts could also order an anesthesiologist to monitor the inmate's anesthetic depth. This monitoring was what Judge Gaitan initially ordered in Missouri and one of the two options Judge Fogel presented to California.³²² The major advantage of this remedy is that in one step it protects the inmate from other errors that might occur.³²³ We know that the three-drug protocol is painless if the inmate is properly anesthetized but excruciating if he is not. Various problems discussed above can result in insufficient anesthesia. But if an anesthesiologist monitors the inmate's anesthetic depth, then any such problem can be detected and corrected before the pancuronium and potassium chloride are injected. The requirement that an anesthesiologist monitor anesthetic depth, therefore, obviates the need for more intrusive instructions regarding the various steps of the procedure.

There are, however, some complications. Due to medical ethics, it may not be easy for some states to find an anesthesiologist or nurse anesthetist willing to play such a substantial role in execution procedures.³²⁴ In fact, the American Medical Association (AMA), the Society of Correctional Physicians, and the American Nurses Association have all adopted statements that doctors or nurses should not participate in executions.³²⁵ The sentiments reflected by these associations, unsurprisingly, make it difficult for states to find willing anesthesiologists. California ran into this problem when the two anesthesiologists who had agreed to participate in the Morales execution balked after discovering the significant role they had been assigned.³²⁶ Along similar lines, following Judge Gaitan's ruling, Missouri insisted (just days after sending out cold-call letters to some Missouri anesthesiologists) that it "is unable to comply with the Court's

322. See *Morales v. Hickman*, 415 F. Supp. 2d 1037, 1047-48 (N.D. Cal. 2006); *Taylor v. Crawford*, No. 05-4173, 2006 WL 1779035, at *8-9 (W.D. Mo. June 26, 2006), *certifying questions to* 457 F.3d 902 (8th Cir. 2006), *rev'd*, 487 F. 3d 1072 (8th Cir. 2007), *cert. denied*, 128 S. Ct. 2047 (2008).

323. This advantage assumes that the anesthesiologist is competent and actually monitors the inmate's anesthetic depth, and that he would delay the administration of the second and third chemicals if the inmate were insufficiently anesthetized by the thiopental.

324. Most experts agree that a nurse anesthetist would possess the training necessary to monitor the inmate's anesthetic depth. See, e.g., Heath Declaration at 15, *Walker v. Epps*, No. 07-176 (N.D. Miss. Oct. 22, 2007) (anesthesiologist explaining that anesthesia can be administered by anesthesiologists and Certified Registered Nurse Anesthetists). For ease of presentation, this Article refers to them collectively as "anesthesiologists."

325. GAWANDE, *supra* note 52, at 136; see, e.g., COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS, AM. MED. ASS'N, CODE OF MED. ETHICS: CURRENT OPINIONS WITH ANNOTATIONS § 2.06 (2005) [hereinafter AMA CODE OF MED. ETHICS].

326. *Morales v. Tilton*, 465 F. Supp. 2d 972, 976 (N.D. Cal. 2006).

direction to obtain and use a board certified anesthesiologist in its execution process.”³²⁷

While the restraint imposed by medical ethics is a substantial concern, it is not an insurmountable one. Although many doctors will not take part in executions, such ethics rules are typically not legally binding.³²⁸ Doctors, therefore, can depart from certain ethical guidelines without risking their licenses or other disciplinary measures.³²⁹ As the AMA Council on Ethical and Judicial Affairs itself puts it, “ethical obligations typically exceed legal duties. In some cases, the law mandates unethical conduct.”³³⁰

From the AMA’s perspective, capital punishment law does mandate unethical conduct. Notwithstanding ethical concerns, many states want a medical presence during executions. Thirty-five of the thirty-eight death penalty states allow physician participation in executions, seventeen require it, and only two (Kentucky and Illinois) explicitly forbid it.³³¹ To protect participating physicians from license challenges for violating ethics codes, states usually promise anonymity and provide legal immunity for such challenges.³³² In fact, in at least one state with a law permitting physician participation in executions, the state medical board upheld against a challenge the license of a physician known to have participated in executions precisely because state law permitted that participation.³³³ Similarly, in North Carolina, a state court ruled that the North Carolina Medical Board cannot punish physicians for participating in execu-

327. Defendants’ 7/14/2006 Submission at 4, *Taylor* (No. 05-4173).

328. See, e.g., AMA CODE OF MED. ETHICS, *supra* note 325, at xv (“The following Principles adopted by the American Medical Association are not laws, but standards of conduct which define the essentials of honorable behavior for the physician.”).

329. See, e.g., GAWANDE, *supra* note 52, at 132. Moreover, while the former president of the American Society of Anesthesiologists advised anesthesiologists to “steer clear” of executions, his words are, by his own account, advice only and lack any binding effect. See Dr. Orin F. Guidry, President, American Society of Anesthesiologists, Observations Regarding Lethal Injection (June 30, 2006), <http://www.asahq.org/news/asanews063006.htm>.

330. AMA CODE OF MED. ETHICS, *supra* note 325, § 1.02.

331. GAWANDE, *supra* note 52, at 151; see also Neil Farber et al., *Physicians’ Attitudes About Involvement in Lethal Injection for Capital Punishment*, 160 ARCHIVES OF INTERNAL MED. 2912, 2913 (2000) (noting that states involve physicians in various ways such as providing technical advice, ordering drugs, supervising drug administration, and pronouncing death); Christopher J. Levy, *Conflict of Duty: Capital Punishment Regulations and AMA Medical Ethics*, 26 J. LEGAL MED. 261, 264 (2005).

332. GAWANDE, *supra* note 52, at 136. Although the identities of some doctors like Dorerhoff are sometimes discovered anyway, see Kohler, *supra* note 42, no doctor has yet lost a license for participation in an execution, see GAWANDE, *supra* note 52, at 137.

333. See GAWANDE, *supra* note 52, at 142.

tions.³³⁴ This ruling makes sense. Even if state statutory law incorporates medical ethics' rules regarding "professional conduct,"³³⁵ a more specific statutory provision allowing physician participation in executions must trump more general ethical rules.³³⁶

Indeed, many doctors do not see medical ethics as a bar to their involvement in executions. Studies demonstrate that 25% of physicians would personally perform five or more steps of a lethal injection procedure, and 19% would be willing to administer the lethal drugs themselves.³³⁷ One anesthesiologist stated at a panel of the American Society of Anesthesiologists that he considered it an ethical duty to assist with lethal injection because prisoners "are suffering

334. See N.C. Dep't of Corr. v. N.C. Med. Board, No. 07-3574, slip op. at 4-5 (N.C. Super. Ct. Div. Sept. 21, 2007) (holding that the medical board improperly sought to discipline a doctor for conduct "specifically authorized and required by law").

335. Many state codes vaguely prohibit doctors' "unprofessional conduct." See, e.g., ALA. CODE § 34-24-360(2) (2007) (stipulating that credential to practice in health care may be revoked for "unprofessional conduct"); ARK. CODE ANN. § 17-95-409 (2007) (same); DEL. CODE ANN. tit. 24 § 1731 (2008) (same); NEB. REV. STAT. § 38-178(23) (2005) (same).

336. See, e.g., *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 738-39 (1989) (Scalia, J., concurring) (citing "rudimentary" principle of statutory construction that "the specific governs the general"); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 663 (1990) (describing Scalia's argument in *Jett* as mainstream statutory interpretation).

It is also possible that a doctor's national certifying board, such as the American Board of Anesthesiology (ABA), could seek to suspend certification for a doctor who participated in executions. Whereas state licensing is required for a doctor to practice medicine in a particular state, board certification is a voluntary process and is awarded to doctors by a national board in an individual specialty. See American Board of Medical Specialties, *Board Certification Editorial Background* 4-5 (Sept. 4, 2007), available at http://www.abms.org/news_and_events/media_newsroom/pdf/abms_editorialbackground.pdf. However, not all hospitals require board certification for anesthesiologists wishing to practice at that institution, OUTCOME ASSESSMENT IN ADVANCED PRACTICE NURSING 246 (Ruth M. Kleinpell, ed. 2001). Additionally, because the ABA's disciplinary procedures commence with a referral from a state medical board, see THE AMERICAN BOARD OF ANESTHESIOLOGY, INC., BOOKLET OF INFORMATION §§ 5.02, 5.06 (2008), available at <http://www.theaba.org/pdf/BOI-2008.pdf>, cases like *North Carolina Medical Board* make it unlikely that the ABA would sanction a doctor whom the State medical board has not already disciplined. It is therefore doubtful that the hypothetical threat of suspended certification would make it much more difficult for a state to find an anesthesiologist to participate.

337. Neil J. Farber et al., *Physicians' Willingness To Participate in the Process of Lethal Injection for Capital Punishment*, 135(10) ANNALS INTERN MED. 884, 884-88 (2001); see also Denno, *Paradox*, *supra* note 28, at 115 (explaining that physicians do participate in executions).

and I have the ability to help them.”³³⁸ Nurses appear even more willing to participate.³³⁹ One state nursing board even permitted a nurse in that state to participate in executions so long as he did not actually push the plunger delivering the drugs.³⁴⁰

It is, therefore, unsurprising that Missouri recently belied its earlier representations that it was impossible to find an anesthesiologist to take part in its lethal injection procedure and represented that it *has* found one.³⁴¹ Assuming that this anesthesiologist is competent and will in fact monitor the inmate’s anesthetic depth and intervene if necessary,³⁴² this development is significant, effectively setting a new standard of care for lethal injection. Moreover, other states could solicit this same doctor’s assistance for their own procedures.³⁴³ Of course, this remedy would not be available in Kentucky and Illinois, which forbid physician participation, but those states are in the significant minority.³⁴⁴ Where available, this remedy is simple and un-intrusive. It permits a state to keep the same procedure but for the addition of one safeguard.³⁴⁵ And, in the grand scheme of things, it also would not be terribly expensive.³⁴⁶

338. *Clinical Forum: Medicalizing Executions Places Anesthesiologists on Slippery Slope*, ASA DAILY NEWS 2006, Oct. 15, 2006, available at <http://www.asadailynews.com/Sunday.html>.

339. See, e.g., *Brown v. Beck*, 445 F.3d 752, 755 (4th Cir. 2006) (noting the participation of a nurse in North Carolina’s procedure); *Morales v. Tilton*, 465 F. Supp. 2d 972, 979 (N.D. Cal. 2006) (noting the same in California); *Evans v. Saar*, 412 F. Supp. 2d 519, 525 (D. Md. 2006) (noting the same in Maryland); *Taylor v. Crawford*, No. 05-4173, 2006 WL 1779035, at *1-3 (W.D. Mo. June 26, 2006) (noting the same in Missouri).

340. GAWANDE, *supra* note 52, at 147.

341. See Defendants’ Reply to Plaintiffs’ Memorandum in Opposition to Defendants’ Motion for Reconsideration of the Order Compelling Discovery at 3, *Clemons v. Crawford* No. 07-4129 (W.D. Mo. May 1, 2008).

342. The state’s filing announcing the development was vague on the details. See *id.*

343. It is not uncommon for personnel participating in one state’s execution procedure to join another state’s team. Dr. Doerhoff, for example, participated on the federal and Arizona lethal injection teams even after Judge Gaitan had barred his participation in Missouri. See *Kiefer*, *supra* note 255; *Weinstein*, *Doctors Barred*, *supra* note 255.

344. See, e.g., 725 ILL. COMP. STAT. 5/119-5(d-5) (West 2008) (“The Department of Corrections shall not request, require, or allow a health care practitioner licensed in Illinois, including but not limited to physicians and nurses, regardless of employment, to participate in an execution.”); KY. REV. STAT. ANN. § 431.220(3) (West 2008).

345. Of course, states with multiple, serious problems with their procedures should correct them, but the addition of an anesthesiologist would not require as close judicial scrutiny of each of those steps.

346. See *infra* notes 368-373 and accompanying text.

While there is much to be said in favor of this alternative, *Baze* again presents an obstacle. Even though ethical guidelines typically lack binding authority, the *Baze* plurality and Justice Alito's concurrence effectively treated them as mandatory.³⁴⁷ The justices overstated the case. First, *Baze* considered the protocol in Kentucky, one of only two states that have barred physician participation. Its comments on this topic, then, should be considered dictum in the thirty-five jurisdictions that permit physician involvement. Second, while the majority of the medical establishment does oppose physician involvement in executions, some doctors obviously are willing to participate.³⁴⁸ Third, as *North Carolina Medical Board* demonstrates, medical associations' ethical opinions cannot trump contrary state law, and states, with court assistance, also shield their execution team members' identities from the public.³⁴⁹ In short, an anesthesiologist's participation is a feasible remedy that would cure most of the three-drug protocol's dangers with little intrusion into the state's affairs.³⁵⁰

2. Negative Injunctions

Even if there are good reasons to impose an affirmative injunction, courts are often reluctant to order a state to take a specific course of action.³⁵¹ By con-

347. See *Baze v. Rees*, 128 S. Ct. 1520, 1536 (2008) (plurality opinion) (“[T]he American Society of Anesthesiologists’ own ethical guidelines prohibit anesthesiologists from participating in capital punishment.”) (internal citations omitted); see also *id.* at 1539-40 (Alito, J., concurring) (arguing that other medical associations’ guidelines prohibit or discourage participation in executions).

348. See, e.g., GAWANDE, *supra* note 52, at 150 (describing views of a doctor who knew AMA position but felt doctors have an ethical obligation to ensure condemned inmates are without pain in their dying moments); David Waisel, *Physician Participation in Capital Punishment*, 82 MAYO CLINICAL PROC. 1073 (2007).

349. See, e.g., GAWANDE, *supra* note 52, at 131 (noting that *Morales* district court agreed to help California maintain anesthesiologists’ anonymity in response to ethical concerns). Whether the government should subvert the ethical principles of medical associations is, of course, another matter. See *id.* at 152 (arguing that society is worse off from such subversion); Jonathan I. Groner, *The Hippocratic Paradox: The Role of the Medical Profession in Capital Punishment in the United States*, 35 FORDHAM URB. L.J. 883, 905 (2008) (arguing that the “individual physician harms his or her relationships with other patients by participating in an execution”).

350. If a court were to order this remedy and the State were to demonstrate that, despite a good-faith effort, it had failed to find an anesthesiologist willing to participate, the court could always order an alternative remedy, such as a negative injunction or the one-drug protocol. Given Missouri’s experience, though, it seems likely that a state making a good-faith effort would be able to find an anesthesiologist to participate.

351. See generally Amy Sinden, *In Defense of Absolutes: Combating the Politics of Power in Environmental Law*, 90 IOWA L. REV. 1405, 1443-44 (2005) (noting law’s general preference for negative injunctions prohibiting action over affirmative injunctions

trast, a negative injunction—ordering the state to cease executions until its procedure passes constitutional muster—is usually the preferred remedy, because it can force constitutional compliance while remaining respectful of the state.³⁵² Such an order would theoretically assure the court of the constitutionally required outcome: either the state must bring its execution procedure into compliance with the Eighth Amendment or it must forgo executions. This option is the approach chosen by the district court in *Harbison*, in which the court barred Tennessee from executing the plaintiff under the existing protocol but left the door open for a future execution with a revised protocol.³⁵³

The negative injunction is an important option, particularly for judges who want to steer clear of dictating specific measures to the state. It is worth remembering, though, that the efficacy of the negative injunction is less certain in the lethal injection context, because state officials who failed to design a constitutional procedure the first time around may be unwilling or unable to do so even under court order. A negative injunction, then, might not give the state official the guidance needed to genuinely reform the state's procedure.³⁵⁴ Although officials in states with problems typically have given little care to their procedures, there is no evidence that any intentionally have designed a dangerous procedure. To the contrary, the finer points of lethal injection fall far outside their core competence, and, burdened with other responsibilities, they do not give sufficient attention to the complicated procedure. A negative injunction might spur better behavior, but it also might merely prompt superficial or inadequate changes, as in California and Tennessee.³⁵⁵ To this extent, a negative injunction should be monitored closely by courts, particularly in jurisdictions with especially poor track records.

requiring particular action); Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO. L.J. 1355, 1406-08 (1991) (summarizing the competency criticisms of broad injunctive relief in public law litigation); Tracy A. Thomas, *Understanding Prophylactic Remedies Through the Looking Glass of Bush v. Gore*, 11 WM. & MARY BILL RTS. J. 343, 380 (2002) (“Instead, [critics of structural reform injunctions] argue, federal courts are limited to issuing negative injunctions that simply prohibit conduct, [while] affirmative remedies should be the responsibility of the executive and legislative branches, which are more competent to make policy decision . . .”).

352. See Fletcher, *supra* note 202, at 649 (“The preferred form of injunction is to instruct the defendant not to do what it has been planning or to stop what it has been doing.”).

353. *Harbison v. Little*, 511 F. Supp. 2d 872, 903 (2007).

354. This attitude might seem patronizing but is realistic given some states' refusal to seek expert assistance. See *supra* Section I.A; *supra* Part III.

355. See *supra* notes 261-270.

3. Administrative Remedies

Yet another alternative is an administrative remedy through a state's Administrative Procedure Act (APA). To receive such a remedy, a plaintiff typically must demonstrate that the procedures used to adopt the lethal injection protocol were inadequate under state administrative law.³⁵⁶ As a formal matter, this remedy is only available in certain states, though, because some states insulate their executions procedures or correctional facilities from otherwise generally applicable administrative law.³⁵⁷

Still, in those states where such claims are colorable, an administrative challenge provides an important avenue for death row inmates. It also can provide a theoretical framework for judges who recognize that the procedures are problematic but are reluctant to issue a § 1983 injunction.³⁵⁸ Admittedly, most APA actions are filed separately from § 1983 attacks,³⁵⁹ so few judges finding problems with state lethal injection protocols are in the position of selecting between an administrative remedy and an injunction. But even where courts are not formally presented with APA claims, judges can draw more generally on admin-

356. See Arnold Rochvarg, *How Administrative Law Halted the Death Penalty in Maryland*, 37 U. BALT. L.F. 119, 119, 124-25 (2007) (discussing the successful administrative law lethal injection challenge in Maryland).

357. State statutes exempting DOCs from administrative law are vague enough to allow for conflicting interpretations. See, e.g., MO. ANN. STAT. § 536.010(6)(k) (West 2009) (exempting “statement concerning only inmates of an institution under the control of the department of corrections” from the definition of a “rule”); TENN. CODE ANN. § 4-5-102(10)(G) (2009) (exempting “statements concerning inmates of a correctional facility”). But, some state courts have read these statutes to preclude APA challenges to lethal injection. See, e.g., Jackson v. Danberg, No. 07M-09-141, 2008 WL 1850585 (Del. Super. Ct. Apr. 25, 2008) (holding that Delaware's lethal injection protocol is not subject to state APA); Hightower v. Donald, No. 2007-135682, slip op. at 4 (Ga. Super. Ct. July 16, 2007) (“[T]he promulgation of these protocols regarding lethal injection by the [Georgia] Department of Corrections are not subject to the requirements of the APA”); Middleton v. Mo. Dep't of Corrections, No. SC 89571, 2009 WL 454279, at *1 (Mo. Feb. 24, 2009) (holding that an execution protocol is not a rule and is therefore not subject to the State APA); Abdur'Rahman v. Bredesen, 181 S.W.3d 292, 311 (Tenn. 2005) (interpreting Tennessee Uniform Administrative Procedure Act not to reach lethal injection).

358. See generally *Morales v. Cal. Dep't of Corr. & Rehab.*, No. 06-1436, 2008 WL 4958279, at *7 (Cal. App. Nov. 21, 2008) (declaring lethal injection procedure invalid under California administrative law); *Evans v. Maryland*, 914 A.2d 25 (Md. 2006) (declaring the same in Maryland).

359. These suits are typically filed separately because many state APA statutes require that APA suits be brought in state court, while many lethal injection challenges are brought in federal courts, which typically allow for more discovery. See, e.g., DEL. CODE ANN. tit. 29 §§ 10102, 10141 (2009); MO. ANN. STAT. § 536.110 (West 2009).

istrative law principles in reviewing and remedying those procedures. The political process failures contributing to the problem invite a judicial order requiring, at a minimum, transparent procedures, greater political accountability, and delegation to competent personnel. Since administrative failings by themselves rarely amount to a constitutional violation, a judge confronted with a § 1983 action will also have to look at the substance of the procedure. But where the evidence suggests real problems, administrative considerations should play a role in helping the court identify a violation and craft a meaningful, workable remedy.

Courts, in fact, should be well situated to rely on administrative principles in crafting a remedy. Some judges may be more comfortable ruling on procedural rather than substantive issues involving science or medicine. Similarly, an administrative remedy—or even a § 1983 injunction suggesting improved administrative procedures—might feel less intrusive to the judge than a traditional negative or affirmative injunction addressing the execution procedure's details. Indeed, administrative law issues get to the heart of what is wrong with many states' lethal injection protocols. The protocols have been poorly conceived in secret by people who know little about the drugs and who have not sought help from experts. These are not admirable administrative processes, and, one would hope, improved governmental decision making would yield safer protocols.³⁶⁰

B. Remedial Modesty and the Case Against Judicial Deference

This discussion should make clear that workable remedies are more modest and readily available than courts assume. For many judges, however, fashioning a remedy is a significant obstacle.³⁶¹ Courts' reluctance to engage with lethal injection remedies fall into three general categories of objections: concerns about intruding excessively on the political branches,³⁶² interrelated concerns about

360. See, e.g., Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 9-10 (1959) (arguing that an attention to process is the best guarantor that courts will decide cases based on “neutral principles” and reach good results). But see Jenny S. Martinez, *Process and Substance in the “War on Terror,”* 108 COLUM. L. REV. 1013, 1025 (2008) (arguing that too devoted an attachment to legal processes “often obscures value judgments about the underlying substantive policies”).

361. See *supra* Section II.A.

362. See, e.g., *Baze v. Rees*, 128 S. Ct. 1520, 1531 (2008) (plurality opinion) (warning that imposing a remedy “would substantially intrude on the role of state legislatures in implementing their execution procedures”); *Morales v. Hickman*, 415 F. Supp. 2d 1037, 1047 (N.D. Cal. 2006) (“[U]nder the doctrines of comity and separation of powers, the particulars of California’s lethal-injection protocol are and should remain the province of the State’s executive branch.”); *Lightbourne v. McCollum*, 969 So. 2d 326, 351 (Fla. 2007) (stating that the judicial “role is not to micromanage the executive branch in fulfilling its own duties relating to executions”).

the judiciary's own institutional capacity,³⁶³ and concerns about relying on street-level subordinates to carry out a judgment. These sources of remedial concerns are legitimate and common in public law litigation, but they should carry less weight in lethal injection cases than many other contexts.

1. Concerns About Intruding on the Political Branches

To the extent courts' refusal to reach the remedial stage suggests a discomfort with intruding on the political branches, they have not been sensitive to reasons why judicial intervention in lethal injection actions is more modest than judicially ordered relief in many other settings. By treating remedial concerns as high hurdles in these cases, courts implicitly exaggerate the extent to which a remedy would interfere with the internal operations of state institutions. For instance, contrary to some courts' deferential assumptions,³⁶⁴ intrusion into lethal injection procedures would not interfere in more than a marginal way with day-to-day prison operations. Changes to the execution procedure certainly would not affect security.³⁶⁵ Lethal injection is a discrete procedure involving only a few prison employees and one inmate at a time. It takes place in specially designated rooms removed from the rest of the prison population. Prison safety, then, would not be impacted by changing the drugs, or by requiring that a member of the execution team have particular medical training. Most members of the prison staff, in fact, have nothing to do with execution procedures.

Relatedly, a lethal injection injunction would not divert significant amounts of money from other government programs or even from within the prison. A negative injunction requiring only that the state cease executions until it has improved its procedure would allow the state to determine the most cost effective way to remedy its procedure. Even an affirmative injunction would

363. See, e.g., *Baze*, 128 S. Ct. at 1531 (warning against “embroil[ing] the courts in ongoing scientific controversies beyond their expertise”); *Emmett v. Johnson*, 511 F. Supp. 2d 634, 639 (E.D. Va. 2007), *aff'd*, 532 F.3d 291 (4th Cir. 2008) (“[I]t is not the office of a federal court to dictate to the Commonwealth of Virginia the precise methodology it should employ in carrying out a lawful death sentence . . .”).

364. See *Cal. First Amendment Coal. v. Calderon*, 150 F.3d 976, 982-83 (9th Cir. 1998) (preparing to defer to state officials on security concerns involving viewing the lethal injection procedure absent substantial evidence that a prison regulation was an exaggerated response by prison officials); *Abdur'Rahman v. Bredesen*, 181 S.W.3d 292, 312 (Tenn. 2005) (noting deference owed to prison officials in a lethal injection case to enable them to manage their “tremendous responsibilities”); *cf. Shaw v. Murphy*, 532 U.S. 223, 229 (2001) (articulating a “unitary, deferential standard for reviewing prisoners’ constitutional claims”).

365. See *Cal. First Amendment Coal. v. Woodford*, 299 F.3d 868, 879-84 (9th Cir. 2002) (holding that a prison regulation barring public viewing of lethal injection execution procedures prior to actual administration of lethal injection was an exaggerated, unreasonable policy to protect safety and institutional security).

likely impose only modest cost. For example, a switch to a one-drug protocol would not noticeably change the cost of lethal injection, as none of the drugs used or contemplated are expensive.³⁶⁶ If anything, switching to a one-drug protocol would make things easier for the states, which would only have to buy one drug instead of three and would no longer have to worry about refrigerating the pancuronium.³⁶⁷

Even the inclusion of an anesthesiologist would not impose excessive costs on the state, especially when compared to costs imposed by structural injunctions. For example, in *Missouri v. Jenkins*, the total cost for the educational programs ordered by the district court as part of its effort to desegregate Kansas City schools exceeded \$220 million.³⁶⁸ In *Pennhurst v. Halderman*, the Court noted that the plaintiffs' interpretation of the relevant statute would impose "massive" financial obligations on the states.³⁶⁹ By contrast, Missouri's Dr. Dorerhoff was paid only \$2,000 per execution,³⁷⁰ and Georgia's execution team's total compensation (including doctors and other personnel) was \$18,000.³⁷¹ No state executes enough people for this cost to amount to a sizable annual sum; even in a state like Texas, which executes more people than any other state,³⁷² these costs would be a small fraction of what the death penalty already costs.³⁷³

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366. See, e.g., GAWANDE, *supra* note 52, at 134 (explaining that drugs used in lethal injection are "cheap and routinely available"); *About Implementing Human Euthanasia in NM Animal Shelters*, <http://www.nmanimalcontrol.com/euthanasia/HEPP/FAQ.html> (last visited Mar. 9, 2008) (noting that average cost of pentobarbital to euthanize an animal would be \$1.27); Phyllis Coleman, *Man's Best Friend Does Not Live by Bread Alone: Imposing a Duty To Provide Veterinary Care*, 12 ANIMAL L. 7, 16, n.65 (2005) (discussing the low cost of pentobarbital).
367. See *Harbison v. Little*, 511 F. Supp. 2d 872, 876-77 (M.D. Tenn. 2007) (noting that the refrigeration of pancuronium is a "con" for retaining the three-drug protocol).
368. *Missouri v. Jenkins*, 515 U.S. 70, 76 (1995). *Jenkins* is admittedly a controversial case, but it provides a striking example of a remedy that asks a good deal of state and local government.
369. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).
370. See Kohler, *supra* note 42.
371. GAWANDE, *supra* note 52, at 151.
372. See Adam Liptak, *At 60% of Total, Texas Is Bucking Execution Trend*, N.Y. TIMES, Dec. 26, 2007, at A1 (noting that executions have declined recently in states other than Texas and that, in 2007, Texas executed twenty-six people and no other state executed more than three).
373. Some scholars and state groups have tried to calculate the cost of the death penalty. Illinois State Comptroller statistics, for example, show capital cases costing an average of \$13.5 million per year, expenses "significantly disproportionate to the cost of processing homicide cases in which state's attorney does not certify the case for the death penalty." Thomas P. Sullivan, *Efforts To Improve the Illinois Capital Punishment System: Worth the Cost?*, 41 U. RICH. L. REV. 935, 964-65

In short, lethal injection is not a very polycentric problem, so an injunction would be unlikely to have far-reaching public consequences.

2. Concerns About the Judiciary's Shortcomings

Courts' reluctance to reach the remedial stage also stems from their related sense of the judiciary's own institutional shortcomings. This concern too carries less weight in lethal injection than other contexts, especially in light of states' own failures to engage with their procedures. In other areas, such as prison condition cases, prison officials can convincingly argue that they understand security concerns far better than judges, and that judicial deference is therefore warranted.³⁷⁴ By way of contrast, many state officials do not understand the lethal injection procedure they administer and have not given the matter sufficient attention. Under such circumstances, government does not deserve the deference it enjoys when it has a genuine expertise over a subject matter.

By contrast, even though most judges also lack training in the relevant science, they will review extensive evidence on the issue. Doing so makes them better equipped to understand the dangers and potential remedies than most legislators or unelected, unqualified DOC officials.³⁷⁵ Even taking the judiciary's

(2007). A New Jersey Policy Perspectives report estimated that the death penalty since 1982 had cost the State \$253 million more than life sentences without parole would have. See MARY E. FORSBERG, N.J. POLICY PERSPECTIVES, MONEY FOR NOTHING? THE FINANCIAL COST OF NEW JERSEY'S DEATH PENALTY 18 (2005), available at <http://www.njadp.org/forms/cost/MoneyforNothingNoveber18.html>; see also *Furman v. Georgia*, 408 U.S. 238, 358 (1972) (Marshall, J., concurring) ("When all is said and done, there can be no doubt that it costs more to execute a man than to keep him in prison for life."); Philip J. Cook & Donna B. Slawson, *The Costs of Processing Murder Cases in North Carolina* 78 (1993), available at <http://fds.duke.edu/db?attachment-34-1667-view-301> ("The extra cost per execution of prosecuting a case capitally is more than \$2.16 million."); Glenn L. Pierce & Michael L. Radelet, *The Role and Consequences of the Death Penalty in American Politics*, 18 N.Y.U. REV. L. & SOC. CHANGE 711, 719 (1991) ("Each death sentence [in Florida] is estimated to cost approximately \$3.18 million, compared to a cost of life imprisonment (forty years) of approximately \$516,000."); John Roman et al., *The Cost of the Death Penalty in Maryland* (2008), available at http://www.urban.org/UploadedPDF/411625_md_death_penalty.pdf (stating that Maryland spends on average \$1.9 million more on capital cases resulting in the death penalty); Rone Tempest, *Death Row Often Means a Long Life: California Condemns Many Murderers, but Few Are Ever Executed*, L.A. TIMES, Mar. 6, 2005, at B1 (stating that the death penalty costs California \$114 million a year above what it would cost to keep the same convicts incarcerated).

374. See *supra* note 200.

375. Cf. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 597 (1993) (holding that the trial judge's role as a "gatekeep[er]" of expert testimony is to ensure that the claimed basis for scientific testimony is valid); *Youngberg v. Romeo*, 457 U.S. 307, 323 & n.30 (1982) (holding that an institution would be liable if a decision about an

institutional limitations into account, then, many judges are probably more likely to engage with the science of the issue than legislators, who are driven by political considerations and are more likely to delegate the procedure to agency officials.³⁷⁶ Indeed, even if legislatures designed the procedures themselves, there would be little reason to defer to their scientific judgment. As one commentator argues:

[O]ne of the chief reasons for allowing legislatures to make findings of fact in disputed areas—that they are democratic, representative bodies—seems to have no applicability where issues of pure medical fact are concerned. Unlike those cases in which so-called social facts are involved, there is (or perhaps should be) no significant political element to the determination of medical fact. This is a fact-finding domain in which the interest in public participation and legislatures' relative institutional competency are at their lowest.³⁷⁷

Finally, it should be re-emphasized that the remedies contemplated in these cases are usually narrow. They do not require massive reforms from the state; they do not cost much; and they do not undermine the death penalty itself. Lethal injection plaintiffs can win a safer procedure, but they cannot escape execution—at least not through this litigation. In light of states' problems with their own procedures, courts are comparatively well situated to deal with these issues.

3. Concerns About Relying on Street-Level Bureaucrats

Another potential judicial concern may stem from the perceived hopelessness of relying on street-level bureaucrats to carry out a judicial decree, particularly in the prison setting. Street-level bureaucrats are generally regarded as low-level employees, such as prison guards, but, as Professor Lipsky famously observed, they often make the decisions that “add up to agency policy.”³⁷⁸ Some commentators have emphasized the difficulties of achieving social and structural changes, including prison reform, through street-level bureaucrats.³⁷⁹

involuntarily committed ward's care was not “made by persons with degrees in medicine or nursing, or with appropriate training”).

376. See Neal Devins, *Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis*, 50 DUKE L.J. 1169, 1182-87 (2001) (noting that the truth-discovering value of legislative fact-finding is often undercut by a variety of political pressures); B. Jessie Hill, *The Constitutional Right To Make Medical Treatment Decisions: A Tale of Two Doctrines*, 86 TEX. L. REV. 277, 337, 333-41 (2007) (stating that there is “little reason to believe that legislatures possess—or exercise—superior institutional competency in the context of medical and scientific fact”).

377. Hill, *supra* note 376, at 339.

378. MICHAEL LIPSKY, *STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES* 3 (1980).

379. See Seth F. Kreimer, *Exploring the Dark Matter of Judicial Review: A Constitutional Census of the 1990s*, 5 WM. & MARY BILL RTS. J. 427, 506-07 (1997) (“In all bu-

However, because lethal injection teams usually consist of only a few people with defined roles, a judicial order would more likely be followed. In something like the school desegregation context, or capital punishment more generally, moral responsibility is so diffuse that most involved are unlikely to see themselves closely connected to the violation.³⁸⁰ But where a small team of people, each with defined tasks, is putting a person to death, a court order is arguably more likely to create a culture of accountability and impact the personnel involved.³⁸¹

Indeed, if anything, the central role played by low-level execution team members renders the need for judicial involvement more pressing and appropriate. Street-level bureaucrats are less politically accountable than upper-level managers, so countermajoritarian concerns weigh less heavily than when courts controvert official agency policies.³⁸² Additionally, and most importantly, given the proper mandate, higher-level DOC officials might do a better job ensuring street-level compliance if they knew that the court would not permit executions without cooperation and if a failure to comply might attract bad publicity.³⁸³

reaucracies, the bureaucracy's mission tends to dwarf competing values" so that conversations among bureaucrats are "not likely to be the locus of transformative constitutional dialogue."); Susan Sturm, *Resolving the Remedial Dilemma: Strategies of Judicial Intervention in Prisons*, 138 U. PA. L. REV. 805, 816-20 (1990) (arguing that for prison guards, "[a]ll other institutional goals (such as service delivery, rehabilitation, and even punishment) are subordinated to and furthered by the pursuit of order"). See generally LIPSKY, *supra* note 378, at 3 (identifying problems with street-level bureaucracy).

380. Social psychologists have long studied the diffusion of responsibility and related concepts like the bystander effect. See Earl F. Martin, *Tessie Hutchinson and the American System of Capital Punishment*, 59 MD. L. REV. 553, 562 (2000) ("[T]hrough the interplay in capital cases between jurors, trial judges, and appellate judges gives the appearance of a system that squarely faces the gravity of its task, the diffusion of responsibility between these actors enables them, and us, to avoid having to experience fully the monumental decision to kill another human being."); Stanley Milgram, *Behavioral Study of Obedience*, 67 J. ABNORMAL & SOC. PSYCH. 371 (1963) (suggesting that individuals minimize their own moral agency to the degree they believe they are simply following instructions).
381. Cf. Bibb Latané et al., *Many Hands Make Light Work: The Causes and Consequences of Social Loafing*, 37 J. PERSONALITY & SOCIAL PSYCH., 822, 823 (1979) (arguing that, in bigger teams, individuals' efforts and feelings of responsibility dwindle).
382. Kreimer, *supra* note 379, at 506-08. But see Roger A. Hanson, *Contending Perspective on Federal Court Efforts To Reform State Institutions*, 59 U. COLO. L. REV. 289, 303, 317-18 (1988) (suggesting that courts' inability to control street-level bureaucrats undermines the efficacy of institutional reform and hence judicial legitimacy).
383. As Professor Ely has explained, on hard issues most elected representatives "shrewdly prefer not to have to stand up and be counted but rather to let some executive-branch bureaucrat . . . 'take the inevitable political heat.'" ELY, *supra*

CONCLUSION

Several remedial options are available to fix lethal injection procedures without intruding excessively on the states. And yet, despite the significant risk of pain resulting from many states' lack of transparency, care, and deliberation, most courts have assumed that any remedy would be onerous and have declined to find a violation. This restraint is excessive. It considers only the dangers of judicial meddling, not the dangers of judicial abdication.

The institutions in control of lethal injection have proven inattentive, incompetent, and nonetheless resistant to change, and courts are institutionally well situated to remedy the problem. Indeed, in such circumstances, courts are often the *only* institution that can secure necessary change. Professors Denno and Berman are correct in calling upon the political branches to re-examine their procedures,³⁸⁴ and, ideally, states will respond to these challenges. Unfortunately, though, some states have chosen to retain the status quo unless forced to do otherwise.³⁸⁵ Such obduracy and lack of transparency create an "immunity to political correction"³⁸⁶ necessitating judicial intervention.³⁸⁷

Courts should also take into account the extent to which a remedy may have far-reaching consequences. When an injunction would affect many spheres of public life and prove very disruptive to non-parties, courts should be

note 283, at 132 (quoting Lloyd N. Cutler & David R. Johnson, *Regulation and the Political Process*, 84 YALE L.J. 1395, 1400 (1975)). But when courts find fault with governmental policies, thereby drawing the media's attention, elected officials are more likely to get involved to address the problem. See, e.g., Press Release, Office of the Governor, Governor Schwarzenegger Issues Statement on Lethal Injection Protocol (May 15, 2007), <http://gov.ca.gov/index.php?/press-release/6237/> (Governor responding publicly to court-identified deficiencies in the lethal injection protocol).

384. See Douglas A. Berman, *Finding Bickel Gold in a Hill of Beans*, 2006 CATO SUP. CT. REV. 311, 330-31 (noting disappointment at legislative inaction since *Hill*); Denno, *Quandary*, *supra* note 28, at 117-23.

385. See *supra* Part III.

386. Sabel & Simon, *supra* note 225, at 1064.

387. See *Lewis v. Casey*, 518 U.S. 343, 414 (1996) (Stevens, J., dissenting) (arguing that the more uncooperative the government is in correcting constitutional violations, the more necessary judicial intervention is); Fletcher, *supra* note 202, at 637 (concluding that the presumption of illegitimacy for structural injunctions is overcome "when the political bodies that should ordinarily exercise such discretion are seriously and chronically in default" and that in such cases "judicial discretion may be a necessary and therefore legitimate substitute for political discretion"); Jeffries & Rutherglen, *supra* note 217, at 1389 (arguing that structural reform injunctions should be "presumptively available when it provides the only effective remedy for constitutional violations"); Mishkin, *supra* note 213, at 949-51 (arguing that institutional decrees are justified when there is a clear constitutional violation and they are the only available remedy).

especially wary. But not all public lawsuits involve such polycentric problems. Accordingly, when a remedy is narrow and creates few subsidiary problems, it should not be treated like an invasive institutional injunction. These distinctions are especially important when courts' misperceptions color not just the scope of remedial discretion but also the content of the constitutional right itself.

Many courts to date have mistakenly assumed that a lethal injection remedy would be overly invasive, but is well within their equitable powers to do a better job considering these issues.³⁸⁸ Indeed, our system reserves an important role for courts to oversee the other branches.³⁸⁹ Admittedly, it will not always be easy to gauge the state's good faith (or lack thereof) or the degree to which a problem is polycentric. States in lethal injection cases, for instance, cite even minor reforms as evidence of good faith³⁹⁰ and, similarly, are likely to cry foul whenever a court imposes any remedy.³⁹¹ Nevertheless, although these factors will not always be easily administered, it is important that they factor into judges' deliberations. Given the extent to which remedial concerns color judges' attitudes towards the merits, courts' initial survey of the remedial issues should appreciate the multi-faceted nuances that favor and disfavor judicial intervention. Increased recognition of these issues is, admittedly, only a small step towards correcting the misperceptions that have plagued much lethal injection litigation, but such a step could help courts guard against a reactionary assump-

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388. See, e.g., *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 193 (1978) (“[S]ince all or almost all equitable remedies are discretionary, the balancing of equities and hardships is appropriate in almost any case as a guide to the chancellor’s discretion.”) (internal quotation marks omitted); *Lemon v. Kurtzman*, 411 U.S. 192, 200 (1973) (“In shaping equity decrees, the trial court is vested with broad discretionary power . . .”); *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 15 (1971) (“Once a right and a violation have been shown, the scope of a district court’s equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies . . .”).
389. See, e.g., *THE FEDERALIST* No. 48, at 256-57 (James Madison) (George W. Carey & James McClellan ed., 2001) (arguing that unless these branches of government “be so far connected and blended, as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained . . .” and that, if left unchecked, the legislature will extend “the sphere of its activity, and draw[] all power into its impetuous vortex”); Scott D. Gerber, *The Court, The Constitution, and the History of Ideas*, 61 *VAND. L. REV.* 1067, 1082 (2008) (citing *Federalist* No. 48 to argue that judicial review imposes an important check on the political branches that is necessary in a system of separation of powers).
390. Cf. *Jones v. McAndrew*, 996 F. Supp. 1439, 1450-51 (N.D. Fla. 1998) (holding that defendants’ good faith efforts to revise the electric chair protocol following botched execution demonstrated lack of deliberate indifference).
391. See, e.g., Defendants’ 7/14/2006 Submission of Proposed Protocol at 11, *Taylor v. Crawford*, No. 05-4173, 2006 WL 1779035 (W.D. Mo. June 26, 2006) (arguing that the court’s remedy is “much broader than necessary”).

tion that any action requesting a public law injunction necessarily would require something intrusive and far-reaching.

Additionally, attention to these issues can help judges clarify when and why they should engage in self-restraint. Judicial restraint is an important constitutional value that quite appropriately arises at various stages of a case. When courts appeal to these values, however, they often do so as if restraint applies identically when determining the right and when issuing a remedy.³⁹² But judicial restraint seems less appropriate when a court with jurisdiction hears evidence suggesting a constitutional violation. In such circumstances, excessive restraint can cause the judge to turn a blind eye to a serious infringement of rights. By way of contrast, at least in the lethal injection context, restraint may be more appropriate when a court has found a violation and is choosing between various remedies, some more intrusive than others.³⁹³ As lethal injection challenges continue to work their way through the judiciary, courts should therefore carefully consider the remedial questions at the outset of the case. It might be unrealistic to expect all courts to dramatically change their approaches to these cases, but self-awareness can yield substantial reforms.

392. See *supra* Section II.A.

393. See Jeffries & Rutherglen, *supra* note 217, at 1411 (discussing courts' imposition of narrower injunctions in part due to judicial restraint concerns); Sabel & Simon, *supra* note 225, at 1019, 1038 (discussing recent developments in constitutional remedies, including departures from command-and-control regime). In different contexts, commentators have argued that courts should be less deferential when formulating a remedy, because, at the remedy stage, it should focus on the harm suffered by the victims. See, e.g., Wendy Parker, *The Supreme Court and Public Law Remedies: A Tale of Two Kansas Cities*, 50 HASTINGS L.J. 475, 552 (1999) ("Deference to the wrongdoer elevates the defendants' interests to an explicit part of the remedial calculus, rather than keeping the remedy focused on redressing the rights of the victims."); Poser, *supra* note 109, at 324-25 ("[A]lthough the Court continues to insist that the scope of the right determines the scope of the remedy, the separation of the two has resulted in a desegregation jurisprudence which is currently rooted in the purported limitations on equity rather than the opportunity of equitable remedies to correct rights violations.").