

## ESSAY

### “THERE MUST BE A MEANS”—THE BACKWARD JURISPRUDENCE OF *BAZE V. REES*

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The Supreme Court’s plurality opinion in *Baze v. Rees* begins with a seemingly simple assertion of constitutional law.<sup>1</sup> “We begin with the principle, settled by *Gregg*, that capital punishment is constitutional.”<sup>2</sup> It continues, “[i]t necessarily follows that there must be a means of carrying it out.”<sup>3</sup> This second pronouncement provides the foundation for the Supreme Court’s holding in *Baze* that Kentucky’s refusal to modify its lethal injection procedure does not violate the Eighth Amendment. However, in taking the position that the constitutionality of an existing method of capital punishment is dependent on the availability of alternative execution procedures, the Supreme Court has turned Eighth Amendment jurisprudence on its head, establishing a dangerous loophole that could imperil our most important constitutional protections. This essay highlights the error in the Court’s reasoning in *Baze* and considers the potentially troubling consequences of applying this reasoning to other areas of constitutional law.

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In *Baze v. Rees*, two death row prisoners brought an Eighth Amendment challenge to Kentucky’s lethal injection protocol.<sup>4</sup> The protocol in question required that a team of individuals, each having at least one year’s experience as a medical assistant, phlebotomist, or paramedic, intravenously administer a series a three drugs that lead

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1 553 U.S. 35 (2008) (citing *Gregg v. Georgia*, 428 U.S. 153, 177 (1976)).

2 *Id.* at 47.

3 *Id.* (emphasis added).

4 *Id.* at 40.

to the prisoner's death.<sup>5</sup> The Kentucky protocol prohibited physician involvement in the procedure, except as necessary to certify the cause of death or, in the case of a last-minute stay of execution, to revive the prisoner.<sup>6</sup> The *Baze* petitioners argued that because the members of the team administering the lethal drugs had limited qualifications and training, the protocol posed an "unnecessary risk" of pain and suffering in violation of the Eighth Amendment.<sup>7</sup> The petitioners also identified alternative procedures (involving licensed physicians and a different series of drugs) that Kentucky could adopt to lessen this risk.

The Supreme Court rejected the petitioners' proposed "unnecessary risk" standard. Instead, it held that an execution method does not violate the Eighth Amendment's prohibition on cruel and unusual punishment unless it presents a "substantial" or "objectively intolerable" risk of serious harm.<sup>8</sup> The Court also responded directly to petitioners' claim that Kentucky erred by failing to adopt safer execution procedures.<sup>9</sup> A petitioner "cannot successfully challenge a [s]tate's method of execution," wrote the Court, "merely by showing a slightly or marginally safer alternative."<sup>10</sup> Rather, to demonstrate that a state's refusal to modify its execution procedure violates the Eighth Amendment, the Court held that a petitioner must identify an alternative procedure that is "feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain."<sup>11</sup> With respect to the alternative procedures proposed by the petitioners in *Baze*, the plurality noted that petitioners were unable to show that these procedures actually reduce a substantial risk of pain<sup>12</sup> and, moreover, that at least one of the proposed alternatives was not feasible.<sup>13</sup>

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5 The first drug, sodium thiopental (Pentothal), is a short-acting barbiturate. The second drug, pancuronium bromide (Pavulon), is a paralytic agent. The third drug, potassium chloride, stops the heart. *Id.* at 44–45.

6 *Id.* at 46.

7 *Id.* at 47.

8 *Id.* at 50–51.

9 One of the questions presented in *Baze* was: "Do the means for carrying out an execution cause an unnecessary risk of pain and suffering in violation of the Eighth Amendment upon a showing that readily available alternatives that pose less risk of pain and suffering could be used?" Brief for Petitioners at i, *Baze v. Rees*, 553 U.S. 35 (2008), (No. 07-5439).

10 *Baze*, 553 at 51.

11 *Id.* at 52. The petitioners must also demonstrate that the state has no "legitimate penological justification" for its refusal to adopt the alternative. *Id.*

12 *Id.* at 57–59 (noting that the additional procedures requested by petitioners have not been scientifically proven to reduce the risk of pain).

13 "The asserted need for a professional anesthesiologist to interpret the BIS monitor readings is nothing more than an argument against the entire procedure, given that both

In so holding, the Court answered two questions—first, what the appropriate standard of risk is in Eighth Amendment cases challenging the method of capital punishment; and second, what effect, if any, the availability of alternative procedures may have. However, in presenting its discussion of the “availability of alternatives” as a core part of its holding, the Court not only muddied the theoretical waters, but in fact took a position on this issue that seems fundamentally incorrect.

If we begin with the premise, established in *Baze*, that an execution method is constitutional unless it presents a “substantial risk of serious harm,” then it is difficult to see why the availability of alternative execution procedures would be relevant, let alone dispositive. That is, if a state’s execution procedure does not pose a substantial risk of serious harm (as the Court found to be the case with the Kentucky protocol), then it does not violate the Eighth Amendment, regardless of any available alternatives.<sup>14</sup> If, on the other hand, an execution procedure by its very nature poses a “substantial risk of serious harm,” then presumably it is unconstitutional, at least as a *prima facie* matter. In this case, as well, the availability of alternative procedures would not seem to affect the substantive constitutional analysis—the existence of a safer alternative might strengthen the finding of unconstitutionality, but the lack of a safer alternative would not render an unconstitutional method permissible. Or would it? The position seemingly taken by the Supreme Court in *Baze* suggests that perhaps it would.

In a case in which a state is using a substantially risky execution procedure but evidence fails to identify a safer alternative, a court has two options. It can find the procedure unconstitutional as a definitional matter based on the substantial risk standard (in which case the availability of alternatives is irrelevant); this seems to be the logical solution. Or, potentially, the court could *uphold* the admittedly risky procedure on the grounds that there is no better alternative. If we are to take seriously the Supreme Court’s holding in *Baze* about the constitutional implications of alternative execution procedures—

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Kentucky law and the American Society of Anesthesiologists’ own ethical guidelines prohibit anesthesiologists from participating in capital punishment.” *Id.* at 59–60 (internal citations omitted); *see also id.* at 64–65 (Alito, J., concurring) (citing a policy statement by the American Medical Association’s Council on Ethical and Judicial Affairs, which states that “[a] physician, as a member of a profession dedicated to preserving life when there is hope of doing so, should not be a participant in a legally authorized execution” (alteration in original) (internal citations omitted) (internal quotation marks omitted))).

14 In such a case, the availability of better alternatives would not impact the constitutional analysis because there is no “substantial risk” to be lessened.

that is, if it is to carry any substantive weight—then we cannot help but conclude that the availability of alternatives would make a difference in at least some cases. In other words, while the availability of alternatives would never make unconstitutional a constitutional execution procedure, a lack of feasible alternatives might save a facially prohibited procedure. This result, I argue, is one that we cannot accept.

What do we really mean when we talk about the constitutionality of capital punishment? *Gregg v. Georgia*, cited in *Baze*, held that “the infliction of death as a punishment for murder is not without justification and thus is not unconstitutionally severe.”<sup>15</sup> In so holding, however, the Supreme Court answered in the negative only the broad question of whether a death sentence is a penalty that is inherently disproportionate to the crime of murder (as compared to other possible penalties, such as life imprisonment or hard labor). It did not, however, speak to the specific methods by which the death penalty may be permissibly imposed, except to say that “the punishment must not involve the unnecessary and wanton infliction of pain.”<sup>16</sup> Indeed, the bulk of the Supreme Court’s death penalty jurisprudence in the past century and a half has focused on the question of proportionality, rather than methodology.<sup>17</sup> Only three times in its history has the Court considered the constitutionality of a particular method of capital punishment; each time, the Court has upheld the method at issue, finding that it does not constitute cruel and unusual punishment.<sup>18</sup> The Court had never used the constitutionality of capital punishment under a proportionality analysis as a general matter to defend a particular method of execution. In *Baze*, however, the Court took this position quite explicitly, finding that because capital punishment is constitutional as a matter of principle under *Gregg*, “[i]t necessarily follows that there must be a means of carrying it out” in a constitu-

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<sup>15</sup> 428 U.S. 153, 187 (1976).

<sup>16</sup> *Id.* at 173. Indeed, the Court in *Gregg* expressly distinguished its decision about proportionality from prior Supreme Court decisions about methodology. *Id.* at 170–71.

<sup>17</sup> See Katie Roth Heilman, Comment, *Contemplating “Cruel and Unusual”: A Critical Analysis of Baze v. Rees in the Context of the Supreme Court’s Eighth Amendment “Proportionality” Jurisprudence*, 58 AM. U. L. REV. 633, 640–43 (2009) (discussing post-*Gregg* challenges to the constitutionality of the death penalty as focused on the issue of “disproportionate punishment”).

<sup>18</sup> See *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 464 (1947) (holding that, where a first attempt at execution by electrocution was unsuccessful as a result of an “unforeseeable accident,” a second attempt would not violate the Eighth Amendment); *In re Kemmler*, 136 U.S. 436, 448 (1890) (refusing to reexamine the New York court’s holding in favor of a statute authorizing execution by electrocution); *Wilkerson v. Utah*, 99 U.S. 130, 130 (1878) (upholding the constitutionality of execution by firing squad).

tional manner.<sup>19</sup> This conclusion is also supported by the Court's holding regarding alternative execution procedures, which suggests that the availability of alternatives may be relevant to the constitutional analysis of an existing procedure.

The problem with this reasoning should be clear: Using the constitutional permissibility of a death sentence as a theoretical matter to uphold a specific method of capital punishment defies the notion of constitutional protection. Constitutional protections exist to protect citizens in precisely those situations where the state would seek to override them on the grounds of utility, yet the Supreme Court in *Baze* seems to do just that. Consider the following hypothetical: Imagine that all legal executions in America took place in a mysterious "black box" that has fallen from space, marked only with a sign reading, "Death Apparatus for Condemned Prisoners." The prisoner enters the black box, the door locks behind him automatically, and, after some specified period of time, the door opens, revealing the deceased prisoner. There is no noise, there are no marks on the prisoner, and autopsy technology is not advanced enough to determine the cause of death. Neither the warden nor onlookers have any idea what happens in the box, except that it inevitably results in the prisoner's death. As a matter of definition, therefore, it is simply impossible to know what the prisoner is experiencing in the box, whether he is suffering any pain, and whether more traditional methods of execution (hanging, firing squad, lethal gas) might be less painful. According to *Baze*, the black box method of execution would be constitutionally permissible because no plaintiff would be able to demonstrate that it entails a substantial risk of severe pain.

Imagine, now, that technology has advanced such that scientists are able to determine exactly what takes place in the "Death Apparatus for Condemned Prisoners." It turns out that the black box houses an alien life form that releases a biological agent affecting human nerve cells. A prisoner who enters an enclosed container with this life form experiences excruciating nerve pain for six hours, akin to the feeling of being burned alive. After that time, the nerves, brain, and spinal cord simply shut down, and the prisoner dies. Imagine, furthermore, that for some reason or another, there exist no alternative methods of execution—in this world, guns have been banned; prison officials are not permitted to hold any weapons, even for legitimate penal purposes; and humans have developed natural defenses to the lethal gas and deadly drugs once used for executions. If the

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19 *Baze v. Rees*, 553 U.S. 35, 47 (2008).

Supreme Court's holding in *Baze* is to be taken seriously, then the black box execution method, no matter how agonizing, would be constitutionally permitted on the grounds that there exist no feasible, readily implemented, and less painful alternatives.

Readers may question the legitimacy of this hypothetical, and I admit that it is somewhat fanciful. That said, the most vehement critics of lethal injection technology might view the black box scenario as an apt analogy, given that the second drug in the standard three-drug protocol is a paralytic that effectively masks any outward evidence of what the prisoner might be experiencing.<sup>20</sup> Furthermore, the paucity of scientific and medical research in this area makes it difficult to know whether and to what extent a prisoner might suffer if the drugs are improperly administered (which is not an uncommon occurrence).<sup>21</sup> Moreover, one could argue that, due to limitations imposed by the Constitution and by principles of medical and research ethics, there are few, reasonable alternatives to the current three-drug protocol.<sup>22</sup> In other words, while we currently have a basic sense of what happens during an execution by lethal injection, our knowledge is necessarily limited in much the same way as in the black box scenario.

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I argue that an execution procedure that poses a substantial risk of severe pain cannot be bootstrapped into constitutional permissibility by reference to the constitutionality of capital punishment as a general matter and the lack of identified alternative procedures. In such cases, the appropriate solution is to reject the existing method of capital punishment and work harder to identify alternative methods that do not pose a risk of severe pain—not to maintain the existing procedure out of necessity.

This distinction between constitutionality of a practice in theory and its implementation in fact is an essential part of our constitutional jurisprudence. To draw just one comparison, the Supreme Court

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<sup>20</sup> See generally Mark Heath, *The Medicalization of Execution: Lethal Injection in the United States*, in PUBLIC HEALTH BEHIND BARS: FROM PRISONS TO COMMUNITIES 92, 92–93 (Robert Greifinger ed., 2007) (discussing the masking effects of pancuronium bromide and the physical pain that prisoners may feel when they undergo lethal injection).

<sup>21</sup> See Nadia N. Sawicki, *Doctors, Discipline, and the Death Penalty: Professional Implications of Safe Harbor Policies*, 27 YALE L. & POL'Y REV. 107, 158–159 n.245 (2008) (citing evidence of administration errors dating back to the first execution by lethal injection in 1982).

<sup>22</sup> See *Baze*, 553 U.S. at 57–59 (describing the inadequacy of additional procedures proposed by petitioners).

held in *Brown v. Board of Education (Brown I)* that segregated educational facilities violated the Equal Protection Clause of the Fourteenth Amendment.<sup>23</sup> After *Brown I*, some states were unwilling or unable to transition to an inclusive system of public education, leading the Court to take up the issue of administration in a later opinion.<sup>24</sup> Citing the importance of the plaintiffs' personal interests in indiscriminate admission to public schools, the Court insisted that states make good faith attempts to comply with its ruling despite the "variety of obstacles," "complexities," and "local school problems" involved.<sup>25</sup> Ultimately, this required massive changes not only to the drawing of school districts, but also to the physical plants of the public schools, their transportation systems, their security systems, and even their personnel. "[I]t should go without saying," wrote the Court, "that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them."<sup>26</sup> Similarly, I argue, the vitality of the constitutional principles underlying the Eighth Amendment prohibition on cruel and unusual punishment cannot be allowed to yield simply because no clear alternatives to current execution technology have been identified.

Of course, the school segregation narrative differs somewhat from the capital punishment narrative in that the Constitution grants a positive right to equal protection of the laws, whereas the right to be free from cruel and unusual punishment is instead a negative right. Had the Constitution also granted a positive right on the part of citizenry to engage in capital punishment, then the Supreme Court's statement in *Baze* would be more defensible. If a finding that lethal injection violates the Eighth Amendment means that the state is unable to implement a (hypothetical) constitutional duty to execute its worst offenders, then perhaps it makes sense to choose to protect this right first and retain the existing lethal injection procedure.<sup>27</sup> On the

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23 *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483 (1954), *reargued on the question of relief*, 349 U.S. 294 (1955).

24 *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294 (1955).

25 *Id.* at 299–300.

26 *Id.* at 300.

27 For a similar argument, consider Ronald Dworkin's conclusion that where there is no choice but to violate one of two conflicting individual rights, it is morally permissible to violate the less important one. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 193–94 (1977). Indeed, Dworkin argues that it is actually the government's job to make such decisions when rights are in conflict, noting that "it is the job of government to discriminate." *Id.* at 193. I, however, disagree with Dworkin's conclusion that the state, when faced with the violation of two competing rights, would be morally justified in making either decision on the basis of necessity. I do not find logical necessity a sufficient moral justification in this case. Arguably, either course of action may be morally *permissible*, in

other hand, perhaps the school segregation narrative is not so different—the Federal Constitution does not establish a positive right to education; accordingly, faced with the challenge of implementing an unpopular desegregation policy, states could (barring state constitutional requirements) have simply abandoned the practice of providing public education altogether. Instead, state courts and elected officials worked against a sea of practical and political problems to implement the Supreme Court’s judgment.

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Given these implications, why, one wonders, did the Supreme Court’s ruling in *Baze* even address the availability of alternative execution procedures? The Court could have easily upheld Kentucky’s lethal injection procedure simply by establishing the “substantial risk of severe pain” standard and finding that the Kentucky protocol did not pose such a risk. The discussion of alternative procedures was neither necessary nor particularly relevant to the Court’s final decision.<sup>28</sup>

The best explanation for why the Court took this approach, I posit, is because it wanted to take advantage of the opportunity provided in *Baze* to offer states another avenue of appeal in Eighth Amendment cases. Had the Court not addressed the issue of alternative procedures in *Baze*, then the next time a litigant persuaded a lower court that his state’s execution procedure posed a substantial risk of serious harm (or, at least, a more substantial risk than that posed by the Kentucky lethal injection procedure), the state might have no choice but to amend its procedure. By establishing a second constitutional hurdle for Eighth Amendment litigants to overcome, the Court increased the likelihood that a state could wage a successful defense in such cases. In fact, the Court’s holding about alternative execution procedures may have a significant impact on trial practice in Eighth Amendment cases: State attorneys general will likely focus their efforts at trial on excluding as much evidence as possible regarding alternative procedures. Because the evidentiary hurdle for plaintiffs under the Supreme Court’s *Baze* standard is so high—they must identify an alternative procedure and demonstrate that it is not only feasible and readily implemented, but also that it substantially

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that an actor faced with two, logically inconsistent alternatives cannot be paralyzed by morality. However, neither act seems morally *justifiable* as the “morally right” thing to do.

<sup>28</sup> In this sense, the Court’s decision, from a case and controversy perspective, was much broader than necessary.



reduces the risk of pain—any uncertainties about the availability of alternatives will likely be resolved in the state’s favor.

More importantly, the Supreme Court’s holding about alternative procedures in *Baze* effectively preserves the constitutionality of capital punishment as a general practice. Had the Court not addressed this issue, then a plaintiff who successfully demonstrates that his state’s execution procedure poses a substantial risk of serious harm might also seek to overturn *Gregg* by arguing that, in fact, *none* of the available alternative procedures satisfy the substantial risk test. But by specifying in *Baze* that neither the constitutionality of a specific execution method nor the constitutionality of the practice of capital punishment in general can be called into question by noting the absence of alternative procedures, the Court was able to defuse future Eighth Amendment challenges in this vein.

As noted above, I do not believe that the Court’s decision in *Baze* was the appropriate resolution of this issue. If a state’s execution procedure is ever found unconstitutional on the ground that it poses a substantial risk of serious harm, and no alternative procedures are identified during trial, one obvious solution would be to direct the state’s department of correction to make an active effort to investigate and evaluate alternatives beyond those that may have been immediately apparent at trial.<sup>29</sup> This would conform with the way in which courts typically resolve as-applied challenges—by maintaining the validity of a practice as a whole, while invalidating one or more particular applications of that practice on constitutional grounds.<sup>30</sup>

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<sup>29</sup> As much was suggested by Justice Ginsburg in her dissenting opinion. *Baze v. Rees*, 553 U.S. 35, 123 (2008) (suggesting that the case be remanded with instructions to consider whether the risk of serious harm might be avoided if “readily available safeguards” were added to the Kentucky protocol). Lest critics object that investigating alternative execution procedures would be an exercise in futility (whether due to opposition from the medical and scientific communities or otherwise), note that execution technologies have developed dramatically in the past century and a half, advancing from hanging, to firing squad, to electrocution, to lethal gas, to, finally, lethal injection. And while there have been no advances in execution technology since the development of lethal injection technology in 1976, this seems to be the result of an unwillingness on the part of states to consider or investigate other methods, rather than a lack of available methods per se. See Sawicki, *supra* note 21, at 152 n.220 (noting that the pursuit of alternate methods of capital punishment has not been explored). For descriptions of historical attempts by state governments to evaluate various execution technologies, see N.Y. COMM’N ON CAPITAL PUNISHMENT, REPORT OF THE COMMISSION TO INVESTIGATE AND REPORT THE MOST HUMANE AND PRACTICAL METHOD OF CARRYING INTO EFFECT THE SENTENCE OF DEATH IN CAPITAL CASES (1888), and Melvin F. Wingersky, *Report of the Royal Commission on Capital Punishment (1949-1953): A Review*, 44 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 695 (1954).

<sup>30</sup> See, e.g., *Gonzales v. Carhart*, 550 U.S. 124, 167 (2007) (holding that a facial challenge to the Partial-Birth Abortion Ban Act should never have been entertained and that an as-applied challenge is the proper means by which to consider exceptions to the Act); Unit-

Though it may result in practical difficulties in implementing capital punishment, such an approach would be more defensible on theoretical grounds.

An alternative solution—particularly if attempts to identify alternative execution procedures are unsuccessful—might be to reconsider the theoretical presumption that the practice of capital punishment does not violate the Eighth Amendment. In other words, if all (or most) execution methods are found to result in a substantial risk of serious harm, then perhaps we ought to rethink the constitutionality of capital punishment as a whole. While a single as-applied challenge will not suffice to overturn an established practice, perhaps a series of successful challenges might lead a court to conclude that a practice that cannot be implemented in fact should be deemed unconstitutional in theory.

At this point, I do not stake a claim to one or the other of these approaches. However, it is important that we consider both of them as alternatives to the Supreme Court's current approach, which would use a principle of "constitutionality by default" to uphold a patently problematic execution procedure where no alternatives are available.

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ed States v. Nat'l Treasury Employees Union, 513 U.S. 454, 477–79 (1995) (holding that a ban on honoraria for government employees violates the First Amendment only as applied to certain junior employees); see also Nathaniel Persily & Jennifer S. Rosenberg, *Defacing Democracy?: The Nature and Rising Importance of As-Applied Challenges in the Supreme Court's Recent Election Law Decisions*, 93 MINN. L. REV. 1644, 1647–49 (describing the Roberts Court's preference for as-applied challenges as consistent with historical concerns about judicial restraint).