EIGHTH AMENDMENT CHALLENGES AFTER *BAZE v. REES*: LETHAL INJECTION, CIVIL RIGHTS LAWSUITS, AND THE DEATH PENALTY

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Abstract: In *Baze v. Rees*, the U.S. Supreme Court upheld the constitutionality of Kentucky's lethal injection protocol, which utilizes a three-drug combination to execute death row inmates. To challenge a lethal injection protocol in the future, the Court stated that an inmate would have to make a showing that the protocol in question presents a "substantial risk of serious harm" or an "objectively intolerable risk of harm." In addition, the inmate would have to show the existence of a feasible alternative that can be readily implemented and would "significantly reduce a substantial risk of severe pain." The standard set forth in *Baze* makes it difficult for inmates to challenge lethal injection protocols. This Article discusses the implications of *Baze* in the lower courts and examines the use of state administrative procedure acts as an alternative litigation strategy.

Introduction

Even after the U.S. Supreme Court addressed the constitutionality of lethal injection in *Baze v. Rees*, death row inmates continue to bring forth litigation.[1] In *Baze*, the Court held that a prisoner cannot successfully challenge a method of execution merely by showing that it may result in pain—"either by accident or as an inescapable consequence of death"—or that a slightly safer alternative is available.[2] Rather, under an Eighth Amendment analysis, it is necessary to show a "'substantial risk of serious harm'" or an "'objectively intolerable risk of harm.'"[3]

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[1] *See* Baze v. Rees, 553 U.S. 35, 41 (2008); Justin F. Marceau, *Lifting the Haze of* Baze*: Lethal Injection, the Eighth Amendment, and Plurality Opinions*, 41 Ariz. St. L.J. 159, 209 (2009).

[2] *Baze*, 553 U.S. at 50–51.

[3] *Id.* at 50 (quoting Farmer v. Brennan, 511 U.S. 825, 842, 846 & n.9 (1994)).

For example, this can be satisfied by showing a "'series of abortive attempts at electrocution.'"[4] Despite this ruling from the Supreme Court, the issue of lethal injection is far from being resolved. Instead, the Court's ruling in *Baze* has had a mixed effect, with lower court judges left to determine how *Baze* affects their state's protocol.[5]

Baze was not the best case for bringing a challenge against lethal injection because the challenged Kentucky procedure was somewhat less problematic than those of other states.[6] Nevertheless, the decision has served to compel states, which may have had problems in the past with their procedures, to make corrections to fall in line with the Kentucky approach.[7] Consequently, this allows states to better defend against focused lawsuits by making it appear as if they are making good faith efforts to improve standards and procedure. Moreover, litigation in the wake of *Baze* continues to highlight problems that plague the lethal injection process, "including the mixing of the drugs; the setting of the IV lines; the administration of the drugs; and the monitoring of their effectiveness."[8]

As a general matter, though establishing an Eighth Amendment violation is still possible after *Baze*, in reality, it is very difficult to do so. To satisfy the standard established by the Court in *Baze*, a plaintiff must show the existence of a feasible alternative that can be readily implemented and would "significantly reduce a substantial risk of severe pain."[9] Efforts to clear the *Baze* hurdle are especially difficult because of the significant deference that courts pay to the decisions of state corrections officials.[10] As Alison Nathan warns, "Given the sad history of

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[4] *Id.* (quoting Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 471 (1947) (Frankfurter, J., concurring)).

[5] *See* Marceau, *supra* note 1, at 160.

[6] *See, e.g.*, Ty Alper, *What Do Lawyers Know About Lethal Injection?*, 1 Harv. L. & Pol'y Rev. (Online), 5–6 (Mar. 3, 2008), http://hlpronline.com/wordpress/wp-content/uploads/2009/12/Alper.pdf (describing major problems with lethal injection procedures in Tennessee and California); Seema Shah, *How Lethal Injection Reform Constitutes Impermissible Research on Prisoners*, 45 Am. Crim. L. Rev. 1101, 1106–08 (2008) (highlighting problems in Texas, Ohio, Florida, and California). Thirty-five states use lethal injection as a method of execution. Alison J. Nathan, *Please Ignore the Pain: History Shows Heedless Rush to Adopt Lethal Injection*, Legal Times, Jan. 7, 2008, at 36.

[7] *See, e.g.*, Marceau, *supra* note 1, at 210 n.252 (noting Arizona's willingness to reexamine lethal injection procedures after *Baze*).

[8] *See* Ty Alper, *Anesthetizing the Public Conscience: Lethal Injection and Animal Euthanasia*, 35 Fordham Urb. L.J. 817, 820 (2008).

[9] *See Baze*, 553 U.S. at 52.

[10] *See* Nathan, *supra* note 6; *see also Baze*, 553 U.S. at 52.

lethal injection, judicial deference to the procedural and administrative decisions of state corrections officials is unwarranted."[11]

This Article explores the implications of the *Baze* decision and examines the ongoing lethal injection litigation since *Baze*. Part I briefly summarizes the Supreme Court's death penalty jurisprudence and examines the *Baze* decision. Part II explains why the Supreme Court ruling in *Baze* makes it difficult, if not impossible, for inmates to wage successful lethal injection challenges. It also examines the use of civil rights claims under 42 U.S.C. § 1983. Part III discusses the use of state administrative procedures acts as an alternative litigation approach. In particular, Part III analyzes litigation stemming from a state's failure to make its execution protocol available for public review. Finally, Part IV reflects upon the teachings of *Baze* and the post-*Baze* litigation.

I. Capital Punishment and the U.S. Supreme Court

A. *Supreme Court Death Penalty Jurisprudence*

The constitutionality of capital punishment was first addressed by the Court in the 1970s with the fractured decisions of *Furman v. Georgia* and *Gregg v. Georgia*.[12] In 1972, the Court examined the question of racism in capital sentencing in *Furman*, ruling that the then-current laws were arbitrary and capricious.[13] The *Furman* majority, however, did not determine that the death penalty in general was racially biased.[14]

Four years later, in *Gregg*, the Court upheld various state death penalty laws that included the bifurcation of trials into guilt and penalty phases, the application of aggravating and mitigating factors to determine just punishment, and the use of other factors permitting jury guidelines, jury discretion, and appellate review of death sentences.[15]

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[11] *See* Nathan, *supra* note 6.

[12] *See* Gregg v. Georgia, 428 U.S. 153, 158 (1976); Furman v. Georgia, 408 U.S. 238, 240 (1972); Stephen F. Smith, *The Supreme Court and the Politics of Death*, 94 Va. L. Rev. 283, 381 (2008) (arguing that the Court politicized the death penalty by constitutionalizing capital punishment); Carol S. Steiker & Jordan M. Steiker, *Opening a Window or Building a Wall? The Effect of Eighth Amendment Death Penalty Law and Advocacy on Criminal Justice More Broadly*, 11 U. Pa. J. Const. L. 155, 167 (2008) ("The 1976 decisions stabilized the American death penalty, and executions resumed shortly thereafter."). At the time, 120 out of 3300 death row inmates were executed. *See* David M. Oshinsky, Capital Punishment on Trial: *Furman v. Georgia* and the Death Penalty in Modern America 39 (2010).

[13] *See Furman*, 408 U.S. at 242; Helen Shin, Note, *Is the Death of the Death Penalty Near? The Impact of* Atkins *and* Roper *on the Future of Capital Punishment for Mentally Ill Defendants*, 76 Fordham L. Rev. 465, 473 (2007).

[14] *See* Oshinsky, *supra* note 12, at 54.

[15] *See Gregg*, 428 U.S. at 195–202.

The Court held that these practices were constitutional under Eighth Amendment standards.[16]

Other legal challenges came before the Court that clarified the scope of the Eighth Amendment in the death penalty context. For instance, one year following *Gregg*, the Court, in *Coker v. Georgia*, ruled that the death penalty was a disproportionate punishment for the offense of rape.[17] In the next decade, the Court followed this ruling in *Ford v. Wainwright*, in which it held that a state may not execute a person who is insane at the time of execution.[18] More recently, in 2002, the Court reversed a previous ruling by holding in *Atkins v. Virginia* that imposing a death sentence on mentally retarded individuals violated the "'evolving standards of decency'" embodied in the Eighth Amendment's Cruel and Unusual Punishment Clause.[19] Irrespective of the need to hold mentally retarded persons criminally responsible, the Court determined that "[b]ecause of their disabilities in areas of reasoning, judgment, and control of their impulses, . . . they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct."[20]

Later, in *Roper v. Simmons*, the Court held that executing juveniles violated the Eighth Amendment.[21] The Court noted that this framework, like that used in *Atkins*, required looking to "'the evolving standards of decency that mark the progress of a maturing society.'"[22] The Court held that juveniles should be immune from execution because of the inherent differences between juveniles and adults, including a "'lack of maturity and an underdeveloped sense of responsibility.'"[23] The Court also reasoned that juveniles are susceptible to peer pressure and that a juvenile's character is "not as well formed as that of an adult," thereby rendering juveniles less culpable than the worst offenders that the death penalty is intended to target.[24]

During the same term that *Baze* was decided, in *Kennedy v. Louisiana*, the Court held that the Eighth Amendment prohibits the death penalty for the rape of a child where the crime was not intended to cause and

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[16] *Id.*

[17] *See* Coker v. Georgia, 433 U.S. 584, 599 (1977).

[18] *See* Ford v. Wainwright, 477 U.S. 399, 401 (1986).

[19] Atkins v. Virginia, 536 U.S. 304, 321 (2002) (quoting Trop v. Dulles, 356 U.S. 86, 100–01 (1958)) (abrogating Penry v. Lynaugh, 492 U.S. 302 (1989)).

[20] *Id.* at 306.

[21] Roper v. Simmons, 543 U.S. 551, 578–79 (2005).

[22] *Id.* at 561 (quoting *Trop*, 356 U.S. at 100–01).

[23] *See id.* at 569 (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993)).

[24] *See id.* at 569–70.

did not result in the victim's death.[25] The Court referred to its past decisions in finding that capital punishment must "be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'"[26] The *Kennedy* Court cited to *Baze* in dicta when it discussed the difficult tensions between general legal principles and case facts.[27]

B. *Race and the Death Penalty*

In a historical context, punishment by death can be perceived as a vestige of the race-based lynchings and executions that were imposed upon young African American males accused of assaults on whites.[28] Yet, the Supreme Court has held that evidence of a statistical disparity in the execution of African Americans is an unconvincing argument against the death penalty.[29] In 1987, the Court in *McCleskey v. Kemp* ruled that statistical evidence showing the racially disproportionate impact of Georgia's death penalty law was insufficient to overturn a defendant's death sentence.[30] Rather, the Court held that regardless of any historical record of a disproportionate impact of death sentences imposed upon African Americans, such evidence is irrelevant absent a showing of intentional discrimination in the sentencing of the particular defendant.[31]

Warren McCleskey was convicted of killing a police officer and, following the jury's recommendation, a Georgia superior court sentenced him to death.[32] McCleskey appealed the sentence to the federal court and argued that Georgia's legal procedures were administered in a racially discriminatory manner because the death penalty was imposed more often when there was a white victim.[33] McCleskey's argument was based on David Baldus's study focusing on death penalty data in Georgia.[34] The Baldus study concluded that a defendant convicted

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[25] *See* Kennedy v. Louisiana, 554 U.S. 407, 413 (2008).

[26] *Id.* at 420 (quoting *Roper*, 543 U.S. at 568).

[27] *Id.* at 436–37. *Baze* reappeared in Justice Thomas's dissent in *Graham v. Florida.* 130 S. Ct. 2011, 2044 (2010) (Thomas, J., dissenting). In *Graham*, the Court held that the Eighth Amendment prohibits the imposition of life sentences without parole on juvenile offenders in non-homicide cases. *Id.* at 2034 (majority opinion). Justice Thomas referred to *Baze* in his discussion of the original meaning of the Eighth Amendment. *Id.* at 2044 (Thomas, J., dissenting).

[28] *See* Oshinsky, *supra* note 12, at 10.

[29] *See* McCleskey v. Kemp, 481 U.S. 279, 287–88 (1987).

[30] *See id.* at 297.

[31] *See id.* at 298 n.20.

[32] *See id.* at 283–85.

[33] *See id.* at 286.

[34] *See McCleskey*, 481 U.S. at 286.

of murdering a white victim was 4.3 times more likely to receive the death penalty than a defendant convicted of murdering a black victim.[35] Nevertheless, Justice Powell, writing for the majority, concluded that race was not an issue in McCleskey's conviction.[36] Applying a colorblind analysis, he explained that race was not a proven factor in the sentencing because the statistical evidence could not establish the requisite racial animus of the prosecutor, jurors, or judge in McCleskey's case.[37] Justice Powell reasoned that the Eighth Amendment was not violated because, though there may have been a race-based discrepancy in sentencing, it was not constitutionally significant.[38] In Justice Powell's view, McCleskey's charge of racial bias could open the floodgates to endless litigation that relied on statistical studies of all sorts.[39] He therefore concluded that the Constitution did not require a state to pursue every trivial factor related to bias in capital sentencing.[40]

In contrast, Justice Brennan urged in dissent that the racial history of the death penalty must be considered.[41] He argued that the Baldus study demonstrated the lingering effects of Georgia's dual system of crime and punishment on death penalty sentencing.[42] Brennan contended that unconscious racism, coupled with statistical evidence, was sufficient to demonstrate racial disparity in the application of Georgia's death penalty statute.[43] He explained,

> The statistical evidence in this case thus relentlessly documents the risk that McCleskey's sentence was influenced by racial considerations. . . . Georgia's legacy of a race-conscious criminal justice system, as well as this Court's own recognition of the persistent danger that racial attitudes may affect criminal proceedings, indicates that McCleskey's claim is not a fanciful product of mere statistical artifice.[44]

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[35] *Id.* at 287.

[36] *Id.* at 313.

[37] *Id.* at 297, 308.

[38] *See id.* at 308.

[39] *See McCleskey*, 481 U.S. at 308–09.

[40] *See, e.g.*, Sheri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 Cornell L. Rev. 1016, 1017–18 (1988); Charles Lawrence III, *Unconscious Racism Revisited: Reflections on the Impact and Origins of "The Id, the Ego, and Equal Protection,"* 40 Conn. L. Rev. 931, 953 (2008).

[41] *See McCleskey*, 481 U.S. at 328–29 (Brennan, J., dissenting).

[42] *See id.* at 322, 328–29.

[43] *See id.* at 332–35.

[44] *Id.* at 328–29.

Justices Blackmun and Stevens also dissented and respectively argued that the race of a defendant was determinative in his treatment by Georgia's capital sentencing system and that Georgia's racial history deserved consideration.[45]

The Court's decision in *McCleskey* led to a great deal of criticism from legal scholars.[46] For example, Professor Stephen Carter argued that *McCleskey* was written in a way that skirted a more fundamental issue—that the entire criminal justice system is racially biased.[47] Professor Carter explained:

> [T]he majority wrote in a way that made it possible to evade a more fundamental difficulty raised by the Baldus study—that racialism might be responsible not only for the disproportionate execution of *murderers* who happens to be black, but for inadequate protection of *murder victims* who happen to be black.[48]

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[45] *See id.* at 345–47 (Blackmun, J., dissenting); *id.* at 366–67 (Stevens, J., dissenting).

[46] *See, e.g.*, Paul Butler, *By Any Means Necessary: Using Violence and Subversion to Change Unjust Law*, 50 UCLA L. Rev. 721, 733 (2003) ("*McCleskey v. Kemp* was received by many racial critics with the same revulsion as the infamous decisions of *Dred Scott v. Sandford* and *Plessy v. Ferguson*."). Professor Randall Kennedy characterized the ruling as legitimizing "racially selective leniency in charging and sentencing." *See* Randall L. Kennedy, McCleskey v. Kemp*: Race, Capital Punishment, and the Supreme Court*, 101 Harv. L. Rev. 1388, 1440 (1988).

[47] *See* Stephen L. Carter, *When Victims Happen to Be Black*, 97 Yale L.J. 420, 441 (1988).

[48] *Id.* at 443. Professor Michelle Alexander argues:

> [T]he *McCleskey* decision was not really about the death penalty at all; rather, the Court's opinion was driven by a desire to immunize the entire criminal justice system from claims of racial bias. The best evidence in support of this view can be found at the end of the majority opinion where the Court states that discretion plays a necessary role in the implementation of the criminal justice system, and that discrimination is an inevitable by-product of discretion. Race discrimination, the Court seemed to suggest, was something that simply must be tolerated in the criminal justice system, provided no one admits to racial bias.

Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness 108 (2010); *see also* David C. Baldus et al., *Race and Proportionality Since* McCleskey v. Kemp *(1987): Different Actors with Mixed Strategies of Denial and Avoidance*, 39 Colum. Hum. Rts. L. Rev. 143, 148 (2007) ("[T]he Supreme Court in *McCleskey v. Kemp* was unwilling to address the complicated political and remedial issues that race claims present . . . ."); Erwin Chemerinsky, *Eliminating Discrimination in Administering the Death Penalty: The Need for the Racial Justice Act*, 35 Santa Clara L. Rev. 519, 529 (1995) ("After *McCleskey*, it will be extremely difficult to successfully challenge a death sentence on equal protection grounds. Even though a majority of the Justices on the Supreme Court have recognized that racism seriously infects the capital process, current law simply fails to provide any remedy.").

In another critique of *McCleskey*, Professor Sheri Lynn Johnson criticized the shortcomings of traditional equal protection analysis, which requires purposeful discriminatory intent.[49] Professor Johnson suggests that data showing "higher conviction rates of other-race defendants; the race-of-victim effect in capital sentencing [and] the overwhelming propensity of prosecutors to strike black jurors from cases with black defendants" together with "verified indicia of unconscious racism" such as racial insults, avoidance of racial minorities, and the application of defense mechanisms, should be sufficient to show racial discrimination.[50] According to Professor Johnson, such a methodology would not require a complete abandonment of current doctrine, but merely modest incremental changes.[51]

Some scholars go even further and offer ambitious claims beyond the realm of capital punishment, focusing instead on the relationship between race and the criminal justice system in this country.[52] For example, Professor Michelle Alexander in her book, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, argues that the current criminal justice system is a racial caste system.[53] She contends that black men are targeted for incarceration through tough sentencing laws and racist police practices.[54] The end result, Professor Alexander claims, is a new Jim Crow era, creating social controls that disenfranchise African American felons who simultaneously face discrimination in employment, housing, education, voting, and jury service.[55] Other academics

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[49] *See* Johnson, *supra* note 40, at 1019.

[50] *See id.* at 1032–34 (footnotes omitted).

[51] *Id.* at 1032. Professor Scott Howe also advocates the consideration of unconscious racial discrimination in developing new ways to analyze capital punishment but, unlike Professor Johnson, he emphasizes an Eighth Amendment-centered approach. *See* Scott W. Howe, *The Futile Quest for Racial Neutrality in Capital Selection and the Eighth Amendment Argument for Abolition Based on Unconscious Racial Discrimination*, 45 Wm. & Mary L. Rev. 2083, 2145–49 (2004).

[52] *See, e.g.*, David V. Baker, *Purposeful Discrimination in Capital Sentencing*, 5 J.L. & Soc. Challenges 189, 194–95 (2003); Maxine Goodman, *A Death Penalty Wake-Up Call: Reducing the Risk of Racial Discrimination in Capital Punishment*, 12 Berkeley J. Crim. L. 29, 32–33 (2007); Rita K. Lomio, *Working Against the Past: The Function of American History of Race Relations and Capital Punishment in Supreme Court Opinions*, 9 J.L. Soc'y 163, 168–71 (2008); Michael Mears, *The Georgia Death Penalty: A Need for Racial Justice*, 1 J. Marshall L.J. 71, 79–83 (2008); Michael Millemann & Gary W. Christopher, *Preferring White Lives: The Racial Administration of the Death Penalty in Maryland*, 5 U. Md. L.J. Race, Religion, Gender & Class 1, 1–3 (2005). *But see* Paul Cassell, *In Defense of the Death Penalty*, Prosecutor, Oct./Nov./Dec. 2008, at 10, 19–22.

[53] Alexander, *supra* note 48, at 11–12.

[54] *Id.* at 14–17.

[55] *Id.* at 185–89.

forcefully argue that capital punishment's roots may be traced to slavery, Jim Crow, and the preservation of white supremacy.[56] Against this backdrop, Professor Charles Ogletree asserts, "The belief that 'justice is blind' will yield to the reality that, in fact, blind justice is injustice.' The strongly-held view that in order to become colorblind we must first be color-conscious must be adopted by the criminal justice system, and reflected in our national crime policy."[57] Given the stark racial disparity of death penalty statistics, it is difficult to reconcile the ideals of a colorblind constitution and formal equality with the actual disparate impact on racial minorities in death penalty cases.[58]

Scholars have reasonably concluded that the death penalty has been used in a racially biased manner.[59] Indeed, there are numerous empirical studies that support the assertion of racial bias in death penalty cases.[60] Recent research supports the original findings of the

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[56] *See, e.g.*, *id.* at 20–22; Gabriel J. Chin, *Jim Crow's Long Goodbye*, 21 CONST. COMMENT. 107, 121–22 (2004) (explaining that some discriminatory vestiges of Jim Crow could be "used to justify incarceration or enhanced punishment today"); Phyllis Goldfarb, *Pedagogy of the Suppressed: A Class on Race and the Death Penalty*, 31 N.Y.U. REV. L. & SOC. CHANGE 547, 551–53 (2007); Dorothy E. Roberts, *Constructing a Criminal Justice System Free of Racial Bias: An Abolitionist Framework*, 39 COLUM. HUM. RTS. L. REV. 261, 272 (2007).

[57] *See* Charles J. Ogletree, Commentary, *The Significance of Race in Federal Sentencing*, 6 FED. SENT'G REP. 229, 231 (1994) (quoting Charles J. Ogletree, Jr., *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938, 1959–60 (1988)) (internal quotation marks omitted).

[58] *See* Anthony V. Alfieri, *Retrying Race*, 101 MICH. L. REV. 1141, 1143–45 (2003) (explaining positive aspects of renewed prosecution of white-on-black racial violence but noting its inadequacies without candid investigation of racist prosecutorial discretion); Michael K. Brown, *The Death Penalty and the Politics of Racial Resentment in the Post Civil Rights Era*, 58 DEPAUL L. REV. 645, 653 (2009) ("The post civil rights racial order is based on formal equality before the law and a public ideology of colorblindness."); Scott W. Howe, *Race, Death and Disproportionality*, 37 N. KY. L. REV. 213, 240–41 (2010) (noting the continued influence of racial bias in capital punishment).

[59] *See* Anthony G. Amsterdam, *Opening Remarks: Race and the Death Penalty Before and After* McCleskey, 39 COLUM. HUM. RTS. L. REV. 34, 35 (2007); David C. Baldus et al., *Evidence of Racial Discrimination in the Use of the Death Penalty: A Story from Southwest Arkansas (1990–2005) with Special Reference to the Case of Death Row Inmate Frank Williams, Jr.*, 76 TENN. L. REV. 555, 574–75 (2009); Katherine Barnes et al., *Place Matters (Most): An Empirical Study of Prosecutorial Decision-Making in Death-Eligible Cases*, 51 ARIZ. L. REV. 305, 339 (2009); Jeffrey J. Pokorak, *Probing the Capital Prosecutor's Perspective: Race of the Discretionary Actors*, 83 CORNELL L. REV. 1811, 1814–18 (1998); Isaac Unah, *Choosing Those Who Will Die: The Effect of Race, Gender, and Law in Prosecutorial Decision to Seek the Death Penalty in Durham County, North Carolina*, 15 MICH. J. RACE & L. 135, 140–41 (2009).

[60] *See, e.g.*, STAFF OF SUBCOMM. ON CIVIL & CONSTITUTIONAL RIGHTS OF THE H. COMM. ON THE JUDICIARY, 103D CONG., RACIAL DISPARITIES IN FEDERAL DEATH PENALTY PROSECUTIONS 1988–94, *reprinted in* 140 CONG. REC. S9588, 9588 (May 6, 1994) ("Race continues to plague the application of the death penalty in the United States. On the state level, racial disparities are most obvious in the predominant selection of cases involving white vic-

Baldus study that the race of the victim also matters in the determination of a death sentence.[61] For instance, a study on the death penalty in North Carolina revealed that a defendant who is suspected of killing a white victim is three times more likely to receive the death penalty than if the victim is black.[62] Moreover, there is ample evidence demonstrating that race plays a central role in the prosecution of capital cases, which are commonly tried by white prosecutors.[63] In response to these criticisms, Kentucky and North Carolina have implemented Racial Justice Acts that allow defendants to use statistics and other evidence in proving racial bias in the application of death penalty laws; there have been attempts made to pass similar acts in Congress and Georgia.[64]

Finally, it is important to note that the discussion over race and the death penalty cannot be neatly divided into categories of black and

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tims. On the federal level, cases selected have almost exclusively involved minority defendants."); Angela J. Davis, Arbitrary Justice: The Power of the American Prosecutor 186–89 (2007); Hugo Adam Bedau, *Racism, Wrongful Convictions, and the Death Penalty*, 76 Tenn. L. Rev. 615, 623 (2009); Richard C. Dieter, *The Death Penalty in Black and White: Who Lives, Who Dies, Who Decides*, Death Penalty Info. Center (June 1998), http://www.deathpenaltyinfo.org/death-penalty-black-and-white-who-lives-who-dies-who-decides (documenting racism in the administration of the death penalty).

[61] *See* David C. Baldus, *Keynote Address: The Death Penalty Dialogue Between Law and Social Science*, 70 Ind. L.J. 1033, 1039–40 (1995); David C. Baldus & George Woodworth, *Race Discrimination in the Administration of the Death Penalty: An Overview of the Empirical Evidence with Special Emphasis on the Post-1990 Research*, 39 Crim. L. Bull. 194, 214–15 (2003); Stephen B. Bright, *Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, 35 Santa Clara L. Rev. 433, 434 (1995); Chemerinsky, *supra* note 48, at 521; Scott Phillips, *Racial Disparities in the Capital of Capital Punishment*, 45 Hous. L. Rev. 807, 811–12 (2008) (asserting that the death penalty is more likely to be imposed on black defendants than white defendants); *see, e.g.*, Ronald J. Tabak, *Capital Punishment*, *in* The State of Criminal Justice 213, 219 (Myrna S. Raeder ed., 2010).

[62] *See* Michael Hewlett, *Disparity Seen in Death Penalty*, Winston-Salem J., July 23, 2010, at A1.

[63] *See* Bright, *supra* note 61, at 436, 443.

[64] N.C. Gen. Stat. §§ 15A-2010 to -2012 (2009) ("No person shall be subject to or given a sentence of death or shall be executed pursuant to any judgment that was sought or obtained on the basis of race."); Ky. Rev. Stat. Ann. §§ 532.300-.309 (LexisNexis 2008) ("No person shall be subject to or given a sentence of death that was sought on the basis of race."); *see* Seth Kotch & Robert P. Mosteller, *The Racial Justice Act and the Long Struggle with Race and the Death Penalty in North Carolina*, 88 N.C. L. Rev. 2031, 2115 n.377 (2010); Gennaro F. Vito, *The Racial Justice Act in Kentucky*, 37 N. Ky. L. Rev. 273, 277 (2010); *see also* Bright, *supra* note 61, at 434; Olatunde C.A. Johnson, *Legislating Racial Fairness in Criminal Justice*, 39 Colum. Hum. Rts. L. Rev. 233, 238–41, 244 n.55 (2007); Michael Mears, *The Georgia Death Penalty: A Need for Racial Justice*, 1 J. Marshall L.J. 71, 73–76 (2008). Pennsylvania is in the early stages of attempting to pass a Racial Justice Act due to concerns over racial bias in sentencing in capital punishment cases. *See* Ashley Mannings, *Bill Takes Aim at Racial Bias on Death Row: Panel Finds Skewed Sentencing in Pa. Capital Cases*, Pittsburgh Post-Gazette, Aug. 16, 2010, at B1.

white.[65] Although rarely discussed, as a historical matter, the first person in the United States executed in a gas chamber was an Asian defendant.[66] In 1923, Gee Jon, a Chinese gang member, was executed by lethal gas at Nevada State Prison.[67] Currently, there are approximately forty Asian inmates on death row in the United States, including the infamous Charles Ng, a former U.S. Marine, who was convicted of eleven murders and suspected of being involved in fourteen others.[68] More recently, Thavirak Sam was convicted of three counts of first-degree murder and received three consecutive death sentences for the killing of his mother-in-law, brother-in-law, and niece.[69] During his post-conviction appeal proceedings, Sam was found to be incompetent to proceed.[70] The Supreme Court of Pennsylvania, however, reversed the lower court's determination and held that Sam's best interests justified the involuntary administration of antipsychotic medication.[71]

C. Lethal Injection Protocols

In 1977, Oklahoma created the first lethal injection protocol; soon thereafter many states followed Oklahoma's lead with their own three-drug lethal injection protocol.[72] As Alison Nathan points out, one significant issue with these state protocols is the manner in which states have adopted an unnecessary paralytic drug as part of the protocol.[73] She explains,

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[65] *See, e.g.*, State v. Gee Jon, 211 P. 676, 677 (Nev. 1923) (featuring an Asian defendant).

[66] *See id.* at 682.

[67] *Id.*

[68] *See* Bill Enfield, *Killer-Torturer of 11 on State's Death Row*, Sacramento Bee (Dec. 10, 2009, 9:22 AM), http://blogs.sacbee.com/crime/archives/2009/12/ask-sacto911-ki-2.html; Deborah Fins, *Death Row U.S.A.*, Crim. Just. Project of the NAACP Legal Def. & Educ. Fund, Inc., 44 (Winter 2010), http://naacpldf.org/files/publications/DRUSA_Winter_2010.pdf; Jeff Jardine, *Accused Shouldn't Expect Better Odds if Trial Moves*, Modesto Bee, Oct. 18, 2009, at B1; *Serial Killer Wants to Make Friends*, Lancashire Evening Post (Feb. 24, 2009), http://www.lep.co.uk/news/serial_killer_wants_to_make_friends_1_88169.

[69] Commonwealth v. Sam, 952 A.2d 565, 568 (Pa. 2008).

[70] *Id.*

[71] *Id.* at 588.

[72] Shah, *supra* note 6, at 1103. In all states that follow the three-drug protocol, a sequence of three powerful drugs is administered. *Id.* at 1105. The first drug is sodium thiopental, which is intended to anesthetize the inmate. *Id.* The second drug is pancuronium bromide, a neuromuscular blocking agent that causes paralysis. *Id.* The final injection is of potassium chloride, which causes death by inducing cardiac arrest. *Id.*

[73] Alison J. Nathan & Douglas A. Berman, Debate, Baze*-d and Confused: What's the Deal with Lethal Injection?*, 156 U. Pa. L. Rev. PENNumbra 312, 316–17 (2008), http://www.pennumbra.com/debates/index.php?date=24096.

> The nature of this drug is to *mask* the realities of the execution from meaningful public scrutiny. A paralyzed inmate suffering pain during the execution will be physically unable to express his suffering. As a result, witnesses, including members of the media . . . see only a sanitized version. Unaware of the painful suffering endured by inmates, the public has assumed wrongly that states always execute inmates in a humane and painless manner.[74]

Problems occur with the application of lethal injection protocols in several states.[75] For example, there have been botched attempts to find suitable veins, with some administrations lasting as long as two hours.[76] Additionally, execution team members have administered lethal injection drugs without any knowledge of their purpose or risks.[77] As Professor Deborah Denno states, "'Lethal injection, which has the veneer of medical acceptability, has far greater risks of cruelty [than death by a firing squad] to a condemned person.'"[78]

D. *The Supreme Court Decision in* Baze v. Rees

In *Baze*, a Kentucky death row inmate claimed that the state's three-drug lethal injection method was cruel and unusual punishment under the Eighth Amendment.[79] He argued that the state's protocol created an unacceptable risk of significant pain.[80] In denying the inmate's claim, the Justices expressed conflicting rationales in a series of divergent opinions.

Chief Justice Roberts, writing for the plurality, refused to apply an "unnecessary risk of pain" standard of review, holding that such a standard would "transform courts into boards of inquiry," creating endless litigation.[81] Instead, Chief Justice Roberts explained that an execution method constitutes cruel and unusual punishment only if it presents a "'substantial risk of serious harm'" or an "'objectively intolerable risk of

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[74] *Id.* at 316.

[75] *See* Alper, *supra* note 6, at 5–6; Shah, *supra* note 6, at 1106–08.

[76] Shah, *supra* note 6, at 1106–07; *see also* Richard Klein, *Supreme Court Criminal Law Jurisprudence—October 2008 Term*, 26 Touro L. Rev. 545, 571 (2010) (noting an instance where an execution needed to be rescheduled after eighteen failed attempts to inject the drugs).

[77] *See* Morales v. Tilton, 465 F. Supp. 2d 972, 979 (N.D. Cal. 2006).

[78] Jennifer Dobner, *Firing Squad Is More Humane, Some Experts Say*, Detroit Free Press, June 17, 2010, at A14 (analyzing lethal injection procedures and their risks).

[79] Baze v. Rees, 553 U.S. 35, 41 (2008).

[80] *Id.*

[81] *Id.* at 51.

harm.'"[82] As a result, a state's refusal to implement alternative execution procedures will not violate the Eighth Amendment unless the alternative procedure is "feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain."[83]

The Court held that the risk of improper administration of the initial drug did not render the three-drug protocol cruel and unusual.[84] Chief Justice Roberts further explained that the state's failure to adopt proposed, allegedly more humane alternatives to the three-drug protocol did not constitute cruel and unusual punishment.[85] Paying deference to the states, Chief Justice Roberts acknowledged that the "Court has never invalidated a State's chosen procedure for carrying out a sentence of death as the infliction of cruel and unusual punishment."[86]

The Court was not persuaded by the "petitioners[']claim that there is a significant risk that the procedures will *not* be properly followed—in particular, that the sodium thiopental will not be properly administered to achieve its intended effect—resulting in severe pain when the other chemicals are administered."[87] Likewise, the Court did not accept the argument that Kentucky could switch from a three-drug protocol to a single-drug protocol.[88] Rather, Chief Justice Roberts reasoned that "a condemned prisoner cannot successfully challenge a State's method of execution merely by showing a slightly or marginally safer alternative."[89] Chief Justice Roberts declared that Kentucky cannot be viewed as wantonly inflicting pain under the Eighth Amendment simply because it uses an injection method for which it simultaneously adopts safeguards.[90]

Justices Stevens, Scalia, Thomas, and Breyer each filed an opinion concurring in the judgment.[91] In particular, Justice Thomas argued that

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[82] *Id.* at 50 (quoting Farmer v. Brennan, 511 U.S. 825, 842, 846 & n.9 (1994)).

[83] *Id.* at 52.

[84] *Baze*, 553 U.S. at 56.

[85] *Id.*

[86] *See id.* at 48.

[87] *See id.* at 49.

[88] *See id.* at 56–57.

[89] *Baze*, 553 U.S. at 51.

[90] *See id.* at 62.

[91] *Id.* at 71 (Stevens, J., concurring in the judgment); *id.* at 87 (Scalia, J., concurring in the judgment); *id.* at 94 (Thomas, J., concurring in the judgment); *id.* at 107 (Breyer, J., concurring in the judgment). Justice Stevens expressed concern that the drug used could "mask[] any outward sign of distress" despite an inmate's "excruciating pain before death occurs." *Id.* at 71 (Stevens, J., concurring in the judgment). He also declared that he believed the death penalty was unconstitutional. *Id.* at 86–87. Yet, constrained by precedent, Stevens determined that Kentucky's method of lethal injection met the tests proposed by

a form of capital punishment "violates the Eighth Amendment only if it is deliberately designed to inflict pain . . . ."[92] He concluded that *Baze* was "an easy case" and that the defendants' challenge should fail "[b]ecause Kentucky's lethal injection protocol is designed to eliminate pain rather than to inflict it . . . ."[93] Justice Thomas also criticized the Court for failing to provide states with any clear guidelines moving forward.[94] He warned that the reasoning offered by the plurality would lead to litigation and burden courts because Kentucky's lethal injection protocol was not intended to inflict pain.[95] Thomas explained,

> [F]ar from putting an end to abusive litigation in this area, . . . today's decision is sure to engender more litigation. At what point does a risk become "substantial"? Which alternative procedures are "feasible" and "readily implemented"? When is a reduction in risk "significant"? What penological justifications are "legitimate"? Such are the questions the lower courts will have to grapple with in the wake of today's decision. Needless to say, we have left the States with nothing resembling a bright-line rule.[96]

In contrast, Justice Ruth Bader Ginsburg argued in her dissent that it was undisputed that Kentucky's method would cause an inmate to suffer excruciating pain.[97] Justices Ginsburg and Stevens were both mindful of the potential pain felt by the inmate and thus argued that "Kentucky's protocol lacks basic safeguards used by other States to confirm that an inmate is unconscious before injection of the second and third drugs."[98] Justice Ginsburg advocated a lesser standard that would require petitioners to demonstrate only "an untoward, readily avoidable risk of inflicting severe and unnecessary pain."[99] She suggested that three factors should be considered: the degree of risk, the magnitude of pain, and the availability of alternatives.[100] Justice Ginsburg argued that if a petitioner demonstrated a high level of one factor, then the

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both the plurality and by Justice Ginsburg in dissent, and therefore concurred in the judgment. *Id.* at 87.

[92] *Id.* at 94 (Thomas, J., concurring in the judgment).

[93] *Id.* at 107.

[94] *See Baze*, 553 U.S. at 105 (Thomas, J., concurring in the judgment).

[95] *See id.* at 94, 105.

[96] *Id.* at 105.

[97] *See id.* at 113 (Ginsburg, J., dissenting).

[98] *See id.* at 114.

[99] *Baze*, 553 U.S. at 114 (Ginsburg, J., dissenting).

[100] *Id.* at 116.

petitioner would not need to make a significant showing on the other factors.[101]

After *Baze*, establishing an Eighth Amendment violation is an uphill battle for those challenging lethal injection protocols.[102] Challengers throughout the country are discovering that it is difficult to meet the *Baze* standard of "'a substantial risk of serious harm.'"[103] Inmates must now show the existence of a feasible alternative that would "significantly reduce a substantial risk of severe pain."[104] It is possible that this high threshold may be too exacting and too difficult for any challenger to meet.[105] At the same time, placing the burden on states to provide an alternative that would significantly reduce a substantial risk of severe pain could also be a herculean task.[106]

Ultimately, major issues concerning litigation over lethal injection remain open and uncertainties persist.[107] *Baze* leaves many questions unresolved.[108] First, it is unclear what factors are necessary to demonstrate that a state protocol would create a risk under the *Baze* standard.[109] Second, *Baze* does not indicate when such a risk is "substantial" or "significant"[110] Finally, the question of whether a single drug protocol is ever appropriate is still unanswered.[111] Moving forward, *Baze* has left the doors open for future lethal injection challenges.[112] As Justice Stevens predicted, "When we granted certiorari in this case, I assumed

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[101] *See id.*

[102] *See id.* at 50–52 (plurality opinion); *id.* at 105 (Thomas, J., concurring in the judgment).

[103] *See id.* at 50 (plurality opinion) (quoting *Farmer*, 511 U.S. at 842, 846 & n.9).

[104] *See Baze*, 553 U.S. at 52.

[105] *See id.* at 105 (Thomas, J., concurring in the judgment).

[106] *See id.* at 47–48 (plurality opinion) (holding that requiring states to adopt procedures with the lowest risk would put states' methods in perpetual doubt); *id.* at 67 (Alito, J., concurring) (noting that purported hazards and advantages are unreliable); *id.* at 105 (Thomas, J., concurring in the judgment) (highlighting the absence of a clear standard going forward).

[107] *See id.* at 105 (Thomas, J., concurring in the judgment).

[108] *See* Marceau, *supra* note 1, at 210–11.

[109] *See Baze*, 553 U.S. at 116–17 (Ginsburg, J., dissenting) (outlining the differences between the plurality's view and her view of the important factors); *see also id.* at 107–08 (Breyer, J., concurring in the judgment) (indicating agreement with the factors Justice Ginsburg listed).

[110] *See id.* at 105 (Thomas, J., concurring in the judgment).

[111] *See id.* at 61 (plurality opinion) ("A State with a lethal injection protocol substantially similar to the protocol we uphold today would [be upheld as constitutional].").

[112] *See id.* at 71 (Stevens, J., concurring in the judgment).

that our decision would bring the debate about lethal injection as a method of execution to a close. It now seems clear that it will not."[113]

II. The Aftershocks: Lethal Injection Litigation in the Lower Courts

A. *§ 1983 Civil Rights Complaints Challenging Lethal Injection Procedures*

The majority of lethal injection lawsuits after *Baze* have been filed under 42 U.S.C. § 1983, which has historically been a means for a prisoner to challenge conditions of confinement.[114] Unlike claims challenging the death penalty in general, claims against specific procedures do not require a writ of habeas corpus.[115] For example, in *Nelson v. Campbell*, the Supreme Court held that an Alabama death row inmate could use § 1983 to challenge the rarely used "cut-down" method of legal injection, and that such actions were not subject to habeas corpus's more rigorous procedural gate-keeping requirements.[116] Likewise, in *Hill v. McDonough*, the Court held that cases challenging a method of execution were generally grounded in civil rights jurisprudence.[117] Because the complaint challenged the particular method that was likely to be used for execution rather than directly challenging the death sentence itself, the Court reasoned that the challenge could proceed as a civil rights action rather than as a habeas action.[118]

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[113] *Id.* Since retiring, Justice Stevens has become more outspoken about his opposition to the death penalty. *See* John Paul Stevens, *On the Death Sentence*, N.Y. Rev. Books (Dec. 23, 2010), http://www.nybooks.com/articles/archives/2010/dec/23/death-sentence/ (reviewing David Garland, Peculiar Institution: America's Death Penalty in an Age of Abolition (2010)).

[114] *See* Richard C. Dieter, *Methods of Execution and Their Effect on the Use of the Death Penalty in the United States*, 35 Fordham Urb. L.J. 789, 800 (2008); Ellen Kreitzberg & David Richter, *But Can It Be Fixed? A Look At Constitutional Challenges to Lethal Injection Executions*, 47 Santa Clara L. Rev. 445, 467–69 (2007).

[115] *See* Dieter, *supra* note 114, at 799–800.

[116] *See* Nelson v. Campbell, 541 U.S. 637, 639, 646–47 (2004). The cut-down method of execution is used when an inmate has compromised veins, making traditional injection procedures impossible. *See id.* at 640–41. In such a case, prison personnel make an incision and catheterize a vein, through which the lethal drugs are delivered. *See id.*

[117] *See* Hill v. McDonough, 547 U.S. 573, 579, 583–85 (2006).

[118] *See id.* at 580–81; *see also* Beardslee v. Woodford, 395 F.3d 1064, 1068–69 (9th Cir. 2005) (acknowledging that a § 1983 action is the proper vehicle to challenge a method of execution); Jackson v. United States, 638 F. Supp. 2d 514, 615 (W.D.N.C. 2009) ("A motion pursuant to § 2255 is not the appropriate procedural mechanism for placing this issue before a court."); Emmett v. Johnson, 489 F. Supp. 2d 543, 547 (E.D. Va. 2007) ("The permissible scope of a constitutional challenge to execution procedures brought under 42 U.S.C. § 1983 is narrow. A civil rights action is not an appropriate vehicle to contest either an inmate's sentence of death or the constitutionality of the death penalty generally.").

Civil litigation under § 1983 is preferable to filing a petition for a writ of habeas corpus, in part because document requests and interrogatories may be made as a matter of course.[119] Inmates need discovery to determine if there is a substantial risk of severe pain due to maladministration of the injection protocol.[120] In litigation, the onus remains on inmates to educate the courts about death penalty protocols because courts may not be knowledgeable about them.[121] As such, it is important for inmates to gather as much information as possible about the protocol through civil rights suits.[122]

B. Baze *as Applied*

In the wake of *Baze*, challenges to lethal injection procedures face major difficulties.[123] Meeting the *Baze* legal standard requires a showing that a state's lethal injection protocol poses a substantial risk of severe pain as written.[124] Many cases highlight the undue deference that courts give to execution protocols.[125] In general, courts tend to defer to states that refuse to adopt alternative methods because of a legitimate penological justification for adhering to the present method.[126] In addition, courts misapply the *Baze* standard, treating the *Baze* decision as a rigid safe harbor.[127]

Indeed, the *Baze* decision has created a safe harbor for states.[128] If a state's lethal injection protocol is similar to the Kentucky protocol that was upheld in *Baze*, then it will not violate the Eighth Amendment.[129] For example, in *Harbison v. Little*, the Sixth Circuit vacated a district court decision holding that Tennessee's lethal injection proto-

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[119] *See Nelson*, 541 U.S. at 639; *see also* Daniel R. Oldenkamp, Note, *Civil Rights in the Execution Chamber: Why Death Row Inmates' Section 1983 Claims Demand Reassessment of Legitimate Penological Objectives*, 42 VAL. U. L. REV. 955, 961–62, 974–75 (2008).

[120] *See, e.g.*, Harbison v. Little, 571 F.3d 531, 540–41 (6th Cir. 2009) (Clay, J., dissenting).

[121] *See* Kreitzberg & Richter, *supra* note 114, at 509.

[122] *See id.*

[123] *See* Eric Berger, *Lethal Injection and the Problem of Constitutional Remedies*, 27 YALE L. & POL'Y REV. 259, 260–62 (2009).

[124] *See* Baze v. Rees, 553 U.S. 35, 41, 52 (2008).

[125] *See* Berger, *supra* note 123, at 260–62.

[126] *See id.* at 262 ("Courts, in other words, are adopting a blanket deference that makes it more difficult for even the strongest cases to get a fair hearing."); Oldenkamp, *supra* note 119, at 997–99.

[127] *See, e.g.*, *Harbison*, 571 F.3d at 536; Dickens v. Brewer, No. CV07-1770-PHX-NVW, 2009 WL 1904294, at *27–28 (D. Ariz. July 1, 2009).

[128] *See, e.g.*, *Harbison*, 571 F.3d at 536.

[129] *See Baze*, 553 U.S. at 61.

col violated the Eighth Amendment.[130] The Sixth Circuit upheld the protocol, concluding that it did not create a substantial risk of severe pain.[131] In the case itself, the petitioner argued that Tennessee's lethal injection protocol "violate[d] his Eighth Amendment rights because it involve[d] the unnecessary and wanton infliction of pain."[132] Harbison's claims focused on the protocol's failure to require a check for consciousness, the inadequate selection and training of personnel, the failure to provide for tactile monitoring of the IV lines, and the state's refusal to adopt alternative procedures.[133]

The *Harbison* court relied heavily on *Baze*.[134] It reasoned that Tennessee's protocol was substantially similar to the Kentucky protocol that was at issue in *Baze* and thus did not create a risk of a constitutional violation.[135] The court explained, "Tennessee's protocol must be upheld because *Baze* addressed the same risks identified by the trial court, but reached the conclusion that they did not rise to the level of a constitutional violation."[136] The court also looked at the training of medical personnel and execution procedures required by the Tennessee protocol and determined that they were similar to those found to be adequate and constitutional in *Baze*.[137]

In dissent, Judge Eric Lee Clay criticized the court's heavy reliance on the "substantially similar" Kentucky protocol at issue in *Baze*.[138] He argued that the majority's reasoning was legally and analytically flawed.[139] Judge Clay explained,

> The majority recasts the district court's evidentiary findings in light of criteria that the [district] court never considered, presuming findings under *Baze* that the district court never made. It does so in a cursory manner, with minimal attention to the *Baze* plurality's fact-specific analysis, summarily concluding at

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[130] *Harbison*, 571 F.3d at 533. The court also vacated the lower court's injunction that had barred Tennessee from executing any state prisoners on death row who brought a § 1983 action challenging the state's lethal injection protocol. *Id.* at 539.

[131] *Id.* at 539.

[132] *Id.* at 534.

[133] *See id.* at 534–35.

[134] *See id.*

[135] *See Harbison*, 571 F.3d at 536.

[136] *Id.*

[137] *See id.* at 537–39.

[138] *See id.* at 540–41 (Clay, J., dissenting).

[139] *See id.* at 540.

> each juncture that any deficiencies in Tennessee's execution protocol had already been considered but rejected in *Baze*.[140]

Of particular concern for Judge Clay was the district court's lack of opportunity to consider the evidence and to apply the *Baze* standard because the district court issued its opinion before the *Baze* ruling.[141] Judge Clay insisted that the district court should have been given the full opportunity to conduct extensive fact-finding to determine whether the state's protocol was properly implemented.[142] He argued, "It is not unforeseeable that a three-drug protocol that is, at first glance, similar to Kentucky's protocol, could fail to meet the standard set forth in *Baze*."[143] Accordingly, Judge Clay concluded that the majority should have remanded the case back to the district court instead of making its own determination on the merits.[144]

Similarly, in Arizona, the federal district court has held that the state's lethal injection protocol does not subject inmates to substantial risk of serious harm in violation of the Eighth Amendment.[145] The court based its holding on the fact that the Arizona protocol was substantially similar to the lethal injection protocol approved in *Baze* and provided even more safeguards than the Kentucky protocol.[146] Likewise, when determining the constitutionality of state protocols, the Fourth Circuit asks whether the execution protocol in question is "substantially similar to the protocol upheld in *Baze*."[147]

Because of the difficulty that challengers face in showing that state protocols create a substantial risk of severe pain as written, a potential alternative is to demonstrate that the protocol, constitutional as written, would be applied in an unconstitutional manner.[148] Under this approach, a challenge may be successful if there is a sufficient risk that the written protocol would not be followed or performed as expected.[149]

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[140] *Harbison*, 571 F.3d at 540 (Clay, J., dissenting).

[141] *See id.* at 540–41.

[142] *See id.*

[143] *Id.* at 540.

[144] *See id.* at 540–41.

[145] *See Dickens*, 2009 WL 1904294, at *38.

[146] *See id.* at *30, *38.

[147] *See* Emmett v. Johnson, 532 F.3d 291, 299 (4th Cir. 2008). In *Emmett v. Johnson*, the Fourth Circuit concluded that Virginia's protocol was substantially similar to the *Baze* protocol, and held that the inmate failed to meet the heightened standard set forth in *Baze*. *See id.* at 300, 305; *see also* Walker v. Johnson, 328 F. App'x 237, 238 (4th Cir. 2009); Jackson v. Johnson, 570 F. Supp. 2d 833, 835 (E.D. Va. 2008).

[148] *See, e.g.*, Clemons v. Crawford, 585 F.3d 1119, 1124–25 (8th Cir. 2009).

[149] *See Baze*, 553 U.S. at 41.

Again, this is a difficult showing to make.[150] For instance, inmates may complain that there is a significant risk that physicians, nurses, or other medical personnel will not follow the lethal injection procedures, but may struggle to prove that a member of the execution team would intentionally or negligently deviate from or disregard the protocol.[151]

Moreover, in this context, courts continue to use *Baze* as a safe harbor.[152] For example, in *Clemons v. Crawford*, a group of death row inmates challenged Missouri's written lethal injection protocol.[153] The inmates claimed that the protocol violated the Eighth Amendment because of the substantial risk that the protocol could be administered improperly.[154] The inmates based their claim on evidence of previous improper preparation and administration of lethal chemicals by state medical personnel.[155] The U.S. District Court for the Western District of Missouri, however, held that the inmates failed to state a viable Eighth Amendment claim.[156] The Eighth Circuit affirmed the district court decision, concluding that the challengers did not allege a sufficiently substantial risk of serious harm or a sufficiently imminent danger to support an Eighth Amendment claim.[157] The court repeatedly referred to similarities between the facts in the case and those in *Baze*, concluding that the Missouri protocol safeguarded against the risk of maladministration in ways similar to or more stringent than the Kentucky protocol.[158]

In general, courts require more than a showing of previous instances of deviations from protocol before invalidating lethal injection procedures.[159] For instance, in *Jackson v. Danberg*, the U.S. District Court of Delaware held that the state's previous casualness in following lethal injection procedures did not by itself create a risk of inability to carry out revised protocol.[160] The court also concluded that the risk of giving an insufficient dose of sodium thiopental at the first stage of the state's revised protocol did not give rise to an objectively intolerable risk of

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[150] *See, e.g.*, *Clemons*, 585 F.3d at 1126–28; Jackson v. Danberg, 601 F. Supp. 2d 589, 598–99 (D. Del. 2009).

[151] *See Clemons*, 585 F.3d at 1126–28.

[152] *See id.* at 1125.

[153] *See id.* at 1124–25.

[154] *See id.* at 1125.

[155] *See id.*

[156] *See* Clemons v. Crawford, No. 07-4129-CV-C-FJG, 2008 WL 2783233, at *1–2 (W.D. Mo. July 15, 2008), *aff'd*, 585 F.3d 1119.

[157] *See Clemons*, 585 F.3d at 1128.

[158] *See id.* at 1126–28.

[159] *See id.* at 1127.

[160] *See Jackson*, 601 F. Supp. 2d at 598–99.

harm.[161] Likewise, the Fifth Circuit, in *Raby v. Livingston*, held that the potential problems associated with intravenous insertions did not render Texas's lethal injection protocol in violation of the Eighth Amendment.[162] The plaintiff's argument in *Raby* was based "entirely on the hypothetical possibilities of human error or failure to follow protocol."[163] The Fifth Circuit affirmed the lower court's finding that "[t]hese hypotheticals are insufficient to remove the Texas procedure from the safe harbor created by *Baze*."[164]

The cases that have followed *Baze* demonstrate that it is unlikely courts will find that a protocol subjects inmates to a substantial risk of serious harm so long as the protocol is similar to Kentucky's.[165] Indeed, without a showing that the execution protocol subjects inmates to a substantial risk of serious harm, plaintiffs will not succeed in their claim, especially if the state's protocol provides more procedural safeguards than the Kentucky protocol.[166] The cases suggest that an alternative strategy for inmates is to demonstrate that the state is not consistently following its own procedures or that there is a pattern of unsuccessful executions.[167] Yet, moving forward, inmates will be hard-pressed to demonstrate that a state's protocol gives rise to an objectively intolerable risk of harm and that there is evidence that the execution would be carried out in a cruel and unusual fashion.[168]

C. *Extreme Deference to State Lethal Injection Protocols*

Based on a small sampling of post-*Baze* § 1983 lethal injection challenge cases, it appears that the courts have given too much deference to state lethal injection procedures.[169] There is no consensus that the protocols of each state guarantee that executions are free from unnecessary pain and suffering.[170] These protocols have been the target of

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[161] *See id.*

[162] *See* Raby v. Livingston (*Raby II*), 600 F.3d 552, 558 (5th Cir. 2010).

[163] Raby v. Johnson (*Raby I*), No. H-05-765, 2008 WL 4763677, at *3 (S.D. Tex. Oct. 27, 2008), *aff'd*, *Raby II*, 600 F.3d 552.

[164] *Raby I*, 2008 WL 4763677, at *3; *see Raby II*, 600 F.3d at 560.

[165] *See, e.g.*, *Harbison*, 571 F.3d at 536; *Emmett*, 532 F.3d at 299.

[166] *See Baze*, 553 U.S. at 49–50; *e.g.*, *Dickens*, 2009 WL 1904294, at *30, *38.

[167] *See Harbison*, 571 F.3d at 536 (showing that attacking procedures on the basis that they might cause substantial harm is an ineffective strategy).

[168] *See Jackson*, 601 F. Supp. 2d at 598–99 (holding that arguments related to past mistakes in executions are insufficient to create a substantial risk of serious harm).

[169] *See* Berger, *supra* note 123, at 260–62 (citing Morales v. Tilton, 465 F. Supp. 2d 972, 975–76 (N.D. Cal. 2006); Lightborne v. McCollum, 969 So. 2d 326, 351 (Fla. 2007)).

[170] *See* Leonidas G. Koniaris et al., *Ethical Implications of Modifying Lethal Injection Protocols*, 5 PLoS Med. 845, 845 (2008), *available at* http://www.plosmedicine.org/article/info%3Adoi

much criticism, even though very little information is available to the public.[171] As one academic remarked, these protocols are descriptions of "hypothetical rituals" that are unlike criminal laws or civil regulations, given their lack of definitions for penalties for improper behavior and any establishment of duty and responsibly.[172] Indeed, Alison Nathan asserts that these procedures "are often exempt from state administrative law notice-and-comment requirements or have been treated as exempt by prison personnel."[173] As such, critical information such as the type of drugs to be used, dosage amounts, and other administrative procedures are not publicly disclosed.[174] This unfortunately precludes the public from learning about flawed procedures, incompetent administration, and execution errors.[175]

So little is known about the execution protocols, in part because some states maintain a confidential manual that details the specific lethal injection proceedings followed.[176] For example, in Pennsylvania, state law requires that an inmate be injected with "a continuous intravenous administration of a lethal quantity of an ultrashort-acting barbiturate in combination with chemical paralytic agents approved by the department until death is pronounced by the coroner."[177] Accordingly, sodium thiopental, an "ultrashort-acting barbiturate," is administered to anesthetize individuals being executed.[178] The lethal injection statute, however, offers no information about the actual method of execution, including the drugs to be used, how the drugs are to be obtained and stored, and the dosage amount.[179] These questions seemingly negate the precautions and safeguards that typically surround the use of con-

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%2F10.1371%2Fjournal.pmed.0050126 ("[E]xecution data and eyewitness reports from various states indicate that some inmates have suffered during lethal injection, and suggest that others may have suffered without detection." (citations omitted)); James R. Wong, Comment, *Lethal Injection Protocols: The Failure of Litigation to Stop Suffering and the Case for Legislative Reform*, 25 Temp. J. Sci. Tech. & Envtl. L. 263, 266 (2006).

[171] *See* Deborah W. Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What It Says About Us*, 63 Ohio St. L.J. 63, 116–17 (2002).

[172] *See* Leigh B. Bienen, *Anomalies: Ritual and Language in Lethal Injection Regulations*, 35 Fordham Urb. L.J. 857, 857, 876 (2008).

[173] Nathan & Berman, *supra* note 73, at 317.

[174] *See id.*

[175] *See id.*

[176] *See* Wong, *supra* note 170, at 271.

[177] 61 Pa. Cons. Stat. Ann. § 4304 (West 2010).

[178] *See id.*; Wong, *supra* note 170, at 272.

[179] *See* § 4304; *see also* Wong, *supra* note 170, at 272.

trolled substances and devices.[180] Any reliable evaluation of Pennsylvania lethal injection process, therefore, depends on knowledge of how the Pennsylvania Department of Corrections carries out executions.[181] Yet, the Department of Corrections maintains this information in secrecy.[182]

Plaintiffs recently raised such concerns in *Chester v. Beard*.[183] In this ongoing litigation, plaintiffs allege that there is no information available that explains how the quantity of sodium thiopental is determined.[184] Plaintiffs also allege that there is no information concerning the selection and training given to the paramedics, nurses, or other health care professionals on the lethal injection team concerning the proper administration of the drug.[185] These allegations raise valid concerns about the proper injection and administration of the two other drugs—pancuronium bromide and potassium chloride—by members of the lethal injection team whose qualifications, licensure, and medical training remain a mystery.[186] Further, there is no information available concerning the procedures for checking consciousness, alternative procedures, or adequate facilities.[187]

In December 2010, Ohio became the first state to execute an inmate with a single drug protocol.[188] Washington has also adopted a single drug protocol.[189] Florida, Kentucky, South Carolina, Texas, and Virginia are all monitoring the implementation of Ohio's method.[190]

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[180] *See, e.g.*, The Controlled Substance, Drug, Device and Cosmetic Act, 35 PA. STAT. ANN. §§ 780-101 to -144 (West 2003).

[181] *See* Wong, *supra* note 170, at 272.

[182] *See* Travaglia v. Dep't of Corr., 699 A.2d 1317, 1321 (Pa. Commw. Ct. 1997).

[183] *See* Chester v. Beard, 657 F. Supp. 2d 534, 544 (M.D. Pa. 2009).

[184] *See id.*

[185] *See id.*

[186] *See id.*

[187] *See* Marceau, *supra* note 1, at 211.

[188] *See* Ariane de Vogue & Dennis Powell, *Ohio Killer Executed in First Use of Single-Drug Lethal Injection*, ABC NEWS (Dec. 8, 2009), http://abcnews.go.com/Politics/lethal-injection-ohio-perform-execution-single-drug/story?id=9277599. Ohio's single drug protocol involves "a massive overdose" of sodium thiopental. *Id.*

[189] *See* Kamika Dunlap, *Lethal Injection: WA Adopts Single Shot Protocol*, FINDLAW BLOTTER (Mar. 4, 2010, 12:15 PM), http://blogs.findlaw.com/blotter/2010/03/lethal-injection-wa-adopts-single-shot-protocol.html. Washington revised its protocol in response to a pending legal challenge before the Washington Supreme Court. *See id.* After an evidentiary hearing in the case but before oral arguments, the Department of Corrections changed from a three-drug protocol to a single drug protocol based on the procedures in place in Ohio. *See id.* The Washington Supreme Court found that, given the amendment, the constitutional challenge to the three-drug procedure was moot. *See id.*

[190] *See id.*; *see also* Elliot Garvey, Comment, *A Needle in the Haystack: Finding a Solution to Ohio's Lethal Injection Problems*, 38 CAP. U. L. REV. 609, 640 (2010) (noting that Ohio's exe-

While some states have switched from a three-drug protocol to a single drug protocol, risks remain.[191] One physician has cautioned that single drug protocols using sodium thiopental demand scrutiny.[192] One major concern about the single drug protocol is that an inmate's death or sense of pain does not immediately become apparent.[193] In the ongoing debate over a three-drug protocol versus a single drug protocol, it is unlikely that states will reach a consensus anytime in the near future.

III. An Alternative Strategy: Challenging Administrative Procedures Acts

A plaintiff will not succeed in challenging a particular execution protocol without a showing that the protocol subjects inmates to a substantial risk of serious harm, especially if the state's protocol provides more procedural safeguards than the Kentucky protocol upheld in *Baze*.[194] Inmates will have difficulty demonstrating that the protocol gives rise to an objectively intolerable risk of harm or that there is evidence the execution would be carried out in a cruel and unusual fashion.[195] The difficulty in overcoming the *Baze* standard calls for an alternative strategy to challenge lethal injections. Plaintiffs must seek creative ways to fight lethal injection instead of, or in addition to, direct Eighth Amendment claims.[196] Indeed, there are indications that this is already happening.[197]

After *Baze*, plaintiffs have brought challenges to state death penalty protocols based on claims that the protocols violate state administrative procedures acts.[198] These plaintiffs argued that the state protocols promulgated by the departments of corrections circumvented legal

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cution procedures are being closely watched and that its single drug protocol may present risks and administration problems).

[191] *See* Garvey, *supra* note 190, at 640; Dunlap, *supra* note 189.

[192] *See* Susi Vassallo, *Thiopental in Lethal Injection*, 35 Fordham Urb. L.J. 957, 958 (2008).

[193] *See* Mark Dershwitz & Thomas K. Henthorn, *The Pharmacokinetics and Pharmacodynamics of Thiopental As Used in Lethal Injection*, 35 Fordham Urb. L.J. 931, 956 (2008).

[194] *See* Mark B. Samburg, Recent Development, *Cruel and Unusual? The Bifurcation of Eighth Amendment Inquires After* Baze v. Rees, 44 Harv. C.R.-C.L. L. Rev. 213, 228–29 (2009).

[195] *See id.*

[196] *See id.* at 228.

[197] *See id.*

[198] *See* Bowling v. Ky. Dep't of Corr., 301 S.W.3d 478, 492 (Ky. 2009); Middleton v. Mo. Dep't of Corr., 278 S.W.3d 193, 196 (Mo. 2009); Power v. State, 992 So. 2d 218, 220 (Fla. 2008); Evans v. State, 914 A.2d 25, 77–81 (Md. 2006); Abdur'Rahman v. Bredesen, 181 S.W.3d 292, 312 (Tenn. 2005); Morales v. Cal. Dep't of Corr. & Rehab., 85 Cal. Rptr. 3d 724, 732 (Cal. Ct. App. 2008).

administrative requirements.[199] In some cases, information obtained through discovery has caused states to make changes to their protocols.[200] The results, however, have been mixed.

The Tennessee Supreme Court in *Abdur'Rahman v. Bredesen* found that the public notice and hearing requirements of the Tennessee Uniform Administrative Procedures Act were not applicable to the Department of Corrections and that the lethal injection protocols concerned only inmates of a correctional facility as an internal matter.[201] Likewise, in Missouri, an inmate claimed that the Department of Corrections's adoption of the lethal injection protocol violated the Missouri Administrative Procedure Act.[202] The Missouri Supreme Court held that the protocol was not a "rule" within the scope of the Procedure Act and therefore there was no notice-and-comment requirement.[203]

In other cases, challenges under administrative procedure acts have been successful. For example, in *Evans v. State*, the Maryland Court of Appeals held that the state's injection protocols were within the scope of the state Administrative Procedure Act and thus subject to its notice-and-comment rulemaking requirement.[204] The court determined that the Administrative Procedure Act required Maryland's lethal injection protocol to be adopted as a regulation.[205] It reasoned that the legislative intent was to allow public review and oversight and that the state protocols for administration as set forth in the directives were ineffective unless properly adopted.[206] The court further concluded that decisions concerning the administration of execution drugs affect inmates, corrections personnel, witnesses who observe the execution, and the general public.[207]

In *Morales v. Tilton*, the U.S. District Court for the Northern District of California held that the state's protocol, as implemented, violated the Eighth Amendment.[208] Central to the decision was the court's finding

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[199] *See Bowling*, 301 S.W.3d at 492; *Middleton*, 278 S.W.3d at 196; *Power*, 992 So. 2d at 220; *Evans*, 914 A.2d at 77–81; *Abdur'Rahman*, 181 S.W.3d at 312; *Morales*, 85 Cal. Rptr. 3d at 732.

[200] *See Bowling*, 301 S.W.3d at 492; *Evans*, 914 A.2d at 77–81; *Morales*, 85 Cal. Rptr. 3d at 732.

[201] *See Abdur'Rahman*, 181 S.W. 3d at 312. Similarly, the Florida Supreme Court held that the Administrative Procedures Act did not improperly provide the Department of Corrections "unfettered discretion" to create lethal injection protocol. *See Power*, 992 So. 2d at 220.

[202] *See Middleton*, 278 S.W.3d at 196.

[203] *See id.*

[204] *See Evans*, 914 A.2d at 77–81.

[205] *See id.*

[206] *See id.*

[207] *See id.* at 80.

[208] *See* Morales v. Tilton, 465 F. Supp. 2d 972, 979–81 (N.D. Cal. 2006).

that there were systemic flaws in the implementation of the protocol, which prevented execution teams from determining the consciousness of the inmates and resulted in the unreliable screening of execution team members, inconsistent record keeping, and the use of inadequate facilities.[209] Two years later, the California Court of Appeal affirmed the lower court's finding in *Morales v. California Department of Corrections* that the state's lethal injection protocol was adopted without complying with the requirements of the Administrative Procedures Act.[210]

After *Morales v. Tilton*, and in light of renewed attention to the state prison system, California began building a new death chamber and revising its lethal injection guidelines.[211] Yet, in 2010, the proposed new death penalty procedures were rejected by the Office of Administrative Law on the basis that some of the language conflicted with current state law or was ambiguous, thereby further delaying the restructuring of California's lethal injection procedures.[212]

Similarly, in *Bowling v. Kentucky Department of Corrections* (also known as "*Baze/Bowling II*"), a group of death row inmates successfully brought an action against the Kentucky Department of Corrections alleging that Kentucky's lethal injection protocol was unenforceable because it was not properly adopted as an administrative regulation under the Administrative Procedure Act.[213] The Kentucky Supreme Court held that the Department of Corrections was required to promulgate the state's lethal injection protocol as an administrative regulation.[214] As such, the specific execution procedures were not confidential, but subject to public disclosure.[215]

IV. Lessons From *Baze* and Subsequent Litigation

After *Baze*, the burden is on the plaintiff to show evidence of a substantial risk of serious harm and to attack procedures using information from past executions.[216] In order to be successful, a plaintiff must estab-

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[209] *See id.* at 979–80.

[210] *See Morales*, 85 Cal. Rptr. 3d at 732.

[211] *See* Kreitzberg & Richter, *supra* note 114, at 506–09; Henry Weinstein, *Judge May Force State to Redesign Executions*, L.A. Times, Oct. 31, 2007, at B1.

[212] *See* Paul Elias, *Regulators Reject New Death Penalty Procedures*, Tahoe Daily Trib. (June 10, 2010), http://www.tahoedailytribune.com/article/20100610/NEWS/100619969 (discussing how lethal injection legal challenges have stalled the execution of condemned prisoners in California).

[213] *See Bowling*, 301 S.W.3d at 492.

[214] *See id.*

[215] *See id.*

[216] *See* Baze v. Rees, 553 U.S. 35, 51–52 (2008).

lish that a feasible alternative procedure, which is supported by existing medical information and new research and advances, exists.[217] It is also beneficial for plaintiffs to obtain additional discovery, including disclosure through the state's administrative procedure act, to support an argument that the written protocol is flawed or unlikely to be followed.[218]

Additionally, as executions by lethal injection continue, litigants should consider crafting equal protection claims. The *McCleskey* decision and the subsequent legal discourse on race and the death penalty make it clear that racial discrimination is a central issue in death penalty challenges.[219] After *McCleskey*, a race-based challenge to execution by lethal injection should include studies of the racial history of the state and studies of conviction rates of all races in the state, as well as an examination of pre-trial charges and plea bargaining terms in capital cases and a review of jury compositions in the state.[220] Given the changing demographics in this country since *McCleskey* and in an effort to move beyond the traditional black and white dichotomy of analyzing racial discrimination within the context of capital punishment, consideration should also be given to the impact of the death penalty on other races, such as Asian Americans.[221]

Conclusion

Although the rate of executions has slowed down tremendously since 2000, those challenging the death penalty must still overcome the high hurdle created by the Supreme Court in *Baze*.[222] Even with growing publicity concerning wrongful convictions and the considerable litigation costs associated with capital cases, the stringent *Baze* standard makes it very difficult for inmates on death row to successfully challenge their sentences. Moreover, the increasingly conservative Supreme Court will make challenges to the death penalty even less likely to succeed.[223] Nev-

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[217] *See id.*

[218] *See* Bowling v. Ky. Dep't of Corr., 301 S.W.3d 478, 492 (Ky. 2009).

[219] *See* McCleskey v. Kemp, 481 U.S. 279, 328–35 (1987); *see, e.g.*, Amsterdam, *supra* note 59, at 49–51 (describing various ways to make race-based legal challenges); Miriam S. Gohara, Commentary, *Sounding the Echoes of Racial Injustice Beyond the Death Chamber: Proposed Strategies for Moving Past* McCleskey, 39 Colum. Hum. Rts. L. Rev. 124, 140–41 (2007) (describing various ways to make race-based legal challenges).

[220] *See* Amsterdam, *supra* note 59, at 49–51; Gohara, *supra* note 219, at 140–41.

[221] *See* Amsterdam, *supra* note 59, at 49–51; Gohara, *supra* note 219, at 140–41.

[222] *See* Baze v. Rees, 553 U.S. 35, 51–52 (2008); Oshinsky, *supra* note 12, at 120.

[223] *See, e.g.*, Erwin Chemerinsky, *Two Cheers for State Constitutional Law*, 62 Stan. L. Rev. 1695, 1709 (2010); Girardeau A. Spann, *Postracial Discrimination*, 5 Mod. Am. 26, 26 (2009); Joan Biskupic, *O'Connor Retired From Court, Not Discourse*, USA Today, Sept. 9, 2010, at 2A.

ertheless, inmates continue active litigation against the lethal injection process. One can hope that with a growing concern over increased and costly constitutional challenges, states will move toward more humane measures that are consistent with evolving standards of decency.