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## A NEW TEST FOR EVALUATING EIGHTH AMENDMENT CHALLENGES TO LETHAL INJECTIONS

An explosion of Eighth Amendment challenges to lethal injection protocols has struck the federal courts. The Supreme Court's recent decision in *Hill v. McDonough*,<sup>1</sup> which empowered prisoners to bring challenges to lethal injection procedures under 42 U.S.C. § 1983, has facilitated a flood of new lethal injection cases. In response, several courts have ordered states to alter their protocols, spurring other capital inmates to litigate such challenges.

Distressingly, the courts evaluating these claims have almost no law to guide them. The last Supreme Court decision applying the Eighth Amendment to a method of execution was written in 1947; that case, *Louisiana ex rel. Francis v. Resweber*,<sup>2</sup> occurred before the Eighth Amendment was applied to the states and resulted in a 4–1–4 split. Although lower courts have heard numerous challenges to execution methods, few have analyzed the constitutional validity of a method of execution in detail. Making matters worse, courts that find Eighth Amendment violations must craft equitable remedies that often amount to entirely new execution protocols. No clear precedent exists to guide courts in formulating such remedies.

This Note proposes a legal standard for the administration of Eighth Amendment method-of-execution claims, focusing on lethal injection cases. Part I describes lethal injection procedures and summarizes recent litigation. Part II discusses the difficulty of evaluating lethal injection claims, analyzing both general difficulties in interpreting the Eighth Amendment and specific difficulties associated with lethal injection cases. Part III proposes a standard for addressing method-of-execution claims that attempts to balance a prisoner's interest in a painless execution with a state's interest in conducting executions efficiently. Part IV discusses remedies for unconstitutional procedures. Part V concludes.

### I. THE LETHAL INJECTION LITIGATION CRISIS

#### A. Criticisms of Lethal Injection

Lethal injection is by far the predominant method of execution in the United States. It is a method of relatively recent vintage: the first

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<sup>1</sup> 126 S. Ct. 2096 (2006).

<sup>2</sup> 329 U.S. 459 (1947).

state to adopt it was Oklahoma in 1977.<sup>3</sup> Since then, however, every state that uses the death penalty except Nebraska has adopted lethal injection as its default method, although several states permit inmates to select alternate methods of execution.<sup>4</sup> The precise reason for this trend is unclear, but humaneness and a public perception of decency are among the likely candidates.<sup>5</sup> All currently pending method-of-execution challenges concern lethal injection.<sup>6</sup>

Lethal injection statutes vary considerably. Whereas some states regulate executions in detail, others have not officially adopted written protocols.<sup>7</sup> Several states mandate the use of barbiturates followed by chemical paralytic agents, while others are vague.<sup>8</sup> In addition, several states authorize multiple execution methods, and they vary in how the method is selected.<sup>9</sup> Ten states permit the government to switch to another method if lethal injection is declared unconstitutional.<sup>10</sup>

However, despite the statutory variations, almost every state uses the same process for executing prisoners. Three chemicals are used.<sup>11</sup> First, the state injects sodium thiopental, a barbiturate that rapidly causes unconsciousness. Second, the state injects pancuronium bromide, a muscle relaxant that paralyzes the body. Finally, the state injects potassium chloride, which induces cardiac arrest.<sup>12</sup>

The most frequently cited complaint with the three-drug procedure is that the barbiturate may not work, leading the inmate to suffer excruciating pain upon the injection of the potassium chloride<sup>13</sup>: the

<sup>3</sup> Deborah W. Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocuting and Lethal Injection and What It Says About Us*, 63 OHIO ST. L.J. 63, 92 (2002).

<sup>4</sup> *Id.* at 129 tbl.1. The table lists Alabama as using electrocution, but Alabama has since made lethal injection its default procedure. ALA. CODE § 15-18-82.1(a) (Supp. 2005).

<sup>5</sup> See Deborah W. Denno, *Getting to Death: Are Executions Constitutional?*, 82 IOWA L. REV. 319, 388-90 (1997).

<sup>6</sup> Inmates who voluntarily select a procedure other than lethal injection cannot challenge the selected procedure. See *Stewart v. LaGrand*, 526 U.S. 115, 119 (1999) (per curiam). Nebraska, the only noninjection state, has only nine inmates on death row, see Death Penalty Info. Ctr., State by State Information, <http://www.deathpenaltyinfo.org/state> (last visited Feb. 10, 2007) (select "Nebraska" from pull-down menu), and appears to have no currently scheduled executions or ongoing litigation challenging the electric chair.

<sup>7</sup> See Denno, *supra* note 3, at 149-81 tbls.14-19.

<sup>8</sup> See *id.* at 142 tbl.10 & nn.2-4.

<sup>9</sup> See *id.* at 92-95.

<sup>10</sup> See *id.* at 145 & n.12.

<sup>11</sup> See *id.* at 146 tbl.11. Contrary to the table, North Carolina now appears to use the three-drug cocktail. See N.C. Dep't of Corr., Execution Method, <http://www.doc.state.nc.us/dop/deathpenalty/method.htm> (last visited Feb. 10, 2007).

<sup>12</sup> See Denno, *supra* note 3, at 97-100.

<sup>13</sup> See *id.* at 108-09. Inmates have also challenged lethal injections under other theories. For instance, on several occasions, prison officials have had difficulty finding a vein, leading to lengthy and gruesome procedures. See *id.* at 110; see also *id.* at 139-41 tbl.9 (reporting numerous executions in which prison officials struggled to find a vein or insert the intravenous tubing).

chemical “inflames the potassium ions in the sensory nerve fibers, literally burning up the veins as it travels to the heart.”<sup>14</sup> The use of this chemical is sufficiently cruel that the American Veterinary Medical Association prohibits unanesthetized administration of potassium chloride to euthanize animals.<sup>15</sup> Compounding this problem, the presence of pancuronium bromide makes it difficult to determine whether the inmate is suffering pain. This chemical causes full-body paralysis, which may render the inmate unable to express the pain he experiences.<sup>16</sup> Thus, executioners may not be able to make appropriate adjustments if the procedure is performed improperly. Pancuronium bromide without anesthetic is sufficiently painful that at least thirty states have banned its use in animal euthanasia.<sup>17</sup>

To be sure, an inmate would experience this pain only if the anesthetic were administered improperly. But there is ample evidence that anesthetizations are indeed unsuccessful on occasion. A recent article in the British medical journal *The Lancet* argues that there is reason to believe that many inmates have been insufficiently anesthetized during lethal injections.<sup>18</sup> In addition, there have been reports of lethal injections in which the inmate was clearly conscious during the execution. In an Ohio execution in 2006, witnesses reported that they heard “moaning, crying out and guttural noises.”<sup>19</sup> In a recent execution in Florida, an inmate was given two doses of potassium chloride and took thirty-four minutes to die.<sup>20</sup> In California, anomalies in execution logs have suggested that at least six inmates were conscious during their executions.<sup>21</sup>

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<sup>14</sup> HUMAN RIGHTS WATCH, *SO LONG AS THEY DIE: LETHAL INJECTIONS IN THE UNITED STATES* 22 (2006), available at <http://hrw.org/reports/2006/uso406/uso406web.pdf>; see also *Brown v. Beck*, No. 5:06CT3018 H, 2006 WL 3914717, at \*7 (E.D.N.C. Apr. 7, 2006) (“If the alleged deficiencies do, in fact, result in inadequate anesthesia prior to execution, there is no dispute that [the inmate] will suffer excruciating pain as a result of the administration of pancuronium bromide and potassium chloride.”).

<sup>15</sup> See 2000 *Report of the AVMA Panel on Euthanasia*, 218 J. AM. VETERINARY MED. ASS’N 669, 680–81 (2001), available at [http://www.avma.org/issues/animal\\_welfare/euthanasia.pdf](http://www.avma.org/issues/animal_welfare/euthanasia.pdf).

<sup>16</sup> Denno, *supra* note 3, at 109 & n.321.

<sup>17</sup> See HUMAN RIGHTS WATCH, *supra* note 14, at 25. *But cf.* *Abdur’Rahman v. Bredesen*, 181 S.W.3d 292, 312–13 (Tenn. 2005) (rejecting the application of an animal euthanasia statute to human beings), *cert. denied*, 126 S. Ct. 2288 (2006).

<sup>18</sup> See Leonidas G. Koniaris et al., *Inadequate Anaesthesia in Lethal Injection for Execution*, 365 LANCET 1412 (2005).

<sup>19</sup> MICHAEL L. RADELET, *SOME EXAMPLES OF POST-FURMAN BOTCHED EXECUTIONS* (2006), available at <http://www.deathpenaltyinfo.org/article.php?did=478> (quoting Alan Johnson, *‘It Don’t Work,’ Inmate Says During Botched Execution*, COLUMBUS DISPATCH, May 3, 2006, at A1) (internal quotation marks omitted).

<sup>20</sup> See Adam Liptak & Terry Aguayo, *After Problem Execution, Governor Bush Suspends the Death Penalty in Florida*, N.Y. TIMES, Dec. 16, 2006, at A11.

<sup>21</sup> See *Morales v. Hickman*, 415 F. Supp. 2d 1037, 1044–46 (N.D. Cal.), *aff’d per curiam*, 438 F.3d 926 (9th Cir.), *cert. denied*, 126 S. Ct. 1314 (2006).

Commentators and courts have identified numerous flaws in state lethal injection procedures that may have been responsible for botched executions. For instance, a federal judge in California has cited inconsistent and unreliable screening of execution team members, a lack of meaningful training, inconsistent and unreliable recordkeeping, improper preparation of chemicals, and inadequate lighting in California executions.<sup>22</sup> In Missouri, a judge stayed an execution after hearing evidence that the physician used no protocol whatsoever and was dyslexic, leading to errors in dosages.<sup>23</sup> Later information came to light revealing that the physician had been sued for malpractice more than twenty times and had been publicly reprimanded.<sup>24</sup>

### B. *The Lethal Injection Litigation Explosion*

The reports of botched executions — and of flawed procedures that may have caused them — have resulted in numerous constitutional challenges to lethal injection. To be sure, Eighth Amendment lethal injection challenges are not novel. Almost immediately after the lethal injection statutes were passed, prisoners challenged them as cruel and unusual. These challenges have historically been summarily rejected.<sup>25</sup>

However, in 2006, courts began to look upon lethal injection claims more favorably. Several events prompted this development. First, the *Lancet* study gave credible evidence that some inmates were suffering excruciating pain during executions. Second, the Supreme Court's ruling in *Hill*, which permitted lethal injection claims to be brought under § 1983, facilitated these cases.<sup>26</sup> Third, successful lawsuits in multiple states, discussed below, accelerated the litigation. The result has been an inundation of lethal injection cases that has severely constrained states' ability to carry out executions. At the same time, the lack of guidance on standards for these claims has led to wildly inconsistent results.

To date, no court has explicitly declared an execution protocol unconstitutional. However, stays that allow inmates to litigate their claims have created de facto moratoriums on the death penalty in several states. In California, a district court evaluating a lethal injection

<sup>22</sup> *Morales v. Tilton*, Nos. C 06 219 JF RS, C 06 926 JF RS, 2006 WL 3699493, at \*6–7 (N.D. Cal. Dec. 15, 2006) (memorandum of intended decision and request for response from defendants).

<sup>23</sup> See *Taylor v. Crawford*, No. 05-4173-CV-C-FJG, 2006 WL 1779035, at \*7–9 (W.D. Mo. June 26, 2006).

<sup>24</sup> Jeremy Kohler, *Behind the Mask of the Execution Doctor*, ST. LOUIS POST-DISPATCH, July 30, 2006, at A1.

<sup>25</sup> See *Morales*, 415 F. Supp. 2d at 1043 (citing cases).

<sup>26</sup> See Douglas A. Berman, *Finding Bickel Gold in a Hill of Beans*, 2005–2006 CATO SUP. CT. REV. 311, 318 (“[T]he Court’s work in *Hill* had a profound nationwide ripple effect on lethal injection litigation and on state efforts to carry out scheduled executions.”). For further discussion of *Hill* and its effects on lethal injection litigation, see *infra* section II.C.3, pp. 1310–12.

challenge concluded that there was considerable evidence that numerous inmates had been conscious when they were supposed to have been anesthetized.<sup>27</sup> The court permitted the challenged execution to occur as long as the state either used only a barbiturate or had an anesthesia expert preside at the execution.<sup>28</sup> After the state was apparently unable to meet these conditions, the court held a bench trial on the constitutionality of the lethal injection procedure. In a recent memorandum, the court found several defects in California's implementation of lethal injection, and concluded that the "[d]efendants' implementation of lethal injection is broken, but it can be fixed."<sup>29</sup> The court invited the state to rewrite its protocols, noting "that the Governor's Office is in the best position" to do so.<sup>30</sup> In Missouri, a court stayed executions until the state agreed to include a trained physician, increase the amount of anesthetic, and implement monitoring and auditing procedures as well as a contingency plan.<sup>31</sup> The state has refused to implement the court's order, and executions are thus currently halted.<sup>32</sup> Federal judges have also issued stays halting executions performed by Delaware, Arkansas, and the federal government.<sup>33</sup>

Other courts have been less receptive to such claims. Following *Hill*, federal courts refused to grant stays that would have permitted them to hear the merits of § 1983 claims in Tennessee,<sup>34</sup> Florida,<sup>35</sup> and Oklahoma.<sup>36</sup> A federal court in Ohio issued a stay in the case of *Cooley v. Taft*,<sup>37</sup> but the Sixth Circuit overturned other stays, leading to

<sup>27</sup> *Morales*, 415 F. Supp. 2d at 1044-45.

<sup>28</sup> *Id.* at 1047-48.

<sup>29</sup> *Morales v. Tilton*, Nos. C 06 219 JF RS, C 06 926 JF RS, 2006 WL 3699493, at \*1 (N.D. Cal. Dec. 15, 2006) (memorandum of intended decision and request for response from defendants).

<sup>30</sup> *Id.* at \*9.

<sup>31</sup> *Taylor v. Crawford*, No. 05-4173-CV-C-FJG, 2006 WL 1779035, at \*8-9 (W.D. Mo. June 26, 2006).

<sup>32</sup> See *Taylor v. Crawford*, No. 05-4173-CV-C-FJG, 2006 U.S. Dist. LEXIS 74896 (W.D. Mo. Oct. 16, 2006).

<sup>33</sup> See *Norris v. Davis*, 126 S. Ct. 2986 (2006) (mem.) (declining to vacate the Arkansas stay); *Jackson v. Taylor*, No. Civ. 06-300-SLR, 2006 WL 1237044 (D. Del. May 9, 2006); Death Penalty Info. Ctr., Lethal Injections: Some Cases Stayed, Other Executions Proceed, <http://www.deathpenaltyinfo.org/article.php?did=1686> (last visited Feb. 10, 2007) (collecting stays issued during 2006).

<sup>34</sup> See *Alley v. Little*, No. 3:06-0340, 2006 WL 1697207 (M.D. Tenn. June 14, 2006), *aff'd*, 186 F. App'x 604 (6th Cir.), *reh'g en banc denied*, 452 F.3d 621 (6th Cir.), *cert. denied*, 126 S. Ct. 2975 (2006).

<sup>35</sup> See *Hill v. McDonough*, 464 F.3d 1256, 1260 (11th Cir.) (per curiam), *cert. denied*, 127 S. Ct. 465 (2006). *Hill*, who won in the Supreme Court, was executed without ever litigating his claim. See Fla. Dep't of Corr., Execution List, <http://www.dc.state.fl.us/oth/deathrow/execlist.html> (last visited Feb. 10, 2007).

<sup>36</sup> See *Hamilton v. Jones*, No. 06-6381, 2007 WL 18926, at \*2-3 (10th Cir. Jan. 4, 2007) (per curiam), *cert. denied*, 75 U.S.L.W. 3366 (U.S. Jan. 8, 2007).

<sup>37</sup> 430 F. Supp. 2d 702 (S.D. Ohio 2006).

confusion about when stays are appropriate.<sup>38</sup> In North Carolina, a district court refused to permit an execution until the state implemented measures to ensure that an inmate would remain unconscious during the execution.<sup>39</sup> The state responded by offering to use a bispectral index monitor, a device that monitors the level of consciousness, to ensure that the inmate remained anesthetized; the Fourth Circuit approved this remedy over an impassioned dissent.<sup>40</sup> State courts have been largely unreceptive to lethal injection claims.<sup>41</sup>

This current legal mess exists because many procedural and substantive issues in lethal injection litigation remain uncertain. Regarding procedure, the Supreme Court has issued no guidance on when stays are justified, how § 1983 actions should take prior challenges into account, and several other issues.<sup>42</sup> As for substance, the standards for what constitutes an unconstitutional execution remain uncertain.

## II. DIFFICULTIES IN EVALUATING LETHAL INJECTION CLAIMS

Faulty lethal injection procedures cause numerous botched executions. But are the procedures unconstitutional, and what remedies would ensure their constitutionality? These questions are extremely difficult for three principal reasons. First, there is almost no method-of-execution case law. Second, the few standards that do exist are vague. Third, lethal injection cases pose unique challenges that do not apply to other method-of-execution cases.

### A. *The Absence of Eighth Amendment Case Law*

In contrast to other areas of Eighth Amendment doctrine, few Supreme Court cases have grappled with the constitutionality of a method of execution. The first such case was *Wilkerson v. Utah*,<sup>43</sup> in which the Court held that execution by firing squad did not constitute cruel and unusual punishment. It noted that “[d]ifficulty would attend the effort to define with exactness the extent of the [Eighth Amendment] . . . ; but it is safe to affirm that punishments of torture, . . . and

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<sup>38</sup> See *Cooley v. Taft*, No. 2:04-CV-1156, 2006 WL 3762133, at \*2 (S.D. Ohio Dec. 21, 2006) (“Faced with two different orders by two different panels reaching two different conclusions, this Court is left with the task of determining what the law of this case is. . . . [N]either order provides any reasoning for its outcome . . . . [T]here is no apparent consistency to the appellate decisions that have arisen from this litigation.”).

<sup>39</sup> See *Brown v. Beck*, No. 5:06CT3018 H, 2006 WL 3914717, at \*8 (E.D.N.C. Apr. 7, 2006).

<sup>40</sup> See *Brown v. Beck*, 445 F.3d 752, 753 (4th Cir. 2006) (per curiam); see also *id.* at 753 (Michael, J., dissenting).

<sup>41</sup> See, e.g., *Malicoat v. State*, 137 P.3d 1234, 1237–38 (Okla. Crim. App. 2006); *Ex parte O’Brien*, 190 S.W.3d 677, 677–78 (Tex. Crim. App.) (per curiam), *cert. denied*, 127 S. Ct. 9 (2006).

<sup>42</sup> See Berman, *supra* note 26, at 323–24 (discussing open questions related to lethal injection).

<sup>43</sup> 99 U.S. 130 (1879).

all others in the same line of unnecessary cruelty, are forbidden.”<sup>44</sup> Eleven years later, the Court considered a challenge to New York’s use of the electric chair in *In re Kemmler*.<sup>45</sup> The Court stated that “[p]unishments are cruel when they involve torture or a lingering death . . . . [Cruelty] implies there something inhuman and barbarous, something more than the mere extinguishment of life.”<sup>46</sup> This passage was dicta: *Kemmler*’s actual holding was that the Eighth Amendment did not apply to the states, and thus the Court did not revisit a New York court’s decision that the execution method was permissible.<sup>47</sup> However, *Kemmler*’s dicta on what constitutes cruelty are still frequently cited by modern courts, often to reject Eighth Amendment claims.<sup>48</sup>

These dicta marked the end of the Court’s method-of-execution jurisprudence until *Resweber*, in which the Court considered whether Louisiana could attempt to execute an inmate by electrocution a second time after the initial electrocution had been botched.<sup>49</sup> The Court upheld the execution in a 4–1–4 decision. The plurality opinion stated that “[t]he traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence.”<sup>50</sup> However, “[t]here [was] no purpose to inflict unnecessary pain nor any unnecessary pain involved in the proposed execution.”<sup>51</sup> Justice Frankfurter concurred in the judgment, arguing that the execution did not “offend[] a principle of justice ‘rooted in the traditions and conscience of our people.’”<sup>52</sup> An impassioned dissent argued that “the execution sh[ould] be so instantaneous and substantially painless that the punishment [would] be reduced, as nearly as possible, to no more than that of death itself.”<sup>53</sup> The dissent concluded that the intentional reapplication of an electric current constituted an excessively cruel punishment.<sup>54</sup>

Although several subsequent opinions have issued dicta on methods of execution,<sup>55</sup> *Resweber* is the last opinion to have focused specifically

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<sup>44</sup> *Id.* at 135–36.

<sup>45</sup> 136 U.S. 436 (1890).

<sup>46</sup> *Id.* at 447.

<sup>47</sup> *See id.* at 448–49. The Eighth Amendment has since been incorporated into the Fourteenth Amendment. *See* *Robinson v. California*, 370 U.S. 660, 667 (1962).

<sup>48</sup> *Denno*, *supra* note 3, at 71 & n.42.

<sup>49</sup> *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 460–61 (1947) (plurality opinion).

<sup>50</sup> *Id.* at 463.

<sup>51</sup> *Id.* at 464.

<sup>52</sup> *Id.* at 470 (Frankfurter, J., concurring) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

<sup>53</sup> *Id.* at 474 (Burton, J., dissenting).

<sup>54</sup> *See id.* at 476–77.

<sup>55</sup> *See, e.g., Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion) (stating that a punishment is unconstitutional if it “makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suf-

on this issue.<sup>56</sup> Moreover, *Resweber* has limited precedential value. Its facts were unique; no opinion garnered a Court majority; it was decided before the Eighth Amendment had been applied to the states; it was decided before the development of much of modern Eighth Amendment doctrine, such as the requirement that courts consider “evolving standards of decency”;<sup>57</sup> and it did not state a clear standard for assessing method-of-execution claims. As a result, the Justices and lower courts have disagreed considerably on how to evaluate method-of-execution claims. At an oral argument, Justice Scalia suggested a limited view of the Eighth Amendment: “I can understand excruciating pain, but . . . you want to press it to the point where there can’t be any pain . . . . Any pain that can be eliminated must be eliminated. That seems to me a very extreme proposition.”<sup>58</sup> In contrast, Justice Brennan argued that “the Eighth Amendment requires that, as much as humanly possible, a chosen method of execution minimize the risk of unnecessary pain.”<sup>59</sup> This disparity underscores the lack of precedents on method-of-execution claims. Lower courts are writing on a nearly clean slate.

### B. Vague Standards

Professor Deborah Denno has catalogued the Eighth Amendment jurisprudence of the Supreme Court and circuit courts, as well as proposed standards from scholarship and the American Medical Association, and has extracted five factors to be used in evaluating method-of-execution claims. These factors are whether the method has a “humane baseline,” whether it is “excessive,” whether it violates “standards of decency,” whether there is an alternative method, and whether there is a penological justification. There are a total of thirty-

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fering”); *Furman v. Georgia*, 408 U.S. 238, 430 (1972) (Powell, J., dissenting) (“[N]o court would approve any method of implementation of the death sentence found to involve unnecessary cruelty in light of presently available alternatives.”). Three Justices have also issued dissents from denials of certiorari in method-of-execution challenges. See *Campbell v. Wood*, 511 U.S. 1119, 1119 (1994) (Blackmun, J., dissenting from denial of certiorari) (hanging); *Glass v. Louisiana*, 471 U.S. 1080, 1080 (1985) (Brennan, J., dissenting from denial of certiorari) (electrocution); *Gray v. Lucas*, 463 U.S. 1237, 1240 (1983) (Marshall, J., dissenting from denial of certiorari) (gas chamber).

<sup>56</sup> The Supreme Court finally appeared ready to address a method-of-execution claim when it granted certiorari in a challenge to Florida’s electrocution procedure, *Bryan v. Moore*, 528 U.S. 960 (1999), but the case was mooted when Florida changed its method to lethal injection, *Bryan v. Moore*, 528 U.S. 1133 (2000) (dismissing certiorari as improvidently granted).

<sup>57</sup> E.g., *McCleskey v. Kemp*, 481 U.S. 279, 300 (1987) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)).

<sup>58</sup> Transcript of Oral Argument at 14, *Hill v. McDonough*, 126 S. Ct. 2096 (2006) (No. 05-8794), available at [http://www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/05-8794.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/05-8794.pdf).

<sup>59</sup> *Glass*, 471 U.S. at 1086 (Brennan, J., dissenting from denial of certiorari).

two subfactors among the five factors, some of which have sub-factors.<sup>60</sup>

This plethora of factors cannot conceivably be incorporated into a single workable test. Given that numerous individual subfactors have been interpreted in vastly different ways,<sup>61</sup> lumping these factors into a single unpredictable balancing test will not result in effective guidance for lower courts.

### C. *Unique Challenges Associated with Lethal Injection Litigation*

Although vagueness afflicts all of the Supreme Court's Eighth Amendment jurisprudence, particular features of lethal injection litigation make the issue even more intractable.

1. *The Absence of Objective Factors.* — The Supreme Court has stated that in assessing evolving standards of decency, courts must consider “objective indicia that reflect the public attitude toward a given sanction.”<sup>62</sup> To achieve this end, the Court has often analyzed legislative trends, as demonstrated in *Roper v. Simmons*<sup>63</sup> and *Atkins v. Virginia*.<sup>64</sup> But this approach is unhelpful in ascertaining whether there is a national consensus on lethal injection.

At first glance, it would seem that there is a legislative trend toward considering lethal injection a permissible execution method. In 1977, there were no lethal injections; today, almost every execution is by lethal injection.<sup>65</sup> But prisoners are not challenging lethal injection per se. Rather, they are challenging the manner in which lethal injections are administered, which is not specified in detail by state legislatures. Presumably, state legislatures adopting lethal injection did not expect that executions would regularly be botched. As a result, state legislative trends are not probative in lethal injection cases.

One might argue that state legislatures knew the risks of the three-drug cocktail when they enacted their statutes. However, the evidence fails to support this view. The three-drug cocktail was not created through any genuine legislative deliberation. In actuality, it was established in a remarkably unconsidered manner: Oklahoma's state medical examiner, a physician with no pharmacological training whatso-

<sup>60</sup> Denno, *supra* note 5, at 402–04 tbl.2.

<sup>61</sup> Compare, e.g., *Roper v. Simmons*, 125 S. Ct. 1183, 1194 (2005) (“[T]he objective indicia of consensus in this case . . . provide sufficient evidence that today our society views juveniles . . . as ‘categorically less culpable than the average criminal.’” (quoting *Atkins v. Virginia*, 536 U.S. 304, 316 (2002))), with *id.* at 1218 (Scalia, J., dissenting) (“Words have no meaning if the views of less than 50% of death penalty States can constitute a national consensus.”).

<sup>62</sup> *Stanford v. Kentucky*, 492 U.S. 361, 370 (1989) (quoting *McCleskey*, 481 U.S. at 300) (internal quotation marks omitted).

<sup>63</sup> 125 S. Ct. 1183.

<sup>64</sup> 536 U.S. 304.

<sup>65</sup> See *supra* pp. 1301–02.

ever, developed the procedure only after numerous physicians invoked the Hippocratic Oath and refused to participate in the process.<sup>66</sup> When asked why he selected these three drugs, he responded: “Why not?”<sup>67</sup> Other states developed their specific protocols in a similarly informal manner.<sup>68</sup> As a result, it is unlikely the particularities of state protocols reflect the considered moral views of legislatures regarding what risk of pain is appropriate in an execution.

2. *The Diversity of Protocols.* — Professor Denno catalogues the multitude of protocols used by the states. Some require doctors to be present; others require paramedics; some have no personnel requirements. Different states use different doses of drugs. The level of specificity of the protocols in the several states varies wildly.<sup>69</sup> This diversity forces each judge to make individualized decisions.

3. *The Need To Impose Remedies.* — In many cases, a judge will be forced to create an equitable remedy within the constraints of a state’s existing death penalty statute and regulations, a potentially difficult task. This requirement arises out of the recent Supreme Court decision in *Hill*, which permitted inmates to style their method-of-execution suits as claims under § 1983.<sup>70</sup> Section 1983 claims differ from habeas claims in that habeas claims challenge the state’s capacity to carry out a sentence under state law, while § 1983 claims challenge the conditions of a legally imposed sentence.<sup>71</sup> *Hill* is likely to increase significantly the number of method-of-execution claims in federal courts because § 1983 claims are not subject to the strict rules governing successive habeas petitions.<sup>72</sup> However, § 1983 claims are restricted in ways that habeas claims are not. Specifically, if an inmate challenges a death sentence on direct appeal or habeas, the court can strike down the death sentence. In contrast, an inmate bringing a § 1983 claim cannot challenge the sentence itself. He must seek a remedy that preserves the state’s ability to impose the lethal injection under its statute and regulations.<sup>73</sup> If he brings a § 1983 claim and it is later found that there is no way to execute him under existing state

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<sup>66</sup> See Maura Dolan & Henry Weinstein, *Concerns About Pain Put Lethal Injection on Trial*, L.A. TIMES, Apr. 24, 2006, at A1; Jamie Fellner, *Lethal Yes, Painless No*, L.A. TIMES, Apr. 24, 2006, at B11; see also Denno, *supra* note 3, at 95–97.

<sup>67</sup> Fellner, *supra* note 66 (internal quotation marks omitted).

<sup>68</sup> See Dolan & Weinstein, *supra* note 66.

<sup>69</sup> See Denno, *supra* note 3, at 147–80 tbls.12–18.

<sup>70</sup> *Hill v. McDonough*, 126 S. Ct. 2096, 2102 (2006).

<sup>71</sup> *Id.* at 2101.

<sup>72</sup> See 28 U.S.C. § 2244 (2000) (establishing procedural requirements for successive habeas petitions).

<sup>73</sup> See *Hill*, 126 S. Ct. at 2101–02.

law, then the claim may be recast as a habeas claim<sup>74</sup> and thus may be barred.

Courts fashioning remedies under § 1983 face a difficult task. First, in *Hill*, the Supreme Court rejected the United States's proposed rule that would force a death row inmate to suggest an alternate mode of execution in order to bring a § 1983 claim. The Court stated that § 1983 claims were cognizable even if the inmate proposed no meaningful alternative.<sup>75</sup> Meanwhile, states may be reluctant to propose meaningful remedies, especially when they are aware that courts cannot strike down the death penalty entirely. Thus, courts may be forced to create remedies out of thin air, without guidance from either party, which will be a difficult task.

Another difficulty is that the remedies available to courts in § 1983 cases will differ from state to state because of the requirement that the execution remain permissible under existing law.<sup>76</sup> In states with very detailed statutes, judges will be able to impose only a narrow set of remedies; in states with broader statutes, they will have more leeway. For instance, several states have a fallback provision holding that if lethal injection is declared unconstitutional, then the inmate can be executed by another method.<sup>77</sup> In such states, prohibiting the government from executing the inmate using lethal injection would be permissible in a § 1983 claim because the state could simply revert to an alternate execution method listed in the statute and still carry out the sentence under existing law. In states without fallback provisions, this outcome would not be possible.

One illustration of this observation concerns the suggestion to switch from the three-drug cocktail to a single barbiturate.<sup>78</sup> Some states' statutes refer only to an injection, whereas others specify that the execution must take place with both a barbiturate and a chemical paralytic agent.<sup>79</sup> In the latter group, the single-barbiturate remedy would make the sentence imposed by the trial court invalid and thus would be impermissible under § 1983. The only way around this constraint would be to construe the state statute to permit such executions

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<sup>74</sup> See *id.* at 2103 ("If the relief sought would foreclose execution, recharacterizing a complaint as an action for habeas corpus might be proper.")

<sup>75</sup> *Id.*

<sup>76</sup> See *Heck v. Humphrey*, 512 U.S. 477, 487 (1994) ("[W]hen a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his . . . sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the . . . sentence has already been invalidated.")

<sup>77</sup> See *Denno*, *supra* note 3, at 145 tbl.10 & n.12.

<sup>78</sup> The district court stated that this remedy was a permissible option in *Morales*. See *Morales v. Hickman*, 415 F. Supp. 2d 1037, 1047 (N.D. Cal.), *aff'd per curiam*, 438 F.3d 926 (9th Cir.), *cert. denied*, 126 S. Ct. 1314 (2006).

<sup>79</sup> See *Denno*, *supra* note 3, at 142 tbl.10.

and hold that the statutes authorize, but do not require, the use of both a barbiturate and a paralytic agent. But this interpretation is implausible. Not only is it in tension with the statutory text, but it is also in tension with the fact that currently states use *more* than the two drugs listed in their state statutes to execute prisoners. The North Carolina Supreme Court ruled that the three-drug cocktail was permissible under the state statute authorizing lethal injection, reading the statute as not intended to provide an exhaustive list.<sup>80</sup> Although South Dakota's governor halted a recent execution that was to use the three-drug cocktail because he deemed it inconsistent with the statute,<sup>81</sup> no court has held that the three-drug cocktail violates a state statute. If a court concludes that the three-drug cocktail is permissible because the statute was intended to provide a nonexhaustive list, then a one-drug lethal injection cannot possibly fit within the statute. It is unlikely that a legislature would intend for prison officials to be able both to supplement and to ignore the enumerated list. As a result, an effective remedy — restricting the lethal injection to just a barbiturate — may not be available in some states.

4. *Lethal Injections as Probabilistic Claims.* — Further complications are caused by the “probabilistic” nature of many recent method-of-execution claims. Most Eighth Amendment claims are “nonprobabilistic” insofar as they require courts to evaluate a determinate set of facts without reference to the probability of a botched execution. Lethal injection challenges are sometimes nonprobabilistic. For instance, in *Nelson v. Campbell*,<sup>82</sup> the Supreme Court permitted a prison inmate to bring a claim under § 1983 that the “cut-down” procedure that the state planned to use to facilitate his lethal injection would be cruel and unusual.<sup>83</sup> The claim was nonprobabilistic because the inmate argued that the procedure, even if performed as intended, was inherently cruel and unusual.

Most recent method-of-execution petitioners, however, have argued that there is some probability that the execution method will be cruel and unusual if not performed properly. These probabilistic claims pose unique problems. First, they require judges to assess the risk of unconstitutional executions on the basis of ambiguous anecdotal evidence. Such risk assessments will be difficult and error-prone. Second, because there is no standard defining how risky a protocol must be before a judge may propose a remedy, judges will create varying risk thresholds.

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<sup>80</sup> See *State v. Hunt*, 591 S.E.2d 502, 503 (N.C. 2003).

<sup>81</sup> See *Execution Halted over Lethal Injection Method*, CHI. TRIB., Aug. 30, 2006, § 1, at 11.

<sup>82</sup> 541 U.S. 637 (2004).

<sup>83</sup> *Id.* at 642–43.

Probabilistic claims also present thorny problems for judges who must fashion remedies. Any remedy for a probabilistic claim will necessarily be prophylactic. Prophylactic rules are “risk-avoidance rules that are not directly sanctioned or required by the Constitution, but that are adopted to ensure that the government follows constitutionally sanctioned or required rules.”<sup>84</sup> They differ from standard constitutional holdings in that they acknowledge that they will prevent the government from engaging in behavior that is not actually unconstitutional in order to reduce the risk of constitutional violations.

Prophylactic rules are controversial. Some scholars<sup>85</sup> and Justices<sup>86</sup> argue that prophylactic rules are impermissible because they go beyond federal judges’ Article III powers and are unwise as a policy matter. However, this is the minority view: most scholars agree that prophylactic rules are permissible.<sup>87</sup> Indeed, the Supreme Court has imposed numerous prophylactic rules.<sup>88</sup> Assuming that prophylactic rules are constitutional, they are uniquely well suited to lethal injection challenges. Normally, constitutional harms can be redressed without using prophylactic remedies: people who have suffered constitutional violations can sue *ex post*. In lethal injection cases, inmates cannot challenge their execution procedures *ex post* for obvious reasons. Without prophylactic rules, an execution protocol could have an eighty-percent likelihood of being unconstitutional but a court would be powerless to enjoin it because of the twenty-percent likelihood that the remedy would apply to a lawful execution.

A more difficult problem than whether prophylactic remedies are permitted is how far such remedies may go. Professor Brian Landsberg describes the Court as having a “schizophrenic attitude” toward prophylactic remedies,<sup>89</sup> with little clear precedent on when such

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<sup>84</sup> Brian K. Landsberg, *Safeguarding Constitutional Rights: The Uses and Limits of Prophylactic Rules*, 66 TENN. L. REV. 925, 926 (1999).

<sup>85</sup> See, e.g., Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U. L. REV. 100, 123–36 (1985).

<sup>86</sup> See, e.g., *Dickerson v. United States*, 530 U.S. 428, 457–61 (2000) (Scalia, J., dissenting); *Hutto v. Finney*, 437 U.S. 678, 712 (1978) (Rehnquist, J., dissenting).

<sup>87</sup> See Michael C. Dorf & Barry Friedman, *Shared Constitutional Interpretation*, 2000 SUP. CT. REV. 61, 73 n.47 (noting that “[m]ost of the academic literature accepts the legitimacy of prophylaxis, with the debate focusing on how to justify it”). For a particularly extensive analysis, see Tracy A. Thomas, *The Prophylactic Remedy: Normative Principles and Definitional Parameters of Broad Injunctive Relief*, 52 BUFF. L. REV. 301 (2004).

<sup>88</sup> See, e.g., *Hutto*, 437 U.S. at 680–81 (affirming a prophylactic remedy to enforce the Eighth Amendment). The Court has also characterized *Miranda v. Arizona*, 384 U.S. 436 (1966), as a prophylactic rule. See, e.g., *Duckworth v. Eagan*, 492 U.S. 195, 209 (1989) (O’Connor, J., concurring) (“Like all prophylactic rules, the *Miranda* rule ‘overprotects’ the value at stake.”); *Connecticut v. Barrett*, 479 U.S. 523, 528 (1987) (“[T]he *Miranda* Court adopted prophylactic rules designed to insulate the exercise of Fifth Amendment rights . . .”).

<sup>89</sup> Landsberg, *supra* note 84, at 947.

remedies are acceptable.<sup>90</sup> To what extent can courts micromanage lethal injection protocols? One judge went as far as criticizing the type of paper used in the state's electrocardiogram tracings and the level of lighting in the execution chamber.<sup>91</sup> Clearly, executions using blank paper and dim lighting are not per se unconstitutional. Switching to better lighting and different paper might slightly reduce the risk of a botched execution. Is this reduction of risk sufficient to justify the judge's imposing a requirement of bright light and graph paper? Issues like this are without clear precedent.

### III. A NEW STANDARD

This Part proposes a test to evaluate lethal injection claims. The test varies according to two distinctions outlined in the previous Part. First, it depends on whether the challenge is probabilistic or nonprobabilistic. Second, it depends on whether the challenge is a § 1983 claim on the one hand, in which the court must find a remedy within the constraints of the prescribed sentence, or a habeas claim or direct appeal on the other hand, in which the court may strike down the sentence.

#### A. Description of the Test

For nonprobabilistic claims, the court should apply the following test:

First, if the execution will involve a nontrivial amount of pain,<sup>92</sup> then the court should request that the state propose an alternative execution procedure that will reduce the pain to a trivially low level. "Trivially low" is the de minimis threshold the Court defined in *Hudson v. McMillian*,<sup>93</sup> which for purposes of the proposed test is equivalent to the pain in a standard anesthetic procedure. If the state refuses to submit a plan or submits an unacceptable plan, the court should propose its own remedy.

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<sup>90</sup> See *id.* at 963 ("The Court's discussion of prophylactic rules has consisted of rumblings in dissents, stray off-hand references, and random comments in opinions.")

<sup>91</sup> See *Morales v. Tilton*, Nos. C 06 219 JF RS, C 06 926 JF RS, 2006 WL 3699493, at \*6 (N.D. Cal. Dec. 15, 2006) (memorandum of intended decision and request for response from defendants) ("Inexplicably, Defendants use blank paper for their electrocardiogram (EKG) tracings instead of the graph paper that typically is used . . ."); *id.* at \*7 ("The lighting is too dim . . . to permit effective observation . . .").

<sup>92</sup> For lethal injection claims, it is appropriate for the extent of physical pain to be the sole measure of cruelty. In other Eighth Amendment cases, judges have considered other forms of cruelty. See, e.g., *Campbell v. Wood*, 18 F.3d 662, 692 (9th Cir. 1994) (en banc) (Reinhardt, J., dissenting) (concluding that the physical mutilation caused by hanging is a form of cruelty). Challenges to such methods of execution could thus incorporate those considerations into the test. In lethal injection cases, however, the primary issue seems to be the physical pain in the procedure.

<sup>93</sup> 503 U.S. 1 (1992).

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Second, if the state objects to any element of the court's remedy, it must either propose an acceptable alternative or demonstrate a substantial interest in the preservation of the more painful method of execution. The more painful the procedure, the more substantial the state's interest must be for it to utilize the challenged method.

In habeas cases and direct appeals, there is a third step. If, under the state's ultimate plan, the prisoner will suffer a torturous execution, then the state will be enjoined from executing him.

For probabilistic claims, the court should apply the following test:

First, if the risk of an excessively painful execution is nontrivial,<sup>94</sup> then the court should request that the state propose an alternative execution procedure that would reduce the risk of an excessively painful execution to a trivially low level. "Trivially low" is defined as the risk that standard anesthetic procedures in hospitals will be botched. If the state refuses to submit a plan or submits an unacceptable plan, the court should propose its own remedy.

Second, if the state objects to any element of the court's remedy, it must either propose an acceptable alternative or show a substantial interest in the preservation of the riskier method. The riskier the procedure, the more substantial the state's interest must be for it to execute the inmate in accordance with the Eighth Amendment.

In habeas cases and direct appeals, there is a third step. If, under the state's ultimate plan, it remains extremely likely that the prisoner will suffer an unconstitutional execution, then the state will be enjoined from executing him.

### *B. The Principles Behind the Test*

The goal of this test is to balance the prisoner's interest in a painless execution with the state's interest in conducting executions efficiently. One of the fundamental problems that courts encounter in evaluating lethal injection claims is that the state's defective protocol frequently seems to arise out of negligence or outright incompetence. Courts have found the defects in the execution procedures in California and Missouri almost inexplicable, and the frequent errors in other states in what should be a routine procedure indicate that other protocols may be needlessly dangerous as well. This negligence is likely

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<sup>94</sup> This leaves open the question of how to define "excessively painful." The nonprobabilistic test provides a potential answer: an execution that will cause nontrivial pain. However, a court may find it overly radical to declare that an execution method that merely has a nontrivial risk of nontrivial pain is unconstitutional even absent any state interest whatsoever to justify it. If so, a court could retain the probabilistic test but define "excessively painful" as "torturous." The definition of "excessively painful" will not affect the application of the test to claims asserting the possibility of unanesthetized potassium chloride injections because it is generally accepted that such injections qualify as torturous. *See supra* pp. 1302-03.

what motivated the California and Missouri courts to enjoin executions even though the risks of unconstitutional execution may not have been very high (and indeed were not quantified). At the same time, courts should not respond to these defective protocols by requiring an extremely low level of pain or risk for an execution to pass judicial muster; such a requirement might invite needless litigation and constrain states in cases like *Nelson* in which a more painful procedure than usual may be necessary because of extenuating circumstances.<sup>95</sup>

The proposed test solves this problem by moving the primary focus from the objective level of pain or risk to the state's reasons for providing a painful or risky execution method. The threshold for a method of execution to fail step one of each branch of the test — non-trivial pain or risk — is low, but that does not make the test strongly pro-inmate. If the state has a substantial reason for using a particular execution protocol, such as inordinate expense or inconvenience associated with the suggested modifications, then the court should defer to the state. For instance, if an inmate can show that the absence of a physician renders an execution protocol dangerous, but the state can show that finding a doctor to preside over an execution would be extremely difficult, then the method should be constitutional. The test merely filters out protocols that are dangerous for no clear reason.

At the same time, step three of each branch of the test recognizes that the court's deference to the state's interest must have limits. If the execution will be truly torturous or highly risky, it should be unconstitutional regardless of the state's interest. In practice, judges are unlikely to reach this step. It will usually be possible to execute a prisoner without "torture," and states are likely to alter their procedures rather than permit judges to strike down the death penalty.

### C. *Doctrinal Justifications for the Test*

1. *The State's Capacity To Provide an Alternate Method of Execution.* — Both branches of the test consider the state's interest in preserving its protocol and the state's capacity to provide an alternate method. These considerations are not clearly relevant to the Eighth Amendment. Unlike other constitutional provisions that mandate that the court consider the state's interest, such as the requirement of reasonable searches, the Eighth Amendment refers only to the extent of the punishment. Whether a method of execution is "cruel" might at first blush seem independent of whether an alternative method exists that is less cruel. Nevertheless, precedent suggests that a state's interests and capacities should be taken into account.

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<sup>95</sup> See *Nelson v. Campbell*, 541 U.S. 637, 640 (2004) (noting that "standard techniques for gaining intravenous access" could not be used due to the inmate's history of drug abuse).

The Supreme Court has implied that although states may inflict some pain in carrying out executions, states may not inflict pain for the sole purpose of achieving a more unpleasant execution.<sup>96</sup> In *Kemmler*, the Supreme Court emphasized in dicta that what the Eighth Amendment prohibits is the intentional infliction of “something more than the mere extinguishment of life.”<sup>97</sup> In *Resweber*, even the plurality, in upholding Willie Francis’s execution, maintained that “[t]here [was] no purpose to inflict unnecessary pain.”<sup>98</sup> The principle that states may not intentionally inflict pain has been invoked in other contexts. While on the Eighth Circuit, then-Judge Blackmun authored an opinion prohibiting the use of corporal punishment — the intentional infliction of pain for punitive purposes.<sup>99</sup> Other courts followed.<sup>100</sup> It would be surprising if the intentional infliction of pain outside the death penalty context was unconstitutional but the intentional infliction of pain while executing prisoners was acceptable.

This principle suggests a stronger rule: it should be impermissible for a state to use a painful or risky method as long as an alternate, less painful method is readily available. It is difficult to see why a state’s motivation of sadism should demand Eighth Amendment scrutiny for a painful execution method but a state’s motivation of apathy or inertia should go unchallenged. Indeed, the Supreme Court has indicated that the Eighth Amendment protects against unnecessary pain. In *Wilkerson*, the Court stated that “unnecessary cruelty” was forbidden by the Eighth Amendment.<sup>101</sup> In *Furman v. Georgia*,<sup>102</sup> even the four dissenters, who argued for a more limited role for the Eighth Amendment than the five Justices in the majority, conceded that the Eighth Amendment prohibits executions exhibiting “unnecessary cruelty in light of presently available alternatives.”<sup>103</sup> Later, another plurality opinion stated that an execution was unconstitutional if it “makes no measurable contribution to accepted goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering.”<sup>104</sup> These cases support the view that if a less painful execution method is readily available, then the state should use it.

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<sup>96</sup> Notably, if this principle were not true — if the state could deliberately select a painful execution method for the sole purpose of achieving greater retributive or deterrence value — then step two of the test would be meaningless. The state could justify any unnecessarily painful punishment by asserting its interest in achieving greater retributive or deterrent value.

<sup>97</sup> *In re Kemmler*, 136 U.S. 436, 447 (1890).

<sup>98</sup> *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 464 (1947) (plurality opinion).

<sup>99</sup> *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968).

<sup>100</sup> *See, e.g., Gates v. Collier*, 501 F.2d 1291, 1306 (5th Cir. 1974).

<sup>101</sup> *Wilkerson v. Utah*, 99 U.S. 130, 136 (1879).

<sup>102</sup> 408 U.S. 238 (1972) (per curiam).

<sup>103</sup> *Id.* at 430 (Powell, J., dissenting).

<sup>104</sup> *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion). Although only four Justices joined this opinion, Justices Brennan and Marshall concurred in the judgment, adhering to their

It follows that if a state wishes to retain a painful or risky execution method, it should have to show a substantial interest — the evaluation encapsulated in step two of both branches of the test. One could conceivably argue that the principle that “unnecessary” pain is impermissible merely suggests that the state must switch to a less painful execution method only if it has no legitimate interest whatsoever in maintaining the status quo. However, this view is unsupportable. Normatively, if unnecessarily causing pain or risk is fundamentally uncivilized, then demonstrating a minimal state interest intuitively does not cure the problem. Practically, a state can always demonstrate an interest in using a more painful or riskier execution method, making the prohibition of unnecessary inflictions toothless. Courts must demand a substantial justification for the restriction to be meaningful.

This discussion so far references only the infliction of pain, which appears more relevant to nonprobabilistic claims. Nevertheless, one can apply this principle to probabilistic claims as well. If it is unconstitutional to increase the *magnitude* of pain unnecessarily, then surely it is unconstitutional to increase the *probability* of pain unnecessarily.

2. *Remedies in Cases of Nontrivial Pain or Risk.* — The parts of the test that empower courts to issue remedies in cases of nontrivial pain or risk derive their inspiration from prison abuse cases. In *Hudson*, the Supreme Court concluded that in cases in which a guard used excessive force in a “deliberately indifferent” manner, “serious harm” is not required to state an Eighth Amendment claim. In such cases, the infliction of pain need only be more than “de minimis,” and “bruises, swelling, loosened teeth, and a cracked dental plate[] are not de minimis for Eighth Amendment purposes.”<sup>105</sup>

Of course, *Hudson* applies only to prison abuse cases in which the official was acting in a “deliberately indifferent” manner. But as Justice Thomas argued in dissent, this mens rea standard is actually lower than the mens rea that can be attributed to the state when it conducts executions: “[I]f a State were to pass a statute ordering that convicted felons be broken at the wheel, we would not separately inquire whether the legislature had acted with ‘deliberate indifference,’ since a statute, as an intentional act, necessarily satisfies an even higher state-of-mind threshold.”<sup>106</sup> Indeed, Justice Thomas emphasized that legislatively imposed punishments, rather than impositions by prison guards, were the historical target of the Eighth Amendment.<sup>107</sup> As a

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views that the death penalty is always unconstitutional. See *id.* at 600 (Brennan, J., concurring in the judgment); *id.* (Marshall, J., concurring in the judgment). They presumably would have accepted this narrower principle.

<sup>105</sup> *Hudson v. McMillian*, 503 U.S. 1, 10 (1992).

<sup>106</sup> *Id.* at 21 (Thomas, J., dissenting).

<sup>107</sup> See *id.* at 18–20.

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result, the standard applied to prisoner abuse proscribes less conduct than the standard applied to legislative punishments.

It might be argued that states do not intentionally botch executions, and thus Justice Thomas's argument is inapposite in the lethal injection context: statutes intentionally prescribing painful procedures may satisfy a "higher state-of-mind threshold" than "deliberate indifference," but unforeseeable botched executions are not the product of "deliberate indifference." However, to the extent that botched executions are the predictable result of defective protocols and untrained personnel, such an intent might be imputed to the state. At the very least, if a prison official acting impulsively in an unpredictable prison setting can act with deliberate indifference, surely a state that retains a defective and easily fixable protocol knowing that it will frequently cause botched executions acts with deliberate indifference. Accordingly, it is appropriate to apply the de minimis threshold established in *Hudson* to method-of-execution claims.

This analysis establishes only that it is permissible to set a baseline of nontrivial *pain*, which is relevant only to the nonprobabilistic test. Nevertheless, it is reasonable to infer that courts may also set a baseline of nontrivial *risk*. The principle underlying *Hudson* is that as long as the state's mens rea violates evolving standards of decency, prisoners need only show that the harm is not de minimis.<sup>108</sup> This logic applies whether the harm is a nontrivial increase of pain or a nontrivial increase in the probability of an excessively painful execution.

#### D. Practical Justifications for the Test

1. *Judicial Manageability*. — One important justification for this scheme is that it is judicially manageable. On its face, this seems like a surprising conclusion. Courts must evaluate whether pain or risk is nontrivial in step one, weigh between the incommensurate criteria of the magnitude of a state interest and the magnitude of pain or risk in step two, and make a seemingly arbitrary determination in step three.

In practice, however, the test will be judicially manageable, at least in relation to an alternate test focusing only on the magnitude of pain or risk without considering the state's interest. A test focusing on the objective magnitude of pain would be intractable: judges have no means other than pure, unsubstantiated intuition to determine whether a procedure is "torturous" or merely "painful." Similarly, a test requiring the state to meet some arbitrary risk threshold, such as "substantial" or "undue" risk, would be impossible to apply consistently. In contrast, the threshold showings in the proposed test use clear baselines — the pain and risk associated with a routine injection.

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<sup>108</sup> See *id.* at 10 (majority opinion).

Concededly, step two requires an unpredictable inquiry into the importance of the state interest. But this inquiry is not altogether different from what courts engage in regularly when assessing whether state interests are “compelling.” Step three requires subjective decisionmaking, but as noted, it will rarely be applied.

2. *The Inevitability of Considering a State’s Interest.* — Realistically, courts will consider a state’s capacity for providing an alternate procedure regardless of whether this consideration is explicitly present in the test. Faced with the intractable question whether a procedure is sufficiently painful or risky to violate the Eighth Amendment, courts will ask the intuitive question whether an alternate procedure can be implemented without jeopardizing legitimate state interests. Indeed, in § 1983 cases, the court must consider the issue of a remedy. At least in these cases, courts are likely to fold their assessment of the state’s capacities into their analysis of whether there is a rights violation. They are unlikely to decide that the prisoner’s constitutional rights will be violated but that there is no remedy because it is a § 1983 case; more likely, if they determine that an appropriate remedy is impossible under the imposed sentence, they will announce that there is no violation of the right. The proposed test thus codifies the logic that courts are likely to use informally.

3. *The Test as a Compromise.* — The proposed test diverges from a bolder proposition for which Justice Brennan argued. In *Glass v. Louisiana*,<sup>109</sup> he argued that a state must enact a system that minimizes the risk of pain as much as possible.<sup>110</sup> Under such a system, if there is any conceivable way to execute the prisoner in a more humane manner, then the state must do it.

Such a system would be inappropriate for at least two reasons, however. First, it would empower judges to rewrite states’ methods of execution in almost every case: as long as the inmate could show non-trivial pain, there would always be some conceivable way to reduce it. Given the traditional deference to state execution methods, such a stringent standard would be inappropriate. Indeed, the ultimate result might be that courts would institute a single set of lethal injection best practices as a constitutional requirement, especially if such practices have been determined to be risk-free in other states. Second, such a system would invite endless litigation: prisoners could make extremely vexing demands on the state, and the courts would be forced to grant them if they made the sentence even slightly more humane.

As a result, a middle ground is necessary. If the state can demonstrate a substantial reason for preserving its execution protocol, then

<sup>109</sup> 471 U.S. 1080 (1985) (mem.).

<sup>110</sup> See *id.* at 1086 (Brennan, J., dissenting from denial of certiorari).

the court must defer to it. The protocol is designed to balance states' interests in efficiency against inmates' interests in humane executions.

#### IV. REMEDIES

This Part briefly discusses remedies in lethal injection cases. Courts have established extremely detailed remedial plans. For instance, a Missouri court required the state to have a physician present, use a specified level of anesthetic, and have contingency and monitoring plans.<sup>111</sup> In his memorandum addressing California's execution procedures, Judge Fogel pointed out several defects with the current protocol, which seems to indicate his willingness to establish a multifaceted remedial plan.<sup>112</sup> Analysis of the specific details of these plans is beyond the scope of this Note.

Nevertheless, some general principles can be stated. As section II.C.4 discusses, the scope of a court's power to formulate prophylactic remedies is ambiguous. However, one sensible principle is that a remedy is appropriate only if it will materially contribute to bringing the execution method within constitutional limits.<sup>113</sup> If Judge Fogel requires that California use a brighter lightbulb and graph paper in executions, as he suggested he might, such an order would be appropriate only if he found that both of these remedies materially reduced the risk threshold. If not, tinkering with the state's protocol would be unacceptable judicial meddling no matter how inexplicable the status quo.

Another critical principle is that courts should strive to create their own execution protocols as infrequently as possible. The creation of execution protocols is a task for legislatures and prison officials, and courts should give the state every opportunity to create a suitable remedy. Judge Fogel abided by this principle when he indicated that he would delay an opinion on the merits until the state proposed an alternative procedure.<sup>114</sup> In response, Governor Schwarzenegger indicated he would swiftly do so.<sup>115</sup> This course of events is preferable to a judicially crafted remedy. Courts are better at evaluating existing procedures than generating new ones.

If the state does not submit an acceptable remedy, courts should use a protocol that already exists in another state. One difficulty in

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<sup>111</sup> See *supra* p. 1305.

<sup>112</sup> See *supra* p. 1304.

<sup>113</sup> See Thomas, *supra* note 87, at 330–52 (describing, as limiting principles for prophylactic remedies, the requirements that the remedies target the legal harm and have a sufficient causal nexus with the harm).

<sup>114</sup> See *Morales v. Tilton*, Nos. C 06 219 JF RS, C 06 926 JF RS, 2006 WL 3699493, at \*9 (N.D. Cal. Dec. 15, 2006) (memorandum of intended decision and request for response from defendants).

<sup>115</sup> See Henry Weinstein, *Governor Demands Changes in Lethal Injection Protocols*, L.A. TIMES, Dec. 19, 2006, at B1.

fashioning a remedy is the court's relative ignorance of what constitutes an effective procedure. The court may overestimate the risk associated with a particular aspect of the protocol or may underestimate the difficulty associated with its proposed remedy. Using a protocol that exists in another state in which botched executions are rare mitigates these problems substantially. The court can be confident both that the protocol can be successfully implemented and that the risks are not too high. For instance, Judge Fogel noted that Virginia's protocol appears to perform successfully.<sup>116</sup> Courts would be wise to mirror the protocol of a successful state as closely as possible if forced to impose a remedy. Governor Bush in Florida, Governor Schwarzenegger in California, and Governor Bredesen in Tennessee have ordered comprehensive reviews of their states' protocols;<sup>117</sup> courts in other states could make use of those states' findings in their remedial orders rather than create remedies from whole cloth.

The task of imposing remedies would be greatly facilitated if the Supreme Court granted certiorari in a lethal injection challenge and held that a particular protocol was constitutional. Such a decision would create a safe harbor for states that wish to resume their executions and therefore would contain the lethal injection litigation explosion. At the same time, it would provide a model remedy for lower courts to impose.

## V. CONCLUSION

The recent explosion of lethal injection litigation has left courts in a difficult situation. Eighth Amendment challenges to methods of execution are exceedingly difficult to adjudicate as a result of the vagueness of the existing tests and profound disagreement on how they should be applied. Lethal injection challenges are particularly problematic, requiring complex factual determinations and detailed remedies with almost no doctrinal guidance.

Courts should adopt a rule that accounts for both the objective measure of pain or risk associated with the procedure and the state's interest in choosing the procedure. Such a rule would be judicially manageable and consistent with Eighth Amendment precedent. But the onus should be on state executives and legislatures to craft improved protocols. Prompt action by the states would preclude poten-

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<sup>116</sup> *Morales*, 2006 WL 3699493, at \*9 n.12 (citing *Walker v. Johnson*, 448 F. Supp. 2d 719 (E.D. Va. 2006)).

<sup>117</sup> See Exec. Order No. 43 (Tenn. 2007), available at <http://www.tennesseeanytime.org/governor/AdminCMSServlet?action=viewFile&id=969>; Liptak & Aguayo, *supra* note 20; *Nation in Brief*, WASH. POST, Feb. 2, 2007, at A9.

tially inappropriate judicially crafted remedies and ensure the successful administration of capital punishment.