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SUPREME COURT OF THE UNITED STATES

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**BAZE ET AL. v. REES, COMMISSIONER, KENTUCKY
DEPARTMENT OF CORRECTIONS, ET AL.**

CERTIORARI TO THE SUPREME COURT OF KENTUCKY

No. 07–5439. Argued January 7, 2008—Decided April 16, 2008

Lethal injection is used for capital punishment by the Federal Government and 36 States, at least 30 of which (including Kentucky) use the same combination of three drugs: The first, sodium thiopental, induces unconsciousness when given in the specified amounts and thereby ensures that the prisoner does not experience any pain associated with the paralysis and cardiac arrest caused by the second and third drugs, pancuronium bromide and potassium chloride. Among other things, Kentucky’s lethal injection protocol reserves to qualified personnel having at least one year’s professional experience the responsibility for inserting the intravenous (IV) catheters into the prisoner, leaving it to others to mix the drugs and load them into syringes; specifies that the warden and deputy warden will remain in the execution chamber to observe the prisoner and watch for any IV problems while the execution team administers the drugs from another room; and mandates that if, as determined by the warden and deputy, the prisoner is not unconscious within 60 seconds after the sodium thiopental’s delivery, a new dose will be given at a secondary injection site before the second and third drugs are administered.

Petitioners, convicted murderers sentenced to death in Kentucky state court, filed suit asserting that the Commonwealth’s lethal injection protocol violates the Eighth Amendment’s ban on “cruel and unusual punishments.” The state trial court held extensive hearings and entered detailed factfindings and conclusions of law, ruling that there was minimal risk of various of petitioners’ claims of improper administration of the protocol, and upholding it as constitutional. The Kentucky Supreme Court affirmed, holding that the protocol does not violate the Eighth Amendment because it does not create a substantial risk of wanton and unnecessary infliction of pain, torture,

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or lingering death.

Held: The judgment is affirmed.

217 S. W. 3d 207, affirmed.

CHIEF JUSTICE ROBERTS, joined by JUSTICE KENNEDY and JUSTICE ALITO, concluded that Kentucky’s lethal injection protocol satisfies the Eighth Amendment. Pp. 8–24.

1. To constitute cruel and unusual punishment, an execution method must present a “substantial” or “objectively intolerable” risk of serious harm. A State’s refusal to adopt proffered alternative procedures may violate the Eighth Amendment only where the alternative procedure is feasible, readily implemented, and in fact significantly reduces a substantial risk of severe pain. Pp. 8–14.

(a) This Court has upheld capital punishment as constitutional. See *Gregg v. Georgia*, 428 U. S. 153, 177. Because some risk of pain is inherent in even the most humane execution method, if only from the prospect of error in following the required procedure, the Constitution does not demand the avoidance of all risk of pain. Petitioners contend that the Eighth Amendment prohibits procedures that create an “unnecessary risk” of pain, while Kentucky urges the Court to approve the “‘substantial risk’” test used below. Pp. 8–9.

(b) This Court has held that the Eighth Amendment forbids “punishments of torture, . . . and all others in the same line of unnecessary cruelty,” *Wilkinson v. Utah*, 99 U. S. 130, 136, such as disemboweling, beheading, quartering, dissecting, and burning alive, all of which share the deliberate infliction of pain for the sake of pain, *id.*, at 135. Observing also that “[p]unishments are cruel when they involve torture or a lingering death[,] . . . something inhuman and barbarous [and] . . . more than the mere extinguishment of life,” the Court has emphasized that an electrocution statute it was upholding “was passed in the effort to devise a more humane method of reaching the result.” *In re Kemmler*, 136 U. S. 436, 447. Pp. 9–10.

(c) Although conceding that an execution under Kentucky’s procedures would be humane and constitutional if performed properly, petitioners claim that there is a significant risk that the procedures will *not* be properly followed—particularly, that the sodium thiopental will not be properly administered to achieve its intended effect—resulting in severe pain when the other chemicals are administered. Subjecting individuals to a substantial risk of future harm can be cruel and unusual punishment if the conditions presenting the risk are “sure or very likely to cause serious illness and needless suffering” and give rise to “sufficiently imminent dangers.” *Helling v. McKinney*, 509 U. S. 25, 33, 34–35. To prevail, such a claim must present a “substantial risk of serious harm,” an “objectively intolerable risk of harm.” *Farmer v. Brennan*, 511 U. S. 825, 842, 846, and

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n. 9. For example, the Court has held that an isolated mishap alone does not violate the Eighth Amendment, *Louisiana ex rel. Francis v. Resweber*, 329 U. S. 459, 463–464, because such an event, while regrettable, does not suggest cruelty or a “substantial risk of serious harm.” Pp. 10–12.

(d) Petitioners’ primary contention is that the risks they have identified can be eliminated by adopting certain alternative procedures. Because allowing a condemned prisoner to challenge a State’s execution method merely by showing a slightly or marginally safer alternative finds no support in this Court’s cases, would embroil the courts in ongoing scientific controversies beyond their expertise, and would substantially intrude on the role of state legislatures in implementing execution procedures, petitioners’ proposed “unnecessary risk” standard is rejected in favor of *Farmer*’s “substantial risk of serious harm” test. To effectively address such a substantial risk, a proffered alternative procedure must be feasible, readily implemented, and in fact significantly reduce a substantial risk of severe pain. A State’s refusal to adopt such an alternative in the face of these documented advantages, without a legitimate penological justification for its current execution method, can be viewed as “cruel and unusual.” Pp. 12–14.

2. Petitioners have not carried their burden of showing that the risk of pain from maladministration of a concededly humane lethal injection protocol, and the failure to adopt untried and untested alternatives, constitute cruel and unusual punishment. Pp. 14–23.

(a) It is uncontested that failing a proper dose of sodium thiopental to render the prisoner unconscious, there is a substantial, constitutionally unacceptable risk of suffocation from the administration of pancuronium bromide and of pain from potassium chloride. It is, however, difficult to regard a practice as “objectively intolerable” when it is in fact widely tolerated. Probative but not conclusive in this regard is the consensus among the Federal Government and the States that have adopted lethal injection and the specific three-drug combination Kentucky uses. Pp. 14–15.

(b) In light of the safeguards Kentucky’s protocol puts in place, the risks of administering an inadequate sodium thiopental dose identified by petitioners are not so substantial or imminent as to amount to an Eighth Amendment violation. The charge that Kentucky employs untrained personnel unqualified to calculate and mix an adequate dose was answered by the state trial court’s finding, substantiated by expert testimony, that there would be minimal risk of improper mixing if the manufacturers’ thiopental package insert instructions were followed. Likewise, the IV line problems alleged by petitioners do not establish a sufficiently substantial risk because IV

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team members must have at least one year of relevant professional experience, and the presence of the warden and deputy warden in the execution chamber allows them to watch for IV problems. If an insufficient dose is initially administered through the primary IV site, an additional dose can be given through the secondary site before the last two drugs are injected. Pp. 15–17.

(c) Nor does Kentucky’s failure to adopt petitioners’ proposed alternatives demonstrate that the state execution procedure is cruel and unusual. Kentucky’s continued use of the three-drug protocol cannot be viewed as posing an “objectively intolerable risk” when no other State has adopted the one-drug method and petitioners have proffered no study showing that it is an equally effective manner of imposing a death sentence. Petitioners contend that Kentucky should omit pancuronium bromide because it serves no therapeutic purpose while suppressing muscle movements that could reveal an inadequate administration of sodium thiopental. The state trial court specifically found that thiopental serves two purposes: (1) preventing involuntary convulsions or seizures during unconsciousness, thereby preserving the procedure’s dignity, and (2) hastening death. Petitioners assert that their barbiturate-only protocol is used routinely by veterinarians for putting animals to sleep and that 23 States bar veterinarians from using a neuromuscular paralytic agent like pancuronium bromide. These arguments overlook the States’ legitimate interest in providing for a quick, certain death, and in any event, veterinary practice for animals is not an appropriate guide for humane practices for humans. Petitioners charge that Kentucky’s protocol lacks a systematic mechanism, such as a Bispectral Index monitor, blood pressure cuff, or electrocardiogram, for monitoring the prisoner’s “anesthetic depth.” But expert testimony shows both that a proper thiopental does obviate the concern that a prisoner will not be sufficiently sedated, and that each of the proposed alternatives presents its own concerns. Pp. 17–23.

JUSTICE STEVENS concluded that instead of ending the controversy, this case will generate debate not only about the constitutionality of the three-drug protocol, and specifically about the justification for the use of pancuronium bromide, but also about the justification for the death penalty itself. States wishing to decrease the risk that future litigation will delay executions or invalidate their protocol would do well to reconsider their continued use of pancuronium bromide. Moreover, although experience demonstrates that imposing that penalty constitutes the pointless and needless extinction of life with only negligible social or public returns, this conclusion does not justify a refusal to respect this Court’s precedents upholding the death penalty and establishing a framework for evaluating the constitutional-

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ity of particular execution methods, under which petitioners' evidence fails to prove that Kentucky's protocol violates the Eighth Amendment. Pp. 1–18.

JUSTICE THOMAS, joined by JUSTICE SCALIA, concluded that the plurality's formulation of the governing standard finds no support in the original understanding of the Cruel and Unusual Punishments Clause or in this Court's previous method-of-execution cases; casts constitutional doubt on long-accepted methods of execution; and injects the Court into matters it has no institutional capacity to resolve. The historical practices leading to the Clause's inclusion in the Bill of Rights, the views of early commentators on the Constitution, and this Court's cases, see, e.g., *Wilkinson v. Utah*, 99 U. S. 130, 135–136, all demonstrate that an execution method violates the Eighth Amendment only if it is deliberately designed to inflict pain. Judged under that standard, this is an easy case: Because it is undisputed that Kentucky adopted its lethal injection protocol in an effort to make capital punishment more humane, not to add elements of terror, pain, or disgrace to the death penalty, petitioners' challenge must fail. Pp. 1–15.

JUSTICE BREYER concluded that there cannot be found, either in the record or in the readily available literature, sufficient grounds to believe that Kentucky's lethal injection method creates a significant risk of unnecessary suffering. Although the death penalty has serious risks—e.g., that the wrong person may be executed, that unwarranted animus about the victims' race, for example, may play a role, and that those convicted will find themselves on death row for many years—the penalty's lawfulness is not before the Court. And petitioners' proof and evidence, while giving rise to legitimate concern, do not show that Kentucky's execution method amounts to “cruel and unusual punishmen[t].” Pp. 1–7.

ROBERTS, C. J., announced the judgment of the Court and delivered an opinion, in which KENNEDY and ALITO, JJ., joined. ALITO, J., filed a concurring opinion. STEVENS, J., filed an opinion concurring in the judgment. SCALIA, J., filed an opinion concurring in the judgment, in which THOMAS, J., joined. THOMAS, J., filed an opinion concurring in the judgment, in which SCALIA, J., joined. BREYER, J., filed an opinion concurring in the judgment. GINSBURG, J., filed a dissenting opinion, in which SOUTER, J., joined.

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SUPREME COURT OF THE UNITED STATES

No. 07–5439

RALPH BAZE AND THOMAS C. BOWLING, PETITIONERS *v.* JOHN D. REES, COMMISSIONER, KENTUCKY DEPARTMENT OF CORRECTIONS, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

[April 16, 2008]

CHIEF JUSTICE ROBERTS announced the judgment of the Court and delivered an opinion, in which JUSTICE KENNEDY and JUSTICE ALITO join.

Like 35 other States and the Federal Government, Kentucky has chosen to impose capital punishment for certain crimes. As is true with respect to each of these States and the Federal Government, Kentucky has altered its method of execution over time to more humane means of carrying out the sentence. That progress has led to the use of lethal injection by every jurisdiction that imposes the death penalty.

Petitioners in this case—each convicted of double homicide—acknowledge that the lethal injection procedure, if applied as intended, will result in a humane death. They nevertheless contend that the lethal injection protocol is unconstitutional under the Eighth Amendment’s ban on “cruel and unusual punishments,” because of the risk that the protocol’s terms might not be properly followed, resulting in significant pain. They propose an alternative proto-

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col, one that they concede has not been adopted by any State and has never been tried.

The trial court held extensive hearings and entered detailed Findings of Fact and Conclusions of Law. It recognized that “[t]here are no methods of legal execution that are satisfactory to those who oppose the death penalty on moral, religious, or societal grounds,” but concluded that Kentucky’s procedure “complies with the constitutional requirements against cruel and unusual punishment.” App. 769. The State Supreme Court affirmed. We too agree that petitioners have not carried their burden of showing that the risk of pain from maladministration of a concededly humane lethal injection protocol, and the failure to adopt untried and untested alternatives, constitute cruel and unusual punishment. The judgment below is affirmed.

I

A

By the middle of the 19th century, “hanging was the ‘nearly universal form of execution’ in the United States.” *Campbell v. Wood*, 511 U. S. 1119 (1994) (Blackmun, J., dissenting from denial of certiorari) (quoting *State v. Frampton*, 95 Wash. 2d 469, 492, 627 P. 2d 922, 934 (1981)); Denno, *Getting to Death: Are Executions Constitutional?* 82 Iowa L. Rev. 319, 364 (1997) (counting 48 States and Territories that employed hanging as a method of execution). In 1888, following the recommendation of a commission empaneled by the Governor to find “‘the most humane and practical method known to modern science of carrying into effect the sentence of death,’” New York became the first State to authorize electrocution as a form of capital punishment. *Glass v. Louisiana*, 471 U. S. 1080, 1082, and n. 4 (1985) (Brennan, J., dissenting from denial of certiorari); Denno, *supra*, at 373. By 1915, 11 other States had followed suit, motivated by the “well-grounded

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belief that electrocution is less painful and more humane than hanging.” *Malloy v. South Carolina*, 237 U. S. 180, 185 (1915).

Electrocution remained the predominant mode of execution for nearly a century, although several methods, including hanging, firing squad, and lethal gas were in use at one time. Brief for Fordham University School of Law et al. as *Amici Curiae* 5–9 (hereinafter Fordham Brief). Following the 9-year hiatus in executions that ended with our decision in *Gregg v. Georgia*, 428 U. S. 153 (1976), however, state legislatures began responding to public calls to reexamine electrocution as a means of assuring a humane death. See S. Banner, *The Death Penalty: An American History* 192–193, 296–297 (2002). In 1977, legislators in Oklahoma, after consulting with the head of the anesthesiology department at the University of Oklahoma College of Medicine, introduced the first bill proposing lethal injection as the State’s method of execution. See Brief for Petitioners 4; Fordham Brief 21–22. A total of 36 States have now adopted lethal injection as the exclusive or primary means of implementing the death penalty, making it by far the most prevalent method of execution in the United States.¹ It is also the method used by the

¹Twenty-seven of the 36 States that currently provide for capital punishment require execution by lethal injection as the sole method. See Ariz. Rev. Stat. Ann. §13–704 (West 2001); Ark. Code Ann. §5–4–617 (2006); Colo. Rev. Stat. Ann. §18–1.3–1202 (2007); Conn. Gen. Stat. §54–100 (2007); Del. Code Ann., Tit. 11, §4209 (2006 Supp.); Ga. Code Ann. §17–10–38 (2004); Ill. Comp. Stat., ch. 725, §5/119–5 (West 2006); Ind. Code §35–38–6–1 (West 2004); Kan. Stat. Ann. §22–4001 (2006 Cum. Supp.); Ky. Rev. Stat. Ann. §431.220 (West 2006); La. Stat. Ann. §15:569 (West 2005); Md. Crim. Law Code Ann. §2–303 (Lexis Supp. 2007); Miss. Code Ann. §99–19–51 (2007); Mont. Code Ann. §46–19–103 (2007); Nev. Rev. Stat. §176.355 (2007); N. J. Stat. Ann. §2C:49–2 (West 2007) (repealed Dec. 17, 2007); N. M. Stat. Ann. §31–14–11 (2000); N. C. Gen. Stat. Ann. §15–187 (Lexis 2007); N. Y. Correc. Law Ann. §658 (West 2003) (held unconstitutional in *People v. LaValle*, 3 N. Y. 3d

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Federal Government. See 18 U. S. C. §3591 *et seq.* (2000 ed. and Supp. V); App. to Brief for United States as *Amicus Curiae* 1a–6a (lethal injection protocol used by the Federal Bureau of Prisons).

Of these 36 States, at least 30 (including Kentucky) use the same combination of three drugs in their lethal injection protocols. See *Workman v. Bredesen*, 486 F.3d 896, 902 (CA6 2007). The first drug, sodium thiopental (also known as Pentathol), is a fast-acting barbiturate sedative that induces a deep, comalike unconsciousness when given in the amounts used for lethal injection. App. 762–763, 631–632. The second drug, pancuronium bromide (also

88, 130–131, 817 N. E. 2d 341, 367 (2004)); Ohio Rev. Code Ann. §2949.22 (Lexis 2006); Okla. Stat., Tit. 22, §1014 (West 2001); Ore. Rev. Stat. §137.473 (2003); Pa. Stat. Ann., Tit. 61, §3004 (Purdon 1999); S. D. Codified Laws §23A–27A–32 (Supp. 2007); Tenn. Code Ann. §40–23–114 (2006); Tex. Code Crim. Proc. Ann., Art. 43.14 (Vernon 2006 Supp. Pamphlet); Utah Code Ann. §77–18–5.5 (Lexis Supp. 2007); Wyo. Stat. Ann. §7–13–904 (2007). Nine States allow for lethal injection in addition to an alternative method, such as electrocution, see Ala. Code §§15–18–82 to 82.1 (Supp. 2007); Fla. Stat. §922.105 (2006); S. C. Code Ann. §24–3–530 (2007); Va. Code Ann. §53.1–234 (Lexis Supp. 2007), hanging, see N. H. Rev. Stat. Ann. §630:5 (2007); Wash. Rev. Code §10.95.180 (2006), lethal gas, see Cal. Penal Code Ann. §3604 (West 2000); Mo. Rev. Stat. §546.720 (2007 Cum. Supp.), or firing squad, see Idaho Code §19–2716 (Lexis 2004). Nebraska is the only State whose statutes specify electrocution as the sole method of execution, see Neb. Rev. Stat. §29–2532 (1995), but the Nebraska Supreme Court recently struck down that method under the Nebraska Constitution, see *State v. Mata*, No. S–05–1268, 2008 WL 351695, *40 (2008).

Although it is undisputed that the States using lethal injection adopted the protocol first developed by Oklahoma without significant independent review of the procedure, it is equally undisputed that, in moving to lethal injection, the States were motivated by a desire to find a more humane alternative to then-existing methods. See Fordham Brief 2–3. In this regard, Kentucky was no different. See *id.*, at 29–30 (quoting statement by the State Representative who sponsored the bill to replace electrocution with lethal injection in Kentucky: “if we are going to do capital punishment, it needs to be done in the most humane manner” (internal quotation marks omitted)).

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known as Pavulon), is a paralytic agent that inhibits all muscular-skeletal movements and, by paralyzing the diaphragm, stops respiration. *Id.*, at 763. Potassium chloride, the third drug, interferes with the electrical signals that stimulate the contractions of the heart, inducing cardiac arrest. *Ibid.* The proper administration of the first drug ensures that the prisoner does not experience any pain associated with the paralysis and cardiac arrest caused by the second and third drugs. *Id.*, at 493–494, 541, 558–559.

B

Kentucky replaced electrocution with lethal injection in 1998. 1998 Ky. Acts ch. 220, p. 777. The Kentucky statute does not specify the drugs or categories of drugs to be used during an execution, instead mandating that “every death sentence shall be executed by continuous intravenous injection of a substance or combination of substances sufficient to cause death.” Ky. Rev. Stat. Ann. §431.220(1)(a) (West 2006). Prisoners sentenced before 1998 have the option of electing either electrocution or lethal injection, but lethal injection is the default if—as is the case with petitioners—the prisoner refuses to make a choice at least 20 days before the scheduled execution. §431.220(1)(b). If a court invalidates Kentucky’s lethal injection method, Kentucky law provides that the method of execution will revert to electrocution. §431.223.

Shortly after the adoption of lethal injection, officials working for the Kentucky Department of Corrections set about developing a written protocol to comply with the requirements of §431.220(1)(a). Kentucky’s protocol called for the injection of 2 grams of sodium thiopental, 50 milligrams of pancuronium bromide, and 240 milliequivalents of potassium chloride. In 2004, as a result of this litigation, the department chose to increase the amount of sodium thiopental from 2 grams to 3 grams. App. 762–

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763, 768. Between injections, members of the execution team flush the intravenous (IV) lines with 25 milligrams of saline to prevent clogging of the lines by precipitates that may form when residual sodium thiopental comes into contact with pancuronium bromide. *Id.*, at 761, 763–764. The protocol reserves responsibility for inserting the IV catheters to qualified personnel having at least one year of professional experience. *Id.*, at 984. Currently, Kentucky uses a certified phlebotomist and an emergency medical technician (EMT) to perform the venipunctures necessary for the catheters. *Id.*, at 761–762. They have up to one hour to establish both primary and secondary peripheral intravenous sites in the arm, hand, leg, or foot of the inmate. *Id.*, at 975–976. Other personnel are responsible for mixing the solutions containing the three drugs and loading them into syringes. *Id.*, at 761.

Kentucky's execution facilities consist of the execution chamber, a control room separated by a one-way window, and a witness room. *Id.*, at 203. The warden and deputy warden remain in the execution chamber with the prisoner, who is strapped to a gurney. The execution team administers the drugs remotely from the control room through five feet of IV tubing. *Id.*, at 286. If, as determined by the warden and deputy warden through visual inspection, the prisoner is not unconscious within 60 seconds following the delivery of the sodium thiopental to the primary IV site, a new 3-gram dose of thiopental is administered to the secondary site before injecting the pancuronium and potassium chloride. *Id.*, at 978–979. In addition to assuring that the first dose of thiopental is successfully administered, the warden and deputy warden also watch for any problems with the IV catheters and tubing.

A physician is present to assist in any effort to revive the prisoner in the event of a last-minute stay of execution. *Id.*, at 764. By statute, however, the physician is

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prohibited from participating in the “conduct of an execution,” except to certify the cause of death. Ky. Rev. Stat. Ann. §431.220(3). An electrocardiogram (EKG) verifies the death of the prisoner. App. 764. Only one Kentucky prisoner, Eddie Lee Harper, has been executed since the Commonwealth adopted lethal injection. There were no reported problems at Harper’s execution.

C

Petitioners Ralph Baze and Thomas C. Bowling were each convicted of two counts of capital murder and sentenced to death. The Kentucky Supreme Court upheld their convictions and sentences on direct appeal. See *Baze v. Commonwealth*, 965 S. W. 2d 817, 819–820, 826 (1997), cert. denied, 523 U. S. 1083 (1998); *Bowling v. Commonwealth*, 873 S. W. 2d 175, 176–177, 182 (1993), cert. denied, 513 U. S. 862 (1994).

After exhausting their state and federal collateral remedies, Baze and Bowling sued three state officials in the Franklin Circuit Court for the Commonwealth of Kentucky, seeking to have Kentucky’s lethal injection protocol declared unconstitutional. After a 7-day bench trial during which the trial court received the testimony of approximately 20 witnesses, including numerous experts, the court upheld the protocol, finding there to be minimal risk of various claims of improper administration of the protocol. App. 765–769. On appeal, the Kentucky Supreme Court stated that a method of execution violates the Eighth Amendment when it “creates a substantial risk of wanton and unnecessary infliction of pain, torture or lingering death.” 217 S. W. 3d 207, 209 (2006). Applying that standard, the court affirmed. *Id.*, at 212.

We granted certiorari to determine whether Kentucky’s lethal injection protocol satisfies the Eighth Amendment. 551 U. S. ____ (2007). We hold that it does.

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II

The Eighth Amendment to the Constitution, applicable to the States through the Due Process Clause of the Fourteenth Amendment, see *Robinson v. California*, 370 U. S. 660, 666 (1962), provides that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” We begin with the principle, settled by *Gregg*, that capital punishment is constitutional. See 428 U. S., at 177 (joint opinion of Stewart, Powell, and STEVENS, JJ.). It necessarily follows that there must be a means of carrying it out. Some risk of pain is inherent in any method of execution—no matter how humane—if only from the prospect of error in following the required procedure. It is clear, then, that the Constitution does not demand the avoidance of all risk of pain in carrying out executions.

Petitioners do not claim that it does. Rather, they contend that the Eighth Amendment prohibits procedures that create an “unnecessary risk” of pain. Brief for Petitioners 38. Specifically, they argue that courts must evaluate “(a) the severity of pain risked, (b) the likelihood of that pain occurring, and (c) the extent to which alternative means are feasible, either by modifying existing execution procedures or adopting alternative procedures.” *Ibid.* Petitioners envision that the quantum of risk necessary to make out an Eighth Amendment claim will vary according to the severity of the pain and the availability of alternatives, Reply Brief for Petitioners 23–24, n. 9, but that the risk must be “significant” to trigger Eighth Amendment scrutiny, see Brief for Petitioners 39–40; Reply Brief for Petitioners 25–26.

Kentucky responds that this “unnecessary risk” standard is tantamount to a requirement that States adopt the “least risk” alternative in carrying out an execution, a standard the Commonwealth contends will cast recurring constitutional doubt on any procedure adopted by the

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States. Brief for Respondents 29, 35. Instead, Kentucky urges the Court to approve the “substantial risk” test used by the courts below. *Id.*, at 34–35.

A

This Court has never invalidated a State’s chosen procedure for carrying out a sentence of death as the infliction of cruel and unusual punishment. In *Wilkerson v. Utah*, 99 U. S. 130 (1879), we upheld a sentence to death by firing squad imposed by a territorial court, rejecting the argument that such a sentence constituted cruel and unusual punishment. *Id.*, at 134–135. We noted there the difficulty of “defin[ing] with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted.” *Id.*, at 135–136. Rather than undertake such an effort, the *Wilkerson* Court simply noted that “it is safe to affirm that punishments of torture, . . . and all others in the same line of unnecessary cruelty, are forbidden” by the Eighth Amendment. *Id.*, at 136. By way of example, the Court cited cases from England in which “terror, pain, or disgrace were sometimes superadded” to the sentence, such as where the condemned was “embowelled alive, beheaded, and quartered,” or instances of “public dissection in murder, and burning alive.” *Id.*, at 135. In contrast, we observed that the firing squad was routinely used as a method of execution for military officers. *Id.*, at 137. What each of the forbidden punishments had in common was the deliberate infliction of pain for the sake of pain—“superadd[ing]” pain to the death sentence through torture and the like.

We carried these principles further in *In re Kemmler*, 136 U. S. 436 (1890). There we rejected an opportunity to incorporate the Eighth Amendment against the States in a challenge to the first execution by electrocution, to be carried out by the State of New York. *Id.*, at 449. In

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passing over that question, however, we observed that “[p]unishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life.” *Id.*, at 447. We noted that the New York statute adopting electrocution as a method of execution “was passed in the effort to devise a more humane method of reaching the result.” *Ibid.*

B

Petitioners do not claim that lethal injection or the proper administration of the particular protocol adopted by Kentucky by themselves constitute the cruel or wanton infliction of pain. Quite the contrary, they concede that “if performed properly,” an execution carried out under Kentucky’s procedures would be “humane and constitutional.” Brief for Petitioners 31. That is because, as counsel for petitioners admitted at oral argument, proper administration of the first drug, sodium thiopental, eliminates any meaningful risk that a prisoner would experience pain from the subsequent injections of pancuronium and potassium chloride. See Tr. of Oral Arg. 5; App. 493–494 (testimony of petitioners’ expert that, if sodium thiopental is “properly administered” under the protocol, “[i]n virtually every case, then that would be a humane death”).

Instead, 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. Our cases recognize that subjecting individuals to a risk of future harm—not simply actually inflicting pain—can qualify as cruel and unusual punishment. To establish that such exposure violates the Eighth Amendment, how-

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ever, the conditions presenting the risk must be “*sure or very likely* to cause serious illness and needless suffering,” and give rise to “sufficiently *imminent* dangers.” *Helling v. McKinney*, 509 U. S. 25, 33, 34–35 (1993) (emphasis added). We have explained that to prevail on such a claim there must be a “substantial risk of serious harm,” an “objectively intolerable risk of harm” that prevents prison officials from pleading that they were “subjectively blameless for purposes of the Eighth Amendment.” *Farmer v. Brennan*, 511 U. S. 825, 842, 846, and n. 9 (1994).

Simply because an execution method may result in pain, either by accident or as an inescapable consequence of death, does not establish the sort of “objectively intolerable risk of harm” that qualifies as cruel and unusual. In *Louisiana ex rel. Francis v. Resweber*, 329 U. S. 459 (1947), a plurality of the Court upheld a second attempt at executing a prisoner by electrocution after a mechanical malfunction had interfered with the first attempt. The principal opinion noted that “[a]ccidents happen for which no man is to blame,” *id.*, at 462, and concluded that such “an accident, with no suggestion of malevolence,” *id.*, at 463, did not give rise to an Eighth Amendment violation, *id.*, at 463–464.

As Justice Frankfurter noted in a separate opinion based on the Due Process Clause, however, “a hypothetical situation” involving “a series of abortive attempts at electrocution” would present a different case. *Id.*, at 471 (concurring opinion). In terms of our present Eighth Amendment analysis, such a situation—unlike an “innocent misadventure,” *id.*, at 470—would demonstrate an “objectively intolerable risk of harm” that officials may not ignore. See *Farmer*, 511 U. S., at 846, and n. 9. In other words, an isolated mishap alone does not give rise to an Eighth Amendment violation, precisely because such an event, while regrettable, does not suggest cruelty, or that the procedure at issue gives rise to a “substantial risk of

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serious harm.” *Id.*, at 842.

C

Much of petitioners’ case rests on the contention that they have identified a significant risk of harm that can be eliminated by adopting alternative procedures, such as a one-drug protocol that dispenses with the use of pancuronium and potassium chloride, and additional monitoring by trained personnel to ensure that the first dose of sodium thiopental has been adequately delivered. Given what our cases have said about the nature of the risk of harm that is actionable under the Eighth Amendment, a condemned prisoner cannot successfully challenge a State’s method of execution merely by showing a slightly or marginally safer alternative.

Permitting an Eighth Amendment violation to be established on such a showing would threaten to transform courts into boards of inquiry charged with determining “best practices” for executions, with each ruling supplanted by another round of litigation touting a new and improved methodology. Such an approach finds no support in our cases, would embroil the courts in ongoing scientific controversies beyond their expertise, and would substantially intrude on the role of state legislatures in implementing their execution procedures—a role that by all accounts the States have fulfilled with an earnest desire to provide for a progressively more humane manner of death. See *Bell v. Wolfish*, 441 U. S. 520, 562 (1979) (“The wide range of ‘judgment calls’ that meet constitutional and statutory requirements are confided to officials outside of the Judicial Branch of Government”). Accordingly, we reject petitioners’ proposed “unnecessary risk” standard, as well as the dissent’s “untoward” risk variation. See *post*, at 2, 11 (opinion of GINSBURG, J.).²

²The difficulties inherent in such approaches are exemplified by the controversy surrounding the study of lethal injection published in the

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Instead, the proffered alternatives must effectively address a “substantial risk of serious harm.” *Farmer, supra*, at 842. To qualify, the alternative procedure must be feasible, readily implemented, and in fact significantly reduce a substantial risk of severe pain. If a State refuses to adopt such an alternative in the face of these documented advantages, without a legitimate penological justification for adhering to its current method of execution, then a State’s refusal to change its method can be viewed as “cruel and unusual” under the Eighth Amendment.³

April 2005 edition of the British medical journal the *Lancet*. After examining thiopental concentrations in toxicology reports based on blood samples drawn from 49 executed inmates, the study concluded that “most of the executed inmates had concentrations that would not be expected to produce a surgical plane of anaesthesia, and 21 (43%) had concentrations consistent with consciousness.” Koniaris, Zimmers, Lubarsky, & Sheldon, *Inadequate Anaesthesia in Lethal Injection for Execution*, 365 *Lancet* 1412, 1412–1413. The study was widely cited around the country in motions to stay executions and briefs on the merits. See, e.g., Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*, 76 *Ford. L. Rev.* 49, 105, n. 366 (2007) (collecting cases in which claimants cited the *Lancet* study). But shortly after the *Lancet* study appeared, peer responses by seven medical researchers criticized the methodology supporting the original conclusions. See Groner, *Inadequate Anaesthesia in Lethal Injection for Execution*, 366 *Lancet* 1073–1074 (Sept. 2005). These researchers noted that because the blood samples were taken “several hours to days after” the inmates’ deaths, the postmortem concentrations of thiopental—a fat-soluble compound that passively diffuses from blood into tissue—could not be relied on as accurate indicators for concentrations during life. *Id.*, at 1073. The authors of the original study responded to defend their methodology. *Id.*, at 1074–1076. See also *post*, at 2–4 (BREYER, J., concurring in judgment).

We do not purport to take sides in this dispute. We cite it only to confirm that a “best practices” approach, calling for the weighing of relative risks without some measure of deference to a State’s choice of execution procedures, would involve the courts in debatable matters far exceeding their expertise.

³JUSTICE THOMAS agrees that courts have neither the authority nor

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III

In applying these standards to the facts of this case, we note at the outset that it is difficult to regard a practice as “objectively intolerable” when it is in fact widely tolerated. Thirty-six States that sanction capital punishment have adopted lethal injection as the preferred method of execution. The Federal Government uses lethal injection as well. See *supra*, at 3–4, and n. 1. This broad consensus goes not just to the method of execution, but also to the specific three-drug combination used by Kentucky. Thirty States, as well as the Federal Government, use a series of sodium thiopental, pancuronium bromide, and potassium chloride, in varying amounts. See *supra*, at 4. No State uses or has ever used the alternative one-drug protocol belatedly urged by petitioners. This consensus is probative but not conclusive with respect to that aspect of the alternatives proposed by petitioners.

In order to meet their “heavy burden” of showing that Kentucky’s procedure is “cruelly inhumane,” *Gregg*, 428 U. S., at 175 (joint opinion of Stewart, Powell, and STEVENS, JJ.), petitioners point to numerous aspects of the protocol that they contend create opportunities for error. Their claim hinges on the improper administration of the first drug, sodium thiopental. It is uncontested that, failing a proper dose of sodium thiopental that would render the prisoner unconscious, there is a substantial, constitutionally unacceptable risk of suffocation from the administration of pancuronium bromide and pain from the

the expertise to function as boards of inquiry determining best practices for executions, see *post*, at 9 (opinion concurring in judgment) (quoting this opinion); *post*, at 13, but contends that the standard we adopt inevitably poses such concerns. In our view, those concerns are effectively addressed by the threshold requirement reflected in our cases of a “substantial risk of serious harm” or an “objectively intolerable risk of harm,” see *supra*, at 11, and by the substantive requirements in the articulated standard.

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injection of potassium chloride. See Tr. of Oral Arg. 27. We agree with the state trial court and State Supreme Court, however, that petitioners have not shown that the risk of an inadequate dose of the first drug is substantial. And we reject the argument that the Eighth Amendment requires Kentucky to adopt the untested alternative procedures petitioners have identified.

A

Petitioners contend that there is a risk of improper administration of thiopental because the doses are difficult to mix into solution form and load into syringes; because the protocol fails to establish a rate of injection, which could lead to a failure of the IV; because it is possible that the IV catheters will infiltrate into surrounding tissue, causing an inadequate dose to be delivered to the vein; because of inadequate facilities and training; and because Kentucky has no reliable means of monitoring the anesthetic depth of the prisoner after the sodium thiopental has been administered. Brief for Petitioners 12–20.

As for the risk that the sodium thiopental would be improperly prepared, petitioners contend that Kentucky employs untrained personnel who are unqualified to calculate and mix an adequate dose, especially in light of the omission of volume and concentration amounts from the written protocol. *Id.*, at 45–46. The state trial court, however, specifically found that “[i]f the manufacturers’ instructions for reconstitution of Sodium Thiopental are followed, . . . there would be minimal risk of improper mixing, despite converse testimony that a layperson would have difficulty performing this task.” App. 761. We cannot say that this finding is clearly erroneous, see *Hernandez v. New York*, 500 U. S. 352, 366 (1991) (plurality opinion), particularly when that finding is substantiated by expert testimony describing the task of reconstituting powder sodium thiopental into solution form as “[n]ot

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difficult at all. . . . You take a liquid, you inject it into a vial with the powder, then you shake it up until the powder dissolves and, you're done. The instructions are on the package insert." 5 Tr. 695 (Apr. 19, 2005).

Likewise, the asserted problems related to the IV lines do not establish a sufficiently substantial risk of harm to meet the requirements of the Eighth Amendment. Kentucky has put in place several important safeguards to ensure that an adequate dose of sodium thiopental is delivered to the condemned prisoner. The most significant of these is the written protocol's requirement that members of the IV team must have at least one year of professional experience as a certified medical assistant, phlebotomist, EMT, paramedic, or military corpsman. App. 984. Kentucky currently uses a phlebotomist and an EMT, personnel who have daily experience establishing IV catheters for inmates in Kentucky's prison population. *Id.*, at 273–274; Tr. of Oral Arg. 27–28. Moreover, these IV team members, along with the rest of the execution team, participate in at least 10 practice sessions per year. App. 984. These sessions, required by the written protocol, encompass a complete walk-through of the execution procedures, including the siting of IV catheters into volunteers. *Ibid.* In addition, the protocol calls for the IV team to establish both primary and backup lines and to prepare two sets of the lethal injection drugs before the execution commences. *Id.*, at 975. These redundant measures ensure that if an insufficient dose of sodium thiopental is initially administered through the primary line, an additional dose can be given through the backup line before the last two drugs are injected. *Id.*, at 279–280, 337–338, 978–979.

The IV team has one hour to establish both the primary and backup IVs, a length of time the trial court found to be “not excessive but rather necessary,” *id.*, at 762, contrary to petitioners' claim that using an IV inserted after any

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“more than ten or fifteen minutes of unsuccessful attempts is dangerous because the IV is almost certain to be unreliable,” Brief for Petitioners 47. And, in any event, merely because the protocol gives the IV team one hour to establish intravenous access does not mean that team members are required to spend the entire hour in a futile attempt to do so. The qualifications of the IV team also substantially reduce the risk of IV infiltration.

In addition, the presence of the warden and deputy warden in the execution chamber with the prisoner allows them to watch for signs of IV problems, including infiltration. Three of the Commonwealth’s medical experts testified that identifying signs of infiltration would be “very obvious,” even to the average person, because of the swelling that would result. App. 385–386. See *id.*, at 353, 600–601. Kentucky’s protocol specifically requires the warden to redirect the flow of chemicals to the backup IV site if the prisoner does not lose consciousness within 60 seconds. *Id.*, at 978–979. In light of these safeguards, we cannot say that the risks identified by petitioners are so substantial or imminent as to amount to an Eighth Amendment violation.

B

Nor does Kentucky’s failure to adopt petitioners’ proposed alternatives demonstrate that the Commonwealth’s execution procedure is cruel and unusual.

First, petitioners contend that Kentucky could switch from a three-drug protocol to a one-drug protocol by using a single dose of sodium thiopental or other barbiturate. Brief for Petitioners 51–57. That alternative was not proposed to the state courts below.⁴ As a result, we are

⁴Petitioners did allude to an “alternative chemical or combination of chemicals” that could replace Kentucky’s three-drug protocol in their post-trial brief, see App. 684, but based on the arguments presented there, it is clear they intended to refer only to other, allegedly less

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left without any findings on the effectiveness of petitioners' barbiturate-only protocol, despite scattered references in the trial testimony to the sole use of sodium thiopental or pentobarbital as a preferred method of execution. See Reply Brief for Petitioners 18, n. 6.

In any event, the Commonwealth's continued use of the three-drug protocol cannot be viewed as posing an "objectively intolerable risk" when no other State has adopted the one-drug method and petitioners proffered no study showing that it is an equally effective manner of imposing a death sentence. See App. 760–761, n. 8 ("Plaintiffs have not presented any scientific study indicating a better method of execution by lethal injection"). Indeed, the State of Tennessee, after reviewing its execution procedures, rejected a proposal to adopt a one-drug protocol using sodium thiopental. The State concluded that the one-drug alternative would take longer than the three-drug method and that the "required dosage of sodium thiopental would be less predictable and more variable when it is used as the sole mechanism for producing death" *Workman*, 486 F. 3d, at 919 (Appendix A). We need not endorse the accuracy of those conclusions to note simply that the comparative efficacy of a one-drug method of execution is not so well established that Kentucky's failure to adopt it constitutes a violation of the Eighth Amendment.

Petitioners also contend that Kentucky should omit the second drug, pancuronium bromide, because it serves no therapeutic purpose while suppressing muscle movements

painful drugs that could substitute for potassium chloride as a heart-stopping agent, see *id.*, at 701. Likewise, the only alternatives to the three-drug protocol presented to the Kentucky Supreme Court were those that replaced potassium chloride with other drugs for inducing cardiac arrest, or that omitted pancuronium bromide, or that added an analgesic to relieve pain. See Brief for Appellants in No. 2005–SC–00543, pp. 38, 39, 40.

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that could reveal an inadequate administration of the first drug. The state trial court, however, specifically found that pancuronium serves two purposes. First, it prevents involuntary physical movements during unconsciousness that may accompany the injection of potassium chloride. App. 763. The Commonwealth has an interest in preserving the dignity of the procedure, especially where convulsions or seizures could be misperceived as signs of consciousness or distress. Second, pancuronium stops respiration, hastening death. *Ibid.* Kentucky's decision to include the drug does not offend the Eighth Amendment.⁵

Petitioners' barbiturate-only protocol, they contend, is not untested; it is used routinely by veterinarians in putting animals to sleep. Moreover, 23 States, including Kentucky, bar veterinarians from using a neuromuscular paralytic agent like pancuronium bromide, either expressly or, like Kentucky, by specifically directing the use of a drug like sodium pentobarbital. See Brief for Dr. Kevin Concannon et al. as *Amici Curiae* 18, n. 5. If pancuronium is too cruel for animals, the argument goes, then it must be too cruel for the condemned inmate. Whatever rhetorical force the argument carries, see *Workman, supra*, at 909 (describing the comparison to animal euthanasia as "more of a debater's point"), it overlooks the States' legitimate interest in providing for a quick, certain death. In the Netherlands, for example, where physician-assisted euthanasia is permitted, the Royal Dutch Society for the Advancement of Pharmacy recommends the use of a muscle relaxant (such as pancuronium dibromide) in addition to thiopental in order to prevent a prolonged, undignified death. See Kimsma, *Euthanasia and Euthanizing Drugs*

⁵JUSTICE STEVENS's conclusion that the risk addressed by pancuronium bromide is "vastly outweighed" by the risk of pain at issue here, see *post*, at 3 (opinion concurring in judgment), depends, of course, on the magnitude of the risk of such pain. As explained, that risk is insignificant in light of the safeguards Kentucky has adopted.

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in *The Netherlands*, reprinted in *Drug Use in Assisted Suicide and Euthanasia* 193, 200, 204 (M. Battin & A. Lipman eds. 1996). That concern may be less compelling in the veterinary context, and in any event other methods approved by veterinarians—such as stunning the animal or severing its spinal cord, see 6 Tr. 758–759 (Apr. 20, 2005)—make clear that veterinary practice for animals is not an appropriate guide to humane practices for humans.

Petitioners also fault the Kentucky protocol for lacking a systematic mechanism for monitoring the “anesthetic depth” of the prisoner. Under petitioners’ scheme, qualified personnel would employ monitoring equipment, such as a Bispectral Index (BIS) monitor, blood pressure cuff, or EKG to verify that a prisoner has achieved sufficient unconsciousness before injecting the final two drugs. The visual inspection performed by the warden and deputy warden, they maintain, is an inadequate substitute for the more sophisticated procedures they envision. Brief for Petitioners 19, 58.

At the outset, it is important to reemphasize that a proper dose of thiopental obviates the concern that a prisoner will not be sufficiently sedated. All the experts who testified at trial agreed on this point. The risks of failing to adopt additional monitoring procedures are thus even more “remote” and attenuated than the risks posed by the alleged inadequacies of Kentucky’s procedures designed to ensure the delivery of thiopental. See *Hamilton v. Jones*, 472 F. 3d 814, 817 (CA10 2007) (*per curiam*); *Taylor v. Crawford*, 487 F. 3d 1072, 1084 (CA8 2007).

But more than this, Kentucky’s expert testified that a blood pressure cuff would have no utility in assessing the level of the prisoner’s unconsciousness following the introduction of sodium thiopental, which depresses circulation. App. 578. Furthermore, the medical community has yet to endorse the use of a BIS monitor, which measures brain function, as an indication of anesthetic awareness. Ameri-

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can Society of Anesthesiologists, Practice Advisory for Intraoperative Awareness and Brain Function Monitoring, 104 *Anesthesiology* 847, 855 (Apr. 2006); see *Brown v. Beck*, 445 F.3d 752, 754–755 (CA4 2006) (Michael, J., dissenting). The asserted need for a professional anesthesiologist to interpret the BIS monitor readings is nothing more than an argument against the entire procedure, given that both Kentucky law, see Ky. Rev. Stat. Ann. §431.220(3), and the American Society of Anesthesiologists’ own ethical guidelines, see Brief for American Society of Anesthesiologists as *Amicus Curiae* 2–3, prohibit anesthesiologists from participating in capital punishment. Nor is it pertinent that the use of a blood pressure cuff and EKG is “the standard of care in surgery requiring anesthesia,” as the dissent points out. *Post*, at 6. Petitioners have not shown that these supplementary procedures, drawn from a different context, are necessary to avoid a substantial risk of suffering.

The dissent believes that rough-and-ready tests for checking consciousness—calling the inmate’s name, brushing his eyelashes, or presenting him with strong, noxious odors—could materially decrease the risk of administering the second and third drugs before the sodium thiopental has taken effect. See *ibid.* Again, the risk at issue is already attenuated, given the steps Kentucky has taken to ensure the proper administration of the first drug. Moreover, the scenario the dissent posits involves a level of unconsciousness allegedly sufficient to avoid detection of improper administration of the anesthesia under Kentucky’s procedure, but not sufficient to prevent pain. See *post*, at 9–10. There is no indication that the basic tests the dissent advocates can make such fine distinctions. If these tests are effective only in determining whether the sodium thiopental has entered the inmate’s bloodstream, see *post*, at 6, the record confirms that the visual inspection of the IV site under Kentucky’s procedure achieves

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that objective. See *supra*, at 17.⁶

The dissent would continue the stay of these executions (and presumably the many others held in abeyance pending decision in this case) and send the case back to the lower courts to determine whether such added measures redress an “untoward” risk of pain. *Post*, at 11. But an inmate cannot succeed on an Eighth Amendment claim simply by showing one more step the State could take as a failsafe for other, independently adequate measures. This approach would serve no meaningful purpose and would frustrate the State’s legitimate interest in carrying out a sentence of death in a timely manner. See *Baze v. Parker*, 371 F. 3d 310, 317 (CA6 2004) (petitioner Baze sentenced to death in 1994); *Bowling v. Parker*, 138 F. Supp. 2d 821, 840 (ED Ky. 2001) (petitioner Bowling sentenced to death in 1991).

JUSTICE STEVENS suggests that our opinion leaves the disposition of other cases uncertain, see *post*, at 1, but the standard we set forth here resolves more challenges than he acknowledges. A stay of execution may not be granted on grounds such as those asserted here unless the condemned prisoner establishes that the State’s lethal injection protocol creates a demonstrated risk of severe pain. He must show that the risk is substantial when compared to the known and available alternatives. A State with a lethal injection protocol substantially similar to the protocol we uphold today would not create a risk that meets this standard.

⁶Resisting this point, the dissent rejects the expert testimony that problems with the intravenous administration of sodium thiopental would be obvious, see *post*, at 10, testimony based not only on the pain that would result from injecting the first drug into tissue rather than the vein, see App. 600–601, but also on the swelling that would occur, see *id.*, at 353. See also *id.*, at 385–386. Neither of these expert conclusions was disputed below.

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* * *

Reasonable people of good faith disagree on the morality and efficacy of capital punishment, and for many who oppose it, no method of execution would ever be acceptable. But as Justice Frankfurter stressed in *Resweber*, “[o]ne must be on guard against finding in personal disapproval a reflection of more or less prevailing condemnation.” 329 U. S., at 471 (concurring opinion). This Court has ruled that capital punishment is not prohibited under our Constitution, and that the States may enact laws specifying that sanction. “[T]he power of a State to pass laws means little if the State cannot enforce them.” *McCleskey v. Zant*, 499 U. S. 467, 491 (1991). State efforts to implement capital punishment must certainly comply with the Eighth Amendment, but what that Amendment prohibits is wanton exposure to “objectively intolerable risk,” *Farmer*, 511 U. S., at 846, and n. 9, not simply the possibility of pain.

Kentucky has adopted a method of execution believed to be the most humane available, one it shares with 35 other States. Petitioners agree that, if administered as intended, that procedure will result in a painless death. The risks of maladministration they have suggested—such as improper mixing of chemicals and improper setting of IVs by trained and experienced personnel—cannot remotely be characterized as “objectively intolerable.” Kentucky’s decision to adhere to its protocol despite these asserted risks, while adopting safeguards to protect against them, cannot be viewed as probative of the wanton infliction of pain under the Eighth Amendment. Finally, the alternative that petitioners belatedly propose has problems of its own, and has never been tried by a single State.

Throughout our history, whenever a method of execution has been challenged in this Court as cruel and unusual, the Court has rejected the challenge. Our society has nonetheless steadily moved to more humane methods

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of carrying out capital punishment. The firing squad, hanging, the electric chair, and the gas chamber have each in turn given way to more humane methods, culminating in today's consensus on lethal injection. *Gomez v. United States Dist. Court for Northern Dist. of Cal.*, 503 U. S. 653, 657 (1992) (STEVENSON, J., dissenting); App. 755. The broad framework of the Eighth Amendment has accommodated this progress toward more humane methods of execution, and our approval of a particular method in the past has not precluded legislatures from taking the steps they deem appropriate, in light of new developments, to ensure humane capital punishment. There is no reason to suppose that today's decision will be any different.⁷

The judgment below concluding that Kentucky's procedure is consistent with the Eighth Amendment is, accordingly, affirmed.

It is so ordered.

⁷We do not agree with JUSTICE STEVENSON that anything in our opinion undermines or remotely addresses the validity of capital punishment. See *post*, at 11. The fact that society has moved to progressively more humane methods of execution does not suggest that capital punishment itself no longer serves valid purposes; we would not have supposed that the case for capital punishment was stronger when it was imposed predominantly by hanging or electrocution.

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SUPREME COURT OF THE UNITED STATES

No. 07–5439

RALPH BAZE AND THOMAS C. BOWLING, PETITIONERS *v.* JOHN D. REES, COMMISSIONER, KENTUCKY DEPARTMENT OF CORRECTIONS, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

[April 16, 2008]

JUSTICE ALITO, concurring.

I join the plurality opinion but write separately to explain my view of how the holding should be implemented. The opinion concludes that “a State’s refusal to change its method [of execution] can be viewed as ‘cruel and unusual’ under the Eighth Amendment” if the State, “without a legitimate penological justification,” rejects an alternative method that is “feasible” and “readily” available and that would “significantly reduce a substantial risk of severe pain.” *Ante*, at 13. Properly understood, this standard will not, as JUSTICE THOMAS predicts, lead to litigation that enables “those seeking to abolish the death penalty . . . to embroil the States in never-ending litigation concerning the adequacy of their execution procedures.” *Post*, at 12 (opinion concurring in judgment).

I

As the plurality opinion notes, the constitutionality of capital punishment is not before us in this case, and therefore we proceed on the assumption that the death penalty is constitutional. *Ante*, at 8. From that assumption, it follows that there must be a constitutional means of carrying out a death sentence.

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We also proceed in this case on the assumption that lethal injection is a constitutional means of execution. See *Gregg v. Georgia*, 428 U. S. 153, 175 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.) (“[I]n assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity”). Lethal injection was adopted by the Federal Government and 36 States because it was thought to be the most humane method of execution, and petitioners here do not contend that lethal injection should be abandoned in favor of any of the methods that it replaced—execution by electric chair, the gas chamber, hanging, or a firing squad. Since we assume for present purposes that lethal injection is constitutional, the use of that method by the Federal Government and the States must not be blocked by procedural requirements that cannot practically be satisfied.

Prominent among the practical constraints that must be taken into account in considering the feasibility and availability of any suggested modification of a lethal injection protocol are the ethical restrictions applicable to medical professionals. The first step in the lethal injection protocols currently in use is the anesthetization of the prisoner. If this step is carried out properly, it is agreed, the prisoner will not experience pain during the remainder of the procedure. Every day, general anesthetics are administered to surgical patients in this country, and if the medical professionals who participate in these surgeries also participated in the anesthetization of prisoners facing execution by lethal injection, the risk of pain would be minimized. But the ethics rules of medical professionals—for reasons that I certainly do not question here—prohibit their participation in executions.

Guidelines issued by the American Medical Association (AMA) state that “[a]n individual’s opinion on capital punishment is the personal moral decision of the individ-

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ual,” but that “[a] physician, as a member of a profession dedicated to preserving life when there is hope of doing so, should not be a participant in a legally authorized execution.” AMA, Code of Medical Ethics, Policy E–2.06 Capital Punishment (2000), online at <http://www.ama-assn.org/ama1/pub/upload/mm/369/e206capitalpunish.pdf> (all Internet materials as visited Apr. 14, 2008, and available in Clerk of Court’s case file). The guidelines explain:

“Physician participation in an execution includes, but is not limited to, the following actions: prescribing or administering tranquilizers and other psychotropic agents and medications that are part of the execution procedure; monitoring vital signs on site or remotely (including monitoring electrocardiograms); attending or observing an execution as a physician; and rendering of technical advice regarding execution.” *Ibid.*

The head of ethics at the AMA has reportedly opined that “[e]ven helping to design a more humane protocol would disregard the AMA code.” Harris, Will Medics’ Qualms Kill the Death Penalty? 441 *Nature* 8–9 (May 4, 2006).

The American Nurses Association (ANA) takes the position that participation in an execution “is a breach of the ethical traditions of nursing, and the *Code for Nurses*.” ANA, Position Statement: Nurses’ Participation in Capital Punishment (1994), online at <http://nursingworld.org/MainMenuCategories/HealthcareandPolicyIssues/ANAPositionStatementsEthicsandHumanRights.aspx>. This means, the ANA explains, that a nurse must not “take part in assessment, supervision or monitoring of the procedure or the prisoner; procuring, prescribing or preparing medications or solutions; inserting the intravenous catheter; injecting the lethal solution; and attending or witnessing the execution as a nurse.” *Ibid.*

The National Association of Emergency Medical Techni-

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cians (NAEMT) holds that “[p]articipation in capital punishment is inconsistent with the ethical precepts and goals of the [Emergency Medical Services] profession.” NAEMT, Position Statement on EMT and Paramedic Participation in Capital Punishment (June 9, 2006), online at <http://www.naemt.org/aboutNAEMT/capitalpunishment.htm> The NAEMT’s Position Statement advises that emergency medical technicians and paramedics should refrain from the same activities outlined in the ANA statement. *Ibid.*

Recent litigation in California has demonstrated the effect of such ethics rules. Michael Morales, who was convicted and sentenced to death for a 1981 murder, filed a federal civil rights action challenging California’s lethal injection protocol, which, like Kentucky’s, calls for the sequential administration of three drugs: sodium pentothal, pancuronium bromide, and potassium chloride. The District Court enjoined the State from proceeding with the execution unless it either (1) used only sodium pentothal or another barbiturate or (2) ensured that an anesthesiologist was present to ensure that Morales remained unconscious throughout the process. *Morales v. Hickman*, 415 F. Supp. 2d 1037, 1047 (ND Cal. 2006). The Ninth Circuit affirmed the District Court’s order, *Morales v. Hickman*, 438 F.3d 926, 931 (2006), and the State arranged for two anesthesiologists to be present for the execution. However, they subsequently concluded that “they could not proceed for reasons of medical ethics,” *Morales v. Tilton*, 465 F. Supp. 2d 972, 976 (ND Cal. 2006), and neither Morales nor any other prisoner in California has since been executed, see Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*, 76 Ford. L. Rev. 49 (2007).

Objections to features of a lethal injection protocol must be considered against the backdrop of the ethics rules of medical professionals and related practical constraints. Assuming, as previously discussed, that lethal injection is

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not unconstitutional *per se*, it follows that a suggested modification of a lethal injection protocol cannot be regarded as “feasible” or “readily” available if the modification would require participation—either in carrying out the execution or in training those who carry out the execution—by persons whose professional ethics rules or traditions impede their participation.

II

In order to show that a modification of a lethal injection protocol is required by the Eighth Amendment, a prisoner must demonstrate that the modification would “*significantly* reduce a *substantial* risk of *severe* pain.” *Ante*, at 13 (emphasis added). Showing merely that a modification would result in some reduction in risk is insufficient. Moreover, an inmate should be required to do more than simply offer the testimony of a few experts or a few studies. Instead, an inmate challenging a method of execution should point to a well-established scientific consensus. Only if a State refused to change its method in the face of such evidence would the State’s conduct be comparable to circumstances that the Court has previously held to be in violation of the Eighth Amendment. See *Farmer v. Brennan*, 511 U. S. 825, 836 (1994).

The present case well illustrates the need for this type of evidence. Although there has been a proliferation of litigation challenging current lethal injection protocols, evidence regarding alleged defects in these protocols and the supposed advantages of alternatives is strikingly haphazard and unreliable. As THE CHIEF JUSTICE and JUSTICE BREYER both note, the much-discussed Lancet article, Koniaris, Zimmers, Lubarsky, & Sheldon, *Inadequate Anaesthesia in Lethal Injection for Execution*, 365 *Lancet* 1412 (Apr. 2005), that prompted criticism of the three-drug protocol has now been questioned, see Groner, *Inadequate Anaesthesia in Lethal Injection for Execution*,

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366 *Lancet* 1073 (Sept. 2005). And the lack of clear guidance in the currently available scientific literature is dramatically illustrated by the conclusions reached by petitioners and by JUSTICE STEVENS regarding what they view as superior alternatives to the three-drug protocol.

Petitioners' chief argument is that Kentucky's procedure violates the Eighth Amendment because it does not employ a one-drug protocol involving a lethal dose of an anesthetic. By "relying . . . on a lethal dose of an anesthetic," petitioners contend, Kentucky "would virtually eliminate the risk of pain." Brief for Petitioners 51. Petitioners point to expert testimony in the trial court that "a three-gram dose of thiopental would cause death within three minutes to fifteen minutes." *Id.*, at 54, n. 16.

The accuracy of that testimony is not universally accepted. Indeed, the medical authorities in the Netherlands, where assisted suicide is legal, have recommended against the use of a lethal dose of a barbiturate. An *amicus supporting petitioners*, Dr. Robert D. Truog, Professor of Medical Ethics and Anesthesiology at Harvard Medical School, has made the following comments about the use of a lethal dose of a barbiturate:

"A number of experts have said that 2 or 3 or 5 g[rams] of pentothal is absolutely going to be lethal. The fact is that, at least in this country, none of us have any experience with this. . . .

"If we go to Holland, where euthanasia is legal, and we look at a study from 2000 of 535 cases of euthanasia, in 69% of those cases, they used a paralytic agent. Now, what do they know that we haven't figured out yet? I think what they know is that it's actually very difficult to kill someone with just a big dose of a barbiturate. And, in fact, they report that in 6% of those cases, there were problems with completion. And in I think five of those, the person actually woke up, came

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back out of coma.” Perspective Roundtable: Physicians and Execution—Highlights from a Discussion of Lethal Injection, 358 *New England J. Med.* 448 (2008).

JUSTICE STEVENS does not advocate a one-drug protocol but argues that “States wishing to decrease the risk that future litigation will delay executions or invalidate their protocols would do well to reconsider their continued use of pancuronium bromide” in the second step of the three-drug protocol.* *Post*, at 8 (opinion concurring in judgment). But this very drug, pancuronium bromide, is recommended by the Royal Dutch Society for the Advancement of Pharmacy as the second of the two drugs to be used in cases of euthanasia. See Kimsma, *Euthanasia and Euthanizing Drugs in The Netherlands*, reprinted in *Drug Use in Assisted Suicide and Euthanasia* 193, 200, 204 (M. Battin & A. Lipman eds. 1996).

My point in citing the Dutch study is not that a multi-drug protocol is in fact better than a one-drug protocol or that it is advisable to use pancuronium bromide. Rather, my point is that public policy on the death penalty, an issue that stirs deep emotions, cannot be dictated by the testimony of an expert or two or by judicial findings of fact based on such testimony.

III

The seemingly endless proceedings that have character-

*In making this recommendation, he states that “[t]here is a general understanding among veterinarians that the risk of pain is sufficiently serious that the use of [this] drug should be proscribed when an animal’s life is being terminated.” *Post*, at 1-2. But the American Veterinary Medical Association (AVMA) guidelines take pains to point out that the Association’s guidelines should not be interpreted as commenting on the execution of humans by lethal injection. AVMA, *Guidelines on Euthanasia* (June 2007), online at http://avma.org/issues/animal_welfare/euthanasia.pdf.

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ized capital litigation during the years following *Gregg* are well documented. In 1989, the Report of the Judicial Conference’s Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, chaired by Justice Powell, noted the lengthy delays produced by collateral litigation in death penalty cases. See Committee Report and Proposal 2–4. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) was designed to address this problem. See, e.g., *Woodford v. Garceau*, 538 U.S. 202, 206 (2003) (“Congress enacted AEDPA to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases . . .” (citing *Williams v. Taylor*, 529 U.S. 362, 386 (2000) (opinion of STEVENS, J.))); H. R. Rep. No. 104–23, p. 8 (1995) (stating that AEDPA was “designed to curb the abuse of the habeas corpus process, and particularly to address the problem of delay and repetitive litigation in capital cases”).

Misinterpretation of the standard set out in the plurality opinion or adoption of the standard favored by the dissent and JUSTICE BREYER would create a grave danger of extended delay. The dissenters and JUSTICE BREYER would hold that the protocol used in carrying out an execution by lethal injection violates the Eighth Amendment if it creates an “*untoward*, readily avoidable risk of inflicting severe and unnecessary pain.” See *post*, at 11 (GINSBURG, J., dissenting) (emphasis added); *post*, at 1 (BREYER, J., concurring in judgment). Determining whether a risk is “*untoward*,” we are told, requires a weighing of three factors—the severity of the pain that may occur, the likelihood of this pain, and the availability of alternative methods. *Post*, at 4 (GINSBURG, J., dissenting). We are further informed that “[t]he three factors are interrelated; a strong showing on one reduces the importance of others.” *Ibid*.

An “*untoward*” risk is presumably a risk that is “unfortunate” or “marked by or causing trouble or unhappiness.”

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Webster's Third New International Dictionary 2513 (1971); Random House Dictionary of the English Language 1567 (1967). This vague and malleable standard would open the gates for a flood of litigation that would go a long way toward bringing about the end of the death penalty as a practical matter. While I certainly do not suggest that this is the intent of the Justices who favor this test, the likely consequences are predictable.

The issue presented in this case—the constitutionality of a *method* of execution—should be kept separate from the controversial issue of the death penalty itself. If the Court wishes to reexamine the latter issue, it should do so directly, as JUSTICE STEVENS now suggests. *Post*, at 12. The Court should not produce a *de facto* ban on capital punishment by adopting method-of-execution rules that lead to litigation gridlock.

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SUPREME COURT OF THE UNITED STATES

No. 07–5439

RALPH BAZE AND THOMAS C. BOWLING, PETITIONERS *v.* JOHN D. REES, COMMISSIONER, KENTUCKY DEPARTMENT OF CORRECTIONS, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

[April 16, 2008]

JUSTICE STEVENS, concurring in the judgment.

When we granted certiorari in this case, I assumed 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. The question whether a similar three-drug protocol may be used in other States remains open, and may well be answered differently in a future case on the basis of a more complete record. Instead of ending the controversy, I am now convinced that this case will generate debate not only about the constitutionality of the three-drug protocol, and specifically about the justification for the use of the paralytic agent, pancuronium bromide, but also about the justification for the death penalty itself.

I

Because it masks any outward sign of distress, pancuronium bromide creates a risk that the inmate will suffer excruciating pain before death occurs. There is a general understanding among veterinarians that the risk of pain is sufficiently serious that the use of the drug should be proscribed when an animal's life is being termi-

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nated.¹ As a result of this understanding among knowledgeable professionals, several States—including Kentucky—have enacted legislation prohibiting use of the drug in animal euthanasia. See 2 Ky. Admin. Regs., tit. 201, ch. 16:090, §5(1) (2004).² It is unseemly—to say the

¹The 2000 Report of the American Veterinary Medical Association (AVMA) Panel on Euthanasia stated that a “combination of pentobarbital with a neuromuscular blocking agent is not an acceptable euthanasia agent.” 218 J. Am. Veterinary Med. Assn. 669, 680 (2001). In a 2006 supplemental statement, however, the AVMA clarified that this statement was intended as a recommendation against mixing a barbiturate and neuromuscular blocking agent in the same syringe, since such practice creates the possibility that the paralytic will take effect before the barbiturate, rendering the animal paralyzed while still conscious. The 2007 AVMA Guidelines on Euthanasia plainly state that the application of a barbiturate, paralyzing agent, and potassium chloride delivered in separate syringes or stages is not discussed in the report. Several veterinarians, however, have filed an *amici* brief in this case arguing that the three-drug cocktail fails to measure up to veterinary standards and that the use of pancuronium bromide should be prohibited. See Brief for Dr. Kevin Concannon et al. as *amici curiae* 16–18. The Humane Society has also declared “inhumane” the use of “any combination of sodium pentobarbital with a neuromuscular blocking agent.” R. Rhoades, *The Humane Society of the United States, Euthanasia Training Manual* 133 (2002); see also Alper, *Anesthetizing the Public Conscience: Lethal Injection and Animal Euthanasia*, 35 *Fordham Urb. L.J.* ___, ___ (forthcoming 2008), online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1109258 (all Internet materials as visited Apr. 10, 2008, and available in Clerk of Court’s case file) (concluding, based on a comprehensive study of animal euthanasia laws and regulations that “the field of animal euthanasia has reached a unanimous consensus . . . that neuromuscular blocking agents like pancuronium have no legitimate place in the execution process”).

²See also, *e.g.*, Fla. Stat. §828.058(3) (2006) (“[A]ny substance which acts as a neuromuscular blocking agent . . . may not be used on a dog or cat for any purpose”); N. J. Stat. Ann. §4:22–19.3 (West 1998) (“Whenever any dog, cat, or any other domestic animal is to be destroyed, the use of succinylcholine chloride, curare, curariform drugs, or any other substance which acts as a neuromuscular blocking agent is prohibited”); N. Y. Agric. & Mkts. Law Ann. §374(2–b) (West 2004) (“No

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least—that Kentucky may well kill petitioners using a drug that it would not permit to be used on their pets.

Use of pancuronium bromide is particularly disturbing because—as the trial court specifically found in this case—it serves “no therapeutic purpose.” App. 763. The drug’s primary use is to prevent involuntary muscle movements, and its secondary use is to stop respiration. In my view, neither of these purposes is sufficient to justify the risk inherent in the use of the drug.

The plurality believes that preventing involuntary movement is a legitimate justification for using pancuronium bromide because “[t]he Commonwealth has an interest in preserving the dignity of the procedure, especially where convulsions or seizures could be misperceived as signs of consciousness or distress.” *Ante*, at 19. This is a woefully inadequate justification. Whatever minimal interest there may be in ensuring that a condemned inmate dies a dignified death, and that witnesses to the execution are not made uncomfortable by an incorrect belief (which could easily be corrected) that the inmate is in pain, is vastly outweighed by the risk that the inmate is actually experiencing excruciating pain that no one can detect.³ Nor is there any necessity for pancuronium bro-

person shall euthanize any dog or cat with T-61, curare, any curariform drug, any neuro-muscular blocking agent or any other paralyzing drug”); Tenn. Code Ann. §44-17-303(c) (2007) (“Succinylcholine chloride, curare, curariform mixtures . . . or any substance that acts as a neuromuscular blocking agent . . . may not be used on any non-livestock animal for the purpose of euthanasia”). According to a recent study, not a single State sanctions the use of a paralytic agent in the administration of animal euthanasia, 9 States explicitly ban the use of such drugs, 13 others ban it by implication—*i.e.*, by mandating the use of nonparalytic drugs, 12 arguably ban it by reference to the AVMA guidelines, and 8 others express a strong preference for use of nonparalytic drugs. *Anesthetizing the Public Conscience*, *supra*, at ____, and App.1.

³Indeed, the decision by prison administrators to use the drug on

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mide to be included in the cocktail to inhibit respiration when it is immediately followed by potassium chloride, which causes death quickly by stopping the inmate's heart.

Moreover, there is no nationwide endorsement of the use of pancuronium bromide that merits any special presumption of respect. While state legislatures have approved lethal injection as a humane method of execution, the majority have not enacted legislation specifically approving the use of pancuronium bromide, or any given combination of drugs.⁴ And when the Colorado Legisla-

humans for aesthetic reasons is not supported by any consensus of medical professionals. To the contrary, the medical community has considered—and rejected—this aesthetic rationale for administering neuromuscular blocking agents in end-of-life care for terminally ill patients whose families may be disturbed by involuntary movements that are misperceived as signs of pain or discomfort. As explained in an *amici curiae* brief submitted by critical care providers and clinical ethicists, the medical and medical ethics communities have rejected this rationale because there is a danger that such drugs will mask signs that the patient is actually in pain. See Brief for Critical Care Providers et al. as *amici curiae*.

⁴Of the 35 state statutes providing for execution by lethal injection, only approximately one-third specifically approve the use of a chemical paralytic agent. See Ark. Code Ann. §5-4-617 (2006); Idaho Code §19-2716 (Lexis 2004); Ill. Comp. Stat., ch. 725, §5/119-5 (West 2006); Md. Crim. Law Code Ann. §2-303 (Lexis Supp. 2007); Miss. Code Ann. §99-19-51 (2007); Mont. Code Ann. §46-19-103 (2007); N. H. Rev. Stat. Ann. §630:5 (2007); N. M. Stat. Ann. §31-14-11 (2000); N. C. Gen. Stat. Ann. §15-187 (Lexis 2007); Okla. Stat., Tit. 22, §1014 (West 2001); Ore. Rev. Stat. §137.473 (2003); Pa. Stat. Ann., Tit. 61, §3004 (Purdon 1999); Wyo. Stat. Ann. §7-13-904 (2007). Twenty of the remaining States do not specify any particular drugs. See Ariz. Rev. Stat. Ann. §13-704 (West 2001); Cal. Penal Code Ann. §3604 (West 2000); Conn. Gen. Stat. §54-100 (2007); Del. Code Ann., Tit. 11, §4209 (2006 Supp.); Fla. Stat. §922.105 (2006); Ga. Code Ann. §17-10-38 (2004); Ind. Code §35-38-6-1 (West 2004); Kan. Stat. Ann. §22-4001 (2006 Cum. Supp.); Ky. Rev. Stat. Ann. §431.220 (West 2006); La. Stat. Ann. §15:569 (West 2005); Mo. Rev. Stat. §546.720 (2007 Cum. Supp.); Nev. Rev. Stat. §176.355 (2007); Ohio Rev. Code Ann. §2949.22 (Lexis 2006); S. C. Code Ann.

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ture focused on the issue, it specified a one-drug protocol consisting solely of sodium thiopental. See Colo. Rev. Stat. Ann. §18–1.3–1202 (2007).⁵ In the majority of States that use the three-drug protocol, the drugs were selected by unelected Department of Correction officials with no specialized medical knowledge and without the benefit of expert assistance or guidance. As such, their drug selections are not entitled to the kind of deference afforded legislative decisions.

Nor should the failure of other state legislatures, or of Congress, to outlaw the use of the drug on condemned prisoners be viewed as a nationwide endorsement of an unnecessarily dangerous practice. Even in those States where the legislature specifically approved the use of a paralytic agent, review of the decisions that led to the adoption of the three-drug protocol has persuaded me that they are the product of “administrative convenience” and a “stereotyped reaction” to an issue, rather than a careful analysis of relevant considerations favoring or disfavoring a conclusion. See *Mathews v. Lucas*, 427 U. S. 495, 519, 520–521 (1976) (STEVENS, J., dissenting). Indeed, the trial court found that “the various States simply fell in line” behind Oklahoma, adopting the protocol without any critical analysis of whether it was the best available alter-

§24–3–530 (2007); S. D. Codified Laws §23A–27A–32 (Supp. 2007); Tenn. Code Ann. §40–23–114 (2006); Tex. Code Crim. Proc. Ann., Art. 43.14 (Vernon 2006 Supp. Pamphlet); Utah Code Ann. §77–18–5.5 (Lexis Supp. 2007); Va. Code Ann. §53.1–234 (Lexis Supp. 2007); Wash. Rev. Code §10.95.180 (2006).

⁵Colorado’s statute provides for “a continuous intravenous injection of a lethal quantity of sodium thiopental or other equally or more effective substance sufficient to cause death.” §18–1.3–1202. Despite the fact that the statute specifies only sodium thiopental, it appears that Colorado uses the same three drugs as other States. See Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*, 76 Ford. L. Rev. 49, 97, and n. 322 (2007).

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native.⁶ App. 756; see also *post*, at 5 (GINSBURG, J., dissenting).

New Jersey's experience with the creation of a lethal injection protocol is illustrative. When New Jersey restored the death penalty in 1983, its legislature "fell in line" and enacted a statute that called for inmates to be executed by "continuous, intravenous administration until the person is dead of a lethal quantity of an ultrashort-acting barbiturate in combination with a chemical paralytic agent in a quantity sufficient to cause death." N. J. Stat. Ann. §2C:49–2 (West 2005). New Jersey Department of Corrections (DOC) officials, including doctors and administrators, immediately expressed concern. The Capital Sentencing Unit's chief doctor, for example, warned the Assistant Commissioner that he had "concerns . . . in regard to the chemical substance classes from which the lethal substances may be selected." Edwards, *New Jersey's Long Waltz With Death*, 170 N. J. L. J. 657, 673 (2002).⁷ Based on these concerns, the former DOC Commissioner lobbied the legislature to amend the lethal injection statute to provide DOC with discretion to select more humane drugs: "[We wanted] a generic statement, like "drugs to be determined and identified by the commis-

⁶Notably, the Oklahoma medical examiner who devised the protocol has disavowed the use of pancuronium bromide. When asked in a recent interview why he included it in his formula, he responded: "It's a good question. If I were doing it now, I would probably eliminate it." E. Cohen, *Lethal injection creator: Maybe it's time to change the formula*, <http://www.cnn.com/2007/HEALTH/04/30/lethal.injection/index.html>.

⁷Officials of the DOC had before them an advisory paper submitted by a group of New York doctors recommending sodium thiopental "without the addition of other drugs," and the supervisor of the Health Services Unit was informed in a memo from a colleague that pancuronium bromide "will cause paralysis of the vocal chords and stop breathing, and hence could cause death by asphyxiation." Edwards, 170 N. J. L. J., at 673.

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sioner, or the attorney general, or the Department of Health”. . . . ‘Who knew what the future was going to bring?’” *Ibid.* And these concerns likely motivated the DOC’s decision to adopt a protocol that omitted pancuronium bromide—despite the legislature’s failure to act on the proposed amendment. See Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocutation and Lethal Injection and What It Says About Us*, 63 *Ohio St. L. J.* 63, 117–118, 233 (2002) (explaining that the New Jersey protocol in effect in 2002 called for use of a two-drug cocktail consisting of sodium thiopental and potassium chloride).

Indeed, DOC officials seemed to harbor the same concerns when they undertook to revise New Jersey’s lethal injection protocol in 2005. At a public hearing on the proposed amendment, the DOC Supervisor of Legal and Legislative Affairs told attendees that the drugs to be used in the lethal injection protocol were undetermined:

“Those substances have not been determined at this point because when and if an execution is scheduled the [DOC] will be doing research and determining the state-of-the-art drugs at that point in time We have not made a decision on which specific drugs because we will have several months once we know that somebody is going to be executed and it will give us the opportunity at that point to decide which would be the most humane.

“And things change. We understand that the state-of-the-art is changing daily so to say we are going to use something today when something may be more humane becomes known later wouldn’t make sense for us.” *Tr. of Public Hearing on Proposed Amendments to the New Jersey Lethal Injection Protocol* 36 (Feb. 4, 2005).

It is striking that when this state agency—with some

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specialized medical knowledge and with the benefit of some expert assistance and guidance—focused on the issue, it disagreed with the legislature’s “stereotyped reaction,” *Mathews*, 427 U. S., at 520, 521 (STEVENS, J., dissenting), and specified a two-drug protocol that omitted pancuronium bromide.⁸

In my view, therefore, States wishing to decrease the risk that future litigation will delay executions or invalidate their protocols would do well to reconsider their continued use of pancuronium bromide.⁹

II

The thoughtful opinions written by THE CHIEF JUSTICE and by JUSTICE GINSBURG have persuaded me that current decisions by state legislatures, by the Congress of the United States, and by this Court to retain the death penalty as a part of our law are the product of habit and inattention rather than an acceptable deliberative process that weighs the costs and risks of administering that penalty against its identifiable benefits, and rest in part on a faulty assumption about the retributive force of the death penalty.

⁸Further, concerns about this issue may have played a role in New Jersey’s subsequent decisions to create a New Jersey Death Penalty Study Commission in 2006, and ultimately to abolish the death penalty in 2007.

⁹For similar reasons, States may also be well advised to reconsider the sufficiency of their procedures for checking the inmate’s consciousness. See, *post*, at 5–10 (GINSBURG, J., dissenting).

JUSTICE ALITO correctly points out that the Royal Dutch Society for the Advancement of Pharmacy recommends pancuronium bromide “as the second of the two drugs to be used in cases of euthanasia.” *Ante*, at 7 (concurring opinion). In the Netherlands, however, physicians with training in anesthesiology are involved in assisted suicide. For reasons JUSTICE ALITO details, see *ante*, at 2–4, physicians have no similar role in American executions. When trained medical personnel administer anesthesia and monitor the individual’s anesthetic depth, the serious risks that concern me are not presented.

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In *Gregg v. Georgia*, 428 U. S. 153 (1976), we explained that unless a criminal sanction serves a legitimate penological function, it constitutes “gratuitous infliction of suffering” in violation of the Eighth Amendment. We then identified three societal purposes for death as a sanction: incapacitation, deterrence, and retribution. See *id.*, at 183, and n. 28 (joint opinion of Stewart, Powell, and STEVENS, JJ.). In the past three decades, however, each of these rationales has been called into question.

While incapacitation may have been a legitimate rationale in 1976, the recent rise in statutes providing for life imprisonment without the possibility of parole demonstrates that incapacitation is neither a necessary nor a sufficient justification for the death penalty.¹⁰ Moreover, a recent poll indicates that support for the death penalty drops significantly when life without the possibility of parole is presented as an alternative option.¹¹ And the available sociological evidence suggests that juries are less likely to impose the death penalty when life without parole is available as a sentence.¹²

¹⁰Forty-eight States now have some form of life imprisonment without parole, with the majority of statutes enacted within the last two decades. See Note, A Matter of Life and Death: The Effect of Life-Without-Parole Statutes on Capital Punishment, 119 Harv. L. Rev. 1838, 1839, 1841–1844 (2006).

¹¹See R. Dieter, Sentencing For Life: Americans Embrace Alternatives to the Death Penalty (Apr. 1993), <http://www.deathpenaltyinfo.org/article.php?scid=45&did=481>.

¹²In one study, potential capital jurors in Virginia stated that knowing about the existence of statutes providing for life without the possibility of parole would significantly influence their sentencing decision. In another study, a significant majority of potential capital jurors in Georgia said they would be more likely to select a life sentence over a death sentence if they knew that the defendant would be ineligible for parole for at least 25 years. See Note, 119 Harv. L. Rev., at 1845. Indeed, this insight drove our decision in *Simmons v. South Carolina*, 512 U. S. 154 (1994), that capital defendants have a due process right to require that their sentencing juries be informed of their ineligibility

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The legitimacy of deterrence as an acceptable justification for the death penalty is also questionable, at best. Despite 30 years of empirical research in the area, there remains no reliable statistical evidence that capital punishment in fact deters potential offenders.¹³ In the absence of such evidence, deterrence cannot serve as a sufficient penological justification for this uniquely severe and irrevocable punishment.

We are left, then, with retribution as the primary rationale for imposing the death penalty. And indeed, it is the retribution rationale that animates much of the remaining enthusiasm for the death penalty.¹⁴ As Lord Justice Denning argued in 1950, “some crimes are so outrageous that society insists on adequate punishment, because the wrong-doer deserves it, irrespective of whether it is a deterrent or not.” See *Gregg*, 428 U. S., at 184, n. 30. Our Eighth Amendment jurisprudence has narrowed the class of offenders eligible for the death pen-

for parole.

¹³Admittedly, there has been a recent surge in scholarship asserting the deterrent effect of the death penalty, see, e.g., Mocan & Gittings, *Getting Off Death Row: Commuted Sentences and the Deterrent Effect of Capital Punishment*, 46 *J. Law & Econ.* 453 (2003); Adler & Summers, *Capital Punishment Works*, *Wall Street Journal*, Nov. 2, 2007, p. A13, but there has been an equal, if not greater, amount of scholarship criticizing the methodologies of those studies and questioning the results, see, e.g., Fagan, *Death and Deterrence Redux: Science, Law and Causal Reasoning on Capital Punishment*, 4 *Ohio St. J. Crim. L.* 255 (2006); Donohue & Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 *Stan. L. Rev.* 791 (2005).

¹⁴Retribution is the most common basis of support for the death penalty. A recent study found that 37% of death penalty supporters cited “an eye for an eye/they took a life/fits the crime” as their reason for supporting capital punishment. Another 13% cited “They deserve it.” The next most common reasons—“sav[ing] taxpayers money/cost associated with prison” and deterrence—were each cited by 11% of supporters. See Dept. of Justice, Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics* 147 (2003) (Table 2.55), online at <http://www.albany.edu/sourcebook/pdf/t255.pdf>.

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alty to include only those who have committed outrageous crimes defined by specific aggravating factors. It is the cruel treatment of victims that provides the most persuasive arguments for prosecutors seeking the death penalty. A natural response to such heinous crimes is a thirst for vengeance.¹⁵

At the same time, however, as the thoughtful opinions by THE CHIEF JUSTICE and JUSTICE GINSBURG make pellucidly clear, our society has moved away from public and painful retribution towards ever more humane forms of punishment. State-sanctioned killing is therefore becoming more and more anachronistic. In an attempt to bring executions in line with our evolving standards of decency, we have adopted increasingly less painful methods of execution, and then declared previous methods barbaric and archaic. But by requiring that an execution be relatively painless, we necessarily protect the inmate from enduring any punishment that is comparable to the suffering inflicted on his victim.¹⁶ This trend, while appropriate and required by the Eighth Amendment's prohibition on cruel and unusual punishment, actually under-

¹⁵For example, family members of victims of the Oklahoma City bombing called for the Government to “put [Timothy McVeigh] inside a bomb and blow it up.” Walsh, *One Arraigned, Two Undergo Questioning*, *Washington Post*, Apr. 22, 1995, pp. A1, A13. Commentators at the time noted that an overwhelming percentage of Americans felt that executing McVeigh was not enough. Linder, *A Political Verdict: McVeigh: When Death Is Not Enough*, *L. A. Times*, June 8, 1997, p. M1.

¹⁶For example, one survivor of the Oklahoma City bombing expressed a belief that “death by [lethal] injection [was] “too good” for McVeigh.” A. Sarat, *When the State kills: Capital Punishment and the American Condition* 64 (2001). Similarly, one mother, when told that her child's killer would die by lethal injection, asked: “Do they feel anything? Do they hurt? Is there any pain? Very humane compared to what they've done to our children. The torture they've put our kids through. I think sometimes it's too easy. They ought to feel something. If it's fire burning all the way through their body or whatever. There ought to be some little sense of pain to it.” *Id.*, at 60 (emphasis deleted).

