

## DEBATE

### BAZE-D AND CONFUSED: WHAT'S THE DEAL WITH LETHAL INJECTION?

On January 7<sup>th</sup>, the Supreme Court heard oral arguments in the case of *Baze v. Rees*, which asks the Justices to examine the constitutionality of Kentucky's lethal injection methodology. As the Court deliberates over the issues involved, an informal nationwide moratorium on lethal injections has been established. In this Debate Professors Alison J. Nathan, of Fordham University, and Douglas A. Berman, of The Ohio State University, tease out the legal, political, and practical issues that the Court faces as it addresses *Baze*.

In her Opening, Professor Nathan critiques the irrationality of the three-formula lethal injection procedure used by Kentucky and many other states. Professor Nathan writes that "lethal injection as pervasively practiced in the United States today is the result of a historical accident, not scientifically informed deliberation." She contends that the sort of democratic reform that has been the catalyst for legislative changes in execution procedures in the past has been stymied by "lethal injection's peculiar history, attendant secrecy, and protocol involving the use of [a] pain-masking paralytic drug." She concludes by arguing that "[i]n this context of non-transparency, it is distinctly the role and responsibility of the judiciary, led by the Supreme Court, to scrutinize the practice of lethal injection and its history."

Professor Berman agrees that "the development and administration of lethal injection protocols have been haphazard and sloppy." However, his concern is principally focused on why the lack of a democratic reform movement has failed to raise the consciousness of the nation. He contends that "three critical practical and political realities" explain the absence of a national backlash: in sum, 1) no human-administered death penalty system can be perfect; 2) few Americans care to make a perfect system; and 3) most Americans are "blissfully ignorant" of any such "imperfections." Through his "real-politik" lenses, Professor Berman remains skeptical that the Justices will be able to rise above "the broader practical and political realities that surround the modern administration of capital punishment [and help] ensure that the machinations of death . . . persist."

## OPENING STATEMENT

*Lethal Injection's Known Unknowns*Alison J. Nathan<sup>†</sup>

The United States Supreme Court has recently heard oral argument in the case of *Baze v. Rees*, a constitutional challenge to the lethal injection procedures that Kentucky uses to execute death row inmates. Kentucky's lethal injection formula is the same employed by almost every death penalty state in the country. As a result, the day after the Court granted certiorari in *Baze*, I argued that because the Supreme Court is considering the *standard* by which such challenges must be judged, for the sake of even-handed and deliberative justice, all lethal injection executions across the nation should be stayed pending the Court's decision in *Baze* (see <http://jurist.law.pitt.edu/forumy/2007/09/pausing-machinery-of-death-supreme.php>). One execution did go forward in Texas on the same day that *Baze* was granted, apparently as a result of the refusal by the Chief Justice of the Texas Court of Criminal Appeals to allow the twenty-minute late filing of the condemned man's stay request. Since that time, however, every scheduled execution (nineteen as of the time of this writing) has been temporarily stayed by the Supreme Court, lower federal courts, state courts, or governors. This national pausing of the machinery of death has garnered significant press attention and some controversy, even leading a few commentators to suggest that lethal injection challenges are, at base, nothing more than a death-row delay tactic. This is a significant error. How states execute convicted defendants is an issue that implicates important aspects of governmental transparency and democratic reform, and should be a serious concern both to those who support the death penalty and those who oppose it. What we know about how states and the federal government currently execute people in the United States is deeply troubling—troubling enough that the Supreme Court has involved itself in the controversy. But the real danger of lethal injection as currently practiced lies in what we do not know. A number of historical and structural factors have co-

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lesced to shroud the administration of lethal injection in secrecy. These factors have entrenched, rather than cured, a needlessly cruel practice. This lack of transparency must change, and it is the existence of constitutional judicial review that will ensure that it does.

One thing we know for sure about lethal injection is its macabre history. As shown by the research of one of the leading experts in this field, Professor Deborah Denno of Fordham University School of Law, lethal injection as pervasively practiced in the United States today is the result of a historical accident, not scientifically informed deliberation. The genesis of today's method of lethal injection can be traced to 1976, the year the Supreme Court decided *Gregg v. Georgia*, 428 U.S. 153 (1976), and ended the nine-year execution hiatus that had begun in the period leading up to the 1972 case of *Furman v. Georgia*, 408 U.S. 238 (1972). After almost a decade without an execution, intense public scrutiny accompanied the preparations for the post-*Gregg* executions. In this context, and in order to help maintain public support for the death penalty, some state legislators scrambled to find a more humane substitute to the viscerally brutal and painful electric chair or gas chamber, the two methods that previously had gained national dominance but were facing increasing public scrutiny and criticism. Legislators in Oklahoma moved first.

Seeking guidance on how to carry out a potentially more humane execution, two Oklahoma state senators turned to the state's chief medical examiner, Dr. A. Jay Chapman. Although Dr. Chapman conceded that he lacked relevant training or expertise—stating at the time that he “was an expert in dead bodies but not an expert in getting them that way,” Deborah W. Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*, 76 *FORDHAM L. REV.* 49, 66 (2007)—he conjured up a procedure that would become the basis for lethal injection protocols nationwide. The Oklahoma legislators did not receive input from experts, did not conduct or commission any studies, and failed to consider the foreseeable administrative difficulties and dangers of Dr. Chapman's proposed procedure. Nevertheless, in 1977, Oklahoma's legislature adopted Dr. Chapman's method and delegated important details—what specific drugs to use, what dosage to administer, who would administer the drugs and how—to unqualified prison officials who made administrative decisions free from public scrutiny and oversight. After further consultation between Dr. Chapman and state prison officials, Oklahoma became the first state to adopt a three-drug lethal injection protocol—a short-acting anesthetic, a paralyzing agent, and a heart-stopping drug—as its preferred method of execution. Texas followed

immediately afterwards, becoming the first state to actually carry out a lethal injection execution, which it did in 1982, using the three-drug protocol.

Despite the inadequate origins of Oklahoma's lethal injection protocol, a ripple effect soon occurred. State after state followed Oklahoma's lead, uncritically borrowing its new three-drug formula and delegating important details to state prison officials who lacked pertinent experience and knowledge. By 2002, thirty-seven states had switched to lethal injection, with all but one state employing Dr. Chapman's original three-drug formula. Yet *none* of these states engaged in any additional medical or scientific study of the method they were adopting. Historical accident (or what sociologists would call a "cascade to mistaken consensus") explains far better than science or medicine the current ubiquity of the three-drug protocol.

We also know, as a result of information just beginning to emerge, that there have been seriously flawed lethal injection executions. For example, in May of 2007, an Ohio inmate named Christopher Newton appeared to be suffocating alive during parts of an execution that lasted almost two hours. Newton's botched execution came one year after a similarly controversial execution in Ohio that lasted approximately ninety minutes and caused the state to reexamine its execution procedures. This execution was sufficiently gruesome that the brother of the victim, who witnessed the execution, has gone on record condemning the lethal injection process as unnecessarily cruel. As another example, it took the state of Florida thirty-four minutes to execute Angel Diaz in 2006. During that time Diaz was flailing, gasping for air, grimacing, and struggling to breathe. A postexecution investigation concluded that Diaz was likely not properly anesthetized during the execution. According to the Florida Supreme Court, the execution "raised legitimate concerns about the adequacy of Florida's lethal injection procedures and the ability of the [Department of Corrections] to implement them." *Lightbourne v. McCollum*, No. SC06-2391, 2007 WL 3196533, at \*16 (Fla. Nov. 1, 2007). Given the incidences of error-prone and flawed executions, it is unsurprising that the three-drug protocol is forbidden for use in animal euthanasia by most states.

The public also is beginning to learn that unqualified individuals are providing guidance and participating in executions, creating circumstances ripe for error. In addition to relying on Dr. Chapman's admittedly inexperienced opinions, many states received guidance in administering lethal injection from Fred Leuchter, who was a leading

figure in the execution equipment “business” of electric chairs and gas chambers. Despite Mr. Leuchter’s dearth of experience with lethal injection, states relied on his advice for years before they learned, during the course of his providing testimony about gas chambers in support of a holocaust denier, that he had lied about his scientific qualifications and educational background, for which he was subsequently prosecuted. Yet Mr. Leuchter’s “lethal injection machine” played a role in further entrenching the three-drug protocol nationwide.

Similarly, recent lethal injection litigation in Missouri exposed that the doctor involved in that state’s lethal injection executions, known as “Dr. Doe” because his identity was steadfastly guarded by Missouri, was the subject of more than twenty malpractice suits and suffers from a form of dyslexia that affects his ability to prepare the drug combinations properly. As a result of this information, a federal judge in Missouri banned his participation in future executions. *Taylor v. Crawford*, No. 2:05-CV-04173-FJG, at 2 (W.D. Mo. Sept. 12, 2006), available at <http://www.law.berkeley.edu/clinics/dpclinic/LethalInjection/Public/MoralesTaylorAmicus/27.pdf>. Despite this, the *Los Angeles Times* recently reported that the very same doctor has continued to assist the federal government in preparing lethal injection executions of federal inmates. There is also evidence emerging of ill-trained executioners in California, including one who smuggled illegal drugs into the prison. And in Kentucky, the execution protocol allowed improperly trained executioners to insert catheters into an inmate’s neck despite a doctor’s refusal to do so. Even Dr. Chapman now agrees that the wrong drugs are being used and that states should be compelled to use expert personnel rather than the “complete idiots . . . [w]hich we seem to have.” Denno, *supra*, at 73.

Arguably more alarming than what we know of the current practice of lethal injection is what we do not know. Several aspects of the history of lethal injection have caused a continued repression of public knowledge and scrutiny of the procedure and its implementation. First, public scrutiny of the three-drug protocol has been stifled because, in copying Oklahoma, state after state has adopted the unnecessary paralytic agent as its second drug. The nature of this drug is to *mask* the realities of the execution from meaningful public scrutiny. A paralyzed inmate suffering pain during the execution will be physically unable to express his suffering. As a result, witnesses, including members of the media who report executions to the public, see only a sanitized version. Unaware of the painful suffering endured by in-

mates, the public has assumed wrongly that states always execute inmates in a humane and painless manner.

Second, by copying Oklahoma's vague lethal injection protocol, states also have followed Oklahoma in delegating critical implementation decisions to department of corrections personnel. The procedures these personnel develop are often exempt from state administrative law notice-and-comment requirements or have been treated as exempt by prison personnel. As a result, prison officials' critical lethal injection implementation decisions—what specific drugs to use, what dosage amounts, and how to administer the drugs—have remained hidden from public scrutiny.

Third, states have frustrated attempts to evaluate lethal injection protocols and procedures by tenaciously guarding the information as secret and nonpublic. In addition to refusing to release information about the qualifications and training of executioners, states also conceal execution procedures by limiting witnesses' ability to view portions of the execution process and by refusing to release postexecution autopsy information. The public, therefore, is precluded from learning of flawed procedures, incompetent administration, and execution errors.

Taken together, lethal injection's peculiar history, attendant secrecy, and protocol involving the use of the pain-masking paralytic drug have produced—and continue to produce—a failure of democratic reform. In the past, public scrutiny of cruel punishment practices led to legislative changes. For example, in the early-to-mid-twentieth century, nearly every state sought to introduce a more humane method of execution when the public learned of the actual horrors of the electric chair, and deemed electrocution to be too barbaric and open to a high risk of pain and error relative to other available options. The same was true for hanging before electrocution and the gas chamber. In contrast, the factors described here have led to systematic and continued repression of public information related to lethal injection's actual procedures and administration, undermining a similar process of public deliberation and democratic reform. As a result, a needlessly risky and unnecessarily cruel method has become entrenched. This is true despite readily available alternatives such as the method veterinarians typically use to euthanize animals: a massive overdose of a single drug barbiturate. Veterinarians favor this approach because it does not carry a significant risk of pain even if unforeseen errors in the implementation process occur.

In this context of non-transparency, it is distinctly the role and responsibility of the judiciary, led by the Supreme Court, to scrutinize the practice of lethal injection and its history, as well as to see through the ill-informed and reflexive state decision making that has perpetuated an execution method that needlessly risks severe and unnecessary pain.

REBUTTAL

*The Bliss of Ignorance and the Perfection Problem*

Douglas A. Berman<sup>†</sup>

Professor Nathan's Opening Statement provides an effective account of why the Supreme Court has now finally come to examine the constitutionality of modern execution procedures. As she spotlights, the development and administration of lethal injection protocols have been haphazard and sloppy, and state internal reviews of protocols have mostly been nonexistent or perfunctory. Jurisdictions that utilize the death penalty generally have not fulfilled their moral and constitutional obligations to ensure that unreasonable execution methods are not utilized. I thus agree with Professor Nathan that, in light of the failings of other branches, "it is distinctly the role and responsibility of the judiciary, led by the Supreme Court, to scrutinize" prevailing lethal injection protocols.

But Professor Nathan's essay fails to examine the reasons *why* so many states have tended to repress "public information related to lethal injection's actual procedures and administration" and the deeper death penalty dilemmas that in part account for the absence of a "process of public deliberation and democratic reform" concerning prevailing protocols. Specifically, Professor Nathan does not grapple with three critical practical and political realities that surround the modern administration of capital punishment: (1) a perfect death penalty system is practically impossible for fallible humans to create and maintain; (2) few persons actively involved with or concerned about modern death penalty systems are genuinely interested in making these systems more perfect; and (3) the vast majority of democratic lawmakers and the public in general is blissfully ignorant of the modern death penalty's imperfections. These critical practical and political realities infect all legal and social debates over capital punishment, and they significantly impede effective tinkering with the machinery of death. Though each of these realities justifies a lengthy law review article, here I will briefly unpack them with an emphasis on how they impact the lethal injection debate.

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1. *Fallibility.* In the words of renowned pop philosopher Hannah Montana, “Nobody’s perfect.” Indeed, the reality of human error is often stressed by death penalty opponents who contend that even the smallest risks of wrongful executions justify the abolition of capital punishment. In the wake of death row exonerations, the fallibility argument resonates with many, but this argument is largely inconsistent with how we assess other governmental functions. The well-known and unavoidable risk of human error does not keep governments from engaging in many life-and-death activities—ranging from waging war to regulating drug safety to running a public transit system—if the public and lawmakers view the benefits of these activities to be worth the risks. Of course, governments generally aspire to reduce the risks of human error as much as possible, but nobody argues that city buses should stop running when one driver negligently causes a fatal crash.

In the context of lethal injection protocols, the reality of human fallibility means that there will always be at least some risk of error and unnecessary pain in any state killing process. Of course, the selection of execution methods and execution personnel can greatly impact the magnitude of these risks: hangings conducted by untrained government officials—the execution norm throughout most of American history—surely will create greater risks of error and unnecessary pain than lethal injections conducted by trained medical personnel.

As Professor Nathan notes, over the last century governments have generally aspired to adopt more humane methods of execution, apparently recognizing that they should try to minimize the risk of error and unnecessary pain in administering the death penalty. Problematically, as Professor Nathan stresses, a “cascade to mistaken consensus” has led nearly all capital jurisdictions to adopt an imperfect three-drug lethal injection protocol. And yet, there is little doubt that the prevailing protocol is still a significant improvement over other execution methods; defendants are not clamoring for a return of the hangman’s noose or the electric chair, and capital jurisdictions are not seriously considering building new gas chambers or assembling firing squads. The formal terms of the modern debate over lethal injection protocols concern whether states, after having adopted an improved, but still flawed execution method, should now have to make their protocols even more perfect. But, as explained below, few persons actively involved with, or seriously concerned about, modern death penalty systems are genuinely interested in trying to make these systems more perfect.

2. *Modern Disinterest in an Even More Perfect System.* For nearly all death row defendants, their lawyers, and opponents of capital pun-

ishment, the only perfect death penalty system is one that has been abolished. Though death penalty opponents regularly chronicle flaws in capital punishment's administration, rarely do they seriously advocate realistic legislative reforms that would enable modern death penalty systems to operate more efficiently and regularly. Notably, death penalty opponents spotlight tales of wrongful convictions and botched executions primarily to boost their advocacy for the elimination of capital punishment altogether. Indeed, sophisticated abolitionists realize that a death penalty system made truly more perfect is a death penalty system more likely to garner broad public support and increase the number of state executions of convicted murderers.

For nearly all prosecutors and supporters of capital punishment, existing death penalty systems are already, in a sense, too perfect because they readily enable defendants and their advocates to delay or avoid the ultimate sanction. With decades often elapsing between a capital verdict and even the setting of an execution date, proponents of capital punishment are understandably far more concerned about repeated appeals and extensive delays than they are troubled by the occasional anecdote of a wrongful conviction or a botched execution of a gruesome murderer. Moreover, sophisticated proponents of capital punishment realize that serious efforts to perfect a death penalty system will provide defense lawyers and abolitionists with new opportunities to impede the progress of any murderer toward a state's death chamber.

Outside the context of lethal injection debates, there is ample evidence that few advocates are genuinely interested in making the administration of capital punishment more perfect. A few years ago, then-Massachusetts Governor Mitt Romney assembled a blue-ribbon panel of experts to devise a death penalty system for his state that he deemed "as foolproof as humanly possible." Letter from Mitt Romney, Governor of Mass., to Members of the Senate and House of Representatives of the Commonwealth of Mass. (Apr. 28, 2005) (on file with author). Tellingly, his proposed more-perfect system received virtually no support in Massachusetts: it was attacked on numerous grounds by both death penalty proponents and opponents. Moreover, the astute procedural and substantive reforms suggested by Romney's blue-ribbon panel—like those of many other groups of lawyers urging capital improvements—have found few serious advocates and have had virtually no traction in modern legislative debates in those jurisdictions still in the business of state killing.

The pragmatic disinterest in death penalty perfection largely accounts for why states have tended, in Professor Nathan's words, to repress "public information related to lethal injection's actual procedures and administration." State officials believe, quite justifiably, that any information-sharing good deed will be punished through new rounds of litigation brought by death row defendants and death penalty opponents. State officials believe, quite justifiably, that most everyone complaining about lethal injection protocols will not start endorsing capital punishment if and when the state successfully develops a more perfect execution method. And, perhaps even more importantly, state officials believe, also justifiably, that very few persons are genuinely concerned about relatively minor imperfections in the administration of the death penalty.

3. *Ignorance Is Bliss.* For the vast majority of the public and lawmakers, the death penalty is a highly symbolic and inconsequential aspect of governmental work. Even in the few active death penalty states, capital cases are a tiny component of massive state criminal justice systems and an even more miniscule part of state governments' broader activities. Practically speaking, the average citizen is impacted far more by street cleaning schedules and school lunch menus than by the day-to-day administration of the death penalty. Moreover, the average citizen assumes—correctly—that most prosecutors and judges generally aspire to reduce the most extreme risks of error in the operation of the death penalty. Politically speaking, the average lawmaker recognizes that voters will care about her basic position on the death penalty, but she also realizes that the symbolism of her position is far more important than any specifics.

These practical and political realities mean that the vast majority of lawmakers and members of the public are blissfully ignorant concerning the modern death penalty's imperfections. Indeed, only the most engaged activists even try to keep up with the copious research about the modern operation of the death penalty, and often lawmakers will resist efforts to commission official studies of the death penalty's administration. Of course, neither the general public nor lawmakers favor a deeply flawed death penalty system, and profound evidence of wrongful convictions or botched executions will often prompt executive officials and legislators to begin a serious program of reform. But when identified problems appear to be minor imperfections and not gross injustices, most people remain more interested in the death penalty as an idea than as a practice. Indeed, by paying little attention to the death penalty in practice, the public and their

elected representatives can hold onto the blissfully ignorant belief that our existing death penalty systems are as perfect as possible.

In the context of lethal injection protocols, the reality of blissful ignorance is reflected in the fact that few are advocating for perfect transparency. In our modern technological era, greater transparency concerning lethal injection protocols could be easily achieved by having all jurisdictions digitally record all executions. But, to my knowledge, nobody has even seriously suggested videotaping all executions. (It is notable, and telling, that thanks to a sneaky cell phone and YouTube, more Americans have seen the execution of Saddam Hussein than any of the 1099 modern executions in the United States.)

These broader realities have an intriguing resonance now that the lethal injection debates have finally reached the Supreme Court in *Baze*. Notably, the Supreme Court's modern death penalty jurisprudence seems to be driven, in fits and starts, by the goal of creating an ever more perfect death penalty system through persistent tinkering with the machinery of death. And, unlike the public and lawmakers, the Justices cannot remain blissfully ignorant to the historical, medical and legal issues surrounding lethal injection protocols and their imperfections. I am not sure what this will mean for the Court's forthcoming work in *Baze*, but the points stressed above must be considered in understanding the likely reactions of the public and the likely responses of government officials after *Baze*—no matter what the Justices say.

## CLOSING STATEMENT

Alison J. Nathan

On several key points related to *Baze v. Rees*, Professor Berman and I agree. Importantly, we appear to agree that state lethal injection protocols have been developed and administered in constitutionally problematic ways; that the ubiquity of the current lethal injection process is the result of a cascade to mistaken consensus; that there has been a significant lack of transparency surrounding the process by which states execute death row inmates; and that, as a result of these flaws, the Court in *Baze* must carefully scrutinize lethal injection protocols and procedures to ensure that they pass constitutional muster.

Beyond these points, Professor Berman reasonably takes my Opening to task for failing to grapple with “*why* so many states have tended to repress ‘public information related to lethal injection’s actual procedures and administration.’” In attempting to answer that question himself, Professor Berman places the lethal injection debate within the context of “three critical practical and political realities that surround the modern administration of capital punishment.” And he concludes that these realities “infect all legal and social debates over capital punishment, and they significantly impede effective tinkering with the machinery of death.” Although I concur with much of what Professor Berman argues in laying out his three political and practical realities—factors that result generally from the often polarized and overly symbolic debate about the death penalty in the United States—I do not agree that his observations fully answer the question of why states refuse to allow so much information about lethal injection procedures and protocols into the public record. More importantly, his observations concerning the lack of transparency and robust public debate are not merely descriptive, as he suggests. Rather, these factors require that the judiciary, including the Supreme Court, vigorously scrutinize whether the *realities* of lethal injection procedures satisfy constitutional demands.

Professor Berman’s first noted practical reality is that any system operated by human beings, including the administration of the death penalty, is fallible. In the lethal injection context, this means that “there will always be at least some risk of error and unnecessary pain in any state killing process.” This is unquestionably true, as the plaintiffs in *Baze* themselves acknowledge by advocating for a constitutional standard that upholds a method of execution unless it “creates a sig-

nificant and avoidable risk that an inmate will suffer severe pain.” Brief for Petitioners at 39, *Baze v. Rees*, No. 07-5439 (Nov. 5, 2007) (emphasis added), available at <http://www.law.berkeley.edu/clinics/dpclinic/LethalInjection/Public/documents/bazebriefs/2007.11.05.ky.baze.scotusmertisbrief.pdf>. Accordingly, it is not dispositive, or even legally relevant, that lethal injection is an improvement over previously entrenched execution methods such as hanging, electrocution, and lethal gas. Nor do I agree with Professor Berman that the “modern debate over lethal injection protocols concerns whether states, after adopting an improved, but still flawed execution method, should now have to make their protocols even more perfect.” Considering the fundamental constitutional right in issue, seeking reasonable improvements in light of existing technologies and information is not the same as a disingenuous and unending search for an impossible-to-achieve “perfection.” An analogy to voting technology is helpful. Surely electronic voting machines offer some improvement over previous voting technology (no more dangling chads, for example). Nevertheless, in light of the constitutional right at stake, voting rights advocates are justified in seeking a paper trail requirement for electronic voting, even if the new technology is an improvement and even if a paper trail still does not make electronic voting a perfect system.

Professor Berman’s response to my voting machine analogy might well be that it fails because of his second political reality factor, what he calls “pragmatic disinterest in death penalty perfection.” Perhaps he would contend that unlike the voting technology context, in which there are people genuinely concerned with assuring that every legitimate vote is counted, advocates on both sides of the death penalty debate have no interest in genuinely improving the capital punishment system. In the lethal injection context (as well as other areas of the death penalty debate beyond the scope of this exchange) I do not entirely agree. There are death penalty proponents—or at least those who firmly believe that the death penalty is and should remain constitutional—who would argue genuinely that states can and should execute defendants in a way that reasonably guards against the severe imposition of pain. There are also certainly death penalty proponents who realize that the best way to safeguard public support for the death penalty is through the adoption of execution methods that are—or at least appear to be—as humane as reasonably possible. To borrow from Professor Berman’s terminology, these individuals could be deemed “sophisticated [death penalty] proponents.” The use in every lethal injection state of the otherwise unnecessary paralytic agent,

which can make potentially painful executions look like peaceful slumber, may well benefit the “sophisticated [death penalty] proponent[']s” cause.

I also disagree with Professor Berman that all who challenge the administration of lethal injection seek only delay and are, at heart, entirely disinterested in genuine improvement of the execution process. I gather these are Professor Berman’s “unsophisticated” abolitionists. It is because of their efforts, Professor Berman contends, that states repress public information related to lethal injection because “[s]tate officials believe, quite justifiably, that any information-sharing good deed will be punished through new rounds of litigation.” Professor Berman’s cynical view overlooks that death penalty lawyers have an ethical obligation to challenge unconstitutional conduct by the government. This obligation may include attempting to ensure that their clients are executed in a manner consistent with the Eighth Amendment. The lawyers, of course, also have an ethical obligation not to bring frivolous or vexatious litigation. Several years ago, challenges to lethal injection were perceived by many as just that. However, given the reaction of lower court judges to the evidence of maladministration and incompetence finally surfacing in these lawsuits, such legal efforts appear vindicated. More importantly, I am unconvinced that the lack of transparency results from states simply seeking to hasten executions. If the underlying information could readily withstand judicial scrutiny, states would be well advised to provide information without the delay that has impeded judicial review of the merits of lethal injection procedures.

This previous point relates to Professor Berman’s final practical and political reality factor: blissful ignorance. He argues that the modern death penalty debate largely occurs at the symbolic level, with little interest in a deeper understanding of the death penalty in its actual practice. I agree with this important observation, but see this failure of informed public debate as precisely the value of the current lethal injection litigation. Contrary to the impression Professor Berman leaves, transparency advocates have made serious attempts to bring greater public access to executions through photographing or video recording, but courts have consistently rejected the efforts. For example, in *Rice v. Kempker*, 374 F.3d 675, 679 (8th Cir. 2004), the Eighth Circuit upheld a ban on the video recording of executions; the Fifth Circuit refused to recognize a First Amendment right to film executions in *Garrett v. Estelle*, 556 F.2d 1274, 1279 (5th Cir. 1977); and a district court in Indiana denied a request to broadcast the execution of Oklahoma City bomber Timothy McVeigh in *Entertainment Network*,

*Inc. v. Lappin*, 134 F.Supp. 2d 1002, 1013-14 (S.D. Ind. 2001). Lethal injection litigation, and in particular such transparency-related efforts, have the potential to dramatically change the national debate. Transparency places stark reality, rather than symbolism, at the center of public consciousness and discourse concerning state-sponsored executions.

What then is the answer to Professor Berman's question of why states refuse to release information to the public about how they execute people? One answer is surely that defending the secrecy of lethal injection procedures is easier for the states than defending the Rube Goldberg machine that is the pervasive three-drug protocol administered by the states. Claims of protecting the identity of executioners for "personal safety" reasons, for example, is easier than defending the employment of dyslexic doctors with multiple malpractice suits against them who have been banned from engaging in executions in other jurisdictions. Similarly, arguing that states do not need to disclose the drugs or dosage amounts used in the execution process because doing so would be detrimental to "national security" is easier than justifying the use of a paralytic drug that serves no purpose other than to hide pain that would result from improper anesthetization.

Another potential explanation for the states' insistence on secrecy relates to a doctrinal argument that some states have used to defend their current lethal injection procedures. These states note that in the death penalty context, the Supreme Court has required "deference . . . to the decisions of the state legislatures under our federal system." *Gregg v. Georgia*, 428 U.S. 153, 176 (1976). But the deference rule rests on the assumption that states have carried out at least a minimal level of investigation into a procedure that eliminates the serious danger of unnecessary and cruel pain. As the history of lethal injection demonstrates, the states never engaged in any such investigation. By refusing to release information about lethal injection protocols and procedures, states have largely been able to avoid having to justify their problematic decision making.

Furthermore, the repression of the details of lethal injection procedures allows these states to hide behind the seeming consensus of a majority of death penalty states, all of whom authorize execution pursuant to similar lethal injection processes. A consensus argument won the day when, in 2002, the Supreme Court held in *Atkins v. Virginia*, 536 U.S. 304, 321 (2002), that the Eighth Amendment prohibits states from executing a person with mental retardation. Similarly, in 2005, the Supreme Court held the execution of juvenile offenders unconsti-

tutional in *Roper v. Simmons*, 543 U.S. 551, 575 (2005). The Supreme Court reached its conclusions in *Atkins* and *Roper*, at least in part, by tallying the number of states that prohibited the execution of the mentally retarded and juvenile offenders and deciding that because more than a majority of states rejected the practices, those practices conflicted with contemporary standards and, therefore, were unconstitutional under the Eighth Amendment.

But the standard Eighth Amendment consensus analysis is premised upon transparency and public knowledge of a penological practice from which a consensus for or against the practice can develop. As I argued in my Opening, in the lethal injection context, the systemic failings of transparency disrupt this process. Moreover, the lack of transparency obstructs the proper framing or level of generality of a consensus analysis. At one level, it can be argued—as twenty states and the United States have argued in an amicus brief filed in *Baze*—that lethal injection, and even the three-drug protocol, is accepted by a majority of states as the preferred method of execution. But the legal challenges to lethal injection, including the one the Supreme Court has heard in *Baze*, are *not* challenges to lethal injection in the abstract. Rather, they are challenges to the specific protocols and procedures that states use to administer lethal injection. The point of these challenges is that although states have chosen lethal injection as a supposedly more humane alternative, and have adopted a drug protocol that is meant to anesthetize an inmate prior to the injection of painful drugs, the implementation of the protocol *in practice* lends itself to a substantial risk that inmates will be improperly anesthetized, will suffer excruciating pain, but will be paralyzed and thus unable to make known their conscious suffering.

Thus, in *Baze*, the petitioners correctly contend that to the extent a “consensus” analysis is relevant in the method-of-execution context, there is in fact a consensus in favor of execution by anesthetized death and the actual procedures challenged in *Baze* cannot stand because they lie outside this consensus. In other words, the constitutional failure of the current three-drug lethal injection protocol and its implementation is that while it *appears* to produce an anesthetized death, there exists an unnecessary risk that it in fact does not. Given the uninformed and non-transparent public debate that Professor Berman has identified, it is the role of the Supreme Court to probe the troubling realities of lethal injection and to ensure that even seemingly humane procedures actually satisfy the Constitution’s demands.

## CLOSING STATEMENT

Douglas A. Berman

I am pleased to conclude this Debate by noting yet again that Professor Nathan and I agree more than we disagree. In particular, like Professor Nathan, I believe that the “significant lack of transparency surrounding the process by which states execute death row inmates” now demands that courts “vigorously scrutinize whether the *realities* of lethal injection procedures satisfy constitutional demands.” Nevertheless, as Professor Nathan correctly surmises, I still have a “cynical view” of the lethal injection litigation principally because, to my knowledge, defendants have never offered to drop their Eighth Amendment claims if states adopt a particular preferred execution protocol. Professor Nathan is justified in complaining that states haven’t been more forthcoming about lethal injection realities. But states are justified in complaining that defendants and defense attorneys haven’t been more forthcoming about execution protocols they would consider constitutionally unassailable.

Professor Nathan asserts that “it is not dispositive, or even legally relevant, that lethal injection is an improvement over previously entrenched execution methods such as hanging, electrocution, and lethal gas.” But, even though the humane evolution of state execution methods may not be of great legal significance as the Justices consider the constitutional claims in *Baze*, this evolution (1) reveals that states have been genuinely willing to improve their execution methods, and (2) explains why states genuinely fear that defense attorneys, in Professor Nathan’s words, “seek only delay and are, at heart, entirely disinterested in genuine improvement of the execution process.” In this context, Professor Nathan’s voting technology analogy is telling. In the litigation over voting technologies, advocates make clear that they principally desire a paper trail to accompany electronic voting methods. But, in the litigation over execution technologies, advocates often obscure that they principally desire the elimination of all execution methods.

Importantly, I do not question either the judgment or ethics of defense lawyers challenging lethal injection protocols; indeed, when I have defended persons on death row, I have felt a professional obligation to raise any and every non-frivolous argument that might delay or prevent my client’s execution. But the fact that defense attorneys have an ethical responsibility to try to delay or prevent executions

contributes to the “bunker mentality” that state officials have tended to adopt in response to evidence about flaws in their lethal injection protocols.

I emphasize these realities neither to justify nor excuse many states’ troubling responses to the mounting evidence of problems in the administration of the traditional three-drug lethal injection protocol. Rather, my goal is to spotlight the litigation “realpolitik” that will necessarily attend, and may perhaps significantly inform, the Justices’ consideration of the arguments in *Baze*. Indeed, those Justices who have previously expressed concerns about extended death row litigation will surely be cognizant of the fact that nearly *two decades* have transpired since the *Baze* defendants committed the brutal murders that landed them on death row. And, though technically Kentucky’s execution protocol is all that is at stake in *Baze*, the Justices know that their ruling in this case will greatly influence whether executions across the country are few or frequent in the months and years ahead.

I close by stressing the litigation “realpolitik” because it helps explain not only why the Supreme Court has long avoided challenges to execution methods, but also the real reason *Baze* presents difficulties for the Justices. The Justices surely realize that, no matter how much or how little they decide to tinker with the machinery of death in *Baze*, the broader practical and political realities that surround the modern administration of capital punishment ensure that the machinations of death will persist.

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