

NOTES

Killing Me Softly: Is the Gas Chamber, or Any Other Method of Execution, “Cruel and Unusual Punishment?”

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Introduction

On October 4, 1994, a judge in the Northern District of California outlawed California’s gas chamber, declaring it “cruel and unusual punishment”¹ barred by the Eighth Amendment.² Judge Patel’s decision was the first federal court opinion to outlaw any method of execution, and only the second attempt by the federal courts to decide what limits the Eighth Amendment places on the methods of lawful killing.³

The first substantive decision on the constitutionality of a method of execution occurred only months earlier, in *Campbell v. Wood*,⁴ where a bitterly divided limited-en banc panel⁵ of the United States Court of Appeals for the Ninth Circuit found hanging permissible under the Eighth Amendment.⁶

Given the deep divisions over *Campbell* and *Fierro* among the judges of the Ninth Circuit,⁷ the fate of Judge Patel’s *Fierro* decision will probably be decided by the luck of the draw when the panel reviewing the case is picked. If the Ninth Circuit affirms, the result will

1. U.S. CONST. amend. VIII.

2. *Fierro v. Gomez*, 865 F. Supp. 1387 (N.D. Cal. 1994).

3. *But see infra* notes 78-81 (discussing *Gray v. Lucas*, 710 F.2d 1048 (5th Cir. 1983), *cert. denied*, 463 U.S. 1237 (1983)).

4. 18 F.3d 662 (6-5 decision) (9th Cir.), *reh’g and reh’g en banc denied*, 20 F.3d 1050 (6-5 decision) (9th Cir.), *cert. denied*, 114 S. Ct. 2125 (1994).

5. The Ninth Circuit does not actually review en banc cases en banc. Rather, a panel comprised of the Chief Judge and ten other judges is picked from the circuit’s twenty-seven active judges to decide the case. 9th Cir. R. 35-3.

6. *See infra* notes 104-25.

7. *See infra* note 13.

be a split in the circuits⁸ and virtually certain review in the Supreme Court.

Surprisingly, the Supreme Court has never directly ruled on the constitutionality of a method of execution. The Court has never even articulated what criteria the lower courts should use to decide the issue. This Note will explore (1) the reasons for, and results of, this historical omission; (2) the lessons to be learned, if any, from "landmark" Eighth Amendment cases; (3) a three-part inquiry necessary to decide the issue systematically, taking into account the meaning and importance of "human dignity" in the execution context; (4) Eighth Amendment tests the Court might choose from, including my suggested formulation for such a test; and (5) the constitutionality of the various methods of execution currently in use, including the gas chamber.

I. After Over a Century, An Issue of First Impression

On April 21, 1992, Robert Alton Harris became the first person to die in California's gas chamber since the reinstatement of the state's death penalty in 1977. Harris, convicted in 1979 of the kidnapping and murder of two sixteen year-old boys, had lost some twelve appeals on his behalf by March of 1992.⁹

On April 17, 1992, in the frantic week culminating in the execution, Harris' attorneys filed a class-action suit under 42 U.S.C. § 1983¹⁰

8. See *infra* notes 78-81 and accompanying text; notes 145-46 and accompanying text. The decision would also conflict with several decisions by state courts of last resort. See, e.g., *Hernandez v. State*, 32 P.2d 18 (Ariz. 1934); *People v. Daugherty*, 256 P.2d 911 (Cal. 1953); *Calhoun v. State*, 468 A.2d 45, 70 (Md. 1983); *Billiot v. State*, 454 So. 2d 445 (Miss. 1984); *State v. Gee Jon*, 211 P. 676 (Nev. 1923).

9. See Deirdre J. Cox, Note, *The Robert Alton Harris Decision: Federalism, Comity, and Judicial Civil Disobedience*, 23 GOLDEN GATE U. L. REV. 155, 158, 208-09 (1993). Harris never got a hearing on what his attorneys contend was the central issue in the case: whether his brain damage, post-traumatic stress syndrome, and fetal alcohol syndrome cast doubt on his culpability, and whether the state's psychiatrist was remiss in ignoring the evidence of brain damage in his testimony at trial. See Charles M. Sevilla & Michael Laurence, *Thoughts on the Cause of Present Discontents: The Death Penalty Case of Robert Alton Harris*, 40 UCLA L. REV. 345, 361 n.49 (1992) (describing the brain damage); *id.* at 366 (calling the psychiatric claim the "fundamental" issue of the case). Although a Ninth Circuit panel denied Harris' first federal petition, *Harris v. Vasquez*, 943 F.2d 930 (9th Cir. 1990), Harris' motion to rehear the case en banc lost by a tie vote of thirteen to thirteen. Sevilla & Laurence, *supra*, at 366.

10. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1994).

on behalf of Harris and the other inmates on San Quentin Prison's death row. The suit alleged that execution by cyanide gas constitutes cruel and unusual punishment, and it sought to enjoin the state from carrying out Harris' scheduled execution.¹¹ The claim was filed as a § 1983 action rather than as a habeas corpus petition to avoid the considerable procedural problems attendant to eleventh-hour successor habeas corpus petitions in death penalty cases.¹²

United States District Judge Patel issued a temporary restraining order (TRO) to allow time for a hearing on the constitutionality of the gas chamber.¹³ The TRO was vacated by a panel of the United States Court of Appeals for the Ninth Circuit, reinstated by other judges in the Ninth Circuit,¹⁴ and vacated again by the United States Supreme Court¹⁵ without anyone addressing the substance of the claim.¹⁶

Despite Harris' execution, *Fierro v. Gomez* continued as a class action on behalf of San Quentin's remaining death row inmates. Freed from the procedural and time constraints that accompany last-minute death penalty appeals, Judge Patel had the unusual luxury of holding an eight-day trial¹⁷ solely on the issue of the gas chamber's constitutionality. She then took nearly a full year after the trial to decide the case.¹⁸

11. Cox, *supra* note 9, at 209. The ACLU decided to pursue the action after hearing descriptions of the April 6, 1992 execution of Don Harding, *see infra* note 84, in Arizona's gas chamber. Sevilla & Laurence, *supra* note 9, at 373.

12. The use of 42 U.S.C. § 1983 to challenge a method of execution was not wholly unprecedented. *See Poyer v. Murray*, 113 S. Ct. 2397 (1993) (Souter, J., with Stevens and Blackmun, JJ., respecting denial of certiorari); Daniel E. Lungren & Mark L. Krotoski, *Public Policy Lessons from the Robert Alton Harris Case*, 40 U.C.L.A. L. REV. 295, 301 n.17 (1992); Sevilla & Laurence, *supra* note 9, at 376.

13. *Fierro v. Gomez*, 790 F. Supp. 966 (N.D. Cal. 1992) *rev'd sub nom. Gomez v. United States Dist. Ct.*, No. 92-70237, 1992 WL 155238 (9th Cir. Apr. 20, 1992) (order and dissenting opinion published at 966 F.2d 460 with the court's opinion omitted) *withdrawn as moot*, 966 F.2d 463 (9th Cir. 1992). Although technically withdrawn as moot, the Ninth Circuit's opinion reversing Judge Patel was actually withdrawn because it was considered flawed. *Wells By and Through Kehne v. Arave*, 18 F.3d 658, 662, 662 n.7 (9th Cir. 1994) (Reinhardt, J., dissenting). Normally, a withdrawn opinion is never published. In this case, however, Judge Patel ordered the panel's opinion published in the Federal Supplement as an appendix to her order following remand, *see Gomez v. United States District Court*, 790 F. Supp. 972, 972-75 (N.D. Cal. 1992), presumably to make public how far some judges on the circuit were willing to go to keep the Harris execution on schedule.

14. *Gomez v. United States Dist. Ct.*, 966 F.2d 463 (9th Cir. 1992) (cited in Cox, *supra* note 9 at 210).

15. *Gomez v. United States Dist. Ct.*, 112 S. Ct. 1652 (1992).

16. *See id.* at 1656 (Stevens, J., dissenting). For a chronology of the Harris litigation, *see Cox, supra* note 9, at 203-212; Lungren & Krotoski, *supra* note 12, at 315. For a detailed explanation of each step, including why the process took as long as it did, *see Sevilla & Laurence, supra* note 9, at 351-379.

17. *See Fierro*, 865 F. Supp. at 1389.

18. *Fierro* went to trial on October 26, 1993, and was decided on October 4, 1994. By contrast, Judge Patel produced the initial decision laying out a potential Eighth Amend-

In recent years, death penalty lawyers across the country have shown increasing interest in fighting particular methods of execution, including the gas chamber, on Eighth Amendment grounds.¹⁹

ment test—in the order granting the original TRO—in approximately 36 hours. See Cox, *supra* note 9, at 209.

19. This sudden interest may come out of desperation. Besides the fact that death penalty attorneys are generally ambivalent about whether the issue ought to be dealt with at all, the relief to be won, a less painful death, is perceived as slight compared to reversal of a sentence or a guilty verdict itself, the usual goal. See Lonny J. Hoffman, Note, *The Madness of the Method: The Use of Electrocution and the Death Penalty*, 70 TEXAS L. REV. 1039, 1041 n.11 (1992); Philip R. Nugent, Note, *Pulling the Plug on the Electric Chair: The Unconstitutionality of Electrocution*, 2 WM. & MARY BILL OF RIGHTS J. 185, 185 (1993).

Many people share the opinion that the issue of the relative cruelty of different methods of execution ought not to be litigated at all. In fact, an Indiana bill proposing a change in the state's method of execution from electrocution to lethal injection was defeated by the combined forces of both the pro and anti-death penalty lobbies, neither of whom wanted to see executions made more humane. William Ecenbarger, *Killing By The Book, Executions Are Gruesome And Horrifying—Just Ask The Witnesses*, PHILA. INQUIRER, Jan. 23, 1994, at 10.

On the abolitionist side, the criticism is severalfold: first, because state killings are inherently abhorrent to human dignity, reflect terrible social policy, and are disproportionately directed against racial and ethnic minorities, it is counting angels on pinheads to worry about how the condemned prisoner spends the last fifteen minutes of her life; and second, that even if the litigation is successful, and all states switch to a less painful and degrading method like lethal injection, the result will only make the death penalty more palatable to the public, and perhaps prolong its use. See, e.g., STEPHEN TROMBLEY, THE EXECUTION PROTOCOL 176-77 (1992) (death row inmate contending that Missouri's switch from the gas chamber to lethal injection has weakened the Missouri public's opposition to the death penalty); Ian Fisher, *Merits of Lethal Injection Are Questioned By Its Foes*, N.Y. TIMES, Feb. 17, 1995, at B5 ("It is precisely because [lethal injection] falsely appeals to the sense of medical technology and efficiency and humaneness and painlessness that it is intended to make the process of sentencing people to death and executing them easier on everybody," said Henry Schwarzschild, director of the New York office of the National Coalition to Abolish the Death Penalty. "That's the true horror of it."). In fact, the ACLU has stated its opposition to litigating the issue for fear of prolonging the existence of capital punishment. See Deborah W. Denno, *Is Electrocution an Unconstitutional Method of Execution? The Engineering of Death Over the Century*, 35 WM. & MARY L. REV. 551, 558 n.32 (1994). Thus, the ACLU's decision to file *Fierro* was apparently a reversal of earlier policy.

On the pro-death penalty side, I hear complaints that these legal arguments are nothing but stalling tactics designed to slow the wheels of justice. See, e.g., Debra J. Saunders, *Can The Death Penalty Be Humane?*, S.F. CHRON., Oct. 12, 1994, at A21. In other words, the two sides seem to agree that the cruelty with which the penalty is inflicted pales in significance to the fact of the execution itself.

Perhaps that is the case. I am a pragmatist, and I oppose the death penalty primarily for practical reasons: 1) it is too expensive (see DEATH PENALTY INFORMATION CENTER, FACTS ABOUT THE DEATH PENALTY 4 (Jan. 26, 1995) (death penalty costs California \$90 million per year above normal criminal justice costs); James Coates, *The Noose Tightens, America Could Witness A Surge In Executions*, CHI. TRIB., Aug. 19, 1990, at 1 (General Accounting Office estimates cost of each execution at \$1.8 million, compared to \$650,000 for life in prison without parole); see generally DEATH PENALTY INFORMATION CENTER, MILLIONS MISSPENT: WHAT POLITICIANS DON'T SAY ABOUT THE HIGH COSTS OF THE

DEATH PENALTY (Richard C. Dieter, author 1994); Margot Garey, Comment, *The Cost of Taking a Life: Dollars and Sense of the Death Penalty*, 18 U.C. DAVIS L. REV. 1221 (1985)); Sam Howe Verhovek, *Across the U.S., Executions Are Neither Swift Nor Cheap*, N.Y. TIMES, Feb. 22, 1995, at A1; 2) it doesn't prevent crime in any measurable way (VICTOR E. KAPPELER, MARK BLUMBERG, & GARY W. POTTER, *THE MYTHOLOGY OF CRIME AND CRIMINAL JUSTICE* 214-22 (1993) (most studies show no deterrent effect for the death penalty, and the one major study that did was significantly flawed); FRANKLIN E. ZIMRING & GORDON HAWKINS, *CAPITAL PUNISHMENT AND THE AMERICAN AGENDA* 14 (1986) ("In reality, the death penalty is about as relevant to controlling violent crime as rain-dancing is to controlling the weather."); *id.* at 167-84 (concluding, after reviewing the major deterrence studies, that (1) the deterrent effect of the death penalty has never been accurately measured, and (2) that no one involved in the debate on either side really cares); for an extensive list of sources on deterrence and the death penalty, see John D. Bessler, *Televised Executions and the Constitution: Recognizing a First Amendment Right of Access to State Executions*, 45 FED. COMM. L.J. 355, 356 n.1 (1993)); 3) it may actually encourage some killings, Welsh S. White, *Defendants Who Elect Execution*, 48 U. PITT. L. REV. 853, 877 (1987) ("the case histories . . . demonstrate that some defendants kill so that society will execute them"); and 4) I doubt that our justice system is capable of imposing it fairly, see *Callins v. Collins*, 114 S. Ct. 1127 (1994) (Blackmun, J., dissenting from denial of certiorari) (contending that the legal system is incapable of reconciling the demands of individual fairness and of consistency in capital sentencing); *McCleskey v. Kemp*, 481 U.S. 279, 286-87 (1987) (describing the "Baldus study," which reveals capital sentencing disparities in Georgia based on the race of the defendant and/or the victim); *Furman v. Georgia*, 408 U.S. 238, 364-65 (1972) (Marshall, J., concurring) (citing similar statistics); DEATH PENALTY INFORMATION CENTER, *FACTS ABOUT THE DEATH PENALTY* 2 (Jan. 26, 1995) (85% of death penalty cases involve a white victim although 50% of murder victims are black; of the 71 people executed for interracial murders since 1976, 69 were black (white victim) and two were white (black victim)); *Another Biased Death Penalty*, N.Y. TIMES, Mar. 17, 1994, at A22 (in cases where the Justice Department has chosen to seek the death penalty under the 1988 "drug kingpin" law, only 4 out of the 37 defendants so charged have been non-Hispanic whites, even though 75% of federal drug trafficking defendants are non-Hispanic whites). I also believe, however, that the death penalty encourages crime by undercutting the general belief in the sanctity of human life and the importance of the feelings of others. See *infra* note 206. This is perhaps the greatest irony of all, and the only argument that cannot be dismissed by someone willing to pay the price for retribution.

I can't help thinking that as long as we are stuck with the death penalty (as we will no doubt be for years to come, based on its popularity) we ought to try to minimize its potentially destructive societal effects. By teaching a modicum of respect for the condemned in their final moments, perhaps we might reclaim some tiny portion of the respect for life of which capital punishment robs us.

Further, litigating the issue keeps it in the public eye. Most people think that executions are quick and painless. See the closing moments of the recent NBC SUNDAY NIGHT MOVIE: WITNESS TO THE EXECUTION (television broadcast, Feb. 13, 1994) (on file with author) for a popular, sanitized view of electrocution, possibly the most horrible of all methods in reality. People support the death penalty in theory without knowing how the prisoners are actually killed. By forcing people to confront the ugly truth of the death penalty, perhaps we can hasten its abolition after all.

Finally, prisoners really do suffer in their final moments of life, and those who wish to minimize their own pain would not be discouraged from litigating the issue simply because of the possible consequences to those that follow them. The duty of every defense attorney fighting a death penalty appeal is to the client first and foremost. The attorney who loses sight of that has ceased to do her job.

They have not stopped any executions, although there have been some small successes.

North Carolina recently executed an inmate in its gas chamber after the U.S. Supreme Court denied certiorari on the question of the gas chamber's legality.²⁰ In Maryland, however, a death row prisoner named Donald Thomas mounted a more successful challenge. Thomas first sought access to the videotape of the Harris execution for use in Thomas' own lawsuit.²¹ Judge Patel denied his request²² and later ordered the tape destroyed.²³ Another federal court, however, ordered the state to allow Thomas' attorney to videotape the Maryland execution of John Thanos.²⁴ In response to the order, the Maryland Legislature passed a bill mandating the use of lethal injection but allowing prisoners to affirmatively choose the gas chamber as an alternative.²⁵

Electrocution, the sole method of execution in eleven states,²⁶ continues to generate controversy as well. Two years ago, a case challenging the constitutionality of electrocution reached the Supreme Court, and although the Court denied certiorari, three justices voted to hear the case.²⁷

In any case, the recent upsurge of such litigation may be a result of the push by the conservative wing of the Supreme Court to "streamline" the capital appeals process through devices like the refusal to apply new rules of constitutional law retroactively, *see infra* note 82 (discussing *Teague v. Lane*, 489 U.S. 288 (1989)), which has stripped the capital defendant of the ability to get many of her claims heard. Questions of the government's fundamental power to punish, however, remain viable on habeas, *see Teague*, 489 U.S. at 311, and presumably legality of a particular method of execution under the Eighth Amendment is such a question (*but see* *Campbell v. Wood*, 114 S. Ct. at 2125, 2126 n.3 (1994) (Blackmun, J., dissenting from denial of certiorari) ("[P]etitioner's claim [that hanging is unconstitutional] might constitute a new rule under *Teague v. Lane*.")).

20. *See Lawson v. Dixon*, 114 S. Ct. 2700 (1994) (Blackmun, J., dissenting from denial of certiorari). North Carolina is the only remaining state, besides California, where the gas chamber is the default method for inmates refusing to choose a method. No state retains the gas chamber as its sole method, although Mississippi, which is switching to lethal injection, continues to use lethal gas for inmates sentenced before July 1, 1984. *See* MISS. CODE ANN. § 99-19-51 (1994).

21. *Fierro v. Gomez*, No. C-92-1482 MHP, 1993 WL 414673, at *1 (N.D. Cal. Oct. 13, 1993).

22. *Id.*

23. Sabra Chartrand, *Given a Push, Maryland Alters Its Death Penalty*, N.Y. TIMES, Mar. 25, 1994, at B12.

24. *In re Thomas*, 155 F.R.D. 124, 125 (D. Md. 1994).

25. *Fierro v. Gomez*, 865 F. Supp. 1387, 1405 (N.D. Cal. 1994); Chartrand, *supra* note 22, at B12; *see* MD. ANN. CODE art. 27 § 627 (1994).

26. Denno, *supra* note 19, at 625 n.492. Of the 261 people executed in the United States since 1976, 113 have died in the electric chair. *See* DEATH PENALTY INFORMATION CENTER, FACTS ABOUT THE DEATH PENALTY 1 (Jan. 26, 1995).

27. *See Poyner v. Murray*, 113 S. Ct. 2397 (1993) (Souter, J., with Stevens and Blackmun, JJ., respecting denial of certiorari).

In February 1993, a Virginia state court set a date for a hearing on the constitutionality of electrocution; in response, the Commonwealth dropped the capital murder charge in the case rather than try the issue.²⁸

The Ninth Circuit's opinion in *Campbell*, which finds hanging permissible, is the first federal court opinion to decide the constitutionality of a method of execution. *Campbell* by no means guarantees the constitutionality of any other method, however, since it was decided by the narrowest of margins (6-5) and on the basis of a truncated evidentiary record.²⁹ Further, Judge Patel managed to outlaw the gas chamber even following the strictures of *Campbell*.³⁰

II. Reasons No Standard Exists for Deciding Which Executions are "Cruel and Unusual"

A. Structural Reasons

Ever since the Supreme Court first heard argument on methods of execution and the Eighth Amendment in *Wilkerson v. Utah*,³¹ courts have been reluctant to create standards for deciding what pun-

28. See Nugent, *supra* note 19, at 195 (citing *Commonwealth v. White*, Criminal No. 8129, Va. Cir. Ct. (Loudon County 1993)).

Capital prisoners in Virginia, like those in California, now have a choice between the state's old method (in Virginia, the electric chair) and lethal injection. VA. CODE ANN. § 53.1-234 (Michie 1994). Although one might think that the issue has become moot because of the existence of the choice, it has not. First, some inmates may refuse to participate in the process of choosing, as did David Mason, who died in the California gas chamber on August 24, 1993. *Fierro*, 865 F. Supp. at 1391. In fact, of the twenty-four California inmates offered the choice thus far, sixteen have refused to make the choice. *Id.*

Second, as the *Campbell* court readily admitted, the existence of a choice between a constitutional and an unconstitutional method of punishment does not moot the issue. That occurs only if the inmate makes it moot by choosing the constitutionally permissible punishment. *Campbell*, 18 F.3d at 680-81; *but see State v. Gollehon*, 864 P.2d 249, 266-67 (Mont. 1993) (existence of choice renders question of constitutionality of hanging moot, even where inmate refuses to choose and is therefore subject to hanging); *DeShields v. State*, 534 A.2d 630, 638-39 (Del. 1987).

29. See *Fierro*, 865 F. Supp. at 1413 n.32; *infra* notes 105-11 and accompanying text. In rejecting both the motion for rehearing and the suggestion that the full court rehear the case en banc, the *Campbell* majority took the unusual step of denying a request for a stay of execution to allow the Supreme Court to consider the application for certiorari. See *Campbell v. Wood*, 20 F.3d 1050, 1051 (9th Cir. 1994) ("find[ing] that exceptional circumstances justify denying the stay in this case"). Judge Reinhardt, writing for three of the five dissenting members of the en banc panel, commented: "If *this* case does not warrant a stay pending certiorari, I cannot think of one that would." *Id.* at 1052 (Reinhardt, J., dissenting). In fact, three justices voted to grant certiorari, so *Campbell* fell one vote short. See *Campbell v. Wood*, 114 S.Ct. 2125 (1994) (Blackmun, J., wrote an opinion dissenting from denial of certiorari, while Ginsberg and Stevens, JJ., dissented without opinion).

30. See *infra* notes 133-40 and accompanying text.

31. 99 U.S. 130 (1878).

ishments violate the "cruel and unusual punishments" clause. That reluctance is understandable given the historical pattern surrounding the emergence of each new method of execution. Typically, a new method is introduced and billed as being more "humane" or "enlightened" than the method in use at the time.³² Empirical testing involving human subjects is impossible, so the claims of the new method's promoters are difficult to refute; the legislature therefore adopts the new procedure for humanitarian reasons, but based on scant scientific evidence.³³ The first challenge comes quickly, usually by the first inmate facing execution by the new method.³⁴ The challenge loses based on the legislature's humane intent and the lack of evidence of cruelty.³⁵ This initial decision is often somewhat provisional in its language, with the court assuming that the executions will be carried out in the most humane manner possible.³⁶

32. See *infra* notes 33, 35, and 36.

33. See, e.g., *In re Storti*, 60 N.E. 210, 211 (Mass. 1901) (electrocution was adopted by the Legislature "precisely because it is instantaneous"; court upholds it on that basis); *State v. Gee Jon*, 211 P. 676, 682 (Nev. 1923) ("[O]ur Legislature, in [choosing execution by gas,] sought to provide a method of inflicting the death penalty in the most humane manner known to modern science."); Denno, *supra* note 19, at 566-77 (showing that commercial interests, rather than scientific evidence, led to the adoption of the first electrocution statute); Nugent, *supra* note 19, at 190 (first adoption of electrocution based only on one doctor's having seen one man accidentally electrocuted).

34. See, e.g., Denno, *supra* note 19, at 556 (William Kemmler challenging electric chair); MICHAEL KRONENWETTER, CAPITAL PUNISHMENT: A REFERENCE HANDBOOK 81 (1993) (*Gee Jon* challenging gas chamber).

35. See, e.g., *Gee Jon*, 211 P. at 682 ("The Legislature has determined that the infliction of the death penalty by the administration of lethal gas is humane, and it would indeed be not only presumptuous, but boldness on our part, to substitute our judgement for theirs, even if we thought differently upon the matter."); *People v. Daugherty*, 256 P.2d 911, 922-23 (Cal. 1953) (quoting *Gee Jon* extensively in upholding the prospective use of California's new gas chamber); *In re Storti*, 60 N.E. 210, 210 (Mass. 1901) ("[W]hen, as here, the means adopted are chosen with just the contrary intent [rather than cruelty], and are devised for the purpose of reaching the end proposed as swiftly and painlessly as possible, we are of opinion that they are not forbidden by the constitution."); Hoffman, *supra* note 19, at 1043 (in *In re Kemmler*, the state trial court found electrocution potentially painless based only on expert testimony; the only actual evidence was a few electrocutions conducted on animals, and those results were ignored).

36. See, e.g., *Gee Jon*, 211 P. at 681-82 ("For many years animals have been put to death painlessly by the administration of poison gas. Gas has been used for years by dental surgeons for the purpose of extracting teeth painlessly. . . . We must presume that the officials intrusted [sic] with the infliction of the death penalty by the use of gas . . . will carefully avoid inflicting cruel punishment."); *In re Kemmler*, 7 N.Y.S. 813, 818 (Sup. Ct. 1889) (holding that electrocution is not cruel and unusual because the cruelty results only from mistakes in the application of electricity, not in the use of electricity per se); *In re Kemmler*, 24 N.E. 6 (N.Y. [Cayuga] County Ct. 1889) (quoted in *In re Kemmler*, 136 U.S. 436, 442 (1890)) (holding that Kemmler had not shown that "a force of electricity sufficient to kill any human subject with celerity and certainty, when scientifically applied, cannot be generated"); see also *Fierro v. Gomez*, 790 F. Supp. 966, 970 (N.D. Cal.) (opinion granting TRO) ("The holding in *Daugherty* [see *supra* note 35] was based on the assumption that

The courts properly defer to the legislature in rendering these decisions, since they do not yet have a factual basis for re-evaluating the legislatures' success in fulfilling the stated humanitarian goal. Unfortunately, when time and experience show that the new method does not work as it was intended, later challenges are summarily dismissed, with the courts citing the earlier provisional decision as controlling.³⁷ As a result, the method of execution is judged only on how it is supposed to work in theory, and never on how it actually works in practice.³⁸

Courts are reluctant to scrutinize the relative cruelty of execution methods for other reasons as well. First, most methods have the theoretical potential to kill quickly and painlessly. In reality they are often carried out by ill-trained and ill-equipped personnel with little regard for the complexity of killing without inflicting pain.³⁹ Mishaps are frequent.⁴⁰ Add to this the relative rarity of executions,⁴¹ the strict con-

lethal gas was the most humane method of execution.”), *rev'd sub nom.* *Gomez v. United States Dist. Ct.*, 966 F.2d 460 (9th Cir.), *withdrawn as moot*, 966 F.2d 463 (9th Cir.), *vacated*, 112 S. Ct. 1652 (1992) .

37. *See, e.g., In re Anderson*, 447 P.2d 117, 130 (Cal. 1968) (citing *Daugherty* [*see supra* note 35]) (“The fact that . . . the death penalty is inflicted by the administration of ‘a lethal gas’ does not render the punishment cruel or unusual.”); *see also infra* note 53.

38. Although *Campbell* was decided recently (Feb. 8, 1994), it follows this pattern closely. The District Court in *Campbell* had excluded all evidence of hangings other than that of Westley Allan Dodd, hanged on Jan. 5, 1993 in Washington, since no other hangings had taken place under Washington’s new hanging procedure. *Campbell*, 18 F.3d at 685-86; *see also infra* notes 105-11 and accompanying text. Thus, by ignoring the world’s hundreds of years of experience with hanging, the court was able to treat the Washington procedure as if it were a newly created method. *Accord Campbell*, 18 F.3d at 713 (Reinhardt, J., dissenting).

39. *See, e.g., Campbell*, 18 F.3d at 714 (Reinhardt, J., dissenting) (“The state did not consult a single medical expert in developing the [hanging] protocol.”); *id.* (adding “the prison employs only relatively untrained physician’s assistants for the task of conducting a medical inspection of the prisoner”); Denno, *supra* note 19, at 650-51 (1994) (describing Florida officials’ decision to forego spending \$3,425 for a new leg electrode for the Florida electric chair, opting instead to make a substitute using a copper strip and an old army boot, with gruesome results); *id.* at 651-52 (replacement of worn natural sea sponge in Florida chair’s headpiece with common household sponge); *id.* at 646-649 (noting various examples of alleged incompetence by Virginia officials in maintaining “Old Sparky,” Virginia’s electric chair, and in conducting electrocutions). The problem is exacerbated by health professionals’ general unwillingness to participate in the actual killing process. *See infra* note 234.

40. One expert conservatively estimates the percentage of botched executions since the reinstatement of the death penalty in *Gregg v. Georgia*, 428 U.S. 153 (1976), at nine percent, although the true figure may be much higher. *See Denno, supra* note 19, at 662-63.

41. *See Campbell*, 18 F.3d at 700 (Reinhardt, J., dissenting) (“[W]ith the exception of South Africa and a few small Caribbean states, there has not been another judicial hanging [besides that of Westley Allan Dodd] in the entire English-speaking world since 1966.”) (footnote omitted). The pace of executions is accelerating, however, 157 people were executed between 1976 and 1991. *See DEATH PENALTY INFORMATION CENTER, FACTS*

trols on the number of witnesses,⁴² the absence of any useful judicial standards against which witnesses can assess what occurs, and the fact that the only people who can testify to the actual level of pain are by definition unavailable for subsequent comment. Courts have a hard time enforcing the Eighth Amendment in the death chamber in the face of such obstacles.

B. The "Landmark Cases"

In the face of these obstacles, it should come as no surprise that the jurisprudence is sparse. Although several cases are widely cited as support for the constitutionality of one or another method of execution, a closer look reveals that their holdings are invariably far more narrow, or that their view of the Constitution is obsolete.

Wilkerson, one of the Supreme Court's earliest Eighth Amendment cases, is sometimes cited for the proposition that the firing squad is constitutional.⁴³ *Wilkerson* was convicted of murder in the territory of Utah, which by an 1852 statute prescribed either hanging, shooting or beheading, in the judge's discretion, as the method of execution.⁴⁴ However, the Revised Penal Code of 1876 replaced that provision and failed to specify an execution method.⁴⁵ The trial judge imposed shooting, and the defendant appealed, arguing that the method-of-execution decision was no longer within the trial court's jurisdiction.

ABOUT THE DEATH PENALTY 1 (Jan. 26, 1995). However, 100 people were executed between 1992 and 1994, and six more went to the nation's death chambers in January of 1995 alone, four of them in Texas. See *id.* (four executions between Jan. 1 and Jan. 26, 1995, two of them in Texas); *Texas Carries Out Double Execution*, S.F. CHRON., Jan. 31, 1995, at A3 (two more Texas executions on Jan. 31, 1995). 1994 was a landmark execution year, with Idaho, Maryland, and Nebraska conducting their first executions since 1976. See DEATH PENALTY INFORMATION CENTER, FACTS ABOUT THE DEATH PENALTY 3 (Jan. 26, 1995). Arkansas executed five prisoners, more than it had in the previous eighteen years combined. *Id.* All pale in comparison to Texas, however, which executed fourteen in 1994. *Id.* at 1. As of October 1994, 2,948 prisoners sat on America's death rows. *Id.* at 2.

42. For a list of the state statutes governing the selection of execution witnesses, see Bessler, *supra* note 19, at 368-72. See also *infra* notes 193, 199, and accompanying text for a discussion of the ways government tends to hide details of executions.

43. Although commentators frequently cite *Wilkerson* for this proposition, (see, e.g., Gailon W. McGowen, Jr., *An Opportunity to Address the Merits: Barefoot v. Estelle*, 17 COLUM. HUM. RTS. L. REV. 83, 97 n.94 (1985); Ved P. Nanda, *Recent Developments in the United States and Internationally Regarding Capital Punishment*, 67 ST. JOHN'S L. REV. 523, 527-28 (1993); Peggy M. Tobolowsky, *Drugs and Death: Congress Authorizes the Death Penalty for Certain Drug-Related Murders*, 18 J. CONTEMP. L. 47, 67 & n.85 (1992); Jennifer Buehler, Note, *Hudson v. McMillian: Rejecting the Serious Injury Requirement, But Embracing the Malicious-And-Sadistic Standard*, 42 CATH. U. L. REV. 683, 691 n.50 (1993); Nugent, *supra* note 19, at 188), only one court has ever directly followed *Wilkerson* in upholding shooting as constitutional, and it seemed to do so reluctantly. See *Andrews v. Shulsen*, 600 F. Supp. 408, 413 (C.D. Utah 1984).

44. *Wilkerson v. Utah*, 99 U.S. 130, 132 (1878).

45. *Id.*

Defense counsel argued that because the territorial legislature had eliminated the earlier legislative act, only hanging, the method chosen by Congress for use by Federal authorities, was permissible in Utah.

Before rejecting the jurisdictional argument, the court discussed shooting in light of the Eighth Amendment:

Cruel and unusual punishments are forbidden by the Constitution, but the authorities referred to are quite sufficient to show that the punishment of shooting as a mode of executing the death penalty for the crime of murder in the first degree is not included in that category, within the meaning of the eighth amendment [sic]. Soldiers convicted of desertion or other capital military offenses are in the great majority of cases sentenced to be shot, and the ceremony for such occasions is given in great fullness by the writers upon the subject of courts-martial.⁴⁶

While apparently unequivocal, the *Wilkerson* holding is less than dispositive for several reasons. First, the statement is pure dicta: the defendant never even claimed that shooting violated the Eighth Amendment.⁴⁷ Further, the *Wilkerson* court was operating under the assumption that the Eighth Amendment must be interpreted in a strictly historical manner—that since the firing squad was accepted at the time of the Amendment's adoption in 1791, it would remain constitutional forever. This view of the Amendment was repudiated in the landmark case of *Weems v. United States*.⁴⁸ Consequently, *Wilkerson's* viability is suspect.⁴⁹

Wilkerson does stress, however, that torture would be impermissible,⁵⁰ and the Court lists punishments which would violate the Eighth Amendment: dragging to the place of execution, disembowelment, beheading, quartering, and burning alive.⁵¹

Courts treat *In re Kemmler*⁵² as definitively legalizing the electric chair.⁵³ In *Kemmler*, New York's newly passed electrocution statute

46. *Id.* at 134-35.

47. Had the statute prescribed the mode of executing the sentence, it would have been the duty of the court to follow it, unless the punishment to be inflicted [i.e. shooting] was cruel and unusual, within the meaning of the eighth amendment to the Constitution, *which is not pretended by the counsel of the prisoner.*

Id. at 136-37 (emphasis added).

48. 217 U.S. 349 (1910). See the discussion of *Weems*, *infra* notes 59-64 and accompanying text.

49. *But cf. infra* notes 221-26 and accompanying text. For an analysis of the gas chamber under a pre-*Weems* historical standard, see *infra* notes 227-28 and accompanying text; *infra* note 233.

50. *Wilkerson*, 99 U.S. at 135-36.

51. *Id.* at 135.

52. 136 U.S. 436 (1890).

53. *Kemmler* has been cited for this proposition in countless cases, one of the earliest being *Ferguson v. State*, 105 So. 840 (Fla. 1925), *aff'd per curiam*, 273 U.S. 663 (1926). For lists of such cases, see *Glass v. Louisiana*, 471 U.S. 1080, 1081 n.3 (1985) (Brennan, J.,

was challenged by William Kemmler, the first inmate scheduled to die by this new method.⁵⁴ The Supreme Court did find the procedure constitutional, but under a quite different set of circumstances than exist today.

First, since in 1890 the Supreme Court had not yet incorporated the Eighth Amendment guarantee against "cruel and unusual punishment" into the Fourteenth Amendment, the Eighth Amendment did not apply to the case.⁵⁵ Rather, the Supreme Court decided *Kemmler* under a pure Fourteenth Amendment procedural due process analysis, asking only whether the New York Legislature had violated due process in adopting the electric chair. The Court concluded that the Legislature's hearings and debates on the subject were sufficient to ensure that due process had attended the adoption of the electric chair.⁵⁶ As a result, the Court's statement that the electric chair would not violate the Eighth Amendment was dicta.⁵⁷ Further, *Kemmler* was based, like *Wilkinson*, on the now-defunct historical interpretation of the Eighth Amendment.⁵⁸

The Supreme Court abandoned the purely historical view of the Eighth Amendment, under which *Wilkinson* and *Kemmler* were decided, in *Weems*. *Weems*, a Coast Guard official working in the Philippines, then a U.S. territory, was found guilty of making a false entry in a payroll book and sentenced to *cadena temporal*, a punishment originating in Spanish law. *Cadena temporal* consisted of (1) twelve to twenty years (fifteen in this case) of imprisonment at hard labor with a chain attached to the wrist and ankle at all times; (2) deprivation of all parental, marital, and property rights while imprisoned; (3) the permanent obligation, after release, to keep the authorities apprised of his whereabouts, and not to change his place of residence without official permission; (4) permanent deprivation of the right to vote, hold office, or collect his government pension; and (5) a fine between 1,250

dissenting from denial of certiorari); Hoffman, *supra* note 19, at 1040 n.9; Nugent, *supra* note 19, at 192 n.71. For a detailed analysis of how courts have used *Kemmler* in denying challenges to various methods of execution, see Denno, *supra* note 19, at 616-23.

Kemmler's viability has been undercut even further by Justice Souter's comment that "the holding of [*Kemmler*] does not constitute a dispositive response to litigation of the issue in light of modern knowledge about the method of execution in question." Poyner v. Murray, 113 S. Ct. 2397, 2399 (1993) (Souter, J., with Stevens and Blackmun, JJ., respecting denial of certiorari).

54. For the history of the Kemmler execution, see TROMBLEY, *supra* note 19, at 17-22; Denno, *supra* note 19, at 566-607; Hoffman, *supra* note 19, at 1042-45; Nugent, *supra* note 19, at 190-93.

55. See *Kemmler*, 136 U.S. at 446-49.

56. *Id.* at 449.

57. Glass v. Louisiana, 471 U.S. 1080, 1083 (1985) (Brennan, J., dissenting from denial of certiorari).

58. *Id.*

to 12,500 pesetas (4,000 in this case).⁵⁹

After pointing out that “[s]uch penalties amaze those who . . . believe that it is a precept of justice that punishment for crime should be graduated and proportioned to offense [sic]”,⁶⁰ the Court questions whether a punishment could be “cruel and unusual” by virtue of its disproportionality to the crime.⁶¹ Rejecting the purely historical view of the Eighth Amendment,⁶² the *Weems* Court holds that the Eighth Amendment “is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice.”⁶³ The Court concludes by finding the provisions of *cadena temporal*, beyond the prison term, unconstitutionally cruel in light of the crime committed because the Eighth Amendment bars punishments disproportionate to the offense.⁶⁴

Since *Weems*, most of the Supreme Court’s Eighth Amendment cases have dealt with proportionality rather than per se constitutionality—that is examining a punishment in the context of the individual case rather than in all possible cases.⁶⁵ *Trop v. Dulles*⁶⁶ is a rare exception, and it remains the only U.S. Supreme Court decision finding a particular type of punishment—expatriation—per se violative of the Eighth Amendment.⁶⁷

59. *Weems*, 217 U.S. at 364-65.

60. *Id.* at 366-67.

61. *Id.* at 371.

62. [A] principle, to be vital, must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. . . . In the application of a constitution, therefore, our contemplation cannot be only of what has been, but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value, and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality.

Id. at 373.

63. *Id.* at 378. In an oft-quoted passage, Chief Justice Burger, writing for the plurality in *Trop v. Dulles*, 356 U.S. 86 (1958), restated this critical holding:

The Court recognized in [*Weems*] that the words of the [Eighth] Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.

Trop, 356 U.S. at 100-101 (Burger, C.J., writing for a four-justice plurality) (footnote omitted).

64. *Weems*, 217 U.S. at 380-81.

65. See, e.g., *Solem v. Helm*, 463 U.S. 277 (1983); *Edmund v. Florida*, 458 U.S. 782 (1982); *Hutto v. Davis*, 454 U.S. 370 (1982); *Rummell v. Estelle*, 445 U.S. 263 (1980); *Coker v. Georgia*, 433 U.S. 584 (1977); but see *infra* note 223.

66. 356 U.S. 86 (1958).

67. Lower federal courts have found some punishments illegal under any circumstances. See *Jackson v. Bishop*, 404 F.2d. 571, 579-81 (8th Cir. 1968) (whippings with a strap); *Landman v. Royster*, 333 F. Supp. 621, 648 (E.D. Va. 1971) (shackling for punitive purposes); *Ho Ah Kow v. Nunan*, 12 F. Cas. 252 (C.C.D. Cal. 1879) (No. 6,546) (cutting off the hair of Chinese immigrants who wear long hair for religious and/or cultural reasons).

Trop involved a soldier, a native-born American, convicted of desertion by court-martial during World War II. He was sentenced to three years at hard labor and dishonorably discharged. When *Trop* applied for a passport in 1952, he discovered that under § 401(g) of the Nationality Act of 1940⁶⁸ his citizenship had been revoked pursuant to his desertion conviction. The Court reversed the penalty, finding, *inter alia*, that expatriation as punishment for a crime is "cruel and unusual" under any circumstances.⁶⁹

Trop is not terribly useful, however, as a tool for deciding what other punishments might violate the Eighth Amendment. Although the four-justice plurality opinion deals largely with the Amendment,⁷⁰ Chief Justice Burger states early in the opinion that expatriation simply "is not subject to the general powers of the National Government and therefore cannot be divested in the exercise of those powers"⁷¹ and that "[o]n this ground alone the judgement in this case should be reversed."⁷² Justice Brennan's concurring opinion,⁷³ which provides the decisive vote, focuses only on the extent of Congress' war-making power, concluding that expatriation is beyond the scope of that power.⁷⁴ Thus, the entirety of the plurality's Eighth Amendment discussion, although widely cited, may be considered dicta.⁷⁵

Nonetheless, *Trop* is widely cited for the notion that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man."⁷⁶ This principle is quite broad, however, and there have been few attempts to define more precisely the meaning of the phrase "the dignity of man."⁷⁷

The *Ho Ah Kow* court's statement was actually dicta, however, since the court had first held that the regulation was violative of Due Process as beyond the power of the San Francisco Board of Supervisors to implement (*see id.* at 253-54) and then added that the regulation violated equal protection because although facially applicable to everyone, it was known to be directed at Chinese immigrants (*see id.* at 254-55). These appear to be the only decisions addressing the issue.

68. 8 U.S.C. § 1481(a)(8), 54 Stat. 1168, 1169 (1940).

69. *Trop*, 356 U.S. at 101-03.

70. *Id.* at 99-104.

71. *Id.* at 92.

72. *Id.* at 93.

73. *Id.* at 105-14.

74. *Id.* at 114.

75. *See Atiyeh v. Capps*, 449 U.S. 1312, 1315 (Rehnquist, Circuit Justice 1981) (referring to *Trop*'s "dignity of man" language, *see infra* note 76, as dicta).

76. *Trop*, 356 U.S. at 100; *see, e.g., Stanford v. Kentucky*, 492 U.S. 361, 392 (1989) (Brennan, J., with Marshall, Blackmun, and Stevens, JJ., dissenting); *McClesky v. Kemp*, 481 U.S. 279, 300 (1987); *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (opinion of Stewart, J., with Powell and Stevens, JJ.); *Furman v. Georgia*, 408 U.S. 238, 270 (1972) (Brennan, J., concurring).

77. *Compare infra* notes 148-75 and accompanying text. For a detailed analysis of every Supreme Court usage of the term "human dignity" and related terms (including

Courts also treat the more recent Fifth Circuit case of *Gray v. Lucas*⁷⁸ as upholding the constitutionality of the gas chamber.⁷⁹ The actual holding in *Gray* was quite equivocal,⁸⁰ however, and even then was based on the historical understanding of the Eighth Amendment explicitly abandoned in *Weems*, as Justice Marshall pointed out in his dissent from the denial of certiorari.⁸¹

III. Consequences of the Lack of Standards

Without any clear standards to govern their actions, state officials have little guidance as to how to carry out executions. Courts, moreover, have no way of deciding whether a particular execution was carried out in a "cruel and unusual" manner, much less what the odds are that future executions will be "cruel and unusual." In the face of omnipresent budgetary concerns, officials have little incentive to review and update execution procedures as psychological and physiological

"dignity of man"), see Jordan J. Paust, *Human Dignity as a Constitutional Right: A Jurisprudentially Based Inquiry Into Criteria and Content*, 27 How. L.J. 145, 150-84 (1984).

78. 710 F.2d 1048 (5th Cir. 1983), *cert. denied*, 463 U.S. 1237 (1983).

79. In disposing of the question of the constitutionality of the gas chamber without any apparent reasoning of its own, *Billiot v. State*, 454 So. 2d 445 (Miss. 1984) cites a string of cases, among which only *Gray* actually mentions the issue. Similarly, *State v. Williams*, 800 P.2d 1240, 1250 (Ariz. 1987) and *Calhoun v. State*, 468 A.2d 45, 70 (Md. 1983) uphold the constitutionality of the gas chamber by simply quoting *Gray* without further analysis.

80. The holding, in its entirety, reads as follows:

Although contemporary notions of civilized conduct may indeed cause some reassessment of what degree or length is acceptable, we are not persuaded that under the present jurisprudential standards the showing made by *Gray* justifies *this intermediate appellate court* holding that, as a matter of law or fact, the pain and terror resulting from death by cyanide gas is so different in degree or nature from that resulting from other traditional modes of execution as to implicate the eighth amendment [sic] right.

Gray, 710 F.2d at 1061 (emphasis added).

Chief Justice Burger, in an opinion concurring in the denial of certiorari, cleverly edits the holding to make it sound less provisional:

I agree with the Court of Appeals that the showing made by petitioner does not justify a court holding "that, as a matter of law or fact, the pain and terror resulting from death by cyanide is so different in degree or nature from that resulting from other traditional modes of execution as to implicate the eighth amendment [sic] right."

Gray v. Lucas, 463 U.S. 1237, 1239-40 (1983) (emphasis added). No other Justices joined this opinion.

81.

First, "[p]unishments are cruel when they involve torture or a lingering death." [*Kemmler*]. Second, punishments are cruel when they "involve the unnecessary and wanton infliction of pain." [*Gregg*]. . . . The Court of Appeals [in the opinion below] failed to apply either of the foregoing principles to the case before it. . . . Had the court made an effort to apply the proper legal standards, it seems highly likely that it would have found the lethal-gas method to be unconstitutional.

Id., 463 U.S. at 1244-45 (Marshall, J., dissenting from denial of certiorari).

knowledge increases, or even to maintain death chamber equipment properly.⁸² Besides the obvious pain and horrific degradation that many condemned prisoners suffer in their final moments of life,⁸³ the tacit judicial acceptance of this cruelty fosters an unhealthy and potentially dangerous atmosphere of indifference to human suffering by prison officials and law enforcement.⁸⁴

The lack of meaningful judicial review perpetuates itself, since the issue tends to arise only in the context of an impending execution. At that point there is great pressure on the court to allow the execution; then the complex procedural bars⁸⁵ to eleventh-hour successor habeas corpus petitions make it easy for courts to avoid the merits of the constitutional issue.

IV. Why the Gas Chamber is Peculiarly Suited to Judicial Scrutiny

The gas chamber⁸⁶ is perhaps the best suited for appellate review of any current method of execution. The course of death is similar in

82. See, e.g., Denno, *supra* note 19, at 683 n.903 ("the only experienced hangman known lives in the backwoods of Canada and 'has not responded to notes left on a tree stump for him by the local authorities'" (quoting Michael D. Hinds, *Making Execution Humane (Or Can It Be?)*, N.Y. TIMES, Oct. 14, 1990, at 8)); see also *supra* note 39; *infra* note 102.

83. See *infra* notes 87, 88, 90-92, 94-97, 100-01, 172, 193, 199, and 236.

84. Ironically, the recent judicial attention to methods of execution may have caused even more official neglect. When the bill adding lethal injection at the prisoner's option was introduced in the California Senate, the Attorney General's office specifically discouraged the Senate from adopting any regulations to guide the lethal injection process, since such regulations would only leave the process more vulnerable to legal challenges. See STAFF OF CALIFORNIA SENATE COMM. ON JUDICIARY, 1991-92 REGULAR SESSION, DEATH PENALTY—EXECUTION BY LETHAL INJECTION OR LETHAL GAS, at 5-6 (Comm. Print 1992) (on file with author).

85. See *Penry v. Lynaugh*, 492 U.S. 302, 341 (1989) (Brennan, J., dissenting) ("The *Teague* plurality adopted for no adequate reason a novel threshold test for federal review of state criminal convictions that, subject to narrow exceptions, precludes federal courts from considering a vast array of important federal questions on collateral review."); Marc M. Arkin, *The Prisoner's Dilemma: Life in the Lower Federal Courts After Teague v. Lane*, 69 N.C. L. REV. 371, 407-10 (1991) (federal habeas claimant must show novelty of claim to overcome procedural default for failure to raise in state habeas petition, but novelty, if proved, bars federal relief; Robert Alton Harris' claim of lack of competent psychiatric assistance under *Ake v. Oklahoma* used as example); Kit Kimports, *Habeas Corpus, Qualified Immunity, and Crystal Balls: Predicting the Course of Constitutional Law*, 33 ARIZ. L. REV. 115, 122-30 (1991) (necessity, and difficulty, of proving novelty of claim); Sevilla & Laurence, *supra* note 9, at 348 (describing habeas barriers as "procedural quicksand"); see generally Kathleen Patchel, *The New Habeas*, 42 HASTINGS L.J. 941 (1991).

86. Ten prisoners have been gassed in America since 1976. DEATH PENALTY INFORMATION CENTER, FACTS ABOUT THE DEATH PENALTY 1 (Jan. 26, 1995).

all cases,⁸⁷ and whatever pain and indignity occurs results from the predictable action of the gas itself, and not from any sort of unforeseeable mishaps.

By contrast, the historically favored method, hanging, has long been thought virtually instantaneous if the prisoner's weight and neck-muscle strength are properly assessed when selecting the rope length, so that the spinal cord is instantly severed at the end of the drop.⁸⁸

87. The sequence of physical symptoms is always the same. Breathing in cyanide gas paralyzes the heart and lungs. The victim becomes giddy. Panic gives way to a severe headache, followed by chest pains. Respiration becomes impossible, so that the victim struggles vainly for breath, eyes popping, tongue hanging thick and swollen from a drooling mouth. His face turns purple.

TROMBLEY, *supra* note 19, at 12.

Execution by cyanide gas is "in essence asphyxiation by suffocation or strangulation." As dozens of uncontroverted expert statements filed in this case illustrate, execution by cyanide gas is extremely and unnecessarily painful.

"Following inhalation of cyanide gas, a person will first experience hypoxia, a condition defined as a lack of oxygen in the body. The hypoxic state can continue for several minutes after the cyanide gas is released in the execution chamber. During this time, a person will remain conscious and immediately may suffer extreme pain throughout his arms, shoulders, back, and chest. The sensation may be similar to pain felt by a person during a massive heart attack."

"Execution by gas . . . produces prolonged seizures, incontinence of stool and urine, salivation, vomiting, wrenching, ballistic writhing, flailing, twitching of extremities, [and] grimacing." This suffering lasts for 8 to 10 minutes, or longer.

Eyewitness descriptions of executions by cyanide gas lend depth to these clinical accounts. On April 6, 1992, Arizona executed Don Eugene Harding. "When the fumes enveloped Don's head he took a quick breath. A few seconds later he again looked in my direction. His face was red and contorted as if he were attempting to fight through tremendous pain. His mouth was pursed shut and his jaw was clenched tight. Don then took several more quick gulps of the fumes."

"At this point Don's body started convulsing violently. . . His face and body turned a deep red and the veins in his temple and neck began to bulge until I thought they might explode."

"After about a minute Don's face leaned partially forward, but he was still conscious. Every few seconds he continued to gulp in. He was shuddering uncontrollably and his body was racked with spasms. His head continued to snap back. His hands were clenched."

"After several more minutes, the most violent of the convulsions subsided. At this time the muscles along Don's left arm and back began twitching in a wavelike motion under his skin. Spittle drooled from his mouth."

"Don did not stop moving for approximately eight minutes, and after that he continued to twitch and jerk for another minute. Approximately two minutes later, we were told by a prison official that the execution was complete."

"Don Harding took ten minutes and thirty one seconds to die."

Gomez v. United States Dist. Ct., 112 S. Ct. 1652, 1654 (1992) (Stevens, J., dissenting from denial of certiorari) (footnotes omitted) (quoting Exhibits in Support of Motion for Temporary Restraining Order). Similar evidence is described at length in Gray v. Lucas, 463 U.S. 1237, 1241-44 (1983) (Marshall, J., dissenting from denial of certiorari), as well as in *Fierro*, see *infra* notes 130-31, 193, and text accompanying each.

88. See, e.g., JOHN LAURENCE, A HISTORY OF CAPITAL PUNISHMENT 48 (1960). However, a recent study of the exhumed skeletons of thirty-four English prisoners hanged in the late nineteenth and early twentieth centuries reveals that the so-called "hangman's

Even in nineteenth-century England, however, when professional and experienced hangmen followed carefully calculated tables and conducted hangings regularly,⁸⁹ it was not uncommon for the executioner to select either too short a rope, in which case the neck failed to snap and the prisoner slowly died of strangulation, or too long a rope, in which case the prisoner was decapitated.⁹⁰ Similar accidents have occurred in American hangings as well.⁹¹ Further, it is unclear whether a proper hanging ever causes quick unconsciousness.⁹²

The other historical method still in use, the firing squad,⁹³ also

fracture," a fracture of the second or third vertebra which causes quick unconsciousness, occurred in only 19% of the hangings. Ryk James & Rachel Nasmyth-Jones, *The Occurrence of Cervical Fractures in Victims of Judicial Hanging*, 54 FORENSIC SCI. INT'L 81, 90 (1992). The study concluded that 48% of the prisoners died not of a broken neck, but wholly or in part by strangulation. *Id.* at 83-86, 90. Further, there was no correlation found between the length of drop and the likelihood of a fracture; nor did the more experienced hangmen have significantly greater success at causing fractures. *Id.* at 86-87.

In fact, the expression "pulling one's leg" may have come from the practice of having assistant executioners stationed under the gallows to pull the prisoners legs if the drop failed to instantly kill him, thus giving the appearance of a perfect hanging. GEORGE V. BISHOP, EXECUTIONS: THE LEGAL WAYS OF DEATH 109 (1965).

89. See LAURENCE, *supra* note 88, at 49-50 (1960); CHARLES DUFF, A HANDBOOK ON HANGING 192 (1974) (example of a nineteenth century chart matching rope length to prisoner's weight); *Rupe v. Wood*, 863 F. Supp. 1307 (W.D. Wash. 1994) ("The British historically sought to utilize an energy level of 1260 foot-pounds [applied to the neck by the rope] during each judicial hanging.").

90. See *Campbell*, 18 F.3d at 715-16; DUFF, *supra* note 89, at 106 (partial decapitation of Patrick Harnet); LAURENCE, *supra* note 88, at 49 (accidental decapitation of Robert Goodale).

91. See *State v. Frampton*, 627 P.2d 922, 935-36 (Wash. 1981) (describing various lengthy strangulations and partial decapitations resulting from botched hangings); Martin R. Gardner, *Executions and Indignities—An Eighth Amendment Assessment of Methods of Inflicting Capital Punishment*, 39 OHIO ST. L.J. 96, 119-21 (1978); Ken Driggs, *A Current of Electricity Sufficient in Intensity to Cause Immediate Death: A Pre-Furman History of Florida's Electric Chair*, 22 STETSON L. REV. 1169, 1175-76 n.29 (1993) (quoting *Had a Hard Time in Hanging Negro*, FLA. TIMES-UNION, July 10, 1909, at 1 (botched hanging ending in 15 minute strangulation) and *Dies on Gallows*, FLA. TIMES-UNION, Apr. 8, 1902, at 5 (14 minute strangulation)); Ecenbarger, *supra* note 19, at 10 (botched Washington hangings included suffocating prisoners begging to be dropped a second time); *id.* (Illinois prisoner in 1896 strangled slowly for 45 minutes); *id.* (decapitation of Eva Dugan in 1930 Arizona hanging). For one court's extensive factual findings regarding the risk of decapitation, see *infra* note 121.

92. See *Frampton*, 627 P.2d at 934-35 (hanging does not usually sever the spinal cord, and consciousness may persist even when the spinal cord is severed).

93. Utah is the sole state still using the firing squad, albeit only at the election of the condemned inmate. Otherwise, the default method is lethal injection. See UTAH CODE ANN. § 77-18-5.5 (1994). Utah's unique use of this method apparently derives from the Mormon doctrine of blood atonement, the belief that a murderer can only be cleansed of her sin by physically spilling her blood on the ground during the execution process. See Martin R. Gardner, *Illicit Legislative Motivation as a Sufficient Condition for Unconstitutionality Under the Establishment Clause—A Case for Consideration: The Utah Firing Squad*, 1979 WASH. U. L.Q. 435, 440 & n.18. For a description of the Utah firing squad

has problems. Death is rarely instantaneous, and it is doubtless quite painful to have a fist-sized hole punched in one's chest.⁹⁴ Further, mishaps can occur regarding the aim and intentions of the executioners.⁹⁵

Electrocution is even more unpredictable, with many varieties of mishaps.⁹⁶ Although electricity has the power to kill instantaneously,⁹⁷ it is quite difficult to get it to do so predictably.

The execution procedures currently in use usually call for one or two long, high-voltage jolts, followed by a series of lower voltage jolts

procedure, see Jacob Weisberg, *This Is Your Death*, THE NEW REPUBLIC, July 1, 1991, at 23, 24.

Although Idaho uses lethal injection as its sole method, state law allows for use of the firing squad should lethal injection become "impractical." IDAHO CODE § 19-2716 (1994). Similarly, Oklahoma uses only lethal injection, but specifies electrocution as a second choice if lethal injection is ever declared unconstitutional; the firing squad is listed as the third choice. OKLA. STAT. ANN. tit. 22, § 1014 (West 1995).

Gary Gilmore, the first person executed after the 1976 reinstatement of the death penalty, died by firing squad in Utah in 1977. Steven A. Blum, *Public Executions: Understanding the "Cruel and Unusual Punishments" Clause*, 19 HASTINGS CONST. L.Q. 413, 413-14 (1992). Interestingly, Gilmore may have committed murder primarily because of a self-destructive impulse, and may have chosen to commit his crimes in Utah because of the availability of blood atonement through the firing squad. White, *supra* note 19, at 873-74; *cf. infra* note 196.

In any case, no one in this country has faced the firing squad since. See DEATH PENALTY INFORMATION CENTER, FACTS ABOUT THE DEATH PENALTY 1 (Jan. 26, 1995).

94. See TROMBLEY, *supra* note 19, at 11 ("Looking at the information he'd gathered on execution by shooting, Fred [Leuchter, formerly America's foremost designer and builder of execution equipment] concluded that it was a painful way to die. . . . '[I]f I shoot you, I know you hurt.'"); *but see* Denno, *supra* note 19, at 688-89 (suggesting that shooting, competently conducted, may actually be less cruel than either hanging or electrocution).

95. Elisio Mares, an inmate popular with the staff at Utah's death row prison, was executed on September 10, 1951. TROMBLEY, *supra* note 19, at 11. Since none of the five riflemen wanted to be the one to fire the fatal shot, each aimed at the right side of his chest rather than at the heart. *Id.* Consequently, "[t]he firing squad and witnesses watched in horror as Mares bled slowly to death." *Id.* Interestingly, at least one commentator attributes the Mares incident to deliberate cruelty and desire for vengeance on the part of the riflemen. See Denno, *supra* note 19, at 689.

96. See TROMBLEY, *supra* note 19 at 44-51, 59-60 (describing Florida's botched 1990 execution of Jesse Tafero, which took 13 minutes and involved flames shooting out of Tafero's head); Denno, *supra* note 19, at 554-56 (same); *id.* at 598-602 (describing the gruesome execution of William Kemmler, the first inmate to die in the electric chair). For descriptions of eleven botched electrocutions between 1979 and 1992, see *id.* at 664-74.

97. See TROMBLEY, *supra* note 19, at 34 (quoting FRED A. LEUCHTER, FRED A. LEUCHTER ASSOCIATES MODULAR ELECTROCUTION SYSTEM SPECIFICATION MANUAL) ("Generally [when Leuchter's state-of-the-art equipment is used] unconsciousness occurs in 4.16 milliseconds, which is 1/240 part of a second. This is twenty-four (24) times as fast as the subject's conscious nervous system can record pain."). *But see* Denno, *supra* note 19, at 637-43 (listing evidence suggesting that electrocution is never instantaneous and is always painful); Nugent, *supra* note 27, at 198 ("[L]arge electrical shocks have never been shown to induce anaesthesia, before unconsciousness." (quoting Affidavit of Dr. Harold Hillman at 5, Poyner v. Murray, 113 S. Ct. 2397 (1993))).

Courts also treat the more recent Fifth Circuit case of *Gray v. Lucas*⁷⁸ as upholding the constitutionality of the gas chamber.⁷⁹ The actual holding in *Gray* was quite equivocal,⁸⁰ however, and even then was based on the historical understanding of the Eighth Amendment explicitly abandoned in *Weems*, as Justice Marshall pointed out in his dissent from the denial of certiorari.⁸¹

III. Consequences of the Lack of Standards

Without any clear standards to govern their actions, state officials have little guidance as to how to carry out executions. Courts, moreover, have no way of deciding whether a particular execution was carried out in a "cruel and unusual" manner, much less what the odds are that future executions will be "cruel and unusual." In the face of omnipresent budgetary concerns, officials have little incentive to review and update execution procedures as psychological and physiological

"dignity of man"), see Jordan J. Paust, *Human Dignity as a Constitutional Right: A Jurisprudentially Based Inquiry Into Criteria and Content*, 27 *How. L.J.* 145, 150-84 (1984).

78. 710 F.2d 1048 (5th Cir. 1983), *cert. denied*, 463 U.S. 1237 (1983).

79. In disposing of the question of the constitutionality of the gas chamber without any apparent reasoning of its own, *Billiot v. State*, 454 So. 2d 445 (Miss. 1984) cites a string of cases, among which only *Gray* actually mentions the issue. Similarly, *State v. Williams*, 800 P.2d 1240, 1250 (Ariz. 1987) and *Calhoun v. State*, 468 A.2d 45, 70 (Md. 1983) uphold the constitutionality of the gas chamber by simply quoting *Gray* without further analysis.

80. The holding, in its entirety, reads as follows:

Although contemporary notions of civilized conduct may indeed cause some reassessment of what degree or length is acceptable, we are not persuaded that under the present jurisprudential standards the showing made by *Gray* justifies *this intermediate appellate court* holding that, as a matter of law or fact, the pain and terror resulting from death by cyanide gas is so different in degree or nature from that resulting from other traditional modes of execution as to implicate the eighth amendment [sic] right.

Gray, 710 F.2d at 1061 (emphasis added).

Chief Justice Burger, in an opinion concurring in the denial of certiorari, cleverly edits the holding to make it sound less provisional:

I agree with the Court of Appeals that the showing made by petitioner does not justify a court holding "that, as a matter of law or fact, the pain and terror resulting from death by cyanide is so different in degree or nature from that resulting from other traditional modes of execution as to implicate the eighth amendment [sic] right."

Gray v. Lucas, 463 U.S. 1237, 1239-40 (1983) (emphasis added). No other Justices joined this opinion.

81.

First, "[p]unishments are cruel when they involve torture or a lingering death." [*Kemmler*]. Second, punishments are cruel when they "involve the unnecessary and wanton infliction of pain." [*Gregg*]. . . . The Court of Appeals [in the opinion below] failed to apply either of the foregoing principles to the case before it. . . . Had the court made an effort to apply the proper legal standards, it seems highly likely that it would have found the lethal-gas method to be unconstitutional.

Id., 463 U.S. at 1244-45 (Marshall, J., dissenting from denial of certiorari).

“Washington protocol”;¹⁰⁵ a series of instructions dictating the rope’s treatment, length, thickness, and placement of the knot.¹⁰⁶ Thus, although hangings had been going on for centuries, some apparently satisfying the requirements of the Washington protocol,¹⁰⁷ the district court would consider evidence relating to only one previous hanging, that of Westley Allan Dodd on January 5, 1993,¹⁰⁸ According to the state’s witnesses, the only ones permitted to witness the execution and view the autopsy results,¹⁰⁹ Dodd lost consciousness in seconds and was dead within two minutes with a minimum of pain.

Even more strangely, the district court similarly refused to admit evidence on the relative amount of pain inflicted by alternative methods of execution, such as lethal injection, on relevance grounds.¹¹⁰ On the basis of this truncated evidentiary record, the district court concluded as a factual matter that there was little risk of unnecessary pain, asphyxiation, or decapitation under Washington’s procedure.¹¹¹

The *Campbell* court’s Eighth Amendment analysis begins by asking whether hanging is either (1) “considered cruel and unusual at the time that the Bill of Rights was adopted,”¹¹² or (2) is now “contrary to ‘the evolving standards of decency that mark the progress of a maturing society,’”¹¹³ intimating that either one would render it invalid. The court disposes of the first question quickly, saying that “[t]here is no dispute that execution by hanging was acceptable when the Bill of Rights was adopted.”¹¹⁴

The court acknowledges that under recent Supreme Court precedent, the actions of the various state legislatures are a strong factor in determining the nation’s evolving standards of decency in most Eighth Amendment cases.¹¹⁵ However, the court discounts the importance of the states’ nearly unanimous abandonment of hanging,¹¹⁶ claiming

105. *Id.* at 685-87.

106. These instructions, also known as Field Instruction WSP 410.500, were taken verbatim from U.S. ARMY REGULATION NO. 633-15, PROCEDURE FOR MILITARY EXECUTIONS (1959). *Campbell*, 18 F.3d at 683. Interestingly, no hanging was ever carried out by the military during the time these regulations were in force, so the validity of its recommendations was never tested. *Id.* at 712 (Reinhardt, J., dissenting).

107. *See id.* at 722 (Reinhardt, J., dissenting) (discussing similarities between current procedures and those used in the botched execution of Black Jack Ketchum in 1901).

108. *Id.* at 685.

109. *Id.* at 723-24 (Reinhardt, J., dissenting).

110. *Id.* at 686-87.

111. *Id.* at 687.

112. *Id.* at 681 (quoting *Stanford v. Kentucky*, 492 U.S. 361, 368 (1989) (quoting, in turn, *Ford v. Wainwright*, 477 U.S. 399, 405 (1986))).

113. *Campbell*, 18 F.3d at 682 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

114. *Campbell*, 18 F.3d at 682.

115. *Id.* (citing *Stanford v. Kentucky* and *McClesky v. Kemp*).

116. Of the 48 states which have used hanging at one time or another, 39 have changed to another method of execution and seven have abandoned the death penalty altogether.

that such considerations are not as compelling when the courts review "methodology" (i.e. the method of execution).¹¹⁷ Rather, when assessing the constitutionality of a method of execution, courts should look "more heavily" at whether a method is "free . . . of 'the unnecessary and wanton infliction of pain.'"¹¹⁸

The court's distinction between proportionality review and "methodology" review, including the assertion that pain is the most important factor in the latter, has no basis in prior law.¹¹⁹ Even so, the court, armed with its new Eighth Amendment test and with the district court's findings of fact, had little trouble concluding that hanging comports with the Eighth Amendment.¹²⁰

Interestingly, the court offhandedly mentions the risk of decapitation as a factor in its decision¹²¹ without explaining why it bothers to

Campbell, 18 F.3d at 697, 726-29 (Reinhardt, J., dissenting). Washington is the only state currently carrying out hangings, having performed two in the past two years. *See id.* at 685 (Westley Allan Dodd hanged on January 5, 1993); *Around the Nation: Struggle at Execution*, WASH. POST, May 28, 1994, at A9 (Charles Rodman Campbell hanged on May 27, 1994). Those have been the only two American hangings since the 1976 reinstatement of the death penalty. *See* DEATH PENALTY INFORMATION CENTER, FACTS ABOUT THE DEATH PENALTY 1 (Jan. 26, 1995).

Montana, which officially retains hanging, carried out its last execution in 1943, *Campbell*, 18 F.3d at 727 (Reinhardt, J., dissenting), and (like Washington) offers condemned inmates the alternative of lethal injection. MONT. CODE ANN. § 46-19-103(3) (1993). New Hampshire designates lethal injection as its method of execution, but retains hanging as an alternate possibility if lethal injection should become "impractical." N.H. REV. STAT. ANN. § 630:5 (XII)-(XIV) (1993). Similarly, Delaware specifies hanging as the default method if lethal injection is ever declared unconstitutional. DEL. CODE ANN. tit. 11, § 4209(f) (1994).

117. *Campbell*, 18 F.3d at 682.

118. *Id.* at 683.

119. "No other court has ever recognized 'methodology review' as a separate category of Eighth Amendment analysis. Indeed, until today this term has *never* appeared in a judicial opinion discussing that Amendment—it did not even appear in the Justice Brennan dissent the majority quotes." *Id.* at 705 n.23 (Reinhardt, J., dissenting).

120. *Id.*

121. *Id.* The *Campbell* court's concession that decapitation violates the Eighth Amendment has already resulted in a bizarre and fascinating lower court decision. In *Rupe v. Wood*, 863 F. Supp. 1307 (W.D. Wash 1994), Michael Rupe, a death row inmate standing 6 feet and one-quarter inches, and weighing 409 and one-quarter pounds, challenged the Washington hanging protocol as applied in his case. He claimed that he was at great risk of decapitation owing to his weight, which was nearly 200 pounds above the maximum weight accounted for in the Washington hanging tables.

After reviewing the extensive evidence regarding the amount of force a hanging rope exerts on the human neck, the spine and neck muscles' ability to absorb shock, and a host of similar concerns, the *Rupe* court finds that under the Washington hanging procedure, Rupe's neck would be subject to a force 24% to 40% higher than that applied to Charles Rodman Campbell's neck. *Rupe*, 863 F. Supp. at 1313. The court adds that the result is an increase in the risk of decapitation, although any further shortening of the rope would increase the risk of slow strangulation. *Id.* After mentioning that there might be some optimal rope length which would minimize both risks, the court concludes that the state

do so. This seems anomalous since according to the court's reasoning only the amount of pain inflicted matters.¹²² Decapitation inflicts no additional pain, and indeed may prevent pain by making unconsciousness instantaneous.¹²³ Indeed, taking the *Campbell* court's logic seriously, one might find deliberate decapitation, such as by the guillotine, *preferable* to hanging.

In upholding the exclusion of evidence on alternative methods of execution, the *Campbell* court finds the relative cruelty of lethal injection irrelevant to the question of whether Washington's hanging method inflicts unnecessary pain.¹²⁴ The majority's test would allow any particular method as long as it is carried out as painlessly as possible, without regard to other methods; an extremely narrow inquiry.¹²⁵

In *Fierro*, Judge Patel's factual findings and evidentiary rulings regarding death by cyanide gas are far more damning than were the *Campbell* district court's findings regarding hanging. Because execution procedures at San Quentin have changed little since the gas chamber's introduction in 1937,¹²⁶ evidence from all executions held there were found relevant and admitted at trial.¹²⁷

has not adequately investigated the mechanics of hanging so as to arrive at an acceptable rope length, concluding that "[i]t is not for the Court to devise an appropriate protocol for hanging Mr. Rupe; that task belonged to the State." *Id.*

The court goes on to distinguish *Campbell*, noting that there had been little risk of decapitating Campbell, while the Risk to Rupe is significantly higher. "Thus, the risk of decapitation cannot be dismissed as a 'possible error' or 'accident.'" *Id.* at 1314.

Interestingly, the district judge in *Rupe* explicitly states what the *Campbell* court only hinted at: that decapitation violates the Eighth Amendment irrespective of how much pain it causes, and that other painless mutilations, even postmortem, might be "cruel and unusual." *Rupe*, 863 F. Supp. at 1314-15.

122. *See id.* at 703 (Reinhardt, J., dissenting).

123. *See id.* at 705 ("[T]he guillotine is a comparatively painless method of execution."); *but cf.* BISHOP, *supra* note 88, at 40-45 (describing French experiment in 1905 showing that guillotined heads remain conscious for a "substantial" period of time).

124. *Campbell*, 18 F.3d at 687.

125. This makes little sense, since it is unclear what the "unnecessary cruelty" could mean without anything to compare the cruelty to. *See Id.*, at 694 (Reinhardt, J., dissenting) ("It is logically impossible to consider whether the risks inherent in hanging are necessary without considering whether alternative methods of execution . . . obviate those risks"); *see also id.* at 716 & n.43.

One commentator does defend the *Campbell* court's reasoning on this point, although the argument can only be characterized as inept and wholly unconvincing. *See* Gary E. Hood, Note, *Campbell v. Wood: The Death Penalty in Washington State: "Hanging" Onto a Method of Execution*, 30 GONZ. L. REV. 163, 179 (1994/95).

126. "The execution procedures were developed in the early 1980s by Warden Vasquez and his staff. In developing the procedures, Vasquez drew on the procedures that had been used for lethal gas executions at San Quentin from 1937 to 1967." *Fierro v. Gomez*, 865 F. Supp. 1387, 1391 (N.D. Cal. 1994).

127. *See id.* at 1400-01 & n.11.

Further, while the *Campbell* court attributed whatever pain that might result from hanging to unforeseeable mishaps, the course of death in the gas chamber is uniform and predictable,¹²⁸ making available more and better scientific literature and opinion.¹²⁹ As Judge Patel's extensive factual findings in *Fierro* show, generally accepted medical teachings¹³⁰ regarding cyanide conclude that death by cyanide is quite painful, lasting several minutes and involving suffocation at the cellular level, intense buildup of lactic acid in the muscles (including the heart), and tetany, spasms of the muscles so intense that the surrounding bones sometimes break.¹³¹

The factual findings by both the *Campbell* and *Fierro* courts are similar in one regard: both district courts found unmistakable legislative trends against the use of the method in question.¹³²

In deciding the case, Judge Patel wrote a first opinion interpreting and applying *Campbell*, a daunting task. The Judge is quite open about the fact that she has trouble understanding *Campbell*.¹³³ *Fierro* lists *Campbell's* many ambiguities and contradictions, and makes a valiant attempt to reconcile the decision with prior Eighth Amendment precedent.¹³⁴ Nonetheless, the *Fierro* test for "cruel and unusualness" bears little resemblance to *Campbell*.¹³⁵

The *Fierro* test says, simply enough, that when examining a method of execution under *Campbell*, a court must determine whether the method meets "evolving standards of decency," using primarily "objective evidence of pain" to determine whether the method is constitutional.¹³⁶ If, however, the evidence of pain is unclear or contradictory, the court then considers legislative trends as evidence

128. See *supra* note 87.

129. See *Fierro*, 865 F. Supp. at 1413 n.32 (noting how much more "extraordinarily detailed and comprehensive" the record in *Fierro* is compared to the record in *Campbell*).

130. See *id.* at 1398 ("Plaintiff's theory of death through cellular suffocation has traditionally been the accepted viewpoint."); *id.* at 1404 ("Dr. Baskin [the primary defense expert] even conceded that medical schools currently teach [the cytochrome oxidase primacy theory, upon which plaintiffs rely].").

131. See *id.* at 1396-97, 1404.

132. See *id.* at 1414-15; *supra* note 117.

133. See *Fierro*, 865 F. Supp. at 1409 ("It is difficult at times to decipher the *Campbell* opinion. This court nonetheless must attempt to do so . . .").

Judge Patel is not alone. The first commentator to address *Campbell* attempts to defend it with logic even more obscure than that of the *Campbell* opinion itself. See Hood, *supra* note 125, at 175-81.

134. [T]his court does not read *Campbell* as a sub silentio overruling of well-established precedent in this area, see, e.g., [*Trop v. Dulles*], or as an "[e]visceration of the Eighth Amendment," as did the dissenters in *Campbell*.

Id. at 1412.

135. In fact, *Fierro* resembles the basic framework of the *Campbell* dissent as much as it does the majority opinion. See *infra* notes 159-72 and accompanying text.

136. *Fierro*, 865 F. Supp. at 1412.

of “evolving standards of decency.”¹³⁷

Fierro’s factual findings paint a grim portrait of death in the gas chamber. *Fierro* adds, however, that such suffering is not plainly unconstitutional under the *Campbell* standard.¹³⁸ Moving to the second part of the analysis, *Fierro* finds the widespread abandonment of the gas chamber dispositive.¹³⁹ The *Campbell* court presumably reached a different result because it never had to address the second question.

Although the test is quite straightforward and seems to be a reasonable clarification of *Campbell*, Judge Patel supplies no historical or doctrinal underpinnings for the test. Indeed, she is in no position to do so, since the *Campbell* opinion gives no hint of the test’s basis in prior law.

Following *Campbell*, *Fierro* makes no effort to compare the gas chamber to other methods of execution, except to note the national legislative trend toward using lethal injection; a trend based primarily, the opinion concludes, on humanitarian concerns.¹⁴⁰ It would have been surprising if Judge Patel had compared the two methods, since *Campbell* explicitly found comparison between methods irrelevant.

B. Other Decisions

In the few other federal cases purporting to address the issue, the opinions have disposed of the question without adequately explaining the reasoning involved.¹⁴¹ The Fifth Circuit’s opinion in *Gray v. Lu-*

137. *Id.*

138. *Id.* at 1414.

139. *Id.* at 1415.

140. See *id.* at 1407-08; see also JAMES W. MARQUET ET AL., THE ROPE, THE CHAIR AND THE NEEDLE: CAPITAL PUNISHMENT IN TEXAS, 1923-1990 132 (“The [Texas] legislative rationale for changing the means of execution resided in the belief that lethal injections were more humane than the physically traumatic and visually offensive electrocution.”). But see Gardner, *supra* note 91, at 96 n.4, 128 n.241 (Oklahoma’s switch to lethal injection, one of the first such decisions, was based primarily on economic concerns (citing OKLA. J., Mar. 3, 1977, § 1, at 2)); STAFF OF CALIFORNIA SENATE COMM. ON JUDICIARY, *supra* note 84, at 2 (California legislature added lethal injection as an alternative to the gas chamber specifically to undercut legal challenges to the gas chamber).

141. Most state courts have disposed of method-of-execution claims with either obscure reasoning, see, e.g., *DeShields v. State*, 534 A.2d 630, 638-40 (Del. 1987) (declaring hanging constitutional with cursory analysis only after explicitly declining to decide the issue, in effect calling its own evaluation of hanging dicta), or with an absence of any identifiable analysis whatsoever, see, e.g., *Billiot v. State*, 454 So. 2d 445, 464 (Miss. 1984); *State v. Coleman*, 605 P.2d 1000, 1058-59 (Mont. 1979); *Duisen v. State*, 441 S.W.2d 688, 693 (Mo. 1969); see also *Calhoun v. State*, 468 A.2d 45, 70 (Md. 1983) (quoting *Gray v. Lucas* without further analysis). One state supreme court went so far as to pretend that the issue was previously settled when in fact it was not. See *State v. Adkins*, 725 S.W.2d 660, 664 (Tenn. 1987) (court disposes of claim against electrocution by saying that “[t]his Court’s authority over punishment for crime ends with the adjudication of constitutionality” when the court had never decided the issue).

cas seemed to use a historical test, comparing the gas chamber to the traditionally accepted methods of execution, although the one-sentence *Gray* holding seems elastic enough to allow any method at all.¹⁴² In another brief holding, the Eastern District Court of Arkansas, in *Hill v. Lockhart*,¹⁴³ disposed of the claim that lethal injection violates the Eighth Amendment as follows:

Another state court disposed of a challenge to electrocution on the basis that the appellant had offered no evidence of the cruelty of electrocution, *see Fleenor v. State*, 514 N.E.2d 80, 89 (Ind. 1987), and then rejected the next challenge, which did include such evidence, by simply citing the earlier decision, *see Johnson v. State*, 584 N.E.2d 1092, 1107 (Ind. 1992).

One court dealt extensively with the question, although without much analysis. In *State v. Frampton*, 627 P.2d 922 (Wash. 1981), the Washington Supreme Court overturned the death penalty statute then in force on grounds unrelated to the Eighth Amendment. *Id.* at 935-36. Justice Dolliver, who wrote the majority opinion, included a finding that hanging was "cruel and unusual," although only one other justice (of a total of nine) approved the section of the opinion dealing with hanging. *See id.* at 936 (Williams, J.) (hanging unlawful); *id.* at 944 (Rosellini, J., with Dore, J.) (hanging lawful); *id.* at 945 (Stafford, J., with Brachtenbach, C.J., and Hicks and Dimmick, JJ.) (hanging lawful); *id.* at 952 (Utter, J.) (hanging lawful).

Even the *Frampton* comparatively lengthy discussions of hanging spend little time on Eighth Amendment analysis. In voting to ban hanging, Justice Dolliver first cites the widespread abandonment of hanging as evidence that it is no longer compatible with "contemporary standards of decency." *Id.* at 934. Dolliver then reviews the testimony of medical experts and lists the various botched hangings in Washington history, *id.* at 934-36, concluding that hanging is unconstitutional without saying how he is using those facts, *id.* at 936. Justice Williams, agreeing with Dolliver, simply adds that it is well within the ability and duty of the courts to assess the meaning and scope of the prohibition against cruel and unusual punishment. *Id.* at 936-38 (Williams, J., concurring specially). Williams sheds no further light on how the task is to be accomplished in the method-of-execution context.

The reasoning of the various dissenters is even skimpier. Justice Rosellini simply says that without a "definitive showing" that the method inflicts unnecessary cruelty (absent here) it is up to the legislature to make such judgements. *Id.* at 944 (Rosellini, J., dissenting in part). Justice Stafford adds that such an "emotional" issue can only be decided by "objective criteria," rather than the "subjective standards" employed by the "majority." *Id.* at 945 (Stafford, J., concurring in part and dissenting in part). Ignoring the trends in other jurisdictions, Stafford regards the Washington Legislature's actions in approving hanging as dispositive of what contemporary standards of decency are. *See id.* Finally, Justice Utter, agreeing with Stafford, says only that the legislature is "better equipped" to choose between methods of execution than are the courts. *Id.* at 952 (Utter, J., concurring in part and dissenting in part).

Interestingly, even though the *Frampton* court actually upheld hanging 7-2, all of the seven separate opinions in *Frampton* refer to Justice Dolliver's minority view as the "majority." As a result, courts in other jurisdictions cite *Frampton* as both outlawing hanging, *see, e.g., Fierro v. Gomez*, 790 F. Supp. 966, 971 (opinion granting TRO) (N.D. Cal.), *rev'd sum nom. Gomez v. United States Dist. Ct.*, 966 F.2d 460 (9th Cir.), *withdrawn as moot*, 966 F.2d 463 (9th Cir.), *vacated*, 112 S. Ct. 1652 (1992); *Calhoun v. State*, 468 A.2d 45, 70 (Md. 1983); *Coleman v. State*, 633 P.2d 624, 661 (Mont. 1981) (Shea, J., dissenting) and upholding hanging, *see, e.g., DeShields*, 534 A.2d at 640 n.9, even though the Washington Supreme Court clarified the holding in *State v. Rupe*, 683 P.2d 571, 593 (Wash. 1984).

142. *See supra* note 80.

143. 791 F. Supp. 1388 (E.D. Ark. 1992).

There is general agreement that lethal injection is at present the most humane type of execution available and is far preferable to the sometimes barbaric means employed in the past. Many states have now abandoned other forms of execution in favor of lethal injection.¹⁴⁴

Similarly, the district judge in *Hunt v. Smith*¹⁴⁵ upheld the legality of the gas chamber with no persuasive constitutional reasoning.¹⁴⁶

VI. Methods of Execution and the Eighth Amendment—A Three-Part Inquiry

Undoubtedly, one reason for the confusion is that courts treat the constitutionality of any particular method of execution as a unitary legal question. In fact, the issue is best understood as a three-part inquiry.

First, one must choose the methods to be compared with each other. Second, the methods must be ranked, from the cruelest to the most humane. Third, one must decide what level of cruelty is permissible; in other words, where to draw the line on that spectrum between acceptable ways of killing and “cruel and unusual punishments.” The second issue is perhaps the most difficult; accordingly, it will be addressed first.

A. “Human Dignity” and the Eighth Amendment

Although the various lower court opinions mentioned above focus almost exclusively on the level of pain a method of execution inflicts as a determiner for the method’s relative “cruelty,” such an analysis sells the Eighth Amendment short. Punishments can be “cruel and unusual” without being painful; pain is merely one type of cruelty.

Cruelty is more comprehensively understood as any act that diminishes human dignity; in fact, the Supreme Court has always recognized the centrality of human dignity to the Eighth Amendment.

144. *Id.* at 1394.

145. 856 F. Supp. 251 (D. Md. 1994).

146. Aside from the observation that no prior cases had outlawed the gas chamber, the *Hunt* court’s legal analysis, in its entirety, reads as follows:

Just because there are other, newer modes of execution thought by some to be more humane (such as lethal injection, eschewed by petitioner in this case) does not mean that the gas chamber has become unconstitutional. Indeed, in *Campbell, supra*, the Ninth Circuit held that hanging was not cruel and unusual punishment in 1994. Certainly, the district courts are not obliged to hold plenary proceedings to test the constitutionality of a means of execution in every case simply because it is claimed to be outmoded or can be botched.

Hunt, 856 F. Supp. at 260.

1. *What Is Dignity?*

a. Dignity in Case Law

The word "dignity" first became part of the Supreme Court's Eighth Amendment jurisprudence when the *Trop* plurality declared:

The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the state has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards.¹⁴⁷

Fifteen years later, Justice Brennan attempted to flesh out the meaning of dignity in his concurring opinion in *Furman v. Georgia*.¹⁴⁸ For Brennan, the Eighth Amendment's prohibition on punishments violative of human dignity covers punishments that are unduly painful and degrading,¹⁴⁹ punishments disproportionate to the offense,¹⁵⁰ and punishments for conditions such as drug addiction or mental illness.¹⁵¹ Justice Brennan emphasized these three areas as situations that "treat members of the human race as nonhumans, as objects to be toyed with and discarded."¹⁵² He later adds: "The State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings. A punishment is 'cruel and unusual,' therefore, if it does not comport with human dignity."¹⁵³ Brennan concludes that the death penalty's violation of human dignity, coupled with other factors, makes it violative of the Eighth Amendment in all cases.¹⁵⁴

Twelve years later, when the Supreme Court denied certiorari in *Glass v. Louisiana*,¹⁵⁵ a case challenging electrocution, Brennan dissented. In so doing, he made the first written attempt by a Supreme Court Justice to articulate the factors affecting human dignity in the execution context. Although his opinion focused primarily on the physical pain inflicted on electrocuted prisoners, he also elaborated on the importance of human dignity.

The Eighth Amendment's protection of "the dignity of man," extends beyond prohibiting the unnecessary infliction of pain

147. *Trop*, 356 U.S. at 100.

148. 408 U.S. 238, 257-306 (1972). *Furman* was a *per curiam* 5-4 decision, with each of the nine justices writing a separate concurring or dissenting opinion. It stands as the longest decision the Supreme Court has ever produced. William J. Brennan, Jr., *Constitutional Adjudication and the Death Penalty: A View from the Court*, 100 HARV. L. REV. 313, 323 (1986).

149. 408 U.S. at 272.

150. *Id.* at 274.

151. *Id.* at 273.

152. *Id.* at 272-73.

153. *Id.* at 270.

154. *Id.* at 305. For a summary of Justice Brennan's view of the Eighth Amendment in tabular form, see LARRY CHARLES BERKSON, THE CONCEPT OF CRUEL AND UNUSUAL PUNISHMENT 16 (table 2.1) (1975).

155. 471 U.S. 1080 (1985).

when extinguishing life. Civilized standards, for example, require a minimization of physical violence during execution irrespective of the pain that such violence might inflict on the condemned. Similarly, basic notions of human dignity command that the State minimize "mutilation" and "distortion" of the condemned prisoner's body. These principles explain the Eighth Amendment's prohibition of such barbaric practices as drawing and quartering.

In evaluating the constitutionality of a challenged method of capital punishment, courts must determine whether the factors discussed above—unnecessary pain, violence, and mutilation—are "inherent in the method of punishment."¹⁵⁶

Brennan goes on to speculate that other forms of execution might be more dignified than electrocution,¹⁵⁷ although he never specifies just how significantly a method of execution, in his view, may permissibly infringe on the dignity of the prisoner without violating the Eighth Amendment.¹⁵⁸

Brennan's opinion reiterates his belief that the death penalty violates human dignity in all circumstances, so although he speculates that other forms of execution might be more dignified than electrocution, nowhere does he feel the need to decide just how much a method of execution, in his view, may permissibly infringe on the dignity of the prisoner without violating the Eighth Amendment.

In the principal dissent in *Campbell*,¹⁵⁹ Judge Reinhardt sets out an alternative to the majority's test of constitutionality.¹⁶⁰ His opinion represents the first attempt to refine Justice Brennan's dignity analysis into a concrete test.

Like most of the Eighth Amendment decisions, Reinhardt begins with the familiar "evolving standards of decency" language¹⁶¹ before going on to assert that a method of execution violates those standards if it either (1) inflicts unnecessary pain or (2) if "the punishment has been rejected by society as savage and barbaric."¹⁶² Although Reinhardt concludes that hanging risks inflicting an unnecessarily slow and painful death and thus violates the Eighth Amendment,¹⁶³ he goes on to list the different ways a judge can find that a punishment has been

156. *Id.* at 1085 (citations omitted).

157. *Id.* at 1094.

158. Brennan may not feel the need to make the analysis any more concrete, since he believes that the death penalty violates the Eighth Amendment in all cases. *See id.* at 1080, 1093-94.

159. 18 F.3d at 692-729 (Reinhardt, J., joined by Browning, Tang, and D.W. Nelson, JJ., dissenting). Judge Poole dissented separately in a one-sentence opinion. *See id.* at 729.

160. *See supra* notes 112-23 and accompanying text.

161. *Campbell*, 18 F.3d at 695 (quoting *Trop v. Dulles*).

162. *Id.* at 696.

163. *See id.* at 711-17, 722-24.

rejected by society.¹⁶⁴

The best evidence of rejection, he says, is if the actions of the state legislatures uniformly indicate rejection. This mode of analysis for Eighth Amendment issues is set out by the Supreme Court explicitly in *Penry v. Lynaugh*,¹⁶⁵ and according to Reinhardt it is dispositive of the question of constitutionality in the execution context.¹⁶⁶

Even if the actions of the legislature were not so uniform, Reinhardt says, judges can ask "whether the punishment 'comports with the basic concept of human dignity at the core of the Amendment.'"¹⁶⁷ In answering the question, he employs "the tools of philosophy, religion, logic, and history" with which judges are "particularly well-equipped, by virtue of training, education, experience, and the characteristics that brought them to the bench."¹⁶⁸ Judge Reinhardt identifies three specific factors to consider when analyzing a method of execution: "whether the punishment involves mutilation or dismemberment, whether it is historically associated with repression or tyranny, and whether it may be fairly characterized as dehumanizing or degrading."¹⁶⁹

Reinhardt concludes that hanging involves a substantial risk of decapitation,¹⁷⁰ the worst kind of "mutilation or dismemberment"; that it is "associated with lynchings, with frontier justice, and with our ugly, nasty, and best-forgotten history of bodies swinging from the trees or exhibited in public places";¹⁷¹ and that the effects on the prisoner's body are impermissibly dehumanizing and degrading.¹⁷²

To sum up, the *Campbell* dissent finds that a method of execution constitutes cruel and unusual punishment if:

- (1) it inflicts unnecessary pain; or
- (2) it has been rejected by society, as evidenced by
 - (a) its uniform rejection by the various legislatures, or

164. *Id.* at 679-702.

165. 492 U.S. 302 (1989); *see supra* note 82. *See also Penry*, 492 U.S. at 335 (stating the Court will not consider public opinion as expressed in opinion polls until those opinions "find expression in legislation").

166. *Campbell*, 18 F.3d at 697, 700.

167. *Id.* at 697 (quoting *Gregg v. Georgia*, 428 U.S. 153, 182 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)).

168. *Campbell*, 18 F.3d at 697.

169. *Id.*

170. *Id.* at 722.

171. *Id.* at 701.

172.

[Lethal injection is] far less inhumane and degrading . . . than the forced march of a prisoner up the gallows steps where the untrained hangman waits in hope that the drop will be spoiled only by the defecation and voiding that result from the state's crude and violent effort to forcefully terminate a human life at the end of a rope.

Id. at 702-03.

- (b) its flagrant violation of human dignity (as determined by the courts in their wisdom), including, but not limited to, any finding that
- (i) it mutilates the body,
 - (ii) it is associated with repression or tyranny, or
 - (iii) it is dehumanizing or degrading.

While this attempt to come to grips with the amorphous concept of “dignity” is admirable, and is really the first such attempt, Judge Reinhardt’s analysis remains unsatisfying. Statements advocating naked judicial activism¹⁷³ are frowned upon in the conservative, neo-federalist climate of the current federal judiciary, and are unlikely to be adopted by the Supreme Court;¹⁷⁴ the dissent relies a bit too heavily on judicial determinations of what “society’s” viewpoint is. Here more than ever, it is unclear how to distinguish “society’s” view from the judge’s personal opinion.¹⁷⁵

b. Who Cares About Dignity?

The *Campbell* court states that in the execution context, only pain implicates the Eighth Amendment.¹⁷⁶ This makes sense, perhaps, if one considers only what the condemned prisoner is feeling during her waning moments in the death chamber. She is probably not concerned with the future condition of her corpse, nor with the violence being done her, insofar as it does not cause any additional pain. One can surmise that the overwhelming pain she suffers leaves room for few other concerns.¹⁷⁷

However, this limited view of the Eighth Amendment does not square with the Eighth Amendment’s undisputed ban on post-mortem

173. See, e.g., *supra* note 168.

174. See, e.g., *Stanford v. Kentucky*, 492 U.S. 361, 378-79 (1989) (Scalia, J., in a portion of the Court’s opinion joined by three other justices) (the opinions of “the citizenry,” not of judges, determine what evolving standards of decency are).

175. One is reminded of the dilemma Justice Marshall faced, when, after he had asserted in *Furman* that capital punishment would no longer be acceptable to fully informed Americans, see *Furman*, 408 U.S. at 362-63 (Marshall, J., concurring), he was forced to confront the fact that in response to *Furman* invalidating death penalty statutes then in force, the legislatures of 35 states had immediately re-enacted the death penalty. See *Gregg v. Georgia*, 428 U.S. 153, 232 (1976) (Marshall, J., dissenting) (“I would be less than candid if I did not acknowledge that these developments have a significant bearing on a realistic assessment of the moral acceptability of the death penalty to the American people.”).

176. See *supra* note 118 and accompanying text.

177. Although a prisoner may in fact prefer to avoid the indignities of mutilation and of losing control of her bodily functions, this concern probably pales in comparison to both (1) the actual fact of her impending death and (2) the pain she will actually feel.

In fact, among suicides, who choose the manner of their own deaths, mutilation and other indignities in death seem to matter little when compared to the priority of avoiding pain. See, e.g., *infra* note 204 and accompanying text.

punishments.¹⁷⁸ Clearly, the dead person whose body is quartered feels no additional pain, mercifully. Neither does *Campbell* account for the fact that beheading violates the Eighth Amendment, though it may be the quickest and least painful of all methods.¹⁷⁹

Further, punishments barred by the Eighth Amendment are impermissible even if the defendant chooses the illegal punishment over a legal one.¹⁸⁰ Indeed, such a prohibition is necessary, since otherwise any punishment short of death, even the most sadistic tortures, would be constitutionally permissible if offered as an alternative to death.¹⁸¹

Clearly, therefore, the individual prisoner is not the only person the Eighth Amendment is protecting. As one commentator writes:

[E]ven if given the choice of punishments between torture and death, the prisoner could not choose torture. This is true not because the prisoner has any rights at stake, but because other citizens have a greater right not to live under a government that sanctions torture as one of its defining structural features.¹⁸²

In fact, some believe that a prisoner cannot properly waive her Eighth Amendment rights, since society's interest in preventing cruel and unusual punishments is so strong.¹⁸³

178. See *Campbell v. Wood*, 114 S. Ct. 2125, 2127 (1994) (Blackmun, J., dissenting from denial of certiorari) ("painless, post-mortem punishments such as public display, drawing and quartering, and mutilation also violate the Eighth Amendment"); *supra* note 51 and accompanying text (quartering, a post-mortem punishment, barred by *Wilkerson v. Utah*).

179. See *supra* note 123.

180. See *supra* note 28.

181. This assumes, of course, that death is proportionate to the crime in question.

182. Blum, *supra* note 93, at 451 (footnote omitted); see also Margaret Jane Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 126 U. PA. L. REV. 898, 1044 (1978) (public exposure heightens a violation of human dignity by exacerbating the devaluation of the injured person).

183. See *Gilmore v. Utah*, 429 U.S. 1012, 1018 (1976) (White, J., with Brennan and Marshall, JJ., dissenting) ("I believe, however, that the consent of a convicted defendant in a criminal case does not privilege a State to impose a punishment otherwise forbidden by the Eighth Amendment."); Laura A. Rosenwald, Note, *Death Wish: What Washington Courts Should Do When A Capital Defendant Wants To Die*, 68 WASH. L. REV. 735, 747-52 (1993) (defendants' refusal to present mitigating evidence at sentencing phase of capital trials violates Eighth Amendment; courts should require that a neutral party present such evidence if defendant will not).

Some constitutional theorists consider dignity a core concern of the Constitution as a whole, not merely of the Eighth Amendment. See Walter F. Murphy, *An Ordering of Constitutional Values*, 53 S. CAL. L. REV. 703, 745-54 (1980); see also G.P. Fletcher, *Human Dignity as a Constitutional Value*, 22 U. W. ONTARIO L. REV. 171, 178-82 (1984) (human dignity in the Kantian sense underlies the German and U.S. constitutions); Charles Robert Tremper, *Respect for the Human Dignity of Minors: What the Constitution Requires*, 39 SYRACUSE L. REV. 1293, 1305-08 (1988) (identifying dignity concerns in decisions involving the First, Fourth, Fifth, Sixth, and Eighth Amendments); *id.* at 1303 (identifying the important aspects of dignity protected by the Constitution as "the primacy of control over personal destiny, the inherent value of each person, and the equal worth of all individuals"). There is disagreement on this point, however, any such discussion is necessarily beyond the

c. The Essence of Dignity

If the Eighth Amendment exists to protect human dignity, and if human dignity is of vital societal interest, it is important to determine exactly what human dignity encompasses. Such an inquiry must begin with a list of what we know impinges on human dignity.

Post-mortem cruelties, including dissection and/or display of the dead body, violate human dignity.¹⁸⁴ So do infliction of unnecessary pain, physical violence, and mutilation in the execution process.¹⁸⁵

What, then, do all of these have in common? Each “treat[s] members of the human race as nonhumans, as objects to be toyed with and discarded.”¹⁸⁶ In other words, human dignity is violated when a punishment blurs the line between human beings and objects; when that punishment masks the things that make people different from animals and objects, such as reason, emotion, and the like, and graphically reveals the raw physicality of the human body.

Dignity, therefore, is simply the expression of the idea that human beings are unique in the universe, different from inanimate objects and even from other animals.¹⁸⁷ Humans have rights and responsibilities under law, while all other creatures and things are merely potential or actual property for humans to either use or ignore.

scope of this Note, but for a summary of the various points of view on whether dignity concerns are inherent in the Constitution as a whole, see Tremper, *supra*, at 1296-303.

184. See *supra* note 178. For one now-famous doctor’s argument in favor of conducting experiments—including vivisection—on condemned prisoners as part of the execution process, see generally JACK KEVORKIAN, *MEDICAL RESEARCH AND THE DEATH PENALTY: A DIALOGUE* (1960).

185. See *supra* notes 155-56 and accompanying text. Note that Brennan’s *Glass* opinion, while hardly binding precedent in the technical sense, was relied upon by both the majority (in a critical passage) and by the dissent in *Campbell*. See *Campbell*, 18 F.3d at 682; *id.* at 705-06 & n.25, 710 n.34, 711 n.35, 715 n.40 (Reinhardt, J., dissenting).

186. *Furman*, 408 U.S. at 272-73 (opinion of Brennan, J.); see also *id.* at 273 (opinion of Brennan, J.) (The *Trop* plurality found expatriation unconstitutional because it “necessarily involves a denial by society of the individual’s existence as a member of the human community.”).

187. See Gardner, *supra* note 91, at 107 n.93 (“Human dignity consists in our recognizing that each human being . . . has intrinsic value and is a valuer in his own right.” (quoting Stern, *On Value and Human Dignity*, 10 LISTENING 74, 83 (1975))); Willard Gaylin, *In Defense of the Dignity of Being Human*, HASTINGS CENTER REP., Aug. 1984, at 18 (“The word ‘dignity’ traditionally alluded to the inherent nobility and worth that had been generally ascribed to our species.”); Paust, *supra* note 77, at 147 (“[F]or those who need an initial approach to definition [of human dignity], however incomplete, the effects which flow from an actual implementation of respect for each person, and thus the equal dignity, value, and worth of each person, come closest to an initial meaning.”); Herbert Spiegelberg, *Human Dignity: A Challenge to Contemporary Philosophy*, 9 PHIL. F. 39, 42-43 (1971) (noting that dignity comprises, at least in part, the ancient view that humans have a superior status among species in the world); cf. Spiegelberg, *supra*, at 52-53 (Sartre’s existentialist philosophy affirms human dignity, according to Sartre, by “opposing free consciousness to the brute fact of Being.”).

The distinction between humans (whom a person must treat as she would want herself to be treated) and other objects in the universe (which she may use however she likes) is a fundamental principle of law as we know it.¹⁸⁸

d. Dignity In Practice

While the *Campbell* dissent's analysis of how executions may violate human dignity seems unwieldy, one can use many of the same factors in a much simpler and more manageable framework. Besides deliberate torture, which is obviously unconstitutional,¹⁸⁹ a method of

188. As Kant put it: "For rational beings all stand under the *law* that each of them should treat himself and all others, *never merely as a means*, but always *at the same time as an end in himself*." IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSIC OF MORALS* 101 (H.J. Paton trans., Harper Torchbooks 1964) (1785) (emphasis in the original). For a concise summary of Kant's argument, which identifies the distinction between rational and non-rational beings as the foundation of morality and law, see Fletcher, *supra* note 183, at 174-75; see also Gaylin, *supra* note 187, at 19 (determinism threatens the critical notion of personal responsibility upon which the law relies); Kenneth Henley, *The Value of Individuals*, 37 *PHIL. & PHENOMENOLOGICAL RES.* 345 (1977) (assertion, without further reason, of the value of individuals is a necessary predicate for valuing anything at all); John T. Noonan, Jr., *Horses of the Night: Harris v. Vasquez*, 45 *STAN. L. REV.* 1011, 1025 (1993) ("The criminal law depends on a belief in free will. If a human will is impaired, the human being cannot be fully responsible.").

This distinction has more than merely theoretical importance. For society to function properly, each person must recognize the unique respect she owes other people. The law cannot catch and punish everyone who violates the rights of others; rather, the law, and therefore organized society as a whole, must instill in all people a self-regulating moral instinct founded on mutual respect—in other words, mutual recognition of the dignity of all.

189. Any intent on the part of the state to deliberately or recklessly inflict more pain than necessary would be *per se* cruel and unusual. This bare minimum is accepted by virtually all of the cases. See, e.g., *Furman v. Georgia*, 408 U.S. 238, 430 (1972) (Rehnquist, J. dissenting) ("[N]o court would approve any method of implementation of the death sentence found to involve unnecessary cruelty in light of presently available alternatives."); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 464 (1947) (allowing second attempt at electrocuting condemned prisoner after botch because there was "no purpose to inflict unnecessary pain"); *Wilkerson v. Utah*, 99 U.S. 130, 136 (1878) ("punishments of torture" banned by the Eighth Amendment); Gardner, *supra* note 91, at 116 ("It is an inappropriate application of the criminal sanction to impose a crueler sanction simply to inflict more suffering upon the offender. Retributive justifications for punishments that are no more than emotional appeals to vengeance against the offender are condemned almost universally."). Infliction of excess pain need not be deliberate, however, to violate the Eighth Amendment. *Whitley v. Albers*, 475 U.S. 312, 319 (1986). Under certain circumstances, an intent to cause pain could be inferred from a state's actions. For instance, if the state's experience with a painful method of execution is extensive enough, and less painful alternatives are widely known and easily useable, a court could infer the intent to cause pain from the continued use of the old method without any other compelling reasons for doing so. If the statute mandating a particular method of execution was passed before alternatives were widely available, as is generally the case, intent would be more difficult to infer. If the legislature, however, had recently amended or reconsidered the law, or engaged in

execution can violate human dignity in three ways.

The first is through mutilation. Mutilation involves the dis-integration of the body. It can be as subtle as scarring or discoloration of the skin, or as gross as dismemberment or decapitation.

The second way to violate human dignity is through excessive violence.¹⁹⁰ Violence is the brute physical force applied by a state upon the body of the prisoner. If human dignity is destroyed and human morality undermined to the extent that a state treats the prisoner as an object rather than a person, then no aspect of the death penalty is more pernicious than when people see a state's execution apparatus restraining, jerking, burning, breaking, or puncturing the human body. Mutilation may leave a person looking more like a piece of meat than a human being, but mutilation is only the visible result of an act of violence. It is during the violent act itself that the State actually treats the person as if she were a piece of meat.

Third, dignity is violated to the degree that the prisoner, as a person, loses control over her own body. We consider our bodies to be our most private sanctuary, where our personal autonomy is inviolable.¹⁹¹ Few things are more disturbing to a person than when, whether as a result of an accident, a medical procedure, a dream, or any other reason, she loses control of her muscles or bodily functions.¹⁹² When a state's execution apparatus takes away control of the body's functions in the throes of death, the prisoner's pathetic flailings and excretions, even if unconscious and painless, underscore the pure physicality of the body and rob the prisoner of dignity in the most visceral sense. This kind of degradation includes involuntary urination, defecation, and spasms of all kinds.¹⁹³

its own fact-finding, then it would be easier to find the existence of intent to cause pain from the continued use of the old method.

190. See *supra* note 156 and accompanying text.

191. See *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 305 (1990) (Brennan, J., with Marshall and Blackmun, JJ., dissenting) ("The inviolability of the person' has been held as 'sacred' and 'carefully guarded' as any common-law right."); *Schmerber v. California*, 384 U.S. 757, 772 (1966) ("The integrity of an individual's person is a cherished value of our society.").

192. See *Cruzan*, 497 U.S. at 311 (Brennan, J., with Marshall and Blackmun, JJ., dissenting) (listing factors causing perceived indignity to comatose patients in persistent vegetative states, including "'invasiveness of life sustaining systems . . . upon the integrity of [the] body . . . and the submission of the most private of bodily functions to the attention of others.'" (quoting *In re Gardner*, 534 A.2d 947, 953 (Me. 1987))).

193. See, e.g., *Fierro v. Gomez*, 865 F. Supp. 1387, 1396 (N.D. Cal. 1994) ("[Cyanide-induced t]etany may be manifested by opisthotonos behavior, muscular contractions so severe that the body is 'arched backwards like a bridge,' with contractions of sufficient force to 'compress and fracture the vertebrae.' Other possible manifestations of tetany include 1) carpal pedal spasm, in which the muscles of the hands and feet contract so severely that they bend and twist in an unnatural and painful manner, and 2) 'sardonic smile,' in which the lip muscles are pulled tightly away from the teeth.") (citations omit-

2. *The Importance of Dignity*

a. Early Recognition of Dignity—Deliberate Cruelty

For thousands of years human societies have recognized that dignity in the execution context has aspects unrelated to the infliction of pain. The death penalty as administered throughout history often included not only gratuitous pain, but also grotesque post-mortem mutilations, both varying in severity and gruesomeness with the seriousness of the offense.¹⁹⁴ Clearly these additional indignities

ted); TROMBLEY, *supra* note 19, at 177 (death row inmate noting that as part of Missouri's lethal injection procedure "[t]hey put a catheter in your penis and a plug in your ass so you don't shit all over yourself in front of their witnesses, because that would just ruin the sterile effect of execution.") (emphasis in the original); *id.* at 36 ("The [Tennessee electric chair's] seat is . . . perforated so that when the victim loses control of his bowels and bladder, liquid waste will pass through the chair. . . . This feature . . . presents a more hygienic image to witnesses."); James & Nasmyth-Jones, *supra* note 88, at 90 ("'Dancing' on the end of the rope [during hanging] may, in some cases, be decerebrate twitching or 'fitting' rather than struggling . . ."); see also *supra* note 87; *supra* note 172.

194. See, e.g., BISHOP, *supra* note 88, at 71-72 (Roman law prescribed entombment alive for vestal virgins violating vow of chastity); DAVID D. COOPER, *THE LESSON OF THE SCAFFOLD* 3-4 (1974) (burning at the stake was considered a lesser punishment than disembowelling, since the woman burned at the stake was strangled by a chain before the flames reached her); LAURENCE, *supra* note 88, at 2 (ancient Egyptian prisoners deprived of burial after execution, leaving bodies exposed to wild animals); *id.* at 3 (Roman parricides punished by throwing prisoner into a sack with a dog, a cock, a viper, and an ape); *id.* at 17 (Swedish Code of 1734 divided capital crimes into three categories, punished, respectively, by decapitation, decapitation followed by exposure or burning of the body, or amputation of a hand followed by decapitation); Anthony F. Granucci, "Nor Cruel and Unusual Punishments Inflicted:" *The Original Meaning*, 57 CAL. L. REV. 839, 853 (1969) (woman convicted of treason in England in 1685 sentenced to burning alive, the traditional punishment for women, but King "commuted" sentence to beheading); *id.* at 854 (punishment for treason by men was hanging, cutting down just before death, disembowelment, burning of the bowels in front of the prisoner, beheading, and finally quartering). As Blackstone put it: "In very atrocious crimes other circumstances [beyond mere hanging] of terror, pain, or disgrace are super-added: . . . being drawn or dragged to the place of execution . . . and in murder, a public dissection." Granucci, *supra*, at 862 (quoting 4 BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 369 (1769)). This attention to injuries upon the body even beyond any possible perception by the condemned prisoner demonstrates the value of dignity in the eyes of the public at that time (as they endeavored to take it away) no less than does the public's current concern with preserving dignity.

Even today, the nation of Rwanda uses different methods of execution for different capital crimes. Hanging is used for most capital convicts, while shooting is used for those who commit "genocidal killings." Jerry Gray, *Rwanda Plans to Try Thousands For Massacres*, *New Leader Says*, N.Y. TIMES, Aug. 3, 1994, at A1.

In nineteenth century England, the connection between dignity and the method of execution was quite explicit. For instance, hanging was considered appropriate for commoners but beneath the dignity of aristocratic criminals. See COOPER, *supra*, at 4 (beheading was the punishment for treason, a crime of aristocrats; when three commoners were convicted of treason in 1817, they were first hanged "as common criminals" and then beheaded); *id.* at 7-8 (at one nobleman's execution, people refused to believe, right up to the end, that he would be hanged); BISHOP, *supra* note 88, at 35-36 (noblemen executed by

could only have meaning for the people witnessing them, rather than for the prisoner, whose life had already ended.

b. Maximizing Dignity—The Dilemma of Punishment

In the last few centuries, however, the law has come to realize not merely the importance of human dignity to the individual, but also the powerful effect that a state's treatment of human dignity has on the larger society.

When a state punishes, it faces a dilemma in trying to maximize human dignity and respect for law. The notion of human uniqueness, so vital to the durability of any society based on law,¹⁹⁵ is threatened by recognition of our physical nature. We are, in fact, made of mere matter, like any other object or animal. It is hard to disguise the fact that we must eat, drink, and breathe to survive, and we all ultimately die and revert to being inanimate objects. This recognition of both our mortality and our similarity to all other things in the universe undermines our sense of uniqueness, and thus our sense of dignity.

This problem—the conflict between our need to see ourselves as more than mere physical bodies and the fact that we are as rooted in physical and temporal reality as any animal or plant—manifests itself in the dilemma of punishment. In order to punish a person, the law must assume that she is an autonomous being possessed of something which non-humans do not have—the freedom and autonomy to choose her actions. Without freedom to act, there can be no responsibility, and without responsibility, no punishment. In other words, the law “dignifies” people through punishment, distinguishing them from non-rational beings and holding them to a higher standard of behavior.¹⁹⁶

beheading were treated with much greater respect by the viewing public than those condemned to hanging); *id.* at 119-22 (distinctions between low block method of beheading (i.e. victim on ground), used either by those of lesser status or where extra punishment was merited; high-block method (kneeling with head lowered), used for royalty; and kneeling with head up, used for the execution of Anne Boleyn).

Similarly, slaves and noncitizen in Ancient Greece convicted of capital crimes were either burned at the stake or crucified, while aristocrats were banished (the functional equivalent of death in an outside world of wild animals and hostile peoples, *see id.* at 30) or, for especially well regarded convicts, allowed to take poison. *Id.* at 36.

American history also provides examples. Major John Andre, a British spy captured by the Continental Army during the American Revolution, wrote to General Washington asking to be shot, as a soldier would be, rather than hanged as a spy. Although Washington felt constrained by military rules, he decided not to reply, thus sparing Andre's feelings by allowing him to believe, until the very hour of his execution, that he was to die honorably before a firing squad. FREDERICK DRIMMER, *UNTIL YOU ARE DEAD: THE BOOK OF EXECUTIONS IN AMERICA* 147-50 (1990).

195. *See supra* note 188 and accompanying text.

196. *See Gardner, supra* note 91, at 107-08 (“[P]unishment in effect honors the choice of the criminal because it completes the rational consequences of his act. To the extent that

If the law's scheme of attaching punishment to crime dignifies people, however, actual physical punishments can cause the opposite: a loss of dignity. When the law focuses on the body, taking advantage of the human body's physical and temporal vulnerability in order to inflict punishment, the punishment emphasizes not the prisoner's autonomy and free will, but the fact that she is a mere physical object like any other.

In short, holding people responsible for their actions makes them seem more human; while punishing them physically—whether through mutilation, violence, or deliberate infliction of pain—makes them seem less human. The more dignity people see in each other, the more likely they will be to respect each other and respect the law; the more we are encouraged to treat each other as mere things, the more we will disrespect each other and the law.¹⁹⁷

c. Modern Recognition of Dignity

As a result of the modern recognition of the importance of preserving dignity even in punishment, western nations have gradually moved from using a wide variety of physical, public punishments for various crimes—which one might think would be most effective at intimidating the populace into obedience—to using imprisonment as the only physical punishment. Imprisonment, alone among physical punishments, (1) does not involve direct physical action upon the body, and (2) remains hidden from the public. The law has recognized, therefore, that the brutality of physical punishments can backfire and

he chooses to commit his criminal act, the law respects his personal choice by punishing him."); Gaylin, *supra* note 179, at 19 (determinism threatens the idea of personal responsibility upon which the law relies); see generally Herbert Morris, *Persons and Punishment*, in PHIL. OF LAW 659 (J. Feinberg & H. Gross, eds., 3d ed. 1986) (criminals have a "right" to be punished, and this right is a fundamental underpinning of all human rights).

One commentator advocates allowing condemned prisoners to kill themselves so as to maximize dignity under the circumstances. See Gardner, *supra* note 91, at 110-12. This suggestion harkens back to ancient Egypt, where the first death sentence in recorded history simply ordered the condemned person to commit suicide. KRONENWETTER, *supra* note 34, at 71.

Interestingly, prison officials have always gone to great lengths to insure that the condemned prisoner does not commit suicide before the execution. In one case, a prisoner who had just tried to kill himself by cutting his own throat was dragged into San Quentin's gas chamber still bleeding, so that he could be killed by lethal gas before he died of blood loss. DRIMMER, *supra* note 194, at 61.

In fact, some suicidal murderers may commit their crimes precisely for the sense of importance (and hence dignity), otherwise lacking in their lives, that the death penalty gives them. Cf. White, *supra* note 19, at 877. Another writer suggests that making executions less painful and more humane, particularly by using anaesthesia, might mitigate this problem, since much of the "thrill and notoriety" surrounding the death penalty would be lost. KEVORKIAN, *supra* note 184, at 46-47.

197. See *supra* note 188.

cause a lessening of mutual respect among people, leading to greater lawlessness. The solution has been to hide the punishment and to remove it from the physical body.

One glaring exception to this trend is the persistence of the death penalty in the United States.¹⁹⁸ Even American capital punishment procedures, however, indicate the law's discomfort with the physical nature of the punishment.¹⁹⁹

Both of the methods of execution in use at the time of the Eighth Amendment's adoption, hanging and shooting, have always been carried out so as to minimize the prisoner's perceived indignity, even at the risk of causing additional pain.²⁰⁰ All hangmen since the nineteenth century have tried to minimize the possibility of decapitation,²⁰¹ and the concern survives to this day. Indeed, the *Campbell* court listed the risk of decapitation as a factor in its decision (concluding that it was negligible) without explaining why this was a concern at all, since presumably decapitation would render the prisoner instantly

198. See Ursula Bentele, *Race and Capital Punishment in the United States and Africa*, 19 BROOK. J. INT'L L. 235, 237 (1993) ("The United States stands alone among Western democratic states in retaining, and carrying out, the death penalty for ordinary crimes during peacetime.").

199. See MARQUET ET AL., *supra* note 140, at 31 (at Texas electrocutions, a guard would stuff cotton into the prisoner's nostrils to trap blood gushing from ruptured veins in the brain); Bessler, *supra* note 19, at 359-65 (contending that state governments try to preserve capital punishment by hiding it); John Lofland, *The Dramaturgy of State Executions*, in STATE EXECUTIONS VIEWED HISTORICALLY AND SOCIOLOGICALLY 273 (1977) (each aspect of the way modern society treats the death penalty evinces a profound discomfort both with death in general and with the penalty itself, while earlier societies openly embraced both); ZIMRING & HAWKINS, *supra* note 19, at 11, 15 (the psychological need for the death penalty is satisfied by the mere existence of the death penalty statute, as shown by the fact that (1) many nations retain such statutes long after they stop actually executing prisoners, and (2) people rarely take notice or object when death sentences are commuted); *id.* at 14 (see discussion contained in *supra* note 19); Denno, *supra* note 19, at 677 ("Today's executions are sterile, invisible events."). For more of the ways executioners try to disguise the messy reality of the execution process, see *supra* note 193.

200. Ironically, concerns with avoiding pain on the one hand and with preserving human dignity on the other can actually conflict in the execution context. See *supra* note 177. As the above examples show, the law has placed greater importance upon dignity than upon avoidance of pain, in direct contradiction to what the *Campbell* majority held. See also Ecenbarger, *supra* note 19, at 10 ("For the past century, there have been sporadic attempts to come up with neater ways to execute human beings, but most of these seem to be aimed at placating the squeamish public rather than easing the pain of the condemned.").

201. See *Campbell*, 18 F.3d at 717-18. For another odd example of the concern with avoiding post-mortem indignities, see Denno, *supra* note 19, at 631 n.508 (New York electrocution procedure in the 1960s called for applying the current while the prisoner was exhaling because if the current was applied when the prisoner had lungs full of air, the throat would shut while the current was on, then release when the current went off, generating an unpleasant noise caused by the release of air.).

unconscious, thus ending her agony.²⁰²

Likewise, the traditional firing squad aims for the heart of the prisoner,²⁰³ although it is unclear how long or painful death from a shot to the heart actually is. Any risk of pain would be eliminated by aiming for the head rather than the heart; and most gun suicides in fact shoot themselves in the head,²⁰⁴ presumably choosing instant unconsciousness and sure death over the more dignified, but potentially more painful, chest wound.

America has also sought to resolve the dilemma of physical punishment by keeping executions hidden from public view.²⁰⁵ The hope, obviously, is that the brutality of the execution process will not rub off on the general population, a possibility which is far from remote.²⁰⁶

202. See *supra* notes 121-23 and accompanying text.

203. See Weisberg, *supra* note 93, at 23, 24 (Utah procedure).

204. See DAVID LESTER, WHY PEOPLE KILL THEMSELVES: A 1990s SUMMARY OF RESEARCH FINDINGS ON SUICIDAL BEHAVIOR 241 (3d ed. 1992) (quoting J.W. Eisele, D. Reay, & A. Cook, *Sites of Suicidal Gunshot Wounds*, 26 JOURNAL OF FORENSIC SCIENCES 480-85 (1981)) (74% of gun suicides shoot themselves in the head, while only 18% shoot to the chest); *id.* (quoting V.J. DI MAIO, GUNSHOT WOUNDS (1985)) (80% of handgun and rifle suicides shoot to the head, along with 50% of shotgun suicides).

205. See Denno, *supra* note 19, at 604-05 (In response to the botched electrocution of Williams Kemmler, and the resultant public outcry, the press was barred from witnessing future New York electrocutions.); *id.* at 403 ("[W]ith television stations in the United States already broadcasting . . . executions in other countries, including executions in Iraq, Romania, Saudi Arabia, and Vietnam, it is ironic . . . that executions performed by our own government are deemed inappropriate for television audiences in the United States." (footnote omitted)); ARK. CODE ANN. § 16-90-504 (Michie 1994) (illegal even to publish details of an execution after witnessing one). Public executions have been banned in the United States since 1937. Denno, *supra* note 19, at 676; see *Furman v. Georgia*, 408 U.S. 238, 297 (1972) (Brennan, J., concurring) ("No longer does our society countenance the spectacle of public executions, once thought desirable as a deterrent to criminal behavior by others. Today we reject public executions as debasing and brutalizing to us all.").

But this can only be a temporary solution. The idea of secret state actions, hidden out of fear of what the psychological effects on an informed public would be, is inimical to the operation of a free society. Besides, with the expansion of mass media, it seems inevitable that the public will at some point be exposed to the grizzly details of executions. For an unusual discussion of how resumption of public executions might actually be beneficial to society, see BISHOP, *supra* note 88, at 53-63.

206. This dilemma, as I see it, highlights the principal risk associated with the death penalty; that by differentiating between those human lives worthy of protection and those that are not, the death penalty teaches that the respect due all people can justly be taken away by human decisionmaking. Once people accept that it is within the permissible range of human choice to decide who deserves to live or die, it is a small step for one or more of them to think that individuals may make the same choices for themselves.

Executions as they are actually carried out underscore and exacerbate the problem. There can be no more powerful statement of disrespect for the uniqueness of human life, for merely physical and ordinary nature of the matter composing the human body, than when the body is shattered by a state, taking control over a body away from the "person" who owns it. In the mutilated bodies of prisoners, in the contortions and spasms the body suffers in the throes of state-sanctioned death, the observer sees the raw physical nature of

human beings separated from any notion of "soul," "mind," or any of the other ways we describe human uniqueness. When a state in effect reduces a person to a pile of mere flesh and bone, taking away her personhood, the state offers you, the individual watching the execution, a choice: sympathize with the prisoner, recognize her humanity, and suffer along with her, *see* MICHEL FOUCAULT, *DISCIPLINE AND PUNISH* 63 (Alan Sheridan trans., Vintage Books 1979) (1975) ("[T]he people never felt closer to those who paid the penalty [of death] than in those rituals intended to show the horror of the crime and the invincibility of power"); WENDY LESSER, *PICTURES AT AN EXECUTION* 46 (1993) (execution turns murderer into "pathetic victim"); ZIMRING & HAWKINS, *supra* note 19, at 133-34 ("The death penalty has the perverse effect of eliciting sympathy for the condemned." (quoting CESARE BECCARIA, *AN ESSAY ON CRIMES AND PUNISHMENT* 86 (1764))), or stifle the instincts that society (hopefully) has spent so much time trying to cultivate in you, and become hardened and indifferent to the apparently horrific suffering of others, *see* Driggs, *supra* note 91, at 1176 ("[W]itnessing an execution [or reading about it] . . . ministers to morbid curiosity, hardens the heart rather than instructs the intellect, brutalizes the feelings rather than enlightens the conscience. It habituates the beholder and the reader to scenes of violence. It tends to attract his thoughts to unfit themes." (quoting *Execution of the Death Penalty*, FRANK LESLIE'S ILLUSTRATED NEWSPAPER, July 11, 1885, at 330)). The result can be only a lessening of respect for others, a respect our society ostensibly wants to instill in its members for the mutual benefit of all. When those in positions of perceived societal importance accept and ignore such suffering, they encourage indifference, or at least passive acceptance, of all types of suffering.

I am not suggesting that the death penalty plays nearly the role in breeding violent crime as do childhood abuse, poverty, lack of opportunity, racism, and the like. But the death penalty is a societal message directed at a tiny minority of deranged individuals: potential murderers who would not be deterred by the prospect of spending the rest of their lives in prison. *See* *Gregg v. Georgia*, 428 U.S. 153, 185-86 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) ("[F]or many [murderers], the death penalty undoubtedly is a significant deterrent. There are carefully contemplated murders, such as murder for hire, where the possible penalty of death may well enter into the cold calculus that precedes the decision to act. And there are some categories of murder, such as murder by a life prisoner, where other sanctions may not be adequate."). *But see* *Furman v. Georgia*, 408 U.S. 238, 301 (1972) (Brennan, J.) ("The [death penalty's] concern, then, is with a particular type of potential criminal, the rational person who will commit a capital crime knowing that the punishment is long-term imprisonment, which may well be for the rest of his life, but will not commit the crime knowing that the punishment is death. On the face of it, the assumption that such persons exist is implausible.").

When the State inflicts obvious cruelty on those it has already rendered helpless, the message to those few deranged individuals may be quite powerful, and not at all what we intend. Rather than teaching fear of the law, the real lesson may be the potential pleasure to be had from killing people one intensely dislikes. Anyone skeptical of the connection between visceral pleasure and executions would be well served by visiting a death row prison the night a capital sentence is carried out. *See* JOSEPH B. INGLE, *LAST RIGHTS* 253 (on the night of the execution of Morris Mason in 1985, "[a]cross the street [from the prison], a cheering mob of seventy-five to one hundred people were chanting 'Fry the nigger' and 'Kill the coon.'"); *id.* at 245 (at 1984 execution of Velma Barfield, a crowd shouted "Kill the bitch! Kill the bitch!"); William J. Brennan, Jr., *Symposium on Capital Punishment: Forward: Neither Victims Nor Executioners*, 8 NOTRE DAME J.L. ETHICS & PUB. POL'Y 1, 7-8 (demonstrators carried signs saying "Save Energy, Use a Rope"; "Fry Him"; and "Let the Juice Flow"); *Child Killer Hanged in Washington State*, BOSTON GLOBE, Jan. 6, 1993, at 4 (during hanging of Westley Allan Dodd, demonstrators set off fireworks). If violent television programs have the dramatic effects that many people think they do on human behavior, imagine what effect authentic state-sanctioned violence may have.

3. *Dignity Summary*

To sum up, a court trying to assess the degree of indignity a method of execution causes must look at broad issues of bodily integrity, rather than simply assessing the pain the method inflicts. Despite what *Campbell* says, history shows the importance of bodily integrity as distinct from pain, whether one looks at the ancient emphasis on inflicting post-mortem indignities or at the modern rejection of deliberately grotesque punishments.

B. "Cruel and Unusual" Compared To What?

Before a court can judge the available methods of execution, however, it must decide which methods to include in the inquiry.

The *Campbell* court seemed to believe, although it was never stated, that a particular protocol need only be compared to other ways of carrying out the same method, such as different ways to perform a hanging.²⁰⁷ This is perhaps the smallest possible sample. It results in the narrowest possible inquiry, and the greatest likelihood that the court will find the method in question permissible.

At the other extreme, a court might try to imagine all possible methods of execution,²⁰⁸ regardless of their feasibility, and rank them all.²⁰⁹ This would be the broadest possible sample, and would almost certainly result in a court finding that executions could conceivably be

207. See *supra* notes 124-25 and the accompanying text. *But cf. Fierro*, 865 F. Supp at 1411 n.26 ("It is not entirely clear to the court how it is to determine whether pain is 'unnecessary' [under *Campbell*] without some comparison or reference to other methods of execution. Presumably it is not the case that any method of execution, no matter how inherently painful, is acceptable as long as it is performed as humanely as possible, without any more pain than is 'necessary' to carry out that mode of execution.").

208. Although only five methods are currently in use in the United States, people have been executed in countless ways throughout history. See, e.g., BISHOP, *supra* note 88, at 71-74, 81-83, 126-30, 144-48, 153-54, (burying alive, crucifixion, beating by the public at large, *auto-da-fe* (burning alive, often en masse), breaking on the wheel, garrotting, burial up to the neck (death being caused by the gradual hardening of the soil), encasement between two walls, "Death of a Thousand Cuts," crushing of the skull by an elephant, boiling alive); *id.* at 64-69 (Emperor Nero's execution of Marcus Gaius by roasting alive inside a giant hollow bronze bull, whose horns magnified and distorted the victim's screams to sound like the roar of a bull); LAURENCE, *supra* note 88, at 3 (impalement, drowning at sea, precipitation); *id.* at 220 (embedding in cement); *id.* at 15 (quartering alive, tearing to pieces by horses), *id.* at 228-30 (the "mazzatello"; *peine forte et dure*, or pressing with iron weights); James & Nasmyth-Jones, *supra* note 88, at 81 (throwing into a quagmire); Ecenbarger, *supra* note 19 (tying to stake and smearing with honey to attract biting insects). Further, there is no limit to the ways people could conceivably be killed, and no limit to the human imagination in dreaming up new ways of killing. See, e.g., BISHOP, *supra* note 88, at 29-39 (proposing shooting condemned prisoners into outer space, to either explore or simply die of starvation).

209. For a discussion of what a perfect method of execution would be in a society uncomfortable with death and the death penalty, see generally Lofland, *supra* note 199.

carried out less cruelly. Thus, a court taking this approach would probably outlaw any particular method before the court.

The answer to how broad a range of punishments the courts must compare may come from an examination of “evolving standards of decency.”

1. *Penry v. Lynaugh and Methodology Review—A Poor Fit*

From *Trop* to *Campbell* and *Fierro*, courts have tried to reconcile the actions of the peoples’ representatives, the usual measure of “community standards of decency,” with the command that any unnecessary cruelty is constitutionally unacceptable. The results have been confusing and illogical.²¹⁰ The fact is that a *Penry*-type analysis,²¹¹ which simply tallies up the decisions of the various state legislatures and says that uniform rejection of a punishment scheme indicates unconstitutionality, makes little sense in the execution-method context. “Evolving standards of decency” have no bearing on the level of permissible excess suffering, since the Amendment demands nothing less than the elimination of all reasonably preventable pain.²¹² It cannot be that the Constitution allows a certain amount of unnecessary cruelty simply because the state legislatures all want to inflict a certain amount of unnecessary pain or indignity as punishment. Any unnecessary cruelty is unconstitutional.

The point of creating an Eighth Amendment test for methods of execution is to look at the continuum of cruelty-infliction and to draw the line between what is constitutionally acceptable and what is not. It is assumed for the purposes of methodology review that the death penalty is proportionate to whatever offense is being punished.²¹³ In other words, killing is permissible. On the other hand, the deliberate infliction of any pain beyond what is necessary to kill is not. Each assumption is absolute, and between them there is little if any room to maneuver.

2. *A Place For Penry—“Feasible” Methods of Execution*

Nevertheless, there is a place for legislatively-determined “evolving standards of decency.” Rather than looking to the legislatures to help decide what society thinks about a particular punishment, the

210. Compare *Fierro*, 790 F. Supp. at 970 (opinion granting TRO) (“the Eighth Amendment does not require states to adopt the most humane method of execution”) with *id.* (“[N]o court would approve any method of implementation of the death sentence found to involve unnecessary cruelty in light of presently available alternatives.”) (quoting *Furman*, 408 U.S. at 430 (Rehnquist, J. dissenting)).

211. See *supra* note 115 and accompanying text; *supra* note 165 and accompanying text.

212. See *supra* note 189.

213. See, e.g., *Campbell*, 18 F.3d at 683 (“Campbell does not argue that the punishment of death is disproportional [sic] to the crimes of which he was convicted.”).

courts should use the actions of the states to decide how far states must go in researching and implementing new, less "cruel and unusual" methods of execution. With little or no prompting from the courts, nearly every state has at one time or another changed methods.²¹⁴ "Society" has obviously felt the need from time to time to experiment to reduce the barbarity of executions, although political and economic pressures have obviously placed limits on the effort. Courts can recognize "evolving standards of decency" as *Penry* demands by considering for comparison purposes only those methods of execution that the states have already found feasible, i.e., those methods currently in use nationwide.

This approach would give proper deference to the states' legislatures, as well as obviating the need for judicial speculation about whether a new, untried method is superior to one already in use.²¹⁵ Further, a court could allow an individual state to counter the presumption of the feasibility of a particular out-of-state method by showing a compelling state interest in keeping its current method; an interest which the court would have to weigh, however, against the relative cruelty involved in the continuing use of that method. To date, however, no state has ever offered a concrete reason why it needed to use one particular method over another,²¹⁶ so it seems unlikely that the need for such a balancing test would ever arise.

C. The Constitutional Yardstick—How Cruel Is Too Cruel?

Once a reviewing court has reviewed all of the feasible methods of execution—those currently in use by the various states—and has ranked them by relative cruelty, the final question becomes where on the spectrum of cruelty the line between acceptable and unacceptable

214. See *Fierro*, 865 F. Supp. at 1406 ("From 1970 until the time of trial [1993], twenty-five states had changed or added a method of execution."); *supra* note 116.

215. If, later on, a state invented a new method of execution and decided to implement it, the courts could defer judgment until it was in use for a reasonable period of time, and then allow a challenge to the new method only after sufficient evidence of its relative cruelty became available. The court could then judge it against the method in use elsewhere; if found more cruel, it would be banned, but if found less cruel, the court would mandate its adoption nationwide.

216. It seems odd that states defend the use of the gas chamber, the gallows, and the electric chair at all, since lethal injection equipment is actually the cheapest to implement and maintain. See *TROMBLEY*, *supra* note 19, at 39 (giving the prices for a new lethal injection system (\$30,000), electric chair (\$35,000), gallows (\$85,000), and gas chamber (\$200,000)); *id.* at 99 (Missouri saved \$270,000 by switching to lethal injection rather than rebuilding its 50-year-old gas chamber).

One commentator mentions an interesting argument in favor of hanging, ascribed to unnamed "penologists and police officials," that among the various methods of execution, hanging is the most effective as a deterrent because the sensation of choking is the easiest for a criminal to imagine. See *BISHOP*, *supra* note 88, at 111.

methods falls. In other words: Which method is to be the constitutional yardstick?

The original understanding of the Eighth Amendment was the historical view that the Amendment prohibited any method which either was, or would have been, considered "cruel and unusual" when the Amendment was adopted in 1791.²¹⁷ Under the historical view, hanging and shooting should be the standards against which to judge all more modern methods.

Although the narrow historical view of the Amendment was specifically abandoned in *Weems*,²¹⁸ it may have continued vitality in the context of methodology review for several reasons. First, the cases following *Weems* have dealt almost exclusively with proportionality,²¹⁹ presumably because proportionality is a much more flexible and powerful line of inquiry than simply comparing a penalty to those in use in 1791. The historical test, however, remains as a minimum standard below which "evolving standards of decency" may never fall.²²⁰

This remaining historical aspect of Eighth Amendment jurisprudence may seem of purely academic concern, but in *Harmelin v. Michigan*²²¹ Justice Scalia writes that he would like to end proportionality review altogether²²² (cheerfully upsetting eighty-four years of precedents beginning with *Weems*), limiting Eighth Amendment review to examining types of punishment against a historical standard.²²³ Chief Justice Rehnquist joined Scalia's opinion, and Justice Thomas, who joined the Court after *Harmelin*, probably shares their view.

Although the Court is unlikely to embrace this strict historicism, the *Harmelin* plurality's restrictive vision of proportionality review, as

217. See *supra* note 48 and accompanying text; *supra* note 58 and accompanying text.

218. See *id.*

219. See *supra* note 65 and accompanying text. But see *infra* note 222.

220. "At a minimum, the Eighth Amendment prohibits punishment considered cruel and unusual at the time the Bill of Rights was adopted." *Penry*, 492 U.S. at 330.

221. 501 U.S. 957 (1991).

222. See *id.* at 965 (opinion of Scalia, J.) ("The Eighth Amendment contains no proportionality review."); *id.* at 992-93 (arguing that *Weems* did not actually create a line of proportionality jurisprudence until over sixty years after it was decided).

Justice Scalia adds that he would preserve the Court's proportionality decisions regarding the death penalty, specifically *Coker v. Georgia*, 433 U.S. 584 (1977) (finding the death penalty disproportionate to the rape of an adult woman) and *Enmund v. Florida*, 458 U.S. 782 (1982) (death penalty disproportionate to non-"trigger-man" felony-murder without intent to kill), although he gives no reason for the distinction between capital and non-capital cases. See *Harmelin*, 501 U.S. at 993-94. He adds: "We would leave [proportionality review] there, but will not extend it further." *Id.* at 994.

223. See *Harmelin*, 501 U.S. at 965-92 ("original intent" of the Eighth Amendment did not include a proportionality guarantee); see also *id.* at 986 ("[T]he proportionality principle becomes an invitation to imposition of subjective values.").

set out by Justice Kennedy,²²⁴ may have a similar effect in practice: to end the Court's review of statutes under the Eighth Amendment outside the death penalty context.²²⁵ Thus, the long-dormant historical view of the Eighth Amendment, and the question of which kinds of punishment violate that view under all circumstances, may be the last live area of Eighth Amendment jurisprudence.

Further, the lower courts, when faced with such an obviously unsettled (and unsettling) area of the law as execution methodology review, have tended to fall back on the historical acceptance of a particular method in upholding its constitutionality, whether out of a hidden desire to re-establish the pre-*Weems* standards or out of mere habitual deference to the status quo.²²⁶

224. Under *Solem v. Helm*, 463 U.S. 277 (1983), courts decided proportionality using three factors: (1) whether the imbalance between the crime and the sentence gives rise to an inference of disproportionality, as well as how the sentence compares to others (2) in the same jurisdiction and (3) in other jurisdictions. *Id.* at 292. The *Harmelin* plurality opinion altered the test so that (1) becomes the threshold test. If there is no "inference of gross disproportionality" from the sentence on its face, courts need not consider (2) or (3). *Harmelin*, 501 U.S. at 1005. It is unclear whether any future sentence actually implemented by a state will ever invoke such an inference, since a sentence of life in prison without possibility of parole for a first-time offender caught with one-and-one-half pounds of cocaine apparently passes muster. *See id.*

225. "While Justice Scalia seeks to deliver a swift death sentence to *Solem*, Justice Kennedy prefers to eviscerate it, leaving only an empty shell." *Harmelin*, 501 U.S. at 1018 (White, J., dissenting).

226. *See supra* notes 141-46 and accompanying text. I view the *Campbell* majority opinion as a historical-opinion-by-default in the same vein as *Gray*. *See supra* notes 78-81 and accompanying text.

Note that *Campbell* is the only federal case other than *Wilkerson* to rule on the constitutionality of one of the historically accepted methods of execution. Since *Wilkerson* was decided at a time when the purely historical view of the Eighth Amendment was in force, *Campbell* is the only case in which a historically accepted method was in jeopardy of being outlawed. It is possible, although it requires looking beyond the text of the opinion, to consider *Campbell* as standing for the proposition that anything acceptable in 1791 is acceptable today, Justice Scalia's view. *See infra* notes 115-25 and accompanying text. If this is in fact what the *Campbell* majority intended, it is unfortunate that they did not say so, since parts of the opinion are nonsensical if read literally, and can only be characterized as willful misreading of the cases it purports to rely. *See Campbell*, 18 F.3d at 705-06, 706 nn.25 & 27 (Reinhardt, J., dissenting).

Perhaps I see *Campbell* as a historically based case because it is so structurally similar to the early method of execution cases decided when the method was new and untried. In *Kemmler*, *Gee Jon*, and *Daugherty*, each court was able to examine the method in question at it was supposed to work in theory and in the absence of any messy evidence to the contrary. The district court in *Campbell* put itself in a similar position by excluding virtually all evidence and deciding the case as if hanging were a newly discovered method of execution. *Accord Campbell*, 18 F.3d at 713 (Reinhardt, J., dissenting) ("Despite the fact that the evidentiary hearing was not conducted before a jury, the district court excluded under Federal Rule of Evidence 403 any evidence providing examples of slow, painful strangulations which had occurred in past hangings (including one ordeal lasting thirteen minutes). Although this evidence was the only direct evidence relating to the risk that

In many areas of constitutional law, a return to eighteenth-century standards would curtail judicial review and, many would say, constitute an abdication of the Supreme Court's responsibility to protect individual liberties. Certainly, both hanging and the firing squad would automatically survive constitutional review. However, the gas chamber, the electric chair, and lethal injection, the methods used in the vast majority of American executions, would be entitled to no comparable deference. Each would be judged against hanging and shooting as to their relative cruelty, and any method found to be more cruel than either would have to be abandoned.

Additionally, even a historical account of the Amendment might have to take the full panoply of "human dignity" concerns described above into account. The concern with dignity in death, after all, seems to go back well before Justice Brennan's *Furman* concurrence, *Trop*, or even the adoption of the Eighth Amendment itself.²²⁷ If this is true, and dignity was a significant legal concern dating back to our common law origins in England, then even the most die-hard historicist must use some sort of dignity analysis when looking at methods of execution, something which even the liberal Judge Patel neglected to include in the *Fierro* test.²²⁸

A second possible way to select a baseline of constitutionality is to use the "evolving standards of decency" relied upon by every Eighth Amendment case since *Weems*. The question might be rephrased as follows: Would a modern "reasonable person" find the method of execution "indecent"? *Trop* seemed to espouse this point of view, searching out the "reasonable person's" view by turning to so-called "objective standards"—in that particular case, the laws of other nations.²²⁹ Other courts have included sociological data,²³⁰ and the *Campbell* dissent openly used "the tools of philosophy, religion, logic, and history" in determining the standard.²³¹ However, the current Supreme Court is unlikely to accept such an openly subjective approach.

Assuming that the historical standard no longer governs the Eighth Amendment, which is almost certainly the case, there is a third alternative besides the rigidly historicist and unduly vague "evolving standards" points of view. If a state may not inflict unnecessary cruelty, and if a less cruel alternative method exists which is both politi-

hanging will cause a lingering death, the court excluded it because *Campbell* did not know every detail of the procedures used in these hangings.").

227. See *supra* note 194 and accompanying text.

228. See *supra* note 136-37 and accompanying text.

229. See *Trop*, 356 U.S. at 102-03.

230. See, e.g., *McCleskey*, 481 U.S. at 320-45 (Brennan, J., dissenting); *Furman*, 408 U.S. at 345-54 (Marshall, J., concurring).

231. See *Campbell*, 18 F.3d at 697 (Reinhardt, J., dissenting).

cally and economically feasible (i.e. a method widely used by other states), then any method other than the least cruel alternative must be cruel and unusual.

In other words, only the least cruel method among those in widespread use ought to be constitutionally acceptable. A state's refusal to adopt a newer, more humane method in the absence of any countervailing concerns²³² should be viewed as equivalent to deliberate cruelty, violating the Eighth Amendment.

D. Summary—An Eighth Amendment Test for Methods of Execution

My proposed test, then, can be summarized as follows: A state violates the Eighth Amendment if it uses a method of execution which either causes or is intended to cause—

- 1) pain, or
- 2) violation of bodily integrity, such as—
 - i) mutilation,
 - ii) violence upon the body, or
 - iii) subversion of the prisoner's control over her body,
 —beyond that inflicted by any other method which is reasonably available (i.e. looking at whatever methods the state legislatures have found to be feasible).²³³

VII. Is the Gas Chamber, or Any Other Method of Execution, Cruel and Unusual Punishment?

Under my test, only the least cruel of the five methods of execution currently in use in the United States (hanging, shooting, electrocution, cyanide gas, and lethal injection) would be constitutionally permissible. Since each has been found economically and politically feasible somewhere in the United States, the decision to kill using any but the least cruel among them can only be a deliberate infliction of unnecessary cruelty in violation of the Eighth Amendment.

By all accounts, lethal injection seems to be the least cruel

232. See *supra* note 216 and accompanying text.

233. This would be the test under the current "evolving standards of decency" understanding of the Eighth Amendment. Under the pre-*Weems* understanding of the Eighth Amendment favored by the Supreme Court's conservative wing (see *supra* notes 221-23 and accompanying text) the test would be as follows: A state violates the Eighth Amendment if it uses a method of execution which either causes or is intended to cause—

- 1) pain, or
- 2) violation of bodily integrity, such as—
 - i) mutilation,
 - ii) violence upon the body, or
 - iii) subversion of the prisoner's control over her body,
 —beyond what traditionally accepted methods of execution (in use in 1791) cause.

method.²³⁴ There is little or no mutilation of the body; physical violence is limited to the insertion of the needle; and perhaps most importantly, the prisoner is given a fast-acting barbiturate to kill the pain before the poison enters the body.²³⁵ The use of an anaesthetic is particularly important, since lethal injection is the only method which includes a direct effort to prevent pain.²³⁶

234. Lethal injection has caused much ethical debate and discussion in the medical community since it demands the active participation of some sort of medical personnel in the killing process. See STAFF OF CALIFORNIA SENATE COMM. ON JUDICIARY, *supra* note 84, at 5 ("The California Nurses Association has requested specific language [in the lethal injection bill] stating that registered nurses should not be expected to administer lethal injections or to train others how to do so."); David C. Anderson, *Who Wears the Blindfold at Executions?*, N.Y. TIMES, Feb. 26 1995, § 4, at 5 ("A group of Illinois doctors challenging that state's lethal injection law argues that the procedure was invented 'to give an aura of medical respectability to a truly nasty deed.'"); Fisher, *supra* note 19, at B5 ("Doctor's groups, objecting to the physician's potential role, have warned members not to participate in [lethal injections]."). This is strictly an issue for doctors, however; such considerations should play little, if any, part in the constitutional debate. Nonetheless, the concern does give rise to another problem: since doctors generally refuse to participate in the actual killing process, there is a greater chance that mishaps will occur. See Weisberg, *supra* note 93, at 27.

235. See Jim Dwyer, *Watching A Killer Die*, N.Y. NEWSDAY, Feb. 22, 1995, at A1, A27 (Texas procedure uses sodium thiopental, an anaesthetic, followed by potassium chloride to stop the heart and pancuronium bromide, a muscle relaxant, to stop the breathing); Fisher, *supra* note 19 (same chemicals used in Oklahoma); Anderson, *supra* note 234 (same chemicals but with the second and third reversed); Michele Parente, "Missouri Model" Considered, N.Y. NEWSDAY, Feb. 16, 1995, at A5 (Missouri procedure, "widely considered . . . the model" nationwide and potentially to be followed in New York, uses sodium pentothal, Pavulon, and potassium chloride, in that order). *But see* Silagy v. Thompson, No. 90-C-5028, 1991 WL 18418, *4 (N.D. Ill. Feb. 7, 1991) (noting Illinois lethal injection procedure causes several minutes of unnecessary pain; implying that no painkiller is used).

236. This is not to say that mishaps have not occurred, or that no unnecessary pain is inflicted. See TROMBLEY, *supra* note 19, at 14-15 (describing botched executions involving repeated failure to properly insert the needle, up to 47 minutes, incorrect mixtures of drugs, and leaking apparatus); Denno, *supra* note 19, at 627-28 n.496, 657 (prominent Illinois anesthesiologist's affidavit for a federal court case says that Fred Leuchter's computerized lethal injection machine, in use in at least four states, "would render inmates incapable of screaming and cause them severe pain before they died."); Anderson, *supra* note 234 (prisoner Stephen McCoy's reaction to the drugs used in his Texas execution included violent gasping and choking); Marshall Frady, *Death In Arkansas*, THE NEW YORKER, Feb. 22, 1993, at 105, 129-30 (at Arkansas execution of the severely brain-damaged Ricky Ray Rector, Rector moaned for an hour as executioners repeatedly stuck the needle in his arm trying to find a vein; executioners finally cut his arm open with a scalpel); Jim Dwyer, *Firsthand Look at Final Moments*, N.Y. NEWSDAY, Feb. 26, 1995, at A4 (Clifton Russell stuck repeatedly with needle for 20-25 minutes); Ecenbarger, *supra* note 19 (painful botches by injecting chemical into muscle instead of a vein, and by injecting chemicals in the wrong order; another inmate stuck repeatedly with needles for 45 minutes before suitable vein found); Fisher, *supra* note 19 (at least ten of the nation's 138 executions by lethal injection have been botched); Weisberg, *supra* note 93, at 27 (intense pain can result from a clogged needle, as happened in the Texas execution of James Autry in 1984, or if the needle is accidentally inserted into a muscle instead of a vein).

By contrast, death by cyanide gas seems quite painful (or at least uncomfortable in the extreme) and is certainly degrading and horrific.²³⁷ Thus, the gas chamber, along with electrocution,²³⁸ hanging,²³⁹ and shooting,²⁴⁰ must necessarily fail the constitutional test under "evolving standards of decency."

However, as mentioned above, it is possible that the Supreme Court could, in the narrow context of methodology review, return to a pre-*Weems* historical standard.²⁴¹ In that case, the Court would judge the gas chamber not against lethal injection, but against hanging and shooting, the methods in use in 1791. In that case, one might well give up and decide that nothing could be worse than hanging and shooting, and that since the modern methods were adopted in an attempt to humanize executions,²⁴² the historicist position leaves nothing left to decide.

For an account of the debates over lethal injection when it was first adopted, see ZIMRING & HAWKINS, *supra* note 19, at 121-23.

237. See *supra* notes 87, 130-31, and 193. The *Fierro* and *Campbell* tests rely heavily on distinguishing the prisoner's conscious and grotesque reactions to pain from unconscious contortions and spasms, since the latter, no matter how degrading, are considered legally irrelevant. See *supra* notes 104-40. Under my test, the distinction would be drastically less important, since both pain and unconscious spasms violate human dignity. Having watched part of the trial, including most of Dr. Baskin's testimony, I can report that there is something Orwellian about government researchers asserting under oath that the writhing, grimacing prisoner dying in the gas chamber is not actually in pain. Judge Patel noted this disturbing phenomenon (although she did not (or could not) discuss it in a substantive way) in the *Fierro* opinion:

While defendants offered theoretical evidence as to why inmates in the gas chamber should lose consciousness within seconds, they made little attempt to square this theory with the numerous objective eyewitness observations and contemporaneous medical records submitted by plaintiffs. It is theoretically possible to interpret any of the seemingly conscious activities cited above in isolation as the actions of an unconscious inmate. . . . After a certain point, [primary defense expert] Dr. Baskin's attempt to explain away all of the possibly conscious activity begins to look less like the rational thought process of a detached scientist and more like the biased rationalizations of a professional who is wedded to his own particular theories. . . .

In a particularly revealing moment in the testimony, Dr. Baskin was questioned about his refusal to euthanize [sic] rabbits for experiments Dr. Baskin conceded that he did not run an objective test to determine whether the injected rabbit was experiencing pain Rather, in response to counsel's question, "[H]ow do you know it was a painful death?", Dr. Baskin responded "[y]ou had to be there," and explained that seeing the animal and hearing the sounds it made was enough to convince him that the manner of death was painful. . . . Dr. Baskin displayed greater familiarity with this phenomenon as it related to rabbits than to human beings.

Fierro, 865 F. Supp. at 1403-04.

238. See *supra* notes 96-103 and accompanying text.

239. See *supra* notes 88-92.

240. See *supra* notes 218-26.

241. See *supra* notes 218-26 and accompanying text.

242. See *supra* notes 33-35 and accompanying text.

Not so. As shown above, subsequent scientific investigations can render those early judgments obsolete. Further, most courts have upheld methods based on how they are supposed to work, rather than how they work in actual practice. When one contrasts even an ideal cyanide death with the ideal hanging approved by the *Campbell* court, the result is clear. The protracted and ugly scenario that unfolds behind the glass at San Quentin is far more cruel than either the quick and painless hanging described in *Campbell* or the ideal electrocution described in *Kemmler*.

Whatever the Eighth Amendment test looks like when the *Fierro* appeal is decided, whether by the Ninth Circuit or by the Supreme Court, the gas chamber is the most vulnerable to constitutional attack under even a historically based standard. One might say that by insisting over the years on judging methods of execution under ideal circumstances, the appellate courts are hoisted by their own petard by the evidentiary rulings in *Fierro*, where the gas chamber's cruelty seems inescapable in the best of circumstances. Whether the appellate courts preserve the modern view of the Eighth Amendment or return to a historical viewpoint regarding executions, the judges and justices will probably have little choice but to recognize that death by cyanide gas is, under any logical and intellectually honest test, cruel and unusual punishment.