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Hang 'Em High: A Proposal for Thoroughly Evaluating the Constitutionality of Execution Methods

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Sech: Hang 'Em High: A Proposal for Thoroughly Evaluating the Constitut

HANG 'EM HIGH: A PROPOSAL FOR THOROUGHLY EVALUATING THE CONSTITUTIONALITY OF EXECUTION METHODS

"Let's do it"¹

I. INTRODUCTION

One reporter was quite uneasy after watching the grisly electrocution of convicted murderer Jessie Tafero on May 4, 1990.² "I don't know if I want to watch another," he commented.³ Tafero, his left hand clenched into a fist except for his little finger, was seemingly burnt to death, rather than electrocuted quickly and painlessly.⁴ He convulsed violently during the ordeal, and he appeared to inhale and exhale deeply while he "produced gurgling sounds."⁵ The electrocution lasted four minutes, during which three sets of 2000 volts of electricity tore into Tafero's body.⁶ Before the execution ended,

1. CHRONICLE OF THE 20TH CENTURY 1120 (Clifton Daniel ed., North American ed., 1987) (quoting convicted murderer Gary Gilmore shortly before his execution by a Utah firing squad in January, 1977).

2. STEPHEN TROMBLEY, THE EXECUTION PROTOCOL: INSIDE AMERICA'S CAPITAL PUNISHMENT INDUSTRY 44 (1992). Tafero was convicted in the 1976 shooting deaths of Florida highway patrol trooper Phillip Black and Black's friend Donald Irwin, an Ontario police officer who was visiting Florida. *Id.* On the date of his execution, Tafero was the 219th person to die in Florida's electric chair since the state began executions in 1924. *Id.*

3. TROMBLEY, *supra* note 2, at 45 (quoting *Florida Times-Union* reporter Bruce Ritchie who stated that Tafero's execution was the most graphic of the three that he had witnessed). Ritchie further explained that "Tafero's body did not just stiffen upright when the electricity was applied at 7:06 a.m., it seemed to reel backward. Smoke rose from the inmate's head, not his leg." *Id.*

4. Cynthia Barnett, *Tafero Meets Grisly Fate In Chair*, GAINESVILLE SUN (Gainesville, FL), May 5, 1990, at 1A. *See also* TROMBLEY, *supra* note 2, at 44-46 (discussing the Tafero execution in a minute-by-minute format). The flames and sparks continued as the electrocution progressed. *Id.* at 45. Five inch flames burned from the left side of Tafero's skullcap, and smaller ones burned to the right. *Id.*

5. Dawn M. Weyrich, *Gruesome Blunders: Botched Execution Spurs New Death Row Challenge*, WASH. TIMES, June 7, 1990, at A1. According to Robert Johnson, a professor at American University, Tafero was not the only person to suffer at his execution: "Members of the execution team also suffer when an execution goes awry . . . What they fear . . . is any kind of botch, which they view as a professional embarrassment that makes the prisoner's last moments even harder than they have to be." *Id.*

6. Deborah W. Denno, *Is Electrocution An Unconstitutional Method of Execution? The Engineering of Death Over The Century*, 35 WM. & MARY L. REV. 551, 554 (1994). Throughout the twentieth century, electrocution has been used in the majority of executions. *See* John G. Leyden, *Death in the Hot Seat: A Century of Electrocutions*, WASH. POST, Aug. 5, 1990, at D5 (stating that over 4100 people have been executed by electrocution in the United States during this

the death chamber was filled with smoke and ashes.⁷ Seven minutes after the first surge of electricity had been administered, a doctor and prison officials declared that Tafero was dead.⁸ Numerous questions in the press conference which followed the execution focused on whether Tafero had died quickly or had suffered needlessly.⁹

Recently, several courts have faced challenges from prisoners concerning the constitutionality of the methods used to execute them.¹⁰ In these cases,¹¹ many of the courts have utilized a wide range of factors in determining whether an execution method was constitutional.¹² Several courts have chosen to analyze

century).

7. Denno, *supra* note 6, at 555. Various theories were presented as to why all of the flames and smoke appeared. *Id.* Some questioned the condition of the electrical equipment, which allegedly was in questionable condition because Florida's superintendent of prisons rejected new equipment due to the expense involved. *Id.*

8. TROMBLEY, *supra* note 2, at 45-46.

9. *Id.* A spokesman for the Department of Corrections told reporters that "[t]he execution was carried out. That's what is the important priority." *Id.* When questioned why Tafero continued to appear as if he was breathing even after two surges of electricity, the spokesman said that "[i]n the doctor's opinion, Mr. Tafero was dead within a second or two. In his opinion, there can be involuntary respiration." *Id.*

10. These claims are normally habeas corpus claims brought under the Eighth Amendment of the United States Constitution, which provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

11. See, e.g., *Campbell v. Wood*, 18 F.3d 662 (9th Cir. 1994) (involving a petitioner who challenged death by hanging as cruel and unusual punishment); *State v. Frampton*, 627 P.2d 922 (Wash. 1981) (same); *Jackson v. State*, 516 So. 2d 726 (Ala. Crim. App. 1985) (involving a petitioner who challenged electrocution as being cruel and unusual); *State v. Black*, 815 S.W.2d 166 (Tenn. 1991) (challenging the Tennessee death penalty statute on the grounds that electrocution, as a means of imposing the death penalty, was cruel and unusual punishment); *State v. Adkins*, 725 S.W.2d 660 (Tenn. 1987) (same); *Fleenor v. State*, 514 N.E.2d 80 (Ind. 1987) (challenging electrocution as being cruel and unusual); *Hunt v. Smith*, 856 F. Supp. 251 (D. Md. 1994) (involving a petitioner who challenged execution by means of lethal gas as being cruel and unusual punishment); *Gray v. Lucas*, 710 F.2d 1048 (5th Cir. 1983) (same); *DeShields v. State*, 534 A.2d 630 (Del. 1987) (involving a petitioner who challenged hanging as being cruel and unusual punishment); *Fitzgerald v. State*, 638 P.2d 1002 (Mont. 1981) (same); *Hill v. Lockhart*, 791 F. Supp. 1388 (E.D. Ark. 1992) (involving a petitioner who challenged lethal injection as being cruel and unusual punishment).

12. See, e.g., *Campbell*, 18 F.3d at 687 (holding that hanging, as conducted in the state of Washington, does not constitute cruel and unusual punishment, reasoning that it does not involve an unnecessary amount of pain); *Gray*, 710 F.2d at 1061 (holding that the gas chamber is constitutional based on the fact that the terror and pain involved are no more than other available methods); *Stephens v. State*, 580 So. 2d 11, 26 (Ala. Crim. App. 1990) (holding that electrocution is constitutional based only on conjecture that no torture is involved in the punishment); *Fleenor*, 514 N.E.2d at 89-90 (holding that electrocution is constitutional based on the estimation that no unnecessary pain is involved in the punishment); *DeShields*, 534 A.2d at 639 (holding that hanging is constitutional based on both the legislature's intent to retain hanging as the method of execution and the court's belief that the state's hanging procedures are reliable); *Adkins*, 725 S.W.2d at 663 (reasoning that the question of whether electrocution is cruel and unusual is a matter for the

the constitutionality of an execution method based solely upon whether an unnecessary amount of pain was involved.¹³ Others have based their rulings exclusively upon the amount of terror involved in the method.¹⁴ Two state courts upheld an execution method, reasoning that a state legislature, not a court of law, should address the constitutionality and humanity of the method.¹⁵ Additionally, some courts have ruled on an execution method's constitutionality solely by examining available case law. These court rulings have been made without scientific or eyewitness evidence which possibly suggest that the method may have been unconstitutional.¹⁶ Finally, several courts have not accounted for the fact that one method has been repeatedly unreliable when applied in recent years.¹⁷

These cases are illustrative of the insufficient guidelines established by courts for deciding on an execution method's constitutionality. Courts are not consistent with the factors they apply when conducting an analysis. With limited and inconsistent factors available, courts are not able to make complete and thorough reviews of prisoners' claims of unconstitutional methods of execution.¹⁸

legislature to decide); *Fitzgerald*, 638 P.2d at 1011 (deferring to the legislature on the question of whether hanging is cruel and unusual punishment); *Hill*, 791 F. Supp. at 1394 (holding that lethal injection is not cruel and unusual based solely upon the contention that it is the most humane method of execution available).

13. See *supra* notes 11-12.

14. See *supra* notes 11-12.

15. See *supra* note 12.

16. *Hunt v. Smith*, 856 F. Supp. 251, 259 (D. Md. 1994). The court reasoned that the petitioner had not demonstrated that lethal gas was cruel and unusual because he failed to cite to any case law in his favor. *Id.* Though the petitioner brought forth graphic eyewitnesses' descriptions of other lethal gas executions, the court held that the descriptions were sufficient to invoke sympathy, but insufficient to merit consideration regarding the cruel and unusual question. *Id.* But see *State v. Black*, 815 S.W.2d 166 (Tenn. 1991) (Reid, J., concurring in part and dissenting in part) (reasoning that the lack of any case law supporting electrocution as being cruel and unusual punishment did not wholly dispose of the fact that electrocution, as a means of imposing the death penalty, may have been cruel and unusual punishment).

17. See *Squires v. Dugger*, 794 F. Supp. 1568, 1580 (M.D. Fla. 1992) (holding that electrocution was a constitutional method of inflicting the death penalty). In its decision, the court reasoned that the electric chair is a reliable method because a pattern of malfunctions could not be established. *Id.* The court did not, however, take into account the fact that mishaps regarding electric chairs around the country established a pattern of malfunctions. See *Denno*, *supra* note 6, at 664-74 (discussing a national pattern of malfunctions concerning the electric chair).

18. See *Brown v. Allen*, 344 U.S. 443, 512 (1953) (Frankfurter, J., concurring) (discussing that federal claims, especially a writ of habeas corpus, should not be taken lightly):

'The great writ of *habeas corpus* has been for centuries esteemed the best and only sufficient defence of personal freedom.' Mr. Chief Justice Chase, writing for the Court, in *Ex Parte Yerger*, 8 Wall. 85, 95. Its history and function in our legal system and the unavailability of the writ in totalitarian societies are naturally enough regarded as one of the decisively differentiating factors between our democracy and totalitarian

In reviewing claims for cruel and unusual punishment, recent courts have asked whether the punishment "comports with contemporary standards of decency."¹⁹ The fact that courts have not used consistent, comprehensive criteria in their decisions shows that they have inconsistent views of contemporary standards of decency.²⁰ A comprehensive set of factors for courts to use each time a method of execution is challenged is imperative to ensure a thorough review of constitutional claims.

Section II of this Note will examine state execution methods from a historical perspective. Background information will demonstrate that our ancestors have used a wide variety of execution methods throughout biblical, medieval, and colonial times.²¹ Section II will also discuss the shift during the nineteenth century from hanging to electrocution as the predominant execution method, as well as current modes of execution.²²

Section III will explore the origin, history, and meaning of the Eighth Amendment of the Constitution. Section III will then focus on the effects the Eighth Amendment has had on the different modes of execution used in America

governments.

Id.

Justice Frankfurter also noted that state courts cannot have the last say when, through a ruling, they may have misconceived a federal right. *Id.* at 508.

19. *Robinson v. California*, 370 U.S. 660, 666 (1962). *Robinson* did not involve a challenge to a method of execution, but a challenge to a California statute which made it a misdemeanor for a person to be addicted to the use of narcotics. *Id.* at 660. A person could be prosecuted for merely being a narcotics addict even though the person may never have used narcotics within the state of California. *Id.* The Court held that the statute was unconstitutional because it inflicted cruel and unusual punishment. *Id.* at 667.

20. Although no court has set out a specific set of factors, some have indicated that any review of a method of carrying out the death penalty should be involved and comprehensive in its nature. See *Campbell v. Wood*, 18 F.3d 662, 697 (9th Cir. 1994) (Reinhardt, J., dissenting) ("[W]e must look to other objective indicia of public attitudes and to other objective factors. Among the latter are 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."). See also *Furman v. Georgia*, 408 U.S. 238, 430 (1972) (Powell, J., dissenting). The *Furman* dissent suggested that courts should consider whether the method is constitutional through a "discriminating evaluation" of all methods of execution available. *Id.* A Royal Commission Report on capital punishment issued in the early 1950s recommended that a method of execution should entail a minimum of physical violence during the execution, irrespective of the pain that this violence might inflict upon the prisoner. ROYAL COMMISSION ON CAPITAL PUNISHMENT, 1949-1953 REPORT §732, at 255 (1953). Additionally, the Supreme Court has reasoned that the swiftness of the punishment should carry some importance: "The all important consideration is that the execution shall be so instantaneous . . . that the punishment shall be reduced, as nearly as possible, to no more than that of death itself." *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 474 (1947).

21. See *infra* notes 35-56 and accompanying text.

22. See *infra* notes 57-76 and accompanying text.

today.²³ Section IV will evaluate several current decisions which involve challenges to certain execution methods. This Section will show that different courts use varying criteria while analyzing a method's constitutionality.²⁴ Section IV will also show, through a discussion of these decisions, that many of the approaches do not properly ensure a thorough review of prisoners' challenges to execution methods. Additionally, Section IV will demonstrate that some of these courts, relying exclusively on case law, exclude relevant scientific and eyewitness evidence while evaluating a method.²⁵

Finally, Section V will propose comprehensive criteria which courts should use when deciding an execution method's constitutionality.²⁶ Further, the proposed recommendations will mandate that courts utilize, in addition to relevant case law, all available scientific and eyewitness evidence to assist them in their decision making.²⁷ The criteria will then be applied to several current methods of execution in order to demonstrate how the criteria operate.²⁸ The primary focus of this Note will be on the constitutionality of various methods of execution. No debate on whether the death penalty is per se unconstitutional or permissible will occur in this Note. A full analysis of the death penalty is beyond the scope of this Note.²⁹

23. See *infra* notes 77-94 and accompanying text.

24. See *infra* notes 95-126 and accompanying text.

25. See *infra* notes 127-65 and accompanying text.

26. See *infra* notes 166-91 and accompanying text.

27. See *infra* notes 192-97 and accompanying text.

28. See *infra* notes 198-220 and accompanying text.

29. The constitutionality of the death penalty itself has been the subject of several Supreme Court decisions and numerous articles and books. In the landmark decision of *Furman v. Georgia*, 408 U.S. 238, 255-57 (1972), the Court held that the Eighth Amendment prohibited the infliction of capital punishment under nearly all state death penalty statutes. The Court reasoned that unrestrained discretion in imposing the penalty had resulted in its arbitrary infliction. *Id.* All nine Justices wrote separate opinions. Two justices held that capital punishment was per se unconstitutionally cruel. *Id.* at 257 (Brennan, J., concurring); *id.* at 314 (Marshall, J., concurring). Three justices considered the nature in which the death penalty was arbitrarily inflicted as a violation of the Eighth Amendment. *Id.* at 240 (Douglas, J., concurring); *id.* at 306 (Stewart, J., concurring); *id.* at 310 (White, J., concurring). The four dissenting Justices would not have invalidated capital punishment. *Id.* at 375 (Burger, C.J., dissenting); *id.* at 414 (Powell, J., dissenting); *id.* at 405 (Blackmun, J., dissenting); *id.* at 465 (Rehnquist, J., dissenting). *American Bar Association Journal* reporter Faye A. Silas noted the repercussions of *Furman*: "That 5-4 decision overturned death penalty laws in more than 30 states, and saved the lives of more than 600 death row inmates. Many death sentences were commuted into life terms." Faye A. Silas, *The Death Penalty: The Comeback Picks Up Speed*, 71 A.B.A. J., April 1995, at 48.50.

After *Furman*, many states reviewed and rewrote their statutes concerning capital punishment. *Id.* at 50. After a review of some of the new state laws, the Court, in *Gregg v. Georgia*, 428 U.S. 153, 176-87 (1976), held that the death penalty is constitutional provided that judges and juries utilize guided discretion when sentencing a person. Many state capital punishment statutes written after *Gregg* call for two trials in capital cases: one to determine guilt and another to set the sentence. Silas, *supra*, at 50. These state statutes spell out criteria for determining whether a death

The modern execution process is confined to a few select methods.³⁰ However, history shows that methods of execution have varied widely. To offer perspective on how certain methods have evolved, Section II will examine a few of these execution methods and the development of the execution process in the United States.

II. "SEND THEM TO THE IRON MAIDEN . . ." ³¹ EXECUTION THROUGH THE YEARS

The purpose of this Section is to provide background on the history of execution methods. Although the states combined currently use five execution methods,³² this Section will examine the various methods used throughout

or life sentence is appropriate. *Id.*

The Court also addressed the death penalty in other contexts. In *Coker v. Georgia*, 433 U.S. 584, 592 (1977), the Court struck down a Georgia statute which imposed the death penalty for the crime of raping an adult woman. Since most states and foreign countries did not treat rape as a crime punishable by death, the Court was convinced that Georgia's statute was unnecessarily cruel and disproportional for such a crime. *Id.* at 592-96. The Court also addressed death penalty challenges based on competency. See *Ford v. Wainwright*, 467 U.S. 1220, 1221 (1984) (holding that the Eighth Amendment prohibits the execution of a prisoner who becomes insane while awaiting execution). See also *Penry v. Lynaugh*, 492 U.S. 302 (1989) (holding that a person of moderate mental retardation possessed the mental culpability to justify the imposition of the death penalty).

It is impossible to list a complete bibliography on the constitutionality of the death penalty in this limited space. However, for a thorough discussion of the death penalty, see Anne Essaye, *Cruel and Unusual Punishment*, 75 GEO. L.J. 1168 (1987); Jodi L. Short and Mark D. Spoto, *Capital Punishment*, 82 GEO. L.J. 1199 (1994); MICHAEL MELTSNER, *CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT* (1973); ROBERT H. LOEB, *CRIME AND CAPITAL PUNISHMENT* (1978); TOM SORELL, *MORAL THEORY AND CAPITAL PUNISHMENT* (1987); REP. WILLIAM L. CLAY, SR., *TO KILL OR NOT TO KILL: THOUGHTS ON CAPITAL PUNISHMENT* (1990); William J. Brennan Jr., *Constitutional Adjudication and the Death Penalty: A View from the Court*, 100 HARV. L. REV. 313 (1986). Brennan's essay calls for an end to capital punishment in all of its forms. *Id.*

30. See *infra* note 32 (referring to the methods currently utilized in the United States).

31. BILL AND TED'S EXCELLENT ADVENTURE (Orion Pictures 1989).

32. Richard D. Walton, *Death by Injection Not Free of Problems*, INDIANAPOLIS STAR, Feb. 19, 1995, at A1. Of the states that have death penalty statutes, many employ lethal injection as the only method of execution or as an alternative. *Id.*

The following are the methods of execution used in states that have death penalty statutes. Alabama: electrocution, ALA. CODE § 15-18-82 (1982 & Supp. 1994); Arizona: option between the gas chamber and lethal injection, ARIZ. REV. STAT. ANN. § 13-704 (Supp. 1994); Arkansas: option between electrocution and lethal injection, ARK. CODE ANN. § 5-4-617 (Michie 1993); California: lethal injection, CALIF. PENAL CODE § 3604 (West Supp. 1995); Colorado: lethal injection, COLO. REV. STAT. ANN. § 16-11-401 (West 1990 & Supp. 1994); Delaware: lethal injection, DEL. CODE ANN. tit. 11, § 4209(f) (Supp. 1994); Florida: electrocution, FLA. STAT. ANN. § 922.10 (West 1985 & Supp. 1995); Georgia: electrocution, GA. CODE ANN. § 17-10-38 (1990); Idaho: option between lethal injection and a firing squad, IDAHO CODE § 19-2716 (1987); Illinois: lethal injection, ILL. ANN. STAT. ch. 4, para. 1 (Smith-Hurd 1993); Kentucky: electrocution, KY. REV. STAT. ANN. § 431.220 (Baldwin 1994); Louisiana: lethal injection, LA.

biblical, medieval, and colonial times.³³ Finally, this Section will examine the evolution of execution methods in this country and their current application.³⁴

A. Biblical Times to Late Seventeenth Century Europe

The death penalty and some of the methods used to inflict it have existed for thousands of years. Though no one is certain, some scholars have maintained that the oldest reference to the death penalty is located in the Code of Hammurabi.³⁵ In biblical times, the primary methods used in executions were stoning, burning, and hanging.³⁶ Crucifixion was also a common form

REV. STAT. ANN. § 15:569 (West 1992); Maryland: option between lethal injection and the gas chamber, MD. CODE ANN., CRIM. LAW § 631 (1992 & Supp. 1994); Mississippi: option between gas chamber and lethal injection, MISS. CODE ANN. § 99-19-51 (1994); Missouri: option between gas chamber or lethal injection, MO. ANN. STAT. § 546.720 (Vernon 1987 & Supp. 1995); Montana: option between hanging and lethal injection, MONT. CODE ANN. § 46-19-103 (1993); Nebraska: electrocution, NEB. REV. STAT. § 29-2532 (1989); Nevada: lethal injection, NEV. REV. STAT. § 176.355 (1992); New Hampshire: lethal injection, N.H. REV. STAT. ANN. § 630:5 (1994 Supp.); New Jersey: lethal injection, N.J. STAT. ANN. § 26:49-2 (West Supp. 1995); New Mexico: lethal injection, N.M. STAT. ANN. § 31-14-11 (Michie 1984); North Carolina: option between gas chamber and lethal injection, N.C. GEN. STAT. § 15-187 (1983); Ohio: electrocution, OHIO REV. CODE ANN. § 2929.22 (Baldwin 1994); Oklahoma: lethal injection, OKLA. STAT. ANN. tit. 22, § 1014 (West 1986); Oregon: lethal injection, OR. REV. STAT. § 137.473 (1991); Pennsylvania: lethal injection, PA. STAT. ANN. tit. 61, § 2121.1 (Supp. 1995); South Carolina: electrocution, S.C. CODE ANN. § 24-3-530 (Law. Co-op. 1989 & Supp. 1994); South Dakota: lethal injection, S.D. CODIFIED LAWS ANN. § 23A-27A-32 (1988); Tennessee: electrocution, TENN. CODE ANN. § 40-23-114 (1990); Texas: lethal injection, TEX. CRIM. PROC. CODE ANN. § 43-14 (West 1979 and Supp. 1995); Utah: option between lethal injection and a firing squad, UTAH CODE ANN. § 77-18-5.5 (1995); Virginia: option between electrocution and lethal injection, VA. CODE ANN. § 53.1-233 (Michie 1994); Washington: option between lethal injection and hanging, WASH. REV. CODE ANN. § 10.95.180 (West 1990); Wyoming: lethal injection, WYO. STAT. § 7-13-904 (1995). New York, without a death penalty for several years, recently reinstituted capital punishment in the form of lethal injection at the urging of governor George Pataki. DeQuendre Neeley, *NEWSDAY*, Mar. 12, 1995, at A17. Additionally, the state of Indiana recently passed a measure which provides that executions will take place via lethal injection rather than by electrocution. Suzanne McBride, *House OKs Lethal Injection; Abortion Bill Also Heads to Bayh's Desk*, INDIANAPOLIS NEWS, Apr. 13, 1995, at A1.

33. See *infra* notes 35-56 and accompanying text.

34. See *infra* notes 57-76 and accompanying text.

35. EDDIE L. SMITH, *THE CHAIR* 16 (1965). Addressing both the prevention of crime and the retribution for crimes committed, Hammurabi's Code is estimated to be nearly 4000 years old. *Id.* Its development took place nearly 1000 years prior to the time of Moses. *Id.*

36. Denno, *supra* note 6, at 560 n.42. Stoning was the primary method of execution at the time. *Id.* Burning was used either as a separate method, or as a way to aggravate the sentence of stoning. *Id.* See also JOHN LAURENCE, *A HISTORY OF CAPITAL PUNISHMENT* 2 (1971) (stating that hanging was used not only as a means of execution, but also as a frighteningly blatant means of deterrence). This occurred since the body of the condemned man or woman was often allowed to hang until nightfall before it was cut down. *Id.*

of the death penalty, and is the method by which Jesus Christ was executed.³⁷ During the reign of the emperor Nero, many who were sentenced to death suffered execution by impalement, a practice not fully abandoned until the nineteenth century.³⁸ The Romans inflicted the death penalty by various means, including drowning at sea, burial while alive, and beatings.³⁹ Generally, beheading was seen as an honorable way to die and such a sentence was given only to nobility and enemies, not to common criminals.⁴⁰ Almost all of these executions were carried out in public.⁴¹

By the Middle Ages, the number of crimes punishable by death increased, and the modes of execution took on more devilish ingenuity than they had before.⁴² In most instances, the form of execution depended on the crime, the

37. See LAURENCE, *supra* note 36, at 2. (stating that crucifixion was considered to be a mode of punishment copied from the Romans). For an account of Christ's execution, see *Luke* 22: 66-23: 49 (New English). Christ was forced to carry the cross on which He was later nailed, to an execution area known as Golgotha, or "Skull Place." *Id.* He was crucified with two other criminals. *Id.* The Gospels, however, give no indication as to what crimes the other men committed to warrant a sentence of death. *Id.*

38. LAURENCE, *supra* note 36, at 3. A person subject to execution by impalement was thrown into an open grave and punctured by sharp, pointed stakes. *Id.* Curiously enough, this punishment did not end with Nero, but was practiced as late as 1876, under the reign of Charles V. *Id.*

39. *Id.* When inflicting the death penalty upon parricides, the Romans had a strange and brutal sentence which they meted out. *Id.* The parricide was thrown into water while encased in a sack which also contained a dog, a rooster, an ape, and a viper. *Id.* Though viewed by some as superstitious, this form was utilized by some countries into the middle ages. *Id.* A parricide is one who murders a person to whom he stands in a specially sacred relation, as a father, mother, or other near relative. WEBSTER'S NEW INTERNATIONAL DICTIONARY 1780 (2d ed. 1934).

40. LARRY CHARLES BERKSON, *THE CONCEPT OF CRUEL AND UNUSUAL PUNISHMENT* 4 (1975). However, when the Jews completed their conquest of Palestine, many Palestinians were executed by "less honorable" methods such as tearing to death by red hot pincers and sawing asunder. *Id.*

41. LAURENCE, *supra* note 36, at 4. An attempt to deter others from crime was the obvious reason for such publicity. Laurence explains:

When criminals are executed, "[said one official], 'the most public places are chosen, where there will be the greatest number of spectators, and so the most for the fear of punishment to work upon them.' [Another official agreed]: 'The more public the punishments are, the greater the effect they will produce upon the reformation of others.'"

Id.

42. LAURENCE, *supra* note 36, at 5. In addition to murder, the death penalty was often the sentence for such crimes as high and petty treason, manslaughter, arson, highway robbery, burglary, larceny, and other statutory felonies. *Id.* at 4-5.

During this time, torture became an integral part of even the simplest forms of execution. *Id.* Women who were sentenced to die by burning at the stake were usually strangled by a rope before the burning flames could reach them. *Id.* at 9. When Catherine Hayes was executed in this manner in 1726 for murdering her husband, however, the executioner had not sufficiently strangled her. *Id.* Ms. Hayes' wails, cries, and petulant lamentations filled the air as she was burnt alive by the torrid, raging flames. *Id.*

gender of the criminal, and the criminal's status in society.⁴³ In England, the reigning King often had the right to choose the form of death.⁴⁴ Pressing a person to death was used during this time, although it was originally intended to force a person to plead to an indictment.⁴⁵

By the late seventeenth century, hanging had become the prevalent mode of execution in Europe, although other methods were occasionally used.⁴⁶ Nonetheless, Dr. Joseph Guillotin, a French physician, proposed to France's Constituent Assembly that beheading would be the best way to carry out all capital sentences.⁴⁷ After some controversy and a somewhat lengthy assembly

43. *THE DEATH PENALTY IN AMERICA* 16 (Hugo A. Bedau ed., 1964). Burning at the stake was the popular sentence for the practice of witchcraft, possibly because the punishment was endorsed by several medieval Christian theologians. See LAURENCE, *supra* note 36, at 7 (discussing that heretics were generally burnt alive for blaspheming). For the crime of high treason, women were often executed by burning, while men were often punished by hanging or drawing and quartering for the same offense. *Id.* at 6. The latter involved the prisoner being tied to four horses and torn into quarters as the horses rushed away. *Id.*

The higher classes were rarely executed by any method other than beheading. *Id.* The beheading was carried out by placing the condemned person's neck on a block while a soldier, skilled as a "headsman," severed the head from the rest of the body with the quick blow of an axe or sword. *Id.*

44. BERKSON, *supra* note 40, at 4.

45. *THE DEATH PENALTY IN AMERICA*, *supra* note 43, at 15-16. This penalty required a person to be placed on his back in a dark room with almost no clothing while heavy weights were placed in increments on his chest. The person was given only a small amount of bread and water each day and was allowed to waste away and die. LAURENCE, *supra* note 36, at 8. Pressing to death was used in England as early as 1426, although its popularity in the courts was not very high. *THE DEATH PENALTY IN AMERICA*, *supra* note 43, at 16. The sole recorded use of the method in this country took place in 1692, when one Giles Corey refused to plead to an indictment of witchcraft. *Id.*

46. *CAPITAL PUNISHMENT* 8 (James A. McCafferty ed., 1972). Pirates were often executed by being hung in chains from specially built gibbet irons along the wharves of London. *Id.* Additionally, heads of criminals in England were often placed in various locations throughout the countryside, serving as a warning to others who might be contemplating any form of wrongdoing. *Id.* at 8-9.

47. See LAURENCE, *supra* note 36, at 71. Guillotin had first brought forth the motion on October 10, 1789, but it was not until May 3, 1791 that the Assembly declared that all executions shall be carried out by beheading. *Id.* The life-secretary of the Academy of Surgery, one Dr. Louis, pushed for a beheading mechanism by pointing out the defects in executing someone by using a headsman and sword. Dr. Louis explained how this new beheading machine would work:

To secure certainty in the proceedings they must necessarily depend on invariable mechanical means, of which the force and the effect can be determined The body of the criminal is laid face downwards between the posts joined by a cross-beam at the top, whence the convex hatchet is made to fall on the neck by means of a trigger. The beam of the instrument should be heavy enough and strong enough to act efficaciously, like the ram that is used for sinking piles This apparatus would not be felt and would hardly be perceptible.

Id. at 71-72.

period, a mechanism was developed to carry out beheading in a "mechanical" manner.⁴⁸ The new method, which became known as the guillotine, was popular with the government but unpopular with many of the people who witnessed its use.⁴⁹

B. America—The Move From Hanging To Other Methods

In the American colonies during the early part of the seventeenth century, colonists primarily from Holland introduced many methods of capital punishment.⁵⁰ However, methods of execution were often left to judicial discretion. Judges had many methods from which to choose,⁵¹ including

48. *Id.* at 72. Early guillotines were constructed almost entirely of wood, and the planks on which the huge cutting mechanism slid were greased with tallow. *Id.* The condemned person was usually executed on a platform which was above the ground. *Id.*

49. *Id.* at 73. Many people felt that the guillotine was not gruesome enough and saved the criminal from a slow, painful death, something they enjoyed seeing at public hangings. *Id.* The *Chronique de Paris* reported that the crowd expected more pain and gore following the first official execution using the new apparatus: "The people, however, were not at all satisfied; they had seen nothing; the affair was too rapid; they dispersed disappointedly and . . . sang 'Give me back my wooden gallows. Give me back my gallows!'" *Id.* The government approved of the new method and executed over 1250 people over a period of just over thirteen months. *Id.* at 74.

50. Denno, *supra* note 6, at 562-63. According to one source, the first execution in the colonies took place in 1608. Francis X. Clines, *A Dismayed Historian of the Gallows*, N.Y. TIMES, Nov. 18, 1992, at A16. George Kendall, a Spanish spy, was executed by a gunshot to the head. *Id.* Shooting was upheld by the Supreme Court in 1878 in the case of *Wilkerson v. Utah*, 99 U.S. 130 (1878). The Court concluded that shooting was not cruel and unusual not only because the Army used it as their method of execution, but because it was used by other civilized nations as a form of the death penalty. *Id.* at 135.

Today, two states permit execution by shooting, although each state offers lethal injection as an alternative. Denno, *supra* note 6, at 687. In Idaho, shooting is used only if the director of the Department of Corrections finds it "impractical" to carry out an execution by means of lethal injection. *Id.* Utah allows a prisoner to choose between shooting and lethal injection. *Id.* The modern application of shooting involves a firing squad consisting of five marksmen. FREDERICK DRIMMER, *UNTIL YOU ARE DEAD: THE BOOK OF EXECUTIONS IN AMERICA* 91 (1990). Four of the marksmen receive live rounds, while a fifth member receives a blank shot in order to prevent any single member of the group from feeling personal guilt for the killing. *Id.* The gunmen shoot at a bull's-eye target placed over the inmate's heart. *Id.*

Shooting captured the nation's attention for the first time in years in 1977 when Utah executed Gary Gilmore by firing squad for a double homicide committed a few years earlier. See CHRONICLE OF THE 20TH CENTURY, *supra* note 1, at 1120 (examining the Gilmore execution). For a discussion of shooting's history and a perspective on its current use in Utah, see L. KAY GILLESPIE, *THE UNFORGIVEN: UTAH'S EXECUTED MEN* (1991). Additionally, the firing squad is not always as reliable as it sounds. See TROMBLEY, *supra* note 2, at 11 (discussing the execution of Elisio Mares, a popular prison inmate among prison officials, wherein all of the shooters aimed away from Mares' heart, and many watched in horror as he slowly bled to death).

51. See Denno, *supra* note 6, at 563. Drawing and quartering was also available. CAPITAL PUNISHMENT, *supra* note 46, at 21. See *supra* note 43 for a brief description of drawing and quartering.

hanging, beheading, breaking at the wheel, drowning, and burning.⁵² However, the number of people who actually underwent any of these horrific sentences is unclear.⁵³

Though many methods were available, most capital crimes in early America were punished by hanging.⁵⁴ Hanging remained the most popular form of execution throughout the eighteenth century and early nineteenth century.⁵⁵ Many of the public hangings conducted during this period resembled huge county fairs and had the raucous atmosphere of a festival.⁵⁶

52. Denno, *supra* note 6, at 563.

53. See BERKSON, *supra* note 40, at 4 (arguing that little evidence exists which would substantiate claims that large numbers of people were beheaded, drawn and quartered, or pressed to death in the American colonies). See also ZECHARIAH CHAFEE, JR., 1 DOCUMENTS ON FUNDAMENTAL HUMAN RIGHTS 122-30 (1963) (stating that few people were actually sentenced to such brutal deaths).

54. NEGLEY K. TEETERS, *HANG BY THE NECK* 4-7 (1967). Teeters asserts that Daniel Frank, convicted of stealing, was the first person to be hanged in the colonies when he went to the gallows on March 1, 1622. *Id.* at 7. Teeters and his colleagues estimate that nearly 16,000 people have been legally hanged in this country alone. *Id.* at 4-5. See also BERKSON, *supra* note 40, at 21 (commenting that hanging was the most popular form of capital punishment in early America). Watt Espy, a capital punishment historian, estimates that half of the hangings prior to the twentieth century were bungled in some form. Weyrich, *supra* note 5, at A1. Espy said that the mishaps usually occurred due to one of two reasons: "Either the rope was too long and the executioner had to hold the guy up until he strangled to death, or the person was too fat and the force of the rope ripped his head off." *Id.*

Presently, hanging is still utilized as a method of execution in the states of Washington and Montana. *Campbell v. Wood*, 18 F.3d 662, 698 n.8 (9th Cir. 1994) (Reinhardt, J., dissenting). The general protocol involves a "long drop" method in which the prisoner is dropped a certain length depending upon the prisoner's weight. *Id.* at 681. However, inmates are offered the option of dying by lethal injection before being sentenced to hang. *Id.* Presently, Washington state Attorney General Christine Gregoire is seeking legislation which would make lethal injection the presumed or "default" method of execution in that state. Jack Broom, *State Is Suing Inmates Who Fought Execution — Gregoire Seeks to End Debate on Hanging*, SEATTLE TIMES, Dec. 13, 1994, at B1. According to Gregoire, more than \$300,000 has been spent by her office over the course of 1993 and 1994 to defend hanging's constitutionality. *Id.*

55. August Mencken, *Introduction* to *BY THE NECK* xv (August Mencken ed., 1942). Mencken noted that large crowds often turned out to see public hangings, especially in the more remote regions of the country. *Id.*

56. Denno, *supra* note 6, at 564. In New York and other states with death penalty statutes, some hangings were such a draw that people often showed up by the thousands. *Id.* At the hanging of convicted murderer Jesse Strang, an estimated 30,000 people attended. *Id.* Not surprisingly, public hangings were wonderful opportunities for merchants to showcase their wares and sell food and other items. *Id.* Ticket sales which provided the best views were also commonplace. *Id.*

By the 1840s, various reform movements and humanitarian campaigns pushed for the abolition of hanging through anti-gallows⁵⁷ campaigns.⁵⁸ Though these crusades declined as the United States entered the Civil War,⁵⁹ many were rejuvenated after the war's conclusion.⁶⁰ The campaigns' efforts prompted many states to abolish all forms of inflicting the death penalty.⁶¹ However, in New York, the movements prompted the landmark move from hanging to electrocution, an allegedly more humane method of execution.⁶²

57. The term "gallows" is defined as: a frame, usually of two upright posts and a crossbeam, from which is suspended the rope with which criminals are hanged. It is also used to generally refer to the punishment of hanging. WEBSTER'S NEW INTERNATIONAL DICTIONARY 1029 (2d ed. 1934).

58. Denno, *supra* note 6, at 565. Societies who sponsored such campaigns, like the New York State Society for the Abolition of Capital Punishment, led the movements during the late 1840s. *Id.* See generally LOUIS P. MASUR, RITES OF EXECUTION: CAPITAL PUNISHMENT AND THE TRANSFORMATION OF AMERICAN CULTURE 1776-1865 (1989) (discussing the movements and trends toward the elimination of public hangings). See also Denno, *supra* note 6, at 566 (discussing the early nineteenth century rise of voluntary societies dedicated to humanitarian causes). Many of the causes espoused by such groups included temperance, prison reform, women's rights, and abolition of the death penalty. *Id.* at 563.

59. Denno, *supra* note 6, at 565. In addition to the Civil War, many national crises were brought on by the huge numbers of immigrants coming to this country. *Id.* Such immigration spawned rising crime rates and inept city governments. *Id.* In the context of this turmoil, the anti-gallows campaigns experienced a gradual decline. *Id.*

60. PHILIP ENGLISH MACKAY, HANGING IN THE BALANCE: THE ANTI-CAPITAL PUNISHMENT MOVEMENT IN NEW YORK STATE, 1776-1861, at 267-70 (1982).

61. John F. Galliher et al., *Abolition and Reinstatement of Capital Punishment During the Progressive Era and Early 20th Century*, 83 J. CRIM. L. & CRIMINOLOGY 538, 541 (1992). In a span of twenty years, from 1897 to 1917, 10 states abolished the death penalty altogether. *Id.* By the end of the 1930s, eight of the 10 states had reinstated the death penalty. *Id.* at 575-76.

62. Denno, *supra* note 6, at 566. In 1885, Governor David Hill of New York addressed the state legislature and asked whether a better method than the gallows might be developed for executing criminals:

The present mode of executing criminals by hanging has come down to us from the dark ages, and it may well be questioned whether the science of the present day cannot provide a means for taking the life of such as are condemned to die in a less barbarous manner.

In re Kemmler, 136 U.S. 436, 444 (1890) (quoting from Governor Hill's speech to the legislature).

The result of Hill's appeal was the forming of a commission which, after a lengthy report, recommended death by electrocution for anyone sentenced to death. BERKSON, *supra* note 40, at 23. The final report was 1025 pages in length and contained disputed testimony and arguments that electrocution was essentially a quick and painless method of executing a prisoner. *Id.* Surprisingly, the commission itself did not include a medical doctor. It consisted of Chairman Elbridge T. Gerry, a prominent attorney, Dr. Alfred P. Southwick, a dentist from Buffalo, and Matthew Hale, an attorney from Albany. Terry S. Reynolds & Theodore Bernstein, *Edison and "The Chair,"* 8 IEEE TECH. & SOC'Y MAG. 19, 19 (1989).

After the recommendation, construction of an electric chair was commenced. WILLIAM J. BOWERS, EXECUTIONS IN AMERICA 9 (1974). The modern chair is equipped with straps for both the arms and legs of the condemned, plus a hood for the prisoner's head. *Id.* Electrodes are applied to the leg and head of the prisoner, and shortly thereafter the prisoner is given several jolts of electricity for two or three minutes. *Id.* Most of the jolts consist of several thousand volts of

In 1890, William Kemmler, a fruit peddler sentenced to die in the electric chair for the murder of his mistress, brought the first constitutional challenge to the new electrocution method.⁶³ Deferring to the judgments of the New York legislature and the New York courts, the Supreme Court of the United States denied Kemmler's plea.⁶⁴ The state executed Kemmler on June 27, 1893.⁶⁵ Despite questions about the cruelty of electrocution, more than half of the states which authorized the death penalty were using electrocution as their method of execution by the end of the 1920s.⁶⁶

In 1931, Nevada became the first state to use lethal gas as a method of execution.⁶⁷ The gaseous asphyxiation method has an intriguing origin which is demonstrated by the fact that prison officials attempted to be as humane as possible when executing a prisoner.⁶⁸ Modern gas chambers operate in a similar

electricity. *Id.*

63. BERKSON, *supra* note 40, at 23. Kemmler appealed to the U.S. Supreme Court. His case, over 100 years ago, is the last case in which the Supreme Court directly addressed the constitutionality of a method of execution. *Id.* at 26.

64. *Kemmler*, 136 U.S. at 449. Chief Justice Fuller was satisfied both with the determination of New York's legislature that electrocution did not inflict cruel and unusual punishment under the Eighth Amendment and with the lower courts' acceptance of that determination:

The courts of New York held that the mode adopted in this instance might be said to be unusual because it was new, but that it could not be assumed to be cruel in the light of that common knowledge which has stamped certain punishments as such; that it was for the legislature to say in what manner sentence of death should be executed; that this act was passed in the effort to devise a more humane method of reaching the result; that the courts were bound to presume that the legislature was possessed of the facts upon which it took action; and that by evidence taken aliunde the statute that presumption could not be overthrown. They went further and expressed the opinion that upon the evidence the legislature had attained by the act the object had in view its passage.

Id. at 447.

65. THE DEATH PENALTY IN AMERICA, *supra* note 43, at 17. The execution was difficult for Kemmler, possibly due to both the hasty assembly of the chair and a clumsy executioner. *Id.* After Kemmler's execution, authorities such as Thomas Edison and Niccola Tesla continued to debate whether or not electricity had a proper role in the execution process. *Id.* Robert G. Elliot, a prominent executioner who executed 387 people by way of electrocution, wrote that he was confident that the condemned person lost consciousness immediately after the first jolt of current. ROBERT G. ELLIOTT, AGENT OF DEATH 38 (1940).

66. THE DEATH PENALTY IN AMERICA, *supra* note 43, at 17-18.

67. BERKSON, *supra* note 40, at 29.

68. Robert A. Maurer, *Death By Lethal Gas*, 9 GEO. L.J. 50, 51 (1921). *See also* BERKSON, *supra* note 40, at 29 (discussing the humane intentions surrounding the proposed gas chamber setup). The original plan was to isolate the prisoner in a special cell and to admit lethal gas to this cell while the prisoner was asleep. *Id.* Thus, officials sought to take the prisoner's life without having to wake him. *Id.*

manner.⁶⁹ As in *Kemmler*, a quick challenge was made to the new method but was rejected by the Nevada Supreme Court.⁷⁰ Eventually, seven other states set up gas chambers during the 1930s, and from 1955 to 1960, three more states chose lethal gas as their method of inflicting the death penalty.⁷¹

Lethal injection, first utilized by Texas in its 1982 execution of Charles Brooks, is now the most widely used method of execution in this country.⁷² After being strapped to a gurney, the condemned person is usually given a sedative,⁷³ followed by a combination of lethal drugs administered intravenously.⁷⁴ Though many point to the comforting, hospital-like aura of lethal injection as an indication of its humane nature, this method has drawn sharp criticism from several physicians who claim the procedure is ethically wrong.⁷⁵

69. For a description of the gas chamber setup which was, until recently, used in California, among other states, see *Fierro v. Gomez*, 865 F. Supp. 1387, 1391-93 (N.D. Cal. 1994). The chamber is often equipped with two chairs, each with heavy duty straps for the arms and legs of the prisoner. *Id.* at 1391. Each chair has holes in the seat to allow the lethal gas to reach the prisoner. *Id.* at 1392. Below the chair lies a mixture of sulfuric acid and distilled water. *Id.* at 1391-92. Suspended above the mixture in a cheesecloth bag are sodium cyanide crystals. *Id.* at 1392. At the given signal, the crystals are lowered into the acid and water mixture, and the resulting reaction produces hydrocyanic gas, which the prisoner then inhales. *Id.* For an account of both chairs being used at once, see CLARK HOWARD, *SIX AGAINST THE ROCK* 220 (1977) (describing the 1948 executions of prisoners Samuel Richard Shockley and Miran Edgar Thompson at California's San Quentin Penitentiary). Howard claims that Shockley appeared to die easily, while Thompson seemed to struggle and died with difficulty. *Id.*

70. See *State v. Gee Jon*, 211 P. 676, 695 (Nev. 1933) (noting that lethal gas could be administered so as to produce suffering, but that the officials charged with the duty of inflicting death by lethal gas would not produce such a result).

71. BOWERS, *supra* note 62, at 9. Three of the ten states which converted to gaseous asphyxiation had previously employed electrocution. *Id.*

72. See TROMBLEY, *supra* note 2, at 73 (discussing lethal injection's beginnings in this country). Although Oklahoma was the first state to choose lethal injection as a form of the death penalty, Texas was the first state to actually execute a prisoner using the method. *Id.*

73. Stephen Braun, *Gacy Executed in Illinois for Murders of 33*, L.A. TIMES, May 10, 1994, at A12. Serial killer John Wayne Gacy, executed by lethal injection in Illinois, drifted into a sleep shortly after his sedative took effect. *Id.*

74. Don Colburn, *Lethal Injection; Why Doctors Are Uneasy About the Newest Method of Capital Punishment*, WASH. POST, Dec. 11, 1990, at Z12. The drugs used during the procedure are lethal doses of drugs ordinarily used during surgery. *Id.* They include: sodium thiopental (a sleep-inducing barbiturate), pancuronium bromide (a drug which relaxes muscles), and potassium chloride (a drug which stops the heart and is often used during heart bypass surgery). *Id.*

75. See Walton, *supra* note 32, at A8 (discussing some of the ethical arguments against lethal injection posed by physicians). Several medical organizations oppose the method because it involves lethal doses of drugs which are normally used to heal people. *Id.* Additionally, David Orentlicher, director of the American Medical Association's division of medical ethics, claims that physician involvement in lethal injection executions is insidious: "Hanging or electrocution or shooting doesn't look like a medical procedure," he said. *Id.* See also Michael deCourcy Hinds, *Making Execution Humane (or Can It Be?)*, N.Y. TIMES, Oct. 13, 1990, § 1 at 1 (stating that many doctors

In summary, five methods of execution are used in the United States today.⁷⁶ All of them, and any future methods which may be developed, must pass the Eighth Amendment's prohibition against cruel and unusual punishment. Section III will briefly examine the origin and history of the Eighth Amendment's Cruel and Unusual Punishments Clause and its application to the execution process.

III. EXECUTION METHODS AND THE EIGHTH AMENDMENT

Methods of execution are subject to the Eighth Amendment's prohibition against cruel and unusual punishments.⁷⁷ The amendment itself was taken verbatim from the English Bill of Rights of 1689.⁷⁸ Following its incorporation into Virginia's Declaration of Rights, the English Bill of Rights Provision became part of the Northwest Ordinance of 1787, and in 1791 it was incorporated into the Eighth Amendment.⁷⁹

Although the words of the Eighth Amendment are similar to the English Bill of Rights, some scholars and authors maintain that the Cruel and Unusual Punishments Clause adopted a slightly different meaning than the meaning it carried in England.⁸⁰ This subtle change occurred because while the English

stay out of the capital punishment debate altogether because their Hippocratic Oath requires them to save lives, not take part in ending them). One family practitioner said that "[i]t has the gloss of being nice and clinical and humane, . . . [b]ut we're using the medical model—which is supposed to be healing and restorative—deliberately to kill a prisoner." Colburn, *supra* note 74, at Z12.

76. See *supra* note 32 for a list of the methods of execution used by states employing the death penalty.

77. See *supra* note 10 for the text of the Eighth Amendment.

78. Philip R. Nugent, *Pulling the Plug on the Electric Chair: The Unconstitutionality of Electrocutation*, 2 WM. & MARY BILL OF RTS J. 185, 187 (1992). The English Bill of Rights initially became a foundation for a provision of the Virginia Declaration of Rights in 1776. *Id.* The original draft of the English version, which was introduced in the House of Commons, provided: "The requiring excessive bail of persons committed in criminal cases and imposing excessive fines, and illegal punishments, to be prevented." *Ingraham v. Wright*, 430 U.S. 651, 665 (1977).

79. Anthony F. Granucci, "Nor Cruel and Unusual Punishments Inflicted:" *The Original Meaning*, 57 CAL. L. REV. 839, 840 (1969). Until 1689, England had not developed an official prohibition against cruel and unusual punishment. *Id.* at 848. Though a general policy against such excessiveness was repeatedly expressed, objections to particular methods of punishment were very rare. *Id.* The first such objection reportedly occurred in the late fifteenth century during struggles between the Puritans and the established Church of England. *Id.*

80. See BERKSON, *supra* note 40, at 5 (arguing that the phrase, though a replication of the one in the English Bill of Rights, took on a different meaning when adopted in the United States). In each case in which the phrase was adopted, very little debate centered on the precise meaning of the Cruel and Unusual Punishments Clause. Granucci, *supra* note 79, at 840. Citing this lack of discussion, Anthony Granucci indicated that the clause was considered to be "constitutional boilerplate":

The history of the writing of the first American bills of rights and constitutions simply does not bear out the presupposition that the process

intended to curb the excesses of their judges in enforcing the criminal law,⁸¹ the Framers who adopted the Cruel and Unusual Punishments Clause were concerned with protecting individuals from methods of torture.⁸² Today, most scholars agree that the clause, when adopted in America, was intended to apply to the methods of punishment, including modes of inflicting the death penalty.⁸³ One Supreme Court Justice has written that prevention of both torture and other cruel punishments was clearly part of the Founding Fathers' intentions when the clause was placed in the Eighth Amendment.⁸⁴

Early courts which addressed the applicability of the Cruel and Unusual Punishments Clause did not offer a comprehensive definition of cruel and unusual punishments.⁸⁵ In order to determine which punishments were cruel

was a diligent or systematic one. Those documents . . . were imitative, deficient, and irrationally selective. Americans tended simply to draw up a random catalogue of rights that seemed to satisfy their urge for a statement of first principles — or for some of them. That task was executed in a disordered fashion that verged on ineptness.

Id. at 840-41 n.8.

81. *Ingraham*, 430 U.S. at 664-65.

82. Granucci, *supra* note 79, at 841-42. Patrick Henry, at a meeting of delegates considering the assembly of the United States Constitution, specifically objected to omitting a prohibition on cruel and unusual punishments and feared that tortures and barbarous punishments would be used in absence of a prohibition. *Id.* at 841. George Mason, drafter of the Virginia Declaration of Rights, confirmed that Virginia's cruel and unusual punishments clause specifically prohibited torture. *Id.* at 841-42. Early congressional debates seem to confirm the fact that the Cruel and Unusual Punishments Clause might prohibit certain punishments in the future. Martin S. Gardner, *Executions and Indignities — An Eighth Amendment Assessment of Methods of Inflicting Capital Punishment*, 39 OHIO ST. L.J. 96, 98 n.13 (1978). Mr. Livermore, a delegate from New Hampshire, stated:

[T]he clause seems to express a great deal of humanity, on which account I have no objection to it; but as it seems to have no meaning in it, I do not think it necessary . . . No cruel and unusual punishment is to be inflicted; it is sometimes necessary to hang a man, villains often deserve whipping, perhaps having their ears cut off; but are we in [the] future to be prevented from inflicting these punishments because they are cruel?

1 ANNALS OF CONGRESS 782-83 (1789) (emphasis is added).

83. Gardner, *supra* note 82, at 98.

84. *See Furman v. Georgia*, 408 U.S. 238, 377 (1972) (Burger, C.J., dissenting) (stating that every indication points to the fact that the Framers of the Eighth Amendment intended to give the phrase a meaning which differed significantly from that of its English counterpart).

85. *See THE DEATH PENALTY IN AMERICA*, *supra* note 43, at 199-200 (discussing the fact that courts defined cruel and unusual punishments simply by rejecting torturous punishments and manifestations of cruelty which were present in past centuries). *See also Wilkerson v. Utah*, 99 U.S. 130, 134-35 (1878) (upholding a sentence of death by shooting against a claim that it was a cruel and unusual punishment). The Court reached this conclusion not by defining cruel and unusual, but by looking back to types of punishments considered to be torture at the adoption of the Bill of Rights and noting that shooting was not among them. *Id.* (citing 4 WILLIAM BLACKSTONE, COMMENTARIES 377). *See also* Nugent, *supra* note 78, at 188 (discussing punishments Blackstone

and unusual, the Supreme Court compared current methods of punishment to methods of punishment which were considered cruel and unusual at the time the Bill of Rights was adopted.⁸⁶ This test became known as the "historical interpretation" test.⁸⁷

The process of comparing current and past forms of punishment began to change in the case of *Weems v. United States*.⁸⁸ The *Weems* Court stated that scholars and commentators have indefinite definitions of "cruel and unusual" punishment.⁸⁹ Thus, the Court concluded that the prohibitions of the Cruel and Unusual Punishments Clause are not merely limited to those punishments considered cruel and unusual at the time the Bill of Rights was adopted.⁹⁰ This broader, less static approach that began with *Weems* continued with other cases such as *Trop v. Dulles*.⁹¹ In *Trop* the Court ruled that the Eighth Amendment must draw its meaning from the "evolving standards of decency which mark the progress of a maturing society."⁹²

referred to as cruel and unusual). According to Blackstone, a noted English jurist, cruel and unusual punishments included embowelling a prisoner alive, beheading and then quartering the prisoner, or dragging the prisoner to the place of execution. *Id.* Blackstone's volume of commentaries were presumably consulted because they were, more than any other source, the codification of English and American law. J.W. EHRLICH, *EHRLICH'S BLACKSTONE V* (1959).

86. *See supra* note 85.

87. Gary E. Hood, Note, *Campbell v. Wood: The Death Penalty in Washington State: "Hanging" on to a Method of Execution*, 30 GONZ. L. REV. 163, 165 (1994).

88. 217 U.S. 349 (1910). The defendant in the case was not accused of murder, but of making a false entry in a government payroll book. *Id.* at 357. This error led the defendant to be sentenced to 15 years of hard labor. *Id.* at 359. The Court held this sentence to be cruel and unusual punishment. *Id.* at 382.

89. *Weems*, 217 U.S. at 370-72.

90. *Id.* at 373. In his opinion, Justice McKenna wrote that the future is important in the clause's content:

In the application . . . 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.

Id.

91. 356 U.S. 86 (1958).

92. *Id.* at 100-01. The defendant in *Trop* had been sentenced to the loss of his American citizenship for the crime of wartime desertion. *Id.* at 89. The Court held that such a sentence was forbidden by the Eighth Amendment. *Id.* at 103. Part of the reason for the Court's decision rested on the fact that only Turkey and the Philippines imposed the loss of one's citizenship for the crime of wartime desertion. *Id.*

Many Eighth Amendment cases brought by prisoners do not involve the constitutionality of an execution method, but claims of mistreatment by corrections officials. *See, e.g., Estelle v. Gamble*, 429 U.S. 97 (1976) (involving a prisoner's claim that he was denied adequate medical care after sustaining an injury on a prison work assignment). The Court held that the prison officials had shown a deliberate indifference to the serious medical needs of the petitioner, and that this indifference constituted cruel and unusual punishment. *Id.* at 104. In claims of prisoner

The ban on cruel and unusual punishments is difficult to translate into judicially manageable terms.⁹³ In addition to this complexity, the Supreme Court has rarely considered whether a specific method of execution constitutes cruel and unusual punishment.⁹⁴ Thus, lower courts receive little guidance for determining if a method of execution is cruel and unusual punishment if the court elects to analyze the method in a quick, perfunctory manner. With this difficulty in mind, the next Section will discuss the manner in which some courts evaluate execution methods in light of the Cruel and Unusual Punishments Clause. The inconsistent evaluations and cursory analyses employed by courts will show that comprehensive criteria are imperative to ensuring consistently thorough reviews by courts. Additionally, the next Section will suggest that courts must consider all relevant scientific and eyewitness evidence which are available concerning a method of execution. The scientific and eyewitness evidence combined with comprehensive criteria will ensure a defendant that a court will thoroughly examine whether a method of execution is cruel and unusual.

IV. THE INADEQUACIES OF CURRENT JUDICIAL APPROACHES TO ANALYZING THE CONSTITUTIONALITY OF EXECUTION METHODS - WHY MORE COMPREHENSIVE ANALYSES ARE NEEDED

In recent years, condemned prisoners have challenged the constitutionality of a state's method of execution.⁹⁵ The prisoners claimed that the manner in which a state administers the death penalty constitutes cruel and unusual

mistreatment; the Court stated that such mistreatment must rise to the level of a "deliberate indifference" for it to violate the cruel and unusual punishment prohibition of the Eighth Amendment. *Id.* at 106.

93. *Furman v. Georgia*, 408 U.S. 238, 375-76 (1972) (Burger, C.J., dissenting). *See also Trop*, 356 U.S. at 101 n.32 (discussing the fact that on the few occasions the Court has had a chance to consider the meaning of the phrase "cruel and unusual," precise distinctions have not been drawn). The Court in *Furman*, 408 U.S. at 378-79, examined the particular punishment involved (shooting as a method of execution) "without regard to any subtleties of meaning that might be latent in the word 'unusual.'" *Id.*

94. The Supreme Court directly addressed the constitutionality of methods of execution in only two cases. *Wilkerson v. Utah*, 99 U.S. 130 (1878), upheld shooting as a method of execution, and *In re Kemmler*, 136 U.S. 436 (1890), upheld electrocution as a method of execution. In *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947), the Court did not directly rule on the constitutionality of electrocution. Rather, it settled the question of whether subjecting a person to a second execution attempt after the failure of the first would constitute cruel and unusual punishment. *Id.* at 460. The Court held that a second attempt would not constitute such punishment. *Id.* at 463.

95. *See supra* notes 11-12 and accompanying text.

punishment.⁹⁶ This Section will examine the inconsistent and often cursory manner in which some courts have ruled on these challenges.⁹⁷ Secondly, the need for comprehensive criteria will be established.⁹⁸ Finally, this Section will set forth the reasons and the need for courts, in their evaluation of an execution method, to consider relevant scientific and eyewitness evidence in addition to relevant case law.⁹⁹

A. Determining an Execution Method's Constitutionality Must Involve Consideration and Analysis of a Comprehensive Set of Factors

Lower courts have neither been consistent nor thorough when summoned to examine an execution method's constitutionality. Though such an evaluation is a complicated task which should involve numerous variables and cogent, thorough analyses, some lower courts have severely limited their focus in the evaluation of prisoners' claims. Many courts have unjustly simplified their analyses by confining them to one or two factors.¹⁰⁰

The element of pain has long been an integral part of the Eighth Amendment.¹⁰¹ Several Supreme Court justices have stated that pain should be considered "first and foremost" when reviewing challenges to a method of punishment.¹⁰² Several courts, however, have determined a method's constitutionality exclusively on the fact that, in their opinion, no unnecessary

96. The inmates challenging a method usually bring forth several claims in addition to the cruel and unusual punishment claim. See, e.g., *Hunt v. Smith*, 856 F.Supp. 251 (D. Md. 1994) (involving a petitioner who also claimed that his trial counsel was ineffective and that due process required a full appellate review of all postconviction decisions). See also *Gray v. Lucas*, 710 F.2d 1048 (5th Cir. 1983) (concerning a petitioner who, in addition to his cruel and unusual punishment claim, brought claims that he was denied his Sixth Amendment right to counsel and that he was entitled to relief from his conviction on insanity grounds).

97. See *infra* notes 100-24 and accompanying text.

98. See *infra* notes 125-26 and accompanying text.

99. See *infra* notes 127-63 and accompanying text.

100. See *Campbell v. Wood*, 18 F.3d 662, 697 (9th Cir. 1994) (Reinhardt, J., dissenting) (stating that courts must look to indicia of public attitudes and objective factors absent a clear legislative repudiation of a punishment). "In short, we must ask whether the punishment 'comports with the basic concept of human dignity at the core of the [Eighth] Amendment.'" *Id.*

101. See *Furman v. Georgia*, 408 U.S. 238, 392 (1972) (Burger, C.J., dissenting) (discussing that the overriding theme of the Eighth Amendment debates was that the ends of the criminal laws cannot justify the use of measures of extreme cruelty to achieve them).

102. *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) See also *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463 (1947) (noting that "[t]he traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence.").

pain was involved in the method.¹⁰³

Despite their importance, physical and mental pain are only one indication of inhumane punishment.¹⁰⁴ Further, they are only one of several reasons why many forms of corporal punishment have been discontinued.¹⁰⁵ In the controversial case of *Campbell v. Wood*,¹⁰⁶ the majority ruled that hanging, as a method of execution, does not involve the infliction of unnecessary pain.¹⁰⁷ Consequently, the Court held that hanging did not violate the Eighth Amendment.¹⁰⁸ Inexplicably, though, the majority ignored several other crucial factors which would have offered a more comprehensive analysis of the constitutionality of hanging.¹⁰⁹ The majority's refusal to utilize factors other

103. See, e.g., *Miller v. State*, 623 N.E.2d 403, 411 (Ind. 1993) (holding that electrocution is not cruel and unusual punishment because the method does not inflict unnecessary and wanton pain); *Johnson v. State*, 584 N.E.2d 1092, 1107 (Ind. 1992) (holding that the court was unable to conclude that electrocution involves the wanton infliction of unnecessary pain).

104. Gardner, *supra* note 82, at 105. See also *Furman*, 408 U.S. at 238, 270 (Brennan, J., concurring) (discussing the physical and mental aspects of pain):

Pain, certainly, may be a factor in the judgment. The infliction of an extremely severe punishment will often entail physical suffering. Yet the Framers also knew 'that there could be exercises of cruelty by laws other than those which inflicted bodily pain or mutilation.' Even though [t]here may be no physical mistreatment or primitive torture [involved], severe mental pain may be inherent in the infliction of a particular punishment . . . More than the presence of pain, however, is comprehended in the judgment that the extreme severity of a punishment makes it degrading to the dignity of human beings.

Id. at 271.

105. *Furman*, 408 U.S. at 272. According to Justice Brennan, barbaric punishments such as the rack and screw, and the iron boot were condemned for reasons not limited to pain. "[T]hey treat members of the human race as nonhumans, as objects to be toyed with and discarded." *Id.* at 272-73. "[E]ven the vilest criminal remains a human being possessed of common human dignity." *Id.* at 273.

106. 18 F.3d 662 (9th Cir. 1994).

107. *Campbell v. Wood*, 18 F.3d 662, 687 (9th Cir. 1994). Charles Campbell was convicted in 1982 of three murders committed in Clearview, Washington. Henry Weinstein, *Hanging Constitutional*, *U.S. Court Rules*, L.A. TIMES, Feb. 9, 1994, at A3. Campbell had not opted for execution by lethal injection, as was his prerogative under state law, so the state was forced to execute him by judicial hanging. *Campbell*, 18 F.3d at 681.

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

109. *Id.* at 693 (Reinhardt, J., dissenting). The majority did not evaluate whether Campbell might suffer a slow, lingering death. *Id.* at 723. Nor did the majority consider whether a prisoner scheduled to be hanged might suffer heightened and unnecessary psychological trauma. *Id.* at 711. The majority refused to rule hanging unconstitutional simply because few states continue to utilize the method. *Id.* at 682. Moreover, the *Campbell* dissent criticized the majority for assuming that Washington state's protocol for hanging will act more reliably than any other hanging protocols:

The evidence at the hearing left no doubt that hanging entails a risk of slow, painful strangulation. This risk has existed under all hanging protocols used throughout history, and it is simply fanciful, or worse, to conclude that the Washington protocol, which is substantially the same as these procedures,

than pain in their evaluation has serious repercussions. Technically, under the Court's analysis, any form of egregiously savage execution would be constitutional provided it inflicted no more pain than necessary.¹¹⁰ An angry dissent reasoned that the scope of the Cruel and Unusual Punishments Clause was drastically curtailed by the ruling.¹¹¹

Other courts have also adopted pain as the exclusive factor in determining the constitutionality of a state's execution method. In *Hunt v. Smith*,¹¹² the petitioner claimed that execution by lethal gas violated the Eighth Amendment and constituted cruel and unusual punishment.¹¹³ Without analyzing whether the punishment resulted in a quick death or was consistently reliable, the court held that the evidence was insufficient to show that a lethal gas execution involved the unnecessary infliction of pain.¹¹⁴ Based solely on a consideration of pain, the court held that death by lethal gas was constitutional.¹¹⁵ Some courts have upheld electrocution based on analyses which involve only a cursory consideration of pain.¹¹⁶ Such analyses, in addition to being wholly inadequate, rest on the unfounded and false premise that the Eighth Amendment

will eliminate this risk. Indeed, the evidence made clear that the Washington state protocol will have little if any effect on the risk of slow, painful death.

Id. at 711.

110. *Campbell*, 18 F.3d at 694 (Reinhardt, J., dissenting). The district court noted that Campbell had not presented evidence that any U.S. Army judicial hangings resulted in unnecessary pain. *Id.* at 712. However, the dissent astutely noted that the Army, while using the protocol which Washington state now uses, never actually carried out a hanging under those procedures. *Id.*

111. *Id.* at 716. In castigating the majority, the dissent concluded that hanging was a violent, mutilative, and barbaric procedure. *Id.* It predicted not only that the Supreme Court would eventually instruct the Ninth Circuit on the meaning of the Eighth Amendment but that the Ninth Circuit would eventually find hanging unconstitutional. *Id.* at 717. See Weinstein, *supra* note 107, at A3 (discussing the angry dissent of Judge Stephen Reinhardt in the *Campbell* case).

112. 856 F. Supp. 251 (D. Md. 1994).

113. *Hunt v. Smith*, 856 F. Supp. 251 (D. Md. 1994). The petitioner actually brought an attack on both lethal injection and the gas chamber, the two methods available in Maryland. *Id.* at 259. Citing the *Campbell* case, the court referred to unnecessary pain as "the standard . . . by which methods of execution have been recently judged." *Id.* at 260.

114. *Id.* at 260. Based only on the "lack of pain" involved in both, the court upheld lethal injection and lethal gas as constitutional methods of execution. *Id.* The court also noted that "district courts are not obliged to hold plenary proceedings to test the constitutionality of a means of execution in every case" *Id.*

115. *Id.*

116. See *Jackson v. State*, 516 So. 2d 726, 738 (Ala. Crim. App. 1985) (holding that electrocution is constitutional because the petitioner made "no showing that the State's method of enforcing a death sentence inflicts any more pain than is absolutely necessary"). See also *Stephens v. State*, 580 So. 2d 11, 26 (Ala. Crim. App. 1990) (upholding electrocution because appellant presented no evidence that the method involved torture); *Miller v. State*, 623 N.E.2d 403, 411 (Ind. 1993) (upholding electrocution on the ground that no unnecessary pain is involved).

requires only that a method of execution not inflict pain unnecessarily.¹¹⁷

While some courts have placed great emphasis on pain in determining the constitutionality of an execution method, others have excluded it entirely from their considerations. The courts who use these analyses which do not include pain have also determined a method's constitutionality in a somewhat cursory manner. In *Duisen v. State*,¹¹⁸ the Missouri Supreme Court upheld the constitutionality of the gas chamber solely on the contention that a rapid death ensues.¹¹⁹ The court failed to address concerns such as whether the method was painful or consistently reliable.¹²⁰ In another recent decision, *State v. Adkins*,¹²¹ the Tennessee Supreme Court deferred exclusively to the judgment of the legislature in holding electrocution constitutional.¹²² Additionally, rather than conduct its own evaluation, a Maryland court simply invoked a decision of the Fifth Circuit to settle a challenge to the gas chamber's constitutionality.¹²³ Since lower courts apply one or two factors in determining the constitutionality of an execution method, they are giving a slightly different meaning to the "contemporary standards of public decency"

117. See *Campbell v. Wood*, 18 F.3d 662, 703 (9th Cir. 1994) (Reinhardt, J., dissenting) (discussing the unfounded premise that the Eighth Amendment only requires a punishment or method of execution to be void of unnecessary pain in order to be considered acceptable).

118. 441 S.W.2d 688 (Mo. 1969).

119. *Duisen v. State*, 441 S.W.2d 688, 692 (Mo. 1969). To bolster his claim, the petitioner presented evidence of testimony from the Record Custodian of the Missouri Penitentiary. *Id.* at 693. The testimony, which encompassed several executions, showed the time interval between the gas being released and the prisoner dying. *Id.* Although the court failed to consider other evidence, such as whether the prisoner was suffering undue pain, the court concluded that the time interval between gas release and death was "very brief." *Id.* However, the court did not offer specific evidence of this, nor did it offer any statistics or scientific evidence to substantiate its claims.

120. *Id.* at 692-93.

121. 725 S.W.2d 660, 664 (Tenn. 1987).

122. *Id.* at 664. The court stated: "The validity and humanity of [the] complaint should be addressed to the Legislature. This Court's authority over punishment for crime ends with the adjudication of constitutionality." *Id.*

Two other lower courts have also given great deference to the legislature in addition to considering pain in their analysis of an execution method. In *DeShields v. State*, 534 A.2d 630, 640 (Del. 1987), the Delaware Supreme Court upheld hanging on the grounds that the legislature explicitly disclaimed any intention to declare hanging unconstitutional. "For nearly two hundred and fifty years, the Delaware legislature has consistently selected hanging as the method of execution." *Id.* See also *State v. Coleman*, 605 P.2d 1000, 1058-59 (Mont. 1979) (discussing the Montana Supreme Court's decision to retain hanging as a method of execution): "The legislature has not seen fit to change it In that limited sense, the legislature has made a choice to continue the present provisions. We have no power to change these settled provisions of the law, nor can we say that hanging is constitutionally cruel and unusual." *Id.* at 1059.

123. *Calhoun v. State*, 468 A.2d 45, 69-70 (Ct. App. Md. 1983). The court denied the petitioner's claim based on the decision of *Gray v. Lucas*, 710 F.2d 1048 (5th Cir. 1983). See *supra* notes 11-12 mentioning *Gray*.

rationale by which punishments are judged.¹²⁴

Certainly, courts will have a difficult time ascertaining an execution method's constitutionality according to contemporary standards of public decency without utilizing several factors in a comprehensive analysis. Therefore, courts need to develop comprehensive criteria to apply each time a method of execution is challenged. Absent such criteria, the courts will continue to utilize varying factors in their analyses and arrive at inconsistent conclusions as to whether a method of execution is constitutional.¹²⁵ For example, in decisions where defendants have challenged criminal punishments other than execution, never has one single factor served as an all-encompassing analysis.¹²⁶ Therefore, a non-comprehensive approach is unacceptable since courts are imposing death, the

124. *Robinson v. California*, 370 U.S. 660, 666 (1962).

125. One example of such inconsistency involves the curious case of Mitchell Edward Rupe, a convicted murderer who was sentenced to die in the State of Washington. *Rupe v. Wood*, 863 F. Supp. 1307 (W.D. Wash. 1994). Rupe did not elect to die by lethal injection, so the state was forced to choose hanging as the method by which Rupe would die. Don Hannula, *The Mitchell Rupe Ruling Strains the Scales of Justice*, SEATTLE TIMES, Sept. 22, 1994, at B6. Rupe, who weighs 409¼ pounds, filed a suit alleging that hanging would constitute cruel and unusual punishment in his case because his massive girth would increase the risk of decapitation. *Rupe*, 863 F. Supp. at 1308. Though the Ninth Circuit Court of Appeals had just held that hanging was constitutional in the *Campbell* case, the United States District Court for the Western District of Washington held that hanging would constitute cruel and unusual punishment in the case of Mitchell Rupe. *Id.* at 1315. Unlike the court in *Campbell*, the court in *Rupe* focused almost exclusively on whether decapitation would result and gave little consideration to the possible pain involved. *Id.* at 1311-13. Charles Campbell, prior to his execution on May 27, 1994, was a muscular 232 pounds. *Id.* at 1310. However, the State of Washington hanging protocol only contained specified drop lengths for prisoners up to 220 pounds. *Id.*

Another example of inconsistency involves the constitutionality of the gas chamber. In *Hunt v. Smith*, 856 F. Supp. 251, 259 (D. Md. 1994), the petitioner challenged the constitutionality of lethal gas and lethal injection. The court ruled that both methods were constitutional based upon a limited analysis which determined that no unnecessary pain or terror was involved in the method. *Id.* at 259-60. In contrast, the analysis in *Fierro v. Gomez*, 865 F. Supp. 1387, 1413-15 (N.D. Cal. 1994) was much more involved. The *Fierro* court considered factors such as the swiftness of the gas chamber, the nature of the pain involved, and legislative trends regarding other methods of execution. *Id.* at 1401, 1396, and 1405-06. Consequently, unlike *Hunt*, the court in *Fierro* held that the gas chamber was cruel and unusual punishment. *Id.* at 1415.

126. See *Hudson v. McMillian*, 503 U.S. 1, 7 (1992) (discussing a claim involving a violation of a prisoner's rights after the prisoner was beaten by correctional officers). The *Hudson* Court considered several factors in their analysis of the petitioner's claim. *Id.* at 8. Among these factors considered were pain, dignity, contemporary civilized standards, and decency. *Id.* See also *Estelle v. Gamble*, 429 U.S. 97, 102-03 (1976) (discussing that penal measures must be measured against factors such as human dignity, civilized standards, decency, and the unnecessary and wanton infliction of pain). Additionally, the dissent in *Campbell v. Wood*, 18 F.3d 662, 694 (9th Cir. 1994) argued for a comprehensive analysis when methods of punishment are challenged: "To hold . . . that we review methods of punishment *only* to determine whether they inflict unnecessary pain, and that we do not look to *any* other factors . . . is to ignore . . . the very roots of the Eighth Amendment." (Reinhardt, J., dissenting). *Id.*

ultimate legal sanction.

In addition to a comprehensive criteria, courts must analyze more than case law in evaluating a method's constitutionality. To ensure a thorough analysis of a challenge, the courts must consider all available scientific and eyewitness evidence which is relevant. This argument will be developed more fully in the next subsection.

B. Courts Need To Consider All Relevant Scientific And Eyewitness Evidence When Analyzing An Execution Method's Constitutionality

In recent years, the study of the execution process has become increasingly scientific.¹²⁷ Scientific data, literature, and eyewitness accounts concerning methods of execution exist and can assist courts in determining a method's constitutionality.¹²⁸ The results from scientific and eyewitness evidence, unlike existing case law, suggest that certain methods of execution fail to end a person's life in a humane manner. Further, such evidence reveals that several execution methods are slow, painful, and unreliable.¹²⁹

The availability of scientific and eyewitness evidence varies depending upon which execution method the state uses. Several experts have claimed that electrocution is a method which borders on torture.¹³⁰ Additionally, eyewitness accounts of electrocutions state that the prisoners' deaths are not

127. See *Protestors Fear Injection the "Hi-Tech" Death Penalty of Future*, UPI, Dec. 8, 1982, available in LEXIS, Nexis Library, UPI File (discussing the increasingly technical nature of the execution process).

128. See, e.g., Tony Mauro, *Gas Chamber Under Cloud*, USA TODAY, Oct. 26, 1993, at A3 (discussing the availability of scientific evidence surrounding the gas chamber). Diann Rust-Tierney of the American Civil Liberties Union asserted that a great deal of scientific and eyewitness evidence which exists shows that the gas chamber causes a slow and torturous death. *Id.*

129. See *infra* notes 130-35 and accompanying text.

130. See CHARLES DUFF, A HANDBOOK ON HANGING 118 (1974) (discussing the thoughts of French scientist L.G.V. Rota, who claimed that no one who is electrocuted dies instantly, no matter how weak the individual might be). One physician has suggested that many of the inmates on death row are very healthy and can be "quite resistant to electrical currents." James Le Fanu, M.D., *Health Second Opinion: A Shocking Way to Be Killed*, THE INDEPENDENT, Aug. 12, 1990, at 51. See also Gardner, *supra* note 82, at 125 n.217 (discussing the findings of one expert who claims that the pain induced by electrocution is too great for us to imagine). One neurologist substantiated claims that electrocution is not the painless punishment that the *Kemmler* court assumed it to be: "[t]he most important thing to appreciate about it is that although they [the prisoners being put to death] are totally paralyzed, they can feel the whole time, they are totally sentient." *A Crime in Itself* (ABC television broadcast, Oct. 17, 1985).

immediate but delayed.¹³¹ The evidence also shows that the effects of the gas chamber are cruel. Lethal gas kills a person by cutting off the supply of oxygen to the body's cells.¹³² The sense a person perceives from cellular suffocation is analogous to the feeling that results from suffocation due to drowning, a heart attack, or strangulation.¹³³ Eyewitnesses to lethal gas executions assert that prisoners are conscious and suffering several minutes after the execution has begun.¹³⁴ Finally, various sources of evidence suggest that hanging is a painful and unreliable process.¹³⁵

Despite the existence of scientific and eyewitness evidence, the majority of courts do not consider this evidence in their analyses.¹³⁶ In *State v. Black*,¹³⁷ the petitioner challenged electrocution as a cruel and unusual method of punishment.¹³⁸ The Tennessee Supreme Court dismissed the claim because a previous case held that electrocution was constitutional.¹³⁹ By dismissing the claim in this manner, the court overlooked a litany of evidence which suggested

131. Many electrocutions are filled with graphic descriptions of horrors. See Mike Allen, *Groups Seek Probe of Electrocution's Unusual Events*, RICHMOND TIMES-DISPATCH, Oct. 19, 1990, at B1 (discussing accounts of Wilbur Lee Evans' execution by electricity). Reverend Russell Ford said that Evans "was covered with blood. When I looked at him, you could see that air was being forced out of his body through his lips. It was somewhat like the sound a pressure cooker makes." *Id.* Additionally, Derick Lynn Peterson lived for nearly seven and a half minutes through two separate sets of electrical jolts prior to expiring in Virginia's electric chair in 1991. Mike Allen, *Death Diary Pleas, Anger, Fill Days Before Execution*, RICHMOND TIMES-DISPATCH, Aug. 25, 1991, at B1.

132. Gardner, *supra* note 82, at 128 n.240.

133. *Fierro v. Gomez*, 865 F. Supp. 1387, 1396 (N.D. Cal. 1994). Dr. Richard Traystman, an anesthesiologist at The Johns Hopkins School of Medicine in Baltimore, Maryland, stated that the cells of a living organism are unable to function without a sufficient supply of oxygen. *Id.* With such a deprivation occurring, unconsciousness ensues, followed by death. *Id.*

134. See Richard Polito, *Harris Saga Finally Ends*, THE MARIN INDEPENDENT J., April 22, 1992, at A1 (reporting the lethal gas execution of Robert Alton Harris). Harris was able to raise his head and look both ways more than two minutes after he first inhaled the lethal gas. *Id.*

135. Eyewitness accounts of hangings are hideously descriptive. See TEETERS, *supra* note 54, at 174 (quoting an eyewitness to an execution by hanging). The witness claimed the prisoner's body began to writhe from the start of the execution and continued to do so for several minutes as the prisoner asphyxiated to death. *Id.*

Although a "long drop" method such as the one used in Washington state reduces the frequency of such painful and agonizing deaths, there remains a risk in every hanging that the prisoner will die through a slow, torturous process. *Campbell v. Wood*, 18 F.3d 662, 709 (9th Cir. 1994) (Reinhardt, J., dissenting). Additionally, evidence in the *Campbell* case also showed that the Washington State hanging protocol is virtually identical in all relevant respects to the hanging procedures which have caused slow, painful asphyxiations in the past. *Id.*

136. See *infra* notes 137-48 and accompanying text.

137. 815 S.W.2d 166 (Tenn. 1991).

138. The petitioner's challenge stated that Tennessee's death penalty statute violated the Tennessee Constitution. *Id.* at 187. Included within this claim was a challenge that electrocution was a cruel and unusual punishment. *Id.* at 189.

139. *Id.* at 197. The majority cited *State v. Adkins*, 725 S.W.2d 660 (Tenn. 1987).

that electrocution might constitute cruel and unusual punishment.¹⁴⁰

The case of *Hunt v. Smith*¹⁴¹ involved a similar omission of scientific and eyewitness evidence. In *Hunt*, the petitioner challenged the constitutionality of using the gas chamber for execution.¹⁴² In dismissing the claim, the court emphasized the fact that the petitioner presented no case law which declared the gas chamber to be unconstitutional.¹⁴³ Additionally, the court gave no weight to the graphic eyewitness accounts of lethal gas executions offered by the petitioner.¹⁴⁴

The lack of use of scientific and eyewitness evidence is not confined to challenges involving the gas chamber, electrocution, or hanging. In *Hill v. Lockhart*,¹⁴⁵ the petitioner asserted that lethal injection was cruel and unusual punishment.¹⁴⁶ The court dismissed the claim by reasoning that lethal injection

140. *Black*, 815 S.W.2d at 199 (Reid, J., dissenting). The dissent noted that several court opinions, articles, and treatises contain graphic descriptions of the nature of electrocution. *Id. See, e.g.,* *Glass v. Louisiana*, 471 U.S. 1080, 1090-91 (1985) (Brennan and Marshall, JJ., dissenting from the denial of certiorari) (discussing electrocution as a "form of torture that would rival burning at the stake"); Note, *The Death Penalty Cases*, 56 CAL. L. REV. 1270, 1338-39 (1968) (discussing that electrocution may in fact amount to prolonged agony and torture even though the Supreme Court has implied that it is painless); Gardner, *supra* note 82, at 126 (discussing the heinous indignities which occur at electrocutions). Gardner claims that at many electrocutions, the eyeballs of the prisoner often release from their sockets. *Id.* Additionally, the prisoner often writhes in agony while sparks and flames sometimes envelop the body. *Id.* Despite a host of cases upholding the constitutionality of electrocution, the only case which involved a full presentation of electrocution's facts, effects, and results was the century-old case *In re Kemmler*, 136 U.S. 436 (1890).

141. 856 F. Supp. 251 (D. Md. 1994).

142. *Id.* at 259.

143. *Id.* at 260. "[T]he petitioner has not begun to demonstrate, by citation to any case law, that execution by lethal gas has been held to violate the evolving standards of decency test by which Eighth Amendment claims are to be judged in general" *Id.* However, until *Fierro v. Gomez*, 865 F. Supp. 1387 (N.D. Cal. 1994), no case law holding the gas chamber unconstitutional existed. Thus, the petitioner could not have presented any such case law in his argument.

144. *Hunt*, 856 F. Supp. at 260. "[G]raphic descriptions of the death throes of inmates executed by gas are full of prose calculated to invoke sympathy, but insufficient to demonstrate that execution by the administration of lethal gas involves the wanton and unnecessary infliction of pain." *Id. See supra* notes 112-15 and accompanying text (arguing that the *Hunt* court's analysis was inadequate because it looked only at the amount of pain inflicted by the gas chamber).

A similar omission of scientific and eyewitness evidence was made in *In re Anderson*, 447 P.2d 117 (Cal. 1968). In *Anderson*, the petitioner also challenged the constitutionality of execution by lethal gas. *Id.* at 119. In ruling the method constitutional, the court considered neither scientific nor eyewitness evidence concerning the gas chamber. The court merely cited the California Penal Code and stated that lethal gas could not be considered a cruel and unusual method of inflicting the death penalty. *Id.* at 130.

145. 791 F. Supp. 1388 (E.D. Ark. 1992).

146. *Id.* at 1394.

is the most humane execution method available.¹⁴⁷ The court did not take into consideration how quickly, efficiently and painlessly the lethal injection could be administered. Nor did the court account for scientific or eyewitness testimony which casts doubt on the humane nature of using lethal injection.¹⁴⁸

Recently, one court conducted a thorough and comprehensive evaluation of an execution method utilizing both scientific and eyewitness evidence. In *Fierro v. Gomez*,¹⁴⁹ the court did not limit itself to considering available case law. Instead, the court evaluated the testimony of six different experts and data from several medical and scientific sources.¹⁵⁰ The court also accorded weight to eyewitness accounts from previous gas chamber executions.¹⁵¹ After this

147. *Id.* The court stated "[t]here is general agreement that lethal injection is . . . the most humane type of execution available Many states have now abandoned other forms of execution in favor of lethal injection." *Id.*

148. See Walton, *supra* note 32, at A1 (discussing instances in which lethal injection executions have been fraught with difficulty). Many condemned prisoners are longtime drug abusers whose damaged vascular systems make carrying out a lethal injection execution a daunting task. TROMBLEY, *supra* note 2, at 73-74. In the 1985 execution of Stephen Morin, technicians spent over 40 minutes jabbing Morin with a needle as they repeatedly attempted to locate a suitable vein for the injection. *Id.* at 74. Billy Wayne White, who was executed in 1992, waited 47 minutes as technicians also sought a vein which could handle the injection. *Id.* This occurred even after White tried to assist the technicians in finding a suitable one. *Id.*

Locating a suitable vein is by no means the only difficulty. During the 1988 execution of Raymond Landry, the intravenous line which carried the lethal drugs burst, spraying the chemicals toward witnesses. Walton, *supra* note 32, at A1. A new line had to be inserted while Landry was half dead, which resulted in a 24 minute death. TROMBLEY, *supra* note 2, at 74. John Wayne Gacy's 1994 execution was delayed because the lethal drugs gelled and clogged the intravenous line leading into his body. Braun, *supra* note 73, at A12. Stephen McCoy choked, moaned and heaved throughout his 1989 execution due to an incorrect mix of the lethal drugs. Doctors say that extreme pain is very possible if the technicians inject the chemicals into muscle tissue rather than veins. deCourcy Hinds, *supra* note 75, at § 1. Such pain can also result from the lethal chemicals being administered in the wrong order or dosage. *Id.*

149. 865 F. Supp. 1387 (N.D. Cal. 1994).

150. *Id.* at 1392-1400. Among the scientific and medical experts were a toxicologist, a neurologist who was qualified as an expert in the determination of consciousness and levels of pain, an anesthesiologist, a pharmacologist, and a forensic pathologist. *Id.* at 1393-94. The experts helped the court evaluate the effects of hydrocyanic gas upon the human body by offering their own medical findings and explaining data found in scientific and medical journals. *Id.* at 1394-1400. Some of this scientific data included BRYAN BALLANTYNE & TIMOTHY C. MARRS, CLINICAL AND EXPERIMENTAL TOXICOLOGY OF CYANIDES (1987); B.P. McNamara, *Estimates of the Toxicity of Hydrocyanic Acid Vapors in Man*, EDGEWOOD ARSENAL TECH. REP. (1976); Robert F. DeBusk & Larry G. Seidl, *Attempted Suicide by Cyanide*, 110 CAL. MED. 394 (1969); and Joseph Barcroft, *The Toxicity of Atmospheres Containing Hydrocyanic Acid Gas*, 31 J. OF HYGIENE 1 (1931).

151. *Fierro*, 865 F. Supp. at 1401-04. The court examined the eyewitness accounts of several gas chamber executions, including those of Robert Alton Harris and David Mason, who were executed in 1992 and 1993, respectively. *Id.* at 1401-02. Several accounts were by journalists who reported that the two prisoners did not die quickly. See Sam Stanton, "Eyewitness: Harris' Violent Life Ends Quietly," SACRAMENTO BEE, Apr. 22, 1992, at A1 (noting that Harris was moving his

evaluation, United States District Court Judge Marilyn Hall Patel ruled that the administration of lethal gas to inflict death constituted cruel and unusual punishment and closed California's gas chamber.¹⁵² The court's decision marks the first time a federal court has declared a method of execution cruel and unusual.¹⁵³

As shown by the preceding cases, existing case law is woefully inadequate for evaluating the constitutionality of execution methods. The seriousness of the situation is amplified by the lack of Supreme Court cases addressing the constitutionality of execution methods since 1890. For example, the Court upheld electrocution in *In re Kemmler*.¹⁵⁴ Because modern scientific and eyewitness evidence is now available concerning electrocution, two Supreme Court justices have intimated that *Kemmler* is "antiquated authority."¹⁵⁵ Despite this assertion, lower courts continue to uphold electrocution based solely on the *Kemmler* decision.¹⁵⁶

The use of case law alone is also inadequate for measuring the constitutionality of new execution methods which may develop in the future. Modern technology may develop new and innovative methods of execution.¹⁵⁷ If courts exclude relevant scientific and eyewitness evidence concerning the new

head in several directions and breathing deeply two minutes after the gas had been released); Kevin Fagen, *Mason Dies as He Said He Would*, S.F. CHRON., Aug. 25, 1993, at A1 (discussing that Mason was still apparently conscious three minutes after the lethal gas was released); and David K. Li, *Watching Mason's Death*, OAKLAND TRIB., Aug. 25, 1993, at A1 (suggesting that Mason was conscious for the same amount of time).

152. *Fierro*, 865 F. Supp. at 1415. "The evidence presented concerning California's method of execution by administration of lethal gas strongly suggests that the [gas chamber] is unconstitutionally cruel and unusual. [The] defendants are hereby Enjoined from administering lethal gas to inflict the punishment of death on any of the plaintiffs to this action." *Id.* Judge Patel said that eyewitness accounts of trouble persuaded her to close the gas chamber, even though the available scientific evidence was in conflict. *Gas Chamber in California Closed by Federal Judge*, THE COM. APPEAL, Oct. 5, 1994, at 5A.

153. *Gas Chamber in California Closed by Federal Judge*, *supra* note 152, at 5A. Patel's ruling came in a lawsuit filed on behalf of several death row inmates by the American Civil Liberties Union. *Id.* California Attorney General Dan Lungren said the ruling "marks a tragic day for victims of crime and their families." *Id.* However, California is still permitted to execute prisoners by lethal injection, which was added as an option in 1993. *Id.*

154. 136 U.S. 436 (1890).

155. *Glass v. Louisiana*, 471 U.S. 1080, 1083 (1985) (Brennan and Marshall, JJ., dissenting from the denial of certiorari).

156. *See, e.g., Sullivan v. Dugger*, 721 F.2d 719 (11th Cir. 1983) (holding that the *Kemmler* case settled the question of whether electrocution was constitutional); *Spinkellink v. Wainwright*, 578 F.2d 582, 616 (5th Cir. 1978) (same); *Stephens v. State*, 580 So. 2d 11, 26 (Ala. Crim. App. 1990) (same). *See also Denno*, *supra* note 6, at 690 (discussing courts' willingness to invoke *Kemmler* as constitutional justification for electrocution and other execution methods).

157. *See Walton*, *supra* note 32, at A8 (discussing that lethal injection is just the latest method in humanity's perennial search for a better way of executing people).

method, they will have no grounds upon which to base their decision. Finding a newly developed execution method constitutional simply because no case law discusses the method is an unacceptable and unsatisfying solution.

In *Furman v. Georgia*,¹⁵⁸ Justice Powell noted that courts must consider whether a means of carrying out the death penalty is unconstitutional by utilizing a “discriminating evaluation of *all available evidence*.”¹⁵⁹ Since “all available evidence” would logically include scientific evidence and eyewitness testimony, it follows that courts cannot continue to evaluate methods of execution solely by utilizing existing case law. Courts must include all available scientific and eyewitness evidence in their considerations. Were it otherwise, the Cruel and Unusual Punishments Clause would be rendered little more than good advice.¹⁶⁰ In summary, it is clear that many lower courts are not evaluating the constitutionality of execution methods in a thorough and complete manner. Some courts analyze an execution method exclusively by the amount of pain the method inflicts.¹⁶¹ No consideration is given to factors such as whether the method is reliable or expeditious. Additionally, courts often determine a method’s constitutionality based exclusively upon existing case law.¹⁶² These courts exclude relevant scientific and eyewitness evidence which could assist them in making a very crucial decision.¹⁶³

In light of these inadequate evaluations, the next Section will propose criteria which will assist courts in determining an execution method’s constitutionality.¹⁶⁴ The proposal will also provide guidelines which recommend that courts consider all relevant scientific and eyewitness evidence during their evaluations.¹⁶⁵ By establishing a “backbone” to the vague phrase “contemporary standards of public decency,” the criteria and the recommendations will enable courts to make well-informed decisions on challenges to execution methods.

158. 408 U.S. 238 (1972).

159. *Furman v. Georgia*, 408 U.S. 238, 420, 430 (1972) (Powell, J., dissenting) (emphasis added).

160. *Trop v. Dulles*, 356 U.S. 86, 103-04 (1958). The Court added: “We are oath-bound to defend the Constitution. . . . The Judiciary has the duty of implementing the constitutional safeguards that protect individual rights. When the Government acts to take away the fundamental right . . . the safeguards of the Constitution should be examined with special diligence.” *Id.* at 103.

161. See *supra* notes 106-17 and accompanying text.

162. See *supra* notes 137-44 and accompanying text.

163. See *supra* notes 137-48 and accompanying text.

164. See *infra* notes 166-91 and accompanying text.

165. See *infra* notes 192-97 and accompanying text.

V. PROPOSAL: A COMPREHENSIVE APPROACH TO ANALYZING THE CONSTITUTIONALITY OF EXECUTION METHODS

The following criteria consist of six factors which courts should use to evaluate the constitutionality of an execution method.¹⁶⁶ Accompanying the list is a recommendation suggesting that courts should use all relevant scientific and eyewitness evidence to augment their evaluations. Both the list and the recommendations are designed to enable courts to conduct thorough evaluations of an execution method's constitutionality.

This Section consists of two parts. In part A, the criteria will be listed. Following each factor is a short comment explaining its importance to the overall analysis. After the factors are listed, the proposal will recommend that courts utilize all relevant scientific and eyewitness evidence when scrutinizing a method of execution. In part B, the criteria will be applied to several methods of execution in order to illustrate how the criteria operate and how they will be effective.

Although two courts have stated that the evaluation of an execution method is a task for the legislature,¹⁶⁷ courts are in a better position to evaluate a method's constitutionality. First, federal judges, by virtue of their life tenure, are able to make their decisions free from political pressure and other "extraneous considerations," something that legislatures cannot do.¹⁶⁸ Second, even though a state legislature may enact a method of execution, the Supreme Court holds the power to ultimately rule on the constitutionality of the method.¹⁶⁹ Therefore, courts, as the final decision makers, should use the criteria and follow the recommendations.

Though the proposal encourages courts to expand their analyses beyond the rudimentary ones currently employed, the proposal does not force courts to use

166. Some of these factors have been traditionally considered in previous cases involving challenges to an execution method, while some are original. See *Glass v. Louisiana*, 471 U.S. 1080, 1085 (1985) (Brennan and Marshall, JJ., dissenting from the denial of certiorari) (stating that courts must determine whether several objective factors are inherent in the method of punishment. These included unnecessary pain, violence, and mutilation).

167. See *State v. Adkins*, 725 S.W.2d 660, 664 (Tenn. 1987) (discussing a claim that the Tennessee death penalty statute and electrocution are cruel and unusual punishment). "The validity and humanity of that complaint should be addressed to the Legislature." *Id.* See also *Fitzpatrick v. State*, 638 P.2d 1002, 1011 (Mont. 1979) (discussing the court's choice to defer to the state legislature on the question of whether hanging constituted cruel and unusual punishment).

168. Hood, *supra* note 87, at 176.

169. In *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), the Court held that neither Congress nor another legislative body shall have the final word in interpreting the Constitution. Therefore, it follows that the Supreme Court would have the final and definitive word as to whether an execution method constitutes cruel and unusual punishment.

these criteria in a specific manner. Assigning a specific importance to each factor is not feasible in light of the imprecision inherent in the Eighth Amendment.¹⁷⁰ Thus, the purpose of proposing the criteria is to encourage courts to expand their analyses of execution methods beyond single factors such as pain, so that courts do not create a mathematical formula by which they "compute" a method's constitutionality. By considering the criteria as a whole and developing their analyses of a method's constitutionality beyond the one or two factors currently employed, courts will ensure that challenges to an execution method receive a comprehensive examination.

A. A Comprehensive Set of Factors Which Courts Should Consider in Determining the Constitutionality of a Method of Execution

1. The swiftness of the execution method:

Courts shall consider how rapidly a method terminates the life of a condemned prisoner, notwithstanding the amount of pain involved.

Comment: This provision recognizes that a prisoner's execution should not require more time than absolutely necessary. Some judges are concerned that a method may inflict death in a slow, lingering manner.¹⁷¹ In light of these concerns, courts must include this factor in their analyses.

The mental suffering a prisoner endures during pre-execution confinement increases the harshness of the punishment.¹⁷² Therefore, the method of execution should not increase this suffering by making the prisoner endure a slow death.¹⁷³ By including a consideration of how rapidly an execution method operates, courts not only guard against a lingering death, but also minimize the risks of pain which could be involved in the method.

2. The pain involved in the execution method:

Courts shall consider the amount of pain a method inflicts upon a

170. See *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958) (discussing that the Supreme Court has not given precise content and meaning to the Eighth Amendment).

171. See *Campbell v. Wood*, 18 F.3d 662, 722-23 (9th Cir. 1994) (Reinhardt, J., dissenting) (discussing the question of whether a person hanged under the State of Washington hanging protocol would suffer a slow, lingering death). See also *In re Kemmler*, 136 U.S. 436, 447 (1890) (noting that punishments are cruel when they "involve torture or a lingering death").

172. See *infra* note 173.

173. Note, *Mental Suffering Under Sentence of Death: A Cruel and Unusual Punishment*, 57 IOWA L. REV. 814, 815-16 (1972) (arguing that pre-execution confinement is a distinct punishment within itself, and one which weighs heavily on the mind of the prisoner in addition to the actual execution).

condemned prisoner.

Comment: As one expert stated, it is virtually impossible to objectively quantify pain.¹⁷⁴ Nevertheless, three Supreme Court justices have stated that pain should be the pre-eminent factor in Eighth Amendment challenges to a method of punishment.¹⁷⁵ As previously demonstrated, several courts have placed so much importance on pain that they have not considered any other factors in their evaluations.¹⁷⁶

Though pain should not be the only factor considered, it should be included in any analysis of an execution method. By including this factor in their analyses, courts will be able to reasonably gauge the amount of pain involved in a method. After measuring the amount of pain, a court will then be able to examine and estimate whether the pain caused by the method is beyond that which is necessary to cause the "mere extinguishment of life."¹⁷⁷

3. *The reliability of the execution method:*

Courts shall consider the reliability of an execution method, including whether the method functions consistently in the manner in which it was intended.

Comment: This factor forces courts to examine the possibility that a challenged method might be unreliable when utilized in an execution. To be considered reliable, an execution method must function consistently in all states which employ the method and not just in one of them.¹⁷⁸ A method which is not reliable could result in a number of other problems including slow death, excess pain, and possibly unnecessary mutilation to a prisoner's body.¹⁷⁹

174. *Fierro v. Gomez*, 865 F. Supp. 1387, 1400 (N.D. Cal. 1994). Experts in the case testified that no method or formula exists which can quantify pain. *Id.* Dr. Alan Hall, a board certified toxicologist, stated: "There is, in reality, no pain-o-meter." *Id.*

175. *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (Stewart, Powell, and Stevens, JJ., concurring). "When a form of punishment in the abstract rather than the particular is under consideration, the inquiry into 'excessiveness' has two aspects. First, the punishment must not involve the unnecessary and wanton infliction of pain." *Id.*

176. See *supra* notes 106-117 and accompanying text (discussing cases in which the courts limited their entire analysis of an execution method to pain).

177. *In re Kemmler*, 136 U.S. 436, 447 (1890).

178. As an example, consider electrocution, a method used by several states. Courts would have to look to all the states that utilize the method as an indication of its reliability and performance.

179. See *Denno*, *supra* note 6, at 664-74 (discussing recent electrocutions which have failed to execute the condemned prisoner in a rapid, reasonably painless, and reliable manner). Many of the prisoners in these "botched" executions have been burned severely by the chair, a result which is not supposed to happen in a "proper" execution by electrocution. *Id.* Many electrocutions have

4. *The dismemberment or mutilation caused by the method:*

Courts shall consider the degree of dismemberment or mutilation a method inflicts upon the prisoner's body.

Comment: This factor recognizes the contention that human dignity is a central theme of the Eighth Amendment.¹⁸⁰ Human dignity also entails respect for one's bodily integrity. Thus, a method of execution which unnecessarily disfigures or mutilates a prisoner's body should be discouraged. However, such a method would not automatically be struck down as unconstitutional solely because it mutilates the prisoner's body.

Because of the Eighth Amendment's concern for human dignity, courts should include this factor in their consideration of a method's constitutionality.¹⁸¹ Evidence of a method's propensity for bodily mutilation would be established by autopsy reports and eyewitness accounts of previous executions.¹⁸² This data would enable courts to ascertain whether a method violates the principles of human dignity which are central to the Eighth Amendment.¹⁸³

5. *The degrading preparations involved in the method:*

Courts shall consider any preparations a prisoner must undergo prior to execution by a certain method and whether these preparations unnecessarily heighten the terror of the execution itself.

taken much longer than they should have. *Id.* John Louis Evans' electrocution required an agonizing 14 minutes to complete. *Id.* at 665-66.

Indiana's electric chair had been notoriously unreliable in recent years. The 72 year-old chair required 17 minutes and five separate jolts of electrical current to kill William Vandiver in 1985. *Electric Chair Takes 17 Minutes to Kill Vandiver*, FLA.-TIMES UNION, Oct. 17, 1985, at A10. In 1961, the same chair required six jolts of electricity to execute convicted murderer Richard Kiefer. *Id.* A reliable electric chair should execute its prisoner after the first jolt of electrical current. See Andrew Fegelman, *Indiana Execution Wasn't "As Planned,"* CHI. TRIB., Oct. 17, 1985, at C9 (discussing that William Vandiver should have been dead after the first jolt of electricity). Indeed, the need for recurrent jolts of electricity is so common that the method has been labeled "death by installments." Lonny J. Hoffman, Note, *The Madness of the Method: The Use of Electrocution and the Death Penalty*, 70 TEX. L. REV. 1039, 1055 (1992). See *supra* note 32 for a brief discussion of Indiana's recent move from electrocution to lethal injection.

180. *Trop v. Dulles*, 356 U.S. 86, 100 (1958). ("The basic concept underlying the Eighth Amendment is nothing less than the dignity of man").

181. *Id.*

182. See *Coroner Concludes Murderer Felt Little Pain When Hanged*, N.Y. TIMES, Jan. 10, 1993, at A23 (discussing the hanging of Westley Allen Dodd and its aftermath). Dodd's autopsy revealed that he had suffered some neck damage as a result of the execution. *Id.* The medical examiner concluded that Dodd's death was caused by both neck damage and strangulation. *Id.*

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

Comment: This factor recognizes that some methods of execution involve preparations which may unnecessarily heighten a prisoner's anxiety beyond the actual execution. The preparations involved in hanging and electrocution are two examples.¹⁸⁴ The day before a hanging, a prisoner must endure the harrowing experience of being weighed and measured for a proper drop length.¹⁸⁵ Electrocution requires a prisoner to have his head and the calf of one of his legs shaved in order to facilitate contact with the electrodes.¹⁸⁶

Death is a fearful and frightening experience.¹⁸⁷ The agony felt by the condemned prisoner after he is sentenced to death is profound regardless of the method involved.¹⁸⁸ Consequently, courts must consider whether a method involves preparations which heighten an already distressful experience.

6. *The legislative endorsement of the method:*

Courts shall consider whether a method of execution is supported by any of the legislatures of the fifty states.

Comment: Legislatures are theoretically elected to represent the will of the people. Indeed, the public's sentiment will be reflected in the legislative judgments of the people's chosen representatives.¹⁸⁹ Therefore, in theory public opinion regarding a method of execution will be expressed by a legislature's decisions.

Several courts have expressly deferred to the legislature's decisions in determining whether a method of execution is constitutional.¹⁹⁰ Additionally, many legislatures, in changing a state's method of execution, have been motivated by the concern for utilizing the most humane method available.¹⁹¹ Since the legislatures are theoretically expressing the will of the people by their

184. See *infra* note 185-86 and accompanying text.

185. Gardner, *supra* note 82, at 121 (quoting the testimony of Clinton Duffy, the former Warden of California's San Quentin Penitentiary).

186. *Id.*

187. ELIZABETH KUBLER-ROSS M.D., ON DEATH AND DYING 5 (1969). Kubler-Ross, a noted psychiatrist, says that the fear of death is a universal one. *Id.* It is with us even if we think we have mastered control over it. *Id.*

188. See John Bluestone & Edward McGahee, *Reaction to Extreme Stress: Impending Death by Execution*, 119 AM. J. PSYCHIATRY 393, 393 (1962) (discussing the fear imposed on a person by a death sentence).

189. See Hood, *supra* note 87, at 176.

190. See *supra* note 122 and accompanying text (examining decisions in which a court deferred to a legislative body when faced with a challenge to the humanity of an execution method).

191. See *Campbell v. Wood*, 18 F.3d 662, 699 n.10 (9th Cir. 1994) (Reinhardt, J., dissenting) (stating that state legislatures have been motivated by core Eighth Amendment concerns in seeking humane methods of punishment).

enactments, courts need to consider whether a method has some degree of approval in the public eye.

In addition to these criteria, this proposal recommends that courts incorporate into their analyses any relevant scientific and eyewitness evidence concerning an execution method. Existing case law, considered without such evidence, is insufficient to render an accurate judgment on a method's constitutional status.¹⁹² Some case law is obsolete because of evolving technological and scientific data.¹⁹³ Other courts, having limited their analyses to one or two factors, do not provide an accurate assessment of a method's speed, reliability, pain, or possible body mutilation.¹⁹⁴

Though scientific and eyewitness evidence cannot provide a clear answer to every question regarding an execution method, it may provide information that case law alone would be unable to supply. Scientists and physicians will be able to provide information on a method's operation, its speed and reliability, its likelihood of inflicting pain, and its possibility for improvement.¹⁹⁵ Such information would be especially crucial in the case of a novel execution method since no case law would be available for the court's consideration.

For methods currently in use, observations of lay witnesses are somewhat less probative than those of medical and scientific personnel.¹⁹⁶ However, witnesses' observations of a method's operation can still provide courts with vital information. Such information may include whether the method causes a lingering death or forces a prisoner to endure a large amount of pain.¹⁹⁷ By incorporating the above criteria and recommendations into their analyses, courts will be able to provide thorough reviews of an execution method's constitutionality. These analyses, in contrast to those currently used by courts, will be carried out through a discriminating evaluation of all available evidence.

192. See *supra* notes 136-48 and accompanying text (discussing courts which did not incorporate scientific and eyewitness evidence into their decisions).

193. The *Kemmler* Court based its ruling on findings which concluded that electrocution resulted in an instantaneous and painless death. Hoffman, *supra* note 179, at 1055. However, these arguments and factual assumptions have been discredited by recent scientific and eyewitness evidence. *Id.* See also notes 130-31 and accompanying text (discussing the nature of electrocution and some of the evidence which indicates that electrocution does not result in an immediate death).

194. See *supra* notes 106-26 and accompanying text (discussing courts which have utilized only one or two factors in their analysis of a method).

195. See generally *Fierro v. Gomez*, 865 F. Supp. 1387 (N.D. Cal. 1994) (discussing the findings of several medical experts on questions relating to the speed, pain, and reliability of the gas chamber).

196. *Id.* at 1401.

197. See *Gas Chamber in California Closed by Federal Judge*, *supra* note 152, at 5A (discussing the *Fierro* case and how Judge Marilyn Hall Patel was heavily influenced by eyewitness accounts of gas chamber executions).

To briefly demonstrate this recommended approach, part B of this proposal will apply these criteria to four methods of execution which were discussed in Section II of the Note.

B. A Brief Application of the Criteria to Four Methods of Execution

In this part of the proposal, the criteria will be applied to four methods of execution: crucifixion, the guillotine, hanging, and the electric chair. This portion of the Note will briefly demonstrate how the criteria operate and will also show how the criteria are effective in analyzing the constitutionality of execution methods. However, this demonstration is in no manner meant to be an exhaustive evaluation of each method of execution presented. This application is only provided to show how a court might use the criteria in evaluating an execution method.

Crucifixion will be the first method subjected to the proposed criteria. Around the time of Jesus Christ, crucifixion was a popular form of execution.¹⁹⁸ This method of execution was used primarily as a form of torture.¹⁹⁹ If crucifixion was still used today and eventually challenged in court as being cruel and unusual, the courts clearly would not uphold this method.

To begin with, crucifixion is an extremely slow method of execution. It is written that Christ hung on the cross for nearly three hours before expiring.²⁰⁰ It is also, doubtlessly, a painful way to be executed. In addition to the pain of being nailed to pieces of wood, the prisoner often died from suffocation. Crucifixion, however, is reliable. It guaranteed that the prisoner would die a slow, painful death each time it was used. Crucifixion also involves bodily mutilation. Historical references suggest that large amounts of blood emanated from the prisoner's body.²⁰¹ Normally, the prisoner did not have to undergo any special preparations prior to death, although some, like Christ, were

198. See MARTIN HENGEL, *CRUCIFIXION IN THE ANCIENT WORLD AND THE FOLLY OF THE MESSAGE OF THE CROSS* 86-87 (1977) (discussing the popularity of crucifixion among various societies, including Judaea, where Christ lived). "[A]mong the Romans it was inflicted above all on the lower classes, i.e. slaves, violent criminals and the unruly elements in rebellious provinces, not least in Judaea." *Id.* See *supra* note 37 and accompanying text for a brief discussion on Christ's crucifixion.

199. See HENGEL, *supra* note 198, at 25. (discussing that crucifixion was a form of execution in which the caprice and sadism of the executioners were given free reign). The executioners could essentially humiliate or torture the prisoner in any way they chose. *Id.*

200. See *Matthew* 27: 45 (New English) (stating that while Christ was on the cross, a darkness fell over the land and lasted from noon until about three in the afternoon).

201. HENGEL, *supra* note 198, at 31. In Hengel's view, it is impossible for some scholars to suggest that crucifixion was a bloodless affair. *Id.* Such statements, in his view, go against all historical evidence. *Id.*

scourged or flogged before actually being nailed to the cross.²⁰² Finally, crucifixion has no legislative support in any of the states. Therefore, after being measured against the criteria, crucifixion would be determined an unconstitutional method of execution.

Such a result demonstrates that the criteria are effective. Crucifixion is an extremely brutal form of punishment. In addition to being painful, it is a slow and gruesome spectacle in which torture played a large part. It is clear that a thorough evaluation of crucifixion using these criteria would result in its being declared unconstitutional.

Unlike crucifixion, the guillotine would fare much better during a constitutional challenge.²⁰³ By severing the head from the rest of a prisoner's body, the guillotine caused a prisoner to be executed rapidly. No risk of a lingering death existed.²⁰⁴ Presumably, there was very little pain involved in the process, for all neurological functioning ceased at the moment the severing occurred.²⁰⁵ The guillotine, since it consisted mainly of a blade attached to a rope, was a highly reliable method of execution.²⁰⁶ It worked quickly, consistently, and with little, if any, pain. Additionally, the prisoner did not have to undergo any degrading preparations prior to execution. The prisoner was merely placed on the platform under the blade and executed.²⁰⁷

The guillotine, however, falters after applying the remaining two factors. The method caused death by mutilating the prisoner's body, and it currently has no legislative support in any of the states. Though the guillotine involved

202. *Id.* at 28-29 (discussing that prisoners were flogged or tortured in some manner prior to actually being nailed to the cross). The torture probably helped to shorten the actual torments of crucifixion which were, above all, caused by the duration of suffering on the cross. *Id.* at 29.

203. See *supra* notes 47-49 and accompanying text for a discussion of the guillotine and its origins.

204. ANDRE SOUBIRAN, *THE GOOD DOCTOR GUILLOTIN AND HIS STRANGE DEVICE* 160 (1964).

205. *Id.* at 164-65. Georges Martin, a guillotin technician who had a chance to observe many executions, believed that a death incurred from the guillotine was instantaneous:

I carried out my observations methodically, taking as my principal points for examination the eyes, the lips, and the coloration of the tissues. I have witnessed one hundred and twenty executions. All of them did not permit a profound examination for reasons of expediency, decency, or simple respect for the dead. But I was able to examine fundamentally about sixty cases. I consider that this number is sufficient to allow me to state that there is never any cerebral survival after the execution. The loss of consciousness and of life therefore must be immediate.

Id.

206. See SOUBIRAN, *supra* note 204, at 134-35 (discussing the components of the guillotine and its operation).

207. *Id.*

mutilation, one report on capital punishment stated that the resulting decapitation was better than a method which resulted in prolonged pain and suffering.²⁰⁸ Although it would be a close call, the guillotine's speed, painlessness, and reliability develop a good case for its being held a constitutional method of execution.

This result again demonstrates the criteria's effectiveness. Though use of the guillotine was a mutilating punishment, this analysis requires courts to examine all aspects of the execution method. If courts utilize these proposed factors, it will determine that the guillotine is an effective method of execution.

Next, the criteria will be applied to hanging as a method of execution. Hanging has made several headlines over the past two years. Throughout the early part of this country, and through much of the Nineteenth Century, it was a widely used and popular form of execution.²⁰⁹ However, after a closer look, it is debatable whether hanging would survive constitutional scrutiny.

Various eyewitness testimonials and other evidence substantiate claims that hanging is a method which causes a lingering death in many instances.²¹⁰ The same sources state that hanging is a form of punishment which involves a visible degree of pain.²¹¹ Because of the risk involved in possible decapitations or strangulations, a valid case can be made for hanging's meager reliability.²¹² Despite precautions, every hanging entails more than a nominal risk that some bodily mutilation will occur. In addition to requiring that a prisoner undergo degrading preparations prior to the execution, the method is endorsed by only two states in this country.²¹³ After taking into account the six factors, it seems unlikely that hanging would be able to withstand a constitutional challenge.

208. REPORT OF THE COMMITTEE APPOINTED TO INQUIRE INTO THE EXECUTION OF CAPITAL SENTENCES xiii (1886), *quoted in* Campbell v. Wood, 18 F.3d 662, 717 (9th Cir. 1994) (Reinhardt, J., dissenting):

[I]f the condition of the culprit is such as to suggest the risk on the one hand of decapitation, or, on the other . . . of pain needlessly prolonged, we have no hesitation in saying that the risk of decapitation should be incurred. It involves no pain, for the culprit is already unconscious.

Id.

209. See *supra* notes 54-56 and accompanying text (discussing hanging's wide use and popularity in the early periods of the United States).

210. See *supra* note 135 (noting that there remains a risk in every hanging that the prisoner will suffer a slow, painful death and that such a process had occurred in the past).

211. See *supra* note 135.

212. See *supra* note 109 (noting that a modern hanging protocol such as Washington state's is no less prone to the risks evident in earlier systems).

213. See *supra* note 54 (bringing to mind that a prisoner sentenced to hang must be measured for a rope to insure a proper drop length).

Again, the criteria are proven effective. Hanging is a sentence which is, by almost all indications and data, prone to severe mishaps, laced with pain, and often tortuously slow. Had the Ninth Circuit Court of Appeals reviewed Charles Campbell's claim utilizing these criteria, it is highly likely that Judge Stephen Reinhardt would have been writing the majority opinion striking down hanging rather than the dissenting one castigating those justices who upheld hanging.

Electrocution will be the final method to which the criteria are applied.²¹⁴ Developed as a new method of execution in the late Nineteenth Century, it was hailed as the humane replacement for hanging.²¹⁵ After using the criteria, the unconstitutional nature of electrocution is evident.

Evidence and testimony support the contention that electrocution is a slow method of punishment.²¹⁶ Although some people claim that the prisoner feels no pain after the onset of electrical surges, medical experts state that the prisoner is able to feel extreme pain through a substantial portion of the execution.²¹⁷ The recent set of "botched" electrocutions in several states has shown that electrocution is a highly unreliable form of execution.²¹⁸ Electrocution, in contrast to common belief, horribly disfigures the prisoner, prompting one Supreme Court justice to comment on electrocution's propensity to burn its victims.²¹⁹ Finally, although it has some legislative support, electrocution requires the prisoner to undergo degrading preparations prior to the execution.²²⁰ After examining the criteria, electrocution would likely be held unconstitutional if challenged today.

The criteria's effectiveness is demonstrated once again while looking at electrocution. It is a punishment which is painful, slow, and perhaps most strikingly, very unreliable. Were courts to use this criteria and obtain a well rounded view of the many aspects of electrocution, little doubt would exist as to its unconstitutionality.

214. See *supra* notes 62-65 for a brief discussion on the origin of electrocution as a method of execution in this country.

215. *Id.*

216. See *supra* notes 131 & 179 (referring to several recent electrocutions which have not transpired in the anticipated manner).

217. See *supra* note 130 and accompanying text (discussing the ability of prisoners to feel pain during the electrocution).

218. See *supra* note 179 (referring to the "botching" of several electrocutions in recent years).

219. *Glass v. Louisiana*, 471 U.S. 1080, 1083 (1985) (Brennan and Marshall, JJ., dissenting from the denial of certiorari). See *supra* note 140 (discussing electrocution's tendency to burn its victims).

220. See *supra* text accompanying note 186.

After applying the criteria to several methods of execution, one can see that the criteria enable courts to consider several factors in their analyses. Moreover, the application shows that the proposed criteria actually work in an effective and practical manner. By allowing courts to take a more comprehensive and well-rounded view of an execution method, the criteria allow courts to make educated and well-reasoned decisions regarding a method's constitutionality. A comprehensive perspective is more effective and preferable in contrast to the cursory analyses discussed earlier in the Note.

VI. CONCLUSION

Lower courts are not thorough when summoned to evaluate the constitutionality of an execution method. Rather than examining the method using several factors, many courts have chosen to analyze a method based only upon the amount of pain the method entails. Other courts have used a cursory analysis involving one or two factors, such as pain and terror, while shunning other factors, such as whether the method works quickly and reliably. Still other courts defer to the legislature.

Adding to the troubling trend is the fact that several courts rely exclusively on case law when analyzing a method's constitutionality. In doing so, these courts exclude relevant scientific and eyewitness evidence which is vital in ascertaining whether a method constitutes cruel and unusual punishment. In light of the fact that the Supreme Court has not addressed the constitutionality of any execution method in over a century, such evidence will contain the necessary medical and technical information that case law alone is unable to supply.

The popularity of the death penalty in the United States is rising.²²¹ Additionally, modern science may develop new and innovative methods of execution. Both of these conditions suggest that courts need the criteria and recommendations proposed in this Note to make well-informed rulings. By using the criteria and recommendations, the courts will be able to conduct thorough reviews of not only the execution methods utilized today, but those that may be developed in the future.

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221. WELSH S. WHITE, *THE DEATH PENALTY IN THE NINETIES* 24 n.147 (1991). A recent survey shows that 80% of U.S. citizens favor the death penalty. *Id.*