THE GALLOWS TO THE GURNEY: ANALYZING THE (UN)CONSTITUTIONALITY OF THE METHODS OF EXECUTION

ROBERTA M. HARDING*

I. INTRODUCTION

The Eighth Amendment to the Constitution of the United States prohibits the infliction of cruel and unusual punishment,[1] and the Supreme Court of the United States has firmly established that death as a penalty for the commission of certain homicides does not violate this proscription.[2] Currently the states employ a variety of methods to extinguish a condemned individual's life. Lethal injection, lethal gas, electrocution, hanging, and a firing squad are the methods presently being used to effectuate a state mandated penalty of death.[3]

Condemned inmates, however, are increasingly challenging the constitutionality of these methods of execution.[4] Despite the multitude of cases on this issue,

---

*Associate Professor of Law, University of Kentucky College of Law; B.S., University of San Francisco, 1981; J.D., Harvard University, 1986. I am grateful to Susan Maines, my Research Assistant, and Sandy Emerson and Teena Archer, my Staff Assistants, for their assistance with this project.

[1] The Amendment states, "Excessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted.*" U.S. CONST. amend. VIII (emphasis added). In Robinson v. California, 370 U.S. 660 (1962), the Supreme Court applied the Eighth Amendment to the states.

[2] *See* Gregg v. Georgia, 428 U.S. 153 (1976) (joint opinion). Presently 38 states, the federal government, and the military use death as a method of punishment. *See* Appendices A and B, *infra*. Since the Supreme Court's 1976 ruling in *Gregg*, approximately 302 individuals have been executed. *See* NAACP LEGAL DEFENSE FUND, DEATH ROW, U.S.A. 3 (Fall 1995). Texas, Florida, Virginia, and Louisiana are the states that lead the nation in the number of individuals executed since the death penalty's reaffirmation. *See id.* at 10. Although the United States is not the only country in the global community with the death penalty, it is the only one of its Western partners that permits capital punishment. *See* ROGER HOOD, THE DEATH PENALTY: A WORLD-WIDE PERSPECTIVE (1989).

[3] *See* Appendix A, *infra*.

[4] Not long after the Supreme Court's decision in *Gregg*, one commentator predicted that "a wave of cases examining the legality of the traditional modes of execution cannot be far away." Martin R. Gardner, *Execution and Indignities — An Eighth Amendment Assessment of Methods of Inflicting Capital Punishment*, 39 OHIO ST. L. J. 96, 97 (1978) (footnote omitted). *See* Campbell v. Wood, 18 F.3d 662, 687 (9th Cir.) (death by hanging is not cruel and unusual punishment), *cert. denied*, 114 S. Ct. 2125 (1994); Woolls v. McCotter, 798 F.2d 695 (5th Cir. 1986) (use of sodium thiopental for lethal injection is not cruel and unusual punishment); Gray v. Lucas, 710 F.2d 1048, 1061 (5th Cir.) (lethal gas as a method of execution is not cruel and unusual punishment), *cert. denied*, 463 U.S. 1237 (1983); Sullivan v. Dugger, 721 F.2d 719 (11th Cir. 1983) (death by electrocution is

there are no coherent and uniform tenets regarding how to analyze a charge that a particular method of execution violates the Eighth Amendment. This reality reflects the Supreme Court's recognition in 1878 that "[d]ifficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishment shall not be inflicted."[5]

Unfortunately, the jurisprudence in this particular area of the law has not significantly improved. This is primarily because the Court has avoided cases which would have provided an opportunity to clarify the complex and controversial issue of how the Cruel and Unusual Punishments Clause should be interpreted in the context of determining whether the aforementioned modes of execution comply with the prohibition embodied in the Eighth Amendment. This "tactic" led one jurist to observe that the Supreme Court "has rarely . . . addressed whether particular methods of execution employed in this country are unconstitutionally cruel."[6] As a result, a significant amount of dissension exists

---

not unconstitutional); Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978) (death by electrocution is not cruel and unusual punishment); Gerlaugh v. Lewis, 898 F. Supp. 1388, 1413 & n.19 (D. Ariz. 1995) (death by lethal gas is not unconstitutional); Booker v. Murphey, 3:95CV49 (S.D. Miss. 1995) (challenge to execution by lethal gas); Hunt v. Smith, 856 F. Supp. 251 (D. Md. 1994) (execution by lethal gas is not cruel and unusual punishment), *aff'd sub. nom.* Hunt v. Nuth, 57 F.3d 1327 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 724 (1996); Harris by and through Ramseyer v. Blodgett, 853 F. Supp. 1239 (W.D. Wash. 1994) (death by hanging is not cruel and unusual punishment); Hill v. Lockhart, 791 F. Supp. 1388, 1394 (E.D. Ark. 1992) (death by lethal injection does not offend the Eighth Amendment); Dix v. Newsome, 584 F. Supp. 1052 (N.D. Ga. 1984) (death by electrocution is not cruel and unusual); Mitchell v. Hopper, 538 F. Supp. 77 (S.D. Ga. 1982) (electrocution is not unnecessarily cruel and tortious); McCorquodale v. Balkcom, 525 F.Supp. 408 (N.D. Ga. 1981) (death by electrocution is not cruel and unusual punishment); Ruiz v. Arkansas, 582 S.W.2d 915 (Ark. 1979) (same); Booker v. Florida, 397 So.2d 910 (Fla. 1981) (same); Godfrey v. Francis, 308 S.E.2d 806 (Ga. 1983) (same); Glass v. Louisiana, 455 So.2d 659 (La. 1984), *cert. denied*, 471 U.S. 1080 (1985); Martin v. Commonwealth, 271 S.E.2d 123 (Va. 1980) (death by electrocution is not constitutionally impermissible). *But see* Fierro v. Gomez, 865 F. Supp. 1387, 1415 (N.D. Cal. 1994), *aff'd*, 77 F.3d 301 (9th Cir. 1996) (lethal gas as a method of execution violates the Eighth Amendment's proscription against the infliction of cruel and unusual punishments).

[5] Wilkerson v. Utah, 99 U.S. 130, 135-36 (1878). Legal commentators and jurists consistently have acknowledged that the clause's ambiguity is one of its most pronounced and problematic characteristics. *See* Trop v. Dulles, 356 U.S. 86, 99 (1958) (plurality opinion) (exact scope of constitutional phrase "cruel and unusual" has not been detailed by this Court) (footnote omitted); Weems v. United States, 217 U.S. 349, 368-69 (1910) (clause's contours have not been "exactly decided" and an "exhaustive definition" has not yet been developed); *see also* Furman v. Georgia, 408 U.S. 238, 264 (1972) (per curiam) (Brennan, J., concurring (citing *Weems*, 217 U.S. at 369)); Jackson v. Bishop, 404 F.2d 571, 577-79 (8th Cir. 1968) (citing *Wilkerson*, 99 U.S. at 135-36).

[6] *Campbell*, 18 F.3d at 681 (9th Cir.), *cert. denied*, 114 S. Ct. 2125 (1994); *see also* Gray v. Lucas 710 F.2d 1048, 1049 (5th Cir.) (noting that the Supreme Court has not addressed the constitutionality of the gas chamber), *cert. denied*, 463 U.S. 1237 (1983);

among the lower courts regarding the appropriate analytical standard to use when assessing whether a specific method of execution constitutes cruel and unusual punishment.[7] Only recently has a Court of Appeals developed a standard to address the issue. In its February 21, 1996 opinion affirming a district court judge's decision that execution by lethal gas violates the Eighth Amendment,[8] the United States Court of Appeals for the Ninth Circuit devised a standard for evaluating the constitutionality of methods of execution.[9]

The objective of this article is to examine this issue by formulating an analytical framework for determining when methods of execution constitute cruel and unusual punishment.[10] This task is accomplished Part II by briefly tracing the historical evolution of the Eighth Amendment's Cruel and Unusual Punishments Clause. Part III examines the prohibition's core components. Part IV reviews the traditional and modern interpretations of cruel and unusual punishment as applied to the methods of capital punishment, and assesses the standard with which to determine whether a specific method of execution comports with the present interpretation of cruel and unusual punishment as it is used in the context of capital punishment. The crux of this article explores and develops the qualitative, or subjective, facet of the Cruel and Unusual Punishments Clause, concluding that such a standard offers the best test for determining whether a method of execution is constitutional.

II. THE HISTORY OF THE EIGHTH AMENDMENT'S CRUEL AND UNUSUAL PUNISHMENTS CLAUSE

The Eighth Amendment prohibits the infliction of cruel and unusual punishment.[11] This proscription originated in the English Bill of Rights of 1689.[12] The

---

Gardner, *supra* note 4, at 97, 103. Gardner's article presents another analytical framework for evaluating the constitutionality of the modes of execution.

[7] An excellent example of this contentious and occasionally acrimonious disagreement is presented in the majority and dissenting opinions in the Ninth Circuit's decision in Campbell v. Wood, 18 F.3d 662 (9th Cir.), *cert. denied*, 114 S. Ct. 2125 (1994). Another example may be found in Judge Patel's opinion in Fierro v. Gomez, 865 F. Supp. 1387 (N.D. Cal. 1994), *aff'd*, 77 F.3d 301 (9th Cir. 1996). Judge Patel commented on how the lack of uniformity and guidance made it "difficult at times to decipher the *Campbell* opinion," *id.* at 1409, which she referred to in rendering her opinion in *Fierro*. *See also supra* note 4.

[8] *See Fierro*, 865 F. Supp. 1387.

[9] *See* Fierro v. Gomez, 77 F.3d 301 (9th Cir. 1996).

[10] Judge Reinhardt aptly observed that "[t]he issue of what methods of punishment are unconstitutional is one that lies at the heart of the Eighth Amendment." *Campbell*, 18 F.3d at 695 (Reinhardt, J., dissenting).

[11] *See supra* note 1.

[12] For a detailed discussion of the origins and history of the Eighth Amendment, see Anthony F. Granucci, *Nor Cruel and Unusual Punishments Inflicted: The Original Meaning*, 57 CAL. L. REV. 839 (1969); *see also* Note, *What Is Cruel and Unusual Punishment*, 24 HARV. L. REV. 54 (1910) [hereinafter *What Is Cruel and Unusual Punishment*].

English adopted this prohibition in response to the Stuart regime's frequent use of torture and other barbaric measures against English subjects.[13] These concerns followed the colonists across the Atlantic to the New World. In 1791 Congress addressed the populace's trepidation by adopting for ratification the Eighth Amendment to the Constitution.[14] Although this prohibition was a part of the Bill of Rights, nearly eighty years passed before the Supreme Court began to shape the clause's contours.[15] It was not until 1962 that the Court expressly announced that the Eighth Amendment's bar against the infliction of cruel and unusual punishments applies to the states through the Fourteenth Amendment.[16]

III. THE CLAUSE'S CORE COMPONENTS

The Cruel and Unusual Punishments Clause has two primary dimensions: methods of punishment and proportionality. The methods of punishment component ensures that a specific mode of punishment is not cruel and unusual. For example, since the Eighth Amendment was adopted it has been assumed that previous traditional forms of punishment—such as burning alive on the stake, crucifixion, breaking on the wheel, disemboweling while alive, drawing and quartering, and public dissection—were manifestly cruel and unusual methods of punishment for an offense.[17]

---

[13] *See What Is Cruel and Unusual Punishment*, *supra* note 12, at 55; *see generally* Granucci, *supra* note 12.

[14] *See* U.S. CONST. amend. VIII (1791).

[15] *See* Purveyor v. Commonwealth, 5 Wall. 475, 479-80 (1867).

[16] *See* Robinson v. California, 370 U.S. 660 (1962). However, the posture of the Court's discussion in an earlier case suggests that the Court either wanted to subject the states to the Eighth Amendment's limitations or implicitly applied the ban to the states. *See In re* Kemmler, 136 U.S. 436, 443-47 (1890) (per curiam). Nonetheless, the Court ultimately determined that death by electrocution did not violate Mr. Kemmler's due process rights under the Fourteenth Amendment. *See id.* Despite this holding, the substance of the opinion was dependent upon the Court's consideration of whether death by electrocution constituted cruel and unusual punishment. For example, the Court relied upon the assurances made to it by New York's courts that the electric chair would result in a painless and instantaneous death. *See id.* at 442-44; *see also* Fierro v. Gomez, 865 F. Supp. 1387, 1409 n.24 (N.D. Cal. 1994) (Judge Patel reached a similar conclusion regarding the substance of the *Kemmler* Court's analysis), *aff'd*, 77 F.3d 301 (9th Cir. 1996); *see* Gardner, *supra* note 4, at 100-02.

[17] *See* Wilkerson v. Utah, 99 U.S. 130, 135 (1878); *see also* Glass v. Louisiana, 471 U.S. 1079, 1084 (1985) (Brennan, J., dissenting to denial of certiorari); Furman v. Georgia, 408 U.S. 238, 264-65 (1972) (per curiam) (Brennan, J., concurring); Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 463 & n.4 (1947); *In re* Kemmler, 136 U.S. 436, 446-47 (1889); Campbell v. Wood, 18 F.3d 662, 681 (9th Cir.), *cert. denied*, 114 S. Ct. 2124 (1994); Gray v. Lucas, 710 F.2d 1048, 1058 (5th Cir.), *cert. denied*, 436 U.S. 1237 (1983); *Fierro*, 865 F. Supp. at 1409; Gardner, *supra* note 4, at 100-01; Granucci, *supra* note 12, at 863-65.

Other former barbaric methods of punishment include the following: "a chamber of metal spikes or [the Sicilian] body cage where the only way to come out is as a skele-

Proportionality is concerned with guaranteeing the absence of a drastic disparity between the severity of the offense and the punishment imposed.[18] *Weems v. United States*[19] provides the classic illustration of this fundamental principle. In *Weems* the petitioner had been convicted for falsifying a cash book, an official public document,[20] and was sentenced to *cadena temporal*.[21] The Court, finding the disparity between the crime and the punishment "repugnant to the bill of rights," reversed the judgment and dismissed the proceedings against Weems.[22]

Although the rights protected by the Eighth Amendment are comprised of these two distinct components, the "cruel and unusual punishments" analysis should not cease at this juncture. Instead, the analysis must advance to explore the issue of how the phrase "cruel and unusual punishments" is applied to a specific method of execution. This first consideration requires an examination of how the clause has been interpreted in this context.

IV. INTERPRETING "CRUEL AND UNUSUAL PUNISHMENT" IN THE CONTEXT OF METHODS OF EXECUTION

The long-acknowledged ambiguity of the clause's language makes interpreting the cruel and unusual clause in this context a difficult task.[23] In fact, "the absence of an exact or exhaustive definition of the [Eighth] Amendment's ban has been repeatedly noted."[24] For example, in *Trop v. Dulles*[25] the Supreme Court acknowledged that "[t]he exact scope of the constitutional phrase 'cruel and unusual punishment' has not been detailed."[26] Nonetheless, the decisions interpreting the clause reveal its initial interpretation in this context and provide the

---

ton;" the "bronze bull" into which the offender was placed inside and cooked alive over an open fire; and being "impaled inside the 'Virgin of Nuremberg,' a spike-filled metal chamber." These tools of punishment can be viewed at the Criminology and Torture Museum in Rome, Italy. Brian Murphy, *Where The Words 'Cruel And Unusual Punishment" Don't Do Justice*, AP, Mar. 5, 1994, *available in* WESTLAW, Associated Press file.

[18] *See* Enmund v. Florida, 458 U.S. 782, 801 (1982) (the punishment of death is disproportionate when the defendant did not commit the murder); Coker v. Georgia, 433 U.S. 584, 592 (1977) (plurality opinion) ("[A] sentence of death is grossly disproportionate and excessive punishment for the crime of rape and therefore is forbidden by the Eighth Amendment as cruel and unusual punishment.") (footnote omitted).

[19] 217 U.S. 349 (1910).

[20] *See id.* at 357.

[21] *See id.* at 356. *Cadena temporal* is an extremely harsh punishment, requiring the convicted individual to "labor for the benefit of the state[,] . . . always carry a chain at the ankle . . . [and] be employed at hard and painful labor" for twelve to twenty years. The convict is also placed under surveillance for life. *See id.* at 364-66.

[22] *Id.* at 382.

[23] *See* Wilkerson v. Utah, 99 U.S. 130, 135-36 (1878); *see supra* note 5.

[24] Jackson v. Bishop, 404 F.2d 571, 577 (8th Cir. 1968) (citations omitted); *see also Weems*, 217 U.S. at 368-69.

[25] 356 U.S. 86 (1958).

[26] *Id.* at 99.

foundation for an analytical scheme for investigating the constitutionality of a method of execution.

A. *The Historical Interpretation Test*

The traditional analytical model is rooted in history, thus the nomenclature "the historical interpretation test." This test requires a historically oriented evaluation of the method of punishment under consideration. Consequently, if the proposed mode of execution was banned in 1791 when the Eighth Amendment was adopted, then that method of punishment is virtually a per se violation of the Cruel and Unusual Punishments Clause.[27] Conversely, if the method of execution was legal in 1791, such as hanging or use of a firing squad, it would not violate the clause's ban.[28]

Applying this traditional method of analysis became problematic when technological advances brought about new methods of execution that were nonexistent when the Eighth Amendment was adopted, such as electrocution and lethal gas. A prime example of this quagmire appears in *In re Kemmler*,[29] which was the first case tacitly to find that a method of execution — electrocution — was not cruel and unusual punishment. Kemmler had the misfortune of being the first individual selected for this form of execution.[30] In objecting to this method of execution, Kemmler charged that it violated state and federal constitutional prohibitions against the infliction of cruel and unusual punishments and deprived him of due process under the federal Constitution.[31] The Court of Appeals of New York rejected Kemmler's position, and adopted the lower court's holding that death by electrocution was not cruel and unusual punishment.[32] On review, the Supreme Court facially rejected Kemmler's proposition that the Court use the

---

[27] The *Weems* Court observed that the historical test is basically a "backwards looking" test. *Weems*, 217 U.S. at 377. *See also* Furman v. Georgia, 408 U.S. 238, 262 (1972) (Brennan, J., concurring) (citing *Weems* for this description of the historical interpretative test); *see supra* text accompanying note 17 (describing punishments banned at the time the Eighth Amendment was adopted).

[28] *See* Wilkerson v. Utah, 99 U.S. 130 (1878) (firing squad). Even modern courts have resorted to this interpretation. For example, in Campbell v. Wood, 18 F.3d 662 (9th Cir.), *cert. denied*, 114 S. Ct. 2125 (1994), the Ninth Circuit used the historical interpretation test to evaluate a challenge to the constitutionality of execution by hanging. To support its conclusion that death by hanging did not constitute cruel and unusual punishment, the court stated that "[t]here is no dispute that execution by hanging was acceptable when the Bill of Rights was adopted." *Campbell*, 18 F.3d at 682.

[29] 136 U.S. 436 (1889).

[30] *See id.* New York had just passed legislation instituting death by this new method. The statute mandated that "[t]he punishment of death must, in every case, be inflicted by causing to pass through the body of the convict a current of electricity of sufficient intensity to cause death, and the application of such current must be continued until such convict is dead. *See id.* at 444-45.

[31] *See id.* at 440-42.

[32] *See id.* at 443-44.

Eighth Amendment as a vehicle to decide the constitutionality of electrocution.[33]Despite its "formal" repudiation, it can be argued that the Court implicitly decided that one reason New York could effectuate death by electrocution was because this method did not constitute cruel and unusual punishment. Supporting this proposition is the Court's statement that "[p]unishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word *as used in the Constitution.* It implies there is something inhuman and barbarous, something more than the mere extinguishment of life."[34] Thus, the Court might have implicitly used an Eighth Amendment analysis to determine the constitutionality of the proposed method of execution.[35] The statement also reflects the Court's effort to define the phrase "cruel and unusual punishments."

Although *In re Kemmler* has varying interpretations, the case still marks a turning point in the continued viability of the historical interpretation test. The Court realized that applying the historical interpretative test to determine the constitutionality of methods of punishment was becoming increasingly difficult as technological advances in the area of life extinguishment continued to be made.[36] Consequently, the simplistic and unsophisticated historical interpretation

---

[33] *See id.* at 446. There is some debate as to whether the Supreme Court implicitly made the Eighth Amendment's prohibition applicable to the states in *In re* Kemmler. Justice Burton, while noting that the *In re* Kemmler case was decided on due process grounds, *see* Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 472 (1947), also noted that the *In re* Kemmler Court refers to the "cruel and unusual punishments" language in the Constitution when deciding that death by electrocution is constitutional. *Id.* at 476; *see also* Furman v. Georgia, 408 U.S. 238, 323 (Marshall, J. concurring); Fierro v. Gomez, 865 F. Supp. 1387, 1409 n.24 (N.D. Cal. 1995), *aff'd*, 77 F.3d 301 (9th Cir. 1996).

[34] *In re* Kemmler, 136 U.S. at 447 (emphasis added).

[35] If the Court did implicitly apply the Eighth Amendment's prohibition against cruel and unusual punishments in New York to *In re* Kemmler, it later repudiated that implied application of the Eighth Amendment's cruel and unusual punishment ban. Three years later in O'Neil v. Vermont, 144 U.S. 323 (1892), the Court reconsidered the issue of the applicability of the Eighth Amendment to the states. In *O'Neil* a large fine was imposed against a defendant convicted of bootlegging. *See id.* at 330. Nonpayment of the fine would result in incarceration with hard labor. *See id.* at 331. Mr. O'Neil objected to the imposition of this sentence on the grounds that it violated the Eighth Amendment. The Court rejected his argument and held that the Eighth Amendment did not apply to the states. *See id.* at 332. Given the posture of the case, however, the Court's decision might not have detracted from the concerns regarding the cruelty of methods of execution previously announced in *In re* Kemmler. For example, in *O'Neil* the defendant was convicted of 307 individual offenses which he claimed were excessive. *See id.* at 331. The Court's disagreement with this proposition suggests that the Court's pronouncement addressed the proportionality dimension of the Eighth Amendment and not the method of punishment dimension. *See supra* Part III for a discussion of the proportionality facet. *See* Gardner, *supra* note 4, at 101 (at the minimum the Court used *In re* Kemmler "to discuss the cruel and unusual punishment clause").

[36] As previously noted this was an integral part of the *Kemmler* case where the Court

method of analysis became insufficient in determining whether the implementation of a particular method of execution violated the cruel and unusual punishments prohibition.

The historical test's inadequacy in the modern world provided an impetus for the creation and adoption of a new guiding principle. The Supreme Court noted the propriety of adopting a new approach when it stated that

> [l]egislation . . . is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is particularly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions.[37]

Eventually the cruel and unusual punishment jurisprudence definitively evolved to include a dynamic stance.[38] The Court's opinion in *Trop v. Dulles*[39] latched onto this principle, noting that the "scope [of the Eighth Amendment] is not static."[40] This statement sowed the seeds for the modern interpretation of the Cruel and Unusual Punishments Clause.

B. *The Modern Interpretation of The Cruel and Unusual Punishments Clause*

The Court's proclamation in *Trop v. Dulles* that "evolving standards of decency"[41] is the litmus test for determining whether a law violates the principles embodied in the Eighth Amendment represented the Court's vehicle for unambiguously promulgating the clause's modern interpretation.[42] Although the

---

was confronted with a method of execution – electrocution – that was the offspring of a technological advance – electricity. *See Kemmler*, 136 U.S. at 442-43; *see also* Gray v. Lucas, 463 U.S. 1237, 1246 (Marshall, J., dissenting to denial of certiorari) (discussing the movement away from primitive modes of execution to more modern modes); *see also* STEPHEN TROMBLEY, THE EXECUTION PROTOCOL 16-22 (1992).

[37] Weems v. United States, 217 U.S. 349, 373 (1910).

[38] *See id.* In 1988 the Supreme Court announced that this was precisely the message sent by the *Weems* Court in 1910. *See* Thompson v. Oklahoma, 487 U.S. 815, 821 n.4 (1988); Campbell v. Wood, 18 F.3d 662, 695 (9th Cir.), *cert. denied*, 114 S. Ct. 2125 (1994) (dissenting opinion notes that *Weems* called for expanding the cruel and unusual punishment clause).

[39] Trop v. Dulles, 356 U.S. 86 (1958) (plurality opinion).

[40] *Id.* at 101. Even the Court in Gregg v. Georgia, 428 U.S. 153, 172-73 (1976), acknowledged the validity of this facet of the Cruel and Unusual Punishments Clause.

[41] *Trop*, 356 U.S. at 101.

[42] Prior to *Trop* the Court had ventured in this area, but failed to advance a significant change. *See In re* Kemmler, 136 U.S. 436, 444 (1890) (Court's endorsement of the search for humane methods of execution); *see also* Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 474 (1947) (Burton, J., dissenting).

The application of the *Trop* standard is not limited to cases challenging the constitutionality of the method of execution. *See* Thompson v. Oklahoma, 487 U.S. 815 (1988)

"evolving standards of decency" standard is the pinnacle of the inquiry into the constitutionality of a method of execution, the variables encompassed in this inquiry still must be determined. While dissension still exists as to the proper resolution of these issues,[43] a perusal of past and present jurisprudence supports the conclusion that the application of this modern standard requires evaluating two variables. These two variables can be referred to as the qualitative component and the quantitative component.

V. The Qualitative Dimension of the Analysis of Whether a Method of Execution Comports with the Cruel and Unusual Punishments Clause

The test for evaluating whether a method of execution passes constitutional muster is comprised of two critical factors: the qualitative, or subjective, feature, and the quantitative, or objective, feature.[44] The qualitative factor is composed of three core factors: whether death is instantaneous; whether death is lingering; and whether death is painful. Consequently, if the method of execution satisfies the qualitative dimension of the cruel and unusual punishments clause's evolving standards of decency test, it must be "certain to produce *instantaneous*, and,

---

(evolving standards of decency prohibit the execution of someone who was 15 years old or younger at the time the offense was committed); Coker v. Georgia, 433 U.S. 584 (1977) (evolving standards hold that execution for the crime of rape is excessive and disproportionate to the severity of the offense); Estelle v. Gamble, 429 U.S. 97, 102 (1976) (applying evolving standards of decency to medical care for incarcerated individuals); *cf.* Stanford v. Kentucky, 492 U.S. 361 (1989) (evolving standards of decency are not violated by the execution of 16- and 17- year-old individuals as modern societal consensus does not condemn it).

[43] The clash between the majority opinion in *Campbell* and Judge Reinhardt's forceful dissent illustrate this point. *See* Campbell v. Wood, 18 F.3d 662 (9th Cir.), *cert. denied*, 114 S. Ct. 2125 (1994); *see also* Fierro v. Gomez, 865 F. Supp. 1387 (N.D. Cal. 1995), *aff'd*, 77 F.3d 301 (9th Cir. 1996).

[44] As previously noted, this article's inquiry is limited to the qualitative feature. *See supra* Part I. *See also Campbell*, 114 S. Ct. at 2126 (Blackmun, J., dissenting to denial of certiorari); Gray v. Lucas, 463 U.S. 1237, 1245-46 (1983) (Marshall, J., dissenting to denial of certiorari); Furman v. Georgia, 408 U.S. 238, 278-79, 296-97 (1972) (Brennan, J., concurring); *Campbell*, 18 F.3d at 682, 697-700 (Reinhardt, J., dissenting); *Fierro*, 865 F. Supp. at 1405-08.

The court has previously endorsed using the objective standard in other contexts assessing the constitutionality of the disputed practice. *See* Thompson v. Oklahoma, 487 U.S. 815 (1988) (few states allow the death penalty for individuals who were younger than 16 at the time of the crime); Ford v. Wainwright, 477 U.S. 399 (1986) (most states do not allow the execution of incompetent condemned inmates); Enmund v. Florida, 458 U.S. 782 (1982) (few states allow the death penalty for someone who was not the "trigger person"); Coker v. Georgia, 433 U.S. 584 (1977) (few states allow death as a method of punishment for rape); *see also Campbell*, 114 S.Ct. at 2126-27 (Blackmun, J., dissenting to denial of certiorari); *cf.* Stanford v. Kentucky, 492 U.S. 361 (1989) (majority of states permit the imposition of the death penalty when the offender was 16 years or older at the time the crime was committed.).

therefore, *painless* death."[45]

The genesis of the instantaneous death requirement occurred more than one hundred years ago in the *In re Kemmler* decision.[46] In *Kemmler* the Supreme Court of the United States recited and endorsed the various New York courts' assurances that electrocution as a method of punishment would result in an instantaneous and painless death.[47] For example, the Court relied upon the conclusion that "[there is no] reasonable doubt that the application of electricity to the vital parts of the human body, under such conditions and in the manner contemplated by the statute, *must result in instantaneous, and consequently in painless death.*"[48]Accordingly, the Court embraced the principle that in order for a method of execution not to inflict cruel and unusual punishment, it must guarantee an instantaneous and painless death.[49]

The "lingering death" component also has its origin in the *In re Kemmler* decision. The Court noted, "Punishments are cruel when they involve torture or a *lingering death*; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there is something inhuman and barbarous, something more than the mere extinguishment of life."[50] Thus, using *In re Kemmler* as a vehicle to develop jurisprudence in this context, the Court established the requirement that in order for the method at issue to be found constitutional it cannot cause the condemned to suffer a "lingering death." Textually the lingering death facet might appear redundant since the Eighth Amendment already requires that the mechanism of death produce an instantaneous death. These two components are distinguishable, however. The proscription against a method of execution which causes a lingering death actually augments the instantaneous death requirement. When evaluating the constitutionality of a particular method, a court must examine objective evidence, primarily the amount of time that passes before an individual actually expires.

The final component of the quantitative standard mandates that the method of execution result in a painless death. This prong of the standard also originated in the *In re Kemmler* opinion through the Court's endorsement of the position that the method of execution "must result in . . . painless[] death."[51]

---

[45] *In re* Kemmler, 136 U.S. 436, 442-44 (1890).

[46] *See supra* Part IV.A. (discussing the *Kemmler* case).

[47] *See Kemmler*, 136 U.S. at 443-44.

[48] *Id.* (emphasis added).

[49] This conclusion was advanced by Justice Butler in his dissenting opinion in Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 475 (1947) (Butler, J., dissenting). Justice Butler noted that substantively the *Kemmler* Court established that methods of execution must produce an instantaneous death as opposed to "death by installments." *Id.* at 474.

[50] *Kemmler*, 136 U.S. at 447 (emphasis added); *see also* Gregg v. Georgia, 428 U.S. 153, 173 (1976); Trop v. Dulles, 356 U.S. 86, 100 (1958); *Resweber*, 329 U.S. at 463; Granucci, *supra* note 12, at 862.

[51] *Kemmler*, 136 U.S. at 443-44; *see also* Furman v. Georgia, 408 U.S. at 238, 271 (1972) (Brennan, J., concurring); *Resweber*, 329 U.S. at 474 (Burton, J., dissenting) (noting that the Court held in *Kemmler* that death by electrocution was not cruel and unusual punishment because death was instantaneous *and painless*); Gardner, *supra* note 4, at

The Ninth Circuit's recent decision in *Fierro v. Gomez*[52] substantially adopts this multi-faceted standard to assess the constitutionality of a method of execution. The *Fierro* court cited the requirement established by *In re Kemmler* that the mode of execution must not involve a "lingering death."[53] It also incorporated the criteria that the death be spontaneous.[54] Yet the Ninth Circuit suggested that the spontaneous death component might be satisfied if the method of execution causes spontaneous unconsciousness.[55] Relying on its opinion in *Campbell*,[56] the court stated that "[d]eath where unconsciousness is likely to be immediate or within a matter of seconds is apparently within constitutional limits."[57] The court also addressed the need for the death producing mechanism to result in a painless death.[58]

With the standard established, the next step is to decide whether the present methods of execution satisfy the qualitative dimension of the evolving standards of decency test. This task is best accomplished by applying the qualitative dimension's individual components to the methods of execution presently used and analyzing the outcome in each instance.

A. *The Method of Execution Must Cause Instantaneous Death*

The methods of execution presently in use are lethal gas, lethal injection, hanging, the firing squad, and electrocution.[59] To pass constitutional muster, each method must cause the condemned individual to die instantaneously. Serious noncompliance problems exist with respect to this element.

Death by hanging provides a haunting and frightening example of this problem.[60] The typical gallows protocol requires using a rope between ¾ and 1 ¼ inches in diameter.[61] A thick rope is used because "a very slender ligature is more prone to break the skin, increasing the chances of partial or complete decapitation."[62] The rope is boiled and stretched to reduce its elasticity and coated with wax or oil so that it slides easier on to the neck and helps the neck bear the kinetic energy created by the force of the drop.[63] The condemned person is

---

103-05.

[52] 77 F.3d 301 (9th Cir. 1996).

[53] *Id.* at 304.

[54] *See id.* at 306.

[55] *See id.*

[56] Campbell v. Wood, 18 F.3d 662 (9th Cir.) (holding that death by hanging is constitutional) (quoting Fierro v. Gomez, 865 F. Supp. 1387 (N.D. Cal. 1994)), *cert. denied*, 114 S. Ct. 2125 (1994).

[57] Fierro v. Gomez, 77 F.3d 301, 307 (9th Cir. 1996).

[58] *See id.* at 307.

[59] *See* Appendix A.

[60] The State of Washington permits death by hanging. *See* Appendix A.

[61] *See* Campbell v. Wood, 18 F.3d 662, 683 (9th Cir.), *cert. denied*, 114 S. Ct. 2125 (1994); *see also* Gardner, *supra* note 4, at 119-23.

[62] *Id.* at 683-84.

[63] *See id.* at 683-85.

weighed so the proper length of rope can be determined.[64] At the time of execution the noose is tightened about the neck of the condemned and tied so that the knot is just below the left ear.[65] The individual is then placed over a trap door which later opens, causing the person's body to fall through the hole below.[66] A doctor observes the hanging and checks the person's vital signs once the body stops moving.[67] After all signs of life cease, the inmate is pronounced dead.[68] Once another fifteen to twenty minutes pass, the body is released from the noose and an autopsy performed.[69]

For an execution by hanging, the accuracy of the length of the "drop" is extremely important.[70] If performed correctly, the hanging dislocates the neck of the condemned, causing a fairly rapid death.[71] If the drop is too short, however, there is a substantial risk that the individual will be asphyxiated and "suffer a *slow* lingering, and painful death."[72] The following passage describes what occurs when this risk materializes:

> [L]ividity and swelling of the face, especially of the ears and lips, which appear distorted; the eyelids swollen, and of a blueish colour; the eyes red, projecting forwards, and sometimes partially forced out of their cavities[;] . . . a bloody froth or frothy mucus sometimes escaping from the lips and nostrils[;] . . . the fingers are generally much contracted or firmly clenched[;] . . . the urine and faeces are sometimes involuntarily expelled at the moment of death.[73]

---

[64] *See id.* at 683.

[65] *See id.* at 685.

[66] *See id.* (adapted from testimony of Dr. Brady, a witness to the execution of Westley Alan Dodd in January, 1993, in Washington State).

[67] *See id.*

[68] *See id.*

[69] *See id.*

[70] *See* Harold Hillman, 22 *Perceptions* 745, 746 (1993); *Campbell*, 18 F.3d at 684.

[71] *See Campbell*, 18 F.3d at 683-84; Gardner, *supra* note 4, at 120. The precise cause of death from hanging results from various mechanisms. The *Campbell* opinion provides the following list of some of the exact causes of death: occlusion of the carotid arteries; occlusion of the vertebral arteries; occlusion of the jugular veins; reflexive cardiac arrest; occlusion of the airway; tearing, transection, trauma, or shock to the spinal cord; fracture or separation of the cervical spinal column; interruption of the odentoid process; and irreversible brainstem damage. *See Campbell*, 18 F.3d at 683-84.

[72] *Campbell*, 18 F.3d at 694 (Reinhardt, J., dissenting) (emphasis added); *see also* Campbell v. Wood, 114 S. Ct. 2125, 2127 (1994) (Blackmun, J., dissenting to denial of certiorari) (hanging always involves the risk of death by strangulation); Gardner, *supra* note 4, at 120. One commentator has observed that "*nobody doubted that hanging was a slow* and painful *way of killing people.* Neither the introduction of the Newgate drop in 1783 nor the lengthy debates a century later about the ratios between body weight and drop ever succeeded in converting the gallows into an efficient instrument of death." V.A.C. GATRELL, THE HANGING TREE 45 (1994)(emphasis added).

[73] GATRELL, *supra* note 72, at 46 (citation omitted); *see also* Gardner, *supra* note 4, at 121.

It is extremely difficult, if not virtually impossible, to reconcile this rendition of death by hanging with the Cruel and Unusual Punishments Clause's spontaneous death requirement.[74]

Death by lethal gas presents another disturbing instance of noncompliance with the spontaneity requirement. At the appointed time of execution, the condemned is led into the gas chamber, where straps are placed across his legs, arms, groin, and chest to fasten securely the condemned into the execution chair.[75] One physician monitors the person's heartrate with an electrocardiogram.[76] Under the chair is a bowl containing a mixture of sulfuric acid and distilled water.[77] A bag containing one pound of sodium cyanide pellets hangs over the bowl.[78] The executioner releases the pellets into the liquid filled bowl.[79] The deadly chemical reaction releases hydrogen cyanide gas that rises through the holes in the condemned's chair.[80] Prior to the execution, the prisoner will have been told to take a deep breath when he smells rotten eggs. After inhaling the lethal gas, the inmate experiences trouble breathing. One observer noted that the condemned inmate's breathing efforts resembled those of "a choking man with a rope cutting off his windpipe . . . . He could get no air in the chamber."[81] Before eventually losing consciousness, "there is evidence of extreme horror, pain and strangling. The eyes pop. The skin turns purple and the victim begins to drool."[82]

This method of execution depletes the body's oxygen cells and "is analogous to . . . suffocation due to drowning or strangulation."[83] The sensation felt by the dying individuals is often referred to as "air hunger."[84] Because the condemned

---

[74] As detailed above, the *Campbell* court was aware that this mode of execution created the risk that death could occur by decapitation or asphyxiation, neither consequence satisfying the spontaneous death prerequisite. The court refused, however, to find that death by hanging violated the Cruel and Unusual Punishments Clause. *See Campbell*, 18 F.3d at 687.

[75] *See* Fierro v. Gomez, 865 F. Supp. 1387, 1391 (N.D. Cal. 1995), *aff'd*, 77 F.3d 301 (9th Cir. 1996).

[76] *See id.*

[77] *See id.* at 1391-92.

[78] *See id.* at 1392.

[79] *See id.*

[80] *See id.*

[81] Gray v. Lucas, 710 F.2d 1048, 1059 (5th Cir.), *cert. denied*, 463 U.S. 1237 (1983).

[82] Jacob Weisberg, *This Is Your Death; Capital Punishment: What Really Happens*, 205 NEW REPUBLIC 23 (1991). Once the doctor pronounces the inmate dead, a vent is opened and an exhaust fan is turned on to remove the deadly gas from the chamber. The body is then sprayed with ammonia to neutralize the remaining gas. After a short interval, orderlies, in gas masks and gloves, remove the body after first ruffling the hair to release any gas. *See id.* For similar descriptions of death by lethal gas, see *Fierro*, 865 F. Supp. at 1391-92; Gardner, *supra* note 4, at 127-28; Hillman, *supra* note 70, at 748.

[83] *Fierro*, 865 F. Supp. at 1396; *see also Gray*, 710 F.2d 1048 (5th Cir.), *cert. denied*, 463 U.S. 1237 (1983).

[84] *Fierro*, 865 F. Supp. at 1396.

inmate is fighting a losing battle for air, death is not instantaneous. Eyewitness testimony further supports the conclusion that the extinguishment of life produced by the use of lethal gas is not spontaneous. A correctional officer witnessing Billy Wesley Monk's execution by lethal gas in 1961 described the condemned man's death throes as a "thrashing about in search of oxygen very much like a fish out of water."[85] Jesse Walter Bishop's involuntary meeting with the gas chamber resulted in what was described as a "protracted struggle with the lethal cyanide gas"[86] before finally succumbing to the lethal fumes. The same observer noted that "you could not tell when Mr. Bishop finally lost consciousness."[87] There is clear evidence of the serious problems concerning lethal gas' ability to comply with this portion of the constitutional mandate. Excluding Judge Patel's decision in *Fierro v. Gomez*,[88] which the Court of Appeals for the Ninth Circuit recently affirmed,[89] most courts continue to hold this method of execution constitutional.[90]

The administration of electrical currents to an individual as a means of causing death presents another situation where it is unlikely that the instantaneous death requirement is satisfied. The inmate is led into the death chamber, where belts are fastened around the person's chest, groin, legs, and arms to strap him into the electric chair.[91] The head is secured to the back of the chair and electrodes are placed on shaved locations on the person's head and legs.[92] The electrode placed on the head is attached to a sponge moistened to aid conductivity.[93] Attendants place a helmet over the prisoner's head as witnesses, guards and a doctor all move to an observation room. The first jolt of electricity is applied at 2000-2200 volts between seven and twelve amperes.[94] Following delivery of the first surge, the doctor waits for the body to cool, wipes moisture from the chest, and applies a stethoscope.[95] If the inmate is still alive, the state applies another jolt.[96] Otherwise, the doctor pronounces the inmate dead. Generally the body is

---

[85] *Id.* at 1403.

[86] *Gray*, 710 F.2d at 1058.

[87] *Id.* at 1059.

[88] 865 F. Supp. 1387 (N.D. Cal. 1994).

[89] *See* Fierro v. Gomez, 77 F.3d 301 (9th Cir. 1996).

[90] *See, e.g., Gray*, 710 F.2d 1048 (5th Cir.) (holding that death by lethal gas is constitutional), *cert. denied*, 463 U.S. 1237 (1983); Gerlaugh v. Lewis, 898 F. Supp. 1388 (D. Ariz. 1995) (same); Hunt v. Smith, 856 F. Supp. 251 (D. Md. 1994) (same), *aff'd sub nom.* Hunt v. Nuth, 57 F.3d 1327 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 724 (1996).

[91] *See* Deborah Denno, *Is Electrocution an Unconstitutional Method of Execution? The Engineering of Death over the Century*, 35 WM. & MARY L. REV. 551, 636 (1994).

[92] *See* Glass v. Louisiana, 471 U.S. 1080, 1086 (1985) (Brennan, J., dissenting to denial of certiorari).

[93] *See* Denno, *supra* note 91, at 651.

[94] *See Glass*, 471 U.S. at 1086 n.13 (1985) (Brennan, J., dissenting to denial of certiorari).

[95] *See* Denno, *supra* note 91, at 631.

[96] *See Glass*, 471 U.S. at 1090.

extremely hot with third-degree burns on the scalp and the legs.[97] The brain practically cooks as many tissues swell or burst.[98] After the body cools it is removed for an autopsy.[99] Consider a condensed version of what "[w]itnesses routinely report" regarding electrocution as a mechanism of death: "The condemned prisoner 'cringes,' 'leaps,' and 'fights the straps with amazing strength.' 'The hands turn red, then white, and cords of the neck stand out like steel bands.' The prisoner's limbs, fingers, toes, and face are severely contorted."[100]

A variety of factors, including poor maintenance of the necessary equipment, lack of trained personnel, and differences in physiological resistance,[101] contribute to this method's inability to comply with the instantaneousness requirement. Jesse Tafero's bungled execution in 1990 is perhaps the most notorious example of how electrocution does not result in a spontaneous death.[102] When Tafero received the first jolt of electricity, flames erupted from his head.[103] This malfunction was allegedly due to the use of improper equipment — a synthetic sponge instead of a natural sponge was placed in the headpiece — and properly trained personnel were not present for the execution.[104] Because of these errors, three jolts of electricity were delivered to Tafero before he expired.[105] Because of the conductivity problems which prevented the deliverance of the appropriate amount of electrical current to Tafero during the first jolt, it is unlikely that he died instantaneously.

B. *The Method of Execution Cannot Result in a "Lingering Death"*

Death by lethal gas poses serious risks of noncompliance with the ban on methods which result in a lingering death. Dr. Traystman,[106] a noted expert on

---

[97] *See* Denno, *supra* note 91, at 637.

[98] *See Glass*, 471 U.S. at 1088.

[99] *See Hillman, supra* note 70, at 747; *See also* Weisberg, *supra* note 82; Denno, *supra* note 91 at 630-33 (1994); Gardner, *supra* note 4, at 125-27.

[100] *Glass*, 471 U.S. at 1086-87.

[101] *See id.* at 1089; Denno, *supra* note 91, at 648 n.632 (addressing the issue of lack of proper training).

[102] Other disturbing examples of the failure to comply with the spontaneity component are described in Deborah Denno's article. *See* Denno, *supra* note 91, at 664-74.

[103] *See Florida Executes Killer, Electric Chair Works Properly*, SUN SENTINEL, July 28, 1990, at 19A; *see also* Ellen McGarrahan, *Maintenance Man Changed 'Worn-Out' Sponge on Own*, MIAMI HERALD, May 9, 1990, at B5.

[104] *See* TROMBLEY, *supra* note 36, at 44-51; *see also* Tom Davidson, *Maintenance Workers Switched Sponge for Execution*, SUN SENTINEL, May 9, 1990, at 1A; Larry Keller, *Foes Call Execution Cruel, Unusual Torture*, SUN SENTINEL, May 5, 1990 at 1A; McGarrahan, *supra* note 69; Donna O'Neal, *Killer's Death Came Instantly, Martinez Says*, ORLANDO SENTINEL, May 9, 1990, at B1.

[105] *See* Keller, *supra* note 104.

[106] Dr. Traystman is an expert on hypoxia and its effects on the heart and brain. He is the Vice Chair of the Department of Anesthesiology and Critical Care Medicine and Director of Research at the Johns Hopkins University School of Medicine. Dr. Traystman provided expert testimony on behalf of the condemned inmates in *Gray* and *Fierro* who

the subject, observes that

> [w]hen anoxia[107] sets in, the brain remains alive for two to five minutes. The heart will continue to beat for a period of time after that, perhaps five to seven minutes, or longer, though at a very low cardiac output. Death can occur *ten to twelve minutes after the gas is released in the chamber.*[108]

California's execution of Aaron Mitchell supports Dr. Traystman's conclusion.[109] Howard Brodie, an artist for CBS news, witnessed five executions, including Aaron Mitchell's in 1967.[110] In providing a rendition of his observations, Brodie noted the following:

> His head was down for several seconds. Then, as we had thought it was over, he again lifted his head in another convulsion. His eyes were open, he strained and he looked at me. I said one more time, automatically, "My Jesus I Love You." And he went with me, mouthing the prayer.[111]

When Jesse Walter Bishop was executed in 1979, prison officials stated that it took twelve minutes for him to die.[112] One execution eyewitness claimed, however, that Mr. Bishop's body was still moving after twelve minutes had lapsed.[113] It is difficult to imagine how a death occurring ten to twelve minutes after the life cessation apparatus is set in motion complies with the Cruel and Unusual Punishments Clause's prohibition against inflicting a lingering death.[114] The situation has not improved following these occurences. When David Mason was executed by the state of California in 1993, eyewitnesses reported that it took approximately one minute from the time he began to breathe the lethal gas before he appeared to lose consciousness. Media observations suggest that consciousness persisted for "between one and three minutes."[115] For example, breathing deadly fumes for three minutes without actual death occurring qualifies as a lin-

---

were challenging death by lethal gas on the basis that it constitutes cruel and unusual punishment. *See* Gray v. Lucas, 710 F.2d 1048, 1059-60 (5th Cir.), *cert. denied*, 463 U.S. 1237 (1983); Fierro v. Gomez, 865 F. Supp. 1387, 1393-94 (N.D. Cal. 1994), *aff'd* 77 F.3d 301 (9th Cir. 1996).

[107] Anoxia is a physical condition that occurs when the body ceases to receive oxygen. *See Gray*, 710 F.2d at 1060. Webster's defines anoxia as "a deficiency of oxygen reaching the tissues of the body] especially of such severity as to result in permanent damage." MIRIAM-WEBSTER'S COLLEGIATE DICTIONARY 48 (10th ed. 1993).

[108] *Gray*, 710 F.2d at 1060 (emphasis added).

[109] *See id.* at 1059.

[110] *See id.*

[111] *Id.*

[112] *See id.*

[113] *See id.*

[114] In his dissenting opinion to the denial of certiorari in *Gray v. Lucas*, Justice Marshall noted that a death which takes 10 to 12 minutes to occur is lingering and thus unconstitutional. *See Gray*, 463 U.S. at 1245. This is not to say necessarily that the converse — that a death is not lingering if it takes less than 10 minutes — is true.

[115] Fierro v. Gomez, 865 F. Supp. 1387, 1402 (N.D. Cal. 1994), *aff'd.* 77 F.3d 301 (9th Cir. 1996).

gering death. Similar observations were made when the state of California executed Robert Harris in 1992. Harris did not lapse into "apparent unconsciousness until two minutes after the cyanide gas hit [his] face."[116] Another minute passed before the attending physician could confirm that Harris was unconscious.[117]

Findings made in connection with hangings and the time until death occurs provide additional evidence of noncompliance with the lingering death prohibition. Hanging poses significant risks of asphyxiation or partial decapitation.[118] If the length of the drop is too short, there is a substantial risk that the inmate's death will result from asphyxiation.[119] Death by asphyxiation is not rapid; indeed, it is a slow death.[120] When asphyxiation occurs, it can take as long as fourteen minutes for the individual to die.[121] The Ninth Circuit has interpreted *Campbell v. Wood*[122] to hold that the "persistence of consciousness for over a minute or for between a minute and a minute-and-a-half, but no longer than two minutes might be outside the constitutional boundaries"[123] of cruel and unusual punishment.

The electric chair also presents problems in satisfying this aspect of the cruel and unusual punishment standard. As previously noted, it took several minutes before Jesse Tafero expired following his execution.[124] In addition, what "witnesses routinely report" regarding what occurs during electrocution supports the proposition that this is not a means for producing a "timely" death. For example, "when the switch is thrown, the condemned prisoner 'cringes,' 'leaps,' and 'fights the straps with amazing strength.' "[125] The condemned person's struggle once the electrical current starts flowing demonstrates the passage of time before death actually occurs. This is contrary to what the lingering death component requires.

Death by lethal injection also has problems complying with this component of the test. This means of extinguishing life typically involves a three-step process. First, an anesthetic such as sodium pentothal is administered to the inmate, rendering him unconscious. Next the state injects a drug such as pavulon, paralyzing the individual's respiratory system and muscles. Lastly, the individual is

---

[116] Fierro v. Gomez, 77 F.3d 301, 307 (9th Cir. 1996).

[117] *See id.*

[118] Campbell v. Wood, 18 F.3d 662, 683-84 (9th Cir.), *cert. denied*, 114 S. Ct. 2125 (1994); *see also* GATRELL, *supra* note 72, at 46; Gardner, *supra* note 4, at 120.

[119] *See Campbell*, 18 F.3d at 684; *See also* Gardner, *supra* note 4, at 120.

[120] *See Campbell*, 18 F.3d at 708 (Reinhardt, J., dissenting); Hillman, *supra* note 70, at 746; Gardner, *supra* note 4, at 120-21.

[121] *See Gardner, supra* note 4, at 121.

[122] 18 F.3d 662 (9th Cir.), cert. denied, 114 S. Ct. 2125 (1994).

[123] Fierro v. Gomez, 77 F.3d 301, 307 (9th Cir. 1996) (quoting Fierro v. Gomez, 865 F. Supp. 1387, 1410-11 (N.D. Cal. 1994) (citing Campbell v. Wood, 18 F.3d 662, 684 (9th Cir. 1994))). The Ninth Circuit relied upon this in affirming Judge Patel's decision that death by lethal gas violates the Eighth Amendment. *See id.* at 309.

[124] *See supra* notes 102-105 and accompanying text.

[125] Glass v. Louisiana, 471 U.S. 1080, 1086-87 (1985) (Brennan, J., dissenting.).

given a dose of potassium chloride, ceasing the person's pulmonary functions.[126]

Texas' 1988 execution of Raymond Landry illustrates the problems associated with lethal injection's inability to comply with the nonlingering death factor. In accordance with Texas execution protocol, Landry was strapped to a gurney and two intravenous needles were inserted into his arms.[127] The lethal drugs flowed for approximately two minutes when suddenly one of the lines began to leak.[128] Fourteen minutes then lapsed before the execution could resume.[129] In all, twenty-four minutes passed before Landry was pronounced dead.[130] An execution, however, does not have to reach the extremes of the Landry case to raise concerns. For example, when Fletcher Thomas Mann was executed by lethal injection in Texas, seven minutes passed before he died.[131] Lastly, compliance with this mandate can be frustrated if the condemned inmate was a former drug user whose significant tolerance to the drugs administered during the execution could result in a "lingering death."

Death by firing squad also has the potential to violate the lingering death prohibition. There are several ways a state may administer an execution by firing squad. For example, protocol may require the participation of a single shooter or of several shooters. If a state utilizes several shooters, one may use a rifle containing blank rounds.[132] Typically, the condemned invididual is strapped to a specially designed chair, a black hood is placed over his face,[133] and a white cloth target is pinned over his heart. A pile of sandbags is arranged behind the chair

---

[126] *See* Hillman, *supra* note 70, at 748; *See also* TROMBLEY, *supra* note 36, at 76, 79-80; Gardner, *supra* note 4, at 128-29; Don Colburn, *Lethal Injection: Why Doctors are Uneasy About the Newest Method of Capital Punishment*, WASH. POST, Dec. 11, 1990, at Z12; Paul Valentine, *Under New Maryland Law, a New Mode of Death: But Condemned Killer's Attorneys Say Lethal Injection Is Inhumane*, WASH. POST (May 8, 1994).

California uses saline, potassium chloride and panucuronium bromide. Kenneth J. Garcia, *San Quentin's Step-by-Step Guide to Execution Procedure 770 Governs Condemned Convicts' Final Hours*, SAN FRANCISCO CHRON., Feb. 21, 1996, at A1.

[127] *See Texas Killer Executed After Hitch 14-Minute Delay As Needle Falls Out*, SACREMENTO BEE, Dec. 13, 1988, at A9 [hereinafter *Texas Killer Executed After Hitch*].

[128] *See id.; see also Execution Goes Awry As Lethal Fluid Leaks*, MIAMI HERALD, Dec. 14, 1988, at 1A [hereinafter *Execution Goes Awry*]; *Murderer Executed After a Leaky Lethal Injection*, N.Y. TIMES, Dec. 14, 1988, at A29.

[129] *See* Colburn, *supra* note 126, at Z12; *Execution Goes Awry*, *supra* note 128; *Texas Killer Executed After Hitch*, *supra* note 127.

[130] *See Texas Killer Executed After Hitch*, *supra* note 127; *Murderer Executed After a Leaky Lethal Injection*, *supra* note 128.

[131] *See Louisville Native Executed in Texas for 1980 Dallas Murders, Rape*, LEXINGTON HERALD LEADER, June 2, 1995, at B4.

[132] *See* Hillman, *supra* note 70, at 745; Gardner, *supra* note 4, at 123-24. In Utah, where John Albert Taylor was recently executed by firing squad, five anonymous marksmen shot him with deer rifles. *See* Matthew Brown, *Child Killer Executed by Utah Firing Squad*, AP, Jan. 26, 1996, *available in* WESTLAW, AP File. One of Taylor's shooters had a gun with blank rounds. *See id.*

[133] *See* Brown, *supra* note 122.

to absorb the impact of the bullets.[134] If the executioners miss the heart, intentionally or unintentionally, the person encounters a substantial risk that he or she will die a slow death.

This brief survey reveals the significant problems that continue to exist in ensuring that the methods of execution adhere to the Eighth Amendment's ban against protracted death.

C. *The Method of Execution Must Result in a Painless Death*

Because "[n]either consciousness nor pain is easy to gauge,"[135] evaluating compliance with this component is not an easy task. The number of courts either ignoring this issue or refusing to conduct a substantive analysis of the issue is startling.[136] For example, in *Hunt v. Smith*[137] the district court, in response to a plaintiff's challenge to the constitutionality of lethal injection as a method of execution, stated that lethal injection is intended to be "more humane" than other methods of execution. Yet the assertion of a consequence is different than substantively ascertaining whether something is actually the case, i.e., that death would be painless.[138] Furthermore, the examination of the various methods of execution[139] provides ample support for the proposition that all of the mechanisms are seriously flawed in terms of satisfying the Eighth Amendment's painless death requirement. The importance of the painless death requirement cannot be overemphasized. For example, in a recent decision affirming the unconstitutionality of death by lethal gas, the Ninth Circuit emphasized that the method of execution must produce a painless death for it to comply with the Eighth Amendment.[140]

There are a multitude of consequences which make death by legal gas painful.[141] Dr. Traystman's general description of what occurs when lethal gas is used provides a powerful and compelling comment on the pain inherent in this mode of death:

---

[134] *See id.*

[135] Fierro v. Gomez, 865 F. Supp. 1387, 1400 (N.D. Cal. 1994), *aff'd*, 77 F.3d 301 (9th Cir. 1996).

[136] *See* cases cited *supra* note 4.

[137] 856 F. Supp. 251 (D. Md. 1994).

[138] As Judge Reinhardt noted in his dissent, this is precisely the tactic used by the *Campbell* majority. *See* Campbell v. Wood, 18 F.3d 662, 693 (9th Cir.) (Reinhardt, J., dissenting), *cert. denied*, 114 S. Ct. 2125 (1994).

[139] *See infra* Appendix A.

[140] *See* Fierro v. Gomez, 77 F.3d 301, 306-07 (9th Cir. 1996).

[141] At trial, both parties in Fierro v. Gomez, 865 F. Supp. 1387 (N.D. Cal. 1994), *aff'd*, 77 F.3d 301 (9th Cir. 1996), offered evidence regarding the effects of lethal gas on executionees. The court cited numerous authorities regarding the implications of lethal gas. *See id.* at 1395-99 (citing, among other authorities, BRYAN BALLENTINE & TIMOTHY C. MARRS, CLINICAL AND EXPERIMENTAL TOXICOLOGY OF CYANIDES (1987)). Those sources provide thorough discussions of the various types of pain an inmate experiences when killed by lethal gas. *See generally* BALLENTINE & MARRS, *supra*.

> Very simply, cyanide gas blocks the utilization of the oxygen in the body's cells. Gradually, depending on the rate and volume of inspiration, and on the concentration of the cyanide that is inhaled, the person exposed to cyanide gas will become anoxic. This is a condition defined by no oxygen. Death will follow through asphyxiation, when the heart and brain cease to receive oxygen. The hypoxic state can continue for several minutes after the cyanide gas is released in the execution chamber. The person exposed to this gas remains conscious for a period of time, in some cases for several minutes, again depending on the rate and volume of the gas that is inhaled. During this time the person is *unquestionably experiencing pain* and extreme anxiety. The pain begins immediately, and is felt in the arms, shoulders, back, and chest. The sensation is similar to the pain felt by a person during a heart attack, where essentially, the heart is being deprived of oxygen. The severity of the pain varies directly with the diminishing oxygen reaching the tissues.[142]

More specifically, there is a significant risk that when the poisoned gas is introduced into the death chamber, the condemned individual will suffer from acidosis.[143] The degree of pain experienced by the condemned inmate could be equivalent to that experienced by a heart attack victim.[144]

Tetany,[145] however, is perhaps the most painful condition associated with death by lethal gas. Tetany produces painful muscle contractions. Several experts note that the "muscular contractions [can be] so severe that the body is 'arched backwards like a bridge,' with contractions of sufficient force to 'compress and fracture the vertebrae.'"[146] Most importantly, "to a conscious person, tetany is *extremely painful*."[147] Eyewitness accounts support the conclusion that Bobby Mason suffered painful tetany when he was executed by the state of California in 1993.[148] Likewise, an eyewitness account of Jesse Walter Bishop's execution supports the conclusion that while dying, he suffered from painful tetany as "[h]is head lurched back. His eyes widened, and he strained as much as the straps that held him to the chair would allow."[149] Key to the eyewitness' descriptions of Mr. Bishop's actions is that he "unquestionably appeared to be in

---

[142] Gray v. Lucas, 710 F.2d 1048, 1060 (5th Cir.) (emphasis added), *cert. denied*, 463 U.S. 1237 (1983).

[143] Acidosis is a painful condition that can occur if lactic acid builds up in the cells that are deprived of oxygen because of the cyanide. *See Fierro*, 865 F. Supp. at 1396. Webster's defines acidosis as "an abnormal condition characterized by reduced alkalinity of the blood and of the body tissues." MIRRIAM-WEBSTER'S COLLEGIATE DICTIONARY 10 (10th ed. 1993).

[144] *See Fierro*, 865 F. Supp. at 1396.

[145] Tetany is defined as "a condition of physiologic calcium imbalance marked by tonic spasm of muscles and often associated with deficient parathyroid secretion." MIRRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1218 (10th ed. 1993).

[146] *Fierro*, 865 F. Supp. at 1396.

[147] *Id.* (emphasis added).

[148] *See id.* at 1402.

[149] Gray v. Lucas, 710 F.2d 1048, 1058 (5th Cir.), *cert. denied*, 463 U.S. 1237 (1983).

pain."[150]

The absence of a painless death is also found when electrocution is the method of death. "[A] number of distinguished electrical scientists and medical doctors have argued that the available evidence strongly suggests that electrocution causes unspeakable pain and suffering."[151] One early critic of electrocution denounced the method because of the pain it would inflict upon the condemned inmate, concluding that

> [t]he current flows along a restricted path into the body, and destroys all the tissues confronted in this path. In the meantime the vital organs may be preserved; and pain, too great for us to imagine, is induced. The brain has four parts. The current may only touch only one of these parts; so that the individual retains consciousness and a keen sense of agony. For the sufferer, time stands still; and this excruciating torture seems to last for an eternity.[152]

A key cause of the pain the individual may experience comes from being burned by the electric current administered during the electrocution.[153] There is also the risk that the condemned will catch on fire.[154] Brief descriptions of several executions best demonstrate the painfulness of the death endured by those whose lives have been extinguished in the electric chair. Jesse Tafero, undoubtedly suffered an excruciatingly painful death. The incorrect sponge used in his headpiece reduced the impact of the electrical currents delivered to Mr. Tafero. As a result, when the twelve-inch blue and orange flames came out of his head, the current was stopped.[155] Because he was still breathing, the state repeatedly administered the current.[156] Mr. Tafero finally succumbed after receiving the third jolt of electricity. Since the use of improper equipment weakened the electrical current, Mr. Tafero probably suffered a painful death as he "roast[ed] to death slowly."[157] Wilbert Lee Evans was electrocuted by the Commonwealth of Virginia in 1990. Mr. Evans, like Mr. Tafero, did not die after he received the first jolt of electricity. In fact, one witness reported that Mr. Evans made audible signs after receiving the first jolt, "suggesting that he may have suffered initially."[158] Derick Peterson was also executed by electrocution in Virginia. After he received the first jolt of electricity, "Peterson's hands and feet clench[ed]; his head jerk[ed]. His

---

[150] *Id.*

[151] Glass v. Louisiana, 471 U.S. 1080, 1088 (1985) (Brennan, J., dissenting to denial of certiorari); *see also* Hillman, *supra* note 70, at 747.

[152] Gardner, *supra* note 4, at 125-26 n.217 (quoting Nicola Tesla); *see also Glass*, 471 U.S. at 1088 (Brennan, J., dissenting to denial of certiorari).

[153] *See* Hillman, *supra* note 70, at 747; TROMBLEY, *supra* note 36, at 44-51, 56-60; Denno, *supra* note 91, at 637.

[154] *See* TROMBLEY, *supra* note 36, at 44-51.

[155] *See* WEISBERG, *supra* note 82; *see also* TROMBLEY, *supra* note 36, at 44-51.

[156] *See* TROMBLEY, *supra* note 36, at 44-51.

[157] WEISBERG, *supra* note 82.

[158] Denno, *supra* note 91, at 671 (quoting Tim Cox).

feet relax[ed] [and] he "*moan[ed] softly*," but he was not dead.[159] A condensed version of what eyewitnesses observe when the electric chair is used to execute provides a strong portrait of the painfulness of death by electrocution:

> [W]hen the switch is thrown, the condemned prisoner "cringes," "leaps," and "fights the straps with amazing strength." "The hands turn red, then white, and the cords of the neck stand out like steel bands." "The prisoner's limbs, fingers, toes, and face are severely contorted. The force of the electrical current is so powerful that the prisoner's eyeballs sometimes pop out and "rest on [his] cheeks." The prisoner often defecates, urinates, and vomits blood and drool . . . . "The body turns bright red as the temperature rises,"and the prisoner's "flesh swells and his skin stretches to the point of breaking." Sometimes the prisoner catches on fire, particularly if [he] perspires excessively. Witnesses hear a loud and sustained sound "like bacon frying," and "the sickly sweet smell of burning flesh" permeates the chamber.[160]

Death by lethal injection also raises concerns pertaining to the painless death requirement. Much remains unknown about what occurs when this process is used, especially regarding whether the condemned retains the ability to feel after receiving the first injection. Proponents of this method argue that the condemned individual is "asleep" and thus can not feel anything.[161] Crtics contend that there is a significant risk that the individual could suffer a painful death. One such risk is that once the muscle relaxing drug is administered, the inmate while seemingly asleep, may actually be capable of experiencing pain but is debilitated to such a degree that prevents communication.[162] Consequently, when the state administers the drug which ceases the functioning of the heart, the individual could be experiencing tremendous pain, but the paralysis created by the previous drugs renders him or her unable to communicate the fact they are in pain.[163] Furthermore, the process used to administer the lethal drugs heightens the risk of this occurring. In most instances, the condemned inmates receive a uniform amount of the deadly mixture administered through a machine.[164] Other protocols use a "questimate" approach to the amount of drugs to use.[165] Under both scenarios there is no correlation between the quantity of drugs necessary to take the

---

[159] *Id.* at 672 (quoting Mike Allen).

[160] Glass v. Louisiana, 471 U.S. 1080, 1087 (1985) (Brennan, J., dissenting to denial of certiorari) (footnotes ommitted).

[161] *See* WEISBERG, *supra* note 82.

[162] *See* Colburn, *supra* note 126; *Murderer Executed After a Leaky Lethal Injection*, N.Y. TIMES, Dec. 14, 1988, at A29.

[163] *See* TROMBLEY, *supra* note 36, at 157, 174 (providing examples of lethal injection executions where the inmate experienced a painful death); Denno, *supra* note 91, at 657.

[164] *See* TROMBLEY, *supra* note 36; Denno, *supra* note 91, at 657; *see* Garcia, *supra* note 126, at A1; Elizabeth Fernandez, *All Forms of Execution Produce Horror Stories, The Execution of Robert Alton Harris*, SAN FRANCISCO EXAMINER, Apr. 22, 1992, at A14.

[165] *See* Fernandez, *supra* note 164, at A14 (quoting Karima Wicks, NAACP Legal Defense Fund Capital Punishment Project).

condemned individual's life and his or her physical characteristics. Consequently, under either scenario, if a condemned inmate has a higher tolerance to the drugs employed, possibly due to prior drug abuse, there is a greater risk that the inmate will be paralyzed, but will be unable to communicate the pain caused by the drugs designed to stop the pulmonary function. It is not necessary, however, for an inmate to have a history of drug abuse in order for death by lethal injection to be painful. When Raymond Landry was executed witnesses heard him groan at least once during the time period after the lethal drugs had been flowing into his body for two minutes and before the fourteen minutes that lapsed before the line was repaired after one of the intravenous lines popped out.[166]

Death by hanging also has problems complying with the painless death requirement.[167] If the length of the drop is too long, there is a risk that the individual's death will be the result of total or partial decapitation.[168] The pain associated with having one's head severed from one's body seems unimaginable. It would certainly occupy a low position on the spectrum of painless deaths. Also, an inmate runs the risk of suffering pain, primarily from struggling to obtain oxygen, while being asphyxiated if the drop is too short.[169]

The Supreme Court implicitly upheld the constitutionality of the firing squad as a method of execution in *Wilkerson v. Utah*.[170] The potential for a painful death occurring when a firing squad is employed is obvious. Although the condemned individual usually wears a target designed to aid the shooters in locating the heart,[171] there is a risk that the shooters will, intentionally or unintentionally, miss the target and hit other parts of the person's body. For example, in one case the condemned was shot on the wrong side of his chest and bled to death.[172] Undoubtedly, this man's death was painful as he lay bleeding. Thus, there is no guarantee that an inmate will be immediately killed or rendered unconscious

---

[166] *See Execution Goes Awry*, *supra* note 128, at 1A; *Texas Killer Executed After Hitch*, *supra* note 127, at A9.

[167] "It is undeniable that every hanging involves at least some risk that the prisoner will die a slow, *painful*, tortuous death." Campbell v. Wood, 18 F.3d 662, 694 (9th Cir.) (Reinhardt, J., dissenting), *cert. denied*, 114 S. Ct. 2125 (1994) (emphasis added).

[168] *See Campbell*, 18 F.3d at 701 (Reinhardt, J., dissenting); Gardner, *supra* note 4, at 120.

[169] *See id.*

[170] 99 U.S. 130 (1878). This mode was implicitly deemed constitutional by the Court in dicta. *See id.* at 133-37. The precise issue before the Court was whether the lower court had the authority to select shooting as the method of execution when the statute allowing the imposition of a death sentence did not proscribe a method of execution. *See id.* at 136-37. Gary Gilmore was executed by firing squad in Utah in 1977. *See* Colburn, *supra* note 126. Nineteen years passed before another individual was executed by a firing squad. On January 26, 1996 John Albert Taylor was executed by a firing squad in Utah. *Firing Squad in Utah Executes Child Killer*, BOSTON GLOBE, Jan. 27, 1996 at 80 (Associated Press).

[171] *See* Denno *supra* note 91, at 688-89.

[172] *See* GARDNER, *supra* note 4, at 124.

before experiencing pain from the bullets that enter parts of his or her body other than the heart.

VI. CONCLUSION

The Supreme Court has not explicitly addressed the issue of what standard is necessary for ensuring compliance with the prohibition against the infliction of cruel and unusual punishments in the context of methods of execution.[173] However, this Article's assessment supports the argument that the qualitative portion of the standard can be articulated. As seen, evolving standards of decency require that the method of execution must result in a spontaneous death that is not lingering or painful. Thus, at this juncture, jurisdictions with the death penalty should follow this standard when implementing their various methods of execution.

This brief foray into examining how the different components operate when applied to certain methods of execution demonstrates the severe constitutional problems with the existing methods of execution. As a result, the only proper resolution at this time is to bar executions employing the existing methods of execution. Consequently, the more than 3000 individuals presently living under the sentence of death[174] should have their executions stayed.

APPENDIX A

States in Which the Death Penalty May Be Imposed (38)

Alabama	Kentucky	Ohio
Arizona	Louisiana	Oklahoma
Arkansas	Maryland	Oregon
California	Mississippi	Pennsylvania
Colorado	Missouri	South Carolina
Connecticut	Montana	South Dakota
Delaware	Nebraska	Tennessee
Florida	Nevada	Texas
Georgia	New Hampshire	Utah
Idaho	New Jersey	Virginia

[173] *See id.* at 97. There is a possibility, however, that the Court might soon be presented with an opportunity to decide the issue. Until recently, federal Courts of Appeals have consistently upheld the constitutionality of the challenged method of execution. On February 21, 1996, however, the Court of Appeals for the Ninth Circuit issued an opinion affirming a District Court judge's decision that lethal gas as a method of execution is unconstitutional because it violates the Eighth Amendment. Pete Wilson, the governor of California, is urging that the State have the case heard by the Supreme Court of the United States. *Gas Chamber Ban Upheld* NAT'L L. J., Mar. 4, 1996, at A8. If the Court grants certiorari, then this would be the first time that the Court will directly confront the issue as to what standard should be used to evaluate the constitutionality of the modes of execution.

[174] *See NAACP Legal Defense Fund, Death Row U.S.A.* (Fall 1995).

Illinois	New Mexico	Washington
Indiana	New York	Wyoming
Kansas	North Carolina	

States in Which the Death Penalty May Not Be Imposed (12)

Alaska	Massachusetts	Rhode Island
Hawaii	Michigan	Vermont
Iowa	Minnesota	West Virginia
Maine	North Dakota	Wisconsin

APPENDIX B

Methods of Execution Currently in Use

LETHAL GAS

California[175]
Mississippi[176]
Missouri
North Carolina

ELECTROCUTION

Alabama	Louisiana[177]
Florida	Nebraska
Georgia	Ohio
Illinois	Tennessee
Kentucky	Virginia

LETHAL INJECTION

Arizona	Maryland	Pennsylvania
Arkansas	Mississippi[178]	South Carolina
California	Missouri	South Dakota
Colorado	Montana	Texas
Connecticut	Nevada	Utah
Delaware	New Hampshire	Washington

---

[175] The Ninth Circuit recently held that death by lethal gas is unconstitutional, however. *See* Fierro v. Gomez, 77 F.3d 301 (9th Cir. 1996). This opinion was recently vacated by the Supreme Court and remanded to the Ninth Circuit in light of Cal. Penal § 3604. *See* Fierro v. Gomez, 117 S. Ct. 285 (1996).

[176] Mississippi employs lethal gas only if the individual was convicted before July 1, 1984.

[177] LA. REV. STAT. ANN. §569 (West 1996) (Every sentence of death before Sept. 15, 1991 shall be electricution; sentences after Sept. 15, 1991 shall be by lethal injection.)

[178] MISS. CODE ANN. § 99-19-51 (1996) (If legal injection is held unconstitutional, or if the person was sentenced before July 1, 1984, then lethal gas is used.)

Idaho
Illinois
Indiana
Louisiana
New Jersey
New Mexico
New York
Oregon
Wyoming
United States
United States Military

HANGING

Montana[179]
Washington[180]

FIRING SQUAD

Utah

[179] MONT. CODE ANN. § 46-19-103 (1996) (Death is by hanging or, at the election of the defendant, by lethal injection.).

[180] WASH. REV. CODE ANN. § 10.95.180 (West 1996) (Death is by lethal injection or, at the election of the defendant, by hanging.).