

Executions and Indignities—An Eighth Amendment Assessment of Methods of Inflicting Capital Punishment

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The death penalty, as it is imposed . . . is a disgusting butchery, an outrage inflicted on the spirit and body of man. . . . Today, when this ignoble death is secretly administered, what meaning can such torture have? The truth is that in an atomic age we kill as we did in the age of steelyards . . . science, which has taught us too much about killing, could at least teach us to kill decently.¹

I. INTRODUCTION

The United States Supreme Court has recently held for the first time that capital punishment as a legislative response to crime is not necessarily cruel and unusual punishment under the eighth amendment to the United States Constitution.² The action of the Court settled, at least for the time being, some of the legal controversy surrounding the death penalty, and after a moratorium of almost ten years, the ultimate legal sanction was again administered in the United States.³

These developments in no way signal an end to the controversy surrounding the execution of criminals. The Supreme Court's ruling that capital punishment is not unconstitutional per se raises new issues concerning the administration of the death penalty. One such issue, understandably neglected during the debate over the constitutionality of capital punishment itself, is the constitutionality of the various means used to take the lives of the condemned. Legislative attempts to provide more humane alternatives to the present modes—hanging, shooting, electrocuting, and gassing—have already begun.⁴ In

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1. Camus, *Reflections on the Guillotine*, in *THE PENALTY IS DEATH* 131, 151 (B. Jones ed., 1968).

2. *Gregg v. Georgia*, 428 U.S. 153 (1976). Dicta in past cases had suggested that the death penalty was not unconstitutional. See, e.g., *Trop v. Dulles*, 356 U.S. 86, 99 (1958). Two Justices, Brennan and Marshall, have expressed the view that capital punishment is indeed violative of the eighth amendment. *Furman v. Georgia*, 408 U.S. 238 (1972) (Brennan and Marshall, JJ., concurring separately).

3. Gary Mark Gilmore was executed on January 17, 1977, by a Utah firing squad. The last person executed in the United States before Gilmore was Luis Jose Monge in June, 1967. H. BEDAU, *THE COURTS, THE CONSTITUTION, AND CAPITAL PUNISHMENT* 121 (1977).

4. The states of Oklahoma and Texas have recently become the first states to provide lethal injection as the method of capital punishment. See 1977 Okla. Sess. Law Serv., ch. 41, § 1014; 1977 Tex. Sess. Law Serv. ch. 138 § 1. Until the introduction of lethal injection, capital punishment was administered through hanging, firing squad, electrocution, and lethal gas. See W. BOWERS, *EXECUTIONS IN AMERICA* 9-12 (1974).

addition, a wave of cases examining the legality of the traditional modes of execution cannot be far away.⁵

The elimination of barbarity from the process of administering death is a concern not only of those advocating abolition of capital punishment⁶ but of many who favor its retention.⁷ Apart from shared humanitarian concerns, however, abolitionists may also utilize these methodological challenges to buy time for another direct assault on the institution of capital punishment itself.⁸ Moreover, attacks on the modes of capital punishment may well aid the abolitionist cause through media coverage that informs an otherwise uninformed public of the ritualistic horrors of executions.⁹

This article assesses the present administration of the death penalty in light of the requirements of the cruel and unusual punishment clause of the eighth amendment. The Supreme Court has never directly confronted the issue of the cruelty associated with the various methods of imposing capital punishment.¹⁰ Thus, the pronouncements of the Court that have sanctioned a particular means of causing death can be characterized either *as dicta* or as highly suspect law, given subsequent doctrinal development of the cruel and unusual punishment clause and advances in medical science. It would appear that the courts are now free to strike down as unconstitutionally cruel some, if not all, of the traditional methods of inflicting death.

5. Reforms in penal law generally, and in capital punishment in particular, are often achieved more quickly through the courts than through the legislative process. See Bedau, *The Courts, the Constitution, and Capital Punishment*, 1968 UTAH L. REV. 201, 239.

6. "If the French state is incapable of overcoming its worst impulses . . . and of furnishing Europe with one of the remedies it needs most [abolition of capital punishment], let it at least reform its means of administering capital punishment." Camus, *supra* note 1, at 151.

7. No less a defender of capital punishment than Immanuel Kant said, "[T]he death of the criminal must be kept entirely free of any maltreatment that would make an abomination of the humanity residing in the person suffering it." Kant, *The Right to Punish*, in PUNISHMENT AND REHABILITATION 35, 37 (J. Murphy ed. 1973). In the words of another retentionist, "I readily concede at the outset that present ways of dealing out capital punishment are . . . revolting. . . . Like many of our prisons, our modes of execution should change." Barzun, *In Favor of Capital Punishment*, in THE DEATH PENALTY IN AMERICA 154, 155 (H. Bedau ed. 1968). The author suggests that we seek methods of "painless, sudden, and dignified death." *Id.*

8. See 8 TEXAS TECH. L. REV. 515, 523 (1976).

9. *Id.* Executions are conducted away from direct public sight. The public is unaware of the details of an execution. See M. MELTSNER, CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT 60-64 (1973). "It has often been noted that American citizens know almost nothing about capital punishment." *Furman v. Georgia*, 408 U.S. 238, 362 (1972) (Marshall, J., concurring). "Public knowledge of the realities of execution today is remote, for the people are protected by prison walls and a semantic veil. The symbols but not the substance reach them." Gottlieb, *Capital Punishment*, 15 CRIME & DELINQUENCY 1, 6 (1969). For evidence that information about the grisly details of death by hanging, the electric chair, and the gas chamber can play a part in shaking the public support for capital punishment, see Sarat & Vidmar, *Public Opinion, the Death Penalty, and the Eighth Amendment: Testing the Marshall Hypothesis*, 1976 WIS. L. REV. 171, 195, 205-06.

10. Cruelty may be defined as "the infliction of pain . . . without necessity. . . ." Gottlieb, *supra* note 9, at 11. The Court apparently has never considered evidence on the actual pain caused by any method of execution. Note, *The Death Penalty Cases*, 56 CALIF. L. REV. 1268, 1334 (1968). See text accompanying notes 20-22, 28-48 *infra*.

The discussion first examines relevant opinions of the United States Supreme Court to discover and articulate the proper analytical standards for assessing modes of execution. On the basis of these standards the author proposes a paradigm of capital punishment that avoids the cruelty of present practices, and argues that the paradigm is constitutionally acceptable under, perhaps even mandated by, the cruel and unusual punishment clause. Finally, contemporary modes of execution are assessed in light of the legal standards and the constitutional paradigm.

Nothing in this paper is intended to justify capital punishment. The ultimate merits of capital punishment should continue to be debated even if more humane methods are substituted for present barbarities. This article focuses solely upon whether various methods of execution are constitutional *if* capital punishment is to be employed.

II. THE EIGHTH AMENDMENT AS A MEASURE OF METHODS OF EXECUTION

The suggestion that methods of execution be scrutinized in terms of the cruel and unusual punishment clause of the eighth amendment is not novel.¹¹ Indeed, it is widely agreed that the clause was initially intended to apply to the cruelty of particular kinds of punishment,¹² including modes of administering the death penalty.¹³ That eighth amendment analysis has recently been used to find cruelty when punishment was excessive in degree¹⁴ in no way indicates that the courts are moving away from the traditional application of the amendment to specific kinds of cruel treatment.¹⁵ Whether their inquiry is

11. The eighth amendment provides, in full: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

12. "Expressions in the first congress confirm the view that the cruel and unusual punishments clause was directed at prohibiting certain methods of punishment." Granucci, "*Nor Cruel and Unusual Punishments Inflicted: The Original Meaning*," 57 CALIF. L. REV. 839, 842 (1969). "Following adoption, state and federal jurists accepted the view that the clause prohibited certain methods of punishment." *Id.* See also *Furman v. Georgia*, 408 U.S. 238, 377 (1972) (Burger, C.J., dissenting); L. BERKSON, *THE CONCEPT OF CRUEL AND UNUSUAL PUNISHMENT* 3-5 (1975).

13. The early congressional debates concerning the cruel and unusual punishment clause reflect an awareness that particular methods of inflicting capital punishment might be proscribed by the clause:

Mr. Livermore [of New Hampshire]—the clause seems to express a great deal of humanity, on which account I have no objection to it; but 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, and perhaps having their ears cut off; *but are we in future to be prevented from inflicting these punishments because they are cruel?*

I ANNALS OF CONG. 782-83 (1789) (emphasis added).

14. See *Weems v. United States*, 217 U.S. 349 (1910).

15. In 1958, for example, the Supreme Court found the punishment of loss of citizenship to be unconstitutionally cruel and unusual. *Trop v. Dulles*, 356 U.S. 86 (1958). More recently, the Eighth Circuit Court of Appeals found whipping of prisoners to be a form of cruel and unusual punishment. *Jackson v. Bishop*, 404 F.2d 571 (8th Cir. 1968).

directed to cruelty in kind or in degree of punishment, however, the courts find it difficult to interpret and apply the value-laden concepts underlying the cruel and unusual punishment clause.¹⁶

A. *The Supreme Court and Methods of Execution*

Although capital punishment has existed in America since colonial times,¹⁷ the first serious Supreme Court challenge to a method of inflicting the death penalty did not occur until 1878. In the case of *Wilkerson v. Utah*¹⁸ the defendant had been convicted of first degree murder in the Territory of Utah and sentenced to be "publicly shot until . . . dead."¹⁹ The territorial statutes provided the death penalty for first degree murder but did not specify the method of execution. Prior statutes had specified shooting, hanging, and beheading as the methods of capital punishment in Utah, but those provisions had inadvertently been repealed in 1876 when the territorial legislature revised the penal code. Wilkerson contended the sentencing judge was without authority to specify the mode of execution. The Supreme Court rejected Wilkerson's argument and upheld the sentence. It reasoned that because the penal statutes obligated the sentencing judge to impose death in cases like Wilkerson's, the statutes also conveyed implicit authority to specify the method of death.²⁰ The Court noted an analogy to the common law tradition of sentencing to death without specifying the means of death.²¹ Although hanging was the usual mode of execution at common law, other methods were sometimes used, and shooting was a common means of executing those convicted of capital offenses under military law.²² Thus, the specification of shooting as the means of death neither exceeded the power of the sentencing judge nor imposed a totally unusual mode of execution.

The issue in *Wilkerson* was not whether shooting was cruel and unusual punishment, but whether the sentencing court possessed authority to prescribe a particular method of capital punishment.²³ The Court noted that Wilkerson did not challenge the constitutional-

16. "[O]f all our fundamental guarantees, the ban on 'cruel and unusual punishments' is one of the most difficult to translate into judicially manageable terms." *Furman v. Georgia*, 408 U.S. 238, 376 (1972) (Burger, C.J., dissenting).

17. N. TEETERS, *HANG BY THE NECK* 7-12 (1967).

18. 99 U.S. 130 (1878). See L. BERKSON, *supra* note 12, at 22.

19. 99 U.S. at 131.

20. *Id.* at 137.

21. *Id.*

22. *Id.* at 134, 137.

23. This interpretation of *Wilkerson* was suggested by Justice Brennan in *Furman v. Georgia* 408 U.S. 238, 284 n.30 (1972) (Brennan, J., concurring).

ity of shooting.²⁴ In dicta, however, the Court discussed shooting in light of the eighth amendment and concluded that it was a constitutionally acceptable mode of capital punishment because it was the traditional method of carrying out executions under military law and did not inflict torture or "unnecessary cruelty."²⁵ The Court referred to the ancient practices of disembowelling while alive, drawing and quartering, public dissecting, and burning alive as the kinds of "terror, pain, or disgrace" proscribed by the eighth amendment.²⁶ Shooting, in the view of the *Wilkerson* Court, was not unconstitutionally cruel because it was unlike historical execution by torture. Definition of present cruelty by comparison with past practices that were considered cruel and unusual at the time the Bill of Rights was adopted—the so-called "historical interpretation" of the eighth amendment²⁷—was the primary mode of judicial analysis of the cruel and unusual punishment clause well into the twentieth century.²⁸

Twelve years after *Wilkerson*, in *In re Kemmler*,²⁹ the Court denied an application for a writ of error that sought reversal of a New York state court decision upholding electrocution as consistent with the state's constitutional proscription of cruel and unusual punishment.³⁰ The Court held that the eighth amendment did not apply to the states and could not be made applicable through either the due process or the privileges and immunities clause of the fourteenth amendment.³¹ Thus, the only federal constitutional issue was whether the state had acted arbitrarily or applied the law unequally to violate the fourteenth amendment.³² The Court noted that the state's decision to adopt electrocution occurred only after the New York legislature had studied the recommendations of a commission appointed to investigate and report "the most humane and practical method" for carrying out the death penalty.³³ Hence, legislation enacting the

24. "Had the statute prescribed the mode of executing the sentence, it would have been the duty of the court to follow it, unless the punishment to be inflicted was cruel and unusual, within the meaning of the eighth amendment to the Constitution, which is not pretended by the counsel of the prisoner." 99 U.S. at 136-37.

25. *Id.* at 136.

26. *Id.* at 135.

27. *Furman v. Georgia*, 408 U.S. 238, 265 (1972) (Brennan, J., concurring).

28. *Id.*; Granucci, *supra* note 12, at 842-43.

29. 136 U.S. 436 (1890).

30. *Id.* at 438, 443-44, 449.

31. *Id.* at 446-49. *Kemmler* was the first decision to hold that the eighth amendment was not applicable to the states. Hence, its discussion of the eighth amendment is dictum. Goldberg & Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1784 n.51 (1970).

32. 136 U.S. at 448-49; Note, *supra* note 10, at 1329. The issues of arbitrary punishment and cruel punishment are fundamentally distinct. Punishment is not arbitrary under the due process clause if there exists a rational basis for what the legislature has done. For cruel and unusual punishment, however, the concern is decency, not rationality, of the legislative action. See Packer, *Making the Punishment Fit the Crime*, 77 HARV. L. REV. 1071, 1076 (1964).

33. 136 U.S. at 444-45.

commission's recommendation of electrocution was not arbitrary, especially because the lower court had considered evidence on the degree of pain involved and had found electrocution "painless."³⁴

Even though the issue whether electrocution violated the eighth amendment was not directly presented in *Kemmler*, the Court, did use the occasion to discuss the cruel and unusual punishment clause. After noting that crucifixion, breaking on the wheel, and other "manifestly cruel" punishments would be unconstitutional,³⁵ the Court in significant dicta, further defined cruel and unusual methods of execution:

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 something inhuman and barbarous, *something more than the mere extinguishing of life.*³⁶

The cruelty of electrocution was obliquely called into question in *Louisiana ex rel. Francis v. Resweber*.³⁷ The issue in that case was whether the State of Louisiana could constitutionally execute the petitioner, Willie Francis, after the electric chair had accidentally malfunctioned during a previous execution attempt. Francis had been prepared for execution, placed in the chair, and kept there for a period of time after the switch was thrown. The victim, who experienced considerable discomfort,³⁸ was removed from the chair when it became apparent that he would not die. A new death warrant was issued.

Francis obtained a stay of execution and sought judicial approval for his claim that any further attempt to execute him would be cruel and unusual punishment contrary to the eighth amendment and a violation of his fourteenth amendment due process rights. The Supreme Court denied relief. Although the Court was not willing specifically to overrule *Kemmler* and hold that the eighth amendment applied to the states,³⁹ a plurality of four Justices took the position

34. *Id.* at 443. Considerable evidence at trial had, however, disputed the view that electrocution was necessarily quick and painless. L. BERKSON, *supra* note 12.

35. 136 U.S. at 446-47. The approach here is reminiscent of the *Wilkerson* "historical interpretation." See text accompanying note 27 *supra*.

36. 136 U.S. at 447 (emphasis added).

37. 329 U.S. 459 (1947).

38. Official witnesses of the aborted execution reported the events: "[T]he electrocutioner turned on the switch and when he did Willie Francis' lips puffed out and he groaned and jumped so that the chair came off the floor. Apparently the switch was turned on twice and the condemned man yelled: 'Take it off. Let me breath' [sic]." *Id.* at 480 n.2.

39. Eight members of the Court seemed, however, to assume the applicability of the eighth amendment to the states. Four Justices took the position in a plurality opinion that even if the eighth amendment applied, it would not preclude a second attempt to execute Francis, but four dissenting Justices strongly suggested that the second execution process would be precluded. See 329 U.S. at 463-64, 475-77. Only Mr. Justice Frankfurter, in his concurring opinion, specifically denied application of the eighth amendment to the states. *Id.* at 470. For the view

that subjecting Francis to the process of execution a second time would not violate the eighth amendment. The cruel and unusual punishment clause was interpreted by the plurality to prohibit only the "wanton infliction of pain" or the "infliction of unnecessary pain," not the suffering involved in "humane" executions.⁴⁰ Because the pain inflicted upon Francis was accidental and unintentional, the state would not be precluded from making a second attempt to execute him.⁴¹

Four dissenting Justices would have issued a stay of execution and remanded the case to the Louisiana Supreme Court to determine the extent to which Francis had suffered pain in the bungled execution.⁴² The dissent suggested that a second attempt to execute Francis might constitute a violation of his due process rights under the fourteenth amendment because it would constitute "torture culminating in death," a repugnant practice long disclaimed in American law.⁴³ The dissent suggested that "[t]aking human life by unnecessarily cruel means shocks the most fundamental instincts of civilized man" and should not be permitted under the constitutional procedure of a self governing people.⁴⁴ Thus, the eight Justices who subscribed to the plurality and dissenting opinions favored an analysis of eighth amendment cruelty in terms of "unnecessary" suffering induced by the state. Significantly, both the plurality and dissenting opinions cited with approval the *Kemmler* dicta quoted above.⁴⁵

The issue in *Resweber* was not whether electrocution per se was compatible with the eighth amendment, but whether the aborted initial execution attempt rendered subsequent attempts to take Francis' life cruel and unusual. In *Resweber* the Court assumed that successful electrocutions are not unconstitutionally cruel⁴⁶ because they do not inflict unnecessary cruelty or pain; the *Resweber* Court, however, did not consider evidence of the actual pain suffered during death by electrocution. In fact, the Court apparently has never reviewed evidence of the actual pain inflicted by any method of execution.⁴⁷

The Supreme Court has never specifically decided whether hanging

that *Resweber* did not assume the applicability of the eighth amendment to actions by the states, see Note, *supra* note 10, at 1334.

40. 329 U.S. at 463-64.

41. Willie Francis was executed one year and six days after the first attempt. L. BERKSON, *supra* note 12, at 28.

42. 329 U.S. at 472 (Burton, J., dissenting).

43. *Id.* at 473.

44. *Id.* at 473-74.

45. *Id.* at 463 n.4, 476.

46. Even the dissent in *Resweber* assumed that the typical execution by electrocution involved instantaneous and painless death and thus would raise few constitutional problems. See *id.* at 474.

47. Note, *supra* note 10 at 1334.

and gassing are cruel and unusual punishment.⁴⁸ Thus, there are no Supreme Court decisions directly holding that *any* of the traditional modes of execution are compatible with the eighth amendment.

B. *Other Decisions—Flesh on the Bones of “Cruel and Unusual Punishment”*

Although *Wilkerson*, *Kemmler*, and *Resweber* are the Supreme Court cases that most closely address the constitutionality of various methods of execution, significant doctrinal developments relevant to that issue have occurred in other eighth amendment cases. A consideration of these cases will provide a fuller definition of the meaning of cruel and unusual punishment.

A landmark in eighth amendment law is the Court's decision in *Weems v. United States*.⁴⁹ *Weems* broke with the earlier “historical interpretation” of the cruel and unusual punishment clause and introduced a more dynamic analysis that defines cruelty in terms of evolving social mores. Under the *Weems* analysis the clause should “acquire meaning as public opinion becomes enlightened by a humane justice.”⁵⁰ Interpretations of the clause should not be based solely on “what has been,” but should take into account “what may be.”⁵¹ As the *Weems* Court put it, “[t]ime works changes, brings into existence new conditions and purposes.”⁵²

Weems is also significant because it reversed, on eighth amendment grounds, a sentence of imprisonment and civil disability that was unnecessarily harsh,⁵³ as evidenced by the fact that it differed significantly from sentences imposed by other jurisdictions for similar crimes.⁵⁴ Thus, *Weems* suggests that an important indication of the unconstitutional cruelty of a given punishment or mode of punishment is its failure to be employed elsewhere.

The relative concept of the eighth amendment that the Court had articulated in *Weems* was developed further in *Trop v. Dulles*.⁵⁵ *Trop* struck down expatriation as cruel and unusual punishment for the crime of military desertion. The Court found that “physical torture” was not

48. L. BERKSON, *supra* note 12, at 21, 31. The Supreme Court has indirectly given approval to hanging and gassing by upholding sentences involving these methods. *Id.*

49. 217 U.S. 349 (1910). *Weems* reversed a Philippine Island court's judgment imposing a sentence of fifteen years at hard labor, perpetual civil disabilities, and a fine, for the offense of falsifying a public record. The Court held that the federal legislation prohibiting cruel and unusual punishment in the Philippine Islands was to be interpreted identically with the eighth amendment. *Id.* at 367. The sentence was reversed essentially because it was disproportionate to the crime committed. *Id.* at 379-81.

50. *Id.* at 378.

51. *Id.* at 373.

52. *Id.*

53. See text accompanying note 44 *supra*.

54. 217 U.S. at 380.

55. 356 U.S. 86 (1958).

a necessary element of unconstitutionally cruel punishment and that the psychological pain inflicted on the expatriate, who would be subjected to "a fate of ever-increasing fear and distress," was sufficient to render the punishment unconstitutional.⁵⁶ The Court perceived the essence of the eighth amendment as "nothing less than the dignity of man."⁵⁷ Although the words of the amendment are difficult to define, their meaning must be drawn "from the evolving standards of decency that mark the progress of a maturing society."⁵⁸ Constitutional provisions "are not time-worn adages or hollow shibboleths," but are "vital, living principles."⁵⁹

The plurality opinion in *Trop*⁶⁰ gave content to the "evolving standards of decency" by examining, in the tradition of *Weems*, contemporary punishment practices of other jurisdictions. That expatriation was no longer authorized elsewhere⁶¹ was taken as a significant indication that it had become an outdated anomaly.⁶²

The standards articulated by *Trop*, although technically accepted by only a plurality of four Justices, have subsequently been embraced by the full Court.⁶³ In the 1972 landmark decision of *Furman v. Georgia*,⁶⁴ the Court held that the eighth amendment, now clearly applicable to the states,⁶⁵ prohibited the infliction of capital punishment under virtually all state statutes because unrestrained discretion in imposing the penalty had resulted in its arbitrary infliction.⁶⁶ All nine Justices wrote separate opinions; seven Justices clearly embraced the *Trop* standards of eighth amendment analysis. Two Justices found capi-

56. *Id.* at 101-02.

57. *Id.* at 100.

58. *Id.* at 101.

59. *Id.* at 103.

60. Justice Brennan concurred in the decision to forbid the sanction of expatriation on different grounds from the plurality's eighth amendment rationale. *See* 356 U.S. at 105 (Brennan, J., concurring).

61. "The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime." *Id.* at 102.

62. *Id.* at 102-03. When the eighth amendment was adopted in 1790, banishment, a form of expatriation, was considered a reasonable and perfectly acceptable punishment for serious crime. Imprisonment beyond brief pre-trial detention or punishment for minor offenses was totally unknown. As modern prisons evolved, however, banishment became increasingly suspect. *See* Bedau, *supra* note 5, at 232.

63. Justices Douglas, Brennan, Marshall, Burger, Blackmun, Powell, and Rehnquist all cited the *Trop* standards as applicable in eighth amendment analysis in their various opinions in *Furman v. Georgia*, 408 U.S. 238 (1972). Justices Stewart and Stevens cited *Trop* with approval in *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) as did Justice White in his dissent in *Roberts v. Louisiana*, 428 U.S. 325, 351-52 (1976) (White, J., dissenting).

64. 408 U.S. 238 (1972).

65. In *Robinson v. California*, 370 U.S. 660 (1962) the Court struck down a California statute criminalizing drug addiction as violative of the eighth amendment, made applicable to the states through the fourteenth amendment.

66. "[T]he capital punishment laws of 39 States and the District of Columbia [are] struck down [by *Furman*]." 408 U.S. at 411.

tal punishment unconstitutionally cruel per se,⁶⁷ and the other three concurring Justices considered its arbitrary application violative of the eighth amendment.⁶⁸ Four Justices, dissenting, would not have interfered with the imposition of capital punishment.⁶⁹

In his concurring opinion, Justice Brennan further refined the idea of "human dignity" that underlies the *Trop* concept of cruel and unusual punishment. To Justice Brennan, "human dignity" as articulated in *Trop* entails respect for the "intrinsic worth" of persons.⁷⁰ Punishments are proscribed by the eighth amendment when they are so severe as to be "uncivilized and inhuman." Mental and physical pain, however, is only one indication of inhumane punishment.⁷¹ Human dignity is also affronted by punishments that are arbitrarily inflicted,⁷² or unacceptable by contemporary standards. These standards are indicated by historical trends away from the use of a particular punishment, or a high level of contemporary public distaste for its employment.⁷³ Finally, Justice Brennan identified lack of necessity as a characteristic of unconstitutionally cruel punishment:

The infliction of a severe punishment by the State cannot comport with human dignity when it is nothing more than the pointless infliction of suffering. If there is a significantly less severe punishment adequate to achieve the purposes for which the punishment is inflicted . . . the punishment inflicted is unnecessary and therefore excessive.⁷⁴

Other members of the *Furman* Court also subscribed to this analysis of unnecessary cruelty and compared present punishment with less severe but equally effective alternatives. The four dissenting Justices in *Furman* joined in the view that "no court would approve any method of implementation of the death sentence found to involve unnecessary cruelty in light of presently available alternatives."⁷⁵ Although they refused to find unconstitutional the institution of capital punishment itself, the dissenters left the door open for later attacks on modes of administering the death penalty under the "less cruel alternative" analysis.⁷⁶ In his concurring opinion, Justice Marshall also adopted

67. See 408 U.S. at 257 (Brennan, J., concurring); *id.* at 314 (Marshall, J., concurring).

68. See 408 U.S. at 240 (Douglas, J., concurring); *id.* at 306 (Stewart, J., concurring); *id.* at 310 (White, J., concurring).

69. See 408 U.S. at 375 (Burger, C.J., dissenting); *id.* at 414 (Powell, J., dissenting); *id.* at 405 (Blackmun, J., dissenting); *id.* at 465 (Rehnquist, J., dissenting).

70. *Id.* at 270 (Brennan, J., concurring). "[E]ven the vilest criminal remains a human being possessed of common human dignity." *Id.* at 273.

71. *Id.* at 271-72.

72. *Id.* at 274.

73. *Id.* at 277-79.

74. *Id.* at 279.

75. *Id.* at 430 (Powell, J., dissenting).

76. The dissenters suggested that inquiry into the permissibility of any of the several methods employed in carrying out the death sentence would call for a "discriminating evaluation

this approach.⁷⁷ Lower courts, too, have applied an eighth amendment "less cruel alternative" standard.⁷⁸

Furman reemphasized the relative nature of the cruel and unusual punishment clause; the Court indicated that contemporary standards of decency should be used for eighth amendment evaluation of punishment.⁷⁹ The dissent suggested, in the spirit of *Weems* and *Trop*, that society's attitudes about morally acceptable and humane punishment can be assessed objectively if state legislative actions are taken as the reflector of public values. "[T]he first indicator of the public's attitude must always be found in the legislative judgments of the people's chosen representatives."⁸⁰ Legislative judgment was presumed by the *Furman* dissent to embody the basic standards of decency prevailing in the society.⁸¹ Because most states had death penalty statutes on their books, the dissenters considered the death penalty to be consistent with contemporary conceptions of humane punishment.

Analysis of decency in terms of legislative action or inaction was re-emphasized in *Gregg v. Georgia*,⁸² this time by a majority of the Court.⁸³ *Gregg* held for the first time that capital punishment did not necessarily violate the eighth amendment.⁸⁴ That many state legislatures had enacted new capital punishment statutes in the wake of *Furman* indi-

of particular means." *Id.* "It is . . . within the historic process of constitutional adjudication to challenge the imposition of the death penalty in some barbaric manner. . . ." *Id.* at 420. "And in making such a judgment in a case before it, a court may consider contemporary standards to the extent they are relevant." *Id.*

77.

In order to assess whether or not death is an excessive or unnecessary penalty, it is necessary to consider the reasons why a legislature might select it as punishment for one or more offenses, and examine whether less severe penalties would satisfy the legitimate legislative wants as well as capital punishment. If they would, then the death penalty is unnecessary cruelty, and, therefore, unconstitutional.

Id. at 342 (Marshall, J., concurring).

78. In *Landman v. Royster*, 333 F. Supp. 621 (E.D. Va. 1971), the court held that shackling prisoners was too severe a sanction and violated the eighth amendment. The court applied the less drastic means test in suggesting that it "simply cannot conceive that no less drastic means can achieve that legitimate end [of keeping inmates from injuring themselves]." *Id.* at 648. The court suggested that alternatives to shackling could be used. "[E]fforts to explore alternative treatment methods have not been exhausted; indeed they have hardly been commenced. On this showing the practice of fettering inmates in closed cells is both cruel and unnecessarily so." *Id.* For a discussion of a variety of the "less cruel alternative" analysis see Singer, *Sending Men to Prison: Constitutional Aspects of the Burden of Proof and the Doctrine of the Least Drastic Alternative as Applied to Sentencing Determinations*, 58 CORNELL L. REV. 51 (1972).

79. See 408 U.S. at 269-70 (Brennan, J., concurring); *id.* at 329 (Marshall, J., concurring); *id.* at 382-83 (Burger, C.J., dissenting). Justices Blackmun, Powell, and Rehnquist joined in the dissent.

80. *Id.* at 437 (Powell, J., dissenting).

81. *Id.* at 384 (Burger, C.J., dissenting).

82. 428 U.S. 153 (1976).

83. Justices Stewart, Powell, and Stevens joined in a plurality in *Gregg*. Justice White, joined by Chief Justice Burger and Justices Rehnquist and Blackmun, recognized legislative action as an indicium of decency in his dissent in a companion case. *Roberts v. Louisiana*, 428 U.S. 325, 352-53 (1976) (White, J., dissenting).

84. 428 U.S. at 176-87.

cated to the *Gregg* Court that capital punishment was still a morally appropriate and necessary sanction.⁸⁵ The new statutes reflected legislative judgment that the death penalty had not become intolerable under contemporary moral standards. The legislative trend also indicated that capital punishment may be useful to achieve the ends of the criminal law.⁸⁶

Very recently, in *Coker v. Georgia*,⁸⁷ the Court struck down a Georgia statute imposing the death penalty for the crime of raping an adult woman.⁸⁸ The Court found the penalty disproportionate to the crime and thus unduly harsh under the eighth amendment. The Court reached its conclusion largely on the basis of legislative decisions of other states. The fact that virtually all other states and most foreign countries did not treat rape as a capital crime compelled the Court to view capital punishment for rape as unnecessarily cruel.⁸⁹

C. *Further Clarification of the Concept of Human Dignity*

The judicial development outlined above significantly clarifies the notion of human dignity that is central to eighth amendment analysis. Other considerations also contribute to a fuller understanding of the application of the cruel and unusual punishment clause to techniques of capital punishment.

Justice Brennan has noted that respect for the intrinsic worth of persons is central to the concept of human dignity.⁹⁰ A human being is treated as a person when he is permitted to make choices that will determine what will happen to him.⁹¹ Hence, the essence of being a person lies in the notions of individual autonomy and freedom of choice.⁹² "[I]f we respect their human dignity, we want people freely to be what they can be and genuinely want to be."⁹³

Considerations of human dignity must be balanced against the legitimate governmental interests that are furthered by a system of

85. *Id.* at 179-83; *Roberts v. Louisiana*, 428 U.S. at 351-54 (White, J., dissenting).

86. The highly controversial question whether capital punishment has a greater deterrent effect than less severe punishments was perceived by the Court as an essentially legislative judgment. Mass reenactment of the death penalty indicated to the Court a legislative judgment that capital punishment was necessary as a deterrent to crime. *Id.* at 185-87; *Roberts v. Louisiana*, 428 U.S. at 353-56 (White, J., dissenting).

87. 433 U.S. 584 (1977).

88. *Id.* at 592.

89. *Id.* at 592-96.

90. See note 70 *supra*.

91. Morris, *Persons and Punishment*, in *PHILOSOPHY OF LAW* 572, 580 (J. Feinberg & H. Gross eds. 1975).

92. "[T]he essence of being a person lies not in reason but in will . . ." Frankfurt, *Freedom of the Will and the Concept of a Person*, 68 *J. PHILOSOPHY* 5, 11 (1971).

93. Stern, *On Value and Human Dignity*, 10 *LISTENING* 74, 83 (1975). "Human dignity consists in our recognizing that each human being . . . has intrinsic value and is a valuer in his own right." *Id.* at 83.

punishment. All punishment necessarily restricts free choice; most offenders would choose to avoid the sanction entirely. At the same time, punishment in effect honors the choice of the criminal because it completes the rational consequences of his act. To the extent that he chooses to commit his criminal act, the law respects his personal choice by punishing him;⁹⁴ yet an offender never forfeits his right to be treated with dignity. If, as Justice Brennan says, "even the vilest criminal remains a human being possessed of common human dignity,"⁹⁵ it follows that a criminal is entitled to have his choices honored and respected unless they are inconsistent with the purposes and goals of punishment.⁹⁶ Thus, punishment is offensive both to the offender's dignity and to the Constitution if it *unnecessarily* defeats the offender's power to act on choices he has made.

Gregg has established that the capital offender has no eighth amendment right to live past the date set for his execution. Since, however, the offender is entitled to all possible dignity before, and perhaps after,⁹⁷ his death, the offender's choices must be respected unless they contradict the purposes of his punishment. His own decisions about how his life is to be terminated should be honored unless it can be shown that those decisions are inconsistent with legitimate state interests.

Treatment as a person also includes recognition of the right to privacy.⁹⁸ The moment of one's death is a particularly personal and private occasion. Dignity is offended if this most intimate experience is involuntarily shared with those beyond the closest circle of family and friends. Thus, techniques of capital punishment that unnecessarily include witnesses to the convict's death may violate personal dignity and raise eighth amendment issues.

Human dignity also entails respect for bodily integrity. The eighth amendment cases express revulsion toward the ancient practice of drawing and quartering.⁹⁹ The courts have thus recognized that unnecessary mutilation of the bodies of capital offenders affronts the principles of human dignity that underlie the cruel and unusual punishment clause. Because such desecration of the body is undignified and

94. See generally *Morris*, *supra* note 91.

95. *Furman v. Georgia*, 408 U.S. 238, 273 (1972) (Brennan, J., concurring).

96. The right to have one's choices respected is of course not absolute. "The recognition [of others' autonomy] amounts . . . to our abstaining, *as far as: circumstances allow*, from attempts at forcing them directly or indirectly to change their views, attitudes, or behavior." Stern, *supra* note 93 (emphasis added).

97. The *Wilkerson* Court viewed the ancient practice of beheading an offender and then disembowelling him and cutting him into four quarters as forbidden by the eighth amendment, presumably as an affront to human dignity. See *Wilkerson v. Utah*, 99 U.S. 130, 135 (1878). For a description of "drawing and quartering," see E. BOWEN-ROWLANDS, *JUDGMENT OF DEATH* 105 (1924).

98. See Stillman, *Prisons and Punishment*, 5 J. Soc. PHILOSOPHY 11, 12 (1974).

99. See note 97 *supra*.

indecent,¹⁰⁰ any form of capital punishment that unnecessarily disfigures the body of the victim is constitutionally suspect.

Human dignity is also disturbed by physical violence during execution.¹⁰¹ Less violent forms of execution are more consistent with the notion of human dignity than more violent forms.

Finally, forms of punishment that unnecessarily undermine the self-respect of the person being executed deny him human dignity.¹⁰² The victim is entitled to be free from unnecessary humiliation.

D. *Summary of the Definition of Cruel and Unusual Punishment*

As discussion of the cases demonstrates, punishments are violative of the eighth amendment when they are "unnecessarily cruel." *Wilkinson* focuses specifically on "unnecessary punishment"¹⁰³ and *Kemmler* speaks of "something more than the mere extinguishing of life"¹⁰⁴ as tests of undue cruelty. Unnecessarily harsh treatment no doubt represents the "something more" that the *Kemmler* Court contemplated. Eight Justices adopted the unnecessary cruelty analysis in *Resweber* although the plurality suggested that the presence of governmental intent to cause unnecessary suffering is a special indication of eighth amendment violation. Furthermore, *Weems*, *Furman*, *Gregg*,¹⁰⁵ and *Coker*¹⁰⁶ all include unnecessary cruelty as an aspect of the Court's eighth amendment analysis.

The post-*Weems* cases all focus on the dynamic nature of the cruel and unusual punishment clause. The evolution of social mores as well as advances in technology and penology may contribute to invalidation of punishments that were constitutionally permissible in the past. Legislative trends away from a particular mode of punishment reliably indicate both its cruelty and its lack of necessity.¹⁰⁷ Similarly, a punishment may be viewed as unnecessarily cruel if jurisdictions that have

100. See *Bedau*, *supra* note 5, at 234.

101. See ROYAL COMMISSION ON CAPITAL PUNISHMENT, 1949-53 REPORT, CMD. NO. 8932, at 255 (1949-1953) [hereinafter cited as ROYAL COMMISSION ON CAPITAL PUNISHMENT].

102. "The idea of human dignity is . . . given content when it is explicated in terms of the capacity for a sense of justice." Gerstein, *Capital Punishment—"Cruel and Unusual"?: A Retributivist Response*, 85 ETHICS 75, 78 (1974). "An affliction which undermines a man's self-respect rather than awakening his conscience, which impairs his capacity for justice rather than stimulating it, could not serve as just punishment." *Id.* Such undermining of self-respect would therefore violate human dignity.

103. 99 U.S. at 136.

104. See 99 U.S. at 447.

105. The *Coker* Court asserts that *Gregg* stated the principle that "a punishment is 'excessive' and unconstitutional if it . . . makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering." 433 U.S. at 592.

106. *Coker* cites favorably the "unnecessary suffering" standard of *Gregg*. *Id.*

107. See text accompanying notes 85 and 89 *supra*.

never employed it are nevertheless able to operate well without it.¹⁰⁸ *Furman* offers another criterion for necessity: whether less cruel but equally effective alternatives to the punishment are available. If they are, the punishment may be unconstitutional.

In sum, legislatures, as reflectors of social values, serve the function of defining the contours of decency and human dignity. Indecent governmental infliction of mental or physical suffering constitutes excessive cruelty. Punishment is considered an assault on human dignity, and therefore cruel under the eighth amendment, when it unduly restricts the offender's autonomy; unnecessarily invades his privacy; or produces excessive mutilation of his body, undue violation of his person, or unnecessary loss of self-respect.

III. AN EXECUTION PARADIGM AS A LESS CRUEL ALTERNATIVE

The foregoing summary of eighth amendment law strongly indicates that constitutional review of modes of execution would benefit from a comparison of present methods with known alternatives, not now in common use, that may be less cruel. To highlight the unnecessary cruelty of present methods, there is posited a paradigm of less cruel capital punishment that appears simultaneously to satisfy constitutional requirements and to further legitimate penal policy.

A. *The Suicide Option*

To permit the condemned person the option of taking his own life instead of being killed by agents of the state is a concession to human dignity not practiced in modern times,¹⁰⁹ but not unknown historically nor without its contemporary advocates.¹¹⁰ The example of Socrates,

108. The Court seems to have taken this approach in *Trop*. See 356 U.S. at 102-03.

109. For a list of methods used in executing criminals throughout the world, see Patrick, *The Status of Capital Punishment: A World Perspective*, 56 J. CRIM. L.C. & P.S. 397, 398-404 (1965). Far from encouraging suicide, those states that employ capital punishment keep convicts on death row under constant observation so that they will not commit suicide. See *Proposed Repeal of the Death Penalty Under Federal Law: Hearings on S. 1760 Before the Subcomm. on Criminal Laws and Procedures of the Comm. on the Judiciary*, 90th Cong., 2d Sess. 21 (1968) [hereinafter cited as *1968 Hearings*] (statement of Clinton Duffy); Wootton, *Morality and Mistakes*, in *THE HANGING QUESTION* 13 (L. Blom-Cooper ed. 1969). The case of Gary Gilmore is illustrative. Gilmore attempted suicide only to be rushed to the hospital to preserve his life so that it might later be taken by the state. H. BEDAU, *supra* note 3, at 122. Cases of prisoners slashing their throats seem fairly common. In one case a prisoner who had cut his throat with a razor blade was granted a brief reprieve in order that his wound might heal sufficiently to insure that his head would not be torn off when he was hanged. In another case, a prisoner slashed his throat moments before he was to be taken into the gas chamber. He was quickly dragged into the gas chamber, blood spraying from his neck, and executed. See Gottlieb, *supra* note 9, at 8-9. The Royal Commission on Capital Punishment rejected the option of suicide because it would not permit the "community's denunciation of the gravest of all crimes" and would be encouraging the offender to commit the sin of suicide. See ROYAL COMMISSION ON CAPITAL PUNISHMENT, *supra* note 101, at 266-67.

110. See, e.g., Camus, *supra* note 1; King, *Some Reflections on Do-it-Yourself Capital Punishment*, 47 A.B.A.J. 668 (1961); Maddox, *An Indecent Ritual*, in *THE HANGING QUESTION* 83 (L. Blom-Cooper ed. 1969).

who refused the requests of his friends to postpone his death until the last legally permitted moment, is particularly poignant. Socrates would have considered it an affront to his self-respect to prolong life beyond the moment it lost meaning. "I should only make myself ridiculous in my own eyes if I clung to life and hugged it when it has no more to offer."¹¹¹ To have hemlock at his disposal infused the whole process of his death with a modicum of dignity and personal respect.

Similar humanitarian considerations could be incorporated into modern execution procedures. An execution date could be set; for a brief, specified period after that date the condemned person would be provided the means to take his life if he chose. He would be told the lethal dosage of an oral sedative¹¹² that would be placed at his disposal. Death by drug overdose would be virtually painless¹¹³ and without many of the other human and economic costs¹¹⁴ that attend traditional modes of execution. If the condemned person failed to take his own life before the period for optional suicide had expired, the state would then execute him in the manner discussed below.

To permit capital offenders the right to suicide¹¹⁵ does not imply that everyone has a moral right to take his own life.¹¹⁶ Nor does it imply that the offender has the right to demand that he be executed.¹¹⁷ Moreover, the existence of this limited right to suicide does not imply

111. PLATO, *THE LAST DAYS OF SOCRATES* 181 (H. Tredennick trans. 1954).

112. A variety of drugs could be provided. An overdose of barbiturates, perhaps nembutal or seconal, would be a possibility. "[A]most all compounds with definite hypnotic potency can cause death if taken in sufficient quantities. . . ." *DRUGS OF CHOICE* 1974-1975, 238 (W. Modell ed. 1974). See L. JONES, *VETERINARY PHARMACOLOGY AND THERAPEUTICS*, 987-88 (3rd ed. 1965).

113. See *id.*

114. "The ritual [of present executions] is unpleasant for the holy men who administer the last rites and the medical men who must attend final heartbeats. And all the others—press observers, official witnesses, death-watch crews, scaffold builders, head-shavers, wardens, gubernatorial phone operators fare little better. King, *supra* note 110, at 669. Capital punishment brutalizes those who must directly administer it." See E. BLOCK, *AND MAY GOD HAVE MERCY* 67-68 (1962); L. LAWES, *TWENTY THOUSAND YEARS IN SING SING*, 306-07 (1932); Elliot, *It is Assumed that I am in Favor of the Death Penalty*, in *VOICES AGAINST DEATH* 205 (P. Mackey ed. 1976). Some forms of execution carry a high monetary cost. It is estimated that it would cost \$250,000 to build a gas chamber for the State of Oklahoma and \$62,000 to repair an existing electric chair. *The Daily Oklahoman*, Mar. 3, 1977, § 1, at 1, 2, col. 1.

115. It is a "right" and not just a "privilege." To say that the convict has a "right" to die by suicide is to say that the state has a "duty" to assist in making the suicide possible. See Corbin, *Legal Analysis and Terminology*, 29 *YALE L. J.* 163, 167 (1919); Williams, *The Concept of Legal Liberty*, 56 *COLUM. L. REV.* 1129, 1138 (1956). A "privilege" to commit suicide would simply recognize that no penalty attaches if suicide is committed. *Id.*

116. A legal privilege to commit suicide now exists in most jurisdictions. Suicide is nowhere treated as a criminal offense; attempted suicide, although technically a crime in some jurisdictions, is seldom prosecuted and its criminal proscription is highly disfavored by scholars. See W. LA FAVE & A. SCOTT, *HANDBOOK ON CRIMINAL LAW* 568-69 (1972). It is difficult to argue on moral grounds that one has a duty, either to himself or to his society, to keep himself alive once the state has decreed by its most solemn processes that he is unfit to live. See King, *supra* note 110, at 669.

117. Suicide is the act of taking one's own life; punishment, by contrast, is infliction of unpleasant consequences upon the offender by an authority outside himself. See Hart, *Prolegomenon to the Principles of Punishment*, in *PUNISHMENT AND RESPONSIBILITY* 1, 4-5 (1968).

that each capital offender has this right before his execution becomes inevitable.¹¹⁸ Rather, after all legal remedies have been exhausted and execution is virtually inevitable,¹¹⁹ the condemned person should be allowed to pick the moment of his death. The time period allowed for exercising the suicide option should be short, perhaps one or two days, to reduce the trauma that attends the decision whether to commit suicide, and to limit the possibility of a grant of clemency after the prisoner had committed suicide but before the appointed hour of state execution.

The option of suicide appears to meet the criteria of constitutional capital punishment.¹²⁰ Physical and mental suffering would not exceed constitutional bounds because death by drug overdose would be painless, perhaps even somewhat pleasant,¹²¹ and the psychological apprehension that now attends the more violent contemporary methods of execution¹²² would be removed. The dignity of the condemned would be respected if the state allowed him to choose the circumstances of his death. His privacy interests would be preserved if he were permitted to pass quietly from life in his cell, without the violent, circus-like atmosphere of traditional executions.¹²³ His right to bodily integrity would be protected; no disfigurement or mutilation would occur. Finally, the option of suicide would allow the condemned to retain a degree of self-respect, in the manner of Socrates.

B. *The Lethal Gas Mask*

If the condemned person chose not to commit suicide the state would take his life at the appointed hour. The interests of decency would require, however, that the violence attending the execution process be minimized. Perhaps the least violent method now available is administration of certain forms of lethal gas.¹²⁴ For example, a concentration of pure and odorless carbon monoxide administered through a mask would cause instantaneous and painless loss of consciousness followed rapidly by death.¹²⁵ Although a brief period of physical

For a discussion of the moral problems raised by the alleged "right to capital punishment" see H. BEDAU, *supra* note 3, at 121-25.

118. Because there is always the possibility of judicial relief through the appellate process or executive clemency, condemned offenders should be prevented from taking their lives while on death row.

119. Execution is virtually certain when all judicial remedies have been exhausted and the date of execution has arrived without executive reprieve.

120. "[O]ne would suppose that an innovative punishment would probably be constitutional if no more cruel than that punishment which it superseded." *Furman v. Georgia*, 408 U.S. 238, 331 (1972) (Marshall, J., concurring).

121. See note 112 *supra*.

122. See text accompanying notes 189, 205 & 226 *infra*.

123. See text accompanying notes 184, 211 & 221-27 *infra*.

124. See ROYAL COMMISSION ON CAPITAL PUNISHMENT, *supra* note 101, at 255.

125. *Id.* at 257. This method of inflicting death was suggested by the British Medical Association as an alternative to hanging. *Id.* at 257. Other gases besides carbon monoxide could be employed. See L. JONES, *supra* note 112, at 989-90. Gassing in the manner described would be quicker and therefore preferable to execution by lethal injection. See text accompanying notes 249-52 *infra*.

restraint might be required to secure the mask to the face of a struggling prisoner, the force would be no greater than the force required to administer the methods of execution now in use.¹²⁶ Use of a mask instead of the customary gas chamber would avoid intensely negative psychological associations with past practices, often brutal and inhumane. Further, it is uncertain that death in American gas chambers is painless.¹²⁷ Moreover, the gas mask could be used in surroundings familiar to the prisoner; he would not be required to endure the additional anxiety of moving to a special death room.

Administration of the death penalty through lethal gas seems to pose few constitutional problems. Physical pain would be virtually eliminated and psychological suffering greatly lessened because the prisoner would fear neither a painful death nor the terrifying last walk to an unfamiliar death house. No bodily disfigurement would occur, and physical violence would be minimal.

It is already apparent, and later discussion of the cruelty of traditional methods of execution will clearly establish, that the paradigm of optional suicide or lethal gas is less cruel than the traditional modes. The remaining issue, therefore, is whether the paradigm would achieve the legitimate interests of capital punishment as effectively as present execution methods.

C. *The Paradigm and Capital Punishment Policy*

A consideration of the relative merits of methods of inflicting capital punishment must focus on two main policy considerations—general deterrence and retribution.¹²⁸ To validate the paradigm as a less cruel alternative to present modes of execution it must be shown that the paradigm achieves the deterrent and retributive ends of capital punishment as effectively as the customary methods of execution.

1. *The Paradigm and Deterrence*

One might argue that the humanitarian aspects of the paradigm, particularly its suicide option, render it a less effective deterrent than the more violent forms of execution now practiced.¹²⁹ This argument seemingly demands that executions be performed publicly and employ the most painful technique.¹³⁰ Because such torture could not satisfy

126. See text accompanying notes 184, 203, 220 & 237 *infra*.

127. See text accompanying notes 237-38 & 240 *infra*.

128. A variety of considerations underlie the imposition of the criminal sanction. The theoretical bases of punishment are generally thought to be incapacitation of dangerous offenders, rehabilitation, special deterrence, general deterrence, and retribution. See W. LAFAVE & A. SCOTT, *supra* note 116, at 21-25. The objective of incapacitating dangerous criminals is realized no matter what method of execution is employed. The goals of rehabilitation and special deterrence are irrelevant to an assessment of the value of various ways of killing offenders. Economic considerations are sometimes relevant but will not be discussed here. It is assumed that the paradigm would probably cost less to implement than any other method.

129. See ROYAL COMMISSION ON CAPITAL PUNISHMENT, *supra* note 101, at 247-48 for the view that hanging carries a special deterrent effect not possessed by more humane alternatives.

constitutional requirements,¹³¹ the interests of deterrence must be balanced against the interests of decency. Even if it were true that more cruel execution methods deter more effectively than less cruel methods, it by no means follows that the state is invariably justified in inflicting the harsher punishment.

Fortunately, the issue need not hinge on a balance between the state's interests in achieving deterrence and the demands of human dignity. There is little reason to believe that the more cruel modes of execution now used serve as better deterrents than the less cruel paradigm. First, the public has very little knowledge of the cruelty of present methods.¹³² Executions are conducted in secret; the public learns of them indirectly through various communications media.¹³³ The ordinary person, if he has thought about it at all, probably believes that present modes of execution are decent, *i.e.*, devoid of unnecessary cruelty.¹³⁴

Apparently there have been no empirical studies that test the relative deterrent effects of various modes of execution, but the British Royal Commission on Capital Punishment has considered the issue. The Commission considered whether to continue execution by hanging, historically "a peculiarly grim and degrading form of execution"¹³⁵ that has retained its "stigma,"¹³⁶ and concluded:

We, . . . like most of our witnesses, are not convinced that a potential murderer in this country is more likely to be deterred by the knowledge that he may have to 'swing for' his victim than he would be by the knowledge that he might have to suffer death in some other way. If there is a difference, it must be so small that we do not think it ought to weigh with us.¹³⁷

The Commission thus rejected the "more horrible the punishment the

131. See text accompanying notes 26 & 35 *supra*.

132. The secrecy of executions prevents contemporary society from reaching an informed opinion of capital punishment. The very fact that executions are concealed indicates that they are repugnant to present standards of decency. See *A Cruel and Unusual Punishment*, in VOICES AGAINST DEATH 264, 281-82 (P. Mackey ed. 1976). See also Elom-Cooper, *Good Moral Reasons*, in THE HANGING QUESTION 121, 123 (L. Blom-Cooper ed. 1969):

The law, in decreeing that murderers can only be executed out of public sight, confesses . . . that the spectacle of execution is injurious to those who see it. . . . [The hangers] conceded some of the supposed deterrent effect of public execution because they could not stomach the cold-blooded and ghoulish procedure of hanging a man by his neck.

133. A. KOESTLER, REFLECTIONS ON HANGING 165 (1957); M. MELTSNER, *supra* note 9, at 60-64. The public's knowledge of the realities of execution is remote. "[T]he people are protected by . . . a semantic veil. The symbols but not the substance reach them." Gottlieb, *Capital Punishment*, 15 CRIME & DELINQUENCY 1, 6 (1969). DELINQUENCY 1, 6 (1969).

134. See Koestler, *supra* note 133, at 164-65.

135. ROYAL COMMISSION ON CAPITAL PUNISHMENT, *supra* note 101, at 246.

136. *Id.* at 248.

137. *Id.*

greater the deterrence" theory¹³⁸ as irrelevant to the consideration whether hanging should be retained.

To the extent that capital punishment deters, the deterrent effect is probably produced by the threat of death itself rather than by the method used to accomplish it. The fear of death is universal,¹³⁹ whether caused by disease, carbon monoxide, or the gallows. Thus, adoption of the paradigm with its suicide option would not reduce the deterrent effect.

Even if it is conceded that some deterrence would be lost through substitution of the paradigm for traditional modes of execution, it is likely that other deterrence would be gained by the substitution. The death penalty actually serves as an incentive to some offenders who commit capital crimes in order to be executed.¹⁴⁰ There is reason to believe that the form of the execution plays a significant role in fostering this "suicide-murder syndrome."¹⁴¹ The thrill and notoriety surrounding a violent mode of execution may well be the source of appeal for such offenders.¹⁴² Adoption of the paradigm might reduce the incidence of crimes committed as a result of the "suicide-murder syndrome." On balance, the paradigm should thus prove as effective a deterrent as other forms of execution.

2. *The Paradigm and Retribution*

The term "retribution" is used in punishment theory to convey a variety of meanings. In the context of administration of capital punishment, retribution can best be understood if its three separate meanings are kept distinct. Retribution is sometimes equated with vengeance to refer to punishment inflicted in a wholly emotional manner.¹⁴³ It is also used to describe nonutilitarian theories of punishment based

138. *Id.*

139. "Death is . . . a fearful, frightening happening, and the fear of death is a universal fear even if we think we have mastered it on many levels." E. KUBLER-ROSS, *ON DEATH AND DYING* 5 (1969).

140. See Bedau, *The Case Against the Death Penalty*, in *VOICES AGAINST DEATH* 301, 304 (P. Mackey ed. 1976); J. KERVOKIAN, *MEDICAL RESEARCH AND THE DEATH PENALTY* 44 (1960).

141. Incitement of capital crimes by the existence of capital punishment is referred to as the "suicide-murder syndrome" in Bedau, *supra* note 140, at 304.

142. There is reason to believe that Gary Gilmore committed his crimes in Utah so that he might die in a "blaze of rifle fire" that would transform him into a kind of hero. See H. BEDAU, *supra* note 117, at 121.

Many have noted that Gilmore, imprisoned in Oregon (where the death penalty has been unconstitutional since 1964), took his parole release in Utah, the one place in the nation where blood atonement, in the form of a firing squad, may be used to administer the death penalty for murder.

Id. at 124. See also J. KERVOKIAN, *supra* note 140, at 46.

143. "Retaliation, vengeance, and retribution have been roundly condemned as intolerable aspirations for a government in a free society." *Furman v. Georgia*, 408 U.S. 238, 343 (1972) (Marshall, J., concurring).

on justice and desert.¹⁴⁴ In its third sense, the term retribution describes punishment that serves a utilitarian purpose: to vent public disgust toward criminals and, as a consequence, to increase respect for the law and eliminate the likelihood that citizens will "take the law into their own hands."¹⁴⁵

Whatever meaning is attached to retribution, the paradigm does not become less desirable than other modes of capital punishment on "retributive" grounds. It is an inappropriate application of the criminal sanction to impose a crueler sanction simply to inflict more suffering upon the offender. Retributive justifications for punishments that are no more than emotional appeals to vengeance against the offender are condemned almost universally.¹⁴⁶ Hence, to favor hanging or shooting over the paradigm simply because the former inflict more pain or indignity is a purposeless and illegitimate invocation of the criminal sanction.

Furthermore, retributive theories of desert will not justify the conclusion that a capital offender deserves hanging or shooting rather than the form of capital punishment outlined by the paradigm. Retributive considerations require that the offender suffer according to his deserts as determined by the seriousness of his crime. Principles of desert, however, set only rough boundaries of proportionality between offense and punishment and do virtually nothing to establish the form that the punishment should take.¹⁴⁷ Even defenders of the *lex talionis* variety

144. See Gardner, *The Renaissance of Retribution—An Examination of Doing Justice*, 1976 WISC. L. REV. 781.

145.

The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they "deserve," then there are sown the seeds of anarchy—of self-help, vigilante justice, and lynch law.

Furman v. Georgia, 408 U.S. 238, 308 (1972) (Stewart, J., concurring).

146. The concept of revenge is by definition an emotional and irrational reaction against a perceived wrongdoer. See Gerstein, *supra* note 102, at 76. The Supreme Court has repeatedly emphasized that punishment must be rationally based, in the sense either that it is proportionate to the crime or that it is not unnecessary. See, e.g., *Weems v. United States*, 217 U.S. 349 (1910). Hence, totally irrational punishment cannot be constitutional.

The Court has on occasion articulated some purposes that may legitimate the infliction of punishment. Retribution has seldom been favored. See *Williams v. New York*, 337 U.S. 241, 248 (1949) ("Retribution is no longer the dominant objective of the criminal law."); *Furman v. Georgia*, 408 U.S. 238, 345 (1972) (Marshall, J., concurring) ("[T]he Eighth Amendment is our insulation from our baser selves. The 'cruel and unusual' language limits the avenues through which vengeance can be channeled.")

Commentators generally agree. "[I]ndignation, however respectable an emotion in the individual, is a dangerous basis for public policy." Younger, *The Historical Perspective*, in *THE HANGING QUESTION* 5, 5 (L. Blom-Cooper ed. 1969).

[V]engeance is the creed of the blood feud. The evolution of "civilized standards" which replace primitive recourse to violence with institutions demanding reasoned resolution of disputes marks the "progress of a maturing society." The mature society, then, is one which denies itself the passion of retribution because civilization demands rationality. Note, *supra* note 10, at 1350.

147. See generally Gardner, *supra* note 144.

of retributivism seem unconcerned whether one method of executing an individual murderer or class of murderers is more just than another.¹⁴⁸ In any event, an attempt to implement strict *lex talionis* doctrine would unquestionably violate the eighth amendment.¹⁴⁹

The argument that the paradigm is unjustly lenient toward the offender is unsupportable. Death is the ultimate sanction however it is administered; the agony imposed on the condemned offender as he counts down the remaining days of his life is profound.¹⁵⁰ The argument that he deserves additional suffering from the method of his execution is not persuasive. Considerations of justice do not preclude permitting the condemned offender the option of taking his own life. The state has actively moved against the offender by decreeing that he cannot live beyond a given date; agents of the state would supply the offender with the fatal drugs and instructions for their use. Hence, though the offender would take an active part in causing his own death, the state would remain the executioner because its power would coerce the suicide decision. If justice demands that the offender give his life for his crime, that demand is met whether the state is the sole agent of death or simply an accomplice. The suicide option should not be rejected on principles of desert; to reject the option as "unjust" seems no more than a hidden concession to revenge.

"Retribution" in its third sense, the necessary venting of public steam, is also insufficient reason to reject the paradigm. Apart from the fact that cathartic retribution is dubious justification for punishment,¹⁵¹ there seems little reason to believe that it is necessary to favor present modes of execution over the paradigm in order to prevent people from taking the law into their own hands. It can just as easily be argued that

148. Although Kant defended the principle that "the undeserved evil which any one commits on another, is to be regarded as perpetrated on himself," Kant, *Justice and Punishment*, in *PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT* 103, 104 (G. Ezorsky ed. 1972), he did not seem to believe that the actual form the murderer utilized in committing his offense is to be used in executing the murderer. See note 7 *supra*. According to Kant, justice seems only to demand the execution of the murderer in as dignified and humane a manner as possible.

149. See, e.g., *Wilkerson v. Utah*, 99 U.S. 130, 135 (1878).

150.

We conventionally think of death as "the worst thing" that can happen to us. Knowing, as we all do, that we will die in some vague future does not impose any great stress. The man in the grip of a relentlessly fatal disease has to cope with much more severe stress. But mercifully, his death date is not fixed and he can always hope to see tomorrow's sun rise. Presumably, the greatest of stresses would be imposed on the man who knows he is going to be put to death—and knows just when that will be.

Bluestone & McGahee, *Reaction to Extreme Stress: Impending Death by Execution*, 119 *AM. J. PSYCHIATRY* 393, 393 (1962); see Note, *Mental Suffering Under Sentence of Death: A Cruel and Unusual Punishment*, 57 *IOWA L. REV.* 814 (1972).

Albert Camus equated the death penalty with the most extreme form of punishment. It induces more suffering in the condemned than he could ever have induced in his victim. It would be comparable for a criminal to warn his victim of the date, months hence, on which a horrible death would be inflicted upon him and to keep the victim confined from the time of warning. See Camus, *supra* note 1, at 142.

151. See note 146 *supra*.

executions through cruel methods encourage public brutality and disrespect for the law.¹⁵² In the past, lynchings seemed to occur more often in states that employed the traditional modes of execution than in jurisdictions that had abolished capital punishment.¹⁵³ Because a significant proportion of the public favors abolition of capital punishment, any execution could inspire public resentment of the legal system, particularly if the capital punishment were performed in an unnecessarily cruel manner.¹⁵⁴ Finally, even if the public is particularly outraged by a particular crime, its emotion almost always diminishes significantly between arrest and execution; one would not expect execution according to the paradigm to create public outcry for harsher punishment.¹⁵⁵

The paradigm accomplishes the policy objectives of general deterrence and retribution at least as effectively as other modes of execution. Therefore, if it can be shown to be less cruel than present methods of inflicting death, the paradigm would seem constitutionally preferable as the less drastic alternative. The cruelty of hanging, shooting, electrocution, gassing, and lethal injection will now be examined.

IV. THE PRESENT METHODS OF CAPITAL PUNISHMENT: A CONSTITUTIONAL ASSESSMENT

The history of capital punishment throughout the ages reveals that a wide variety of gruesome devices have been used to torture offenders to death.¹⁵⁶ Executions were often performed publicly in order to impress upon onlookers the consequences of violating the law.¹⁵⁷ Although the grosser forms of inflicting death were not officially sanctioned in the post-colonial United States,¹⁵⁸ executions were often public and were not made exclusively private until well into the twentieth century.¹⁵⁹ Removal of capital punishment from public view constituted an admission that the common methods of execution, although unlike the barbarities of past times, were nevertheless unseemly and gruesome.¹⁶⁰

152. See Note, *supra* note 10, at 1299-1301. Taking human life by present execution methods is basically demoralizing and repugnant to common human instincts. Various devices are employed to spare the sensitivities of executioners: the individual members of a firing squad are not told whether their rifles contain live rounds or blanks; three persons simultaneously pull switches but do not know which switch activates the electric chair. See E. BLOCK, *supra* note 114, at 67. Executioners, haunted by memories of executions, have committed suicide. *Id.* at 68.

153. L. LAWES, *MAN'S JUDGMENT OF DEATH* 53-55 (1924).

154. Note, *supra* note 10, at 1299-1300.

155. *Id.*

156. See J. LAURENCE, *A HISTORY OF CAPITAL PUNISHMENT* 2-12 (1960).

157. G. SCOTT, *THE HISTORY OF CAPITAL PUNISHMENT* 193 (1950).

158. In colonial times, however, gibbeting (suspending an already hanged body on a frame) was not uncommon, and beheading, drawing and quartering, pressing to death, and burning were not unknown. N. TEETERS, *supra* note 17, at 87-110.

159. The last legal public hanging occurred in Kentucky in 1936. *Id.* at 6.

160. "We hide our executions because we are disgusted to look at them, because the view

Four main methods of capital punishment have been used in the United States. Until the turn of the twentieth century, hanging was virtually the exclusive method.¹⁶¹ Shooting was authorized in Utah and briefly employed in Nevada but later abandoned. The advent of electricity at the turn of the century started a distinct trend away from hanging toward electrocution. Later, in the 1920's and 1930's, the movement away from hanging continued, and several states abandoned the gallows in favor of the gas chamber. Some states that had previously switched from hanging to electrocution also moved to the gas chamber.¹⁶² In their post-*Furman* reenactments of capital punishment Oklahoma and Texas selected lethal injection as the means of capital punishment,¹⁶³ but neither state has inflicted death by this method. Electrocution is now the most popular execution method,¹⁶⁴ followed by the gas chamber.¹⁶⁵ Only seven states still permit hanging, and Utah alone authorizes shooting.¹⁶⁶ Oklahoma and Texas now employ lethal injection.¹⁶⁷

This brief review of historical developments provides a background for examining the constitutionality of the common methods of execution. The discussion will place the various methods on a continuum from most cruel to least cruel on the basis of the eighth amendment analysis developed above.¹⁶⁸

A. Hanging

Although hanging as a means of executing criminals is an ancient practice,¹⁶⁹ modern refinements have been made in an attempt to in-

of them would make men sick. We hide them because their public display would render them unacceptable and flout the dignity of man." *A Cruel and Unusual Punishment*, *supra* note 132, at 283.

161. See Bedau, *General Introduction*, in *CAPITAL PUNISHMENT* 21 (J. McCafferty ed. 1972); N. TEETERS, *supra* note 17, at 461.

162. See W. BOWERS, *EXECUTIONS IN AMERICA* 9 (1974).

163. See note 4 *supra*.

164. For the status of execution methods in the various states as of 1972, see LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, U.S. DEPT. OF JUSTICE, *CAPITAL PUNISHMENT 1971-72*, at 57-58 (National Prisoner Statistics Bulletin No. SD-NPS-CP-1, 1974) [hereinafter cited as *CAPITAL PUNISHMENT 1971-72*]. With the exception of Oklahoma and Texas no state has changed its mode of execution since that time. See note 4 *supra*.

165. See note 182 *infra*.

166. As of 1972, Delaware, Idaho, Kansas, Montana, New Hampshire, North Dakota, Rhode Island, Utah, and Washington permitted hanging. *CAPITAL PUNISHMENT 1971-72*, *supra* note 164, at 57-59. North Dakota has subsequently abolished capital punishment, 1973 N.D. Sess. Laws, ch. 116, § 41, and Rhode Island has switched from hanging to the gas chamber. 1973 R.I. Pub. Laws ch. 280, § 1. No other states have subsequently adopted hanging as the mode of execution.

167. See note 4 *supra*.

168. The constitutional analysis corresponds to an intuitive ranking of methods according to cruelty, hanging being most cruel, followed by shooting, electrocution, and gassing. See J. KERVOKIAN, *supra* note 140, at 15-16.

169. Hanging is traceable to biblical times. L. BERKSON, *supra* note 12, at 21.

flict death quickly and painlessly. Before the advent of the "long drop" in the late nineteenth century,¹⁷⁰ death by hanging was often a slow and painful process of strangulation.¹⁷¹ When the victim is dropped from a sufficient height his vertebrae are dislocated and his spinal cord crushed; unconsciousness is immediate and death follows a short time later.¹⁷² If the drop is too long, however, decapitation occurs.¹⁷³ Although hanging has become something of an art in modern times¹⁷⁴ and may well be painless when properly performed,¹⁷⁵ evidence of bungled hangings abounds: inadvertent decapitation¹⁷⁶ when victims are dropped too long; strangulation¹⁷⁷ when they are dropped too short to break their necks.¹⁷⁸ Strangulation may be the rule rather than the exception.¹⁷⁹ Unconsciousness is supposedly instantaneous even when the neck is not broken,¹⁸⁰ but it is not entirely certain that this is true.¹⁸¹ If the victim is conscious, death by strangulation must be extremely painful.¹⁸²

Apart from the pain that may occur during strangulation and the horror of occasional decapitations,¹⁸³ other indignities attend hanging.

170. See G. SCOTT, *supra* note 157, at 211; N. TEETERS, *supra* note 17, at 156-58.

171. N. TEETERS, *supra* note 17, at 156-57.

172. A. KOESTLER, *supra* note 133, at 139-40.

173. *Id.* at 140.

174. The proper ratio of the height of the drop to the weight of the victim's body was computed and tabulated for use by British hangmen. See N. TEETERS, *supra* note 17, at 157-58.

175. *Id.* at 154.

176. See *id.* at 186.

177. *Id.* at 176-78.

178. See G. SCOTT, *supra* note 157, at 214.

179. See *id.*; Duffy, in DEATH ROW: AN AFFIRMATION OF LIFE 29 (S. Levine ed. 1972).

180. N. TEETERS, *supra* note 17, at 154.

181. A. KOESTLER, *supra* note 133, at 140.

182. This account of a bungled hanging and ultimate strangulation is related in N. TEETERS, *supra* note 17, at 174:

The two weights, of 206 and 120 pounds, fell . . . and Jefferson's body was raised about five feet in the air. It fell back limp when suddenly it began to writhe in agony. The movements at first were not violent, but presently the legs, which had not been pinioned, were drawn up toward the body, the knees reaching almost to the chin, while the arms were extended pleadingly towards the occupants of the balconies right and left. The man kicked furiously and moaned so piteously that a thrill of horror went through the audience. The sheriff was bewildered. His face turned pale and his eyes filled with tears. The hangman was called from his pen to witness his clumsy work. He looked at his struggling victim, but said he could do nothing for him. Jefferson freed his hands sufficiently and clutched the noose, but, being unable to loosen the rope, he tore the black cap from his face and stretched out his hand imploringly toward the audience. The appearance of his face was terrible. After eight minutes of agony, which must have been horrible, the contortions began to lessen, and finally ceased.

183.

The rope allowed a fall of more than seven feet, and one of the most sickening and revolting scenes in the history of Ohio executions followed. As the body dropped to a standstill, a heavy gurgling sound was heard, and soon the blood in torrents commenced pouring on the stone floor below. The black cap was raised slightly and it was found that decapitation was almost complete, the head hanging to the body by a small piece of skin at the back of the neck. During the half minute or more that the heart beat, the blood was thrown against the platform above from the gash caused by the head being pulled

Clinton Duffy, who participated in over sixty executions, offers the following description of hanging:

Hanging, whether the prisoner is dropped through a trap, after climbing a traditional 13 steps, or whether he is jerked from the floor after having been strapped, black-capped and noosed, is a very gruesome method of execution. . . .

The day before an execution the prisoner goes through a harrowing experience of being weighed, measured for length of drop to assure breaking of the neck, the size of the neck, body measurements, et cetera. When the trap springs he dangles at the end of the rope. There are times when the neck has not been broken and the prisoner strangles to death. His eyes pop almost out of his head, his tongue swells and protrudes from his mouth, his neck may be broken, and the rope many times takes large portions of skin and flesh from the side of the face that the noose is on. He urinates, he defecates, and droppings fall to the floor while witnesses look on, and at almost all executions one or more faint or have to be helped out of the witness room. The prisoner remains dangling from the end of the rope for from 8 to 14 minutes before the doctor, who has climbed up a small ladder and listens to his heart beat with a stethoscope, pronounces him dead. A prison guard stands at the feet of the hanged person and holds the body steady, because during the first few moments there is usually considerable struggling in an effort to breathe.

The legal witnesses are dismissed after having signed the usual witness forms. However, the body of the condemned is left hanging below the gallows for an additional 15 to 20 minutes. This is to assure those in charge that ample time has elapsed before cutting the rope in order to make certain of death.¹⁸⁴

Sometimes, women who were hanged were paid the ironic consideration of being provided rubber underwear to catch the droppings.¹⁸⁵ Mutilation of the body is substantial; portions of the victim's face are ripped apart.¹⁸⁶ The victim's neck elongates, distorts, and discolors.¹⁸⁷ The powerful jerk when the weight of the body reaches the end of the rope makes hanging a particularly violent form of execution.¹⁸⁸

back on the shoulder. The strong men who had charge of the execution turned to avoid the scene, and stood fixed for a time, looking each other in the eye. Finally Coroner Carrick, more thoughtful than the rest, though unable to speak above a whisper, called for help to take the body down before it should disconnect from the head and fall. The heavy clothing of the murderer had by this time become soaked and running with blood from every wrinkle and seam. Those who lifted it up until the rope could be untied were smeared with blood, and as the body was lowered to the pools of gore below, the gasping trunk was exposed in all its horror.

Id. at 186.

184. 1968 *Hearings*, *supra* note 109, at 19-20 (statement of Clinton Duffy).

185. Koestler & Rolph, *Hanged by the Neck*, in *THE PENALTY IS DEATH* 229 (B. Jones ed. 1968).

186. *See Duffy*, *supra* note 179, at 29.

187. *See ROYAL COMMISSION ON CAPITAL PUNISHMENT*, *supra* note 101, at 255; N. TEETERS, *supra* note 17, at 180.

188. "[A]nticipation of the drop must be more dreadful than anticipation of the onset of the electric current or the gas." *ROYAL COMMISSION ON CAPITAL PUNISHMENT*, *supra* note 101, at 254.

Hanging is cruel because of the possibility that it inflicts physical pain. The fear of physical pain as well as other indignities attendant to hanging generates psychological suffering and loss of self-respect in the victim as he anticipates his fate.¹⁸⁹ The physical violence of hanging mutilates the body and offends the victim's right to bodily integrity. Privacy is invaded when witnesses are permitted to attend the affair¹⁹⁰ and autonomy is denied because the offender is allowed no choice of his fate.¹⁹¹ On the basis of the constitutional criteria for cruelty developed above, hanging is cruel on all counts. It is significantly more cruel than the paradigm and thus unnecessarily harsh.

The unnecessary cruelty of hanging is further evidenced by the legislative trend away from its use. Electrocuting and the gas chamber were initially developed to avoid the gross cruelties of hanging.¹⁹² Less than a century ago, hanging was authorized in every American state.¹⁹³ Today, although forty states retain capital punishment,¹⁹⁴ only seven still permit hanging.¹⁹⁵ Under the analysis developed in this article, hanging is violative of the eighth amendment.

There is no Supreme Court decision directly upholding the constitutionality of hanging.¹⁹⁶ Those state court cases that uphold hanging as constitutional predate the application of the eighth amendment to the

189. The following description of a hanging illustrates its indecency:

The clumsy bailiff . . . proceeded to attire the performers [sic] for their final act. On each of them he first placed a long white sleeveless robe which he tied around the neck and ankles. Over their heads he drew a cone-shaped white cotton hood, and so transformed what was a figure of pity into one of horrible offensive comedy. . . . The Majesty of the Law jested with these victims at the end, added indignity to death and sent the poor devils as masked clowns to their doom.

Dunne, *The Majesty of the Law*, in VOICES AGAINST DEATH 156, 164 (P. Mackey ed. 1976).

190. See *id.*

191. Utah does provide capital offenders the choice of hanging or the firing squad. UTAH CODE ANN. § 77-36-16 (1953). The fact that offenders overwhelmingly choose the firing squad over hanging is an indication of the harshness of hanging. See G. BISHOP, EXECUTIONS: THE LEGAL WAYS OF DEATH 34 (1965).

192. New York adopted electrocution after the governor had urged that a "less barbarous" method of execution than hanging be found. *In re Kemmler*, 136 U.S. 436, 444-45 (1890). Lethal gas was introduced in Nevada to replace hanging and shooting in order to "provide a method of inflicting the death penalty in the most humane manner known to modern science." *State v. Gee Jon*, 46 Nev. 418, 437, 211 P. 676, 682 (1923). "Since the development of the supposedly more humane methods of electrocution late in the 19th century and lethal gas in the 20th . . . hanging and shooting have virtually ceased." *Furman v. Georgia*, 408 U.S. 238, 296-97 (1972) (Brennan, J., concurring). The court in *State v. Jones*, 200 La. 808, 823, 9 So. 2d 42, 46 (1942) found "the infliction of death by electrocution is more humane and less painful than by hanging . . ."

193. See W. BOWERS, *supra* note 162, at 6-10. Maine abolished capital punishment entirely in 1887; other states followed in the twentieth century. *Id.*

194. The constitutionality of some state statutes may be questionable in light of *Furman* and *Woodson v. North Carolina*, 428 U.S. 280 (1976). The only states that do not have some form of capital punishment on their books are Maine, Michigan, North Dakota, Wisconsin, Minnesota, Iowa, West Virginia, Oregon, Alaska, and Hawaii. In CAPITAL PUNISHMENT 1971-72, *supra* note 164, at 57-59, New Jersey was mistakenly reported as having abolished capital punishment. See LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, U.S. DEPT. OF JUSTICE, CAPITAL PUNISHMENT 1975, at 5 n.6 (National Prisoner Statistics Bulletin No. SD-NPS-CP-4, 1976) [hereinafter cited as CAPITAL PUNISHMENT 1975].

195. See note 166 *supra*.

196. L. BERKSON, *supra* note 12, at 21.

states¹⁹⁷ and are ripe for reexamination in light of the doctrinal development of the cruel and unusual punishment clause that is outlined above.¹⁹⁸

B. Shooting

Because the firing squad is rarely employed as a method of capital punishment, there is little information about its use.¹⁹⁹ The small amount of information that is available, however, suggests the firing squad is also unconstitutional.

Firing squads in Utah, the only state to execute by shooting,²⁰⁰ are composed of five citizen volunteers selected secretly by a presiding officer.²⁰¹ Four of the five are given weapons with live rounds; the rifle of the fifth contains a blank.²⁰² The victim is strapped in a chair less than ten feet from the firing squad.²⁰³ A hood is fitted over his head and a small target placed over his heart.²⁰⁴ Upon the signal to fire, four bullets are supposed to enter his heart and kill him instantly.

It is not certain whether death by firing squad causes physical pain.²⁰⁵ It is probable, however, that if the marksmen miss their target,

197. See, e.g., *State v. Burris*, 194 Iowa 628, 639, 190 N.W. 38, 43 (1922); *State v. Butchek*, 121 Ore. 141, 153, 253 P. 367, 370 (1927). "The earliest Supreme Court authority for the proposition that the eighth amendment applies to the states dates from 1962. The Court has never assessed modes of capital punishment in terms of that proposition." Note, *supra* note 10, at 1327 (footnote omitted).

198. Since the time when most death penalty provisions were enacted relevant constitutional doctrine has changed radically. Most capital punishment statutes were passed long before *Trop*. Goldberg & Dershowitz, *supra* note 31, at 1814. Virtually none of the post-*Furman* reenactments changed the method of execution. See note 4 *supra*. Since the time of the original enactment of capital punishment statutes, standards of decency seem to have changed as they relate to hanging.

The fact that a minority of nine states permits hanging does not bar a finding that hanging is unconstitutional. At the time *Robinson v. California* struck down criminal punishment for drug addiction as violative of the eighth amendment, nine other states besides California had similar laws. *Gregg v. Georgia*, 428 U.S. 153, 174 n.19.

199. There is little serious scientific substantiation of the claims advanced for electrocution or gassing. According to a 1953 Gallup Poll, however, the American public strongly favored electrocution over gassing and hanging, and shooting had very few supporters. Bedau, *supra* note 161, at 23.

200. The military retains shooting as a mode of execution but it is very rarely employed. It is generally imposed only for desertion, mutiny, or other purely military offenses. W. WINTHROP, *MILITARY LAW AND PRECEDENTS* 418 (2d ed. 1920). Military executions for crimes not purely military in nature are carried out by hanging. *Id.* During 1930-67 the Army and the Air Force carried out 160 executions, 159 of which were for ordinary crimes and only one for a purely military offense. CAPITAL PUNISHMENT 1975, *supra* note 194, at 4 n.5. In any event, it is arguably appropriate to permit military executions by firing squad, particularly for mutiny or desertion on the front lines. Under military conditions shooting might be the only practicable means to effectuate capital punishment, but this rationale clearly does not apply to states that impose the death penalty.

201. G. BISHOP, *supra* note 191, at 34.

202. *Id.*

203. 1968 Hearings, *supra* note 109, at 79 (statement of Phillip Hansen).

204. *Id.* For an account of the execution of Gary Gilmore, see N.Y. Times, Jan. 18, 1977, § 1, at 1, col. 4.

205. "[W]hen the heart is ripped out by bullets, who can say what passes through the victim's

pain will occur. In the 1951 execution of Eliseo Mares, for example, all four of the bullets of a Utah firing squad entered the wrong side of the victim's chest, and the condemned man bled to death.²⁰⁶ It appears the misses were intentional; whether the riflemen wished to torture the victim or feared to inflict the fatal shot in the heart is unknown. In another reported incident the victim was shot in the shoulder and screamed in pain for twenty minutes until more ammunition could be obtained. He was finally shot in the head.²⁰⁷ Victims have been shot in other parts of the body, sometimes as far from the ideal target as the ankle.²⁰⁸

The Royal Commission on Capital Punishment did not even consider the firing squad as a serious alternative to hanging: "The firing squad is open to obvious objections as a standard method of civil execution: it needs a multiplicity of executioners and does not possess even the first requisite of an efficient method, the certainty of causing immediate death."²⁰⁹ The possibility of severe pain and prisoners' apprehension of painful death bespeak the cruelty of shooting.

The involvement of ordinary citizens in the execution process allows the firing squad to be a vehicle of public vengeance, stripping the execution process of whatever dignity it might otherwise have.²¹⁰ Many citizens volunteered for the firing squad in the recent execution of Gary Gilmore,²¹¹ and the Mares incident reveals that the firing squad is potentially a source of torture at the hands of citizens seeking revenge. The *Resweber* Court pointed out, however, that an execution process motivated by an intent unnecessarily to harm the victim may be unconstitutional.²¹² Hence, for a state to use the firing squad is unwise and probably unconstitutional.

Death by firing squad significantly mutilates the body of the offender, an affront to his dignity.²¹³ The multiplicity of executioners

mind? What appears to us as a pleasant death, because apparently instantaneous, may be extremely torturous." J. KERVOKIAN, *supra* note 140, at 19.

206. G. BISHOP, *supra* note 191, at 34-35.

207. 1968 *Hearings*, *supra* note 109, at 21 (statement of Clinton Duffy).

208. *Id.* at 79 (statement of Phillip Hansen).

209. ROYAL COMMISSION ON CAPITAL PUNISHMENT, *supra* note 101, at 249.

210. The Royal Commission on Capital Punishment noted its disapproval of methods of execution that perpetuate vengeance. "[T]he ambition that prompts an average of 5 applications a week for the post of hangman . . . reveal[s] psychological qualities of a sort that no state would wish to foster in its citizens." *Id.* at 256 (footnote omitted). Another commentator has said: "[T]he desire for vengeance has deep, unconscious roots and is roused when we feel strong indignation or revulsion. . . . [S]uch impulses should [not] be legally sanctioned by society, any more than we sanction some other unpalatable instincts of our biological inheritance. Deep inside every civilized being there lurks a tiny Stone Age man, dangling a club to rob and rape, and screaming an eye for an eye. But we would rather not have that little furclad figure dictate the law of the land.

A. KOESTLER, *supra* note 133, at 100.

211. See N.Y. Times, Nov. 11, 1976, § 1, at 14, col. 1.

212. See text accompanying note 40 *supra*.

213. See 1968 *Hearings*, *supra* note 109, at 20 (statement of Clinton Duffy).

denies the condemned person his right of privacy. Shooting with high-powered rifles at ten feet produces gross physical violence that indicates disrespect for the victim as a person.

Legislative rejection of shooting serves to confirm that it is cruel. Nevada, the only state other than Utah ever to permit the firing squad, replaced shooting with lethal gas in an attempt to "provide a method of inflicting the death penalty in the most humane manner known to modern science."²¹⁴ The cruelty of the firing squad is unnecessary in light of less cruel alternatives such as the paradigm. Moreover, every jurisdiction in the nation except one operates without it.²¹⁵

C. *Electrocution*

Although the electric chair was introduced initially as a more humane alternative to hanging or shooting, it is questionable whether electrocution represents any humanitarian advance. Most authorities agree that death by electrocution is painless,²¹⁶ although some strongly disagree.²¹⁷ Even if most electrocutions are painless, *Resweber* illu-

This is a shooting. They strap him in there. They find his heart. They put the patch. . . . [T]hey shoot with these high-powered rifles. They have had to reload on occasion. . . . Then while he is twitching like the chicken with his nerves and the head cut off, the doctor goes in with his stethoscope again in approximately 2 minutes or in excess thereof. He finally says, "dead." . . . They take him out between the fences right out in the yard and shoot him and these bullets go through him . . . and ricochet off like in the cowboy movies. This is what we have going on in the State of Utah. I am sure other types of killing are just as cruel, are just as barbaric. . . .

Id. at 79 (statement of Phillip Hansen).

Shooting is so inhumane that it is not even considered a dignified way to perform euthanasia on animals. "Few laymen countenance shooting in euthanasia of pets. . . . Pets generally are destroyed by electrocution or by the administration of a lethal dose of a drug." L. JONES, *supra* note 112, at 893.

214. See *State v. Gee Jon*, 46 Nev. 418, 437, 211 P. 676, 682 (1923). The Oklahoma Legislature recently ranked shooting below both intravenous injection and electrocution as an acceptable mode of execution. See 1977 Okla. Sess. Laws, ch. 41, § 1. Such a ranking is based on humanitarian and not economic considerations. See *Tulsa Daily World*, Mar. 3, 1977. Employing the electric chair is considerably more expensive than shooting.

215. The *Wilkerson* dictum with respect to execution by firing squad carries little authority, given the Court's post-*Weems* analysis of cruelty in terms of evolving social mores. Although shooting convicts may have been consistent with concepts of decency at the time *Wilkerson* was decided, there is little reason to believe the same view prevails today. Hence, under the analysis presented in this article, the firing squad is an unconstitutionally cruel punishment.

216. See ROYAL COMMISSION ON CAPITAL PUNISHMENT, *supra* note 124, at 251; M. DiSALLE, *THE POWER OF LIFE OR DEATH* 20 (1965) (pathologists differ on just how electrocution kills; some say the heart muscle is paralyzed, but most believe death is caused by paralysis of the respiratory center); J. LAURENCE, *supra* note 156, at 68. There is scant scientific substantiation of the claims advanced for electrocution. See Bedau, *supra* note 161, at 22-23.

217. A distinguished French scientist, L.G.V. Rota, characterized execution through electrocution as a form of "torture" because the victim may be alive for several minutes after the current has passed through the body. He also contended that certain persons have greater physical resistance to electric current than others. N. TEETERS, *supra* note 17, at 447. Another early expert said:

The current flows along a restricted path into the body, and destroys all the tissue 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 touch only one of these parts; so that the individual retains consciousness and a keen sense of

strates that agonizing torture caused by malfunctions in the electric chair is always possible. Often two or three jolts are required before the victim is pronounced dead.²¹⁸

Apart from the issue of physical pain, electrocution, like hanging, requires preliminaries that sharpen the prisoner's apprehension of his fate and increase his psychological suffering.²¹⁹ Early in the morning of execution day, the top of the condemned person's head and the calf of one leg are shaved to afford direct contact with electrodes. The prisoner then waits, sometimes for hours, until he is taken to the execution chambers, strapped into the chair, and connected to electrodes at his head and legs.²²⁰

Various indignities attend electrocutions. Sometimes the victim's eyeballs fall from their sockets.²²¹ He urinates and defecates, and his tongue swells.²²² The body may catch on fire,²²³ and the smell of burning flesh usually permeates the chamber.²²⁴ Electrocution is an extremely violent means of inflicting death. At the moment the switch is thrown all the muscles of the body contract; the result is severe contortions of the limbs, fingers, toes, and face.²²⁵ The body turns bright red as its temperature rises.²²⁶ Witnesses to electrocutions often become emotionally upset by the gruesome aspects of this method of death.²²⁷

Electrocution is cruel because it may inflict pain. It causes undue psychological suffering and offends human dignity because it is violent and disfigures the body. None of this cruelty is necessary since less cruel alternatives are available.

There is evidence of a legislative trend away from electrocution. Two states, acting on humanitarian grounds, recently abandoned electrocution in favor of the more humane method of lethal injection.²²⁸

agony. For the sufferer, time stands still; and this excruciating torture seems to last for an eternity.

Id., quoting N.Y. World, Nov. 17, 1929.

218. *Id.* at 449.

219. One requirement of "humanity" in executions is to keep the preliminaries to the act of execution as simple as possible. ROYAL COMMISSION ON CAPITAL PUNISHMENT, *supra* note 101, at 253.

220. *Id.* at 251.

221. See 1968 Hearings, *supra* note 109, at 20 (statement of Clinton Duff); Rubin, *The Supreme Court, Cruel and Unusual Punishment, and the Death Penalty*, 15 CRIME & DELINQUENCY 121, 129 (1969).

222. 1968 Hearings, *supra* note 109, at 20 (statement of Clinton Duff).

223. Rubin, *supra* note 221, at 128.

224. *Id.*; "[T]he smell of frying human flesh is sometimes bad enough to nauseate even the press representatives who are present." As quoted in N. TEETERS, *supra* note 17, at 449. See also 1968 Hearings, *supra* note 109, at 20.

225. See C. DUFF, A NEW HANDBOOK ON HANGING 118 (1954).

226. G. BISHOP, *supra* note 191, at 27.

227. See note 224 *supra*; Rubin, *supra* note 221, at 129.

228. Before adopting lethal injection, both Oklahoma and Texas employed the electric chair. See CAPITAL PUNISHMENT 1971-72, *supra* note 164, at 58. See also note 3 *supra*. Sponsors of the lethal injection legislation in Oklahoma were motivated by a desire to eliminate

Earlier, three states had rejected the electric chair in favor of the gas chamber.²²⁹ Although five states have moved from electrocution to more humane methods of execution, no state has moved from gassing or lethal injection to electrocution.²³⁰ This legislative activity evidences the unnecessary cruelty and thus the probable unconstitutionality of the electric chair.

Supreme Court dicta in *Kemmler* and *Resweber* should not preclude judicial scrutiny of execution by the electric chair.²³¹ State cases that hold electrocution consistent with state constitutional provisions against cruel punishment²³² should be reexamined in light of subsequent eighth amendment doctrine.

D. *The Gas Chamber*

Lethal gas was introduced in response to the cruelties of hanging, shooting,²³³ and electrocution.²³⁴ Although the gas chamber has certain advantages over these other methods because it is less violent²³⁵ and does not mutilate or disfigure the body,²³⁶ it is questionable whether death by lethal gas is painless:

[The prisoner] is accompanied the 10 or 12 steps by two officers, quickly strapped in the metal chair, the stethoscope applied, and the door sealed. The warden gives the executioner the signal and, out of sight of the wit-

the cruelty and inhumanity of electrocution in favor of a more humane form of execution. See *Tulsa Daily World*, Mar. 3, 1977; *The Oklahoma Journal*, May 10, 1977, § 1, at 1, 2. Representative Ben Grant, one of the sponsors of the Texas bill to introduce lethal injection, argued in the Texas Legislature that death by electrocution is a "gruesome ritual," and the electric chair is "a barbaric torture device." Letter from Representative Ben Z. Grant to Martin R. Gardner (August 8, 1977) (on file in University of Nebraska College of Law Library).

229. W. BOWERS, *supra* note 162, at 9. The change from electrocution to gas was no doubt primarily motivated by humanitarian and not economic considerations. Gas chambers are expensive to build and maintain. The cost to build a gas chamber in Oklahoma was recently estimated at \$250,000. *The Daily Oklahoman*, Mar. 3, 1977, § 1, at 1, 2, col. 1.

230. See W. BOWERS, *supra* note 162, at 200-402.

231. "[I]f the Supreme Court hears evidence on the realities of capital punishment in terms of physical pain and mental torture, it cannot adhere to the premises upon which it has assumed the death penalty consistent with the eighth amendment." Note, *supra* note 10, at 1338 (footnote omitted). See note 197 *supra*.

232. See, e.g., *Ferguson v. State*, 90 Fla. 105, 105 So. 840 (1925); *Hart v. Commonwealth*, 131 Va. 726, 743, 109 S.E. 582, 587 (1921); *State v. Burdette*, 135 W. Va. 312, 339-40, 63 S.E.2d 69, 85 (1951).

233. See *State v. Gee Jon*, 46 Nev. 418, 437, 211 P. 676, 682 (1923).

234. The Nevada Legislature considered and rejected shooting, hanging, and electrocution in favor of the gas chamber. See *id.*; G. BISHOP, *supra* note 191, at 162. "[I]t is generally believed, if not demonstrable, that asphyxiation is less brutal than electrocution and far less than hanging." N. TEETERS, *supra* note 17, at 451.

235. See ROYAL COMMISSION ON CAPITAL PUNISHMENT *supra* note 101, at 255.

236. The absence of mutilation is a significant humanitarian consideration. In executions by lethal gas

the family of the condemned prisoner, his loved ones and the friends who claim the body do not go through as much of a harrowing experience when they claim a body that has not been mutilated. I have talked with many of these folks and, although they are grief-stricken, it is not quite so hard on them emotionally, when the body is not disfigured.

1968 *Hearings*, *supra* note 109, at 21 (statement of Clinton Duffy).

nesses, the executioner presses the lever that allows the cyanide gas eggs to mix with the distilled water and sulphuric acid. In a matter of seconds the prisoner is unconscious. At first there is extreme evidence of horror, pain, strangling. The eyes pop, they turn purple, they drool. It is a horrible sight. Witnesses faint. It finally is as though he has gone to sleep.²³⁷

Other accounts describe the prisoner struggling, apparently consciously, for a matter of minutes before becoming unconscious.²³⁸ The apparent suffering is sometimes said to be unconscious reflex²³⁹ but no one knows for certain whether the victim of gaseous asphyxiation suffers pain.²⁴⁰

When the eighth amendment criteria of cruelty are applied it is open to question whether the gas chamber can pass constitutional scrutiny. Because the gas chamber avoids some of the violence and indignity inherent in hanging, shooting, and electrocution, it is unclear whether the paradigm alternative is *significantly* less cruel. Moreover there has not been a demonstrable legislative trend away from gas.²⁴¹

Case law that upholds gassing is outdated in light of subsequent eighth amendment development.²⁴² No Supreme Court decisions directly uphold the gas chamber.²⁴³ Given the possibility that gassing inflicts pain and the availability of demonstrably less painful alternatives, the constitutionality of the gas chamber is questionable.

E. *Lethal Injection*

Legislative movement away from the traditional modes of execution was signalled by the recent adoption of lethal injection in Oklahoma and Texas²⁴⁴ and the consideration of this new method by several other states.²⁴⁵ Intravenous injection of sufficient quantities of an ultra fast-acting barbiturate combined with a paralytic agent²⁴⁶ causes uncon-

237. *Id.*

238. *See, e.g.*, the account quoted in Rubin, *supra* note 221, at 129.

239. M. DiSALLE, *supra* note 216, at 23.

240. Cyanide causes convulsions and kills by cutting off the supply of oxygen to the cells. This amounts to suffocation, probably an unpleasant way to die. *See* J. KERVOKIAN, *supra* note 140, at 17-18.

241. The State of Oklahoma has recently adopted lethal injection after it had considered the gas chamber. The choice was motivated, however, primarily by economic and not humanitarian considerations. *See* The Oklahoma Journal, Mar. 3, 1977, § 1, at 2, col. 1.

242. *See, e.g.*, *People v. Daugherty*, 40 Cal. 2d 876, 894, 256 P. 2d 911, 922, *cert. denied*, 346 U.S. 827 (1953); *State v. Gee Jon*, 46 Nev. 418, 211 P. 676 (1923) note 219 *supra*.

243. *See* L. BERKSON, *supra* note 12, at 31.

244. *See* note 4 *supra*.

245. *See* The Oklahoma Journal, Mar. 11, 1977, § 1, at 11, col. 7.

246. The Oklahoma statute specifies "continuous, intravenous administration of a lethal quantity of an ultrashort-acting barbiturate in combination with a chemical paralytic agent" as the method of execution. OKLA. STAT. ANN. tit. 22 § 1014(a) (West Supp. 1977). The Texas statute specifies only "intravenous injection of a substance or substances in a lethal quantity." The Director of the Department of Corrections is empowered to determine the injection procedures. TEX. CODE CRIM. PROC. ANN. art. 43.14 (Vernon 1978).

sciousness within forty seconds and death shortly thereafter.²⁴⁷ Apart from the initial pain of inserting the needle, the process is painless if properly done.²⁴⁸ Because the injection must be intravenous and not simply intramuscular,²⁴⁹ however, some practical problems might arise in administering lethal injections. If the victim struggled or his veins were difficult to locate²⁵⁰ the injection might inadvertently be administered intramuscularly, which would cause the victim pain.²⁵¹ These problems could be minimized by administering a nonlethal sedative, either oral or intramuscular, prior to beginning the process of lethal injection.²⁵² Thus, the process of execution would extend over a longer period of time than it now does and for this reason would be less desirable than the mode outlined in the paradigm; but the victim would feel only the pain of the sedative injection and not even that if he consented to oral sedation. There would be minimal violence, no mutilation, and little more indignity than attends an ordinary surgical operation.

Because of the novelty of lethal injection as a means of inflicting capital punishment there are no cases dealing with its constitutionality. It would appear, however, to comport with the requirements of the Constitution unless failure to provide the suicide option is found to be a significant infringement of autonomy and dignity. Lethal injection, like the firing squad, is vulnerable to abuse by malevolent executioners. These points might be argued if the new lethal injection statutes are subjected to constitutional challenge.

Hanging, shooting, and electrocution are unconstitutional under the stringent eighth amendment analysis described in this article. The gas chamber, although less cruel in many ways, is not beyond constitutional question. Even lethal injection, clearly the most humane of the present methods, might be unconstitutional when compared to less cruel alternatives like the paradigm. The time is ripe for constitutional scrutiny of all these methods.

V. CONCLUSION

This paper has not argued that "humane" ways of inflicting death could or should be devised. The inherent indignities of death deliberately imposed upon a person by his fellows may well make the death

247. See ROYAL COMMISSION ON CAPITAL PUNISHMENT *supra* note 101, at 257; Letter from Dr. Stanley Deutsch, Head of Department of Anesthesiology, The University of Oklahoma Health Sciences Center, to Senator Bill Dawson, Oklahoma State Senate (February 28, 1977) (on file in University of Nebraska College of Law Library) [hereinafter cited *Deutsch Letter*].

248. See ROYAL COMMISSION ON CAPITAL PUNISHMENT, *supra* note 101, at 257; *Deutsch Letter*, *supra* note 247.

249. See ROYAL COMMISSION ON CAPITAL PUNISHMENT, *supra* note 101, at 257-58.

250. See *id.* at 258.

251. *Id.* at 260.

252. See *Deutsch Letter*, *supra* note 248.

penalty untenable from a truly humanitarian perspective.²⁵³ Given capital punishment as a present reality, however, human decency as embodied in the eighth amendment and defined by the courts demands at least that execution be imposed more humanely than it has been in the past. The movement away from ruthless punishment has been a gradual process.²⁵⁴ The incremental humanitarian gains achieved by rejection of more cruel methods of execution in favor of less cruel methods may be significant in the progression from a barbarous society to one that espouses principles of dignity and humanity. Honest and open scrutiny of the ways we inflict death may serve eventually to raise the collective moral conscience to the point that the public will oppose any infliction of death as a punishment. Until then, rejection of present cruelties would at least "provide a little decency where today there is nothing but a sordid and obscene exhibition."²⁵⁵

253. See generally Ramsey, *The Indignity of 'Death with Dignity'*, 2 HASTINGS CENTER STUDIES 47 (1974).

254.

The history of criminal law is in large part a history of abolitions. Cruel procedures, like torture, once thought indispensable, and punishments no less cruel, such as amputation, have been progressively abolished, not only because they were repugnant to a more enlightened moral conscience but also because their utter uselessness had been learned by experience.

Del Vecchio, *The Struggle Against Crime*, in *THE PHILOSOPHY OF PUNISHMENT* 197, 199 (H. Acton ed. 1969).

255. Camus, *supra* note 1, at 131, 153.