McGeorge Law Review

Volume 26 | Issue 1 Article 5

1-1-1994

Hang by the Neck until Dead: The Resurgence of Cruel and Unusual Punishment in the 1990s

Pamela S. Nagy
Temple University School of Law

Hang by the Neck Until Dead: The Resurgence of Cruel and Unusual Punishment in the 1990s

Pamela S. Nagy*

> I hold that no man can be hanged, because who will assert that to take a man and drag him up and let him choke to death is not cruel? We all know that it is cruel. There can be nothing more cruel conceived by the mind of man. It is torture the most horrible. And yet it is done.[1]

On January 5, 1993, an atrocious act was committed by the State of Washington. Westley Allan Dodd, a convicted child killer, was hanged at the Washington state prison in Walla Walla.[2] It was the first hanging in the United States since 1965.[3] Why such a barbaric method of execution was used in this modern day when execution by lethal injection prevails is a question that looms in the minds of many people, legal theorists and lay persons alike.[4] More important, however, is the question of whether or not states should still be using such a method in light of the Eighth Amendment's prohibition against cruel and unusual punishment.[5] While Washington was the first state in twenty-eight years to hang a person, three other states still retain the ability to hang a person when the death penalty is imposed.[6]

---

* B.S., Eastern Michigan University, 1987; J.D., Case Western Reserve University School of Law, 1990; Graduate Teaching Fellow, Temple University School of Law, 1991-93; LL.M., Temple University School of Law, 1994.

1. People v. Anderson, 6 Cal.3d 628, 642 n.23, 493 P.2d 880, 889 n.23, 100 Cal. Rptr. 152, 161 n.23 (1972) (relating a statement by a delegate of the California Legislature in opposition to the death penalty in 1879).

2. *Coroner Concludes Murderer Felt Little Pain When Hanged*, N.Y. TIMES, Jan. 10, 1993, at 23 [hereinafter *Murderer Felt Little Pain*].

3. *Id.*

4. For statistics on the various methods of execution, see *infra* notes 251-263 and accompanying text.

5. The Eighth Amendment states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

6. The three other states are Delaware, New Hampshire and Montana. It should be noted that a person is not automatically sentenced to die by hanging in any state. In both Washington and Montana, a person sentenced to death has a choice between death by hanging and death by lethal injection. *See* MONT. CODE ANN. § 46-19-103(3) (1993) (permitting a defendant to choose between death by hanging or, in the alternative, lethal injection, if the defendant makes the choice at the hearing at which an execution date is set; however, if the defendant for some reason fails to choose lethal injection at that time, then the option to choose lethal injection is waived); WASH. REV. CODE ANN. § 10.95.180(1) (West 1993) (mandating death by hanging unless the defendant chooses lethal injection); *see also* DEL. CODE ANN. tit. 11, § 4209(f) (1993) (retaining hanging as an alternative method in the event the preferred method of lethal injection is found unconstitutional); N.H. REV. STAT. ANN. § 630:5 (XIII, XIV) (Supp. 1993) (leaving defendants in New Hampshire at the mercy of the commissioner of corrections who may choose hanging if he or she deems that death by lethal injection is

This Article explores the issue of whether hanging constitutes cruel and unusual punishment under the Eighth Amendment. In reaching the conclusion that hanging is cruel and unusual, the author does not intend to suggest that the death penalty itself is unconstitutional; rather, only that this particular method of execution needs re-examining. The Article is divided into four sections. Part I discusses the history and phenomenon of hanging, as well as the executions of Westley Allan Dodd and Charles Rodman Campbell, the most recent hangings in the United States.[7] Part II reviews the Cruel and Unusual Punishments Clause and the cases interpreting the Clause.[8] Part III considers the treatment of this issue by state courts.[9] Part IV contains the discussion, and it is divided into three subsections. Subsection A provides evidence to support the conclusion that hanging is cruel and unusual.[10] Subsection B addresses the evidence in light of the standards promulgated by the United States Supreme Court for assessing whether punishments are cruel and unusual.[11] Finally, in Subsection C, reasons for retaining hanging are analyzed.[12]

I. HANGING AS A METHOD OF EXECUTION

Hanging dates back as early as the tenth century,[13] to a time when other torturous methods of execution, such as burning alive, boiling alive, disembowelling,[14] drawing and quartering,[15] and gibbeting,[16] were considered the norm.[17] By the seventeenth and eighteenth centuries, hanging had replaced most

---

"impractical").

7. *See infra* notes 13-73 and accompanying text. Campbell was executed on May 27, 1994, in Walla Walla, Washington. *Gallows Drop Reduced to Avoid Decapitation During Killer's Hanging*, ARIZ. REPUBLIC, July 2, 1994, at A8 [hereinafter *Gallows Drop*]; *Killer Struggles with Guards Before Hanging*, L.A. TIMES, May 28, 1994, at A19 [hereinafter *Killer Struggles*].

8. *See infra* notes 74-127 and accompanying text.

9. *See infra* notes 128-200 and accompanying text.

10. *See infra* notes 201-270 and accompanying text.

11. *See infra* notes 271-277 and accompanying text.

12. *See infra* notes 278-322 and accompanying text.

13. JOHN LAURENCE, A HISTORY OF CAPITAL PUNISHMENT 4 (1960).

14. This literally means that the person's internal organs were removed. *See* WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 362 (1990).

15. This literally means to change one's shape by pulling and stretching, and then to cut into four pieces. *Id.* at 381, 964.

16. A gibbet is "an upright post with a projecting arm for hanging the bodies of executed criminals as a warning." *Id.* at 516. However, many criminals were hung in chains alive on gibbets and left there until they died, often after several days. Some of the corpses were even tarred to last longer. ARTHUR KOESTLER, REFLECTIONS ON HANGING 8 (1957).

17. LAURENCE, *supra* note 13, at 6, 9.

other methods of execution in England. It was, however, considered a more disgraceful method of execution than beheading or shooting,[18] the former of which was often reserved only for important people such as royalty.[19]

In early hangings, people were hung from ropes in trees or a crude type of gallows, and were made to climb to their deaths by means of a ladder.[20] Not only were these hangings public, but they were often considered the social event of the season.[21] As times progressed, executioners became more concerned about how the person actually died. Thus, the "long drop" was introduced in the eighteenth century to ensure that death occurred by breakage of the neck rather than by strangulation, which was a common occurrence prior to this invention.[22] This method of hanging used a formula based on the prisoner's weight in order to determine the height from which the body should be dropped.[23] Prior to this method, virtually all prisoners were hung from a height of approximately eight feet.[24] It was eventually discovered that without this precise ratio, the possibility of decapitating as well as strangling the prisoner was all too real.[25] Additionally, hangmen learned to place the knot at a precise angle behind the left side of the prisoner's neck, in order to assure breakage of the neck.[26] These methods are still considered very important today.

---

18. *Id.* at 41.

19. *Id.* at 6.

20. *Id.* at 41.

21. In his book, Arthur Koestler states that "hanging days" in eighteenth century England were considered the equivalent of national holidays. At many public hangings, fights and stampedes were the norm. For the upper classes, grandstands were erected, and balconies and windows were rented out for people to watch the hangings, similar to the modern practice of renting balconies to watch a concert or a baseball game. Further, the Governor of Newgate Prison frequently entertained certain onlookers with breakfast after a hanging. *See* KOESTLER, *supra* note 16, at 8-10.

22. LAURENCE, *supra* note 13, at 44-48; NEGLEY K. TEETERS, "...HANG BY THE NECK..." THE LEGAL USE OF SCAFFOLD AND NOOSE, GIBBET, STAKE, AND FIRING SQUAD FROM COLONIAL TIMES TO THE PRESENT 156 (1967). Koestler notes that before the introduction of the long drop and placing the knot under the left jaw, "the agony of slow suffocation without loss of consciousness could last up to twenty minutes." KOESTLER, *supra* note 16, at 139-40.

23. TEETERS, *supra* note 22, at 157. Under the Army's current manual, "drop is defined as the distance from the execution rope knot origin toward the execution area floor base." Jimmy Breslin, *Weighty Problem of Decapitation*, NEWSDAY, May 19, 1994, at A02 (quoting Army manual 633-15). The smaller the prisoner, the farther the prisoner must drop in order to avoid problems. For instance, a prisoner weighing 120 pounds requires a drop of eight feet, one inch; 150 pounds requires six feet, seven inches; 170 pounds requires six feet, two inches; and 220 pounds requires five feet, four inches. *Id.*

24. LAURENCE, *supra* note 13, at 48.

25. TEETERS, *supra* note 22, at 158.

26. According to a discussion by a former hangman before the Royal Commission on Capital Punishment in 1950, if the knot is placed behind the right side of the neck, the knot stays behind the prisoner's neck and throws the neck forward, causing the prisoner to strangle. If the knot is placed behind the left side of the neck, it causes the prisoner's chin to fall back because the knot ends up under it, breaking the prisoner's neck. *Id.* at 156-57; *see also* Bernard J. Ficarra, *Death by Hanging*, *in* LEGAL MEDICINE 1987 at 44, 47 (Cyril H. Wecht, M.D., J.D., ed., 1988) (quoting executioner Albert Pierrepoint).

In time, people began to speak out against public hangings.[27] However, states did not begin prohibiting public hangings until 1834, when Pennsylvania became the first state to do so.[28] Not only did these new laws prohibit public hangings, they mandated that hangings be conducted in the state prisons or county jails.[29] Moreover, these new laws provided that a physician must be present at the hanging, and that other witnesses chosen by the sheriff, and in some instances witnesses chosen by the prisoner, could attend.[30] Finally, the prisoner could also choose to have a particular minister observe the hanging.[31] In many cases, there was still a large turnout for the hanging. People would crowd inside the jail to watch the hanging or, if it was conducted within the prison yard, people would watch from rooftops outside the prison walls.[32]

In the early 1900s, hanging began to lose its popularity as the preferred method of execution. This was due in part to the introduction of the electric chair, which was considered a much faster and less painful method of execution than hanging.[33] New York was the first state to adopt electrocution as its mode of execution in 1888, and the first electrocution occurred in Auburn Prison in New York in 1890.[34] In time, the majority of states eliminated hanging from their death penalty statutes and replaced it with death by electrocution.[35]

A. Westley Allan Dodd: A Modern Day Hanging

On January 5, 1993, history was made when Westley Allan Dodd became the first person in twenty-eight years to be hanged in the United States.[36] For Dodd, who had the choice between hanging or lethal injection pursuant to the

---

27. Teeters describes the movement to abolish public hangings as originating from the movement to abolish capital punishment altogether. Dr. Benjamin Rush and William Bradford were two persons who voiced strong opposition to capital punishment. Rush, a renowned Philadelphia physician and one of the signers of the Declaration of Independence, gave a speech in 1787 at Benjamin Franklin's home denouncing all forms of public punishment, and later in 1792 wrote a pamphlet opposing capital punishment. TEETERS, *supra* note 22, at 152. Bradford, who was the attorney general of "the Quaker state," wrote in 1788 in favor of abolishing capital punishment. *Id.*

28. *Id.* at 152.

29. *Id.* at 153.

30. *Id.*

31. *Id.*

32. *Id.* For instance, at a hanging conducted in 1909 at Emporium, the county seat of Cameron County, Pennsylvania, people crowded outside the courthouse where the hanging occurred. Even though officials placed canvas from the jail to the lawn of the courthouse grounds in order to obstruct the view, people were still able to see from the sides that were not covered. *Id.*

33. Lonny J. Hoffman, *The Madness of the Method: The Use of Electrocution and the Death Penalty*, 70 TEX. L. REV. 1039, 1039 (1992).

34. *Id.*

35. The following states quickly adopted electrocution soon after New York: Ohio in 1896; Massachusetts in 1898; New Jersey in 1907; Virginia in 1908; North Carolina in 1909; Kentucky in 1910; and Arkansas, Indiana, Pennsylvania, and Nebraska in 1913. *Id.*

36. *Hanging: A Matter of Choice*, ECONOMIST, Jan. 9, 1993, at 25 [hereinafter *A Matter of Choice*].

Washington death penalty statute,[37] hanging was the clear choice. Dodd, 31, a confessed child molester and murderer, chose hanging because he raped and tortured three young boys, and then hanged one of them in 1989.[38]

Although Dodd's case sparked an intense debate over whether hanging is cruel and unusual punishment,[39] the hanging in Walla Walla, Washington proceeded without incident.[40] Shortly before Dodd was scheduled to hang, a team of prison workers put the hood, ankle strap and noose on him.[41] At 12:09 a.m. Pacific time, an official at the Washington State Penitentiary pressed a red button.[42] The button triggered the trap door in the gallows to open, causing Dodd, who was attached to the gallows by a thirty-foot-long rope, to hang.[43] Only sixteen spectators were present to witness the event, including twelve reporters and two relatives of Dodd's victims.[44] None of the witnesses reported that Dodd "writhed" or "twitched," although some reported seeing some body "movements" or "flexing."[45] None of the witnesses could see Dodd's face, which was covered by a hood.[46]

Obviously, Dodd's case was controversial because he was the first person to be hanged since 1965.[47] One question was whether he actually suffered any pain during the execution. Central to this issue was the coroner's report. Dr. Donald Reay, King County Medical Examiner, stated at a news conference that although Dodd actually died within two to three minutes of the hanging, he did not die

---

37. *See* WASH. REV. CODE ANN. § 10.95.180(1) (West 1990). Hanging was the sole method of execution for first degree murder until 1981, when lawmakers added the choice of lethal injection. Sally Macdonald, *Death Watch at Walla Walla—Hanging, Once Quite Common, Is Now Rare*, SEATTLE TIMES, Jan. 4, 1993, at A1.

38. Lynne Duke, *A Hanging Fires Debate over Cruelty: Child Killer Dies on Prison Gallows*, WASH. POST, Jan. 6, 1993, at A3; *A Matter of Choice*, *supra* note 36, at 25. Dodd pleaded guilty to killing William and Cole Neer, ages 10 and 11, from Vancouver, Washington, and Lee Iseli, age 4, from Portland, Washington. Macdonald, *supra* note 37, at A1.

39. Not only did the American Civil Liberties Union file suit in Washington to prevent Dodd's hanging, Dodd's case sparked debate over the entire death penalty issue. Duke, *supra* note 38, at A3. The media focused on Dodd's case. For instance, "television reports walked viewers through the process, dramatically broadcasting the thunk of the trap door and the silence that follows." *A Matter of Choice*, *supra* note 36, at 25. Likewise, newspaper reports also described hanging to the smallest detail, including the type of rope to be used and the need to wax the rope so that it easily tightens around the prisoner's neck. *Id.*

40. *A Matter of Choice*, *supra* note 36, at 25.

41. Jack Broom, *Gallows Gear Shown at Campbell Hearing*, SEATTLE TIMES, May 25, 1993, at B1 [hereinafter *Gallows Gear*].

42. Brian Christie, *Is Execution by Hanging Cruel and Unusual Punishment?*, CNN, Jan. 5, 1993 (live report- transcript #166) (*available in* LEXIS, News Library, Script File).

43. *Id.*

44. *Id.*

45. *See* Duke, *supra* note 38, at A3; Peter Lewis, et al., *Doctor Says Dodd Felt No Pain - Neck Ligaments Tore, Then He Strangled*, SEATTLE TIMES, Jan. 6, 1993, at C1.

46. *See* Duke, *supra* note 38, at A3; Lewis, *supra* note 45, at C1.

47. *Murderer Felt Little Pain*, *supra* note 2, at 23.

from the "classic hangman's fracture."[48] In other words, Dodd's neck was not broken from the hanging; rather, Dr. Reay opined that Dodd probably died from a combination of strangulation and neck damage.[49] He concluded that Dodd's neck ligaments tore first, which separated the bones in his spinal column, all of which rendered him unconscious before he hit the end of the rope.[50] He further opined that any pain Dodd felt was probably brief.[51]

While opponents of the death penalty voiced strong opposition prior to Dodd's hanging, the Washington State Supreme Court declined to stay the execution, despite an American Civil Liberties Union brief filed by a group of twenty-six citizens including two retired judges and four state legislators.[52] Another person also voiced opposition to Dodd's hanging—convicted killer Charles Rodman Campbell.

B. Charles Rodman Campbell

On November 26, 1982, Campbell was convicted on three counts of aggravated first degree murder for the deaths of Renae Wicklund, age 31, her daughter Shannon, age 8, and their next door neighbor, Barbara Hendrickson, age 51.[53] This was not the first time the three victims had encountered Campbell. Campbell had previously raped and sodomized Renae Wicklund in 1974 while threatening to kill Shannon, who was one year old at the time, by holding a knife to Shannon's throat.[54] Neighbor Hendrickson came to Wicklund's aid after the rape.[55] At the trial, both Wicklund and Hendrickson testified against Campbell, who was convicted of first degree assault and sodomy.[56]

In March, 1982, Campbell was transferred from prison to a work release facility.[57] Less than one month later, while on work release, Campbell revisited Wicklund's home. There he beat her, strangled her, and eventually cut her throat

---

48. *Id.* Where "'fracture dislocation of the second and third cervical vertebrae with severed spinal column'" occurs which results in instantaneous death, there has been a classic hangman's fracture. Ficarra, *supra* note 26, at 46-47 (quoting executioner Albert Pierrepoint). According to Jeffrey Cohen, a party working for the ACLU which attempted to prevent Dodd's execution, the lack of a hangman's fracture showed that hanging was unpredictable. Kate Shatzkin, et al., *Dodd Autopsy Fuels Both Sides of Debate Over Hanging*, SEATTLE TIMES, Jan. 7, 1993, at G1.

49. *Murderer Felt Little Pain*, *supra* note 2, at 23.

50. Shatzkin, *supra* note 48, at G1; Lewis, *supra* note 37, at C1.

51. *Murderer Felt Little Pain*, *supra* note 2, at 23.

52. *See* Duke, *supra* note 38, at A3; *First Man Since '65 Hanged in U.S.*, WORLD NEWS DIGEST, Jan. 14, 1993, at 20 G2 (*available in* LEXIS, News Library, Curnws File).

53. Richard Barbieri, *Judge May Reopen Challenge to Washington Death Penalty*, THE RECORDER, Jan. 21, 1993, at 4; Don Hannula, *Killer Campbell: A Decade Is Not a Fast Track*, SEATTLE TIMES, June 3, 1993, at A12.

54. *See* Campbell v. Kincheloe, 829 F.2d 1453, 1456 (9th Cir. 1987); Hannula, *supra* note 53, at A12.

55. Campbell v. Kincheloe, 829 F.2d at 1456.

56. *Id.*

57. *Id.*

with a knife.[58] He also cut the throats of Shannon and Hendrickson, who, coincidentally, happened to be visiting Wicklund that day.[59] All three of the victims bled to death.[60]

Campbell's experience with death penalty appeals is voluminous.[61] In April

---

58. *Id.*

59. *Id.*

60. *Id.*

61. A partial recitation of the history of Campbell's case is warranted at this juncture. For a discussion of the procedural history leading to Campbell's conviction, see Campbell v. Blodgett, 978 F.2d 1502, 1504-05 (9th Cir. 1992). Campbell's conviction was affirmed by the Washington Supreme Court in 1984. State v. Campbell, 691 P.2d 929, 948 (Wash. 1984). He then obtained a stay of execution, which had been scheduled for March 29, 1985, pending action by the U.S. Supreme Court on his petition for certiorari. Hannula, *supra* note 53, at A12. The petition for certiorari was denied. Campbell v. Washington, 471 U.S. 1094 (1985).

Campbell's second date of execution was scheduled for July 25, 1985. Two weeks before the date of execution, Campbell filed a stay of execution with the Washington Supreme Court, which rejected the stay on July 18, 1985. He then filed a habeas corpus petition and a stay of execution in the federal district court, the latter of which was granted by the court. The court held an evidentiary hearing on the habeas corpus petition, which was denied on February 12, 1986. This denial was affirmed by the Ninth Circuit Court of Appeals in Campbell v. Kincheloe, 829 F.2d 1453, 1467 (9th Cir. 1987).

After another petition for certiorari was denied by the U.S. Supreme Court, Campbell v. Kincheloe, 488 U.S. 948 (1988), the third date for execution was set for March 30, 1989, five years after the first execution date. After denials of stays by the Washington Supreme Court and the federal district court, the Ninth Circuit granted a stay pending appeal of a denial of a second habeas corpus petition by Campbell. Campbell then filed a personal restraint against the Washington Supreme Court and raised various issues regarding the death sentence. While this action was pending in the state supreme court, the Ninth Circuit decided the appeal of the second habeas corpus petition.

Regarding the constitutionality of the Washington death penalty statute, Campbell made two claims. First, he argued that the statute was unconstitutional because it was cruel and unusual punishment to make a person choose between hanging or lethal injection as a method of execution. Campbell v. Blodgett, 978 F.2d 1502, 1517 (9th Cir. 1992). In other words, forcing a person "to aide [sic] in the method of his own demise by electing death by intravenous injection, the less frightening method, to escape death by hanging" was cruel and unusual. *Id.*

The Ninth Circuit rejected this argument, noting that Campbell presented no support for this argument other than the fact that he feared hanging because it might result in suffocation and strangling. *Id.* Additionally, the court ruled that "logic dictates against Campbell's position because any person would naturally fear their own execution." *Id.* The fact that people sentenced to die in Washington had a choice of methods, however, was considered a more humane approach because they had the opportunity to "avoid or lessen [their] particular fear." *Id.*

Campbell also argued that hanging was cruel and unusual punishment under the Eighth Amendment and further, that the Eighth Amendment was violated because Washington did not have a qualified hangman. The court rejected this argument without reaching the merits of it, on the basis that there was no real case or controversy at issue. Since Campbell had the opportunity to avoid hanging by choosing lethal injection, his claim was non-justiciable. As such, any denial by the district court of an evidentiary hearing regarding the hanging issue was not in error. *Id.* at 1518. The court also noted in a footnote that Campbell's argument that the statute violated equal protection was inaccurate, because all capital prisoners in Washington were treated equally. *Id.* at 1518 n.9. Thus, it did not matter that Washington was one of the few states to subject its prisoners to this method of execution, because only the laws of Washington were being applied to Campbell in this case. *Id.*

A majority of the Ninth Circuit judges then voted that this case be reheard by the en banc court. Campbell v. Blodgett, 978 F.2d 1519 (9th Cir. 1992). The government appealed and the Ninth Circuit denied its appeal in Campbell v. Blodgett, 992 F.2d 984 (9th Cir. 1993). The court, however, ordered a remand in order for the district court to conduct an evidentiary hearing on whether hanging was cruel and unusual

1992, Campbell argued that hanging was cruel and unusual under the Eighth Amendment. A three-judge Ninth Circuit panel rejected Campbell's claim, stating that he had no standing to challenge hanging because he had a choice between hanging and lethal injection under the Washington death penalty statute.[62] The same judges ruled that it was not error for the district court to deny Campbell's request for an evidentiary hearing on this subject since an evidentiary hearing was not necessary in light of the fact that Campbell's claim was non-justiciable.[63] Six months later, however, the court had a change of heart, and a majority of the Ninth Circuit voted that this case be heard by the en banc court.[64]

The Ninth Circuit then remanded the case to the district court for an evidentiary hearing on whether hanging is cruel and unusual punishment under the Eighth Amendment, although it retained jurisdiction over the matter. In so doing, the circuit court did not indicate that the previous evidentiary hearings held by the district court were inadequate, or that it would be error to deny Campbell a hearing altogether. U.S. District Judge John C. Coughenour conducted hearings over four days and ultimately concluded that hanging did not "involve torture, lingering death, mutilation, or the unnecessary and wanton infliction of pain," and

---

punishment. The government then petitioned the U.S. Supreme Court, asking it to vacate the Ninth Circuit's order for a remand to conduct an evidentiary hearing. In denying the government's application to vacate, Justice O'Connor wrote, "Although I am concerned about the glacial progress in this case, I have grave doubts about my authority to offer such relief by way of application." Blodgett v. Campbell, 113 S. Ct. 1965, 1966 (1993). Since she could find no authority which would permit her to grant the application, it was dismissed without prejudice. *Id.*

In June 1993, U.S. District Judge John Coughenour conducted the evidentiary hearing and stated that "hanging does not involve torture, lingering death, mutilation or the unnecessary and wanton infliction of pain." *Is Hanging Cruel and Unusual Punishment?*, SEATTLE TIMES, June 10, 1993, at A1. In an unpublished opinion, the court held that hanging was not cruel and unusual punishment, and directed the case back to the Ninth Circuit for further proceedings. *See infra* notes 65, 300-314 and accompanying text (discussing Judge Coughenour's findings). The Ninth Circuit recently affirmed Judge Coughenour's conclusions. Campbell v. Wood, 18 F.3d 662 (9th Cir. 1994). After the Ninth Circuit denied Campbell's petition for rehearing and request for a stay of mandate, Campbell v. Wood, 20 F.3d 1050 (9th Cir. 1994), the Supreme Court denied Campbell's petition for certiorari, Campbell v. Wood, 114 S. Ct. 2125 (1994).

Meanwhile, the district court also denied Campbell's third habeas corpus petition, Campbell v. Blodgett, No. C91-1420C (W.D. Wash. Mar. 9, 1992), which was affirmed in Campbell v. Blodgett, 997 F.2d 512, 525 (9th Cir. 1992). The Supreme Court denied Campbell's petition for certiorari with regard to this action in Campbell v. Wood, 114 S. Ct. 1337 (1994).

On May 27, 1994, Campbell was executed. *Gallows Drop*, *supra* note 7, at A8.

62. Campbell v. Blodgett, 978 F.2d 1502, 1518 (9th Cir. 1992). The court declined to consider Campbell's argument by reasoning that he had brought this situation on himself. "Campbell has within his power the ability to avoid hanging and put an end to his fear. By exercising his right to choose lethal injection, Campbell has a means to moot his constitutional objection. Thus, his failure to take advantage of the opportunity to avoid hanging essentially fabricates a case or controversy. This court may not decide a question that, but for Campbell's choice, would not have arisen." *Id.* at 1518; *see* WASH. REV. CODE ANN. § 10.95.180 (West 1990) (allowing a defendant to choose between hanging by the neck and lethal injection).

63. Campbell v. Blodgett, 978 F.2d at 1518-19.

64. *Id.* at 1519.

was therefore constitutional.[65] The findings of fact were reviewed by the Ninth Circuit, which affirmed Judge Coughenour's decision in February 1994.[66]

After twelve years of fighting his conviction, and twenty years after his initial encounter with the Wicklunds, Campbell was executed on May 27, 1994—one day after the Supreme Court denied his petition for certiorari.[67] He did not hang willingly, however. Prison authorities reported that they had to subdue Campbell with pepper spray, strap him to a board, and carry him to the gallows because he refused to cooperate prior to his hanging.[68] The authorities also found homemade weapons in Campbell's cell, including one piece of metal that had been sharpened into a blade.[69]

Although Campbell's fight is over, the implications of both his and Dodd's hangings remain. With two hangings in two years, it seems likely that Washington will continue to utilize hanging as its primary method of capital punishment, especially since the Supreme Court declined to review the constitutionality of hanging.[70] This also means that Montana, which has a death penalty statute nearly identical to that of Washington,[71] could also hang people in the near future. However, there are even greater consequences that flow from the hangings in Washington. While the Ninth Circuit found hanging to be constitutional, a U.S. District judge for the Northern District of California recently declared California's use of lethal gas to be unconstitutional.[72] Whether this will survive scrutiny by the Ninth Circuit, in light of its decision to uphold hanging, remains to be seen. Finally, there appears to be one situation where hanging cannot be constitutionally conducted in Washington. U.S. District Judge

---

65. Campbell v. Blodgett, No. C89-456C, slip op. at 6 (W.D. Wash. June 1, 1993) (copy on file with the *Pacific Law Journal*) (setting forth unpublished findings of fact and conclusions of law of U.S. District Judge John C. Coughenour).

66. *See infra* notes 298-322 and accompanying text (discussing the Ninth Circuit's decision).

67. *Gallows Drop*, *supra* note 7, at A8; *Killer Struggles*, *supra* note 7, at A19. The Supreme Court denied Campbell's petition for certiorari on May 26, 1994. Campbell v. Wood, 114 S. Ct. 2125 (1994).

68. Jack Broom & Anthony Lin, *Attorney Glad He Didn't Know Campbell Had Anti-Depressant*, SEATTLE TIMES, June 16, 1994, at B1; *Killer Struggles*, *supra* note 7, at A19.

69. *Killer Struggles*, *supra* note 7, at A19.

70. Washington State Attorney General Christine Gregoire has recently proposed that Washington adopt lethal injection as its primary method of capital punishment and allow prisoners the option of hanging. *A Very Sensible Solution in Debate over Hanging*, SEATTLE TIMES, July 19, 1994, at B4 [hereinafter *Sensible Solution*]. Even if this proposal is adopted into law, however it is unlikely that it would end the current debate in Washington, especially since people sentenced to die by hanging would most likely appeal the constitutionality of the new law. *See id.*

71. *See* MONT. CODE ANN. § 46-19-103(3) (1993). Under both statutes, the primary method of execution is death by hanging unless the defendant specifically chooses death by lethal injection. *See supra* note 6 (describing the death penalty statutes of Delaware, Montana, New Hampshire and Washington).

72. Fierro v. Gomez, No. C92-1482 MHP, 1994 U.S. Dist. LEXIS 14304 (N.D. Cal. Oct. 4, 1994). This case was filed by the ACLU against the California Department of Corrections on behalf of 375 condemned inmates on San Quentin's death row. Jim Doyle, *Gas Chamber Death is Painless, State Expert Says at ACLU Trial*, S.F. CHRON., Oct. 28, 1993, at A8; Seth Rosenfeld, *Gas Chamber Ban Gets Boost at State Hearing*, S.F. EXAM., Nov. 6, 1993, at A10.

Thomas S. Zilly recently granted inmate Mitchell Edward Rupe's petition for habeas corpus, finding a likelihood of decapitation should the state actually hang Rupe, who weighs 409 pounds.[73] Whatever the final outcome of these cases, however, it seems clear that hanging will remain an issue for debate for quite some time.

II. CRUEL AND UNUSUAL PUNISHMENT CASES

In order to determine whether hanging is cruel and unusual punishment, one needs to understand the Eighth Amendment and how the Supreme Court has interpreted its meaning. The Cruel and Unusual Punishments Clause, and its meaning, have been a subject of debate in the past, particularly as to what the Framers intended when they adopted this language verbatim from the English Bill of Rights, which first included this language in 1689.[74] In part, the debate exists because there is no explanation or reason given for the Clause in the Constitution.[75] However, it has generally been determined that the Clause was adopted in order to prevent the types of cruel punishments that occurred when the Stuart monarchs reigned over England.[76]

Before examining the Supreme Court cases that discuss the Clause, there are two points worth mentioning. First, the Supreme Court has never considered the issue of cruelty associated with any particular method of execution, including

---

73. Rupe v. Wood, No. C91-1635Z, 1994 U.S. Dist. LEXIS 13543 (W.D. Wash. Sept. 16, 1994) (holding hanging under Rupe's particular circumstances to be unconstitutional). Part of the problem is that Washington's hanging protocol, which relies on United States Army Manual 633-15, lists of a chart for weights of 220 pounds or less. The chart directs that people over 220 pounds are to be dropped from a distance of five feet. *See* Jimmy Breslin, *Weighty Problem of Decapitation*, NEWSDAY, May 19, 1984, at AO2; *Gallows Drop*, *supra* note 7, at A8. Incidentally, Charles Campbell weighed 220 pounds at the time of his hanging, and according to Rupe's attorney Kathryn Ross, Campbell suffered extreme neck damage and was nearly decapitated during his execution. *Id.* at A8.

74. Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CAL. L. REV. 839, 839 (1969); *see* Allyn G. Heald, United States v. Gonzalez: *In Search of a Meaningful Proportionality Principle*, 58 BROOK. L. REV. 455, 460 n.18 (1992) (stating that there is a lively and inconclusive debate over the origins and meaning of the Cruel and Unusual Punishments Clause); *see also* Harmelin v. Michigan, 111 S. Ct. 2680, 2687-91 (1991) (discussing the history of the English Declaration of Rights and the possible origination of the Cruel and Unusual Punishments Clause).

75. The Eighth Amendment states in its entirety: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

76. *See infra* note 103. In *Weems v. United States*, 217 U.S. 349 (1910), the Supreme Court noted that some commentators suggested the Clause originated because of the atrocities the Stuart monarchs inflicted on their subjects. *Id.* at 371-73 (citing Story, Patrick Henry in the Virginia Convention, and Mr. Wilson in the Pennsylvania Convention as authorities on the Constitution); *see also* Campbell v. Wood, 18 F.3d 662, 681 (9th Cir. 1994) (stating that the proscription of cruel and unusual punishment has been attributed to barbaric, torturous punishments imposed by the Stuarts); Heald, *supra* note 74, at 461 n.19 (stating that the Eighth Amendment "was thought to be a safeguard against [various] heinous acts" committed by the English); *cf.* Furman v. Georgia, 408 U.S. 238, 266 (1972) (noting that the Clause was not limited to prohibiting the types of punishments that were inflicted by the Stuarts).

hanging.[77] Second, the Eighth Amendment did not apply to the states until the Supreme Court's decision in *Robinson v. California* in 1962.[78] As the following discussion will show, the Court has frequently discussed punishment in terms of the Eighth Amendment, even though none of the cases raised the precise issue of whether a particular method of execution was constitutional under the Eighth Amendment. As such, the Court's references to the Eighth Amendment are merely dicta. Nonetheless, there is no doubt that the concepts embodied in these cases formulated today's standard for defining cruel and unusual punishments.[79]

In the Supreme Court's early discussions of the Clause, it used an "historical interpretation"[80] in order to find punishment constitutional under the Clause. This mode of analysis defined cruel and unusual punishment by referring to punishments of past ages and comparing them with the punishment at issue before the Court. Naturally, this historical analysis contains an inherent flaw. Under any sort of comparison with punishments such as whipping, beheading, disembowelling, etc., modern punishment is bound to pale in comparison and thus would be considered constitutional under the Eighth Amendment.

The first known case dealing with a challenge regarding a method of execution is *Wilkerson v. Utah*.[81] This case is also an example of the Court's use of historical interpretation. In this case, Wilkerson had been convicted of first degree murder in the Territory of Utah and was sentenced to public execution by shooting.[82] Wilkerson appealed the judge's sentence of public shooting because the statute in effect at that time only stated that any person convicted of first degree murder "shall suffer death."[83] Thus, the only issue was whether the judge had exceeded his authority by imposing the manner of execution.[84]

The Court, in holding that the judge had not committed error in choosing death by shooting, looked to the Territory's previous legislation which provided that a person convicted of a capital offense would be executed either by shooting, hanging, or beheading as the court directed, or as the offender chose.[85] Upon

---

77. Martin R. Gardner, *Executions and Indignities—An Eighth Amendment Assessment of Methods of Inflicting Capital Punishment*, 39 OHIO ST. L.J. 96, 97, 102-03 (1978); Michael H. Marcus & David J. Weissbrodt, Comment, *The Death Penalty Cases*, 56 CAL. L. REV. 1270, 1334 (1968).

78. *See* Marcus, *supra* note 77, at 1327 n.515 (citing Robinson v. California, 370 U.S. 660 (1962)).

79. For other articles discussing the evolution of the Clause and the values it was intended to protect, see Stephen A. Blum, *Public Executions: Understanding the "Cruel and Unusual Punishments" Clause*, 19 HASTINGS CONST. L.Q. 413, 437-54 (Winter 1992); Gardner, *supra* note 77, at 99-109; Marcus, *supra* note 77, at 1326-43; Note, *Mental Suffering Under Sentence of Death: A Cruel and Unusual Punishment*, 57 IOWA L. REV. 814, 821-26 (1972) [hereinafter *Mental Suffering*].

80. For other references to cases which relied on this type of analysis, see Gardner, *supra* note 77, at 100; Marcus, *supra* note 77, at 1328-37. *See also* Furman v. Georgia, 404 U.S. 238, 263-69 (1972) (discussing the Court's early decisions which relied upon an historical analysis).

81. 99 U.S. 130 (1878).

82. *Wilkerson*, 99 U.S. at 131.

83. *Id.*

84. Gardner, *supra* note 77, at 99.

85. *Wilkerson*, 99 U.S. at 132.

interpreting the current statute, the Court held that the judge had the power to prescribe the method of death, since the current statute was silent on that issue. The Court then remarked that this power was, of course, subject to the Cruel and Unusual Punishments Clause of the Eighth Amendment. In dictum, the Court referred to other past methods of execution which constituted torture, and which would be prohibited by the Eighth Amendment. These included dragging the prisoner to the place of execution, disembowelling while alive, beheading and quartering, dissecting the prisoner in public, and burning alive.[86] Thus, even though the constitutionality of shooting was not at issue, the Court tacitly conducted an historical interpretation, thereby deeming shooting to be constitutional.[87]

The next case to discuss the Eighth Amendment was *In re Kemmler*,[88] where the Supreme Court was to determine whether the infliction of death by electrocution as imposed by the New York Legislature was constitutional. In this case, the Court expressly held that the Eighth Amendment did not apply to the states, nor could it be applicable through the Fourteenth Amendment.[89] As such, the only constitutional issue before the Court was whether the state had acted arbitrarily or applied the law unequally in violation of the Fourteenth Amendment.[90]

The Court first noted that in choosing electrocution as the state's method of execution, the Legislature had done so as a response to the Governor of New York, who stated in his annual message, "The present mode of executing criminals by hanging has come down to us from the dark ages, and it may well be questioned whether the science of the present day cannot provide a means for taking the life of such as are condemned to die in a less barbarous manner."[91] In defining what constituted cruel and unusual punishment, the Court again reverted to its historical interpretation and stated:

> [I]f the punishment prescribed for an offense against the laws of the state were manifestly cruel and unusual, such as burning at the stake, crucifixion, breaking on the wheel or the like, it would be the duty of the court to adjudge such penalties to be within the constitutional prohibition.[92]

---

86. *Id.* at 135.

87. Gardner, *supra* note 77, at 100.

88. 136 U.S. 436 (1890).

89. *Kemmler*, 136 U.S. at 445-49. This was the first decision by the Court to hold that the Eighth Amendment did not apply to the states. Gardner, *supra* note 77, at 100 n.31 (citing Arthur J. Goldberg & Alan M. Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1784 n.51 (1970)).

90. Gardner, *supra* note 77, at 100.

91. *Kemmler*, 136 U.S. at 444.

92. *Id.* at 446.

The Court continued:

> 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 extinguishment of life.[93]

Thus, the Court held that death by electrocution was not unconstitutional because, although at the time electrocution may have been unusual, it certainly was not cruel according to the standard stated above.

Interestingly, one commentator has suggested that *Kemmler* could be interpreted as implying that death by hanging was unconstitutionally cruel, given that the Court quoted the Governor of New York and expressly upheld the New York Legislature's decision to utilize electrocution.[94] While such an interpretation is attractive, it is doubtful that the Court intended to imply anything about hanging, other than to show that New York was concerned about humanity in its decision to employ electrocution. Moreover, since hanging was not an issue before the Court, any attempts to find such an interpretation are tenuous at best.

The year 1910 marked a turning point for the Court with its decision of *Weems v. United States*.[95] First, the Court no longer relied on its historical interpretation to define cruel and unusual punishments.[96] Second, the Court began to utilize various concepts other than "torture and lingering death" when interpreting the Clause. Beginning with *Weems* and continuing forward with other cases, the Court's concept of cruel and unusual punishment developed into a framework consisting of approximately four different factors.[97] First, cruel and unusual punishment is defined by the contemporary norms and standards of society. As part of this determination, courts consider the prevalence (or lack thereof) of a certain punishment in other states or areas. Second, courts contemplate the prisoner's dignity, as well as the dignity of society. Third, courts measure whether a punishment is unnecessarily cruel in terms of physical pain. Fourth, courts also examine the potential for unnecessary psychological pain. It must be noted that none of these factors alone embody the concept of cruel and unusual punishment. Rather, it is the sum of all these parts which make up this nebulous concept.

---

93. *Id.* at 447.

94. *Death Cases*, *supra* note 77, at 1328-29.

95. 217 U.S. 349 (1910).

96. Gardner, *supra* note 77, at 103; Marcus *supra* note 77, at 1331-32; *see also* Furman v. Georgia, 408 U.S. 238, 263-67.

97. For another discussion of the factors that embody the Clause, *see Furman*, 408 U.S. at 269-81 (setting forth the principles to be applied when determining whether a particular punishment is "cruel and unusual," which include: human dignity, a punishment proportionate to the crime, contemporary norms of society, and a prohibition against arbitrary infliction of punishment).

In *Weems*, the defendant, a government official in the Philippines, had been convicted of falsifying an official public document. Weems falsified the document to show that he had paid employees, when in reality he had not. After the Supreme Court of the Philippine Islands affirmed his sentence, Weems sought review of his sentence, alleging, in part, that the punishment of fifteen years' imprisonment constituted cruel and unusual punishment.[98]

In an eloquent opinion written by Justice McKenna, the Court first looked at the minimum sentence that could have been imposed on Weems. For simply "perverting the truth" on a single item in a public record, the minimum sentence was twelve years and one day of imprisonment.[99] This sentence included not only imprisonment, but "a chain at the ankle and wrist of the offender, hard and painful labor, no assistance from friend or relative, no marital authority or parental rights or rights of property, no participation even in the family council."[100] Additionally, even when

> [H]is prison bars and chains are removed . . . he goes from them to a perpetual limitation of his liberty. He is forever kept under the shadow of his crime, forever kept within voice and view of the criminal magistrate, not being able to change his domicil[e] without giving notice to the "authority immediately in charge of his surveillance," and without permission in writing.[101]

The Court then examined other cases and writings of commentators to determine what the phrase "cruel and unusual punishments" meant. It noted that before the phrase was adopted, the language of the Clause received some opposition in Congress, although generally there was very little debate on the subject.[102] The Court concluded that the Clause was adopted in part to prevent the

---

98. Since the Eighth Amendment did not yet apply to the states or other territories of the United States at the time he was prosecuted, Weems argued that the sentence was unconstitutional in light of the Bill of Rights adopted by the Philippine Islands, which contained the exact language from the Eighth Amendment of the U.S. Constitution. *Weems*, 217 U.S. at 367.

99. *Id.* at 365-66.

100. *Id*

101. *Id.*

102. One of the oft-quoted opponents of the Clause was Mr. Livermore, who stated:
> The clause seems to express a great deal of humanity, on which account I have no objection to it; but, as it seems to have no meaning in it, I do not think it necessary. What is meant by the terms excessive bail? Who are to be the judges? What is understood by excessive fines? It lays with the court to determine. 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? If a more lenient mode of correcting vice and deterring others from the commission of it could be invented, it would be very prudent in the legislature to adopt it; but until we have some

atrocities that occurred when the Stuarts reigned in England.[103] In refusing to fall into its old habit of using an historical analysis, however, the Court stated that punishments should be defined in accordance with society's current views of justice:

> Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore, a principle, to be vital, must be capable of wider application than the mischief which gave it birth.[104]

In determining that the law at issue here was cruel and unusual, the Court based its decision on the fact that the Constitution was capable of change and "may acquire meaning as public opinion becomes enlightened by a humane justice."[105] Apparently, the Court felt that a modern, more humane society would not impose such a harsh sentence on Weems. Further, the Court's notation that he would not only be subject to harsh physical punishment, but would be "forever kept under the shadow of his crime,"[106] suggests that the Court was concerned about the prisoner's dignity as well. Finally, another factor that the Court considered was that there were no laws in the states similar to this law of the Philippine Islands.[107]

> security that this will be done, we ought not to be restrained from making necessary laws by any declaration of this kind.

Id. at 369.

103. *Id.* at 371-73. Although the Court cited Story, who authored a treatise on the Constitution, Patrick Henry of the Virginia Convention, and Mr. Wilson of the Pennsylvania Convention, and regarded these authorities as all referring to the reign of the Stuart monarchs as the reason for the clause, the Court disagreed that this was the Clause's only purpose. Rather, the Court noted that the Framers wrote the Constitution because of a fear of political power and must have contemplated the types of cruel punishments one could inflict based on one's political power. The Court stated that the Framers

> must have [contemplated] that there could be exercises of cruelty by laws other than those which inflicted bodily pain or mutilation. With power in a legislature great, if not unlimited, to give criminal character to the actions of men, with power unlimited to fix terms of imprisonment with what accompaniments they might, what more potent instrument of cruelty could be put into the hands of power? And it was believed that power might be tempted to cruelty. This was the motive of the Clause, and if we are to attribute an intelligent providence to its advocates we cannot think that it was intended to prohibit only practices like the Stuarts, or to prevent only an exact repetition of history.

Id. at 372-73.

104. *Id.* at 373.

105. *Id.* at 378.

106. *Id.* at 366.

107. *Id.* at 377.

The concepts hinted at in *Weems* became grounded after the Court's decision in *Trop v. Dulles*.[108] In *Trop*, the Court held that section 401(g) of the Immigration and Nationality Act of 1944, which provided that a wartime deserter would lose his citizenship if he was dismissed or dishonorably discharged, constituted cruel and unusual punishment.[109] The Court noted that although the punishment did not amount to torture or extreme physical punishment, it was cruel and unusual because it destroyed a man's "status in the national and international political community."[110] A state could impose various sanctions on him, such as banishment, and it was this threat of an unknown fate that was too overwhelming to endure.[111] In so stating, the Court reiterated the concept of dignity hinted at in *Weems*:

> The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. . . . The Amendment stands to assure that this power [to punish] be exercised within the limits of civilized standards. Fines, imprisonment and even execution may be imposed depending upon the enormity of the crime, but any technique outside the bounds of these traditional penalties is constitutionally suspect.[112]

Thus, by the latter half of the twentieth century, the notion of cruel and unusual punishment was no longer measured by comparing a punishment with punishments in the past. Instead, it was firmly accepted that the Eighth Amendment embraced "evolving standards of decency that mark the progress of a maturing society."[113] Some courts described the Clause as embodying "broad and idealistic concepts of dignity, civilized standards, humanity and decency,"[114] that prohibited punishments which "involve the unnecessary and wanton infliction of

---

108. 356 U.S. 86 (1958).
109. *Id.* at 101.
110. *Id.*
111. *Id.* at 102.
112. *Id.* at 100.
113. *Id.* at 101.
114. Estelle v. Gamble, 429 U.S. 97, 102 (1976) (illustrating the Court's reliance on an evolving standard of decency when interpreting the Eighth Amendment and quoting Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968)); *see* Wilson v. Seiter, 501 U.S. 294, 307 (1991) (White, J., concurring) (relying on a broad and idealistic standard in analyzing an assertion by a prisoner of cruel and unusual punishment); Hutto v. Finney, 437 U.S. 678, 683-85 (1978) (holding that the Eighth Amendment prohibits forms of punishment which transgress today's broad and idealistic concepts of human dignity and decency); Gibson v. Lynch, 652 F.2d 348, 351 (3rd Cir. 1981), *cert. denied*, 462 U.S. 1137 (1983) (holding that temporary confinement of a prisoner at a facility where a prisoner was denied, *inter alia*, entry into the prison population and regular yard recreation did not violate the Eighth Amendment).

pain."[115] Other courts assessed punishments in terms of their potential for painful psychological consequences as well as their painful physical components.[116]

While it may be viewed as an aberration, in the time span between *Weems* and *Trop* the Court decided the case of *Francis v. Resweber*.[117] An interesting question was posed to the Court: Was it a denial of due process, in violation of the Fifth Amendment prohibiting double jeopardy and the Eighth Amendment prohibiting cruel and unusual punishment, to execute the condemned prisoner after one unsuccessful attempt had been made?[118] In this case, petitioner had been convicted and sentenced to death for murder. On May 3, 1946, Francis underwent preparations to die in the electric chair in Louisiana. Although a current of electricity passed through his body,[119] because of a malfunction in the machine, he did not die. Thereafter, the Governor of Louisiana issued a second death warrant, which was the subject of this case.[120]

The Court first stated that it was operating under the assumption, without actually deciding, that violation of the Fifth and Eighth Amendments would be a violation of the Fourteenth Amendment.[121] The Court then decided that this action was not violative of the Due Process Clause.[122] In holding that the punish-

---

115. Gregg v. Georgia, 428 U.S. 153, 173 (1976); *see also* Ingraham v. Wright, 430 U.S. 651, 669-70 (1977) (comparing the viability of Eighth Amendment claims of school children subjected to corporal punishment with the claims of prisoners subjected to prison brutality, and finding that after a prisoner is convicted and incarcerated, only the "unnecessary and wanton infliction of pain" constitutes cruel and unusual punishment).

116. *See* Smith v. Aldingers, 999 F.2d 109, 110 (5th Cir. 1993) (holding that the district court erred in failing to consider psychological effects of a prisoner's claim who witnessed a battery of another prisoner); Strickler v. Waters, 989 F.2d 1375, 1381 (4th Cir. 1993) (recognizing serious emotional injury as a basis for Eighth Amendment claim); Jordan v. Gardner, 986 F.2d 1521, 1531 (9th Cir. 1993) (finding a viable an Eighth Amendment claim where emotional harm resulted from cross-gender clothed body search); Northington v. Jackson, 973 F.2d 1518, 1524 (10th Cir. 1992) (stating that an Eighth Amendment claim resulted from death threats by a person brandishing weapons); Anderson v. California, 6 Cal. 3d 628, 649, 493 P.2d 880, 894, 100 Cal. Rptr. 152, 166 (1972) (holding that capital punishment was cruel and unusual because of its brutalizing psychological effects as well as for other reasons); *see also Mental Suffering*, *supra* note 79, at 824 and cases cited therein (stating that courts have considered mental suffering in finding punishments cruel, and that mental suffering caused by imprisonment in overcrowded or unsanitary cells violates society's standards of human dignity).

117. 329 U.S. 459 (1947).

118. *Francis*, 329 U.S. at 460. Again, it should be noted that at this time, the Eighth Amendment still was not applicable to the states. Marcus *supra* note 77, at 1334.

119. The following is an account of the first execution attempt, contained in a brief submitted by the petitioner's attorney: After the petitioner had been strapped into a chair and a hood placed over his eyes, "the 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 then the condemned man yelled: 'Take it off. Let me breath [sic].'" Another witness stated: "I saw the electrocutioner turn on the switch and I saw his lips puff out and swell, his body tensed and stretched. I heard the one in charge yell to the man outside for more juice when he saw that Willie Francis was not dying and the one on the outside yelled back he was giving him all he had." *Francis*, 329 U.S. at 480 n.2.

120. *Id.* at 460-61.

121. *Id.* at 462.

122. *Id.* at 463-64.

ment in this case was not cruel and unusual, the Court once again mentioned the notion of humane justice.[123] It stated: "The traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence. Prohibition against the wanton infliction of pain has come into our law from the Bill of Rights of 1688."[124] Rejecting petitioner's argument that making him undergo the psychological preparations for a second electrocution was cruel and unusual, the Court noted that the fact that he had already undergone one electrocution did not make this electrocution more cruel than any other execution.[125]

> The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely. The fact that an unforeseeable accident prevented the prompt consummation of the sentence cannot, it seems to us, add an element of cruelty to a subsequent execution. There is no purpose to inflict unnecessary pain nor any unnecessary pain involved in the proposed execution.[126]

Although at first glance the decision in *Francis* appears contrary to the standards of dignity, contemporary norms and humane justice espoused in *Weems* and *Trop*, it is not necessarily so. The Court only determined whether the punishment of death was unconstitutionally cruel in this case. As there was nothing in the record to indicate that the State of Louisiana was intentionally inflicting unnecessary pain on Francis in carrying out his death sentence, and the need to resort to a second execution was simply due to an accident, the Court could properly say his punishment was not cruel and unusual.

The Court made its determination by viewing the Cruel and Unusual Punishment Clause objectively.[127] From an objective viewpoint, the state did nothing more than carry out the death sentence. As electrocution had previously passed muster in *Kemmler*, objectively the state did not inflict any cruel punishment on Francis, in the sense of violating his dignity or failing to comport with contemporary norms of society. Many people today would disagree that Francis' dignity was not violated, but to the Court, its decision was in keeping with its past decisions.

In sum, these cases demonstrate how the interpretation of the Eighth Amendment has progressed since its inception. No longer do courts resort to the historical interpretation when faced with an Eighth Amendment issue. Instead, judicial interpretation of the Clause had progressed to such a state that it really

---

123. *Id.* at 470.
124. *Id.* at 463.
125. *Id.* at 464.
126. *Id.*
127. Blum, *supra* note 79, at 445.

encompasses four central ideas: physical pain, psychological pain, dignity of both the prisoner and society, and contemporary norms of society. When these four ideas are examined with regard to hanging, it becomes clear that hanging is unconstitutional.

III. STATE COURT CONSIDERATION OF THE CONSTITUTIONALITY OF HANGING

As previously stated, while the Supreme Court has defined the Cruel and Unusual Punishments Clause, it has not considered the constitutionality of any method of execution.[128] However, there are several state courts that have been confronted with the question of the constitutionality of hanging as a method of execution. Interestingly, the majority of these courts have skirted the issue, claiming that it is not the function of the court to substitute its judgment for that of the legislature.[129] Thus, according to such reasoning, the legislature is better able to determine whether hanging is the appropriate method of execution, and since the legislature has deemed it appropriate, then it simply must not be cruel and unusual.

The obvious flaw with this type of reasoning is that one of the functions of the judiciary is to prohibit legislatures from enacting unconstitutional laws. Thus, the courts relinquish their power to the legislature by blindly deferring to it. By avoiding the difficult task of examining whether hanging is cruel, courts ultimately fail in their duty to protect the public from unconstitutional laws because justice is not administered. This is especially egregious because the courts are perfectly capable of making this determination by holding an evidentiary hearing.[130] Therefore, this line of reasoning simply makes no sense.

Courts have also utilized other weak arguments to avoid this difficult constitutional determination. Some courts rely on the same cases that have deferred the issue to the legislature, stating that the issue had previously been

---

128. *See supra* note 77 and accompanying text.

129. *See* Kansas v. Kilpatrick, 439 P.2d 99, 110 (Kan. 1968) ("The legislature has chosen to prescribe hanging by the neck as a means of execution in Kansas, and it is not for this court to determine the wisdom of that decree."); Fitzpatrick v. Montana, 638 P.2d 1002, 1010 (Mont. 1981) (deferring issue to the legislature since court had never determined whether any means of punishment violated the Eighth Amendment); Montana v. Coleman, 605 P.2d 1000, 1059 (Mont. 1979), *cert. denied*, 446 U.S. 970 (1980) (noting that the legislature refused to change the statute at issue and that "we have no power to change these settled provisions of the law"). Courts that consider other methods of execution employ the same decision-making technique. *See, e.g.*, Nevada v. Gee Jon, 211 P. 676, 682 (Nev. 1923) (stating that "[T]he Legislature has determined that the infliction of the death penalty by the administration of lethal gas is humane, and it would indeed be not only presumptuous, but boldness on our part, to substitute our judgment for theirs, even if we thought differently upon the matter.").

130. *See Fitzpatrick*, 638 P.2d at 1053 (Morrison, J., dissenting) (noting that only the judiciary and not the legislature is capable of determining if punishments violate the Clause, and therefore the defendant was entitled to an evidentiary hearing for the court to properly consider the medical evidence on hanging).

decided.[131] In *Andrews v. Morris*[132] the Supreme Court of Utah utilized another avoidance technique. The defendant argued that both shooting and hanging were cruel and unusual, citing *Coker v. Georgia*[133] for this proposition.[134] The supreme court reasoned that *Coker*'s holding, that the death penalty was barbaric and excessive punishment for the crime of rape, could not be "strained to cover the *means* of imposing the death penalty in an appropriate case."[135]

A. Washington

In the State of Washington, the attitude of the judiciary towards hanging appears somewhat mixed. The supreme court of Washington first considered whether hanging was cruel and unusual punishment in *Washington v. Frampton*.[136] Although the holding appears to be that death by hanging was not cruel and unusual punishment, a close reading of the case leaves confusion in the mind of the reader.[137]

Justice Dolliver, writing the majority opinion for the court sitting en banc, thoroughly considered the evidence and arguments of counsel before deciding that hanging was unconstitutional under the Eighth and Fourteenth Amendments of the Constitution. First, Justice Dolliver noted that the State provided no current cases which held that hanging was constitutional or that actually discussed any standards.[138] The court then noted the proper standard to be used in making this determination in light of the Supreme Court's cases on cruel and unusual

---

131. This is a favorite excuse with the Montana Supreme Court. *See* McKenzie v. Osborne, 640 P.2d 368, 382 (Mont. 1981) (stating that the issue has fully been decided by the court and then citing its previous decision in Montana v. Coleman, 605 P.2d 1000, 1058-59 (Mont. 1979), *cert. denied*, 446 U.S. 970 (1980), where the court refused to usurp the legislature's function); *see also* Montana v. Fitzpatrick, 684 P.2d 1112, 1113 (Mont. 1984) (referring to its previous rejection of the argument in Fitzpatrick v. Montana, 638 P.2d 1002 (Mont. 1981)).

132. 607 P.2d 816 (Utah 1980).

133. 433 U.S. 584 (1977).

134. *Andrews*, 607 P.2d at 819.

135. *Id.* at 824. It should be noted that Utah no longer permits hanging; rather, under its current statute, it gives the prisoner a choice between lethal injection and death by firing squad. UTAH CODE ANN. § 77-18-5.5 (1993).

136. 627 P.2d 922 (Wash. 1981). At the time, Washington used hanging as its only method of execution.

137. The confusion occurs because Justice Dolliver, who wrote the majority opinion, found hanging to be unconstitutional. However, the only way to determine that the court did not adopt Justice Dolliver's holding is by reading the opinion of each separate justice. Some justices, however, did not write, or wrote an opinion without discussing the hanging issue, thus leaving the reader even more confused. Several courts have interpreted *Frampton* differently, some holding that it found hanging to be unconstitutional, and others holding that it found hanging constitutional. *Compare* Fierro v. Gomez, 790 F. Supp. 966, 971 (N.D. Cal. 1992) (stating that plaintiff's eyewitness descriptions of death by lethal gas are comparable to eyewitness descriptions of death by hanging in *Frampton*, a decision which found hanging to be unconstitutional) *and* Calhoun v. Maryland, 468 A.2d 45, 70 (Md. Ct. App. 1983) (stating that Washington banned the use of hanging in *Frampton*) *with* Washington v. Duhaime, 631 P.2d 964, 971 (Wash. App. 1981) (stating that *Frampton* held hanging was constitutional).

138. *Frampton*, 627 P.2d at 933.

punishment.[139] Given that only four jurisdictions in the English-speaking world utilized hanging as a method of execution, Justice Dolliver remarked that hanging could hardly qualify as compatible with the evolving standards of decency as announced in *Trop v. Dulles*.[140] Second, Justice Dolliver discussed the medical evidence which he found convincing in making his determination.[141] On the one hand, he noted that the State's expert witnesses did not present much detailed evidence, and in fact one witness had never attended a judicial hanging, while the State's other witness had attended three in 1945.[142] Both experts concluded that hanging resulted in severance of the spinal cord and immediate unconsciousness, although immediate was defined as taking up to ten seconds.[143]

On the other hand, the defense's experts presented detailed evidence about the consequences of hanging.[144] This evidence led Justice Dolliver to conclude that in the "great majority of cases death by hanging does involve slow, lingering death."[145] In most cases, people died by suffocating or strangling, which could take several minutes to occur, as opposed to dying by spinal severance, which was the intended consequence of hanging.[146] Further, even if the spinal cord was completely severed, it did not necessarily mean that unconsciousness would result. If there was less than complete severance, death could take considerably longer.[147] This evidence was supported by three defense experts.[148]

The defense also presented testimony of eyewitnesses to judicial hangings. One witness, Clinton Duffy, a former warden of San Quentin Prison, gave a particularly gruesome account:

> The executioner put the noose over the man's head with a knot under the left ear. . . . I gave the nod, OK, and he raised his hand and these men in the little room saw that and they cut the springs which sprung the trap. The man hit the bottom and I observed that he was fighting by pulling on the straps, wheezing, whistling, trying to get air, and that blood was

---

139. *Id.* at 933-34. These standards include "broad and idealistic concepts of dignity, civilized standards, humanity, and decency." *Id.* at 933 (citing Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968)). Punishment which does not conform to "the evolving standards of decency that mark the progress of a maturing society" or which "involve the unnecessary and wanton infliction of pain are repugnant to the Eighth Amendment." *Id.* at 933-34 (citing Gregg v. Georgia, 428 U.S. 153, 173 (1976); Trop v. Dulles, 356 U.S. 86, 101 (1958)).

140. 356 U.S. 86 (1958). Justice Dolliver was referring to Delaware, Washington, Montana and South Africa. *Frampton*, 627 P.2d at 934. However, it appears that New Hampshire had also adopted hanging as its method of execution prior to 1981. *See* N.H. REV. STAT. ANN. § 630:5 Notes on History and Amendments (Supp. 1993) (describing the previous versions of New Hampshire's death penalty statute).

141. *Frampton*, 627 P.2d at 934-35.

142. *Id.* at 934.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* at 934-35.

> oozing through the black cap. I observed also that he urinated, defecated, and droppings fell to the floor, and the stench was terrible. I also saw witnesses pass out and have to be carried from the witness room. Some of them threw up. After a doctor had placed a stool in front of the man, he ripped his shirt open, put the stethoscope over his heart, and between eight and thirteen minutes later, the doctor pronounced the man dead by no heartbeat.[149]

When the man was taken down and his black cap removed, Duffy testified he noticed that "big hunks of flesh were torn off" the side of his face where the noose had been, "his eyes were popped," his tongue was "swollen and hanging from his mouth," and he had turned purple.[150]

In another account:

> [T]he trap door was sprung. He fell through the trap door some feet going out of my sight since I was standing on the platform. He disappeared from my view; but when he hit the end of the rope he bounced so hard that his head and shoulders came back up above the floor of the platform, which was a surprise to me. He bounced several times. He then again, contrary to what was shown in the films, engaged in gyrations. Though his ankles and wrists were bound together, there was a great deal of motion, torso twisting, which motion continued, as I recall, for perhaps five minutes; and then began to decline in frequency and amount. After ten minutes or so I saw no further motion.[151]

He further noted that he waited at least twenty minutes, only to find that the victim still had an irregular pulse.[152]

The accounts of bungling[153] presented by the defense were numerous. In one case, a man strangled to death only after pleading with his executioners to be sprung from the drop again.[154] In another account, the victim was partially decapitated and took nineteen minutes to die.[155]

Based on this evidence, the absence of trained hangmen at the Washington State Penitentiary, and the fact that the prison authorities were unaware of any trained hangmen in the United States, Justice Dolliver concluded that hanging

---

149. *Id.* at 935

150. *Id.*

151. *Id.* at 935-36. This account was given by Dr. Clarence Schrag, Professor of Sociology at the University of Washington, and former Director of Corrections for the Washington State Department of Institutions.

152. *Id.* at 936.

153. *Id.*; *see infra* notes 217-234 and accompanying text (providing more detail on the concept of "bungling").

154. *Frampton*, 627 P.2d at 936.

155. *Id.*

was the kind of "cruel, wanton and barbarous act which offends civilized standards of decency."[156] He then concluded that hanging violates the Eighth Amendment of the U.S. Constitution, and Article I, Section 14, of the Washington State Constitution.[157]

Most of the justices then gave their separate opinions. Concurring with Justice Dolliver on the hanging issue were Justices Williams[158] and Utter.[159] Justices Hicks,[160] Dimmick,[161] and Chief Justice Brachtenbach[162] did not address the hanging issue. Three other justices dissented.[163] Citing a lack of objectivity by the court, Justice Stafford gave the favorite explanation that the legislature was "the body most closely representative of the people whose standards of decency are said to be impacted."[164] As such, it was best to defer to the legislature. Justice Rosellini also felt that it was a decision for the legislature, as there was no definitive evidence that hanging was unnecessarily cruel.[165] Not surprisingly, the reason given for Justice Dore's dissent was the same as the others.[166]

The Washington Supreme Court later clarified its position in *Frampton* by its decision in *Washington v. Rupe*.[167] In *Rupe*, the Washington Supreme Court was faced with another challenge to the constitutionality of the state's death penalty statute.[168] The amended statute gave the person facing execution a choice between

---

156. *Id.*

157. *Id.*; *see* U.S. CONST. amend. VIII ("excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted"); WASH. CONST. art. I, § 14 ("excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted").

158. *Frampton*, 627 P.2d at 936-38.

159. *Id.* at 945-47.

160. Without writing an opinion, Justice Hicks merely concurred on the hanging issue, thus implying he agreed with the majority opinion by Justice Dolliver. *Id.* at 945. However, his vote was given after Justice Stafford's dissent on the hanging issue, *id.* at 944-45, thereby also implying he agreed with that dissent.

161. Like Justice Hicks, Justice Dimmick also concurred on the hanging issue after Stafford's dissent. *Id.* at 945. He also wrote a separate opinion but failed to address the hanging issue. *Id.* at 952-53.

162. Chief Justice Brachtenbach also concurred after Justice Stafford's dissent. *Id.* at 945. He did not address the hanging issue when voting on the other issues elsewhere in the opinion. *Id.* at 948, 953.

163. These were Justices Rosellini, *id.* at 938-44, Stafford, *id.* at 944-45, and Dore, *id.* at 948-52.

164. *Id.* at 945 (Stafford, J., concurring in part and dissenting in part).

165. *Id.* at 944 (Rosellini, J., dissenting in part).

166. *Id.* at 92 (Dore, J., concurring in part and dissenting in part).

167. 683 P.2d 571 (Wash. 1984).

168. *Rupe*, 683 P.2d at 576; *see* WASH. REV. CODE ANN. § 10.95.180 (West 1990) ("The punishment of death shall be . . . inflicted either by hanging by the neck or, at the election of the defendant, by intravenous injection of a substance or substances in a lethal quantity sufficient to cause death and until the defendant is dead."). The death penalty provision was amended in 1981 shortly after the *Frampton* decision so as to include the choice of lethal injection as a method of execution.

death by hanging or death by lethal injection. Holding that it was not unconstitutional to present a choice to a person on death row, the court first noted that neither side presented any evidence to support its position.[169] However,

> logic dictates neither result. Individual reactions to the various methods of execution and the right to choose vary greatly. In some cases, a person may be so appalled by the thought of physically hanging by the neck that the option of death by lethal injection is welcome. To others, the idea of lying strapped upon a gurney awaiting the lethal poison to seep into one's veins at an unknown time may be equally abhorrent. These individuals embrace the idea of choosing the method of their death as a way to avoid their own private terrors. But to a third type of individual, the choice itself is cruel. As they await the day of their death, they are faced not only with the terror of death itself but also with the choice on how to die. These individuals do not embrace the idea of choice; they dread its requirement that they take an active part in their own demise.[170]

The supreme court then reasoned that in either situation, with or without the choice, the court is imposing its personal view of cruelty over the views of condemned felons. By removing the choice, the court was imposing a method of execution upon those who feared that type of execution; by retaining the choice, the court imposed its views on those who feared choosing the method of their death.[171] However, since there was no evidence that having to choose the method psychologically affected the prisoner, or that the defendant would undergo any sort of psychological trauma by having to choose, the court refused to "speculate" that it was more cruel to impose a choice upon the prisoners.[172] Not only is this case important because it is the first case to address whether a choice of methods was constitutional,[173] but also because the court expressly stated that it found hanging to be constitutional in *Frampton*.[174]

---

169. Defendant argued that giving a person a choice between methods of death was unconstitutional, while the State argued that giving a choice was less cruel than imposing one method or the other without any choice. *Rupe*, 683 P.2d at 593.

170. *Id.* at 594.

171. *Id.*

172. *Id.*

173. Although an earlier case, Malloy v. South Carolina, 237 U.S. 180 (1915), held that a statute providing a choice between methods was not an unlawful bill of attainder or an ex post facto law, *Rupe* appears to be the first case to determine if the choice itself was constitutional. Further, in Delaware v. Bailey, No. IK79-05-0085RI, 1991 Del. Super. LEXIS 352 (Del. Super. Ct. Aug. 23, 1991), the only other court outside the State of Washington to address this issue merely cited *Rupe* without conducting any independent analysis. *See infra* notes 187-197 and accompanying text (describing the holding in *Bailey*).

174. *Rupe*, 683 P.2d at 593.

B. Delaware

The law in Delaware parallels the law in Washington when it comes to these issues. In *DeShields v. Delaware*,[175] the Delaware Supreme Court specifically held that death by hanging was constitutional. The court first noted that plaintiff lacked standing to challenge the sentence of death by hanging because, after plaintiff was sentenced to die, the Delaware Legislature changed the statute to death by lethal injection.[176] The new statute provided that all persons sentenced to die for acts committed before the date of enactment could elect to choose lethal injection as the method of death instead of hanging.[177] Thus, since plaintiff had a choice, and could choose not to undergo death by hanging, his challenge was non-justiciable.[178]

The supreme court, however, then considered plaintiff's objections to hanging, using historical interpretation to hold that hanging was constitutional.[179] Given the fact that Delaware had selected hanging as its method for of execution nearly 250 years, many legislators considered it an appropriate method.[180] Further, since it was also an alternative to lethal injection if lethal injection should be found unconstitutional, the court concluded that there was no legislative intent to repeal hanging from the statute.[181]

Nor did the court find that it was cruel and unusual in light of the Delaware Constitution. First, the plaintiff offered no facts to support his argument that if properly performed, hanging caused unnecessary torture.[182] Second, he did not offer any evidence that the procedures for hanging were susceptible to accidents or bungling.[183] The court also relied on *Frampton*[184] and *Coleman*[185] as further support that hanging was constitutional.[186]

---

175. 534 A.2d 630 (Del. 1987). DeShields was executed by lethal injection on August 31, 1993, having spent many years on death row after conviction for a murder committed in 1984. *National Briefs*, HOUSTON CHRON., Sept. 1, 1993, at 14.

176. DeShields was sentenced to die on April 4, 1986, and in June of that same year the death penalty statute was amended. *DeShields*, 534 A.2d at 639 (citing 65 DEL. LAWS 281 § 1 (1986) (effective June 13, 1986)).

177. *DeShields*, 534 A.2d at 639 (citing DEL. CODE ANN. tit. 11, § 4209(f) (1993)). As previously noted, under the current statute, Delaware retains hanging only for cases in which lethal injection is found unconstitutional. *See supra* note 6 (describing, *inter alia*, the Delaware death penalty statute).

178. *DeShields*, 534 A.2d at 639.

179. *Id.*; *see supra* note 80 and accompanying text (describing the "historical interpretation" method of constitutional analysis).

180. *DeShields*, 534 A.2d at 640.

181. *Id.*

182. *Id.*

183. *Id.*

184. 627 P.2d 922 (Wash. 1981); *see supra* notes 136-166 and accompanying text (discussing the holding in *Frampton*).

185. 605 P.2d 1000 (Mont. 1979), *cert. denied*, 446 U.S. 970 (1980); *see supra* notes 129, 131 (discussing the holding in *Coleman*).

186. *DeShields*, 534 A.2d at 640.

Further similarity between the laws of Washington and Delaware can be found in the case of *Delaware v. Bailey*.[187] Bailey, who elected in 1986 to be executed by hanging, argued that both hanging and lethal injection, as well as the requirement that defendants choose the means of death, all violated the U.S. and Delaware Constitutions.[188] He also asked for an evidentiary hearing to determine if it was possible to assure death without unnecessary pain and delay from these methods, and whether the state was presently capable of conducting an execution in a manner so as not to cause unnecessary pain or delay.[189] Similar to the Washington Supreme Court's reasoning, the Delaware Superior Court noted that Bailey lacked standing to challenge death by lethal injection because he had chosen death by hanging.[190] Likewise, the Delaware Superior Court failed to find that hanging was unconstitutional.[191] While Bailey presented historical evidence that not all hangings produced instantaneous deaths, Bailey failed to establish that his own execution would involve "unnecessary torture, unneeded terror, pain, or disgrace, a lingering death, or that it is so susceptible to accidents as to be unconstitutional."[192] The court relied on affidavits from the Department of Corrections which stated that Bailey's execution would be implemented by following past regulations of the U.S. Department of the Army.[193] This was enough to prevent any further inquiry into the methods used by the Department of Corrections officials. The court hinted that, in any event, Bailey's point was moot because he had a choice to elect death by lethal injection, although he did not do so.[194]

Without any real analysis, the superior court rejected Bailey's argument that the choice also violated the Constitution. Citing *Washington v. Rupe*,[195] the court stated that the existence of a choice did not require that a choice be made.[196] Finally, the court rejected Bailey's request for an evidentiary hearing, stating simply, without reason, that Bailey's submissions did not overcome the presumption that the Department of Corrections would carry out the procedure properly.[197] Thus, as in the Washington cases, the plaintiff had failed to prove that the method or the choice between the methods was unconstitutional.

---

187. No. IK79-05-0085RI, 1991 Del. Super. LEXIS 352 (Del. Super. Ct. Aug. 23, 1991).
188. *Bailey*, 1991 Del. Super. LEXIS 352 at *4.
189. *Id.* at *59.
190. *Id.* at *56.
191. *Id.* at *57.
192. *Id.*
193. *Id.*
194. *Id.* at *58 (stating that "because Bailey has rejected the option to die by lethal injection, he has waived any constitutional objection to hanging" (citing *DeShields*, 534 A.2d at 639)).
195. 683 P.2d 571, 594 (1984).
196. *Bailey*, 1991 Del. Super. LEXIS 352 at *58.
197. *Id.* at *59.

C. Montana

One final case merits discussion. Apparently following the decisions of the supreme courts of Washington and Delaware, the Montana Supreme Court recently held that the defendant's failure to choose death by lethal injection rendered moot his argument that hanging was cruel and unusual punishment.[198] Thus, in states where petitioners have a choice, they are put in a quandary. If they choose one method of execution, they have no standing to challenge the other method. If they choose one method and attack the constitutionality of that method, then their attack will not be considered since they could have chosen the other method. Thus, petitioners can never win when they are given the choice. And, as the courts have explained, the choice is constitutional.[199] The courts have found the perfect way to avoid the issue because by keeping the choice, the courts never have to address the attacks on the specific methods of execution. Rather, they can hide behind the legal excuses of lack of standing and non-justiciability. However, as Justice Dolliver's ignored majority opinion demonstrates,[200] it is time to stop hiding behind these excuses and to start considering the merits of these arguments.

IV. DISCUSSION

A. The Evidence

Once one considers the evidence about hanging, it seems clear that hanging is unconstitutional under the four guidelines considered by the Supreme Court in cruel and unusual punishment cases: physical pain, psychological pain, dignity of the prisoner and society, and contemporary norms of society.[201] Unfortunately, as the last section shows, courts rarely reach the merits of arguments raised by persons challenging the constitutionality of hanging. This is because no state imposes death by hanging unilaterally, and the defendant for all practical purposes can now choose an alternative method.[202] However, as will be discussed later in this article, the existence of such a choice should not preclude challenges to the constitutionality of hanging.[203]

---

198. Montana v. Langford, 833 P.2d 1127, 1129 (Mont. 1992) (citing *DeShields*, 534 A.2d 630).

199. *See supra* note 173.

200. *See supra* notes 138-157 and accompanying text (discussing Justice Dolliver's majority opinion in Washington v. Hampton, 627 P.2d 922 (Wash. 1981)).

201. *See supra* note 97 and accompanying text (describing the four-part framework used by the Court in analyzing cruel and unusual punishment cases).

202. *See supra* note 6 (describing the state death penalty statutes which include hanging as a means of execution).

203. *See infra* notes 288-297 and accompanying text (describing problems which arise when prisoners are faced with a choice of methods of execution).

1. Physical Pain

The foremost concern with execution by hanging is whether it causes unnecessary pain. Obviously, any type of execution will involve some sort of pain; however, if one method is considerably less painful than all others, then it should be the method employed. If hanging is unnecessarily painful, it does not fall within the standards of the Eighth Amendment.

Teeters suggests that, if properly performed, death by hanging is instantaneous, or if not instantaneous, at least unconsciousness occurs almost instantaneously.[204] If that is the case, then the only pain the victim feels is the initial sensation when the body is dropped and the spinal cord is severed, which may take a matter of seconds.[205] In fact, there have been reports of people in England in the nineteenth century who survived attempted hangings, and all reported that they felt no pain.[206] For instance, "[a]n acquaintance of Lord Bacon who meant to hang himself partially lost his footing and was cut down at the last extremity . . . and declared he felt no pain and his only sensation was fire before his eyes which changed first to black and then to sky blue."[207] Whether these accounts are accurate, of course, we have no way of knowing. However, all the experts emphasize that a successful hanging, i.e., one where the spinal cord is severed, depends on proper placement of the knot of the noose behind the ear, as well as the proper length of the rope in conjunction with the weight and height of the victim.[208] Thus,

> the drop must be just long enough to produce dislocation of the spinal cord, not so long as to result in decapitation, yet not so short as to result in slow strangulation. The line between the "intense agony" of strangulation and dislocation short of decapitation is so fine as to require the executioner to calculate the length of the drop from the condemned man's weight and physical condition with the use of a chart.[209]

---

204. TEETERS, *supra* note 22, at 154-55 (quoting Henry L. Mencken as stating that "hanging, if competently carried out, is a humane method of putting criminals to death" and "in most cases causes immediate unconsciousness, or, at all events, such a shattering of the faculties that he is hardly able to suffer"). Further, although Teeters makes this suggestion, he stresses that the degree of pain involved from hanging depends on the competence in the art of hanging. In so stating, he notes that history is replete with incidents of bungling. *Id.* at 155.

205. *Id.* at 155.

206. *Id.* at 154.

207. *Id.* (quoting an account taken from the *Quarterly Review* in 1849).

208. Marcus, *supra* note 77, at 1340; TEETERS, *supra* note 22, at 157 (noting that the "height of the drop in ratio with the weight of the victim's body plus the skill in adjusting the knot, theoretically revolutionized hanging").

209. Marcus, *supra* note 77, at 1340.

Further, the knot must be placed on the lower left jaw.[210] If it is placed under the right side of the neck, the head will be forced forward and strangulation will result.[211]

Opponents of the abolishment of hanging may argue that once the art of hanging is perfected, then spinal dislocation will always occur, and there is no possibility of decapitation or strangulation. The problem is that it does not seem possible to perfect hanging without experimenting on people first, which obviously is not an option. Nonetheless, some have argued that the technique can be perfected. In 1953, the English concluded that they perfected the art of hanging and there had been no mishaps in the preceding fifty years.[212] However, a Welsh pathologist who testified at Charles Campbell's hearing in June of 1993, stated that out of his findings from a study of 34 persons who underwent judicial hangings in Great Britain, only two of them had actually died of a broken neck.[213] Further, one English surgeon reported the following after witnessing a double execution in 1927:

> The bodies were cut down after fifteen minutes and placed in an antechamber, when I was horrified to hear one of the supposed corpses give a gasp and find him making spasmodic respiratory efforts, evidently a prelude to revival. The two bodies were quickly suspended again for a quarter of an hour longer. The executioner, who was thoroughly experienced, had done his part without a hitch, and the drop given was the regulation one according to individual physique. Dislocation of the neck is the ideal aimed at, but, out of all my post-mortem findings, that has proven rather an exception, while in the majority of instances the cause of death was strangulation and asphyxia.[214]

While capital punishment was eventually abolished in England in 1965, it is reported that prior to abolition, hangmen in England left prisoners hanging for a full hour before taking them down.[215] Reports also abound of victims who took as long as 15 to 18 minutes or longer to die.[216]

---

210. TEETERS, *supra* note 22, at 156.

211. *Id.* at 156-57 (noting that if the knot is under the left side of the jaw, then it finishes under the chin when the victim is hung and causes the chin to be thrown back, breaking the prisoner's neck).

212. Marcus, *supra* note 77, at 1340.

213. *Gallows Gear*, *supra* note 41, at B1.

214. Marcus, *supra* note 77, at 1340 (quoting a letter to the *British Medical Journal*, Feb. 19, 1927).

215. *Id.* at 1340-41.

216. Gardner, *supra* note 77, at 121 (quoting an account reported by Clinton Duffy, a former prison warden, who participated in over 60 hangings); *see also* KOESTLER, *supra* note 16, at 140-41 (noting the *Encyclopedia Britannica*, 1955 edition, indirectly expressed skepticism following publication of the Royal Commission investigations by stating, "*It is said* that the dislocation of the vertebrae causes immediate unconsciousness . . . the heart may continue to beat for up to 20 minutes but this is *thought to be* a purely automatic function." (emphasis added by A. Koestler)); *id.* at 11 (stating that victims in the nineteenth century were frequently still alive after 15 to 20 minutes).

Related to the consideration of whether death or unconsciousness is instantaneous is the phenomenon of "bungling."[217] While many of the cases of bungling occurred in the nineteenth century, perhaps when people were not as enlightened about hanging techniques, there is still evidence of bungling in the twentieth century, even after the weight charts and placement of the knot has supposedly been perfected.[218] As stated by Arthur Koestler in his *Reflections on Hanging*, bunglings

> are not entirely matters of the distant past. Official hypocrisy, taking advantage of the fact that executions are no longer public, pretends that modernized hanging is a nice and smooth affair which is always carried out "expeditiously and without a hitch." But the hanging of the Nuremberg war criminals in 1946 was as terribly bungled, and the hanging of Mrs. Thompson in 1923 was a butchery as revolting, as any reported in the *Newgate Calendar*. Her executioner attempted suicide a short time later, and the prison chaplain stated that "the impulse to rush in and save her by force was almost too strong for him." Yet Government spokesmen tell us that all executions are smooth and nice, and Government spokesmen are honorable men.[219]

When the hanging does not proceed as planned, the results are disastrous.[220] One account, as recorded in the 1954 edition of Charles Duff's *Handbook on Hanging*:

> 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 cap was raised and it was found that decapitation was almost complete, the head hanging to the body only 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 exposed gash caused by the head being pulled on the shoulder.[221]

The other consequences of bungling can be just as gruesome and painful as decapitation. Strangulation, for instance, is another consequence of bungling, which is accompanied by kicking convulsions and much struggling.[222] This can

---

217. This term is used by Teeters to describe incidents of blundered hangings. TEETERS, *supra* note 22, at 173-81.

218. KOESTLER, *supra* note 16, at 141 (reporting that a bungled execution took place in 1942).

219. *Id.* at 11.

220. While it is not the intention of this author to shock the reader by these gory accounts, they are necessary in order to understand the potential consequences if hanging is to remain a method of execution in the present day. For further accounts of bungling, see TEETERS, *supra* note 22, at 173-81.

221. Stephen Aylett, *Hanging by a Thread*, 138 NEW L.J. 331 (1988).

222. *Id.*

last several minutes before one actually dies from strangulation.[223] One commentator notes that "strangulation may be the rule rather than the exception."[224] There is also the chance that part of the body, especially the face, will be mutilated.[225] While the face is covered by the hood, often the eyes pop, the tongue swells, veins explode, the face and neck turn purple, and the neck elongates and distorts.[226]

Finally, it should be noted that the hangings of Westley Allan Dodd and Charles Campbell establish that even in the present day, hangings do not go as expected. Although Dodd's hanging appeared to have proceeded in a proper manner and none of the witnesses reported any evidence of consciousness in their notes,[227] the medical examiner, Dr. Donald Reay, reported that the cause of death was separation of Dodd's cervical vertebrae and *strangulation.*[228] Dodd's neck was not broken, which was the intended effect of the hanging.[229] Dr. Reay reported that death was most likely painless because the first injury was the tearing of Dodd's ligaments in his neck, and this most likely rendered him unconscious very quickly.[230] Death probably also occurred in two to three minutes.[231] However, Dr. Reay was surprised that Dodd's neck was not broken.[232]

According to reports, Campbell's execution was not entirely successful either. Campbell, who weighed approximately 220 pounds when he was hanged, was nearly decapitated during the hanging.[233] Experts reported he suffered severe neck damage, and that his spinal cord and vertebrae were separated.[234]

2. *Psychological Pain*

The previous section discussed the possibility of physical pain experienced by the prisoner. Another aspect that must be considered, in order to truly apply

---

223. *Id.*

224. Gardner, *supra* note 77, at 120 (noting that death by strangulation is undoubtedly extremely painful).

225. *Id.* at 121; *see also* TEETERS, *supra* note 22, at 176.

226. TEETERS, *supra* note 22, at 176; Gardner, *supra* note 77, at 121.

227. *Murderer Felt Little Pain*, *supra* note 2, at 9.

228. Shatzkin, *supra* note 48, at G1.

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

233. Jack Broom, *Expert: Rupe's Decapitation Risk 80-90%—State Attorney Puts Little Stock in Testimony as Overweight Killer Appeals Death Sentence*, SEATTLE TIMES, July 14, 1994, at B3 [hereinafter *Decapitation Risk*]; Rebecca J. Fowler, *At 409 Pounds, Is He Too Heavy To Hang?*, INT'L HERALD TRIB., Aug. 5, 1994, at News Sec.; *Gallows Drop*, *supra* note 7, at A8.

234. *Gallows Drop*, *supra* note 7, at 48; Fowler, *supra* note 233. It should be noted that the injuries suffered by Campbell have not been conclusively determined. Although Alan Tencer, the director of the biomechanics laboratory at Harborview Medical Center testified in federal court about Campbell's injuries, Assistant Attorney General John Samson raised the question of whether Tencer actually examined Campbell. *See Decapitation Risk*, *supra* note 233, at B3.

evolving standards of a civilized society, is the possibility of psychological pain caused by hanging.[235]

For some people, the mere thought of hanging evokes a violent reaction. Consider for a moment that you had been convicted of murder in a state that uses only hanging for capital punishment. How would you react to dying in this manner (once you got used to the idea that you were going to die at all)? Or, suppose you were given the choice between hanging and lethal injection. Which would you choose? Common sense tells us that the majority of persons would choose lethal injection. While the author knows of no studies that have been conducted on this issue, the reason for this choice is fairly clear. Lethal injection involves a fairly simple and familiar procedure.[236] In all likelihood, everyone has received an injection or had blood drawn at some point in their lives. The procedure of lethal injection is relatively painless, aside from the initial pinprick, and the person usually falls into unconsciousness within the first few seconds.[237] In fact, the only sort of bungling problem reported about lethal injection is that medical technicians sometimes have difficulty locating the inmate's vein,[238] although death penalty opponents also cite ruptured veins, failure to immediately induce unconsciousness and inaccurate dosages as other examples of bungling.[239] Further, the clinical aspect of the procedure seems to be soothing because it is something familiar to the prisoner.[240]

---

235. As previously discussed, this concept was considered by the Court in Trop v. Dulles, 356 U.S. 86 (1958). *See supra* notes 108-112 and accompanying text. Commentators have suggested that persons on death row undergo mental suffering which may also be violative of the Eighth Amendment, and that mental suffering is demonstrated by use of defense mechanisms such as denial of the death sentence. The person facing death may also undergo stark terror, and the increasing delay between the sentence and the actual death may also produce mental suffering. *Mental Suffering*, *supra* note 79, at 824-31.

236. It has been noted that the first phase of death by lethal injection is almost exactly the same as the procedure used to anesthetize a person for surgery. Paul Jacobs, *Execution by Lethal Injection OK'd*, L.A. TIMES, Aug. 29, 1992, at 17. Medical technicians first inject a series of chemicals to anesthetize the inmate, and then a second round of chemicals is injected which operates to stop the heartbeat. *Id.*

237. Lethal injection is "the only form of execution which from our own life's experience, we can conclude is entirely devoid of discomfort." *Id.* (quoting California Assemblymember Tom McClintock).

238. *Id.*

239. *The Firm That Outfits Death Row*, CHI. TRIB., June 12, 1988, at F13.

240. Some states that have adopted lethal injection use what is known as a lethal injection machine instead of medical technicians to administer the drugs. This procedure is still similar to preparation for surgery, and thus the familiarity aspect is not removed. The prisoner is strapped to a gurney and has an intravenous tube in his arm. The tube is attached to a tube in the machine, and a heart monitor is also attached to the prisoner. In Illinois, two persons each push a button, one of which activates the machine (so neither operator knows who activated it). The machine then goes through cycles and administers the drugs via the tube inserted in the prisoner's arm. Illinois uses three drugs: sodium pentothal to put the prisoner to sleep, pancuronium bromide to stop his breathing, and potassium chloride to stop his heart. Rob Karwath, *Death's Arrival One of Precision*, CHI. TRIB., Sept. 11, 1990, at C6.

Hanging, on the other hand, involves none of these aspects. Very few people have previously undergone experiences similar to hanging.[241] Thus, it is a foreign experience, and common sense tells us that things which are unknown are typically feared. Further, hanging lacks the clinical aspect that is present with lethal injection. The person must walk up to the gallows, where her legs and wrists are tied together, a rope is placed around her neck, and a white or black cap placed over her head.[242] While the cap is intended to protect the onlookers from the gruesome view of the person being hanged, it cannot provide much comfort to the victim, who may feel the added sensation that she is about to suffocate.

Moreover, the person facing hanging not only must deal with the fact that death may be painful, but that he may also be decapitated or strangled. Further, almost every hanging results in some mutilation of the body.[243] Even if death is not painful, persons who are hung must also contemplate that their deaths may be gruesome and that this will take place in front of the number of witnesses who are watching the event.[244]

It is likely that the only people who would choose hanging over lethal injection are those that have a specific aversion to needles, leaving death by hanging as the only viable option, or persons like Dodd, who specifically chose hanging as a means of punishment because he hung his victims.[245] Thus, the potential for psychological pain and the possibility of physical pain, mutilation and suffering in front of onlookers, all suggest that hanging destroys the dignity of the condemned prisoner.

3. *Modern Morality*

The key phrase in *Trop v. Dulles*, "evolving standards of decency,"[246] has particular importance in determining whether hanging is cruel and unusual punishment. Even if it remains indeterminable whether hanging is painful or

---

241. This statement assumes that the majority of people do not engage in sexual gratification via constriction of the neck, a very real phenomenon where persons suspend themselves in order to gain sexual gratification. While it does not often occur, one unintended result of this activity is death "via autoerotic asphyxiation." For a more thorough discussion of this phenomenon, see Ficarra, *supra* note 26, at 54-57.

242. *See* Gardner, *supra* note 77, at 121 (quoting Clinton Duffy as saying that "[h]anging, 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.") Interestingly, Dr. Ficarra notes that the cap is white, although it was erroneously depicted as black in movies. Ficarra, *supra* note 26, at 46. Moreover, the cap is intended to protect onlookers from the sight in case of strangulation and decapitation, and to prevent the victim from knowing when the lever was going to be pulled. *Id.*

243. "'[A]t best there is always the chance of popped eyes, purple countenance, swollen tongue and exploded veins—but these are covered up by the black hood.'" TEETERS, *supra* note 22, at 176 (quoting *Concern*, a bi-monthly Journal of Opinion, New London, N.H., Nov. 17, 1961).

244. *See* Gardner, *supra* note 77, at 122 (stating that hanging is cruel because "[t]he 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 affair.").

245. *See supra* note 38 and accompanying text.

246. 356 U.S. 86 (1958).

constitutes torture, the mere fact that it has fallen from use in comparison to other methods of execution shows that it does not comport with society's current standards of decency. In a word, it is unusual. That hanging has fallen into disfavor is a fact which can no longer be ignored. People conjure up the image of hanging in their minds, and relate it to some barbaric practice that took place in England in centuries past.[247] It was said over fifteen years ago that the Cruel and Unusual Punishments Clause "originated in the English Declaration of Right of 1688 and was designed to prohibit such practices as execution by *hanging*, drawing and quartering, burning at the stake, the rack and the thumb screw."[248]

Further, over a century ago, the governor of New York prompted the Legislature to adopt electrocution over hanging as the method of execution by his statement that "[t]he present mode of executing criminals by hanging has come down to us from the dark ages, and it may well be questioned whether the science of the present day cannot provide a means for taking the life of such as are condemned to die in a less barbarous manner."[249] When Montana changed its death penalty statute in 1983 to allow a choice between hanging and lethal injection, Justice Sheehy of the Montana Supreme Court stated that "the amendment [was] an admission by the legislature that death by hanging is too horrible to contemplate."[250] Indeed, out of forty-six states that discarded hanging, thirty-nine states chose alternative methods of execution because hanging was much too horrible to contemplate.[251]

Not only does the fact that a majority of states abandoned hanging in favor of electrocution indicate that hanging is "unusual," but the fact that those alternate methods are also undergoing criticism signifies that hanging does not comport with society's contemporary standards. Of states that currently employ the death penalty,[252] the majority use lethal injection.[253] Electrocution is the second most

---

247. When the Supreme Court of California decided to abolish capital punishment in 1972, it stated that in the late 1800's, hanging was a popular form of vigilante justice. People v. Anderson, 6 Cal.3d 628, 642, 493 P.2d 880, 889, 100 Cal. Rptr. 152, 161 (1972).

248. Cunningham v. Jones, 567 F.2d 653, 655 (6th Cir. 1977) (emphasis added).

249. *In re Kemmler*, 136 U.S. 436, 444 (1890).

250. Montana v. Kills on Top, 787 P.2d 336, 356 (Mont. 1990) (Sheehy, J., dissenting).

251. *See, e.g.*, Malloy v. South Carolina, 237 U.S. 180, 185 n.1 (1915) (reporting that many states such as Ohio, Massachusetts, New Jersey, Virginia, North Carolina, Kentucky, South Carolina, Arkansas, Indiana, Pennsylvania and Nebraska followed New York and adopted electrocution as a means of execution in place of hanging with the idea that electrocution was "less painful and more humane than hanging"); *see also* Campbell v. Wood, 18 F.3d 662, 697-98, (9th Cir. 1994) (Reinhardt, C.J., dissenting) (noting that the U.S. Army also discarded hanging in 1986). Ironically, Washington uses the U.S. Army's protocol to conduct its hangings. *See* Campbell v. Blodgett, No. C89-456C (W.D. Wash. June 1, 1993), at 2, ¶ 1 (copy on file with the *Pacific Law Journal*). *See also* Brown v. Alabama, 264 So.2d 529, 537 (Ala. 1971) (stating that the Louisiana Supreme Court also deemed electrocution more humane than hanging by its decision in State *ex rel.* Pierre v. Jones, 9 So.2d 42 (La. 1942), *cert. denied*, 317 U.S. 633 (1942)).

252. *See* Fierro v. Gomez, 790 F. Supp. 966, 971 (N.D. Cal. 1992) (reporting that 38 states still employ the death penalty).

common method,[254] followed by the gas chamber,[255] hanging[256] and shooting.[257] Electrocution has been abandoned by at least five states in favor of a more humane method of execution, and commentators have suggested that it is also cruel and unusual.[258] Likewise, in California, the gas chamber was recently ruled unconstitutional by U.S. District Judge Marilyn Hall Pasel, who previously likened descriptions of executions by lethal gas to descriptions of executions by

---

253. At present, 26 states use lethal injection, although many of those states have provisions that allow for a choice between lethal injection and another form of execution, or a provision deeming an alternative method of execution if lethal injection is ruled unconstitutional. *See* ARIZ. REV. STAT. ANN. § 13-704 (1993) (choice between lethal injection and lethal gas); ARK. CODE ANN. § 5-4-617 (Michie 1993) (electrocution if lethal injection is unconstitutional); CAL. PENAL CODE § 3604(a) (West Supp. 1994) (choice between lethal injection and lethal gas); COLO. REV. STAT. ANN. § 16-11-401 (West Supp. 1993) (lethal injection); DEL. CODE ANN. tit. 11, § 4209 (1992) (hanging if lethal injection is unconstitutional); IDAHO CODE § 19-2716 (1993) (firing squad if lethal injection is impractical); ILL. ANN. STAT. ch. 725, para. 5/119-5 (Smith Hurd Supp. 1994) (electrocution if lethal injection is unconstitutional); LA. REV. STAT. ANN. § 15:569 (West 1992) (lethal injection after Sept. 15, 1992; all others sentenced before that date receive electrocution); MD. ANN. CODE art. 27, § 627 (Supp. 1994) (lethal injection);MISS. CODE ANN. § 99-19-51 (1993) (gas for execution of defendant's sentenced before July 1, 1984, or if lethal injection is unconstitutional); MO. REV. STAT. § 546.720 (Supp. 1994) (choice between lethal injection and gas); MONT. CODE ANN. § 46-19-103 (1993) (choice between hanging and lethal injection); NEV. REV. STAT. ANN. § 176.355 (Michie 1991) (lethal injection); N.H. REV. STAT. ANN. § 630:5 (Supp. 1993) (hanging if lethal injection is impractical); N.J. REV. STAT. § 2C: 49-2 (Supp. 1994) (lethal injection); N.M. STAT. ANN. § 31-14-11 (Michie 1993) (lethal injection); N.C. GEN. STAT. § 15-187 (1993) (choice between gas and lethal injection); OHIO REV. CODE ANN. § 2949.22 (Anderson Supp. 1993) (choice between electrocution and lethal injection); OKLA. STAT. tit. 22, § 1014 (1992) (electrocution if lethal injection is unconstitutional, firing squad if electrocution is unconstitutional); OR. REV. STAT. § 137.473 (Supp. 1994) (lethal injection); 61 PA. CONS. STAT. ANN. § 2121.1 (1993) (lethal injection); S.D. CODIFIED LAWS ANN. § 23A-27A-32 (1993) (lethal injection); TEX. CODE CRIM. PROC. ANN. art. 43.14 (West Supp. 1994) (lethal injection); UTAH CODE ANN. § 77-18-5.5 (1993) (choice between lethal injection and firing squad); WASH. REV. CODE ANN. § 10.95.180 (1990) (choice between hanging and lethal injection); WYO. STAT. § 7-13-904 (1993) (gas if lethal injection is unconstitutional).

254. Eleven states use electrocution exclusively. *See* ALA. CODE § 15-18-82 (1993); FLA. STAT. ANN. § 922.10 (West Supp. 1994); GA. CODE ANN. § 17-10-38 (1993); IND. CODE § 35-38-6-1 (1992); KY. REV. STAT. ANN. § 431.220 (Baldwin 1993); MASS. GEN. L. ch. 279, § 60 (Supp. 1994); NEB. REV. STAT. § 29-2532 (1992); N.Y. CORRECT. LAW § 662 (McKinney 1987); S.C. CODE ANN. § 24030530 (Law. Co-op. 1993);TENN. CODE ANN. § 40-23-114 (1993); VA. CODE ANN. § 53.1-1-233 (Michie 1993). As previously mentioned, Ohio provides for a choice between electrocution and lethal injection, and Louisiana uses only electrocution on persons sentenced before September 15, 1992. *Supra* note 253.

255. Four states (California, Arizona, North Carolina and Missouri) provide that the defendant may choose between another method and gas. *See supra* note 253. Further, both Mississippi and Wyoming retain gas as an alternative method should lethal injection be found unconstitutional. *Id.*

256. *See supra* note 6 (describing the state death penalty statutes which include hanging as a means of execution).

257. While Utah is the only state to offer a choice between the firing squad and another method, both Idaho and Oklahoma retain shooting as an alternative method of execution. *See supra* note 253.

258. Gardner, *supra* note 77, at 125-27 n.228 (noting that both Oklahoma and Texas adopted lethal injection as a more humane substitute for the electric chair, and also noting that electrocution is painful, causes disfigurement and is not altogether reliable); Hoffman, *supra* note 33, at 1039 (taking the stance that electrocution is cruel and unusual punishment).

hanging.[259] This decision comes closely on the heels of the decision of the Arizona Legislature to switch from the gas chamber to a choice between gas and lethal injection, after a prisoner executed by gas took ten agonizing minutes to die, all the while gasping, shuddering and making obscene gestures to the witnesses with his strapped-down hands.[260] In fact, the only method which appears not to have been subjected to criticism is the most favored method of lethal injection.[261]

It can thus hardly be said that society favors hanging as a modern method of execution.[262] Yet four states continue to carry hanging on their books. Interestingly, Washington appears to be the only state which has used hanging in over fifty years.[263] Why hanging remains a viable method in light of a standard that looks to the contemporary norms of society is certainly a puzzle. The fact that only four states retain hanging also shows that, as in *Weems*,[264] it should no longer be a valid method of execution. These four states need to adapt to contemporary norms and reject hanging as the majority of society has.

The fact that there is a very real lack of qualified and experienced hangmen also indicates that hanging does not comport with contemporary norms. In 1984, then-Representative Daniel A. Eaton pointed to the lack of qualified hangmen when arguing to replace hanging with lethal injection in New Hampshire.[265] In 1987, as Delaware prepared for the hanging of Billie Bailey, it erected a new gallows and hired an executioner, "a Canadian backwoodsman who could only be contacted through notes left on a tree stump by the local mounties."[266] This argument was also heard in 1981 by the Washington Supreme Court in the

---

259. *See* Fierro v. Gomez, No. C92-1482 MHP, 1994 U.S. Dist. LEXIS 14304 (N.D. Cal. Oct. 4, 1994) (holding use of gas chamber unconstitutional); Fierro v. Gomez, 790 F. Supp. 966, 971 (N.D. Cal. 1992) (comparing death by hanging to death by lethal gas).

260. *Gruesome Death in Gas Chamber Pushes Arizona Toward Injections*, N.Y. TIMES, Apr. 25, 1992, at 9.

261. *See* Mark Curriden, *Lethal Injection Now a Preferred Method*, ATLANTA J. & CONST., Sept. 24, 1991, at C4 (reporting that many states have recently adopted lethal injection because of rising criticism of both electrocution and the gas chamber).

262. There has not been a judicial hanging in any English-speaking country since 1966, with the exceptions of the hangings of Westley Allan Dodd and Charles Campbell, other than in South Africa and some smaller states in the Caribbean. Campbell v. Wood, 18 F.3d 662, 700 (9th Cir. Feb. 8, 1994) (Reinhardt, C.J., dissenting), *cert. denied*, 114 S. Ct. 2125 (1994).

263. New Hampshire has not conducted a hanging since 1939. Amy Miller, *Lethal Injection May Replace Hanging*, UPI, July 17, 1984, *available in* LEXIS, News Library, Arcnws File.

264. 217 U.S. 349 (1909). In determining that the Philippine Islands' statute was cruel and unusual, the Court in *Weems* considered the fact that there were no laws in the United States similar to the Philippine statute. *See supra* notes 95-107 and accompanying text.

265. Miller, *supra note* 263.

266. Kurt Heine, *In Delaware, Killers Face Needle or Noose*, CHI. TRIB., Aug. 18, 1991, at C4.

Frampton case.[267] Other than the persons who recently hung Mr. Dodd and Mr. Campbell, it is unlikely that any trained hangmen exist in the United States.[268]

4. *Dignity of Society and the Prisoner*

Related to the issue of contemporary norms is the idea of dignity of both society and the prisoner. This concept was demonstrated in *Weems* when the Court held that it was cruel and unusual for the Philippine Islands to sentence a person so harshly as to take away the prisoner's dignity.[269] Implicit in that concept is the idea that when the government acts in such a cruel manner, it is harming society by creating a framework for tyranny. In other words, it is setting a precedent for invoking laws in the future that will also treat prisoners harshly. By refusing to allow such cruel punishments, the dignity of society is also preserved, and society itself becomes more humane and more conscious of the dignity of prisoners.

One only needs to look at changes that have occurred with regard to prisoners' rights in the last twenty years to see the increased consideration given to the dignity of prisoners, and society itself, by legislators and the courts. For instance, suits by prisoners abound, declaring that their civil rights have been infringed during the arrest and detention phases. Likewise, it is now considered cruel and unusual for prisons to deny prisoners basic necessities, to force them to eat certain foods, to subject them to cramped or unsanitary living conditions or harsh noise levels, and even to deny them access to law libraries.[270]

Because we recognize the dignity of individual prisoners, hanging should be rejected as a method of execution. By retaining hanging, prisoners receive contradictory treatment. On the one hand, the courts and society recognize some prisoner's rights. On the other hand, courts and society subject prisoners to a possibly painful and undignified death by hanging. Moreover, society's own

---

267. Larry Roberts, UPI, Jan. 13, 1981, *available in* LEXIS, News Library, Arcnws File.

268. Although there are no reports about the identity of Dodd's or Campbell's hangmen, the state of Washington previously faced the problem of a lack of qualified hangmen when it appeared that Campbell would be executed in 1989. The state eventually hired an anonymous retired hangman from Topeka, Kansas, after searching in other states and even other countries, according to Richard Bauer, spokesman for the Washington state penitentiary. Ann Japenga, *Mystery Hangman Sets Off A Washington Controversy*, L.A. TIMES, Apr. 12, 1989, at View 1. The hangman, aged 74, knew of only one other experienced hangman in the country, and expressed doubt that others existed. *Id.* Further, it was unknown whether the other qualified hangman, the person from whom Campbell's hangman learned his trade at a prison for war crimes near Tokyo after World War II, was still alive. *Id.* The anonymous hangman claimed to be responsible for 64 previous hangings. *Id.*

269. 217 U.S. 349 (1909); *see supra* notes 95-107 and accompanying text.

270. *See, e.g.*, Jae v. Boyer, 977 F.2d 568 (3rd Cir. 1992) (holding, in an unpublished opinion, that the allegation that a prisoner was denied access to law library should not have been dismissed as frivolous); Davenport v. DeRobertis, 844 F.2d 1310, 1313 (7th Cir. 1988) (finding an Eighth Amendment prohibition against certain harsh prison conditions); Inmates of Occoquan v. Barry, 844 F.2d 828 (D.C. Cir. 1988) (discussing Eighth Amendment protections against deprivations of basic necessities such as toiletries, among others).

dignity also dictates that hanging be abolished. By retaining an archaic and barbaric method of execution, the United States will become known as a backward and barbaric country that still hangs prisoners who commit crimes. Consider one's own view of other cultures that chop off the hand or finger of someone caught stealing. Most people in the United States would consider that cruel, and think that the country which practices that method of punishment is barbaric as well. Hanging in the 1990s similarly reflects on the dignity of our society.

B. The Argument

While the Ninth Circuit has recently determined that hanging is not cruel and unusual,[271] the evidence presented above strongly suggests that hanging would be found unconstitutional if the United States Supreme Court was actually to decide this issue. Hanging is unconstitutional because it does not meet the four standards for assessing cruel and unusual punishments under the Eighth Amendment. Further, when the arguments in favor of hanging are weighed against the arguments opposing hanging, the balance tips in favor of abolition.

The standards of the Eighth Amendment were developed because courts were concerned about humanity. While the courts recognized the need for punishment, to send a message to the criminal as well as to society, they also recognized that our society has certain notions about dignity and humanity; it is not ethical to subject anyone to torture or needless suffering. *Kemmler*, *Weems*, *Trop* and all of the other cases from which the definition of cruel and unusual punishment originated, teach us that man, no matter what crime he has committed, has a right to be punished in a manner that is as humane as possible.[272] The definition of humane is to be decided by the current standards of society.

Hanging cannot be constitutional under the Eighth Amendment in 1994 because the notion of hanging as humane was discarded when the electric chair first came into use.[273] For over a century, our society has considered hanging inhumane and barbaric.[274] When one considers that lethal injection is the most widely accepted and probably the least objectionable method of execution, the contemporary norms of society strongly suggest that hanging should not be retained.

Nor should hanging be retained as a choice among methods of execution. Retaining hanging as an option does not preclude other states in the future from adopting hanging as their sole method of execution. More importantly, since

---

271. *See infra* notes 298-322 and accompanying text (discussing Campbell v. Wood, 18 F.3d 662 (9th Cir. Feb. 8, 1994), *cert. denied*, 114 S. Ct. 2125 (1994)) and why it is in error).

272. *See supra* notes 88-113 and accompanying text (discussing *Kemmler*, *Weems* and *Trop*).

273. *See supra* note 251 (describing several instances in which states chose alternative methods of execution because they were believed to be more humane than hanging).

274. *See supra* notes 88-94 and accompanying text (discussing the 1890 case of Kemmler, which described hanging as a barbarous means of execution).

hanging violates all of the factors currently required under Eighth Amendment analysis, in reality, the prisoner is not given a choice among constitutional alternatives at all. The "choice" only serves as a vehicle to ease legislators', jurists' and society's minds. If a prisoner chooses his method of execution, then it can be rationalized that no cruel and unusual punishment has been imposed. Because there is no real choice for the prisoner, however, states should impose only one method, such as lethal injection, and face the consequences of making the choice for the prisoner. By having to face the consequences, it is less likely that controversial methods of execution, such as hanging or even shooting, would be imposed.

Furthermore, there is conflicting evidence that hanging is painless and that death is instantaneous.[275] But should hanging be retained because of a possibility that it is not always painful? There is no real way of knowing if hanging is painless or if there will be more bungling in the future. Experience, however, teaches us that there is a probability that bunglings and painful deaths by strangulation or mutilation will occur. A court weighing such possibilities should take a conservative approach and rule hanging unconstitutional because the chance of painful death exists. Further, that lethal injection provides a method that is virtually pain-free and "bungle-proof"[276]is another factor a court should weigh when considering the pain hanging might inflict. Comparing lethal injection, a predictable method of execution, with hanging and the unknown consequences it can produce, moves the balance in favor of hanging's abolition.

Finally, abolishing hanging is consistent with the letter and intent of the Eighth Amendment because it retains the dignity of prisoners as well as society. The punishment of death is painful enough for the prisoner. We must not create added stress and pain for the prisoner by subjecting him to a painful and humiliating method of execution. The *Weems* Court intended to prevent degrading punishments when it declared the punishment of fifteen years' imprisonment cruel and unusual for the crime of merely falsifying a public document.[277] Although capital crimes are much more heinous than the crime committed in *Weems*, a civilized society does not impose punishments that violate a prisoner's dignity.

Not only must we consider the dignity of the prisoner, but we must consider the dignity of society as well. Hanging should not be retained simply as a means of deterrence; indeed, it goes against the very dignity of society to retain a barbaric and potentially torturous form of punishment simply to deter others from committing crimes. Making our system of justice more cruel is not an answer to the escalating violent crime problem in the United States. We must find other

275. *See supra* notes 204-234 and accompanying text (discussing the physical pain involved in hanging).
276. *See supra* notes 217-234 and accompanying text (describing "bungling").
277. *See supra* notes 95-107 and accompanying text (discussing *Weems*).

solutions than simply imposing cruel and outdated modes of execution. Harsher penalties are one thing, but cruel penalties are another.

C. *The Ninth Circuit's Flawed Reasoning and Other Reasons to Retain Hanging*

Probably the foremost argument against abolishing hanging is that it simply is a nonissue. Opponents would argue that because hanging is presented as a choice among methods of execution, and it is not summarily imposed upon those about to be executed, then there is no reason to discuss it. People are free to choose the alternate method, and thus hanging need not even be considered.

As was demonstrated in *Rupe*[278] and *DeShields*,[279] this approach has several flaws. It permits the courts to completely avoid the very real issues that need to be addressed, such as the potential pain inflicted on the person being hanged and the lack of fit with contemporary norms. Society, as well as judges, should not avoid the difficult questions by hiding behind this excuse.[280] Would the same argument be made if states gave a choice between lethal injection and burning at the stake? While a choice still exists, it is doubtful people would be content to sit back and let a "death by fire" statute remain on the books.

Second, as was previously explained, a prisoner really does not have a choice at all. This is evidenced by the fact that there have been no hangings until recently, yet in both Montana and Washington, the choice of death by hanging has been available.[281] Even the legislatures of the states that retain hanging concede that there is no real choice. For instance, New Hampshire added lethal injection to its books because, when hanging was the only method of execution, juries were reluctant to impose the death penalty on prisoners, believing it was too cruel.[282] The choice between hanging and lethal injection was added in Montana based, in part, on the efforts of Senator Bob Brown, who deemed hanging inhumane and possibly even unconstitutional.[283] Montana Assistant State

---

278. *See supra* notes 167-174 and accompanying text (discussing *Rupe*).

279. *See supra* notes 175-186 and accompanying text (discussing *DeShields*).

280. Interestingly, although state cases exist for the proposition that a method of execution cannot be challenged because prisoners are given the choice of an alternate method, prior to the Ninth Circuit's decision in Campbell v. Blodgett, 978 F.2d 1502 (9th Cir. 1992), where the court decided not to hear Campbell's arguments against hanging because he had a choice in the matter, there were no federal court cases standing for such a proposition. Barbieri, *supra* note 53, at 4.

281. Campbell refused to make a choice, Campbell v. Wood, 18 F.3d 662, 681 (9th Cir. 1994), *cert. denied*, 114 S. Ct. 2125 (1994) and thus hanging was mandated by Washington's death penalty statute. *See supra* note 6 (describing the Washington state death penalty statute, among others). It should be noted that in Montana, where prisoners have a choice between hanging and lethal injection, *see supra* note 6, there has not been a hanging since the state hung Philip "Slim" Coleman on September 10, 1943. Peter Fox, REUTERS NORTH EUROPEAN SERVICE, Feb. 21, 1983, *available in* LEXIS, News Library, Arcnws File.

282. Bob Hohler, *Not Carried Out for 50 Years; As Recently Revised, N.H. Death Penalty More Apt to be Used: Execution Stirs Debate*, NEW HAMPSHIRE WEEKLY, July 9, 1989, at 1.

283. Fox, *supra* note 281.

Attorney General John Maynard also backed Brown's proposal, indicating that the United States Supreme Court might rule hanging unconstitutional.[284] Lethal injection was added to Washington's statute because legislators thought the Washington Supreme Court would find hanging to be cruel and unusual.[285] This sentiment was proven wrong, however, by the decision in *Frampton*.[286] Finally, before Delaware changed to lethal injection, supporters of the change called hanging "brutal" and reasoned that juries would be more willing to impose the death penalty if it were carried out by lethal injection.[287]

Third, problems occur when the prisoner refuses to choose. For instance, she may have an objection to participating in her own death in any manner, possibly for religious reasons, and that includes choosing the means of execution. Hanging may be chosen for her. Under the Montana and Washington statutes, this possibility exists.[288] For instance, Campbell was hung because he refused to choose between hanging and lethal injection and thus, under the Washington statute, hanging was chosen for him.[289] In Montana, the choice of lethal injection is waived if not asserted when the date for execution is set.[290] Delaware also faces this problem because its current statute,[291] which imposes lethal injection, gives people who were sentenced to die by hanging under its prior statute[292] the choice between hanging or lethal injection.[293] For people sentenced before 1986 who refuse to choose, however, hanging is still imposed.[294] Finally, it is possible that hanging could even be imposed in New Hampshire, which uses lethal injection as its primary method, because the statute gives the commissioner the discretion to impose hanging should he find it is impractical to carry out lethal injection for

---

284. *Id.*

285. Robert McDaniel, UPI, Apr.16, 1981, *available in* LEXIS, News Library, Arcnws File.

286. 627 P.2d 922 (Wash. 1981).

287. UPI, May 15, 1986, *available in* LEXIS, News Library, Arcnws File (quoting Rep. Roger Roy and Sen. Thomas Sharp).

288. *See supra* note 6 (describing the Montana and Washington death penalty statutes).

289. Campbell v. Wood, 18 F.3d 662, 681 (9th Cir. 1994), *cert. denied*, 114 S. Ct. 2125 (1994); *see supra* note 6 (describing the Washington statute).

290. MONT. CODE ANN. § 46-19-103(3) (1993).

291. DEL. CODE ANN. tit. 11, § 4209(f) (1993) (retaining hanging only if lethal injection is found unconstitutional).

292. *Id.* § 4209(f) (1979).

293. The act states that "any person sentenced to death for acts committed prior to the enactment of this act shall be permitted to elect lethal injection, as provided herein, as the method of death." DEL. CODE ANN. tit. 11 § 4209(f) (1986). This statute was enacted on June 13, 1986.

294. Heine, *supra* note 266, at C4 (discussing the dilemma of death row inmate James W. Riley, who refused to choose between lethal injection and hanging). The court in *DeShields* also noted that hanging would be imposed on Mr. DeShields because he was sentenced to die prior to the new statute, and because he refused to exercise his choice between methods of execution. DeShields v. Delaware, 534 A.2d 630, 639 (Del. 1987); *see supra* notes 175-186 (describing *DeShields*).

any reason.[295] Since the statute does not define "impractical," there appear to be no limits on the commissioner's power to choose.

Given the overwhelming evidence that hanging is cruel and unusual, to impose hanging on people who exercise a right not to choose is tantamount to punishing them for not making the choice. For instance, the Delaware court stated, "DeShields can avoid hanging and any unnecessary pain and degradation which he suggests hanging entails by choosing lethal injection."[296] However, prisoners who have a valid objection to choosing (and who are not merely refusing to choose in the hopes that the method imposed will be deemed unconstitutional) should not be forced to act against their beliefs by the threat that hanging, a painful and demeaning method of execution, will be imposed if they do not choose. By imposing hanging in this situation, the state seizes all of the prisoner's rights: the right to die as painlessly as possible, and the freedom to choose - or not to choose.[297]

Even when a prisoner chooses hanging, it does not mean that he had access to information that enabled him to make an informed decision. Many people might blindly accept that hanging has been perfected since it is currently being used and has not been ruled unconstitutional. Even if they choose hanging believing it to be a dignified manner of execution, they may be ignorant of the controversy surrounding the pain inflicted by hanging. A state cannot escape the consequences of its laws by reasoning that it was the prisoner's choice, where it allows uninformed persons to choose hanging in the midst of this controversy. Instead of this "conscious ignorance" approach, the state has an obligation to either change its laws, or inform prisoners of the risks associated with hanging.

Proponents of execution by hanging point to the Ninth Circuit's decision in *Campbell v. Wood*[298] as evidence that hanging survives constitutional scrutiny. The obvious flaw in this argument is that hanging has not yet received constitutional scrutiny by the United States Supreme Court, nor does such scrutiny appear likely, since the Court denied Campbell's petition for certiorari.[299]

---

295. N.H. REV. STAT. ANN. § 630:5 (XIII, XIV) (Supp. 1993). The statute states:

> [T]he commissioner of corrections or his designee shall determine the substance or substances to be used and the procedure to be used in any execution, provided, however, that if for any reason the commissioner finds it to be impractical to carry out the punishment of death by administration of the required lethal substance or substances, the sentence of death may be carried out by hanging under the provisions of law for the death penalty by hanging in effect on December 31, 1986.

296. *DeShields*, 534 A.2d at 639.

297. Apparently some people recognize that imposing hanging as the default method has constitutional problems. Washington Attorney General Christine Gregoire recently introduced a proposal to the Legislature that lethal injection be the default method when prisoners refuse to choose, and to allow prisoners to choose hanging if they desire. *A Very Sensible Solution In Debate Over Hanging*, SEATTLE TIMES, July 19, 1994, at B4.

298. 18 F.3d 662 (9th Cir. 1994), *cert. denied*, 114 S. Ct. 2125 (1994).

299. Campbell v. Wood, 114 S. Ct. 2125 (1994).

As discussed below, the Ninth Circuit's decision is faulty for many reasons. However, by declining to review hanging, not only does the Court permit Washington and Montana to continue to inflict a cruel punishment on prisoners, it permits all states to do so, since hanging remains a viable option for any state. In these times when crime is a national problem, a barbaric yet constitutional punishment like hanging is attractive to those seeking solutions to the problem. The Supreme Court's "green light," coupled with the fact that the recent hangings appeared to proceed rather smoothly, may be the impetus needed for other states to adopt hanging.

Had the Court actually reviewed the Ninth Circuit's decision that hanging is constitutional, it is doubtful that it would have survived constitutional scrutiny. The Ninth Circuit first stated that it was operating under the presumption that Washington's statute was valid.[300] Relying heavily on United States District Judge John J. Coughenour's findings of fact and conclusions of law, the court determined that hanging did not involve any wanton or unnecessary infliction of pain, and as such, was constitutional.[301] The fact that Judge Coughenour did not allow any evidence of bungling in the evidentiary hearing was not error, according to the court, because such evidence was not relevant to Washington's hanging procedures.[302] Further, the fact that no evidence regarding lethal injection was allowed by Judge Coughenour also was not error, as the only method at issue was hanging and whether it was unnecessarily painful.[303]

However, the court's reliance on Judge Coughenour's determinations, as well as its own reasoning, were defective. First, Judge Coughenour's findings of fact and conclusions of law are questionable.[304] In determining that hanging was constitutional under Washington's protocol, Judge Coughenour only concentrated on the possibility of decapitation and pain resulting from a hanging, and did not consider the possibility of strangulation. Thus, Judge Coughenour began with the finding that Washington's protocol was virtually accident-proof.[305] He found that hanging could have several consequences, such as cardiac arrest, irreversible brain damage, trauma to the brain stem, occlusion of the airway, and laceration of the spinal cord, among others.[306] He concluded that all of these consequences would result in either immediate or near immediate death or unconsciousness, without defining the term "immediate."[307] He also concluded that cervical

---

300. Campbell v. Wood, 18 F.3d at 675 (9th Cir. 1994).

301. *Id.* at 683.

302. *Id.* at 679.

303. *Id.* at 687.

304. Judge Coughenour's determinations are contained in an unpublished opinion; *see* Campbell v. Blodgett, No. C89-456C (W.D. Wash. June 1, 1993) (copy on file with the *Pacific Law Journal*).

305. *Id.* at 3, ¶¶ 7-9. As the dissent in *Campbell v. Wood* points out, the protocol relied upon by Washington was derived from the U.S. Army. Ironically, however, the U.S. Army abandoned the use of hanging as a method of execution in 1986. Campbell v. Wood, 18 F.3d at 697-98 (Reinhardt, C.J., dissenting).

306. Campbell v. Blodgett, slip op. at 3-4, ¶ 10.

307. *Id.* at 4, ¶¶ 11-12.

fracture, which occurs in a sizeable *minority* of the cases, was not required in order to produce immediate or near immediate unconsciousness or death.[308] Given, however, that cervical fracture is the ideal consequence of judicial hanging, Judge Coughenour's conclusion is questionable considering his concession that it only happens in a minority of cases.

Judge Coughenour hardly discussed the evidence presented by Campbell, other than to state that Campbell did not present convincing evidence that hanging would result in decapitation or that death would not be almost immediate. Judge Coughenour noted that he had excluded much of Campbell's evidence regarding bungling due to admissibility problems, but that his findings would be the same even if it were admitted.[309] Again, given the above accounts of bungling,[310] and the fact that many bunglings occurred even after the introduction of the "long drop" technique which was supposed to revolutionize hanging,[311] Judge Coughenour's conclusion that the evidence of bungling did not matter is also debatable.[312] Interestingly, Judge Coughenour also includes Westley Allan Dodd's hanging in his findings of fact, although he does not mention the fact that Dodd's neck was not broken:[313] "The execution of Westley Allan Dodd resulted in death without decapitation or *significant mutilation.*"[314] However, this finding gives little support to his conclusion that hanging is not cruel and unusual because he ignores the fact that Dodd's neck was not broken, and he does not address how much mutilation is necessary before hanging would be considered cruel.

Not only are Judge Coughenour's determinations disputable, but the Ninth Circuit relied on them almost exclusively without doing a proper Eighth Amendment analysis.[315] The court did not consider any factors such as the contemporary norms of society, psychological pain, or the dignity of the prisoner and society. As the dissent and this article point out, one cannot properly conclude that hanging is constitutional without considering factors others than the possibility of physical pain. The court noted Campbell's argument that the scarcity of states using hanging should be considered in making this determination. The court, however, dismissed this argument by stating that the real issue is the pain involved in the challenged method. "The number of states

---

308. *Id.* at 5, ¶ 13.

309. *Id.* at 6, ¶ 22.

310. *See supra* notes 217-234 and accompanying text (describing bungling).

311. *See supra* notes 22-26 and accompanying text (describing the long drop technique).

312. The importance of this evidence cannot be understated. There was simply no other evidence available to Campbell to demonstrate the effects of hanging other than the evidence from Dodd's hanging. However, since that was the only hanging to occur in recent years, it was not exactly fair for Judge Coughenour to rely solely on this evidence.

313. Judge Coughenour also relied on the evidence presented by the medical examiner regarding Dodd's hanging. Campbell v. Blodgett, slip op. at 5-6, ¶ 20.

314. *Id.* at 7, ¶ 29 (emphasis added).

315. A full discussion of the Ninth Circuit's decision is beyond the scope of this article. However, Judge Reinhardt's dissent provides an excellent critique of the majority analysis. *See* Campbell v. Wood, 18 F.3d at 692-729 (9th Cir. 1994) (Reinhardt, C.J., dissenting), *cert. denied*, 114 S. Ct. 2125 (1994).

using hanging is evidence of public perception, but sheds no light on the actual pain that may or may not attend the practice. We cannot conclude that judicial hanging is incompatible with evolving standards of decency simply because few states continue the practice."[316] Incredibly, the court made this determination despite the prevailing notion that Eighth Amendment analysis should be conducted under "evolving standards of decency that mark the progress of a maturing society."[317]

The court discussed Washington's hanging procedures, as well as Judge Coughenour's determinations. It stated, "Although there is no way to predict with a high degree of accuracy which of the various mechanisms will contribute to unconsciousness and death in any given hanging, there are methods of increasing the likelihood that unconsciousness will be rapid and death comparatively painless."[318] The court noted that one of these methods was the introduction of the long drop. As previously stated, however, this method does not ensure instantaneous death or unconsciousness.[319] The fact that the court relied on this evidence, yet failed to see any error by Judge Coughenour in disallowing evidence regarding bunglings, suggests that the court made its decision while wearing blinders. Further, the court also considered the success of Dodd's hanging, and the fact that Washington has now carried out one judicial hanging under its protocol.[320] Ignoring the fact that Dodd's death did not occur as intended, the court focused on the fact that the medical examiner concluded Dodd was most likely unconscious in a matter of seconds.[321] Apparently, the court was so determined to use Dodd's hanging as evidence of the success of the protocol that it failed to realize the irony of relying on the *only* judicial hanging which had ever been conducted under Washington's protocol.

Finally, the court's holding that Judge Coughenour's evidentiary rulings were not in error also begs the question. Not only is evidence of bunglings relevant to this issue because it demonstrates the possibility of pain experienced by the prisoner, but evidence of lethal injection should also have been considered because it is a relevant comparison to determine if hanging is truly humane and not unnecessarily painful.[322] In the end, the court found that hanging was not

---

316. *Id.* at 682.

317. Trop v. Dulles, 356 U.S. 86, 101 (1958); *see supra* notes 108-113 (discussing *Trop*).

318. *Campbell v. Wood*, 18 F.3d at 684.

319. *See supra* notes 204-219 and accompanying text (discussing the difficulties in attempting to assure "instantaneous" death or unconsciousness).

320. Campbell v. Wood, 18 F.3d at 683, 685.

321. *Id.* at 685.

322. *See id.* at 715 (Reinhardt, C.J., dissenting) (noting that by preventing Campbell's presentation of evidence regarding lethal injection, the district court "precluded him from showing that the pain associate with haging is unnecessary to the termination of human life"). Quoting Justice Powell's dissent in Furman v. Georgia, 408 U.S. 238, 430 (1972) (Powell, J., dissenting) ("[N]o court would approve any method of implementaiton of the death sentence found to involve unnecessary cruelty in light of presently available alternatives"), Reinhardt remarked: "Justice Powell would surely have been surprised at the district court's rulings . . . . He would have been even more astonished by the majority's cursory and unexplained

painful, based on evidence which was severely limited and flawed, and then used that finding as the sole basis for its decision. The court's holding, however, is clearly faulty because it is not predicated on an adequate Eighth Amendment analysis.

Other potential arguments in favor of retaining hanging have little merit when compared to the evidence that hanging is unconstitutional. Opponents automatically state that there are problems with all methods; electrocution and the gas chamber immediately come to mind. However, this article does not attempt to weigh the differences between hanging and other methods, other than to point out that almost all other methods except lethal injection are undergoing criticism. The key is to keep in mind the standards of the Eighth Amendment. The purpose of the Eighth Amendment is to give our society dignity, and ensure that prisoners die as dignified and as painless a death as possible. In light of evidence that hanging may be horribly painful, that death is not always instantaneous, that contemporary norms do not support hanging, and that lethal injection is a much cheaper and painless solution, it does not matter how hanging compares to electrocution or gas. What matters is how hanging survives Eighth Amendment analysis. Nor should hanging be retained in response to the argument that abolishing hanging is simply another route to abolishing the death penalty. If these types of arguments are seriously considered, then no change will ever be accomplished.

Proponents of hanging may argue that because society is becoming more violent, we need harsher punishments to deter potential criminals. This argument also has little validity. It does not consider the factors used by the courts in assessing whether a punishment is cruel and unusual. While it is fine to want harsher penalties for crimes, the rights of prisoners cannot be ignored. If we allow punishments with constitutional implications to exist, our system of justice becomes no better than those in societies where prisoners' rights are routinely violated. For both the dignity of society and the prisoner, hanging should be abolished.

V. CONCLUSION

Despite the notion that hanging is a "popular form of vigilante justice,"[323] the state of Washington has hanged two people in the last two years, and three other states retain the ability to execute by hanging. This article attempts to demonstrate why hanging is not constitutional under the Eighth Amendment and should be abolished. In essence, hanging is a cruel and unusual punishment because it violates the four elements courts must consider when doing a proper Eighth

---

endorsement of them." Campbell v. Wood, 18 F.3d at 715 (Reinhardt, C.J., dissenting).

323. People v. Anderson, 6 Cal.3d 628, 642, 493 P.2d 880, 889, 100 Cal. Rptr. 152, 161 (1972).

Amendment analysis: physical pain, psychological pain, dignity of the prisoner and society, and contemporary norms of society.

To date, no court has properly reviewed hanging to determine if it is constitutional. The recent decision by the Ninth Circuit was based on flawed reasoning.[324] That court simply failed to consider all of the factors necessary to make a proper determination, and the evidence it did consider was incomplete. Other courts have managed to avoid the issue by stating that it is a job for the legislature,[325] or that the choice between hanging and another method renders the challenge moot.[326] However, until a court gives hanging the consideration it deserves, it is likely that a few states will continue to send people to their deaths by a trip to the gallows, thereby violating constitutional rights in the process.

---

324. Campbell v. Wood, 18 F.3d 662 (9th Cir. 1994) *cert. denied*, 114 S. Ct. 2125 (1994); *see supra* notes 298-322 and accompanying text (discussing the reasoning of the Ninth Circuit in Campbell v. Wood).

325. *See supra* note 129 (discussing several state court decisions which defer to the legislatures on the issue of hanging).

326. *See supra* notes 62-63, 178, 194, 198-200 and accompanying text (describing instances in which courts have found that the availability of a choice between hanging and another method of execution renders moot a challenge to the constitutionality of hanging).

INTENTIONAL BLANK