Getting to Death: Are Executions Constitutional?

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Getting to Death: Are Executions Constitutional?

Deborah W. Denno*

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ABSTRACT
GETTING TO DEATH: ARE EXECUTIONS CONSTITUTIONAL?

This Article addresses the question of when a method of executing a capital defendant amounts to cruel and unusual punishment under the Eighth Amendment. The United States Supreme Court has never reviewed evidence concerning whether any particular execution method is unconstitutional and has rarely even broached the issue. However, the Court’s stance is changing. In 1993, three Supreme Court Justices invited litigation concerning the constitutionality of electrocution in light of modern evidence of electrocution’s effects on the human body. Moreover, the Court may have the opportunity to examine the execution method question as a result of Fiero v. Gomez, the Ninth Circuit’s recent and unprecedented decision holding that execution by lethal gas amounts to cruel and unusual punishment.

This Article contends that Fiero and other execution methods cases, while reaching the right result, fail to provide a sufficiently comprehensive Eighth Amendment standard for determining the constitutionality of any execution method. The Article proposes a test that better comports with the Court’s Eighth Amendment case law and more appropriately considers scientific determinations of excessive pain. To apply this test, the Article studies each state’s legislative changes in execution methods during the Twentieth Century as well as accounts of “botched” executions. The Article suggests that the two most prevalent methods of execution—lethal injection and electrocution—are unconstitutional. The Article concludes that this country’s historic failure to question the constitutionality of execution methods has often been motivated solely by legislatures’ and courts’ desires to perpetuate the death penalty. This motivation distorts the “death is different” principle as well as any rational philosophy of punishment.

INTRODUCTION

The United States Supreme Court has never reviewed evidence concerning whether any method of execution1 violates the Eighth Amendment’s Cruel and Unusual Punishments Clause.2 Indeed, the Court has rarely even broached the issue.3 In striking contrast to its treatment of

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1. Currently, there are five available methods of execution in the United States: hanging, firing squad, electrocution, lethal gas, and lethal injection. See infra app. 1, tbl. 1.
2. The Eighth Amendment provides that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. Const. amend. VIII.
3. See Campbell v. Wood, 18 F.3d 662, 681 (9th Cir.) (en banc) (“The Supreme Court has rarely . . . addressed whether particular methods of execution employed in this country are unconstitutionally cruel.”), cert. denied, 511 U.S. 1119 (1994); Fiero v. Gomez, 865 F. Supp. 1387, 1409 (N.D. Cal. 1994) (“The Supreme Court has rarely addressed the question of whether a specific mode of execution violates the eighth amendment.”), aff’d, 77 F.3d 301, 309 (9th Cir.) (holding that execution by lethal gas constitutes cruel and unusual punish-
executions, the Court has made more expansive use of the Clause to guard against "cruel and unusual" prison conditions. This incongruity between the Court's execution and prison conditions jurisprudence is especially curious in light of the Eighth Amendment's original purpose—to proscribe "torturous" and "barbarous" punishments, the penalties most commonly associated with executions.

Such disparate restraints on capital and noncapital punishments are not specific to execution devices nor to the differing standards of review applicable to legislatures and prison personnel under the Eighth Amendment. More generally, the disparity reflects the Court's failure to heed its principle that "death is different" from all other punishments and therefore requires greater scrutiny.

The Court first enunciated the death is different principle in *Furman v. Georgia.* *Furman* emphasized that death—"an unusually severe
punishment, unusual in its pain, in its finality, and in its enormity—anumbered heightened procedural safeguards to preclude its cruel and unusual application. More recently, the Court has twisted the purpose of death is different to such an extent that the doctrine now represents the
ultimate irony. Death often triggers fewer safeguards in certain circumstances than lesser forms of punishment.

This Article examines the distortion of the death is different principle in the context of one of the Eighth Amendment’s original goals—safeguarding states’ selection and use of execution methods. Because the Court has not analyzed this issue thoroughly nor established a doctrinal framework for it, this Article proposes an execution methods

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there is an actual holding in Furman because each Justice wrote a separate opinion. See Robert Weisberg, Deregulating Death, 1983 Sup. Ct. Rev. 314-15 (1984) (arguing that “what Furman condemned is not very clear”; it may have overruled McCautha, or it may “be merely an exhortation to the states to solve a problem the Court could barely identify”). Five Justices filed separate supporting opinions, which posit two positions. Justices Brennan and Marshall contended that any method of capital punishment violated the Eighth and the Fourteenth Amendments. See Furman, 408 U.S. at 293 (Brennan, J., concurring); id. at 364-66 (Marshall, J., concurring). Rejecting this per se position, Justices Douglas, Stewart, and White stated that existing capital punishment statutes were deferent in their form. Id. at 240-57 (Douglas, J., concurring); id. at 305-10 (Stewart, J., concurring); id. at 310-14 (White, J., concurring). They claimed that the statutes allowed decisionmakers to have unbridled discretion that resulted in “wanton” or “freakish” capital sentencing patterns. See id. at 309-10 (Stewart, J., concurring); id. at 313-14 (White, J., concurring). Chief Justice Burger, and Justices Blackmun, Powell, and Rehnquist, filed separate dissenting opinions. See id. at 375-470.

8. Furman, 408 U.S. at 287-89 (Brennan, J., concurring). The Steikers appropriately note that although Justice Brennan “singlehandedly constructed” the death is different argument in his solo concurrence in Furman, the “now-familiar” principle was highlighted by a plurality of the Court four years later in Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion), “in language that would be repeated many times in future cases.” Steiker & Steiker, supra note 6, at 370. See, e.g., California v. Ramos, 465 U.S. 992, 998-99 (1983) (recognizing that the “qualitative difference of death from other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination”).

9. The death is different principle has provided the foundation for the Court’s creation of two requirements to monitor the constitutionally valid application of the death penalty. The first requirement, presented in Furman, stated that a capital sentence must not result from unguided discretion. See Furman, 408 U.S. at 256-57 (Douglas, J., concurring); id. at 274-97 (Brennan, J., concurring). The second requirement, presented after Furman, mandated a consideration of all relevant mitigating evidence, such as the defendant’s character, record, or other circumstances of the offense, to enable individualized sentencing. See Lockett v. Ohio, 438 U.S. 586, 604-05 (1978) (plurality opinion) (arguing that courts must consider mitigating factors); see also Steiker & Steiker, supra note 6, at 370-71, 397-403 (reviewing the Court’s death is different case law).

10. See White, supra note 6, at 4-75; Daniel Ross Harris, Capital Sentencing After Walton v. Arizona: A Retreat From the “Death is Different” Doctrine, 40 Am. U. L. Rev. 1389, 1389-92 (1991) (discussing the problems associated with the death is different doctrine); see also Deborah W. Denno, “Death is Different” and Other Twists of Fate, 83 J. Crim. L. & Criminology 437, 437-59 (1992) (reviewing Welsh S. White, The Death Penalty in The Nineties: An Examination of the Modern System of Capital Punishment (1991)).

11. See supra note 5 and accompanying text (discussing the Eighth Amendment’s original goal of proscribing punishments associated with executions).

test that comports with the broader Eighth Amendment case law and restores the true meaning of death is different.

Recent decisions may force the Court to confront an Eighth Amendment evaluation of different execution methods. In 1993, three Supreme Court justices invited litigation concerning the constitutionality of electrocution, concluding that century-old precedent is not dispositive in light of modern evidence of electrocution’s effects on the human body.\textsuperscript{13} One year later, in \textit{Campbell v. Wood},\textsuperscript{14} the Ninth Circuit Court of Appeals held that execution by hanging does not violate the Eighth Amendment;\textsuperscript{15} however, the court’s 6-5 en banc opinion pertained only to the State of Washington’s particular method of hanging and the limited evidence available on how it specifically operated.\textsuperscript{16} Moreover, in \textit{Fierro v. Gomez},\textsuperscript{17} the Ninth Circuit unanimously held that California’s statute authorizing execution by lethal gas is unconstitutionally cruel and unusual.\textsuperscript{18} \textit{Fierro} marked the first time in this country’s history that a federal appeals court has held any method of execution unconstitutional.\textsuperscript{19} The ruling also enables the Court to address the constitutionality of an execution method at some future point should the Court decide to review the Ninth Circuit’s

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15. \textit{See id.} at 687.

16. \textit{See id.} at 683-87. The \textit{Campbell} majority’s decision prompted a lengthy response from four members of the circuit court, \textit{see id.} at 692 (Reinhardt, J., concurring in part and dissenting in part), in addition to Justice Blackmun’s heated dissent in the Court’s denial of Campbell’s petition for writ of certiorari. \textit{See Campbell v. Wood}, 511 U.S. 1119 (1994) (Blackmun, J., dissenting from denial of certiorari). Perhaps in light of these conflicts, the United States District Court for the Western District of Washington determined several months later that hanging was unconstitutionally cruel and unusual when the condemned’s excessive body weight heightened the risk of decapitation. \textit{See Rupe v. Wood}, 863 F. Supp. 1307, 1314-15 (W.D. Wash. 1994), \textit{vacated on other grounds as moot}, 93 F.3d 1434 (9th Cir. 1996) (appeal dismissed as moot in light of changed statute).


18. \textit{See id.} at 309.

19. \textit{See id.} at 308 (stating that two circuit courts have found execution by lethal gas to be constitutional). Notably, the Eighth Circuit Court of Appeals recently rendered unconstitutional a prosecutor’s unsupported closing argument suggesting that the defendant’s death by lethal gas would be “quick, painless, and humane.” \textit{Antwine v. Delo}, 54 F.3d 1357, 1361 (8th Cir. 1995). The court emphasized that “[t]he reality, as we understand it, is or at least may be quite different.” \textit{Id}. 
decision concerning lethal gas. 20

Part I of this Article discusses the major types of Eighth Amendment claims and the early execution methods jurisprudence. This background frames an analysis of the 1994-1997 execution methods cases and their failure to develop a sufficiently comprehensive Eighth Amendment test. Part I also surveys the Court's relatively more expansive approach to prison conditions cases to show that an Eighth Amendment test of execution methods requires examining the behavior of prison officials, as well as the decisions of legislatures and courts.

Part II introduces a five-factor execution methods test that, unlike prior tests, incorporates the multifaceted legal and factual issues pertinent for assessing any execution method. Part II focuses on the most widely used methods—electrocution and lethal injection.

Applying the first two factors of the execution methods test ("humane baseline" and "excessiveness") to electrocution, Part II suggests that electrocution may be unconstitutionally excessive in terms of its "unnecessary and wanton infliction of pain," the risk of pain, and the loss of human dignity. Part II bases this conclusion on scientific determinations of pain and this Article's account of a selected number of "botched" executions. To determine if electrocution and other methods comport with the test's third factor, "standards of decency," Part II conducts an extensive study of each state's legislative changes in execution methods during the Twentieth Century. This study reveals a national consensus opposing the use of electrocution, lethal gas, hanging, and the firing squad. The study also shows that most states have switched to lethal injection. Application of the test's fourth factor, "alternative methods of execution," demonstrates that lethal injection is not a constitutionally feasible alternative to electrocution given the growing evidence of medical difficulties, botched injections, and physicians' criticisms. Lastly, Part II examines lethal injection, electrocution, and other methods according to the test's fifth factor, "the penological justification for punishment." The Article contends that states that either change or retain an execution method are often

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20. The Supreme Court recently vacated the Ninth Circuit's decision in light of the California legislature's subsequent amendment of the state's death penalty statute allowing lethal injection to be used unless the defendant specifically requested lethal gas. See Gomez v. Fierro, 117 S. Ct. 285 (remanding for reconsideration in light of changed statute), vacating on other grounds, 77 F.3d 301 (9th Cir. 1996). The issue on remand will not be the merits of the Ninth Circuit's decision regarding lethal gas, but rather whether the defendants have standing to question the constitutionality of their executions under the changed statute. Telephone Interviews with Michael Laurence, Partner, Sternberg, Sowards & Laurence, Attorney for Defendants (Oct. 21, 1996; April 24, 1997). California has also encountered challenges to its method of administering lethal injection because prison officials have prohibited witnesses from viewing the entire execution procedure. Recently, for example, the United States District Court for the Northern District of California held that the First Amendment requires prison officials to allow the public and the media to witness a lethal injection from the moment preceding a prisoner's strap down to a gurney until just after the prisoner's death. See California First Amendment Coalition v. Calderon, 956 F. Supp. 883, 890 (N.D. Cal. 1997).
motivated solely by legislatures' and courts’ desires to perpetuate the death penalty. This motivation distorts the death is different principle as well as any rational philosophy of punishment.

This Article concludes that the death is different principle has ensured less, not more, scrutiny of execution methods, particularly as compared to prison conditions. Various factors fuel this counterintuitive result. First, this Article suggests that if the Court conducted a comprehensive and balanced Eighth Amendment review of execution methods, the Court might decide that no current method could ever be enforced humanely and that the death penalty would once again be open to critique. Rather than face another constitutional assault on its oversight of this most final punishment, the Court has continued to dodge the issue. Second, the Court lacks a coherent constitutional standard for assessing pain. Although the gratuitous infliction of pain is definitely impermissible, far less clear is the constitutionally allowable amount of pain that can exist for an execution and the penological theory that might justify such pain. For this reason, the lower courts generally avoid evaluating the wide range of medical and scientific evidence available on execution methods. From both a constitutional and scientific standpoint, they find such evidence difficult to comprehend. Lastly, courts frequently deflect emotionally and morally laden subjects such as the death penalty. With regard to the specific context of implementing an execution method, courts have chosen several paths—shunning the issue entirely, relying on ill-conceived Eighth Amendment standards, and deferring to state legislatures that have repeatedly failed to fulfill courts’ expectations.

By introducing and applying an execution methods test, this Article attempts to revive the Eighth Amendment’s original purpose and the true meaning of death is different. It suggests that because the most frequently used execution methods are constitutionally suspect, legislatures should either seek a method of execution that comports with the standards of a comprehensive Eighth Amendment jurisprudence or eliminate the death penalty. Justices Powell and Blackmun ultimately concluded that the death penalty should be abolished because the punishment could never be administered fairly or meaningfully under any set of rules.21 I agree with

21. For a discussion of Justice Powell’s views, see John C. Jeffries, Jr., Justice Lewis F. Powell, Jr. 451-52 (1994) (stating that “capital punishment should be abolished” because, among other things, it “serves no useful purpose” and “brings discredit on the whole legal system, that the sentence upheld by the Supreme Court and adopted by more than thirty states can’t be or isn’t carried out”). For an overview of Justice Blackmun’s views, see Collins v. Collins, 510 U.S. 1141, 1158-59 (1994) (Blackmun, J., dissenting) (“Because I no longer can state with confidence that this Court is able to reconcile the Eighth Amendment’s competing constitutional commands . . . I believe that the death penalty, as currently administered, is unconstitutional.”). See generally David Von Drehle, Among The Lowest of the Dead: The Culture of Death Row 412 (1995) (noting Justices Powell’s and Blackmun’s “conversions” in the Supreme Court’s death penalty cases); David C. Baldus et al., Reflections on the “Inevitability” of Racial Discrimination in Capital Sentencing and the “Impossibility” of its Prevention, Detection, and Correction, 51 Wash. & Lee L. Rev. 359 (1994) (discounting claims that scrutiny of the death
their views. This Article suggests that evidence of the unconstitutional application of execution methods is simply one more indication of the legal system's ongoing incompetence in the capital punishment arena.

I. CRUEL AND UNUSUAL PUNISHMENTS

When the United States Constitution was being ratified, criticism of its failure to provide protection for convicted criminals spurred the inclusion of the Eighth Amendment in the Bill of Rights.23 "[P]recisely because the legislature would otherwise have had the unfettered power to prescribe punishments for crimes," the Framers included in the Bill of Rights a prohibition of cruel and unusual punishments.24 Although the Framers did not define what they considered to be "cruel"25 or "unusual,"26 there

sentencing system will result in de facto abolition of the death penalty). Justices Brennan's and Marshall's statements would favor elimination because both declared that the death penalty, in general, and electrocution and lethal gas, in particular, were cruel and unusual punishments. See supra note 7 and accompanying text and infra notes 108-10, 287 and accompanying text. See generally Alan L. Bigel, Justices William J. Brennan, Jr. and Thurgood Marshall on Capital Punishment: Its Constitutionality, Morality, Deterrent Effect, and Interpretation by the Court, 8 Notre Dame J.L. Ethics & Pub. Pol'y 13 (1994) (providing a thorough account and comparison of the Justices' views); William J. Brennan, Jr., The 1986 Oliver Wendell Holmes, Jr. Lecture: Constitutional Adjudication and The Death Penalty: A View From the Court, 100 Harv. L. Rev. 313 (1986) (presenting Justice Brennan's views on the Court's death penalty cases).

22. The origin of the Eighth Amendment's Cruel and Unusual Punishments Clause has been described in detail. See Harmelin v. Michigan, 501 U.S. 957, 973-79 (1991); Furman v. Georgia, 408 U.S. 238, 316-28 (1972) (Marshall, J., concurring); Raoul Berger, Death Penalties: The Supreme Court's Obstacle Course 29-58 (1982); Anthony F. Granucci, "Nor Cruel and Unusual Punishments Inflicted": The Original Meaning, 57 Cal. L. Rev. 839, 839-65 (1969) (examining the history of the Clause and the case law). This section concerns how the Clause has been interpreted in Eighth Amendment cases.

23. See Ingraham v. Wright, 430 U.S. 651, 666 (1977) (noting that criticism of the original Constitution in the Massachusetts and Virginia Conventions "provided the impetus" for including the Eighth Amendment in the Bill of Rights).

24. Furman, 408 U.S. at 263 (Brennan, J., concurring).

25. See, e.g., Weems v. United States, 217 U.S. 349, 368 (1910) (noting that "[t]he provision received very little debate in Congress").

26. This Article does not focus on the issue of what constitutes an "unusual" punishment or how that term relates to the word "cruel." In Furman, Justice Brennan suggested that the distinction was of "minor significance" because the Court did not try to interpret the meaning of the Clause by examining each word. Furman, 408 U.S. at 276 n.20 (Brennan, J., concurring). Anthony Granucci contends that the final phrasing of the Clause, particularly the use of the word "unusual," was due to "chance and sloppy draftsmanship," since other terms, such as "illegal," had been considered. See Granucci, supra note 22, at 855. Indiction of an "illegal" punishment could be cruel because its severity would be less known and predictable, and therefore arbitrary. See Furman, 408 U.S. at 318 (Marshall, J., concurring) (concluding that the use of the word "unusual" appears to be inadvertent). In Harmelin v. Michigan, 501 U.S. 957 (1991), the Court considered as "unusual" that which "[d]oes not occur[r] in ordinary practice." Id. at 976 (citation omitted); see also John Hart Ely, Democracy And Distrust: A Theory Of Judicial Review 14 (1980) (referring to "unusual" as "susceptible to sporadic imposition"). The Court appears to have relied on this interpretation in the few cases that have discussed the concept of unusualness. See, e.g., Trop v. Dulles, 356 U.S. 86, 101 n.32 (1958) (noting that although it was unclear whether the word "unusual" had any different
is no evidence to suggest the Framers intended to ban only torture or punishments viewed as cruel and unusual at the time.27

Such vagueness may have contributed in part to the Clause's initial dormancy.28 A similarly important factor may have been the Court's determination in 1890 that the Eighth Amendment did not apply to the states.29 Indeed, prior to its 1962 incorporation into the Due Process Clause of the Fourteenth Amendment,30 the Clause was discussed in only nine Supreme Court cases.31 Only in the last three decades has the Court

meaning apart from the word "cruel," if it did, "unusual" should take on its ordinary meaning, i.e., signify something different from what is normally done); Weems, 217 U.S. at 377 (concluding that the punishment of cadena temporal - which consisted of 12-to-20 years in prison, as well as "hard and painful" labor, the loss of various civil rights, and surveillance for life - was both "cruel in its excess of imprisonment" and "unusual in its character" for it had "no fellow in American legislation").

27. See Furman, 408 U.S. at 263 (Brennan, J., concurring); Hugo A. Bedau, Thinking of The Death Penalty as a Cruel and Unusual Punishment, 18 U.C. Davis L. Rev. 873, 892-97 (1985).


29. In re Kemmler, 136 U.S. 456, 445 (1890). Several years prior to Kemmler, the Court held that two other amendments were not incorporated into the Fourteenth Amendment: the Second Amendment, Presser v. Illinois, 116 U.S. 252, 265 (1886), and the guarantee of a grand jury provision of the Fifth Amendment, Hurtado v. California, 110 U.S. 516, 535 (1884). Nearly three decades later, the Court held that the Seventh Amendment was not incorporated. See Minneapolis & St. Louis R.R. v. Bombolli, 241 U.S. 211, 220 (1916). The issue concerning the incorporation of the Third Amendment has not been litigated before the Supreme Court. See Ronald D. Rotunda, Modern Constitutional Law: Cases and Notes 358 (4th ed. 1993).


established that the Clause limits state legislatures as well as Congress, even though such limits were tacitly assumed in earlier cases.\textsuperscript{32}

Over time, courts and commentators have proposed five interrelated types of Eighth Amendment limitations on criminal punishments:\textsuperscript{33} (1) means of punishment; (2) proportionality; (3) power to criminalize; (4) prison conditions (conditions of confinement); and (5) procedural due process.\textsuperscript{34} Types 1 and 2 include the major cruel and unusual punishments cases, whereas Types 3, 4, and 5 also bear on the Due Process Clause.\textsuperscript{35} The following overview of these five types of limitations is important for several reasons: the types frame this Article's analysis of the deficiencies in current case law; they support this Article's proposal for a comprehensive Eighth Amendment execution methods test; and they illustrate why a court's reliance on only one or two types can create a truncated Eighth Amendment evaluation that twists the true meaning of death is different.

Type 1: Means of Punishment. Type 1 cases limit the legislature's power to authorize a particular means of punishment for any crime.\textsuperscript{36} In dictum, the Court has referred to constraints on the legislature's power to allow the more obvious kinds of barbaric punishments, such as embowelling alive, public dissection,\textsuperscript{37} burning at the stake,\textsuperscript{38} quartering, and castration.\textsuperscript{39} As early as 1910, however, the Supreme Court recognized that the Eighth Amendment's prohibitions are not confined to those methods considered cruel and unusual at the time the Bill of Rights was adopted.\textsuperscript{40} Rather, "[t]he Amendment must draw its meaning from the

\begin{itemize}
\item[(1903)] O'Neil v. Vermont, 144 U.S. 323, 339-41 (1892) (Field, J. & Harlan & Brewer, JJ., dissenting); \textit{id.} at 370-71 (Howard & Flemming, JJ., dissenting); \textit{In re Kemmler}, 136 U.S. 436 (1890); Wilkerson v. Utah, 99 U.S. 130 (1878); Pervear v. Commonwealth, 72 U.S. (5 Wall.) 475 (1866).

\item[32] See \textit{Francis}, 329 U.S. at 463 (holding that the Fourteenth Amendment would prohibit execution by a state in a cruel manner); see also Radin, supra note 28, at 997 (suggesting that historically, the Court saw few reasons to use the Eighth Amendment because it was unlikely that a state legislature would authorize such punishments as the rack or the wheel, and even less likely that it would use them in the future).

\item[33] Radin clarified these five types in a superb article on death penalty jurisprudence. See Radin, supra note 28, at 992-96. This Article modifies these five types to reflect current case law and the topic of this Article. An excellent analysis of much of this current case law can be found in Steiker & Steiker, supra note 6, at 357-403.

\item[34] See Radin, supra note 28, at 992-96.

\item[35] See id. at 996.

\item[36] Id. at 993; see Harmelin v. Michigan, 501 U.S. 987, 976 (1991) (stating that "the Clause disables the Legislature from authorizing particular forms or 'modes' of punishment—specifically, cruel methods of punishment that are not regularly or customarily employed").

\item[37] Wilkerson v. Utah, 99 U.S. 130, 135 (1878).

\item[38] \textit{In re Kemmler}, 136 U.S. 436, 446 (1890).


\item[40] See id. at 372-73 (discussing the flexibility of Eighth Amendment protections). In \textit{Trop v. Dulles}, 356 U.S. 86 (1958) (plurality opinion), for example, the Court held that the use of denationalization for wartime desertion was also cruel and unusual, emphasizing that Eighth
evolving standards of decency that mark the progress of a maturing society." Although Type 1 cases are most applicable to restrictions on the legislative power to authorize execution methods, there are few execution methods cases.

**Type 2: Proportionality.** Type 2 cases limit two types of power: 43 (A) the legislature's power to allow a means or amount of punishment for a particular crime, for example, the Court's rejection of the death penalty for rape and its restrictions on the death penalty for accomplice felony murder; and (B) the legislature's power to authorize a means or amount of punishment for a particular category of offender, such as insane individuals or persons under age sixteen at the time of their offense.

Amendment protections were "not static." Id. at 103. Although denationalization did not involve "physical mistreatment" or "primitive torture," the Court concluded that it was a punishment "more primitive than torture" because it "strips the citizen of his status in the national and international political community." Id. at 101. Moreover, denationalization could be considered "unusual" because it was never applied by the government until 1940 and was never before tested against the Constitution. Id. at 100 n.32.

42. See infra Part IA-B of this Article (discussing the early execution methods cases and the 1994-1997 cases).
43. Radin, supra note 28, at 993; see also Nancy J. King, Portioning Punishment: Constitutional Limits on Successive and Excessive Penalties, 144 U. Pa. L. Rev. 101, 151-57 (1995) (discussing proportionality review for all penalties as well as the culmination of penalties from different jurisdictions).
44. Radin, supra note 28, at 993. Although Harmelin v. Michigan, 501 U.S. 957 (1991), a Type 2A case, diminished the strength of the proportionality requirement for noncapital cases, the requirement still exists. See id. at 957-96.
47. See Radin, supra note 28, at 993. This Article modifies and redefines Radin's Type 2B category to comport with more recent case law. Radin proposed that a Type 2B case would take the following form: "Is it constitutional for the government to impose punishment X on offender Y for crime Z, committed in a particular manner and under particular circumstances?" Id. When Radin proposed this category, there was not yet a Supreme Court case using the Type 2B rationale. See id. at 994 n.16. Because of the infrequency of cases representing such a category, this Article shortens Radin's question for Type 2B cases so that it asks the following: "Is it constitutional for the government to impose punishment X on offender Y for crime Z?"
48. See Ford v. Wainwright, 477 U.S. 399, 405-10 (1985) (concluding that the Eighth Amendment prohibits the execution of insane individuals). But see Penry v. Lynaugh, 492 U.S. 302, 333-40 (1989) (holding that the Eighth Amendment does not prohibit the execution of a mentally retarded person who commits a capital crime "simply by virtue of his or her mental retardation alone").
Type 3: Power to Criminalize. Type 3 cases limit the legislature’s power to make particular conduct criminal.\(^{50}\) In *Robinson v. California*,\(^ {54}\) for example, the Court determined that it is unconstitutional to punish individuals because they have the status of being a narcotics addict.\(^ {62}\)

Type 4: Prison Conditions (Conditions of Confinement). Type 4 cases, which limit the official discretion that accompanies the performance of an acceptable punishment,\(^ {53}\) primarily concern prison conditions and inmate health care. They are frequently brought as section 1983 civil rights actions.\(^ {54}\) *Estelle v. Gamble*\(^ {55}\) introduced the most pervasive prison conditions standard by forbidding prison officials' "deliberate indifference" to prisoners' serious medical problems.\(^ {56}\) The Court subsequently enhanced *Estelle's* subjective standard with an objective standard\(^ {57}\) and extended it to cases that involve prison officials' use of excessive force,\(^ {58}\) prisoners' risk of future injury,\(^ {59}\) and inmate-against-inmate violence.\(^ {60}\)

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*But see* Stanford v. Kentucky, 492 U.S. 361, 380 (1988) (holding that the Eighth Amendment does not prohibit the execution of an individual who committed a capital offense at age 16 or 17).

52. *See id.* at 666-67. *Robinson's* reach is very limited. *See, e.g.*, Ingraham v. Wright, 430 U.S. 651, 667 (1977) (emphasizing that the limitations on the Cruel and Unusual Punishments Clause put forth by *Robinson* and cases like it are "to be applied sparingly"); Powell v. Texas, 392 U.S. 514, 533 (1968) (plurality opinion) ("The entire thrust of *Robinson's* interpretation of the Cruel and Unusual Punishment Clause is that criminal penalties may be inflicted only if the accused has committed some act, has engaged in some behavior, which society has an interest in preventing.").
54. *See* Fierro v. Gomez, 77 F.3d 301, 305 (9th Cir.) (explaining that challenges to the method of execution may be brought as habeas petitions or as § 1983 actions and citing cases brought under the latter), *vacated on other grounds*, 117 S. Ct. 285 (1996) (remanding for reconsideration in light of changed statute). Under 42 U.S.C. § 1983,

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

56. *See id.* at 104, 106; *see infra* notes 150-53 and accompanying text (discussing recent prison conditions cases).
57. *See* Wilson v. Seiter, 501 U.S. 294, 298 (1991) (requiring that an inmate show that the deprivation alleged was "sufficiently grave").
58. *See* Hudson v. McMillian, 503 U.S. 1, 10-13 (1992) (discussing the standard appropriate when prison officials are accused of using excessive force).
Type 5: Procedural Due Process. Type 5 cases limit the legislature's power to authorize the procedures for imposing a particular punishment. In Furman v. Georgia, for example, three Justices stated that the death penalty, as administered, was cruel and unusual because it could be arbitrarily or capriciously applied. The plurality in Gregg v. Georgia emphasized the constitutionally required constraints on discretion in implementing the death penalty. More recent cases have held that capital sentencing procedures must reliably distinguish between those individuals who receive the death sentence and those who do not.

These five types of cases are not mutually exclusive. In particular, Type 4 (prison conditions) cases could overlap with other categories, for example, Type 1 (means of punishment) and Type 2 (proportionality). At the same time, some distinction among these types of cases is generally necessary because a court's standard of review concerning a punishment will differ when it is reviewing a legislature's enactment, a court's decision, or a prison official's conduct. "[N]o one 'test' seems to fit all types of cases that can arise under the clause." An Eighth Amendment analysis of execution methods requires a simultaneous examination of the behaviors of all three institutional decisionmakers—legislatures, courts, and prison officials. For example, a

61. Radin, supra note 28, at 995.
62. 408 U.S. 238 (1972) (per curiam).
63. See id. at 240-57 (Douglas, J., concurring); id. at 306-10 (Stewart, J., concurring); id. at 310-14 (White, J., concurring).
64. 428 U.S. 153 (1976) (plurality opinion).
65. See id. at 188-95 (holding that legislation authorizing the death penalty must require that the sentencer takes into account the individual offender and the offense, as well as aggravating and mitigating factors). The Court has refined such procedures substantially over the past two decades. See Steiker & Steiker, supra note 6, at 378-96.
66. See Stringer v. Black, 503 U.S. 222, 237 (1992) (holding that a vague aggravating factor is improper "in deciding who shall be eligible for the death penalty or who shall receive the death penalty"). The Court has limited the kinds of distinctions that can be made. In McCleskey v. Kemp, 481 U.S. 279 (1986), for example, the Court held that statistical evidence demonstrating a racial disparity in Georgia's imposition of the death sentence failed to show that the state arbitrarily and capriciously applied its capital punishment system, that race is a factor in any capital sentencing decisions, or that race influenced McCleskey's particular case. See id. at 308-12.
67. See Radin, supra note 28, at 996.
68. See id. A standard of review can incorporate a number of different factors: (a) burden of proof (including a determination of whether a question is one of law or fact); (b) relevance and weight of the evidence; and (c) adjudicatory attitudes, which can range from extreme judicial activism to extreme deference to a state legislature. See id. at 1001.
69. Id. at 1011. The Court has also shied from developing a single test for evaluating forfeitures under the Eighth Amendment's Excessive Fines Clause. Although the Court held in Austin v. United States, 509 U.S. 602 (1993), that civil in rem forfeitures are subject to the Eighth Amendment's Excessive Fines Clause, see id. at 694, the Justices relegated to the lower courts the creation of an excessiveness test. See id. at 622-23; see also King, supra note 43, at 158-94 (discussing how courts determine which penalties are cumulated and when these combined penalties are in excess of Eighth Amendment limitations).
federal appeals court’s standard of review of lethal gas as a method of execution should accommodate not only the legislature’s enactment of such a punishment, but also the trial court’s decision concerning the execution method’s constitutionality. In addition, the appeals court should evaluate prison officials’ conduct in administering the method. Even though a legislature may consider a particular method to be the most humane under ideal circumstances, prison officials may, in practice, continually misapply the method. If a pattern of inappropriate application exists, the court should find that method unconstitutional, and the legislature should abandon the method.

A. The Early Execution Methods Cases

To date, the Court has provided only scant guidance for reviewing evidence on the constitutionality of any method of execution which, historically, is the prototypical means of punishment issue and the raison d’etre of the Eighth Amendment. Moreover, courts often dismiss execution methods cases for various reasons—rendering execution methods evidence to be “marginally” relevant, irrelevant, unconvincing or “frivolous,” indicative only of an “accident,” or raised too late in the case to justify a judicial evaluation.

Most commonly, courts dismiss the execution issue entirely (often in one sentence) by relying on the century-old precedent of In re Kemmler.

70. See supra note 3 and accompanying text.
71. See, e.g., Campbell v. Wood, 18 F.3d 662, 686 (9th Cir.) (excluding evidence of botched hangings that were “of marginal relation” to hangings conducted under the protocol in Washington State), cert. denied, 511 U.S. 1119 (1994).
72. See, e.g., id. at 686-87 (excluding evidence related to execution by lethal injection because “[t]he relative merits of lethal injection are irrelevant” to determining whether hanging is cruel and unusual punishment).
73. See id. at 686, 688; Jones v. Whitley, 938 F.2d 536, 542 (5th Cir. 1991) (concluding that evidence concerning Louisiana’s electric chair does not demonstrate that electrocution is inhumane); Lindsey v. Smith, 820 F.2d 1137, 1155 (11th Cir. 1987) (concluding that claims that electrocution is cruel and unusual are “frivolous”).
74. See, e.g., Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 464 (1947) (plurality opinion) (holding that the Clause prohibits only the “infliction of unnecessary pain,” not the suffering created in an “unforeseeable accident”).
75. The Robert Alton Harris case exemplifies when an execution methods issue is raised too late in the process to warrant judicial consideration. See Gomez v. United States, 503 U.S. 653, 654 (1992) (contending that Harris’ claim that lethal gas was cruel and unusual punishment “should have been brought a decade ago”); see also infra note 288 and accompanying text (discussing the Court’s holdings in Gomez and Fiero, both of which dealt with lethal gas challenges). Notably, no court has dismissed a claim under the standards proposed by Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 589 (1993) (adopting the following standard from Fed. R. of Evid. 702: “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue’ an expert ‘may testify thereto’”), or by Teague v. Lane, 489 U.S. 288, 310 (1989) (holding that new rules of constitutional criminal procedure cannot be imposed retroactively to cases in which direct review had become final prior to the decision introducing the new rule).
76. 136 U.S. 436 (1890). Kemmler, in turn, relied heavily on Wilkerson v. Utah, 99 U.S. 130,
In *Kemmler*, the Court held that the Eighth Amendment did not apply to the states and deferred to the New York legislature's conclusion that electrocution was not a cruel and unusual punishment under the state's Electrical Execution Act.\(^77\) Although courts have relied on *Kemmler* primarily to dismiss challenges to the constitutionality of electrocution,\(^78\) they have also used *Kemmler* to dismiss challenges to each of the other four execution methods.\(^79\)

However, *Kemmler*'s precedential value has diminished substantially over the last century. First, the *Kemmler* Court never specifically employed the Cruel and Unusual Punishments Clause\(^80\) even though post incorporation cases have continued to cite *Kemmler* as an Eighth Amendment case.\(^81\) Moreover, *Kemmler* was decided before anyone had been electrocuted; therefore, the Court had limited evidence in reaching its conclusion.\(^82\) Next, the *Kemmler* Court adopted the burden of proof promulgated by the New York court\(^83\) that required the prisoner to show

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135 (1878) (determining in dicta that the firing squad is not a cruel and unusual punishment).

\(^77\) *Kemmler*, 136 U.S. at 443.


\(^80\) See Arthur J. Goldberg & Alan M. Dershowitz, *Declaring The Death Penalty Unconstitutional*, 83 Harv. L. Rev. 1773, 1784 n.51 (1970) (noting that *Kemmler*'s impact as precedent is limited because it did not "specifically apply" the Cruel and Unusual Punishments Clause). Instead, the Court examined Kemmler's alternative claim that his execution would violate both the Privileges and Immunities and Due Process Clauses of the Fourteenth Amendment by depriving him of life without due process of law. *Kemmler*, 136 U.S. at 446.

\(^81\) See supra notes 78-79 and accompanying text (listing cases citing *Kemmler* specifically as an Eighth Amendment case); see also Denno, supra note 5, at 616-23 (analyzing the 226 cases that have cited *Kemmler* from the time the case was decided to the present and indicating that state and federal courts have repeatedly and incorrectly referred to *Kemmler* as Eighth Amendment authority).

\(^82\) Historical accounts of *Kemmler* show that it was based in part on the particular uncertainties and pressures resulting from the passage of the Electrical Execution Act, as well as the political, financial, and scientific controversies preceding it. See Denno, supra note 5, at 559-567.

\(^83\) According to the Court, the lower court "held that the presumption of constitutional-
"beyond doubt" that the execution method was cruel and unusual. As far as can be determined, this standard has not been used since Kemmler in this context.  Although courts typically fail to specify any kind of burden of proof standard when they review evidence for an Eighth Amendment violation (including the recent execution methods cases), the burden of proof most frequently cited—preponderance of the evidence—is far less stringent. Lastly, because the Court never conducted an Eighth Amendment evaluation of New York's Electrical Execution Act, the Court would be less likely to defer to the state's legislature today to the extent it did when it decided Kemmler. In summary, the Kemmler Court's factual

![Image](https://www.heinonline.org/handle/10.2307/949032)
assumptions regarding the acceptability of electrocution have no support in light of modern evidence.\textsuperscript{89} Some of the Kemmler Court’s legal conclusions, however, remain viable: “Punishments are cruel when they involve torture or a lingering death . . . something more than the mere extinguishment of life.”\textsuperscript{90}

Following Kemmler, a number of electrocution executions were grotesque failures,\textsuperscript{91} including William Kemmler’s.\textsuperscript{92} Regardless, the Court relied on Kemmler in Malloy v. South Carolina\textsuperscript{93} to conclude that the State’s implementation of death through electrocution, rather than hanging, did not increase the punishment of murder, but only changed its mode.\textsuperscript{94} Twenty-two years later in Louisiana ex rel. Francis v. Resweber,\textsuperscript{95} the issue was not whether electrocution was per se unconstitutional, but whether the State of Louisiana could constitutionally execute the appellant after the electric chair had malfunctioned during the first attempt.\textsuperscript{96} In

there was nothing in the constitution of the government or in the nature of things giving any color to the proposition that, upon a mere question of fact involved in legislation, the judgment of a court is superior to that of the legislature itself, nor was there any authority for the proposition that in respect to such questions, relating either to the manner or the matter of legislation, the decision of the legislature could be reviewed by the court.

Kemmler, 136 U.S. at 442-43 (citation omitted).

89. See infra Part IIA of this Article (discussing the constitutionality of electrocution).


91. See Denno, supra note 5, at 605-06 n.375 (discussing the circumstances of several failed electrocution executions).

92. William Kemmler’s execution was a well-publicized technical and medical bungle. See Far Worse Than Hanging, N.Y. Times, Aug. 7, 1890, at 1 [hereinafter Far Worse]; see also infra note 261 (providing a detailed description of Kemmler’s execution).

93. 237 U.S. 180 (1915).

94. See id. at 185. The Court considered that such a change was not unconstitutional under the Ex Post Facto provision. See id. at 184 (“I do not consider any law ex post facto, within the prohibition, that mollifies the rigor of the law; but only those that create, or aggravate, the crime; or increase the punishment, or change the rules of evidence, for the purpose of conviction.”) (citation omitted).

95. 329 U.S. 489 (1947) (plurality opinion).

96. See id. at 461. Justice Reed, who wrote the plurality opinion contending that a second execution attempt would not be cruel and unusual, was joined by Chief Justice Vinson and Justices Black and Jackson. See id. at 460. Justices Burton, Douglas, Murphy, and Rutledge contended that a second attempt at execution would be cruel and unusual. See id. at 479 (Burton, J., dissenting). Justice Frankfurter’s concurrence cast the fifth and deciding vote. See id. at 471-72 (Frankfurter, J., concurring). The appellant, Willie Francis, a 16 year-old black, was sentenced to be electrocuted for the murder of a popular white druggist in St. Martinsville, Louisiana. See Arthur S. Miller & Jeffrey H. Bowman, Death by Installments 19-24 (1988) [hereinafter Miller & Bowman, Death by Installments]; Arthur S. Miller & Jeffrey H. Bowman, "Slow Dance on the Killing Ground": The Willie Francis Case Revisited, 32 DePaul L. Rev. 1, 5-7 (1982) [hereinafter Miller & Bowman, Willie Francis Revisited]. Francis' execution failed, however, apparently because of some "mechanical difficulty," Francis, 329 U.S. at 460, with the portable hardwood chair that the state had delivered. See Miller & Bowman, Willie Francis Revisited, supra, at 86. Although the executioner had flipped the switch, there was insufficient current and, after another attempt, Francis yelled that the hood be removed so that he could breathe. See id. at 8.
examining the circumstances of Francis "under the assumption, but without so deciding" that the Eighth Amendment applied. 97 A plurality of four Justices interpreted the Cruel and Unusual Punishments Clause as prohibiting only the "infliction of unnecessary pain," not the suffering created in an "unforeseeable accident." 98 The Justices thus assumed that state officials performed "their duties in a careful and humane manner." 99 Justice Frankfurter explained, however, that his deciding fifth vote did "not mean that a hypothetical situation, which assumes a series of abortive attempts at electrocution . . . would not raise different questions." 100

In 1962, the Court held in Robinson v. California 101 that the Eighth Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment. 102 Both before and after Robinson, however, the Court’s Eighth Amendment doctrine emphasized an evolving standard of cruel and unusual punishment. 103 This evolution occurs because "time . . . 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 For these reasons, the Court has viewed the Eighth Amendment "in a flexible and dynamic manner," 105 recognizing that the Clause "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." 106

97. Francis, 329 U.S. at 462. The four plurality Justices contended that even if the Eighth Amendment did apply to the states, a second execution attempt could be authorized. See id. at 463-64. The four dissenting Justices strongly suggested otherwise. See id. at 475-81 (Burton, J., dissenting). Only Justice Frankfurter's concurrence directly stated that the Eighth Amendment did not apply to the states. See id. at 470 (Frankfurter, J., concurring).

98. Id. at 464.

99. Id. at 462 ("Accidents happen for which no man is to blame."). Both the plurality and the dissent relied on Kemmler's "torture or lingering death" standard for cruelty. See id. at 463-64 n.4 (Reed, J., plurality) & 476 (Burton, J., dissenting) ("Punishments are cruel when they involve torture or a lingering death . . . something more than the mere extinguishing of life.") (quoting Kemmler, 136 U.S. at 447 (1890)). Yet, the Court did not review evidence of any potential pain that an individual may suffer during electrocution. Even the dissent appeared to assume that, properly applied, electrocution would be painless and instantaneous. See id. at 474 (Burton, J., dissenting).

100. Id. at 471 (Frankfurter, J., concurring). It is not clear whether Justice Frankfurter was referring to "a series of abortive attempts" in the execution of one individual, or a series over time for a number of individuals. This Article contends that the distinction is irrelevant, since both interpretations suggest negligence and possibly deliberate indifference on the part of the state.


102. See id. at 666. In Furman v. Georgia, 408 U.S. 239 (1971), Justice Douglas relied on both Francis and Robinson to conclude that the Eighth Amendment's applicability to the states is "now settled." Id. at 241 (Douglas, J., concurring).

103. See supra notes 40-42 and accompanying text (discussing Type 1 (means of punishment) cases).


Current claims of cruel and unusual punishment must therefore be assessed "in the light of contemporary human knowledge." 107

Regardless of this jurisprudence, the Court has refused to consider the constitutionality of electrocution or the other execution methods despite considerable evidence that the methods may be unconstitutionally cruel. In a lengthy dissent from the Court's denial of certiorari to review a prisoner's challenge to electrocution in Glass v. Louisiana, 109 Justice Brennan, joined by Justice Marshall, denounced both the law and the application of electrocution. 109 The dissent focused on Justice Frankfurter's concern with "abortive" or "botched" executions. 110

109. See id. (Brennan, J., dissenting). First, the Glass dissent depicted Kemmler as "antiquated authority" given the Eighth Amendment's applicability to the states, see id. at 1083, although it retained Kemmler's "torture and lingering death" standard. See id. at 1086. Next, the dissent suggested three "objective" criteria for determining the constitutionality of an execution method, see id. at 1084-85, based upon the Court's Eighth Amendment jurisprudence: (1) "the unnecessary and wanton infliction of pain," id. at 1084 (citing Gregg v. Georgia, 428 U.S. 153, 173 (1976); Francis, 329 U.S. at 463; In re Kemmler, 136 U.S. 436, 447 (1890); Wilkerson v. Utah, 99 U.S. 130, 135-36 (1879)); (2) "flawed execution" (e.g., "a minimization of physical violence during execution"), id. at 1085 (citing Trop v. Dulles, 356 U.S. 86, 100 (1958) (plurality opinion)); and (3) "mutilation" and "distortion" of the condemned person's body. Id. (citation omitted). "If a method of execution does not satisfy these criteria—i.e., it causes 'torture or lingering death' in a significant number of cases—then unnecessary cruelty inheres in that method of execution and the method violates the Cruel and Unusual Punishments Clause." Id. at 1086 (quoting Kemmler, 136 U.S. at 447). Even if electrocution did not "invariably produce pain and indignities, the apparent century-long pattern of 'abortive attempts' and lingering deaths suggests that this method of execution carries an unconstitutionally high risk of causing such atrocities." Id. at 1093.

110. It appears that the term "botch" as it applies to executions was first used to describe Kemmler's mishap in 1890. See Far Worse, supra note 92, at 1-2. The term has been frequently used since that time to characterize defective executions, particularly those that result in extraordinary pain, violence, or mutilation. See, e.g., Elizabeth Fernandez, All Forms of Execution Produce Horror Stories, S.F. Examiner, Apr. 22, 1992, at A14 (listing the most recent "botched executions"). Herb Haines contends that the term "botched execution" is too narrow because it excludes other problematic aspects of the capital punishment process. See Herb Haines, Flawed Executions, the Anti-Death Penalty Movement, and the Politics of Capital Punishment, 39 Soc. Probs. 125, 125 (1992). Haines prefers the broader term "flawed executions," defined as "executions in which public sensitivities are offended by a breakdown in the 'normal' routine of convicting killers and putting them to death." Id.

According to Michael Radelet, an execution is "botched" when there are "unanticipated problems or the duration of the execution (over thirty minutes) caused prolonged agony for the prisoner." Affidavit of Professor Michael L. Radelet ¶ 3 [hereinafter Radelet Affidavit], Exhibit of Application for Post-Conviction Writ of Habeas Corpus, Ex parte Miguel A. Richardson, No. 81-CR-1548 (Tex. Crim. App. Dec. 16, 1990) [hereinafter Richardson Application]. Radelet has collected reports of botched executions over the past decade. Id. ¶ 2. In light of this commentary and range of definitions, this Article considers an execution to be "botched" when the execution has demonstrated technical, mechanical, or physical mishaps that substantially heighten the likelihood that an inmate experienced extreme pain and prolonged suffering. See Deborah W. Denno, Execution and the Forgotten Eighth Amendment, in America's Experiment with Capital Punishment: Reflections on the Past, Present, and Future of the Ultimate Penal Sanction (James R. Acker et al. eds., 1997).
In light of these early execution methods cases, the following sections briefly examine the more recent and significant cases on execution methods and prison conditions as a backdrop for developing this Article's execution methods test. The sections emphasize the integration of the five Eighth Amendment typologies discussed previously as a means of restoring the principle that death is different.

B. The 1994-1997 Execution Methods Cases

A focus on the 1994-1997 execution methods cases requires some perspective on the number of states that allow only one method of execution and those states that allow a choice between two different methods of execution. According to Table 1 (Appendix 1), which lists the methods of execution currently enacted in the thirty-eight death penalty states, lethal injection is the predominant method of execution, followed by electrocution. Hanging, the firing squad, and lethal gas are no longer the sole method of execution in any state; however, these methods are included as options in some states.

Recent cases may prompt the Court to conduct an Eighth Amendment review of execution methods. In 1993, three members of the Court indicated their interest in deciding the constitutionality of electrocution, emphasizing that *Kemmler was not “a dispositive response to litigation of the issue in light of modern knowledge.”* One year later, in *Campbell v. Wood,* a 6-5 en banc decision, the Ninth Circuit Court of Appeals reviewed the constitutionality of hanging under Washington State's choice statute. The statute provided for death “either by hanging by the neck or, at the election of the defendant, by [lethal injection].” Upon rejecting the State's contention that Campbell’s claims were not justiciable because Campbell was allowed to select lethal injection—an execution method that would render his case moot—the *Campbell majority concluded that execution by hanging*

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111. See supra notes 33-69 and accompanying text.

112. Although the federal government and the United States military also have a death penalty, see Denno, supra note 5, at 624, this Article examines only state death penalty statutes.


114. 18 F.3d 662 (9th Cir.), cert. denied, 511 U.S. 1119 (1994).

115. Judge Beezer, who wrote the majority opinion, was joined by Chief Judge Wallace and Judges Wiggins, Thompson, O'Scannlain, and Kleinfeld. See id. at 667. Judge Reinhardt, who wrote the minority opinion, was joined by Judges Browning, Tang, and D.W. Nelson. See id. at 692 (Reinhardt, J., concurring in part and dissenting in part). Judge Poole wrote the sole dissenting opinion. See id. at 729.

116. See id. at 680.


118. *Campbell,* 18 F.3d at 680. Emphasizing that the government may not "cloak unconstitutional punishments in the mantle of "choice,"") the court provided examples of

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under Washington State's protocol was not cruel and unusual punishment.\textsuperscript{119}

In general, \textit{Campbell} constituted an unsophisticated and disappointing exercise in Eighth Amendment jurisprudence, perhaps because of the unprecedented nature of the issue or because of the sharp split within the court.\textsuperscript{120} A detailed critique of the \textit{Campbell} majority's approach is available in \textit{Campbell}'s minority opinion.\textsuperscript{121} The \textit{Campbell} majority's primary flaws resulted from the majority's reliance upon a truncated Type 1 (means of punishment) and Type 2 (proportionality) cases as well as the majority's nearly exclusive focus on the Court's "unnecessary and wanton infliction of pain" standard.\textsuperscript{122} In a heated dissent to \textit{Campbell}'s denial of certiorari,\textsuperscript{123} Justice Blackmun emphasized that even if he thought the death penalty were constitutional,\textsuperscript{124} \textit{Campbell}'s claim had merit. Justice Blackmun noted in particular the \textit{Campbell} majority's unprecedented doctrinal truncation\textsuperscript{125} and the

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\textsuperscript{119} \textit{Campbell}, 18 F.3d at 681. Reviewing the district court's finding of no Eighth Amendment violation as one of "mixed questions of fact and law," and also of "questions of law," the \textit{Campbell} court stated that it would set aside the district court's factual findings only if they were "clearly erroneous." Id. The court asserted no other standard of review.


\textsuperscript{121} See \textit{Campbell}, 18 F.3d at 693-94 (Reinhardt, J., concurring in part and dissenting in part); see also Peter S. Adolf, \textit{Killing Me Softly: Is the Gas Chamber, or Any Other Method of Execution, "Cruel and Unusual Punishment"?}, 22 Hastings Const. L.Q. 815, 837 (1995) (critiquing \textit{Campbell}).

\textsuperscript{122} See \textit{infra} note 125 and accompanying text. It is telling, for example, that Washington State's own Department of Corrections recommended that the state legislature either replace hanging with lethal injection or make lethal injection the default method when the condemned refused to choose. See Marcia Chambers, \textit{No Death by Hanging}, Nat'l L.J., May 16, 1994, at A19. The legislature finally complied with this recommendation. See \textit{supra} note 117 and accompanying text; \textit{infra} app. 3 (Washington).

\textsuperscript{123} \textit{Campbell} v. Wood, 511 U.S. 1119 (1994) (Blackmun, J., dissenting from denial of certiorari).

\textsuperscript{124} \textit{Id.} at 1119 (citing Callins v. Collins, 510 U.S. 1141 (1994) (Blackmun, J., dissenting from denial of certiorari)).

\textsuperscript{125} \textit{Id.} at 1121. Despite the wide range of types of Eighth Amendment cases that the Court has proffered over the century, the \textit{Campbell} majority based its entire analysis upon only
majority's predominant concern with pain. 126

Several months following Campbell, the United States District Court for
the Western District of Washington held in Rupe v. Wood 127 that hanging
under Washington State's protocol generally did not violate the Eighth Amendment, 128 however, because of the unique circumstances involved, the hanging of Mitchell Rupe would be unconstitutional. 129 There was a
"significant risk" 130 that Rupe, who was obese, 131 would be decapitated and the extent of this risk could not "be dismissed as a 'possible error' or

a portion of them, offering dubious arguments for why some types were not applicable to
execution methods. For example, the majority framed the bulk of its Eighth Amendment
analysis of hanging on the following single sentence incorporating a two-part test:

Recent decisions construing the Eighth Amendment focus on whether (1) the
sentence constitutes "one of 'those modes or acts of punishment that had been
considered cruel and unusual at the time that the Bill of Rights was adopted," and
on whether (2) the punishment is contrary to "the evolving standards of decency
that mark the progress of a maturing society."

Campbell, 18 F.3d at 681-82. The majority concluded that because there was no question that
"hanging was acceptable when the Bill of Rights was adopted," the court should focus on the
second part of the test—whether hanging complies with contemporary standards of decency.
Id. at 682.

Even at the start, however, the majority's analysis is truncated and misleading. First, the
majority implies that this two-part test is typically followed in Eighth Amendment cases when
there is no such generic Eighth Amendment standard or Eighth Amendment case. Rather,
Eighth Amendment cases generally fall in one of the five types discussed in Part I of this
Article. See supra notes 33-69 and accompanying text. Although Type 1 (means of punish-
ment) cases should provide some guidance, they are limited in their scope and the Supreme
Court has never used them to evaluate execution methods. See supra notes 38-42 and
accompanying text. Indeed, it is odd that the majority derives its two-part test from Stanford v.
Kentucky, 492 U.S. 361 (1989), a Type 2B (proportionality) decision that concerned not the
means of punishment, but rather the constitutionality of applying the death penalty to 16 and
17-year-old offenders. See id. at 380 ("We discern neither a historical nor a modern societal
consensus forbidding the imposition of capital punishment on any person who murders at 16
or 17 years of age."). This distinction is important because the majority expressly rejects as
inappropriate those standards that are available in other Eighth Amendment proportionality
cases (such as legislative trends in the use of execution methods). See Campbell, 18 F.3d at 682.

126. Campbell, 511 U.S. at 1121-22. Justice Blackmun also highlighted other factors,
including: (1) the infrequent application of hanging, id. at 1120-21; (2) the rejection of hang-
ing by nearly all of the state legislatures and its decline in popularity over the years, id.; (3)
the substantial evidence that hanging, "a crude and imprecise practice[,] . . . always includes a
risk that the inmate will slowly strangulate or asphyxiate," id. at 1122; and (4) the fact that the
number of states rejecting hanging has been far greater than the number of states rejecting
other laws or procedures that the Court previously has determined to be cruel and unusual,
Id. at 1120-21.

127. 863 F. Supp. 1307 (W.D. Wash. 1994), vacated on other grounds, 93 F.3d 1434 (9th Cir.

128. Id. at 1314 (noting that a state need not eliminate "every single possibility of error" in
its execution procedure to withstand constitutional scrutiny) (citing Campbell v. Wood, 18
F.3d 662, 687 (9th Cir.), cert. denied, 511 U.S. 1119 (1994)).

129. Id. at 1314 n.9., 1315.

130. Id. at 1314.

131. Rupe weighed 409 ¼ pounds and measured 6' ½" in height. Id. at 1319.
Despite the Rupe court’s emphasis on the weight difference between Rupe and Campbell, which the court said justified its determination, the Rupe court applied a broader Eighth Amendment analysis than the Campbell court and considered more evidence.

One month after Rupe, the United States District Court for the Northern District of California held, in Fierro v. Gomes, that execution by lethal gas violated the Eighth Amendment even though the plaintiffs, San Quentin death row inmates, had the option of choosing lethal injection. In reaching this determination, the Fierro district court offered three major doctrinal expansions: (1) a more comprehensive Eighth Amendment framework than Campbell by emphasizing an

133. When Campbell was executed, he weighed 232 pounds, including the eight-pound board connected to his body. Id. at 1310. According to the court, "Campbell was a muscular person who exercised frequently and his neck muscles were well developed and strong. He was in excellent physical shape." Id.
134. The Rupe court particularly emphasized an incorporation of Type 4 (prison conditions) issues. For example, like the Campbell court, the Rupe court recognized that "[t]raditional methods of execution selected by a state’s legislature are presumed to be valid." Id. at 1314 (quoting Gregg v. Georgia, 428 U.S. 153, 175 (1976)). A presumption of validity was not warranted in this case, however, because the legislature did not choose the drop length for a person with excessive weight and did not consider whether hanging would be acceptable if the procedure could result in a significant risk of decapitation. Id. In contrast to the Campbell court’s exclusive focus on pain, the Rupe court emphasized instead “evolving standards of decency,” id. (quoting Gregg 428 U.S. at 173), “public attitudes toward hanging,” id. (“Public attitudes toward hangings that might carry a slight risk of decapitation cannot be equated with public attitudes toward hangings that carry a significant risk of decapitation.”), and most particularly, “human dignity[,] . . . ‘the basic concept underlying the Eighth Amendment,’” id. at 1315 (quoting Gregg, 428 U.S. at 173).
135. This evidence included, most particularly, reports of decapitations that had resulted in other judicial hangings as well as graphic photos of a decapitation early in the century. Id. (referring to the decapitation of Black Jack Retchum in New Mexico in 1901). Without such evidence, the court could never have made its determination that “decapitation is a recurrent phenomenon in the history of judicial hanging.” Id.
137. Id. at 1415. Former California Penal Code § 3604(b) (West 1992) provided that “[i]f a person under sentence of death does not choose either lethal gas or lethal injection . . . the penalty of death shall be imposed by lethal gas.” See generally David Sternbach, Hanging Pictures: Photographic Theory and Framing of Images of Execution, 70 N.Y.U. L. Rev. 1100, 1131-38 (1995) (examining the use of videotapes and photographic images of executions to demonstrate the inmate’s pain and suffering, with specific discussions of the lower court decisions preceding Fierro v. Gomes, 77 F.3d 301 (9th Cir. 1996)). California’s amended death penalty statute now provides that lethal injection shall be used unless the inmate requests lethal gas. See infra app. 3 (California); note 149 and accompanying text (discussing the change in California’s death penalty statute providing that lethal injection be used unless the defendant requests lethal gas).
138. The framework relies on cases representing each of the five Eighth Amendment types previously discussed in this Article. See supra notes 33-69 and accompanying text. These cases include the following: Yop v. Dulles, 256 U.S. 86 (1958) (Type 1, means of punishment); Ford v. Wainwright, 477 U.S. 399 (1986) (plurality opinion) (Type 2B, proportionality for a
evolving standards of decency test (dependent upon legislative trends); a broader process for challenging an execution method by allowing an inmate to bring a section 1983 action in lieu of a petition for writ of habeas corpus; and a more detailed measure of pain and unconsciousness. In turn, the Fierro district court derived from Campbell the following framework for evaluating the constitutionality of any execution method: "[O]bjective evidence of pain must be the primary consideration, and evidence of legislative trends may also be considered where the evidence of pain is not dispositive."

The Ninth Circuit Court of Appeals readily endorsed the Fierro district court’s suggested standards for determining the extent and risk of unconstitutional pain, as well as the court’s rehabilitative interpretation of Campbell’s doctrinal ambiguities and deficiencies. "The district court’s findings of extreme pain, the length of time this extreme pain lasts, and the substantial risk that inmates will suffer this extreme pain for several minutes, require the conclusion that lethal gas is cruel and unusual."
Because the Ninth Circuit found the district court’s factual findings regarding pain “dispositive under the framework of Campbell,” there was no need to consider legislative trends as an additional gauge for determining whether lethal gas violated the Eighth Amendment. The Ninth Circuit also agreed that “[m]ethod of execution challenges are analogous to challenges to conditions of confinement,” which are typically brought by inmates as section 1983 actions. Any alternative holding would “carve out” a “separate [Eighth Amendment] jurisprudence for death penalty cases.”

Fierro is the first federal appeals court case holding unconstitutional any method of execution. Consequently, Fierro enables the Supreme Court to address the constitutionality of an execution method in the future should the Court decide to review the Ninth Circuit’s decision regarding lethal gas. In light of this possibility, the Fierro court deserves credit for improving the Campbell majority’s doctrine and affirming the district court’s approach to evaluating execution methods. By rejecting an artificial distinction between challenges to execution methods and prison conditions, the Ninth Circuit also endorsed a more integrated Eighth Amendment execution jurisprudence. Yet, as the following sections show, neither the Fierro district court nor the Ninth Circuit sufficiently encompassed the applicable Eighth Amendment case law. In the context of recent Supreme Court prison conditions cases, this Article contends that a more comprehensive Eighth Amendment execution methods test should also include scrutiny of prison personnel as well as of the courts and

gas differed from that of hanging in Washington State because the evidence supporting the unconstitutionality of lethal gas was more compelling. Id. at 808.

145. Id.
146. Id. at 805.
147. Id. at 804.
148. See Fierro, 77 F.3d at 308 (stating that two circuit courts have not found execution by lethal gas to be unconstitutional). In Antwine v. Delo, 54 F.3d 1357 (8th Cir. 1995), the Eighth Circuit Court of Appeals rendered unconstitutional a Missouri prosecutor’s unsupported closing argument suggesting that the defendant’s death by lethal gas would be “quick, painless, and humane,” emphasizing that “[t]he reality, as we understand it, is or at least may be quite different.” Id. at 1361. Moreover, this year, in California First Amendment Coalition v. Calderon, 956 F. Supp. 883 (N.D. Cal. 1997), the United States District Court for the Northern District of California acknowledged the potential risks associated with lethal injection executions. The district court held that, under the First Amendment, prison officials were required to allow the public and the media to witness a lethal injection from the moment preceding a prisoner’s strap down to a gurney until just after the prisoner’s death. Id. at 890; see also infra notes 180-83 and accompanying text (discussing Calderon); app. 3 (California) (placing Calderon in the context of California’s execution method jurisprudence).
149. The Supreme Court’s recent decision to vacate Fierro did not discuss the Ninth Circuit’s determination regarding lethal gas. Rather, the decision concerned whether the defendants will have standing to question the constitutionality of their executions in light of the change in the state’s death penalty statute providing that lethal injection be used unless the defendant requests lethal gas. See Gomez v. Fierro, 117 S. Ct. 285, 285-86 (remanding for reconsideration in light of changed statute), vacating on other grounds, 77 F.3d 301 (9th Cir. 1996); see also supra note 20 and accompanying text (discussing the Supreme Court’s decision to remand Fierro).
legislatures. Any less inclusive doctrine would perpetuate the dilution of the death is different principle.

C. The Recent Prison Conditions Cases

The coming of age of Eighth Amendment jurisprudence occurred in 1976 when the Court, in Estelle v. Gamble,150 first applied the Eighth Amendment to an injury that was not part of an inmate’s sentence, but that the inmate sustained while in prison. The Court held that prison personnel’s “deliberate indifference” to an inmate’s serious illness or injury constituted an “unnecessary and wanton infliction of pain” violative of the Eighth Amendment.151 The Estelle Court distinguished the inmate’s claim of officials’ deliberate indifference to inadequate medical care from the facts that were before it nearly thirty years earlier in Louisiana ex rel. Francis v. Resweber,152 emphasizing that a second effort at electrocuting the prisoner in Francis was not unconstitutional because the first attempt was an “unforeseeable accident,” not deliberate indifference.155

In 1991, the Court enhanced what it called Estelle’s “subjective” deliberate indifference component that required an inmate to show that a prison official has a “sufficiently culpable state of mind.”154 The Court coupled this subjective component with an “objective” component that mandated an inmate to demonstrate that the deprivation alleged was “sufficiently serious.”155 Soon thereafter, the Court relaxed its requirements for the objective component in two primary ways. First, the Court held that a prison official’s malicious and sadistic use of excessive force against an inmate constitutes cruel and unusual punishment even when the inmate does not evidence serious injury156 because excessive and sadistic

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151. Id. at 104 (quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976)). The Court rejected the inmate’s claim that he received inadequate medical care for a back injury allegedly suffered while conducting prison work, stating that the physician responsible for treating the inmate’s injury was not sufficiently culpable. Id. at 107.
152. 329 U.S. 459 (1947). See supra notes 95-100 and accompanying text.
155. Id. at 298. In Wilson, the inmate claimed that the conditions of his confinement per se violated the Eighth Amendment and that he should not have to demonstrate that officials acted culpably. Id. at 299-302. Upon rejecting this argument, the Court held that an inmate must satisfy both the subjective and objective components of the Eighth Amendment to establish a constitutional violation. Id. at 298.
156. Hudson v. McMillian, 503 U.S. 1, 3 (1992). Writing for the majority, Justice
force always violates "contemporary standards of decency." Second, the Court held that an inmate's Eighth Amendment claim of prison officials' deliberate indifference could apply to conditions threatening future, as well as present, harm to health.

In Farmer v. Brennan, a unanimous Court more fully delineated its views on the Eighth Amendment by explaining the meaning of "deliberate indifference." The Court held that a prison official violates the Eighth Amendment "for denying humane conditions of confinement only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." At the same time, the Court established a number of loopholes for inmates—ensuring, for example, that they could prevail without demonstrating they had warned officials about a particular threat or that officials believed a particular inmate was going to be harmed. Moreover, whether an official possessed the required knowledge of a substantial risk was a question of fact that could be shown "in the usual ways," such as "inference from circumstantial evidence" or the factfinder's conclusion that "a prison official knew of a substantial risk from the very

O'Connor was joined by Chief Justice Rehnquist and Justices White, Kennedy, and Souter. Id. Justices Blackmun and Stevens wrote separate opinions in which both concurred in the judgment and Justice Stevens concurred in part. Id. (Stevens, J., concurring in part and concurring in the judgment); id. at 12 (Blackmun, J., concurring in the judgment). Justice Thomas filed a dissenting opinion, which Justice Scalia joined. Id. at 17 (Thomas, J., dissenting).

157. Id. at 9. Justice O'Connor explained that to hold otherwise would deem constitutional "any physical punishment, no matter how diabolic or inhuman," which "inflict[ed] less than some arbitrary quantity of injury." Id.

158. Helling v. McKinney, 509 U.S. 25, 34-35 (1993) (discussing harm resulting from the inmate's involuntary exposure to environmental tobacco smoke). The Helling Court paralleled the Hudson Court's 7-2 split. In Helling, Justice White's majority opinion was joined by Chief Justice Rehnquist and Justices Blackmun, Stevens, O'Connor, Kennedy, and Souter. Id. at 26. Justice Thomas filed a dissenting opinion, which Justice Scalia joined. Id. at 37 (Thomas, J., dissenting).


160. Justice Souter's opinion was joined by Chief Justice Rehnquist and Justices Blackmun, Stevens, O'Connor, Scalia, Kennedy, and Ginsburg. Id. at 827. Justices Blackmun, id. at 851, and Stevens, id. at 858, filed concurring opinions. Justice Thomas filed an opinion concurring in the judgment. Id.

161. Id. at 829. Dee Farmer, a preoperative transsexual who "projects feminine characteristics," claimed that federal prison officials violated the Eighth Amendment through their deliberate indifference to his safety by placing him in the general population of a penitentiary after his transfer from a correctional institute. Id. Within two weeks, Farmer was raped and beaten in his cell by another inmate. Id. at 830-31. The record showed that although prior to his transfer Farmer had been housed in the general male prison population in several federal facilities, more often he was housed in segregation. Id. The Court recognized that "penitentiaries are typically higher security facilities that house more troublesome prisoners than federal correctional institutes," where Farmer resided before his transfer to the penitentiary. Id. at 830.

162. Id. at 847.

163. Id. at 842-43.
fact that the risk was obvious."  

Farmer and the other recent cases have clarified the Court's broad Eighth Amendment jurisprudence on prison conditions, although not without critique. According to Justice Thomas, who filed heated dissents in two cases joined by Justice Scalia, the Court has expanded the Cruel and Unusual Punishments Clause "beyond all bounds of history and precedent." Most particularly, Justice Thomas has questioned the Court's post-Estelle premise that prisoners' deprivations can be punishment under the Eighth Amendment even when those deprivations are not part of a criminal sentence.

It is beyond the scope of this Article to challenge Justice Thomas' position, and, in light of his stance, a debate is unnecessary. This Article focuses on the very type of punishment that Justice Thomas would render fit for an Eighth Amendment challenge. Given the Court's

164. Farmer, 511 U.S., at 842. The Court provided an example. If evidence showed that a substantial risk of inmate violence was

"longstanding, pervasive, well-documented, or expressly noted by prison officials in the past, and the circumstances suggest that the defendant-official being sued had been exposed to information concerning the risk and thus 'must have known' about it, then such evidence could be sufficient to permit a trier of fact to find that the defendant-official had actual knowledge of the risk."

Id. at 842-43 (quoting Brief for Respondents, at 22).

165. Although Farmer steers a more middle course relative to Hudson and Helling, Farmer nonetheless "eased the concerns" of prisoners' advocates by establishing, along with McMillian, the duty of prison officials to protect inmates not only from prison guards, but also from other inmates. See Linda Greenhouse, Prison Officials Can be Found Liable for Inmate-against-Inmate Violence, Court Rules, N.Y. Times, June 7, 1994, at A18 (quoting Alvin J. Greenhouse, director of the National Prison Project of the American Civil Liberties Union, which represented Farmer). Farmer also impedes the government's efforts to have suits dismissed at an early stage in the process. See id.; see also Ashley Dunn, Flood of Prisoner Rights Suits Brings Effort to Limit Filings, N.Y. Times, Mar. 21, 1994, at A1 (describing the crushing burden of inmates' civil suits over the last three decades).

166. Helling, 509 U.S. at 38 (Thomas, J., dissenting); Hudson, 503 U.S. at 17 (Thomas, J., dissenting).

167. Helling, 509 U.S. at 38. Discussing the text and history of the Eighth Amendment, along with pre-Estelle precedent, Justice Thomas asserted in Helling that he would possibly vote to overrule Estelle if given the opportunity because the Estelle Court's interpretation of "punishment" does not comport with its historical meaning of being "a penalty imposed for the commission of a crime." Id. Justice Thomas' separate concurring opinion in Farmer, which Justice Scalia did not join, reiterated his position that the Eighth Amendment did not apply to prison conditions. Farmer, 511 U.S. at 859 (stating that "judges or juries—but not jailers—impose "punishment""") (quoting Helling 508 U.S. at 40). Although Justice Thomas emphasized that he "disagreed with the constitutional predicate of the Court's analysis" in Farmer, he signed the opinion nonetheless because he shared the Court's view that Farmer's theory of liability did not comport with Estelle. Id. at 860.


169. Despite this Article's confidence that Justice Thomas would agree that execution methods are appropriate subject matter for the Eighth Amendment, it is, of course, a wholly different matter concerning whether he would agree that current methods of execution are
relatively expansive view of the Eighth Amendment in prison conditions cases, however, this Article considers how that perspective may be applied in another context: prison officials' administration of an execution method.

Generally, courts have shied from addressing whether a prison official acted with deliberate indifference when depriving a death row inmate of a proper execution, despite evidence that the execution method, as applied, included a substantial risk of failure. Although the Estelle Court noted that the "unforeseeable accident" in Francis was not deliberate indifference,\textsuperscript{170} the Court did not project a threshold point of when such failed attempts would be considered unconstitutional. In turn, neither the Fierro district court nor the Ninth Circuit discussed the potential Eighth Amendment ramifications of viewing analogously challenges to execution methods and prison conditions. On the other hand, the Farmer Court does provide some guidance through its standard for determining whether a prison official possessed "actual knowledge" of a substantial risk of harm, that is, the risk was "longstanding, pervasive, well-documented, or expressly noted" by past prison personnel, and that the sued official "must have known about it."\textsuperscript{171} Part II's discussion of this Article's execution methods test focuses on these issues to provide a more comprehensive approach to assessing the constitutionality of executions.

II. TESTING THE CONSTITUTIONALITY OF EXECUTION METHODS

The proposed five-factor test for evaluating execution methods in Table 2 (Appendix 1) relies predominantly on three sources: the Eighth Amendment typologies detailed in Part I of this Article, the Ninth Circuit's more specific standards introduced in Campbell and Fierro, as well as related evidence pertaining to electrocution, lethal injection, and the penological justification of punishment that this Article discusses later. The test uses, as a starting point, several Supreme Court standards that constitute the test's first factor, a "human baseline" \((H)\), against which the test's remaining four factors are compared. Under these humane baseline standards, punishments are cruel when: (1) they involve "something more than the cruel and unusual.

\footnotesize{
\textsuperscript{170} See supra notes 152-53.

\textsuperscript{171} Farmer, 511 U.S. at 842; see supra note 164 and accompanying text. One can make the argument that an execution device, such as an electric chair, is not a prison condition per se; rather, the application of the chair is simply one facet of the court's or the jury's decision to impose the death sentence and of the legislature's decision to select electrocution as the means by which death will be accomplished. Examining electrocution at these levels comports with Justice Thomas' view of "traditional Eighth Amendment jurisprudence, which focuses on penalties meted out by statutes or sentencing judges." Hudson, 503 U.S. at 21 (Thomas, J., dissenting). Yet, such distinctions become artificial when determining the constitutionality of execution methods that should involve all three levels—the legislatures, the courts, and prison officials. This Article contends that a comprehensive Eighth Amendment analysis cannot exclude scrutiny of any level.

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mere extinguishment of human life";\textsuperscript{172} (2) they "constitute 'one of "those modes or acts of punishment that had been considered cruel and unusual at the time the Bill of Rights was adopted"";\textsuperscript{173} and (3) they are contrary to "evolving standards of decency."\textsuperscript{174}

According to Table 2's execution methods test, any punishment that exceeds these humane baseline standards may be excessive (E) and therefore, possibly cruel and unusual (O). Theoretically, an excessive punishment may not be per se cruel and unusual because there may be no alternative (A) punishment that we yet know of that can meet the humane baseline standards. In addition, there are varying degrees and types of excessiveness. However, a punishment that is excessive in light of presently used or available alternatives and that has no acceptable penological justification (P) can be considered cruel and unusual and therefore unconstitutional under the Eighth Amendment. In turn, "standards of decency" (D) pervade every facet of an assessment of the constitutionality of an execution method. In sum, under Table 2's test, an execution method is cruel and unusual (O) if it is excessive (E) and therefore greater than the humane baseline (H), accounting for presently used or available alternatives (A) and any legitimate penological justification (P) that method may serve. As mentioned earlier, standards of decency (D) influence each of these factors.\textsuperscript{175}

As Table 2 shows, E, D, A, and P comprise subfactors derived from early and recent cases. With respect to the excessiveness (E) factor, for example, this Article agrees with the Ninth Circuit's determination in \textit{Campbell}\textsuperscript{176} and \textit{Fierro}\textsuperscript{177} that objective evidence of pain is the primary concern in scrutinizing the constitutionality of an execution method. This approach is followed, if necessary, by an analysis of states' legislative trends in applying that method.\textsuperscript{178}

Although the Supreme Court set forth general principles gauging what can be considered excessive, the \textit{Campbell} and \textit{Fierro} courts provided

\begin{itemize}
\item \textsuperscript{172} See \textit{Kemmler}, 136 U.S. 436, 447 (1890) ("Punishments are cruel when they involve torture or a lingering death . . . . It implies that there is something inhuman and barbarous, something more than the mere extinguishment of human life.").
\item \textsuperscript{174} See id. at 682 (quoting \textit{Trop v. Dulles}, 356 U.S. 86, 101 (1958)).
\item \textsuperscript{175} For example, if the "symbolic" formula, \( C_s = (E_A > H_A) - (A_B P_B) \), expresses these interrelationships. This formula is symbolic because it is not to be taken literally, i.e., it does not presume that A and P, for example, have additive properties, or that they can be compared along a common metric. Rather, the formula is a way of organizing descriptive factors so that they can be balanced and evaluated.
\item \textsuperscript{176} See id. at 682-83.
\item \textsuperscript{177} See \textit{Fierro v. Gomez}, 77 F.3d 301, 308 (9th Cir.), \textit{vacated on other grounds}, 117 S. Ct. 285 (1996) (remanding for reconsideration in light of changed statute).
\end{itemize}
substantially more detail in their actual evaluations. In an effort to
determine if an inmate experienced "unnecessary and wanton infliction of
pain" while conscious, the Ninth Circuit supported the Fierro district court's
consideration of a wide range of evidence, including scientific research
and eyewitness accounts of actual executions. This year, in California
First Amendment Coalition v. Calderon, the United States District Court of
the Northern District of California once again emphasized the importance
of eyewitness accounts of actual executions, this time in the context of
lethal injection executions. The court addressed in particular media
witnesses, who "almost invariably now serve as the public's surrogate" to
ensure that "no untoward conduct has occurred."

In Fierro, the Ninth Circuit also endorsed the district court's threshold
"at which the time to unconsciousness and the corresponding pain would
violate the Constitution." Although death "where unconsciousness is
likely to be immediate or within a matter of seconds is apparently within
constitutional limits, . . . the persistence of consciousness for over a minute
or for between a minute and a minute-and-a-half, but no longer than two
minutes might be outside constitutional boundaries." Because Campbell
"also made clear that the method of execution must be considered in
terms of the risk of pain," the Ninth Circuit held that a method may
be unconstitutional if an inmate faces a "substantial risk" of suffering
"extreme pain for several minutes."

According to the Fierro district court, this risk was heightened if the execution protocol was created in an
"unscientific, slapdash manner."

For its standards of decency (D) factor, this Article considers critical
an analysis of "objective factors to the maximum extent possible" when

179. See Fierro, 77 F.3d at 308. In light of the scientific uncertainty concerning measurements
of pain and unconsciousness, the Fierro district court found to be probative, "in varying
degrees," all the evidence of eyewitness observations of gas chamber executions. Fierro, 865 F.
Supp. at 1400. The court particularly considered as "objective" and "reliable sources of clinical
information," the San Quentin execution records produced contemporaneously with the
actual executions by trained medical personnel observing inmates closely before them. Id. at
1400-01. The execution records of two recently executed inmates were deemed "the most
probative evidence of pain and consciousness" because the men were executed under the
protocol being challenged. Id. at 1401.


181. Id. at 890 (noting that the First Amendment protects public access to executions).

182. Id. at 889 ("Even though the historical basis for the media's witnessing of executions
is somewhat less clear than that of the public generally, it is no stretch to suggest that the
public's right of access includes a right of media access.").

183. Id. The court emphasized that public access to executions was needed to "inform the
community when justice is not even-handed and reform measures are therefore necessary." Id. at 888.

184. Fierro, 77 F.3d at 307.

185. Id.

186. Id.

187. Id. at 308.

188. Fierro, 865 F. Supp. at 1413.
assessing whether a punishment is cruel and unusual in light of the Court’s requirement.\textsuperscript{189} Objective factors include legislation passed by elected representatives,\textsuperscript{190} as well as public attitudes and opinion polls.\textsuperscript{191} Although the Ninth Circuit declared unnecessary an examination of legislative trends in \textit{Fierro} because the evidence of pain was so substantial, the \textit{Fierro} district court conducted an extensive standards of decency analysis of states’ past and current uses of lethal gas.\textsuperscript{192} Because other courts may not agree with the Ninth Circuit’s assessment of lethal gas, or because courts may find other execution methods less obviously cruel, Table 2’s standards of decency factor provides guidance on how such legislative trends may be used.

Table 2’s execution methods test also includes a factor allowing a court to evaluate alternative execution methods (\textit{A}) to determine if the tested method at issue is unnecessary. Most likely, that alternative method will be lethal injection,\textsuperscript{193} which provides the focus of this Article’s later alternative method analysis.\textsuperscript{194} Similarly, the last factor of the execution methods test evaluates the possible penological justification (\textit{P}) for inhumane execution methods. This Article concludes that legislatures, courts, and prison personnel have continued to apply particular execution methods despite substantial evidence suggesting the methods are cruel and unusual. The penological justification factor surveys the various philosophies of punishment, the current choice: execution methods statutes, as well as the retroactive and nonretroactive uses of new execution methods.

The following sections of this Article apply the execution methods test to electrocution and lethal injection, currently the two most widely used execution methods,\textsuperscript{195} as an initial approach to assessing whether these

\begin{itemize}
\item \textsuperscript{189} \textit{Id.} at 1410 (citing Stanford v. Kentucky, 492 U.S. 361, 369 (1989)).
\item \textsuperscript{190} \textit{Id.}
\item \textsuperscript{191} \textit{Id.} at 1400-01.
\item \textsuperscript{192} \textit{See id.} at 1404-08.
\item \textsuperscript{193} Although the Ninth Circuit in \textit{Fierro} never assessed whether lethal injection was a viable alternative for executions, the \textit{Campbell} majority refused to review evidence regarding lethal injection in order to determine if the risk of pain resulting from hanging was “unnecessary.” \textit{Campbell} v. \textit{Wood}, 18 F.3d 662, 665-87, 716 (9th Cir.) (en banc) (concluding that in assessing whether a method of punishment is unnecessarily cruel, “[t]he relative merits of lethal injection are irrelevant”), \textit{cert. denied}, 511 U.S. 1119 (1994). Yet, the \textit{Campbell} minority and the \textit{Fierro} district court seriously questioned this aspect of \textit{Campbell}, contending that by definition, “unnecessary” is a comparative standard. If one can show that another method of execution is not as painful, or that it reduces the risk of inflicting pain, then one can conclude that the pain, or risk of pain, associated with the execution method at issue is unnecessary. \textit{See Campbell}, 18 F.3d at 710; \textit{Fierro}, 865 F. Supp. at 1411 n.26.
\item \textsuperscript{194} \textit{See infra part II.C} (discussing alternative execution methods).
\item \textsuperscript{195} \textit{See infra app.} 1, tbl. 1. This Article does not evaluate thoroughly the firing squad because that method is used infrequently and, apart from historical accounts of the obvious intentional infliction of pain, it does not evidence the same degree of botching. \textit{See generally L. Kay Gillespie, The Unforgiven: Utah’s Executed Men} (1991) (describing the history and current application of the firing squad in Utah); \textit{Denno, supra} note 5, at 687-89 (discussing
\end{itemize}
methods violate the Eighth Amendment. Because few sources exist to
counter claims that these methods constitute cruel and unusual
punishment, the execution methods test relies on the information that is
available. Therefore, this Article offers no pretense that the analysis is
balanced.106 With this caveat in place, the following sections begin an
evaluation of electrocution.

A. Electrocutio

1. Humane Baseline

The first question a court should ask is whether electrocution satisfies
the three humane baseline \((H)\) standards that courts have applied
previously. The first humane baseline \((HI)\) standard considers whether an
execution method was unacceptable when the Bill of Rights was adopted.
If a court’s answer to this question is in the affirmative, no additional
examination is necessary because the execution method would be rendered
per se unconstitutional. However, because electrocution did not exist when
the Bill of Rights was adopted, this standard has limited applicability in this
context apart from one key consideration—electrocution was created to
displace hanging, a means of execution that was acceptable when the Bill
of Rights was adopted, but which the New York legislature had declared
“barbarous.”107 For this reason, a court may recognize that at least at the
time electrocution was introduced, the New York legislature determined it
was the relatively more humane method and therefore per se acceptable.

In In re Kemmler,108 the Court implicitly evaluated electrocution
according to the second humane baseline standard \((H2)\), “more than the
mere extinguishment of human life.”109 The recent conclusion by three
Justices that Kemmler is not dispositive110 suggests that electrocution
should be evaluated according to the second as well as the third humane
baseline standard \((H3)\), evolving standards of decency.

Some courts have also considered whether a particular state’s
execution methods statute is unconstitutionally vague. This approach
recognizes that all three levels of decision makers (legislatures, courts, and

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firing squad botches). Regardless, this Article examines briefly past and present penological
justifications for the firing squad in light of Utah’s recent firing squad execution and its
resulting controversy. See infra notes 459-63 and accompanying text.

106. Additional information can easily be incorporated into the execution methods test if
and when it is ever available. A number of informative analyses of execution methods have
been conducted. See generally Jonathan S. Abernethy, The Methodology of Death: Reexamining the
Deterrence Rationale, 27 Colum. Hum. Rts. L. Rev. 579 (1996); Adolph, supra note 121; Kristina
E. Beard, Comment, Five Under the Eighth: Methodology Review and the Cruel and Unusual Punishments
Clause, 51 Miami L. Rev. 445 (1997); Roberta M. Harding, The Gallows to the Gurney:


108. Id.

109. Id. at 447.

prison personnel) are simultaneously involved in execution procedures, but that legislatures could play a greater role in curtailing prison personnel's discretion in implementing executions.201

Currently, nine states can still use electrocution. Six states use electrocution as their sole method of execution,202 and three states allow the condemned a choice between electrocution and lethal injection.203 Three of the nine states that allow electrocution are included in the top five death penalty states that account for three-fourths of all executions.204 Yet, not one of these nine states provides information on the voltage or amperage of the electrical current that should be applied, or the way that current should be administered. Four of the nine states specify

201. See infra notes 280, 286, 326-29 and accompanying text; see also Reno v. Koray, 115 S. Ct. 2021, 2022 (1995) (holding that "[a] statute is not ambiguous ... merely because there is a division of judicial authority over its proper construction"); compare Walton v. Arizona, 497 U.S. 659, 652-56 (1990) (holding that Arizona's sentencing scheme for evaluating aggravating and mitigating circumstances for death sentences was not unconstitutionally vague under the Eighth and the Fourteenth Amendments because the decision was made by a judge and not a jury) with Godfrey v. Georgia, 446 U.S. 420, 430-33 (1980) (holding that Georgia's death penalty statute violated the Eighth and the Fourteenth Amendments because it was too broad and invited "arbitrary and capricious infliction of the death sentence").


203. Ohio, South Carolina, and Virginia allow a choice between electrocution and lethal injection; only the electrocution provisions in their respective statutes are cited here. See Ohio Rev. Code Ann. § 2949.22(A) (Banks-Baldwin 1993) (amended 1994) (current 1997) ("[T]he death sentence shall be executed by causing a current of electricity, of sufficient intensity to cause death, to pass through the body of the person upon whom the sentence was imposed."); S.C. Code Ann. § 24-3-530 (A) (Law Co-op. 1976) (amended 1995) (current 1996) ("[T]he condemned shall suffer the [death] penalty by electrocution."); Va. Code Ann. § 53.1-233 (Michie 1994) (current 1997) ("The death chamber shall have all the necessary appliances for the proper execution of prisoners by electrocution."). Arkansas allows pre-enactment prisoners a choice between electrocution and lethal injection. See infra app. 1, tbl. 8, n.494; app. 3 (Arkansas). However, only two inmates remain who can make that choice. Telephone Interview with Dina Tyler, Spokesperson, Arkansas Dept. of Corrections (June 14, 1997). Because of the limited potential for the use of electrocution in Arkansas, this Article does not consider Arkansas a choice state.

204. Since 1977, Texas, Florida, Virginia, Louisiana, and Georgia have constituted the top five death penalty states. Until 1995, Virginia was an electrocution-only state. See infra app. 3 (Virginia); Bureau of Justice Statistics Bulletin, Capital Punishment 1994, 10 (1996).
nothing more than "death or punishment by electrocution." Overall, the electrocution statutes alone provide insufficient information to assess whether electrocution meets Table 2's humane baseline standard. For this reason, electrocution must be evaluated under the remaining four factors of the execution methods test. The examination continues by inquiring whether electrocution is excessive.

2. Excessiveness

Determining whether electrocution is excessive (E) depends upon three standards assessing the "unnecessary and wanton infliction of pain" (EI), "the dignity" of the individual (E2), and the risk of "unnecessary and wanton infliction of pain" (E3). If evidence of excessive pain is not dispositive, this evaluation will consider evidence of legislative trends in light of current standards of decency (D).

a. "Unnecessary and Wanton Infliction of Pain"

Until 1990, Fred A. Leuchter Associates, Inc., of Boston dominated the modern design and creation of the electric chair, serving as this country's only commercial supplier of execution equipment and sole organizer of a training program for execution technicians. Fred Leuchter, the president of the company, created, repaired, and installed all types of execution equipment, including electrocution systems and chairs, lethal injection machines, gas chambers, and gallows. Revelations that Leuchter had no formal academic credentials in engineering and was not

205. See supra notes 202-03 (The four states are Florida, Georgia, South Carolina, and Virginia.).
qualifed to call himself an engineer 209 ruined his execution business. 210 Regardless, Leuchter's depictions of electrocution devices are important because he has had more experience with the development and application of execution equipment than anyone else in this country; 211 his ideas and execution equipment continue to dominate the prison industry. 212

A typical Leuchter electric chair applies 2640 volts and five amperes of electrical current in two separate one-minute jolts. 213 A current exceeding six amps can cause excessive burning of the flesh. 214 According to Leuchter, electrocution can be more humane than other methods of execution because it operates more quickly than a subject's conscious nervous system can record pain. 215 Yet, because most of the execution equipment is nearly a century old, the electric chair probably creates pain 216 because it is either in "questionable condition" or "downright defective." 217 In sum, Leuchter believes an inmate becomes unconscious immediately and feels no pain if electrocution is applied under ideal conditions. If electrocution is applied improperly or the equipment is faulty, an inmate becomes unconscious relatively slowly and can feel great pain. 218

Other research on the effects of electrocution has accumulated over

209. See Denno, supra note 5, at 654-60 (noting that Leuchter's qualifications were investigated when he gained national attention through his published articles and expert testimony proposing that the number of deaths in the Holocaust had been exaggerated and that the Nazis could not have used gas chambers to kill six million Jewish people).

210. See id. at 659-60.

211. From 1979 to 1990, Leuchter consulted with or provided execution equipment for at least 27 states. Id. at 627. This number may be an underestimate. In a personal interview with this author, Leuchter stated that he has at one time or another consulted with an official in every state that has the death penalty. Telephone Interview with Fred A. Leuchter, former president, Fred A. Leuchter Associates, Inc. (July 17, 1992). Leuchter's testimony and affidavits have also been used in a number of cases to determine whether design defects or disrepair of electric chairs have resulted in pain and suffering. See Squires v. Dugger, 794 F. Supp. 1568, 1579-80 (M.D. Fla. 1992); Kirkpatrick v. Whiteley, No. 91-0502, 1991 U.S. Dist. LEXIS 7387, at *49 (E.D. La. 1991); Buenoano v. Dugger, No. 90-473-CIV-ORL-19, 1990 WL 119637, at *32 (M.D. Fla. 1990), vacated sub nom. Buenoano v. Singletary, 963 F.2d 1433 (11th Cir. 1992).

212. See Trombley, supra note 208, at 3-94 (discussing how Leuchter's work on execution equipment began and continues to dominate executions in the prison industry).

213. Lehman, supra note 207, at 27. According to Leuchter, a "good" electrocution system uses three electrodes. Id. at 25. An electrode on the inmate's head first introduces electricity to the body and the current then travels through the body toward two electrodes secured to the ankles. Id.

214. Id. at 27.

215. Under ideal circumstances, an inmate should lose consciousness in 4.16 milliseconds (1/240 of a second), 24 times faster than the subject's conscious nervous system can record pain. Id. at 28. See Fred A. Leuchter Assocs., Inc., Modular Electrocutions System Manual 1 (Nov. 27, 1989) [hereinafter Electrocution Manual].

216. Lehman, supra note 207, at 28. According to Leuchter, however, "fewer people are tortured" because of his efforts. Id.

217. Id.

218. Id.
the century. The most recent research and eyewitness observations suggest that a wide range of factors associated with an electrocution, such as severe burning, boiling body fluids, asphyxiation, and cardiac arrest, can cause extreme pain when unconsciousness is not instantaneous.

219. Experiments on animals near the turn of the century considerably swayed the Kemmler trial courts because the experiments suggested that death by electrocution was instantaneous. See, e.g., George E. Fell, The Influence of Electricity on Protium, with Some Remarks on the Kemmler Execution, 12 Physician & Surgeon 433, 440 (1890) (describing the research on animals that lead to the development of the electric chair). Yet, other research indicated that electrocution causes "pain too great to imagine." See Negley K. Teeters & Jack H. Hedblom, Hang By The Neck 447 (1967) (discussing Nicola Tesla, an expert on electricity who worked at times with Thomas Edison, and who stated that during electrocution, "the vital organs may be preserved; and pain, too great for us to imagine, is induced"). No one systematically examined the issue again until five decades later in a report by Great Britain's influential Royal Commission on Capital Punishment ("Royal Commission"). See Royal Commission On Capital Punishment, 1949-53 Report 251 (1953) [hereinafter Royal Comm'n Rep.]. The Royal Commission agreed with the Kemmler trial courts' conclusions that during electrocution, "unconsciousness is apparently instantaneous." Id. Yet, the Royal Commission's Report was based upon a limited overview of electrocution in the United States, and it had no solid scientific support. See Denno, supra note 5, at 636-37.

220. See infra app. 2A (Electrocution); Declaration of Theodore Bernstein, Ph.D. ¶ 7-9 [hereinafter Bernstein-Jones Complaint Declaration], Exhibit 3 of App. to Complaint for Declaratory and Injunctive Relief Pursuant to 42 U.S.C. § 1983, Jones v. McAndrew, No. 97CV10 (N.D. Fla. Apr. 4, 1997) [hereinafter Jones Complaint]; Affidavit of Orrin Devinsky, M.D. ¶ 9-10 [hereinafter Devinsky-Jones Complaint Affidavit], Exhibit 2 of Jones Complaint, supra; Affidavit of Orrin Devinsky, M.D. ¶ 18-21 [hereinafter Devinsky-Bassette Memorandum Affidavit], Exhibit 1 of Memorandum in Support of Bill of Complaint for Declaratory Relief, and Temporary and Permanent Injunctive Relief, Bassette v. Virginia, No. 92CV11 (E.D. Va. Jan. 23, 1992) [hereinafter Bassette Memorandum]; Affidavit of Harold Hillman, M.D., Ph.D. ¶ 19 [hereinafter Hillman-Bassette Memorandum Affidavit], Exhibit Z of Bassette Memorandum, supra; Affidavit of Harold Hillman, M.D., Ph.D. ¶ 8-15 [hereinafter Hillman-Poyner Stay Affidavit], Exhibit 10 of Application for Stay of Execution, Poyner v. Murray, 508 U.S. 931 (1993) (No. 92-7944) [hereinafter Poyner Stay]; Affidavit of E.B. Ilgren, M.D. ¶ 8-15 [hereinafter Ilgren-Jones Complaint Affidavit], Exhibit 5 of Jones Complaint, supra; Affidavit of E.B. Ilgren, M.D. ¶ 8-14 [hereinafter Ilgren-Poyner Reprieve Affidavit], Exhibit 5 of Syvasky L. Poyner, Petition for Temporary Reprieve 7, Poyner v. Murray, 508 U.S. 931 (1993) (No. 92-7944) [hereinafter Poyner Reprieve] (reviewing autopsy reports for 14 men electrocuted in Virginia's electric chair); Affidavit of E.B. Ilgren, M.D. ¶ 15 [hereinafter Ilgren-Poyner Stay Affidavit], Exhibit 12 of Poyner Stay, supra; Declaration of Robert H. Kirchner, M.D. ¶ 8-9 [hereinafter Kirchner-Jones Complaint Declaration], Exhibit 1 of Jones Complaint, supra; Affidavit of Donald D. Price, Ph.D. ¶ 15-30 [hereinafter Price-Jones Complaint Affidavit], Exhibit 4 of Jones Complaint, supra; Affidavit of Donald D. Price, Ph.D. ¶ 4-12 [hereinafter Price-Poyner Reprieve Affidavit], Exhibit 8 of Poyner Reprieve, supra; Affidavit of Donald D. Price, Ph.D. ¶ 4-10 [hereinafter Price-Poyner Stay Affidavit], Exhibit 13 of Poyner Stay, supra, see also Harold Hillman, An Unnatural Way to Die, New Scientist, Oct. 27, 1983, at 276, 278 ("In fact, there is no reason whatsoever to believe that the condemned person does not suffer severe and prolonged pain"); Harold Hillman, The Possible Pain Experienced During Execution by Different Methods, 22 Perception 745, 749 (1993) [hereinafter Hillman, Possible Pain] (noting the high intensity of the pain of electrocution compared to other execution methods). Necropsy reports indicate that the electric chair generally causes death by massive electrical damage to the nervous system. See Hillman, Possible Pain, supra, at 747; Dr. James Le Fanu, Health Second Opinion: A Shocking Way to Be Killed, Independent, Aug. 12, 1990, at 51.

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Leuchter notes in his Modular Electrocution System Manual,221 a nineteen-page instruction manual for operating his electric chairs, that an improper adherence to the Manual requirements "could result in pain to the subject and failure to achieve heart death, leaving a brain dead subject in the chair."222 Furthermore, voltages of less than 2000 volts, at saturation, cannot ensure heart death and are therefore inadequate because "they may cause unnecessary trauma to the subject prior to death."223 Leuchter's account supports arguments that even a routine electrocution can cause torture and a lingering death because of human error, a lack of experience and knowledge, or machine malfunction.224 Scant and unscientific protocols exacerbate these problems.225

Other experts also emphasize that the human skull can insulate the brain from an electric current,226 thereby preventing the current from penetrating the brain to cause unconsciousness or to destroy nerve activity.227 Because the electric current stimulates each muscle to full contraction, a prisoner cannot move even when the current is momentarily turned off, "a physiological effect that, in itself, is enormously painful and further prevents the prisoner from crying out or providing other outward signs of other massively painful effects of electrocution such as third degree burns and an enormous heating up of bodily fluids throughout the body."228

In some states, the more recent practice of administering a series of two or more electric jolts, then waiting to examine the prisoner's pulse, heightens the likelihood that death will have occurred by the time a physician checks for the heartbeat.229 Even under these circumstances, however, witnesses of botched executions have reported a substantial number of outward signs of life, such as gasps for breath, moans, and twitches of the hands.230 Moreover, research on the effects of electricity on the brain resulting from all kinds of causes—for example, lightning, electroconvulsive therapy, accidental electrocutions, and intentional electrocutions—indicates that during an intentional electrocution, an individual is very likely to: (1) experience intense pain, (2) die slowly, (3) evidence serious emotional trauma, and (4) remain conscious.231

222. Id. at 1.
223. Id.
224. See Bassette Memorandum, supra note 220, at 2.
225. See id. at 34 (describing the brevity of training materials).
226. See id. at 12.
229. See id. ¶ 13.
230. See id.; infra app. 2A (Electrocution) (listing botched electrocutions).
According to Orrin Devinsky, M.D., Professor of Neurology at the New York University Medical Center and Chief of Neurology at the Hospital for Joint Diseases, substantial evidence indicates that the effects of electrical current differ among individuals due to a range of factors: (1) skin resistance, (2) skull thickness and resistance, (3) the type of electrode used for stimulation, and (4) the type and amount of conductive solution applied. No study has definitively determined whether electrocution causes immediate brain death or pain.

In light of courts' emphasis on the probative value of eyewitness accounts of actual executions for establishing pain, Appendix 2A of this Article details eighteen botched electrocutions following Gregg v. Georgia, when the Supreme Court ended its moratorium on the death penalty. The number of post-Gregg botched electrocutions is likely to be a gross underestimate of the botches that have actually occurred because of the dearth of media witnesses. Nonetheless, these accounts provide considerable evidence of extensive pain and suffering experienced by electrocuted prisoners.

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on the physical effects of accidental and therapeutic electrocution, see Max Fink, M.D., Convulsive Therapy: Theory and Practice 51-57 (1979) (balancing the physiological risks of electroconvulsive therapy with the benefits); MacDonald Critchley, M.D., Electrical Injuries, 229 Lancet 1002 (1935) (report of a lecture by MacDonald Critchley before the Medical Society of London); MacDonald Critchley, M.D., Neurological Effects of Lightning and Electricity, 226 Lancet 68 (1934); Leston A. Havens, M.D., A Comparative Study of Modified and Unmodified Electric Shock Treatment, 19 Diseases Nervous Sys. 29, 32-34 (1959); G.W. Hume, Electric Shock and Subjective Sensation, 229 Lancet 1021 (1935); Fredric Panse, Electrical Trauma, in 23 Handbook of Clinical Neurology: Injuries of the Brain and Skull, Part I 683 (P.J. Vinken & G.W. Bruyn eds., 1975); A.H.D. Richmond, A Fatal Case of Electrocution, 228 Lancet 16 (1955).

232. Devinsky-Bassette Memorandum Affidavit, supra note 220, ¶ 3-4; Devinsky-Jones Complaint Affidavit, supra note 220, ¶ 3-4.


234. Id.

235. Id. ¶ 18; see also Price-Jones Complaint Affidavit, supra note 220, ¶ 30 (emphasizing "the absence of any objective, scientific evidence for immediate loss of consciousness").

236. See supra notes 179-83 and accompanying text.


238. See id. at 168-207.

239. See infra notes 266, 318 and accompanying text (citing instances where media witnesses were barred or discouraged from witnessing executions).

240. Notably, eyewitness accounts of pain are generally determined by a wide range of sources, including attorneys, reporters, prison personnel, politicians, family, friends, spiritual advisors and, when available, doctors conducting an autopsy. Unlike some of the evidence cited in Fierro v. Goméz, 865 F. Supp. 1387, 1400-02 (N.D. Cal. 1994), aff'd, 77 F.3d 301 (9th Cir.), vacated on other grounds, 117 S. Ct. 285 (1996) (remanding for reconsideration in light of changed statute), there are no records available that provide contemporaneous accounts of electrocutions systematically acquired by medical personnel, the data the Fierro district court considered most probative. Id. At the same time, however, extensive autopsy data collected from electrocuted inmates provide information that was not reported for the lethal gas executions analyzed in Fierro. Altogether, then, a substantial amount of evidence suggests that electrocutions can inflict pain, particularly when the electrocutions are botched.
b. "Nothing Less than" Human Dignity

Evidence of mutilation resulting from electrocution is derived from three sources: post-execution autopsies, which are required in some states; observations provided by experts; and witnesses’ descriptions of executions, some of which are detailed in Appendix 2.A of this Article. According to autopsy records and pictures, the mutilation results from excessive burning of the skin that removes chunks of flesh from the prisoner’s face and body and reveals leg and skull bone wherever an electrode was touching.\(^{241}\) Theodore Bernstein, a nationally known electrical engineer,\(^ {242}\) contends that faulty electrode designs can create “excessive, completely unnecessary burning of the person being executed.”\(^ {245}\)

Even if electrocution were instantaneous, it could still be considered unconstitutional given its effects on the human body, including: charring of the skin and severe external burning, such as the possible burning away of the ear; exploding of the penis; defecation and micturition, which necessitate that the condemned person wear a diaper; drooling and vomiting; blood flowing from facial orifices; intense muscle spasms and contractions; odors resulting from the burning of the skin and the body; and extensive sweating and swelling of skin tissue.\(^ {244}\) Moreover, condemned individuals feel considerable anxiety and fear while they are on death row, emotions that become more intense as the prospect of an execution nears.\(^ {245}\)

\(^{241}\) Some of the most extensive pictorial and autopsy evidence of burns and mutilation is provided in the briefs for Anthony Bertolotti. See App. to Petition for Writ of Habeas Corpus by Person in State Custody, Bertolotti v. Dugger, No. 90-559-CIV-ORL-18 (M.D. Fla., July 23, 1990) [hereinafter Bertolotti Petition] (providing post-mortem pictures of numerous death row inmates who have been executed); see also Ron Wikberg, Death Watch: The Horror Show, Angolite, Sept.-Oct. 1990, at 25, 33-37 (describing, among other things, the mutilated bodies of Robert Wayne Williams and Wayne Robert Fels, who died in Louisiana’s electric chair in 1983 and 1988, respectively).

\(^{242}\) Wikberg, supra note 241, at 40-41. Bernstein holds B.S., M.S., and Ph.D. degrees in electrical engineering from the University of Wisconsin. His interest in the history of electrocution began with his studies on the effects of electricity and lightning on humans. He also worked with Boeing in Seattle, with the AC Electronics Division of General Motors Corporation in Milwaukee, and with TRW Systems in Redondo Beach, California. He recently retired from the faculty of the University of Wisconsin, where his major interests were in electrical and lightning safety. He has been qualified as an expert in electrical engineering and lightning in over 15 state and federal courts. Id. Currently, Bernstein is a consulting electrical engineer. See Bernstein-Jones Complaint Declaration, supra note 220, ¶ 1-3.

\(^{243}\) Wikberg, supra note 220, at 40; see also Bernstein-Jones Complaint Declaration, supra note 220, ¶¶ 7-9; Affidavit of Theodore Bernstein, Ph.D., Exhibit of Kirkpatrick v. Whitley, 1991 U.S. Dist. LEXIS 7387 (E.D. La. May 29, 1991) (No. 91-0502), vacated and remanded, 992 F.2d 491 (5th Cir. 1993).


\(^{245}\) See Lackey v. Texas, 115 S. Ct. 1421, 1421-22 (1995) (discussing the horrible feelings
The 1990 execution of Wilbert Lee Evans in Virginia was particularly offensive because of the physical violence that electrocution inflicted on his body. According to accounts by witnesses and reporters, blood poured from Evans’ eyes and nose, drenching his shirt.246 The flames witnessed during the 1990 execution of Jesse Joseph Tafero and the 1997 execution of Pedro Medina made the public explicitly aware of how a human body could be burned and distorted during an electrocution.247 The body of Wayne Robert Felde, who died in Louisiana’s electric chair in 1988, showed such severe third and fourth degree burns that “chunks” of his skin had been burned off the left side of his head, revealing his skull bone.249

c. The Risk of “Unnecessary and Wanton” Pain

When legislatures or courts validate the use of electrocution, they presume that prison officials will carry out executions properly and that equipment will not malfunction. An assessment of the risk of unnecessary and wanton pain, however, comports with the Fierro district court’s focus on the execution “procedure as a whole and over time.”250 It therefore recognizes the potential for prison personnel’s contributions to a risk, either in terms of their administration of an execution, the quality of their protocols, or their deliberate indifference to a risk.

In 1990, for example, the botched electrocution of Jesse Joseph Tafero in Florida251 suggested there was a substantial likelihood the state’s execution procedure could result in severe pain and prolonged agony.252 Yet, the District Court of the Middle District of Florida held in Hamblen v. Dugger253 that James William Hamblen would not be entitled to an evidentiary hearing on such a claim.255 The court based its decision on the factual findings of a prior evidentiary hearing254 and determined

of uncertainty that can arise during the time of incarceration preceding an execution); Robert Johnson, Death Work: A Study of the Modern Execution Process 83-109 (1990) (describing reports of fear and anxiety by those on death row).
246. See id. app. 2.A (Describing Wilbert Lee Evans).
247. See id. (Electrocution: Jesse Joseph Tafero, Pedro Medina).
250. See id. app. 2.A (Electrocution: Jesse Joseph Tafero) (describing in detail the results of the botched Tafero execution).
253. Id. at 2197-04.
254. Id. at 1501 (citing Buenoano v. Dugger, No. 90-483-CIV-ORL-12, at 70-82 (M.D. Fla.,
the Director of Corrections’ repairs to the electric chair precluded the likelihood of future problems. Moreover, Florida’s record of executions put Tafero’s botch “in the category of a single, unforeseeable accident.” Using Alabama’s experiences as an example, the Hamblen court determined that “[i]f a pattern of malfunctions develops, perhaps even as few as two consecutive or nearly consecutive executions, then it may become appropriate to consider whether the application of electrocution in Florida is infected with ‘an element of cruelty.’”

Unfortunately, a pattern of consecutive malfunctions was established this year when Pedro Medina’s Florida electrocution was botched. As the following accounts indicate, Tafero’s and Medina’s executions shared similar problems.

Jesse Joseph Tafero, May 4, 1990 (Florida). For four minutes, the hooded executioner applied three 2000-volt jolts of electricity to Tafero’s body. Until the last jolt Tafero “continued to clench his fists, nod, convulse and appear to breathe deeply . . . as if he were alive.” The jolts then sparked a fire on Tafero’s head with six-to twelve-inch flames that filled the execution chamber with smoke. The fire also caused ashes, “flames and smoke clouds to fly from [Tafero’s bobbing] head during each of the three surges” while “his throat produced gurgling sounds.” Witnesses and reporters were shocked by the incident, which created statewide newspaper headlines the next day.

Pedro Medina, March 25, 1997 (Florida). “Immediately” after the executioner applied the electricity, Medina “lurched backward into the chair and balled his hands into fists” while his mask “burst into flames.” According to witnesses, “[b]lue and orange flames up to a foot long shot from the right side of Mr. Medina’s head and flickered for 6 to 10 seconds, filling the execution chamber with smoke.” The “smell of burnt flesh filled the witness room.” Four minutes later, Medina was pronounced dead. Corrections Department spokesperson Kerry Flack explained that “a maintenance supervisor wearing electrical gloves patted out the flames while another official opened a window to disperse the smoke.” Witnesses described the scene as “ghastly.” Others claimed they were “nauseated by the sight and the smell.” “It was horrible. A solid flame covered his whole head from one side to the other. I had the impression of somebody being burned alive,” stated one witness.


255. Id. at 1503.
256. Id. at 1504.
257. Hamblen, 748 F. Supp. at 1504 (emphasis added); see also Squires v. Dugger, 794 F. Supp. 1568, 1580 (M.D. Fla. 1992) (“[A]n occasional malfunction that may produce added anguish does not establish that a method of execution is unconstitutional. Absent a showing establishing a pattern of malfunctions . . . the Court cannot conclude that unnecessary pain is being inflicted during executions in the Florida electric chair.” (citation omitted)).
258. See infra app. 2A (Electricution: Jesse Joseph Tafero).
259. See id. (Electricution: Pedro Medina).
The range and variety of official explanations for Tafero's and Medina's electrocutions were also similar. Officials pointed to difficulties with insufficient electrical current and voltage; problems with the sponge in the headset; defects with the electrodes and overall mechanical failure; as well as evidence that both men failed to die instantly or painlessly as prison doctors contended.\(^\text{260}\) Ironically, Tafero's and Medina's executions resembled William Kemmler's, which took place over a century ago.\(^\text{261}\)

A pattern of consecutive botching also occurred in Virginia even after the state rewired the electric chair due to prior botching. Nonetheless, Virginia still retains electrocution as a choice method.\(^\text{262}\)

In general, the Hamblen court failed to recognize the Fierro district court's reasoning that an execution method should be evaluated "as a whole and over time,"\(^\text{263}\) rather than as a discrete execution event specific to a particular time and state. Not only do most states (such as Florida and Virginia) possess the same kinds of execution equipment, but prison officials are aware of the problems occurring elsewhere.\(^\text{264}\)

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260. See id. (Electrocution: Jesse Joseph Tafero, Pedro Medina).
261. According to a New York Times reporter's account of Kemmler's August 6, 1890, execution in New York,

"After the first convolution there was not the slightest movement of Kemmler's body. . . . Then the eyes that had been momentarily turned from Kemmler's body returned to it and gazed with horror on what they saw. The men rose from their chairs impulsively and groaned at the agony they felt. "Great God! he is alive?" some one said; "Turn on the current," said another . . . ."

Again came that click as before, and again the body of the unconscious wretch in the chair became as rigid as one of bronze. It was awful, and the witnesses were so horrified by the ghastly sight that they could not take their eyes off it. The dynamo did not seem to run smoothly. The current could be heard sharply snapping. Blood began to appear on the face of the wretch in the chair. It stood on the face like sweat . . . .

An awful odor began to permeate the death chamber, and then, as though to cap the climax of this fearful sight, it was seen that the hair under and around the electrode on the head and the flesh under and around the electrode at the base of the spine was singeing. The stench was unbearable.

See Far Veras, supra note 92, at 1. Officials' explanations for Kemmler's botched execution also resembled the explanations provided for the Tafero and Medina botches. See Denno, supra note 5, at 601-02.

262. In Bassette v. Commonwealth, No. 3:92CV17 (E.D. Va. Jan. 23, 1992), Herbert R. Bassette, who was eventually removed from death row, see Arthur Hodges, Bassette Escapes His Date with Death, Richmond Times-Dispatch, Jan. 24, 1992, at A1, challenged the constitutionality of Virginia's use of the electric chair. See Bassette Memorandum, supra note 220, at 2. Among other things, Bassette contended that a botched electrocution was highly foreseeable because 2 out of the last 5 electrocutions in Virginia had been bungled. Id. at 2 n.1. Moreover, before Virginia rewired its electric chair in 1990 due to complaints that the chair was antiquated, the state experienced 2 botched electrocutions out of 11, or 18%; yet after the chair's rewiring, Virginia experienced an even higher botch ratio—1 botched electrocution out of 2, or 50%. See id. at 40-41.


264. See infra app. 2.A (Electrocution) (demonstrating that many officials admit to making
According to Michael Radelet, Professor of Sociology at the University of Florida, nearly nine percent of all media-reported executions (for all execution methods) since Gregg have been botched. Detailed accounts of these and other botches are provided in Appendix 2A-C of this Article. Radelet's and this Article's calculations of botches are limited, however, because not all executions are media-witnessed or reported systematically. Regardless, these estimates highlight the need to assess botches in the aggregate. Furthermore, the evidence on botched executions suggests that the risk of a botch within some states approaches the Farmer Court's standard of deliberate indifference—the risk is "longstanding, pervasive, well-documented, or expressly noted by prison officials in the past, and that the circumstances suggest that the defendant-official... had been exposed to information concerning the risk and thus 'must have known about it.'"

3. "Standards of Decency" and Legislative Trends

According to the Fierro district court's interpretation of Campbell, a state should examine legislative trends if evidence of pain inflicted by an execution method is "not dispositive." This Article's assessment of

errors and that the officials are aware of them occurring in other states). For example, Florida corrections officials were aware of the problems with electrocution from accounts of Alabama's botched execution of Horace F. Dunkins. See Sean Loughlin, Miswiring Requires Second Electroction, Gainesville Sun (Fla.), July 15, 1989, at 1A. Yet, officials said such a malfunction at Florida State Prison would be unlikely to occur because they would "do everything possible to make sure it does not." Id. at 8A (quoting the assistant superintendent for operations at Florida State Prison).

265. See Fernandez, supra note 110, at A14. Radelet's estimate was based on his scrutiny of the 168 media-witnessed executions that occurred prior to the April 1992 execution of Robert Alton Harris. Of those 168 executions, 15, or 8.9%, were botched. Id. Of the 15 executions that were botched, 7 were by electrocution, 7 by lethal injection, and 1 by lethal gas. Id. For a depiction of Radelet's active involvement in death penalty cases, see Von Drehi, supra note 21, at 280-82, 320, 355, 378, 383, 388-90; see also Affidavit of Michael L. Radelet [hereinafter Radelet-Jones Complaint Affidavit], Exhibit 6 of Jones Complaint, supra note 220 (describing botched electrocution executions).

266. For example, until 1988, the Commonwealth of Virginia barred the media from witnessing executions. Bassette Memorandum, supra note 220, at 3. This year, the Northern District of California held that prison officials' exclusion of the public's and media's witnesses from critical phases of the lethal injection process violated the First Amendment in light of officials' curtailment of witnesses' abilities to view the 1996 execution of William Bonin. See California First Amendment Coalition v. Calderon, 956 F. Supp. 883, 883-890 (N.D. Cal. 1997). Recently, some major news organizations in Texas have stopped sending reporters to cover executions simply because executions have become too frequent. See Sam Howe Verhoven, As Texas Executions Mount, They Grow Routine, N.Y. Times, May 25, 1997, at 1, 22.

267. Farmer v. Brennan, 511 U.S. 825, 842 (1994). Even though the Farmer Court's standard pertains to the risk of inmate attacks, the Court did not suggest that it should be limited only to this circumstance. Furthermore, the likelihood of a botched execution can be estimated far more accurately than the likelihood of an inmate attack, given that the former is based on more readily identifiable and objective criteria.

electrocution suggests that evidence of pain, the risk of pain, and the loss of human dignity are dispositive. Nonetheless, this section evaluates standards of decency (D) as the third factor in Table 2’s execution methods test in light of possible challenges to this interpretation.

A thorough assessment should consider legislative changes in execution methods over the course of the Twentieth Century, starting after the Kemmler Court’s decline to review the constitutionality of the New York legislature’s selection of electrocution. Tables 3-7 (Appendix 1), and their supporting materials (Appendix 3), provide unprecedented documentation of century-long legislative changes for each state for all five methods of execution.269 Tables 3 and 4 show changes in every execution method for each state; Tables 5-7 illustrate states’ changes in execution methods as a whole, starting with an overview of the century-long pattern in Table 5, and particular states’ changes in Tables 6 and 7.270

Three themes emerge from an overview of legislative trends. First, most state legislatures purport to change from one method of execution to another, or to a choice between a state’s old method and lethal injection, for humanitarian reasons. However, other factors (for example, cost) can also influence the legislature’s decision. Second, legislatures evidence a fairly consistent pattern of movement from one method to another, suggesting states take notice of the methods used and the difficulties encountered by other states. Third, since 1977 when lethal injection was first introduced, no state has changed to, or included as a choice, any other method of execution. This Article will discuss whether such adherence to lethal injection is warranted.

a. From Hanging to Electrocution and Lethal Gas

In 1853, hanging—the “nearly universal form of execution”—was used in forty-eight “states.”271 Nearly four decades later, however, states began

269. See In re Kemmler, 136 U.S. 436, 443 (1890).

270. All materials focus on when legislatures enacted changes in a method of execution, not on the effective dates of those changes nor on the state-wide effects of Supreme Court decisions, such as Furman and Gregg. For example, Appendix 1, Tables 3 and 4, infra, which document legislative changes only, do not reflect the fact that the Massachusetts judiciary has abolished the death penalty or that, until 1985, New York’s governor had always vetoed the death penalty. However, Appendix 3, infra, does document state courts’ limits or bans on death penalty statutes or execution methods. Appendix 3 also details the reasons for legislative changes, using materials recommended by the Fiero district court—statutes, legislative histories, cases, and newspaper articles. See Fiero, 865 F. Supp. at 1407.

271. Campbell v. Wood, 511 U.S. 1119 (1994) (Blackmun, J., dissenting from denial of certiorari) (quoting State v. Frampton, 627 P.2d 922, 934 (Wash. 1981)); see also infra app. 3 (detailing when each state enacted a hanging statute). Of course, in 1853, a number of “states” were still territories. See The World Almanac and Book of Facts 542 (Robert Famighetti ed., 1997) [hereinafter The World Almanac] (listing when states entered the Union and showing that, in 1853, 19 states were still territories). Justice Blackmun is referring to the current designation of these territories as states.
to switch to electrocution following Kemmler. By 1913, the year preceding the outbreak of World War I, a total of fifteen states had changed to electrocution as a result of "a well-grounded belief that electrocution is less painful and more humane than hanging." By 1949, twenty-six states had changed to electrocution, although no state thereafter selected electrocution as its method of execution. Those states authorizing exceptions to this hanging-to-electrocution pattern solely for the crime of rape may well have been racially motivated.

272. See infra app. 1, tbls. 3-7; app. 3 (discussing changes in execution methods).
274. See infra app. 1, tbls. 3-7; app. 3 (outlining the various states' execution methods). Between the turn of the century and the time when America was entrenched in World War I in 1917, see Thoumin, supra note 275, at 347, came an era of increasing support for feminism, prohibition, prison reform, and abolition of the death penalty. See William J. Bowers, Legal Homicide: Death as Punishment in America, 1864-1982, 10 (1984). As Appendix 1, Table 3, infra, shows, nine states abolished the death penalty during the years between 1910 and 1917. Yet, most of these periods of abolition were short-lived for several reasons: (1) the changing mood that accompanied American involvement in World War I, see Bowers, supra, at 10; (2) the unprecedented "crime wave" during the Roaring Twenties and the Great Depression, see The Death Penalty in America 22 (Hugo Bedau ed., 3d ed. 1982); and (3) the fear of vigilantism, see infra app. 3 (e.g., Arizona's death penalty was reinstated in a landslide referendum after the lynching of a murderer/rapist was blamed on the governor and his followers during the abolition movement.). As Appendix 1, Tables 3 and 4, infra, and Appendix 3, infra, indicate, there was no abolition of the death penalty after 1916 until Delaware's abolition in 1958. (Hawaii and Alaska abolished the death penalty in 1956 and 1927, respectively, but neither gained statehood until 1959. Thus neither was ever a death penalty state.).
276. See infra app. 1, tbls. 3-7; app. 3.
277. For example, both Kentucky and Arkansas, which changed from hanging to electrocution in 1910 and 1913, respectively, retained public hangings for persons convicted of rape. See infra app. 3. Kentucky returned to public hanging for rapists between 1920 and 1938, "presumably as a less humane method of execution," in response to a heinous child rape. Bowers, supra note 274, at 12, 18 n.c. In 1915, Tennessee abolished the death penalty for murder, but not for rape. In 1918, Virginia provided that when the death sentence had been imposed for rape (or attempted rape), the body was not to be delivered to the condemned's relatives. See infra app. 3.
278. On the surface, these policies appear to reflect the public perception that rape was a more serious crime than murder and therefore warranted a "symbolically disproportionate" penalty. Yet, before the Supreme Court held that the death penalty for rape was unconstitutional in Coker v. Georgia, 433 U.S. 584, 592 (1977), a grossly disproportionate number of blacks were executed for rape relative to whites. This disproportionality has been particularly evident for the alleged rapes of white women by black men. See Susan Brownmiller, Against Our Will: Men, Women and Rape 230-38 (1975) (analyzing the historical relationship between race and rape); Leon Higginbotham, Jr. & Anne F. Jacobs, The "Law Only As An Enemy": The Legitimization of Racial Powerlessness Through the Colonial and Antebellum Criminal Laws of Virginia, 70 N.C. L. Rev. 969, 1057-60 (1992) (discussing the implicit and explicit bias against black men who raped or were accused of raping a white woman in Virginia and throughout the past); Jennifer Wiggins, Rape, Racism, and the Law, 6 Harv. Women's L.J. 103, 104-17 (1983) (examining "the historical legacy of the racist social meaning of rape and its consequences"). In one extensive study of 3000 rape convictions in 11 southern states between 1945 and 1965, researchers found that blacks were seven times more likely to receive the death penalty than whites. See Marvin E. Wolfgang & Marc Riedel, Race, Judicial Discretion, and The Death Penalty,
The gradual cessation of states’ adoption of electrocution appears to be attributable to Nevada’s switch in 1921 from hanging and shooting to lethal gas in accordance with the state’s new Humane Death Bill. Two years later, the Supreme Court of Nevada rejected a claim that the state’s lethal gas statute inflicted cruel and unusual punishment. Following Nevada’s lead, both Arizona and Colorado switched from hanging to lethal gas in 1933.

Of all the years during the century, however, 1935 appears most intriguing in terms of states’ uses of execution methods; perhaps the effects of the Great Depression led to a record high that year of 199 executions. Whereas three states changed their methods of execution, their patterns varied, illustrating what was, at that time, no clear method of choice.

407 Annals Am. Acad. Pol. & Soc. Sci. 119, 129-30 (1973). A black who was convicted of raping a white woman, however, was 18 times more likely to be executed compared to a black convicted of raping a black, a white convicted of raping a white, or a white convicted of raping a black woman. Id. Altogether, 405 of the 445 men who were executed for rape in this country were black. Higginbotham & Jacobs, supra, at 1060. Indeed, nine men, eight of them black, were publicly hanged for rape during Kentucky’s 18 year regression from electrocution to public hanging only for the crime of rape. Bowers, supra note 274, at 442, 445. Thus, what appears on the surface to be symbolic disproportionality for the crime of rape, may actually be reflecting the use of execution methods for the purpose of institutionalizing racial prejudice, a subject that is discussed further in this Article. See infra notes 470-77 and accompanying text.

279. See infra app. 1, tbls. 3-7; app. 3.

280. See State v. Gee Jon, 211 P. 676, 682 (Nev. 1923). The court emphasized two points: (1) the legislature “sought to provide a method of inflicting the death penalty in the most humane manner known to modern science,” id; see also Robert A. Maurer, Death by Lethal Gas, 9 Geo. L.J. 50, 51 (1921) (noting that “It would appear that the Nevada statute would be upheld as another attempt by a legislature to find a still more humane method of execution than by electrocution and the other methods now in use.”); and (2) prison officials administering the gas would also “carefully avoid inflicting cruel punishment” when selecting the type of gas to use, since it was unspecified in the statute. See Gee Jon, 211 P. at 682; see also Raymond Hartmann, The Use of Lethal Gas in Nevada Executions, 8 St. Louis U. L.J. 167, 168 (1923) (expressing support for the Nevada statute despite concerns that the lack of specification for the type of gas might introduce error on the part of prison officials, who may inadvertently select a type of gas that would inflict pain and suffering).

281. See infra app. 1, tbls. 3-7; app. 3.

282. Bowers, supra note 274, at 15, 22; The Death Penalty in America, supra note 274, at 25; see also John F. Galliher et al., Criminology: Abolition and Reinstatement of Capital Punishment During the Progressive Era and the Early 20th Century, 83 J. Crim. L. & Criminology 538, 571 n.240 (1992) (noting that in 1935, the state representative of Kansas who proposed the death penalty bill cited “the loss of lives in the state in the wave of crime” as the reason for reinstating the death penalty). This high number of executions declined after 1935. Notably, there were fewer prisoners sentenced to death in the 1960s than there were executions in the 1930s, despite similar numbers of homicides during these two time periods. Bowers, supra note 274, at 15 (explaining that there was an average of 106 admissions to death row per year from 1961-70, and an average of 167 executions per year during the 1930s).

283. Connecticut changed from hanging to electrocution. Wyoming changed from hanging to lethal gas. North Carolina changed from electrocution to lethal gas, the only state to make that change while electrocution was still being selected by other states. See infra app. 3 (summarizing the states’ legislative changes in execution methods and their statutory
Thereafter, lethal gas surpassed electrocution as the preferred new method even though electrocution was, and still is, used by more states. By 1955, eleven states were using lethal gas and twenty-two states were using electrocution.\(^{284}\) Since 1973, however, no state has selected lethal gas.\(^{285}\)

With each new lethal gas statute came controversy and constitutional challenges, both before\(^{286}\) and after\(^{287}\) the Furman Court's moratorium on capital punishment, as well as directly prior to Fierro in the context of the controversial case of Robert Alton Harris.\(^{288}\) Indeed, Jesse Bishop, the
first person to die from lethal gas following *Gregg* in 1979, appeared to experience such pain and agony that Nevada abolished lethal gas and changed to lethal injection.\(^{289}\) As the *Fierro* district court noted, by 1994 there was a national consensus concluding that lethal gas was not an acceptable execution method.\(^{290}\) Yet, some of the *Fierro* court's rationales for why states have abandoned lethal gas more frequently than electrocution failed to consider other factors that may contribute to this discrepancy.\(^{291}\) As the next section discusses, there is also a particularly striking national consensus rejecting electrocution that has solidified in recent years.

### b. Comparing Electrocution to Lethal Gas

The *Fierro* district court's comparison of legislative trends between 1970 and 1992 emphasized that in 1992, Maryland was the sole lethal gas-only state whereas there were ten lethal gas-only states in 1970.\(^{292}\) This

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289. *See infra* app. 2.B (Lethal Gas) and app. 3 (noting post-*Gregg* botched executions by lethal gas and statutory documentation of legislative changes in execution methods).


291. *See infra* note 289 and accompanying text (stating that electrocution is quickly approaching the level of repugnancy established by lethal gas).

292. *Fierro*, 865 F. Supp. at 1405. In 1970, these 10 states were Arizona, California, Colorado, Maryland, Mississippi, Missouri, Nevada, New Mexico, North Carolina, and Wyoming. *Id.* The *Fierro* court excluded Oklahoma from its list of 1970 lethal gas-only states, even though Oklahoma did enact a lethal gas statute in 1951. Most likely, the court considered Oklahoma to be an electrocution-only state in 1970 because Oklahoma never actually constructed a lethal gas chamber, whereas it actually did apply electrocution. Also, because the *Fierro* court focused on states' uses of execution methods in 1970 as compared to 1992, it did not mention that Rhode Island became the last lethal gas-only state in 1975. Rhode Island eventually abolished the death penalty in 1984. *See infra* app. 1, tbls. 3-7; app. 3 (Rhode Island). The fact that both Oklahoma and Rhode Island changed their lethal gas-only statutes, however, provides further support for the *Fierro* court's conclusion that there is a national consensus rejecting lethal gas as a viable method of execution.

The *Fierro* court asserted that states' rejection of lethal gas as an execution method from 1970 to 1992 was "dramatically higher" than their rejection of other methods of execution. *Fierro*, 865 F. Supp. at 1405. For example, of the 25 states in 1970 (other than California) that had a method of execution other than lethal gas, 14 (56%) switched to lethal injection-only or some choice between their older method and lethal injection by 1992. *Id.* These 14 states were Arkansas, Delaware, Idaho, Illinois, Louisiana, Montana, New Hampshire, New Jersey, Oklahoma, Pennsylvania, South Dakota, Texas, Utah, and Washington. The 11 states that retained their old method of execution as their sole means of execution were Alabama, Connecticut, Florida, Georgia, Indiana, Kentucky, Nebraska, Ohio, South Carolina, Tennessee, and Virginia. *See* Franklin Zimring, Table 1: Current Method of Execution by Pre-*Purman*
Article's 1997 update of the *Fiero* district court's analysis shows that currently no lethal gas-only states exist.\(^\text{293}\) Thus, Maryland's recent change renders incontrovertible the *Fiero* court's contention that a national consensus rejects lethal gas.

The update also shows that during the three year period since the *Fiero* district court's analysis, states have made substantial changes with regard to their rejection of electrocution. Five electrocution-only states have changed either to lethal injection-only or to a choice between electrocution and lethal injection.\(^\text{294}\) Therefore, of the twenty-five states in 1970 (other than California) that had a method of execution other than lethal gas, a total of nineteen (76%) switched their method to lethal injection or some choice between their method and lethal injection by 1997.\(^\text{295}\) This switch represents a 20% increase over the 56% figure cited by the *Fiero* court. Additional comparisons counter the *Fiero* court's claim that states' rejection of lethal gas is also "more pronounced" than their rejection of electrocution\(^\text{296}\) or that "[t]he experience of a gas execution

Method in Current Death Penalty States (California Excluded) (used to aid Zimring's expert testimony in *Fiero*) (on file with the author). In comparison, 8 (89% percent) of the 9 states (other than California) that had lethal gas as a method of execution in 1970 had changed their method of execution by 1992. *Fiero*, 865 F. Supp. at 1406. All states (100%) had changed by 1994. California was excluded from the legislative trend analyses presented in *Fiero* because California's application of execution methods was the subject of the litigation. See Transcript of Proceedings 3-151, *Fiero* v. Gomez, 865 F. Supp. 1387 (N.D. Cal. 1994) (No. C-92-1482) (testimony of Professor Franklin E. Zimring concerning why California was excluded from analysis), aff'd, 77 F.3d 301 (9th Cir.), vacated on other grounds, 117 S. Ct. 285 (1996) (remanding for reconsideration in light of changed statute).

293. Maryland changed to lethal injection soon after the *Fiero* trial. The *Fiero* district court took judicial notice of Maryland's change. *Fiero*, 865 F. Supp. at 1406. With one exception, this Article's 1997 update reflects states' uses of and changes in execution methods up to August 1, 1997, shortly before this Article went to press. The one exception concerns this Article's decision to exclude Kentucky's electrocution of Harold McQueen on July 1, 1997. See Death Penalty Information Center, Executions in the U.S. Since 1976, 6 (June 25, 1997). This decision was based on a number of considerations: (1) McQueen's electrocution was Kentucky's first execution since 1962; and (2) "more than likely," Kentucky will switch to lethal injection either this fall (if a special legislative session is held) or in January, 1998. See Telephone Interview with Norman W. Lawson, Jr., Staff Administrator for the Judiciary Committee of the Legislative Research Commission, Lexington, Kentucky (July 28, 1997). Given the prospect of Kentucky's change to lethal injection, including it as an "active" electrocution state would inappropriately exaggerate states' uses of electrocution. As it stands, Kentucky's switch will further support this Article's contention that a national consensus rejects electrocution.

294. These states are, in order of date of change, Ohio, Virginia, Connecticut, Indiana, and South Carolina. See infra app. 1, tbl. 3-7; app. 3 (summarizing legislative changes in execution methods).

295. See supra note 292 for a list of these 25 states. New York changed from electrocution to lethal injection in 1995. However, the *Fiero* court did not include New York among the 25 states in 1970 that had a method of execution. Until 1995, the death penalty in New York had long periods of judicial abolition. See infra app. 3 (New York) (summarizing documentation of legislative changes in execution methods).

296. *Fiero*, 865 F. Supp. at 1406. Altogether, 11 (58%) of the 19 states that used
appears to have a very different effect on legislative behavior than the experience of an execution by electrocution." Although there is more state-wide repugnance to lethal gas, states are also rapidly abandoning electrocution.

Electrocution as the sole means of execution in 1970 also retained electrocution as the sole means of execution in 1992. These 11 states are Alabama, Connecticut, Florida, Georgia, Indiana, Kentucky, Nebraska, Ohio, South Carolina, Tennessee, and Virginia. See Franklin Zimring, Table 2: Adoption of Lethal Injection as Choice or Sole Means of Execution, by Prior Method of Execution (California Excluded) (used to aid Zimring's expert testimony in Fiero) (on file with the author). Yet, as already stated, only 1 (11%) of the 9 states other than California that retained lethal gas as the sole method of execution in 1970 also retained lethal gas during 1992. Fiero, 865 F. Supp. at 1406. By 1994, no state had retained lethal gas. Once again, however, this situation has changed quite dramatically for electrocution. Only 6 (32%) of the 19 states that used electrocution as the sole means of execution in 1970 have retained electrocution as the sole means in 1995. These six states are Alabama, Florida, Georgia, Kentucky, Nebraska, and Tennessee. This change represents a 26% reduction in the figure provided in Fiero.

297. Fiero, 865 F. Supp. at 1406. Of the nine lethal gas-only states in 1970 other than California, three had actually executed an inmate by 1992; however, none of those three states retained lethal gas after these executions. Id. These three states were Arizona, Mississippi, and Nevada. See Franklin Zimring, Table 3: Impact of Post-Gregg Execution Experience on Retention of Means of Execution, by Method of Execution (California Excluded) (used to aid Zimring's expert testimony in Fiero) (on file with the author). An update of the Fiero district court's analysis provides additional support for the court's conclusions concerning lethal gas. Since 1992, Maryland, one of the nine lethal gas-only states in 1970, executed an inmate. After the execution, Maryland decided not to retain lethal gas. Maryland's decision raises from three states to four the number of states abandoning lethal gas following a lethal gas execution. These four states are Arizona, Maryland, Mississippi, and Nevada. See Death Penalty Information Center, supra note 293; NAACP Legal Defense and Educational Fund, Inc., Death Row, U.S.A. (July 31, 1996). The Fiero district court noted other evidence supporting a "national consensus against lethal gas executions," including legislative histories, newspaper reports of legislative decisions, and public opinion polls. Fiero, 865 F. Supp. at 1407. In addition, the court discounted other factors possibly explaining states' primary motivations for rejecting lethal gas, such as the appeal of lethal injection as an alternative or injection's potentially lower cost, because electrocution-only states had not made comparably rapid switches to injection and had not conducted a cost analysis of injection. Id.

Of the 19 electrocution-only states existing in 1970, 7 (37%) had executed an inmate by 1992; yet, 6 of those 7 (86%) states retained electrocution as their sole method of execution after these executions. Id. at 1406. An update of the Fiero court's analysis indicates that electrocution-only states are beginning to exhibit a pattern comparable to lethal gas-only states. Although no additional electrocution-only states have executed an inmate other than the 7 already mentioned, only 3 of those 7 (43%) have retained electrocution as their sole method of execution, more than a 40% reduction in the figure provided by the Fiero court. These three states are Alabama, Florida, and Georgia. See Death Penalty Information Center, supra note 293. Arkansas now requires lethal injection, and Virginia and South Carolina allow a choice between lethal injection and electrocution. See infra app. 1, tbls. 3-7; app. 3 (summarizing legislative changes in execution methods).

298. Although this Article supports the Fiero district court's contention that lethal gas is more repugnant than electrocution, it also claims there is a national consensus rejecting electrocution and that states' reluctance to abandon electrocution may be due to various factors. First, over the course of the century, states have incorrectly relied on Kemmler to support the retention of electrocution whereas no Supreme Court case has even addressed the constitutionality of lethal gas. See In re Kemmler, 136 U.S. 458 (1890); supra notes 78-90.
c. Establishing a "National Consensus"

The results of this Article's 1997 update suggest that state legislatures may have reached a sufficient degree of national consensus to find both lethal gas and electrocution unconstitutional. Although the Supreme Court has never specified how much of a consensus is considered "sufficient," it has rendered unconstitutional punishments with far less consensus than that shown for lethal gas or electrocution. In *Enmund v. Florida,* for example, the Court held the death penalty unconstitutional for some kinds of felony murder, explaining that of the thirty-six death penalty jurisdictions, "only" eight, "a small minority," allowed capital punishment for such an offense. Furthermore, even if the Court considered along with these eight an additional nine jurisdictions that allowed the death penalty for an unintended felony murder if aggravating circumstances outweighed mitigating circumstances, the Court emphasized that still "only about a third of American jurisdictions" would allow a defendant to be sentenced to death for such offenses. The Court noted that even though this trend was "neither wholly unanimous among state legislatures," nor as striking as the trends presented in *Coker v. Georgia,* "it nevertheless weigh[s] on the side of rejecting capital punishment for the crime at issue." In those cases where the Court has rejected Eighth Amendment challenges to a particular punishment, there has been far less disparity between the number of states retaining or rejecting that punishment. In sum, then, electrocution appears to be not simply cruel, but

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and accompanying text (detailing courts' inappropriate and antiquated reliance on *Keenmeyer*). Next, electrocution was introduced three decades earlier than lethal gas during a time when science was substantially less advanced; therefore, lethal gas, which was also considerably more visible than electrocution, had the advantage of greater immediate scrutiny. Nonetheless, electrocution and lethal gas have similar "legislative lifelines" (61 and 52 years respectively) between the point at which they were introduced and the point at which they were no longer used. Electrocution was first introduced in 1888 and last adopted in 1949; lethal gas was first introduced in 1921 and last adopted in 1973. These comparable time spans suggest comparable periods of intolerance. Finally, lethal gas is more expensive than electrocution, a factor that states have acknowledged when they have changed execution methods. See infra app. 3 (summarizing documentation of legislative changes in execution methods).

300. There have been interesting empirical attempts to test societal consensus and proportionality. See e.g., Catherine A. Crosby et al., *The Juvenile Death Penalty and the Eighth Amendment,* 19 Law & Hum. Behav. 245 (1995) (empirically examining societal consensus and proportionality of juvenile death penalties).
302. Id. at 792.
303. Id. (emphasis added).
304. 453 U.S. 584, 595-96 (1977) (invalidating the death penalty for the rape of an adult woman, emphasizing that Georgia was the sole jurisdiction that had such a punishment, and that only two other jurisdictions authorized such a punishment when the victim was a child).
305. *Enmund,* 458 U.S. at 793.
306. See e.g., Penry v. Lynaugh, 492 U.S. 302, 384-35 (1989) (rejecting a challenge to the constitutionality of the death penalty for mentally retarded persons, emphasizing that only two
also unusual.

One last issue bears on the standards of decency factor. Both electrocution and lethal gas are considered unacceptable methods of euthanasia for animals. This fact highlights the irony that death row inmates can be executed by a method prohibited for use on stray, unwanted, or ill animals to ensure that such animals do not suffer needlessly.

The next section of this Article analyzes the fourth factor in Table 2's execution methods test—whether there are alternative execution methods (A) that would render unnecessary the pain involved in electrocution. The section focuses on lethal injection, currently the most widely-used execution method, as well as the method the public most favors in opinion polls.

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states had prohibited it); Stanford v. Kentucky, 492 U.S. 361, 370-72 (1989) (rejecting a challenge to the constitutionality of the death penalty for 16 year-olds, noting that 22 of the 37 death penalty jurisdictions allowed capital punishment for such youths); Tison v. Arizona, 481 U.S. 137, 154 (1987) (rejecting a challenge to the constitutionality of the death penalty for a major participant in a felony evidencing reckless indifference to human life, stating that only 11 jurisdictions had invalidated the death penalty in such circumstances).

307. See Humane Soc'y of the U.S., General Statement Regarding Euthanasia Method for Dogs and Cats, 17 Shelter Sense, Sept. 1994, at 11-12 (classifying electrocution as an inhumane form of euthanasia for animals); American Veterinarian Med. Ass'n, 202 JAVMA 230, 230-49 (1993) (classifying electrocution as an unacceptable method unless it is preceded by an injury inducing immediate unconsciousness, such as a blow to the head, because electrocution alone will not lead to unconsciousness for 10-to-30 seconds or longer).

308. See Gray v. Lucas, 463 U.S. 1237, 1242 (1982) (Marshall, J., dissenting from denial of certiorari). According to Richard Trashtman, M.D., Vice Chair of the Department of Anesthesiology and Critical Care Medicine and Director of Research at Johns Hopkins Medical School, "[w]e would not use asphyxiation, by cyanide gas or by any other substance, in our laboratory to kill animals that have been used in experiments—nor would most medical research laboratories in this country use it." Id. (quoting Gray v. Lucas, 710 F.2d 1048, 1060 (5th Cir. 1983)).

309. According to one source, lethal injection was favored by the great majority (84%) of voters. See Carla McClain, Arizona Gas Chamber Stays, Cannet News Serv., Apr. 7, 1992. This percentage was 21 points lower, however, in a Los Angeles Times poll taken April 23-26, 1992, which surveyed a sample of 1,395 Californians who responded to the question, "What is the method of execution you prefer?" The results of the Los Angeles Times poll are as follows:

Lethal injection 63%
Gas chamber 12%
Electric chair 4%
Firing squad 3%
Hanging 2%
Other/Don't know 12%
None 4%

See George Skelton, Death Penalty Still Strong in State, L.A. Times, Apr. 29, 1992, at A1, A18. The sample consisted of registered voters statewide; the margin of error was plus-or-minus 5%.

Id. On July 30, 1997, a Florida Voter poll indicated that most Florida voters desired a switch from electrocution to lethal injection. See Florida Voter Poll: Voters Want to Retire "Old Sparky," Florida Voter, July 30, 1997, at 1 (on file with the author); Sydney P. Freedberg, Floridians Ready to Retire Chair, The Herald (Miami), July 30, 1997, at 53. The poll surveyed by telephone 600 Florida registered voters who responded to the following question: "Currently, the state of Florida uses the electric chair to execute criminals sentenced to death. Do you think the state should keep the electric chair or switch to lethal injection instead?" Voters' responses were as
B. Lethal Injection

In 1888, lethal injection was considered along with other execution methods when New York's governor-appointed Commission was seeking the most humane means of implementing the death penalty. Lethal injection failed to become a serious rival for either hanging or electrocution, however, because the medical profession strongly opposed the use of the hypodermic needle for executions, fearing that the public would associate the practice of medicine with death. In 1953, the British Royal Commission on Capital Punishment reported that its expert witnesses questioned both the humaneness and, most particularly, the practicality of lethal injection for four major reasons that still remain viable. Twenty-five years later, the United States was the first country to re-examine the issue.

A rising interest in lethal injection developed after Gregg in 1976 when the United States once again confronted the dilemma of sentencing people

follows:

- Keep electric chair 34%
- Lethal Injection 44%
- Other method (volunteered) 7%
- Against death penalty (volunteered) 8%
- Don't know 7%

Florida Voter, supra, at 1. At a 95% confidence level, the margin of error for the entire sample was plus-or-minus 4%. Id.; see also supra note 921 and accompanying text (noting a Mason-Dixon Political/Media Research poll conducted in January 1992 which reported that 49% of Virginians favored switching from electrocution to lethal injection; 21% opposed the switch, and the remainder stated they did not know).

310. Denno, supra note 5, at 571-72.

311. Id.; Patrick Malone, Death Row and the Medical Model, 9 Hastings Center Rep. No. 5, Oct 1979, at 5. See also James W. Garner, Inflection of the Death Penalty by Electricity, 1 J. Crim. L. & Criminology 626, 626 (1910) (According to one Philadelphia physician, utilizing "the practice of medicine ... for the purpose of putting criminals to death would arouse the unanimous protest of the medical profession.").

312. Royal Comm'n Rep., supra note 219, at 258-61 (stating that "the practical difficulties encountered in many cases when injection into a vein is attempted are such as to render the method quite unsuitable for the purpose of execution").

313. The Royal Commission concluded that: (1) lethal injection could not be administered to individuals with certain "physical abnormalities" that make veins impossible to locate, and that even "normal" veins can be flattened by cold or nervousness, conditions frequently characteristic of an execution setting; (2) lethal injection is difficult unless the subject fully cooperates and remains "absolutely still"; (3) lethal injection requires medical skill although the medical profession was opposed to participating in the process; and (4) because of such problems, it was likely that executioners would have to implement intramuscular (rather than intravenous) injection even though the intramuscular method would be slower and more painful. Id. at 258-59; see also infra notes 360-400 and accompanying text (discussing the excessiveness of lethal injections).

314. In 1965, executions were abandoned entirely in Great Britain; consequently, there was no reason for the British to re-evaluate whether lethal injection would be preferable to other methods of execution. See Franklin E. Zimring & Gordon Hawkins, Capital Punishment and the American Agenda 109-10 (1986).
to death.\textsuperscript{315} Some scholars claim legislatures had no preference for a particular execution method.\textsuperscript{316} However, others contend that legislatures preferred lethal injection because it made the death penalty appear more humane and palatable\textsuperscript{317} in light of an increasing public interest in the possibility of televised executions,\textsuperscript{318} as well as prior concerns over botched electrocutions and gassings.\textsuperscript{319} Economics also constituted a major impetus behind the initial adoption of lethal injection\textsuperscript{320} because injection was far cheaper than electrocution or lethal gas.\textsuperscript{321}

\textsuperscript{315} Id. at 110. According to some commentators, lethal injection became popular along with the conservative shift in the nation’s politics. See Ward Casscells, M.D. & William J. Curran, M.D., \textit{Doctors, The Death Penalty, and Lethal Injection}, 307 New Eng. J. Med. 1532, 1532-33 (1982). In 1973, for example, then-Governor Ronald Reagan of California recommended the idea of lethal injection when he compared it to animal euthanasia.

Being a former farmer and horse raiser, I know what it’s like to try to eliminate an injured horse by shooting him. Now you call the veterinarian and the vet gives it a shot and the horse goes to sleep—that’s it. I myself have wondered if maybe this isn’t part of our problem [with capital punishment], if maybe we should review and see if there aren’t even more humane methods now - the simple shot or tranquilizer.


\textsuperscript{316} Zimring & Hawkins, \textit{supra} note 314, at 111.

\textsuperscript{317} See Daniel C. Hoover, \textit{Injection Death Bill Endorsed by House}, News & Observer, June 29, 1983, at IA.

\textsuperscript{318} See, e.g., Garrett v. Estelle, 424 F. Supp. 468, 470-71 (N.D. Tex.) (discussing an attempt by a Public Broadcasting Service television station to enjoin the Texas Department of Corrections from banning the broadcast of the first execution in Texas since 1964), \textit{rev’d}, 556 F.2d 1274 (5th Cir. 1977); Lesser, \textit{supra} note 288, at 24-92 (analyzing the effects of televised executions on the public); James W. Marquart et al., The Rope, the Chair, and the Needle: Capital Punishment in Texas, 1923 - 1990, 132 (1994) (noting that at the time lethal injection was passed by the Texas legislature, a reporter had filed a suit seeking permission to film executions and that it was believed that injection would appear to be less cruel); John W. Murphy, \textit{Technology, Humanism, and Death by Injection}, 11 Phil. & Soc. Action 55, 55 (1985) (emphasizing how modern engineering has made it possible to refine the act of execution by making the process increasingly technological, and therefore more acceptable); Jef I. Richards & R. Bruce Easter, \textit{Televising Executions: The High-Tech Alternative to Public Hangings}, 40 UCLA L. Rev. 381, 386-89 (1992) (discussing Garrett and related cases). For a fascinating historical account of the press’ attempts to cover executions in New York, see Michael Madow, \textit{Forbidden Spectacle: Executions, the Public and the Press in Nineteenth Century New York}, 43 Buff. L. Rev. 461 (1995).


\textsuperscript{320} See Christianson, \textit{supra} note 315, at 72 (contending that Oklahoma passed the lethal injection statute in part because of its economical benefits). Advocates of lethal injection present four major arguments on its behalf: (1) economy; (2) humaneness; (3) political feasibility; and (4) constitutional soundness. See Herb Haines, \textit{Primum Non Nocere: Chemical Execution and the Limits of Medical Social Control}, 36 Soc. Problems 442, 445-46 (1989).

\textsuperscript{321} In 1977, the now-deceased Senator Bill Dawson of Oklahoma asked Dr. Stanley Deutsch, then Head of Oklahoma Medical School’s Anesthesiology Department, to
For both economical and supposed humanitarian reasons, Oklahoma adopted lethal injection as its execution method on May 11, 1977; Texas followed the next day and Idaho and New Mexico soon after.\(^{522}\) Although by 1981, five states had adopted lethal injection,\(^{523}\) the method was not actually used in an execution until 1982, when Texas executed Charles Brooks, Jr. in a botched procedure.\(^{524}\) Currently, twenty-one states have adopted lethal injection as their sole method of execution and eleven states provide a choice between lethal injection and another execution method.\(^{525}\)

The following sections apply Table 2's execution methods test to lethal injection. Although the sections offer only initial results, they prompt clear concerns with the constitutionality of this newest method.

1. Humane Baseline
   a. Judicial Determinations

Like electrocution, lethal injection did not exist when the Bill of Rights was adopted (H1). Similarly, courts have used Kemmler (H2) and the evolving standards of decency (H3) principle to reject challenges to lethal injection and the vagueness of the lethal injection statutes. In Ex parte Granviel,\(^{226}\) for example, the Texas Court of Criminal Appeals rejected the first Eighth Amendment challenge to lethal injection by emphasizing that courts, such as Kemmler, had upheld the constitutionality of other execution methods\(^{227}\) and that injection complied with evolving standards of decency.\(^{228}\)

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322. See infra app. 1, tbls. 2-7; app. 3.
323. See id.
324. See infra app. 2.C (Lethal Injection: Charles Brooks, Jr.).
325. See infra app. 1, tbls. 2-7; app. 3.
327. See id. at 509.
328. See id. The court also countered a wide range of the appellant's additional claims, concluding that: (1) any possible pain associated with injection-related complications "could be characterized as a possible discomfort or suffering necessary to a method of extinguishing life humanely," id. at 510; (2) the Texas statute's failure to specify the substances to be used
Following two other unsuccessful challenges, Heckler v. Chaney constituted the next major attack on lethal injection. In Heckler, inmates sentenced to death in Oklahoma and Texas claimed the drugs used for lethal injection had been approved by the Food and Drug Administration (FDA) only for the medical purposes stated on their labels—for example, animal euthanasia—and not for the executions of humans. Given this circumstance and the likelihood that the drugs would be applied by unknowledgeable prison personnel, "it was also likely that the drugs would not induce the quick and painless death intended." According to the inmates, such practices constituted the "unapproved use of an approved drug" and therefore a violation of the prohibition against "misbranding" under the Federal Food, Drug, and Cosmetic Act. However, the Supreme Court steadfastly held that the FDA's discretionary authority in refusing to initiate proceedings according to the inmates' demands was not subject to judicial review. One year later, the Fifth Circuit Court of Appeals relied on Heckler in Woolls v. McCotter to deny Randy Woolls' claim that Congress failed to provide for judicial review of the FDA's refusal to evaluate the use of sodium thiopental as a lethal drug, emphasizing that the use of such a drug did not constitute cruel and unusual punishment. Six days after his challenge, Woolls' execution

In the injection was no less clear than those statutes pertaining to other execution methods, such as electrocution, which no court had declared unconstitutionally vague, id. at 511-13; and (3) the fact that the Director of the Department of Corrections determined the lethal substance and procedure to be used does not constitute an improper delegation of the state's legislative power, id. at 514 (noting that a legislative body "may delegate to the administrative tribunal or officer power to prescribe details"). See generally John H. Gordon, Jr., Note, Criminal Procedure—Capital Punishment—Texas Statutes Amended to Provide for Execution by Intravenous Injection of a Lethal Substance, 9 St. Mary's L.J. 359 (1977) (providing arguments for why the Texas lethal injection statute is constitutional).


331. Id. at 823.


333. Heckler, 470 U.S. at 823.

334. Id; see also Michele Stolls, Heckler v. Chaney: Judicial and Administrative Regulation of Capital Punishment by Lethal Injection, 11 Am. J.L. & Med. 251, 251-71 (1985) (discussing the Heckler Court's decision to decline to review the FDA's nonenforcement decision and its impact on the judicial regulation of death penalty cases.).


336. Id. at 837-38.

337. 798 F.2d 695 (5th Cir. 1986).

338. Id. at 697-98. In support of his claim, Woolls provided testimony from several physicians contending that (1) "the injection of sodium thiopental may cause physical and mental pain due to possible technical difficulties in administering the drug"; (2) "even if administered by a professional... the individual would be aware of the onset of loss of consciousness and the paralytic drug would produce a sense of shortness of breath and suffocation over a two to three minute period"; and (3) "the individual may also experience a
was botched.\textsuperscript{339}

After \textit{Woolls}, courts rejected additional challenges to lethal injection,\textsuperscript{340} including one class action by Illinois death row inmates. The inmates contended, among other things, that the State's use of Leuchter's lethal injection machine was unconstitutional because of Leuchter's lack of qualifications and because prison officials administered the wrong drugs.\textsuperscript{341} Recently, thirty-six Missouri death row inmates filed suit claiming that lethal injection is unconstitutional because of the nature and length of Emmitt Foster's 1995 execution.\textsuperscript{342} Although a judge granted an order halting all executions in Missouri, the Eighth Circuit Court of Appeals overturned it.\textsuperscript{343} Other challenges, however, are ongoing.\textsuperscript{344}

sensation of multiple electric shocks over the entire body with erratic muscle twitching followed by acute paralysis and suffocation." \textit{Id.}

\textsuperscript{339} See infra app. 2.C (Lethal Injection: Randy L. Woolls).

\textsuperscript{340} See, \textit{e.g.}, Hill v. Lockhart, 791 F. Supp. 1388, 1394 (E.D. Ark. 1992) (rejecting a claim that lethal injection is unconstitutional because it is not performed by medical doctors and therefore results in difficulties, such as an inability to locate a vein); People v. Stewart, 520 N.E.2d 348, 358 (Ill. 1988) (rejecting a claim that lethal injection constitutes cruel and unusual punishment because "defendant has submitted no evidence which indicates that execution by lethal injection results in protracted death or unnecessary pain").

\textsuperscript{341} In 1990, Charles Silagy and Walter Stewart brought a class action for injunctive relief against the State of Illinois and the Illinois Department of Corrections (DOC) contending that the lethal injection procedure used by the DOC violated the Illinois death penalty statute. Plaintiffs' Complaint at 1-2, Silagy v. Thompson, No. 90-C05028 (N.D. Ill. Feb. 7, 1991). Plaintiffs emphasized that they were not challenging the constitutionality of lethal injection per se, but rather the particular procedure the defendants intended to use to implement it. \textit{Id.} at 2-3. Although the Illinois statute authorized the injection of only two chemicals (a barbiturate and a paralytic agent), the defendants authorized the injection of three chemicals—sodium pentothal, pancuronium bromide, and potassium chloride. See \textit{id.} at 1-2. According to the plaintiffs, "defendants' procedures create the substantial risk that plaintiffs will experience or suffer excruciating pain during the three-chemical injection, but will be prevented by the paralytic agent from communicating their distress." \textit{Id.} at 2. In addition, the DOC planned to use a lethal injection machine manufactured by Leuchter despite the fact that the DOC had hired Leuchter because of his questionable qualifications. See \textit{id.} at 6. Subsequently, Leuchter announced that his machine in Illinois was faulty and likely to fail. See \textit{id.} at 6-7. The District Court for the Northern District of Illinois ultimately dismissed the plaintiffs' complaint. See Memorandum Opinion and Order, Silagy v. Thompson, No. 90-C-5028 (N.D. Ill. Feb. 7, 1991). Similar arguments condemning lethal injection were raised and dismissed prior to the execution of John W. Gacy. See Verified Complaint in Chancery, Gacy v. Peters, No. 94 CH (Ill. Apr. 1994) [hereinafter Gacy Complaint]. Yet, Gacy's execution was botched. See infra app. 2.C (Lethal Injection: John Wayne Gacy).


\textsuperscript{343} See Jackman, supra note 342, at CI.

\textsuperscript{344} See, \textit{e.g.}, Richardson Application, supra note 110 (concerning the first evidentiary hearing on the constitutionality of lethal injection held on April 28-30, 1997); Petition for Writ of Habeas Corpus, Felder v. Scott, No. H-95-5756 (S.D. Tex. Dec. 20, 1995) [hereinafter \textit{Felder II Petition}] (petition pending), \textit{preceded by Felder I Petition}; see also State v. Webb, 680 A.2d 147, 198 (Conn. 1995) (allowing the defendant's action to be remanded to the trial court so that the defendant could challenge the constitutionality of the state's administration
b. Legislative Determinations

There are six general and overlapping types of lethal injection statutes, as Table 8 (Appendix 1) documents. These types illustrate both the complexity and peculiarity of the manner in which states have introduced lethal injection as a new method of execution, particularly within the choice states. Most notable are the distinctions between states that authorize either retroactive or nonretroactive applications of a new method of execution, depending on whether the amending statute was enacted after the prisoners were sentenced or convicted ("pre-enactment prisoners") or before they were sentenced or convicted ("postenactment prisoners").

Table 8 shows that twenty-one states provide no alternative method of execution for prisoners sentenced or convicted after the date the lethal injection statute was enacted or became effective (Type 1). Eight states allow prisoners to choose between lethal injection and another execution method (Type 2), and four states restrict such a choice to those prisoners sentenced or convicted prior to the statute's enactment (Type 3).

The single Type 4 state (Mississippi) is perhaps most odd because it mandates that a pre-enactment prisoner use the method of execution that existed when the prisoner was sentenced to death, although postenactment prisoners receive lethal injection. In *Malloy v. South Carolina*, the Court held that it was not a violation of the Ex Post Facto Clause when a new, purportedly more humane, method of execution was retroactive. Only recently have prisoners challenged a statute where the

of lethal injection).

345. Additional types can be delineated; these six provide the most workable introduction to lethal injection statutes.


347. These 21 states are Arizona, Arkansas, Colorado, Connecticut, Delaware, Illinois, Indiana, Kansas, Louisiana, Maryland, Mississippi, Nevada, New Jersey, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, South Dakota, Texas, and Wyoming.

348. These eight states are California, Montana, North Carolina, Ohio, South Carolina, Utah, Virginia, and Washington.

349. These four states are Arizona, Arkansas, Delaware, and South Carolina. Because of the restrictive nature of this choice, three Type 3 states are also encompassed under Type 1. The exception is South Carolina, a Type 2 choice state, because it allows a choice for postenactment prisoners.

350. Mississippi's prior provisions introducing changes in execution methods have not been so restrictive. *See infra* app. 3 (Mississippi).

351. 227 U.S. 180 (1915).

352. *See id.* at 182-84 (holding that a retroactive method of execution is not violative of Art. I, § 10 of the Constitution barring ex post facto laws); *see also infra* notes 93-94 and accompanying text (discussing Malloy v. South Carolina, 227 U.S. 180 (1915)).
new, purportedly more humane, method is not retroactive. In Booker v. Murphy, three death row inmates, the only remaining prisoners in this country who are required to be executed by lethal gas, challenged Mississippi’s use of lethal gas, claiming that it inflicted cruel and unnecessary pain. Initially a stay had been entered pending the state’s promise to encourage the Mississippi legislature to eliminate the state’s use of lethal gas entirely. However, the United State’s District Court for the Southern District of Mississippi subsequently lifted the stay, holding that: (1) there existed a genuine issue of material fact concerning whether execution by lethal gas was constitutional; and (2) inmates’ section 1983 action was an acceptable means of challenging lethal gas. Litigation on these issues is ongoing.

The last two types of Table 8’s lethal injection statutes are also peculiar. Ten states now have a lethal injection-only statute but provide a “constitutional substitute” in case lethal injection is held to be unconstitutional or invalid (Type 5). As this Article later discusses, this constitutional substitute is typically considered more inhumane or problematic than lethal injection. States appear to have such a replacement to avoid any possible hiatus that may arise in applying the death penalty should lethal injection prove to be constitutionally troublesome. In turn, three other states allow someone other than the prisoner (such as the commissioner of corrections) to choose the method of execution (Type 6). Type 6 provisions appear to be partly a function of practicality in case one method is difficult or unavailable.

2. Excessiveness

As with electrocution, an evaluation of both the presence and risk of an “unnecessary and wanton infliction of pain” (El, E3) requires some background on how a lethal injection is performed. In general, executioners strap the inmate to a gurney in the execution chamber, insert a catheter into a vein, and inject a nonlethal solution. After the reading of a death warrant, a lethal mixture is injected by one or more executioners or, depending upon the state, by a machine.

The typical lethal injection consists of three chemicals. The first
chemical is a nonlethal dose of sodium thiopental, more commonly known as sodium pentothal, a frequently used anesthetic for surgery. Lethal injection statutes refer to sodium pentothal as an "ultrashort-acting barbiturate" or an "ultrafast-acting barbiturate."502 Sodium pentothal is supposed to induce a deep sleep and the loss of consciousness, usually in twenty seconds.503 The second chemical is pancuronium bromide, a total muscle relaxant. The third and last chemical is potassium chloride, which physicians most frequently use during heart bypass surgery. Potassium chloride is supposed to induce cardiac arrest and stop the inmate's heartbeat permanently.504

a. "Unnecessary and Wanton Infliction of Pain"

According to Edward A. Brunner, M.D., Ph.D., Professor of Anesthesia at Northwestern University Medical School, and Lawrence Deems Egbert, M.D., former Professor of Anesthesiology at the University of Texas Southwestern Medical School, substantial pain and suffering can occur when the inmate receives an inadequate dosage of sodium pentothal and therefore retains consciousness and sensation during the injection of the second and third chemicals.505 Brunner noted that the procedure applied in Illinois initially required an amount of pentothal that would be insufficient to produce unconsciousness in approximately twenty percent of the population.506 Similar problems arise when the three chemicals are administered out of sequence, thereby creating a high risk that the


362. Malone, supra note 311, at 6; see also infra app. 1, tbl. 8.

363. Malone, supra note 311, at 6. Because prisoners differ in their physiological constitution as well as their drug tolerance and drug use histories, some prisoners may need a far higher dosage of sodium pentathol than others "before losing consciousness and sensation." See Affidavit of Edward A. Brunner, M.D., Ph.D. ¶ 8G [hereinafter Brunner Affidavit], Exhibit B of Gacy Complaint, supra note 341 (Illinois Department of Correction's procedures typically recommend that 40cc of sodium pentothal be injected.).


365. Brunner Affidavit, supra note 363, ¶ 8G-H; Affidavit of Lawrence Deems Egbert, M.D. ¶ 15 [hereinafter Egbert Affidavit], Exhibit 3 of Felder I Petition, supra note 321. See also Chaney v. Heckler, 718 F.2d 1174, 1191 (D.C. Cir. 1983) ("Even a slight error in dosage or administration can leave a prisoner conscious but paralyzed while dying, a sentient witness of his or her own slow, lingering asphyxiation."). rev'd, 470 U.S. 821 (1985).

366. Brunner Affidavit, supra note 363, ¶8G; see also supra note 363 and accompanying text (explaining why some dosages may be insufficient).
prisoner will suffer extreme physical pain during a lethal injection even without the outward appearance of pain.\textsuperscript{367}

Other factors can also lead to possible pain and suffering. First, the discretion allowed those administering each procedure\textsuperscript{369} fails to take into account each prisoner’s physical characteristics. However, “[a]ge, sex, and body weight all contribute to the individual’s response to the drug,” in addition to the condition of an individual’s veins.\textsuperscript{369} For example, physicians have difficulty finding a suitable vein for diabetics, those with heavily pigmented skin, the obese or extremely muscular, the very nervous, and drug users.\textsuperscript{370} Indeed, nearly one-quarter of the prison population’s veins may be inaccessible because they are too deep, flat, below layers of fat, or inoperative from drug use.\textsuperscript{371}

Although finding a vein can be difficult for medically trained people, the procedure becomes even more problematic for the untrained executioner.\textsuperscript{372} In some cases, executioners must insert a catheter into a

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367. See id. ¶ 8H. As Brunner explains:

Under such circumstances, the prisoner will suffer an extremely painful sensation of crushing and suffocation, as the pancuronium bromide takes effect and stops his ability to breathe. The pancuronium bromide will paralyze the prisoner, rendering him unable to move or communicate in any way, while he is experiencing excruciating pain. As the third chemical, potassium chloride is administered, the prisoner will experience an excruciating burning sensation in his vein. This burning sensation—equivalent to the sensation of a hot poker being inserted into the arm—will then travel with the chemical up the prisoner’s arm and spread across his chest until it reaches his heart, where it will cause the heart to stop.

Id.

368. Id. ¶ 7 (noting that under the Illinois procedure, “unlimited discretion to determine the dosages—and even to ‘alter’ the chemicals themselves—is given to unspecified ‘qualified health care personnel!’”); Egbert Affidavit, supra note 365, ¶ 7 (emphasizing the discretion under the Texas death penalty statute); Appellants’ Brief at 22, Stewart v. Thompson, No. 91-1470 (7th Cir. Apr. 15, 1991) (stating that the Illinois statute gives the department broad discretion in determining dosages by using the term “lethal dosage” instead of the necessary amount).


370. See Finks, supra note 369, at 397 (explaining that “[l]ethal injections may not work effectively on diabetics, drug users, and people with heavily pigmented skins”); Hirsh, supra note 361, at 1 (noting that “if a person is nervous or fearful, his veins become constricted”); On Lethal Injections and the Death Penalty, 12 Hastings Center Rep. 2, 2 (Oct. 1982) [hereinafter On Lethal Injections] (explaining that lethal injections are particularly difficult to administer to people with heavily pigmented skins . . . and to diabetics and drug users’); Welsberg, supra note 361, at 23 (describing the 45 minutes required for technicians to find a serviceable vein in a former heroin addict); Another U.S. Execution Amid Criticism Abroad, NY. Times Apr. 24, 1992, at B7 [hereinafter Another U.S. Execution] (reporting that the difficulty in executing Billy Wayne White was due to his history as a heroin user).

371. See Finks, supra note 369, at 397 (explaining that “[a]s many as one in four prisoners may have veins that are hard to get at because they are deep, flat, covered by fat or damaged by drug use”).

372. See Egbert Affidavit, supra note 365, ¶ 11 (“Unskilled personnel may be unable to insert successfully the IV catheter in the prisoner. This may be because the prisoner was once
relatively accessible, yet sensitive, part of the body, such as the hand373 or groin.374 In other cases, executioners are forced to perform a “cutdown,” a surgical procedure that exposes the vein.375 Other problems include: (1) inserting the catheter in the wrong direction, causing the chemicals to flow away from the inmate’s heart, thereby hindering their absorption;376 (2) inserting the catheter directly into an artery instead of a vein;377 and (3) inserting the catheter intramuscularly instead of intravenously.378 Moreover, the injection of sodium pentothal may cause choking or gagging if the prisoner eats or drinks six to eight hours before the chemical is administered.379

Lethal injection is considered the most humane method for the euthanasia of animals.380 Yet, in contrast to the way the procedures are handled for death row inmates, the Humane Society firmly states that the chemicals must be injected by “well trained and caring personnel.”381

b. The High Risk of Botching in Texas

According to Radelet, “[l]ethal injections are far more likely to be botched than any other modern method of execution.”382 Although lethal injection botches have occurred in a number of death penalty states, the incidence of botching is particularly high in Texas.383 Leechter contends

an addict and used the veins carelessly so the veins clotted or because the prisoner is anxious and this causes the veins to constrict.”).

373. See infra app. 2.C (Lethal Injection: Rickey Ray Rector).
375. Trombley, supra note 208, at 261; Finks, supra note 369, at 397; Haines, supra note 320, at 448. Cutdowns are typically unnecessary if a technician is experienced and uses modern equipment. Interview with Edward A. Brunner, M.D., Ph.D., Professor of Anesthesia, Northwestern University Medical School, San Antonio, Texas (Apr. 29, 1997).
376. See Affidavit of Stephen M. Trombley ¶ 20 [hereinafter Trombley Affidavit], Exhibit A of Cacy Complaint, supra note 341.
378. See Brunner Affidavit, supra note 363, ¶ 5; Egbert Affidavit, supra note 365, ¶ 9. If the catheter is improperly administered into the muscle, the prisoner will experience a severe burning sensation, and the drugs will take longer to absorb than if they had been directly inserted into the bloodstream. See Brunner Affidavit, supra note 363, ¶ 8E; Egbert Affidavit, supra note 365, ¶ 9.
379. Brunner Affidavit, supra note 363, ¶ 8E (noting that the risk of strangulation could be prevented by denying the prisoner food six to eight hours before execution, but that this precaution is not mentioned in the manuals produced by the Illinois Department of Corrections).
381. Id. at 11-12.
382. Radelet Affidavit, supra note 110, ¶ 4 (listing Radelet’s account of 11 botched lethal injection executions since 1985).
that "about eighty percent" of the lethal injections in Texas "have had one problem or another," although he does not document this estimate.

According to the botched execution information provided in Appendix 2.C of this Article, eleven–or nine percent–of the 121 lethal injection executions conducted in Texas from December, 1982 (when lethal injection was first used) to May, 1997, have been botched. The high percentage of botches in Texas may be partly attributable to the dearth of written procedures provided to the executioners concerning how to perform an execution. These "procedures" list little more than the chemicals to be used (in incorrect order of application) and a vague account of the content of the syringes. Moreover, there is no information specifying the nature and extent of the qualifications that executioners should have in order to perform an execution.

The results of this lack of guidance and training can be devastating, as Raymond Landry's 1988 Texas execution demonstrated. Newspapers reported the following:

While Landry was strapped to a gurney, executioners "repeatedly probed" his veins with syringes for forty minutes, attempting to inject potassium chloride. Then, two minutes after the execution began, the syringe came out of Landry's vein, "spewing deadly chemicals toward startled witnesses." What officials termed a "blowout" resulted in the squirting of lethal injection liquid about two feet across the room. A plastic curtain was pulled so that witnesses could not see the execution team reinsert the catheter into Landry's vein. "After 14 minutes, and after witnesses heard the sound of doors opening and closing, murmurs and at least one groan, the curtain was opened and Landry appeared motionless and unconscious." Landry was pronounced dead 24 minutes after the drugs were initially injected.

According to state officials, Landry's execution was delayed because of a "mechanical problem caused by Landry's muscular arms and previous drug use." A spokesperson for the Texas Attorney General conceded that Landry's execution "was a mechanical and physical problem . . . .

Morin, Randy L. Woolls, Elliot Rod Johnson, Raymond Landry, Stephen McCoy, Billy Wayne White, Justin Lee May, and Ronald Allridge).

384. Trombley, supra note 208, at 73 (noting that, "[i]n the final analysis, it looks disgusting" because the inmates "routinely choke, cough, spasm, and writhe as they die").

385. See supra note 383 and accompanying text; see also Verhovek, supra note 266, at 1 (noting that there have been 121 lethal injection executions in Texas since the time of the first lethal injection execution in December, 1982 until May, 1997).

386. See generally Richardson Application, supra note 110 (including extensive Appendixes criticizing the lack of written guidelines for Texas lethal injection executions). The risk of botching also creates psychological suffering, particularly if the procedure is delayed. See Malone, supra note 311, at 6; see also Welsberg, supra note 361, at 23 ("Being strapped to a table for a lengthy period while waiting to die [is] a form of psychological torture arguably worse than most physical kinds.").

387. See infra app. 2.C (Lethal Injection: Raymond Landry).

388. Id.
Landry was very muscular and had ‘Popeye-type’ arms. When the stuff was flowing, it wouldn’t go into the veins and there was more pressure in the hose than his veins could absorb. A spokesperson for the Texas Department of Corrections stated that this was the first time such a problem had occurred in Texas. Yet, others noted the difficulties authorities encountered in 1985 when technicians experienced setbacks locating a vein in another Texas inmate, Stephen Morin. Morin also had been a heavy drug user.

Indeed, executioners required more than forty minutes to insert Morin’s lethal injection needle because his long-term drug use hindered technicians' abilities to locate a blood vessel that had no scars or other damage. Two minutes after entering Morin’s death chamber, technicians attempted the first injection carrying a saline solution. “At least five more attempts were made to locate appropriate veins in [Morin’s] arms and even legs before the technicians came from the department to review its procedures for administering the drugs when the condemned man has a history of drug abuse.” Morin’s death required eleven minutes after technicians finally found a suitable vein. A prison spokesperson stated that the difficulty caused from inserting the needles “would probably prompt the Texas Department of Corrections to review its procedures for administering the drugs when the condemned person has a history of drug abuse.”

Notably, the Texas Department of Corrections has never changed its procedures to accommodate the special injection problems associated with damaged veins. Indeed, a botched execution attributable to an inmate’s unsuitable veins occurred each year following Morin’s execution until Landry’s botched execution. Such drug user botches continue to take place in Texas and other states.

Not all errors can be linked to ill-trained prison personnel and executioners. The lethal injection machinery can also malfunction in those states that use them. As of 1990, four states had purchased Leuchter-created lethal injection machines, although Leuchter had no technical or medical expertise for devising the different mixtures of chemicals he

389. Id.
390. Id.
391. See infra app. 2.C (Lethal Injection: Stephen Peter Morin).
392. Id.
393. Id.
394. Id.
395. See generally Richardson Application, supra note 110.
397. See infra app. 2.C (Lethal Injection). The Texas executions of Billy Wayne White in 1992 and Ronald Allridge in 1995 were also botched because technicians experienced difficulties locating suitable veins. Id.
398. See id.
399. Denno, supra note 5, at 627-28 (listing Illinois, Delaware, Missouri, and New Jersey).
recommended.\textsuperscript{400}

Lastly, lethal injection does not entail mutilation in quite the same way as electrocution. Yet, lethal injection does offend an inmate’s dignity (\textit{E3}) in light of the accounts of botched lethal injections listed in Appendix 2.G and those discussed in this section.

3. “Standards of Decency” and Legislative Trends

Although legislative trends are moving exclusively in the direction of lethal injection, there are significant issues concerning lethal injection that bear on the standards of decency factor. Most predominant is the ongoing stance by the American Medical Association’s (AMA’s) Council on Ethical and Judicial Affairs, which prohibits physicians’ participation in executions.\textsuperscript{401} Although the Council’s position pertains to all methods of execution, it is particularly applicable to lethal injection because of that method’s perceived affiliation with the medical profession.\textsuperscript{402}

The question of what does and should constitute physician involvement in executions is controversial.\textsuperscript{403} The AMA and state medical associations have publicly condemned physician participation in lethal injection executions, stating that a physician’s role should be limited to the pronouncement of death.\textsuperscript{404} Some states have attempted to solve this

\textsuperscript{400} For example, when one of the first states that switched to lethal injection contacted Leuchter for advice on that method, he began to study pharmacology and chemistry. Based upon the results of studies conducted on pigs and rabbits, Leuchter calculated the dosages of sodium pentothal, pancuronium bromide, and potassium chloride required for the lethal injection of human beings. Thereafter, he created a computer-controlled machine for injecting prisoners without, as he explained, rupturing their veins or inducing “undue discomfort.” Dr. Death and His Wonderful Machine, N.Y. Times, Oct. 18, 1990, at A24.


\textsuperscript{403} See, e.g., Ronald Bayer, Lethal Injections and Capital Punishments: Medicine in the Service of the State, 4 J. Prison & Jail Health 7, 7-14 (1984) (discussing the controversy surrounding physician participation in lethal injections); Cassells & Curran, supra note 315, at 227 (same).

\textsuperscript{404} Council on Ethical and Judicial Affairs, supra note 401, at 366-67. “The AMA guidelines . . . specify that selecting injection sites, starting intravenous lines, prescribing, preparing or administering injection drugs, and consulting with lethal injection personnel constitute physician participation in executions and are unethical.” American College of Physicians, supra note 364, at 20. The presence of a physician at a lethal injection execution was required by some state statutes such as Oklahoma’s. See Okla. Stat. tit. 22, § 1014 (1996). However, this arrangement has changed for two reasons: (1) the AMA’s pronouncement and physicians’ complaints that states were turning executions into medical procedures, see Jerome D. Gorman, M.D. et al., The Case Against Lethal Injection, Va. Med., Dec. 1988, at 576; and (2) claims that physicians were blurring the line between their role as a healer and as a killer, see
dilemma by employing Leuchter's lethal injection machines in which syringes are activated by a mechanical plunger.403 In turn, a number of state statutes are simply extremely vague on the subject of the procedure to be used and the involvement of medical personnel.406

Finally, there is the issue of organ donation by inmates.407 According to some commentators, lethal injection is a preferred method of execution because it does not mutilate the body and therefore enables death row inmates to donate some of their organs,408 or all organs if the injection contains noncontaminating chemicals.409 Although it is beyond the scope of this Article to debate whether inmate organ donation constitutes an evolving410 or “devolving”411 standard of decency, this issue will become

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Fisher, supra note 361, at B5 (reporting that, in several states, doctors are present at executions, but do not administer the injections). As a result, states with lethal injection no longer require the services of a physician, except to pronounce death. See generally American College of Physicians, supra note 364. The executioners in Texas, for example, are volunteers who are not properly trained to insert the intravenous tubing before the execution. See Felder I Petition, supra note 321, at 66 ¶ 138 (arguing that procedures in Texas do not require executioners to be trained, increasing the risk that inmates will suffer).

405. See supra note 399 and accompanying text (discussing those states that apply Leuchter's machines).

406. See generally American College of Physicians, supra note 364, at 18-20; Felder I Petition, supra note 321, at 63 ¶ 131.

407. In the context of organ donation, this Article illustrates the evolving standards of decency factor by considering the transformation in states' execution method provisions relating to the disposition of prisoners' corpses. Historically, most states had provided for the dissection of the corpse without regard for the burying of the body by the prisoner's relatives. See Madew, supra note 318, at 540-41. This dissection requirement was slowly removed from all state statutes. In contrast, the modern Kansas statute allows for the condemned to make an "anatomical gift" and provides that "a person making such gift shall be executed in such a manner that such gift can be carried out." An Act concerning crimes and punishments and procedures relating thereto; creating the crime of capital murder and providing for a sentence of death therefor under certain circumstances; providing for mandatory terms of imprisonment for certain crimes. 1994 Kan. Sess. Laws 252 § 14. The modern Mississippi statute is similar in that it allows for the condemned's "unclaimed" body to be donated to science. 1994 Miss. Laws 479 §§ 99-19-55(4).

408. See Jack Kevorkian, Prescription: Medicine, the Goodness of Planned Death 17-99 (1991) (emphasizing that the great majority of death row inmates want to donate their organs in order to "repay a social debt" despite anti-donation arguments by the medical profession); Rorie Sherman, "Dr. Death" Visits the Condemned: Officials Question a Search for Organ Donors, Nat'l L.J., Nov. 8, 1993, at 11 (noting Kevorkian's contention that "wholesale transplantation of the death row inmates' organs should be permitted, because theoretically 'a single healthy condemned inmate could be the salvation of at least six doomed adults'").

409. To save key organs such as the heart and liver, prison officials would have to use a chemical other than sodium thiopentol because it contaminates the organs. See Condemned Man is Hoping to Save Lives of Others: He Seeks to Donate His Organs for Transplant After Execution, Dallas Morning News, Oct. 19, 1993, at 25A [hereinafter Condemned Man].

410. See supra notes 407-09; Michael A. DeVita et al., Procuring Organs from a Non-Heart Beating Cadaver: A Case Report, 3 Kennedy Inst. Ethics J. 371, 388 (1993) (discussing the ethical and social issues concerning organ transplants); Richard A. Epstein, Organ Transplants, 4 Am. Enterprise 50, 52 (1993) (arguing that we should "shed our ethical scruples and embrace a market system" of organ donation); Jack Kevorkian, Opinions on Capital Punishment, Executions
more significant with time.\textsuperscript{412}

C. Alternative Execution Methods

No state has introduced a new method of execution, despite the repeated complications associated with lethal injections. At the same time, courts are expected to oversee the method of execution chosen by a particular state.\textsuperscript{413} Such Eighth Amendment review should be conducted "in the light of contemporary human knowledge"\textsuperscript{414} and "presently available alternatives."\textsuperscript{415} It is outside the bounds of this Article to discuss presently available alternatives other than lethal injection. Yet, recent research and literature on the subject of suicide and assisted suicide suggest there is a range of alternatives designed to result in the most humane death possible, particularly for the frail and terminally ill.\textsuperscript{416} It is

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\textit{and Medical Science}, 4 Med. & L. 515, 515-33 (1985) (contending that lethal injection is the preferred execution method and that inmates should be allowed to donate their organs); Charisse Jones, \textit{Sharing Memories of Organ Donations Who Shared}, N.Y. Times, Dec. 6, 1993, at B3 (reporting that 34,000 people nationwide are awaiting transplants and that "tens of thousands more" may need them).

\textsuperscript{411} See, e.g., J.H. Meredith, \textit{Organ Procurement From the Executed}, 18 Transplantation Proceedings 406, 406-07 (1986) (detailing the legal, ethical, medical, logistic, and media-related problems concerning organ procurement from the executed); Jones, supra note 410, at B3 (discussing religious and personal arguments against donation); Catherine S. Manegold, \textit{Senate Told of China Convicts Shot for Organs}, N.Y. Times, May 5, 1995, at A10 (reporting that Chinese refugees had testified in Senate hearings concerning the Chinese government's practices of removing organs from executed prisoners and selling them to be used as medical transplants in state-owned hospitals); Sherman, supra note 408, at 11 (noting lethal ethicists' objections to inmates' organ donations to non-relatives "because they believe that it is impossible to obtain voluntary consent in a prison setting—especially among death row prisoners who hope their benevolence might win them pardon"); \textit{China Accused of Taking Organs from Prisoners}, Herald Statesman, Aug. 30, 1994, at A2 (reporting allegations by the Human Rights Watch/Asia, that China's judiciary system intentionally botches some inmates' executions so that surgeons can remove for transplants the shot inmates' organs while they are still alive); \textit{Condemned Man}, supra note 409, at 25A (describing problems faced by an inmate in his attempt to donate his organs).

\textsuperscript{412} See Lloyd R. Cohen, \textit{Organ Transplant Market Would Save Lives}, Nat'l L.J., Jan. 29, 1996, at A19 (arguing that the law should allow people to sell their organs to help alleviate the shortage of organs for transplants); Mike Smith, \textit{Does Lethal Injection Bar Organ Donation? Legislative Panel to Study the Issue}, Courier J. (Louisville), July 22, 1995, at 5A (discussing a legislative committee that will investigate execution methods enabling an inmate to donate organs).


\textsuperscript{414} Robinson v. California, 370 U.S. 660, 666 (1962).

\textsuperscript{415} Furman v. Georgia, 408 U.S. 238, 430 (1972) (Powell, J., dissenting) (emphasizing that "no court would approve any method of implementation of the death sentence found to involve unnecessary cruelty in light of presently available alternatives").

\textsuperscript{416} For a discussion of the range of alternative execution methods, see generally Derek Humphry, \textit{Final Exit: The Practicalities of Self-Deliverance and Assisted Suicide for the Dying} (1991); Kevorkian, supra note 408, at 185-244, 373; \textit{New Group Offers to Help the Ill Commit Suicide}, N.Y. Times, June 13, 1993, at A32; Elisabeth Rosenthal, \textit{Methods Used in Suicides Follow
unknown whether these alternatives would appear more humane than our current methods when examined under Table 2's execution methods test. However, there is sufficient evidence available to warrant an Eighth Amendment evaluation of these alternatives, thereby potentially rendering our current methods unnecessary.

D. The Penological Justification for Inhumane Execution Methods

Why have legislatures, courts, and prison personnel perpetuated, over the course of the century, particular execution methods when substantial evidence suggests they constitute cruel and unusual punishment? Why, for example, have post-Kemmler legislatures refused to initiate a scientific and legal inquiry into which methods inflict unnecessary pain, and which methods constitute the least inhumane alternative? Why has the Supreme Court continued to avoid an Eighth Amendment evaluation of these methods when the Court reviews a wide range of other claims of possible cruel and unusual prison conditions? Why do some state statutes incorporate provisions that have no apparent penological justification, such as the nonretroactivity of a new, purportedly more humane, execution method?

There are no clear answers to these questions.417 This section attempts to explore some possible explanations, however, by focusing on the reasons states provide for their decisions to either change or retain an execution method in the context of Table 2's execution methods test. As this section concludes, regardless of the reasons states give, each explanation rests on a distortion of the death is different principle in ways the Supreme Court did not intend.

1. Why States Change An Execution Method

Legislatures and courts have consistently insisted that the primary reason states change from one execution method to the next is to ensure greater humanness and standards of decency for those awaiting execution.418 This stance comports with the view that even a condemned person has "basic human rights."419 The punishment should be the loss of life itself, not excessive deprivation or pain prior to or during the

417. It is beyond the scope of this Article to conduct a fundamental rights analysis concerning the compelling state interest in retaining inhumane execution methods, although this is a viable topic of inquiry. As Justice Marshall has stated with respect to such an analysis of the death penalty itself, "the substantive due process argument reiterates what is essentially the primary purpose of the Cruel and Unusual Punishments Clause of the Eighth Amendment—i.e., punishment may not be more severe than is necessary to serve the legitimate interests of the State." Furman v. Georgia, 408 U.S. 258, 359 n.141 (1972) (Marshall, J., concurring).

418. See infra app. 3.

execution. For this reason, "we take strenuous measures to mitigate so far as we can the incidental physical and other kinds of pain that attend [death]."

At the same time, legislatures and courts have engaged in statutory and judicial behavior that belies their purported humanity. Throughout history, for example, it appears that a number of legislatures have been motivated to change a method of execution not for strictly humanitarian concerns, but because the perpetuation of the death penalty itself became jeopardized due to that state's particular method. In 1888, the New York legislature sought a more humane method of execution than hanging because the public's perception of hanging's barbarity spurred movements toward a total abolition of capital punishment. Thereafter, many states adopted electrocution, which offered a far less visible and, therefore, less scrutinized procedure. Some electrocution states slowly began to switch to lethal gas when problems with electrocution became more public. Lastly, some states' decisions to change to lethal injection after Gregg appeared to be based on economic motivations, in addition to efforts to make the death penalty more palatable to the public after its long hiatus. According to the creator of New Jersey's lethal injection bill, for example, lethal injection makes it easier for a jury to vote for the death penalty.

States have also appeared to change methods to stay one step ahead of a constitutional challenge to a particular method of execution. This approach buffers the death penalty itself from scrutiny, or from any possible death penalty hiatus that may occur if a method is rendered unconstitutional. For example, the Maryland legislature was stirred to authorize lethal injection in response to a death row inmate's request in 1994 to have his lethal gas execution videotaped in support of another condemned inmate's challenge of Maryland's lethal gas statute. In turn, when California Governor Pete Wilson signed a bill into law that

420. Id.
421. Id.
422. See The Death Penalty in America, supra note 274, at 21 (depicting the historical movement toward total abolition); Denno, supra note 5, at 562-77 (discussing New York's anti-capital punishment movement); Madow, supra note 318, at 490-506 (describing the abolition of public executions in antebellum New York).
423. See infra app. 1, tbls. 3-7; app. 3 (charting methods of executions by state from 1895-1996).
424. See id.
425. See infra app. 3; see supra notes 315-22 and accompanying text.
426. Michael Norman, Why Jersey Is Learning to Executions by Injection, N.Y. Times, May 18, 1983, at B6 ("If you're on the jury, the thought of some guy in that chair sizzling is going to bother them . . . . This way, with lethal injections, it might ease their conscience when they come up with a verdict.") (quoting Dr. Thomas H. Paterniti, author of the New Jersey lethal injection bill).
allowed California's death row inmates a choice between lethal gas and lethal injection, he emphasized that "he hoped the new law would stop last-minute appeals" of the constitutionality of lethal gas, such as those filed by Robert Alton Harris. The South Carolina legislature's recent decision to allow prisoners a choice between electrocution and lethal injection came quickly on the heels of the prosecutor's announcement to seek the death penalty in the Susan Smith case, perhaps in an effort to preclude the defense's possible attack on electrocution.

Lastly, the concern for ensuring the continuation of the death penalty process through execution methods is perhaps most clearly illustrated by the constitutional substitute provisions of ten states listed in Table 8 (Type 5). These states have one or more constitutional substitutes in case lethal injection is deemed unconstitutional or invalid. In Oklahoma, for example, if lethal injection is rendered unconstitutional, the death sentence "shall be carried out by electrocution." Yet, if both lethal injection and electrocution are rendered unconstitutional, the death sentence "shall be carried out by firing squad." Presumably, the three execution methods are ordered in terms of their relative humaneness. The state's interest, however, is not with seeking the method that inflicts unnecessary pain, but rather the constancy of the death penalty process itself with a substitute initially considered to be second or third in a rank ordering of humaneness. This policy is comparable to a state's determination that because its twenty-year sentence for crime X is found to be unconstitutionally cruel and unusual, the state will instead substitute a twenty-five year sentence for crime X, its next choice, because the twenty-five year sentence has not yet been deemed unconstitutional. The death is different principle is twisted because the state's goal is not to enforce a higher level of scrutiny or justice, but rather to safeguard the enactment of the death penalty, without interruption or regard to human cost.

2. Why States Retain An Execution Method

Another approach to deciphering the distortion of the death is different principle is to examine why states defend their decision to retain an execution method. One answer concerns states' purported reliance on precedent, most particularly Kemmler, despite Kemmler's limited applicability to post incorporation issues. Such reliance not only fosters legislative inertia, it protects the viability of the death penalty. As the Ninth
Circuit in *Fierro* made clear, however, there was no support for the defendants' claim that allowing a challenge to lethal gas "would result in reductions in [plaintiffs'] sentences" because lethal injection was a valid alternative.\(^{433}\) Yet, the defendants readily equated the abolition of the execution method with that of the death penalty.

Another answer may be that legislatures and courts are attempting to reflect what they consider to be the public's views toward punishment. Because scholars have discussed the different theories of punishment in great detail,\(^{434}\) this section presents the theories only briefly and only in the context of the public's and the states' perceptions of different execution methods.

According to retribution theory, offenders deserve to be punished in proportion to the crimes they commit because they made the choice to engage in social harm.\(^{435}\) Westley Alan Dodd provided what he considered to be an execution method example of this theory when he chose hanging over lethal injection under Washington State's choice statute, explaining that because he had hanged one of his victims, he too should hang.\(^{436}\)

Utilitarian theory, in contrast, does not view punishment as an end in itself, but considers whether punishment would provide any future social benefit, most particularly in terms of crime prevention. The theory presumes that human actors behave rationally; they will avoid engaging in crime if they believe the potential pain of punishment is greater than the potential pleasure reaped from the crime.\(^{437}\) Types of utilitarian theory include general deterrence, which presumes the punishment of a particular offender will prevent others from engaging in similar conduct because they will be aware of, and fear, the consequences.\(^{438}\) *Antwine v.*

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legislative "pattern seen with electrocution states reflects the powerful force of legislative inertia"), *aff'd*, 77 F.3d 301 (9th Cir.), *vacated on other grounds*, 117 S. Ct. 285 (1996) (remanding for reconsideration of change made statute).

433. *Fierro*, 77 F.3d at 305.


436. *See Hanged Slayer Felt Little Pain at Death, A Doctor Concludes*, N.Y. Times, Jan. 8, 1993, at A7. Of course, Dodd's explanation gives the impression that modern retributive proportionality theory is based on literal lex talionis ("an eye for an eye"), when it is not.


438. *See* Dressler, *supra* note 434, § 2.03[B][2] at 10. Other types of utilitarian theory
Delo highlighted the issues raised when a prosecutor encourages a jury to consider the alleged humaneness of a particular execution method in determining whether to recommend the death penalty, however, there is no evidence that potential criminals are deterred by a state’s execution method.

By retaining certain execution methods, legislatures and courts appear to reflect what they consider to be the public’s emphasis on retribution toward criminals. For example, legislatures and courts commingle the public’s stated endorsement for the death penalty, which opinion polls show is currently seventy-five to eighty percent, with a comparable desire for the cruelest method possible to inflict death. However, this presumption contradicts other polls indicating that the majority of the public prefers what they perceive to be the most humane method.

Legislatures and courts therefore use execution methods to symbolize society’s so-called “moral outrage” or “revenge-utilitarianism”

include specific deterrence and rehabilitation, which are not applicable to a discussion of execution methods.

439. 54 F.3d 1387 (8th Cir. 1995).
440. See id. at 131-64 (rendering unconstitutional a prosecutor’s unsupported closing argument that the defendant’s death by lethal gas would be “quick, painless, and humane” because the statement had no evidentiary support in the record and “diminished the jury’s sense of responsibility” for the difficult decision of imposing the death penalty).
441. There is no reliable evidence that the death penalty serves as a general deterrent. See Paternoster, supra note 284, at 218-43, for a review of the research and literature in this area. Indeed, some research suggests that “highly publicized executions actually brutalize society by legitimating lethal violence, leading to unintended increases in the level of criminal homicide.” John K. Cochran et al., Deterrence or Brutalization? An Impact Assessment of Oklahoma’s Return to Capital Punishment, 32 Criminology 107, 108 (1994) (discussing a research study that supports prior demonstrations of a brutalizing effect); see also Lesser, supra note 288, at 47-92 (noting the public’s fascination, “sympathies,” and “identifications” with executions in the context of “the killer inside us”); Danny Scott, Executions Keep Tight Grip on Public’s Imagination; Death Penalty: The Ritualized Killing is Riveting for Some. For Others, It Brings a Sense of Order and Justice, L.A. Times, Apr. 18, 1992, at A1 (explaining that, “on a deeper level, experts say people see in an execution the possibility of order in a world they fear has lost its bearings”).
442. See White, supra note 6, at 24; Williams J. Bowers et al., A New Look at Public Opinion on Capital Punishment: What Citizens and Legislatures Prefer, 22 Am. J. Crim. L. 77, 78-81 (1994) (noting that if given the choice in an opinion poll, the public preferred lengthy imprisonment and restitution to murder victims’ families over the death penalty, although polls frequently exclude these options).
443. See supra note 309 and accompanying text; Strong Support in California for Executions: Most in Poll Would Replace the Gas Chamber with Lethal Injection, Atlanta J. & Const., Apr. 29, 1992, at 8 (describing a 1992 Los Angeles Times poll finding that although 77% of the poll’s voters supported the death penalty for convicted murderers, 63% viewed lethal injection as the preferred method of execution, “including those who favor capital punishment”).
444. See Packer, supra note 437, at 284 (describing various moral standards as reasons for punishment).
445. Radin, supra note 28, at 105-6; see also Margaret Jane Radin, Cruel Punishment and Respect for Persons: Super Due Process for Death, 53 S. Cal. L. Rev. 1143, 1165 (1980). Radin applies the concept of “revenge-utilitarianism” to reflect the argument that “[i]t is human nature to desire revenge against criminals. If the government does not punish criminals to the extent necessary to satisfy this desire, then people will take it upon themselves to get revenge,
toward criminals.

Of course, there are anecdotal statements supporting unrestrained vengeance toward criminals in the form of the cruelest execution method available.446 For example, Bob Butterworth, the Attorney General of Florida, indicated that Pedro Medina's botched electrocution would serve as both a means of retribution and as a deterrent.447 "People who wish to commit murder, they'd better not do it in the state of Florida because we may have a problem with our electric chair."448 On the other hand, other individuals claim that lethal injection is not cruel enough. As the mother of one crime victim stated in an interview preceding the execution of her daughter's killer, lethal injection "is too quick. He would need to suffer a little bit more according to what he gave [my daughter], which was a lot of suffering."449 Senator Bob Robinson, co-sponsor of the bill replacing Nevada's gas chambers with lethal injections, emphasized that "the humane aspect [of lethal injection] didn't enter into his thinking. He said it would not bother him if the prisoners were executed in the same method as their victims."450 Justice Scalia may have mirrored such views when describing a gruesome case he considered particularly eligible for the death penalty—the rape and murder of an eleven-year-old girl.451 "How enviable a quiet death by lethal injection compared to that!"452

The study of hatred and resentment toward criminals in the context of retribution is an extensive topic that can provide some insight into such attitudes.453 At the same time, however, such anecdotes appear to

and social disorder will result." Radin, supra note 28, at 1054.

446. According to an individual calling CNN News to comment about the execution of child sex-murderer Wesley Alan Dodd, for example, lethal injection "is too easy for these killers—I think the hanging and the electrocution or a firing squad is proper." Brian Christie, Is Execution by Hanging Cruel and Unusual Punishment? (CNN News, Jan. 5, 1993) (transcript of live report).


450. See Cy Ryan, U. Press Int'l, Feb. 22, 1983; see also Stephen H. Gettlinger, Sentenced to Die: The People, The Crimes, and the Controversy 86 (1979) (noting that when lethal injection was introduced in Oklahoma, "[m]any legislators opposed the new method because it was too 'soft on criminals'").


452. Id.

453. See e.g., Jeffrie G. Murphy & Jean Hampton, Forgiveness and Mercy (1988) (discussing the role of forgiveness, resentment, hatred, and mercy in the law); Stephen P. Garvey, "As the Gentle Rain From Heaven": Mercy in Capital Sentencing, Cornell L. Rev. 999 (1996) (arguing for a new "mercy-inclusive" approach to capital sentencing); Jean Hampton, Correcting Harms Versus Righting Wrongs: The Goal of Retribution, 39 UCLA L. Rev. 1659 (1992) (contending that retribution is a necessary part of "any morally right" justice system); Margaret R. Holmgren, Forgiveness and the Intrinsic Value of Persons, 30 Am. Phil. Q. 541 (1993) (presenting a position on forgiveness based upon Kant's claim that all individuals are of equal intrinsic worth); Samuel H. Pillsbury, Emotional Justice: Moralizing the Passions of Criminal Punishment, 74 Cornell L. Rev. 655 (1989) (discussing the influence of emotions on sentenc-
represent a small percentage of individuals' views toward execution methods.\textsuperscript{454} If this is the case, legislatures and courts are appealing to the venefugal minority, as well as twisting the death is different principle.\textsuperscript{455} As Justice Brennan emphasized, "[t]he Court has never accepted the proposition that notions of deterrence or retribution might legitimately be served through the infliction of pain beyond that which is minimally necessary to terminate an individual's life."\textsuperscript{456}

3. Choice Statutes

Table 8's choice statutes illustrate legislatures' simultaneous efforts to change and retain methods of execution. Such cross purposes result in nonsensical provisions that have no apparent penological or social policy justification. First, states can choose to have either the prior method or the new purportedly more humane method as the default if an inmate refuses to make a choice between methods. Yet, given that most inmates decline, for whatever reason, to make such a choice,\textsuperscript{457} they consequently die by the least humane method in those states that have the least humane method identified as the default. This least humane default prompted the litigation in both Campbell and Fierro, where inmates challenged the constitutionality of the default method. Neither the legislature nor the Ninth Circuit ever addressed the penological justification of having the least humane method serve as the default, particularly in light of evidence that inmates who face immediate execution may not have the psychological bearing for making choices at all, much less the means by which they are to die.\textsuperscript{458}

\textsuperscript{454} See supra notes 309, 443 and accompanying text (discussing opinion polls).

\textsuperscript{455} According to Radin, revenge-utilitarianism "plays havoc with attempts to limit punishment [because] judges will be tempted to conclude that the amount of punishment needed to serve this utilitarian revenge purpose is exactly the amount the legislature has specified." Radin, supra note 28, at 1054.

\textsuperscript{456} Glass v. Louisiana, 471 U.S. 1080, 1084 (1985) (Brennan, J., dissenting from denial of certiorari); see also Furman v. Georgia, 408 U.S. 288, 392 (1972) (Burger, C.J., dissenting) ("The dominant theme of the Eighth Amendment debates was that the ends of the criminal laws cannot justify the use of measures of extreme cruelty to achieve them.").

\textsuperscript{457} In Fierro v. Gomez, 865 F. Supp. 1387, 1391 (N.D. Cal. 1994), for example, the court noted that of the 24 California death row inmates who were provided a choice between lethal gas and lethal injection between January 1, 1993 and October 14, 1993, two-thirds (16 inmates) declined to make a choice, seven selected lethal injection, and one chose lethal gas, aff'd, 77 F.3d 301 (9th Cir.), vacated on other grounds, 117 S. Ct. 285 (1996) (remanding for reconsideration in light of changed statute).

\textsuperscript{458} Although the Royal Commission initially considered that giving a prisoner a choice between methods would provide a way of "introducing an untried system," the Commission ultimately decided against it because of the "tormenting vacillation" involved in such a decision. Royal Comm'n Rep., supra note 219, at 225; see also White, supra note 6, at 176-78 (discussing attorneys' difficulties with handling the depression and death wishes of death row
ARE EXECUTIONS CONSTITUTIONAL?

A comparably peculiar circumstance arises when an inmate chooses the method that the legislature, courts, prison personnel, and public consider to be the least humane or most archaic, but which is allowed by statute. A recent example is John Albert Taylor's highly publicized choice to be executed by firing squad under Utah's choice statute, which has lethal injection as the default.\(^{459}\) Apparently motivated by a desire to embarrass the State,\(^ {460}\) Taylor's decision spotlighted the early Mormon belief in "blood atonement" which underlied the state's practice of providing a choice of "blood shedding" methods.\(^ {461}\) Taylor's decision also accentuated current problems in administering the firing squad.\(^ {462}\) Regardless, the diminished publicity following Taylor's death appears to have comparably dimmed the political concern with the firing squad, in part because eliminating the firing squad could weaken the mantel upon which the death penalty itself is based.\(^ {463}\) Likewise, in those states where wardens make the choice,\(^ {464}\) it can be questioned whether granting them authority in this matter is any more humane or competent given that the wardens are provided the ultimate discretion—choosing the manner of inmates).


460. See Brooke, supra note 459, at A16; Condemned Criminal, supra note 459, at A14.

461. See Gillespie, supra note 195, at 12 (describing the evolution of the Mormon belief in "blood atonement," which proposes that "only through choosing a method of execution which results in blood being "spilled" (or shed) can the condemned hope to receive forgiveness in the next life").

462. The problems with administering the firing squad are varied, ranging from: (1) the "unwanted flood" of volunteers desiring to be part of the firing squad; (2) the building of a "customized firing squad execution chair" that accommodates a pan underneath in order to catch the inmate's blood because of the concern with AIDS, Brooke, supra note 459, at A16; and (3) the "need to deal with lighting conditions, shooting distances and, most importantly, give the firing squad members a chance to get over any emotional barrier to pulling the trigger," Condemned Criminal, supra note 459, at A14.

463. At the height of the publicity surrounding Taylor's decision, a number of state representatives claimed they would introduce a bill to eliminate the firing squad in Utah. See Brooke, supra note 459, at A16. Although such a bill was introduced, see H.B. 257, 523 Leg., Gen. Sess. (Utah 1996), it was never even brought to a vote. Telephone Interviews with Clay Hatch, Administrative Assistant to the Utah Speaker of the House (Mar. 22, 1996; June 14, 1997). Yet, this situation raises the prospect of a number of other potentially unusual circumstances for those inmates who, in a choice state, may be challenging one of the methods of execution. For example, by "winning," an inmate may intentionally or unintentionally place himself or others in a position where they are executed by the least humane method. A strong argument can be made that the firing squad is the most humane method of the five methods available if it is competently performed (that is, without vengeful shooters). See Denno, supra note 5, at 687-89. Moreover, some inmates may prefer having even a difficult choice rather than no choice at all. See, e.g., Bonin v. Calderon, 77 F.3d 1155, 1162-63 (9th Cir. 1996) (rejecting an inmate's claim that execution by lethal injection in California violates his constitutional right to choose his method of execution).

464. See infra app. 1, tbl. 8 (Type 6).
someone else’s death.

Next, history shows that some states that selected a new method of execution did not allow death row inmates convicted or sentenced before a certain date to make the choice between the old and new method or the states failed to specify whether their enactment of a new method was retroactive.\(^465\) Therefore, by default, pre-enactment prisoners were executed by the prior method, even though a state’s purported rationale for changing methods was that the new method was more humane. Although the Court has held that an inmate can be executed by the new, supposedly more humane method rather than the old method,\(^466\) there appears to be no penological justification for the reverse situation—executing the pre-enactment inmate by the least humane technique. Increasingly, the more modern choice statutes allow the same choice to both pre-enactment and postenactment inmates, although this is not the current situation in Mississippi.\(^467\)

Indeed, South Carolina, the most recent choice state, has a unique provision with no apparent purpose apart, perhaps, from some odd compromise based upon the wide range of statutes provided in other states. Both pre-enactment and post enactment prisoners can choose their method of execution, although the no choice default for the former is electrocution whereas the no choice default for the latter is lethal injection. Predictably, electrocution is the constitutional substitute if lethal injection is rendered unconstitutional.\(^468\)

One reason for such oddities may pertain to states’ concerns that if they introduce a new method of execution, the old method will be presumed unconstitutional. Indeed, some statutes specify that the prior method is not rendered unconstitutional due to the introduction of a new method.\(^469\) Furthermore, these are the kinds of issues that courts want to avoid; instead, they prefer to have the legislature simply change the execution method without creating legal precedent. Such side-stepping is functional. It skirts the problems involved in rendering an execution method unconstitutional if that method is still being used in other states. And, perhaps most importantly, it precludes any suggestion that the death penalty may not be viable.

\(^{465}\) See infra app. 3.

\(^{466}\) Malloy v. South Carolina, 237 U.S. 180, 185 (1915).

\(^{467}\) See infra app. 1, tbl. 8 (Type 4).

\(^{468}\) See id.

\(^{469}\) See, e.g., Ark. Code Ann. § 5-4-617(c) (Michie 1985) ("[N]othing in this section is to be construed as a declaration by the Arkansas General Assembly that death by electrocution constitutes cruel and unusual punishment in violation of the Constitutions of the United States or the State of Arkansas.").
4. Symbolic Disproportionality

Determining whether legislatures are impelled by illicit motivations in their selection or retention of particular execution methods is difficult. Nonetheless, some evidence suggests legislatures use execution methods as a means of symbolic, if not actual, disproportionality in punishment. This Article has noted that such evidence was more apparent historically when states retained or regressed to using public hangings for the crime of rape, while employing the new, purportedly more humane method of electrocution for other crimes. Because a grossly disproportionate number of blacks were executed for the crime of rape, it can be presumed that the symbolic disproportionality of execution methods pertained not to the differences in crime, but rather the differences in race. “Symbolically at least, lynching has been perceived as an act against the whole black community, not merely the execution of a single ‘criminal.’”

The obvious response, of course, is that states no longer have public executions and the death penalty for rape is now unconstitutional. Yet, substantial research shows that, while controlling for a myriad of factors relevant to the seriousness of a crime, blacks are disproportionately executed for homicides involving white victims. While execution with lethal injection is a private, sterile event as compared to a public lynching, far more open and visible are the racial differences in the implementation of the death penalty and the fact that executions occur at all. In this context, the issue of race and cruel and unusual execution methods only takes a different form.

Whether legislatures or the courts should assume the greater responsibility in determining the constitutionality of an execution method,


471. See supra notes 277-78 and accompanying text (discussing possible racial motivations for exceptions to changes from hanging to electrocution for the crime of rape).

472. See supra note 278 and accompanying text (evaluating the treatment of blacks convicted of rape).


475. This argument has also been raised recently in response to the reintroduction of chain gangs. See Recent Legislation: Criminal Law—Prison Labor—Florida Reintroduces Chain Gangs, 109 Harv. L. Rev. 876, 878 (1996) ("[P]roponents seem to argue that the symbolic value of chain gangs alone justifies their use. Such an argument either ignores the racially divisive nature of this symbol or, more insidiously, attempts to take advantage of it by subtly scapegoating one segment of society.") (footnote omitted).
thereby diminishing the opportunity for symbolic disproportionality, is too large an issue for this Article to discuss. Notably, there is less legislative and judicial action in states that do not regularly impose the death penalty.476 Among those states that do impose the death penalty more frequently, courts are beginning to take a relatively larger role. As the Fierro district court emphasized, however, "[w]hile 'it is for [the judiciary] ultimately to judge' whether a given punishment offends the eighth amendment, the amendment is not a vehicle for judges to impose their own views about what society's standards ought to be."477

CONCLUSION

In Furman v. Georgia,478 the Supreme Court set forth the death is different principle that established death as a unique punishment in terms of its "pain," its "total irrevocability," and "its absolute renunciation of all that is embodied in our concept of humanity."479 This principle fueled the Court's creation of heightened Eighth Amendment requirements to preclude the death penalty's cruel and unusual application.480 But the death is different principle has meant less, not more, scrutiny with respect to at least one significant issue—the form of the punishment itself. The Court has yet to review evidence concerning the constitutionality of any execution method.481 Apart from recent Ninth Circuit decisions addressing the constitutionality of lethal gas and hanging,482 the lower

476. For example, although most states that switched to lethal injection had previously used lethal gas or electrocution, some states did not follow this trend. Idaho used hanging before it adopted lethal injection in 1978 (and allowed the choice of the firing squad in 1982). This sequence is not surprising given that Idaho executed only nine individuals from 1901 to 1957. See Bowers, supra note 274, at 436. Idaho has executed only one other individual since then, on January 6, 1994. First Idaho Execution In 36 Years: A Killer Who Used a Baseball Bat, N.Y. Times, Jan. 7, 1994, at A20. See infra app. 3 (Idaho). Delaware also authorized hanging prior to adopting lethal injection, but retained hanging as an option. See infra app. 3 (Delaware). Like Idaho, Delaware had few (12) executions from 1930-1980. The Death Penalty in America, supra note 274, at 60. Presumably, these states would have changed to electrocution or lethal gas prior to switching to lethal injection had they been more actively involved in executions.


478. 408 U.S. 238 (1972) (per curiam).

479. Id. at 306 (Stewart, J., concurring).

480. See supra notes 7-9 and accompanying text (discussing the ramifications of Furman and the death is different principle).

481. See supra notes 1-2 and accompanying text (noting the Court's refusal to review the constitutionality of execution methods).

482. See Fierro v. Gomez, 77 F.3d 301, 309 (9th Cir.) (holding lethal gas unconstitutional),
courts also have afforded scant attention to this issue. The Court’s neglect betrays the Eighth Amendment’s original purpose of proscribing the “torturous” and “barbarous” punishments that most commonly resulted from execution methods.\(^{483}\)

In contrast, the Court has developed a relatively expansive Eighth Amendment approach to cases involving prison conditions and inmate health care, addressing in relative detail such issues as prison officials’ use of excessive force, the risk of prisoners’ future injury, and inmate-against-inmate violence.\(^{484}\) Increasingly, such cases have impeded states’ efforts to have inmates’ suits dismissed at an early stage of the criminal justice process, thereby inviting greater judicial involvement in evaluating the conduct of prison personnel.\(^{485}\)

This Article offers various reasons for courts’ disparate Eighth Amendment approaches to capital and noncapital punishments. First, this Article suggests that if the Court encouraged judicial scrutiny of execution methods to the same extent that it has evaluated prison conditions, it might reach the conclusion that no execution method that currently exists could be implemented humanely. Having finally resolved the issues raised in Furman and Gregg concerning the constitutionality of the death penalty itself, the Court would balk to yet again reconsider its oversight of this most final punishment.

Next, courts lack a coherent theory for the constitutional role of pain. Although the gratuitous infliction of pain is definitely impermissible, far more perplexing is the nature and amount of pain that courts will allow in the sui generis and seemingly standardless context of an execution. Moreover, courts are not clear on when pain is truly gratuitous and when pain is justified under some acceptable penological theory. This dilemma explains, for example, courts’ discomfort with assessing the scientific and medical evidence on execution methods. On one level, courts appear unable to comprehend such evidence either constitutionally or scientifically; on another level, they may be reluctant to acknowledge that no acceptable standard would warrant the implementation of any existing method of execution.

Lastly, courts typically shun emotionally and morally charged subjects,

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\(^{483}\) See supra note 5 and accompanying text (discussing the Eighth Amendment).


\(^{485}\) See supra note 165 and accompanying text.
and few subjects elicit stronger feelings than the death penalty.\textsuperscript{486} The death penalty itself presents an additional conundrum. Courts allow the death penalty, but the punishment introduces unique issues concerning how it must be applied. With respect to execution methods, the courts can respond in three alternative ways. First, they can skirt the issue entirely (as the Supreme Court has done) even though three Justices have recently invited litigation on the constitutionality of electrocution.\textsuperscript{487} Next, courts can develop an Eighth Amendment execution standard that allows for a high level of pain and frequently botched executions; yet, such a standard in practice may incur substantial criticism. Lastly, courts can defer to state legislatures as a number have done, emphasizing legislatures' greater expertise and responsibility in the matter.\textsuperscript{488} As this Article has demonstrated, however, legislatures repeatedly have not accomplished what courts have expected them to do; this failure suggests that highly deferential judicial rulings are at best unsatisfactory and at worst, hypocritical.

By developing and applying an execution methods test, this Article shows that there are available Eighth Amendment standards for evaluating execution methods and that courts are not justified in dismissing them. Rather, courts should engage in detailed factfinding investigations of such methods in the same way they have approached prison conditions. This Article has suggested that the most frequently used execution methods appear constitutionally deficient. It suggests, therefore, that until legislatures enact statutes providing for a constitutionally humane method of execution, the death penalty should not be imposed.

\textsuperscript{486} See Bowers et al., supra note 442, at 119-22 (providing survey data indicating the public's ambivalence toward the death penalty).


\textsuperscript{488} See infra app. 3 (surveying the legislative changes in execution methods in each state).
APPENDIX 1. TABLES

TABLE 1. CURRENT METHODS OF EXECUTION BY STATE*

<table>
<thead>
<tr>
<th>SINGLE METHOD STATES (27)</th>
<th>ELECTROCUTION ONLY (6)</th>
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<tbody>
<tr>
<td><strong>LETHAL INJECTION ONLY (21)</strong></td>
<td>Alabama Florida Georgia Kentucky Nebraska Tennessee</td>
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<th>CHOICE STATES (11)</th>
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<td><strong>INJECTION OR HANGING</strong>: Montana New Hampshire Washington</td>
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<td><strong>INJECTION OR FIRING SQUAD</strong>: Idaho Utah</td>
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<tr>
<td><strong>INJECTION OR ELECTROCUTION</strong>: Ohio South Carolina Virginia</td>
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<td><strong>INJECTION OR GAS</strong>: California Missouri North Carolina</td>
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<td>Wisconsin</td>
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* Appendix 3 provides statutory documentation for each state.
TABLE 2. THE EXECUTION METHODS TEST

_Humane Baseline (H)_

1. Unacceptable when the Bill of Rights was adopted (Stanford, Campbell)
2. "More than the mere extinguishment of life" (Kemmler)
3. "Evolving standards of decency" (Trop, Campbell, Fierro)

_Excessive (E)_

1. "Unnecessary and wanton infliction of pain" (Gregg, Francis)
   a. Pain experienced while conscious (Campbell, Fierro)
      i. Scientific research and testimony (Fierro)
      ii. Data extrapolated from animal experiments (Fierro)
      iii. Anecdotal accounts of human exposure (Fierro)
      iv. Eyewitness accounts of actual executions (Fierro)
         - Contemporaneous records by medical personnel (Fierro)
         - Eyewitness accounts by the media (Fierro, California First)
         - Eyewitness accounts by the public (Fierro, California First)
         - Aggregation of all eyewitness accounts (Fierro)
   v. Executions under a state's current protocol (Campbell, Fierro)
   vi. Executions under a state's prior protocol (Fierro, Rupe)
   vii. Aggregation of all (current and prior) executions (Fierro)
   b. Length of time consciousness exists (Campbell, Fierro)
      i. > 1 minute (Campbell, Fierro)
      ii. > 1 or 1.5 minutes, but < 2 minutes (Campbell, Fierro)
      iii. Drifting in and out of consciousness (Fierro)
   c. Physical characteristics of the inmate (Rupe)
   d. Relative merits of other methods (Fierro)
2. "Nothing less than" human dignity (Trop)
   a. Mutilation and dismemberment (Campbell, Rupe)
   b. "A minimization of physical violence" (Glass dissent)
3. Risk of "unnecessary and wanton infliction of pain" (Farmer, Fierro)
   a. Risk for the particular execution at issue
      i. Risk "is more than slight" (Campbell)
      ii. "Substantial risk" of suffering "extreme pain for several minutes" (Fierro)
   b. "Series of abortive attempts" (Francis)
   c. The "procedure as a whole and over time" (Fierro)
   d. Manner in which the execution protocol is created (Fierro)
      i. "Unscientific and slapdash" (Fierro)
      ii. No consultation with medical personnel (Rupe)
   e. Accuracy of prison personnel's decisions (Rupe)
   f. Competence of manufacturer and/or executioner (Fierro, Rupe)
   g. Prison personnel's deliberate indifference (Farmer)
      i. Knows and disregards "substantial risk" of harm (Farmer)
         - "inference from circumstantial evidence" (Farmer)
ARE EXECUTIONS CONSTITUTIONAL?

- "the risk was obvious" (Farmer)
- "longstanding, pervasive," "noted" (Farmer)

ii. Executions and prison conditions "are analogous" (Fierro)

"Standards of Decency" (D)

1. "Objective factors to the maximum possible extent" (Stanford)
2. Legislation passed by elected representatives (McCleskey, Fierro)
   a. Statutes are presumptively constitutional
   b. Few states authorize the method
   c. Relatively fewer states authorize the method
   d. Legislative trend is away from the method
   e. Legislative histories regarding the method
   f. Newspaper accounts of legislative changes
3. Public attitudes (Gregg) and opinion polls (Fierro)
4. Legal challenges to a particular method (Fierro)
5. Acceptability as a form of euthanasia for animals (Glass dissent)
6. Physician involvement (AMA)
7. Heart death (as opposed to brain death)
8. Organ donation by inmates

Alternative Method (A)

1. Competence of manufacturer and/or executioner
2. Physician involvement (AMA)
3. Availability of information about effectiveness
4. Whether the method is "unusual"
5. Cost

Penological Justification (P)

1. "Basic human rights" (Lloyd Weinreb)
2. Utilitarianism (Gregg) and "revenge utilitarianism" (Margaret Radin)
3. Retribution (Gregg) and "moral outrage" (Herbert Packer)
4. Humaneness
5. Cost (California, Nevada, Oklahoma)
6. Symbolic disproportionality
7. Public versus private methods
8. Racial disparities (e.g., rape)
9. Choice statutes
   a. Default is the prior method for postenactment inmates
   b. Default is the prior method for pre-enactment inmates
   c. Choice made by the warden (or choice is unclear)
   d. Choice made by the inmate
10. Retroactive new method statutes (Malloy)
11. Nonretroactive new method statutes
12. Unconstitutionality provisions/constitutional substitutes
13. Illicit legislative motives
### TABLE 3. METHODS OF EXECUTION BY STATE: 1895 - 1943

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**TABLE 4. METHODS OF EXECUTION BY STATE: 1944 - 1996**

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<th>Year</th>
<th>Lethal Injection</th>
<th>Lethal Gas</th>
<th>Electrocution</th>
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<th>No Change in Execution Method</th>
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<td>* States that eventually abolished the death penalty.</td>
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TABLE 7. CHANGES IN EXECUTION METHODS BY STATE: 1977 - 1996

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<th>YEAR</th>
<th>STATES</th>
<th>HANGING TO ELECTROCUTION</th>
<th>HANGING TO LETHAL GAS</th>
<th>ELECTROCUTION TO LETHAL GAS</th>
<th>ELECTROCUTION TO LETHAL INJECTION</th>
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<th>LETHAL GAS TO LETHAL INJECTION</th>
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<td>CT</td>
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<td>NY</td>
<td>SC**</td>
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** States that eventually abolished the death penalty.

** Choice States. (For example, if a state (e.g., Massachusetts) changes from one execution method (electrocution) to a choice between that method and a new method (a choice between electrocution and lethal injection in 1982), the new method (lethal injection) only is shown in the Table. When a state (e.g., Nevada) changes from a choice method (hanging or firing squad) to a single method (lethal gas in 1921), the primary choice method (hanging) only is shown in the Table.)
TABLE 8. TYPES OF LETHAL INJECTION STATUTES

1. Lethal Injection Only

These statutes (for twenty-one states) provide no alternative method of execution for prisoners sentenced or convicted after the date the statute was enacted or became effective. 489 There are two general types of lethal injection-only statutes:

(A) Type A statutes (for eight states) refer to an injection of a “substance or substances in a quantity sufficient to cause death.” 490
(B) Type B statutes (for eleven states) refer to a “lethal quantity of an ultrashort-acting barbiturate or other similar drug in combination with a chemical paralytic agent until death.” 491

Statutes for two states depart slightly from Type A and Type B. 492

2. Lethal Injection or Other Method—Prisoner’s Choice

These statutes (for eight states) allow prisoners to choose between lethal injection and another method of execution. 493

489. See supra app. 1, tbl. 1, "Lethal Injection Only" states.


493. The eight states and the other methods they have selected are as follows: Lethal Injection or Hanging: Montana, Washington; see Mont. Code Ann. § 46-19-108(3) (1983) (amended...
3. Lethal Injection and Pre-enactment Prisoner's Choice

These statutes (for four states) apply to states that now have a lethal injection-only statute enacted, but provide pre-enactment prisoners a choice between lethal injection and the method that existed when the prisoner was convicted or sentenced to death.\(^{494}\)

4. Lethal Injection and No Pre-enactment Choice

This statute (for one state) mandates that a pre-enactment prisoner use the method of execution that existed when the prisoner was sentenced to death, even though the state has now enacted a lethal injection-only statute.\(^{495}\)

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494. This section lists only those states where at least one pre-enactment prisoner remains who is eligible to choose between lethal injection and another method. Lethal Injection or Hanging: Delaware; see Del. Code Ann. tit. 11, § 4209(6) (1953) (amended 1986) (current 1996) (by Type A); 65 Del. Laws 281 § 3 (1986) ("This Act shall become effective only for acts committed after its enactment [June 13, 1986] except that any person sentenced to death for acts committed prior to the enactment of this act shall be permitted to elect [Type A] . . . as the method [rather than "hanging by the neck"]; see also infra app. 3 (Delaware) (noting that only one inmate remains who can choose hanging). Lethal Injection or Electrocution: Arkansas and South Carolina; see Ark. Code Ann. § 5-4-617(a)(1), (b) (Michie 1983) (current 1995) (by Type B "until the defendant's death is pronounced according to accepted standards of medical practice." According to 1983 Ark. Acts 774 § 2, lethal injection applied only to offenses committed after July 4, 1983. However, 1983 Ark. Acts 774 § 3 provided that "any defendant sentenced to death by electrocution prior to July 4, 1983, could elect to be executed by lethal injection"); see also supra note 205 and accompanying text and infra app. 3 (Arkansas); S.C. Code Ann. § 24-3-530(A-C) (Law Co-op. 1976) (amended 1995) (current 1996) ("(B) Person convicted prior to effective date must be administered . . . electrocution unless the person elects death by lethal injection."); see also infra app. 3 (South Carolina). Lethal Injection or Lethal Gas: Arizona; Ariz. Const., art. XXII, § 22 (1933) (amended 1992) (current 1996) (Type A "except that defendants sentenced to death for offenses committed prior to the effective date of the amendment shall have the choice of lethal gas"); Ariz. Rev. Stat. § 13-704(B) (1978) (amended 1993) (current 1996) ("if defendant fails to choose [It will be] by lethal injection"); see also infra app. 3 (Arizona). Although Maryland maintains a choice statute (lethal gas or lethal injection) for pre-enactment prisoners, no inmates remain who are eligible to make this choice. Therefore, Maryland's choice provision no longer has practical significance. See infra app. 3 (Maryland).

5. Lethal Injection and Constitutional Substitutes

These statutes (for ten states) provide a constitutional substitute in case lethal injection is held to be unconstitutional or invalid. 496

6. Lethal Injection By Discretion

These statutes (for three states) allow someone other than the prisoner to choose the execution method, or the statute is unclear about who makes this choice. 497

("sentenced prior to July 1, 1984, ... shall be by lethal gas" and on or after July 1, 1984, by Type B).

496. *Lethal Injection or Hanging* Delaware, New Hampshire; see Del. Code Ann. tit. 11, § 4209(f) (1953) (amended 1986) (current 1996) (if Type A is held unconstitutional, then by "hanging by the neck"); 1986 N.H. Laws § 82:3 (if Type B is held unconstitutional, then by hanging). *Lethal Injection or Electrocution* Arkansas, Illinois, Ohio, South Carolina; see Ark. Code Ann. § 5-4-617(a)(1), (b) (Michie 1983) (current 1995) (if Type B is held unconstitutional, then by electrocution); 725 Ill. Comp. Stat. 5/119-5(a)(2) (1963) (amended 1992) (West 1996) (current 1996) (if Type B is held unconstitutional, then by electrocution); Ohio Rev. Code Ann. § 2949.22(D) (Banks-Baldwin 1993) (amended 1994) (current 1997) (If lethal injection is held unconstitutional, the death sentence shall be by electrocution); S.C. Code Ann. § 24-3-530(C) (Law Co-op. 1976) (amended 1995) (current 1996) ("(C) if lethal injection is held unconstitutional, then by electrocution."). *Lethal Injection or Electrocution or Firing Squad* Oklahoma; see Okla. Stat. tit. 22, § 1014(A-C) (1977) (current 1996) (If Type B is held unconstitutional, then by electrocution; if electrocution is held unconstitutional, then by firing squad). *Lethal Injection or Lethal Gas* California, Mississippi, Wyoming; see Cal. Penal Code § 3604(d) (West 1941) (amended 1992) (current 1996) ("(d) if either manner of execution described in subdivision (a) [lethal gas or Type A] is held invalid, the punishment of death shall be imposed by the alternative means specified in subdivision (a) [lethal gas or Type A]"; Miss. Code Ann. § 99-19-51 (2) (1972) (amended 1993) (current 1996) (if Type B is held unconstitutional, then by lethal gas); Wyo. Stat. Ann. § 7-13-904(b) (Michie 1984) (current 1997) (if Type B is held unconstitutional, then by lethal gas).

497. *Lethal Injection or Hanging* New Hampshire; see N.H. Rev. Stat. Ann. § 630.5(XIII-XV) (1986) (current 1996) ("XIII. [Type B] XIV. The commissioner of corrections or his designee shall determine the substance or the substances to be used"; if it is "impractical," death will be by "hanging"). *Lethal Injection or Firing Squad* Idaho; see Idaho Code § 19-2716 (1982) (current 1997) ("The director of the department of corrections shall determine the substance or substances to be used ... provided, however, that, in any case where the director finds it to be impractical ... for the reason that it is not reasonably possible to obtain expert technical assistance, should such be necessary to assure that infliction of death by [Type B] can be carried out in a manner which causes death without unnecessary suffering, the sentence of death may be carried out by firing squad."). *Lethal Injection or Lethal Gas* Missouri; see Mo. Rev. Stat. § 546.720 (1988) (current 1996) ("The manner of inflicting death shall be by ... lethal gas ... or lethal injection"); see also infra app. 3 (Missouri) (explaining that, in practice, the Director of the Missouri Department of Corrections decides which method to use for an execution; lethal injection is the Director's method of choice now and for the foreseeable future).
APPENDIX 2. POST-GREGG BOTCHED EXECUTIONS

A. Electrocuton

1. John Spenkelink (Florida, May 25, 1979)

Spenkelink, the first person to be electrocuted after Gregg, received three separate jolts of electricity; five minutes lapsed before his death. After the first jolt, smoke filled the room and the flesh on his right leg scorched, revealing a three-inch wound. Because the doctor stated that Spenkelink was not yet dead, the executioner applied two additional surges. According to State Representative Andy Johnson, one of the witnesses, “[w]e saw a man sizzled and sizzled again.” A leather harness that fit around Spenkelink’s head and over his chin and arms, prevented him from opening his mouth and emitting possible sounds of distress.

2. Frank J. Coppola (Virginia, August 10, 1982)

No media representative was present to report Coppola’s execution and corrections officials never released the details of what happened. According to the account provided by J. Samuel Glasscock, an attorney and former representative to the General Assembly of Virginia, Coppola received two separate jolts of electrical current, each lasting about fifty-five seconds. The second jolt produced smoke that filled the entire death chamber, along with the smell and sizzle of burning.

498. See Robert A. Burt, Disorder in the Court: The Death Penalty and the Constitution, 85 Mich. L. Rev. 1741, 1805-19 (1987) (discussing the judicial proceedings in the Spenkelink case); An Electric Chair Is Turned On, Newsweek, June 4, 1979, at 26 (outlining the history of the Spenkelink case and the final days before his execution); NAACP Legal Defense and Educational Fund, Inc., supra note 297, at 2; Death Penalty Information Center, supra note 293, at I. Gary Gilmore, the first person to be executed after the ban, died by firing squad on January 17, 1977. Paternoster, supra note 284, at 18; NAACP, supra note 297, at 2; Death Penalty Information Center, supra note 293, at 1.


500. Id.


503. See Curry, supra note 499, at A1 (stating that “a thick black strap covered [Spenkelink’s] mouth”).

504. See Bassette Memorandum, supra note 220, at 19-20.

505. See id. at 28.

506. See Affidavit of J. Samuel Glasscock, Esq. ¶ 1-2, Exhibit 3 of Bassette Memorandum, supra note 220.

507. See id. ¶ 4.
flesh when Coppola’s head and leg became inflamed. A medical examiner pronounced Coppola dead minutes after a prison official turned off the current when Coppola’s leg burst in flames.


Evans’ execution in Alabama’s Holman prison was one of the most grotesque. Evans’ attorney, Russell Canan, who witnessed the event, stated that the first jolt of 1900 volts of electricity shot through Evans’ body and lasted thirty seconds. Thereafter, “sparks and flames erupted from the electrode tied to his leg,” his body strained against the straps, his fists clenched, and an electrode caught on fire, bringing with it smoke and “an overpowering stench of burnt flesh and clothing.” When the current stopped, two doctors went into the chamber and determined that Evans still had a heartbeat; a reporter then yelled that Evans had survived as “a gush of saliva oozed from [Evans'] face.” Executioners sent a second jolt of 1900 volts of current, and Evans gripped the arms of his chair as more smoke emitted from his head and leg. After doctors examined Evans for the second time, they reported that he was still alive. According to Canan, “Commissioner [Fred] Smith did not know what he was doing.” When Canan requested clemency for Evans because the electro-cution constituted cruel and unusual punishment, Smith telephoned then-Governor George Wallace about Canan’s request. Wallace responded that he would “not interfere.” After a third, thirty-second jolt of electricity, Evans was pronounced dead. His execution lasted fourteen minutes.

4. Robert Wayne Williams (Louisiana, December 14, 1983)

When executioners applied electricity to Williams, smoke and sparks emitted from the side of Williams’ head, flames appeared from his knee, and the room smelled like “burning flesh.” Williams’ minister, Rev. J.

508. Id. ¶ 5-8.
509. Id. ¶ 8.
510. For a description of Evans’ execution, see Shirley Dicks, Death Row: Interviews with Inmates, Their Families and Opponents of Capital Punishment 47, 48 (1990); Mark G. Winne, What It’s Like to See a Man Die in the Chair, Atlanta J. & Const., May 1, 1983, at 17D.
512. Id. at 78-79; see also If We Must, Execute by Injection, Atlanta J. & Const., Apr. 27, 1983, at 10A (describing Evans’ execution and comparing it to ritualized revenge and torture); Garry Mitchell, Killer Executed in Electric Chair in Alabama, Boston Globe, Apr. 23, 1983, at 3 (providing a detailed account of the Evans execution and the judicial action preceding it).
513. See Canan, supra note 511, at 79.
514. Id.
515. Id.
516. Id.
517. Id at 80; Mitchell, supra note 512, at 8; If We Must, Execute by Injection, supra note 512, at 10A.
D. Brown, reported that when he viewed Williams’ body in the morgue after Williams’ diaper had been removed, it was a “bad sight to see.”519 Among other things, Williams’ penis “was busted.”520 Roland Braud, an electrician who inspects the chair and removes the electrodes from the prisoners’ bodies, conceded that Williams’ execution had mistakes. “On [Williams’ execution], I will agree that it wasn’t professional. . . . That was excessive burning . . . . It was our first one [since Gregg].”521 Williams’ execution was part of the focus of an evidentiary hearing based upon a condemned inmate’s unsuccessful claim that the State of Louisiana “has concealed since Wayne Williams’ execution in 1983, that its electric chair has design defects which cause mutilation and torture.”522 However, the 1990 publication of postexecution photographs of Williams’ “badly burned head” and body in The Angolite, Louisiana’s award winning prison magazine, “helped stop the use of electrocution as Louisiana’s method of execution.”523

5. Alpha Otis Stephens (Georgia, December 12, 1984)

After experiencing one two-minute jolt of 2080-volt electricity, Stephens slumped;524 soon thereafter, witnesses said that he struggled to breathe.525 During the six minutes doctors waited for Stephens’ body to cool so that they could examine it, Stephens took about twenty-three breaths.526 Stephens died after receiving the second two-minute, 2080-volt current.527 Altogether, eight minutes lapsed before the second jolt caused his death.528 A prison spokesperson said that “apparently there is no malfunction,” in the electric chair, but added that “prison officials intended to find out why it took two charges to kill Mr. Stephens.”529

519. Id. at 147.
520. Id. at 146.
525. Id.
526. Id.
527. Id.
529. Murderer Electrocuted, supra note 524, at A18.
6. William E. Vandiver (Indiana, October 16, 1985)

Vandiver’s execution required five jolts of electricity from the seventy-two year-old electric chair.530 A witness stated that Vandiver continued to breathe after the first two jolts of 2300-volt current, and the doctor did not pronounce him dead for over seventeen minutes after the electricity was first applied.531 According to Vandiver’s attorney, who witnessed the execution, “[w]hat I saw initially was smoke coming from someone’s head . . . . There was a tremendous smell of burning in the room.”532 Vandiver’s fists remained clenched throughout the execution.533 Some witnesses commented that “the technical problems inhumanely prolonged the execution.”534 The physician who determined Vandiver’s death stated that “[t]his is very rare,”535 adding that Vandiver should have died after the first jolt.536 The Department of Corrections spokesperson conceded that the execution “did not go according to plan,” although the electric chair had been tested three times by a private contractor and functioned flawlessly.537 Moreover, “[t]he chair has been used 61 times . . . and has never failed, except sometimes it needs more than one application.”538 Indeed, in 1961, the same chair required six jolts to kill Richard Kiefer, another Indiana inmate.539

7. Alvin Moore (Louisiana, June 9, 1987)

According to Moore’s embalmer, Moore evidenced “severe” circular burns on the top of his head and burns on his left leg.540

8. Wayne Robert Felde (Louisiana, March 15, 1988)

Felde received four jolts of electricity.541 In an issue devoted solely to

530. Weyrich, supra note 528, at A1.
537. Id.
539. Id.
electrocution, *The Angolite* printed a description of Felde's body.542 The
witness providing the description was Felde's sister, a veteran nurse with
fifteen years of experience as an Emergency Room Supervisor and who had
witnessed numerous electrical burns.543 She stated that she was
"shocked at the extent of the burning on Wayne's body." The
burns were severe: third and fourth degree burns with sloughing,
"meaning the skin had literally come loose from his body and was
sliding," she said. Felde's ear was badly burned. "Chunks of skin,
about four centimeters in diameter had been burned off the left
side of his head, toward the front, revealing the skull bone," she
added. The burn to her brother's calf, at the point of contact of
the leg electrode, was "gaping and oozing." She stated the leg was
so badly mutilated that "it had been necessary to enclose that
portion of his calf in a zipped plastic sleeve, with some sawdust-
lke material, to absorb and prevent draining of the burn."

*The Angolite*'s issue on electrocution helped persuade state officials to
switch to lethal injection.544

9. *Horace F. Dunkins (Alabama, July 14, 1989)*

Witnesses stated that Dunkins, who was mentally retarded, required
nineteen minutes to die in Alabama's electric chair "when it failed to
deliver a single killing jolt."545 Ultimately, two jolts, nine minutes apart,
cause Dunkins' death.546 Dunkins' attorney described the execution as
"brutal."547 When it had become clear that Dunkins had not received a
sufficient amount of electricity from the first jolt, a prison guard captain
opened the witness room door announcing, "I believe we've got the jacks
on wrong."548 Electricians had to reconnect the faulty cables, which
created insufficient current between jolts, in order for the electrocution to
proceed.549 Prison officials admitted, and experts confirmed, that the
electrical jacks were improperly connected and that no electricity appeared
to have reached Dunkins' chair initially550 even though officials stated

542. Denno, *supra* note 5, at 643; *see also* *supra* notes 241, 523 (discussing the contents and
impact of *The Angolite*'s issue).
Whitley, No. 91-0502, 1991 U.S. Dist. LEXIS 7387, at *49 (E.D. La. May 29, 1991), vacated and
remanded, 992 F.2d 491 (5th Cir. 1993)).
545. Denno, *supra* note 5, at 643 n.595; *see also* *supra* note 525 and accompanying text
(describing the impact of *The Angolite*'s accounts of electrocution).
546. John Archibald, *On Second Try, Dunkins Executed for Murder, Birmingham News, July 14,
1989, at 8A; Michael deCourcy Hinds, *Making Execution Humane (Or Can It Be?)*, N.Y. Times,
548. *Id.*
549. Archibald, *supra* note 546, at 8A.
at 41-42.
that the equipment was tested every day for the five days preceding the execution. Alabama Prison Commissioner Morris Thigpen commented at the time, "I regret very, very much what happened. It was human error. I just hope he was not conscious and did not suffer." Although a private electrician had tested the chair for its reliability, Thigpen noted that "[y]ou can get some reading from the tests, but there is no way to know if they are accurate." Indeed, the press remembered that Alabama's electric chair, nicknamed "Yellow Mama," had also malfunctioned in 1983 when John Louis Evans III required three jolts of electricity before doctors pronounced him dead. Regardless, the United States District Court of the Southern District of Alabama found "no credible evidence that Dunkins suffered any pain ... and that the likelihood of an error similar to that which occurred during the Dunkins execution is remote and not likely to occur in the foreseeable future." The court also said that it had "heard ample testimony" that electrocution in Alabama "is painless." Dunkins' execution constituted the focus of an evidentiary hearing based upon a condemned inmate's unsuccessful claim that the "State of Alabama has neither the equipment nor the personnel to competently carry out a humane execution" and that Dunkins' execution "violated the Eighth Amendment because Dunkins was physically and psychologically tortured."


Tafero's execution has been described as "gruesome." For four minutes, the hooded executioner applied three 2000-volt jolts of electricity to Tafero's body. Until the last jolt Tafero "continued to clench his fists, nod, convulse and appear to breathe deeply ... as if he were alive." Moreover, the jolts sparked a fire on his head with six- to twelve-inch flames that filled the execution chamber with smoke while Tafero's

552. See Loughlin, supra note 264, at 8A.
553. Wikberg, supra note 241, at 42.
555. See Archibald, supra note 546, at 8A; supra notes 510-17 and accompanying text (describing Evans' death).
556. Thomas v. Jones, 742 F. Supp. 598, 606 (S.D. Ala. 1990). According to the court, the first attempt to electrocute Dunkins was a "cycle" not a jolt because there was no electricity administered. The second cycle of electricity constituted the first jolt. Id. at 605.
557. Id. at 607.
558. Id. at 602.
559. Trombley, supra note 208, at 44 (characterizing Tafero's execution as "probably the most gruesome in U.S. history"); Cynthia Barnett, Tafero Meets Grisly Fate in Chair, Gainesville Sun (Fla.), May 5, 1990, at 1A, 9A (quoting an Associated Press reporter who witnessed Tafero's execution, stating that the incident "was, in a word, gruesome . . . . I've never seen anything like this"). For an extensive discussion of the Tafero execution, see generally Bertolotti Petition, supra note 241.
560. Barnett, supra note 559, at 1A.
561. Id.
“throat produced gurgling sounds.”562 There were varying explanations for why the fire occurred and why the first jolt failed to kill as intended. Some experts said that the synthetic sponge in Tafero’s headset did not properly conduct electricity and burst into flames with each jolt.563 Leuchter testified that the head and leg electrodes were in “questionable” condition because Florida’s superintendent of prisons had rejected new equipment considered to be too costly.564 Leuchter declined the superintendent’s subsequent request that he create a leg electrode from an old army boot and a copper strip.565 Indeed, minutes after the execution, Department of Corrections spokesperson Bob MacMaster said, “[t]here was a fault in the headpiece.”566 Still others suggested that an impaired electrode reduced the current from 2000 to 100 volts,567 “low enough . . . to keep a person alive and in great pain.”568 The medical examiner who conducted Tafero’s autopsy said he could not determine whether Tafero survived the first two jolts or died instantly,569 as a prison doctor had contended.570 Overall, then, there is substantial evidence that Florida’s electric chair was defective at the time of Tafero’s execution and that those administering his execution were inexperienced.571 Regardless, the

562. Trombley, supra note 208, at 47; Barnett, supra note 559, at 1A; Weyrich, supra note 528, at 1A; Ron Word, Florida’s Electric Chair Focus of Legal Debate, St. Paul Pioneer Press Disp., June 24, 1990, at 5A.

563. See Denno, supra note 5, at 555; see also Trombley, supra note 208, at 48-50.

564. See Buenoano v. Dugger, No. 90-473-CIV-ORL-19, 1990 WL 119637, at *32 (M.D. Fla. June 22, 1990) (citing the affidavit and testimony of Leuchter, “a consulting engineer who designs and constructs electric chairs”); vacated sub nom., Buenoano v. Singletary, 963 F.2d 1433 (11th Cir. 1992); Trombley, supra note 208, at 51-52 (describing an interview with Leuchter on Tafero’s execution); State Used Army Boot to Fix Electric Chair, Affidavit Says, Sun Sentinel (Ft. Lauderdale, Fla.), June 16, 1990, at 1A (referring to Leuchter’s affidavit); see also Denno, supra note 5, at 650-51 nn.658-62 and accompanying text (summarizing Leuchter’s testimony about his consultation with Florida’s prison electrician and superintendent, who inquired about the possibility of replacing equipment they thought was “questionable” condition on the state’s electric chair).

565. See Buenoano, 1990 WL 119637, at *32.


567. See Trombley, supra note 208, at 50 (discussing the views of Robert Kirschner, M.D., the deputy chief medical examiner of Cook County, Illinois, and a specialist in torture and human rights abuses, who reviewed the available evidence in Tafero’s case); Weyrich, supra note 528, at A1 (describing the views of experts).

568. Weyrich, supra note 528, at A1; see also Trombley, supra note 208, at 60 (quoting Kirschner’s view that “the failure to administer the requisite voltage combined with the other physiological reactions noted by observers of the execution raises the substantial possibility that Mr. Tafero experienced conscious pain and suffering during the execution”).

569. See Larry Keller, Autopsy Fails to End Execution Dispute, Sun Sentinel (Ft. Lauderdale, Fla.), May 8, 1990, at 1A (referring to the explanation provided by the medical examiner’s spokesperson).


571. Denno, supra note 5, at 650-54. By July 27, 1990, the day that Anthony Bertolotti was executed in Florida, the Supreme Court and the Court of Appeals for the Eleventh Circuit believed that the electric chair was operating sufficiently well. While there were no gruesome
United States District Court of the Middle District of Florida concluded that there was "sufficient evidence to negate any constitutional claim of cruel and unusual punishment and to negate the contention that the unusual events accompanying Mr. Tafero's execution will probably occur again." Tafero's execution constituted the focus of an evidentiary hearing based upon a condemned inmate's unsuccessful claim that the procedure for electrocution in Florida constituted cruel and unusual punishment.


Boggs required two fifty-five second applications of 2500-volts of electricity. According to one source, Boggs did not die after the first application.

12. Wilbert Lee Evans (Virginia, October 17, 1990)

According to accounts by witnesses and reporters, during the application of the first of two fifty-five second, 2400-volt jolts of electricity, blood "poured" from Evans' eyes and nose," drenching his shirt. Rev. Russell Ford stated that "air spilled from Evans's lips ... He was covered with blood." According to Tim Cox, a United Press International reporter, Evans "appeared to give an audible moan or groan when the electricity was first applied, suggesting he may have suffered initially... It was kind of unsettling because we weren't prepared for it." Initially, prison officials stated that Evans merely suffered a nosebleed possibly caused by his head jerking against the death mask during the first jolt. Then, officials suggested that the death mask may have been too small for Evans' nose and physical features. Later they

circumstances such as those present in the Tafero case, there was one unusual aspect of Bertolotti's execution. Rather than waiting for a doctor to pronounce death, the time of Bertolotti's death was recorded as 7:07 p.m., the time immediately following the last of three two-minute jolts. See Florida Executes Killer; Electric Chair Works Properly, Sun Sentinel (Fla.), July 28, 1990, at 19A.


573. See id. at *31.


575. See id.

576. DeNeen L. Brown, Execution Probe Sought, Wash. Post, Oct. 21, 1990, at B1; see also Mike Allen, Groups Seek Probe of Electrocution's Unusual Events, Richmond Times-Disp., Oct. 19, 1990, at B1 ("Witnesses at the State Penitentiary were stunned to see blood stream from the right side of the leather mask that covered Evans' face to his upper lip.").


578. Id.


580. See id.

declared that Evans' high blood pressure, due to his heavy consumption of pork prior to the execution, had caused the bleeding. 582 These officials provided no explanation for Evans' moaning, other than Leuchter's comment that the sound could have been attributed to "a contraction of the diaphragm [sic] forcing out air." 583 When asked if Evans had experienced pain, a prison spokesperson replied, "[w]ell, that's possible. When you touch a circuit you're going to feel a little something." 584 According to Virginia's Corrections Director, however, an investigation of Evans' execution was unnecessary because the chair did not malfunction. 585 "We know it didn't because there was no need to administer any additional surge of electricity." 586 "The machines involved operated properly . . . Different people react differently." 587 Although Leuchter stated that he could not comment on the possibility that Evans' high blood pressure caused the bleeding, he emphasized that "[i]f they put something on his face that was too small for his physical features, that would be inhumane, medieval." 588 He explained that Virginia's Department of Corrections had communicated with him about five or six years prior to Evans' execution requesting a price estimate for replacing the helmet and electrodes used for the electric chair. 589 The State's attorneys dismissed Leuchter's negative comments about Evans' execution, claiming that Leuchter made them only because he was disgruntled that he did not receive the contract. 590 They contended that Leuchter's failure to obtain the contract also explained why Leuchter had testified as an expert against the State (claiming that the state's electric chair could malfunction) in the appeal of Richard Boggs, whom the State had executed three months earlier. 591

13. Derick Lynn Peterson (Virginia, August 22, 1991)

Peterson's death occurred after thirteen minutes and two separate jolts of electricity. 592 After the first series of jolts, Peterson's heart

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582. See Allen, supra note 576, at B1; Brown, supra note 576, at B8.
583. Letter from Marie Deans, Executive Director, Virginia Coalition on Jails and Prisons, to Edward W. Murray, Director, Virginia Department of Corrections 2 (Oct. 19, 1990) (concerning the possible malfunction of the electric chair used in the Evans execution) (on file with the author).
584. Cox, supra note 579.
586. Id.
589. See id.
590. See id.
591. See id.; see also supra notes 574-75 and accompanying text (describing Boggs' death).
continued to beat. The Director of Virginia’s Department of Corrections explained: “We’re dealing with brand new equipment. I think you have to make adjustments as you use the equipment.” He added that in future executions a second jolt would immediately follow the first. Jail officials had “planned all along to do a second cycle if they felt it was necessary.” Jay A. Wiechert, owner of the Arkansas company that designed the wiring for Virginia’s electric chair, stated that “[m]any years ago, [two doses] was not uncommon at all .... With modern equipment, that would be uncommon.” After Virginia’s announcement of its new “two-jolt policy,” however, prison officials installed new electrical equipment on the chair and changed the dose of current. According to Virginia’s Deputy Director of the Department of Corrections, Edward C. Morris, “[t]he old chair used a much higher voltage. This [new] system is less likely to cause some of the burning of the body that happened in the old high-voltage system.” However, the risk of botches in Virginia was even higher under the new system.

14. Roger Keith Coleman (Virginia, May 20, 1992)

Executioners applied two 1700-volt jolts of electricity with seven amps of energy in order to electrocute Coleman. According to Mike Hazlewood, a member of the Virginia legislature and a witness to the execution, “[a]s the switch was thrown, [Coleman’s] body took an immediate jolt backwards. One thing I did notice was some smoke that started to come from his leg. This was ... when the current was running through his system.” Hazlewood stated that he considered what he had witnessed a form of cruel and unusual punishment. “[It] was not instantaneous. It was a good seven minutes before a physician even examined Mr. Coleman to determine whether or not he was still alive.”

595. Id. Bassette considered this new procedure “an admission that a prisoner is not killed either painlessly or instantaneously.” See Bassette Memorandum, supra note 220, at 30.
597. Id.
599. Id.
600. See Bassette Memorandum, supra note 220, at 40-41 (explaining that the percentage of botched executions rose after Virginia’s electric chair was rewired); see also supra note 282 and accompanying text (comparing the ratio of botches to electrocutions before and after Virginia rewired its electric chair).
602. Id.
603. See id.
604. Id.
15. Gregory Resnover (Indiana, December 8, 1994)

Only one reporter, Lynn Ford, was among the small number of witnesses who attended Resnover’s execution.605 Ford explained that “even now, it’s hard to talk about, let alone write about. You don’t know what it’s like to watch a living being fry unless you’ve actually seen it.”606

[When] the blinds opened in the window between the viewing area and the execution room, I felt like I knew the man strapped in the electric chair with a black hood covering his shaven head. Then Resnover’s body jerked upward—the first jolt, 2,300 volts. Hazy smoke. An orange halo of fire and sparks encircled his head. His body slumped, then jumped—the second jolt, 500 volts. His body slumped one last time.

Robert Hammerle, Resnover’s attorney, noted that when the electricity was applied, Resnover rose suddenly “from his chair in a giant spasm... His head jerked back and smoke and spark-like flames came out of the top of his head.”608 When Resnover’s “body stilled,” his eighteen year-old son cried, and “several minutes ticked by,” causing another witness to ask, “[w]hy is this taking so long? Does this mean he hasn’t passed yet?”609 Senator Richard Thompson said he was spurred to write Indiana’s lethal injection bill “after seeing graphic media accounts” describing Resnover’s execution.610


There were reports that White screamed and lunged when he was executed.611 According to prison officials, however, “those who die in the electric chair immediately become unconscious and do not feel any pain.”612

17. Larry Lonchar (Georgia, November 14, 1996)

According to a media witness, Lonchar moaned and “seemed to gasp for air” as the executioner applied two jolts of 2000 volts each to Lonchar’s body before he was pronounced dead.613 The current remained on for

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606. Id.
607. Id.
612. Florida Executes Molester-Killer, supra note 611, at B11.
two minutes during the first cycle and was put on once again for the second cycle.614 Lonchar’s attorney, Clive Stafford Smith, reported that Lonchar’s moaning and gasping occurred during the application of both cycles of electricity while Lonchar’s fists increasingly clenched tighter.615

18. Pedro Medina (Florida, March 25, 1997)

“Immediately” after the executioner applied the electricity, Medina “lurched backward into the chair and balled his hands into fists”616 while his mask “burst into flames.”617 According to witnesses, “[b]lue and orange flames up to a foot long shot from the right side of Mr. Medina’s head and flickered for 6 to 10 seconds, filling the execution chamber with smoke.”618 Four minutes later, Medina was pronounced dead.619 Witnesses described the scene as “ghastly.”620 Others claimed they were “nauseated by the sight and the smell.”621 “It was horrible. A solid flame covered his whole head, from one side to the other. I had the impression of somebody being burned alive,” stated witness Michael Minerva, an attorney at Florida’s Capital Collateral Representative.622 Corrections Department spokesperson Kerry Flack explained that “a maintenance supervisor wearing electrical gloves patted out the flames while another official opened a window to disperse the smoke.”623 The “smell of burnt flesh filled the witness room.”624 Another prison spokesperson claimed there was no explanation for the cause of the flame and the execution was not interrupted because of it.625 Eugene Morris, a spokesperson for the State Department of Corrections, noted that the flames were a “total surprise, disbelief . . . . In a split second you could tell something had gone wrong.”626 “It was something entirely out of the ordinary. I have witnessed 11 executions and have never seen anything like what I saw this morning.”627 Florida Governor Lawton Chiles said, however, that an

614. Id.
618. Id.
619. Id.
621. Condemned Man’s Mask, supra note 617, at B9.
625. Id.
627. Davies, supra note 620, at 13.
attending doctor informed him that "the burns were no different than you’d see in any execution and, in his opinion, [Medina] felt no pain."\textsuperscript{628} Governor Lawton added that, "[w]e’ve had an occasion of smoke before. But the question is really, Is this something that is torturous or painful?"\textsuperscript{629} Senate President Toni Jennings of Orlando noted that, "[t]he equipment . . . should work properly, and we might want to discuss other avenues of execution."\textsuperscript{630} However, Bob Butterworth, the Attorney General of Florida, claimed that Medina’s execution would serve as a deterrent. "People who wish to commit murder, they’d better not do it in the state of Florida because we may have a problem with our electric chair."\textsuperscript{631} According to Lt. Gov. Buddy MacKay, "[l]ethal injection would be a more reliable and cost-effective method of execution. . . . [B]ut the last thing we want to do is generate sympathy for these killers."\textsuperscript{632} Regardless, Governor Chiles ordered an investigation by the Department of Corrections and requested that an independent medical examiner take part in an autopsy on Medina.\textsuperscript{633} Whereas corrections officials had blamed Jesse Tafero’s 1990 botched execution on a plastic sponge that had been substituted for the natural type of sponge used in prior Florida executions, officials used a natural sponge for Medina’s execution.\textsuperscript{634}

B. Lethal Gas

19. Jesse Walter Bishop (Nevada, October 22, 1979)

According to Tad Dunbar, a television news anchor who witnessed Bishop’s execution,

When the cyanide reached him, he gasped, and convulsed strenuously. He stiffened. His head lurched back. His eyes widened, and he strained as much as the straps that held him to the chair would allow. He unquestionably appeared to be in pain . . . . I noticed he had urinated. The convulsions continued for approximately ten more minutes, and you could see his chest expand, and then contract, trying to take in fresh air. These movements became weaker as the minutes ticked away. You could not tell when Bishop finally lost consciousness. . . . Death was pronounced after the shade on our observation window had been drawn, though there was still some slight movement in the

\textsuperscript{628} \textit{Condemned Man’s Mask}, supra note 617, at B9.
\textsuperscript{629} Id.
\textsuperscript{631} \textit{Condemned Man’s Mask}, supra note 617, at B9.
\textsuperscript{632} \textit{Baker}, supra note 623, at A1.
\textsuperscript{634} \textit{Baker}, supra note 623, at A1; \textit{see also} Denno, supra note 5, at 554-56, 650-54 (describing the different theories and experiments with sponges following Tafero’s botched electrocution). Medina’s botched execution provided the impetus for a new round of ongoing litigation concerning the constitutionality of Florida’s electric chair. \textit{See infra} app. 3 (Florida).
body.\textsuperscript{635}

Before Nevada's next execution, the legislature replaced lethal gas with lethal injection.\textsuperscript{636}

20. Jimmy Lee Gray (Mississippi, September 2, 1983)

Eight minutes after the gas was released, officials required everyone to clear the witnesses' room when witnesses were repulsed by Gray's desperate gasps for air. Gray's attorney criticized state officials for clearing the room while Gray remained alive.\textsuperscript{637} Gray "died banging his head against a steel pole in the gas chamber while the reporters counted his moans (eleven according to the Associated Press)."\textsuperscript{638} According to another account,

Once the gas reached Mr. Gray's face he began to thrash around in his chair.... The chilling sound of his head desperately smashing against the pole reverberated through the air over and over again. About the seventh time he pounded his head against the pipe, his desperation was so great that the six-sided glass chamber seemed to shake with the impact. He slumped and lay still for a few moments, then tensed up and resumed his struggling, again smashing his head against the pole. Mr. Gray struggled for air while his body contorted and twisted.\textsuperscript{639}

Another witness added, "[h]e looked like he was being strangled to death. It was obvious that Mr. Gray was in excruciating pain."\textsuperscript{640} State Corrections Commissioner Morris Thigpen acknowledged that Gray's execution indicated that the process needed to be "refined" in order to subject witnesses to "as little gore as possible."\textsuperscript{641} Prior to Gray's execution attorneys had submitted an affidavit supporting their argument that the gas chamber was cruel and unusual because cyanide is no longer used to kill laboratory animals due to its painful effects.\textsuperscript{642} Following Gray's execution, the Mississippi legislature amended its statute to provide for execution by means of lethal injection for those prisoners who were sentenced to death after the date of the amendment.\textsuperscript{643}

\begin{footnotes}
\item 635. Gray v. Lucas, 710 F.2d 1048, 1058 (5th Cir. 1983).
\item 636. Id. at 1060; infra app. 3 (Nevada).
\item 637. See Fernandez, supra note 110, at A14.
\item 640. Id. (citing the Declaration of Dan A. Lohwasser, Exhibit 34).
\item 642. See Gray v. Lucas, 710 F.2d 1048, 1060 (5th Cir. 1983).
\item 643. See infra app. 3 (Mississippi).
\end{footnotes}

Johnson's death required seventeen minutes.\(^{644}\) “He was conscious for several of those minutes, gasping and crying out in agony.”\(^{645}\) According to Don Cabana, then Warden of Parchman State Prison in Mississippi and a former Air Force paramedic in Da Nang, Vietnam, “I've seen the body do the most amazing things during death and after death, but I was really shaken by Edward Earl’s asphyxiation.”\(^{646}\) Cabana further described the scene:

He inhaled deeply as the gas rose and seemed to lose consciousness quickly. “Seven minutes into it, though,” says Cabana, “he shifted, and this huge, guttural sound came out of him, an unearthly noise. My head snapped to the right to look at the physician, and he read my mind: ‘He's dead, don’t worry.’”\(^{647}\)

22. Connie Ray Evans (Mississippi, July 8, 1987)

Evans' execution required thirteen minutes.\(^{648}\) According to one witness,

[after the gas began to rise from Evans’ chair, he] let out the first of several loud agonizing gasps. I saw the muscles tightening and bulging on his neck. His forced breathing and tensed body exhibited excruciating pain. He lost control of his bodily functions. Saliva drooled from his mouth, running down his chin, and hanging in a long rope from his chin.\(^{649}\)

23. Leo Edwards (Mississippi, June 21, 1989)

Edwards' death required fourteen minutes.\(^{650}\) A witness to the execution stated that:

When [the gas] reached his face, he gasped, then started banging his head and throwing himself back and forth in the chair. His body strained so desperately against the straps that I was afraid they would cut him. He then let out a shriek of terror, the first of many. It was the sound of pure torment. My heart raced as I tried to control my own reaction to the torture I was witnessing . . . . The shrieking and thrashing lasted for several minutes; he

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\(^{644}\) See Complaint at 9, Booker v. Murphy, 953 F. Supp. 756 (S.D. Miss. 1997) (No. 95CV498BN).

\(^{645}\) Id.


\(^{647}\) Id. See generally Donald A. Cabana, Death at Midnight: The Confession of an Executioner (1996) (detailing former prison warden Cabana's account of the prison system and the administration of the death penalty).

\(^{648}\) See Fierro Memorandum, supra note 639, at 7 (citing the Declaration of Robert R. Marshall, Exhibit 35).

\(^{649}\) Id.

\(^{650}\) Id. (citing the Declaration of Kenneth Rose, Exhibit 43).
remained alive for some time after that.\textsuperscript{651}

24. Donald Eugene Harding (Arizona, April 6, 1992)

Harding’s death required ten and one-half minutes after two cyanide pellets were placed in a bowl of sulfuric acid beneath his chair.\textsuperscript{652} “Witnesses described a gruesome scene: Mr. Harding gasping, shuddering and desperately making obscene gestures with both strapped-down hands.”\textsuperscript{655} As Harding’s defense attorney and witness stated:

When the fumes enveloped Don’s head he took a quick breath. A few seconds later he again looked in my direction. His face was red and contorted as if he were attempting to fight through tremendous pain. His mouth was pursed shut and his jaw was clenched tight. Don then took several more quick gulps of the fumes. At this point Don’s body started convulsing violently. . . . His face and body turned a deep red and the veins in his temple and neck began to bulge until I thought they might explode. After about a minute Don’s face leaned partially forward, but he was still conscious. Every few seconds he continued to gulp in. He was shuddering uncontrollably and his body was racked with spasms. His head continued to snap back. His hands were clenched. After several more minutes, the most violent of the convulsions subsided. At this time the muscles along Don’s left arm and back began twitching in a wavelike motion under his skin. Spittle drooled from his mouth. Don did not stop moving for approximately eight minutes, and after that he continued to twitch and jerk for another minute. Approximately two minutes later, we were told by a prison official that the execution was complete.\textsuperscript{654}

Other eyewitness accounts confirmed this depiction.\textsuperscript{655} The nature of Harding’s death led Arizona’s Attorney General to recommend lethal injection.\textsuperscript{656}

\textsuperscript{651} Id.
\textsuperscript{653} Id.
\textsuperscript{654} Fierro Memorandum, supra note 639, at 7 (quoting Exhibits in Support of Motion for Temporary Restraining Order in No. 92-70237 (N.D. Cal.), Vol. II, Exhibit 17 at 3-4 (Affidavit of James J. Belanger, Esq.)).
\textsuperscript{655} See id. at 7-8.
\textsuperscript{656} See Arizona Man Executed by Lethal Injection, Reuters, Mar. 3, 1993; see also Chris Limberis, State Scrambling to Get Gas Chamber Tested, Arizona Daily Star, Dec. 15, 1991, at 1B (noting that Arizona’s gas chamber had not been used for more than 28 years prior to Harding’s death and that, in light of revelations of Leuchter’s lack of qualifications, the state was quickly attempting to find an expert to test it).
25. Robert Alton Harris (California, April 21, 1992)

Harris' death required sixteen minutes. More than two minutes after Harris inhaled the gas, he raised his head and glanced toward either side and the ceiling. "Harris gasped, moaned, drooled and convulsed for 7 minutes... before the cyanide stilled him." According to one account, "[m]any European papers... condemned the amount of time it took the gas to kill Mr. Harris." For example, Spain's leading daily newspaper, El Pais, emphasized in its front-page report the "10 minutes of agony" Mr. Harris suffered before dying.

26. David Mason (California, August 24, 1993)

The attending physician and media witnesses said that Mason remained conscious between one to three minutes. They categorized many of Mason's apparently conscious actions to be "responses to pain"—e.g., his hands "clenched into tight painful fists," and "his eyes closed, his throat looked as if every muscle in it were strained." The execution of Charles Brooks was the first by lethal injection. The prison doctor, Ralph E. Gray, M.D., asserted that the state...
appointed executioner had a difficult time locating a suitable vein for the procedure because of Brooks’ long history of intravenous drug use. Gray explained that he “could have hit those veins easier than the people who did it,” although, because of his profession, he could not get involved. Brooks was injected with an overdose of sodium thiopental, which required seven minutes to effectuate his death. Dick Reavis, a writer for Texas Monthly Magazine and a witness, stated that during the execution process, Brooks “moved his head as if to say ‘no’. Then he yawned and his eyes closed, and then he wheezed. His head fell over toward us, then he wheezed again.” Brooks’ arm also “bounced up and down.” Terry Bertling, managing editor of The Huntsville Item and also a witness, said that “Brooks’s bare stomach was visibly moving up and down, showing his last few deep breaths. . . . [He] opened and closed his right hand several times after the injection began and died with his hand in a relaxed fist.” Witnesses felt that, “from what they had seen, [Brooks] had not died easily.”


Autry was the second person in the United States to be executed by lethal injection. Throughout much of the time, Autry complained of pain. Immediately before Autry’s death, a “tremor ran through” his body. The entire event required ten minutes, which medical experts perceived as unusually long. When questioned about why the execution took so long, some medical experts suggested that the drugs may have been diluted because the tube leading to Autry’s arm was clogged. Others suggested that the I.V. may have slipped out of his vein and into his tissue as a result of an inexperienced technician’s improper insertion of the needle.

666. Stryker, supra note 321, at 6.
667. Id.
672. Drimmer, supra note 665, at 74.
673. Id. at 79.
675. Id. Drimmer, supra note 665, at 82.
677. See Eileen Keerdoja et. al., A Civilised Way to Die, Newsweek, Apr. 9, 1984, at 106 (noting possible reasons for the extended length of Autry’s execution).
678. Id.
29. **Thomas Andy Barefoot (Texas, October 30, 1984)**

Richard Moran, Professor of Sociology at Mount Holyoke College, was one of the witnesses to Barefoot's execution.\(^679\) He reported that, while Barefoot was saying the names of his friends on death row,

Barefoot let out a terrible gasp. His neck straightened. His eyes bulged and his back arched. He lay stiff on the gurney, glazed eyes fixed on the ceiling, like a soldier standing at attention .... [The prison medical examiner] tried to close Barefoot's eyes, but the lids would not budge. He tried a second time. Still they would not move. Finally the doctor said: "Eyes dilated, respiration stopped, heartbeat slowed. Barefoot is dead." I thought to myself, no he isn't. His heart is still beating.\(^680\)

30. **Stephen Peter Morin (Texas, March 13, 1985)**

Technicians required more than forty minutes to insert the lethal injection needle because Morin's long-term drug use hindered their ability to locate a blood vessel that had no scars or other damage.\(^681\) Two minutes after entering Morin's death chamber, technicians attempted the first injection carrying a saline solution.\(^682\) "At least five more attempts were made to locate appropriate veins in [Morin's] arms and even legs before the technicians came from the department to review its procedures for administering the drugs when the condemned man has a history of drug abuse."\(^683\) Morin died eleven minutes after technicians finally found a suitable vein.\(^684\) A prison spokesperson stated that the difficulty caused by inserting the needles "would probably prompt the Texas Department of Corrections to review its procedures for administering the drugs when the condemned person has a history of drug abuse."\(^685\)


\(^680\) *Id.*; see also Texas Dep’t of Criminal Justice, Death Row Inmate Execution File on Thomas Barefoot (Oct. 30, 1984) (on file with the author) (noting that Barefoot “coughed” and then ceased talking in mid-sentence, while giving his last statement); Dana Wilkie, *Support Seen for Injection; State Lawmakers Begin Reconsidering Lethal Gas*, San Diego Union-Trib., Apr. 22, 1992, at A3 (noting that as Barefoot talked with a reporter, he “gasped in mid-sentence”).


\(^682\) *Murderer of Three Women*, supra note 681, at A23.

\(^683\) Michael L. Graczyk, *Convicted Killer in Texas Waits 45 Minutes Before Injection is Given*, Gainesville Sun (Fla.), Mar. 14, 1985, at 12A.

\(^684\) Stolls, supra note 534, at 260.

\(^685\) *Murderer of Three Women*, supra note 681, at A23. The Texas Department of Corrections has not yet changed its procedures to accommodate condemned inmates with a history of drug use. See supra notes 395-98 and accompanying text.
31. Randy L. Woolls (Texas, August 20, 1986)

Because of his history of drug addiction, Woolls had to assist execution technicians to find an adequate vein for insertion. Woolls reportedly told authorities that "prominent veins in his arms had collapsed long ago from drug use." Woolls died seventeen minutes after technicians inserted the needle.

32. Elliot Rod Johnson (Texas, June 24, 1987)

Johnson's execution was plagued by repetitive needle punctures. Technicians finally required thirty-five minutes to locate and insert a catheter into one of Johnson's veins.

33. Raymond Landry (Texas, December 13, 1988)

While Landry was strapped to a gurney, executioners "repeatedly probed" his veins with syringes for forty minutes, attempting to inject potassium chloride. Then, two minutes after the execution began, the syringe came out of Landry's vein, "spewing deadly chemicals toward startled witnesses." What officials termed a "blowout" resulted in the squirting of lethal injection liquid about two feet across the room. A plastic curtain was pulled so that witnesses could not see the execution team reinsert the catheter into Landry's vein. "After 14 minutes, and after witnesses heard the sound of doors opening and closing, murmurs and at least one groan, the curtain was opened and Landry appeared motionless and unconscious." Landry was pronounced dead twenty-four minutes after the drugs were initially injected. State officials said the delay was due to a "mechanical problem caused by Landry's muscular arms and previous drug use." According to a spokesperson for the Texas Attorney General, Landry's execution "was a mechanical and physical problem.... Landry was very muscular and had 'Popeye-type' arms. When the stuff was flowing, it wouldn't go into the veins and there was

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686. Texas Executes Murderer, Las Vegas Sun, Aug. 20, 1986, at 12A.
688. Texas Dep't of Criminal Justice, Death Row Inmate Execution File on Randy L. Woolls (Aug. 20, 1986) (on file with the author).
689. See Felder I Petition, supra note 321, at 65.
690. Douglas Freelander, Johnson Executed for 1982 Murder at Beaumont Store, Houston Post, June 24, 1987, at 3A; see also Texas Dep't of Criminal Justice, Death Row Inmate Execution File on Elliot Rod Johnson (June 24, 1987) (on file with the author) (noting that the saline solution started at 12:09 a.m. and the lethal injection was given at 12:43 a.m.).
691. Hinds, supra note 546, at 1.
695. Id.
696. Id.
697. Id.
more pressure in the hose than his veins could absorb."698 A spokesperson for the Texas Department of Corrections stated that this was the first time such a problem had occurred in Texas. Yet, others noted the difficulties authorities encountered in 1985 when technicians experienced trouble locating a vein in another Texas inmate, Stephen Morin. Morin had also been a heavy drug user.699

34. Stephen McCoy (Texas, May 24, 1989)

McCoy reacted violently to the introduction of lethal injection drugs into his blood stream.700 Experts stated that a weak dosage of drugs caused McCoy "to choke and heave" during the last minutes of his execution.701 According to Karen Zellars, McCoy's attorney, soon after the injection, "McCoy began gagging and coughing deeply, his back arching off the gurney in the death chamber . . . . He breathed a deep, long moan, closed his eyes and stopped breathing. The normal solitude of the death chamber was shattered then, when Robert Hurst, a reporter . . . witnessing the execution, fainted, crashing into one of four other media witnesses."702 When this happened, Zellars claimed that she "nearly lost control herself,"703 stating that "I stayed with [McCoy] until the first violent heave. [McCoy's reaction] was more violent than I had expected. Then I heard the choking. The next thing I realized, everybody was gasping. I had no idea what it was, I really felt we were going to have a chain reaction."704 According to one experienced execution reporter, "[i]t was the first time a witness had fainted at an execution since they were resumed in 1982, and one of the most violent reactions from an inmate."705 The Texas Attorney General acknowledged that McCoy "seemed to have a somewhat stronger reaction [to the drugs]," adding that "[t]he drugs might have been administered in a heavier dose or more rapidly."706

35. George "Tiny" Mercer (Missouri, January 6, 1989)

A medical doctor was required to perform a cutdown on Mercer's groin.707 Cutdown procedures are now rare in light of medical advances in injection techniques.708

699. Id.
700. Marquart, supra note 318, at 147.
702. Witnesses to An Execution, Houston Chronicle, May 27, 1989, at 11B.
703. Id.
704. Id.
705. Id.
706. Id.
707. See Trombley, supra note 208, at 115.
708. See supra note 375 and accompanying text.
36. George C. Gilmore (Missouri, August 31, 1990)

According to Kenneth Smith, M.D., a neurosurgery professor who attended Gilmore’s execution, force was used to stick the needle into Gilmore’s arm.709 Smith said that the “experience had solidified his belief that the death penalty is wrong.”710

37. Charles Troy Coleman (Oklahoma September 10, 1990)

Coleman was the first person to be executed by lethal injection in Oklahoma.711 According to a corrections officer, technicians had difficulty finding a usable vein. As a result, Coleman’s execution was delayed by ten minutes.712

38. Charles Walker (Illinois, September 12, 1990)

Walker’s execution required eleven minutes rather than the three or four contemplated by the Department of Corrections’ procedures. There was some indication that the first chemical may have worn off before Walker became unconscious.713 “If this occurred, . . . Walker would have slowly strangled and suffered excruciating pain while remaining completely immobile—appearing ‘calm’ and ‘serene’ to all witnesses because he was completely paralyzed.”714 According to journalist Stephen Trombley, an assistant to Walker’s execution stated there were two major problems.715 First, a kink developed in the intravenous line that stopped the flow of the lethal injection chemicals and extended the time required for Walker’s heart function to cease.716 Second, the three doctors attending the execution inserted the intravenous needle improperly so that the chemicals flowed toward Walker’s fingertips instead of his heart.717 This mistake further delayed the time for the chemicals to reach Walker’s vital organs and take effect. It appears that these problems were due to the incompetency of the doctors who were rumored to be residents with limited experience.718 The executioner stated that when these difficulties

710. Tom Uhlenbrook, Execution Enforced Beliefs, Witness Says, St. Louis Post-Disp., Sept. 9, 1990, at 1D.
712. Id.
713. Plaintiff’s Supplemental Memorandum Opposing Defendant’s Motion to Dismiss at 14-15, Silagy v. Thompson, No. 90-C-5028 (N.D. Ill. 1991).
714. Id.
716. Id. ¶ 19.
717. Id. ¶ 20; see also Trombley, supra note 208, at 252.
arose, corrections officials “panicked” and ordered that the blinds to the execution room be closed.\footnote{719} Therefore, witnesses could not see the executioner’s inspection of the intravenous line and removal of the kink or “the period when Mr. Walker’s heart function ceased.”\footnote{720}


An executioner using Leuchter’s lethal injection machine stated that he “had a problem with one of the pistons that drives one of the syringes in the machine. The piston became stuck and did not automatically depress the plunger on one of the syringes.”\footnote{721} As a result, the executioner needed to activate the piston by using the manual override in the system. Thereafter, he altered Leuchter’s machine by substituting stainless steel pistons for the ones Leuchter had originally provided.\footnote{722}

40. Rickey Ray Rector\footnote{723} (Arkansas, January 24, 1992)

The thirteen witnesses seated behind a thick, black curtain could not see the lethal injection procedure. However, the witnesses stated that they heard “as many as eight moans”\footnote{724} that “filtered from the death chamber as technicians pierced Rector’s skin with needles and searched almost an hour for suitable veins to carry lethal doses of chemicals.”\footnote{725} While those administering the execution attempted to find a vein, a sheriff commented to a reporter that “[i]t sounds like they’re really having trouble. They’re palpating his arm.”\footnote{726} An administrator of medical and dental programs for the Arkansas Department of Corrections said that “the moans did come as a team of two medical people that had grown to five worked on both sides of his body to find a vein.”\footnote{727} Altogether, eight people were involved, including what were called the “tie-down people.”\footnote{728} Rector himself assisted the team in finding the vein.\footnote{729} By the time the execution team found a vein in Rector’s right hand, the team was already in the process of preparing for a cut-down.\footnote{730} According to the prison’s

\begin{footnotes}
\item[719] Trombley Affidavit, supra note 376, ¶ 19.
\item[720] Id. ¶ 21; see also supra note 341 and accompanying text (discussing litigation over the lethal injection concerns in Illinois).
\item[721] Id. ¶ 15.
\item[722] Id.
\item[723] After killing a police officer, Rector shot himself in the head. The wound and the resulting surgery in effect lobotomized him. However, Rector’s attorneys were unsuccessful at convincing the court that he was mentally incompetent. See Joe Farmer, Rector, 40, Executed for Officer’s Slaying Arkansas Democrat Gazette, Jan. 25, 1992 at 1A, 9A.
\item[724] Id. at 1A.
\item[725] Sonja Clinesmith, Moans Pierced Silence During Wait, Arkansas Democrat Gazette, Jan. 26, 1992, at 4B.
\item[726] Id. at 8B. The term “palpate” means “[t]o examine by feeling and pressing with the palms of the hands and the fingers.” Stedman’s Medical Dictionary 1285 (26th ed. 1995).
\item[727] Farmer, supra note 723, at 1A.
\item[728] See Clinesmith, supra note 725, at 4B.
\item[729] See id.
\item[730] Id.; see supra notes 375; 708 (explaining that cutdown procedures are now rare in light
\end{footnotes}
administered, Rector’s hand was the only part of his body where the medical staff could start an IV.\textsuperscript{731} Although two intravenous needles are used to send chemicals into the bloodstream, a witness for the Associated Press stated that he saw only one needle in Rector’s hand.\textsuperscript{732} According to the administrator, “[t]he blood vessels collapsed and we couldn’t find them.”\textsuperscript{733} “Small drops of blood were splattered on the white sheet Rector was lying on and on the metal gurney—apparent signs of the difficulty before the curtain was opened.”\textsuperscript{734}

41. \textit{Robyn Lee Parks (Oklahoma, March 10, 1992)}

One reporter’s account of Parks’ death stated that:

 Moments after executioners administered the drugs . . . , Parks was blinking and nervously licking his lips when he gasped and violently gagged. His head jerked toward his right shoulder . . . . [M]uscles in his jaw, neck and abdomen began to contract spasmodically for approximately 45 seconds . . . . [T]he rhythmic jaw clenching returned for a few seconds.\textsuperscript{735}

According to another account:

 Less than two minutes after [the execution began], Parks’ body began bucking under straps that held him to a gurney. He spewed out all the air in his lungs, spraying a cloud of spit . . . . The death looked scary and ugly . . . . Several times, Parks groaned and turned his head back and forth, his eyes tightly shut. A vein on the left side of his neck stood out thickly.

A reporter stated that, “[f]or appearances sake, it looked painful and inhumane.”\textsuperscript{737} Parks died within eleven minutes after the executioners administered the drugs.\textsuperscript{738}

42. \textit{Billy Wayne White (Texas, April 23, 1992)}

White’s death required forty-seven minutes because the executioners had difficulty finding a vein that was not severely damaged from years of heroin abuse.\textsuperscript{739} After White assisted the executioners, they found a vein in his hand.\textsuperscript{740} The director of the Texas prison system defended the

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\textsuperscript{731} See Farmer, supra note 729, at 9A.
\textsuperscript{732} Id.
\textsuperscript{733} Id.
\textsuperscript{734} Clinesmith, supra note 725, at 8B.
\textsuperscript{735} Don McCoy, Dying Parks Gassed for Life, Daily Oklahoman, Mar. 11, 1992, at 1, 2.
\textsuperscript{737} See Michael Murphy, Lethal Injection Use Questioned; Debate Swirls Around Executions Designed to Be More Humane, Phoenix Gazette, Feb. 8, 1993, at A1 (quoting Wayne Greene, a reporter for the Tulsa World).
\textsuperscript{738} See Greene, supra note 736, at A13.
\textsuperscript{739} See Killer Executed by Lethal Injection, supra note 657, at 5A; Another U.S. Execution, supra note 370, at B7.
\textsuperscript{740} See Murphy, supra note 737, at A1.
executioners, explaining that at least one comparable sort of delay had occurred in Texas for the same reason. White’s execution was delayed even further, however, because the doctor in charge of examining executed prisoners arrived late. White required nine minutes to die after the initial injection.

43. Justin Lee May (Texas, May 7, 1992)

“May violently reacted to the drugs.” According to Robert Wernsman, a local reporter, “May gasped, coughed, and reared against heavy leather restraints, coughing once again before his body froze.” An Associated Press reporter added that May “went into a coughing spasm, groaned and gasped, lifted his head from the gurney and would have arched his back if he had not been held down by wide white leather belts.” When May finally stopped breathing, “his eyes were open and his mouth agape.” May's death required about nine minutes.

44. John Wayne Gacy (Illinois, May 10, 1994)

Gacy’s execution process was delayed when a “clog developed in the delivery tube attached to his arm.” Technicians noticed that one of the delivery tube’s chemicals was “gelling or clotting.” The execution team pulled a curtain around Gacy as they struggled to clear the tube in order to allow the drugs to flow into him. The execution was expected to last ten minutes, but the complications caused the execution to last eighteen minutes before Gacy died. “According to witnesses, as a dose of anaesthetic knocked him unconscious, [Gacy] uttered a long grunting sound, his belly rose and fell, and then there were no signs of life.”

741. See Killer Executed by Lethal Injection, supra note 657, at 5A.
743. See id.
744. Murphy, supra note 737, at A1.
745. Id. In an interview, Wernsman said, “I certainly did not see a humane extinguishing . . . because there was anguish there.” Id; see also Convict Struggled During His Execution, S.F. Examiner, May 7, 1992, at A12 (noting a statement made by Texas Department of Corrections spokesperson Charles Brown, that May “attempted to rise up against the straps that held him to the gurney”).
746. Man Put to Death for 1978 Murder. Texas May Execute 5 Other Killers This Month, Dallas Morning News, May 8, 1992, at 32A.
747. Id.
748. See Kathy Fair & John Toth, Justin May is Executed for ’78 Murder Rampage, Houston Chron., May 7, 1992, at 34.
751. See Seideman, supra note 749, at 52.
752. See Susan Kuczk & Rob Karwath, All Appeals Fail; Gacy is Executed, Chi. Trib., May 10, 1994, at 1.
753. Illinois Promises More Executions, Despite Foul-up with Gacy, Detroit Free Press, May, 11,
45. Emmitt Foster (Missouri, May 3, 1995)

Twenty-nine minutes passed before Foster was pronounced dead after receiving his first injection.754 George Lombardi, a Department of Corrections spokesperson, stated that, "Mr. Foster's veins had apparently collapsed because of long-term drug use."755 Additionally, the death was prolonged because a leather strap on Foster's arm was tied too tightly.756 According to one account,

[prison workers closed the blinds to the windows of the execution chamber at 12:10 a.m. and did not reopen them until 12:36 a.m., three minutes after [Foster] was pronounced dead. The official witnesses, including reporters, could not see into the chamber during that time. One witness refused to sign the routine statement that she had witnessed the execution.757

Thirty-six death row inmates filed suit in federal court claiming that Foster's execution represents the cruelty of lethal injection. The suit resulted in a temporary restraining order that was lifted for the execution of Larry Griffin on June 21, 1995.768

46. Ronald K. Allridge (Texas, June 8, 1995)

Typically, a lethal injection needle is inserted into both of an inmate's arms. However, Allridge's execution was conducted with only one needle, which was inserted into his right arm, because officials had difficulty discovering a vein in his left arm.769 Allridge was pronounced dead nine minutes after the chemicals started flowing.770

47. Richard Townes, Jr. (Virginia, January 23, 1996)

Townes was executed "after a 22-minute delay to allow medical personnel to find a vein large enough for the needle."761 Eventually, personnel injected Townes in his right foot.762 Typically, an intravenous line is inserted into each arm.763

1994, at 5A.
755. Id.
756. See Carolyn Tuft, Appeals Denied: Griffin Executed, St. Louis Post-Disp., June 22, 1995, at 7A.
758. See Tuft, supra note 756, at 7A; see also supra notes 342-43 and accompanying text (discussing the Missouri inmates' suit).
759. Man is Executed for Fort Worth Woman's Slaying, Dallas Morning News, June 9, 1995, at 12D.
760. Id.
48. Tommie J. Smith (Indiana, July 18, 1996)

Prison officials acknowledged that they knew two months prior to Smith’s execution that he had “unusually small veins that might cause problems with the lethal injection.” After searching for sixteen minutes for a vein in Smith’s arm, the execution team called in a medical doctor who tried to insert a tube into Smith’s neck, but failed. Finally, the doctor inserted a tube into Smith’s foot. The team required thirty-six minutes to find a vein. Although the doctor was in conflict with professional guidelines when he assisted with the execution, the team explained that they asked him to participate.

49. Luis M. Mata (Arizona, August 22, 1996)

Under established procedures, at approximately 11:30 p.m. on August 21, officials strapped Mata to a gurney and inserted the lethal injection needle into his arm. Mata remained in this position in the execution chamber for one hour and ten minutes while his attorneys argued his case to the Arizona Supreme Court. When Mata’s execution began, his head jerked back and from side to side while his face contorted and his mouth made unnatural movements. Minutes later, his chest and stomach began a series of quick, sharp up and down movements.


765. Id.

766. See Petition Under 28 U.S.C. § 2241 for Writ of Habeas Corpus Challenging the Execution of Sentence, Greenawalt v. Stewart, No. 97-99001, at 11-12 (9th Cir. 1997) [hereinafter Greenawalt Petition]; Affidavit of Edward A. Brunner, M.D., Ph.D. [hereinafter Brunner Affidavit], Exh. A of App. to Greenawalt Petition, supra (discussing Mata’s lethal injection procedure); Affidavit of Jeffrey L. Kirchmeler, Esq. [hereinafter Kirchmeler Affidavit], Exh. 7. of App. to Greenawalt Petition, supra (Kirchmeler, who is on the faculty of Tulane University Law School, was one of Mata’s attorneys); Steve Benson, Bearing Witness to a Wrongful Execution, Arizona Republic, Sept. 1, 1996, at H1 (describing a personal account of Mata’s execution).

APPENDIX 3. STATE TRENDS IN EXECUTION METHODS

**ALABAMA (AL)**

1836-1922: hanging
1923-present: electrocution

**ALASKA (AK)**

1913-1956: hanging
1957-present: no death penalty

**ARIZONA (AZ)**

1901-1915: hanging
1916-1917: no death penalty (except for treason and train robbery)
1918-1932: hanging

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768. This Appendix benefitted from the research provided in Watt Espy, Changes of Methods of Execution: First by Method After Hanging (Jan. 12, 1994) (unpublished paper on file with the author).


770. 1923 Ala. Acts 587 § 1; Ala. Code § 5309 (1923) (electrocution); Ala. Code § 15-18-82(a) (1975) (current 1998). The 1923 Act affected only those sentenced to death after February 28, 1927. *State Prepares to Quit Gallous After October I*, Birmingham News, Feb. 6, 1926, at 1. Although electrocution was generally considered more humane, in 1927, three 2000 volt jols were required for Alabama’s electric chair to kill Horace DeVaughn. See Sean Reilly, *Ala. Eliminated Hangings in ’20*, Star (Anniston, Ala.), Jan. 5, 1993, at 1A. In 1983, the same chair required three jols to kill John Louis Evans III. *Id.; see supra app. 2A* (Electrocution: John Louis Evans III). In *Brown v. State*, 264 So.2d 549 (Ala. 1971), the Supreme Court of Alabama held that, although Kilby Prison was the only statutorily designated location for executions, Kilby’s dismantling did not force a de facto repeal of the death penalty. *See id.* at 549-51. Currently, legislation is being assembled in Alabama to allow lethal injection as an alternative method of execution because injection is “considered more humane than electrocution.”


1933-1991: lethal gas
1992-present: lethal injection (lethal injection or lethal gas at the condemned’s election if the condemned was sentenced to death for an offense committed prior to the Act’s effective date; lethal injection if the pre-enactment condemned fails to choose a method)

ARKANSAS (AR)

1894-1912: hanging

The death penalty was reinstated for first degree murder; this referendum passed by a margin of 2-1, or about 10,000 votes. See id. at 21 (Note). An influential factor in the 1918 reinstatement was the lynching of a murderer/rapist; the Tucson Citizen attributed the condemned’s crimes to the abolitionist beliefs of the current governor and his followers in the abolition movement. See Galliher et al., supra note 282, at 563 nn.173-74 and accompanying text.

776. Ariz. Const. art. XXII, § 22 (1933) (lethal gas). In 1930, Eva Dugan was decapitated when she was hanged because of her 250 pound weight and the length of the drop. See James E. Cook, Arizona Gas Chamber is a Roomful of Bad Memories, Ariz. Republic, June 23, 1991, at E2. As a result, “[r]evulsion was so widespread and great that Governor George W. P. Hunt asked the legislature to find “a means to enact the death penalty less barbarous and revolting than the one used at present.” Id. Accordingly, Arizona’s switch to lethal gas in 1933 was “on the ground that [lethal gas] was more humane.” After a Gas Chamber Ordeal, Arizona Considers Injection, N.Y. Times, Apr. 25, 1992, at A10 [hereinafter After a Gas Chamber Ordeal]; see also Crane McClennen, Capital Punishment in Arizona, 29 Ariz. Att’y 17, 18 (Oct. 1992) (noting that the switch to lethal gas in Arizona was due to botched hangings). In Hernandez v. State, 52 P.2d 18 (Ariz. 1934), the Supreme Court of Arizona considered lethal gas to be humane because “for many years animals have been put to death painlessly by the administration of poisonous gas” and “gas has been used for years by dental surgeons for the purpose of extracting teeth painlessly.” Id. at 25 (quoting State v. Gee Jon, 211 P. 676, 682 ( Nev. 1923)). In 1992, however, Donald Eugene Harding required 10 1/2 minutes to die by lethal gas. See supra app. 2.B (Lethal Gas: Donald Eugene Harding); After a Gas Chamber Ordeal, supra, at A10. Harding’s botched execution spurred the state’s change to lethal injection. See Arizona Man Executed by Lethal Injection, Reuters, Mar. 3, 1993.

777. Ariz. Const. art. XXII, § 22 (1992) (current 1996) (lethal injection (lethal injection or lethal gas at the condemned’s election if the condemned was sentenced to death for an offense committed prior to the Act’s effective date; lethal injection if the pre-enactment condemned fails to choose a method)); Ariz. Rev. Stat. Ann. § 13-704 (A-3) (1976) (amended 1993) (current 1996). A defendant who is sentenced to death for an offense committed before November 23, 1992, shall choose either lethal gas or lethal injection. Ariz. Rev. Stat. Ann. § 13-704(B). Currently, approximately 85 of the 118 inmates on Arizona’s death row can choose between lethal gas and lethal injection. See Arizona Dep’t of Corrections, Inmates on Death Row (June 27, 1997); Telephone Interview with Mike Arra, Public Affairs Administrator, Arizona Dep’t of Corrections (July 28, 1997). There have been serious criticisms of Arizona’s procedure for administering lethal injection. See generally Greenawalt Petition, supra note 766, at 10-19 (detailing prior problems with Arizona’s lethal injection procedure and the likelihood of future difficulties); Brunner Affidavit, supra note 766 (concluding, after a thorough review of Arizona’s lethal injection procedure, that there are “severe risks of error” because, for example, the “Operations Checklist” that personnel presumably follow in inserting a catheter, provides no guidance).

778. 1894 Ark. Acts 49 § 2304 (hanging). This law prohibited any public execution for a capital offense. Id. § 2302. Moreover, § 2303 penalized, with a $100 fine, any officer who disobeyed the law. Id. The law is the same today. See Ark. Code Ann. § 16-90-502(d)(1)
1913-1982: electrocution 779
1983-present: lethal injection (electrocution, or lethal injection at the condemned's election, if the condemned was sentenced to death prior to the Act's effective date; electrocution if the pre-enactment condemned fails to choose a method) 780

CALIFORNIA (CA)

1872-1936: hanging 781
1937-1991: lethal gas 782

(Michie 1987) (current 1995). Notably, however, 1901 Ark. Acts 58 § 1 amended the 1894 law by providing public executions only for the crime of rape.


780. 1983 Ark. Acts 774 § 1; Ark. Code Ann. § 5-4-617(a)(1) (Michie 1983) (current 1995) (lethal injection). The provision, 1983 Ark. Acts 774 § 3, provided that any defendant sentenced to death by electrocution prior to July 4, 1983, could elect to be executed by lethal injection. This choice provision was confirmed by the Supreme Court of Arkansas in Fairchild v. State, 690 S. W.2d 355 (Ark. 1985), even though the condemned inmate in that case ultimately allowed prison officials to choose the method by which he would be executed. Id. at 356. Prison officials selected electrocution, which was originally specified in the inmate's sentence. See Arkansas Electrocutes Its First Inmate Since 1964, N.Y. Times, June 20, 1990, at A10. See also supra note 203 and accompanying text (noting that only two Arkansas inmates remain who can choose electrocution). According to Senator John Bearden and Attorney General Steve Clark, who both testified in favor of a lethal injection bill, the state's change to lethal injection was motivated by a desire to "provide the most humane form of execution currently available." U. Press Int'l (Feb. 15, 1983).

781. Cal. Penal Code 2 § 1228 (1872) (hanging). In 1930, Assemblyman Melvin L. Cronin, relying on accounts of Nevada executions, stated that "execution by means of lethal gas is certainly a more humane manner of putting a criminal to death than the horrible and hideous picture that hanging presents." Gilbert Gordon, Lethal Gas or Hanging: Which?, True Detective Mysteries, Oct. 1931, at 10. Cronin was supporting a lethal gas bill that eventually passed both houses of the state legislature, but was vetoed by Governor James Rolph, Jr. Id. Rolph declared that

I have held conferences with the board of prison directors, wardens and physicians of both penitentiaries and others, and have received many written reports from experts on the subject of execution by lethal gas and who are by no means united in their opinion. After thoughtful consideration of this means of execution I am not in favor of experimenting with human misery.

Id. at 12. Rolph explained that "[i]t's the lonesomeness of such a death that influenced me to veto the lethal gas bill. Imagine the horror of it—a man sealed in a place alone with no air." Id. at 14.

782. 1937 Cal. Stat. 172 § 1 (lethal gas). The switch to lethal gas eventually occurred in 1937 when James B. Holohan, a former San Quentin Warden who was elected to the State Senate, considered lethal gas more humane and less subject to mishap than hanging. Kevin Roderick, Last Steps, Last Words on the Row: California Has Put 501 Men and Women to Death Since the State Took Charge of Executions. Not All of Them Went Quietly, L.A. Times, Mar. 28, 1990, at A1. Furthermore, Eaton Metal Products Company of Colorado had informed California officials that the gas chamber would be more effective, stating that their new chamber "would snuff out life in about fifteen seconds." Id.; see also Hull, supra note 659, at A14 (noting that a lethal
1972-1991: mandatory death penalty judicially abolished
1992-1996: lethal gas or lethal injection at the condemned’s election; lethal gas if the condemned fails to choose a method
1996-present: lethal gas or lethal injection at the condemned’s election; lethal injection if the condemned fails to choose a method

COLORADO (CO)

1868-1896: hanging
1897-1900: no death penalty
1901-1932: hanging
1933-1987: lethal gas
1988-present: lethal injection

Gas death was characterized as invoking “instantaneous unconsciousness”). In People v. Daugherty, 256 P.2d 911 (Cal. 1953), the Supreme Court of California denied an Eighth Amendment challenge to the lethal gas statute, rejecting the defendant’s contention that the statute was so vague an executioner could use a slower acting lethal gas that would cause long and cruel suffering. Id. at 922-23; see supra note 286 and accompanying text (discussing Daugherty).

783. People v. Anderson, 493 P.2d 880, 899 (Cal. 1992) (declaring the state’s death penalty unconstitutional under the state prohibition against cruel and unusual punishment).


785. Cal. Penal Code § 3604 (a)-(b) (amended 1996) (current 1996) (lethal gas or lethal injection at the condemned’s election; lethal injection if the condemned fails to choose a method). In Fierro v. Gomez, 77 F. 3d 301 (9th Cir.), vacated on other grounds, 117 S. Ct. 285 (1996) (remanding for reconsideration in light of changed statute), the Ninth Circuit held unconstitutional execution by lethal gas. Id. at 309. However, the Supreme Court remanded the case for reconsideration in light of the legislature’s decision to change the statute and provide that lethal injection be administered unless the inmate requests lethal gas. See Gomez v. Fierro, 117 S. Ct. 285, 286 (1996); see also supra notes 136-49, 286-88 (discussing Fierro). Most recently, the United States District Court for the Northern District of California held that the First Amendment requires prison officials to allow the public and the media to witness a lethal injection from the time preceding a prisoner’s strap down to a gurney until just after the prisoner’s death. California First Amendment Coalition v. Calderon, 956 F. Supp. 883, 890 (N.D. Cal. 1997).

786. Colo. Rev. Stat. 22 § 183 (1868) (hanging); see also Garvey v. People, 6 Colo. 559, 560 (1883) (noting that prior to 1870, Colorado had instituted death by hanging).

787. 1897 Colo. Sess. Laws 35 § 1 (death penalty abolished). This law was not retroactive. Id. § 2.

788. 1901 Colo. Sess. Laws 64 § 3 (death penalty reinstated; hanging). Those executed by hanging had their hearts removed after the hanging so that executioners could be certain of their deaths. See Gas Execution Success: Kills Victim Quickly, Jackson Daily News (Miss.), June 23, 1934, at 1 (describing the execution of William C. Kelly, the first person in Colorado to be executed by lethal gas).

789. 1933 Colo. Sess. Laws 61 § 1 (lethal gas). The 1933 law was not applied retroactively, even for those who committed their offense prior to the new law but who were convicted and sentenced later. See id.; see also True Detective Mysteries, Mar. 1934, at 111 (describing the hanging execution of Walter Jones on December 1, 1934, even though lethal gas had statutorily replaced hanging).

CONNECTICUT (CT)

1875-1934: hanging
1935-1994: electrocution
1995-present: lethal injection

DELAWARE (DE)

1829-1957: hanging
1958-1960: no death penalty
1961-1985: hanging
1986-present: lethal injection (hanging, or lethal injection at the condemned's election, if the condemned's offense was committed prior to the Act's effective date; hanging if the pre-


792. 1935 Conn. Pub. Acts 266 § 2 (electrocution); Conn. Gen. Stat. 335 § 1727c (1935). The 1935 law did not expressly indicate retroactive operation. In Simborski v. Wheeler, 183 A. 688 (Conn. 1936), the Connecticut Supreme Court held that a judgment directing execution by hanging was not affected by the electrocution statute. There were statutes expressly stating that repeals of the execution method would not affect any existing liability to prosecution and punishment, nor any pending proceedings for offenses committed prior to the electrocution statute. See id. at 689-90.

793. 1995 Conn. Acts 95-16 § 1 (Reg. Sess.) (lethal injection); Conn. Gen. Stat. § 54-100 (1963) (amended 1995) (current 1997). Connecticut lawmakers stated that lethal injection was "cheaper and more humane than electrocution." Matthew Daly, Tougher Death Penalty Passes Governor, Senate Expected to Approve House Bill Next Week, Hartford Courant, Apr. 6, 1995, at A1. In State v. Webb, 680 A.2d 147 (Conn. 1996), the Supreme Court of Connecticut allowed the defendant's action to be remanded to the trial court so that the defendant could challenge the constitutionality of the state's administration of lethal injection. Id. at 198-99. At the time the defendant was convicted and sentenced, Connecticut's death sentences were carried out by electrocution, thereby precluding the defendant's opportunity to challenge lethal injection at the trial court level. Id. at 198. Litigation concerning the constitutionality of lethal injection in Connecticut is ongoing. An evidentiary hearing is planned for October 6, 1997. Telephone Interviews with Barry Butler, Chief Public Defenders Office, Hartford, Conn. (May 19, 1997, Aug. 1, 1997).

794. Del. Code p. 143 § 4 (1829) (hanging). It appears that hanging began to replace other forms of execution in Delaware as early as 1787. See 1786 Del. Laws p. 135 (containing "An Act to alter the Judgment at Common-Law against persons convicted of Petit-Treason," passed on June 5, 1787, to change the penalty from burning to hanging for the crime of petit treason); State v. Cannon, 190 A.2d 514, 517 (Del. 1953) (noting that the Act of June 5, 1787, changed the penalty for petit treason from burning to hanging in sufficient time to ease the execution of Sarah Kirk, who was convicted of petit treason for murdering her husband). However, it was not until 1829 that Delaware determined that all punishments by death shall be inflicted by hanging. See Del. Code p. 143 § 4 (1829); see also Cannon, 190 A.2d at 517 (noting that the 1829 Delaware Code "provided that all punishments by death shall be inflicted by hanging").

enactment condemned fails to choose a method)\textsuperscript{797}

**FLORIDA (FL)**

1868-1922: hanging\textsuperscript{708}
1923-present: electrocution\textsuperscript{799}

\textsuperscript{797} 65 Del. Laws 281 § 1 (1980) (lethal injection); 65 Del. Laws 281 § 3 (1986) (hanging, or lethal injection at the condemned's election, if the condemned's offense was committed prior to the Act's effective date; hanging if the pre-enactment condemned fails to choose a method); Del. Code Ann. tit. 11, § 4209(f) (1993) (amended 1996) (current 1996). The Act's effective date was June 13, 1986. 65 Del. Laws 281 § 3 (1986). Governor Michael N. Castle called hanging "barbarous and inhumane" when he signed the 1986 law switching to lethal injection. See Kurt Heine, *The Deliverance of Death in Delaware*, Phil. Daily News, Aug. 16, 1991, at 5. In *DeShields v. State*, 554 A.2d 630 (Del. 1987), the Supreme Court of Delaware held that the defendant lacked standing to challenge the constitutionality of death by hanging because he could not avoid hanging by electing lethal injection; therefore his challenge was non-justiciable. See id. at 639. The court added that even if it were to assume that the defendant had standing, the defendant's challenge would fail. There was no evidence of a "legislative intent to declare hanging unconstitutional" or of facts indicating that hanging was cruel and unusual. Id. at 640. Currently, only one Delaware inmate remains who can choose between hanging and lethal injection (James W. Riley). See Telephone Interview with Loren C. Meyers, Deputy Atty Gen., Dep't of Justice, Wilmington, Del. (July 25, 1997); Telephone Interview with Anthony Farina, Spokesperson for the Delaware Department of Corrections, Wilmington, Del. (July 25, 1997). The last person hanged in Delaware was Billy Bailey, who was executed on January 25, 1996. See Death Penalty Information Center, *supra* note 293, at 6.

\textsuperscript{798} 1868 Fla. Laws ch. 1637 § 27 (hanging).


1. Cruel or unusual punishment is defined by the Courts as the wanton infliction of unnecessary pain; ... 2. Florida's electric chair, in past executions, did not wantonly inflict unnecessary pain, and therefore, did not constitute cruel or unusual punishment; 3. Florida's electric chair, as it is to be employed in future executions pursuant to the Department of Corrections' written testing procedures and execution day procedures, will result in death without inflicting wanton and unnecessary pain, and therefore, will not constitute cruel or unusual punishment; 4. Florida's electric chair in its present condition does not constitute cruel or unusual punishment; 5. During the hearing it has been strongly suggested and inferred by Jones that Florida's electric chair as the method of judicial execution should be abandoned in favor of judicial execution by lethal injection. Such a move to adopt lethal injection is not within the constitutional prerogative of the Courts of this State, but rather lies solely within the prerogative of the Legislature of the State of Florida.

Id. at 24-25. The Florida Supreme Court is currently reviewing Soud's ruling. So far, however, it is unclear whether the Florida legislature will attempt to adopt lethal injection, either because the legislature is not interested in the issue or because its members believe a change may delay executions or encourage additional litigation (among other reasons). See Jeffrey Brainard, *Faculty Execution Renew Debate*, St. Petersburg Times (Fla.), Mar. 26, 1997, at A11.
ARE EXECUTIONS CONSTITUTIONAL?

GEORGIA (GA)

1845-1923: hanging

1924-present: electrocution

HAWAII (HI)

1925-1955: hanging

1956-present: no death penalty

IDAHO (ID)

1864-1977: hanging

1978-1981: lethal injection

1982-present: lethal injection at the election of the director of the department of corrections; firing squad if injection is "impractical"

ILLINOIS (IL)

1839-1926: hanging

1927-1982: electrocution

1983-present: lethal injection


807. 1839 Ill. Laws div. 15 § 156 (hanging).

808. 1927 Ill. Laws div. 14 § 1 (electrocuton).

809. 1983 Ill. Laws 83-223 § 1 (lethal injection); 725 Ill. Comp. Stat. 5/119.5(a)(1) (1965) (amended 1992) (West 1996) (current 1996). In 1982, Governor James Thompson, in vetoing a bill that proposed a switch from electrocution to lethal injection, stated that “if you’re going to impose the death penalty . . . you ought to impose it and not try to save your conscience about it by making it something akin to a peaceful passing.” See Thompson Statement on Lethal Injection Much Softer Now, Ill. News-Sun, Sept. 9, 1983, at 14A. When Thompson signed the lethal injection bill in 1983, he said he no longer saw it as “a gesture to opponents of the death penalty . . . I bow to [the General Assembly’s] judgment.” Id. Sponsors of the 1983 legislation characterized lethal injection as “a ‘more humane’ alternative to electrocution.”
### INDIANA (IN)

<table>
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### IOWA (IA)

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### KANSAS (KS)

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<td>1935-1993</td>
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Chair Yields to Needle as Method of Execution, Ill. News-Sun, Sept. 9, 1983, at 14A. Representative Joseph Ebbeson said that lethal injection is a “more humane procedure” than the electric chair, which he described as “archaic at best.” *Legislature Approves Execution By Injection*, Ill. News-Sun, June 22, 1983, at 4B. Senator John Groberg, who sponsored the lethal injection legislation, denounced electrocution as “obsolete” and “barbaric.” “What we do with animals we should be able to do with people. Society's power to take a life is enough. We don’t need the sideshow.” *Thompson Signs Lethal Injection Bill*, U. Press Int'l (May 19, 1981). “I don’t think the frying, roasting and writhing is necessary for the state to take a life,” he added. U. Press Int'l (Mar. 10, 1981). The 1983 law did not expressly indicate retroactive operation.

810. 1889 Ind. Acts art. 22 § 367 (hanging).

811. 1913 Ind. Acts §15 § 1 (electrocution).


813. 1878 Iowa Acts 165 § 9 (hanging).


816. 1907 Kan. Sess. Laws 188 §§ 1, 2 (death penalty abolished).

1994-present: lethal injection\(^{918}\)

**KENTUCKY (KY)**

1894-1909: hanging\(^{919}\)

1910-present: electrocution\(^{920}\)

**LOUISIANA (LA)**

1884-1939: hanging\(^{921}\)

1940-1989: electrocution\(^{922}\)

(hanging). In 1935, the Governor cited the “loss of lives in the state in the wave of crime” as the reason for the state’s reinstatement of the death penalty. See Callihan, *supra* note 282, at 571 n.240 and accompanying text (quoting a state representative introducing a death penalty bill). There were no executions for nine years after the reinstatement. Id. at 571 n.259 and accompanying text. However, while 43 people have been legally executed in Kansas, more than 200 were lynched. See Ramona Jones, *Return to Death Row: Syringe Replaces the Rope*, Wichita Eagle-Beacon, Dec. 14, 1986, at 1A. Between 1965 and 1989, the death penalty was not inflicted in Kansas. See John Marshall, *A History of The Death Penalty*, Parsons Sun (Kan.), Jan. 9, 1989, at 49.


A person sentenced to death may make an anatomical gift in the manner and for the purposes provided by the uniform anatomical gift act. To the extent deemed practicable by the secretary of corrections, in the discretion of the secretary, a person making such gift shall be executed in such a manner that such gift can be carried out.

Id.


820. 1910 Ky. Acts 88 § 1 (electrocution); Ky. Rev. Stat. Ann. § 431.220 (Banks-Baldwin 1992) (current 1997). The 1910 law did not apply to offenses committed before its passing. 1910 Ky. Acts 88 § 10. Notably, 1920 Ky. Acts 163 § 1, provided for public hangings for the crime of rape. Nine men, eight of them black, were punished under this law between 1920 and 1938, when the law was repealed. See Bowers, *supra* note 274, at 442-45. Kentucky conducted the last public execution (hanging) in this country on August 14, 1936. It is estimated that 15,000 individuals observed. See Legislative Research Commission, Capital Punishment, Research Report No. 218, at 9 (Oct. 1985) (on file with the author). Currently, Kentucky legislators are debating whether to allow lethal injection as an alternative execution method because injection is considered more humane than electrocution. See Joseph Gerth, *Lethal Injection: Humane or Cruel*, Courier-Journal (Louisville, Ky.), Mar. 14, 1997, at 1A. “More than likely,” Kentucky will switch to lethal injection either this year or in January 1998. See *supra* note 293 and accompanying text. Notably, however, the United States Court of Appeals for the Sixth Circuit recently held that a challenge to a method of execution “is to be treated as a habeas petition” and not “a simple ‘conditions of confinement’ action.” In re Sapp, No. 97-5755, 1997 U.S. App. LEXIS 781, at *9 (6th Cir. June 27, 1997). The Sixth Circuit’s conclusion came in response to Harold McQueen’s claim that Kentucky’s use of electrocution was cruel and unusual punishment. Id. at *1; see also *supra* note 293 and accompanying text (discussing McQueen’s execution).


822. 1940 La. Acts 14 § 1 (electrocution). In 1932, Representatives Edmund G. Burke and Peter A. Hand introduced a bill to switch to execution by electrocution, a method they perceived as more humane than hanging. See *Report on New Execution Bill*, New Orleans Times-Picayune, June 8, 1932, at 6. The 1940 electrocution law did not expressly indicate retroactive
1990-present: lethal injection\textsuperscript{823}

**MAINE (ME)**

1841-1886: hanging\textsuperscript{824}
1887-present: no death penalty\textsuperscript{825}

**MARYLAND (MD)**

1809-1954: hanging\textsuperscript{826}
1955-1993: lethal gas\textsuperscript{827}
1994-present: lethal injection (lethal injection, or lethal gas at the condemned's election, if the condemned's death sentence was imposed prior to the Act's effective date; lethal injection if the pre-enactment condemned fails to choose a method)\textsuperscript{828}

operation. However, in *State ex rel. Pierre v. Jones*, 9 So.2d 42 (La. 1942), the Supreme Court of Louisiana held that the electrocution statute should apply retroactively to those who had been sentenced to hang, emphasizing that "electrocution is recognized as a more humane and less painful manner or means of carrying out the death penalty than by hanging." Id. at 43. *See also* Helen Prejean, *Dead Man Walking: An Eyewitness Account of the Death Penalty in the United States* 18 (1993) (noting that Louisiana switched from hanging because it considered electrocution "more humane and efficient").


824. Me. Rev. Stat. tit. 12, 168 § 10 (1841) (hanging). As early as 1821, murderers, arsonists, rapists, burglars, and robbers could be hanged. In 1829, rapists, burglars, and robbers could no longer be executed. In 1876, the death penalty in Maine was abolished altogether, but was reinstated for murder in 1883 before being permanently abolished in 1887. *See* Letter from the Law and Legislative Reference Library of Maine, to Prof. Deborah Denno (Aug. 3, 1993) (on file with the author).

825. 1887 Me. Laws 135 (death penalty abolished).
826. 1809 Md. Laws 138 § 16 (hanging).
827. 1955 Md. Laws 625 § 1 (lethal gas). The 1955 law did not apply to offenses committed prior to June 1, 1955 (one year before the Act's effective date of June 1, 1956). *Id.* §§ 2-3.
828. 1994 Md. Laws 5 § 1 (lethal injection); 1994 Md. Laws 5 § 2 (lethal injection, or lethal gas at the condemned's election, if the condemned's death sentence was imposed prior to the Act's effective date; lethal injection if the pre-enactment condemned fails to choose a method); Md. Ann. Code art. 27, § 71 (1957) (amended 1994) (current 1996); Md. Ann. Code art. 27, § 627 (1957) (amended 1994) (current 1996). *See supra* notes 292-98 (discussing Maryland's switch from lethal gas to lethal injection). All Maryland pre-enactment prisoners electing to be executed by lethal gas were required to provide a written request for lethal gas within 60 days after the Act's effective date of March 25, 1994. Their right to a lethal gas execution would be waived if they made no such timely request. *See* 1994 Md. Laws 5 § 2. Currently, no prisoner now on Maryland's death row elected lethal gas by May 24, 1994, the
MASSACHUSETTS (MA)

1835-1897: hanging\textsuperscript{829}
1898-1981: electrocution\textsuperscript{830}
1975-1981: death penalty judicially abolished\textsuperscript{831}
1982-present: electrocution or lethal injection at the condemned’s election; electrocution if the condemned fails to choose a method\textsuperscript{832}
1984-present: death penalty judicially abolished\textsuperscript{833}

MICHIGAN (MI)

1816-1845: hanging\textsuperscript{834}
1846-present: no death penalty\textsuperscript{835}

last day of the election period. Therefore, Maryland’s pre-enactment choice provision no longer has practical significance. Gregory Hunt, who was recently executed, did request a lethal gas execution on May 24, 1994, even though he subsequently changed to lethal injection. See Telephone Interview with Denise Charlotte Barrett, Asst. Federal Public Defender, Baltimore, Md. (July 25, 1997). In Hunt v. Nuth, 57 F.3d 1327 (4th Cir. 1995), the Fourth Circuit Court of Appeals held that Maryland’s choice provision did not violate the Eighth Amendment, thus discounting Hunt’s claim that “forcing a person to choose the method of his execution is cruelly inhumane.” Id. at 1337. The court further rejected Hunt’s contention that Maryland’s provision required a choice between two cruel and unusual methods. Id. Upon holding that lethal gas was not a cruel and unusual method (even though it “may not be the most humane method”), the court did not have to address Hunt’s challenge to lethal injection. Hunt had already selected lethal gas, a constitutional method. Id. at 1337-38.

830. 1898 Mass. Acts 326 § 6 (electrocution). The 1898 law did not apply to persons sentenced to death for offenses committed prior to the effective date of the Act. Id. § 8. In In re Storti, 60 N.E. 210 (Mass. 1901), Chief Justice Holmes explained that the legislature changed from hanging to electrocution “for the purpose of reaching the end proposed as swiftly and as painlessly as possible.” Id. at 210.
832. 1982 Mass. Acts 554 § 6 (electrocution or lethal injection at the condemned’s election; electrocution if the condemned fails to choose a method). The 1982 law did not apply to offenses committed prior to the effective date of the Act, January 1, 1983. Id. § 8.
833. In Commonwealth v. Colon-Cruz, 470 N.E.2d 116 (Mass. 1984), the Supreme Judicial Court of Massachusetts again declared the state’s death penalty statute unconstitutional. Id. at 119-34. While the death penalty statute remains on the books, it is effectively abolished. Furthermore, no one has been executed in Massachusetts since 1949. See High Court Will Be Asked For Ruling on Death Penalty Law, Boston Globe, May 6, 1984, at 31; Jeremy Crockford, Death Penalty Vote Sought, Patriot Ledger, Aug. 3, 1995, at 1. Whether this situation will change in the future remains to be seen. See id.; Nat. Hentoff, Death Penalty Tears Up a State, Rocky Mountain News, July 31, 1995, at 28A (Editorial).
MINNESOTA (MN)

1905-1910: hanging\textsuperscript{856}
1911-present: no death penalty\textsuperscript{857}

MISSISSIPPI (MS)

1906-1939: hanging\textsuperscript{858}
1940-1953: electrocution (electrocution or hanging at the condemned's election if the condemned's death sentence was imposed prior to the Act's effective date; hanging if the condemned fails to choose a method)\textsuperscript{859}
1954-1983: lethal gas (lethal gas or electrocution at the condemned's election if the condemned's death sentence was imposed prior to the Act's effective date; electrocution if the condemned fails to choose a method)\textsuperscript{860}

did not apply to the crime of treason because treason is a federal offense; therefore, Michigan is considered to have had no death penalty since 1846. The treason exception was removed in 1963. See Bowers, supra note 274, at 9 n.b.; see generally James H. Lincoln, The Everlasting Controversy: Michigan and the Death Penalty, 33 Wayne L. Rev. 1765 (1987) (discussing the history and conflict surrounding the death penalty and its abolition in Michigan). In 1846, Michigan became the first state to abolish the death penalty (after having entered the Union in 1837). See id. at 1775-77. For 116 years, from 1847 to 1963, the death penalty was banned by an act of the Michigan legislature. In 1963, however, a ban was put into effect by the Michigan constitution. The 1963 ban requires that the state's constitution be amended before the death penalty could return to Michigan. See id. at 1787.

836. Minn. Rev. Laws 104 § 5419 (1905) (hanging). Capital punishment in Minnesota originated in 1849, when an Act of Congress created the Minnesota Territory. See John D. Bessler, The "Midnight Assassination Law" and Minnesota's Anti-Death Penalty Movement, 1849-1911, 22 Wm. Mitchell L. Rev. 577, 583 (1996). On December 29, 1854, the new Territory experienced its first hanging—a Dakota Indian named U-ha-zy. Id. The boisterous mob that attended U-ha-zy's hanging reportedly left the scene afterwards "satisfied and in high glee." Id. at 585. The last hanging in Minnesota occurred in 1906. See Galliher et al., supra, note 282, at 553. Because the rope was too long, the prisoner reached the ground. Id. Consequently, officials had to hold the prisoner's feet off the ground for fourteen and one-half minutes while he choked to death. Id. at 553 n.110 and accompanying text. This "gruesome, slow death... began a six-year movement in the Minnesota Legislature to abolish the death penalty, which finally succeeded in 1911." See Grant Moos, Newspaper Details of 1906 Hanging Made It State's Last, Star Trib., Mar. 26, 1992, at 1A.

837. 1911 Minn. Laws 387 § 1 (death penalty abolished).

838. Miss. Code Ann. tit. 31, ch. 168 § 11 (1906) (hanging); see also Bowers, supra note 274, at 11 (noting that Mississippi had the death penalty since at least 1872).

839. 1940 Miss. Laws 242 §1 (electrocution); 1940 Miss. Laws 242 § 8 (electrocution or hanging at the condemned's election if the condemned's death sentence was imposed prior to the Act's effective date; hanging if the condemned fails to choose a method). In Children v. State, 1 So.2d 494 (Miss. 1941), the Supreme Court of Mississippi held that, where the defendant chose electrocution before the electric chair had been installed, resentencing the defendant to be executed on a later date was not a violation of his due process rights. See id. at 494-95.

840. 1954 Miss. Laws 220 § 1 (lethal gas); id. § 4 (lethal gas or electrocution at the condemned's election if the condemned's death sentence was imposed prior to the Act's
1984-present: lethal injection (lethal gas if the condemned’s death sentence was imposed prior to the Act’s effective date)\(^{841}\)

**MISSOURI (MO)**

1866-1936: hanging\(^{842}\)
1937-1987: lethal gas\(^{843}\)
1988-present: lethal gas or lethal injection; statute leaves unclear at whose election\(^{844}\)

**MONTANA (MT)**

1895-1982: hanging\(^{845}\)
1983-present: hanging or lethal injection at the condemned’s election; hanging if the condemned fails to choose a method\(^{846}\)

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Effective date; electrocution if the condemned fails to choose a method). The 1954 law stated that "in all cases where sentence of death was imposed prior to the passage of this Act, the one so sentenced shall have the choice of receiving the death penalty under this act or as provided by law prior to the date of the passage of this act." Id. § 4. The Act took effect on December 31, 1954. Id. § 7.


843. 1937 Mo. Laws p. 222 § 1 (lethal gas). The 1937 law did not expressly indicate retroactive operation. However, in State v. Brockington, 162 S.W. 2d 860 (Mo. 1942), the Supreme Court of Missouri held that the lethal gas statute should apply retroactively to those sentenced to hanging. See id. at 860-01. When asked about his views concerning the state’s forthcoming lethal gas bill, Roscoe “Red” Jackson, the last person to be hanged in Missouri, stated that, “[f]rom the viewpoint of the condemned man that would be an improvement, but from the viewpoint of society, I think the example of a public hanging is better.” Jackson’s Last to Die by Rope, Leader & Press (Springfield, Mo.), May 21, 1987, at 1.

844. 1988 Mo. Laws p. 985 § A (lethal gas or lethal injection; statute leaves unclear at whose election); Mo. Rev. Stat. § 546.720 (1988) (current 1996). The 1988 Act did not expressly indicate retroactive operation. In addition, the 1988 Act states only that “[t]he manner of inflicting the punishment of death shall be by the administration of lethal gas or by means of the administration of lethal injection.” Id. It thus leaves unclear who decides what method of execution to use. In practice, the Director of the Missouri Department of Corrections decides which method to use for an execution. Lethal injection is the Director’s method of choice now and for the foreseeable future because the gas chamber is not appropriately equipped. See Telephone Interview with Tim Kniest, Public Information Officer, Missouri Dep’t of Corrections (July 28, 1997).


NEBRASKA (NE)

1895-1912: hanging
1913-present: electrocution

NEVADA (NV)

1885-1911: hanging
1912-1920: hanging or firing squad at the condemned's election; the court's choice if the condemned fails to choose a method
1921-1982: lethal gas
1983-present: lethal injection

847. Neb. Comp. Stat. 51 § 7276 (1895) (hanging). In 1905, Frank Barker built an electrical hanging device that enabled him to spring the trap door at his own execution. See Will Execute Himself by an Ingenious Electrical Device of His Own Design, Popular Mechanics, June 1905, at 712. Apparently, the warden approved of this scheme and allowed Barker to proceed. Id.

848. 1913 Neb. Laws 32 § 1 (electrocution); Neb. Rev. Stat. § 29-2532 (1943) (electrocution) (current 1996). The 1913 law did not apply to offenses committed prior to its effective date. 1913 Neb. Laws 32 § 1. On June 25, 1959, five separate 2200 volt jolts were administered before Charles Starkweather was pronounced dead by the attending physician. See Del Harding, Killer Executed, Morning Star, June 25, 1959, at 1. Recently, Senator Ernie Chambers called electrocution a “high tech burning at the stake.” Execution by Electrocution: Is It Humane or Cruel Death?, Sunday World-Herald, July 12, 1992, at 4B.


850. Nev. Rev. Stat. p. 2039 § 7281 (1912) (hanging or firing squad at the condemned's election; the court's choice if the condemned fails to choose a method). The 1912 law did not expressly indicate retroactive operation. In 1912, Andrija Mirkovitch chose the firing squad as his method of execution. See Phillip L. Earl, Nevada's Execution Machine, The Nebadan, Dec. 3, 1972, at 3. However, several guards were reluctant, or flatly refused, to carry out the sentence because they thought it was too similar to cold-blooded murder. Id. When word of this reluctance was revealed, volunteers from all over the world wrote to Nevada's warden. The warden tried to convince Mirkovitch to consent to hanging, but Mirkovitch refused. Mirkovitch was finally killed by a 1000 pound execution machine that fired three mounted rifles upon the cutting of three strings, only two of which fired the weapons with real bullets. Thus, the three “executioners” never even had to see their victim. Id. Although the machine performed successfully, it was never used again. Id.

851. 1921 Nev. Stat. 246 § 1 (lethal gas). In 1921, in an attempt to prove the state humane, the Nevada legislature passed a law providing that lethal gas was to be administered “without warning and while [the inmate was] asleep in his cell.” Bowers, supra note 274, at 12. This procedure was never followed, however, because it was impossible to release the gas in a regular cell. Id. Yet, in State v. Gee Jon, 211 P. 676 (Nev. 1923), the Nevada Supreme Court emphasized that the legislature “sought to provide a method of inflicting the death penalty in the most humane manner known to modern science.” Id. at 682. The legislature evaluated, but rejected, hanging, shooting, and electrocution in favor of lethal gas. Id. The 1921 lethal gas law did not expressly indicate retroactive operation.

NEW HAMPSHIRE (NH)

1891-1985: hanging

1986-present: lethal injection at the election of the commissioner of corrections; hanging if injection is “impractical”

NEW JERSEY (NJ)

1898-1905: hanging

1906-1982: electrocution

1983-present: lethal injection


856. 1906 N.J. Laws 79 § 1 (electrocution). The 1906 law went into effect on March 1, 1907, and applied only to crimes committed after that date. Id. § 14. For example, there was a hanging in New Jersey as late as 1909. See Bowers, supra note 274, at 457 n.1. In State v. Tomaszi, 69 A. 214 (N.J. 1908), the Court of Errors and Appeals in New Jersey noted that the switch to electrocution was to “mitigate the pain and suffering of the convict.” Id. at 217-18. The court relied, in part, on the fact that the Court of Appeals of New York had sustained a similar statute in People v. Durston, 24 N.E. 6 (N.Y. 1890), and People v. Kemmler, 24 N.E. 9 (N.Y. 1890). A 1907 editorial in the Newark Evening News, arguing for the switch to electrocution, stated that:

The change from the rope to electricity was made in the interests of decency and humanity. Choking a man to death is believed to prolong his agony unnecessarily, but the action of the electric current is instantaneous, and therefore, in the general belief, painless. If the death penalty must be inflicted the quickest way is best. New York State has had many executions by the new swift method, and no such bungling as sometimes happens at hangings has occurred since the electric chair was adopted.


NEW MEXICO (NM)

1880-1928: hanging
1929-1954: electrocution
1955-1978: lethal gas
1979-present: lethal injection

NEW YORK (NY)

1778-1887: hanging
1888-1964: electrocution
1965-1973: no death penalty (except for the murders of peace officers engaged in their duties or for the murders committed by prisoners serving a term of life imprisonment)
1974-1994: electrocution
1977-1983: part of the mandatory death penalty judicially abolished
1984-1994: remainder of the mandatory death penalty judicially abolished

859. 1929 N.M. Laws 69 § 11 (electrocution). The 1929 law did not expressly indicate retroactive operation. However, in Woo Dak Soo v. State, 7 P.2d 940 (N.M. 1931), the Supreme Court of New Mexico held that the new law substituted electrocution for hanging as the method of execution, even for those individuals under a sentence of hanging on the effective date of the statute. See id. at 941.
860. 1955 N.M. Laws 127 § 1 (lethal gas). The 1955 law did not apply to capital offenses committed prior to the Act's effective date. Id. § 3.
862. 1886 N.Y. Laws 19 (Act passed on Mar. 30, 1778) (hanging). For an account of the history of capital punishment in New York and the events that led to the abolition of hanging, see Denno, supra note 5 at 562-77.
863. 1888 N.Y. Laws 489 § 5 (electrocution). In 1886, Governor David B. Hill appointed a commission to find a method of execution that was "more humane than hanging." Denno, supra note 5, at 566-67. The 1888 law switching to electrocution did not apply to any offenses committed prior to the Act's effective date. See id. at 573 (noting that under New York's Electrical Execution Act, anyone convicted of a capital crime after January 1, 1889, would be electrocuted rather than hanged).
864. 1965 N.Y. Laws 321 § 1 (death penalty partially abolished). The 1965 statute abolished the death penalty except for the murders of peace officers engaged in their duties or for the murders committed by prisoners serving a term of life imprisonment. Id.
865. 1974 N.Y. Laws 367 § 2 (death penalty reinstated; electrocution). The 1974 statute reinstated the death penalty and made the penalty mandatory for murderers of police officers or prison workers and for murderers committed by inmates serving a term of life imprisonment. Id.
866. In People v. Davis, 371 N.E.2d 456 (N.Y. 1977), the New York Court of Appeals held unconstitutional the statutes that imposed mandatory death sentences for certain enumerated crimes. See id. at 463-64.
867. In People v. Smith, 468 N.E.2d 879 (N.Y. 1984), the New York Court of Appeals invalidated the last remaining mandatory death penalty provision, which imposed the death sentence for murder by an inmate serving a term of life imprisonment. See id. at 896-98.
1995-present: lethal injection\textsuperscript{868}

\textbf{NORTH CAROLINA (NC)}

1883-1908: hanging\textsuperscript{869}
1909-1934: electrocution\textsuperscript{870}
1935-1982: lethal gas\textsuperscript{871}

\textsuperscript{868} 1995 N.Y. Laws 1 § 32 (lethal injection); N.Y. Correct. Law § 658 (McKinney 1995) (current 1997); The Death Penalty Debates, New York State (NYS) Assembly (Mar. 6, 1995) (Record of Proceedings) [hereinafter NYS Death Penalty Debates]. According to 1995 N.Y. Laws 1 § 38, "[t]his act shall take effect on [Sept. 1, 1995] and shall apply only to offenses committed on or after such date." From 1977 to 1995, efforts to pass a new death penalty measure consistently failed due to the inability (and sometimes unwillingness) of the New York State Assembly to join the State Senate in overriding numerous gubernatorial vetoes. See Dale M. Volker (New York State Senator), Chronology of Death Penalty, Mar. 1993 (memorandum on file with the author). This circumstance changed in 1995 when the death penalty in New York was once again enacted. See 

\textsuperscript{869} New York Enacts Capital Punishment, Nat'l J.L., Mar. 27, 1995, at A8. Early on, Senator Dale M. Volker suggested that the state would use lethal injection rather than electrocution because lethal injection was perceived "as a less-cruel method of execution than strapping someone into an electric chair with no certainty that the result would be quick." Dan Herbeck, Electric Chair Unlike\textemdash If Death Penalty Returns, Buff. News, Dec. 27, 1994, at 1; see also New Law on Death Penalty is Reasonable Compromise; Hedges Ultimate Punishment with Safeguards, Buff. News, Mar. 8, 1995, at 2 ("Death will be by lethal injection, a more humane method of execution than the electric chair."). Several times during the course of the New York State Assembly's 1995 debates concerning New York's re-enactment of the death penalty, representatives expressed their differing views on the humaneness of lethal injection. See generally NYS Death Penalty Debates, supra, at 68-609. For example, Assemblyman Philip M. Boyle stated that he was "happy that Governor Pataki ha[d] decided to use lethal injection," in light of Boyle's opportunity to witness a lethal injection execution in Texas. \textit{Id.} at 261. As Boyle explained, "[f]rom the moment that the injection starts... the prisoner is dead within five seconds. He will cough once or twice and then a blast of air, and [he's] gone. As far as I could tell, [the Texas execution] was very painless and over quickly." \textit{Id.} On the other hand, Assemblyman Alexander B. Grannis contended that "Mr. Boyle must have been in Texas on a good day because there have been bad days in Texas when things didn't go so well." \textit{Id.} at 325. Grannis also elicited testimony that the technician administering lethal injections in New York would not be required to have "any particular special license in a healthcare profession." \textit{Id.} at 323. Grannis emphasized that none of the execution methods currently used in the United States has ever worked properly, including lethal injection. \textit{Id.} at 323-24 (referring to a number of botched lethal injections in Texas). As Assemblyman Michael A. Balboni contended, however, the "perception" was that lethal injection involved "less pain" and was "somewhat less cruel" than electrocution. \textit{Id.} at 364. See Pamela Katz, \textit{Death Penalty is Unacceptable Human Behavior}, Times Union (Albany, N.Y.), Feb. 28, 1995, at E1 (contending that the state is "choosing lethal injection instead of the electric chair in an attempt to sidestep the state constitution's ban against cruel and unusual punishment").

\textsuperscript{869} N.C. Code 26 § 1243 (1883) (providing for private execution); N.C. Code p. 861, Index (1883) (hanging).

\textsuperscript{870} 1909 N.C. Sess. Laws 443 § 1 (electrocution). The 1909 law did not apply to crimes committed before the law's effective date.

\textsuperscript{871} 1935 N.C. Sess. Laws 294 § 1 (lethal gas). The 1935 law did not apply to crimes committed before its effective date. See State v. Brice, 197 S.E. 690, 691 (N.C. 1938) (noting that because the crime occurred before the enactment of the 1935 statute, the defendant would be administered electrocution rather than lethal gas); State v. Hester, 182 S.E. 738, 740-41 (N.C. 1935) (indicating that the language concerning which offenses pertained to the 1935
1983-present: lethal gas, or lethal injection at the condemned’s election; lethal gas if the condemned fails to choose a method.\footnote{872}

**NORTH DAKOTA (ND)**

1983-present: injection\footnote{873}

1993-present: no death penalty\footnote{874}

**OHIO (OH)**

1983-present: electrocution\footnote{875}

1993-present: lethal injection at the condemned’s election; electrocution if the condemned fails to choose a method\footnote{876}

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act was identical to, and modelled from, the 1909 statute). Pressure for a more humane method of execution prompted the 1935 switch to lethal gas. See Guy Munger, *The Grim History of N.C. Executions*, News and Observer Perspective, Mar. 4, 1984, at 8D.

872. 1983 N.C. Sess. Laws 678 § 1 (lethal gas, or lethal injection at the condemned’s election; lethal gas if the condemned fails to choose a method); N.C. Gen. Stat. § 15-187 (1983) (current 1996). It seems that the 1983 law did not apply to crimes committed before the statute’s effective date. While debating the 1983 bill to provide for the choice of lethal injection, Representative John W. Varner, a physician, said:

There’s no doubt about it. Death in a gas chamber is a horrible death. You’re strapped in a little room. For many minutes, not a few, he’s struggling, trying to breathe and all he can breathe is gas. With lethal injection, he feels no pain. It’s like going into an operating room and going to sleep. He passes away with no struggle.

Munger, supra note 871, at 1D.


874. 1915 N.D. Laws 63 § 1 (death penalty partially abolished). The 1915 abolition bill included an emergency clause to prevent the hanging of a man already on death row. See id. § 4. The bill did not abolish the death penalty for first degree murder committed by a prisoner serving a life sentence for first degree murder. See id. § 1; see also Gallilher et al., supra note 282, at 555-56 (discussing the death penalty in North Dakota).


876. 1855 Ohio Acts p. 41 § 40 (“An Act Providing for the Punishment of Crimes”) (hanging); see also Webster v. State, 4 N.E. 92, 93-94 (Ohio 1885) (providing a brief history of hanging legislation in Ohio).

877. 1896 Ohio Laws p. 159 § 1 (electrocution). This law applied only to crimes committed from and after July 1, 1896. Id. § 5.

878. 1993 Ohio Laws 38 § 1 (electrocution, or lethal injection at the condemned’s election; electrocution if the condemned fails to choose a method); Ohio Rev. Code Ann. § 2949.22(A-B) (Banks-Baldwin 1993) (amended 1994) (current 1997). The 1993 law did not expressly indicate retroactive operation. The push to change Ohio’s execution method law began in 1985, when Republican State Representative John Galbraith contended that “death by lethal injection is a more humane method, that is quick and painless, and the cost is minimal.” U. Press Int’l (Feb. 6, 1985). Although the lethal injection bill was passed by both Houses in 1989, it was vetoed by then-Governor Richard F. Celeste, a death penalty opponent.
OKLAHOMA (OK)

1890-1912: hanging
1913-1950: electrocution
1951-1976: lethal gas
1977-present: lethal injection

OREGON (OR)

1874-1913: hanging
1914-1919: no death penalty

who claimed lethal injection was a "façade to make people feel more comfortable about capital punishment." Lee Leonard, New Law Permits Execution by Lethal Injection, Colum. Disp., July 7, 1993, at 6D. After the state legislature passed the 1993 bill, Representative Ronald M. Mottl stated that lethal injection was a "much more humane way of executing an individual" than electrocution. Lee Leonard & James Bradshaw, House Oks Bill Giving Condemned Choice in Execution, Colum. Disp., Mar. 25, 1993, at 4D. However, Representative Otto Beatty, Jr., said that offering the choice to the condemned is to "ease our own consciousness [sic]... This doesn't make it any easier on anybody except us." Id. Notably, the 1993 law states that "[n]o change in the law made by this amendment constitutes a declaration by or belief of the general assembly that execution of a death sentence by electrocution is a cruel and unusual punishment." 1993 Ohio Laws 38 § 1. However, the law also states, in the section regarding choice of execution, that "the person's death sentence shall be executed by causing the application to the person of a lethal injection of a drug or combination of drugs of sufficient dosage to quickly and painlessly cause death instead of by electrocution as described in division (A) of this section." Id. The electrocution statute does not specify that the execution should be quick or painless.

880. 1913 Okla. Sess. Laws 113 § 1 (electrocutio). The 1913 law did not expressly indicate retroactive operation. For a discussion of the construction and early uses of Oklahoma's electric chair, see Bob Gregory, They Died for Their Sins, Okla. Monthly, Nov. 1979, at 73.

881. 1951 Okla. Sess. Laws 17 § 1 (lethal gas). The 1951 law provided that the method of execution would be electrocution until a lethal gas chamber was built. Id. Electrocutio was used in Oklahoma as late as 1966. Bowers, supra note 274, at 486.

882. 1977 Okla. Sess. Laws 41 § 1 (lethal injection); Okla. Stat. tit. 22, § 1014(A) (1977) (current 1996). Oklahoma was the first state to institute lethal injection. State Senator Bill Dawson introduced the idea and consulted Stanley Deutsch, then Chief of Anesthesiology at the University of Oklahoma Health Sciences Center. Don Colburn, Oklahoma Was the First, Wash. Post, Dec. 11, 1990, at Z14. Deutsch assured Dawson that lethal injection was "[w]ithout question ... extremely humane in comparison to ... electrocutio." Id. Deutsch stated that "[f]rom what I had heard of electrocutio, it was pretty grotesque, with eyeballs popping out of their sockets and smoke coming out of the head helmet. It seemed to me a lethal injection would be much more humane. I thought it was a pretty good idea, myself." Id.; see also supra notes 320-21 and accompanying text (discussing the communications between Dawson and Deutsch, and the impetus behind the introduction of lethal injection). Nancy Nunnally, a spokesperson for the Oklahoma Corrections Department, confirmed that the state changed to lethal injection for "humane" reasons. As she explained, "[p]eople don't realize it, but the electric chair can take 11 minutes to kill people. The first shock knocks you unconscious, but then it would just cook you. You would literally fry." Mary Thornton, Death by Injection, Wash. Post, Oct. 6, 1981, at A1. The 1977 law did not expressly indicate retroactive operation.

883. 1874 Or. Laws p. 115 § 1 (hanging).
884. 1915 Or. Laws 92 § 1 (abolishing the death penalty); 1915 Or. Laws p. 12
1920-1936: reinstated but method unknown (hanging presumed)\(^695\)
1937-1963: lethal gas\(^688\)
1964-1977: no death penalty\(^697\)
1978-1983: lethal gas\(^688\)
1981-1983: death penalty judicially abolished\(^699\)
1984-present: lethal injection\(^690\)

**PENNSYLVANIA (PA)**

1860-1912: hanging\(^891\)
1913-1989: electrocution\(^892\)
1990-present: lethal injection\(^893\)

(constitutional amendment) (stating that Oregon voters abolished capital punishment by 157 votes in 1914, when the abolition took effect).

885. 1920 Or. Laws 19 § 1, 21 § 1 (death penalty reinstated). Between 1920 and 1937, the method of inflicting the death penalty was not made clear in the statutes. This ambiguity, however, was apparently not a bar to inflicting the death penalty. See Bowers, supra note 274, at 489. According to the governor at the time, the 1920 reinstatement was due to a nationwide wave that Oregon had experienced and that had spurred its residents to demand “greater and more certain protection.” Galliher et al., supra note 282, at 569.

886. 1937 Or. Laws 274 § 1 (lethal gas). The 1937 law did not apply to offenses committed prior to its effective date. Id. § 2. In 1937, “[t]he electric chair was ruled out [as a possible method] because there were too many cases of men being inadvertently tortured by the current before they died. The unavoidable odor of burning flesh was also a mark against it.” Dick Pintarich & Ray Stout, In Hard Times, Capital Punishment Makes a Comeback: Execution Oregon Style, Oregon Times Mag., June 1977, at 25.

887. 1964 Or. Laws p. 6 art. I (Capital Punishment Bill) (death penalty abolished).


889. In State v. Quinn, 623 P.2d 630 (Or. 1981), the Supreme Court of Oregon declared the death penalty statute unconstitutional. See id. at 639-44. The statute did not operate for three years.


892. 1913 Pa. Laws 338 § 1 (electrocution). The 1913 law did not apply to offenses committed prior to its approval date. Id. § 11. The legislature switched to electrocution because it was allegedly more humane than hanging. See John Watson, The Strange Life of Reily, True Detective, May 1943, at 25, 26.

893. 1990 Pa. Laws p. 572, no. 1990-145, § 1 (lethal injection); Pa. Stat. Ann. tit. 61, § 2121.1 (West 1990) (amended 1995) (current 1996). The 1990 law did not indicate retroactive operation. State Senator Richard Snyder, one of the sponsors of the lethal injection bill, witnessed an electrocution in the late 1930s. Lawmakers Propose Execution by Lethal Injection, U. Press Int'l (July 25, 1983). He concluded that “the electric chair is a brutal way to kill someone.” Id. Representative James Barber said he introduced the bill because he was “appalled” at an earlier botched electrocution in Alabama. Id. Contending that “‘death in itself is enough of a punishment,’” Barber emphasized that “electrocution only makes it even more inhumane.” Id.
### RHODE ISLAND (RI)

<table>
<thead>
<tr>
<th>Year Range</th>
<th>Method</th>
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<tbody>
<tr>
<td>1822-1972</td>
<td>hanging</td>
</tr>
<tr>
<td>1973-1983</td>
<td>lethal gas</td>
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<tr>
<td>1979-1983</td>
<td>mandatory death penalty judicially abolished</td>
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<tr>
<td>1984-present</td>
<td>no death penalty</td>
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### SOUTH CAROLINA (SC)

<table>
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<tbody>
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<tr>
<td>1912-1994</td>
<td>electrocution</td>
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<tr>
<td>1995-present</td>
<td>electrocution, or lethal injection at the condemned’s election; lethal injection if the postenactment condemned fails to choose a method; electrocution if the pre-enactment condemned fails to choose a method</td>
</tr>
</tbody>
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894. 1822 R.I. Pub. Laws p. 353 § 63 (hanging). Rhode Island carried out its last hanging in 1845. The 1896 law made the death penalty mandatory for persons who murdered while under a sentence of imprisonment for life. The law did not expressly indicate retroactive operation. Hanger was the only method ever used. See Bowers, *supra* note 274, at 13 n.a.

895. 1973 R.I. Pub. Laws 280 § 1 (lethal gas). The 1973 law made the death penalty mandatory for persons who murdered while confined in an adult correctional institution or the state reformatory for women. The law did not expressly indicate retroactive operation. *Id.* § 2.

896. In *State v. Cline*, 397 A.2d 1309 (R.I. 1979), the Supreme Court of Rhode Island declared the state’s mandatory death penalty unconstitutional. *See id.* at 1309-11.


898. S.C. Code p. 446, Punishment (1841) (hanging) (“on the conviction of a slave or free person of color, for a capital offense”). *See also* F. Carlisle Roberts, *Law and the Judiciary, in Columbia: Capital City of South Carolina, 1786-1936*, at 161, 168 (Helen Kohn Hennig ed., 1936) (noting that prior to 1868, executions were by hanging, “which might take place under any convenient tree”; from 1868 to 1912, hangings were conducted in the county jail or jailyard); J.E. Williams, *Old and New Columbia 40-48*, 102-33 (1929) (describing hangings in Columbia, South Carolina, during the 1800s).

899. 1912 S.C. Acts 492 § 1 (electrocution).

**SOUTH DAKOTA (SD)**

<table>
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<tr>
<th>Period</th>
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<tbody>
<tr>
<td>1877-1915:</td>
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<td>1915-1938:</td>
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<td>1939-1983:</td>
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<tr>
<td>1984-present:</td>
<td>lethal injection&lt;sup&gt;904&lt;/sup&gt;</td>
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**TENNESSEE (TN)**

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<td>1858-1912:</td>
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<td>1913-1914:</td>
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<td>1915-1916:</td>
<td>no death penalty (except for the crime of rape and for convicts serving life terms convicted of any offense previously punishable by death)&lt;sup&gt;907&lt;/sup&gt;</td>
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<tr>
<td>1917-present:</td>
<td>electrocution&lt;sup&gt;908&lt;/sup&gt;</td>
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**TEXAS (TX)**

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<td>1836-1922:</td>
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<tr>
<td>1923-1976:</td>
<td>electrocution&lt;sup&gt;910&lt;/sup&gt;</td>
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902. 1915 S.D. Laws 158 §§ 1-3 (death penalty abolished).
903. 1939 S.D. Laws 30 § 1 (death penalty reinstated); 1939 S.D. Laws 135 § 11 (electrocution). The 1939 law did not expressly indicate retroactive operation. During World War II, it was impossible to get materials for an electric chair, so several death sentences were commuted. See Bowers, supra note 274, at 502.
906. 1913 Tenn. Pub. Acts 36 § 1 (first executive session) (electrocution). Although the 1913 law did not expressly indicate retroactive operation, the Supreme Court of Tennessee held that the law should be retroactive. See Shipp v. State, 172 S.W. 317, 318 (Tenn. 1914) (holding that the legislature intended that the death penalty be imposed “by means of electrocution in all cases where the sentence of death was pronounced after the act of 1913 went into effect, without regard to whether the crime was committed before or after the passage of the act.”)
907. 1915 Tenn. Pub. Acts 181 § 1 (death penalty partially abolished); Tenn. Code 15 § 7204a8 (1918) (citing the 1915 Act). The 1915 law did not abolish the death penalty for the crime of rape or for convicts serving life terms convicted of any offense previously punishable by death. In Dawson v. Bomar, 354 S.W.2d 763 (Tenn. 1962), the court held there was no bar to inflicting the death penalty even though the law designating electrocution as the method of execution was passed by a state legislature that had not yet reapportioned itself in accordance with the constitution. See id. at 765-67. Since the law designating capital punishment for rape had been in effect since 1871 and had not been abolished in 1915 along with the law designating capital punishment for murder, the prisoner’s conviction was still valid. See id. While the method of execution was arguably invalid, the petitioner was barred from arguing that on appeal as he had neglected to do so in the trial court. See id. at 766.
910. 1923 Tex. Gen. Laws 51 § 1 (electrocution). The 1923 law did not apply to sentences
imposed prior to its effective date.  *Id.* § 13. Representative T. K. Irvin and Senator J.W. Thomas authored the 1923 bill that switched Texas to the electric chair because they believed that the chair was more humane than hanging.  See *id.* § 14 (stating that hanging "frequently creates great disturbance in the county"); Billy Porterfield, *Electric Chair Has Seen Its Share of Pain, Death,* Am. Statesman (Austin Tex.), Oct. 26, 1990, at B1 (noting arguments that the electric chair was more humane than hanging). The 1923 bill stated that "[t]he system [of hanging] is antiquated and has been supplanted in many states by the more modern and humane system of electrocution." 1923 Tex. Gen. Laws 51 § 14.

911. 1977 Tex. Gen. Laws 138 § 1 (lethal injection); Tex. Code Crim. P. Ann. art. 43.14 (West 1977) (amended 1995) (current 1997). The 1977 law did not expressly indicate retroactive operation. In *Earvin v. State,* 582 S.W.2d 794 (Tex. Crim. App. 1979), the Texas Court of Criminal Appeals held that the state's use of lethal injection was not cruel and unusual punishment, nor was it violative of the Equal Protection and Due Process Clauses of the Fourteenth Amendment. See *id.* at 799. Indeed, sponsors of the state's lethal injection bill were spurred by their belief that lethal injection was a far more humane method of execution than electrocution. According to Ben Grant, one of the bill's sponsors, death by electrocution is a "gruesome ritual," and the electric chair is "a barbaric torture device." Martin R. Gardner, *Executions and Indignities—An Eighth Amendment Assessment of Methods of Inflicting Capital Punishment,* 39 Ohio St. L. J. 96, 125-27 n.228 (1978) (citation omitted). However, Texas is the first state to have granted an evidentiary hearing on the constitutionality of lethal injection, given the substantial amount of evidence suggesting that the state's procedure is cruel and unusual. See generally Richardson Application, *supra* note 110 (concerning the evidentiary hearing on the constitutionality of lethal injection in Texas held on April 28-30, 1997); see also Kurt Anderson, *A 'More Palatable' Way of Killing,* Time, Dec. 20, 1982, at 28 (noting that "[t]echnicians, botching an injection, could accidentally inflict excruciating pain"); *supra* notes 382-400 (emphasizing the particularly high risk of botched executions in Texas).

912. 1852 Utah Terr. Laws tit. XII, pp. 142-43 §125 ("General Definition and Provision as to Crimes and Offenses") (Mar. 6, 1852) (firing squad, hanging, or beheading at the court's or condemned's election). Utah entered the Union on January 4, 1896. See The World Almanac, *supra* note 271, at 542. For a history of the development of Utah's execution method laws, see Gillespie, *supra* note 195, at 11-107; Gardner, *supra* note 470, at 449-57. In *Wilkinson v. Utah,* 99 U.S. 130 (1878), the Supreme Court held that, although the Utah territory's legislature had made no provision for a method of execution in the 1876 Code, which superseded the 1852 law, the petitioner could properly be sentenced to death by shooting. See *id.* at 132-37. It appears that Utah was the first state to give the condemned a choice of method of execution. Allowing the choice has roots in the Mormon religious doctrine of blood atonement. See Gillespie, *supra* note 195, at 12. Only through choosing a method of execution that results in blood being shed can the condemned hope to receive forgiveness in the next life. *Id.* See *supra* notes 459-63 (discussing the current consequences of the early Mormon belief in blood atonement).

913. Utah Rev. Stat. § 4939 (1898) (firing squad or hanging at the condemned's election; court's choice if the condemned fails to choose a method). Only two men elected to be hanged under the 1898 statute. Bowers, *supra* note 274, at 13 n.h.

914. 1980 Utah Laws 15 § 2 (firing squad). The 1980 law did not expressly indicate
1983-present: firing squad or lethal injection at the condemned’s election; lethal injection if the condemned fails to choose a method

VERMONT (VT)

1840-1911: hanging
1912-1964: electrocution
1965-present: no death penalty (with exceptions)

VIRGINIA (VA)

1887-1907: hanging
1908-1993: electrocution
1994-present: electrocution or lethal injection at the condemned’s election; lethal injection if the condemned fails to choose a method

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917. 1912 Vt. Acts & Resolves 97 § 6 (electrocution). The 1912 law did not apply to offenses committed before its effective date. Id. § 8.

918. 1965 Vt. Acts & Resolves 30 § 1 (death penalty abolished, except for the murder of police and prison employees or a second unrelated murder). Currently, there is still a partial death penalty statute in Vermont. However, the statute applies only to the crime of treason, see Vt. Stat. Ann. tit. 13, § 3401 (1996), or, relatedly, crimes committed by three or more people, acting in concert, in a time of war or of threatened war, see id. § 3484. Electrocution is used when the death penalty is imposed. Id. § 7106.


920. 1908 Va. Acts ch. 398 § 1 (electrocution). The 1908 law indicated no retroactive operation. Id. § 8. Notably, Va. Code Ann. 196 § 4946 (1918), provided that, when the death sentence had been imposed for the offense of rape (or attempted rape), the body was not to be delivered to the relatives of the condemned. According to Charles V. Carrington, M.D., Assistant Professor of Surgery, University College of Medicine, and Surgeon to the Virginia Penitentiary, electrocution was “a great step forward” relative to the “sickening horrible” death of hanging. Charles V. Carrington, The History of Electrocution in the State of Virginia, Va. Med. Semi-Monthly 353, 353 (1910).

An electrocution . . . is a swift, solemn, and withal humane way of inflicting the death penalty. It is all over in about sixty to seventy seconds . . . . There is absolutely no physical preparation necessary, or made, and I never knew a single one of the thirty-one I’ve seen electrocuted do a thing but meet death calmly and without flinching. It is so quickly over, so swift in its every detail the subject does not have time to weaken or wilt.

Id.

921. 1994 Va. Acts ch. 921 § 1 (electrocution or lethal injection at the condemned’s election; lethal injection if the condemned fails to choose a method); Va. Code Ann. § 53.1-233 (Michie 1994) (current 1997). The 1994 law did not expressly indicate retroactive operation. The legislature’s decision to allow inmates a choice between electrocution and lethal injection was motivated by a number of botched electrocutions that had occurred in the
State's injection, indicate hanging special by see Peter that witnessed the Feb. lethal objective stoop native to state, therefore also injection change, which was also the Feb. method (discussing Way 1949-1964: 1899-1948: 1981-1996: 1919-1980: 1891-1912:). ARE EXECUTIONS CONSTITUTIONAL?

WASHINGTON (WA)

1891-1912: hanging
1913-1918: no death penalty
1919-1980: hanging
1981-1996: hanging, or lethal injection at the condemned's election; hanging if the condemned fails to choose a method
1996-present: lethal injection, or hanging at the condemned's election; lethal injection if the condemned fails to choose a method

WEST VIRGINIA (WV)

1899-1948: hanging
1949-1964: electrocution

state, such as Derick Peterson's in 1991 and Wilbert Evans' in 1990. See Electric Chair On Its Way Out As Va. Switches to Lethal Injection, Charleston Gazette, Mar. 5, 1994, at 2A. According to State Delegate Philip Hamilton, a Republican sponsor of the bill, the lethal injection alternative allowed Virginia "to carry out the death penalty in a way that doesn't cause the state to stoop to the level of the criminal." Id. As Senator Edgar S. Robb, who has witnessed an execution, explained, "[e]lectrocution is a violent, tortuous and dehumanizing act . . . . The objective is death, not violent torture." Warren Fiske, Executions, Va. Pilot and Ledger-Star, Feb. 26, 1994, at D1. The majority of the state senators who were "[s]upporters said that lethal injection would offer a more humane and less painful death than electrocution." Id. Moreover, public opinion strongly upheld the bill. "Polls consistently have shown support for lethal injection [in Virginia]." Peter Baker, Va. Assembly Adds Option for Execution, Wash. Post, Feb. 26, 1994, at A1 (citing Mason-Dixon Political/Media Research poll conducted in January, 1992, which found that 49% of Virginians favored changing to lethal injection, 21% opposed the change, and the remainder said they did not know). Hamilton said that when he witnessed the state's first execution by lethal injection, the experience "confirmed" his belief that injection "was a less violent method" than electrocution, which he had also witnessed. Peter Baker, Va. Carries Out Its 1st Execution by Lethal Injection, Wash. Post, Jan. 25, 1995, at D1; see also Cody Lowe, Killer Dies by Needle, Roanoke Times & World News, Jan. 25, 1995, at A1 (discussing the execution of Dana Ray Edmonds, the first person in Virginia to be executed by lethal injection).

923. 1913 Wash. Laws 167 § 1 (death penalty abolished).
924. 1919 Wash. Laws 112 § 1 (death penalty reinstated (hanging) subject to imposition by special verdict of the jury).
928. 1949 W. Va. Acts pp. 163-67, ch. 37 (electrocution). The 1949 law did not apply to "capital punishment crimes committed prior to the effective date of this act." Id. at 163.
1965-present: no death penalty

WISCONSIN (WI)

1839-1852: hanging
1853-present: no death penalty

WYOMING (WY)

1887-1934: hanging
1935-1983: lethal gas
1984-present: lethal injection

State v. Burdette, 63 S.E.2d 69 (W. Va. 1950), the Supreme Court of Appeals of West Virginia stated that "It is common knowledge that the purpose and intent of the Legislature of West Virginia in enacting [electrocution as the method of execution] was to provide a more humane and less cruel means for execution of death sentences." Id. at 85.


930. 1839 Wis. Terr. Laws p. 379 § 9 ("An Act to provide for the punishment of offences against the lives and persons of individuals") (hanging); 1849 Wis. Laws 150 § 9 (hanging). See also Wisconsin Legislative Reference Bureau, Capital Punishment in Wisconsin and the Nation, Informational Bulletin 90-1, 4 (Jan. 1990) (noting that the first codified laws of the territory of Wisconsin provided in 1839 that the punishment for murder would be hanging).

931. 1853 Wis. Laws 103 § 1 (death penalty abolished). The state’s abolishment of the death penalty was spurred by the 1851 hanging of John McCaffary, whose execution was witnessed by more than 1000 people. See Wisconsin Legislative Reference Bureau, supra note 930, at 4. Although a number of attempts have been made to re-enact the death penalty in Wisconsin, none has yet been successful. See id. at 4-5; Matt Pommer, Lawmaker Asks Return of Death Penalty in State, Capital Times (Madison, Wis.), Oct. 7, 1992, at 3A.


933. 1935 Wyo. Sess. Laws 22 § 1 (lethal gas). The 1935 law did not apply to offenses committed before its effective date. Id. § 2.