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Five Under the Eighth: Methodology Review and the Cruel and Unusual Punishments Clause

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COMMENTS

Five Under the Eighth: Methodology Review and the Cruel and Unusual Punishments Clause

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I. INTRODUCTION

Currently, thirty-eight states and the federal government have death penalty statutes; of these, eleven employ electrocution,¹ five lethal gas,²

1. See ALA. CODE § 15-18-82 (1995); CONN. GEN. STAT. ANN. § 54-100 (West 1995); FLA. STAT. ANN. § 922.10 (West 1985 & Supp. 1995); GA. CODE ANN. § 17-10-38 (1990); IND. CODE ANN. § 35-38-6-1 (West 1986); KY. REV. STAT. ANN. § 431.220 (Michie 1994); NEB. REV. STAT. § 29-2532 (1995); OHIO REV. CODE ANN. § 2949.22 (Anderson 1993); S.C. CODE ANN. § 24-3-530 (Law Co-op. 1989 & Supp. 1993); TENN. CODE ANN. § 40-23-114 (1990); VA. CODE ANN. § 53.1-234 (Michie 1996) (choice between electrocution and lethal injection).

2. See ARIZ. REV. STAT. ANN. § 13-704 (West 1995) (choice between lethal gas and lethal injection); MISS. CODE ANN. § 99-19-51 (1994) (lethal gas for sentences imposed before 1984 or if lethal injection is unconstitutional); MO. ANN. STAT. § 546.720 (West 1995) (lethal gas or lethal injection); N.C. GEN. STAT. § 15-187 (1983) (choice between lethal gas and lethal injection); WYO. STAT. ANN. § 7-13-904 (Michie 1995) (lethal gas if lethal injection is unconstitutional).

two hanging,³ three firing squad,⁴ and twenty-six lethal injection.⁵ The death penalty has been a traditional method of punishment in the United States—it has historically been widely accepted and carried out in most jurisdictions.⁶ In spite of this, challenges to the death penalty have continually questioned the constitutionality of the penalty under the cruel and unusual punishments clause of the Eighth Amendment to the United States Constitution.⁷ Seminal cases in the United States Supreme Court have varied as to the grounds of challenge, but three basic categories have emerged—challenges to proportionality, challenges to the death penalty itself, and challenges to the class of people on whom the death penalty can be imposed.⁸

In the 1970's, the Supreme Court declared the death penalty unconstitutional on grounds that it was arbitrarily and capriciously imposed.⁹ More recently, cases have principally involved challenges to the class of people on whom the death penalty can be constitutionally imposed.¹⁰

3. See MONT. CODE ANN. § 46-19-103 (1979) (choice between hanging and lethal injection); WASH. REV. CODE ANN. § 10.95.180 (West 1990) (choice between hanging and lethal injection).

4. See IDAHO CODE § 19-2716 (1987) (firing squad if lethal injection is impractical); OKLA. STAT. ANN. tit. 22, § 1014 (West 1986) (electrocution if lethal injection is unconstitutional, firing squad if electrocution is unconstitutional); UTAH CODE ANN. § 77-18-5.5 (1996) (choice between firing squad and lethal injection).

5. See ARIZ. REV. STAT. ANN. § 13-704 (West 1995); ARK. CODE ANN. § 5-4-615 (Michie 1995); CAL. PENAL CODE § 3604 (West 1996); COLO. REV. STAT. ANN. § 16-11-401 (West 1990 & Supp. 1996); DEL. CODE ANN. tit. 11, § 4209(F) (1987 & Supp. 1994); IDAHO CODE § 19-2716 (1987); 725 ILL. COMP. STAT. ANN. 5/1119-5 (West 1996); LA. REV. STAT. ANN. § 15:569(B) (West 1992); MD. ANN. CODE art. 27, § 71 (1992); MISS. CODE ANN. § 99-19-51 (1994); MO. ANN. STAT. § 546.720 (West 1996); MONT. CODE ANN. § 46-19-103 (1979) (choice between hanging and injection); NEV. REV. STAT. ANN. § 176.355 (Michie 1992); N.H. REV. STAT. ANN. § 630:5 XIII, XIV (1996) (unless impractical and then hanging is the method); N.J. STAT. ANN. § 2C:49-2 (West 1995); N.M. STAT. ANN. § 31-14-11 (Michie 1984); N.C. GEN. STAT. § 15-187 (1983) (choice between gas and injection); OKLA. STAT. ANN. tit. 22., § 1014 (West 1986); OR. REV. STAT. § 137.473 (1995); PA. STAT. ANN. tit. 61, § 2121.1 (Supp. 1996); S.D. CODIFIED LAWS ANN. § 23A-27A-32 (1988); TEX. CRIM. CODE ANN. § 43.14 (West 1995); UTAH CODE ANN. § 77-18-5.5 (1996) (firing squad or injection); VA. CODE ANN. § 53.1-234 (Michie 1996) (choice between electrocution and injection); WASH. REV. CODE ANN. § 10.95.180 (West 1990) (hanging or injection); WYO. STAT. ANN. § 7-13-904 (Michie 1995) (lethal gas if lethal injection is held unconstitutional).

6. At one time forty-eight states employed the death penalty. See *Campbell v. Wood*, 18 F.3d 662, 697 (9th Cir. 1994) (Reinhardt, J., dissenting) (referring to death by hanging), *cert. denied*, 114 S. Ct. 2125 (1994). Judge Reinhardt also noted that Alaska and Hawaii have never employed capital punishment since obtaining statehood. *Id.* at 697 n.6.

7. The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. For a discussion of cases interpreting Eighth Amendment see *infra* Part III.

8. See *infra* Part III for a discussion of these cases.

9. See *Furman v. Georgia*, 408 U.S. 238 (1972). There was no one rationale underlying the *Furman* decision. Five Justices wrote separate concurring opinions—Douglas, Brennan, Stewart, White and Marshall—and four wrote separate dissents—Blackmun, Burger, Powell and Rehnquist. See also *infra* Part III for a detailed discussion of *Furman*.

10. See *infra* Part III for a discussion of these cases.

While many of the latter challenges have been successful in the Court, there is one class of newer challenges the Court has recently refused to consider—challenges to methodology.¹¹

Although this subject has received considerable attention in the lower courts,¹² only one methodology case appealed to the Supreme Court has been granted certiorari.¹³ However, the Court has decided several challenges to the death penalty brought on other grounds.¹⁴ In fact, the last time the Supreme Court considered a challenge to methodology, was in 1890—in *In re Kemmler*.¹⁵ That case involved a challenge to electrocution, and the Court held that electrocution was not cruel or unusual.¹⁶ *Kemmler*, however, is relatively out-dated and did not formulate any definitive test for determining the constitutionality of

11. See *Campbell v. Wood*, 18 F.3d 662 (9th Cir. 1994), cert. denied, 114 S. Ct. 2125 (1994); *Louisiana v. Glass*, 455 So. 2d 659 (La. 1984), cert. denied, 471 U.S. 1080 (1985).

12. See *infra* Parts IV and V for a discussion of lower court decisions on methodology.

13. See *In re Kemmler*, 136 U.S. 436 (1890).

14. See, e.g., *Penry v. Lynaugh*, 492 U.S. 302 (1989); *Thompson v. Oklahoma*, 487 U.S. 815 (1988); *Ford v. Wainwright*, 477 U.S. 399 (1986); *Enmund v. Florida*, 458 U.S. 782 (1982); *Coker v. Georgia*, 433 U.S. 584 (1977); *Gregg v. Georgia*, 428 U.S. 153 (1976); *Furman v. Georgia*, 408 U.S. 238 (1972); *Louisiana ex rel Francis v. Resweber*, 329 U.S. 459 (1947).

15. See *In re Kemmler*, 136 U.S. 436 (1890). *Wilkerson v. Utah* was the first case in which the Court mentioned the Eighth Amendment as it applies to a method of execution. 99 U.S. 130 (1878). In *Wilkerson*, an inmate convicted in Utah challenged the sentencing court's discretion to choose the method of execution. The trial court had chosen shooting, as it was the traditional method, and the Supreme Court noted in dicta that shooting is not unconstitutional cruel punishment. See *id.* at 136-37. *Wilkerson* is cited for the proposition that the firing squad is not unconstitutional, but I have not included it in the "test" as it adds nothing to discussion of how courts should analyze cases brought under the Eighth Amendment. In addition, although often cited as a methodology case, *Resweber* did not actually involve a challenge to the electrocution method itself. 329 U.S. at 459. See *infra* Part III for a discussion of this case.

16. See *Kemmler*, 136 U.S. at 449. *Kemmler* was actually an appeal brought under the 14th Amendment. *Kemmler*, who had challenged the constitutionality of electrocution under the New York Constitution's cruel and unusual punishments clause, lost on this issue in the New York courts. See *id.* at 438. The case was appealed to the United States Supreme Court on the grounds that the privileges and immunities and due process clauses of the Fourteenth Amendment prohibited a state from imposing cruel and unusual punishments. See *id.* at 446. *Kemmler's* arguments rested mainly on the unusualness of the punishment. See *id.* The Supreme Court held the Eighth Amendment inapplicable to the states through the due process clause or the privileges and immunities clauses of the Fourteenth Amendment. See *id.* at 446-49.

However, in subsequent Eighth Amendment challenges, the Court has assumed the Amendment applies to the states. See *Furman*, 408 U.S. at 239; *Trop v. Dulles*, 356 U.S. 86 (1958). This assumption actually began with *Resweber*. 329 U.S. at 463-64, 475-77 (eight Justices assumed the Eighth Amendment was applicable to the states). Even though *Resweber* did not present the question of electrocution's constitutionality under the Eighth Amendment, the Court, in dicta, considered this question in *Kemmler*, and concluded that electrocution could not be called cruel or unusual. 136 U.S. at 449. In *Kemmler*, the Court stated that for a punishment to be cruel, it must involve torture or a lingering death, and must be "something more than the mere extinguishment of life." *Id.* at 447. In spite of the real grounds for the decision, *Kemmler* is treated as Supreme Court authority on the constitutionality of electrocution.

a method.¹⁷

In other types of death penalty challenges, though, the Court has consistently considered the same factors relevant in deciding the constitutionality of a punishment under the Eighth Amendment.¹⁸ The first such factor is the historical acceptance of the punishment: Was the punishment accepted at the time of the adoption of the Bill of Rights? The second factor is whether the punishment comports with evolving standards of decency, as measured by objective indicia of contemporary norms and societal values. These objective indicia mainly include evidence of legislative attitudes towards a particular punishment: legislative trends, evidence of the number of states employing the penalty, and, to a lesser extent, the laws of other Western nations. The third factor the Court has considered is whether the punishment comports with the "dignity of man." Punishments which involve unnecessary and wanton infliction of pain offend human dignity, as do those that disrespect the body or the person by mutilating or causing violence to the body. Such punishments fail to accord a condemned prisoner the respect due a fellow human.

In this Comment, I will argue that these standards can and should also apply to methodology review. Using the three factors stated above (the "standard"), every method of execution employed today is unconstitutional, with the possible exception of lethal injection.

After a brief general history of the cruel and unusual punishments clause and the death penalty, I will explain the evolution and applicability of this test by examining Supreme Court precedent. Part I will examine the history and development of the cruel and unusual punishments clause. Part II will examine the Supreme Court cases considering the Eighth Amendment, illustrating the evolution and content of the standard, and why it should apply to methodology review. Part III will examine each of the five methods in use today in the United States—electrocution, firing squad, lethal gas, hanging, and lethal injection—under the standard. Part IV examines two recent Ninth Circuit decisions, *Campbell v. Wood* and *Fierro v. Gomez*, which reach incongruous results. Finally, Part V discusses lethal injection, and considers possible future challenges to it based on analogies to the medical profession.¹⁹

17. See *infra* Part III for a discussion of how these cases work into "the standard."

18. In the context of some Eighth Amendment challenges, such as those to proportionality, other factors may be relevant. See, e.g., Martin R. Gardner, *Executions and Indignities—An Eighth Amendment Assessment of Methods of Inflicting Capital Punishment*, 39 OHIO ST. L.J. 96, 113-15 (1978) (noting that in the case of proportionality review, a court should consider penological justifications).

19. One of these cases was appealed to the Supreme Court. See *Fierro v. Gomez*, 865 F.

II. BRIEF HISTORY OF THE CRUEL AND UNUSUAL PUNISHMENTS CLAUSE AND THE DEATH PENALTY

The cruel and unusual punishments clause has its origins in the British Bill of Rights of 1689 and was incorporated by the framers of the United States Constitution into the Eighth Amendment, adopted in 1791.²⁰ The British interpretation of the clause was much different from the interpretation courts give it today, and even from the interpretation the framers attached to the clause.²¹ In England, the clause was meant to prohibit punishments excessive to the crime, not torturous or barbaric punishments.²² In contrast, the framers intended the clause to prevent not excessive punishments, but inhumane and gory punishments, such as those which were common to seventeenth century continental Europe.²³

Some punishments widely considered today as cruel and unusual were not seen as such in the framers' time. This shift is partly due to the changing role of punishment in our criminal justice system.²⁴ Punishment, historically one of the most visible parts of the penal system, gradually became the most hidden, as the trial and conviction became the public part of the criminal justice process.²⁵ A growing respect for the body and for human dignity also led to a shift in the purpose of punishment. No longer was the goal to revenge and deter, in the process causing pain, but rather to revenge and deter, and in the process cause no

Supp. 1387 (N.D. Cal. 1994), *aff'd* 77 F.3d 1301 (9th Cir. 1996), *vacated and remanded*, 117 S. Ct. 285 (1996); *see also* notes 207-19 and accompanying text.

20. *See* Anthony F. Granucci, *Nor Cruel and Unusual Punishments Inflicted: The Original Meaning*, 57 CAL. L. REV. 839, 840 (1969).

21. The American framers apparently thought the British intended the clause as a prohibition on cruel punishments, and incorporated it into the U.S. Constitution with this interpretation in mind. Granucci, *supra* note 20, at 842. The Supreme Court eventually held the clause to be a prohibition on excessive punishments as well as a prohibition on torturous punishments. *See* *Weems v. United States*, 217 U.S. 349 (1910).

22. *See generally* Granucci, *supra* note 20.

23. *See id.* at 860-65. Such punishments include drawing and quartering, burning alive, and public executions. *See generally* MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (Alan Sheridan trans., 1978).

24. *See* FOUCAULT, *supra* note 23, at 9.

25. *See id.* at 9. Originally, because of the low value placed on human life in a non-industrial economy the body was dispensable, and very little dignity was accorded it. *See id.* at 54. Pain was a necessary element of punishment, and post-mortem mutilations were common. *See id.* at 43. Public executions were put on to act as deterrents and to show the dissymmetry between the sovereign and the subjects. *See id.* at 54. Public executions, though, to be effective, needed the participation of the people, but eventually the crowds of on-lookers became agitated with sympathy for the accused, as often the poorest received the harshest sentences. *See id.* at 60. Once the state realized this, executions were moved indoors; it even became a crime in France for witnesses to describe the scene of an execution. *See id.* at 15. There is some debate today about whether televised executions would cause the same effects. *See generally* WENDY LESSER, *PICTURES AT AN EXECUTION* (1993).

pain, or at least as little as possible.²⁶ In the death penalty context, this meant that loss of life alone became the intent of the law.²⁷ Supreme Court decisions interpreting the Eighth Amendment in death penalty cases reflect changing attitudes towards punishment. Consequently, the Court has placed limits on the amount of pain that may be inflicted, on the class of people on whom the penalty may be applied, and on the crimes it can be used to punish.²⁸

III. USING THE CASES TO ARRIVE AT THE STANDARD

Although Supreme Court death penalty jurisprudence rarely contains a unanimous opinion as to the result of a particular challenge, the Justices have followed the same basic framework in their analysis of various types of Eighth Amendment challenges— those to proportionality, those to the constitutionality of the penalty itself, and those to the class of people on whom the penalty may be constitutionally imposed. A closer look at the opinions reveals that the test is composed of essentially three parts. First is the historical inquiry: was the punishment considered cruel and unusual in the framers' time?

A. Historical Inquiry

An examination of Supreme Court case law indicates that the historical test is still the initial inquiry. In the 1972 case of *Furman v. Georgia*, the Court held that the death penalty was unconstitutional.²⁹

26. See FOUCAULT, *supra* note 23, at 11. Along with social advances came a more industrialized economy which relied much more on the body as the means of production. Therefore, the body became more respected, and was seen less as an object on which to inflict pain and mutilation.

27. See *id.* at 13. The state, instead of flaunting the execution and taking pride in it, now viewed it as shameful and something from which to keep its distance. See *id.* at 9. This may account for government reluctance to allow televised executions. In addition to the possibility of provoking the audience with sympathy for the condemned, the state does not want its role as executioner publicized.

Some studies have shown that the public, although in favor of the death penalty in theory, becomes less enthusiastic when confronted with, for example, being on a sentencing jury and having the option to recommend the penalty. See Neil Vidmar and Phoebe Ellsworth, *Public Opinion and the Death Penalty*, 26 STAN. L. REV. 1245 (1974). In theory, if members of the public witness a live execution attendant with all of its indignities, they may become less in favor of the penalty. *But see* Peter S. Adolf, *Killing Me Softly: Is the Gas Chamber, or Any Other Method of Execution, "Cruel and Unusual Punishment?"*, 22 HASTINGS CONST. L.Q. 815, 855 n.206 (1995) (noting that televised executions might actually have the effect of promoting disrespect for human life: "If violent television programs have the dramatic effects that many people think they do on human behavior, imagine what effect authentic state-sanctioned violence may have").

28. See *infra* Part III for a discussion of the major caselaw.

29. 408 U.S. 238. *Furman* invalidated Georgia's death penalty statute on the grounds that the large amount of discretion allowed in imposing the punishment led to arbitrary imposition. The judgment affected almost all state death penalty statutes then on the books, as they all allowed

Although Justice Brennan's concurrence treats the historical test as if it were outmoded,³⁰ the four dissenting Justices—later to become a majority in overturning *Furman*—agreed that the historical inquiry was still viable. Capital punishment was authorized in the framers' time, and as no one had shown that the current execution methods were any more cruel than those historically used, the dissenters believed there was no reason to hold the death penalty cruel and unusual.³¹ Four years after *Furman*, in *Gregg v. Georgia*, seven Justices voted to overturn *Furman*.³² The plurality opinion by Justice Stewart also looked first to the death penalty's historical acceptance in the common law.³³ Ten years later, in *Ford v. Wainwright*,³⁴ in holding that execution of the insane is prohibited by the Eighth Amendment,³⁵ the Court stated that there is now "little room for doubt" that the Eighth Amendment bans punishments and modes of execution that were cruel and unusual in the framers' time.³⁶ Thus, the Court, in determining the constitutionality of such executions, again looked to the historical inquiry and considered whether there was a common law prohibition on executing the insane.³⁷ Finally, in *Penry v. Lynaugh*,³⁸ in holding that it was not cruel and unusual punishment to execute a mentally retarded individual,³⁹ the Court first looked to whether there was a historical common law prohibition on executing the mentally retarded.⁴⁰

The historical inquiry is especially relevant to methodology review.

similar amounts of discretion. *See id.* at 411. The Court was divided on the issue—each Justice writing a separate opinion—with five Justices voting to hold the penalty unconstitutional.

30. *See id.* at 265-66. Brennan argued that if the framers' only intended to forbid those punishments that were cruel and unusual in their time, the clause would be superfluous, as society presumably would not have retained these punishments anyway. *See id.* at 268. The sole function of the clause would be to "legitimize advances already made by the other departments and opinions already the conventional wisdom." *Id.*

31. *See id.* at 382.

32. 428 U.S. 153 (1976).

33. *See id.* at 169-71.

34. 477 U.S. 399 (1986).

35. *Id.* Four Justices joined the majority opinion; two others concurred in the result, and two dissented. *See id.* *Ford* involved a challenge to Florida's procedures for determining sanity of death row prisoners. The Court held that the procedures did not provide adequate assurance of sanity, and simultaneously created a substantive right under the Eighth Amendment not to be executed while insane. *See id.* at 418.

36. *Id.* at 405.

37. *See id.* at 408.

38. 492 U.S. 302 (1989).

39. *Id.* at 335. Justice O'Connor delivered the opinion of the majority as to that part of the decision holding the sentence not cruel or unusual.

40. *Id.* at 331-33. Penry did not come within the class of people historically protected: At common law, those who could not appreciate the wrongfulness of their actions could not be executed. Penry did not fall within this historically protected class, however, because he had been found competent to stand trial and knew the "difference between good and evil." *Id.* at 332.

Methods of punishment were the principal concern of the framers in adopting the Eighth Amendment.⁴¹ The framers wanted to prohibit punishments that were torturous and barbaric, not necessarily to create a prohibition against whom a punishment may be imposed or to prohibit punishments excessive to the crime. Thus, in adopting the Eighth Amendment, the framers primarily wanted to control and limit methodology. As such, whether the framers would have approved of an execution method is particularly relevant in methodology review and should be an initial inquiry in determining any method's constitutionality under the Eighth Amendment. If a method of execution was considered cruel and unusual in their time, it should be held cruel and unusual in our time. However, as shown below, Supreme Court death penalty cases illustrate that if a punishment was not historically "cruel and unusual," then a court should go on to determine whether the punishment comports with "evolving standards of decency."⁴²

B. *Evolving Standards*

In *Weems v. United States*,⁴³ the Supreme Court held that the Eighth Amendment prohibited punishments which were excessive to the crime.⁴⁴ While the punishment at issue in *Weems* may not have always been considered harsh for the crime in question, the Court stated that as times change, so must the interpretation of the Eighth Amendment. "[I]n the application of a constitution . . . our contemplation cannot be only of what has been, but of what may be."⁴⁵ In the later case of *Trop v. Dulles*,⁴⁶ the Court stated that "[t]he Amendment must draw its meaning from evolving standards of decency that mark the progress of a maturing society."⁴⁷ Death penalty challenges since *Trop* have continu-

41. See *supra* Part II for a discussion of the framers' interpretation of the cruel and unusual punishments clause.

42. For a discussion of lower courts following the Supreme Court's lead in considering this the next inquiry, see *infra* Part V.

43. 217 U.S. 349 (1910). *Weems* involved an appeal from a punishment imposed by a Philippine court. The punishment—"cadena"—consisted of fifteen years imprisonment with hard labor followed by constant surveillance by the authorities—all for the crime of falsifying public records. *Id.* at 358. The Eighth Amendment was not yet applicable to the states, but the Court held that the federal legislative prohibition in the Philippines on cruel and unusual punishment should be interpreted in the same way as the Eighth Amendment's prohibition on cruel and unusual punishment. *Id.* at 367.

44. *Id.* at 382. The Court stated, "[t]ime works changes, brings into existence new conditions, and purposes. Therefore, a principle[,] to be vital[,] must be capable of wider application than the mischief which gave it birth." *Id.* at 373.

45. *Id.*

46. 356 U.S. 86 (1958).

47. *Id.* at 101.

ally looked at these evolving standards.⁴⁸ To the Court, evolving standards of decency mainly constitute legislative trends towards (or away from) a punishment, and the number of states using it.⁴⁹

For example, in cases challenging the proportionality of a punishment under the Eighth Amendment, the Court has considered national and international legislation as a strong indicator of evolving standards. In *Trop*, a case which held denationalization to be a punishment excessive to the crime, only two other nations imposed denationalization as a punishment.⁵⁰ The Court determined that this international near-consensus against the punishment was persuasive evidence of its excessiveness.⁵¹ In *Coker v. Georgia*, the Court held that imposition of the death penalty for the crime of rape was disproportionate to the crime, and thus unconstitutional.⁵² The majority opinion in *Coker* looked first at the legislative response to *Furman*: Of sixteen states that had previously authorized the death penalty for rape, only three reenacted those statutes post-*Furman*, and none of the states that did not authorize the penalty for rape pre-*Furman* did so post-*Furman*.⁵³ Georgia was the only jurisdiction authorizing the death penalty for the rape of an adult woman.⁵⁴ The Court conceded that the jurisdictions' disapproval was not unanimous, but the fact that a majority of states did not authorize the death penalty for rape, coupled with the trend away from such an authorization, "weigh[ed] very heavily on the side of rejecting capital punishment as a suitable penalty for raping an adult woman."⁵⁵ Thus, the Court in *Trop* and *Coker* looked at the same indicator of evolving standards—legislation.⁵⁶

In cases challenging the penalty itself, legislation is again treated as

48. See, e.g., *Ford v. Wainwright*, 477 U.S. 399, 406 (1986); *Coker v. Georgia*, 433 U.S. 584 (1977); *Furman v. Georgia*, 408 U.S. 238, 270 (1972).

49. See *infra* notes 62-64.

50. 356 U.S. at 103.

51. See *id.*

52. 433 U.S. at 600.

53. *Id.* at 594.

54. See *id.* at 595-96. Two other jurisdictions authorized it for the rape of a child. *Id.* at 596.

55. *Id.* Similarly, Burger's dissent first looked to legislative judgments, but went beyond the legislation of the recent past to consider pre-*Furman* days, when more than one-third of states authorized the penalty for rape. *Id.* at 614 (Burger, J., dissenting). Burger would have held that although legislation is the correct thing to consider in death penalty challenges, the figures could not be read to support the conclusion that there is nationwide disapproval of the punishment. *Id.* at 615. I would disagree with this. Over two-thirds of the states rejected the punishment, and there was a clear legislative trend away from it. This, under the standard, is more than sufficient to indicate a legislative consensus against it.

56. The *Coker* Court also looked at the actions of sentencing juries, noting that nine out of ten times sentencing juries declined to impose the penalty in rape cases. 433 U.S. at 597. See *infra* note 70 for a discussion of why the actions of sentencing juries are not necessarily currently relevant in methodology review.

the primary indicia of values. This can be seen from majority opinions in cases such as *Penry*,⁵⁷ and *Thompson v. Oklahoma*.⁵⁸ It can also be seen in Burger's dissent in *Furman*: Legislative judgments are presumed in these cases to embody "basic standards of decency prevailing in the society," and are the most trustworthy indicators of contemporary standards.⁵⁹ Forty states having retained their death penalty statutes, plus the fact that Congress had added to the list of federal crimes punishable by death, was sufficient proof to the dissenters that the punishment of death itself was not cruel and unusual.⁶⁰ Powell's *Furman* dissent similarly stated that interpretation of the Eighth Amendment must be progressive, and that in a democracy, the first indicator of public attitudes is the actions of chosen representatives.⁶¹ Ironically, legislative indicators, overlooked by the concurrences in *Furman*, obtained new importance in *Gregg*, which used the legislative response to *Furman* to overrule that case. Post-*Furman*, thirty-five state legislatures enacted new death penalty statutes authorizing the penalty for murder. To the *Gregg* majority, this was an important indicator of evolving standards, sufficient for the majority to find that the death penalty comported with evolving standards.⁶²

In cases challenging to whom the death penalty may be constitutionally applied, the Court also considers legislation to be an important indicator of evolving standards and, thus, an important factor in determining the constitutionality of the penalty's application. The *Ford* majority treated the fact that no state statute permitted execution of the insane as almost dispositive evidence of a national consensus against it.⁶³ Two years later, in *Thompson v. Oklahoma*,⁶⁴ a three Justice plurality held that the Eighth Amendment prohibited imposition of the death penalty for a crime committed when the defendant was under sixteen at

57. *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989).

58. 487 U.S. at 830, 838.

59. *Furman v. Georgia*, 408 U.S. 238, 384-85 (1972) (Burger, J., dissenting).

60. *See id.* at 385. "Nor is it a punishment so roundly condemned that only a few aberrant [state] legislatures have retained it on the statute books." *Id.* Burger also looked at the actions of sentencing juries and public opinion polls. *See id.* *See infra* note 72 for a discussion of why public opinion polls should be given little weight in death penalty review.

61. *Id.* at 437 (Powell, J., dissenting). Powell agreed with Burger that forty states' retention of the penalty, and Congress' addition to the list of federal death penalty crimes, shows that the penalty was widely accepted. *Id.* at 437.

62. *Gregg v. Georgia*, 428 U.S. 153, 179-80 (1976).

63. *Ford v. Wainwright*, 477 U.S. 399, 408-09 (1986). At the time, of forty-one states with death penalty statutes, twenty-six expressly required competence for execution, a few others had adopted the common law rule against execution while incompetent by judicial decision, some had discretionary statutory procedures allowing for the suspension of the sentence if the prisoner was found incompetent, and the four remaining had not repudiated the common law rule. *Id.* at 408 n.2.

64. 487 U.S. 815 (1988).

the time of his or her offense.⁶⁵ By looking at state laws, most of which set minimum ages at sixteen and above, and legislation of Western European countries that “share our Anglo-American heritage,” the Court concluded that such executions were contrary to evolving standards of decency.⁶⁶

Finally, in *Penry v. Lynaugh*, the majority considered state legislation to be the “clearest and most reliable objective evidence of contemporary values.”⁶⁷ Two states banning the execution of retarded persons provided insufficient evidence of a national consensus for such executions to be contrary to evolving standards.⁶⁸

As the above discussion indicates, the most important evidence of society’s values regarding a punishment is state legislative judgments, and secondarily the laws of other Western nations. In *Coker* almost all states had rejected the punishment, as did the Court; in *Penry*, nearly all states accepted the punishment, and the Court held the penalty’s imposition constitutional;⁶⁹ and in *Gregg*, over two-thirds of states had death penalty statutes on the books, and the Court upheld the death penalty as constitutional.⁷⁰ Thus, a lower court, when considering a challenge to

65. *Id.* at 838.

66. *Id.* at 830, 838. To determine whether execution of juveniles was constitutional, the Court considered the culpability of a juvenile as compared to an adult, and whether imposition of the death penalty would further the penalty’s social purposes. *Id.* at 833-35. The Court decided that most juveniles would not have the reasoning capacity to make the cost-benefit analysis that would deter them from committing capital crimes, so imposing the death penalty on them has little penological justification. *Id.* at 834-38.

The Court also considered international legislation. *Thompson’s* plurality opinion stated that the relevance of international judgments in determining evolving standards had been recognized in *Trop* and *Coker*. *Id.* at 830 n.31. At the time, most other Western nations retaining the death penalty rarely authorized its use on juveniles. *Id.* at 830-31.

The majority conceded that most state legislatures had not expressly set a minimum age, but in the eighteen that did, the minimum age was at least sixteen. *Id.* at 829. Justice O’Connor’s concurrence similarly noted that the nineteen states which say nothing about a minimum age do not necessarily approve of the practice. *Id.* at 850. (O’Connor, J., concurring). She added that the eighteen that do set an age to the nineteen that do not to determine that two-thirds of states did not authorize the penalty for juveniles.

67. 492 U.S. 302, 331 (1989).

68. *See id.* at 334. O’Connor also stated that public opinion polls are relevant insofar as they find expression in legislation, which is reliable objective evidence of a national consensus. *See id.* at 335.

69. The *Penry* Court dealt with negative evidence: Only two states expressly prohibited executing mentally retarded persons, so by implication thirty-four states allowed it, compared to a total of sixteen states that disallowed it. *Id.* at 334. However, one can turn that argument around and argue that no state expressly allowed such executions, so, by implication, no state approved it. This is the argument the *Thompson* majority used: Many states were silent regarding the execution of minors; therefore, these “silent states” were counted in the number of states that prohibited the execution of juveniles, leading the Court to conclude that the majority of states disapproved of juvenile executions. 487 U.S. at 829.

70. The Court often mentions the importance of considering jury actions, but in the context of methodology review, jury behavior is not as relevant. Juries do not recommend a method; they

the death penalty under the Eighth Amendment, should look at evolving standards of decency as indicated primarily by trends in state legislation. Nearly unanimous disapproval is not required to hold that a punishment fails the test, but a majority of states rejecting a punishment is very persuasive.⁷¹ When coupled with other evidence, such as trends away from the use of a particular punishment, it should be held unacceptable to contemporary norms.⁷²

The evolving standards of decency prong should be the next step in methodology review. Assuming a method was in existence and accepted when the Eighth Amendment was adopted, so that it passes the historical inquiry, or was not in use, so the historical inquiry is inappli-

recommend the death penalty itself. The state prescribes the method. When juries refuse to impose the death penalty in a significant number of cases, an important fact in the *Furman* decision, courts infer that the juries did not approve of the penalty itself—not that the juries did not approve of the method. *Furman v. Georgia*, 408 U.S. 238, 314 (1972).

A similar inference can be drawn in methodology review. If the rate of imposition of the death penalty in a certain state is much lower than in other states which employ a different method, it can be argued that the juries are expressing disapproval of the *method*. However, it is unlikely that a court would look seriously at jury behavior in a methodology case, as jury actions in other types of death penalty challenges have not been taken very seriously by the Supreme Court. See, e.g., *Penry*, 492 U.S. at 334-35 (the Court did not consider jury actions); *Gregg v. Georgia*, 428 U.S. 153, 182 (1976) (the infrequency of the death penalty's imposition—it was imposed in only about 10% of cases where it was available—did not mean it had been rejected in light of its strong legislative acceptance). It seems jury actions are now used primarily to bolster an already strong evolving standards argument based on legislation. See e.g., *Thompson*, 487 U.S. at 832-33; *Coker v. Georgia*, 433 U.S. 584, 597 (1977) (jury actions used as an added argument to legislative rejection).

71. In some ways, cases such as *Ford* and *Thompson* illustrate how the numbers can come out differently depending on what a court considers to be the relevant statutes. In *Ford*, all of the state statutes that said anything about executing the insane did not permit it; even though there were only twenty-six statutes disallowing such executions, this number, plus the common law prohibition against executing the insane, was enough to conclude that a legislative consensus existed against it. *Ford v. Wainwright*, 477 U.S. 399, 408-09 n.2 (1986). In *Thompson*, less than one half of states set a minimum age, but the Court decided that the only relevant statutes were those that expressly set some age requirement. 487 U.S. at 829. In the context of methodology review, however, the relevant statutes in determining legislative judgments will not necessarily run into these problems. Every state with the death penalty expressly authorizes a certain method or a default method. See *supra* notes 1-5 and accompanying text. Therefore, the relevant statutes are those of states with a death penalty statute.

72. The Court occasionally has mentioned public opinion polls in the context of the evolving standards inquiry. However, such polls are given little weight. Marshall's concurrence in *Furman* stated that polls are not very useful in the evolving standards inquiry, because people are generally uninformed about the death penalty's purposes and liabilities. 408 U.S. at 361-62 (Marshall, J., concurring). Burger's dissent in *Furman* also mentioned polls, but without intimating that any "judicial reliance could ever be placed on them." *Id.* at 386-87 (Burger, J., dissenting). In *Penry*, O'Connor expressly repudiated that polls can have any weight: Penry offered poll evidence showing that more than two-thirds of the public opposed the execution of the mentally retarded. 492 U.S. at 334-35. Unmoved, O'Connor stated that such polls must wait to find expression in legislation, "which is an objective indicator of contemporary values upon which we can rely." *Id.* at 335.

cable, the next step in determining whether a method is cruel and unusual is to determine how society views it: Would most people consider it cruel and unusual? The best way to determine this is to consider how the peoples' elected representatives have acted with respect to a particular punishment. Whether state legislatures have adopted a method, rejected it, or simply let it remain in place, is a good indicator of how that state's voters view that punishment. Also relevant is how other Western nations view the method. If only one jurisdiction in the U.S. employs a particular method of execution, and no other Western nation which retains the death penalty employs that method, this is a good indication that the particular method should be disfavored in the U.S. as well. The evolving standards of decency inquiry is relevant and useful in evaluating the constitutionality of a method and should be the next step in analyzing any challenge under the Eighth Amendment.

C. Dignity

The last and most important part of the analysis when dealing with death penalty review is "dignity," which includes a prohibition on unnecessary pain as well as a concern for the integrity of the body and the person.⁷³ The Eighth Amendment prohibition on unnecessary pain has its origins in *Kemmler* and *Resweber*. In *Kemmler*, the Court stated that a punishment may be cruel and unusual if it is "something more than the mere extinguishment of life."⁷⁴ "Punishments are cruel when they involve torture or a lingering death."⁷⁵ In *Kemmler*, the Court noted that New York's electrocution statute was passed in an effort to find a more humane method of execution than hanging, the previous method in New York, and that it (the Court) would presume the New York legislature had evidence indicating that electrocution was more humane.⁷⁶ In *Resweber*, the Court expanded on this desire that a method of execution be humane by stating that the Eighth Amendment forbade the infliction of unnecessary and wanton pain.⁷⁷ In *Furman* and *Gregg*,

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

74. *In re Kemmler*, 136 U.S. 436, 447 (1890). See *supra* note 16 for a discussion of the facts of the case. New York was the first state to adopt electrocution. See *Far Worse Than Hanging*, N.Y. TIMES, Aug. 7, 1890, at 1.

75. *Kemmler*, 136 U.S. at 447.

76. *Id.*

77. See 329 U.S. at 463. *Resweber* involved a prisoner sentenced to die in Louisiana's electric chair. In the state's first attempt at electrocution, the electrical current was insufficient to kill the prisoner, due to mechanical difficulty. *Id.* at 460. The inmate was returned to prison and a new warrant was issued. *Id.* After the new warrant was issued, the inmate filed for an injunction to stop Louisiana from electrocuting him again. He claimed that to be electrocuted twice would deny him due process under the Fourteenth Amendment, as it would violate the Eighth Amendment's cruel and unusual punishments clause. *Id.* at 461. The Court rejected the claim,

the Court again mentioned pain as a factor in determining whether a method is undignified.⁷⁸

As the Court has not looked at the amount of pain involved in a method since *Kemmler*,⁷⁹ there is very little precedent as to the amount of pain that will make it "unnecessary," or the relevant factors in such a determination. In *Kemmler*, the Court gave weight to the fact that electrocution was adopted by the New York legislature as a humane alternative to hanging, and that it was supposedly comparatively *painless* and instantaneous.⁸⁰ Powell's dissent in *Furman* similarly noted that the prohibition on unnecessary pain assumes "no court would approve any method of implementation of the death sentence found to involve unnecessary cruelty in light of presently available alternatives."⁸¹ Both statements indicate that relevant factors in determining the necessity of pain involved in a method include the pain inherent in the method itself, especially when compared with available alternatives, and the length of time it takes before unconsciousness occurs.

That dignity includes something more than a prohibition on unnecessary pain is apparent even from earlier Eighth Amendment cases.⁸² In *Estelle v. Gamble*,⁸³ the Court stated that the Amendment incorporates "broad and idealistic concepts of dignity, civilized standards, humanity, and decency . . ."⁸⁴ In *Furman*, Brennan said dignity meant that the clause "prohibits the infliction of uncivilized and inhuman punishments. The State, even as it punishes, must treat its members with respect for

holding that to be electrocuted twice was not cruel or unusual. However, Burton's dissent shed some light on the Court's exact interpretation of "unnecessary and wanton." In *Kemmler*, the Court stressed that the chair was to cause instantaneous and consequently almost painless death. *Id.* at 475 (Burton, J., dissenting). Thus, in order not to involve unnecessary pain, "[a] punishment shall be reduced, as nearly as possible, to no more than that of death itself." *Id.* at 474.

78. *Gregg v. Georgia*, 428 U.S. 153, 173 (1976); *Furman v. Georgia*, 408 U.S. 238, 392-93 (1972) (Burger, C.J., dissenting).

79. In *Resweber*, the Court assumed the constitutionality of electrocution, so the only issue was whether being electrocuted twice was cruel and unusual. 329 U.S. at 464.

80. 136 U.S. at 447. Although the holding of *Kemmler* should no longer be given precedential weight as many of its underlying factual suppositions have not withstood the test of time, that case can still give some guidance in determining how to assess a method of execution under the cruel and unusual punishments clause.

81. 408 U.S. at 430 (Powell, J., dissenting).

82. For a discussion of *Trop* and dignity see *supra* notes 46-51 and accompanying text.

83. 429 U.S. 97 (1976). *Estelle* involved an inmate who claimed that while in prison, he was denied adequate medical treatment. The prisoner injured his back on a work assignment, and prison doctors examined him and gave him some time off. *Id.* at 100. One of the doctors recommended he return to work before he had fully recovered; shortly after being forced to work again, he was hospitalized. *Id.* at 101. The Court held that in this context, a deliberate indifference to medical needs would violate the Eighth Amendment; however, here the inadequate treatment was due to negligence which did not violate the cruel and unusual punishments clause. *Id.* at 104-05.

84. *Id.* at 102 (quoting *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968)).

their intrinsic worth as human beings.”⁸⁵ Barbaric punishments were not condemned only because they were painful, but also because they treated “members of the human race as non-humans” and were contrary to the underlying premise of the clause.⁸⁶ In *Gregg*, the plurality also accorded dignity an important part in the analysis, stating that a punishment should not be excessive or involve unnecessary pain.⁸⁷ The concept of dignity underlying the Eighth Amendment has come to subsume a concern for the dignity of the person, as well as a prohibition on unnecessary pain.

The dignity prong is especially relevant in methodology review, in that the factors relevant to dignity—pain and violence to the person—should be great concerns in *how* the state employs execution. Indeed, concern with limiting the amount of pain in an execution is rooted in *Kemmler*, the Court’s only methodology case. Concerns about violence to the body—the second prong in the dignity analysis—should also play a large role in methodology review, due to the possible violence, mutilation, and degradation involved in many methods of execution.⁸⁸ Thus, the dignity prong is a logical and necessary step in assessing a method’s constitutionality under the cruel and unusual punishments clause.

D. Summary

In methodology cases, courts should employ a three-step analysis. First, assuming the method was in existence at the framers’ time, was it historically accepted? Currently, the answer to this question will be “yes.”⁸⁹ Second, does the method comport with evolving standards of

85. 408 U.S. at 270 (Brennan, J., concurring).

86. *Id.* at 272-73 (Brennan, J., concurring). “[E]ven the vilest criminal remains a human being possessed of common human dignity.” *Id.*

87. *Gregg v. Georgia*, 428 U.S. 153, 173 (1976). In *Gregg*, the “something more” than mere infliction of pain or excessiveness was a concern that the penalty be justified: A penalty “cannot be so totally without penological justification that it results in the gratuitous infliction of suffering.” *Id.* at 183. In methodology cases this “something more” is a concern with mutilation, violence, and loss of bodily control. For a discussion of the various methods and dignity see *infra* Part IV.

88. Historically, pain and a concern with mutilation and bodily integrity were subsumed under “dignity.” At a minimum, the Eighth Amendment was meant to prohibit those punishments considered barbarous in the framers’ time—some of which involved unnecessary pain and some violence and mutilation. For a discussion of the cruel and unusual punishments clause see *supra* Part II. These punishments were thought to offend human dignity because they were either excessively painful or involved violence and mutilation. See *supra* Part II.

89. Both methods in use at the framers’ time and still in use today—shooting and hanging—were historically accepted. The only time this first question will come into play in the methodology context is if a state decides to bring back the guillotine or some other ancient practice. Then the answer will be “yes,” the method was in use in the framers’ time, and “no,” it was not accepted, rendering it automatically unconstitutional. Although this is unlikely—and

decency as measured by state and possibly international legislation?⁹⁰ Third, is the method dignified? Does it involve unnecessary pain and/or visit indignities upon the body or person?⁹¹ If it does either, it should fail the dignity prong and, thus, even if a majority of legislatures approve of it, it should be held unconstitutional.

Detailed analysis of the constitutionality of the various methods of execution used today has been done before.⁹² However, a brief summary under the standard formulated above is warranted to facilitate later discussion of lower court decisions.

IV. CURRENT METHODS UNDER THE STANDARD

A. *Electrocution*

Electrocution as a method was invented in the late 1800s,⁹³ so the historical inquiry is inapplicable. Currently it is the preferred method in only eleven of the thirty-eight death penalty states.⁹⁴ Thus, the majority of states which retain the death penalty have chosen another method.⁹⁵ In addition, many states have rejected electrocution.⁹⁶

Once thought to cause almost instantaneous and painless death,⁹⁷ research now is divided on this issue.⁹⁸ Witness reports indicate death is

even if it does occur, it will probably be unconstitutional under at least one of the other two prongs—it is still a possibility, so this question should remain part of the analysis.

90. See *supra* notes 70 and 72 regarding the relevance of the actions of sentencing juries and public opinion polls in methodology challenges.

91. See Gardner, *supra* note 18, at 108-09 (discussing how the human dignity aspect of the standard entails respect for integrity, and so prohibits mutilation of the body and unnecessary violence during the execution); see also *Glass v. Louisiana*, 471 U.S. 1080, 1085 (1985) (Brennan, J., dissenting) (“[B]asic notions of human dignity command that the State minimize ‘mutilation’ and ‘distortion’ of the condemned prisoner’s body”).

92. See, e.g., Deborah W. Denno, *Is Electrocution an Unconstitutional Method of Execution? The Engineering of Death Over the Century*, 35 WM. & MARY L. REV. 551 (1994); Gardner, *supra* note 18.

93. See *Far Worse Than Hanging*, *supra* note 74, at 1.

94. See *supra* note 1 (listing statutes).

95. If one counts the states without the death penalty as an indication that these states, too, disapprove electrocution as contrary to contemporary norms, four-fifths of states reject it.

96. See Gardner, *supra* note 18, at 126 n.228 (discussing how Texas and Oklahoma adopted lethal gas as a more humane alternative to electrocution). Also, no state has moved to electrocution from lethal injection or lethal gas. See *id.* at 127. As early as the first electrocution, international disapproval was expressed. See *Far Worse Than Hanging*, *supra* note 74, at 2 (describing London newspaper reports denouncing the execution and claiming disbelief that Americans would allow electrocution to stand).

97. See Lonny J. Hoffman, Note, *The Madness of the Method: The Use of Electrocution and the Death Penalty*, 70 TEX. L. REV. 1039, 1055 (1992).

98. See Philip R. Nugent, *Pulling the Plug on the Electric Chair: The Unconstitutionality of Electrocution*, 2 WM. & MARY BILL OF RTS. J. 185, 197 (1993) (noting the amount of pain involved has never been proven, and that it depends on the prisoner, as some people have more resistance to the current than others and will remain conscious longer).

likely far from instantaneous, and there may be great pain.⁹⁹ In the first electrocution, that of Kemmler in 1890, eyewitnesses reported hearing a singeing sound, and that the flesh around Kemmler's face was bloody. Further, the current had to be turned on twice once the executioners determined that Kemmler was still alive after the first shock.¹⁰⁰ More recent electrocutions have fared no better—repeated application of the current is often necessary, blood seeps out of the death hood, and smoke emanates from the condemned's head.¹⁰¹ These accounts indicate that electrocution is likely very painful.

Electrocution also involves mutilation and violence to the body. In Kemmler's electrocution, some of the medical witnesses agreed that he was probably rendered unconscious fairly soon after the current hit, but they were horrified none the less by the violence done to the body.¹⁰² Severe burns and gaping wounds where the electrodes touch the flesh are not uncommon.¹⁰³ The prisoner often urinates, defecates, and vomits, and the skin catches fire, causing the smell of burning flesh.¹⁰⁴

Botched electrocutions occur with enough frequency to support a persuasive argument that the possibility of a botch makes the method inherently cruel and unusual.¹⁰⁵ At the Florida electrocution of Jesse Tafero in 1991, witnesses reported seeing flames and sparks emanating from the death hood, and four power surges were necessary to ensure death.¹⁰⁶ It was later discovered that the probable reason for the botch was that in place of the natural ocean sponge normally used in the head-piece, which had worn out, prison officials used an ordinary kitchen sponge.¹⁰⁷ Other examples of botched electrocutions include that of Wilbert Lee Evans in Virginia in 1990. During the five minutes before his death was pronounced, he bled profusely, drenching his shirt in

99. See *Glass v. Louisiana*, 471 U.S. 1080, 1086-87 (1985) (discussing witness reports of electrocuted prisoners cringing and fighting the straps while the limbs contort).

100. See *Far Worse Than Hanging*, *supra* note 74, at 1 (describing the execution as a "disgrace to civilization," and not just unsuccessful, but "terrible").

101. See *infra* notes 102-09 and accompanying text.

102. See *Far Worse Than Hanging*, *supra* note 74, at 1-2.

103. See *Denno*, *supra* note 92, at 644 (witnesses described one case where the electrode went through to the bone).

104. See, e.g., *Glass*, 471 U.S. at 1086-87.

105. See *Hoffman*, *supra* note 97, at 1055-56 (recurrent shocks are so common that electrocution has been called "death by installments"). Mechanical failures and technical mishaps can also make it inherently unreliable. See *id.* at 1057-58.

106. See *id.* at 1051. Tafero's electrocution is also graphically described in *Denno*, *supra* note 92, at 554-56 (describing six inch flames shooting from his head and filling the execution chamber with smoke).

107. See Ellen McGarrah, *Kitchen Aids Come in Handy on Death Row*, *MIAMI HERALD*, July 29, 1990, at B6. Once officials determined that the fault lay with the sponge, the Eleventh Circuit lifted a temporary stay on electrocutions in Florida which it had issued after the Tafero execution. *Denno*, *supra* note 92, at 675.

blood.¹⁰⁸

These cases indicate that in many instances, several minutes elapse before the prisoner is rendered unconscious. During this time, severe pain may be felt. Even when unconsciousness occurs rapidly, the mutilation attendant in electrocution is enough to violate the dignity prong, which in turn is enough to invalidate the method under the three-part test. When coupled with the evidence of rejection by contemporary society, as measured by legislation, electrocution should be held unconstitutional.¹⁰⁹

B. *Firing Squad*

In the 1878 case of *Wilkerson v. Utah*, the Supreme Court noted in dicta that the firing squad as a method of execution was not cruel or unusual.¹¹⁰ Like *Kemmler*, however, this case was decided prior to the development of "the standard" and should not be dispositive of the issue today. The firing squad was used in the framers' time, but today it is used as the preferred method in only one state, and as an alternate method in two others.¹¹¹ This indicates almost unanimous legislative consensus against the firing squad. Because the firing squad is so rarely used, little information regarding the pain involved exists. As early as the 1950s, however, the British Royal Commission on Capital Punishment recommended against using the firing squad because it did not ensure immediate death.¹¹² Some evidence suggests that competent shooting produces relatively little pain,¹¹³ but does mutilate the body. Although the dignity prong may be inconclusive, under the evolving standards prong, the firing squad should also be held unconstitutional.

108. See Deneen L. Brown, *Execution Probe Sought*, WASH. POST, Oct 21, 1990, at B1.

109. *Kemmler* should not be cited as dispositive precedent. At the time it was decided, the test had not been fully formulated, nor did the Court have any evidence of pain. Indeed, electricity had been developed just a few years earlier. See generally Denno, *supra* note 92. Denno's article also includes an interesting discussion of the politics behind New York's adoption of the electric chair. Once evidence regarding the pain involved in an electrocution was developed, *Kemmler* was already entrenched as precedent. See Hoffman, *supra* note 97, at 1044-45; see also Nugent, *supra* note 98, at 195 (noting that respect for *Kemmler's* precedential value may be waning, as some courts have ordered evidentiary hearings regarding the pain involved in electrocution). But see *Illinois v. Stewart*, 520 N.E.2d 348 (Ill. 1988) (using *Kemmler* as precedent to reject a challenge to electrocution under the Eighth Amendment).

110. 99 U.S. 130 (1878).

111. See *supra* note 4 for a list of the state statutes. Utah's firing squad requires five volunteer marksmen, four with live rounds and one with a blank, to shoot at a bullseye placed on the inmate's heart. UTAH CODE ANN. § 77-18-5.5 (1996).

112. ROYAL COMMISSION ON CAPITAL PUNISHMENT 1949-1953 Report 249 (1953).

113. But incompetent shootings can cause acute pain. See Denno, *supra* note 92, at 689; see also Gardner, *supra* note 18, at 124 (discussing possible vengeful motivations on the part of volunteer gunmen).

C. *Lethal Gas*

The gas chamber, not yet invented in the framers' time, is rare today. Although lethal gas was once the second most popular method of execution, only one state out of thirty-eight employs it as the sole method with four others retaining it as an alternative.¹¹⁴ No state has adopted lethal gas since 1970.¹¹⁵ These figures show that an almost unanimous number of states prefer other methods and that the legislative trend is towards rejection of the gas chamber as a method of execution. As such, lethal gas should fail the evolving standards of decency prong.

The pain and mutilation in lethal gas executions is easy to document, as each execution is relatively predictable.¹¹⁶ There is evidence of severe pain in most executions by gas,¹¹⁷ and in many such executions the prisoner remains conscious for several minutes.¹¹⁸ Gas causes death by asphyxiation, and the pain inherent in the method has been described as similar to that of a heart attack.¹¹⁹ Asphyxiation stimulates the nervous system, which causes the condemned to urinate, defecate, drool, and vomit.¹²⁰ The eyes have been known to pop out, and the prisoner to turn literally purple.¹²¹ The toxic gas causes burns to the nose lining and lungs, so that it feels as if the gas is burning the condemned "from the inside out."¹²²

The mutilation, loss of bodily control, and extreme pain which lethal gas causes render it violative of the human dignity prong.¹²³ Therefore, lethal gas fails two prongs under the standard, and should be held unconstitutional.

D. *Hanging*

Hanging, accepted in the framers' time, was the most common

114. See *supra* note 2 for a list of state statutes; see also *Gray v. Lucas*, 710 F.2d 1048, 1060-61 (5th Cir. 1983) (noting that Nevada, New Mexico, and North Carolina switched from lethal gas to lethal injection).

115. See *Fierro v. Gomez*, 865 F. Supp. 1387, 1406 (W.D. Cal. 1994).

116. See *Adolf*, *supra* note 27, at 835.

117. See *Proposed Repeal of the Death Penalty Under Federal Law: Hearings on S. 1760 Before the Subcomm. on Criminal Laws and Procedures of the Comm. on the Judiciary*, 90th Cong., 2nd Sess., 21 (1968) [hereinafter *1968 Hearings*] (statement of Clinton Duffy, warden of San Quentin Prison).

118. See *Gray*, 710 F.2d at 1058-59 (describing the 1979 execution of Jesse Walter Bishop in Nevada in which he gasped, lurched, and took more than ten minutes to die).

119. See *id.* at 1060.

120. See *id.*

121. See *1968 Hearings*, at 21.

122. Allen Huang, 74 OR. L. REV. 995 (1995). Huang, and others, have analogized the modern gas chamber to those used in Nazi Germany.

123. For a discussion of *Fierro* see *infra* notes 161-212 and accompanying text.

method in use in the United States for a long time.¹²⁴ But today, out of forty-eight states that once employed it, only three jurisdictions retain the practice, and none of them employ it as the sole method.¹²⁵ One other English-speaking jurisdiction in the world—South Africa—retains hanging.¹²⁶ Many states since the late 1700s have switched from hanging to what were perceived as the more humane methods of electrocution and lethal gas.¹²⁷ An overwhelming national consensus exists against hanging: The majority of states reject it, and the legislative trend is to reject hanging as a method of execution.¹²⁸

A large amount of evidence documents the pain and indignity involved in hanging. In properly-performed hangings, the neck breaks immediately and unconsciousness is supposedly instantaneous.¹²⁹ However, hanging has been called an “art,”¹³⁰ and considerable skill is necessary to ensure that the neck breaks—this result being termed a “hangman’s fracture.”¹³¹ In most instances, however, this hangman’s fracture does not result, and the condemned dies a violent and lingering death.¹³² If the drop is too long, the prisoner may be decapitated,¹³³ causing great indignity to the body. If the drop is too short, the inmate may slowly strangle to death. In strangulation, extreme pain is evident: the eyeballs pop out, the tongue swells and protrudes, the rope can pull hunks of flesh off the face, and the neck elongates and distorts.¹³⁴ As it

124. For a discussion of *Campbell v. Wood* see *infra* notes 146-206 and accompanying text.

125. See *Campbell v. Wood*, 18 F.3d 662, 697-98 (9th Cir. 1994) (Reinhardt, J., dissenting).

126. See Pamela S. Nagy, *Hang by the Neck Until Dead: The Resurgence of Cruel and Unusual Punishment in the 1990s*, 26 PAC. L.J. 85, 105 n.140 (1994).

127. See Gardner, *supra* note 18, at 122; see also *In re Kemmler*, 136 U.S. 437, 444-45 (1890); Nagy, *supra* note 126, at 117-18 (the majority of states that abandoned hanging but kept the death penalty did so in an effort to find a more humane method).

128. See *Washington v. Frampton*, 627 P.2d 922, 934 (Wash. 1981) (noting this fact alone indicates that hanging is incompatible with evolving standards of decency).

129. See Gardner, *supra* note 18, at 120.

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

131. *Id.* at 935-36 (noting that prison authorities at the Washington State Penitentiary are unaware of any experts on hanging in the United States).

132. See *id.* at 935; see also *Campbell v. Wood*, 18 F.3d 662, 712 (9th Cir. 1994) (Reinhardt, J., dissenting) (considerable evidence exists that death in many instances results from slow asphyxiation). According to the reports of a Welsh pathologist who performed autopsies on hanged people, in only two of 34 cases was the cause of death a broken neck. See Ryk James and Rachel Nasmyth-Jones, *The Occurrence of Cervical Fractures in Victims of Judicial Hanging*, 54 FORENSIC SCI. INT'L 81, 82 (1992).

133. See *Rupe v. Wood*, 863 F. Supp. 1307 (W.D. Wash. 1994). In *Rupe*, a 400 pound death row inmate challenged his hanging as cruel and unusual on the grounds that under the long-drop method—dropping the prisoner with the rope rather than letting him dangle until he strangles—there was a very significant risk of decapitation. For a discussion of *Rupe* see *infra* notes 213-19 and accompanying text.

134. See *1968 Hearings*, *supra* notes 117, at 21; see also Nagy, *supra* note 126, at 114-15 (noting that in the case of death by strangulation, the victim remains conscious for many minutes).

is so often improperly performed, the risk of either decapitation or slow strangulation is likely. Under both factors in the dignity prong, therefore, hanging is unconstitutional. This, or the evidence of the legislative trend against it, is enough to conclude that hanging is cruel and unusual punishment under the Eighth Amendment.

E. *Lethal Injection*

Texas first used lethal injection in 1982.¹³⁵ Since then, twenty-seven states have adopted lethal injection.¹³⁶ Currently, over two-thirds of states authorize lethal injection, indicating a legislative consensus in favor of, and a trend towards, lethal injection.¹³⁷

By most accounts, lethal injection involves minimal pain, and there is little apparent violence or bodily mutilation.¹³⁸ However, there is still a risk of botched injections which can lead to incredible pain.¹³⁹ In one Texas case, the executioners struggled for 45 minutes to find a suitable vein; in another, the executioner inserted the needle into a muscle instead of a vein, causing an excruciatingly long and painful death.¹⁴⁰

At present, lethal injection is widely viewed as humane when performed properly,¹⁴¹ but it can be argued that the significant body of evidence of botched injections renders the method itself inherently cruel as violative of human dignity.¹⁴² However, in light of its general legislative acceptance, supposed relative painlessness when correctly performed as compared to other methods, and the little apparent mutilation associated with lethal injection, it is unlikely that a court today would

135. See Don Colburn, *Lethal Injection: Why Doctors are Uneasy About the Newest Method of Capital Punishment*, WASH. POST, Dec. 11, 1990, at 13, 14.

136. See *supra* note 5 for a listing of states that employ lethal injection.

137. See *infra* note 225 for a discussion of *Heckler v. Chaney*, the only Supreme Court case to deal even peripherally with lethal injection.

138. See Adolf, *supra* note 27, at 863-64 (the violence is limited to insertion of the needle, and the fast-acting drugs administered lessen any pain); Gardner, *supra* note 18, at 128-29.

139. See *Chaney v. Heckler*, 718 F.2d 1174, 1191 (D.C. Cir. 1983) (petitioners presented substantial evidence that errors in drug dosage can lead to paralysis but not immediate death, making the condemned the witness of his own asphyxiation), *overruled by Heckler v. Chaney*, 470 U.S. 821 (1985); see also Adolf, *supra* note 27, at 864 n.236 (recounting instances of incorrect insertions and an inability to locate the vein).

140. See William Ecenbarger, *Killing by the Book, Executions are Gruesome and Horrifying—Just Ask the Witnesses*, PHILA. INQUIRER, Jan. 23, 1994, at 10.

141. See FRANKLIN E. ZIMRING AND GORDON HAWKINS, *CAPITAL PUNISHMENT AND THE AMERICAN AGENDA* 112 (1986). The authors note that lethal injection is often described as an "ultra fast acting barbiturate," which makes it seem innocuous.

142. In *Poland v. Stewart*, 92 F.3d 881 (9th Cir. 1996), which rejected a claim that lethal injection was unconstitutional, the petitioner cited nine lethal injection executions involving considerable problems finding a vein or violent reactions to the drugs. For a discussion of attempts to use medical ethics to argue that lethal injection is contrary to evolving standards of decency see *infra* notes 226-31 and accompanying text.

hold lethal injection to be unconstitutional.¹⁴³

V. CONFLICT AMONG THE COURTS

Recent lower court decisions have been in conflict regarding the factors to consider in methodology challenges. Consequently, lower courts have reached opposite conclusions to the same questions. The recent cases of *Campbell v. Wood*¹⁴⁴ and *Fierro v. Gomez*,¹⁴⁵ both decided by the Ninth Circuit, provide the most glaring examples. *Campbell* held hanging constitutional, and *Fierro* held execution by lethal gas unconstitutional.

A. *Campbell & Fierro*

In *Campbell*, the defendant, Charles Rodman Campbell, was convicted of three murders: that of a woman he had raped in 1974, and those of her daughter and neighbor who testified against him at the rape trial.¹⁴⁶ He was sentenced to death, which in Washington is done by hanging. Campbell challenged Washington's death penalty statute on the grounds that hanging was cruel and unusual in violation of the Eighth Amendment.¹⁴⁷ Numerous stays were issued, and eventually a federal district court held an evidentiary hearing in 1993 to consider the constitutionality of hanging.¹⁴⁸ The district court found hanging, at least under the Washington protocol, to be constitutional, and the Ninth Circuit affirmed.¹⁴⁹

In its analysis, the district court easily concluded that the framers of the Bill of Rights would have found hanging to comport with the Eighth Amendment.¹⁵⁰ Rather than next considering how state legislatures have dealt with hanging—either adopting, discarding in favor of another method, or preserving the status quo—which would have revealed a

143. See *infra* note 224 (discussing cases in which lower courts rejected challenges to lethal injection).

144. 18 F.3d 662 (9th Cir. 1994), *cert. denied*, 114 S. Ct. 2125 (1994).

145. 77 F.3d 301 (9th Cir. 1996).

146. 18 F.3d at 668.

147. See *id.* at 681. Washington's statute actually provided that the prisoner could choose lethal injection over hanging, with hanging as the default. See *id.* at 680. The state argued that this made Campbell's claim non-justiciable. The Ninth Circuit decided the claim was justiciable: "[T]he government may [not] cloak unconstitutional punishments in the mantle of 'choice'." *Id.* To declare a claim moot because one could have chosen another course of action would foreclose "an entire universe of claims." *Id.* But see *Arizona v. Ross*, 886 P.2d 1354 (Ariz. 1994) (holding a challenge to lethal gas moot because the prisoner could have chosen lethal injection).

148. See *Campbell*, 18 F.3d at 668.

149. See *id.* The district court refused to accept evidence of past non-Washington protocol hangings, leaving only one hanging to consider. See *id.* at 685-87. Nor did the court consider relevant any evidence of alternative methods. See *id.* at 686-87.

150. See *id.* at 682.

clear national consensus against it, the court determined that the only relevant inquiry in methodology challenges was evidence of pain.¹⁵¹ The court refused to consider evidence the defendant offered to show that the number of states rejecting hanging—in both trends away from it as well as “numbers count”—indicated a national judgment that hanging was no longer acceptable to contemporary society.¹⁵² Rather, the district court stated that Supreme Court cases such as *Coker* and *Thompson*, which considered legislative trends, were proportionality challenges, and the same standards did not necessarily apply in methodology review.¹⁵³ The district court held that in methodology review, “evolving standards” were irrelevant.¹⁵⁴ Thus, the *Campbell* court determined that the only relevant inquiry was evidence of pain.

Although the district court agreed that under *Kemmler* one is entitled to an execution free of unnecessary pain,¹⁵⁵ the court decided that the only relevant evidence of pain in hanging was that of hangings conducted under the Washington protocol, or those that could be reliably compared to one conducted under the Washington protocol.¹⁵⁶ “[W]hether judicial hanging only as it is performed in Washington is cruel and unusual,” not whether hanging in general involves unnecessary pain, was the relevant inquiry.¹⁵⁷ Thus, in deciding the amount of pain that would be experienced, the district court only considered the one Washington hanging conducted according to the protocol. That hanging was fairly quick, unconsciousness came within several seconds, and the procedure generally worked properly.¹⁵⁸ Medical experts testified that the Washington protocol minimized the risk of death by asphyxiation

151. *See id.* In determining that the only relevant inquiry was unnecessary pain, the majority relied on Brennan’s dissent from denial of certiorari in *Glass*, where he stated that among objective factors in determining a method’s constitutionality is whether the method involves unnecessary pain. 471 U.S. at 1084 (Brennan, J., dissenting).

152. *Id.*

153. *See id.*

154. *Campbell*, 18 F.3d at 682.

155. *See id.* at 683.

156. *See id.* at 683. This protocol was taken from a 1959 never-used army protocol which described how to conduct a long drop hanging, including the appropriate drop length and rope diameter. *See id.* at 683. The purpose of the long drop was to avoid strangulation and ensure rapid severance of the spinal cord. *See id.* The protocol also contained discussion regarding the treatment of the rope and the need to properly soak it to make it flexible. *See id.* at 685. Apparently, the more rigid the rope the higher the risk of decapitation. *See id.* at 684. Washington had employed the protocol once in the execution of Westley Allen Dodd a few years earlier. *See id.* at 685.

157. *Id.* at 686. The majority failed to consider pain under other hangings, making it unsurprising that it treated evidence of the painlessness of lethal injection as irrelevant to the determination. *See id.* at 687.

158. *See id.* at 687. Witnesses to Dodd’s execution testified that his body did not convulse at all; unconsciousness was almost immediate, and certain death was pronounced within minutes. *See id.* at 685.

and decapitation, and death would usually occur rapidly.¹⁵⁹ The district court found, and the Ninth Circuit panel agreed, there was little likelihood of unnecessary pain under the protocol.¹⁶⁰

The same year as *Campbell*, a district court in Northern California was faced with a challenge to lethal gas. In *Fierro v. Gomez*, district court Judge Marilyn Patel found the gas chamber cruel and unusual—following the *Campbell* test.¹⁶¹ In 1992, three inmates at San Quentin—David Fierro, Alejandro Ruiz, and Robert Alton Harris—acting on behalf of themselves and all others similarly situated, brought a 42 U.S.C. § 1983 action claiming California's lethal gas chamber violated the Eighth and Fourteenth Amendments to the U.S. Constitution.¹⁶² Judge Patel rendered her decision a full year after the eight-day evidentiary hearing.¹⁶³

The California court interpreted *Campbell* to say that the initial step in methodology review was to consider objective evidence of unneces-

159. *See id.* at 684. The court stated that *Campbell* did not present sufficient evidence of risks associated with the protocol. *See id.* at 687. This is hardly remarkable, as the court would only consider the one hanging conducted under the exact Washington protocol.

160. *See id.* at 687. In a lengthy dissent, Judge Reinhardt, joined by three other judges, contended that evolving standards of decency and objective evidence of pain should be considered. *See id.* at 693 (Reinhardt, J., dissenting). He noted that even the U.S. Army, whose protocol the state used, abandoned the method, leaving the Ninth Circuit as the only jurisdiction retaining hanging as the method of choice. *See id.* at 697-99. Also, Judge Reinhardt looked at other hangings—not just that of *Dodd*—several of which were gruesome, in concluding that hanging in general is very painful and undignified.

Judge Reinhardt also thought dignity should be part of the analysis, but his definition of dignity differs somewhat from the bodily integrity definition I have used. Reinhardt would define dignity as larger than this—coming from “philosophy, religion, logic, and history.” *Id.* at 697. He also stated that federal judges are better able to decide if a punishment violates human dignity. *See id.* Although I agree that the dignity prong should consist of more than a simple pain inquiry, it is not necessarily workable to state explicitly that judges should use their own “philosophy, religion and logic” to decide death penalty cases, because these would differ from judge to judge. A better, less subjective dignity analysis would focus on avoiding pain, mutilation and violence to the body. *See, e.g., Campbell v. Wood*, 114 S. Ct. 2125, 2127 (1994) (Blackmun, J., dissenting from denial of certiorari) (in light of the indignities that go along with the risks of hanging—strangulation and mutilation—hanging violates human dignity).

161. *See* 865 F. Supp. 1387, 1403 (N.D. Cal. 1994) [hereinafter *Fierro I*], *aff'd*, 77 F.3d 301 (9th Cir. 1996), *vacated and remanded*, 117 S. Ct. 285 (1996).

162. *See id.* at 1389-90. By the time of *Fierro I*, Harris had already been executed. *Id.* Soon after Harris's execution, the California legislature amended its death penalty statute to allow for lethal injection as an alternative method, with gas as the default if the inmate refused to choose injection. *See* CAL. PENAL CODE § 3604 (Deering 1996). The *Fierro I* court did not address the issue of mootness as the *Campbell* court did. *See supra* note 147.

Harris's execution may arguably be called unconstitutional for a different reason. The night of the execution he was placed in and out of the execution chair as the courts issued and then lifted stays of execution. Judge Stephen Reinhardt, *The Supreme Court, the Death Penalty, and the Harris Case*, 102 YALE L.J. 205, 215 (1992). This is like a form of psychological torture as terrible as the physical pain involved.

163. *See Fierro I*, 865 F. Supp. at 1389.

sary pain involved in the challenged method; if this was not dispositive, the next step was to consider evolving standards of decency as measured by legislation.¹⁶⁴ Evolving standards, Patel concluded, *may* still be part of the analysis in methodology challenges; the *Campbell* court simply did not look at legislative trends, because it found the evidence of the minimal pain involved in hangings to be dispositive. Therefore, Judge Patel concluded that under *Campbell*, if a court finds that objective evidence of pain is not dispositive, a court should consider legislative actions.¹⁶⁵

To determine the amount of pain in a lethal gas execution, the *Fierro* court considered testimony given by both the inmates' and the state's witnesses, execution records of the two previous executions under the California protocol, and medical textbooks describing the effect of cyanide gas on the body.¹⁶⁶ Plaintiffs' experts testified that gas works by acting on the cells, so that the cells cannot receive oxygen. This in turn, causes a feeling of intense suffocation and "air hunger."¹⁶⁷ While the prisoner drifts in and out of consciousness, lactic acid builds in the cells and eventually causes acidosis, which involves pain similar to a heart attack.¹⁶⁸

To the *Fierro I* court, the length of the prisoner's consciousness was very important, as the *Campbell* opinion had indicated consciousness, while experiencing intense pain for more than a minute, would be outside of constitutional boundaries.¹⁶⁹ Both sides' experts agreed that unconsciousness occurred prior to actual death, but disagreed as to the time periods. Plaintiffs' experts believed it could take as long as two minutes before the inmate became unconscious, while the defendant's experts testified that it only took ten to thirty seconds, and that unconsciousness occurred before cellular suffocation, so the prisoner felt no pain.¹⁷⁰

164. *See id.* at 1414.

165. *See id.*

166. *Id.* at 1396-1403.

167. *Id.* at 1396. The typical gas execution uses hydrogen cyanide, which is dropped into a reservoir of acid at the base of the chair in which the inmate sits. *See id.*

168. *See id.* Experts also testified that tetany of the muscles causes a "sardonic smile" and involuntary twisting, and that the body releases a painful discharge of adrenalin. *Id.* at 1396-97; *see also supra* notes 114-23 and accompanying text regarding the pain involved in lethal gas execution.

169. *See Campbell v. Wood*, 18 F.3d 662 (9th Cir. 1994).

170. *See Fierro I*, 865 F. Supp. at 1395-97. The court gave less weight to the defendant's experts because most of their testimony was based on their own theoretical assumptions, not data from actual executions. *See id.* at 1403. Interestingly, one of the defense experts, when asked how he knew in an unrelated experiment with a rabbit that the animal was experiencing pain, stated "you had to be there." *Id.* at 1404. This indicates that outward signs of pain, even if one does not know exactly what the inmate is experiencing, can be probative.

The scientific literature tended to support plaintiffs' theory that cyanide gas executions caused tetany, followed by seizure activity, as well as a fading in and out of consciousness.¹⁷¹ However, the district court found such studies and expert testimony inconclusive, because they were often based on anecdotal accounts of cyanide exposure in uncontrolled circumstances involving unknown dosages.¹⁷² Therefore, the literature and experts alone could not answer the key questions of "which effects are felt first, and whether unconsciousness sets in quickly."¹⁷³

The court went on to consider the San Quentin records and observations of lay witnesses for the two executions conducted under the protocol—Robert Harris in 1992 and David Mason in 1993.¹⁷⁴ Harris experienced apparent unconsciousness within two minutes after the gas hit his face and certain unconsciousness one minute later. Mason experienced apparent unconsciousness approximately one minute after exposure and certain unconsciousness two minutes later.¹⁷⁵ Movements of both appeared to be volitional responses to pain, including clenched fists, eye movement, and strained muscles.¹⁷⁶ Records of other pre-*Furman* executions showed unconsciousness persisting for between fifteen seconds to one minute, and in some cases occurring much later.¹⁷⁷ In sum, the court found that inmates were not rendered immediately unconscious, and during that time may experience extreme pain.¹⁷⁸

The court, however, concluded that although the San Quentin reports and scientific evidence supported the conclusion that death was painful, the evidence of length of consciousness was too conflicting, making the pain inquiry inconclusive. The pain experienced was clearly excruciating, but if only felt for several seconds, it would not be enough to render lethal gas unconstitutional.¹⁷⁹ On the other hand, if the pain were experienced for several minutes, this would be clearly unconstitutional.¹⁸⁰ Based on the evidence before it, the *Fierro I* court could not say that the pain felt was, in itself, sufficient to hold one way or the other.¹⁸¹ Judge Patel concluded that objective evidence of contemporary

171. *See id.* at 1398.

172. *See id.*

173. *Id.* at 1399.

174. *See id.* at 1401-02. The *Campbell* court only considered the hanging conducted according to the Washington protocol as relevant. Similarly, *Fierro I* considered the two California protocol executions most probative. *Id.* at 1401; *see also infra* note 196.

175. *See Fierro I*, 865 F. Supp. at 1402.

176. *See id.*

177. *See id.*

178. *See id.* at 1404.

179. *See id.* at 1414.

180. *See id.*

181. *Id.*

norms should be analyzed as the “tie-breaker.”¹⁸²

Legislative evidence showed a clear rejection of lethal gas, and trends indicated that the abandonment of gas was even more pronounced than the abandonment of electrocution.¹⁸³ *Fierro I* also noted that most states discarded lethal gas in favor of lethal injection—considered the current “state-of-the-art execution technique” and widely viewed as more humane than any other.¹⁸⁴ *Fierro I* concluded that evidence of legislative rejection of lethal gas as a method of execution, coupled with the evidence of pain, were enough to render California’s protocol unconstitutional under the Eighth Amendment.

B. *Fierro II*

Fierro I was immediately appealed to the Ninth Circuit.¹⁸⁵ That the Ninth Circuit would hold execution by lethal gas unconstitutional, even though only a few years earlier it held execution by hanging constitutional, seemed an incongruous and almost impossible result, especially since this would create a split in the circuits. The Fifth Circuit, in the 1983 case of *Gray v. Lucas*, held lethal gas constitutional,¹⁸⁶ and in 1995 the Fourth Circuit did the same in *Hunt v. Nuth*.¹⁸⁷ Yet, a three-judge panel affirmed *Fierro I* in late February of 1996.¹⁸⁸

Fierro II essentially held that Judge Patel correctly interpreted *Campbell* to require that evidence of pain be the primary inquiry in methodology cases; if evidence of pain did not dictate a result as to constitutionality, a court may consider evolving standards of decency as measured by legislation.¹⁸⁹ The *Fierro II* panel said in *Campbell* it was unnecessary to look at legislation because it was clear that hanging involved little pain and an extremely short period of consciousness before death, and this was sufficient to conclude that hanging was con-

182. *Id.* (stating that the court would turn “to other objective indicia that the punishment is contrary to society’s civilized standards”). Interestingly, most states do not administer muscle relaxers or heavy sedatives prior to lethal gas executions. Contrary to popular belief, this is not what occurs at lethal injection executions either. The first drug administered in a lethal injection is actually a muscle paralyzer. See *infra* note 231.

183. See *Fierro I*, 865 F. Supp. at 1406. Only one of nine states that previously used gas as the sole method retained it at the time of the decision. *Id.* See also *supra* note 2 for a list of states that currently use lethal gas.

184. *Fierro I*, 865 F. Supp. at 1408.

185. See *Fierro v. Gomez*, 77 F.3d 301 (9th Cir. 1996) [hereinafter *Fierro II*], vacated and remanded, 117 S. Ct. 285 (1996).

186. 710 F.2d 1048, 1061 (5th Cir. 1983).

187. 57 F.3d 1327 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 724 (1996).

188. *Fierro II*, 77 F.3d at 302. None of the three judges sitting in *Fierro II* sat on *Campbell*. *Id.*

189. *Id.* at 307-08.

stitutional.¹⁹⁰ Judge Patel correctly found the most probative evidence to be that presented by plaintiffs' experts and that concerning the two executions under the challenged protocol.¹⁹¹ However, the Ninth Circuit further stated that in *Fierro I*, considering legislative indicators was error because the evidence of the horrible pain involved plus the risk that it would last for several minutes was enough to hold lethal gas unconstitutional.¹⁹² The Ninth Circuit panel distinguished *Gray* and *Hunt*, stating that in those cases the courts did not have the benefit of extensive execution records or expert testimony on the effects of lethal gas, both key in *Fierro I*.¹⁹³

A closer analysis reveals that *Fierro I* and *II* do not follow *Campbell* as closely as *Fierro II* would claim. *Campbell* unequivocally stated that in methodology cases, objective evidence of pain was the only inquiry, and evolving standards were irrelevant.¹⁹⁴ Had the *Fierro I* court been true to *Campbell*, it would have considered only objective evidence of pain in gas executions. The district court would have been

190. *Id.* at 307.

191. *See id.*

192. *Id.* at 308.

193. *See id.* at 308-09. In *Gray*, a three judge panel of the Fifth Circuit heard Jimmy Lee Gray's challenge to Mississippi's method of execution by lethal gas. 710 F.2d at 1057-58. Plaintiff introduced affidavits at the evidentiary hearing of eyewitness accounts of gas executions. *See id.* at 1058. These affidavits vividly described condemned inmates' protracted struggles and convulsions and other outward indications of severe pain; the reports indicated that consciousness continued for well over several minutes in each case. *See id.* at 1058-59. Gray also submitted scientific evidence indicating gas caused painful asphyxiation, a feeling similar to a heart attack. *See id.* at 1060.

The court noted that several states recently abandoned lethal gas in favor of lethal injection. *See id.* at 1061. However, the court denied Gray's request for an evidentiary hearing, stating that the pain and terror involved in gas execution were no different from that involved in any traditional method of execution, such as hanging. *See id.* The court conceded that perhaps contemporary norms called for a re-evaluation of the acceptable degree of pain, but decided Gray's evidence was insufficient to implicate the Eighth Amendment. *See id.*

In *Hunt v. Nuth*, a three-judge panel of the Fourth Circuit affirmed a district court opinion holding lethal gas constitutional. 57 F.3d 1327 (4th Cir. 1995). Flint Gregory Hunt challenged his execution under Maryland's death penalty statute, which allowed an inmate to choose between gas and injection, with injection as the default method. *See* MO. ANN. STAT. § 546.720 (West 1995). Hunt chose gas, but argued that both methods were unconstitutional, citing *Fierro I*. *See* 57 F.3d at 1337-38. The court of appeals stated that it declined to become the first court to follow *Fierro I*, and that the mere existence of more humane methods did not render a contested method cruel and unusual. *See id.* at 1338. The court cited *Gray*, and further stated that the evidence of the pain experienced in lethal gas executions, was "calculated to invoke sympathy, but insufficient to demonstrate that execution by the administration of gas involves the wanton and unnecessary infliction of pain." *Id.* (internal quotations omitted).

194. *Campbell*, 18 F.3d at 682. *Fierro I* interpreted the language from the beginning of the *Campbell* opinion regarding "objective indicators" to mean objective indicators of evolving standards. *Fierro I*, 865 F. Supp. at 1412. However, the *Campbell* court stated that evolving standards as considered in cases like *Coker* and *Thompson* are irrelevant in methodology cases. *Campbell*, 18 F.3d at 682-83.

forced to find the evidence of pain dispositive, as the Ninth Circuit was forced to do. As Judge Patel stated, after an eight-day evidentiary hearing, such evidence was not dispositive; thus, the district court had to consider evolving standards of decency.¹⁹⁵

Confronted with the controlling *Campbell* opinion stating that evolving standards of decency are irrelevant in methodology cases, and *Fierro I* having considered both factors in apparent contravention of *Campbell*, the Ninth Circuit, if it wanted to uphold *Fierro I*, had to reconcile the two cases. On this analysis, the Ninth Circuit panel did a masterful job. Objective evidence of unnecessary pain being the only relevant inquiry under *Campbell*, it had to be dispositive one way or the other. Thus, the Ninth Circuit simply decided the evidence of pain was dispositive.¹⁹⁶ Therefore, the result reached in *Fierro I* was correct, even if the means to the result were not.

Nonetheless, problems with and between *Fierro II* and *Campbell* remain. First, the *Campbell* court should have considered evolving standards: A punishment violates the Eighth Amendment when it involves unnecessary pain *or* when it offends evolving standards of decency. To comport with the Eighth Amendment, the method must be inoffensive to both parts.¹⁹⁷ Thus, only considering one prong would be sufficient if under that prong the method was unconstitutional. In this respect, the *Fierro II* court correctly held that evidence of pain alone was enough to hold that lethal gas was cruel and unusual punishment, making it unnecessary to consider evolving standards. However, if under the initial prong the answer is inconclusive, or the method is constitutional, the other prong must be considered as well. In this respect, the *Campbell* holding and standard are both incorrect.

The Supreme Court has never distinguished methodology and proportionality cases; in fact, the cases reject such a distinction.¹⁹⁸ Had the *Campbell* court considered this and further examined evolving stan-

195. *Fierro I*, 865 F. Supp. at 1414.

196. See *Fierro II*, 77 F.3d at 308-09. Another inconsistency between the two cases is in the evidence considered. In *Campbell*, the court looked at only the one hanging conducted under the Washington protocol. 18 F.3d at 685. Therefore, in *Fierro I*, the district court should have considered only the two executions conducted under the California protocol. The district court, however, considered other California executions conducted under an earlier protocol. Unless the *Fierro I* court concluded that these prior executions were substantially similar to those conducted under the current California protocol, this is another inconsistency between the two cases.

197. If pain were the only relevant question, punishments such as the guillotine and public executions should be constitutional. Yet the *Campbell* majority implicitly accepted that decapitation is unconstitutional. *Campbell*, 18 F.3d at 681; see also Adolf, *supra* note 27, at 846.

198. *Gregg* and *Furman* were both challenges to the death penalty itself, yet the Supreme Court considered evolving standards in determining the penalty's constitutionality. *Penry*, *Ford*, and *Thompson* were all challenges to the class of persons on whom the penalty could be constitutionally imposed, and in those cases, the Court again looked at evolving standards.

dards, it would have been confronted with an overwhelming legislative rejection of hanging.¹⁹⁹ Evidence presented in *Fierro I* was not as strong, but it too was enough to hold that there was a legislative consensus against the use of lethal gas.²⁰⁰

Next, the *Campbell* court should have considered the evidence of pain involved in hangings generally. The Washington protocol was substantially the same as other long-drop methods used throughout history,²⁰¹ and evidence proffered by Campbell clearly showed that the "protocol [will] have virtually no effect on the risk of slow strangulation."²⁰² Had the district court considered this evidence, it would have found a much greater than slight risk of strangulation.²⁰³

Also, the *Campbell* court should have compared the pain involved in hanging with the pain involved in other methods. It is hard to determine whether pain is necessary in an execution without looking at the amount of pain involved in other available methods.²⁰⁴ Finally, neither court dealt with the question of dignity as it concerns bodily mutilation or violence.²⁰⁵ Had the Ninth Circuit considered both methods under the

Therefore, contrary to the *Campbell* majority's assertion, evolving standards of decency are not relevant only in proportionality cases.

199. Many agree that had the Supreme Court granted certiorari, the case probably would have been overturned. See Nagy, *supra* note 126, at 127. But see Gary E. Hood, Note, *Campbell v. Wood: The Death Penalty in Washington State: "Hanging" on to a Method of Execution*, 30 GONZ. L. REV. 163 (1994). Wood argues that the *Campbell* majority made the correct decision: Evolving standards of decency, even if the court should have looked at them, should only take into account the consensus on a punishment of the state whose method is challenged. In *Campbell*, the people of Washington obviously thought hanging was fine, as it was still on the books. *Id.* at 178. However, if evolving standards of decency meant only looking at how the people in that state whose method is being challenged view the punishment, "evolving standards" as a test would become a worthless inquiry. Presumably the consensus, as measured by legislation, will always be that the challenged method comports with evolving standards of decency. Otherwise, that method would not be on the statute books.

200. Six of thirty-eight states employing lethal gas, and of those most only retaining it as an alternate method, should have been sufficient to show it is contrary to evolving standards. Most courts faced with the issue of gas' constitutionality have not dealt with it thoroughly, and many simply rely on precedent. See, e.g., *Brown v. Cain*, 1995 WL 495890 (E.D. La. Aug. 18, 1995); *Arizona v. Greenway*, 823 P.2d 22 (Ariz. 1991).

201. *Campbell*, 18 F.3d at 711 (Reinhardt, J., dissenting).

202. *Id.* at 714-15; see *supra* note 156 (regarding the Washington protocol).

203. Judge Reinhardt noted that the evidence developed at trial indicated that death may occur through asphyxiation. See *Campbell*, 18 F.3d at 712 (Reinhardt, J., dissenting). He also noted that the district court's objections to the admission of evidence of other hangings—rope length and prisoner weight being unrecorded so it couldn't be exactly determined if the drop length and rope width were the same as required under the protocol—were actually estimated by Campbell's experts to be roughly the same as required under the protocol. See *id.* at 722. Therefore, the district court could have reliably considered evidence from these other hangings.

204. See *Campbell*, 18 F.3d at 715 (Reinhardt, J., dissenting); Nagy, *supra* note 126, at 127-28. But see Hood, *supra* note 199, at 179 (arguing that different methods do not have to be compared to determine the pain involved in each).

205. See *supra* notes 124-34 and accompanying text for a discussion of the indignities

standard set out previously, it probably would have held both hanging and gas unconstitutional.

Fierro II was appealed to the Supreme Court, and the Court granted the petition for certiorari. On October 15, 1996, the Court vacated and remanded the case back to the Ninth Circuit.²⁰⁶ However, the Court did not consider the constitutionality of lethal gas; it simply stated that the case was remanded for further consideration in light of California Penal Code Section 3604.²⁰⁷

After *Fierro II*, the California legislature amended California's death penalty statute to provide for lethal injection as the primary method of execution unless the defendant specifically requests the gas chamber.²⁰⁸ Although the Supreme Court did not elaborate, the Court apparently believes that the question of lethal gas' constitutionality in *Fierro II* is rendered moot by the adoption of lethal injection as the preferred method in California.²⁰⁹

Two Justices dissented from the decision. They point out that under either the new statute, or the judgment in *Fierro II*, Fierro and Ruiz will be executed by lethal injection.²¹⁰ Thus, the only result of vacating the judgment will be to delay the executions, which in turn will "frustrate[] the public interest in deterrence and eviscerat[e] the only rational justification" for the death penalty.²¹¹

It will be interesting to see how the Ninth Circuit handles reconsideration of the case. Even if that court upholds its original decision, however, it is unlikely that California's amended death penalty statute itself will be successfully attacked on the grounds that lethal gas is unconstitutional.²¹²

The Court's handling of *Fierro II* leaves lower courts with as little guidance as previously. In spite of having sidestepped the issue in

involved in hanging. Concern with human dignity answers the question why we, as a society, are repulsed by inmates' spasms and facial expressions associated with the death penalty, even if they appear unconscious.

206. See *Gomez v. Fierro*, 117 S. Ct. 285 (1996).

207. See *id.*

208. See CAL. PENAL CODE § 3604 (West 1996).

209. This raises interesting questions. California's statute now provides that an inmate may choose lethal gas. See *id.* Lethal gas has been held unconstitutional by the Ninth Circuit. Thus, whether an inmate may choose to be executed by an unconstitutional method is a question that is bound to arise in California, as indeed it already has elsewhere. In a recent case which challenged Arizona's death penalty statute, also providing for a choice between lethal gas and lethal injection, the Ninth Circuit held without much discussion that if an inmate chooses to be executed by lethal gas he has waived the protections of the Eighth Amendment. See *Poland v. Stewart*, 92 F.3d 881 (9th Cir. 1996). For a further discussion of *Poland v. Stewart*, see *infra* note 224.

210. See *Gomez*, 117 S. Ct. at 286 (Stevens, J., dissenting).

211. *Id.* at 285.

212. See notes 209 and 224.

Fierro, however, the Supreme Court will likely be faced with the constitutionality of gas or other methods in the near future. A review of several other lower court decisions will further illustrate the need for such review.

C. Other Challenges

One of the most recent cases, *Rupe v. Wood*, involved the hanging of an inmate weighing over four-hundred pounds, who challenged the execution on the grounds that the long-drop method employed was significantly more likely to cause decapitation in obese people.²¹³ The district court considered the correct standard by distinguishing the issue in *Campbell* from the issue in *Rupe*: *Rupe*'s case involved substantial risk of decapitation, while *Campbell*'s involved minimal risk.²¹⁴ Thus, the issue was not whether hanging itself was unconstitutional under the protocol, but whether the protocol violated the Eighth Amendment as it related to *Rupe*: was hanging with a substantial risk of decapitation unconstitutional?²¹⁵

The *Rupe* court further analyzed evolving standards and dignity as they related to hanging with a substantial possibility of decapitation.²¹⁶ "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."²¹⁷ In short, the court considered most of the relevant factors under the standard, but only by side-stepping *Campbell*. The district court concluded that hanging in *Rupe*'s case would fail the test and violate the Eighth.²¹⁸

In the context of hanging, then, the test has been inconsistently applied, causing very different results. For *Campbell* and *Rupe*, these different results meant that one was executed by a method likely to cause slow and agonizing strangulation or decapitation, and the other was executed by one of the most "humane and painless" methods known

213. *Rupe v. Wood*, 863 F. Supp. 1307 (W.D. Wash. 1994). The protocol only goes up to two-hundred twenty pounds and specifies a five foot drop for the maximum weight on the chart. See *id.* at 1309. The state's engineering expert decided five feet was too long of a drop for someone with *Rupe*'s weight, and recommended a drop of three feet six inches; no medical experts were consulted in this decision. See *id.*

214. *Id.* at 1314. "The historical literature supports a conclusion that decapitation is more likely to occur during a long-drop hanging when the condemned person has excessive body weight." *Id.* at 1313.

215. See *id.* at 1314.

216. *Id.* For this evidence the court considered plaintiff's witnesses who testified that there was an 80-90% chance of decapitation if the proposed length was used. See *id.* at 1312.

217. *Id.* at 1314.

218. See *id.* at 1315. *Rupe* was executed by lethal injection, the default method under Washington's death penalty statute. See *supra* note 3.

today. The choice boiled down to a difference of 180 pounds.²¹⁹

In the case of electrocution, results in the lower courts have been less inconsistent, although under the correct standard, they are all questionable. In most cases, claims have been denied with little analysis; courts simply cite *Kemmler*.²²⁰ In cases appealed to the Supreme Court, several Justices have joined in dissents from denial of certiorari²²¹ and have pointed out that in light of modern knowledge regarding electrocution, *Kemmler's* factual suppositions are not reliable and should be reviewed.²²²

There have been many more cases challenging lethal gas and lethal injection.²²³ The grounds of challenges to lethal injection have been numerous, yet the cases have been few where courts took challenges seriously.²²⁴ One newer area of challenges indicates this may not

219. See *supra* note 3. Other cases dealing with challenges to hanging have often relied on precedents such as these and not reached the merits of the case. See, e.g., *Delaware v. Deputy*, 644 A.2d 411 (Del. 1994).

220. See e.g., *Glass v. State*, 455 So. 2d 659, 659-60 (1984), *cert. denied*, 471 U.S. 1080 (1985).

221. See e.g., *Poyner v. Murray*, 113 S. Ct. 2397 (1993); *Glass*, 471 U.S. 1080.

222. In *Glass*, Justice Brennan stated that *Kemmler* was grounded on a number of "factual assumptions that appear not to have withstood the test of experience." He believed electrocution violates human dignity, is incompatible with evolving standards, and is extremely painful. See 471 U.S. at 1081, 1086-89 (Brennan, J., dissenting).

223. The first case to consider the substance of the question in the lethal gas context was *Gray*, which has been relied on by other courts to hold lethal gas constitutional. See, e.g., *Hunt v. Nuth*, 57 F.3d 1327, 1338 (4th Cir. 1995); *Arizona v. Greenway*, 823 P.2d 22, 27 (Ariz. 1991). In *Hunt v. Smith*, the district court of Maryland cited *Campbell* to hold lethal gas constitutional: If hanging was not unconstitutional in 1994, then how could lethal gas be unconstitutional? 85 F. Supp. 251, 260 (D. Md. 1994); *aff'd sub nom.*, *Hunt v. Nuth*, 57 F.2d 1327 (4th Cir. 1995). Now that the circuits are split, lower courts need not rely so heavily on these two cases.

224. Several courts post-*Fierro II* have rejected challenges to lethal injection under *Fierro's* framework. See, e.g., *Lambright v. Lewis*, 932 F. Supp. 1547, 1583-84 (D. Ariz. 1996) (stating that although execution by lethal gas, in light of *Fierro II*, is probably unconstitutional, lethal injection is not). The *Lambright* court did not simply dismiss the challenge to lethal injection. The district court first looked at the widespread acceptance of lethal injection, noting that twenty-six states and the federal government use it, and every court to consider a challenge to lethal injection upheld its constitutionality. See *id.* at 1584.

The court also considered the evidence of pain. The petitioner gave one reporter's account of a lethal injection, which the court decided portrayed a quick death without significant "observed indications of pain or distress." *Id.* Technically, under *Fierro II*, the Arizona district court should have looked first at the pain inquiry, and then considered legislative indicators only if the pain inquiry proved inconclusive. See *supra* notes 185-93 regarding *Fierro II*. However, the *Lambright* court looked at both prongs without stating that it found the pain inquiry in lethal injection to be inconclusive.

In *Poland v. Stewart*, 92 F.3d 881 (9th Cir. 1996), the Ninth Circuit rejected a challenge to Arizona's death penalty statute, which provided for a choice between lethal gas and lethal injection. The petitioner raised several arguments. First, he argued that the Arizona death penalty statute was unconstitutional because it allowed an inmate to choose to be executed by lethal gas, a method which the Ninth Circuit had declared unconstitutional in *Fierro II*. See *id.* at 891-92. The court stated that if the inmate chose to be executed by lethal gas, this would be only because

always be so.²²⁵ This area involves the medicalization of the death penalty. The Food and Drug Administration, the American Medical Association (AMA), and the ethics of the medical profession have all become involved.

D. *Medicalization of the Death Penalty*

Several cases have challenged lethal injection as contrary to evolving standards on the grounds that the AMA does not allow doctors in any way participate in an injection.²²⁶ This, it is argued, is an objective indicium of current standards.²²⁷ Participation has been described under the AMA guidelines as selecting the injection sites, prescribing, preparing or otherwise supervising the drugs, doses, or types, and consulting with or supervising personnel.²²⁸ Doctors are allowed to certify death and witness executions as long as no active role is taken.²²⁹ This forced

he had waived the protections of the Eighth Amendment. *See id.* at 892. "Since execution of Poland by lethal gas could only follow his specific choice of that method of execution in the face of his knowledge of its unconstitutionality, he presents no justiciable claim for relief." *Id.* The inmate next argued that lethal injection was cruel and unusual. In rejecting this claim, the Ninth Circuit dismissed Poland's evidence of botched lethal injections which had occurred in other states partly on grounds that those other states had dissimilar protocols to Arizona's and could prove little about possible constitutional violations of the Arizona protocol. *See id.*

225. In 1983, the First Circuit upheld a challenge to lethal injection on the grounds that the use of the drugs for lethal injection had not been approved by the FDA, and the Food, Drug, and Cosmetic Act required the FDA to investigate and take action against unapproved uses. *Chaney v. Heckler*, 718 F.2d 174, 1176-77 (1st Cir. 1983); *rev'd*, *Heckler v. Chaney*, 470 U.S. 821 (1985). The petitioners challenged drugs used in executions as an "unapproved use of an approved drug." *Chaney*, 470 U.S. at 823-24. The court of appeals held that the FDA had to approve the drugs as suitable for human execution under 21 U.S.C. § 355. *See id.* By failing to exercise its statutory responsibilities, the court of appeals held, the plaintiffs were faced with the risk of a cruel execution and a constitutionally impermissible burden on their Eighth Amendment rights. *See Chaney*, 718 F.2d at 1192. The Supreme Court overruled the appellate decision, stating that the FDA's decision not to investigate the use of the drugs or take regulatory action was part of its enforcement discretion, and this decision was not judicially reviewable under the Administrative Procedures Act, 5 U.S.C. § 701(a)(2). *See Chaney*, 470 U.S. at 837-38.

226. *See* Stacy A. Ragon, Comment, *A Doctor's Dilemma: Resolving the Conflict Between Physician Participation in Executions and the AMA's Code of Medical Ethics*, 20 U. DAYTON L. REV. 975, 986-87 (1995). She notes that participation is grounds for sanctions and license revocation by the AMA. *See id.* at 991.

227. *See Louisiana v. Perry*, 610 So. 2d 746, 769 (La. 1992). The argument worked in this case, but not to challenge the validity of lethal injection itself. Rather, the case concerned the forcible medication of an insane prisoner to make him fit for execution. *See id.* at 761. The court held that AMA standards can be used as objective evidence of contemporary norms. Since doctors cannot participate in executions, and forcible medication in preparation for an execution is similar to actual participation in the execution, to allow forcible medication inherently conflicts with medical ethics under the AMA standards and is contrary to contemporary norms. *See id.* at 769.

228. *See* Ragon, *supra* note 220, at 986-87.

229. *See id.* at 987-88. The AMA created these guidelines in response to the conflict between the image of doctor as healer, and that of doctor as executioner. *See id.* at 988. The "medical

removal of trained medical personnel from the execution process has created a conflict with many state statutes that require or allow physician participation.²³⁰ Many doctors disapprove of lethal injection as an execution method even if they do not disapprove of the death penalty itself. Some doctors have gone so far as to argue that the state should return to traditional methods of execution, because methods such as electrocution cannot be mistaken for medical therapy.²³¹

Part of the reason for lethal injection's general societal acceptance is the perceived humaneness of it and its, however unwanted, association with the medical profession, which adds sterility and a look of painlessness. But if botches caused by untrained personnel become common, making the risk of pain substantial, or if society one day sees the inherent conflict between the medical model and lethal injection, then the image of lethal injection may change. With new knowledge, lethal injection may come to be seen as inhumane, and this may find expression in legislation. Therefore, even though lethal injection is currently widely accepted, the Eighth Amendment standard for determining its constitutionality will continue to be important.

VI. CONCLUSION

In spite of numerous lower court decisions which seem to indicate otherwise, this paper has argued that a standard for methodology review under the Eighth Amendment does exist. This standard has been formulated by the Supreme Court throughout the past century and has been used in various types of Eighth Amendment challenges since the mid 1950s. This standard should apply to methodology review as well as other challenges. *Fierro II* and *Campbell* indicate a misunderstanding of the standard, resulting in the same court holding that hanging, a method

model" is supposed to be healing and nurturing, yet lethal injection uses the same drugs as are used to anesthetize. See Colburn, *supra* note 135, at 13.

230. See Ragon, *supra* note 226, at 991. These requirements may have been a reaction to earlier lethal injections performed by untrained non-medical personnel where, in some cases, the injection was horribly bungled. Currently, thirty-four of thirty-six state statutes reference the presence of a physician at executions and seventeen require the physician to pronounce death. See *id.* at 980-81. Some states have dealt with the ethical conflict by allowing wardens to obtain the drugs without a prescription and by allowing trained non-medical personnel to perform the execution. See Colburn, *supra* note 135, at 14. Colburn also noted that often a lethal injection machine performs the procedure, and the physician only certifies death. See *id.* at 14-15.

231. See ZIMRING AND HAWKINS, *supra* note 141, at 114-15; see also Colburn, *supra* note 135, at 15. Colburn cites a doctor who thinks lethal injection is no more humane than electrocution, as in electrocution, loss of consciousness is fairly quick. Maybe new evidence will arise indicating that lethal injection is actually very painful and that the person is conscious for a long time. This is possible, as the first drug in a injection is a muscle paralyzer; thus, there are no outward signs of pain, creating the illusion that lethal injection is painless. See *id.* at 13.

“associated with lynchings . . . [and] . . . frontier justice,”²³² is constitutional, but lethal gas, which many states adopted as a more humane alternative to hanging, is unconstitutional. Had these cases been analyzed under the appropriate standard, the results would not have been so incongruous.

Numerous other lower court decisions also indicate the courts’ general uncertainty about review of Eighth Amendment challenges. Finally, the newer challenges to lethal injection illustrate that the furor is by no means over by the simple adoption of lethal injection in most states.

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232. *Campbell v. Wood*, 18 F.3d 662, 701 (9th Cir. 1994) (Reinhardt, J., dissenting).