



## MODE OF EXECUTION OF DEATH SENTENCE IN AMERICA: A JUDICIAL PROSPECTIVE\*

### 1. Introduction

With the gradual evolving standards of human decency and dignity, the law needs to be changed with the changing dynamism of the dynamic society. Nonetheless, the American society, being one of the oldest civilizations in the world owes to itself that the agony at the exact point of execution should be kept to the minimum. This is more so when execution is the result of a judicial verdict.<sup>1</sup> Courts play a vital role in major social reform, and that we as a society do have certain expectations from the very independent and impartial organ of the state. Moreover, history is a witness to significant social reforms bought by amendments to the prevalent law, through judicial process.<sup>2</sup> Effective judicial intervention in social controversy requires a consensus on the goals and objectives of social change, at a time in history when it is our failure as a society to agree on the goals and objectives of social change that is one of the principal causes of social unrest.<sup>3</sup> Judges have traditionally been very careful to emphasize that their role is not to make the law, merely to apply it. But it is apparent that judges play a significant role in the development of law through the interpretation of both common law principles and legislative provisions.<sup>4</sup> The phrase “judicial responsibility” means not just the responsibility to uphold the law; it means the overarching responsibility to do justice. Courts should realize that as long as there is life, there is room for reform.<sup>5</sup>

In this research paper, the scholar would be discussing the role played by Judiciary United States of America in humanizing the judicial modes of execution of death sentence. The author would be examining relevant opinions of the United States Supreme Court to discover and articulate the proper analytical standards for assessing modes of execution. On the basis of these standards the scholar proposes a paradigm of capital punishment that avoids the cruelty of present practices, and argues that the

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<sup>1</sup> *Supra* note 3

<sup>2</sup> Daniel R. Mandelker, “The Role of Law in Social Change” 8 *OHLJ* 355-364 (1970).

<sup>3</sup> *Id*

<sup>4</sup> Do judges make law?, available at: [www.downingcentrecourt.com.au](http://www.downingcentrecourt.com.au) (Visited on January 20, 2017)

<sup>5</sup> *Id*

paradigm is constitutionally acceptable under, perhaps even mandated by, the cruel and unusual punishment clause. Finally, contemporary modes of execution are assessed in light of the legal standards and the constitutional paradigm. Nothing in this chapter is intended to justify capital punishment. The ultimate merits of capital punishment should continue to be debated even if more humane methods are substituted for present barbarities.

## **2. United States Supreme Court Perspective towards Modes of Execution**

For the first time, the United States Supreme Court has recently held that capital punishment as a legislative response to crime is not necessarily cruel and unusual punishment under the eighth amendment to the United States Constitution.<sup>6</sup> The action of the Court settled, at least for the time being, some of the legal controversy surrounding the death penalty, and after a moratorium of almost ten years, the ultimate legal sanction was again administered in the United States.<sup>7</sup> These developments in no way signal an end to the controversy surrounding the execution of criminals. The Supreme Court's ruling that capital punishment is not unconstitutional per se raises new issues concerning the administration of the death penalty. One such issue, understandably neglected during the debate over the constitutionality of capital punishment itself, is the constitutionality of the various means used to take the lives of the condemned.

Legislative attempts to provide more humane alternatives to the present modes of execution like hanging, shooting, electrocuting and gassing have already begun.<sup>8</sup> In addition, a wave of cases examining the legality of the traditional modes of execution cannot be far away.<sup>9</sup>

The elimination of barbarity from the process of administering death is a concern not only of those advocating abolition of capital punishment<sup>10</sup> but of many who favor its retention.<sup>11</sup> Apart from shared humanitarian concerns, however, abolitionists may also utilize these methodological challenges to buy time for another direct assault on the institution of capital punishment itself.<sup>12</sup> Moreover, attacks on the modes of capital punishment may well aid the abolitionist cause through media coverage that informs an otherwise uninformed public of the ritualistic horrors of executions.<sup>13</sup> This article assesses the present administration of the death penalty in light of the requirements of the cruel and unusual punishment clause of the eighth amendment. The Supreme Court

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<sup>6</sup> *Gregg v. Georgia*, 428 U.S. 153 (1976).

<sup>7</sup> H. BEDAU, *THE COURTS, THE CONSTITUTION, AND CAPITAL PUNISHMENT* 121 (1977).

<sup>8</sup> W. BOWERS, *EXECUTIONS IN AMERICA* 9-12 (1974).

<sup>9</sup> Bedau, *The Courts, the Constitution, and Capital Punishment*, 1968 *UTAH L. REV.* 201, 239.

<sup>10</sup> Camus, *Reflections on the Guillotine*, in *THE PENALTY IS DEATH* 131, 151 (B. Jones ed, 1968).

<sup>11</sup> Barzun, *In Favor of Capital Punishment*, in *THE DEATH PENALTY IN AMERICA* 154, 155 (H. Bedau ed. 1968).

<sup>12</sup> *TEXAS TECH. L. REV.* 515, 523 (1976).

<sup>13</sup> M. MELTSNER, *CRUEL AND UNUSUAL THE SUPREME COURT AND CAPITAL PUNISHMENT* 60-64 (1973).

has never directly confronted the issue of the cruelty associated with the various methods of imposing capital punishment.<sup>14</sup> Thus, the pronouncements of the Court that have sanctioned a particular means of causing death can be characterized either as dicta or as highly suspect law, given subsequent doctrinal development of the cruel and unusual punishment clause and advances in medical science. It would appear that the courts are now free to strike down as unconstitutionally cruel some, if not all, of the traditional methods of inflicting death.

The discussion first examines relevant opinions of the United States Supreme Court to discover and articulate the proper analytical standards for assessing modes of execution. On the basis of these standards the author proposes a paradigm of capital punishment that avoids the cruelty of present practices, and argues that the paradigm is constitutionally acceptable under, perhaps even mandated by, the cruel and unusual punishment clause. Nothing in this paper is intended to justify capital punishment. This research paper focuses solely upon whether various methods of execution are constitutional if capital punishment is to be employed.

## **2.1. The Eighth Amendment as a Measure of Methods of Execution**

The suggestion that methods of execution be scrutinized in terms of the cruel and unusual punishment clause of the eighth amendment is not novel.<sup>15</sup> Indeed, it is widely agreed that the clause was initially intended to apply to the cruelty of particular kinds of punishment,<sup>16</sup> including modes of administering the death penalty.<sup>17</sup> That eighth amendment analysis has recently been used to find cruelty when punishment was excessive in degree<sup>18</sup> in no way indicates that the courts are moving away from the traditional application of the amendment to specific kinds of cruel treatment.<sup>19</sup> Whether their inquiry is directed to cruelty in kind or in degree of punishment, however, the courts find it difficult to interpret and apply the value-laden concepts underlying the cruel and unusual punishment clause.<sup>20</sup>

### **2.1.1. The Supreme Court and Methods of Execution**

Although capital punishment has existed in America since colonial times,<sup>21</sup> the first serious Supreme Court challenge to a method of inflicting the death penalty did not occur until 1878. In the case of *Wilkerson v. Utah*<sup>22</sup> the defendant had been convicted of first degree murder in the Territory of Utah

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<sup>14</sup> *Id.*, at 1.

<sup>15</sup> U.S.CONST. amend. VIII.

<sup>16</sup> L. BERKSON, *THE CONCEPT OF CRUEL AND UNUSUAL PUNISHMENT* 3-5 (1975).

<sup>17</sup> *Id.*, at 2.

<sup>18</sup> *Weems v. United States*, 217 U.S. 349 (1910).

<sup>19</sup> *Trop v. Dulles*, 356 U.S. 86 (1958).

<sup>20</sup> *Furman v. Georgia*, 408 U.S. 238, 376 (1972).

<sup>21</sup> *N. Ta E as, HAG BY THE NECK* 7-12 (1967).

<sup>22</sup> L. BERKSON, *supra* note 11, at 2.

and sentenced to be "publicly shot until . . . dead."<sup>23</sup> The territorial statutes provided the death penalty for first degree murder but did not specify the method of execution. Prior statutes had specified shooting, hanging, and beheading as the methods of capital punishment in Utah, but those provisions had inadvertently been repealed in 1876 when the territorial legislature revised the penal code. Wilkerson contended the sentencing judge was without authority to specify the mode of execution. The Supreme Court rejected Wilkerson's argument and upheld the sentence. It reasoned that because the penal statutes obligated the sentencing judge to impose death in cases like Wilkerson's, the statutes also conveyed implicit authority to specify the method of death.<sup>24</sup> The Court noted an analogy to the common law tradition of sentencing to death without specifying the means of death.<sup>25</sup>

Although hanging was the usual mode of execution at common law, other methods were sometimes used, and shooting was a common means of executing those convicted of capital offenses under military law.<sup>26</sup> Thus, the specification of shooting as the means of death neither exceeded the power of the sentencing judge nor imposed a totally unusual mode of execution. The issue in Wilkerson was not whether shooting was cruel and unusual punishment, but whether the sentencing court possessed authority to prescribe a particular method of capital punishment.<sup>27</sup> The Court noted that Wilkerson did not challenge the constitutionality of shooting.<sup>28</sup> In dicta, however, the Court discussed shooting in light of the eighth amendment and concluded that it was a constitutionally acceptable mode of capital punishment because it was the traditional method of carrying out executions under military law and did not inflict torture or "unnecessary cruelty."<sup>29</sup>

The Court referred to the ancient practices of disemboweling while alive, drawing and quartering, public dissecting, and burning alive as the kinds of "terror, pain, or disgrace" proscribed by the eighth amendment.<sup>30</sup> Shooting, in the view of the Wilkerson Court, was not unconstitutionally cruel because it was unlike historical execution by torture. Definition of present cruelty by comparison with past practices that were considered cruel and unusual at the time the Bill of Rights was adopted-the so-called "historical interpretation" of the eighth amendment<sup>31</sup> was the primary mode of judicial

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<sup>23</sup> 99 U.S. 131 (1878).

<sup>24</sup> *Id.* at 137.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 134, 137.

<sup>27</sup> *Furman v. Georgia* 408 U.S. 238, 284 n.30 (1972).

<sup>28</sup> 99 U.S. at 136-37.

<sup>29</sup> *Id.* at 136.

<sup>30</sup> *Id.* at 135.

<sup>31</sup> *Furman v. Georgia*, 408 U.S. 238, 265 (1972).

analysis of the cruel and unusual punishment clause well into the twentieth century.<sup>32</sup>

Twelve years after *Wilkerson*, in *In re Kemmler*<sup>33</sup> the Court denied an application for a writ of error that sought reversal of a New York state court decision upholding electrocution as consistent with the state's constitutional proscription of cruel and unusual punishment.<sup>34</sup> The Court held that the eighth amendment did not apply to the states and could not be made applicable through either the due process or the privileges and immunities clause of the fourteenth amendment.<sup>35</sup> Thus, the only federal constitutional issue was whether the state had acted arbitrarily or applied the law unequally to violate the fourteenth amendment.<sup>36</sup> The Court noted that the state's decision to adopt electrocution occurred only after the New York legislature had studied the recommendations of a commission appointed to investigate and report "the most humane and practical method" for carrying out the death penalty.<sup>37</sup> Hence, legislation enacting the commission's recommendation of electrocution was not arbitrary, especially because the lower court had considered evidence on the degree of pain involved and had found electrocution "painless."<sup>38</sup>

Even though the issue, whether electrocution violated the eighth amendment was not directly presented in *Kemmler*, the Court did use the occasion to discuss the cruel and unusual punishment clause. After noting that crucifixion, breaking on the wheel, and other "manifestly cruel" punishments would be unconstitutional,<sup>39</sup> the Court in significant dicta further defined cruel and unusual methods of execution:

"Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishing of life."<sup>40</sup>

The cruelty of electrocution was obliquely called into question in *Louisiana ex rel. Francis v. Resweber*.<sup>41</sup> The issue in that case was whether the State of Louisiana could constitutionally execute the petitioner, Willie Francis, after the electric chair had accidentally malfunctioned during a previous

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<sup>32</sup> *Id.*

<sup>33</sup> 136 U.S. 436 (1890).

<sup>34</sup> *Id.*, at 438, 443-44, 449.

<sup>35</sup> *Id.* at 446-49.

<sup>36</sup> 136 U.S. at 448-4.

<sup>37</sup> 136 U.S. at 444-45.

<sup>38</sup> *Id.*, at 443.

<sup>39</sup> 136 U.S. at 446-47.

<sup>40</sup> 136 U.S. at 447.

<sup>41</sup> 329 U.S. 459 (1947).

execution attempt. Francis had been prepared for execution, placed in the chair, and kept there for a period of time after the switch was thrown. The victim, who experienced considerable discomfort,<sup>42</sup> was removed from the chair when it became apparent that he would not die. A new death warrant was issued. Francis obtained a stay of execution and sought judicial approval for his claim that any further attempt to execute him would be cruel and unusual punishment contrary to the eighth amendment and a violation of his fourteenth amendment due process rights. The Supreme Court denied relief. Although the Court was not willing specifically to overrule *Kemmler* and hold that the eighth amendment applied to the states,<sup>43</sup> a plurality of four Justices took the position that subjecting Francis to the process of execution a second time would not violate the eighth amendment. The cruel and unusual punishment clause was interpreted by the plurality to prohibit only the "wanton infliction of pain" or the "infliction of unnecessary pain," not the suffering involved in "humane" executions.<sup>44</sup> Because the pain inflicted upon Francis was accidental and unintentional, the state would not be precluded from making a second attempt to execute him.<sup>45</sup> Four dissenting Justices would have issued a stay of execution and remanded the case to the Louisiana Supreme Court to determine the extent to which Francis had suffered pain in the bungled execution.<sup>46</sup>

The dissent suggested that a second attempt to execute Francis might constitute a violation of his due process rights under the fourteenth amendment because it would constitute "torture culminating in death," a repugnant practice long disclaimed in American law.<sup>47</sup> The dissent suggested that "taking human life by unnecessarily cruel means shocks the most fundamental instincts of civilized man" and should not be permitted under the constitutional procedure of self governing people.<sup>48</sup> Thus, the eight Justices who subscribed to the plurality and dissenting opinions favored an analysis of eighth amendment cruelty in terms of "unnecessary" suffering induced by the state. Significantly, both the plurality and dissenting opinions cited with approval the *Kemmler* dicta quoted above.<sup>49</sup>

The issue in *Resweber* was not whether electrocution per se was compatible with the eighth amendment, but whether the aborted initial execution attempt rendered subsequent attempts to take Francis' life cruel and unusual. In *Resweber* the Court assumed that successful electrocutions are

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<sup>42</sup> *Id.*, at 480 n.2.

<sup>43</sup> 329 U.S. at 463-64, 475-77.

<sup>44</sup> 329 U.S. at 463-64.

<sup>45</sup> *L. BMTWSOQ*, *supra* note 11.

<sup>46</sup> 329 U.S. at 472 (Burton, J., dissenting).

<sup>47</sup> *Id.*, at 473.

<sup>48</sup> *Id.*, at 473-74.

<sup>49</sup> *Id.*, at 463 n.4, 476.

not unconstitutionally cruel<sup>50</sup> because they do not inflict unnecessary cruelty or pain; the Resweber Court, however, did not consider evidence of the actual pain suffered during death by electrocution. In fact, the Court apparently has never reviewed evidence of the actual pain inflicted by any method of execution.<sup>51</sup>

### 2.1.2. Other Decisions-Flesh on the Bones of "Cruel and Unusual Punishment"

Although Wilkerson, Kemmler, and Resweber are the Supreme Court cases that most closely address the constitutionality of various methods of execution, significant doctrinal developments relevant to that issue have occurred in other eighth amendment cases. A consideration of these cases will provide a fuller definition of the meaning of cruel and unusual punishment. A landmark in eighth amendment law is the Court's decision in *Weems v. United States*.<sup>52</sup>

*Weems* broke with the earlier "historical interpretation" of the cruel and unusual punishment clause and introduced a more dynamic analysis that defines cruelty in terms of evolving social mores. Under the *Weems* analysis the clause should "acquire meaning as public opinion becomes enlightened by a humane justice."<sup>53</sup> Interpretations of the clause should not be based solely on "what has been," but should take into account "what may be."<sup>54</sup> As the *Weems* Court put it, "time works changes, brings into existence new conditions and purposes."<sup>55</sup> *Weems* is also significant because it reversed, on eighth amendment grounds, a sentence of imprisonment and civil disability that was unnecessarily harsh, as evidenced by the fact that it differed significantly from sentences imposed by other jurisdictions for similar crimes.<sup>56</sup> Thus, *Weems* suggests that an important indication of the unconstitutional cruelty of a given punishment or mode of punishment is its failure to be employed elsewhere.

The relative concept of the eighth amendment that the Court had articulated in *Weems* was developed further in *Trop v. Dulles*.<sup>57</sup> *Trop* struck down expatriation as cruel and unusual punishment for the crime of military desertion. The Court found that "physical torture" was not a necessary element of unconstitutionally cruel punishment and that the psychological pain inflicted on the expatriate, who would be subjected to "a fate of ever-

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<sup>50</sup> *Id.*, at 474.

<sup>51</sup> NOTE, *supra* note 10.

<sup>52</sup> 217 U.S. 349 (1910).

<sup>53</sup> *Id.*, at 378.

<sup>54</sup> *Id.*, at 373.

<sup>55</sup> *Id.*, 53.

<sup>56</sup> 217 U.S. at 380.

<sup>57</sup> 356 U.S. 86 (1958).

increasing fear and distress," was sufficient to render the punishment unconstitutional.<sup>58</sup> The Court perceived the essence of the eighth amendment as "nothing less than the dignity of man."<sup>59</sup>

The plurality opinion in *Trop*<sup>60</sup> gave content to the "evolving standards of decency" by examining, in the tradition of *Weems*, contemporary punishment practices of other jurisdictions. That expatriation was no longer authorized elsewhere<sup>61</sup> was taken as a significant indication that it had become an outdated anomaly.<sup>62</sup> The standards articulated by *Trop*, although technically accepted by only a plurality of four Justices, have subsequently been embraced by the full Court.<sup>63</sup> In the 1972 landmark decision of *Furman v. Georgia*,<sup>64</sup> the Court held that the eighth amendment, now clearly applicable to the states,<sup>65</sup> prohibited the infliction of capital punishment under virtually all state statutes because unrestrained discretion in imposing the penalty had resulted in its arbitrary infliction.<sup>66</sup> All nine Justices wrote separate opinions; seven Justices clearly embraced the *Trop* standards of eighth amendment analysis. Two Justices found capital punishment unconstitutionally cruel per se<sup>67</sup>, and the other three concurring Justices considered its arbitrary application violative of the eighth amendment.<sup>68</sup>

Four Justices, dissenting, would not have interfered with the imposition of capital punishment.<sup>69</sup> In his concurring opinion, Justice Brennan further refined the idea of "human dignity" that underlies the *Trop* concept of cruel and unusual punishment. To Justice Brennan, "human dignity" as articulated in *Trop* entails respect for the "intrinsic worth" of persons.<sup>70</sup> Punishments are proscribed by the eighth amendment when they are so severe as to be "uncivilized and inhuman." Mental and physical pain, however, is only one indication of inhumane punishment.<sup>71</sup> Human dignity is also affronted by punishments that are arbitrarily inflicted,<sup>72</sup> or unacceptable by contemporary standards. These standards are indicated by historical trends away from the use of a particular punishment, or a high

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<sup>58</sup> *Id.*, at 101-02.

<sup>59</sup> *Id.*, at 100.

<sup>60</sup> 356 U.S. at 105 (Brennan, J., concurring).

<sup>61</sup> *Id.*, at 102.

<sup>62</sup> *Id.*, at 102-03.

<sup>63</sup> *Gregg v. Georgia*, 408 U.S. 238 (1972).

<sup>64</sup> 408 U.S. 238 (1972).

<sup>65</sup> *Robinson v. California*, 370 U.S. 660 (1962).

<sup>66</sup> 408 U.S. at 411.

<sup>67</sup> 408 U.S. at 257 (Brennan, J., concurring).

<sup>68</sup> 408 U.S. at 240 (Douglas, J., concurring).

<sup>69</sup> 408 U.S. at 375 (Burger, CJ., dissenting).

<sup>70</sup> *Id.*, at 270 (Brennan, J., concurring).

<sup>71</sup> *Id.*, at 271-72.

<sup>72</sup> *Id.*, at 274.

level of contemporary public distaste for its employment.<sup>73</sup> Finally, Justice Brennan identified lack of necessity as a characteristic of unconstitutionally cruel punishment:

Other members of the Furman Court also subscribed to this analysis of unnecessary cruelty and compared present punishment with less severe but equally effective alternatives. The four dissenting Justices in Furman joined in the view that "no court would approve any method of implementation of the death sentence found to involve unnecessary cruelty in light of presently available alternatives."<sup>74</sup> Although they refused to find unconstitutional the institution of capital punishment itself, the dissenters left the door open for later attacks on modes of administering the death penalty under the "less cruel alternative" analysis.<sup>75</sup> In his concurring opinion, Justice Marshall also adopted this approach.<sup>76</sup> Lower courts, too, have applied an eighth amendment "less cruel alternative" standard.<sup>77</sup>

Furman reemphasized the relative nature of the cruel and unusual punishment clause; the Court indicated that contemporary standards of decency should be used for eighth amendment evaluation of punishment.<sup>78</sup>

## 2.2. Summary of the Definition of Cruel and Unusual Punishment

Punishments are violative of the eighth amendment only if they are "unnecessarily cruel," as demonstrated by discussion of the cases. Test of undue cruelty according to Kemmler is "something more than the mere extinguishing of life,"<sup>79</sup> however; Wilkerson focuses exclusively on "unnecessary punishment."<sup>80</sup> No doubt unreasonably harsh punishment symbolizes "something more" that the Kemmler Court contemplated. In Resweber, the unnecessary cruelty analysis was adopted by eight Justices although the plurality suggested that a special indication of eighth amendment violation is the presence of governmental intent to cause unnecessary suffering.

Furthermore, unnecessary cruelty as a feature of the Court's eighth amendment analysis was included by all Weems, Furman, Gregg,<sup>81</sup> and Coker.<sup>82</sup> Subsequent to the Weems cases all emphasis was on the dynamic nature of the cruel and unusual

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<sup>73</sup> *Id.*, at 277-79.

<sup>74</sup> *Id.*, at 430 (Powell, J., dissenting).

<sup>75</sup> *Id.*, at 420.

<sup>76</sup> *Id.*, at 342 (Marshall, J., concurring).

<sup>77</sup> SINGER, SENDING ALEN TO PRISON: CONSTITUTIONAL ASPECTS OF THE BURDEN OF PROOF AND THE DOCTRINE OF THE LEAST DRASTIC ALTERNATIVE AS APPLIED TO SENTENCING DETERMINATIONS, 58 CORNELL L. REV. 51 (1972).

<sup>78</sup> *Id.*, at 32 (Marshall, J., concurring).

<sup>79</sup> 99 U.S. at 447.

<sup>80</sup> 99 U.S. at 136.

<sup>81</sup> 433 U.S. at 592.

<sup>82</sup> *Id.*

punishment clause. The progression of societal mores as well as advancement in technology and further development of penology may contribute to invalidation of punishments that were constitutionally permissible in the past. Legislative drift away from a specific mode of punishment constantly signify both its cruelty and its lack of necessity.<sup>83</sup>

### 3. Conclusion and suggestions

#### 3.1. An Execution Paradigm as a Less Cruel Alternative

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

##### 3.1.1. The Suicide Option

To permit the condemned person the option of taking his own life instead of being killed by agents of the state is a concession to human dignity not practiced in modern times,<sup>84</sup> but not unknown historically nor without its contemporary advocates.<sup>85</sup> The example of Socrates who refused the requests of his friends to postpone his death until the last legally permitted moment, is particularly poignant. Socrates would have considered it an affront to his self-respect to prolong life beyond the moment it lost meaning. "I should only make myself ridiculous in my own eyes if I clung to life and hugged it when it has no more to offer."<sup>86</sup> To have hemlock at his disposal infused the whole process of his death with a modicum of dignity and personal respect.

Similar humanitarian considerations could be incorporated into modern execution procedures. An execution date could be set; for a brief, specified period after that date the condemned person would be provided the means to take his life if he chose. He would be told the lethal dosage of an oral sedative<sup>87</sup> that would be placed at his disposal. Death by drug overdose would be virtually painless<sup>88</sup> and without many of the other human and economic costs<sup>89</sup> that attend traditional modes of execution. If the condemned person failed to take his own life before the period for optional suicide had expired, the state would then execute him in the manner discussed below.

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<sup>83</sup> *Supra* note 83 and 87.

<sup>84</sup> *Supra* note 101.

<sup>85</sup> Camus, *supra* note 5.

<sup>86</sup> PLATO, THE LAST DAYS OF SOCRATES 181 (H. Tredennick trans. 1954).

<sup>87</sup> L. JONES, VETERINARY PHARMACOLOGY AND THERAPEUTICS, 987-88 (3rd ed. 1965).

<sup>88</sup> *Id.*

<sup>89</sup> E. BLOCK, AND MAY GOD HAVE MERCY 67-68 (1962).

To permit capital offenders the right to suicide<sup>90</sup> does not imply that everyone has a moral right to take his own life.<sup>91</sup> Nor does it imply that the offender has the right to demand that he be executed.<sup>92</sup> Moreover, the existence of this limited right to suicide does not imply that each capital offender has this right before his execution becomes inevitable.<sup>93</sup> Rather, after all legal remedies have been exhausted and execution is virtually inevitable," 9 the condemned person should be allowed to pick the moment of his death. The time period allowed for exercising the suicide option should be short, perhaps one or two days, to reduce the trauma that attends the decision whether to commit suicide, and to limit the possibility of a grant of clemency after the prisoner had committed suicide but before the appointed hour of state execution.

The option of suicide appears to meet the criteria of constitutional capital punishment.<sup>94</sup> Physical and mental suffering would not exceed constitutional bounds because death by drug overdose would be painless, perhaps even somewhat pleasant,<sup>95</sup> and the psychological apprehension that now attends the more violent contemporary methods of execution<sup>96</sup> would be removed. The dignity of the condemned would be respected if the state allowed him to choose the circumstances of his death. His privacy interests would be preserved if he were permitted to pass quietly from life in his cell, without the violent, circus-like atmosphere of traditional executions.<sup>97</sup> His right to bodily integrity would be protected; no disfigurement or mutilation would occur. Finally, the option of suicide would allow the condemned to retain a degree of self-respect, in the manner of Socrates.

### 3.1.2. The Lethal Gas Mask

If the condemned person chose not to commit suicide the state would take his life at the appointed hour. The interests of decency would require, however, that the violence attending the execution process be minimized. Perhaps the least violent method now available is administration of certain forms of lethal gas.<sup>98</sup> For example, a concentration of pure and odorless carbon monoxide administered through a mask would cause instantaneous and painless loss of consciousness followed rapidly by death.<sup>99</sup> Although a brief period of physical restraint might be required to secure the mask to the face of a struggling prisoner, the force would be no greater than the force required to

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<sup>90</sup> Corbin, *Legal Analysis and Terminology*, 29 YALE L. J. 163, 167 (1919).

<sup>91</sup> W. LA FAVE & A. SCOTR, HANDBOOK ON CRIMINAL LAW 568-69 (1972).

<sup>92</sup> Hart, *Prolegomenon to the Principles of Punishment*, in PUNISHMENT AND RESPONSIBILITY 1, 4-5 (1968).

<sup>93</sup> *Id.*

<sup>94</sup> *Furman v. Georgia*, 408 U.S. 238.

<sup>95</sup> *Supra* note 110.

<sup>96</sup> ROYAL COMMISSION ON CAPITAL PUNISHMENT, *supra* note 101, at 255.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> L. JONES, *supra* note 112.

administer the methods of execution now in use.<sup>100</sup> Use of a mask instead of the customary gas chamber would avoid intensely negative psychological associations with past practices, often brutal and inhumane.

Further, it is uncertain that death in American gas chambers is painless.<sup>101</sup> Moreover, the gas mask could be used in surroundings familiar to the prisoner; he would not be required to endure the additional anxiety of moving to a special death room. Administration of the death penalty through lethal gas seems to pose few constitutional problems. Physical pain would be virtually eliminated and psychological suffering greatly lessened because the prisoner would fear neither a painful death nor the terrifying last walk to an unfamiliar death house. No bodily disfigurement would occur, and physical violence would be minimal. The remaining issue, therefore, is whether the paradigm would achieve the legitimate interests of capital punishment as effectively as present execution methods.

### 3.2. The Paradigm and Capital Punishment Policy

A consideration of the relative merits of methods of inflicting capital punishment must focus on two main policy considerations-general deterrence and retribution.<sup>102</sup> To validate the paradigm as a less cruel alternative to present modes of execution it must be shown that the paradigm achieves the deterrent and retributive ends of capital punishment as effectively as the customary methods of execution.

#### 3.2.1. The Paradigm and Deterrence

One might argue that the humanitarian aspects of the paradigm, particularly its suicide option, render it a less effective deterrent than the more violent forms of execution now practiced.<sup>103</sup> This argument seemingly demands that executions be performed publicly and employ the most painful technique. 30 Because such" torture could not satisfy constitutional requirements,<sup>104</sup> the interests of deterrence must be balanced against the interests of decency. Even if it were true that more cruel execution methods deter more effectively than less crilel methods, it by no means follows that the state is invariably justified in inflicting the harsher punishment. Fortunately, the issue need not hinge on a balance between the state's interests in achieving deterrence and the demands of human dignity. There is little reason to believe that the more cruel modes of execution now used serve as better deterrents than the less cruel paradigm. First, the public has

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<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> W. LAFAVE & A. SCOTR, *supra* note 116.

<sup>103</sup> *Supra* note 99.

<sup>104</sup> *Supra* note 24 and 33.

very little knowledge of the cruelty of present methods.<sup>105</sup> Executions are conducted in secret; the public learns of them indirectly through various communications media.<sup>106</sup> The ordinary person, if he has thought about it at all, probably believes that present modes of execution are decent, i.e., devoid of unnecessary cruelty.<sup>107</sup>

Apparently there have been no empirical studies that test the relative deterrent effects of various modes of execution, but the British Royal Commission on Capital Punishment has considered the issue. The Commission considered whether to continue execution by hanging, historically "a peculiarly grim and degrading form of execution"<sup>108</sup> that has retained its "stigma,"<sup>109</sup> and concluded:

We, . . . like most of our witnesses, are not convinced that a potential murderer in this country is more likely to be deterred by the knowledge that he may have to 'swing for' his victim than he would be by the knowledge that he might have to suffer death in some other way. If there is a difference, it must be so small that we do not think it ought to weigh with us.<sup>110</sup>

The Commission thus rejected the "more horrible the punishment the greater the deterrence" theory<sup>111</sup> as irrelevant to the consideration whether hanging should be retained. To the extent that capital punishment deters, the deterrent effect is probably produced by the threat of death itself rather than by the method used to accomplish it. The fear of death is universal,<sup>112</sup> whether caused by disease, carbon monoxide, or the gallows. Thus, adoption of the paradigm with its suicide option would not reduce the deterrent effect.

### 3.2.2. The Paradigm and Retribution

The term "retribution" is used in punishment theory to convey a variety of meanings. In the context of administration of capital punishment, retribution can best be understood if its three separate meanings are kept distinct. Retribution is sometimes equated with vengeance to refer to punishment inflicted in a wholly emotional manner.<sup>113</sup> It is also used to describe no utilitarian theories of punishment based on justice and desert.<sup>114</sup>

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<sup>105</sup> *A Cruel and Unusual Punishment*, in VOICIS AGAINST DEATH 264, 281-82 (P. Mackey ed. 1976).

<sup>106</sup> A. KOESTLER, REFLECTIONS ON HANGING 165 (1957).

<sup>107</sup> *Supra* note 130.

<sup>108</sup> *Supra* note 99.

<sup>109</sup> *Id.*, at 248.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> E. KUBLER-ROSS, ON DATH AND DYING 5 (1969).

<sup>113</sup> *Furman v. Georgia*, 408 U.S. 238, 343 (1972) (Marshall, J., concurring).

<sup>114</sup> Gardner, *The Renaissance of Retribution-An Examination of Doing Justice*, 1976 WISC. L. REV. 781.

In its third sense, the term retribution describes punishment that serves a utilitarian purpose: to vent public disgust toward criminals and, as a consequence, to increase respect for the law and eliminate the likelihood that citizens will "take the law into their own hands."<sup>115</sup> Whatever meaning is attached to retribution, the paradigm does not become less desirable than other modes of capital punishment on "retributive" grounds. It is an inappropriate application of the criminal sanction to impose a crueler sanction simply to inflict more suffering upon the offender. Retributive justifications for punishments that are no more than emotional appeals to vengeance against the offender are condemned almost universally.<sup>116</sup>

Hence, to favor hanging or shooting over the paradigm simply because the former inflicts more pain or indignity, is a purposeless and illegitimate invocation of the criminal sanction. Furthermore, retributive theories of desert will not justify the conclusion that a capital offender deserves hanging or shooting rather than the form of capital punishment outlined by the paradigm. Retributive considerations require that the offender suffer according to his deserts as determined by the seriousness of his crime. Principles of desert, however, set only rough boundaries of proportionality between offense and punishment and do virtually nothing to establish the form that the punishment should take.<sup>117</sup>

Finally, even if the public is particularly outraged by a particular crime, its emotion almost always diminishes significantly between arrest and execution; one would not expect execution according to the paradigm to create public outcry for harsher punishment.<sup>118</sup> The paradigm accomplishes the policy objectives of general deterrence and retribution at least as effectively as other modes of execution. Therefore, if it can be shown to be less cruel than present methods of inflicting death, the paradigm would seem constitutionally preferable as the less drastic alternative.

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<sup>115</sup> *Furman v. Georgia*, 408 U.S. 238, 308 (1972) (Stewart, J., concurring).

<sup>116</sup> *Gerstein*, *supra* note 98.

<sup>117</sup> *Gardner*, *supra* note 140.

<sup>118</sup> *Id.*