HIGH-TECH LYNCHINGS IN AN AGE OF EVOLVING STANDARDS OF DECENCY

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What this town needs is a good old fashioned lynching. The real thing. With all the trimmings. It would be like going to church. Puts things in their proper perspective. Reminding everybody of who they are, where they stand. Divides the world simple and pure. Good or bad. Oppressors and oppressed. Black or white.[1]

INTRODUCTION

On February 8, 1994, the Court of Appeals for the Ninth Circuit, sitting en banc, determined that the convicted rapist and murderer Charles Rodman Campbell could constitutionally be hanged to death by the state of Washington.[2] In a lengthy opinion remarkable for its numb clinicism, the Ninth Circuit concluded that Campbell was not entitled to a painless execution, but rather to one free of "purposeful cruelty."[3] Washington state could enforce its death penalty by mode of hanging, and the Eighth Amendment would remain intact. At a time when the justice of the death penalty is in bitter dispute, the holding in *Campbell v. Wood* can be said to stand for the proposition that the administration of death is an unseemly enterprise for our courts of law. In fact, *Campbell* unleashes an even subtler dilemma. The hallmark of the death penalty in this country is its discriminatory application. Accepting as a given that racial animus supervises the punishment of death, what does it mean when a state executes by lynching?

Two states, Washington and Montana, continue to implement the death penalty by hanging.[4] The Eighth Amendment

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1. JOHN EDGAR WIDEMAN, THE LYNCHERS 60 (1973).
2. Campbell v. Wood, 18 F.3d 662 (9th Cir. 1994).
3. *Id.* at 687.
4. WASH. REV. CODE § 10.95.180(1) (1992) and MONT. CODE ANN. § 46-21-103(3) (1993).

requires that a method of state punishment be consistent with societal notions of dignity. The classic formulation is that the amendment "draws meaning from the evolving standards of decency that mark the progress of a maturing society."[5] Critics of the death penalty maintain that state sponsored execution can never meet such standards; execution is by definition cruel and unusual. This paper takes no position as to the legitimacy of the death penalty itself. Instead, it is this author's contention that there is something unusually cruel about the practice of execution by hanging. That cruelty springs from a historical context that attaches meaning to this form of death and consequence to the party likely to receive the sentence of death. Hanging is atavistic in that it is bound to a legacy of racial injustice in this country.

Between the years 1889 and 1932, 2954 African-Americans met their deaths at the hands of lynch mobs.[6] The rise of lynching, whether in the form of crude hanging or actual burning, coincided with a period of newfound power and status for blacks. The post-Reconstruction period was an uneasy about-face for the majority of Southern whites.[7] The lynching of blacks would come to be used as an instrument of political oppression. At the essence of the practice was the double entendre of restoring order through example. Popular opinion justified lynching as a response to black transgression, usually in the form of rape or murder. The psychosexual paradigm was the rape/murder of a white woman by a black male,[8] a crime which "demanded" summary, extralegal punishment. However, these allegations were more often merely an excuse for punishment. A lynching was a cathartic experience, and the unlucky victim a symbol of the desired racial hierarchy. With each gruesome killing the entire community was put on notice; blacks were to know their place, and to stay in it.[9]

5. Trop v. Dulles, 356 U.S. 86, 101 (1958).

6. ARTHUR F. RAPER, THE TRAGEDY OF LYNCHING 480-1 (1933).

7. *See generally* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION (1988).

8. *See generally* JACQUELYN DOWD HALL, REVOLT AGAINST CHIVALRY: JESSIE DANIEL AMES AND THE WOMEN'S CAMPAIGN AGAINST LYNCHING (1979); WALTER WHITE, ROPE AND FAGGOT: A BIOGRAPHY OF JUDGE LYNCH (1929).

9. *See, e.g.*, James M. Inverarity, *Populism and Lynching in Louisiana, 1889-1896: A Test of Erikson's Theory of the Relationship Between Boundary Crises and Repressive Justice, in* LYNCHING, RACIAL VIOLENCE, AND LAW 208 (Paul Finkelman ed., 1992) (applying Kai Erikson's theory that the disruption of group solidarity pro-

There is an African American folktale that has retained currency. A black man, admiring a comely white woman, wonders aloud, "Oh Lord, will I ever?" Says the white man who has overheard, "No, nigger, never." Black man: "As long as there's life, there's hope." White man: "As long as there's trees, there's rope."[10] The phenomenon of lynching faded in the 1940's,[11] but the symbolism stays potent. Lynching images, from the mob and the noose to the "Strange Fruit" conjured up by songstress Billie Holiday, persists as a reminder of racial terrorism. Nowhere is this cultural preoccupation more evident than in the psyche of African-Americans. Black fiction of every generation registers the impact of lynching.[12] For countless black writers and thinkers, lynching has become an allegory for the precarious position of minorities in this country. There is only a small psychological step between hanging and lynching, and both practices chafe at what is still a raw nerve.

Lynching has particular meaning to the typical death row inmate. Minority criminals in general and black criminals in particular are disproportionately eligible for a jury verdict of death. Of the 2785 inmates on death row as of October 1993, 1102 were black.[13] A full fifty percent of death row inmates are of an ethnic

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duces a dramatic increase in repressive justice to the facts of lynching's ascendance in the state of Louisiana). Between 1890 and 1900, lynchings were twice as common as legal executions. *Id.* at 210.

10. DARYL CUMBER, DANCE, SHUCKIN' AND JIVIN': FOLKLORE FROM CONTEMPORARY BLACK AMERICANS 101 (1978).

11. *See generally* ROBERT L. ZANGRANDO, THE NAACP CRUSADE AGAINST LYNCHING, 1909-1950 (1980).

12. Among the numerous fictional works by black American authors that address lynching are JAMES BALDWIN, GOING TO MEET THE MAN (1968), WILLIAM WELLS BROWN, CLOTEL (1853), CHARLES WADDELL CHESNUTT, THE MARROW OF TRADITION (1901), PAUL LAURENCE DUNBAR, *The Tragedy at Three Forks, in* THE STRENGTH OF GIDEON AND OTHER STORIES (1900), Ralph Ellison, *The Birthmark*, 36 NEW MASSES (1940), SUTTON GRIGG, THE HINDERED HAND (1905), LANGSTON HUGHES, *Home, in* THE WAYS OF WHITE FOLKS (1933), JAMES WELDON JOHNSON, *Brothers— American Drama, in* ST. PETER RELATES AN INCIDENT (1935), CLAUDE MCKAY, *The Lynching, in* SELECTED POEMS OF CLAUDE MCKAY (1953), JEAN TOOMER, CANE (1923), ALICE WALKER, *The Flowers, in* IN LOVE AND IN TROUBLE: STORIES OF BLACK WOMEN (1973), MARGARET WALKER, JUBILEE (1967), WALTER WHITE, THE FIRE IN THE FLINT (1924), JOHN EDGAR WIDEMAN, THE LYNCHERS (1973), Richard Wright, *Between the World and Me*, 2 THE PARTISAN REVIEW 18 (1935), RICHARD WRIGHT, THE LONG DREAM (1958). *See generally* TRUDIER HARRIS, EXORCISING BLACKNESS: HISTORICAL AND LITERARY LYNCHING AND BURNING RITUALS (1984).

13. Data compiled by the Death Penalty Information Center (Washington, D.C.), *quoted in* course material for Yale Law School class *Capital Punishment: Race, Pov-*

minority.[14] The relevance of race to sentencing is even clearer upon a survey of murder victims. Killers of white victims are far more likely to receive a sentence of death than are killers of black victims. Studies indicate that 84% of the victims in death penalty cases are white, even though 50% of all murder victims are black.[15] Racial prioritization heavily influences the decision to impose the death penalty.

Death penalty jurisprudence has long been guided by knowledge of inequity. In 1972, the Supreme Court halted the practice of state execution altogether, acknowledging that "death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual."[16] In the watershed decision *Furman v. Georgia*, the Supreme Court conceded that, in past practice, the only discernible basis for the selection of a death sentence had been the race of the offender. A concurring opinion by Justice Marshall detailed the statistics. Of the 3859 persons executed by the states between 1930 and 1972, 2066 were black.[17] Of the 455 persons executed for the crime of rape, 405 were black.[18] The *Furman* court pinpointed the problem; the vast discretion given to sentencing bodies made the death penalty arbitrary, capricious, and thus unconstitutional. For four years between the decision in *Furman* and the decision in *Gregg v. Georgia*,[19] the official execution of criminals was suspended. The Supreme Court holding in *Gregg* clarified the *Furman* mandate. The punishment of death only violates the Constitution when the discretion of a sentencing authority is unguided. With *Gregg*, the state execution of criminals resumed, and the brunt of the act continues to fall upon blacks.[20]

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erty & Other Issues, taught by Stephen B. Bright of the Southern Center for Human Rights (Spring 1994).

14. *Id.*

15. *Id.*

16. Furman v. Georgia, 408 U.S. 238, 390 (1972) (Stewart, J., concurring).

17. 408 U.S. at 421 (Marshall, J., concurring).

18. *Id.*

19. Gregg v. Georgia, 428 U.S. 153 (1976).

20. Knowledge of the "arbitrariness, discrimination, caprice, and mistake" still inherent in the process has led many to renounce the death penalty as a means of punishment. In a startling pronouncement on the occasion of a denial of certiorari, Justice Blackmun vowed, "I no longer shall tinker with the machinery of death." Blackmun's decision was based in part on the biased application of the death penalty. Callins v. Collins, 114 S.Ct 1127 (1994) (Blackmun, J., dissenting).

Knowledge of past racial discrimination must inform a present analysis of hanging. The constitutional inquiry does not end with the sentence of death. The question of how a death sentence is to be carried out is as important as it is overlooked. Challenges to the death penalty have by and large failed to assail any particular form of execution.[21] Part I of this perspective discusses the limited challenges to execution methods and the development of a constitutional standard. This section reveals the judicial struggle to articulate the role of historical association in the analysis of a mode of punishment. Part I proposes that history is more central to the analysis than the courts have acknowledged. Part II of this article criticizes the decision in *Campbell v. Wood* upholding the constitutionality of hanging. Part III examines the intimate psychological association between the practice of hanging and the experience of lynching. The paper arrives at the conclusion that an act of state hanging, when put into context, is a vicious indignity.

I. THE FORMATION OF THE EIGHTH AMENDMENT STANDARD

A. EARLY CHALLENGES TO EXECUTION MODES

There are thirty-six states in the nation whose statutes provide for capital punishment.[22] The method of choice in these states is usually electrocution or lethal injection.[23] However, exceptions exist. A number of states employ the gas chamber to execute condemned criminals. Utah executes its criminals with a five-citizen firing squad.[24] The statutes of Washington and Mon-

21. Opponents of the death penalty, including the American Civil Liberties Union, refuse to lobby for more humane methods of execution. Adamant that every execution is inhumane, the groups stand on their principle. The results of this approach can be curious. In at least one instance, both sides of the death penalty debate put aside their differences and joined in opposition to an Indiana statute that would have replaced electrocution with lethal injection. Michael deCourcy Hinds, *Making Execution Humane (or Can it Be?)*, N.Y. TIMES, Oct. 13, 1990, at A1.

22. The states are: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraka, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming. Death Penalty Information Center data (Washington, D.C.).

23. Note, *The Madness of the Method: The Use of Electrocution and the Death Penalty*, 70 TEX. L. REV. 1039, 1039 (1992).

24. Utah's use of citizens in state executions calls to mind the remarks of the now-defunct British Royal Commission on Capital Punishment. Observing that the

tana specify death by hanging. State choice in the manner of execution is constrained only by public sentiment and by the Eighth Amendment prohibition against cruel and unusual punishment.[25]

Hanging had once been the preferred mode of execution in states subscribing to the death penalty. Yet over time some thirty-nine states renounced hanging in favor of what were felt to be more modern and/or humane forms of execution.[26] As late as 1972, Delaware, Idaho, Kansas, Montana, New Hampshire, North Dakota, Rhode Island, Utah, and Washington all permitted judicial hanging. By 1981, only four jurisdictions in the Eng-

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office received five applications per week for the position of hangman, the Commission identified "psychological qualities of a sort that no state would wish to foster in its citizens." ROYAL COMMISSION ON CAPITAL PUNISHMENT 1949-1953, REPORT 261, 256 (1953), *quoted in* FRANKLIN E. ZIMRING & GORDON HAWKINS, CAPITAL PUNISHMENT AND THE AMERICAN AGENDA 108 (1986).

25. Financial concerns may also be a factor. As of 1990, the typical electric chair cost over $45,000, plus the high price of repairs. (Moreover, experienced repairmen of electric chairs are rare). A state-of-the-art lethal injection system was priced at $35,000, and the chemicals for each execution were $800. A gas chamber cost as much as $200,000 to install, though the gas itself was just $50. The construction of a gallows was valued at $55,000. There are no additional costs, save personnel salaries. The price of an execution by firing squad has never been calculated. Dawn M. Weyrich, *Lethal Logistics is Labor of Love*, WASH. TIMES, June 7, 1990, at A10.

26. Alabama—1923 (from hanging to electrocution), Arizona— 1933 (to lethal gas), Arkansas— 1913 (to electrocution), California— 1937 (to lethal gas), Colorado— 1933 (to lethal gas), Connecticut— 1935 (to electrocution), Delaware— 1986 (to lethal injection), Florida— 1923 (to electrocution), Georgia— 1924 (to electrocution), Idaho— 1978 (to lethal injection), Illinois— 1927 (to electrocution), Indiana— 1913 (to electrocution), Iowa— 1965 (simultaneously abandoning hanging and abolishing death penalty), Kentucky— 1938 (to electrocution), Louisiana— 1940 (to electrocution), Maine— 1887 (simultaneously abandoning hanging and abolishing the death penalty), Maryland— 1955 (to lethal gas), Massachusetts— 1898 (to electrocution), Michigan— 1963 (simultaneously abandoning hanging and abolishing the death penalty), Minnesota— 1911 (simultaneously abandoning hanging and abolishing the death penalty), Mississippi— 1940 (to electrocution), Missouri— 1937 (to lethal gas), Nebraska— 1913 (to electrocution), Nevada— 1921 (to lethal gas), New Hampshire— 1986 (to lethal injection), New Jersey— 1906 (to electrocution), New Mexico— 1929 (to electrocution), New York— 1888 (to electrocution), North Carolina— 1909 (to electrocution), North Dakota— 1973 (simultaneously abandoning hanging and abolishing the death penalty), Ohio— 1896 (to electrocution), Oklahoma— 1913 (to electrocution), Oregon— 1937 (to lethal gas), Pennsylvania—1913 (to electrocution), Rhode Island— 1973 (to lethal gas), South Carolina— 1912 (to electrocution), South Dakota— 1939 (to electrocution), Tennessee— 1913 (to electrocution), Texas— 1923 (to electrocution), Utah— 1983 (substituting a choice between shooting and hanging to a choice between shooting and lethal injection), Vermont— 1913 (to electrocution), Virginia— 1908 (to electrocution), West Virginia— 1949 (to electrocution), Wisconsin— 1853 (simultaneously abandoning hanging and abolishing the death penalty), Wyoming— 1935 (to lethal gas). Campbell v. Wood, 18 F.3d 726-28 (9th Cir. 1994).

lish speaking world continued to sanction hanging: Delaware, Montana, Washington, and South Africa.[27] Delaware forsook hanging in 1986, after conducting a futile search for a Canadian backswoodsman thought to be the last of the experienced hangmen.[28] The United States Military abandoned hanging the same year.[29]

Most of the states that renounced hanging did so in the period following the turn of the twentieth century, in response to the invention of electricity.[30] Electrocution quickly became a symbol of modernity. States rushed to change their death penalty statutes, substituting electrocution for hanging. Although many of the states justified the switch on grounds of humanity,[31] the evidence was slight that the "pass[ing] through the body of a convict a current of electricity of sufficient intensity to cause death"[32] was indeed a painless demise. The fledgling electric companies of the time resisted the move towards electrocution out of reputational concern. The companies feared the public association of electricity with death, and went so far as to finance the appeal of the very first convict sentenced to die by electrocution.[33]

The case was *In re Kemmler*, and the condemned convict sought to prove that electricity was a cruel and unusual agent of death.[34] At the time of the *Kemmler* decision (1890), the Eighth Amendment did not apply to the states. However, the relevant state constitution forbade the infliction of cruel and unusual punishment, and the Fourteenth Amendment of the U.S. Constitution proscribed arbitrary or unequal action on the part of a state.[35] Kemmler's argument was that the arbitrary adoption of

27. Frampton v. Washington, 95 Wash. 2d 469, 627 P.2d 922, 934 (Sup. Ct. Wash. 1981).

28. Michael deCourcy Hinds, *Making Execution Humane (or Can it be?)*, N.Y. TIMES, Oct. 13, 1990, at A1. The backwoodsman failed to respond to notes left on tree stumps by the authorities.

29. *Campbell*, 18 F.3d at 729.

30. Note, *The Madness of the Method*, *supra* note 23, at 1039.

31. *See, e.g.*, State v. Tomasi, 75 N.J.L. 739, 69 A. 214, 217-18 (1908) ("Instead of hanging by the neck, [the legislature has] now provided that death shall be caused as speedily as possible by the direct application of electricity to the body of the convict. On its face the statute imports an effort by the lawmaking body to mitigate the pain and suffering of the convict.").

32. 1888 N.Y. Laws ch. 489.

33. Note, *The Madness of the Method*, *supra* note 23, at 1043.

34. In re Kemmler, 136 U.S. 436 (1890).

35. *Id.* at 443.

electrocution by the New York legislature violated his right to due process. Strictly speaking, the decision in *Kemmler* did not implicate the Eighth Amendment. Nonetheless, the *Kemmler* Court's interpretation of "cruel and unusual" is central to any analysis of execution methods.

The *Kemmler* decision reveals that the cruelty of a form of punishment can derive from intuitive or historical knowledge. "Common knowledge" can render a punishment manifestly cruel.[36] The Court found that its collective wincing at the mention of such punishments as crucifixion, breaking on the wheel, and burning at the stake was instructive.[37] Struggling to voice a standard, the Court declared that "[p]unishments 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 mere extinguishment of life.*"[38] *Kemmler* suggests that inchoate distaste can be the starting point for a constitutional analysis. The presence of torture or the slowness of death are key factors.

The *Kemmler* opinion relied upon the rationale of a related case, *Wilkerson v. Utah*.[39] *Kemmler* adopted a sentiment first voiced in *Wilkerson* that punishment should not equal "terror, pain, or disgrace."[40] The case of *Wilkerson* involved a criminal condemned to die under an 1876 statute that neglected to specify the mode of execution. Wilkerson, a convicted murderer, challenged the authority of the sentencing judge to dictate that Wilkerson should die by shooting. As a corollary to the analysis of authority, the Court considered the legitimacy of shooting as a means of death. The Court decided that shooting, and hanging as well, were acceptable because both methods were common in military practice.[41] Because shooting was a traditional means of death, the custom did not violate the Eighth Amendment mandate. The sentencing judge was permitted the discretion to determine how Wilkerson would die.

36. *Id.* at 447.
37. *Id.* at 446.
38. *Id.* at 447 (emphasis added).
39. Wilkerson v. Utah, 99 U.S. 130 (1878).
40. *Wilkerson*, 99 U.S. at 135.
41. *Id.* at 134-35.

As the *Wilkerson* Court recognized, the problem with historical interpretation is that many punishments of long heritage are unconstitutional. The Court thus attempted to draw a distinction between unacceptable practices (public burning and other atrocities) and acceptable practices (hanging and shooting). The *Wilkerson* Court cited examples such as the drawing and dragging of prisoners, disembowellment, quartering, beheading, public dissection, and burning alive.[42] These punishments were denounced. In the eyes of the Court, the common denominator of these practices was "torture" and "unnecessary cruelty."[43] The conclusion was that a shooting death involved neither gothic torture nor gratuitous cruelty, and therefore was constitutionally sound.

It is crucial to note that both the *Kemmler* opinion and the *Wilkerson* opinion present a parade of historical horribles in an effort to distinguish the acceptable practices of electrocution and shooting, respectively. This list of horribles: crucifixion, breaking at the wheel, drawing and quartering, burning alive, and et cetera, would later guide the constitutional analysis of several Eighth Amendment cases.[44] The practices described by *Kemmler* and *Wilkerson* are generally invoked as "easy calls" of unconstitutionality,[45] the rationale being that torture and slow death are involved. However, the above atrocities are unconstitutional for reasons other than first seem obvious.

Severe and agonizing punishments such as those rejected in *Kemmler* and *Wilkerson* are historical throwbacks to times of tyranny and repression. Until the beginning of the nineteenth century, the body of a criminal was the major target of penal repression, and an execution had all the bloodlust of a sacrifice.[46] Grisly execution was a response to serious transgression, whether defined as treason, regicide, heresy, or simple murder. The atrocity of the actual crime was echoed in the atrocity of the retribution. Punishments such as crucifixion and public dissection

42. *Id.* at 135.

43. *Id.* at 136.

44. *See, e.g.*, Glass v. Louisiana, 471 U.S. 1080, 1084-85 (1985) (Brennan, J., dissenting from the denial of certiorari); Weems v. United States, 217 U.S. 349, 376-77 (1910); Campbell v. Wood, 18 F.3d 662, 681 (9th Cir. 1994).

45. *See, e.g.*, *Glass*, 471 U.S. at 1084 (noting "the obvious unconstitutionality of such ancient practices. . . .").

46. *See generally* MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (Alan Sheridan trans., 1977).

were chosen for their symbolic value. Death was incidental, a passing moment rather than the climax of the event. For this reason, corporal punishments often continued long after the death of the transgressor.[47] The point of the punishments criticized in *Kemmler* and *Wilkerson* was the heaping on of various and progressive indignities.

Wilkerson characterizes "torture" and "a lingering death" as the crux of these acts. This characterization misses the mark. The instinctive shudder of the *Wilkerson* and *Kemmler* Courts was informed by overtones of French revolutionaries, witch hunts, Joan of Arc, and so on. The practices are atrocities because they fit into a historical repertoire of repression. There is no "torture" involved in the act of beheading, but no American court would uphold its constitutionality. There is no "lingering death" in a mock execution, but the ritual is roundly condemned. On the other hand, electrocution since its inception has been likened to burning at the stake,[48] and malfunctions of the electric chair have caused incidents of slow, singeing deaths.[49] Yet no court has questioned the propriety of electrocution.[50] The strength of historical association gives meaning to a form of punishment.

The early cases of *Kemmler* and *Wilkerson* lay the groundwork for analysis of the propriety of hanging. *Kemmler* establishes that the "mere extinguishment of life" does not make for a

47. *See, e.g.*, DAVID D. COOPER, THE LESSON OF THE SCAFFOLD 4 (1974) (describing the hanging and subsequent beheading of insurrectionists convicted of treason).

48. A reporter who witnessed the first-ever electrocution of a criminal in this country remarked, "The age of burning at the stake is past; let the age of burning at the wire pass also." *Burning at the Wire*, N.Y. PRESS, Aug. 7, 1890, at A4, *quoted in* Note, *The Madness of the Method, supra* note 23, at 1045 n.36. *See also* Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 476 (Burton, J., dissenting).

49. A defective sponge in Florida's electric chair was responsible for the bungled execution of Jesse Tafero on May 4, 1990. Tafero was slowly burned alive as twelve-inch blue and orange flames burst from either side of his head. Jacob Weisberg, *This is Your Death: Capital Punishment, What Really Happens*, 205 THE NEW REPUBLIC, July 1, 1991, at 23. The Tafero incident led several Florida death row inmates to file applications for a stay of execution, questioning the state's ability to conduct a torture-free execution. A malfunctioning of Alabama's electric chair in 1989 also resulted in an agonizing death and inmate litigation. Note, *The Madness of the Method, supra* note 23, at 1050-54. A botched Louisiana electrocution was responsible for the 1947 Supreme Court case of Louisiana ex rel. Francis v. Resweber, 329 U.S. 459 (1947).

50. *See* Note, *The Madness of the Method, supra* note 23, at 1040 n.9 for a partial list of the judicial decisions summarily dismissing challenges to electrocution.

cruel or unusual punishment.[51] Rather, death plus some additional, inchoate factor can combine to render a punishment "inhuman" or "barbarous." *Wilkerson* reveals that history is factored into the Eighth Amendment analysis, and that punishment cannot be tantamount to "terror, pain," or, importantly, "disgrace."[52] The later Eighth Amendment cases would bring these concepts into modern focus.

B. LATER CHALLENGES TO STATE PUNISHMENTS

Judicial interpretation of the Eighth Amendment was revolutionized in 1910 with the Supreme Court decision in *Weems v. United States.*[53] *Weems* held that a punitive measure could no longer be justified on the basis of tradition alone. Instead, the Court recognized that the Eighth Amendment is "progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice."[54] For the appellant in *Weems*, this holding reversed an unduly harsh, but common, imprisonment sentence. The conflict in *Weems* required that the Court consider "cruel and unusual" as a question of degree rather than kind. Unlike the execution method challenges, *Weems* addressed the *excessiveness* of a punishment.[55] Nonetheless, the rationale of *Weems* extends to all Eighth Amendment cases.[56] *Weems* acknowledges that "time works changes, brings into existence new conditions and purposes."[57] In order to satisfy the constitutional mandate, a punitive measure must reflect dynamic societal standards of justice.

The *Weems* principle reached full articulation in the case of *Trop v. Dulles.*[58] *Trop* concerned the plight of a native born American who deserted the military in a time of war, and in consequence lost his citizenship. A provision of the Nationality Act

51. *In re Kemmler*, 136 U.S. 436, 447 (1890)
52. *Wilkerson*, 99 U.S. 130, 135 (1878).
53. Weems v. United States, 217 U.S. 349 (1910).
54. *Id.* at 378.
55. The most famous of the Eighth Amendment cases addressing the excessiveness of a punishment is Coker v. Georgia, 433 U.S. 584 (1977) (holding that the penalty of death is disproportionately severe for the crime of adult rape).
56. *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (the Eighth Amendment inquiry is twofold: "First, the punishment must not involve the unnecessary and wanton infliction of pain. Second, the punishment must not be grossly out of proportion to the severity of the crime.").
57. *Weems*, 217 U.S. at 373.
58. Trop v. Dulles, 356 U.S. 86 (1958).

of 1940 stipulated that convicted wartime deserters were to be denationalized. The petitioner in *Trop* protested that the Eighth Amendment forbade the penalty of divestment of citizenship. The Supreme Court agreed. In language that would be endlessly cited, the Court announced that "the words of the [Eighth] Amendment are not precise, and . . . their scope is not static. *The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.*"[59] With this as its premise, the Supreme Court began to examine the meaning of statelessness in civilized society.

The Court took offense at the *psychological* effects of forced statelessness on an individual. Certainly the loss of citizenship involves "no physical mistreatment, no primitive torture."[60] What is implicated is the very status of the individual in organized society. A political existence that was centuries in the making could be instantaneously destroyed under the statute. The *Trop* opinion contemplates "the dignity of man"[61] as well as the "ever-increasing fear and distress"[62] that would accompany the punishment of denationalization. Simply because the government *could* have provided that death be the penalty for desertion, the government could not constitutionally choose denationalization.[63] *Trop* is significant in that the case rejects the centrality of death as an ultimate punishment. Instead, the Court explicitly links the cruelty of a punitive measure with its emotional effects and political connotations.

An earlier death penalty case also called into question the psychological effects of a punishment.[64] Convicted murderer Willie Francis had been sentenced to die by electrocution, but was spared when the electric chair fizzled in the course of his execution. Instead of dying when the switch was repeatedly thrown, Francis groaned, jumped, and finally demanded that the current be turned off and that he be allowed to breathe.[65] The issue in the case, *Louisiana ex rel. Francis v. Resweber*, was whether the Constitution would preclude a second attempt at

59. *Id.* at 100-01 (emphasis added).
60. *Id.* at 101.
61. *Id.* at 100.
62. *Id.* at 102.
63. *Id.* at 99.
64. Louisiana ex rel. Francis v. Resweber, 329 U.S. 459 (1947).
65. *Id.* at 480 n.2.

electrocution.[66] Francis suggested that a second electrocution would create a severe psychological strain.[67] However, the *Resweber* Court chose to cast the debate in terms of official intent. Because it was not the *purpose* of the state to inflict unnecessary pain, the state was morally blameless for any cruelty that resulted from the accident.[68] Francis could constitutionally face the electric chair again, and he did.

Four Justices dissented in *Resweber*. The dissenters recommended that the case be remanded for a determination of the pain suffered by Francis in the first electrocution attempt. Despite the confirmed reports of witnesses to the attempt, the state contended that "no current whatsoever" passed through Francis.[69] The dissenters in *Resweber* dismissed the intent approach of the majority. Distinguishing the case from instances of successive stays of execution, the dissent pointed to the pain as well as the anguish of Francis.[70] The fate of Francis was sealed with the majority holding; he perished in the second electrocution. However, the *Resweber* case predates by nine years the standard announced in *Trop*. Under an "evolving standards of decency" rule, the emotional strain theory of Francis might have carried the day.

The history of judicial interpretation of the Eighth Amendment reveals two distinct themes. The first theme, shared by the early decisions of *Wilkerson* and *Kemmler*, is that punishments involving gratuitous pain, torture, and barbarity are foreign to the Constitution. Both cases contrast the legitimacy of certain modes of execution with the unconstitutionality of repressive, historical practices. The second theme, articulated in *Weems* and developed fully in *Trop*, is that a punitive measure may, in time, become socially disfavored. A court must hold a punishment to

66. Petitioner claimed that a "second" execution would deny him due process, invoking both the double jeopardy provisions of the Fifth Amendment and the cruel and unusual clause of the Eighth Amendment. *Id.* at 461.

67. *Id.* at 464.

68. *Id.*

69. *Id.* at 472-73.

70. *Id.* at 477. When California gassed its first convict since the reinstatement of the death penalty, opponents decried the repeated stays of execution. The convict, Robert Alton Harris, had just been strapped into the chamber— but not subjected to lethal gas— when a short-lived stay was granted. Death penalty opponents pointed to the cruelty of the on-again, off-again eventual execution. However, the absence of the actual catalyst of death distinguishes the Harris plight. *Agony on Death Row*, THE TIMES NEWSPAPERS LTD., April 22, 1992.

"evolving standards of decency." As a corollary, the cases of *Trop* and *Resweber* represent a judicial recognition of the psychological impact of a punishment. Although the *Trop* Court was swayed by the psychological evidence and the *Resweber* Court was not, mental anguish is central to both cases. The issue of hanging prompts an examination of these themes in practice.

II. THE CASE OF *CAMPBELL V. WOOD*

The Ninth Circuit decision in *Campbell* was the culmination of a series of judicial appeals by three-time murderer Charles Rodman Campbell.[71] Campbell was first sentenced to die for his crimes in 1982. After a volley of death warrants and habeas corpus petitions, the Ninth Circuit granted a rehearing en banc of Campbell's claims. Campbell introduced a number of issues on appeal. In addition to a procedural challenge to the penalty of death, Campbell raised the question of the constitutionality of the mode of execution. Washington law provides that "[t]he punishment of death . . . shall be inflicted either by hanging by the neck or, at the election of the defendant, by intravenous injection of a substance or substances in a lethal quantity sufficient to cause death and until the defendant is dead."[72] Campbell maintained that the "choice" between hanging and lethal injection was a specious one. Hanging could not be an option because the practice was a per se violation of the Eighth Amendment.[73] Likewise, argued Campbell, the direction that a condemned criminal be hanged unless he elects injection is a cruel and unusual measure.[74] A criminal should not be compelled to participate in his own execution.

From the court's perspective, the prospect of a choice between hanging and lethal injection did not render the question moot. A statute providing for a choice between two methods of execution, one constitutional and the other unconstitutional,

71. Campbell v. Wood, 18 F.3d 662, 682 (9th Cir. 1994).

72. WASH. REV. CODE § 10.95.180(1) (1992). Montana law also allows the condemned to choose between death by hanging or by the injection of "an ultra-fast-acting barbituate" in combination with other deadly chemicals. MONT. CODE ANN. § 46-21-103(3) (1993). A 1983 amendment made injection an alternative in Montana. However, the condemned must specifically request lethal injection at the time that the execution date is set or the option is automatically waived. *Id.*

73. *Campbell*, 18 F.3d at 680.

74. *Id.*

would violate Campbell's rights.[75] Thus, the court defined its central task to be an analysis of the constitutionality of hanging. After a remand to the district court for purposes of fact finding, the Ninth Circuit considered the evidence before it.

The court found that Washington's procedure for hanging did not cause lingering death, mutilation, or the gratuitous infliction of pain.[76] The experience of death by hanging might not be painless, but the Constitution does not safeguard against pain. In the eyes of the court, the Eighth Amendment is satisfied so long as hanging involves no "purposeful cruelty."[77] The court held that hanging, as conducted by Washington protocol, is neither a cruel nor an unusual punishment.[78]

To reach this conclusion, the court relied solely on an inquiry into physical pain and ignored altogether what it conceded to be "the more difficult question . . . of decency."[79] The holding in *Campbell* is simply that there is no unnecessary pain in hanging, and thus no constitutional violation.[80] As the dissent characterized the majority holding, "barbaric and savage forms of punishment are not prohibited by the Eighth Amendment, except in cases in which the use of such techniques results in the needless infliction of pain."[81] Put another way, the *Campbell* majority placed undue emphasis on the concerns expressed in *Kemmler* and *Wilkerson*, and overlooked the moral of *Weems* and *Trop*. The court insisted on looking to "objective factors to the maximum extent possible"[82] instead of considering societal standards of decency.

The court's emphasis on suffering inspires a macabre and painfully literal constitutional analysis. The opinion cites to the

75. *Id.* at 680, 687.
76. *Id.* at 687.
77. *Id.*
78. The question of the constitutionality of hanging had been challenged peripherally on other occasions. Coleman v. Montana, 185 Mont. 299, 605 P.2d 1000 (1979) (holding that in the absence of unconstitutionality, the court lacks the power to change the legislature's choice of execution mode). *But cf.* Frampton v. Washington, 95 Wash. 2d 469, 627 P.2d 922 (1981) (holding that a properly performed hanging is "an art" which the state had not perfected, leading to an unacceptable risk of asphyxiation), *overruled by* State v. Robtoy, 653 P.2d 284 (1982).
79. *Campbell*, 18 F.3d at 682.
80. *Id.* at 687 ("We hold that judicial hanging . . . does not involve the wanton and unnecessary infliction of pain, and therefore does not violate the Eighth Amendment.").
81. *Id.* at 693.
82. *Id.* at 681.

standard atrocities (disembowelment, beheading, burning at the stake, breaking at the wheel), and distills from these practices a constitutional prohibition on torture and a lingering death.[83] The *Campbell* court, like the *Wilkerson* and *Kemmler* Courts, fails to identify a common denominator of historical association. Instead, the court focuses upon the experience of death under the Washington method of hanging. Specifically, the court addresses the mechanisms causing unconsciousness and death, the risks of death by asphyxiation and decapitation, and the effect of various contributing factors (including the length of the drop, the elasticity of the rope, and the placement of the knot).[84]

No one is certain of exactly how a hanged man dies. It is commonly assumed that the vertebrae snap and the spinal cord tears, causing instant unconsciousness and subsequent death. In fact, death may be more gradual, resulting from an occlusion of the arteries or slow asphyxiation. The amount of suffering has much to do with the hanging technique. Two factors are significant, the selection of the rope and the distance the condemned falls when the trap door of a gallows is released. Explains the *Campbell* opinion: "If the drop is too short in relation to the weight of the prisoner, death is likely to result from the mechanism of airway occlusion; that is, the condemned will asphyxiate. If the drop is too long in relation to weight, death may result from decapitation."[85]

Ultimately, the holding in *Campbell* is in the details. The opinion includes a chart of drop lengths, correlating prisoner weight to drop distance.[86] The *Campbell* court cites to autopsies of hanged criminals.[87] The court soberly notes the absence of "twisting, turning, and swinging" in the body of the last man to meet his death by hanging in the state of Washington.[88]

The court attaches great importance to the specifics of the state method of hanging. Washington borrowed its procedure from a 1959 Army execution manual that was never used in mili-

83. *Id.*

84. *Id.* at 683.

85. *Id.* at 684.

86. *Id.* at 724.

87. *Id.* at 684, *quoting* Ryk James & Rachel Nasmyth-Jones, *The Occurrence of Cervical Fractures in Victims of Judicial Hanging*, 54 FORENSIC SCI. INT'L 81 (1992).

88. *Id.* at 685 (testimony of a doctor present at the 1993 execution of Westley Allan Dodd).

tary practice.[89] The state had conducted only one hanging under the procedure, the January 1993 execution of Westley Allan Dodd.[90] Nonetheless, the court realized that hanging could only be upheld so long as the actual protocol was acceptable. Therefore, the court registered its approval of the Washington procedure:

> The evidence presented to the district court indicates that a very slender ligature is more prone to break the skin, increasing the chances of partial or complete decapitation. A thicker ligature is less likely to do so. More importantly, by treating the rope to reduce elasticity, the Washington protocol guarantees that the kinetic energy caused by the drop will be quickly transferred to and borne by the neck structures, rather than simply being absorbed by the rope. Finally, treating the surface of the rope to reduce surface friction allows the rope to slide easily and tighten about the neck.[91]

In this manner, the *Campbell* court measured the constitutional cruelty of hanging by its most literal effects.

Four judges joined a separate opinion in *Campbell*, in partial concurrence with and partial dissent from the majority holding. The defining achievement of this opinion is that the opposing four come closest to naming the beast. The dissent stammers, but gives voice to what had long been an intuitive sense that historical connotation matters in the realm of the Eighth Amendment. The grand failure of the *Campbell* dissent is that the dissenters know not what they say. The opinion revolves around the central ideas of history and association, but is unable to denounce hanging for its lurid past. Instead, the dissent resorts to the graphic tactics of the majority, ultimately condemning hanging because it is a grotesque way to die.

The thrust of the dissent is an objection to the majority's focus on physical suffering. Missing from the grisly majority account is any sustained analysis of the "decency" of hanging from the perspective of society at large. Instead, the *Campbell* opinion simply announces that the general unpopularity of hanging as a means of execution is not dispositive.[92] Yet even accepting the

89. *Id.* at 694.

90. Campbell had sought to obtain permission to videotape the execution as evidence, but the courts denied his request. Campbell v. Blodgett, 982 F.2d 1356 (9th Cir. 1993).

91. *Campbell*, 18 F.3d at 684.

92. *Id.* at 682.

premise that unpopularity is not unconstitutionality, the *Campbell* majority fails to conduct any independent inquiry into societal standards of decency. The dissenters in *Campbell* claim to remedy the oversight, and conclude that hanging is wrong because it is indecent. The conclusion takes two steps.

First, the dissent endorses the twin concepts of bodily integrity and dignity. In the eyes of the dissent, *Wilkerson* was mistaken. The common denominator of historically disfavored punishments is not "torture" or "a lingering death," but rather dismemberment and affront. The dissent explains that "[b]asic notions of human dignity command that the state minimize 'mutilation' and 'distortion' of the condemned prisoner's body. These principles explain the Eighth Amendment prohibition of such barbaric practices as drawing and quartering."[93]

Cruelty, notes the dissent, is an altogether different issue than pain. Thus the dissenters isolate the element of cruelty in such historically repressive acts as the displaying of carcasses on yardams and the stringing up of bodies in public squares; what is cruel is the manifest indignity.[94] The *Campbell* dissent expands the notion of disgrace to the collective level. Says the dissent: "Hanging is associated with lynching, with frontier justice, and with our ugly, nasty, and best-forgotten history of bodies swinging from the trees or exhibited in public places."[95] The problem with the dissent's picture is that shame, mutilation, and connotation are bound together.[96] Historical association is neither given independent force nor recognized as a personal source of trauma. Hanging is not simply an embarrassment to the nation; it is a targeted insult. The *Campbell* dissent first proposes, then dilutes the notion of historical relevance.

The second step of the *Campbell* dissent is a retreat from the historical approach. The same dissenters who chided the majority for its graphic details now turn to the physical indignities of hanging to justify the conclusion of indecency. According to the dissent, the Washington protocol for hanging "assur[es] that the greatest possible amount of force will be transferred to the prisoner's neck. The risk that the force of the drop will be so great as

93. *Id.* at 705.
94. *Id.* at 702.
95. *Id.* at 701.
96. *Id.* at 696.

to rip the head off of the body, while blood spurts uncontrollably, is but one of hanging's degrading incidents."[97]

The dissent also references the lyrics to the song "Strange Fruit," a stinging indictment of Southern lynching.[98] The inclusion of the song is an implicit recognition of the importance of history and connotation. Yet the *Campbell* dissent gropes towards an understanding of the fullest meaning of hanging, and finally settles for the literal. Ultimately, what the dissent declares to be sinister is the physical effect of hanging on the condemned's body. The dissent concludes that "[t]he state of Washington shows absolutely no respect for human dignity when it seeks to kill a person by stretching his neck at the end of a rope so that his spine will be torn apart; yet that is exactly the goal of judicial hanging."[99] The centrality of history is forgotten as the dissent dwells upon fainting witnesses[100] and the details of decapitation.[101]

The result is that both the *Campbell* majority and minority take a prosaic approach to the complex question of whether hanging conforms to evolving societal standards of decency. The indecency of hanging is not measured only by the ratio of asphyxiations to decapitations. Indignity can exact a psychic toll as well. The *Campbell* court emphasized objectivity at all costs, ignoring the fact that historical association has the detachment of distance. An undue focus on the physical can actually distort the analysis of decency. One commentator goes as far as to state that any form of execution that unnecessarily disfigures the body of the condemned is constitutionally suspect.[102] Under this inter-

97. *Id.* at 701.

98. *Id.* The lyrics of the legendary song read:

> Southern trees bear a strange fruit. Blood on the leaves and blood at the root. Black bodies swingin' in the Southern breeze. Strange fruit hanging from the poplar trees.
>
> Pastoral scene of the gallant South. The bulging eyes and the twisted mouth. Scent of magnolia, sweet and fresh. Then the sudden smell of burning flesh.
>
> Here is a fruit for the crows to pluck. For the rain to gather, for the wind to suck. For the sun to rot, for the tree to drop. Here is a strange and bitter crop.

99. *Id.* at 716.

100. *Id.*

101. *Id.* at 719-22.

102. Martin R. Gardner, *Executions and Indignities— An Eighth Amendment Assessment of Methods of Inflicting Capital Punishment,* 39 OHIO ST. L.J. 96, 109 (1978). The dissent in one electrocution case also implies that descriptions of un-

pretation, the Eighth Amendment is satisfied upon a mere showing that the shooting, or other specified form of execution, is as sanitized as possible.

The appeal of the clean kill is seductive, but superficial. The court in *Campbell* succumbs to the comforting notion that any tidy execution is a constitutionally agreeable one. The *Campbell* majority is clinical in the extreme. The contribution of the dissent is that *disgrace* counts as strongly as do pain and suffering. Likewise, history is surely linked to justice. The sad story of a past of lynching and a currently biased death penalty have filtered into the collective consciousness. As standards of decency evolve, connotation moves closer to the fore. Historical association matters. To borrow the words of one author, "[t]he gallows is not only a machine of death, but a symbol. It is the symbol of terror, cruelty, and irreverence for life—the common denominator of primitive savagery, medieval fanaticism, and modern totalitarianism."[103]

III. THE LONG SHADOW OF LYNCHING

A. RITES AND RITUALS

Every state execution is an act of ritualized violence. The violence is less of a surprise than the actual ritual involved in a state-sponsored death. Each state that provides for the death penalty also specifies the means of execution. As discussed previously, death takes many forms, including lethal injection, the gas chamber, and electrocution.[104] Yet execution is generally more elaborate than it need be. Death administration bows deeply to ceremony, sometimes at the expense of accuracy. Despite proposals for simpler, more easily administrable methods of execution, most states retain the same handful of death modes.[105]

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sightly executions can substitute for constitutional analysis. Glass v. Louisiana, 471 U.S. 1080 (1985) (Brennan, J., dissenting from the denial of certiorari). Brennan describes in detail the grisly consequences of electrocution on the body of the condemned. However, the specific effects of electrocution are incidental. Brennan eventually concedes that he finds all methods of execution to be suspect. *Id.* at 1093-94.

103. ARTHUR KOESTLER, REFLECTIONS ON HANGING *quoted in* GEORGE V. BISHOP, EXECUTIONS: THE LEGAL WAYS OF DEATH 110-11 (1965).

104. *See supra* text accompanying notes 22-25.

105. *See, e.g.*, Gardner, *supra* note 102, at 110-13 (proposing a suicide option or a lethal gas mask that might be applied in the familiar surroundings of the condemned's cell). Interestingly, Gardner remarks that the use of the gas mask rather than the gas chamber would avoid "intensely negative psychological associations

The reason is that ritual serves a cathartic function. The penalty of death is more a symbolic gesture than a remedy, and so it follows that the execution itself is stylized.

Ceremony is a preoccupation common to most forms of execution practiced by the states today. The court in *Campbell* focused upon the minutiae of the Washington protocol because a proper hanging is an "art." Realizing that the task required a strange skill, officials of the Washington State Penitentiary held several rehearsals in preparation for the hanging of convict Westley Allan Dodd.[106] The element of ritual is clearer still in the case of Utah's execution by shooting. The condemned is bound to a chair and placed before an oval wall made of canvas. Officials pin a round white cloth, the target, over the heart of the condemned. Five shooters position themselves twenty feet away and, aiming together through a slot in that wall of canvas, all empty their weapons.[107] There is even a system to lethal injection; after the intravenous tube is inserted, three separate doses of chemicals are introduced, with a one minute wait between each.[108]

Death is only one of the goals of capital punishment. Procedure exists not just to facilitate death, but also for procedure's sake. Thus the suicide of a condemned convict is unacceptable. For example, the hanging date of a convict who tried to slash his own throat was once postponed until the wound could heal sufficiently to reduce the risk of decapitation at the hanging.[109] Another convict who attempted suicide moments before the scheduled execution was dragged bleeding into the gas chamber so that he would not die of his own devices.[110] Clearly, the state's view is that the death of a convict, standing alone, is insufficient; the state as executioner demands atonement. Agency and ceremony define the execution experience.

It is often assumed that the ritual aspect of execution eases the brutality of the state's act. However, in the context of hang-

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with past practices," namely the genocide of the Holocaust. *Id.* at 113. *See also* HUGO ADAM BEDAU, THE DEATH PENALTY IN AMERICA 16 n.22 (3d ed. 1982).

106. *Campbell*, 18 F.3d at 688.

107. Weisberg, *supra* note 49.

108. First sodium pentothol, then pancuronium bromide, then potassium chloride is inserted into the intraveneous tubing. Dawn M. Weyrich, *Lethal Logistics is Labor of Love*, WASH. TIMES, June 7, 1990, at A10.

109. Gardner, *supra* note 102, at 110 n.109.

110. *Id.*

ing, ritual does little to distance a state hanging from a mob lynching. One noteworthy aspect of lynching is that there was a pattern to the practice. News reports of lynching deaths reveal a similar method to the hundreds and thousands of unrelated murders. The symbolic nature of lynching was articulated in a ritual summarized as follows.[111] First, the intended victim was apprehended, either seized from the lawful authorities or discovered after a manhunt. The would-be lynch mob consisted of male members of the local community, men who had rallied together for the purpose of killing. Rarely did the lynchers bother to conceal their identities. The mob would transport the victim to a predetermined location where others (men, women, and not infrequently children) stood in wait. The mood was sometimes festive, sometimes resolute. The victim would be hoisted on the limb of a tree. A crowd of onlookers then proceeded to castrate or otherwise mutilate the suffocating victim. The body of the victim was often set afire, regardless of whether he or she was alive or dead at the time. When the spectacle drew to a close, members of the mob might collect relics of the murder before retiring to their respective homes.[112]

It is telling that there is an echo in the actions of various mobs, lynching various victims, in various states. The explanation is that lynching was an instrument of white dominance. The lynch mob's noose, the Klansman's robes, and the burning cross were symbols of segregation and outright oppression.[113] In contrast, a state acting as executioner attaches different meaning to its ritual killing. The careful ceremony of a state execution is intended to distinguish the official executioner from the sadistic mob, vigilant justice from vigilantism. Yet when a state executes by hanging, the stronger symbolism of lynching prevails. Even in

111. *See generally* RAPER, *supra* note 6; FRANK SHAY, JUDGE LYNCH (1938).

112. The 1930 lynching of James Irwin in Ocilla, Georgia is typical in many respects. The lynching was precipitated by the rape and murder of a sixteen year old white girl. Suspicion fell upon Irwin, a wage hand. Although there was only circumstantial evidence to connect Irwin with the crime, Irwin was arrested by the police after a night-long manhunt. The next morning, a mob of agitated local men snatched Irwin from police custody. The mob carried Irwin to the location where the body of the girl had been found. At this spot, Irwin was chained to a tree before a crowd of 1000 onlookers. His fingers and toes were severed and kept as relics. His teeth were pulled loose with wire pliers. Irwin was castrated. The mob concluded its tortures by setting the still-living victim on fire. The body of James Irwin was left to hang all day beside a public road. The lynchers were never indicted. RAPER, *supra* note 6, at 141-71.

113. LYNCHING, RACIAL VIOLENCE, AND LAW vii (Paul Finkelman ed., 1992).

the absence of the mob[114] and of needless cruelty, the presence of ritual in a state hanging suggests a message, and that message cannot be neatly contained. Shades of lynching persist.

B. SCAPEGOAT KILLINGS

A lynching is properly understood as a scapegoat killing. The lynch mob chose its victims for their symbolic value and hoped that the lynching would have resonant effect. It is usually said that lynching was a response to crimes of rape or murder,[115] but this is only half the story. The other half is that lynching was a response to the disturbing prospect of racial equality. The diffuse racial tensions at the heart of the practice meant that lynching was often a sacrificial act. Any event might trigger the lynch mob, and any black victim might suit the collective purpose of the mob. A black man could unwittingly stumble into his own lynching.

Between 1889 and 1918, the lynch mob struck at a rate of roughly one lynching every three days.[116] The professed excuse was that the lynchers provided a service to their communities. The victims of lynching were generally black men accused of brutal crimes. Ostensibly, the lynch mob intervened in order to purge the community of evil in their midst. Lynching was to be a swift and terrible "justice." A comment made by one member of a 500 person lynch mob describes the sense of obligation: "When we left home tonight, our wives, daughters, and sisters kissed us good bye and told us to do our duty, and we're trying to do it as citizens."[117] To many otherwise law-abiding Southerners, lynch-

114. A state execution is a private event and attendance is limited to select witnesses. In recent years, death penalty opponents and commercial broadcasters have lobbied for the televising of executions. The theory is that the spectacle of a killing in the name of the state will increase public awareness and debate about capital punishment. *See, e.g.*, Garrett v. Estelle, 556 F.2d 1274 (5th Cir. 1977), *cert. denied*, 438 U.S. 914 (1978); K.Q.E.D., Inc. v. Vasquez, No. C-90-1383RHS, 1991 U.S. Dist. LEXIS 19791 (N.D. Cal. June 17, 1991). *See also* Jef I. Richards & R. Bruce Easter, *Televising Executions: The High-Tech Alternative to Public Hangings*, 40 U.C.L.A. L. REV. 381 (1992) (implying a First Amendment guarantee of access to state killings); *Nightline: Making the Death Penalty Visible* (ABC television broadcast, May 24, 1991).

115. *See, e.g.*, JANE ADDAMS & IDA B. WELLS, LYNCHING AND RAPE: AN EXCHANGE OF VIEWS (Bettina Aptheker ed., 1977) (1901) (contesting the view that rape was the catalyst for most lynchings).

116. James M. SoRelle, *The "Waco Horror": The Lynching of Jesse Washington, in* LYNCHING, RACIAL VIOLENCE, AND LAW 303, 303 (Paul Finkelman ed., 1992).

117. *Id.* at 307.

ing was *different*, a respectable sort of crime.[118] Governor James K. Vardaman of Mississippi once remarked that he had no conscientious objection to the lynch mob. In fact, continued Vardaman, he lacked respect for any white man who would shun the lynchers.[119] The lynch mob effectively had the sanction of the state, and members of the mob were seldom punished.

The convenient link between the crime of the lynching victim and the punishment of the mob dissolves upon inspection. A survey of lynching incidents reveals that the victims of lynching were often scapegoats for the displaced hostility of the white populace. A lynching could be provoked by the mere allegation of a crime, or suggestion of a taboo violated. The case of Scott Burton and William Donegan is instructive. Burton and Donegan were lynched in 1908 amidst a roiling controversy surrounding the murder of a local white. The white man was stabbed to death after he discovered a black intruder in the bedroom of his daughter. The killing shook the town of Springfield, Illinois, but it took another assault of a sexually suggestive nature to trigger the violence of the mob. After a young white woman accused a black man of attempted rape, the men of Springfield took action. A mob of thousands descended upon the black section of town. The men pillaged the black neighborhoods and decided to make an example of Burton and Donegan. Scott Burton, an elderly

118. A newspaper editorial dating from 1930 typifies the attitude:

> Some of those who have criticised us most severely for the lynching that occurred in our county last Saturday seem to have almost lost sight of the fact that a most heinous crime had been committed the afternoon before by the man who was lynched. They lose sight of the fact that one of our pure lovely young girls just budding into attractive young womanhood was attacked and slain by the wanton brute... They write chiefly of the quivering flesh of the burning victim, and not at all of the grasp of the foul beast....

Editorial of the MACON TELEGRAPH, *quoted in* RAPER, *supra* note 6, at 147. Southerners who remained undecided about the decency of lynching were reassured by the comparison between the vicious crime and deserved punishment of the victim. One letter to a Georgia newspaper rationalized: "Compared to the crime he committed, [the lynching victim] spent his last two hours in paradise contrasted with the justice he deserved." Letter to the editor of the OCILLA STAR, *quoted in* RAPER, *supra* note 6, at 150. In striking similarity to the lynching apologist, Justice Scalia once upheld the death sentence of a convict with the comment that death by injection "looks pretty desirable" next to "the murder of a man ripped by a bullet suddenly and unexpectedly." Linda Greenhouse, *Death Penalty is Renounced by Blackmun*, N.Y. TIMES, Feb. 23, 1994, at A1.

119. George C. Rable, *The South and the Politics of Antilynching Legislation, 1920-1940*, *in* LYNCHING, RACIAL VIOLENCE, AND LAW 227, 228 (Paul Finkelman ed., 1992).

black barber, was chosen by the mob after he took up arms against the men storming his home. Burton was dragged through the streets, lynched, and mutilated. William Donegan, a black cobbler aged eighty-four, was chosen by the mob because his wife of thirty years happened to be white. The mob first lynched Donegan, then slashed his throat, then hacked his body apart with knives. Despite the 117 indictments handed down against the mob members, only one participant was found guilty of any crime.[120]

The commission of a sexual crime or a sadistic murder was not a prerequisite to a lynching. A crime committed under more generous circumstances might yet provoke the lynch mob, if the accused was an African-American. In 1911, the men of Coatesville, Pennsylvania lynched Zachariah Walker for his part in a killing in self defense. Between 2000 and 5000 observers attended the lynching. Walker, a black mill worker, had earlier crossed with a local policeman and shot the man in self defense. An improvised search party quickly tracked down the fugitive Walker. Sensing the spirit of the group, Walker aimed his pistol at his head and attempted to take his own life. He was unsuccessful. A mob soon grew outside the hospital where Walker was taken. Dragging Walker from his bed, the mob chanted for a lynching. The crowd of men, women, and children toted Walker to a distant site. There, Walker reportedly pleaded for his life: "For God's Sake, give a man a chance. I killed Rice [the policeman] in self defense. Don't give me a crooked death because I'm not white." Unchecked, the mob clubbed Walker onto a makeshift funeral pyre. His singed fingers were later collected as relics.[121]

The lesson of lynching was not lost on black America. Scapegoat lynchings eased the seething frustrations of the white majority and put the black minority on notice. In the horrid demise of men such as Burton, Donegan, and Walker, blacks saw the potential for their own destruction. The practice of lynching disappeared from the American landscape in the 1940's, but the lesson was not easily forgotten. Black fiction of every generation

120. James L. Crouthamel, *The Springfield Race Riot of 1908, in* LYNCHING, RACIAL VIOLENCE AND LAW 76, 76-93 (Paul Finkelman ed., 1992).

121. William Ziglar, *"Community on Trial": The Coatesville Lynching of 1911, in* LYNCHING, RACIAL VIOLENCE AND LAW 323, 323-29 (Paul Finkelman ed., 1992).

has struggled with the memory of lynching.[122] In plays, novels, and poems, black writers describe this "peculiarly American ritual"[123] in an effort to make peace with history and to exorcise the past. The persistence of lynching imagery in black fiction suggests two related notions. First, the story of lynching in this country is an integral part of the black experience and, by extension, the black identity. Second, lynching has particular resonance to a death row comprised mostly of minorities, the majority of whom are black.

Early black fiction treats lynching as a troubling fact. The fictional scenes of lynching tend to echo historical accounts, rather than elicit any metaphorical meaning. The 1905 novel *The Hindered Hand* includes a graphic depiction of the torture and lynching of one young black couple.[124] The passage details the sufferings of the two: digits were severed as souvenirs, eyes were gouged, and corkscrews applied to flesh. The fictional murder is an outrage, but not because of any artistic manipulation. The description from the *Hindered Hand* parallels (and probably incorporates) a news report of the same year. A Mississippi newspaper item lists identical atrocities: a lynched pair, severed digits, loosened eyeballs, and corkscrewed flesh.[125] Blacks were being lynched, and black writers were acutely aware of this fact. The injustice of the Mississippi lynching registers in the passage from the novel.

In later works by African-American authors, depictions of lynching would assume personal dimensions. Lynching, as seen in fiction, ceased to be a factual shame and instead became a menace lurking over the shoulder of the black Everyman. Black writers began to portray lynching with all the intensity of personal identification. The premise of these later works was that the bell might toll for any African-American with bad luck and bad timing. Renowned writer Langston Hughes spoke to this fear in the short story "Home."[126] "Home" describes the fate of an accomplished black musician who inspires the envy and ire of

122. See *supra* note 12 for a partial list of African-American fiction featuring lynching scenes.

123. TRUDIER HARRIS, EXORCISING BLACKNESS: HISTORIAL AND LITERARY LYNCHING AND BURNING RITUALS (1984), *supra* note 12, at 1, *quoting* SUTTON GRIGG, THE HINDERED HAND (1905).

124. *See id.* at 1-2.

125. *Id.*

126. LANGSTON HUGHES, *Home, in* THE WAYS OF WHITE FOLKS (1933).

his white hometown. The musician's clothes are fancy, and his manner is superior. He makes the "mistake" of approaching his former music teacher, an elderly white woman, and the town erupts into violence; the mob lynches the musician for his pretensions. The achievements of the musician and, by implication, Hughes as well, were perpetually circumscribed by fear and helplessness.

The poem "Between the World and Me," by Richard Wright, exemplifies the feeling of emasculation:

> And one morning while in the woods I suddenly stumbled upon the thing,
> Stumbled upon it in a grassy clearing guarded by scaly oaks and elms.
> And the sooty details of the scene rose, thrusting themselves between the world and me. . .
> There was a design of white bones slumbering forgottenly upon a cushion of gray ashes.
> There was a charred stump of a sapling pointing a blunt finger accusingly at the sky.
> There were torn tree limbs, tiny veins of burnt leaves, and a scorched coil of greasy hemp;
> A vacant shoe, an empty tie, a ripped shirt, a lonely hat, and a pair of trousers stiff with black blood.
> And upon the trampled grass were buttons, dead matches, butt-ends of cigars and cigarettes, peanut shells, a drained gin-flask, and a whore's lipstick;
> Scattered traces of tar, restless arrays of feathers, and the lingering smell of gasoline.
> And through the morning air the sun poured yellow surprise into the eye sockets of a stony skull. . .
> And while I stood there my mind was frozen with a cold pity for the life that was gone. .
> The ground gripped my feet and my heart was circled with icy walls of fear—
> The sun died in the sky; a night wind muttered in the grass and fumbled with leaves in the trees; the woods poured forth the hungry yelping of hounds; the darkness screamed with thirsty voices, and the witnesses rose and lived:
> The dry bones stirred, rattled, lifted, melting themselves into my bones.
> The gray ashes formed flesh firm and black, entering into my flesh.
> The gin-flask passed from mouth to mouth; cigars and cigarettes glowed, the whore smeared lipstick red upon her lips.

> And a thousand faces swirled around me, clamoring that my life be burned. . .
> And then they had me, stripped me, battering my teeth into my throat till I swallowed my own blood.
> My voice was drowned in the roar of their voices, and my black wet body slipped and rolled in their hands as they bound me to the sapling.
> And my skin clung to the bubbling hot tar, falling from me in patches,
> And the down and the quills of the white feathers sank into my raw flesh, and I moaned in my agony.
> Then my blood was cooled mercifully, cooled by a baptism of gasoline.
> And in a blaze of red I leaped to the sky as pain rose like water, boiling my limbs.
> Panting, begging, I clutched childlike, clutched to the hot sides of death.
> Now I am dry bones and my face a stony skull staring in yellow surprise at the sun. . . .[127]

To Wright and to other black authors, lynching was an act of racial terrorism meant to be taken personally.

Black literature is preoccupied with the political and philosophical meaning of the lynching ritual. One novel by esteemed author John Edgar Wideman explores the ritual by reversing it.[128] In *The Lynchers*, four black men lament that the urban community of the twentieth century has become complacent about its heritage and forgotten its past. The men plan to rally the black community with the protest lynching of a scapegoat white. The conspiracy becomes an obsession to the men, who see in their plot to lynch a white policeman a chance to redeem history. *The Lynchers* is concerned with the moral consequences of violence and the symbolic significance of lynching. The would be lynchers expect that conspiracy will be empowering; instead, the plot is divisive. Unable to handle the violence that they themselves summoned, the men self-destruct.

Literature's effort to fathom lynching is a microcosm of the larger black struggle. Blacks as a group continue to grapple with the American experience of lynching, and black convicts are no exception. The disturbing notion of scapegoat killing is all the

127. Richard Wright, *Between the World and Me*, 2 THE PARTISAN REVIEW 18 (1935), *quoted in* HARRIS, *supra* note 12, at 98-99.

128. WIDEMAN, *supra* note 1.

more real to a death row population that is disproportionately black. The symbolism of the death sentence and the scapegoat tendencies of the death penalty system are exacerbated when a state executes by hanging. To the average death row inmate, the rope and the noose are the instruments of lynchers.

The affinity between hanging and lynching proved too vivid for the state of Montana. Although Montana law continues to provide for hanging as a means of execution,[129] state officials have conducted no hanging since 1943. In that year, the state hanged a black man who confessed to murder. The victim of the crime was a white woman.[130] Montana did not seek to hang another criminal until 1976. Again, the convict was a black man who had confessed to raping and killing a white woman.[131] In a state with as sparse a black population as Montana, the coincidence of the two death sentences is doubtful.

The death sentence of the second Montana convict was reversed on appeal.[132] The convict, Dewey Coleman, murdered the young woman with the help of a white accomplice. The state of Montana entered into a plea bargain with the accomplice, but refused to negotiate with Coleman. The consequence was an extreme disparity in the sentences of the two murderers; Coleman accused the state of racial discrimination against him. On appeal, the circuit court criticized the disparity and, accordingly, spared Coleman a hanging death.

The political nature of the death penalty overlaps with the political nature of hanging to create an allusive gray area. This is not a case of punishment fitting the crime. When blacks are disproportionately condemned to die and the method of death is hanging, it would seem that the punishment is made to fit the criminal. To the typical death row inmate, the trauma of a lynching-style death is not overcome by technical refinements. Lynching was a reminder of the powerlessness of blacks. The practice of hanging, with its aspect of ritual and its scapegoat victims, is reminiscent of lynching. Psychologically speaking, hanging revisits the unresolved antagonisms and racial terrain of lynching. The message of hanging is one of shameful dispatch.

129. MONT. CODE ANN. sec. 46-21-103(3) (1993).

130. *See* Campbell v. Wood, 18 F.3d 662, 727 (9th Cir. 1994).

131. In re Coleman, 177 Mont. 1, 579 P.2d 732 (1978).

132. Coleman v. McCormick, 874 F.2d 1280 (9th Cir. 1989).

CONCLUSION

With the decision in *Campbell*, the Ninth Circuit endorsed a mode of execution that is both a cruel barb and an unusual indignity to the class of persons most eligible for the penalty of death. The court's holding that hanging is constitutional destroys the Eighth Amendment tenet of "evolving standards of decency," a recognition that times change. To the litany of such historically disfavored punishments as beheading, drawing and quartering, and crucifixion, one might add another—hanging. A punishment that fits into a repertoire of repression cannot satisfy the mandate of decency. The *Campbell* decision ignores the fact that the noose is a loaded symbol. The story of more than a half-century of racial killings in this country is not forgotten simply because the state holds the rope.