Copyright © Journal of Prisoners on Prisons (1995)
All Rights Reserved. Cite this article as the Formatted Online Version (2006)

"Mephistophelean Volition"

Steven King Ainsworth
[Death Row, San Quentin, CA]

* * *

Oh, how cruel and diabolical we can be in our efforts to judicially murder individuals we have deemed beyond the pale!

In the spring of 1992, just prior to California's stepping into the position of being a killer state with the gas chamber execution of Robert Alton Harris after a quarter of a century hiatus, a civil rights class action suit was filed on behalf of all condemned inmates in California challenging the constitutionality of execution by lethal gas *[Fierro* v. *Gomez,* 790 F. Supp.966 (N.D.CAL.1992)].

In California, executions in the gas chamber are performed by lowering one pound of sodium cyanide pellets wrapped in cheese cloth into a mixture of sulfuric acid and distilled water. The chemical reaction, will produce hydrogen cyanide gas, the same gas known by its trade name Zyklon used by the Nazis to exterminate over a million men and women at Auschwitz-Birkenau.

Unfortunately, after some questionable rulings and conflicts between the 9th Circuit Court of Appeals and the United States Supreme Court[1], the following bit of macabre occurred:

> At 3:49 A.M., Harris walked into the gas chamber. Two minutes later, as the sulfuric acid was being pumped into the vat below Harris, Judge Pregerson telephoned the gas chamber, informing prison officials of the stay of execution. Harris, of course, could not understand the reason for delay. At 3:58 A.M., the sulfuric acid was drained from the vat. At 4:01 AM., Harris was taken from the gas chamber. While Harris had been strapped in the chamber, the Attorney General's office had sought an order from the United States Supreme Court vacating his stay of execution. In a one-paragraph motion to the Supreme Court, the Attorney General's office had typed "Mr. Harris is presently in the gas chamber". That sentence was crossed out by hand. The Attorney General's facsimile machine stamped the time of the correspondence to the Supreme Court as 4:06 A.M., minutes after Harris had been removed from the gas chamber. At 5:45 A M., the stay was lifted by a 7-2 vote in the U.S. Supreme Court and Robert Alton Harris was rushed back into the gas chamber and executed. The last-ditch attempt to save Harris was unsuccessful, but the class action lawsuit challenging the method of execution survived, and as a result the California legislature quickly passed a law, which the governor immediately signed, giving a condemned human being the option of choosing the method of his or her execution; lethal gas or lethal injection. If the condemned refuses to choose, they would be executed by lethal gas [California Penal Code: Section 3604].[2]

I questioned the validity of this latest legislative move in a letter to the *San Francisco Daily Journal* in early January of 1993:

> So the good people of California offer death by injection thinking it to be a more humane method, or was it to avoid the civil suit aimed at the gas chamber? Is it to make the whole process easier? To make killing less cruel? Having been in the. . . system most of my adult life and seeing firsthand some of the ineptness of these civil servants, I can well imagine the mess they will make of death by injection.[3]

This latter observation is aptly illustrated in the recent execution by lethal injection of a man in Illinois:

> As he was wheeled into the chamber, he made no eye contact. Almost his last sight of this world was an exit sign over the door. At 12:04 A M. the order was given to push the two buttons which were to release the lethal "juice" into the veins. As the poison began to

> work--a deadly cocktail of sodium pentathol, pancuronium bromide and potassium chloride--there was a reflex jerk of his head, followed by a loud snort. For three minutes, his puggish, wide open eyes bulged in their sockets. His flabby belly heaved in and out. Then, as if in a surreal black pantomime, an official stepped calmly forward and closed the theatre-like curtain. What had happened, it seems, is that the Illinois State death machine had malfunctioned. A technician had to replace the tubing because some of the poison had" gelled". When the curtains reopened, John had turned purple and was still twitching. Instead of taking ten minutes to execute him, it took nearly 20. He was finally pronounced dead at 12:58 A.M.[4]

With both of these executions in mind, many men and women on death rows across the nation, in states where an option of method is proffered, no doubt ponder this Mephistophelean volition and further agonize over their fate. It is human nature to fight death, especially a premeditated one, a death well planned in advance, a death not fought in a physical sense but one that is contested in a judicial arena. Even the matter of choice has been contested. To date, most courts have adopted this view:

> Individual reactions to the various methods of execution and the right to choose vary greatly. In some cases, a person may be so appalled by the thought of physically hanging by the neck [shot in the heart, choking on lethal gas or strapped into an electric chair and fried] that the option of death by lethal injection is welcome. To others, the idea of lying strapped upon a gurney awaiting the lethal poison to seep into one's veins at an unknown time may be equally abhorrent. These individuals embrace the idea of choosing the method of their death as a way to avoid their own private terrors. But to a third type of individual, the choice itself is cruel. As they await the day of their death, they are faced not only with the terror of death itself but also with the terror of making the wrong choice on how to die. These individuals do not embrace the idea of choice; they dread its requirement that they take an active part in their own demise *[State* v. *Rupe* (WASH. 1984) 683 P.2d.571].

Judicial resolution of this matter may well be beyond a court's ability. A court, not being actually faced with a fatal choice itself, must speculate whether removing the choice is to impose a cruel method of execution or retaining the choice imposes cruel psychological pressure on the condemned, or if in fact requiring an individual to actively participate in his or her own killing is in itself cruel and unusual.

The catch-22 is, how do you present evidence to support any of these contentions? The evidence can only come from the condemned. California provides that the choice must be made in writing not more than 10 days after being served with a notification of an execution date being set [California Code of Regulations, Title 15, Section 3349 (A,B,C,D)], which means from 20 to 60 days from actual execution. Psychological evidence can be gathered prior to that on the matter of being faced with choice and whether or not to choose at all. After the choice is made, psychological evidence can be gathered as to the impact of the choice upon the condemned

However, many obstacles must be overcome. First and foremost is the condemned's willingness to talk about what obviously is a most private matter at a most inopportune time. A court would have to order the state to allow access to the condemned by independent psychologists to evaluate the issue at a time when prison officials are most concerned with security. Examination at this point on a matter that may well prohibit an execution would be contrary to the goals of the state and their own psychiatric evaluations that are prerequisite to an execution.

Some evidence might be gathered in the years prior to a condemned human being's actually being faced with the choice. But such evidence may be tainted with beliefs that judicial relief will be granted long before a choice has to be made, that a stay of execution is imminent or that actual innocence is at issue and the condemned refuses to contemplate any outcome other than total exoneration.

What is the answer? It is my view that giving a condemned human being a choice about how he or she wishes to be exterminated is cruel. Requiring a condemned person to actively participate in his or her own state-sanctioned killing is cruel and unusual. Finally, if the State cannot make up its mind how it wishes to extinguish the lives of those it has condemned to death, then it should not be doing the killing at all.

---

[1] *Gomez* v. *U.S. DIST. CT.,* 112 S. Ct. 1652; *Gomez* v. *U.S. DIST. CT.,* NO.92-70237, 1992 U.S.APP. LEXIS 7735; *Vasquez* v. *Harris,* 112 S.Ct.1713 (1992).

[2] "Thoughts on the Cause of the Present Discontents: The Death Penalty Case of Robert Alton Harris", Chas. Sevilla and M. Laurence, CACJ Forum Vol. 20 No.1 (1993) FN: 130.

[3] *San Francisco Daily Journal,* "Already an Ordinary Execution", Wed., 25 Aug, 1993, Vol. 99-No. 164.

[4] Quoting William Cash, British journalist, eyewitness account, May 1994, Joliet, Illinois