



UNIVERSITY OF LEEDS

This is a repository copy of *Beastly Humans: The Welfare Model of Executions*.

White Rose Research Online URL for this paper:

<https://eprints.whiterose.ac.uk/123555/>

Version: Accepted Version

Article:

Jones, SI orcid.org/0000-0003-2940-4431 and Malkani, B (2017) *Beastly Humans: The Welfare Model of Executions*. *Law, Culture and the Humanities*. ISSN 1743-8721

<https://doi.org/10.1177/1743872117739563>

© The Author(s) 2017. This is an author produced version of a paper published in *Law, Culture and the Humanities*. Uploaded in accordance with the publisher's self-archiving policy.

Reuse

Items deposited in White Rose Research Online are protected by copyright, with all rights reserved unless indicated otherwise. They may be downloaded and/or printed for private study, or other acts as permitted by national copyright laws. The publisher or other rights holders may allow further reproduction and re-use of the full text version. This is indicated by the licence information on the White Rose Research Online record for the item.

Takedown

If you consider content in White Rose Research Online to be in breach of UK law, please notify us by emailing eprints@whiterose.ac.uk including the URL of the record and the reason for the withdrawal request.



eprints@whiterose.ac.uk
<https://eprints.whiterose.ac.uk/>

BEASTLY HUMANS: THE WELFARE MODEL OF EXECUTIONS

I. INTRODUCTION

On April 29, 2014, the State of Oklahoma botched the execution of Clayton Lockett.¹ The White House Press Secretary at the time, Jay Carney, stated that “...even when the death penalty is justified, it must be carried out humanely... this case fell short of that standard”.² This emphasis on “humane” execution methods sets the scene for what continues to be a period of turbulence in the history of the death penalty in the United States of America. Yet despite the importance of this standard, there is a lack of clarity about what constitutes a humane execution. The dominant view, as established through a series of US Supreme Court decisions from *Wilkinson v. Utah* in 1879, though to *Glossip v. Gross* in 2015, is that an execution is humane when “unnecessary cruelty” or suffering is avoided.³ Therefore, when debating whether a particular method or protocol is “humane”, the focus has tended to be on the amount of pain that the method under review inflicts on a condemned person.

We object to this orthodoxy. The “unnecessary cruelty” standard, we argue, mirrors that found in discourses relating to the killing of non-human animals,⁴ particularly companion animals. This previously under-explored perspective highlights that approaches to executing condemned humans and to killing companion animals are both premised on balancing a range of interests. These include the interest of the human/animal to be free from suffering, and that of observers to be free from distress. This weighing of interests, which we term the “welfare model”, demonstrates that contemporary execution protocols treat condemned humans as though they are morally and legally comparable to non-human animals. As such, lethal injections are contrary to the Eight Amendment, we argue, not because of the amount of pain that they expose a person to, but because they involve the relegation of human

beings to the same moral space that is occupied by companion animals, thus falling foul of the US Supreme Court's demand that executions respect *human* dignity.⁵

While it has been argued that the death penalty is per se incompatible with respect for the dignity of the person⁶, we are not concerned with that question in this paper. Instead, we take as our starting point the Supreme Court's position that the death penalty is compatible with respect for human dignity. Our focus is on whether lethal injections can ever be compatible with this requirement. Contemporary cases have tended to focus on specific lethal injection protocols, but in this article we demonstrate that as a conceptual matter, lethal injections are contrary to the Eighth Amendment. To advance this argument we begin by examining the historical transition from public, often humiliating and violent executions to the apparently serene death provided by the lethal injection. First, we tease out the factors that have influenced the adoption of one method over another, such as the well-being of the person being executed, and the sensibilities of others such as the execution team, witnesses, and the broader community. Second, we highlight how comparisons with approaches to killing non-human animals have long informed these debates, from experiments carried out on stray dogs to prove the effectiveness of electrocution to the use of animal euthanasia protocols, to both defend and challenge the legality of lethal injection protocols. We find evidence that the appearance of a humane death is crucial to maintaining public acceptance of the death penalty. This feeds our belief that in its lethal injection jurisprudence, comprising *Baze v. Rees* and *Glossip v. Gross*, the Supreme Court has misconstrued the constitutional requirement that punishments respect the dignity of the person. Although dignity is a morally and legally troublesome concept, we understand the term to mean that human beings should not be treated as something other than human, such as non-human animals or property. It follows from this

that “[t]o impose sanctions that damage and dehumanize is antithetical to basic human rights; such sanctions deny and suppress a person’s humanity and hence violate one’s inherent human dignity.”⁷

We then examine the principles which guide our killing of animals, showing exactly why contemporary human executions are not compatible with this understanding of dignity. As we explain, approaches to killing animals are premised on what we call “the welfare model.” This model is based upon the belief that although animals have worth, they nonetheless occupy a lesser moral status than humans. In the context of euthanizing companion animals, two principles flow from this: (a) the “humane treatment” principle, and (b) the “humane aesthetic” principle.⁸ The first of these takes the relative worthiness of animals into account, and stipulates that although it can be morally justifiable to terminate the lives of such animals, they should not be exposed to any more pain and suffering than is necessary to bring about death. The second is specific to those animals to which humans are emotionally attached. It aims to ensure that the death appears to be painless so to minimize the psychiatric suffering of humans. Whether animal or human, we see a balancing of interests in the calculation of what suffering is “necessary.” Yet legally, politically, and morally, the death penalty depends on the condemned person being viewed as a rational moral agent,⁹ attributes which are derived from their status as a human being. It follows that the processes which balance the interests of the person being put to death with the perception of those observing the execution dehumanize the condemned and as such are incompatible with respect for their dignity.¹⁰

We conclude by suggesting that those who oppose the death penalty ought to challenge the courts and politicians to take more seriously their commitment to human dignity. Doing so might result in the re-emergence of less aesthetically pleasant methods of execution, but the brutality of killing is something

that advocates of the death penalty ought to be willing to face. In reaching this point, we lend support to Justice Sotomayor's view, expressed in a recent dissent from a denial of certiorari involving a challenge to lethal injections. "States", Sotomayor writes, "have designed lethal-injection protocols with a view toward protecting their own dignity, but they should not be permitted to shield the true horror of executions from official and public view. Condemned prisoners... might find more dignity in an instantaneous death rather than prolonged torture on a medical gurney."¹¹ Although we do not agree that an instantaneous death satisfies the requirement to respect dignity, Sotomayor is correct to highlight the problems with a method of execution that is designed to protect the dignity of state authorities.¹²

II. EXECUTING HUMANS: THE TRAJECTORY TO WELFARE

Current debates regarding methods of execution in the USA can be located within a lengthy history of a search for a method of killing which serves a range of sometimes conflicting goals. These include the desire for visible retribution, the need for general deterrence, the requirement that the state maintain itself as morally superior to those it punishes and the limitations that have come with developing jurisprudence, especially that relating to the Eighth Amendment. In this section, we show that methods have gained dominance in response to altered political and cultural contexts. This leads us to the current day, whereby dissatisfaction with the lethal injection threatens the return of previously rejected execution techniques.

1. Public hangings and firing squads: putting penology first

Until the mid-nineteenth century, executions were often visibly brutal spectacles. They were intentionally violent and humiliating. Public hangings and firing squads, it was believed, served the

purposes of retribution and deterrence.¹³ They also demonstrated the sovereign's power over its subjects.¹⁴ However, by the early 1800s concerns surfaced that exposure to violence encouraged brutality among spectators, and turned condemned people into martyrs.¹⁵ By the 1830s, an emerging middle-class came to see the large crowds that attended public executions as "a mob oblivious to the moral lesson a hanging was supposed to impart".¹⁶ They considered themselves more refined and rejected public hangings as being morally equivalent to the accused's crimes. This concern led Connecticut to abolish public hangings in 1830, a move swiftly followed by other states.¹⁷

The constitutionality of firing squads was challenged in 1879, but in *Wilkinson v. Utah* the US Supreme Court dismissed the challenge on the grounds that the framers of the Eighth Amendment considered it acceptable. Nonetheless, the Court emphasized that executions which involved "unnecessary cruelty, are forbidden".¹⁸ This concern also affected discussions about hanging, particularly as people became aware of its unreliability.¹⁹ Given the breadth of concerns, in 1886, the New York legislature appointed a commission "to investigate and report at an early date the most humane and practical method known to modern science of carrying into effect the sentence of death."²⁰ The Commission felt that executions should be humane, partly out of respect for the condemned person and partly to minimize any negative impact on witnesses and the public. They further asked: "Should not the contemporary state seek to discover a way of killing that does not so closely resemble the revolting act which the criminal expiates?"²¹ These dual concerns set the scene for the emergence of the electric chair.

2. The electric chair: welfare's precursor

In its 1888 report, the New York Commission rejected a range of alternatives to hangings. The guillotine was rejected because it would “be needlessly shocking to the necessary witnesses”.²² Gassing was considered undesirable as it would take several minutes to bring about death. Firing squad was objected to because of concerns that it would normalize the fatal use of fire-arms. The Commissioners therefore grappled with a range of issues including the welfare of the inmate; the speed by which death was brought about; the need to ensure that executions did not normalize undesirable behavior; and the desire to protect the sensibilities of witnesses.

The Commissioners recommended the use of the electric chair.²³ Death by electrocution, it was believed, did not mutilate the body, was instantaneous, was certain to bring about death, and would therefore be kind to the inmate, witnesses and executioners.²⁴ This view was informed, in part, by the experiences of one of the Commissioners, Alfred Southwick. Southwick had witnessed the use of electricity to kill stray dogs, and was convinced that if dogs were killed instantaneously by the electric current, then such a method could be used to kill humans humanely.²⁵ In other words, methods used in the killing of non-human animals informed the execution techniques applied to humans. Indeed, the precise workings of the electric chair were also dictated by the results of animal experimentation. As Banner explains, “[i]t was only after electrocuting forty to fifty dogs, six to ten calves, and two horses that [authorities] concluded that at least 1,500 to 2,000 volts would be necessary to ensure the death of a human being”.²⁶

A constitutional challenge to New York's electric chair was rejected by the US Supreme Court in *Re Kemmler*²⁷ in 1890. However, the Court clarified that “Punishments are cruel when they involve torture

or a lingering death,” and that a method of execution will be unconstitutional if it does “something inhuman and barbarous – something more than the mere extinguishment of life”.²⁸ No longer were methods of executions to be determined by the retributive and deterrent purposes of capital punishment; humane treatment was now the primary driver.

3. Gassing: a concession to the welfare model

In 1921, Nevada became the first of several states to introduce execution by lethal gas, advancing the grounds that it was more humane than electrocution. Whereas electrocuted persons would convulse violently, those being gassed appeared to drift off peacefully to their death.²⁹ The New York Commission had earlier rejected gassing because of the length of time that it took to bring about death, and several commentators expressed unease with locking the condemned person alone in a small room prior to their death, asserting that a humane death requires minimized mental as well as physical suffering.³⁰ The fact that both of these concerns did not prevent the adoption of gassing indicates how the *appearance* of a humane death began to displace concerns with the inmate’s actual physical and emotional experience. Again, execution methods depended on non-human involvement: gas chambers were often tested on rabbits shortly before an execution, to ensure that it was working correctly.³¹ What was “good” enough for a rabbit was “good” enough for a human.

Even in those cases where the electric chair was still used, the experiences of the person being executed were considered to be of less importance than the experiences of those doing the executing. In *Resweber*,³² decided in 1947, Willie Francis challenged the State of Louisiana’s decision to subject him to a second execution, after the first attempt failed. Francis argued that “because he once underwent the

psychological strain of preparation for electrocution, now to require him to undergo this preparation again subjects him to a lingering or cruel and unusual punishment”.³³ The Court noted that “the traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence”.³⁴ However, Francis’ argument was rejected on the grounds that the “cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed”.³⁵ It seems that the intent of the State was more decisive than the actual anguish felt by the person being executed.

A little over a decade later, in 1958, the US Supreme Court clarified its approach to interpreting the Eighth Amendment. In *Trop v. Dulles* the Court opined that “[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man”.³⁶ This has controlled Eighth Amendment opinions ever since. We would expect, therefore, that future discussions about methods of execution would turn on whether the proposed method comported with respect for dignity. However, as explained below, in adopting lethal injections as the primary method of execution, jurisdictions across the US have paid scant attention to the dignity of the person. In upholding the constitutionality of lethal injections, the US Supreme Court has also failed in its duty to ensure that persons are put to death with respect for their dignity.

4. Lethal injections and the primacy of the welfare model

In 1972, in *Furman v. Georgia*³⁷, the death penalty was temporarily abolished by the US Supreme Court on the grounds that contemporary laws bred arbitrariness in the administration of capital punishment. As states responded by re-writing their death penalty statutes, they reconsidered methods of execution.

Gassing had come to be associated with the horrors of Nazi concentration camps, and authorities eventually turned to lethal injections. It is here that we see comparisons being increasingly drawn with animal euthanasia. For example, in 1973, the then Governor of California, Ronald Reagan, said: “[Y]ou call the veterinarian and the vet gives it a shot and the horse goes to sleep—that’s it...maybe we should review and see if there aren’t even more humane methods [of execution] now—the simple shot or the tranquilizer”.³⁸

The legislative debates that preceded Oklahoma’s adoption of lethal injections in 1977 go some way to revealing the legislature’s intentions. Instead of expressing concerns with dignity, several legislators cited the low costs of lethal injections.³⁹ The experience of Texas also suggests that authorities were not primarily concerned with the dignity of the person. Dr Etheredge, a veterinarian who was asked to provide advice on lethal injections, suggested that Texas authorities use an overdose of one drug, an anesthetic called sodium pentobarbital, because in the context of euthanizing animals it had proven to be “very safe, very effective, and very cheap”.⁴⁰ According to Etheredge, Dr Gray, the doctor in charge of prisoners, “was afraid of a hue and cry” if “people [think] we are treating people the same way that we’re treating animals”.⁴¹ Gray’s fear could be interpreted in two ways. It might be that Gray genuinely recognized that, despite their violation of social and legal norms, capital offenders remain human and should be treated (and killed) as human beings. Alternatively, it could be that Gray was more concerned with public perception. After all, according to Etheredge, Gray was more concerned with what people *would think*, rather than with the actual treatment of death row inmates as animals. As Kaufman-Osborn has argued, the adoption of lethal injections “may have had little to do with humanitarian concerns, but much to do with identifying a method that would temper opposition to the death penalty and reduce if not eliminate court challenges by the condemned”.⁴²

The focus on the experience of parties other than the condemned is further evident in some contemporary execution protocols. For example, the execution procedure in Montana provides that staff should be “adequately prepared and de-briefed to minimize any anxiety and/or negative impacts...”⁴³ Similarly in Ohio a “psychological debriefing” process is offered to staff.⁴⁴ Most states also provide specific services for the family members of victims and sometimes for those of the condemned.⁴⁵ Whilst the need for these support mechanisms acknowledges the significance of a human life being taken, such counselling could also be said to degrade the condemned metaphysically, because it seeks to mitigate the act of killing. This should be distinguished from the argument that it is demeaning to the condemned because it is seeking to alleviate the burden caused by loss of life. After all, we would not suggest that bereavement counselling outside the context of the death penalty is somehow undignified, merely because it seeks to help others with their loss. To be sure, these states also address the well-being of the condemned person. Such persons have rights to spiritual guidance and are often offered a mild sedative in advance of the execution. However, both these provisions and the Supreme Court jurisprudence fail to ensure that executions comport with the constitutional requirement to respect the dignity of the person. To explain this, we take a brief detour to explore the idea of dignity.

2. DIGNITY AND THE US SUPREME COURT

Dignity is a fraught concept about which there is little settled opinion.⁴⁶ Our purpose here is not to provide a substantive account of what dignity is, but rather to demonstrate that a concern with dignity is lacking not just from many lethal injection protocols, but also from the Supreme Court’s approach to considering the constitutionality of the lethal injection in a conceptual sense. At a rudimentary level, the

idea of dignity has often been linked to the features that distinguish human beings from other living entities. Kant, for example, argued that human beings have “inner worth” or dignity, because they have the ability to act as free, autonomous agents, who are capable of rational thought.⁴⁷ People are to be respected equally, since they do not differ in their worth regardless of their conduct or moral virtue. This conception of dignity goes beyond the principle of “humaneness”. It also includes treating each person with respect for their free will, or autonomy.⁴⁸ However, Chief Judge Kozinski argued in *Baal v. Godinez*⁴⁹, that the “capacity to choose” is what separates humans from animals: “the dignity of human life comes not from mere existence, but from that ability which separates us from the beasts—the ability to choose; freedom of will.”⁵⁰ Under this view, dignity involves the preservation of “whatever minimal modicum of agency is requisite to qualify a being as human.”⁵¹ However, agency and the capacity to choose cannot be the sole determinants of “dignity”. Some humans, such as babies, do not possess these qualities, and yet they would widely be regarded as able to suffer indignities.⁵² Human dignity must be grounded in something more general than this. We suggest that human dignity should be understood as a status concept.⁵³ It is membership of the human species that is crucial to our account.⁵⁴ The problems with lethal injections, then, is that such a method involves the proposition that it is acceptable to risk inflicting suffering on the condemned person so that others involved in the process are not psychologically troubled. The difficulties with this become more apparent through the Supreme Court’s lethal injection case-law. Whilst this too lacks clarity, we are able to identify key features and contradictions in the Supreme Court’s discussions of dignity.

1. Baze v. Rees (2008) and Glossip v. Gross (2015)

By 2008 most death penalty jurisdictions in America had adopted a three-drug execution protocol. The first was a sedative (usually sodium thiopental, until pentobarbital was introduced at the end of 2010); the second was a paralytic agent such as pancuronium bromide; and the final drug was a chemical, such as potassium chloride, which stops the heart and causes death.⁵⁵ In 2005, the medical journal *The Lancet* published an article that claimed that some inmates may suffer during these executions. This was followed in 2007 by a similar article in *Public Library of Science Medicine*.⁵⁶ In light of these findings, the constitutionality of Kentucky's protocol, which was substantially the same as that adopted in other states, was challenged.

In *Baze v. Rees*, petitioners argued that the drug protocol in Kentucky was less humane than that used to euthanize animals.⁵⁷ Counsel for Baze argued that where an animal's death is effected by barbiturate overdose, this is not accompanied by a paralytic drug.⁵⁸ The inclusion of a paralytic drug in executions, they claimed, risked the condemned being asphyxiated or suffering a heart attack whilst conscious, but physically unable to demonstrate their pain.⁵⁹ This objection was explained by anesthesiologist Dr Lubarsky, who opined that "vecuronium bromide would paralyze Plaintiff and render him unable to convey pain or suffering. Plaintiff would experience a sensation akin to being buried alive, but not be able to convey the feeling of pain or suffocation, and the paralysis would camouflage any voluntary movement that might result from an incomplete lack of consciousness".⁶⁰ This begs the question of why some States felt the need to administer a paralytic, given that veterinarians purposely avoided the use of paralytics.⁶¹ The answer to this was provided by the State's reply in *Baze*. The State asserted that the paralytic agent "does bring about a more dignified death, dignified for the inmate, dignified for the witnesses".⁶²

The Court rejected petitioners' analogy with animal euthanasia. Chief Justice Roberts stated that "other methods approved by veterinarians - such as stunning the animal or severing its spinal cord...make clear that veterinary practice for animals is not an appropriate guide to humane practices for humans."⁶³

Justice Stevens disagreed. Drawing on the work of Alper, Stevens said that "[i]t is unseemly—to say the least—that Kentucky may well kill petitioners using a drug that it would not permit to be used on their pets".⁶⁴ Stevens found the comparison useful for determining whether the standards employed in human executions are constitutionally acceptable. In his view, humans should not be executed in a manner which is considered unacceptable for animals.

The Court stayed silent on the State's submission regarding the dignity of the inmate, but noted that "[t]he Commonwealth has an interest in preserving the dignity of the procedure, especially where convulsions or seizures could be misperceived as signs of consciousness or distress".⁶⁵ That is, instead of being concerned that convulsions indicated that the condemned was *actually* experiencing severe and unnecessary pain, Roberts focused on the possibility that execution officials and witnesses might be untowardly disturbed by the inmate's distress. Similarly, he emphasized the "*State's* legitimate interest in providing for a quick, certain death"⁶⁶, rather than the *individual's* interest in avoiding suffering. Stevens rightly chastised Roberts: "This is a woefully inadequate justification. Whatever minimal interest there may be in ensuring that a condemned inmate dies a dignified death, and that witnesses to the execution are not made uncomfortable by an incorrect belief (which could easily be corrected) that the inmate is in pain, is vastly outweighed by the risk that the inmate is actually experiencing excruciating pain that no one can detect".⁶⁷

The Court ultimately dismissed petitioners' challenge, stating that a method of execution will only be unconstitutional if it "creates a demonstrated risk of severe pain. [And the prisoner] must show that the risk is substantial when compared to the known and available alternatives".⁶⁸ In other words, a method might pose a risk of severe pain, but will be constitutional if petitioners cannot show that there is a lower risk, readily available, alternative.

Following this, pharmaceutical companies began to object to the use of their products being used in executions.⁶⁹ Rather than halt executions until they could acquire the requisite chemicals, authorities began to experiment with different drugs, sometimes from unlicensed sources.⁷⁰ Consequently, just seven years later, a new protocol was challenged in the Supreme Court. *Glossip v. Gross* concerned the use of midazolam as a sedative in the three-drug protocol. Petitioners agreed that if administered properly, the execution would be "humane," but argued that there was a substantial risk of the drug failing to work as intended.

Writing for the Court, Justice Alito affirmed the *Baze* Court's approach to determining the constitutionality of a particular method of execution. However, his only mention of "dignity" came in a discussion of the execution of Clayton Lockett, which had taken place a year earlier. Alito stated: "The team eventually believed that it had established intravenous access through Lockett's right femoral vein, and it covered the injection access point with a sheet, in part to preserve Lockett's dignity during the execution".⁷¹ Alito equated respect for dignity with appearance, rather than the inmate's physical experience.

This raises an important aspect of the dignity debates. One function of punishment is the denunciatory message sent about an individual to the wider community. It follows that the awareness of how one appears to others when being punished alters the nature of the suffering involved. We acknowledge that humiliation - which is psychologically, but not necessarily physically, painful – can violate a person’s dignity, making it possible that Lockett’s dignity would have been undermined by the exposure of his genitals. Similarly, it seemed that the State believed that respect for dignity required a death that *looked* serene because the person would not writhe in agony or scream in pain.⁷² Thus, when the State in *Baze* submitted that a paralytic made execution more ‘dignified for the inmate’, it is likely that they were alluding to these kinds of concerns. This demonstrates that there can be a trade-off between the reduction in psychological and physical suffering, the desire not to be in agony, and the maintenance of public composure.⁷³ Despite this, we proceed on the basis that the minimization of severe physical pain should take precedence over the appearance of death, especially where alternative methods also permit the condemned to maintain composure.

The term “dignity” only appeared once more in the decision. Dissenting, Justice Sotomayor quoted the statement in *Roper v. Simmons* that “the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons”.⁷⁴ She then criticized the majority for “...misconstruing and ignoring the record evidence regarding the constitutional insufficiency of midazolam as a sedative in a three-drug lethal injection cocktail, and by imposing a wholly unprecedented obligation on the condemned inmate to identify an available means for his or her own execution”.⁷⁵ Thus, Sotomayor provides a little more guidance on what, for her, constitutes an execution that comports with respect for dignity. A method will be respectful of dignity if, according to medical evidence, it does not present a significant risk of pain.

Nor should the burden of finding a suitable execution method be placed on prisoners themselves, presumably because it would be undignified to be compelled to assist in your own death.

From the preceding account, we can identify two conceptions of dignity. The *Glossip* majority related (in)dignity with public exposure of bodily mutilation, and Sotomayor related respect for dignity to the avoidance of actual pain, and to the avoidance of requiring a person to be complicit in their own death. A further conception was provided by the British Royal Commission in *Capital Punishment* in 1953, which related dignity with autonomy. In contrast to Sotomayor, the Commission took the view that “human nature is so constituted as to make it easier for a condemned man to show courage and composure in his last moments if the final act required of him is a positive one, such as walking to the scaffold, than if it is mere passivity, like awaiting the prick of a needle”.⁷⁶ Under this view, it is not dignified to be killed while strapped to a gurney, regardless of which protocols are in place. Although these differences might be considered indicative of the problems with dignity as a concept, we suggest that one common feature between Sotomayor and the British Commission is that they responded to very human concerns. Other than suffering, we do not worry about these factors—namely the ability to choose or contribute to one’s own death—when it comes to killing animals, even those we care about.

What is missing from these accounts, however, is recognition that to balance the experience of the condemned person with that of witnesses to the execution treats capital convicts as if they are less-than-human. To explain this, we need to look more closely at the approaches taken to killing animals. We can then appreciate the role of the welfare model in human executions and its relationship with the Eighth Amendment.

IV. THE WELFARE MODEL: ANIMAL EXPERIENCES, HUMAN INTERESTS

Whilst the analogy with animal euthanasia was rejected in *Baze*, we suggest that the comparison is illuminating. The attachment that people feel to companion animals is significant, often resulting in the animal being assigned a social role of friend or family member.⁷⁷ Companion animals therefore exist in “the liminal space between object and individual being, between...nonperson and unique person”.⁷⁸ In particular, it can be argued that dogs exist “at the borders of the human”.⁷⁹ Thus, such animals are considered to occupy a moral space below humans, but above other animals to whom humans feel less affinity. This mimics the ambivalence towards the status of capital convicts who, despite being biologically human, are often considered to be atypical of human beings.⁸⁰ This results in discourse and treatment which is in crucial ways equivalent to that of those animals whose status has been amplified to that of “low-status human”. It is only when we appreciate the overlapping status of (some) animals and capital convicts that we can understand how this kind of moral status purgatory leads to a balancing of interests in bringing about death.

In making our argument, we accept the premise that there is a moral difference between humans and other animals, and that this is central to the meaning of human dignity. This reflects mainstream orthodoxy⁸¹ that although animals are morally inferior to humans they are still sentient beings and therefore have, at minimum, an interest in avoiding suffering.⁸² Humans kill animals for a wide variety of reasons, including (non-exhaustively) slaughter for consumption, “euthanasia” of ill or “dangerous” companion animals, diseased animals and those used in scientific experiments, population control, blood sport, and pest extermination. Often the choice of killing method will be informed by the human interest that is being served. For example, the flesh of animals slaughtered for food needs to be free of poisons and absent excess blood. This means that many animals will be stunned, their death brought about by the

severing of major blood vessels. Indeed, the numerous purposes and human interests in terminating the lives of animals means that a huge range of methods of killing are invoked. As we highlight in relation to companion animals below, whether such a method accords with the demands of “welfare” will be determined by reference to what suffering is necessary to achieve the relevant human goals.

Because of our ambivalence towards the moral status of pets, the euthanasia of companion animals provides the most instructive comparator to human executions. The American Veterinary Medical Association (AMVA) Guidelines for the Euthanasia of Animals can be used to establish what the welfare model means in this context. These suggest that euthanasia, which it says is “tantamount to the humane termination of an animal’s life”⁸³ should be guided by two interlinked duties. These are (a) “humane disposition,” whereby death is in the animal’s interests, and (b) “humane technique.” Humane technique (which applies to all killing contexts) involves effecting the most rapid, painless and distress-free death possible in the circumstances. These recognize that most animals can feel pain, framing our moral obligations to non-humans. Francione has used the term “humane treatment principle” to summarize this emphasis on suffering.⁸⁴ Put simply, this means that companion animals can be used and killed in ways that benefit humans without the need for this to be in the animal’s interests so long as they are not made to suffer unnecessarily. The “humane treatment principle,” then, encompasses the requirement that suffering either be avoided or justified by reference to its utility to humans.

These assessments are further complicated by the basis upon which we assign social significance to animals. More attractive animals have a greater chance of being attributed human “feelings”. For example, whilst “pigs rate much higher than koalas on intelligence tests... pigs don’t writhe in quite the right humanoid way, and the pig’s face is the wrong shape for the facial expressions... So we send pigs

to slaughter with equanimity, but form societies for the protection of koalas”.⁸⁵ This disparity is amplified when we consider an animal to be more than just pleasant to look at, or even a pet, but rather a companion. Here, emotional connections and co-dependence are so strong that we feel a special interest in *that* animal’s suffering.⁸⁶

The status of companion animals as something more than just animal means that those who are involved in the killing may be emotionally affected by it. Put another way, when humans are not emotionally attached to the animal being killed, the unpleasantness of killing (in terms of gore and visibility of suffering) need not be hidden. The only considerations are the purpose of killing and the welfare of the animal in the sense of minimized suffering. By comparison, when we euthanize companion animals, the external appearance of death is a further limiting factor when choosing how to kill the animal. We term this further consideration the “humane aesthetic” principle, since it refers to the *appearance* of humaneness.

We see evidence of the “humane aesthetic” principle in the warnings about the “side effects” of death issued to those who are to witness companion animal euthanasia. In most cases, such animals will be killed by the administration of a large dose of barbiturates, sometimes with prior sedation. The reason for this is not maximized humane technique. Instead, the interests of the animal are balanced with considerations of the welfare of external parties. This is necessary because death is liable to look unpleasant. In the UK, the Animal Welfare Foundation (AWF) warn those wishing to be present at the death that, “[e]very animal, including humans, has some reflexes which can happen at the time of death. They can sometimes be quite shocking or upsetting...”.⁸⁷ They go on to explain that this might include the taking of deep breaths and gasping, muscle twitching and the emptying of the bladder and bowels.

Similar concerns are noted in the AMVA Guidelines, which highlights the emotional impact of euthanasia on those involved.⁸⁸ Whilst these side-effects of death can be disagreeable, they are more tolerable than methods which involve bloodletting such as decapitation or shooting.

Additionally, there are distinct emotional burdens experienced by veterinarians carrying out euthanasia. The AMVA note that “[v]eterinarians and their staffs may also become attached to patients and struggle with the ethics of the caring-killing paradox, particularly when they must end the lives of animals they have known and treated for many years. Repeating this scenario regularly may lead to emotional burnout, or compassion fatigue”.⁸⁹ Thus, in animal euthanasia, the concern for those carrying out the killing is not that they will be traumatized⁹⁰ by witnessing death so much as recognizing that their role for a substantial period, like that of prison staff, is to care for the condemned. They may also find stressful the pressure to provide an “aesthetic death”.⁹¹ If they, for example, miss the animal’s vein, the animal is likely to show pain. This raises possibility of having to deal with adverse (human) client emotions as well as personal distress. Thus, we adapt Francione’s description to suggest that in addition to humane treatment, the welfare model of killing in the context of animal euthanasia includes the “humane aesthetic” principle. This encapsulates the notion that sometimes the appearance of death should inform the choice of killing method, this being a legitimate element of the calculation as to *necessary* suffering.

Appreciating how this emotional dynamic and the resulting demand for humane aesthetic has impacted upon the way that animals are killed is particularly important given moves by some states to adopt one or two drug protocols in cases of human executions.⁹² This is directly comparable to the method used in companion animal euthanasia. It might appear that these protocols, absent a paralytic, respect the

dignity of the offender. For example, it was announced on 12 June 2017 that a paralytic agent will no longer be used in Arizona. Dale Baich, who represents Arizona death row inmates, said that “The state is taking appropriate steps to decrease the risk that prisoners will be tortured to death”⁹³ because any signs of suffering during execution will no longer be hidden from view, and can thus be addressed speedily. However, whilst it is true that the removal of a paralytic makes more likely the exposure of any suffering, it would be wrong to suggest that this change results in a respect for human dignity. These protocols are still designed to kill in a way which gives weight to the appearance of death, albeit with less certainty of the elimination of all visible side-effects. Whilst this is clearly preferable to techniques which are designed to mask suffering, to give weight to the experience of observers when choosing a killing method is to treat the offender as if their interests are equivalent to those who are less-than-human.

We have shown that Chief Justice Roberts was mistaken to say, as he did in *Baze*, that comparisons cannot be drawn between human executions and animal euthanasia. In focusing on stunning and severance of the spinal cord, Roberts failed to recognize that the principles behind human executions mirror those behind the killing of companion animals. We do however recognize one important difference between the killing of humans and that of companion species. Where there may be an element of humiliation (such as was the case for Lockett when his genitals were exposed) it is possible that, in these limited circumstances, humane aesthetic may advance the dignity of a condemned person.

The dominance of the welfare model can, and should, be located within a broader tendency to dehumanize those accused of capital crimes.⁹⁴ Neal argues that dehumanization “involves denying that the individual... shares in whatever it is that we regard as *uniquely important* about human beings; a

denial, in other words, of precisely the status that the term “human dignity” tries to capture”.⁹⁵ Such dehumanisation serves at least two functions. First, it helps communities rationalize how a person could commit a horrific act. Second, exclusion of people from the “human moral circle”⁹⁶ enables punishment of the offender in ways that they would not normally treat another human being, including executions pursuant to a death sentence.⁹⁷ Dayan has demonstrated how this widespread practice has drawn lines to facilitate dispossession, disenfranchisement, and death in the penal system.⁹⁸ The language of humane treatment may itself be indicative of the moral ambivalence felt towards convicts. In this regard, our analysis of the jurisprudence reflects Esmeir’s argument that, in law, humans *possess* humaneness whereas dehumanized subjects (such as convicts and animals) *receive* it.⁹⁹ This provides one reason why an aesthetic death may be preferred by legislators; it allows oppressive practices such as executions to be transformed into apparently humane ones. As Sarat has noted: “We give them a kinder, gentler death than they deserve to mark a boundary between the “civilized” and the “savage,”... We kill humanely, not out of concern for the condemned but rather to vividly establish a hierarchy between the law-abiding and the lawless.”¹⁰⁰ Concurrently, the visibility of suffering in botched executions means that the state has transgressed its own boundaries by openly causing unnecessary suffering, something which is inherently dehumanizing.

Whilst dehumanization is prevalent at most stages of the capital process, it is important to note that the prevailing view is that offenders are “re-humanized” in the moments before, and during, the execution. This is done by offering the choice of a last meal and the opportunity to speak before their execution. LaChance suggests that “[t]hrough these individualizing procedures, inmates are portrayed as autonomous actors endowed with free will and distinct personalities, in possession of both a kind of agency and authenticity”.¹⁰¹ By appearing to grant the condemned person some degree of control in their

last moments, the system affirms that the condemned person is a rational, moral agent, who is deserving of death.

Moreover, as we condemn the act of premeditated killing generally, the people involved in the execution must be absolved of responsibility for their impending actions. Thus, in addition to dehumanizing them, we make the condemned person complicit in their own execution, minimizing any moral culpability that the executioner might feel. As Johnson writes, these “[s]eeming civilities are invoked to move the condemned along to their deaths in an orderly, unremarkable, seemingly voluntary procession, allowing the rest of us to live with executions, and with ourselves.”¹⁰² This point is crucial to the question of how executions are carried out. Even when inmates *are* treated as human beings, this is not wholly out of respect for their dignity, but rather to assuage the feelings of those who are involved in the imposition of capital punishment.¹⁰³

V. CONCLUSIONS

Blecker has contended that “How we kill those we rightly detest should in no way resemble how we kill or euthanize beloved...pets”.¹⁰⁴ This is because we execute human beings in response to their moral culpability, whereas most animals are not ascribed moral blameworthiness. However, as we have shown, the welfare model has come to dominate discourses regarding of methods of execution. The way we kill those we “detest” does in fact very much resemble the way we kill pets. The weight given to the interests of external parties in an aesthetically pleasing death mirrors approaches to animal euthanasia, suggesting that the actual experiences of the condemned person may be less important than how others perceive their death. In endorsing this approach, policy-makers and judges have contradicted the principles which are meant to guide their approach to methods of execution. The welfare model does not

assist with the penological purpose of retribution; nor does it satisfy the political need to draw a moral distinction between the state-sanctioned execution and the criminal homicide that is being condemned. Fundamentally, the welfare model fails to advance the constitutional requirement to respect the human dignity of the person.

Several states have recently indicated a willingness to return to methods of execution such as firing squad, electrocution and gassing. None of these developments are premised on a concern with respect for dignity.¹⁰⁵ On April 17, 2015, Governor Fallin of Oklahoma signed into law the use of nitrogen oxide in the event that lethal injections are no longer possible. Fallin acknowledged the interests of the offender when she said “I believe capital punishment must be performed effectively and without cruelty.” However, critics of the Bill noted that the use of nitrogen oxide is untested, and that some states prohibit the use of such gas when euthanizing animals.¹⁰⁶ On March 23, 2015, Utah passed a law permitting the use of firing squads in the event that the state is unable to administer lethal injections. Whereas Justice Sotomayor has indicated a preference for firing squad on the basis that such a method comports with respect for dignity, Representative King—speaking against the Bill—highlighted the trauma that would be felt by those tasked with pulling the trigger. This is indicative of how the welfare model might be used to defeat the adoption of a method that prioritizes humane method over aesthetic.¹⁰⁷

Chief Judge Alex Kozinski’s proffered rationale for favoring firing squads suggests that respect for dignity is not necessarily incompatible with the welfare model. Kozinski states that “If we as a society cannot stomach the splatter from an execution carried out by a firing squad, then we shouldn’t be carrying out executions at all.”¹⁰⁸ Although this appears to prioritize dignified treatment over the

aesthetic quality of the execution, he also states that firing squads require less active involvement on the part of executioner.¹⁰⁹ Thus whilst not being motivated by the aesthetic quality of the death, he is nonetheless partly driven by minimizing the impact on those who administer executions. It is possible, then, that visibly brutal executions could be humane, more respectful of an individual's dignity, and protect the psychological wellbeing of the executioners.

Execution protocols which balance the interests of witnesses' and those of the condemned dehumanize the inmate.¹¹⁰ Those who oppose the death penalty ought to seize upon this argument. They should make clear that the burden is on supporters of the death penalty to either embrace aesthetically unpleasant deaths, or accept that seemingly pleasant deaths are unconstitutional because they fail to comport with the constitutional requirement to treat and kill human beings as human beings. We recognize the uphill struggle involved in convincing a majority of this argument, but posit that any progress towards abolition requires such difficult questions to be grappled with.

Acknowledgements

We are grateful to Wei-Sheng Lin for his excellent research assistance, and to Professor Robert Johnson, Professor Erika Rackley, Dr Mary Ford, Dr Charlie Eastaugh, and the two anonymous reviewers for their comments on earlier drafts. All errors are attributable to the authors only.

¹ Katie Fretland, “Scene at Botched Execution of Clayton Lockett was a Bloody Mess” *The Guardian*, 13 December, 2014.

<https://www.theguardian.com/world/2014/dec/13/botched-oklahoma-execution-clayton-lockett-bloody-mess>

² Jerry Markon et al, “White House: Execution was not conducted humanely” *The Washington Post*, 30 April, 2014

https://www.washingtonpost.com/politics/2014/04/30/5a40bd62-d06c-11e3-a6b1-45c4dff85a6_story.html

³ *Wilkerson v. Utah*, 99 U.S. 130, 136 (1879); *Glossip v. Gross*, 135 S. Ct. 2726 (2015)

⁴ This is accepted within much of the academic literature and is an established standard within animal welfare regulations.

See also Gary Francione, “Animal Welfare and the Moral Value of Non-Human Animals” *Law, Culture and the Humanities* 6 (2010) 24.

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

⁶ For the view that the death penalty is per se incompatible with respect for dignity, see the concurring opinion of Justice Brennan in *Furman v. Georgia*, 408 U.S. 238 (1972). Also see Bharat Malkani, “Dignity and the Death Penalty in the United

States Supreme Court? *Hastings Const. L. Q.* 44 (2017) 145. For a defense of capital punishment, see, for example, Walter Berns, *For Capital Punishment: Crime and the Morality of the Death Penalty* (New York: Basic Books, 1979).

⁷ Robert Johnson, *Reflections on the Death Penalty: Human Rights, Human Dignity, and Dehumanization in the Death House*, 13 *Seattle Journal for Social Justice* 583, 588 (2015).

⁸ This is not an orthodox definition of the welfare model, but it is ours.

⁹ Rational choice theory was popularised by Gary Becker in “Crime and punishment: an economic approach” *Journal of Political Economy* 76 (1968), 169. In relation to the death penalty it was a cornerstone of Immanuel Kant’s justification for the imposition of the death penalty. See Immanuel Kant, *Groundwork for the Metaphysics of Morals* (Thomas E. Hill and Arnulf Zweig eds., Arnulf Zweig trans., Oxford, OUP, 2003) AK 4:434 – AK 4:436.

¹⁰ There is an extensive body of literature on the (un)constitutionality of lethal injections as a method of execution. See, for example, Deborah Denno “The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty” *Ford. L. Rev.* 76 (2007) 105; Timothy V. Kaufman-Osborn, “The Death Of Dignity” in Austin Sarat & Jurgen Martschukat eds., *Is the Death Penalty Dying?: European and American Perspectives* (Cambridge, CUP, 2011), p. 204.

¹¹ *Arthur v. Dunn*, 580 U.S. (2017) (Sotomayor J., dissenting from denial of certiorari).

¹² For the view that the dignity of state authorities and the dignity of the individual are inter-related, see Malkani, “Dignity”.

¹³ Stuart Banner, *The Death Penalty: An American History* (Cambridge, Mass, 2003), pp.146-147.

¹⁴ Michel Foucault, *Discipline and Punish* (New York, Random House, 1995), p.50.

¹⁵ Banner, “American History”, pp.148-149. Cesare Beccaria raised a concern with the brutalizing effect of executions in 1764, see Cesare Beccaria, *Beccaria: On Crimes and Punishments and Other Writings* (Richard Bellamy ed., Richard Davies et al. trans., Cambridge, CUP, 1995).

¹⁶ Banner, “American History”, p.154.

¹⁷ *Op. cit.*, p.154.

¹⁸ Wilkerson, p.136.

¹⁹ Banner, “American History” p.176-177.

²⁰ New York Commission on Capital Punishment, *Report of the Commission to Investigate and Report the Most Humane and Practical Method of Carrying Into Effect the Sentence of Death in Capital Cases.* (Ithaca, New York, 1888), p.3.

²¹ *Op. cit.*, p.35.

²² Banner, “American History”, p.179.

²³ Jürgen Martschukat, “The Art of Killing by Electricity: The Sublime and the Electric Chair”, *The Journal of American History* 89 (2002) 900.

²⁴ New York Commission, pp.75-80.

²⁵ Banner, “American History”, pp.178-179.

²⁶ Op. Cit., p.183.

²⁷ 136 U.S. 436, 446 (1890).

²⁸ Op. Cit. p.446.

²⁹ Banner, “American History”, pp.196-207.

³⁰ Op. Cit., pp.198-199.

³¹ This is portrayed in the documentary, *Fourteen Days in May* (dir. Paul Hamann, 1987) which chronicled the final two weeks of Edward Earl Johnson’s life before he was gassed to death by the State of Mississippi.

³² 329 U.S. 459 (1947)

³³ Op. Cit., p.464.

³⁴ Op. Cit., p.463.

³⁵ Op. Cit., p.464.

³⁶ 356 U.S. 86, 100 (1958).

³⁷ 408 U.S. 238 (1972).

³⁸ Coleman McCarthy, “Killing With Kindness” *Washington Post*, June 11, 1983, A23.

³⁹ Denno suggests that many legislators suspected that lethal injections would not pass the test of the Eighth Amendment.

Deborah Denno, “For Execution Methods Challenges, the Road to Abolition is Paved with Paradox” in C.J. Ogletree Jr & A. Sarat, *The Road to Abolition? The Future of Capital Punishment in the United States* (New York, NYU Press, 2003).

⁴⁰ Ty Alper, “Anesthetizing the Public Conscience: Lethal Injection and Animal Euthanasia,” *Fordham Urb. L.J.* 35 (2008) 817, 817.

⁴¹ Op. Cit.

⁴² Timothy V. Kaufman-Osborn, *From Noose to Needle: Capital Punishment and the Late Liberal State* (Ann Arbor, University of Michigan Press, 2002) p.180. He has also argued that lethal injections are primarily about protecting the

feelings of witnesses: “the sensibilities of the living come to take precedence over any concerns that might be registered in the name of the dignity of the condemned” (Kaufman-Osbourne, ‘Dignity’, p.205).

⁴³ Montana Department of Corrections (2013) Montana State Prison Execution Technical Manual p4, para E.

⁴⁴ State of Ohio, Department of Rehabilitation and Correction, “Execution” Para IV.

⁴⁵ See, for example, Montana Department of Corrections (2013) Montana State Prison Execution Technical Manual p4, para D.

⁴⁶ The literature on the general jurisprudential and philosophical problems with “dignity” is too vast to outline here, but a useful collection of essays on the subject can be found in Christopher McCrudden ed. *Understanding Human Dignity* (Oxford, OUP, 2013). For dignity and the death penalty specifically, see Maxine Goodman, “Human Dignity in Supreme Court Constitutional Jurisprudence”, *Neb. L. Rev* 84 (2006) 740 and Malkani, “Dignity”.

⁴⁷ Kant, “Groundwork”, AK 4:434 – AK 4:436.

⁴⁸ Alan Gewirth, “Human Dignity as the Basis of Rights”, in M.J. Meyer & W.A. Parent, eds. *The Constitution of Rights: Human Dignity and American Values* (Ithaca, Cornell University Press, 1992) p.15.

⁴⁹ No. 90-15716 (CA9, June 2, 1990)

⁵⁰ Alex Kozinski, ”Tinkering with Death”, in H.A. Bedau & P.G. Cassell eds. *Debating the Death Penalty : Should America Have Capital Punishment? The Experts on Both Sides Make Their Best Case* (Oxford, OUP, 2004) p.9.

⁵¹ Kaufmann-Osborn, “Dignity”, p.228 (internal quotation marks omitted).

⁵² Mary Neal, “Not Gods but Animals: Human Dignity and Vulnerable Subjecthood” *Liverpool L. Review* 33 (2012) 177

⁵³ For discussion of the original and meanings of dignity as a right (as opposed to an ethical value) see Mary Neal, “Dignity, Law and Language Games” *Int. J. Semiot. Law* 25 (2012) 107

⁵⁴We are alert to allegations of speciesism. See, for example, Peter Singer, *Practical Ethics*, (2nd ed, Cambridge, CUP 1993). Whilst our discussion necessarily centres on human dignity, it is not our purpose to comment on whether the reach of dignity ought to be limited humans. For a discussion of animal dignity, see David DeGrazia, “Human-Animal Chimeras: Human Dignity, Moral Status and Moral Prejudice”, *Metaphilosophy* 38 (2007) 309

⁵⁵ A State by State breakdown can be found at <https://deathpenaltyinfo.org/state-lethal-injection> (last accessed 15 June 2017). This link also provides information regarding current protocols, including the number of drugs involved.

⁵⁶ Jürgen Martschukat, “No Improvement over Electrocution or Even a Bullet: Lethal Injection and the Meaning of Speed and Reliability in the Modern Execution Process,” in in C.J. Ogletree Jr & A. Sarat, *The Road to Abolition? The Future of Capital Punishment in the United States* (New York, NYU Press 2009) p.188-253

⁵⁷ *Baze v. Rees*, 553 U.S. 35 (2008)

⁵⁸ Brief for Petitioners, cited in *Baze*, 58 (“This drug combination is so sensitive to error and potentially inhumane that Kentucky law, like that of many other States, prohibits its use in animal euthanasia without aesthetic monitoring by trained professionals.”)

⁵⁹ Brief for Petitioners, cited in *Baze*, 54

⁶⁰ Michael Lewis, “The myth of Florida’s perfect executions”, *The Tampa Tribune* April 29, 2015
<http://www.tbo.com/list/news-opinion-commentary/the-myth-of-floridas-perfect-executions-20150429>

⁶¹ Alper, “Anesthetizing”, p.821. Also see American Medical Veterinary Association (2013), Guidelines For The Euthanasia Of Animals, 16: “Loss of consciousness should precede loss of muscle movement. Agents and methods that prevent movement through muscle paralysis, but that do not block or disrupt the cerebral cortex or equivalent structures...are not acceptable as sole agents for euthanasia of vertebrates because they result in distress and conscious perception of pain prior to death.”

⁶² Alper, “Anesthetizing”, p.817.

⁶³ *Baze*, 58. Not all judges have rejected this analogy. Judge Price on the Court of Criminal Appeals of Texas, for example, has said: “a national trend that recognizes that pancuronium bromide is inhumane for use in animals can also be said to be a national trend that recognizes that pancuronium bromide is inhumane for use in human beings.” *Ex Parte Hopkins*, 160 S.W.3d 9, 10 (Tex. Crim. App. 2004) (Price, J., dissenting).

⁶⁴ *Op. Cit.* pp.72-73.

⁶⁵ *Op. Cit.*, p.57.

⁶⁶ *Op. Cit.*, p.58.

⁶⁷ *Op. Cit.*

⁶⁸ *Op. Cit.*, p.61.

⁶⁹ On the controls imposed by such companies to ensure that their drugs were not used in executions, see Reprieve, Stop Lethal Injection Project (<http://www.reprieve.org.uk/topic/lethal-injection/>). The website of the Death Penalty Information

Center contains up-to-date information about the restrictions on the supply of drugs needed for lethal injections. See <http://www.deathpenaltyinfo.org/lethal-injection>.

⁷⁰ Chris Geidner & Chris McDaniel, “States Lawyer Up, Looking To Find A Way To Buy Execution Drugs From Overseas” (BuzzFeed News, 26 Oct, 2015) https://www.buzzfeed.com/chrisgeidner/states-lawyer-up-looking-to-find-a-way-to-buy-execution-drug?utm_term=.rhVG8BX3B#.jaxw9vMKv .

⁷¹ Glossip, 2734.

⁷² Alper, “Anesthetizing”, p.833 provides a detailed comparison of execution protocols with those used in animal euthanasia.

⁷³ This issue is also raised in relation to the psychological pain caused by the delays in administering the death penalty.

Efforts to protect human dignity (by not executing the innocent) have arguably led to the creation of a super due process that forces the condemned to wait on death row for well over a decade. We might therefore question whether the psychological pain of waiting compromise their dignity. Even Kant, who thought that dignity demanded the death penalty, required that convicts were not subject to ‘abominable’ suffering. Kant, ‘Metaphysics’, p.333.

⁷⁴ Glossip 2797, citing *Roper v. Simmons*, 543 U.S. 551, 560 (2005) .

⁷⁵ Glossip 2797.

⁷⁶ Report of the Royal Commission on Capital Punishment 1949-1953 (1953) (Cmd. 8932), pp.260-2610.

⁷⁷ Kenneth Shapiro, “Understanding dogs through kinesthetic empathy, social construction, and history”, *Anthrozoos* 3 (1990) 184.

⁷⁸ Clinton Sanders, “Killing with Kindness: Veterinary Euthanasia and the Social Construction of Personhood” *Sociological Forum* 10 (2005) 195, 196. Also Rebekah Fox, “Animal Behaviours, Post-Human Lives: Everyday Negotiations of the Animal-Human Divide in Pet-Keeping”, *Social and Cultural Geography* 7 (2006) 525.

⁷⁹ Phased co-opted from Erica Fudge et al eds. *At The Borders Of The Human: Beasts, Bodies And Natural Philosophy In The Early Modern Period* (New York, St. Martin’s Press, 2002).

⁸⁰ Colin Dayan, *The Law Is A White Dog: How Legal Rituals Make And Unmake Persons* (Princeton, Princeton University Press, 2011).

⁸¹ This is not universally accepted, see, for example Donna Haraway, *When Species Meet* (Minneapolis: University of Minnesota Press, 2007).

⁸² Alastair Cochrane, “Do Animals Have an Interest in Liberty?” *Political Studies* 67 (2009) 66

-
- ⁸³ American Medical Veterinary Association, Guidelines For The Euthanasia Of Animals (2013) p.6.
- ⁸⁴ Gary Francione, *Animals, Property, And The Law* (Philadelphia, Temple University Press, 1995); “Animal Welfare and the Moral Value of Non-Human Animals” *Law, Culture and the Humanities* 6 (2010) 24.
- ⁸⁵ Richard Rorty, *Philosophy And The Mirror Of Nature* (Princeton, Princeton University Press, 1979) p.190.
- ⁸⁶ Anthony Podberscek, Anthony et al, eds., *Companion Animals And Us: Exploring The Relationships Between People And Pets* (Cambridge, CUP, 2000); Donna Haraway, *When Species Meet* (Minneapolis, University of Minnesota Press, 2008)
- ⁸⁷ Animal Welfare Foundation, *Saying Goodbye – the Ultimate Kindness: What You Need to Know about Euthanasia*, (2013), p.9.
- ⁸⁸ American Medical Veterinary Association, Guidelines For The Euthanasia Of Animals (2013), p.14.
- ⁸⁹ AMVA, p.14; C.S. Manette, “A reflection on the ways veterinarians cope with the death, euthanasia, and slaughter of animals” *J. Am. Vet. Med. Assoc.* 225 (2004) 34.
- ⁹⁰ Vanessa Rohlf & Pauline Bennett, “Perpetration-induced Traumatic Stress in Persons Who Euthanize Nonhuman Animals in Surgeries, Animal Shelters, and Laboratories” *Soc’y. & Animals* 13 (2005) 201.
- ⁹¹ Earl Shelp, “Active infant euthanasia is acceptable”, in N. Bernards, ed. *Euthanasia: Opposing Viewpoints* (San Diego CA, Greenhaven Press, 1989) pp.190-194.
- ⁹² For example, between July 2012 and March 2017, the State of Texas carried out 60 executions using only the drug pentobarbital. See <https://deathpenaltyinfo.org/state-lethal-injection> (last accessed 16th June 2017).
- ⁹³ Eric Johnson, “Arizona to cut paralytic drugs in execution overhaul: lawyer”, *Reuters* June 12, 2017 <https://www.reuters.com/article/us-arizona-executions-idUSKBN194001>
- ⁹⁴ See Milica Vasiljevic, & G. Tendayi Viki, “Dehumanization, moral disengagement, and public attitudes to crime and punishment”, in P. Bain et al, eds. *Humanness and Dehumanization* (New York, Psychology Press, 2013); Michael Osofsky et al, “Role of moral disengagement in the execution process”, *Law and Human Behavior* 29 (2005) 371, 387.
- ⁹⁵ Mary Neal, “Discovering dignity: unpacking the emotional content of killing narratives” in Heather Conway and John Stannard, eds. *The Emotional Dynamics of Law and Legal Discourse* (Oxford, Hart Publishing, 2016).
- ⁹⁶ ‘Human moral circle’ is concept borrowed from Peter Singer, *The Expanding MCircle: Ethics, Evolution and Moral Progress* (Princeton, Princeton Univ. Press 1981).

⁹⁷ Sophie Oliver, 'Dehumanization: Perceiving the Body as (In)Human' in *Humiliation, Degradation, Dehumanization: Human Dignity Violated* (Kaufmann, Kuch, Neuhäuser and Webster, Routledge 2010) p.87.

⁹⁸ Dayan, "White Dog".

⁹⁹ Samera Esmier, *Juridical Humanity: A Colonial History* (Stanford: Stanford University Press, 2012) p.112.

¹⁰⁰ Austin Sarat, *When the State Kills: Capital Punishment and the American Condition* (Princeton, Princeton University Press, 2001) p.28.

¹⁰¹ Daniel LaChance, "Last Words, Last Meals, and Last Stands: Agency and Individuality in the Modern Execution Process", *Law and Soc. Inquiry* 32 (2007) 701, 704.

¹⁰² Robert Johnson, "Reflections on the Death Penalty: Human Rights, Human Dignity, and Dehumanisation in the Death House", *Seattle J. for Soc. Just.* 13 (2014) 583, 597-98.

¹⁰³ Osofsky et al have argued that the "execution process is institutionally professionalized and dignified, but the offenders tend to be dehumanized by those who have to take a human life." Michael Osofsky, Albert Bandura, & Philip Zimbardo., *Role of moral disengagement in the execution process*, 29 *Law and Human Behavior* 371, 387 (2005).

¹⁰⁴ Blecker, "Meditations", p.991.

¹⁰⁵ These states have turned to older methods in light of ongoing practical difficulties with carrying out lethal injections. In May 2014, Tennessee introduced legislation permitting the use of the electric chair. See Ed Payne & Mariano Castillo, "Tennessee to use electric chair when lethal drugs unavailable" *CNN*, September 8, 2014

<http://edition.cnn.com/2014/05/22/us/tennessee-executions/>

¹⁰⁶ Associated Press, "Oklahoma governor signs "foolproof" nitrogen gas execution method", *The Guardian*, April 18, 2015

<https://www.theguardian.com/us-news/2015/apr/17/oklahoma-nitrogen-execution-method-death-penalty>

¹⁰⁷ King also referred to the experiences of the person being shot, but it is noticeable that he also emphasized the experiences of those not being executed. See <http://le.utah.gov/~2015/bills/static/HB0011.html> for debates.

¹⁰⁸ *Wood v. Ryan*, 759 F.3d 1076, 1103, 2014 U.S. App. LEXIS 13867 (9th Cir. Ariz., July 19, 2014) (Chief Judge Kozinski, dissenting). Also see Associated Press, "Bring back the firing squad, influential 9th Circuit judge says", *The Mercury News*, July 24, 2014 http://www.mercurynews.com/crime-courts/ci_26210928/bring-back-firing-squad-influential-9th-circuit-judge?source=pkg

¹⁰⁹ Patt Morrison, “Judge Alex Kozinski on bringing back firing squads: No, I wasn’t kidding” *Los Angeles Times*, July 30, 2014 <http://www.latimes.com/opinion/op-ed/la-oe-0731-morrison-kozinski-20140729-column.html>

¹¹⁰ It is also arguable that such protocols dehumanize the persons involved in the execution process too, as outlined by Johnson, “Collateral”.

Word count:

Abstract: 100

Main text (including footnotes): 10,067