

NOTES

DEATH AND ITS DIGNITIES

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Dignity has been associated with death in two very different areas of constitutional jurisprudence: assisted suicide and the death penalty. This Note seeks to analyze what the concept of dignity means in these two contexts: who is the subject of dignity and what are dignity's requirements? It argues that assisted suicide foregrounds the subjective dignity of the individual; what dignity involves is largely, though not wholly, a question of what an individual considers a dignified way to die. By contrast, the subject of dignity in death penalty jurisprudence is the collective and not the individual. Inasmuch as the jurisprudence claims to speak to the dignity of the individual, that dignity is objective and extends no further than collective dignity's reach. As a result, what constitutes dignity in execution is almost wholly determined by what appears dignified to society. This Note ends by critically assessing how the two constitutional areas that link death and dignity may fruitfully inform each other. It suggests that assisted suicide's individualistic dignity includes not just a right to decide how to die, but also a responsibility to collective society to consider how the nature of that suicide may impact collective dignity. In turn, in the death penalty context, states and courts should import subjective individual dignity considerations and reconsider whether their invocation of "dignity" in fact reflects a collective valuation of dignity or merely assuages social sensibilities by masking the reality of death.

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INTRODUCTION

In 2014, Clayton Lockett became the first inmate in Oklahoma to be executed under the State’s revised three-drug protocol.¹ After the injection of the second and third drugs, something went wrong. Lockett started to writhe and call out.² Officials closed the blinds to the viewing room then checked the IV and discovered the line had blown, causing the drugs to absorb into his tissue or leak out.³ The execution team had failed to notice an area of swelling “larger than a golf ball” at the IV access point near his groin.⁴ Though Lockett had not requested it, officials had covered the area with a sheet to preserve his “dignity.”⁵ Over fifteen years earlier, James Poe, a terminally ill patient, was suffering from “a constant sensation of suffocating” due to emphysema and associated panicked reactions that regular morphine doses were unable to assuage.⁶ He argued for a constitutional right to physician-assisted suicide so that he might die with dignity.

Dignity has been associated in constitutional litigation with two very different kinds of death. In recent death penalty jurisprudence, states have invoked the concept of dignity to defend their methods of execution against inmate challenges. In *Baze v. Rees*,⁷ for instance, Kentucky defended in the name of dignity its use of a paralytic agent that suppressed the inmate’s ability to signal pain. Though the drug did nothing to effect the execution, by preventing involuntary convulsions it brought “about a more dignified death, dignified for the

¹ Eric Berger, *Lethal Injection Secrecy and Eighth Amendment Due Process*, 55 B.C. L. REV. 1367, 1386 (2014).

² *Id.*

³ *Id.*

⁴ *Id.* at 1390.

⁵ Brief for Respondents at 14, *Glossip v. Gross*, 135 S. Ct. 2726 (2015) (No. 14-7955), 2015 WL 1619433, at *14.

⁶ See, e.g., Brief for Ronald Dworkin, Thomas Nagel, Robert Nozick, John Rawls, Thomas Scanlon, and Judith Jarvis Thomson as Amici Curiae in Support of Respondents at 21, *Washington v. Glucksberg*, 521 U.S. 702 (1997) (Nos. 95-1858, 96-110), 1996 WL 708956, at *21.

⁷ 553 U.S. 35 (2008) (plurality opinion).

inmate, dignified for the witnesses.”⁸ Writing for a plurality, Chief Justice Roberts affirmed the continued use of the drug on these grounds.⁹ Advocates of assisted suicide, meanwhile, have relied on the concept of “death with dignity” to argue against state bans on assisted suicide and for a right to die grounded in self-determination and individual integrity.¹⁰ They deploy dignity to empower the individual to die in a manner of her choosing. Dignity is thus invoked by individuals against states in order to justify an individual’s decision to take her own life. But it is also invoked by states in litigation against death-row inmates in order to justify how they execute prisoners involuntarily.

What are we to make of the concept of dignity? Is it an empty term or usefully flexible? Does it have a distinct core of meaning, and does that meaning change at all when connected to death? Although the concept of dignity appears across U.S. constitutional jurisprudence, as Leslie Meltzer Henry writes, “its meanings and functions are commonly presupposed but rarely articulated.”¹¹ This Note seeks to accomplish two things by analyzing the meaning of dignity in the

⁸ Transcript of Oral Argument at 33, *Baze v. Rees*, 553 U.S. 35 (2008) (No. 07-5439).

⁹ *Baze*, 553 U.S. at 57–58 (“[Pancuronium bromide] prevents involuntary physical movements during unconsciousness that may accompany the injection of potassium chloride. The 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.” (citations omitted)).

¹⁰ Both Oregon’s and Washington’s assisted suicide statutes are named “Death with Dignity” acts. See Oregon Death with Dignity Act, OR. REV. STAT. §§ 127.800–897 (2015); Washington Death with Dignity Act, WASH. REV. CODE §§ 70.245.010–904 (2010). Though the Court did not find a right to assisted suicide in *Washington v. Glucksberg*, many advocates and judges thought dignity supported such a right. See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 773 (1997) (Souter, J., concurring); *Compassion in Dying v. Washington*, 79 F.3d 790, 813–14 (9th Cir. 1996), *rev’d sub nom.* *Washington v. Glucksberg*, 521 U.S. 702 (1997); Brief for Ronald Dworkin, Thomas Nagel, Robert Nozick, John Rawls, Thomas Scanlon, and Judith Jarvis Thomson as Amici Curiae in Support of Respondents at 3–4, *Washington v. Glucksberg*, 521 U.S. 702 (1997) (Nos. 95-1858, 96-110), 1996 WL 708956, at *3–4. Some Justices addressed whether an individual had a constitutional right to assisted suicide “for the sake of personal dignity, apart even from relief from pain.” *Glucksberg*, 521 U.S. at 753 (Souter, J., concurring). Assisted suicide bills recently gained renewed national tradition when a terminally ill Californian, Brittany Maynard, moved to Oregon to take advantage of its “Death with Dignity” act. See Brittany Maynard, *My Right to Death with Dignity at 29*, CNN (Nov. 3, 2014), <http://edition.cnn.com/2014/10/07/opinion/maynard-assisted-suicide-cancer-dignity> (describing Maynard’s move to Oregon). In October 2015, California Governor Jerry Brown signed a right-to-die bill into law. See Mollie Reilly, *Right to Die Becomes Law in California*, HUFFINGTON POST (Oct. 5, 2015), http://www.huffingtonpost.com/entry/right-to-die-california_us_560c6037e4b076812700b6d8. In February 2015, New York lawmakers introduced a right-to-die bill. See Michele Richinick, *New York Lawmakers Introduce ‘Death with Dignity’ Bill*, MSNBC (Feb. 18, 2015), <http://www.msnbc.com/msnbc/new-york-lawmakers-introduce-death-dignity-bill>.

¹¹ Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 169 (2011).

assisted suicide and death penalty contexts. Descriptively, it seeks to theorize the different meanings of dignity that appear in the two areas of constitutional jurisprudence where death is central. Normatively, it argues that the two areas of jurisprudence can fruitfully inform one another. Jurisprudence and commentary on assisted suicide should learn from the meaning of dignity in the death penalty context and vice versa.

Part I provides an overview of the concept of dignity as it has appeared in the Fourteenth and Eighth Amendments and asks whether dignity has particular meanings in association with death. Part II analyzes the meaning of dignity in both assisted suicide and death penalty jurisprudence and scholarship. It suggests that although death modifies the meaning of dignity in the Fourteenth and Eighth Amendment contexts, courts and scholars reach different conclusions as to *who* the subject of dignity is and what dignity requires in light of its subject. The subject of dignity in the assisted suicide context is primarily, though not wholly, the individual, while the subject of dignity in the death penalty context is primarily, but again not wholly, the collective. In the assisted suicide context, the subjective dignity of the individual, understood as self-determination or integrity, takes precedence. It is the individual who largely determines what is a dignified process of dying. By contrast, although at times courts and advocates describe dignity in the death penalty context as that of the individual, more often they understand the dignity at stake as that of society as a whole. The respect society holds for human dignity is said to be implicated by the manner in which it executes. Part III concludes by sketching out how dignity in each of the two death contexts might fruitfully inform the other. It argues that we should recognize in assisted suicide's individualistic dignity not just a right to choose how to die but also a responsibility to respect society's collective dignity in doing so. Conversely, death penalty jurisprudence should import subjective dignity considerations and reconsider whether collective dignity is properly invoked to defend practices that hide the realities of execution and death from the eyes of the collective.

I

THE MEANINGS OF DIGNITY

In recent decades, the concept of dignity has been central in both legal and ethical philosophy.¹² Simmering debates in legal philosophy

¹² See, e.g., MICHAEL ROSEN, *DIGNITY: ITS HISTORY AND MEANING* (2012) (tracing history of the concept of dignity for insight into its current meaning); JEREMY WALDRON, *DIGNITY, RANK, AND RIGHTS* (Meir Dan-Cohen ed., 2012) (discussing dignity in legal

and comparative law have disputed its origins, its meaning, and its place both in national constitutional regimes and across borders.¹³ Most scholars admit that dignity is difficult to define.¹⁴ It can mean treating individuals or institutions as befits their rank,¹⁵ as ends rather than means,¹⁶ with respect for the autonomy of their decision-making,¹⁷ or with attention to the integrity of their lives.¹⁸ Dignity may be ascribed to individuals, institutions, things, or procedures.¹⁹ In recent years, scholars have attended to the deployment of dignity language in U.S. constitutional law opinions across a range of issues, from state sovereignty to abortion to same-sex marriage to defama-

philosophy); UNDERSTANDING HUMAN DIGNITY (Christopher McCrudden ed., 2014) (collecting essays on dignity in fields including law and philosophy).

¹³ See Samuel Moyn, *The Secret History of Constitutional Dignity*, 17 YALE HUM. RTS. & DEV. L.J. 39 (2014) (describing how dignity entered global constitutional history through Irish constitutional politics in 1937 and the importance of a transnational Catholic discourse on dignity in the interwar period); see also JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* (2005) (tracing the rise of dignity in European punishment to the eighteenth century's treatment of high-status prisoners); Luís Roberto Barroso, *Here, There, and Everywhere: Human Dignity in Contemporary Law and in the Transnational Discourse*, 35 B.C. INT'L & COMP. L. REV. 331, 334 (2012) (arguing that the minimum content of human dignity includes the intrinsic value of each human being, individual autonomy, and community value); Stéphanie Hennette-Vauchez, *A Human Dignitas? Remnants of the Ancient Legal Concept in Contemporary Dignity Jurisprudence*, 9 INT'L J. CONST. L. 32, 55–56 (2011) (extending James Whitman and Jeremy Waldron's idea that dignity began as a rank-based legal concept to explain why today dignity sometimes does more to impose obligations than extend rights); Neomi Rao, *On the Use and Abuse of Dignity in Constitutional Law*, 14 COLUM. J. EUR. L. 201, 201, 246 (2008) (arguing against the importation of the European idea of dignity into the American constitutional context).

¹⁴ See, e.g., Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT'L L. 655, 713 (2008) (arguing that dignity provides a useful but limited language for the adoption of substantive interpretations of human rights).

¹⁵ See Waldron, *supra* note 12, at 14 (describing dignity as a high-ranking status assigned to every human).

¹⁶ See IMMANUEL KANT, *GROUNDING FOR THE METAPHYSICS OF MORALS* 40–41 (James W. Ellington trans., 3d ed. 1993) (1785).

¹⁷ See Reva B. Siegel, *Dignity and Sexuality: Claims on Dignity in Transnational Debates over Abortion and Same-Sex Marriage*, 10 INT'L J. CONST. L. 355, 367 (2012) (describing how dignity in American abortion law has historically been tied to the liberty and equality of the woman).

¹⁸ See, e.g., RONALD DWORKIN, *IS DEMOCRACY POSSIBLE HERE?: PRINCIPLES FOR A NEW POLITICAL DEBATE* 10 (2006) (“[E]ach person has a special responsibility for realizing the success of his own life.”); RONALD DWORKIN, *JUSTICE FOR HEDGEHOGS* 209 (2011) (“Because you take yourself seriously, you judge that living well means expressing yourself in your life, seeking a way to live that grips you as right for you and your circumstance.”); RONALD DWORKIN, *LIFE’S DOMINION* 233–37 (1993) [hereinafter DWORKIN, *LIFE’S DOMINION*] (discussing dignity as integrity).

¹⁹ See Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921 (2003) (discussing the dignity of sovereign state entities).

tion.²⁰ Constitutional theorists seem to loosely agree that the concept of dignity implies an ethical, rights-based backbone to the U.S. Constitution.²¹

This Part provides a brief overview of how scholars have conceptualized dignity in the areas of U.S. constitutional law most relevant to assisted suicide and the death penalty: the Fourteenth and Eighth Amendments. It then reviews those assisted suicide and death penalty cases in which dignity has played an important role. Scholars have analyzed dignity as it relates to major concepts in American political philosophy, including liberty and equality, and they have discussed dignity in relation to intimate decisionmaking involving pregnancy and sexuality. But scholars have yet to seek to understand the meaning and implications of dignity as it has appeared in recent death penalty case law.²² Nor, more importantly, have scholars sought to comparatively analyze the meaning of dignity in the two areas of constitutional jurisprudence with death at their crux: assisted suicide and the death penalty.²³

²⁰ See, e.g., John D. Castiglione, *Human Dignity Under the Fourth Amendment*, 2008 WIS. L. REV. 655 (2008) (analyzing dignity in the context of the Fourth Amendment); Erin Daly, *Human Dignity in the Roberts Court: A Story of Inchoate Institutions, Autonomous Individuals, and the Reluctant Recognition of a Right*, 37 OHIO N.U. L. REV. 381, 426 (2011) (arguing that human dignity in American constitutional law is compatible with understanding dignity in terms of autonomy); Maxine D. Goodman, *Human Dignity in Supreme Court Constitutional Jurisprudence*, 84 NEB. L. REV. 740, 743 (2006) (arguing that human dignity underlies “express and un-enumerated constitutional rights and guarantees”); Meltzer Henry, *supra* note 11, at 179–80 (presenting a theoretical view of human dignity throughout U.S. constitutional doctrine); Gerald L. Neuman, *Human Dignity in United States Constitutional Law*, in *Zur Autonomie des Individuums* 249, 271 (Dieter Simon & Manfred Weiss eds., 2000) (surveying U.S. constitutional law and finding a belief in human dignity inherent particularly in the Fourteenth Amendment); Resnik & Suk, *supra* note 19.

²¹ For examples, see the essay collection *THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES* (Michael J. Meyer & William A. Parent eds., 1992).

²² Representative is the treatment of dignity by the country’s leading expert on the death penalty, Deborah Denno, who very briefly discusses mutilation in addressing whether electrocution or lethal injection offends human dignity. Deborah W. Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What It Says About Us*, 63 OHIO ST. L.J. 63, 80–81, 112 (2002) [hereinafter Denno, *Legislatures*] (describing graphic mutilation caused by electrocution and offenses to dignity caused by botched lethal injections).

²³ One student note, written before *Glucksberg*, has suggested that a right to assisted suicide derives from the “explicit constitutional protection for a dying person’s interest in dignity . . . found in the Supreme Court’s interpretation of the Eighth Amendment.” Brian C. Goebel, Note, *Who Decides if There Is “Triumph in the Ultimate Agony?” Constitutional Theory and the Emerging Right to Die with Dignity*, 37 WM. & MARY L. REV. 827, 874 (1996). But this cannot be right, not only because *Glucksberg* was analyzed under the Fourteenth Amendment, *Washington v. Glucksberg*, 521 U.S. 702, 705–06 (1997), but also because the Eighth Amendment clearly addresses the parameters of the state’s ability to punish, not the parameters of how an individual lives and dies.

A. *Dignity in the Fourteenth and Eighth Amendments*

Dignity points in different directions in the Fourteenth and Eighth Amendments, the former emphasizing individual decision-making and the latter collective decisionmaking. In *Washington v. Glucksberg*,²⁴ respondents argued for a right to physician-assisted suicide under the liberty clause of the Fourteenth Amendment using the language of dignity.²⁵ However, it was an eighteenth-century German philosopher, Immanuel Kant, who began the centuries-long discussion relating dignity and autonomy.²⁶ For Kant, humanity's unique capacity for autonomy gave rise to human dignity. Because humans had the ability to think of themselves as self-legislators, humans had dignity and deserved special treatment. Namely, an individual should "not [] be valued merely as a means to the ends of others or even to his own ends, but as an end in himself."²⁷ Critically for Kant, what made human autonomy special was not that a human had the freedom to act on her every urge, but instead that she had the capacity to set boundaries on her own behavior and constrain herself by acting as a law unto herself.²⁸

In its Fourteenth Amendment jurisprudence on abortion, sexuality, and marriage, however, the Supreme Court has connected dignity to a somewhat different kind of autonomy: personal autonomy. Rather than self-legislation and constraint, personal autonomy is about having the freedom to make those decisions most important to the formation and expression of one's identity. Even as the Court allowed for greater restrictions on the abortion right in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,²⁹ the plurality connected intimate decisionmaking to dignity: "These matters, involving the most intimate and personal choices a person may make in a life-

²⁴ 521 U.S. 702 (1997).

²⁵ Brief of Respondents at 7, *Washington v. Glucksberg*, 521 U.S. 702 (1997) (No. 96-110), 1996 WL 708925, at *7 (noting the guarantee of liberty under the Fourteenth Amendment and arguing the state should not force patient-plaintiffs to endure "painful and undignified deaths").

²⁶ See Darryl Pullman, *Dying with Dignity and the Death of Dignity*, 4 HEALTH L.J. 197, 202 (1996) ("The basing of human dignity on the capacity for rational autonomy is often traced back to Kant, but without the metaphysical trappings associated with his explication.").

²⁷ IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 186 (Mary Gregor ed. & trans., 1996). Kant continued: "[T]hat is, he possesses a dignity (an absolute inner worth) by which he exacts respect for himself from all other rational beings in the world." *Id.* (emphasis omitted).

²⁸ See also Michael J. Meyer, *Dignity, Death and Modern Virtue*, 32 AM. PHIL. Q. 45, 47 (1995) ("Kant suggests that human dignity is grounded on the human capacity for practical reason, especially the capacity for moral deliberation." (emphasis omitted)).

²⁹ 505 U.S. 833 (1992).

time, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.”³⁰ The Court tends to invoke dignity when it seeks to cabin off an area of intimate decisionmaking, where individuals are free from government interference to make private choices.³¹

If dignity in the Fourteenth Amendment context is about enabling individual choice, dignity in the Eighth Amendment context might be conceived as constraining collective choice. Dignity restrains the government to punish in a way that befits a decent society. When the Court held it unconstitutional to execute a mentally insane prisoner, the Court concluded that “civilized societies” feel a “natural abhorrence” at executing the insane and declared a need “to protect the dignity of society itself from the barbarity of exacting mindless vengeance.”³² In *Hope v. Pelzer*,³³ the Court described the hitching of a prisoner to a post outside for seven hours in “degrading and dangerous” conditions—without a shirt and without bathroom breaks—as “antithetical to human dignity.”³⁴ In invoking dignity in its Eighth Amendment jurisprudence, the Court puts forth a representational, expressive notion of dignity.³⁵ The Court seeks to “stop or limit activities that do not comport with how a decent society should respect the dignity of human life.”³⁶

B. Connecting Death and Dignity

Dignity has a special connection with death in constitutional law, appearing in both assisted suicide and death penalty jurisprudence. Litigants in *Washington v. Glucksberg* challenged a Washington State

³⁰ *Id.* at 851.

³¹ Dignity has also made appearances in Justice Kennedy’s opinions describing rights to same-sex intimacy and marriage. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599 (2015) (“[T]he right to personal choice regarding marriage is inherent in the concept of individual autonomy.”); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (“The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty . . . gives them the full right to engage in their conduct without intervention of the government.”).

³² *Ford v. Wainwright*, 477 U.S. 399, 409–10 (1986); *see also* Judith N. Shklar, *Putting Cruelty First*, 111 DAEDALUS 17, 18 (1982) (“Cruelty, like lying, repels instantly, because it is ‘ugly.’ It is a vice that disfigures human character.”).

³³ 536 U.S. 730 (2002).

³⁴ *Id.* at 734–35, 745. Recently, the Court held that the conditions in Californian prisons were unconstitutional under the Eighth Amendment, because “[a] prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society.” *Brown v. Plata*, 563 U.S. 493, 511 (2011).

³⁵ *See* Meltzer Henry, *supra* note 11, at 221–26 (tracing Supreme Court Eighth Amendment jurisprudence on dignity in the form of collective virtue).

³⁶ *Id.* at 222.

law that made it a crime to aid another person's attempt to commit suicide as a violation of their liberty interest under the Fourteenth Amendment.³⁷ The plaintiffs included three patients suffering from debilitating, painful, and terminal diseases, and four physicians who regularly treated terminal patients.³⁸ Briefing for respondents characterized the patients' terminal diseases as threatening to deprive them of dignity.³⁹ One plaintiff, who had cared for his partner until he died of AIDS and was now dying of AIDS himself, claimed to have "witnessed firsthand the pain, suffering, and loss of bodily function, integrity, and personal dignity that the disease causes at the end of life."⁴⁰

The Ninth Circuit held en banc that terminally ill individuals had a constitutional right to assisted suicide. The court framed the question as a balance between an "interest in preserving human life [and] the desire to die peacefully and with dignity."⁴¹ Plaintiffs had a right to avoid what could "otherwise be a protracted, undignified, and extremely painful death."⁴² The majority quoted Justice O'Connor's concurrence in *Cruzan*,⁴³ a Supreme Court case holding that a patient had the right to refuse life-saving treatment, where she emphasized that "[r]equiring a competent adult to endure such procedures against her will burdens the patient's liberty, dignity, and freedom to determine the course of her own treatment."⁴⁴ But on appeal, the Supreme Court reversed the Ninth Circuit. Finding no constitutional right to assisted suicide, the Court left it to "[p]ublic concern and democratic action" to decide "how best to protect dignity and independence at the end of life."⁴⁵

The concept of dignity has also appeared in Eighth Amendment challenges to execution methods employed by states. In *Campbell v. Wood*,⁴⁶ Justice Blackmun dissented from a denial of certiorari in a case challenging hanging as an execution method.⁴⁷ In the court

³⁷ See Brief of Respondents, *Washington v. Glucksberg* at 1, 521 U.S. 702 (1997) (No. 96-110), 1996 WL 708925, at *1.

³⁸ See *id.* at 2-4, 1996 WL 708925, at *2-4.

³⁹ See, e.g., *id.* at 5, 1996 WL 708925, at *5 (describing a terminally ill patient who requested medication to hasten her death because she "rejected living her final days in a dependent and undignified manner").

⁴⁰ *Id.* at 3, 1996 WL 708925, at *3.

⁴¹ *Compassion in Dying v. Washington*, 79 F.3d 790, 793 (9th Cir. 1996), *rev'd sub nom.* *Washington v. Glucksberg*, 521 U.S. 702 (1997).

⁴² *Id.*

⁴³ *Cruzan ex rel. Cruzan v. Dir. Mo. Dep't of Health*, 497 U.S. 261 (1990).

⁴⁴ *Compassion in Dying*, 79 F.3d at 815 (alteration in original) (quoting *Cruzan*, 497 U.S. at 289).

⁴⁵ *Washington v. Glucksberg*, 521 U.S. 702, 716 (1997).

⁴⁶ 511 U.S. 1119 (1994) (Blackmun, J., dissenting from denial of certiorari).

⁴⁷ *Id.* at 1119.

below, Judge Reinhardt described hanging as “a crude, rough, and wanton procedure, the purpose of which is to tear apart the spine,” and asserted that “indignity” stemmed from the “relatively painless infliction of degradation, savagery, and brutality.”⁴⁸ In his dissent to the denial of certiorari, Justice Blackmun also emphasized hanging’s graphic barbarism as a dignity violation.⁴⁹ Yet between 1994 and 2008, the idea of a dignified death switched from a concept used to challenge a state’s method of execution to one used to defend it. Hence in *Baze v. Rees*,⁵⁰ it was the State that argued that the use of a paralytic agent was necessary to ensure that a prisoner died a dignified death.⁵¹

Although dignity also appears in cases like *Ford v. Wainwright*,⁵² which challenged states’ execution of the mentally incompetent,⁵³ this Note limits its analysis in the death penalty context to dignity as it is invoked in challenges to execution protocols. The dignity issues arising out of execution procedures more closely parallel those raised by assisted suicide: Both deal with the question of not *whether* but *how* to die. This Note brings assisted suicide and death penalty litigation together in order to ask a fundamental question about what exactly is meant by “dignity” in connection with death, and whether the same concerns do or should motivate the invocation of dignity in assisted suicide and death penalty jurisprudence.

II

WHAT DOES IT MEAN FOR A DEATH TO BE DIGNIFIED?

This section analyzes what the concept of dignity means in the jurisprudence of assisted suicide and the death penalty. It argues that even though the concept of “death with dignity” appears in each context, what is considered dignified about dying differs according to whose dignity is ostensibly at stake—the individual’s or society’s. Assisted suicide jurisprudence foregrounds the subjective dignity of the individual; what is dignified is largely, though not wholly, a question of what an individual considers a dignified way to die. By contrast, although death penalty jurisprudence speaks in the language of

⁴⁸ *Campbell v. Wood*, 18 F.3d 662, 701–02 (9th Cir. 1994) (Reinhardt, J., dissenting).

⁴⁹ *Campbell v. Wood*, 511 U.S. 1119, 1122 (1994) (Blackmun, J., dissenting from denial of certiorari) (“A person who slowly asphyxiates or strangulates while twisting at the end of a rope unquestionably experiences the most torturous and ‘wanton infliction of pain,’ while partial or complete decapitation of the person, as blood sprays uncontrollably, obviously violates human dignity.” (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (joint opinion of Stewart, Paul, and Stevens, JJ.)) (citations omitted)).

⁵⁰ 553 U.S. 35 (2008).

⁵¹ Transcript of Oral Argument at 33, *Baze v. Rees*, 553 U.S. 35 (2008) (No. 07-5439).

⁵² 477 U.S. 399 (1986).

⁵³ *Id.* at 405, 410.

the procedure, the subject implicated by procedural dignity is the collective more so than the individual. Inasmuch as the jurisprudence claims to speak to the dignity of the individual, that dignity is objective and extends no further than collective dignity's reach. As a result, what constitutes dignity in execution is almost wholly determined by what appears dignified to the collective. When it comes to death, then, individual dignity is not about choice alone, nor is collective dignity just about constraints on collective action. Instead, the finality of death amplifies the significance of dignity as the expression of individual or collective identity.

A. *Assisted Suicide: Subjective and Objective Individual Dignity*

When James Poe in *Glucksberg* asked the federal judiciary to overturn Washington State's ban on physician-assisted suicide,⁵⁴ he knew he would soon die one way or the other. Indeed, by the time his case reached the Supreme Court, Poe had passed away.⁵⁵ His case, then, was not about whether to die, but how to die—about the process of dying. But being the one to decide was itself important. Deciding to die even six weeks before an inevitable death allowed Poe to end his life on his own terms, to insist not only on one last act of free will but to die a death that better preserved the integrity of his life. Another plaintiff, Jane Roe, was dying of cancer and had a life expectancy of six months when suit was brought.⁵⁶ As is the case for many cancer patients, her bodily integrity was under assault. She suffered “swollen legs, bed sores, poor appetite, nausea and vomiting, impaired vision, incontinence of bowel, and general weakness.”⁵⁷ As one plaintiff doctor described, a number of his patients suffered “prolonged deaths often involving pain, suffering, and loss of dignity.”⁵⁸

These stories represent different ways of thinking about who the subject of dignity is and what dignity in the assisted suicide context means to that subject. For the most part, the subject of dignity in the assisted suicide context appears to be the individual. For this indi-

⁵⁴ *Washington v. Glucksberg*, 521 U.S. 702 (1997).

⁵⁵ All three terminally ill patients who had been plaintiffs passed away after the district court's decision. See Craig Peyton Gaumer & Paul R. Griffith, *Whose Life Is It Anyway?: An Analysis and Commentary on the Emerging Law of Physician-Assisted Suicide*, 42 S.D. L. REV. 357, 381 (1997).

⁵⁶ Robert M. Hardaway et al., *The Right to Die and the Ninth Amendment: Compassion and Dying After Glucksberg and Vacco*, 7 GEO. MASON L. REV. 313, 334 (1999).

⁵⁷ *Compassion in Dying v. Washington*, 850 F. Supp. 1454, 1456 (W.D. Wash. 1994), *rev'd*, 49 F.3d 586 (9th Cir. 1995), *reh'g en banc granted*, 62 F.3d 299 (9th Cir. 1995), *aff'd on reh'g en banc*, 79 F.3d 790 (9th Cir. 1996), *rev'd sub nom. Washington v. Glucksberg*, 521 U.S. 702 (1997).

⁵⁸ *Compassion in Dying*, 850 F. Supp. at 1457.

vidual, dignity is defined as a matter of subjective self-determination as well as existential and bodily integrity. Yet the inclusion of doctors' voices describing shared understandings of the indignities suffered by terminal patients suggests that dignity in this context may be *both* subjectively and objectively understood. Society's conception of what qualifies as an indignity to the dying patient plays a role in shaping what counts as death with dignity for the individual.

In the following pages, this Note analyzes dignity in the assisted suicide context by first describing dignity as subjective self-determination⁵⁹ and then as subjectively defined existential and bodily integrity.⁶⁰ It then suggests that dignity in the assisted suicide context contains an objective element that circumscribes what counts as dignity when it comes to an individual's self-determination and integrity.⁶¹ While this subpart is motivated by conceptions of dignity that appear in federal case law, it also relies on legal and philosophical commentary to expand on those ideas.

1. *Subjective Self-Determination*

Though the Supreme Court in *Glucksberg* would ultimately reject the idea that a right to assisted suicide constituted a fundamental liberty interest,⁶² the majority opinion and the cases leading up to it framed the question of what role dignity played in the assisted suicide context as a question of self-determination.⁶³ "Like the decision of whether or not to have an abortion," the Ninth Circuit wrote, "the decision how and when to die is one of 'the most intimate and personal choices a person may make in a lifetime,' a choice 'central to personal dignity and autonomy.'"⁶⁴ The *Cruzan* majority opinion,⁶⁵ the Ninth Circuit pointed out, had described "[t]he choice between life and death [as] a deeply personal decision of obvious and overwhelming finality."⁶⁶

⁵⁹ See *infra* Section II.A.i.

⁶⁰ See *infra* Section II.A.ii.

⁶¹ See *infra* Section II.A.iii.

⁶² See *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997).

⁶³ See, e.g., *Compassion in Dying v. Washington*, 79 F.3d 790, 813–15 (9th Cir. 1996), *rev'd sub nom.* *Washington v. Glucksberg*, 521 U.S. 702 (1997) (describing the issue as one about "intimate and personal choices," especially with respect to choices "of overwhelming finality" (first quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992); and then quoting *Cruzan ex rel. Cruzan v. Dir. Mo. Dep't of Health*, 497 U.S. 261, 281 (1990))); see also *Cruzan*, 497 U.S. at 278 ("[A] competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment.").

⁶⁴ *Compassion in Dying*, 79 F.3d at 813–14 (quoting *Casey*, 505 U.S. at 851).

⁶⁵ *Cruzan*, 497 U.S. 261.

⁶⁶ *Compassion in Dying*, 79 F.3d at 815 (quoting *Cruzan*, 497 U.S. at 281).

Choosing how to die in the face of a terminal illness affirms dignity by recognizing the self-sovereignty that many, reasoning from Kant, understand to be the basis of human dignity.⁶⁷ That sovereignty may be all the more important for individuals facing a death wrought by “the dictates of fate.”⁶⁸ A death with dignity is a last chance to infuse meaning into an existence cut unexpectedly short by terminal disease. It is “a final proof that we are not merely pawns to be swept from the board by an unknown hand.”⁶⁹ Note that although this is not the prevailing view, dignity could be conceived of in such a way as to give the opposite result. The religious beliefs of some have led them to reject suicide on the basis of dignity.⁷⁰

Self-determination at the end of life may implicate two different but related understandings of death. Death can mean the specific moment when one transitions from life to death, or it can mean the *process* of dying.⁷¹ Thus the Ninth Circuit described an interest in both when and how to die. The court described a “liberty interest in hastening one’s own death,” and in “determin[ing] the nature of the final period of his existence.”⁷² Having the right to decide *when* to die means not having to wait for the disease to take its natural course. Even if one takes one’s life mere days before the disease would have accomplished the same, assisted suicide gives an individual the freedom to die by her own clock, thus reaffirming her standing as an autonomous agent. Having the right to decide *how* to die relates to the question of *when* to die. An individual may wish to die before she is completely bedridden or dependent. But the *how* also speaks to the question of how the taking of life itself should go: Should the suicide

⁶⁷ See Joel Feinberg, HARM TO SELF 354 (1986) (describing the choice to die as an exercise of self-sovereignty). But see Jyl Gentzler, *What Is a Death with Dignity?*, 28 J. MED. & PHIL. 461, 462 (2003) (describing Kant’s belief that the “dignity of human beings renders suicide morally impermissible”).

⁶⁸ Gentzler, *supra* note 67, at 469 (quoting William McCord, *Death with Dignity*, HUMANIST, Jan. 1993, at 26, 27).

⁶⁹ *Id.* (quoting McCord, *supra* note 68, at 27).

⁷⁰ See, e.g., David Mills, *Death Dignified by Christ*, FIRST THINGS (Nov. 8, 2010), <http://www.firstthings.com/web-exclusives/2010/11/death-dignified-by-christ> (“[Dying] with dignity means to accept what God has given you and deal with it till the end.”).

⁷¹ Peter Allmark describes death in four ways but centers his analysis on transition and process, suggesting that transition itself implies a process. Peter Allmark, *Death with Dignity*, 28 J. MED. ETHICS 255, 255 (2002) (“Thus it would seem that the more common use of the phrase ‘death with dignity’ attaches to the second and third senses of death. If this is so then we appear to mean dying with dignity when we use the phrase.”).

⁷² *Compassion in Dying v. Washington*, 79 F.3d 790, 814, 816 (9th Cir. 1996), *rev’d sub nom.* *Washington v. Glucksberg*, 521 U.S. 702 (1997).

occur by gunshot wound or lethal injection, lying in a hospital or in one's bed at home, alone or with one's loved ones?⁷³

Even understood as self-determination, dignity in death may not be as individualistic an endeavor as it first appears. To die when and how one wishes may depend on both professional and personal assistance. Consider the case of Debbie Purdy, a British woman suffering from progressive multiple sclerosis (MS), who won a legal victory requiring the British Director of Public Prosecutions (DPP) to clarify the law on the prosecution of those who aid others in taking their lives.⁷⁴ Purdy had made arrangements to go to an assisted suicide clinic in Switzerland once MS made life unendurable.⁷⁵ But at the point when she was in fact ready to die, it was unlikely she would be able to travel to Switzerland alone. Her husband had agreed to go with her, but she feared he would be prosecuted.⁷⁶ If so, she would have to travel to the clinic while she could still make it on her own, thus ending her life earlier than she wished. When the DPP finally issued guidelines making it clear that Purdy's husband was unlikely to be prosecuted for providing such assistance, Purdy saw it as "permission to live."⁷⁷ Purdy's ability to determine the time and manner of her death would have been impossible absent the solidarity of her husband.⁷⁸ Just as socioeconomic rights are sometimes understood as clearing space for free action,⁷⁹ personal assistance may be a floor on which self-determination in death depends.

⁷³ See Hardaway, *supra* note 56, at 316 ("Compassion in Dying told Frank about the risks of taking his own life with a shotgun, including the risk that he might survive the shooting, and be in even greater agony. More importantly, ending his life in this way would deprive his daughter and friends of being with him and holding him in their arms when he died. Compassion in Dying urged Frank to seek a doctor who would allow him to die with dignity.").

⁷⁴ See Jeremy Waldron, *Torture, Suicide and Determinatio*, 55 AM. J. JURIS. 1, 13–18 (2010) (describing the case and the importance of clarification by the DPP for Purdy and her husband).

⁷⁵ *Id.* at 14.

⁷⁶ *Id.*

⁷⁷ See Damian Whitworth, 'We Suck the Marrow Out of Life . . . I Am Not Ready to Die', TIMES (London), Mar. 10, 2010, at 12.

⁷⁸ Cf. Hardaway, *supra* note 56, at 316 (describing a patient who wanted to commit suicide, but feared doing so without medical assistance "would deprive his daughter and friends of being with him and holding him in their arms when he died").

⁷⁹ See, e.g., Jeremy Waldron, *Homelessness and the Issue of Freedom*, 39 UCLA L. REV. 295, 320 (1991) ("If someone needs to urinate, what he needs above all as a dignified person is the *freedom* to do so in privacy and relative independence of the arbitrary will of anyone else.").

2. *Subjective Integrity*

Death with dignity may be an expression not only of self-determination at the end of life, but of the integrity of that life. The Ninth Circuit recognized that an interest in integrity underlay the right to assisted suicide: “A competent terminally ill adult, having lived nearly the full measure of his life, has a strong liberty interest in choosing a dignified and humane death rather than being reduced at the end of his existence to a childlike state of helplessness, diapered, sedated, incontinent.”⁸⁰ Dying with dignity in this sense is not just about exercising freedom at the end of life but exercising freedom so that the way an individual dies aligns with the way she has lived. This understanding of dignity may be connected to the relationship some courts and theorists have drawn between dignity and the value of life itself.⁸¹

Dignity understood as *existential integrity* may seem definitionally close to self-determination. But integrity does not demand individual autonomy for the sake of self-determination alone. Instead, as Ronald Dworkin writes, because dignity is central to “the intrinsic importance of human life,” it is also central to the idea that it is “intrinsically, objectively important how [a] life goes.”⁸² Dignity demands control over how one dies for the sake not of freedom but of validating the distinctive life an individual has lived and the personality she has created.⁸³ Authors have used different terms and metaphors to represent this concept of dignity. Lennart Nordenfelt calls it the “dignity of

⁸⁰ *Compassion in Dying v. Washington*, 79 F.3d 790, 814 (9th Cir. 1996), *rev'd sub nom. Washington v. Glucksberg*, 521 U.S. 702 (1997). *But see* Derrick Augustus Carter, *Knight in the Duel with Death: Physician Assisted Suicide and the Medical Necessity Defense*, 41 VILL. L. REV. 663, 669 (1996) (describing how historically, many philosophers have “rallied against suicide as being cowardly, undignified and abusive”).

⁸¹ Catholic theory, in particular, has connected dignity with life itself. *See* Patrick Lee & Robert P. George, *The Nature and Basis of Human Dignity*, 21 *RATIO JURIS* 173, 191 (2008) (describing how “human beings are animals of a special kind” and therefore their lives have intrinsic dignity). This connection has made dignity concerns especially prevalent in the abortion context. In 1975, the German Constitutional Court struck down a law that would have liberalized abortion during the first twelve weeks of pregnancy. The court imputed dignity to the fetus: “Where human life exists, human dignity is present to it; it is not decisive that the bearer of this dignity himself be conscious of it and know personally how to preserve it.” Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 25, 1975, 39 *ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS* [BVERFGE] 1 (Ger.), translated in Robert E. Jonas & John D. Gorbey, *West German Abortion Decision: A Contrast to Roe v. Wade*, 9 *J. MARSHALL J. PRAC. & PROC.* 605, 641 (1976); *see also* *Gonzales v. Carhart*, 550 U.S. 124, 157 (2007) (“The [Partial-Birth Abortion Ban] Act expresses respect for the dignity of human life.”).

⁸² DWORKIN, *LIFE'S DOMINION*, *supra* note 18, at 236.

⁸³ *See id.* at 224 (“It allows us to lead our own lives rather than be led along them, so that each of us can be, to the extent a scheme of rights can make this possible, what we have made of ourselves.”).

identity,”⁸⁴ while Darryl Pullman suggests that life should be viewed as a composition, each individual creating her life “much as a poet creates a poem, an author a novel, or a painter or sculptor an object of art.”⁸⁵

Death is an essential part of that composition because it is its last note. Forcing a dissonant death on an individual who has otherwise lived a full life disrespects the dignity of that life. This is not to say that that life must have been lived harmoniously; one’s life might sound just as much like John Cage as Johann Sebastian Bach.⁸⁶ The idea is instead that it does violence to an individual’s identity to die in a way that shatters the history and self-image an individual has created and in fact believes she ontologically *is*. As Pullman writes, “just as a poor final chapter can spoil an entire story, or a few errant strokes can destroy what might otherwise have been a beautiful painting, the manner of death can cast a dark shadow over the rest of a life.”⁸⁷ It may also cast a shadow for friends and family who watch a loved one die and whose understanding of that person may be transformed by the experience of his or her suffering. New research shows that when a person’s partner is ill before dying, the poor quality of that life can haunt the surviving partner for a long time afterward.⁸⁸ As the Ninth Circuit wrote, “[h]ow a person dies not only determines the nature of the final period of his existence, but in many cases, the enduring memories held by those who love him.”⁸⁹

⁸⁴ Lennart Nordenfelt, *The Varieties of Dignity*, 12 HEALTH CARE ANALYSIS 69, 75 (2004).

⁸⁵ Pullman, *supra* note 26, at 203–04.

⁸⁶ See DWORKIN, *LIFE’S DOMINION*, *supra* note 18, at 224 (describing how individuals are “responsible for shaping our lives according to our own coherent or incoherent—but, in any case, distinctive—personality”). Under this meaning of dignity, an individual could deny his or her own dignity by denying a sense of himself as “someone with critical interests, the value of whose life is important for its own sake.” *Id.* at 237. Note that Dworkin’s idea that one’s death may be consonant with one’s life depends on conceiving death as something other than a painful evil. If death were only ever viewed as evil, then there would be no way to harmonize it with a life (except perhaps a life that was itself painful and evil).

⁸⁷ Pullman, *supra* note 26, at 204.

⁸⁸ See, e.g., *How Decedents’ Quality of Life at the Time of Death Affects Others*, NPR NEWS (Apr. 6, 2016), <http://one.npr.org/?sharedMediaId=473201959:473201960> (noting the the long-term negative consequences on surviving partners after a spouse has passed away, and indicating exacerbated effects where the deceased had low quality of life at time of death).

⁸⁹ *Compassion in Dying v. Washington*, 79 F.3d 790, 814 (9th Cir. 1996), *rev’d sub nom.* *Washington v. Glucksberg*, 521 U.S. 702 (1997); see also *Washington v. Glucksberg*, 521 U.S. 702, 743 (1997) (Stevens, J., concurring) (describing an individual’s “interest in dignity, and in determining the character of the memories that will survive long after her death”).

Watching a loved one die may involve watching the metamorphosis of her body as well. The Ninth Circuit focused on bodily aspects in the adult's reduction to a childlike state, describing how the adult would be "diapered" and "incontinent."⁹⁰ One of the amicus briefs to the Ninth Circuit described a man who felt his dignity compromised by being forced to "lay dying, diapered, moaning in pain, begging to die."⁹¹ Justice Breyer, in his concurring opinion in *Glucksberg*, wrote that the core of our interest in "dying with dignity" was freedom from "unnecessary and severe physical suffering."⁹²

Suffering is inclusive of but different from pain. Pain is a sensation of a part of the body. By contrast, suffering involves not only pain but also distress; it is at once bodily and emotional.⁹³ Suffering may impinge on dignity in two different respects. For one, physical suffering may involve the loss of a bodily integrity once imperative to an individual's identity. Now incontinent, possibly sedated—no longer able to walk, go to the store, reach the bathroom without aid—a person may experience her new bodily state as a colonization of the individual she once was. In displacing the relatively stable (if not unchanging) physical state on which the individual constructed her identity, a loss of bodily integrity may contribute to the displacement of existential integrity. In addition, as Jeremy Waldron writes, "[d]ignity has long had a connection with something like physical bearing—standing upright: a sort of moral orthopaedics."⁹⁴ The accelerating loss of bodily functions, of the ability to "stand[] upright," may be felt as a loss of dignity in itself.

⁹⁰ *Compassion in Dying*, 79 F.3d at 814.

⁹¹ Brief for Ten Surviving Family Members in Support of Physician-Assisted "Suicide" as Amici Curiae Supporting Appellees at 6, *Compassion in Dying v. Washington*, 79 F.3d 790 (9th Cir. 1996) (No. 94-35534), 1994 WL 16012285, at *6.

⁹² *Glucksberg*, 521 U.S. at 790 (Breyer, J., concurring).

⁹³ *Compare Suffering*, THE OXFORD ENGLISH DICTIONARY (2d ed. 1989) ("The bearing or undergoing of pain, distress, or tribulation."), and *Distress*, THE OXFORD ENGLISH DICTIONARY (2d ed. 1989) ("The sore pressure or strain of adversity, trouble, sickness, pain, or sorrow; anguish or affliction affecting the body, spirit, or community."), with *Pain*, THE OXFORD ENGLISH DICTIONARY (2d ed. 1989) ("Bodily suffering; a distressing sensation as of soreness (usually in a particular part of the body)."). Advocates emphasize that dying with dignity involves more than the avoidance of pain. See, e.g., Gentzler, *supra* note 67, at 467 ("Pain is not the main reason we want to die. It's the indignity. It's the inability to get out of bed or get onto the toilet, let alone drive a car or go shopping without another's help" (quoting Janet Good, past president and founder of the Michigan chapter of the Hemlock Society, a pro-assisted suicide organization)).

⁹⁴ Jeremy Waldron, *How Law Protects Dignity*, 71 CAMBRIDGE L.J. 200, 219 (2012) ("Even in circumstances where behaviour is very tightly controlled by law (e.g. the behaviour of a person in custody), there is an assumption that people will stand upright and move in response to commands rather than being dragged as though they were incapable of self-locomotion.").

3. *Objective Individual Dignity*

Whether understood as self-determination or integrity, death with dignity has so far been described as a primarily subjective phenomenon. The individual expresses her self-sovereignty or maintains the integrity of her self-defined life by deciding, in the face of a terminal illness, when and how she thinks it makes sense to die. Yet dignity continues to be important after death. Many cultures think that it violates the dignity of the dead to mistreat the dead's memory or body.⁹⁵ Consider a scene from the *Iliad*. After Achilles kills Hector, he ties Hector's lifeless body to his chariot and, in Hector's parents' view, drags him behind: "Purple the ground, and streak the sable sand; Deform'd, dishonour'd in his native land[.]"⁹⁶ Hector is dead but his parents and the crowd know the indignity visited upon his remains: "Given to the rage of an insulting throng[.] And, in his parents' sight, now dragg'd along!"⁹⁷ Dignity in association with death is not merely subjective; it is also objective.⁹⁸

An objective conception of death with dignity exists not only after death but also before. Implicit in the idea of bodily integrity is the idea that it may matter to friends and family what a dying individual's death looks like. That audience may have its own idea of what dying with dignity embodies. Such an idea is objective and is based on indicators of dignity or indignity rather than subjective understandings of the individual whose dignity is at stake.

The Hemlock Society, a pro-assisted suicide organization, does not favor dying however one likes. Instead, the society describes death with dignity as a "peaceful, gentle, certain and swift death in the company of their loved ones."⁹⁹ The Ninth Circuit articulated a similar view of what it means to die with dignity, discussing terminally ill patients "who wish[ed] to hasten their deaths by peaceful means."¹⁰⁰ To illustrate, the court told a series of stories of the implicitly undigni-

⁹⁵ See YECHIEL MICHAEL BARILAN, HUMAN DIGNITY, HUMAN RIGHTS, AND RESPONSIBILITY (2012) 109 (describing how respect for the dignity of the dead "recurs in diverse cultural and historical sources"). For instance, slandering the dead or spitting on a grave can be considered a dignity violation. Nordenfelt, *supra* note 84, at 77; see also Pullman, *supra* note 26, at 209 (noting that we treat the dead with dignity to afford them "a continued measure of moral consideration").

⁹⁶ ILLIAD, Book XXII (Felicity Rosslyn ed., Alexander Pope trans., Bristol Classical Press 2d ed. 2002).

⁹⁷ *Id.*

⁹⁸ See Nordenfelt, *supra* note 84, at 77 (discussing how post-death dignity violations cannot be understood unless there is "an objective ground for the dignity").

⁹⁹ Philip King, Note, *Washington v. Glucksberg: Influence of the Court in Care of the Terminally Ill and Physician Assisted Suicide*, 15 J.L. & HEALTH 271, 288 n.181 (2000-01).

¹⁰⁰ *Compassion in Dying v. Washington*, 79 F.3d 790, 834 (9th Cir. 1996), *rev'd sub nom. Washington v. Glucksberg*, 521 U.S. 702 (1997).

fied ways patients died when they were denied assisted suicide. A mentally competent woman in her eighties secured a plastic bag around her head and suffocated to death.¹⁰¹ An eighty-four-year-old man shot himself in the head, leaving his splattered brains on the basement wall for his children to clean up.¹⁰²

It makes sense that an objective conception of death with dignity has formed in connection with assisted suicide. In seeking to define the scope of a right to die with dignity and eventually codify it in law, advocates must give shape to this right. Dworkin may have described dignity as central to understanding the value of distinctive, individual life,¹⁰³ but he addressed his theory of dignity to the society that would have to determine how to respect that individual's dignity. Dworkin in fact begins with cultural norms; the first thing to do is to recognize that "people have a right not to suffer *indignity*, not to be treated in ways that in their culture or community are understood as showing disrespect."¹⁰⁴ Yet one can imagine a community that has decided that the most dignified way to die is any way the individual wishes. What if an individual prefers to jump from a ravine or shoot her brains out? To the life-long adventurer or hunter, these might seem like perfectly dignified ways to die. American advocates and courts do not have these ways of dying in mind when they talk about death with dignity. Their understanding of dignity centers on a particular cultural norm of what constitutes a death with dignity: a peaceful and easy transition from existence to nonexistence. While there is a great deal of talk about self-determination and integrity, the expanse of that self-determination is bounded by objective notions of what it means to die with dignity.

B. *The Death Penalty: Collective Dignity*

The history of execution in the United States is the history of an evolution from public spectacle to solemn, semi-private ritual.¹⁰⁵ Although most executions in American history took place in public,¹⁰⁶

¹⁰¹ *Id.* at 835.

¹⁰² *Id.* at 834–35.

¹⁰³ Dworkin, *Life's Dominion*, *supra* note 18, at 236.

¹⁰⁴ *Id.* at 233.

¹⁰⁵ For a theory of the "disappearance of punishment as a spectacle" and its replacement by "legal or administrative practice" in the Western world, see MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 8 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977).

¹⁰⁶ Deborah W. Denno, *Is Electrocution an Unconstitutional Method of Execution? The Engineering of Death over the Century*, 35 WM. & MARY L. REV. 551, 676 (1994) [hereinafter Denno, *Electrocution*].

the last public hanging occurred eighty years ago.¹⁰⁷ Only three people have been executed by firing squad in the past forty years.¹⁰⁸ Electrocutation became disfavored after a series of high-profile botches in the 1980s and 1990s.¹⁰⁹ Today, the majority of states use lethal injection, a procedure that takes place within prison walls, with just a small select audience in attendance.¹¹⁰ Although drug shortages have caused problems in the past several years, most states currently employing lethal injection use a three-drug protocol.¹¹¹ The first drug is a fast-acting barbiturate sedative that induces a coma-like state when administered at certain levels.¹¹² The second drug is a paralytic agent whose primary purpose is to keep the inmate's body still while the third drug kills.¹¹³ The third drug is potassium chloride, which induces cardiac arrest.¹¹⁴

The paralytic agent carries some risk. If the initial barbiturate is ineffective, the inmate is left conscious but paralyzed, unable to signal that he can feel the paralytic agent's suffocating effect or the excruciating, burning pain caused by the potassium chloride as it stops the heart.¹¹⁵ As Ty Alper notes, no inmate has ever survived a lethal injection, so it is impossible to know exactly what this feels like;¹¹⁶ however, accounts of improperly anesthetized patients left conscious but paralyzed on the operating room table give a sense of the terror the condemned may feel.¹¹⁷

In its 2008 opinion *Baze v. Rees*,¹¹⁸ the Supreme Court held that the three-drug protocol did not violate the Eighth Amendment's pro-

¹⁰⁷ See Woody R. Clermont, *Your Lethal Injection Bill: A Fight to the Death over an Expensive Yellow Jacket*, 24 ST. THOMAS L. REV. 248, 266 (2012) (noting that the last public hanging in the United States occurred on August 14, 1936).

¹⁰⁸ See *id.* at 268 (noting that three executions by firing squad took place in Utah).

¹⁰⁹ See Denno, *Electrocutation*, *supra* note 106, at 662–76 (describing various botched executions).

¹¹⁰ *Id.* at 557.

¹¹¹ See Deborah W. Denno, *Lethal Injection Chaos Post-Baze*, 102 GEO. L.J. 1331, 1341–42, 1347 (2014) (discussing states' overwhelming adoption of lethal injection and drug shortages that states have faced).

¹¹² See *Glossip v. Gross*, 135 S. Ct. 2726, 2732 (2015) (describing Oklahoma's three-drug protocol).

¹¹³ See *id.* (describing a paralytic agent that inhibits muscular-skeletal movements).

¹¹⁴ *Id.*; see *Baze v. Rees*, 553 U.S. 35, 73 (2008) (Stevens, J., concurring) (“Nor is there any necessity for [the paralytic agent] pancuronium bromide to be included in the cocktail to inhibit respiration when it is immediately followed by potassium chloride, which causes death quickly by stopping the inmate's heart.”).

¹¹⁵ See *Conner v. N.C. Council of State*, Nos. 07-GOV-0238, 07-GOV-0264, at 276 (N.C.O.A.H. Aug. 9, 2007).

¹¹⁶ See Ty Alper, *Anesthetizing the Public Conscience: Lethal Injection and Animal Euthanasia*, 35 FORDHAM URB. L.J. 817, 829 (2008).

¹¹⁷ See *id.* (describing anesthesia awareness in the hospital setting).

¹¹⁸ 553 U.S. 35 (2008).

hibition on cruel and unusual punishment despite the risk that an inmate could be left paralyzed and in pain due to the paralytic agent.¹¹⁹ The Justices framed the issue as a balance between dignity and pain. In his plurality opinion, Justice Roberts claimed that Kentucky had “an interest in preserving the dignity of the procedure, especially where convulsions or seizures could be misperceived as signs of consciousness or distress.”¹²⁰ Justice Stevens, concurring in judgment, retorted that any interest in a dignified death was outweighed by the possibility of the inmate “actually experiencing excruciating pain that no one can detect.”¹²¹

This subpart first analyzes two dignities explicitly invoked in death penalty litigation: the dignity of the procedure and the objective dignity of the individual. Then it argues that the subject of dignity in the death penalty context is in fact the collective in whose name the state punishes. The dignity of the procedure serves as a proxy for collective dignity, and collective dignity in turn overdetermines the definition of individual dignity in the death penalty.

1. *Dignity of the Procedure*

The paralytic agent in *Baze* was considered important for dignity because without it, the unconscious inmate’s body would mechanically convulse as the lethal drugs ran through him. Justice Brennan first made the connection between the aesthetics of an execution procedure and its dignity in *Glass v. Louisiana*.¹²² Dissenting to a denial of certiorari in a case challenging death by electrocution, he argued that human dignity “require[d] a minimization of physical violence during execution irrespective of the pain that such violence might inflict on the condemned.”¹²³ Justice Blackmun picked up on the same theme in another dissent to a denial of certiorari, this time in a case challenging death by hanging: “[P]artial or complete decapitation of the person” with “blood spray[ing] uncontrollably, obviously violate[d] human dignity.”¹²⁴ In excruciating detail, Justice Blackmun described what a witness to a hanging saw:

¹¹⁹ *Baze*, 553 U.S. at 47, 61 (plurality opinion) (holding that Kentucky’s lethal injection protocol satisfied the Eighth Amendment and that to receive a stay of execution, a prisoner “must show that the risk is substantial when compared to the known and available alternatives”).

¹²⁰ *Id.* at 57.

¹²¹ *Baze*, 553 U.S. at 73 (Stevens, J., concurring).

¹²² 471 U.S. 1080 (1985) (Brennan, J., dissenting from denial of certiorari).

¹²³ *Id.* at 1085.

¹²⁴ *Campbell v. Wood*, 511 U.S. 1119, 1122 (1994) (Blackmun, J., dissenting from denial of certiorari).

When the trap springs he dangles at the end of the rope. There are times when the neck has not been broken and the prisoner strangles to death. His eyes pop almost out of his head, his tongue swells and protrudes from his mouth, his neck may be broken, and the rope many times takes large portions of skin and flesh from the side of the face that the noose is on. He urinates, he defecates, and droppings fall to the floor while witnesses look on.¹²⁵

Although the Supreme Court has never declared an execution procedure unconstitutional due to its undignified nature, the “cruelty and indignity” associated with various execution methods have motivated legislatures to ban their use in favor of less public and ostensibly more humane ways to take life.¹²⁶ A doctor who helped propel Oklahoma to become the first state, in 1977, to adopt lethal injection, explained that “[f]rom what I had heard of electrocution . . . it was pretty grotesque, with eyeballs popping out of their sockets and smoke coming out of the head helmet. It seemed to me a lethal injection would be much more humane.”¹²⁷

Having found a less spectacular way to execute, it is now states, and not inmates, that invoke dignity to defend the optics of the execution. Even though a paralytic agent is unnecessary to the effectiveness of lethal injection, states defend the use of such an agent by arguing it is necessary for the procedure’s dignity.¹²⁸ In *Baze*, Kentucky argued against petitioners’ claim that the inmate’s involuntary muscle contractions were inconsequential to the dignity of the inmate because the inmate would be sedated and impervious to pain.¹²⁹ Dignity was about aesthetics, not pain. Petitioners “ignore[d] the impact [of convulsions] on family members and other witnesses.”¹³⁰ President

¹²⁵ *Id.* (citation omitted).

¹²⁶ See Denno, *Electrocution*, *supra* note 107, at 683 (“The cruelty and indignity associated with hanging prompted legislation against its use.”); see also Deborah W. Denno, *Getting to Death: Are Executions Constitutional?*, 82 IOWA L. REV. 319, 389 (1997) [hereinafter Denno, *Executions*] (discussing how states adopted electrocution because it “offered a far less visible and, therefore, less scrutinized procedure” and how some states then switched from electrocution “to lethal gas when problems with electrocution became more public”).

¹²⁷ Denno, *Legislatures*, *supra* note 22, at 96 (alteration in original) (quoting Dr. Stanley Deutsch, then-head of Oklahoma Medical School’s Anesthesiology Department).

¹²⁸ See *id.* at 91 (describing how Ronald Reagan, when he was Governor of California, spoke favorably of lethal injection, comparing it to the ease of a veterinarian putting a horse to sleep).

¹²⁹ Brief for Respondents at 51, *Baze v. Rees*, 553 U.S. 35 (2008) (No. 07-5439).

¹³⁰ *Id.*; see also Alper, *supra* note 117, at 822 n.30 (“Q. Is there anything beneficial that pancuronium does for the inmate? A. Not the inmate directly. Q. And indirectly? A. It may decrease the misperception of these involuntary movements as consistent with suffering on the part of the witnesses, including the inmate’s family. Q. But for the inmate himself? A. I said no.” (quoting deposition of Dr. Mark Dershwitz)).

George W. Bush expressed a similar sentiment after a video circulated of Saddam Hussein's execution in which taunts could be heard moments before he was hanged.¹³¹ Asked for his reaction, Bush said he wished the execution had "gone in a more dignified way."¹³²

The perception of the audience, or imagined perception of the audience, is essential to the dignity of the execution procedure. In *Baze*, Justice Roberts implied that the dignity of the procedure diminishes when an audience misperceives an inmate's convulsions as signs of distress.¹³³ How the procedure *looks* to its audience determines the dignity of the procedure.¹³⁴ States have decided that what the audience wishes to see, and hence what counts as dignified, is a passive and pacific ritual in which an execution looks like a slumberous turn to unconsciousness.¹³⁵

The seriousness of what the state does when it executes, to be sure, is better recognized by solemnity and ritual than chaos and carnival. It is legitimate for a state to be concerned with the appearance of an execution for its witnesses and unsurprising that its concern for solemnity is expressed through the language of dignity. In the assisted suicide context, we have already seen how dignity understood as integrity contains a bodily aspect, important for the individual and the friends and family who watch her die. But it is important to note that in the death penalty context, the dignity of the procedure seems to be defined according to the perspective of the state, witnesses, and society.

¹³¹ See Sam Dagher et al., *Second Guard Held in Hussein Video Investigation*, CNN (Jan. 4, 2007, 10:29 AM), <http://www.cnn.com/2007/WORLD/meast/01/04/saddam.execution/index.html> (describing taunts heard moments before Hussein was hanged).

¹³² *Bush Wishes Hussein Execution 'More Dignified'*, CNN (Jan. 4, 2007, 8:56 PM), <http://www.cnn.com/2007/WORLD/meast/01/04/iraq.main>.

¹³³ See *Baze v. Rees*, 553 U.S. 35, 57 (2008) (plurality opinion) (asserting a governmental interest in preserving dignity of the procedure by preventing convulsions).

¹³⁴ See Robert Blecker, *Killing Them Softly: Meditations on a Painful Punishment of Death*, 35 FORDHAM URB. L.J. 969, 986 (2008) ("[T]he Chief Justice insisted that 'dignity' might justify a real risk of painful death in order to avoid a messy looking painless one.").

¹³⁵ See Alper, *supra* note 117, at 819 n.17 ("Witnesses to lethal injection executions routinely describe them as 'peaceful.'"); *id.* at 822 ("States use pancuronium in the execution process because it paralyzes the inmate before death, thus sparing witnesses to the execution the experience of seeing the twitching and gasping that sometimes accompanies even painless deaths."); Shai J. Lavi, *Humane Killing and the Ethics of the Secular: Regulating the Death Penalty, Euthanasia, and Animal Slaughter*, 4 U.C. IRVINE L. REV. 297, 318 (2014) ("What distinguishes the death penalty from the scaffold, medical euthanasia from suicide, and the stunning of the animal in the modern abattoir from the traditional neck-cut is the pacified taking of life.").

2. *Objective Individual Dignity*

Courts and states also speak of the dignity of the *individual* in death penalty litigation. During oral argument in *Baze*, for instance, the lawyer for Kentucky justified the use of the paralytic agent on the ground that it brought about “a more dignified death, *dignified for the inmate*, dignified for the witnesses.”¹³⁶ When Clayton Lockett’s execution went awry, prison officials claimed they had covered the IV access point near his groin to preserve Lockett’s dignity.¹³⁷ But Lockett himself had not requested the sheet; it was the warden’s decision.¹³⁸ When it comes to execution procedure, individual dignity in the death penalty context is construed objectively.

For many, it might make sense that individual dignity in the death penalty context should be objective: based on a generalized assumption of what death-row inmates would consider dignified rather than subjectively based on an individual’s expressed wishes. After all, when an inmate is punished with imprisonment, and ultimately death, part of her punishment surely consists in a loss of liberty. Yet the Supreme Court has held that “convicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison.”¹³⁹ And as Justice Brennan wrote, “[E]ven the vilest criminal remains a human being possessed of common human dignity.”¹⁴⁰ In addition, elements of subjective dignity already appear in connection with other aspects of the death penalty. Scholars, for instance, have debated whether lawyers should respect a prisoner’s wish to forgo appeals on a death sentence, framing the issue as a question of the “prisoner’s dignity” versus “the dignity of the law.”¹⁴¹ The opportu-

¹³⁶ Transcript of Oral Argument at 33, *Baze v. Rees*, 553 U.S. 35 (2008) (No. 07-5439) (emphasis added).

¹³⁷ Brief for Respondents at 14, *Glossip v. Gross*, 135 S. Ct. 2726 (2015) (No. 14-7955). Members of the execution team failed to notice this in part because of the sheet, which covered an area of swelling “larger than a golf ball” near the IV access point. Berger, *supra* note 1, at 1390.

¹³⁸ OKLA. DEP’T OF PUB. SAFETY, *THE EXECUTION OF CLAYTON D. LOCKETT: EXECUTIVE SUMMARY* 17 (2014), <http://deathpenaltyinfo.org/documents/LockettInvestigationReport.pdf>. Perhaps the warden thought a person in Lockett’s position would want his groin covered, yet she did not seek Lockett’s opinion.

¹³⁹ *Bell v. Wolfish*, 441 U.S. 520, 545 (1979) (stating the proposition and citing a number of cases to support it).

¹⁴⁰ *Furman v. Georgia*, 408 U.S. 238, 273 (1972) (Brennan, J., concurring).

¹⁴¹ See Richard J. Bonnie, *The Dignity of the Condemned*, 74 VA. L. REV. 1363, 1377, 1389 (1988); see also John H. Blume, *Killing the Willing: “Volunteers,” Suicide and Competency*, 103 MICH. L. REV. 939, 941 (2005) (arguing that the current standard for volunteering, which views volunteering as a personal client choice, is flawed); Meredith Martin Rountree, *Volunteers for Execution: Directions for Further Research into Grief, Culpability, and Legal Structures*, 82 UMKC L. REV. 295 (2014) (presenting a study of death-row volunteers); Christy Chandler, Note, *Voluntary Executions*, 50 STAN. L. REV.

nity for the prisoner to choose her last meal and last words can be understood as an effort to respect the prisoner's dignity by allowing her a final opportunity to act on free will.¹⁴² A small number of states have choice-of-execution laws, which allow inmates to choose between, for example, lethal injection and the firing squad.¹⁴³ To be sure, all of these choices are circumscribed by the state and may reflect concerns about collective dignity.¹⁴⁴ But the inmate's subjective choice too is taken into account.

In constitutional cases dealing with execution procedure, however, the subjective concerns of the condemned are limited to the language of pain.¹⁴⁵ Consider Justice Sotomayor's recent dissent in *Glossip v. Gross*,¹⁴⁶ a case challenging Oklahoma's revised lethal-injection protocol: "At least from a condemned inmate's perspective . . . visible yet relatively painless violence may be vastly preferable to an excruciatingly painful death hidden behind a veneer of medication."¹⁴⁷ For Justice Sotomayor, the inmate's primary concern is whether her death is painful or not; therefore an inmate might prefer a less painful death by firing squad than a more painful death by lethal injection. Viewpoints of the condemned may be considered, but their preference is spoken of in the language of pain rather than dignity. This is surprising given what we know from assisted suicide. In assisted suicide, pain was a meaningful factor affecting what it meant to die with dignity. In the death penalty, pain and dignity are separate

1897 (1998) (analyzing attorney's role when a client volunteers for execution); Stephen Skaff, Comment, Chapman v. Commonwealth: *Death Row Volunteers, Competency, and "Suicide by Court"*, 53 ST. LOUIS U. L.J. 1353 (2009) (discussing case of Marco Chapman as example of death row volunteerism).

¹⁴² See Daniel LaChance, *Last Words, Last Meals, and Last Stands: Agency and Individuality in the Modern Execution Process*, 32 LAW & SOC. INQUIRY 701, 702 (2007) (noting that allowing inmates to choose a last meal permits a sympathetic identification with them).

¹⁴³ See Denno, *Legislatures*, *supra* note 22, at 69 (describing "choice" states, which give inmates an option as to the method of execution).

¹⁴⁴ See *infra* Section II.B.iii.

¹⁴⁵ Although Utah once gave inmates a choice between different execution methods, in 2004 it banned death by firing squad and applied the law prospectively. *Utah Firing Squad Executes US Killer Ronnie Lee Gardner*, BBC, (June 18, 2010), <http://www.bbc.com/news/10347166>. However, Utah's governor signed legislation in March 2015 that made the firing squad an alternative execution method in case the State is unable to obtain the drugs needed for lethal injection. Michael Muskal, *Three of Utah's 8 Death Row Inmates Have Chosen Firing Squads*, L.A. TIMES (Mar. 24, 2015), <http://www.latimes.com/nation/la-na-firing-squad-utah-20150324-story.html>.

¹⁴⁶ 135 S. Ct. 2726 (2015).

¹⁴⁷ *Id.* at 2797 (Sotomayor, J., dissenting).

considerations pointing in opposite directions.¹⁴⁸ Thus, Justice Stevens in his *Baze* concurrence contrasted an interest in making sure “condemned inmate[s] die[] a dignified death” with the “risk that the inmate is actually experiencing excruciating pain that no one can detect.”¹⁴⁹

Individual dignity in the death penalty context is an objective concept. Notably, no court has asked what a reasonable person condemned to execution would consider to be a death with dignity. Instead, the dignity of the prisoner seems to hew closely to descriptions of procedural dignity, so much so that one may conclude that procedural dignity in fact defines the nature and scope of individual dignity. Kentucky’s counsel in *Baze*, perhaps unsurprisingly, took the stance that the use of a paralytic agent allowed a dignified death for both the inmate and the witnesses.¹⁵⁰ Chief Justice Roberts repeated this conclusion, explaining that the use of a paralytic agent would “enhance the dignity, not only of the procedure as a whole, but also to the condemned.”¹⁵¹ Even if the subjects of the two dignities differed, their requirements coincided exactly.

3. *Collective Dignity*

So far, this Note has identified the dignity of the procedure and individual objective dignity as two types of dignity that appear in the death penalty context. Still another type of dignity appears in death penalty jurisprudence: collective dignity. This subpart suggests that when courts and litigants discuss dignity in the death penalty context, the primary subject of that dignity is implicitly the collective. The dignity of the procedure is a proxy for collective dignity, and collective dignity in turn overdetermines the definition of individual dignity in the death penalty.

Collective dignity “addresses how members of civilized societies ought to behave and ought to be treated in order to respect the collective dignity of humanity. It is less concerned with individual dignity per se than with *how a society values the totality of human life*.”¹⁵² Collective dignity therefore neighbors the expressive theory of crime and punishment, which emphasizes that what society designates as

¹⁴⁸ See Denno, *Executions*, *supra* note 127, at 402 tbl.2 (separating the Court’s consideration of “unnecessary and wanton infliction of pain” from its consideration of human dignity, with the latter depending on minimizing mutilation and physical violence).

¹⁴⁹ *Baze v. Rees*, 553 U.S. 35, 73 (2008) (Stevens, J., concurring) (finding that the former interest was “vastly outweighed by” the latter).

¹⁵⁰ Transcript of Oral Argument at 33, *Baze v. Rees*, 553 U.S. 35 (2008) (No. 07-5439).

¹⁵¹ *Id.* at 10. Kentucky’s counsel in *Baze* also argued that the paralytic agent produced a more dignified death for both the inmate and the witnesses. *Id.* at 33.

¹⁵² Meltzer Henry, *supra* note 11, at 220–21 (emphasis added).

criminal and how society punishes cannot be understood independent of social values.¹⁵³

Collective dignity has the capacity to limit the scope of punishment generally and the death penalty specifically.¹⁵⁴ When the Supreme Court in 2014 placed new restrictions on the execution of the mentally incompetent,¹⁵⁵ it did so under the auspices of both individual and collective dignity. Not only does the Eighth Amendment “reaffirm[] the duty of the government to respect the dignity of all persons,” but its “protection of dignity reflects the Nation we have been, the Nation we are, and the Nation we aspire to be.”¹⁵⁶ The dignity of society or the state has a longer history beyond the Eighth Amendment. As scholars have explained, “from the earliest times, dignity has been associated with sovereignty.”¹⁵⁷ Until the twentieth century, the majority of Supreme Court references to dignity ascribed dignity only to sovereign bodies.¹⁵⁸ What makes the application of dignity in the execution procedure context unique is that, unlike in other areas of Eighth Amendment jurisprudence, dignity as applied to execution procedures has been used to *justify* forms of punishment.

In death penalty jurisprudence, the concept of collective dignity appears most overtly in references to “the dignity of man,” which refer to mankind as a whole and express the idea that society ought to treat individuals in a way that recognizes the specialness of their

¹⁵³ See EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 62–63 (W.D. Hall trans., Simon & Schuster 1997) (1893) (“[Punishment] does not serve, or serves only very incidentally, to correct the guilty person or to scare off any possible imitators. . . . Its real function is to maintain inviolate the cohesion of society by sustaining the common consciousness in all its vigour.”); H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY* 235 (Oxford Univ. Press 2d ed. 2008) (“[M]odern retributive theory has shifted the emphasis, from the alleged justice or intrinsic goodness of the return of suffering for moral evil done, to the value of the authoritative expression, in the form of punishment, of moral condemnation . . . involved in the offence.”); Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 *HARV. L. REV.* 413, 421 (1999) (“Punishment, the expressive theory tells us, conveys an authoritative schedule of moral values.”).

¹⁵⁴ Meltzer Henry, *supra* note 11, at 222 (“The Supreme Court invokes collective virtue as dignity to stop or limit activities that do not comport with how a decent society should respect the dignity of human life. This approach is evident in the Court’s Eighth Amendment jurisprudence, which limits the death penalty to mentally competent adults.”).

¹⁵⁵ *Hall v. Florida*, 134 S. Ct. 1986, 2001 (2014).

¹⁵⁶ *Id.* at 1992. The Supreme Court of Connecticut, relying on *Weems v. United States*, 217 U.S. 349 (1910), fashioned a four-factor framework for addressing the constitutionality of a particular method of execution: “(1) whether the method of execution comported with the contemporary norms and standards of society; (2) *whether it offends the dignity of the prisoner and society*; (3) whether it inflicted unnecessary physical pain; and (4) whether it inflicted unnecessary psychological suffering.” *State v. Webb*, 750 A.2d 448, 454 (Conn. 2000) (emphasis added).

¹⁵⁷ Daly, *supra* note 20, at 384–85; see also Resnik & Suk, *supra* note 19 (discussing the historical and contemporary relationship between sovereignty and dignity).

¹⁵⁸ Daly, *supra* note 20, at 384.

humanity.¹⁵⁹ The “dignity of man” might be understood as either the dignity of an institution or as the dignity of the human species. The latter may be seen as a generalization of individual dignity in a way the former may not. But in both cases, the protection of that dignity reflects back on the dignity of society as a whole.¹⁶⁰ Denouncing electrocution in *Glass*,¹⁶¹ Justice Brennan associated the protection of “the dignity of man” with the rejection of “barbaric practices.”¹⁶² When the state acts in a barbaric manner, treating “members of the human race as nonhumans,” it exceeds “the limits of civilized standards.”¹⁶³ In other words, as Meltzer Henry has written, collective dignity “is expressed when people behave and are treated in ways worthy of humans, not beasts.”¹⁶⁴ The concern with distinguishing the treatment of humans from animals helps explain comparisons made between state execution methods and veterinarian practices. Critics of lethal injection procedures have pointed to states that ban the use of a paralytic agent in animal euthanasia because of the risk of pain.¹⁶⁵ “It is unseemly—to say the least,” wrote Justice Stevens, “that Kentucky may well kill petitioners using a drug that it would not permit to be used on their pets.”¹⁶⁶

Collective dignity appears in death penalty litigation in a more implicit sense as well. This Note claimed earlier that the perspectives

¹⁵⁹ See *Furman v. Georgia*, 408 U.S. 238, 273 (1972) (Brennan, J., concurring) (“[E]ven the vilest criminal remains a human being possessed of common human dignity.”).

¹⁶⁰ In either case, there may be a risk that an individual will be expected to guard her particular slice of that larger-scale dignity. Stéphanie Hennette-Vauchez has warned that ascribing dignity to humanity as a whole may place demands on the individual to act in such a way that preserves humanity’s dignity. In that case, dignity becomes inalienable; the individual can neither renounce it nor subjectively define it. Hennette-Vauchez, *supra* note 13, at 51–52. The well-known case of M. Wackenheim, a French dwarf who made his living by participating in the game of dwarf throwing, is illustrative. The French Supreme Administrative Court ruled that dwarf throwing could be banned on the basis of the principle of dignity, even though only willing and competent adults participated in it. *Id.* at 36–37; see also Conseil d’État Assembly [CE Ass.], Oct. 27, 1995, 136727, Rec. Lebon 372 (Fr.).

¹⁶¹ *Glass v. Louisiana*, 471 U.S. 1080 (1985).

¹⁶² *Id.* at 1085 (1985) (Brennan, J., dissenting from denial of certiorari).

¹⁶³ *Furman v. Georgia*, 408 U.S. 238, 270, 273 (1972) (Brennan, J., concurring) (quoting *Trop v. Dulles*, 356 U.S. 86, 100 (1958)).

¹⁶⁴ Meltzer Henry, *supra* note 11, at 221.

¹⁶⁵ See generally Alper, *supra* note 117.

¹⁶⁶ *Baze v. Rees*, 553 U.S. 35, 72–73 (2008) (Stevens, J., concurring). But see the strange interpretation of the relevance of animal practices in *Abdur’Rahman v. Bredesen*, No. M2003-01767-COA-R3-CV, 2004 WL 2246227, at *7 (Tenn. Ct. App. Oct. 6, 2004), *aff’d*, 181 S.W.3d 292 (Tenn. 2005) (“The logic of Mr. Abdur’Rahman’s interpretation . . . leads to absurd results. If he is a nonlivestock animal for the purpose of the Nonlivestock Animal Humane Death Act, then his execution may only be carried out by a licensed veterinarian, a veterinarian technician, or a shelter employee who has successfully completed a euthanasia-technician certification course.”).

of witnesses are essential to judging whether or not an execution procedure should be considered dignified.¹⁶⁷ This subpart asks more directly *who* the subject of procedural dignity is, and suggests that it is collective society. The collective's role as the subject of procedural dignity helps explain why it is now states invoking dignity in *defense* of execution methods rather than individuals in *opposition* to them. When courts speak of maintaining the dignity of the process for the sake of the witnesses, their concern is that witnesses will conclude that the state fails to execute with dignity, not that the proceedings will somehow injure the witnesses.¹⁶⁸ There is a reason why officials close curtains when executions go awry,¹⁶⁹ seek to keep the media from viewing the execution until all is perfectly staged,¹⁷⁰ and write execution protocols that become exercises in "window dressing, stage directions, the establishment of ritual, designed to create an illusion of an orderly, humane, dignified procedure for a controlled euthanasia."¹⁷¹ Officials are concerned about whether the dignity of the procedure expresses the dignity of state and society.

¹⁶⁷ In *Baze's* oral argument, counsel for Kentucky claimed that using a paralytic agent served "the purpose of dignifying the process for the benefit of the inmate and for the benefit of the witnesses." Transcript of Oral Argument at 43, *Baze v. Rees*, 553 U.S. 35 (2008) (No. 07-5439).

¹⁶⁸ See Brief for Petitioners at 52, *Baze v. Rees*, 553 U.S. 35 (2008) (No. 07-5439) ("There is no evidence and no reason to think that witnesses would be injured by viewing any involuntary movements associated with death.").

¹⁶⁹ See Corinna Barrett Lain, *The Politics of Botched Executions*, 49 U. RICH. L. REV. 825, 831 (2015) (describing how officials shut the blinds after Clayton Lockett started to kick, pull off the gurney, and say something was wrong during his 2014 botched lethal injection procedure).

¹⁷⁰ See *Cal. First Amendment Coal. v. Woodford*, No. C-96-1291-VRW, 2000 WL 33173913, at *4 (N.D. Cal. July 26, 2000), *aff'd*, 299 F.3d 868 (9th Cir. 2002) (quoting one prison warden explaining that "[i]t is important that we are perceived as using only the minimal amount of force necessary to accomplish the task. In reality, it may take a great deal of force. This would most certainly be misinterpreted by the media and inmate invited witnesses who don't appreciate the situation"); see also Denno, *Legislatures*, *supra* note 22, at 108 (describing how prison officials try to stage the scene before allowing witnesses to view the proceedings).

¹⁷¹ Leigh B. Bienen, *Anomalies: Ritual and Language in Lethal Injection Regulations*, 35 FORDHAM URB. L.J. 857, 879 (2008); see also Alper, *supra* note 117, at 833 ("The explicit insistence on the 'dignity' of the execution—even at the expense of knowing whether the execution is actually humane—is quite a concession from the State, as it confirms the suspicion that the use of pancuronium is designed to maintain appearances at all costs. As such, it brings to mind the words of the British physician Edward Berdoe . . . who argued that curare anesthetizes only 'the public conscience.'" (quoting EDWARD BERDOE, *A CATECHISM OF VIVISECTION: THE WHOLE CONTROVERSY ARGUED IN ALL ITS DETAILS* 70 (1903)); Lavi, *supra* note 136, at 316 ("Furthermore, the insistence that dying not only be painless, but also appear to be painless, suggests that humane killing is carried out as a public spectacle as much as an ethical commitment, and that it seeks to appease public emotions as much as to assuage public reason.").

The interest that states have in employing the language of dignity to defend their procedures does not wholly explain why defendants do not themselves invoke dignity to challenge execution methods. That reason may be found in the idea that procedural dignity overdetermines the nature and scope of individual dignity claims in this context. From *Glass* through *Campbell* to *Baze*, death penalty jurisprudence has portrayed dignity offenses as “physical violence,”¹⁷² “mutilation,”¹⁷³ decapitation and spraying blood,¹⁷⁴ and “convulsions or seizures.”¹⁷⁵ The concern is less about “an indignity to the unconscious inmate” and more a concern for “the potential for discomfort of witnesses,” as suggested by the overwhelmingly visual nature of these dignity violations, the exclusion of considerations of pain from the dignity analysis, and the fact that these violations all occur when the condemned is unconscious.¹⁷⁶ All these violations may be considered violations of the objective dignity of the condemned, but objective individual dignity appears, in turn, to be merely an epiphenomenon of procedural, and hence collective, dignity.

III

DIGNITY LEARNING FROM DIGNITY

Thus far, this Note has explored two seemingly very different concepts of dignity, one in the assisted suicide context and one in death penalty jurisprudence. We determined that the subject of dignity in the assisted suicide context is primarily the individual, and her dignity largely consists of self-determination and integrity, although an element of objective individual dignity is also involved. The subject of dignity in the death penalty context, by contrast, is the collective in whose name the state punishes, and the dignity of the collective depends on a dignified procedure, understood as nonviolent and peaceful.

This Note ends by critically assessing whether the two constitutional areas that link death and dignity have anything to learn from each other. I suggest they do. We should recognize that assisted suicide’s individualistic dignity includes not just a right to decide how to die but also a responsibility to collective society to consider how the

¹⁷² *Glass v. Louisiana*, 471 U.S. 1080, 1085 (1985) (Brennan, J., dissenting from denial of certiorari).

¹⁷³ *Id.*

¹⁷⁴ *Campbell v. Wood*, 511 U.S. 1119, 1122 (1994) (Blackmun, J., dissenting from denial of certiorari).

¹⁷⁵ *Baze v. Rees*, 553 U.S. 35, 57 (2008) (plurality opinion).

¹⁷⁶ Jason D. Hughes, *The Tri-chemical Cocktail: Serene Brutality*, 72 ALB. L. REV. 527, 555–56 (2009).

nature of that suicide may impact collective dignity. We should also reassess the place of the individual in collective and procedural dignity in death penalty jurisprudence. The state and courts should import subjective individual dignity considerations and reconsider whether its invocation of dignity in fact reflects a collective valuation of dignity or merely assuages social sensibilities by masking the reality of death.

A. *Assisted Suicide: Learning from Collective Dignity*

The idea that dignity in assisted suicide is primarily about self-determination or integrity has led some scholars to ask: What is dignity's logical stopping point? If dying with dignity means giving an individual the choice of when and how to die, what is to stop someone who suffers from impotence from arguing that it destroys the integrity of his life to live impotently?¹⁷⁷ One response is to point out that within the concept of individual dignity lies an objective notion of dignity. But then there might be a second challenge. What if an objective notion of dignity overrides people's subjective preferences, compelling them to consider death when they might not have otherwise? What if an objective notion of death with dignity is too Nietzschean, exhibiting a contempt for weakness and overvaluing a noble death?¹⁷⁸

Apart from externally imposed constraints, there is a different way to think about placing limits on a subjective notion of dignity. Constraints *internal* to a subjective notion of dignity may require the individual to consider the impact of her suicide on collective dignity. The first step is to recognize that an individual's suicide may express something not just about individual dignity but also about society. Over a hundred years ago, the French sociologist Émile Durkheim pointed to an etiological connection between society and suicide, with

¹⁷⁷ See Allmark, *supra* note 71, at 256 (discussing critiques of the notion that "dying with dignity is whatever the dying person thinks it is"); Christopher Miles Coope, *Death with Dignity*, 27 HASTINGS CTR. REP. 37, 37 (1997) (suggesting that "death with dignity" has no meaning if it is entirely subjectively defined); Patrick M. Curran, Jr., Note, *Regulating Death: Oregon's Death with Dignity Act and the Legalization of Physician-Assisted Suicide*, 86 GEO. L.J. 725, 737 n.92 (1998) (arguing it may be impossible to create standards around "pain" and "dignity" because they are subjective terms).

¹⁷⁸ See Coope, *supra* note 178, at 38 (describing Nietzsche's romanticized notion of profound death as "an invitation to folly and disaster"). Nietzsche's *Thus Spoke Zarathustra* might be read to advocate a heroic and strong-willed "superman," who might prefer to meet death than to live weakly. However, Nietzsche's *Übermensch* might be better translated as an "overman," someone who is able to overcome his or her own selfhood. See FRIEDRICH NIETZSCHE, *THUS SPOKE ZARATHUSTRA* 3–5 (Adrian Del Caro & Robert Pippin eds., Adrian Del Caro trans., Cambridge Univ. Press 2006).

the former a cause of the latter.¹⁷⁹ The causal pathway may run in the other direction as well. First, the very fact of suicide deeply impacts and reverberates through one's community. Consequently, the individual may bear some responsibility to lessen the impact of her transgressive death on her community. Second, as discussed above, collective dignity "addresses how members of civilized societies ought to behave and ought to be treated in order to respect the collective dignity of humanity."¹⁸⁰ Suicide may reflect the "moral constitution of society," in particular the respect a community accords human life.¹⁸¹ When and how individuals take their lives matters for *both* individual and collective dignity. An individual's right to take her life may include a responsibility to do so in a way that reflects her community's values. In other words, a right to assisted suicide may be a responsibility-right.

Jeremy Waldron has argued that a subset of rights may be considered responsibility-rights.¹⁸² Intrinsic to such rights are responsibilities that "inform[] and condition[] the individual possession and exercise of the right."¹⁸³ Importantly, that responsibility or obligation is not imposed from the outside but instead is "part and parcel of the right."¹⁸⁴ Waldron emphasizes that not all rights are responsibility-rights—certainly not, for instance, the right not to be tortured.¹⁸⁵ But assisted suicide seems like a good contender for a responsibility analysis. Understood broadly, the right to assisted suicide allows discretion in how the right is exercised. And as with freedom of speech,¹⁸⁶ the way a right to assisted suicide is exercised may either reinforce or fray the social fabric.

Analyzing assisted suicide as a responsibility-right also helps clarify the connection between autonomy and dignity. If dignity is tightly tied to individual autonomy, why bother with the language of dignity at all? One reason is that dignity implicates existential and bodily integrity as well. But another reason may be that the concept of dignity implies not just rights or privileges but also responsibilities.

¹⁷⁹ ÉMILE DURKHEIM, *SUICIDE: A STUDY IN SOCIOLOGY* 263 (George Simpson ed., John A. Spaulding & George Simpson trans., Routledge 2002) (1897) [hereinafter DURKHEIM, *SUICIDE*].

¹⁸⁰ Meltzer Henry, *supra* note 11, at 220–21.

¹⁸¹ DURKHEIM, *SUICIDE*, *supra* note 180, at 263.

¹⁸² Jeremy Waldron, *Dignity, Rights, and Responsibilities*, 43 ARIZ. ST. L.J. 1107, 1107 (2011).

¹⁸³ *Id.* at 1117.

¹⁸⁴ *Id.* at 1123–24.

¹⁸⁵ *Id.* at 1134.

¹⁸⁶ Waldron suggests freedom of speech could be considered a responsibility-right. *Id.* at 1124.

Dignity was traditionally associated with status and office.¹⁸⁷ Thus one used to speak of the dignity of a judge, and that dignity pertained to both the privileges of his office and his duty to adjudicate.¹⁸⁸

Within the concept of individual dignity as it appears in the assisted suicide context may sit both a right to assisted suicide and a responsibility to the community that facilitates the individual's death. To the extent possible, then, an individual seeking assisted suicide should feel constrained by a responsibility to respect collective dignity in choosing how to die. Even as it provides for assisted suicide, a legislature may be justified in limiting the means by which it is achieved.

B. *Death Penalty: Learning from Individual Dignity*

Efforts to make an execution appear dignified to its witnesses may visit indignities on the condemned. One death row prisoner “not[ed] the irony that witnesses just see someone going to sleep and that they do not see the prison officials ‘put a catheter in your penis and a plug in your ass so you don’t shit all over yourself in front of their witnesses, because that would just ruin the sterile effect of execution.’”¹⁸⁹ We may find it troubling that procedures defended under the avatar of collective dignity serve to whitewash a central social fact. The state is taking an individual life when it executes, and that, by its nature, is a violent act.

There are two ways individual dignity in assisted suicide might help us think through the “masking” effect of dignity in the death penalty context. First, considerations of subjective dignity could be imported into the death penalty. For example, the condemned could be given some choice about the method of death. At the very least, the inmate’s pain could be considered an intrinsic element of dignity rather than an extrinsic counter-consideration.

Alternatively, contrasting dignity in assisted suicide with dignity in the death penalty may lead us to consider how little weight the death penalty accords the condemned’s dignity. This might lead us to question whether we are really acting for the sake of collective dignity when we invoke dignity to defend execution practices that mask the reality of an individual’s death. Collective dignity speaks to society’s valuation of human life and dignity. But how can society know whether it executes in a way that honors that valuation if the reality of

¹⁸⁷ *Id.* at 1120–21.

¹⁸⁸ *Id.* at 1121.

¹⁸⁹ Meghan S. Skelton, *Lethal Injection in the Wake of Fierro v. Gomez*, 19 T. JEFFERSON L. REV. 1, 38 (1997) (quoting STEPHEN TROMBLEY, *THE EXECUTION PROTOCOL: INSIDE AMERICA’S CAPITAL PUNISHMENT INDUSTRY* 177 (1992) (quoting A.J. Bannister, an inmate on death row in Missouri)).

the death is obscured by the staging of the execution? The death penalty's current conception of dignity, overwhelmingly pinned to the optics of the execution, may frustrate more than reflect an accounting of collective values.

To be sure, under collective dignity's auspices, there is good reason to attend to the solemnity of the execution, which recognizes the seriousness of what the state does. Yet collective dignity depends on society being able to accurately understand what it means to take an individual's life. Forcing society to confront the reality of execution helps ensure that an execution reflects collective dignity.¹⁹⁰

Before going further into what the death penalty can learn from dignity in the assisted suicide context, I want to review a few reasons why individual dignity might get short shrift in death penalty jurisprudence. First is the fact that dying with dignity in the assisted suicide context has been framed as a liberty interest, whereas executions are almost always unwilling and therefore deprive the inmate of liberty. Yet in both cases, life inevitably ends at an involuntarily premature moment, either at the hand of the state or as a result of terminal illness. In both cases, the question of freedom applies not to choosing *whether* to die but instead to *how* one dies. The dignity interests in this sense are similar.¹⁹¹

More important may be a sense that a prisoner who is on death row for having murdered another human being, often brutally, does not really deserve a dignified death—or at least should not be able to define what it means to die with dignity given her own callous treatment of human life. If dying with dignity is important in part to maintain the integrity of an individual's life, what kind of death does an individual who has murdered deserve? This is an understandable reaction, but it falsifies the Court's ostensible interest in the dignity of the condemned, reduces the totality of a life to a crime, however horrendous, and visits greater punishment on the inmate than has been prescribed. The inmate is sentenced to death, not to an undignified death.

Hence death penalty jurisprudence might import from assisted suicide jurisprudence a concept of subjective individual dignity, which would give inmates greater freedom in deciding how they die. For instance, execution protocols currently allow witnesses to view the

¹⁹⁰ See Jeremy Waldron, *Homelessness and Community*, 50 U. TORONTO L.J. 371, 380–81 (2000) [hereinafter Waldron, *Homelessness*] (suggesting that citizens' confrontation with distressing social facts like homelessness importantly force an ethical reckoning with the issue).

¹⁹¹ To be sure, precautionary measures may need to be taken in executions to protect prison officials. Such precautions need not, however, erase all interest in the individual dignity of the condemned.

execution, including the family members of victims.¹⁹² If an inmate did not want to be put on display, individual dignity might require a prison to maintain the privacy of an execution or allow only those witnesses the condemned approved.¹⁹³ Even more, individual dignity might require states to give individuals a choice in execution method. We should take seriously Justice Sotomayor's *Glossip* dissent,¹⁹⁴ where she admonishes: "In the future . . . condemned inmates might well decline to accept States' current reliance on lethal injection. In particular, some inmates may suggest the firing squad as an alternative."¹⁹⁵

As with assisted suicide, giving the condemned some choice in how to die would require a *balance* between respecting collective dignity and respecting the inmate's interest in a death reflecting her self-determination and integrity. There might be ways an individual would choose to die that impinge on collective dignity and therefore should not be allowed. This would be the case for any method clearly unconstitutional under the Eighth Amendment. An inmate, for instance, could not insist on being drawn and quartered.¹⁹⁶

There are reasons to believe that alternatives to lethal injection might better respect *both* collective and individual dignity. For instance, a firing squad may be both more reliable than lethal injection and "relatively quick and painless."¹⁹⁷ Some inmates may find death by firing squad a better expression of their life and self-determination than lethal injection, where the condemned is strapped to a gurney, "flipping around like a fish."¹⁹⁸ At the same time, a firing squad could still fulfill the requirements of collective dignity. Indeed, within the last fifteen years, Idaho, Oklahoma, and Utah have all considered the firing squad as at least a backup to lethal injection.¹⁹⁹

¹⁹² See Denno, *Legislatures*, *supra* note 22, at 123–25 (discussing what types of witnesses are allowed to see a lethal injection and what they are allowed to view).

¹⁹³ Perhaps a member of the media would attend as well, to serve as the public's surrogate in observing executions to ensure no untoward conduct occurs. See *id.* at 105–06 (describing the significance of media coverage of executions).

¹⁹⁴ *Glossip v. Gross*, 135 S. Ct. 2726 (2015).

¹⁹⁵ *Id.* at 2796 (Sotomayor, J., dissenting).

¹⁹⁶ See *Wilkerson v. Utah*, 99 U.S. 130, 135–36 (1878) (describing being drawn and quartered as forbidden under the Eighth Amendment).

¹⁹⁷ *Glossip*, 135 S. Ct. at 2796.

¹⁹⁸ Christopher Q. Cutler, *Nothing Less than the Dignity of Man: Evolving Standards, Botched Executions and Utah's Controversial Use of the Firing Squad*, 50 CLEV. ST. L. REV. 335, 360 (2003) (quoting a Utah inmate who chose the firing squad over lethal injection).

¹⁹⁹ See Denno, *Legislatures*, *supra* note 22, app. 2, at 192, 201, 204 (listing the execution procedures of the fifty states). Idaho made lethal injection the sole execution method in 2009. *Authorized Methods*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/methods-execution?scid=8&did=245#ok> (last visited July 9, 2016) (listing updated information on execution methods).

Until 2004, Utah offered a choice between lethal injection and the firing squad.²⁰⁰ Of the eight prisoners on Utah's death row as of 2015, three have chosen the firing squad.²⁰¹ And importantly, though a state would have the opportunity to control the protocols of a firing squad so as to attend to the solemnity of the act,²⁰² the fact of death would not be cleansed as it has been in lethal injection. As Judge Kozinski writes:

Using drugs meant for individuals with medical needs to carry out executions is a misguided effort to mask the brutality of executions by making them look serene and peaceful—like something any one of us might experience in our final moments. But executions . . . are brutal, savage events, and nothing the state tries to do can mask that reality.²⁰³

In the case of a firing squad, the inmate would have the opportunity to sit or stand upright and experience a relatively painless death; the state would be able to ritualize the procedure; and the fact of death would be apparent in the sudden, bloody transition from life to death.

CONCLUSION

Society has an interest in executing in a dignified manner, but not at the expense of obscuring the fact that when the state executes, it kills an individual. Indeed, we may fail to respect collective dignity by hiding this reality from society's eyes. "The States may well be reluctant to pull back the curtain for fear of how the rest of us might react to what we see," writes Justice Sotomayor.²⁰⁴ "But we deserve to know the price of our collective comfort before we blindly allow a State to make condemned inmates pay it in our names."²⁰⁵ In hiding the blood, urine, and spasms, states and prison officials deprive society of the opportunity to wrestle with whether executions in fact reflect

²⁰⁰ See Muskal, *supra* note 146. Utah recently reinstated the firing squad as an alternative if lethal injection proved infeasible. *Id.*

²⁰¹ See *id.* (noting that of eight inmates, four chose lethal injection, three selected firing squad, and one inmate's choice was unspecified).

²⁰² In this way, death by firing squad under the death penalty should be distinguished from an individual shooting himself in an act of suicide. Though the method of death is the same, the contexts are different. The former takes place within prison walls and under state-controlled conditions, while the latter takes place in public and not under controlled conditions, meaning that friends and family members may be left to unexpectedly stumble upon a distressing scene.

²⁰³ *Wood v. Ryan*, 759 F.3d 1076, 1102–03 (9th Cir.) (Kozinski, J., dissenting from the denial of rehearing en banc), *vacated*, 135 S. Ct. 21 (2014) (citations omitted).

²⁰⁴ *Glossip v. Gross*, 135 S. Ct. 2726, 2797 (Sotomayor, J., dissenting), *reh'g denied*, 136 S. Ct. 20 (2015).

²⁰⁵ *Id.* (Sotomayor, J., dissenting).

their understanding of human dignity. The distress that taking life may cause may be necessary in order for society to have a “vigorous ethical confrontation” with whether and how the death penalty comports with both individual and collective dignity.²⁰⁶

²⁰⁶ See Waldron, *Homelessness*, *supra* note 191, at 381 (“People are naturally upset when they are involved in this sort of confrontation. If no one is disturbed, hurt, or distressed . . . that is a sign that vigorous ethical confrontation is not taking place, and . . . intellectual life and ethical and cultural progress of our civilization may be grinding to a halt.”).