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## **Reflections on the Death Penalty: Human Rights, Human Dignity, and Dehumanization in the Death House**

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Robert Johnson\*

### ABSTRACT

A working definition of human dignity is developed and applied to the death penalty. It is argued that the death penalty is inherently dehumanizing and hence is a violation of human dignity.

### KEYWORDS

Human Dignity, Human Nature, Human Rights, Dehumanization, Last Meals, Last Words, Executions, Capital Punishment

A central premise of human rights thinking is that each and every human being has an innate dignity that must be respected. Respect for one's human dignity is the original human right from which other human rights

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flow.<sup>1</sup> This begs two closely related questions: “What does it mean to be a human being?” and “What does it mean to respect a person’s human dignity?” In sketching an answer to these questions, I will offer what might be called a working definition of human nature and the human dignity possessed by all human beings by virtue of their status as human beings. Using this working definition, I will argue that the death penalty is inherently dehumanizing and hence is a violation of human dignity and human rights.

#### HUMAN NATURE AND HUMAN DIGNITY

At its core, the answer to the question, “What does it mean to be a human being?” starts with the matter of consciousness. Human beings are endowed with the capacity for a conscious awareness of self that marks the individual as distinct and separate from others; that conscious awareness is found in a world that exists independently of individuals and can be understood objectively through the use of reason.<sup>2</sup> Individual distinctiveness is understood through the use of the unique human capacity to reason about the world and one’s place in the world, which in turn entails the capacity, and ultimately the obligation, to bear responsibility for one’s life as a continuing moral enterprise.<sup>3</sup> Reasoning thus makes it possible to understand oneself as having a life that can be

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<sup>1</sup> See generally ERIN DALY, *DIGNITY RIGHTS: COURTS, CONSTITUTIONS, AND THE WORTH OF THE HUMAN PERSON* (2012).

<sup>2</sup> See generally JOHN R. SEARLE, *MIND, LANGUAGE, AND SOCIETY: PHILOSOPHY IN THE REAL WORLD* 40–45 (1999).

<sup>3</sup> ERNST CASSIRER, *ESSAY ON A MAN* 1–6 (1970); see generally Herbert Morris, *Persons and Punishment*, in *ON GUILT AND INNOCENCE: ESSAYS IN LEGAL PHILOSOPHY AND MORAL PSYCHOLOGY* 31 (1976). Cassirer distills the essential wisdom of Socrates on the subject of human nature as follows: “‘A life which is unexamined,’ says Socrates in his *Apology*, ‘is not worth living.’ We may epitomize the thought of Socrates by saying that man is defined by him as that being who, when asked a rational question, can give a rational answer. Both his knowledge and his morality are comprehended in this circle. It is by this fundamental faculty, by this faculty of giving a response to himself and to others, that man becomes a ‘responsible’ being, a moral subject.” CASSIRER at 6.

reflected upon and understood to be one's own, for which one is responsible; and, further, to understand that this awareness and its consequences—that is, individual consciousness, identity, and moral obligation—are necessarily true for other human beings as well.<sup>4</sup>

Awareness that one has a life that can be understood to be one's own conveys the capacity to make choices that shape the course of one's life, which is to say, choices that permit self-determination.<sup>5</sup> Self-determination is necessarily achieved in the world of other human beings through a process of self-defining social interactions.<sup>6</sup> No human being is born in isolation from others or lives in isolation without the implicit permission of others. We are born into a society composed of others who, like ourselves, possess the capacity for autonomous thought and action, and who must be seen and treated as intrinsically equal in kind and value to us because they are fellow human beings.<sup>7</sup>

Human beings shape their distinctive characters through self-determining choices and actions. We are self-directed, in that choice and action come from within. We are also connected to others outside ourselves, those who comprise the social context against which individuality is situated and in which choices and actions are grounded.<sup>8</sup> No human being, to paraphrase the great metaphysical poet John Donne, is

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<sup>4</sup> SEARLE, *supra* note 2, at 42; *see generally* LYNN HUNT, *INVENTING HUMAN RIGHTS: A HISTORY* (2007); *see generally* SUSIE LINFIELD, *THE CRUEL RADIANCE: PHOTOGRAPHY AND POLITICAL VIOLENCE* 46 (2010) (discussing “our growing consciousness of what it means to be human” from the perspective of photography).

<sup>5</sup> *See* Jeffrey H. Reiman, *Privacy, Intimacy, and Personhood*, 6 *PHIL. & PUB. AFF.* 26, 39 n. 10 (1976); *see generally* Herbert Morris, *A Paternalistic Theory of Punishment*, 18 *AM. PHIL. Q.* 263, 265 (1981); *see generally* Morris, *supra* note 3.

<sup>6</sup> JOHN DEWEY, *HUMAN NATURE AND CONDUCT* 9 (1922); ABRAHAM H. MASLOW, *MOTIVATION AND PERSONALITY* 21 (3d ed. 1954); *see generally* PAUL BLOOM, *JUST BABIES: THE ORIGINS OF GOOD AND EVIL* (2013).

<sup>7</sup> *See* DALY, *supra* note 1; *see generally* HUNT, *supra* note 4; LINFIELD, *supra* note 4.

<sup>8</sup> DEWEY, *supra* note 6, at 9; *see generally* LEWIS MUMFORD, *THE CONDITION OF MAN* (1944).

an island secure unto him- or herself.<sup>9</sup> We are separate yet part of the whole, always working out our lives in relation to the possibilities embodied in the social world, the world formed by the decisions and actions of ourselves and others.<sup>10</sup>

The answer to the second question, “What does it mean to respect a person’s human dignity?” comes down to acknowledging their humanity, a humanity shared by all human beings by virtue of being human beings. Awareness of self, reason, choice, connection to others—these are part and parcel of what it means to be a member of the human species.<sup>11</sup> These attributes, in turn, convey the moral right to live as a human being, which is to say, to act on one’s awareness of self, to use reason, to make choices, and to take into account the existence and corresponding rights of other human beings. The essential respect due another human being is to treat him or her as a human being with the right to live as a human being. To be sure, the capabilities that undergird our humanity vary over the life course and among individual persons—in awareness of self, in reasoning power, in insight, in the capacity to see others as like oneself and, indeed, in the ability to see oneself in others, often captured in the notion of empathy. These capabilities vary as a function of genetic, congenital, developmental, or environmental factors. Yet even with such variations, all human

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<sup>9</sup> JOHN DONNE, *No Man is an Island*, in MEDITATION XVII: DEVOTIONS UPON EMERGENT OCCASIONS (1864).

<sup>10</sup> ROBERT JOHNSON, HARD TIME: UNDERSTANDING AND REFORMING THE PRISON 93–94 (2002). Brian Hare, *From Nonhuman to Human Mind: What Changed and Why?*, 16 CURRENT DIRECTIONS IN PSYCHOL. SCI. 60, 60–61 (2007) (Arguing that human beings are endowed with a “unique flexibility of behavior . . . As humans, we are skilled at assessing the perceptions, intentions, and beliefs of others” and adjusting our behavior accordingly. “The ability to use social cues in a cooperative-communicative context . . . seems to have evolved after the hominid split” and thus is, as far as science can tell us at this time, distinctly human and central to our understanding of human social behavior.).

<sup>11</sup> BLOOM, *supra* note 6, at 218. We are, even as babies, “moral animals, equipped by evolution with empathy and compassion, the capacity to judge the actions of others, and even some rudimentary understanding of justice and fairness.” Our identity as fully developed human beings “is the product of our compassion, our imagination, and our magnificent capacity for reason.” *Id.*

creatures share an essential humanity and, by virtue of that endowment, possess human dignity and hence the right to be treated like human beings.

#### CRIME AND CHOICE: CHOOSING CRIMINAL PUNISHMENTS

In the area of crime and punishment, we stipulate that the vast majority of human beings are responsible for their criminal choices, even if there are factors in their lives—such as abuse, neglect, or discrimination—which limit action or cause damage that in turn mitigates or reduces that responsibility.<sup>12</sup> Criminal choices result in actions that typically, perhaps necessarily, violate the human dignity of the victims, who are treated like objects or animals, not fellow human beings. But when we punish criminals, we explicitly seek not to replicate the essential criminal quality of the crimes in question; we seek not to dehumanize, but rather to hold accountable the human beings who committed the crimes and who, moreover, deserves to be held accountable for criminal actions they chose to commit.<sup>13</sup>

Punishment that dehumanizes is itself a crime; punishment that respects the human dignity of the criminal is justice. In the matter of crime and just punishment, criminals dehumanize their victims but, ideally, the punishments meted out in society's name do not dehumanize the criminals. Punishment is meant to entail sanctions that reflect a moral point of view.<sup>14</sup> The person punished should deserve that punishment and, according to Plato's *Laws*, should emerge from that punishment "a better man, or failing this, less of a wretch."<sup>15</sup> In a similar vein, in his *Nicomachean Ethics*, Aristotle famously claimed that "punishment is intended as moral

<sup>12</sup> See generally Craig W. Haney, *Evolving Standards of Decency: Advancing the Nature and Logic of Capital Mitigation*, 36 HOFSTRA L. REV. 835 (2008).

<sup>13</sup> Morris, *supra* note 5, at 265.

<sup>14</sup> Jean Hampton, *The Moral Education Theory of Punishment*, 13 PHIL. & PUB. AFF. 208, 208–09 (1984); Morris, *supra* note 5, at 25.

<sup>15</sup> Plato, *Laws, Book IX*, in PLATO IN TWELVE VOLUMES 854 (d)–(e) (R. G. Bury trans., 1967).

medicine.”<sup>16</sup> Ideally, any given punishment should offer a moral lesson because it is deserved and, hence, right and just. The point of a moral exchange is to offer the possibility for change and even redemption to the wayward offender now in our custody and also our care. Punishment hurts, but punishment should not demean, damage, or extinguish hope by precluding change.<sup>17</sup>

Regrettably, criminal sanctions in the real world too often are criminal themselves, trafficking in widespread and pervasive dehumanization and producing a host of harms, some permanent and beyond amelioration.<sup>18</sup> To impose sanctions that damage and dehumanize is antithetical to basic human rights; such sanctions deny and suppress a person’s humanity and hence violate one’s inherent human dignity. It is critical to note that, as a general matter, and in sharp contrast to practices in Western Europe, “American criminal justice displays a resistance to considering the very personhood of offenders”<sup>19</sup> and a blindness to routine acts of cruelty.<sup>20</sup> Nowhere is the routine violation of the offenders’ personhood or humanity more evident than in America’s prisons—and especially America’s high-security and supermax prisons<sup>21</sup>—grim settings to which long-term inmates are routinely relegated.<sup>22</sup>

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<sup>16</sup> Aristotle, *Punishment in Intended as a Moral Medicine*, in NICOMACHEAN ETHICS 33 (D. Ross & L. Brown trans., 2009).

<sup>17</sup> ROBERT JOHNSON, *DEATH WORK: A STUDY OF THE MODERN EXECUTION PROCESS* 233 (2d. ed., 1998); see generally HANS TOCH, *THE PSYCHOLOGY OF CRIME AND CRIMINAL JUSTICE* (1986).

<sup>18</sup> JOHNSON, *supra* note 10, at 6–9; see also TODD R. CLEAR, *HARM IN AMERICAN PENOLOGY: OFFENDERS, VICTIMS, AND THEIR COMMUNITIES* 4–5 (1994) (thoughtfully discussing harms without explicit consideration of whether those harms entail permanent damage).

<sup>19</sup> JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* 9 (2003)

<sup>20</sup> ROBERT A. FERGUSON, *INFERNO: AN ANATOMY OF AMERICAN PUNISHMENT* 12–13 (2014).

<sup>21</sup> Craig W. Haney, *Mental Health Issues in Long-term Solitary and ‘Supermax’ Prison Confinement*, 49 *CRIME & DELINQ.* 124, 125 (2003); Haney, *supra* note 12, at 956.

<sup>22</sup> For examples of this phenomenon, see generally DWAYNE BETTS, *A QUESTION OF FREEDOM: A MEMOIR OF LEARNING, SURVIVAL, AND COMING OF AGE IN PRISON*

## DEATH ROW AND THE CRUCIBLE OF DEHUMANIZATION

Among America's high security prisons, the setting that is the most profoundly dehumanizing is death row. Condemned prisoners are warehoused for execution on death row in what amounts to solitary confinement.<sup>23</sup> American states with high rates of executions, such as Texas, have the most repressive regimes of solitary confinement on their death rows.<sup>24</sup> Research on the experience of death row confinement reveals widespread demoralization in the face of objectively dehumanizing conditions. That demoralization, in turn, is the end result of conditions of death row confinement that render prisoners powerless, vulnerable, and alone, deprived of opportunities to make decisions that affect the course of their lives in any meaningful way. In the words of the prisoners, the condemned are "the living dead"; death row, in turn, is a "living death."<sup>25</sup>

To put the matter another way, prisoners on death row are relegated to a kind of existential limbo, existing as entities in cold storage rather than living as human beings with even a modicum of self-determination.<sup>26</sup> Thus,

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(2010); VICTOR HASSINE, *LIFE WITHOUT PAROLE: LIVING AND DYING IN PRISON TODAY* (2010).

<sup>23</sup> See generally ROBERT JOHNSON, *CONDEMNED TO DIE: LIFE UNDER SENTENCE OF DEATH* 43–63 (1981); Robert Johnson & Harmony Davies, *Life Under Sentence of Death: Historical and Contemporary Perspectives*, in *AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION* 661–86 (3d ed., 2014); Dave Mann, *Solitary Men*, *OBSERVER* (Nov. 10, 2010, 7:01 PM), <http://www.texasobserver.org/solitary-men/>.

<sup>24</sup> Johnson & Davies, *supra* note 23, at 668; Mann, *supra* note 23.

<sup>25</sup> JOHNSON, *supra* note 23, at 99–118; see generally JOHNSON, *supra* note 17, at 93; see also MARIO HECTOR, *DEATH ROW: JAMAICAN PRISON DIARY* (1984) (discussing death rows as unremittingly bleak living environments); Lloyd Vogelmann, *The Living Dead: Living on Death Row*, 5 *S. AFR. J. HUM. RTS.* 183 (1989); LISA GUENTHER, *SOCIAL DEATH AND ITS AFTERLIVES: A CRITICAL PHENOMENOLOGY OF SOLITARY CONFINEMENT* (2013); Diana Peel, *Clutching at Life, Waiting to Die: The Experience of Death Row Incarceration*, 14 *W. CRIMINOLOGY REV.* 61 (2013).

<sup>26</sup> It is darkly ironic that for some condemned prisoners, called "execution volunteers," the decision to drop their appeals rather than endure continued confinement on death row is the most autonomous action available to them. For a revealing case study of one such execution volunteer, see Robert Johnson, et al., *Autonomy in Extremis: An Intelligent Waiver of Appeals on Death Row*, 39 *AM. J. CRIM. JUST.* 787 (2014).



for years, and more often decades, condemned prisoners are contained and constrained in solitary cells on death row, knowing that one day they will likely be moved to another cell, this one in the death house, and then finally to the death chamber, the last cell in the modern execution sequence. The death penalty as a penal sanction, though waning in popularity and declining in practice,<sup>27</sup> is nevertheless here to stay, at least in the important sense that this penalty has repeatedly passed constitutional muster in relation to most offenders convicted of aggravated capital murder.<sup>28</sup> The prisoners thus convicted, waning and declining in their circumscribed lives on death row, are in jeopardy. The threat of execution for them is quite real. At the end of this grim legal procession—from court to prison to death chamber—the condemned are, we know from ethnographic research on male prisoners, “defeated men, men worn down by time and pressure and isolation on death row.”<sup>29</sup>

The condemned, male and female alike, are well-versed in a dark etiquette of submission. They are, to quote execution team officers from ethnographic research on the modern execution process, “humbled” by force of impending death, making up a class of the “walking dead.”<sup>30</sup>

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<sup>27</sup> William J. Bowers & Scott E. Sundby, *Why the Downturn in Death Sentences?*, in *THE FUTURE OF AMERICA'S DEATH PENALTY: AN AGENDA FOR THE NEXT GENERATION OF CAPITAL PUNISHMENT RESEARCH* 47–67 (Charles S. Lanier, William J. Bowers, & James R. Acker eds., 2009).

<sup>28</sup> Carol S. Steiker & Jordan M. Steiker, *Judicial Developments in Capital Punishment Law*, in *AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION* 77–100 (James R. Acker, Robert M. Bohm, & Charles S. Lanier eds., 2014); John D. Bessler, *Capital Punishment Law and Practices: History, Trends, and Developments*, in *AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION* 19–37, 32 (James R. Acker, Robert M. Bohm, & Charles S. Lanier eds., 2014).

<sup>29</sup> Robert Johnson et al., *Death Row Confinement and the Meaning of Last Words*, 3 *LS* 141, 147 (2014); see JOHNSON, *supra* note 23, at 147.

<sup>30</sup> ROBERT JOHNSON, *DEATH WORK: A STUDY OF THE MODERN EXECUTION PROCESS* 156 (2d ed., 1998); see also Mona Lynch, *The Disposal of Inmate #85271: Notes on a Routine Execution*, 20 *STUD. L. POL. & SOC'Y* 3 (2000)(describing the mechanized and impersonal execution process).

These humbled creatures, with very rare exceptions, are more dead than alive; they offer no resistance, instead following the execution script in every morbid detail. Passive acquiescence from persons once considered “the worst of the worst” by the juries that sentenced them to death<sup>31</sup> is the essential contribution of death row confinement to the killing process, destroying the human spirit of the prisoners and, in effect, grooming them for the execution chamber. As adumbrated in the profound reflections on the guillotine rendered years ago by the noted French philosopher Albert Camus, “As a general rule, a man is undone by waiting for capital punishment well before he dies. Two deaths are inflicted on him, the first being worse than the second[.]”<sup>32</sup>

#### DEATH HOUSE ETIQUETTE: LAST MEALS

Acquiescence in the death house takes many forms. One is being a good guest at one’s own last meal, a ritual that, upon reflection, is at once absurd and macabre beyond belief.<sup>33</sup> Condemned prisoners are typically offered a special last meal, as if they are participants in some sort of twisted celebration of their lives, their impending deaths, or both. Few refuse, though the meaning of their participation is unclear.<sup>34</sup> Most dutifully make their special requests, though no one knows how many eat their last meals, in whole or in part. The details—what is eaten, and what is left on the plate—are not published. Some prisoners, in what may be a spoof of the process, order enormous and elaborate meals, as if daring the officials to cruelly refuse them.

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<sup>31</sup> See generally SCOTT E. SUNDBY, *A LIFE AND DEATH DECISION: A JURY WEIGHS THE DEATH PENALTY* (2007).

<sup>32</sup> Albert Camus, *Reflection on the Guillotine*, in *RESISTANCE, REBELLION, AND DEATH* 205 (1969).

<sup>33</sup> Brent Cunningham, *Last Meals*, LAPHAM’S Q. (2013), <http://www.laphamsquarterly.org/essays/last-meals.php?page=all>.

<sup>34</sup> See generally Linda Ross Meyer, *The Meaning of Death: Last Words, Last Meals*, in *WHO DESERVES TO DIE: CONSTRUCTING THE EXECUTABLE SUBJECT* 176 (2011).

Clearly, providing last meals is meant to soften the hard edges of the execution process. “It’s the least we can do,” one can imagine the officials thinking. And who can blame them? The striking thing, though, is that the prisoners, with what amounts to a loaded gun to their heads, go along with the routine, ordering and perhaps also eating these meals, and then, as seen in ethnographic research, sometimes saying “thank you” to their would-be hosts in the death house or even in the execution chamber.<sup>35</sup> At best, this is a deeply ironic form of passing along their compliments to the staff—kitchen or custodial, if you will—but it is more likely sheer, unadulterated, servile submissiveness. And who can blame them? Officials watch the prisoners eat their last meals, maybe take notes; the officers on the execution team need to know the mood of the person before them, the living, breathing human being they will kill not long after dinner. Some prisoners offer their keepers a portion of their final bounty. Sometimes officers accept. Killer and victim breaking bread, then arguably breaking the most fundamental rule of the social contract: “Thou shalt not kill.”<sup>36</sup>

The last meal is a strange and sordid business. Even though the last meal is offered with humane pretensions and even though it affords the prisoner an opportunity to choose among a range of foods and, by that choice, exercise a morsel of autonomy, these are not its purposes. The last meal is not food offered as a means of connection but food offered as a way to simulate concern and perhaps to disarm the offender, in effect serving as a distraction from the killing to come. Murderers don’t feed their victims; executions are not cold-blooded killings, we say. They’re not at all like

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<sup>35</sup> Expressions of gratitude for last meals occur with some regularity. Jerry Givens, Former Member, Virginia Department of Corrections Execution Team, Guest Lecture in Honors 302.007H, Death Penalty Colloquium, at American University (Apr. 4, 2012). Last words may include expressions of gratitude to staff for their civility or professionalism. Scott Vollum & Dennis Longmire, *Giving Voice to the Dead: Last Statements of the Condemned*, 12 CONTEMPORARY JUSTICE REVIEW 5, 11 (2009). Informal farewells to staff may express gratitude as well. DONALD A. CABANA, DEATH AT MIDNIGHT: THE CONFESSIONS OF AN EXECUTIONER 15–16 (1996)

<sup>36</sup> See JOHNSON, *supra* note 30, at Part III.

murder, and to prove this, we point to last meals as part of a decent ritual, not just a break in the violence.<sup>37</sup> But one has to imagine, in the spirit of Camus, that the person dies a little with each bite of this final meal. We, the observers—officials, sometimes researchers—perhaps die along with them. This observation is captured in a first-hand description of a last meal, rendered in the form of a poem:

A fried steak, diced into little squares,  
arrives at the death house,  
neatly reassembled, like a puzzle,  
laid to rest in the center berth  
of a standard white styrofoam box,  
bordered on one side by soggy, sagging fries,  
on the other by wilted greens, curled and brown,  
long past their salad days, like the man himself,  
who ordered this meal as the sad celebration,  
culmination, of a dreary, wasted life  
that it is even now slipping away,  
as he ages before our eyes right there in his cell,  
called “the last night cell” in some prisons,  
“the death cell” in this one.

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Later, he will be cooked, in a manner of speaking,  
in the electric chair, but not diced or reassembled,  
before he is boxed without frills in a plywood coffin,  
the mortuary’s answer to the styrofoam box, and  
buried in the prison cemetery, home to the  
most common and indigestible waste  
of the prison system.

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<sup>37</sup> Daniel LaChance, *Last Words, Last Meals, and Last Stands: Agency and Individuality in the Modern Execution Process*, 32 L. & SOC. INQUIRY 710 (2007); Meyer, *supra* note 34.

He eats alone with a plastic fork—  
no knives for the condemned,  
no dinner companions for the condemned—  
chewing carefully, kneeling by his bed, as if in  
genuflection before the raw power of the state,  
his meager meal placed carefully on the steel gray metal bed,  
sitting precariously on the top sheet, drawn tight  
like a sail battened down for heavy weather.

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We look at each other tentatively, almost furtively,  
lawyers, chaplains, even officers speaking in low tones,  
words directed toward the ground,  
as if we are greasy, dirty, our mouths dry,  
tongues swollen, sticking to our teeth,

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our noses stinging from the scent of corruption,  
the bittersweet stink of fear in the air,  
in our hair, on our skin, in our clothes.  
We are guests at a living wake,  
where the dead live,  
where the dead see,  
look you in the eye and see nothing,  
see no one will save them  
see they are utterly alone.

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The condemned man finishes his meal,  
says ‘thank you’ to the officers who fed him dinner,  
and later walks with them to his execution, on schedule,  
dead before the stroke of midnight. We go home,  
stomachs empty, hungry for sleep.<sup>38</sup>

Hunger for sleep should be read as hunger to forget—a dreamless sleep of  
denial of what one has seen and, and by virtue of that seeing, become

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<sup>38</sup> ROBERT JOHNSON, *A ZOO NEAR YOU: POETRY*, 148–49 (BleakHouse Publishing 1st ed. 2010).

complicit. Here we might remember Shakespeare's haunting admonition in Hamlet (III.i.1758): "To sleep: perchance to dream: ay, there's the rub[.]"<sup>39</sup>

#### DEATH HOUSE ETIQUETTE: LAST WORDS

Many condemned prisoners, we know from studies of last words, go to their deaths mute, saying nothing at all, or speaking incoherently; these responses, or the lack thereof, can be plausibly linked directly to the dehumanizing effects of extended death row confinement.<sup>40</sup> Others have much to say, offering what might be termed a "farewell speech" in which they

wish others well, offer an apology to all concerned parties, then hope to go gladly on their journey (even if this is an unusual journey), expecting to find a better life (mostly featuring the afterlife), and for all of this they are grateful and, they hope, reconciled with the world.<sup>41</sup>

For these more voluble prisoners, one line of analysis suggests that their last words, like those of their mute or incoherent fellow prisoners, are likely a manifestation of the pervasive passivity wrought by the execution process. Rooted in the defeatist dynamics of the death row experience, their last words portray an often

contrite acceptance of the traditional social meanings associated with the execution, expressed in last words that reflect, not the violence of wild, often psychopathic men, but the tame, civil sentiments of religion, culpability, remorse, the desire for forgiveness, and even gratitude that they have been treated decently by others, notably officers and relatives.<sup>42</sup>

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<sup>39</sup> WILLIAM SHAKESPEARE, THE TRAGEDY OF HAMLET, PRINCE OF DENMARK act 3, sc. 1, line 1758 (B. A. Mowat & P. Werstine ed., 1992).

<sup>40</sup> See Johnson, et. al., *supra* note 29, at 147.

<sup>41</sup> *Id.* at 146–47; see also Vollum & Longmire, *supra* note 35.

<sup>42</sup> See Johnson, et. al., *supra* note 29, at 148.

Thus it is that the implacable, unyielding force of execution, extending from death row through the death house, brings in its wake the abasement of condemned prisoners, their last moments soiled by a degradation of self that is rendered in their own words. “Kill me,” some say, with their silence; “I am not one of you,” say others with their disjointed perorations; “I deserve to die,” others intone, with solemn pronouncements of remorse or regret; “I thank you for any small kindness you deign to show,” say many, in meek word or timorous deed, after their last meal and again after the last strap is cinched down, holding them tight to the lethal gurney. Dead, each of them, in the manner of Camus’s reckoning, “undone by waiting for capital punishment well before he dies.”<sup>43</sup>

Then there are words of staff, whispered, we know from ethnographic research, in the shadow of the death chamber—during last meals, last hours, last walks—offering faux support, seeking collusion with the condemned.<sup>44</sup> Poet Joanna Heaney captures this dynamic during the last walk with a perfect eye for tone and detail in her award-winning poem, “Too Little, Too Late.”

The most gently I can remember being treated  
Was when I was walked to the electric chair  
Two people on either side of me, each holding an elbow;  
If I was older, it would look like they were helping me cross the  
street.

“You can do this,  
No problem,  
You can do this.”<sup>45</sup>

The point of the poem, of course, is that the gentle ministrations of the officials in the death house during the prisoner’s last walk are “too little, too late.” Where were these helpful people when help might have

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<sup>43</sup> Camus, *supra* note 32, at 205.

<sup>44</sup> JOHNSON, *supra* note 30, at Part III.

<sup>45</sup> Joanna Heaney, *Too Little Too Late*, 6 BLEAKHOUSE REV. 15 (2013).

mattered? When, in Heaney's words, the condemned prisoner "was trying to live and not to die." Occurring at the end of a brutal regime of confinement on death row, ostensibly humane gestures, however well intended, stink of rank hypocrisy. Inevitably, personal intentions notwithstanding, every person in the death house colludes in the execution process, helping move things along to their grim conclusion. Even the chaplain, ostensibly outside the process, paves the way for the execution at hand, in effect, blessing the event.<sup>46</sup>

#### ODIOUS COURTESIES

The words we hear in the death house have a disembodied character, floating above the execution process; they are, at bottom, immaterial and inconsequential elements of the killing routine. The same is true for gestures, like the touching of a hand or elbow or the wiping of a brow. "You can do this; I know you can"; and by implication, "I'm here for you." None of this is true. The condemned *must* do this, and *no one* is there for them. Nothing that is said or done by others in the death house matters in any material way; nothing changes the inexorable killing routine.

Words and gestures of ersatz humanity are but a gloss over the workings of a modern-day charnel house. And they remind us—if we need reminding—that the justice system relies on what noted existentialist Franz Kafka's aptly termed "odious courtesies"<sup>47</sup> to make condemned prisoners complicit in their own executions, thereby hiding the underlying violence at work. This seductive collusion, so antithetical to human dignity, may be among the most glaring violations of human rights that come in the wake of executions. We hide this shameful deceit behind form and protocol, aided by surface gestures of humanity. Seeming civilities—a supportive

<sup>46</sup> CARROLL PICKETT, *WITHIN THESE WALLS: MEMOIRS OF A DEATH HOUSE CHAPLAIN* 59 (2002).

<sup>47</sup> FRANZ KAFKA, *THE TRIAL* 156 (B. Mitchell trans., 1999). (The term "odious" is sometimes translated as "repulsive").



arm during the last walk, words of encouragement, attention to the prisoners' last words—are invoked to move the condemned along to their deaths in an orderly, unremarkable, seemingly voluntary procession, allowing the rest of us to live with executions, and with ourselves.