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DIGNITY AND THE DEATH PENALTY IN THE US SUPREME COURT

*Bharat Malkani*¹

INTRODUCTION

The idea of dignity is central to moral and legal debates about the death penalty worldwide. Philosophers,² theologians,³ and drafters of international human rights law⁴ have all referred to dignity in the context of capital punishment, as have judges on constitutional courts around the globe.⁵ In the US Supreme Court, the term dignity has generally been used to uphold the constitutionality of capital punishment, but this has largely gone unnoticed because the role of dignity in the Court's capital punishment case law has received little academic attention.⁶ The

¹ With thanks to Dr Stephen Smith, Professor Fiona de Londras, Professor John Coggon, and Professor Jon Yorke for comments on earlier drafts. All errors are attributable to me only.

² Immanuel Kant notably used the concept of dignity to argue in favor of capital punishment. See IMMANUEL KANT, *THE METAPHYSICS OF MORALS* (Mary J. Gregor ed., Mary J Gregor trans., 1996) and n.111 *infra* and accompanying text. Other philosophical treatments of capital punishment include MATTHEW KRAMER, *THE ETHICS OF CAPITAL PUNISHMENT: A PHILOSOPHICAL INVESTIGATION OF EVIL AND ITS CONSEQUENCES* (2011); TOM SORRELL, *MORAL THEORY AND CAPITAL PUNISHMENT* (1987); LLOYD H. STEFFEN, *EXECUTING JUSTICE: THE MORAL MEANING OF THE DEATH PENALTY* (2d ed. 2006).

³ For example, Pope Francis has repeatedly called for the abolition of the death penalty on the grounds of its incompatibility with Catholicism. In an address to the US Congress on September 24, 2015, Pope Francis said that the death penalty should be abolished because “every human person is endowed with an inalienable dignity, and society can only benefit from the rehabilitation of those convicted of crimes.” See Pope Francis, *Apostolic journey - United States of America: Visit to the Congress of the United States of America* (Washington D.C., 24 September 2015), https://w2.vatican.va/content/francesco/en/speeches/2015/september/documents/papa-francesco_20150924_usa-us-congress.html.

The US Conference of Catholic Bishops has also based their opposition to the death penalty on dignitarian grounds: “Even when people deny the dignity of others, we must still recognize that their dignity is a gift from God and is not something that is earned or lost through their behavior. Respect for life applies to all, even the perpetrators of terrible acts.” COMMITTEE ON DOMESTIC POLICY OF THE UNITED STATES CONFERENCE OF CATHOLIC BISHOPS (USCCB), *A CULTURE OF LIFE AND THE PENALTY OF DEATH* (2005) 11.

⁴ The Preamble to the Second Optional Protocol to the International Covenant on Civil and Political Rights reads: “abolition of the death penalty contributes to enhancement of human dignity and progressive development of human rights”.

⁵ For an outline of jurisdictions that have invoked the concept of dignity in decisions relating to capital punishment, see Paolo G. Carozza, “*My Friend is a Stranger*”: *The Death Penalty and the Global Ius Commune of Human Rights*, 81 *TEX. L. REV.* 1031, 1043-1077 (2003).

⁶ Helen Knowles has considered the way in which various justices have understood the relationship between dignity and the death penalty. See Helen Knowles, *A Dialogue on Death Penalty Dignity*, 11(2) *CRIMINOL. CRIM. JUST.* 115 (2011). Although several other scholars have addressed this topic, they have done so within broader studies of

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Court's use, though, is remarkable because in legal discourses, respect for dignity is usually associated with the abolitionist position.⁷ This anomaly requires attention because the normative strength of the Court's death penalty jurisprudence depends in part on whether the Court has offered convincing reasons for the way in which it has invoked the idea of dignity.⁸

This Article therefore explains how and why the Court has used dignity to justify the retention of the death penalty. It is also argued that dignity should not be used to uphold the constitutionality of capital punishment, and should instead provide a framework for finding the death penalty to be contrary to the Eighth Amendment prohibition on "cruel and unusual punishments." In short, I argue that in the context of capital punishment, the idea of dignity involves the relationship between (a) the "human dignity" of the people involved in the crime, (b) the dignity of the wider community in whose name the death penalty is being imposed (what I term "communitarian dignity"), and (c) the dignity of the legal institution that administers capital punishment ("institutional dignity"). To date, the Supreme Court has not adequately

dignity in the Court's jurisprudence more generally, and their accounts of dignity and the death penalty specifically are therefore brief. See, for example, Maxine D. Goodman, *Human Dignity in Supreme Court Constitutional Jurisprudence*, 84 NEB. L. REV. 740, 772-778 (2006); Leslie Meltzer Henry, *The Jurisprudence of Dignity* 160 U. PA. L. REV. 169, 222-224 (2011). Other scholars have focused on dignity and one aspect of capital punishment. See, for example, Nicole Dailo, "Give me Dignity by Giving me Death": *Using Balancing to Uphold Death Row Volunteers' Dignity Interests amidst Executive Clemency*, 23 S. CAL. REV. L. & SOC. JUST. 249, 264 (2014) (focusing on dignity and volunteers for execution); Richard J. Bonnie, *Panetti v. Quarterman: Mental Illness, the Death Penalty, and Human Dignity* 5 OHIO ST. J. CRIM. L. 257 (2007) (focusing on dignity, mental illness and the death penalty); Timothy V. Kaufman-Osborn, *The Death of Dignity*, in IS THE DEATH PENALTY DYING? EUROPEAN AND AMERICAN PERSPECTIVES 204 (Austin Sarat and Jürgen Martschukat eds., 2011). (focusing on dignity and methods of execution).

⁷ The Constitutional Court of South Africa, the Hungarian Constitutional Court, and the Supreme Court of Canada have all used the term dignity when declaring the death penalty unlawful. See n x below, and accompanying text.

⁸ I do not mean to suggest that the legitimacy of the Court's decisions depend *wholly* on the way in which it has invoked dignity. There are many other factors which will affect an observer's perception of the legitimacy of any judicial opinion. See, for example, Martha Dragich, *Will the Federal Courts of Appeals Perish If They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose A Greater Problem?* 44 AM. U. L. REV. 757 (1995) (citing stability, certainty, predictability; consistency, and fidelity to authority as factors that affect the perceived legitimacy of a judicial decision); James L. Gibson, *Understandings of Justice: Institutional Legitimacy, Procedural Justice, and Political Tolerance* 23 LAW & SOC'Y REV. 469 (1989); Tom R. Tyler and Kenneth Rasinski, *Procedural Justice, Institutional Legitimacy, and the Acceptance of Unpopular U.S. Supreme Court Decisions: A Reply to Gibson* 25 LAW & SOC'Y REV. 621 (1991);

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addressed the relationship between these types of dignity. If it were to do so, the Court would be compelled to hold that the death penalty is contrary to respect for dignity, and is therefore unconstitutional.

To make these arguments, this Article proceeds as follows. In Part I, an outline is provided of how non-American jurisdictions have found capital punishment to be inconsistent with respect for human dignity. Although the idea of human dignity in particular has historically been absent from debates within the US about punishments generally, it is notable that the US Supreme Court has invoked various conceptions of dignity in a number of constitutional contexts.⁹ In Part II, therefore, we will address how the Court has used dignity in its death penalty jurisprudence. We will see two ways in which Justices Brennan and Marshall used dignity to justify the judicial abolition of capital punishment in the 1970s, and we will see four ways in which dignity has conversely been used by other Justices since the 1970s to justify retention. It will be seen that there is little consistency in the conceptions of dignity that have been invoked by the various Justices when reaching their various conclusions about capital punishment. For example, Justices Brennan and Kennedy have tended to focus on the “human dignity” of the offender;¹⁰ Justice Marshall has considered the implications of capital punishment for communitarian dignity;¹¹ and Justice Powell and Chief Justice Roberts have raised concerns with the dignity of the legal institution.¹² Even within each group, there is disagreement. Brennan considered capital punishment to always be violative of the offender’s innate human

⁹ Leslie Meltzner Henry, *The Jurisprudence of Dignity* 160 U. PA. L. REV. 169 (2011); Maxine D. Goodman, *Human Dignity in Supreme Court Constitutional Jurisprudence*, 84 NEB. L. REV. 740 (2006); THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES (Michael J. Meyer and William .A. Parent eds., 1992).

¹⁰ *Furman v. Georgia*, 408 U.S. 238 (1972) (Brennan J. concurring in judgment); *Roper v. Simmons*, 543 U.S. 551 (2005)

¹¹ *Furman v. Georgia*, 408 U.S. 238 (1972) (Marshall J. concurring in judgment)

¹² *McCleskey v. Kemp*, 481 U.S. 279 (1987); *Baze v. Rees*, 553 U.S. 35, 57 (2008)

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dignity, whereas Kennedy has tied dignity to moral virtue, and has concluded that capital punishment can be consistent with respect for the dignity of the offender.¹³

Whatever one's view on the normativity and constitutionality of the death penalty, it is clear that the Justices have been speaking past one another on this issue. This is partly because the different Justices have adopted different approaches to interpreting the Eighth Amendment, and partly because dignity is a vague concept in moral discourses and is open to a multitude of definitions. If philosophers have long struggled to ascribe meaning to dignity,¹⁴ it is perhaps inevitable that the Court has also struggled. It follows that to make sense and to critique the various judicial invocations of dignity, we need to address the idea of dignity in the philosophical literature. This is undertaken in Part III. Indeed, just as philosophical approaches to dignity can help explain and assess judicial uses of the term, so too can legal understandings of dignity be used to shed light on dignity as a concept in moral philosophy.¹⁵ There is also a normative reason for exploring the philosophical accounts of dignity through the lens of local legal culture. It is unwise to impose moral philosophy on a community without due regard of local circumstances,¹⁶ and therefore in Part III we will consider each of the Court's uses of dignity in turn. That is, the works of philosophers such as Immanuel Kant, Louis Pojman,¹⁷ Robert Johnson,¹⁸ and others are

¹³ See Part II *infra*

¹⁴ See Part III *infra*

¹⁵ See, for example, Jeremy Waldron, Dignity, Rank, and Rights – The Tanner Lectures on Human Values (University of California, Berkeley, 21-23 April 2009), at 209 (“Dignity seems at home in law. Let us begin by analyzing how it works in its native habitat, and see whether the jurisprudence of dignity can cast any light on its use in moral discourse.”)

¹⁶ For an attempt to use existing America practices and institutions to construct a theory of American public philosophy, see MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* (1998). Also see Joshua Kleinfeld, *Two Cultures of Punishment*, 68 *STAN L. REV.* 933, 993 (2016) (“a philosophical theory without roots in the culture will not do.”)

¹⁷ Louis Pojman, *Why the Death Penalty is Morally Permissible*, in *DEBATING THE DEATH PENALTY: SHOULD AMERICA HAVE CAPITAL PUNISHMENT? - THE EXPERTS ON BOTH SIDES MAKE THEIR BEST CASE* (Hugo Adam Bedau and Paul G Cassell eds., 2004)

¹⁸ Robert Johnson, *Reflections on the Death Penalty: Human Rights, Human Dignity, and Dehumanization in the Death House*, 13 *SEATTLE J. FOR SOC. JUST.* 583 (2015).

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used to get to grips with the Court's approaches to human dignity, communitarian dignity, and institutional dignity. While it might be tempting to seek to defend one of the particular existing judicial approaches to dignity, it is argued instead that all three conceptions of dignity are important and relevant to determinations of the constitutionality of capital punishment. However, each conception by itself is insufficient. It is argued that these dignities inter-relate and inform one another, and thus need to be considered holistically. For example, we cannot understand whether the dignity of the institution has been respected without understanding whether the human dignities of the people involved in the institution have been respected. When the three dignities are considered together, we can better understand how and why dignity must not be conflated with other values such as moral virtue (as Justice Kennedy has done), must not be subject to popular opinion (as the Court has tended to do), and provides the framework for finding capital punishment to be contrary to the Eighth Amendment prohibition on "cruel and unusual punishments."

I. DIGNITY AND THE DEATH PENALTY WORLDWIDE

The term dignity has been invoked by a number of legal authorities when explaining why the death penalty should be abolished. In international law, the Preamble to the Second Optional Protocol to the International Covenant on Civil and Political Rights, which outlaws capital punishment in all circumstances, states that the "abolition of the death penalty contributes to enhancement of human dignity and progressive development of human rights."¹⁹ Countries

¹⁹ It should be noted that, in the past, treaties of international human rights law suggested that capital punishment is compatible with respect for dignity. For example, the Preamble to the International Covenant on Civil and Political Rights reads: "These rights derive from the inherent dignity of the human person", yet Article 6 of this treaty tolerates capital punishment. However, over the years international human rights law has moved towards advocating the abolition of the death penalty on the grounds that such a punishment is not compatible with a commitment to

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around the world have adopted a similar position. In 1990, the Hungarian Constitutional Court tied the constitutional right to life to the concept of human dignity when ruling that “capital punishment resulted not merely in a limitation upon that right but in fact the complete and irreversible elimination of life and dignity.”²⁰ In a wide-ranging consideration of the constitutionality of the death penalty in South Africa, the South African Constitutional Court outlawed capital punishment in the 1994 case of *State v. Makwanyane* on the grounds that it violated, inter alia, the convicted person’s constitutional right to dignity.²¹ The death penalty, Justice Chaskalson wrote, “annihilates human dignity”²² because it “objectif[ies] murderers [by] putting them to death to serve as an example to others...”²³

In a case involving the extradition of a person to face capital charges abroad, the Supreme Court of Canada also asserted that respect for human dignity pulls towards the abolition of capital punishment. In *Kindler v. Canada*, three of the seven judges stated that the death penalty is “the supreme indignity to the individual, the ultimate corporal punishment, the final and complete lobotomy and the absolute and irrevocable castration. [It is] the ultimate desecration of human dignity.”²⁴ Three other judges referred to “the serious invasion of human dignity [that the death penalty] engenders”.²⁵ More recently, in August 2015, the Law Commission of India

protect and respect human dignity. See ROGER HOOD AND CAROLYN HOYLE, *THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE* (2015) Chapter 1

²⁰ *Alkotmánybíróság* [Hungarian Constitutional Court], Dec. No. 23/1990 (X.3 1) AB (Oct. 24, 1990), translated in 1 E. EUR. CASE REP. CONST. L 177 (1994)

²¹ *State v. Makwanyane*, 1995 (3) SA 391 (CC) (S. Afr.).

²² *State v. Makwanyane*, 1995 (3) SA 391, [95] (CC) (S. Afr.).

²³ *State v. Makwanyane*, 1995 (3) SA 391, [144] (CC) (S. Afr.).

²⁴ *Kindler v. Canada*, (1991) S.C.R. 779, 241 (per Cory, J, dissenting with Lamer, CJC, concurring). See also, *Sopinka, J, dissenting (with Lamer, CJC, concurring)* at 220.

²⁵ *Kindler v. Canada*, (1991) S.C.R. 779, 202 (per La Forest, J)(L’Heureux-Dube and Gonthier, JJ concurring)

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issued a report on the death penalty that recommended the abolition of capital punishment because of “prevailing standards of constitutional morality and human dignity”.²⁶

From the above, we can tentatively set out why some legal authorities have considered the death penalty to be incompatible with respect for the dignity of the offender. Dignity, according to these authorities, demands that human beings are not objectified, but the death penalty involves putting people to death as a means for deterring others from committing crimes. Also, as the “complete lobotomy”, the death penalty does not comport with respect for dignity because it involves removing a person’s capacity to determine how they live their own life.

These authorities have felt enabled to ground their approaches to the death penalty within discourses of dignity largely because dignity is central to these legal orders.²⁷ In contrast, the term dignity does not appear in the text of the US Constitution, and the idea of dignity has historically been absent from US constitutional, legal, and political traditions. James Whitman has argued that the absence of dignity as a controlling constitutional value has fueled an American propensity to treat criminals without respect for their dignity precisely because of their criminality.²⁸ To explain this, Whitman notes that the word “dignity” derives from the Latin

²⁶ Law Commission of India, Report No. 262 The Death Penalty, August 2015 p.217. It should be noted, though, that the Supreme Court of India has suggested that the death penalty is compatible with respect for human dignity. See *Bachan Singh v. State of Punjab*, (1980) 2 SCC 684, at para 209 (“A real and abiding concern for the dignity of human life postulates resistance to taking a life through law’s instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed.”)

²⁷ For example, Article 1 of the Constitution of the Republic of South Africa reads: “The Republic of South Africa is one, sovereign, democratic state founded on the following values: (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.” Article 10 also protects a right to dignity: “Everyone has inherent dignity and the right to have their dignity respected and protected.” Article 54(1) of the Constitution of Hungary reads: “In the Republic of Hungary every human being has the innate right to life and the dignity of man.” The Basic Law for the Federal Republic of Germany is also notorious for explicitly protecting human dignity: “The dignity of man is inviolable. To respect and protect it shall be the duty of all public authority.” (Article 1 Basic Law) Also see, for example, Matthias Mahlmann, *The Basic Law at 60 - Human Dignity and the Culture of Republicanism*, 11 *German L.J.* 9 (2010);

²⁸ JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* (2d ed. 2005). Also see Jonathan Simon, *Dignity and Risk: The Long Road from Graham v. Florida to Abolition of Life without Parole*, in *LIFE WITHOUT PAROLE: AMERICA’S NEW DEATH PENALTY?* (Charles J. Ogletree Jr and Austin Sarat eds., 2012). Alexander Reinert has noted that the Court’s invocation of dignity in cases involving

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“dignitas”, which referred to the honor and worthiness of high-ranking officials in ancient Rome, such as Senators and other noblemen.²⁹ The social status of these people demanded that they be treated with a particular level of respect. For many years, aristocrats found guilty of criminal offences were therefore subjected to milder punishments than their non-aristocratic counterparts. Over time, particularly during the Enlightenment era, communities across Europe came to believe that everybody should be treated with respect for their worthiness, and the levels of punishments were raised so that all persons were subjected to milder and more humane punishments than had previously been the case. America, though, has never recognized the concept of aristocracy. This is made clear by Article I, Section 9 of the Constitution: “No Title of Nobility shall be granted by the United States.” Instead, historically the main differences in social rank in American communities were between slaves and free persons, and the punishment of criminals was therefore aligned with the harsh and degrading treatment of slaves,³⁰ in order to reflect their lower social standing. To compound this, when slavery was abolished, slaves were not “elevated” to the social status enjoyed by free persons. Instead, black people were increasingly criminalized, and thus subjected to punishments such as incarceration and the death penalty.³¹ Indeed, even though the Thirteenth Amendment banned slavery, it explicitly permitted slavery as punishment for crime, and many black people found themselves re-enslaved as a

the treatment of prisoners generally is problematic: “To the extent that the modern Supreme Court aligns its Eighth Amendment jurisprudence with respect for human dignity, the Court should appreciate how shallow that conception is in operation. Indeed, there is ample evidence that, despite the promise of judicial regulation of prisoners’ treatment, courts often fall short of guaranteeing minimum standards of decency in prisons and jails even after years of judicial intervention.” (Alexander A. Reinert, *Reconceptualizing the Eighth Amendment: Slaves, Prisoners, and “Cruel and Unusual” Punishment* 94 N. C. L. REV 817, 825 (2016))

²⁹ Jeremy Waldron, *Citizenship and Dignity*, in UNDERSTANDING HUMAN DIGNITY (Christopher McCrudden (ed) 192 Proceedings of the British Academy 2013) 327

³⁰ JOHN D. BESSLER, CRUEL & UNUSUAL: THE AMERICAN DEATH PENALTY AND THE FOUNDERS’ EIGHTH AMENDMENT (2012); Alexander A. Reinert, *Reconceptualizing the Eighth Amendment: Slaves, Prisoners, and “Cruel and Unusual” Punishment* 94 N. C. L. REV 817 (2016))

³¹ DAVID M. OSHINSKY, “WORSE THAN SLAVERY”: PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE (1996); DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II (2009).

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result. All of this had the effect of tying the treatment of prisoners with the now historical treatment of slaves: as if they were sub-human. This set in motion the historical trend in the US towards the degrading and undignified treatment of criminals, and in part explains why the US today imposes punishments such as the death penalty that have been rejected by other liberal democracies. Describing the differences between European and American approaches to punishment generally as a “great divergence”, Joshua Kleinfeld writes: “The story of capital punishment is the story of the great divergence writ small, and it has something to teach us about the great divergence writ large.”³²

For some jurists and commentators, the absence of the term dignity from the text of the US Constitution precludes the Supreme Court from considering dignity at all in constitutional interpretation.³³ Notwithstanding these views, and despite Whitman’s observations that dignity has been absent from political and public debates about punishment, the Court has long accepted the position that “the principles of human dignity ... are embodied in the Constitution”,³⁴ and that “human dignity remains in the background [of US law] as a value justifying the set of human rights, [even though it] does not operate as an applicable legal rule at all.”³⁵ While the Court has invoked the term dignity in a number of constitutional contexts,³⁶ it is particularly

³² Joshua Kleinfeld, *Two Cultures of Punishment*, 68 STAN L. REV. 933, 991 (2016)

³³ Justice Thomas has criticized his colleagues for referring to dignity in a case concerning the constitutionality of state-wide prohibitions on same-sex marriage: “[T]he majority goes to great lengths to assert that its decision will advance the “dignity” of same-sex couples... The flaw in that reasoning, of course, is that the Constitution contains no “dignity” Clause.” (*Obergefell v. Hodges*, 576 U.S. ___ (2015) (slip op. Thomas J. dissenting at 16)). Also see Raoul Berger, *Justice Brennan, “Human Dignity,” and Constitutional Interpretation*, in THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES (Michael J. Meyer and William A. Parent eds., 1992) p.134 (“Respect for ‘human dignity’ clearly is spun out of thin air; it is an evangelistic exhortation rather than a constitutional mandate.”)

³⁴ Ronald Dworkin, “Three Questions for America” N.Y. REV. BOOKS, Sept. 21, 2006, at 24, 26.

³⁵ Gerald Neuman, *Discourses of Dignity*, in UNDERSTANDING HUMAN DIGNITY (Christopher McCrudden ed., 2013) at 640

³⁶ Leslie Meltzer Henry, *The Jurisprudence of Dignity* 160 U. Pa. L. Rev. 169 (2011) In her empirical study of the Court’s invocation of dignity, Henry asserts that the Court has used the word dignity in over 900 opinions over the

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relevant to the Eighth Amendment.³⁷ This much was made clear in *Trop v. Dulles*, decided in 1958, when Chief Justice Warren asserted that “The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards.”³⁸ Warren explained that the Eighth Amendment “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”³⁹ It was affirmed that punishments would be unconstitutionally cruel—in other words, contrary to human dignity—if they were disproportionately severe when compared to the gravity of the crime in question.

The Court has repeatedly endorsed *Trop*, with Justice Kennedy recently asserting that “Evolving standards of decency must embrace and express respect for the dignity of the person, and the punishment of criminals must conform to that rule.”⁴⁰ However, ever since *Trop* was decided, the Justices have struggled to define what they mean by human dignity, and they have struggled to devise a methodology for determining which punishments contravene “evolving standards of decency.”⁴¹ This has led to differing attitudes within the Court over the relationship between dignity and the death penalty.

course of 220 years. There has been a particular focus on “human dignity” since that term first appeared in an opinion in 1946.

³⁷ Shannon D. Gilreath, *Cruel and Unusual Punishment and the Eighth Amendment as a Mandate for Human Dignity: Another Look at Original Intent*, 25 T. JEFFERSON L. REV 559 (2003) [others]

³⁸ *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion)

³⁹ *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958) (plurality opinion)

⁴⁰ *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008)

⁴¹ For a thorough account of the history of the Eighth Amendment and the death penalty, see JOHN D. BESSLER, *CRUEL & UNUSUAL: THE AMERICAN DEATH PENALTY AND THE FOUNDERS’ EIGHTH AMENDMENT* (2012)

II. THE US SUPREME COURT’S USE OF DIGNITY IN ITS DEATH PENALTY

JURISPRUDENCE

Although the Court in *Trop* referred to the dignity of the individual person—in other words, “human dignity”—a number of Justices have invoked other conceptions of dignity. We will first see how Justices Brennan and Marshall concluded that the death penalty is always violative of human and communitarian dignity respectively, and we will then explore four ways in which the Court has used human and institutional dignity to uphold and entrench the constitutionality of capital punishment.

A. Reading Dignity to Require the Abolition of Capital Punishment

In *Furman v. Georgia*, decided in 1972, Justice Brennan asserted that “the deliberate extinguishment of human life by the State is uniquely degrading to human dignity.”⁴² Brennan explains why: “The true significance of these punishments is that they treat members of the human race as nonhumans, as objects to be toyed with and discarded. They are thus inconsistent with the fundamental premise of the [Eighth Amendment] that even the vilest criminal remains a human being possessed of common human dignity.”⁴³

In addition to stating that the death penalty in the abstract contravenes the dignity of the offender, Brennan notes that capital punishment as practiced at the time was also violative of human dignity: “there is a strong probability that it is inflicted arbitrarily; its rejection by contemporary society is virtually total; and there is no reason to believe that it serves any penal purpose more effectively than the less severe punishment of imprisonment. The function of these principles is to enable a court to determine whether a punishment comports with human dignity.

⁴² *Furman v. Georgia*, 408 U.S. 238, 291 (1972)

⁴³ *Furman*, 408 U.S. at 272-273. For an account of Justice Brennan’s approach to dignity in constitutional interpretation generally, see Stephen Wermiel, *Law and Human Dignity: The Judicial Soul of Justice Brennan*, 7 WM. & MARY BILL RTS L. 223 (1998).

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Death, quite simply, does not.”⁴⁴ Brennan is clear, though, that the deontological ground for holding capital punishment unconstitutional is central to his opinion, since in his view the Constitution is premised on the protection of human dignity: “The country has debated whether a society for which the dignity of the individual is the supreme value can, without a fundamental inconsistency, follow the practice of deliberately putting some of its members to death. In the United States... the struggle about this punishment has been one between ancient and deeply rooted beliefs in retribution, atonement or vengeance, on the one hand, and, on the other, beliefs in the personal value and dignity of the common man”.⁴⁵

In the same case, Justice Marshall offered another reason for holding that the death penalty is contrary to respect for dignity. For Marshall, “the Eighth Amendment is our insulation from our baser selves.”⁴⁶ It follows that a community that imposes an excessive punishment debases itself, and since the death penalty is always unnecessary in his view, it is excessive and thus unconstitutional. Thus, Marshall is not so much concerned with the dignity of the offender, as he is with the dignity of the wider community.

Marshall also differs from Brennan in that he believes that the content of dignity is to be defined by the people, rather than by the courts: “In judging whether or not a given penalty is morally acceptable, most courts have said that the punishment is valid unless “it shocks the conscience and sense of justice of the people.””⁴⁷ This is not to say that public opinion dictates the determination of whether or not a punishment is “cruel and unusual”, though. Marshall makes it clear that in his role as a justice of the Supreme Court, he must test the premises on which public opinion is based. He opines that most Americans would find capital punishment to

⁴⁴ *Furman*, 408 U.S. at 305

⁴⁵ *Furman*, 408 U.S. at 296

⁴⁶ *Furman*, 408 U.S. at 345

⁴⁷ *Furman*, 408 U.S. at 360 (citations omitted)

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be shocking, and thus degrading to their sense of dignity, if they had detailed knowledge of how it fails to deter offenders and is applied disproportionately on the basis of race and poverty.⁴⁸

Justice Marshall comes close to recognizing the multi-faceted nature of dignity when he ends his judgment with the words: “In recognizing the humanity of our fellow beings, we pay ourselves the highest tribute.”⁴⁹ That is, he recognizes that the dignity of the offender is bound up with the dignity of the community. As explained below,⁵⁰ this is an important step to understanding why the concept of dignity pulls towards abolition, but unfortunately Marshall did not elaborate on this point. In any event, the other three Justices who decided in favor of Furman based their opinions on the narrower ground that the administration of the death penalty, and not the death penalty per se, was unconstitutional.⁵¹ Since the opinions of Brennan and Marshall were not controlling, the majority of states responded to *Furman* by drafting new statutes that purported to address the concerns of the plurality. Four years later, in *Gregg v. Georgia*,⁵² the Court held that the new statutes would eliminate the arbitrariness and discrimination that had characterized the pre-*Furman* death penalty, and capital punishment was therefore reinstated. Moreover, since *Gregg* was decided, no other Justice has said that respect for human or communitarian dignity requires the abolition of capital punishment,⁵³ and dignity has instead done more to sustain the death penalty than to pull towards abolition.

⁴⁸ *Furman*, 408 U.S. at 361-2. The notion that an informed citizenry would reject the death penalty has come to be known as “The Marshall Hypothesis”. See Carol S. Steiker, *The Marshall Hypothesis Revisited*, 52 HOWARD L.J. 525 (2009); Austin Sarat and Neil Vidmar, *Public Opinion, the Death Penalty, and the Eighth Amendment: Testing the Marshall Hypothesis*, 1976 WIS. L. REV. 171 (1976); Enekwa, C. Crystal, *Capital Punishment and the Marshall Hypothesis: Reforming a Broken System of Punishment*, 80 TENN. L. REV. 411 (2013).

⁴⁹ *Furman*, 408 U.S. at 371

⁵⁰ See Part III.B *infra*

⁵¹ Justices Stewart, White, and Douglass issued separate but concurring opinions, agreeing that the death penalty was unconstitutional because it was arbitrarily imposed.

⁵² *Gregg v. Georgia*, 428 U.S. 153 (1976)

⁵³ Justices Blackmun, Stevens, and Breyer (joined by Ginsburg) have all opined that the death penalty is unconstitutional, but have not based their opinion on the contention that capital punishment is fundamentally incompatible with respect for human dignity. See Part II.B.4 *infra*

B. Reading Dignity to Justify the Constitutionality of Capital Punishment

There are four ways in which the Court has used dignity to justify the constitutionality of capital punishment. First, some Justices have said that respect for the dignity of the *victim* either demands capital punishment, or at least justifies states' retention and use of the death penalty. If this can be described as an "active" use of dignity to uphold capital punishment, then the remaining three uses have been more passive. The second way in which dignity has been used passively to justify capital punishment can be found in the Court's attempts to narrow the scope of capital punishment so that it is only imposed on the "worst of the worst" offenders. By using dignity to justify the exclusion of certain people from capital punishment, the Court has implied that capital punishment *is* compatible with respect for the dignity of the "worst of the worst", or that such people have somehow forfeited their dignity, or their right to have their dignity respected. Third, some Justices have used a concern with respecting the dignity, or integrity, of the legal system in order to decide in favor of the states that use the death penalty. Fourth, with the exception of Justices Brennan and Marshall, the term dignity has conversely *not* been invoked at all by the Justices who have called for a reconsideration of the constitutionality of capital punishment. The net result of this is that the term dignity is absent from abolitionist discourses, but is present in retentionist discourses on the Court. Let us consider these four pro-death penalty uses of dignity in turn.

1. The dignity of the victim justifies, if not requires, capital punishment

In *Furman* and *Gregg*, some Justices suggested that respect for the dignity of the victim actually justifies, if not requires, capital punishment. Dissenting in *Furman*, Justice Powell stated that the crime of rape is "the most atrocious of intrusions upon the privacy and dignity of the victim",⁵⁴

⁵⁴ *Furman*, 408 U.S. at 458 (Powell J. dissenting)

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and thus the death penalty for rape is constitutional. This approach was reiterated in *Gregg*, when Justice Stewart wrote: “the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community’s belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death.”⁵⁵

Importantly, in *Gregg v. Georgia*, Justice Stewart offered an approach to interpreting the Eighth Amendment which has since paved the way for public opinion to supersede judicial considerations of dignity in Eighth Amendment analysis. Stewart stated that “evolving standards of decency” are best determined with reference to “objective indicia that reflect the public attitude toward a given sanction.”⁵⁶ He asserted that the primary “objective indicia” of contemporary standards are state legislative judgments and the decisions of juries, since these reflect “the moral values of the people”,⁵⁷ and are a “reliable objective index of contemporary values”.⁵⁸ Stewart made it clear that public opinion was not decisive of the question, though. He noted that “our cases also make clear that public perceptions of standards of decency . . . are not conclusive. A penalty must also accord with ‘the dignity of man,’ which is the ‘basic concept underlying the Eighth Amendment. This means, at least, that the punishment not be ‘excessive’”.⁵⁹ In this respect, the Court indicated that it would apply its own determination on whether or not a punishment is disproportionate. The Court emphasized that although the views of state legislatures would be taken into account when making such a determination, such legislation would not necessarily be determinative of the issue because the “Eighth Amendment

⁵⁵ *Gregg*, 428 U.S. at 184 (citations omitted)

⁵⁶ *Gregg*, 428 U.S. at 173

⁵⁷ *Id.* at 175 (emphasis added) (quoting *Furman v. Georgia*, 408 U.S. 238, 383 (1972) (Burger, C.J., dissenting)).

⁵⁸ *id.*, at 181.

⁵⁹ *id.*, at 173

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is a restraint upon the exercise of legislative power.”⁶⁰ Therefore, judicially-determined conceptions of human dignity were to act as a check against the will of the populace. However, as explained in the next section, the Court has subsequently given greater prominence to “public attitudes” when interpreting the Eighth Amendment, effectively delegating determinations of standards of decency to the public. This has resulted in equating “respect for dignity” with “respect for public opinion.”

2. The death penalty is compatible with respect for dignity in limited circumstances

The Court’s post-*Gregg* jurisprudence provides a second way in which dignity has been used to sustain capital punishment. On the same day that *Gregg* was decided, the Court also handed down judgment in *Woodson v. North Carolina*,⁶¹ in which the majority said that respect for human dignity prohibits mandatory death penalty schemes because they preclude consideration of the defendant’s moral culpability. In the Court’s words: “The respect for human dignity underlying the Eighth Amendment... requires consideration of aspects of the character of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of imposing the ultimate punishment of death. The North Carolina statute impermissibly treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the death penalty.”⁶²

The implication of *Woodson* is that the death penalty is only violative of human dignity if a person is executed without first being treated as a unique individual. That is, contrary to

⁶⁰ *id.*, at 174

⁶¹ *Woodson v. North Carolina*, 428 U.S. 280 (1976).

⁶² *Woodson v. North Carolina*, 428 U.S. 280, 281 (1976). This approach has been taken in other jurisdictions too. For example, the High Court of Lagos State, in Nigeria, has held: “the prescription of mandatory death penalty for offences such as armed robbery and murder contravenes the right of the applicants to dignity of human person...” *James Ajulu & Others v. Attorney General of Lagos*, Suit No. ID/76M/2008, October 2012.

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Brennan’s view, a person can still be treated as a human being when being sentenced and put to death. The next year, the Court continued with its attempts to define the constitutionally permissible scope of capital punishment. In *Coker v. Georgia*,⁶³ the Court outlawed the death penalty for rapes that do not result in death, but in doing so began the process of removing judicial understandings of dignity from the interpretation of the Eighth Amendment. The Court asserted that “Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual justices; judgment should be informed by objective factors to the *maximum possible extent*.”⁶⁴ Thus, it became clear that public attitudes to the death penalty were to override any judicial determination of whether or not capital punishment in any particular case was disproportionate and thus incompatible with human dignity. As if to underscore this point, the *Coker* Court did not mention the word “dignity” at all in its judgment.⁶⁵

During the 1980s, the Court continued to step away from explicit considerations of dignity in its death penalty jurisprudence, particularly when considering the constitutionality of the death penalty as a substantive punishment for certain crimes, or on certain groups of people such as young offenders. In *Enmund v Florida* (1982), *Thompson v Oklahoma* (1988), *Penry v Lynaugh* (1989) and *Stanford v Kentucky* (1989), the Court did not refer to “dignity” at all, and instead relied primarily on “objective indicia” to determine what public opinion said about the imposition of the death penalty in various circumstances.⁶⁶ In upholding the death penalty for 16- and 17-year-old offenders in *Stanford*, Justice Scalia expressly eschewed proportionality analysis and based his finding on the fact that the Framers permitted such a punishment, and that

⁶³ *Coker v. Georgia*, 433 U.S. 584 (1977)

⁶⁴ *Coker*, 433 U.S. at 592 (emphasis added).

⁶⁵ It should be noted that Justices Brennan and Marshall repeatedly issued dissents calling for the outright abolition of the death penalty, and repeatedly invoked the term “dignity” in these dissents. See, for example, *Glass v. Louisiana*, 471 U.S. 1080 (1985)

⁶⁶ *Enmund v. Florida*, 458 U.S. 782 (1982); *Thompson v. Oklahoma*, 487 U.S. 815 (1988); *Penry v. Lynaugh*, 492 U.S. 302 (1989); *Stanford v. Kentucky*, 492 U.S. 361 (1989)

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the majority of states with the death penalty permitted such punishment.⁶⁷ In this sense, Scalia suggested that judicially-determined conceptions of dignity have no role to play in the Court's analysis, and that wide discretion is to be granted to the states as to the substantive scope of capital punishment. It is in this sense that concerns with "human dignity" were subsumed under concerns for respecting public opinion.

In recent years, the Court has reconfigured its approach to the Eighth Amendment, and has used judicially-determined conceptions of dignity to impose further limits on the death penalty. In *Atkins v. Virginia*,⁶⁸ decided in 2002, the Court showed greater willingness to refer to the evidence of relevant experts,⁶⁹ and the opinion of the international community,⁷⁰ to help with its own determination of whether the death penalty was disproportionate and thus unconstitutional when imposed on persons suffering from "mental retardation."⁷¹ Although the Court did not expressly use the word dignity in *Atkins*, the term has been invoked in later cases with a remarkable degree of regularity. In outlawing the death penalty for juvenile offenders in *Roper v. Simmons* in 2005, Justice Kennedy noted that "[b]y protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons."⁷² In this case, Kennedy still gave primacy to public opinion as expressed in state legislation and the decisions of juries, but went on to make explicit and considerable reference to relevant experts in child psychology and neuroscience,⁷³ and the laws and practices of other countries to help affirm the reasonableness of his finding that the death penalty for

⁶⁷ *Stanford*, 492 U.S. at 368-379

⁶⁸ *Atkins v. Virginia*, 536 U.S. 304 (2002)

⁶⁹ In this case, experts on "mental retardation". See *Atkins*, 536 U.S. at 317-321

⁷⁰ *Atkins*, 536 U.S. at 316, n.21

⁷¹ The Court has since eschewed this term in favor of the less-offensive "intellectually disabled". See *Hall v. Florida*, 134 S. Ct. 1986, 1992 (2014)

⁷² *Roper v. Simmons*, 543 U.S. 551, 560 (2005)

⁷³ *Roper*, 543 U.S. 568-575

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juvenile offenders is disproportionate and contravenes the constitutional requirement to respect human dignity.⁷⁴

Writing in 2006 about the Court's deference to public opinion, Maxine Goodman states that that "while the Court expresses an unwavering commitment to advancing human dignity in these cases, the Court's analysis of human dignity in most death penalty cases is weak and meaningless."⁷⁵ This is because the Court has largely equated respect for human dignity with respect for public opinion. However, in later judgments, Justice Kennedy has omitted reference to the *Coker* doctrine that Eighth Amendment judgments should "be informed by objective factors to *the maximum possible extent*",⁷⁶ and has opened the door to non-populist understandings of dignity. In outlawing the death penalty for the non-fatal rape of a child in *Kennedy v. Louisiana* (2008), for example, Kennedy asserted that "Evolving standards of decency must embrace and express respect for the dignity of the person, and the punishment of criminals must conform to that rule."⁷⁷ Put another way, the Eighth Amendment, and the definition of "human dignity", is not to be informed by the actions of state legislatures, but rather the "dignity of the person" must inform legislative approaches to the punishment of criminals. Further, in reiterating in *Hall v. Florida* in 2014 that it is unconstitutional to impose the death penalty on the intellectually disabled, Kennedy wrote: "No legitimate penological purpose is served by executing a person with intellectual disability. To do so contravenes the Eighth Amendment for to impose the harshest of punishments on an intellectually disabled person

⁷⁴ *Roper*, 543 U.S. 575-578

⁷⁵ Maxine D. Goodman, *Human Dignity in Supreme Court Constitutional Jurisprudence*, 84 NEB. L. REV. 740, 772-772 (2006) (internal references omitted)

⁷⁶ *Coker*, 433 U.S. at 592. Also see Susan Raeker-Jordan *Kennedy, Kennedy, and the Eighth Amendment: "Still in Search of a Unifying Principle"?* 73 U. PITT. L. REV. 107 (2011).

⁷⁷ *Kennedy*, 554 U.S. at 420

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violates his or her inherent dignity as a human being.”⁷⁸ This opinion built on Justice Marshall’s reasoning in *Ford v. Wainwright*, decided in 1986, outlawing the death penalty for persons suffering from insanity: “Whether its aim be to protect the condemned from fear and pain without comfort of understanding, or to protect the dignity of society itself from the barbarity of exacting mindless vengeance, the restriction finds enforcement in the Eighth Amendment.”⁷⁹

For some, the increasing limitations that the Court has placed on the scope of capital punishment suggests that the US is moving towards outright abolition of the death penalty, and it would follow that the idea of dignity in these cases has been used to foster abolition.⁸⁰ However, it could also be said that these cases suggest that either the death penalty is compatible with respect for the dignity of the morally reprehensible, or that the morally reprehensible have forfeited any claim to have their dignity respected.⁸¹ Given that the Court has repeatedly affirmed that even those convicted of criminal offences retain their dignity,⁸² we must conclude that the Court uses dignity as part of its balancing exercise when determining whether or not the death penalty is disproportionate in any given circumstance.⁸³ It is in this sense, then, that dignity has worked to legitimize the imposition of the death penalty, at least in those cases where the

⁷⁸ *Hall v. Florida*, 134 S. Ct. 1986, 1992 (2014) (internal references omitted)

⁷⁹ *Ford v. Wainwright*, 477 U.S. 399, 410 (1986)

⁸⁰ Charlie Eastaugh, *Capital Punishment: An Institution Vanishing Through the Evolution of the Eighth Amendment* 3 WESTMINSTER LAW REVIEW 23 (2014); Carol Steiker and Jordan Steiker, *The Beginning of the End? in THE ROAD TO ABOLITION? THE FUTURE OF CAPITAL PUNISHMENT IN THE UNITED STATES* (Charles J. Ogletree, Jr and Austin Sarat eds., 2009) (“...the prospects for judicial abolition of the death penalty have increased enormously since the late 1990s. Recent Eighth Amendment decisions have substantially altered the Court’s proportionality doctrine, and the newly emerging approach is more hospitable to a global assault against the death penalty than the relatively deferential framework that it replaced.” p.101)

⁸¹ The US is not the only jurisdiction in which it has been held that respect for dignity merely requires the regulation of capital punishment. The Supreme Court of India has held: “A real and abiding concern for the dignity of human life postulates resistance to taking a life through law’s instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed.” *Bachan Singh v. State of Punjab*, (1980) 2 SCC 684, at para 209.

⁸² See, for example, *Roper*, 543 U.S. at 560: “By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons.”

⁸³ On human dignity in proportionality analysis, see Mattias Kumm and Alec D. Walen, *Human Dignity and Proportionality: Deontic Pluralism in Balancing*, in *PROPORTIONALITY AND THE RULE OF LAW: RIGHTS, JUSTIFICATION, REASONING* (Grant Huscroft et al. eds., 2014).

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offender is morally culpable of committing a particularly heinous crime that results in death. Indeed, when the Court upheld certain lethal injection procedures in the 2015 case of *Glossip v. Gross*, Justice Alito expressly used the dignity of the person facing death to give the execution a veneer of acceptability. In describing the background to the case, Alito noted how, in the previous execution of Clayton Lockett, the execution team had “covered the injection access point with a sheet, in part to preserve Lockett’s dignity during the execution.”⁸⁴ This gives the impression that the authorities and the Court paid due respect to the dignity of the person being executed, thus legitimizing the execution. We have already seen, though, that respect for human dignity requires more than the mere covering up of the physical point of execution, and it would appear that Justice Alito was instead betraying a concern with maintaining the appearance of a dignified process. Indeed, as we will now see, concerns with “institutional” dignity have also led some Justices to decide in favor of the states administering capital punishment.

3. *The dignity of the institution takes priority over the dignity of the person*

A third way in which dignity has been used to sustain capital punishment can be found in the opinions of Justice Powell in *McCleskey v. Kemp* in 1987,⁸⁵ and Chief Justice Roberts in *Baze v. Rees* in 2008.⁸⁶ In *McCleskey*, Justice Powell accepted the validity of statistical evidence relating to racial discrimination in the application of the death penalty, but refused to use that evidence to strike down the death penalty because of the damage that such a decision would bring to the criminal justice system as a whole: “McCleskey’s claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system. The Eighth Amendment is not limited in application to capital punishment, but applies to all penalties. Thus,

⁸⁴ *Glossip v. Gross*, 576 U.S. ____ (2015) (slip op. 7)

⁸⁵ *McCleskey v. Kemp*, 481 U.S. 279 (1987)

⁸⁶ *Baze v. Rees*, 553 U.S. 35 (2008)

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if we accepted McCleskey's claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty."⁸⁷ Concerns with the appearance of the dignity of the institution, then, overrode concerns with the dignity of Warren McCleskey, who had most likely been sentenced to die because of the color of his skin, rather than because of his crime and moral culpability.⁸⁸ In focusing on the integrity of the institution, Powell entrenched the constitutionality of capital punishment. Similarly, in upholding the constitutionality of Kentucky's lethal injection protocol in *Baze v. Rees*, Roberts placed emphasis on the need to respect the "dignity of the procedure",⁸⁹ expressing reluctance to interfere with a method of execution that has a dignified appearance. Roberts did not refer at all to the dignity of the person being executed, and it would appear that a dignified procedure is, in his view, either inherently respectful of the inmate's dignity, or supersedes the need to respect the inmate's dignity.⁹⁰ Both *McCleskey* and *Baze* have been described as the two post-*Furman* cases that could have conceivably brought a halt to the death penalty altogether,⁹¹ and we can see therefore how the choice to focus on a particular conception of dignity over another—in this

⁸⁷ *McCleskey*, 481 U.S. at 315

⁸⁸ JEFFREY L. KIRCHMEIER, *IMPRISONED BY THE PAST: WARREN MCCLESKEY AND THE AMERICAN DEATH PENALTY* (2015); Christopher Bracey, *Dignity in Race Jurisprudence*, 7 U. PA. J. CONST. L 669, 671 (2005). ("The struggle for racial justice in America, then, is perhaps best understood as a struggle to secure dignity in the face of sustained efforts to degrade and dishonor persons on the basis of color")

⁸⁹ *Baze*, 553 U.S. at 57.

⁹⁰ Timothy V. Kaufman-Osborn, *The Death of Dignity, in IS THE DEATH PENALTY DYING? EUROPEAN AND AMERICAN PERSPECTIVES* 204 (Austin Sarat and Jürgen Martschukat eds., 2011). For the view that lethal injections respect the human dignity of the inmate, see JOSEPH B.R. GAIE, *THE ETHICS OF MEDICAL INVOLVEMENT IN CAPITAL PUNISHMENT: A PHILOSOPHICAL DISCUSSION* (2004) ("The service of the execution by the medical doctor enhances the prisoners' human dignity, or at least it reduces the indignities, experienced in other methods of execution" at p.95)

⁹¹ John Bessler has described *McCleskey* and *Baze* as the two "systemic challenges" to the death penalty since *Furman* and *Gregg*. See John D. Bessler, *The American Enlightenment: Eliminating Capital Punishment in the United States*, in *CAPITAL PUNISHMENT: A HAZARD TO A SUSTAINABLE CRIMINAL JUSTICE SYSTEM?* (Lill Scherдин ed., 2014) p.95. This is because a ruling in favor of petitioners in either case would have halted the death penalty, at least temporarily.

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case, the dignity of the institution over and above the dignity of the inmate—can lead to the strengthening of death penalty systems.

4. *Dignity-free abolitionist opinions*

A fourth way in which dignity has sustained capital punishment can be found in the opinions of Justice Blackmun in *Callins v. Collins*,⁹² Justice Stevens in *Baze v. Rees*,⁹³ and Justice Breyer in *Glossip v. Gross*.⁹⁴ In these opinions, the Justices called on their colleagues to reconsider the constitutionality of capital punishment, but none went as far as Justices Brennan and Marshall in their reasoning. Rather than assert that capital punishment is always contrary to respect for human dignity or the dignity of the community, these three Justices instead focused on the practical problems with the administration of the death penalty.⁹⁵ Having said this, a close reading of their opinions reveals that all three had concerns that are rooted in the idea of dignity. For example, Justice Blackmun emphasized that respect for humanity required individualized sentencing, which in his experience always bred arbitrariness in the administration of capital punishment. Given the importance of respecting the humanity of the individual facing death, Blackmun concluded that the death penalty can never work in a constitutionally-acceptable manner.⁹⁶ Similarly, Justice Breyer expressed concern with the anguish felt by those who spend an inordinate amount of time on death row awaiting execution.⁹⁷ However, it is notable that none of these Justices expressly used the word dignity in their opinions. Given that, in *Baze*, Roberts

⁹² *Callins v. Collins*, 510 U.S. 1141 (1994) (Blackmun J. dissenting from denial of cert.)

⁹³ *Baze v. Rees*, 553 U.S. 35 (2008) (Stevens J. concurring in part)

⁹⁴ *Glossip v. Gross*, 576 U.S. ___ (2015) (Breyer J. dissenting) (joined by Ginsburg J.)

⁹⁵ Dwight Aarons, *The Marshall Hypothesis and the Rise of Anti-Death Penalty Judges*, 80 TENN. L. REV. 381, 396-409 (2013)

⁹⁶ *Callins*, 510 U.S. at 1144 (Blackmun J. dissenting from denial of cert.) (“Experience has taught us that the constitutional goal of eliminating arbitrariness and discrimination from the administration of death... can never be achieved without compromising an equally essential component of fundamental fairness—individualized sentencing.”)

⁹⁷ *Glossip*, 576 U.S. at 19 (slip op. Breyer J. dissenting) (“a lengthy delay in and of itself is especially cruel because it “subjects death row inmates to decades of especially severe, dehumanizing conditions of confinement.””) (Quoting *Johnson v. Bredesen*, 558 U. S. 1067, 1069 (2009) (Stevens, J., statement respecting denial of certiorari).

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expressly used the word dignity when holding in favor of the state administering capital punishment, it is arguable that the failure of Stevens to invoke dignity in that same case means that dignity features more prominently in retentionist opinions, than in abolitionist opinions. Thus, dignity has been used to legitimate the death penalty, rather than to justify or demand its abolition.

C. Evaluating the Court's Uses of Dignity in its Death Penalty Jurisprudence

From the preceding account, we can identify three conceptions of dignity in the Court's death penalty jurisprudence. Justices Brennan, Powell, and Kennedy have authored opinions that focus on the "human dignity" of the offender and victim; Justices Marshall and Kennedy have invoked the dignity of the community; and Justice Powell and Chief Justice Roberts have paid more attention to the dignity of the institution. Moreover, different justices have adopted different understandings of human, communitarian, and institutional dignity, leading to different conclusions over what these dignities mean for the constitutionality of the death penalty. For example, whereas Brennan concluded that the inherent worth of all human beings requires abolition, Kennedy has asserted that respect for human dignity is tied to moral virtue, and thus the death penalty is constitutional when the offender is sufficiently morally reprehensible. And, whereas "human dignity" appears to refer to some intrinsic quality of human beings, "communitarian" and "institutional" dignity appear to reflect a concern with how the community and institution should behave. That is, dignity is both an inherent quality that all humans have by virtue of being human, and is a guiding principle for ethical behavior on the part of the community and the institution.

The lack of a coherent and consistent approach to dignity might be attributable to one, or both, of two things. First, it might be symptomatic of the Court's uncertain approach to

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interpreting the Eighth Amendment prohibition on “cruel and unusual punishments.”⁹⁸ A judge who adopts the theory of originalism would look to how the Framers understood the idea of dignity (if that judge considers dignity to be relevant at all),⁹⁹ whereas a judge who believes that the Constitution should be interpreted in light of prevailing standards might focus on their own understanding of dignity, as Brennan did, or might look to what the public consider to be compatible with respect for dignity, as the Court did between *Gregg* and *Atkins*. While the Court has in the past left the definition of “evolving standards of decency” largely to public opinion, we saw that in recent years Justice Kennedy in particular has reconfigured Eighth Amendment analysis so that the Justices play a more searching role in delimiting the contours of acceptable punishments, with dignity playing an increasingly prominent role in such determinations.

A second plausible explanation for the Court’s confusing use of dignity lies in the more general problems with dignity as a legal and moral concept. Philosophers and jurists have long debated the meaning of dignity, and have perennially disagreed on the impact that dignity has, or should have, in any given context such as the imposition of capital punishment. It follows that we should explore the philosophical literature on dignity and the death penalty when questioning the role of dignity in Eighth Amendment analysis. However, given the lack of consensus within the philosophical literature, and given that philosophy does not necessarily translate into constitutional interpretation, we should use the Court’s existing dignity jurisprudence to frame our philosophical analysis.

⁹⁸ On the Court’s problematic and varying approach to Eighth Amendment analysis, see John C. Shawde, *Jurisprudential Confusion in Eighth Amendment Analysis*, 38 U. MIAMI L. REV 357 (1984); Susan Raeker-Jordan, *A Pro-Death, Self-Fulfilling Constitutional Construct: The Supreme Court’s Evolving Standard of Decency for the Death Penalty*, 23 HASTINGS CONST. L.Q. 455 (1996); Susan Raeker-Jordan *Kennedy, Kennedy, and the Eighth Amendment: “Still in Search of a Unifying Principle”?* 73 U. PITT. L. REV. 107 (2011); JOHN D. BESSLER, *CRUEL & UNUSUAL: THE AMERICAN DEATH PENALTY AND THE FOUNDERS’ EIGHTH AMENDMENT* (2012) pp.26-27 (“Eighth Amendment case law is in such a state of disarray that locating a unifying set of principles in that body of law is like trying to solve a Rubik’s Cube while blindfolded. It simply cannot be done.”)

⁹⁹ See n.106 *infra* and accompanying text

III. THE RELATIONSHIP BETWEEN DIGNITY AND THE DEATH PENALTY

We might take the view that there is one correct conception of dignity as it relates to the death penalty, and our task then would be to first ascertain which of the judicial conceptions outlined above (if any) is the correct one according to the philosophical literature, and second to determine what that conception means for the constitutionality of capital punishment. So we might seek to defend Brennan's position, or Kennedy's, or Roberts', for example. The approach taken in this paper, though, is that each conception of dignity raised by the various Justices is a valid concern for the interpretation of the Eighth Amendment, but that each conception of dignity by itself is insufficient. The task, then, is to understand how the various dignities inter-relate and inform one another. In this sense, the role of dignity is akin to a jigsaw puzzle: to get the complete picture, the judge needs to ensure that the various pieces of dignity are arranged in such a way that they properly connect with one another. Each piece by itself might appear unhelpful, similar to another piece, or even contrary to another piece, but it is nonetheless possible to develop a complete picture with a bit of work.

The following pages address each of the three conceptions of dignity in turn. The first refers to the inherent human dignity of the people involved in the crime, including offenders, victims, offenders' families, and victims' families. The second—"communitarian dignity"—refers to the dignity of the wider community in whose name the death sentence is being sought, and the dignity of the people involved in administering the death sentence. The third conception of dignity refers to the dignity and integrity of the legal system.

A. Human Dignity and the Death Penalty

In the outline of the Court’s jurisprudence, we saw that several Justices have referred to the “inherent worth” of the offender, while others have referred to the worth of the victim. We also saw that different understandings of human dignity have led to different conclusions regarding the constitutionality of capital punishment. These inconsistencies are not unique to the question of the constitutionality of the death penalty in the US. In surveying the judicial use of human dignity in courts around the world, in a variety of contexts, Christopher McCrudden finds that “[t]here are significantly differing expressions of the relationship between human rights and dignity, and significant variations between jurisdictions in how dignity affects similar substantive issues.”¹⁰⁰

These variations are possibly attributable to the variations in philosophical approaches to human dignity. In broad terms “the dignity of the person” refers to the idea that all human beings have worth and are important, and should be treated as such. However, this rudimentary definition raises a host of philosophical and legal questions which receive varying responses: What exactly is it about humans that means we have worth, or dignity? Does this mean that we have a right to have our dignity respected, or is dignity a principle that governs our conduct, or both? What sorts of things will constitute a breach of dignity? Will the infliction of pain and suffering breach one’s dignity, or is dignity more about autonomy and the ability to exercise self-determination? Can we forfeit our dignity through immoral conduct? And how do all of these kinds of questions crystallize and play out in the context of a legal instrument, such as a constitution?

¹⁰⁰ Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT’L L. 655 (2008).

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For some, the idea of human dignity is unhelpful precisely because we cannot agree on the answers to these questions. The idea of dignity seems to lack sufficient definitional precision for its deployment in a legal context.¹⁰¹ The ambiguity of the term means that it can be used, and often is used, to justify a range of diametrically opposed opinions, thus undermining its normative force and usefulness. This is often the case, for example, in discussions about abortions. On one view, the “dignity of the woman” demands respect for her control over her body; on another view, respect for the “dignity of the unborn fetus” demands that abortion be prohibited.¹⁰²

The malleability of the concept has led Gerhold Becker to describe dignity as merely a “rhetorical device” which people resort to in order to make their moral arguments seemingly unassailable, particularly when they have no other means, such as empirical evidence, to strengthen their arguments.¹⁰³ It has also been said by Helga Kuhse that the term is “nothing more than a shorthand expression for people’s moral intuitions and feelings.”¹⁰⁴ That is, the person who is instinctively “pro-choice” will be led to focus on the dignity of the woman, whereas the person who is intuitively “pro-life” will be led to focus on the dignity of the fetus. The danger here, then, is that because the term is so malleable, justices on the US Supreme Court have been using dignity in order to advance their own view of what the Constitution *should* say about the death penalty, rather than to interpret the Constitution to understand what it *does*

¹⁰¹ Michael Rosen, *Dignity: The Case Against*, in UNDERSTANDING HUMAN DIGNITY (Christopher McCrudden ed., 2013); Neomi Rao, *On the Use and Abuse of Dignity in Constitutional Law*, 14 COLUM. J. EUR. L. 201 (2008).

¹⁰² See Reva Siegal, *Dignity and the Duty to Protect Unborn Life*, in UNDERSTANDING HUMAN DIGNITY (Christopher McCrudden ed., 2013)

¹⁰³ Gerhold K. Becker, *In Search of Humanity: Human Dignity as a Basic Moral Attitude*, in THE FUTURE OF VALUE INQUIRY 53, 53 (Matti Hayry & Tuija Takala eds, 2001). Also see Michael Rosen, *Dignity: The Case Against*, in UNDERSTANDING HUMAN DIGNITY (Christopher McCrudden ed., 2013).

¹⁰⁴ Helga Kuhse, *Is there tension between autonomy and dignity?* in 2 BIOETHICS AND BIOLAW 61, 72 (Peter Kemp et al. eds, 2000)

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say.¹⁰⁵ That is, they will not use dignity in order to help them reach a decision about the constitutionality of the death penalty, but instead the judge who instinctively opposes the death penalty will use dignity to justify the advancement of their moral view, just as the judge who supports capital punishment will find a way to use dignity to support its retention. These concerns reflect the more general disagreements among jurists about how the Constitution should be interpreted notwithstanding references to “dignity.” For those who ascribe to the theory of originalism, the text of the Constitution should be interpreted in light of how it would have been understood at the time of ratification, in part because such an approach limits, if not eradicates, the possibility of the judge acting as a moral philosopher and law-maker.¹⁰⁶ This is why Justice Thomas—an ardent proponent of originalism—has rejected the judicial invocation of dignity in constitutional interpretation.¹⁰⁷ Indeed, in many cases, justices have simply written the word “dignity” in their opinions without even offering any definition of the term,¹⁰⁸ adding weight to the belief that the term is used for rhetorical purposes and to support a pre-ordained conclusion, rather than to help reach a conclusion.

This does not mean that the Court should abandon the concept of human dignity altogether, though. To do so would be contrary to decades of the Court’s jurisprudence.¹⁰⁹ The

¹⁰⁵ Raoul Berger, *Justice Brennan, “Human Dignity,” and Constitutional Interpretation*, in *THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES* (Michael J. Meyer and William A. Parent eds., 1992). Writing about human dignity in legal orders around the world, Christopher McCrudden observes that “dignity seems open to significant judicial manipulation, increasing rather than decreasing judicial discretion.” Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 *EUR. J. INT’L L.* 655, 655 (2008).

¹⁰⁶ ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (Amy Gutmann ed., 1998). Note that “originalism” is an umbrella term for a variety of approaches that use the historical method to determine the meaning of the Constitution.

¹⁰⁷ *See supra* n. 33

¹⁰⁸ Erin Daly, for example, notes that “while the justices of the court, individually and collectively, do recognize the relevance of dignity to constitutional interpretation, they do not seem particularly interested in defining it.” ERIN DALY, *DIGNITY RIGHTS: COURTS, CONSTITUTIONS, AND THE WORTH OF THE HUMAN PERSON*, 97 (2012).

¹⁰⁹ Leslie Meltzer Henry, *The Jurisprudence of Dignity* 160 *U. PA. L. REV.* 169, 178 (2011) (noting that Supreme Court Justices have invoked the term “dignity” in more than 900 opinions over the last 220 years, with “nearly half of these [900] opinions [appearing] after 1946, when the phrase “human dignity” first appeared in an opinion”).

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task instead is to construct a coherent framework of human dignity for the purposes of determining the constitutionality of the death penalty. Let us first consider the conceptions of human dignity that *demand* the imposition of capital punishment. We can then consider conceptions of dignity that *permit* the death penalty, and this is followed by conceptions that *prohibit* capital punishment. We will see that, in order to make sense of these conceptions, we need to consider the dignity of the community and the dignity of the legal institution.

1. A conception of human dignity that demands the death penalty

No Justice of the US Supreme Court has said that the Constitution demands the imposition of capital punishment; they have merely said that the Fifth and Fourteenth Amendments permit legislatures to enact death penalty statutes and carry out executions following due process. While this is probably because the text of the Constitution does not mandate capital punishment, this nonetheless sheds light on how the Justices have not, or feel that they cannot, adopt a strictly Kantian approach to dignity and the death penalty. This is despite the fact that Immanuel Kant is the obvious starting point for any philosophical discussion on dignity and the death penalty, since he provided the first sustained study of this relationship.¹¹⁰ For Kant, the death penalty is required for the crime of murder because any other punishment would be an affront to the dignity of the offender and the victim. Although Kant does not refer to the dignity of the community and legal institution, such concerns are implicit in his words. To explain this, we must first set out Kant's approach to human dignity.

In the *Groundwork for Metaphysics of Morals*, Kant explains that human beings have "inner worth", or dignity, because they are capable of rational thought and possess the ability to

¹¹⁰ Carol Steiker, *The Death Penalty and Deontology*, in *THE OXFORD HANDBOOK OF PHILOSOPHY OF CRIMINAL LAW* (John Deigh and David Dolinko eds., 2011) p.441

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act as free autonomous agents.¹¹¹ Because humans are rational beings, they can never be used as a means to an end – that is, they must be treated with respect for their rationality and ability to act autonomously. Similarly, people do not differ in their worth, and are to be respected equally. This conception of human dignity demands both negative and positive types of treatment. To treat someone with respect for their human dignity involves both refraining from treating them in certain ways (eg, not inflicting unwanted physical or psychological harm), as well as positively treating them with due consideration and respect (eg, providing them with the conditions required for them to act autonomously).¹¹² In this sense, we can see that dignity as “inner worth” can be implicated in various situations, including the infliction of pain and suffering,¹¹³ and the denial of free will.¹¹⁴

From these premises, Kant justifies the retributive aim of state punishments for criminal offences. This is set out in his later work, *The Metaphysics of Morals*.¹¹⁵ Kant defends what can be called a “strict retributivism”, under which the state has a duty, and not just a license, to inflict certain punishments.¹¹⁶ For Kant, a state must impose a punishment that is equal to the crime (the principle of *Ius Talionis*) in order to respect the principle of equality, and in order to respect the dignity of the offender.¹¹⁷ This is because a rational moral agent (A) who chooses to treat another person (B) a certain way, is expressing his or her judgment about the way that people should be treated. In order to ensure that we treat (A) with respect for his or her rationality, then, we must treat him or her in the way that s/he has decreed. In other words, if a person kills, then

¹¹¹ IMMANUEL KANT, *GROUNDWORK FOR THE METAPHYSICS OF MORALS* (Thomas E. Hill and Arnulf Zweig eds., Arnulf Zweig trans., 2003) AK 4:434 – AK 4:436

¹¹² Alan Gewirth, *Human Dignity as the Basis of Rights*, in *THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES* (Michael J. Meyer and William A. Parent eds., 1992). p.15

¹¹³ *Gäfgen v. Germany*, 22978/05 [2010] ECHR 759 (1 June 2010)

¹¹⁴ *Lawrence v. Texas*, 539 U.S. 558 (2003).

¹¹⁵ IMMANUEL KANT, *THE METAPHYSICS OF MORALS* (Mary J. Gregor ed., Mary J Gregor trans., 1996).

¹¹⁶ IMMANUEL KANT, *THE METAPHYSICS OF MORALS* (Mary J. Gregor ed., Mary J Gregor trans., 1996) AK 6:331

¹¹⁷ *Ius Talionis* translates to the maxim “An eye for an eye, a tooth for a tooth.”

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we must execute them in order to respect their dignity: “If... he has committed murder he must *die*.”¹¹⁸ Kant asserts that “whatever undeserved evil you inflict upon another within the people, that you inflict upon yourself”,¹¹⁹ explaining that a murderer must be executed since the murderer has inflicted the murder on himself. This is not to say that the murderer has literally killed him- or herself, but that they have rationally willed the taking of life. It is in this sense that the death penalty, and punishment more generally, fits with Kant’s categorical imperative—the basic moral rule that one should only act in a way that they would will into a universal law. Importantly, for Kant, the death penalty only serves legitimate retributive purposes when the offender is a rational moral agent, and thus the death penalty can only be imposed on rational moral agents who commit murder.

Kant accepts that punishments do not have to literally mirror the crime, and so convict labor, for example, will suffice for theft since both involve security in property.¹²⁰ He insists, though, that “[t]here is no similarity between life, however wretched it may be, and death, and hence no likeness between the crime and the retribution unless death is judicially carried out upon the wrongdoer”.¹²¹

Kant’s thesis, though, is not just focused on the dignity of the offender. He asserts that states have a duty to punish because the integrity of the legal system, and the state as a whole, will be called into question if an offender escapes punishment. In explaining why a person sentenced to death should not be permitted to evade death by giving themselves up for medical experimentation for the purposes of developing medicines to save others, Kant writes: “justice

¹¹⁸ IMMANUEL KANT, *THE METAPHYSICS OF MORALS* (Mary J. Gregor ed., Mary J Gregor trans., 1996) AK 6: 333. For a fuller explanation of Kant’s position, see Benjamin S. Yost, *Kant’s Justification of the Death Penalty Reconsidered*, 15 *KANTIAN REVIEW* 1 (2010).

¹¹⁹ IMMANUEL KANT, *THE METAPHYSICS OF MORALS* (Mary J. Gregor ed., Mary J Gregor trans., 1996) AK 6: 332

¹²⁰ IMMANUEL KANT, *THE METAPHYSICS OF MORALS* (Mary J. Gregor ed., Mary J Gregor trans., 1996) AK 6: 333

¹²¹ IMMANUEL KANT, *THE METAPHYSICS OF MORALS* (Mary J. Gregor ed., Mary J Gregor trans., 1996) AK 6: 333

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ceases to be justice if it can be bought for any price whatsoever.”¹²² Although Kant here is concerned with the idea that dignity cannot be traded away, he also identifies a concern with the integrity of the legal system. He also addresses the role of the community in punishment. For Kant, even if a society voluntarily dissolves itself, the last murderer in prison must be executed.¹²³ Although this could be taken to mean that human dignity does not depend on relations with others (even a person alone on an island has dignity), the point remains that it is the community that is required to act in order to respect the dignity of the individual.

In some respects, the Court appears to have adopted a Kantian approach to dignity. Justice Kennedy has referred to the “inherent worth” of individuals, and the Court has espoused individualized sentencing in order to determine whether an offender is a morally rational agent, and thus eligible for capital punishment.¹²⁴ However, the Court has long rejected the contention that a morally rational agent *must* be punished with death. Perhaps if the Court mandated the death penalty, we would then have a consistent and clear approach to the role of dignity in death penalty cases. Having said this, Kant recognizes that not all crimes can or should be punished with literal likeness, and he accepts that it would be morally reprehensible to punish the crime of rape by raping the offender.¹²⁵ If we accept that there are some things that are so morally reprehensible that we should not mimic them, then it is at least arguable that state-sanctioned killing is morally reprehensible and thus not required within the Kantian tradition. Explaining why state-sanctioned killing is morally reprehensible requires a careful consideration not just of the dignity of the offender, but also of the integrity (or dignity) of the legal system. We would

¹²² IMMANUEL KANT, *THE METAPHYSICS OF MORALS* (Mary J. Gregor ed., Mary J Gregor trans., 1996) AK 6: 332

¹²³ IMMANUEL KANT, *THE METAPHYSICS OF MORALS* (Mary J. Gregor ed., Mary J Gregor trans., 1996) AK 6: 333

¹²⁴ *Woodson*, 428 U.S. at 281 (demanding that those convicted of capital crimes are treated as “uniquely individual human beings, [and not] as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the death penalty.”)

¹²⁵ IMMANUEL KANT, *THE METAPHYSICS OF MORALS* (Mary J. Gregor ed., Mary J Gregor trans., 1996) AK 6: 363 (Appendix: Explanatory Remarks on *The Metaphysical First Principles of the Doctrine of Right*)

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not punish rape with rape because this would require the legal system to justify, or require, another human being to commit the act of rape, and it is arguable that the legal system cannot maintain its integrity when it requires a human being to put another human being to death.¹²⁶ We can already see, therefore, how the various dignities might be interconnected, and this is a theme returned to below in the section on institutional integrity. For now, given that the Court has instead used human dignity to say that the death penalty is *permitted*, we should explore the philosophical roots of this approach.

2. A conception of human dignity that permits the death penalty

It is clear from the Court's jurisprudence that, since *Trop v. Dulles* was decided, a majority of justices have taken the view that although the death penalty is not required by the duty to respect human dignity, it is compatible with respect for dignity in some circumstances. A number of reasons have been given for this. First, Justice Kennedy in particular has tied human dignity to the idea of moral virtue, holding that those who lack moral virtue can be executed consistent with respect for their dignity. Second, some justices have asserted that the death penalty is permissible when it restores respect for the dignity of the victim. Third, albeit from a case not emanating from the Supreme Court, it has been argued that Kant's conception of dignity permits the death penalty in cases involving volunteers for execution.¹²⁷ Let us consider these in turn.

With respect to the first way in which capital punishment might be considered compatible with respect for human dignity, Louis Pojman has written: "Human beings have dignity as self-conscious rational agents who are able to act morally. One could maintain that it is precisely their moral goodness or innocence that bestows dignity and a right to life on them. Intentionally

¹²⁶ Hugo Adam Bedau, *The Eighth Amendment, Human Dignity, and the Death Penalty*, in *THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES* (Michael J. Meyer and William A. Parent eds., 1992).

¹²⁷ Order in *Baal v. Godinez*, No. 90-15716 (CA9, June 2, 1990) (Judge Kozinski, dissenting)

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taking the life of an innocent human being is so evil that absent mitigating circumstances, the perpetrator forfeits his own right to life. He or she deserves to die.”¹²⁸ In other words, human dignity is connected to behavior, and somebody who commits a particularly immoral act, such as murder, forfeits any claim to have their dignity and right to life respected unless they have mitigating circumstances.

A cursory look at the Supreme Court’s recent death penalty jurisprudence suggests that it is this conception of dignity that underpins the Court’s approach to the Eighth Amendment. We saw above that Justice Kennedy in particular has said that it is permissible to execute those who lack “moral goodness”, and that a sentence of death is only an affront to the offender’s dignity when that offender is not morally reprehensible either because of their diminished capacity or because of the relative gravity of their crime.¹²⁹ Indeed, Kennedy has been reluctant to consider the dignity of those who have been permissibly sentenced to death, suggesting that his concern with dignity is limited to assessments of moral culpability. That is, Kennedy has not expressed a concern with whether the time spent on death row, or methods of execution, comport with respect for human dignity,¹³⁰ suggesting that he also considers death-eligible criminals to have forfeited their dignity claims. However, a closer look at Kennedy’s jurisprudence reveals that he is not clear on this point. He has repeatedly referred to the “inherent” dignity of people, and has explicitly stated that “*Prisoners retain the essence of human dignity inherent in all persons*. Respect for that dignity animates the Eighth Amendment prohibition against cruel and unusual

¹²⁸ Louis Pojman, *Why the Death Penalty is Morally Permissible*, in *DEBATING THE DEATH PENALTY: SHOULD AMERICA HAVE CAPITAL PUNISHMENT? - THE EXPERTS ON BOTH SIDES MAKE THEIR BEST CASE* (Hugo Adam Bedau and Paul G Cassell eds., 2004) at 56

¹²⁹ *See supra* Part II.B.2

¹³⁰ *Lackey v. Texas*, 514 U.S. 1045 (1995); *Knight v. Florida*, 528 U.S. 990 (1999); *Foster v. Florida*, 537 U.S. 990 (2002); *Valle v. Florida*, 132 S. Ct. 1 (2011) (denial of certiorari in all cases involving challenges to length of time on death row). *Baze v. Rees*, 553 U.S. 35 (2008); *Glossip v. Gross*, 576 U.S. ____ (2015) (rejection of petitioners’ claims relating to methods of execution)

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punishment.”¹³¹ Thus, whereas Pojman states that a convicted murderer “forfeits” their right to have their dignity respected, Kennedy believes that even convicted prisoners retain their dignity. Indeed, in a recent death penalty case, Kennedy wrote a separate concurring opinion to address the problems with solitary confinement, in which he expressed concerns with the dignity of those confined on death row.¹³² Although Kennedy did not invoke the term “dignity”, the concerns he expressed reflect concerns with respect for human dignity. Kennedy notes how solitary confinement can cause a person to “lapse in and out of a mindless state with almost no awareness or appreciation for time or his surroundings.”¹³³ Further, in quoting from an earlier case, Kennedy notes that “A considerable number of the prisoners fell, after even a short [solitary] confinement, into a semi-fatuous condition . . . and others became violently insane; others, still, committed suicide.”¹³⁴ This, then, suggests that Kennedy *is* concerned with how even the most morally culpable people are treated during their punishment. Kennedy’s jurisprudence, then, has wavered between saying that it is consistent with respect for human dignity to execute the morally reprehensible, and that even the morally reprehensible retain their dignity.

It might be that these two positions are reconcilable. That is, perhaps the taking of life is consistent with dignity, so long as the treatment of the person leading up to their death is respectful. This is because death is the punishment, but the conditions on death row and the means for bringing about death are not. This is consistent with Kant’s position, since Kant expressly states that the imposition of capital punishment “must still be freed from any

¹³¹ *Brown v. Plata*, 563 U.S. 493, 510 (2011)

¹³² *Davis v. Ayala*, 576 U.S. ____ (2015)

¹³³ *Davis*, 576 U.S. (Kennedy J. concurring, slip op. 2). It should be noted here that Kennedy was referring to depictions in literature of how solitary confinement affects individuals, citing CHARLES DICKENS, *A TALE OF TWO CITIES* (1859). While it could be reasonably said that a fictional account from 1859 is hardly relevant to contemporary constitutional analysis, Kennedy also refers to more recent scholarly work on this issue, including *THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY* (Norval Morris and David Rothman eds, 1995)

¹³⁴ *Davis*, 576 U.S. (Kennedy J. concurring, slip op. 2)

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mistreatment that could make the humanity in the person suffering it into something abominable.”¹³⁵ That is, the treatment of the person while awaiting execution, and the actual execution itself, must not be “abominable.” However, Kant and Kennedy differ in that the former advocated the mandatory death penalty in order to respect the inherent dignity of the person, whereas Kennedy does not.

Furthermore, Kennedy refers to the inherent dignity of persons, while simultaneously holding that dignity is dependent on conduct. However, while our inherent characteristics might influence or even determine the way we act, our inherent characteristics are not necessarily contingent on our actions. For example, our inherent capacity to feel pain might influence our conduct, but we do not lose the ability to feel pain just because we act immorally as a result of feeling pain. Thus, we cannot say that dignity is something that we “inherently” have because of our characteristics as human beings, while simultaneously holding it to be contingent on virtuous conduct, for a person who acts without virtue still has the characteristics of being human. It is for this reason that Gerald Neuman says: “Those who assert that human dignity must be earned by virtuous conduct, or is unequally distributed, are talking about something else.”¹³⁶

Joshua Kleinfeld has offered an account of what such people are talking about. Kleinfeld draws a distinction between “human dignity” in the Kantian sense of inherent worthiness, and “democratic dignity”, which seems to more closely fit with Kennedy’s approach. Under this conception of dignity, it is the social contract, or democratic society, that is infused with moral goodness, and that is the basis of individual rights (as opposed to their inherent worth). One who transgresses the law has disrespected the dignity of the democratic order, thus justifying their

¹³⁵ IMMANUEL KANT, *THE METAPHYSICS OF MORALS* (Mary J. Gregor ed., Mary J Gregor trans., 1996) AK 6: 333

¹³⁶ Gerald Neuman, *Discourses of Dignity*, in *UNDERSTANDING HUMAN DIGNITY* (Christopher McCrudden ed., 2013) at 638

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treatment as something other than a human being: “Those who declare themselves to ‘live by another rule’ are enemies of justice, at war with all, and dangerous to all; they are ‘noxious creatures’ and, as such, rightless creatures who may properly be destroyed.”¹³⁷

To be consistent, then, the Court (or at least Justice Kennedy) needs to adopt one of two positions. First, the Court could stop referring to the “inherent” dignity of all persons, and adopt something like the conception of “democratic dignity”. This would involve adhering to the idea that some people no longer enjoy the right to live because they lack moral virtue. This could mean that conditions on death row or methods of execution need not meet the requirements of the Eighth Amendment, for it could be argued that such people deserve particularly harsh treatment, or lack the right to be free from cruel punishment. Alternatively, if the Court continues to state that dignity attaches to all persons, regardless of moral reprehensibility, then the Court must give serious consideration to whether conditions on death row and methods of execution violate human dignity. At the moment, the Court has taken neither of these approaches. It has consistently said that death row and executions must meet the requirements of the Eighth Amendment, but it has never considered the merits of claims that lengthy stays on death row violate the Eighth Amendment, and its method of execution jurisprudence has never addressed concerns with human dignity. Instead, in such cases it has focused on institutional dignity.¹³⁸ Again, we can see why we need to consider the relationship between the various types of dignity.

Louis Pojman has also defended the death penalty on the grounds that it restores the dignity of the victim: “the use of capital punishment respects the worth of the victim in calling

¹³⁷ Joshua Kleinfeld, *Two Cultures of Punishment*, 68 STAN L. REV. 933, 1003-1006 (2016) (referring to, and quoting, the work of John Locke, JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 8, at 10 (C.B. Macpherson ed., Hackett Publ’g Co. 1980) (1690))

¹³⁸ See *infra* Part III.C

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for an equal punishment to be exacted from the offender.”¹³⁹ In other words, imposing a proportionate punishment on an offender serves to restore the dignity of the victim.¹⁴⁰ We saw that this view has found some support on the US Supreme Court, with Justice Powell referring to the dignity of the victim when explaining why he thought the death penalty is constitutionally permissible.¹⁴¹ Even in those cases in which the victim’s dignity is not expressly referred to, we see in some judgments an implicit attempt to highlight the dignity of the victim. In several cases, the Justices have recounted the suffering of the victim(s) when rejecting an appeal by a death row inmate.¹⁴² This serves to bring the victim’s voice and experience to light, and to remind readers of the worth of the victim, and the indignity suffered by them.

Neither Pojman nor Powell, though, explain exactly how a proportionate punishment restores the dignity of the victim. Presumably there are many people who would feel undignified if they knew that they had brought about someone else’s death, and it could be argued that capital punishment is an affront to the dignity of the victim because further violence and killing is being carried out in their name, but without their consent. This is not to say that the death penalty is an affront to the dignity of the victim because the victim has no say in the matter. That is, I am not referring to a denial of the victim’s autonomy. It makes little sense to speak of a deceased person’s autonomy, since they cannot exercise their will, but we often speak of treating

¹³⁹ Louis Pojman, *Why the Death Penalty is Morally Permissible*, in *DEBATING THE DEATH PENALTY: SHOULD AMERICA HAVE CAPITAL PUNISHMENT? - THE EXPERTS ON BOTH SIDES MAKE THEIR BEST CASE* (Hugo Adam Bedau and Paul G Cassell eds., 2004) at 61

¹⁴⁰ Carol Steiker, *The Death Penalty and Deontology*, in *THE OXFORD HANDBOOK OF PHILOSOPHY OF CRIMINAL LAW* (John Deigh and David Dolinko eds., 2011) (noting the views of those retributivists who argue that “punishment is required to undo the “demeaning message” of the low status of the victim promulgated by the crime.” p.442)

¹⁴¹ *Furman*, 408 U.S. at 458 (Powell J. dissenting)

¹⁴² *Payne v. Tennessee*, 501 U.S. 808 (1991) (permitting evidence of victim impact statements); *Kansas v. Carr*, 136 S. Ct. 633 (2016) (recounting the suffering of the victims in detail)

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the dead with dignity, through proper burials and so on.¹⁴³ This means treating dead bodies with respect—we do not cast away dead bodies as we would cast away objects that we no longer use. Therefore, we should not objectify a deceased person by using them as a means to bring about an end, namely, the death of the perpetrator.

To explain this further, we can consider two ways in which the dignity, or inherent worth, of victims' families might be violated by the imposition of capital punishment. The first relates to the inevitable attention that is given to the death row inmate, particularly when an execution date is nearing. It is at least arguable that, as the inmate is cast as a victim of state violence and receives sympathy from some quarters, the feelings of the victims' family are not adequately respected.¹⁴⁴ A second way in which the dignity of the victims' family might be implicated has been identified by the organization Murder Victims' Families for Reconciliation (MVFR), which is made up of, and works for, the interests of family members of homicide victims who oppose capital punishment. MVFR issued a report in 2002 titled "Dignity Denied: The Experience of Murder Victims' Family Members Who Oppose the Death Penalty".¹⁴⁵ The report highlights how victims' families should be classed as victims too, given the suffering that they have endured. It then goes on to argue that those families who oppose the death penalty are treated without respect for their dignity when prosecutors seek death sentences against their wishes. Noting that the federal Victims of Crime Act 1984 begins by asserting "the right to be treated with fairness and with respect for the victim's dignity and privacy", the report provides examples of prosecutors ignoring the wishes of victims who do not want to see capital punishment

¹⁴³ Sheelagh McGuinness and Margaret Brazier, *Respecting the Living Means Respecting the Dead too*, 28 OXFORD JOURNAL OF LEGAL STUDIES 297 (2008)

¹⁴⁴ Walter C. Long, *The Death Penalty as a Public Health Problem*, in DEATH PENALTY AND THE VICTIMS (UNITED NATIONS 2016) at 317. Also see Mickell Branham, *Listening to Victims*, in DEATH PENALTY AND THE VICTIMS (UNITED NATIONS 2016)

¹⁴⁵ MURDER VICTIMS' FAMILIES FOR RECONCILIATION, DIGNITY DENIED: THE EXPERIENCE OF MURDER VICTIMS' FAMILY MEMBERS WHO OPPOSE THE DEATH PENALTY (2002)

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imposed in their names or in the names of their deceased loved ones.¹⁴⁶ If we understand the phrase “to be treated with dignity” to mean to be treated with respect for one’s capacity to make choices and determine one’s own course of conduct, then we might argue that these families are actually being denied the opportunity to exercise their autonomy, and that the report uses the word “dignity” for rhetorical purposes. However, this misses the point of why family members speak out against the death penalty. It is not merely so that they can exercise their free will. These families do not want to see any more lives taken in their names, or in the names of their loved ones. This is because, in any other circumstances, we would feel undignified if we knew that we had unintentionally caused the death of another person. If I accidentally caused someone’s death through no fault of my own when driving, I would not complain that I was unable to exercise my autonomy (that is, I was unable to exercise my choice not to kill them), but I would feel undignified that, whether blameworthy or not, I caused someone’s death. Thus, for prosecutors to ignore the wishes of family members, and for a person to be executed in their name, is tantamount to causing family members to feel undignified, and is tantamount to using these victims as a means to an end. It is in this sense, then, that the dignity of the victim might be negatively implicated by the imposition of capital punishment: we might desecrate their memory by using their name as a means to end, to bring about the death of another.¹⁴⁷ Thus, it cannot be said unequivocally that implementing the death penalty “in the name of the victim” necessarily restores the victim’s dignity. This is what Justice Brennan seems to be saying when he writes:

¹⁴⁶ On this, see Charles F. Baird and Elizabeth E. McGinn, *Re-Victimizing the Victim: How Prosecutorial and Judicial Discretion Are Being Exercised to Silence Victims Who Oppose Capital Punishment* 15 STAN. L. & POL’Y REV 447 (2004)

¹⁴⁷ For an example, see the story of the parents of Eric Autabee, a corrections officer who was murdered in 2002. Mr and Mrs Autabee opposed the decision of the prosecutor to seek death against the perpetrator, with a court filing stating: “Eric would not speak disdainfully of inmates, but, instead, recognized their human dignity.... Eric would not have wanted someone killed in his name, nor would he have wanted his family to live in the darkness of hatred.” Mickell Branham, *Listening to Victims*, in DEATH PENALTY AND THE VICTIMS (UNITED NATIONS 2016) 53-54

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“when the state punishes with death, it denies the humanity and dignity of the victim”.¹⁴⁸ Of course, the prosecutor might argue that they are seeking a death sentence in the name of the wider community, rather than in the name of the victim or the victim’s family. This highlights the relevance of communitarian dignity to philosophical and legal discussions about dignity and the death penalty, which is considered below.

A third way in which respect for dignity might justify the use of capital punishment occurs when we conflate dignity with autonomy. It has been argued that when a death row inmate requests to waive their appeals and volunteers for execution, we should permit this out of respect for the inmate’s dignity. Nicole Dailo has argued that “to fully understand the dignity interests that death row inmates value most, and therefore, the dignity interests that the courts should protect, dignity in the death penalty context must also be defined as autonomy.”¹⁴⁹ This is the view put forward by Judge Kozinski on the Court of Appeals for the Ninth Circuit.¹⁵⁰ The case centered on Thomas Baal’s request to waive his appeals, and his parents’ objection to this on the grounds that he was not mentally competent to volunteer for execution. In finding Baal competent, Kozinski expressly referenced Kant when writing: “It has been said that capital punishment is cruel and unusual because it is degrading to human dignity....But the dignity of human life comes not from mere existence, but from that ability which separates us from the beasts— the ability to choose; freedom of will. When we say that a man— even a man who has committed a horrible crime—is not free to choose, *we take away his dignity just as surely as we do when we kill him*. Thomas Baal has made a decision to accept society’s punishment and be

¹⁴⁸ William J. Brennan Jr, *Constitutional Adjudication and the Death Penalty: A View from the Court* 100 HARV. L. REV. 313, 331 (1986)

¹⁴⁹ Nicole Dailo, “*Give Me Dignity by Giving Me Death*”: *Using Balancing to Uphold Death Row Volunteers’ Dignity Interests amidst Executive Clemency*, 23 S. CAL. REV. L. & SOC. JUST. 249, 264 (2014).

¹⁵⁰ Order in *Baal v. Godinez*, No. 90-15716 (CA9, June 2, 1990),

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done with it. *By refusing to respect his decision we denigrate his status as a human being.*¹⁵¹ In other words, Kozinski claims that to restrict Baal's autonomy ("the ability to choose, freedom of will") would be tantamount to denying him his dignity. Simultaneously, though, Kozinski notes that to "kill him" would also "take away his dignity."

This issue is not confined to those already sentenced to death. Many people serving sentences of life without the possibility of parole have argued that they would prefer to be executed, rather than to spend many more years languishing behind bars.¹⁵² Should we retain the death penalty for those who want to be executed, out of respect for their dignity? There are at least two reasons for answering this question in the negative. First, a number of courts have recognized that individual interests and rights do not always trump other interests such as the integrity of institutions, including the medical profession and the legal system. For example, in 1993 the Supreme Court of California upheld the right of a quadriplegic prisoner to refuse life-sustaining food and medical treatment, but noted that in some cases it might be necessary to rule against the individual's self-determination in the interests of maintaining the integrity of the medical profession.¹⁵³ Thus, we can see how the issue of institutional dignity is relevant to cases that seem to primarily involve respect for individual autonomy. A second reason for asserting that respect for dignity does not require or permit the death penalty in such circumstances lies in

¹⁵¹ Order in *Baal v. Godinez*, No. 90-15716 (CA9, June 2, 1990), quoted in Alex Kozinski, *Tinkering with Death, in DEBATING THE DEATH PENALTY: SHOULD AMERICA HAVE CAPITAL PUNISHMENT? THE EXPERTS ON BOTH SIDES MAKE THEIR BEST CASE* (Hugo Adam Bedau and Paul G Cassell eds., 2004) at 9 (referring to Kant's Critique of Pure Reason) (emphasis added)

¹⁵² See, for example, *TOO CRUEL, NOT UNUSUAL ENOUGH* (Kenneth E Hartman ed., 2013). John Stuart Mill argued that the death penalty is required to respect the dignity of offender because the alternative—languishing in prison—is antithetical to respect for dignity. See George A. Thoma, *A Note on John Stuart Mill's Views on Capital Punishment*, 3 HISTORY OF ECONOMICS SOCIETY BULLETIN 49 (1981).

¹⁵³ *Thor v Superior Court*, (1993) 5 Cal 4th 725. See also *R(Brady) v Collins* [2000] EWHC 639 (Admin) (England and Wales). In this case, Maurice Kay J opined, without deciding, that competent prisoners could still be force-fed if, on the facts, countervailing interests such as the integrity of the medical profession outweighed the prisoner's rights to self-determination: "it would seem to me to be a matter for deep regret if the law has developed to a point in this area where the rights of a patient count for everything and other ethical values and institutional integrity count for nothing", at [73].

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understanding the relationship between autonomy and dignity. If we equate dignity with autonomy, then we might feel compelled to answer in the affirmative, but we should not be so quick to equate dignity with autonomy.¹⁵⁴ It makes perfect sense, for example, to speak of “death with dignity” in the context of assisted suicide and euthanasia for those who cannot exercise their autonomy, such as those in a persistent vegetative state. In other words, “death with dignity” does not mean “death with autonomy.” To further explain why respect for autonomy is not necessarily the same as respect for dignity, we can explore how Kant understood the term autonomy. Kant used the term to describe the idea that human beings can govern themselves, but he asserts that self-governance must be done in accordance with certain duties attached to moral worth and a sense of dignity.¹⁵⁵ So, for Kant, to commit suicide would contravene one’s own dignity since, in Kant’s view, no rational being can will their own annihilation.¹⁵⁶ In a legal context, the famous dwarf-tossing case from France illustrates how dignity and autonomy are linked but not synonymous.¹⁵⁷ In France, the authorities prohibited the practice of dwarf-tossing on the grounds that it violated the dignity of those involved, notwithstanding the fact that the dwarf in question actually wanted to participate in such events since it provided him with gainful employment and a sense of self-worth. In other words, his autonomy to work as he pleased was over-ridden on the grounds that he could not consent to a practice that was antithetical to dignity,

¹⁵⁴ Ruth Macklin has argued that “dignity is a useless concept” because it means nothing more than “autonomy” and therefore does not add anything to moral and legal debates. See Ruth Macklin, *Dignity is a Useless Concept*, 327 *BMJ* 1419 (2003).

¹⁵⁵ IMMANUEL KANT, *GROUNDWORK FOR THE METAPHYSICS OF MORALS* (Thomas E. Hill and Arnulf Zweig eds., Arnulf Zweig trans., 2003) AK 4:436. Also see Michael Rosen, *Dignity: The Case Against*, in *UNDERSTANDING HUMAN DIGNITY* (Christopher McCrudden ed., 2013) at 150

¹⁵⁶ IMMANUEL KANT, *GROUNDWORK FOR THE METAPHYSICS OF MORALS* (Thomas E. Hill and Arnulf Zweig eds., Arnulf Zweig trans., 2003) AK 4:422

¹⁵⁷ Conseil d’Etat, 27 October 1995, Commune de Morsang-sur-Orge, no. 136727, Rec. Lebon 372, *Commune de Morsang-sur-Orge v Société Fun Production et M Wackenheim*.

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both his dignity and the dignity of society at large.¹⁵⁸ With this in mind, it is arguable that no rational being can will their own execution, in the same way that, in Kant's view, they cannot rationally will suicide.¹⁵⁹

It is difficult to find a judicial conception of human dignity, then, that unassailably either demands or permits the death penalty. The Court's current attempt to tie dignity to moral virtue is problematic partly because of the Court's use of the phrase "inherent worth", and partly because the Court has not been consistent in applying concerns with human dignity across the application of the death penalty. To be consistent in his assertion that the Eighth Amendment must ensure respect to the treatment of people in prison, Kennedy must consider how dignity relates to the treatment of people on death row, and to methods of execution. These two issues, as we will now see, offer grounds for arguing that respect for dignity actually demands the abolition of capital punishment.

3. A conception of human dignity that prohibits the death penalty

There are two ways in which Kant's conception of human dignity might pull towards abolition. The first lies in Kant's own qualification to his position on the death penalty. Kant asserts that death penalties must be carried out with respect for the inherent dignity of the person. That is, the

¹⁵⁸ Another example would be an attempt to justify slavery on the grounds that the slave desires bondage: "slavery is wrong even if it is not experienced as a negative by the slave and even if the slave maintains a substantial amount of de facto autonomy." Kent Greenawalt, *Dignity and Victimhood*, 88 CALIF. L. REV. 779, 781 (2000). Also see Leslie Meltzer Henry, *The Jurisprudence of Dignity* 160 U. PA. L. REV. 169, 222 (2011)

¹⁵⁹ For a much more detailed account of how Kant's approach to suicide can be applied to capital punishment, see Attila Ataner, *Kant on Capital Punishment and Suicide*, 97 KANT STUDIEN (2006). Ataner writes: "as it is irrational (or self-contradictory) and hence impermissible for me to frame a suicidal maxim from an ethical standpoint, it is also irrational and hence impermissible for me to frame a capital penal law as a co-legislator in the social contract from a political standpoint." (at 457). Kant rejects suicide on the grounds that from an ethical, internal law-making standpoint, no rational agent can will their own death. His discussion of capital punishment, on the other hand, is rooted in the political domain—that is, the domain relating to the way in which a society organizes itself, rather than the internal ethical domain relating to how a person governs their own life. While this might seem to preclude an application of his approach to suicide to discussions about capital punishment, Ataner makes the point that under the Kantian tradition, rational agents are all co-legislators, and thus they cannot will the formulation of a capital penal law which will lead to their execution.

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sentence of death and the execution “must still be freed from any mistreatment that could make the humanity in the person suffering it into something abominable.”¹⁶⁰ It has been argued by several commentators that conditions on death row, the lengthy time between sentence and execution, and the methods of execution, all inflict “abominable” suffering on the individual.¹⁶¹ Therefore, even if Kant’s position is theoretically consistent, he himself would not accept the death penalty as it is practiced today for its administration does not respect the dignity of the individual.¹⁶² As noted above, though, the Court has repeatedly refused to hear constitutional challenges to the time spent on death row¹⁶³ and has neglected to consider the dignity of the person in cases involving methods of execution.¹⁶⁴ We can surmise that if the Court did agree to hear these cases, and did adopt Kant’s approach to dignity, then it would likely decide in favor of petitioners. As noted above, this is particularly applicable in the context of Justice Kennedy’s exhortations on the subject of dignity and the Eighth Amendment, and Kennedy has recently indicated a willingness to explore this issue in the context of solitary confinement.

Perhaps the clearest use of human dignity to argue in favor of abolition can be found in Justice Brennan’s decision in *Furman*, in which he explained that capital punishment is not compatible with respect for the inherent worth of a human being because such a punishment involves treating people as a means to an end.¹⁶⁵ As we saw in Part I, judges in other countries and drafters of international human rights law have agreed with Brennan. In the US, Justice

¹⁶⁰ IMMANUEL KANT, *THE METAPHYSICS OF MORALS* (Mary J. Gregor ed., Mary J Gregor trans., 1996) Ak 6: 333.

¹⁶¹ Nelson T. Potter Jr, *Kant and Capital Punishment Today*, 36 *THE JOURNAL OF VALUE INQUIRY* 267, 275-281 (2002); Robert Johnson, *Reflections on the Death Penalty: Human Rights, Human Dignity, and Dehumanization in the Death House*, 13 *SEATTLE J. FOR SOC. JUST.* 583 (2015).

¹⁶² Nelson T. Potter Jr, *Kant and Capital Punishment Today*, 36 *THE JOURNAL OF VALUE INQUIRY* 267 (2002).

¹⁶³ *Lackey v. Texas*, 514 U.S. 1045 (1995); *Knight v. Florida*, 528 U.S. 990 (1999); *Foster v. Florida*, 537 U.S. 990 (2002); *Valle v. Florida*, 132 S. Ct. 1 (2011). Also see Kara Sharkey, *Delay in Considering the Constitutionality of Inordinate Delay: The Death Row Phenomenon and the Eighth Amendment*, 161 *U. PA. L. REV.* 861 (2013)

¹⁶⁴ *Wilkerson v. Utah*, 99 U.S. 130 (1879); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947); *Glass v. Louisiana*, 471 U.S. 1080 (1985); *Baze v. Rees*, 553 U.S. 35 (2008); *Glossip v. Gross*, 576 U.S. ____ (2015). Also see Deborah W. Denno, *Getting to Death: Are Executions Constitutional?*, 82 *IOWA L. REV.* 319 (1997)

¹⁶⁵ *Furman*, 408 U.S. at 272-273

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Palmer of the Connecticut Supreme Court has explained how “the death penalty has been imposed disproportionately on those whom society has marginalized socially, politically, and economically: people of color, the poor and uneducated, and unpopular immigrant and ethnic groups. It always has been easier for us to execute those we see as inferior or less intrinsically worthy.”¹⁶⁶ The corollary of this is that if we recognize that *all* people are equally intrinsically worthy, as Kant does, then we would not impose death sentences on anyone.

It is also arguable that the death penalty violates the dignity of the condemned’s family. The stigma of having a relative on death row, the feelings of guilt by association, and the prolonged suffering inherent in knowing that a family member will be executed, all contribute to feelings of lower worth and indignity.¹⁶⁷ Although the Justices of the US Supreme Court have not tended to consider the dignity of the condemned’s family members, they have recognized that the dignity of the wider community, and the dignity of the institution, are both relevant to Eighth Amendment considerations of the death penalty. It is necessary, then, to consider what these dignities mean for the constitutionality of capital punishment. As we will see, these dignities help shed light on what human dignity means for capital punishment.

B. Communitarian Dignity

To explain what is meant by communitarian dignity, we can turn once again to Chief Justice Warren’s statement in *Trop v. Dulles*: “The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards.”¹⁶⁸ While

¹⁶⁶ *State of Connecticut v Eduardo Santiago*, 318 Conn. 1, 54 (2015)

¹⁶⁷ SUSAN F. SHARP, *HIDDEN VICTIMS: THE EFFECTS OF THE DEATH PENALTY ON FAMILIES OF THE ACCUSED* (2005); Sandra Joy, *Socio-Psychological Challenges of ‘Death Row families’*, in *DEATH PENALTY AND THE VICTIMS* (UNITED NATIONS 2016)

¹⁶⁸ *Trop*, 356 U.S. at 100

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this prima facie appears to be focusing on the dignity of the person facing punishment, the reference to “civilized standards” suggests that we need to consider the possibility that the dignity of the community and of the people imposing the punishment might be implicated by capital punishment. Up until now, we have focused on the dignities of the perpetrator, the victim, and the victims’ families. However, we must remember that it is prosecutors who seek death sentences, jurors (representing the community) who impose death sentences, and state officials who work on death row and carry out executions, in the community’s name.

This is the view that Justice Marshall took in *Furman* when he asserted that “the Eighth Amendment is our insulation from our baser selves.”¹⁶⁹ Put simply, when we degrade another person’s dignity, we fall below dignified, or civilized, standards ourselves. A community can, and should, act in a dignified manner towards its members. When the community does not act virtuously, then it has not acted with dignity. We can refer to this as “communitarian dignity”, and this conception of dignity extends the Aristotelian notion of personal excellence to the community as a whole.¹⁷⁰ This is what Leslie Meltzer Henry means when she writes of the “collective virtue” of society.¹⁷¹ It should be noted that this is not the equivalent to the aggregation of the dignity of the individual members within the community. We are not speaking here about the inherent worth of a group of people that needs to be respected, but rather we are speaking of “dignity” as a guiding principle. Recently, in *Hall v. Florida*, Justice Kennedy explained that dignity in the communitarian sense is not so much about the worth of the community or the individuals within it, but is rather about the way in which a community of people should aspire to behave towards its members: “The Eighth Amendment’s protection of

¹⁶⁹ *Furman*, 408 U.S. at 345

¹⁷⁰ Leslie Meltzer Henry, *The Jurisprudence of Dignity* 160 U. PA. L. REV. 169, 221 (2011)

¹⁷¹ Leslie Meltzer Henry, *The Jurisprudence of Dignity* 160 U. PA. L. REV. 169, 220 (2011)

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dignity reflects the Nation we have been, the Nation we are, and the Nation we aspire to be.”¹⁷²

However, while Kennedy has invoked the moral aspirations of the Nation in order to restrict the scope of the death penalty, he has not adopted Marshall’s position that the death penalty is always contrary to the dignity of the Nation.

This begs the question whether or not the imposition of the death penalty degrades the dignity of the community in whose name the death sentence is administered.¹⁷³ In *Gregg v. Georgia*, Justice Stewart justified the imposition of the death penalty on the grounds that some crimes threaten the humanity of the community as a whole.¹⁷⁴ Matthew Kramer has adopted a similar line of argument, putting forward a “purgative rationale” for capital punishment.¹⁷⁵ In his view, the death penalty can be justified when a “community is tainted—in other words, its moral integrity is lessened—by the continuing existence of anyone who has perpetrated some especially hideous crimes and who is within the jurisdiction of the community or otherwise specially connected to it. To avert or remove that taint, a community must devote some of its resources to terminating the life of such an offender.”¹⁷⁶ Capital punishment, then, is justified when a community needs to “purge” itself of people who are “defilingly evil” and whose continued existence threatens the moral integrity—or dignity—of the community.¹⁷⁷

¹⁷² *Hall v. Florida*, 134 S. Ct. 1986, 1992 (2014)

¹⁷³ For the view that it does, see Stephen B. Bright, *The Role of Race, Poverty, Intellectual Disability, and Mental Illness in the Decline of the Death Penalty*, 49 U. RICH. L. REV. 671, 691-692 (2015) (“The death penalty is not only degrading to the person who is tied down and put down, but it is degrading to the society that carries it out. It coarsens society, telling future generations that problems can be solved with more violence.”)

¹⁷⁴ *Gregg*, 428 U.S. at 184

¹⁷⁵ MATTHEW KRAMER, *THE ETHICS OF CAPITAL PUNISHMENT: A PHILOSOPHICAL INVESTIGATION OF EVIL AND ITS CONSEQUENCES* (2011).

¹⁷⁶ MATTHEW KRAMER, *THE ETHICS OF CAPITAL PUNISHMENT: A PHILOSOPHICAL INVESTIGATION OF EVIL AND ITS CONSEQUENCES* (2011) 186-187

¹⁷⁷ Kramer describes his account as a “purgative rationale” for capital punishment. See MATTHEW KRAMER, *THE ETHICS OF CAPITAL PUNISHMENT: A PHILOSOPHICAL INVESTIGATION OF EVIL AND ITS CONSEQUENCES* (2011) 8, 179-265

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On these views, the fact that the community supports the punishment suggests that the dignity of the community is not negatively affected by the imposition of capital punishment. However, there are two reasons for avoiding this conclusion. First, remember the French dwarf-tossing case.¹⁷⁸ Sometimes, the mere fact that a person or persons chooses to do something does not in and of itself make that conduct dignified or compatible with human dignity. Second, even if we take the view that Justice Stewart and Kramer are actually ignoring public opinion, and are instead stating what they think the community needs, there are deficiencies with their rationales. Kramer's justification, which is mirrored in Stewart's reasoning, rests on two premises: (a) that the continued existence of an offender might threaten the integrity of the community, and (b) that removing the individual will remove the stain from the community. This seems to neglect the fact, though, that it is the *crime* that stains the community, rather than the individual. Removing the person does nothing to remove society's memory of the crime, and the effect of the crime on society.

The idea of "collective virtue", then, does not axiomatically justify the retention of capital punishment. In fact, as stated by Justice Marshall, it can pull towards abolition. Carol Steiker explains why the death penalty might be incompatible with a communitarian conception of dignity: "inflicting death... as punishment can, in addition, damage or destroy the human capacities [for compassion and empathy] of those of us in whose name the punishment is publicly inflicted."¹⁷⁹ In other words, extreme punishments such as the death penalty "violate human dignity—not because of what it does to the punished, but rather because of what it does to

¹⁷⁸ See *supra* n.157 and accompanying text

¹⁷⁹ Carol Steiker, *No, Capital Punishment Is Not Morally Required: Deterrence, Deontology, and the Death Penalty*, 58 STAN. L. REV. 751, 773 (2005).

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all of us.”¹⁸⁰ In the South African case of *State v. Makwanyane*, Justice Madala was one of several justices to note that the death penalty “diminished the dignity of our society as a whole.”¹⁸¹ The South African Constitution enshrines the idea of Ubuntu, which is defined by Justice Langa as a value “which places some emphasis on communality and on the interdependence of the members of a community.”¹⁸² As such, while the execution of a person might deny that person their dignity, we must also remember that the very act of sentencing a member of our community to death degrades our dignity too. Every execution, it could be argued, demeans society’s respect for life. Even Kant recognized that, if imposed improperly, the death penalty implicates the dignity of the community: “there can be disgraceful punishments that dishonor humanity itself (such as quartering a man, having him torn by dogs, cutting off his nose and ears). Not only are such punishments more painful than loss of possessions and life to one who loves honor (who claims the respect of others, as everyone must); they also make a spectator blush with shame at belonging to a species that can be treated that way.”¹⁸³

Marshall, Steiker and the South African Constitutional Court have offered partial reasons for why “communitarian dignity” pulls towards abolition. To get a fuller picture of how this understanding of dignity demands abolition, we must understand the relationship between “collective virtue” and the dignity of the people involved in the crime. This first involves understanding the death penalty as a “cultural symbol.” The relatively low numbers of people affected by capital punishment suggests that the death penalty should not attract much concern or

¹⁸⁰ Carol Steiker, *No, Capital Punishment Is Not Morally Required: Deterrence, Deontology, and the Death Penalty*, 58 STAN. L. REV. 751, 773 (2005).

¹⁸¹ *Makwanyane*, 1995 (3) SA 391, at [237]

¹⁸² *Makwanyane*, 1995 (3) SA 391, at [224]. Also see Thaddeus Metz, *Human Dignity, Capital Punishment, and an African Moral Theory: Toward a New Philosophy of Human Rights*, 9 JOURNAL OF HUMAN RIGHTS 81 (2010). Metz suggests that the idea of communitarian dignity is particular to African moral theory, but Chief Justice Warren and Justice Marshall have shown that his conception of dignity is applicable in the US context too.

¹⁸³ IMMANUEL KANT, *THE METAPHYSICS OF MORALS* (Mary J. Gregor ed., Mary J Gregor trans., 1996) Ak 6: 463

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attention, but it is undeniably a topic that generates heated debate and holds considerable public interest. This is because “[c]apital punishment says something about where a culture stands on matters of violence, evil, wrongdoing, and rights”.¹⁸⁴ That is, the death penalty tells us about community’s response to the dignity of the individuals involved in the crime. To explain this, we can consider the views of Robert Johnson, Stephen Smith, and Mary Neal, who have all posited approaches to human dignity that situate individual dignity within its social context. That is, they assert that we cannot understand an individual’s inherent worth without first understanding the nature of human relationships.

Mary Neal has pointed out that under Kant’s conception, those who are not rational, such as babies and the mentally ill, do not possess dignity.¹⁸⁵ However, it is difficult to accept that we can treat babies and the mentally ill without respect for their dignity, and thus we commit ourselves to respecting the dignity of even those who lack capacity to assert their right to have their dignity protected. In fact, as Neal points out, the vulnerability of those who lack capacity actually provides a reason for taking special steps to protect their dignity, and this is illustrated by Justice Kennedy’s rationale in both *Roper* and *Hall*, outlawing the death penalty for juvenile offenders and the intellectually disabled respectively. Neal puts forward an account of dignity that is inextricably tied to the idea of vulnerability.¹⁸⁶ She suggests that every individual is vulnerable in the sense that (a) their well-being depends, to varying extents, on other people, and (b) they are open to harm from other people. Put another way, “even the *least* vulnerable human being is still fundamentally, and inescapably, vulnerable in the negative sense, since none of us

¹⁸⁴ Joshua Kleinfeld, *Two Cultures of Punishment*, 68 STAN L. REV. 933, 987 (2016)

¹⁸⁵ Mary Neal, “*Not Gods but Animals*”: *Human Dignity and Vulnerable Subjecthood*, 33 LIVERPOOL LAW REVIEW 177 (2012).

¹⁸⁶ Mary Neal, “*Not Gods but Animals*”: *Human Dignity and Vulnerable Subjecthood*, 33 LIVERPOOL LAW REVIEW 177, 193 (2012). On vulnerability generally, see MARTHA A. FINEMAN, *VULNERABILITY: REFLECTIONS ON A NEW ETHICAL FOUNDATION FOR LAW AND POLITICS* (2013).

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can meet her basic needs and satisfy her core desires without the co-operation of others; and even the most capable adult is vulnerable to hurt and harm, both physical and emotional.”¹⁸⁷ The main point to take from this is that our dignities and inherent worth are brought into focus through our relationships with other people.

Robert Johnson and Stephen Smith have also asserted that a person’s dignity can only be understood with reference to their connections with other people.¹⁸⁸ Johnson first sets out a conception of human dignity that bears similarities to Kant’s conception: “Human beings are endowed with the capacity for a conscious awareness of self that marks the individual as distinct and separate from others”.¹⁸⁹ However, Johnson emphasizes that human beings can only exercise their capacity for self in a social setting. That is, “[s]elf-determination is necessarily achieved in the world of other human beings through a process of self-defining social interactions.”¹⁹⁰ This understanding of what it means to be human informs his answer to the question “What does it mean to respect a person’s human dignity?”¹⁹¹ According to Johnson, “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”.¹⁹² Stephen Smith takes a similar view. According to Smith, “the concept of dignity appears to owe much more to the social community of being human.”¹⁹³ This approach obviates

¹⁸⁷ Mary Neal, “*Not Gods but Animals*”: *Human Dignity and Vulnerable Subjecthood*, 33 LIVERPOOL LAW REVIEW 177, 187 (2012). (italics in original)

¹⁸⁸ Robert Johnson, *Reflections on the Death Penalty: Human Rights, Human Dignity, and Dehumanization in the Death House*, 13 SEATTLE J. FOR SOC. JUST. 583 (2015). It is unique in the sense that all punishments could be said to be degrading but there is something special about the infliction of death as a punishment.

¹⁸⁹ Robert Johnson, *Reflections on the Death Penalty: Human Rights, Human Dignity, and Dehumanization in the Death House*, 13 SEATTLE J. FOR SOC. JUST. 583, 584 (2015).

¹⁹⁰ Robert Johnson, *Reflections on the Death Penalty: Human Rights, Human Dignity, and Dehumanization in the Death House*, 13 SEATTLE J. FOR SOC. JUST. 583, 585 (2015).

¹⁹¹ Robert Johnson, *Reflections on the Death Penalty: Human Rights, Human Dignity, and Dehumanization in the Death House*, 13 SEATTLE J. FOR SOC. JUST. 583, 586 (2015).

¹⁹² Robert Johnson, *Reflections on the Death Penalty: Human Rights, Human Dignity, and Dehumanization in the Death House*, 13 SEATTLE J. FOR SOC. JUST. 583, 586 (2015).

¹⁹³ STEPHEN W. SMITH, *END-OF-LIFE DECISIONS IN MEDICAL CARE: PRINCIPLES AND POLICIES FOR REGULATING THE DYING PROCESS* (CAMBRIDGE BIOETHICS AND LAW) (2012) pp.138-139

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the need to find some inherent characteristic like autonomy or rationality. In Smith's words: "Dignity appears to come from our being part of a particular social group - that of human beings. Since the requirement for participation in this social group is to be a member of the species *homo sapiens*, all who fit within that criteria are capable of joining the group. As such, all human beings are entitled to be treated as part of that group. Human dignity is the expression of that entitlement but it does not depend on the possession of particular characteristics which all humans are expected to have. Human beings are entitled to be treated as if they matter because membership in the social group entitles one to that consideration."¹⁹⁴

It is in this sense that Smith describes dignity as "an ethical brake".¹⁹⁵ That is, we generally use the term dignity when claiming that a person or persons should not treat another person as though they were not a member of the human community. Thus, the concept of dignity does not just protect the (potentially) abused, it also protects the (potential) abuser from acting in an uncivilized, or undignified, manner.

If dignity is the expression of the entitlement to be treated as a human being, then it becomes clear that "[t]o impose sanctions that damage and dehumanize is antithetical to basic human rights; such sanctions deny and suppress a person's humanity and hence violate one's inherent human dignity."¹⁹⁶ Peggy Cooper Davis also explains "the physical... [and] the psychological and social aspects of respect for human dignity."¹⁹⁷ Thus, a violation of dignity occurs when a person is denied membership of the human species, and this can be done when a

¹⁹⁴ STEPHEN W. SMITH, *END-OF-LIFE DECISIONS IN MEDICAL CARE: PRINCIPLES AND POLICIES FOR REGULATING THE DYING PROCESS* (CAMBRIDGE BIOETHICS AND LAW) (2012) p.139

¹⁹⁵ STEPHEN W. SMITH, *END-OF-LIFE DECISIONS IN MEDICAL CARE: PRINCIPLES AND POLICIES FOR REGULATING THE DYING PROCESS* (CAMBRIDGE BIOETHICS AND LAW) (2012) p.138

¹⁹⁶ Robert Johnson, *Reflections on the Death Penalty: Human Rights, Human Dignity, and Dehumanization in the Death House*, 13 SEATTLE J. FOR SOC. JUST. 583, 588 (2015).

¹⁹⁷ Peggy Cooper Davis, *Responsive Constitutionalism and the Idea of Dignity*, 11 U. PA. J. CONST. L. 1373, 1374 (2009).

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person is “dehumanized.” Although neither Johnson nor Smith explicitly discuss how this understanding of human dignity implicates the dignity of the wider community, Brenda Hale has succinctly explained that “[r]espect for the dignity of others is not only respect for the essential humanity of others; it is also respect for one’s own dignity and essential humanity. Not to respect the dignity of others is also not to respect one’s own dignity.”¹⁹⁸

The question, then, is whether the death penalty dehumanizes and assaults the physical and psychological dignity of those who are sentenced to death, and what this means for the dignity of the community. Johnson surveys life on death row in order to make the argument that the death penalty is always dehumanizing, for “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.”¹⁹⁹ This is probably too far: even death row prisoners have a “modicum” of self-determination, and it is more accurate to say that their ability to live as human beings is severely curtailed, rather than prevented altogether. That being said, Johnson’s point is valid to the extent that when we destroy a person’s life, we cannot be said to be treating them as a member of the human family.

The main point to take from this analysis is that the individual’s human dignity cannot be conceived separately to the dignity of the wider community, and vice versa. Thus, while Johnson (and Smith and Neal) are concerned with the dignity of the individual, and thus perhaps their views should have been discussed in the section on inherent worth, or as a separate conception of dignity altogether, their accounts shed light on the implications for the collective virtue, or dignity, of the community.

¹⁹⁸ Brenda Hale, *Dignity*, 31 JOURNAL OF SOCIAL WELFARE AND FAMILY LAW 101, 106 (2009).

¹⁹⁹ Robert Johnson, *Reflections on the Death Penalty: Human Rights, Human Dignity, and Dehumanization in the Death House*, 13 SEATTLE J. FOR SOC. JUST. 583, 589 (2015).

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We should not restrict ourselves to the dignity of the people in whose name the death sentence is carried out, though. Lauren de Lilly has provided a thorough account of how the dignity of the persons involved in administering the death sentence, from the prosecutor who seeks the death penalty through to the executioner, is implicated by the psychological harm suffered by these people as a result of sending other human beings to their death.²⁰⁰ Just as the community is debased, so those who administer death sentences are also debased. Several former executioners have spoken out against the death penalty partly on the grounds of the emotional and psychological harm that they have suffered.²⁰¹ In many ways, the integrity of the legal system is threatened by the fact that the legal institution might threaten the dignity of those involved in the legal process. This leads to another conception of dignity, which I term “institutional dignity.”

C. Institutional Dignity

Dignity is not always attached to a human being, and the US Supreme Court has long acknowledged the dignity of certain institutions and offices, rather than of the individual per se. For example, in *The Schooner Exchange v. M’Faddon*, Chief Justice John Marshall explained that “A foreign sovereign is not understood as intending to subject himself to jurisdiction incompatible with his dignity, and the dignity of his nation.”²⁰² Cases involving state immunity

²⁰⁰ For a thorough account of the harm and psychological trauma suffered by those involved in the execution process, see Lauren M. de Lilly, “*Antithetical to Human Dignity*”: *Secondary Trauma, Evolving Standards of Decency, and the Unconstitutional Consequences of State-Sanctioned Executions* 23 S. CAL. INTERDISC. L.J. 107 (2014)

²⁰¹ See, for example, Allen Ault, *I Ordered Death in Georgia*, NEWSWEEK, Sept. 25, 2011; Justin Jouvenal, *Ex-Virginia Executioner Becomes Opponent of Death Penalty*, WASHINGTON POST, Feb. 10, 2013 (discussing Jerry Givens, who now speaks out against the death penalty partly on the grounds of the harm it inflicts on executioners). For the view that the dignity of prison guards is also affected by conditions on death row, see Walter C. Long and Oliver Robertson *Prison Guards and the Death Penalty*, PENAL REFORM INTERNATIONAL (2015). p. 1

²⁰² ERIN DALY, *DIGNITY RIGHTS: COURTS, CONSTITUTIONS, AND THE WORTH OF THE HUMAN PERSON* (2012) at 74

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from civil suits have also invoked reference to the dignity of the institution.²⁰³ In many respects, this conception of dignity is tied to the older idea of dignity as something that reflects the higher social status of monarchs and aristocrats, in the sense that it is the sovereign status of the entity that gives it dignity.²⁰⁴ In addition to these conceptions of institutional dignity, Justice Kennedy has alluded to the dignity of the institution of marriage in *Obergefell v. Hodges*.²⁰⁵

In death penalty cases, the Court has on occasion referred to the dignity of the courtroom,²⁰⁶ the dignity of “judicial proceedings”,²⁰⁷ the “integrity not just of one jurist, but of the larger institution”²⁰⁸ and the “dignity of the procedure” in the context of methods of execution.²⁰⁹ Moreover, the Court has sometimes assumed that the dignity of the institution is separable to respect for the dignity of the individual, or the dignity of the community. In this sense, the Court has upheld the dignity of the legal institution *at the expense of* human dignity, pulling the Court away from interfering with how states use the death penalty. This much was clear in the case of *McCleskey*, in which Justice Powell accepted the possibility of people being sentenced to death on the basis of skin color, but did not act on this possibility largely because he did not want to call into question the integrity of the legal system as a whole.²¹⁰ Similarly, we have seen that Chief Justice Roberts’ concern with the “dignity of the procedure” in *Baze* led him to conclude that a method of execution which *looks* dignified is more important than a concern

²⁰³ Leslie Meltzer Henry, *The Jurisprudence of Dignity* 160 U. PA. L. REV. 169, 195-197 (2011); Judith Resnik and Julie Chi-Hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN L. REV. 1921, 1941-1946 (2003).

²⁰⁴ Judith Resnik and Julie Chi-Hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN L. REV. 1921, 1923 (2003). (“This turn to dignity as a justification for or as an explanation of state power within the United States is actually a return to an older conception of the sovereign. Monarchs were the sovereigns to whom dignity belonged in eras when ordinary persons were not due such respect and deference.”)

²⁰⁵ *Obergefell v. Hodges*, 576 U.S. ____ (2015)

²⁰⁶ *Deck v. Missouri*, 544 U.S. 622 (2005)

²⁰⁷ *Wellons v. Hall*, 558 U.S. 220 (2010)

²⁰⁸ *Williams v Pennsylvania*, 579 U.S. ____ (2016),

²⁰⁹ *Baze v. Rees*, 553 U.S. 35 (2008)

²¹⁰ See *supra* n.85 and accompanying text

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with the pain that an inmate might *actually* feel.²¹¹ What neither Justice Powell nor Chief Justice Roberts acknowledge, though, is that such an approach actually demeans the dignity or integrity of the legal system precisely because such an approach threatens the dignity of the individual. That is, a concern with “institutional dignity” arguably requires the system to pay due regard to human dignity.

To illustrate this point, we can turn our attention to the United Kingdom. Speaking about capital punishment in the UK, Lord Denning seemed to suggest that it is permissible for innocent people to remain jailed, and presumably executed, if to do so would maintain the “integrity,” and therefore dignity, of the legal system: “Hanging ought to be retained for murder most foul. We shouldn’t have all these campaigns to get the Birmingham Six released if they’d been hanged. They’d have been forgotten, and the whole community would be satisfied... It is better that some innocent men remain in jail than that the integrity of the English judicial system be impugned.”²¹² For Denning, then, the hallowed status of the judicial system means that its procedures and decisions must be respected over and above the dignity of the person wrongly imprisoned. This in itself is not an argument that the Supreme Court should steadfastly retain capital punishment. At most, his statement about maintaining the dignity of the institution simply cautions against respecting the dignity of the wrongfully convicted. This was an approach espoused by Justice Scalia, who claimed that respect for legal procedures can exclude appeals based on new evidence pertaining to the innocence of a condemned person on death row.²¹³

²¹¹ See *supra* n.89 and accompanying text

²¹² Quoted in EVAN WHITTON, *THE CARTEL: LAWYERS AND THEIR NINE MAGIC TRICKS* (1988) p.117

²¹³ *Herrera v. Collins*, 506 U.S. 390 (1993)

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Scalia was widely criticized for this view, especially in light of the considerable number of exonerations from death row.²¹⁴ For many, the dignity of the institution *requires respect* for human dignity, and the two dignities are not mutually exclusive. Similarly, we might say that the dignity of the institution *depends* on the dignity of the individuals that occupy positions in that institution. It is helpful to consider these two approaches in turn.

1. Institutional dignity requires respect for human dignity

It is arguable that, in order to maintain its dignity, the legal system must ensure that death sentences are carried out with appropriate solemnity, given the seriousness of the issue. This includes a requirement that officials exonerate those who are innocent, contrary to Lord Denning's and Justice Scalia's assertions. It also requires that death sentences are only imposed out on those considered deserving of death, after due process and careful consideration, contrary to Justice Powell's position.²¹⁵ It also requires, as Kant argued, that executions do not inflict excessive pain on the inmate, contrary to Chief Justice Roberts' approach.

To explain this, let us consider the potential implications of this approach for *McCleskey*. Not only should the Court have considered the harm that a racially discriminatory death penalty inflicts on the dignity of the legal system and the Fourteenth Amendment, but it also should have considered the human dignity of racial minorities who are subjected to capital punishment on the basis of skin color rather than moral culpability.²¹⁶ Support for this view can be found in the experiences of South Africa and Germany. Several of the Justices in *Makwanyane* pointed out that the death penalty had been a vital component in the machinery of Apartheid, and noted that

²¹⁴ For a list of individuals exonerated from death row since 1973, see Death Penalty Information Center, Innocence: List of those freed from death row (2016), <http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row>.

²¹⁵ It should be noted that in both *Wellons* and *Williams*, respect for institutional dignity resulted in findings that due process had been violated.

²¹⁶ *McCleskey v. Kemp*, 481 U.S. 279 (1987)

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to retain the integrity of the new constitutional order, the Constitution and the country had to sever the remnants of Apartheid, such as capital punishment.²¹⁷ In other words, if an institution perpetuates a historical wrong such as the treatment of minorities without respect for their individual human dignity or their dignity as a community, then it is arguable that that institution is not acting in a dignified manner. Germany faced a similar situation after World War Two, when it abolished the death penalty in part because of its associations with Nazism.²¹⁸ Applying this to the United States, it has long been argued that today's death penalty in America is inextricably linked to America's history of racial subjugation, whether it be in the form of slavery or lynching.²¹⁹ This line of argument is premised on the historical and contemporary racially discriminatory application of the death penalty, and it is therefore plausible to argue that the retention of capital punishment, and the racial discrimination inherent in the application of the death penalty, demeans the legal system and the values of the Fourteenth Amendment which purports to provide "equal protection under the law", because it perpetuates the historical wrongs of racial subjugation, which itself was premised on an assault on the dignity of racial minorities.

²¹⁷ See in particular the opinion of Justice O'Regan, *Makwanyane*, 1995 (3) SA 391, [318]-[344] ("Respect for the dignity of all human beings is particularly important in South Africa. For apartheid was a denial of a common humanity... The death sentence was imposed sometimes for crimes that were motivated by political ideals. In this way the death penalty came to be seen by some as part of the repressive machinery of the former government... In conclusion, then, the death penalty is unconstitutional. It is a breach of the rights to life and dignity that are entrenched in sections 9 and 10 of our Constitution, as well as a breach of the prohibition of cruel, inhuman and degrading punishment contained in section 11(2). The new Constitution stands as a monument to this society's commitment to a future in which all human beings will be accorded equal dignity and respect. We cannot postpone giving effect to that commitment.")

²¹⁸ Those who were inclined to view the death penalty as a symbol of Nazism were joined by Nazi sympathizers, who were eager to abolish the death penalty in order to prevent convicted war criminals from being executed. See WILLIAM A. SCHABAS, *THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW* (3d ed. 2002) p.240 ("The harshness of the death penalty in the post-war trials incited an unholy alliance in the post-war legislature of Nazi sympathizers, who were anxious to shelter their friends, and left-wing penal reformers. These rather different constituencies joined forces to prohibit capital punishment in the May 1949 German *Basic Law*"). Also see RICHARD J. EVANS, *RITUALS OF RETRIBUTION: CAPITAL PUNISHMENT IN GERMANY, 1600-1987* (1996); Charles Lane, *The Paradoxes of a Death Penalty Stance*, WASHINGTON POST, Jun. 4, 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/06/03/AR2005060301450.html>.

²¹⁹ FROM LYNCH MOBS TO THE KILLING STATE: RACE AND THE DEATH PENALTY IN AMERICA (Charles J. Ogletree, Jr and Austin Sarat eds., 2006).

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As Christopher Bracey has written, “[t]he struggle for racial justice in America... is perhaps best understood as a struggle to secure dignity in the face of sustained efforts to degrade and dishonor persons on the basis of color.”²²⁰

Yet another way in which institutional dignity depends on respect of human dignity can be found in the work of Lauren de Lilly, referred to above, who has insightfully argued that the human dignities of the people involved in seeking, handing down, and executing death sentences, are all implicated by capital punishment. This is because, as de Lilly outlines, the act of condemning someone to death, and the act of killing that person, imposes considerable psychological harm.²²¹ There is an argument that the legal system is not acting in a dignified way if, in order to function, it necessarily disrespects the dignity of those charged with operating the system, or requires those individuals to act in an undignified way. Indeed, we saw above that the Supreme Court of California has recognized the relationship between the dignity and integrity of the medical profession, and the rights of prisoners’ to bring about their own death through refusal of life-sustaining treatment. That is, it might be contrary to the integrity of the medical profession to compel medics to allow someone to die, and it is thus arguable that the integrity of the medical profession is compromised when medics are called to take life through the administration of lethal injections.²²²

²²⁰ Christopher Bracey, *Dignity in Race Jurisprudence*, 7 U. PA. J. CONST. L. 669, 671 (2005). (“The struggle for racial justice in America, then, is perhaps best understood as a struggle to secure dignity in the face of sustained efforts to degrade and dishonor persons on the basis of color”)

²²¹ For a thorough account of the harm and psychological trauma suffered by those involved in the execution process, see Lauren M. de Lilly, “*Antithetical to Human Dignity*”: *Secondary Trauma, Evolving Standards of Decency, and the Unconstitutional Consequences of State-Sanctioned Executions* 23 S. CAL. INTERDISC. L.J. 107 (2014)

²²² For an outline of the professional medical organizations, such as the American Medical Association, that have called for practitioners to refuse to be involved in executions on the grounds that such involvement is contrary to medical ethics and the Hippocratic Oath, see Deborah W. Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*, 76 Fordham L. Rev. 49, 79-84 (2007). Also see the database of resolutions and statements by medical organizations on the Death Penalty Information Center’s website: <http://www.deathpenaltyinfo.org/lethal-injection-statements-medical>

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2. *Institutional dignity depends on the dignity of the individuals administering the institution*

To further explain how institutional dignity cannot be divorced from respect for human dignity, we must recognize that the institution is made up of individuals. This includes the prosecutor who uses his or her office to seek a death sentence, the jury who must decide whether to impose a death sentence, and the prison workers and executioners who carry out the death sentence. The dignity of the institution depends on its members “acting with dignity” when carrying out their jobs and duties. When a prosecutor is undignified in their actions—for example, they abuse their power and withhold exculpatory evidence from the defense—then the dignity and integrity of the system is called into question. Individuals who use the legal system to condemn people to death on the basis of skin color are not acting with dignity, they are not respecting the dignity of the person sentenced to death, and thus the integrity of the legal system is called into account.²²³

Taking these strands of thought together, then, we could say that for an institution to retain its dignity and integrity, the people administering that institution must act with dignity, and must be treated with dignity. If the individuals administering the institution act without dignity, or if the institution demeans human beings by requiring them to act without respect for the dignity of another person, then that institution itself is demeaned. In this sense, capital punishment threatens the integrity and dignity of the judicial and legal system, as well as the human dignity of the people involved in its administration. For this reason, it is arguable that institutional dignity pulls towards the abolition of capital punishment.

It can be seen, then, that the relationship between “institutional dignity” and the death penalty is complex, and that “institutional dignity” is not separable and distinct from “human dignity” or “communitarian dignity.” Thus, when Chief Justice Roberts invoked the “dignity of

²²³ For a recent US Supreme Court decision condemning racism within the administration of the death penalty, see *Foster v. Chatman*, 578 U.S. ____ (2016)

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the procedure” when considering the constitutionality of a particular lethal injection protocol, he erred in not also addressing the dignities of the people affected by this.²²⁴ It is with all this in mind that we can now see the necessity of considering a variety of conceptions of dignity when discussing cases involving capital punishment.

D. Dignity(s) and the Death Penalty

The above analysis has shown that the death penalty implicates various dignities, and that any judicial consideration of the death penalty must consider how these various dignities relate to one another. While it might seem as though the various conceptions sometimes pull in different directions, we can still use these approaches to map out the relationship between dignity generally and capital punishment. This is because the various approaches complement each other. When I say that the approaches complement each other, I mean that the various conceptions shed light on each other, cohere with one another, and that the picture of dignity vis-à-vis the death penalty is not complete without an acknowledgement of all the relevant conceptions of dignity. That is, we cannot make sense of the offender’s human dignity without working out how it connects to the community’s dignity, and the dignity of the institution.

In some ways, this builds on the Wittgensteinian approach to understanding dignity, as explained by Leslie Meltzer Henry. She contends that “dignity has multiple meanings that... share “family resemblances” to each other.”²²⁵ For Henry, dignity is not reducible to some other concept such as autonomy or inherent worth, and has no “core meaning that is applicable across

²²⁴ *Baze*, 553 U.S. (Stevens J. concurring in judgment) describing Chief Justice Roberts’ use of the dignity of the procedure as “woefully inadequate” p.3 (slip. op)

²²⁵ Leslie Meltzer Henry, *The Jurisprudence of Dignity* 160 U. PA. L. REV. 169, 177 (2011). quoting wittgenstein

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all contexts.”²²⁶ The Court’s jurisprudence bears this out, but whereas some dignity-skeptics have used this to call for a retreat from invoking dignity, Henry takes the view that this “family resemblances” approach is welcome, for it allows dignity to serve various helpful purposes across a range of situations.

To explain further how the various dignities overlap and inter-relate, we can consider how communities and legal institutions treat death row inmates as they near execution. Many states permit offenders to say last words, have a choice of last meals, and be put to death “humanely.” On the face of it, we permit death row inmates these opportunities to exercise their self-determination, and we attempt to minimize the pain they might feel, so that inmates can “act with dignity” as they go to their death, and so that they do not suffer the physical pain that would constitute an undignified death. However, any gesture of humanity that does take place, whether it be in the form of last meals or last words, actually serves “to make condemned prisoners complicit in their own executions, thereby hiding the underlying violence at work.”²²⁷ In other words, on closer inspection, we are not treating inmates with respect for their dignity, for we are using them as a means to an end – we are surreptitiously making them complicit in their own executions, so that we can claim that the community’s dignity remains intact,²²⁸ and so that we can claim that the legal institution that has imposed and carried out the death sentence has acted with dignity. This is particularly true of the move towards lethal injections in the quest for “humane” executions. It is widely recognized now that far from seeking to protect the dignity of the individual, such a method is instead geared towards protecting the sensibilities of the

²²⁶ Leslie Meltzner Henry, *The Jurisprudence of Dignity* 160 U. PA. L. REV. 169, 177 (2011)

²²⁷ Robert Johnson, *Reflections on the Death Penalty: Human Rights, Human Dignity, and Dehumanization in the Death House*, 13 SEATTLE J. FOR SOC. JUST. 583, 597 (2015).

²²⁸ Daniel La Chance, *Last Words, Last Meals, and Last Stands: Agency and Individuality in the Modern Execution Process*, 32 Law & Soc. Inquiry 701 (2007)

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community, and the integrity of the State carrying out the execution.²²⁹ In Robert Johnson's words: "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."²³⁰ So, in order to understand that we are not respecting the inherent worth or autonomy of the inmate, we must consider the dignity of the community and the dignity of the procedure.

The contention that the death penalty debases the dignity of all the people and institutions involved is hardly a novel contention. Cesare Beccaria made similar observations some 250 years ago in his famed *On Crimes and Punishments*.²³¹ In his treatise, which inspired the Framers,²³² Beccaria makes his views on this clear: "What are men to think when they see wise magistrates and the solemn ministers of justice order a convict to be dragged to his death with slow ceremony, or when a judge, with cold equanimity and even with a secret complacency in his own authority, can pass by a wretch convulsed with his last agonies, awaiting the coup de grace, to savour the comforts and pleasures of life?"²³³ Although Beccaria does not use the word "dignity", his sentiments are clearly echoed in the sentiments expressed throughout this article. The death penalty implicates the dignity of the offender ("a wretch"), the dignity of the community (the reference to "men" can be assumed to mean the community at large), and the dignity of those "solemn ministers of justice" who administer the institution.

²²⁹ Timothy V. Kaufman-Osborn, *The Death of Dignity*, in *IS THE DEATH PENALTY DYING? EUROPEAN AND AMERICAN PERSPECTIVES* 204 (Austin Sarat and Jürgen Martschukat eds., 2011).

²³⁰ Robert Johnson, *Reflections on the Death Penalty: Human Rights, Human Dignity, and Dehumanization in the Death House*, 13 *SEATTLE J. FOR SOC. JUST.* 583, 597 (2015).

²³¹ CESARE BECCARIA, *BECCARIA: "ON CRIMES AND PUNISHMENTS" AND OTHER WRITINGS* (Richard Bellamy ed., Richard Davies et al. trans., 1995)

²³² JOHN D. BESSLER, *THE BIRTH OF AMERICAN LAW: AN ITALIAN PHILOSOPHER AND THE AMERICAN REVOLUTION* (2014); John D. Bessler, *Revisiting Beccaria's Vision: The Enlightenment, America's Death Penalty, and the Abolition Movement*, 4 *NW. J. L. & SOC. POL'Y* 195 (2009).

²³³ CESARE BECCARIA, *BECCARIA: "ON CRIMES AND PUNISHMENTS" AND OTHER WRITINGS* (Richard Bellamy ed., Richard Davies et al. trans., 1995) p.70

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The complexity of understanding the ways in which institutional, communitarian, and human dignity inform and shape one another is another reason why the Court should not defer to majoritarian impulses in its Eighth Amendment analysis. Justice Marshall recognized this when he said that people might instinctively support capital punishment, but would surely reject it if they gave the matter informed thought.²³⁴ Marshall also understood that to defer to legislative judgments would be an abdication of the judicial role: “deference to the legislature is tantamount to abdication of our judicial roles as factfinders, judges and ultimate arbiters of the Constitution.”²³⁵ Justice Jackson made it clear that the purpose of the Bill of Rights is to protect minority groups, including criminals, from the whims of public opinion: “The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One’s right to life,... and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.”²³⁶ In abolishing the death penalty on dignitarian grounds, the South African Constitutional Court also explained why public opinion should not dictate judicial determinations of whether or not a particular punishment comports with the requirement to respect dignity: “Public opinion may have some relevance to the enquiry [into the constitutionality of the death penalty], but in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive there would be no need for constitutional adjudication.”²³⁷ When examining what the concept of dignity should mean for

²³⁴ *Furman*, 408 U.S. at 361-2.

²³⁵ *Furman*, 408 U.S. at 359

²³⁶ *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 638 (1943).

²³⁷ *State v. Makwanyane*, 1995 (3) SA 391, [88] (CC) (S. Afr.). Judges on other supreme and constitutional courts have developed rich traditions of elaborating the meaning of dignity in constitutional analysis, suggesting that it is feasible for a judge to invoke dignity in a principled and coherent manner, in order to help them reach a conclusion

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the constitutionality of the death penalty, then, we must be careful not to equate respect for human dignity with respect for public opinion.

It is little surprise to find that as some Justices have moved away from relying on objective indicia of national opinion “to the maximum extent possible”, they have simultaneously paid greater heed to the views of experts and the opinions of the worldwide community²³⁸ to help them with their understanding of human dignity, and how the dignity of the community and of the legal system depend on respect for the dignity of individuals.

CONCLUSION

This article has argued that the death penalty implicates a complex web of various dignities, and that the various dignities themselves consist of a cluster of issues. Moreover, as constitutional courts around the world have come to realize, the interconnectedness of these dignities pulls unequivocally towards abolition. I do not mean to suggest that the Court should use dignity to abolish the death penalty merely because other courts have, but rather that the approaches to dignity in the philosophical literature and in the jurisprudence of other courts reveals problems with the US Supreme Court’s current use. Although some conceptions of dignity might appear to warrant the death penalty, it is only when we build a picture made up of the various conceptions that we can understand why the death penalty is not compatible with dignity, however conceived.

rather than merely buttress their own subjective views. See Paul Sourlas, *Human Dignity and the Constitution*, 7 JURISPRUDENCE 30 (2015) for an account of how the German Constitutional Court has long given thoughtful considerations to the meaning of dignity. See AHARON BARAK, HUMAN DIGNITY: THE CONSTITUTIONAL VALUE AND THE CONSTITUTIONAL RIGHT (2015) Chapter 15 for an account of how the Supreme Court of Israel has understood dignity for the purposes of constitutional interpretation. See ALBIE SACHS, THE STRANGE ALCHEMY OF LIFE AND LAW (2011) for an account of dignity in South African case law.

²³⁸ For a thorough account of how courts around the world have referred to each other’s jurisprudence in order to understand the role of dignity in death penalty cases, see Paolo G. Carozza, “*My Friend is a Stranger*”: *The Death Penalty and the Global Ius Commune of Human Rights*, 81 TEX. L. REV. 1031 (2003). But note the view of Neomi Rao that US courts should not deploy “European ideals of human dignity” (Neomi Rao, *On the Use and Abuse of Dignity in Constitutional Law*, 14 COLUM. J. EUR. L. 201, 201 (2008)).

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In an essay on how the Eighth Amendment is underpinned by human dignity, which in turn demands the abolition of the death penalty, Hugo Adam Bedau explains how the imposition of capital punishment cannot be compatible with respect for human dignity: “It is conceptually impossible... for a person in a given act to deserve condemnation by the law for the criminality of that act *and* for the person to have proved by this act that he is no longer a person at all—but only a creature who now lacks any moral standing in the community of persons.”²³⁹ This article has added to this view by showing that it is impossible for a community or legal system to retain dignity when asserting that a fellow human being is no longer worthy of living.²⁴⁰ For these reasons, if the Court is going to invoke dignity in its Eighth Amendment jurisprudence, then it must hold that capital punishment is contrary to the prohibition on “cruel and unusual punishments.”

²³⁹ Hugo Adam Bedau, *The Eighth Amendment, Human Dignity, and the Death Penalty*, in *THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES* (Michael J. Meyer and William A. Parent eds., 1992) at 176 (emphasis in original)

²⁴⁰ For recent work that explores the effect of capital punishment on wider society and the legal system, see Walter C. Long, *The Death Penalty as a Public Health Problem*, in *DEATH PENALTY AND THE VICTIMS* (UNITED NATIONS 2016); James R. Acker, *The Death Penalty: Killing what we instead could be*, in *DEATH PENALTY AND THE VICTIMS* (UNITED NATIONS 2016)