

Against Acting ‘Humanely’

by Michael Goldberg*

I.

Who could possibly be against acting ‘humanely’?¹

I, for one, am willing to be charged with such an offense, for the charge is too broad. What precisely does it mean to act ‘humanely’? Name some cases of exemplary individuals acting ‘humanely’ to give some kind of context for the charge; furnish some case histories that depict specific human beings who stand as virtual metaphors of ‘humanity at its best.’ I maintain such narratives as these are indispensable if our talk of acting ‘humanely’ is to have any real content. They provide the various *contexts* within which we can see what acting ‘humanely’ might *in practice* look like, especially if it means that we should act in a way that shows ‘humanity at its best.’ As the old ‘Ethics 101’ example illustrates, even the Golden Rule needs explicit context: just try teaching it to a sadomasochist. That seemingly self-explanatory ‘rule for righteousness’ becomes a prescription for perversion.

Even so, I suspect that this attempt at defending my position is not likely to prove successful — and not merely because I have yet to set forth a fuller argument. For, on the surface, anyone against acting ‘humanely’ must *ipso facto* favor acting cruelly, even *bestially*, in short, ‘inhumanely.’ Yet my defense here is but the logical obverse of my prior one. Without some narrative context for speaking meaningfully of ‘humanity at its best,’ there can be no meaningful discourse of ‘humanity at its worst,’ that is, of acting ‘inhumanely.’

I wager, however, that neither defense proffered will prove strong enough to overcome the objections to the argument I have put forth thus

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1. Double quotes (“ ”) are used for quotations; so-called scare quotes (‘ ’) appear elsewhere to call attention to particular phrases under discussion or locutions which, in the Author’s estimation, deserve special notice.

far, for argument is about more than logic alone. It is also about rhetoric, which is to say that argument is also about *arguing*, which is what lawyers do, after all. Lawyers not only try to win their arguments through the force of logic, but also through the power of words — and not just any words, but artfully persuasive ones. When I served as Special Consultant to the Georgia Supreme Court, my mandate was to respond to various justices' requests for my help in drafting their opinions in terms of logic *and* rhetoric. Logic required ensuring that one thing followed from another. But rhetoric required making sure the other justices, the Bar, the policymakers, and the public would see the way one thing followed from another *as persuasive*.

Plainly, talk of acting 'humanely' or, for that matter, of preserving 'human dignity,' figures in all sorts of arguments rhetorically. Usually, though, these ideas are taken as terms with meaning so self-evident that their mere utterance has the rhetorical force of 'Checkmate!' which *necessarily* means that one's opponent has no choice but to capitulate. Yet tellingly, many of our public policy disputes remain hotly contested² when it comes to issues of acting 'humanely' or of preserving 'human dignity.' Although the meaning of 'Checkmate!' is firmly grounded in the game of chess, with its precise definitions of what it means to play — and win — we have no comparably precise way of defining the meanings of acting 'humanely' or of preserving 'human dignity' because we have no *definitive* way of stating what it means to act, let alone succeed, 'as a human being.'

Nevertheless, we do possess what George Lakoff and Mark Johnson have called "metaphorical thought" or "seeing one kind of thing in terms of another kind of thing."³ Metaphors of being human, I contend, only

2. And even, perhaps, "interminable." See ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 6 (2d ed., Univ. of Notre Dame Press 1984) (1981) [hereinafter MACINTYRE, *AFTER VIRTUE*].

3. GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* 193 (1980). Although I think that Lakoff and Johnson have important insights regarding the significance of metaphors for the ways we think and thus express our experience, I believe that their argument, as stated, is deficient for several reasons:

First, the statement just made regarding the deficiency of the authors' argument as stated is not clearly metaphorical, and moreover, it seemingly lacks any of the metaphors by which Lakoff and Johnson describe argument, i.e., as a "war" or "journey";

Second, Lakoff and Johnson do not finally answer the question, 'Is there anything that can be expressed *literally*?' It seems insufficient to say that all of our metaphors have to do with our physically embodied experience and orientation. Even given our 'verticality,' such that, according to the authors, "Up is good," and "Down is bad," we nevertheless say, 'Get your feet back down on the ground,' 'Let's get settled down,' 'What's the bottom line?' etc.; moreover, 'getting high' is not necessarily a good thing. Furthermore, we use metaphors that could apply as much to four-legged mammals that work by horizontal

gain real content within the diverse contexts of the various stories that recount the varied experiences of different human beings. For ultimately, each of us is the author of a story, our own unique life story, as well as the heir to a larger story, our particular community's history.

When I took American history in seventh grade in Cincinnati, I had a teacher named Mr. Moore. One day, Mr. Moore said something that did not seem quite right to me, and so, I raised my hand and asked him a question about it. He glowered at me and said, "I don't need a Philadelphia lawyer in this class!" When I got home, I asked my father what Mr. Moore had meant. Angrily, my father explained that Mr. Moore was implying that I was a high-priced shyster paid to trip up other people with my nitpicking questions. Because of my view of myself at that extremely sensitive time in my own life story, Mr. Moore's 'Philadelphia lawyer' metaphor was very hurtful. But no matter how insensitive, his metaphor only made sense against the backdrop of a wider American communal story, one in which lawyers are often viewed, rightly or wrongly, with suspicion for their ubiquitous role in America's justice system and politics. By the way, I subsequently came to have a metaphorical way of my own for seeing Mr. Moore: dumbass⁴ — a

physical orientation just as well as to the upright, two-legged ones of our own species: for example, 'Let's go forward,' or 'Two steps forward, one step back,' or 'Let's back up a minute and look at what we're doing';

Third, for the authors' metaphor-centered 'anti-category' theory, what does a classical philosophical 'category mistake' look like? Can there even be one in the first place? For instance, Spinoza's contentions in his *Ethic* may be fatally flawed because of his confusion of a 'cause' with a 'reason.' What do Lakoff and Johnson have to say about such a thing, or more basically, can they even address it *on their theory*?

Fourth, Lakoff and Johnson do not provide an adequate account of the difference between an 'empty' figure of speech and one that is not 'empty,' such as, for instance, 'The sun sets.' While we know that the sun physically does not revolve around the earth, we still know of no better, that is, convenient, shorthand way of expressing what is happening when night is approaching;

Fifth, and of most significance for this paper, is that the authors seem to pay insufficient attention to the way in which our more important moral, legal, and religious metaphors typically rely on *narrative contexts for their intelligibility*. Even a rather simple metaphor, such as the Psalmist's saying that YHWH is his "Rock and . . . Redeemer," *Psalms* 19:14, depends for its intelligibility on the context of Israel's prior history in which YHWH *qua* 'rock' and *qua* 'redeemer' has played a key role. Otherwise, terming God a 'rock' could just as easily be understood the way that metaphor functions in the Texas expression: 'Jake is dumb as a box of rocks!' Hence, for this reason, and the others aforementioned, I suspect that the theory of Lakoff and Johnson cannot be shown (at least, not yet) to be *philosophically* — that is, logically and conceptually — adequate in terms of its coherence and comprehensiveness, no matter the purported cognitive science (whether good or bad, by the way) upon which they say it rests.

4. This is, by the way, not a metonym for a part of Mr. Moore's body.

metaphor drawn broadly, I suppose, from the unhappy stories of muleskinners.

Let me be clear. None of us is inextricably trapped in his or her own story. Just as we can each consciously act to change our life, we can each do so with our communal story. In religious terms, this is called 'conversion'; in secular terms, 'changing citizenship.' But in any case, without reference to some specific narrative context, there can be no real content to our talk of acting 'humanely,' or of preserving 'human dignity,' or of acting in accordance with 'humanity at its best.'

And yet, that is exactly how we tend to talk as we mechanically invoke these notions when it comes to such public policy issues as putting our condemned to death and putting our loved ones out of their misery. Lacking any narrative contexts and the metaphors they engender, our public policy disputes and legal arguments around these issues will be little more than mere 'cover talk,' at times intentionally meant to cover our deeds from others' sight, while at other times, unintentionally covering them even from our own, thus perniciously blinding us from seeing that we may not be acting in accordance with 'humanity at its best,' but at its worst.

II.

In February 2006, in *Morales v. Hickman*,⁵ United States District Court Judge Jeremy Fogel stayed the lethal injection execution of condemned California inmate, Michael Morales, requiring the presence of anesthesiologists to ensure that Morales's death be free of "excessive" pain, lest it violate the Eighth Amendment's ban on "cruel and unusual punishment."⁶ Nowhere perhaps is our cover talk meant to show us at our most humane more revealed for what it is than here: before we give somebody a lethal injection, let us make them as comfortable as possible,

5. 415 F. Supp. 2d 1037 (N.D. Ca. 2006).

6. *Id.* at 1047-48. Execution by lethal injection is the method of capital punishment that is used or allowed in 37 of 38 states with death penalty statutes. Wikipedia, Capital Punishment in the United States, http://en.wikipedia.org/wiki/Capital_punishment_in_the_United_States (last visited Feb. 7, 2007).

A few months following the decision in *Morales*, and citing it as persuasive, U.S. District Judge Malcolm Howard in *Brown v. Beck*, No. 5:06-CT-3018-H, 2006 U.S. Dist. LEXIS 60084 (E.D.N.C. Apr. 7, 2006), told North Carolina prison officials that they could proceed with inmate Willie Brown Jr.'s execution only *if* someone with medical training were present to make sure Brown was unconscious when potentially painful drugs were injected. *Id.* at *25. As in the California case, Howard said records and observations of executions suggested there were problems with the administration of lethal injections. *Id.* at *12-*15. He cited lawyers' accounts of prisoners apparently writhing in pain on the execution table. *Id.* at *16-*18.

and, while we are at it, let us not forget to swab their arm with alcohol before we insert the needle so as to prevent infection.⁷

Virtually atop the precedents Judge Fogel cited for his first-of-a-kind ruling stood *Gregg v. Georgia*,⁸ which prohibits executions that “involve the unnecessary and wanton infliction of pain.”⁹ *Gregg*, of course, represents only one in a long line of United States Supreme Court decisions interpreting the Eighth Amendment’s ‘Cruel and Unusual Punishment Clause’¹⁰ to mean that in the imposition of the death penalty, “the basic concept of human dignity” must be observed.¹¹ That principle, as Justice Brennan had opined earlier in *Furman v. Georgia*,¹² requires that any punishment the State imposes “must not be so severe as to be degrading to the dignity of human beings.”¹³ The true significance of punishments that violate this principle, wrote the Justice, “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 Clause that even the vilest criminal remains a human being possessed of common human dignity.”¹⁴ As such, we must not treat humans — even vicious, ‘mad-dog’ murderers — as nonhumans. Because we and they *are* humans, we cannot — whether we like it or not — treat them brutally, that is, *brutishly*, despite the ‘monstrosities’ of their crimes. Our own humanity hinges on our acting ‘humanely’ toward them — even when we execute them.

Since the Enlightenment, in fact, the State has striven to develop ever more ‘humane’ ways of executing criminals. Revolutionary France implemented the guillotine¹⁵ as an execution device more ‘humane’ than that of the *ancien régime*, under whose penal system capital punishment by decapitation sometimes required several blows.¹⁶ Later,

7. I wish to thank Mr. Matthew Goldberg for bringing this point to my attention.

8. 428 U.S. 153 (1976).

9. *Id.* at 173.

10. U.S. CONST. amend. VIII.

11. *Gregg*, 428 U.S. at 182.

12. 408 U.S. 238 (1972).

13. *Id.* at 271.

14. *Id.* at 272-73.

15. Wikipedia, Guillotine, <http://en.wikipedia.org/wiki/Guillotine> (last visited Apr. 21, 2007). The guillotine was named after the physician, Dr. Joseph-Ignace Guillotine (1738-1814), who proposed — but did not invent — the device. *Id.* Ironically, like some of his professional descendants, Dr. Guillotine, who was ostensibly trained to preserve life, instead became involved with decisions about taking it ‘humanely.’

16. See for example the beginning of Michel Foucault’s classic work, *Discipline and Punish: The Birth of the Prison*, which describes the grisly execution of a condemned man named Damien in 1757; Damien had been convicted of attempted regicide. MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 3-6 (Alan Sheridan trans.,

in 1890, electrocution gained favor over the then-prevalent mode of capital punishment, hanging, as a more 'humane' execution method.¹⁷

But in the 1980s, after several electric chair executions had gone awry, most infamously in Florida's notorious "Old Sparky," which repeatedly served up 'condemned flambé,' many states crowned execution by lethal injection as the new 'Miss Humanity.' Reports nevertheless persisted of the condemned experiencing suffering tantamount to torture. As a result, in June 2006, the United States Supreme Court in *Hill v. McDonough*¹⁸ ruled unanimously that death-row inmates could contest their lethal-injection death sentences.¹⁹ The Court's ruling opened the door for potential challenges by thousands of condemned prisoners, and consequently, executions have been stayed in California, Florida, Maryland, and Missouri while lower courts consider whether death by lethal injection causes excessive pain.²⁰ In sum, paradox persists: how do we act 'humanely' when we end another human life?

And yet, both prosecutors and death-penalty defense attorneys know how to solve the paradox, namely, by seeing it as no paradox at all, but as something else entirely. For both sides view the call to act 'humanely' not in the context of some storied account of 'humanity at its best' acting 'humanely' as it puts someone to death, but exclusively within the narrow framework of an argument *opposing capital punishment altogether*.²¹ Within that limited frame of reference, the call to act 'humanely' becomes nothing more than a rhetorical throwaway.

Pantheon Books 1995) (1977). I wish to thank Professor Phyllis Gorfain of Oberlin College for pointing me to Foucault's volume, and more importantly, for sharing with me so generously both her knowledge about the subject of metaphor and her time regarding ways to make this Article more logically sound and rhetorically persuasive.

17. See Tom McNichol, *Why the Reputations of 'Humane' Execution Methods Keep Dying Out*, S.F. CHRON., June 18 2006, at Insight section, E-1. As many know, of course, there was another motive at work in the touting of electrocution as a modern way of performing executions besides its alleged advance in humanity: *profit*. Thomas Edison used the electric chair (in a rather arcane, but cunning plan) to promote his company's direct current over rival George Westinghouse's alternating current. *Id.*

18. 126 S. Ct. 2096 (2006), *rev'g* Hill v. Crosby, 437 F.3d 1084 (2006).

19. *Id.* at 2099-2100.

20. McNichol, *supra* note 17.

21. This point is key to the rest of my Article, and I am deeply indebted to Professor Jack Sammons of the Walter F. George School of Law at Mercer University, without whose help this Article would never have come to fruition. I cannot fully express my gratitude to him for all his insights and continuing commentary about the Article during its development.

In addition, I wish to express my heartfelt appreciation to Ms. S. Renee Huskey, Esq., for her invaluable assistance to me on a variety of aspects pertaining to legal research issues.

But, for prosecution and defense alike, their rather constricted view of the issue, no matter how shared, may well restrict them from seeing the possibility of other arguments arising from other contexts — arguments that, both pro and con, may prove ultimately more persuasive. Prosecutors as well as defense lawyers need to see that their context, like any human context, is not universal. Instead, it is only one of many contexts provided by a variety of narratives depicting human experience. Those narratives yield other vantage points from which to see, for instance, what 'humanity at its best' might look like.

For narrative accounts such as these, I have coined the name "master stories," because for each of their respective communities, these stories serve as the template for understanding the world and as the tutor for acting in it.²² Those twin aspects of master stories have a singularly important implication for any community's perception of such matters as 'humanity at its best' and of acting 'humanely.' If a community's discourse about these subjects is *to have any genuine content, it must refer to the context provided by the community's master story*. However, because there are in fact many different master stories and because virtually all of our moral, legal, and religious practices have their foundation in some master story or other, nearly all of our more intractable disputes between communities may reflect fundamental clashes between their rival master stories.²³ Disputes about what it means to act 'humanely' are no exception.

Consider, for example, what I have elsewhere called 'the Christian master story' and the momentous metaphor to which it gave birth.²⁴ The Christian theologian, Sallie McFague, has written that "[f]or the Christian, the story of Jesus is *the story par excellence . . .*, [showing] God's ways of . . . being with human beings *as they are . . .*"²⁵ In fact, within the context of the Christian master story, McFague sees Jesus "as

22. Cf., e.g., MICHAEL GOLDBERG, *JEWS AND CHRISTIANS, GETTING OUR STORIES STRAIGHT: THE EXODUS AND THE PASSION-RESURRECTION* (1985) [hereinafter, GOLDBERG, *JEWS AND CHRISTIANS*].

23. See MICHAEL GOLDBERG, *THEOLOGY AND NARRATIVE: A CRITICAL INTRODUCTION* 177 (1982). My views have been significantly influenced by the work of Stanley Hauerwas and Alasdair MacIntyre. See, e.g., STANLEY HAUERWAS, DAVID BURRELL & DAVID BONDI, *TRUTHFULNESS AND TRAGEDY* (1977); MACINTYRE, *AFTER VIRTUE*, *supra* note 2; ALASDAIR MACINTYRE, *WHOSE JUSTICE? WHICH RATIONALITY?* (1989). Exacerbating matters, as MacIntyre observes, is the fact that a society like ours, which is pluralistic and secular, may be composed of many different story "fragments" that splinter its own moral vision as well as that of the individuals within it.

24. See generally GOLDBERG, *JEWS AND CHRISTIANS*, *supra* note 22.

25. SALLIE MCFAGUE, *SPEAKING IN PARABLES* 139 (1975). At times, McFague's approach has striking parallels with that of Lakoff and Johnson: "Metaphor," she writes, "follows the way . . . the mind works." *Id.* at 56.

the metaphor of all human movement.”²⁶ Hence, by revealing ‘the Divine-at-work’ through his own life’s work, Jesus, God’s incarnation, *by definition* displays for Christians *the* metaphor of ‘humanity at its best,’ thus enabling them to see what it means to act ‘humanely.’²⁷

Members of the Amish community in Georgetown, Pennsylvania, recently sought to display that story-shaped metaphor after five of their schoolchildren were murdered and another five wounded by Charles Carl Roberts, who then killed himself. After burying their children, the Amish then attended Roberts’s funeral as a sign of forgiveness, and in addition, they collected funds for the surviving members of his family. Commenting on what had transpired, Donald Kraybill, a scholar whose work has focused on the Amish and their practices, explained:

The Amish model is the suffering Jesus who carried his cross without complaint, [a]nd who, hanging on the cross, extended forgiveness to his tormentors: “Father, forgive them, for they know not what they do” Retaliation and revenge are not part of their vocabulary As pragmatic as they are about other things, the Amish do not ask if forgiveness works; they simply seek to practice it as the Jesus way of responding to adversaries, even enemies.²⁸

Lest we dismiss the Amish as some quaint sect of simple souls, my late friend and teacher, the noted Christian theologian and ethicist, James McClendon, claimed that, on the contrary, *any* community truly Christian “*is exactly one in which forgiveness, not punishment, is [practiced as] the norm.*”²⁹

Accordingly, a *Jesus-formed* metaphor of ‘humanity at its best’ has *informed* the viewpoints of numerous Christian communities regarding punishment and forgiveness as they pertain to the death penalty. A resolution of the Disciples of Christ, along with similar statements made by many other Christian denominations likewise opposed to capital punishment, declared:

We believe there is a Christian mandate against capital punishment. We know God’s justice and mercy through the teachings of His son, Jesus Christ, who both taught and practiced the forgiveness of injustice. We are called to forgive the murderer as Christ forgives the

26. *Id.* at 125.

27. Jesus’ story, with its attendant practices, is, of course, meant not only for Christians, but for the world. Such is the nature of most, if not all, master stories. However, this phenomenon does not logically entail that every community’s master story requires its community to use violence to force other communities to adopt that story as their own.

28. Donald B. Kraybill, *Forgiving is Woven Into Amish Life*, PHILADELPHIA INQUIRER, Oct. 2006, at 8.

29. 1 JAMES MCCLENDON, SYSTEMATIC THEOLOGY: ETHICS 224 (1986).

murderer, as Christ forgives us. We are called to be reconciled with those who have injured us.³⁰

For those raised within a culture contextualized by the Christian master story, the consummate revelation of 'humanity at its best' is the resurrected Jesus, whose return to the world as Christ demonstrated God's own practice of unconditional forgiveness that spares even the lives of murderers.³¹

By comparison, consider another story with another foundational metaphor of 'humanity at its best.' Though not delineated in chapter and verse as is the Christian master story, it can still be narrated as the mutual interplay between characters and their circumstances over time. As told by the renowned military historian, John Keegan, the story begins with the lives of those who depended on the practice of tending sheep and goats.³² Despite the idyllic picture suggested by the term 'pastoralists' to designate these human beings, their descendants eventually became what Keegan calls "the horse peoples of the steppe,"³³ whose war-making practices both impacted and subsequently influenced civilizations from Asia to Europe and, in time, beyond.

30. Disciples of Christ, *Sense of Assembly Resolution 9131*; see also U.S. Conference of Catholic Bishops, *Statement on Capital Punishment* (1980) ("We believe that abolition of the death penalty is most consonant with the example of Jesus, who both taught and practiced the forgiveness of injustice . . ."); American Friends Service Committee, *Statement on the Death Penalty* (Nov. 1976) (reaffirming Quaker "opposition to the death penalty. We base our stand on the Quaker belief that every person has value in the eyes of God and on Quaker testimonies against the taking of human life"); Church of the Brethren, *General Statement* (1979) ("pray[ing], in the spirit of Jesus Christ who calls us to share his ministry of reconciliation, that our society will turn away from the use of capital punishment.").

Finally, see E.P. Sanders's book *Jesus and Judaism*, which convincingly argues that the two unique elements of Jesus' teaching, that is, unique in the Roman-Mediterranean world of the time, were (1) its commitment to God's forgiveness preceding the sinner's repentance and thus (2) its dedication to nonviolence. E.P. SANDERS, *JESUS AND JUDAISM* (1987). For if God, who could 'stand on his rights' rather than forgive, nevertheless chooses to forgo those rights for the sake of forgiveness (*cf.* the Lord's [sometimes called 'the Disciples'] Prayer), so, too, ought human beings do likewise. Giving up one's rights undermines, if not eliminates altogether, the need (perhaps even the urge?) to resort to violence to enforce one's rights.

31. Who, in passing, it should be noted were not (simply) "the Jews." That is, as depicted in the Gospel of Matthew, for instance, Jesus' murder/execution occurs due to the actions of both Jews and Romans, the purportedly holiest people in the world and the reputedly unholy people in the world, thus serving as a metaphor of *all the people* of the world — and that is, of course, precisely whom Jesus came to save.

32. JOHN KEEGAN, *A HISTORY OF WARFARE* (1993).

33. *Id.* at 179.

Keegan asks why these shepherds should have become more warlike than their farmer counterparts. His answer, he says, is “not for the squeamish,” because it requires considerations “having to do with how man has killed — or not killed — fellow mammals.”³⁴ As Keegan explains, sedentary farmers tend to extend the lives of their animals, such as sheep and goats, in order to furnish a lasting source of both clothing and food, such as milk and cheese.³⁵ By contrast, nomadic shepherds who are always on the move in search of new grazing land to feed their animals rather than themselves must typically, in order to survive, cull their herds for food as soon as their livestock reach maturity.³⁶ Hence, as Keegan puts it, shepherds “learn to kill as a matter of course,” becoming “quite unsentimental about their sheep and goats,” as they correspondingly become ever more practiced in “dealing the lethal blow, once, quickly and neatly.”³⁷

The implications of the pastoralists’ highly-developed ‘skill-set’ for the practice of making war ought to be readily apparent. Their proficiency at ‘flock management’ of sheep and goats equipped them to become cold-bloodedly adept at ‘managing’ sedentary farmers in battle. As Keegan astutely notes:

Working a herd . . . was the pastoralists’ stock in trade. They knew how to break a flock up into manageable sections, how to cut off a line of retreat by circling to a flank, how to compress [its] scattered [ones] into a compact mass, how to isolate [its] leaders, how to dominate superior numbers by threat and menace, how to kill the chosen few while leaving the mass inert and subject to control.³⁸

As the centuries passed, the pastoralists’ story continued to unfold with increasingly well-honed warfare practices enacted by the various horse peoples who became its heirs. Among them, some struck special dread in the hearts of Christians. One was Attila, whose very name became such anathema to some of Jesus’ followers that they dubbed him “The Scourge of God.”³⁹ The fact that Attila and his Huns were, in Keegan’s words, “culturally accustomed to shedding blood, [and hence] ethically untroubled by [the Christian] religious prohibitions against taking . . . lives . . .” may explain why Pope Leo I took the risky step of venturing out to Attila’s camp to plead with him to turn back from

34. *Id.* at 160.

35. *Id.*

36. *Id.* at 160-61.

37. *Id.*

38. *Id.* at 161.

39. Wikipedia, Attila the Hun, http://en.wikipedia.org/wiki/Attila_the_hun (last visited Apr. 21, 2007).

taking Rome.⁴⁰ Presumably, only the Pope's *not* taking that step would have proved more perilous.

But Attila's exploits pale in comparison with those of another leader who later figures prominently in the pastoralists-turned-horse-peoples' master story: the fabled Genghis Khan. Genghis united the individual Mongol tribes and went on to create by far the largest contiguous empire in history.⁴¹ Like the majority of empires, Genghis' was established mainly by means of military conquest. Unlike most empires, however, Genghis' was built via the extermination of the inhabitants of every village, town, and city who did not immediately surrender to him. In the end, Genghis may have provided the horse peoples with their metaphor of 'humanity at its best.' That metaphor not only grew out of their overarching history, but was articulated by Genghis himself in terms of his individual life story: "Man's greatest good fortune is to chase and defeat his enemy, seize his total possessions, leave his married women weeping and wailing, ride his gelding [and] use the bodies of his women as a nightshirt"⁴²

While Jesus Christ on the cross prayed that his killers be forgiven, Genghis Khan's response to his adversaries, whether real or imagined, was starkly unforgiving: death — without appeal, clemency, or pardon. As Keegan bluntly summarizes the matter, "Genghis' life is largely a history of revenge-taking"⁴³ Who knows what spectacle we might see if Jesus and Genghis were thrown together in a cage match? What we can definitely see, however, are two contrasting narrative-dependent metaphors of 'humanity at its best' — 'Christ the Reconciler' and 'Khan the Revenger' — and thus two conflicting ways of acting on those visions.⁴⁴

40. KEEGAN, *supra* note 32, at 183.

41. Wikipedia, Genghis Khan, http://en.wikipedia.org/wiki/Genghis_Khan (last visited Apr. 21, 2007).

42. PAUL RATCHNEVSKY, *GENGHIS KHAN: HIS LIFE AND LEGACY* 153 (Thomas Nivision Haining ed. & trans., Blackwell Publishers 1991) (1983).

43. KEEGAN, *supra* note 32, at 204.

44. The extent to which we have trouble seeing Genghis' practices as 'humane' from within a Mongol context may reflect exactly the extent to which we are held within our own context and, of course, within the story that goes with it. To be sure, not all contexts and not all stories are created equal. There are ways of testing one context and one story against another. Some may be inconsistent, some incoherent, and some may, for example, provide broader standpoints that afford a wider field of vision and hence a wider range of potential actions. But a 'one-size-fits-all' common context or common story is as ephemeral as so-called 'common sense' — which generally translates into what my dorm mates and I think of some subject over a pitcher of beer on a Saturday night.

Interestingly, those two opposing metaphors may throw light on one facet of the 2006 Amnesty International Report⁴⁵ on capital punishment that might otherwise go unseen. Nations historically influenced by Christianity have largely abolished the practice of the death penalty while the country most affected by Genghis and his descendants, China, now accounts for over 84 percent of the world's executions.⁴⁶

III.

Nevertheless, an unanchored appeal to acting 'humanely' keeps resurfacing in contemporary American public policy debates. Particularly where the stakes are life and death, the appeal to act 'humanely' is frequently thrown down as a virtual rhetorical trump card. It is played, for instance, when we talk about how we should act toward animals.

Millions of Americans have had pets of one sort or another from childhood. For many of them, their first significant experience with death and grief may have occurred with the loss of a childhood pet, such as the family dog or cat. Indeed, many Americans metaphorically, or more precisely metonymically, see a long-time pet as part of the family, and perhaps, the only part from which they receive unconditional love. Hence, when our spinster Aunt Mary's cat, Peetee, gets old or sick, the dear woman may be forced to watch, over a protracted period, her sweet Peetee's suffering. Eventually, Aunt Mary decides to end that suffering by having Peetee 'put to sleep' so that he dies 'humanely' — instead of 'catfully,' as his species has been dying for eons, even as feral tabbies and mountain wildcats continue to die now.⁴⁷ Thus, even as Aunt Mary speaks of Peetee's death, she speaks metaphorically.

Nevertheless, following her Peetee's death, Aunt Mary feels genuine loss and grief. But finally, when she no longer has to witness and live with Peetee's suffering, another feeling may arise — *relief*. Her relief may in turn raise in its wake yet another feeling — *guilt* — accompanied by a haunting question no longer shrouded by Aunt Mary's talk of acting 'humanely.' When she decided to have Peetee 'put down,' was she trying to help put an end to his misery — or *hers*?

As elderly Aunt Mary becomes increasingly frail and ill, and as we increasingly become *her* human caretakers, whether as a family or as a

45. Amnesty International, Death Penalty Report 2006, http://web.amnesty.org/report2006/key_issue-5-eng (last visited Apr. 21, 2007).

46. *See id.*; Amnesty International, Campaign to Abolish the Death Penalty in China: Fact Sheet, http://www.amnestyusa.org/abolish/world/china/fact_sheet.html (last visited Apr. 21, 2007).

47. Once more, I am indebted to Professor Jack Sammons for bringing this point to my attention.

society or both, how does our talk of acting 'humanely' lead us to see — or not to see at all — what we are doing in actual practice to 'end her misery'? Our talk of acting 'humanely' toward ever-older, ever-sicker Aunt Mary may now become far more dangerous, not because it will deceitfully cloak our deeds from others' sight, but instead, because it may self-deceptively veil our own eyes from seeing what it is we do.

IV.

In January 2006, the United States Supreme Court ruled in *Gonzales v. Oregon*⁴⁸ on a very narrow issue, namely, whether the federal Controlled Substances Act⁴⁹ (CSA) overrode Oregon's legislation authorizing the prescription of regulated drugs for use under Oregon's "Death with Dignity Act."⁵⁰ The Court ruled that it did not.⁵¹ All the same, the mere occasion of the Oregon legislation coming before the Court ratcheted up the volume (already ear-splitting thanks to the Terry Schiavo case) on current public policy arguments regarding such matters as 'physician-assisted suicide,' 'the right to die,' and, of course, acting 'humanely' in our treatment of the terminally ill.⁵²

Let it be stipulated at the outset that the Oregon "Death with Dignity Act" is, *prima facie*, a well-drafted piece of legislation. It contains requirements ranging from the patient's having to make at least two requests for a lethal dosage, to two doctors' having to confirm the patient's terminal diagnosis as well as his or her mental competence.⁵³

48. 126 S. Ct. 904 (2006).

49. 21 U.S.C. §§ 801-904 (2000 & Supp. IV 2004).

50. OR. REV. STAT. §§ 127.800-127.995 (2003).

51. *Gonzales*, 126 S. Ct. at 925-26.

52. See, e.g., Robin Marantz Henig, *Will We Ever Arrive at the Good Death?*, N.Y. TIMES, Aug. 7, 2005, available at 2005 WLNR 12419779; Cathy Lynn Grossman, *When Life's Flame Goes Out*, USA TODAY, Oct. 5, 2005, at D1, available at 2005 WLNR 16157086 (including my remarks therein); Matthew Yi, *California Looks to Replicate Oregon's Assisted Suicide Law*, S.F. CHRON., June 18, 2006, at A1, available at 2006 WLNR 10556558.

53. See OR. REV. STAT. §§ 127.800-127.995. More specifically, the patient must: (1) be an Oregon resident, eighteen years of age or older; (2) make two oral requests for lethal dosages of prescribed drugs to the attending physician, separated by at least 15 days; (3) provide a written request to the attending physician for such drugs, signed in the presence of two witnesses, at least one of whom is not related to the patient; (4) have the attending physician and a consulting physician confirm the patient's terminal diagnosis and prognosis; (5) have the attending physician and a consulting physician determine whether the patient is mentally or physically capable of making and communicating such healthcare decisions; (6) permit a psychological examination if either the attending or consulting physician believes the patient's judgment to be impaired by a psychiatric or psychological disorder (such as depression); (7) allow the attending physician to provide feasible

Crucially, although the patient's physician must prescribe the lethal dosage of the particular medication,⁵⁴ the patient — *not* the physician — must administer it.⁵⁵

So here we have an apparently clear and thoughtful — and contrary to all the naysayers, Nervous Nellies, and slippery-slopers — piece of public policy enacted by the State of Oregon to act compassionately, indeed 'humanely,' to those of its citizens who want to avail themselves legally of such an option at perhaps their hour of greatest suffering.⁵⁶ What could be a better example of public policy, legislated under the banner of acting 'humanely,' to ensure that 'human dignity' be preserved?

Yet, preserving 'human dignity' beaches on the same sort of conceptual shoals on which acting 'humanely' wrecks. Glaringly, this statute, entitled the "Death with Dignity Act," nowhere states exactly what it means by 'dignity'! Instead, the legislation simply — and rather simple-mindedly — assumes that the meaning of 'human dignity,' like that of acting 'humanely,' is virtually self-evident and therefore, once again, universally shared. But only recently, a philosopher-king no less than President Bush exposed the flaw in that assumption.⁵⁷ He underscored the problems associated with that assumption when he initially responded to the U.S. Supreme Court's ruling that the United States must conduct itself in accordance with Common Article 3 of the Geneva

alternatives to assisted suicide including comfort care, hospice care, and pain control; (8) let the attending physician ask, though not require, that the patient notify next-of-kin of the prescription request; and (9) have the opportunity to rescind the request at any time and in any manner. *Id.*

54. Usually, secobarbital or pentobarbital or some other barbiturate is administered. Strikingly, in the aforementioned *Brown v. Beck* case, Judge Howard made note of the plaintiff's suggestion that the State "use a long-acting barbiturate [sic], such as pentobarbital or secobarbital." *Brown v. Beck*, No. 5:06-CT-3018-H, 2006 U.S. Dist. LEXIS 60084, at *5-*6 (E.D.N.C. Apr. 7, 2006). In a footnote to the plaintiff's suggestion, the Judge mentioned the plaintiff's observation that "protocols utilizing such long-acting barbiturates [sic] have been adopted by the American Veterinary Medical Association and by physicians under Oregon's Death with Dignity Act." *Id.* at *6 n.2 (emphasis added). The same rhetorical thread, it seems, runs from putting our condemned to death to putting our pets 'to sleep' to putting the terminally-ill 'out of their misery.'

55. In Oregon's "Death with Dignity Act," the term 'physician-assisted suicide' nowhere appears, and additionally, the legislation expressly gives no authorization for "mercy killing or active euthanasia." See OR. REV. STAT. § 127.880.

56. Between 1998 and 2005, 246 terminally-ill Oregonians received prescriptions for lethal dosages; of those 246, 69 took the drugs. Yi, *supra* note 52.

57. President George W. Bush, Press Conference of the President (Sept. 15, 2006), available at <http://www.whitehouse.gov/news/releases/2006/09/20060915-2.html> (last visited Apr. 22, 2007).

Convention.⁵⁸ As the President observed, “[That Article] says that there will be no outrages upon human dignity. It’s very vague. What does that mean, ‘outrages upon human dignity’? That’s a statement that is wide open to interpretation.”⁵⁹

Indeed. Despite the fact that the term ‘dignity’ appears repeatedly in American jurisprudence, reaching back from Oregon’s statute to *Gregg* to *Furman*, the term’s meaning — or more precisely, a narrative-context to give content to a meaning for the term — has never been spelled out. Acting in accordance with ‘human dignity’ has, like the notion of acting ‘humanely,’ been consistently used by most Americans in a way totally apart from, and totally unconscious of, their own storied historical context. Such obliviousness causes most Americans to think, see, and talk about things in certain ways so that they do not — and perhaps, more chillingly, need not — think, see, and talk about them in other ways at all. I have come to realize that fact not only as someone with doctoral training in philosophy, but also as somebody with practical experience in hospice chaplaincy. The way we think, see, and talk about our life invariably shapes the way we live it — and leave it.

The argument surrounding physician-assisted suicide legislation typically turns, as many American public policy issues do, on the notion of some intrinsic ‘right,’ in this case, a purported ‘right to die.’ But this belief in a ‘right to die’ goes hand-in-hand with our story-dependent conviction that we fundamentally exist as autonomous individuals with ultimate choice and thus final control over our lives’ circumstances. That conviction is at the very heart of the American master story.

Sometimes called “consensus history” by professional historians, the American master story reveals its essential meaning from its very beginning with the proclamation of a Declaration of Independence that asserted that “due to certain unalienable rights” which were “self-evident,”⁶⁰ the story’s revolutionary heroes were justified in freeing themselves from the oppressors who had wronged them. The American master story’s arc next moves forward to an epic struggle to grant independence from slavery’s oppression to all within the Union’s borders. America’s master story afterwards continues with tales of rugged pioneer-explorers like Daniel Boone, Jim Bridger, and Kit Carson, who ventured forth to wide-open spaces, independent of any place or anyone who might threaten their liberty through various oppressive restrictions. Can it thus be any wonder that *the* American rite of passage is a teenager’s getting a driver’s license, in the process gaining *independence*?

58. *Id.*

59. *Id.*

60. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

Nor should it consequently be any surprise that an elderly American should grieve over losing a driver's license and with it not only independence, but more distressing still, perhaps the very core of what it means to be fully human, let alone of being part of 'humanity at its best,' as envisaged within the context of the American master story?

Maybe, though, the narration of some fundamentally independent human existence is as mythical as some account of 'humankind's essential condition' that speaks of a man, a woman, and a talking serpent in a garden. At life's beginning, we cannot exist independently in the world even for a little while without significant support from other human beings. Departing the world, as the oxymoron '*physician-assisted suicide*' attests, entails reliance on others too.⁶¹ The choices afforded Oregonians under the state's "Death with Dignity Act" are manifestly not choices simply up to them *alone*; other agents' choices are also involved. While, plainly, an Oregon physician must first decide whether to write a prescription for a lethal dosage of some drug, an Oregon pharmacist must then decide whether to fill it, and an Oregon health insurance company representative must afterwards decide whether to reimburse it.⁶²

Still, who can argue with trying to preserve 'human dignity,' especially at life's end, and particularly when we hear one writer's story of her father's demise?

61. Other kinds of suicides, besides physician-assisted ones, also reflect this fact. For instance, people who shoot themselves need to obtain a gun from someone else, either through purchase or theft. Even the numerous people who have jumped — and still jump every year — off San Francisco's Golden Gate Bridge need others to decide *not* to put up a suicide fence, which despite all statistics and appeals, the opponents of such a fence continually refuse to erect.

62. In Oregon, those insured by the Archdiocese of Portland cannot get the cost of drugs prescribed for lethal overdoses reimbursed, nor can those insured by Medicare, nor even can some patients covered by Kaiser HMO if the prescription written by the physician does not meet the HMO's requirements.

In any case, one might surmise, quite correctly, that I do not put much stock in the notion of 'inherent' or 'natural' rights. The invocation, however, of an abstract 'right' to die (or, for that matter, of a 'right' to life) casts a beguiling spell over how we think about end-of-life issues. Talk of a right only makes sense within the context of a set of communally-affirmed, rule-governed practices. Take the 1965 Voting Rights Act, for example, and fill in the blanks: barring people from casting their ballots because of their race violates their right to vote under the rules defining our society's legitimate election practices. *See Voting Rights Act of 1965*, 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2000). Avowing the existence of a right completely detached from any social moorings is like any belief wholly ungrounded in reality — a superstition. One may, of course, take comfort in a superstition and even act on it, but that does not make it true. Like Bentham, I regard the invocation of 'natural rights,' especially in a secular society (that is, one which does not see itself as living under the decrees of some Divine Lawgiver), as "nonsense upon stilts."

My father died while sitting on the toilet. The terrible unseemliness of this, the image of him falling to the cold tile floor with his pants down around his ankles, has haunted me . . . since his death . . . I imagine . . . my mother hearing the thump, rushing up the stairs and shouting: "Sidney! Sidney!" through the closed bathroom door, opening it at last to see him slumped there, stripped not only of life but of dignity.⁶³

But as the old Yiddish proverb puts it: *Ein moshol macht nisht a derveiz*: "One example doesn't make a proof." Thus, here is another story, perhaps equally heartwrenching. I am, of course, using a story for rhetorical effect — just like good lawyers do. They bring another case, they bring a counter-story, to persuade their audience because they know that the most interesting legal arguments are not so much made by moves of *logical deduction*, but of *analogical comparison* that invite us to attend not to the similarities of case storylines but to the differences between them.⁶⁴

One time in my hospice work, I served as chaplain to an elderly woman, Helen, who was dying of cancer. Her husband, Joe, was her principal caregiver and, more important, the only means by which she could remain at home to die instead of having to go to a nursing home, a terrible kind of place to try to die in peace, frequently overpopulated by moaning, at times shrieking, dementia patients, while generally underpopulated by staff who do little more than sit around as though they themselves were catatonic. Given his own advancing age, Joe understandably worried about his ability to continue to help provide adequate homecare for his wife of nearly half a century.

One morning as I made my rounds, I went to the small apartment where Joe and Helen lived. I knocked on the door. There was no answer. I knew that Joe was hard of hearing, and consequently, I knocked again more loudly. Again, there was no answer. Anxious now, I called the apartment manager. He opened the door, and I called out, "Joe! Helen!" When there was no answer still, I rushed to Helen's bedroom and finding her barely breathing, I paged a hospice nurse. Telling the manager to stay with Helen, I literally ran throughout the rest of the apartment's rooms frantically searching for Joe. The last room in which I looked was the bathroom. There, I finally found him: he was sitting on the toilet, dead, his pants down around his knees. He had died of a heart attack while trying to have a bowel movement.

63. Henig, *supra* note 52.

64. I would bet that there are a lot more good litigators in courtrooms than good preachers in pulpits; the former know how to tell a story.

When the hospice nurse arrived a few minutes later, she told me that deaths like Joe's were not all that uncommon. Elvis, she told me, died the exact same way.

But at that moment, I did not care about how Elvis died, and I surely was not thinking about Joe's dignity. I could not really *think* at all; because I could only feel a chest-numbing, stomach-tightening grief. However Joe had died, he had predeceased his wife, and as a result, he had failed to get one of his last wishes in life fulfilled, namely, to take care of her so she could get one of her last life wishes: to die in her own bed. In fact, Helen was transferred that same day to a nursing home, where some months later she finally died.

But before Helen was transported to the nursing home, and before Joe was taken away by the funeral home, I went back to Helen's bedroom to provide what comfort I could give — not much, I warrant — and there I found the hospice nurse, who had restored Helen's breathing and then washed urine off her body and wiped pus out of an ulcerated wound. Afterwards, the nurse went to the bathroom to clean the feces off Joe's corpse.

When the nurse and I at last left the apartment, I asked her, having seen her give such care to numerous other patients in the past, how she could bear to do such sad and, to me at least, often nauseating work. Without a moment's hesitation, she replied, "Because everybody's created in God's image."

"In God's image" — another metaphor for helping us to envisage what 'humanity at its best' might look like, for aiding us to see what it might mean to act 'humanely.' Hence, using the metaphor of "God's *image*" as the focal point for our care of human beings, we try to *imagine* two things at once: what it might be like for us to give care *to God*, in whose image others are created, and what it might be like for us, who are molded in that selfsame image, to give care akin to that *of God*. Of course, that metaphor of humanity created "in God's image" stands as the crown of Genesis' first chapter.⁶⁵ Consequently, for my hospice nurse, 'human dignity' was not, to use a Detroit-based metaphor, an optional 'add-on,' but rather something 'factory-installed.' As such, 'human dignity' is something human beings can no more lose any more than they can gain it — whether dying alone on a toilet seat or dying on a royal throne with thousands of courtiers all around; whether dying by their own hand, tortured by depression, or dying tortured at the hand of one of Genghis' contemporary progeny in Syria or Gitmo. Within the context of the metaphor "in God's image," grounded in the creation

65. See *Genesis* 1:26.

narrative recounted in the opening chapter of the Bible, talk of 'losing human dignity' as well as talk of 'preserving' it make no sense. In just that sense, such talk is literally nonsense.

Consequently, just as with the notion of acting 'humanely,' so too with the notion of 'human dignity,' there is no unambiguous usage or necessarily-shared universal context. Such ambiguity resides even in calls for 'compassionate' care at the end of life. In California, a "Compassionate Choices Act,"⁶⁶ modeled after the Oregon statute, has been proposed by supporters who argue that it will give terminally-ill Californians "control, comfort, and care."⁶⁷ Who, then, could be against 'compassionate' care?

As before, I, for one, am willing to stand so charged. But by now, I hope I am not the only one willing to issue a countercharge that those waving the flag of 'compassionate' care need to provide a narrative-based, metaphor-illuminated context for understanding what 'compassionate' care is supposed to mean.

Is it something best practiced by a physician who will provide assistance to end her patient's pain and suffering — but not her patient's life? In the light of which metaphor does such a physician see herself? As healer, but not as executioner?⁶⁸ And precisely in which story does that particular metaphor have its base? It is, of course, a story whose high point is the Hippocratic Oath, pledging doctors' troth "never do harm to anyone, [nor] [t]o please [someone] . . . prescribe a deadly drug . . . [or] give advice which may cause his death."⁶⁹

Or is compassion better practiced through physician assistance like that of Dr. Kevorkian, whose primary commitment is not to some oath of ages past but to a middle-aged, ALS-stricken⁷⁰ patient whose suffering will only increase unless a doctor releases him from a life

66. Compassionate Choices Act Home Page, <http://www.caforaidindying.org/index.php> (last visited Feb. 7, 2007).

67. In June 2006, a proposed "Compassionate Choices Act" (AB 651), meant to give Californians "control, comfort, and care," was voted down in committee by members of the State Assembly. Greg Lucas, *California Judiciary Committee Votes Down Assisted-Suicide Bill*, S.F. CHRON., June 27, 2006, available at <http://www.deathwithdignity.org/news/news/california.asp> (last visited Apr. 21, 2007). Nevertheless, given Californians' propensity to rely on popular referenda in the form of ballot propositions to enact legislation, the Compassionate Choice Act might well soon become California law.

68. This is the very same metaphor generally shared by those anesthesiologists who refuse to act as lethal injection executioners.

69. Wikipedia, Hippocratic Oath, http://en.wikipedia.org/wiki/Hippocratic_oath (last visited Apr. 21, 2007); see also Richard P. Vance, *We Are All Pragmatists Now*, in *AGAINST THE GRAIN: NEW APPROACHES TO PROFESSIONAL ETHICS* 51-52 (Michael Goldberg ed. 1993).

70. ALS is commonly known as 'Lou Gehrig's Disease.'

sentence of bodily imprisonment with no chance of parole? But, again, seeing himself as a physician through which metaphor's lens? Perhaps that of a revolutionary struggling heroically for independence for his patient — and for himself — so as to be free of the oppressive 'Powers-That-Be'? And in which narrative is that metaphor grounded? Well . . . you know the story.

These are not rhetorical questions of the kind whose answers are so self-evident as to make them silly: 'Is the Pope Catholic?'; 'Do bears . . .?'⁷¹ Instead, the questions I have posed belong to a different order of rhetorical question, for they and others like them, such as 'What do we mean by acting "humanely?"' and 'What do we mean by "human dignity?"' have answers that are anything but self-evident, and consequences that are anything but silly. Lacking rhetorical questions like these, asked by both prosecution and defense, all their death-by-lethal-injection arguments will remain simply bogus arguments.

Genuine arguments, using powerful rhetoric, are crucial now for our public policy debates, which are too often sadly — and not infrequently sad — dumb shows with little display of wit, much less of probing questioning or of real attempts at persuading the unconvinced. By contrast, lively rhetoric that animates truly spirited *arguing* can do more than simply strip away any cover talk meant to deceive others about what, in truth, we or they might desire or do. More potently, it can force our opponents *and ourselves* to *dis*-cover other possibilities to which we may have both been blinded by sharing the same myopic context, a context that might give way to new, more panoramic ones as novel stories are conceived and fresh metaphors devised.

Fashioning convincing rhetoric, crafting compelling narratives, creating eye-opening metaphors: all these are arts, and all are part of fine lawyering. And like all fine art, fine lawyering, often key to changing public policy, presents us with new contexts for seeing things we have not seen before.

I rest my case.

71. Unless, of course, I know too much about church history and too little about bears.