

Mercer University School of Law

Mercer Law School Digital Commons

Faculty Publications

Faculty

2014

Cold Comfort Food: A Systematic Examination of the Rituals and Rights of the Last Meal

Sarah Gerwig-Moore

Mercer University School of Law, gerwig-moore@law.mercer.edu

Follow this and additional works at: https://digitalcommons.law.mercer.edu/fac_pubs



Part of the [Criminal Law Commons](#), and the [Criminal Procedure Commons](#)

Recommended Citation

Sarah L. Gerwig-Moore, et al., *Cold Comfort Food: A Systematic Examination of the Rituals and Rights of the Last Meal*, 2 Brit. J. Am. Legal Stud. 411 (2014).

This Article is brought to you for free and open access by the Faculty at Mercer Law School Digital Commons. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Mercer Law School Digital Commons. For more information, please contact repository@law.mercer.edu.

COLD (COMFORT?) FOOD: THE SIGNIFICANCE OF LAST
MEAL RITUALS IN THE UNITED STATES

SARAH L. GERWIG-MOORE¹

Merceer University School of Law

ANDREW DAVIES²

State University of New York at Albany

SABRINA ATKINS³

Baker, Donelson, Bearman, Caldwell & Berkowitz P. C

ABSTRACT

Last meals are a resilient ritual accompanying executions in the United States. Yet states vary considerably in the ways they administer last meals. This paper explores the recent decision in Texas to abolish the tradition altogether. It seeks to understand, through consultation of historical and contemporary sources, what the ritual signifies. We then go on to analyze execution procedures in all 35 of the states that allowed executions in 2010, and show that last meal allowances are paradoxically at their most expansive in states traditionally associated with high rates of capital punishment (Texas now being the exception to that rule.) We conclude with a discussion of the implications of last meal policies, their connections to state cultures, and the role that the last meal ritual continues to play in contemporary execution procedures.

¹ Associate Professor, Mercer University School of Law.

² Director of Research, New York State Office of Indigent Legal Services & Post-doctoral Fellow, State University of New York at Albany.

³ Associate, Baker, Donelson, Bearman, Caldwell & Berkowitz P. C. We would also like to express our deep appreciation for the able research and editorial assistances of Bethany Veasey, who gathered the lion's share of the data relied on, and Natasha Crawford, Dale Brantley, and Jessica Lee.

CONTENTS

INTRODUCTION 411

I. THE CONTEMPORARY POLICY CONTEXT IN TEXAS 412

II. CONTEXT AND PERSPECTIVE..... 416

 A. *ORIGINS OF AND SUPPORT FOR THE TRADITION OF THE
 LAST MEAL* 417

 B. *LAST MEALS AS POLITICAL STATEMENTS: WHAT THEY MAY (AND
 MAY NOT) MEAN* 418

 C. *LAST MEALS OFTEN REVEAL SOMETHING SPECIAL AND
 TENDER ABOUT A PRISONER- OR THE ONES GUARDING
 HIM* 420

III. GETTING THE RITUALS RIGHT: WHY DO STATES MAKE
THE DECISIONS THEY DO ABOUT LAST MEALS? 422

 A. *APPETITE SUPPRESSANTS: A DESCRIPTION OF THE RESTRICTIONS
 STATES IMPOSE ON LAST MEALS* 422

 B. *ECONOMICS, PUNITIVITY OR RITUALISM? EXPLAINING
 THE CHOICES STATES MAKE* 427

 i. Economics and Security 427

 ii. Punitive Penal Culture 428

 iii. Retributive Ritualism and the Use of Capital Punishment 429

 C. *ANALYSIS AND RESULTS* 429

 D. *DEATH REALLY IS DIFFERENT* 432

IV. ANALYSIS AND CONCLUSION 433

 A. *DO MERCY AND CRUELTY SHARE THE SAME DINNER
 TABLE OR IS BLIND TRADITION THE MAIN COURSE?* 433

 i. Cruelty 433

 ii. Guilt..... 434

 iii. Mercy 435

 iv. Blind Tradition 436

 a. *Historical Significance* 436

 b. *Texas* 437

 B. *IF THE PHILOSOPHY IS KINDNESS, THE KEY IS
 CODIFICATION* 438

INTRODUCTION

There is no shortage of controversy surrounding capital punishment in America. From innocence to lethal injection, from remorse to retribution, the issue is as complex and painful as any modern policy issue can be. About the same time that Troy Davis – a man whose innocence was proclaimed by supporters from his trial witnesses to the Dalai Lama – was executed in Georgia in the fall of 2011, the execution of a Texas man convicted of a brutal hate crime sparked its own brand of controversy. Lawrence Russell Brewer’s case, however, seems to have gained notoriety more because of the change in Texas policy it provoked than because of Brewer’s crime or eventual punishment.

Brewer had been convicted in the late 1990’s and sentenced to die by lethal injection for dragging James Byrd, 49, to his death in Jasper, Texas.⁴ With his execution looming, Brewer requested a final meal of two chicken fried steaks, a triple meat bacon cheeseburger, a cheese omelet, fried okra, fajitas, a pint of ice cream, a pound of barbecue with white bread, a pizza, and three root beers.⁵ With an extravagant meal in front of him (although it is not clear that he was served his entire request), Brewer didn’t eat a bite. When Texas State Democratic Senator John Whitmire learned of the request (and Brewer’s failure to eat his final meal), he wrote a letter to the Texas Criminal Justice Division requesting that it immediately end the last meal practice and warning that if it did not, he would introduce legislation to end the practice in the next session. “It is extremely inappropriate,” Whitmire wrote, “to give a person sentenced to death such a privilege.”⁶

In this article we review the meaning and substance of the last meal ritual through a consideration of legal and empirical evidence. In Section I we raise the question of what Texas ‘lost’ when it discarded the last meal tradition. We examine the manner in which the decision was taken, the process used, and the reasons given by those involved. We end with a consideration of the possible impact on those most directly affected – condemned inmates and their jailers.

In Section II we review evidence on the cultural roles that last meals play, and have played, in execution rituals. A brief historical review reveals many forms last meals have taken, and their remarkable endurance through different epochs. Next, we review the use of last meals as a means of sending a political message – both by condemned inmates and other commentators. Last, we consider the rarefied interactions that the occasions of last meals produce between condemned inmates and their jailors – from the somber to the light-hearted, the disengaged to the compassionate.

In Section III we examine the different rules that exist in states regulating the content of last meals. We review the details of these policies, and then divide states into groups based on whether they permit greater or lesser choice among inmates

⁴ See 3 Whites Indicted in Dragging Death of Black Man in Texas, CNN.COM (July 6, 1998 11:07 pm), <http://edition.cnn.com/US/9807/06/dragging.death.02/>

⁵ See TEXAS ENDS ‘LAST MEALS’ FOR DEATH ROW INMATES, LA TIMES Blog (Sept. 23, 2011, 2:03 pm), <http://latimesblogs.latimes.com/nationnow/2011/09/texas-ends-death-row-inmates-final-meals.html>.

⁶ See Manny Fernandez, *Texas Death Row Kitchen Cooks Its ‘Last Meal’*, N.Y. TIMES, Sept. 23, 1991, at A17, available at http://www.nytimes.com/2011/09/23/us/texas-death-row-kitchen-cooks-its-last-last-meal.html?_r=0.

in what they might request for their final meal. We then use some statistical comparisons to show that states which execute the most people are also those with the fewest restrictions on what might be provided in a last meal. Further, our findings also suggest a strong relationship between fundamentalist Protestant religious populations in states and their willingness to honor elaborate meal requests. We suggest some possible interpretations of these findings, which suggest that those with the strongest attachment to the death penalty may also be those most invested in the panoply of ritual which surrounds executions themselves.

In Section IV we elucidate four major themes present throughout contemporary discussions of the last meal: that it is cruel, that it is offered out of guilt, that it is a gesture of mercy, and that it is a vestige of a bygone era. Our discussion suggests these descriptions may all be fair at times, but that above all the ritual itself has the intrinsic property of recognizing the humanity, if not the dignity, of the condemned inmate, and that as such it should be protected through statutory codification.

I. THE CONTEMPORARY POLICY CONTEXT IN TEXAS

The really surprising thing about the abolition of the last meal privilege in Texas is how easy it was. It took only one individual – Texas State Senator John Whitmire, representative for parts of the city of Houston and Harris County, and Chair of Texas’ Senate Criminal Justice Committee – to write to the Texas Department of Criminal Justice (TDCJ) to express his moral outrage at Lawrence Brewer’s last meal.⁷ “He never gave his victim an opportunity for a last meal,” Senator Whitmire explained, “It’s wrong to treat a vicious murderer in this fashion. Let him eat the same meal on the chow line as the others.”⁸ TDCJ Executive Director Brad Livingston agreed and the matter was settled.

Casually breaking with a Texas tradition that extended back 87 years, the Criminal Justice Division immediately and summarily ended its practice of offering Texas death row prisoners the opportunity to request a special last meal.⁹ Prisoners scheduled to be executed are now served the same meal offered to all other prisoners.

With a history that goes back centuries, how could a single state legislator successfully demand the end of this tradition? What does a final meal ritual reveal about the larger, legal processes implicated by the death penalty, and what insight might it offer into the personal relationships between the prisoners and those who guard them? Is there something about a sentence of death that calls for ritual courtesies, or are such courtesies weak and meaningless in the face of an execution?

Regrettably, Livingston’s deliberative process is not yet a matter of public record. It is not difficult to imagine how it would have proceeded in an ideal world, however. Livingston’s decision ought to have required him to answer at least three fundamental questions. First, what is being abolished? The last meal is a complex and long-lived ritual and one should know what is being given up in advance of

⁷ See TEXAS ENDS ‘LAST MEALS’ FOR DEATH ROW INMATES, *supra* note 5.

⁸ See Manny Fernandez, *supra* note 6.

⁹ See Allan Turner, Last-Meal Requests off Death Row Menu, mySA Blog (Sept. 23, 2011, 1:36 am), http://www.mysanantonio.com/news/local_news/article/Last-meal-tradition-for-death-row-inmates-2184368.php.

any decision. Second, how can it be abolished? Policy changes can happen in many ways. One should at least know the options. Third, what does it mean to abolish it? Policy-makers regularly reflect on the wisdom of basing their decisions on evidence. It would clearly be desirable to know the consequences of a decision before it is made. Much less than the questions of high principle that the abolition of the last meal invoke, the need to address at least these basic issues may be presumed to be broadly accepted by all involved in the debate.

First, the last meal is a ritual stretching back across centuries of United States history and before. Its resilience is due perhaps to the fact that the execution, unlike the death penalty, is not usually a matter of extensive debate. The execution is an administrative matter. It is the process by which a living person is put to their death. It is governed by “execution protocols” which describe the procedure to varying degrees of exhaustion, including the precise combinations of lethal chemicals, their manner of application, and the determination of the fact of death. They lay out the chain of events that will accompany the administration of the lethal dose including the visit by the family, the proffering of spiritual counsel, and, of course, the last meal.

Although mundane and prosaic, these documents represent the accumulated experience and tradition of centuries of execution practice in the United States. Adapted as they are for modern purposes, they nevertheless bear the hallmarks of the history of the manner and means of inflicting capital punishment in America. They are cold, but they reveal the fundamental elements of the American execution. Amid tight security, the condemned meet family, eat their final meal and go to their swift and certain deaths with spiritual and legal counsel at their side until almost the final moments.

There has long been interest in the tradition of the prisoner’s last meal. Some of the interest has been historical and academic, while some has been more sensational and voyeuristic. Swedish filmmakers Mats Bigert and Lars Bergström’s project, *Last Supper*, carefully traces the origins of offering a ceremonial final meal to prisoners set to die.¹⁰ The blog “Dead Man Eating” includes an archived list that dates back to early 2002, focused on what prisoners nationwide request to eat before their sentence is carried out.¹¹ Former Texas jailhouse cook Brian Price’s book, *Meals to Die For*, includes descriptions of over 200 meals he has prepared for condemned inmates awaiting their execution.¹² Notably, Price has offered to cook all Texas inmates’ last meals for free. As he explained in an interview with CNN reporters, “We should not get rid of the last meal.... Justice is going to be served when this person is executed, but can we not show our softer side? Our

¹⁰ Bigert & Bergström (Producers), 2005. *The Last Supper* [Documentary] Stockholm, Sweden: Studio Bigert & Bergström.

¹¹ See generally <http://deadmaneating.blogspot.com>.

¹² BRIAN D. PRICE, *MEALS TO DIE FOR* (2005).

compassionate side?”¹³ However, Texas Department of Criminal Justice spokesperson Michelle Lyons told the Los Angeles Times that Price’s offer is “kind,” but “it’s not the cost, but rather than concept we’re moving away from.”¹⁴

It becomes clear, then, that the American way of execution is ridden not only with legal technicalities but also with ceremonies and rituals which are vestigial representations of a process that was once transected with spiritual concerns. Execution customs – even, arguably, the presence of defense counsel, to whom one can after all confess with impunity – represent the vanishing traces of a once vibrant spiritual culture associated with death and execution.

Today’s last meals may seem a poor relation to those ornate and carefully considered rituals of the past, but parallels remain. Louisiana State Prison Warden Burl Cain reports that he has shared in the last meals of several of the inmates put to death under his jurisdiction and that he tries to keep the mood of the occasion ‘upbeat.’¹⁵ Robert Johnson, a sociologist who has studied the men who work on death row directly, describes the meal as a focal point that guards will use to distract the condemned from their fate.¹⁶ The last meal continues to serve as a place to manage the condemned and broker their co-operation in the execution process. But in the midst of the tight security of death row, they certainly are not operationally required.

The abolition of the last meal in Texas demonstrates a feeling that the state has no understanding of (or at least respect for) the last meal’s ostensible meaning and functions. What those meanings and functions are, and what it means to be a society that no longer has use for them, are the questions that every decision-maker in Livingston’s position must contemplate.

Second, the decision to abolish the last meal, if it is to be made, falls generally under the auspices of the bureaucrats and professionals responsible for the execution protocol itself. As Livingston was reminded by Senator Whitmire, however, those bureaucrats may not themselves be able to operate in a political vacuum. Whitmire has presided over criminal justice for the Texas State Senate for some years, and has clashed with TDCJ on numerous occasions. In 2006 Whitmire received a direct, personal threat from a death row inmate who had successfully obtained a cell phone, after which contraband became his signature issue.¹⁷ TDCJ went on to be humiliated by a series of revelations about the ease of transporting goods in and out of its prisons.¹⁸ Such is Whitmire’s lack of regard for TDCJ that

¹³ See Lateef Mungin, Former death row chef offers to cook free meals for the condemned, CNN JUSTICE, Oct. 2, 2011, at <http://www.cnn.com/2011/10/02/justice/texas-last-meal/index.html>.

¹⁴ See Mark Memmott, Texas Turns Down Cook’s Offer of Free ‘Last Meals’, NPR.com (Sept. 27, 2011), <http://www.npr.org/blogs/thetwo-way/2011/09/27/140838771/texas-turns-down-cooks-offer-of-free-last-meals>.

¹⁵ Warden Describes Inmates’ Last Hours, ABCNEWS.COM (May 4), http://abcnews.go.com/2020/story?id=124095&page=1_

¹⁶ Robert Johnson, *Death Work: A Study of the Modern Execution Process* (1998).

¹⁷ Death Row Killer Threatens Texas Senator Via Cellphone, USA Today (Oct. 21, 2008, 9:06am), http://usatoday30.usatoday.com/news/nation/2008-10-21-inmate-senator-threats_N.htm.

¹⁸ Texas Prisons Can’t Stop Cell Phones at Cell Walls, CBS DFW. (Jun. 13, 2011, 9:20pm), <http://dfw.cbslocal.com/2011/06/13/texas-prisons-can-t-stop-cell-phones-from-reaching->

he has called repeatedly for the entire department to be moved from its present location in Huntsville – also the location of Texas’ death row – to the state capital, Austin.

Livingston’s decision to abolish the last meal was made necessary, in effect, by the combination of the actions of Senator Whitmire, on the one hand, and Lawrence Brewer on the other. On Sept 22, 2011, Whitmire wrote directly to Brewer that “I have yielded to TDCJ judgment in the past, but now enough is enough.”¹⁹ The practice should be discontinued immediately, he went on, “or I am prepared to do so by statute next session.” Meanwhile, Brewer’s ordering and subsequent rejection of a vast feast prior to his execution made a mockery of any symbolic value the last meal might be said to hold. In the circumstances, it is hard to imagine any other response option by Livingston. Was he to side with the unrepentant racist who was laughing in his face, or with the politician with the mandate – and apparently the intention – to implement popular will? Amid this rattling of sabres, Livingston’s decision cannot have been difficult. Given the obvious constraints on Livingston’s actions, the question here is whether states wish to construct execution protocols which are based on the judgments of professionals acting freely to facilitate the operation of their units, or to arrive at them at the conclusion of a morality play.

Third, the consequences of the abolition of the last meal will be felt most keenly not by those debating it so hotly but rather by those implicated directly in the process of the execution itself. For all their antiseptic bureaucracy, executions remain somber moments in prisons. Condemned prisoners now average over twelve years between sentencing and execution nationwide. In that time they may come to be known, and often liked, in the prisons which are their homes. Executions and the protocols by which they are carried out are most binding, and most onerous, on the condemned and those who must supervise and care for him in his final hours.

Executions are conducted in a secret world inhabited by a select few people and the research on what the last meal means to them has yet to be done. Certainly, all is not well in that world. Robert Johnson reports that the mood prior to an execution, particularly of the condemned, is one of despondency and fear, notwithstanding the apparent best efforts of professionals such as Warden Cain. The final meal is far from the idealized moment of sharing or forgiveness that ancient customs may have signified. But for those present – staff and condemned alike – it may still be some kind of fitting but hollow consolation. It is hard to imagine why else Brian Price, the erstwhile chef for Texas’ death row, offered in the wake of the abolition to continue to cook final meals at his own expense. TDCJ’s response to Price, that it was “not the cost but rather the concept that we’re moving away from,” indicates that the types of consequences it contemplated in making its decision may not have had anything to do with the concerns of the people involved in the execution process.²⁰ If true, then this might be regrettable – not because

cell-walls: “In 2010 791 cell phones were taken away from Texas prisoners. From January through May of this year about 316 phones have been confiscated.”

¹⁹ Letter from Sen. John Whitmire to Brad Livingston (Sept. 22, 2011), *Texas Letter on Prisoner Meals*, available at <http://www.scribd.com/doc/65940295/Texas-letter-on-prisoner-meals> (last visited Aug. 6, 2014).

²⁰ See Mark Memmott, *Texas Turns*, *supra* note 14.

Price's concerns should outweigh anyone else's, but because it might indicate that TDCJ has made the mistake of considering this reform in a vacuum. If there is anything that should be remembered about the last meal it is that it is a story about history, culture, politics and people. Whether Livingston was right or wrong, the question of whether he could or should have made a different decision is not just a matter of "concept," but of judging whether an act committed at a moment of high passion, ending old traditions, and changing the last moments of the hundreds who remain on death row as well as the professional lives of those charged with caring for them, was taken with due diligence.

II. CONTEXT AND PERSPECTIVE

Because of the religious, historical, and cultural complexity of the last meal before execution, it is not surprising that a good deal has been written about it in scholarly articles, cinema, popular and social media. One of the most comprehensive of these academic approaches to the subject was written by Linda Meyer. Discussed together with the examination of prisoners' last words, the author describes last meals and last words as a final attempt to be human and to prevent the capital punishment process from becoming an extermination.²¹ Yet, the rituals introduce an element of the unpredictable and unmanaged and human. Even in this atmosphere of near total control, the process of execution requires these last remnants of the human.²² Indeed, this piece, among others, helps explore the most pressing questions about the last meal – regardless of its abolition or the procedures for providing it: whether it humanizes a barbaric process or whether it adds to the macabre traditions surrounding execution.²³

When my co-authors and I first became interested in this project, we were first struck by the broad, pop-culture interest in the last meal. A prisoner's last meal is almost always described in news stories about an execution. But little did we know then about projects such as the "Last Meals Project" created by Jonathon Kambouris. It focuses on the last meals of some of the most notorious prisoners, including Ted Bundy and Timothy McVeigh, and it includes (reproduced) photographs of the meals the prisoners requested. Those meal requests ranged from a bag of assorted Jolly Ranchers to a request for justice, equality, and world peace. It has had thousands of visitors since its inception.²⁴

²¹ Linda Ross Meyer, *The Meaning of Death: Last Words, Last Meals*, 2 (2008) (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1480686, last visited Aug. 6, 2014).

²² *Id.* at 2.

²³ *Id.* at 3.

²⁴ Even beyond the context of actual executions, considering a last meal has become a sort of get-to-know you game. A few years ago, an article ran in Time Magazine relaying the questions asked by Melanie Dunea, in her book called "My Last Supper." Dunea asked celebrities what they would order for their last meal. The project drew responses from Gordon Ramsay, Mario Batali and Jacques Pépin who claimed they would choose: a classic roast beef dinner; a ten course meal including molto dishes of pasta, seafood and vegetables both raw and cooked; and a hot dog. Joel Stein, *You Eat What You Are*, TIME, Oct. 2007, at 51 (citing, MELANIE DUNEA, MY LAST SUPPER: 50 GREAT CHEFS AND THEIR FINAL MEALS (2007)).

But what we ultimately became more interested in was what the last meal meant (or didn't mean), what it represented (or didn't). Beyond a popular fascination with the topic that might extend from sensationalism into art, this article, rather, seeks to investigate what prisoners' actual last meals (or refusals thereof) might signify – and what we might learn from them.

A. *ORIGINS OF AND SUPPORT FOR THE TRADITION OF THE LAST MEAL*

Although most believe the ritual originates with the last meal of Jesus Christ, according to Max Bigert, co-producer of the Swedish documentary *Last Supper*, the tradition “can be traced back to pre-Christian times, to the fear of ghosts. In Ancient Greece you had to feed the person who was going to be executed, so that they could cross the River Styx into the underworld, and not come back as a hungry ghost.”²⁵ The Last Supper of Christ, contemplated and examined by artists, historians, and religious figures for centuries, is one of the most sacred events for members of the Christian faith.²⁶ Of course, that supper was not only tied to the traditional Jewish Passover meal but formed the basis for the Sacrament of Communion; laden with symbolism, it was at its most basic a supper in the shadow of arrest and execution with people to whom Jesus of Nazareth felt especially close.

Over the years, new traditions surrounding a last meal emerged, sometimes even incorporating a final Communion. In Germany, during the eighteenth century the so-called Hangman's Meal would be attended by jurists, clergy, local dignitaries and often the executioner himself. The food served at such occasions was grand: Nuremburg established the municipal tradition of providing every condemned man with an entire roasted goose. A series of scripted exchanges would ensue in which the condemned would be directed to seek forgiveness in the next life and would be offered bitter lemons to signify their fate. The entire meal comprised a grand symbolic gesture implying complicity between condemned and condemner, forgiveness and acceptance in the breaking of bread and the bittersweet satisfaction of earthly desires.²⁷ History records that then, as today, appetites were fickle.²⁸

²⁵ A. Britten, Five questions for...Mats Bigert [Interview], *Metro*, 23 Jan. 2007, reproduced at <http://artemundi.org/ebulletin/bulletin2007-02.htm> (last visited Jun. 6 2012; unavailable Aug 6, 2014, original on file with authors).

²⁶ Terri J. Gordon, *Debt, Guilt, and Hungry Ghosts: A Foucauldian Perspective on Bigert's and Bergstrom's Last Supper*, 6 *Cabinet Magazine* Online, <http://cabinetmagazine.org/events/lastsuppergordon.php> (last visited Aug. 1, 2014).

²⁷ Scholars have noted the irony of such a tradition, especially compared to a biblical context. “Covenant meals in the Old Testament, for example, make plain that ritual meals offered to an enemy must come with an obligation of protection, and sitting down to a meal with an enemy who intends no such protection may be the deepest kind of betrayal.” Meyer, *supra* note 21, at 21.

²⁸ In Frankfurt am Main, Susanna Margarethe Brandt, 25, was sentenced to death for killing her infant daughter. On the day of her execution, she was ordered to feast with six of the local officials and judges through the ritual known as the “Hangman's Meal.” On the menu, there were three pounds of fried sausages, ten pounds of beef, six pounds of baked carp, twelve pounds of larded roast veal, soup, cabbage, bread, a sweet and eight and a half measures of 1748 wine. She reportedly managed nothing more than a glass of water. Brian

In eighteenth century London, some prisoners were allowed to hold a celebration with outside guests on the eve of their execution. On the next day, the procession would stop at a pub for the condemned's customary "great bowl of ale to drink at their pleasure, as their last refreshment in life."²⁹ Later, in America, the Puritans of Massachusetts once held grand feasts for the condemned, believing it emulated the Last Supper of Christ, representing a communal atonement for the community and the prisoner.³⁰

Across cultures then, even in the context of the realities of a forthcoming execution, the last meal emerges as a tradition verging on a celebration – or at the very least of comfort – of the one facing his imminent death. Many see a value in that, even as they protest the legality or morality of the execution itself. Put one way by Celia Shapiro, an artist who has compiled photographs of last meals, "The process of composing the pictures became a profound meditation on violence and how the state metes out justice and retribution. The meal is life given to the body, the execution is life taken from the body."³¹

Of course, reasons for publication of details related to the last meal may be somewhat different from the reasons justifying the last meal itself. But both, oddly, seem to be about connection, explains Treadwell, featured on the Dead Man Eating blog, "I honestly think everybody loves food, and it gives people a way to connect with this segment of the population they normally have nothing in common with," Treadwell said. "They can say, 'Hey, I've never killed anybody with a hammer, but I love fried chicken.'"³² Trite, perhaps, but that explanation is borne out in other discussion of the reasons we seem to crave details about prisoners' last meals.³³

B. LAST MEALS AS POLITICAL STATEMENTS: WHAT THEY MAY (AND MAY NOT) MEAN

There are political implications, too, of Last Meals: in the requests and in their portrayals. Amnesty International began a campaign in February 2013 that showed the last meals of five innocent prisoners who were executed and later

Cunningham, *Last Meals*, LAPHAM'S QUARTERLY, Wed. July 23 2014, <http://www.laphamsquarterly.org/essays/last-meals.php?page=all> (last visited Aug. 6, 2014).

²⁹ BRIAN P. BLOCK & JOHN HOSTETTLER, HANGING IN THE BALANCE: A HISTORY OF THE ABOLITION OF CAPITAL PUNISHMENT IN BRITAIN 34 (1997).

³⁰ Meyer, *supra* note 21.

³¹ Celia A. Shapiro, Last Supper, <http://www.celiaashapiro.com/posts/view/168> (last visited, Aug 1, 2014).

³² Carlos Campos, *Prisoners' Last Meals Satisfy Appetite For Curious Facts*, DEAD MAN EATINGWEBLOG (Dec. 1, 2003), http://deadmaneating.blogspot.com/2003/12/dme_02.html (last visited Aug. 6 2014).

³³ Daniel Nasaw, *Last Meal: What's the Point of This Death Row Ritual?*, BBC NEWS MAG. (Sept. 26, 2011), <http://www.bbc.co.uk/news/magazine-15040658> (last visited Aug. 6 2014). ("What men and women request for their last meal reflects how they lived their lives and how they choose to face their deaths, and offers Americans a poignant human connection to the people they have decided should die for their crimes, scholars and legal analysts say.")

exonerated of their crimes in the United States.³⁴ The campaign won the Gold Outdoor Lion at the Cannes International Festival 2013.

Prisoners know that their requests are described in news reports surrounding impending (or completed) executions and sometimes use that opportunity to make a final statement. While one death row inmate ordered a single olive (symbolizing world peace) for his final meal, James Smith ordered a plate of dirt. Smith, however, settled on yogurt since dirt was not on the approved list.³⁵ Robert Madden “asked that final meal be provided to a homeless person.”³⁶ Counting on journalists to report his outrage when prison staff could not accommodate him, Thomas Grasso’s final words were, “I did not get my SpaghettiOs, I got spaghetti. I want the press to know this.”³⁷ In at least two cases, food has been connected to prisoners’ attempts to avoid the execution completely.³⁸

Even when unintentional, a prisoner’s requested last meal may reveal information crucial to a larger political or legal issue, such as his competency to be executed. Before the United States Supreme Court decision finding the execution of the severely mentally disabled to be unconstitutional,³⁹ many are haunted by the case of Ricky Ray Rector, who ate his final meal, but “saved” pecan pie “for later.”⁴⁰

A prisoner’s failure to request a last meal – or to eat the meal previously ordered – may be the area most likely to produce controversy or speculation. This may or not be fair. There may be biological reasons for declining and psychological reasons for partaking. Explains Meyer, “At a certain rational level, declination of the last meal makes sense since – unless there is a late, unexpected pardon – there is no biological need for energy. At other levels, declination of the last meal makes little sense since the person voluntarily foregoes a final sensory experience over which they have some degree of control.”⁴¹ Or a prisoner may simply be too terrified to take a bite of food.⁴² Many accounts of those preparing meals for or

³⁴ *Amnesty and the Last Meal*, THE INSPIRATION ROOM (July 2, 2013), <http://theinspirationroom.com/daily/2013/amnesty-and-the-last-meal/> (last visited Aug. 6 2014).

³⁵ Sam Howe Verhovek, *Word for Word/ Last Meals; For the Condemned in Texas, Cheeseburgers Without Mercy*, N.Y. TIMES (Jan. 4, 1998).

³⁶ Daniel LaChance, *Last Words, Last Meals, and Last Stands: Agency and Individuality in the Modern Execution Process*, 32 L. & SOC. INQUIRY 701, 714-15 (2007).

³⁷ R. K. Elder, *Last Words of the Executed*, 205 (2010).

³⁸ Julie Greene, *Last Supper*, PROTEUS 49 (2007) (“[I]n the early part of the twentieth-century in Washington State, a condemned man tried to eat so much as to be too fat to fall through the trapdoor when he was hanged. Around this time, a convict named Donald Schneider also attempted to gorge himself so he wouldn’t fit into the electric chair. Neither succeeded.”)

³⁹ *Atkins v. Virginia*, 536 U.S. 304 (2002).

⁴⁰ See <http://www.famouslastmeals.com/2010/09/ricky-ray-rector.html> (last visited Aug. 6 2014).

⁴¹ Meyer, *supra* note 21 at 15-16.

⁴² “[M]eal remains ambiguous until the prisoner acts. Did he refuse or ridicule the meal? Did he order it, but was not sufficiently at peace to eat it? Did he eat and enjoy it? Did he invite the guards to join him? Was his family allowed to eat with him? Did he thank the cook?” Meyer, *supra* note 21, at 22.

sharing time with a prisoner before his execution explain that appetites have long left many men facing death.⁴³

There may be some difference between declining to order a final meal and ordering a final meal and refusing to eat it. Leonel Torres Herrera and Gary Graham, like others before them, were Texas prisoners who famously protested their innocence in hard-fought legal challenges. In protest, each failed to order a last meal. Explains Linda Meyer, “these denials impress upon us the seriousness of their protestations of innocence. Their refusal to acquiesce in the ritual of the last meal is itself a protest and a refusal to ‘make peace.’ Yet, if no such ritual existed, these men could not ‘refuse’ it in so meaningful a way.”⁴⁴

Outside observers are forever trying to make meaning out of a prisoner’s last words or actions.⁴⁵ What becomes clear, though, after review of last meals requests, prisoners who declined last meals, and prisoners who ordered a last meal but did not eat, is that our understanding of their meaning is extremely limited.

C. LAST MEALS OFTEN REVEAL SOMETHING SPECIAL AND TENDER ABOUT A PRISONER- OR THE ONES GUARDING HIM

A meaningful final meal is not limited to people in prison. Many who know or suspect death is impending seek out meaningful rituals and traditions with loved ones—some of which include food. The traditional last meal request, however, often reveals what is on the heart or mind of someone who has taken life – and for that reason – for reasons of curiosity, of mystery, that fact has become newsworthy. What we found in this project, however, was less about the meal requests as a collection of favorite tastes, but more about meaning and memory. As one article related, “[w]hen it comes to our deepest desires, it turns out that food isn’t just about taste. It’s tied right into memory and the longing for the sensations of when we felt happiest or most loved.”⁴⁶

And if our civilian belief that our choices of a last meal may reveal our deepest desires or core personality traits, how much more so may the last meal reveal about a person with limited opportunities for expression? Prisoners, for example, may request the Eucharist for a final meal⁴⁷ – or even whimsical, symbolic food. A man once asked for a traditional Chinese meal whose recipe calls for a one hundred year old egg; he promised he wouldn’t eat it “a minute early.”⁴⁸

⁴³ Rev. Carroll Pickett and Carlton Stowers. *Within These Walls: Memoirs of a Death House Chaplain*. 2002. See also Power Ekroth, *LAST SUPPER TEXTS*, Studio Bigert & Bergstrom (Jan. 6, 2010).

⁴⁴ Meyer, *supra* note 21 at 51.

⁴⁵ In New York City, there is an invitation-only supper club called Studiofeast. Every year they host a dinner based on the best responses to the question, “You’re about to die, what’s your last meal?” The group takes requests from all over and compiles the top 10 or 20 ingredients and creates a menu for dinner. The project was centered on the idea that what a person chooses to eat in their final moments reveals a little about who that person is. *I AM WHAT I EAT: THE LAST MEAL*, Studiofeast, available at Vimeo, <http://studiofeast.com/our-story/> (last visited Aug. 6 2014).

⁴⁶ Stein, *supra* note 24, at 51, 52.

⁴⁷ Meyer, *supra* note 21, at 49.

⁴⁸ *Id.* at 50.

Cold (Comfort?) Food

Even a refusal of a meal may be telling: one author tells of a prisoner refusing his final meal “so that he could spend more time with his visitors, since he would have had to be taken out of the visiting yard to eat it.”⁴⁹ And notably, there are also touching stories of last “meals” revealing prisoners’ empathy – even for those carrying out an execution. Recalling a last meal request to Lewis Lawes, the abolitionist warden of Sing Sing, an article in the *New York Times* recounted: “Once, when a condemned man named Patrick Murphy pleaded for a strictly prohibited last drink of spirits, Lawes broke the rules to deliver a medicinal dose of bourbon. Murphy accepted it gratefully and then offered it back to the stricken Lawes, saying, ‘You need the shot more than I do, warden.’”⁵⁰

Conversely, the meal is also a way for prison employees to show their compassion to the condemned. Over the decades spent on death row, guards frequently build relationships with prisoners—and this is sometimes revealed through the last meal tradition.⁵¹ That is not to say all wardens or guards join in this tradition or that they all support it. Expense and punishment, after all -- regardless of one’s opinion about a last meal -- are two core concerns of prison administration.⁵²

In at least one case, involvement in preparation of the last meal has changed a prison chef’s views on death row prisoners. Brian Price, a Texas cook who prepared hundreds of last meals before Texas discontinued the practice of offering a special one, recalls, “I think that through their meals, they were seeking a small bit of comfort and courtesy. Food can take you back to a better time in your life, and it gave me comfort to give these dying men and women some comfort in their last hours.”⁵³

⁴⁹ Katya Lezin, *FINDING LIFE ON DEATH ROW: PROFILES OF SIX INMATES* 184 (1999).

⁵⁰ RALPH BLUMENTHAL, *A MAN WHO KNEW ABOUT THE ELECTRIC CHAIR*, N.Y. TIMES, Nov. 6, 2011 5:02 pm, <http://cityroom.blogs.nytimes.com/2011/11/06/a-man-who-knew-about-the-electric-chair/> (last visited Aug. 1, 2014).

⁵¹ JOHN D. BESSLER, *KISS OF DEATH: AMERICA’S LOVE AFFAIR WITH THE DEATH PENALTY* (2003) (citing Jim Willett, *89 Executions. I was the Warden*, STAR TRIB. (Minneapolis), May 20, 2001, at A25. “Sometimes I wonder whether people really understand what goes on down here and the effect it has on us,” Jim Willett asks himself, “I wondered most about the mothers who saw their sons being put to death,” he says. “Some would just wail out crying. It’s a sound you’ll never hear any place else, an awful sound that sticks with you.”).

⁵² Others beyond the prison walls may be concerned with the expense of a special last meal, but our research shows that in most prison systems, there is either a cap on the dollar amount that may be spent in preparation of a prisoner’s final meal or that the ingredients must already be stocked in the prison kitchen (see *infra* Section III generally.) We also note that not all prison administrators use food as a way to connect with the inmates under their supervision: “...Maricopa County (Arizona) Sheriff Joe Arpaio famously cut caloric intake for nearly 9,000 jail inmates from 3,000 to 2,500 calories per day. Arpaio justified the caloric reduction on health-related and budgetary grounds. ‘Do you hear me?’ he was quoted as telling inmates. ‘You’re too fat. I’m taking away your food because I’m trying to help you. I’m on a diet myself. You eat too much fat.’ Arguing that he was saving the county about \$300,000 a year in food costs, Arpaio boasted: ‘I got meal costs down to 40 cents a day per inmate. It costs \$1.15 to feed the department dogs.’” Avi Brisman, *Fair Food?: Food as Contested Terrain in U.S. Prisons and Jails*, 15 G. J. ON POV. L. & POL’Y 49, 67 (2008).

⁵³ Brian Price, *The Last Supper*, LEGAL AFFAIRS, (Mar./Apr. 2004),

Coming to understand that these men and women – whatever they may have done – were human seeking comfort amidst crisis has led Price to offer to prepare last meals at no cost to Texas prisons. As with many other personal encounters with men and women facing death, his experiences have even changed his views on capital punishment: “I used to be a strong believer in the death penalty – thinking that what goes around should come around. But my experience cooking for the condemned forced me to weigh my values and look at the death penalty from both sides of the fence.”⁵⁴

III. GETTING THE RITUALS RIGHT: WHY DO STATES MAKE THE DECISIONS THEY DO ABOUT LAST MEALS?

Last meals are served within the administrative contexts of state Departments of Corrections, many of which regulate the contents of the meals themselves. As such, while such meals are frequently interpreted for what they say about the condemned men and women who consumed them, they may also reflect something about the states they come from. Our analysis in this section explores some of the differences that exist between states in the restrictions they impose.

Executions are highly ordered procedures where everything, including the timing and contents of the last meal, is prescribed. A comparison of these execution procedures reveals just how much states vary in what they permit inmates to be provided.⁵⁵ Some, like Texas after the Whitmire affair, provide nothing special. Most provide at least some special consideration, though this comes by degrees.⁵⁶

To better understand why states make the decisions they do about constraining the contents and lavishness of last meals, we examined available information on last meal policies and rules for all states that used capital punishment in 2010. Our analysis first catalogued the variety of restrictions states placed on meals, and then examined how those restrictions were related to a variety of other state characteristics including characteristics of their correctional systems, punitivity in state penal cultures, and the extent of their use of capital punishment.

A. APPETITE SUPPRESSANTS: A DESCRIPTION OF THE RESTRICTIONS STATES IMPOSE ON LAST MEALS

Thirty-five states had capital punishment as an available sentencing option in 2010, though Illinois was at the time undergoing a period of moratorium. We sought information on the rules and regulations surrounding the provision of last

http://www.legalaffairs.org/issues/March-April-2004/feature_price_marapr04.msp (last visited Aug. 6 2014). (“The last meal is an ancient tradition, which some say predates the death of Christ. I always thought of the LMs I prepared as a version of the Last Supper, when Christ knew that he would die the next day.”).

⁵⁴ *Id.*

⁵⁵ See e.g., Deborah W. Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What it Says About Us*, 63 OHIO ST. L.J. 63 (2002).

⁵⁶ See Fig. 1, below.

meals in each of these states. Our preferred sources were so-called ‘execution protocols’ – documents drawn up typically by prison administrators which describe in great detail the precise procedures to be followed in executions.⁵⁷ A total of twenty such protocols (or part-protocols) were collected, from which information regarding the restrictions placed on the contents of last meals could be extracted from nine.

We then set about gathering information on the remaining states by scouring state DOC websites, statute law, news sources, and other research articles in this area.⁵⁸ We sought descriptions of last meal regulations in each state that could be traced directly back either to official documents produced describing last meal procedures, or to individuals with direct knowledge of such policies and procedures. In this manner, we were able to compile a dataset containing authoritative information on the regulations governing last meal provisions in all 35 states of interest.

Two of the 35 states – Kansas and New Hampshire – had no execution protocols or regulations in place in 2010.⁵⁹ Neither state had executed an inmate since *Gregg*.⁶⁰ In the case of New Hampshire no execution had taken place since 1939.⁶¹ As a result, neither state had faced the need to actually draw up procedures for an execution. In all of the remaining 33 states procedures for executions and last meals had, to a greater or lesser extent, been stipulated. We organized all thirty-three states in our dataset into four categories according to the extent of the explicit constraints that were placed upon the decisions of the prison officials who prepared them. The status for each state is shown in Figure 1.⁶²

⁵⁷ For example, Idaho’s protocol can be found online, *available at* <http://www.idoc.idaho.gov/content/policy/708>. The rules surrounding the last meal are mentioned on page 19.

⁵⁸ Denno, *supra* note 55.

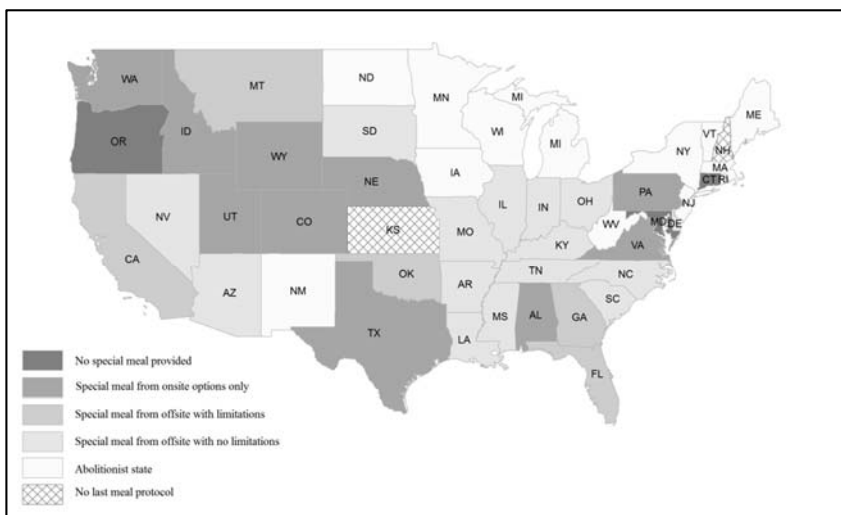
⁵⁹ The absence of any protocols in either Kansas or New Hampshire was confirmed in email communications with relevant Department of Corrections officials in each state, on file with the authors.

⁶⁰ *See Gregg v. Georgia*, 428 U.S. 153 (1976).

⁶¹ New Hampshire executed Howard Long in 1939. The sentencing to death of Michael Addison in 2008 has led to discussions of the development of a new protocol, however. *See* Death Penalty Information Center at <http://www.deathpenaltyinfo.org/new-hampshire-1> (last visited Aug. 5, 2014).

⁶² A complete listing of sources for this material is available on request from the authors.

Figure 1: Last Meal policies by State, 2010. (Note Hawaii and Alaska, not shown, were both abolitionist states in 2010).



In fifteen states, there were no specific constraints on the decisions prison officials could make about what was prepared for the last meal.⁶³ Rather, discretion over the contents of the meal was granted, often explicitly, to prison officials themselves. Inmates in Arkansas and Tennessee, for example, may expect to have any request fulfilled provided they are deemed ‘within reason’ by those charged with preparing the meal.⁶⁴ Delaware inmates may be more fortunate: the protocol in that state enjoins officials to make ‘every effort’ to fulfill the inmate’s request.⁶⁵ One restaurant near to the Bonne Terre prison in Missouri has the distinction of having been selected several times; speaking to the local press, the cook said she felt ‘honored,’ and explained, ‘I think it’s because we got the best food in the county.’⁶⁶

Five states fell into a slightly more restrictive category – permitting prison officials to purchase meals or ingredients from outside the prison, but stipulating

⁶³ These states were Arizona, Arkansas, Delaware, Illinois, Indiana, Kentucky, Louisiana, Mississippi, Missouri, Nevada, North Carolina, Ohio, South Carolina, South Dakota and Tennessee.

⁶⁴ Ashley Blackstone, *Arkansas Death Penalty: Execution Day*, TODAY’S THV (Nov. 3, 2011) <http://www.todaysthv.com/news/crime/179279/370/Arkansas-Death-Penalty-Execution-Day->; Tennessee Department of Corrections website, ‘Deathwatch’, at <http://www.tn.gov/correction/media/deathwatch.html> (last visited 9/24/2012).

⁶⁵ Death Row Facts Sheet, STATE OF DELAWARE-DEPARTMENT OF CORRECTION, *available at* http://doc.delaware.gov/information/deathrow_factsheet.shtml (last visited Feb. 12, 2013). Likewise in California which replicates the ‘every effort’ language, though, as noted below, a financial limit is placed on the purchase of ingredients in that state.

⁶⁶ Website of Office of Clark County, Ind., prosecuting attorney, mentioning details of execution of Dennis Skillicorn, *available at* <http://www.clarkprosecutor.org/html/death/US/skillicorn1165.htm> (last visited Jan.13, 2014).

certain limitations on what could be bought.⁶⁷ In California, a meal could be purchased from a local restaurant though a spending limit of \$50 was imposed.⁶⁸ In Florida the limit was \$40,⁶⁹ in Georgia it was \$20,⁷⁰ and in Oklahoma it was \$15.⁷¹

In Montana, no spending limit was imposed, but it was specified – as it was in several other states in this category – that the meal must be purchased locally to the prison.⁷² The local purchase rule serves, at the very least, to formalize a more or less real fear that last meal requests might generate excessive costs. Georgia, for example, will provide local lobster if requested, but the state “will not fly it in from Maine.”⁷³ Although still permitting prison officials to provide the inmate with something above and beyond what they could usually expect as prison fare, therefore, these states explicitly prescribed the breadth of discretion those officials had as they set about fulfilling the inmate’s request.

A further ten states had drafted policies of a yet-more-restrictive form, requiring that any last meals prepared for prisoners must be crafted only from ingredients that are already available on prison premises.⁷⁴ In Pennsylvania the inmate is presented with a menu in eight categories from which they are invited to choose: protein items, starches, soups, grains, side dishes (such as coleslaw or apple sauce), dessert, drinks (of which they might pick two), and relishes.⁷⁵ In Virginia and Idaho, inmates are constrained to choose from among the items in the regular prison menu, the Idaho regulations also noting that “The offender may retain consumable commissary items as approved by the IMSI warden until completion of the last meal.”⁷⁶ Texas fell into this category in 2010, and as Brian Price’s book on the preparation of meals for condemned inmates in that state reports, this constraint required him to become creative in his attempts to fulfill inmate requests.⁷⁷

⁶⁷ See Figure 1. These states include California, Florida, Georgia, Montana and Oklahoma.

⁶⁸ California Text of Regulations, Subchapter 4, Article 7.5, 3349.3.4(b)(5), available at http://www.cdcr.ca.gov/Regulations/Adult_Operations/docs/4_LI_7-28-10.pdf (last visited Jan.14, 2014).

⁶⁹ Florida Department of Corrections, Death Row Fact Sheet, available at <http://www.dc.state.fl.us/oth/deathrow/index.html>.

⁷⁰ Jennifer G. Hickey, *Dining in with Capital Punishment*, 17 INSIGHT ON THE NEWS, 24 (2001).

⁷¹ R. Peterson *Life on Death Row – Execution Day*, McAlester News (2011) available at <http://mcalesternews.com/local/x756276814/Life-on-Death-Row-Execution-Day> (last visited Jan. 13, 2014).

⁷² Montana Department of Corrections, Montana State Prison Execution Technical Manual, 51.

⁷³ Greene, *supra* note 38, at 48.

⁷⁴ These states are Alabama, Colorado, Idaho, Nebraska, Pennsylvania, Texas, Utah, Virginia, Washington and Wyoming.

⁷⁵ Greene, *supra* note 38, at figure 2.

⁷⁶ Regarding Virginia, see A. Stewart, *Execution Day: What’s Scheduled to Happen* (2009) formerly available at http://www2.insidenova.com/news/2009/jul/12/execution_day_whats_scheduled_to_happen but no longer available when last visited (Aug. 5, 2014). Copy on file with authors available on request. Idaho Department of Correction, Execution Procedures, 19.

⁷⁷ BRIAN D. PRICE, MEALS TO DIE FOR (2005).

Price reports ingredients were frequently not available, and substitutions were frequently necessary. The use of hamburger meat in the place of steak appears to have been particularly common.⁷⁸

Finally, last meal policies in three states stipulated that the inmate would be served the same meal as other inmates prior to execution and that no special meal would be provided.⁷⁹ In two of these, Oregon and Connecticut, although the regulations clearly stipulated that “The inmate shall be served the same food as other inmates at the normal meal time,” the prison warden was granted discretion to overrule this general principle.⁸⁰ In the other state, Maryland, no such discretion was granted.⁸¹ In 2011, as a result of the Whitmire affair, Texas joined this category.

Notwithstanding variation in the restrictiveness of last meal provisions, the authority of correctional officials to make ultimate determinations about the form the last meal would take was clear throughout all the documents reviewed. In Ohio, for example, the rules stipulate that the execution “Team Leader” shall “ask the prisoner to identify his or her special meal request,” which should then be served “at a time to be determined by the Managing Officer.”⁸² In Arizona, the duty falls to the prison Warden, who should request that the inmate complete the “Last Meal Request, Form 710-5,” and return it “no later than 14 days prior to the execution” to give time for the request to be considered.⁸³ In Montana and California, the responsibility of soliciting the inmate’s request fell to food services staff, though California warns the inmate “The Associate Warden and the Food Manager will review your request to determine if the request can be accommodated.”⁸⁴ In Oregon, the affirmative duty to solicit the inmate’s request was absent altogether, the regulations stating instead that “At the discretion of the Superintendent, the inmate may be permitted a last meal of the inmate’s choosing.”⁸⁵

⁷⁸ *Id.*

⁷⁹ Maryland, Oregon and Connecticut.

⁸⁰ The wording is from Connecticut Department of Correction Directive 6.15, Administration of Capital Punishment, page 5. In Oregon, the language reads “The inmate will be served the same food as other inmates assigned to the facility,” and the prison official with discretion is the ‘Superintendent.’ Oregon Bulletin, 2011, Department of Corrections Administrative Order DOC 9-2011, Capital Punishment (Death by Lethal Injection), *available at* Oregon Secretary of State Archives Division, http://arcweb.sos.state.or.us/pages/rules/bulletin/0711_bulletin/0711_ch291_bulletin.html (last visited 13 Jan. 2014).

⁸¹ Greene, *supra* note 73, at 47.

⁸² State of Ohio Department of Rehabilitation and Correction (2011), rule ORC 2949.22; 2949.25, page 8.

⁸³ Arizona Department of Corrections Department Order 710, Execution Procedures, page 4.

⁸⁴ California Lethal Injection Regulations, Thirty Day Notification, item 12. *See also* Subchapter 4, Article 7.5, 3349.3.4 (b) (5) “The Team Administrator shall... Along with the Food Manager, interview the inmate to ascertain what request, if any, the inmate may have for a last meal.” Montana Department of Corrections, Montana State Prison Execution Technical Manual 20.

⁸⁵ Oregon Bulletin, 2011, Department of Corrections Administrative Order DOC 9-2011, Capital Punishment (Death by Lethal Injection) *available at* Oregon Secretary of State Archives Division,

Reflecting the importance of the last meal as a ritualistic practice, the last meal isn't actually the last thing the inmate eats in at least three states. In Ohio and Indiana, the meal is eaten the day prior to the execution – no less than “thirty-six (36) to forty-eight (48) hours before the execution” in Indiana, where it is to be “consumed in one sitting.”⁸⁶ In Idaho, the meal is served “at approximately 1900 hours the day prior to the execution,” while the following day “five (5) hours prior to the execution, the offender shall be offered a light snack.”⁸⁷ While states differ in the leeway they offer in the preparation of the meal, their level of commitment to the ritual itself can also be gauged from their determination to preserve it even in situations where its literal status as a ‘last meal’ no longer exists.⁸⁸

The geographical patterns shown in Figure 1 may at first glance be unexpected. The most restrictive, highly regulated last meal policies are clustered in the Western half of the country, with the exception of a small number of South-Western states. The states of the Deep South, meanwhile, where capital punishment itself is most concentrated, vary in their restrictiveness, with several forming part of a cluster of states with unrestricted last meal policies extending far north into the Mid-West. Rather than correlating neatly with the prevalence of other punitive policies such as capital punishment and mass incarceration, therefore, last meal policies evince a different pattern. To clarify this picture further, we examined statistically the relationship between last meal policies and a variety of measures of differences in state correctional systems, punitive penal culture, and their usage of capital punishment.

B. ECONOMICS, PUNITIVITY OR RITUALISM? EXPLAINING THE CHOICES STATES MAKE

There are many things that might explain the choices that states make in how they structure their last meal policies. Based on our review of existing literature and theory in the area, we examined three: economic and security considerations, punitive penal culture, and ‘retributive ritualism’ associated with the use of capital punishment.

i. Economics and Security

Last meal policy decisions might be made on the basis of the need to preserve security and efficiency in state correctional systems. Policy decisions about last meal provisions are made most directly by correctional administrators themselves with the result that execution protocols are likely to answer to operational needs. Decisions against allowing external food to be brought into the prison may be

http://arcweb.sos.state.or.us/pages/rules/bulletin/0711_bulletin/0711_ch291_bulletin.html (last visited Jan.13 2014).

⁸⁶ Email communication with Indiana Department of Corrections. The Ohio protocol also specifies the meal should be served the day prior to the execution: State of Ohio Department of Rehabilitation and Correction (2011), rule ORC 2949.22; 2949.25, page 8.

⁸⁷ Idaho Department of Correction, Execution Procedures 19, 33.

⁸⁸ See Denno, *supra* note 55, at 123, where questions are raised about the possibility that meals may interfere with injection procedures where the inmate has insufficient time to digest its contents.

made on the basis of security concerns over contraband. California's protocol explicitly notes that the meal must be inspected for contraband prior to being served.⁸⁹ Equally, honoring lavish requests may be seen as wasteful. Rules in Georgia state that in the event of a stay of execution the inmate will not have the right to an additional "last meal" should they later find themselves strapped to the gurney for a second time.⁹⁰ Accordingly, we collected data on the incarceration rate in each state, the sizes of correctional budgets and the amounts spent by states per inmate, in order to try and capture the operating conditions of correctional systems across the county, and assess whether those conditions were related to last meal policies. We expected last meal policies to be least restrictive where incarceration rates were low, correctional budgets were high, and spending-per-inmate was high.⁹¹

ii. Punitive Penal Culture

Alternatively, decisions about last meal provisions may be made on the basis of a wider desire to punish inmates and deprive them of comfort. Whitmire's letter, which noted Brewer did not provide the "privilege" of a last meal to his victim, may be an example of this sentiment.⁹² Sociologists of punishment have argued that criminal justice policy has, for a generation or more, become progressively more preoccupied with inflicting punishment, deprivation and austerity upon inmates.⁹³ Research has shown relationships between trends toward punitive correctional policy decisions and the size of states' minority populations, the conservatism of state electorates and the prevalence of fundamentalist religious beliefs in the general population.⁹⁴ We collated data on each of these dimensions and examined them for any relationship to last meal policies. We expected last meal policies

⁸⁹ CALIFORNIA TEXT OF REGULATIONS, SUBCHAPTER 4, ARTICLE 7.5, 3349.3.4(B)(5), available at http://www.cdcr.ca.gov/Regulations/Adult_Operations/docs/4_LI_7-28-10.pdf.

⁹⁰ Greene, *supra* note 73.

⁹¹ Correctional population and incarceration rate data obtained from Bureau of Justice Statistics (2010) *Prisoners in 2009*, Appendix Table 1 (available at <http://bjs.gov/content/pub/pdf/p09.pdf>, Mar. 18, 2013). Correctional spending data obtained from Bureau of Justice Statistics (2012) *Justice Expenditure and Employment Extracts, 2009 – Preliminary*, Table 3 (available at <http://bjs.gov/index.cfm?ty=pbdetail&iid=4335>, Mar. 18, 2013). Spending per inmate data calculated by the authors from the previous two sources.

⁹² Whitmire, *supra* note 19.

⁹³ DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY*, (2001).

⁹⁴ See, e.g., Thomas D. Stucky, Karen Heimer, & Joseph B. Lang *Partisan Politics, Electoral Competition and Imprisonment: An Analysis Of States Over Time*, 43 *CRIMINOLOGY* 211-47 (2005); D. Jacobs & J. T. Carmichael, *The Politics of Punishment Across Time and Space: A Pooled Time-Series Analysis of Imprisonment Rates*, 80(1) *SOCIAL FORCES* 61 (2001).

to be least restrictive where African-American populations were high, the proportion of Republican voters low, and the prevalence of fundamentalist religious beliefs was low.⁹⁵

iii. Retributive Ritualism and the Use of Capital Punishment

Finally, last meal policy decisions may be the result of a distinctive, contrary trend in the area of capital punishment whereby states that execute the most are also those with the most invested in the ritual panoply of executions. Linda Ross Meyer has suggested that regular use of capital punishment is associated with greater commitment to the curious rituals that surround it including last meals and last words, commenting that “Without the symbolic accoutrements of death, execution becomes merely extermination.”⁹⁶ Noting that Texas is yet the only state that chooses to publish the last words of condemned on its website,⁹⁷ she writes:

The ultimate justification for the death penalty, retribution, requires that these executions have their ritual element, the uncontrolled possibility for rebellion or pity, in order to have also the possibility of retributive meaning. States that resist the tradition of last words tend to be states with less experience in killing.⁹⁸

If Meyer is right and the regular use of capital punishment is also associated with a more full knowledge of and commitment to its ritualistic accoutrements, it is also possible that states which use the penalty the most will also prove the least restrictive in their provision of last meals.⁹⁹ Accordingly, we collected data on the number of executions and the population of state death rows to test this hypothesis. Notwithstanding our more general hypothesis about punitivity, therefore, we expected last meal policies to be *least* restrictive where the use of the death penalty was *most* common.¹⁰⁰

C. ANALYSIS AND RESULTS

Because our sample of thirty-three states is relatively small for statistical purposes, we divided them into just two categories: those which restrict the preparation of last meals to prison kitchens, and those which permit the purchasing of meals from outside the prison. To our minds, this is a key distinction that divides states that (literally) ‘go the extra mile’ to obtain and prepare last meals from those

⁹⁵ Percent African-American data obtained from the Bureau of the Census, 2010 census (available at www.census.gov, Mar. 18, 2013). Percent Republican data is the percent of the popular vote in the 2008 Presidential Election favoring John McCain, obtained from the Federal Election Commission (2009) *Federal Elections 2008* (available at <http://www.fec.gov/pubrec/fe2008/federalections2008.pdf>, Mar. 18, 2013). Data on percent evangelical obtained from the Pew Forum on Religion and Public Life (2008), *U.S. Religious Landscapes Survey*, Appendix 1, p. 100 (available at <http://religions.pewforum.org/pdf/report-religious-landscape-study-full.pdf>, Mar. 18, 2013).

⁹⁶ Meyer, *supra* note 21.

⁹⁷ See http://www.tdcj.state.tx.us/death_row/dr_executed_offenders.html.

⁹⁸ *Id.*

⁹⁹ Daniel LaChance, *Last Words, Last Meals, and Last Stands: Agency and Individuality in the Modern Execution Process*, 32 LAW & SOC. INQUIRY 701, 702-704 (2007).

¹⁰⁰ Data on death sentences and executions obtained from DEATH PENALTY INFORMATION CENTER, <http://deathpenaltyinfo.org/> (last visited Mar. 18, 2013).

that limit themselves to what can be prepared and served internally. Accordingly, the comparisons that follow juxtapose data on correctional operations, punitive penal culture and the use of capital punishment for the thirteen states that restrict meals to in-house preparation ('restrictive' states) and the twenty that allow inmates to order food from other sources ('non-restrictive' states).

Table 1: Comparing restrictive and non-restrictive states on correctional operations and punitive culture.

	Variable	Restrictive states (n=13)	Non-restrictive states (n=20)	Non-restrictive states are....	T-test for difference of means
Correc-tional operations	Incarceration rate (per 100,000)	411	502	Higher	2.031 *
	Corrections budget (\$bn)	\$1.499	\$1.898	Higher	0.431
	Spending per inmate	\$64,230	\$42,323	Lower	-3.076 ***
Punitive penal culture	% African-American	9.56%	15.04%	Higher	1.507
	% Republican	50.16%	50.60%	Higher	0.139
	% Fundamental-ist	23.92%	33.40%	Higher	2.150 **

* $p < 0.1$, ** $p < 0.05$, *** $p < 0.01$; Degrees of freedom = 31.

Table 1 compares restrictive and non-restrictive states on characteristics of their correctional operations and factors associated with punitive penal culture. The column on the right hand side of Table 1 illustrates whether the differences between restrictive and non-restrictive states are large enough to be considered statistically significant – that is, unlikely to be due to simple chance. The findings suggest that among all the differences between the states we observed, certain ones are particularly worthy of attention. Specifically, states with the least restrictive last meal policies have higher incarceration rates, spend less per inmate, and have larger fundamentalist populations.

In short, our results suggest the opposite of what we hypothesized. We expected the states which placed the fewest restrictions on last meal policies would be those which incarcerated the fewest and spent the most on housing their inmates. Instead, we found they tended to have higher incarceration rates and to spend less on each inmate. Equally, we expected last meal policies to be least restrictive where state populations were the least fundamentalist. Instead, we found that states with the least restrictive policies tended to have higher number of fundamentalist Christians. That states with the largest prison populations, the least spending per inmate, and the most fundamentalist populations should also be those that are the most 'generous' to those they condemn to die is at odds with our expectations of the influence that correctional operations and punitive penal cultures have. Clearly, if last meal policies are a product of correctional operations or punitive penal cultures, then the relationship is more complicated than we had expected.

Tables 2a & b: Comparing restrictive and non-restrictive states on their capital punishment records.

<i>Table 2a: Number of executions</i>	Restrictive states	Non-restrictive states	
Under 12 executions	14	6	20
Over 13 executions	3	10	13
	17	16	33

$X^2 = 6.9453$ ***
(1 d.f.)

<i>Table 2b: Death row population</i>	Restrictive states	Non-restrictive states	
Death row population 34 or under	14	6	20
Death row population over 35	3	10	13
	17	16	33

$X^2 = 6.9453$ ***
(1 d.f.)

Next, restrictive and non-restrictive states were compared on their capital punishment records. Because state execution records vary so dramatically, with some states carrying out many more executions and housing much larger death rows than others, the states in the sample were divided into categories based on whether they had carried out more than 12 executions since 1976 and whether they had a death row population of over 34 individuals. These were the median values among states in 2010, and by dividing states up in this way it was possible to eliminate the disproportionate influence that states such as Texas and California have on statistical analyses by virtue of their massive capital punishment operations.

The results of the analysis show that states with non-restrictive last meal policies do indeed conduct more executions and have larger death rows than those with restrictive policies. This may seem surprising, since it contradicts the general assumption that penal culture will be more ‘punitive’ where executions are more common. This apparent ‘generosity’ in the form of relatively unrestrictive last meal rights in states which also kill the most inmates is in keeping with Meyer’s ‘retributive ritualism’ hypothesis, however, which implies states which execute the most will also be the most invested in execution rituals such as the provision of last meals. This strong, statistically significant relationship supports Meyer’s contention that states that make the greatest use of capital punishment are also the most likely to institutionalize ritualistic aspects of executions.

D. DEATH REALLY IS DIFFERENT

The results of the foregoing analysis are fascinating for sociologists because they represent an exception of sorts to the power of punitive penal culture in states. States that execute the most also imprison the most, inflict the longest sentences, and maintain correctional systems designed to inflict austerity. And yet our analysis shows that those states which execute the most are also the most likely to provide an expansive entitlement to a last meal at the moment of a condemned inmate's death, allowing them the greatest freedom in what they choose to eat. Even in systems which house many more people and spend almost a third less on housing each inmate, condemned men and women are extended the broadest choices of foods at the times of their deaths.

Meyer's general argument that attachment to last meals reflects the latent importance of rituals to accomplishing the retributive meaning of capital punishment is compelling, but our results also point to a more explicitly spiritual reason behind these more expansive entitlements in certain states. Large populations of fundamentalist Protestants are present not only in the Southern states but also as far west as Arkansas and Oklahoma (both 53%) and as far north as Indiana (34%).¹⁰¹ Moreover, recent research into fundamentalist Protestant opinions on the death penalty has shown a complex relationship whereby fundamentalists tend to support capital punishment generally, but are also more likely to be compassionate to sinners and to believe in the possibility of forgiveness.¹⁰² Little wonder, perhaps, that states with the largest fundamentalist populations are also those that are least likely to place constraints on the last meal ritual, given its longstanding role as an occasion of reconciliation and peacemaking.

Of course, this 'snapshot' of state policies in 2010 renders us unable to examine the evolution of such policies over time or to speculate very deeply about what 'latent' trends the patterns we observe reveal. The development and institutionalization of capital punishment 'rituals' may well be an historical process borne out of tradition and custom. As such, rituals such as last meals may have evolved in ways that visibly confirm, or add nuance to, Meyer's argument that a kind of latent retributive ritualism is at work. More work of an historical nature would undoubtedly elaborate on her insights. Nevertheless, the tokenistic acknowledgment of the need for last meals in states that rarely resort to execution may indeed be symptomatic of an approach which relegates execution rituals, like executions themselves, into a position of 'de facto abolition.'

¹⁰¹ Fundamentalist Protestantism has a variety of definitions. In our data, gathered by the Pew Forum on Religion and Public Life, fundamentalists are described as a religious tradition composed of denominations which "share certain religious beliefs (such as the conviction that personal acceptance of Jesus Christ is the only way to salvation), practices (such as an emphasis on bringing other people to the faith) and origins (including separatist movements against established religious institutions)." Other related terms include 'born-again' or 'evangelical' Christians. Pew Forum on Religion and Public Life *U.S. Religious Landscapes Survey* 13 (2008), available at <http://religions.pewforum.org/pdf/report-religious-landscape-study-full.pdf> (last visited Aug. 6 2014).

¹⁰² J.D. Unnever & F.T. Cullen, *Christian Fundamentalism and Support for Capital Punishment*, 43 J. RESEARCH IN CRIME & DELINQUENCY 169-97 (2006).

IV: ANALYSIS AND CONCLUSION

A. DO MERCY AND CRUELTY SHARE THE SAME DINNER TABLE OR IS BLIND TRADITION THE MAIN COURSE?

The circumstance of a last meal, then, begs Hamlet's old question of whether we must be "cruel only to be kind."¹⁰³ Is the last meal part of a tough love approach to the procedures surrounding the modern day death penalty? Is it cruelty disguised as a gift? Maybe it's just a last sentiment of kindness from the State, the guards, and the wardens, or perhaps no one really knows and it is merely continued as blind tradition sustained not by thoughtful understanding, but only by a vestigial sense of obligation. Regardless of whether this ritual is considered as a form of cruelty, of mercy, or as a relic, it is only by seeking an answer to the question of why we continue to provide last meals that we can understand what exactly the state of Texas has abolished; why the last meal is important; and where it came from to begin with.

i. Cruelty

Is the last meal purely a tool wielded by the State for knowledge, voyeuristic pleasure, or perhaps communal punishment? Once an individual is ensnared in the penitentiary system, it has been argued; they become models for the internalization of the law, individuals of constant scrutiny, and are subjected to never ending surveillance.¹⁰⁴ Is the last meal, this so-called last opportunity for a prisoner to control his or her own human behavior, really just one last chance for the State and the public at large to scrutinize them, judge them, or probe them?

Gordon compares the last meal to Shylock's treatment in Shakespeare's *Merchant of Venice*, explaining that "the last meal comes at great cost. The price of the last supper for the prisoner is a radical loss of personhood and privacy, a weird reduction of the individual for posterity to his/her last meal."¹⁰⁵ Many last meals requested by the condemned are composed of foods that recall an inmate's pre-prison life—a childhood favorite or their mother's home cooking—and from this, an intimate detail about him or her is revealed, subsequently broadcasted to the public without regard to his or her privacy or human dignity.¹⁰⁶

The allegation that last meals are 'cruel' speaks to larger issues regarding the perversity of affording the condemned inmate any kindness whatsoever. The question is really whether an act of any sustaining kindness can have any meaning or reality in the context of a system where every component continually turns toward the moment of the recipient's death. Of course, those who reside on death row may be sustained by such kindnesses, so in human terms an interpretation of the last meal as inherently 'cruel' may be questionable: the simple spectacle of states with high execution rates which afford the greatest liberty in this last rite is perhaps instructive as to the very great importance of such acts in the final moments of an inmate's life. Nevertheless, the question of cruelty may arise again in the context

¹⁰³ WILLIAM SHAKESPEARE, *HAMLET*, Act 3, Scene 4, Page 8.

¹⁰⁴ Gordon, *supra* note 26, at 9.

¹⁰⁵ *Id.* at 10.

¹⁰⁶ See e.g., Stein, *supra* note 24.

of actions taken to remove the entitlement to a special meal during an inmate's final hours. May a state, having elected to kill a man, reduce that act into a simple performance of euthanasia, devoid of all emotion or humanity?¹⁰⁷ Whether as a structured act of degradation or a withdrawal of a treasured privilege, there is plenty of evidence to suggest last meals are acts of implicit cruelty.

In light of this continuing debate over this ritual's cruelty, or kindness, the history behind the last meal shows evidence of an extremely grim past. One of the most disturbing examples emanates from the witch trials that swept across the county and the world in the nineteenth century. Once a woman was convicted of practicing witchcraft she was normally sentenced to burn at the stake. However, before her execution, she would be served a considerable amount of alcohol. Unfortunately, this drink was not to calm the condemned woman's nerves, but rather, it was generally thought that the alcohol would make her burn more rapidly.¹⁰⁸

While the example above is almost a blatant cruelty, is the last meal just a mechanism or an attempt to make the execution of a human seem gentler? It has been argued that the last meal merely emphasizes the 'softer side' of society—"just before they break your neck."¹⁰⁹

ii. Guilt

Perhaps, as suggested by one analyst, we feed the condemned not because of their own wrongs but rather because we ourselves are guilty as well.¹¹⁰ We use the last meal not as a gift, therefore, but rather as a tool to repress our own guilt spurred from participating in a state sanctioned killing.¹¹¹ Conversely, to suppress or cast doubt on our own guilt, we provide these last meals to the condemned in order to move the spotlight from ourselves and onto someone else who we've deemed more deserving of it. Additionally, it's quite possible that the wardens and death row personnel use the last meal to help them cope with and overcome their reluctance to kill or the potential guilt which might stem from that killing – for being a part of an execution team is, psychologically, a difficult task.¹¹² As the findings in Section Three show, the Southern States of the United States seem to have more generous protocols concerning the last meal, but should we take the notion of 'generosity' at face value? While the size of the meals provided to prisoners and the variety of food allowed might seem large, is it all just for the prisoners; or rather, as previously mentioned, is it to help with the coping of prison officials? If so, should we really consider the meal as a 'kind' gesture when the desired consequence is not to calm the nerves of the condemned but rather the nerves of the living?

¹⁰⁷ For the euthanasia analogy, see Meyer, *supra* note 21.

¹⁰⁸ Bigert & Bergström, *supra* note 10.

¹⁰⁹ *Id.*

¹¹⁰ See Stein, *supra* note 24.

¹¹¹ *Id.*

¹¹² Cynthia F. Adcock, *The Collateral Anti-Therapeutic Effects of the Death Penalty*, 11 FLA. COASTAL L. REV. 294, 314 (2009) (quoting Robert Jay Lifton, co-author of ROBERT JAY LIFTON & GREG MITCHELL, WHO OWNS DEATH? CAPITAL PUNISHMENT, THE AMERICAN CONSCIENCE, AND THE END OF EXECUTIONS (2002)).

At least in America, there has been a progression towards a dehumanized capital punishment; we've attempted to make this system painless, those who work for it passive, and the inmate pacified.¹¹³ Is the last meal just another attempt to make the process easier? Lawrence Hayes, a former death row inmate, spoke about the last meal in a recent interview and stated (concerning a modern and historical analysis of the ritual)

Last meals are a gimmick to make people feel better about execution....When I first thought about the issue, I thought, 'Ok, this is an act of humanity, of benevolence.' But when I started studying it, I realized it was created to ease the conscience of the executioner.¹¹⁴

Hayes, when asked if he would have accepted a last meal if still on death row, simply replied "no." To him, it was a contradictory and ambivalent gesture – using a meaningful and good thing, like the comfort of food and family, to make a bad thing, like execution, "not so bad."¹¹⁵ So arguably correctional officials, society, and its executioners use the last meal to force the condemned to accept their fate. By partaking in this ritual, the prisoner, by eating or being forced to order the meal, accepts the execution that they surely know awaits them.¹¹⁶ In fact, many of the convicted, whose guilt was called into question after their execution, chose not to eat the meal served to them.¹¹⁷ These perspectives, while sometimes seen as centered on forgiveness, mercy, or kindness, are not to help the condemned but rather, are based on the need or fascination of someone else – namely the personnel in charge, the State, or the public.

iii. Mercy

Last, perhaps the meal is offered out of kindness, generosity, and mercy. While the State considers these offenders to be morally irrelevant, unpredictable and incapable of any sort of change, it still offers this gesture in the offender's last moments of life.¹¹⁸ In keeping in line with Meyer's notion of 'retributive ritualism,' the states with large execution rates just might be those that are the most invested in the last meal ritual and the meanings behind it.¹¹⁹ From our statistical findings, it can be inferred that states with the greatest experience in executions may have developed a more profound appreciation for the difference between executions and exterminations.

While in prison, an individual loses all forms of control. Prisoners must adapt to prison food, meal times, wake up times, bed times, where they can go, who they

¹¹³ Meyer, *supra* note 21.

¹¹⁴ Interview with THE HUFFINGTON POST on Aug., 8, 2012, available at http://www.huffingtonpost.com/2012/08/21/last-meals-on-death-row_n_1814369.html (last visited Aug. 6 2014).

¹¹⁵ *Id.*

¹¹⁶ Bigert & Bergström, *supra* note 10.

¹¹⁷ *Id.*

¹¹⁸ LaChance, *supra* note 34, at 702-03, 711.

¹¹⁹ Meyer, *supra* note 21.

can talk to, and anything in between.¹²⁰ The lives of an American inmate are controlled by every second – these men and women are powerless in almost every regard to how they live their lives.¹²¹ To most Americans or individuals worldwide, food is central to religious beliefs, political power, economic security, and the like; once it's drastically minimized or controlled, a person's core beliefs can emphasize the powerlessness experienced while in prison.¹²² There is a unique loss of control over one's body, privacy, dietary habits, and autonomy and the last meal serves to return that one last choice, one last ounce of power, back to the prisoner.¹²³ This last choice might be the only thing left for a prisoner, "[j]ustice may not always be served because the innocent can be proved guilty and the guilty can be proved innocent. Choosing the last meal is a significant ritual because the accuracy and validity of this choice is the only answer one can ultimately accept."¹²⁴ So, while for many death row inmates it might be hard to accept the hand of cards they've been dealt, one thing that is acceptable is the final choice they were able to make for themselves. For it is inevitable that everyone will experience death, and food can bring calmness to the experience for all involved.

The last meal, while it can give a calming effect to an individual can also be a way for prisoners to assert one final time their political and religious beliefs – one final way for them to express, without a correctional system limitation, how they feel.¹²⁵ Perhaps it is this unawareness of what lies beyond death that attracts the voyeuristic fascination with the last meal and sparks the imagination and intrigue of popular culture.

iv. Blind Tradition

a. Historical Significance

Death, its finality, and our mortality terrify yet intrigue us. Because of this intrigue, this morbid fascination with after-life, we have, over time, created rituals and traditions concerning the dead and the condemned. In particular, last suppers have been in existence not only since our generation and the ones before, but more notably since the time of Jesus Christ and before. It has even been said that "the tradition of the last supper is traced to the belief in the eternal human soul, a soul that will be able to continue life in one way or another after the body is being dispersed." For even the people of the pre-Christian eras had rituals concerning the last meals of inmates or prisoners. Not only does the Christ's last supper resemble the tradition which we hold true to today but the Ancient Greeks also participated in similar offerings.¹²⁶ One would feed a last meal to prisoners so that they could pass over the River Styx into the Underworld—for if not fed, the executed might return to the living as a hungry ghost.¹²⁷

¹²⁰ Rachel Marie-Cane Williams, *Entering the Circle: The Praxis of Arts in Corrections*, 31 J. ARTS MGMT. L. & SOC'Y 293, 299 (2002).

¹²¹ See Brisman, *supra* note 51.

¹²² *Id.* at 51.

¹²³ *Id.* at 50-51.

¹²⁴ LAST MEALS PROJECT, available at www.lastmealsproject.com/pages.html.

¹²⁵ See LaChance, *supra* note 34, at 714-15 (2007).

¹²⁶ *Id.*

¹²⁷ *Id.*

As such, therefore, the last meal is a rite that locates present-day executions in a vast arc linking not only acts of criminal punishment but also noble acts of selfless sacrifice, defeat in battle, and even suicide. The conundrum occurs when one realizes that after decades of being treated mercilessly, a prisoner is given one last small concession: a last meal. In other words, why would (before this recent Lawrence Brewer debacle) a Governor like Rick Perry, who brags about being the governor with the most executions in modern times (275 as of April 27, 2014), show any sign of mercy towards the very end of a cruel process?¹²⁸ Do we even know why we still give this seemingly sacred rite? Even if one could make the argument that these men and women do not *deserve* a last meal – a last choice – they’ve nevertheless grown to expect it. It’s a tradition that almost everyone has heard of, a ritual of cultural significance allowing popular culture to express its imagination. However, by a State revoking it, the Correctional system has successfully constrained and curtailed this once religious, cultural, and historical ritual into nothingness.

b. Texas

What was it about Lawrence Brewer’s last meal request that sparked this exaggerated, swift, and destructive decision? Was it the fact that he ordered enough food to feed all of death row or rather, once served, he didn’t eat a bite of it? While it is unclear as to whether Mr. Brewer was given his exact request (it seems unlikely given the frequency with which the prison kitchen in Texas is known to alter requests based on what is available)¹²⁹; it is a factual surety that once served, Mr. Brewer refused the feast altogether. Of the 35 of the states which executed prisoners in 2010 just two northeastern states (Connecticut and Maryland) provided no special last meal. By joining this category, Texas is now a stark deviation to the findings provided in Section Three – namely that deep-south states are more generous in providing last meals to prisoners.

Perhaps the oddity is that most states prescribe last meal protocols via their respective Department of Corrections or through the Warden, however, in Texas, the extinction of the last meal came not from DOC or a Warden but rather from an elected legislator. A legislator isn’t politically invisible to the public as a commission or correction staff is; could it be that when politically accountable individuals partake in decisions concerning death row inmates the findings might very well be drastically different? Should this be a topic that legislators and governors consider, and if it is, would our findings look different?

Regardless of Texas’ reasoning behind disallowing a last meal to current death row inmates, Mr. Brewer’s request and actions, and the consequences resulting from it, will surely affect future prisoners. There are many prisoners, unlike Lawrence Brewer, who upon their final hours of life, kept their requests simple, selfless, or as close to non-existent as one can get. Inmates have been reported to

¹²⁸ Rick Perry on Death Penalty and ‘Ultimate Justice’ in Texas: ‘I’ve Never Struggled With That,’ HUFFINGTON POST ONLINE, http://www.huffingtonpost.com/2011/09/07/rick-perry-death-penalty-gop-debate_n_953214.html (last visited Aug. 6 2014).

¹²⁹ Price, *supra* note 12.

merely order a cup of coffee,¹³⁰ a bag of jolly ranchers,¹³¹ oatmeal and milk,¹³² fresh squeezed orange juice,¹³³ or just justice, equality, and world peace.¹³⁴

B. IF THE PHILOSOPHY IS KINDNESS, THE KEY IS CODIFICATION

If the philosophy that we are holding true to is kindness, or even some sort of blind tradition, then it seems logical to suggest that there should be some standard that we hold this tradition to. Currently, there is neither a recognized Constitutional right to a last meal, nor is there a nationally uniform administrative policy. While the standard, and the procedures that accompany the last meal range greatly from state to state, they are nonetheless important not only to the condemned but also to the wardens, families, religious advisors, and prison personnel involved in the executions.

To place this long marveled tradition on sturdy legs, it is the recommendation of these authors that states codify the right to a last meal. The scenario that took place in Texas is the perfect example to show just how easy it is to ban a practice that is not codified. Had Texas created a statute which gave prisoners a last meal, the entire legislature would have had to vote to remove it – not just one senator who became angry after receiving news of Lawrence Brewer’s behavior.

Obviously, another best case scenario would be for the United States to proclaim that the last meal is a constitutional right – disallowing states like Texas to ban it altogether. Although even with this scenario, the standards and contours of that right would still be largely in the hands of the States.

However, considering the other side of this codification coin, would involving the legislatures of the states do more harm than good? As we have seen in Texas, once the politically involved become an integral part of the decision making process concerning the last meal, the protocols or lack thereof could change drastically with little or no oversight.

There are others, though, who believe the last meal has been imbued with more meaning than is appropriate.¹³⁵ Why bicker about SpaghettiOs or pecan pie when life is at stake? In the shadow of an execution, does this tradition actually matter? We acknowledge the truth of greater needs amidst the machinery of death,

¹³⁰ 9 LAST MEALS PROJECT, www.lastmealsproject.com. This was the last meal request of Aileen Carol Wuornos. She was executed in the State of Florida at 9:47 A.M. on October 9, 2002.

¹³¹ *Id.* at 10. An assorted bag of Jolly Ranchers was the last request of Gerald Lee Mitchell who was executed on October 22, 2001 by the State of Texas.

¹³² *Id.* at 3. Stanley “Tookie” Williams requested just oatmeal and a cup of milk before being executed on December 13, 2005 in California.

¹³³ *Id.* at 6. Nothing extravagant was requested by John R. Thompson when he asked for a cup of fresh squeezed orange juice on July 8, 1987 when he was executed by the State of Texas.

¹³⁴ *Id.* at 13. The most unselfish of all requests (which now cannot be made under the last meal rite) was by Odell Barnes Jr. who requested, simply and selflessly, “justice, equality, world peace.” He was executed on March 1, 2000 by the State of Texas.

¹³⁵ “If the last meal process has been abused, then maybe it warrants changing, but there are a lot more serious abuses that have gone on in terms of lack of due process in Texas. Inmates would much prefer a last lawyer to a last meal.” Richard Dieter, DPIC (www.dpic.org); *see also* Fernandez, *supra* note 4, at A17.

Cold (Comfort?) Food

but also have learned of the comfort offered by this tradition amidst the emotional pain for all involved. Put another way, “[k]illing people is a morally messy business. Whether we allow a man carte blanche with junk food menus ... or we simply serve him that day’s fried chicken ... the act is, in essence, the same.”¹³⁶ For us, however, exploring this strand of the tapestry has revealed even more about the needless difficulty and arbitrary choices accompanying legal executions in the United States.

¹³⁶ Tony Karon, *Why We’re Fascinated by Death Row Cuisine*, TIME (Aug. 10, 2000); see also Earl F. Martin, *Masking the Evil of Capital Punishment*, 10 VA. J. SOC. POL’Y & L. 179, 213 (2002) (“[T]here are other more subtle means by which the American public hides the evil of capital punishment from itself in an effort to salve its collective conscience. Specifically, through the bureaucratization of executions, the inclusion of lawyers and medical doctors within the system, and the employment of religious themes and activities in connection with the sanction, society manages to push the evil that is inherent in capital punishment either out of view or, at least, to a place of minor significance, in weighting the pros and cons of the sanction.”).