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The Ethics of Capital Punishment and a Law of Affective Enchantment

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Abstract
This paper re-reads American Appellate and Supreme Court rulings about the constitutionality of execution by electrocution from the perspective of new materialism. Using the case of Provenzano v. Moore, this paper highlights how the existing jurisprudence develops a notion of cruelty that deliberately avoids the sensual and affective dimensions of punishment. Given the profoundly corporeal nature of punishment and even more so capital punishment, any consideration of the ethics of punitive practice must meaningfully engage with the body, its situatedness, and its material networks, all of which enact punishment as a social phenomenon. Employing Jane Bennett’s ethics of affective enchantment, grounded in the ethico-onto-epistemology of new materialist thinkers, this paper critiques the majority opinion in Provenzano by demonstrating how it feeds into modern disenchantment. It then draws on Provenzano’s landmark dissent to show how ethical practice stems from deliberately opening oneself up to the wonderment of an entangled world produced through the acknowledgement of nonhuman selves and plastic bodies. This has the potential to generate an understanding of ‘humane’ punishment that better, and more meaningfully accounts for how human beings relate to and engage with the world around them.

Keywords
affectivity, affective punishment, capital punishment, intra-activity, modern disenchantment, new materialism, onto-epistemology, vibrant matter
Introduction

The death penalty in the United States has been under attack for decades now. Throughout its history, state governments have adopted varying modes of execution, justifying each on the basis that it provided a more civilised and humane method of putting inmates to death (Sarat, 2016). At the end of the nineteenth century, execution by hanging was replaced with the electric chair, making the United States the first and only country in the world to electrocute prisoners. Though several American states have declared electrocution unconstitutional, many others have stymied constitutional challenges either by eliminating electrocution as the sole or primary mode of state punishment, or by altogether replacing it with lethal injection. In states that have not yet declared electrocution unconstitutional under the Eighth Amendment, the threat of drug shortages and a general loss of confidence in the lethal injection protocols has made it so that the electric chair is threatening a comeback (Barnes, 2018). In fact, under the Trump administration, plans were underway to revive both the electric chair and gas chamber in these states (Fuchs, 2020). It is timely, then, to consider the ethical implications of execution by electrocution and, perhaps, to draw some insights from these debates to speak about the ethics of capital punishment more broadly.

This paper advances a new materialist critique of capital punishment. Its arguments are grounded in the view that the death penalty attracts criticism, at least partly, because existing legal accounts which consider the cruelty of state-instituted death, deny, denigrate, and minimise the sensual and affective dimensions of punishment. Many rights advocates and criminologists have written about this neglect in terms of the condemned inmate’s experiences (Harrison and Tamony, 2010; Johnson, 1979, 2016; Vogelman, 1989), but apart from studies about its deterrent effects (Abernethy, 1995; Zimmerman, 2006), very little academic attention has been paid to the affective qualities of capital punishment as it relates to the wider public. How punitive processes engage the bodies of those who bear witness to its practice has relevance for whether the death penalty is seen as a legitimate exercise of legal power. And, for this reason, death penalty abolitionists and advocates alike, report feeling alienated by legal decision-making that does not account for sensual experience (Baniel-Stark, 2014; Lynch, 2000).

According to Max Weber, these feelings of politico-legal estrangement are symptomatic of a modern world, in which empirical knowledge and understanding are treated as distinct and superior to ideals, values, and beliefs. Modernity, he opines, brings about a state of human disaffection (Weber, 1919). In the kind of calculable world theorised by modernism, a world divested of mystery or ‘magic’ (Entzauberung), there is an expectation that scientific reasoning and empirical knowledge is capable of explaining nature’s workings; that nature or the physical world is stable and, for this reason, provides us with the necessary grounding for ethical decision-making. Questions about how we should act become dependent on what science reveals to us about how the world operates. Modernist empiricism lends itself to an understanding of the body that is simultaneously neutral and selfish. The body is seen as a neutral tool for acquiring knowledge about the world in which it is embedded (i.e. sensory knowledge), but its ability to assess and use that knowledge is always treated as partial and self-interested (i.e. perceptual knowledge). In a modern world, when science fails us, when the material world we are told is
passive and calculable, takes unpredictable and inexplicable courses of action, it is easy to become disenchanted. If neither scientific knowledge nor perceptual experience can be trusted, to what can we turn to as the basis of ethical practice?

This paper explores this ‘disenchantment of modernity’ through an analysis of legal judgements about the constitutionality of execution by electrocution. The Eighth Amendment jurisprudence in this area has been clear that scientific innovation has been critical to developing more humane forms of judicial killing, such that contemporary modes of execution are relatively less painful and more expedient than methods used in the past. Yet, the sheer number of executions that continue to take place amidst ‘gruesome spectacles’ of violence, have left many Americans unconvinced about the ethics of putting prisoners to death. On what basis can we determine the acceptability of a mode of killing that continuously defies the science underlying its enactment and exposes witnessing-bodies to contexts that do not feel right? Following Weber’s Entzauberung thesis, one could argue that a (modern) law that examines the ethics of punitive practice, without accounting for the body, ultimately risks alienating its subjects. Indeed, some critical legal theorists have argued that this is precisely what makes legal rulings so effective (Nirta, 2020; Philippopoulos-Mihalopoulos, 2013). It is for this reason that the current paper deems it necessary to draw attention to the visual, olfactory, auditory dimensions of judicial electrocutions. The moments that perhaps make us most uncomfortable, but also most amenable to critically reassessing the practice of capital punishment.

Drawing on Jane Bennett’s theory of affective enchantment, itself inspired by the Weberian concept of Entzauberung and rooted in new materialist visions of subjectivity, this paper shows how existing Eighth Amendment jurisprudence privileges a rational, calculable view of the world, how this divests the execution process of its indeterminacy and singularity (its ‘magic’) and why this causes us to become disenchanted with the punitive process. Approaching the topic from the unique and innovative perspective of material relations, this paper examines how social phenomena, like punishment, are materially enacted through interactions between human and nonhuman bodies, forces, and energies, how these assemblages exercise agency, and why these relationships should be of ethical concern, particularly in the context of legal decision-making.

In the first section of the paper, I consider Bennett’s theory of affective enchantment and its new materialist roots. I explain what I believe is the value of her theory of enchanted materialism to debates about the ethics of execution by electrocution, and the death penalty more broadly. In the second part of the paper, I turn to the Eighth Amendment challenge invoked in the Supreme Court of Florida case, Provenzano v. Moore. Here I trace the genealogy of the majority opinion, bringing to light how the historical rulings on which it relies, progressively disenchant. Finally, in the third section of the paper I turn to the ground-breaking dissent in Provenzano to show how an affective disposition towards ethico-political life can help mitigate the effects of modern disenchantment. The dissent in Provenzano is a good (but by no means perfect) example of how we can employ a materialist ontology to re-evaluate the (un) acceptability of judicial electrocution and capital punishment more broadly. I explain how affective enchantment engenders, using Bennett’s terminology, the greatest
degree of ‘presumptive generosity’ towards (both human and nonhuman) participants in the punitive process and why this should be considered ideal ethical practice.

**Affective Enchantment as Ethical Practice**

Bennett’s theory of affective enchantment draws inspiration from new materialist social theory. Based on a philosophy of immanence, new materialism adopts an ethical stance that is critical of both scientific empiricism, for its conflation of replicable data with the ‘the facticity of the natural order’ (Kirby, 2018), as well as Kantian transcendentalism, for its anthropocentric privileging of an a priori rationalism that positions humans at the centre of its philosophy (Braidotti, 2015). For new materialists, both perspectives support the kind of substance dualism advocated by Descartes, according to which the mind is the incorporeal, privileged site of decision-making, all the while the body and its modalities of interaction are derided and minimised.

As many critical legal theorists have rightly pointed out, this disparagement of the body and sensual relations also plagues positivist legal practice and discourse (Bently and Flynn, 1996; Pavoni et al., 2018; Philipopoulous-Mihalopoulos, 2013), much of which relies on a transcendental understanding of the human subject and a modernist vision of the world. Basing itself in the realm of the rational and empirical, positive law, for the most part, eschews the body, corporeality, and sensoriality as legitimate sources of legal knowledge. According to Nirta, for law to present itself in this way is deceptive on two fronts. First, positivist law, she writes, ‘manages to fool us by allowing us to think that we own our senses in full phenomenological immersion’ (Nirta, 2020: 6) and conceals from us the myriad ways in which law exercises its power by controlling our sensory perception of the world (Haldar, 1996; Philipopoulous-Mihalopoulos, 2013). Second, by ‘associat[ing] itself purely with reason’, law also deceives us as to the extent to which it, itself, has a sense, and privileges certain ways of sensing the world (Haldar, 1996; Hibbitts, 1994) by treating its revelations as ‘matters-of-fact’, impervious to external critique (Stern, 1996).

Placing matter and material relations at the centre of their philosophy, new materialists look to expose how the social world is enacted through a rich and complex entanglement between matter, bodies, and ideas (Coole and Frost, 2010), producing what authors like Barad refer to as a ‘material-discursive’ world (Barad, 2007: 132–188). In their view, when our systems of knowledge apportion the world into one that is ‘natural’ and another that is ‘social’, a world that is governed by reason and another governed by passions, there is a tendency to overlook how deeply implicated humans are in the enactment of the very ‘natural’ objects and phenomena of their inquiry (Barad, 2007: 147–148; Kirby, 2018; Mol, 2002).3 The sheer density, or ‘viscosity’ (Tuana, 2008), of these various exchanges between bodies, ideas, and things make it so that it becomes virtually impossible, borderline unethical, to treat the cultural sources of their emergence as separable from the material and/or environmental.

Accordingly, for new materialists the cosmos unfolds through microlevel interactions (or ‘intra-actions’) and combinations between human and nonhuman matter (Barad, 2007; Delanda, 2016), though many of these relationships may not seem relevant in a modern world which generally treats matter as passively ‘lying there’ awaiting discovery
(Barad, 2003; Mol, 2002). For this reason, much of new materialist critique is directed at exposing the ways in which the things, materials, and forces that we treat as the inert, passive ‘stuff’ of the world, possess a vitality or vibrancy; the capacity to do things and make things happen without human input, and sometimes contrary to human design. Some of this work even brings to light how the nonhuman world also has the potential to shape the contents of human minds – our thoughts, feelings, and even our will to act (Ahmed, 2010, 2014). Accordingly, some new materialists have argued that even cognition and emotion can be theorised as material enactments (Bennett, 2001: 83), and have used the term ‘affect’ to refer to this relationship between the material/sensual and cognitive world (Massumi, 2002: 28).

Sometimes described as the state or set of events that exist between sensation and perception, a pre-cognitive ‘visceral perception’ (Zajonc, 2009), affect describes how the intensities of the world are processed and felt by the body and how what is felt ‘diminish[es] and augment[s]’ the body’s ‘capacity to act’ (Clough, 2008: 1). For this reason affect is perceived as ‘integral to the body’s perceptual becoming …’; it is how the body relates to, is compos[ed] through’, the forces of material encounter (Gregg et al., 2010: 3; Philippopoulos-Mihalopoulos, 2015). Since material systems have a persisting potential to ‘affect’ (and be ‘affected’ by) their constituting bodies and elements, they are often described as possessing a liveliness or ‘vibrancy’. Bennett refers to the capacity of material systems to shape human action (or inaction) as its ‘thing-power’. In Vibrant Matter, she argues that the thing-power of matter plays an essential role in the bringing about of social and political phenomena, often without our conscious awareness, and frequently in defiance of our own intentions and desires (2010). As we will see, this paper alludes to the ‘thing-power’ of (amongst other things) corpses, photographic images and electrical currents in bringing about the social phenomenon of punishment.

Indeed, these imbrications which make the world a place of endless possibility, also render it indeterminable in human terms. When the world possesses unceasing potential, where any combination of bodies, agencies, ideas could give rise to an infinite number of unexpected and new phenomena, not only are potential outcomes difficult to discover, but become unthinkable (Bennett, 2001: 102). There are things that human beings simply cannot know given the physical limitations of our bodies. These limitations serve to preserve the ‘magic’ of the world’s workings.

Drawing on Weber’s idea of the Entzaubierung, Bennett argues that rationalism and its treatment of the material world as passive, its belief that the world exists for humans, and that it can be discovered and known with greater and greater precision, divests the world of the ‘magic’ or sense of wonder that an immeasurable and indeterminable world possesses.

A rationalising culture encourages a particular style of thinking – the kind used in mathematics and scientific experimentation (that, unlike magic, ‘is a means of reliably controlling experience’). One interesting implication of this habit of mind is the emergence, or at least enhanced salience, of an ‘in principle’ realm of existence. One learns to relate to things by seizing upon their structure or logic, on the principle of their organisation than, say, by discerning their inherent meaning as part of a cosmos or by engaging their sensuous appeal in a world alive with animate bodies large and small (2001: 58–59).
For Bennett, a philosophy that tells us that everything can be explained, reasoned, attributed to some scientifically identifiable source, everything has a cause that precludes us, vacates the world of its allure and mystery; it disillusions us. We come to see the natural world that invades our senses as inevitable and, as a result, ourselves as powerless to change it. Instead, we become preoccupied with measuring the value of things and practices by resorting to a detached ‘cold-eyed instrumentalism’, where feeling and emotion are perceived as clouding reasoned decision-making. The world becomes meaningless. ‘In a disenchanted world, the principle of calculability tends to overrule, even if it does not always overpower, experience’ (Bennett, 2001: 59).

This paper mobilises these ideas to speak about the social phenomenon of punishment and precisely how and why the existing jurisprudence (and the rational worldview it employs) disenchant us. How do we reconcile a law that claims to rely on a science which promises an imperceptible and tranquil death, with the forms of spectacular punishment in which death does not evade, but engages our bodies in its unsettling sights, smells, and sounds? It is not entirely surprising that people become disenchanted by legal decision-making that relies on a science that is frequently proven inaccurate, all-the-while treating sensual experience as political, subjective, and legally irrelevant.

While Western rationalism has always treated the sensual world as neutral matters-of-fact, many social theorists have long argued that sensory perception is deeply ‘permeated with social values’ (Howes, 2021: 3) and assists us in structuring the cosmos and defining our place within it. Think for instance about how deeply implicated our sense of smell and sound is to the perception of (moral/political/legal) order, or an awareness of privilege and wealth (Low, 2006), and how this sensory knowledge influences our actions, behaviours, and emotions (e.g. to feel disgust or avoid contact with the source of sounds and smells we find unpleasant). In recognising that these ‘crossings’ between our bodies and the natural world has relevance and significance to the ordering of social relations and political/legal/moral decision-making is to restore the modern world with some of its lost ‘magic’ or allure. Bennett uses the term ‘enchantment’ to describe this kind of ‘interactive fascination’ with the world (2001: 5):

To be enchanted is to be both charmed and disturbed: charmed by a fascinating repetition of sounds or images, disturbed to find that, although your sense-perception has become intensified, your background sense of order has flown out the door (Bennett, 2001: 34).

To be enchanted is to recognise that the world is lively, that ‘matter is not dead at all’ (Bennett, 2001: 81) and possesses an ability to ‘make a difference in the world’ (2001: 163), and that through our material engagement with it, we are part of the world’s perceptual becoming. Enchantment ‘is a state of openness to the disturbing-captivating elements in everyday experience’ (2001: 131) – elements that defy the logic and order of our systems of knowledge – and to see those disturbances as constitutive of the self. Enchantment thus discloses the human’s own potential for metamorphosis (Braidotti, 2011). The ‘magic’ of matter ‘resides in [its] mobility, that is, [its] capacity to travel, fly, or transform [itself]; in [its] morphing transits … Metamorphing creatures enact the very possibility of change; their presence carries with it the trace of dangerous, but also exciting and exhilarating, migrations’ (Bennett, 2001: 17). Affective engagement
is how we expose ourselves (through our bodies) to a world full of unexpected and marvellous possibility, revealing our own contingency and open-endedness. We are enchanted by the freedom, Bennett believes, that is brought on by the ‘pleasure of bodily mobility’ (2001: 18).

It is important here to make the point that the material world that Bennett imagines, a world that is ontologically open-ended, is not one that is entirely random (though she does emphasise that it is not teleological) (2001: 11). It has an order that often repeats itself. There are some ensembles, some kinds of ‘crossings’, given the composition of their constituting elements, that emerge time and time again (Bennett, 2001: 126–127). Using Deleuze’s distinction between bare and spiral repetition (Deleuze, 1994), Bennett explains how, in nature, even phenomena that resemble each other are still, to some extent, singular because their constituting molecules possess an ever-present potential to swerve. Even the smallest ‘shift in the parameters of their existence’ can cause entirely new phenomena to emerge (2001: 101).

For our purposes here, in considering the ethics of judicial electrocutions, this is important. Material interactions that take place under the same set of execution protocols may – in a controlled environment at complete equilibrium – yield the same, unremarkable results. A quiet, odourless, unspectacular death. But the natural world is not a self-enclosed laboratory. Consequently, for judges to base their analysis of electrocution’s constitutionality on what happens (or should happen) under controlled experimental conditions is problematic, for even the tiniest change in variables – the material composition of the sponge being used to lower the body’s resistance to the electrical current, or an irregularity in the inmate’s blood pressure) – could give rise to an electrical death of a very different kind. Each repetition, therefore, is singular and unique because its constituting elements can form new (indeterminable) combinations or assemblages. These ‘swerves’ manifest as mutations in the ‘natural order’ of things, and can give rise to electrified bodies that convulse and stink, ignite and howl. Thus, an ordered world does not mean a static world, and these moments of disorder, as Bennett explains, are worthy of our attention. Crossings and mutations both charm and disturb us because they bring to light ‘a certain wilfulness or at least quirkiness or mobility’ that is ‘dispersed throughout the universe as an attribute of all things, human or otherwise’ (2001: 100).

Finally, Bennett’s ethics of enchanted materialism encourages, in her words, a ‘stance of presumptive generosity … rendering oneself more open to the surprise of other selves and bodies and more willing to enter into productive assemblages with them’ (2001: 131). Enchanted materialism, with its focus on affective engagement, recognises how human-nonhuman assemblages (and not just human bodies) are productive of agency. Here she borrows heavily from Epicurean philosophy, which is based in the idea that the world, neither fatalistic nor divinely ordained, possesses vitality. Enchantment as ethical practice requires taking into consideration these cross-dependencies between the human and nonhuman world. This deep entanglement between all matter imposes upon each of us a responsibility, given that ‘multispecies human and nonhuman ways of living and dying’ are at risk in our every practice (Haraway, 2008).

So let us now turn to the issue of execution by electrocution, first to see how the existing jurisprudence contributes to this so-called ‘disenchantment of modernity’ which, I believe, threatens the long-term legitimacy of the death penalty, and then to think
about how a turn to sensuality and affectivity may restore the world’s lost magic and, perhaps, leave us feeling a little less estranged from the legal systems we have vested with the power to define (and refine) ethical practice.

**Electrical Death, Legal Disenchantment and Provenzano**

The case of Provenzano (1999) was preceded by a long list of Eighth Amendment challenges against electrocution, starting almost a century earlier with Kemmler (1890). Since Kemmler, the United States Supreme Court has never undertaken a ‘method of execution’ analysis, leaving it up to the individual State legislatures to determine how to execute their inmates (Nelson v. Campbell 541 U.S. 637 [2004]; Glass v. Louisiana 471 U.S. 1084, 105 S.Ct. [1985]). The Kemmler standard is thus established precedent and based on this ruling, electrocution has never been declared unconstitutional under the Federal Eighth Amendment clause.4

Given that William Kemmler was the first inmate to be sentenced to death by electric chair, the Supreme Court had the difficult task of defining whether electrocution constituted ‘cruel’ punishment in the abstract. Apart from experiments in which animals were electrocuted (Beichman, 1963), and the testimony of medico-legal professionals and scientists who had designed the electric chair and/or the electrocution protocols (including Thomas Edison himself), the Courts possessed no other reliable data about the implications of applying electricity to human bodies (Hughes, 1958). The hope was that the electric chair, in comparison to the gallows and gas chamber, would bring about an instantaneous and unremarkable death.

For the above reasons, the Court in Kemmler ruled that electrical death would be cruel only if the petitioning party could provide irrefutable evidence that it was scientifically impossible to generate a force of electricity that was powerful enough to ‘kill any human subject with celerity and certainty’ (at 443). The Courts treated scientific data that showed that electricity could be precisely measured and administered in certain, very controlled environments, as evidencing the fact that it could be controlled and administered in any environment, including the death chamber. Electrical death was imagined as both determinable and replicable.

While Kemmler’s counsel presented substantial research to suggest that electricity caused death only after the infliction of grave pain and suffering, the Court read this alongside the State’s countering evidence from electrocution survivors who reported that being struck by electricity was a painless experience. The Court accepted that if being accidentally electrocuted was not painful to those who had survived the experience, it must also not be painful for those who perish from it, never mind that the degree of electrical force needed to generate death was likely to be a great deal higher and the conditions under which judicial electrocutions take place may have some (if not significant) bearing on the pain and suffering experienced by inmates. For example, there is research which suggests that conditions of restraint, loneliness, dehumanisation, long-term immobility and lack of stimulation are not only likely to cause prolonged feelings of psychological suffering in inmates but may also, interestingly, increase their physical sensitivity to pain (Garland, 2012). While in many post-Kemmler cases the Courts have written-off the inmate’s pre-execution suffering as a natural and inevitable response to one’s
imminent death and have ruled that the constitutionality of a mode of punishment should only focus on the direct means by which death is inflicted (Francis v. Resweber 329 U.S. 459 [1947]), the research cited above suggests that the Court’s definition of human death is remarkably narrow. Legal conceptions of death treat bodies as if they go from being alive to dead, subjects to objects, human to nonhuman naturally and instantaneously. Definitions of death that focus primarily on the biological or physical state of the body have the potential to elide a whole range of affects that have meaning and significance for those experience and witness an execution. This has relevance for how we assess the ethics of capital punishment. I return to this discussion a little later in my critique of Provenzano.

But there are other issues with the Kemmler ruling as well, and which come out far more clearly in later judgements. There is a sense in the Court’s ruling that it is not electricity that is cruel, but electrocution, the human application of electricity to flesheled bodies. And while this may appear a frivolous point to make, it has a significant bearing on the continued legitimacy of electrical death as a form of punishment. In a whole cluster of post-Kemmler cases, when confronted with electrocutions that did not proceed to plan, Appellate and Supreme Court judges sought out evidence of human error to prove that these instances were exceptional and rectifiable. Everyone from the prison guard who either used the inappropriate type of sponge or applied it incorrectly, the operators who failed to connect the electric chair’s cables properly (Thomas v. Jones 742 F. Supp. 598 [S.D. Ala. 1990]), and even inmates who allowed themselves to become unacceptably obese (Denno, 1993) were considered responsible for the spectacular deaths that came about. In the law’s view, each of these examples fell short of electrical death that was, according to the Kemmler standard, ‘scientifically applied’.

However, in saying that only human agents possess the potential for cruelty, that actions and intentions (and not processes) are cruel, the Courts place a whole range of cases where neither human negligence nor wrongful intention could be identified, as being outside of the Court’s purview. In these instances the Courts have historically ruled that electrocutions do not breach the Eighth Amendment guarantee unless the pain and suffering they inflict is foreseeable. Unforeseeable events are simply natural accidents and the Courts have been clear that the law cannot be responsible for protecting people from ‘innocent misadventures’ (Francis v. Resweber [1947] at 465). For a Court that bases itself on a modernist worldview, this response is not entirely surprising. As Bennett writes, rationalising discourses treat the material world as if it ‘repeat[s] more or less familiar patterns, that matter arranges itself, and lends itself to an arrangement’ (2001: 100). As a result, when events transpire in a way that challenges this vision of matter as inert, acting in defiance of how we believe things exist, the tendency is to disregard these events as statistically insignificant. The Courts’ reasoning here disenchant precisely because, while it treats electrocution’s spectacular violence as irrelevant to legal considerations of its acceptability, for many Americans there is something about these spectacles that nevertheless feels unethical. This disconnect between legal reasoning and individual affective engagement was palpable in Jones, for instance, when the Trial Court attempted to correct witnesses as to the source of an offensive odour during an electrocution, explaining that it was not burnt flesh but a charred sponge that was its cause (at 79). Did the Court believe that in explaining the source of the odour
it could somehow override the actual pungency and violence with which the odour assaulted witnessing bodies and shaped their moral understanding of the punitive process? This dissonance between how human bodies engage with the spectacle of electrical death, and the meaning and significance (or lack thereof) that the law ascribes to these engagements, has consequences for the perceived legitimacy of the death penalty. Using Bennett’s logic, should the ‘fanciful quality’ of these electrical deaths, ones that cannot be explained or sourced to human agency, ‘disqualify [them] as a picture of nature worthy of modern [i.e. legal] consideration’ (2001: 100), ‘particularly given their powerful sensual affects?’

I turn now to the case of Provenzano [Fla. 1999] which, for the most part, draws on the visions of cruelty and electrical death adopted by the Courts from Kemmler onwards. In this case, the petitioner filed for a stay of execution with the Florida Supreme Court, citing the recent violent and horrific electrocution of fellow inmate, Allen Lee Davis, as evidence of electrocution’s inherent cruelty. The Court responded to Provenzano’s petition for a writ of habeas corpus by remanding his case to the Circuit Court to hold an evidentiary hearing on the constitutionality of the electric chair. During this hearing, graphic photographic and medical evidence was presented by the petitioning counsel, who argued that Davis’ execution was cruel because the injuries sustained by the inmate suggested that the process was painful, the equipment was ill-maintained and likely to malfunction, and that there was a real possibility that the protocols were being insufficiently followed by prison officials (at 415). In short, Davis’ electrocution affirmed that electrical death, using the Kemmler standard, was neither swift nor certain, breached the evolving standards of decency established in Trop [1958], and resembled punishment that was likely to cause the inmate wanton pain and violence as set out in Glass [1985].

In response, the Circuit Court’s findings indicated that the electric chair had functioned as designed and intended, and the prison officials responsible for administering the fatal current had acted in accordance with the devised protocols. While it accepted that the restraints used as part of the electrocution protocol may have been partly responsible for Davis’ painful injuries, they concluded that these were separate to the actual ‘operation of the electric chair’, did not occur as a result of the current being applied, and thus their effects were immaterial to determining the cruelty of this particular mode of execution. The Circuit Court concluded that Davis did not suffer from any ‘conscious pain’ while being electrocuted and underwent ‘instantaneous and painless death once the current was applied to him’ (emphasis added) (at 414).

Florida’s execution protocols state that judicial electrocutions should proceed by applying 2300 volts of electricity for eight seconds, followed by 1000 volts for twenty-two seconds, followed by another 2300 volts for a further eight seconds. During Davis’ electrocution, the electric chair’s chart recorder registered that 1500 volts of electricity were applied to his body for eight seconds, followed by 600 volts for twenty-two seconds, followed by a further 1500 volts for four and half seconds (Clark County Prosecuting Attorney, 1999). In determining whether this variation meant that the protocols were insufficiently followed, the Circuit Court found that such discrepancies were not indicative of a malfunction with the electric chair or the execution process because voltage and amperage levels my fluctuate based on the inmate’s own body resistance
or size. In their view, these fluctuations were irrelevant to determining whether the process could be considered cruel.

Calculating body resistance is an extremely complicated exercise. While mathematically represented through the equation $I = \frac{V}{R}$ (current in amperes is equal to the voltage applied divided by the resistance offered up by the conductor), this calculation is only considered valid for conductors that remain internally uniform across their entire length. Calculating the resistance of human bodies, heterogenous in their makeup, where there is a difference in vertical and horizontal resistivity, and where the internal densities differ based on the presence of water, fat, muscle, bones, and organs, requires sophisticated three-dimensional modelling and many intricate calculations (Fish and Geddes, 2009). As some have noted, it is near impossible to calculate body resistance with the kind of precision that is required for a judicial electrocution (Re: Daryl Keith Holton [2007]). Body resistance that is calculated by measuring the length and diameter of the skull and leg is only valid for controlling the current that flows into and out of the body. Given the complexity of the body’s composition, it is virtually impossible to predict what happens to the current flow once it enters the body. The movement of the electrical current through the body, the multiple possible paths that it can take, the organs, fat, tissues, and bones that the current encounters, could make the difference between an electrocution that is imperceptible (and thus considered humane), and one that is sensationaly violent (and thus cruel). In essence then, the need for a higher voltage of fatal electricity depends on events that cannot be determined prior to the current being administered, at least not without sophisticated mathematical analysis, and even then, not with a high degree of precision. If the underlying rationale for establishing a set of protocols is, as the Courts have previously argued, to ensure that electrocutions bring about death with ‘celerity and certainty’, then these variations in the voltage and amperage levels suggest exactly the opposite. In a sense, these fluctuations speak to the current’s ‘thing power’ in shaping human action and thought, and expose how the cruelty of electrical death inheres in events outside of human control.

But there is a further reason I am concerned about the Court’s declaration that body resistance is immaterial to legal debates about the ethics of judicial electrocution. Body resistance has always been critical to procedural discussions about how inmates should be executed. In their advice to law-makers, medical professionals have suggested practices that could lower the inmate’s body resistance to electricity and bring about a more ‘humane’ death (Fell, 1892: 365). Based on these recommendations, the execution protocols in each of the States using electrocution call for the use of saltwater-soaked sponges and metal electrodes for this very purpose.

Using the same logic, if penal institutions were implementing policies or engaging in practices that had the effect of raising a death row inmate’s body resistance to electricity, and thus possibly prolonging electrical death, even unintentionally, one could argue that this would be germane to any discussion about the cruelty of judicial electrocution. One factor that researchers have highlighted as affecting the body’s resistivity to electricity is its size. The tissues with the highest levels of resistance are bones and fat. Consequently, bodies with a higher fat content would require a higher voltage of fatal electricity (Bernstein and Reynolds, 1989; Leuchter, 1989). Social scientists have long written about how institutional decisions about feeding prisoners cheaply (Sawyer, 2017) and
prison regime designs that limit an inmate’s physical activity and exercise, have contributed to rising levels of obesity within the prison population (Wang et al., 2017: 2969–2970). In a study including fifteen countries, the United States was the only country in which the prevalence of obesity amongst prisoners was found to be higher than amongst the general population (Herbert et al., 2012). Some researchers have even suggested that there may be a strong correlation between high-calorie food preferences and insecure environments like the prison, particularly amongst inmates on death row, who may feel that their futures ‘hold[…] no value’ (Wansink et al., 2012: 837). Whether it be through deliberate institutional design and practice – such as the use of soaked sponges and metal electrodes – or the unintended consequences of policies which limit physical activity and the nutritional quality of prison food, body resistance is invariably shaped by prison politics.

When legal decision-making treats body resistance as simply a property of bodies, they dismiss a whole host of political and institutional factors that make inmate bodies, lived bodies not confined to a laboratory under controlled conditions, more vulnerable to being executed in a spectacularly horrific fashion. In fact, Allen Lee Davis’ attorney made a similar argument in appealing his sentence, claiming that his significant weight gain while imprisoned could cause him greater pain during the electrocution process, making this punishment unacceptably cruel for him. Consequently, when leaks, burns, blisters exhibited by executed bodies are attributed to the abnormal size of inmates (Notley, 1993; Nugent, 1993: 200), we must simultaneously consider to what extent institutional practice and political decision-making may be directly contributing to maintaining and sustaining bodies that are more likely to implode and explode when being executed. Legal rulings that fail to draw attention to how penal institutions are implicated in the ‘making’ of resistant bodies, disregard the ways in which these failings engage moral and ethical questions and thus breed disenchantment. We become disillusioned by scientific explanations that cannot explain the spectacles that unfold in front of us and rulings that deny their ethico-legal significance.

As I noted earlier, a further puzzling point about the Circuit Court’s findings in Provenzano is that while it accepted that the restraints used on Davis were part of the electrocution protocols, the serious injuries sustained by their use did not, in the Court’s view, render this mode of killing, cruel. The Court was clear that only events that transpired immediately after the current was applied to the body and before the inmate’s death was declared, are subject to legal scrutiny. Anything that happened outside of these very narrow temporal parameters is extraneous to the Court’s ethical consideration of electrical death. It is only in-between these two moments in time that the ‘death penalty’ happens.

And here I return to a point that I made earlier. From the new materialist perspective, the temporal limit set by the Circuit Court can be considered problematic because it draws attention away from how life and death are not just biological states of the body, but socio-material enactments, the ordering of perceptual data for social and political purposes (e.g. the denuding of rights, the articulation of legal power, and/or the reorganisation of social roles). In treating bodies as either living or dead, abstracts from one’s analysis states of becoming and conceals the fact that the law is very much bound up with this progression from human to corpse. One could say that the condemned
inmate, being physically alive, is ‘human’. At the same time, however, one could also argue that their long-term confinement, the limitations imposed on their civil and political rights, the precisely pre-planned and publicly-devised nature of their death, makes him/her something in-between. This hybrid existence is likely to have a bearing on the inmate’s identity, actions, feelings, and thoughts (Hensl, 2004), and indeed, how others behave towards, and think about, them (Johnson, 1979: 143).

More importantly, this hybrid existence, being the ‘living’ dead, also contributes to material changes in body composition that ultimately inform how electrical death transpires. For instance, research suggests that institutionalised inmates have a higher propensity for hypertension and cardiovascular disease given the high pressure and precarious prison environment, and the lack of physical activity and adequate nutrition provided to prisoners (Arries and Maposa, 2013; Masotto, 2014). This is coupled with the fact that high security costs for out-of-institution care, and general public disapproval towards improving the health of prisoners, means that inmates (and particularly those on death row) do not receive adequate preventative and corrective health care for life-threatening or seriously debilitating ailments (Masotto, 2014). Interestingly, high blood pressure was identified as a cause for the horrific blood loss sustained by inmates in several botched electrocutions (Clark County Prosecuting Attorney, 1999; Radelet, 2018). Limiting the analysis of cruelty to the electric chair’s functioning thus fails to capture the social, cultural, political and economic factors which influence the physical morphing of human to corpse, and which may have a significant bearing on the injurious and distortive effects of electrical death and how punitive death is materially enacted within the confines of the death chamber.

Throughout Provenzano there is evidence of the law’s anaesthetic qualities, how it operates to, as Pavoni writes ‘numb the polymorphous realm of the sensorial in order to assert the rational domain of normativity’ (Pavoni, 2018: 3). In his concurring opinion, Harding C.J. explains that while he is disturbed by the photographic evidence of Davis’ execution, he does not ‘find this alone enough to deem electrocution ‘cruel and unusual’ punishment’; the photograph cannot be considered a ‘factual finding of pain’. He specifically notes that what the Courts must determine is ‘how much pain the inmate suffers’ (at 416), and yet he fails to consider the photograph as evidence of that suffering. Pain is, at least partly (if not mostly), a material enactment (Scarry, 1985). It is given presence and being through language, yes, but also through bodily performances and affective encounters. We affirm the reality of another’s pain largely by how their bodies behave (e.g. screaming, moaning, contorting, resisting) and how those interactions move us. So why do Courts not recognise the materiality of pain, the visual, odoriferous, and sonorous aspects, particularly in the presence of bodies unable to use literal communication?

In the legal context, the corpse’s pain, one could argue, is always tempered by the logic of rationalising discourses, a series of ‘experts’ in the field of neuro-, psycho-, physio-, medico-science, whose ‘findings’ abstract us, as bodies, from our lived experiences. As Langford has argued, this is a hallmark of modern law, disassociating itself from the sensual world, all the while toiling to select modes of execution that render the killing of its condemned, imperceptible (2015). Noted earlier, this is one of the ways in which the law deceives us; preserving its ‘rational’ authority by
controlling our phenomenological experiences of the world, all-the-while declaring that it is, itself, distinct and separate from body and affectivity. In Provenzano the Court went as far as to reorient the social gaze by downplaying the affective significance of Davis’ electrocution. In stating ‘there has been much said about the Davis execution because of the blood which dripped from the inmate’s nostril during the process … the real question presented here is whether or not the use of electrocution violates the ‘evolving standards of decency’ espoused in Trop v. Dulles [emphasis added]’ (at 420), Quince J. effectively discounts the affective power of the visual experience of punishment. To suggest that affectivity is not a measure of the ‘evolving standards of decency’, that we must look to the intellectual rather than the bodily to find the contents of this legal fiction, is to divest sensual experience of social and ethical value. For human beings, given our status as embodied creatures, this becomes disenchanting.

**Affective Enchantment and the Ethics of the Death Penalty**

I want to turn now to another narrative from Provenzano and consider for a moment, its enchanting qualities and what insights can be gained from it about the ethics of the death penalty more broadly. The dissenting opinion in this case, submitted by Shaw, J., was critical of the approach adopted by the majority. Referring to it as ‘a “snapshot” review of the execution apparatus’, Shaw J. argued that the majority opinion focussed solely on the operation of the chair in one given case (the execution of Davis), rather than looking at its violent and mutilating effects across judicial electrocutions more broadly (at 420). In his view, it was not the proper functioning of the chair, and whether it was appropriately designed and operationalised, that determined whether the process could be saved under the Eighth Amendment, but the effects its operation had on bodies. Any consideration of the ethics of electrical death must account for not only the moments it does mutilate but see the presence of several cases in which bodies burn, char, ignite, stink, gurgle, howl as evidence of the fact that it has an ever-present potential to mutilate. He explains that, despite the law’s various attempts to rectify the mechanical and human causes of many spectacular and sensational electrocutions, this potential has yet to be dampened or suppressed. To show the dramatic effects of this oversight, Justice Shaw went onto include Davis’ post-mortem photographs as part of the public record of his ruling, making his bloated, discoloured, bloodied body accessible to the public at large.

Justice Shaw’s focus on mutilation rather than the actions and intentions of those who designed, advocated for, and operationalised the electric chair was extraordinary, for it defined cruelty by reference to sense-able conditions – the presence of which did not require any expert or technical training in bio-medical engineering, biology, or neurosciences. The average, everyday citizen can determine the presence of cruelty by reference to sensual experience. More importantly, the dissenting opinion suggests that even if it were possible to identify every reason for why Davis’ body exploded in the given instance, the fact that it did, the fact that it was not possible to identify the presence of these forces and agencies until they had acted, restores electrical death with the allure and mystery denied to it by previous rulings.
A crucial aspect of Justice Shaw’s dissent in Provenzano was his decision to publicly disseminate the electrocution photographs taken by the Department of Corrections. In publicising the post-mortem photographs of Davis, Justice Shaw restores the inmate’s corpse with a kind of agency that is absent within conventional Eighth Amendment jurisprudence. In many States, execution photography and videography are legally prohibited. When challenged on this point, the Courts have argued that it is to protect the privacy and safety of prison guards and other state officials involved in the execution process (Kqed v. Vasquez C 90-1383. RHS [N.D. Cal. 1991]; Garrett v. Estelle 556 F.2d 1274 [5th Cir. 1977]). The interests of the living take precedence over those of the dead. Nevertheless, one could argue that the photographs submitted of Davis’ execution is one example of how recognising the thing-power of the corpse, its ability to shape human action and intention, does not necessarily have to preclude the privacy rights of animate bodies.

As the ‘object’ of punishment, the inmate’s body has always been given very little attention in terms of evaluating how punishment is operationalised. The focus is always on the inmate as ‘subject’ – the sentient human possessing rights, obligations, and responsibilities. The corpse – stripped of animacy, consciousness, sentience, basically all the qualities that the law tells us makes bodies rights-bearing subjects – is thus less of a concern to the Courts in its analysis of the ethics of capital punishment. In reading the many cases that preceded Provenzano, and even cases involving other modes of execution, the corpse is treated as the ‘scene’ upon which human intentionality is enacted: its sole purpose is to provide ‘evidence’ of human error, misconduct, pain, suffering – excavated through meticulous study by a team of medical, psychological, criminological ‘experts’ who are able to ‘interpret’ the corpse. Together, the testimonies of these experts weave the narrative law employs to tell us what we should think about the phenomenon that unfolds before us: whether it represents purposeful punishment or purposeless violence.

In a sense then, what is concealed from us, made less visible to us by traditional jurisprudence of the kind that preceded Provenzano, is precisely the power law possesses in defining the scope and limits of humanity. The law does not only regulate our conduct as subjects but expounds what sorts of conduct are constitutive of subjectivity. The law does not only judge our actions but defines what constitutes ‘action’ and ‘inaction’. The corpse, the law tells us, given its state of immobility, unconsciousness, insentience, is not capable of acting; it is a body that has succumbed to nature. According to this narrative, bodies do not make things happen without the presence of a conscious mind and based on this, it is not possible to study the corpse for what it does but only in terms of what is done to it.

Yet, as Bennett rightly points out, this is part of the rationalising culture that characterises modern discourse and its privileging of a particular sort of human existence. By acknowledging the thing-power of the corpse, we do not automatically minimise or undermine the agency of animate bodies. Agency is relational, it does not inhere in bodies, but is exercised through different bodies in their encounters with one another. One way to think about this is through Philippopoulos-Mihalopoulos’ notion of liveliness, how bodies manifest and express life in relation and in combination with other bodies and matter. Recognising the agency of matter, one could argue, serves to
enhance human agency or liveliness; we begin to see the natural world, the world that we have always been told is inevitable, as malleable and part of our own becoming. To give but one example, our perception of self, our ideas about human existence, change in the presence of bodies that medical science and the law claim to be ‘dead’ and thus incapable of acting, affecting, moving, communicating. We are under the impression that this passive, inactive, immobile body is not only inevitable, but different from the ‘living’ human body. And yet, here the dead body is, in Provenzano, doing all those things we have been told corpses cannot, and do not, do – acting, communicating, affecting. Might this be one way of extending presumptive generosity to the non-human?

More than a mere ‘representation’ of reality, the photograph operates as a ‘lively’ assemblage. The combination of flesh, flash, light waves, and digital bits and bytes, facilitate intra-actions that have the potential to affect. The corpse, in this kind of assemblage, possesses liveliness. It is acted upon by forces (chemicals, ions, atmosphere, photoelectrons), objects (restraints, sponges, syringes, and conductors, camera flashes), ideas (rights, citizenship, social identities), and acts upon us by constraining and enabling our thoughts, behaviours, feelings by the sights these intra-actions emit. The material exchanges that occur between our bodies and the photograph bring both the human and the corpse into reciprocal existence. In this intersubjective moment, we feel connected. As Bennett notes:

The fanciful and the real, like the virtual and the actual, are incestuous partners – we have no choice about them being connected; what counts is how we mobilise the connections. These connections do not assume the form of a tight argument, and they have contingency built into them. They are affective affinities that move from wonder to attachment and attachment to generosity (2001: 162).

It is this intersubjective condition, this complex coming together of matter, bodies, ideas, forces, energies that enact social phenomena, including the phenomenon of punishment. Whether an electrical death transpires as purposeful punishment or senseless violence is entirely dependent on the intra-actions through which it unfolds, and our legal theory and practice must recognise that we, as human beings, exist as part of those material conditions.

For these reasons, in my view, the dissent in Provenzano was based in the very kind of ethical practice expounded by Bennett’s theory of affective enchantment. First, by focussing its attention on material relations, how bodies morph and mutate in response to the world in which they are embedded, the dissenting opinion in Provenzano signalled a turning away from the disembodied legal subject that sustains traditional legal discourse. Instead, the body, its transformative potential, and its ability to affect are given centre stage. More importantly, the dissent in Provenzano saw ruptures or swerves as having jurisgenerative potential. Justice Shaw clearly noted that, instead of focussing on the Davis execution as an anomaly, the Court should see it as one example of electricity’s omnipresent potential to mutilate and distort human bodies, and to rule on that basis. In so doing, this ruling develops an understanding of cruelty according to which events can be cruel even in the absence of malicious (human) intent and the presence of laudable (human) intentions. It is the material
conditions of affective encounter, bodily engagements that produce crossings that challenge our preconceived notions about human subjectivity and existence, that determines the cruelty of a mode of punishment – electrical or otherwise. Modes of execution are not cruel because they cause purposeless (i.e. ‘wanton’) violence; they are cruel because they demonstrates to us, the limited human capacity to invariably predict and control the natural world, to maintain a seamless and unified vision of human existence, and compel us to consider our own (social, psychical, physical, epistemological, ethical) vulnerability in the face of these forces.

Second, and even more remarkably, the decision to make Davis’ post-mortem photographs public represents precisely the kind of practice Bennett advocates in favour of when she writes ‘the ethical value of enchantment resides in its ability to persuade without compelling, to structure experience without insisting that this structure is the one which must be duplicated again and again’ (2001: 29). It is one thing to recognise that judicial electrocution is cruel, and quite another to make available effected bodies for affective encounter. In doing so, the Court takes a chance, for it has no way of knowing what ‘crossings’ these encounters may produce and what kinds of affectively driven responses they may incur. In fact, when the Provenzano decision was made public, the Supreme Court website crashed multiple times from the level of internet traffic generated by the gruesome post-execution photos, and the Court was inundated with phone calls from members of the public commending the majority’s decision to uphold judicial electrocutions. One commentator expressed that ‘the death penalty only remains a public deterrent when it remains in public view … thank you for showing the world the horror of execution’ [emphasis added] (Peltier, 1999). Given his ruling, it is certain that this was not the response Justice Shaw envisioned in making the photographs public. Nevertheless, an ethics of enchantment is not one which compels people towards empathetic judgement, where one imagines themself in the position of the Other. For Bennett, an ethics of enchantment is about creating the conditions under which we may recognise that neither the self nor the Other is a unified, coherent, self-contained, universal, enduring entity; that in fact the self and Other inform one another, and to develop an understanding of ‘cruelty’ based on this unity. In acknowledging this intersubjective moment, we can come to see the ‘inhuman’ and ‘nonhuman’ (but also the human) as contingent and open-ended.

Ethical practice, in this context, requires the deliberate cultivation of sites which make it possible for human beings to see themselves as boundary-subjects, enacted through the acts of censure, condemnation and punishment by which they produce, in this instance, the condemned prisoner, the executed inmate.

And perhaps Bennett would argue that this is where the dissent in Provenzano does not push the boundaries far enough, because the ruling does not genuinely repudiate what she refers to as one of the ‘dangers’ of an ethics of material enchantment: that it might be read as an aesthetic disposition (2001: 132–134). Here she is critical of Schiller’s understanding of aesthetics as a ‘pleasing sensation that all’s well with the world’ (138) because, though it perceives bodily affect as having an ethical role, it treats the aesthetic disposition as alone being able to unify or harmonise “‘our physical character” (which demands multiplicity and ceaseless change), with our ‘moral character’ (which demands unity and unconditional cause)’ (140). And we can clearly see the
operation of this aesthetic disposition within the dissent in Provenzano. For as ground-
breaking as Justice Shaw’s ruling was, he determined the unacceptability of electrical
death by reference to how the practice distorted and mutilated bodies, causing them to
behave in ways that he found offensive based on an indisputable image of the ‘normal’
human body. The ideal (normative) body is one that remains intact, self-enclosed, and
continuous. The body of our tastes – the one that is judged to be beautiful, the standard
to which electrocuted bodies are upheld – also carries moral weight; it is the right
way for bodies to be. His ruling affirms the idea that human beings are part of a designed
universe. And so, in many ways then, the dissenting opinion in this case reasserts the
epistemological and material boundaries between the natural, pre-existing, pre-legal
normative body (‘us’) and the unnatural, politically charged, electrocuted corpse
(‘them’). The ruling rests on the same Schillerian principles that Bennett is critical
of, that the aesthetic mood is a kind of reason-driven ‘longing for personal and
social unity’ (140). As Bennett explains, this idea that we are searching for some
sort of ‘lost unity’ of the past, measuring up existing political practice by reference
to this natural, universal, singular human, furthers the ‘disenchantment tale’. The
ruling fails to draw attention to how both normal and mutilated bodies are socially engi-
neered material enactments. In treating humane punishment as those penal practices
that do not disturb the naturalised body, the kind of body that we believe is ideal and
natural (i.e. pre-political) – the body that tells us that ‘all’s right with the world’ –
falls into the same trap as Kantian transcendentalism: it continues to define aesthetics
(judgement of beauty) as distinct from reason (moral decision-making) and, in doing
so, it does not give sensuous affect the kind of ethical power that Bennett believes it
deserves.

There are other ways in which the ruling, I believe, could have further cultivated sites
for enchantment. For instance, the Court could have more clearly drawn attention to the
precise material conditions which must be present before an electrical death proceeds
silently and unsensationally. For instance, even the sponge that is placed atop the
inmate’s head must be just moist enough to lower the body’s resistance to the electrical
charge, but not overly so, to avoid short-circuiting the electrical current (Death Penalty
Information Center, 2019). By consulting historically botched executions and identifying
their (alleged) causes of failure, the Court could have more clearly shown just how many
of these causes were outside of direct human control, and likely even beyond the scope of
human knowledge. In many instances, it was only after executions failed that many of
these miscalculations even came to light. Hence, there is a complexity to physical
events that modern law invariably undermines or diminishes in its treatment of
humans as masters over nature, the agents of punishment; and the dissent in
Provenzano is no different in this regard. What understanding of cruelty might emerge
if we were to allow, as Bennett claims, ‘magical gestures’ to regularly ‘displace instru-
mental reason’ (2001: 111)?

My reading of judicial electrocutions, as I have already alluded to throughout the
paper, has relevance for the ethics of capital punishment more broadly. Enchantment
Bennett writes ‘is not a moral code, but it might spark a bodily will to enact such a
code and foster the presumption of generosity toward those who transgress or question
it [emphasis added]’ (2001: 32). Using law to expound and justify punishment, rather
than using it to establish sites of ‘presumptive of generosity’ towards different material agents (including the executed corpse, but also electricity, lethal drugs, minerals and gases that compose the body, along with ideas that shape our understanding of the ideal body), is not only unethical but unsustainable. A moral code on its own, Bennett notes, is ‘insufficient to ethics. In addition to rules of behaviour, one needs an aesthetic disposition hospitable to them, the perceptual refinement to apply them to particular cases, the energy or will to live them out, and the generous mood that enables one to consider them in the face of new and surprising developments’ (2001: 29). All moral principles she argues, have a somatic and material dimension to them: what is the moral sentiment of ‘respect’, she asks, ‘without the somatic gearing up, the tensing of muscles, the change in breath, the alteration in chemical-neural flows’ in response to certain contexts? (2001: 135) Given the corporeal, somatic, sensorial dimensions of punishment, then, one could say that an effective law must be an affective one; it must recognise that we are materially connected to the world; that the non-human world exercises agency by affecting us and moving us into action, and all of this has relevance to the moral and ethical ordering of our social world.

Let me return briefly to the idea of disenchantment and resistance in the context of capital punishment broadly. Social movements that resist and demand the abolishment of capital punishment are not only triggered by the violence of the events themselves, but the fact that these horrors come about after reassurances from politicians, judges, lawmakers, scientists and medical professionals that electrical death is both predictable and tractable (Macready, 2000: 786). As Denno explains, the government’s ‘science’ of it all that, for many of us, makes the electric chair acceptable. Abolition movements are thus triggered by a growing disenchantment with a world that is consistently presented as calculable and predictable, but which has time-and-again proven anything but, and with explosive and ghastly results. The Court’s continued refusal to accept the intractability of electrical death, its continued efforts to identify the ‘human’ source of the injuries and mutilation sustained by inmates, only furthers this disillusionment and discontent (Sarat et al., 2013). Legal representations of judicial killing as painless and instantaneous are being challenged by the public, many of whom demand that the medical community be involved in assessing different methods of execution to bring to light all its effects (even those that may be imperceptible at first because they are happening within the interior of the body) and that execution protocols be made public to maximise the transparency of the execution process (Denno, 2007). Others have criticised the Courts for justifying contemporary execution practices by conflating the meaning of ‘humane’ and ‘more humane’, and referring to them as such even when they continue to have affects that cause many of us to cringe and recoil in response (Rutledge, 1998).

In the context of capital punishment jurisprudence, a law structured around affective enchantment would be one that does not source its power to bare repetition, the words of experts that tell us that it is possible to secure the conditions under which different kinds of judicial killing can be made to resemble another. As I demonstrated earlier in the paper, in the past this has led to the labelling of sensational deaths as ‘botched’; anomalous occurrences that judges invariably place outside the scope of
law’s regulatory power. Legal institutions need to treat each of these deaths as a kind of ‘spiral repetition’, where each ‘iteration occurs in an absolutely unique context, each turn of the spiral enters into a new and distinctive assemblage with the absolutely local chirps, odours, herbs, thoughts, whirs, images, breezes, light waves, viruses, animals, machines and minerals in its milieu’ (Bennett, 2001: 40). These assemblages occur independently of our involvement, and they have ethical significance because they signal to us an ever-present potential for phenomena to transpire in ways that might shock, horrify, but also fascinate us. We only become aware of this potential when electrical, gas-/drug-induced deaths engage our senses, and through these engagements, influence our aesthetic and ethical sensibilities, our emotional, physical and physiological states. This potential to affect, however, is omnipresent, and the law needs to recognise these (nonhuman) agencies and re-evaluate human capacity in light of them.

For these reasons, I would venture as far as to say that an ethical law is one that acknowledges and makes decisions grounded in the mutations and alterations that disrupt static and passive visions of the world and our place within it. And, as Sarat has aptly argued, every mode of execution ever used by the United States has produced such mutations and alterations (2016). The idea that the Courts treat the minority of botched executions as indicative of an overriding and consistent potential that any kind of induced death has towards mutilation and distortion is one concrete example of how such a law might look. But, to do this, legal institutions and practitioners need to be sufficiently attuned to the sensational, willing to accept the liveliness of matter, and trained to not see the bodily as a disruption to legal normativity, but as its accompaniment.

Conclusion

This paper undertakes an original critique of capital punishment jurisprudence using new materialist theory. It argues that the existing Eighth Amendment jurisprudence operates under a modernist worldview and interprets the cruelty of capital punishment, specifically execution by electrocution, in a manner that minimises the sensual and affective nature of punishment. Neglecting the significance and power of material relations, positivist legal systems adopt a rationalising logic that fails to capture the essence of how human beings interact with and define their place in the cosmos. As a result of this neglect, legal decision-making often has the effect of disenchanting its human subjects. Using Bennett’s theory of affective enchantment this paper argues that ethical practice demands a turn to the body, sensuality, and affectivity and legal considerations of the (un)acceptability of capital punishment is no different. Through my analysis of the case of Provenzano, I show how positivist law disenchants, but also possesses the potential to re-enchant the world by embracing the power of material agency, the contingency of matter, and the human potential for metamorphosis. While thinking about capital punishment from the lens of affective enchantment may not necessarily lead to its abolishment, it is far more likely to produce judgements about cruelty that better align with how human beings exist in, interact with, and come to know (and be in) the world around them.
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Notes
1. Mona Lynch describes how the case of Provenzano (1999) triggered public demands that more execution and crime scene photography be included in the Court’s public record of its judgement.
2. According to conservative estimates one out of thirteen electrocutions are likely to be ‘botched’ (either protracted in duration or having unintended side effects) (Nugent, 1993). Surprisingly the numbers of botched executions are higher for lethal injection than any other mode of putting prisoners to death (Sarat, 2016).
3. For a particularly poignant materialist reading of the phenomenon of disease see Mol’s work in *Body Multiple*. For thinkers like Barad this entanglement is captured in the idea of the ‘onto-epistemological’ – how matter is produced (and not merely interpreted) through our knowledge practices.
4. Most State legislatures have enacted their own Constitution with a clause that mirrors the Federal Eighth Amendment protections against cruel and unusual punishment, but it was only in 1962 that the Supreme Court definitively declared that the Eighth Amendment protections applied to all states irrespective of whether it was included in their Constitutions or not. Inmates who continue to challenge electrocution’s constitutionality typically do so under the incarcerating State’s Eighth Amendment protections.
5. See the Court’s explanation of Pedro Medina’s botched execution in *Jones*. Jones v. State 701 So. 2d 76 (Fla. 1997); Buenoano v. State 565 So. 2d 309 (Fla. 1990)
6. And indeed, the Courts have argued something to this effect in several Eighth Amendment cases which rely on ‘botched’ executions as evidence of electrical death’s cruelty. Francis v. Resweber 329 U.S. 459 (1947); Robinson v. California 370 U.S. (1962).
7. The Supreme Court of Louisiana’s decision in *Glass* ruled that the petitioner’s claims that the electric chair inflicts gratuitous pain and suffering were ‘wholly lacking in medical and scientific merit’. Glass v. Louisiana 471 U.S. 1084, 105 S.Ct. (1985); Francis v. Resweber 329 U.S. 459 (1947) at 463; Coker v. Georgia 433 U.S. 584 (1977) at 592.
8. Provenzano v. Moore 744 So. 2d 413 at 414 (Fla. 1999). Though the Court also confirmed that the cause of Davis’ injuries was never officially identified during the two autopsies which were carried out post-mortem.
9. Provenzano v. Moore 744 So. 2d 413 at 414 (Fla. 1999). The Supreme Court of Florida also made a similar claim in Davis’ own appeal. See, Davis v. State 742 So. 2d 233 (Fla. 1999).
10. In Singleton, a schizophrenic inmate refused to continue taking his antipsychotic medication after this execution date was set, arguing that it was no longer in his medical interest to do so. He believed a restoration of his health seemed contrary to his death sentence and had a bearing on the kind of post-sentencing life he wanted to live (namely a life where he was

11. See Part II of Justice Shaw’s dissenting opinion and his discussion of Medina and Davis’ executions. Provenzano v. Moore 744 So. 2d 413, 434-6 (Fla. 1999)

12. Although some could also argue that this focus on injury and pain came much earlier in the dissenting opinion of Brennan, J. in Glass v. Louisiana, but here the Court primarily focussed on whether there was scientific or medical evidence to suggest the presence of pain, which is very different than the point Shaw, J. makes in Provenzano. Glass v. Louisiana 471 U.S. 1084, 2162.

Works Cited

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