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GOD AND THE EXECUTIONER: THE INFLUENCE OF WESTERN RELIGION ON THE DEATH PENALTY

Davison M. Douglas*

In this Essay, Professor Douglas conducts an historical review of religious attitudes toward capital punishment and the influence of those attitudes on the state's use of the death penalty. He surveys the Christian Church's strong support for capital punishment throughout most of its history, along with recent expressions of opposition from many Protestant, Catholic, and Jewish groups. Despite this recent abolitionist sentiment from an array of religious institutions, Professor Douglas notes a divergence of opinion between the "pulpit and the pew" as the laity continues to support the death penalty in large numbers. Professor Douglas accounts for this divergence by noting the declining influence of religious organizations over the social policy choices of their members. He concludes that the fate of the death penalty in America will therefore "most likely be resolved in the realm of the secular rather than the sacred."

* * *

INTRODUCTION

Justice William O. Douglas' observation almost fifty years ago that "[w]e are a religious people"¹ remains accurate today.² Accordingly, public debates about the

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¹ *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). The Court stated "We are a religious people whose institutions presuppose a Supreme Being When the state encourages religious instruction or cooperates with religious authorities . . . it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs." *Id.* at 313-14.

² Poll surveys consistently demonstrate the highly religious nature of the American people. A Gallup poll conducted in March 2000 found:

61% say religion is very important in their lives, 68% are members of a church or synagogue, and 60% attend religious service on a regular basis (36% attend weekly or more often, 11% almost every week, and 13% about once a month). Thus, it is no surprise that a comparably high number of Americans—66%—also say that religion can answer all or most of today's problems [These] patterns have remained remarkably similar since Gallup began asking these questions, some as long as six decades ago.

David W. Moore, *Two of Three Americans Feel Religion Can Answer Most of Today's Problems*, The Gallup Organization (Mar. 29, 2000), available at <http://www.gallup.com/>

death penalty and its use invariably invite considerations of what our religious traditions teach us about the morality of capital punishment. Indeed, many contemporary proponents of the death penalty cite its legitimacy in the Jewish law of the Hebrew Scriptures as justification for its retention,³ while opponents rely on

[poll/releases/pr000329.asp](http://www.gallup.com/poll/releases/pr000329.asp).

A December 1999 Gallup poll found that “[a]lmost nine out of [ten] Americans (86%) say that they believe in God, even when given the choice of saying that they ‘don’t believe in God, but believe in a universal spirit or higher power.’” Frank Newport, *Americans Remain Very Religious, But Not Necessarily in Conventional Ways*, The Gallup Organization (Dec. 24, 1999), available at <http://www.gallup.com/poll/releases/r991224.asp>.

An April 2000 Gallup poll found:

About 85% of Americans say that their religious preference is a form of Christianity. That includes 59% who say that they are a member of a Protestant denomination, and 26% who say that they are Roman Catholic

About 6% of Americans say they have ‘no’ religious preference, and 4% can’t name or designate a specific religion with which they are affiliated. That actually leaves just 5% who name a specific non-Christian religion in response to this question, including 2% who are Jewish.

Frank Newport, *America Remains Predominantly Christian*, The Gallup Organization (Apr. 21, 2000), available at <http://www.gallup.com/poll/releases/pr000421.asp>.

³ Prosecutors seeking the death penalty frequently cite the endorsement of capital punishment in the Hebrew Scriptures in their arguments to jurors. See examples cited in John H. Blume & Sheri Lynn Johnson, *Don’t Take His Eye, Don’t Take His Tooth, and Don’t Cast the First Stone: Limiting Religious Arguments in Capital Cases*, 9 WM. & MARY BILL RTS. J. 59 (2000); Irene Merker Rosenberg & Yale L. Rosenberg, *The Erroneous Invocation of “Eye for Eye” in Support of the Death Penalty*, 35 CRIM. L. BULL. 3, 4-5 n.5 (1999); Daniel A. Rudolph, Note, *The Misguided Reliance in American Jurisprudence on Jewish Law to Support the Moral Legitimacy of Capital Punishment*, 33 AM. CRIM. L. REV. 437, 439-41 (1996).

Such arguments have also entered the political arena. For example, during the 1978 gubernatorial race in New York, several Jewish newspapers claimed that elimination of capital punishment violated Jewish law. See Rudolph, *supra*, at 440. Opponents of the death penalty in New York in 1995 argued that “[t]he Jewish view on the death penalty is that it should exist but it should never be used. . . . [If Governor Pataki] acts on the death penalty, he will be the leader of a bloody government.” Steven Davidoff, *A Comparative Study of the Jewish and the United States Constitutional Law of Capital Punishment*, 3 ILSA J. INT’L & COMP. L. 93, 93 (1996) (quoting Rabbi Aaron Soloveichik, *The One-Hundred Smartest New-Yorkers*, N.Y. MAG., Jan. 30, 1995, at 52).

Briefs have been filed in the United States Supreme Court in capital cases making arguments explicitly from Jewish law. See Brief of the National Jewish Commission on Law and Public Affairs (“COLPA”) and the International Association of Jewish Lawyers and Jurists (American Section) (“IAJLJ”) as Amici Curiae in Support of Petitioner’s Petition for Writ of Certiorari, *Bryan v. Moore*, ___ U.S. ___, 120 S.Ct. 1003 (2000) (No. 99-6723) (arguing that execution by electric chair in Florida violates command of Jewish law that executions be conducted in the least painful and disfiguring manner possible).

Jesus' message of mercy and forgiveness.⁴

This Essay examines the history of theological understandings in Western religion⁵ of the legitimacy of capital punishment, as well as the ways in which those understandings have influenced the use of the death penalty by the state. For the past two thousand years, two of the dominant Western religious traditions—Christianity and Judaism—have debated the legitimacy of capital punishment in light of theological interpretations of their sacred texts and the traditions grounded in those texts. Not surprisingly, these interpretations have not been uniform over time. Until the twentieth century, the Roman Catholic Church and most Protestant churches consistently supported the state's use of the death penalty.⁶ Judaism, though grounded in a sacred text that clearly legitimated the use of capital punishment, has been far more skeptical of the use of the death penalty than a superficial read of the Torah might suggest.⁷

The support of the Christian Church for capital punishment played a significant role in validating the state's use of capital punishment for most of the past two thousand years.⁸ By the same token, for much of that time, the state's embrace of the death penalty served the Church's efforts to eliminate heresy.⁹ At the end of the eighteenth century, a movement to abolish, or at least sharply limit, the death penalty emerged in the Western world.¹⁰ Though this abolitionist movement has ebbed and flowed during the past two centuries, it has enjoyed striking success during the past forty years as a majority of the world's nations, including virtually every Western nation except the United States, has abolished capital punishment.¹¹

⁴ See, e.g., James W.L. Pack (former execution officer, San Quentin, CA) at <http://www.religioustolerance.org/execute.htm> ("As I read the New Testament, I don't see anywhere in there that killing bad people is a very high calling for Christians. I see an awful lot about redemption and forgiveness.").

⁵ Because Christianity has been the dominant religion in the West for over fifteen hundred years, this Essay will focus primarily on Christian attitudes toward the death penalty.

⁶ See generally JAMES J. MEGIVERN, *THE DEATH PENALTY: AN HISTORICAL AND THEOLOGICAL SURVEY* (1997) (examining the history of Christian attitudes towards the death penalty).

⁷ See Rosenberg & Rosenberg, *supra* note 3, at 6-10; see also MEGIVERN, *supra* note 6, at 10-12.

⁸ As one prominent sociologist has noted, "it is clear that throughout the history of penal practice religion has been a major force in shaping the ways in which offenders are dealt with." DAVID GARLAND, *PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY* 203 (1990).

⁹ See MEGIVERN, *supra* note 6, at 27-30, 55-60, 103-11, 259-67.

¹⁰ See LOUIS P. MASUR, *rites of execution: CAPITAL PUNISHMENT AND THE TRANSFORMATION OF AMERICAN CULTURE, 1776-1865* 50-70 (1989).

¹¹ By 1965, twelve nations had abolished the death penalty completely: Venezuela (1863), San Marino (1865), Costa Rica (1877), Brazil (1882, but later reintroduced), Ecuador (1906), Uruguay (1907), Colombia (1910), Argentina (1921, but later

Opposition to capital punishment in recent years has come from a variety of sources, including religiously inspired individuals and organizations. Particularly during this century, important theological shifts in both Catholicism and Protestantism have prompted a reconsideration of capital punishment. These theological shifts have been dramatic, particularly in light of the Church's robust embrace of capital punishment for most of its history. During the past forty years, the Roman Catholic Church, most mainline Protestant denominations, and both Reform and Conservative Jewish groups have announced their formal opposition to capital punishment.¹² Many conservative Protestant groups have not joined this movement for abolition, however, and in a few instances have issued formal statements in support of capital punishment.¹³

reintroduced), Iceland (1928), Federal Republic of Germany (1949), Honduras (1956), and Monaco (1962). Eleven other nations had abolished it for ordinary crimes in times of peace: Portugal (1867), Netherlands (1870), Norway (1905), Sweden (1921), Denmark (1930), Switzerland (1942), Italy (1947), Finland (1949), Austria (1950), Israel (1954), and New Zealand (1961). Between 1965 and 1995, an additional fifty-eight countries abolished the death penalty, forty-six for all crimes, and twelve for "ordinary" crimes. Twenty-five of those nations acted between 1989 and 1995. Among those nations that retain the death penalty, at least thirty have not executed anyone for at least ten years, many far longer than that. See ROGER HOOD, *THE DEATH PENALTY: A WORLD-WIDE PERSPECTIVE* 7-8 & nn.1-2 (1996). The number of nations banning the death penalty has increased sharply since 1995. See Death Penalty Information Center, *The Death Penalty: An International Perspective* (2000), at <http://www.deathpenaltyinfo.org/dpicintl.html>.

¹² For example, in 1989, twenty-four religious groups, including the American Baptist Churches, the American Friends Service Committee, the Church of the Brethren, the Mennonite Central Committee US, the National Council of the Churches of Christ in the USA, the Union of American Hebrew Congregations, the Unitarian Universalist Association, and the United Methodist Council of Bishops endorsed a statement providing that "we commit ourselves and our faith communities to do everything within our power to abolish the death penalty. We will use our moral leadership to change attitudes through education and engagement in faithful public witness, service, and advocacy toward that end." HERBERT H. HAINES, *AGAINST CAPITAL PUNISHMENT: THE ANTI-DEATH PENALTY MOVEMENT IN AMERICA, 1972-1994*, 105 (1996); see also GARDNER HANKS, *AGAINST THE DEATH PENALTY: CHRISTIAN AND SECULAR ARGUMENTS AGAINST CAPITAL PUNISHMENT*, 147-170 (1997) (citing fifteen church statements opposing the death penalty); Hanna Rosin, *Catholic, Jewish Leaders Target Death Penalty in National Effort; Group Aims to Abolish Practice by Raising Moral Awareness*, WASH. POST, Dec. 6, 1999, at A2 (describing how American Catholic bishops and Reform and Conservative rabbis have launched a national campaign to abolish the death penalty).

¹³ In June 2000, the Southern Baptist Convention resolved that because God authorized capital punishment for murder after the Noahic Flood, validating its legitimacy for human society . . . the messengers to the Southern Baptist Convention . . . support the fair and equitable use of capital punishment by civil magistrates as a legitimate form of punishment for those guilty of murder or treasonous acts that result in death

Resolution No. 5, Southern Baptist Convention (June 13-14, 2000), available at

Despite this extensive institutional support for abolition, the vast majority of Christian and Jewish adherents continue to favor retention of the death penalty.¹⁴

<http://www.sbcannualmeeting.org/sbc00/resolutions.asp>.

Other conservative Protestant groups have also taken positions in recent years affirming the legitimacy of capital punishment. For example, the Orthodox Presbyterian Church noted in 1995 that

[i]n the covenant that God made with Noah, . . . capital punishment was prescribed for the murderer: "Whoever sheds the blood of man, by man shall his blood be shed (Gen. 9:6) The faithful imposition of capital punishment for premeditated murder can be expected to deter this horrendous act, but when the civil magistrate fails to obey this command of the living God, violence abounds. The Preacher warned that this would occur: "When the sentence for a crime is not quickly carried out, the hearts of the people are filled with schemes to do wrong" (Eccl. 8:11).

The Orthodox Presbyterian Church, *What is the Reformed Faith? High Points of Calvinism* (Oct. 1995), available at http://www.opc.org/what_is/the_reformed_faith.html.

In 1967, the Lutheran Church-Missouri Synod, the conservative branch of American Lutheranism, stated its position "that capital punishment is in accord with the Holy Scriptures and the Lutheran Confessions." In particular, the Synod resolved:

Whereas, Various church bodies have condemned capital punishment in recent years; and

Whereas, God's Word supports capital punishment (Gen. 9:6; Lev. 24:17; Ex. 21:12; Num. 35:21; Deut. 19:11; Rom. 13:4; Acts 25:11); and

Whereas, The Lutheran Confessions support capital punishment: "[The right of government] to take human life is not abrogated. God has delegated His authority of punishing evil-doers to civil magistrates" [citing Luther's *Large Catechism I*]

Therefore be it Resolved, That The Lutheran Church-Missouri Synod declare that capital punishment is in accord with the Holy Scriptures and the Lutheran Confessions.

Lutheran Church-Missouri Synod, *Frequently Asked Questions*, available at <http://www.lcms.org/cic/death.html>. The Lutheran Church-Missouri Synod has retained this position since 1967. See Lutheran Church-Missouri Synod, *Report on Capital Punishment* (1976), in J. GORDON MELTON, *THE CHURCHES SPEAK ON: CAPITAL PUNISHMENT* 113-19 (1989) (reaffirming that the state has the right to use capital punishment).

The National Association of Free Will Baptists, a conservative church body located primarily in the South, issued a statement in 1977 in support of capital punishment, noting that "the Bible supports capital punishment." National Association of Free Will Baptists, *Statement on Capital Punishment* (1977), in MELTON, *supra*, at 120.

The Christian Reformed Church has consistently affirmed during the past quarter century that although modern states "are not obligated by Scripture, creed, or principle, to institute and practice capital punishment Scripture acknowledges the right of modern states to institute and practice capital punishment if it is exercised with the utmost restraint." Christian Reformed Church, *Position: Capital Punishment*, available at <http://www.crcna.org/cr/crbe/crbe10821.htm>; see Christian Reformed Church in North America, *Statement on Capital Punishment* (1981), in MELTON, *supra*, at 64-96.

¹⁴ Support for the death penalty among Protestant, Catholics, and Jews has consistently

Indeed, this sharp dissonance between the pulpit and the pew is one of the most striking aspects of the current death penalty debate in America. This dissonance derives, in part, from the declining influence of religious institutions over the social policy predilections of their members,¹⁵ as well as from the failure of those religious institutions who favor abolition to emphasize this issue with their members.

The debate over the use of capital punishment in America is very much alive. Illinois Governor George Ryan's recent call for a moratorium on the death penalty in the wake of the large number of innocent people who reached that state's death row has helped trigger a national reconsideration of the issue, the end results of which are unclear.¹⁶ Theological understandings will likely play some role in the death penalty deliberations of many Americans, the large majority of whom self-identify as persons of religious commitment,¹⁷ but America's ultimate resolution of the issue of capital punishment is likely to be influenced more by prudential concerns such as executing the innocent, race and class discrimination, and the availability of life imprisonment without parole, than by theological interpretations of what our sacred texts teach us about the legitimacy of capital punishment.

I. BIBLICAL CONSIDERATIONS OF CAPITAL PUNISHMENT

Any history of religious attitudes towards the death penalty in the West must begin with a consideration of the Bible, in particular the teachings of the Hebrew Scriptures. The Torah contains more than thirty offenses that are punishable by

been at similar levels as the entire American population. See George Gallup, *The Death Penalty: 7 in 10 Favor Death Penalty for Murder*, GALLUP REP., Jan.-Feb. 1986, at 12 (1986) (showing 72% of Protestants and 70% of Catholics favor the death penalty for murderers); Murray Friedman, *Are American Jews Moving to the Right?*, 109 COMMENTARY 50 (Apr. 1, 2000) (American Jewish Congress survey in 1997 finding that 80% of Jews surveyed favored death penalty for persons convicted of murder); Rosin, *supra* note 12 (noting in 2000 that "two-thirds of U.S. Catholics support the death penalty, roughly the same percentage as Americans as a whole . . .," but that Jewish support for the death penalty is slightly less than that).

¹⁵ For example, a 1999 Gallup poll found that despite their outward affiliation with a religion and frequent church attendance, less than half of Americans live their daily lives strictly by the code or teachings of their religious faith. While 48% say that they pay more attention "to God and religious teachings" in deciding how to conduct their lives, almost as many, 45%, say that they pay more attention to their "own views and the views of others."

Newport, *supra* note 2.

¹⁶ See William Claiborne & Paul Duggan, *Spotlight on Death Penalty*, WASH. POST, June 18, 2000, at A1 (noting that Governor Ryan's moratorium "ignited a national debate on capital punishment").

¹⁷ See *supra* note 2.

death: everything from murder to a child's chronic disobedience of his parents.¹⁸ Moreover, in the book of Genesis, God announces following the flood of Noah that "[w]hoever sheds the blood of man, by man shall his blood be shed; for God made man in his own image."¹⁹ This verse from Genesis and the prescription of punishment by death for a variety of crimes in the Torah have been cited for centuries—particularly by Christians—as justification for capital punishment.²⁰

Yet, as many Jewish legal scholars have noted, the stringent procedural protections afforded capital defendants in Jewish law—such as the requirement of two eyewitnesses,²¹ the requirement that the eyewitnesses must warn the accused,²²

¹⁸ Within the various legal codes contained in the books of Exodus, Leviticus, and Numbers are many offenses for which death is the prescribed penalty. These offenses include murder, various types of illegal sexual relations, violations of religious laws such as blasphemy and profanation of the Sabbath, various offenses against parents, and kidnapping. See Rudolph, *supra* note 3, at 443. For example, from the twenty-first chapter of Exodus: "Whoever strikes a man so that he dies shall be put to death . . . Whoever strikes his father or his mother shall be put to death. Whoever steals a man, whether he sells him or is found in possession of him, shall be put to death. Whoever curses his father or his mother shall be put to death." *Exodus* 21:12, 15-17 (Revised Standard Version). Also, from the twentieth chapter of Leviticus:

If a man commits adultery with the wife of his neighbor, both the adulterer and the adulteress shall be put to death. The man who lies with his father's wife has uncovered his father's nakedness; both of them shall be put to death, their blood is upon them. If a man lies with his daughter-in-law, both of them shall be put to death; they have committed incest, their blood is upon them. If a man lies with a male as with a woman, both of them have committed an abomination; they shall be put to death, their blood is upon them. If a man takes a wife and her mother also, it is wickedness; they shall be burned with fire, both he and they, that there may be no wickedness among you. If a man lies with a beast, he shall be put to death; and you shall kill the beast. If a woman approaches any beast and lies with it, you shall kill the woman and the beast; they shall be put to death, their blood is upon them.

Leviticus 20:10-16 (Revised Standard Version).

¹⁹ *Genesis* 9:6 (Revised Standard Version).

²⁰ See *supra* note 13; MEGIVERN *supra* note 6, at 14-16.

²¹ This prohibition on executions unless there are at least two eyewitnesses is found in the books of Numbers and Deuteronomy. The book of Numbers provides: "If any one kills a person, the murderer shall be put to death on the evidence of witnesses; but no person shall be put to death on the testimony of one witness." *Numbers* 35:30 (Revised Standard Version). See also *Deuteronomy* 17:6 and 19:15. Moreover, if the testimony of the two eyewitnesses was inconsistent—even in a minor detail—the testimony was generally disregarded. See Rosenberg & Rosenberg, *supra* note 3, at 12.

²² According to the Talmud, the two eyewitnesses must have warned the accused that the conduct he was about to engage in was prohibited and punishable by death. The accused must have acknowledged the warning to the witnesses and proceeded nevertheless with the unlawful conduct. See THE CODE OF MAIMONIDES, BOOK FOURTEEN, THE BOOK OF JUDGES 34 (Abraham M. Herschman, trans., 1949); Rosenberg & Rosenberg, *supra* note 3, at 12.

and the rejection of circumstantial evidence²³—made actual implementation of the death penalty extremely infrequent.²⁴ Moreover, once the Jewish Temple was destroyed by the Romans in 70 C.E., Jewish courts lacked jurisdiction to implement the death penalty.²⁵ Death sentences thereafter were exceedingly rare.²⁶ In modern Israel, prior to that nation's abolition of the death penalty in 1954 (except for crimes of genocide and treason), many rabbis argued that pronouncing a death sentence would be incompatible with Jewish law.²⁷ Notwithstanding these procedural restrictions that rendered capital punishment a rare event in Jewish law, Christians through the ages have relied heavily on the sanction of capital punishment in the Torah to justify the death penalty.²⁸

The New Testament does not specifically address the issue of capital punishment. Jesus did intervene at an execution of a woman caught in adultery,

²³ The two eyewitnesses must have both seen the accused engage in the unlawful behavior; circumstantial evidence and confessions have no evidentiary value. Rosenberg & Rosenberg, *supra* note 3, at 12. The Talmud states:

Even if the witnesses saw him (the assailant) chasing the other, gave him warning, and then lost sight of him, or they followed him into a ruin and found the victim writhing (in death agony), while the sword dripping with blood was in the hands of the slayer, the court does not condemn the accused to death, since the witnesses did not see him at the time of the slaying.

HERSHMAN, *supra* note 22, at 60.

²⁴ The Talmud, for example, notes that with respect to the law requiring the execution of a rebellious son, "[i]t never happened and it never will happen" and that the law was given merely "that you may study it and receive reward . . .," although one rabbi apparently indicates that he witnessed such an execution. *Capital Punishment*, ENCYCLOPEDIA JUDAICA 145 (1971). The Talmud also contains rabbinic dialogues suggesting that some rabbis believed that a *Sanhedrin* that imposed a death sentence one time in seventy years was doing so too often. The full text provides:

A Sanhedrin which executes once in seven years is known as destructive. Rabbi Eleazar Ben Azariah says, "once in every seventy years." Rabbi Tarfon and Rabbi Akiba say, "if we were in Sanhedrin no man would ever have been executed. Rabbi Shimeon Ben Gamliel says, "they (Rabbi Tarfon and Rabbi Akiba) would cause the proliferation of blood shedders in Israel."

Edna Erez, *Thou Shalt Not Execute: Hebrew Law Perspective on Capital Punishment*, 19 CRIMINOLOGY 25, 37 (1981). See generally Samuel J. Levine, *Capital Punishment in Jewish Law and Its Application to the American Legal System: A Conceptual Overview*, 29 ST. MARY'S L. J. 1037, 1046 (1998).

²⁵ See Rudolph, *supra* note 3, at 451-52.

²⁶ See *id.* at 452. Some Jewish courts, particularly during the Middle Ages in Spain, did issue death sentences. These courts attempted to avoid exercising sanhedrical jurisdiction by not prescribing death by one of the authorized methods in the Torah. See *Capital Punishment*, *supra* note 24, at 144.

²⁷ *Capital Punishment*, *supra* note 24, at 145.

²⁸ See MEGIVERN, *supra* note 6, at 9-14; see also Rudolph, *supra* note 3, at 439-41.

preventing her death,²⁹ and taught an ethic of forgiveness and mercy, calling for his followers to turn the other cheek when assaulted.³⁰ On the other hand, many Christians have placed considerable emphasis on the counsel of the apostle Paul in his epistle to the Romans that Christians should respect civil authorities, since the ruler “does not bear the sword in vain; he is the servant of God to execute his wrath on the wrongdoer.”³¹ Indeed, for centuries, Christians have seized on this notion of the civil magistrate as “the servant of God to execute his wrath on the wrongdoer” as support for the notion that God has authorized the state to conduct executions.³²

²⁹ See *John* 8:2-11.

³⁰ In his Sermon on the Mount, Jesus said: “You have heard that it was said, ‘An eye for an eye and a tooth for a tooth.’ But I say to you, Do not resist one who is evil. But if any one strikes you on the right cheek, turn to him the other also.” *Matthew* 5:38-39 (Revised Standard Version). A few Christians interpret Jesus’ statement after Peter had struck the servant of the high priest at Jesus’ arrest—“Put your sword back into its place; for all who take the sword will perish by the sword,” *Matthew* 26:52 (Revised Standard Version)—as support for the notion that the state has the right to exercise the death penalty. See Randy Frame, *A Matter of Life and Death: As the Number of Executions Surges, Christians Remain Divided on the Death Penalty’s Morality and Purpose*, 39 CHRISTIANITY TODAY 50, 52 (August 14, 1995) (noting twentieth-century Christian theologian Carl Henry’s support for this theory). Others, such as Ambrose of Milan of the fourth century, interpreted this same passage as a call for believers to exercise an ethic of nonviolence. See MEGIVERN, *supra* note 6, at 32.

³¹ *Romans* 13:4 (Revised Standard Version). Paul wrote:

Let every person be subject to the governing authorities. For there is no authority except from God, and those that exist have been instituted by God. Therefore he who resists the authorities resists what God has appointed, and those who resist will incur judgment. For rulers are not a terror to good conduct, but to bad. Would you have no fear of him who is in authority? Then do what is good, and you will receive his approval, for he is God’s servant for your good. But if you do wrong, be afraid, for he does not bear the sword in vain; he is the servant of God to execute his wrath on the wrongdoer.

Romans 13:1-4 (Revised Standard Version).

Many scholars note, however, that the use of the word “sword” in these verses refers to the overall authority of the state, not the authority of the state to execute criminals. See e.g., Glenn H. Stassen, *Biblical Teaching on Capital Punishment*, in CAPITAL PUNISHMENT: A READER 126 (Glenn H. Stassen, ed., 1998) (arguing that Paul was addressing the tendency of Christians to resist paying Romans taxes and noting that the *macharian* is not the sword used in executions, but “names the symbol of authority carried by the police who accompanied tax collectors”); John Howard Yoder, *A Christian Perspective*, in THE DEATH PENALTY IN AMERICA 373 (Hugo Adam Bedau, ed., 1982) (“The sword of which Paul writes [in *Romans* 13:4], the *machaira*, is the symbol of judicial authority; it is not the instrument the Romans used for executing criminals.”);

³² See MEGIVERN, *supra* note 6, at 17-18.

II. ATTITUDES TOWARD THE DEATH PENALTY IN EARLY CHRISTIANITY

During the first three centuries of the Christian era, the question of the death penalty was quite real for Christians as they were frequent victims of Roman executions, particularly during the reigns of Emperors Decius and Diocletian in the third and fourth centuries.³³ As a minority and persecuted religion in the Roman Empire, Christian understandings of the death penalty had little impact on the manner in which the state conducted its penal policy. A few early Christian writers did, however, address the issue of the death penalty. Most argued that killing was contrary to Christian ethics and that Christians must play no role in executions, although they conceded that the state did have the right to impose the death penalty.³⁴

When Emperor Constantine converted to Christianity during the early fourth century and established Christianity as the official religion of the Roman Empire, Christian views on capital punishment took on greater significance. Within a generation, Christianity evolved from a minority religion to the religion of the state. In short order, Emperor Constantine confronted an issue that would bedevil the Church for more than a thousand years: how best to deal with those whose beliefs do not conform to those of the Church. Constantine used the repressive system of Roman law to Christianize the empire, issuing decrees against both Christian heretics and pagans. Those whose beliefs were found wanting were subject to execution.³⁵ The Theodosian Code of the fifth century specified 120 laws mandating the death penalty—both pre-Constantine Roman laws for a variety of offenses, as well as post-Constantine laws whose purpose was to control heresy and the spread of paganism.³⁶ The Justinian Code of the sixth century went even further, and Emperor Justinian used the death penalty liberally to crush religious dissenters.³⁷ Three centuries later, Emperor Leo V is estimated to have killed over

³³ See *id.* at 25.

³⁴ See *id.* at 20-27. Tertullian of Carthage, for example, objected to Christians serving in the Roman army in part because of the role they would play in executions, but he conceded that rulers had the power of the sword. See *id.* at 22. Origen counseled Christians not to participate in executions, but he did defend the state's use of the death penalty, relying in part on the fact that the Hebrew Scriptures outlined a number of capital crimes. See *id.* at 23. Cyprian of Carthage, though not specifically addressing capital punishment, claimed that "it is not lawful for the innocent to kill even the guilty . . ." *Id.* at 24. A few Christian writers, however, offered an explicit endorsement of capital punishment. Clement of Alexandria, for example, claimed that when someone "falls into incurable evil—when taken possession of, for example, by wrong or covetousness—it will be for his good if he is put to death." *Id.* at 23.

³⁵ See *id.* at 27. In time, Constantine and his successors issued at least sixty-six decrees against Christian heretics and another twenty-five against pagans. See *id.* at 27-28.

³⁶ See *id.* at 45.

³⁷ See *id.* at 48-49.

100,000 Paulician heretics.³⁸

Many Christian writers of the Constantinian era offered an endorsement of capital punishment. Lactantius, for example, had condemned capital punishment in the pre-Constantinian era: "It does not matter whether you kill a man with the sword or with a word, since it is the killing itself that is prohibited. And so there is no exception to this command of God. Killing a human being, whom God willed to be inviolable, is always wrong."³⁹ But after Constantine's conversion, Lactantius took a different view of the state's right to impose capital punishment, declaring that the emperor was "God's divinely appointed agent to restore justice and exact divine vengeance on the wicked."⁴⁰

Other Christian writers also supported the use of the death penalty for heretics and pagans. Julius Firmicus Maternus drafted a booklet in 346, *On the Error of Pagan Religions*, which one historian has described as "the earliest-known instance of an appeal by a Christian to 'the secular arm' to enforce Christianity and destroy other religions without mercy."⁴¹ Maternus urged the liberal use of executions to eradicate paganism, calling on the emperor to "castigate and punish this evil!"⁴²

To be sure, some Christians refused to embrace the use of the death penalty to eradicate pagans and heretics. Writing in the fourth century, John Chrysostom opposed the use of the death penalty to control heresy. Chrysostom relied on Jesus' parable in the Gospel of Matthew in which the master tells his servants not to remove weeds planted by the enemy from the field of wheat.⁴³ Chrysostom went further:

³⁸ See *id.*

³⁹ LLOYD STEFFEN, *EXECUTING JUSTICE: THE MORAL MEANING OF THE DEATH PENALTY* 150 (1998).

⁴⁰ MEGIVERN, *supra* note 6, at 26.

⁴¹ Clarence A. Forbes, "Firmicus Maternus," 5 *New Catholic Encyclopedia* 935 (1967), *quoted in* MEGIVERN, *supra* note 6, at 28.

⁴² MEGIVERN, *supra* note 6, at 28-29.

⁴³ In the thirteenth chapter of Matthew, Jesus told this parable:

The kingdom of heaven may be compared to a man who sowed good seed in his field; but while men were sleeping, his enemy came and sowed weeds among the wheat, and went away. So when the plants came up and bore grain, then the weeds appeared also. And the servants of the householder came and said to him, "Sir, did you not sow good seed in your field? How then has it weeds?" He said to them, "An enemy has done this." The servants said to him, "Then do you want us to go and gather them?" But he said, "No; lest in gathering the weeds you root up the wheat along with them. Let both grow together until the harvest; and at harvest time I will tell the reapers, Gather the weeds first and bind them in bundles to be burned, but gather the wheat into my barn."

Matthew 13:24-30 (Revised Standard Version).

[I]t is not right to put a heretic to death, since an implacable war would be brought into the world He does not forbid our checking heretics, and stopping their mouths, and taking away their freedom of speech, and breaking up their assemblies and confederacies, but [he does forbid] our killing and slaying them.⁴⁴

Other early Christians also challenged the use of the death penalty as inconsistent with Jesus' views on love and forgiveness. Pope Gregory I (590-604) commented that "[s]ince I fear God, I shrink from having anything whatsoever to do with the death of anyone."⁴⁵ Pope Nicholas I in the ninth century recommended abolishing the death penalty: "You should save from death not only the innocent but also criminals, because Christ has saved you from the death of the soul."⁴⁶

Others in the early Church conceded the authority of the state to execute, but counseled Christians to play no role. In 382, church leaders in Rome issued a directive to the bishops of Gaul stating that those who "have handed down death penalties . . . cannot be regarded as free from sin."⁴⁷ Yet in a society increasingly populated by Christians, the directive that believers play no role in executions foundered. In response to these practical concerns, the Church developed the notion that laity could participate in executions, but that clergy, subject to more stringent moral demands, could not. Ambrose of Milan, writing in the fourth century, set forth a demanding ethical standard of nonviolence for clergy:

[W]hen [a Christian] meets with an armed robber he cannot return his blows, lest in defending his life he should stain his love toward his neighbor. The verdict on this is plain and clear in the books of the Gospel. "Put up thy sword, for everyone that taketh the sword shall perish with the sword."⁴⁸

Despite these constraints on the clergy, the Church continued to condone the use of the death penalty by turning condemned heretics over to the state for execution.⁴⁹

Proponents of the death penalty would rely for the next thousand years on the words of St. Augustine, the most influential Christian theologian of the early Church, to support their views. In a letter in 408, Augustine wrote:

⁴⁴ MEGIVERN, *supra* note 6, at 35.

⁴⁵ *Id.* at 47.

⁴⁶ *Id.* at 48.

⁴⁷ *Id.* at 33.

⁴⁸ *Id.* at 32.

⁴⁹ *See supra* note 9.

I was formerly of the opinion that no one should be forced to the unity of Christ, that we should agitate with the word, fight with disputation, conquer by reason, lest we substitute feigned Catholics for avowed heretics. This opinion of mine was changed, not by words of critics, but by the logic of events. My own town rose up to convict me. It had been entirely devoted to the Donatist party [viewed as heretics], but now was brought to Catholic unity by fear of the imperial laws.⁵⁰

In recent years, scholars have argued that the characterization of Augustine as a strong proponent of the death penalty is unfair, noting that although he did recognize the authority of the state to execute, he repeatedly urged, in the name of mercy, that this authority be exercised very sparingly, if at all.⁵¹

III. THE CHRISTIAN CHURCH AND THE DEATH PENALTY IN THE MIDDLE AGES

Beginning in the eleventh century, the use of the death penalty to control heresy sharply increased. As one leading scholar has noted, the Middle Ages witnessed "the enshrinement of the death penalty at the very heart of church policy for dealing with heretics."⁵² Following the decentralization that accompanied the collapse of the Roman Empire, the Church confronted an increase in heresy. At the same time, the conversion of large numbers of Celtic, Germanic, and Slavic peoples brought many with views and practices at odds with traditional doctrine into the Church. Thousands would die for their unorthodox beliefs during the Middle Ages, with the full blessing of the Church. Pope Innocent IV legitimized torture as a means of

⁵⁰ MEGIVERN, *supra* note 6, at 36.

⁵¹ See *id.* at 39-45; see, e.g., GARRY WILLS, SAINT AUGUSTINE (1999) (emphasizing Augustine's distaste for the death penalty and urging that it not be utilized).

⁵² MEGIVERN, *supra* note 6, at 61. For a time, many Christians downplayed this ugly aspect of the Church's history. The 1911 edition of the *Catholic Encyclopedia*, for example, tried to minimize the Church's role in the execution of heretics:

During the Middle Ages, in spite of the zealous humanitarian efforts of the Church, cruel punishments were commonly employed, and the death penalty was very frequently inflicted. This severity was, in general, an inheritance from the Roman Empire, the jurisprudence of which, civil and criminal, pervaded Europe The nations of modern Europe, as they gradually developed, seemed to have agreed upon the necessity of extirpating all influences and agencies which tended to pervert the faith of the people Therefore, the laws of all these nations provided for the destruction of contumacious unbelievers, teachers of heresy, witches, and sorcerers, by fire Canon law has always forbidden clerics to shed human blood and therefore capital punishment has always been the work of the officials of the State and not of the Church.

Capital Punishment, in 12 THE CATHOLIC ENCYCLOPEDIA (1919), available at <http://www.newadvent.org/cathen/12565a.htm>.

ferreting out heretics in the thirteenth century, and called the elimination of heresy "the chief duty of the state."⁵³ Burning at the stake emerged as the preferred method of execution. By the thirteenth century, the death penalty for heretics was well in place and indeed had become a major tool for the control of heresy. Although the Church delegated the role of executioner to the state, the Church exercised considerable control by identifying those heretics deserving of death.⁵⁴

At the same time, sentiment about the death penalty received support from the Church's new doctrine of glorifying warfare in the service of the Church that culminated in the emergence of the "warrior-pope."⁵⁵ During the eleventh century, Pope Gregory VII led soldiers into bloody battle against Muslims, pagans, and heretics, calling upon his followers to take up the sword in the service of Christ.⁵⁶ This legitimization of the warrior provided an "atmosphere in which the death penalty was viewed as just one more violent measure authorized by God for the success of the church."⁵⁷

Following Gregory VII, Pope Urban II called for a holy war, or Crusade, in the name of Christ. Urban II announced: "Hitherto you have waged unjustifiable warfare Now we set before you wars which have in themselves the glorious reward of martyrdom, and the halo of present and everlasting fame."⁵⁸ This glorification of war and violence involved a perversion of traditional Christian ethics. In the *Chanson d'Antioche*, one of the great epic poems of the First Crusade, Christ is depicted on the cross as reassuring the thief next to him: "Know for certain that from over the seas will come a new race which will *take revenge* on the death of its father."⁵⁹ Traditionally, Christian theologians had rejected revenge as an impermissible motivation for action, relying in part on Paul's statement in the twelfth chapter of his epistle to the Romans: "Vengeance is mine, I will repay, says the Lord."⁶⁰ But the slaughter of non-Christians—Muslims, Jews, and pagans—was now justified as avenging the death of Christ.

Leading Christian theologians such as Thomas Aquinas developed theological justifications for the death penalty during the Middle Ages. Aquinas referred to the criminal as a "diseased member" that must be cut off in order for society to remain healthy.⁶¹ Aquinas wrote: "If a man be dangerous and infectious to the community, on account of some sin, it is praiseworthy and advantageous that he be killed in

⁵³ MEGIVERN, *supra* note 6, at 110-11.

⁵⁴ See, e.g., *id.* at 55-61.

⁵⁵ *Id.* at 62.

⁵⁶ See *id.* at 63-64.

⁵⁷ *Id.* at 64.

⁵⁸ *Id.* at 65.

⁵⁹ *Id.* at 68.

⁶⁰ *Romans* 12:19 (Revised Standard Version).

⁶¹ MEGIVERN, *supra* note 6, at xii.

order to safeguard the common good.”⁶² Aquinas disagreed with the interpretation of Jesus’ parable of the wheat and the weeds that earlier Christian theologians had relied upon to support their opposition to capital punishment: “If heretics be altogether uprooted by death, this is not contrary to our Lord’s command, which is to be understood of a case when the weeds could not be pulled up without uprooting the wheat.”⁶³ This notion of protecting the common good would find its way into the Catholic catechism promulgated by Pope Pius V at the Council of Trent in 1566. The catechism legitimated the exercise of capital punishment by “the civil authorities . . . [to] punish the guilty and protect the innocent” and noted that such action gives “security to life by repressing outrage and violence.”⁶⁴

Once again, some Christians during the Middle Ages opposed the death penalty. Bishop Wazo of Lieges, writing in the eleventh century, counseled against the death penalty for heretics:

Let us not seek to remove from this life by the sword of secular authority those whom God himself, Creator and Redeemer, wishes to spare It is possible for an omnipotent God to make those whom we now consider to be enemies of the way of the Lord superior even to us in that heavenly home.⁶⁵

Recognizing the aggravation that heretics caused, Wazo urged their excommunication, not execution.⁶⁶ Peter the Chanter, a professor of theology at the University of Paris in the twelfth century, also opposed the use of capital punishment to control heresy.⁶⁷ At the end of the twelfth century and the beginning of the thirteenth century, the Waldensians challenged the Church’s views on capital punishment. Their challenge not only failed, but led to efforts in the Church to further legitimize the death penalty.⁶⁸ Medieval dissension on the issue of the death penalty was not without difficulty; to question the Church’s embrace of capital punishment to control heresy risked enduring the fate of the heretic.⁶⁹

⁶² Thomas Aquinas, “Of Murder,” *Summa* 3:1461 (II-2, 64, 2), quoted in AHARON W. ZOREA, IN THE IMAGE OF GOD: A CHRISTIAN RESPONSE TO CAPITAL PUNISHMENT 136 (2000).

⁶³ MEGIVERN, *supra* note 6, at 117.

⁶⁴ *Id.* at 170.

⁶⁵ *Id.* at 58. Like Chrysostom, Wazo relied on the parable of the wheat and the weeds: “What does the Lord reveal by these words but His patience, which He wishes His preachers to display to their erring fellow men, particularly since it may be possible for those who today are weeds, tomorrow to be converted and become wheat.” *Id.*

⁶⁶ *See id.* at 59.

⁶⁷ *See id.* at 81-83.

⁶⁸ *See id.* at 99-103.

⁶⁹ *See id.* at 120-21.

At the same time that the Church endorsed the death penalty, it successfully resisted the state's efforts to enforce the penal law against clergy. Over the centuries, clerical immunity from punishment by the state developed. For example, a 1350 statute in England provided that clerics convicted of felonies should "enjoy the privilege of [the] Holy Church" and be delivered to ecclesiastical authorities for proper disposition.⁷⁰ In time, this notion of "benefit of clergy" extended to all convicts who could read and operated to prevent the execution of many felons.⁷¹ The Church declined, however, to extend this mercy to those convicted of heresy.⁷² Religious sensibilities also offered another mild limitation on capital punishment: throughout most of Europe, executions could not be held on the Sabbath.⁷³

The state readily acceded to the Church's desires that capital punishment be imposed on heretics. For example, in 1382, the death penalty in England was extended to heretics under the writ *de heretico comburendo* which remained in use until the end of the seventeenth century.⁷⁴ Those accused of witchcraft were particularly vulnerable to execution. Thousands of witches were burned in Europe between the fifteenth and seventeenth centuries, relying on the command in the book of Exodus: "Thou shalt not suffer a witch to live."⁷⁵ Burning at the stake emerged as the dominant punishment for witchcraft.⁷⁶

In addition to heresy and witchcraft, various European states imposed the death penalty for a variety of other crimes, such as murder, adultery, rape, and sodomy, frequently invoking the demands of the Jewish law. A Swedish ordinance of 1563 provided:

We decree that henceforth the following crimes shall not be punished by fine or imprisonment, to wit, blasphemy, treason, assassination, open adultery, incest, rape, sodomy and other similar crimes, for as much as Almighty God has Himself decreed, and nature and reason agree that those who commit such crimes should not escape death It is therefore necessary, in order to avoid the anger of God, that such Malefactors should not be spared.⁷⁷

⁷⁰ JOHN LAURENCE PRITCHARD, A HISTORY OF CAPITAL PUNISHMENT WITH SPECIAL REFERENCE TO CAPITAL PUNISHMENT IN GREAT BRITAIN 6-7 (1932).

⁷¹ *See id.* at 7.

⁷² *See id.*

⁷³ *See id.* at 23.

⁷⁴ *See id.* at 5.

⁷⁵ Exodus 22:18 (King James Version); *see* PRITCHARD, *supra* note 70, at 10.

⁷⁶ *See* PRITCHARD, *supra* note 70, at 10.

⁷⁷ *Id.* at 16. Another Swedish ordinance, from 1681, provided the death penalty for women who murder their illegitimate children, "because this crime, which is becoming frequent, ought to be as severely punished as possible in order that the anger of God be averted." *Id.*

Christian emphasis on mercy did help temper the use of the death penalty in some medieval societies. Alfred the Great in tenth century England repealed many capital offenses as inconsistent with Christianity, and "for the mercy that Christ taught," made restitution rather than retribution the general basis of his penal code.⁷⁸ William the Conqueror abolished the death penalty for all crimes in the eleventh century (although he did substitute castration in its place for many crimes).⁷⁹ Over the next several centuries, however, the death penalty re-emerged in England for a wide variety of offenses.

IV. REFORMATION EUROPE

Many of the Protestant reformers of the sixteenth century questioned the Church's use of the death penalty to control heresy, but did not, for the most part, question the right of the state to execute criminals. Martin Luther, for example, strongly supported the state's use of the death penalty as a means of exercising social control: "Let no one imagine that the world can be governed without the shedding of blood. The temporal sword should and must be red and bloodstained, for the world is wicked and is bound to be so. Therefore the sword is God's rod and vengeance for it."⁸⁰ Relying on the apostle Paul's epistle to the Romans, Luther explained that "God has delegated his authority of punishing evil-doers to civil magistrates."⁸¹ But Luther objected to the execution of heretics, of which he was one in the eyes of the Catholic Church, claiming that "[i]t is against the will of the Spirit to burn heretics."⁸² John Calvin also supported the state's use of the death penalty for the punishments of evildoers.⁸³

⁷⁸ HARRY POTTER, *HANGING IN JUDGMENT: RELIGION AND THE DEATH PENALTY IN ENGLAND 2* (1993).

⁷⁹ *See id.* at 2.

⁸⁰ MEGIVERN, *supra* note 6, at 142.

⁸¹ *Id.* at 524; *see supra* note 31.

⁸² *Id.* at 141.

⁸³ Calvin wrote in his *Institutes of the Christian Religion*:

Here . . . arises an important and difficult question. If by the law of God all Christians are forbidden to kill, . . . how can it be compatible with piety for magistrates to shed blood? But if we understand, that in the infliction of punishments, the magistrate does not act at all for himself; but merely executes the judgments of God, we shall not be embarrassed with this scruple.

JOHN CALVIN, *A COMPEND OF THE INSTITUTES OF THE CHRISTIAN RELIGION* 207-08 (Hugh T. Kerr ed., 1939). The *Westminster Confession of Faith*, derived in significant measure from Calvin's theology, provided:

God, the supreme Lord and King of all the world, hath ordained civil magistrates to be under Him, over the people, for His own glory, and the public good, and, to this end, hath armed them with the power of the sword, for the defense and encouragement of them that are good, and for the punishment of

This notion of the death penalty to punish evil had both secular and religious components. The death penalty operated to protect society from further harm, but it also functioned as a divine repudiation of evil.⁸⁴ As the Torah commanded: "You shall not thus pollute the land in which you live; for blood pollutes the land, and no expiation can be made . . . for the blood that is shed in it, except by the blood of him who shed it."⁸⁵ Because the criminal had not only endangered the social order but also had disobeyed the laws of God, the execution served to reassert the power of God over evil in this world. As one English cleric explained, the magistrates who carried out the death penalty were no less than "ministers of God; his revengers to execute wrath upon him that doeth evil."⁸⁶

The Church of England, established in the aftermath of the Protestant Reformation, also offered its endorsement of the death penalty.⁸⁷ Gilbert Burnet, a seventeenth-century bishop of Salisbury, echoed a common theme when he argued that the death penalty could lead to repentance and hence the salvation of the accused:

[N]othing is so likely a means to bring the criminal to repent of his sins, and to fit him to die as a Christian, as to condemn him to die for his crimes. If anything can awaken his conscience, and strike terror in him, that will do it. Therefore as capital punishments are necessary to human society, so they are often real blessings to those on whom they fall.⁸⁸

Moreover, because executions were often well-attended, the spectacle could lead to repentance and conversions in the broader community. The role of the death penalty in producing conversions would feature prominently among Anglicans and Puritans in their justification of capital punishment in the seventeenth and

evil doers.

The Westminster Confession of Faith, chapter XXIII, available at http://www.pcanet.org/general/cof_chapxxi-xxv.htm.

⁸⁴ See POTTER, *supra* note 78, at 160-61.

⁸⁵ *Numbers* 35:33 (King James Version).

⁸⁶ POTTER, *supra* note 78, at 162. This conception of the role of the executioner in the scheme of divine justice would continue. In the eighteenth century, the Roman Catholic political philosopher Joseph de Maistre would describe the executioner as the instrument of God on whom "all grandeur, all power, all subordination rests." *Id.* at 165. In the nineteenth century, Scottish retentionists would argue that "it is not the Sheriff's hand, it is not the sword of the executioner, but it is the hand of God, it is the sword of his justice that takes away the life that he himself gave." *Id.*

⁸⁷ The thirty-seventh article of the Church of England provided: "The Laws of the Realm may punish Christian men with death, for heinous and grievous offences." V.A.C. GATRELL, *THE HANGING TREE: EXECUTION AND THE ENGLISH PEOPLE, 1770-1868*, 373 (1994).

⁸⁸ *Id.* at 11-12.

eighteenth centuries.

Yet many Protestant reformers of the sixteenth and seventeenth centuries, particularly those associated with the Anabaptist wing of the Reformation, such as the Swiss Brethren and the Mennonites, opposed all forms of violence.⁸⁹ Although Anabaptists grounded their opposition to the death penalty in the teachings of Jesus, they had practical concerns as well. During the sixteenth century, approximately five thousand Anabaptists were executed as heretics.⁹⁰ In seventeenth-century England, the Quakers and the Levellers also opposed capital punishment. As one Leveller argued: "If the power of life and death be only in the hand of the Lord, then surely he is a murderer of the creation that takes away the life of his fellow creature man, by any law whatsoever."⁹¹

V. THE DEATH PENALTY IN COLONIAL AMERICA

English settlers in colonial America widely embraced the death penalty. The English Puritans who settled Massachusetts and Connecticut were particularly enthusiastic in their support of capital punishment. Viewing themselves as children of Israel, the Puritans borrowed heavily from the Mosaic law in establishing their new society, including the Torah's compilation of capital crimes. The Massachusetts Code of 1648, for example, with its long list of capital crimes, borrowed heavily from the Mosaic law, in some instances almost verbatim.⁹² Heresy remained a capital crime in the Puritan colonies; both Quakers and suspected witches lost their lives in seventeenth-century Massachusetts and Connecticut.⁹³ On the other hand, in colonies settled by Quakers, the death penalty was far more limited in its application.⁹⁴

⁸⁹ See MEGIVERN, *supra* note 6, at 197-207.

⁹⁰ See *id.* at 8.

⁹¹ MASUR, *supra* note 10, at 4.

⁹² See GEORGE LEE HASKINS, LAW AND AUTHORITY IN EARLY MASSACHUSETTS: A STUDY IN DESIGN AND TRADITION 145-146 (1960).

⁹³ Eight women and men accused of witchcraft were executed in Connecticut between 1647 and 1654 and four more between 1662 and 1663; twenty died in Essex County, Massachusetts, in 1692 and 1693. Four Quakers were executed in Massachusetts between 1659 and 1661 because of heresy coupled with their refusal to leave the colony. See Daniel Allen Hearn, Legal Executions in New England: A Comprehensive Reference, 1623-1960 14, 29-32 (1999).

⁹⁴ In the 1646 royal charter for South Jersey, for example, no crime warranted the death penalty; no person would be executed in this colony until the end of the seventeenth century. In Pennsylvania, William Penn's Great Act of 1682 confined the death penalty to murder and treason, a striking departure from English law that imposed the death penalty for a variety of property-related crimes. See Hugo Adam Bedau, *Evolution of the Death Penalty in America*, in THE DEATH PENALTY 29 (Irwin Isenberg, ed. 1977). In the Rhode Island colony, comprised of many religious dissenters who had fled Massachusetts, the death

Executions in colonial America, particularly in Puritan New England, were both civil and religious acts, as magistrates and clergy each played a role. Held in public, the execution served the social function of deterring others from like behavior and the religious function of inducing repentance and expiating the evil that had polluted the community.⁹⁵ Executions were typically preceded by church services wherein clergy preached to the condemned and to the community, urging repentance and explaining the divine requirements of execution.⁹⁶ These "execution sermons" played a critical role in conveying the social and religious meaning of the execution. Some historians have argued that by the time of the American Revolution, "execution day" gave the clergy a chance to reassert their influence at a time when the authority of the clergy was slipping.⁹⁷

VI. THE BEGINNING OF ABOLITIONIST SENTIMENT IN THE LATE EIGHTEENTH CENTURY

Following the American Revolution, there was, in the words of one historian, "an unprecedented assault on the death penalty."⁹⁸ Opponents of capital punishment reflected an array of religious and philosophical perspectives.

Eighteenth-century Enlightenment thinkers concerned with the abuses of state power, particularly anti-republican monarchies, sharply criticized the harsh penal

penalty was utilized for relatively few crimes, specifically excluding blasphemy and idolatry. See Philip English Mackey, *Introduction* to VOICES AGAINST DEATH: AMERICAN OPPOSITION TO CAPITAL PUNISHMENT, 1787-1975 xi (Philip English Mackey, ed., 1976).

Following the English example, however, the number of capital crimes in the American colonies sharply increased during the eighteenth century. See *id.* at xii.

⁹⁵ See MASUR, *supra* note 10, at 6. In eighteenth-century England, many viewed the death of the accused as performing a "sacrificial" role, atoning for the evil committed. In this environment, the body of the deceased took on a talismanic quality, as many believed that touching the corpse provided physical healing. See POTTER, *supra* note 78, at 162-63.

⁹⁶ See MASUR, *supra* note 10, at 25-26. For example, in his 1687 sermon preceding an execution, Puritan clergyman Increase Mather exhorted both the condemned man and the assembled crowd to repent and quoted the Bible to explain the religious demand for the execution: "Whosoever sheddeth man's blood, by man (i.e. by some man in Authority, proceeding in an orderly way of Judicature, as the Hebrew Expositors do rightly interpret the words) shall his blood be shed, for in the Image of God made He him." Increase Mather, *A Sermon Occasioned by the Execution of a Man Found Guilty of Murder*, in CAPITAL PUNISHMENT IN THE UNITED STATES: A DOCUMENTARY HISTORY 13 (Bryan Vila & Cynthia Morris, eds. 1997) [hereinafter CAPITAL PUNISHMENT] (citing *Genesis* 9:6). Mather also cited the book of Numbers to the effect that the death penalty was necessary so that "the Land where the murder is committed may be purged from the guilt of Blood." *Id.* (citing *Numbers* 35:33).

⁹⁷ See MASUR, *supra* note 10, at 42-43.

⁹⁸ *Id.* at 50.

systems of most Western nations.⁹⁹ Both Montesquieu and Cesare Beccaria proffered theories of punishment that called into question basic assumptions about the cause of crime and the purpose of punishment that were implicit in existing penal practice. In 1764, the Italian Beccaria published a highly influential book, *An Essay on Crimes and Punishments*, that set forth a new penal theory. Beccaria located the cause of crime as much in social environment as in human depravity, and argued that the purpose of punishment was to deter crime, not to exact retribution.¹⁰⁰ Beccaria wrote that “[t]he end of punishment is no other than to prevent the criminal from doing further injury to society, and to prevent others from committing the like offense.”¹⁰¹ Having jettisoned the long cherished notion of retribution as the central principle of punishment, Beccaria urged a penal system based on certainty of punishment, not severity, and that was grounded in the principle of proportionality. Pursuant to this theory, less serious crimes should be punished less severely, a notion contrary to the existing practice of imposing capital punishment for a vast array of personal and property crimes. Going further, Beccaria argued that imprisonment could both protect society and provide a more effective deterrent to crime than could the death penalty, which merely served as an example of human barbarity.¹⁰²

Beccaria’s work was influential in both the United States and Europe. Thomas Jefferson, for example, drawing heavily on Beccaria’s penal theories, proposed the abolition of all capital crimes except murder and treason in Virginia in 1779.¹⁰³ Though Virginia rejected Jefferson’s proposal, by the end of the eighteenth century, capital punishment had been restricted in much of the new nation to a limited number of crimes.¹⁰⁴ Moreover, in part due to the influence of Beccaria, the

⁹⁹ Many Americans in the post-revolutionary generation argued that the death penalty was corrosive of republican values, associating the gallows with the unfettered power of the English monarchy. See DAVID J. BODENHAMER, *FAIR TRIAL: RIGHTS OF THE ACCUSED IN AMERICAN HISTORY* 56 (1992). As Benjamin Rush, a leading opponent of the death penalty in the late eighteenth century, noted, “[c]apital punishments are the natural offspring of monarchical governments.” MASUR, *supra* note 10, at 65.

¹⁰⁰ See MASUR, *supra* note 10, at 52-53; BODENHAMER, *supra* note 99, at 41-42.

¹⁰¹ Quoted in MASUR, *supra* note 10, at 52.

¹⁰² See *id.* at 52-53. Beccaria’s work was not well-received by religious traditionalists. The Catholic Church placed Beccaria’s book on its *Index of Forbidden Books*. See WALTER BERNS, *FOR CAPITAL PUNISHMENT: CRIME AND THE MORALITY OF THE DEATH PENALTY* 19 (1991).

¹⁰³ See Thomas Jefferson, *A Bill for Proportioning Crimes and Punishments* (1779), in CAPITAL PUNISHMENT, *supra* note 96, at 16-18.

¹⁰⁴ See MASUR, *supra* note 10, at 4-5; Mackey, *supra* note 94, at xvi-xvii. The English, on the other hand, retained the death penalty for more than two hundred crimes in the early nineteenth century, as part of that country’s “Bloody Code.” See *id.* at xii; POTTER, *supra* note 78, at 3-4. English attitudes towards capital punishment were, according to historian Harry Potter, perhaps best typified by the story of the shipwrecked sailor “who when washed

penitentiary emerged in the late eighteenth century as an alternative to the gallows. Penal reformers, embracing a more optimistic view of human nature than that found in traditional religious understandings, argued that the criminal could be reformed and rehabilitated in the confines of the penitentiary.¹⁰⁵

Important theological shifts also contributed to the eighteenth-century assault on the death penalty. A number of liberal religious groups—Quakers, Unitarians, and Universalists—articulated theologies of divine and human nature that emphasized God's goodness and the human capacity for moral improvement in contrast to the Calvinist emphasis on God's judgment and human depravity. Unitarians, in particular, emphasized the social causes of crime and the possibility of rehabilitation of the criminal.¹⁰⁶ Such understandings directly contradicted those of many evangelical clergy who contested the notion that crime had social causes, instead labeling criminals as "naturally vicious" or "naturally inclined to vice."¹⁰⁷ Moreover, Universalists, who believed in universal salvation of all humanity, rejected the notion of a punitive God who required the execution of the criminal as a form of expiation.¹⁰⁸

Quakers played a particularly important role in the limitation of capital punishment in late eighteenth-century America. Quakers, whose pacifism led not only to opposition to war but also to the death penalty, had long been critical of capital punishment.¹⁰⁹ In 1786, Pennsylvania, with strong Quaker influence, became the first state to reform its penal code, sharply reducing the number of capital crimes. Reflecting Quaker rejection of the Calvinist notion of human depravity and Quaker belief in the possibility of human rehabilitation, the preamble to the Pennsylvania penal code of 1786 began by noting that "it is the wish of every good government to reclaim rather than destroy."¹¹⁰

Perhaps the most articulate eighteenth-century opponent of capital punishment was Benjamin Rush, a Quaker and signer of the Declaration of Independence from

ashore, and seeing a body swinging from a gibbet, thanked God that he was in a Christian country." POTTER, *supra* note 78, at 16.

¹⁰⁵ See DAVID J. ROTHMAN, *THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC* 59-108 (1971) (noting how the conception of deviancy as being determined by one's environment led to the idea of prisons as a means for reforming criminals).

¹⁰⁶ Nineteenth-century Unitarian minister William Henry Channing, for example, argued against the death penalty in one instance by emphasizing the poor environment in which the condemned had lived. See MASUR, *supra* note 10, at 15. Such an argument would carry no weight with a religious traditionalist who emphasized bad character as the primary cause of crime.

¹⁰⁷ MASUR, *supra* note 10, at 37.

¹⁰⁸ See *id.* at 68-69.

¹⁰⁹ In 1699, for example, John Bellars, an English Quaker, had argued that the death penalty was a "Stain . . . to Religion." MASUR, *supra* note 10, at 74.

¹¹⁰ *Id.* at 76.

Philadelphia. Rush challenged the widely held view that the executioner was God's servant, labeling it sacrilegious for public officials to claim that they shared with God the right to punish by death.¹¹¹ Rush urged incarceration, with the possibility of rehabilitation, in lieu of execution.¹¹² Rush argued that laws "which inflict death for murder, are, in my opinion, as unchristian as those which justify or tolerate revenge; for the obligations of christianity upon individuals, to promote repentance, to forgive injuries, and to discharge the duties of universal benevolence, are equally binding upon states."¹¹³ Criticizing those death penalty proponents who relied on the verse, "[w]hoever sheds the blood of man, by man shall his blood be shed . . .,"¹¹⁴ Rush argued that it was "the ignorance and cruelty of man, which by the misapplication of this text of scripture, has so long and so often stained the religion of Jesus Christ with folly and revenge."¹¹⁵

Religious traditionalists, however, defended the retribution theory of punishment that underlay capital punishment. Rejecting the liberal theologies of human and divine nature proffered by many death penalty opponents, evangelical and Anglican clergy supported the retention of capital punishment. In an increasingly irreligious age, many clerics thought that a decline in religious faith would lead to increasing lawlessness for which the death penalty was needed as a restraint.¹¹⁶

The nineteenth century witnessed a growth in anti-death penalty sentiment in the United States. During the 1830s and 1840s, a serious abolitionist campaign developed in parts of the North, which procured legislation abolishing the death penalty in Michigan, Rhode Island, and Wisconsin.¹¹⁷ The greatest success of the movement, however, was not abolition, but rather the removal of executions from the public square to behind prison walls.¹¹⁸

Unitarian and Universalist clergy played central roles in these nineteenth-century abolitionist efforts, while clergy from the more orthodox religious establishment—primarily Congregationalists and Presbyterians—offered strong opposition.¹¹⁹ To some extent, the nineteenth-century abolitionist movement pitted two competing views of human nature, grounded in competing religious

¹¹¹ See *id.* at 67.

¹¹² See *id.* at 68-69.

¹¹³ Benjamin Rush, *An Enquiry into the Effects of Public Punishments Upon Criminals and Upon Society*, in CAPITAL PUNISHMENT, *supra* note 94, at 22.

¹¹⁴ Genesis 9:6 (Revised Standard Version).

¹¹⁵ MEGIVERN, *supra* note 6, at 303.

¹¹⁶ See POTTER, *supra* note 78, at 15.

¹¹⁷ Michigan abolished capital punishment in 1846, Rhode Island in 1852, and Wisconsin in 1853. See PHILIP ENGLISH MACKEY, *HANGING IN THE BALANCE: THE ANTI-CAPITAL PUNISHMENT MOVEMENT IN NEW YORK STATE, 1776-1861*, at vii (1982).

¹¹⁸ See MASUR, *supra* note 10, at 93-116.

¹¹⁹ See Mackey, *supra* note 94, at xxiii.

understandings. Abolitionists tended to view humans as basically moral, educable, and capable of redemption, while Calvinist-influenced supporters of the death penalty viewed humans as basically sinful and depraved.¹²⁰ Likewise, abolitionists tended to emphasize God's mercy, while retentionists emphasized God's justice.¹²¹

In the nineteenth-century debates over capital punishment, competing religious arguments, replete with extensive interpretations of various biblical texts, were common. Charles Spear, a Universalist minister in Massachusetts and one of the leading abolitionists of the nineteenth century, wrote a popular anti-death penalty book, *Essays on the Punishment of Death*, in which he made a strong appeal that capital punishment was inconsistent with fundamental Christian principles:

[The death penalty] is wholly subversive of any good, and entirely contrary to the spirit of Christianity It is said that the Christian precepts were designed for individuals, not nations. This has always been urged against every attempt to make an application of Christianity to life and conduct If individuals are bound to act up to Christian rules, societies are subject to the same.¹²²

On the other hand, Presbyterian clergyman George Cheever of New York, whom Spear called "the champion of the gallows in America,"¹²³ was perhaps the nation's most powerful mid-century proponent of capital punishment. In his influential 1842 book *Punishment by Death*, Cheever argued that God had mandated death for murderers in the aftermath of the Noahic flood ("[w]hoever sheds the blood of man, by man shall his blood be shed").¹²⁴ Because God had never abrogated that command, disobedience would constitute defiance and would risk God's wrath.¹²⁵

Another wave of anti-death penalty reform swept this country as part of the

¹²⁰ See MASUR, *supra* note 10, at 7.

¹²¹ See HAINES, *supra* note 12, at 7-8.

¹²² CHARLES SPEAR, *ESSAYS ON THE PUNISHMENT OF DEATH* 176, 182 (1845). John O'Sullivan, a leading abolitionist lawyer from New York, also framed his views in religious terms:

The Voice of God has issued the perpetual and universal mandate to the race of his creation, "*Thou shalt not kill!*" . . . It should be the policy of all social government to maintain and magnify, by every means in its power, this great idea of the inviolability of the life of man.

John O'Sullivan, *Report in Favor of the Abolition of the Punishment of Death by Law*, in CAPITAL PUNISHMENT, *supra* note 96, at 52-53.

¹²³ Mackey, *supra* note 94, at xxiii.

¹²⁴ *Genesis* 9:6 (Revised Standard Version).

¹²⁵ See GEORGE B. CHEEVER, *PUNISHMENT BY DEATH: ITS AUTHORITY AND EXPEDIENCY* 139 (1849) ("If its obligation ceased at any time, or with any race, *when* did its obligation cease, and by what sign or message from God did men know it? These are questions that no man can answer."); Mackey, *supra* note 94, at xxiii-xxiv.

larger Progressive Era reform movement during the first two decades of the twentieth century; as a result, nine states abolished the death penalty.¹²⁶ What is striking about the debates of this era is the relative unimportance of theological arguments for both abolitionists and retentionists. Defenders of capital punishment during the nineteenth century relied heavily on the legitimization of capital punishment in the Hebrew Scriptures. Early twentieth-century retentionists, however, articulated their arguments primarily in prudential terms, emphasizing the deterrent effect of capital punishment.¹²⁷ Some supporters of the death penalty also emphasized the social control benefits of the death penalty, arguing that executions were necessary because America was "composed so largely of foreigners and Negroes."¹²⁸ The nativist anxieties of the World War I era helped to scuttle the Progressive Era reform movement in favor of abolition.¹²⁹ Indeed, national momentum would swing in favor of capital punishment over the course of the next three decades, particularly as a number of states included kidnapping as a capital crime in response to the notorious Lindbergh baby kidnapping in 1932.¹³⁰

VII. THE DEATH PENALTY IN THE LATE TWENTIETH CENTURY

The aftermath of World War II produced an extensive reconsideration of capital punishment on many fronts. Within a few years of the war's conclusion, Germany, Italy, and Austria each abolished the death penalty.¹³¹ In 1949, England commissioned a Royal Commission on Capital Punishment to examine the death penalty which, in 1953, produced a monumental critique that seriously questioned the deterrent effect of capital punishment.¹³² Three years later, Arthur Koestler produced a widely read and biting critique of both the death penalty and its support in the Anglican Church.¹³³

In theological circles, a growing number of Protestant theologians questioned the legitimacy of capital punishment. Karl Barth, the great German theologian, offered a theological critique of the retributive function of the death penalty in the early 1950s:

¹²⁶ See Mackey, *supra* note 94, at xxxii-xxxiv.

¹²⁷ See *id.* at xxxv.

¹²⁸ Quoted in *id.* at xxxv.

¹²⁹ See *id.* at xxxvi. During the 1919-1920 time period, four abolitionist states reenacted capital punishment statutes. See *id.* at xxxvii.

¹³⁰ See *id.* at xl-xli.

¹³¹ See HOOD, *supra* note 11, at 7-8.

¹³² See MEGIVERN, *supra* note 6, at 284-85.

¹³³ See ARTHUR KOESTLER, REFLECTIONS ON HANGING (1957); MEGIVERN, *supra* note 6, at 285-86.

The death penalty has been abolished on earth by the execution of Jesus Christ on Golgotha. The atonement of the Son of God has annihilated it completely; nothing speaks for it, everything speaks against it

. . . .

Now that Jesus Christ has been nailed to the cross for the sins of the world, how can we still use the thought of *expiation* to establish the death penalty?

. . . .

Capital punishment must always be rejected and opposed as the legally established institution of a stable and peaceful state.¹³⁴

In the meantime, during the mid-1950s, abolitionist sentiment in the United States again began to stir. A number of factors contributed to this rise in abolitionist sentiment. Scores of social scientists challenged the notion that capital punishment deterred crime. Both the Royal Commission's study of the deterrent effect of capital punishment in England and Koestler's follow-up critique received considerable attention in the United States.¹³⁵ More importantly, the impending execution of Caryl Chessman in California for kidnapping helped energize abolitionist sentiment throughout the country. Chessman, who achieved considerable prominence for writing several books and articles during his twelve years on death row, inspired an international campaign to save his life. Though he was finally executed in 1960, his case sparked renewed interest in the issue of capital punishment.¹³⁶ Several states abolished capital punishment during the early 1960s.¹³⁷

One of the most striking aspects of this movement was the large number of Protestant denominations that formally announced their support for abolition during the late 1950s and 1960s, many of which had not previously expressed opposition to capital punishment. The Methodist Church (1956),¹³⁸ the United Church of Canada (1956),¹³⁹ the Christian Church (Disciples of Christ) (1957),¹⁴⁰ the

¹³⁴ MEGIVERN, *supra* note 6, at 275-76 (quoting Karl Barth, *Church Dogmatics* III/4, 443-449 (1951)). Barth did concede that "in an absolute emergency," when the existence "of the state and its members is at issue," the death penalty could be used. *Id.*

¹³⁵ See Mackey, *supra* note 94, at xlii.

¹³⁶ See *id.* at xlii-xlv.

¹³⁷ See *id.* at xlvii-xlix.

¹³⁸ See MEGIVERN, *supra* note 6, at 321-22, 551, n.32 (The Methodist Church's 1956 statement provided in part that "[w]e deplore the use of capital punishment."). For more recent Methodist statements of opposition to capital punishment, see MELTON, *supra* note 13, at 136-41.

¹³⁹ See MEGIVERN, *supra* note 6, at 322, 551-52 n.33 (opposing capital punishment as "contrary to the spirit and teaching of Christ").

¹⁴⁰ Christian Church (Disciples of Christ), *Resolution Concerning Opposition to the Use of the Death Penalty* (1985) (noting that the Christian Church approved resolutions

Episcopal Church (1958),¹⁴¹ the American Baptist Church (1958),¹⁴² the Church of the Brethren,¹⁴³ the Presbyterian Church in the United States of America (1959),¹⁴⁴ the Quakers (1960),¹⁴⁵ the Moravian Church (1961),¹⁴⁶ the Reformed Church in America (1965),¹⁴⁷ the Mennonite Church (1965),¹⁴⁸ and the Lutheran Church in America (1966)¹⁴⁹ all issued formal statements of opposition to capital punishment.¹⁵⁰ The Unitarians and the Universalists¹⁵¹ also issued formal

opposing capital punishment in 1957 and 1962), *available at* <http://www.netpath.net/~ucch/pfadp/church4.htm>; *see also* MELTON, *supra* note 13, at 57-58 (containing 1976 and 1985 statements of opposition to capital punishment).

¹⁴¹ The Episcopal Church, *Capital Punishment* (1979) (noting that the 1958 General Convention of the Episcopal Church opposed capital punishment on the grounds that "the taking of such a human life falls within the providence of Almighty God and not within the right of Man . . ."), *available at* <http://www.netpath.net/~ucch/pfadp/church7.htm>; *see also* MELTON, *supra* note 13, at 98-105 (containing a 1987 statement of opposition to capital punishment).

¹⁴² *See* American Baptist Church in the U.S.A., *Resolution on Capital Punishment* (1958), in MELTON, *supra* note 13, at 53-54.

¹⁴³ Church of the Brethren *Statements on Capital Punishment* (1959) (citing 1959 statement commending "current efforts to abolish capital punishment"), *available at* <http://www.netpath.net/~ucch/pfadp/church6.htm>.

¹⁴⁴ The Presbyterian Church, *Capital Punishment* (1997) (citing 1959 policy statement of the Presbyterian Church General Assembly that provided that "capital punishment cannot be condoned by an interpretation of the Bible based upon the revelation of God's love in Jesus Christ" and called on Christians to "seek the redemption of evil doers and not their death"), *available at* <http://www.pcusa.org/pcusa/info/cappun.htm>.

¹⁴⁵ Friends United Meeting, *Statement of Capital Punishment* (1960) (noting that 1960 "Five Years Meeting of Friends" expressed opposition to capital punishment because it "violates the gospel we proclaim" and "promotes the evils of vengeance"), *available at* <http://www.netpath.net/~ucch/pfadp/church9.htm>.

¹⁴⁶ The Moravian Church, *Capital Punishment* (1961) (adopting resolution 1961 urging church members "to work for the abolition of the death penalty"), *available at* <http://www.netpath.net/~ucch/pfadp/church11.htm>.

¹⁴⁷ Reformed Church in America (U.S.A.), *Resolution on Capital Punishment* (1965) (describing capital punishment as "incompatible with the spirit of Christ and the ethic of love"), *available at* <http://www.netpath.net/~ucch/pfadp/church14.htm>.

¹⁴⁸ General Conference of the Mennonite Church, *Capital Punishment* (1965) (stating that "Christ through His redemptive work has fulfilled the requirement of the death penalty . . ."), *available at* <http://www.netpath.net/~ucch/pfadp/church8.htm>.

¹⁴⁹ Lutheran Church in America, *Statement on Capital Punishment* (1991) (urging abolition of capital punishment), *available at* <http://www.netpath.net/~ucch/pfadp/church10.htm>.

¹⁵⁰ At the same time, the Church of England underwent a radical transformation of its views, as virtually all of the Church's bishops announced their opposition to capital punishment, a sharp departure from the Church's pre-World War II embrace of the death penalty. *See* POTTER, *supra* note 78, at 193-203.

¹⁵¹ *See* MEGIVERN, *supra* note 6, at 322.

statements of opposition in the late 1950s, and then issued another statement of opposition following their merger in 1961.¹⁵² Since then, virtually every mainline Protestant denomination has affirmed or reaffirmed its opposition to the use of capital punishment. Moreover, during the past forty years, various Reform and Conservative Jewish groups have also announced their opposition to capital punishment.¹⁵³

In 1968, the National Council of Churches of Christ, speaking on behalf of 103 separate church bodies, unanimously adopted a resolution calling for the abolition of the death penalty.¹⁵⁴ When the Supreme Court in 1972 considered the constitutionality of the death penalty in *Furman v. Georgia*,¹⁵⁵ thirteen religious organizations—Protestant, Catholic, and Jewish—filed amicus briefs asking the United States Supreme Court to declare the death penalty unconstitutional.¹⁵⁶

Even more striking, however, was the reversal within the Roman Catholic Church on the death penalty. According to James Megivern, the leading historian of the Catholic Church's views on capital punishment, the Church began a "revolutionary repudiation of capital punishment" after the 1965 Second Vatican Council.¹⁵⁷ The Second Vatican Council had a significant impact on Catholic attitudes, particularly the Council's emphasis on the protection of human life. One American bishop who announced his opposition to capital punishment in the early 1970s reported the impact of Vatican II on his own thinking: "The last thing that [Pope] Paul VI said to the bishops of the world on the last day of the council was this: Go out into the world and make every effort possible in every way to restore the dignity of man and all that it implies!"¹⁵⁸

In the early 1970s, opposition to the death penalty in the American Catholic

¹⁵² Unitarian Universalist Association (U.S.A.), Capital Punishment (1979) (statement of opposition to capital punishment by the newly merged Unitarian Universalist Association), available at <http://www.netpath.net/~ucch/pfadp/church15.htm>; see also MEGIVERN, *supra* note 6, at 322, 552 n.34.

¹⁵³ Since 1959, both the Central Conference of American Rabbis and the Union of American Hebrew Congregations have maintained formal opposition to the death penalty. Religious Action Center of Reform Judaism, *Issues: Death Penalty: Position of the Reform Jewish Movement* (June 26, 2000) (noting opposition of Conservative and Reform rabbis to death penalty), available at <http://rj.org/rac/issues/issuedp.html>; see also Rosin, *supra* note 12.

¹⁵⁴ See MEGIVERN, *supra* note 6, at 333-34. The National Council offered a variety of reasons in support of its resolution, some of which were theological in nature and some of which were pragmatic: the dignity of human life, the lack of deterrence, the impact on poor defendants and those who are racial minorities, and the frustration of redemption of the wrongdoer. See *id.*

¹⁵⁵ 408 U.S. 238 (1972) (striking down the Georgia death penalty statute as applied).

¹⁵⁶ See MEGIVERN, *supra* note 6, at 339.

¹⁵⁷ *Id.* at 457.

¹⁵⁸ *Id.* at 343.

Church substantially increased. In 1972, the Indiana bishops became the first in the United States to call for the abolition of the death penalty. Their arguments were several: the inconsistency of opposition to abortion and euthanasia with support for the death penalty; the Church's renewed emphasis on respect for human dignity in all manner of life; the lack of a deterrent effect; the arbitrariness of the death penalty and its bias against the poor; and the question of whether the death penalty served any purpose other than revenge.¹⁵⁹ This emphasis on the dignity and sacredness of human life would animate Catholic opposition to the death penalty thereafter.

The American Catholic bishops issued their first of many statements against the death penalty in 1974.¹⁶⁰ The Pontifical Commission for Justice and Peace, which examined the issue at the request of the Catholic bishops in 1976, concluded that "[t]here is no convincing evidence to support the contention that [the death penalty] is exemplary or, in modern terms, a deterrent. [Therefore] it can be concluded that capital punishment is outside the realm of practicable just punishments."¹⁶¹ In 1980, the National Conference of Catholic Bishops issued a Statement on Capital Punishment in which they, too, concluded "that in the conditions of contemporary American society, the legitimate purposes of punishment do not justify the imposition of the death penalty."¹⁶² During the early 1980s, American Cardinal Joseph Bernadin coined the phrase, the "seamless garment," to describe Catholic opposition to a variety of practices involving the taking of human life—capital punishment, euthanasia, abortion, and nuclear war.¹⁶³

In March 1995, Pope John Paul II made clear the Church's opposition to the death penalty. In his papal encyclical, *Evangelium Vitae*, John Paul II wrote that

there is a growing tendency, both in the Church and in civil society, to demand that [the death penalty] be applied in a very limited way or even that it be abolished completely [T]he nature and extent of the punishment must be carefully evaluated and decided upon, and ought not to go to the extreme of executing the offender except in cases of absolute necessity: in other words, when it would not be possible otherwise to defend society. Today however, as a result of steady improvements in

¹⁵⁹ See *id.* at 341-42.

¹⁶⁰ See Robert M. Bohm, *Toward an Understanding of Death Penalty Opinion Change in the United States: The Pivotal Years, 1966 and 1967*, 16 HUMAN. & SOC'Y 524, 524-25 (1992).

¹⁶¹ John H. Garvey & Amy V. Coney, *Catholic Judges in Capital Cases*, 81 MARQ. L. REV. 303, 310 (1998).

¹⁶² *Id.* at 310; U.S. Catholic Bishops' Statement on Capital Punishment (Nov. 1980), available at <http://www.pbs.org/wgbh/pages/frontline/angel/procon/bishopstate.html>.

¹⁶³ See John Langan, *Capital Punishment*, 54 THEOLOGICAL STUDIES 111, 114 & n.8 (1993).

the organization of the penal system, such cases are very rare, if not practically non-existent.¹⁶⁴

John Paul II acknowledged that the Hebrew Scriptures contained many references to the use of capital punishment, but stated that these references must be read in the context of the New Testament: "But the overall message, which the New Testament will bring to perfection, is a forceful appeal for respect for the inviolability of physical life and the integrity of the person."¹⁶⁵

The 1997 Catholic Catechism affirmed the notion that capital punishment should be rarely deployed:

If . . . non-lethal means are sufficient to defend and protect people's safety from the aggressor, authority will limit itself to such means, as these are more in keeping with the concrete conditions of the common good and more in conformity with the dignity of the human person. Today, in fact, as a consequence of the possibilities which the state has for effectively preventing crime, by rendering one who has committed an offense incapable of doing harm—without definitively taking away from him the possibility of redeeming himself—the cases in which the execution of the offender is an absolute necessity "are very rare, if not practically nonexistent."¹⁶⁶

By the 1990s, virtually every mainline Protestant denomination, the Catholic Church, and most Jewish groups¹⁶⁷ in the United States had expressed formal

¹⁶⁴ John Paul II, *Evangelium Vitae* (March 1995) quoted in Garvey & Coney, *supra* note 161, at 311, available at <http://www.historyplace.com/pointsofview/evangelium-vitae.htm>.

The Catholic Catechism now reads:

[T]he traditional teaching of the church does not exclude recourse to the death penalty, if this is the only possible way of effectively defending human lives against the unjust aggressor. If, however, non-lethal means are sufficient to defend and protect people's safety from the aggressor, authority will limit itself to such means, as these are more in keeping with the concrete conditions of the common good and more in conformity with the dignity of the human person.

Garvey & Coney, *supra* note 161, at 313.

¹⁶⁵ *Capital Punishment in Wisconsin: A Statement from the State's Roman Catholic Bishops* (June 1995) (quoting John Paul II, *Evangelium Vitae* § 56), at <http://www.wisconsinccatholic.com/statements/punishment.html>.

¹⁶⁶ Catholics Against Capital Punishment, *New (1997) Language in the Catechism of the Catholic Church on the Subject of the Death Penalty* (quoting John Paul II, *Evangelium Vitae*), available at <http://www.igc.org/cacp/catechism.html>.

¹⁶⁷ Within Judaism, Orthodox Jews have tended to be more supportive of capital punishment, not joining Conservative and Reform rabbis in their recent efforts to abolish the death penalty. See Rosin, *supra* note 12. As Mandell I. Ganchrow, president of the Union

opposition to the death penalty. The one notable exception was conservative Protestant groups who either expressed no opinion or offered their support for capital punishment as did the Southern Baptist Convention in June 2000.¹⁶⁸ This lack of opposition to capital punishment among conservative Protestant groups is grounded in part in differing theological assumptions about the importance of retribution. While mainline Protestants and Catholics have largely jettisoned interpretations of the verse “[w]hoever sheds the blood of man, by man shall his blood be shed”¹⁶⁹ as requiring the execution of the murderer, many conservative Protestants have not.¹⁷⁰ Indeed, many empirical studies have found a positive correlation between conservative Protestants and support for the death penalty.¹⁷¹

of Orthodox Jewish Congregations, the nation’s largest Orthodox Jewish umbrella organization, stated in June 2000, “traditional Judaism clearly contemplates and condones the death penalty as the ultimate sanction within a legitimate legal system” *Union of Orthodox Jewish Congregations Endorses Death Penalty Moratorium* (June 13, 2000), available at <http://www.ou.org/public/statements/death%20penalty.htm>. See Yosef Edelstein, *A Few Reflections on Capital Punishment* (June 23-24, 2000) (noting that the statement in Genesis 9:6—“Whoever sheds the blood of man, by man shall his blood be shed”—constitutes a “universal code of law and morality binding on the non-Jewish world” and that “capital punishment is part of that general mandate”), available at <http://www.ou.org/torah/savannah/5760/behaalotcha60.htm>.

At the same time, however, the Union of Orthodox Jewish Congregations announced its support for a death penalty moratorium in June 2000 pending a comprehensive review of the manner in which the death penalty is administered in this country. See *Union of Orthodox Jewish Congregations Endorses Death Penalty Moratorium*, *supra*.

¹⁶⁸ See *supra* note 13.

¹⁶⁹ Genesis 9:6 (Revised Standard Version).

¹⁷⁰ The Southern Baptist Convention, for example, specifically relied on this verse in its resolution endorsing capital punishment at its June 2000 annual meeting. See *supra* note 13. Similarly, both the Orthodox Presbyterian Church and the Lutheran Church–Missouri Synod rely on this verse in justifying their support for capital punishment. See *id.* Orthodox Jews also rely on Genesis 9:6 to support the death penalty. See Edelstein, *supra* note 167.

¹⁷¹ See Christopher G. Ellison & Marc A. Musick, *Southern Intolerance: A Fundamental Effect?*, 72 SOC. FORCES 379 (1993); Harold G. Grasmick & Anne McGill, *Religion, Attribution Style, and Punitiveness Toward Juvenile Offenders*, 32 CRIMINOLOGY 23, 24-25 (1994) [hereinafter Grasmick & McGill]; Harold G. Grasmick, et al., *Religious Beliefs and Public Support for the Death Penalty for Juveniles and Adults*, 16 J. CRIME & JUST. 59 (1993); H.G. Grasmick, et al., *Protestant Fundamentalism and the Retributive Doctrine of Punishment*, 30 CRIMINOLOGY 21 (1992) [hereinafter H.G. Grasmick, et al.]; Dennis R. Longmire, *American Attitudes About the Ultimate Weapon in AMERICANS VIEW CRIME AND JUSTICE: A NATIONAL PUBLIC OPINION SURVEY* (Timothy J. Flanagan & Dennis R. Longmire eds.) 94-95 (1996); Robert L. Young, *Religious Orientation, Race and Support for the Death Penalty*, 31 J. FOR SCI. STUDY RELIGION 76 (1992). But see Thomas C. Berg, *Religious Conservatives and the Death Penalty*, 9 WM. & MARY BILL RTS. J. 29 (2000); Frame, *supra* note 30 (May 1995 Gallup poll finds that 81% of members of “mainline denominations” support the death penalty, while 80% of those identifying themselves as “born again” support the death penalty); Marla Sandys & Edmund F. McGarrell, *Beyond the*

Social scientists have offered two theories explaining conservative Protestant's support for the death penalty: their tendency both to embrace the retributive justification for punishment and to locate the cause of crime in the offender's moral character rather than in the offender's environment.¹⁷²

One of the most striking aspects of the contemporary death penalty debate in this country has been the extraordinary divergence between the formal statements of opposition to capital punishment by religious organizations and the support for the death penalty among their members. For example, even while American Catholic bishops have opposed the death penalty with increasing fervor during the past quarter century, support for the death penalty among lay Catholics through the late 1980s was higher than the national average.¹⁷³ The Presbyterian Church USA surveyed its congregations in recent years and found that while 75% of the clergy favored abolition of the death penalty, about 75% of the laity supported retention of the death penalty.¹⁷⁴ Support for the death penalty among both Protestants and Catholics has tended for the past quarter century to be roughly equivalent to that of the entire population.¹⁷⁵ Most social science empirical studies have found that religious affiliation is not a significant predictor of a person's views on the death penalty.¹⁷⁶

How can we account for this dissonance between the views of the laity and the church leadership?¹⁷⁷ Part of this divergence has been due to the failure or unwillingness of many religious leaders to invest considerable energies in building

Bible Belt: The Influence (or Lack Thereof) of Religion on Attitudes Toward the Death Penalty, 20 J. CRIME & JUST. 179, 185 (1997).

¹⁷² See Grasmick & McGill, *supra* note 171, at 24-25; H.G. Grasmick, et al., *supra* note 171, at 21.

¹⁷³ See HAINES, *supra* note 12, at 104.

¹⁷⁴ See *id.* Particularly in twentieth-century mainline Protestantism, American clergy have frequently held more liberal views on social issues than have their members. These issues include, in addition to capital punishment, civil rights for African-Americans, the role of women in church leadership, and the place of gays and lesbians in church and community life.

¹⁷⁵ See *id.*

¹⁷⁶ See, e.g., H.G. Grasmick, et al., *supra* note 171, at 24; Philip W. Harris, *Oversimplification and Error in Public Opinion Surveys on Capital Punishment*, 3 JUST. Q. 429 (1986); Tom R. Tyler & Renee Weber, *Support for the Death Penalty: Instrumental Response to Crime or Symbolic Attitude?*, 17 LAW & SOC. REV. 21 (1982).

¹⁷⁷ See, e.g., J. Stephen Cleghorn, *Respect for Life: Research Notes on Cardinal Bernadin's "Seamless Garment,"* 28 REV. RELIGIOUS RES. 129, 138-39 (1986) (citing statistical analysis of Catholic attitudes concluding that American Catholics are "lukewarm" with regard to capital punishment despite the Church's statements on issues, and that "there is a great deal of work to be done" convincing Catholic laity that the death penalty is an immoral taking of life).

support among the laity for abolition of the death penalty. As one critic noted in 1983:

[T]he churches as a group have been very disappointing on this issue. While they have been generally supportive, they have not made a vigorous commitment, either in terms of staff, program or money. And they have certainly not exercised any sustained or visible moral force on what is essentially a moral issue. This has hurt, and continues to hurt, the public advocacy effort, and undercuts one of its basic premises.¹⁷⁸

Clergy, despite denominational statements in opposition to capital punishment, generally have not emphasized this issue with their members who, for the most part, support the death penalty. Some observers argue that many Catholic priests have failed to emphasize the Church's teaching on capital punishment to their parishes for fear of alienating their parishioners.¹⁷⁹ Other clergy appear not to embrace fully the Catholic Church's current strong opposition to capital punishment.¹⁸⁰

Moreover, theological interpretations of matters of social policy are arguably less salient for many Americans than they were in prior generations.¹⁸¹ Fewer and fewer Americans rely on their religious institutions for guidance in formulating their policy predilections.¹⁸² As one historian of the death penalty abolitionist movement has noted: "In more recent times, death penalty opponents have de-emphasized theology, because theological points rarely settle policy questions in a society like the United States."¹⁸³ Not surprisingly, much of the contemporary debate over the death penalty has focused on prudential concerns such as the deterrent effect of executions, the disparate impact of capital punishment on the poor and racial minorities, and the problem of innocence, as opposed to explicit theological

¹⁷⁸ HAINES, *supra* note 12, at 104 (quoting Henry Schwarzschild).

¹⁷⁹ See, e.g., Teresa Malcom, *Activists Share Strategies for Ending Death Penalty*, 35 NAT'L CATH. REP. (Apr. 23, 1999).

¹⁸⁰ In the aftermath of the April 1995 bombing of the federal building in Oklahoma, and just a few months after Pope John Paul II issued his *Evangelium Vitae* encyclical, Miami Archbishop John C. Favalora suggested that the death penalty for the bombers would assure justice and "might serve as a deterrent for similar groups currently roaming at large in our nation." Faith Abbott, *Death Row and the Innocent*, 21 HUM. LIFE REV. 5, 13 (June 22, 1995).

¹⁸¹ See *supra* note 15; Abigail McCarthy, *Two Churches: Fixed Menu or à la Carte?*, 124 COMMONWEAL 7, 9 (Jan. 31, 1997) (noting that "[o]pposition to capital punishment . . . [is] for the majority no longer considered essential to being a good Catholic"); Peter Steinfels, *Laity, American, and Catholic*, COMMONWEAL (Sept. 13, 1996) (noting the declining influence of the Catholic Church on lay attitudes and practices).

¹⁸² See *supra* note 14; see also Berg, *supra* note 171, at 47 (emphasizing the decentralized nature of conservative Protestantism).

¹⁸³ Haines, *supra* note 12, at 162.

understandings of the legitimacy of the deliberate taking of human life.

In predicting views on capital punishment, one's race is far more salient than is one's religion. Opposition to capital punishment is significantly higher among non-whites than among whites,¹⁸⁴ while members of religious groups oppose the death penalty in roughly the same percentage as do non-members.¹⁸⁵ Moreover, black religious conservatives are much more likely to oppose capital punishment than their white religious counterparts.¹⁸⁶ Americans may be a religious people, but the theological understandings of our religious institutions no longer directly shape the views of many Americans on a variety of social issues, including penal policy.

CONCLUSION

The influence of Western religion—particularly the Christian Church—on the state's use of the death penalty has ebbed and flowed over the past two thousand years. For much of that period, the Church sacralized and legitimized capital punishment, explaining that God required the death of the condemned as a form of expiation and retribution. These religious understandings had a profound impact on the widespread use of capital punishment by the state. In the post-Enlightenment West, the influence of the Church over secular matters has slowly declined. Although most Americans retain religious sensibilities, the influence of religious institutions over various aspects of our social preferences has declined in recent years. The ultimate fate of the death penalty in this country will thus more likely be resolved in the realm of the secular rather than the sacred.

¹⁸⁴ See Mark Gillespie, *Public Opinion Supports Death Penalty*, The Gallup Organization (Feb. 24, 1999) (41% of non-whites "say the death penalty is imposed too often, while only 22% of whites agree . . ."), available at <http://www.gallup.com/poll/releases/pr990224.asp>.

¹⁸⁵ See *supra* note 14.

¹⁸⁶ See Chester L. Britt, *Race, Religion, and Support for the Death Penalty: A Research Note*, 15 JUST. Q. 175 (1998).