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Capital Punishment as the Unconstitutional Establishment of Religion: A Girardian Reading of the Death Penalty

JAMES McBRIDE

When the switch is thrown, the prisoner "cringes," "leaps," and "fights the straps with amazing strength." "The hands turn red, then white, and the cords of the neck stand out like steel bands." The prisoner's limbs, fingers, toes and face are severely contorted. The force of the electrical current is so powerful that the prisoner's eyeballs sometimes pop out and "rest on [his] cheeks." The prisoner often defecates, urinates, and vomits blood and drool.

"The body turns bright red as its temperature rises," and the prisoner's "flesh swells and his skin stretches to the point of breaking. Sometimes the prisoner catches on fire, particularly if [he] perspires excessively." Witnesses hear a loud and sustained sound "like bacon frying," and "the sickly sweet smell of burning flesh" permeates the chamber. This "smell of frying human flesh in the immediate neighborhood of the chair is sometimes bad enough to nauseate even the Press representatives who are present." In the meantime, the prisoner almost literally boils: "the temperature in the brain itself approaches the boiling point of water," and when the postelectrocution autopsy is performed "the liver is so hot that doctors have said that it cannot be touched by the human hand." The body frequently is badly burned and disfigured.[1]

So argued Justice William Brennan in his 1985 dissent to the denial of a writ of certioriari in *Glass v. Louisiana* in which he compared electrocution to "disemboweling while alive, drawing and quartering, public dissection, burning alive at the stake, crucifixion, and breaking at the wheel."[2] Although capital punishment was temporarily struck down by the High Court in 1972 in the *Furman v. Georgia* decision on the grounds that its arbitrary and discriminatory application was "cruel

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1. *Glass v. Louisiana,* 471 U.S. 1080 (1985) at 1086-88.
2. Ibid. at 1084.

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and unusual punishment,"[3] that case was overturned in 1976 by the *Gregg v. Georgia* decision which held that statutory adoption of sentencing guidelines would eschew constitutional impediments to the death penalty.[4] Today thirty-eight states retain capital punishment and use such methods of execution as electrocution (13), the gas chamber (7), lethal injection (24), hanging (3), and the firing squad (2). Those executed since *Gregg* number 270, including thirty-eight in 1993, the largest annual figure since capital punishment was resumed in 1977 with the execution of Gary Gilmore before a Utah all-volunteer firing squad.[5] Although executions numbered thirty-one in 1994, the death penalty has been carried out fifteen times so far in 1995 (April)—a record-setting pace. Michael Radelet, a sociologist and one of the country's leading opponents of the death penalty, has documented among those 270 cases at least fifteen botched executions, including eight electrocutions, ranging from instances where the prisoner's head and/or leg caught on fire and eyeballs literally exploded to taking up to one hour and four minutes to kill the victim.[6]

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3. Justice William O. Douglas, concurring: "The high service rendered by the 'cruel and unusual' punishment clause of the Eighth Amendment is to require legislatures to write penal laws that are even-handed, nonselective, and nonarbitrary, and to require judges to see to it that general laws are not applied sparsely, selectively, and spottily to unpopular groups . . . [t]hese discretionary statutes are unconstitutional in their operation. They are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on 'cruel and unusual' punishments." *Furman v. Georgia,* 408 U.S. 238, (1972) at 256-57. See the Eighth Amendment to the U.S. Constitution: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

4. Justices Potter Stewart, Lewis Powell, and John Paul Stevens: "It seems clear, however, that the problem will be alleviated if the jury is given guidance regarding the factors about the crime and the defendant that the State, representing organized society, deems particularly relevant to the sentencing decision." *Gregg* v. *Georgia,* 428 U.S. 153 (1976) at 192.

5. Some scholars argue that Idaho and Utah's adoption of execution by firing squad, like the now abolished practice of beheading, is based on the Mormon religious principle of "blood atonement." This principle holds that some sins, such as murder, are so heinous that they are not covered by Christ's substitutionary atonement. Instead, such sinners are required literally to spill their own blood in order to receive forgiveness. "The strongest link between blood atonement and mainstream Mormondom exists in the simple fact that to this day the states of Utah and Idaho, unlike the other forty-eight, provide a condemned prisoner the option of dying by firing squad rather than by lethal injection in order that his or her blood might mix with the soil and become that 'smoking incense' that will 'atone for their sins.'" James Coates, *In Mormon Circles: Gentiles, Jack Mormons, and Latter-Day Saints* (Reading, Mass.: Addison-Wesley, 1991), 66.

6. "Post-*Furman* Botched Executions." Document accompanying affidavit of Michael L. Radelet, 15 April 1992, in appeal of Steven Douglas Hill, State of Arkansas.

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The Irrelevance of Factual Innocence

As horrendous as these figures and the methods of execution are to critics of the death penalty, many observers have been even further appalled by the High Court's *Herrera v. Collins* decision in 1993 which, by a 6-3 margin, rejected the appeal of Lionel Torres Herrera to overturn his murder conviction on the grounds that new evidence demonstrated his factual innocence. Although the Court has made an exception for habeas relief in cases a fundamental miscarriage of justice,[7] such relief is forthcoming " 'only where the prisoner *supplements* his constitutional claim with a colorable showing of factual innocence' *Kuhlmann v. Wilson*, 477 U.S. 436, 454 (1986) [emphasis added]. We have never held that it extends to free-standing claims of actual innocence. Therefore, the exception is inapplicable here."[8] Since appeals are based on issues of law rather than those of fact, claims of actual innocence alone are deemed irrelevant. In his dissent to Chief Justice William Rehnquist's majority opinion, Justice Harry Blackmun lamented that "the execution of a person who can show that he is innocent comes perilously close to simple murder."[9] In his most recent book, *In Spite of Innocence: Erroneous Convictions in Capital Cases*, Michael Radelet has argued that at least 139 innocent persons in the United States have been condemned to death since 1900, twenty-three of whom have been executed,[10] and his colleague Hugo Adam Bedau, a philosophy professor at Tufts University, has suggested that in the United States perhaps as many as four innocent persons per year have been convicted of murder since 1900.[11] The Rehnquist opinion admits that, although unlikely, there exists the possibility of convicting and executing the innocent, legitimated in the eyes of the chief justice by the admission of human fallibility, something on the order of a judicial "law of double effect" — that the state is blameless when the execution of a factually innocent person is foreseen but not intended.

Although the chief justice opined in *Herrera* that "the central purpose of any system of criminal justice is to convict the guilty and free

7. *Sawyer* v. *Whitley*, No. 91-6382, 4-6 (1992).
8. *Herrera* v. *Collins*, No. 91-7328 (1993), Chief Justice William Rehnquist (majority opinion), 13 (emphasis added). Also ibid. at 8: "Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding."
9. Ibid. Justice Harry Blackmun, joined by Justice Souter and Justice Stevens, (dissenting opinion) at 18.
10. Michael L. Radelet, Hugo Adam Bedau and Constance E. Putnam, *In Spite of Innocence: Erroneous Convictions in Capital Cases* (Boston, Mass.: Northeastern, 1992).
11. Hugo Adam Bedau, *The Case Against the Death Penalty* (Washington, D.C.: Capital Punishment Project [ACLU] 1992), 12.

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the innocent,"[12] such is not the case in the appeals process. For according to the logic of the majority opinion in *Herrera,* prisoners are not condemned because they are guilty; they are guilty because they are condemned. In other words, whether or not they committed the crime is irrelevant; insofar as they stand condemned, they are legally guilty, regardless of the question of their factual innocence. Accordingly, the execution of a factually innocent person, if condemned, would violate neither the Eighth Amendment's prohibition of "cruel and unusual punishment" nor the Fourteenth Amendment's protection of an individual's right to "due process." This conclusion suggests that something is sorely amiss: the standards of justice, fairness, and human decency are being perverted, but to what end? What purpose does it serve to execute the condemned, regardless of the question of their factual innocence?

The Interests of the State: Deterrence and Retributive Justice

What seemed manifestly unfair to the three justices who dissented — Blackmun, David Souter and John Paul Stevens — is legitimated on the grounds that, particularly in capital cases, more than the fate of the individual is at stake. Citing the *Patterson* case (1977), Rehnquist noted that "due process does not require that every conceivable step be taken, at whatever cost. . . . To conclude otherwise would all but paralyze our system for the enforcement of the criminal law."[13] Hence, the claim of actual innocence is not sufficient to overcome either the permissible legal grounds for appeal (a primarily constitutional rather than factual claim) or the utilitarian arguments of economic costs.[14] The Rehnquist opinion suggests that something else is at stake which outweighs the fate of the individual: the fate of society itself as represented by the state. In other words, the criminal justice system must operate efficiently in order to preserve the interests of society which clearly, in his view, come first.

Those interests are allegedly served by the death penalty itself, for its purpose is not merely to punish the individual but to protect the

12. *Herrera* at 6.

13. *Patterson v. New York*, 432 U.S. 197(1977) at 208, cited in *Herrera* at 7-8.

14. Legal theorist Ronald Dworkin heavily criticizes the latter which favor a single value instrumentalism over the principle of innocence, i.e., the "right" not to be convicted, if innocent. He recommends a normative calculus based upon "multi-value instrumentalism." Although taking the risk of convicting the innocent may reduce economic costs, it also entails a moral cost — the violation of the principle of innocence — not sustained if the guilty elude conviction; see Ronald Dworkin, *A Matter of Principle* (Cambridge, Mass.: Harvard, 1985).

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social order at large. For example, Donald Hook and Lothar Kahn have argued that (based on the average of 1985-86) some 196 persons on death row each year have had previous homicide convictions before the conviction for which they stand condemned. "This means that, out of the group of offenders alone, 196 innocent lives were lost as a result of the release of murderers. Extrapolating from these figures and taking into rough account the increase in the U.S. population since 1900, we may estimate that between 1900 and 1986, at least 1,380 *additional* and unnecessary murders occurred as a result of our having released convicted murderers."[15] According to this utilitarian calculus, the loss of twenty-three innocents to the death penalty (as calculated by Michael Radelet) is a small price to pay compared to the 1,380 innocent victims murdered.

Hence, capital punishment has been frequently justified as a form of deterrence. It is a tautology that dead murderers do not rise from their graves to kill again. However, the argument for deterrence means more than incapacitation. It suggests that persons who would otherwise kill are deterred from murder by the threat of capital punishment for their contemplated crime. But as the majority opinion admitted in *Gregg,* "there is no convincing evidence either supporting or refuting"[16] the deterrent effect of the death penalty. However, Justices Potter Stewart, Powell, and Stevens speculated that common sense says that there *must* be others for whom capital punishment serves as a significant deterrent, e.g., cases of pre-meditated murder. Yet as Justice Brennan pointed out in *Furman,* that presumes "a particular type of potential criminal" — one who would be deterred by the death penalty but would not be by life imprisonment. "On the face of it," wrote Brennan, "the assumption that such persons exist is implausible."[17] "No one can know how many people have refrained from murder,"[18] insisted the late Justice Marshall, since, as one sociologist has adroitly pointed out, deterrence is an "*inherently unobservable* phenomenon . . . we never *observe* someone omitting an act."[19] Yet, despite the fact that there is neither empirical nor logical proof for the supposed deter-

15. Donald D. Hook and Lothar Kahn, *Death in the Balance: The Debate Over Capital Punishment* (Lexington, Mass.: D.C. Heath, 1989), 97.

16. *Gregg* at 185.

17. *Furman* at 301. Justice Brennan further contended that a deterrent effect, even if it were accepted in principle, would be undermined by the present administration of the death penalty which makes it "remote and improbable; in contrast, the risk of long-term imprisonment is near and great." Ibid. at 302.

18. *Furman* at 347.

19. Jack P. Gibbs, *Crime, Punishment and Deterrence* (New York: Elsevier, 1975), 3. See Justice Marshall's comment in *Furman* at 347: "This is the nub of the problem and it is exacerbated by the paucity of useful information."

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rent effect of the death penalty, the chief justice at the time of the *Furman* decision, Warren Burger, suggested that it is up to opponents of the death penalty to conclusively *prove* that capital punishment is *not* a deterrent! "To shift the burden of proof to the States is to provide an illusory solution to an enormously complex problem,"[20] wrote Burger. Inverting the established rules of debate, Burger's argument echoes the claim to magisterial authority exercised by religious institutions which substantiate truth claims by fiat. Yet, this crypto-theological justification of the death penalty reflects the belief adopted by his successor, Chief Justice William Rehnquist (and implicitly affirmed in *Herrera*), that the presumption is granted the interests of the state and society-at-large over that of the individual. As Ernest van Haag, one of the most vocal academic defenders of the death penalty, has concluded, "wherefore I prefer over- to under-protection."[21] In light of the *Herrera* decision, this endorsement of the deterrence position (despite the lack of either empirical or logical proof) indicates that the support of the majority for the constitutionality of the death penalty is derived from a deep-seated *irrational* belief in the need to execute the condemned, even though they might be factually innocent, in order to defend the well-being of the social order as a whole.

The Court's overriding interest in the protection of society as a legitimation of capital punishment also appears in another guise: that of retributive justice. In the stead of friends and family members who might feel obligated by a desire for vengeance, the state *in principle* acts to enforce the *lex talionis*—"an eye for an eye," a life for a life—by putting to death those it deems responsible for murder. Admittedly, wrote Justice Stewart in *Gregg*, "Retribution is no longer the dominant objective in criminal law (*Williams v. New York*, 337 U.S. 241, 248 (1949)), but neither is it a forbidden objective nor one inconsistent with our respect for the dignity of men."[22] Citing his own opinion in *Furman*, Stewart claimed that capital punishment safeguards "the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy — of self-help, vigilante justice and lynch law."[23] Stewart's

20. *Furman* at 396.
21. Ernest van den Haag, "Refuting Reiman and Nathanson," *Philosophy of Punishment*, eds. Robert M. Baird and Stuart E. Rosenbaum (Buffalo, N.Y.: Prometheus, 1988), 145.
22. *Gregg* at 183.
23. *Furman* at 308. See Brennan, ibid. at 303: "Moreover, we are told, not only does the punishment of death exert this widespread moralizing influence upon community values, it also satisfies the popular demand for grevious condemnation of abhorrent crimes and thus prevents disorder, lynching, and attempts by private citizens to take the law into their own hands."

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claim concerning retributive justice puts the deterrence argument in a new light, for *it is not that the death penalty deters criminals from acts of violence* (there is no proof for that assertion), *but that capital punishment deters law-abiding citizens from vigilantism.* Putting the condemned to death — even if they be factually innocent — is therefore a surrogate for the bloodletting that would otherwise ensue if the state did not substitute its own ritual of government-sponsored executions for the extra-legal spiral of citizen violence.

Yet here there is a significant shift in the argument from legal justifications, based upon the guilt and innocence of the individual, to manipulating the psychic economy of the body politic. The death penalty is justified not as a legal recourse to punish the individual but rather as a social mechanism to vent the violence which would otherwise destroy the social order. It is in this context that a Girardian reading of the death penalty might be offered, that is, that capital punishment is essentially a religious ritual of the state.

René Girard's Theory of Religion

Although most mainstream religious organizations in the United States today oppose the death penalty,[24] the late Justice Thurgood Marshall noted in *Furman* that capital punishment had its origins in colonial America in religious prohibitions mandated by the Old Testament. Capital offenses in the Massachusetts Bay Colony included "idolatry, witchcraft, blasphemy, murder, assault in sudden anger, sodomy, buggery, adultery, statutory rape, rape, manstealing, perjury in a capital trial, and rebellion."[25] The incremental secularization of the state in the nineteenth century reduced the number of capital crimes and loosened them from their religious moorings. Yet even today, as Justice Brennan has observed, there seems to be a barbaric similarity between electrocution and former religiously-identified methods of capital pun-

24. These organizations include the American Baptist Churches in the USA, American Ethical Union, American Friends Service Committee, The American Jewish Committee, Christian Church (Disciples of Christ), Christian Reformed Church in North America, Church of the Brethren, Church Women United, The Episcopal Church, Fellowship of Reconciliation, Friends Committee on National Legislation, Friends United Meeting, The General Association of General Baptists, General Conference Mennonite Church, Lutheran Church in America, Mennonite Central Committee US, The Mennonite Church, The Moravian Church, National Board YWCA of the USA, National Council of the Churches of Christ in the USA, The Orthodox Church in America, Presbyterian Church (USA), Reformed Church in America, Unitarian Universalist Association, United Church of Christ, United Methodist Church, and United States Catholic Conference; see *The Death Penalty: The Religious Community Calls for Abolition* (Washington, D.C.: National Coalition to Abolish the Death Penalty, National Interreligious Task Force on Criminal Justice, 1988).
25. *Furman* at 335.

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ishment. How, he asked in a 1986 speech at Harvard Law School, can " 'frying in a chair' be distinguished from burning at the stake?"[26] While, on its face, this relationship seems limited to a physiological similarity, René Girard's theory demonstrates that this similarity is not merely incidental, but rather substantive.

Girard argues that violence is a product of mimetic rivalries that are endemic to all human societies. In that human beings model themselves on each other, they imitate the attributes of their respected elders and peers and seek to acquire their emblematic signs of social status. Desire (variously described as "natural" or "instinctive") is in fact derivative of this primary social dynamic. Hence, when violence erupts among individuals over social status or possessions, it has a potential which far exceeds the instinctual aggression of the animal kingdom. Because of the clan structure of human societies, violence is intimately tied to retributive justice, begatting a spiral of morally-based vengeance.[27] Invoking the language of the medical model, Girard suggests that such violence infects the body politic, and, like the physical body, can only be overcome through an inoculation of what infects the body. Violence is therefore both the disease and the cure. "Only violence can put an end to violence," he argues. "The aim is to achieve a radically new kind of violence, truly decisive and self-contained, a form of violence that will put an end once and for all to violence itself."[28] Girard has noted in numerous works that this new kind of violence could be found in the sacrifice of a scapegoat which appeared in Western culture not only as a religious fixture among the Hebrews and the Greeks but also as the very foundation of Christendom: the Christ as the scapegoat of humanity.[29] Through the suffering and death of the scapegoat, the violence which convulses the social order and threatens its very foundation is cathartically exhausted.

Although a substitute for the original transgressor, the scapegoat as surrogate victim is more than a proxy for the perpetrator of an isolated incident. On the contrary, the scapegoat embodies the very meaning of transgression and bears the weight of collective hatred expressed by

26. Associate Justice William Brennan, speech before the Harvard Law School, 5 September 1986.

27. Cf. Justice Marshall's remarks in *Furman* at 333: "[Capital punishment's] precise origins are difficult to perceive, but there is some evidence that its roots lie in violent retalitaion by members of a tribe or group itself, against persons committing hostile acts toward group members. Thus, infliction of death as a penalty for objectionable conduct appears to have its beginnings in private vengeance."

28. René Girard, *Violence and the Sacred*, trans. Patrick Gregory (Baltimore, Md.: Johns Hopkins, 1972), 26-27.

29. See René Girard, *Des choses cachées depuis la fondation du monde* (Paris: Bernard Grasset, 1978); and René Girard, *Le bouc émissaire* (Paris: Bernard Grasset, 1982).

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members of the community toward all those who violate the norms and persons of the social order. Girard notes that in ancient Hellenic society, the scapegoat or *pharmakos* was selected from a separate class of surrogate victims, drawn largely from foreigners, slaves, women, and children.[30] The surrogate was most often dragged through the streets to absorb, as it were, the hostilities which beguiled the community-at-large. Likewise, in the Christian tradition, Jesus — the "lamb of god" who dies for us, *pro nobis* — suffers the indignities of the stations of the cross by which he is made to bear the transgressions of all humanity. Like all scapegoats, he is the screen on which is projected all instances of mimetic rivalry, which are interchangeable and therefore ultimately abstract and impersonal. As a social mechanism designed to vent the violence which would otherwise destroy the social order, the execution of the scapegoat becomes the *sine qua non* for the restoration of a healthy community.

In order to be an effective inoculation, the surrogate victim must be both similar and different from those perceived as transgressors in the body politic: without similarity the transfer of affect from transgressors to surrogate is impossible; without sufficient difference, the violence done to the scapegoat threatens to spill over back into the body politic. That similarity is underwritten by choosing a scapegoat who is recognized for sharing the attributes of all those who are capable of obeying social norms, i.e., a "sane" human being who lives in the midst of the community. But insofar as the scapegoat is a member of a class of transgressors (e.g., foreigners, slaves, etc.), s/he is sufficiently different from members of the community to guarantee that the spasm of violence directed toward the scapegoat will not overflow its channels and flood the society-at-large. Although indicted for a particular crime, it is irrelevant whether the scapegoat is personally innocent or guilty. The scapegoat is categorically guilty. "The persecutors," contends Girard, "do not realize that they chose their victim for inadequate reasons, or perhaps for no reason at all, more or less at random."[31] Since the scapegoat is *tautologically* guilty, s/he is *in fact* guilty in the eyes of members of the society, whether or not s/he committed the crime of which s/he has been accused.

This social mechanism is, however, fraught with certain dangers. If the substitution is too obvious, then the villification of the surrogate victim is dispelled. The transfer of affect is interrupted and, while the execution of the condemned may take place, the expression of public violence continues to mount precipitously. If the substitution is too

30. Girard, *Violence and the Sacred,* 93ff.
31. Ibid., 81.

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obscure, the scapegoat is desymbolized and again the transfer of affect fails to take place. Both of these possibilities, however, may be avoided, especially if the scapegoat is seen as coming from a category of lawbreakers, i.e., a class of potential "criminals," who live amidst the walks of everyday life.

Hence, this social dynamic is precarious. The irrational substitution of the scapegoat for transgressors-at-large is carried out on an unconscious level, for to consciously recognize this displacement of hostility is to risk its success. The effectiveness of the religious expiation of violence from society is therefore predicated on misunderstanding. That is to say, only insofar as this religiously-based social mechanism is misunderstood can it save the social order from anarchy. The members of the community must believe the scapegoat to be guilty even though s/he may be factually innocent.

The Death Penalty Revisited

In light of the *Herrera* decision, capital punishment may be read as a religious ritual, practiced by the state in order to vent the hostility directed toward all those who transgress social norms, as was specifically suggested by Justice Stewart in the *Furman* and *Gregg* decisions. As one witness testified before the U.S. Congress, the condemned serves as a "sacrificial lamb"[32] who dies for us and thereby saves us from the spiral of violence which otherwise would surely ensue. Although the overtly religious language which once surrounded this ritual, e.g., in the Massachusetts Bay Colony, has all but disappeared, the religious character of this ritual of the state remains. Indeed, *the very denial of its religious nature,* i.e., its substitutionary dynamic, *is necessary in order for it to effectively exorcise violence from the social order.* In other words, public denial of its religious character *supports* the proposition that the death penalty is, in fact, a religious ritual. It could not be otherwise, for to acknowledge the substitutionary atonement of the surrogate victim for transgressors-at-large would negate the cathartic release of affect which infects the body politic. The effectiveness of this social mechanism is predicated on the socio-legal designation of the condemned who, according to *Herrera,* is categorically guilty, whether or not s/he is factually innocent.

The surrogate victim comes from a specific class set aside for ritual execution. Whereas in ancient social orders that class included foreigners, slaves, women, and children, the members of this class in modern

32. Hearings on S. 1760 before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 90th Cong., 2nd sess. (1968), cited in *Furman* at 364.

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America are prisoners on death row, today numbering some 2,800. Since the ratio of homicide arrests to death sentences in the United States runs roughly 100 to 1 (1976-1980)[33] and the ratio of murder convictions to executions stands currently at about 115 to 1 (1993),[34] it is evident that, consistent with Girard's analysis, those who are executed are chosen arbitrarily and at random. As Justice Brennan argued in *Furman,* "When the punishment of death is inflicted in a trivial number of the cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily. Indeed, it smacks of little more than a lottery system."[35] Many prisoners have been languishing on death row for up to fifteen years. Even if the death penalty was asserted to be a deterrent to crime (lack of evidence notwithstanding), there are simply far too few executions per year to be effective.[36] Instead, this class of prisoner—or surrogate victim—serves the interest of the state by appealing to a religious reflex that is deeply ingrained in Western culture, that is, to arbitrarily execute a scapegoat in order to transfer and expel the hostilities which characterize everyday life.

This reflex has been most evident in the public reaction to the prosecution and condemnation of "cop-killers." Whereas scapegoating remains largely unconscious in most other cases, "cop-killings" make plain this substitutionary dynamic by consciously recognizing the representative character of both the deceased and transgressor. According to the legislative intent mandating capital punishment for "cop-killing," the death penalty is imposed not simply because an individual has been killed but because the social order itself has been violated. Unpunished "cop-killing," it is said, would lead to social anarchy, but that is no different from the spiral of violence which is feared would result from morally-based retribution in cases involving civilian deaths. To execute a "cop-killer," then, is not only to revenge the death of the individual police officer; it also purges the fear and anger which the populace-at-large feels for being subjected to the lawlessness of everyday life. Those accused of murdering police officers are therefore particularly vulnerable to bearing the full weight of all transgressions since, in the public mind, scapegoating the accused is consciously intended. Yet the desire to execute "cop-killers" is just the tip of the iceberg. That same dynamic is present in all cases of capital punishment since the con-

33. Samuel R. Gross and Robert Mauro, *Death and Discrimination: Racial Disparities in Capital Sentencing* (Boston, Mass.: Northeastern University, 1989), 3.

34. *The Death Penalty: Cruel and Unusual Punishment* (New York: Amnesty International, 1993), and "Execution Update" (New York: Amnesty International, 6 October 1993), 1.

35. Brennan, *Furman* at 293.

36. Executions rose from one in 1977 to thirty-eight in 1993.

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demned as a class serve as a means to vent the build-up of violence in society-at-large. The hysteria which drives the bloodlust for capital punishment has more recently been evident in the suggestion from some quarters that HIV-positive persons and PWAs (people with AIDS) who engage in nonconsensual sexual activity be subject to the death penalty as well.[37]

While ideologically speaking the execution of the condemned is couched in terms of the humane termination of life, the prisoner is not permitted to exercise the option of suicide. Condemned prisoners do not have the right to decide for themselves the method or time of execution. There is no room for privacy and individuality here. The condemned is to play a role in the psychic economy of the state which extends far beyond his/her own personal story. As a scapegoat who bears the transgressions of the social order, the body no longer belongs to the inmate, but to the state itself. And as the virtual materialization of Jeremy Bentham's panopticon, death row serves as a prison within a prison, "a cruel, ingenious cage"[38] where the inmates are watched continually, lest the prisoner attempt to take his/her own life. But the panopticism of death row does not only ensure against suicide; it also inscribes in the body of the inmate "a state of conscious and permanent visibility that assures the automatic functioning of power. So to arrange things that the surveillance is permanent in its effects, even if it is discontinuous in its action; that the perfection of power should tend to render its actual exercise unnecessary; that this architectural apparatus should be a machine for creating and sustaining a power relation independent of the person who exercises it; in short, that the inmates should be caught up in a power situation of which they themselves are the bearers."[39]

There is no escape from the eyes of the state, no matter which guard is on duty or whether s/he is in fact conducting surveillance at any given moment. Death row is a state of being—a state of being watched abstractly by the ever-present eye of the state which eliminates the privacy necessary for a sense of human subjectivity. It is not just a waiting for death; it is a process of dying in which the prisoner is eventually reified into a body—a thing indispensable for the social mechanism of expiation. Intervention by prison chaplains to the contrary, the nature of death row produces an anomaly in human society: the living dead. In her book *Dead Man Walking*, Helen Prejean, a

37. S.S. Werner, "The Death Penalty: A Solution to the Problem of Intentional AIDS Transmission through Rape," *John Marshall Law Review* 26 (Summer 1993): 941-76.
38. Michel Foucault, *Discipline and Punish: The Birth of the Prison*, trans. Alan Sheridan (New York: Pantheon, 1977), 205.
39. Ibid., 201.

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member of the Sisters of St. Joseph of Medaille, recalls one visit to the condemned in a Louisiana prison and her revulsion for this process, despite its alleged rationality:

> The reality of this waiting place for death is difficult to grasp. It's not a ward in a hospital where sick people wait to die. People here wait to be taken out of their cells and killed. This is the United States of America and these are government officials in charge and there's a law sanctioning and upholding what is going on here, so it all must be legitimate and just, or so one compartment of my brain tells me, the part that studied civics in high school, the part that wants to trust that my country would never violate the human rights of its citizens. The red block letters say "Death Row." My stomach can read the letters better than my brain.[40]

But however much clergy and other persons religious — even the odd sympathetic guard — may attempt to bring a kind word to the condemned, they cannot unwrite the dehumanizing inscription of power in the very structure of death row.

For those who are insane or have been driven to insanity by their lives on death row, prison authorities have subjected the condemned to psychiatric therapy and in some cases even drug treatment in order to render the prisoner sane enough for execution.[41] Strangely enough, the condemned must be assisted in his/her efforts to resist the inevitable dehumanizing effects of death row so that the process might someday bear fruit in the form of the prisoner's own death. In this ironic double-bind, psychiatric professionals—dedicated to "doing no harm"—have provided both drugs and therapy to make their inmate patients sane enough to submit to a prospect which any sane person would resist. Criminally insane patients are thereby forced to live a ghostly existence in the twilight between insanity and death. Although the courts have sometimes been ambivalent, prison authorities in the past have even encouraged the condemned to undergo life-saving operations in order to preserve the body for execution. Perhaps the most evident irony lies in the High Court's affirmation of "evolving standards

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40. Helen Prejean, C.S.J., *Dead Man Walking: An Eyewitness Account of the Death Penalty in the United States* (New York: Random House, 1993), 27-28.

41. While the Supreme Court has ruled that executing the insane is unconstitutional (*Ford v. Wainwright*, 407 US 399 (1986)), such a prisoner may be executed if successfully treated through the use of drugs or therapy. The ruling fits the Girardian theory insofar as insanity makes the surrogate victim too dissimilar from original transgressors to effect the transference of affect through his or her execution. The pharmacological method of alleviating psychosis in order to carry out the death sentence was used in the state of Louisiana prior to *State v. Perry*, 608 So. 2d 594 (La. 1992), which held that a death row inmate could not be forcibly administered antipsychotic drugs in order "to make him sane enough to be executed." Again, from the Girardian perspective, rendering the person "sane," i.e., similar, through artificial means, however, is too obvious a simulation to be genuine. It risks producing pity rather than the expiation of hostility. Only an "authentic cure" through psychotherapy returns the prisoner to the requisite state of similarity necessary for execution.

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of decency,"[42] which seek to make the execution of the condemned more humane by excluding not only intentional torture (rather than the allegedly unintentional and incidental tortures of current methods of execution) but also publicly-staged executions. The latter supposedly desecrates the solemnity of the event and demeans the condemned by eliminating the respect for the privacy due any person facing death — a privacy already eliminated by the panopticism of death row. The law becomes a cruel joke designed to redeem the humanity of public witnesses (and thereby of society-at-large) rather than that of the surrogate victim.

Although the religious dynamic of capital punishment pre-empts the vigilantism of extra-legal moral retribution, there is always the risk that public inoculation of violence may unleash what it is trying to cure. Hence, the state must ensure that the degree to which the public may witness expiatory violence does not spill over into mimetic behavior. Indeed, it is the very danger of infectious violence that led state authorities in this country to change the manner of execution from publicly-staged to privately-staged acts. Although it is popularly believed that the privitization of execution occurred over the nineteenth and early twentieth centuries due to "evolving standards of decency," the sheer brutality of these executions, whatever the method,[43] as noted by Justice Brennan, dispels this fiction. In his book on the history of public executions, Louis P. Masur cites numerous documents which evince real concern that publicly-staged executions threaten the social order itself. "Legislators, editors, ministers, and merchants all decried public hangings as festivals of disorder that subverted morals, increased crimes, excited sympathy with the criminal and wasted time. . ." producing, as one politician feared, a "deleterious effect on the public morals."[44] Although ultimately displaced by privately-staged rituals to ensure against the spread of violence, executions remained public in character due to the requisite participation of witnesses representing the citizenry, as mandated by law.[45] Insulated from direct exposure to

42. *Trop v. Dulles,* 356 U.S. 86.(1958) at 101.

43. See, e.g., Ian Gray and Moira Stanley, "Execution Methods in the United States," in *A Punishment in Search of a Crime: Americans Speak Out Against the Death Penalty* (New York: Avon, 1989), 19-40; and Martin R. Gardner, "Executions and Indignities—An Eighth Amendment Assessment of Methods of Inflicting Capital Punishment," *Ohio State Law Journal* 39 (1978): 96-130.

44. Louis P. Masur, *Rites of Execution: Capital Punishment and the Transformation of American Culture, 1776-1975* (New York: Oxford, 1989), 95, 97.

45. As John D. Bessler has pointed out, the public witnessing of state executions fall into several types. Some states permit the condemned to choose relatives and friends to be present along with the official witnesses chosen by the warden or superintendent of state prisons. Other states permit representatives of the press to witness the execution at the discretion of prison authorities, although some states prohibit the use of audio and visual

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executions, the public nonetheless was informed of the executions by the medium of mass culture during the nineteenth and early twentieth centuries — the newspapers — lest the citizenry not experience the cleansing effect of the sacrificial killing.

In contemporary America where electronic media has displaced print media as the primary vehicle of mass communication, it should not be surprising that there has been a surge of interest in televising executions of the condemned. The courts, however, have seen fit to bar television cameras from the death chambers on the grounds that such coverage would constitute "special access" not protected under the First Amendment.[46] Despite the resistance of the courts, the controversy has recently been the subject of a flurry of articles in legal journals which examine and sometimes advocate the presence of the electronic media at state executions.[47] "In this age of talk-show politics and televised town hall meetings, the lens and the microphone have become the eyes and ears of America . . . . An execution might not be pretty, and it might not be entertaining, but it is an undertaking, and our responsibility. The First Amendment should serve to ensure that all of our undertakings are carried out with our knowledge, and with our blessing."[48] Whereas the term "blessing" may be read as a simple endorsement of the death penalty, its use is strangely appropriate since a religious metaphor reflects the sacred significance of the demise of the scapegoat. Etymologically, blessing (derived from the OE *Bletsein*) means a "wounding" whose redemptive powers redound to the benefit of those who bear witness. Just as the execution receives the public's metaphorical blessing (and the condemned the state's literal

recording equipment. John D. Bessler, "Televised Executions and the Constitution: Recognizing a First Amendment Right of Access to State Executions," *Federal Communications Law Journal* 45 (1993): 355-435, 368-72.

46. See *Garrett v. Estelle*, 556 F.2d 1274 (5th Cir. 1977), cert. denied, 438 U.S. 914 (1978) and *KQED Inc. v. Vasquez*, 18 Media L. Rep. (BNA) 2323 (N.D. Cal. 1991). In the latter case, the execution of Robert Alton Harris by lethal gas was videotaped (with the condemned's permission) for use in a class action suit by the American Civil Liberties Union on behalf of death row prisoners who claim the death penalty to be "cruel and unusual punishment." The tape was destroyed by court order on 15 January 1994 after an agreement between the state and the ACLU. "Videotape of a California Execution Is Destroyed," *New York Times*, 13 February 1994, 35. Most recently, Phil Donahue attempted unsuccessfully to garner permission to televise a state execution on his nationally syndicated talk show.

47. See G. Santamarina, "The Case for Televised Executions," *Cardozo Arts & Entertainment Law Journal* (1992): 101-43; D.A. Drobny, "Death TV: Media Access to Executions under the First Amendment," *Washington University Law Quarterly* 70 (Winter 1992): 1179-204; N.E. Nussbaum, " 'Film at Eleven . . .'—Does the Press Have the Right to Attend and Videotape Executions?" *North Carolina Central Law Journal* (1992): 121-42; W.B. Turner and B.S. Brinkman, "Televising Executions: The First Amendment Issues," *Santa Clara Law Review* 32 (1992): 1135-62.

48. Nussbaum, "Film at Eleven," 142.

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blessing), so too does the public reciprocally receive the blessings which flow from the body of the executed. Although it is a matter of some speculation, it is worth noting that the demand for televised executions coincides with the epidemic of murders throughout the country and the concomitant proliferation of guns in the hands of its citizenry. It is as if the alarming spiral of violence begets a public interest in televised executions as a means to alleviate the fears and hostilities which infect the populace.

Although this class of surrogate victims includes both men and women, adults and juveniles, as well as whites and nonwhites, it is evident that some categories of persons in society-at-large are statistically more likely to be assigned to the class of the condemned. In other words, the state, through the criminal justice system, is predisposed toward classing some groups of people as scapegoats. Blacks,[49] the poor,[50] and the illiterate are all disproportionately represented on death row.[51] Although these figures may reflect racial and class bias in the nation as a whole, the presence of the marginalized on the list of the condemned helps to emphasize the difference rather than the similarity of the surrogate victim and to prevent the spillover of violence into mainstream white, predominantly middle-class communities. Perhaps this injustice is most blatently evident in the case of African-Americans. Whereas blacks number some 12 percent of the general population, they constitute 39 percent of those executed since the reinstitution of the death penalty in 1976[52] and nearly 40 percent of those presently on death row.[53] This statistical imbalance was heavily influenced by the race of the murder victim. In perhaps the best known study on this topic, David Baldus found that, in the state of Georgia, a defendant was 4.3 times more likely to receive the death sentence if the victim was white

49. See, e.g., "Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities," GAO/GGD 90-57, Report to Senate and House Committees on the Judiciary, United States General Accounting Office, February 1990

50. Helen Prejean, *Dead Man Walking*, 47, reported that one Louisiana attorney, Millard Farmer, who specialized in death penalty appeals, estimated that "99% of death-row inmates are poor."

51. Fifty-four percent of death row prisoners did not complete high school, including 8 percent who have the benefit of only an elementary school education; see Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics—1992*, ed. Kathleen Maguire, Ann L. Pastore, Timothy J. Flanagan (Washington, D.C.: GPO, 1993), Table 6.127, 670. In his dissent in *Murray* v. *Giarratano*, Justice John Paul Stevens noted the "typically low educational attainment of prisoners. In 1982 more than half of Florida's general inmate population was found to be functionally illiterate, while in 1979 the state's death row inmates possessed a ninth-grade mean educational level." 492 US 1, at 28, n. 23.

52. "Execution Update," 1.

53. *Sourcebook—1992*.

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than if the victim was black.[54] And as the *New York Times* reported in 1991, "although whites represent only 35 percent of murder victims, 85 percent of capital cases brought by local prosecutors involve white victims. Prosecutors have sought the death penalty in one of three murders involving whites; with black victims the ratio drops to 1 in 17."[55] In a culture still infected by the scourge of racism, capital punishment therefore serves as a means to vent the hostility of a predominantly white society by scapegoating blacks as members of a subclass of the condemned rather than executing them as individuals. As the 1990 GAO report to the Congressional Judiciary Committees on "Death Penalty Sentencing" concluded, "the black defendant/white victim combination was the most likely to receive the death penalty."[56]

Cruel and Unusual Punishment and the Establishment of Religion

The Supreme Court ruled over one hundred years ago that the death penalty in itself is not cruel and unusual punishment.[57] In *In re Kemmler*, the justices interpreted the Eighth Amendment to refer to the method of execution and concluded that methods which would ensure a swift and relatively painless death were constitutional, including electrocution, even though the latter may take as much as fifteen to twenty minutes. Supposedly compared to drawing and quartering while alive or burning at the stake, state execution by "modern" methods is far preferable. Despite the lack of evidence, it is presumed that victims of such modern methods suffer far less than they would otherwise, even if it is frankly admitted that such procedures are rarely swift and painless. The courts have seen fit to dismiss claims that the intentional infliction of the death penalty implies any state responsibility for the concomitant death agonies which accompany various methods of execution, including electrocution, lethal injection, hanging or shoot-

54. *McCleskey v. Kemp*, 481 U.S. 279 at 286-87. The February 1990 GAO report to the Senate and House Committees on the Judiciary, *"Death Penalty Sentencing,"* confirmed that "the race-of-victim influence was found at all stages of the criminal justice system process." In the period between 1930 and the 1971 *Furman* decision, blacks constituted over 50 percent of those executed for a capital crime, proportionally five times that of their numbers in the general American population; see Gross and Mauro, *Death and Discrimination*, 17.

55. David Margolick, "In Land of Death Penalty, Accusations of Racial Bias," *New York Times*, 10 July 1991, A1, A7.

56. *"Death Penalty Sentencing,"* 7.

57. "Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishing of life." *In re Kemmler*, 136 U.S. 436 (1890) at 447.

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ing. Again, the moral law of double effect seems to be invoked whereby the pain inflicted may be foreseen but not intended. Instead it is viewed as an unfortunate side effect: the collateral damage of the state's legitimate purpose.

Yet the Oxford English Dictionary defines "cruel" as "causing or characterized by great suffering; extremely painful or distressing."[58] The fact that the death agony may not be as painful as could be imagined by the most monstrous and bestial minds does not make the death agonies of the condemned less "painful or distressing." Ironically, conservative jurists (who insist on a "plain reading" of the text) frequently seem too quick to wash their hands of such responsibilities. In the *Furman* decision, however, Justice Thurgood Marshall argued (following Justice Field's dissent in *O'Neil)*[59] that punishment is "cruel and unusual" wherever it is "excessive."[60] He concluded that, since capital punishment cannot be shown to have a greater deterrent effect than life imprisonment, it is, on its face, excessive.

A Girardian reading would agree with Marshall's conclusion that it is excessive but *not* that it is needlessly excessive. On the contrary, the death penalty is, in fact, *necessarily* excessive because the scapegoat must bear the weight of *all* transgressors. The scapegoat dies *pro nobis,* for the redemption of the social order, and not merely to pay his own due. On its face, capital punishment is unusual, not just empirically (due to the rarity with which those convicted of capital crimes are executed), but structurally, since paying the blood debt owed by all transgressors guarantees that it will be unusual. *The very purpose of the death penalty is therefore "cruel and unusual punishment"; else it would make no sense at all.*

Yet, it is not only that the death penalty violates the Eighth Amendment's prohibition against "cruel and unusual punishment"; it is also manifestly an establishment of religion — a ritual which is intended to sanctify and reinscribe the law-making and law-preserving violence of the state[61] and to counter the spiral of violence which plagues contemporary America. Although, as Justice Brennan argued in *Furman,* "there is no evidence whatever that utilization of imprisonment rather

58. *The Compact Edition of the Oxford English Dictionary,* 4th ed., s.v. "cruel."
59. *O'Neil* v. *Vermont,* 144 U.S. 323 (1892) at 340.
60. *Furman* at 332: "It should also be noted that the 'cruel and unusual' language of the Eighth Amendment immediately follows language that prohibits *excessive* bail and *excessive* fines." See also 4th ed., s.v. "cruel." *Bartlett Dict. Amer,* "one of the numerous substitutes for very, exceedingly." *The Compact Edition of the Oxford English Dictionary.*
61. See Walter Benjamin, "Critique of Violence," *Reflections,* ed. Peter Demetz, trans. Edmund Jephcott (New York: Harcourt Brace Jovanovich, 1978), 277-300, and Jacques Derrida, "Force of Law: The Mystical Foundation of Authority," *Cardozo Law Review* 11 (5-6 July-August 1990): 920-1045.

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than death encourages private blood feuds and other disorders,"[62] religion does not need a rational foundation for its beliefs. The existence of capital punishment in thirty-six states and the strong support of the citizenry for the death penalty evidences an irrational belief that public executions spare the public from physical harm. In the religious psychic economy, it is irrelevant whether it does in fact exorcise violence from the body politic.

It could be argued that while Girard's scapegoat theory may prove that capital punishment is a violation of the Eighth Amendment, designed by the Founders as "our insulation against our baser selves,"[63] it is not necessarily a violation of the First Amendment. Indeed, it is most likely that state authorities would readily dismiss the allegations of religious establishment. After all, it could be said that the state never endorses any particular religious beliefs nor does it shroud public executions in the trappings that accompany most religious rituals. At most, the scapegoat practices which so characterize Western religions may only be coincidentally related to executions by the government. Hence, it would strain credibility to argue that the death penalty is a religious ritual of the state. Yet, it might be contended that an examination of Court precedent on the religion clauses suggests otherwise.

While, as Elisabeth Bergeron has pointed out, the Court has never adopted a "precise definition of religion," it has been confronted with the pragmatic task of finding a "workable" one.[64] One element of the Court's workable definition is the so-called "parallel position" argument, established in the 1960s conscription cases involving conscientious objectors. Under the 1948 Selective Service and Training Act, an individual was eligible for exemption from the draft on the basis of his "religious training and belief," defined in ¶6 as "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code."[65] In *U.S. v. Seeger* (1965), the respondent argued that his objection was based on a "religious faith in a purely ethical creed."[66] The Court held that, even though the respondent refused to affirm a belief in a "Supreme Being," his objections to military service could be deemed religious if they paralleled the role which traditional religious faith played in the lives of believers. "The test might be stated in these

62. *Furman* at 303.
63. Justice Marshall, *Furman,* at 303.
64. Elisabeth Bergeron, "Note: 'New Age' or New Testament?: Toward a More Faithful Interpretation of 'Religion'," *St. John's Law Review* 65 (Winter 1991): 365-87, 366.
65. 50 U.S.C. 456(j).
66. *United States* v. *Seeger,* 380 U.S. 163 (1965) at 167.

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words: A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those qualifying for the exemption comes within the statutory definition."[67] Five years later in *Welsh v. United States* the High Court overturned the conviction of a draft resister who, like Seeger, refused to characterize the grounds for his objection as religious. "In view of the broad scope of the word 'religious,' a registrant's characterization of his beliefs as 'non-religious' is not a reliable guide to those administering the exemption."[68]

The precedent of the conscientous objector cases holds forth an interesting perspective on the nature of the death penalty, for it is not only that capital punishment fits the scapegoat model of Girard's theory of religion, it is that, according to legal precedent, a belief or practice may be religious if it holds a parallel position in the lives of the practitioners to that of traditional believers even though they may deny its religious character. It is clear that capital punishment, as practiced by the state, parallels the role of the scapegoat in traditional Western religious belief. Although the religious character of the death penalty may be disavowed by representatives of an allegedly secular state, such a denial in itself is *not* dispositive in determining its religious status. On the contrary, both analysis and evidence shows that, despite such a denial, public execution is in fact a form of ritual sacrifice, intended to magically redeem the body politic from the infection of violence.

It has been suggested that while the conscientious objector cases can be cited to demonstrate that a practice may be religious, even if its religious character is denied by its practitioner, this constitutional principle is drawn from the jurisprudence of the Free Exercise Clause. The characterization of the death penalty as a religious practice would, on the other hand, involve the Establishment Clause. It is sometimes argued that constitutional principles derived from free exercise cases are not necessarily transferable to establishment cases. Hence, the precedent of the conscientious objector decisions may not be legitimately invoked in the controversy over the alleged religious character of death penalty cases. Just a few short years ago, attorneys representing the Christian Right attempted to effect such a transfer by arguing that, since secular humanism could be considered religious under the

67. Ibid. at 176.

68. *Welsh* v. *United States,* 393 U.S. 333 (1970) at 334. For a fuller discussion of the relationship between these conscientious objector cases and the High Court's "workable definition" of religion, see James McBride, "Paul Tillich and the Supreme Court: Tillich's 'Ultimate Concern' as a Standard in Judicial Interpretation," *Journal of Church and State* 30 (Spring 1988): 245-72.

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Free Exercise Clause,[69] the promotion of secular values by the state would be a violation of the Establishment Clause — arguments that they ultimately lost in the *Mozert* and *Smith* decisions.[70] And while it is true that a common belief (e.g., humanism) or practice (e.g., eating or slaughtering animals) may have some religious significance (e.g., ultimate concern, transsubstantiation, kosher slaughter, or animal sacrifice), it is not necessarily religious. Hence, it has been suggested that capital punishment is not a religious practice. We might therefore be obliged to accept at face value the denials of capital punishment's religious significance.

Of course, this objection is predicated on the somewhat dubious proposition that religion has a different meaning in each of the respective clauses, despite the fact that the term "religion" appears but once.[71] Clearly it is a question of what function a particular act plays in the community. Humanist values may be of ultimate (i.e., religious) concern to members of a small community within the broader social order; they may also be the basis simply for the penultimate aims of governance: a peaceful and well-run society. In other words, it is not that religion has two different meanings under the establishment and free exercise clauses, but rather that humanist values are religious in one context and nonreligious in another. Whereas it is open to question whether humanist values are religious or nonreligious in particular contexts, there can be little doubt as to what structural function capital punishment plays in the broader social context according to recent Supreme Court precedent: it is the arbitrary execution of a member of the condemned class for the purpose of purging the community of violence, a function which is the essential characteristic of the Western religious tradition. The *Herrera* decision — sanctioning the legal execution of the "factually innocent" — unveils the religious imperative which motivates death penalty advocacy in all capital cases — an unconscious but barely hidden desire for blood sacrifice rooted in the Western paradigm of the sacred social order.

Although a critic of the High Court's interpretation of the religion clauses, Michael McConnell has aptly summarized the Court's separationist tendencies developed over the past twenty years: "what the free

69. See *Torcaso v. Watkins*, 367 U.S. 488 (1961) at 495, n. 11, which states, "Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism, and others."
70. See, e.g., John Conlan and John W. Whitehead, "The Establishment of the Religion of Secular Humanism and Its First Amendment Implications," *Texas Tech Law Review* 10 (Winter 1978): 1-66; see also *Mozert v. Hawkins County Public Schools*, 765 F.2d 75 (1985) and *Smith v. Board of School Commissioners of Mobile County*, 827 F.2d 684 (1987).
71. United States Const., Amend. I, § n: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

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exercise clause requires the establishment clause forbids. . . ."[72] Whereas the advocacy of blood sacrifice for the redemption of the social order is permitted under the Free Exercise Clause, it is proscribed to the government under the Establishment Clause. That certainly is the premise which underlies the classic *Lemon* test which has survived despite criticism from numerous legal scholars and Supreme Court justices themselves. Under the *Lemon* test, legislation must show a secular purpose, must neither advance nor inhibit religion, nor involve the state in excessive entanglement with religion.[73] As the above analysis shows, advocates of capital punishment may claim to show a secular purpose for the death penalty, but such claims are disproven by the underlying psychic economy of substitutionary atonement. As a reinscription of state authority, executions enhance the civil religious claims of the state and therefore excessively entangle government with religious soteriology as public policy. Hence, according to the separationist standards which have dominated Supreme Court jurisprudence on the religion clauses, capital punishment appears to be unconstitutional.

However, many constitutional scholars would prefer a more accommodationist viewpoint, one influenced by what was once articulated by former Chief Justice Warren Burger as a "benevolent neutrality" between religion and nonreligion.[74] Under this paradigm, the state should not vigorously assume an anti-religious stance and attempt to push religious beliefs and practices into the private sphere, far from the public forum. Instead, government should acknowledge the role which religious beliefs and practices play in the public lives of its citizens and should accommodate those beliefs and practices as long as they do not effectively endorse one religion over another or prefer religion over nonreligion. Yet the accommodationist viewpoint should be no more tolerant of religious practices *by the state* than that of separationists, particularly in light of the fact that accommodationists come from traditional Western religious backgrounds. Religious practices by the state — particularly that of blood sacrifice — which mime traditional Western sacred rituals are deeply offensive to both Christian and Jewish faiths, for such practices are, on their face, idolatrous. From the Christian perspective, the secular state uses the death row prisoner in place of the *agnus dei*. Guilt for such a theological transgression does

72. Michael McConnell, "The Religion Clauses of the First Amendment: Where is the Supreme Court Heading?," *Catholic Lawyer* 32 (Summer 1989): 187-202, 197.

73. *Lemon v. Kurtzman*, 403 U.S. 602 (1971) at 612-13.

74. "Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Walz v. Tax Commission*, 397 U.S. 664 (1970) at 669.

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not lie with the prisoner but with the cultic structure that imposes this religious role on the condemned. By this act the state ascribes to itself a place which Christians reserve for God alone. "The principal crime of the human race, the highest guilt charged upon the world, the whole procuring cause of judgment," wrote the church father Tertullian, "is idolatry. . . . The essence of *fraud,* I take it, is, that any should seize what is another's, or refuse to another this due; and, of course, fraud done toward man is a name of greatest crime. Well, but idolatry does fraud to God, by refusing to Him, and conferring on others, His honours; so that to fraud it also conjoins *contumely.*"[75]

The aura of sanctification which surrounds and embellishes state authority is therefore not merely a matter of invoking God's blessing, as Robert Bellah and other scholars of civil religion have noted,[76] but rather is embedded in the very structure of state power. Historically, Jews and Christians have refused to bow before such idolatrous power, most notably in their persecution by the Roman state for their refusal to acknowledge the divinity of the state in the person of the emperor. Such demands violated the first and primary stipulation of the Mosaic covenant in Exodus 20:3, "You shall have no other Gods before me" — a prohibition reiterated in Isaiah 44: 6, "I am the first and the last: there is no other God beside me." Likewise, idolatry violates the spirit of the Christian new covenant, founded on the blood of Christ who died *pro nobis,* and undermines the Christocentric exclusivity which animates Christian *koinonia* itself. "This is the reason, my dear brothers, why you must keep clear of idolatry. I say to you as sensible people: judge for yourselves what I am saying. The blessing cup that we bless is a communion with the blood of Christ, and the bread that we break is a communion with the body of Christ. *The fact that there is only one loaf means that, though there are many of us, we form a single body because we all have a share in this one loaf"* (1 Corinthians 10:14-17, emphasis added). It is therefore logical that many religious organizations have opposed the death penalty.[77] These religious traditions are not necessarily pacifist, yet it is evident that capital punishment is more than just violence. It is a particular form of violence — an idolatrous claim by the state over life and death in the community. The death penalty is therefore not just an establishment of religion; it is an

75. S. Thelwall, trans., "On Idolatry," *The Anti-Nicene Fathers. Translations of the Writings of the Fathers down to A.D. 325: Latin Christianity: Its Founder, Tertullian,* ed. Alexander Roberts and James Donaldson (Grand Rapids, Mich.: Wm. B. Eerdmans, 1968) 3: 61-76, 61.

76. Donald G. Jones and Russell E. Richey, eds., *American Civil Religion* (New York: Harper and Row, 1974) and Robert Bellah and Phillip E. Hammond, eds., *Varieties of Civil Religion* (San Francisco: Harper & Row, 1980).

77. See n. 24 herein.

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endorsement of a particular theological position which prefers its own version of substitutionary atonement over that of Jewish and Christian soteriologies. As Chief Justice Burger himself noted in his description of "benevolent neutrality," "The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion."[78] The death penalty does both. Hence, it is not only the separationists who should oppose the death penalty on constitutional grounds; it is also believing accommodationists who should condemn capital punishment for *both* legal *and* theological reasons.

Conclusion

The arguments presented above against the death penalty may be regarded by some as eccentric, novel, or extreme, but in actuality they only reflect what has been long recognized in that antecedent of American jurisprudence, English law. In his recently published historical study of public execution in Britain, Harry Potter concluded that "[w]hether imposed in the name of the king, the representative of God on earth, or by priests, or in the name of a society considered as a sacred body, the infliction of the death penalty was seen not just as a punishment for a crime, but as a repudiation by society of the evil in its midst, ridding the land of its blood-guilt."[79] Indeed, Potter notes that the attempt to abolish the death penalty in Britain's post-war era was opposed in the House of Lords by the leading bishops of the Anglican Church on the grounds that it served "a *religious* function."[80] Dr. Mervyn Haigh, the Bishop of Winchester, argued that

> The execution of a murderer is a solemn ritual act and its object is not only to demonstrate that murder does not pay but that it is shameful. The penalty is not only death but death with ignominy. The death penalty fulfills this rule in an unequalled way because of this quasi-religious sense of awe which attaches to it. In wantonly taking a life, the murderer is felt somehow to have invaded the sphere of the sacred and to be guilty of profanity. His impious act can only be countered by imposing on him a penalty which also has a "numinous" character. This is a deeply rooted belief which cannot be wholly rationalized but should not be summarily dismissed.[81]

Inasmuch as the English common law tradition has left an indelible mark on American jurisprudence, it should not be surprising that a

78. *Walz* at 669.
79. Harry Potter, *Hanging in Judgment: Religion and the Death Penalty in England* (New York: Continuum, 1993), 160.
80. Ibid. Emphasis added.
81. *Parliamentary Debates*, House of Lords (27 April 1948) 5th Series, vol. 155 cols. 426-27, as cited in Potter, *Hanging in Judgment*, 147.

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Girardian reading of the American death penalty bears out what remains at heart — objections to the contrary — a religious practice. As two anthropologists noted in their comparative analysis of Aztec ritual sacrifice and American capital punishment, "Just as Aztec ripping out of human hearts was couched in mystical terms of maintaining universal order and well-being of the state . . . capital punishment in the United States serves to assure many that society is not out of control after all, that the majesty of the Law reigns, and that God is indeed in his heaven."[82] Although English law has no such impediment to the endorsement and adoption of religious practices by Her Majesty's government, the United States Constitution proscribes the state from either the endorsement of religion or the preference of one religious interpretation over another, even if the religious character of the practice is disavowed by the legislature which established it. While the death penalty is opposed by those religious groups who find it to be a violation of the reverence for life, these moral claims against capital punishment as cruel and unusual punishment have fallen short of the constitutional threshold needed for its abolition. A Girardian reading of the death penalty, however, presents an alternative strategy which demonstrates the numinous character of public execution, embraced by the state for the expiation of violence in the American body politic. As such, the death penalty is an establishment of religion which violates the First Amendment. In the name of humanity, in the name of the Constitution, it ought to be abolished.

82. Elizabeth D. Purdam and J. Anthony Paredes, "Rituals of Death: Capital Punishment and Human Sacrifice," in *Facing the Death Penalty: Essays on a Cruel and Unusual Punishment*, ed. Michael L. Radelet (Philadelphia, Pa.: Temple University, 1989), 139-55, 152.

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