

**NOTHING CHANGES—IT ALL REMAINS THE
SAME: MODERN CAPITAL PUNISHMENT
(HUMAN SACRIFICE BY A DIFFERENT NAME)**

Patrick S. Metz *

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For his yearly Symposium on Criminal Law, Professor Arnold Loewy has asked, “Is capital punishment a good or bad idea?” This question is not as simple as it may seem. As ordered, I will attempt to ignore the tangential questions of morality or the possibility of executing the innocent. For a year now I have wrestled with this question. Knowing Professor Loewy, I have tried to understand the direction in which he was pushing me. Did he want me to talk strictly about the various suggested effects of capital punishment, such as deterrence, rehabilitation, retribution, and removal? It is unlikely he wants me to address the more hideous concept of using death as a solution to a cultural problem; however, I have often thought this is the unspoken agenda of death-penalty advocates. I wondered if it could be the capriciousness or arbitrariness of the death penalty, or its use as a method of retaliation or vengeance. There is always the issue of cost and, in a constitutional legal system such as ours, the inevitable protracted battle to prevent or justify execution considering the financial burden on society. Because our racial bias plays such a significant role in our legal system, surely this is Professor Loewy’s preferred interpretation. Maybe it is the political process and how the implementation of the death penalty becomes a platform from which many conservative politicians find security. Or is it Professor Samuel Gross’s point that the implementation of the death penalty is a practical failure, echoing the

* Patrick S. Metz is Professor of Law and Director of the Criminal Clinics at Texas Tech University School of Law. B.A., Texas Tech University 1970; J.D., The University of Houston 1973. I want to thank Neha Rao Casturi, who is a practicing attorney in Corpus Christi and was my research assistant, for her help. We began this project during her final semester of school, and even though she was studying for the Bar, she took the time to help me finish this project. I had no doubt she could do both at the same time.

American Law Institute's abandonment of pro-death-penalty scholarship?¹ Is it the slow but ever-present march of the states toward abolition? I have not a clue, as there surely are topics I have not considered that only Professor Loewy holds back in his Socratic motivation of this discussion.

So, I tried to imagine a society where the one charged with the responsibility of executing another is infallible, incapable of executing an innocent person—as surely no society would allow the execution of the innocent by those in power. I also tried to imagine a culture that found it perfectly moral to execute other human beings and that considered the decision maker who imposed the sentence of execution infallible. My first thought was of first century Rome. The emperor was a god.² His decisions had all the weight of one incapable of fallibility.³ His rule was the definition of morality.⁴ But in Rome, murder was not an issue for the State to settle.⁵ Families considered the proper remedy for murder to be a matter of restitution.⁶ One could be put to death and the event was often a public spectacle.⁷ The use of capital punishment and public spectacle were common, often taking place in public arenas that sometimes held as many as 150,000 spectators.⁸ These “executions” took on the flavor of ritual or ceremonial sacrifice where humans were the object of public sport and their death enjoyed as entertainment.⁹ So it is this ritualized human sacrifice—often public, always moral, and never of the innocent—that guides my discussion. As will be seen, often in history and throughout the world, the execution of humans has frequently taken on a public, and often spiritual, purpose within each society, performed by its leaders—the infallible cultural icons of morality—for both their own benefit and the benefit of their gods.¹⁰

1. See Adam Liptak, *Group Gives Up Death Penalty Work*, N.Y. TIMES, Jan. 5, 2010, at A11, available at http://www.nytimes.com/2010/01/05/us/05bar.html?_r=0.

2. See Nigel Pollard, *Roman Religion Gallery: The Imperial Cult*, BBC HISTORY, http://www.bbc.co.uk/history/ancient/romans/roman_religion_gallery_06.shtml (last updated Feb. 17, 2011); *The Roman Empire in the First Century: Augustus*, PBS, http://www.pbs.org/empires/romans/empire/augustus_religion.html (last visited Oct. 17, 2014).

3. KARL LOEWENSTEIN, *THE GOVERNANCE OF ROME* 429 (1973).

4. *Id.*

5. Kevin Walker, Book Review, 52 AM. J. LEGAL HIST. 377, 377 (2012).

6. Jacques E. du Plessis, *Compulsion in Roman Law* (1997) (unpublished Ph.D. thesis, University of Aberdeen), available at <http://www.abdn.ac.uk/law/documents/dupless-1.pdf> (“[P]enal remedy, aimed at obtaining damages in fourfold, was available to pressurize the recipient into providing restitution . . .”).

7. NIGEL CAWTHORNE, *PUBLIC EXECUTIONS* 6 (2006).

8. *Circus Maximus*, ENCYCLOPAEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/118506/Circus-Maximus> (last visited Oct. 17, 2014).

9. See CAWTHORNE, *supra* note 7, at 6–7.

10. *Id.* at 16, 27–31; Philip R. Wiese, *Popcorn and Primetime vs. Protocol: An Examination of the Televised Execution Issue*, 23 OHIO N.U. L. REV. 257, 259 (1996).

I. CEREMONIAL SACRIFICES

So what is a human sacrifice and what specific characteristics does it possess? Harding defines it as “a term that can be used to refer to the complex phenomenon of the collective killing of a human victim, its mythic rationalization, and its ritualization.”¹¹ There is evidence that ritual sacrifice of humans existed during the Palaeolithic Age.¹² It is well understood that human sacrifice was present in the ancient cultures of Mexico, Persia, and Greece.¹³ The Peruvian Incas used children almost exclusively in their sacrificial ceremony—called “Vilacha” or “Pipano.”¹⁴ All highly ritualized; all moral without regard to innocence.

Until 1959, eastern cultures, such as Tibetan Buddhism, saw evidence of human and animal sacrifice, the use of human bones in religious rituals, and the practice of burying live children in the cornerstones of houses or monasteries.¹⁵ Ancient Germans, Arabs, Indonesians, Africans, and Polynesians all practiced human sacrifice.¹⁶ Ancient Egyptians sacrificed humans until, and during, the time of the Roman Republic and, to this day, many African countries still practice such rituals.¹⁷ All highly ritualized; all moral without regard to innocence.

11. Roberta M. Harding, *Capital Punishment As Human Sacrifice: A Societal Ritual As Depicted in George Eliot's Adam Bede*, 48 *BUFF. L. REV.* 175, 182 (2000) (quoting *VIOLENT ORIGINS: WALTER BURKERT, RENE GIARD, AND JONATHAN Z. SMITH ON RITUALS KILLING AND CULTURAL FORMATION* Preface (Robert G. Hamerton-Kelly ed., 1987)).

12. Nicholas Toth & Kathy Schick, *Overview of Paleolithic Archeology*, in 3 *HANDBOOK OF PALEOANTHROPOLOGY* (Winfried Henke & Ian Tattersall eds., 2007). The Palaeolithic Age began approximately 2.5 million years ago. *Id.*; ZOE HARCOMBE, *THE OBESITY EPIDEMIC: WHAT CAUSED IT? HOW CAN WE STOP IT?* 167 (2010) (“The Stone Age, also known as the Palaeolithic era, is the name given to the period between about 2.5 million and 20,000 years ago.”).

13. Harding, *supra* note 11, at 182 (“[Human Sacrifice] also existed in the ancient cultures of Mexico, Persia, and Greece.”).

14. *Id.*

15. A. TOM GRUNFELD, *THE MAKING OF MODERN TIBET* 29 (M.E. Sharpe, Inc. rev. ed. 1996).

16. *See generally* *THE STRANGE WORLD OF HUMAN SACRIFICE* (Jan N. Bremmer ed., 2007) (providing examples of human sacrifice in many ancient cultures).

17. *Id.* at 129. Africa has a rich history of ritual killing and human sacrifice. Leo Igwe, IHEV Representative, *Ritual Killing and Human Sacrifice in Africa*, Address Before the International Humanist and Ethical Union: African Commission on Human and People's Rights (Oct. 24, 2010), *available at* <http://iheu.org/ritual-killing-and-human-sacrifice-africa/>. Even in modern times, humans are hunted, mutilated, murdered, and sacrificed for ritual purposes in Africa. *Id.* Witch doctors use human body parts for charms and magic concoctions that they believe spiritually fortifies their people; makes them richer; and protects them from harm, disease, poverty, accident, and death. *Id.* There have been reports in recent years of the disinterment of the dead for the removal of organs, genitals, and eyes to make potions used in rituals (in particular, the skin of albinos is prized). *Albino Girl Killed for Witchcraft*, SKY NEWS (Oct. 21, 2008, 3:52 PM), <http://news.sky.com/story/642546/albino-girl-killed-for-witchcraft>.

II. ROMANS

In ancient Rome, slaves were publicly crucified.¹⁸ Other methods of public execution included execution in the arena—where criminals were pitted against either a gladiator or a wild animal.¹⁹ Crowds of criminals were herded naked into the arena in front of thousands of spectators.²⁰ Criminals were forced to fight to the death and suffered abuse at the hands of the guards if they refused to fight.²¹ Death by animal usually came by way of lions, bulls, bears, or leopards.²² Domitian, the first-century emperor of Rome, condemned Christians to painful and humiliating public deaths.²³ Some were hacked to death; others were burned to death.²⁴ There was also death by stake—where the condemned would be pierced with a stake and left to die.²⁵ Other forms of death included the tearing of flesh by spikes, pincers, and iron claws.²⁶ Some were strung up by one leg, a thumb, or their hair.²⁷ Women's breasts were cut off; machinery was used to crush victims to death; and victims were beaten to death with hammers, whips, or cudgels.²⁸ Some unfortunate souls were roasted or skinned alive, others were boiled in oil or had molten lead poured over them.²⁹ Other heinous forms of death included the tearing out of eyes and the tearing of limbs and genitals from the body.³⁰ All highly ritualized; all moral without regard to innocence.

In Monarchical Rome, murder was considered treason because every subject belonged to the monarch.³¹ Thus, the Romans considered murder an infringement on sovereignty.³² After the monarchy was overthrown and the republic established, the definition of murder changed.³³ The Republic reverted to a patriarchal society.³⁴ The father had an absolute right over his family and

18. DONALD G. KYLE, SPECTACLES OF DEATH IN ANCIENT ROME 53 (1998); CAWTHORNE, *supra* note 7, at 10; Wiese, *supra* note 10, at 259–60.

19. JAMES A. CORRICK, THE BLOODY, ROTTEN ROMAN EMPIRE: THE DISGUSTING DETAILS ABOUT LIFE IN ANCIENT ROME 25 (2011); CAWTHORNE, *supra* note 7, at 16–17.

20. CAWTHORNE, *supra* note 7, at 16–17; CORRICK, *supra* note 19, at 25.

21. CAWTHORNE, *supra* note 7, at 16–17.

22. *Id.*

23. *Id.* at 22; Domitian, ENCYCLOPAEDIA BRITANNICA, available at <http://www.britannica.com/EBchecked/topic/168802/Domitian> (last updated Feb. 17, 2014).

24. CAWTHORNE, *supra* note 7, at 22.

25. *Id.*

26. *Id.*; see PAUL FRIEDLAND, SEEING JUSTICE DONE: THE AGE OF SPECTACULAR CAPITAL PUNISHMENT IN FRANCE 28 (2012).

27. CAWTHORNE, *supra* note 7, at 22.

28. *Id.*

29. *Id.* at 23; Eddie Clark, Capital Punishment in Ancient Rome (2005) (unpublished A.B. thesis, Xavier University), available at <http://www.xavier.edu/classics/documents/Theses/Clark.pdf>.

30. CAWTHORNE, *supra* note 7, at 22.

31. Walker, *supra* note 5, at 377.

32. *Id.*

33. *Id.* at 378.

34. *Id.*

thus held the power of life and death.³⁵ In fact, the killing of children was seen as a duty to the Republic—“an exercise of [the father’s] judgment about whether or not [his] sons had the qualities of citizens.”³⁶ The death penalty was reserved for citizens who committed parricide (killing of parents) or cult killings (offenses against the gods).³⁷ For parricide, the accused “was sealed in a sack containing an ape, dog, rooster, and viper and then thrown into the river,” a ritual known as the *Poena Cullei*.³⁸ Interestingly, because of the importance of family in Roman culture, parricide was considered the most heinous of crimes.³⁹ The murdering of a family member was considered unnatural.⁴⁰ Each of the animals thrown in the *Poena Cullei* with the perpetrator had a significant meaning in Roman culture.⁴¹ Conversely, murder of descendants was not treated the same as parricide.⁴² For example, murder by a father of his sons would, more than likely, escape punishment.⁴³ All highly ritualized; all moral without regard to innocence.

Much like our modern society, Roman society was based heavily on a class system; upper-class citizens suffered milder punishments than lower-class citizens.⁴⁴ Generally, citizens of status enjoyed exile—often temporary—as the most severe form of punishment (even for murder).⁴⁵ Moreover, citizens of status were exempt from many popular methods of punishment, such as crucifixion and death by beasts.⁴⁶ Lower-class citizens, however, often faced public and ritualistic capital punishment.⁴⁷ The XII Tables, published around 450 BCE, codified the Roman death penalty.⁴⁸ The law described capital punishment as either death or surrender of Roman citizenship (which included exile and loss of property).⁴⁹ The method of punishment varied depending on the type of crime committed and the social standing of the accused.⁵⁰

35. *Id.*; RICHARD P. SALLER, *PATRIARCHY, PROPERTY AND DEATH IN THE ROMAN FAMILY* 120 (1994).

36. Walker, *supra* note 5, at 378.

37. *Id.*

38. RICHARD A. BAUMAN, *CRIME AND PUNISHMENT IN ANCIENT ROME* 17 (1996); ALISON FUTRELL, *BLOOD IN THE ARENA: THE SPECTACLE OF ROMAN POWER* 258 n.21 (1997); Connie L. Scarborough, *Women as Victims and Criminals in the Siete Partidas*, in *CRIME AND PUNISHMENT IN THE MIDDLE AGES AND EARLY MODERN AGE* 225, 229 (Albrecht Classen & Connie Scarborough eds., 2012); Woody R. Clermont, *Your Lethal Injection Bill: A Fight to the Death over an Expensive Yellow Jacket*, 24 *ST. THOMAS L. REV.* 248, 259 (2012).

39. *Ancient Roman Executions—How and Why the Romans Executed People*, HUBPAGES, <http://hubpages.com/hub/roman-executions-why-the-romans-executed-people> (last updated Aug. 26, 2013) [hereinafter *Ancient Roman Executions*]; BAUMAN, *supra* note 38, at 30; Walker, *supra* note 5, at 378.

40. *Ancient Roman Executions*, *supra* note 39.

41. *Id.*

42. *Id.*

43. *Id.*

44. Clark, *supra* note 29, at 2.

45. *Id.*

46. *Id.*

47. *Id.*

48. Clermont, *supra* note 38, at 259.

49. *Id.*

50. *Id.*

Murder of other Roman citizens of equal status was generally not punishable by capital punishment.⁵¹ Rather, these individuals would be fined or sentenced to exile.⁵² In events where capital punishment was imposed, the accused would be beheaded.⁵³ Killing a Roman of a lesser status (i.e., a slave) often carried no punishment at all.⁵⁴ While the Roman culture grew in Europe, the native population of the Americas flourished and, in time, developed its own ceremonial rituals centered not so much on punishment for wrongdoing, but on appeasing the gods—equally ritualistic and significantly parallel in many respects.⁵⁵

III. MAYA

The Maya,⁵⁶ primarily from the Yucatan Peninsula of Eastern Mexico, commonly sacrificed humans, animals, and plants as a celebration of a victory in war or to improve fertility of the land in order to grow better crops.⁵⁷ As descendants of the gods, the “Maya rulers . . . made special blood sacrifices, including drawing blood from the tongue, earlobes, or genitals.”⁵⁸ These sacrifices were necessary to prevent chaos and cosmic disorder.⁵⁹ The Maya, like the Aztecs, commonly decapitated or disemboweled their sacrificial victims, or killed them by tying them up and pushing them down the stone stairs of their temples.⁶⁰ The Maya were also notorious for cutting their victims’ hearts out during sacrificial rituals.⁶¹ Most importantly, the Maya believed there was a spiritual link to creation and rebirth through death and sacrifice.⁶²

51. *Ancient Roman Executions*, *supra* note 39.

52. *Id.*

53. *Id.*

54. *Id.*

55. *See infra* Parts III–V.

56. The Maya fully developed a written language, art, architecture, mathematics, and astronomical systems from around 2000 BC to AD 900, until the arrival of the Spanish, which was virtually during the same period Roman culture developed with remarkably similar beliefs in spirituality and ritual sacrifice. J. ALLAN DANELEK, 2012: EXTINCTION OR UTOPIA 72 (2009) (“Known for possessing the only fully developed written language in pre-Columbian America, the Maya were also famous for their spectacular art, monumental architecture, and sophisticated mathematical and astronomical systems . . .”).

57. Deborah Neffa, *Rituals of Sacrifice and Worship*, Comment to *GeoPedia: Maya*, NAT’L GEOGRAPHIC (Aug. 5, 2008, 4:34 PM), <http://ngm.nationalgeographic.com/geopedia/Maya#Rituals%20of%20Sacrifice%20and%20Worship>.

58. *Id.*

59. *Id.*

60. Christopher Minster, *The Ancient Maya and Human Sacrifice*, ABOUT EDUC., <http://latinamerican.history.about.com/od/Maya/p/The-Ancient-Maya-And-Human-Sacrifice.htm> (last visited Oct. 17, 2014).

61. *Id.*

62. *Id.*

IV. CHRISTIANITY

Interestingly, similar beliefs were developing within the Christian religion. Centered in the development of the Roman Catholic Church, the sacrificial execution of Jesus of Nazareth was spiritually linked to the rebirth and salvation of humanity, symbolizing how a god—through his manifestation as a human, who ritually submitted to be sacrificed in order to be resurrected after death—creates a spiritual link between the deity and the salvation of humanity from its own immorality, fallibilities, and inevitable death.⁶³ Like the Maya, this ritual sacrifice also symbolized the spiritual link between the deity and the salvation of humanity—whether from starvation of the body by the Maya or starvation of the soul by the Christians.⁶⁴ The Christian ritual is relived to this day by highly ritualized passion plays during the Christians' Easter season each year.⁶⁵ The ritualistic death of Jesus Christ is played out throughout the world.⁶⁶

Another similarity between the Maya, Aztecs, and the developing Christian religion involved the eating of human flesh as part of the ritual or to celebrate the ritual. Arriving at Cholula, Spanish explorer Cortez found “cages of stout wooden bars . . . full of men and boys who were being fattened for the sacrifice at which their flesh would be eaten.”⁶⁷ Does this seem strange and bizarre?

Then Jesus said unto them . . . Except ye eat the flesh of the Son of man, and drink his blood, ye have no life in you. Whoso eateth my flesh, and drinketh my blood, hath eternal life; and I will raise him up at the last day. For my flesh is meat indeed, and my blood is drink indeed. He that eateth my flesh, and drinketh my blood, dwelleth in me, and I in him.⁶⁸

In our European history, religion provides that mythical rationalization component of human sacrifice. During the late middle ages, the public played a big role in the ritualized spectacle of institutionalized killing.⁶⁹ Although the rituals in Europe during the last millennium mostly punished wrongdoing, the codes that were violated were based in religious teaching.⁷⁰ To this day, the

63. *Id.*

64. See generally *id.* (demonstrating a similar sacrificial, religious ritual).

65. See *Holy City of the Wichitas Easter Passion Play*, OKLAHOMA, <http://www.travelok.com/listings/view.profile/id.18990> (last visited Oct. 17, 2014).

66. For example, the Oberammergau Passion Play has been performed every ten years since 1634 as a tradition by the inhabitants of a village in Germany, about forty miles south of Munich. Christopher O'Toole, *Oberammergau Passion Play: Travels to Bavaria*, ENCYCLOPAEDIA BRITANNICA (May 21, 2010), <http://www.britannica.com/blogs/2010/05/oberammergau-passion-play-travels-to-bavaria/>.

67. Michael Harner, *The Ecological Basis for Aztec Sacrifice*, 4 AM. ETHNOLOGIST 117, 121 (1977).

68. *John* 6:53–56 (King James).

69. See *supra* Part I.

70. See James J. Megivern, *Capital Punishment: The Curious History of Its Privileged Place in Christendom*, 147 PROC. AM. PHIL. SOC'Y 3, 3 (2003), available at <http://www.amphilsoc.org/sites/default/files/proceedings/147102.pdf>.

invocation of Christian and Hebrew law finds itself a regular place in the execution of criminal penalties.⁷¹ The development of ritualization and gruesomeness in the execution of punishment is ever-present. God, speaking to Moses, said:

Anyone who strikes another person and kills him must be put to death. . . . If someone injures his neighbor, what he did is to be done to him—break for break, eye for eye, tooth for tooth—whatever injury he has caused the other person is to be rendered to him in return. . . . but he who kills another person is to be put to death.⁷²

V. AZTECS

During the fifteenth and sixteenth centuries, the Aztecs, from Central and Southern Mexico, took ritual sacrifice to new levels.⁷³ The Aztecs would hold “their victims down on top of temples,” cut open the chest or abdomen, tear out the hearts, and offer “the still-beating organs to their gods.”⁷⁴ Estimates of those executed by the Aztecs range from 20,000 to 250,000 annually.⁷⁵ Highly ritualistic, the Aztecs executed war captives, women, and “large numbers of children—sold to the priests by the poor.”⁷⁶ After death, the bodies were decapitated, the heads put on display, and the bodies cut up and eaten.⁷⁷ The Aztecs practiced these sacrificial rituals during the same time period as the first European explorers arrived in North America and claimed the land for their infallible leaders—primarily European royalty—including the Vicar of Christ, the Pope of the Catholic Church, a force to which European society looked to for the definition of morality.⁷⁸ Even though the Europeans did not call it sacrifice, millions of indigenous people of North and South America lost their lives through disease and conquest.⁷⁹

71. *See id.*

72. *Leviticus* 24:17–22.

73. *See* THE STRANGE WORLD OF HUMAN SACRIFICE, *supra* note 16, at 9–10.

74. Minster, *supra* note 60.

75. Elizabeth D. Purdum & J. Anthony Paredes, *Rituals of Death: Capital Punishment and Human Sacrifice*, in *FACING THE DEATH PENALTY: ESSAYS ON A CRUEL AND UNUSUAL PUNISHMENT* 139, 143 (Michael L. Radelet ed., 1989).

76. *Id.*

77. *Id.* at 150.

78. *See infra* Part VI.

79. Some historians believe that European diseases destroyed up to 80% of the Native American population. *See Native American History*, JUST BEGINNING FOUND., <http://www.jtbf.org/index.php?src=gendocs&ref=Native%20American%20History&category=Integration> (last visited Oct. 17, 2014).

VI. EUROPEANS

It was not just among the indigenous peoples of North and South America that such gruesome behavior manifested itself.⁸⁰ Ancient indigenous people of the Americas used such sacrifice and public spectacle to appease their gods; the gods—regardless of culture—have always played a significant role in executions.⁸¹ Explaining the unknown through rituals involving death occurred throughout the world's cultures.⁸² The role of the public in the ritualized spectacle of institutionalized killing during the late middle ages in developing European cultures must not be forgotten.⁸³ To what degree this influenced our contemporary view of executions cannot be overlooked. Even though the rituals in Europe during the last millennium centered around punishment for wrongdoing, the codes that were violated were based in religious teaching and the development of Western cultural norms.⁸⁴ So in a sense, to violate a law—to the degree one suffered punishment—was certainly just as much a violation of religious values as it was a violation of civil or criminal law.⁸⁵ To this day, the invocation of Christian and Hebrew law finds a regular place in the execution of criminal penalties.⁸⁶ And the development of ritualization and gruesomeness in the execution of punishment is ever-present.

For example, during the twelfth century in present-day England, the penalty imposed for capital crimes involved public spectacles of hanging, and if the condemned was a traitor, he was first dragged to the gallows behind horses.⁸⁷ In the thirteenth century, the bodies of the executed were “sometimes disemboweled and then dismembered after hanging.”⁸⁸ During Medieval times, women were burned or buried alive for transgressions, some as simple as theft.⁸⁹ This era saw the development of breaking on the wheel⁹⁰ and being

80. See Trisha Olson, *The Medieval Blood Sanction and the Divine Beneficence of Pain: 1100–1450*, 22 J.L. & RELIGION 63, 63 (2006) (discussing gruesome behavior in Western Europe).

81. THE STRANGE WORLD OF HUMAN SACRIFICE, *supra* note 16, at 11, 52.

82. *Id.*

83. See Olson, *supra* note 80, at 63.

84. See CARL LUDWIG VON BAR, A HISTORY OF CONTINENTAL CRIMINAL LAW 43 (Thomas S. Bell trans., The Lawbook Exchange Ltd., 1999) (1916) (“A State which makes religion an instrument to accomplish its own ends, as Rome had done from the beginning, can not remain indifferent to the intrusion of a new religion.”).

85. See *id.*

86. See Megivern, *supra* note 70.

87. Olson, *supra* note 80, at 69 (citing SUZANNE LEWIS, THE ART OF MATTHEW PARIS IN THE CHRONICA MAIORA 235 (1987)).

88. *Id.*

89. *Id.* at 69–70 (citing WESTMINSTER CHRONICLE 322–23 n.7 (L.C. Hector & Barbara F. Harvey eds. & trans., Clarendon Press 1982) (speaking of the sentence of Elizabeth Wanton who was burned for aiding in the death of her husband in 1388)).

90. Breaking on the wheel involved strapping a person to a wheel, turning the wheel, and striking the body with canes until broken, all to the amusement of crowds of spectators. ERIK C. RÜHLING, INFERNAL DEVICE: THE MACHINERY OF TORTURE AND EXECUTION 70 (2007).

drawn and hanged.⁹¹ All these methods of execution were completely moral and inflicted upon those who had been convicted, or at least accused, of a crime including murder, treason, rape, or theft from a mill or a church.⁹² Charming, sodomites were burned and counterfeiters were merely boiled.⁹³ In the Italian city-states, there was a “growing array of savage and spectacular punishments, from death by burning and quartering to starvation in a cage,” all with preliminary public torture.⁹⁴ By the fourteenth century, a rape victim was often given the opportunity to “gouge out the eyes and/or sever the offender’s testicles herself.”⁹⁵ All highly ritualized; all moral without regard to innocence.

Huge crowds of people would gather during the fourteenth century in Europe to “enjoy[] the spectacle of an execution in the town square.”⁹⁶ These traditions followed Europeans to the Americas with the use of the stock (or pillory) in Puritan America to shame and punish wrongdoers,⁹⁷ flogging,⁹⁸ the use of fire to burn witches,⁹⁹ and the hanging of the condemned in town centers so that hundreds or thousands of other people could watch the highly ritualistic execution with ignominious effect upon the executed.¹⁰⁰ The public display of the punished could involve the humiliation of being peppered with objects such as tomatoes or stones, or being tarred and feathered.¹⁰¹ Such public

91. See *Drawing and Quartering*, ENCYCLOPAEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/171149/drawing-and-quartering> (last updated Jan. 9, 2014).

92. Olson, *supra* note 80, at 70.

93. *Id.* Other methods of execution included flaying, scaphism, the garrote, the brazen bull, sawing in half, chopping off the head, and the infamous guillotine. See generally JACOB F. FIELD, ONE BLOODY THING AFTER ANOTHER: THE WORD’S GRUESOME HISTORY (2013) (discussing flaying and scaphism); JEAN KELLAWAY, THE HISTORY OF TORTURE AND EXECUTION: FROM EARLY CIVILIZATION THROUGH MEDIEVAL TIMES TO THE PRESENT (2003) (detailing the methods of torture and execution through history).

94. Olson, *supra* note 80, at 70 (quoting PHILLIP JONES, THE ITALIAN CITY-STATE: FROM COMMUNE TO SIGNORIA 379 (1997)).

95. *Id.* at 69.

96. Neil E. Nussbaum, “*Film at Eleven . . .*”—Does the Press Have the Right to Attend and Videotape Executions?, 20 N.C. CENT. L.J. 121, 122 (1992).

97. Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1881 (1991).

98. John Coffey, *Toleration*, in 2 PURITANS AND PURITANISM IN EUROPE AND AMERICA 567, 568 (Francis J. Bremer & Tom Webster eds., 2006).

99. See Peter J. Galie & Christopher Bopst, *Great Political Trials of the Millennium*, LITIGATION, Winter 2001, at 39, 39.

100. See Jef I. Richards & R. Bruce Easter, *Televising Executions: The High-Tech Alternative to Public Hangings*, 40 UCLA L. REV. 381, 384 (1992). Public hangings followed a certain set tradition: (1) the erection of a scaffold high enough to be seen by all and to permit the proper dropping of the executed—to break his neck or permit strangulation; (2) the use of an executioner often portrayed as the grim reaper; (3) the authority of the State represented by law enforcement or elected officials; (4) the reading of certain words, the last meal, and words of the condemned; (5) the covering of the head and eyes of the victim and certain protocol in the preparation of the hangman’s noose; and (6) the disposing of the body by an appropriately dressed person whose job it was to escort the dead to the ground. See generally PIETER SPIERENBURG, THE SPECTACLE OF SUFFERING: EXECUTIONS AND THE EVOLUTION OF REPRESSION: FROM A PREINDUSTRIAL METROPOLIS TO THE EUROPEAN EXPERIENCE (1984) (detailing the history of executions).

101. See Brigham Henry Roberts, *Introduction to Joseph Smith, History of the Church of Jesus Christ of Latter-Day Saints LXXXIV* (Desert News 1902), available at <https://archive.org/details/historyofchurch06robe>; CAWTHORNE, *supra* note 7, at 7.

punishments in the New World are legend. Execution by fire, hanging, or firing squad provided the common folk a festival environment and great entertainment.¹⁰² As a satisfying way to set apart “the other,” our society finds itself at the end of a long line of humans quick to enjoy the sport of public murder.¹⁰³

Roman law played a significant role in the developing Western society. In the sixth century, after the fall of the Roman Empire, Salic law from France, Visigothic law from Germanic customs, and Roman law all began to intertwine.¹⁰⁴ Before the twelfth century, punishment for wrongdoing, even murder, often revolved around restitution to the victim and his family.¹⁰⁵ Prior to the development of modern legal theory, this restitution model was a civilized improvement from primitive society, which often settled disputes with violence motivated by vengeance.¹⁰⁶ But during this period, if one was unable to compensate with restitution, the convicted had to pay “with his life.”¹⁰⁷ By the ninth century, Christian concepts of modern punishment familiar to modern people developed and were primarily based on deterring further crime with a shift to punishment being the government’s responsibility.¹⁰⁸ Near the end of the eleventh century, the rediscovery of the Roman *Corpus Juris Civilis* (Justinian Code) brought about the modern use of intent to determine culpability and the use of deterrence as the overriding purpose of punishment.¹⁰⁹ During much of the period preceding the latter half of the eleventh century, the intent of the actor was not a concern.¹¹⁰ Compensation to the victim of crime was the issue—so much so that if there was no injury worthy of compensation, then no crime was committed.¹¹¹ During this same period, the Christian religion, as manifested in the rise of the power of the Catholic Church in Rome and the Western World, saw a shift away from personal accountability to the victim or his kin.¹¹² Intent became an issue in determining culpability, and the taking of other life—especially by an individual in retribution—was forbidden.¹¹³ The Church, however, condoned state-sponsored killing (i.e., execution) well into the late twentieth century.¹¹⁴

102. See Steven A. Blum, *Public Executions: Understanding the “Cruel and Unusual Punishments” Clause*, 19 HASTINGS CONST. L.Q. 413, 413–21 (1992).

103. See generally FRIEDLAND, *supra* note 26, at 28 (tracing the theory and practice of public executions over time).

104. *Id.* at 29.

105. *Id.* at 30.

106. *Id.*

107. *Id.* at 31.

108. *Id.* at 33.

109. *Id.* at 38. See generally Cary R. Alburn, *Corpus Juris Civilis: A Historical Romance*, 45 A.B.A. J. 562 (1959) (discussing *Corpus Juris Civilis*).

110. FRIEDLAND, *supra* note 26, at 47–48.

111. *Id.* at 48.

112. *Id.*

113. *Id.*

114. Davison M. Douglas, *God and the Executioner: The Influence of Western Religion on the Death Penalty*, 9 WM. & MARY BILL RTS. J. 137, 139 (2000).

VII. THE CATHOLIC CHURCH

Until recently, the Catholic Church, along with most Protestant churches, supported the imposition of the death penalty.¹¹⁵ The Church's endorsement of the death penalty allowed capital punishment to be imposed for much of the past two thousand years.¹¹⁶ "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.'"¹¹⁷ Moreover, the Church's endorsement of the death penalty served its efforts to eliminate and punish heresy.¹¹⁸ "[I]n 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.'"¹¹⁹ For centuries, people have cited this verse from the book of Genesis, along with crimes the Torah punishes by death, as a justification for capital punishment.¹²⁰ The Christian Old Testament (Hebrew Bible) enumerates approximately thirty-six capital offenses that are punishable by death, including magic, blasphemy, necromancy, apostasy, and murder.¹²¹

Although the Christian New Testament does not specifically address capital punishment, Christians look to the Book of Romans to make such a justification.¹²² In the Book of Romans, the Apostle Paul wrote:

Let every person be subject to the governing authorities; for there is no authority except from God, and those authorities that exist have been instituted by God. Therefore whoever resists authority resists what God has appointed, and those who resist will incur judgment. For rulers are not a terror to good conduct, but to bad. Do you wish to have no fear of the authority? Then do what is good, and you will receive its approval; for it is God's servant for your good. But if you do what is wrong, you should be

115. *Id.*; David F. Greenberg & Valerie West, *Siting the Death Penalty Internationally*, 33 LAW & SOC. INQUIRY 295, 304 (2008); Monica Kostielney, *Understanding Justice with Clarity, Civility, and Compassion: Reflections on Selected Biblical Passages and Catholic Church Teachings on the Death Penalty*, 13 T.M. COOLEY L. REV. 967, 968 (1996); *Capital Punishment*, BBC, http://www.bbc.co.uk/religion/religions/christianity/christianethics/capitalpunishment_1.shtml (last updated Aug. 3, 2009); see AUGUSTINE JUDD, CATHOLICS AND CAPITAL PUNISHMENT (2000), available at <http://www.kofc.org/un/en/resources/cis/cis302.pdf>. See generally JAMES J. MEGIVERN, THE DEATH PENALTY: AN HISTORICAL AND THEOLOGICAL SURVEY (1997) [hereinafter THE DEATH PENALTY] (discussing the historical development of Christian views toward capital punishment).

116. See THE DEATH PENALTY, *supra* note 115; Douglas, *supra* note 114, at 138 n.3.

117. Douglas, *supra* note 114, at 139 n.8 (quoting DAVID GARLAND, PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY 203 (1990)).

118. *Id.* at 139; THE DEATH PENALTY, *supra* note 115, at 27–30, 55–60, 103–11, 259–67.

119. Douglas, *supra* note 114, at 143 (quoting *Genesis* 9:6); see also JUDD, *supra* note 115, at 6 (quoting *Genesis* 9:6).

120. Douglas, *supra* note 114, at 143.

121. JUDD, *supra* note 115, at 6; *Capital Punishment*, *supra* note 115.

122. See Douglas, *supra* note 114, at 139; see also *Romans* 13:1–5 (New Revised Standard Version); JUDD, *supra* note 115, at 7.

afraid, for the authority does not bear the sword in vain! It is the servant of God to execute wrath on the wrongdoer.¹²³

The Church has embraced the “servant of God to execute . . . wrath on the wrongdoer” language and used it as a justification for the death penalty.¹²⁴ Further, Pope Innocent III stated: “The secular power can, without mortal sin, exercise judgment of blood, provided that it punishes with justice, not out of hatred, with prudence, not precipitation.”¹²⁵ Roman Catechism taught that God entrusted life and death to civil authorities and that using this power was considered an obedience to God’s commandments and not murder.¹²⁶

The use of capital punishment against heretics saw a rise after Constantine declared Christianity “the official religion of the Roman Empire.”¹²⁷ As a result, imposition of “the death penalty to control heresy sharply increased” in the Middle Ages.¹²⁸ One leading scholar noted that the Middle Ages witnessed “the enshrinement of the death penalty at the very heart of church policy for dealing with heretics.”¹²⁹ “Pope Innocent IV legitimized torture as a means” to detect and eradicate heresy.¹³⁰ Moreover, Pope Innocent IV declared that eliminating heresy was “the chief duty of the state.”¹³¹ Leading Christian theologians also developed justifications for capital punishment. Thomas 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 order to *safeguard the common good*.”¹³² European states sanctioned the death penalty for crimes other than heresy, “such as murder, adultery, rape, and sodomy.”¹³³ Between 1929 and 1969, even the Vatican authorized “the death penalty [as a punishment] for anyone who tried to assassinate the Pope.”¹³⁴

In the early nineteenth century, certain places in the United States began to move away from public ritual executions to highly ritualized executions behind closed doors in prisons or jails.¹³⁵ New York was the first to hide executions in 1830.¹³⁶ California followed a generation later in 1858.¹³⁷ It was not until

123. *Romans* 13:1–5 (New Revised Standard Version).

124. THE DEATH PENALTY, *supra* note 115, at 17–18; Douglas, *supra* note 114, at 145.

125. *Capital Punishment*, *supra* note 115.

126. *Id.*

127. See Douglas, *supra* note 114, at 146.

128. *Id.* at 149.

129. *Id.*; THE DEATH PENALTY, *supra* note 115, at 61.

130. Douglas, *supra* note 114, at 149–50.

131. *Id.*; THE DEATH PENALTY, *supra* note 115, at 110–11.

132. Douglas, *supra* note 114, at 150–51 (emphasis added) (quoting 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)).

133. *Id.* at 152.

134. *Capital Punishment*, *supra* note 115.

135. Nussbaum, *supra* note 96, at 123.

136. Richards & Easter, *supra* note 100, at 384.

137. *Id.*

1891 that California moved the executions from local jails to the state penitentiary.¹³⁸ This poses the question: why have we removed executions from public view? One answer could be that as we moved to more industrialized methods of killing, we developed the electric chair and the gas chamber, neither of which lent themselves to the sensibilities of the late nineteenth century. Interestingly, the question was not whether executions should continue—a seemingly logical progression in a maturing, increasingly civilized society—but where to continue the process so as not to offend the Victorian psyche.

Descriptions of electrocutions, for example, contain horrible scenes of fire shooting from the condemned, eyes popping out, and a violent death not lending itself to public enjoyment, at least since the Victorian period.¹³⁹ The use of cyanide in the gas chambers presented logistical problems, which endangered those who attended to the executions.¹⁴⁰ And then there was the unseemly use of gas during the early and mid-twentieth century, which had the effect of rendering that method of execution mostly unacceptable.¹⁴¹ One should ask why executions during the last half of the twentieth century were completely closed to the public, resembling almost a clinical or sterile approach.¹⁴²

Without the benefit of the crowds of disinterested witnesses, all public expression of disapproval—or approval for that matter—for the ritual would have to come from those directly involved in the process of the execution.¹⁴³ “Out of sight, out of mind” worked to the benefit of those who perpetuated the ritual. To the modern masses, the political use of *panem et circenses*¹⁴⁴ diverts any emotional connection to the murder of their fellow citizens by the State and secures public approval rather than disdain. In the United States, a majority still approve of capital punishment.¹⁴⁵ Certainly we are a moral society and would never condone the execution of the innocent. So, in such a society, why would the public nature of executions change? One must ask why the sensibilities of modern society would be any different from

138. *Id.*

139. See Deborah W. Denno, *Getting to Death: Are Executions Constitutional?*, 82 IOWA L. REV. 319, 360 (1997).

140. See SCOTT CHRISTIANSON, *THE LAST GASP: THE RISE AND FALL OF THE AMERICAN GAS CHAMBER* 98–99 (2010).

141. See Denno, *supra* note 139, at 364–71.

142. See Gil Santamarina, *The Case for Televised Executions*, 11 CARDOZO ARTS & ENT. L.J. 101, 102–03 (1992); Amanda K. Eklund, Comment, *The Death Penalty in Montana: A Violation of the Constitutional Right to Individual Dignity*, 65 MONT. L. REV. 135, 151 (2004).

143. See Santamarina, *supra* note 142, at 102.

144. “Bread and games.” The phrase describes how politicians appeal to the common folk by creating a distraction and satisfying the base requirements of the population to gain their approval. See J. P. TONER, *LEISURE AND ANCIENT ROME* 69–70 (1998) (explaining the significance of Roman festivals in toppling the social order).

145. Lydia Saad, *U.S. Death Penalty Support Stable at 63%*, GALLUP POL. (Jan. 9, 2013), <http://www.gallup.com/poll/159770/death-penalty-support-stable.aspx>.

those of our ancestors. After all, a public execution in such a society would only show how the death of the condemned is totally justified and correct, and that justice is served by the act. We should take comfort at the event. At least in some ancient societies, the lack of shame showed confidence in their actions and convictions.¹⁴⁶ Whether it is the gruesome results of using electricity or gas, or that the public can be easily diverted from the real atrocities committed by its government, I argue that if ancient history does not sway us, modern times should warn that a government without fault and morality in its every decision involving the life and death of human beings is neither infallible nor moral.

Adolf Hitler rose to power during an economic depression that left Germany in shambles.¹⁴⁷ Hitler's charismatic and spellbinding persona appealed to the masses and gave the people hope for a better Germany.¹⁴⁸ At the time of Hitler's rise to power, the vast majority of Germans were Christian—less than one percent of Germans were Jewish.¹⁴⁹ Christian Germany relied on interpretations of religious scriptures to support anti-Jewish prejudices.¹⁵⁰ Religious beliefs and rituals played a considerable role in the actions and attitudes of Nazi Germany.¹⁵¹ Article 24 of the 1920 Nazi Party Platform helped persuade German Christians with a statement of “positive Christianity,” which read:

We demand the freedom of all religious confessions in the state, insofar as they do not jeopardize the state's existence or conflict with the manners and moral sentiments of the Germanic race. The Party as such upholds the point of view of a positive Christianity without tying itself confessionally to any one confession. It combats the Jewish-materialistic spirit at home and abroad and is convinced that a permanent recovery of our people can only be achieved from within on the basis of the common good before individual good.¹⁵²

Although the Vatican was hesitant to endorse Hitler's actions, the Nazi Party and the Vatican signed a concordat in 1933, which Hitler interpreted as the Vatican's approval of the Nazi Party.¹⁵³ Many members of the Church openly

146. See CAWTHORNE, *supra* note 7, at 6–7.

147. *Hitler Comes to Power*, U.S. HOLOCAUST MEMORIAL MUSEUM, <http://www.ushmm.org/outreach/en/article.php?ModuleId=10007671> (last visited Oct. 17, 2014).

148. *Id.*

149. *The German Churches and the Nazi State*, U.S. HOLOCAUST MEMORIAL MUSEUM, <http://www.ushmm.org/wlc/en/article.php?ModuleId=10005206> (last visited Oct. 17, 2014).

150. *Id.*

151. *Id.*; *Changing Life for the German People*, BBC, http://www.bbc.co.uk/schools/gcsebite/size/history/tch_wjec/germany19291947/2racialreligiouspolicy2.shtml (last visited Oct. 17, 2014).

152. *The German Churches and the Nazi State*, *supra* note 149.

153. *Id.*; ECKHARD BERNSTEIN, *CULTURE AND CUSTOMS OF GERMANY* 87 (2004); David B. Kopel, *Evolving Christian Attitudes Towards Personal and National Self-Defense*, 45 *CONN. L. REV.* 1709, 1767 (2013); Robert A. Krieg, *The Vatican Concordat with Hitler's Reich*, *AM. NAT'L CATHOLIC REV.* (Sept. 1, 2003), <http://americamagazine.org/issue/448/article/vatican-concordat-hitlers-reich>; *Changing Life for the*

supported the Nazi Regime.¹⁵⁴ In reality, however, the Nazis closed many Catholic churches and imprisoned many non-Aryan clergymen.¹⁵⁵ In 1937, the Pope issued a letter in an attempt to denounce and protest the actions of the Nazi Party.¹⁵⁶ Unfortunately, the Pope's attempt had little impact.¹⁵⁷ In place of these closed churches, the Nazis formed the National Reich Church, which endorsed "German Christians."¹⁵⁸ The Nazis used this Church as a vehicle to advance their party's platforms.¹⁵⁹

VIII. INFALLIBLE

As Hitler gained momentum and power in the German government, he was quickly proclaimed as an infallible leader.¹⁶⁰ One article wrote: "The head of the party, the chief of the whole state administration, the supreme lord of justice is the Fuehrer, Adolf Hitler. . . . What the Fuehrer does is always right."¹⁶¹ This notion of Hitler's infallibility was regarded as the foundation of German justice and legitimized any action taken by the Nazi Party in the Fuehrer's name.¹⁶² Most importantly, the article states as follows: "No court of justice . . . has the right to interfere if such party functionary violates any German's 'private legal rights' because that would be a relapse into the liberalistic ideas of the past and would be disregarding the national socialist leadership principle."¹⁶³

IX. DEATH PENALTY

Almost immediately after his rise to power, Hitler and the Nazi Party enacted laws to implement the death penalty.¹⁶⁴ Hitler's capital punishment laws imposed the death penalty for arson and high treason (previously not punishable by death), thus violating ex post facto ideals and ensuring that any

German People, supra note 151.

154. *The German Churches and the Nazi State*, supra note 149.

155. *Changing Life for the German People*, supra note 151.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. IAN KERSHAW, *HITLER: A BIOGRAPHY* 422 (W.W. Norton & Company 2008); Special Radio to the Journal, *Nazis Proclaim Hitler Infallible*, MILWAUKEE J., July 17, 1936, at 4 [hereinafter *Nazis Proclaim Hitler Infallible*], available at <http://news.google.com/newspapers?nid=1499&dat=19360717&id=U7JQAA AAIIBAJ&sjid=AyIEAAAIBAJ&pg=5313,7297056>.

161. *Nazis Proclaim Hitler as Infallible*, supra note 160 (quoting Hitler's newspaper).

162. *Id.*

163. *Id.*

164. *Background: Law for the Imposition and Implementation of the Death Penalty*, U.S. HOLOCAUST MEMORIAL MUSEUM, <http://www.ushmm.org/wlc/en/article.php?ModuleId=10007894> (last visited Oct. 17, 2014).

opposition to his regime would be extinguished.¹⁶⁵ The accused were usually executed by hanging, which was considered harsh and shameful.¹⁶⁶

Hitler's death penalty changed throughout World War II.¹⁶⁷ At the start of the war, only three crimes were punishable by death; at the end, the number rose to forty-six.¹⁶⁸ The death penalty was imposed freely during the Nazi regime, and by 1944 approximately half of accused individuals were sentenced to death.¹⁶⁹ Capital punishment was mainly imposed for crimes considered insubordinate to Germany and the Nazi Party.¹⁷⁰ All highly ritualized; all moral without regard to innocence. Harding's definition of human sacrifice must here be restated as "a term that can be used to refer to the complex phenomenon of the collective killing of a human victim, its mythic rationalization, and its ritualization."¹⁷¹

I hesitated to use the illustration of the man whose name should never be uttered, but in it lies my point. I am not the first to make the comparison between human ritualistic sacrifice throughout the world in ancient times and the implementation of the death penalty in the United States, particularly in Texas. But, when trying to answer the question, "Is capital punishment a good idea or a bad idea?"—within the parameters of ignoring the morality of the death penalty and ignoring the possibility of convicting and subsequently executing the innocent—I was forced to review history to see if such a society ever existed. To my amazement, many societies throughout history have met these parameters. One common thread seems to be the strength of the government over the lives of the average citizen. In every case, the one making the life and death decisions was an autocrat of some sort, whether king, emperor, chancellor, god, or representative or reincarnation of a god. By divine providence, these leaders made decisions without fear of mistake. If the law did not fit the behavior, these leaders simply changed the law. Morality was defined by their behavior, not the norms of the society. And the rituals performed by these leaders were all carefully crafted to appear important and significant so that the appearance of the infallibility of the execution could not be questioned.

In Texas for example, the ritual for capital punishment is carefully crafted and codified in the Texas Code of Criminal Procedure.¹⁷² All 146 crimes that

165. *Id.*

166. *Id.* As an aside, Johann Reichhart, known as the executioner of Scholl, executed over 3,000 people, most of them during the period between 1939 and 1945. RICHARD J. EVANS, *RITUALS OF RETRIBUTION: CAPITAL PUNISHMENT IN GERMANY, 1600–1987* 772 (1996). Most of these sentences were carried out by a shorter, largely metal, redesigned German version of the French guillotine. *Id.*

167. ROBERT GELLATELY, *BACKING HITLER: CONSENT AND COERCION IN NAZI GERMANY* 86 (2001).

168. *Id.*

169. *Id.*

170. *See id.*

171. Harding, *supra* note 11, at 182.

172. *See generally* TEX. CODE CRIM. PROC. ANN. (West Supp. 2014) (codifying Texas criminal procedure).

carry a potential death sentence are enumerated in the penal code.¹⁷³ A complicated, separate trial procedure exists where death is sought.¹⁷⁴ The Texas appellate procedure is very specific.¹⁷⁵ Texas provides specific guarantees both before¹⁷⁶ and after trial for the accused.¹⁷⁷ As to the execution ritual itself, many detailed statutes provide when, where, and how the execution is to be carried out; who is to be present; and what happens to the body afterwards.¹⁷⁸ The ritual is highly scripted.

As I have shown, throughout history a society's morality has been defined and expressed by that society's political or religious leadership. That definition of what is moral provides the framework by which the people of a society will tolerate the execution of human beings, both in manner and method. What we have often seen is acquiescence of the people to the leader's definition and their willingness to accept the morality of the acts of the government in this regard. In the United States today, the majority of the citizens favor the death penalty and acquiesce to the manner of execution.¹⁷⁹ This societal dynamic sets the norm. Even with the recent innovation of a life sentence with the guarantee of no chance for parole, the majority still approves of the use of capital punishment.¹⁸⁰ It follows that the modern political leaders are proud of the system of death they have created and are not concerned in the least bit with the possibility of executing the innocent.¹⁸¹ In fact, the rituals they have devised are carefully crafted to appear infallible.

The death penalty in ancient Rome was reserved for the killing of the upper class, especially fathers.¹⁸² Today, if one kills a white person—a

173. Patrick S. Metzke, *Death and Texas: The Unevolved Model of Decency*, 90 NEB. L. REV. 240, 330 (2011).

174. TEX. CODE CRIM. PROC. ANN. art 37.071 (West 2006 & Supp. 2014).

175. See generally TEX. R. APP. P. (publishing the appellate rules promulgated by the Supreme Court of Texas and the Texas Court of Criminal Appeals).

176. See TEX. CODE CRIM. PROC. ANN. arts. 1.07 (West 2005), 1.13–141, 16.15 (West 2005 & Supp. 2014), 26.052 (West 2009 & Supp. 2014), 29.12, 35.13, 35.15–17, 42.04, 43.23 (West 2006), 46.05, 48.01 (West 2006 & Supp. 2014).

177. See TEX. CODE CRIM. PROC. ANN. arts. 11.071, 44.29 (West 2006 & Supp. 2014).

178. TEX. CODE CRIM. PROC. ANN. arts. 43.14 (West 2006 & Supp. 2014), 43.141–17 (West 2006), 43.18–19 (West 2006 & Supp. 2014), 43.20–26 (West 2006).

179. MICHAEL KRONENWETTER, CAPITAL PUNISHMENT: A REFERENCE HANDBOOK 21 (2001).

180. *Id.*

181. *Reagan Debate Audience Applauds Texas' Rate of Executions*, REAL CLEAR POL. (Sept. 8, 2011), http://www.realclearpolitics.com/video/2011/09/08/reagan_debate_audience_applauds_texas_rate_of_executions.html (Moderator to Governor Perry: "Governor Perry a question about Texas. Your state has executed 234 death row inmates more than any other governor in modern times . . . Have you struggled to sleep at night with the idea that any one of those might have been innocent?")

Governor Perry: "No sir. I've never struggled with that at all. The state of Texas has a very thoughtful, a very clear process in place of which [i]f someone commits the most heinous of crimes against our citizens they get a fair hearing, they go through an appellate process. They go up to the Supreme Court of the United States if that's required. But in the state of Texas, if you come into our state and you kill one of our children, you kill a police officer, you're involved in another crime and kill one of our citizens you will face the ultimate justice in the state of Texas. And that is you will be executed.")

182. See GARY P. GERSHMAN, DEATH PENALTY ON TRIAL: A HANDBOOK WITH CASES, LAWS, AND DOCUMENTS 17 (2005).

“quality” victim by Roman standards—this raises the possibility of receiving a death sentence by a factor of three.¹⁸³ Nothing has changed except the definition of the protected class. As in the days of ancient Rome, the ritual sacrifice of humans through the use of capital punishment still primarily affects the powerless and the poor—the “other.” Ritual sacrifice has often symbolized rebirth and the guarantee of continued life, either in this world or the world to come. Ritual sacrifice has always been for the amusement or appeasement of the masses and reinforced their wellbeing.

Today, executions provide for the masses a feeling of community, security, and safety, and an affirmation that their expectations are fulfilled—that God has a plan to protect and secure his people. In short, the death penalty makes them feel better. The people are manipulated into these beliefs by the same use of political power by their leaders seen throughout history. If it were to the political elites’ benefit to end capital punishment, we would quickly see efforts to change public opinion by redefining what we will tolerate as moral.

Our Supreme Court often speaks of “Evolving Standards of Decency” when framing the death-penalty debate.¹⁸⁴ Professor Steiker, in her morning talk at the Symposium, jokingly quipped that our society would exclude from our definition of the “reasonable man” the exercise of human sacrifice. I argue that the reasonable man (and woman) in Texas, and throughout the majority of the United States, believes in human sacrifice, finds it perfectly reasonable and moral, and has faith that the system only executes those who are most deserving of what Governor Perry calls the “ultimate justice.”¹⁸⁵

Ultimately, what is the point? We should consider how we will be judged by history. As we look with disdain at those that strapped people to a wheel and beat them to death, or removed the head of the condemned by a giant knife blade or devices designed to tear the body apart, or burned humans at the stake while alive, or impaled the body with large spears, or tore the heart out of living people and ate their flesh, or crucified what many believe to be the son of God, we will be judged for the ritual killing of our own because we are not infallible and our definition of what is moral has gone astray.

183. AIUSA Death Penalty Abolition Campaign, *Death Penalty and Race*, AMNESTY INT’L, <http://www.amnestyusa.org/sites/default/files/pdfs/deathpenaltyfacts.pdf> (last updated Mar. 2011).

184. See GERSHMAN, *supra* note 182, at 103.

185. See *Reagan Debate Audience Applauds Texas’ Rate of Executions*, *supra* note 181.

