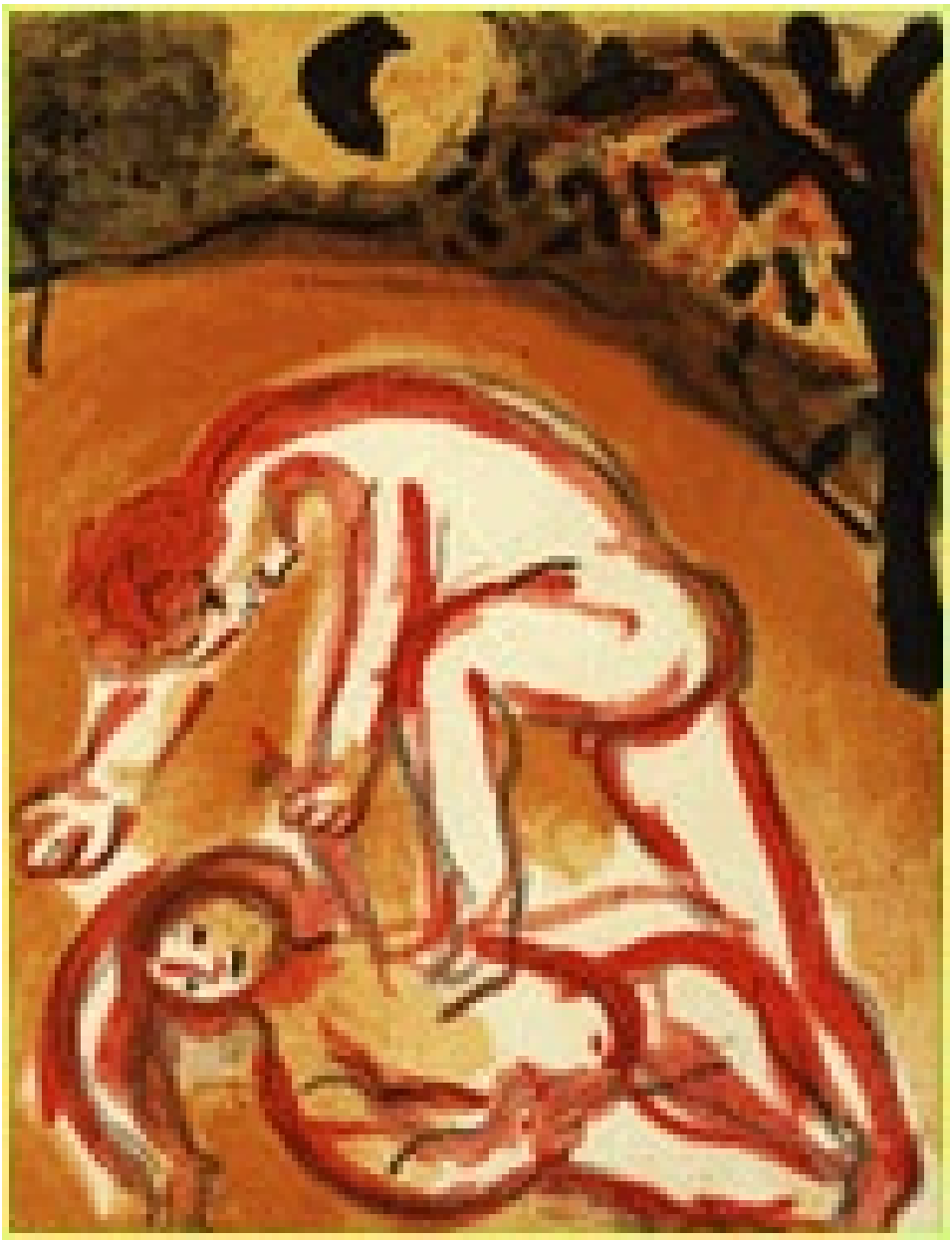
The Death Penalty: Three (of Four) New Perspectives

By Mark J. Mahoney



Marc Chagall "Cain and Abel"

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By Mark J. Mahoney[1]

The very notion that there could be anything new to say about the death penalty, especially as practiced in the United States, may be difficult for many to accept. The short explanation comes from the first page of the seminal publication by Rene Girard:

> Although it is so obvious that it may hardly seem worth mentioning, where sacrifice is concerned first appearances count for very little, are quickly brushed aside—and should therefore receive special attention.
>
> René Girard, *Violence and the Sacred*, 1

Sometimes the only thing *new* is the obvious. What is obvious is what may reveal itself after time shreds the veils culture puts before us.

The longer explanation is what follows. And the true explanation will be written by someone else, when more becomes obvious.

What I offer here is a discussion of the death penalty which focuses on the implication of what becomes "obvious" when this practice is held up to the light generated by the study of the origins of violence in culture, and the scapegoating rituals with which society attempts to confront that violence.

While it may be painfully obvious that the practice of the death penalty is a scapegoating mechanism, using the selection of a few people from a larger population of putative murderers for state-sanctioned execution, whether there are any strictly legal consequences of that fact have not been considered by lawyers or addressed by the legal system. I expand on the view, not original to myself, that the death penalty, as a ritual which is religious by its character and ancestry, violates the First Amendment proscription against the "establishment of religion." This is not only an argument for courts to consider, it is a question for our society to consider in understanding its craving for the death penalty.

The second perspective I offer has to do with the crimes themselves. Once the issue of legal guilt is resolved against the accused in a death penalty case, there remains the issue of whether a death sentence must be imposed. In cases of homicide where the death penalty is sought the conduct is often bizarre and apparently purposeless. Psychology, most often used as a vehicle for arguing degrees of diminishment of responsibility for otherwise criminal conduct, often does not help explain why people who are not mentally ill, or who do not suffer from extreme temporary mental disturbance, may engage in such conduct. That inexplicable character of the conduct may be the most significant factor in the selection of those cases in which the

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death penalty is sought by the state, and then imposed by jurors. Does the study of the origins of violence in mimetic rivalry provide a framework for the jury at least to understand—if not excuse or justify— the accused or the conduct?

Finally, whether or not the concept of mimetic rivalry is helpful in a particular case to explain the behavior of the accused, articulation of the fact that the accused is merely a scapegoat may be the most powerful argument that can be made in any case for demythifying the death penalty and eroding the arguments advanced in support of this current iteration of human sacrifice.

If there is any merit to my analysis, then those who have studied violence and culture from the perspective or mimesis and scapegoating have much to offer the community of lawyers and social scientists who daily struggle to prevent the death penalty from being sought and imposed, and the wider community which seeks to have the death penalty abolished in the United States.

I ask the reader to bear in mind that the first part of this paper originated as an actual legal argument, designed for an audience wholly unfamiliar with the core literature, the writings of René Girard, and prepared before I have become sufficiently familiar with this work to have any truly original ideas of my own, or to avoid mistakes that will be obvious to others. In the style of legal argument I therefore frequently relied on the writings of others better qualified than I, giving the reader the benefit of true scholarship.

The death penalty as state-sponsored religious ritual

Discussion of the death penalty in the courts of the United States typically involves talk about what the death penalty represents or is supposed to represent for the state: punishment, deterrence, retribution, "justice." Legal claims against the death penalty have been based on the claim that the punishment, *in se* or as applied by different methods, is "cruel and unusual" or that the penalty is sought or applied unfairly. Pretending to make a secular determination of whether and when the state is entitled to take a human life as punishment for crime the courts normally exclude moral or theological claims, however much such claims abound on both sides of the debate.

Because the death penalty's role in the mind of our community is symbolic, the language of this discourse is symbolic. We find a chasm between those who favor and those who oppose the use of death as punishment. Above that chasm the discourse terminates, always in this symbolic language, beyond which neither side is able to go. Once something is understood only as a symbol, it can mean anything to anyone.

The argument I now raise goes beneath the symbols, and therefore apart from the "traditional" types of legal arguments that have been addressed which rely on what capital punishment *represents*, as opposed to what it *is*. Although we return to make a very legal

argument based on the First Amendment—and correlative state constitutional provisions—it is, as far as I know, an argument which has been made to only two trial courts[2] and still has never been considered by any appellate court.

The immediate temptation would be to dismiss this argument on the simple basis of its novelty. The assumption is that, with all that has been argued about capital punishment, no truly new argument could have any merit. While it may sound paradoxical to say so, it will be understood that the novelty of our argument indicates its strength, not a weakness. It is precisely *because* the death penalty is what I describe that its true character had to be concealed from popular consciousness, that no matter how "obvious," its essential character had to be "brushed aside" and "count for very little."

Here the starting point is *the obvious*. The "first appearance" of capital punishment is as a form of human behavior, rather than as the cultural language used to justify it. Let us look at the essential character of the act. Instead of trying to bridge the chasm between the opposing views, let's go down in to the chasm to substrata common to both sides.

To begin with, imagine a person who finds herself in an unfamiliar place, in an unfamiliar era. Watching secretly, the person sees a group of people surround a helpless, terrified victim. Following a procedure that appears to be preordained, the crowd acts. The person is put to death. It is apparent that the crowd all agree, without even saying so, that the sacrifice of this one person was for the good of all.

If this stranger, this disinterested observer, asks the participants about what has happened, and why, should the justification offered for the violence be accepted at face value?

Imagine the group as Aztecs five hundred years ago or as ancient Greeks or Egyptians. Imagine the crowd as Medieval Europeans, or colonists in Salem, Massachusetts. Imagine them as a lynch mob in rural America in the first half of this century, or the prosecutor and jury and judge in a courtroom, today. Between acts of collective homicide is there a commonality which eclipses the different justifications in which each homicidal group firmly believes?

Our answer is that, like other organized collective homicidal acts, putting a criminal offender to death as "punishment," which is not demonstrated to be necessary for any practical purpose, is a scapegoating ritual which is, by inheritance and character, a religious practice, and thus something in which the state is not constitutionally permitted to engage. This view is compelled by consideration of what "religion" means under our constitutions, and the essential character of state-sanctioned killings as exemplified in the death penalty. Beyond this, the institutionalization of this rite of human sacrifice offends the rights of many to the free exercise of their own religious beliefs according to which such symbolic killing of fellow human beings is not an option.

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[2] One in New York and one in Tennessee.

A. The state is prohibited from imposing a religious ritual on its citizens

This is an elementary point which can be put simply. The state, itself or through instruments of the state, is not entitled to sanction, participate in, endorse, establish, or force upon its citizens a religious practice, belief or milieu. Even the longstanding acceptance of a practice—for generations or even from the founding of the country—will not insulate it from reconsideration in light of this constitutional prohibition.

Thus, prayers in public schools and the installation of Nativity scenes at Christmas time in town squares have been disallowed after years of acceptance as fixtures of civic life. *See Smith v. County of Albermarle*, 895 F.2d 983 (4th Cir. 1990), cert. denied, 111 S.Ct. 74 (1989).

This rule is at least as true under the federal constitution as it is under the state constitution. Though typically raised under the federal constitution, it may be raised under the state constitution alone. *Smith v. Community Bd. No. 14*, 128 Misc 2d 944, 491 N.Y.S.2d 584 (1985).

What may be the establishment of religion can be as simple as the use of religious symbolism in an otherwise secular state function. *People v. Rose*, 82 Misc 2d 429, 368 N.Y.S.2d 387 (1975). (Selection as a court house a building dedicated to religion or permeated with religious symbols). "Every government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion." *Lynch v. Donnelly*, 465 U.S. 668, 694 (1984). The Establishment Clause, "at the very least, prohibits government from *appearing* to take a position on questions of religious belief." *Allegheny County v. Am. Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 593-594 (1989).

Nor is it necessary that to be religious, a practice must be explicitly so. A practice or belief can be religious despite the explicit declarations of the person or group that the beliefs or practices are *not* religious. *See, United States v. Seeger*, 380 U.S. 163, 85 S.Ct. 850, 13 L.Ed.2d 733 (1965).[3] See also, *Welsh* v. *United States,* 393 U.S. 333 (1970) ("In view of the broad scope

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[3] *Seeger* dealt with "conscientious objection" to participation in the military. The 1940 Selective Training and Service Act Congress broadened the exemption afforded in the 1917 Act for conscientious objectors by making it unnecessary to belong to a pacifist religious sect if the claimant's own opposition to war was based on 'religious training and belief.' (The Immigration and Nationality Act has similar language). Between 1940 and 1948 two courts of appeals held that the phrase 'religious training and belief' did not include philosophical, social or political policy. Then in 1948 the Congress amended the language of the statute and declared that 'religious training and belief' was to be defined as 'an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but (not including) essentially political, sociological, or philosophical views or a merely personal moral code.' In *Seeger,* the Court held that sincere beliefs in opposition to miliary service which were equivalent to religious beliefs were also a basis for conscientious objection:

> We have concluded that Congress, in using the expression 'Supreme Being' rather than the designation 'God,' was merely clarifying the meaning of religious training and belief so as to embrace all religions and to exclude essentially political, sociological, or philosophical views. We believe that under this construction, the test of belief' in a relation to a Supreme Being' is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor

of the word 'religious,' a registrant's characterization of his beliefs as 'non-religious' is not a reliable guide to those administering the exemption."[4]

1. Overtly religious support for the death penalty

There are immediate overt signs that the belief in putting offenders to death is the equivalent of a religious belief for the most influential and ardent supporters of the practice. Belief that the death penalty provides some good to our society, is, for this group, as Bowers *et al.* tell us, a fixed and firmly held belief which is maintained despite substantial evidence to the contrary.[5] But for the fact that it is a belief shared by many, it could be categorized, in clinical psychological terms, as a "delusion." *Being shared by many* however, such a counterfactual belief suggests religiosity and nothing else. It is accepted, in fact, as an article of Faith.

It is the explicit view of many of those who support of the death penalty that it is *God's will* that this be done. Even if this view is a misinterpretation of religious text and doctrine, it remains not only a belief, but the expression of a deeper faith that these individuals are "just" in desiring the death of those selected, and that it is God who tells them this.

However, despite the overt religious *motif* of the most ardent death penalty supporter, the practice itself has its historical roots in religion, and its essential function is a function that has been assumed by religions since time immemorial, even if masked, today, as "justice."

B. The nature of collective violence and homicide

There are two main problems in discussing violence. The first is defining violence. The second is defining the cause of violence. With an objective definition of violence, we are not only able to better recognize those types of maltreatment of persons that, while not presenting overtly physical aggression, are often more harmful in their function and effect than the infliction of simple physical injury. A really useful definition of violence would instruct us on what, in fact, is "non-violence." The term "violent" as used in the typical penal code is obviously too narrow to encompass the notion.

> parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption. Where such beliefs have parallel positions in the lives of their respective holders we cannot say that one is 'in a relation to a Supreme Being' and the other is not.

Seeger at 165. Justice Douglas, concurring, put it this way:

> In sum, I agree with the Court that any person opposed to war on the basis of a sincere belief, which in his life fills the same place as a belief in God fills in the life of an orthodox religionist, is entitled to exemption under the statute. *Seeger* at 192-93 (Justice Douglas concurring).

[4] 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," 30 *Journal of Church and State* 2, 245-272, Spring 1988.

[5] Bowers, William, et al., *a New Look at Public Opinion on Capital Punishment: What Citizens and Legislators Prefer*, 22 Am. J. Crim. L. 77 (1994)

1. Defining violence and its cause

When I was a student at the University of Notre Dame, in South Bend Indiana, in the remarkable, if short-lived Program for the Study of Non-Violence, taught by the likes of John Yoder, Fr. Emmanuel Charles McCarthy, James L. Douglass, and Fr. Maurice Amen, we defined violence as the treating of another person as an object for the sake of our own individual or collective gratification.[6]

As to the causes of violence, there have been various models developed over the centuries to describe, if not explain, deviant or aggressive or criminal behavior. Usually the models served to either identify those in society who needed to be controlled in some way or to justify the persecution of these persons. Possession by the devil or evil spirits, or morphological (genetic), racial, ethnic, religious, class, and psychological traits figured into these models. All of these views are culturally bound, relative to the particular social structure and culture. They often suffer from the fact that the models are developed by the group in control in a society, who typically have a different view of who, and what, is to be feared as violent.

Just as we find useful a normative definition of violence, it would be useful to have an objective, normative explanation of the cause of violence that would not be relative to a particular ethnological or sociological setting. By defining the cause of violence we would be in a better position to decide what we need to do to reduce violence.

Violence, of course, exists in society in different forms. There is individual treatment of other individuals, group violence toward another group, collective treatment of individuals or a minority class of some sort. We expect a relationship between these categories of violence, and there should be commonality between such behavior in each culture.

For example, the process of the community, by some repeated process, in selecting individuals to kill for the sake of what is thought to be the good of the group is a pattern of behavior that has been repeated in almost every known culture. What may have changed, from time to time, is the *explanation* or *justification* for the behavior, but not its essential dynamics. One can see in the death penalty, as many scholars and jurists and commentators have, a direct ancestry in ancient and prehistoric group bloodlettings.

One cannot possibly discuss this phenomenon or its implications without discussing the role of violence in the generation and maintenance of culture. In a way this is to look backwards on our social evolution, involves the progress of humanity toward limiting reliance on violence in order to insure the future survival of society. This discussion, in turn, cannot be had without reference to the body of scholarly work of René Girard, and the extraordinarily large body of scholarship and thought his work has inspired in the past twenty years.

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[6] See also Redekop, Vern, *Scapegoats, the Bible, and Criminal Justice: Interacting with René Girard*, 4 (Mennonite Central Committee, Akron. Pa. 1993) describing violence, at p. 11:

> "In the category of Martin Buber it is treating the other person as an "it". It is the violence of slavery. It is treating the other person as an object . . . "

2. René Gerard

René Girard was educated in France until his doctoral study in history at Indiana University, with a degree in 1950. He taught there and at Duke, Bryn Mawr and Johns Hopkins Universities, at the latter as chair of the Romance Languages Department. In 1971 he accepted a distinguished professor position at the State University of New York at Buffalo.[7] It was at this time that he published his seminal work, in French, *La violence et le sacré*. By the time this appeared in English, as *Violence and the Sacred*, (Baltimore: Johns Hopkins, 1977, Patrick Gregory trans.) Girard had returned to accept a Chair as Professor of the Humanities at Johns Hopkins where he remained until accepting his last post, Andrew B. Hammond Professor of French Language, Literature, and Civilization, at Stanford University.

Girard's analysis of the origins of violence and the generative, or foundational, role of violence in culture has inspired a wide range of scholarship, hundreds of articles and books, an international symposium each year since 1990, an international organization (the Colloquium on Violence & Religion, dedicated to Girard-inspired research and scholarship), a biannual bulletin, an annual journal, and the Girard Document Collection at the University of Innsbruck. Critics have described Girard as having made the most sweeping and significant intellectual breakthroughs of the century. As a result of the publication of *La violence et le sacré* in 1972 *Le Monde* declared that "The year 1972 should be marked with an asterisk in the annals of the humanities."

The revelatory nature of his thought on society and culture can be compared to any of the revolutions in scientific theories of the physical world. Like those scientific theories, such as the General Theory of Relativity, whose power lay not in solving particular problems, but in their power to better explain and predict a wide range of physical phenomenon and be tested against reality, Girard's thought has had a wide "ripple effect" on areas of study he never tackled, as evidenced by the numerous "Girard scholars" who have developed in every field of the social sciences in recent years.

> . . . René Girard has completely modified the landscape in the social sciences. Ethnology, history of religion, philosophy, psychoanalysis, psychology, and literary criticism are explicitly mobilized in this enterprise. Theology, economics and political sciences, history and sociology—in short all the social sciences and those that used to be called the moral sciences—are influenced by it.[8]

Having thus accredited Girard, it is clear that it is a challenge to attempt to summarize his thought. This is not because it is not clear, but because it involves analysis of very complex phenomena. So we repeat the following words of caution

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[7] Coincidentally, I was a student at the Law School at the University of Buffalo at this time.

[8] Paul Dumouchel (Ed.) *Violence and Truth*, 23 (Stanford Univ. Press 1988).

> No summary brief enough for an introduction could convey the subtlety of the Girardian theory, and an oversimplified presentation of it would lead to misconceptions . . .

Gil Bailie, *Violence Unveiled*, "Introduction," p. 6 (New York, Crossroads Publishing 1992).[9]

3. The discoveries of René Girard

Syracuse University Professor of Religion James G. Williams is the editor of a book entitled *The Girard Reader* (Crossroad Publishing 1996). In the introductory "Note to the Reader" Williams describes three moments in Girard's process of discovery, the first two of which are our focus:

> First was the dawning of insight into both how we learn and why we are prone to rivalry and conflict which may, and often does, lead to violence: *we are mimetic, or acquisitively imitational, creatures*. Our objects of desire and our ideas are based on the desires and ideas of others who are our models. This carries the potential of bringing us into conflict, even violence, with the models we imitate, for there always lurks the danger that we might compete with them for the objects of desire we have learned from them. The second moment of discovery for Girard was the discovery of the scapegoat mechanism: *the age-old way of gaining release from the violence or potential violence that mimesis produces is through non-conscious convergence upon a victim*. Scapegoating, in other words. Girard notes . . . that this gave him a very plausible way of interpreting myths and ritual in ancient cultures. The third great moment of discovery was Girard's encounter with the Bible: *the Jewish and Christian Scriptures, especially the New Testament Gospels, are singular. They represent a revelatory movement away from scapegoating.*

Girard started the development of his scapegoat theory while studying literature. He observed that very often the key characters desired the same thing, often resulting in competition and violent feelings or actions. The more he looked, the more his theory became "more nuanced, expansive and powerful." Vern Redekop, *Scapegoats, the Bible, and Criminal Justice: Interacting with René Girard*, 4 (Mennonite Central Committee, Akron. Pa. 1993) His first major book sets out these basic observations. Girard, René, *Deceit, Desire and the Novel: Self and Other in Literary Structure* (Johns Hopkins 1966).

As put by James McBride, from whom I have derived this argument, Girard shows

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[9] As an introduction to Girard's thought, and to the application of this thought to the problems of violence in culture at this very moment, this book is excellent. The other good resource is the collection of materials in Prof. James G. Williams' *Girard Reader*.

> 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

McBride, James, Capital Punishment as the Unconstitutional Establishment of Religion: A Girardian Reading of the Death Penalty, 37 JOURNAL OF CHURCH AND STATE 267, 270 (1995).

What Girard explains is that the generation of cultural institutions, especially and originally religion, was in the development of a means to prevent reciprocal violence, blood feuds. "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." *Violence and the Sacred*, 27. Girard has noted in numerous works that this new kind of violence could be found in the sacrifice of someone or something. This appears in "primitive" cultures but Girard focuses on Western culture where it was a religious fixture among the Hebrews and the Greeks. It also appears, but in a paradoxical way, at the very foundation of Christendom: Christ as the scapegoat of humanity.[10] Through the suffering and death of the scapegoat, the potential for violence arising out of crises, threats and fears which convulse the social order can be expiated.

In the opening of *The Scapegoat*, Girard discusses a long poem by the mid-fourteenth century French poet Guillaume de Machaut. Among other things the poem tells of how, after a great number of deaths had occurred in his city, it was rumored that the Jews had poisoned the water. The population massacred the Jews. Eventually the deaths stopped. Order was returned, and again there was "music in the streets." We are sure, reading this account, that the plague, not poison, killed all the people.

What was of interest to Girard was not merely the events described. The persecution of Jews by Christians at times of the plague is well known. According to historians, in some cities Jews were massacred by Christians at the mere mention of the plague being in the area, even before it had actually arrived. [*The Scapegoat*, 3] But Girard is also interested in how we interpret Guillaume's text. In the historical text that survived we recognize the falsity of the belief that the Jews were guilty, but we do not discount the fact that the persecution and deaths occurred.

> The text we are reading has its roots in a real persecution, described

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[10] *See* René Girard, *Des choses cachées depuis la fondation du monde* (Paris: Bernard Grasset, 1978); translated as *Things Hidden Since the Foundation of the World* (Stanford University Press 1987); and René Girard, *Le bouc émissaire* (Paris: Bernard Grasset, 1982), translated as *The Scapegoat*, (Johns Hopkins 1986).

> from the perspective of the persecutors. The perspective is inevitably deceptive since the persecutors are convinced that their violence is justified; they consider themselves judges, and therefore they must have guilty victims, yet their perspective is to some degree reliable, for the certainty of being right encourages them to hide nothing of their massacres. [*The Scapegoat*, 6]

This introduces one to issues about the interpretation of "persecution texts," which Girard describes:

> By that I mean accounts of real violence, often collective, told from the perspective of the persecutors, and therefore influenced by characteristic distortions. These distortions must be identified and corrected in order to reveal the arbitrary nature of the violence that the persecution text presents as justified. [*The Scapegoat*, 9]

So it is with texts of the "witch hunts" of the 16th century:

> We need not examine at length the accounts of witch trials to determine the presence of the same combination of real and imaginary . . . Everything is presented as fact, but we do not believe all of it, nor do we believe that everything is false. . . . The accused may well believe herself to be a witch, and may well have tried to harm her neighbors by magical proceedings. We still do not consider that she deserves the death sentence. We do not believe that magic is effective. We have no difficulty in accepting the fact that the victim shares her torturers' ridiculous belief in the efficacy of witchcraft, but this belief does not affect us; our skepticism is not shaken. . . . This means that not only the judges and the witnesses but also the accused are not in agreement with our interpretation of their own texts. This unanimity fails to influence us. [*The Scapegoat*, 9-10]

We understand that historical texts of such persecution reflect the persecutor's viewpoint, justifying the persecution. Future generations reject that justification, appreciating that the killings simply fit a stereotype of collective persecution of individuals.

4. Stereotypes of persecution

Girard describes several "stereotypes of persecution." One arises out of the crisis within society where "[c]ulture is somehow eclipsed as it becomes less differentiated." This refers to the need within cultures to preserve differences of class, property, and power. A plague is such a crisis because all are at risk, and the rich die as miserably as the poor. These can be crises generated by disease, economy, war.

> But, rather than blame themselves, people inevitably blame either

> society as a whole, which costs them nothing, or other people who seem to be harmful for easily identifiable reasons. [*The Scapegoat*, 14]

The second stereotype arises from the demand for more rational causes for the collective action, and gravitates toward accusation of particular crimes:

> The suspects are accused of a particular category of crimes. . . . All these crimes seem to be fundamental. They attack the very foundation of cultural order, the family and the hierarchical differences without which there would be no social order. . . . [*The Scapegoat*, 14-15]
>
> Ultimately the persecutors always convince themselves that a small number of people, or even a single individual, despite his relative weakness, is extremely harmful to the whole of society. [*The Scapegoat*, 15]

Girard is not being ideological or judgmental in his description. He is simply describing the common denominators, the stereotypes involved when societies select individuals for persecution or the etymologically identical "prosecution."[11]

> I now turn to the third stereotype. The crowd's choice of victims may be totally random; but it is not necessarily so. It is even possible that the crimes of which they are accused are real, but that sometimes the persecutors choose their victims because they belong to a class that is particularly susceptible to persecution rather than because of the crimes they have committed. . . . Ethnic and religious minorities tend to polarize majorities against themselves. . . . There are very few societies what so not subject their minorities to certain forms of discrimination and even persecution.[*The Scapegoat*, 17-18]

Girard says:

> I am not interested in defining what is good and bad in the social and cultural order. My only concern is to show that the pattern of collective violence crosses cultures and that its broad contours are easily outlined.[*The Scapegoat*, 19-20]

It is not difficult to see how imposition of the death penalty fits within the "broad contours" of Girard's "stereotypes of persecution." And it is not as if he disregards the actual guilt of the accused, or the dangerous nature of his conduct. But the interest is on the perspective of the state (the "persecutor"), which is distorted.

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[11] See Redekop, *supra*, p.36.

> Let's look at another example of a condemned person, someone who has actually committed the deed that brings down on him the crowd's violence: a black male who actually rapes a white female. The collective violence is no longer arbitrary in the most obvious sense of the term. It is actually sanctioning the deed it purports to sanction. Under such circumstances the distortions of persecution might be supposed to play no role. . . . Actually, these distortions of persecution are present and are not incompatible with the literal truth of the accusation. The persecutor's portrayal of the situation is irrational. It inverts the relationship between the global situation and the individual transgression. If there is a link between the two levels, it can only move from the collective to the individual. The persecutor's mentality moves in the reverse direction. Instead of seeing in the microcosm a reflection or imitation of the global level, it seeks in the individual the origin and cause of all that is harmful. [*The Scapegoat*, 20-21]

In this case, the modern representation of this distortion is to see the continued existence of the offender as a threat and a cause of further violence by others. However abstract this construct may seem, it is replicated in various ways in every single death penalty prosecution.

5. Stereotypes of persecution in religious myths

Girard looked at mythology and, with an anthropological view, religion. Girard uses the way we interpret the "persecution texts" to interpret numerous myths and the mythical tradition. He finds the links which connect the apparently religious scapegoating to the explicitly religious mythological traditions. Girard examines primarily Greek myths to use the same methods of interpretation used to interpret the historical "persecution texts." He concludes that there must be real events which somehow generated these myths. Girard compares myths, which "exude the sacred" to the "persecution texts" which appear not to. Myths appear to have more power over society than persecution stereotypes because of the overtness of the sacred in the myths. In myths there might be the same pattern of persecution, say of Oedipus, but "the victim restores the order, symbolizes, and even reincarnates it." [*The Scapegoat*, 42] In other words, the victim of persecution becomes sacred.

In contrast, it appears that "medieval and modern persecutors do not worship their victims" as frequently occurred in myths, "they only hate them."[*The Scapegoat*, 38] Of course this would especially be true where the target of hatred was a "guilty" offender. But looking closer at the problem, Girard exposes the dual characteristics of the target of such collective violence. Examining the "*true belief* in . . . the stereotype of accusation, the guilt and the apparent responsibility of the victims" in persecution texts, he sees that due to the

> mechanism of persecution, collective anguish and frustration found vicarious appeasement in the victims who easily found themselves united in opposition to them by virtue of being poorly integrated minorities. . . . Once we understand we almost exclaim: *The victim is a*

> *scapegoat.* Everyone has a clear understanding of this expression; no one has any hesitation about its meaning.[*The Scapegoat*, 39]

Girard sees that even the target of hatred, the offender, is invested with equivalent powers of the victim who, in ancient religious myths, becomes sacred: because the scapegoat is considered the cause of the crisis in society, the victim, at least through its sacrificial death, is invested with the sole curative power for the crisis

> How could the persecutors explain their own reconciliation and the end of the crisis? They cannot take credit for it. Terrified as they are of their own victim, they see themselves as completely passive . . . There is only room for a single cause in their field of vision, and its triumph is absolute, it absorbs all other causality: it is the scapegoat. . . . There is only one person responsible for everything, one who is absolutely responsible, and he will be responsible for the cure because he is already responsible for the sickness. [*The Scapegoat*, 43]

To illustrate this hidden dimension in "persecution texts" Girard returns to the medieval massacre of Jews around plague epidemics. He notes that it seems paradoxical that Jewish doctors were the most valued, even in times of the plague, where no medicine worked. Girard explains:

> Both the aristocrats and the common people preferred Jewish doctors because they associated their power to cure with the power to cause sickness. Prestige and prejudice seem to be two faces of the same attitude, indicating the survival of a primitive form of the sacred.. . . The same is true in the case of Apollo. If the Thebans beg him . . . to cure them of the plague, they do so because they hold him responsible. [*The Scapegoat*, 46]

Later he notes too, "Just as in the case of the Jews, the same men who denounce the witches go to them for help." [*The Scapegoat*, 48]

And so Girard eventually concludes that the "decision to define a text as historical or mythological is arbitrary" [*The Scapegoat*, 47] and that the representations of persecution in each demonstrate the scapegoat mechanism. And in that connection Girard finds the sacred link between the history of myth and the history of persecution.

> [T]he scapegoat no longer appears to be a passive receptacle for evil forces, but is rather the mirage of an omnipotent manipulator . . . Once the scapegoat is recognized as the unique cause of the plague, then the plague becomes his to dispose of at will . . .[*The Scapegoat*, 46]

Still, it remains necessary, for its effectiveness, that the actual scapegoating mechanism be kept

as concealed as possible, or its existence denied.

> The scapegoat or sacrificial mechanism is really the process of transferring the violence which has been generated through mimetic desire to the scapegoat victim. According to Girard, the mechanism must remain hidden in order to be effective. That is, people are never, ever aware of the fact that they are making a scapegoat of someone. . . . While it is being used it is hidden through the presumed legitimacy of the sacrificial act.

Redekop, *supra*, at 14.

C. The religious function, and religious beliefs inherent in scapegoating

Summarizing his discoveries, Girard notes the persecution mechanism that prevails in myth and persecutions:

> The return to peace and order is ascribed to the same cause as the earlier troubles—to the victim himself. That is what makes the victim sacred and transforms the persecution into a point of religious and cultural departures. The whole process, in effect, serves as : (1) a model for mythology in which it is commemorated as a religious epiphany; (2) a model for ritual which is forced to reproduce it on the principle that the action or experience of the victim, in that it was beneficial, must always be repeated; and (3) a countermodel for the forbidden, by virtue of the principle that one must never repeat the actions of this same victim, insofar as they were harmful. [*The Scapegoat*, 55]

The term "scapegoat" summarized what Girard had described as "collective persecutions." Naturally the term "scapegoat" and the setting in which it takes place evokes a religious setting: "We are reminded of the rite; we think of a religious ceremony that unfolds on a fixed date and is performed by priests; we imagine a deliberate manipulation."[*The Scapegoat*, 40] But Girard goes further to establish the connection

1. Scapegoating as model for religious systems

The seminal transition for us is where Girard points out that "the phenomena of persecution provided both the model and countermodel for every religious institution." [*The Scapegoat*, 55] An act of violence, usually murder, arising out of rivalry, such as the deaths of Remus and Romulus, lies at the founding of each religion and culture. "In order to retain its structuring influence the generative violence must remain hidden." [*Violence and the Sacred*, 310]

"The foundation and structure of every community is based on violence. . . ." he writes. "As religion and cultures are formed and perpetuated, the violence is hidden. The discovery of their secret would provide what must be called a *scientific* solution to man's greatest enigma, the nature and origins of religion." [*The Scapegoat*, 95]

> The preceding analysis forces us to conclude that human culture is predisposed to the permanent concealment of its origins in collective violence. Such a definition of culture enables us to understand the successive stages of an entire culture as well as the transition from one stage to the next by means of a crisis similar to those we have traced in myths and to those we have traced in history during periods of frequent persecutions. [*The Scapegoat*, 100]

Though hidden, the nature of this violence "can logically be deduced from myths and rituals once their real structures have been perceived." [*Violence and the Sacred*, 310] The core of human religious experience has included rituals which use a scapegoat mechanism to deal with the violence within the community. Thus the religious character of any scapegoat mechanism, which the death penalty reveals itself to be, derives in part from the fact that such rites are not only the focus of religion, but the origin of religion. Religions are vehicles for the maintenance of such rites.

> [T]here is a common denominator that determines the efficacy of all sacrifices and that becomes increasingly apparent as the institution grows in vigor. This common denominator is internal violence—all the dissensions, rivalries, jealousies, and quarrels within the community tat the sacrifices are designed to suppress. [*Violence and the Sacred*, 8]

These rites were carried out by the Priests, not by bureaucrats.

> In the ritualistic societies most familiar to us—those of the Jews and of the Greeks of the classical age—the sacrificial victims are almost always animals. However, there are other societies in which human victims are substituted for the individuals who are threatened by violence.
>
> Even in fifth century Greece—the Athens of the great tragedians—human sacrifice had not completely disappeared. The practice was perpetuated in the form of the *pharmakos*, maintained by the city at its own expense and slaughtered at the appointed festivals as well as at a moment of civic disaster. [*Violence and the Sacred*, 9]

2. Transition from overtly religious to judicial scapegoating

The stages of development of society correspond to the evolving methods used to control violence, which are rooted in religion.

> Primitive religion tames, trains, arms, and directs violent impulses as a defensive force against those forms of violence that society regards as inadmissible. It postulates a strange mixture of violence and nonviolence. The same can perhaps be said of our own judicial system of control. [*Violence and the Sacred*, 20]

Girard describes the connected progression of "methods employed by man since the beginning of time to avoid being caught up in an interminable round of revenge."

> They can be grouped into three general categories: (1) preventive measures in which sacrificial rites divert the spirit of revenge into other channels; (2) the harnessing or hobbling of vengeance by means of compensatory measures, trial by combat, etc., whose curative effects remain precarious; (3) the establishment of a judicial system. . . . [*Violence and the Sacred*, 21]

It is impossible then, to conceal the religious aura of the judicial process:

> For Girard, the central role of religion is to help people deal with their violence. The survival of communities of all types, therefore, is dependent on religion. In many cultures this would not seem strange since cultures were built around religion. In cultures which call themselves "secular" one must look for new forms of the "religious." . . . In secular democratic society, nothing is as sacred as the law code and the justice system which enforces it. The buildings in which laws are made are the most elaborate and the courts in which decisions are made about points of law are the most stately

Redekop*, supra*, 15.

Just as it is not possible to make a practice religious merely be saying that it is religious—as many individuals and corporations have tried to do to avoid government regulation and taxation—it is also not possible to obscure the religious character of beliefs or practices by giving them secular labels, as also has been attempted in order to allow government regulation of individual and corporate activity.

Rather than by explicitly religious rituals, the judicial system attempts to control violence by means of replacing private vengeance with public vengeance. Girard explains:

> Vengeance is a vicious circle whose effect on primitive societies can only be surmised. For us the circle has been broken. We owe our good

> fortune to one of our social institution above all: our judicial system, which serves to deflect the menace of vengeance. The system does not suppress vengeance: rather it effectively limits it to a single act of reprisal . . . [*Violence and the Sacred*, 15]

But this is exactly the same explanation as our own courts use to justify the death penalty. Supreme Court Justice Potter Stewart wrote, in the case which invalidated the death penalty as it was then implemented, that claimed that capital punishment protects

> 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.[12]

The judicial system, in other words, stands in the shoes of religion as a vehicle for controlling violence. It does so using secular-sounding procedural and substantive guidelines which emphasize establishment of factual guilt. And, in the main it imposes controls on vengeance by the types of sentences allowed. Even so, our judicial proceedings are full, in their form of solemnity, in various appeals to God—as in oath taking and courtroom and courthouse inscriptions—of the religious. And the sentencing process serves, we know, vengeful function, even if vengeance, or retribution, is not explicitly permitted as a sufficient purposes for imposing a penalty. However, in the case of the death penalty, that is about all that is actually served, with the secular all but stripped away from the underlying ritual.

3. Not all judicial actions are religious

Of course not all judicial actions toward violence, or crime, mimics the earlier religious sacrificial rites. Often the system is strictly limited to compensation and punishment. However, Girard notes, "These methods [of the judicial system in general] are inherently ritualistic in character, and are often associated with sacrificial practices." [*Violence and the Sacred*, 21] This is so clear in the case of the death penalty, where the choice of the victim and the demands of the crowd being gratified represent a higher level of function which fully invokes the scapegoating mechanism. But still this is hidden, as always.

> Retribution in its judicial guise loses its terrible urgency. Its meaning remains the same, but this meaning becomes increasingly indistinct or even fades from view. In fact the system functions best when everyone concerned is least aware that it involves retribution. The system can—and as soon as it can it will—reorganize itself around the accused

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[12] *Furman v. Georgia,* 408 U.S. 238 at 308, 92 S.Ct. 2726 (1972). *See* Brennan, *id.,* 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 grievous condemnation of abhorrent crimes and thus prevents disorder, lynching, and attempts by private citizens to take the law into their own hands."

> and the concept of guilt. In fact retribution still holds sway, but forged into a principle of abstract justice that all men are obliged to uphold and respect. . . .
>
> . . . As the focal point of the system turns away from religion and the preventive approach is translated into judicial retribution, the aura of misunderstanding that has always formed a protective veil around the institution of sacrifice shifts as well, and becomes associated in turn with the machinery of the law. . . .
>
> In the final analysis, then, the judicial system and the institution of sacrifice share the same function . . . . The procedures that keep men's violence in bounds have one thing in common: they are no strangers to the ways of violence. There is reason to believe that they are all rooted in religion. As we have seen, the various forms of prevention go hand in hand with religious practices. The curative procedures are also imbued with religious concepts—both the rudimentary sacrificial rites and the more advanced judicial forms. *Religion,* in its broadest sense, then, must be another term for that obscurity that surrounds man's efforts to defend himself by curative or preventive means against his own violence. It is that enigmatic quality that pervades the judicial system when that system replaces sacrifice. This obscurity coincides with the transcendental effectiveness of a violence that is holy, legal, and legitimate . . . .
>
> In the same way that sacrificial victims must in principle meet the approval of the divinity before being offered as a sacrifice, the judicial system appeals to a theology as a guarantee of justice. Even when this theology disappears, as has happened in our culture, the transcendental quality of the system remains intact. Centuries can pass before men realize that there is no real difference between their principle of justice and the concept of revenge. [*Violence and the Sacred*, 21-24]

Certainly it is not Girard's argument, nor ours, that the entire criminal justice system is religious in character. Girard spoke just of "that *obscurity* that surrounds" the criminal law, "that *enigmatic quality* that pervades the judicial system when that system replaces sacrifice." Not the legal system in general but the obscure purpose which "coincides with the transcendental effectiveness of a violence that is holy, legal, and legitimate" that corresponds to the ritual of sacrifice. And this brings to mind the last ditch claims in favor of the death penalty that it is "justice" to take the life of the accused in certain cases, as opposed to palpable and objective criteria of compensation, incapacitation and punishment which, however difficult of application, are hardly obscure.

While Girard points out differences between the religious sacrificial ritual and judicial punishment—and in general there are a lot of differences and ought to be—he says that "it is important to understand their fundamental identity." [*Violence and the Sacred*, 25]

D. The death penalty as religious ritual

We now have a range of contexts in which to consider the character and function of the death penalty. There are the overt characteristics of the support for the death penalty and the manner of its implementation which suggest religious content—if not explicitly, then in the range of those "parallel beliefs" which are the constitutional equivalent of expressly religious views.[13] There are the religious, ritualistic, and sacrificial concepts commonly used to describe the process. And there is, finally, the essentially religious role and function of the scapegoat mechanism from time immemorial.

1. Overt features of death penalty support and implementation

Earlier in this paper numerous characteristics of support for and dependence upon the death penalty that are directly supportive of or consistent with its religious character and the religious nature of the belief in its use were described.

- The state cannot prove—and it will try to avoid having to prove—that the death penalty serves any acceptable practical purpose which could not be served by a life sentence.
- Scientific research into the attitudes of Americans establishes that those who most strongly favor executions do so without regard to the fact that they serve no such practical purpose. Their support is abstract, symbolic, and correlates with religious beliefs.[14]
- Since only a few eligible offenders can ever actually be selected for execution, and given the role of discretion at every step, the selection process is unavoidably arbitrary and discriminatory.
- The actual function served by executions is to symbolize "retribution." This, it is said, is a symbol of the "moral outrage" of the community at the offense. This is a sense of gratification which some, but not all, members of society claim to derive from killing the offender, a feeling that "justice" was done and the prisoner "got what (s)he deserved."
- Interestingly this gratification is not tied to the actual harshness of punishment, as it seems to adhere even with those offenders who "volunteer" for the death penalty, preferring it to a lifetime of imprisonment which to them seems harsher.

From the discussion above, about the scapegoat mechanism, it is obvious how, when the legitimate purposes of criminal punishment are stripped away, as being inapplicable, and the retributive and symbolic purposes of the death penalty are unmasked, the role of executions at present is the same for us as for the scapegoating rituals described by Girard. People will at first parrot the secular purposes for the death penalty—deterrence—but will fall back on abstract notions of "justice" when these practical arguments fail, as Bowers, *et al.* described so well.

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[13] See, *supra*, at n. 3.

[14] See, Robert L. Young, "Religious Orientation, Race and Support for the Death Penalty," 31 J.SCI. STUDY RELIGION 76, 82 (1992) (linking death penalty support to religious fundamentalism), cited in Bowers, *et al.* at n. 18.

The means of imposition of the death penalty historically have not differed much from sacrificial rituals in the often grotesque forms of execution as well as its ceremonious application. The religious trappings have withered away, but not the essential role which is inherited from religious rites.

Beneath the insubstantiable justifications offered for the death penalty are beliefs just like those which supported all sacrificial rituals in the past, beliefs which, if not explicitly religious, hold a parallel position in the lives of the practitioners to explicitly religious beliefs, even though they may feel bound to deny its religious content.

Nevertheless, it is often the case today that those who support the death penalty, those who enact and implement the death penalty, do it on the basis of overtly religions declarations that they have some divine given right to kill killers. This is necessary, this is just, this is God's will.

2. The death penalty is understood and described in terms of its ritualistic and sacrificial character

As two anthropologists noted in their comparative analysis of Aztec ritual sacrifice and American capital punishment,

> [j]ust 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.

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: Temple University, 1989), 139-55, 152. Of course the movement toward lethal injection is an effort to further wash away the vestiges of ritual to replace them with something clinical. However, as recent executions attest, this has had no effect on the mobilization of support for individual executions at the time they take place. That is, nothing in the scientific research supports a view that the process is seen as any less ritualistic merely because of the way it is performed.

In his historical study of public execution in Britain, Harry Potter concluded:

> Whether 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.[15]

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[15] Harry Potter, *Hanging in Judgment. Religion and the Death Penalty in England* (New York: Continuum, 1993), 160.

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."[16] Dr. Mervyn Haigh, the Bishop of Winchester, argued that

> [t]he 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 unequaled 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.[17]

McBride comments:

> Inasmuch as the English common law tradition has left an
>
> indelible mark on American jurisprudence, it should not be surprising that a Girardian reading of the American death penalty bears out what remains at heart—objections to the contrary—a religious practice.

McBride *supra*, 286-287. McBride observes that "English law has no such impediment to the endorsement and adoption of religious practices by Her Majesty's government" and thus it is not surprising to have the religious buttresses to the practice exposed by its supporters. *Id.* at 287.

It is different here where our Constitution proscribes the State from either the endorsement of religion or the preference of one religious interpretation over another. Thus it is necessary for the religious character of the practice to be disavowed by the legislature which established it, and those officials who enforce it.

The connection between the death penalty today and collective violence toward individuals in primitive society is too obvious. In Congress it has been said, and repeated by the Supreme Court, that the condemned serves as a "sacrificial lamb" who dies for us and thereby saves us from the spiral of violence which else would surely ensue.[18] Numerous judicial and legislative observations have been made of this fact.

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[16] *Id.*

[17] *Parliamentary Debates* (Lords) 5th Series, vol. 155 (27 April 1948) cols 426-7, as cited in Potter, *supra,* at 147.

[18] 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, supra,* at 364.

> Capital punishment has been used to penalize various forms of conduct by members of society since the beginnings of civilization. Its precise origins are difficult to perceive, but there is some evidence that its roots lie in violent retaliation by members of a tribe or group, or by the tribe or group itself, against persons committing hostile acts toward group members.[19] Thus, infliction of death as a penalty or objectionable conduct appears to have its beginnings in private vengeance.[20]
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> As individuals gradually ceded their personal prerogatives to a sovereign power, the sovereign accepted the authority to punish wrongdoing as part of its 'divine right' to rule. Individual vengeance gave way to the vengeance of the state, and capital punishment became a public function.[21] Capital punishment worked its way into the laws of various countries,[22] and was inflicted in a variety of macabre and horrific ways.[23]

Furman v. Georgia, 408 U.S. 238, 333, 92 S.Ct. 2726, 2774 (1972) (Marshall, J. Concurring).

> Several state legislatures have abandoned electrocution in favor of lethal injection for these very reasons; one of the architects of this change has emphasized that it resulted precisely from the recognition that the electric chair is "a barbaric torture device" and electrocution a "gruesome ritual."[24] . . .
>
> . . . For the reasons set forth above, there is an ever-more urgent question whether electrocution in fact is a "humane" method for extinguishing human life or is, instead, nothing less than the contemporary technological equivalent of burning people at the stake.

Glass v Louisiana, 471 U.S. 1080, 1093, 105 S.Ct. 2159, 2168 (1985) (Brennan and Marshall dissenting from denial of *certiorari* on constitutionality of electrocution). Justice Brennan

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[19] Ancel, The Problem of the Death Penalty, in Capital Punishment 4– 5 (T. Sellin ed. 1967); G. Scott, The History of Capital Punishment 1 (1950).

[20] Scott, *supra*, n. 38, at 1.

[21] Id., at 2; Ancel, supra, n. 38, at 4– 5.

[22] The Code of Hammurabi is one of the first known laws to have recognized the concept of an 'eye for an eye,' and consequently to have accepted death as an appropriate punishment for homicide. E. Block, *And May God Have Mercy* . . . 13– 14 (1962).

[23] Scott, supra, n. 38, at 19– 33.

[24] Gardner, 39 Ohio St.L.J., supra n. 2, at 126-127, n. 228 (quoting Texas Rep. Ben Grant).

compared electrocution to "disemboweling while alive, drawing and quartering, public dissection, burning alive at the stake, crucifixion, and breaking at the wheel." *Id.* at 1084. In specific cases the shades of the ritualistic are palpable, such as the suggestion that the retention of execution by firing squad in Utah has a specific bloodletting function.[25]

> Justice Thurgood Marshall noted in *Furman* v. *Georgia* 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."[26] 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 punishment. How, he asked in a 1986 speech at Harvard Law School, can "'frying in a chair' be distinguished from burning at the stake?"[27] While, on its face, this relationship seems limited to a physiological similarity, Girard's theory demonstrates that this similarity is not merely incidental, but rather substantive.

McBride, *supra,* at 269-270. McBride calls upon Justice Stewart for an illustration of the fact that the true function of the death penalty, typical of ritual, is beneath the surface:

> 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."[28] Stewart's claim concerning

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[25] 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. James Coates, *In Mormon Circles. Gentiles, Jack Mormons, and Latter-Day Saints* (Reading, MA: Addison-Wesley, 1991), 66.

[26] *Furman, supra,* at 335.

[27] Associate Justice William Brennan, Speech before the Harvard Law School, September 5, 1986.

[28] *Furman,* at 308. *See* Brennan, *id.,* 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 grievous condemnation of abhorrent crimes and thus prevents disorder, lynching, and attempts by private citizens to take the law into their own hands."

> 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.

McBride, *supra*, at 268-269.

UCLA Psychiatry Professor Louis West describes capital punishment as follows:

> Society uses its occasional legal victim of the gas, the rope, or the electric chair as a lightning rod to focus divine wrath upon a single offender, while at the same time magically insinuating the survivors into the good graces of the gods by the blood sacrifice.

Bailie, *supra*, 79

3. Capital punishment operates as a ritualistic sacrifice

The scapegoat mechanism inherent in the death penalty establishes its direct linkage to the religious function of sacrifice that has appeared from the earliest stages of civilization, even if under a different set of labels in each culture. The execution of offenders,

> is manifestly an establishment of religion—a ritual which is intended to sanctify and reinscribe the law-making and law-preserving violence of the State[29] and to counter the spiral of violence which plagues contemporary America. . . . The existence of capital punishment in 36 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 exorcize violence from the body politic.

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[29] *See* Walter Benjamin, "Critique of Violence," *Reflections* (New York: Harcourt Brace Jovanovich, 1978), ed. Peter Demetz, trans. Edmund Jephcott, 277-300, and Jacques Derrida, "Force of Law: The Mystical Foundation of Authority" 11 *Cardozo Law Review* 5-6, July-August 1990, 920-1045.

McBride, *supra*, at 280-281.

Based on the identifiable origin, character, and purpose of the practice of killing human beings as punishment for crime, capital punishment fits the model of religion as an institution set up in society as a means to control the potential for violence in society by various uses of a scapegoat mechanism. As put by Andrew McKenna, the legal use of "retribution" "remains party to a more primitive liturgical imperative." Andrew McKenna, *Violence and Difference*, 85 (Univ. Of Illinois Press, 1992). This derives from the relationship between violence and the foundation of religion in human culture, and the direct ancestral and functional connection between that original religion and our system for legally sanctioned executions.

> It is clear that the belief in and practice of 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.
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> 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.[30] 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.

McBride, *supra,* at 282, 284.

McBride may be the first, but he is not the only legal scholar to point out the fact that Girard's analysis explains the use of and support for the death penalty. See, Donald L. Beschle, "What's guilt (or deterrence) got to do with it?: The death penalty, ritual, and mimetic violence,"

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[30] Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

38 WM. & MARY L.REV. 487 (1997). In this article John Marshall Law School's Prof. Beschle concludes, in part:

> In a legal environment that assumes rational argument to be the foundation of governmental decision making, it is easy to overlook the possibility that elements of the legal system are best explained by powerful, nonrational motives. The contemporary debate over capital punishment proceeds, as it has for centuries, with a focus on rational justifications for the practice. Yet, powerful evidence that the practice does not advance the rational goals set forth as its objectives should make one wonder about society's basic assumptions concerning the death penalty's real function.
>
> Although commentators have noted the symbolic function of executions, this usually has been relegated to the margins of the debate; unsurprisingly, the debate has focused on the purported goals of deterrence and retribution. Upon close examination, however, these goals seem strangely beside the point. Supporters of the death penalty are unmoved by evidence that it does not deter violent crime, or by evidence that in practice the death penalty falls woefully short of the demands of retributive theory.
>
> Perhaps, then, the key to understanding the death penalty is to see it as filling a nonrational, yet very real, need. René Girard's theory of mimetic violence provides an intriguing alternative explanation for the death penalty, and one that also explains its resistance to rational argument. If Girard is correct, the death penalty serves primarily as a ritual of violence through which the community attempts to unify itself, concentrating its urge to mimetic violence on one individual identified as the other, the enemy of the community. If the death penalty should be understood in this way then one must view the surrounding debate in a fundamentally different way.

Girard had explained that the scapegoating process requires assigning absolute responsibility to the victim, which in turn attributes to the victim not only the power to create the crisis in society but also, if by death, to cure it. This is the substrata on which Girard makes the connection between the "sacred" transfiguration of the scapegoat in purely religious sacrifices and the role of the scapegoat in "historical" "persecution texts."

Similarly, our procedures insure this absolute responsibility, at least in a formal way, by excluding any other possible causes ("mitigation") for the evil. In other words, the formal "consideration" of mitigating facts, and the finding that they are overcome by "aggravating factors" is a device to support the view of absolute responsibility. This helps prevent discussion of the possibility that society might be to blame for the crisis represented by the offender, even though it continues to be the case that those selected for execution almost invariably were victimized by society in horrific ways before their crimes. That is, not only is the accused totally to blame, but the problem is not at all with society.

The "flip side" of this is the stake the society develops in the execution. This is reflected in the enormous energy expended toward the completion of the death ritual. There are the expensive and elaborate legal procedures dedicated expressly to the qualification and selection and confirmation of the accused as the one to be executed—the trial, the appeals, collateral review, clemency. But this is especially reflected in the stake various constituencies claim in the execution, from the actual prosecutors to the police and elected officials and the media, especially the scripted news coverage of the desires and reactions of the victim's family. All this testifies to the dependence on the victim/prisoner as the "cure" for the crisis. Everyone will be better off because of his death.[31]

The victim/prisoner, through his death, has curative power that cannot otherwise be found. This goes directly toward Girard's point about the dual nature of the victim/prisoner. We view the victim/prisoner with ambivalence.

The power of the prisoner is evident. Consider in this context how much turns upon the posture of the accused in the process from accusation to condemnation to execution: does he express remorse, how does he behave in the courtroom when the sentence is passed, does he appeal, does he volunteer for death, does he cry like a coward, what does he ask for a last meal, and, indisputably the most important, what are his "last words" before he is killed? Will he say something that will transfigure himself or us? By even so much as a gesture, the condemned person can generate great waves of action and emotion and ambivalence in the entire society.

Although there are many cases that demonstrate this, consider the recent execution of Karla Faye Tucker in Texas, whose case generated worldwide attention because of the support she received from conservative fundamentalist Christian evangelists as a result of her undisputedly thorough conversion to Christianity, as well as the fact that she was to be the first woman executed in Texas since the Civil War. We were bounced back and forth between the images of her as a drug-crazed, blood-lustful, pickaxe killer, on the one hand, and a redeemed, transfigured, even sanctified, believer in God, on the other hand.

Recalling that the effective operation of the scapegoat mechanism depends on its remaining in the unconscious, McBride explains how we can predict that the executioners will deny that there is any hidden meaning to the rite:

> 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*

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[31] Mark Costanzo writes in his book, "Just Revenge" (St. Martin's Press, 1997), at p. 168:

> Other anthropologists have pointed out that executions are not unlike ancient human sacrifices. Both are wrapped in ritual: the last supper, the reading of the death warrant, the last walk, the visit with clergy, weighing and measuring the doomed man. But the most fundamental similarity is that both are irrational attempts to alter mysterious and frightening forces . . . .The killing of prisoners persists not because it stems the tide of violent crime, but because, like human sacrifice, it creates the comforting illusion that the state is taking action.

> *necessary in order for it to effectively exorcize 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.

McBride*, supra*, at 272. The reference to *Herrera* reminds us that the symbolic value to society of the death penalty appears to be so strong that innocence is irrelevant. According to the logic of the majority opinion in *Herrera,* and state court post-conviction procedures as well, once convicted, whether or not the prisoner committed the crime is irrelevant: they are legally guilty, regardless of the question of their factual innocence.[32]

For the scapegoat mechanism to work it is not necessary that the victim be actually guilty. The victim may or may not be guilty of an "offense." Indeed, Girard exposes the scapegoat mechanism as "man's terrible propensity, in a group, to spill innocent blood in order to restore the unity of their community." *The Scapegoat,* 209. Predictably, to conceal the scapegoat mechanism at work, no effort is spared in emphasizing the guilt of the condemned—even if that relates to events a decade earlier which may be truly and completely detached in every way from the prisoner at the time of her execution. In the final analysis, given the real role of the scapegoat, it is irrelevant whether the scapegoat is personally innocent or guilty. The scapegoat is categorically guilty.

> The persecutors do not realize that they chose their victim for inadequate reasons, or perhaps for no reason at all, more or less at random. [*Violence and the Sacred,* at 81.

Chosen by the ritual to be the scapegoat, the victim is by definition "guilty" and therefore

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[32] In *Herrera v. Collins*, 506 U.S. 390, 113 S.Ct. 853 (1992) the Supreme Court rejected the effort to overturn the capital murder conviction on a claim that new evidence demonstrated the factual innocence of the Mr. Herrera. The majority opinion by Chief Justice Rehnquist made it clear that once the person to be executed is selected, through the trial process, there is simply no avenue in the federal system to overturn the conviction or sentence purely on a factual issue of innocence.

But the condemned person typically fares little better under state systems which are also amenable only to legal arguments. Under current rules, a person selected for execution in New York but who can later prove their actual innocence may simply be denied a hearing—the rule rather than the exception in proceedings under Art. 440—or be barred by the parameters on what constitutes "newly discovered evidence." The common practice of summary disposal of Art. 440 motions is encouraged by the fact that the person has no right to review of that denial and can only appeal by permission, which is rarely granted.

Other states are for more restrictive than New York in allowing "newly discovered evidence" claims.

s/he is *in fact* guilty in the eyes of members of the society, whether or not s/he committed any transgression or is actually accused of any offense. In this context, it is no answer to say that the accused in a capital case is "guilty." The need to sacrifice is not limited to the sacrifice of the "guilty." And means by which a person is selected from the "guilty" for execution as the death penalty is worked out in the United States, and under our New York statute, renders actual guilt relevant only as a common denominator, not as the criteria for selection.

This is a very subtle point. Gil Bailie has described it this way in the process of comparing the archetypal "guilty" scapegoat (Caryl Chessman, in California in 1960) to the archetypal "innocent" scapegoat:

> The structural similarity between the Chessman execution and the crucifixion endows the convicted criminal with a kind of "innocence" that has nothing to do with moral flawless, an "innocence" based not on moral or legal criteria but on the degree of one's social isolation. . . . No doubt Jesus was innocent in [behavioral and ethical] terms, but the innocence on which the gospel revelation throws light is the structural "innocence" of the outsider. . . . The first issue is the guilt or innocence of the accused, their responsibility for wrongdoing, and the question of what is to be done to protect society. The second issue is the use to which such persons are put in a social ritual in which their guilt is incidental, except that it helps to allay moral misgivings in those obliged to witness their torment.

Bailie, *supra*, 83, 85.

In any event, guilt is finally not a necessary ingredient for execution, as *Herrera* and our slack postconviction procedures show.

In light of Girard's analysis, the *Herrera* decision might appear to have been contrived for the sole purpose of proving our point: capital punishment is 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. And the value of this eclipses concerns for factual innocence.

Still, it remains an imperative that every effort be expended to defend the selection of the few victims for execution as serving some rational purpose directly tied to guilt. And yet, those who are executed are chosen arbitrarily and from predictable subclasses of potential outcasts. As Justice Brennan argued in *Furman,*

> [w]hen 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.[33]

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[33] Brennan, *Furman,* at 293.

Of course this is worse than a lottery, because the odds are the same for everyone in the lottery. The various points at which discretion enters into the selection process for capital punishment assures plenty of avenues for the subconscious exercise of choice as to the appropriate scapegoat. And those subconsciously influenced discretionary choices reflect, not surprisingly, feelings of who the enemies, the outcasts, the contaminated are in society, as has so characterized the features of the scapegoat.

Interesting is McBride's evaluation of this scapegoat mechanism in operation in the "best case" scenario for the use of the death penalty, the "cop killer":

> 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.

McBride, *supra* at 273.

The fervor for execution by strong supporters of the death penalty does not wane with "volunteers," those who refuse to appeal their death sentences or even, at trial, offer mitigating evidence. McBride makes an additional observation which completes the point:

> 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.

McBride, *supra*, at 274.

Justice Marshall had argued in *Furman* that the death penalty was excessive because it was harsher than necessary to achieve the permissible objective of deterrence. However, when tested against the criteria for scapegoats, it is precisely the excessiveness that is required, as McBride discerns:

> 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.*

McBride, *supra*, at 280.

4. The death penalty does not merely establish a religious practice; it offends the religious beliefs of others

It is all the more problematic that capital punishment is not merely an accommodation by the state to some benign and universally accepted religious practice, such as prayers in public school might have been in particular homogenous communities decades ago. Executions are deeply offensive to the explicitly religious beliefs and teachings of millions of people and the majority, if not all, of the established religious bodies. On what basis, even if it were to sanction a religious ritual, does the state establish this ritual over contrary beliefs?

> The aura of sanctification which surrounds and embellishes
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> State authority is therefore not merely a matter of invoking God's blessing, as Robert Bellah and other scholars of civil religion have noted[34], 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

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

> which animates Christian *koinonia* itself. . . . It is therefore logical that many religious organizations have opposed the death penalty. These religious traditions are not necessarily pacifist, yet it is evident that capital punishment 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 endorsement of a particular theological position which prefers its own version of substitutionary atonement over the that of Jewish and Christian soteriologies.

McBride, *supra*, at 285-286.

As Chief Justice Burger himself noted in his description of "benevolent neutrality," of the state toward religion,

> [t]he 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.[35]

The death penalty does both. Hence, the death penalty is not only objectionable from the viewpoint of ardent "separationists" in the church-state dialog, but it is especially so to "accommodationists" for government's interference with the free exercise of religion.

It is, of course, true that an uncountable number of people historically have believed that God wants homicidal punishment. The point here is that because there is no definitive way of ascertaining with certainty what the Divinity's will is on this matter there can be no argument from religious authority to justify the blatantly impractical, irrational activity of murdering the murderer. Any attempt to choose one image of divinity over another to garner authority to kill is self-evidently the establishment of one religion over another.

5. Acknowledging the scapegoat mechanisms on which we depend

As society has evolved, we arrogantly laugh at the various justifications for ancient barbarities—possession by the devil, witchcraft, appeasement of the gods, extermination of disease, etc. But our "rational" and "modern" excuses to disguise the scapegoat mechanism—which is kept hidden "behind the curtain"—are as vapid as those of the past. Indeed, there was far more evidence of witchcraft and the poisoning of wells by the Jews than there is for the "rational" argument of deterrence. Many confessed to being witches and even displayed florid symptoms of possession by evil spirits before being burned at the stake; the numerous outbreaks of the plague indeed subsided after the culprit Jews had been sacrificed; often droughts ended after enough virgins were tossed off the precipice. But for deterrence we

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[35] *Waltz*, *supra*, 669.

have no evidence, after decades, even centuries, of scientific study.

Girard's discussion of the "stereotypes of persecution" alerts us to the fact that future generations will judge our execution of people by the same criteria as we judge the "witch-hunters." Stripped of the unsupportable justifications for executions, can our executions appear as any different in essence, in character, in function, than those earlier displays of collective persecution which we now see as ridiculous and barbaric?

This is obviously not a question of sincerity of belief on the part of many of those who assert a practical purpose to the death penalty. As Girard notes with respect to the beliefs that the Jews had caused an epidemic, or that witchcraft was being practiced,

> [W]e must begin by recognizing a true belief in what I have called the stereotype of accusation, the guilt and the apparent responsibility of the victims. . . . We do not have to sympathize with the belief to admit its sincerity. Jean Bodin was an intelligent man and yet he believed in sorcery. Two centuries later such a belief makes people of even mediocre intelligence laugh. What is the source of the illusions . . .? Clearly they are social in nature. The are illusions shared by a great number of people.[*The Scapegoat*, 39]

Girard anticipates the difficulty in contemporaneous recognition of scapegoating:

> Too conscious and calculating an awareness of all that the "scapegoat" connotes in modern usage eliminates the essential point that the persecutors believe in the guilt of their victim. . . . Imprisonment in this system allows us to speak of an unconscious persecutor, and the proof of his existence lies in the fact that those in our day who are the most proficient in discovering other people's scapegoats . . . are never able to recognize their own. Almost no one is aware of his own shortcoming. We must question ourselves . . . Each person must ask what his relationship is to the scapegoat. I am not aware of my own, and I am persuaded that the same holds true for my readers. We only have legitimate enmities.[*The Scapegoat*, 41]

It would have been especially difficult to expose the scapegoating to the earlier societies which depended on it.

> The concept that crowds, or even entire societies , can imprison themselves in their own illusions of victimage was inconceivable. . . . [T]hey would not have understood.[*The Scapegoat*, 41]

Is it any different today? We believe that it *should* be and *is* different today, that we have evolved in our standards of decency precisely because myths, including the myth and mechanism of the scapegoat, are more easily understood as illusory now and that the answer to the violence

within our community is not violence itself.

If we are unwilling to examine the scapegoating going on in our current criminal justice system, in the name of "deterrence," then one must agree with the sarcastic remark of Girard.

> We must condemn in retrospect all those who brought an end to the witch trials. They were even more dogmatic than the witch hunters and, like them, they believed they possessed the truth. . . . What right have these people to declare their interpretation to be the only right one when thousands of other interpreters, eminent witch-hunters, distinguished scholars, some of whom were very progressive like Jean Bodin, had a completely different idea of the problem? What insufferable arrogance, what a frightful intolerance, what shocking puritanism. Should we not let all the different interpretations blossom, witches and nonwitches, natural and magical causes, those that are susceptible to corrective intervention and those that never receive the correction they deserve. [*The Scapegoat*, 99]

Girard invites us to "expose to the light of reason the role played by violence in human society" referring both to the violence within each of us and the violence of society's treatment of those selected for sacrifice. [*Violence and the Sacred*, 318]

He recognizes that modern collective violence is creating new myths.

> Collective violence must therefore be recognized as a mechanism that is still creating myths in our universe, but for reason we shall learn more about, is functioning less and less well. [*The Scapegoat*, 50]

It is "functioning less and less well," we find, because of historical developments which have tended to expose the illusory nature of the myths and the scapegoat mechanism—virtually identical to the mechanism for "evolving standards of decency" I have analyzed elsewhere.[36]

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[36] It has been a familiar attack on the death penalty that it constitutes "cruel and unusual punishment," a standard which may change over time because of the "evolving standards of decency" in our "maturing society." That argument has finally been defeated on the notion that the current "standards of decency" are reflected in the current supposedly representative legislative judgment that death ought to be a punishment available for certain categories of crime.

I have separately argued, first in an actual case ~~in~~ which the death penalty was not imposed ~~and~~ now in a separate manuscript in process, that the perspective from which we must evaluate the "cruelty" or "usualness" of the use of death as punishment must be judged in light of the growing international condemnation of the death penalty, and that the ascendency of international protection for individual rights, and the decreasing international tolerance for blood vengeance, objectively establish a course of "evolving standards of decency" with which judgments about appropriate punishment should correspond. Because of this linear view of history I believe it is that Girard says, "there is less resistance to the truth, and all of mythology will soon be understood." Girard announces that "There is, in other words, a *history* of mythology" [*The Scapegoat*, 74] which is the equivalent to saying there is an end to mythology, which is like Hegel's "end of history," in the evolution of social

The very existence of the debate over the utility of the death penalty in particular has tended to undercut its mythology, its effectiveness as a scapegoating mechanism. Rather than resolving the crisis in society, the death penalty is a point for the *creation* of crisis in society. The international pressure that is escalating against the United States, and the unceasing revelations of miscarriages of justice in our criminal courts and in death cases are others reasons that capital punishment is functioning less well as a scapegoating mechanism.

E. Conclusion

If the arguments presented above against the death penalty are novel, it is only a product of the effective social and subconscious efforts to keep hidden the underlying scapegoat machinery, and to deny it, no matter how obvious it is. But the existence and nature of the ritual is obvious if one is only willing to look behind the mythology with which the cultural consciousness necessarily surrounds the practice. Usually this only happens on a broad scale when, through the passage of time, the bonds with the earlier culture disintegrate. So it is that we today unhesitatingly recognize brutal murderous violence in the collective homicides of earlier cultures for whom the very same conduct was just, necessary, and divinely ordained. Already the rest of the civilized world has seen through the ritualistic veil of the death penalty and condemns us for these collective homicides as much as we would condemn the burning or hanging of witches by our own forbearers. The proof of the strength of the ritualistic mechanism and our need to keep it hidden, and of our argument here, is our arrogant reaction to this condemnation.

Even without exposing the scapegoat mechanism, the religious content and character of the use of death of a few to inoculate society as a whole is too evident to ignore. It cannot be practically justified, and so it is done simply as God's will.

But, as James McBride concludes in his article, at p. 287,

> a Girardian reading of the death penalty, however,. . . 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.

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consciousness.

This discussion cannot sweep aside the question of what replaces the role of these myths, but that is truly another question.

Mimetic Rivalry as an Explanation for Homicidal Behavior: Case study

In the determination of guilt in a criminal case we are accustomed to considering the causes or circumstances which justify the behavior or lessen the culpability of the actor, such as intellectual, perceptual, or psychological deficits. In sentencing, however, a broader range of explanations of conduct, which fall short of legal defenses or diminished cognitive capacity, may be relevant. Given the often subtle nature of the case features which may result in a case being selected for the death penalty by the state, and jurors, correspondingly subtle themes and images and factors relating to the accused or the conduct may lead jurors away from the imposition of death.

Obversely, it is the *lack of explanation for behavior* which may be a most important cue as to the selection of a case for the death penalty, either because of the fear that arises from the unknown or the programming we experience in our culture about stereotypes of the "born" killer who blooms forth on the scene without any explanatory context or history.

> For lack of any better, more serviceable lessons, the public was encouraged to believe that this is what capital punishment is about: People whose evil is so profound that it defies any attempt at rational explanation.[37]

The process of presenting historical and developmental and environmental facts about an accused, in contemplation of the sentencing process is considered as "humanizing" the accused, which implicitly recognizes that the sentencer (the judge in non-capital cases and some capital cases, or the jury in most capital sentencing) sees, or wants to see, the accused as a demon or object. This approach aims at diluting the moral blameworthiness of the accused, and opening up the possibility that jurors will identify or empathize with the accused.

In capital cases this "mitigation" evidence is often ambivalent: that the accused is deficient in some way may be seen by some jurors as justifying their extermination—their selection as the sacrificial victim, in other words. Others discount the evidence because no causative link can be established between the deficit and the criminal conduct, and jurors might reason that others having experienced the same deficits have not, as a result, murdered. Often, in fact the prosecutors will use the siblings of the accused, especially if they attempt to testify on behalf of the accused at sentencing, as examples of this.

All this reflects the subtlety in the process of selecting a victim for execution, and the interplay between the characteristics of the accused and his or her conduct, and our own needs for a suitable victim.

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[37] Craig Haney, "The Social Context of Capital Murder: Social Histories and the Logic of Mitigation," 35 Santa Clara L. Rev. 547 (1995) at 553..

The problem in some cases is that there is no "explanation" for the homicidal behavior that fits into a recognizable category on which a juror might establish a foothold from which to perceive the accused other than as a monster. Is it possible that there are cases of homicide which become more "understandable" if the conduct can be shown to fall into a pattern of mimetic rivalry, a fundamental and originary human pattern? While not a challenge to "free will" or a resort to deterministic ideas about "nature or nurture" in the causes of crime, the exposure of human traits, even the traits for violence, in the accused, and even if totally beyond the comprehension of the actor, may provide a basis upon which individual jurors could conclude that annihilation of the accused was not necessary.

Skill in recognizing such a pattern in homicidal acts would improve the ability of defenders to investigate, explore and present case features which might not otherwise be considered significant. Such patterns, and even mythical stories which exemplify them, would add to the types of "themes" and "images" that trial lawyers use to communicate with jurors to make homicidal acts "understandable." The recognition of such patterns might inspire the use as expert witnesses those who have studied such patterns. Acceptance by jurors of this information may tend toward interest in the behavior as illustrative of the weakness of humans in general rather than the need for the sacrifice of few as the cause of social unease.

To give an example of what I mean, I present the fact pattern, as I developed it in a presentence memorandum, in a case in which two young men employed by a door-to-door sales company killed two co-workers and the death penalty was sought by the state. From beginning to end, the central question in the case was why this happened. The question was asked so frequently that it was clear that having a satisfactory answer would have materially affected whether death would have been sought or imposed. Even after the death penalty no longer was implicated, as a result of a plea agreement, this question remained the central question for the sentencing judge.

These facts are developed with a socio-psychological framework, but from the outset the method of homicide carried with it the suggestion of ritual. Here is how I introduced the sentencing memorandum:

> In the "ordinary" criminal case, in which can be included even the most unspeakable crimes, there is no mystery about how it came to be. Normal human desires and emotions, like anger, lust, greed, jealousy, and even love, and predictable, or at least unsurprising, responses account for most of the crimes people commit. Insanity accounts for most of the others. Occasionally there comes along a more bizarre case, a case like this. From the beginning, and long into the future, one would be forced to ask, Why did these two young men die? Why did they die at the hands of these two defendants? Why, at this time and at that place?
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> It is the very persistence of these questions, the imponderability of this crime, that compels us to accept this fact: the road to understanding what happened here cannot be simple. While this presentation covers a number of subjects that might be addressed in any

> ordinary case: the character and background of the accused, his capacity for rehabilitation, and general rules relating to imposition of sentence, a very substantial portion goes to our explanation of what occurred.

A. The magazine door-to-door sales subculture

A few words at the outset about the business in which these youngsters were involved will be helpful. Familiarity with that environment is as critical to understanding this case as is familiarity with drug distribution systems, or gangs, or financial markets, or dysfunction in families critical to understanding crimes committed within these environments. Whether it contributes to or distracts from an analysis of the features of mimesis in this case has to be considered.

The magazine door-to-door sales environment is a subculture with all the features of a "cult," in which youth are exploited and abused for profit and the personal and often sexual gratification of its managers. It engages in illegal activity, both with respect to the public, which is often defrauded, and the youth who are exploited, psychologically damaged, and often held against their will. The young adults who have been intentionally subjected to the abusive and dangerous conditions, as part of the "thought reform" essential to such "cultic relationships,"[38] have a distorted perception of reality and typically show the symptoms of Post Traumatic Stress Disorder.[39] Many have been injured and not a few killed as a result of the dangers to which they are exposed.

Practically every magazine and major newspaper seen on a newsstand is represented in the door-to-door sales system which results in between 1% and 30% of the subscriptions. The publisher contracts with magazine clearinghouses to sell subscriptions. The clearing houses, in turn, contract with distributors, also known as crew chiefs, or managers. The crew chiefs are "owners." Below the crew chief are the car handlers. Car handlers are sales agents that have done well in sales and earned the right to drive the crews to the neighborhoods. Becoming a car handler is difficult, but it offers privileges and monetary rewards.

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[38] Dr. Margaret Thaler Singer is a leading expert in the United States on the phenomenon of cults. Her recent book, "Cults in Our Midst" (Joffy-Bath Publ. 1995), summarized her years of field research in the area. Her definition of a "cultic relationship" has clear applicability to the subculture of the magazine door-to-door sales subculture.

[39] Mark Spellman, Ph.D., a counselor at Pace University, while a doctoral candidate in psychology at Yeshiva University, in 1992 conducted a study of experiences of former sales agents. Spellman's study concluded that crew experiences, coupled with their own belief systems, were primary sources of PTSD symptoms among the former agents participating in the study. Additionally, knowing of physical assaults on others, knowledge of other crew members being inadequately fed and housed, not receiving adequate medical treatment, and being stranded in remote areas, produced significant PTSD symptoms in those workers who had not been the object of such treatment. As would be expected, direct physical and sexual assaults, being deprived of medical care, and being deprived of meals were consistent significant predictors of PTSD symptoms. Spellman also concluded that among his sample, verbal abuse was as traumatizing as physical abuse.

The lowest level in the crew is the actual sales agents. They are lured by newspaper ads promising exciting travel, and good pay. Generally between the ages of 18-25, they are usually "at odds with their families" when they sign on and are given little time to confer with their family or friends about the decision. Most come from broken homes and have been abused. They've had prior trouble with the law, have been in foster homes or juvenile detention centers, have been unsuccessful in the military, and have trouble finding other jobs. They are desperate for emotional support and attention, have extremely low self-esteems and yearn to be successful and rewarded as adults. Recruits are naive and vulnerable to challenges to their adulthood and maturity. Many exhibit antisocial features.

Agents are made to be financially dependent, and focused all the time on the need to make sales above all else. They learn to fear the abuse and humiliation that comes with poor performance and the loss of privileges, even necessities such as food and health care, if they fail to perform. The atmosphere is pregnant with the threat of physical harm and observation of experience of managers beating associates is prevalent.

The sales agent's life is a hard one. They generally rise at 6 or 6:30 a.m. to shower and attend a morning sales meeting. The morning sales meeting includes a motivational chanting of the "five steps" sales "pitch." The text of this "pitch" changes only slightly from company to company and is traceable to an "original" text. The sales agents also recite the sales pitch to each other individually in succession while going through the high-five routine. Those who made mistakes in their "five step spiel" were punished in various ways including having to do jumping jacks through the session.

The agents then go out on territory to knock on doors until approximately 9:00 p.m. They return to the hotel is generally an hour drive from the last neighborhood.

Those who fail to meet their sales quota are required to attend a night-time sales meeting that may end as late as midnight. Their daily allowance will be withheld or cut. Because they often do not receive an allowance, or it is less than $10, breakfast is often eliminated. They are prohibited from "socializing" (*i.e.* having sexual relations) with the others, and have to sleep on the floor.

The withholding of money (and therefore food) and social interaction as punishment also creates an atmosphere of unity amongst the agents, leaving them feeling guilty if they were to leave while also unifying them against those being punished.

This schedule is followed six days a week including holidays, regardless of weather conditions. Sunday, after traveling all night to a new destination, is spent doing laundry.

Lore abounds, and true stories are numerous, about abandoned and disappearing sales agents. Partly this is the result of the absolute *maxim* among the sales crews: at the first sign of trouble leave the area, including any sales associates. If there is trouble, the entire crew moves on. Indeed, when the homicides in this case were discovered, the Manager arranged for it to be kept secret long enough for the crews to be sent out for that day, and then when they returned they were instructed to pack and "jump," in this case a 15 or 16 hour trip to Oklahoma.

All sales agents have direct stories or anecdotes of abandoned or disappeared associates.

The threat of abandonment is part of the "brainwashing."

The drivers are the crew agents themselves, often with no experience traveling long distance between sales locations, usually done overnight. Often the drivers are new or unlicenced. Not surprisingly, there are many reports of accidents, and there have been numerous deaths in such accidents.

Sales agents, especially the young women, are exposed to the danger of physical and sexual assault as they go about their job alone, and often in the dark. They are exposed to assaults by others on the crew and by people from whom they solicit subscriptions and drug dealers whom they seek out. Managers frequently get in involved sexually with young sales agents for personal gratification, punishment, or to quell romances in the crew.

Because the managers carry weapons (guns and knives) the girls would often give in to the managers' sexual demands.

Crew members in need of medical attention are often left to fend for themselves. Crew members who are sick must still work or they will not receive there daily stipend. They receive no general medical attention such as dental visits gynecological visits. If an agent did see a doctor when they were sick, the company would often not pay for their prescriptions to be filled.

Many sales agents accumulate criminal and traffic records and develop fear of the police. They were forced to sell in areas where it was forbidden. Being arrested for illegal solicitation is very common. They were told that if they saw police while they were at someone's door to do what ever they had to get in the house. Car handlers were often ticketed for vehicle equipment, insurance and registration violations.

While the sales agents will be bailed out, there is no provision for them to reappear, since the group moves on, resulting in warrants being issued. The bail that was lost might then be deducted from the sales agent's account.

A wide range of social and psychological factors make leaving the crew much more problematic than would initially be apparent. Crew members are led to believe they are failures if they leave the company. They are told they wouldn't be there if they had anything at home, that their parents would see them as failures, and that they owed the company for the time and training they gave them. They were also told that because of fines, deductions, and charges their accounts are in the negative and they had to stay until they paid them back.

B. The Killing

1. The beginning of the day

On the morning of August 27, 1996, when Michael Grinnell and Jacob Russell got in a car with three others, Sabrina Russ, Adam Chesnek, and Billy Joe Gilbert, there was absolutely no basis upon which to suspect that any harm would come to any of them that day. Jake and Mike had become close friends. Sabrina was considered flirtatious, and the object of desire.

Outside the ordinary dangers confronting one working in the door-to-door magazine sales business for All Star Promotions, there was no dispute, or bad blood, or emotion evident which threatened to boil over into violence, or even criminality.

What there was was the distorted perception of reality that is inculcated by the mind regulating environment at All Star and places like All Star. Sales are everything. With them there comes reward. Without sales there comes punishment, at least humiliation, probably financial, and loss of privileges.

Beyond these concerns there is not much, for the group is isolated from family and friends. They are not concerned about the people who live behind the doors on which they knock, except as a source of money to bring to their manager in exchange for magazine subscriptions which may, or may not, ever get fulfilled. For them, this is their family, although they realize that their connection to it is tenuous: only sales success and compliance with the rules stand between them and abandonment, the threat of which is constantly present.

Their isolation is even greater because of the persistence of danger—from the managers, the driving, the strangers they encounter—and their ingrained mistrust of the police as a source of protection from that danger. They move through communities where they feel themselves, and hope to be, nearly invisible.

2. It was a bad sales day

At the end of this day, sales were not good. This is not surprising. For part of it Mike and Sabrina were just sitting around in a lounge at the Geneseo campus for much of the afternoon, and not trying to sell magazines. When they were all picked up Jake was angry. He was afraid of losing his "keys" and the privileges and opportunities of being the car handler represented in those keys. Jake raises a discussion by asking Mike if he remembered what they had talked about in relation to gas stations or "the Shell Station" on an earlier occasion. "Are you down with it?" meaning, is he willing to do it? This created curiosity on the part of Sabrina about what the "secret" was.

3. The Robbery Idea

The secret, it turns out, was a sort of "kidding" about robbing a convenience store to raise money to purchase additional magazines, to make the quota. Somehow this discussion becomes serious, or at least consequential. Sabrina's attitude, expressed repeatedly in her video interview was "I didn't care." In any event, Sabrina and Adam indicate that they are willing to do this. Billy Joe does not want to get involved but does not oppose it. No one voices anything negative about it except Michael who said he did know if he could do it.

The discussion leads to the casing of a convenience store. Sabrina and Adam determine that there is only an elderly clerk in the store. Three, Mike, Adam and Sabrina, went in. Mike was supposed to grab the man while Sabrina grabbed the cash drawer. However, twice Mike got nervous, and failed to execute on the plan. Each time Sabrina challenges his masculinity, calling him as "a pussy" for his inaction. However, there was no robbery

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4. The murder idea

Mike hoped that would be the end of it. Though he knew the idea was a stupid one, he did not have the nerve to say so. The excuse he used to Jake was that he was too nervous and suggests that he is nervous about "witnesses."

Rather than abandoning the plan, Jake drove Billy Joe to a bar nearby so that he would not be a witness to what might happen. Returning to near the store, Jake suggests that they "get rid of" the witnesses. Mike, like Sabrina, does not think that this will happen, and thinks that at most they will just "rough up" Adam to insure his loyalty, but hopes that even this will blow over. Though still feeling that it is a bad and stupid idea, Mike is not able to voice this.

Jake's concern over "witnesses" had nothing to do with the police. His immediate concern was that if Tony, the manager, found out about the robbery plan he would fire them. However, the original goal of getting more subscriptions was not abandoned: Billy Joe and Adam had subscriptions and cash that Jake could take and apply to his quota.

5. The "first stone"

With the initial killing of Adam, Michael has from the very beginning had difficulty explaining how it actually came about—at what point did he realize that Adam would die if this was not stopped? Why couldn't he stop it? How could he, who was too "nervous" to rob the convenience store, actually help kill one of his cohorts? In reflecting on it there are many instances of potential violence by a group against a victim, or a group of victims, which require only a spark to explode beyond control, and without which nothing happens. The first shot, the first blow, the first stone. Mike hoped that there would be no spark.

Adam is taken by them to a remote gravel pit, where the four of them eventually talk. Nothing is happening. Jake whispers to Mike to "start it." But Mike does nothing to start it. Exactly how it got started is the subject of disagreement. Mike said that Sabrina confronted Adam. She verbally threatened him and then, finally, punched him in the face, apparently hurting her hand in the process. Adam started to move away. With this, Mike felt that "it" had started, and that it was necessary for him to do his part. He had hoped that if he did nothing, nothing would happen. But something had happened, and he was caught in it.

He tackled Adam by grabbing around his head and pulled him to the ground. Even at this point he, like Sabrina, still did not believe that Adam would be killed. But Jake and Sabrina started punching and kicking Adam. Then the three threw stones at him until it appeared that Adam was dead.

6. Billy Joe

With Billy Joe, there is no mystery as to how it came to happen. This is what Jacob wanted to do. Michael was unable to see any way out of what appeared to be inevitable. Unfortunately for poor Billy Joe, there was no "point of no return" that might not be reached—it had already been reached before the trio came to pick him up. Nor was it possible that there would be no "spark" or "first stone."

Billy Joe, who had remained where he had been left, was brought back to the quarry and led up to near the spot where Adam lay. Mike took the first devastating step, which quite possibly resulted in the immediate death of Billy Joe, striking him on the back of the head with a large stone. The others followed with stones of their own until Billy Joe was clearly dead. It was done.

7. The cover story

On they way back, after Jake filled out his car sheet with added information about the subscriptions taken from the victims, they talked about what story to tell. The story involved Adam and Billy disappearing after a car breakdown. This misses the point, for the story would simply be that they disappeared. They were all to "stick together," and no one would get caught.

8. The criminal charges

However, the following morning Sabrina told the manager what had happened, the police were called, and Jake and Mike were arrested. Sabrina was never charged. News of the killings and the arrest traveled fast in the small community. By the time the two were first presented in a court that evening, in a chilling demonstration of community reaction to the bizarre event, local citizens gathered outside the courthouse actually calling for the two to be lynched. The state sought the death penalty against Jake and Mike.

A good criminal defense lawyer could make much of the environmental and personal features of this case. Much "responsibility" could be placed at the doorstep of the magazine door-to-door sales business, without which the crime was inconceivable. The accused had no prior criminal record, and the crime seems the result of an accidental confluence of events rather than an inevitable product of a threatening sociopathology. A good case could be made, in other words, for forgoing the death penalty. But the nagging problem is the inability to "understand" the behavior, which reinforces the fear of the accused, and the temptation to see his extermination as a "solution" to the threat of such unpredictable violence.

C. Mimetic explanations

What makes the conduct of Jake and Mike so bizarre and irrational is precisely what fueled the angry mob at their arraignment, and the eventual request for the death penalty. The "normal" explanations for violent behavior were not there: neither accused were under the influence of drugs or a mental disease or defect at the time; there was no extreme emotional or physical distress diminishing their cognitive functioning; though possessing antisocial traits, they were not the product of extraordinary abuse or neglect as children.

It is partly for lack of a such a category into which to put this behavior that the death penalty was seen as a likely eventuality. At the time of sentencing the judge focused on the absence of an "explanation" for why the killings occurred.

While the manner of killing—using stones— has a significant place in human sacrificial practices, there is something about the story itself which is also reminiscent of myth and ritual. Is it possible that mimesis, on its own and even as expressed in ritual and myth, can provide a

framework in which the average person can better understand, or at least "compartmentalize" such behavior so as to make the accused less suitable as victims of a state-sponsored sacrifice? Here there is prominent rivalry, for magazine subscriptions, privilege, and more subtle rivalry for the female, whose presence is unmistakably provocative, or, perhaps, rivalry *with* the female for the attention of the other.

Those who have studied other cultures and the history of our own, and the myths and rituals which represent original forms of collective violence may see in such fact patterns a mirror of such myths or rituals. If so they have much to offer the defense of these cases, and the jurors who decide them, by providing such vehicles for achieving understanding.

"Let him who is without sin . . .": arguing against the sacrifice

> The Paraclete is called on behalf of the prisoner, the victim, to speak in his place and act in his defense. The Paraclete in the universal advocate, the chief defender of all innocent victims, *the destroyer of every representation of persecution*. He is truly the spirit of truth that dissipates the fog of mythology.
>
> René Girard, *The Scapegoat*, 207.

The mythology of capital punishment is like the mythology which has supported every other scapegoating ritual involving collective homicide. Capital punishment is justified by a range of putatively functional and religious arguments which simply mask its underlying scapegoating mechanism. These arguments are neither more persuasive nor valid than the arguments used in the past to justify collective homicide, arguments which we now find laughable. But the arguments for collective homicide which are accepted today, whatever their worth, define the preconceptions of jurors called to serve in capital cases.

A core premise in *The Scapegoat* is that scapegoating can be destroyed by the simple revelation that the victim is a scapegoat. This Girard exposes as the Gospel message, the message of the Passion of Jesus. He describes the role of this revelation in history, as much a socio-anthropological event as it is spiritual. But he also draws our attention to examples of the tactical use of the power of this revelation by Jesus in discrete situations where the crowd threatened others and even himself.

Whatever the positive comparisons might be between the practice of state executions and human sacrifices in earlier cultures, an important difference lies in the fact that the victim here has a relatively independent advocate to speak for him, to argue against its implementation.[40]

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[40] There are, and have been, substantial limitations on the role of the defense lawyer. In far too many cases they are underfunded and therefore often incapable or unwilling to implement a thorough defense. See

While the reality of state sponsored homicide, as a sacrifice, has implications for the political arenas in which the question is debated, the focus here is on empowering the paraclete of our legal system , the capital defense lawyer, to translate this revelation to the "crowd," the jury in individual cases, so that the mythology of the death penalty can be broken on a case-by-case basis.

A. The jury is prepared to kill

Legal commentators have identified in socio-psychological terms the process by which the jury, before and during the trial, becomes "mobilized" to kill the accused.[41] Craig Haney, a leading theoretician of the defense of capital cases, has described five mechanisms by which jurors accommodate themselves to the impulse to kill the murderer.[42] He begins with the assumption that people are reluctant participants in the process of killing another human being"

> Since, under typical circumstances, a group of twelve law-abiding persons would not calmly, rationally, and seriously discuss the killing of another, or decide that the person in question should die and then take actions to bring about that death, this unique set of conditions is crucial to allow the death-sentencing process to go forward.

Haney, n. 37, at 1448. Despite this natural reluctance jurors have frequently voted for death.

Stephen B. Bright, Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer, 103 Yale L.J. 1835, 1836 (1994) ("[P]eople accused of capital crimes are often defended by lawyers who lack the skill, resources, and commitment to handle such matters."); Stephen B. Bright, Death by Lottery--Procedural Bar of Constitutional Claims in Capital Cases Due to Inadequate Representation of Indigent Defendants, 92 W. Va. L. Rev. 679, 680-81 (1990) ("Poverty ... may result in a less than vigorous defense at a trial where the death penalty is imposed." (footnote omitted)); Stephen B. Bright, In Defense of Life: Enforcing the Bill of Rights on Behalf of Poor, Minority and Disadvantaged Persons Facing the Death Penalty, 57 Mo. L. Rev. 849, 861 (1992) ("[O]ften whether someone receives the death penalty is determined not by whether he committed the worst crime but whether he was assigned the worst lawyer ...."); Richard H. Burr III, Representing the Client on Death Row: The Politics of Advocacy, 59 U.M.K.C. L. Rev. 1, 2-16 (1990) (discussing the unfair obstacles facing capital defendants); William S. Geimer, Law and Reality in the Capital Penalty Trial, 18 N.Y.U. Rev. L. & Soc. Change 273, 277-78 (1990-91) (discussing the increased importance and complexity of, and the effort that must be invested in, the capital penalty trial).

Additionally, the role accorded the defense lawyer in the system often is simply part of the ritual and tends to reinforce a formalistic approach by the jury which is naturally engineered in the ritual to prevent its decoding.

[41] Of course Girard takes special care in addressing the etymological and practical connection between "mobilizing" and the "mob." *The Scapegoat*, 16.

[42] Craig Haney, "Violence and the Capital Jury: Mechanisms of Moral Disengagement and The Impulse to Condemn to Death," 49 Stanford L. Rev. 1447 (1997). Haney is Professor of Psychology, University of California, Santa Cruz, and also has a law degree from Stanford University Law School.

The conclusion to his article summarizes this:

> Mechanisms of moral disengagement enable capital jurors to
>
> overcome the prohibitions against violence that must be traversed if normal, law-abiding citizens are to condemn their fellow citizens to death. Through a variety of practices and procedures structured into the very process of death sentencing, capital jurors are encouraged to dehumanize capital defendants, overemphasize the differences between them, and interpret those differences in terms of fundamental defects and profound deficit. The death-sentencing process also acts to decontextualize the defendant's violence in ways that make it more frightening, thus exaggerating the jurors' impulse toward self-protection and self-defense. In a variety of other ways, mechanisms of moral disengagement also serve to minimize the perceived personal consequences of the legal violence in which the jurors are asked to participate. By couching the life- and-death decision in terms of legal authorization, which removes the jurors' collective and individual sense of moral responsibility, the process finally conveys to them a quality of legal compulsion that disengages their most critical ethical sensitivities

In exemplary fashion, Haney goes as far as one possibly can in describing in clinical psychological and sociological terms, each of these preconditions for mob participation in collective homicide.

The solution offered by Haney parallels that offered in the Gospel revelation as seen by Girard, but on a more political level of attacking the superstructure of the system:

> Indeed, if the realities of this system were laid bare for capital jurors--not just the cold intricacies of the legal machinery of death and the human face that endures the consequences, but also the larger sociopolitical system that produces capital crime in the first place and then mystifies its origins--then the death-sentencing process might just break from the weight of all the honesty.

This, indeed, would be a lot for individual lawyers to take on in an address to the jury. But it does suggest avenues of attack for the defense lawyer to attempt to neutralize these mechanisms of moral disengagement, if only simply by talking to jurors about them.[43]

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[43] For example, in *People v. Andrew Brown*, a California case, the attorney said:

> [Y]ou might not be looking at Andrew Brown as a human being any longer, as a person, with individualized traits, feelings, experiences. . . . A lot of emotional symbols have been thrown in the courtroom such as "gang member," a "sociopath." He is an "outsider." Those are the type of symbols that statrt to dehumanize somebody. He represents something you fear.

California Death Penalty Defense Manual, Vol. V: "Final Arguments," p. 28 (1993 Ed.)

While Haney is describing in clinical terms this process, we immediately recognize it as a scapegoating ritual, evidencing the same conditions that existed in the lynch mob, in the witch hunters, in the community or tribe which engaged in one form of human sacrifice or another for one reason or another. The focus on any particular set of arguments for the sacrifice, or the contemporaneous mechanisms available to the crowd to sanction it, blurs the historical commonality between all these practices—scapegoating—which I believe can be and ought to be dealt with directly.

It is not the case at all that Haney and his colleagues ignore the presence of myth and ritual surrounding the death penalty. As discussed in the first part of this paper, people who have thought nothing about scapegoating cannot avoid referring to the execution of criminals as sacrifice, ritual and mythical. Just as Haney, in his conclusion, alludes to the "mystification" of the causes of murder—the cause of the violence and the crisis which impel the jury to kill the accused—he sees the presence of the mythical throughout.

> My implicit premise in this discussion is that, *absent the mystification that generally surrounds capital punishment in our society* and without the specific mechanisms of disengagement that separate capital jurors from the realities of their decisions, a system of democratically administered death sentencing would not be possible.[1449]

(*Italics added*) He refers repeatedly to executions as "rituals of killing" and has separately written about several myths involved in the system of death sentencing in the United States.[44] So, even in emphasizing the "mechanisms of disengagement," Haney does not discount the mythical. But the analysis, which nearly completely accounts for the process by which communities select victims and unify themselves around them with homicidal violence, is lacking a full explanation of the function of this "mystification" which is apparently presumed to belong to a parallel but less precise discipline.[45]

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[44] Haney, *supra* n. 37, describes these myths:

> The first myth, what might be called the myth of demonic agency, serves to deny the humanity of the persons who commit capital murder, substituting the heinousness of their crimes for the reality of their personhood. The second one -- the myth of "super due process" -- implies that the legal procedures under which capital punishment is administered are so extraordinarily fair and solicitous of the rights of capital defendants that only the truly deserving are finally executed. The last one -- the myth of civilized exterminations -- saves proponents of capital punishment from the psychologically difficult (for some, insurmountable) task of coming face to face with the acts they sanction. In each instance, these myths function to blur the core realities of capital punishment -- the social causes of capital crime, the normative inadequacies of capital trials, and the horror of state-sanctioned executions. Thus, at one end of this lethal process we are led to believe that those whose lives will be taken are less than human, and at the other end that the actions finally taken in our name by the state are other than barbarous.

[45] From his perspective, Haney treats the circumstances giving rise to death verdicts as "extraordinary." To ensure its viability, the system of death sentencing in the United States depends on the

Looking just at the social-psychological elements of the process, however, Haney is surprised at how impervious it is: after all, we can show that the arguments for the use of death as punishment are wrong, and that there is no utility in its individual use, but the citizenry, and the jurors among them, are not moved by the empirical reality of this.

> The fact that each year since 1980 two to three hundred juries in the United States have been able to traverse the moral and psychological barriers against taking a life (*footnote omitted*) suggests that the system is surprisingly effective in overcoming natural inhibitions and creating an atmosphere conducive to lethal judgments.

From a different perspective, from the perspective of the mythical features of the death penalty, seen as but a current prominent iteration of human sacrificial scapegoating, there is no surprise in its magical grip on the community. In the death penalty, just as in other sacrificial homicides in the past, our culture finds the security and comfort it craves in the face of the tension and violence within our culture. The jury, like the "crowd," is easily mobilized, is prepared to be mobilized, to pick up the stones. While this is the source of the surprising, but not surprising, power of the ritual, the realization of this may be the key to its dissipating its power. For while it has been common for modern scholars to discount the ritualistic underpinnings of culture, the behavior of culture is still only fully explicable in such terms.[46]

B. The role of the defense lawyer: "mitigation"

The role taken by criminal defense lawyers in modern death penalty cases at the penalty phase of the trial, the role imposed on them by the legal procedures involved, is to present "mitigation" evidence.[47]

> creation of an extraordinary set of psychological conditions. These conditions must prevail in capital trials to facilitate or somehow "enable" the participation of ordinary people in a potentially deadly course of action.

[46] Thus, although the clinical psychological analysis, represented by Craig Haney, may parallel and resonate with a Girardian "scapegoating" analysis, there is a substantial paradigm shift here. It is reflected in the opposite views about how "surprising" it is that jurors can be mobilized to convict, for example. While Haney's premise that people are reluctant to kill may serve more of a rhetorical than scientific role in his presentation, the fact is that modern social science seems to take a different approach to the relationship between the mythical and the rational. While Mark Costanzo, in "Just Revenge," p. 168, refers to the anthropologist Bronislaw Malinowski as positing that "cultures turn to magic when reason fails" (Malinowski, *Magic, Science and Religion and other Essays*, 1954). Girard posits the opposite, that people turn to reason only when magic fails. "The invention of science is not the reason that there are no longer witch hunts, but the fact that there are no longer witch-hunts is the reason that science has been invented." *The Scapegoat* p.204.

[47] Death penalty cases are broken down into two phases. In the first phase it is determined whether the accused is factually guilty of a crime for which the death penalty id available. If found guilty of capital murder in that phase, there is a separate sentencing phase, usually before the same jury, or a judge, in which the state is allowed to prove "aggravating factors" and the defense allowed to present "mitigating" factors which jurors are

> Mitigating the punishment by humanizing the defendant is a direct attempt to overcome the dehumanizing aspects of the trial process and the case against the defendant that make lethal violence by the jury more likely.[48]

The mitigation case from the defense has been refined in recent years, under the "modern" death penalty, under which jurors are required by law to consider facts or circumstances which may counter the perceived need to execute the accused. In its best configuration, the victimization of the accused as a child, the intellectual and emotional deficits, the failure of the community, institutions, and the family to properly nurture him or her to responsible adulthood, as well as any good deeds or qualities which show merit to the accused, or his or her "redeemability" will be shown. Unfortunately this is not always done.[49]

But when it comes to explaining the actual function of such mitigation" evidence, in reaching a decision, the point is not only left unclear to jurors, it is left deliberately unclear. This is a result, partly, of the judge's instructions to the jury, in which jurors are not actually directed to consider "mitigating evidence" as actually weighing in the negative with respect to imposing death. There are two reasons for this.

First, judges, in the instructions given to jurors at various stages of the case, instructions which are constrained by judicial decisions, do not require jurors to actually regard "mitigation" evidence as detracting from the case for death or supporting the case for life.[50]

Second, when lawyers argue to jurors about the import of the mitigation evidence, the tendency is to take it for granted that the jurors will understand that such evidence weighs in

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expected to evaluate in determining whether a death sentence ought to be imposed.

[48] Haney, n. 42 at 1456.

[49] As Craig Haney points out

> One final consideration helps to explain the above data and, in many cases, adds another morally disengaging dimension to the capital trial. An effective case in mitigation--one that genuinely humanizes a capital defendant--requires deep commitment to one's client, a moderately sophisticated grasp of human psychology, and hundreds of hours to assemble. Yet typically impoverished capital defendants are too frequently represented by inadequately compensated, inexperienced, and sometimes incompetent court-appointed attorneys who are unable or unwilling to gather and present this kind of evidence.

Haney, *supra* n. 42 1458.

[50] In his dissent in the case of *Morgan v. Illinois*, 504 U.S.719, 112 S.Ct. 2222, 2230, 119 L.Ed.2d 492 (1992), the case establishing the right of the defense to assurance that jurors would "consider" mitigating evidence, Justice Antonino Scalia reminds us:

> Illinois law permitted each juror to define for himself whether a particular item of evidence was mitigating, in the sense that it provided a "reason] why the Defendant should not be sentenced to death."

favor of a life sentence rather than death.

A good example of this comes from an exemplary—and successful— jury address by Stephen Bright, a preeminent capital defense lawyer with the Southern Center for Human Rights, in Atlanta, and an influential legal author on issues related to the defense of death penalty cases. Here I will just quote the passages which argue on the effect of the "mitigation" evidence, which was extensive concerning the childhood abuse and exposure to abuse experienced by the accused. These are the primary arguments advanced. Note that no argument is typically made against the practice of the death penalty. Such arguments are considered ill-advised, because only jurors who have accepted the validity of the use of death as punishment are allowed to serve on capital juries.

[From opening statement at penalty phase]

> . . . you go to look at mitigating circumstances—anything in fairness and mercy, anything about the life and background of the human being who is on trial—anything about that life that tells you whether this person is so beyond redemption that they should be eliminated altogether from the human community. Is this a person who is so bad . . . that we will destroy them, or is this somebody that can be severely punished by the sentence of imprisonment for the rest of his life?
>
> . . . What kind of life did he have compared to the kind of life that other people have? And what does that tell us in terms of understanding a part of what happened?
>
> . . . Mitigating circumstances are things about the life and background of the person that tell you who this person is and how do you punish them in choosing between these two punishments.
>
> . . . As I said . . . that doesn't make anything that William did okay, but it's something that you can take into account when you think about how to punish William for the awful crimes that were committed.

[From closing argument at penalty phase]

> . . . The evidence that we put in is offered to you to help you to understand what happened.
>
> . . . feelings of mercy and sympathy that flow from the evidence are things you can appropriately take into account in deciding how to sentence William. And in a way I think that instruction is particularly important because it squares up with what we've all learned growing up as Christians about the place that mercy and compassion have in our life.
>
> . . . And [the judge] will tell you . . . about the kind of evidence that you heard here, anything about the life and background of William, anything about his environment, anything about his behavior in prison that makes

> him a person less deserving of the ultimate and extreme penalty of death.
>
> . . .You can look at whether this is someone who had every opportunity and made the decision to go into a life of crime. Or whether we are talking about somebody . . . whose life was one nightmare after another. That's an appropriate thing to consider.
>
> . . . We're not saying that . . . it made what he did okay. It doesn't. But it tells us something about which of these two awful punishments . . . might be the appropriate punishment.
>
> . . . What kind of . . . life he lived and what kind of impact did it have? Does it account for everything, excuse everything? No. But did it have an impact? Does it tell us something that we want to know in sentencing the man? Of course.
>
> . . . And when you look at two ways to punish that young man, that's something that you can take into consideration.

As we see, mitigating factors are simply "presented" for the jury to evaluate its worth, with the hope that the jury's sympathy for the accused would be aroused.[51]

But jurors, especially those who agree in principle with the use of the death penalty, are not always impressed by these factors, and often take them to support the opposite conclusion. As Haney puts it,

> At times, a capital defendant's experiences may seem too foreign to provide the typical juror with the basis for any common understanding. . . . Many of these experiences are unrecognizable to the average person and, absent attempts to teach a different lesson, will instead convince jurors that the defendant has been rendered fundamentally and irredeemably different from them.[52]

Thus, the accused is "damaged goods" and disposable (fitting the profile used throughout time to select victims of collective sacrificial homicide). The deficits of the accused can also easily be dismissed as not adequately explaining the conduct of the accused because others are presumed to exist who have experienced the same difficulties and not murdered as a result. Advocates are enraged by this because it seems so clear to them that such mitigating evidence *means* that death

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[51] "But if we can identify with their struggles, if we are moved in our heart by the things that made them this way, and realize that they did not choose these formative experiences any more than they chose the emotional consequences of having to grapple with them, then we *take the sum of that life*, and the terrible turn that it took, *into account* when deciding how to punish them." Haney, *supra* n. 37, 609. Another example of this: "[The mitigation evidence] is intended to see of you have understandng or mercy toward this human being, a fellow citizen that sits before you whose life you have to decide." California Death Penalty Manual, Vol. V "Final Argument" p.56, 70 (1993 Ed.)

[52] Haney, *supra* n. 42, 1465-66

is less warranted, that the accused is relatively less blameworthy.

The problem is that jurors are confused about what exactly to do with mitigation evidence. There is no question about where the evidence of bloodshed, pain, and terror in the criminal act leads. But the "mitigation" evidence does not directly counter this evidence or the reactions to it, and may be seen as irrelevant or even confirming of the appropriateness of execution. The legal instructions to the jury about this call upon them to "consider" it all, and to "weigh" the "aggravating factors," generally facts about the crime and negative facts about past misconduct of the accused, against the "mitigating facts." These instructions are complicated by additional rules about the "burden" and "standard" of proof. Jurors really don't understand these instructions.

The instructions provide no mathematical model by which an answer can be calculated by adding and subtracting "factors" from each other. The instructions do not even tell jurors that "mitigating" facts must be taken as actually weighing against a death sentence. Aggravating facts (including other contextual forces pointing toward death) and mitigating facts are apples and oranges to jurors.

> [T]he convoluted verbiage of the capital jury instructions . . . confuses jurors about the critical concept of "mitigation," on which all life verdicts essentially depend, and fails to provide an intellectual or moral framework, or even an orderly cognitive process, by which life verdicts can be consistently reached.
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> * * *
>
> Because few people have any preexisting framework for understanding and applying the key concept of mitigation, it is more likely to be discounted or ignored in the jury's decisionmaking process. For example, after having heard the sentencing instruction read to them three times, less than half of our subjects could provide even a partially correct definition of mitigation. Almost a third provided definitions that bordered on being uninterpretable or incoherent, and slightly more than one subject in ten was so mystified by the concept that he or she was unable to venture a guess as to its meaning. [*footnotes omitted*].[53]

Some research on actual jurors suggests that very little attention is paid to the "mitigation" case, though it is considered critical by the advocates. *See,* Geimer and Amsterdam, "Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases," 15 AM. J. CRIM. LAW 1, 27(1988).[54]

Since jurors don't understand the instructions, and because the instructions do not

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[53] Haney, *supra* n. 42, 1483-84

[54] Jurors tend to disregard "mitigating factors" which are not directly operating on the accused at the time of the offense. California Death Penalty Defense Manual, Vol. V: "Final Arguments," p. 16 (1993 Ed)

actually provide much help, jurors are left free to respond intuitively. The problem is the divergence in intuitive reaction to mitigation evidence. Why does it arouse sympathy in some, and fear or detachment in others. Why are some persons punitive in orientation where others see a therapeutic deficit?

I believe that the key to this divergence lies in the acceptance of, or dependence upon, scapegoating as a vehicle for feelings of unity or well-being in the community, which relates to the ability of the juror to accept the notion that the community, and therefore all of us, are also "blameworthy."

> [D]emonizing the perpetrators of certain kinds of crimes gets the rest of society off the hook for attitudes and practices that are widespread but which implicitly promote and condone violence. For example, as one theorist has argued, "in myriad ways, the culture regularly doublethinks a distance between itself and sexual violence, denying the fundamental normalcy of that violence in a male supremacist culture and trying to paint it as the domain of psychopaths and 'monsters' only." And, because the media presents us with the most distorted and extreme possible versions of violence -- individual grotesques that bear so little relationship to the rest of us that no one in the audience can identify with them -- we are saved the unpleasant task of confronting the potential for violence that we all share.
>
> In addition, it becomes justifiable "to kill those who are monsters or inhuman because of their abominable acts or traits, or those who are 'mere animals' (coons, pigs, rats, lice, etc.) . . . ." because they have been excluded "from the universe of morally protected entities." But locating the causes of capital crime exclusively within the offender—whose evil must be distorted, exaggerated, and mythologized—not only makes it easier to kill them but also to distance ourselves from any sense of responsibility for the roots of the problem itself. If violent crime is the product of monstrous offenders, then our only responsibility is to find and eliminate them. On the other hand, social histories -- because they connect individual violent behavior to the violence of social conditions -- implicate us all in the crime problem.[*footnotes omitted*] [55]

As a result, a more explicit view of the role of mitigation is avoided by the lawyer addressing the jury, because of the fear that the jury "can't handle the truth": "mitigating" facts are facts which show that the threat of violence perceived in the accused are in fact the product of our society's dependence on violence and the numerous ways, no doubt exaggerated in the case

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[55] Haney, *supra* n. 37, 558. Charles A. Gessler, in his "Outline of Penalty Argument" section of the California Death Penalty Defense Manual, (Vol. V: "Final Arguments" (1993 Ed.) introduces the area of argument concerning mitigation evidence relating to the environmental and nurturing deficits of the accused with the question "Is there shared blame?"

of the accused, in which we tolerate and generate the objectification of the individual for the sake of our individual or collective gratification. That is, as it has been put, "society gets the criminals it deserves." This accused is here for no better reason than that he or she has been selected to represent the violence and crisis in society which we do not want to take responsibility for ourselves. Though guilty in a factual sense of a crime, the accused is innocent with respect to the purpose for which he is sacrificed, as the cause of violence in society, and in fact the accused—and what he hath wrought—is the product of our collective violence. The accused is less blameworthy for the reason that we are ourselves all blameworthy.[56]

Accordingly, the prevailing wisdom is that it would do no good to blame society, that the theme of "free will" and that the corresponding "Biblical" notions of retribution as "justice" are too easily triggered by such an approach. Instead, "mitigating" facts are often thrown out to the jury with the almost magical hope that the subliminal message will sink in and undercut the resolve of jurors to do what they are prepared to do, or may even feel obligated to do. Unfortunately, studies of jurors' behavior shows that they have no problem in individual cases in entirely discounting objectively overwhelming "mitigation" evidence.

So lawyers can frame the question of mitigation in terms of the degree of "moral responsibility" of the accused, a degree that is supposed to be affected by the emotional, cognitive and developmental deficits, without explicitly referring to blame shifting. But this is difficult to do without leaving a gaping hole in the logic of the argument.[57]

With daring and eloquence, lawyers appeal to the jurors sense of mercy as an affirmative virtue, and affirmative religious prescriptions.[58] but careful to avoid confronting the opposite

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[56] "Yet, in many ways, these are stories much more about us, about our priorities as a society, about the bitter fact that we somehow feel more comfortable expending scarce resources on the process of killing than on the task of creating lives worth living. These social histories seem to say much more about these things than they do about individual human evil and abject depravity. Indeed, that may be exactly why such stories are so difficult to tell." Haney, supra n. 37, 609

[57] In an argument that began "At this point in time, as you are well aware, your decision is, is he, ultimately, morally responsible? Is he ultimately responsible in the manner that warrants the death penalty . . .?" the attorney came around to indicting others: "I feel the anger many of you are feeling toward Andrew Brown. . . . That anger should fairly be leveled at many people . . . Many people are responsible for what you have heard about in this case. Many people are responsible for producing that human being that sits in this courtroom." California Death Penalty Defense Manual, Vol. V: "Final Arguments" p. 25, 27 (1993 Ed.)

[58] An excellent example is that of Barry Morris' summation in in People v. White (Alameda Co., Cal) (Cal. Death Penalty Defense Manual, Vol V., p. 127 *et seq.*:

> Do I need to argue to you , ladies and gentlemen of the jury, that cruelty breeds cruelty, that hatred only causes hatred, that if there is any way to soften the human heart, if there is any way to rid the world of evil and hatred, it is not by doing evil, it is not by hating? If there is a way, it is through charity. If there is a way, it is through love. If there is a way, it is through understanding.

Morris later reminded the jury of the Commandment "Thou shalt not kill," and the words "Vengeance is mine." He reminded them of "the sacred idea that no man is beyond redemption." This is powerful argument as to the

instinctive impulses which work in the opposite direction.

An interesting alternative attempt to explain the role of mitigation without touching on its "blame reversal" component is presented by Gregory Paraskou, a California lawyer. He argues to the jury that the mitigation evidence is offered in order to provide a basis for favorable comparison between the accused and the "worst of the worst" for whom the death penalty is intended. He would argue as follows:

> And I suggest to you that this weighing process [weighing aggravating factors against mitigating factors] is a means by which you are to separate . . . .the worst of the worst. . . . those criminals who are so bad in comparison with other people who commit who commit [capital murder] that death is the only appropriate response.

Rather than challenge the idea of killing a person, this argument validates it, but just not for the accused. The practical problem with the argument, clever as it is, is that at some point the jury will run into the same "apples to oranges" problem comparing the mitigating factors in this case to aggravating factors in some other hypothesized (or highly publicized, *i.e.* Ted Bundy, Tim McVeigh) case which is raised for comparison. The argument is exposed to challenge as a "sleight of hand" because the possible existence of equivalent "mitigating facts" in those hypothesized cases was not mentioned, and yet was overlooked by the jurors who voted for death in those archetypal cases. Nevertheless, the argument does succeed in bringing mitigation to bear without the juror immediately think about the responsibility of society for the creation of these "born criminals."[59]

Many advocates do return to focus on the jurors themselves, and their verdict as more of an expression of who they are—or really who they *wish* to become, individually and as representatives of the community—than what the accused deserves.[60] While qualities such as mercy and forgiveness are understood as affirmative virtues, they are also the converse of vengeance and retribution, the engines behind scapegoating. Indeed, the counter arguments by prosecutors—essentially that the jury should show the same mercy to the accused which was shown to the victim of the crime—is a total abnegation of mercy and forgiveness as virtuous

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dysfunctionality of violence and hatred ~~that~~ that it not only does no good, but also perpetuates itself. However it falls short of exposing penal execution itself as a form of hatred or violence, and the accused as the scapegoat, implicit though that is in the argument.

[59] The very notion of the "born criminal" and other eugenic theories of biological causation of social problems and inferiority is fits well with a discussion of scapegoating in society. *See*, Nicole Hahn Rafter, *Creating Born Criminals* (Univ. of Illinois 1997).

[60] Charles A. Gessler, *supra at n. 55,* contemplates the advocate asking jurors about themselves, and society, in th e context of what we aspire to be: "Who are you as a person . . . as a society." See also page 42 of the closing argument of Wendy Downing, in *People v. James Edward King* (Contra Costa Co.,California) in California Death Penalty Defense Manual, Vol. IV: "We are facing intimate questions about ourselves, really, in this decision. . . . Do we, after calm, rational, thoughtful deliberation needlessly kill again?"

conduct, and total commitment to creating a new victim, the accused-as-scapegoat.

References to mercy are also more likely to be successful when they are not in the abstract, but tied, instead, to "the juror's recognition of human frailty—both theirs and the defendant's."[61] That "frailty" is a pointer to collective responsibility for the evil in our community, and signals the fact that accused is not the cause of it nor would the extermination of the accused cannot cure it. However, though advocates frequently touch on these issues more or less in passing, as I have noted, they rarely get beyond generalities to explain in detail *how* their own character is implicated or why they should be "merciful" in the case. It is left to the jurors to figure out how or whether the "mitigation" "works."

C. The scapegoating factor

Looking at the execution of convicted murderers as a scapegoating ritual—with direct lines of ancestry to the foundation of our culture and social and religious institutions—adds substantially to our understanding of the urge to punish, and the ease with which jurors are mobilized to use the power given to them to put the criminal to death.[62] There is no longer any paradox arising out of the presumed reluctance to be personally involved in killing (both in the abstract and in certain policing situations) and support for the death penalty—both in general and in individual cases. No longer is there mystery in the otherwise surprising power of the death penalty machinery.

But we must take this further than providing a useful explanation for what *is*. Appreciation of the linkage between human sacrificial rituals of the past and the "modern" death penalty in the United States does more than explain the psychic pressure to kill the killer, and the imperviousness of the community to empirical evidence of the falsity of the functional and emotional rationales for the practice. The scapegoating analysis provides a valuable, and perhaps the only, key to releasing the "mob"—the jury—from its killing frenzy.

As I noted before, a core premise in *The Scapegoat* is that scapegoating can be destroyed by the simple revelation that the victim is a scapegoat. How is this?

Recall that, according to Girard, the scapegoating mechanism must remain hidden in order to be effective. People must not be aware of the fact that they are making a scapegoat of someone. It is hidden through the presumed legitimacy of the sacrificial act, especially if the

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[61] California Death Penalty Defense Manual, Vol. V: "Final Arguments," p. 13 (1993 Ed)

[62] Not only do I think that the power of being made a member of the "mob" is necessary to account for the willingness to kill which might otherwise be surprising, I believe that the dynamics of a group mobilized against a scapegoating victim is substantially different, and more powerful indeed, than the forces which prepare a soldier to kill in battle, in which far more effort and "training" has to be undertaken to render the soldier homicidal. *See,* Lieutenant Colonel Dave Grossman, On Killing: The Psychological Cost of Learning to Kill in War and Society 156 (1995) and other sources listed at Haney, n. 37 at n. 24. A most famous literary exploration of the banality of human sacrifice is found in Shirley Jackson's story, "The Lottery" published in the New Yorker in 1948 and found now in a collection of the same name. (Farrar Strauss and Giroux 1982)

victim has been accused of doings something wrong. The legitimization of the scapegoating mechanism is maintained by political and legal institutions, the new "religions," even if by arguments that can be shown as fallacious. If people become conscious, however, of the fact that the sacrifice is merely a device to vent the collective violence in the community, and to unify the community in a fashion in which the actual guilt of the accused is irrelevant, the mythical power of the sacrifice (and of the victim) is destroyed.

Before I quoted Prof. James Williams' summary of Girard's discoveries:

> The third great moment of discovery was Girard's encounter with the Bible: *the Jewish and Christian Scriptures, especially the New Testament Gospels, are singular. They represent a revelatory movement away from scapegoating.*

The movement away from scapegoating in the Hebrew and Christian texts was the transformation of historical and mythical accounts away from the perspective of the persecutors and toward that of the victim. The tales of the sacrifice of innocents were being passed on, in which the persecutors were exposed as unjust, undercutting the validity of the mythology of scapegoating.

In this the story of Jesus is climactic. He always sided with the victim and against the "crowd." By surrendering himself to homicidal sacrifice he exposed its inner workings. While the scapegoat mythology was protected at the time by the accusations of guilt, and served the function of uniting the political establishment, (Caiaphas the high priest said that it was necessary for Jesus to die to save the nation. John11:49-50), the lasting message of Jesus' execution is the exposure of the scapegoat dynamics on which society had depended.

Thus, those Biblical passages which point to the innocence of Jesus, and describe him as the "sacrificial lamb" are strong cues as to the innocence of scapegoat victims generally. One can take literally Jesus' exclamation, "Father, forgive them; they do not know what they are doing." (Luke 23:34) "It says something precise about men gathered together by their scapegoat. *They do not know what they are doing. . . .* In this passage we are given the first definition of the unconscious in human history." *The Scapegoat,* 111.

But of more focused interest are those situations in which Jesus intervenes to overturn the scapegoating process, and does so by exposing its operation. One of the most powerful of these stories is in John, Ch. 8, when Jesus is confronted with the crowd poised to stone the adulteress.

> ***2*** Early in the morning he came again to the temple; all the people came to him, and he sat down and taught them. ***3*** The scribes and the Pharisees brought a woman who had been caught in adultery, and placing her in the midst ***4*** they said to him, "Teacher, this woman has been caught in the act of adultery. ***5*** Now in the law Moses commanded us to stone such. What do you say about her?" ***6*** This they said to test him, that they might have some charge to bring against him.

> Jesus bent down and wrote with his finger on the ground. ***7*** And as they continued to ask him, he stood up and said to them, "Let him who is without sin among you be the first to throw a stone at her." ***8*** And once more he bent down and wrote with his finger on the ground. ***9*** But when they heard it, they went away, one by one, beginning with the eldest, and Jesus was left alone with the woman standing before him.[63]
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> ***10*** Jesus looked up and said to her, "Woman, where are they? Has no one condemned you?" ***11*** She said, "No one, Lord." And Jesus said, "Neither do I condemn you; go, and do not sin again."

This passage can at least be taken as an example of the fact that it is inconceivable that Jesus would take part in the process of imposing a sentence of death, in literal response (of course there are many others) to the "biblical" arguments for death. But on a deeper level this is an example of the fact that exposing the scapegoating mechanism, and its lie, is a means to forestall violence and scatter the mob that was prepared to kill. The simple—but subconsciously complex—observation that the gratification derived from killing the scapegoat, the ritualized feeling of relief that the violence of the crowd will cleanse society of the sin within it, is an illusion, robs the ritual of its power. This is subconsciously complex because we have little insight into the extent to which our entire culture is founded from the very earliest, most primitive point, upon this scapegoating process. Yet, the examples we see, such as Jesus' defense of the adulterous woman, show that, subconscious or not, realized or not, the spell can be broken.

Of course defense lawyers for years have understood the secret of exposing the negative mental operations dictated by culture as a way to diffuse their impact on an accused. For every reason jurors might have to condemn the accused, lawyers have tried to neutralize the effect by simply exposing it. If the issue is race, the fearsome appearance of the accused, the brutality of the conduct, the weakness of the victim, lawyers have learned to talk with jurors about the lawyer's own racism, fears, and repulsion aroused by the event. Focused clinical analysis like that of Craig Haney has helped advocates to identify these issues in need of exposure. What lawyers did not know is *why* this works, and therefore we did not have a systematic way to build on this discovery. With the help of this new scholarship we can understand that our emotional reactions to the violence of the accused—however rationalized or legitimized these reactions might be in terms of the legal or political culture—are dictated by the scapegoating mechanism on which culture was founded, and that it is that mechanism which we must attack.

I also think about the evidence that the accused has expressed remorse for the crime is

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[63] In the King James version, the passage reads: "And they which heard it, *being convicted by their own conscience*, went out one by one, beginning at the eldest, even unto the last: and Jesus was left alone, and the woman standing in the midst."

given stronger weight by jurors than the usual mitigation evidence.[64] Why is this? Are there rituals of human sacrifice in which the victim is allowed to escape death, depending on their response to the threat? The defendant's expression of remorse reflects his acceptance of guilt. Jurors may intuit that mercy toward the accused in that situation does not imply assessment of guilt upon themselves, as the accused has accepted guilt. Does this mean that the need for the scapegoating sacrifice diminishes where the accused volunteers remorse (guilt)?

D. Dealing with the scapegoating

It is the task of every defense lawyer in a capital case to stop the murderous crowd. Does this and other examples from the Bible and literature provide help?

A first step is to eliminate the functional theories for execution, such as "deterrence" and "necessity." Attorney Barry Morris, in People v. White (Alameda Co., Cal) (Cal. Death Penalty Defense Manual, Vol V., p. 123-25) asked jurors "What good would it do, what good would be accomplished by putting Freddie Lee White to death?" From there a number of utilitarian theories can be defused. And Morris proceeded from there to affirm positive principles of charity, love, and mercy, to replace the dysfunctionality of executions.[65] But most importantly, at the conclusion of his address, he attacked the scapegoating process:

> Vote for life because life is sacred, so that it may be said, when the final chapter is written in the sage of "The People of the State of California versus Freddie Lee White, that when the choice was put to twelve men and women . . . that they rejected the siren call of vengeance for vengeance sake, that they turned a deaf ear to the plea for hatred, that they rejected the lust for more spilled blood, that when given a chance, they chose life over death.

An example of a jury address at the penalty phase which focuses precisely on components of the scapegoat mentality is found in John Philipsborn's argument in *People v. Victor Keit Wu* (California 1996).[66] In the first of two "starting points" to his remarks, Philipsborn addresses the "unique power" given to the jury to decide to kill. He draws a linear historical perspective, referring to the power to impose death as "through the ages . . . the most powerful element in society." He then refers to "mob" mentality which allows a group to determine that a person "deserves to die" pointing out that it is not an aggravating factor, or a legal basis for imposing

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[64] *See,* Geimer and Amsterdam, "Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases," 15 AM. J. CRIM. LAW 1, 40 (Table 3) (1988) ("Demeanor" of the accused was operant factor for 32% of death jurors); Haney, C., Hurtado, A., and Vega, L., *Enlightened by a Humane Justice: Public Opinion and the Death Penalty in California*, Unpublished Manuscript, University of California at Santa Cruz) (Absence of remorse is factor for 72% of those who would impose death).

[65] See n. 58, *ante*.

[66] Reprinted in the California Death Penalty Defense Manual, Vol. IV "Final Argument Manual"

death that one "deserves to die." He points out that few people who commit murder, even murders eligible for the death penalty, are sentenced to death, and that other crimes for which jurors might say the offender "deserves to die" are not eligible for the death penalty—all of which establishes the random and arbitrary nature of the selection process, something which is typical of the selection of victims of sacrifice in all cultures. This is critical to exploding the myth that the guilt of the accused for the offense provides a rational justification of putting him to death.

He challenged the jury: "who will be better off if you execute Thuan Wu?" This question and the statements which follow undercut the functional justifications underlying the death penalty mythology. He concludes with an admonition that whether the jurors vote for mercy "depends a lot on who your are as a person." While this oration touches on many of the elements of the scapegoating mechanism, and undercuts many of them, it does not make an explicit or conscious point that, once the myths associated with the death penalty are defused, the only thins left is a symbolic gesture that carries gratification for the jury under the unacceptable rubric that the accused just deserves to die.

Philipsborn's co-counsel takes the matter a few steps further. He acknowledges the fear of violence in the community: "We are all concerned how close that violence comes to us." Immediately he again points to the lack of functionality of the death penalty, labeling it as "violence" and invoking the moral and religious wisdom that violence is not an answer to violence: "But I do suggest to you that there must be abetter answer in this case than to say this violence deserves more violence." All at once he condemns the execution as an act of violence, eradicating any distinction between the death penalty today and other forms of collective killing, and affirms positive non-violence principles heavily rooted in the teachings of major religions.

He restates the role of sacrifice, however subliminally: "I know some of us think about revenge. Maybe it is an expression for a safer world, maybe they want somehow to have a world free from fear." The argument could be completed: "for eons human societies have been slaves to the myth that sacrificing a few persons would reduce the violence or crises within society. But only the next culture recognizes the previous practice as merely scapegoating, and laughs at the ignorance of the people who thought that the various forms of human sacrifice would protect them from what they feared—which ineradicably was within all of them. While laughing at their forbearers, each society ignores their own implementation of the same practice under a different name with different justifications."

Capital defense lawyers are aware of the power of Gospel passages which cue the reader to the innocence of the victim, and use them, often obliquely. Stephen Bright finds a way to use the "least of these" theme of Matthew 25, but in the context of validating the ministry of the defendant's spiritual advisor, a Baptist minister. But this is merely an excuse to throw in the powerful imagery of Jesus as the scapegoat, as the victim, and identification of the accused with the innocent Jesus. Surely the advocate in this example hopes that Matthew can carry the day with the powerful message hidden within the text, even though it was ostensibly presented for another purpose.

The question to be determined, however, is whether a direct confrontation of the use of capital punishment, in general, and in this particular case, as a scapegoat mechanism, can more

powerfully undercut the impulse to punish with death. Can we use directly, and in developing the structure of our argument, the Biblical texts which eschew sacrifice. Can we tell the jury that the accused is simply a scapegoat and demonstrate this, with confidence that that will be at least as effective as any other means of persuasion?[67]

More important, can we equip the individual defense lawyer to bring this argument to the jury no matter what the factual scenario? If we are to do this, then those who are familiar with this analysis will have to be prepared to lend a hand to the defense lawyers, in analyzing their cases and in preparing compelling utilization "mitigating facts," stories, themes, images and text. We need help to catalog those passages, like Jesus' rescue of the adulteress, which specifically convey the drive home the Revelation that the accused is only a scapegoat. We need to help lawyers talk to jurors about these passages, and the Passion itself, in a way that effectively exposes, the scapegoat mechanism in the death penalty myth, and thereby undercuts the jurors' willingness to resort to it.

There are also other religious traditions in which this theme can be traced, and it will be necessary to expose sources for such examples.[68] This is especially important in cases where the focus ought to be more on the anthropological than revelatory side of this phenomenon, juries or mixed religious backgrounds.

I propose that lawyers speak directly to jurors about the mechanisms for moral disengagement described by Haney, and the myths of the death penalty and especially its concealed scapegoating function. I believe that the lawyer can lead the jury on a historical trek, tracing the lineage of modern collective homicides to the ritual executions of the past, and then put the jury in the role of the "detached observer" who is about to witness an act of collective violence and is offered an unverified, unverifiable (unfalsifiable) explanation for the threatened action. But lawyers will need the help of scholars and theologians and ministers to perform this task that has proved so elusive and daring for even the best of our advocates to attempt directly, even though it is clearly the message they want to send.

Conclusion

> The wanton killing must stop before it makes a mockery of the civilised, humane and compassionate society to which the nation aspires and has constitutionally pledged itself. And the state must set the example by demonstrating the priceless value it places on the lives of all its subjects, even the worst.
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> Didcott, J. of the South African Constitutional Court

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[67] Of course the huge danger in this business is in the superficial use of this as a mere tactic, without its total integration into a through presentation of a "mitigation" case. The last thing to do is to suggest that the processes which have evolved for the humanization of the accused be abandoned or overlooked.

[68] Some examples are revealed in the *Our Oriental Heritage*, the first volume of *The Story of Civilization* series by Will and Ariel Durant.

Capital punishment is human sacrifice. It is technologically updated from its antecedents, but homicidal scapegoating nonetheless. It has always seemed easier to burn a person at a stake or on an altar or in an electric chair than to do the hard work of addressing the real problems of society which scapegoating is meant to hide. As a practice which epitomizes the dependence of our culture on scapegoating, the death penalty must be a focus for effort by those committed to the Revelation of the Gospel and to freeing society of the "imprisonment in the system of mythological representation based on the false transcendence of a victim who is made sacred because of the unanimous verdict of guilt."

It will be said that God or the laws of God demand an eye for an eye, a life for a life. But countless members of the human family conclude from their encounter with the Divine that the true God does not want the murderer murdered and, any attempt to choose one image of divinity over another to garner authority to kill is self-evidently the establishment of one religion over another.

The use of scapegoating does not in fact to solve any problem. No problem was ever solved by human sacrifice, despite the transitory sense, for some, of gratification that some step had been to address the current crises in society. The fact that no rational relationship exists between solving the problem and killing this person is what categorizes penal executions as sacrifice of a human scapegoat. In the process we avoid dealing with the real causes and real solutions to the problem.

If we are to eliminate victims, we need to eliminate executioners. In this, the religious, theological, and academic community will play an indispensable role in equipping our paracletes to protect the victim.

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