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## Reimagining the Death Penalty: Targeting Christians, Conservatives

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## Reimagining the Death Penalty: Targeting Christians, Conservatives

SPEARIT†

ABSTRACT

This Article is an interdisciplinary response to an entrenched legal and cultural problem. It incorporates legal analysis, religious study and the anthropological notion of “culture work” to consider death penalty abolitionism and prospects for abolishing the death penalty in the United States. The Article argues that abolitionists must reimagine their audiences and repackage their message for broader social consumption, particularly for Christian and conservative audiences. Even though abolitionists are characterized by some as “bleeding heart” liberals, this is not an accurate portrayal of how the death penalty maps across the political spectrum. Abolitionists must learn that conservatives are potential allies in the struggle, who share overlapping ideologies and goals. The same holds true for Christians—there is much in the teachings of Jesus to suggest that he aligned more with forgiveness than capital retribution. As such, abolitionists would do well to focus on these demographics more earnestly than in the past. The notion of “culture work” underscores these groups as natural allies in the quest to end the death penalty.

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A great irony in abolitionist messaging inspires this Article, namely, that abolitionists have failed to get much mileage out of the “Greatest Story Ever Told.” The narrative of Jesus of Nazareth stands as a powerful message to convey the problems inherent in capital execution, yet its explanatory power has gone largely untapped. Jesus was, by today’s standards, wrongfully convicted, tortured, and executed by the state. The simplicity of the story is breathtaking and sits at the core of abolitionist concerns: *An innocent man was put to death*. Like these religious considerations, there are others that reveal how political conservatives share overlapping space with their religious counterparts. For example, it is arguable that being anti-death penalty is both a religious and politically conservative posture. The Declaration of Independence suggests as much: “all men . . . are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.” The meaning here is clear—life is sacred—the Creator gives humans life, and nothing can alienate that right. Furthermore, the actual cost of taking a felon all the way to execution is a huge financial burden on taxpayers as well, which represents the epitome of big government spending and the most physically maleficent power the state can exercise over an individual’s life. Today’s death penalty embodies much of what conservatives disavow, and abolitionists must work to build upon these natural affinities and interest convergences to help bring the death penalty to its demise.

REIMAGINING THE DEATH PENALTY:  
TARGETING CHRISTIANS, CONSERVATIVES

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## I. THE STRUGGLE TO UPROOT AMERICA'S KILLING FIELDS

*The reality of the execution is also hidden. The most experience people have with execution is the headline that simply says, "[fill in criminal's name here] is Executed." Very few people have the misfortune of entering a room, sitting down behind a glass barrier, watching a state employee put IV's into the arm of a person, watching the person writhe, scream and cry, and five minute later be face to face with a corpse. Conveniently these facts of capital punishment are hidden from citizens.<sup>1</sup>*

There is an ongoing struggle to end the death penalty in the United States, which remains a stubbornly entrenched mode of punishment.<sup>2</sup> The death penalty has been a part of the country's national structure since the earliest origins.<sup>3</sup> The Fifth Amendment in the Bill of Rights, for example, provides that no one shall be deprived of life without due process of law.<sup>4</sup> The First Congress created a number of capital offenses with mandatory punishment upon conviction in the Crimes Act of 1790.<sup>5</sup> Since then, aside from a brief

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1. Kevin Flanagan, *Against the Death Penalty*, ANTI DEATH PENALTY PROJECT, <https://www.ocf.berkeley.edu/~marto/adpp/flanagan.htm>.

2. Practically speaking, the death penalty operates in 30 states and the federal government, which has recently announced that it will resume killings after a nearly 20 year hiatus. Jacqueline Thomsen, *Trump Justice Department to Resume Federal Executions*, THE HILL (July 25, 2019, 10:25 AM), <https://thehill.com/homenews/administration/454700-justice-department-to-resume-federal-executions-for-first-time-in-16>. Of the killing states, half of them have produced over 90% of all executions. Even further, the vast bulk of these killings are done in only a handful of States in specific counties that include Harris County and Dallas County in Texas, Oklahoma County in Oklahoma, and Pima and Maricopa counties in Arizona. The vast majority of executions take place along the "bible belt" of the country, with only 9 states executing with regularity. *Executions Overview: Executions by County*, DPIC (last updated Nov. 14, 2019), <https://deathpenaltyinfo.org/executions/overview/executions-by-county>. Hence, although it is generally believed that the death penalty is legal in America, about 2/3 of the country is either not executing by law or virtually not participating in executions. These points provide a practical sense of the killing landscape in the country and go to show that the task of abolition is not as daunting as one might think.

3. Rory K. Little, *The Federal Death Penalty: History and Some Thoughts about the Department of Justice's Role*, 26 FORDHAM URB. L.J. 347, 365 (1999).

4. U.S. CONST. amend. V.

5. This Act provided death as punishment for a number of crimes, including

suspension of the death penalty nationally, the vast majority of the country's existence has operated under a normative attitude toward the death penalty. Thus, the battle to end the death penalty is not merely a legal struggle, but one that sits at the heart of American culture.

In common parlance, movements aimed at ending state killing fall within the general title of abolition. Earnest efforts to reverse the death penalty trace to the turn of the nineteenth century.<sup>6</sup> In court, death penalty statutes have historically been challenged based on the Eighth Amendment's prohibition on "cruel and unusual" punishment.<sup>7</sup> While the Eighth Amendment may be the primary constitutional hook for legal challenges, there is no singular line of thought that informs abolitionist thinking or that mobilizes abolitionist activity. While the multiplicity of rationales that animate opposition to the death penalty are more certain, it is useful to distinguish full blown abolition from the qualified variety, such as those who "are not opposed to the death penalty but believe the death penalty system is unfair and who seek a moratorium on executions until the system can be fixed."<sup>8</sup>

What follows offers a set of ideas about how abolitionists

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treason, murder, robbery, felony on the high seas, mutiny, piracy, hostility against the United States, among others. Crimes Act of 1790, ch. 9, 1 Stat. 112.

6. See Sheherezade C. Malik & D. Paul Holdsworth, *A Survey of the History of the Death Penalty in the United States*, U. RICH. L. REV. 693, 697 (2015) ("both religious leaders and enlightened idealists, such as Benjamin Rush, advocated for complete abolition of the death penalty.").

7. The cruel and unusual punishment clause of the Eighth Amendment has been upheld as applicable to the states via the Fourteenth Amendment. *Robinson v. California*, 370 U.S. 660, 667 (1962) ("[c]ruel and unusual punishment [is] in violation of the Fourteenth Amendment."); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 462 (1947). Prior to *Robinson*, the Supreme Court had never ruled on whether the Eighth Amendment applied to the states, and there was never a federal restriction on states inflicting "cruel and unusual" punishment. Today, however, abolitionist efforts are largely centered on this provision as a means of attacking death penalty statutes at the state and federal level.

8. Jeffrey L. Kirchmeier, *Dead Innocent: The Death Penalty Abolitionist Search for a Wrongful Execution*, 42 TULSA L. REV. 403, 404 (2006).

might rebrand and market their message. It is a call on the abolitionist cause to reinvent itself and make itself more relevant to a broader base of support. Christians are natural allies in the struggle, yet abolitionists have failed to harness the power of religion and failed to articulate a comprehensive and compelling religious message that is attractive to Christian sensibilities. Despite that abolitionists might be typified as “bleeding heart” liberals, this Article contends that this characterization is incomplete and misleading. A closer look reveals a number of conservative ideas and values that support abolition of the death penalty. Political conservatives are potential allies in the struggle, who have a stake in ending the death penalty as well. Abolitionists must capitalize on this point due to the current climate of the death penalty.

In recent years, killing criminals as a legal practice continues to wane,<sup>9</sup> and while this empirically is certain, less so is how much abolitionist efforts influence public and political decision-making.<sup>10</sup> To be sure, when it comes to public opinion, regardless of what the actual state of the law is, public support can rise and fall.<sup>11</sup> As a social matter, it can hardly be said that anti-death penalty movements are thriving or enjoy significant political clout. Whether one looks at law schools and universities, or even the public at large, there is little popular clamor for overturning the death

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9. See Richard C. Dieter, *The Future of the Death Penalty in the United States*, 49 U. RICH. L. REV. 921, 921 (2015); Samuel R. Gross, *The Death Penalty, Public Opinion, and Politics in the United States*, 62 ST. LOUIS U.L.J. 763, 771 (2018) (between 1999 and 2016, the number of nationwide capital killings shrunk from ninety-eight to twenty).

10. Hon. Paul G. Cassell, *In Defense of the Death Penalty*, IACJ J., Summer 2008, at 16 (noting that “death penalty abolitionists have made so little progress in challenging [the death penalty] head on.”).

11. Any notion of a smooth lessening of public support for the death penalty has been complicated. At the time Timothy McVeigh was executed, American support for the death penalty was somewhat feverish. Dawinder S. Sidhu, *On Appeal: Reviewing the Case Against the Death Penalty*, 111 W. VA. L. REV. 453, 469–70 (2009). Thus, even if support is generally in decline, public sentiment may change, particularly when heinous crimes stoke public sentiment.

penalty. For those extant university or social organizations, their existence may be largely due to the hard work of die-hards who carry heavy loads to keep the organization afloat. Without superpower speakers like Sister Helen Prejean or Hurricane Carter, the average death penalty or wrongful conviction event is not overflowing, and whose attendances are often filled with individuals who are already sold on the idea.<sup>12</sup> When such is the scenario, abolitionists are, in large part, in conversation with themselves rather than expanding the base. Instead of bringing more recruits into the fold, abolitionists have been preaching to the proverbial choir. This article contends that they need to focus on preaching to *real* choirs.

The closest the country has ever come to eliminating the death penalty nationally was in the early 1970s, when *Furman v. Georgia* put a moratorium on state killing. In this case, the U.S. Supreme Court held the death penalty as applied was a violation of the Eighth Amendment's prohibition on cruel and unusual punishment.<sup>13</sup> This decision marked a unique point in American legal history since the decision sent a majority of jurisdictions back to the drawing boards to redesign their statutes to accord with the mandates of the *Furman* opinion. Four years later, in *Gregg v. Georgia*, a torn Supreme Court handed down a decision that became the gateway to the modern era of capital killing.<sup>14</sup> This frontal attack on the death penalty, without doubt, came at the hands of a frustrated judiciary perhaps more than the lobbying of death penalty activists. Whereas previous abolitionist strategies focused on using courts as a solution to end the death penalty, it has been noted that more

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12. Ross Kleinstuber et al., *Into the Abyss: The Unintended Consequences of Death Penalty Abolition*, 19 U. PA. J.L. & SOC. CHANGE 185, 186 (2016) (criticizing abolitionists for adopting the language of and capitulating to the demands of death penalty proponents, and for failing to “challenge the very philosophical justifications that have sustained the death penalty.”).

13. *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972).

14. See *Gregg v. Georgia*, 428 U.S. 153, 207 (1976).



recent abolitionist efforts have begun to address legislatures rather than courts.<sup>15</sup>

In the last decade, the death penalty has suffered some legal setbacks. In general, states have been moving away from the death penalty, including in 2019 when New Hampshire became the twenty-first state to abolish, with Washington State doing so the year prior.<sup>16</sup> In 2016, the Pew Research Center found that for the first time in forty-five years, support for capital punishment fell below 50% of those polled.<sup>17</sup> There is further public disavowal due to botched executions and the politics of acquiring drugs for the killings. Horrific accounts of individuals at killings-gone-wrong include the condemned convulsing, screaming, and writhing in agony for prolonged periods of time. Moreover, there have been ongoing controversies involving some states and their attempts to use or obtain the chemicals used to make the “death cocktails,” litigation on behalf of prisoners,<sup>18</sup> as well as lack of cooperation by medical staff.<sup>19</sup> These and other developments have tarnished the death penalty’s name, and underscored that whatever swaying of opinion that has been achieved may be less the work of abolitionists and more about state incompetence in administering the death penalty itself.

Unsurprisingly, today’s popularity of the death penalty

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15. See, e.g., Austin Sarat et al., *The Rhetoric of Abolition: Continuity and Change in the Struggle Against America’s Death Penalty, 1900–2010*, 107 J. CRIM. L. & CRIMINOLOGY 757, 757 (2017); Austin Sarat, *The “New Abolitionism” and the Possibilities of Legislative Action: The New Hampshire Experience*, 63 OHIO STATE L.J. 343, 343 (2002).

16. *State v. Gregory*, 427 P.3d 621, 626 (Wash. 2018).

17. J. Baxter Oliphant, *Support for the Death Penalty Lowest in More Than Four Decades*, PEW RES. CTR. (Sept. 29, 2016), <http://www.pewresearch.org/fact-tank/2016/09/29/support-for-death-penalty-lowest-in-more-than-four-decades/>.

18. See, e.g., *Glossip v. Gross*, 135 S. Ct. 2726, 2731 (2015) (inmates failed in the quest to have a particular drug removed from use as a sedative for the lethal drug dose).

19. See Deborah W. Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*, 76 FORDHAM L. REV. 49, 49 (2007).

is at a major low point,<sup>20</sup> which makes the time ripe for abolitionists to capitalize on the moment and push to end the practice. Indeed, legislation and court decisions have shifted the tide against the death penalty, some of which is due to the above-mentioned botched executions and wrongful convictions.<sup>21</sup> “Not only are executions now extremely rare, especially in comparison to life sentences, but the death penalty is administered in an arbitrary, error-prone, discriminatory, and torturous manner.”<sup>22</sup> The timing suggests that abolitionists should try to capitalize on the moment by reimagining the death penalty as an issue that sits at the heart of conservative and religious politics.

This Article considers abolitionist prospects through a cultural lens, which, in turn, underscores the cultural impacts of the death penalty on American society. In the United States, the death penalty does not mean the same thing to everyone. Instead, marginal, minority communities are forced to engage with the death penalty as a much more menacing aspect of life and entanglement with the criminal justice system. For minority communities that disproportionately bear the burden of law enforcement, the threat of the death penalty plays a more prominent role, which warrants treating abolition as an aspect of culture. As such, the work begins with the assumption that there is a cultural phenomenon in America that may be generally understood as “death culture.” In the way it is intelligible to speak of “rape culture” as a discrete aspect of culture in American social and legal history, the same holds for the notion of death culture. There are different aspects of death

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20. See, e.g., Thomas Adcock, *A History of the Death Penalty in America*, 36 CORNELL L.F. 6, 8–10 (2010) (noting that by 2009, “the frequency of death sentences was clearly in a plunging trend, even in the execution-friendly South.”).

21. Malik & Holdsworth, *supra* note 6, at 709 (“recent botched lethal injection executions and the difficulty in obtaining lethal injection drugs have called into question the legitimacy of our most common execution method.”).

22. John D. Bessler, *The Concept of “Unusual Punishments” in Anglo-American Law: The Death Penalty as Arbitrary, Discriminatory, and Cruel and Unusual*, 13 NW. J. L. & SOC. POL’Y 307, 307 (2018).

culture, which include the knowledge, issues, and practices surrounding human death and killing, and human practices such as the death penalty, arms sales, mass killings, abortion, hospice, suicide, euthanasia and other areas of concern. As such, abolition might be rightly characterized as a subspecies of death culture and a suitable subject to consider under the notion of culture work.

## II. CULTURE WORK TO SURVIVE AND THRIVE

*Recording songs, dances, and country with audio and video equipment is part of the compromise Warumungu people are willing to make as they seek both cultural preservation and innovation.*<sup>23</sup>

The concept of “culture work” offers insights into how death penalty abolitionists might gain greater momentum, and ultimately, attract support sufficient to end the death penalty. As a theoretical lens, this concept affords a glimpse into the predicament of modern-day abolition and points to prospects for expanding the movement to other sympathetic audiences. Although there has been little scholarly attention paid to this novel concept, it is nonetheless critical for gaining insight to this aspect of American culture. As the last Part detailed some of the weak spots in abolitionist activism, this Part considers how a cultural group can reimagine ways to preserve a culture, promote its message to receptive audiences, and expand its cultural influence. It offers a homological referent for abolitionist culture and the possibility of repackaging a message for consumption by different audiences. This Part of the Article stands for the proposition that cultural stability, power, and influence do not come easily and that for some cultures, there is social labor that must be undertaken simply to survive. To be clear, simply living the culture is not enough—for some groups, particularly those on the edge of extinction or non-existence, it takes more to move beyond and expand, including targeted marketing, promoting, and other tactics that are seemingly useful for abolitionist campaigns.<sup>24</sup>

This concept derives from projects involving indigenous communities in Australia, specifically, the Warumungu tribe

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23. Kimberly Christen, *Tracking Properness: Repackaging Culture in a Remote Australian Town*, 21 *CULTURAL ANTHROPOLOGY* 416, 423 (2006).

24. *Id.* at 429 (noting Warumungu concerns about “who will carry on” the songs, language, and cultural knowledge given the allures of nightlife and drinking among youth).

in the northern territory.<sup>25</sup> “Culture,” in this context, refers categorically to beliefs, customs, and productions of the identified group.<sup>26</sup> In this indigenous context, the phrase “culture work” was an outgrowth of the assimilation policies of the Australian government that aimed at solutions to the goal of greater assimilation of Natives to mainstream Australian culture. The assimilation goals included getting the natives to assimilate and develop economically, as well as “giving them back the culture we tried to stamp out.”<sup>27</sup> From the colonizers’ perspective, then, the term embodied the opportunity to give culture back, along with economic prosperity. It is the work necessary to “be like us” in the sense of economic success, but also a deep commitment to cultural preservation and maintaining Warumungu identity and practices. The term “culture work” in this indigenous context, referred to cultural recognition and economic sustainability “that implicitly called into question the separation of Aboriginal culture from mainstream notions of capitalism and financial success.”<sup>28</sup> The work itself aimed to produce greater self-determination, without cultural attrition. Such a framework envisions the tribe taking strides toward social and economic advancement, and engaging in “those daily activities that ensure the

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25. Judy Nakkamarra is credited with coining the term, and the author adds, “In popular and legal discourses, culture has become synonymous with aboriginality—something ‘they’ have or have lost.” *Id.* at 416. Work remains a thorny concept; at once a set of practices linked to economic self-determination and at the same time a perceived movement away from authentic “tradition” and “culture.” Culture work as such is aligned in ways with heritage projects that seek to maintain and even propagate a particular heritage, such as the ‘Sons of Italy,’ “Moorish Science Temple,” and other such organizations that are intent on preserving and promoting their particular cultural group. See James Clifford, *Looking Several Ways: Anthropology and Native Heritage in Alaska*, 45 CURRENT ANTHROPOLOGY 5 *passim* (2004).

26. Kimberly Christen, *Gone Digital: Aboriginal Remix and the Cultural Commons*, 12 INT’L J. CULTURAL PROP. 315, 325 (2005).

27. *Id.* at 229.

28. Kimberly Christen, *Properly Warumungu: Indigenous Future-Making in a Remote Australian Town* (June 2004) 227–28 (unpublished Ph.D. dissertation, University of California).

reproduction of Warumungu tradition.”<sup>29</sup>

In projects involving the Warumungu, researchers sought to document a process of culture work. One involved appropriating the DVD format as a means of documenting different aspects of life, including recording oral histories, dances and songs, and other cultural practices that aimed to capture the “proper” Warumungu way of life.<sup>30</sup> Related to notions of properness is the indigenous notion of “making it straight,” which stresses cultural authenticity. The work of making it straight functions as an epistemological check on the venture of culture work, ensuring that cultural products are exported to other markets and communities in their most authentic form possible.<sup>31</sup> One project involved the planning, production, and promotion of an art and culture center, which united “culture and work in steel and cement, paintings and text, retrieved objects and newly created histories.”<sup>32</sup> Another project involved developing CDs of traditional songs, with an eye to exporting the music to “new contact zones.”<sup>33</sup>

For the Warumungu, these aspects of technology were breakthrough solutions to the problems of modernity in general, and more specifically, in preserving and documenting culture. Despite that by the turn of the 20<sup>th</sup> century, DVD use was already becoming widespread, for the tribe, the technology was embraced as more than just a means of consumption. They used the technology to the fullest, designing the DVD along subsections akin to a movie DVD’s “director’s cuts” or “special scenes.” They created discrete sections to document some of the most intimate

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29. Christen, *supra* note 23, at 416.

30. Christen, *supra* note 27, at 43.

31. Christen, *supra* note 23, at 425.

32. Christen, *supra* note 27, at 236.

33. See, e.g., JAMES CLIFFORD, ROUTES: TRAVEL AND TRANSLATION IN THE LATE TWENTIETH CENTURY 192 (1997); MARY LOUISE PRATT, IMPERIAL EYES: TRAVEL WRITING AND TRANSCULTURATION 6–7 (1997).

aspects of their customs and practices. As such, the Warumungu were consciously aware that their embrace of technology might compromise the project in certain ways. Yet they were consciously aware that the technology, while providing some cultural solutions, simultaneously opened up the Warumungu community to the world of DVDs—movies, images, games, music, and more—the very influences that tended to draw Warumungu youth away from their culture.

Members of this tribe carry out the work with the urgency of a cultural group that is trying to move beyond mere existence—they want more than to survive, but to exert cultural influence. Both the cultural center and the DVD were conceived not simply as documentary efforts, but as ways to promote the culture, its products, and ideas beyond the immediate tribe. Part of the task involved seizing opportunities to reinforce cultural identity by packaging it to share with others, and indeed learning how to translate those efforts into material progress. The key to Warumungu success is thus in many ways a function of whether community members can develop ways to hustle culture, as Chuck D. would have it.<sup>34</sup> For the Warumungu, the hustling necessarily includes conscious planning to interface with those outside the tribe, as well as promotion and tourism. More critically, the community must deliberate about what parts of the culture are too sensitive to share with the public, including songs that should be restricted.<sup>35</sup> They considered their target audiences with songs that were specifically selected as suitable for a broader consumption.

Field research on the Warumungu suggests that abolitionists might have something to learn from the tribe and the concept of culture work. At its simplest, the concept of culture works teaches that “tradition is mobile and fixed,

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34. PUBLIC ENEMY, *Welcome to the Terrordome*, FEAR OF A BLACK PLANET (Def Jam Recordings 1990) (“What I got, better get some, (get on up) hustler of culture”).

35. Christen, *supra* note 23, at 420.

part of a dialogue between community members and outsiders, linked to material needs and cultural responsibilities. Tradition is always in the making.” In particular, the thrust of culture work underscores the project of breaking down barriers and creating “new contact zones.” For abolitionists, Christians and conservatives represent the groups that are more inclined to “be like us” than other Americans. Part of the task lies in communicating their messages in a way that highlights state killing as antithetical to core beliefs and ideologies, which makes broader religious and political partnering a potential path to producing “newly created histories.” For abolitionists, these groups represent markets for their cultural product. Just as the Warumungu worked to export certain aspects of their culture to the wider Australian and international audiences, abolitionists must work to make the cause appealing to broader bases in American society. There are multiple ways to win people over to the cause, but part of it entails targeting audiences with the principles and values that resonate and help them to discover opposition to the death penalty within their own deeply-held beliefs.



## III. CULTIVATING COMMON GROUNDS

*At the heart of Christianity is an executed Savior. He was a convicted felon, tried and found guilty, jailed, shamed, and sentenced to die at the hands of the state. That alone should stop us in our tracks. Before we get to the theological implications of Christ's death and resurrection, we first have to recognize this: Jesus was given the death penalty and executed.*<sup>36</sup>

As the last Part offered a practical blueprint for understanding how a cultural group can work to promote and propagate itself, this Part makes the case that Christians and political conservatives are natural allies in the cause to end the death penalty. There are values and principles that these groups share with abolitionists, which might not be so obvious to the naked eye, but which nonetheless emphasize overlapping interests in eliminating the death penalty. For these groups, state executions sit in tension with deeply cherished notions that make these groups particularly receptive to certain narratives about the evils of state-sponsored killing. This Part gives a sense of other common grounds and highlights why opposition to the death penalty is not about liberals or leftists, but about ideas that sit at the core of conservative politics and Christian theology.

In this Article, culture is not intended as a static, essentialist concept, but one that gives hope for reform. As anthropologists understand it, culture is not some inert, unchanging feature of life, but instead represents a dynamic and fluid concept.<sup>37</sup> This point is sometimes overlooked in human rights circles, particularly because “anthropology and anthropologists are too often unduly ignored in the processes that could benefit from anthropological expertise.”<sup>38</sup> This

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36. SHANE CLAIBORNE, EXECUTING GRACE: HOW THE DEATH PENALTY KILLED JESUS AND WHY IT'S KILLING US 82 (2016).

37. Sally Engle Merry, *Human Rights Law and the Demonization of Culture (and Anthropology Along the Way)*, 26 POL. & LEGAL ANTHROPOLOGY REV. 55, 67 (2003).

38. Annelise Riles, *Anthropology, Human Rights, and Legal Knowledge: Culture in the Iron Cage*, 15 FINNISH Y.B. INT'L L. 9, 10 (2004).

Article, by contrast, builds on the notion that death penalty culture has something to learn from the Warumungu and the notion of culture work. More importantly, it is also to say that abolition itself is a subculture, which lends itself as a subject of ethnographic study.<sup>39</sup> These considerations suggest that Christians and political conservatives have more in ideological common with abolitionists than with supporters of the death penalty. Abolitionist culture, in turn, must recognize these potential allies and understand that there is no essential element for opposing the death penalty—there are various rationales for disavowing death—abolitionists would do well to fathom how the themes and narratives presented below are attractive to individuals who have not traditionally been considered part of the abolitionist fold.

#### A. “*The Greatest Story Ever Told*”

*Oddly, lessons from the sentencing of Christ have not been a part of the American debate of the death penalty, even when the argument is between Christians.*<sup>40</sup>

The trial, execution, and resurrection of Jesus of Nazareth are the most climactic moments for Christians around the world.<sup>41</sup> In the narratives, Jesus was arrested, tortured, tried, and ultimately executed by the Roman government. The story of Jesus is at once gruesome and beautiful, which culminates in a bloody execution and resurrection that, for some, fulfilled Jewish prophecy. In the story, the Roman official, Pontius Pilate, is the authority figure who oversees Jesus’s prosecution and execution. As such, for Christian believers, it is somewhat obligatory to understand “Rome” with a bit of animosity. It was at the

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39. *Id.* at 12.

40. Mark Osler, *Christ, Christians, and Capital Punishment*, 59 BAYLOR L. REV. 1, 3 (2007).

41. For an excellent overview of the trial narrative, see William A. Herin, *The Trial of Jesus*, 7 U. FLA. L. REV. 47, 47 (1954).

hands of this government that Jesus was made a sacrificial lamb, even though the decision to kill him was the procedural consequence of decision-making that was as capricious as a coin flip.<sup>42</sup> Even if it were necessary to fulfill the prophecy, it is without doubt that the deepest and most sensitive emotions that Christians hold about the execution of Jesus are directly tied to a harsh and oppressive Roman government, which executed a man for speaking words—words that would ultimately form the basis of their most deeply-held beliefs.

Modern-day abolitionists largely overlook this basic narrative as central to their struggle. They fail to recognize the story of Jesus as a template for illustrating the unfairness and injustice in today's capital punishment. The Catholic Church and other religious groups have been voicing growing antagonism toward the death penalty since the 1960s, when the Church began to focus more on the protection of life.<sup>43</sup> In *Furman v. Georgia*, thirteen religious organizations, including Catholic, Protestant and Jewish groups, filed amici briefs asking the Court to overrule the practice of capital punishment.<sup>44</sup> By the mid-1990s, Pope John Paul II initiated wide scale rethinking in the Catholic Church on the issue of capital punishment.<sup>45</sup> Catholic leadership continues this trend with the current Pope Francis proving to be an outspoken critic of the death penalty, which has had a critical impact on Church

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42. As described below, Barabbas was pitted against Jesus for pardon and was ultimately released.

43. Davison M. Douglas, *God and the Executioner: The Influence of Western Religion on the Death Penalty*, 9 WM. & MARY BILL RTS. J. 137, 164 (2000); *but see* Thomas C. Berg, *Religious Conservatives and the Death Penalty*, 9 WM. & MARY BILL RTS. J. 31, 39 (2000) (describing how the Church has endorsed the death penalty in certain eras, including as punishment for heresy).

44. Douglas, *supra* note 43, at 164.

45. E. Christian Brugger, *To Kill or Not to Kill: The Catholic Church and the Problem of the Death Penalty*, YAMAUCHI LECTURE IN RELIGION (2001), <http://cas.loyno.edu/sites/cas.loyno.edu/files/to-kill-or-not-to-kill-the-catholic-church-and-the-problem-of-the-death-penalty.pdf>.

teaching.<sup>46</sup> Abolitionists would do well to reimagine how Jesus can play a more prominent role in the quest to end the death penalty.

### 1. Natural Allies in Justice

The arrest, trials and execution of Jesus are moments of extreme injustice, but this has not stopped Christian support of the death penalty. Even when considered against modern legal sensibilities, the tribulations of Jesus are unfair in multiple respects, as was the case against the backdrop of Jewish law: “One would think that the Catholic Church would have opposed the death penalty from the very beginning. After all, the execution of Jesus Christ was unjust in almost every detail.”<sup>47</sup> The trial of Jesus is complicated legally, and according to one commentator, “is one of the most difficult and controversial legal subjects in the history of the world.”<sup>48</sup> Of course, without his execution at the hands of Roman authorities, there is no Jewish prophecy to fulfill, and more importantly, no resurrection. But aside from these prophetic issues, it is worth considering the chain of events that led to his legal execution.<sup>49</sup> Examination of his case illustrates how a justice system can be so lopsided and perverted; it shows how religious narrative speaks directly to the ills of capital punishment and the overreach of state

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46. See Nicole Winfield, *Pope Rules Out Death Penalty in Church Teaching*, ASSOCIATED PRESS (Aug. 2, 2018), <http://apnews.com/b1cf76995c864b118184fc5b009b129c>.

47. Robert F. Drinan, *Religious Organizations & the Death Penalty*, 9 WM. & MARY BILL RTS. J. 171, 171 (2000).

48. John W. Welch, *The Legal Cause of Action against Jesus in John 18:29–30*, in CELEBRATING EASTER: THE 2006 BYU EASTER CONFERENCE (2006), <http://rsc.byu.edu/archived/celebrating-easter/legal-cause-action-against-jesus-john-1829-30>.

49. Often the question is raised that without Jesus’s death, there is no resurrection. While the point is valid, it overlooks that Jesus *did not have to die like this*. It did not have to be a torturous state execution of an innocent man. There are myriad other ways this could have happened. The story itself is not support to reinforce capital killing, but a siren that screams the problem with letting the government kill as punishment.

government.

Procedurally speaking, Jesus faced two criminal trials. The first involved his arrest by temple guards and trial by the Sanhedrin, the religious high court for Jews.<sup>50</sup> This court was an ad hoc judicial gathering that was convened, in this instance, in nighttime to hear the case against Jesus and to determine whether he was guilty of blasphemy.<sup>51</sup> They found Jesus guilty, and wanted him sentenced, but because Rome had exclusive jurisdiction to administer the death penalty, the Sanhedrin turned Jesus over to the Roman authorities, and asked Pontius Pilate to try him.

The Roman court reviewed Jesus's case de novo since the Sanhedrin had changed the charge to include perverting the nation, forbidding the giving of tribute to Caesar, and claiming to be a king.<sup>52</sup> As the latter claim would be considered treasonous and a direct challenge to Roman leaders, the claims gave Rome jurisdiction over Jesus and the power to execute. However, according to tradition, Pilate initially punted the decision and tried to get Jesus's case transferred to the jurisdiction of Herod Antipas, who governed Galilee, Jesus's hometown.

In this respect, the Gospel gives conflicting accounts—in Mark and Matthew, Jewish authorities did not have discretionary power to kill offenders, and that Jewish authorities wanted Jesus dead, which is why they turned him over to Pilate.<sup>53</sup> In these accounts, Rome plays a more

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50. *John* 18:12; Luis Kutner, *Jesus Before the Sanhedrin*, 69 U. DET. MERCY L. REV. 1, 5 (1991).

51. Malcolm Cannon, *The Trial of Jesus Christ: A Question of Culpability*, LAKE FOREST C. PUBLICATIONS 17, 19 (1990).

52. *Luke* 23:2; Earl Schwartz, *The Trials of Jesus and Paul*, 9 J.L. & RELIGION 501, 502 (1992) (“[W]hen Jesus actually appears before Pilate, claims concerning the Temple and blasphemy are not put forward. *Luke* makes no mention of the specific charges raised in *Mark* and *Matthew* . . .”).

53. Jiří Bílý, *Jesus of Nazareth—the Most Infamous Trial*, J. EUR. HIST. L. 92, 92 (2013) (“The Romans allowed the local Jewish hierarchy to administer justice among the Jews according to their own law but apparently did not grant them

innocuous role and he is portrayed as suspecting the Jewish leaders of duplicity.<sup>54</sup> In Luke's account, Roman authorities play a more complicit role in the trial of Jesus from the outset. As one scholar notes, this may have been pragmatic at the time since "Christians did not want to be enemies of the Roman Empire and they soon sought to play down the role of the Romans in the story. So the Passion Narratives shifted blame on to the Jewish authorities . . ." and that "Pontius Pilate . . . was portrayed as inquisitive and bewildered, cross-questioning the seditious prisoner before him as if Jesus were an equal and making every effort to get him off the hook."<sup>55</sup>

This biblical narrative offers a compelling account of flawed justice, regardless of one's ideological persuasion. It is a story that highlights the death penalty as a tool of oppression and injustice, and embodies the arbitrary and capricious treatment of convicts. This is shown in Pilate's failed attempt to transfer Jesus to Herod. This failure left him to resort to his pardoning power in favor of Jesus in order to avoid having to execute him. As tradition has it, when Jesus was tried, it was Passover, and Roman authorities would annually release a condemned prisoner.<sup>56</sup> Pilate put up Jesus and a criminal named Barabbas to be voted on by the public that had gathered at the proceeding. His plan was to wash himself from Jesus's death, but the plan backfired when Jesus lost the bid for freedom. Rather than opt to set Jesus free, the angry mob supported the release of Barabbas, who was ultimately spared.<sup>57</sup> In the end, Jesus was denied anything that looked like procedural justice, and even the state's attempt to wash its hands from the killing reveals the killing as a capitulation to an angry,

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the legal authority to execute criminals.").

54. Cannon, *supra* note 51, at 19.

55. Bily, *supra* note 53, at 95.

56. *Mark* 15:6–15; *Luke* 23:13–25; *John* 19.

57. *Luke* 23:18–19; *John* 18:39–40.

bloodthirsty mob rather than the meaningful execution of the rule of law. From this perspective, it is more accurate to say that the rule of law itself was executed along with Jesus, or as one commentator has written, “the whole procedure was permeated with such gross illegality and such flagrant irregularities that the result can be considered nothing short of judicial murder.”<sup>58</sup> Another describes that the arrest and trial of Jesus were both illegal, stating that for Jesus, “there is little resemblance to justice or fair play.”<sup>59</sup> So, even if one holds Old Testament attitudes about the propriety of the death penalty, it goes without saying that this view is predicated on death being executed fairly and justly. If the practice is unfair, as was the case of Jesus, then the practice cannot be upheld, and according to one Catholic, should be protested.<sup>60</sup>

## 2. Thou Shall Not Kill

Beyond the killing of Jesus, the death penalty resonates with Christians due to the familiar commandment, “thou shall not kill.” This ideological cornerstone appears in the Ten Commandments of the Hebrew Bible, which tradition says were handed down to humans by God through Moses. In the later Christian Bible, Jesus would reiterate this and other commandments given by Moses, and would additionally proclaim commandments of his own. When Moses conveyed the Commandments, Jewish legal systems already distinguished between the unlawful killing of an

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58. GEORGE W. THOMPSON, *THE TRIAL OF JESUS 2* (1927).

59. Robert Bucklin, *The Legal and Medical Aspects of the Trial and Death of Christ*, 10 *MED. SCI. & L.* 14, 17 (1970) (“The events leading up to the arrest, the arrest itself and the subsequent trial and punishment, as reported by the Evangelists, followed none of the rigid rules . . . . The time and date of the trial was illegal, not only because it took place at night, but also because it took place on the eve of the Sabbath.”).

60. See Gerald F. Uelmen, *Catholic Jurors and the Death Penalty*, 44 *J. CATH. L. STUD.* 355, 377–78 (2005) (encouraging Catholic lawyers, judges, and jurors who oppose the death penalty for practical reasons to make their voices heard, even at the risk of recusal from cases or being struck from a jury panel).

innocent versus killing a guilty criminal. Indeed, at that time a great many biblical laws enumerated a robust set of capital offenses.<sup>61</sup> In this era, the Ten Commandments' prohibition on killing was certainly understood as having exceptions, including for war and as a penalty for crimes, yet some of these capital crimes were somewhat trivial and some were highly sexist and gendered.<sup>62</sup> The New Testament adopts this perspective and acknowledges the role of civil government in maintaining justice and even execution as punishment for crime. To be sure, even though the Hebrew religion was grounded in sacred text that clearly legitimated the use of capital killing, Jewish adherents have "been far more skeptical of the use of the death penalty than a superficial read of the Torah might suggest."<sup>63</sup> In general, rabbis were wont to authorize this form of punishment despite how fearsome the God of the Jewish Bible was.

Even though it is argued that the more proper translation of the phrase is "thou shall not murder," such a distinction in translation hardly supports that Jesus favored the death penalty. More critically, as Jesus's redemption frees humanity from the impossibility of following "the law," there is every reason to think that as an innocent victim of

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61. Richard H. Hiers, *The Death Penalty and Due Process in Biblical Law*, U. DET. MERCY L. REV. 751, 758 (2004).

62. *E.g.*, *Exodus* 21:12–14 (murder); *Exodus* 21:15, 17 (cursing a parent); *Exodus* 21:16 (kidnapping); *Exodus* 21:28–29 (failure to confine a dangerous animal resulting in death); *Exodus* 22:19 (bestiality); *Exodus* 31:14, 35:2 (working on the Sabbath); *Leviticus* 18:6–18, 20:11–12, 14, 17, 19–21 (incest); *Leviticus* 20:2–5 (human sacrifice); *Leviticus* 20:10 (adultery); *Leviticus* 20:13 (homosexual acts); *Leviticus* 20:16 (bestiality); *Leviticus* 20:27 (witchcraft and sorcery); *Leviticus* 24:14, 16, 23 (blasphemy); *Leviticus* 24:17, 21 (murder); *Numbers* 15:32–36 (working on the Sabbath); *Deuteronomy* 13:6 (witchcraft and sorcery); *Deuteronomy* 18:20 (false prophecy); *Deuteronomy* 21:18–21 (disobedience to parents); *Deuteronomy* 22:13–27 (false claim of a woman's virginity at time of marriage); *Deuteronomy* 22:22 (adultery); *Deuteronomy* 22:23–24 (sexual acts by a betrothed woman with a man, not her fiancé); 1 *Samuel* 28:9 (witchcraft and sorcery); etc.

63. Douglas, *supra* note 43, at 139. *See also* Bílý, *supra* note 53, at 95 (outlining a number of procedural safeguards Hebrew law developed around capital cases).



the death penalty, he would be opposed to it. As one theologian has noted, “It is not possible to argue a Christian case in support of the death penalty while citing passages from Hebrew scriptures, because this will put one at odds with Jesus himself.”<sup>64</sup> His message of love and forgiveness flipped the “eye for an eye” script and instead instructed others that if one is slapped on the face, one should give the other side too, the other “eye,” to be slapped.<sup>65</sup> Such a radical departure from Jewish retributive law flipped *lex talionis* on its head, and promulgated a view seemingly at odds with capital killing.<sup>66</sup> In the biblical accounts, Jesus was known to have specifically prevented capital killing in the famous story of the adulterous woman.<sup>67</sup> She was brought before Jesus by her accusers for his opinion on her punishment. Although under Jewish law, the woman should have been stoned to death, Jesus refuses the penalty and issues a challenge to her accusers and would-be executors: “He that is without sin among you, let him first cast a stone at her.”<sup>68</sup> In one swoop, Jesus spares the woman’s life and issues an ideological blow to the existing death penalty regime.<sup>69</sup>

For abolitionists, there are several critical points to note regarding religious narrative and the ancient prohibition on murder. First, there is a repeated failure of states to dole out the death penalty justly, which has been a problem

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64. Benjamin Corey, *5 Reasons Jesus People Ought Oppose the Death Penalty*, SOJOURNERS (Feb. 5, 2014), <http://sojo.net/articles/5-reasons-why-jesus-people-ought-oppose-death-penalty>.

65. *Matthew* 5:38–48.

66. See, e.g., Hiers, *supra* note 61, at 753–58 (describing various Biblical arguments against capital punishment, including that offenders should be spared alive and subject to wander for life or some punishment other than death. Biblical texts also urge people not to seek vengeance against others, particularly since this is the prerogative of God alone, who is the ultimate judge and life giver).

67. *John* 8:3–11.

68. *John* 8:7.

69. Others may point to the Book of Genesis narrative of Cain and Abel as another example of God’s willingness to spare human life since he banished, rather than killed, Cain for slaying his brother Abel.

throughout the country's history as it was in the time of Jesus. As one of his companions on the cross noted during their execution, Jesus was being killed even though he did nothing criminal.<sup>70</sup> Yet not only does the Hebrew bible repeatedly stress God's anger at the shedding of innocent blood, "the biblical laws express explicitly and implicitly stress the importance of not executing innocent persons, and insist that only those persons who deserve to die should be put to death."<sup>71</sup>

Much like the systems of old, today's justice system factually yields wrongful convictions. From the biblical perspective this is problematic since when the state kills a wrongfully convicted individual, the state commits murder because it kills an innocent. "The right question to ask is not whether capital punishment is an appropriate or moral response to murders. It is whether the government should be in the business of executing people [especially] knowing to a certainty that some of them are innocent."<sup>72</sup> The Jesus narrative underscores this point along with the myriad of problems that surround the death penalty, including biblical laws that "caution in particular against biased or preferential treatment of the accused on the basis of their economic and social or ethnic status."<sup>73</sup> As one commentator notes, "Jesus, most of the Apostles, and most of the early martyrs of the faith were victims of inconsistent justice systems that allowed for capital punishment."<sup>74</sup> Today's system of killing undoubtedly creates death rows based on factors like race of the victim, class, and the race of the defendant. Thus, even if most instances of execution are of

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70. *Luke* 23:39–43.

71. Hiers, *supra* note 61, at 838.

72. Carl Cannon, *The Problem with the Chair: A Conservative Case Against Capital Punishment*, NAT'L REV., June 19, 2000, at 29.

73. Hiers, *supra* note 61, at 838–39.

74. Jonathan Merritt, *Would Jesus Support the Death Penalty?*, THE ATLANTIC (May 2, 2014), <https://www.theatlantic.com/politics/archive/2014/05/jesus-death-penalty/361649/>.

individuals guilty of murder, who gets killed in the end shows an entirely different aspect of the system's oppression. "The death penalty creates a jarring dichotomy that elevates some lost lives over others because death is imposed as a punishment."<sup>75</sup> When people who are innocent are sent to die, and those who deserve to die are allowed to live, it cuts across all sensibilities of justice, and Christian justice in particular—for as described, the wrongful killing of Jesus stands as the ultimate study in injustice.

Intimately related is the death penalty's racial overtone, to which an array of metrics attests.<sup>76</sup> According to one scholar, "racism is the one significant topic that is often overlooked or pushed aside in most death penalty courses . . . most modern abolition activists do not see racism as a valid criticism of, or substantial reason for abolishing, the death penalty."<sup>77</sup> Still, it is hard to deny the import of race when it comes to executing criminals, as a few examples will hopefully suffice. For example, the celebrated Baldus Study, which focused on Georgia's death penalty sentencing, made a number of concrete findings, including that prosecutors sought the death penalty at a rate of twenty four percent (24%) of black defendants accused of killing whites, but only six percent (6%) of black defendants charged with the same murder.<sup>78</sup> Similarly, a report on Virginia's sentencing practices showed that between 1978 and 2001, in cases of

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75. Dieter, *supra* note 9, at 929.

76. See Rob Warden & Daniel Lennard, *Death in America Under Color of Law: Our Long, Inglorious Experience with Capital Punishment*, 13 NW. J.L. & SOC. POL'Y 194, 195 (2018) ("capital punishment also has been plagued by racism"); Thomas Adcock, *A History of the Death Penalty in America*, 36 CORNELL L.F. 6, 7 (2010) (citing various areas of racial disparity).

77. William Fraser, *Crime for Crime: Racism and the Death Penalty in the American South*, 10 SOC. SCI. J. 20, 22 (2010) ("Death penalty activists have been trying for years to abolish the death penalty for a myriad of reasons. They have fought this battle with their statistical knives, rhetorical guns, and moral cannons.").

78. David C. Baldus et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661, 708–12 (1983).

capital rape-murder, black defendants were sentenced to death only 28.6% when the victim was black, but sentenced to death 100% of the time when the victim was white.<sup>79</sup> In *Furman*, the Court cited a number of studies that showed the lopsided application of the death penalty, including one that showed from 1924 to 1968, most of those executed were poor, young, and ignorant.<sup>80</sup>

As the above points suggest, the question of capital killing is not simply a matter of whether an individual found guilty has been sentenced to death. It is also about whether that process was fair and whether the individual's rights were given their due. Christian tradition paints a picture of unfairness and injustice when it comes to the treatment of Jesus, and suggests that it is no stretch to imagine that the same is happening in today's justice system.

### 3. Robbing Repentance

Christianity is a religion of redemption, and this fact has stark implications on whether the death penalty can be endorsed according to the teaching of Jesus. As his narrative depicts, despite being persecuted and tormented, he died praying for his tormentors. The central message of the Gospel is Jesus's redemption of humanity. This aspect of faith reflects that humans were essentially given the death penalty by God, a sentence that was vacated by Jesus's offering himself as a sacrifice for the crimes of humanity.<sup>81</sup> The execution of Jesus, then, is the story that teaches mercy and compassion, despite that Jesus himself was shown none of this by state officials. His story of redemption serves as

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79. AM. CIVIL LIBERTIES UNION OF VA., *BROKEN JUSTICE: THE DEATH PENALTY IN VIRGINIA* 13 (2003).

80. *Furman v. Georgia*, 408 U.S. 238, 250 (1972) (Douglas, J., concurring).

81. See *Hebrews* 9:12 ("He did not enter by means of the blood of goats and calves; but he entered the Most Holy Place once for all by his own blood, having obtained eternal redemption."); CLAIBORNE, *supra* note 36, at 112 ("If we think that Jesus was punished in our place, this means, in effect, that Jesus spared us the death penalty and suggests that we too should stand on this side of life.").

something of a blueprint for humans, who can achieve salvation through repentance. Capital execution, however, preempts the process, and with it, the chance for an individual to reconcile with God. From this view, one must be given the opportunity to repent for wrongdoing and must be given the opportunity to resurrect himself morally and spiritually from sin, to achieve “personal redemption.”<sup>82</sup>

Accordingly, the death penalty not only extinguishes the body, it also denies the soul a chance at redemption and forgiveness. Whether one understands the point in terms of restorative or resurrective justice, a common thread in these ideas is that there is spiritual meaning in an individual’s admitting to and repenting for wrongs committed. Capital criminals, some of whom have committed among the most heinous crimes, are perhaps the ones in greatest need of repentance. Yet execution violently strips the criminal of an opportunity to repent. Humans interrupt this process that leads to redemption, and even though Jesus begged humanity to repent, humans, in turn, deny this opportunity to some through capital punishment.

This point was evident at Jesus’s execution, where he was crucified with two other criminals. Described by tradition as “companions of the cross,” one of these is deemed the “impenitent,” who flung insults at Jesus, and challenged, “Aren’t you the Messiah? Save yourself and us!”<sup>83</sup> The other condemned defended Jesus, saying, “we are punished justly, for we are getting what our deeds deserve. But this man has done nothing wrong.”<sup>84</sup> He then asked Jesus to remember him, to which Jesus replied, “Truly I tell you, today you will be with me in paradise.”<sup>85</sup> The narrative suggests that penitence leads to union with Jesus. For the penitent criminal, it was fortuitous that he was able to repent before

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82. See Berg, *supra* note 43, at 53.

83. *Luke* 23:39.

84. *Luke* 23:41.

85. *Luke* 23:43.

his killing. For the other criminal, this opportunity was cut short because of his execution, which disallowed sufficient time for him to recognize his own misdeeds. The story shows how the death penalty cuts short an individual's opportunity for genuine repentance. This is clear in the criminal who mocked Jesus—he does so without any sense of remorse or guilt. The fact that one experiences penitence before the other should not be the deciding factor for achieving salvation. The state killing machine should not determine one's spiritual fate, but this is exactly what the death penalty does, which is only punctuated by the killing of a man who had done “nothing wrong.”

B. “*Self Evident . . . That Among These are Life . . .*”

*Conservatives have every reason to believe the death penalty system is no different from any politicized, costly, inefficient, bureaucratic, government-run operation, which we conservatives know are rife with injustice. But here the end result is the end of someone's life. In other words, it's a government system that kills people.*<sup>86</sup>

What follows explores the common ground shared by death penalty foes and individuals who are generally known and designated as political conservatives. It is an attempt to demonstrate that among the founding ideals of this country is the absolute right to life. This orientation was, in part, grounded in attitudes toward the British monarchy and a murderous King George III, who sent soldiers to attack colonists, burn their towns, attack their ships, in addition to hiring foreign mercenaries and refusing to protect the colonies from native American attack. The “Bloody Codes” in Britain give a sense of the king's power to kill, as outlined in more than two hundred capital crimes. During the revolutionary period, King George III was a relentless tyrant in his dealings with Americans, and the death penalty was one of his greatest allies for quelling opposition and treason.

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86. Richard Viguerie, *When Governments Kill*, SOJOURNERS, July 2009, <http://sojo.net/magazine/july-2009/when-government-kills>.

In contrast to their legal ancestry, colonial statutes allowed killing for only a handful of crimes. In this sense, the colonists without doubt brought with them the legal mechanics to carry out the death penalty, but overall they were much more conservative than their British counterparts in several respects.<sup>87</sup> The very founding of this country, then, rested on principles that were conservative in comparison to the Crown. The post-Revolutionary period saw a marked shift away from the death penalty, some of which was likely due to revulsion against a king and a system that killed at will. Some of the shift was also due to Americans relying more on imprisonment as a primary form of punishment.<sup>88</sup> From this perspective, the founding of this country is synonymous with freedom and liberty, and most importantly, the right to life.

Because of these historical roots, conservative political ideologies embody a number of beliefs and practices that sit in tension with the practice of state-sponsored killing of criminals.<sup>89</sup> As one commentator notes, “Suspicion of power is at the heart of conservative philosophy.”<sup>90</sup> As the second sentence of the Declaration of Independence demonstrates, politically conservative views often overlap with religious ideals:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.<sup>91</sup>

The framers of this statement, who themselves were

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87. Malik & Holdsworth, *supra* note 6, at 693–94.

88. *Id.* at 697.

89. Arthur L. Rizer III, *Does True Conservatism Equal Anti-Death Penalty?*, 6 HOW. SCROLL: SOC. JUST. L. REV. 88, 93 (2004) (“The concept of limited government should be of critical concern of all Americans, especially conservative Americans. The founding fathers established a government that rejected the notion that government is benign and should be trusted.”).

90. *Id.*

91. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

politically conservative, cannot be any clearer: God gives humans life, and this life is inalienable. This statement seems to suggest that in the new country, there will be no government machinery that could execute its citizens. At the same time, such statements indicate how political conservatism is indebted to religious ideals, which inform the very basis of the country's identity. Often described by scholars as "civil religion," there is a certain dimension of American law, government, and institutions that build from a theological baseline, which gives the State and its institutions the status of quasi-religious organization. This phenomenon is part and parcel of why political conservatives are ripe for abolitionist messaging—their political posture is, in large part, already in alliance with their religious worldview.

The Declaration does not stop at emphatically declaring life as an absolute right, it also issues disdain for the use of the death penalty and the farce of death penalty trials. As the Framers make plain, killing infringes on God's creation, but it also infringes on earthly justice as well. When the law is applied unfairly such that the king and his killers get away with their crimes, the result is heinous as the Declaration proclaims, "He has combined with others to subject us to a jurisdiction foreign to our constitution . . . protecting them, by a mock Trial, from punishment for any Murders which they should commit on the Inhabitants of these States."<sup>92</sup> The drafters of the Declaration were conscious of the moral and religious problems of state killings, and they also were aware that death penalty laws could be applied unfairly, as a means to oppress and terrorize society.

In bold fashion, the Declaration illustrates the earthly and heavenly wrongs of the death penalty. At the time of the country's founding, the political mixing of God's power and the country's identity reveals an ideological demographic that is already a natural ally in the abolitionist cause.

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92. *Id.* at para. 14–16.



Political conservatives represent a receptive audience to particular framings of the right to life—the question is whether abolitionists can create further inroads into religious and conservative camps.<sup>93</sup> As the story of Jesus demonstrated a momentous example of the unfairness and oppression that can come at the hands of a death penalty, this Section moves beyond religion and explores how conservative philosophy is amenable to abolitionist messaging.

### 1. Limited Government

*When in doubt, limit government.*<sup>94</sup>

The death penalty represents a most expansive government power and intrusion into the life of a civilian, one that discords with conservative ideals of limited government.<sup>95</sup> “Often, however, the same officials who rely on the rhetoric of skepticism to argue for limited Government in some areas (e.g., taxes), remain remarkably confident not just in the effectiveness of capital punishment, but of their own perfection as administrators of it.”<sup>96</sup> This penalty is the “alienation” of life proscribed in the Declaration and its exhortations about the sanctity of life. Even for “eye for an

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93. See Ben Jones, *The Republican Party, Conservatives, and the Future of Capital Punishment*, 108 J. CRIM. L. & CRIMINOLOGY 223, 227 (2018) (noting that “for much of its history, the Republican Party has been split on the death penalty,” which indicates a portion of the party that would be receptive to abolitionist efforts).

94. Michael Rowan, *Minding Our Skepticism: A Conservative Approach to Capital Punishment*, 31 FLA. ST. U.L. REV. 377, 382 (2004).

95. Jones, *supra* note 93, at 234 (noting the second tier power behind the ability to kill: “at its most basic level, the death penalty represents an expansion of government power. It is one thing to give government the power to remove dangerous individuals from society and incarcerate them. The death penalty, though, confers a distinct and additional power to government: executing an individual after he or she has been imprisoned and is no longer a threat to society.”).

96. See Rowan, *supra* note 94, at 381 (discussing inconsistencies in the conservative commitment to limited government and the death penalty).

eye” retributivists, the death penalty is not a proportionate match since the penalty is not applicable to criminal homicides only, but also a number of crimes that involve no violence whatsoever.<sup>97</sup> Thus, when it comes to government overreach, the death penalty sits as the greatest threat in the government’s arsenal against civilians.

These words of the Declaration, as egalitarian as they made the new republic sound, would be soon abandoned, and the U.S. government would legally be allowed to kill citizens. As the Bill of Rights of the U.S. Constitution makes clear, under the Fifth Amendment, federal defendants cannot be deprived of “life, liberty, or property, without due process of law.” Although the Declaration had already touted life as “inalienable,” now it was merely a constitutional right that could succumb to legal prosecution by the state. This radical shift in posture happened so quickly as to make one wonder, what exactly caused these sentiments to be adopted in the U.S. Constitution, particularly after such a bold Declaration? To be certain, just because the government adopted state killing hardly means that this was the prevalent sentiment at the time. There is a strong argument to be made that within the context of the Revolutionary War, there was a genuine sentiment that the new country was going to be different from the tyranny and terrorism that characterized the politics of the British Monarch, under whom a number of colonists suffered the death penalty.

Despite shifting to “due process” as prerequisite for imposing death, capital execution may conflict with due process itself, particularly because once a person is executed, the courts are no longer available to him.<sup>98</sup> The killing itself destroys the chance of an individual ever having access to the legal system: “Once an execution date has been set, the courts and state resist new evidence or new lines of appeal,”

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97. See, e.g., 18 U.S.C. § 794 (2012) (espionage); 18 U.S.C § 2381 (treason); 18 U.S.C. § 3591(b) (drug trafficking).

98. Dieter, *supra* note 75, at 933.

which yields an arbitrary cutoff point, particularly since “[s]cience, with its new insights into earlier evidence, does not stop evolving. Forensic techniques soon to be discovered may reveal new facts about a crime, just as the advent of DNA testing did in the 1990s.”<sup>99</sup>

Due process also takes a blow due to the fact that death penalty juries are skewed by race and class. The Supreme Court has found that the use of a death-qualified jury comports with the U.S. Constitution.<sup>100</sup> As a result, the prosecution can strike any potential juror who refuses to impose the death sentence for ideological reasons. Although this stacks the jury against the defendant, it results in other biases as well:

The people who will be struck will more likely be people of color, women, Democrats, and Catholics or members of other religious faiths that oppose the death penalty . . . those groups will more likely answer the death penalty question in a way that eliminates them from service, compared to their counterparts. The resultant jury will have proportionately higher numbers of whites, males, Republicans, and others who represent a more conservative segment of society, and will not only be more likely to find the defendant guilty than a randomly selected jury, it will also be far more likely to sentence the defendant to death.<sup>101</sup>

The very nature of political conservatism and limited government aligns with religionists due to deeply held beliefs. As one scholar has noted, “The conservative view . . . is centered around the Biblical doctrine of ‘original sin’—the idea that man is morally flawed and imperfectible . . . A conservative may distrust human nature because he does not trust man’s ability to hold to moral values or to govern without making serious mistakes.”<sup>102</sup> Moreover, as a general matter, it has been noted, “those with greater levels of

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99. *Id.*

100. *See* *Lockhart v. McCree*, 476 U.S. 162, 165 (1986); *Witherspoon v. Illinois* 391 U.S. 510, 517–18 (1968).

101. Dieter, *supra* note 75, at 936–37.

102. CHARLES W. DUNN & J. DAVID WOODWARD, *THE CONSERVATIVE TRADITION IN AMERICA* 53 (1999).

religious commitment are more inclined to hold conservative political positions than are those with lower levels of religious commitment.”<sup>103</sup>

The ability to practice religion itself requires the freedom to do so, which is why the guarantees of the First Amendment are important to preserve, particularly for religious adherents. Hence, religionists are partially conservative by virtue of the desire to protect the First Amendment, which in turn protects against government intervention when it comes to religion. This is particularly true for those religious groups who came to this country to avoid religious persecution. In this sense, “conservative” can be rightly seen as conserving one’s religion as well. This point has been noted in the Irish Catholic context in America:

Catholics thrived here in a land where they were allowed to worship without governmental interference, and political leaders were correspondingly prohibited from meddling in their ecclesiastical affairs. During the same time, this beneficial freedom was often denied to Catholics in other countries even ironically where they constituted historic majorities. Such actions by anticlerical or totalitarian regimes led American Catholics to appreciate their religious liberty as one of the chief benefits of limited government.<sup>104</sup>

## 2. Fiscal Responsibility

*Despite its common sense appeal, studies have upset the notion that executing an individual saves the State a significant amount of money and, to the contrary, have found that capital cases actually cost more than sending an inmate away for life.*<sup>105</sup>

“Republicans identify themselves as the party of fiscal responsibility.”<sup>106</sup> The spending involved in capital killing

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103. Ariel Malka et al., *The Association of Religiosity and Political Conservatism: The Role of Political Engagement*, 33 POL. PSYCHOL. 275, 293 (2012).

104. Daniel J. Morrissey, *The Separation of Church and State: An American-Catholic Perspective*, 47 CATH. U.L. REV. 1, 7 (1997).

105. Sidhu, *supra* note 11, at 466.

106. Rizer, *supra* note 89, at 104.

thus sits at odds with conservative aversion to not just big government, but big government taxing and spending too, including for mass incarceration.<sup>107</sup> So, the death penalty not only represents the greatest government interference that could affect the life of a citizen—this very same citizen who is subject to the penalty is also picking up the legal tab as a taxpayer.<sup>108</sup> The situation amounts to a double tax on civilians, which is problematic since such government taxing is antithetical to conservative values and principles.

The cost of taking a defendant all the way through to execution represents wasteful government spending at its most exuberant. It literally costs taxpayers millions to kill, as reporting by the New York Times has indicated, with states wasting millions of dollars on death penalty cases.<sup>109</sup> Among these costly factors, death penalty eligible cases are more expensive at trial and in pretrial procedures. One study of Pennsylvania's capital system showed the range of additional costs that incur for capital cases.<sup>110</sup> For example, pretrial motions in capital cases tended to be longer, more complex, and raise evidentiary questions that are unique to the capital process, not to mention a longer voir dire process, which, in some places “consumes as much time and as many resources as the trial itself.”<sup>111</sup> Moreover, as another researcher has described, “a murder trial normally takes

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107. Jones, *supra* note 93, at 233 (“It is natural for some conservatives and Republicans to extend this critical approach to capital punishment. After all, many of the conservative critiques of mass incarceration—its high cost, ineffectiveness, and failure to recognize the possibility of redemption—equally apply to the death penalty.”).

108. See, e.g., Peter A. Collins et al., *An Analysis of the Economic Costs of Seeking the Death Penalty in Washington State*, 14 SEATTLE J. SOC. JUST. 727, 779 (2016) (“the practice of seeking the death penalty, as it is currently used, creates economic and geographic disproportionality that raises significant legal, fiscal, and social concerns.”).

109. Editorial, *High Cost of Death Row*, N.Y. TIMES (Sept. 27, 2009), <https://www.nytimes.com/2009/09/28/opinion/28mon3.html>.

110. See Marla D. Tortorice, *Costs Versus Benefits: The Fiscal Realities of the Death Penalty in Pennsylvania*, 78 U. PITT. L. REV. 519, 525 (2017).

111. *Id.* at 527.

much longer when the death penalty is at issue than when it is not. Litigation costs—including the time of judges, prosecutors, public defenders, and court reporters, and the high costs of briefs—are mostly borne by the taxpayer.”<sup>112</sup>

There are other related costs. As many capital trials are bifurcated proceedings, there are essentially two trials required—one for the guilt phase, and a second to determine punishment. In such systems, two attorneys are usually appointed as defense counsel—one for the first trial, and another for the sentencing, yet such bifurcated proceedings are not present in noncapital cases.<sup>113</sup> Taken wholly, it is estimated in 2008 that the average capital-eligible case that did not seek the death penalty costed around \$1.1 million, while the full-cost estimate for a single death sentence is about \$3.1 million.<sup>114</sup>

Capital convicts often engage in appeals processes that can take sometimes decades to exhaust. Because death penalty jurisdictions typically provide for automatic appellate review in the highest state criminal court, such review, which is discretionary in noncapital cases, automatically begins the time and expense of an inmate living on death row.<sup>115</sup> Relatedly, capital sentences are more likely to be reversed at the appellate level so that the trial ends up being a more expensive route to a life without parole sentence.<sup>116</sup> “The prolonged legal process that results during the trial and appellate process costs hundreds of thousands, if not millions, of dollars more than similar cases that do not

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112. Hugo Adam Bedau, *The Case Against the Death Penalty*, ACLU (rev. 2012) (1973) <https://www.aclu.org/other/case-against-the-death-penalty>.

113. Tortorice, *supra* note 110, at 528.

114. Nicole C. Brambila & Liam Migdail-Smith, *Executing Justice: A Look at the Cost of Pennsylvania's Death Penalty*, READING EAGLE (June 17, 2016, 10:18 AM), <http://www.readingeagle.com/news/article/executingjustice-a-look-at-the-cost-of-pennsylvanias-death-penalty>.

115. Tortorice, *supra* note 110, at 528.

116. Jones, *supra* note 93, at 236.

seek the death penalty.”<sup>117</sup> As one study of California’s death penalty system found, the state spent about \$308 million for each of the thirteen executions carried out since 1978.<sup>118</sup>

There is also the price tag of keeping an individual on death row. In general, the average time spent on death row has increased over the years. In 1984, the average was a little over six years, but by 2012, the average hovered around sixteen years due to increasing legal complexities and appellate procedures.<sup>119</sup> In addition to the longer durations, the costs of housing inmates on death row are significantly more expensive than housing general population inmates. California is perhaps one of the most extreme examples, as the state spends \$90,000 more per year on individuals on death row compared to individuals housed in the general population.<sup>120</sup> Over the course of two decades, the average time an inmate spends on death row can add up to millions of dollars for all death row inmates.

Finally, while it might seem obvious, it must be mentioned that huge amounts of legal labor are expended in the name of representing indigent death-row inmates. When considering the use of energy and legal talent, often voluntary, labors of love, it is certainly worth tallying all the countless hours donated by attorneys, law students, law schools, activists, and other organizations to provide legal aid to those condemned to death. The sheer volume of human

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117. See *id.*; Michael E. Silverman, *Toward a Modern, Apolitical Death Penalty Abolition Movement in Georgia (and Other Conservative States)*, 3 SAVANNAH L. REV. 251, 259 (2016) (noting that the Jodi Arias murder trials costed taxpayers well over 3.2 million dollars, whereas that county’s average cost of a murder trial is \$333,627).

118. Judge Arhur L. Alarcon & Paula M. Mitchell, *Costs of Capital Punishment in California: Will Voters Choose Reform this November?*, 46 LOY. L.A. L. REV. 221, 226 (2012).

119. Torin McFarland, *The Death Penalty v. Life Incarceration: A Financial Analysis*, 4 SUSQUEHANNA U. POL. REV. 46, 54 (2016).

120. Rone Tempest, *Death Row Often Means a Long Life; California Condemns many Murderers, but Few are Ever Executed*, L.A. TIMES (Mar. 6, 2005), <https://www.latimes.com/archives/la-xpm-2005-mar-06-me-deathpen6-story.html>.

effort expended to keep people from being killed is a major waste of pro bono and low bono work that could be put to far greater use in other areas of social need. The death penalty abolished would result in a more efficient justice system and would free up time, money, and effort that could be spent to shore up the access to justice gap in other areas of criminal and civil law. Rather than simply feeding a permanent legal black hole, the resources could be spent on more pressing needs than simply to satisfy the penchant for killing.

### 3. Sanctity of Life & Human Dignity

The death penalty also sits in tension with deeply-held convictions about justice, the rights of man, the sanctity of life, and human dignity.<sup>121</sup> From a historical perspective, “slavery is often seen as an analogous case to the death penalty . . . Many argue that the Republicans should go back to their roots and oppose the death penalty.”<sup>122</sup> As the application of the death penalty is overwhelmingly disparate when it comes to race and class, the unfairness of the situation results in injustice, both in terms of its distributive and retributive aspects;<sup>123</sup> and as has been noted, “an arbitrary and capricious government is not a limited one.”<sup>124</sup> The edited volume, *The Killing State*, underscores how right-leaning citizens “can say that the most important issue in the debate about capital punishment is one of fairness not one of sympathy for the murderers; they can position themselves as defenders of law itself, as legal conservatives.”<sup>125</sup>

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121. Robert Johnson, *Reflections on the Death Penalty: Human Rights, Human Dignity, and Dehumanization in the Death House*, 13 SEATTLE J. SOC. JUST. 583, 583 (2014) (describing how the concept of “dignity” wills against use of capital punishment).

122. Rizer, *supra* note 89, at 117.

123. *See State v. Gregory*, 427 P.3d 621, 642 (Wash. 2018) (a majority opinion finding that not only was the state’s system unfair in application, but also that it was heavily skewed against racial minorities).

124. Rizer, *supra* note 89, at 93.

125. AUSTIN SARAT, *THE KILLING STATE* 8 (1998).



Perhaps the greatest threat to these principles is the fact that there have been numerous death row exonerations. This means that there have likely been mistakes made, and innocent lives wrongfully executed. “Almost all exonerations from death row begin with ordinary errors that happen regularly in our criminal justice system: mistaken eyewitness identification, evidence withheld by the prosecution, ineffective representation, coerced confessions, and racial bias.”<sup>126</sup> Hence, the death penalty is a threat to innocent lives. As one commentator confirms, “no other practical argument cuts more sharply against capital punishment than the risk of executing an innocent person.”<sup>127</sup>

Another related point that overlaps with the religious themes described above is the theological notion that humans are “created in God’s image.” Religious commentators throughout history have suggested that being made in God’s image is a central part of the Christian argument against the death penalty.<sup>128</sup> From this view, humanity’s creation means that every life counts: “Regardless of what individuals do—even the commission of grave crimes—their life remains sacred . . . By putting innocent life at risk and taking life unnecessarily, the death penalty goes against core pro-life values.”<sup>129</sup> Abolitionists must use these ideas to streamline the fact that the death penalty is not necessary in this country, nor is it even a relevant tool of justice inasmuch as a political tool:

The death penalty is largely driven by a relatively small number of district attorneys who commonly seek it and campaign on that

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126. Dieter *supra* note 9, at 929–30.

127. See Silverman *supra* note 117, at 264; *The Innocent and the Death Penalty*, INNOCENCE PROJECT (Feb. 10, 2009), <http://www.innocenceproject.org/free-innocent/improve-the-law/the-innocent-and-the-deathpenalty> (reporting in December 2014 that 325 persons have been “fully exonerated” by DNA evidence) (last visited Nov. 16, 2019).

128. Rizer, *supra* note 89, at 112.

129. Jones, *supra* note 93, at 237.

record, and by a few other officials who try to distinguish themselves from their opponents by aligning with the death penalty. The death penalty may occasionally serve political ends, but it is not essential to the protection of lives.<sup>130</sup>

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130. Dieter, *supra* note 9, at 929

#### IV. GROWING ALLEGIANCES AND ALLIANCES TO KILL THE KILLING

*The influence of Western religion—particularly the Christian Church—on the state’s use of the death penalty has ebbed and flowed over the past two thousand years. For much of that period, the Church sacralized and legitimized capital punishment, explaining that God required the death of the condemned as a form of expiation and retribution. These religious understandings had a profound impact on the widespread use of capital punishment by the state . . . . The ultimate fate of the death penalty in this country will thus more likely be resolved in the realm of the secular rather than the sacred.*<sup>131</sup>

This Article has tried to argue quite the opposite of the final sentence above. While it agrees that the Church has allowed the death penalty to flourish in its kingdoms, looking forward, it is not so clear that victory over the death penalty will be a secular affair. As one commentator notes, Church-related groups are “theoretically less influential today than they were in the previous generations.”<sup>132</sup> This point suggests that the traditional ways may not hold as much sway on believers as in the past, who may be more inclined to recognize the aspects of capital punishment that conflict with other values. Abolitionists must customize their message and target new audiences to forge new allegiances and alliances. Culture work in this area prescribes the conscious targeting of groups whose own ideology sits at odds with the general thrust of capital killing. Most prominently is the number of serious ideological conflicts, which pit Christian and politically conservative thought against the practice of capital execution. These already-existing conflicts make these demographic groups obvious targets for abolitionist outreach efforts. Religion is built into the struggle against the death penalty, and abolitionists must act on this reality.

Although this prescription aims to coordinate efforts to

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131. Douglas, *supra* note 43, at 170.

132. Drinan, *supra* note 47, at 177.

help end capital punishment, some might counter that the point is relatively pointless. After all, the death penalty is rarely applied in practice, and ending it will only affect the tiniest fraction of criminal convicts.<sup>133</sup> In other words, it is not that big of an issue, statistically speaking, considering that since the country's inception, there have been over 15,000 legal executions,<sup>134</sup> and there are less than 3,000 individuals on death row today.<sup>135</sup> However, such thinking underestimates exactly what is at stake in the ability to kill as a legal punishment. There is more to be considered than simply the factual number of people killed or on death row. More critically, for some communities, the death penalty holds tremendous sway and meaning—these are other points of culture that highlight how the death penalty itself influences society.

In effect, the death penalty exerts social control over some communities more than others. In black communities, the threat of death-by-state looms in a way that it does not in other American enclaves. There is a long history of legal and extra-legal killings of Blacks in American culture, which gives the death penalty the appearance of being just another way of legally killing Blacks. Although black life might be cheap in America, during the time of slavery, it was worth even less, since killing a slave was not even punishable as a crime. The threat of extra-legal killings like lynching and legal killings like the death penalty have loomed ominously

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133. The Death Penalty Information Center reports that as of July 2018, there were 2738 convicts on death row. *Prisoners on Death Row on April 1, 2019 (Per Death Row USA)*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year>. This is a relatively small figure compared to the millions of violent felonies committed each year in the U.S. as reported by the Federal Bureau of Investigation. See *Crime in the United States, 2015*, U.S. DEP'T JUST., <https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/offenses-known-to-law-enforcement/violent-crime>.

134. *Executions in the U.S. 1608–2002: The ESPY File*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions-us-1608-2002-espy-file>.

135. DEATH PENALTY INFO. CTR., *supra* note 133; Deborah Fins, *Death Row U.S.A. Summer 2018*, NAACP LEGAL DEF. & EDUC. FUND, INC. (July 1, 2018), <https://www.naacpldf.org/wp-content/uploads/DRUSASummer2018.pdf>.

for black communities since the days of slavery. Moreover, the poverty line is the greatest indicator of how one is likely to fare against a capital offence. Indeed, “minorities are not the only group of people who fear the criminal justice system’s inconsistent treatment. People in poverty also face similar treatment.”<sup>136</sup> From a macroscopic view, the threat of capital punishment acts as more than simply some law on the books, but it is a fearsome face of the government that exerts pressure on particular social groups. Thus, even if capital defendants represent only a tiny percentage of criminals convicted, the ability to inflict death is perhaps the greatest statement the state can make to wield power. Erasing capital punishment nets the people far more than simply saving condemned lives on death row; it also eliminates a death-machine that imbues the state with the ultimate power over the lives of citizens, and all the advantages that accrue to it.

Great power manifests from the state’s ability to inflict legal death on an individual. This inscrutable power gives the state a hand against citizens and works to the detriment of the people.<sup>137</sup> Even if capital execution is used infrequently, the ability to do so gives prosecutors an upper hand in the ability to invoke the threat of death to secure convictions, which would otherwise be unavailable. The state’s ability to threaten death gives the state an incredible bargaining chip to secure plea deals, not to mention that taxpayers fund the full bill, while indigent defendants with few resources are resigned to the limited assistance that court-appointed counsel can provide, also largely paid for by taxpayers.

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136. Rizer, *supra* note 89, at 98.

137. See, e.g., Cynthia F. Adcock, *The Collateral Anti-Therapeutic Effects of the Death Penalty*, 11 FLA. COASTAL L. REV. 289, 290 (2010) (“a study of the human costs of the death penalty as measured by the anti-therapeutic impact of the punishment on those other than the condemned prisoners—costs the public debate over the death penalty rarely acknowledges.”); Tung Yin, *The Death Penalty Spectacle*, 3 U. DENV. CRIM. L. REV. 165 *passim* (2013).

It may seem obvious, but it is still worth stating that even if the bulk of death-row inmates never face execution, the taxpayer cost is virtually the same. The fact is that states spend big sums of money to get a defendant to the point of execution, even though many in fact are not executed. Since the amount of money spent is nearly the same whether everyone or hardly anyone is killed, the smart-on-crime thing to do would be to cut the excessive spending altogether.

Although this Article is ultimately about helping to guide abolitionists to greener pastures, it has been forced to contend with the consideration of how adding greater diversity to the abolitionist camp might impact the camp itself. It might be argued that, like the Warumungu, the diversity opens up the movement to other influences in turn. For example, the embracing of new demographics into the fold might have undesirable downstream consequences, including the threat of alienating others in the camp or the creation of other internal discord. Such developments are certain to undercut the strength of the Article's main argument, which is predicated on the notion that more people working together toward abolition will yield more momentum and greater political strength for the abolition lobby. However, there are no illusions that such a happy ending cannot go awry. This critique is valid, but it hardly means that attempting such outreach is not worth the risk. Moving forward, one would hope that abolitionists learn to take shelter in the strength of diversity, in the strength of the various rationales for wanting to end the death penalty. As this work has tried to show, some rationales complement other rationales for disavowing the death penalty, and new rationales are developing with each passing year. Those in the struggle against this form of legal punishment must learn how to embrace those who would like to see it end for their own rationales.

Finally, it must be mentioned that whether the death penalty itself lives or dies is not simply in the hands of abolition efforts per se. As described above, the judiciary has

been a key arena for mounting legal challenges against the death penalty. Less has been said, however, about the lawyers working in the trenches who, year by year, chip away at the death penalty through tireless work advocating for death row prisoners. In recent decades the death penalty has been struck down by the Supreme Court for a range of criminal defendants, including juveniles and the mentally retarded, which was in part the result of hardworking and dedicated lawyers and their ongoing advocacy.<sup>138</sup> They have as much to do with the abolition of the death penalty as do activists and other stakeholders. This Article aims to emphasize that abolitionists should be working to harness the minds of judges, jurors, and other actors in the legal system, so that they can see how their views of the death penalty might fit within their own religious and political beliefs. After all, state and government officials often vote according to religious and political convictions. The culture work of the abolitionist rests in convincing Christian and conservative counterparts that their beliefs pair more with pro-life ideals than supporting state-sponsored killing. Beyond, the abolitionist movement must recognize that abolition embodies core conservative and religious thought; it must not be deceived into thinking that the death penalty line is drawn between liberal and conservative.

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138. See *Roper v. Simmons*, 543 U.S. 551, 551 (2005); *Atkins v. Virginia*, 536 U.S. 304, 304 (2002).