

CHRIST, CHRISTIANS & CAPITAL PUNISHMENT

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I. INTRODUCTION

In part, we judge nations by who they choose to kill. There are two primary ways that national governments kill people intentionally: in war, and through the execution of criminals.¹ Nations vary widely in how many people they choose to kill, how discriminate they are in choosing to kill, and whether or not they will intentionally kill people at all.

Whatever else may divide them, Presidents Bill Clinton and George W. Bush chose to kill abroad and at home, in that they supported both military actions abroad and the death penalty at home.² They share another commonality as well: both are Christians and made their faith a part of their public and political persona.³

This Article explores an intriguing aspect of that commonality—that Clinton and Bush have proclaimed a faith which has at its center a death penalty sentencing and whose primary public symbol, the cross, is itself an instrument of execution. Even today’s accounts of a condemned prisoner’s last meal⁴ echo the Last Supper,⁵ which was the final meal of a man well

¹Those executed as criminals are sometimes guilty of nothing more than political or religious dissent.

²Kenneth Williams, *The Death Penalty: Can It Be Fixed?*, 51 CATH. U. L. REV. 1177, 1207 (2002).

³For example, Clinton often made public statements through prayer breakfasts. James M. Wall, *There But For the Grace of God*, 115 CHRISTIAN CENTURY 922, 922 (1998). Similarly, President Bush famously claimed Jesus Christ to be his favorite philosopher. Bill McKibben, *The Christian Paradox: How a Faithful Nation Gets Jesus Wrong*, HARPER’S, Aug. 2005, at 31.

⁴Unique among those descriptions of “last meals” is the story of Brian Price, a Texas inmate who prepared many such meals for his fellow prisoners. His account provided the only reference I found comparing these meals to the Last Supper, in the context of fixing those meals himself and doing his best to make them decent with the limited items available, such as by “adding spices to the canned vegetables to make them taste fresh.” Brian Price, *The Last Supper*, LEGAL AFFAIRS, Mar.–Apr. 2004, at 31.

⁵*Matthew* 26:20–30 (all biblical references are to the New Revised Standard Version).

aware He was about to be executed.⁶ Oddly, lessons from the sentencing of Christ have not been a part of the American debate over the death penalty,⁷ even when the argument is between Christians.⁸ This Article sets out to change that.⁹

One reason we have much to learn from the criminal process afforded Christ is that it bears so many similarities to the criminal process employed in the United States today. Like many convicts sentenced to death in the here and now, Christ was given up to the authorities by a paid informant (Judas Iscariot),¹⁰ was arrested in a strategic manner by the authorities,¹¹ was given an arraignment and stood mute to the charges,¹² was tried and convicted,¹³ was sentenced to death,¹⁴ appealed to two separate sovereigns,¹⁵ and finally, was refused a pardon.¹⁶

In objectively reading the Gospel accounts of the trial of Christ as a death penalty process, certain aspects strike some Christians (and others) as unfair.¹⁷ I am one such Christian.¹⁸ There are four primary aspects about

⁶In preparing for the Passover meal that was the Last Supper, Jesus sends His disciples to a man who is to be told that His “time is near.” *Matthew* 26:18.

⁷Even articles expressly addressing the link between Christianity and capital punishment do not consider the death of Christ Himself in their discussion. See Joseph Bottum, *Christians and the Death Penalty*, 155 *FIRST THINGS* 17, 18 (Aug. 2005). See generally Richard H. Hiers, *The Death Penalty and Due Process in Biblical Law*, 81 U. DET. MERCY L. REV. 751 (2004).

⁸In the United States, this debate necessarily will be between Christians, given that 85% of Americans identify themselves as such. McKibben, *supra* note 3, at 32.

⁹Unlike some others, I do not believe that “Christianity’s influence on American law and culture will continue to wane.” Michael V. Hernandez, *A Flawed Foundation: Christianity’s Loss of Preeminent Influence on American Law*, 56 *RUTGERS L. REV.* 625, 710 (2004). Rather, it seems that Christianity is a vibrant force within the American political dialogue with several strong voices in politics; this Article seeks only to be a part of that dialogue, rather than celebrate or denigrate it.

¹⁰*Matthew* 26:14–:16.

¹¹*Matthew* 26:48–:50, :57.

¹²*John* 18:19–:24.

¹³*Mark* 14:55–:64.

¹⁴*Mark* 14:64.

¹⁵*Luke* 23:1–:11.

¹⁶*Luke* 23:18–:24.

¹⁷See Craig S. Keener, *Mistrial of the Millennium*, 59 *CHRISTIAN HISTORY* 38, 38 (1998).

¹⁸As this Article involves matters of religious faith, I feel compelled to disclose that I am a practicing member of Seventh and James Baptist Church in Waco, Texas. As a Christian, my reading of the Bible gives primacy to the life and teachings of Jesus Christ, and, therefore, I focus on the New Testament in this Article. I understand that some other Christians and Jews would

the process undertaken which bother me: First, the innocence of Christ makes His execution wrong.¹⁹ Second, the process happened too quickly.²⁰ Third, the role of the mob as a political force seems to determine a result out of momentary passion, independent of evidence or policy.²¹ Fourth and finally, Jesus had no true advocate in the court.²²

Here, after explaining the similarities between Jesus's trial and modern procedure, I will apply the same four-point critique to modern capital sentencing, which continues to threaten the killing of innocents, moves too fast, responds too reflexively to political pressures, and provides inadequate representation to defendants.

From these four Gospel-centered critiques, I urge action by Christian legislators in the present day, in one of two forms. First, the trial of Christ can be read as a moral basis for eliminating capital punishment altogether so long as there is the possibility of the execution of an innocent.²³

Second, even if one remains an advocate of the death penalty, the trial of Jesus also offers a guide for specific elements of procedural reform to address the unfair aspects of Jesus's trial (described in a preceding paragraph) which continue to infect today's cases. These reforms might include lengthening the trial process,²⁴ reducing the role of political influences within at least some of the stages of the process,²⁵ and providing better representation for those accused.²⁶ Others, of course, have argued for similar reforms, but not as a Christian imperative derived from the singular life story of the Christian savior.

take a different approach and primarily or exclusively focus on the teachings of the Old Testament. *E.g.*, Hiers, *supra* note 7, at 757 n.27.

Many parts of my analysis found their genesis through an exercise my colleague Bill Underwood and I conducted in 2002 at Seventh and James Baptist Church, in which we conducted the sentencing phase of the trial of Christ under Texas rules, using the congregation as a jury. For the record, the jury was hung after deliberations, which under the laws of Texas would result in a life sentence. TEX. CRIM. PROC. CODE ANN. art. 37.071(2)(g) (Vernon 2006).

¹⁹ See *infra* Part IV(A)(2).

²⁰ See *infra* Part IV(B)(2).

²¹ See *infra* Part IV(B)(3).

²² See *infra* Part IV(B)(4).

²³ See *infra* Part IV(A)(2).

²⁴ See *infra* Part IV(B)(2).

²⁵ See *infra* Part IV(B)(3).

²⁶ See *infra* Part IV(B)(4).

While I certainly do not mean to compare the crime of which Christ was accused with the depraved acts of modern-day killers, I do think it is fair to compare the process leading to that execution and the American death penalty process today. Less has changed than we might imagine. I will be using Biblical texts in addressing a contemporary political question,²⁷ but it was not my choice to interject the Christian faith into national politics. Nor was it Clinton's or Bush's decision—the role of Christian faith in government has been an issue since Christians first came to these shores: It was the Puritans, not our modern-day Republicans and Democrats, who first sought to rest their government on the back of Christianity and pass laws in accordance with the “rule of the word of God.”²⁸

My goal here is not to pry Christianity out of politics, nor to force it in, but rather to make the discussion of the death penalty by Christians more complete, by adding to the mix one of the central stories of the faith.

In Part II of this Article, I will set out the Gospel accounts of the investigation, arrest, and trial of Christ, describing it as a process akin in many respects to what we employ today in capital cases, using Texas law as a reference.²⁹ In Part III, I will similarly examine the post-trial procedures³⁰ allowed Christ, which included the rough equivalents of an appeal (to Pilate),³¹ a habeas petition to a separate jurisdiction's authority (Herod),³²

²⁷Importantly, the Christian Gospels address the death penalty directly, something that is not true of other contemporary political issues with religious overtones, such as abortion and human cloning. In addition to the death penalty sentencing of Christ, *John* 8 includes the story of Jesus stopping a lawful execution because those assembled lack the moral authority to kill the convict. The story included in *John* 8 is discussed in Part IV.A.2, *infra*.

²⁸Jay Tolson, *Divided We Stand*, U.S. NEWS AND WORLD REPORT, Aug. 8, 2005, at 42, 44. Of course, there were civilizations and laws before Europeans arrived as well, and many of the legal constructs of the Native Americans derived from theological underpinnings. For example, intellectual property customs among some Native American groups required that certain sacred drawings used in healing could not be reproduced as they were intended to be transitory. Amina Para Matlon, *Safeguarding Native American Sacred Art by Partnering Tribal Law and Equity: An Exploratory Case Study Applying the Bulun Bulun Equity to Navajo Sandpainting*, 27 COLUM. J.L. & ARTS 211, 213–14 (2004).

²⁹Texas has conducted 36% of the executions in the United States since 1972, more than three times the percentage of the next state in order of frequency of execution, Virginia. Reynaldo Anaya Valencia et al., *Avena and the World Court's Death Penalty Jurisdiction in Texas: Addressing the Odd Notion of Texas's Independence from the World*, 23 YALE L. & POL'Y REV. 455, 473 (2005).

³⁰I have limited the scope of this Article to the legal proceedings involving Christ, rather than the actual execution methods used and the preparations for that execution.

³¹*John* 18:28–38.

and a final request for a pardon by the Governor (Pilate).³³ Finally, in Part IV, I look for lessons from that trial in either barring or guiding capital sentencing today, and in Part V conclude by briefly urging honest introspection on this issue by Christians, in a way that encompasses more than Old Testament admonitions and affirmation for bloodlust.

II. CHRIST'S TRIAL AS DEATH PENALTY SENTENCING

A. *The Trial of a Savior*

*Phytiphores: That righteousness which moveth sedition amongst the common people, is needless for the estate of the Country.*³⁴

The Gospel accounts of the trial of Jesus vary in what they describe—that is, while they don't necessarily contradict one another, they do tell different parts of the same story. In analyzing those accounts, the reader

³² *Luke* 23:6–:12. Luke is the only Gospel account which includes the encounter with Herod.

³³ *Luke* 23:13–:25.

³⁴ GERARDUS GOSSENIUS, THE MANNER AND ORDER OF PROCEEDING AGAINST CHRIST BY THE JUDGES (n.p. 1586), *microformed on Early English Books, 1475–1640, Fiche 1861:43* (Univ. Microforms Int'l). The Gossenius broadside, which the author purports to be the transcription of a document he found “at Vienna in a little box under the ground,” includes supposed statements by the judges at the trial of Christ. *Id.* Pontius Pilate, by some accounts of the ninth century, was thought to have died in Vienna. 1 RAYMOND BROWN, THE DEATH OF THE MESSIAH 696 (Doubleday 1994). The quote above is attributed by Gossenius to the Judge identified as Phytiphores.

Oddly, theologians (and legal scholars) do not seem to be aware of the Gossenius broadside and its claim of such mysterious origin. Dr. David E. Garland, author of the definitive bibliography of the passion, *see generally* DAVID GARLAND, ONE HUNDRED YEARS OF STUDY ON THE PASSION NARRATIVES (1990), and a professor at Baylor's Truett Seminary, had not heard of Gossenius, but told me that his “guess is that this reference [to the buried box in Vienna] is useless legend, like the Gospel of Peter and the Acts of Pilate. It is possible that a Roman governor would have kept minutes and forwarded them to Rome, or simply given a general report. I doubt that anything would have survived, however.” Email from David E. Garland, Ph.D., Associate Dean and Professor of Christian Scriptures, George W. Truett Theological Seminary, to Mark Osler, Associate Professor of Law, Baylor Law School (July 12, 2005) (on file with author).

Here, I have limited my use of the Gossenius piece to quotations at section headings, and give them credit only for being an interesting view of what might have been said, several quanta beneath the credit I accord the Gospel accounts. They are intriguing at that level—after all, one does not need to share Dante's view of the structure or existence of Hell to appreciate that he has a point to make in his *Inferno*.

will notice that I sometimes jump from one Gospel narrative to another, especially where a particular event is only reported in one of the Gospels. For example, only the Gospel of Luke includes the appearance of Christ before Herod,³⁵ so I leave the other Gospels behind in describing the encounter with Herod, then return to the narrative found in other Gospels. I realize that the Gospels were written at different times after the death of Christ, but for purposes of analyzing the story in whole as a criminal law process, I have chosen to present the different facets of the story in a logical order even when those events are found in different accounts of the story.³⁶

The intersection of faith and politics is dangerous to cross even in the best of times. I do so with the humbling acknowledgment that I am a lawyer, not a theologian, and thus I have tried to look at the trial of Christ from the perspective supported by my own training and experience and acknowledge my limitations as a Biblical scholar.³⁷

The primary characteristic distinguishing Christ from many others executed by governments is simply that He was not guilty of what we might today consider a capital crime. Rather, He was accused of claiming to be the Son of God,³⁸ and threatening to destroy the temple at Jerusalem,³⁹ which would probably⁴⁰ not be considered a crime⁴¹ in modern America.⁴²

³⁵ *Luke* 23:6–:12.

³⁶ Some might call this approach “harmonizing,” in that differing accounts are made to coordinate. Admittedly, this approach often neglects to examine inconsistencies. The well-respected theologian Raymond Brown, for example, concluded that “although the individual Gospels often do preserve memories of what happened, changes and adaptations that occurred in the course of preaching and writing about the passion usually mean that the end products are not simply historical and that harmonizing them can produce a distortion.” BROWN, *supra* note 34, at 23.

³⁷ It is an odd anomaly that in the political arena, candidates are compelled to discuss faith issues, while within the legal community faith issues rarely enter our discussions, to the point that the word “sacred” has now been applied not to objects of religious faith, but to the Supreme Court cases of *Marbury v. Madison* and *Brown v. Board of Education*. Joseph Tsai, *Sacred Visions of Law*, 90 IOWA L. REV. 1095, 1099 (2005). Tsai intriguingly and correctly says that *Marbury* and *Brown* are at the center of “communities of legal faith.” *Id.*

³⁸ *Mark* 14:61–:64.

³⁹ *Matthew* 26:60–:61.

⁴⁰ It is conceivable that a plot to blow up a temple could be construed as an act of terrorism under United States law, but it is unlikely that the mere threat to do so could be a capital offense. 18 U.S.C.A. § 2332a (2000 & Supp. 2006).

⁴¹ Of course, treason (which involves the same underlying danger of upsetting the order of authorities) is a capital crime under federal law. 18 U.S.C. § 2381 (2000).

⁴² Notably, however, such blasphemy was a capital crime in colonial America, including in

To Christians, Christ will always be a singular individual in the history of the world. However, Christ's singularity does not mean that we should not examine the process that led to the execution of Christ. If we were to set aside all lessons that could be learned from Jesus's life because of His singular and unique role in the Christian view of the world and its history, we would ironically lose exactly those stories which animate the faith and inform the poetry of our heroes.

B. Investigation and Arrest

*Achias: The cause of the offender ought to be thoroughly examined before sentence of death be given against Him.*⁴³

The investigation and arrest of Jesus was conducted by many individuals (though few are named) and involved two modern elements: the use of a paid informant and a strategically-timed arrest.

The principal investigators of Jesus were the Pharisees and scribes, who were religious officials.⁴⁴ It should be no surprise that these officials would want to prosecute Jesus, as He denounced them publicly in the harshest terms, saying at one point “[w]oe to you, scribes and Pharisees, hypocrites! . . . [Y]ou cross sea and land to make a single convert, and you make the new convert twice as much a child of hell as yourselves.”⁴⁵ Further, He challenged their teachings, which often seemed to favor formalism over spirit. For example, the Pharisees and scribes roundly criticized Jesus for eating with tax collectors and sinners⁴⁶ and for gathering grain on the Sabbath.⁴⁷

The final turning point for the religious officials was the incident in the last days of Jesus when He confronted them directly in the holy temple of Jerusalem.⁴⁸ Objecting to the commercialization of the temple, He drove out the merchants doing business there and “overturned the tables of the

the Colony of Massachusetts, along with “manstealing” and rebellion. *Furman v. Georgia*, 408 U.S. 238, 335 (1972) (Marshall, J., concurring).

⁴³ GOSSENIUS, *supra* note 34.

⁴⁴ Jesus describes the Pharisees and scribes as sitting on “Moses’ seat.” *Matthew* 23:2.

⁴⁵ *Matthew* 23:15.

⁴⁶ *Mark* 2:15–17.

⁴⁷ *Mark* 2:23–28.

⁴⁸ *Mathew* 21:12–13.

money changers and the seats of those who sold doves.”⁴⁹ Jesus tops off this episode by publicly declaring that the religious hierarchy have turned the temple into a “den of robbers.”⁵⁰ It was at this point that the authorities began their investigation in earnest, “looking for a way to kill him; for they were afraid of him, because the whole crowd was spellbound by his teaching.”⁵¹

Some may object to my description of the actions of the Pharisees and scribes as an “investigation,” since their actions largely consisted of attempts to get Jesus to say publicly something that would violate the law or trouble the Roman authorities, knowing His predisposition to do exactly that.⁵² However, given the different laws in play, I fail to see the distinction (in terms of process) between this form of investigation and the actions of an undercover narcotics officer who offers a known drug dealer a wad of cash for a bag of crack: Both are trying to set up a situation in which a violation of law thought to occur regularly outside the view of the authorities can easily be observed for evidentiary purposes.⁵³

Among other devices, the Pharisees and scribes tried to trap Jesus by showing Him to be an enemy of the state who advocated the non-payment of taxes.⁵⁴ A group of Pharisees and “Herodians”⁵⁵ approached Jesus and asked Him, “Is it lawful to pay taxes to the emperor, or not? Should we pay them, or should we not?”⁵⁶ Jesus apparently passes this test by showing them the picture of Caesar on a coin and telling them to “[g]ive to the Emperor the things that are the Emperor’s, and to God the things that are God’s.”⁵⁷

⁴⁹ *Id.* 21:12. These are perhaps the only Gospel account of Jesus acting even arguably in a violent way, and the imagery of His physically overturning the tables stands in stark contrast to the oft-portrayed passive Christ in the face of injustice. Compare *id.* 21:12 with *id.* 5:10–12.

⁵⁰ See *id.* 21:13 (internal quotation marks omitted); *Mark* 11:17 (internal quotation marks omitted).

⁵¹ *Mark* 11:18. See *Luke* 22:2.

⁵² *Mark* 11:27–33.

⁵³ Of course, I make this analogy only to illustrate the meaning of the word “investigation” and do not mean to equate the actions of narcotics investigators on a moral level with those of the Pharisees. As an Assistant United States Attorney, I personally prosecuted narcotics traffickers following this type of investigation.

⁵⁴ *Mark* 12:13–17.

⁵⁵ See *id.* 12:13.

⁵⁶ *Id.* 12:14.

⁵⁷ *Id.* 12:17 (internal quotation marks omitted).

Intriguingly, this inquisition is conducted by local religious authorities (the Pharisees), working together with the more secular officials representing Herod.⁵⁸ This echoes the combined multi-jurisdictional task forces at work in the United States today.⁵⁹

Other attempts to trap Jesus were also unavailing. For example, a scribe⁶⁰ challenged Jesus to name the most important of the commandments,⁶¹ probably in an attempt to elicit a slight to one of the ancient laws. Jesus does not dodge the question but rather simply states that the most important commandment is to “love the Lord your God with all your heart, and with all your soul, and with all your mind, and with all your strength.”⁶² Rather than considering this as incriminating evidence, the questioning scribe seems to be converted to His views.⁶³ The Gospel of Mark reports, “After that no one dared to ask him any question.”⁶⁴

It appears that the authorities viewed their best bet for prosecution, given the failure of their own attempts to elicit evidence, to be what they understood as Jesus’s very public threat to destroy the temple at Jerusalem—a claim derived from Jesus’s (correct) prediction that at the temple “not one stone will be left here upon another.”⁶⁵

The authorities were intentional about timing in arresting Jesus. Originally, they planned to arrest Jesus during the “Festival of Unleavened Bread” (Passover) but postponed the arrest for strategic reasons.⁶⁶ Specifically, they feared the reaction of Jesus’s followers, concluding that if they chanced a public arrest during the festival, “there may be a riot among

⁵⁸*Id.* 12:13. Herod was not the Roman prefect who directly ruled the area (that was Pontius Pilate), but rather a relatively secular local leader of the ethnic Jews. BROWN, *supra* note 34, at 763–73.

⁵⁹Presumably, a drug task force would be of interest to multiple jurisdictions because narcotics are seen to threaten multiple jurisdictions; similarly, it would seem that multiple jurisdictions were threatened by the political power Jesus wielded.

⁶⁰Mark describes the questioner as one of the scribes. *Mark* 12:28. Matthew describes him as a “lawyer.” *See Matthew* 22:35.

⁶¹*Mark* 12:28.

⁶²*Id.* 12:30. Jesus then goes on to say that the second most important commandment is to “love your neighbor as yourself.” *Id.* 12:31.

⁶³*Id.* 12:32. Specifically, the scribe answers: “You are right, Teacher . . . this is much more important than all whole burnt offerings and sacrifices.” *Id.* 12:32–:34 (internal quotation marks omitted).

⁶⁴*Id.* 12:34.

⁶⁵*Matthew* 24:2.

⁶⁶*Luke* 22:1–:2.

the people.”⁶⁷ Strategic arrest, of course, is still a part of criminal law. Law enforcement officers may choose to delay arrest to avoid a similar uproar amongst the supporters of the defendant or, conversely, may strategically make the arrest very public so as to deter others.⁶⁸ As a United States Attorney, Rudolph Giuliani was well known for directing such strategic public arrests, especially in financial cases.⁶⁹ Giuliani’s tactic of arresting financial traders at work so that everyone in the office could see was not so different from arresting Jesus before His own followers centuries earlier.⁷⁰

Finally, having come to the time they had chosen for the arrest, the authorities reached out to someone within Jesus’s organization and offered to pay cash to that informant for his cooperation in identifying and convicting their target, a process well-known to modern prosecutors⁷¹ as “flipping.”⁷² Such informants and cooperators are essential to modern law enforcement, and they can play a key role in identifying defendants, gathering evidence, providing testimony, and locating other defendants for arrest.⁷³ It was for at least some of these reasons that the Pharisees and scribes welcomed the assistance of a well-placed cooperator: Judas Iscariot.⁷⁴

In modern criminal investigations, such paid informants are often most needed in pursuing “‘victimless’ or ‘consensual’ crimes.”⁷⁵ This, of course, would describe the crimes Jesus was accused of and for which Judas was recruited as informant, substantiating Amanda Schreiber’s claim that “[s]o

⁶⁷ Mark 14:2.

⁶⁸ See Jonathan D. Glater, *Five Questions for Mary Jo White: Those Very Public Arrests of Executives*, N.Y. TIMES, July 28, 2002, § 3, at 4.

⁶⁹ Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 767 n.74, 770 (2003).

⁷⁰ Mark 14:43.

⁷¹ See Daniel C. Richman, *Cooperating Defendants: The Costs and Benefits of Purchasing Information from Scoundrels*, 8 FED. SENT’G REP. 292, 292 (1996).

⁷² Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U. CIN. L. REV. 645, 652 (2004).

⁷³ Michael A. Simons, *Retribution for Rats: Cooperation, Punishment, and Atonement*, 56 VAND. L. REV. 1, 15–21 (2003).

⁷⁴ Mark 14:43.

⁷⁵ Amanda J. Schreiber, *Dealing with the Devil: An Examination of the FBI’s Troubled Relationship with Its Confidential Informants*, 34 COLUM. J.L. & SOC. PROBS. 301, 301–302 (2001).

long as there has been law enforcement, there has been the confidential informant.”⁷⁶

As is often the case in modern investigations,⁷⁷ it was the cooperator, Judas, who sought out the authorities to provide information.⁷⁸ “Then one of the twelve, who was called Judas Iscariot, went to the chief priests and said, ‘What will you give me if I betray him to you?’ They paid him thirty pieces of silver. And from that moment he began to look for an opportunity to betray him.”⁷⁹

So, not only was Judas a confidential informant, he was a paid confidential informant, putting him at the center of one of the most controversial practices extending to the modern day. Recently, the practice of paying such informants has been condemned as providing improper incentives leading to perjury,⁸⁰ and the practice of offering benefits such as shorter sentences to cooperators was even (briefly, before an *en banc* reversal) ruled to violate federal law by a panel of the United States Tenth Circuit Court of Appeals.⁸¹

With the aid of their cooperator, they came to arrest Jesus at night while the apostles were sleeping.⁸² Jesus tried to wake the apostles so they could attempt an escape and avoid arrest,⁸³ but while He was still speaking, Judas arrived with “a large crowd with swords and clubs, from the chief priests and the elders of the people.”⁸⁴ According to John, this task force⁸⁵

⁷⁶*Id.* at 301.

⁷⁷Sometimes, in a modern context of harsh sentencing laws which provide enhanced incentives to cooperate, there is a “race to the stationhouse” among potential cooperators, as each seeks to be the first to cooperate and receive the greatest reward for that cooperation. Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 *FORDHAM L. REV.* 917, 929 (1999) (internal quotation marks omitted).

⁷⁸*Matthew* 26:14–:15.

⁷⁹*Id.* 26:14–:16.

⁸⁰Richman, *supra* note 71, at 293–95.

⁸¹*United States v. Singleton*, 144 F.3d 1343, 1352 (10th Cir. 1998), *rev’d en banc*, 165 F.3d 1297 (10th Cir. 1999), *cert. denied*, 527 U.S. 1024 (1999).

⁸²*Matthew* 26:36–:46.

⁸³“Get up, let us be going. See, my betrayer is at hand.” *Id.* 26:46 (internal quotation marks omitted).

⁸⁴*Id.* 26:47.

⁸⁵Some might argue that the arrest of Jesus was a mob action rather than a civil arrest. Theologian Raymond Brown, however, views the arresting group as a delegation from the authorities, and concludes, “No vigilantism or lynch mentality is implied. . . . In any case, ‘rabble’ or ‘mob’ is an overinterpretation.” BROWN, *supra* note 34, at 247.

included both soldiers (presumably Roman or carrying the authority of Rome)⁸⁶ and policemen.⁸⁷

The scene as the heavily-armed authorities arrived in the darkness to effect an arrest with overwhelming force further illustrates the strategic nature of the arrest. In fact, at the arrest of Jesus, the purpose for such standard procedures as the use of overwhelming force (officer safety) was demonstrated as one of Jesus's followers cut off the ear of a member of the arresting party.⁸⁸

Even Jesus's words at the time reflect a recognition that this was a strategically-timed arrest, which could have been made sometime other than the dark of night: "Day after day I was with you in the temple teaching, and you did not arrest me. But let the scriptures be fulfilled."⁸⁹ The followers fled⁹⁰ in varying states of disarray,⁹¹ and Jesus alone was taken into custody.⁹²

While the Pharisees now had Jesus in custody, it would seem there was little evidence against Him. Of course, the practice of arresting someone against whom there is limited evidence, in the hope they will confess, is not unknown today.⁹³ Justice Douglas, looking at contemporary cases, condemned this ancient tactic of using scant evidence to hold a defendant in the hopes of a confession: "How convenient it is to make detention the vehicle of investigation! Then the police can have access to the prisoner day and night."⁹⁴

⁸⁶Raymond Brown saw the arresting party as being comprised of both "Roman and Jewish troops." BROWN, *supra* note 34, at 250.

⁸⁷*John* 18:3. John's description of the arresting officers arriving with "lanterns and torches and weapons" both confirms that the arrest was at night and echoes the horrific scenes of vigilante and lynch-mob justice throughout history. *Id.*

⁸⁸*Matthew* 26:51. John reports the swordsman as Simon Peter. *John* 18:10. Before a melee ensued, however, Jesus told His followers not to struggle, saying that "all who take the sword will perish by the sword." *Matthew* 26:52.

⁸⁹*Mark* 14:49 (internal quotation marks omitted).

⁹⁰*Id.* 14:50.

⁹¹One young man who fled "was wearing nothing but a linen cloth. They caught hold of him, but he left the linen cloth and ran off naked." *Id.* 14:51–52.

⁹²*Id.* 14:50.

⁹³*E.g.*, *Gov't of Virgin Is. v. Lovell*, 378 F.2d 799, 804 (3d Cir. 1967).

⁹⁴*United States v. Carignan*, 342 U.S. 36, 46 (1951) (Douglas, J., concurring). In the present day, some have called for radical reform to remedy just such actions. See Russell D. Covey, *Interrogation Warrants*, 26 CARDOZO L. REV. 1867, 1896 (2005).

C. The Initial Appearance/Arraignment

*Josaphat: Let Him be bound in iron chains and kept secretly.*⁹⁵

Jesus, upon His arrest, was not directly taken to Caiaphas, who was the high priest⁹⁶ (at least according to the Gospel of John).⁹⁷ Rather, He was taken first to an official named Annas,⁹⁸ who conducted something which sounds strikingly like an initial appearance⁹⁹ or arraignment.¹⁰⁰ A primary purpose of an arraignment, of course, is to make the defendant aware of the charges and enter a plea on those charges.¹⁰¹

Although the story is somewhat hard to follow (in part because both Annas and Caiaphas are referred to as “the high priest”), it appears that Jesus is essentially asked to enter a plea. He was questioned “about his disciples and his teaching,”¹⁰² which were at the center of the charges against Him. In response, Jesus essentially stands mute, neither admitting guilt nor denying it, but instead saying, “Why do you ask me? Ask those who heard what I said to them; they know what I said.”¹⁰³

The words of Jesus at His arraignment have the same effect as asserting the Fifth Amendment—they amount to a refusal to admit guilt and a demand that the authorities produce their own evidence.¹⁰⁴ Of course, the authorities prosecuting Jesus do not respond well to this assertion or to Jesus’s demand that the authorities come up with their own evidence rather than rely on a coerced plea of guilty:

When he had said this, one of the police standing nearby struck Jesus on the face, saying, “Is that how you answer the high priest?” Jesus answered, “If I have spoken wrongly, testify to the wrong. But if I have spoken rightly,

⁹⁵ GOSSENIUS, *supra* note 34.

⁹⁶ *John* 18:12–14.

⁹⁷ The initial appearance before Annas does not appear in the other Gospels.

⁹⁸ *John* 18:12–14.

⁹⁹ FED. R. CRIM. P. 5.

¹⁰⁰ FED. R. CRIM. P. 10.

¹⁰¹ *Id.*

¹⁰² *John* 18:19.

¹⁰³ *John* 18:21.

¹⁰⁴ U.S. CONST. amend. V.

why do you strike me?" Then Annas sent him bound to Caiaphas the high priest.¹⁰⁵

Thus, His arraignment was complete and He was sent on to be tried.¹⁰⁶

D. The Trial¹⁰⁷

*Mesa: If he be just then let us join with Him, but if he be guilty let us root Him out.*¹⁰⁸

1. The Setting

The trial of Christ took place in the courtyard of Caiaphas's palace.¹⁰⁹ The "scribes and elders"¹¹⁰ had gathered there, apparently before the arrival of Jesus.¹¹¹ Some have suggested that the trial was held at night, which (if true) might have been in violation of the requirement of Jewish law that capital trials be conducted only in daylight.¹¹² Regardless of the timing, however, this trial would not be wholly unfamiliar to the modern court-watcher.

Generally, it appears that Caiaphas served as the prosecutor and the religious elders formed the jury.¹¹³ The jury having been selected, the next step was the taking of testimony.

¹⁰⁵ *John* 18:22--:24.

¹⁰⁶ *Id.*

¹⁰⁷ What I describe as a trial, some have considered as "irregular" or "formally illegal." See BROWN, *supra* note 34, at 331. I am not concerned here with whether or not the trial of Jesus met the standards of that time but rather with the general process followed in that one case.

¹⁰⁸ GOSSENIUS, *supra* note 34.

¹⁰⁹ *Mark* 14:53--:55.

¹¹⁰ This group of judges is often referred to as the Sanhedrin, and was "dominated by the chief priests, with other priests, wealthy nobles or elders, and Pharisees." BROWN, *supra* note 34, at 340-41.

¹¹¹ *Mark* 14:53.

¹¹² Keener, *supra* note 17, at 38.

¹¹³ See *Mark* 14:53. "They took Jesus to the high priest; and all the chief priests, the elders, and the scribes were assembled." *Id.* The following description portrays Caiaphas as directing the testimony while the others listened. *Mark* 14:53--:62.

2. The Testimony

As in most modern criminal trials, the principal evidence against Jesus was the testimony of purported witnesses to the crimes.¹¹⁴ The fact that the case rested on witnesses apparently recruited by the prosecution reflects modern practice—it appears that the witnesses were brought to court by those seeking to convict Jesus or drafted from amongst the crowd who had come to watch the proceedings.¹¹⁵

Also reflecting many modern criminal cases, this testimony was not entirely consistent.¹¹⁶ In fact, according to the Gospel of Mark, though many gave testimony against Him, “their testimony did not agree.”¹¹⁷ Specifically, the accusation was made that Jesus said, “I will destroy this temple that is made with hands, and in three days I will build another, not made with hands,”¹¹⁸ but the descriptions provided by witnesses of how or where this statement was made did not match.¹¹⁹ Like many modern prosecutors, Caiaphas faced the problem of unreliable and biased witnesses.¹²⁰

Finally, having failed to establish its case through these witnesses, the court tried to confront Jesus directly (at least according to the Gospel of Mark):

Then the high priest stood up before them and asked Jesus, “Have you no answer? What is it that they testify against you?” But he was silent and did not answer. Again the high priest asked him, “Are you the Messiah, the Son of the Blessed One?” Jesus said “I am”¹²¹

In the Gospel of Luke, Jesus responds to the inquisitors in a more enigmatic way. When asked, “Are you, then, the Son of God?”¹²² He

¹¹⁴ *Mark* 14:55–:57.

¹¹⁵ *Id.*

¹¹⁶ Conflicting evidence is often present where cooperating defendants are involved. Schreiber, *supra* note 75 at 320–340.

¹¹⁷ *Mark* 14:56.

¹¹⁸ *Mark* 14:58; *Matthew* 26:61.

¹¹⁹ “But even on this point their testimony did not agree.” *Mark* 14:59.

¹²⁰ See Stephen S. Trott, *Words of Warning for Prosecutors Using Criminals as Witnesses*, 47 *HASTINGS L.J.* 1381, 1383, 1385 (1996).

¹²¹ *Mark* 14:60–:62.

¹²² *Luke* 22:70.

responds simply by saying, “You say that I am.”¹²³ Once again, as at the arraignment, Jesus is seen to be leaving the authorities to their proofs, reminding us that while the Fifth Amendment granted us the *right* to remain silent, it did not create the *ability* to remain silent in the face of an accusation (provided we are willing to stand up to whatever coercion is employed).¹²⁴

What is significant is what Jesus does not have in any of the Gospel accounts of the trial. He does not have counsel or an advocate of any kind. He does not seem to have the ability to call witnesses or have any role in the composition of the fact-finders.¹²⁵ In short, it does not seem to be a very fair proceeding or one intended to come to the truth rather than a conviction—an observation that some would argue also describes the modern capital murder trial.¹²⁶

3. The Verdict

*Caiaphas: All you know not what you say: it is better that one man die than all the people perish.*¹²⁷

The Bible’s account of the testimony against Christ is much more detailed than the description given of deliberation and verdict. The story of the verdict is consistent in Matthew¹²⁸ and Mark,¹²⁹ while Luke gives a less-complete account,¹³⁰ and John does not describe this part of the process at all.

Matthew and Mark describe a single step in which Jesus is condemned to die rather than a two-stage process in which a defendant is first found

¹²³ *Id.*

¹²⁴ Of course, these are different things. The distinct advantage of the right to remain silent is that we are protected (supposedly) from torture and coercion when we employ the ability to remain silent. *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967).

¹²⁵ See *Mark* 14:55–:56, 15:1–:15.

¹²⁶ See generally Kenneth Williams, *Texas: Tough on Murderers or on Fairness?*, 53 DRAKE L. REV. 631 (2005).

¹²⁷ GOSSENIUS, *supra* note 34.

¹²⁸ *Matthew* 26:65–:68.

¹²⁹ *Mark* 14:63–:65.

¹³⁰ *Luke* 22:71.

guilty and only then is sentencing considered.¹³¹ The two-step approach prevails now in the United States, but until very recently some states had mandatory sentencing statutes, which required execution once a defendant was convicted of a qualifying crime.¹³²

At the close of the proceeding, Caiaphas, in the role of prosecutor, concludes the trial with a passion many modern prosecutors might admire.¹³³ “Then the high priest tore his clothes and said, ‘He has blasphemed! Why do we still need witnesses? You have now heard his blasphemy. What is your verdict?’ They answered, ‘He deserves death.’”¹³⁴

The structure of this passage represents what an objective observer would immediately recognize as a closing argument. Further, as in a modern trial, Caiaphas is facing the panel serving as deciders of fact (the jury) and asks directly for their verdict. This replicates, in tone and substance (save for the tearing of clothes), what happens every day in American courtrooms.¹³⁵

Each aspect of Caiaphas’s argument reflects a principle I included in my own closing arguments as a prosecutor (though I never did tear my clothes).¹³⁶ For example, “do we still need witnesses?” has the same meaning as a boilerplate segment of every prosecutor’s closing—that the evidence has been sufficient to meet the burden of proof. Similarly, “[y]ou have now heard his blasphemy” is nothing more than the point any prosecutor would make—that a defendant who chose to testify simply proved the point of the prosecution through his statements.

¹³¹Some historians have argued that this would have been in violation of Jewish law, which may have required that one day pass between the guilty verdict and a death sentence. Keener, *supra* note 17, at 38.

¹³²*Roberts v. Louisiana*, 428 U.S. 325, 331 (1976). Justice Thomas, among others, remains a proponent of mandatory capital sentencing schemes. Angela Onwuachi-Willig, *Just Another Brother on the SCT?: What Justice Clarence Thomas Teaches Us About the Influence of Racial Identity*, 90 IOWA L. REV. 931, 999–1000 (2005).

¹³³In fact, attorneys are trained that such short, intense messages are highly effective. The popular Mauet text on trial practice, in fact, instructs that closing arguments must meet the expectations of jurors who “are part of the ‘sound bite’ generation. They now want it fast, painless, interesting and visual.” MAUET, TRIAL TECHNIQUES 20 (6th ed. 2002).

¹³⁴*Matthew* 26:65–66.

¹³⁵For example, in the well-publicized Andrea Yates case, prosecutor Kaylynn Williford closed the case by saying that Yates’s conduct “was wrong in the eyes of God and it was wrong in the eyes of the law.” Monica K. Miller & Brian H. Bornstein, *Religious Appeals in Closing Arguments: Impermissible Input or Benign Banter?*, 29 LAW & PSYCHOL. REV. 29, 30 (2005).

¹³⁶Nor did I ever receive a verdict this quickly.

The verdict is stunningly simple: “He deserves death!”¹³⁷ This, too, is like the sentence of an American jury, whose most profound decision is often reflected by simply checking a box in the verdict form rather than in the lengthy opinions issued by judges or the complex multi-part verdict forms completed by civil juries.¹³⁸

Certainly, this “trial” may have been nothing more than a brief hearing before religious officials in the courtyard of the home of the high priest. But let us have no delusions about the sometimes perfunctory proceedings in our own capital cases, which are at times tried by the very least experienced defense lawyers¹³⁹ in the least populous and poorest parts of our country, in courtrooms smaller than that courtyard and before jurors less well educated than the Pharisees who were probably among the best learned of Jerusalem’s citizens.¹⁴⁰

The similarities between Christ’s experience as a suspect and prisoner are no different from those criminals who are the least among us today; targeted by the authorities, identified by a paid confidential informant, subjected to a strategic arrest, arraigned on the charges, and thrown into trial without vigorous representation, Jesus was trapped and humbled in much the same way as those who today are most reviled in our society. Is there a grim and complex lesson there, at least for those who accept God as the playwright for this tragic drama?

¹³⁷ *Matthew* 26:66.

¹³⁸ It appears, however, that though the jury demanded death, they were not able to impose this sentence themselves and thus had to turn Jesus over to the Roman authorities in the person of Pilate. John reports that when they took Jesus to Pilate, the Roman Governor suggests that they “[t]ake him yourselves and judge him according to your law.” *John* 18:31. They decline, saying, “We are not permitted to put anyone to death.” *Id.* Thus, the bar of Jewish law to this execution plays a key role in an appellate process, which in some ways duplicates our own.

¹³⁹ *Miranda v. Clark County, Nev.*, 319 F.3d 465, 471 (9th Cir. 2003), *cert. denied*, 540 U.S. 814 (2003).

¹⁴⁰ There are striking parallels between the trial of Christ and the capital trial condemned by the Supreme Court in *Powell v. Alabama*, 287 U.S. 45 (1932), which remains the paradigm of one-sided proceedings.

III. GOSPEL ACCOUNTS OF POST-TRIAL PROCEDURE

A. *Comparison to American Post-Trial Procedure*

A defendant who is convicted of capital murder and sentenced to die in Texas has a well-defined series of procedural steps to follow prior to execution. First, he receives an appeal of right to the Court of Criminal Appeals,¹⁴¹ which is the supreme court in Texas for criminal matters,¹⁴² with no intermediate stop at the Court of Appeals.¹⁴³ Were he (as usual)¹⁴⁴ to lose his appeal in the Court of Criminal Appeals, he would next have the ability to petition the Supreme Court of the United States to hear the case.¹⁴⁵ After that, he could petition for habeas corpus in state court.¹⁴⁶ Were this to fail, he could seek a writ of habeas corpus in federal court¹⁴⁷ and appeal the adverse decision there, possibly to the level of the United States Supreme Court.¹⁴⁸ Finally, the modern defendant can seek a pardon or commutation from the governor prior to the sentence.¹⁴⁹

Thus, in simpler terms, a defendant has the ability to appeal to both the state and federal authorities and to seek a reprieve from the governor before being put to death.

Jesus's post-sentence appeals were less lengthy and convoluted than those described above, and His first appeal and final request for commutation were from the equivalent of federal, not state, authorities (reversing the order of appeals in American courts).¹⁵⁰ Still, the fact remains that, like a Texas man sentenced to die, Jesus had appeals before representatives of two separate jurisdictions¹⁵¹ (Pilate as a representative of

¹⁴¹TEX. R. APP. P. 71.1.

¹⁴²TEX. CONST. art. V, § 5.

¹⁴³TEX. R. APP. P. 71.1.

¹⁴⁴Williams, *supra* note 126, at 643–48.

¹⁴⁵28 U.S.C. § 1254 (2000).

¹⁴⁶TEX. CRIM. PROC. CODE ANN. art. 11.071 (Vernon Supp. 2006).

¹⁴⁷28 U.S.C. § 2254 (2000).

¹⁴⁸*Id.* § 1254.

¹⁴⁹TEX. CRIM. PROC. CODE ANN. art. 48.01 (Vernon Supp. 2006).

¹⁵⁰See *Luke* 23:1–:25 (showing that Jesus was tried by Pilate and Herod, who answered directly to Rome, rather than by Caiaphas, the Jewish high priest); *John* 18:28–:33.

¹⁵¹Raymond Brown notes that the Herod described in this story is probably Herod Antipas, a Jewish ruler of the area who ruled with the permission of the Romans. BROWN, *supra* note 34, at 763.

Rome and Herod as ruler of Judea)¹⁵² and the opportunity for a final reprieve from the governor before being put to death.¹⁵³

B. *The Appeal to Pilate*

*Pilate: I, Pontius Pilate, Procounsul and Judge in Jerusalem, under the mightiest Emperor Tiberius . . . greeting. Sitting in judgment seat for the love of justice, by the Synagogue of the Jewish people, is presented before me Jesus of Nazareth, which with presumptuous words hath named Himself to be the Son of God, although he be born of a poor mother: He hath preached Himself to be the King of the Jews, advancing to destroy Solomon's Temple, and to withdraw the people from the most approved Law of Moses. All this exactly considered and approved of, condemn we Him to the Cross with the two murderers.*¹⁵⁴

Each of the Gospel accounts describe Jesus being taken before Pilate,¹⁵⁵ who was the Roman Prefect (or Governor)¹⁵⁶ for the area at that time. The accounts given of this hearing by Matthew and Mark are remarkably consistent.¹⁵⁷ According to both, after the trial described above, the chief priests took Him in chains to Pilate, the representative of Rome in that jurisdiction.¹⁵⁸

It appears that Pilate had an immediate understanding of the issues at hand.¹⁵⁹ Unlike a modern court of appeals, he heard evidence himself

¹⁵²The hearing before Herod, unlike the remainder of the story, is reported in only one of the Gospels, *Luke*. *Luke* 23:7–9.

¹⁵³*Luke* 23:11–16.

¹⁵⁴GOSSENIUS, *supra* note 34.

¹⁵⁵*Matthew* 27:2; *Mark* 15:1; *Luke* 23:1; *John* 18:28.

¹⁵⁶Archaeology has revealed Pilate to be the Roman “Prefect,” and scholars describe him as the representative of Rome in that province. BROWN, *supra* note 34, at 694–95.

¹⁵⁷Compare *Matthew* 27:1–2 with *Mark* 15:1.

¹⁵⁸*Matthew* 27:2; *Mark* 15:1.

¹⁵⁹*Mark* 15:8–15.

instead of relying on a report from the lower court.¹⁶⁰ He immediately asks Jesus if He is the King of the Jews, and Jesus responds, “You say so.”¹⁶¹

Pilate follows up by asking, “Do you not hear how many accusations they make against you?”¹⁶² Jesus makes no answer to this whatsoever, and Pilate is “amazed”¹⁶³ by the fortitude of the prisoner before Him.¹⁶⁴ Yet, Pilate does not reverse the conviction of the court below.

Here, the Gospels diverge. Luke, alone, describes Pilate’s reaction in greater detail, quoting Pilate as saying, “I find no basis for an accusation against this man.”¹⁶⁵ Luke then describes Pilate’s next move—sending Jesus to Herod for a further appeal, apparently based on his fear of the political consequences of releasing Jesus given the passions of the chief priests and the people.¹⁶⁶

C. *The Appeal Before Herod*¹⁶⁷

*Texas: It were better and safer for us to banish Him [from] the country, or else send Him up to Caesar.*¹⁶⁸

Though Herod was not the direct representative of Rome for the area (Pilate fulfilled that role), he was the Jewish ruler allowed by the Romans to control his people.¹⁶⁹ According to Luke, when Pilate “learned that [Jesus] was under Herod’s jurisdiction, he sent him off to Herod, who was himself

¹⁶⁰ *Id.* 15:1–5.

¹⁶¹ See *Matthew* 27:11; *Mark* 15:2.

¹⁶² *Matthew* 27:13 (internal quotation marks omitted). *Mark* 15:4 is similar: “Have you no answer? See how many charges they bring against you!”

¹⁶³ *Matthew* 27:14; *Mark* 15:5.

¹⁶⁴ *Matthew* 27:14; *Mark* 15:5.

¹⁶⁵ *Luke* 23:4 (internal quotation marks omitted).

¹⁶⁶ *Id.* 23:7.

¹⁶⁷ Another confusing element to the story is the presence of multiple Herods in the Gospels. The Herod who hears Jesus’s appeal is probably Herod Antipas, the son of Herod the Great. BROWN, *supra* note 34, at 763.

¹⁶⁸ GOSSENIUS, *supra* note 34.

¹⁶⁹ According to Raymond Brown, Judea was an ethnarchy largely independent of Roman rule at the time of Jesus’s birth. BROWN, *supra* note 34, at 677. However, about 6 A.D., Roman rule became more immediate as a Roman prefect was given direct authority over the area. *Id.* Herod the Great’s sons were given some power, though less than that of a King. *Id.* Thus, Pilate had direct Roman authority, while Herod Antipas was a local ethnic leader (but not a King). *Id.*

in Jerusalem at that time.”¹⁷⁰ It seems that Herod did not have much better luck getting a confession out of Jesus than Pilate: “When Herod saw Jesus, he was very glad, for he had been wanting to see him . . . perform some sign. He questioned him at some length, but Jesus gave him no answer. The chief priests and the scribes stood by, vehemently accusing him.”¹⁷¹

Despite this failure to see convincing evidence, Herod does not free Jesus. Rather, he put an “elegant robe” on Him and sent Him back to Pilate for a final consideration of clemency.¹⁷²

Before both Pilate and Herod, there seems to be a standard of review at work which is difficult to overcome—one which shows great deference to the trial court and the political will of the local population.¹⁷³ Such deference, of course, has a policy basis, as the trial court heard the whole of the evidence and is closer to the situation.¹⁷⁴ It also echoes the deference federal courts in habeas actions show to the decisions of state courts, typically based on “federalism concerns, arising from the unique character of federal habeas review of state-court judgments.”¹⁷⁵

Then, as now, civil authorities were reluctant to reverse even the most extreme and important failures of process, in the interests of finality.¹⁷⁶ Herod and Pilate, like a modern American court hearing a habeas petition, seemed unwilling to change the initial decision in the absence of the most remarkable circumstances, an attitude now codified into American habeas law.¹⁷⁷

D. The Denial of a Reprieve or Pardon

*Ehiheris: Although he be just yet shall he die, because the people are moved by his words.*¹⁷⁸

¹⁷⁰ Luke 23:7.

¹⁷¹ *Id.* 23:8–:10.

¹⁷² *Id.* 23:11. Luke also reports that “Herod with his soldiers treated Him with contempt and mocked Him,” *id.*, repeating the humiliation He suffered previously before the Council, where He was blindfolded, struck, and spat upon. *Mark* 14:65.

¹⁷³ Luke 23:13–:25.

¹⁷⁴ *Id.* 23:1–:5.

¹⁷⁵ *Bell v. Thompson*, 125 S. Ct. 2825, 2836 (2005).

¹⁷⁶ Compare Luke 23:13–:25 with 28 U.S.C. § 2254(d) (2000).

¹⁷⁷ *E.g.*, 28 U.S.C. § 2254(d).

¹⁷⁸ GOSSENIUS, *supra* note 34.

The appeal to Herod having failed, Jesus has one last hope, the same last hope as many capital convicts today: that, somehow, the Governor will at the last minute pardon Him or commute the sentence.¹⁷⁹

Jesus's last stop prior to execution was a pardon consideration by the Governor, Pilate.¹⁸⁰ For his part, Pilate seems to have wanted to give such a pardon or at least a different sentence, based on the lack of evidence:

Pilate then called together the chief priests, the leaders, and the people, and said to them, "You brought me this man as one who was perverting the people; and here I have examined him in your presence and have not found this man guilty of any of your charges against him. Neither has Herod, for he sent him back to us. Indeed, he has done nothing to deserve death. I will therefore have him flogged and release him."¹⁸¹

Pilate was trying to mediate a fair outcome by suggesting a sentence less than death.¹⁸² It would appear that Pilate did have the ability to grant such a commutation given that the local authorities, on their own, did not have the ability to actually carry out an execution.¹⁸³

Pilate had an additional option as well. At the Passover festival, it was a tradition that the Roman authorities would release a local prisoner.¹⁸⁴ Pilate had two prisoners (at least) he could release under this tradition—Jesus and a murderer/insurrectionist named Barabbas.¹⁸⁵

Thus, Pilate had at least two alternatives available: either stick with his initially-declared commutation of the sentence (which would be within his inherent authority to deny the locals the courtesy of execution of a prisoner) or release Jesus as part of the festival tradition. However, Pilate lacked the will to stick with either solution in the face of grassroots political opposition and gave in to the desires of the mob despite his own conscience.¹⁸⁶

¹⁷⁹ See TEX. CRIM. PROC. CODE ANN. art. 48.01 (Vernon Supp. 2006).

¹⁸⁰ *Luke* 23:13–16.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *John* 18:31.

¹⁸⁴ *Mark* 15:6.

¹⁸⁵ *Id.* 15:9–12.

¹⁸⁶ Pilate has maintained a position of moral ambiguity among varying Christian sects. Some

Then they all shouted out together, “Away with this fellow! Release Barabbas for us!” (This was a man who had been put in prison for an insurrection that had taken place in the city, and for murder). Pilate, wanting to release Jesus, addressed them again; but they kept shouting, “Crucify, crucify him!” A third time he said to them, “Why, what evil has he done? . . .” But they kept urgently demanding with loud shouts that he should be crucified; and their voices prevailed.¹⁸⁷

Thus, His last appeals exhausted, Jesus was handed over for execution.¹⁸⁸ The particulars of that execution¹⁸⁹ have been well chronicled in both the popular¹⁹⁰ and scholarly¹⁹¹ spheres.

IV. LESSONS FROM THE TRIAL OF CHRIST

*Saveas: An hypocrite is very dangerous in a commonwealth, therefore let him be rooted out from among the people.*¹⁹²

There are two types of lessons which can be drawn from a discussion of the trial of Christ as a death penalty process: first, lessons on the legitimacy or illegitimacy of the death penalty itself, and second, lessons on what

believe that he converted to Christianity later in life, and some have even considered him a martyr of the faith. See BROWN, *supra* note 34, at 696. Regardless of his later actions, his lack of will in the face of the mob, as discussed in *infra* Part IV, offers its own cautionary tale to the modern politician.

¹⁸⁷ Luke 23:18–23.

¹⁸⁸ Mark 15:15. Curiously (given that flogging was previously discussed as an alternative to execution), He was flogged prior to being turned over for the execution. *Id.*

¹⁸⁹ Some scholars feel that the fact that crucifixion was the manner of execution reflects two facts: that the Roman authorities, not the Jewish authorities, directly ordered the killing, and that Jesus was executed as a political prisoner. Bruce Corley, *Trial of Jesus*, in *DICTIONARY OF JESUS AND THE GOSPELS* 841, 850 (Joel B. Green & Scot McKnight eds., 1992). However, the idea that only those convicted of political crimes were crucified conflicts with the fact that two “bandits” were crucified on either side of Jesus. *Mark* 15:27.

¹⁹⁰ *E.g.*, THE LAST TEMPTATION OF CHRIST (Universal Pictures 1988); THE PASSION OF THE CHRIST (Icon Productions 2004).

¹⁹¹ *E.g.*, GARLAND, ONE HUNDRED YEARS OF STUDY ON THE PASSION NARRATIVES (1990) (comprehensive bibliography).

¹⁹² GOSSENIUS, *supra* note 34.

procedures should be employed within a system which allows the death penalty. I will address each in turn.

A. *Lessons Regarding Moral Legitimacy of the Death Penalty*

Principled arguments can be made that the trial of Christ supports arguments both for and against the death penalty. While I am persuaded that the greater weight of this story is against capital punishment in the modern context, I will examine the opposing view first.

1. The Trial of Christ in Support of the Death Penalty

Some, I would imagine, might turn the trial of Christ towards the goal of supporting capital punishment. Of course, to many Christians, the full meaning of the faith was fulfilled only with the death of Christ and His resulting resurrection.¹⁹³ Thus, capital punishment was not only a part of, but necessary to, the establishment of the Christian religion. While this argument certainly would apply to the killing of Jesus Christ, those who make it probably would not expand it to others subject to execution because that would assume that they somehow also share that singular role of Christ—the ability to redeem the world through His death. The execution of others in the modern era seems to do nothing to propagate, promote, or enhance any faith. In short, we don't kill murderers thinking that they might be messiahs.

Setting aside this “necessity” argument, as it applies to only one person, we can turn to the story of the trial and execution itself. As with so many other things, the Gospels can be seen many ways, and there is at least one part of the story which could be taken as support for the general proposition of capital punishment. Crucifixion kills slowly,¹⁹⁴ and it appears that Christ suffered for some time on the cross next to the two bandits who were crucified on either side of Him.¹⁹⁵ One of the bandits chides Jesus, saying,

¹⁹³N.T. Wright, *On the Third Day: God's Promise Fulfilled*, CHRISTIAN CENTURY, Apr. 2003, at 32–36.

¹⁹⁴As a form of torture, crucifixion was designed in part to prolong agony. For example, Raymond Brown quotes a third century source who described the process as painful: “Punished with the limbs outstretched[,] . . . they are fastened and nailed to the stake in the most bitter torment, evil food for birds of prey and grim pickings for dogs.” BROWN, *supra* note 34, at 951 (citation omitted).

¹⁹⁵*Luke 23:39–43. See Mark 15:27* (referring to the two criminals as “bandits”).

“Are you not the Messiah? Save yourself and us!”¹⁹⁶ The other bandit, however, rebukes him, saying, “[W]e indeed have been condemned justly, for we are getting what we deserve for our deeds, but this man has done nothing wrong,”¹⁹⁷ and asks Jesus to remember him “when you come into your kingdom.”¹⁹⁸ Rather than condemn the punishment He is facing, Christ seems to honor the man’s acceptance of his punishment, telling him, “Truly I tell you, today you will be with me in Paradise.”¹⁹⁹

Two things can be seen in this exchange. First, Jesus chooses not to criticize the execution of this guilty man. Second, it appears that Jesus approves of the bandit’s humility in the face of death. Of course, it could also be that Jesus was not commenting at all on the execution itself but rather honoring the man’s recognition of Him as the Son of God.

2. The Trial of Christ as a Basis for Opposition to the Death Penalty

*Joram: Wherefore suffer we this innocent man to die, is it for his righteousness?*²⁰⁰

Just as an argument for the death penalty drawn from the trial of Jesus Christ must imply lessons from that story, so must an argument against capital punishment rely on implication because Christ did not take the opportunity to condemn the punishment in a general way at the time of His own death.

This is not to say, however, that Christ never directly addresses the question of capital punishment. The Gospel of John tells the remarkable story in which the scribes and Pharisees (no doubt in another attempt to trick Jesus into contravening the law)²⁰¹ bring an adulteress before Jesus.²⁰² They tell Jesus, correctly, that the Law of Moses requires that she be stoned to death and ask what should be done.²⁰³

¹⁹⁶ Luke 23:39.

¹⁹⁷ *Id.* 23:41.

¹⁹⁸ *Id.* 23:42.

¹⁹⁹ *Id.* 23:43.

²⁰⁰ GOSSENIUS, *supra* note 34.

²⁰¹ John 8:6 (“They said this to test him, so that they might have some charge to bring against him.”).

²⁰² *Id.* 8:3–4.

²⁰³ *Id.* 8:5.

Strikingly, Christ does not answer immediately. Instead, He “bent down and wrote with his finger on the ground.”²⁰⁴ We don’t know what He wrote, or why, but it does reflect a moment of deliberation, of pondering the balance between justice and mercy from a place of humility.²⁰⁵

As they persist in their questioning, Christ answers their question with a challenge: “Let anyone among you who is without sin be the first to throw a stone at her.”²⁰⁶ One by one, they drift off, and in the end, the woman is left alone.²⁰⁷ It is hard to imagine a more direct condemnation of the death penalty than the Son of God coming across a lawful execution and stopping it by commanding that no man has the moral authority to kill the guilty person.²⁰⁸

The trial of Christ lacks a similar directness in condemning capital punishment and those who would authorize it. Jesus’s trial does, however, lend support to a primary argument used by those who oppose the death penalty: that by its nature, the death penalty may lead to the execution of innocents, and this ultimate injustice is too high a cost to pay for the benefits which may come from the ability to kill the guilty.²⁰⁹

The Bible itself takes pains to point out the innocence of Christ, an implicit criticism of this inherent risk of the death penalty. Specifically, two of the actors in the trial and execution seem stricken with guilt at their actions due to Christ’s innocence—including not only one of the Roman centurions standing guard but Pilate himself.²¹⁰

At the time of the execution, the Gospels describe the conversion of one of the executioners, a Roman centurion, who recognizes the innocence of Christ.²¹¹ After Jesus dies (which coincided with a darkness falling over the

²⁰⁴ *Id.* 8:6.

²⁰⁵ *See Micah* 6:8.

²⁰⁶ *John* 8:7.

²⁰⁷ *Id.* 8:9.

²⁰⁸ With shocking abruptness in his rush to get to the Old Testament texts that support his “conservative” principles, Richard Hiers dismisses this compelling teaching, saying, “Would Jesus have said the same to a person convicted of murder? There is no New Testament case on point.” Hiers, *supra* note 7, at 757. Rather than shrug off any moral teaching that may fall from this story, it seems more fair to conclude that the point made by Christ has to do with the moral authority of the Pharisees and the mob to kill, not the crime for which the lawful penalty was being exacted.

²⁰⁹ *See* HELEN PREJEAN, *THE DEATH OF INNOCENTS: AN EYEWITNESS ACCOUNT OF WRONGFUL EXECUTIONS* 200, 228–34 (Jason Epstein ed., 2005).

²¹⁰ *Luke* 23:47; *John* 19:4.

²¹¹ *Matthew* 27:54; *Mark* 15:39; *Luke* 23:47.

land),²¹² the centurion says, “Certainly this man was innocent.”²¹³ Pilate, in a more subtle way, also declares that Jesus may have been innocent. At the time of the crucifixion, a sign was placed over Jesus’s cross saying, “Jesus of Nazareth, the King of the Jews.”²¹⁴ The chief priests urged Pilate to change the sign to read, “This man said, ‘I am King of the Jews,’”²¹⁵ but Pilate refused, saying, “What I have written I have written.”²¹⁶

Within the modern debate over the death penalty, the issue of innocence is gaining increasing prominence as DNA evidence provides a means of calling capital convictions and even executions into question. For example, Barry Scheck, Peter Neufeld and Jim Dwyer’s book *Actual Innocence* tells the stories of several people whose executions were overturned after DNA evidence established their innocence.²¹⁷ More famously, the Republican Governor of Illinois, George Ryan, granted a blanket commutation to all death row prisoners in Illinois based on innocence questions.²¹⁸

Nor is the question of innocence necessarily limited to those who managed to avoid execution when the problem was identified. Recently, for example, prosecutors in St. Louis have reopened the trial of Larry Griffin, who was executed in Missouri in 1995.²¹⁹ His conviction for murder rested on the testimony of a supposed eyewitness who was seeking to reduce his own charges, and contrary evidence has now come to light.²²⁰ This contrary evidence includes the fact that other eyewitnesses did not recall seeing a white man at the scene.²²¹ That solitary government eyewitness was white.²²² Griffin may have been innocent.

Christian politicians, of course, may finesse this point by assuming that the criminal justice system is infallible and could not result in the execution of an innocent, an assumption that does not seem to be borne out by the

²¹² *Luke* 23:44.

²¹³ *Id.* 23:47.

²¹⁴ *John* 19:19 (internal quotation marks omitted).

²¹⁵ *Id.* 19:21.

²¹⁶ *Id.* 19:22 (internal quotation marks omitted).

²¹⁷ BARRY SCHECK ET AL., *ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED*, at xi–xvii (2000).

²¹⁸ Maurice Possley & Steve Mills, *Clemency for All*, CHI. TRIB., Jan. 12, 2003, at C1.

²¹⁹ Kate Zernike, *In a 1980 Killing, a New Look at the Death Penalty*, N.Y. TIMES, July 19, 2005, at A15.

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

facts.²²³ For example, Florida Governor Jeb Bush has justified his positions in opposition to abortion and in support of the death penalty²²⁴ through the familiar shibboleth that “taking an innocent life is wrong.”²²⁵

Bush’s position has a weak point: It assumes that the American system of criminal justice is infallible. A belief in such infallibility seems unjustified given the story of defendants such as Larry Griffin, now dead.²²⁶ The bare fact that we have probably executed innocents raises the question of the moral validity of the death penalty for those who would condemn the execution of Christ as the wrongful murder of an innocent.

In league with those who would claim infallibility for the death penalty are some Christians who seem to center their support for capital punishment on the words of the Old Testament. However, resting a defense of the death penalty simply on the words of the Old Testament seems inadequate for Christians as this approach cuts out the experiences and lessons of Christ.²²⁷ Nonetheless, this has long been the “Christian” justification for the death penalty. For example, Matthew Hale’s 1763 treatise offers justifications for the death penalty drawing from Genesis, Exodus, and Deuteronomy, to the exclusion of the New Testament,²²⁸ and the Massachusetts Bay Colony’s

²²³ *Id.*

²²⁴ The Catholic Church, among others, has rejected this pair of positions as incompatible. Pope John Paul II issued an encyclical embracing the concept of a consistent ethic of life, which includes opposition to the death penalty. POPE JOHN PAUL II, *EVANGELIUM VITAE (THE GOSPEL OF LIFE)* 18–19 (1995). For an excellent discussion of this encyclical by one Catholic judge, see Michael R. Merz, *Conscience of a Catholic Judge*, 29 U. DAYTON L. REV. 305, 305–18 (2004).

²²⁵ Michael Rowan, Comment, *Minding Our Skepticism: A Conservative Approach to Capital Punishment*, 31 FLA. ST. U. L. REV. 377, 398 & n.139 (2004) (quoting Interview by the Florida Baptist Witness with Jeb Bush, Governor of Florida (Oct. 31, 2002)).

²²⁶ See Zernike, *supra* note 219.

²²⁷ The relative ordering of scripture, as individuals pick and choose what parts of the text they will respect and ignore, is probably inevitable in the absence of a literal belief in the whole of the Bible. Those who might find it odd to discover this problem at the heart of a legal discussion should rest assured that it is lodged in the middle of many disciplines, even those such as modern dance. The most recent piece by choreographer and dancer Bill T. Jones, *Blind Date*, is intended, according to Jones, “to prompt his secular audiences to ask themselves why it is that they abide by certain biblically derived proscriptions on sexual conduct while maintaining that others have no validity.” Ginia Bellafante, *Bill T. Jones Is About to Make People Angry. Again*. N.Y. TIMES, Sept. 18, 2005, § 2 (Arts & Leisure), at 1.

²²⁸ SIR MATTHEW HALE, *HALE’S HISTORY OF THE PLEAS OF THE CROWN* 1–3 (First American 1847) (1736).

list of some 13 capital offenses included with each offense “a reference to the Old Testament to indicate its source.”²²⁹

This aversion to discussing the Gospels and Christ’s own capital sentence continues to the current day: In one of the more complete legal articles addressing Christian faith and the death penalty, Richard Hiers surveys several Biblical passages which could support opposition to the death penalty but does not include those passages describing the trial of Christ Himself.²³⁰

The views of scholars such as Hiers are interesting philosophy—they resonate with our urge for retribution, and they are popular and historically orthodox. But without so much as a whiff of Christ Himself, they should not be called Christian.²³¹ Christ, for Christians, must enter the field of vision when matters of morality are discussed.

B. The Lessons of Christ’s Trial for Capital Procedure

1. The Troubling Procedure Allowing for Execution

Even if the story of Christ’s trial does not decide the issue of whether or not the death penalty is moral for any given individual,²³² the similarities between the process leading to Christ’s death and our modern procedures seem to suggest certain remedies short of abolition of the death penalty. By no means am I the first to suggest any of these reforms, but I am probably the first to urge them based on their similarities to the unfairnesses within the capital trial of Christ.²³³ I argue that we should not inflict on the “least

²²⁹ *Furman v. Georgia*, 408 U.S. 238, 335 (1972) (Marshall, J., concurring).

²³⁰ See Hiers, *supra* note 7, at 754–58.

²³¹ See McKibben, *supra* note 3, at 31, 32. The tendency of American Christians to attribute non-Christian beliefs to their faith was recently described by Bill McKibben, who noted that 75% of American Christians wrongly believe that the teaching “God helps those who help themselves” comes from the Bible, rather than Benjamin Franklin. *Id.*

²³² Again, I recognize that there are many who feel that the Old Testament gives all the support a Christian should need to support the death penalty. I do not agree with this reading of the Bible, which grants superior moral authority to the teachings of Old Testament prophets rather than to Jesus.

²³³ See, e.g., Charles I. Lugosi, *Executing the Factually Innocent: The U.S. Constitution, Habeas Corpus, and the Death Penalty: Facing the Embarrassing Question at Last*, 1 STAN. J. CIV. RTS. & CIV. LIBERTIES 473, 490 (2005); Robert F. Drinan, *Religion’s Role in the Administration of the Death Penalty: Religious Organizations and the Death Penalty*, 9 WM. & MARY BILL RTS. J. 171, 171 (2000). While Lugosi references the capital trial of Christ in relation

of these” the same procedural wrongs that were inflicted on Christ at His own trial.²³⁴

Although I am sure there are others that could be identified, the procedural problems with the capital trial of Christ seem to include (1) a process which occurred too quickly, (2) a process in which the role of the public as a political force seems to determine a result, independent of evidence or policy, and (3) a process in which He has no true advocate in the court to represent His interests.²³⁵

2. A Rush to Judgment

It would appear that Jesus was tried and convicted within a single day’s time. Some modern capital proceedings are done quickly, too. For example, in the 2002 case of *Bell v. Cone*, the U.S. Supreme Court denied habeas relief in a case where the capital sentencing hearing “lasted about three hours.”²³⁶ This brevity was in part because the defense attorney declined to give a closing argument.²³⁷

But this was just one aspect of the deadly speed of the proceeding—also too quick, and probably more important, were the periods from arrest to trial, from conviction to sentencing, and the course of appeals. I will address each of these in turn.

a. *The Period from Arrest to Trial*

It is easy to imagine the ways that Jesus was prejudiced by the fact He was swept up for arrest almost directly before His capital trial—He was unable to obtain assistance of counsel or friend, there was no chance to gather witnesses, and there was no time for passions to cool.²³⁸

In the modern era, there is usually an adequate amount of time allowed for preparation of a capital case, though most jurisdictions do not provide a

to the death penalty, he does not address the specific inequities of Christ’s trial. Lugosi, *supra*, at 490.

²³⁴ See *Matthew* 25:45.

²³⁵ See *Matthew* 27:17–:23.

²³⁶ 535 U.S. 685, 690 (2002).

²³⁷ *Id.* at 692.

²³⁸ *Luke* 22:54. The apostle Peter did follow Jesus “at a distance” after He was arrested. See *id.* It was at this point, however, that he denied three times even knowing Jesus. *Id.* 22:56–:62.

guaranteed time period.²³⁹ Rather, the opposite is true—speedy trial laws, such as the federal provisions,²⁴⁰ go the other way—they mandate that the trial must be held within a certain number of days after arraignment.²⁴¹ At the very least, judges should be liberal in granting continuances in capital cases if the defense requires them for preparation.

b. The Period from Trial to Sentencing

Jesus was sentenced immediately upon conviction—in fact, His conviction appears to include the sentence.²⁴² While, at least since the overturning of mandatory death statutes, the conflation of adjudication and sentence does not exist in American law, there is often almost no gap between the two.²⁴³ For example, in Texas the sentencing phase of trial is required by statute to be held “as soon as practicable” after guilt is determined.²⁴⁴ Clearly, this works to the prejudice of the defendant. Up to that point, defense counsel in a capital case have been working to disprove guilt. Suddenly, often within a day’s time, they must shift gears abruptly and argue mitigation—that aspects of the defendant’s life merit a sentence of life in prison rather than execution. Were even a week allowed between the two phases of trial, the defense could present a stronger case at sentencing.

This may, of course, work to inconvenience the jury, who would have to come back to the court having taken a week off. Given that the stakes at issue are the highest imaginable, this seems like a relatively reasonable cost.

c. The Period Allowed for Appeals

Within the past decade, all three branches of government seem nearly obsessed with reducing the time period allowed for capital appeals and habeas. Most strikingly, the Antiterrorism and Effective Death Penalty Act,

²³⁹ See generally *Innocence and the Death Penalty: Assessing the Danger of Mistaken Executions: Before the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary*, 103d Cong. (1993).

²⁴⁰ 18 U.S.C. §§ 3161–74 (2000).

²⁴¹ *Id.* § 3161(c)(1) (requiring trial within seventy days).

²⁴² *Mark* 14:64.

²⁴³ *Roberts v. Louisiana*, 428 U.S. 325, 331–336 (1976) (plurality opinion).

²⁴⁴ See TEX. CRIM. PROC. CODE ANN. art. 37.071, § 2(a)(1) (Vernon 2006).

passed in 1996 by Congress and signed by Bill Clinton, has set strict and Byzantine restrictions on federal habeas petitions.²⁴⁵

The same way the brevity of Jesus's appeals was wrong, to so restrict the appeals of the modern prisoner is wrong. To offer just one example, my colleague Bill Underwood handled the appeal and habeas petitions of a Texas prisoner for almost 15 years.²⁴⁶ On its face, this may seem to be the kind of anecdote that those urging speedy death may rely on. However, the story takes a turn to the detriment of their argument. Underwood's client was mentally retarded.²⁴⁷ On June 20, 2002, the United States Supreme Court reversed its own precedent and held in *Atkins v. Virginia* that it was unconstitutional to execute the mentally retarded.²⁴⁸ As a result, Underwood's client was resentenced to life—a life that would have long been over if the speedy appeals advocates had their way, and an execution which would have been unconstitutional under modern law.²⁴⁹ Delay may increase costs, but it also allows for justice to run its course.²⁵⁰

3. The Role of the Mob

*Rabineh: Whether he be just or innocent, because he is against the manner of our forefathers, we will not suffer Him.*²⁵¹

At each turn, powerful political actors urged those making the decision on Jesus's fate to have Him killed.²⁵² In the end, Pilate rejects commutation

²⁴⁵ Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (relevant portions codified as amended at 28 U.S.C. §§ 2241–66). Nearly ten years after the AEDPA's passage, one leading textbook still notes that "[t]he AEDPA provisions are less than crystal clear and have yet to be fully interpreted by the courts." NINA RIVKIND & STEVEN F. SHATZ, *CASES AND MATERIALS ON THE DEATH PENALTY* 605 n.8 (2001).

²⁴⁶ Diane S. Morales, *Valdez Escapes Death Penalty, Gets Life Term*, CORPUS CHRISTI CALLER-TIMES, June 12, 2004, at B1.

²⁴⁷ *Id.*

²⁴⁸ *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

²⁴⁹ Morales, *supra* note 246, at B1.

²⁵⁰ See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 529 (2001). More process, of course, may result in fewer death sentences sought. As William Stuntz has aptly put it in discussing criminal law, "[W]e do more of something when it becomes cheaper and less when it becomes more expensive." *Id.*

²⁵¹ GOSSENIUS, *supra* note 34.

²⁵² *Luke* 23:23.

of the sentence in the face of the crowd's cries of "crucify him!"²⁵³ The response of the judges to political pressure is clear. Are things so different today? One response to the story of Christ's trial is to provide more political insulation between those who make decisions on capital cases and the public who may be inclined to an emotional reaction to the crime rather than a balanced consideration of guilt and punishment.

Consider Texas, for example, where nearly all involved in a capital case are forced to be responsive to an electorate.²⁵⁴ The jurors must go back into the streets of the town where they live.²⁵⁵ The trial judge must stand for election, as do the prosecutor (or her boss), the judges of the Court of Appeals and the Court of Criminal Appeals (the supreme court in Texas for criminal matters).²⁵⁶ When it is time for a stay of execution or commutation request, it goes to an elected governor.²⁵⁷ Were one or more of these levels protected from the voices of retribution by a screen of careful reflection, perhaps just one egregious tragedy could be averted.²⁵⁸

This point has perhaps never so artfully or subtly been made as it was by Justice Brennan in dissenting from the Supreme Court's majority opinion in *Tison v. Arizona*.²⁵⁹ That case involved a son who helped his father break out of prison and was present when innocents were killed in the Arizona desert, though the son was not directly involved.²⁶⁰ In disagreeing with Arizona native Justice O'Connor's majority opinion, Brennan hints subtly at the effects "public passion" may have had on her judgment:

Our Constitution demands that the sentencing decision itself, and not merely the procedures that produce it, respond to the reasonable goals of punishment. But the decision to execute these petitioners . . . appears responsive less to reason than to other, more visceral, demands. The urge to employ the felony-murder doctrine against

²⁵³ *Id.* 23:20–:25.

²⁵⁴ *Pierson v. State*, 614 S.W.2d 102, 108 (Tex. Crim. App. 1981) (en banc).

²⁵⁵ *Lacy v. State*, 899 S.W.2d 284, 285 (Tex. App.—Tyler 1995, no writ).

²⁵⁶ *Williams*, *supra* note 126, at 649.

²⁵⁷ *Ex parte Giles*, 502 S.W.2d 774, 774 (Tex. Crim. App. 1973).

²⁵⁸ *Williams*, *supra* note 126, at 649. Given that the Texas Legislature has rejected even the most modest reform proposals, at least one informed observer would rate the chance of nonpartisan elections in Texas as "practically non-existent." *Id.*

²⁵⁹ 481 U.S. 137, 159–85 (1987) (Brennan, J., dissenting).

²⁶⁰ *Id.* at 139 (majority opinion).

accomplices is undoubtedly strong when the killings stir public passion and the actual murderer is beyond human grasp. And an intuition that sons and daughters must sometimes be punished for the sins of the father may be deeply rooted in our consciousness.²⁶¹

In short, one Justice of the Supreme Court suggests that another Justice was acting in response to, and effectively as a part of, a mob of citizens crying out “crucify him!”²⁶² If this charge can be leveled at such lofty heights as the United States Supreme Court, how much truer might it be among those of us with less training, prestige, and power?

4. The Need for Effective Representation

*Joseph of Arimathea: What a shame is this, that in a whole city not one is to be found that will defend the innocent.*²⁶³

Jesus, like the litigants of His day, had no representation at all, no one to assist Him and advocate on His behalf.²⁶⁴ Some would say that the representation provided to some capital defendants today is not much better than nothing and that the system is structured to encourage poor representation.²⁶⁵ Specifically, the system favors efficiency and simple answers,²⁶⁶ something that good defense attorneys simply don't provide.²⁶⁷ Frank Zimring has succinctly described this systemic problem in graphic, simple, and compelling terms:

Genuine concern with due process, then, all but shuts down the machinery of capital punishment, as good lawyers manipulate the system to create delay. Any effort to speed up executions works best when it provides bad lawyers to

²⁶¹ *Id.* at 183–84 (Brennan, J., dissenting).

²⁶² *See id.* at 184 & n.20 (quoting *Exodus* 20:5 (King James version)) (other citations omitted).

²⁶³ GOSSENIUS, *supra* note 34.

²⁶⁴ *See Matthew* 27:24.

²⁶⁵ *See generally* Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 *YALE L.J.* 1835 (1994).

²⁶⁶ *See generally* Eric Schnapper, *Taking Witherspoon Seriously: The Search for Death Qualified Jurors*, 62 *TEX. L. REV.* 977 (1984).

²⁶⁷ *See generally* Abbe Smith, *Defending Defending: The Case for Unmitigated Zeal on Behalf of People Who Do Terrible Things*, 28 *HOFSTRA L. REV.* 925 (2000).

capital defendants and then uses procedural defaults to defeat any meaningful substantive inquiries. Anyone who is not worried about this dilemma is no friend of American law.²⁶⁸

There can be no doubt that at least in some places, it is the policy of the government to provide capital defendants with the worst possible counsel.²⁶⁹ For example, Clark County, Nevada, when accused of “assigning the least-experienced attorneys to capital cases without providing any training,” simply replied that “as a matter of law, attorneys who have graduated from law school and passed the bar should be considered adequately trained to handle capital murder cases.”²⁷⁰

The corrupting urge for efficiency is exacerbated by the fact that elected officials with the greatest interest in efficiency, judges, often are the ones to choose the defense attorneys appointed to a case. In Texas, defense attorneys in capital cases are often selected by the judges who are to hear that capital case.²⁷¹

While most judges will, of course, choose the most capable attorneys in their jurisdiction for this task, it remains true that some choose the worst.²⁷² Matthew Fogelman has described the result of less-pure motives guiding appointments in telling the story of Joe Frank Cannon, a Houston lawyer whose clients received the death penalty no less than ten times.²⁷³ Cannon may well have been appointed so often because of his tendency to race through trials like “greased lightning” and sometimes doze off.²⁷⁴

²⁶⁸ Franklin E. Zimring, *The Unexamined Death Penalty: Capital Punishment and Reform of the Model Penal Code*, 105 COLUM. L. REV. 1396, 1410 (2005).

²⁶⁹ Richard C. Dieter, *International Influence on the Death Penalty in the U.S.*, FOREIGN SERV. J., Oct. 2003, at 31, 32, available at <http://www.deathpenaltyinfo.org/article.php?scid=17&did=806>.

²⁷⁰ *Miranda v. Clark County, Nev.*, 319 F.3d 465, 471 (9th Cir. 2003).

²⁷¹ TEX. CRIM. PROC. CODE ANN. art. 26.052(e) (Vernon Supp. 2006) provides that the presiding judge for the district court appoints capital defense attorneys. To its credit, Texas requires that these attorneys be selected from a specially-qualified panel and that the lead counsel for the defense have at least five years experience in criminal law. *Id.* art. 26.052(d)(2)(D).

²⁷² Dieter, *supra* note 269, at 31.

²⁷³ Matthew J. Fogelman, *Justice Asleep Is Justice Denied: Why Dozing Defense Attorneys Demean the Sixth Amendment and Should Be Deemed Per Se Prejudicial*, 26 J. LEGAL PROF. 67, 67 (2002).

²⁷⁴ *Id.*

For many judges, making appointments may require a balance between competence and efficiency, leading to neither the best or worst lawyers in the jurisdiction. A judge naturally does not want to have decisions overturned on appeal. This goal is furthered if the defense attorney is competent but not aggressive in making objections. These interests, of course, which favor an unaggressive defense, work to the detriment of the defendant, who benefits from a vigorous defense in two ways. First, a vigorous defense may result in more acquittals or life sentences through the exclusion of evidence and passionate argument. Second, if the verdict is guilty and for the death sentence, more issues will be preserved for appeal.

We can do better than judicial appointments of defense counsel. A system in which an independent body, such as a public defender's office, provides capital representation or chooses those who will provide such representation avoids the problem of such conflicting interests.

5. Can a Christian Defend the Depraved?

But who will provide this better representation to those accused of the vilest crimes imaginable? Can it be said that those who defend murderers are in a vocation consistent with the Christian faith? Christ Himself answers these questions. Jesus urged us directly to treat those in prison the way that we would treat Him.²⁷⁵ In the book of Matthew, He describes the separation upon His return of those who lived good lives from those who did not.²⁷⁶ In describing those condemned by their actions to "eternal fire,"²⁷⁷ Jesus says that He would tell them that they failed to visit Him when He was a stranger, naked, or "sick and in prison."²⁷⁸ Naturally, they ask, "Lord, when was it that we saw you hungry or thirsty or a stranger or naked or sick or in prison, and did not take care of you?"²⁷⁹ His answer is chilling to those of us who have not lived up to His standard: "Truly I tell you, just as you did not do it to one of the least of these, you did not do it to me."²⁸⁰ He does not qualify His statement to apply to the innocent who are in prison.²⁸¹ Today, the very least of those among us must be those

²⁷⁵ *Matthew* 25:34–40.

²⁷⁶ *Id.* 25:31–33.

²⁷⁷ *Id.* 25:41.

²⁷⁸ *Id.* 25:43.

²⁷⁹ *Id.* 25:44.

²⁸⁰ *Id.* 25:45.

²⁸¹ *Id.*

condemned to die. Those who answer the call to defend them cede the moral high ground to no man.

V. CONCLUSION

Whether we like it or not, the bare fact is that religion, and specifically Christianity, is a political force in modern America, particularly in “religious values” areas such as the death penalty. The death of Christ portends nothing less—at the time of His death, the curtain in the temple which separated the sacred from the profane, the secular from the religious, tore in two.²⁸²

In holding the sacred story of Christ’s trial up to the profane capital processes used in the United States, we see the place where that curtain has torn. Present-day capital procedure, and perhaps the existence of the death penalty at all, do not match up with the lessons to be gleaned from the trial of Christ Himself.

Christians draw their morality from the teachings of Christ—this is a large part, hopefully, of what defines them as Christians. To say that Christians in public life must incorporate Christ’s lessons into their public values is to say nothing more, then, than that they seek a morally justifiable system of government.

Justice Thurgood Marshall argued for a moral tempering of bloodlust (or as Joseph Bottum prefers to call it, “blood debt”)²⁸³ better than I could hope to in voting to strike down the death penalty in Georgia and Texas:

I cannot agree that the American people have been so hardened, so embittered that they want to take the life of one who performs even the basest criminal act knowing that the execution is nothing more than bloodlust. This has not been my experience with my fellow citizens. Rather, I have found that they earnestly desire their system of

²⁸² *Luke 23:45*. My point is not that the state should endorse or even support any religion but that the discussion of religious beliefs and their effect on political issues should be open, honest, and vigorous and to deny that the Gospel of Christ presents a bar between the political and religious beliefs of any one individual. Religious pluralism, however, requires that the state itself, while it will reflect the majoritarian views of the electorate, not become the arm of any one sect or faith.

²⁸³ See Joseph Bottum, *Christians and the Death Penalty*, *FIRST THINGS*, Aug.–Sept. 2005, at 17.

punishments to make sense in order that it can be a morally justifiable system.²⁸⁴

What Marshall said of his fellow citizens, I would say of my fellow Christians: It has been my experience that they earnestly desire their world to be ordered by morally justifiable systems.²⁸⁵ To do that, the life of Christ must enter into the debate among Christians over capital punishment if that debate is truly to be about morality rather than political expediency.

²⁸⁴Furman v. Georgia, 408 U.S. 238, 370 n.163 (1972) (Marshall, J., concurring).

²⁸⁵See *id.*