

Christ, Christians & Capital Punishment

By Mark Osler¹ (Copyright 2006)

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.² 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.³ They share another commonality as well: Both are Christians and made their faith a part of their public and political persona.⁴

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² Those executed as criminals, of course, are sometimes guilty of nothing more than political or religious dissent.

³ Kenneth Williams, *The Death Penalty: Can It Be Fixed?*, 51 CATH. U. L. REV. 1177, 1207 (2002).

⁴ For example, Clinton often made public statements through prayer breakfasts. James M. Wall, *There But For the Grace of God—President Clinton's Prayer Breakfast Confessional*, CHRISTIAN CENTURY, October 14, 1998, available at http://www.findarticles.com/p/articles/mi_m1058/is_n27_v115/ai_21235041/print. Similarly, President Bush famously

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 meal⁵ echo the Last Supper,⁶ which was the final meal of a man well aware he was about to be executed.⁷ Oddly, lessons from the sentencing of Christ have not been a part of the American debate over the death penalty,⁸ even when the argument is between Christians.⁹ This article sets out to change that.¹⁰

claimed Jesus Christ to be his favorite philosopher. Bill McKibben, *The Christian Paradox: How a Faithful Nation Gets Jesus Wrong*, HARPER’S, August, 2005, at 31.

⁵ Unique 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*, 2004 Legal Affairs 31 (March/April 2004).

⁶ Matthew 26:26-29.

⁷ In 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.

⁸ Even articles expressly addressing the link between Christianity and capital punishment do not consider the death of Christ himself in their discussion. E.g., Joseph Bottum, *Christians and the Death Penalty*, FIRST THINGS, August/September 2005, at 18; Richard H. Hiers, *The Death Penalty and Due Process in Biblical Law*, 81 U. DET. L. REV. 751 (2004),

⁹ In the United States, this debate necessarily will be between Christians, given that 85% of Americans identify themselves as such. Bill McKibben,

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),¹¹ was arrested in a strategic manner by the authorities,¹² given an arraignment and stood mute to the charges,¹³ was tried and convicted,¹⁴ sentenced to death,¹⁵ appealed to two separate sovereigns,¹⁶ and finally was refused a pardon.¹⁷

In objectively reading the Gospel accounts of the trial of Christ as a death penalty process, certain aspects strike some Christians (and others) as

The Christian Paradox: How a Faithful Nation Gets Jesus Wrong, HARPER'S, August 2005, at 32.

¹⁰ Unlike 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.

¹¹ Matthew 26:14-16. All biblical references in this article are to the New Revised Standard Version.

¹² Mathew 26:48-50 & 57.

¹³ John 18:19-24.

¹⁴ Mark 14:55-64.

¹⁵ Id.

¹⁶ Luke 23-1-11.

¹⁷ Luke 23:17-21 & 24.

unfair.¹⁸ I am one such Christian,¹⁹ and there are four primary aspects about the process undertaken which bother me: First, the innocence of Christ makes his execution wrong.²⁰ Second, the process happened too quickly.²¹ Third, the role of the mob as a political force seems to determine a result out of momentary passion and independent of evidence or policy.²² Fourth and finally, Jesus had no true advocate in the court.²³

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,

¹⁸ E.g., Craig S. Keener, *Mistrial of the Millenium*, 59 Christian History No. 3, p. 38 (August 1998).

¹⁹ As 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 take a different approach and primarily or exclusively focus on the teachings of the Old Testament. E.g., Richard H. Hiers, *The Death Penalty and Due Process in Biblical Law*, 81 U. Det. Mercy L. Rev. 751 (2004). 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. Texas Code of Crim. Pro. 37.071(2)(g).

²⁰ Section IV(A)(2), *supra*.

²¹ Section IV(B)(2), *supra*.

²² Section IV(B)(3), *supra*.

²³ Section IV(B)(4), *supra*.

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.²⁴

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' trial (described in the preceding paragraph) which continue to infect today's cases. These reforms might include lengthening the trial process,²⁵ reducing the role of political influences within at least some of the stages of the process,²⁶ and providing better representation for those accused.²⁷ Others, of course, have argued for similar reforms, but not as a Christian imperative derived from the singular life story of the Christian savior.

While certainly I 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

²⁴ Section IV(A)(2), *supra*.

²⁵ Section IV(B)(2), *supra*.

²⁶ Section IV(B)(3), *supra*.

²⁷ Section IV(B)(4), *supra*.

penalty process today. Less has changed than we might imagine. I will be using Biblical texts in addressing a contemporary political question,²⁸ 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.”²⁹

My goal here is not to pry Christianity out of politics, or 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.

²⁸ Importantly, 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 Section IV(a)(2), *supra*.

²⁹ Jay Tolson, *Divided We Stand*, U.S. NEWS AND WORLD REPORT, August 8, 2005, p. 44. Of course, there were civilizations and law before Europeans arrived, as well, and many of the legal constructs of the native Americans derived from theological underpinnings. For examples, 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, 213-214 (2004).

In Section Two 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.³⁰ In Section Three, I will similarly examine the post-trial procedures³¹ allowed Christ, which included the rough equivalents of an appeal (to Pilate),³² a habeas petition to a separate jurisdiction's authority (Herod),³³ and a final request for a pardon by the Governor (Pilate).³⁴ Finally, In Section Four, I look for lessons from that trial in either barring or guiding capital sentencing today, and in Section Five conclude by briefly urging honest introspection on this issue on this issue by Christians, in a way that encompasses more than Old Testament admonitions and affirmation for bloodlust.

³⁰ Texas 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, Craig L. Jackson, Leticia Van de Putte, Rodney Ellis, *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).

³¹ I 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.

³² John 18:28-38.

³³ Luke 23:6-12. Luke is the only Gospel account which includes the encounter with Herod.

³⁴ Luke 23:13-25.

II. Christ's Trial As Death Penalty Sentencing

A. The Trial of a Savior

*Phytiphores: That righteousness which moveth sedition among the common people, is needless for the estate of the Country.*³⁵

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 will

³⁵ Gerardus Gossenius, *The Manner and Order of Proceeding Against Christ by the Judges*, (English Broadside, 1586, Original in the Society of Antiquaries). 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. RAYMOND BROWN, *THE DEATH OF THE MESSIAH*, v. 1, p. 696 (1992). 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, *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 Dr. David E. Garland to author, July 12, 2005.

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 quantum 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*.

notice that I sometimes jump from one 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,³⁶ so I leave the other gospels behind in describing the encounter with Herod. In short, I have chosen to read the Gospel accounts in the manner of a person who has bought several newspapers after some particularly interesting event, knowing that some will report facts ignored by others, allowing for a more complete picture of what happened.³⁷

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.³⁸

³⁶ Luke 23:6-12.

³⁷ Some might call this approach “harmonizing,” in which 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.” RAYMOND BROWN, *THE DEATH OF THE MESSIAH*, v. 1, p. 23 (1992).

³⁸ 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

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,³⁹ and threatening to destroy the temple at Jerusalem,⁴⁰ which would probably⁴¹ not be considered a crime⁴² in modern America.⁴³ To Christians, Christ will always be a singular individual in the history of the world. However, this 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’ life because of his singular and unique role in the Christian view of the world and its history, we would

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”).

³⁹ Mark 14:61-64.

⁴⁰ Matthew 26:61.

⁴¹ It is conceivable that a plot to blow up a temple could be construed as an act of terrorism under the law of the United States, but it is unlikely that the mere threat to do so could be a capital offense. 18 U.S.C. § 2332a.

⁴² 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.

⁴³ Notably, however, such blasphemy was a capital crime in colonial America, including in the Colony of Massachusetts, along with “manstealing” and rebellion. *Furman v. Georgia*, 408 U.S. 238, 335 (Marshall, J., concurring) (1972).

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 to him.*⁴⁴

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.⁴⁵ 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 “Woe to you, scribes and Pharisees, hypocrites!... you cross sea and land to make a single convert, and you make the new convert twice as much a child of hell as yourselves.”⁴⁶ Further, he challenged their teachings, which often seemed to favor formalism over spirit. For example, the Pharisees and scribes roundly

⁴⁴ Gerardus Gossenius, *The Manner and Order of Proceeding Against Christ by the Judges*, (English Broadside, 1586, Original in the Society of Antiquaries).

⁴⁵ Jesus describes the Pharisees and scribes as sitting on “Moses’ seat.” Matthew 23:2.

⁴⁶ Matthew 23:13-15.

criticized Jesus for eating with tax collectors and sinners,⁴⁷ and for gathering grain on the Sabbath.⁴⁸

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. Objecting to the commercialization of the temple, He drove out the merchants doing business there, and “overturned the tables of the 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.

⁴⁷ Mark 2:15-17.

⁴⁸ Mark 2:23-28.

⁴⁹ Mark 12:15. This is perhaps the only Gospel account of Jesus acting even arguably in a violent way, and the imagery of his physical overturning the tables stands in stark contrast to the oft-portrayed passive Christ in the face of injustice.

⁵⁰ Mark 12:17.

⁵¹ Mark 12:18.

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.⁵²

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. A group of Pharisees and “Herodians”⁵³ approached Jesus and asked him “is it lawful to pay taxes or not? Should we pay them, or should we not?”⁵⁴ Jesus apparently passes this test by showing them the picture of Caesar on a coin and telling them to “Give to the Emperor the things that are the Emperor’s and to God the things that are God’s.”⁵⁵

Intriguingly, this inquisition is conducted by local religious authorities (the Pharisees), working together with the more secular officials

⁵² 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.

⁵³ Mark 12:13.

⁵⁴ Mark 12:14.

⁵⁵ Mark 12:17.

representing Herod.⁵⁶ This echoes the combined multi-jurisdiction task forces at work in the United States today.⁵⁷

Other attempts to trap Jesus were also unavailing. For example, a scribe⁵⁸ challenged Jesus to name the most important of the commandments,⁵⁹ 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.”⁶⁰ Rather than considering this as incriminating evidence, the questioning scribe seems to be converted to His views.⁶¹ The Gospel of Mark reports that “after that no one dared ask him any question.”⁶²

⁵⁶ Mark 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. RAYMOND BROWN, *THE DEATH OF THE MESSIAH*, v. 1, 677 & 763-773.

⁵⁷ Presumably, 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.

⁵⁸ Mark describes the questioner as one of the scribes, Mark 12:28, while Matthew describes him as a “lawyer.” Matthew 22:35.

⁵⁹ Mark 12:28.

⁶⁰ Mark 12:30. Jesus then goes on to say that the second most important commandment is to “love your neighbor as yourself. Mark 12:31.

⁶¹ Mark 12:32. Specifically, the scribe answers that “You are right, Teacher... this is much more important than all whole burnt offerings and sacrifices.” Mark 12:32-34.

⁶² Mark 12:34.

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.”⁶³

The authorities were intentional about timing in arresting Jesus. Originally, they planned to arrest Jesus during the “Festival of Unleavened Bread” (Passover),⁶⁴ but postponed the arrest for strategic reasons. 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 the people.”⁶⁵ 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. As a United States Attorney, Rudolph Giuliani was well known for directing such strategic public arrests, especially in financial cases.⁶⁶ Giuliani's tactic of arresting

⁶³ Matthew 24:2, Matthew 27:61.

⁶⁴ Luke 22:1-2.

⁶⁵ Mark 14:2.

⁶⁶ Daniel Richman, *Prosecutors and their Agents, Agents and their Prosecutors*, 103 COL. L. REV. 749, 767 & n. 74 (2003).

financial traders at work so that everyone in the office could see was not so different from arresting Jesus before his own followers centuries later.⁶⁷

Finally, having come to the time they had chosen for the arrest, the authorities reached out to someone within Jesus' organization and offered to pay cash to that informant for his cooperation in identifying and convicting their target, a process well-known to modern prosecutors⁶⁸ as "flipping."⁶⁹ 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.⁷⁰ It was for at least some of these reasons that the Pharisees and scribes welcomed the assistance of a well-placed cooperator: Judas Iscariot.

In modern criminal investigations, such paid informants are often most needed in pursuing "'victimless' or 'consensual'" crimes."⁷¹ This, of course would describe the crimes Jesus was accused of and for which Judas

⁶⁷ Mark 14:43.

⁶⁸ See Daniel C. Richman, *Cooperating Defendants: The Costs and Benefits of Purchasing Information From Scoundrels*, 8 FED. SENT. R. 292 (March/April 1996).

⁶⁹ Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U. CIN. L. REV. 645, 652 (2004).

⁷⁰ Michael A. Simmons, *Retribution for Rats: Cooperation, Punishment, and Atonement*, 56 VAND. L. REV. 1, 15-20 (2003).

⁷¹ Amanda Schreiber, *Dealing With the Devil: An Examination of the FBI's Troubled Relationship With Its' Confidential Informants*, 34 COLUM. J.L. & SOC. PROBS. 301, 302 (2001).

was recruited as informant, substantiating Amanda Schreiber's claim that "So long as there has been law enforcement, there has been the confidential informant."⁷²

As is often the case in modern investigations,⁷³ it was the cooperator, Judas, who sought out the authorities to provide information:

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."⁷⁴

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,⁷⁵ and the practice of offering benefits such as shorter sentences to cooperators was even (briefly, before an *en banc*

⁷² Id. at 301.

⁷³ Sometimes, in a modern context of harsh sentencing laws which provide enhanced incentives to cooperate, there is a "race to the courthouse" 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).

⁷⁴ Mark 26:14-16.

⁷⁵ Daniel C. Richman, *Cooperating Defendants: The Costs and Benefits of Purchasing Information From Scoundrels*, 8 FED. SENT. R. 292 (March/April 1996).

reversal) ruled to violate federal law by a panel of the United States Tenth Circuit Court of Appeals.⁷⁶

With the aid of their cooperator, they came to arrest Jesus at night, while the apostles were sleeping.⁷⁷ Jesus tried to wake the apostles so they could attempt an escape and avoid arrest,⁷⁸ 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.”⁷⁹ According to John, this task force⁸⁰ included both soldiers (presumably Roman or carrying the authority of Rome)⁸¹ and policemen.⁸²

The scene as the heavily-armed authorities arrived in the darkness to affect an arrest with overwhelming force further illustrates the strategic

⁷⁶ United States v. Singleton, 144 F.3d 1343 (10th Cir. 1998), *reversed on banc* 165 F.3d 1297 (10th Cir. 1999), *cert. denied* 527 U.S. 1024 (1999).

⁷⁷ Matthew 26:36-46.

⁷⁸ “Get up, let us be going. See, my betrayer is at hand.” Matthew 26:46.

⁷⁹ Matthew 26:47.

⁸⁰ Some 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 that “No vigilantism or lynch mentality is implied.... In any case, “rabble” or “mob” is an overinterpretation. RAYMOND BROWN, *THE DEATH OF THE MESSIAH*, v. 1, p. 247 (1992).

⁸¹ Raymond Brown saw the arresting party as being comprised of both “Roman and Jewish troops.” RAYMOND BROWN, *THE DEATH OF THE MESSIAH*, v. 1, p. 250 (1992).

⁸² 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 through history.

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.⁸³

Even Jesus' 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."⁸⁴ The followers fled⁸⁵ in varying states of disarray,⁸⁶ and Jesus alone was taken into custody.

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. 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

⁸³ 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.

⁸⁴ Mark 14:49.

⁸⁵ Mark 14:50.

⁸⁶ One 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." Mark 14:51-52.

vehicle of investigation! Then the police can have access to the prisoner day and night.”⁸⁷

C. The Initial Appearance/Arraignment

*Josaphat: Let him be bound in iron chains and kept secretly.*⁸⁸

Jesus, upon his arrest, was not directly taken to Caiaphus, who was the high priest⁸⁹ (at least according to the Gospel of John).⁹⁰ Rather, he was taken first to an official named Annas,⁹¹ who conducted something which sounds strikingly like an initial appearance⁹² or arraignment.⁹³ A primary purpose of an arraignment, of course, is to make the defendant aware of the charges and enter a plea on those charges.⁹⁴

Although the story is somewhat hard to follow (in part because both Annas and Caiaphus are referred to as “the high priest”), it appears that Jesus is essentially asked to enter a plea. He was questioned “about his

⁸⁷ United States v. Carignan, 342 U.S. 36, 46 (1951) (Douglas, dissenting). In the present day, some have called for radical reform to remedy just such actions. Russell D. Covey, *Interrogation Warrants*, 26 CARDOZO L. REV. 1867, 1896 (2005).

⁸⁸ Gerardus Gossenius, *The Manner and Order of Proceeding Against Christ by the Judges*, (English Broadside, 1586, Original in the Society of Antiquaries).

⁸⁹ John 18:12-14.

⁹⁰ The initial appearance before Annas does not appear in the other Gospels.

⁹¹ John 18:12-14.

⁹² F.R.Crim.P. 5.

⁹³ F.R.Crim.P. 10.

⁹⁴ Id.

disciples and his teaching,⁹⁵ 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.”⁹⁶

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. Of course, the authorities prosecuting Jesus do not respond well to this assertion and 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, why do you strike me?” Then Annas sent him bound to Caiaphus the high priest.⁹⁷

Thus, his arraignment was complete and he was sent on to be tried.

⁹⁵ John 18:19.

⁹⁶ John 18:21.

⁹⁷ John 18:22-24.

D. The Trial⁹⁸

*Mesa: If he be just then let us join with him, but if he be guilty let us root him out.*⁹⁹

1. The Setting

The trial of Christ took place in the courtyard of Caiaphus' palace.¹⁰⁰ The "scribes and elders"¹⁰¹ had gathered there, apparently before the arrival of Jesus.¹⁰² 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.¹⁰³ Regardless of the timing, however, this trial would not be wholly unfamiliar to the modern court-watcher.

⁹⁸ Some have considered what I describe as a trial as "irregular" or "formally illegal." RAYMOND BROWN, *THE DEATH OF THE MESSIAH*, v. 1, p. 331 (1992). 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.

⁹⁹ Gerardus Gossenius, *The Manner and Order of Proceeding Against Christ by the Judges*, (English Broadside, 1586, Original in the Society of Antiquaries).

¹⁰⁰ Mark 14:53-55.

¹⁰¹ This group of judges are often referred to as the "Sanhedrin," and was "dominated by the chief priests, with other priests, wealthy nobles or elders, and Pharisees...." RAYMOND BROWN, *THE DEATH OF THE MESSIAH*, v. 1, p. 340 (1992).

¹⁰² Mark 14:53.

¹⁰³ Craig S. Keener, *Mistrial of the Millenium*, 59 *Christian History* No. 3, p. 38 (August 1998).

Generally, it appears that Caiaphus served as the prosecutor and the religious elders formed the jury.¹⁰⁴ The jury having been selected, the next step was the taking of testimony.

2. The Testimony

As in most modern criminal trials, the principal evidence against Jesus was the testimony of purported witnesses to the crimes. 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.¹⁰⁵

Also reflecting many modern criminal cases, this testimony was not entirely consistent.¹⁰⁶ In fact, according to the Gospel of Mark, though many gave testimony against him, “their testimony did not agree.”¹⁰⁷ 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

¹⁰⁴ Mark 14:53 says that “They took Jesus to the high priest; and all the chief priests, the elders and the scribes were assembled.” The following description portrays Caiaphus as directing the testimony while the others listened. Mark 14:53-62.

¹⁰⁵ Mark 14:55-57.

¹⁰⁶ Conflicting evidence is often present where cooperating defendants are involved. Amanda Schreiber, *Dealing With the Devil: An Examination of the FBI's Troubled Relationship With Its Confidential Informants*, 34 COLUM. J.L. & SOC. PROBS. 301, 320-340 (2001).

¹⁰⁷ Mark 14:56.

built with hands,”¹⁰⁸ but the description provided by witnesses of how or where this statement was made did not match.¹⁰⁹ Like many modern prosecutors, Caiaphus faced the problem of unreliable and biased witnesses.¹¹⁰

Finally, having failed to establish their 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? But why 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....”¹¹¹

In the Gospel of Luke, Jesus responds to the inquisitors in a more enigmatic way. When asked, “Are you, then, the Son of God?”¹¹² he responds simply by saying, “You say that I am.”¹¹³ 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

¹⁰⁸ Mark 14:58; Matthew 26:61.

¹⁰⁹ Mark 14:59: “But even on this point their testimony did not agree.”

¹¹⁰ See Hon. Stephen S. Trott, *Words of Warning For Prosecutors Using Criminals as Witnesses*, 47 HASTINGS L.J. 1381 (1996).

¹¹¹ Mark 14:61.

¹¹² Mark 14:70.

¹¹³ Id.

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).¹¹⁴

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. 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.¹¹⁵

3. The Verdict

*Caiaphas: All you know not what you say: it is better that one man die than all the people perish.*¹¹⁶

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 Matthew¹¹⁷ and Mark,¹¹⁸ while Luke gives a less-

¹¹⁴ 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.

¹¹⁵ E.g., Kenneth Williams, *Texas: Tough on Murderers or On Fairness?* 53 DRAKE L.REV. 631 (2005).

¹¹⁶ Gerardus Gossenius, *The Manner and Order of Proceeding Against Christ by the Judges*, (English Broadside, 1586, Original in the Society of Antiquaries).

¹¹⁷ Matthew 26:65-68.

complete account,¹¹⁹ and John does not describe this part of the process at all.

Mark and Matthew describe a single step in which Jesus is condemned to die, rather than a two-stage process in which a defendant is first found guilty and only then is sentencing considered.¹²⁰ 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 is convicted of a qualifying crime.¹²¹

At the close of the proceeding Caiaphas, in the role of prosecutor, concludes the trial with a passion many modern prosecutors might admire:¹²²

Then the high priest tore his clothes and said, “He has blasphemed! Why do we still need witnesses?”

¹¹⁸ Mark 14:63-65.

¹¹⁹ Luke 22:71.

¹²⁰ Some 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. Craig S. Keener, *Mistrial of the Millenium*, 59 Christian History No. 3, p. 38 (August 1998).

¹²¹ *Roberts v. Louisiana*, 428 U.S. 325 (1976). Justice Thomas, among others, remains a proponent of mandatory capital sentencing schemes. Angela Onwauchi-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).

¹²² In 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).

You have heard his blasphemy. What is your verdict? They answered, “He deserves death.”¹²³

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.¹²⁴

Each aspect of Caiaphas’ argument reflects a principle I included in my own closing arguments as a prosecutor (though I never did tear my clothes).¹²⁵ 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, “You have 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.

¹²³ Matthew 26:65-66.

¹²⁴ For example, in the well-publicized Andrea Yates case, prosecutor Kaylynn Williford closed the case by saying that Yates’ actions “were 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: Impermissible Input or Benign Banter?*, 29 LAW & PSYCHOL. REV. 29, 30 (2005).

¹²⁵ Nor did I ever receive a verdict this quickly.

The verdict is stunningly simple: “He deserves death.”¹²⁶ 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.¹²⁷

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 lawyers¹²⁸ 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.¹²⁹

¹²⁶ Matthew 26:66.

¹²⁷ It appears, however, that though the jury demanded death, that 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 him to Pilate, the Roman Governor suggests that they “take him yourselves and judge him according to your law.” John 18:31. They decline, saying that “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.

¹²⁸ *Miranda v. Clark County, Nevada*, 319 F. 3d 465, 471 (2003).

¹²⁹ 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.

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?

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,¹³⁰ which is the Supreme Court in Texas for criminal matters,¹³¹ with no intermediate stop at the Court of Appeals.¹³² Were he (as usual)¹³³ to lose his appeal in the Court of Criminal Appeals, he would next have the

¹³⁰ Texas Rule of App. Pro. 71.1 (2005).

¹³¹ TEXAS CONST. art. V, § 5.

¹³² Texas Rule of App. Pro. 71.1 (2005).

¹³³ Kenneth Williams, *Texas: Tough on Murderers or On Fairness?* 53 DRAKE L. REV. 631, 643-648 (2005).

ability to petition the Supreme Court of the United States to hear the case.¹³⁴ After that, he could petition for habeas corpus in state court.¹³⁵ Were this to fail, he could seek a writ of habeas corpus in federal court,¹³⁶ and appeal the adverse decision there, possibly to the level of the United States Supreme Court.¹³⁷ Finally, the modern defendant can seek a pardon or commutation from the governor prior to the sentence.¹³⁸

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' 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). Still, the fact remains that, like a Texas man sentenced to die, Jesus had appeals before representatives of two separate jurisdictions¹³⁹ (Pilate as a representative of Rome, and Herod as ruler of

¹³⁴ 28 U.S.C. § 1254.

¹³⁵ Texas Code of Crim. Pro. art 11.071.

¹³⁶ 28 U.S.C. § 2254.

¹³⁷ 28 U.S.C. § 1254.

¹³⁸ Texas Code of Crim. Pro. art 48.01.

¹³⁹ Raymond 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. RAYMOND BROWN, *THE DEATH OF THE MESSIAH*, v. 1, p. 763 (1992).

Judea)¹⁴⁰ and the opportunity for a final reprieve from the Governor before being put to death.¹⁴¹

B. The Appeal to Pilate

*Pilate: I, Pontius Pilate, Procounsel 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 has 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 is considered and approved of, condemn him to the cross with the two murderers.*¹⁴²

Each of the gospel accounts describe Jesus being taken before Pilate,¹⁴³ who was the Roman Prefect (or Governor)¹⁴⁴ for the area at that time. The accounts given of this hearing by Matthew and Mark are remarkably consistent. According to both, after the trial described above,

¹⁴⁰ The hearing before Herod, unlike the remainder of the story, is reported in only one of the Gospels, John.

¹⁴¹ Luke 23:11-16.

¹⁴² Gerardus Gossenius, *The Manner and Order of Proceeding Against Christ by the Judges*, (English Broadside, 1586, Original in the Society of Antiquaries).

¹⁴³ Matthew 27:2, Mark 15:1, Luke 23:1, John 18:28.

¹⁴⁴ Archaeology has revealed Pilate to be the Roman "Prefect," and scholars describe him as the representative of Rome in that province. RAYMOND BROWN, *THE DEATH OF THE MESSIAH*, v. 1, p. 695 (1992).

the chief priests took him in chains to Pilate, the representative of Rome in that jurisdiction.¹⁴⁵

It appears that Pilate had an immediate understanding of the issues at hand. Unlike a modern court of appeals, he heard evidence himself instead of relying on a report from the lower court. He immediately asks Jesus if he is the King of the Jews, and Jesus responds “You say so.”¹⁴⁶

Pilate follows up by asking “Do you not hear how many accusations they make against you?”¹⁴⁷ Jesus makes no answer to this whatsoever, and Pilate is “amazed”¹⁴⁸ by the fortitude of the prisoner before him.¹⁴⁹ 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.”¹⁵⁰ Luke then describes Pilate’s next move—sending Jesus to Herod for a further appeal, apparently based on his fear of the political

¹⁴⁵ Matthew 27:2, Mark 15:1.

¹⁴⁶ Matthew 27:11, Mark 15:2.

¹⁴⁷ Matthew 27:13, Mark 15:4 is similar: “Have you no answer? See how many charges they bring against you.”

¹⁴⁸ Matthew 27:14, Mark 15:5.

¹⁴⁹ Id.

¹⁵⁰ Luke 23:4.

consequences of releasing Jesus, given the passions of the chief priests and the people.¹⁵¹

C. The Appeal Before Herod¹⁵²

*Tecas: It were better and safer for us to banish him [from] the country, or else send him up to Caesar.*¹⁵³

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.¹⁵⁴ According to Luke, when Pilate “heard that [Jesus]

¹⁵¹ Luke 23:7.

¹⁵² 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. RAYMOND BROWN, *THE DEATH OF THE MESSIAH*, v. 1, p. 763 (1992).

¹⁵³ Gerardus Gossenius, *The Manner and Order of Proceeding Against Christ by the Judges*, (English Broadside, 1586, Original in the Society of Antiquaries).

¹⁵⁴ According to Raymond Brown, Judea was an ethnarchy largely independent of Roman rule at the time of Jesus’s birth. However, about 6 A.D., Roman rule became more immediate as a Roman prefect was given direct authority over the area. Herod the Great’s sons were given some power, though less than that of a King. Thus, Pilate had direct Roman authority, while Herod Antipas was a local ethnic leader (but not a King).

was under Herod’s jurisdiction, he sent him off to Herod, who was himself in Jerusalem at that time.”¹⁵⁵ 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.¹⁵⁶

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.¹⁵⁷

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. Such deference, of course, has a policy basis, as the trial court heard the whole of the evidence and is closer to the situation. It also echoes the deference federal

RAYMOND BROWN, *THE DEATH OF THE MESSIAH*, v. 1, p. 677 (1992).

¹⁵⁵ Luke 23:7.

¹⁵⁶ Luke 23:8-10.

¹⁵⁷ Luke 23:11. Luke also reports that “Herod and 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.

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 judgements....”¹⁵⁸

Then, as now, civil authorities were reluctant to reverse even the most extreme and important failures of process, in the interests of finality. 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.¹⁵⁹ In other words, whether under Pilate or our current laws, it is not enough for an appellate court to think that probably there was not enough evidence or that an error was made—that appellate court must usually find that there was no reasonable evidence presented at all,¹⁶⁰ or a truly profound error was committed.¹⁶¹

Like Herod Antipas, the United States Supreme Court has concluded that a prisoner condemned to death may not, on habeas review, be spared death simply because of the inconvenient fact that he happens to be innocent of the charges against him.¹⁶²

¹⁵⁸ Bell v. Thompson, 125 S.Ct. 2825, 2836 (2005).

¹⁵⁹ E.g., 28 U.S.C. § 2254(d).

¹⁶⁰ 28 U.S.C. § 2254(d)(2).

¹⁶¹ 28 U.S.C. § 2254(d)(1).

¹⁶² Herrera v. Collins, 506 U.S. 390 (1993).

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.*¹⁶³

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.¹⁶⁴

Jesus's last stop prior to execution was a pardon consideration by the Governor, Pilate.¹⁶⁵ 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:

¹⁶³ Gerardus Gossenius, *The Manner and Order of Proceeding Against Christ by the Judges*, (English Broadside, 1586, Original in the Society of Antiquaries).

¹⁶⁴ Texas Code of Crim. Pro. art 48.01.

¹⁶⁵ Luke 23:13:16.

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, and he sent him back to us. Indeed, he has done nothing to deserve death. I will therefore have him flogged and release him.”¹⁶⁶

Pilate was trying to mediate a fair outcome by suggesting a sentence less than death. 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.¹⁶⁷

Pilate had an additional option as well. At the Passover festival, it was a tradition that the Roman authorities would release a local prisoner.¹⁶⁸ Pilate had two prisoners (at least) he could release under this tradition—Jesus and a murderer/insurrectionist named Barabbas.¹⁶⁹

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

¹⁶⁶ Luke 23:13-16.

¹⁶⁷ John 18:31.

¹⁶⁸ Mark 15:6.

¹⁶⁹ Mark 15:7.

opposition and gave in to the desires of the mob despite his own conscience:¹⁷⁰

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 him, crucify him! A third time he said to them, “Why, what evil has he done?.... But they kept kept urgently demanding with loud shouts that he should be crucified, and their voices prevailed.¹⁷¹

Thus, his last appeals exhausted, Jesus was handed over for execution.¹⁷² The particulars of that execution¹⁷³ have been well chronicled in both the popular¹⁷⁴ and scholarly¹⁷⁵ spheres.

¹⁷⁰ Pilate has maintained a position of moral ambiguity among varying Christian sects. Some believe that he converted to Christianity later in life, and some even have considered him a martyr of the faith. RAYMOND BROWN, *THE DEATH OF THE MESSIAH*, v. 1, p. 696 (1992). Regardless of his later actions, his lack of will in the face of the mob, as discussed in Section IV, *supra*, offers its own cautionary tale to the modern politician.

¹⁷¹ Luke 23:18-25.

¹⁷² 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.*

¹⁷³ 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*, 850 (1992). However, the idea that only those convicted of

IV. Lessons From The Trial of Christ

*Saveas: A hypocrite is very dangerous in a commonwealth, therefore let him be rooted out from among the people.*¹⁷⁶

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 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.

political crimes were crucified conflicts with the fact that two “bandits” were crucified on either side of Jesus. Mark 15:27.

¹⁷⁴ E.g. THE LAST TEMPTATION OF CHRIST (Criterion Collection 1988); THE PASSION OF THE CHRIST (Newmarket Films 2004).

¹⁷⁵ DAVID GARLAND, ONE HUNDRED YEARS OF STUDY ON THE PASSION NARRATIVES (1992)(comprehensive bibliography).

¹⁷⁶ Gerardus Gossenius, *The Manner and Order of Proceeding Against Christ by the Judges*, (English Broadside, 1586, Original in the Society of Antiquaries).

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. 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,¹⁷⁷ and it appears

¹⁷⁷ As 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 “Punished with the limbs outstretched... they are fastened and

that Christ suffered for some time on the cross next to the two bandits who were crucified on either side of him.¹⁷⁸ One of the bandits chides Jesus, saying “Are you not the Messiah? Save yourself and us!”¹⁷⁹ 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,”¹⁸⁰ and asks Jesus to remember him “when you come into your kingdom.”¹⁸¹ 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.”¹⁸²

Two things can be seen in this exchange: First, Jesus chooses not to criticize the execution of this guilty man. Second, it appears that the bandit’s humility in the face of death is approved of. 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.

nailed to the stake in the most bitter torment, evil food for birds of prey and grim pickings for dogs.” RAYMOND BROWN, *THE DEATH OF THE MESSIAH*, v.2, p. 951 (1992).

¹⁷⁸ Luke 23:39-43. The two criminals are referred to as “bandits” in Mark 15:27.

¹⁷⁹ Luke 23:39.

¹⁸⁰ Luke 23:41.

¹⁸¹ Luke 23:42.

¹⁸² Luke 23:43.

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?*¹⁸³

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)¹⁸⁴ bring an adulteress before Jesus.¹⁸⁵ They

¹⁸³ Gerardus Gossenius, *The Manner and Order of Proceeding Against Christ by the Judges*, (English Broadside, 1586, Original in the Society of Antiquaries).

¹⁸⁴ John 8:6 (“They said this to test him, so that they might have some charge to bring against him.”)

tell Jesus, correctly, that the Law of Moses requires that she be stoned to death,¹⁸⁶ and ask what should be done.

Strikingly, Christ does not answer immediately. Instead, he “bent down and wrote with his finger on the ground.”¹⁸⁷ 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.¹⁸⁸

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.”¹⁸⁹ One by one, they drift off, and in the end, the woman is left alone.¹⁹⁰ 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.¹⁹¹

¹⁸⁵ John 8:3-4

¹⁸⁶ John 8:5.

¹⁸⁷ John 8:6.

¹⁸⁸ Micah 6:8.

¹⁸⁹ John 8:7.

¹⁹⁰ John 8:9.

¹⁹¹ With shocking abruptness in his rush to get to the Old Testament texts which support his “conservative” principles, Richard Hiers dismisses this compelling teaching, saying “Would Jesus have said the same thing to a person convicted of murder? There is no New Testament case on point.” Richard H. Hiers, *The Death Penalty and Due Process in Biblical Law*, 81 U. Det. Mercy L. Rev. 751, 757 (2004). Rather than shrug off any moral teaching that may fall from this story, it seems more fair to conclude that the

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.¹⁹²

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 centurians standing guard, but Pilate himself.

At the time of the execution, the Gospels describe the conversion of one of the executioners, a Roman centurian, who recognizes the innocence of Christ.¹⁹³ After Jesus dies (which coincided with a darkness falling over the land),¹⁹⁴ the centurian says “Certainly this man was innocent.”¹⁹⁵ Pilate, in a more subtle way, also declares that Jesus may have been innocent. At

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.

¹⁹² HELEN PREJEAN, *THE DEATH OF INNOCENTS: AN EYEWITNESS ACCOUNT OF WRONGFUL EXECUTIONS* (2005).

¹⁹³ Matthew 28:54, Mark 15:39, Luke 23:47.

¹⁹⁴ Luke 23:44.

¹⁹⁵ Luke 23:47.

the time of the crucifixion, a sign was placed over Jesus' cross saying "Jesus of Nazareth, the King of the Jews."¹⁹⁶ The chief priests urged Pilate to change the sign to read "This man said 'I am the King of the Jews,'"¹⁹⁷ but Pilate refused, saying "what I have written I have written."¹⁹⁸

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 Neueld and Jim Dwyer's book *Actual Innocence* tells the stories of several people whose executions were overturned after DNA evidence established their innocence.¹⁹⁹ More famously, the Republican Governor of Illinois, Jim Ryan, granted a blanket commutation to all death row prisoners in Illinois based on innocence questions.²⁰⁰

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,

¹⁹⁶ John 19:19.

¹⁹⁷ John 19:21.

¹⁹⁸ John 19:22.

¹⁹⁹ Barry Scheck et al., *Actual Innocence: Five Days to Execution and Other Dispatches from the Wrongly Convicted* (2000).

²⁰⁰ Maurice Possley & Steve Mills, *Clemency For All*, Chicago Tribune, Jan. 12, 2003, at C1.

who was executed in Missouri in 1995. 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. This contrary evidence includes the fact that other eyewitnesses did not recall seeing a white man at the scene. That solitary government eyewitness was white.²⁰¹ Griffin may have been innocent.

Christian politicians, of course, may finesse this point by assuming that the criminal justice is infallible and could not result in the execution of an innocent, an assumption that does not seem to be borne out by the facts.²⁰² For example, Florida Governor Jeb Bush has justified his positions in opposition to abortion and in support of the death penalty²⁰³ through the familiar shibboleth that “[T]aking an innocent life is wrong.”²⁰⁴

²⁰¹ “In a 1980 Killing, a New Look at the Death Penalty,” New York Times, A15, July 19, 2005.

²⁰² Id.

²⁰³ 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, Lecture, *Evangelium Vitae*, (March 25, 1995), in Pope John Paul II, *The Gospel of Life (Evangelium Vitae)*(Times Books 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 (2004).

²⁰⁴ Interview by the Florida Baptist Witness with Jeb Bush, Governor of Florida (Oct. 31, 2002) cited in Michael Rowan, *Minding Our Skepticism: A*

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. 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 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.²⁰⁵ Nonetheless, this has long been the "Christian" justification for the death penalty. For example, Matthew Hale's 1763

Conservative Approach to Capital Punishment, 31 Fla. St. U. L. Rev. 377, 398, n. 139 (2004)(comment).

²⁰⁵ 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 disciples, 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 others have no validity." Ginia Bellafante, *Bill T. Jones Is About to Make People Angry. Again*. N.Y. TIMES, September 18, 2005, § 2 (Arts & Leisure), p. 1, 22.

treatise offers justifications for the death penalty drawing from Genesis, Exodus, and Deuteronomy, to the exclusion of the New Testament,²⁰⁶ and the Massachusetts Bay Colony's list of some 13 capital offenses included with each offense "a reference to the Old Testament to indicate its source."²⁰⁷

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.²⁰⁸

The views of scholars such as Hiers are interesting philosophy, they resonate with our urge for retribution, they are popular and historically orthodox, but without so much as a whiff of Christ himself they should not be called *Christian*.²⁰⁹

²⁰⁶ SIR MATTHEW HALE, *HALE'S HISTORY OF THE PLEAS OF THE CROWN* 1-3 (First American Version) (1847)(First published 1736).

²⁰⁷ *Furman v. Georgia*, 408 U.S. 238, 335 (Marshall, J., concurring) (1972).

²⁰⁸ Richard H. Hiers, *The Death Penalty and Due Process In Biblical Law*, U. Det. Mercy L. Rev. 751, 754-758 (2004).

²⁰⁹ 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

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,²¹⁰ 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.²¹¹ I argue that we should not inflict on the "least

who help themselves" comes from the Bible, rather than Benjamin Franklin. Bill McKibben, *The Christian Paradox: How a Faithful Nation Gets Jesus Wrong*, HARPER'S, August 2005, at 31.

²¹⁰ 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.

²¹¹ It is hard to prove a negative, but an extensive search failed to produce any other articles in the legal journals addressing this point. It could well be that theologians have traveled this ground before, and made essentially the same remarks.

of these”²¹² the same procedural wrongs that were inflicted on Christ at his own trial.

Although I am sure there are others which 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.

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*,²¹³ the U.S. Supreme Court denied habeas relief in a case where the capital sentencing hearing “lasted about three hours.”²¹⁴ This brevity was in part because the defense attorney declined to give a closing argument.²¹⁵

But this was just one aspect of the deadly speed of the proceeding—also too quick, and probably more important, was the period from arrest to

²¹² Matthew 25:45.

²¹³ 535 U.S. 685 (2002).

²¹⁴ 535 U.S. at 690.

²¹⁵ 535 U.S. at 692.

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,²¹⁶ there was no chance to gather witnesses, and there was no time for passions to cool.

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 guaranteed time period. Rather, the opposite is true—speedy trial acts, such as the federal act,²¹⁷ go the other way—they mandate that the trial must be held within a certain number of days after arraignment.²¹⁸ 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

²¹⁶ The apostle Peter did follow Jesus “at a distance” after he was arrested. Luke 23:54. It was at this point, however, that he denied three times even knowing Jesus. Luke 23:56-62.

²¹⁷ 18 U.S.C. § 3161 et. seq.

²¹⁸ 18 U.S.C. § 3161(c)(1).

Jesus was sentenced immediately upon conviction—in fact, his conviction appears to include the sentence.²¹⁹ While, at least since the overturning of mandatory death statutes,²²⁰ the conflation of adjudication and sentence does not exist in American law, there is often almost no gap between the two. For example, in Texas the sentencing phase of trial is required by statute to be held “as soon as practicable” after guilt is determined.²²¹ 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

²¹⁹ Mark 14:64.

²²⁰ *Roberts v. Louisiana*, 428 U.S. 325 (1976).

²²¹ Texas Code of Crim. Pro. 37.071(2)(a)(1).

habeas. Most strikingly, the Antiterrorism and Effective Death Penalty Act,²²² passed in 1996 by Congress and signed by Bill Clinton, has set strict and Byzantine restrictions on federal habeas petitions.²²³

The same way the brevity of Jesus' 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 some 16 years. 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. Bill's client was mentally retarded. On June 20, 2002, the Supreme Court reversed its own precedent and held that it was unconstitutional to execute the mentally retarded.²²⁴ As a result, Bill's client was resentenced to life—a life which would have long been over if the speedy appeals advocates had their way, and an execution which would have been unconstitutional under modern law. Delay may increase costs, but it also allows for justice to run its course.²²⁵

²²² The primary provisions of the AEDPA are codified at 28 U.S.C. §§ 2244, 2253 & 2254.

²²³ Nearly ten years after the AEDPA's passage, one leading textbook still notes that "The 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* (2001).

²²⁴ *Atkins v. Virginia*, 536 U.S. 304 (2002).

²²⁵ More process, of course, may result in fewer death sentences sought. As William Stuntz has aptly put it in discussing criminal law, "we do more of

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.*²²⁶

At each turn, powerful political actors urged those making the decision on Jesus' fate to have him killed. In the end, Pilate rejects commutation of the sentence in the face of the crowd's cries of "crucify him!"²²⁷ 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.

something when it becomes cheaper and less when it becomes more expensive." William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 529 (2001).

²²⁶ Gerardus Gossenius, *The Manner and Order of Proceeding Against Christ by the Judges*, (English Broadside, 1586, Original in the Society of Antiquaries).

²²⁷ Luke 23:23.

Consider, for example, the case of Texas, where nearly all involved in a capital case are forced to be responsive to an electorate. The jurors must go back into the streets of the town where they live. 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 Texas Supreme Court for criminal matters).²²⁸ When it is time for a stay of execution or commutation request, it goes to an elected governor. 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.²²⁹

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*.²³⁰ 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. 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:

²²⁸ Kenneth Williams, *Texas: Tough on Murderers or On Fairness?*, 53 DRAKE L. REV. 631, 649 (2005).

²²⁹ Given that Texas has rejected even the most modest reform proposals, at least one informed observer would rate the chance of non-partisan elections in Texas as "practically non-existent." Kenneth Williams, *Texas: Tough on Murderers or On Fairness?* 53 DRAKE L. REV. 631, 649.

²³⁰ 481 U.S. 137 (1987).

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 to other, more visceral, demands. The urge to employ the felony-murder doctrine against 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.²³¹

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!”²³² 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.*²³³

Jesus, like the litigants of his day, had no representation at all, no one to assist him and advocate on his behalf. Some would say that the

²³¹ 481 U.S. at 183-184.

²³² In so doing, Brennan supports his point by quoting the Book of Exodus. 481 U.S. at 184, n. 20.

²³³ Gerardus Gossenius, *The Manner and Order of Proceeding Against Christ by the Judges*, (English Broadside, 1586, Original in the Society of Antiquaries).

representation provided to some capital defendants today is not much better than nothing, and that the system is structured to encourage poor representation. Specifically, the system favors efficiency and simple answers, something that good defense attorneys simply don't provide. 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 capital defendants and then uses procedural defaults to defeat any meaningful substantive inquiries. Anyone who is not worried about this is no friend of American law.²³⁴

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. For example, Clark County, Nevada, when accused of “assigning the least-experienced attorneys to capital cases without providing any training,”²³⁵ replied simply that “... as a matter of law, attorneys who have

²³⁴ Franklin E. Zimring, *The Unexamined Death Penalty: Capital Punishment and Reform of the Model Penal Code*, 105 COLUM. L. REV. 1396, 1410 (2005).

²³⁵ *Miranda v. Clark County, Nevada*, 319 F.3d 465, 471 (9th Cir. 2003).

graduated from law school and passed the bar should be considered adequately trained to handle capital murder cases.”²³⁶

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.²³⁷

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. 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. Cannon may well have been appointed so often because of his tendency to race through trials like “greased lightning” and sometimes doze off.²³⁸

²³⁶ Id.

²³⁷ TEXAS CODE OF CRIM. PRO. § 26.052(e) 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. TEXAS CODE OF CRIM. PRO. § 26.052(d)(2)(D).

²³⁸ Matthew J. Fogelman, *Justice Asleep is Justice Denied: Why Dozing Attorneys Demean the Sixth Amendment and Should Be Deemed Per Se Prejudicial*, 26 J. LEGAL PROF. 67, 67 (2002).

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, it 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 most vile 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. In the book of Matthew, he

describes the separation upon His return of those who lived good lives from those who did not.²³⁹ In describing those condemned by their actions to “eternal fire,”²⁴⁰ Jesus says that He would tell them that they failed to visit Him when he was a stranger, naked, or “sick and in prison.”²⁴¹ 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?”²⁴² 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.”²⁴³ He does not qualify his statement to apply to the innocent who are in prison. Today, the very least of those among us must be those 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

²³⁹ Matthew 25:31-34.

²⁴⁰ Matthew 25:41.

²⁴¹ Matthew 25:43.

²⁴² Matthew 25:44.

²⁴³ Matthew 25:45.

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.²⁴⁴

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”)²⁴⁵ better than I could hope to, in voting to strike down the death penalty in Georgia and Texas:

²⁴⁴ 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.

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 systems of punishments to make sense in order that it can be a morally justifiable system.²⁴⁶

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. 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.

²⁴⁵ Joseph Bottum, *Christians and the Death Penalty*, FIRST THINGS, August/September 2005, at 17.

²⁴⁶ *Furman v. Georgia*, 408 U.S. 238, 369 (1972) (Marshall, J., concurring).