Religious Conservatives and the Death Penalty

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I. INTRODUCTION

Between the date the William and Mary symposium was held (April 2000) and the date this article was drafted (July 2000), the administration of the death penalty, surprisingly, became a first-tier national issue. This symposium helped boost the issue to prominence, of course, when the Rev. Pat Robertson, the keynote speaker, endorsed the current proposals for a moratorium on executions until concerns about the process in capital cases could be satisfied.[1] The current questioning of the death penalty is distinctive because much of it comes from political conservatives like Robertson, who support capital punishment in principle, but who now worry that innocent people may be executed because of, among other things, incompetent representation by appointed counsel.[2] The Republican governor of Illinois, a death penalty supporter, declared a moratorium in his state because 13 men sentenced to death there in the last 20 years had been determined to be innocent.[3] The Republican assembly in New Hampshire repealed the death penalty, although the Democratic governor vetoed the repeal.[4] And columnist George Will pointed out to his fellow conservatives that capital punishment "is a government program, [so] skepticism is in order."[5] These concerns are affecting public opinion; in Gallup Polls in February and June 2000, support for the

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[1]A few examples of the national media reports include Brooke A. Masters, *Pat Robertson Urges Moratorium On U.S. Executions,* WASH. POST, April 8, 2000, at A1; Andrew Petofsky, *Death Penalty in Virginia Assailed; Robertson Backs Moratorium on Executions*, RICHMOND TIMES-DISPATCH, April 8, 2000, at A1; *Robertson Backs Moratorium, Says Death Penalty Used Unfairly*, CHI. TRIBUNE, April 8, 2000, at 12.

[2]See, e.g., E.J. Dionne, Jr., *Conservatives Against the Death Penalty*, WASH. POST, June 27, 2000, at A23; Robert Reno, *Conservatively Speaking, Good Signs on Death Penalty*, NEWSDAY, May 4, 2000, at A60.

[3]See Dirk Johnson, *Illinois, Citing Verdict Errors, Bars Executions*, N.Y. TIMES, Feb. 1, 2000, at A1.

[4]See, e.g., *N.H. Governor Vetoes Bill to Repeal the Death Penalty*, CHI. TRIBUNE, May 20, 2000, at 3 (2000 WL 3667391).

[5]George Will, *Innocent on Death Row*, WASH. POST, April 6, 2000, at A23.

death penalty dropped to 66 percent, the lowest level in 19 years and down from 80 percent in 1994.[6] About 80 percent of Americans believe an innocent person has been executed in the last five years.[7]

What conservatives think about capital punishment, therefore, has become a subject of considerable interest. This paper focuses on the ideas and views of one large segment of conservatives: theologically conservative Christians, often labeled as the "Religious Right." According to conventional wisdom, conservative Christians are the most fervent supporters of capital punishment in America today. The anecdotal evidence is plentiful. Theologian Harvey Cox remembers watching a convention of the Christian Coalition on C-SPAN, where "the most thunderous applause anybody got was for saying, 'We really have to get tough with the death penalty. We have to [use] capital punishment more and more.'"[8] In a published collection of official religious statements on the death penalty, the most theologically conservative bodies represented all approve the use of the death penalty,[9] while the moderate to liberal mainline Protestant denominations all opposed it. Pat Robertson, in his symposium address at the College of William and Mary, continued to support the death penalty in principle.[10] In the summer of 2000, even as other conservatives voiced their doubts, the increasingly fundamentalist Southern Baptist Convention

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[6]Gallup News Service, *Two-Thirds of Americans Support the Death Penalty for Convicted Murders*, June 23, 2000, available at http://www.gallup.com/poll/releases/pr000623b.asp (visited July 8, 2000); Frank Newport, Gallup News Service, *Support for Death Penalty Drops to Lowest Level in 19 Years, Although Still High at 66%*, http://www.gallup.com/poll/releases/pr000224.asp (visited June 30, 2000).

[7]*Id.* (declaring that 91 percent of Americans believe an innocent person has been sentenced to death in the past 200 years); see also Death Penalty Information Center, Public Opinion About the Death Penalty 2 (1999), available at http://www.essential.org/dpic/po.html (indicating that more than two-thirds of citizens in 1999 Ohio survey thought it at least "somewhat" likely that an innocent person would be executed, up from 46 percent in 1997).

[8]Quoted in WILLIAM MARTIN, WITH GOD ON OUR SIDE: THE RISE OF THE RELIGIOUS RIGHT IN AMERICA 367 (1996).

[9]See THE CHURCHES SPEAK ON CAPITAL PUNISHMENT 108-11, 113-20 (J. Gordon Melton ed. 1989) (statements of Evangelical Presbyterian Church, Lutheran Church-Missouri Synod, National Association of Freewill Baptists, and National Association of Evangelicals).

[10]Videotape of Pat Robertson's Keynote Address, Conference on "Religion's Role in the Administration of the Death Penalty," College of William and Mary Law School, April 7, 2000 (transcript available at the Institute of Bill of Rights Law) (hereafter "Robertson Address").

explicitly endorsed capital punishment for the first time as "a just and appropriate means of punishment."[11]

Yet the anecdotes, and the statements of leaders and official bodies, may not give a true picture of the opinion of rank-and-file Americans. Opinion surveys suggest that theologically conservative Christians do not support the death penalty much more than do most other Americans, and that one set of theological conservatives – traditionalist Roman Catholics – supports it noticeably less. In the 1998 National Election Survey (NES),[12] 75 percent of Americans favored the death penalty, 56 percent strongly.[13] By contrast, "Catholic traditionalists" supported the death penalty at a far lower rate: only 65 percent favored it, and 24 percent "strongly opposed" it.[14] "Traditionalists" were defined as respondents who believe that the Bible is the inspired word of God and who attend church regularly.[15] That level of support is lower than for any major group in the survey except African-Americans (58 percent support, 25 percent strongly opposed). Catholic traditionalists were far more skeptical of capital punishment than were other Catholics, 76 percent of whom supported it and only 14 percent of whom were strongly opposed. Other polls confirm that the more conservative a Catholic is theologically – for example, the more she accepts the Bible as divinely inspired (and presumably also accepts the teaching authority of the Pope and bishops) – the more she is likely to oppose capital punishment.[16]

Even the figures for "evangelical Protestants" differed very little from those of Americans overall;

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[11]Southern Baptist Convention Annual Meeting 2000, *Resolution No. 5: On Capital Punishment* (June 13-14, 2000), available at http://www.sbcannualmeeting.org/sbc00 (visited June 30, 2000); see also David Waters, *God Authorized Death Penalty, Baptists Declare*, MEMPHIS COMMERCIAL APPEAL, June 15, 2000, at A2.

[12]Virginia Sapiro and Steven J. Rosenstone, NATIONAL ELECTION STUDIES, 1998: POST-ELECTION STUDY (University of Michigan, Center for Political Studies, 1999) (hereafter NES Study). Tanks to Professor Lyman Kellstedt of Wheaton College for providing the figures from the NES survey.

[13]*Id.*

[14]*Id.*

[15]*Id.*

[16]For example, in the 1996 General Statistical Survey (GSS), where 70 percent of Catholics overall supported the death penalty, the figure was 76 percent for those with a "not very strong" religious affiliation, and only 64 percent for those with a "strong" or "somewhat strong" religious affiliation. Support for the death penalty was 61 percent among Catholics who described the Bible as "the Word of God" and 81 percent among those who described it as "a book of fables."

80 percent supported capital punishment, 60 percent strongly.[17] Nor did they differ much from the figures for "secularists," 76 percent of whom indicated support, 64 percent strongly.[18] Of course, many questions remain concerning these figures. Categories such as "evangelical" and "traditionalist" need to be carefully defined. Some parts of the sample have fairly high margins of error. Even if other Americans support the bare existence of the death penalty just as much as conservative Protestants do, the latter may be more willing to impose it regularly and with less concern for flaws in the process. Since overall support for the death penalty has fallen significantly even since 1998, it would be interesting to know if has fallen proportionately among religious conservatives. But the figures at least suggest that theologically conservative Christians, who are unquestionably politically "conservative" on matters such as gay rights and abortion, do not support the death penalty noticeably more than does the rest of America, and that some of them support it quite a bit less.

In addition, a set of events in recent years, including Pat Robertson's statement at this symposium, have raised the question of whether traditionalist Christians' support for the death penalty might drop substantially. Pope John Paul II took a strong stand against capital punishment in his 1995 encyclical *Evangelium Vitae (The Gospel of Life)*, and he has registered a protest and asked for clemency in every American execution since then. The Pope is especially respected among conservative Catholics; his forceful teaching has probably already reduced their support for the death penalty, and it may do so even more in the future.

On the conservative Protestant side, in 1998 both Robertson and Jerry Falwell made unsuccessful efforts to stop the execution in Texas of Karla Faye Tucker, who was convicted of committing two brutal murders with a pickax, but who became a born-again Christian while in prison and appeared to have experienced a sincere transformation. The intervention of those leaders was quite surprising. About a year later, Robertson, in a speech in New York City, further voiced his discomfort with the death penalty and the "air of unseemly vengeance" that accompanied Tucker's execution. Echoing the Pope, he suggested that conservatives who oppose abortion and euthanasia "need to be pro-life across the board."[19] Many commentators at the time suggested that Robertson's concern extended to Karla Tucker only because of "her whiteness, her femaleness, her photogenic Christianness," and would not extend to prisoners on death

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[17] *Id.*

[18] *Id.*

[19] See Teresa Malcolm, *Tucker's Death Affected Robertson's Views*, NAT'L CATH. REPORTER, April 23, 1999, at 4. See also Robertson Address, *supra* note 10 (commending the Pope's stands on abortion and the death penalty and echoing the call for a "respect for life" rather than a "culture of death").

row in general.[20] But others thought that the Tucker case might mark a "turning point" in American attitudes toward the death penalty, because of "the challenge her execution posed to Christian conservatives who support the death penalty in principle."[21] Ronald Tabak, a leading opponent of the death penalty, predicted that Falwell and Robertson's stance on Karla Tucker would "make[ ] it seem legitimate for other social conservatives to rethink the death penalty."[22] Shortly after Tucker's execution, the leading evangelical Protestant magazine in America, *Christianity Today*, published an editorial calling for the abolition of the death penalty on the ground that it had "outlived its usefulness."[23] Then at the William and Mary symposium, Robertson stated again his doubts about executions, although Falwell broke with him in response and opposed the death penalty moratorium.[24]

The purpose of this Essay is to discuss whether these years indeed represent a turning point in religious conservatives' attitude toward the death penalty. In light of the Pope's campaign, some evangelicals' expressions of doubt, and the general questioning of the death penalty, it seems an opportune time to ask what factors might lead to any significant decline in support for capital punishment among conservative Catholics and Protestants.

Last year in Montgomery, Alabama, the civil rights organization Equal Justice Initiative erected eight billboards asking "What Would Jesus Do?" concerning the death penalty and quoting his rebuke, "Let him who is without sin cast the first stone."[25] The campaign was aimed at Alabama's conservative churches, which had used the same slogan about Jesus earlier in the fall to mobilize their members and defeat a referendum proposal for a state lottery. According to director Bryan Stevenson, the Initiative was challenging religious activists who seek "to use the teachings of Jesus to guide policy" on moral issues: "We

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[20]Ellen Goodman, *Karla Faye Tucker Put A Face on Death Row*, BOSTON GLOBE, Feb. 8, 1998, at C7. In response to a question at the William and Mary symposium, Robertson said that he believed the proper issue concerning commuting sentence was whether a prisoner truly had a "change of heart," not whether he had become a born-again Christian, thus suggesting that a sincere Muslim or non-religious prisoner could similarly qualify. Robertson Address, *supra* note 10.

[21]E.J. Dionne, Jr., *Karla Tucker's Legacy*, COMMONWEAL, Feb. 27, 1998, at 9.

[22]Malcolm, *supra* note 19, at 4.

[23]Editorial, *The Lesson of Karla Faye Tucker*, CHRISTIANITY TODAY, April 6, 1998, at 25 (hereafter "*CT* Editorial").

[24]Frank Green, *Falwell Opposes A Moratorium – He, Robertson Differ on Executions*, RICHMOND TIMES-DISPATCH, April 11, 2000, at B4.

[25]*Group Asks Churches to Consider Religious Stance on Death Penalty,* ASSOCIATED PRESS, Jan. 16, 2000.

just wanted people of faith to start thinking about" the death penalty as such an issue.[26] This Essay analyzes how conservative religious believers have approached, and are likely to approach, the death penalty, and what arguments or developments might convince religious conservatives that it is indeed wrong in current circumstances.

Part I analyzes the approaches toward the death penalty first of traditionalist Roman Catholics and then of evangelical Protestants. The discussion of Catholicism pays particular attention to the Pope's recent teachings against capital punishment and how authoritatively they are likely to be perceived by traditionalist Catholics. The section on evangelical Protestants discusses how evangelicals are influenced by the culture around them, but also how central themes in their theology might provide a basis for them to reject capital punishment. I conclude that both Catholics and Protestant conservatives may be moved by theological arguments against the death penalty, but that both are as likely to be moved by practical concerns, such as the risk of convicting the innocent, the same sort of factors that might convince Americans with no religious beliefs. Part II concludes by reviewing the factors that are most likely to sway religious conservatives against the death penalty, not only its current operation and administration, but its very existence.

I. THEOLOGICAL CONSERVATIVES' APPROACHES TO THE DEATH PENALTY

I begin by examining some of the recent thinking about the death penalty among conservative Christians: conservative Roman Catholics and evangelical Protestants. Before taking those two groups in order, I first say some brief words about a source of authority on which both of them rely: the Bible.

A. The Biblical Passages and Conflicting Interpretations

Both Catholic and Protestant traditionalists look to the Bible as authority on matters of doctrine, personal morals, and social ethics. Evangelical Protestants, in particular, are committed to what one scholar calls "biblicism": looking to the Bible for direct, specific answers to current ethical or social questions such as death penalty.[27] However, the Bible says varying things that may bear on the death penalty. The death penalty is authorized and even commanded in Genesis and the Mosaic law, but only with certain crucial limits; and for Christians, perhaps Jesus's message of mercy and reconciliation makes it inappropriate that humans should impose such a final penalty. Thus the Bible offers different approaches toward the death

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[26] *Id.*

[27] MARK NOLL, THE SCANDAL OF THE EVANGELICAL MIND 160 (1994). See also DONALD G. BLOESCH, 1 ESSENTIALS OF EVANGELICAL THEOLOGY 3-4 (1978) ("[t]he divine authority of Scripture will always be fundamental in evangelical theology"); George M. Marsden, *Introduction: The Evangelical Denomination*, in EVANGELICALISM AND MODERN AMERICA ix (George M. Marsden ed. 1984) (stating that evangelicals emphasize the "doctrine of the final authority of Scripture").

penalty. As is often the case, the text must be interpreted, either by some authoritative person or institution or through some theological framework.

Bible-oriented supporters of the death penalty tend to start with the passage in the book of Genesis where immediately after the Flood, God covenants with Noah and describes to him how human society will be reconstituted, stating, among other things, that "[w]hosoever sheds the blood of Man, in Man shall his blood be shed; for in the image of God He made Man."[28] The Mosaic law commanded the death penalty not only for murder, but for at least a dozen other crimes including as adultery, bestiality, homosexuality, witchcraft, and rebellion against parents. Bible-oriented proponents of the death penalty then go on to say that "[n]othing in the teachings of Jesus or the apostles contradicts this sanctioning" of capital punishment.[29] They point, for example, to the passage in the 13th chapter of Paul's letter to the Romans, which endorses human government as the instrument of God's "wrath" against offenders and speaks of government wielding the "sword," both of which the proponents say refer specifically to the use of death as punishment.[30]

The difficulty with such arguments is that they rely heavily on "proof texting," the use of individual verses or short passages in isolation without putting them in the context of their history or of an overall theological approach. This method, treating Bible verses as bits of data – of theological "facts" that merely need to be compiled – has been especially deeply imbedded among evangelical and fundamentalist Protestants since the early 20th century.[31] The method reflects the understandable desire that scripture should always be clear to any person without a need for extensive education or study. But it is simply not enough to pull Bible verses out of their historical or theological context, as even most Christian scholars committed to the authority of the Bible admit.

Thus, to treat the above passages as instituting the death penalty for all times and places overlooks several complexities. As scholars have pointed out, the Genesis verse about the shedding of blood is, in literary form, less a law and more a poetic lyric: less a command from God and more a description of how,

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[28]GENESIS 9:6.

[29]H. Wayne House, *The New Testament and Moral Arguments for Capital Punishment*, in THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES 415, 422 (Hugo Adam Bedau ed. 1997) (hereafter "Bedau")..

[30]*Id.* at 421-22 (concluding that the reference to the sword "is far closer to an affirmation than to a denial" of capital punishment).

[31]NOLL, *supra* note 27, at 160. Fundamentalism was dominated by a form of thought called dispensationalism, which according to one of its leading writers, viewed theology as a "scientific" process of "induction" from the theological "facts" found in the Bible. *Id.* at 128, 134 (quoting 1 LEWIS SPERRY CHAFER, SYSTEMATIC THEOLOGY x, 117 (1947)).

in a primitive society without a formal legal system, the killing of a person prompted vengeance by his family and thus an escalating spiral of retaliatory violence.[32] It is widely recognized that the Mosaic law, prescribing death only for certain offenses and under certain procedures, was meant to stop spiraling retaliation and control the lust for vengeance,[33] a concern that should similarly apply to the displays of vengefulness that occur today outside American prisons when executions take place.[34] Moreover, the Mosaic law's provision for the death penalty for scores of crimes such as bestiality, witchcraft, and idol worship – crimes virtually no one suggests would merit execution today – reflects, at least in part, "Israel's unique position as a nation God called to be holy."[35] Maintaining such purity demanded that the stain be ritually removed through the death of the offender. Even the execution of murderers may have rested on the notion that the blood of a murder victim "pollutes the [special] land" of Israel.[36]

Moreover, the Biblical authorization of the death penalty was also coupled with significant limits on its actual implementation. Jewish law required two eyewitnesses to convict someone of a capital crime, a higher standard than in other cases. It also impressed on the witnesses the importance of their testimony

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[32]See, e.g., John Howard Yoder, *Noah's Covenant, The New Testament, and Christian Social Order*, in BEDAU, *supra* note 29, at 429, 430-33; JAMES J. MEGIVERN, THE DEATH PENALTY: AN HISTORICAL AND THEOLOGICAL SURVEY 15-16 (1997).

[33]See GARDNER C. HANKS, AGAINST THE DEATH PENALTY: CHRISTIAN AND SECULAR ARGUMENTS AGAINST CAPITAL PUNISHMENT 30 (1997) (citing 1 INTERPRETERS' BIBLE 999-1000 (1951)).

[34]As Pat Robertson described the scene outside the prison where Karla Tucker was executed: "[I]t was like a Roman circus. There was bloodthirstiness out there. They were cheering and cursing and chanting for her to be executed." Robertson Address, *supra* note 10.

[35]See, e.g., Daniel W. van Ness, *Capital Punishment: A Call to Dialogue* 5 (1994). A small wing of conservative Protestants called "reconstructionists" believes that the Mosaic rules remain valid in all but purely ritual matters, and so continues to affirm the death penalty for "homosexuality, adultery, blasphemy, propagation of false doctrine, and incorrigible behavior by disobedient children." WILLIAM MARTIN, WITH GOD ON OUR SIDE: THE RISE OF THE RELIGIOUS RIGHT IN AMERICA 353 (1996). This extreme camp has occasionally had influence on the Religious Right in America, but never on the subject of the death penalty. Most theological proponents of the death penalty believe that many details of the Mosaic law were abrogated but the covenant with Noah was retained, thus setting aside the use of execution in the vast range of crimes that the Mosaic law covered, but preserving its legitimacy in principle for murder.

[36]van Ness, *supra* note 35, at 5 (quoting NUMBERS 35:33)).

by requiring them to carry out the execution if the accused was convicted.[37] The tradition showed a real reluctance to execute – a reluctance based on stories like God's protection of the murderer Cain – to the point that in one passage of the Talmud, several great rabbis agree that "a Sanhedrin which executes once in seven years is known as destructive," and some added that they would never vote to execute.[38]

The anti-death-penalty side has its proof texts too, and they suffer from similar weaknesses. Death penalty opponents often rely, for example, on the story in which Jewish leaders brought Jesus a woman who had been caught in adultery, for which the Mosaic law prescribed death by stoning. Jesus responded by saying, "Let him who is without sin among you cast the first stone," and the accusers left embarrassed.[39] The story, it is sometimes asserted, shows that Jesus opposed capital punishment, and that "our reaction to sin must be forgiveness, even as we ask for the forgiveness of our own sins."[40] But such simple interpretation creates obvious problems. It is difficult to read Jesus as "demanding complete sinlessness of every witness, jury member, and judge" in all criminal cases, "for then the criminal justice system would not be possible at all,"[41] and both the Bible and Christian tradition affirm the general legitimacy of government using force to restrain wrongdoers.[42] Perhaps the story is intended to disapprove of capital penalties in particular, but on its face it does not say so, or why. To explain why execution in particular is wrong, one needs to develop a broader theological approach to issues such as punishment and the value of human life.

As in many other situations, the biblical texts in this instance can point in different directions, and one needs to interpret them in the light of some overall theological approach. Of course, the texts limit what kinds of approaches are possible, and they are a central component in determining the overall theological approach. Nevertheless, too often Christians, especially evangelical Protestants, have acted as if they do not have to make such judgments at all, as if the Bible speaks with unbroken clarity.

B. Traditionalist Roman Catholic Approaches

For Roman Catholics, an important, perhaps crucial role in interpreting the biblical message is played by the Pope and the bishops: the "magisterium" of the Church. This teaching authority is especially

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[37]HANKS, *supra* note 33, at 31-32; van Ness, *supra* note 35, at 10-11.

[38]MEGIVERN, *supra* note 32, at 11 (Talmud and other citations omitted).

[39]See JOHN 8:1-11.

[40]HANKS, *supra* note 33, at 40-41.

[41]House, *supra* note 29, at 418.

[42]See *id.*

respected by theologically conservative or traditionalist Catholics. While "liberal" Catholics tend to give weight to personal experience as well as secular sources, one of the defining features of traditionalists is their deference to the magisterial teaching, which represents the ongoing authority of Christ.[43] Pope John Paul II, in particular, has the respect of traditionalist Catholics because of his reaffirmation of traditional positions on controversial issues such as abortion, birth control, and women's ordination.

For more than a millennium, the Church officially endorsed the death penalty.[44] Some early Christian writers condemned it under the Fifth Commandment ("thou shalt not kill"); but after Christianity became intertwined with the Roman Empire, capital punishment became a "deeply entrenched" policy for Church and the state,[45] especially during the assaults on various heresies from the 1000s through the 1200s.[46] Thomas Aquinas said that just as a physician "beneficially amputates a diseased organ if it threatens the corruption of the body," so the ruler "executes pestiferous men justly and sinlessly [to protect] the peace of the state."[47] The 1566 *Roman Catechism* endorsed the death penalty as a "lawful slaying," adding that its "just use,"

> far from involving the crime of murder, is an act of paramount obedience to this Commandment which prohibits murder. The end of the Commandment is the preservation and security of human life. Now the punishments inflicted by the civil authority, which is the legitimate avenger of crime, naturally tend to this end, since they give security to life by repressing outrage and violence.[48]

This passage remained the central official teaching on the death penalty well into the 20th century. It

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[43]For an example of this attitude in one conservative diocese, see CHARLES R. MORRIS, AMERICAN CATHOLIC: THE SAINTS AND SINNERS WHO BUILT AMERICA'S MOST POWERFUL CHURCH 382-88 (1997) (describing the diocese of Lincoln, Nebraska).

[44]The following brief summary relies on James J. Megivern's comprehensive and excellent historical survey of the theology and philosophy of capital punishment, *supra* note 32.

[45]*Id.* at 53.

[46]See *id.* at 54-70 (tracing Church's increasing approval of violence and revenge in this period, including execution of heretics by the Inquisition, romanticization of fighting, and launching of the Crusades).

[47]*Id.* at 115-16 (quoting 3 THOMAS AQUINAS, SUMMA CONTRA GENTILES c. 146, at 219-22 (Vernon J. Bourke trans. 1975)).

[48]*Id.* at 170-71 (quoting CATECHISM OF THE COUNCIL OF TRENT FOR PARISH PRIESTS (J. McHugh and C. Callan trans. 1934).

endorsed vengeance as well as deterrence as rationales for the death penalty, and authorities cited it as a blessing not only for the use of capital punishment, but for its widespread use.[49] At the same time, however, there were always countering themes from Christian thinkers like Augustine, who defended the right of the state to kill in the abstract but always argued for clemency in each case.[50]

Until recently, the longstanding teaching that the death penalty was legitimate led traditionalist Catholics to support it enthusiastically. Opposition to the death penalty, which was first voiced by Enlightenment intellectuals like Beccaria and Voltaire, came to be associated with other modernist attacks on religion's historic doctrines and "traditional values." A 1956 dissertation defending the death penalty on traditionalist grounds said that the calls to abolish it were based on "the modern errors of 'individualism, rationalism, and sentimentalism.'"[51] Moreover, as Thomism became the authoritative philosophical framework for Catholic thinkers in the late 1800s, Aquinas' views on particular matters, such as his strongly-expressed support for the death penalty, became authoritative as well.[52]

All this has changed quite dramatically in the last 30 years. The Pope and the American bishops have taken a vigorous position against the death penalty. The bishops issued a series of statements beginning in 1980, when they asserted that "in the conditions of contemporary American society, the legitimate purposes of punishment do not justify the imposition of the death penalty,"[53] and began to intercede to ask that particular executions be cancelled. In 1983, Cardinal Bernardin of Chicago included opposition to the death penalty along with opposition to abortion and euthanasia among his so-called "seamless web" of pro-life positions, the "consistent ethic of life." The effect of the bishops' activities, though, was somewhat limited. Many conservatives thought that the bishops' conference was too receptive to liberal political ideology, and that the "consistent ethic of life" would dilute the strength of the Church's campaign against abortion. As Bernardin put it: "Some of the people . . . accused me of down-playing abortion, just making it one issue among many."[54] However, when Pope John Paul II weighed in strongly

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[49] *Id.* at 171-73.

[50] *Id.* at 42 ("[i}n the last analysis, the Augustinian position was that [this] right, no matter how valid or well founded, ideally should never actually be exercised."); GARRY WILLS, SAINT AUGUSTINE 109-11 (1999) (discussing Augustine's pleas for clemency for Donatists and concluding that "he opposed any use of capital punishment").

[51] MEGIVERN, *supra* note 32, at 287 (quoting FRANCISCUS SKODA, DOCTRINA MORALIS CATHOLICS DE POENA MORTIS A C. BECCARIA USQUE AD NOSTROS DIES (1956)).

[52] *Id.* at 256, 258.

[53] *Id.* at 367 (quoting 1980 statement).

[54] *Id.* at 377-78 (quoting phone conversation with Cardinal Bernardin, Dec. 29, 1994).

against capital punishment in the 1990s, the matter was different. The Pope had more credibility with conservatives because of his position, his record of challenging Communism (especially in his native Poland), and his reaffirmation of traditional teachings on family and sexual ethics.[55]

The Pope's critique of capital punishment crystallized in the 1995 encyclical *Evangelium Vitae (The Gospel of Life*),[56] which demands close attention. The heart of the encyclical defends "the value and inviolability of human life"[57] against the many threats to it in the modern world, and it applies the commandment "Thou Shalt Not Kill" forcefully to condemn murder, abortion, and euthanasia – the deliberate killing of innocent human beings – in the strongest terms.[58] But before reaching this conclusion, the Pope states that the "negative" rule against killing also implies "a positive attitude of absolute respect for life,"[59] "even [the lives] of criminals and unjust aggressors."[60] Because human life "from its beginning . . . involves 'the creative action of God' and . . . remains forever in a special relationship with the Creator," "[o]nly God is the master of life."[61] In support of these propositions, the Pope cites God's decision to shield the first murderer, Cain, from the retribution of others.[62]

In the "paradox" of life in an imperfect world, the encyclical goes on, there are many "tragic" cases in which the "legitimate defence" of life, one's own or another's, can necessitate harming the attacker. But in these cases the Pope justifies the killing only as the byproduct of necessity: "Unfortunately it happens that the need to render the aggressor incapable of causing harm sometimes involves taking his life."[63] This argument from necessity, the Pope says, "is the context in which to place the problem of the death

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[55]See the comprehensive and admiring review of the Pope's life and work by a politically conservative American Catholic, GEORGE WEIGEL, WITNESS TO HOPE: THE BIOGRAPHY OF POPE JOHN PAUL II (1999).

[56]POPE JOHN PAUL II, THE GOSPEL OF LIFE (EVANGELIUM VITAE): THE ENCYCLICAL LETTER ON ABORTION, EUTHANASIA, AND THE DEATH PENALTY IN TODAY'S WORLD 1 (1995) (hereafter "*EV*").

[57]*Id.* at para. 1.

[58]*Id.* at para. 3.

[59]*Id.* at para. 54.

[60]*Id.* at para. 57.

[61]*Id.* para 53, at 94; para. 55, at 97.

[62]See *di.* at para. 13-19.

[63]*Id.* para. 55, at 98.

penalty."[64] Thus, he continues in the key passage, the government

> ought not go to the extreme of executing the offender except in cases of absolute necessity: in other words, when it would not be possible otherwise to defend society. Today, however, as a result of steady improvements in the organization of the penal system, such cases are very rare, if not practically non-existent.[65]

Evangelium Vitae appears to condemn capital punishment as unnecessary in any advanced Western society where a secure term of life imprisonment is possible. Its position was so strong that the new *Catechism of the Catholic Church*, issued only three years before the encyclical, was revised in its Latin version in 1997 to incorporate the new teaching. The 1992 *Catechism*, which as yet is unrevised in English, states that the death penalty is appropriate for cases of "extreme gravity,"[66] perhaps implying that the heinousness of a crime could itself justify execution; but the encyclical narrows the legitimate use of executions to protecting others from future harm. The 1992 *Catechism* teaches that execution should not be used "[i]f bloodless means are sufficient to defend human lives against an aggressor,"[67] but the encyclical goes further and states that in advanced societies, means short of death are sufficient in virtually every situation. After some observers expressed distress that the *Catechism* was being changed so soon, Cardinal Joseph Ratzinger, the Church official in charge of propounding doctrine, stated that while *Evangelium Vitae* "has not altered the doctrinal principles . . . in the Catechism," it has "deepened the application of such principles in the context of present-day historical circumstances. Thus, where other means for the self-defense of society are possible and adequate, the death penalty may be permitted to disappear. Such a development . . . is something good and ought to be hoped for."[68]

A significant feature of the Pope's argument is that he does not try to claim that the state *never* has authority to execute a murderer. Rather, he argues that even if there is such authority in theory, the presumption should be strongly against exercising it, and that in current circumstances in the West that presumption is virtually never met. This has the advantage of turning the issue away from purely abstract questions and toward the concrete question of the necessity for the death penalty in our current context. The argument in this form also stands a greater chance of convincing average Americans and Christians.

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[64] *Id.* para. 56, at 99.

[65] *Id.* at 100.

[66] 1992 CATECHISM OF THE CATHOLIC CHURCH § 2266.

[67] *Id.* § 2267.

[68] Quoted in Richard J. Neuhaus, *The Public Square: A Clarification on Capital Punishment*, FIRST THINGS, October 1995, at 74.

The Pope has since intensified the campaign against American executions by sending a letter of protest to the relevant governor as the execution date approaches. In a typical appeal, made unsuccessfully to George W. Bush of Texas before a January 2000 execution, the Pope emphasized "the sacredness and dignity of each human life," referred to the murderer's "troubled childhood," and asked the governor to show "compassion and magnanimity."[69] To date, only one such letter has succeeded in obtaining clemency, an appeal that the Pope made to Missouri's governor during a visit to St. Louis in January 1999.[70] In December 1999, the Pope announced that a priority of the "jubilee" year 2000 would be "to reach an international consensus on the abolition of the death penalty." The Colosseum in Rome would be illuminated every time an execution anywhere in the world was commuted or a nation abolished capital punishment.[71]

No doubt the strong position of the Pope and to some extent that of the bishops helps explain why the polls show that in general, "traditionalist" Catholics support the death penalty less than do other Catholics and Americans. However, *Evangelium Vitae* has received criticism from some theologically conservative Catholics, even those generally respectful of papal authority and of John Paul II's record. The criticisms fall along two lines.

First, some argue that the Pope erroneously treats incapacitation and deterrence – that is, preventing the aggressor or others from doing harm – as the only overriding goals of punishment. The critics argue that the death penalty also serves the legitimate goals of retribution and of "restor[ing] the moral imbalance brought about by a crime."[72] They raise familiar objections to deterrence-based theories of criminal punishment. In a widely-noted op-ed article in the *Wall Street Journal*, Thomist philosopher Ralph McInerny, a professor at Notre Dame University, complained that the Pope's arguments wrongly "turn the attention . . . away from the crime actually committed."[73] As other critics noted, focusing on deterrence alone could justify executing people for minor crimes, without regard to whether their actions

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[69]*John Paul Urges Bush to Stay Execution in 1990 Juvenile Case*, HOUSTON CHRONICLE, Jan. 21, 2000, at 21, available at 2000 WL 4276258.

[70]See Paul Duggan, *Rising Number of Executions Welcomed, Decried*, WASH. POST, Dec. 13, 1999, at A3.

[71]*Pope Calls for Worldwide Abolition of Death Penalty*, ST. LOUIS POST-DISPATCH, Dec. 13, 1999, at A5, available at 1999 WL 3060123.

[72]Ralph M. McInerny, *A Missouri Compromise*, WALL STREET J., Feb. 26, 1999, at W15.

[73]*Id.* (criticizing the Pope for intervening to oppose executions in Missouri and other states).

deserved such punishment.[74] This particular concern seems misplaced. The Pope demands not only that killing the criminal prevent further crime but also that it be absolutely necessary to do so, which severely limits, rather than expands, the appropriate cases for capital punishment.

Nevertheless, there is something unsatisfying in the way *Evangelium Vitae* ends up reducing its analysis of capital punishment to considerations of incapacitation and deterrence. The key paragraph points in a different direction when it states that "[t]he primary purpose" of punishment "is 'to redress the disorder caused by the offence.'"[75] But the Pope fails to pursue this idea, instead turning quickly to the prevention of harm. Thus, he does not confront the criticism that the only adequate way to address and correct the disorder caused by murder is to take the murderer's life; only execution can symbolize the seriousness with which society views the intentional taking of innocent life. As natural law ethicist Russell Hittinger has argued, this "medicinal" purpose of punishment, the healing of society, also figures prominently in historic Catholic teaching.[76]

However, there is a strong conservative rejoinder that the death penalty, as actually practiced in modern times, fails miserably to serve the medicinal purpose of restoring society's health and order, and instead degrades society further. The argument rests on the Pope's general warning in *Evangelium Vitae* about a "culture of death" in which the taking of life, through means such as abortion and euthanasia, is common and is defended as legitimate. In such a society, as one conservative who agrees with the Pope put it, "the imposition of the death penalty ends up demonstrating . . . that yet more life is valueless, yet more life can be thrown away."[77] "[I]n that kind of society, to continue to exact the death penalty is not medicinal but poisonous."[78] There are many reasons to think that the death penalty as practiced cheapens the value of life rather than upholding its sanctity. For example, the presentation of victim impact statements to the jury naturally implies that some victims' lives are worth more than others, and it calls on the jury to

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[74]See Ethics and Public Policy Center, *Center Conversation: Current Catholic Thought on the Death Penalty*, available at http://www.eppc.org/library/conversations/02-deathpenalty.html) (remarks of Russell Hittinger) (hereafter "EPPC Conversation") (noting that the goal of deterring crime could justify "rounding people up to reinforce the social perception that 'you're not going to get away with it'"); *id.* (remarks of Keith Pavlischek).

[75]*EV*, *supra* note 56, at para. 56, at 99.

[76]EPPC Conversation (remarks of Russell Hittinger).

[77]*Id.* (remarks of Joseph Bottum).

[78]*Id.* (remarks of Russell Hittinger).

measure even the murderer's life in that flawed way.[79] Likewise, when the application of the death penalty systematically values white victims more than black victims, and white murderers more than black murderers – and when the public realizes that this is so – the message undermines the inherent value of life rather than affirming it. And when innocent people are sentenced to death, often because of inadequate, underfunded legal representation, the message could hardly be clearer that some human life is cheap.

The second critical response to *Evangelium Vitae* is that its teaching, even if defensible on the merits, is not especially authoritative for Catholics, but reflects more the Pope's personal philosophy. It deserves respect and careful consideration, but not obedience. Not even traditionalists claim that every word a Pope utters is authoritative. Indeed, in other contexts political conservatives have criticized religious leaders, including the Catholic bishops, for pronouncing too quickly on contested political questions without clear theological warrant.[80]

Critics give several reasons why the Pope's condemnations of the death penalty might have only persuasive rather than binding force. First, he himself presents them more as arguments than as authoritative declarations. *Evangelium Vitae*'s extremely strong pronouncements against abortion and euthanasia are accompanied by verbal formulas that signal claims to finality "approaching that of infallible definitions," in the words of one leading theologian.[81] "[B]y the authority which Christ conferred upon Peter and his Successors, in communion with the Bishops," the Pope declares abortion and euthanasia to be "grave" wrongs, on the basis of "natural law, . . the written word of God, . . . the Church's Tradition, and . . . the ordinary and universal Magisterium."[82] The statements condemning the death penalty, though strongly felt and closely reasoned, are less emphatic and formal. Second and relatedly, the condemnation of capital punishment, as we have seen, does not reflect a long tradition of teaching. As many scholars of

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[79]*Id.* (remarks of Joseph Bottum) (victim impact statements wrongly imply that the death penalty is compensating the survivors for "a tort, a harm done to those individuals" determined by the value of the life lost, rather than teaching "that life is sacred"). Victim impact statements can be important in allowing victims to express their emotions, but the statements should not be presented to the decisionmaker before sentencing.

[80]See, e.g., ROBERT BENNE, THE PARADOXICAL VISION: A PUBLIC THEOLOGY FOR THE TWENTY-FIRST CENTURY 99 (1995) (criticizing mainline Christian churches for being "extremely busy in making pronouncements on the major and minor [political] issues of our time"while "showing a loss of confidence in the specifically *religious* mission of the church"); THOMAS C. REEVES, THE EMPTY CHURCH: THE SUICIDE OF LIBERAL CHRISTIANITY 28 (1996) ("Many [conservatives] argue that the mainline churches are hemorrhaging because they concentrate on politics.").

[81]Avery Dulles, S.J., *The Gospel of Life: A Symposium*, FIRST THINGS, Oct. 1995, at 32.

[82]*EV*, *supra* note 56, para. 62, at 112; para. 65, at 119. The opening phrase on the authority given to Peter appears only in the abortion statement.

Catholicism have emphasized, the concept of papal infallibility rests not simply on the authority of one man, but on the idea that in such instances he is endowed with the protection against error that Jesus gave to the Church.[83] This suggests that teaching should be propounded or widely accepted for some time before it attains authoritative status. Cardinal Ratzinger's comments on the encyclical indicate that the doctrine concerning capital punishment is "undergoing development,"[84] not that it has reached a settled state where opposition to the practice is binding on all Catholics.

In addition, some conservative commentators have pointed out that *Evangelium Vitae* does not condemn all instances of capital punishment. The necessity of the death penalty depends, according to the encyclical, on whether imprisonment will suffice "to defend society," that is on conditions "in the organization of the penal system" – which might be seen as a policy determination on which the Pope has no special insight or authority. Thus, shortly after the encyclical, leading conservative Richard John Neuhaus downplayed the assertions of *Evangelium Vitae* as reflecting "only a prudential judgment that, in some contemporary circumstances, the death penalty is no longer necessary and therefore should not be used."[85]

However, there are strong answers to each of these arguments. *Evangelium Vitae* makes quite vigorous criticisms of the death penalty even if it does not claim infallibility. When the Pope says that capital punishment is unnecessary, his judgment stems from moral principle rather than simply prudence. The reason that he judges the penalty under the demanding test of "absolute necessity" is a moral reason: the death penalty contravenes the fundamental maxim of "absolute respect" for human life. And traditionalist Catholics tend to affirm that even the "ordinary, noninfallible teaching" of the Pope on theological and moral matters should receive assent from the faithful.[86] Since the encyclical John Paul II has shown how deeply he holds his principles, by intensifying his campaign to stop American executions, which is as dramatic an intervention into political matters as he has made on any issue. He clearly sees the increasing resort to the death penalty in America as an important reflection of the "culture of death." Conservatives who deeply admire his resistance to that culture on other matters, such as abortion and euthanasia, should be very troubled if they think that he has gotten this issue so wrong.

Nevertheless, for the reasons given earlier, the magisterial statements on capital punishment will be

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[83]See, e.g., THOMAS BOKENKOTTER, CATHOLICISM: DYNAMICS OF FAITH AND BELIEF 116 (1986) (noting that Catholic theologians stress that "the primary subject of infallibility is the total Church, and Vatican I ascribed to the Pope no other infallibility than that which Christ wished to endow his Church").

[84]Dulles, *supra* note 81.

[85]Neuhaus, *Clarification*, *supra* note 68.

[86]BOKENKOTTER, *supra* note 83, at 95.

taken as non-binding by many Catholics, even by many traditionalists committed in principle to papal authority. The Pope seems aware that the debate is in a relatively early stage and therefore presents his claims as arguments rather than as declarations of the Church's mind. The effect of his claims will rest significantly, as Fr. Dulles puts it, "in their persuasiveness to the audience he is addressing – not merely Catholics, but all persons of good will."[87] In other words, for the magisterial teaching to turn many Americans against the death penalty, it will have to be reinforced by and intertwined with non-theological arguments as well. Americans, including Catholics, will have to come to believe that innocent people are likely to be executed, or that racial bias and other arbitrary factors too greatly affect whether a defendant is put to death.

C. Evangelical Protestant Approaches

Turning to discuss how Protestant conservatives approach the death penalty, we first run into a problem of definition. There is a wide range of features that might define a Protestant as being theologically conservative or "traditionalist." For example, one common term for conservative Protestants, "evangelicals," encompasses a dizzying range of groups from pacifist Mennonites to Religious-Right fundamentalists to African-American pentecostals.[88] However, there are at least three themes common to most of these groups, themes that make them part of an "extended family" of traditionalist Protestants.[89] The first common feature has already been noted in part I-A above: "biblicism," an emphasis on the Bible, divinely inspired, as a direct, specific guide for belief and practice.[90] I have already briefly discussed the biblical passages and the difficulties in drawing final guidance from them without putting them in some historical or theological context. Thus, it is worth moving on to other features common among evangelical Protestants.

A second common theme is evangelicals' emphasis on "personal redemption": that the individual person can receive salvation from sin through God's forgiveness and grace, followed by personal transformation and a direct relationship with God. This focus, embodied most dramatically in the many waves of Christian "revivals" throughout American history, is especially concerned with "the personal

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[87]Dulles, *supra* note 81.

[88]See, e.g., THE VARIETY OF AMERICAN EVANGELICALISM (Donald W. Dayton and Robert K. Johnston eds. 1991) (suggesting that the term "evangelical" has so many meanings as to be useless without further definition).

[89]See Robert K. Johnston, *American Evangelicalism: An Extended Family*, in DAYTON AND JOHNSTON, *supra* note 88, at 252-69.

[90]See *supra* notes 27-42 and accompanying text.,

appropriation of [God's] grace – with the conversion and the 'new life' that follows the 'new birth."[91] A leading evangelical theologian calls this "the Gospel of reconciliation and redemption" running from God to human beings.[92]

In addition to these key themes of biblical authority and personal spiritual redemption, leading evangelical scholar Mark Noll has identified two other key features of how evangelicals think about social and political issues in particular. Noll emphasizes the "moral activism" of evangelicals, their willingness at certain times to raise a political issue to the level of a moral crusade, tirelessly pursued.[93] In the last 150 years in America, movements to abolish slavery, do away with the gold standard, prohibit liquor, and limit the teaching of Darwinism in schools were all mounted primarily by evangelical Protestants.[94] And while evangelicals withdrew from social and political activism during some periods (for example, during the decades after the famous Scopes evolution trial of 1925), they have been intensely active in the last twenty years in the form of the Religious Right. This capacity for moral activism and fervor is one reason why is worth asking whether evangelicals could be moved against the death penalty. If such fervor turned to the abolition or reform of capital punishment, it could have significant power. Indeed, perhaps only individuals with such religious energy could have the stamina to overcome the public attitudes and inertia that combine to undergird the death penalty.[95]

Finally, Professor Noll remarks on evangelicals' tendency to rely on "populism [and] intuition" in approaching politics.[96] This factor raises important questions about authority and cohesion among evangelicals, and I will now address its relation to the death penalty debate. After that, I will discuss how the remaining factor identified above – the evangelical emphasis on "personal redemption" – might also

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[91]DONALD W. DAYTON, DISCOVERING AN EVANGELICAL HERITAGE 138-39 (1976).

[92]BLOESCH, *supra* note 27, at 4. See also Marsden, *supra* note 27, at ix-x (asserting that evangelicals focus on "eternal salvation only through personal trust in Christ," "the importance of evangelism" (that is, seeking to bring others to that salvation), and "the importance of a spiritually transformed life").

[93]NOLL, *supra* note 27, at 160.

[94]See, e.g., *id.* at 157, 162-64; TIMOTHY L. SMITH, REVIVALISM AND SOCIAL REFORM IN MID-NINETEENTH-CENTURY AMERICA (1957).

[95]See, e.g., David M. Smolin, *Cracks in the Mirrored Prism: An Evangelical Critique of Secularist Academic and Judicial Myths Regarding the Relationship of Religion and American Politics*, 29 Loyola L.A. L. Rev. 1487 (1996) (discussing the importance of moral idealism and fervor that religion can bring to politics).

[96]NOLL, *supra* note 27, at 160.

affect their views on the death penalty.

1. Evangelicalism As a "Democratic" Movement: Populism and "Common Sense" Intuition

Unlike Roman Catholics, evangelicals do not have a single institutional body speaking theologically for their community, let alone an individual like the Pope who so speaks. Instead, American evangelicalism is a complex "mosaic" of many different groups[97] with different leaders who enjoy influence not because of an institutional position, but because of their ability to appeal to the rank-and-file of believers. In the words of historian Nathan Hatch, evangelicalism has historically been a "democratic" movement: decentralized, populist, distrustful of tradition and of formal theological reasoning.[98] As Hatch has shown, these tendencies run as far back as the massive revivals of the early 1800s among common folk, the "Second Great Awakening," and the tendencies remain apparent today. Evangelicals have refused to give much weight to the statements of institutional religious leaders; instead, they have insisted that the average individual can understand and apply the Bible and Christian principles by his or her own common sense.

Here, then, are Professor Noll's themes of populism and intuition. As Noll puts it, the political positions that evangelicals have taken over the years have often rested on "intuitive conceptions of justice." "[E]vangelicals in general have trusted their sanctified common sense more than formal theology, systematic study of history, or deliverances from academically trained ethicists."[99] Pat Robertson gave an example of this "common sense" tendency at the symposium, when he simply asserted that execution saves society the burden of "pay[ing] [the bills of a convicted prisoner] for the rest of their lives"[100] – even though in this case the common sense is wrong, since studies show that with appeals included, it costs considerably more to execute a person than to incarcerate him for life.[101]

These tendencies toward populism and "common sense" intuition have two implications relevant to the current reexamination of the death penalty. First, even if some evangelical leaders such as Pat Robertson were to become deeply and actively opposed to the death penalty, they will be limited in their ability to bring others along with them. Even such a prominent figure as Robertson represents only a small part of evangelicalism. And although many conservative evangelicals admire Pope John Paul II for his

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[97]Johnston, *supra* note 89, at 261-62.

[98]See NATHAN O. HATCH, THE DEMOCRATIZATION OF AMERICAN CHRISTIANITY (1989).

[99]NOLL, *supra* note 27, at 160.

[100]Robertson Address, *supra* note 10.

[101]See, e.g., Richard C. Dieter, *Millions Imsspent: What Politicians Don't Say About the High Costs of the Death Penalty*, in BEDAU, *supra* note 29, at 401-02 (reporting data from various states).

traditionalist stands on some moral issues, they are not likely to treat his condemnation of capital punishment as binding on them.

To be sure, prominent evangelical preachers can exert considerable authority over their flocks. As Professor Hatch notes, the populist orientation of evangelicalism has always meant that charismatic preachers could attract followers and dominate their thinking, much as charismatic political figures can rise to power through populist appeals to voters. Hatch shows how this "authoritarian mantle" was exercised by some 19th-century preachers, but he also sees it in the careers of Pat Robertson and Jerry Falwell.[102] To the extent this is true, an evangelical leader with Robertson's prominence and popularity might significantly affect many evangelicals' views on an issue such as the death penalty.

However, any one evangelical leader, even Pat Robertson, is likely to face limits in truly changing his followers' views on social and political issues. Again, no one leader speaks for the majority of evangelicals in the way that the Pope speaks for Catholics. Indeed, various evangelical leaders often compete with each other for prominence by taking different positions on particular matters. We may have seen precisely that dynamic at work when Jerry Falwell broke from Pat Robertson and opposed the call for a death penalty moratorium.[103] For the populist and democratic leader to maintain his prominence and authority, especially against such competition, he must not outrun the views of the people too far. Populist leaders, as Hatch points out, gain their position precisely "by appealing to the hopes, fears, and interests of plain folks."[104] And from the 1800s to the present, Hatch points out, evangelical preachers have shown a "deep sensitivity to audience" that has often "resulted in values of the audience shaping the message's contours."[105] Thus, it is not surprising that Pat Robertson, although he endorsed the death penalty moratorium, says that for now he is not ready to "crusade for it."[106]

This brings us to the second implication of evangelical populism for the death penalty debate. The reliance on "common sense" intuition has advantages, especially in keeping Christian faith vital among average people rather than just among the committed few. But it also means that evangelicals' religious attitudes can be strikingly shaped by the culture surrounding them rather than by the distinctives of the Christian message. What seems to be simply common sense is typically the product of cultural assumptions so natural that one does not even see that they exist, like the air we breathe. A prime example in modern politics is how so many southern white Protestants failed to overcome the racial prejudices of

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[102]HATCH, *supra* note 98, at 16, 208.

[103]See *supra* note 24 and accompanying text.

[104]HATCH, *supra* note 98, at 208.

[105]*Id.* at 16.

[106]Petkofsky, *supra* note 1, at A1.

their region during the civil rights era, notwithstanding the New Testament teaching that "in Christ there is neither Jew nor Greek."[107] Indeed, it has been argued that evangelical religion became dominant in the South from the 1800s forward only by adopting preexisting features of Southern culture, such as an emphasis on honor, masculinity, and the legitimacy of violence.[108] Likewise, because evangelical churches are "democratic" institutions highly accountable to their members, they can be more captive to the community's general social attitudes than is a more hierarchical church. Again, the civil rights era provides an example: Roman Catholic bishops in several southern cities ordered the desegregation of their parochial schools in the early 1950s, a number of years before the general, largely Protestant society in the South accepted the process in public schools.[109]

With respect to the death penalty, then, we should expect white evangelicals' attitudes to fall in line with the general attitudes of their regions. Southern evangelicals will be more pro-death-penalty. They will tend to harmonize their religious attitudes with the greater acceptance of state violence in this region.[110] They will achieve that harmonization by emphasizing the biblical passages that endorse or assume capital punishment, rather than the themes that undercut it or severely limit it.

The populist and intuitive orientation of white evangelicals thus suggests that efforts to turn them against the death penalty cannot rely predominantly on theological arguments from religious leaders. Criticisms will also have to rely heavily on arguments that appeal simply to individuals' intuitive "common sense." In other words, conservative Protestants, like other Americans, will probably be as much or more influenced by factors such as the threat of executing innocent people, the inadequacy of representation of capital defendants, and the racial and other arbitrary disparities in sentencing. Not surprisingly, features Pat Robertson focused on those features in his symposium address at William and Mary. Likewise, *Christianity Today* began its 1998 editorial against the death penalty with the empirical problems in the system – those same factors – using them as a "conversation starter."[111] One leader of the evangelical

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[107]GALATIANS 3:28; see, e.g., ANDREW MICHAEL MANIS, SOUTHERN CIVIL RELIGIONS IN CONFLICT: BLACK AND WHITE BAPTISTS AND CIVIL RIGHTS 25-27, 65 (1987).

[108]See CHRISTINE LEIGH HEYRMAN, SOUTHERN CROSS: THE BEGINNINGS OF THE BIBLE BELT 26-27 (1997).

[109]See JAMES HENNESEY, AMERICAN CATHOLICS: A HISTORY OF THE ROMAN CATHOLIC COMMUNITY IN THE UNITED STATES 305-06 (1981) (noting, however, that these directives met with resistance).

[110]See Hugo Adam Bedau, *Background and Developments*, in BEDAU, *supra* note 29, at 1,23 (describing "the lower tier running from Virginia and the Carolinas west through Texas to Arizona," where "the death penalty is as firmly entrenched as grits for breakfast").

[111]*CT* Editorial, *supra* note 23, at 25.

prison ministry Prison Fellowship, in an article criticizing the death penalty, wrote that "[t]his issue cannot be decide on the basis of Scripture or theology alone. We have to put capital punishment in its legal and socioeconomic context. . . . Moving beyond abstractions, we must consider how the death penalty is applied," especially how the quality of representation, in turn affected by the defendant's wealth, greatly affects whether a death sentence will be imposed.[112]

At the same time, there are also Biblical and theological grounds, as well as "common sense" grounds, for condemning the flaws in the current system. As has already been mentioned, the historic Jewish practice in capital cases required a "certainty of guilt" and showed great "reluctance" to execute, for example by requiring two eyewitnesses in order to convict and requiring that the witnesses themselves carry out the execution.[113] The biblical practice also showed concern for equal justice, stipulating that neither rich nor poor should have an advantage in legal proceedings.[114] As evangelical scholar Daniel van Ness has argued, the current practice fails to provide such safeguards. Innocent people have been sentenced to death based on the testimony of a single, questionable eyewitnesses. The volume of capital sentences is becoming more and more troublesome, raising the question whether juries are showing the proper reluctance to prescribe death. The low quality of some appointed counsel makes it plain that economic status affects the result in capital cases; and the statistics show that the race of the victim and the accused matters as well.[115] Thus, while simple common sense can show the flaws in the current administration of the capital system, the common-sense criticisms might be significantly bolstered among evangelical Protestants by specific appeals to standards found in the Bible.

2. Theological Challenges to the Death Penalty: Grace and Personal Redemption

So far, the argument concerning evangelicals has been largely negative: they cannot be turned against the death penalty by theological arguments alone, but must be convinced on a practical level as well, and the practical arguments primarily challenge the administration of the death penalty rather than challenging its basic morality. Nevertheless, theology is still relevant. One central theological theme in evangelical religion can join with practical arguments to challenge the very existence of capital punishment, or at least severely limit it. This theme is what I have called "personal redemption": the evangelical emphasis on divine mercy and grace, and the idea that God can forgive and redeem even the worst

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[112]Steve J. Varnam, *A Barely Tolerable Punishment*, CHRISTIANITY TODAY, Sept. 11, 1995, at 19.

[113]See *supra* notes 37-38 and accompanying text.

[114]van Ness, *supra* note 35, at 12 (citing EXODUS 23: 3, 6).

[115]*Id.*

sinner.[116] This emphasis stems from the classical Protestant doctrine that one is saved not by one's goodness or merit ("works"), but by accepting (in "faith") God's gift of forgiveness, made possible because Jesus died to take the punishment for human sins. The theme of redemption by grace runs throughout the history of American evangelicalism, especially in the tradition of "revival" services continuing from 19th-century camp meetings to the sophisticated modern campaigns and TV shows of Billy Graham, Jerry Falwell, and the Promise Keepers.

One has to be careful, of course, in suggesting that concepts of grace and forgiveness apply to the sphere of law and politics without qualification. In mainstream Christian doctrine, grace is unmerited: God forgives us in his mercy, even though we deserve condemnation, no matter what our sins. Of course, the very existence of law and punishment must rest on some notion that the offender receives a sanction he deserves, and that he must in fact receive that sanction in order to vindicate the law and deter others from misconduct.

Nevertheless, concepts of grace and forgiveness can apply, not to abrogate punishment altogether, but to prescribe imprisonment instead of execution. Two points stand out.

First, by ending the offender's life, capital punishment logically reduces his life to the act he has committed, and it denies the possibility of redemption. Capital punishment not only reduces the time in which remorse and rehabilitation are possible. In addition, the lack of possible rehabilitation serves as a key aggravating factor under many capital statutes. This logical feature of capital punishment conflicts with the Christian assertion that redemption is always possible. Thus, evangelicals who question the death penalty point out that however brutal the crime, "we must never forget the power of grace and mercy," and that "[t]aking the life of the offender only removes the possibility of remorse, repentance, and penance."[117] Jesus' reaction to the adulterous woman may not be a "proof text" in itself against capital punishment, but it does generally support the argument that "[r]ather than demanding vengeful punishment, we are to show forgiveness, compassion, and the opportunity for repentance."[118] Saint Augustine pursued the same line of argument in one of his sermons:

> "Man" and "sinner" are two different things. God made man; man made himself sinner. So, destroy what man made but save what God made. Thus, do not go so far as to kill the criminal, for in wishing to punish the sin, you are destroying the man. Do not take away his life; leave him the possibility of repentance. Do not kill[,] so that he can correct

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[116]See *supra* notes 144-45 and accompanying text.

[117]Varnam, *supra* note 112, at 19.

[118]*Id.*

himself.[119]

For this reason, Augustine argued repeatedly that the Donatists and other heretics he so vigorously opposed should not be executed, even when several of them were convicted of murdering one of Augustine's own priests in the diocese where he was bishop. In the words of Garry Wills, "Augustine fe[lt] that the criminal needs time to cool down, to consider, to repent, to pray. [He] knew from his own case that God may have future uses for a sinner who renounces his sin."[120]

For this reason, the execution of Karla Faye Tucker posed a challenge to many evangelical Protestants such as Pat Robertson. As Sister Helen Prejean put it, Tucker, with her conversion and prison activities, "embodie[d]" the principle of redemption, that even a murderer could be "transformed."[121] But evangelicals cannot not coherently limit their desire for clemency to someone like Tucker, for the power of the evangelical message lies in the claim that the redemptive power of Jesus can extend to *any* human being, no matter how depraved. In Sister Prejean's words, Tucker's case forced evangelicals to consider the "possibility that perhaps every human being is more than the worst act of their lives, and that they can be open to redemption."[122] Robertson's address at this symposium dramatized the difficulty. He continued to support the death penalty in principle, but reaffirmed his opposition to applying it to someone such as Tucker who truly had transformed.[123] Then came the obvious question from the audience: given the unlimited power of God, how do you know that any given death-row convict, no matter how unrepentant now, would not be similarly transformed in the future? Robertson candidly admitted that he had no answer to that question.[124]

Second, the Christian doctrine of grace asserts that forgiveness has a healing power that no other approach to evil has. It therefore challenges the claim, undergirding capital punishment, that ending the

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[119]MEGIVERN, *supra* note 32, at 38 (quoting sermon cited in GUSTAVE COMBES, LA DOCTRINE POLITIQUE DE SAINT AUGUSTINE 188-92 (1927)).

[120]GARRY WILLS, SAINT AUGUSTINE 111 (1999).

[121]Malcolm, *supra* note 19, at 4.

[122]*Id.*

[123]Robertson Address, *supra* note 10 ("I, frankly, stand before you as one who is in favor of the death penalty. I'm not opposed to the death penalty as such. . . . [But] we must temper justice with mercy.").

[124]*Id.* (conceding the point and adding only that "[i]n order to accommodate [it] you'd essentially have to do away with the death penalty entirely because you never know at what period of time somebody would have an experience").

murderer's life is the only way to bring peace to the survivors and to society. On this score, the testimony of Debbie Morris is striking. Morris was kidnapped and raped, and her boyfriend shot and seriously wounded, during a crime spree by Robert Lee Willie, whose execution for a murder committed during that spree became the subject of the book and movie *Dead Man Walking*.[125] In her own book, *Forgiving the Dead Man Walking*, Morris describes the long process of recovery from the emotional trauma she suffered, and how the news that Willie had been executed left her "numb": "I'd finally realized that no punishment – not even the ultimate punishment, the ultimate justice – could ever heal all the wounds."[126] Real healing only began later when Morris, who by then had become an evangelical Christian, began to forgive first Willie, then God (for allowing the terrible events to happen), and finally herself (for the things she had done wrong in the intervening years). "[My] refusal to forgive [Willie]," Morris writes, "always meant that I held on to all my Robert Willie-related stuff – my pain, my shame, my self-pity."[127] In the book itself, issued by a major evangelical publisher, Morris remains ambivalent about whether executing Willie was morally right, but she is adamant that it did not bring her peace. "Justice didn't do a thing to heal me. Forgiveness did."[128]

Morris' argument concerning forgiveness was echoed by *Christianity Today* in its editorial against the death penalty, calling for churches to provide help to survivors and victim's families rather than to support executions of killers: "Christian compassion can comfort the afflicted. More executions cannot."[129] The editorial bemoaned the fact that executions seem to appeal to our "carnal appetite for revenge, and it argued that

> Jesus' counsel of nonresistance has as its goal not only crushing the spirit of vendetta, but also reconciliation (a goal embodied in victim-offender reconciliation programs that have proved effective where tried). . . . [W]hile murderers clearly *deserve* to die, Christians know that we all deserve death, and the ethic of Jesus drives us to spend most of our limited energies in the relationally complex and costly task of reconciliation.[130]

Morris's is only one story about the effect of capital punishment on survivors; other people strongly

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[125]HELEN PREJEAN, C.S.J., DEAD MAN WALKING (1993).

[126]DEBBIE MORRIS, FORGIVING THE DEAD MAN WALKING 174 (1998).

[127]*Id.* at 249-50.

[128]*Id.* at 251.

[129]*CT* Editorial, *supra* note 23, at 26.

[130]*Id.*

disagree.[131] However, there are good reasons to believe that execution is a very flawed way to seek such peace. Review of a death penalty case is inevitably longer and more complicated than review of a prison sentence, thus dredging up the crime repeatedly. The defense at the sentencing hearing and various appeals will try to humanize the defendant and evoke sympathy for him, and both of these subjects – the horror of the crime and the sympathy for the condemned murderer – become the focus of attention again at the time of the execution itself.[132]

These arguments do not necessarily show that the state lacks authority ever to execute someone. Rather, the arguments, like those of the Pope, caution that if such authority exists, it should only be exercised extremely sparingly and in cases of absolute necessity. Again, Augustine's reluctance to execute in order to preserve the possibility of repentance provides a model: "One may endlessly defend the right of the state to execute wrongdoers when absolutely necessary, but in the last analysis, the Augustinian position was that that right, no matter how valid or well founded, ideally should never actually be exercised."[133]

II. WHAT DEVELOPMENTS MIGHT SWAY RELIGIOUS CONSERVATIVES AGAINST THE DEATH PENALTY?

The previous discussion has analyzed the approaches, theological and cultural, of conservative Catholics and Protestants toward the death penalty. How does this analysis apply to real-world events? What developments might work to sway more religious conservatives against the death penalty?

A. Reforming the Application of the Death Penalty

One conclusion from the above analysis is clear and not surprising: it should be easier to convince religious conservatives that the death penalty currently is unfairly and improperly administered than that it is immoral or improper *per se*. Religious conservatives, I have argued, are likely to be swayed by the same prudential or "common sense" arguments that would sway Americans in general, and most of these concern the administration of the system: the danger of executing innocent people, the poor quality of defense counsel, the racial disparities in sentencing, and so forth. Even if one believes that executing murderers can, in theory, communicate the state's respect for life, one may be convinced that the system as currently practiced fails to show such respect. Thus, opponents of the death penalty should, to a significant extent, continue their recent strategy of focusing attention on how capital punishment is actually practiced, not on what its validity might be in the abstract.

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[131]See, e.g., Eugene Kennedy, *Inner Peace Restored for Victims' Families When Murderer is Executed*, NAT'L CATH. RPTR., July 2, 1999, at 21.

[132]HANKS, *supra* note 33, at 91-92.

[133]MEGIVERN, *supra* note 32, at 42.

Of course, the strategy of focusing on flaws in the penalty's application, and sidestepping the question of its basic moral legitimacy, carries a risk. If the flaws in application are corrected, the death penalty will actually gain greater legitimacy and be more difficult to overturn in total. Some commentators warn that this is all that the current attack on the death penalty will accomplish.[134] To be sure, the focus on applications is still quite defensible. The perfect should not be made the enemy of the good, and many of the flaws in applications are unlikely to be corrected to the point where we can rest comfortably with executing people. Society's tendency to value people's lives according to their race seems deeply ingrained, and my state of Alabama, among others, is unlikely suddenly to devote massive amounts of money to funding adequate representation for indigent defendants. Nevertheless, the strategy of focusing on applications rather than per se legitimacy clearly has its limits.

B. Opposing the Death Penalty *Per Se*

Accordingly, it is worth asking what developments, if any, might help turn religious conservatives against the death penalty in principle, rather than just raise concerns about particular flawed convictions and sentences. Again, many of the factors that would influence religious conservatives are those would influence other Americans as well. Thus, the flaws in the system and the difficulty of correcting them fully (for example, the costs and difficulties of truly ensuring that no innocent person is executed) are certainly relevant. So too are the overall levels of crime and homicides, which since the 1950s have been among the best predictors of public support for the death penalty – falling as crime rates stayed low from 1953 to 1966, rising rapidly as crime rose from 1966 to 1982, and leveling off at high rates in the 1980s and early 1990s as crime rates did the same.[135] Violent crime rates have fallen substantially in the mid- to late-1990s.[136] Allowing for lags in public perception of that fact, support for the death penalty might drop further as well.

With Pope John Paul II aging and in poor health, the question arises whether the next Pope will continue the campaign against the death penalty and, perhaps more importantly, possess the stature and charisma to do so as effectively as John Paul has. But opposition to capital punishment is now so deeply ingrained among Roman Catholic leaders, in America and elsewhere, that it likely will continue strongly in the future as well. To close, then, I want to focus on evangelical Protestants and on two possible developments that may be particularly important, even if indirectly, in swaying them against the death

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[134]Benjamin Soskis, *Alive and Kicking*, THE NEW REPUBLIC, April 17, 2000, 2000 WL 4661954 (noting that some death-penalty proponents support reforms "as a sort of purge that will rid the death-penalty debate of a few embarrassing statistics").

[135]See Phoebe C. Ellsworth and Samuel R. Gross, *Hardening of the Attitudes: Americans' Views on the Death Penalty*, in BEDAU, *supra* note 29, at 90, 107-08.

[136]See, e.g., Roberto Suro, *Major Crime Down in '98 for 7th Consecutive Year*, DENVER POST, May 17, 1999, at A9 (1999 WL 7883808).

penalty over the long term.

One such development would be for white conservative Christians to interact and sympathize more with African-Americans. Blacks, of course, support the death penalty less than any other major social group (about 58 percent in the 1998 election survey), largely because they are keenly aware of the way in which capital sentencing values the lives of black victims and offenders less than those of their white counterparts.[137] More white conservative Christians would be likely to appreciate this flaw at the heart of the system if they interacted more with their black brothers and sisters. The future may see more such interactions. Black Christians share many standard evangelical beliefs with white evangelicals, especially about personal salvation and the divine inspiration of the Bible. Recently, white evangelicals have made overtures toward blacks. The strongly conservative Southern Baptist Convention has apologized for its past and current racism and has begun strenuous efforts to add black churches to the denomination.[138] The Promise Keepers, the conservative evangelical men's movement, features racial reconciliation as a prominent message at rallies and includes many minorities as speakers and on its staff.[139] One leading evangelical political activist comments that "'[f]or the first time in this century, white evangelicals are serious about the issue of racism."[140]

Understandably, many black leaders are skeptical of these overtures. In their view, such contacts have gone on for years, are largely symbolic, and have not increased white suburban evangelicals' concern about the situation of racial minorities or the needs of the inner cities.[141] Black leaders remark that whites want to form individual friendships with blacks, but that they balk at confronting social and political issues

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[137]NES Study, *supra* note 12.

[138]See Anne Saker, *Southern Baptists Apologize to Blacks*, RALEIGH NEWS & OBSERVER, June 21, 1995, at A1; Julia Lieblich, *Southern Baptists Recruit in Inner Cities*, ASSOCIATED PRESS, June 15, 1999; Joe Maxwell, *Black Southern Baptists: The SBC's Valiant Effort to Overcome Its Racist Past*, CHRISTIANITY TODAY, May 15, 1995, at 26 (noting that 1500 new or existing black churches joined Southern Baptist Convention from 1985 to 1995).

[139]See *Promise Keepers and Race*, 113 THE CHRISTIAN CENTURY 254 (March 6, 1996).

[140]Jim Jones, *Still Playing Catch-Up*, CHRISTIANITY TODAY, May 19, 1997, at 56.

[141]See, e.g., WILLIAM PANNELL, THE COMING RACE WARS? A CRY FOR RECONCILIATION 126 (1993) ("[B]lack evangelicals have never been taken seriously by the larger [evangelical] group."); *id.* at 116 ("The evangelical church in the suburbs has virtually no comprehension of the hopelessness that abounds in [the inner city] just a couple of dozen miles away.").

such as inequality in the economy and racism in the criminal justice system.[142] Although there may be far to go and significant limits on likely accomplishments, nevertheless, increasingly regular interaction between blacks and whites, with an eye toward reconciliation, is likely to make more whites understand the poison of racism, including the ways that it affects the capital sentencing process.

A second development for which to hope is for more conservative Christians to become involved in ministries to prisoners such as vocational programs, counseling sessions, victim-reconciliation meetings, and so forth. According to a study of volunteers for the evangelical organization Prison Fellowship, about half of the volunteers who visited prisoners or undertook other activities "said their attitudes had changed toward a more rehabilitative view of criminal justice since becoming volunteers."[143] And increased belief in the possibility of rehabilitation should lead, other things being equal, to increased doubts about the death penalty. As was noted above, Christian theology emphasizes the possibility of redeeming even the worst sinner, but in practice people find it far easier to believe in such redemption when they can relate to the offender as a person rather than an abstraction. That was why Karla Tucker's challenged white evangelicals directly; her winsomeness "br[oke] through" the typical cultural walls and enabled conservatives to relate to her.[144] But Tucker was only one death-row inmate, and a uniquely appealing one to Christian conservatives. Volunteer prison ministers provide a more systematic, ongoing way for evangelicals to connect with prisoners as persons. One evangelical author reports how his opposition to the death penalty "solidified" after he began visiting and befriending a life prisoner whose death sentence had been commuted in the 1970s:

> My new friend had experienced redemption that would not have been possible had he been executed. I now knew personally that, for all the problems with imprisonment as a form of punishment, it at least allowed for redemptive possibilities in the lives of criminals – possibilities that were cut off by the death penalty. This experience has shaped my approach to the death penalty in concrete ways. The testimonies of many others involved

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[142]See, e.g., PANNELL, *supra* note __, at 57, 134 ("[t]he evangelical world is prepared to deal with black men one at a time," but it "get[s] uptight when nonwhites press the claim for a theology that liberates in the socio-political arena"). A recent book addressing the subject similarly concludes thatwhite evangelicals, though often well-intentioned toward blacks, are hampered in crossing racial divides because they perceive race as a amtter of personal relationships rather than systematic injustices. See MICHAEL O. EMERSON AND CHRISTIAN SMITH, DIVIDED BY FAITH: EVANGELICAL RELIGION AND THE PROBLEM OF RACE IN AMERICA (2000).

[143]Description and Key Findings, The South Carolina Initiative Against Crime Project: 1996 – Volunteer Survey (June 12, 1997), available at http://www.pfm.org.

[144]Malcolm, *supra* note 19 (quoting Sr. Helen Prejean).

in prison visitation [are] similar.[145]

Concern for prisoners does not necessarily translate into opposition to the death penalty. Prison Fellowship's founder, former Watergate convict Charles Colson, supports the death penalty "in extreme cases" despite his friendship with many death-row prisoners.[146] Nevertheless, on the whole, the more that conservative Christians become directly involved with prisoners' lives, the more likely they will be to question the act of ending those lives and any further chance for rehabilitation. Death penalty opponents should welcome the involvement of conservative Christians in prison ministries; they should question legal rules, whether prison regulations or strict interpretations of church-state separation, that hamper such organizations from relating to prisoners on a voluntary basis.

CONCLUSION

A series of recent developments, from the statements of the Pope and Pat Robertson questioning capital punishment to the publicity over flaws in the capital system, have raised the possibility that support for the death penalty might be significantly undermined among religiously conservative Americans. If opponents of the death penalty are to take advantage of the opportunity, they will have to engage theological conservatives in part on practical, "common sense" grounds: the danger of executing innocent people, the lack of competent counsel in too many cases, and so forth. But as discussion of the moral implications of the death penalty goes forward, it is also important to understand how theological conservatives tend to reason about social issues in general, with the death penalty as a specific example. This Essay is simply a preliminary examination of how traditionalist Roman Catholics and evangelical Protestants have approached the issue. Much more discussion needs to follow about the moral and theological implications over the death penalty: discussions both among conservative religious believers and between them and other Americans.

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[145]Michael L. Westmoreland-White, *How Renewal in Church Practices Can Transform the Death Penalty Debate*, in CAPITAL PUNISHMENT: A READER 219, 221 (Glen H. Stassen ed. 1998).

[146]Charles W. Colson, *Capital Punishment: A Personal Statement* 1 (unpublished manuscript, on file with author).