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Seeing Executions as Breaching the Liminal Line:
Undermining Modern Justifications for the Death Penalty

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Abstract

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In his essay, "On Crimes and Punishment," Beccaria stated, "The punishment of death is pernicious to society, from the example of barbarity it affords." He argued that the law is intended to civilize society, but by executing individuals, it does not achieve this goal. Beccaria asks, "Is it not absurd, that the laws, which detest and punish homicide, should, in order to prevent murder, publicly commit murder themselves?" Benjamin Rush took up this question in his presentation to Benjamin Franklin's Society for Promoting Political Enquires, when he argued that public executions increase the likelihood of murder in 1787. The brutalization argument again was picked up in the modern day, with articles appearing in both sociological and economic academic journals from 1978 - 2011.

Only one explanation for the brutalization effect has been posited, but not fully explained, by the authors of the modern brutalization effect articles: that of lethal vengeance. Lethal vengeance turns the rationalization of the deterrence theory on its head: instead of identifying with the condemned person being executed, the possible criminal identifies with the state and "executes" the person who has wronged him. No detailed explanation for why this is possible is articulated, however. This paper attempts to fill this gap in the literature and explain why the brutalization effect is possible and, consequently, how the modern justifications for the death penalty are undermined.

If only God controls the decisions of life or death for humanity, then the state breaks the barrier between God and humanity when it chooses to execute a condemned individual. By breaking this barrier, the state opens up the possibility for lethal vengeance and the brutalization effect. If executions are understood as a Girardian sacrificial ritual that breaches the liminal line between God and humanity, today's death penalty justifications of deterrence and retribution are undermined.

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I would like to take this opportunity to recognize the four people from my time in college that shaped this thesis long before it was written. As a junior at Centre College I took a course entitled “Civil Rights and Civil Liberties” taught by Dr. Daniel Stroup and the Honorable Pierce Lively, senior judge on the 6th Circuit Court of the United States. One of our assignments in this course was to read and discuss the recent *Roper v. Simmons* decision by the U.S. Supreme Court. This was my first introduction to the issue of the death penalty with any substance, and reading Justice Kennedy’s firm disapproval of executions of minors based partially on his understanding of the “evolving standards of decency” resonated with my religious studies major in ways that I did not expect. Before I took this course, I had taken “Basketball as Religion” taught by W. David Hall, and learned about Victor Turner and liminality – and it struck me that liminality might be relevant to the death penalty cases I was reading.

After taking this course I applied to the Tennessee Justice Project to be their first intern. The Tennessee Justice Project no longer exists, but at the time it was a new non-profit dedicated to educating the public and the legislature about “how the criminal justice system is broken.” Bill Redick was the director of TJP, and he took me to Tennessee’s death row to meet Abu-Ali Abdur’Rahman, his client that was to have a hearing before the Tennessee Supreme Court that summer. Bill’s passion for pursuing justice, no matter how heinous the crime committed may seem to have been, inspired me, as did Abu-Ali’s calm trust in his attorney and willingness to pursue what he thought were just causes, despite the fact that they might lead his execution to occur earlier. Bill Redick passed away this year and so he may never know the degree to which he impacted my education and likely career, so at least I can acknowledge his influence here.

Finally, I’d like to acknowledge family members. First, I’d like to thank both of my parents, Sharon and Robert Anderson, for their unwavering support through these four years of law school and theology school, despite the fact that my mother wishes I would leave criminal law behind me. And last, but not least, I’d like to acknowledge my spouse, Charles Williams, because I could not have completed this thesis without him – may we never have to write another thesis and dissertation in the same semester ever again!

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Introduction

“The power over human life, is the solitary prerogative of HIM who gave it. Human laws, therefore, rise in rebellion against this prerogative, when they transfer it to human hands.” - Benjamin Rush

Benjamin Rush argued to Benjamin Franklin’s Society for Promoting Political Enquires in 1787 that public punishment was in fact antithetical to its justifications of reform, prevention, and protection. He states, “all *public* punishments tend to make bad men worse, and to encrease [*sic*] crimes, by their influence upon society.”¹ Rush makes no exception when he discusses capital punishment. He describes the difference in murder rates between Tuscany and Rome: in Tuscany, where capital punishment was abolished after Cesare di Beccaria’s treatise was published, had five murders in twenty years, whereas Rome, which not only still performed public executions but celebrated them through public parades, had sixty murders in three months. Rush states, “Even murder itself is propagated by the punishment of death for murder.”²

Rush’s brutalization argument was a direct response to the justifications announced in execution sermons across New England throughout the Puritan and Revolutionary periods. The death penalty had been practiced in the American colonies ever since 1608, when Capitan George Kendall was executed

***This thesis follows the 16th edition of The Chicago Manual of Style.

¹ Benjamin Rush, *An Enquiry Into the Effects of Public Punishments Upon Criminals, and Upon Society. Read in the Society for Promoting Political Enquires, . . . March 9th, 1787. By Benjamin Rush, M.D. . . .* [London], 1787, *Eighteenth Century Collections Online*, Gale, Emory University Robert W. Woodruff Library (Gale Document Number CW104206799): 4.

² Rush, *Enquiry Into Effects of Public Punishments*, 30.

in Jamestown, Virginia for being a Spanish spy.³ In the Massachusetts Bay Colony the first execution occurred in 1630, and shortly thereafter executions typically were accompanied by sermons preached in the local church by pastors who had been visiting with the condemned individual since their conviction.⁴ The first execution sermon was published and distributed was Samuel Danforth's "The Cry of Sodom Enquired into," which was preached on the occasion of Benjamin Goad's execution in Roxbury, Massachusetts.⁵ Between 1623 and 1835 at least 460 public executions, usually accompanied by an execution sermon, took place in New England.⁶

After the American Revolution, however, public figures such as Benjamin Rush began calling for punishment reform and the abolition of public executions under the influence of Quaker religious beliefs and Enlightenment ideas about the social contract.⁷ Capital crimes were narrowed to fewer crimes and incarceration and executions behind prison walls replaced highly attended public hangings. Concurrently, crime novels replaced execution sermons as the widely distributed crime literature of the day.

³ Joseph A. Melusky and Keith Alan Pesto, *Capital Punishment*, Historical Guides to Controversial Issues in America (Santa Barbara, California: Greenwood, 2011), 7.

⁴ Melusky, *Capital Punishment*, 19.

⁵ Ronald A. Bosco, "Lectures at the Pillory: The Early American Execution Sermon," *American Quarterly* 30, no. 2 (1978), 158.

⁶ Scott D. Seay, *Hanging Between Heaven and Earth: Capital Crime, Execution Preaching, and Theology in Early New England* (DeKalb, Illinois: Northern Illinois University Press, 2009): 14.

⁷ William Bradford, state attorney of Pennsylvania for eleven years, justice on the Pennsylvania Supreme Court for three years, attorney general for the United States under George Washington for two years, also called for the abolition of the death penalty.

Opposition to the death penalty mounted until in 1846 Michigan became the first state to abolish the death penalty for all crimes except treason.⁸ Rhode Island followed in 1852 and Wisconsin the following year; however, most states, instead of abolishing the death penalty, shifted from mandatory to discretionary capital punishment.⁹ The next big movement to abolish the death penalty did not occur until nearly a hundred years later, when the number of executions dropped and a number of states abolished the death penalty through judicial review, legislative reform, or public referendum.¹⁰ In 1972 the Supreme Court decision in *Furman v. Georgia*, 408 U.S. 238, effectively created a *de facto* moratorium on executions due to evidence of inconsistent applications of the penalty.

This moratorium was reversed in 1976 in *Gregg v. Georgia*, 428 U.S. 153, in which the Supreme Court held that the death penalty was constitutional provided statutory safeguards, such as bifurcated trials that determined guilt in one trial and determined whether to sentence the individual to the death penalty in a separate trial, were in place. Following *Gregg*, states slowly began to restart their execution processes, but Massachusetts abolished the death penalty in 1984.¹¹

Recently, following the Supreme Court's rulings that the executions of persons under the age of 18 and of "mentally retarded" persons are unconstitutional, and the rise of recognition of wrongful convictions, some states

⁸ Melusky, *Capital Punishment*, 33.

⁹ Melusky, *Capital Punishment*, 34.

¹⁰ Hugo Adam Bedau, "Background and Developments," In Bedau, *Death Penalty in America*, 9-10. Prior to this, Maine abolished the death penalty in 1887, Minnesota in 1911, and North Dakota in 1915. States abolishing the death penalty in the mid-1900s are: Alaska (1957), Hawaii (1957), Vermont (1964), Iowa (1965) and West Virginia (1965).

¹¹ Melusky, *Capital Punishment*, 45.

have begun abolishing the death penalty.¹² In 2000, Illinois governor George Ryan, following the release of thirteen death row inmates due to innocence, created a commission to review death penalty decisions in Illinois and in 2003 he commuted the sentences of all remaining persons on death row to life imprisonment. In 2004, the New York Superior Court held death penalty procedures to be unconstitutional and reaffirmed this holding and retroactively applied it in 2007.¹³ New Jersey and New Mexico have also abolished the death penalty, in 2009 and 2007 respectively, and in 2008 the Nebraska Supreme Court held electrocution to be unconstitutional, effectively ending the death penalty in that state as well.¹⁴ Illinois officially repealed the death penalty in 2011.¹⁵

During the mid-2000s the cases being brought about the death penalty focused on the method of execution, lethal injection, and most attempted to argue that it was cruel and unusual according to the Eighth Amendment of the United States Constitution and thus should be ruled unconstitutional.¹⁶ The method of execution has evolved over the history of the death penalty in America. Hanging was the primary method of execution from the 1600s until the electric chair was created in New York in 1888.¹⁷ Public hangings, sanctioned by the

¹² In *Atkins v. Virginia*, 536 U.S. 304 (2002), the Supreme Court ruled that the execution of “mentally retarded” individuals violates the Eighth Amendment ban on cruel and unusual punishment; this was followed in 2005 by *Roper v. Simmons*, 543 U.S. 551, which similarly held the execution of persons under eighteen to be unconstitutional under the Eighth Amendment.

¹³ Melusky, *Capital Punishment*, 45.

¹⁴ Melusky, *Capital Punishment*, 45.

¹⁵ *Ibid.*

¹⁶ *Baze v. Rees*, 533 U.S. 35 (2008); *Abdur’Rahman v. Bredesen*, 181 S.W.3d 292 (Tenn. 2005).

¹⁷ Bedau, “Background and Developments,” 8.

courts, continued sporadically until the mid-1930s, but hanging as a method of execution is still currently authorized by Delaware, Washington, and New Hampshire, although the last hanging was in 1998.¹⁸ Execution by electrocution was the most common method of execution from 1930 to 1980, and it remains an alternate execution method in Alabama, Arkansas, Florida, Kentucky, Oklahoma, South Carolina, Tennessee, and Virginia.¹⁹ Currently, despite the movement against it, lethal injection is the most common type of execution method, and all states that currently authorize the death penalty other than Nebraska use this as the primary method of execution. This method was first adopted in Oklahoma, but performed first by Texas in 1982.²⁰ Other methods of execution include execution by firing squad (currently authorized by Idaho, Oklahoma and Utah; last used in 2010) and gas chamber (currently authorized by Arizona, California, Missouri and Wyoming; last used in 1999).²¹

Concurrently to the evolution in the method of execution, the justifications for the death penalty have evolved as well. In Puritan New England, execution sermons emphasized Scriptural selections as authorization for the execution and as texts for other lessons to be learned by the congregations. Preachers explained the civil authorities' role as ministers of God who were required to execute the condemned to "rid the land of egregious sinners" and thusly, "protecting the region from God's judgment."²² The condemned also served as an example to the members of the community – execution sermons warned congregations of the

¹⁸ Melusky, *Capital Punishment*, 33, 55.

¹⁹ *Ibid.*, 56.

²⁰ *Ibid.*, 57.

²¹ *Ibid.*, 54, 56.

²² Seay, *Hanging*, 107.

path of sin taken by the condemned, suggesting that the early, seemingly minor, sins of the condemned lead them to their execution and that this path could be taken by any member of the congregation.²³

The theme of deterrence, although differently understood, has continued to modern times. In 1972, Justice Stewart, writing the opinion of the Court, announced in *Gregg v. Georgia*, “The death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders.”²⁴ After reviewing modern death penalty case law, Donald L. Beschle argues that prior to *Gregg*, the Supreme Court viewed deterrence as the more secure justification for the death penalty.²⁵ Richard O. Lempert argues, in fact, that the Supreme Court decided to end the moratorium of the death penalty in *Gregg* partially because of a recent economic study that found a deterrent effect of the death penalty.²⁶ Isaac Ehrlich published his article, “The Deterrent Effect of Capital Punishment: A Question of Life and Death,” in the *American Economic Review* in 1975, but the Solicitor General of the United States included a draft version of this article in the appendix to the government’s brief in support of capital punishment and the Court briefly mentioned Ehrlich’s findings in its

²³ Seay, *Hanging*, 131-132. Seay references Nathan Strong’s sermon in 1777 on the occasion of the execution of Moses Dunbar, in which Strong asserts that the civil government was required to punish sin severely to deter others from wickedness by example.

²⁴ *Gregg v. Georgia*, 428 U.S. 153, 183 (1976). Justice Stewart footnotes two other possible purposes: incapacitation of dangerous criminals and the consequent prevention of crimes that they may otherwise commit in the future.

²⁵ Donald L. Beschle, “What’s Guilt (or Deterrence) Got To Do With It?: The Death Penalty, Ritual, and Mimetic Violence,” *William and Mary Law Review* 38 (January 1997), 497.

²⁶ Richard O. Lempert, “Desert and Deterrence: An Assessment of the Moral Bases of the Case for Capital Punishment,” *Michigan Law Review* 79, no. 6 (1981): 1206-1207.

decision.²⁷

Despite the Court's use of this study in deciding to reinstate the death penalty, deterrence has come to be questioned as a legitimate justification and most supporters now turn to retribution as the primary justification for the death penalty. J. Budziszewski, a political philosopher at the University of Texas, argued in 2004 that retribution is the primary purpose of punishment and that "[d]eterrence is secondary to retribution."²⁸ A majority of arguments for and against the death penalty today surround the issue of retribution, despite the Supreme Court's seeming lack of sympathy for that justification.²⁹

Undermining both retribution and deterrence is an argument originally made by Cesare di Beccari in 1764: the idea that executions brutalize society. In his essay, "On Crimes and Punishment," Beccaria stated, "The punishment of death is pernicious to society, from the example of barbarity it affords."³⁰ He argued that the law is intended to civilize society, but by executing individuals, it does not achieve this goal.³¹ Beccaria asks, "Is it not absurd, that the laws, which detest and punish homicide, should, in order to prevent murder, publicly commit murder themselves?"³² Benjamin Rush took up this question in his presentation to Benjamin Franklin's Society for Promoting Political Enquires, when he argued that public executions increase the likelihood of murder in 1787. The

²⁷ Lempert, "Desert and Deterrence," 1206.

²⁸ J. Budziszewski, "Categorical Pardon: On the Argument for Abolishing Capital Punishment," In Owens, *Religion and the Death Penalty*, 110-111.

²⁹ Beschle, "What's Guilt," 488.

³⁰ Cesare di Beccaria, *An essay on crimes and punishments* [sic]. *By the Marquis Beccaria of Milan. With a commentary, by M. de Voltaire. A new edition corrected* [sic]. (Glasgow), 1770. *Eighteenth Century Collections Online*. Gale. Emory University Robert W. Woodruff Library (Gale Document Number U101424563), 100.

³¹ Seay, *Hanging*, 142.

³² Beccaria, *On Crimes and punishments*, 100.

brutalization argument again was picked up in the modern day, with articles appearing in both sociological and economic academic journals from 1978 to 2011.

Only one explanation for the brutalization effect has been posited, but not fully explained, by the authors of the modern brutalization effect articles: that of lethal vengeance.³³ Lethal vengeance turns the rationalization of the deterrence theory on its head: instead of identifying with the condemned person being executed, the possible criminal identifies with the state and “executes” the person who has wronged him. No detailed explanation for why this is possible is articulated, however. This paper attempts to fill this gap in the literature and explain why the brutalization effect is possible and, consequently, how the modern justifications for the death penalty are undermined.

Benjamin Rush articulated the basic argument of this explanation when he argued in 1787, that “[t]he power over human life, is the solitary prerogative of *HIM* who gave it. Human laws, therefore, rise in rebellion against this prerogative, when they transfer it to human hands.”³⁴ If only God controls the decisions of life or death for humanity, then the state breaks the barrier between God and humanity when it chooses to execute a condemned individual. By breaking this barrier, the state opens up the possibility for lethal vengeance and the brutalization effect. If executions are understood as a Girardian sacrificial ritual that breaches the liminal line between God and humanity, today’s death penalty justifications of deterrence and retribution are undermined.

³³ William J. Bowers and Glenn L. Pierce, “Deterrence or Brutalization: What Is the Effect of Executions?” *Crime and Delinquency* 26 (1980): 456.

³⁴ Rush, *Enquiry*, 32.

In the first chapter, the first half of this argument will be explored. Victor Turner's theory of liminality will be set out, before turning to the idea that the death penalty is a ritual. René Girard's theory of mimetic violence and the necessity of the sacrificial ritual to end this violence then will be briefly explained and reviewed as the appropriate form of ritual to be applied to the death penalty. Specifically, the execution sermons and gallows speeches by the condemned in Early New England will be demonstrated to fall very closely in line with Girard's sacrificial ritual. Today, on the other hand, the execution process does not follow Girard's sacrificial ritual template as closely, but both Early New England and today exhibit qualities of Girard's sacrificial crisis, in which violence spills outside of the intended ritual. Finally, the role of God in decisions of life or death will be addressed, referencing Karl Barth's understanding of the role of God and the possibility that executions regardless of their secular trappings are ultimately grounded in religious ritual. Ultimately, I will argue that the liminal line between God and humanity is breached when the state executes the condemned individual, regardless of the attempts in Early New England to explain the execution as God's will and today's disregard of the religious implications of its actions.

The remainder of this thesis will address the implications of this explanation for the justifications articulated for the death penalty today. In the second chapter, the justification of deterrence will be outlined and undermined. First, I will set out the basic trajectory of deterrence, starting in the New England execution sermons, all the way up to today, including the Supreme Court's jurisprudence. Next, I will review the studies of crime statistics and execution

dates that attempt to determine whether there is proof of deterrence, and follow that closely with the studies that attempt to show the existence of a brutalization effect. Then, I will explain why understanding executions as a breach of the liminal line between God and humanity explains lethal vengeance, especially in situations where other social bonds do not exist. Finally, I will address the retribution as a justification for the death penalty, briefly explaining how it is defined, before explaining that without deterrence, it cannot stand, and thus, because executions put society into a liminal state where deterrence is no longer valid, retribution cannot be a valid justification of capital punishment.

I became interested in this topic while working at the Tennessee Justice Project on Abu-Ali Abdur'Rahman's lethal injection case that was argued in front of the Tennessee Supreme Court in the summer of 2005. I had learned about Victor Turner's theory of liminality in a course taught by W. David Hall entitled, "Basketball as Religion" at Centre College in 2004, and when I discovered evidence that murder rates spike around executions in my research for the Tennessee Justice Project I wondered about what liminality might explain. I do not expect that this thesis will completely carve out all the possibilities of how liminality plays a role in the death penalty, nor do I expect that its argument will work outside the realm of the death penalty, like in seeming other breaches of the liminal line in abortion and assisted suicide. The necessary key to this argument is the idea that the death penalty is a ritual and therefore Victor Turner's ritual process can be applied and the ramifications of liminality can be seen during the midst of the ritual, without this public ritual (as in the situations of abortion and assisted suicide), this argument likely cannot apply.

1: Executions as Girardian Sacrificial Rituals that Breach the Liminal Line

On December 27, 1739, twenty-seven year old infanticide Sarah Simpson attended the sermon of William Shurtleff given on the occasion of her execution, one of the first in Portsmouth, New Hampshire.³⁵ After attending the sermon, Simpson walked a mile from the prison to the execution site, attended by multiple ministers of the local and neighboring churches, who asked her questions, and “[s]he all the way discover’d an uncommon Composure of Mind, and gave very pertinent Answers to the Questions that were put to her.”³⁶ Once she arrived at the execution site, a minister read aloud a statement, purported to be dictated by Simpson, to the crowd.³⁷ In this statement, Simpson laments that she did not spend more time honoring God on the Sabbath either as a child or once she married, warns other young people against not paying attention during sermons, and declared her forgiveness for the world, “[signifying] her own Hope, notwithstanding her great and manifold Sins, of obtaining Forgiveness and finding Mercy with God thro’ the Blood of Jesus Christ his Son.”³⁸ Subsequently, Simpson was hanged.

Sarah Simpson’s execution followed the typical pattern of executions in Early New England, a ritual that has been altered slightly in modern day. Now

³⁵ William Shurtleff, *The faith and prayer of a dying malefactor. A sermon preach’d December 27, 1730. On occasion of the execution of two criminals, namely Sarah Simpson and Penelope Kenny, and in the hearing of the former. By William Shurtleff, A.M. Pastor of a church in Portsmouth, New-Hampshire. To which is annex’d a brief narrative concerning the said criminals: and a preface by the Reverend Mr. Fitch.* Boston, 1740. *Eighteenth Century Collections Online*. Gale. Emory University Robert W. Woodruff Library. (Gale Document Number CB3331760337).

³⁶ *Ibid.*, 27.

³⁷ *Ibid.*, i, 27.

³⁸ *Ibid.*, 28.

condemned individuals are not drawn out into the public, instead the day before the execution, the condemned person is moved to a separate cell and is watched to guarantee that the state will be able to perform its execution. Family members, friends, and ministers may visit the condemned person, but there is no requirement that this occur. At the time of execution, typically the condemned individual is given the right to speak, and then the execution takes place. Despite these differences, the role of the state and the execution has remained the same.

This chapter will analyze the execution as a form of a ritual *rite de passage* that attempts to follow René Girard's sacrificial ritual to reduce violence in society. It will be demonstrated while the death penalty ultimately considers the existence of God, when the state chooses to execute an individual it "acts with usurped divinity."³⁹ The execution, therefore, breaches the liminal line between God and humanity. This breach places society in a liminal state, and following Victor Turner's description of the liminal period in *A Forest of Symbols*, distinctions and gradations among society are eliminated – specifically expressed in the brutalization effect and the possibility of lethal vengeance.⁴⁰

To make this argument, this chapter will first address the definition of *rites de passage* before turning to a brief review of Girard's theory as explained in *Violence and the Sacred*. Clear lines matching Girard's theory to the context of the Early New England execution then will be drawn, demonstrating the close relationship of executions in American history to ritual and religion. Next, the

³⁹ Karl Barth, *The Doctrine of Creation*, translated by A.T. Mackay, T.H.L. Parker, Harold Knight, Henry A. Kennedy, and John Marks. Vol. 3, pt. 4 of *Church Dogmatics*, edited by G.W. Bromiley and T.F. Torrance (Edinburgh: T. & T. Clark, 1961), 445.

⁴⁰ Victor Turner, "Betwixt and Between: The Liminal Period in *Rites de Passage*," Chap. 4 in *The Forest of Symbols: Aspects of Ndembu Ritual* (Ithaca, NY: Cornell University Press, 1967), 99.

modern execution will be compared to the Early New England execution and a brief literature review will demonstrate that although executions today still follow the violence of Girard's sacrificial victim, the sacrificial framework is not successfully completed, yet the close relationship of executions to understandings of God still remains. Early New England execution sermons articulate the idea that God is truly the one deciding that the execution must occur, and the roots of this sentiment have been carried over to modern executions. Understanding God as being in control of life and death, however, clearly defines the liminal line between society and God.⁴¹ With this liminal line drawn, regardless of the explanations provided, when the state executes an individual, it breaks the liminal line. The consequences of breaking the liminal line then will be explained with reference to Turner's description of the liminal state.

Sacrifice as a Rite De Passage

Victor Turner explains that *rites de passage* "indicate and constitute transitions between states."⁴² These states refer "to any type of stable or recurrent condition that is culturally recognized."⁴³ Turner argues that such *rites* exist in all societies, though he believes that they are more clearly seen in small cyclical societies.⁴⁴ Turner relies upon Arnold van Gennep's description of *rites de passage* when explaining the phases of the rite. The first phase is that of

⁴¹ The death penalty certainly is a life-crisis situation as viewed by the condemned individual, but the death penalty itself also is a state of transition for society at large. At least one article has addressed the possibility that death row inmates exist in a liminal state. Evi Gurling, "Looking Death in the Face': The Benetton Death Penalty Campaign." *Punishment & Society* 6, no. 3 (2004): 271-287. doi: 10.1177/146247450404043632.

⁴² Turner, "Betwixt and Between," 93.

⁴³ *Ibid.*, 94.

⁴⁴ *Ibid.*, 93.

separation: there is a symbolic detachment of the ritual unit from their previous point in the social structure.⁴⁵ The second phase is that of the “intervening liminal period.”⁴⁶ During this phase, the ritual unit is in an ambiguous state – none of society’s typical attributes exist. Once the transition is completed, the third phase, aggregation, occurs.⁴⁷ During this phase, the ritual unit returns to a stable state and again follows customary norms and ethical standards.⁴⁸ The typical *rites de passage* is the transition of a young man through puberty, but *rites de passage* “are not confined to culturally defined life-crises but may accompany any change from one state to another.”⁴⁹ The ritual unit, according to Turner, can include both individuals and groups; in fact, he discusses the possibility for *rites de passage* when a whole society goes to war or celebrates a harvest festival.⁵⁰

René Girard’s sacrificial ritual is one such *rites de passage* for a society. Girard argues that there is no real difference between rites of passage and rights intended to maintain the status quo (as he understands the use of the sacrificial ritual), for they both attempt to ensure minimal disturbance in society.⁵¹ Specifically, Girard says that he will not address the idea that his sacrificial victim is at the center of the *rites de passage* as he explains it.⁵² Girard limits his description of *rites de passage* to the typical puberty transition of youth in

⁴⁵ Ibid., 94.

⁴⁶ Ibid.

⁴⁷ Turner, “Betwixt and Between,” 94.

⁴⁸ Ibid.

⁴⁹ Ibid., 94-95.

⁵⁰ Ibid., 95.

⁵¹ Girard, René, *Violence and the Sacred*. Translated by Patrick Gregory (Baltimore, MD: The Johns Hopkins University Press, 1979), 284.

⁵² Girard, *Violence and the Sacred*, 280-281.

primitive tribes; however, if *rites de passage* are seen more broadly as transitions between states, the sacrificial ritual to end violence and transition the society to a state of peace can also be seen as a *rite of passage*.

For Girard the sacrificial ritual is necessary because it is the only way in primitive society for a cycle of internal violence to end. This internal violence exists because of the universal human tendency toward mimesis.⁵³ Mimesis is the desire to imitate others, and mimetic desire leads to competition.⁵⁴ Sara Osborne explains Girard's mimesis as both "triangular and generative."⁵⁵ One individual models one activity or object that another first imitates and then desires – the triangle. This mutual desire then becomes a relationship of rivalry with the potential to escalate into conflict.⁵⁶ This cycle inevitably leads to violence, which leads to a cycle of violence in which the sacrificial ritual intervenes.⁵⁷

For Girard, mimesis leads to vengeance – acts of reprisal for the violence done to another.⁵⁸ "Vengeance, then, is an interminable, infinitely repetitive process."⁵⁹ To end this unending cycle of violence, Girard asserts that primitive societies turned to sacrifice. Paradoxically, "[o]nly violence can put an end to violence. . .," and through sacrifice, societies were able to enact violence without fear of vengeance being enacted upon it in response.⁶⁰ "The role of sacrifice is to

⁵³ Beschle, "What's Guilt," 514.

⁵⁴ Beschle, "What's Guilt," 513; John Steele, "A Seal Pressed in the Hot Wax of Vengeance: A Girardian Understanding of Expressive Punishment," *Journal of Law and Religion* 16, no. 1 (2001): 43.

⁵⁵ Sara Osborne, "The Role of an Ultimate Authority in Restorative Justice: A Girardian Analysis," *Contagion: Journal of Violence, Mimesis and Culture* 7 (Spring 2000), 90.

⁵⁶ Ibid.

⁵⁷ Beschle, "What's Guilt," 514.

⁵⁸ Girard, *Violence and the Sacred*, 14.

⁵⁹ Ibid.

⁶⁰ Ibid., 26.

stem [the] rising tide of indiscriminate substitutions and redirect violence into ‘proper’ channels.”⁶¹ The proper channel, for Girard, is onto the sacrificial victim, and thus outside the community.

If the sacrifice was of the perpetrator himself or herself, Girard argues that this “counterviolence . . . would by this very act participate in, and become indistinguishable from, the original act of violence.”⁶² The sacrificial victim must be similar enough to the society to be able to be identified with, but different enough from society to avoid any confusion with society itself so that “[t]heir death does not automatically entail an act of vengeance.”⁶³ Possible sacrificial victims for primitive societies include domesticated animals, prisoners of war, slaves, small children, and even the king.⁶⁴ Girard recognizes that none of these categories, nor any possible category of sacrificial victim, perfectly meets the requirement of belonging both to the inside and the outside of the community.⁶⁵ Therefore, the society puts the victim through a sacrificial preparation that could consist of two distinct approaches: first, making the victim more foreign to the community, or second, reintegrating a foreign seeming victim into the community.⁶⁶

Through the sacrificial ritual, the community comes to see the sacrificial victim as the source of all discord in their society.⁶⁷ To encourage this belief, the sacrificial victims are encouraged to violate social taboos, and the sacrifice is seen

⁶¹ Ibid., 10.

⁶² Ibid., 26.

⁶³ Girard, *Violence and the Sacred*, 12-13.

⁶⁴ Ibid., 11-12.

⁶⁵ Ibid., 272.

⁶⁶ Ibid.

⁶⁷ Beschle, “What’s Death,” 515.

as avenging those acts and restoring the social order.⁶⁸ A successful sacrificial ritual ends the violence in the society because all members of the society seek vengeance for the wrongs done to them that was caused by mimesis. Girard argues, “[a]s the violence subsides it is thought to have departed with the victim, to have somehow been projected outside the community. The community itself is felt to be free of infection – so long, that is, as the cultural order within it is respected.”⁶⁹ The bad violence has been expelled from society, and the sacrificial ritual “reinforces the status of violence as an exterior influence, transcendent and beneficent.”⁷⁰

Therefore, at the same time that the sacrificial victim is seen as the cause of all the evil occurring within the society, the execution of the sacrificial ritual is seen as the introduction of good violence into society to reestablish order and remove the violence back to its exterior location. This certainly is a transition between states. First, the society is troubled by violence and then, through the process of the sacrificial execution, society is returned to peace and unity. Interestingly, Girard asserts that this is most efficiently done when society “regard[s] the process not as something emanating from within themselves, but as a necessity imposed from without, a divine decree whose least infraction calls down terrible punishment.”⁷¹

Girard argues that the sacrificial ritual, with the external divine decree, is no longer needed because of the criminal justice system. He asserts that the

⁶⁸ Ibid., 518.

⁶⁹ Girard, *Violence and the Sacred*, 266.

⁷⁰ Ibid.

⁷¹ Girard, *Violence and the Sacred*, 14.

judicial system guarantees that violence “does indeed fall on the ‘right’ victim; but it falls with such force, such resounding authority, that no retort is possible.”⁷² The judicial system, therefore, is still taking part in the cycle of vengeance, it just does so with such force that no member of society would want to respond to avenge the wrong done to his or her family. Girard, however, does state that the judicial system and the sacrificial ritual share the same function, and both appeal to a “theology as a guarantee of justice.”⁷³

Early New England Executions and the Girardian Sacrificial Ritual

In Early New England the judicial system’s executions and Girard’s sacrificial ritual differed only in the fact that the condemned individual had been found guilty of the offending crime by the local civil magistrates. Sarah Simpson’s execution is archetypal of the executions that occurred during that period. She was held in jail for a period of time after her sentencing at trial as an opportunity for her to repent before being executed.⁷⁴ On the day of her execution, she attended church to hear a sermon preached because of the occasion of her execution that set out to justify and explain the execution, as well as yet again admonish her to repent for her bad act, and then once she reached the place of her execution, she publicly repented for her crime, in an effort to be granted mercy upon her death by God.⁷⁵ The justifications for executions articulated in execution sermons and the typical events of the execution day almost directly match Girard’s description of and justifications for the sacrificial ritual.

⁷² Ibid., 22.

⁷³ Ibid., 23.

⁷⁴ Seay, *Hanging*, 9.

⁷⁵ William Shurtleff, *The faith and prayer of a dying malefactor*, 3-28.

The victim in the sacrificial ritual, for Girard, must be “neither too familiar to the community nor too foreign to it.”⁷⁶ He or she is an individual that does not have social bonds with the community and typically does not have recognized rights and duties.⁷⁷ The condemned in Early New England were not drawn from an exterior source, like the sacrificial victims for Girard, but after being sentenced by the magistrate, they fell into the category of being like but unlike the rest of community. Until the crime, the condemned was seen as a regular member of the community. In a Girardian sacrificial ritual the victim cannot be a fully integrated member of the community, therefore in Early New England, after the crime and until the execution sermon, the condemned was represented as unique and foreign – a person away from whom God had turned, unlike the rest of the community.⁷⁸ Shurtleff, for example, exhorted the condemned Sarah Simpson, “you have provoked God to leave you to a great many Sins, and particularly to the Sin, that has brought you to this ignominious Death.”⁷⁹ This process made the condemned more foreign to the community, achieving the Girardian requirement that the victim be unlike the community.

The condemned must not be so unlike the community, however, that the community cannot identify with him or her. If the condemned individual were alienated entirely from the community, then the purpose of the Girardian sacrificial ritual, ending the violence cycle, would not be met.⁸⁰ Therefore, the execution sermon and the gallows speech also emphasized the similarities

⁷⁶ Girard, *Violence and the Sacred*, 271.

⁷⁷ *Ibid.*, 12.

⁷⁸ Seay, *Hanging*, 82.

⁷⁹ Shurtleff, *The faith and prayer of a dying malefactor*, 17.

⁸⁰ Girard, *Violence and the Sacred*, 266.

between the condemned and the community: all individuals in Puritan New England suffered from innate depravity.⁸¹ By focusing on the idea that the root of crime is innate depravity, the condemned was reintegrated into the community.⁸² The condemned was a mirror into which the members of the community could look and see their own rages, impulses, inclinations taken to an extreme, and understand that “but for God’s restraining grace go all of us.”⁸³ Thus, the condemned was like the community: a sinner with innate depravity just like everyone else; but also unlike the community: a sinner who had behaved so badly that it was clear that God’s “restraining grace” had been withheld from him or her.⁸⁴

Execution sermons, after discussing the parity of the community and the condemned due to their shared innate depravity, generally then would explain that the execution must occur to prevent God’s judgment on the entire community.⁸⁵ The condemned, through their “particularly heinous sins,” polluted the community.⁸⁶ Similarly, the sacrificial victim, for Girard, “embodies the very meaning of transgression and bears the weight of collected hatred expressed by members of the community toward all those who violate the norms and persons of the social order.”⁸⁷ Thus, just as the victim in a Girardian sacrificial ritual was viewed as the source of all discord in the community, the condemned individual

⁸¹ Karen Halttunen, *Murder Most Foul: The Killer and the American Gothic Imagination* (Cambridge, MA: Harvard University Press 1998), 14.

⁸² *Ibid.*

⁸³ *Ibid.*, 29.

⁸⁴ Seay, *Hanging*, 82.

⁸⁵ Seay, *Hanging*, 24.

⁸⁶ Seay, *Hanging*, 83.

⁸⁷ James McBride, “Capital Punishment as the Unconstitutional Establishment of Religion: A Girardian Reading of the Death Penalty,” *Journal of Church and State* 37, no. 2 (Spring 1995): 270-271.

in Early New England was seen as “draw[ing] the ‘wrath of God’ upon [the entire community].”⁸⁸ Both Girard’s sacrificial victim and the condemned individual in Early New England, therefore, must be executed to protect the community.

The execution not only protects the community, but it provides the opportunity for the community to become more unified through seeing that the individual who has been executed has efficiently drawn the evil out and away. Girard explains that although the victim of the sacrificial ritual is seen as the bringer of evil, once the victim is executed, he or she is seen as sacred for bringing peace to the community – for removing the evil back to its correct exterior location.⁸⁹ Through the process of executing the sacrificial victim the community is also drawn together; the sacrifice creates a social cohesion and the victim is identified as the sacred source of the peace brought by his or her execution.⁹⁰

The overlap between the unification of the community and the sacralization of the condemned individual also exists in Early New England executions. The condemned individual, who follows the typical and expected script for the execution, plays the role of a moral example by repenting during a gallows speech, asking for God’s mercy, as all sinners should.⁹¹ The condemned, through their gallows speech, participates in “a dramatic public demonstration of the redemption of an exemplary sinner.”⁹² By confessing his or her great sin, discussing his or her spiritual progress away from that sin after his or her conviction, and then repenting and asking for God’s mercy, the condemned is

⁸⁸ Daniel Cohen, “In Defense of the Gallows: Justifications of Capital Punishment in New England Execution Sermons, 1674-1825,” *American Quarterly* 40, no. 2 (1988), 150.

⁸⁹ Beschle, “What’s Guilt,” 515.

⁹⁰ Steele, “A Seal Pressed in Hot Wax,” 44.

⁹¹ Halttunen, *Murder*, 24; Seay, *Hanging*, 77.

⁹² Halttunen, *Murder*, 21

seen as a model, “harnessing both her extraordinary sinfulness and her dramatic demonstration of repentance and spiritual awakening to restore a backsliding New England people to their earlier relationship with God.” The condemned, although not a sacred source of peace, still acts as a sacred being in that he or she becomes a “saint in life” through his or her repentance example, very similar to the sacralization of Girard’s sacrificial victims.

By becoming a “saint in life,” the condemned provided a social occasion prompting unity within the community.⁹³ Acting out his or her repentance in public, the condemned restored his or her connection with the rest of the community, fixing the social break caused by his or her crime.⁹⁴ At the same time, and more importantly, this renewed attachment to the condemned cause the community to feel a mutual bond.⁹⁵ Just as the execution of the Girardian sacrificial victim draws the society back together, the execution of the condemned in Early New England provided an occasion of social solidarity – an opportunity to recognize the mutual compassion felt toward the condemned occasioned by his or her execution.⁹⁶ Not only did the execution provide an opportunity for a feeling of mutual compassion, but the gallows speech also reaffirmed communal

⁹³ Lincoln B. Faller, *Turned to Account: The Forms and Functions of Criminal Biography in Late Seventeenth and Early Eighteenth Century England* (Cambridge: Cambridge University Press, 1987), 107. Faller’s descriptions of English executions is comparative to New England executions of the same time because of the similarity in religious beliefs, view of the role of government, and understanding of the interrelatedness of religion and government in performing executions.

⁹⁴ Faller, *Turned to Account*, 107; Halttunen, *Murder*, 29.

⁹⁵ Faller, *Turned to Account*, 109-110.

⁹⁶ *Ibid.*, 115.

norms, just like the sacrificial ritual returned evil to its correct location outside of the community.⁹⁷

Girard's sacrificial rituals and Early New England executions also share the idea that the communities that performed them saw the executions as being imposed by an external sacred force. Girard explains that to end the cycle of violence caused by mimetic desire, it is more efficient for the sacrificial ritual to be seen as "a necessity imposed from without, a divine decree whose least infraction calls down terrible punishment."⁹⁸ Execution sermons highlighted God's role in requiring the execution by citing to Scripture, articulating the manifestation of God's law in the law of the time, and explaining the civil magistrate's role as a "minister of God."⁹⁹ The execution of the condemned, who had repented at the gallows and had been welcomed back into the social bond of society, was nevertheless required, imposed by God's decree – just like Girard's sacrificial rituals.

Ministers in almost every execution sermon first justified the capital sentence of the condemned through Scriptural texts.¹⁰⁰ William Shurtleff, for example, undertook a long analysis of Luke 23: 42 during his sermon on the occasion of the execution of Sarah Simpson in 1739. By grounding their sermons in Scripture, the Early New England ministers cited God as the decision-maker: "Let no man think that this looks Cruel or Inhumane: The Justice of God has so

⁹⁷ Daniel LaChance, "Last Words, Last Meals, and Last Stands: Agency and Individuality in the Modern Execution Process," *Law and Social Inquiry* 32 (Summer 2007): 705; Seay, *Hanging*, 91.

⁹⁸ Girard, *Violence and the Sacred*, 14.

⁹⁹ Seay, *Hanging*, 114.

¹⁰⁰ Cohen, "In Defense of the Gallows," 149.

fix'd it."¹⁰¹ John Rogers explained in his 1701 sermon on the occasion of Esther Roger's execution (no relation) that, "God makes every breach of his Law to be Capital . . . He that breaks any one of his Commandments forfeits his life, God hath set Death as a stated penalty of every sin."¹⁰² Thus, as Cotton Mather explained, "Not only will God deliver them into the hands of the earthly executioner, but God will 'take him into his own Hands, and make him feel such scalding strokes of His Wrath, as will be more torturous than flaming Sulphur . . .'"¹⁰³ Accordingly, the laws of the state were seen as "consonant to the Divine," and the executions as divinely decreed, just as Girard's sacrificial ritual.¹⁰⁴

Girardian Sacrificial Rituals: The Evolution of Early New England Executions to Modern Executions

Although executions are no longer justified first as God's will, modern executions resonate with executions in Early New England. This resonance occurs, partially, because executions in both time periods reflect Girard's sacrificial ritual. This section will first compare modern executions to Girard's sacrificial ritual, demonstrating that just like executions in Early New England, executions today follow the pattern of a *rite de passage*. Once this common ritual format is established, the evolution of capital punishment will be traced from Early New England to today. Just as the executions in Early New England relied

¹⁰¹ Benjamin Colman, *The hainous nature of the sin of murder. And the great happiness of deliverance from it. As it was represented in a sermon at the lecture in Boston, Sept. 24, 1713. Before the execution of one David Wallis. By Benjamin Colman, Pastor of a church in Boston*, (Boston), 1713. Eighteenth Century Collections Online. Gale. Emory University Robert W. Woodruff Library. (Gale Document Number CB129256611), 8.

¹⁰² Seay, *Hanging*, 88.

¹⁰³ *Ibid.*, 89.

¹⁰⁴ *Ibid.*, 117.

on the civil religion of the day to understand the occasion of an execution, the civil religion of today is cited when discussing executions.

Executions today no longer happen in the public square and sermons are no longer published widely on the occasion of the execution, instead today the media reports the occasion of the execution in print, television and on the internet. The entire community does not stop its daily activities for each execution, like was done in Early New England, but the executions themselves still affect the community as a whole because of the widespread media coverage. Inside the prison, on the other hand, ritualizing procedures distinguish execution days just as they were set apart in Early New England. Executions are still rituals set up to distinguish the actions of the condemned from the state's actions, distinguishing legitimate violence in the form of the execution from the illegitimate violence performed by the condemned.

Brian Smith compared modern executions to Girard's human sacrifices in a 2000 article in the *Journal of the American Academy of Religion*, intending to demonstrate why capital punishment is so hotly debated today.¹⁰⁵ Smith effectively establishes that executions today fit Girard's sacrificial ritual and that the debate today fits Girard's sacrificial crisis. Girardian sacrificial rituals are designed to impose the "correct" violence to expel other violence out of the community.¹⁰⁶ Executions today, according to Smith, are "deliberately calculated to draw a clear distinction between their own 'perfect' kill and the illegitimate,

¹⁰⁵ Brian Smith, "Capital Punishment and Human Sacrifice," *Journal of the American Academy of Religion* 68, no. 1 (2000): 3-25. doi: 10.1093/jaar/68.1.3.

¹⁰⁶ Smith, "Capital Punishment and Human Sacrifice," 17.

uncontrolled killings for which the executed are paying the ultimate price.”¹⁰⁷ By taking the life of the condemned in a ritualized fashion, modern executions attempt to demonstrate that murder is inappropriate – a modern version of Girard’s “[o]nly violence can put an end to violence.”¹⁰⁸ Similarly, Girard’s sacrificial victims also can be compared to the majority of those who are executed today according to Smith.¹⁰⁹ Just like Girard’s sacrificial victims who had to be like, but unlike the society, those who are executed today are “marginal to the social, racial, and economic ‘mainstream.’”¹¹⁰ Like the condemned in Early New England, the condemned today are marginalized after their convictions, today through the media instead of through the church.¹¹¹ Finally, Smith argues that the highly medical and bureaucratic processes used to execute individuals today are reminiscent of the repeatable sacrificial rituals described by Girard.¹¹²

Melissa Ptacek challenged Brian Smith’s views in her responsive 2011 article in *Law, Culture and the Humanities*. She argued that regardless of the marginal quality of a condemned individual, that is not the same as a representative instead of the actual convicted person as is used in the Girardian sacrificial ritual.¹¹³ Next, Ptacek asserts that unlike the societies that participated in sacrificial rituals, modern communities are more interested in the punitive purpose of the execution than re-establishing power relations.¹¹⁴ Finally, Ptacek

¹⁰⁷ Smith, “Capital Punishment and Human Sacrifice,” 12.

¹⁰⁸ Girard, *Violence and the Sacred*, 26.

¹⁰⁹ Smith, “Capital Punishment and Human Sacrifice,” 12-13.

¹¹⁰ *Ibid.*, 13.

¹¹¹ *Ibid.*, 13.

¹¹² Melissa Ptacek, “Remarks on Sacrifice and Punishment,” *Law, Culture and the Humanities* 7, no. 1 (Feb. 2011): 35.

¹¹³ *Ibid.*

¹¹⁴ Ptacek, “Remarks,” 36.

stresses that modern executions have not only been medicalized, but also privatized so that the community does not directly participate, unlike in Girard's sacrificial rituals.

Each of Ptacek's criticisms, while having some merit, do not destroy the comparison. There are occasions where it is possible that an innocent individual has been executed, thus what matters is the execution, not the representative quality of the victim. Girard, himself, asserts that the judicial system has effectively replaced the sacrificial ritual; inasmuch that the individual executed is now the "right" person instead of a substitute without fear of reprisal.¹¹⁵ Part of the punitive purpose of modern executions is to demonstrate that one must follow the laws of the state (even if this goal is not achieved through the execution), thus the punitive purpose is in fact a way of re-establishing state power. Finally, today's society has the opportunity to participate in the executions through the media, which for modern individuals could be just as effective as attending the execution itself.¹¹⁶ Ptacek does point out that today the condemned individual is not sacralized as the Girard's sacrificial victim and the condemned in Early New England are, but this, she says, allows for the comparison of the "violence of the scapegoat . . . separated from its sacrificial framework."¹¹⁷ Up until this point, however, despite some criticism, modern executions fit as

¹¹⁵ Girard, *Violence and the Sacred*, 15.

¹¹⁶ Besides the media reports of executions leading up to the day of the execution and after the execution, some states participate in the broadcasting of the event themselves, to some degree. For example, the Texas Department of Corrections website has a section dedicated to its death row, listing all the current individuals on death row with a picture and a description of his or her crime, and the individuals it has executed, listing the individual, their last words, and the date of their execution.

¹¹⁷ Ptacek, "Remarks," 45.

modern examples of the Girardian sacrificial ritual, with complications similar to those that existed in Early New England.

Modern executions and executions in Early New England are both versions of the Girardian sacrificial ritual in their implementation. The executions in these two time periods also demonstrate how sacrificial rituals establish religion, whether it be specifically announced, or unofficially sanctioned. During the Puritan period in Early New England, the execution sermons specifically announced that the executions were being undertaken following the will of God. Puritan preachers believed that God placed the civil authorities in their positions and that the civil government was a divine institution that was empowered by God to “protect the true church, uphold the highest standards of morality, and punish those who disobey God’s law.”¹¹⁸ For example, Increase Mather’s 1686 sermon on the occasion of James Morgan’s execution not only identified one of the commonalities between Girard’s sacrificial ritual and Early New England executions but he also emphasized that the civil magistrates were doing God’s will by executing the condemned individual. Mather announced, “Private Revenge is evil, but Publick Revenge on those that violate the Laws of God, is good,” and continued, “The Magistrate is ‘God’s Vice-regent.’”¹¹⁹ For Mather, if the civil authority did not go through with

¹¹⁸ Seay, *Hanging*, 107.

¹¹⁹ *Ibid.*, 114. Also see Benjamin Colman’s sermon on the occasion of David Wallis’ execution in 1713. Scott Seay refers to this sermon and discusses the common idea that if the civil magistrates, deemed “ministers of God” did not perform the executions in “obedience to Divine law,” then they would be held accountable to both God and the society. *Ibid.*, 115-116.

the execution of the condemned individual disaster would result and Holy Commonwealth would not be maintained.¹²⁰

The concern of maintaining the Holy Commonwealth continued after the great heyday of the Puritans, but there was a shift of focus slightly away from implementing divine laws to also recognizing executions as “a public service to the State.”¹²¹ “Civil magistracy is an ordinance of God,” and “the great end and design of it is the public good,” announced Noah Hobart in his 1768 sermon on the occasion of the execution of Isaac Fraiser.¹²² This shift was a simple step from Increase Mather’s belief that one of the primary reasons murder was “all the more wicked” was because it was a “rebellion against the divinely ordained social order.”¹²³ Submission to God and his authority to punish was seen as requiring the submission to civil authority and its authority to punish by the Puritans, and by the American revolution this was translated into the idea that “God made known the divine will for civil government and empowered civil governments through constitutional and electoral processes.”¹²⁴

The ready acceptance of this shift from divinely required executions to divinely ordained executions came about because the theological teaching by preachers of execution sermons that the civil authorities had been “invested with the *jus gladii*, the right of the sword.”¹²⁵ Therefore, by the American Revolution, violation of the laws of the state had shifted from being viewed as a violation of God’s laws to being offensive to God because God had ordained the laws of the

¹²⁰ Ibid., 114.

¹²¹ Seay, *Hanging*, 123.

¹²² Ibid., 124.

¹²³ Ibid., 84.

¹²⁴ Ibid., 102 and 121.

¹²⁵ Ibid., 113.

state.¹²⁶ In other words, although the primary message of public executions during and after the American revolution was submission to state authority, this submission was based on the idea that God had worked through the democratic process to establish the constitution, and therefore, the laws of the state were sacred – and “the transgressor offends against Heaven and Earth.”¹²⁷

The understanding that transgressing against the laws of the state is contravening God’s ordained laws has been carried over to today. Although God is not typically mentioned by the State when a modern execution occurs, the form by which the executions are undertaken highlights the continuing role of religion, the sacred, and the proper function of God today. Girard explains that religion has been created to instruct what to do and not to do to prevent violence and to remove the violence that exists through the sacrificial ritual.¹²⁸ Brian Smith argues that during rituals, be they sacrificial rituals or executions, humans attempt to imitate the omniscience and omnipotence they attribute to God in carrying out the killing of the condemned individual.¹²⁹ Thus, the medicalization and bureaucratic nature of modern executions is an attempt to control the exact manner and time of death of the condemned.¹³⁰

The high ritualization of executions in modern day has in fact led to an unusual manner of attempting to demonstrate the unconstitutionality of capital punishment – by arguing that the death penalty is an unconstitutional establishment of religion that violates the First Amendment of the United States

¹²⁶ Ibid., 132.

¹²⁷ Seay, *Hanging*, 132.

¹²⁸ Girard, *Violence and the Sacred*, 259.

¹²⁹ Smith, “Capital Punishment and Human Sacrifice,” 5.

¹³⁰ Ibid., 9 and 17.

Constitution.¹³¹ James McBride argued in a 1995 article for the *Journal of Church and State* that Supreme Court’s announcement of the irrelevance of innocence for *habeas* petitions in *Herrera v. Collins*, 506 U.S. 390 (1993) reveals the underlying purpose of modern executions: it is “a social mechanism to vent the violence which would otherwise destroy the social order,” and is thus “essentially a religious ritual of the state” in light of Girard’s sacrificial ritual.¹³² McBride asserts that “the religious character of this ritual [executions] of the state remains,” and that the denial of a religious nature, in fact is necessary to effectively remove violence to its proper external-to-the-community location.¹³³ McBride points out that even the legislative intent behind laws that allow capital punishment show that “the death penalty is imposed not simply because an individual has been killed, but because the social order itself has been violated.”¹³⁴

McBride demonstrates that modern executions fit the Girardian sacrificial ritual, and thus indicating a religious motivation. First, he points out that just like Girard’s sacrificial victim must be a member of the “condemned class,” but not necessarily (in fact specifically not) the one who committed the criminal act, the condemned individuals on today’s death row seem to be arbitrarily there – for it does not seem to matter how horrible the crime is, but instead how bad the courtroom representation was and how eager the prosecutor was to encourage

¹³¹ McBride, “Capital Punishment as the Unconstitutional Establishment of Religion,” 263-287.

¹³² McBride, “Capital Punishment and the Unconstitutional Establishment of Religion,” 269.

¹³³ *Ibid.*, 272.

¹³⁴ *Ibid.*, 273.

the jury to apply the death penalty.¹³⁵ Second, he shows that the State announces its own authority for committing the execution, in the name of protecting the sacred body of the community, following civil religious understandings of the State, just like the society announces its authority for performing the sacrificial ritual to protect itself for Girard.¹³⁶ This motivation to protect society and its laws is just a slight evolution from the perspectives announced in the late execution sermons in Early New England.

Understandings of God and Breaking the Liminal Line

McBride argues that modern executions in fact are an assertion of a specific kind of violence: “an idolatrous claim by the state over life and death in the community.”¹³⁷ The state’s assertion of control over life and death evolved out of the theological arguments made in the execution sermons in Early New England. In 1754, Charles Chauncy explained, “murder is an impiety to a great degree chiefly because ‘it is a downright Encroachment upon and Usurpation of that Right over Life, which the Sovereign Lord has reserved to be exercised by himself alone.’”¹³⁸ With the shift from recognizing civil authorities as divinely mandated to perform executions to seeing the civil authorities’ decision to execute as divinely authorized, the state attempted to be included in the sovereign right to condemn murder as a violation of God’s right over life. The state’s claim to decide the occasions of executions to protect society from the violation of murder and other crimes did not go unnoticed in Early New England.

¹³⁵ Ibid., 283.

¹³⁶ Ibid., 285-286.

¹³⁷ McBride, “Capital Punishment and the Unconstitutional Establishment of Religion,” 286.

¹³⁸ Seay, *Hanging*, 126.

Benjamin Rush, a signer of the Declaration of Independence, asserted that that the state's claim to determine whether an individual was to be executed was to "flagrantly usurp the prerogative of God over human life."¹³⁹ He declared, in his speech to Benjamin Franklin's Society for Promoting Political Enquires in 1787, "The power over human life, is the solitary prerogative of HIM who gave it. Human laws, therefore, rise in rebellion against this prerogative, when they transfer it to human hands."¹⁴⁰ Rush hints at the idea that there is a clear line between the rights of humans and the rights of God, and regardless of whether the community believes itself to be acting out God's will, deciding to execute a person breaks this line.

The idea that murder is offensive to God because human life belongs to God and not humans was discussed in modern times most thoroughly by Karl Barth in his *Church Dogmatics*. Barth writes, "Human life – one's own and that of others – belongs to God. It is His loan and blessing."¹⁴¹ Therefore, Barth argues that human law cannot effectively calculate God's decision between life and death for humans.¹⁴² Barth sees three possible explanations for the existence of capital punishment today: (1) to protect society against the criminal and his or her actions, (2) to "act as a representation and proclamation in human and earthly terms of the retributive justice of God," and (3) to bring the criminal to recognize that his act was wrong.¹⁴³ Barth criticizes each of these. First he explains the invalidity of the third explanation in the case of capital punishment – for the

¹³⁹ Ibid., 153.

¹⁴⁰ Rush, *Enquiry Into Effects of Public Punishments*, 32.

¹⁴¹ Barth, *Church Dogmatics*, 397.

¹⁴² Ibid., 422.

¹⁴³ Ibid., 440.

criminal does not truly have a chance to learn from the punishment once he is put to death. Second, humans do not act with humility and assume that they can establish “indisputably” “whether this or that act is really worthy of death” and so it is impossible for humans to act out the retributive justice of God.¹⁴⁴ Finally, Barth points out that although punishment is meant to be a deterrent and to protect society against the criminal and other similar acts, the “state leaves the human level and acts with usurped divinity. It destroys life instead of maintaining it. It deprives of right instead of upholding it,” and therefore, Barth argues, capital punishment cannot be deterrent.¹⁴⁵

Regardless of the secular justifications articulated by supporters of the death penalty, death is different from other forms of punishment currently imposed by the judicial system. “Death is not just death, but judgment on sin.”¹⁴⁶ The condemned individual has done something so horrid that society does not view that they can be rehabilitated, they are so evil that they must be removed from the community finally; even secular explanations go back to this boundary between God and man, even if the state attempts to “theologically sever[] death from God’s judgment.”¹⁴⁷ The fact that executions clearly point to a theological judgment of the condemned individual, and the assertion that human laws usurp

¹⁴⁴ Ibid., 442.

¹⁴⁵ Ibid., 445. This opinion is also held in the Islamic tradition according to Khaled Abou el Fadl, who writes that “human life . . . is sanctified – life is inviolable and its existence or termination is placed squarely within the boundaries of the divine jurisdiction.” Khaled Abou el Fadl, “The Death Penalty, Mercy, and Islam: A Call for Retrospection,” In Owens, *Religion and the Death Penalty*, 74.

¹⁴⁶ Stanley Hauerwas, “Punishing Christians: A Pacifist Approach to the Issue of Capital Punishment,” In Owens, *Religion and the Death Penalty*, 67.

¹⁴⁷ Ibid.

divine power when they determine life or death as discussed by Barth and Rush, point to the existence of a liminal line dividing society from God.

The division between legitimate and illegitimate violence as announced by Girard is the liminal line between God and humanity. In the sacrificial ritual, the sacrifice was seen as being imposed by a divine force to maintain the peace and harmony within the society; the violence being acted was seen as legitimate because it was viewed as being done by divine decree. Executions, however, by the time of the American Revolution and in modern day, are not seen as being done solely at the behest of God. This has forced society into what Girard describes as a “sacrificial crisis.”¹⁴⁸ More specifically, Smith argues that the debate over whether it is just to execute an individual, and the fact that it is based on the idea that God wants to protect life and thus life is God’s realm, has forced society into a Girardian “sacrificial crisis,” according to Smith.¹⁴⁹ The distinction between legitimate and illegitimate violence is debated when discussing executions, and this to Smith, demonstrates a lack of unity among the community.¹⁵⁰ Instead, the contestation surrounding the death penalty in fact makes it so executions are “no longer a socially ‘purifying’ act,” but instead creates the possibility for social dissention and renewed violence.¹⁵¹ This sacrificial crisis reflecting the fact that the state’s action has pushed society into a liminal state.

¹⁴⁸ Girard, *Violence and the Sacred*, 49.

¹⁴⁹ Smith, “Capital Punishment and Human Sacrifice,” 19.

¹⁵⁰ Ibid.

¹⁵¹ Ibid.

Victor Turner explains that the liminal state is the transitory state between the society as it existed and the society as it will exist.¹⁵² Turner focuses on the experience of the person participating in the *rites de passages* and emphasizes that during the liminal state the participant is “at once no longer classified and not yet classified.”¹⁵³ Viewing, instead, the participant in the *rites de passages* as the whole society, this lack of classification indicates that the typical societal mores have been broken down. The divisive line between the boundaries of what is God’s realm and what decisions society can make separately has been crossed. Once the state crosses this boundary, there can no longer be a division between legitimate and illegitimate violence. Turner states, “In the liminal period such distinctions and gradations tend to be eliminated.”¹⁵⁴ Society can no longer enforce the idea that only it can execute another human being because it is the state, for the distinction between the state and a single individual has been blurred in the liminal state. “Liminality is the realm of primitive hypothesis, where there is a certain freedom to juggle with the factors of existence.”¹⁵⁵ Thus, the basic line preventing strangers who have no other social bond from killing one another is erased.

Once the liminal line is crossed and basic structures and hierarchies in society are blurred, lethal vengeance is possible. Lethal vengeance occurs when the person about to commit a murder, instead of seeing himself or herself as the condemned individual that was executed by the state for doing wrong in the eyes

¹⁵² Turner, “Betwixt and Between,” 94.

¹⁵³ Ibid., 96.

¹⁵⁴ Turner, “Betwixt and Between,” 99.

¹⁵⁵ Turner, “Betwixt and Between,” 106.

of the state, sees himself or herself as the state – and able to “execute” the one that he or she believes wronged him or her.¹⁵⁶ The liminal state allows for lethal vengeance. When the state breaks the liminal line between God and society, the state removes the distinctions between legitimate and illegitimate violence. A sacrificial crisis exists, because executions are no longer purifying acts, and thus renewed violence occurs.

Executions are ritual *rites de passage* that are supposed to move society from a violent state to a peaceful state by following René Girard’s sacrificial ritual format. Executions have been practiced in the United States since the first British colonies, and have always reflected Girard’s sacrificial ritual, but have evolved over time. Girard’s sacrificial ritual ultimately assumes the intervention of a divine force, and this idea was clearly reflected in the early execution sermons in Early New England that asserted that God required for the condemned to be executed. The understood role of God evolved by the American Revolution, however, and this evolved understanding that protecting society plays a bigger role than divine decree has led to the debate surrounding capital punishment today. The mix of doubt about the legitimacy of executional violence and whether the state has usurped the role of God reflect the fact that a sacrificial crisis exists. The primary reason for this sacrificial crisis, and what allows for renewed violence in the form of lethal vengeance to occur, is the state breaching the liminal line between God and humanity forcing society to exist in a liminal state. Executions, as understood as Girardian sacrificial rituals, breach the liminal line between God and humanity.

¹⁵⁶ Bowers, “Deterrence or Brutalization,” 456.

The remainder of this thesis will address how understanding executions as breaking this liminal line undermines the two primary justifications for the death penalty of today: deterrence and retribution.

2: The Consequences of Breaching the Liminal Line for Modern Justifications for the Death Penalty

Deterrence has been an articulated justification for capital punishment since at least the time of Early New England. At the same time, however, the ability of capital punishment to successfully deter individuals from committing murder has been debated. Specifically, the idea that instead of deterring, capital punishment in fact brutalizes society has existed since Cesare Beccaria stated in 1764, “The punishment of death is pernicious to society, from the example of barbarity it affords.”¹⁵⁷ Once it is understood that executions breach the liminal line between the state and God, it is clear that the deterrence argument is invalid because of the actual brutalization effect that occurs with each execution.

The justification for capital punishment on the basis of deterrence is simple: “executing murders will save more lives than are taken.”¹⁵⁸ This argument is based on the idea that human behavior can be influenced by incentives, be it a positive or negative incentive.¹⁵⁹ Thus, demonstrating that if one commits murder (or in Early New England, any number of other crimes), one will be executed serves as an example for others considering committing murder themselves and is a negative incentive – it stops them from committing the crime.¹⁶⁰ Deterrence is also cited as a moral justification for the death penalty, because despite how

¹⁵⁷ Beccaria, *An essay on crimes*, 100.

¹⁵⁸ Lempert, “Desert and Deterrence,” 1187.

¹⁵⁹ Christopher Adams Thorn, “Retribution Exclusive of Deterrence: An Insufficient Justification for Capital Punishment,” *Southern California Law Review* 57 (November 1983), 200.

¹⁶⁰ *Ibid.*

many difficulties the system has, if the net effect is a saving of human life, then the system seems to be justified.¹⁶¹

This chapter will first trace the basic trajectory of deterrence from its announced purpose in Early New England execution sermons to recent Supreme Court precedent. Then, this chapter will conduct a brief literature review of articles that have addressed the likelihood of both or either a deterrent effect and brutalization effect caused by executions. Finally, the specific ramifications of the breach of the liminal line between God and humanity will be discussed, as a possible explanation for the existence of the brutalization effect.

The History of Deterrence as a Justification for Capital Punishment

In the first execution sermon widely published, Samuel Danforth used the occasion of Benjamin Goad's execution to warn the congregation against taking a path similar to Goad's path of crime. Goad's execution day was "an opportunity for God 'to pluck poor sinners out of the snare of lasciviousness . . .,'" an opportunity for the rest of the community to be deterred from sin.¹⁶² Holding out the condemned individual as an example of divine justice from which others could learn was a typical practice of the preachers of execution sermons.¹⁶³ William Shurtleff cajoled his congregation to look at Sarah Simpson and exhorted them "to make it your Endeavour, as well as your Prayer, that your blessed Savior, who is gone into his Kingdom and is seated upon the Throne of his Glory, *may remember you for Good and shew Favour to you, when you come into*

¹⁶¹ Lempert, "Desert and Deterrence," 1188.

¹⁶² Seay, *Hanging*, 52.

¹⁶³ *Ibid.*, 81.; Faller, *Turned to account*, 107.

another World. And let the Example of the condemn'd and dying Person here before you, and the other under the like Circumstances, serve as a Means to quicken you to it."¹⁶⁴

Increase Mather put the value of deterrence in theological terms, "Hence he hath appointed that Justice shall be *executed* in a solemn way, upon *Capital offenders*, that others may hear and fear, and none may do any more so wickedly."¹⁶⁵

The Supreme Court has not articulated theological understandings of deterrence in its jurisprudence. Instead, in 1963, Justice Arthur Goldberg petitioned the Court to take up capital punishment to debate whether it should be ruled unconstitutional.¹⁶⁶ He asserted that to be justified, the death penalty must serve as an effective deterrent.¹⁶⁷ Most of the Supreme Court's jurisprudence, however, has not been focused on whether or not capital punishment is an effective deterrent. Instead, cases have primarily focused on methods of execution, categories of individuals to be executed, and whether the application of the punishment was discriminatory. Beschle argued that the Court ultimately considers in each of its decisions whether the death penalty is rational, and one way to determine rationality is to look at the goals of the punishment, including deterrence.¹⁶⁸ Justice Marshall took up the issue of deterrence in his opinion in *Furman v. Georgia*, the case that briefly imposed a moratorium on capital punishment in the United States in 1972. Justice Marshall asserted that deterrence has always been the primary justification for the death penalty in the

¹⁶⁴ Shurtleff, *The faith and prayer of a dying malefactor*, 19-20.

¹⁶⁵ Cohen, "In defense of the gallows," 151.

¹⁶⁶ Beschle, "What's Guilt," 491.

¹⁶⁷ Ibid.

¹⁶⁸ Beschle, "What's Guilt," 492-493.

United States, however this was a bit of an overstatement.¹⁶⁹ When the death penalty was reinstated with *Gregg v. Georgia*, “most justices either expressly or implicitly endorsed both deterrence and retribution as legitimate goals of punishment,” however, of the two, deterrence appeared to be the more secure justification based on precedent.¹⁷⁰ At the same time that this institutional debate about deterrence was occurring, a debate between economists and social scientists was brewing about the empirical proof of deterrence or brutalization.

Deterrence or Brutalization: Literature Review

The first studies of the deterrent effect of capital punishment began to be published in the early 1950s. Karl Shuessler published his empirical study of the deterrent effect of the death penalty in 1952 in the *Annals of the American Academy of Political and Social Science*, and argued that the argument for deterrence was statistically not provable, and so continued reliance on the argument must be based more in tradition than in empirical fact.¹⁷¹ Thorsten Sellin’s 1973 study was the next most substantive evaluation of the deterrent effect of the death penalty.¹⁷² Sellin compared yearly homicide rates for retentionist and abolitionist states and did not find statistical proof for deterrence.¹⁷³

In 1975, however, Isaac Ehrlich published the first substantive economic analysis of the deterrent effect of capital punishment. Using time-series data and

¹⁶⁹ Ibid., 494.

¹⁷⁰ Ibid., 496-497.

¹⁷¹ Karl F. Schuessler, “The Deterrent Influence of the Death Penalty,” *Annals of the American Academy of Political and Social Science* 284, no. 54 (Nov. 1952), 62.

¹⁷² Lempert, “Desert and Deterrence,” 1200.

¹⁷³ Lempert, “Desert and Deterrence,” 1199-1202.

possible deterrent, economic, and demographic variables, Ehrlich found a “statistically significant negative relationship between the murder rate and execution rate, indicating a deterrent effect.”¹⁷⁴ Specifically, “he estimated that each execution resulted in approximately seven or eight fewer murders.”¹⁷⁵ The Supreme Court cited this study in its decision to reinstate the death penalty in *Gregg v. Georgia* in 1976.¹⁷⁶ Ehrlich’s study, however influential, has been criticized. Ehrlich did not take into consideration the marginal effective difference of life imprisonment as compared to execution.¹⁷⁷ Further, when later economists used the same data, their results varied as to whether deterrence was found.¹⁷⁸ Most recently the economic research about the deterrent effect of executions has focused on panel-data analysis. This panel-data analysis, using county-level data, has always found a deterrent effect.¹⁷⁹

Sociological studies during the same time period, however, do not find a deterrent effect.¹⁸⁰ Instead, these sociological studies have found the possibility of a brutalization effect of executions. William Bowers and Glenn Pierce published their paper, “Deterrence or Brutalization: What is the Effect of Executions?” in *Crime & Delinquency* in 1980. In this paper, Bowers and Pierce suggested that there was the possibility that executions, instead of having a deterrent effect,

¹⁷⁴ Joanna M. Shepherd, “Deterrence versus Brutalization: Capital Punishment’s Differing Impacts among States,” *Michigan Law Review* 104, no. 2 (2005): 211.

¹⁷⁵ Shepherd, “Deterrence versus Brutalization,” 211.

¹⁷⁶ Lempert, “Desert and Deterrence,” 1207.

¹⁷⁷ Lempert, “Desert and Deterrence,” 1211.

¹⁷⁸ Shepherd, “Deterrence versus Brutalization,” 211.

¹⁷⁹ *Ibid.*, 214.

¹⁸⁰ *Ibid.*, 218.; David King, for example, published a study in 1978 analyzing the effect of the media at the time on deterrence or brutalization in South Carolina and found no significant statistical proof for either. King, David R. “The Brutalization Effect: Execution Publicity and the Incidence of Homicide in South Carolina.” *Social Forces* 57, no. 2 (1978): 683-687. doi: 10.2307/2577690.

could have a brutalization effect allowing for lethal vengeance to exist.¹⁸¹ Taking into consideration the publicity surrounding executions, they found that “on the average, executions imposed in a given month add one homicide to the number committed two months later.”¹⁸² Bowers and Pierce limited their study, however, by stating that was clear that “the brutalization occurs among the pool of potential killers . . . and not the population at large.”¹⁸³ This study was followed by a study done after the first execution in Oklahoma after the reinstatement of capital punishment, which occurred in 1990.¹⁸⁴

John Cochran, Mitchell Chamlin and Mark Seth analyzed weekly time-series data on the number and type of criminal homicides that occurred for one year before and one year after Oklahoma’s 1990 execution.¹⁸⁵ Cochran, Chamlin, and Seth found it odd that deterrence assumed that the murders would exercise rational judgment and weigh costs and benefits when deciding whether or not to commit murder.¹⁸⁶ In fact, most murders involve persons who know or are related to one another and occur during a moment of passion, not a moment when rational judgment prevails.¹⁸⁷ Therefore, Cochran, Chamlin, and Seth divided their data into categories of homicides to determine if there was any one type of homicide that was affected by the first execution in Oklahoma in twenty-five years. They found that after the 1990 execution, “the state of Oklahoma

¹⁸¹ Bowers, “Deterrence or Brutalization,” 456.

¹⁸² *Ibid.*, 473.

¹⁸³ *Ibid.*, 482.

¹⁸⁴ Cochran, John K., Mitchell B. Chamlin, and Mark Seth. “Deterrence or Brutalization? An Impact Assessment of Oklahoma’s Return to Capital Punishment.” *Criminology* 32, no. 1 (1994): 107-134. doi: 10.1111/j.1745-9125.1994.tb01148.x.

¹⁸⁵ *Ibid.*, 108.

¹⁸⁶ *Ibid.*

¹⁸⁷ *Ibid.*, 108-109.

experienced an abrupt, permanent increase of approximately one stranger murder every three weeks.”¹⁸⁸ A stranger homicide is one that involves two individuals that do not know and are not related to one another, usually set off in non-felony and argument situations.¹⁸⁹ In these situations, the social bond that might otherwise keep a rational person from deciding to murder another does not exist other than in the fact that both are humans. Or, as Cochran, Chamlin, and Seth put it, “the reintroduction of capital punishment, at least in Oklahoma, seemingly has produced a brutalizing effect in situations where the relational distance between offender-victim pairs minimizes socially derived inhibitions against killing and where the dynamics of the encounter are likely to enhance the perpetrator’s perception of being wronged (i.e., nonfelony and argument-related stranger homicides).”¹⁹⁰

Four years later, William C. Bailey reanalyzed the data used by Cochran, Chamlin and Seth incorporating media coverage of executions nationwide during the 1989-1991 period and examining the data down to the week to determine whether there was a delay in the brutalization effect.¹⁹¹ Bailey asserted that if executions teach that it is ok to kill, it does not matter where the execution occurred, what matters is where the media included coverage of the execution.¹⁹² Bailey found that there is a “clear suggestion that the overall level of murder, capital homicides, and robbery-related killings was encouraged, and not

¹⁸⁸ Ibid., 121.

¹⁸⁹ Ibid., 127.

¹⁹⁰ Cochran, et al., “Deterrence or Brutalization,” 128.

¹⁹¹ William C. Bailey, “Deterrence, Brutalization, and the Death Penalty: Another Examination of Oklahoma’s Return to Capital Punishment,” *Criminology* 36, no. 4 (1998): 713.

¹⁹² Ibid., 715.

discouraged, in Oklahoma by media coverage of executions.”¹⁹³ Bailey, therefore, adds the insight that media coverage can artificially produce an indication of a deterrent effect for executions for some types of homicides, but that over all, even executions that occurred outside of Oklahoma might have had a brutalization effect felt in Oklahoma.¹⁹⁴

The possibility that executions can have both a deterrent and a brutalizing effect was picked up by Cochran and Chamlin again in 2000.¹⁹⁵ They revisited their method from the 1994 study of Oklahoma and used data from California to look at the possibility of conflicting effects of executions. Cochran and Chamlin found that both the deterrent and brutalizing effect of executions were dependent on the victim-offender relationship.¹⁹⁶ They found that there is a deterrent effect of executions for “instrumental crimes (felony-murders), in which informal social controls also operate (as measured by the presence of a prior victim-offender relationship).”¹⁹⁷ That same execution could have a brutalization effect, without those same social controls, allowing a message of the “appropriateness of lethal vengeance to be expressed in full force.”¹⁹⁸ Long term, however, Cochran and Chamlin found that “the brutalization effect appears to be a relatively permanent consequence of a state’s return to capital punishment,” but that the “deterrent

¹⁹³ Ibid., 723.

¹⁹⁴ Ibid., 728, 730.

¹⁹⁵ John K. Cochran and Mitchell B. Chamlin, “Deterrence and Brutalization: The Dual Effects of Executions,” *Justice Quarterly* 17, no. 4 (2000): 685 – 706. doi: 10.1080/07418820000094721

¹⁹⁶ Cochran, “Deterrence and Brutalization,” 702.

¹⁹⁷ Ibid.

¹⁹⁸ Ibid., 702-703.

effect apparently requires additional repeated applications to maintain its influence.”¹⁹⁹

Joanna Shepherd tested this conclusion in 2005 when she undertook an economic panel-data set analysis and tested the effect of executions in different states.²⁰⁰ She found that executions “deter murder in a few states, have no impact in a few more, but *increase* murders in many more states than the number where there is deterrence.”²⁰¹ Specifically, Shepherd found a deterrent effect in six states, eight states that experienced no change in the number of murders after executions, and thirteen states that had a median increase in the number of murders after an execution.²⁰² Shepherd calculates that “approximately 262 innocent people” die each year because of the brutalization in many states caused by executions.²⁰³ She explains that her previous finding of a deterrent effect of executions in an economic study was due to the fact that the states were lumped together, so the deterrent effect caused by executions in Texas, South Carolina, Delaware, Florida, Georgia and Nevada overwhelmed the brutalization effects felt in the rest of the country.²⁰⁴ After careful analysis, Shepherd concluded that the sole difference between deterrent and brutalizing states was the number of executions performed and death sentences imposed.²⁰⁵ She found that every execution has a brutalization effect, but that the marginal brutalization effect

¹⁹⁹ Ibid., 703.

²⁰⁰ Shepherd, “Deterrence versus Brutalization,” 223.

²⁰¹ Ibid., 229.

²⁰² Ibid., 230-231.

²⁰³ Shepherd, “Deterrence versus Brutalization,” 232.

²⁰⁴ Ibid., 233.

²⁰⁵ Ibid., 237.

decreases with every execution.²⁰⁶ As a result, the brutalization effect of executions outweighs any deterrent effect of executions, until at least nine executions have occurred in that state.²⁰⁷ Shepherd hypothesizes that once nine executions have occurred in the state, that the criminals realize that the “state is serious about the punishment,” and start to reduce their criminal activity.²⁰⁸ This explanation has never been tested, and most recently an article was published in the *American Journal of Forensic Psychiatry* in 2011 that concluded that executions do not cause a significant change in the violent crime rate in either abolitionist or retentionist states, and so determined that executions cause neither a deterrent nor a brutalizing effect.²⁰⁹

Brutalization and the Liminal Line

Each of these studies created limits on who would feel the brutalizing effect of an execution. Bailey and Pierce articulated the idea that only potential killers, individuals who had the capacity and ability to commit murder, would be affected by brutalization. Cochran, Chamlin and Seth added the limitation that the brutalization effect can really only be seen in the case of stranger homicides in 1994. Four years later Bailey emphasized the role of media coverage, highlighted the fact that even executions outside of the state could cause brutalization to occur, and mentioned the fact that some data seemed to point to the idea that a

²⁰⁶ Ibid., 241.

²⁰⁷ Ibid., 242.

²⁰⁸ Ibid., 247.

²⁰⁹ Margaret-Ann Keaton and Alyssa Lee, “Capital Punishment and the Brutalization Effect,” *American Journal of Forensic Psychiatry* 32, no. 1 (2011): 29. This study is rather simplistic mathematically compared to the previously highlighted studies, it did not take into consideration factors other than the violent crime rate, and it did not consider states that had performed executions “too recently” to be included in the study.

deterrent effect might still occur as a result of the media coverage. Cochran and Chamlin picked up this possibility of a dual effect of executions and demonstrated that although executions cause a brutalization effect on stranger homicides, there is a possible deterrent effect on crimes that take rational thought (felony murders, for example). Cochran and Chamlin further discussed the fact that their data seemed to show that the brutalizing effect of an execution is permanent, but executions need to occur more regularly to continue the deterrent effect. Finally, Shepherd demonstrated through careful economic analysis that all executions cause a brutalization effect, but that that effect is marginalized over time with more executions, possibly because of the certainty that multiple executions exhibits.

All of the variants in the brutalization effect highlighted by these studies can be explained by the state's breach of the liminal line between God and humanity. Once this is understood, it is clear that deterrence cannot be seen as a legitimate justification for capital punishment. Once the state breaks the liminal line between God and humanity legitimate and illegitimate violence are confused, as are the usual social barriers within a community. Therefore, the simple social barrier that tells people not to kill one another, simply because they are people if for no other reason, is erased during the liminal period. Also, a simple recognition of the distinction of the community acting as a whole and the individual's actions can also be erased. The only reason these two barriers matter is in the case of an individual that has already contemplated the possibility of murdering another and only in the situation where a stronger social bond, such as familiarity or relationship, might not exist. Thus, the effects of the liminal state

are most clearly seen in the case of an individual who has already contemplated the ability and has the capability to murder another, and in fact murders a stranger after that stranger has done something that is seen as wronging the individual.

Lethal vengeance is possible among the narrow category of persons described by the studies in the previous section and is explained through the breakdown of societal barriers that is representative of existing in a liminal state. In a liminal state, where the barrier keeping to God the sole decision of life has been broken, it is much easier to understand the possibility of an individual believing that they are more like the state, and thus able to “execute” the person who has wronged them, than thinking that they are like the condemned individual who has been executed.

The liminal state also explains why every execution has a brutalization effect, even if that effect is marginalized over time. Each execution is a reinforcement of the idea that the state can assume the role of God, and therefore a reinforcement of the break of the liminal line between God and humanity, so every execution must have a brutalization effect. The possibility that with enough executions the brutalization effect might be outweighed by the deterrent effect can be explained with reference to Girard’s understanding of the role of the judicial system. Girard points out that the judicial system effectively executes the “right” person for the crime, and is able to do this without fear of overflowing renewed violence because of the force with which the state is able to muster.²¹⁰ If the liminal line is broken with each execution, then a sacrificial crisis has

²¹⁰ Girard, *Violence and the Sacred*, 15-16.

occurred and renewed violence is possible, but once the state speaks with enough force that murder will result in execution – by executing enough people (nine, according to Shepherd) this statement is made clear.

If a brutalization effect occurs no matter how many executions have been undertaken, then deterrence is no longer a valid justification for capital punishment. Deterrence turns on the idea that executions save more lives than they take, which if brutalization exists, is not the case. Further, deterrence also assumes that murderers are rational individuals who weigh costs and benefits of their crimes, but this is typically not the case. For those individuals who are making a rational decision, the breach of the liminal line between God and humanity has blurred or erased the basic social barriers that might keep that individual in check, recognizing that they are more like the condemned individual than the state. Finally, the trend of decreasing numbers of executions (only Texas executed more than nine people in 2011) and the length of the criminal appeals process, including *habeas* petitions make it questionable whether any state, other than Texas, could in fact execute enough individuals to feel a deterrent effect that could be maintained. Thus, because deterrence cannot be maintained consistently without a high execution rate, that only one state maintains, deterrence can no longer be seen as a valid justification for the death penalty.

Retribution as an Invalid Justification without Deterrence

Today, despite the Supreme Court's qualms about it and the multiple possible definitions for it, retribution has risen to be the primary justification articulated for the death penalty. Despite this primary status, retribution has a

few major criticisms that it cannot refute without the use of deterrence to support it. Thus, because retribution ultimately relies on deterrence, and because retribution also assumes that only with the death of the condemned can society be restored, understanding executions as a breach of the liminal line between God and humanity effectively invalidates it as a justification for capital punishment.

Retribution, in its most simple sense, is society exacting punishment in recompense for crime, enacting the biblical injunction to take “an eye for an eye.”²¹¹ This simplistic definition of retribution, however, does not show all the variations of retribution that are used today. Retribution is seen as an expressive purpose of punishment, it is “an expression of anger accompanied by a sanction and directed at those who ‘have violated the foundations of trust and friendship, the necessary elements of moral community.’”²¹² Retribution is seen as restoring balance to society that was destroyed by the act of the murder, by inflicting the same punishment on the condemned individual that they were convicted of committing.²¹³ Retribution is seen as a publically allowed form of vengeance for the crime. Girard discusses the idea that the sacrificial ritual takes place to enact the vengeance of the community against the sacrificial victim for the wrong they “caused,” and thus restores society to its right balance.²¹⁴ Finally, Immanuel

²¹¹ Erick C. Owens and Eric P. Elshtain, “Religion and Capital Punishment,” In Owens, *Religion and the Death Penalty*, 4.

²¹² LaChance, “Last Words,” 706.

²¹³ Beschle, “What’s Guilt,” 505. Beschle asserts that retributivists argue that by committing the crime, the criminal has indicated that he believes the act is permissible, and thus by inflicting the same fate upon the criminal, society is actually acting upon the criminal’s invitation.

²¹⁴ Girard, *Violence and the Sacred*, 15.; Ernest van den Haag disagrees with the idea that vengeance is the purpose of the death penalty, instead, he argues that it is the motive.

Kant's theory of punishment based in an idea of justifiable coercion is the basis for the primary understanding of retribution today. Like the theory of retribution that sees punishment as restoring balance to society, Kant emphasized the importance of the condemned individual's act. For Kant, the condemned is not supposed to be a means to an end, but instead a person with intrinsic worth.²¹⁵ Thus, when the condemned takes the life of another individual, they have created an inequality that must be rectified by the taking of their own life.²¹⁶ Hauerwas explains, "Punishment, so to speak, gives back the offense, not simply as vengeance, but in the sense that a true statement is made about what has happened."²¹⁷ Punishment, as seen as justified through retribution, is requital, and it requires no justification beyond requiting evil, thus evening out the inequality set up by the condemned's actions.²¹⁸ Thus, for Kant, retribution includes an obligation to punish those who deserve it to the amount that they deserve and a prohibition of punishing those who do not deserve it, for that would not comport with human dignity.²¹⁹

The difficulty, therefore, with retribution is that the criminal justice system is not perfect – there is the possibility that innocent individuals are executed. Some have argued, following Girard's sacrificial ritual theory, that a few innocent individuals being executed is fine because it still meets the goal of

Ernest van den Haag, "The Death Penalty Once More," In Bedau, *Death Penalty in America*, 445-456.

²¹⁵ Lloyd Steffen, *Executing Justice: The Moral Meaning of the Death Penalty* (Eugene, Oregon: Wipf & Stock Publishers, 1998), 72.

²¹⁶ Ibid.

²¹⁷ Hauerwas, "Punishing Christians," 64.

²¹⁸ Budziszewski, "Categorical Pardon," 110.

²¹⁹ Thorn, "Retribution Exclusive of Deterrence," 205.

restoring societal balance and enforcing state power.²²⁰ Executing the innocent, for Kant, would be a grave injustice because it violates that individual's right and dignity.²²¹ Vengeance is not a legitimate motive of punishment for Kant, for that would see the individual being executed as a means instead of an end unto himself or herself.²²²

This same qualm in retribution occurs if executions in fact have a brutalization effect – causing the death of innocent persons secondarily. For Kant, the person that dies must deserve to die because of his or her own actions, and if an execution allows for the brutalization of society that in effect can kill up to 262 innocent persons as Shepherd claims, then executions do not meet with Kant's perfect retribution.²²³ Furthermore, as Thorn explains, if an execution leads to an increase murder rate, then the execution of a condemned individual does not return society to an equal position; instead, the inequality of the original act would be exacerbated.²²⁴

When the state breaks the liminal line between God and humanity by executing the condemned individual, the state undermines its own retributive justification for capital punishment. The fact that in the liminal state lethal vengeance is not only possible, but likely enacted in the form of stranger homicides, means that the execution ultimately causes an overflowing of violence outside the previously legitimate form, resulting in the death of innocent persons unrelated to the original crime for which the condemned was convicted. The

²²⁰ Steffen, *Executing Justice*, 77.

²²¹ Ibid.

²²² Ibid., 83.

²²³ Shepherd, "Deterrence versus Brutalization," 232; Thorn, "Retribution Exclusive of Deterrence," 206-207.

²²⁴ Thorn, "Retribution Exclusive of Deterrence," 208.

death of innocent persons directly violates the Kantian retributive justification, invalidating retribution as a justification for capital punishment.

Conclusion

Understanding executions as Girardian sacrificial rituals that breach the liminal line between God and humanity undermines today's death penalty justifications of deterrence and retribution. This thesis articulates an explanation of the brutalization effect first mentioned by Cesare Beccaria's "On Crimes and Punishment." Brutalization occurs because the community is thrown into a liminal state upon the execution of the condemned. This liminal state occurs because the state violates the clear line between legitimate and illegitimate violence, or as Benjamin Rush stated, "Human laws, therefore, rise in rebellion against [God's solitary prerogative of the power over human life], when they transfer it to human hands."²²⁵

Executions as sacrificial rituals have been traced from Early New England until today, and although the mode of execution has changed, the fact that society is still attempting to bring about unity and peace has remained. Also carried over from Early New England executions to today has been the ultimate understanding that executions occur because of the divine approval of the state. The idea that the execution is in fact taking place because the condemned has violated a divinely imposed societal norm allows for the possibility that a liminal line between God and humanity still exists. Because this line still exists, the state violates it when performing executions.

The violation of the liminal line between God and humanity ultimately means that the death penalty cannot be justified today.

²²⁵ Rush, *Enquiry Into Effects of Public Punishments*, 32.

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