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# SMASHING THE TRAGIC ILLUSION OF JUSTICE: THE REPREHENSIBILITY OF THE DEATH PENALTY IN VIRGINIA

MEAGAN E. COSTELLO\*

*We cannot overcome crime by simply executing criminals, nor can we restore the lives of the innocent by ending the lives of those convicted of their murders. The death penalty offers the tragic illusion that we can defend life by taking life.<sup>1</sup>*

## INTRODUCTION

The death penalty is not a new phenomenon in America or the world. It is an unjust attempt to allow mankind to control the ultimate judgment of another. Not only is it morally reprehensible and arrogant to think society possesses the right to impose final judgment, but capital punishment is also applied in an unfair and arbitrary manner, preying on the weak and the poor, while the powerful extol their indifference as a means to justice. Nowhere is this more true than in the Commonwealth of Virginia.

This paper shows how these forces are at play in Virginia, and why, as Catholics and Americans we must strive to provide true justice for all citizens. Part I of this paper provides a brief history of the death penalty, in order to facilitate an

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<sup>1</sup> United States Conference of Catholic Bishops, *A Statement of the Administrative Board of the United States Conference of Catholic Bishops: A Good Friday Appeal to End the Death Penalty*, SOC. DEV. & WORLD PEACE (Apr. 2, 1999), <http://www.nccbuscc.org/sdwp/national/criminal/appeal.htm>.

understanding of the roots of the problem. Part II shows how the death penalty is being questioned both in the United States and in Virginia as an aberration of justice. Part III explores the religious response to the death penalty, focusing particularly on the Catholic viewpoint as expressed by Pope John Paul II in *Evangelium Vitae*.<sup>2</sup> Part IV examines why, especially in light of the Pope's call for respect of all human life, the death penalty in Virginia is an atrocity. The reasons for this are threefold: the perverse representation the most impoverished defendants receive, the strict judicial review of these sentences and indifference to them exhibited by the Supreme Court of Virginia and the Fourth Circuit, and the vengeance with which the death penalty is carried out, without regard for either the goals of punishment or the need for forgiveness. Lastly, Part V shows how the situation is slowly starting to improve, and implores all who become aware of this atrocity to educate others on how to make a difference, for action really does mean the difference between life and death.

### I. THE ROOTS OF THE DEATH PENALTY

The controversy surrounding the death penalty is not unique to our time, or our country.<sup>3</sup> The imposition of the death penalty can be traced back as far as the Eighteenth Century, B.C.<sup>4</sup> For

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<sup>2</sup> POPE JOHN PAUL II, ENCYCLICAL LETTER *EVANGELIUM VITAE* (Mar. 25, 1995), available at <http://www.cin.org/jp2ency/jp2evang.html> [hereinafter *EVANGELIUM VITAE*].

<sup>3</sup> John Willey Willis, *Capital Punishment*, in THE CATHOLIC ENCYCLOPEDIA, VOLUME XII, (Robert Appleton Co. 1911), available at <http://www.newadvent.org/cathen/12565a.htm> (last visited Nov. 14, 2001) (describing the Latin roots of the term "capital punishment" as well as the imposition of the death penalty by the Ancient Greeks and Romans). RICHARD C. DIETER, DEATH PENALTY INFORMATION CENTER, INTERNATIONAL PERSPECTIVES ON THE DEATH PENALTY: A COSTLY ISOLATION FOR THE U.S. (Oct. 1999), <http://www.deathpenaltyinfo.org/internationalreport.html> (listing the nations that abolished the death penalty along with the date of abolition). Dieter also lists the countries with which the United States is allied in its quest to maintain the death penalty. *Id.* Included in the list are the following nations: Afghanistan, North Korea, South Korea, Kazakhstan, Iran, Iraq, China, Japan, India, Pakistan, Somalia, Syria, Vietnam and Uzbekistan. *Id.* There is some irony in the fact that in the last century the United States has engaged in conflicts with many of these 'uncivilized' nations, and attempted to make them see the light of Western Civilization.

<sup>4</sup> DEATH PENALTY INFORMATION CENTER, HISTORY OF THE DEATH PENALTY, at <http://www.deathpenaltyinfo.org/history2.html> (last visited Dec. 18, 2001)

Christians, the most notorious example of the death penalty is the crucifixion of Christ, who, even in His greatest moment of physical pain, still valued mercy over vengeance.<sup>5</sup> From then on, capital punishment was a mainstay in the western world.<sup>6</sup> At times, Christians were the objects of the sword, while at other times, they wielded it against their enemies, or those whom they perceived to be such.<sup>7</sup> For centuries the situation remained status quo; capital punishment was an acceptable way for society to deal with those guilty of a wide variety of crimes.<sup>8</sup>

Of particular relevance to American history is the fact that Britain retained the death penalty for many crimes as late as the 1700's.<sup>9</sup> This is the primary reason this form of punishment took root in America. As one of the original colonies, Virginia has used the death penalty virtually since the moment it was colonized.<sup>10</sup> This is not to say there was a lack of abolitionist

[hereinafter *HISTORY*] (noting an Eighteenth Century codification of the death penalty in the Code of King Hammurabi of Babylon).

<sup>5</sup> See *Luke 23:33–43* (New American) (describing Christ's compassion as he said, "Father, forgive them, they know not what they do."). *Id.* at 23:34. Sister Helen Prejean, author of *Dead Man Walking*, urges those she speaks with to remember Jesus was executed as a criminal. See Stephen G. Vegh, *Nun Speaks Against Death Penalty: Sister Helen Prejean Urges Church Leaders to Bring Up Issue with Congregation*, *VIRGINIAN-PILOT*, Jan. 13, 2001, at B3. Further, Sr. Helen speculates, "If he'd been executed in an electric chair, we'd be wearing little chairs around our neck, and not the cross the Romans used in their anti-crime campaign." *Id.*

<sup>6</sup> See Willis, *supra* note 3 (describing the Jewish law of stoning, and the Athenian and Roman method of drinking hemlock or other poison. During the Middle Ages, burning at the stake was the chosen method, although beheadings were also utilized. In England and France, hanging was primarily employed).

<sup>7</sup> See JAMES J. MEGIVERN, *THE DEATH PENALTY: AN HISTORICAL AND THEOLOGICAL SURVEY* 63–64 (1997). Megivern's work chronicles the death penalty and the Christian reaction to it throughout history, both in Europe and America.

<sup>8</sup> Capital punishment has been the ultimate punishment for a wide variety of crimes throughout history. The ancient Greek and Roman civilizations imposed the death penalty for intentional homicide. See Willis, *supra* note 3. The most rampant application of this ultimate penalty during the Middle Ages was for witches and wizards. *Id.*

<sup>9</sup> "By the 1700's, 222 crimes were punishable by death in Britain, including stealing, cutting down a tree, and robbing a rabbit warren." *HISTORY*, *supra* note 4.

<sup>10</sup> The first recorded execution in Virginia took place in 1608 in Jamestown. *Id.* Captain George Kendall was executed for being a Spanish spy. *Id.* In 1612, the Governor promulgated the Divine, Moral and Martial Laws. *Id.* These authorized the use of the death penalty for such grandiose crimes as "stealing grapes, killing chickens, and trading with Indians." *Id.* In 1632, Virginia

sentiment,<sup>11</sup> but even then, these voices were drowned out by the popularity of vengeance.<sup>12</sup> Since the colonial period, most of the western world has abolished the death penalty, and has left the American justice system centuries behind.<sup>13</sup>

Modern history of the death penalty in America begins with a temporary abolitionist victory in *Furman v. Georgia*.<sup>14</sup> Four years later, this brief victory ended with *Gregg v. Georgia*.<sup>15</sup> In

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zealously continued its use of the death penalty by hanging Jane Champion, the first woman executed in America. *Id.*

<sup>11</sup> Abolitionist sentiment is not a new occurrence. Blackstone, Voltaire, and Beccaria are just a few of those who penned their objections to the death penalty. See Willis, *supra* note 3. See also, *HISTORY*, *supra* note 4 (adding Montesquieu and Bentham to those notables who opposed capital punishment). In America, Thomas Jefferson tried to reform Virginia's death penalty laws so that the ultimate punishment would be imposed only for murder and treason. See *HISTORY*, *supra* note 4. This modern vision was defeated by one vote. *Id.*

<sup>12</sup> During the height of English and French executions, viewing these gruesome displays was a favorite pastime of many citizens. See Willis, *supra*, note 3. In France, the women became known as les tricoteuses (the knitters), for this was how they passed the time at these daily executions. *Id.*

<sup>13</sup> See DIETER, *supra* note 3 (providing a list of nations that had abolished the death penalty, those who have not carried out an execution in the last ten years or have made an international commitment not to do so, and those who retain the death penalty only for crimes during war and other extraordinary circumstances).

<sup>14</sup> 408 U.S. 238 (1972). The precise result in *Furman*, was for the Supreme Court to declare the Georgia death penalty statute unconstitutional. *Id.* at 239-40. As a result, similar death penalty statutes in other jurisdictions were also stricken. Despite the result, however, the Justices did not agree on the reasons for the statute's unconstitutionality. The death penalty was found to be unconstitutional per se, as a violation of the Eighth Amendment prohibition on cruel and unusual punishment, only by Justices Brennan and Marshall. See *id.* at 305 (Brennan, J., concurring); *id.* at 360 (Marshall, J., concurring). The majority struck down the Georgia scheme because of the way in which it was administered, finding the imposition of the death penalty to be arbitrary and random, and an Eighth Amendment violation as a result. See *id.* at 256-57 (Douglas, J., concurring); *id.* at 308-10 (Stewart, J., concurring); *id.*; (White, J., concurring). Since the majority did not find the death penalty unconstitutional in all cases, the door was open for the states to re-write the applicable statutes.

<sup>15</sup> 428 U.S. 153 (1976). In *Gregg*, the Supreme Court, approved the re-written Georgia scheme for the imposition on the death penalty. *Id.* at 187, 198. Among the reasons for this were the new procedural safeguards that had been enacted, including bifurcated trials and automatic and meaningful appellate review. See *id.* at 198. After this stamp of approval, other states enacted similar statutes and after a four year hiatus, the death penalty returned to many states. To this day, the Supreme Court has not examined whether the procedural safeguards they approved in *Gregg* corrected the problems that resulted in the random and arbitrary imposition of the death penalty in the pre-*Furman* era.

reality, there are not many differences today in the way the death penalty is administered than there were in 1972. The administration of capital *justice* is completely arbitrary, and whether or not someone receives the death penalty is more dependent on geography and wealth, than on the facts of the crime. Virginia is a prime example.

## II. THE DEATH PENALTY CALLED INTO DOUBT IN THE NATION AND VIRGINIA

The procedures the Supreme Court approved in *Gregg* were supposed to ensure justice and fairness. More than twenty years later, it is apparent that the *justice* of capital punishment is a farce.<sup>16</sup> Law enforcement personnel realize this; the death penalty does not deter crime.<sup>17</sup> Some Justices of the Supreme

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<sup>16</sup> RICHARD C. DIETER, DEATH PENALTY INFORMATION CENTER, TWENTY YEARS OF CAPITAL PUNISHMENT: A RE-EVALUATION, (June, 1996), <http://www.deathpenaltyinfo.org/dpic.r01.html>. Dieter notes that many of the factors that led to the result in *Furman* are still present despite the 'safeguards' of *Gregg*. Among these are racial disparities, which is linked to poverty in many ways. *Id.* Almost 90% of those facing death have court appointed attorneys. *Id.* The death penalty is also applied in a geographically biased way, with the majority of executions occurring in the South, and even applied differently within those states, themselves. *Id.* Since *Furman*, there are two more reasons to doubt the fairness of the death penalty: the execution of juveniles and the mentally retarded. *Id.* Recently, in a Virginia case, the Supreme Court found the execution of the mentally retarded to violate the 8th Amendment's prohibition on cruel and unusual punishment. *Atkins v. Va.* 122 S. Ct. 2242 (2002). Writing for the majority, Justice Stevens cited the consistency with which states had begun to oppose such executions as a main reason for recognizing the prohibition. *Id.* at 2248–50.

<sup>17</sup> See DIETER *supra* note 16 (noting that over 80% of criminologists do not believe the death penalty deters crime). RICHARD C. DIETER, DEATH PENALTY INFORMATION CENTER, ON THE FRONT LINE: LAW ENFORCEMENT VIEWS ON THE DEATH PENALTY, (Feb. 1995) <http://www.deathpenaltyinfo.org/dpic.r03.html>. In this study, law enforcement officials were asked an open ended question regarding what were effective tools in fighting crime. The death penalty was not a popular answer, it "was mentioned by fewer than 2% of the chiefs and followed twenty-five other areas of concern." *Id.* The chiefs were also asked about cost-effective methods of battling crime. The death penalty ranked last behind more rehab programs, more anti-gang efforts and longer prison sentences. *Id.* This data shows that those who actually fight crime support lengthier prison sentences over the death penalty. Additionally, the 12 states that have not enacted the death penalty since 1976 have homicide rates below the national average, further dispelling the notion that capital punishment is a crime deterrent. See *States With No Death Penalty Have Lower Homicide Rates, Study Finds*, ACLU FREEDOM NETWORK (Sept. 22, 2000) at

Court acknowledge that fairness cannot be ensured, though not yet formally acting on this belief.<sup>18</sup> Families of victims understand that the hatred and vengeance the death penalty represents will not return their loved ones to them.<sup>19</sup> As a result

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<http://www.aclu.org/news/2000/w092200a.html>. The report also noted that half of the states with the death penalty had homicide rates above the national average.

<sup>18</sup> Justice Brennan made his opinion clear in *Furman*, and he continued his efforts as a Justice to subsequently re-instate the effect of that decision. He was perhaps the most vocal opponent of capital punishment to sit on the Supreme Court, but his statements were not limited to judicial opinions. "The barbaric death penalty violates our Constitution. Even the most vile murderer does not release the state from its obligation to respect dignity, for the state does not honor the victim by emulating his murderer." DIETER, *supra* note 16 (citing William Brennan, *What the Constitution Requires*, N.Y. TIMES, Apr. 28, 1996). Justice Blackmun was quite willing to concede the death penalty in America is a failure. See *Callins v. Callins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting) ("Rather than continue to coddle the Court's delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated to concede that the death penalty experiment has failed.")

More recently Justices Sandra Day O'Connor and Ruth Bader Ginsburg have vocalized their opposition to the death penalty. THE DEATH PENALTY INFORMATION CENTER, *THE DEATH PENALTY IN 2001: YEAR END REPORT* (Dec. 2001), at <http://www.deathpenaltyinfo.org/yearendreport2001.pdf> [hereinafter YEAR END REPORT]. Justice O'Connor was concerned with the possibility that innocent people had been executed, and she addressed this issue in speeches to local bar associations in July and October of 2001. *Id.* In April, 2001, Justice Ginsburg favored a moratorium on the Maryland death penalty, fearing capital defendants were receiving poor representation. *Id.*

<sup>19</sup> See SISTER HELEN PREJEAN, *DEAD MAN WALKING* 242-45 (1994). Sister Helen recounts the forgiveness embodied by Lloyd LeBlanc, father of the slain boy whose killer, Pat Sonnier, Sister Helen ministered to and befriended prior to his execution by the state of Louisiana. Sister Helen recounts how Mr. LeBlanc struggled with bitterness and vengeance, but would have found imprisonment for Pat Sonnier acceptable over death. She also tells the tale of forgiveness, how Mr. LeBlanc immediately forgave his son's killer and now prays for the repose of Pat Sonnier's soul.

Some victim's families reject outright the notion that the death penalty offers them any solace. "[T]he memory of the victim is grossly insulted by the premise that the death of one malfunctioning person will be a just retribution for the inestimable loss of the beloved." RICHARD C. DIETER, *DEATH PENALTY INFORMATION CENTER, SENTENCING FOR LIFE: AMERICANS EMBRACE ALTERNATIVES TO THE DEATH PENALTY* (Apr. 1993), <http://www.deathpenaltyinfo.org/dpic.r07.html> (quoting Marietta Jaeger, whose seven year old daughter was kidnapped and murdered). Jaeger also commented on the effect committing another murder, this one in her daughter's name, would have on the memory of her daughter, "[i]n my case, my own daughter was such a gift of joy and sweetness and beauty, that to kill someone in her name would have been to violate and profane the goodness of her life; the idea is offensive and repulsive to me." *Id.* (citing Letter from Marietta Jaeger to the

of these factors, there is more and more information available about the death penalty, and the American people are beginning to question the continued use of capital punishment, and to prefer alternatives to death sentences.<sup>20</sup>

There is no question that the death penalty system in America is riddled with errors. The most comprehensive study undertaken on this subject proves that executing an innocent citizen is a real possibility.<sup>21</sup> It examined every death penalty state and process, and determined that the American system of capital punishment was "broken."<sup>22</sup> Even more telling was the conclusion that the system of capital punishment in Virginia was the most anomalous of all examined.<sup>23</sup> The national error rate in capital cases was determined to be 68%.<sup>24</sup> That means that on average, between direct appeal, habeas petition and post-conviction relief, almost seven out of every ten death sentences imposed in America are reversed. When defendants are tried on

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Death Penalty Information Center, Feb. 17, 1993). Forgiveness, particularly forgiveness of enemies is a necessity of Christian prayer. This is so that good may triumph over evil, love triumph over sin. See CATECHISM OF THE CATHOLIC CHURCH, § 2844 (2d ed. 1997).

<sup>20</sup> See YEAR END REPORT, *supra* note 18 (noting 51% of Americans support a national moratorium until the death penalty can be studied adequately); DIETER, *supra* note 19 (observing "[o]nly 41% of the population would choose the death penalty over a sentence of life without parole coupled with restitution to the victim's family."). See also Part V, *infra*.

<sup>21</sup> See James S. Liebman, Jeffrey Fagan & Valerie West, A Broken System: Error Rates in Capital Cases, 1973-1995 (2000) (unpublished report). The authors note that with an overall error rate of 68% permeating the American capital punishment scheme, there must be some errors that slip through the cracks. *Id.* at 109.

<sup>22</sup> See *id.* at 1. The authors studied 5,760 capital sentences and 4,578 appeals that occurred from 1973-1995, and discovered that American courts during this time period found error serious enough to reverse in 68% of the cases. *Id.* at i. The risk of executing erroneously is a large one. The authors discovered that of the 68% of capital defendants whose sentences were reversed, 82% received a sentence less than death on retrial and 7% were found to be innocent. *Id.* at ii. This means that 68% of capital cases are tried more than once at taxpayer expense.

<sup>23</sup> See *id.* at 55 (noting Virginia, with the lowest level of state reversal either on direct appeal or post-conviction at 13% was "a distinct anomaly").

<sup>24</sup> See *id.* at i. The authors correctly point out that this level of error would not be tolerated by the public in other arenas that are far less important. *Id.* What consumer would purchase a television if they knew there was a 68% chance it would not work, and if the consumer got one that did not work, they could not take it back, but would have to purchase another one, instead? The authors also compare the error rate in capital cases with the error rate associated with non-capital cases, which hovers around 15%. *Id.* at 8-9.



capital charges in America, only 30% receive an error free trial.<sup>25</sup> In sharp contrast, in Virginia the reversal rate is 18%, by far the lowest of any state.<sup>26</sup> In spite of this low reversal rate, Virginia is second only to Texas in frequency with which death sentences are imposed.<sup>27</sup> Such a low reversal rate implies that either Virginia is the only state in the union that has figured out how to administer the death penalty fairly, with jurists that are superior to those of every other state, or that Virginia is a state that simply refuses to correct its mistakes under the guise of deference to judicial opinion and the law. Studies suggest the low reversal rate is caused by the latter.<sup>28</sup>

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<sup>25</sup> The authors are talking about serious error that results in a 68% reversal rate. They define this as “error that substantially undermines the reliability of the guilt finding or death sentence imposed at trial.” *Id.* at 5. This means the error must have been prejudicial, properly preserved, and discovered in time to make a difference. *Id.* at 121–22 note 33. The authors found the two most common types of serious error were inadequate defense counsel and intentional suppression of exculpatory evidence by the state. *Id.* at 5.

<sup>26</sup> Virginia’s courts have the lowest error detection rate. *Id.* at 66, A-59. When this is combined with the low reversal rate of the Fourth Circuit Court of Appeals (6% in Virginia cases), there is little hope for Virginia’s capital defendants that error is being treated as such throughout their appeals process. *Id.* at 59–60, B-6.

<sup>27</sup> See Roger Chesley, *Sept. 11 Attacks May Challenge Opponents of Executions*, VIRGINIAN-PILOT, Oct. 20, 2001, at B9. Since 1976, Texas has led the nation with 262 executions, followed by Virginia with 84 and Missouri with 56. See DEATH PENALTY INFORMATION CENTER, NUMBER OF EXECUTIONS BY STATE SINCE 1976, at <http://www.deathpenaltyinfo.org/dpicreg/html> (last updated Mar. 14, 2002).

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In considering whether Virginia capital judgments are substantially less error prone than all others in the nation or, on the other hand, whether laxer error detection takes place there, the death-sentencing states that surround Virginia and lie within its same federal judicial circuit—Maryland, North Carolina and South Carolina—may be treated as partial “natural controls.” Insofar as philosophical, cultural or historical factors—which probably do not vary much between Virginia and its neighbors—are thought to be the main influences on the amount of expected error in capital judgments, the fact that high capital error rates are consistently found in states bordering Virginia casts doubt on the hypothesis that Virginia capital sentences are starkly less error prone. For this analysis to show convincingly that Virginia courts are laxer detectors or serious capital error than courts in the surrounding states, there would have to be an explanation for that difference among presumably similar states.

Liebman, *supra* note 21, at 106–07.

### III. RELIGION AND THE DEATH PENALTY

There is no issue more complex and more emotional in the modern world than the right to life. The death penalty is at the heart of this issue. Proponents of the death penalty argue the Old Testament notion of an eye for an eye form of justice.<sup>29</sup> Yet, one of the most important teachings of the Old Testament, the Ten Commandments, forbids killing.<sup>30</sup> Abolitionists argue for mercy, stating that Jesus' teachings and eventual death by crucifixion eviscerate the vengeance of the Old Testament and replace it with teachings of mercy and forgiveness.<sup>31</sup> To kill in

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<sup>29</sup> *Exodus* 21:23–24 (New American). See Stephen M. Colecchi, *It's Time to Abolish the Death Penalty*, VIRGINIAN-PILOT, Dec. 24, 2000, at J5 (noting this assumption is premised on the notion that “we can balance the scales of justice fairly”, which is not a reality in the modern application of the death penalty. Sr. Helen Prejean points out that the notion of an ‘eye for an eye’ is mentioned only three times in the Bible. See Vegh, *supra* note 5.

<sup>30</sup> The Fifth Commandment states, “You shall not kill.” *Exodus* 20:13 (New American). Notably absent from this simple command is a list of exceptions. See Caryle Murphy, ‘Eye for an Eye’ Challenges Faithful, WASH. POST, May 13, 2001, at C1 (noting there are no exceptions or footnotes to the Commandment). The Pope urges us to use this Commandment as a spring board for the protection of all life. “It leads us to promote life actively, and to develop particular ways of thinking and acting which serve life.” *EVANGELIUM VITAE*, *supra* note 2, at ¶ 76.

Despite this call to serve life, some try to manipulate this command into a twisted justification for state sponsored executions. To return to the primary example of the Commonwealth of Virginia, consider how the Bible was used and manipulated by a prosecutor during closing arguments:

Some will say that society shouldn't take a life because that's murder also. That's not true. Vengeance is mine saith the Lord, but later when he covered the Earth with water and only left Noah and his family and some animals to survive, when he saw the damage what [sic] had been done to the Earth, God said, “I'll never do that again” and handed down the sword of justice to Noah. Noah is now the Government. Noah will make the decision who dies. “Thou shall [sic] not kill” is a prescription [sic] against an individual; it is not against Government. Because government has a duty to protect its citizens.

*Bennett v. Angelone*, 92 F.3d 1336, 1345–46 (4th Cir. 1996) (finding that since this was an argument to the jury and not evidence, the behavior of the attorney was proper). Here, the prosecutor is only telling half of the story. Government does have a duty to protect its citizens, and this is sanctioned by the Catholic Church, but it should serve the goals of punishment, not vengeance.

<sup>31</sup> See Vegh, *supra* note 5 (Sr. Helen Prejean reminds us the word mercy is mentioned more than 2000 times in the Bible). Mercy is “[t]he loving kindness,

the name of justice is to misunderstand the virtue of justice, and to confuse it with vengeance.<sup>32</sup> Justice implies respect and even-handed punishment for the guilty.<sup>33</sup>

Many of the major world religions have taken a position that values life over death.<sup>34</sup> Pope John Paul II has made a special calling to Catholics asking them to preserve life and dignity and to reject the death penalty as unnecessary in modern society.<sup>35</sup>

compassion, or forbearance shown to one who offends." CATECHISM OF THE CATHOLIC CHURCH, *supra* note 19, at 888. "In the fullness of time, by taking flesh and giving his life for us, the Son of God showed what heights and depths this law of reciprocity can reach." *EVANGELIUM VITAE*, *supra* note 2, at ¶ 76.

<sup>32</sup> "[T]he desire to execute someone as punishment can become a form of vengeance that Christianity strongly renounces." Guy Friddell, *Conference Condemns Death Penalty as Immoral*, VIRGINIAN-PILOT, Jan. 15, 2001, at B1.

<sup>33</sup> Justice is "[t]he cardinal moral virtue which consists in the constant and firm will to give their due to God and to neighbor." CATECHISM OF THE CATHOLIC CHURCH, *supra* note 19, at p. 885. The relationship of the state and the individual vis-à-vis this virtue is one of reciprocity. "[L]egal justice . . . concerns what the citizen owes to the community, and distributive justice . . . regulates what the community owes its citizens in proportion to their contributions and needs." *Id.* In the name of justice, the community has a responsibility to act with a view toward harmony, equity and the common good. *See id.* at § 1807. This means that as members of the community we are responsible not only for our own deeds, but for our deeds and attitudes towards others. *Id.* Thus, a punishment is only just if it "redress[es] the violation of personal and social rights by imposing on the offender an adequate punishment for the crime, as a condition for the offender to regain the exercise of his or her freedom." *EVANGELIUM VITAE*, *supra* note 2, at ¶ 56.

<sup>34</sup>

[T]he Catholic Church and the ruling bodies of most Protestant denominations favor abolition of the death penalty. . . [i]n Judaism, both the Reform and Conservative branches support abolition of the death penalty and the third, the Orthodox branch, favors a moratorium on use of the death penalty until ways are found to make it work fairly. . . Many religious faiths preach that incarcerating wrongdoers in prison is adequate to protect society. . . .

Friddell, *supra* note 32. *See also* Murphy, *supra* note 30 (noting Catholic and Jewish opposition to the death penalty, as well as the predisposition of Islam through the Koran toward forgiveness rather than vengeance and violence).

<sup>35</sup>

[T]he nature and extent of the punishment must be carefully evaluated and decided upon, and ought not go to the extreme of executing the offender except in cases of absolute necessity: in other words, when it would not be possible otherwise to defend society. Today however, as a result of steady improvements in the organization of the penal system, such cases are very rare, if not practically non-existent.

*EVANGELIUM VITAE*, *supra* note 2, at ¶ 56 (emphasis in original). *See* CATECHISM OF THE CATHOLIC CHURCH, *supra* note 19, §2267 (noting a just authority will

The use of the death penalty not only cheapens society as a whole, it cheapens our relationship with God.<sup>36</sup> From an early age Catholics are taught that God created each of us in His own image and likeness.<sup>37</sup> When we kill another human being, we are, in effect, killing a part of God, and as a result, a part of ourselves.<sup>38</sup> Respect for all life must be unequivocal.<sup>39</sup> The moral

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restrain itself from use of capital punishment and such restraint promotes the common good and human dignity).

<sup>36</sup> As the culture of life and the culture of death clash in modern society, “[w]e have to go to the heart of the tragedy being experienced by modern man: *the eclipse of the sense of God and of man. . . when the sense of God is lost, there is also a tendency to lose the sense of man, of his dignity and his life . . .*” *EVANGELIUM VITAE*, *supra* note 2, at ¶ 21 (emphasis in original).

<sup>37</sup> See CATECHISM OF THE CATHOLIC CHURCH, *supra* note 19, at §§ 1700–1715. The fact that we are made by God is apparent through our understanding of the natural order, our ability to exercise free will, and our ability to choose good over evil. *Id.*

<sup>38</sup>

[W]hen the sense of God is lost, the sense of man is also threatened and poisoned. . . Man is no longer able to see himself as “mysteriously different” from other earthly creatures; he regards himself merely as one more living being, an organism which, at most, has reached a very high stage of perfection. Enclosed in the narrow horizon of his physical nature, he is somehow reduced to being “a thing,” and no longer grasps the “transcendent” character of his “existence as man.” He no longer considers life as a splendid gift of God, something “sacred” entrusted to his responsibility and thus also to his loving care and “veneration.” Life itself becomes a mere “thing,” which man claims as his exclusive property, completely subject to his control and manipulation. Thus . . . man is no longer capable of posing the question of the truest meaning of his own existence, nor can he assimilate with genuine freedom these crucial moments of his own history. . . . By living “as if God did not exist,” man not only loses sight of the mystery of God, but also the mystery of the world and the mystery of his own being.

*EVANGELIUM VITAE*, *supra* note 2, at ¶ 22. Since God made us to mirror His goodness, when we act contrary to His message of mercy and human dignity by killing another, we are in effect, moving away from God, and losing sight of ourselves as well because of our dependency on Him for constant guidance and nourishment. This does not correct the wrong done by the defendant awaiting his fate in the court of human justice. What it does mean, however, is that we, as a society, have a duty to protect each other, including the defendant, and preserve each individual’s right to eternal judgment in His own time. To that end, not only is the death penalty unnecessary to protect society, when alternatives are available such as lengthy prison sentences without parole, but to seek such deadly punishment is contrary to our mission to protect human dignity for all individuals.

<sup>39</sup> Our time on earth is the beginning of our relationship with God. “Man is

relativism that permeates the right to life issue in our democracy will be the undoing of this great nation.<sup>40</sup>

Intentional killing is never justified, whether committed by the state<sup>41</sup> or by an individual.<sup>42</sup> Life is our most precious gift

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called to a fullness of life which far exceeds the dimensions of his earthly existence, because it consists in sharing the very life of God." *Id.* at ¶ 2. To guard this initial stage of our eternal relationship is part of our covenant with God, who by His grace gave us life we are called to respect the lives of all. "For the Christian it involves an absolute imperative to respect, love and promote the life of every brother and sister, in accordance with the requirements of God's bountiful love in Jesus Christ . . . We are asked to love and honour the life of every man and woman . . ." *Id.* at ¶ 77.

<sup>40</sup> Nothing good can come of this now prevalent attitude. It exists in the realm of the death penalty when the state values the life of the capital defendant less than that of other citizens by killing him in the name of justice for his victim. Some say this relativism is a natural byproduct of democracy. The truth is, that this relativism cheapens democracy. *Id.* at ¶ 70. "[I]t is precisely the issue of respect for life which shows what misunderstandings and contradictions, accompanied by terrible practical consequences, are concealed in this position." *Id.* Though democracy is generally associated as 'majority rule,' where the right to life is concerned, there must be a higher power at work, which is not as susceptible to changing opinions. *Id.* Civil law must strive to return to its roots in moral law and natural law. We must remember that God does not value one life over another. "As far as the right to life is concerned, every innocent human being is absolutely equal to all others." *Id.* at ¶ 57. When man administers justice, given our close relationship with God, our justice should be guided by the principles of human dignity. The death penalty does not meet this standard.

It is therefore urgently necessary, for the future of society and the development of a sound democracy, to rediscover those essential and innate human and moral values which flow from the very truth of the human being and express and safeguard the dignity of the human person: values which no individual, no majority and no State can ever create, modify or destroy, but must only acknowledge, respect and promote.

*Id.* at ¶ 71.

<sup>41</sup> This prohibition against state sponsored killing does not reach the issue of self-defense, which is permissible under Catholic teachings as unintentional. See CATECHISM OF THE CATHOLIC CHURCH, *supra* note 19, at § 2263 (noting this action has the intent of self-preservation, of which the killing of the aggressor is an unintentional occurrence). This extends to the state as a duty to protect society. *Id.* To defend oneself and others from aggression is not only permissible, but a duty to preserve life. *Id.* at 2264–2265. See also *EVANGELIUM VITAE*, *supra* note 2, at ¶ 55 (when the life of the aggressor is taken in self-defense, it is attributable to the aggressor, himself). Despite this 'permission' to protect its citizens, intentional killing of an individual by the state does not serve the goals of self-preservation because it uses more force than is necessary to protect society. See *id.* at ¶ 27 (noting that some view the death penalty as "legitimate defence", but that such is not the position of the Church). This form of state aggression is prohibited. "Infanticide, fratricide, parricide, and the murder of a spouse are especially grave crimes by reason of the natural bonds

from God, and the life of our neighbor is the greatest gift—a gift that is to be protected and revered.<sup>43</sup> As Catholics, the Pope has called us to work against the culture of death,<sup>44</sup> and towards a culture and society of life and love where all are safe to exist.<sup>45</sup>

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which they break. Concern for eugenics or public health *cannot justify any murder, even if commanded by public authority.*” CATECHISM OF THE CATHOLIC CHURCH, *supra* note 19, § 2268 (emphasis added).

<sup>42</sup> See *EVANGELIUM VITAE*, *supra* note 2, at ¶ 55 (“to kill a human being, in whom the image of God is present, is a particularly serious sin”). See also CATECHISM OF THE CATHOLIC CHURCH, *supra* note 19, at § 2268. Some proponents of the death penalty may argue that God forbids only the taking of innocent life, and the capital defendant having been found guilty does not meet this criteria. This argument fails for several reasons. First, it assumes that it is man with whom God has entrusted issues of life and death. These are issues God, in His wisdom, has clearly reserved for His eternal realm. “*Only God is the master of life!*” *EVANGELIUM VITAE*, *supra* note 2, at ¶ 55. Secondly, it presumes that God values the life of the innocent, as determined by human standards, over that of one whom society has judged to be guilty. “Before the moral norm which prohibits the direct taking of the life of an innocent human being ‘there are no privileges or exceptions for anyone . . . . Before the demands of morality we are all absolutely equal.’” *Id.* at ¶ 57 (citing POPE JOHN PAUL II, ENCYCLICAL LETTER *VERITATIS SPLENDOR* (Aug. 6, 1993).

<sup>43</sup>

The Creator has entrusted man’s life to his responsible concern, not to make arbitrary use of it, but to preserve it with wisdom and to care for it with loving fidelity. The God of Covenant has entrusted the life of every individual to his or her fellow human beings, brothers and sisters, according to the law of reciprocity in giving and receiving, of self-giving and of acceptance of others.

*EVANGELIUM VITAE*, *supra* note 2, at ¶ 76.

<sup>44</sup> Though not specifically called for regarding the issue of capital punishment, *EVANGELIUM VITAE*, calls for Catholics to act as conscientious objectors, and to avoid supporting laws that infringe upon the dignity of human life and the right of all human life to exist. The methods advanced for such objection include, disobeying the law, to avoid promoting the law and to not vote for these laws. See *id.* at ¶ 63 (calling for such tactics to be used to respond to the threat to life posed by abortion and euthanasia). See also CATECHISM OF THE CATHOLIC CHURCH, *supra* note 19, at § 2242 (authorizing disobedience of the law when it is “contrary to the demands of the moral order, to the fundamental rights of persons, or the teachings of the Gospel.” We are reminded that even as citizens, our first responsibility is to God.) (emphasis added).

<sup>45</sup>

We are asked to love and honour the life of *every man and woman* and to work with perseverance and courage so that our time, marked by all too many signs of death, may at last witness the establishment of a new culture of life, the fruit of the culture of truth and love.

*EVANGELIUM VITAE*, *supra* note 2, at ¶ 77 (emphasis added).

#### IV. A CLOSER LOOK: CAPITAL PUNISHMENT IN VIRGINIA

The death penalty is fundamentally wrong. It infringes upon the most basic of all human rights, the right to life itself, and is increasingly unnecessary in modern society. Despite this, the administration of the death penalty in the Commonwealth of Virginia is particularly egregious. Most of the inmates on death row are poor and often receive ineffective counsel, who may not question witnesses, discover prominent evidence, or even raise a defense at all. Though the representation afforded to these inmates usually meets the low threshold necessary to be constitutionally sufficient, such actions would almost certainly result in termination by paying clients. Appointing such poor representation causes a breakdown of the justice system and compromises the adversarial process. In stark contrast to the vast and virtually unlimited resources of the state, the impoverished capital defendant receives only a court appointed advocate, without any assurance that such advocate has the necessary time or qualitative experience needed to try the complicated issues arising in capital cases.

Appellate judges, who are in a position to grant capital defendants the protection they need, compound this dilemma by hiding behind the letter of the law with a great level of indifference to human life. The process of denial begins with the Supreme Court of Virginia certifying the case for review. It purports to conduct a proportionality and fairness review of the capital sentence. This process is flawed, as the methods used by the Supreme Court of Virginia slant the decision towards maintaining the death sentence imposed. Furthermore, the courts allow procedural mistakes to survive judicial review rather than granting capital defendants judicial protection and fairness. Once the United States Supreme Court has denied the direct appeal, the habeas process begins. Here, the Supreme Court of Virginia and the Fourth Circuit's continued unwillingness to offer protection leaves capital defendants in Virginia without any real hope of fairness or justice.

With this as the background for its administration, it becomes clear that the death penalty in Virginia serves no purpose of punishment and is in no way justice for any victim or reparation for any crime. The death penalty in Virginia is not a measured and even punishment, as it is inflicted only on the

poorest and weakest members of society. The death penalty is excessive and extends far beyond punishment needed by a modern society to protect its citizens. The application of the death penalty in Virginia is nothing shy of pure, bloodthirsty vengeance, which desperately needs to be tempered with mercy and fairness for the sake of all.

#### A. *Unjust and Unequal Treatment for the Poor*

When the Supreme Court overturned the death penalty scheme in America, it did so because of the arbitrary way in which sentences were administered.<sup>46</sup> The Justices opined there was no meaningful way to discern the cases in which the ultimate sentence was imposed from those in which it was not.<sup>47</sup> When the Justices re-instated the death penalty as Constitutionally acceptable, with certain provisions,<sup>48</sup> it was done on the presumption that new precautions would result in a fair and even-handed form of this ultimate justice.<sup>49</sup> With twenty-five years of experience under this new scheme, it is now obvious that these procedures do not work.<sup>50</sup> The Commonwealth of Virginia is no exception. The imposition of the death penalty in Virginia is arbitrary, not because of the way the statute is written, but because of the process by which a death sentence comes to fruition.

Though there are several reasons why the death penalty in Virginia is arbitrary,<sup>51</sup> poverty of the defendant is a leading

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<sup>46</sup> See *Furman v. Georgia*, 408 U.S. 238, 293–94 (1972) (Brennan, J., concurring). Death penalty laws should not be imposed wantonly and freakishly. *Id.* at 310 (Stewart, J., concurring).

<sup>47</sup> See *id.* at 313 (White, J., concurring); *id.* at 293–94 (Brennan, J., concurring).

<sup>48</sup> See *Gregg v. Georgia*, 428 U.S. 153, 179–80 (1976) (including meaningful appellate review, bifurcated trials, and strict guidance by the legislature).

<sup>49</sup> See *id.* at 198 (noting the concerns of *Furman* appear to be met by these new procedures).

<sup>50</sup> See Liebman, *supra* note 21, at 109–10 (concluding high error-detection rates, combined with cost and length of appeal render the death penalty in America a complete failure).

<sup>51</sup> ACLU OF VIRGINIA, UNEQUAL, UNFAIR AND IRREVERSIBLE: THE DEATH PENALTY IN VIRGINIA (Dec. 2000), [http://members.aol.com/\\_ht\\_a/acluva/DPSTUDY.doc](http://members.aol.com/_ht_a/acluva/DPSTUDY.doc) [hereinafter ACLU]. This report asserts several reasons why the death penalty as applied in Virginia are unconstitutional: prosecutorial discretion, geography, quality of counsel, lack of meaningful judicial review and race. See also ACLU, ACLU BRIEFING PAPER #8: THE DEATH PENALTY, at <http://www.aclu.org/library/pbp8.html> [hereinafter



factor in its imposition, as it relates to a defendant's ability to afford counsel.<sup>52</sup> This factor is exemplified by Virginia where 97% of inmates on death row were too poor to afford an attorney and instead had one appointed for them.<sup>53</sup> The impact of affluence on retaining representation cannot be overestimated. This wealth discrepancy is "the gravest of the problems" affecting the imposition of the death penalty, as it produces arbitrary results.<sup>54</sup> The fact is clear, "[p]oor people do not have the same opportunity to buy their lives"<sup>55</sup> that the wealthy do. In many instances, the ability to *hire* an attorney is literally the difference between life and death. "The American Bar Association and many scholars have found that what most often determines whether or not a death sentence is handed down is not the facts of the crime, but the quality of the legal representation."<sup>56</sup>

When the indigent do not receive competent appointed counsel and a death sentence is imposed, such a result is arbitrary. A defendant with his life at stake should be entitled to the best our justice system has to offer, especially when opposed by the virtually unlimited resources of the state. When these defendants do not have adequate counsel, the judicial process breaks down, and the outcome is unfair. "The process of sorting out who is most deserving of society's ultimate punishment does

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BRIEFING PAPER].

<sup>52</sup> Poverty and race are often intertwined in America. See Hugo Adam Bedeau, *The Case Against the Death Penalty*, ACLU FREEDOM NETWORK, at [http://www.aclu.org/library/case\\_against\\_death.html](http://www.aclu.org/library/case_against_death.html) (last visited Dec. 18, 2001) (noting there is widespread discrimination against the poor through the imposition of the death penalty, and racial minorities tend to be poor in American society). See also, BRIEFING PAPER, *supra* note 51 (discussing race as a factor).

<sup>53</sup> See Colecchi, *supra* note 29; Liebman, *supra* note 21, at 107 (commenting since the indigent are forced to use appointed attorneys which are substandard, necessary evidence often remains undiscovered, resulting in a higher imposition of the death sentence on those with appointed counsel). This 97% rate is higher than the 90% national rate of those indigents with appointed counsel facing execution. See Bedeau, *supra* note 52.

<sup>54</sup> See Frank Green, *Standards Urged In Capital Cases; Quality of Lawyers Called Uneven*, RICHMOND TIMES-DISPATCH, June 28, 2001, at A1 (quoting The Blue Ribbon Committee of the Constitution Project's Death Penalty Initiative which concluded "the death penalty as currently administered [is] arbitrary, unfair, and fraught with serious error . . .").

<sup>55</sup> BRIEFING PAPER, *supra* note 51. Defending a capital case can require an attorney to work 700-1000 hours; time which the poor simply can't afford. *Id.*

<sup>56</sup> *Id.* See also ACLU, *supra* note 51, at 12 (commenting the quality of counsel should not be the difference between life and death).

not work when the most fundamental component of the adversary system, competent representation by counsel, is missing.”<sup>57</sup> This does not imply, of course, that all appointed lawyers are deficient or incompetent in other areas. It does mean, however, that these lawyers are often not prepared to deal with the unique challenges facing a capital defendant.<sup>58</sup>

In order for appointed counsel to be constitutionally insufficient, they must violate the standard established by the United States Supreme Court in *Strickland v. Washington*.<sup>59</sup> To establish that counsel was constitutionally inadequate defendants must prove the attorney’s performance “fell below an objective standard of reasonableness”<sup>60</sup> and that “there is a reasonable probability but for counsel’s unprofessional errors, the result of the proceeding would have been different.”<sup>61</sup> This standard is so easy to meet that attorneys who slept through trials have been found to provide constitutionally satisfactory representation.<sup>62</sup> Despite the low bar for acceptability set by *Strickland*, it is clear that the representation received by impoverished capital defendants in Virginia is questionable.<sup>63</sup>

In an effort to provide indigent defendants with *quality* representation in capital cases, Virginia has established guidelines for appointed counsel.<sup>64</sup> The necessary pre-requisites

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<sup>57</sup> Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1837 (1994).

<sup>58</sup> *Id.* at 1836 (“Poor people accused of capital crimes are often defended by lawyers who lack the skills, resources, and commitment to handle such serious matters.”).

<sup>59</sup> 466 U.S. 668 (1984).

<sup>60</sup> *Id.* at 688.

<sup>61</sup> *Id.* at 694.

<sup>62</sup> See ACLU, *supra* note 51, at 19 (citing incidents of such behavior in Georgia and Texas). In Virginia, counsel has been found to be effective where they recommended the defendant accept a plea offer for capital murder. This meant the defendant agreed to be put to death, and avoided a trial and a chance that a jury would impose a lesser sentence. See *id.* at 28–29 (citing *Stout v. Commonwealth*, 237 Va. 126 (1989); *Beaver v. Commonwealth*, 232 Va. 521 (1987)).

<sup>63</sup> See Frank Green, *A Capital Defense?: Are Court Appointed Lawyers in Virginia Providing a Quality Defense in Trials Where the Lives of Their Clients are at Stake?*, RICHMOND TIMES-DISPATCH, June 24, 2001, at C1 (“the line between a less-than-perfect defense and a defense so bad it violates constitutional rights is a fuzzy one, and, in Virginia, it’s extremely difficult to prove the line has been crossed”).

<sup>64</sup> See VA. CODE ANN. §§ 19.2 to 163.7-8 (Michie 2001) (listing qualifications for attorneys appointed in capital cases).

include five years of experience in criminal trials, with at least five jury trials where the underlying charge is a violent felony; six hours of training in representing a capital defendant; and prior experience with a capital case.<sup>65</sup> The Virginia Public Defender's Commission keeps a list of qualified volunteers, without verifying the truthfulness of the qualifications.<sup>66</sup> Yet, judges are not required to select an attorney from this list when appointing representation for a capital defendant.<sup>67</sup> Additionally, "[t]hese requirements are all concerned with past experience rather than past competence . . . [there is no way] to distinguish between bad, but experienced lawyers and good lawyers."<sup>68</sup> While this is a positive step, more needs to be done, as these safeguards alone are not sufficient to ensure that capital defendants receive the representation they deserve.

One example of such 'quality' representation can be found in the case of Mr. Lonnie Weeks, Jr.<sup>69</sup> Weeks' appointed counsel filed his habeas petition in the wrong court.<sup>70</sup> On the day it was due in the Supreme Court of Virginia, the attorney discovered the mistake, withdrew it from the wrong court and mailed it to the Supreme Court of Virginia, where it arrived three days later.<sup>71</sup> Since it was mailed only by regular mail, and not certified or registered mail, the petition, received three days after the filing date, was dismissed as untimely.<sup>72</sup> The Fourth Circuit Court of Appeals then found these mistakes *were not grounds* for an ineffective assistance of counsel claim, and dismissed Weeks' appeal.<sup>73</sup>

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<sup>65</sup> See ACLU, *supra* note 51, at 12.

<sup>66</sup> *Id.* at 13.

<sup>67</sup> See *id.* (noting in a survey of judges, 18% responded they had never appointed an attorney from the list, and also noting the Public Defender Commission does not keep track of capital appointments in order to determine which judges use the list and which do not).

<sup>68</sup> *Id.* at 12-13.

<sup>69</sup> See *Weeks v. Angelone*, 176 F.3d 249 (4th Cir. 1999) *aff'd* 528 U.S. 225 (2000).

<sup>70</sup> See *id.* at 273.

<sup>71</sup> See *id.*

<sup>72</sup> See *id.* at n. 17.

<sup>73</sup> See *id.* at 274. The Fourth Circuit was equally unsympathetic to the claims of Andre L. Graham, whose habeas counsel was not initially notified of his appointment until four days before the filing date, and though being granted an extension, failed to investigate and develop Graham's petition while responding to motions made by the Commonwealth during such preparation time. See *Graham v. Angelone*, No. 99-4, 1999 U.S. App. LEXIS 22080, \*10-\*11

Though this is just one example, it is indicative of a widespread problem in Virginia. The attorneys of the men on Virginia's death row were six times more likely to be disciplined by the bar, when compared to other attorneys in the Commonwealth.<sup>74</sup> One of the major ways in which appointed counsel fail their clients is a failure to develop mitigation evidence on their behalf.<sup>75</sup> The practical effect is short trials, where the jury does not get a complete look, if they gain any insight at all, of the defendant and his possible motives for the crime.<sup>76</sup> Instead, this information is generally unearthed by appointed appellate counsel, when it is too late to reverse the death sentence.<sup>77</sup> Literally, "the quality of trial counsel can determine the difference between a life sentence and a death sentence in Virginia."<sup>78</sup>

Despite these instances, the Virginia judiciary, which oversees the performance of appointed counsel at trial, seems very pleased with the level of representation received by capital defendants.<sup>79</sup> These judges, however, have a responsibility to appoint counsel that is competent to represent a capital defendant.<sup>80</sup> "If a judge regarded trial representation as being systematically deficient, he or she would be obligated to take corrective measures. Indeed a judgment impugning the competence of defense counsel in capital cases would in itself raise grave doubts about any death sentence imposed by that

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(4th Cir. 1999).

<sup>74</sup> See *ACLU*, *supra* note 51, at 18 (noting 6% had faced some kind of disciplinary action, although these actions were not directly related the capital cases).

<sup>75</sup> See *id.* at 16. Failure to develop mitigation evidence has not proved viable grounds for ineffective assistance of counsel. See *id.* at 29, notes 14–15 (citing *Saunders v. Commonwealth*, 242 Va. 107 (1991); *Wise v. Commonwealth*, 230 Va. 322 (1985)).

<sup>76</sup> See *id.* at 16–17.

<sup>77</sup> See *id.* at 17 (citing two examples where evidence of defendants' treatment for psychosis was not uncovered by trial counsel, not presented at trial, and resulted in the imposition of the death sentence by a jury).

<sup>78</sup> *Id.* at 20.

<sup>79</sup> See *id.* at 15 (citing a Virginia State Crime Commission Survey); see also *Bailey v. Commonwealth*, 529 S.E.2d 570, 581–82 (Va. 2000) (not only dismissing Bailey's claim that the Commonwealth does not foster a system for indigent capital defendants, but also citing the Report of the Virginia State Crime Commission on Capital Representation of Indigent Defendants, which stated that trial court judges found the behavior of these appointed attorneys acceptable ninety-eight percent of the time).

<sup>80</sup> See *ACLU*, *supra* note 51, at 15.

judge.”<sup>81</sup> In addition, it must be noted that these judges see only what trial attorneys present at trial, and generally do not learn of the failures to uncover mitigating evidence.<sup>82</sup>

Despite the fact that these capital defendants are accused of violent crimes, as Catholics, we have a special calling to aid the poorest and weakest members of society.<sup>83</sup> Jesus calls his followers to reserve the best for the poor and those who cannot provide for themselves.<sup>84</sup> Yet, in the realm of capital representation, our society falls short of providing indigent capital defendants with the best counsel society has to offer.<sup>85</sup> We must not be indifferent to the fates of these defendants, as their fate is intricately intertwined with our own.<sup>86</sup> We must strive to help them by providing them with fair representation, a fair trial, and a fair sentence.<sup>87</sup> This imperative for helping the

<sup>81</sup> *Id.* (quoting University of Virginia Law Professor Richard Bonnie) (footnote omitted).

<sup>82</sup> *See Id.*

<sup>83</sup> *See EVANGELIUM VITAE, supra* note 2, at ¶ 32 (“It is above all the ‘poor’ to whom Jesus speaks in his preaching and actions.”).

<sup>84</sup> *See CATECHISM OF THE CATHOLIC CHURCH, supra* note 19, at § 2405 (“Those who hold goods for use and consumption should use them with moderation, reserving the better part for guests, for the sick *and the poor.*”) (emphasis added).

<sup>85</sup> *See EVANGELIUM VITAE, supra* note 2, at ¶ 20 (“How is it still possible to speak of the dignity of every human person when the killing of the weakest and most innocent is permitted? In the name of what justice is the most unjust of discriminations practised: (sic) some individuals are held to be deserving of defence and others are denied that dignity?”) (quoting John Paul II, *Address to the Participants on the Study Conference on “The Right to Life and Europe”* (Dec. 18, 1987)).

<sup>86</sup>

The crimes of which [capital defendants] are accused bring out anger, hatred and a quest for vengeance on the part of most people . . . All of this leads to, at best, indifference and, more often, hostility toward the plight of those accused. . . . It is tempting to pretend that [those] on death row share a fate in no way connected to our own, that our treatment of them sounds no echoes beyond the chambers in which they die. *Such an illusion is ultimately corrosive. . . [t]he way in which we choose those who will die reveals the depth of moral commitment among the living.*

Bright, *supra* note 57, at 1878 (emphasis added). *See also* CATECHISM OF THE CATHOLIC CHURCH, *supra* note 19, at § 1932 (noting the “urgent” need to serve the disadvantaged).

<sup>87</sup> *See CATECHISM OF THE CATHOLIC CHURCH, supra* note 19, at §2443 (“God blesses those who come to the aid of the poor and rebukes those who turn away from them.” (citing *Matthew* 5:42; 10:8)).

disadvantaged is even more immediate in the Commonwealth of Virginia.<sup>88</sup>

*B. The Indifference of the Supreme Court of Virginia and the Fourth Circuit Court of Appeals*

Those who distribute justice must do so fairly. As already shown, the death penalty is inflicted arbitrarily on the poorest members of society. To compound this, those in a position to offer additional protection often turn a blind eye to the plight of those sentenced to death. As Catholics, we are called upon to respect human dignity. The death penalty, while condoned by and imposed in the name of civil authority, robs this dignity from all of us.<sup>89</sup> This is a perversion of civil authority.<sup>90</sup> Government must recognize the fundamental notions of justice and human dignity, and refuse to forsake the common good for popularity and political gain.

The threat to human life and human dignity posed by the death penalty is real. Those in a position to right this wrong must not be allowed to stand idly by while the machinery of death obliterates more human lives. “Some threats [to human life] come from nature itself, but they are made worse by the *culpable indifference and negligence* of those who could in some

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<sup>88</sup> See Green, *supra* note 63 (observing the importance that capital defendants receive quality counsel given the low reversal rate in the Virginia appeals process).

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The exercise of authority is meant to give outward expression to a just hierarchy of values in order to facilitate the exercise of freedom and responsibility by all. Those in authority should practice distributive justice wisely, taking account of the needs and contribution of each, with a view to harmony and peace. They should take care that the regulations and measures they adopt are not a source of temptation by setting personal interest against that of the community. *Political authorities* are obliged to respect the fundamental rights of the human person. They will dispense justice humanely by respecting the rights of everyone, especially of families and the disadvantaged.

CATECHISM OF THE CATHOLIC CHURCH, *supra* note 19, at §2236–2237 (emphasis in original) (footnote omitted).

<sup>90</sup> “[P]ublic authority can . . . never presume to legitimize as a right of individuals—even if they are the majority of the members of society—an offence [sic] against other persons caused by the disregard of so fundamental a right as the right to life.” *EVANGELIUM VITAE*, *supra* note 2, at ¶ 71.

cases remedy them.”<sup>91</sup> This indifference is rampant in Virginia. “Virginia has a moral obligation to its citizens to see that justice is administered fairly, and to review cases in which fairness is at issue. When it comes to capital punishment, the state has abdicated this responsibility, choosing instead to defend every death penalty it obtains.”<sup>92</sup> This responsibility is ‘abdicated’ throughout the judicial process in Virginia, from the inadequate counsel that indigents receive to the lack of meaningful judicial review these defendants receive on appeal.

“Meaningful” appellate review is necessary to ensure that the imposition of the death penalty is not arbitrary.<sup>93</sup> The Virginia procedure for judicial review, while maintaining the appearance of meaningful judicial *procedure*, falls far short of meaningful judicial *review*. Once a death sentence is imposed, the case is reviewed on an expedited basis by the Supreme Court of Virginia on direct appeal. The court conducts a mandatory proportionality review and attempts to ensure that the death sentence was not predicated upon passion or prejudice. When it maintains the death sentence, the defendant can appeal to the United States Supreme Court. Once certiorari is denied on direct appeal, the habeas corpus process begins. This starts in the Supreme Court of Virginia, then the appeal is taken to the Fourth Circuit Court of Appeals, and lastly, a final appeal for certiorari is made to the United States Supreme Court.<sup>94</sup>

On direct appeal, the two most important issues reviewed are proportionality and prejudice. As a general rule, these issues which were intended to be important safeguards against the arbitrary imposition of the death penalty are usually dealt with in short order. It is incumbent on the Supreme Court of Virginia to review each death sentence to determine whether such sentence is “excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.”<sup>95</sup> The court must then compare the sentence imposed in the case at

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<sup>91</sup> *Id.* at ¶ 10 (emphasis added).

<sup>92</sup> ACLU, *supra* note 51, at 34.

<sup>93</sup> See *Gregg v. Georgia*, 428 U.S. 153, 195 (1976).

<sup>94</sup> See generally, ACLU, *supra* note 51 (discussing the mechanics of the process of judicial review in Virginia).

<sup>95</sup> VA. CODE ANN. § 17.1-313(C)(2)(Michie 2001). Though this proportionality review is required by statute, it is not required by the Constitution. See *Roach v. Angelone*, 176 F.3d 210, 216 (4th Cir. 1999) (citing *Pulley v. Harris*, 465 U.S. 37, 50–51 (1994)).

issue with the other capital cases reviewed by the Supreme Court of Virginia.<sup>96</sup>

This reveals the first problem with this method of compilation: rarely do those instances where a life sentence was imposed reach the Supreme Court of Virginia, as a review of those cases is not mandated by statute.<sup>97</sup> Additionally, crimes in which defendants plead guilty in exchange for a life sentence are not considered, and the facts can be equally as heinous as those instances where a sentence of death is imposed.<sup>98</sup> Thus, the proportionality review is incomplete because the court considered a disproportionately small number of death sentences.<sup>99</sup>

The second problem of proportionality review is the indifference of the Supreme Court of Virginia to the plight of those sentenced to death. A death sentence is considered proportionate, and is upheld if, after consideration of the defendant and the facts surrounding the crime at issue, “the court is satisfied that, “while there are exceptions,” other sentencing bodies in this Commonwealth generally imposed the supreme penalty of death for comparable or similar offences.’”<sup>100</sup> The circular reasoning the Virginia Supreme Court uses in its review makes it clear that the determination of proportionality is predetermined.<sup>101</sup>

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<sup>96</sup> See VA. CODE ANN. § 17.1-313(E)(Michie 2001).

<sup>97</sup> See Kelley E. P. Bennett, Note, *Symposium, A Quarter Century of Death: A Symposium on Capital Punishment in Virginia Since Furman v. Georgia: Proportionality Review: The Historical Application and Deficiencies*, 12 CAP. DEF. J. 103, 103-04, 109 (1999).

<sup>98</sup> See Kiran Kirshnamurthy, *No Parole for Widow's Murder*, RICHMOND TIMES-DISPATCH, June 21, 2001 at B1 (reporting Ashby Edward Hall plead guilty and received life without the possibility of parole for bludgeoning and stabbing an elderly woman in her home so hard that her dentures were knocked out of her head, then robbing her). Mr. Hall's case will not be considered when the Supreme Court of Virginia uphold the death sentence of another prisoner, because such is not part of the cases heard by that court.

<sup>99</sup> See Bennett, *supra* note 98 at 109.

<sup>100</sup> *Id.* at 107 (citing *Williams v. Commonwealth*, 472 S.E.2d 50, 54 (Va. 1996) (citing *Roach v. Commonwealth*, 468 S.E. 2d 98, 114 (Va. 1996)).

<sup>101</sup> Consider the absurdity of this process: the Virginia Supreme Court is directed to conduct a proportionality review of death sentences, but the cases before them are disproportionately those in which a sentence of death was imposed. Then, when actually reviewing the case, and purporting to consider the defendant and the crime at hand, the death sentence will be upheld, it seems, if such sentence has ever been imposed for that crime or a similar crime, in Virginia, regardless of whether the opposite result has also been reached under another similar fact pattern. To an outsider, it seems that in Virginia,



To exemplify the circularity of this review, consider *Burns v. Commonwealth*.<sup>102</sup> Burns was convicted of capital murder during the commission of rape or forcible sodomy.<sup>103</sup> When conducting its proportionality review, the Supreme Court of Virginia examined other cases in which the death penalty was imposed for murder during the commission of rape or forcible sodomy.<sup>104</sup> Then the court, on its own volition, considered two cases where life sentences were imposed.<sup>105</sup> Since such a review might have led the court to conclude that such a sentence was disproportionate, given that this crime had previously resulted in both life sentences and capital punishment, the court asserted it had the power to consider all cases in which a death sentence was imposed. When viewed in that light, Burns' sentence was not disproportionate.<sup>106</sup>

The second statutorily mandated review conducted by the Supreme Court of Virginia is for "passion, prejudice, or any other arbitrary factor."<sup>107</sup> The result of this process is just as dismal as the proportionality review.<sup>108</sup> For instance, in a case where the prosecutor called the defendant a "monster" and a "predator," and the judge stated that the defendant should be "put in a gunny sack with some bricks and dropped off a bridge," it was held that passion and prejudice were not the reason for imposition of the death penalty.<sup>109</sup> Similarly, this court found no passion or prejudice to be present when the prosecution called the defendant an "animal" and urged the jury to "send a message."<sup>110</sup> The possibility that a jury's verdict could be based

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death sentences will be upheld as often as the state supreme court wants to uphold them. As of 1999, the Virginia Supreme Court had never overturned a death sentence as disproportionate. *See id.*

<sup>102</sup> 541 S.E.2d 872 (Va. 2001), *cert. denied*, 122 S. Ct. 621 (2001).

<sup>103</sup> *See id.* at 877.

<sup>104</sup> *See id.* at 896.

<sup>105</sup> *See id.* (citing *Horne v. Commonwealth*, 339 S.E.2d 186 (Va. 1986); *Keil v. Commonwealth*, 278 S.E.2d 826 (Va. 1981)).

<sup>106</sup> *See id.* at 896-97.

<sup>107</sup> VA. CODE ANN. § 17.1-313(C)(1) (Michie 2001).

<sup>108</sup> As of 1999, the Supreme Court of Virginia had not reversed one sentence on this ground. *See William S. Geimer, Two Decades of Death: Trashing the Rule of Law in Virginia*, 11 CAP. DEF. J. 293, 303 (1999).

<sup>109</sup> *See Bennett, supra* note 98, at 106 (citing *Payne v. Commonwealth*, 509 S.E.2d 293, 294 (Va. 1999)).

<sup>110</sup> *Burns*, 541 S.E.2d at 896. When Burns' counsel moved for a mistrial after these remarks by the prosecution, such motion was denied. *See id.* at 894. The Supreme Court of Virginia found this denial to be proper since, by the time

on the brutality of the crime it is confronted with, or could be a response to one-sided presentation of the case, does not seem to pose a problem for the Supreme Court of Virginia, which frequently allots only one sentence in a multi-page opinion to the dismissal of such a claim.<sup>111</sup> “As emotional as one would think life and death trials might be, that is apparently not the case in Virginia. Everything is calm, rational and fair.”<sup>112</sup>

All of the foregoing occurs during the initial, direct appeal to the Supreme Court of Virginia. Since the United States Supreme Court rarely grants certiorari,<sup>113</sup> the next step of Virginia’s effort to provide a “meaningful” appellate process is the habeas corpus petition. Though this process originates in the Supreme Court of Virginia, the real review happens when the petition reaches the Fourth Circuit Court of Appeals.<sup>114</sup> The ability of this court to review a state-imposed death sentence is limited by the Anti-Terrorism and Effective Death Penalty Act,<sup>115</sup> which gives a great deal of deference to the rulings of the state courts. In order for a habeas petition to succeed, the defendant must demonstrate that the decision of the state court was, “contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.”<sup>116</sup> The

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the motion for a mistrial had been made, the prosecution had said “excuse me” three times to the jury and no longer called the defendant an animal, but instead said he was “a person acting like an animal.” *See id.* at 894–95.

<sup>111</sup> *See id.* at 896 (“We do not believe any of these factors created an atmosphere of passion or prejudice that influenced the sentencing decision.”). In holding that calling the defendant an animal did not warrant a finding of passion or prejudice, the court provided no guidelines as to what types of behavior could rise to such a level. *See also* *Atkins v. Commonwealth*, 534 S.E.2d 312, 318 (Va. 2000) (“[W]e initially note that Atkins has presented no argument that his sentence of death was influenced by passion, prejudice or any other arbitrary factor, nor has our review of the record revealed any such improper influence.”), *rev’d* 122 S. Ct. 2242 (2002). Again, the Virginia court offered no guidance as to what behavior would be required to meet this standard.

<sup>112</sup> Geimer, *supra* note 109, at 303.

<sup>113</sup> *See* ACLU, *supra* note 51, at 23–24 (noting that the Supreme Court of the United States receives approximately 6,500 petitions for certiorari each year, and chooses only 75–100, out of which only three or four usually involve the death penalty).

<sup>114</sup> To say the review of habeas petitions provided by the Supreme Court of Virginia is meaningless is an understatement. Since 1976, exactly one such petition has been successful in this court. *See* *Jackson v. Warden of the Sussex I State Prison*, 529 S.E.2d 587 (Va. 2000).

<sup>115</sup> 28 U.S.C. § 2254 (2001).

<sup>116</sup> *Id.* at § 2254(d).

facts, as determined by the states' courts, are presumed to be correct.<sup>117</sup> Therefore, success on such a petition is very unlikely.<sup>118</sup>

"The record of the Supreme Court of Virginia and the Fourth Circuit, however, is one that goes beyond the rubber stamp. These courts create new and innovative ways to sustain death sentences."<sup>119</sup> One of the more innovative ways by which death penalties are sustained as they work their way through the Virginia judicial process is the court's rigid adherence to strict procedural guidelines.<sup>120</sup> This doctrine requires that each objection be renewed at every stage of the appellate process: trial, direct appeal, and habeas.<sup>121</sup> This means if an objection is made at trial and is not mentioned in direct appeal to the Supreme Court of Virginia, that objection is forfeited in an appeal to the Supreme Court of the United States and for the duration of the habeas process. Likewise, if an issue is raised on habeas petition that was raised at trial, but not renewed on direct appeal, it is forfeited. "[T]he Virginia experience is one of courts demonstrating far, far greater concern for procedural regularity than for fundamental constitutional error. People are killed on technicalities in Virginia."<sup>122</sup>

In Virginia, issues cannot be preserved for appeal by a mere

<sup>117</sup> See ACLU, *supra* note 51, at 32.

<sup>118</sup> See *Roach v. Angelone*, 176 F.3d 210 (4th Cir. 1999).

<sup>119</sup> Geimer, *supra* note 109, at 295.

<sup>120</sup> The absurdity produced by this adherence can best be illustrated by the following example:

Suppose you went to a police station, reported that you had just witnessed a rape, and asked that someone investigate to confirm or deny that you were telling the truth and, if you were, to do something about it. Suppose you called back later to check on the investigation. You were told that, to preserve order and maximize the efficient use of police time [sic] felony complaints could not be made in person. Rather, such complaints had to come in by phone or fax. Consequently there would be no investigation and no answer to the question of whether a rape had occurred.

*Id.* at 296.

<sup>121</sup> See ACLU, *supra* note 51, at 24.

<sup>122</sup> Geimer, *supra* note 109, at 296. Such a technicality was found to exist when a judge instructed a jury, "[a]ny decision you make regarding punishment must be unanimous." *Roach*, 176 F.3d at 221. *Roach* contended that this incorrectly led the jury to believe that to impose a sentence less than death, the jury had to be unanimous. Since, however, such issue was not raised on direct appeal to the Supreme Court of Virginia, it was defaulted. See *id.*

reference on appeal to trial documents, they must be briefed.<sup>123</sup> Additionally, absent special permission from the court, the Supreme Court of Virginia limits a defendant's brief to fifty pages on direct appeal. Where an issue is not raised on direct appeal, it is forfeited in *every* later step of the appellate process.<sup>124</sup> This effectively eliminates the strategy of raising issues previously rejected by the Supreme Court of Virginia in the United States Supreme Court. Instead, this forces a defendant to raise almost all arguments on appeal directly at the Supreme Court of Virginia.<sup>125</sup> This also means defendants pay the ultimate price for the decisions made by their (usually appointed) lawyers in deciding which issues to brief.<sup>126</sup>

The result of all of these procedures contributes to the abnormally low reversal rate for death sentence convictions in the Commonwealth of Virginia. Virginia's reversal rate for death sentence convictions is 18%, compared with a national reversal rate of 68%.<sup>127</sup> Even Texas, the only state to execute more people than Virginia since *Furman*, has a reversal rate of 52%, almost *three times* the reversal rate of Virginia.<sup>128</sup> Nationally, 41% of death sentences were overturned on direct appeal, compared with 10% in Virginia.<sup>129</sup> This underscores the importance of the willingness of state court judges to perform their jobs diligently.<sup>130</sup>

The refusal of the judges of the Commonwealth of Virginia to reverse death sentences is further compounded by similar actions

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<sup>123</sup> See Geimer, *supra* note 109, at 298. (citing Swisher v. Commonwealth, 506 S.E.2d 763 (Va. 1998) and Hedrick v. Commonwealth, 513 S.E. 2d 634 (Va. 1999)).

<sup>124</sup> See *id.* (citing Va. Sup. Ct. R. 5:26(a)). See also ACLU, *supra* note 51, at 24.

<sup>125</sup> See Geimer, *supra* note 109, at n.15 (noting that although the Supreme Court of Virginia had repeatedly rejected the notion that juries had to be instructed on the fact that "life means life" in Virginia, the Supreme Court of the United States held that such was necessary in certain circumstances (citing Simmons v. South Carolina, 512 U.S. 154 (1994))).

<sup>126</sup> See ACLU, *supra* note 51, at 24.

<sup>127</sup> Liebman, *supra* note 21, at 68.

<sup>128</sup> See *id.*

<sup>129</sup> See *id.* at 47.

<sup>130</sup> "There can be no confidence in a legal system which so completely fails to police itself." VIRGINIA COLLEGE OF CRIMINAL DEFENSE ATTORNEYS, STATEMENT OF VIRGINIA COLLEGE OF CRIMINAL DEFENSE ATTORNEYS ON "UNEQUAL, UNFAIR AND IRREVERSIBLE, THE DEATH PENALTY IN VIRGINIA," (Apr. 7, 2000) at <http://www.aclu.org/library/va-dp-state.html>.

of the Fourth Circuit Court of Appeals. Nationally, 40% of reversals occur in federal courts as a result of habeas corpus petitions.<sup>131</sup> In the Fourth Circuit, only 15% of such petitions result in a reversal.<sup>132</sup> The next highest reversal rate is the Third Circuit which, with 29%, has a reversal rate almost twice that of its Southern counterpart.<sup>133</sup> Furthermore, within the Fourth Circuit, only 6% of the judgments reversed on habeas petition originated in the Commonwealth of Virginia.<sup>134</sup>

When the reversal rates of the Commonwealth of Virginia on direct appeal are combined with those of the Fourth Circuit Court of Appeals for habeas relief, the result is alarming. The result is a double-whammy on capital defendants in Virginia. "[T]here is no evidence that Virginia's courts have tried to compensate for very low error detection by the Fourth Circuit. . . . As a consequence of simultaneously low state and federal error detection, the rate of error detected in Virginia capital judgments is both extremely, and unusually, low."<sup>135</sup> Not everyone, however, agrees with the assertion that this low reversal rate is a flaw in the system. Some opine that it is an example of a system at its finest, that Virginia is the first state in the nation to conduct a successful experiment with capital punishment.<sup>136</sup> Liebman disagrees, blaming the low reversal rate on the broad death penalty statute, poor representation, limited judicial review and conservative judges.<sup>137</sup> "When it comes to getting and keeping death sentences, the planets are just really aligned over Virginia."<sup>138</sup>

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<sup>131</sup> See Liebman, *supra* note 21, at 57.

<sup>132</sup> *Id.* at App. B-6.

<sup>133</sup> *Id.* at App. B-4.

<sup>134</sup> *Id.* at 60 tbl. 8.

<sup>135</sup> *Id.* at 66.

<sup>136</sup> See ACLU, *supra* note 51, at 31 (quoting David Botkins, an assistant to Virginia's Attorney General, "Virginia has some of the best state and federal judges in the country who are very thorough and deliberative in their decisions; Virginia prosecutors do a good job of trying their cases with few errors; [and] Virginia's capital statutes are well written and narrowly defined."). See also Brooke A. Masters, *Legal Scrutiny Slows Pace of Executions in Virginia*, WASH. POST, Dec. 26, 2000, at B1 (also quoting Botkins, "Virginia's system has been looked at as a model for the nation—it's efficient and works well.").

<sup>137</sup> ACLU, *supra* note 51, at 31.

<sup>138</sup> *Id.*

### C. *The Goals of Punishment*

The death penalty, as carried out against the poorest members of society, with blind indifference by those in a position to remedy the situation, results in the arbitrary imposition of the death penalty in Virginia. As such, the goals of punishment are not served.<sup>139</sup> Punishment of those who commit wrongs is entirely permissible so long as it is not excessive.<sup>140</sup> The primary goal of punishment is restoring the natural order, which was disturbed by the criminal.<sup>141</sup> In lieu of capital punishment, this goal is served just as effectively by imposing a sentence of life without parole.<sup>142</sup>

The death penalty, as currently administered is nothing more than an act of vengeance.<sup>143</sup> It is an unnecessary and excessive form of punishment,<sup>144</sup> and thus it violates the goals of punishment as established by the Church.<sup>145</sup> No other crime is

<sup>139</sup> See Liebman, *supra* note 21, at iii (citing the national reversal rate, the lengthy appeals and the resulting costs as the reasons the death penalty in America “renders unattainable the finality, retribution and deterrence that are the reasons usually given for having a death penalty.”).

<sup>140</sup> United States Conference of Catholic Bishops, *Responsibility, Rehabilitation, and Restoration: A Catholic Perspective on Crime and Criminal Justice*, SOC. DEV. & WORLD PEACE (Nov. 15, 2000) at 9, <http://www.nccbuscc.org/sdwp/criminal.htm> (“The community has a right to establish and enforce laws to protect people and to advance the common good.”).

<sup>141</sup> See MEGIVERN, *supra* note 7, at 113–15. Megivern discusses St. Thomas Aquinas’ trifold view of punishment: that punishment grants some form of restitution, corrects the wrongdoer, and serves as a reminder to the republic to obey the laws. See also *EVANGELIUM VITAE*, *supra* note 2, at ¶ 56 (seeking to grant the defendant an opportunity for rehabilitation).

<sup>142</sup> Virginia is one of 35 states that offers life without the possibility of parole as a sentence. See DEATH PENALTY INFORMATION CENTER, LIFE WITHOUT PAROLE, at <http://www.deathpenaltyinfo.org/lwop.html>.

<sup>143</sup> “The death penalty seems to fan the flame of revenge (and violence) rather than foster a genuine sense of justice in society.” Archbishop Daniel M. Buechlein, OSB, *Statement on the Scheduled Execution of Timothy McVeigh*, SOC. DEV. & WORLD PEACE (Apr. 5, 2001), <http://www.nccbuscc.org/sdwp/national/buechlein.htm>.

<sup>144</sup> The official Church position on the death penalty is that it is only authorized if there is no other way to protect society. See *EVANGELIUM VITAE*, *supra* note 2, at ¶ 56. Pope John Paul II, considers this situation to be extremely rare in modern society. *Id.* (“Today however, as a result of steady improvements in the organization of the penal system, such cases are very rare, if not practically non-existent.”).

<sup>145</sup> See United States Conference of Catholic Bishops, *supra* note 141, at 13 (“[P]unishment by civil authorities for criminal activity should serve three principal purposes: (1) the preservation and protection of the common good of society, (2) the restoration of public order, and (3) the restoration or conversion

punished with this arbitrary 'eye for an eye' mentality.<sup>146</sup> In addition, it robs the victims' families of a true healing process.<sup>147</sup> With all of this as the backdrop, there are some indications, however, that society is slowly realizing capital punishment is wrong, and non-lethal methods of punishment are viable alternatives in a modern civilization.

## V. SIGNS OF CHANGE

Despite how deeply entrenched the death penalty is in western culture,<sup>148</sup> there are growing indications that the American public is beginning to realize how flawed this system of death is, and is starting to prefer alternative methods of punishment.<sup>149</sup> A declining crime rate, and high profile cases where innocent men are released from death row after years in prison have contributed to the lowest levels of public support for the death penalty in two decades.<sup>150</sup> These same factors have led more than half of all Americans to support a national

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of the offender.") (citing CATECHISM OF THE CATHOLIC CHURCH, *supra* note 19, at §2266–2267).

<sup>146</sup> We do not approve of raping rapists as punishment, killing serial killers multiple times, or torturing those who torture others. *See* Bedeau, *supra* note 52, at 16. Additionally, the death penalty, when examined closely fails to measure up to this retributive line of thinking. "For there to be equivalence, the death penalty would have to punish a criminal who had warned his victim of the date at which he would inflict a horrible death on him and who, from that moment onward, had confined him at his mercy for months." *Id.* (citing Albert Camus, *Reflections on the Guillotine*, in RESISTANCE, REBELLION, AND DEATH (1960)).

<sup>147</sup> The death penalty is currently no more than revenge inflicted on a wrongdoer. "Revenge neither liberates the families of victims nor enables the victims of crime. Only forgiveness liberates." Buechlein, *supra* note 143, at 2. The death penalty is incompatible with the notion of forgiveness, which Catholics are called upon to embrace as central to the teachings of Jesus. *See id.*

<sup>148</sup> *See* discussion *supra* Part I; *see also supra* note 19 and accompanying text.

<sup>149</sup> Only 46% of Americans support the death penalty when another sentencing option is life without parole. *See* DEATH PENALTY INFORMATION CENTER, SUMMARIES OF RECENT POLL FINDINGS, 3–4, at <http://www.deathpenaltyinfo.org/Polls.html> [hereinafter RECENT POLL FINDINGS].

<sup>150</sup> *See* Brooke A. Master, *Executions Decrease For the 2nd Year; Va., Texas Show Sharp Drops Amid a National Trend*, WASH. POST, Sept. 6, 2001, at A1 (noting support for the death penalty dropped to 63%). *See also* YEAR END REPORT, *supra* note 18, at 2 (noting the effect of innocence on changing public opinion).

moratorium on the death penalty until the system(s) can be examined to determine whether the death penalty is administered fairly.<sup>151</sup>

The fairness of the imposition of the death penalty has also become an issue in Virginia, where support for the death penalty is at its lowest level in seven years.<sup>152</sup> Statistics indicate the majority of Virginians support alternatives to the death penalty, such as long prison sentences and restitution to the victim's families.<sup>153</sup> This change of opinion has not fallen on deaf ears. One state legislator sponsored a bill last year to abolish the death penalty in Virginia.<sup>154</sup> Previously, this same man had proposed re-instating public hangings as an acceptable method of execution in Virginia.<sup>155</sup> Legislators, whose jobs are dependent upon continued public support, cannot support unpopular notions of justice,<sup>156</sup> and are coming to terms with the possibility that under the current system, Virginia may execute an innocent person.<sup>157</sup> Even the Virginia courts are beginning to grant capital defendants increased protections.<sup>158</sup> In recent years, the

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<sup>151</sup> See YEAR END REPORT, *supra* note 18, at 2–3. Some statistics show support for a moratorium at 51%, others show it at 72%. Additionally, 91% of Americans favor granting inmates access to DNA tests and a chance to prove innocence. *Id.* at 3. 84% are concerned with the level of experience provided by appointed counsel. *See id.* at 3.

<sup>152</sup> See RECENT POLL FINDINGS, *supra* note 150, at 18 (citing a 74% approval rating for the death penalty).

<sup>153</sup> *See id.* (noting 54.8% supported this alternative).

<sup>154</sup> Peter Mansbridge, *Reconsidering the Death Penalty in the US*, THE NATIONAL (Canadian Broadcast Corporation, Feb. 15, 2001) (describing an interview with Frank Hargrove, Sr.). Delegate Hargrove predicts the death penalty will be abolished in Virginia within the next three years. *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> Kenneth Stolle, a Republican state senator from Virginia notes, "We were losing the faith of the people with regard to the death penalty." Toni Locy, *Push to Reform Death Penalty Growing Advocates: Mistakes Could Shake Confidence in System*, USA TODAY, Feb. 20, 2001, at 5A.

<sup>157</sup> See YEAR END REPORT, *supra* note 18, at 4 (noting the concern of Delegate Hargrove that an innocent person could be executed in the Commonwealth). *See also* Mansbridge, *supra* note 155 (Delegate Hargrove notes the impossibility of correcting a mistake after the death penalty has been improperly carried out).

<sup>158</sup> See Frank Green, *Death Penalty Cases Scrutinized: More Hearings are Being Ordered in Virginia*, RICHMOND TIMES DISPATCH, Apr. 9, 2001, at A1. Green discusses the actions of the Supreme Court of Virginia since the *Liebman Report* was released, and notes the fact that it has ordered hearings in several capital cases in recent years, something that was practically unheard of before Liebman exposed the lax judiciary in Virginia. *See id.*



Supreme Court of Virginia has required a jury instruction in capital cases that 'life means life',<sup>159</sup> and has taken a closer look at the rulings of the trial courts in capital cases.<sup>160</sup> The Supreme Court of the United States has also taken an increased interest in Virginia death penalty cases.<sup>161</sup>

Only by stopping executions long enough to examine the system can society be certain that innocent people are not being executed. Hopefully, once such occurs, it will become clear that the only way to gain peace of mind is to stop state sponsored murder forever.<sup>162</sup> Though there has been a recognizable change in public opinion,<sup>163</sup> more needs to be done. The place to start is at the grass roots level. Since *Gregg*, the United States Supreme Court has repeatedly rejected the notion that the death penalty is a cruel and unusual form of punishment. Similarly, the Supreme Court of Virginia has rejected the argument that the

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<sup>159</sup> See *Yarbrough v. Commonwealth*, 519 S.E.2d 602, 616 (Va. 1999) (holding when a defendant asks for it, courts shall instruct a jury that "imprisonment for life' means 'imprisonment for life without the possibility of parole"). The court noted that prior to this, the United States Supreme Court had held such an instruction was required when a defendant was sentenced to die on the basis of future dangerousness as an aggravating factor, but such requirement had not been extended by either court to other situations. See *id.* at 611.

<sup>160</sup> See *Green v. Commonwealth*, 546 S.E.2d 446, 451 (Va. 2001) (holding defendant deserved a new trial when the trial court abused its discretion by admitting two jurors, over defense objection, where one juror stated he would not consider alternatives to the death penalty, and another stated she thought the defendant was guilty after reading accounts of his crime in the newspaper).

<sup>161</sup> Between 1999 and 2001, the United States granted certiorari to hear six death penalty cases from Virginia, more than any other state. Of these, two cases were overturned and two more were remanded for further proceedings. See Craig Timberg, *In Va., a Change of Heart on Death Penalty; Assembly to Weigh Measures to Study, Stall, Alter System*, WASH. POST, Jan. 28, 2001, at C9. Others have speculated the recent statements by Justice O'Connor regarding the death penalty in general, are attributable to Virginia cases. See Frank Green, *Death Penalty Doubts Arise; O'Connor Questions Whether Laws Always Protect Innocent*, RICHMOND TIMES-DISPATCH, July 9, 2001, at A1.

<sup>162</sup> "Life in prison without parole is a reasonable—though imperfect—alternative. Our collective quest for vengeance might not be satisfied. But we as a society won't have to wonder whether we executed an innocent person." Roger Chesley, *Flawed System Demands an End to the Death Penalty*, VIRGINIAN-PILOT, June 30, 2001, at B9.

<sup>163</sup> Even the Pope has recognized the growing public opposition to the death penalty. See *EVANGELIUM VITAE*, *supra* note 2, at ¶ 27. (citing growing opposition to the death penalty as growing support for the idea that punishment should suppress crime, and prevent criminals from harming society while still giving them the chance to reform).

death penalty in Virginia is unconstitutional. The place to put the pressure is on the legislature. "If enough people come to doubt the justice of capital punishment, politically elected officials will shift their stance, too, and suspend or abolish the death penalty."<sup>164</sup> There is growing evidence that the people of the Commonwealth of Virginia favor a moratorium.<sup>165</sup> Since state-wide initiatives to suspend or abolish the death penalty have failed so far in Virginia, some communities are taking matters into their own hands by passing resolutions asking the Governor to declare a moratorium until capital punishment in Virginia can be fully examined.<sup>166</sup> As Catholics, we must strive to continue the conversation to put an end to the death penalty.<sup>167</sup> We must raise awareness of the injustice this form of punishment embodies and work toward a culture of life, where all life is sacred and respected.

#### CONCLUSION

Catholics have a particular calling to respect life. There is no doubt the death penalty is violative of this divine imperative. It is equally clear the death penalty in Virginia is carried out with a particular vengeance against the poor, while the judiciary exhibits indifference for their plight, preferring the technicalities of law to the need for fair and equitable punishment. Though there have been signs of improvement, and growing awareness, there must be an end to the culture of death. "To all the members of the Church, *the people of life and for life*, I make this most urgent appeal . . . to ensure . . . a new culture of human life

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<sup>164</sup> Vegh, *supra* note 5.

<sup>165</sup> 58% of Virginians favor a moratorium until the questions of fairness surrounding the imposition of the death penalty in the Commonwealth can be resolved. See RECENT POLL FINDINGS, *supra* note 150, at 18–19.

<sup>166</sup> The localities of Blacksburg, Charlottesville, and Lexington have all passed such resolutions. See *Death Penalty Gives Justice to No One*, UNIV. WIRE, July 12, 2001.

<sup>167</sup> All Catholics can learn from open and honest conversations about the death penalty. Education about the realities of the ways the death penalty is implemented is the key to abolition. One parish in Triangle, Virginia took this message to heart and held several nights of discussions on the topics with guest speakers. Attendees learned of the judicial process in Virginia, the Catholic position on the death penalty, and the feelings of victim's families. See Laura Stanko Britto, *Triangle Parish Hosts Death Penalty Series*, CATH. HERALD, at <http://www.catholic.org/ach/articles/deathpen.htm> (last visited Nov. 14, 2001).

will be affirmed, for the building of an authentic civilization of truth and love."<sup>168</sup>

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<sup>168</sup> *EVANGELIUM VITAE*, *supra* note 2, at ¶ 6.