

# Article

## The Constitutionality and Ethics of Execution-Day Prison Chaplaincy

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### I. INTRODUCTION

Before 1995, Texas law required executions to occur between

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midnight and sunrise.<sup>1</sup> On Sunday, December 11, 1994, after a night of intense legal wrangling, Raymond Carl Kinnamon's lawyer finally ran out of appeals as sunrise approached. At 5:15 a.m., Kinnamon was brought into the execution chamber at the Walls Unit in Huntsville, Texas, and tied down to the gurney. Left alone in the chamber with the warden and the execution-day chaplain, Kinnamon began saying his "last words" into the microphone, and he kept talking—to the point that prison officials might have worried that Kinnamon would filibuster his way out of his death sentence. Around 5:45 a.m., Kinnamon stated, "I see no reason for my death," and he began squirming in his tight leather straps and trying to sit up on the gurney. The warden and chaplain both reached out to restrain the inmate. The chaplain put his hands on Kinnamon's shoulders and pushed him back down on the pallet as the executioner in a hidden room began the lethal injection. Eleven minutes later, Kinnamon was pronounced dead.<sup>2</sup>

Texas execution-day chaplains are assigned by the prison system to work with condemned inmates in the immediate days and hours before their execution and to accompany them in the execution chamber when the lethal injection is administered.<sup>3</sup> The system considers chaplains invaluable participants in the execution process because they provide an air of solemnity to the process, assist with the emotional needs of the prison staff, and help make the inmate compliant.<sup>4</sup> The chaplains, on the other hand, report that they see themselves as playing roles of grief

<sup>1</sup> Tex. Code Crim. Proc. art. 43.14 (1995).

<sup>2</sup> *Killer Executed at Texas Prison*, N.Y. TIMES, Dec. 12, 1994 [www.nytimes.com/1994/12/12/us/killer-executed-at-texas-prison.html](http://www.nytimes.com/1994/12/12/us/killer-executed-at-texas-prison.html), <[perma.cc/YZZ9-BPW7](http://perma.cc/YZZ9-BPW7)>; CARROLL PICKETT & CARLTON STOWERS, WITHIN THESE WALLS: MEMOIRS OF A DEATH HOUSE CHAPLAIN 243–45 (2002).

<sup>3</sup> *Interview with Reverend Carroll Pickett*, FRONTLINE: THE EXECUTION (Feb. 9, 1999), <http://www.pbs.org/wgbh/pages/frontline/shows/execution/readings/pickett.html>, <<http://perma.cc/358R-QCZM>> [hereinafter *Pickett Interview*].

<sup>4</sup> ROBERT M. BOHM, ULTIMATE SANCTION: UNDERSTANDING THE DEATH PENALTY THROUGH ITS MANY VOICES AND MANY SIDES 206 (2010) ("Prison chaplains are an instrumental part of the execution team. . . . Prison administrators believe that it is important to have the prison chaplain present during the deathwatch and execution to address any staff problems. . . . Importantly, they also help to make condemned inmates compliant for execution. They do this by offering inmates a way to salvation—that is, 'deliverance by the grace of God from eternal punishment for sin.'") (citation omitted); Salatheia Bryant, *Chaplains Offer Faith to Those on Death Row: Inmates have a Diverse Range of Beliefs*, HOUS. CHRON., July 30, 2007, <http://www.chron.com/life/houston-belief/article/Chaplains-offer-faith-to-those-on-death-row-1806245.php>, <<http://perma.cc/YA57-3MFZ>> ("Sometimes [chaplains] are there to listen. Other times it is the chaplain who is a calming presence when the inmate has vowed to physically fight his fate; 'In a number of cases, the inmates have made peace with their situation and are looking to what's beyond. . . . The chaplains have made a big impact on the day of execution. In spending the last hours with the chaplain, we've seen the prisoner 'turn around.'") (quoting Michelle Lyons, spokesperson for the Texas Department of Criminal Justice); ROBERT JAY LIFTON & GREG MITCHELL, WHO OWNS DEATH? CAPITAL PUNISHMENT, THE AMERICAN CONSCIENCE, AND THE END OF EXECUTIONS 83–85 (2000) (describing execution-day chaplains as "offer[ing] active spiritual participation that helps energize the overall execution process" and concluding that "when[] spiritual advisers lend support to the condemned man . . . they become part of the execution project" securing an execution that "looks humane and dignified and is not sullied in any way by obvious violence."); PICKETT & STOWERS, *supra* note 2, at 246 ("We can't do executions without him.") (quoting Wayne Scott, director of the institutional division of the Texas Department of Criminal Justice, referring to execution-day chaplain Carroll Pickett).

counselor and hospice worker.<sup>5</sup> They consider themselves as being there for the soon-to-be-dying prisoner.<sup>6</sup> By placing their hand on the inmate's body at the time of injection,<sup>7</sup> they emphasize the importance of being there because they believe no one should have to die alone.<sup>8</sup>

All chaplains employed by the Texas prison system—not just the small number involved in executions—have roles that inherently conflict due to their simultaneous duties to institutional and inmate stakeholders.<sup>9</sup> Execution-day chaplains work for the State, but there should be no question that they also form quick and strong emotional bonds with the men and women they are assigned to counsel and accompany to their deaths.<sup>10</sup> Because of this, when Texas began executing inmates in the 1980s following reinstatement of the death penalty, the director of the prison system, W. James Estelle, assigned new chaplains with no prior relationship to the condemned prisoners to work with them in their last days and hours.<sup>11</sup> This strategy attempted to protect the execution-day chaplains against psychological strain<sup>12</sup> and also to maintain some credibility for the other chaplains who worked daily with the inmates on death row.<sup>13</sup> It has experienced limited success because execution-day

<sup>5</sup> See *Interview with Reverend Jim Brazzil*, FRONTLINE: THE EXECUTION (Feb. 9, 1999), <http://www.pbs.org/wgbh/pages/frontline/shows/execution/readings/brazzil.html>,

<<http://perma.cc/L7GK-NNHK>> [hereinafter *Brazzil Interview*] (comparing execution chaplaincy to comforting patients in a hospital or hospice, and adding that “anytime you’re dealing with grief, any time you’re dealing with that kind of major crisis, there’s going to be anger, there’s going to be strong emotions. And so you have to deal with every man or person on an individual kind of level just to meet their needs and not to go in there with any kind of agenda or any kind of motives other than to just be with that person.”); *Pickett Interview*, *supra* note 3 (“[T]hey want to talk about things that a lot of people don’t know and a lot of people are going to never know, because I’m not going to tell. . . they just want to talk about things that may have been sitting there on their hearts and their spirits and their souls for a long, long time.”); VIRGINIA S. OWENS & DAVID C. OWENS, *LIVING NEXT DOOR TO THE DEATH HOUSE* 192, 198 (2003).

<sup>6</sup> *Brazzil Interview*, *supra* note 5 (“I look at my job as strictly being there for the inmate”).

<sup>7</sup> Virginia Stern Owens, *Watchman on the Walls*, CHRISTIANITY TODAY, May 21, 2001, at 46; INTO THE ABYSS (IFC Films 2011); WITNESS TO AN EXECUTION (National Public Radio 2000).

<sup>8</sup> *Pickett Interview*, *supra* note 3; INTO THE ABYSS, *supra* note 7.

<sup>9</sup> It has been suggested that chaplains inevitably are corrupted by the prison setting. Jody L. Sundt & Francis T. Cullen, *The Correctional Ideology of Prison Chaplains: A National Survey*, 30 J. CRIM. JUST. 369, 371 (2002) (quoting T. O. Murton, *The Prison Chaplain: Prophet or Pretender?*, REFORMED J. 7, 11 (1979)) (observing that chaplains operate under “an erroneous assumption: that the objects of ministerial service are the prison inmates while in fact . . . it is the prison administration [they] serve[.]”). However, recent studies show that a majority of prison chaplains identify with inmate-centered treatment and rehabilitation goals, believing that treatment works. Catholics and those who reject a fundamentalist orientation indeed are more likely to support treatment and rehabilitation. *Id.* at 381.

<sup>10</sup> In the documentary film *Into the Abyss*, Texas execution-day chaplain Richard Lopez uses an incongruous and yet moving analogy to express the great emotional tension and impotence he feels being in the execution chamber with an inmate. INTO THE ABYSS, *supra* note 7. He tells a story about having been on a golfing outing when, as he was driving his cart down a trail, two playing squirrels dashed right in front of his wheels. *Id.* He had only a second to stop but successfully missed them by jamming on the brake. *Id.* Visibly very upset on camera, he then laments that, in his role as an execution-day chaplain, he has no brake that can stop the machine from killing. *Id.*

<sup>11</sup> *Pickett Interview*, *supra* note 3; PICKETT & STOWERS, *supra* note 2, at 244.

<sup>12</sup> See *Pickett Interview*, *supra* note 3 (noting that when a chaplain works with an inmate for some time, execution is “difficult.”).

<sup>13</sup> *Id.* (observing that if he had said he was opposed to the death penalty to inmates, the prison system would have fired him; if he had told inmates he was in favor of capital punishment, some of the

chaplains are unavoidably emotionally damaged by the executions of men and women they had never previously met.<sup>14</sup> Chaplains report that they frequently suffer strong psychological trauma and need to receive their own ongoing professional therapy.<sup>15</sup> Unfortunately, Carl Kinnamon's chaplain had accepted the role due to the unavailability of the assigned execution-day chaplain.<sup>16</sup> Since his day job was chaplain to inmates on death row, his awkward behavior in the execution chamber may have been due to distress over the killing of a man he had known for years.<sup>17</sup>

This essay explores the legal and ethical parameters of the unique Texas job of execution-day chaplaincy. It is intended as a resource for prison chaplains themselves who may be considering the role, and for chaplaincy organizations and coalitions that are articulating ethical standards for state-employed prison spiritual advisors. It has been written with great sympathy toward those employees of the Texas Department of Criminal Justice who feel a calling to minister to our society's condemned. The sobering history of participation by Christian clergy in executions is explored as the seedbed from which the relatively recent rise of prisons and the chaplaincy profession have sprung. Then, the specific job of the Texas execution-day chaplain is first considered in regard to its constitutionality because the law is an entrée into ethics—the initial question is whether the practice of execution-day chaplaincy is legal. An arguable failure of a practice to withstand legal scrutiny does not prove necessarily that it is unethical, but it does raise heightened ethical concern. Two distinct aspects of the execution-day job are evaluated: work with the inmate before her entry into the execution chamber and work with her in the chamber itself. It is concluded that the execution-day chaplain's religious or therapeutic support of a condemned inmate before her entry into the execution chamber may be legal and ethical if it is freely requested by the inmate. However, chaplain participation in the execution chamber itself almost certainly violates the U.S. Constitution's rule against the establishment of religion. Examination of nascent professional chaplaincy codes, more established ethics codes in other related caregiving professions, and general ethical principles also finds chaplain participation with the inmate in the execution chamber unethical.<sup>18</sup>

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inmates would not have talked to him).

<sup>14</sup> INTO THE ABYSS, *supra* note 7; Brazzil Interview, *supra* note 5; PICKETT & STOWERS, *supra* note 2, at xiii.

<sup>15</sup> PICKETT & STOWERS, *supra* note 2, at xiii.

<sup>16</sup> *Id.* at 243.

<sup>17</sup> *Id.* at 244. Following the next day's Huntsville, Texas, newspaper headline ("Chaplain Restrains Inmate During Execution"), the prison demoted Kinnamon's chaplain to a desk job—he eventually left the system. *Id.* at 245.

<sup>18</sup> Modern prison chaplains, often trained in psychology and clinical pastoral theology, are considered members of inmates' treatment teams. Jody L. Sundt & Francis T. Cullen, *The Role of the Contemporary Prison Chaplain*, 78:3 PRISON J. 271, 274 (1998). Chaplains assert that, like their medical and psychological colleagues, their sole aim is the beneficence of the inmate. For further discussion of beneficence, see *infra* notes 131–133.

In determining whether their execution-day tasks are ethical, prison chaplains should consider not only professional ethics rules and practices but also the deep history of the Christian clergy's role in executions. They must also confront the most fundamental and common ethical question with which the modern chaplaincy wrestles: in their professional role as chaplain and prison employee, whom do they serve? To whom is their duty?

## II. CHRISTIAN CLERGY AND THE EXECUTION RITUAL

Over the course of Western history, Christian clergy have moved from the background to the foreground of the execution performance. Prior to Rome's adoption of Christianity as its official state religion, church leaders showed either opposition or ambivalence toward Christian participation in capital punishment or war.<sup>19</sup> Early on, however, church fathers such as Ambrose (in the late fourth century) began articulating an enduring model of the "two coordinated arms" of public authority: the partnership between bishop and emperor allowing the church to hand over heretics to the "secular arm" for execution, while maintaining an appearance thereby that all church responsibility for the bloodshed was avoided.<sup>20</sup> Saint Jerome expressed around the same time the even more lasting distinction—still found today in the Roman Catholic Catechism<sup>21</sup>—between "innocent blood" and other "blood" worthy of punishment, including that of murderers, whose execution Jerome deemed "not the shedding of blood but the administration of laws."<sup>22</sup> Since the fourth century, therefore, church fathers, priests, and ministers have considered innocent lives morally inviolate and, concomitantly, non-innocent lives expendable under various circumstances for the sake of punishment.<sup>23</sup> Until the post-Enlightenment era of the freedom of

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<sup>19</sup> See generally JAMES J. MEGIVERN, *THE DEATH PENALTY: AN HISTORICAL AND THEOLOGICAL SURVEY* 19–27 (1997) (briefing on early Christian thinkers' views of capital punishment).

<sup>20</sup> *Id.* at 31.

<sup>21</sup> CATECHISM OF THE CATHOLIC CHURCH para. 2270 ("From the first moment of his existence, a human being must be recognized as having the rights of a person—among which is the inviolable right of every innocent being to life."). The complicated, ancient theological discussion of sin and innocence is beyond the scope of this article. However, it should be emphasized here that the theological essentializing of some humans as innocent and some not—dividing humanity into innocent and non-innocent being—appears to be a precedent dangerous to human dignity and life, akin to unfounded, invidious distinctions over race, gender, gender orientation, nationality, *indeed religion*, that have proven to nurture human violence and discord.

<sup>22</sup> MEGIVERN, *supra* note 19, at 34.

<sup>23</sup> See CATECHISM, *supra* note 21, at para. 2267 (accepting capital punishment when "bloodless means" to defend against aggression are unavailable). The Catholic Church now rejects the death penalty in the United States, at minimum because bloodless means are available (life sentences), and Pope Francis has rejected the penalty in no uncertain terms: "Nowadays the death penalty is inadmissible, no matter how serious the crime committed. It is an offense against the inviolability of life and the dignity of the human person, which contradicts God's plan for man and society, and his merciful justice, and impedes the penalty from fulfilling any just objective. It does not render justice to the victims, but rather fosters vengeance. . . . For the rule of law, the death penalty represents a

conscience and religion, the crimes most harshly punished by the “secular arm” were religious offenses, because such offenses were directed against “collective things (whether ideal or material), of which the principal examples [were] public authority and its representatives” (i.e., the sometimes subtle, sometimes overt, team of church and state).<sup>24</sup>

From at least the eighth century, when Charlemagne ordered thousands of Saxons beheaded whom he had found to flaunt his “Christian” laws,<sup>25</sup> until the middle of the nineteenth century, public executions in Christian regimes were staged as “demonstrations of the power of God—and of the monarch [or state] in as much as he [or it] was God’s regent on earth—against rebellion.”<sup>26</sup> The pretense to separation of secular and religious authority waxed and waned over the millennium. In 1231, Pope Gregory IX introduced the first Inquisition, authorizing the church to use torture on heretics.<sup>27</sup> In Medieval Europe, convicted criminals undertook a public ritual of atonement acknowledging their guilt and expressing repentance.<sup>28</sup>

Addressing the crowd . . . felons might recount their life stories, implore the judges for mercy, or ask the spectators for their prayers. Finally, on the way to the place of execution, or on the scaffold itself, the criminal was given an opportunity to confess his sins to an attending priest or friar, who provided spiritual solace, implored repentance, heard confession, and focused the condemned person’s mind [and the minds of the audience members] on the salvation which awaited.<sup>29</sup>

This public-expiation formula took hold in the diverse corners of Christendom.<sup>30</sup> In Catholic and Protestant realms alike, clergy promoted

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failure, as it obliges the state to kill in the name of justice. . . . Justice can never be wrought by killing [a] human being.” NRC Staff, *Pope’s Quotes: No Justice*, NAT’L CATH. REP., July 20, 2015, <http://ncronline.org/blogs/francis-chronicles/pope-s-quotes-no-justice>, <<http://perma.cc/SF3G-V3EN>>. Note the “nowadays” at the outset of the Pope’s statement, rendering his unqualified opposition to the death penalty consistent with the Catechism, but begging the question whether human dignity ever was not offended by judicial killing.

<sup>24</sup> Emile Durkheim, *Two Laws of Penal Evolution*, in READINGS FROM EMILE DURKHEIM, 41 (K. Thompson ed., rev. ed. 2004); see also Earl F. Martin, *Masking the Evil of Capital Punishment*, 10 VA. J. SOC. POL’Y & L. 179, 227 (2002) (“The identification of human institutions and actions with the divine cosmos means that those actions take on a rightness that is normally associated with the higher power itself. In this fashion, ‘human power, government and punishment, thus become sacramental phenomena [and are seen] as channels by which divine forces are made to impinge upon the lives of men.’”) (quoting PETER L. BERGER, *THE SOCIAL REALITY OF RELIGION* 33–42 (1967)).

<sup>25</sup> RITA NAKASHIMA BROCK & REBECCA ANN PARKER, *SAVING PARADISE: HOW CHRISTIANITY TRADED LOVE OF THIS WORLD FOR CRUCIFIXION AND EMPIRE* 229 (2008).

<sup>26</sup> HARRY POTTER, *HANGING IN JUDGMENT: RELIGION AND THE DEATH PENALTY IN ENGLAND FROM THE BLOODY CODE TO ABOLITION* 161 (1993).

<sup>27</sup> BROCK & PARKER, *supra* note 25, at 310.

<sup>28</sup> See MITCHELL B. MERBACK, *THE THIEF, THE CROSS, AND THE WHEEL: PAIN AND SPECTACLE OF PUNISHMENT IN MEDIEVAL AND RENAISSANCE EUROPE* 147–48 (1999) (“Atonement rituals often included an *amende honorable*, or public acknowledgment of guilt, and a proclamation of repentance.”).

<sup>29</sup> *Id.*

<sup>30</sup> Nineteenth century poet John Greenleaf Whittier, a critic of capital punishment, captured the power of the public-expiation formula in a work entitled “The Human Sacrifice,” in which he

the church's temporal power by using the imminent death presented by executions to encourage belief in a future, more real judgment in a world to come.<sup>31</sup> For example, in the Spanish Inquisition, Catholic priests dramatically ministered to heretics on the stake, seeking to achieve their public conversion before they were dispatched in flame by the nominally secular authority.<sup>32</sup> In the case of one "judaizer"<sup>33</sup> who converted on the stake in 1719, the priest wrote in his diary that he was "desirous that the soul which had given so many signs of conversion should not be lost, [so] I went round casually behind the stake to where the executioner was, and gave [the executioner] the order to strangle him immediately because it was very important not to delay."<sup>34</sup> Persons sentenced to death in contemporary France and regions under French control had to undergo an elaborate ritual called the "amende honorable."<sup>35</sup>

The condemned man was escorted by court-appointed guards and the executioner to the front door of the local church, where he knelt and declared loudly that he had falsely and wickedly offended God, the king, and justice, and that he repented for this offence and now begged for their forgiveness. This formulaic declaration was as fixed as the canon of the Mass.<sup>36</sup>

In Protestant, Georgian England, the "purificatory liturgy" was performed on the day before the execution, followed by a processional on execution day in which the parson and offender performed a "carefully stage-managed theatre of guilt" displaying "exhortation,

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referred to ministers involved in executions as the "hangman's ghostly ally" who was "blessing with solemn text and word the gallows-drop and strangling cord; lending the sacred Gospel's awe and sanction to the crime of Law." *Id.* at 130 (quoting John Greenleaf Whittier, *The Human Sacrifice*, in ANTI-SLAVERY POEMS: SONGS OF LABOR AND REFORM 284 (1888)).

<sup>31</sup> See POTTER, *supra* note 26, at 160–61. ("In Christian times and in Christian states, in part because the crucifixion of Jesus had always been seen in sacrificial terms, judicial execution took the place of [the historic practice of] overtly sacrificial disposal of criminals" that had been conducted in many societies to repudiate evil by "ridding the land of its blood-guilt. . . The criminal was still said to be 'sacrificed to the laws of his country' but the "death penalty also allowed for the possibility of salvation, for the real judgment was not pronounced in this world but the next, and the threat of imminent death could accomplish repentance and salvation in the most inveterate sinner").

<sup>32</sup> See, e.g., HENRY KAMEN, *THE SPANISH INQUISITION: A HISTORICAL REVISION* 211–12 (1998) (illustrating the scene of an execution by burning at the stake, wherein "a lighted torch is passed before [the accused's] face to warn him of what awaits him if he does not repent. Around [him] are numbers of religious who pressed the accused with greater anxiety and zeal to convert himself").

<sup>33</sup> "Judaizing" was a term used by clergy in the Spanish Inquisition to describe recent converts to Christianity who were charged with the "heresy" of slipping back into Jewish practices. Marvin Lunenfeld, *Pedagogy of Fear: Making the Secret-Jew Visible at the Public Autos de Fe of the Spanish Royal Inquisition*, 18:3 SHOFAR 77, 79 (2000). Nation formation was accomplished by state and church cooperation in the scapegoating of Jews and other social outcasts. *Id.* "Whenever tensions damaging to the state were high, verbal and visual stratagems were mustered to bring into view during some great public spectacle the Secret-Jew, or Crypto-Jew, segregated out from the ranks of New Christians and disgraced through stereotyped charges of 'Judaizing' heresy." *Id.*

<sup>34</sup> KAMEN, *supra* note 32, at 211.

<sup>35</sup> Peter N. Moogk, *The Liturgy of Humiliation, Pain, and Death: The Execution of Criminals in New France*, 88:1 CAN. HIST. REV. 91, 93–94 (2007).

<sup>36</sup> *Id.* at 94–95.

confession and repentance before an awed and approving crowd.”<sup>37</sup>

Protestant ministers in colonial and post-colonial United States adopted the public-expiation formula to reinforce their own social influence. They published widely circulated execution sermons given in pulpits and on the gallows from the last quarter of the seventeenth century into the first half of the nineteenth century.<sup>38</sup> “A consistent message delivered in execution sermons was the importance of paying attention to ministers—not just at hangings, but every day. . . . And with the power of the state on display, an execution was perfect for underscoring secular authority as well.”<sup>39</sup> The sermons recounted how the ministers had labored to achieve the repentance and conversion of the condemned in the brief days or hours between sentence and punishment.<sup>40</sup> Sentenced “to die by civil authorities who believed they acted in accordance with divine precepts, criminals were encouraged and manipulated to recant publicly their sins and plea for the mercy of God.”<sup>41</sup> The execution ritual sanctioned violence to unify the community against outsiders and, thus, to reinforce social order and stability.<sup>42</sup> Consequently, in colonial America, religious crimes such as heresy or blasphemy continued to be deemed among the worst offenses to which the death penalty applied.<sup>43</sup> Massachusetts authorities, for example, targeted and executed Quakers because they were viewed as trying to “‘undermine and ruine’ [sic] authority, making their heresy far worse than mere religious error.”<sup>44</sup>

Today, Texas inmates executed in private participate in vestigial aspects of the age-old public-expiatory ritual.<sup>45</sup> Half make some kind of religious reference in their last words, the majority of those alluding to an afterlife.<sup>46</sup> One recently said, apparently without irony, “Warden, since I don’t have anything to say, you can go ahead and send me to my

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<sup>37</sup> POTTER, *supra* note 26, at 20.

<sup>38</sup> DANIEL A. COHEN, PILLARS OF SALT, MONUMENTS OF GRACE: NEW ENGLAND CRIME LITERATURE AND THE ORIGINS OF AMERICAN POPULAR CULTURE, 1674–1860 3–4 (1993).

<sup>39</sup> STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 34 (2002).

<sup>40</sup> *See id.* at 18–19 (“While in jail awaiting execution, the condemned person was not alone. A steady stream of ministers came to call, armed with advice on how to prepare for the death and the afterlife that awaited.”).

<sup>41</sup> LOUIS P. MASUR, RITES OF EXECUTION: CAPITAL PUNISHMENT AND THE TRANSFORMATION OF AMERICAN CULTURE, 1776–1865 41 (1989).

<sup>42</sup> *Id.* at 39.

<sup>43</sup> LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 32 (1994); *United States v. Hillyard*, 52 F. Supp. 612, 613–14 (E.D. Wash. 1943) (“Even the ‘Act of Toleration’ of which Maryland so proudly boasts, provided the death penalty for those who might thrice be convicted of violating the statute defining blasphemy to be to ‘deny our Savior to be the Son of God, or deny the Holy Trinity, or the Godhead of any of the three Persons, or the Unity of the Godhead.’”) (quoting BACON’S LAWS OF MARYLAND ch. 16, § 1).

<sup>44</sup> FRIEDMAN, *supra* note 43, at 32; *see also* Horatio Rogers, *Mary Dyer Did Hang as a Flag*, in THE QUAKER READER 171–178 (Jessamyn West ed., 1992) (telling the story of a Quaker hanged after refusing banishment for unrepentant religious dissent).

<sup>45</sup> *See* Scott Vollum & Dennis R. Longmire, *Giving Voice to the Dead: Last Statements of the Condemned*, 12:1 CONTEMP. JUST. REV. 5, 13–16 (2009) (highlighting themes of faith, contrition, and gratitude in condemned inmates’ last words before execution).

<sup>46</sup> *Id.* at 13–14.

Heavenly Father.”<sup>47</sup> Not infrequently, they continue the ritual idea that contrite execution is a vehicle to salvation. Earl Behringer, for example, announced, “I belong to Jesus Christ. I confess my sins. I have been baptized. I am going home with Him.”<sup>48</sup> However, there are also some significant departures from the formula in the words of the condemned that may reflect the post-Enlightenment demystification of State power. There are essentially no apologies to the State or Church. Less than 7% of inmates ask for forgiveness from God.<sup>49</sup> A full third of final statements contain words of contrition, but most are direct apologies to the human “co-victims” (the survivors of the inmate’s victim).<sup>50</sup> Remarkably, the most frequent statements (more than 50%) are “well wishes,” statements of love and encouragement, most often made to family and friends.<sup>51</sup> The former majesty of the church-state partnership in execution, designed to maintain social control through terror, is lost, although the connection between church and state continues behind the walls on execution day and remains ardently supported by a segment of the modern Church.<sup>52</sup> This loss of majesty is reflected in today’s general public apathy toward the execution ritual, as compared to the crowds garnered by executions and the vast popularity of execution sermons in the nineteenth century.

### III. PRISON CHAPLAINCY AND EXECUTION RITUALS

The nineteenth century saw the rise of the prison institution and the introduction of proportionality (between crime and severity of punishment) into penal codes, springing from Quaker Pennsylvania’s

<sup>47</sup> Larry Wooten, executed October 21, 2010. *Offender Information*, TEX. DEP’T OF CRIM. JUST., [http://www.tdcj.state.tx.us/death\\_row/dr\\_info/wootenlarrylast.html](http://www.tdcj.state.tx.us/death_row/dr_info/wootenlarrylast.html), <<http://perma.cc/P8NJ-N9L5>>.

<sup>48</sup> Vollum & Longmire, *supra* note 45, at 14.

<sup>49</sup> *Id.* at 16.

<sup>50</sup> *Id.* at 15.

<sup>51</sup> *Id.* at 11–12.

<sup>52</sup> See generally Harold G. Grasmick, Elizabeth Davenport, Mitchell B. Chamlin, & Robert J. Bursik, Jr., *Protestant Fundamentalism and the Retributive Doctrine of Punishment*, 30:1 CRIMINOLOGY 21 (1992) (linking retributive beliefs of Protestant fundamentalists and the death penalty), and Robert L. Young, *Punishment at All Costs: On Religion, Convicting the Innocent, and Supporting the Death Penalty*, 9 WM. & MARY BILL RTS. J. 237 (2000) (same); see also Randall Styers, *Capital Punishment, Atonement, and the Christian Right*, 18:5 DIFFERENCES: A J. OF FEM. CULT. STUD. 97, 116 (2007) (reflecting on modern Christian belief in blood atonement for crime and citing the affirmation of a Christian proponent of capital punishment that “many prison chaplains have testified to the spiritual benefits of capital punishment in focusing the criminal’s attention on the afterlife.”). Cf. Antonin Scalia, *God’s Justice and Ours*, FIRST THINGS, May 2002, <http://www.firstthings.com/article/2002/05/gods-justice-and-ours>, <<http://perma.cc/8J8E-KATQ>> (“The current predominance of opposition to the death penalty is the legacy of Napoleon, Hegel, and Freud rather than St. Paul and St. Augustine.”). But see James D. Unnever & Francis T. Cullen, *Christian Fundamentalism and Support for Capital Punishment*, 43:2 J. RES. CRIME & DELINQUENCY 169, 192–93 (2006) (finding fundamentalists not more likely to support death penalty than moderate or liberal Christians because, although they hold views predicting support (a harsh understanding of God), they also express beliefs negatively supporting the death penalty (in compassion)).

abolition of the death penalty in 1794 for all crimes other than first-degree murder.<sup>53</sup> Pennsylvania's reform announced secular bases for punishment—prevention of crime and reparation of injury—and denounced the use of the death penalty for murder unless it was “absolutely necessary for the public safety.”<sup>54</sup> Rehabilitation became recognized as a punishment goal and experimental prisons called “penitentiary houses” were built in Pennsylvania and New York that became the models for the American penitentiary system that prevails to this day.<sup>55</sup>

With the removal of condemned prisoners to penitentiaries, the clergy's role in the execution-day drama also drifted into the prisons and became the purview of professional prison chaplains.<sup>56</sup> In the United States and England, public executions also began to devolve into carnival-like, unruly mob scenes—the opposite of their order-creating purpose.<sup>57</sup> In 1830, Connecticut became the first state to respond by removing executions from public view.<sup>58</sup> Texas and other former slave states were among the last, waiting until the twentieth century to take executions inside.<sup>59</sup> In 1923, following a series of horrific public lynching-executions of African-American men—including one in Waco, Texas, where the victim was burned alive before a white crowd of 10,000 to 15,000<sup>60</sup>—the Texas legislature ordered executions moved from the counties to the interior of a Huntsville prison unit, where they are carried

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<sup>53</sup> POTTER, *supra* note 26, at 32–33.

<sup>54</sup> *Id.* at 33.

<sup>55</sup> FRIEDMAN, *supra* note 43, at 78–79; Melvin Gutterman, *Prison Objectives and Human Dignity: Reaching a Mutual Accommodation*, 1992 BYU L. REV. 857, 862 (1992) (noting that the Pennsylvania “break with colonial savagery of punishment necessitated the establishment of a prison system to house the convicted.”).

<sup>56</sup> POTTER, *supra* note 26, at 46, 51; BANNER, *supra* note 39, at 35.

<sup>57</sup> See James R. Acker, Thomas Brewer, Eamonn Cunningham, Allison Fitzgerald, Jamie Flexon, Julie Lombard, Barbara Ryn & Bivette Stodghill, *A Glimmer of Light in the Shadows of Death: Condemned Prisoners' Access to Spiritual Advisors—An Assessment of Policies and Practices*, 2:3 CONTEMP. JUST. REV. 235, 239 (1999) (“Crowds became so large, ribald, and unruly that public executions turned into degrading and embarrassing displays, representing more of a threat to and repudiation of social order and moral values than a source of their reinforcement.”) (internal citations omitted).

<sup>58</sup> *Id.*

<sup>59</sup> BANNER, *supra* note 39, at 35–36 (“The sermon remained a standard part of the execution ceremony as long as executions were held in public, throughout the first half of the nineteenth century in the North and well into the twentieth in parts of the South. After executions were moved into the jail yard and the sermon was abandoned, ministers would remain on hand to counsel the condemned prisoners and to lead those present in prayer. Even today, when executions are attended by only a few carefully chosen spectators and officials, there is often a clergyman in the room, a vestige of a time when the clergy played an important role in political life, when the line between secular and religious power was not drawn as sharply as it is today.”).

<sup>60</sup> PATRICIA BERNSTEIN, *THE FIRST WACO HORROR: THE LYNCHING OF JESSE WASHINGTON AND THE RISE OF THE NAACP* 110 (2005); see also WILLIAM CARRIGAN, *THE MAKING OF A LYNCHING CULTURE: VIOLENCE AND VIGILANTISM IN CENTRAL TEXAS, 1836–1916* 4–7 (2004) (providing photographs of Jesse Washington's burned corpse and the crowd that attended the lynching); and WITHOUT SANCTUARY: *LYNCHING PHOTOGRAPHY IN AMERICA* 17, 82, 173–74 (James Allen ed., 2000) (showing Washington's burned corpse, the spectators who attended the lynching, and explaining Washington's alleged offense and subsequent trial).

out to this day.<sup>61</sup>

The curtailed public influence of clergy during executions preceded a similar progressive diminution of the power and influence of chaplains in state prisons and the transformation of their tasks from primarily religious to reformatory and therapeutic.<sup>62</sup> In the nineteenth century, prison chaplains wielded political influence within prisons and with policy makers.<sup>63</sup> However, by the early twentieth century, as social science began to guide prison policy in many states, influential tasks previously assigned to chaplains were given to other professionals, such as educators and social workers.<sup>64</sup> Chaplains adjusted by presenting themselves as specialists in the moral reform of the offender: as “soul doctors” or “moral physicians.”<sup>65</sup> By the mid-1950s, chaplains became trained in psychology and clinical pastoral education and were incorporated in prison “treatment teams” that focused on rehabilitating offenders.<sup>66</sup> In the mid-1970s, the United States Supreme Court added another secularizing influence when it made clear that the federal Bill of Rights protects state prison inmates.<sup>67</sup> The First Amendment Free Exercise Clause obligated state chaplains to become ecumenical and to defer to prisoners’ expressed religious preferences.<sup>68</sup>

The Texas execution-day chaplain’s routine includes the following. The chaplain arrives at the death row unit to visit with the inmate some time before the execution date to prepare him or her for the process.<sup>69</sup> With the inmate’s permission, the chaplain talks to the inmate’s family ahead of the execution date, attempting to prepare them for what to expect.<sup>70</sup> Chaplains report that, on the day of execution, they stay with the inmate from the time he or she is brought to the Walls Unit where the execution occurs or until a stay is granted.<sup>71</sup> Chaplains experience

<sup>61</sup> JAMES W. MARQUART, SHELDON EKLAND-OLSON & JONATHAN R. SORENSON, *THE ROPE, THE CHAIR, AND THE NEEDLE: CAPITAL PUNISHMENT IN TEXAS, 1923–1990* 18 (1994).

<sup>62</sup> See Acker et al., *supra* note 57, at 240 (“The participation and role of religious counselors . . . changed as swift, public hangings gave way to modern, cloistered executions performed years after the pronouncement of a death sentence.”); Sundt & Cullen, *The Role of the Contemporary Prison Chaplain*, *supra* note 18, at 273–74 (summarizing the evolution of the prison chaplain’s role from the nineteenth to twentieth centuries).

<sup>63</sup> See Sundt & Cullen, *supra* note 18, at 272–273 (chronicling the “considerable importance” of the prison chaplain throughout the 1800s, noting that at the time “the chaplain’s influence and political clout rivaled those of the warden.”) (internal citation omitted).

<sup>64</sup> Sundt & Cullen, *supra* note 18, at 273.

<sup>65</sup> *Id.* at 274 (internal citation omitted).

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

<sup>67</sup> *Wolff v. McDonnell*, 418 U.S. 539, 555–56 (1974).

<sup>68</sup> See *Cruz v. Beto*, 405 U.S. 319, 321 (1972) (holding that even in the state prison context, “[t]he First Amendment, applicable to the states by reason of the Fourteenth Amendment, prohibits government from making a law prohibiting the free exercise of religion.”) (internal citations omitted) (internal quotations omitted).

<sup>69</sup> See, e.g., Owens, *supra* note 7, at 46 (“A day or two before the execution date, I go out to the unit and visit with them”). *But see* OWENS & OWENS, *supra* note 5, at 192 (“Unlike Rev. Pickett . . . who never met the condemned man until the day of his execution, [Jim] Brazzil was able to visit the person scheduled for death as soon as the judge set the execution date.”).

<sup>70</sup> See, e.g., Owens, *supra* note 7, at 46 (“If they approve, I call their family ahead of time and talk to them.”).

<sup>71</sup> *Id.*

varying degrees of trust and antagonism with the inmates.<sup>72</sup> They pray with and counsel receptive inmates.<sup>73</sup> They help inmates receive approved phone calls, and they sit with them during their last meals.<sup>74</sup> Chaplains assist the inmates to craft their last statements, which the inmates will deliver from the execution gurney.<sup>75</sup> Chaplains prepare the inmates for the logistics of the execution: how they are to enter the execution chamber, which direction they will sit, and where they will place their feet.<sup>76</sup> Finally, when legal appeals are over and the execution tie-down team comes to escort the inmate from the holding cell to the chamber, the chaplain leads the inmate into the chamber.<sup>77</sup> Once the inmate is strapped down on the gurney, the chaplain stands next to the warden and places his hand on the inmate until he or she is dead.<sup>78</sup>

The current milieu of professionalism, ecumenism, inmate legal rights, and the continuing institutional goal of rehabilitation, reinforces the natural emotional empathy that chaplains historically have had for prisoners.<sup>79</sup> The same milieu also tends to frustrate the deeply historical two-dimensional template presenting condemned prisoners as mere objects of spiritual conversion for the consequential goal of public order.<sup>80</sup> Nevertheless, the strong political influence of fundamentalist Christianity in Texas and other prolific executing states is notable.<sup>81</sup> When the Texas Legislature reinstated the death penalty in 1973, the authors of the legislation argued that it was supported by Biblical authority in Genesis, Numbers, and other books of the Hebrew

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<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> Bryant, *supra* note 4.

<sup>75</sup> Pickett Interview, *supra* note 3.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> See OWENS & OWENS, *supra* note 5, at 192 (“As a prison chaplain, [Brazzil] used to stand beside the gurney, his hand resting just below the knee of the condemned. His was the last human touch they ever felt in this world.”); INTO THE ABYSS, *supra* note 7 (recounting chaplain Richard Lopez’s hand placement on the inmate during the execution).

<sup>79</sup> See generally Sundt & Cullen, *The Role of the Contemporary Prison Chaplain*, *supra* note 18 (describing evolving role of prison chaplain).

<sup>80</sup> Acker et al., *supra* note 57, at 239–40 (“Public executions were ceremonials, the symbolic significance of which was to reinforce the political authority of the secular state, the moral authority of the church, and the awful consequences of breaching legal and religious injunctions . . . . After executions were moved inside of jails, and later behind prison walls, they were stripped of their ceremonial character.”) (internal citation omitted).

<sup>81</sup> See generally Harold G. Grasmick, John K. Cochran, Robert J. Bursik, Jr. & M’Lou Kimpel, *Religion, Punitive Justice, and Support for the Death Penalty*, 10 JUST. Q. 289 (finding greater support for punitive measures and the death penalty among evangelical/fundamentalist Christians); Grasmick et al., *Protestant Fundamentalism and the Retributive Doctrine of Punishment*, *supra* note 52 (indicating a link between support for retributive doctrine and fundamentalist Protestant denominations and religious beliefs); Michael J. Lieber, Anne C. Woodrick & E. Michele Roudebush, *Religion, Discriminatory Attitudes, and the Orientations of Juvenile Justice Personnel: A Research Note*, 33:3 CRIMINOLOGY 431 (1995) (reporting that Biblical-literalist juvenile court personnel support the death penalty for juveniles); Robert L. Young, *Religious Orientation, Race and Support for the Death Penalty*, 3 J. SCI. STUD. RELIGION 76, 85 (1992) (highlighting correlation between Protestant fundamentalism and high support for the death penalty while noting that the “absolutism of a fundamentalist orientation appears to eliminate some of the uncertainty which others experience in considering the appropriateness of [the death penalty].”).

Scriptures.<sup>82</sup> Prison employees influenced by literalist Christian beliefs may adopt the passive position that because human law is divinely sanctioned and God is in control of history, their participation in executions is a moral good, however strange and emotionally troubling they find their own participation. For example, when asked how God would view his participation in execution-day proceedings, Richard Lopez, a lay Roman Catholic execution-day chaplain in Texas, said—tears of empathy for executed inmates streaming down his face—that he took comfort in the belief that God wills all things to be and is behind the operation of human government.<sup>83</sup>

#### IV. CONSTITUTIONALITY OF TEXAS EXECUTION-DAY PRISON CHAPLAINCY

Texas chaplains should view the question of the constitutionality and legality of their practice with condemned inmates on execution day as a component of a broader inquiry into the ethics of the practice. The discussion below of the constitutionality of the practice illumines values involved in the broader ethical consideration, in particular, principles respecting the dignity of the inmate.

Death-penalty states differ on the access allowed to spiritual advisors and chaplains as execution approaches. It appears that no other state allows clergy to participate in executions the way Texas does.<sup>84</sup> Nearly all death-penalty states require any contact between the inmate and spiritual advisor or chaplain to terminate before the inmate enters the execution chamber.<sup>85</sup> Colorado, which has not seen an execution since 1997,<sup>86</sup> would allow a spiritual advisor of the inmates' choice to be in the

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<sup>82</sup> H.B. 200, 63<sup>rd</sup> Leg., Reg. Sess. (Tex. 1973) (floor debate, May 10, 1973) (transcript on file with author). After the author of the bill to reinstate the death penalty, Representative L. Dean Cobb, introduced several biblical passages from Genesis, Numbers, and Exodus as arguably good grounds for the legislation, one of his co-sponsors asked him how he could “reconcile” his actual bill, which would provide the death penalty only for a limited set of circumstances, with the biblical references. *Id.* Rep. Cobb responded that, “philosophically” he did not know that he could, because he had “some difficulty in singling out specific types of murder for which a life will be taken, as opposed to anyone taking with malice aforethought . . . another person’s life.” *Id.* In other words, he could not reconcile the “blood for blood” biblical commands with the limited bill, but he said the criminal jurisprudence committee “felt that it had to be defined into the specific categories” in order to meet United States Supreme Court muster. *Id.* See also *Holberg v. State*, 38 S.W.3d 137, 140 (Tex. Crim. App. 2000) (holding that, despite the appeal to scripture by the death penalty bills’ authors, “it [was] at least as likely that the Legislature’s actual purpose in enacting the statutes was . . . secular.”).

<sup>83</sup> INTO THE ABYSS, *supra* note 7.

<sup>84</sup> Acker et al., *supra* note 57, at 249–53 tbl. 1.

<sup>85</sup> See *id.* (Alabama, Arizona, Arkansas, California, Delaware (unclear; up to discretion of warden), Florida (unclear; “varies”), Georgia, Indiana, Kentucky, Louisiana, Kansas, Mississippi, Missouri, Montana, Nevada, New Hampshire (no information; no post-*Furman* executions), New Mexico, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, South Dakota (unclear)).

<sup>86</sup> John Ingold, *A History of the Death Penalty in Colorado*, DENVER POST, Mar. 23, 2012, <http://blogs.denverpost.com/crime/2012/03/23/history-death-penalty-colorado/3921/>, <<http://perma.cc/S5FQ-VH29>>.

chamber during execution.<sup>87</sup> Idaho similarly allows a spiritual advisor of the inmate's choice to be present to the inmate "as long as the inmate wishes."<sup>88</sup> Utah and Virginia allow a spiritual advisor of choice to accompany the inmate as he goes into the chamber.<sup>89</sup> Both Oklahoma and Texas require an execution-day prison chaplain to be ordained before he can participate.<sup>90</sup> But in Oklahoma, the prison chaplain is required to leave before the execution process begins.<sup>91</sup> Only in Texas does the chaplain stay and participate in the execution. The circumstances create two important constitutional queries for a Texas chaplain: whether the requirements of the First Amendment religious clauses of the federal and Texas constitutions are met by, first, the chaplain's pre-execution counseling with a condemned inmate and, second, the chaplain's presence and participation in the execution chamber during execution.<sup>92</sup>

The First Amendment Establishment Clause guards against excessive government involvement with religion.<sup>93</sup> Thus, Texas' employment of chaplains triggers constitutional scrutiny.<sup>94</sup> Practices they may perform on behalf of the state raise additional constitutional questions.<sup>95</sup> Texas prison chaplains are ordained by Christian

<sup>87</sup> Acker et al., *supra* note 57, at 249 tbl. 1.

<sup>88</sup> *Id.* at 250.

<sup>89</sup> *Id.* at 253.

<sup>90</sup> *Id.* at 252–53.

<sup>91</sup> See OKLAHOMA DEPARTMENT OF CORRECTIONS, PROCEDURES FOR THE EXECUTION OF INMATES SENTENCED TO DEATH IV(C)(3) (2014), <https://s3.amazonaws.com/s3.documentcloud.org/documents/1175017/oklahoma-execution-protocol.pdf> <<http://perma.cc/DLK8-5B3A>> ("The inmate will be advised that the facility chaplain and/or spiritual advisor are not permitted to be present in the execution chamber during the execution process.").

<sup>92</sup> See *LeCroy v. Hanlon*, 713 S.W.2d 335, 338 (Tex. 1986) ("The federal constitution sets the floor for constitutional rights; state constitutions establish the ceiling."). Accordingly, on occasion the Texas Constitution has been held to provide "individuals greater safeguards to their personal freedom" than the federal Constitution. *E.g.*, *State v. Morales*, 826 S.W.2d 201, 204 (Tex. App. 1992), *rev'd on other grounds*, 869 S.W.2d 941 (Tex. 1994). However, if a state law or practice is found to violate federal rights, the constitutionality query is answered and need not proceed further. The language of the Texas constitution's "Freedom of Worship" clause conveys a strong purpose to protect the individual's autonomy of religious belief and practice from Government interference, either imposing or prohibiting religion. The clause asserts, "No man shall be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent." TEX. CONST. art. I § 6. This would by all appearances prohibit the State's provision of a prison chaplain at any time the inmate does not consent. The same clause asserts an "indefeasible" positive right possessed by "all men" to "worship Almighty God according to the dictates of their own consciences." *Id.* So it likewise would suggest that the State is almost categorically bound to provide a chaplain at all times that the inmate desires. The State clause essentially amplifies the federal First Amendment rights.

<sup>93</sup> *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000) ("[T]he Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.'" (quoting *Lee v. Weisman*, 505 U.S. 577, 587 (1992))); *Cnty. Of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 594 (1989) ("The Establishment Clause . . . prohibits government from appearing to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.'" (quoting *Lynch v. Donnelly*, 465 U.S. 668, 672 (1984))).

<sup>94</sup> *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 296–97 (1962) (Brennan, J., concurring) ("There are certain practices, conceivably violative of the Establishment Clause. . . . [P]rovision by state and federal governments for chaplains in penal institutions may afford an[] example.").

<sup>95</sup> Obviously, not only the chaplain's employment by the State, but also what the chaplain does in

denominations—Roman Catholic and Protestant—but they are all employed by the state of Texas.<sup>96</sup> Chaplains' jobs are defined in large part by the prison system; according to some chaplains' self-reporting, they may be terminated if they publicly express their opinion on the death penalty.<sup>97</sup>

The United States Supreme Court has issued several tests for determining if state or federal government actions violate the Establishment Clause.<sup>98</sup> First, a government act must have a secular, non-religious purpose.<sup>99</sup> A government's secular rationale usually will be allowed so long as it does not appear to be a sham.<sup>100</sup> Second, the primary effect of the government act must not advance or inhibit religion.<sup>101</sup> Third, the government act may not be excessively entangled with religion.<sup>102</sup> Entanglement can occur when "the involvement" between government and religion "is excessive, and [constitutes a] continuing [involvement] calling for official and continuing surveillance leading to an impermissible degree of entanglement."<sup>103</sup> Fourth, a government act will not be allowed if the act sends a message endorsing religion.<sup>104</sup> Finally, a government act will not be allowed if it coerces persons into a religious exercise.<sup>105</sup>

Inmates' constitutional rights are enforced so long as those "First Amendment rights are not inconsistent with [their] status as a prisoner or with the legitimate penological objectives of the corrections system."<sup>106</sup> The "legitimate penological objectives" test allows regulations that

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connection with that employment, is relevant. The chaplain's presence in the chamber with his hand on the inmate's leg or ankle while the lethal drugs are administered is not mere witnessing or accompaniment. It is participation in the State's execution.

<sup>96</sup> Brandi Grissom, *Texas Prison Chaplains Pray, Plead for Funds*, TEX. TR., Feb. 17, 2011, <http://www.texastribune.org/2011/02/17/texas-prison-chaplains-pray-plead-for-funds/> <<http://perma.cc/4LDE-9Q86>>; see generally *Rehabilitation Programs Division*, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, [https://www.tdcj.state.tx.us/divisions/rpd/rpd\\_chaplaincy.html](https://www.tdcj.state.tx.us/divisions/rpd/rpd_chaplaincy.html), <<http://perma.cc/2N3G-EAGT>> (providing mission and overview of Texas prison chaplaincy program).

<sup>97</sup> See, e.g., *Pickett Interview*, *supra* note 3 ("[I]f I said I was opposed to [the death penalty], they'd fire me.").

<sup>98</sup> See, e.g., *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987) (laying out test to determine when government action has a religious purpose).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 586–87 ("While the Court is normally deferential to a State's articulation of a secular purpose, it is required that the statement of such purpose be sincere and not a sham. 'It is not a trivial matter, however, to require that the legislature manifest a secular purpose and omit all sectarian endorsements from its laws. That requirement is precisely tailored to the Establishment Clause's purpose of assuring that Government not intentionally endorse religion or a religious practice.'") (quoting *Wallace v. Jaffree*, 472 U.S. 38, 75 (1985) (O'Connor, J., concurring in judgment)) (internal citations omitted).

<sup>101</sup> *Id.* at 583.

<sup>102</sup> *Edwards*, 482 U.S. at 583.

<sup>103</sup> *Walz v. Tax Comm'n of the City of N.Y.*, 397 U.S. 664, 675 (1970).

<sup>104</sup> *Cnty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 600–01 (1989).

<sup>105</sup> *Lee v. Weisman*, 505 U.S. 577, 587 (1992).

<sup>106</sup> *Pell v. Procunier*, 417 U.S. 817, 822 (1974). The Supreme Court has explicitly recognized inmates' retention of the right to free exercise of religion. See generally *Cruz v. Beto*, 405 U.S. 319 (1972).

restrict an inmate's rights when (1) a valid, rational connection exists between the regulation and the legitimate governmental interests advanced; (2) the prisoner has alternative means to exercise the right in question; (3) accommodating the inmate's right might have a significant impact on guards, other prisoners, or the allocation of prison resources, generally; or (4) alternative means exist for the prison to accommodate the prisoner's asserted right.<sup>107</sup> Under that test, courts have recognized that death row inmates have a free exercise right to meet with spiritual advisors of their choice on the day of their execution. However, the law permits prisons to place restrictions on that right, due to concern about security risks with inmates and their spiritual advisors just before execution, as well as administrative burdens on the staff that monitor spiritual advisor visits, when no monitoring is needed for a prison's own execution-day chaplain.<sup>108</sup> Thus, all death-penalty states accommodate condemned inmates' First Amendment free exercise rights by allowing them to select a personal spiritual advisor to accompany them on execution day, even from among persons unaffiliated with the prison.<sup>109</sup> Practices vary as to when inmates and their chosen advisors are required to separate: from up to twenty-four hours in advance of execution to not at all.<sup>110</sup> Texas requires the personal spiritual adviser (as opposed to the execution-day chaplain) to depart a couple of hours before the execution, although that person may witness the execution from a separate room.<sup>111</sup>

Governments may constitutionally employ prison chaplains because prison creates an "exceptional government-created burden" on the "private religious exercise" of inmates.<sup>112</sup> In other words, chaplains employed by the government are constitutionally allowed insofar as they are surrogates for the religious resources inmates would otherwise seek to avail themselves of in the free world.<sup>113</sup> There is no constitutional ground for prison chaplaincy other than accommodation of inmates' free exercise, as Justice William Brennan made clear in his concurring opinion in *Abington School District v. Schempp*<sup>114</sup>:

The . . . provision by state and federal governments for chaplains in penal institutions [arguably may] . . . be assumed to contravene the Establishment Clause, yet be sustained on constitutional grounds as necessary to secure to the . . .

<sup>107</sup> *Turner v. Safley*, 482 U.S. 78, 89 (1987).

<sup>108</sup> *Card v. Dugger*, 709 F. Supp. 1098, 1104-07 (M.D. Fla. 1988), *aff'd*, 871 F.2d 1023 (11th Cir. 1989).

<sup>109</sup> *Acker et al.*, *supra* note 57, at 254.

<sup>110</sup> *Id.* at 249-53.

<sup>111</sup> *Id.* at 253.

<sup>112</sup> *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005).

<sup>113</sup> *See* *Rudd v. Ray*, 248 N.W.2d 125, 128 (Iowa 1976) ("The crucial and controlling fact in this case is that it deals with the exercise of religion by prison inmates. Prison inmates are restrained and consequently deprived of their liberty. By reason of their status they are displaced from their homes and communities. They are thereby denied the opportunity to exercise their individual rights to worship in the same manner as could an ordinary citizen.")

<sup>114</sup> *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963).

prisoners those rights of worship guaranteed under the Free Exercise Clause. Since government has deprived such persons of the opportunity to practice their faith at places of their choice, the argument runs, government may, in order to avoid infringing the free exercise guarantees, provide substitutes where it requires such persons to be. . . . The State must be steadfastly neutral in all matters of faith, and neither favor nor inhibit religion. In my view, government cannot sponsor religious exercises in public schools without jeopardizing that neutrality. On the other hand, hostility, not neutrality, would characterize the refusal to provide chaplains and places of worship for prisoners . . . cut off by the State from all civilian opportunities for public communion.<sup>115</sup>

If a condemned inmate informs the authorities that she does not want the institutional execution-day chaplain to meet with her, counsel her, or even be present around her during the day of the execution or in the execution chamber, then the chaplain's continuing presence would be a federal establishment violation and state "freedom of worship" violation.<sup>116</sup> The prison chaplain's sole *legal* justification for being in the prison, much less near the holding tank outside the execution chamber, is a pure accommodation of the inmates' free exercise rights.<sup>117</sup> A chaplain cannot constitutionally argue with an inmate who exercises those rights by asking that he be removed.<sup>118</sup> According to Supreme Court jurisprudence, this would likely be a hostile use of religion by the state and improper coercion.<sup>119</sup> As a result, Texas execution-day chaplains have, by their own admission, violated the federal and state constitutions, although it would be difficult to know how often. Chaplain Jim Brazzil, for example, admitted in a 2001 interview that arguments sometimes

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<sup>115</sup> *Id.* at 296–299 (Brennan, J., concurring).

<sup>116</sup> *Lee v. Weisman*, 505 U.S. 577, 587 (1992); TEX. CONST. art. I § 6 ("No man shall be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent.").

<sup>117</sup> See *Schempp*, 374 U.S. at 296–299 (Brennan, J., concurring); *Montano v. Hedgepeth*, 120 F.3d 844, 850 n.10 (8th Cir. 1997) ("[S]tates might commit a technical violation of the Establishment Clause by even hiring prison chaplains. Nonetheless, this is condoned as a permissible accommodation for persons whose free exercise rights would otherwise suffer."); see also Steven H. Aden, *The Navy's Perfect Storm: Has a Military Chaplaincy Forfeited Its Constitutional Legitimacy by Establishing Denominational Preferences?*, 31 W. ST. L. REV. 185, 186 ("A military chaplaincy system only passes constitutional muster . . . if it strictly adheres to its constitutionally permissible purpose: to provide for accommodation of free exercise of religion for service personnel.").

<sup>118</sup> See *Wallace v. Jaffree*, 472 U.S. 38, 53–54 (1985) ("Just as the right to speak and the right to refrain from speaking are complementary components of a broader concept of individual freedom of mind, so also the individual's freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority. . . . [T]he Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all.").

<sup>119</sup> See *Walz v. Tax Commission*, 397 U.S. 664, 669 (1970) (holding that the purpose of the Establishment and Free Exercise Clauses "is to insure that no religion be . . . commanded."); see also *Schempp*, 374 U.S. at 223 (holding that opening of the public school day with selections and readings of verses from the Holy Bible "and the law requiring [such] exercises are in violation of the Establishment Clause.").

occur between inmate and chaplain.<sup>120</sup> “Generally,” he said, “I have been received wonderfully. There’ve been a few [inmates] who were antagonistic. But I’ve been in the death chamber with every one of them. I’ve never had one of them turn me down.”<sup>121</sup>

Provision by the prison of an execution-day chaplain up until the time of execution, even within the two-hour window right before it, could be constitutionally permissible, especially if the inmate requests it with no signs of coercion.<sup>122</sup> The State, however, should have a hard time providing a reasonable, neutral, non-religious motive for having the chaplain in the execution chamber.<sup>123</sup> If the rationale is the usually stated one—that chaplains help keep the inmate and guards calm—the State probably cannot make a reasonable argument that a secular individual trained in therapy would not do as well, or that the substitution of trauma and grief training for inmates and guards would not do as well.<sup>124</sup> If the State must argue that it is the additional religious training, experience, expertise, authority, or mere religious professional status of the chaplain that is the most calming element, it is in constitutional trouble because it is arguing for the chaplain’s service to the State to an equal or higher degree than the chaplain’s service to the inmate. Effectively, this is arguing for State-imposed religious service vis-a-vis the inmate, and the government cannot show that an equally situated, secular state employee would be less effective in the role. In short, this would be an argument for the endorsement of religion.<sup>125</sup> If the State must argue that chaplains are needed because they are *Christian* or will be most effective to calm the *Christian* inmates, further constitutional red flags would be raised because the State would be moving from promotion of religion generally to promotion of a specific religion.<sup>126</sup> If the State argues that *chaplains* are necessary, then it is likely taking the position that it cannot carry out

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<sup>120</sup> Owens, *supra* note 7.

<sup>121</sup> *Id.* Rev. Carroll Pickett also suggested that he would fairly insistently offer his services. “There have been a couple of them who came in and said they didn’t want to talk, but after a couple of hours I will just tell them, ‘Okay, if that’s your choice, I will be available.’ I will not leave the unit, or I can go down to Cell 7 and be out of the way. But basically . . . of the 95 that I have been with all the way, there has been only one who refused to talk at all.” Pickett Interview, *supra* note 3.

<sup>122</sup> See *Lee v. Weisman*, 505 U.S. 577, 587 (1992) (prohibiting religious coercion).

<sup>123</sup> See *Edwards v. Aguillard*, 482 U.S. 578, 586–87 (1987). The Establishment Clause requires the State to provide a non-sham, non-religious purpose for the presence of its Christian chaplain employee in the execution chamber. *Id.* In light of the history of the expiatory ritual reinforcing the temporal power of the State with Christian religious authority and the aura of solemnity and sanctity that the execution-day prison chaplain continues to bring today’s non-public spectacle, this would not seem possible.

<sup>124</sup> See *Turner v. Safley*, 482 U.S. 78, 89 (1987) (holding that “when a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.”). There is no valid, rational connection between the use of a *chaplain* over a therapist and accomplishment of the “legitimate governmental interest” of obtaining a *calm* execution. The therapeutic training that chaplains now obtain, giving them the tools to help calm inmates, guards, and the prison milieu, arguably makes chaplains *substitutes* for therapists in that regard.

<sup>125</sup> See *generally* Cnty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573 (1989).

<sup>126</sup> See *id.* at 601 (discussing endorsement of Christian faith by the government through display of Christmas crèche at county building).

its allegedly secular punishment without delegating part of the task to a religious person—this would effectuate an unconstitutional entanglement, an unconstitutional endorsement of religion, and an unconstitutional coercive use of religion.<sup>127</sup>

A Texas execution-day chaplain should consider that his presence in the execution chamber is unconstitutional. In addition, he should recognize the great progress our society has made from the time that prisoners were considered in some states to be slaves with no constitutional or other human rights.<sup>128</sup> Today, inmates' rights, as well as a conception of their autonomy and dignity as persons, are legally recognized and supported. Legal execution, however, is an anomaly in today's world of rights because it literally erases the rights holder.<sup>129</sup> To the extent that a state may want to argue that an inmate has no rights by the time of execution—and, thus, the chaplain's unconstitutional presence in the chamber would not matter—the state is arguing for a return to the time when people could be owned and disposed of like objects.<sup>130</sup> Execution-day participation by chaplains stands on shaky legal ground.

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<sup>127</sup> See *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) (discussing unconstitutional entanglement); *Allegheny*, 492 U.S. at 601 (discussing unconstitutional endorsement of religion); and *Lee*, 505 U.S. at 587 (discussing unconstitutional coercive use of religion).

<sup>128</sup> See, e.g., *Ruffin v. Commonwealth*, 62 Va. 790, 796 (1871) (“The bill of rights is a declaration of general principles to govern a society of freemen, and not of convicted felons and men civilly dead. . . . They are the slaves of the State undergoing punishment.”).

<sup>129</sup> Only persons may bring claims of constitutional violations in federal courts. *Diamond v. Charles*, 476 U.S. 54, 62 (1986). At the point right before execution, the person being subjected to capital punishment retains constitutional rights. However, in most cases, due to the finality principle built into state and federal habeas statutes, realistic opportunities to gain access to the courts to vindicate those rights have been exhausted. See, e.g., 28 U.S.C. 2244(b) (laying out federal habeas finality principle); Tex. Code Crim. Proc. art. 11.071 § 5 (1965) (laying out state habeas finality principle); *Evans v. Muncy*, 498 U.S. 927, 930 (1990) (Marshall, J., dissenting) (explaining that observance of finality sometimes means judicial tolerance of unlawful execution). *During* execution by lethal injection, the inmate would appear to have a limited right not to be subjected by prison officials to “severe pain” while being killed, an act which, once accomplished, renders the right moot. *Glossip v. Gross*, 135 S. Ct. 2726, 2737 (2015) (quoting *Baze v. Rees*, 553 U.S. 35, 61 (2008)). The diminution (and destruction) of legal personhood and access to redress rights involved in the execution process seems concomitant with the deprivation of human dignity identified by jurists as execution's principal flaw. See *infra* note 128.

<sup>130</sup> See *Gregg v. Georgia*, 428 U.S. 153, 230 (Brennan, J., dissenting) (quoting *Furman v. Georgia*, 408 U.S. 238, 272–73 (Brennan, J., concurring)). Justice William J. Brennan suggested that the death penalty was such a temporal throwback, yet still inconsistent with the Constitution's original Eighth Amendment Cruel and Unusual Punishment Clause. “The fatal constitutional infirmity in the punishment of death is that it ‘treats members of the human race as non-humans, as objects to be toyed with and discarded. [It is] thus inconsistent with the fundamental premise of the [Eighth Amendment Cruel and Unusual Punishment] Clause that even the vilest criminal remains a human being possessed of common human dignity.’” *Id.* Brennan's position highlights the tension that existed within our original Constitution which on the one hand uncritically recognized and incorporated slavery, and on the other hand barred cruel and unusual punishments. It points to the unfinished work of the Thirteenth and Fourteenth Amendments, because slavery and the death penalty share the same disrespect for human dignity and are so closely intertwined in U.S. history, and yet the death penalty persists.

## V. ETHICS OF TEXAS EXECUTION-DAY PRISON CHAPLAINCY

There is a reasonably strong basis for finding that chaplain participation in executions violates the federal and state Constitutions' religion clauses, but can an argument nevertheless be made that, aside from the religious role of the chaplain, the practice is ethical? Execution-day chaplains de-emphasize purely religious functions when they describe their work with condemned inmates, frequently asserting that what they do is therapeutic, palliative, or hospice related.<sup>131</sup> Again, chaplains themselves report their duty as being there for the inmate because no person should have to die alone.<sup>132</sup> They should be considered sincere. Since Texas chaplains consistently identify their role in the execution chamber as committed to the benefit of the inmate, and additionally would not be employed by the prison but for the accommodation that they are there for the good of inmates, beneficence, the duty to "do good"—and its companion non-maleficence, the duty to "do no harm"—should be the *minimal* ethical standards by which they assess and govern the appropriateness of their actions in relation to the inmate.<sup>133</sup> Beneficence is the first principle of ethics for all health and mental health care professionals.<sup>134</sup> Although they arise from different sources, the chaplaincy and health professional communities share a core ethic of caring for others; comparison between codes and ethical analyses in the disciplines is therefore apropos, and provides a foundation on which to analyze the ethical question of execution-day chaplaincy.<sup>135</sup>

Unlike health care regulatory communities, chaplaincy professional associations seem to have been slow to develop relevant ethical standards and also have been silent on the subject of the ethics of participation in the death penalty.<sup>136</sup> There is a dearth of literature applying ethics to

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<sup>131</sup> See discussion of chaplain role, *supra* notes 5–8.

<sup>132</sup> See *supra* note 8.

<sup>133</sup> Beneficence and corresponding non-maleficence also commonly have been considered "prima facie duties" of ethics. THOMAS A. MAPPES & JANE S. ZEMBATY, *BIOMEDICAL ETHICS*, 1–2, 21–22 (3d ed. 1991). According to the English philosopher W.D. Ross, "prima facie duties" arise from our "morally significant relations"—"promisee to promisor, creditor to debtor, spouse to spouse, child to parent, friend to friend, citizen to the state, fellow human being to fellow human being." *Id.* at 22.

<sup>134</sup> See, e.g., AM. PSYCHOL. ASS'N, *ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT*, General Principle A (2010), <http://www.apa.org/ethics/code/index.aspx>, <<http://perma.cc/8K44-F9G3>> (stating that the first General Principle of the professional code is "Beneficence and Nonmaleficence: Psychologists strive to benefit those with whom they work and take care to do no harm. In their professional actions, psychologists seek to safeguard the welfare and rights of those with whom they interact professionally and other affected persons.").

<sup>135</sup> See Margaret E. Mohrmann, *Ethical Grounding for a Profession of Hospital Chaplaincy*, 38 *HASTINGS CENTER REP'T* 6, 19–20 (2008) ("Medical ethics tends to ground the patient's central status in general principles of respect for persons and in more specific, relationship-generated obligations of care for others' well-being. Theological or religious ethics tends to base similar principles and obligations on claims about common humanity, with or without reference to a creator-god, and on (divine) injunctions to love others. But the two ethical frameworks are agreed on much that might be called an ethic of caring for patients [or inmates], the practice that forms the large area of overlap in the work of these professions.").

<sup>136</sup> The American Correctional Chaplains Association (ACCA), for example, is presently governed

chaplaincy work in prison. However, in 2004, the Association for Clinical Pastoral Education (ACPE) brought together six major chaplaincy groups, including prison chaplains, to adopt an appropriate *Common Code of Ethics for Chaplains, Pastoral Counselors, Pastoral Educators and Students*.<sup>137</sup> The Code's norms read like an exposition of the principle of beneficence, requiring chaplains to support the autonomy, dignity, and healing of their client.<sup>138</sup> This begs the question of who the prison chaplain's client really is, since the execution instance is loaded with conflicting interests. As long as chaplains assert that they seek the inmate's beneficence, then the object of their duty should be the inmate. Yet the inmate's beneficence is under lethal assault by the chaplain's employer, supervisor, and colleagues at the time of execution.

### A. Execution-Day Chaplains Have a Conflict of Interest.

The ACPE Code requires that, in order to carry out a professionally ethical practice, chaplains must avoid all conflicts of interest and coercive relationships with clients that might impose the values or beliefs of others.<sup>139</sup> Strikingly, execution-day chaplains seem compromised at

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by a 1992 ethics code that has little to say about duties owed by chaplains to the persons under their care. AM. CORRECTIONAL CHAPLAINS ASS'N, CODE OF ETHICS, <http://www.correctionalchaplains.org/>, <<http://perma.cc/2AJX-KTSW>> [hereinafter ACCA CODE]. Indeed, the principle of beneficence can only be weakly inferred. The code otherwise stresses maintenance of an image of professionalism: "All members make use of their skill and training to maintain the integrity and enhance the image of religious ministry in a correctional setting." *Id.* at Principle II. The absence of any focus on duties toward or the rights of beneficiaries of chaplaincy care is unsettling.

<sup>137</sup> See ASS'N FOR CLINICAL PASTORAL EDUC., COMMON CODE OF ETHICS FOR CHAPLAINS, PASTORAL COUNSELORS, PASTORAL EDUCATORS AND STUDENTS (2004), [http://www.professionalchaplains.org/files/professional\\_standards/common\\_standards/common\\_code\\_ethics.pdf](http://www.professionalchaplains.org/files/professional_standards/common_standards/common_code_ethics.pdf), <<http://perma.cc/M8Q2-9AH7>> [hereinafter COMMON CODE]. The six groups were the Association of Professional Chaplains, American Association of Pastoral Counselors, Association for Clinical Pastoral Education, National Association of Catholic Chaplains, National Association of Jewish Chaplains, and the Canadian Association for Pastoral Practice and Education. According to the ACPE, "[t]he membership of the participating groups represent[ed] over 10,000 members who currently serve[d] as chaplains, pastoral counselors, and clinical pastoral educators in specialized settings as varied as healthcare, counseling centers, prisons or the military." *Id.* at 1.

<sup>138</sup> See generally COMMON CODE. Notably, the 2004 COMMON CODE was superseded by the "Code of Professional Ethics for ACPE Members" in 2010, which weakens the prior ethical code by removing a positive duty to provide care intended to "promote the best interest of the client and to foster strength, integrity and healing," and replacing it with a negative duty to "respect the integrity and welfare of those served or supervised, refraining from disparagement . . . and . . . exploitation." ASS'N FOR CLINICAL PASTORAL EDUC., ACPE STANDARDS & MANUALS: 2010 STANDARDS 3 (2010), <http://s531162813.onlinehome.us/pdf/2010%20Manuals/2010%20Standards.pdf>, <<http://perma.cc/34UA-ZFFU>>. The new code removes the prior code's provisions on avoiding conflicts of interest between duties to institutions, third parties, and the client, and avoiding all coercive behavior with the client. The removal of the conflict of interest provision from an ethical code is curious, but especially from a code that is designed to guide professionals working in institutional settings that frequently raise conflict issues. The discussion herein is confined, therefore, to the code of 2004.

<sup>139</sup> The Code requires chaplains to "refrain from imposing [their] own values and beliefs on those served[.]" "refrain from exploit[ing] . . . the imbalance of power in the professional/client relationship[.]" "avoid any conflicts of interest or appearance of conflicting interest(s)[.]" and

the outset by others' interests, which conflict directly with the survival of the inmates they purport to help. They are impeded by their position as an agent of the State from advocating for the inmate's survival or from otherwise countering the values, beliefs, or actions of other state agents who are preparing to kill the inmate. Yet chaplains' mere ineffectiveness to assist their "client" in any truly beneficial way still does not sufficiently describe the ethical concerns inherent in the practice of execution-day chaplaincy.

Within the chamber, chaplains are compromised by their employment status because they cannot object to the inmate's execution, much less try to stop it, and they arguably *do* assist the warden in killing the inmate.<sup>140</sup> As clergy always have, execution-day chaplains bring the spiritual aura of their presence as a religious authority into the chamber, authenticating the State's action as morally legitimate before the assembled participants and witnesses. They help the warden, tie-down guard team, and executioner think of their mission as sanctified and necessary, albeit emotionally difficult, not only by the chaplains' presence, but additionally by laying their hands on the inmate until he or she has no pulse.<sup>141</sup> Within the execution chamber, the inmate is no more an object of their clerical beneficence than those assisted on their heavenly journey by the Inquisitor. The chaplains are players in an ancient drama of redemptive violence and not, as they would like to portray themselves, present healers. Rather than carrying out a duty to "do good" and "do no harm" to their clients, execution-day chaplains' work in fact benefits the other side—the state seeking to enact ultimate violence on the inmates the chaplains ostensibly serve.

### **B. Execution-Day Chaplains Are Required to Act Against Dignity of Prisoner.**

The ACPE Code requires chaplains to "affirm the dignity and value

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"refrain from any form of . . . coercion . . . in relationships with clients." COMMON CODE, *supra* note 135, at paras. 1.4, 1.6, and 1.8. The ACCA Code contains a weak counterpart: "Chaplains function as religious professionals within the correctional setting and do not undertake roles that are contrary to that of pastoral care provider." ACCA CODE, *supra* note 134 at 3.

<sup>140</sup> See *supra* note 4 (discussing chaplain assistance in execution-day proceedings).

<sup>141</sup> See, e.g., Alberta Phillips, *Questioning the Myth of a Painless Execution*, AUSTIN AM. STATESMAN, Dec. 11, 2003, at A21 ("In the 32 executions Pickett had witnessed before [Carlos DeLuna's], the condemneds' pulses had stopped before the second lethal chemical was injected into their veins. Carlos' pulse continued after the first drug and anesthesia sodium thiopental flowed through one of the young man's veins. Pickett could feel Carlos' pulse as he clutched his ankle and stared into his big brown eyes, which never blinked. Carlos' ankle jerked after the second lethal drug, pancuronium bromide, dripped into another vein. His eyes remained open. The pulse kept throbbing until a third drug kicked in."); see also LIFTON, *supra* note 4 (describing execution-day chaplains as "offer[ing] active spiritual participation that helps energize the overall execution process" and concluding that "when[] spiritual advisers lend support to the condemned man . . . they become part of the execution project" securing an execution that "looks humane and dignified and is not sullied in any way by obvious violence.").

of each individual[,]” and to “act in ways that honor the dignity and value of every individual.”<sup>142</sup> It is important to take stock of our place in history. We are only three centuries from the time in human development when drawing and quartering—execution by pulling a person apart with four horses tied to each of her limbs—was not considered illegal, immoral, unethical, or prohibited.<sup>143</sup> In the late eighteenth century, the Bill of Rights of the United States Constitution and the French Declaration of the Rights of Man and of the Citizen changed that by giving effect to rights summoned to protect humanity from itself.<sup>144</sup> Cruel punishments were brought into question at that time, in a way that could not have been comprehended by the Inquisitor only a century before because society was undergoing a revolutionary new awareness of the affective interior life of others.<sup>145</sup> The new constitutional societies outlawed cruel punishments

because the traditional framework of pain and personhood [had fallen] apart, [and was being] replaced, bit by bit, by a new framework, in which individuals owned their bodies, had rights to their separateness and to bodily inviolability, and recognized in other people the same passions, sentiments, and sympathies as in themselves.<sup>146</sup>

In other words, every person possessed an inviolable dignity.<sup>147</sup>

The Enlightenment philosopher Immanuel Kant is largely credited with originating the use of dignity in moral discourse as an innate characteristic possessed by all members of humanity.<sup>148</sup> Within Kant’s

<sup>142</sup> COMMON CODE, *supra* note 135, at Preamble, para. 1.1.

<sup>143</sup> LYNN HUNT, *INVENTING HUMAN RIGHTS: A HISTORY* 77–79 (2007).

<sup>144</sup> See U.S. CONST. amends. I–X; DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN art. 1 (Fr. 1789). The French declaration that all humans “are born and remain free and equal in rights” is an obvious source for the United Nations Universal Declaration of Human Rights’ foundational principle, “All human beings are born free and equal in dignity and rights.” HUNT, *supra* note 141, at 17; Universal Declaration of Human Rights, art. 1, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

<sup>145</sup> HUNT, *supra* note 141, at 112.

<sup>146</sup> *Id.*

<sup>147</sup> Many human rights authorities consider the death penalty incompatible with respect for and protection of human dignity, which is the foundational principle of modern human rights law. International Covenant on Civil and Political Rights, pmbl., G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, 999 U.N.T.S. 171, U.N. Doc. A/6316, at 173 (Dec. 19, 1966) (stating that all human rights “derive from the inherent dignity of the human person.”); International Covenant on Economic, Social, and Cultural Rights, pmbl., G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/63/16 (Dec. 16, 1966) (stating the same); High Commission for Human Rights Res. 1997/12, U.N. GAOR, 37th Sess. (April 3, 1997) (The “abolition of the death penalty contributes to the enhancement of human dignity and to the progressive development of human rights.”); *Kindler v. Can.*, 1991 Carswell Nat 3 (Can.) (WL) (“The death penalty not only deprives the prisoner of all vestiges of human dignity, it is the ultimate desecration of the individual as a human being. It is the annihilation of the very essence of human dignity.”); *The State v. Makwanyane*, 1995 (3) S.A. (CC) at 271 (S. Afr.) (holding that the death penalty violates the South African Constitution because it “destroys life” and “it annihilates human dignity.”).

<sup>148</sup> See Hugo Adam Bedau, *The Eighth Amendment, Human Dignity, and the Death Penalty*, in *THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES* 145, 152–53 (Michael J. Meyer & William A. Parent eds., 1992) (“It may well be that the Kantian idea of human dignity is nothing more than the secular counterpart to the Biblical notion of the sanctity of human life,

conception:

[a] person's worth must be kept distinct from other attributes of the person, in particular the person's merit or value or usefulness. Above all, a person's dignity . . . is not to be seen as a result or product of decent conduct, virtuous behavior, moral rectitude, or respect for the moral law. Rather, it is to be seen as a result of the *capacity* for such conduct.<sup>149</sup>

Dignity is an attribute recognized between persons as stemming from their mutual innate capacity for autonomous moral conduct. Actions that tend to prevent others from exercising that innate capacity violate dignity. Invidious discrimination is a clear example: treating others as though they possess inferior moral capacity and have no *right* to assert their own rights.<sup>150</sup> Torture is another clear example since torture requires treating others as though they have no moral capacity nor right to defend themselves even from severe physical aggression.<sup>151</sup> On the other hand, dignity means that, even in the light of evidence that psychopaths may exist (i.e., persons who seem inherently unable to respect autonomous moral capacity in others), all persons are to be treated as capable of some rehabilitation.<sup>152</sup> Denial to any prison inmate of an opportunity for rehabilitation is a denial of that person's dignity.<sup>153</sup> This was the crux of former California death row chaplain Byron Eschelman's criticism of the death penalty:

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according to which our dignity is established by having been 'created in the image' of God.'). Church bodies that traditionally have found the value of humanity in its creation in the "image of God" now also use the term dignity to articulate that ultimate characteristic requiring respect. *See, e.g.,* U.S. CONFERENCE OF CATHOLIC BISHOPS, STATEMENT ON CAPITAL PUNISHMENT, <http://www.pbs.org/wgbh/pages/frontline/angel/procon/bishopstate.html>, <<http://perma.cc/6LYG-3FJB>> [hereinafter USCCB STATEMENT] ("[A]bolition of capital punishment is [] a manifestation of our belief in the unique worth and dignity of each person from the moment of conception, a creature made in the image and likeness of God.").

<sup>149</sup> Bedau, *supra* note 146 at 153 (emphasis in original).

<sup>150</sup> *See, e.g.,* William A. Parent, *Constitutional Values and Human Dignity*, in *THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES* 47, 57 (Michael J. Meyer & William A. Parent eds., 1992) ("[Martin Luther] King's concern with the 'degenerating sense of 'nobodiness' . . . experienced by black people in a racist culture is a concern for human dignity.").

<sup>151</sup> *E.g.,* Manfred Nowak, *What Practices Constitute Torture?: US and UN Standards*, 28 *HUM. RTS. Q.* 809, 832 (2006) ("Both torture and slavery can be described as direct and brutal attacks on the core of human dignity and personality.").

<sup>152</sup> *See, e.g.,* U.S. CONFERENCE OF CATHOLIC BISHOPS, *RESPONSIBILITY, REHABILITATION, AND RESTORATION: A CATHOLIC PERSPECTIVE ON CRIME AND CRIMINAL JUSTICES* (2000), <http://www.usccb.org/issues-and-action/human-life-and-dignity/criminal-justice-restorative-justice/crime-and-criminal-justice.cfm>, <<http://perma.cc/BL7H-DCJS>> ("[B]oth the most wounded victim and the most callous criminal retain their humanity. All are created in the image of God and possess a dignity, value, and worth that must be recognized, promoted, safeguarded, and defended. For this reason, any system of penal justice must provide those necessities that enable inmates to live in dignity.").

<sup>153</sup> *See* Eva S. Nilsen, *Decency, Dignity, and Desert: Restoring Ideals of Humane Punishment to Constitutional Discourse*, 41 *U.C. DAVIS L. REV.* 111, 166 (2007–2008) ("The U.S. Supreme Court has found no constitutional right to rehabilitation for prisoners, although some lower courts have found Eighth Amendment violations where prison conditions made debilitation likely. By contrast, international law incorporates a right to progressive social reintegration of prisoners. International law has found that barriers to a prisoner's successful reintegration violate his fundamental dignity rights.").

Those who embrace the death penalty are paying tribute to the static belief that an offender is beyond fundamental growth and dynamic development. They assert that what he seems to be, he is; that what he has been, he always will be. They deny the reality of transformation and redemption. Or they reject the reality of change for everyone but themselves: 'I can change if necessary, but you cannot.'<sup>154</sup>

Over recent decades, massive anecdotal evidence from chaplains, guards, attorneys, relatives, and friends of death row inmates has exposed such dogmatic blanket denial of the capacity for moral change in dangerous offenders as without evidentiary foundation.<sup>155</sup>

The coercion utilized in the death penalty is on a different order than that employed in imprisonment.<sup>156</sup> Imprisonment is restraint; execution is annihilation. The State threatens for years to physically annihilate the inmate and then carries out the threat. Current debates about the "cruelty" of lethal injection—over whether the inmate silently suffers an agonizingly painful heart attack under insufficient sedation—miss what is more fundamentally cruel about execution. One of the principal justifications of execution as punishment for murder is that it might project sufficient terror to deter would-be murderers.<sup>157</sup> The threat of extinction is designed to inspire emotional anguish and fear,<sup>158</sup> and it succeeds in inducing psychological dysregulation in many persons who come into contact with a death penalty case.<sup>159</sup> The cruelty of this

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<sup>154</sup> BYRON ESCHELMAN, DEATH ROW CHAPLAIN 239–240 (1962); see also USCCB STATEMENT, *supra* note 146 ("With respect to the difficulties inherent in capital punishment, we note first that infliction of the death penalty extinguishes possibilities for reform and rehabilitation for the person executed as well as the opportunity for the criminal to make some creative compensation for the evil he or she has done. It also cuts off the possibility for a new beginning and of moral growth in a human life which has been seriously deformed.")

<sup>155</sup> Bedau, *supra* note 146, at 173 (internal citations omitted); see also PICKETT & STOWERS, *supra* note 2, at xiii ("I met men who had, indeed, committed the crimes for which they were sentenced to die and who displayed genuine remorse. In those years between their crime and their punishment, some changed dramatically. Even on Death Row I saw some men whose lives had regained some degree of promise, purpose, and even dignity. Yet they died the same death as the unrepentant."); Walter C. Long, *Karla Faye Tucker: A Case for Restorative Justice*, 27 AM. J. CRIM. L. 117, 127 (observing how "a remarkable . . . measure of restoration can occur [in the offender] even following [the] most heinous offense.").

<sup>156</sup> See Bedau, *supra* note 146, at 169–170 (comparing the coercive control needed to incarcerate offenders with the control exercised over a condemned inmate when they are executed).

<sup>157</sup> See *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) ("The death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders.").

<sup>158</sup> BANNER, *supra* note 39, at 10 (quoting VIRGINIA GAZETTE, January 31, 1751, at 1:1) (describing capital punishment as a means of "counterbalancing Temptation by Terror, and alarming the Vicious by the Prospect of Misery.").

<sup>159</sup> See BOHM, *supra* note 4, at 236 (arguing that capital punishment's "collateral damage" to, inter alia, defense attorneys, prosecutors, judges, jurors, governors, wardens, death row correctional officers, chaplains, execution team members, and execution witnesses is a "good argument for rethinking the wisdom of the ultimate sanction."); see generally Cynthia Adcock, *The Collateral Anti-therapeutic Effects of the Death Penalty*, 11 FLA. COASTAL L. REV. 298 (2010) (addressing the traumatic impact of death sentencing on death penalty lawyers, prison officials, murder victim survivors, and death row families). Arguably, the death penalty also assaults the dignity of those who carry it out. Donald Cabana, a Mississippi warden who participated in executions, observed that the executioner "dies with his prisoner." LIFTON & MITCHELL, *supra* note 4 at 106 (quoting DONALD

psychological impact is compounded by the overwhelming power of the State being brought to bear against an ultimately helpless individual who, at the time of execution, is stripped by the State's action of any recognition of his moral agency, every right ever afforded him, and any possibility to defend himself.<sup>160</sup> This display of "total activity smashing total passivity" highlights the "heart of cruelty."<sup>161</sup>

Prior to the Enlightenment, dignity was an attribute of nobility of station, a characteristic attributed to the royalty of kings or popes.<sup>162</sup> Inquisitors or regular clergy would not attempt to protect the dignity of society's victims, who were many social strata below them and were more likely to be afforded pity than respect. Today, in modern democracies born within the Enlightenment tradition of respecting fundamental human rights, dignity is considered inherent and inviolate in every human being.<sup>163</sup> Every human is to be afforded respect for the potential she holds, *qua* human, to be a moral agent. Texas chaplains participating in executions should ask whether they understand dignity in some way other than such a respect for the moral agency of the prisoner or whether they are in effect hitting the "off" button to their usual attention to the dignity of the prisoners under their care and accepting a "ranking of cruelties."<sup>164</sup>

### C. Execution-Day Chaplains Are Required to Act Against Health of Prisoner.

The ACPE Code's provisions prioritizing healing are also at odds with chaplain participation in executions. The Code requires provision of "care that is intended to promote the best interest of the client and to foster strength, integrity, and healing."<sup>165</sup> During the long period of public executions, clergy openly celebrated executions as triumphs for

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CABANA, DEATH AT MIDNIGHT: THE CONFESSION OF AN EXECUTIONER (1996)). See also Sara Rimer, *In the Busiest Death Chamber, Duty Carries Its Own Burdens*, N.Y. TIMES, Dec. 17, 2000 ("Just from a Christian standpoint, you can't see one of these and not consider that maybe it's not right.") (quoting Texas warden Jim Willett, who participated in scores of executions).

<sup>160</sup> During execution, the inmate would appear only to retain a right not to be subjected to severe pain; a right rapidly mooted by his or her own annihilation. See discussion *supra* note 127.

<sup>161</sup> Bedau, *supra* note 146, at 168 (quoting PHILLIP P. HALLIE, THE PARADOX OF CRUELTY 90 (1969)).

<sup>162</sup> See, e.g., NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) (including in its definitions of "dignity": "[a]n elevated office, civil or ecclesiastical, giving a high rank in society; advancement; preferment, or the rank attached to it" and "[t]he rank or title of a nobleman.").

<sup>163</sup> See, e.g., William J. Brennan, Jr., Associate Justice, U.S. Sup. Ct., Speech at Georgetown University: The Constitution of the United States: Contemporary Ratification (Oct. 12, 1985) (positing that dignity is the fundamental value underlying the U.S. Constitution: "the Constitution is a sublime oration on the dignity of man, a bold commitment by a people to the ideal of libertarian dignity protected through law.").

<sup>164</sup> TERRY K. ALADJEM, THE CULTURE OF VENGEANCE AND THE FATE OF AMERICAN JUSTICE 92 (2008).

<sup>165</sup> COMMON CODE, *supra* note 135, at para. 1.2.

the individual being killed, preaching even at the gallows about the change in eternal fate that would result from the inmate's newfound conversion of heart and belief.<sup>166</sup> In this world view, the condemned was not annihilated; to the contrary, he was marvelously transformed as his earthly body was replaced with a heavenly one and he enjoyed the fellowship of God himself.<sup>167</sup> However, a prison chaplain making such public pronouncement today would not only be violating the Constitution with such an ostentatious endorsement of Christian belief, he would be offending many in today's non-homogenous society since he would be declaring antipathy to what would be considered the inmate's well-being.<sup>168</sup> Today, most prison chaplains—whatever they might believe about an afterlife—probably would constrain themselves to say that only persons who are biologically alive possess the potential for “strength, integrity, and healing.”<sup>169</sup> Yet, chaplain participation in an execution actively undermines those traits in the inmate.

#### D. Virtually All Other Professions Bar Participation in Executions as Unethical.

Virtually all other health, mental health, and social work professional organizations bar participation in state executions as unethical.<sup>170</sup> The American Medical Association (AMA) provides helpful

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<sup>166</sup> See, e.g., COHEN, *supra* note 38, at 63 (describing the “superb gallows theater” of Esther Rodgers’ execution). Northern states ended public executions before the Civil War and western states just afterward. Michael A. Trotti, *The Scaffold’s Revival: Race and Public Execution in the South*, 45:1 J. SOC. HIST. 195, 201 (2011). However, public executions in the South lasted into the twentieth century, where the principal objects of executions were African Americans, and whites came to resent the “benevolent” religious aspect of executions for making the condemned black man on the gallows—about to enter heaven—appear too heroic to black crowds. *Id.* at 205. The argument has been made that executions went inside in the South (and that public lynchings increased in the region) in order to deny black crowds at executions the consolation of religious spectacle, thereby enhancing the terror aspect of executions for them. *Id.* at 209.

<sup>167</sup> See, e.g., COHEN, *supra* note 38, at 44 (quoting SAMUEL CLARK, THE MARROW OF ECCLESIASTICAL HISTORY 851 (1654)) (describing sixteenth century English Puritan evangelist William Perkins as accompanying condemned men to the gallows in order to carry out a public display of last-minute conversion. One prisoner “rose from his knees cheerfully; and went up the Ladder again so comforted, and took his death with such patience, and alacrity, as if he actually saw himself delivered from the hell which he feared before, and heaven opened for the receiving of his soul, to the great rejoicing of the beholders.”).

<sup>168</sup> See *Wallace v. Jaffree*, 472 U.S. 38, 52–53 (1985) (holding that “the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all”). An inmate’s family members, moreover, arguably would have family association rights to be present under the First and Fourteenth Amendments. See generally Rachel King, *No Due Process: How the Death Penalty Violates the Constitutional Rights of the Family Members of Death Row Prisoners*, 16 BOSTON U. PUB. INT. L. J. 195 (2000) (defending substantive due process family rights of inmates’ families). On the basis of personal experience as a death penalty habeas attorney, the author is well aware of instances in which inmates’ families have found chaplain participation on execution day to violate their consciences.

<sup>169</sup> COMMON CODE, *supra* note 135, at para. 1.2.

<sup>170</sup> See, e.g., AM. B. OF ANESTHESIOLOGY, COMMENTARY: ANESTHESIOLOGISTS AND CAPITAL PUNISHMENT (2010), [www.theaba.org/pdf/CapitalPunishmentCommentary.pdf](http://www.theaba.org/pdf/CapitalPunishmentCommentary.pdf), <perma.cc/WWX5-E2Y9> (providing that anesthesiologists should not participate in an execution “on the grounds that

insight into what “participation” in executions means:

(1) an action which would directly cause the death of the condemned; (2) an action which would assist, supervise, or contribute to the ability of another individual to directly cause the death of the condemned; and (3) an action which could automatically cause an execution to be carried out on a condemned prisoner.<sup>171</sup>

Professionals may not provide medications contributing to execution, monitor vital signs, or render technical information.<sup>172</sup> “Attending or observing an execution as a physician” also is barred as unethical, while witnessing an execution in a “nonprofessional capacity” or as an invitee of the condemned person is explicitly not barred.<sup>173</sup> Pre-execution medical care for the condemned, by “relieving the acute suffering of a condemned person while awaiting execution, including providing tranquilizers at the specific voluntary request of the condemned person to help relieve pain or anxiety in anticipation of the execution” is allowed.<sup>174</sup>

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physicians are members of a profession dedicated to preserving life when there is hope of doing so.”); AM. CORRECTIONAL HEALTH SERVICES ASS’N, THE ACHSA CODE OF ETHICS No. 10 (1996), <http://achsa.tripod.com/cofe.htm>, <<http://perma.cc/396P-GHBL>> (“Not be involved in any aspect of execution of the death penalty.”); AM. MED. ASS’N, AMA CODE OF ETHICS: OPINION 2.06—CAPITAL PUNISHMENT (1980), <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion206.page>, <<http://perma.cc/KK9D-SURK>> (“A physician, as a member of a profession dedicated to preserving life when there is hope of doing so, should not be a participant in a legally authorized execution.”); AM. PSYCHIATRIC ASS’N, POSITION STATEMENT ON CAPITAL PUNISHMENT (2008) (adopting the American Medical Association statement); AM. PUB. HEALTH ASS’N, PARTICIPATION OF HEALTH PROFESSIONALS IN CAPITAL PUNISHMENT (2001), <http://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2014/07/28/13/02/participation-of-health-professionals-in-capital-punishment>, <<http://perma.cc/BPP8-WB4Q>> (“[r]esolv[ing] that the APHA publicly reaffirm its March 1994 collaborative statement to all health professional societies and state licensing and discipline boards that health professional participation in executions or pre-execution procedures is a serious violation of ethical codes.”); INT’L FED’N OF SOC. WORKERS, WORLD DAY AGAINST THE DEATH PENALTY: IFSW STATEMENT (2010), <http://ifsw.org/news/world-day-against-the-death-penalty-ifsw-statement/>, <<http://perma.cc/MLV6-HRFG>> (“The Social Work profession respects the inherent dignity and worth of each person. The International Social Work Code of Ethics prohibits contributing to inhumane treatment of people. . . . For these reasons IFSW urges all nations to abolish the death penalty.”); NAT’L ASS’N OF SOC. WORKERS, SOCIAL WORK SPEAKS: EIGHTH EDITION—NASW POLICY STATEMENTS 2009–2012 40–41 (8<sup>th</sup> ed., 2009) (“NASW’s broad ethical principle that social workers respect the inherent dignity and worth of each person prohibits support of the death penalty. . . . [A]ll state authorities, which have laws that provide for capital punishment, should abolish the death penalty for all crimes.”); SOC’Y OF CORRECTIONAL PHYSICIANS, THE SCP’S CODE OF ETHICS (1997), <http://societyofcorrectionalphysicians.org/resources/code-of-ethics> <<http://perma.cc/4NKN-3754>> (“Not be involved in any aspect of execution of the death penalty.”); WORLD MED. ASS’N, WMA DECLARATION OF TOKYO—GUIDELINES FOR PHYSICIANS CONCERNING TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT IN RELATION TO DETENTION AND IMPRISONMENT (1975), <http://www.wma.net/en/30publications/10policies/c18/>, <<http://perma.cc/2DCV-7GQ9>> (“The physician shall not countenance, condone or participate in the practice of torture or other forms of cruel, inhuman or degrading procedures, whatever the offense of which the victim of such procedures is suspected.”).

<sup>171</sup> AM. MED. ASS’N, *supra* note 168.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

Under the AMA terms, the Texas chaplain's presence in the execution chamber with the warden, no matter the chaplain's motive, would be prohibited participation "contribut[ing] to the ability of another individual to directly cause the death of the condemned."<sup>175</sup> However, AMA rules probably would not prohibit the chaplain from merely witnessing the execution from outside of the chamber—especially if the chaplain is not working in an official capacity.<sup>176</sup> A question remains: does the soothing of an inmate by pastoral means, up until the moment he is ushered into the execution chamber, contribute to the ability of the authorities to cause the death of the inmate? Such aid arguably induces the defendant not to defend himself to the extent that he is able under the circumstances.<sup>177</sup> The AMA rules allowing physicians to tranquilize the prisoner before execution are distinguishable because the physician treats only the physical symptoms of anxiety and only at the inmate's request.<sup>178</sup> The chaplain, on the other hand, may be engaged in trying to convince the inmate to be calm and submit to the procedure without protest.<sup>179</sup> This, unlike the physician's intervention, directly affects the inmate's autonomy as a moral agent in the most coercive of situations.

Ethics codes for the correctional health associations—the American Correctional Health Services Association and the Society of Correctional Physicians—may partially answer this question, as they require professionals to respect inmates' dignity, to always act in ways "that merit trust and prevent harm," to ensure the inmates' autonomy, and to "promote a safe environment" for the inmates.<sup>180</sup> One of "the essentials of honorable behavior for correctional health officials" is that they "[n]ot be involved in any aspect of execution of the death penalty."<sup>181</sup> The prison sees the chaplain's role as ensuring a safe environment for the execution—and a surely unsafe one for the inmate under his care—because the chaplain is an essential part of the execution team.<sup>182</sup> The correctional health service codes help to clarify that even the chaplain's work with the inmate outside the execution chamber in preparation for

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<sup>175</sup> *Id.*

<sup>176</sup> *See id.* (allowing physician to "witness[] an execution in a totally nonprofessional capacity" or "witness[] an execution at the specific voluntary request of the condemned person, provided that the physician observes the execution in a nonprofessional capacity.").

<sup>177</sup> *See* Editorial, *Many Will Continue to Doubt Graham's Guilt*, HOUS. CHRON., June 23, 2000, at A36 (describing Texas inmate Gary Graham, who declared his innocence to the end, having to be subdued by guards before execution); *Killer Resists Execution*, AMARILLO GLOBE-NEWS, Nov. 17, 1999, [http://amarillo.com/stories/1999/11/17/tex\\_LD0696.001.shtml#\\_Vn9ChYvZPKA](http://amarillo.com/stories/1999/11/17/tex_LD0696.001.shtml#_Vn9ChYvZPKA), <<http://perma.cc/P3WP-84WU>> (describing Texas inmate who resisted execution by obliging guards to carry him into the chamber).

<sup>178</sup> AM. MED. ASS'N, *supra* note 168.

<sup>179</sup> *See* sources cited *supra* note 4 and accompanying text.

<sup>180</sup> AM. CORRECTIONAL HEALTH SERVICES ASS'N, *supra* note 168; SOC'Y OF CORRECTIONAL PHYSICIANS, *supra* note 168.

<sup>181</sup> AM. CORRECTIONAL HEALTH SERVICES ASS'N, *supra* note 168.

<sup>182</sup> *See Bohm, supra* note 4 ("Prison chaplains are an instrumental part of the execution team. . . . Prison administrators believe that it is important to have the prison chaplain present during the deathwatch and execution to address any staff problems. . . . Importantly, they also help to make condemned inmates compliant for execution.").

the event may infringe upon the inmate's dignity and be ethically problematic, due to the codes' emphasis on trust, harm prevention, inmates' autonomy, creation of safe environment, and avoidance of "any aspect of execution of the death penalty."<sup>183</sup>

## VI. CHAPLAIN PARTICIPATION IN EXECUTION IS UNETHICAL.

As long as the Texas Department of Criminal Justice assigns its prison chaplains to do execution-day work, each chaplain will be required to exercise his or her own conscience—weighing the law, ethics codes, general ethical considerations, and moral and religious norms—to determine what to do.<sup>184</sup> In the heat of execution preparation, chaplains will be tempted to allay their doubts about their already compromised role in relation to the inmate by thinking of themselves as serving not only the inmate and prison staff, but even other persons that they might imagine to have interests in a calm execution, such as relatives of the crime victim<sup>185</sup> or the inmate's family members<sup>186</sup> who Texas allows to observe the execution.

The chaplain must choose whether the inmate is his client. If that is the case, chaplaincy and healthcare ethics require chaplains to be "single minded in their focus" on the interests of the inmate.<sup>187</sup> Once the process has moved into the execution chamber, however much the chaplain "may wish to be there for [the] inmate," in that situation "the inmate is not really [his] patient."<sup>188</sup> Instead, clergy assistance "is being made an

<sup>183</sup> SOC'Y OF CORRECTIONAL PHYSICIANS, *supra* note 168.

<sup>184</sup> See Gerald Dworkin, *Patients and Prisoners: the Ethics of Lethal Injection*, 62 ANALYSIS 181, 184 (2002) ("A citizen of a democratic society cannot regard the existence of an authorized law as irrelevant to her obligations. But citizens also retain the right and duty to critically evaluate the law and its impact in specific situations in order to form a judgment on its justice. As there are unjust laws, there may be codes which contain unjust or immoral provisions. The provisions of a professional code have to be judged in the light of general ethical considerations which are binding on persons independent of their particular professional status.").

<sup>185</sup> Cf. Michael Keane, *The Ethical "Elephant" in the Death Penalty "Room"*, 8 AM. J. BIOETHICS 45, 49 (2008) (arguing that physicians opposing the death penalty may harm relatives of the victim "who have already been through almost unimaginable torment" by causing delay, halting, or advocating against an execution). Execution-day chaplains likely also consider their role vis-à-vis the victim's family as they prepare for and carry out their duties.

<sup>186</sup> Cf. Atul Gawande, *When Law and Ethics Collide—Why Physicians Participate in Executions*, 354:12 NEW ENG. J. MED. 1221, 1226 (2006) (quoting physician participant: "I think that if I had to face someone I loved being put to death, I would want that done by lethal injection, and I would want to know that it is done competently.") When considering the effect execution of a loved one will have on the inmate's family members, execution-day chaplains likewise probably view themselves as meeting deep emotional and spiritual needs on execution day by providing competent, experienced support.

<sup>187</sup> Dworkin, *supra* note 182, at 188.

<sup>188</sup> Cf. Gawande, *supra* note 183, at 1229 (noting that "the medical assistance provided [at an execution would] primarily serve[] the government's purposes—not the inmate's needs as a patient.") Similarly, chaplains serve the interest of the state in their facilitation roles on execution day, rather than purely serving their "client."

instrument of punishment.”<sup>189</sup> Justifying the continued presence of the chaplain in the chamber is akin to excusing chaplain participation in torture on the ground that the chaplain’s presence lessens the victim’s pain.<sup>190</sup> In the ethics of medicine, it is impermissible for the “healing hand to act as the hurting hand.”<sup>191</sup> So it should be in the ethics of chaplaincy.

The ACPE Code requires chaplains to “promote justice in relationships with others, in [one’s] institutions and in society”<sup>192</sup> and to “advocate for changes in their institutions that would honor spiritual values and promote healing.”<sup>193</sup> Indeed, for half a century, some American prison chaplains with years of experience participating in executions have pursued positive institutional change by becoming public advocates for condemned inmates and ardent opponents of the death penalty.<sup>194</sup> It remains to be seen how the system would adjust if prison chaplains chosen for execution-day service might begin to turn down that role in greater numbers. Undoubtedly, a publicly unknown number of chaplains have rejected service when asked, because the Texas job of execution-day chaplaincy must in part respect ethical or other qualms that chaplains might have. What might the system do if it became hard for it to find a willing chaplain?

Texas execution-day prison chaplains are players, not bystanders, in the execution drama as Christian clergy generally have been for centuries. When Texas chaplains are in the chamber, they are there for

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<sup>189</sup> Cf. *id.* (arguing that if doctors participate in executions, even under the auspice of providing competence and comfort to the inmate during the execution process, “[m]edicine is being made an instrument of punishment. The hand of comfort that more gently places the IV . . . is also the hand of death.”). Chaplains inevitably face a similar quandary.

<sup>190</sup> Notably, the death penalty is torture in fact—an act by which severe “mental” pain is “intentionally inflicted on a person . . . punishing him for an act he . . . has committed.” United Nations, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. Doc. A/RES/39/46, at art. 1 (Dec. 10, 1984). However, the death penalty is not recognized as torture in law because the drafters of the U.N. torture convention made an exception for it as a “lawful sanction” at a time, the 1950s, when widespread acceptance of the death penalty around the world would have frustrated adoption of the convention. Christina M. Cerna, *Universality of Human Rights: The Case of the Death Penalty*, 3 ILSA J. INT’L & COMP. L. 465, 475 (1997) (“[T]he imposition of the death penalty itself is the most extreme form of torture imaginable, but is excluded from the definition of torture by means of a legal fiction.”). See also Eric Prokosch, *The Death Penalty Versus Human Rights*, in THE DEATH PENALTY: ABOLITION IN EUROPE 17, 18 (1999) (“Threatening to kill a prisoner can be one of the most fearsome forms of torture. As torture, it is prohibited. How can it be permissible to subject a prisoner to the same threat in the form of a death sentence, passed by a court of law and due to be carried out by the prison authorities?”).

<sup>191</sup> Dworkin, *supra* note 182, at 185 (“[T]here is an argument against the participation of a doctor in torture that is not predicated on torture itself being morally forbidden. It is predicated on the impermissibility of the healing hand acting as the hurting hand. It is a perversion of a role which is defined in terms of healing, of alleviating pain, of increasing the patient’s resistance to injury, to use one’s skills, training and education to increase the pain and weaken the resistance of those to whom one administers these skills.”).

<sup>192</sup> COMMON CODE, *supra* note 139, at para. 4.1.

<sup>193</sup> *Id.* at para. 4.8.

<sup>194</sup> See e.g., ESCHELMAN, *supra* note 152, at 9 (reflecting on the futility of execution and presenting capital punishment as an “essential symptom of our cultural condition . . . . When the deeper condition is adequately healed, the surface symptom will vanish.”).

the benefit of the warden, the guards, the prison officials observing from a hidden room, the press and public, and the respective witnesses on the inmate's and victim's sides. Carl Kinnamon's chaplain pressing him to the gurney is not an anomaly. It faithfully renders a tragic human tendency, captured in words by Lionel Trilling: "Some paradox of our nature leads us, when once we have made our fellow men the objects of our enlightened interest, to go on to make them the objects of our pity, then of our wisdom, ultimately of our coercion."<sup>195</sup> Kinnamon's chaplain failed in his performance on behalf of the system and a calm, orderly execution, perhaps because he panicked out of genuine and anguished care for the prisoner.

The participation of clergy in Texas executions should be held unconstitutional. Furthermore, chaplaincy professional licensing organizations should address the ethics of the prison chaplain's role in preparing the inmate for execution as well as executing him. Chaplains themselves should discern their own duty by reflecting on chaplaincy ethics rules, correctional health care ethics rules, general health care ethics rules and principles, and the history of clergy participation in executions. They also should consider that the "modern" respect for human dignity that undergirds ethical practice is reflected in the non-violent ethos championed by leaders of the Christian church before the church became aligned with the Constantine empire. The church fathers Origen, Tertullian, and Justin Martyr opposed the taking of human life for any reason.<sup>196</sup> Tertullian said that Jesus, "by taking away Peter's sword, disarmed every soldier thereafter."<sup>197</sup> An early Christian writer, Athenagorus of Athens, forcefully protested against the idea that Christians would participate in the Roman death penalty or any homicide: "[W]e, deeming that to see a man put to death is much the same as killing him, have abjured such spectacles. How then, *when we do not even look on*, lest we should contract guilt and pollution, can we put people to death?"<sup>198</sup>

With Roman adoption of Christianity as the official state religion and the consequent rising temptation to use violence against heresy, the church slowly adopted the sword. By 410 C.E., Augustine argued, "Since the agent of authority is but a sword in the hand, and is not responsible for the killing, it is in no way contrary to the commandment, 'Thou shalt not kill,' to wage war at God's bidding, or . . . to put criminals to death."<sup>199</sup> Many who condone the modern death penalty side with

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<sup>195</sup> James F. Childress & Courtney C. Campbell, "Who is a Doctor to Decide Whether a Person Lives or Dies?" *Reflections on Dax's Case*, in *DAX'S CASE: ESSAYS IN MEDICAL ETHICS AND HUMAN MEANING* 23, 40 (Lonnie D. Kliever ed. 1989) (quoting Lionel Trilling, *Manners, Morals, and the Novel*, 10:1 *KENYON REVIEW* 11 (1948)).

<sup>196</sup> BROCK & PARKER, *supra* note 25, at 183-184.

<sup>197</sup> *Id.* at 184 (internal quotations omitted).

<sup>198</sup> MEGIVERN, *supra* note 19, at 20-21 (internal quotation omitted) (emphasis added).

<sup>199</sup> *Id.* at 41 (internal quotation omitted).

Augustine,<sup>200</sup> and Augustine is strikingly “modern” in his pronouncement for he surely describes the situation in Texas and other death-penalty states where the execution process obscures responsibility for the killing:

No one is responsible for this death. The juries merely decide on the facts, the judges merely utter the sentence prescribed by law, the prosecutors and lawyers are just doing their jobs. The warden is sympathetic and, on the last night, does everything he can to make the condemned comfortable. There is no one to be angry at. The participants are turned into agents, not people; the Condemned, the State, the Executioner. A priest stands by and certifies that it is a moral event.<sup>201</sup>

Texas ministers and priests should refuse to participate in execution-day chaplaincy. They should take responsibility when it most matters, *before* executions occur, and tell the state of Texas they will not “stand by” the killing of another person. They should consider the word of Jesus that he himself is found in the prisoner,<sup>202</sup> echoed in the exhortation of the church father Athanasius: “How does it come about that each one of us has turned away from his brother, despising the peace which we had been given? Yet your brother, your neighbor, is not only a man, but is God himself!”<sup>203</sup> They should join their brethren in other states where chaplains are not allowed to stay in the chamber during an execution and simply say they will no longer go there.

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<sup>200</sup> Justice Antonin Scalia, for example, has asserted that “the more Christian a country is the *less* likely it is to regard the death penalty as immoral. Abolition has taken its firmest hold in post-Christian Europe, and has least support in the church-going United States.” Scalia, *supra* note 52 (emphasis in original). By this he must mean: the more Christian a country is in a *Constantinian* sense, the more support there will be for the death penalty. Cf. CORNELL WEST, *DEMOCRACY MATTERS: WINNING THE FIGHT AGAINST IMPERIALISM* 147–49 (2005) (“America is undeniably a highly religious country, and the dominant religion by far is Christianity, and much of American Christianity is a form of Constantinian Christianity. . . . Constantinian Christianity has always been at odds with the prophetic legacy of Jesus Christ. . . . Constantinian strains of American Christianity have been on the wrong side of so many of our social troubles, such as the dogmatic justification of slavery and the parochial defense of women’s inequality. It has been the prophetic Christian tradition, by contrast, that has so often pushed for social justice.”).

<sup>201</sup> BRUCE JACKSON & DIANE CHRISTIAN, *DEATH ROW: A DEVASTATING REPORT ON LIFE INSIDE THE TEXAS DEATH HOUSE* 291–92 (1980).

<sup>202</sup> *Matthew* 25:34–36 (New International) (“Then the King will say to those on his right, . . . I was hungry and you gave me something to eat, I was thirsty and you gave me something to drink, I was a stranger and you invited me in, I needed clothes and you clothed me, I was sick and you looked after me, I was in prison and you came to visit me.”).

<sup>203</sup> BROCK & PARKER, *supra* note 25, at 184 (quoting JEAN-MICHEL HORNUS, *IT IS NOT LAWFUL FOR ME TO FIGHT: EARLY CHRISTIAN ATTITUDES TOWARD WAR, VIOLENCE, AND THE STATE* (Trans. Alan Kreider & Oliver Coburn) 71 (1980)).