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Capital Punishment As Human Sacrifice: A Societal Ritual As Depicted In George Eliot's *Adam Bede*

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More can be said for the thesis that all orders and forms of authority in human society are founded on institutionalized violence.¹

I. INTRODUCTION

The ritual² slaughter of humans for sacrificial purposes

†Professor of Law, University of Kentucky College of Law; B.S., University of San Francisco, 1981; J.D., Harvard Law School, 1986. My sincere thanks go to Professor Roger Hood, Fellow at All Souls College, University of Oxford and the Director of the University of Oxford's Centre for Criminological Research, for allowing me to be a Visiting Scholar at the Centre during my sabbatical in the Spring of 1998. Professor Hood's professional and personal generosity gave me the opportunity to develop and research the topic of this article. I also extend my sincerest thanks to the staff at the Centre who extended every kindness to me during my stay. I greatly appreciate the comments and guidance provided by Professor Robert Batey, Stetson University College of Law, during the early drafts of this article. Many thanks to Bonnie Detzel, my Administrative Assistant at the University of Kentucky, for her patience and assistance with this project. My two Research Assistants, Elizabeth Woodford, University of Kentucky College of Law, and Katy Lewis, University of Georgia School of Law, also played important and valuable roles in the evolution of this project. And April Hollon, another of my Research Assistants at the University of Kentucky College of Law, who was also especially helpful by devoting many hours to confirming the sources and citations. Finally, if I have omitted to specifically thank anyone, it is only because of limited space. I greatly appreciate the selfless assistance provided by so many colleagues and friends.

¹ VIOLENT ORIGINS: WALTER BURKERT, RENE GIRARD, AND JONATHAN Z. SMITH ON RITUALS KILLING AND CULTURAL FORMATION Preface (ROBERT G. HAMERTON-KELLY ed., 1987) [hereinafter VIOLENT ORIGINS] (quoting WALTER BURKERT, HOMO NECANS: THE ANTHROPOLOGY OF ANCIENT GREEK SACRIFICIAL RITUAL AND MYTH (Peter Bing trans., 1983) [hereinafter HOMO NECANS]).

² A "ritual is stereotyped action redirected for demonstration." WALTER BURKERT, STRUCTURE AND HISTORY IN GREEK MYTHOLOGY AND RITUAL 57 (1979) [hereinafter BURKERT, STRUCTURE AND HISTORY]; see also VIOLENT ORIGINS,

has an ancient provenance.³ Few members of modern society would be inclined to believe that killing humans for sacrificial purposes continues. Of those, most probably envision it only being practiced by individuals who belong to "uncivilized," or non-"First-World" cultures. Upon closer scrutiny, however, it becomes apparent that this is a misconception because the past and present practice of capital punishment includes a thinly disguised manifestation of the ritualized killing of people, otherwise known as human sacrifice.

The purpose of this article is to identify, describe, and analyze the historic and contemporary connection between the practices of capital punishment and human sacrifice. After describing how human sacrifice constitutes an integral component of capital punishment, it will be argued that the institutionalization of this antiquated barbaric ritual, *vis-à-vis* the use of capital punishment, renders the present use of the death penalty in the United States incompatible with "the evolving standards of decency that mark the progress of a maturing society";⁴ and that consequently, this facet of capital punishment renders the penalty at odds with the Eighth Amendment's prohibition against the infliction of "cruel and unusual" punishments.⁵

The Article commences by providing a thorough explanation of how human sacrifice functions as a subtext of judicially sanctioned executions. This is followed by a discussion and analysis of Professor Rene Girard's⁶ theory

supra note 1, at 8 (defining a ritual as the "reenactment of a 'prior event' "). Rituals occupy an important position in society because they provide a means of social communication. *See id.* at 161; *see also* PETER BURKE, POPULAR CULTURE IN EARLY MODERN EUROPE 180 (1978) (noting that rituals "express meaning . . . and also [express] meaning through words or images"). Professor Girard, a noted commentator and theorist on cultural norms, believes that rituals, along with myths and prohibitions, are one of "[t]he three major pillars of human culture." VIOLENT ORIGINS, *supra* note 1, at 92. He contends that "[t]he sole purpose of ritual is to ensure total [cultural] immobility, or failing that, a minimum of disturbance." *Id.* at 284. Consequently, ritual practices in society facilitate the conveyance of messages designed to ensure the maintenance of the prevailing social order. *See infra* note 6 for a description of Professor Girard.

³ *See* NIGEL DAVIES, HUMAN SACRIFICE: IN HISTORY AND TODAY 31 (1981) [hereinafter HUMAN SACRIFICE] (stating that "to trace the origins of human sacrifice in one form or another we have to go back very far indeed").

⁴ *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).

⁵ U.S. CONST. Amend. VIII.

⁶ Professor Girard, an eminent literary social philosopher, was the first Andrew B. Hammond Professor of French Language, Literature and Civilization at

of the surrogate victim,⁷ or violence and human sacrifice, which supplies the analytical framework for the examination of this issue. This includes probing the separate components comprising Professor Girard's theory.⁸ Subsequently, they are illuminated by applying them to a literary situation that features a state-imposed death sentence. George Eliot's nineteenth century novel *Adam Bede*⁹ is the literary vehicle that will be used to elucidate

Stanford University. See RENE GIRARD, *VIOLENCE AND THE SACRED* [hereinafter GIRARD] (Patrick Gregory trans., Johns Hopkins University Press 1977) (1972). Before joining the Stanford faculty in 1981, Girard held an endowed chair at Johns Hopkins University. Professor Girard's professional honors include being named Doctor Honoris Causa of the Free University in Amsterdam and Chevalier de l'Ordre National de la Legion d'Honneur in France. He is a member of the American Academy of Arts and Sciences and a former Guggenheim Fellow. Girard's most notable works include: *DECEIT, DESIRE, AND THE NOVEL: SELF AND OTHER IN LITERARY STRUCTURE* (1965); *VIOLENCE AND THE SACRED* (1977); and "TO DOUBLE BUSINESS BOUND": *ESSAYS ON LITERATURE, MIMESIS, AND ANTHROPOLOGY* (1978). He has been described as a "brilliant interpreter of modern culture." See *TO HONOR RENE GIRARD* (Alphonse Juilland et al., eds., Department of French and Italian, Stanford University 1986).

⁷ See GIRARD, *supra* note 6, at 30. Girard notes that his development of this theory derived from an interest in examining how the history of human sacrifice impacts religion, or its absence, in modern society. *Id.* at 309 (observing that his "theory of the nature of primitive religion has emerged from the foregoing inquiry into the origins of myth and ritual"); see also *id.* at 306-8, 310 (suggesting that "religion" is merely another term for surrogate victim). This statement, however, does not function as a limitation on the application of Girard's theory. In fact, Girard acknowledges the breadth of his theory when he notes that "all great institutions of mankind, both secular and religious, spring from ritual." *Id.* at 306. He continues by specifically identifying legal institutions as one such institution. See *id.* For a discussion on Girard's identification of the connection between human sacrifice and capital punishment see *infra* pp. 109-111 of text.

⁸ Girard's theory has four major parts. They are: the triggering event; the sacrificial crisis; the sacrifice; and the sacrificial benefit. The penultimate component is composed of two sub-parts: the sacrificial subject and the sacrificial killing. See *infra* pp. 116-134 of text for a detailed description and discussion of the properties of each factor.

⁹ GEORGE ELIOT, *ADAM BEDE* (Valentine Cunningham ed., Oxford University Press: The World's Classics 1996) (1859). George Eliot's relatively early exposure to the circumstances surrounding the execution of a woman probably contributed towards her decision to make capital punishment one of the central themes in *Adam Bede*. When George Eliot was twenty years old, her "Aunt Samuel," Elizabeth Tomlinson Evans, recounted how in 1802 "before her marriage, she had ministered in Nottingham prison to a young woman sentenced to death for murdering her baby and had gone with her in the prison-cart to the place of execution." *Id.* at xvi, xxxvii. Her aunt's actions were not unusual because as an adherent of the Methodist faith she followed the precedent established in 1783 by John Wesley, the founder of the Methodist

how human sacrifice is a subtext of state sanctioned executions. The extensive and fecund relationship that exists between law and literature provided the impetus for selecting this particular conceptual framework as it permits the exploration of the subject matter in an engaging context.¹⁰

religion, when he visited several condemned at London's Newgate Prison and then accompanied them on their way to the gallows at the Triple Tree at Tyburn. See PETER LINEBAUGH, *THE LONDON HANGED: CRIME AND CIVIL SOCIETY IN THE EIGHTEENTH CENTURY* 214 (1991). Coincidentally, the esteemed author Thomas Hardy also had a youthful encounter with the judicially sanctioned execution by hanging of a woman. In 1856, when Hardy was sixteen years old, he witnessed Elizabeth Martha Brown's death at the gallows for the murder of her husband. See HOWARD ENGEL, *LORD HIGH EXECUTIONER* 226 (1996); see also Beth Kalikoff *The Execution of Tess d'Urberville at Winchester*, in *EXECUTIONS AND THE BRITISH EXPERIENCE* 111-14 (William B. Thesing ed., 1990); V.A.C. GATRELL, *THE HANGING TREE: EXECUTION AND THE ENGLISH PEOPLE 1770-1868* 266 (1994). Engel concludes that this event "soundly and indelibly stirred [Hardy's] young imagination and imprinted upon it images which remained with him until his death." ENGEL, *supra* at 226. The magnitude of the impression that witnessing this event had upon Hardy is easily discernable in his authorship of *TESS OF THE D'URBERVILLES A PURE WOMAN* (Signet 1964) (1891) [hereinafter *TESS*], one of his literary masterpieces. See *id.* at 228; see also GATRELL, *supra* note 9, at 266. The crime that Tess, the central character in Hardy's novel, commits is identical to that for which Martha Brown was hung when Hardy was a youth. See ENGEL, *supra* note at 226 (describing how Tess agrees to be Alec's "wife" and eventually kills him). Despite these overt parallels between the real-life character and the fictional character, Hardy refused to publicly acknowledge the profound erotic effect this event had on his life until, when in his eighties, he disclosed how he: "remember[ed] what a fine figure [Martha Brown] showed against the sky as she hung in the misty rain, and how the tight black silk gown set off her shape as she wheeled half round and back . . ." ENGEL, *supra* at 226 (emphasis added); GATRELL, *supra* at 9, 264-65 (asserting that "[t]o the male mind regressing freely into unchecked association, the bucking female body as it hanged could elicit obscene fantasies"); GEORGE V. BISHOP, *EXECUTIONS: THE LEGAL WAYS OF DEATH* 135, 141 (1965) (opining that "[w]hether it be public execution or private murder, accidental death or ritual killing, the close relationship between dying and the sex act, however perverted, remains a fact borne out by repeated experience"); ALBERT BOROWITZ, *THE WOMAN WHO MURDERED BLACK SATIN: THE BERMONDSEY HORROR* 262-64 (1981) (commenting on how John Forster's "gushing letter" to novelist Sir Edward Bulwer Lytton mentions Marie's "noble figure finely and fully expressed by close fitting satin") (emphasis added); James Alterbury Davies, *John Forster at the Mannings' Execution*, 67 *DICKENSIAN J.* 12, 15, (1972) (commenting on how Forster's letter to Bulwer had "undertones of suppressed sexuality").

¹⁰ See generally ALBERT P. BLAUSTEIN, *FICTION GOES TO COURT: FAVORITE STORIES OF LAWYERS AND THE LAW SELECTED BY FAMOUS LAWYERS* (ed. vii. 1954) (opining that "[l]egal themes have long served as the basis for the greatest and most popular literature of the English-speaking world"); see also *MASTERPIECES*

By setting forth the long-standing parallels between human sacrifice and capital punishment it will be argued that state mandated executions involve the sacrifice of a human being. Consequently, since this archaic and barbaric practice does not comport with the “evolving standards of decency that mark the progress of a maturing society,”¹¹ capital punishment violates the Eighth Amendment’s prohibition against the infliction of cruel and unusual punishments.¹²

II. A HISTORY OF CAPITAL PUNISHMENT’S HUMAN SACRIFICE DIMENSION

Sacrificial acts have been described as “the most crucial and fundamental of rites.”¹³ This significant cultural emblem exists in a variety of formats. Agricultural products are a well known means of making an offering.¹⁴ Other symbolic sacrifices were also commonly made. Usually such sacrifices would require a sacrificial subject who would be apprehended and tortured, frequently ending just short of death; at which time a “symbolic” “sacrificial animal [would

OF LEGAL FICTION (Maximilian Koessler ed., 1964); LAW IN LITERATURE: LEGAL THEMES IN SHORT STORIES (Elizabeth Villiers Gemmetter ed., 1992); RICHARD POSNER, LAW AND LITERATURE (rev. & enl. ed. 1998); LEGAL FICTIONS: SHORT STORIES ABOUT LAWYERS AND THE LAW (Jay Wishingrad ed., 1992); LITERATURE AND LEGAL PROBLEM SOLVING: LAW AND LITERATURE AS ETHICAL DISCOURSE (Paul J. Heald ed., 1998); TRIAL AND ERROR: AN OXFORD ANTHOLOGY OF LEGAL STORIES (Fred R. Shapiro and Jane Garry eds., 1998); BARRY J. SCHALLER, A VISION OF AMERICAN LITERATURE: JUDGING LAW, LITERATURE, AND THE STORIES WE TELL (1997); LYNNE MARIE DEICICCO, WOMEN AND LAWYERS IN THE MID-NINETEENTH CENTURY ENGLISH NOVEL: UNEASY ALLIANCES AND NARRATIVE MISREPRESENTATION (1996); Richard H. Weisberg and Karen L. Kretschman, *Wigmore’s “Legal Novels” Expanded: A Collaborative Effort*, 7 MD. L. F. 94 (1977). See Appendix A for a more detailed discussion of the relationship between law, literature, and capital punishment. The Appendix also includes a non-exhaustive list of poems, novels, and plays that explore the subject matter.

¹¹ *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).

¹² See U.S. CONST. Amend. VIII.

¹³ GIRARD, *supra* note 6, at 300.

¹⁴ Food, especially first fruits, or “premites,” was frequently used to perform sacrifices. See BURKERT, *supra* note 2, at 52; see also CATHERINE BELL, RITUAL: PERSPECTIVES AND DIMENSIONS 112 (1997) (noting that “first fruits” were used for sacrificial offerings); DAVIES, HUMAN SACRIFICE, *supra* note 3, at 23 (commenting on the “mountains of fruit and vegetables” that have been sacrificed over the years); RUDOLF SIMEK, DICTIONARY OF NORTHERN MYTHOLOGY 271 (Angela Hall trans., 1993) (noting that “[t]he sacrifice of food was one of the most important forms of sacrifice among Germanic peoples”).

be] substituted" and killed.¹⁵ Effigies provided another method of implementing sacrifices whereby a surrogate was used for the subject.¹⁶ Of course, the ritual slaughter of animals is one of the most traditional means of performing sacrifices.¹⁷ Experts agree that "[a]nimal-sacrifice was an

¹⁵ BURKERT, *HOMO NECANS*, *supra* note 1, at 46; *see also* HANS VON HENTIG, *PUNISHMENT: ITS ORIGIN, PURPOSE AND PSYCHOLOGY* 40 (1937). Tangible items symbolizing humans, such as dolls, could also be used as substitutes. *See id.* The capital punishment policies in seventeenth century Amsterdam included using symbolic sacrifices. "The official formulation usually involved a condemnation to some corporal penalty followed by the announcement that it was remitted because of the convict's youth. *As a rule the latter had to undergo symbolic exposure instead.*" PIETER SPIERENBURG, *THE SPECTACLE OF SUFFERING: EXECUTIONS AND THE EVOLUTION OF REPRESSION: FROM A PREINDUSTRIAL METROPOLIS TO THE EUROPEAN EXPERIENCE* 162 (1984) (emphasis added). With this type of symbolic sacrifice, an offender could be forced to mount the public scaffold and a sword would be waved over his or her head, or a rope placed around his or her neck. *See id.* at 162-63; *see also* DAVIES, *HUMAN SACRIFICE*, *supra* note 3, at 39-40 (discussing how the Chinese used symbolic sacrifices); Adam J. Hirsch, *From Pillory to Penitentiary: The Rise of Criminal Incarceration in Early Massachusetts*, 80 MICH. L. REV. 1179, 1225 (1982) (noting that the Puritans imposed sentences requiring the offender to stand on the gallows with a rope around the neck for a predetermined number of hours).

¹⁶ This generally required the "use of a doll, made of wax, clay, lead or other material, to kill, injure, or seduce the person the doll represents." *ENCYCLOPEDIA OF MAGIC AND SUPERSTITION* 19 (1974). This type of sacrifice was "known from Egypt and Mesopotamia, from India, Greece and Rome, and from all over the world, ancient and modern." *Id.*; *see also* DAVIES, *HUMAN SACRIFICE*, *supra* note 3, at 40-41 (discussing how the Japanese used rice effigies during sacrificial rites). During the Spanish Inquisition, effigies, usually made of straw, were frequently used as stand-ins at auto-da-fe's, periodic mass executions by burning. *See* BISHOP, *supra* note 9, at 81-93 (1965). A modern example of the use of effigy occurred when Florida executed the notorious serial killer Ted Bundy on January 24, 1989. *See* NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, *DEATH ROW U.S.A.* 6 (Winter 1998) [hereinafter *DEATH ROW*]. At Bundy's execution, a group of death penalty supporters gathered outside the prison making an effigy of him. ROBERT JOHNSON, *DEATH WORK: A STUDY OF THE MODERN EXECUTION PROCESS* 42 (2d ed. 1998); *see also* NEGLEY K. TEETERS & JACK H. HEDBLUM, *HANGED BY THE NECK: THE LEGAL USE OF SCAFFOLD AND NOOSE, GIBBET, STAKE, AND FIRING SQUAD FROM COLONIAL TIMES TO THE PRESENT* 432-33 (1967) (commenting on how "hanging in effigy" . . . is proof however crude, that the practice of hanging remains smoldering below the surface in our American mores"). On a more practical level, effigies also served as substitutes for human sacrifices who had died in prison or been condemned for contumacy. *See* George RYLEY SCOTT, *THE HISTORY OF CAPITAL PUNISHMENT* 30 (1950); *see also* BISHOP, *supra* note 9, at 82-83 (noting that during the Spanish Inquisition those accused of heresy who ran away were commonly executed by having a straw effigy of them burned); BURKE, *supra* note 2, at 197.

¹⁷ For example, before Socrates was judicially executed he asked his friend Crito to sacrifice a cock to Aesculapius, the Greek god of health. *See* ELINOR LANDER

all-pervasive reality in the ancient world.”¹⁸ The slaughter of animals for the objective of making a sacrifice, like the other forms of sacrifice, did not expire with the cessation of antiquated cultures. For example, animal sacrifice remains an integral ritual for the modern followers of the Santeria religion.¹⁹ Furthermore, it has been hypothesized that animal sacrifice reflected the desire to secure a substitute for the use of humans to effectuate offerings.²⁰

HORWITZ, CAPITAL PUNISHMENT, U.S.A. 16-17 (1973). Animals were not only sacrificed, but also convicted of capital offenses, given death sentences, and executed. See JAMES BLAND, THE BOOK OF EXECUTIONS 134-36 (1993); FRANZ SCHMIDT, A HANGMAN'S DIARY: BEING THE JOURNAL OF MASTER FRANZ SCHMIDT PUBLIC EXECUTIONER OF NUREMBERG, 1573-1617, 58 (Albrecht Keller ed., C.V. Calvert & W.A. Gruner trans. 1973) (1928); E.P. EVANS, THE CRIMINAL PROSECUTION AND CAPITAL PUNISHMENT OF ANIMALS (The Lawbook Exchange Ltd. 1998) (1906); BRIAN LANE, THE ENCYCLOPEDIA OF CRUEL AND UNUSUAL PUNISHMENT 61-63 (1993) (discussing the history of animal executions); HORWITZ, *supra* at 24; SCOTT, *supra* note 16, at 33-36; Andrew J. McClurg, *Fowl Play*, A.B.A.J., July-Dec. 1998 at 14; Walter W. Hyde, *The Prosecution and Punishment of Animals and Lifeless Things in the Middle Ages and Modern Times*, 64 UNIV. PENN. L. REV. 696 (1916). This historical practice even became the subject of a cinematic venture. In the film “The Advocate,” released in the United Kingdom as “Hour of the Pig,” Courtois, an educated lawyer in fifteenth century France, moves from Paris to the rural hamlet of Abbeville. Unexpectedly his new legal career finds him defending a pig accused of murdering a child. If found guilty, his “client” would be sentenced to death and executed. The character Courtois is based upon Bartholomew Chassene, a real-life French advocate who defended many animals in capital trials. See Leonard Maltin, THE ADVOCATE, Jan. 15, 1999, <<http://www.amazon.com/exec/obidos/ASIN/63.../qid=916957031/sr=1-6/002-0828421-5983426>>; Jan. 15, 1999, <http://www.suntimes.com/ebert/ebert_reviews/1994/09/938345.html>; Jan. 15 1999, <http://www.washingtonpost.com/wp-sr.../videos/theadvocaterhowe_a0b37d.htm>. For a more in detailed discussion of the execution of animals, see Appendix B.

¹⁸ BURKERT, HOMO NECANS, *supra* note 1, at 9; see also BURKERT, STRUCTURE AND HISTORY, *supra* note 2, at 54-56; EDWIN RADFORD & MONA A. RADFORD, ENCYCLOPEDIA OF SUPERSTITION 55-6, 65 (1948) (providing a comprehensive description of the practice of animal sacrifice in the British Isles). The importance of having animals available to use for sacrificial purposes has led some experts to theorize that at one point in time cows were domesticated solely to sacrifice. See BURKERT, HOMO NECANS, *supra* at note 1, at 43, n.36.

¹⁹ See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 521 (1993); see also Mark Henry Holzer, *Contradictions Will Out: Animal Rights vs. Animal Sacrifice in the Supreme Court*, 1 ANIMAL L. 79 (1995) (discussing how the Supreme Court's decision in *Lukumi Babalu* allows animals to be sacrificed in the furtherance of the free exercise of religion).

²⁰ See GIRARD, *supra* note 6, at 2-3; see also DON LEWIS, RELIGIOUS SUPERSTITION THROUGH THE AGES 53 (1975). But see DAVIES, HUMAN SACRIFICE, *supra* note 3, at 18-20.

Human sacrifice is "a term that can be used to refer to the complex phenomenon of the collective killing of a human victim, its mythic rationalization, and its ritualization."²¹ It is this reference to the human sacrifice's "collective attribute" that supports the proposition that human sacrifice is accurately construed as the institutionalized slaughter of humans. It is one of the institutionalized rituals that has existed since time immemorial.²² "[E]vidence for [the] ritual of sacrifice of men in the Palaeolithic age is overwhelming."²³ The custom also existed in the ancient cultures of Mexico, Persia, and Greece.²⁴ The Inca's had an important ceremony—"Vilacha" or "Pipano"²⁵—which almost exclusively used children as the sacrificial subjects.²⁶ Professor Girard argues that since violence constitutes an integral component of sacrifice, "hardly any form of violence cannot be described in terms of sacrifice."²⁷ Consequently, it stands to reason that since the

²¹ VIOLENT ORIGINS, *supra* note 1, at 8, 20; ENCYCLOPEDIA OF MAGIC AND SUPERSTITION, *supra* note 11, at 16 (noting that "the killing or wounding of a human being" is one historical element of rituals); *see also* HANS VON HENTIG, PUNISHMENT: ITS ORIGIN, PURPOSE AND PSYCHOLOGY, *supra* note 16, at 111 (commenting on the death penalty's "magical beginning").

²² "[H]uman sacrifice of ordinary mortals was practiced at one time or another, globally." DON LEWIS, *supra* note 21, at 51-2 (noting that "an integral part of ancient religious ceremonial involved human sacrifice"); BURKERT, HOMO NECANS, *supra* note 1, at 38, n.15; *see also* DAVIES, HUMAN SACRIFICE, *supra* note 3, at 18-20.

²³ *See* BURKERT, HOMO NECANS, *supra* note 1 at 43, n.36.

²⁴ *Id.* at 38, n. 15; *see also* GIRARD, *supra* note 6, at 9 (noting that human sacrifices were made in fifth century Greece); NIGEL DAVIES, HUMAN SACRIFICE, *supra* note 1, at 198-241 (discussing the human sacrifice practices of the Aztecs); *see also* Heather Pringle, *Temples of Doom*, DISCOVER, March 1999, at 78-85 (describing recently discovered evidence of the Aztec's human sacrificial practices).

²⁵ DAVIES, HUMAN SACRIFICE, *supra* note 1, at 137.

²⁶ The Aztecs had a similar ceremony which mandated sacrificing children to the rain god. *See* DAVIES, HUMAN SACRIFICE, *supra* note 1, at 212; *see also* ELIZABETH D. PURDUM & J. ANTHONY PAREDES, RITUALS OF DEATH: CAPITAL PUNISHMENT AND HUMAN SACRIFICE IN FACING THE DEATH PENALTY: ESSAYS ON A CRUEL AND UNUSUAL PUNISHMENT 143 (Michael L. Radelet ed., 1989) (noting that the Aztecs sacrificed children); DAVIES, HUMAN SACRIFICE, *supra* note 1, at 38, 51, 61, 69, 76, 77, 185, 192-93, 200-1, 206-7, 212-13, 261, 273 (for a general description of other ancient cultures that sacrificed children); GRACE A. MURRAY, ANCIENT RITES AND CEREMONIES 169-170 (1929).

²⁷ GIRARD, *supra* note 6, at 1. *See generally* KATE MILLETT, THE BASEMENT: MEDITATIONS ON A HUMAN SACRIFICE 16-18 (1979) (characterizing the torture murder of a teenage girl by her foster family as the making of a human sacrifice).

implementation of the collectively endorsed state mandated death sentence requires inflicting lethal violence upon a human being,²⁸ the penalty itself has a dimension that incorporates the ritual of providing human lives for sacrificial purposes. In a discussion on the breadth of the applicability of his surrogate victim theory,²⁹ Girard acknowledges and expounds upon the existence of the intimate relationship between the death penalty and human sacrifice.³⁰ For example, after identifying how this relationship manifests itself in two forms, he concludes that: “[i]n neither case can the concept of legal punishment be divorced from its original impulse. The concept can be traced back to spontaneous unanimity, to the irresistible conviction that compels an entire community to vent its fury on a single individual.”³¹

The Dinkas, an African tribe, use a sacrificial rite that provides an example of the tenability of Girard’s conclusions. The Dinkas have a particularly important sacrificial rite that focuses on the sacrificial victim’s genitals.³² This practice is eerily reminiscent of the drawing and quartering method of execution used by the British which required severing the victim’s genitals while he was still conscious and then burning them before his eyes.³³

²⁸ Death penalty scholar Robert Johnson argues that capital punishment is nothing more than “premeditated acts of lethal violence.” JOHNSON, *supra* note 16, at 31.

²⁹ See GIRARD, *supra* note 6, at 297 (noting that “[i]n the course of this work [he has] tried to demonstrate that generative violence penetrates all forms of mythology and ritual” and that “there can be nothing in the whole range of human culture that is not rooted in violent unanimity”). In fact, in *Violence And The Sacred*, Girard devotes an entire chapter to the discussion of this aspect of his theory. See *id.* at 274–308 (the chapter is appropriately titled “The Unity of All Rites”).

³⁰ See *id.* at 298, 307.

³¹ *Id.* at 299, 304 (equating the “grand finale of the guillotine” with “sacred violence”). Girard also endorses Louis Gernet’s assertion that “[t]he death penalty is a means of eliminating pollution . . . It purifies the affected group.” ANTHROPOLOGIE DE LA GRECE ANTIQUE 326 (1968) (quoted in *VIOLENCE AND THE SACRED*, *supra* note 6, at 298). In approving Gernet’s observations, Girard contends that “[t]here is no doubt that the death penalty is portrayed [in Gernet’s work] as a direct extension of generative violence [or, human sacrifice].” GIRARD, *VIOLENCE AND THE SACRED*, *supra* note 6, at 298.

³² See *id.* at 98.

³³ See GATRELL, *supra* note 9, at 315-16; see also JOHN LAURENCE, A HISTORY OF CAPITAL PUNISHMENT 11-12 (1963); J.H. Baker, *Criminal Courts and Procedure at Common Law 1550-1800*, in *CRIME IN ENGLAND* 42 (J.S. Cockburn ed.) (1977) (the penalty for treason in England mandated that the offender’s “privy-

Drawing and quartering also mirrors what occurred in another well-known situation involving the ritual of human sacrifice. Pentheus, the King of Thebes, was sacrificed by dismemberment to the god Dionysus in *The Bacchanal*.³⁴ Like the Dinkas' ritual, this method of effectuating Pentheus's sacrifice parallels the drawing and quartering method of execution which requires dividing the condemned's body into four parts.³⁵

Repetition, another critical feature of Girard's human sacrifice theory,³⁶ also exists in the judicial execution context. The key in both instances is the reoccurrence of a precise form of violence. The number of people executed in the United States since 1977 supplies ample evidence of the death penalty's repetitive quality. More than 522 people have been executed in the United States since Utah executed Gary Gilmore in 1977.³⁷ This aspect of the interface between capital punishment and human sacrifice is accurately captured in Professor Girard's statement that:

[S]pontaneous violence contains an element of appeasement that can also be found in ritual sacrifice, though in diluted form. In the original event, it is unleashed violence that is checked and at the same time partially appeased; *in the ritual enactment*, it is more or

members to be cut off . . . and there burned"); RADZINOWICZ, Vol. 1, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750: EMERGENCE OF PENAL POLICY IN VICTORIAN AND EDWARDIAN ENGLAND 221-22, n.73 (1948) (describing how the British sentence for treason included cutting off "privy members" and burning them in the offender's view). The mutilation of the genitalia symbolized that the offender was "unworthily begotten, and unfit to leave any generation after him." RADZINOWICZ, Vol. 1, *supra* at 222 (quoting Sir Edward Coke, a noted 17th century English jurist).

³⁴ See GIRARD, *supra* note 6, at 131; see also DAVIES, HUMAN SACRIFICE, *supra* note 3, at 58 (noting that the "manner of [Pentheus'] death became the regular Dionysian ritual").

³⁵ See RADZINOWICZ, Vol. 1, *supra* note 33, at 221.

³⁶ GIRARD, *supra* note 6, at 103, 104, 107, 109, 266; see also DAVIES, HUMAN SACRIFICE, *supra* note 3, at 277 (commenting on the importance of the repetitive act in the sacrificial process).

³⁷ See DEATH PENALTY INFORMATION CENTER, Feb. 5, 1999, <<http://www.essential.org/dpic/dpicexec.html>>. Texas, having executed more than 160 people, leads the pack. See *id.*, Feb. 5, 1999, <<http://www.essential.org/orgs/dpicreg.html>>; see also JOHNSON, DEATH WORK, *supra* note 16, at 47-52, 169-183 (describing the execution protocols that are repeated with each execution); JAMES W. MARQUART, SHELDON EKLAND-OLSON, AND JONATHAN R. SORENSON, THE ROPE, THE CHAIR, AND THE NEEDLE: CAPITAL PUNISHMENT IN TEXAS, 1923-1990, 143-6 (1994) (describing the execution protocols used at each execution in Texas).

less latent aggressions that are dealt with. The community is both attracted and repelled by its own origins. *It feels the constant need to reexperience them, albeit in veiled and transfigured form.* By means of rites the community manages to cajole and somewhat subdue the forces of destruction. But the true nature and real function of these forces will always elude its grasp, precisely because the source of the evil is the community itself. The only way in which the ritualistic imagination can succeed in its self-appointed task—a task both painstaking and elusive—is by allowing violence a certain amount of free play, *as in the original instance*, but not too much; that is, *by exercising its memory of the collective expulsion on carefully designated objects and within a rigorous framework.*³⁸

Therefore, these critical characteristics of judicially sanctioned executions demonstrate how capital punishment contains a subtext that renders the administration of the death penalty another means of effectuating the sacrifice of humans.³⁹ Consequently, since retentionist jurisdictions

³⁸ See GIRARD, *supra* note 6, at 99 (emphasis in original) (emphasis added); see also *id.* at 266 (discussing the social effects of natural human sacrifice).

³⁹ See JOHNSON, DEATH WORK, *supra* note 16, at 28 (concluding that public executions “can be seen as a form or variant of human sacrifice”); see also CAMILLE NAISH, DEATH COMES TO THE MAIDEN: SEX AND EXECUTION 1431-1933, 80-2 (1991) (discussing the relationship between executions and ancient sacrificial rites); HANGED BY THE NECK, *supra* note 16, at 200 (asserting that “[c]apital punishment is the last remaining relic of human sacrifice in Western Europe”); BURKERT, HOMO NECAN, *supra* note 1, at 46-7 (commenting on how it “has often been shown [that] the criminal’s execution at a public festival corresponds to a sacrificial ritual”); HOWARD ENGEL, LORD HIGH EXECUTIONER: AN UNASHAMED LOOK AT HANGMEN, HEADSMEN, AND THEIR KIND 12 (1997) (describing capital punishment as the “ritual of killing in the public’s name”); *id.* at 111-12 (characterizing the death penalty as “ritual slaughter”); SARA L. KNOX, MURDER: A TALE OF MODERN AMERICAN LIFE 70-1 (1998) (characterizing judicial executions as cultural symbols) POPULAR CULTURE, *supra* note 2, at 196-97 (discussing how public execution functioned as an important cultural ceremony); PURDUM & PAREDES, *supra* note 26, at 139-153 (evaluating the similarities between Aztec human sacrifice practices and contemporary capital punishment); PURDUM & PAREDES, *supra* note 26, at 181 (quoting a former Governor of Ohio who contends that the condemned become “society’s blood sacrifice”). Two commentators have concluded that “modern capital punishment is an institutionalized *magical* response to perceived disorder in American life and in the world at large . . . and in certain aspiring politicians they find their sacrificial priests.” PURDUM & PAREDES, *supra* note 26, at 153 (emphasis in original). Another commentator observed how even though people during the Middle Ages tried to “struggle against the *old heathen* ideas of sacrifice . . . [c]apital punishment still kept a supernatural reference.” VON HENTIG, *supra* note 15, at 48 (emphasis added); CHARLES DUFF, A HANDBOOK ON HANGING 63 (1981) (observing that “English hanging is an ancient institution, not in essence

exist in contemporary society,⁴⁰ the passage of time has not

dissimilar from what social anthropologists call 'ritual sacrifice,' which is as old as the hills"). Mr. Duff opines that

a good hanging can be the cathartic ritual sacrifice of a victim who, on being hanged in accordance with the traditional ritual, carries with him into eternity the murderous potentialities in all of us, thus symbolizing a liberation from them. Hence its uplifting moral value to so many good people.

Id. at 64 (emphasis added). He also uses sacrificial terms to describe England's execution of Derek Bentley, a nineteen year old intellectually challenged young man who was not the trigger person in the murder of a British police officer. *Id.* at 66. For example, Duff notes that: "The ritual of hanging had to be fulfilled, and the blood sacrifice took place at 9 a.m. on Wednesday morning 28th January 1953." *Id.* (emphasis in original and added). Derek Bentley was recently legally exonerated of this crime. *Man Hanged 45 Years Ago is Cleared of Crime*, LEXINGTON HERALD-LEADER, July 31, 1998, at A7. An anthology of letters, writings, and speeches by prisoners includes a letter that a condemned man had delivered to the sheriff on the scaffold before his execution in 1683. Mr. Algernon Sidney's "last words" included a reminder to the members of the community assembled to watch his execution by hanging that he was "fall[ing] as a Sacrifice unto Idols." PRISON ANTHOLOGY 172-73 (A.G. Stock & Reginald Reynolds eds., 1938). In a speech Robert Emmet made to the judges after his death sentence was delivered, he alleged that they were "impatient for the sacrifice." *Id.* at 182. In the novel *Hanged By The Neck* the protagonist informs the parson, who is there to comfort the condemned person, that "[c]apital punishment is the last remaining relic of human sacrifice in Western Europe." HANGED BY THE NECK, *supra* note 16, at 200. Nigel Davies initially appears to suggest that the practice of judicial execution is not equivalent to human sacrifice. See DAVIES, HUMAN SACRIFICE, *supra* note 3, at 6. He does acknowledge that capital punishment and human sacrifice might have intersected during older times. See *id.* at 69 (opining that "[v]ery often the notions of crime and sacrifice are inseparable"). He also notes that "Roman justice had a sacrificial element." *Id.* at 51. In fact, according to Davies "[t]he distinction therefore became a fine one between victims offered to the law and those offered to the god." *Id.* And later, Davies declares that "[i]n general terms, throughout [sic] the history of mankind, sacrifice, vengeance and penal justice were not separate notions but different facets of the same process, needed alike to protect the state against the wrath of the gods." *Id.* at 52. Davies also refers to how frequently the sacrificial victims calmly met their fate. *Id.* at 17. This practice, of dying "game," has historically been and continues to be an integral part of the execution ceremony. See Gatrell, *supra* note 9, at 34 (describing dying "game" on the gallows in 18th century England). These observations lead to the conclusion that Davies might not totally reject the thesis that capital punishment has a human sacrifice component.

⁴⁰ Death as a sentence for the commission of a crime has existed for ages. See HORWITZ, *supra* note 17, at 13 (noting that "[t]he story of capital punishment goes as far back as recorded history"); see also LAURENCE, *supra* note 33, at 1-27 (discussing the longevity of capital punishment). The well-known Code of Hammurabi included death as a sanction for the commission of certain offenses.

resulted in the cessation of the archaic practice of human immolation.

This connection between capital punishment and human sacrifice has not gone unobserved. In 1792 Benjamin Rush, the renowned abolitionist, commented on how “[a]n execution in a republic is like a human sacrifice in religion.”⁴¹ The fictionalized account of a nineteenth

See id. at 26-9; HORWITZ, *supra* note 17, at 13 (noting that the Babylonian code drafted by Hammurabi dates back to 2000 B.C.). The ancient Athenians frequently imposed and carried out death sentences. In fact, capital punishment was a centerpiece of Draco’s penal code. *See* IRVING BARKAN, CAPITAL PUNISHMENT IN ANCIENT ATHENS 1 (1935); *see also* ISRAEL DRAPKIN, CRIME AND PUNISHMENT IN THE ANCIENT WORLD 179-86 (1989); LAW: A TREASURY OF ART AND LITERATURE 13 (Sara Robbins ed., 1990); SPIERENBURG, *supra* note 15, at 1-12 (discussing capital punishment during Western Europe’s feudal age).

As of 1999, there were approximately 90 retentionist countries, including the United States. DEATH PENALTY INFORMATION CENTER, *supra* note 37, Sept. 10, 1999, <<http://www.essentia.org/orgs/dpic/dpicintl.html>>; *see also* ROGER HOOD, THE DEATH PENALTY: INTERNATIONAL PERSPECTIVES 52-7 (2d ed. 1995) (containing a comprehensive discussion of the status of capital punishment in the global community); *see also* *Gregg v. Georgia*, 428 U.S. 153 (1976). In the United States, forty jurisdictions—composed of 38 states, the federal government, and the United States’ military—permit the imposition of death sentences. *See* DEATH ROW U.S.A., *supra* note 16, at 1. It should be noted that while Massachusetts is categorized as a non-retentionist jurisdiction, capital punishment was abolished judicially, not legislatively. *See generally* *Commonwealth v. Colon-Cruz*, 470 N.E.2d 116, 119-34 (Mass. 1984). Given that human sacrifice has such an ancient pedigree, it is ironic that the United States Supreme Court has held that the practice of state sanctioned killing comports with “the evolving standards of decency that mark the progress of a maturing society,” the talisman of America’s cruel and unusual punishment jurisprudence. *See Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion). The principle embodied in the phrase, conveys, as was the intention, notions of positive progression and improvements. *See Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (adopting the *Trop* test in a non-capital Eighth Amendment context). The retention of capital punishment in United States, particularly given its human sacrifice component, is at odds with this far-sighted precept.

⁴¹ LOUIS P. MASUR, RITES OF EXECUTION: CAPITAL PUNISHMENT AND THE TRANSFORMATION OF AMERICAN CULTURE 1776-1865 65 (1989); *see also* SPIERENBURG, *supra* note 15, at 6 (noting that some commentators describe “executions, especially capital ones, [as a] sort of sacrifice, an act of expiation”). The celebration of the “Red Mass” in post-revolutionary France aptly represents Benjamin Rush’s observation. At the celebration held in 1794, two years after Rush’s comment, the guillotine, the government’s relatively new instrument of death, occupied center stage. In the words of one commentator:

The guillotine: it was more, much more than a toy; it was the symbol of a religion, it was an altar-piece, *it was the altar itself*, and Amar summoned his fellow deputies to join him there ‘to see the red Mass celebrated.’ When on June 8th, 1794, Robespierre conducted his service in praise of the Supreme Being the guillotine was draped in blue velvet

century Parisian execution witnessed by William Makepeace Thackeray, the celebrated author and satirist, contains a statement that reaches an identical denouement.

embroidered with roses and given its place in the quasi-religious celebrations.

ALISTER KERSHAW, *A HISTORY OF THE GUILLOTINE 2* (1958) (emphasis added) (citations omitted); see also G. LENOTRE, *THE GUILLOTINE AND ITS SERVANTS* 206 (Rodolph Stawell trans., 1929) (describing the Red Mass festivities); ENGEL, *supra* note 9, at 125 (characterizing France's first execution by guillotining as "the first live sacrifice to democratic decollation" (emphasis added)). This theme also is present in Victor Hugo's novel *The Last Day Of A Condemned Man And Other Prison Writings*. See generally VICTOR HUGO, *THE LAST DAY OF A CONDEMNED MAN AND OTHER PRISON WRITINGS* (Geoff Wollin trans., Oxford University Press: World's Classics 1992) (1829). The central character in the story "Claude Gueux," commits a capital offense while serving time in prison for the commission of a petty theft. See *id.* at 119-20. The capital offense is committed in the prison, a former abbey. Adding a touch of irony, Hugo describes the abbey's altar as being "turned into a pillory." *Id.* at 106. In another instance, the translator of speeches given by two orators in ancient Greece notes that judicial execution in nineteenth century Great Britain constituted an "appeal to the supreme page of Holy Writ for our adherence to the scaffold," reminiscent of the situation in ancient Greece. See *THE SPEECHES OF CLEON AND DIODOTUS, UPON CAPITAL PUNISHMENT, AWARDED AGAINST THE PEOPLE OF MITYLENE, AFTER THEIR REVOLT FROM ATHENS, AND COMMUTED AFTER A REVISION OF THE SENTENCE, TRANSLATED FROM THUCYDIDES 6* (2d ed. 1865) (not for sale), at 6. A nineteenth century poet also conveyed this relationship by recounting what the hangman tells the gallows: "[t]hus a service, supposed for the worship of God, is really a *service for worshipping blood*." ALBERT MIDLANE, *A COLLOQUY BETWEEN THE GALLOWES AND THE HANGMAN: A POEM ON THE EVILS OF CAPITAL PUNISHMENT; WITH NOTES* (C. Gilpin 1851). John Greenleaf Whittier's poem *The Gallows* presents another instance of the fusion between the religious symbolism of capital punishment and human sacrifice. For example, in the poem Whittier remarks on how "[o]f those foul altars streaming with warm blood." JOHN GREENLEAF WHITTIER, *The Gallows*, in *THE COMPLETE POETICAL WORKS OF JOHN GREENLEAF WHITTIER* 465. Whittier also uses the poem as a mechanism for drawing a parallel between scaffolds and altars used for non-secular purposes ("[s]et up your scaffold - altars in our land"). See *id.* at 466; see also *id.* at 470 (poem in which Whittier asks whether the gallows is "[a]n awful altar built to Thee, With sacrifice of blood and tears?"). Another commentator also notes how the popular broadsheets describing the condemned the crime, and the last confessions distributed at public executions "underlined the sacral nature of the proceedings." Richard J. Evans, *Justice Seen, Justice Done?: Abolishing Public Executions In 19th-Century Germany*, 46 *HISTORY TODAY* 20, 22 (1996). One scholar who studies ancient Germanic tribes surmises that there was an intricate relationship between the death penalty and human sacrifice. He notes how "[t]he forms of the death penalty in heathen Germanic tribes are the same as the forms of sacrifice, which leads to the surmise that the origin of the death penalty was indeed probably sacral despite all objections." RUDOLF SIMEK, *DICTIONARY OF NORTHERN MYTHOLOGY*, 58 (Angela Hall trans., 1996) (citation omitted).

It is made when the narrator, a fictionalized version of Thackeray, describes how after Peytel's execution, "Mr. Executioner and his aides have, in half an hour, removed all traces of the *August sacrifice*, and of the *altar on which it had been performed*."⁴² Professor Von Hentig also recognized this attribute of capital punishment when in the early twentieth century he opined that: "[c]apital punishment's stronghold in our life is its mystic necessity, an inheritance of long past centuries, whose traces have not yet been completely removed from our brain."⁴³

As suggested by Professor Von Hentig, it is highly unlikely that many members of the modern world would readily consciously acknowledge the intimate and complex relationship that exists between human sacrifice and the retention of capital punishment. Instead, society exhibits a general reluctance to confront the issue which can be partially attributed to the fact that "sacrifice is abhorrent to [society]."⁴⁴ Nonetheless, "many modern customs and practices and much of modern thinking *may still be related to sacrifice in a manner we do not suspect*."⁴⁵ Professor Girard shares this notion that a critical rationale for this reluctance is linked to the possibility that the motivation for retaining sacrificial ceremonies resides in the nonconscious portion of the human psyche.⁴⁶ Professor

⁴² WILLIAM MAKEPEACE THACKERAY, *THE CASE OF PEYTEL IN TITMARSH'S PARIS SKETCHBOOK* 203 (2d. ed. 1840) (emphasis added).

⁴³ VON HENTIG, *supra* note 15, at 164; *see also* ADOLF GUGGENBUHL-CRAIG, *THE OLD FOOL AND THE CORRUPTION OF MYTH* 31 (Dorothea Wilson trans., 1991) (concluding that "[m]yths and rituals have remarkable persistence, despite our attempts to explain and interpret them, to regard them as anachronisms").

⁴⁴ VIOLENT ORIGINS, *supra* note 1, at 109 (noting Professor Girard's commentary).

⁴⁵ *Id.* at 107. The author of *The Old Fool And The Corruption Of Myth* reached a similar conclusion: "[t]oday, the mythological background of human life is often hidden. We do not recognize myths as long as they work, for they are then regarded as self-evident truths." GUGGENBUHL-CRAIG, *supra* note 43, at 67; *see also id.* at 31 (concluding that "[m]yths and rituals have remarkable persistence, despite our attempts to explain and interpret them, to regard them as anachronisms"); JOHNSON, *supra* note 16, at 4 (opining that "the death penalty is an anachronism that survives today because we hide it from our awareness and deny its violence"). George Ryley Scott, another notable capital punishment commentator, similarly remarked that: "[m]urder becomes a much more fearful thing when it is performed by the State. It is much more fearful because it *masquerades, on every such occasion, as justice*." SCOTT, *supra* note 16, at x (emphasis added).

⁴⁶ VIOLENT ORIGINS, *supra* note 1, at 10, 107 (Professor Girard commenting on how the motivation for engaging in human sacrifice can operate at the

Burkert's endorsement of Girard's proposition is evidenced by his assertion that the "central role of sacrifice in ancient religion [is] taken for granted today."⁴⁷ Likewise, another noted academic contends that the public retains only a "vague recollection of the sacrificial character of . . . punishment."⁴⁸ Thus, even if contemporary society professes to have only a vague memory of how the death penalty is a means of effectuating the sacrifice of humans, this connection did and continues to exist today.

III. THE THEORETICAL BASIS FOR ESTABLISHING CAPITAL PUNISHMENT'S HUMAN SACRIFICE DIMENSION

Professor Rene Girard has formulated a comprehensive theory on human sacrifice. The theoretical underpinnings are composed of four critical components: 1) the triggering event; 2) the sacrificial crisis; 3) the sacrifice; and 4) the sacrificial benefit. The penultimate element is composed of two sub-categories: 1) the subject of the sacrifice; and 2) the

nonconscious level). Along the same line, Professor Von Hentig emphasized that "[p]hysically we live a double life, civilized in scientific and technical matters, wild and primitive in the things of the soul. *That we are no longer conscious of being primitive*, makes our tamed kind of wildness all the more dangerous." VON HENTIG, *supra* note 15, at 164 (emphasis added). Viscount Templewood, however, advances a contrary opinion through his proposition that such connections might not be hidden in the unconscious, but intentionally or consciously ignored. In support of his contention he argues that: "[w]e do not like troubling ourselves over established institutions and practices, and . . . we accept the traditional and comfort ourselves with thinking that we are really applying them to up-to-date tests." VISCOUNT TEMPLEWOOD, *THE SHADOW OF THE GALLOWS* 15 (1951) (emphasis added). The position he advances, however, does not necessarily greatly differ from Girard's since both explanations share a fundamental principle of monumental importance: society's inability to openly confront the sacrificial aspect of the death penalty.

⁴⁷ BURKERT, *HOMO NECANS*, *supra* note 1, at Preface, xiii.

⁴⁸ VON HENTIG, *supra* note 15, at 111; *see also* GUGGENBUHL-CRAIG, *supra* note 43, at 67 ("[t]oday, mythological background of human life is often hidden. We do not recognize myths as long as they work, for they are then regarded as self-evident truths"). William Shakespeare's work also implicitly touches upon this aspect of capital punishment as illustrated by the following exchange between two clowns: "[F]irst Clown: What is he that builds stronger than either the mason, the shipwright, or the carpenter? Second Clown: The gallows-maker; for that frame outlives a thousand tenants." WILLIAM SHAKESPEARE, *HAMLET* act 5, sc.1. The sturdiness and consequential longevity of the gallows' "frame" can be interpreted as representing society. The tenants are the condemned: those who have been sacrificed over the ages. Thus, this explanation reflects the tenacity of the practice of sacrificing humans under the guise of executing "justice."

sacrifice itself. Each feature is individually discussed below.

A. *The Triggering Event*

Making a human sacrifice is contingent upon an event occurring.⁴⁹ However, it warrants emphasizing that not just any event will suffice. Instead, an event of catastrophic proportions is necessary.⁵⁰ At its most fundamental level, Girard characterizes the triggering event as an incident that resuscitates “dissensions, rivalries, jealousies and quarrels within the community,”⁵¹ one that threatens to or actually does destroy or severely undermine the collective’s social order and cohesiveness.

A classic example of a triggering event is the presence of a plague or pestilence among farm animals.⁵² Classifying these incidents as triggering events is understandable because of the tremendous threat they pose to a group’s survival. The risk of disease to the human members of the social unit could also be eligible for inclusion in the category of triggering events. Such events placed the members of the collective in the disconcerting position of potential annihilation.⁵³ The introduction of religion into the calculus also greatly influenced whether a triggering event would

⁴⁹ GIRARD, *supra* note 6, at 18. I have opted to label it the “triggering event.”

⁵⁰ *See id.* at 79 (characterizing the requisite event as an “overwhelming catastrophe”).

⁵¹ *Id.* at 8. For a general description of triggering events that result in “total disintegration” of the social fabrics see page 79 of *Violence and the Sacred*. In addition one can also see page 78 of *Violence and the Sacred* for a general description of the event as one that destroys the community’s sense of unity. Lastly, one can see page 76 of Walter Burkert’s *Structure and History in Greek Mythology*, for a description of how the dynamics of the scapegoat theory of human sacrifice include occasions that produce “situation[s] of anxiety,” see also DAVIES, HUMAN SACRIFICE, *supra* note 3, at 27 (discussing how the Rumanian scholar Mircea Eliade also concluded that events that pose “dire threats to the cosmic order” are suitable to result in a communal consensus that a sacrifice is necessary).

⁵² For example, in ancient times “stay[ing] plague (or murrain) among cattle” frequently operated as a catalyst for the decision to sacrifice a calf. *See* M.A. RADFORD, ENCYCLOPEDIA OF SUPERSTITIONS 55-6 (1948); *see also* DAVIES, HUMAN SACRIFICE, *supra* note 3, at 21-5.

⁵³ *See* Lewis, *supra* note 20, at 52 (noting that the threat of serious diseases caused societies to make human sacrifices to their deities); *see also* DAVIES, HUMAN SACRIFICE, *supra* note 3, at 21 (commenting on how sacrifices were made “[t]o stave off epidemics . . . since man was defenceless against disease”).

come into existence.⁵⁴ Displays of "sacrilegious or immoral or even uncivil behavior, all of which offended God"⁵⁵ could supply the requisite triggering event.

The ancient Greek theory of pollution clarifies the concept of the triggering event as it substantially resembles Girard's event criterion.⁵⁶ Pollution was a key principle in Plato's homicide law.⁵⁷ "Pollution simply marks the commission of an abnormal and damaging act *which threatens the order and stability of the family and/or community*."⁵⁸ "In Greek society a wide variety of acts, some of them offences (notably homicide), were supposed to produce pollution (miasma) in the agent."⁵⁹ Thus, as is the case with Girard's theory, the commission of a particular

⁵⁴ Thunder, lightning, earthquakes, eclipses of the sun or moon were "regarded as direct manifestations of the wrath of heaven." LEWIS, *supra* note 20, at 87-88. As Nigel Davies notes, sacrifices often provided a type of insurance to ensure that events needed for the community's survival, such as good harvests and an ample water supply, continued to occur. See DAVIES, HUMAN SACRIFICE, *supra* note 3, at 22; see also *id.* at 15 (contending that "[r]itual and religion are inseparable from human sacrifice").

⁵⁵ JOHNSON, *supra* note 16, at 10; see also BARKAN, *supra* note 40, at 57-58. See generally THORSTEN SELLIN, THE PENALTY OF DEATH 9-33 (1980) (discussing religion's influence on the use of the death penalty).

⁵⁶ See GIRARD, *supra* note 6, at 95.

⁵⁷ See TREVOR J. SAUNDERS, PLATO'S PENAL CODE: TRADITION, CONTROVERSY, AND REFORM IN GREEK PENOLOGY 66 (1994). Drakon's law on homicide that was formulated in 621 B.C. embodies the primary concepts of pollution. If an individual is responsible for an unintentional homicide, he is polluted and is sent into exile. See LAW: A TREASURY OF ART AND LITERATURE, *supra* note 40, at 32. This course of action ensures that the polluted individual is no longer nearby to contaminate the other members of the community. Banishing the transgressor eliminates the source of the pollutant and serves to purify the community of the taint from the crime. In more recent times, the Greeks' pollution theory parallels the South's historic obsession with preventing sexual relations between the races. The concern that such transactions, particularly between white women and black men, would "pollute" the white race and hence the white social order, is one reason why so many black men were accused of, convicted of, and executed for rape. See JOHNSON, *supra* note 16, at 34; see also *id.* at 23, n.19 (noting that "[c]rossing the color line in the commission of a violent crime is indeed seen as legally more serious than violence among our black citizens, *in part because social arrangements are such that the very act of crossing the color line is itself a threat to the larger social order*") (emphasis added)); *Loving v. Virginia*, 388 U.S. 1 (1967) (holding that Virginia's antimiscegenation law prohibiting a white person from marrying anyone other than another white person violated the Fourteenth Amendment's equal protection and due process clauses). See *infra* at 130-34 (describing how judicial hangings and lynchings are forms of human sacrifice).

⁵⁸ SAUNDERS, *supra* note 57, at 65 (emphasis added).

⁵⁹ *Id.*

act becomes an integral requirement for the creation of the dynamics that lead to the creation of the sacrificial crisis that signals the need for a human sacrifice.

B. *The Sacrificial Crisis*

The triggering event is the essential prerequisite to the development of a sacrificial crisis. However, it should be emphasized that every act subject to characterization as aberrant does not automatically produce the sacrificial crisis required to support making a human offering. Rather, whether the triggering event transforms into a sacrificial crisis is dependent upon the collective's reaction to the triggering event. The response must be one that effects to "the very basis of the community, to the principles on which its social harmony and equilibrium depend."⁶⁰ In the final analysis, the quality of the crisis must be such that the "social fabric of the community is threatened."⁶¹ In addition, whether the occurrence of a particular event actually produces a sacrificial crisis is heavily dependent upon how the members of the relevant focus group perceive and interpret the event.⁶²

⁶⁰ GIRARD, *supra* note 6, at 49; *see also id.* at 39-67 (discussing the attributes of the sacrificial crisis); PURDUM & PAREDES, *supra* note 26, at 153 (concluding that "modern capital punishment is a magical response to perceived disorder in American life and in the world at large") (emphasis in original). This crisis is similar to Plato's concern that the larger society will be contaminated by the pollution generated by an individual. *See* SAUNDERS, *supra* note 57, at 65; *see also* GIRARD, *supra* note 6, at 81 (analogizing the crisis to the exposure of the community to contamination through the commission of a particular act). Ancient Greek society offers another general example of this connection between the occurrence of the precipitating event and the need to make a sacrifice for communal order purposes. Trevor Saunders' analysis of Plato's Penal Code includes a reference to the crucial position occupied by a community's perceived desire to eliminate tension that has been created by the commission of an act, or even the omission of some act. He notes that although "[t]he offences are often stated explicitly to be against 'justice,' the core of this concept involves the peaceful relationship among men, "whose disruption is thought of as a disruption of the world-order itself." SAUNDERS, *supra* note 57, at 34. Saunders also posits that the act that can activate pollution is one "which threatens the order and stability of the family and/or community." *Id.* at 65.

⁶¹ GIRARD, *supra* note 6, at 18.

⁶² This is consistent with noted sociologist Emile Durkheim's position that "[v]alues are the product of opinion; things have no value except in relation to states of mind." EMILE DURKHEIM, *SOCIOLOGY AND PHILOSOPHY* 57 (1953); *see also* JOHNSON, *supra* note 16, at 29 (discussing how perceived threats to the social order impact judicial executions).

Ulysses's speech in Shakespeare's *Troilus and Cressida* sheds some light on the type of crisis that could precipitate making a human sacrifice:

O, when *degree is shaken*, Which is the ladder of all high designs,
The enterprise is sick! How could communities, Degrees in schools
and brotherhoods in cities, Peaceful commerce from dividable
shores, The primogenitive and due of birth, Prerogative of age,
crowns, sceptres, laurels, *Take but degree away, untune that
string, And, hark what discord follows!*⁶³

This scenario, as recounted by Shakespeare, is tantamount to a sacrificial crisis because there is a triggering event—the sickness of the enterprise—and the sacrificial crisis is produced by the intense reaction to the triggering event and the anxiety about the “discord” that will follow. Another easily recognizable situation is the crisis that occurs as a result of a major natural disaster, such as an earthquake, a famine, or a flood.⁶⁴ Events of this nature possess the potential to seriously compromise the community's ability to survive. Thus, they necessarily impact the foundation of the social order's continuity. For example, if there is a famine, then there are no crops. If there are no crops, then the farm animals could die and the people face the danger of dying from starvation. Consequently, this event—the natural disaster—produces the requisite sacrificial crisis—a threat to the society's survival—upon which a human offering can be based.

The introduction of religion into the equation can intensify the gravity of the crisis. For example, in ancient Greece the existence of numerous gods accentuated the crisis because then the peril posed to the preservation of the cultural order was derived from the danger of arousing a deity's wrath. “Greek literature exhibits everywhere the general belief, often passionate, unreflecting, and with no tinge of doubt, that the gods, especially Zeus, punish offenders.”⁶⁵ Therefore, thunder, lightning, earthquakes,

⁶³ WILLIAM SHAKESPEARE, *Troilus and Cressida*, Act I., § III, in THE UNABRIDGED WILLIAM SHAKESPEARE 775 (1989) (emphasis added).

⁶⁴ Professor Girard designated the plague as the quintessential motif for the ensuing crisis. See GIRARD, *supra* note 6, at 76-77.

⁶⁵ SAUNDERS, *supra* note 57, at 33-4, 38 (noting the populace's fear of rousing the god's anger); see also GIRARD, *supra* note 6, at 7; SELLIN, *supra* note 55, at 9 (noting how “sins against the deities became criminal acts endangering the community” (emphasis added)).

eclipses of the sun or moon were “regarded as direct manifestations of the wrath of heaven.”⁶⁶ The threat of being subjected to social annihilation was the crisis that resulted from the triggering event, the god’s wrath, as evidenced by a thunderstorm or a flood. In order to abate the crisis “it was believed that this wrath might be appeased should the right prayers *and sacrifices* be offered to the offended powers.”⁶⁷

The Orthodox Christian religions function in a similar manner. This is due to their characterization of the supreme divine figure as being righteous and vengeful,⁶⁸ which can facilitate creating the requisite crisis. Calvinistic and Orthodox theological teachings which claim that civil governments obtain their authorization to govern from a divine source reinforces this position.⁶⁹ Accordingly, if society’s laws were transgressed, then, in order to make amends with this divine figure, and to circumvent any ensuing wrath, the collective determined that the situation warranted sacrificing an individual to demonstrate to the divine figure that the violation had been discovered, acknowledged, and rectified. Non-compliance was

⁶⁶ LEWIS, *supra* 20, at 87-88.

⁶⁷ *Id.* at 88 (emphasis added); see also GIRARD, *supra* note 6, at 87 (noting that collective salvation has required “the death of a single victim [who] serves to appease the anger of some god or spirit”).

⁶⁸ See MASUR, *supra* note 41, at 76 (noting that the 18th century American Calvinistic religions characterized God as “punitive”); see also GUGGENBUHL-CRAID, *supra* note 43, at 76 (describing the “inherent contradiction in myths, and symbols of divinity as God is ‘dear God’-the friendly and benevolent God-but also the raging and frightening God”); COLIN M. TURNBULL, THE DEATH PENALTY AND ANTHROPOLOGY IN MICHAEL RADELET 159 (1989) (commenting on the resemblance between judicial executions and religious acts).

⁶⁹ See MASUR, *supra* note 41, at 44-45 (commenting on how “[r]eligious figures made it clear that, while the state served as hangman, such action was taken with the direct authority of God”). During the mid-1840’s one conservative theologian who supported capital punishment advanced the thesis that capital punishment was legitimate because “[t]he punishment of death was especially imperative in the case of murder *because such a crime was not merely an ‘injury to man . . . but to God.’*” *Id.* (emphasis added).

This connection is aptly depicted in the novel *Mary Barton* by Elizabeth Gaskell, a nineteenth century British novelist. The book’s hero, James (“Jem”) Wilson, is accused of murdering Harry Carson, the “dandy” son of Mr. Carson, a leading mercantilist in the town. At the beginning of the chapter describing Jem’s trial, the author includes the following quote: “[t]hou stand’st here arraign’d, That with presumption impious and accurs’d, Thou hast usurp’d God’s high prerogative. . . .” ELIZABETH GASKELL, *MARY BARTON* 316 (Alan Shelston ed., 1996) (1848), (quoting Milman’s “*Fazio*”).

hazardous as it created the intolerable risk that the social unit could suffer additional instability by being subjected to the wrath of this vengeful divine being. Contemporary capital punishment's human sacrifice dimension still embodies this concept of thwarting or correcting an actual or potential disabling event, secular and nonsecular.⁷⁰

C. *The Sacrifice*

1. *The Sacrificial Subject.* The principal feature of this aspect of Girard's theory requires "framing a reply to the mythical question *par excellence*: 'Who initiated the crisis.'"⁷¹ Consequently, the person ultimately designated to be the human offering must be responsible or deemed responsible by the relevant social unit for the occurrence of the incident that triggered the resulting sacrificial crisis.⁷² It is important to stress that under Girard's theory the sacrificial victim's actual culpability is irrelevant. Instead, the relevant inquiry focuses on whom the community has selected to be held responsible for generating the triggering event and the resulting sacrificial crisis. Although, in some instances, the subject selected to be sacrificed may actually possess some degree of culpability for the commission of the act triggering the sacrificial crisis.⁷³ Nonetheless, there may be an unconscious desire on the part of the community that if the subject of the impending immolation is indeed guilty of committing the triggering event, then the taint of culpability must be minimized. Evidence of the need to transform the sacrificial subject's status in this manner is found in the purification rituals in which "guilty" sacrificial subjects participate.⁷⁴ Ironically, sometimes the victim may

⁷⁰ See DAVID GARLAND, PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY 245 (1990) (opining that capital punishment is society's reaction to the perceived threat to the social order presented by "many of the social fears and racial class tensions of U.S. society").

⁷¹ GIRARD, *supra* note 6, at 78 (emphasis in original).

⁷² See *id.* at 77-85 (describing criteria for selecting the sacrificial victim). This also resembles Plato's pollution theory, as the pollutant is the "enemy who is contaminating the rest." GIRARD, *supra* note 6, at 81.

⁷³ See *supra* notes 52-57 and accompanying text.

⁷⁴ Presumably this puts them on equal footing with sacrificial subjects who are actually "innocent" but deemed responsible so that in both situations, while deemed responsible, which makes immolation necessary, the sacrificial victim is also "pure." GIRARD, *supra* note 6, at 77-78, 82-83. For example, in

even be aware that he or she has been selected as the sacrificial subject in order to save the community from threatened or actual harm.⁷⁵

Another critical attribute of the sacrificial subject is the substance and quality of his or her connection to the community confronted with the existing or impending disaster.⁷⁶ The sacrificial subject might even formerly have been a member of the social collective experiencing the crisis.⁷⁷ Nonetheless, even if the person can be classified as being "in" the community, it is unlikely that he or she is considered "of" the community.⁷⁸ Essentially it is imperative

contemporary times the execution protocol calls for the condemned to bathe and shave. See JOHNSON, *supra* note 16, at 153. The color white has been and still is used for the outfits selected by or provided to those immediately facing execution. See *infra* Appendix H for an explanation of what the color white symbolizes. The use of this color for the clothing worn at the time of execution could suggest that although the suitability of the sacrificial subject is not contingent upon the total absence of culpability, or total purity, the acceptability of the subject might be enhanced by improving the subject's presentation through the use of various purification rituals—donning white clothing, use of the white cap for hangings, bathing and shaving prior to execution, and so forth. In turn, it is possible that this outcome improves the quality of the benefit bestowed upon the social order that has provided the impetus for making a sacrifice. See also *infra* at 126-28 for a discussion of the sacrificial preparation component of Girard's surrogate victim theory.

⁷⁵ See GIRARD, *supra* note 6, at 93 (Professor Girard uses Oedipus to exemplify this feature); see also Davies, *supra* note 3, at 13. This is arguably the situation with the impending execution of Hetty Sorrel in *Adam Bede* and most likely the case with the execution of Tess in *TESS*. See *infra* notes 224-227 (Hetty's steadfast refusal to aid in her defense at her murder trial).

⁷⁶ See GIRARD, *supra* note 6, at 13 (noting that the sacrificial and nonsacrificial beings possess similarities); see also *id.* at 39.

⁷⁷ See *id.* at 13. See also pages 76-77 of *VIOLENCE AND THE SACRED*, where Girard notes that Oedipus was a member of the Theban community when he was selected to be the sacrificial offering; and JOHNSON, *supra* note 16, at 28.

⁷⁸ GIRARD, *supra* note 6, at 12, 80 (noting that Andromache was a foreigner); see *id.* at 83 (commenting on how "[t]he crisis is seen as a mysterious illness introduced into the community by an outsider") (emphasis added). This concept is similar to the Greek's theory of pollution that required exiling the transgressor in order to eliminate the polluting effect the person had on the community. See *id.* at 411. Additional evidence of Girard's incorporation of this principle is supplied by his contention that after "[t]he surrogate victim is generally destroyed, and always expelled from the community . . . The community itself is felt to be free of infection. *Id.* at 266 (emphasis added); see also JOHNSON, *supra* note 16, at 28; PURDUM & PAREDES, *supra* note 26, at 142-43 (discussing how modern capital punishment victims are predominantly marginal members of society, which resembles the Aztecs' human sacrifices who frequently came from neighboring villages); BURKE, *supra* note 2, at 165 (noting that "[n]o image of society can be complete if it does not include the outsiders");

that the person selected to be the sacrificial victim be able to adopt the status of an "outsider" or a non-integrated member of the society that is debilitated by the crisis.⁷⁹ Girard illuminates this prerequisite by noting that "ritual victims tend to be drawn from categories that are neither outside nor inside the community, but *marginalized to it*."⁸⁰ "This marginal quality is crucial to the proper functioning of the sacrifice"⁸¹ if the sacrificial victim is to successfully "polarize the aggressive tendencies of the community,"⁸² which is needed in order to facilitate the collective in making the sacrifice.

id. at 167 (commenting on how "[e]ven more fearsome, if possible, was *the outsider who lived within the community*") (emphasis added).

⁷⁹See GIRARD, *supra* note 6, at 12-13, 102, 269-272; see also *Furman v. Georgia*, 408 U.S. 238, 250 (1972) (per curiam) (Douglas, J. concurring) (referring to one study concluding that the "[a]pplication of the death penalty is unequal: most of those executed were poor, young and ignorant"); *id.* at 251 (reiterating former Attorney General Ramsey Clark's statement that "[i]t is *the poor, the sick, the ignorant, the powerless and the hated* who are executed") (emphasis added) (citation omitted); DAVIES, *supra* note 3, at 212 (noting that many of the Aztecs' sacrificial victims "were those favoured all the world over—war captives, children, and slaves"); HORWITZ, *supra* note 17, at 181 (quoting former Ohio governor Michael Di Salle who opined that the one feature shared by death row prisoners is that "[t]hey are penniless"); LINEBAUGH, *supra* note 9, at 288-326 (discussing why 14% of the people hanged at Tyburn in London during the eighteenth century were Irish); MASUR, *supra* note 41, at 39 (opining that "juries [in America from 1776 until 1865] most likely found it easier to convict outsiders of ... capital crimes"); DAVID C. BALDUS AND GEORGE WOODWORTH, RACE DISCRIMINATION AND THE DEATH PENALTY: AN EMPIRICAL AND LEGAL OVERVIEW IN AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION 386 (James R. Acker et al. eds., 1998) (opining that "the potential of the death penalty as a means of intimidating and subordinating *the black community* was clearly perceived and contributed to the *strong support for the use of the death penalty that continues to this day in the deep South*") (emphasis added); Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L. J. 1835, 1840 (1994) (observing that "a large part of the death row population is made up of people who are distinguished by neither their record nor the circumstances of their crimes, but by their abject poverty. . ."); Adam J. Hirsch, *From Pillory to Penitentiary: The Rise of Criminal Incarceration in Early Massachusetts*, 80 MICH. L. J. 1179, 1224 (1982) (noting that nonresidents were encompassed in the small group against whom the Puritans exercised expulsion from the community as a criminal sanction).

⁸⁰GIRARD, *supra* note 6, at 271 (emphasis added); see also *id.* (commenting on how it is critical that "[t]he victim must be neither too familiar to the community nor too foreign to it.")

⁸¹*Id.*

⁸²*Id.*

2. *The Sacrificial Killing.* The community's "cure lies in ridding the community of the sole malignant element."⁸³ Successfully achieving this goal necessitates removing the causal agent from the environment, "invariably by violent means."⁸⁴ This task can be accomplished by sending the person into exile⁸⁵ or resorting to the use of lethal force to extinguish the person's life.⁸⁶ When the latter option is adopted it can be accomplished by committing murder.⁸⁷ Capital punishment, a violent act that requires intentionally taking a human life, qualifies as murder.⁸⁸ In the context of sacrifices, the intentional taking of the human life, or the act of making the sacrificial offering, is a collective act. Although judicial executions in the United States are presently committed in the privacy provided by the prison,⁸⁹ it remains a collective mission because one of the purported reasons for extinguishing the designated person's life is to exact society's revenge.⁹⁰ Therefore, it is society's decision to shed a person's blood that "transforms into a guarantee of order and tranquility."⁹¹

Before the sacrificial killing can occur an important phase that Girard terms "sacrificial preparations"⁹² must transpire. These are those "ritual actions that immediately

⁸³ *Id.* at 83.

⁸⁴ *Id.* at 89. Girard notes that "[v]iolence directed against the surrogate victim banishes" the communal disequilibrium. *Id.* at 85.

⁸⁵ *See id.* at 85, 87. For an explanation of how exile can be equivalent to the use of violence, see *infra* notes 206, 215 & 218 (discussing the similarities between the ills of Hetty's transportation sentence and banishment).

⁸⁶ *See* GIRARD, *supra* note 6, at 85, 87.

⁸⁷ *See id.* at 85.

⁸⁸ Murder is defined as the intentional taking of human life. *See* MODEL PENAL CODE §§ 210.1 & 210.2 ("[a] person is guilty of criminal homicide if he purposely, knowingly, recklessly or negligently causes the death of another human being Criminal homicide constitutes murder when... it is committed purposely or knowingly. . . ."). This aptly describes capital punishment as the intention is to take a specific person's life, on a specific date, at a specific time, at a specific place, and in a specific manner. In fact, Utah has acknowledged this reality by listing homicide as the cause of death for an executed person because "he died an 'intentional death by another hand.'"

⁸⁹ *See generally* MASUR, *supra* note 41, at 93-116 (describing the change from public to private executions).

⁹⁰ *See* *Gregg v. Georgia*, 428 U.S. 153, 138-184 (1976) (plurality opinion) (joint opinion, Stewart, J.) (noting that retribution is one of the appropriate governmental rationales supporting the state sanctioned taking of human life).

⁹¹ GIRARD, *supra* note 6, at 87.

⁹² *Id.* at 272-73.

precede sacrificial killing.⁹³ They can include such rituals as ceremonial displays of the sacrificial victim⁹⁴ and the use of masks during the sacrificial process.⁹⁵ This stage of the

⁹³ *Id.* at 272; see also JOHNSON, *supra* note 16, at 142-163 (describing the execution protocols that precede carrying out state sanctioned executions in contemporary society). See generally STEVEN TROMBLEY, *THE EXECUTION PROTOCOL: INSIDE AMERICA'S CAPITAL PUNISHMENT INDUSTRY* (1993) (describing Missouri's protocol for execution by lethal injection).

⁹⁴ See GIRARD, *supra* note 6, at 287 (noting that "[s]hortly before his execution [the Greek] *pharmakos* is paraded ceremonially through the streets of the village."). The *pharmakos* is the person who is to be executed. See *id.* at 286. The famous 2 mile trek from Newgate Prison to the site of the gallows at the Triple Tree at Tyburn in England is an example of the incorporation of a ceremonial parade in the capital punishment context. See GATRELL, *supra* note 9, at 32. The movement of Hetty Sorrel, the surrogate victim in *Adam Bede*, to the execution site is consistent with this as she is transported in a cart through the village from the jail to her execution site. See *infra* at 159. The modern version of yesterday's ceremonial parade that preceded most executions is the "last walk" that a condemned makes from the death cell to the death chamber. Due to the use of incarceration and the non-public nature of modern executions, the length of the "last walk" has been substantially reduced. Now the condemned person typically walks from the death cell to the death chamber, which is usually a short distance. See ARTHUR S. MILLER & JEFFREY H. BOWMAN, *DEATH BY INSTALLMENTS: THE ORDEAL OF WILLIE FRANCIS* 140 (1988) (noting that Willie Francis's "last walk" required taking about a dozen steps from the holding cell to the execution chamber); JOHNSON, *supra* note 16, at 175 (describing how the condemned "proceeded down a *short hallway* leading to the death chamber" (emphasis added)); LEWIS E. LAWES, *MEET THE MURDERER!* 129 (1940) (noting the reduction in the distance of the "last walk" by describing it as "those eighteen steps to Eternity"); FREDERICK DRIMMER, *UNTIL YOU ARE DEAD: THE BOOK OF EXECUTIONS* 57 (1990) (noting that in California the condemned prisoner was escorted "down the short corridor" leading from the holding cell to the death chamber). Nonetheless, it is interesting to consider that, as if to remain cognizant of how the distances required to be covered in the past were necessary in order for the festive or pageantry aspect of the sacrificial slaying to be satisfied, the condemned's last walk is still colloquially referred to as walking the "last mile." See LAWES, *supra* note 94, at 106, 129; see also MILLER & BOWMAN, *supra* note 94, at 140.

⁹⁵ See GIRARD, *supra* note 6, at 284. The traditional use of masks or blindfolds during executions by hanging, electrocution, and firing squads is a contemporary manifestation of this means of preparing for the sacrifice. James Berry, a former executioner for Britain, explained how "as the procession moves [from the cell to the scaffold] *I place the white cap upon the head of the convict. Just as we reach the scaffold I pull the cap over his eyes.*" *MY EXPERIENCES AS AN EXECUTIONER* BY JAMES BERRY 46 (H. Snowden Ward ed., 1972) (emphasis added); see also LANE, *supra* note 17, at 244-45 (1993) (noting how with execution by hanging "a white cap, shaped somewhat like a bag, [is] pull[ed] down over the eyes of the criminal to prevent his seeing the final preparation"); DRIMMER, *supra* note 94, at 130-31 (Clinton Duffy, a former warden at San Quentin Prison in California, describes how black hoods were placed over the heads of the condemned before they were hung). In *Death By Installments* the

authors describe how when sixteen year-old Willie Francis was being prepared for his first appointment to be executed by electrocution a black hood covering the upper portion of his face, including his eyes, was placed over his head, "except for a small slit to enable him to breathe." MILLER & BOWMAN, *supra* note 94, at 8; *see also id.* at 141 (describing how Francis's head and face were covered by a dark wet hood at his second, and final, execution by electrocution); ROBERT G. ELLIOTT, AGENT OF DEATH: THE MEMOIRS OF AN EXECUTIONER 14, 40 (1940) (according to Robert Elliott, New York's executioner who "hurled into eternity three hundred and eighty-seven occupants of the electric chair," a black mask is placed over the condemned's face after he or she has been secured to the electric chair); COLE MORRIS, *The History of the Electric Chair*, in DEATH ROW 9, 14 (1997) (noting that "[a] tight mask is placed over the condemned's face to hide facial contortions when the current is released into his body"); JOHNSON, *supra* note 16, at 176-77 (noting that the mask used for an electrocution was made of leather and how it had "two parts. The bottom part covered the chin and mouth; the top, the eyes and lower forehead. Only the nose was exposed. The effect of the rigidly restrained body, together with the bizarre cap and the protruding nose, was nothing short of grotesque"). Utah's protocol for execution by firing squad calls for the condemned person to have "a blindfold over his eyes." DRIMMER, *supra* note 94, at 95; *see also Child Killer Faces Utah Firing Squad*, LEXINGTON HERALD-LEADER, Jan. 26, 1995, at A3 (noting that a "black hood" would be placed over the head of John Albert Taylor who requested to be executed by firing squad). When Barbara Graham was executed by lethal gas by the state of California in 1955 she "asked for a covering for her eyes and a matron lent her a sleeping mask." DRIMMER, *supra* note 94, at 63. Other past and present preparatory rituals include serving a "last meal" and allowing the condemned to make a "last speech or statement." Lewis Lawes who served a long tenure as the warden at Sing Sing Prison in New York and witnessed numerous executions commented on how it is common to ask for "final words" or a "last statement." LAWES, *supra* note 94, at 109; *see also* WATT ESPY, *Facing the Death Penalty*, in FACING THE DEATH PENALTY: ESSAYS ON CRUEL AND UNUSUAL PUNISHMENT, 27, 36 (Michael Radelet ed., 1989) (recounting two ironic "last statements"); Ralph Slovenko, *The Last Words Of The Condemned*, 20 AAPL NEWSLETTER 38, 51-53 (1995) (listing a sample of contemporary "last words"); DRIMMER, *supra* note 94, at 239-252 (recounting some interesting "last words"); MASUR, *supra* note 41, at 32-36, 38, 42 & 114 (providing a detailed description and analysis of last speeches and confessions made by the condemned at executions held during the post-Revolutionary War period in the former colonies); RADZINOWICZ, *supra* note 33, at 178, 180 (commenting on the phenomena of capital punishment and "dying speeches and confessions" that existed in 18th and 19th century England). The "last meal" is probably one of the most widely-known and followed rituals that proceed the sacrifice by state sanctioned execution. *See* LAWES, *supra* at 172-75 (discussing the "last meal" and society's fascination with this relic). In preparation of Willie Francis's first execution scheduled to take place on May 3, 1946, the Sheriff told him that he "could have anything he wanted to eat for his last supper." MILLER & BOWMAN, *supra* note 94, at 2. Willie selected ice cream and steak. *Id.* When the day of reckoning finally arrives, after the United States Supreme Court refused to prohibit his execution after the first attempt was botched, Francis decided to have a "last meal" of fried catfish and potatoes. *Id.* at 140; *see also* Don Edwards, *Inmates' last meals are food for thought*, LEXINGTON HERALD-LEADER,

human sacrificial process serves two major purposes. First, it “seeks to make appear more foreign a victim who is too much a part of the community.”⁹⁶ It is critical to achieve this objective of the sacrificial preparation process because the sacrificial victim’s “marginal quality is crucial to the proper functioning of the sacrifice.”⁹⁷ Second, sacrificial preparations play an important role in facilitating the creation of the circumstances necessary for the sacrifice to render its cathartic effect on the populace.⁹⁸ Related to the latter objective is how the actions employed during this stage “contribute to the ‘efficiency’ of the total operation.”⁹⁹

D. *The Sacrificial Benefit.* At this point, an event has triggered a crisis of a magnitude sufficient to destabilize the social order. As previously explained, the prescription for salvaging the community is to sacrifice a suitable individual.¹⁰⁰ Once the person has been selected and sacrificed the community anticipates the restoration of the social equilibrium. It is the accomplishment of this objective

Dec. 16, 1991, at B1; JOHNSON, *supra* note 16, at 171. In some jurisdictions the condemned wore finery to his or her execution. This practice is a ritual that frequently occurs in sacrificial rites. It is as though those making the offering want to enhance the quality of the sacrifice, the sacrificial subject, through external adornment. For example, William Kemmler, the first person to be executed by electrocution, “was wearing a fine new outfit *the state had provided for the occasion*—trousers with a mixed yellow pattern, a sack jacket of dark gray and matching waistcoat, a white linen shirt, a bow tie, and brightly polished black shoes.” DRIMMER, *supra* note 94, at 5 (emphasis added). Clinton Duffy, a former warden at San Quentin, in describing the protocols used when California still executed by hanging, mentioned that “[b]efore the execution the condemned person was taken to a holding cell. Here he was issued his last outfit: jeans, a white shirt and slippers.” *Id.* at 130. When Ruth Snyder was electrocuted by the state of New York in 1928 she was “[d]ressed in a khaki smock over a black skirt.” *Id.* at 37. Twenty-five years later, when Ethel Rosenberg was electrocuted she was “clad in a green dress with polka dots.” *Id.* at 44. In anticipation of his second, and final execution, Willie Francis wore his “Sunday best.” MILLER & BOWMAN, *supra* note 94, at 140. See also Appendix H for a discussion of how it was common for the condemned to be executed in dress resembling wedding attire.

⁹⁶ GIRARD, *supra* note 6, at 272.

⁹⁷ *Id.* at 271.

⁹⁸ See *id.* at 273; see *infra* at 129-134 (discussing the social benefits created when a human offering is made).

⁹⁹ GIRARD, *supra* note 6, at 278; see also JOHNSON, *supra* note 16, at 123-39, 142-51 & 159-63 (describing how the modern execution protocols act to facilitate making the execution process run smoothly).

¹⁰⁰ See *supra* notes 71-82 and accompanying text.

that the selection and elimination of the victim is directed. Consequently, “[t]he purpose of sacrifice is to restore harmony to the community, to reinforce the social fabric.”¹⁰¹ At its most fundamental level, “[t]he surrogate victim dies [is sacrificed] so that the entire community . . . can be reborn in a new or renewed cultural order.”¹⁰² Nigel Davies’ agreement with Girard’s position is revealed by his conclusion that human sacrifice had solely one end and that was to further “the good of the community, if not its very existence.”¹⁰³ Professor Burkert’s contention that one of the ancient Greeks’ integral objectives when making sacrifices was “to preserve a social structure over the course of generations”¹⁰⁴ also reinforces the benefit component of Girard’s sacrificial theory.

The Germanic tribes’ practice of expelling miscreant members of the social unit serves as a compelling exemplar of this precept.¹⁰⁵ If a member of these tightly knit social groupings, whose survival was dependent upon the

¹⁰¹ GIRARD, *supra* note 6, at 8 (“[t]he elements of dissension scattered throughout the community are drawn to the person of the sacrificial victim and eliminated, at least temporarily, by its sacrifice”); *see also id.* at 84-87 (discussing how in his hypothesis the benefit received from destroying the individual held responsible for the crisis is to restore the disintegrated social order to its pre-crisis status); JOHNSON, *supra* note 16, at 29 (contending that the purpose of judicial execution is “to render the dominant group *safe and secure from the sort of earthly dangers represented by the criminal*”) (emphasis added); MASUR, *supra* note 41, at 47 (noting that on execution days the social authorities hoped that “the carefully designed ritual of execution day would effectively transmit those values they deemed necessary to the *preservation of social order.*”) (emphasis added). The objective of the purification ritual used by the ancient Greeks when pollution occurred is similar to that of human sacrifice as its objective was to “restor[e] the *status quo* socially and religiously.” SAUNDERS, *supra* note 57, at 66.

¹⁰² GIRARD, *supra* note 6, at 255.

¹⁰³ DAVIES, *supra* note 3, at 17, 275. Davies also identifies other experts who reached an identical conclusion; *see also id.* at 24-25 (noting that Westermarck concluded that human sacrifice is usually “practised for the benefit of the community”); *id.* at 26 (noting that Georges Gusdorf concluded that human sacrifices bring the “society back into a state of balance”); *id.* at 27 (noting that the Romanian scholar Mircea Eliade concluded that one purpose for making a human sacrifice is to “restore[] the general equilibrium of society”); *see also* RITUAL, *supra* note 2, at 114 (asserting that sacrifices are used to “secur[e] the well-being of the community”).

¹⁰⁴ BURKERT, *HOMO NECANS*, *supra* note 1, at 46; *see also id.* at xiv.; *see also* BURKE, *supra* note 2, at 201 (citing Victor Turner’s argument that “rituals lead to ‘an ecstatic experience,’ an enhanced sense of community, followed by a ‘sober return to the normal social structure’”).

¹⁰⁵ *See* SPIERENBURG, *supra* note 15, at 2.

maintenance of this structure, engaged in activity that the collective considered to pose an intolerable threat to the group's continuity, then "he could be expelled from the tribal community (branded a 'wolf') or even killed."¹⁰⁶ "Being thrown to the wolves"¹⁰⁷ is equivalent to being sacrificed by the community since expulsion from the greater social unit, with the knowledge that survival outside of the group was unlikely, was deemed imperative in order for the benefit to accrue to the community. The benefit could be the preservation of the status quo or the prevention of an event that might threaten the group's physiological continuity.

The executions, both judicial and extra-judicial, of black men for rape and/or murder is another exemplar of this facet of the human sacrifice and capital punishment equation.¹⁰⁸ The death of Roosevelt Wilson is a poignant

¹⁰⁶ *Id.*; see also RUDOLF SIMEK, *DICTIONARY OF NORTHERN MYTHOLOGY* 165 (Angela Hall trans., 1996) (noting that the ancient Germanic tribes regularly engaged in human sacrificial rites as a means of responding to crises).

¹⁰⁷ This phrase has come to mean sacrificing someone "to avert danger or difficulties for [others]." *THE OXFORD DICTIONARY OF PHRASE, SAYING, AND QUOTATION* 390 (Elizabeth Knowles ed. 1997). For Western cultures this concept probably originated in the Bible, which states: "Go your ways: behold, *I send you forth as lambs among wolves.*" *THE MACMILLAN DICTIONARY OF QUOTATIONS* 61 (1989) (quoting *Luke* 10:3-7) (emphasis added).

¹⁰⁸ Professor Girard also comments on how the violence required to restore or preserve the social fabric exists in lynchings. See GIRARD, *supra* note 6, at 80. Similarly, the commentator Robert Johnson observed that "there were elements of human sacrifice in many lynchings." JOHNSON, *supra* note 16, at 34. The use of extra-judicial lynchings, however, was not limited to circumstances involving accusations of rape. Instead, it had a broad reach because "African-American liberation threatened to topple the class structure of Southern society and the racial caste system on which it was fabricated, and this challenge to the established social order could not go unanswered." STEWART E. TOLNAY & E.M. BECK, *A FESTIVAL OF VIOLENCE: AN ANALYSIS OF SOUTHERN LYNCHINGS, 1882 - 1930* 5, 19 (1995); see also TERENCE FINNEGAN, *Lynching and Political Power in Mississippi and South Carolina*, in *UNDER SENTENCE OF DEATH: LYNCHING IN THE SOUTH* 189-191, 202-4 (W. Fitzhugh Brundage ed., 1997); TOLNAY, *supra* at 64, at 76; SENTENCED TO DEATH, *supra* note 9, at 75-103 (Chapter Four contains a discussion of Richard Wright's 1940 novel *Native Son* about Bigger Thomas's alleged murder and rape of the daughter of his employer, a rich white philanthropist); *id.* at 84, 88-89 (noting similarities in Bigger's fictionalized situation and the Scottsboro's real situation involving the alleged rape of white women by black men and the ensuing public clamor for "justice"). In *Native Son* the death and alleged rape of Mary are the events that produce the crisis. The crisis flows from the white public's belief that Mary was killed and raped by Bigger, a black male. In order to rectify the perceived social imbalance—black people "stepping way outside the accepted social norms"—Bigger must be sacrificed. He is aware of this reality as he reflects on how "they were

example of this social phenomenon.¹⁰⁹ Wilson was accused by the state of Alabama of raping a white woman who resided in the small farming community where he lived.¹¹⁰ The seriousness of the threat posed to the existing cultural order, which was premised upon the maintenance of white supremacy, is conveyed by the author's statement that these allegations were "old familiar fabric."¹¹¹ Consistent with prevailing practice, Roosevelt was quickly convicted and sentenced to be judicially executed¹¹² since his death was needed in order to release the mounting stress placed on a social order that mandated adherence to mores subjugating the black residents.¹¹³ This was especially perceived to be warranted because the situation presented a risk of producing off-spring of mixed blood,¹¹⁴ which could,

determined to make his death mean more than a mere punishment; [and] . . . the atmosphere of the crowd told him that they were going to use his death as a bloody symbol of fear to wave before the eyes of that black world." *Id.* at 92 (quoting RICHARD WRIGHT, *NATIVE SON* 318-19 (1940) (emphasis added). Albert French's novel *Billy* which centers around the conviction and execution by electrocution of a ten year-old black male child in Mississippi during the late 1930's for killing Lori, a teen-aged white girl, also implicitly notes the prevailing attitude with respect to the gravity of black on white rape. After the town Sheriff arrives on the scene to investigate the murder, Lori died from the wounds she received when ten year-old Billy "sticks" her because she threatened to beat him again. See ALBERT FRENCH, *BILLY* 26-30 (1993). The initial inquiry was about whether Lori had been "bothered." *Id.* at 34. Later, after the town physician has completed the autopsy, the Sheriff again inquires about whether the ten year-old defendant had "bothered" her. See *id.* at 123.

¹⁰⁹See WILLIAM BRADFORD HUIE, *The South Kills Another Negro, in THE DEATH PENALTY: A LITERARY AND HISTORICAL APPROACH* 85-91 (Edward G. McGehee et al. eds., 1964).

¹¹⁰ See *id.* at 85-86. Given the time, location, and prevailing social norms, the alleged rape would qualify as the triggering event.

¹¹¹ *Id.* at 85. Further evidence of the magnitude of this transgression and the resulting pressure it placed on the community is supplied by the fact that "two or three thousand people massed to the streets leading up to the courthouse square." *Id.* The situation was so volatile that it became necessary for two companies of armed National Guards to maintain surveillance outside and inside the courthouse where Roosevelt was to be tried. *Id.* at 85-86. Even more revealing is that "[t]he Attorney-General himself was on hand . . . [and] [e]very elected prosecutor in district and county was present." *Id.* at 86. See generally UNDER SENTENCE OF DEATH: LYNCHING IN THE SOUTH (W. Fitzhugh Brundage ed., 1997). The statement's representation of the outrage displayed by the white members of the community towards the triggering event marks the creation of the requisite sacrificial crisis.

¹¹² See BRADFORD HUIE, *supra* note 109, at 88.

¹¹³ See TOLNAY & BECK, *supra* note 108, at 19, 57.

¹¹⁴ See generally TOLNAY & BECK, *supra* note 108, at 76 (this concern constitutes

over time, dilute the power wielded by the whites. However, the acuteness of the crisis intensified when Roosevelt revealed that he was innocent of the charges because the complainant, a white woman in her thirties, had consented to his request that she engage in sexual intercourse with him in exchange for a piece of jewelry.¹¹⁵ The judge's refusal to grant a mistrial, which was legally warranted because the woman's husband tried to shoot Roosevelt in front of the jury, signals the escalation of the crisis. As the judge informed the author: it was imperative "to get rid of this mess."¹¹⁶ "Getting rid of the mess" can be interpreted as a desire to reattain the previous social accord. Since Roosevelt was deemed responsible for causing the disequilibrium,¹¹⁷ it was imperative to permanently remove him from the community. This endeavor would require his annihilation. Even though Roosevelt's jurors freely admitted that they believed his testimony regarding the consensual nature of the sexual encounter,¹¹⁸ his innocence was an insufficient basis upon which to halt his impending immolation because "he deserves the chair for messin' around with a white woman,"¹¹⁹ the true source of the crisis.¹²⁰

an additional component of the sacrificial crisis).

¹¹⁵ See BRADFORD HUIE, *supra* note 109, at 87-88.

¹¹⁶ *Id.* at 88.

¹¹⁷ Roosevelt is the obvious sacrificial candidate because he satisfies certain crucial criteria. As a member of an African-American community in the rural South Roosevelt qualified as being characterized as a marginalized individual. Although he was born and raised in that community he has almost no concrete ties to it because he is illegitimate. *See id.* at 85. In the author's eyes, which reflect the communal conscience, Roosevelt is "the most insignificant human being in the world." *Id.* To emphasize this numbing summation, the narrator advises the reader to "[t]hink of him as a black, burr-headed creature who felt no superior to a hound dog, and whose death would not have brought a waft of regret across any heart in America." *Id.* Thus, as required, Roosevelt lives "in" the community, but is not "of" the community. *See id.*

¹¹⁸ See BRADFORD & HUIE, *supra* note 109, at 88. The judge and the members of jury believed Roosevelt's rendition of the events: that the white woman consented to his request that she "lay with him" in order to receive a ring that he had and she wanted. *Id.*

¹¹⁹ *Id.* It is my opinion that sacrificing Roosevelt in accordance with the proscribed state mandated electrocution signifies that a benefit will be bestowed upon certain members of the threatened community: the removal of the designated cause of the disequilibrium and the restoration of the prevailing social order.

¹²⁰ The author intimates that this is the real reason for Roosevelt's execution. When, by happenstance, the author is at the prison at the time of Roosevelt's

In sum, the need for instituting and performing ceremonies at which humans are tendered as sacrifices is activated by the occurrence of an event¹²¹ that is of a magnitude that it is perceived, from the community at issue's perspective,¹²² as a threat to the community's survival or to the social order's ability to maintain its equilibrium.¹²³ Consequently, offering a human to be

appointment with the electric chair, Roosevelt asks the author to explain why he has to die for a crime he did not commit. The narrator's response not only confirms Roosevelt's suspicion that he is being executed for "messin' aroun wid dat lady," but also informs him that "there's a *bigger and more awful reason* that I haven't time to explain." *Id.* at 90 (emphasis added). Roosevelt was not alone in suffering the plight of being anointed the sacrificial victim under such unjust circumstances. In Mississippi, Willie McGee suffered a similar fate. In 1945 McGee was tried and convicted and sentenced to death for raping a white woman. Subsequently, his conviction was reversed twice and he was reconvicted and sentenced to death two more times. Like Roosevelt, McGee's defense was that the sexual relations were consensual. Apparently, McGee and the rape victim had been having a sexual relationship for four years. Eventually he told her that he wanted to end their relationship. Upon receipt of this information, his lover became outraged and lodged rape charges against him. "Ignored by the jury was the fact that her husband and her two children had been sleeping in the next room when the alleged rape took place, and all denied they had heard any disturbance." FREDERICK DRIMMER, *UNTIL YOU ARE DEAD: THE BOOK OF EXECUTIONS* 211 (1990). Willie McGee was executed in 1951. *See id.* As the means of curtailing the destruction of the governing community's unity, McGee and Roosevelt both innocent sacrificial subjects are illustrative of Girard's contention that when it becomes imperative to alleviate the tension that has plunged the community into a disharmonious state "[a] single victim can be substituted for all the potential victims." GIRARD, *supra* note 6, at 79. Innocence in this context also was irrelevant when Ike Fitzgerald's jury deadlocked on whether he was guilty of raping a white woman. The public simply stormed the courthouse, grabbed Fitzgerald and hung him from a nearby tree. *See* TOLNAY & BECK, *supra* note 108, at 62.

¹²¹ Recall that historically the event providing the impetus for the commencement of a sacrificial ceremony can range from the transgression of a criminal law, to the quest for sustenance, famine, the presence of a contagious disease or a pestilence, or the occurrence of a mass disaster. *See supra* notes 57 and 60 and accompanying text; VIOLENT ORIGINS, *supra* note 1, at 24-25, 80, 84.

¹²² *See* VIOLENT ORIGINS, *supra* note 1, at 90 (noting that the motivating factor for any form of sacrifice, human or otherwise, is whatever the community "designate[s] [as the] cause for disruption in [the] social order"); *see also supra* notes 60-62 and accompanying text.

¹²³ Walter Burkert reached the conclusion that "[s]tability stayed with those groups who managed to make use of the social and psychological appeal of the ritual tradition, [the hunting ritual], by transforming, by redirecting, it until the who action became a ritual." STRUCTURE AND HISTORY, *supra* note 2, at 56, 65-67 (observing how when the social dynamics of the community were perceived to be threatened, the taking of human life was deemed necessary to restore the shattered dynamics); VIOLENT ORIGINS *supra* note 1 at 61 (describing

sacrificed is the remedy either consciously or unconsciously selected by the community to relieve the internal tensions in the social order. Thus, in the final analysis, it is this fear of disrupting the established social order that has supplied the impetus for sacrificial ceremonies through the ages.

IV. APPLYING GIRARD'S HUMAN SACRIFICE THEORY TO A LITERARY EXEMPLAR OF THE DEATH PENALTY'S HUMAN SACRIFICE DIMENSION

History is replete with examples of how the occurrence of an incident, one that qualifies as a triggering event, provides the requisite stimulus needed in order for a social collective to resort to capital punishment as the means of making a sacrifice for the purpose of satisfying an important communal objective: typically, the preservation of or restoration of the society's stability and order. George Eliot's novel *Adam Bede*¹²⁴ presents an ideal fictional model for applying Girard's human sacrifice theory in order to understand the operation of capital punishment's sacrificial facet.¹²⁵ The central characters featured in *Adam Bede* are Hetty Sorrel, Arthur Donnithorne, Adam Bede, and the residents of the rural villages of Hayslope and Broxton. A serious transgression committed by Hetty, a dairy maid and the beautiful niece of a local tenant farmer, and Arthur, a member of the aristocracy and the heir to the local estate, greatly concerns the villagers because it jeopardizes the

sacrificial ritual as the "means of reestablishing an order of the extraordinary"); see *id.* at 62-63 (noting that one of the integral objectives of sacrifice is "to preserve a social structure over the course of generations"); see also DAVIES, *supra* note 3, at 16-17 (elucidating how sacrifice was deemed necessary to maintain social order); VIOLENT ORIGINS, *supra* note 1, at 84 (noting Professor Girard's comments on the role "internal disorder" and social disaster play in establishing and perpetuating human sacrifice). The Presocratic philosopher Heraclitus advocated a similar connection between social calamity and social order. One of his precepts was that: "Opposition brings concord. Out of discord comes the fairest harmony." THE PRESOCRATICS 77 (Philip Wheelwright ed., 1966).

¹²⁴ ELIOT, *supra* note 9.

¹²⁵ Girard's theory can also be applied to examples involving the contemporary use of capital punishment. See GIRARD, *supra* note 6, at 25-26, 298-99 (contending that sacrifice and legal punishment have a fundamental identity); *id.* at 80 (mentioning lynchings and pogroms as manifestations of human sacrifice); *supra* notes 7, 29 and accompanying text. For this Article, however, the author has opted to limit the application of his theory to a fictional account set in England during the late eighteenth and early nineteenth centuries.

communities' continued stability and the fulfillment of promises made to resolve the desperate need for growth and improvement. To remedy the situation, a sacrificial victim must be selected and sacrificed by being actually or constructively executed by the state.

The events that transpire in *Adam Bede* occur in England from the late eighteenth century until the early nineteenth century.¹²⁶ The critical events primarily take place in the villages of Hayslope and Bloxton.¹²⁷ Dominion over these villages and their residents is exercised by the inhabitants of "Donnithorne Chase," and particularly by the "Old Squire," the estate's present master.¹²⁸ The Old Squire presently governs the estate, its occupants, tenants, and the villagers.¹²⁹ When he dies, his grandson, young Captain Arthur Donnithorne, will inherit the estate.¹³⁰ The ultimate necessity to make a human sacrifice through the judicial execution mechanism is closely intertwined with the tremendous importance placed on Arthur's succession.¹³¹ The discontent that pervades the inhabitants of Hayslope

¹²⁶The precise time span is from 1799 until 1807. *See id.* at 5, 179, 473, 537.

¹²⁷*See id.* at 5, 15.

¹²⁸*Id.* at 16.

¹²⁹*See id.*

¹³⁰*See* ELIOT, *supra* note 9, at 262 (noting that at the fete held to celebrate Arthur's majority birthday, Mr. Poyser, one of the estate's "larger" tenants and Hetty Sorrel's uncle, stated that he and the tenants are "joyful when we look forrard to your being our landlord").

¹³¹The tenants are especially keen on Arthur's succession because that occasion will mark the end of his grandfather's "reign." His grandfather's tenure has not been a particularly cordial, productive, or happy one. For example, one day Mrs. Poyser, the wife of Martin Poyser, one of the estate's "larger" and more prosperous tenants, "forgets herself" and gives the Old Squire a dressing down after he "subtly" threatens not to renew the family's lease if they refuse to accept his proposition for restructuring the tenancies. *See id.* at 340-49. As if to emphasize the importance of Arthur's position in relation to his grandfather's, George Eliot titles the chapter "Mrs. Poyser Has Her Say Out." *Id.* at 341. Mrs. Poyser, in no uncertain terms, informs the old squire that the views she just expressed about him are widely held throughout the neighborhood: "there's plenty o' the same way o' thinking i' this parish and the next to 't, for your name's no better than a brimstone match in everybody's nose." *Id.* at 348. Perhaps most important are the tangible benefits the villagers anticipated receiving upon Arthur's ascension. "[E]very tenant was quite sure things would be different when the reigns got into his hands—there was to be a millennial abundance of new gates, allowances of lime, and returns of ten percent." *Id.* at 86 (emphasis added); *see also id.* at 263 (noting that Mr. Poyser's toast of Arthur included the statement that the residents believe in Arthur's commitment "to do right by everybody").

and Bloxton is attributed primarily to their antipathy toward the Old Squire.¹³² The situation is exacerbated by the tenants increasing frustration brought about by what they consider to be the Old Squire's unreasonable parsimoniousness. His unwillingness to part with a farthing has resulted in the constant denial of the villagers' requests for capital in order to make necessary and beneficial repairs and improvements.¹³³ In a way, the Old Squire's tenacity and perceived unreasonableness keeps the populace bound to the past and hindered from progressing socially, technologically, and economically. These concerns and frustrations have led to the creation of a general consensus that the Squire simply is not interested in his tenants' well-being.¹³⁴ His reputation for being "spiteful"¹³⁵ does nothing to improve the relationship between the Old Squire and the residents of the two communities associated with Donnithorne. On the other hand, the villagers' opinion of Arthur sharply contrasts with the one they hold of his

¹³²For example, at Arthur's twenty-first birthday celebration it is noted that the tenant farmers, holders of large and small plots, "hated the old Squire." *See id.* at 265. Once again, Mrs. Poyser, Hetty's aunt and the wife of Martin Poyser, shared her views on the Old Squire and commented on how he "repulsed" her. *See id.* at 350. This should be contrasted with the villagers general positive view of Arthur as he "was a great favourite throughout the estate." *Id.* at 86; *see also infra* note 136.

¹³³When Mrs. Poyser "Has Her Say Out" she reminds the Squire of his "meanness." For example, when buildings owned by the Squire, but rented by the tenants, require extensive repairs, more on the level of improvements that would enhance the value of his capital in the estate, he "wi' never [has] a bit o' repairs done till a place tumbles down—and not then, on'y wi' begging and praying, and having to pay half." *Id.* at 348. In an earlier conversation with Arthur, in response to his comment that his grandfather holds them in esteem as tenants, Mrs. Poyser states that "if he thinks so well o' Mr. Poyser for a tenant, I wish you could put in a word for him to allow us some new gates for the Five closes, for my husband's been asking and asking till he's tired, and to think o' what he's done for the farm, and's never had a penny allowed him, be the times bad or good." *Id.* at 81-82. Even Arthur complains about the tight reins his grandfather keeps on the purse strings. *See id.* at 62 (complaining to his friend Mr. Rector Irwine about how he lives like "a poor devil, with a mortgaged allowance of pocket-money"); *see also id.* at 64 (noting that for his majority birthday celebration his "grandfather has given me *carte blanche* for once").

¹³⁴Mrs. Poyser becomes suspicious when the old Squire stops to visit at the Hall because "the old Squire's visits to his tenantry were rare." *Id.* at 342.

¹³⁵*Id.* at 347 (stating that Mr. Poyser, a "larger" tenant known for his good humor, "believed the old Squire had small spite enough for anything").

grandfather.¹³⁶

Arthur is “a great favourite throughout the estate.”¹³⁷ Not only is he well respected by the tenants,¹³⁸ but he is also anointed their “knight in shining armor”¹³⁹ because “[e]very tenant was *quite sure things would be different when the reins got into [Arthur’s] hands.*”¹⁴⁰ Mr. Poyser conveys the villagers high regard for Arthur when, while leading a toast to the young heir at the celebration honoring Arthur for reaching his majority, he uses glowing terms to depict the young Captain’s person and future ascendancy to the position of lord of the manor:

[T]his I’ll say, as we’re all o’ one mind about our young Squire. We’ve pretty nigh all on us known you when you war a little un, *an we’ve niver known anything on you but what was good an’ honorable.* You speak fair an’ y’ act fair, an’ *we’re joyful when we look forrard to your being our landlord, for we b’lieve you mean to do right by everybody,* an’ ‘ull make no man’s bread bitter to him if you can help it.¹⁴¹

Mr. Reverend Irwine, Arthur’s friend and to some extent mentor and confidante, confirms these expectations by declaring that he “share[s] [the tenants] high hopes concerning [Arthur], and [their] confidence in his possession of those qualities which will make him an excellent landlord when the time shall come for him to take that important position among you.”¹⁴²

Equally relevant is the seriousness given to Arthur’s social rank. As the grandson of a Squire, the heir to his grandfather’s aristocratic position, and a Captain in the

¹³⁶ For example, one day while engaged in a conversation about the old Squire and Arthur, Adam notes that Arthur has “got a conscience, and a will to do right.” *Id.* at 244. Even Arthur recognizes the distinct differences between him and his grandfather and how they will affect the administration and governance of the estate and surrounding villages. *See id.* at 125.

¹³⁷ *Id.* at 86.

¹³⁸ *See id.* at 170 (noting Arthur’s comments on how “it’s very pleasant to go among the tenants here, they seem all so well inclined to me”).

¹³⁹ THE OXFORD DICTIONARY OF PHRASE, SAYING AND QUOTATION 206 (1997).

¹⁴⁰ *See* ELIOT, *supra* note 9, at 86 (emphasis added). When the power base eventually shifts, the tenants anticipated receiving and benefiting from such improvements as “a millennial abundance of new gates, allowances of lime, and returns of ten per cent.” *Id.* *See also id.* at 164 (noting Adam’s conclusion that when Arthur inherits the estate there would be improvements and repairs).

¹⁴¹ *Id.* at 263 (emphasis added).

¹⁴² *Id.* at 267.

local regiment, Arthur is above all else a "gentleman."¹⁴³ The villagers' delight with Arthur's personality, and the unspoken promise to positively alter their life situation is evidence that the villagers and the estate's tenants consider Arthur a gentleman "God"¹⁴⁴ and consequently their savior.¹⁴⁵

Arthur's perspective on his position in the communities of Hayslope and Broxton is also equally as vitally important. This is revealed when one day he shares with Mr. Reverend Irwine his vision of his future relationship with the communities: "I should like to know all the labourers, and see them touching their hats to me with a look of good-will I *couldn't live in a neighbourhood*

¹⁴³ Arthur expresses this attribute when he discloses his intention of being "the model of an English gentleman . . ." *Id.* at 125; *see id.* at 94, 96 (making references to Arthur's gentleman status during a visit to the Hall Farm); *id.* at 298 (noting that Adam refers to Arthur's "gentleman" status when conversing with him after encountering Hetty and Arthur in an intimate embrace); *id.* at 61, 96, 100, 137, 296 (providing examples of Eliot's references to Arthur's white hands as a means of symbolizing his membership in an elevated social class).

¹⁴⁴ ELIOT, *supra* note 9, at 61 (noting that to the tenants of Hayslope, Arthur "was more intensely a captain than all the young gentlemen of the same rank in His Majesty's regulars—he outshone them as the planet Jupiter outshines the Milky Way") (emphasis added); *see also id.* at 80 (commenting on the tenants' and villagers' general "awe at the sight of the gentry, such as of old men felt when they stood on tip-toe to watch the gods passing by in tall human shape.") (emphasis added).

When the young Squire entered [his birthday celebration], with Mr. Irwine by his side, every one stood up, and *this moment of homage was very agreeable to Arthur*. He liked to feel his own importance, and besides that, he cared a great deal for the good-will of these people: he was fond of thinking that they had a hearty, special regard for him.

Id. at 263 (emphasis added). Hetty Sorrel, a dairy maid and the niece of Martin Poyser, a major tenant of Donnithorne, whom Arthur seduces, also uses divine terms in some of her references to Arthur. For example, after she has a chance intimate meeting with Arthur she described it "as if she had been wooed by a river-god." *Id.* at 136. On another occasion the narrator describes Hetty's reverence for Arthur as that of "a simple farmer's girl, to whom a gentleman with a white hand was dazzling as an *Olympian God*." *Id.* at 100 (emphasis added).

¹⁴⁵ *See id.* at 244 ("[I]f the Captain was master o' th' estate, it 'ud be different: he's got a conscience, and a will to do right"); *id.* at 361 (commenting on how the members of the communities anticipate that Arthur, "the Captain," "ull see folks righted if he can"). At one point, Adam expresses the viewpoint that "[h]e felt sure it would be a *fine day for everybody about Hayslope when the young squire came into the estate*." *Id.* at 164 (emphasis added); *see also* FRANCOISE BASCH, *RELATIVE CREATURES: VICTORIAN WOMEN IN SOCIETY AND THE NOVEL* 256 (1974) (characterizing Arthur as "being father Christmas towards his subjects").

where I was not respected and beloved."¹⁴⁶

In response, the Reverend acknowledges the collective's expectation that Arthur will indeed be a "model landlord."¹⁴⁷ Arthur's self-image and the villagers' and tenants' positive perception of him not only mirror each other but are also critically dependent upon Arthur maintaining his impeccable honor and integrity. Arthur confirms the tremendous influence these attributes have on his image and his public persona when, after realizing the inappropriateness of his interest in and affection for Hetty Sorrell, the pretty teenaged niece of his grandfather's tenant Mr. Martin Poyser, he considers how "he should hate himself if he made a scandal of that sort, on the estate that was to be his own some day, and *among tenants by whom he liked, above all, to be respected. He could no more believe that he should so fall in his own esteem . . . [h]e couldn't imagine himself in that position it was too odious, too unlike him.*"¹⁴⁸

Nonetheless, good intentions aside, the inevitable "crisis" soon occurs.¹⁴⁹

One day while walking in the woods, Adam, the hard-working and worthy village carpenter¹⁵⁰ who is in love with Hetty, discovers Arthur and Hetty exchanging a kiss in the hidden Grove.¹⁵¹ Despite the breadth of the gulf between their social stations, Adam unhesitatingly confronts Arthur about his relationship with Hetty. While unrelentingly

¹⁴⁶ ELIOT, *supra* note 9, at 170 (emphasis added). In another instance, Arthur notes that:

All his pictures of the future, when he should come into the estate, were made up of a prosperous, contented tenantry, *adoring their landlord, who would be the model of an English gentleman*—mansion in first-rate order, all elegance and high taste—jolly housekeeping—finest stud in Loamshire—purse open to all public objects—in short, *everything as different as possible from what was now associated with the name of Donnithorne.*

Id. at 125 (emphasis added).

¹⁴⁷ *Id.* at 170; see also *supra* notes 131-32 and accompanying text.

¹⁴⁸ *Id.* at 139 (emphasis added); see also *id.* at 133-34 (noting Arthur's rumination about the dangers of entering into a liaison with Hetty).

¹⁴⁹ Given Professor Girard's terminology, see *supra* note 60 and accompanying text, George Eliot appropriately titled the chapter containing the circumstances that produce the event that threatens to undermine the present and future equilibrium of the hamlets of Hayslope and Broxton as "A Crisis." See ELIOT, *supra* note 9, at 291.

¹⁵⁰ See *id.* at 6, 17.

¹⁵¹ See *id.* at 295-96.

upbraiding Arthur, Adam poses the following query to him:

Why, then, instead of acting like the' *upright, honourable man we've all believed you to be*, you've been acting the part of a selfish, light-minded scoundrel. You know, as well as I do, what it's to lead to, when a gentleman like you kisses and makes love to a young woman like Hetty, and gives her presents as she's frightened for other folks to see You know it couldn't be made public as you've behaved to Hetty as y' have done, without her losing her character, and bringing shame and trouble on her relations . . . *while I thought you was . . . a noble-minded man, as I was proud to work for You think little o' doing what may damage other folks.*¹⁵²

These words inflict a terrible wound to Arthur's psyche because although Adam is a member of a lower social class, "the loss of Adam's respect was a shock to his self-contentment which suffused his imagination with the sense that he had sunk in all eyes."¹⁵³

Furthermore, with a third party privy to the precise nature of their relationship, there is a real risk that the "secret" will be disclosed. Disclosure of this socially taboo inter-class liaison increases the likelihood that a crisis will occur. Any ensuing catastrophe in the community would be the consequence of the disabling social tensions that would emerge because of the existence of this socially taboo disparate liaison.¹⁵⁴ Furthermore, a calamity generated in this manner possesses a level of seriousness that could destroy or seriously unwind the weave of the prevailing and anticipated social fabric.¹⁵⁵ Matters are subject to further

¹⁵² *Id.* at 298-99 (emphasis added).

¹⁵³ *Id.* at 310.

¹⁵⁴ As previously noted, Arthur is a member of the upper-class. *See supra* note 143 and accompanying text. Hetty's position as a dairy maid on her Uncle's farm makes her a member of the lower stratum in society. *See ELIOT, supra* note 9, at 74, 82-83, 101. Before embarking on his affair with Hetty, Arthur even acknowledged the social impropriety of such an attachment as he concluded that "[n]o gentleman, out of a ballad, could marry a farmer's niece." *Id.* at 139. He also was aware that a scandal would be the consequence if they entered into an illicit affair and it was discovered. *See id.* Something that he did not want to occur as it would negatively impact his status and consequently his relationship with the tenants and villagers. *See id.*

¹⁵⁵ *See* BASCH, *supra* note 145, at 255-56 (noting how Arthur's involvement with a woman "at once near and far can lead to disaster"); ELIOT, *supra* note 9, at 138-39; *see also* ELIZABETH C. GASKELL, RUTH, (World's Classics 1906) (1853) (writing story of a young milliner's apprentice who falls in love with and is impregnated by the son of local gentry); *see also supra* note 154 and

deterioration as the pressure placed on the communities would undoubtedly intensify because they would believe that Arthur had betrayed them because his entanglement with a woman from a lower social class would force them to re-examine the accuracy of their previous assessment of his integrity and honor.¹⁵⁶ This consequence places Arthur in an unenviable precarious position, one that exposes him to the very real risk that he will lose the villagers and tenants trust: something he dearly covets.¹⁵⁷ Furthermore, the crisis is subject to reach epic proportions because of the close connection between Arthur's integrity and the benefits the tenants anticipate he will be bestowing in the not too distant future. If the tenants and villagers lose faith in Arthur, then it becomes highly unlikely that their long-standing dreams about the improvement in their lot will reach fruition when the Old Squire expires. Accordingly, Hetty and Arthur's situation, which is partially attributable to Hetty's mistaken belief that she, a mere plebian dairy maid,¹⁵⁸ could gain admittance into the ranks of the upper classes by wedding a gentleman such as Arthur, is precisely the type of event¹⁵⁹ possessing the qualities necessary to

accompanying text.

¹⁵⁶ Remember that Adam indignantly questioned the veracity of his and others previous opinion that Arthur was a gentleman with a noble character when he discovered Arthur and Hetty kissing in the Grove. See ELIOT, *supra* note 9, at 298-99.

¹⁵⁷ See *id.* at 125 (sharing Arthur's rapturous thoughts about succeeding his grandfather as lord of the manor).

¹⁵⁸ See *id.* at 74, 82-83, 101 (noting that Hetty works as a dairy maid on the dairy farm her Uncle leases from Arthur's grandfather). Tess, another famous "fallen" female protagonist, was also employed as a dairy maid. See TESS, *supra* note 9, at 115-17, 123-24. In fact, it is Tess' acceptance, approximately two years after the death of her illegitimate son Sorrow, of a milk maid position at a dairy some distance from her home village of Marlott that propels her toward the events igniting the need for her eventual immolation. See *id.* at 111, 117.

¹⁵⁹ Arthur, as previously noted, is a member of the landed gentry. See *supra* note 143 and accompanying text. In fact, George Eliot's references to the whiteness of his hands symbolize his elevated class status as well as underscore the critical role his social stature plays in the development of the sacrificial crisis. See ELIOT, *supra* note 9, at 61, 96, 100, 296. Also, the first time Arthur and Hetty find themselves alone Hetty is dumbfounded because "[s]he didn't know one bit how to speak to a gentleman like Mr. Arthur." *Id.* at 131. The thoughts that occur to Arthur during this same rendezvous highlight the vast difference that exists between their respective social stations: "[As Arthur] gazed into Hetty's dark beseeching eyes, it made no difference to him what sort of English she spoke; and even if hoops and powder had been in fashion, he would very likely not have been sensible just then that Hetty wanted those signs of high

function as a catalyst for the creation of the requisite sacrificial crisis.¹⁶⁰ Such a dire state of affairs, in turn,

breeding." *Id.* at 133 (emphasis added). Hardy's Tess also was attached to men who were members of classes above hers. Tess, the daughter of financially strapped hagglers, was an innocent teenaged village girl when she was deceived and seduced by Alexander Stokes-d'Urberville, a "gentleman." *TESS*, *supra* note 9, at 46, 57. Angel, the son of a vicar and one of the dairy maids with whom she worked, who Tess eventually married was described as "quite the gentleman-born." *Id.* at 129; *see also id.* at 373 (noting that when the Durbeyfields are forced to move from Marlott after Mr. Durbeyfield's death, the villagers note that Tess had made "queer unions"); *id.* at 334 (describing the relationship between Alec and Tess as "unconventional"). Both young women operated under the illusion that society was devoid of impenetrable barriers for those who desired to marry outside their designated class. For example, in Hetty's case, one night while primping in front of her bedroom mirror she becomes vexed because "towards the wrist [her arms] . . . were coarsened with by butter-making, and other work that ladies never did." *ELIOT*, *supra* note 9, at 151 (emphasis added). This observation led Hetty to muse about how Arthur "couldn't like her to go on doing work he would like to see her in nice clothes, and thin shoes and white stockings." *Id.* at 151. From the perspective Hetty has adopted to ruminate on the circumstances, Arthur's distaste for her to continue working would be because "[h]e would want to marry her, and make a lady of her." *Id.* Although Hetty purports to "hardly dare to shape [that] thought," she still imagines marriage as the sole outcome from her relationship with Arthur. *Id.* Despite the fact that the product of her mental processes has her strolling down the bridal path with Arthur, she is cognizant that "differences" exist between them, and she correctly predicts that Arthur's grandfather would be irate. *Id.* Her solution to this dilemma is consistent with her resolve: that Arthur "[m]arry her quite secretly." *Id.* Ultimately Hetty dismisses these as petty concerns and prejudices as Arthur, being a "great gentleman," could work out the details as he "could have his way in everything." *ELIOT*, *supra* note 9, at 151 (emphasis added). Unlike Hetty, Arthur knows that he cannot have everything his way; especially marrying her. In fact, he reminds himself that "[n]o gentleman, out of a ballad, could marry a farmer's niece." *Id.* at 139. Mr. Irwine, who suspects the precise nature of Arthur's interest in Hetty, reassures himself that the pride Arthur takes in having the good-will of his tenants and the villagers constituted a "safeguard" against "a lower kind of folly" occurring. *Id.* at 174. For additional information regarding the role social disparities occupied in using judicially sanctioned executions as a means of effectuating human sacrifices see *infra* Appendix C.

¹⁶⁰ Both Tess and Hetty pose substantial threats to the preservation of the cohesiveness of the existing social order. The scope of the negative impact of Tess' behavior, however, is broader than Hetty's. First, Tess' effort to cross the class barrier by matrimony strains Angel's relationship with his family. When Angel finally informs his parents of his intention to propose to Tess, they expressed their displeasure because she was not of "a family such as [one] would care to marry into—a lady, in short." *TESS*, *supra* note 9, at 180; *see also id.* at 163 (noting that one evening in their room the dairymaids discuss how Angel's family has selected "a young lady of his own rank" for him to marry). Even at that early juncture, Angel refrained from mentioning Tess to his older brothers, Felix and Cuthbert. *See id.* at 182. The possibly irreparable rift

demands resolution by the ritual slaughter of a human being. Thus, the disclosure of the relationship would have detrimental consequences for the communities as the residents would realize they had entrusted the wrong person with the responsibility of fulfilling their hopes and dreams.¹⁶¹ Fortunately for Arthur and the occupants of the

between the brothers is actualized when Felix and Cuthbert refuse to attend Tess and Angel's nuptials. *See id.* at 230. "They disapproved of the marriage and could not be expected to countenance it." *Id.* Later while going to Angel's parents' home to request assistance after more than one year has lapsed since she last heard from Angel, Tess overhears one of his older brothers telling the other how Angel never confides in him as "[h]is ill-considered marriage seems to have completed that estrangement from me which was begun by his extraordinary opinions." *Id.* at 318. On the eve of their wedding, Angel receives a packet from his father containing the jewels his godmother left for him to give to his wife. *See id.* at 237. The enclosed note expresses the family's sentiments with respect to Tess' intrusion "[t]hough *I feel it to be a somewhat incongruous act in the circumstances.* I am, as you will see, bound to hand over the articles to the woman to whom the use of them for her lifetime will now rightly belong." *Id.* (emphasis added). Even Tess acknowledges her limitations with respect to the propriety of adorning herself with the jewels of a squire's wife as she rhetorically asks Angel: "[t]hey are not fit for me, are they?" *Id.* at 239. When Angel returns to his parents' home after Tess tells him about her past, his mother informs him that they received his note about the wedding but "[o]f course it was best that none of us should be present, *especially as you preferred to marry her from the dairy and not at her home, wherever that may be.* It would have embarrassed you and given us no pleasure. Your brothers felt that very strongly." *Id.* at 279 (emphasis added). The scope of Tess' degradation of the social equilibrium also extended to the inhabitants of Marlott, the village of her birth and childhood, as they hold her responsible for creating any immorality that existed in the community. *See id.* at 372-73. This conviction also adversely affected her family. For example, after Mr. Durbeyfield's death the landlord refuses to renew the lease, which means Joan Durbeyfield and the children will be homeless. Tess acknowledges the social tension her behavior has produced as she surmises that the landlord's decision to displace of her family was due to "her own evil influence." *Id.* at 373. In fact, "[e]ver since the occurrence of the event which had cast such a shadow over Tess' life, the Durbeyfield family . . . had been tacitly looked on as one which would have to go when their lease ended, if only in the interests of morality." *Id.* at 372-73. These opinions ensured that the villagers would remain committed to preserving the collective's purity (noting that "[b]y some means the village had to be kept pure"). *Id.* at 373 (emphasis added). Lastly, is what Tess' involvement with two "gentlemen" symbolizes to the upper-classes: namely, that there is a risk, sometimes disguised as a seductive beautiful woman from the lower echelon of society, of the demise of the existing social order. To ensure that their preferred means of securing social harmony and equilibrium is not displaced, it becomes imperative to remedy the situation by sacrificing Tess. She then stands for the inflexibility of the "order" which acts to the benefit those who occupy the ranks of the upper-classes. *See generally* TESS, *supra* note 9.

¹⁶¹ *See supra* note 156 and accompanying text. In TESS, this destabilizing effect

villages, Adam resolves to remain silent about what he witnessed.¹⁶² However, Adam purportedly makes this concession for Hetty's sake, and not for Arthur's.¹⁶³ Given Adam's agreement to remain silent, it would appear that the potential disaster has been averted. This certainly would seem to be the case when Arthur finally departs to rejoin his military company in Windsor¹⁶⁴ as this leaves Hetty and Adam, the only two members of the collective cognizant of how narrowly the members of the group avoided being confronted with the occurrence of a catastrophic event. Thus, by all appearances the social order remains intact and stable. In fact, as if to provide additional insurance to ward off even the hint of calamity,

has another critical permutation that is not as apparent in the story relayed by George Eliot in *Adam Bede*. This is the perceived negative impact and devastation that Tess has imparted to male members of the upper-class. See generally TESS, *supra* note 9. Remember that Angel is estranged from several members of his family and he begins to abhor himself after realizing the error of his ways for deserting Tess. See *id.* at 359-62. Alec, Tess' childhood seducer, also is detrimentally impacted by a later encounter with Tess. After Tess returned to Marlott and gave birth to their child, Alec became a preacher. See *id.* at 324-27. Subsequently, several years later after Alec accidentally encounters Tess at a religious meeting where he is preaching a sermon, he locates her and tells her that he has decided to leave preaching "and give way to [his] passion for [her]." *Id.* at 341. He confides in Tess how "[she has] been the means . . . of [his] backsliding . . ." *Id.* at 342. The implication is that when men of means come in contact with Tess she "betwiches" them in such a manner that they are forced to veer from their previous socially acceptable paths. See *id.* at 342-43. For example, Angel's parents blame themselves for his "unlucky marriage" and believe that "[i]f Angel had never been destined for a farmer, he would never have been thrown with agricultural girls." *Id.* at 358. Alec also emphasizes the gravity of the havoc Tess is accused of wreaking on the established social structure by comparing her to Eve, the Biblical character responsible for man's downfall. See *id.* at 342; see also *id.* at 369. Lastly, the displacement of her own family after the death of her father is connected to the crisis that resulted from Tess' interaction with men from the ranks of the upper classes. In this vein, her mother exclaims "Oh, Tess, what's the use of your playing at *marrying gentlemen* if it leaves us like this!" *Id.* at 383 (emphasis added). Tess concurs with her mother's assessment of the circumstances. She realizes that it is because she is "not a—proper woman," and that her mother and younger siblings have been forced to move when the lease expires upon the death of her father. *Id.* at 373-74.

¹⁶² See ELIOT, *supra* note 9, at 312 (discussing Arthur's acknowledgement that Adam "would rather help them to keep it than betray it").

¹⁶³ See *id.* at 298 (acknowledging to Adam that he does not want to bring "shame and trouble on her and her relations").

¹⁶⁴ See *id.* at 366-67, 376.

Hetty eventually agrees to marry Adam.¹⁶⁵

Not surprisingly, the crisis that will ultimately lead the collective social units to seek a human sacrifice has yet to materialize. It finally materializes when physiology prevails and Hetty can no longer ignore that Arthur has impregnated her.¹⁶⁶ She is well aware that her condition and her status as an unwed mother-to-be preclude her from marrying Adam. More importantly, it leads her to conclude that she can no longer reside with her relatives, the Poysers, at the Hall Farm in Hayslope.¹⁶⁷ After realizing

¹⁶⁵ See *id.* at 358-59.

¹⁶⁶ Hetty notes how “[a]fter the first on-coming of her great dread, some weeks after her betrothal to Adam, she had waited and waited, in the blind vague hope that something would happen to set her free from her terror; but she could wait no longer.” *Id.* at 365. “All the force of her nature had been concentrated on the one effort of *concealment*, and she had shrunk with irresistible dread from every course that *could tend towards a betrayal of her miserable secret.*” *Id.* (emphasis added); see also *id.* at 362 (noting that her “mind was oppressed . . . with a worse difficulty” than that experienced by Adam’s mother). Hardy’s Tess, like Hetty, was impregnated by a member of the aristocracy. See HARDY, *supra* note 9, at 92, 97-98, 100, 330, 348; *id.* at 114 (noting Tess’ reflection on that “disastrous night of her undoing at Trantridge”). Although, Tess’ aristocrat, Alec Stoke-d’Urberville, who convinced her family that he was a distantly related cousin descended from the ancient noble d’Urberville family, is actually a fraud. Alec’s family is financially prosperous, but “[t]he Stoke-d’Urbervilles were no more d’Urbervilles of the true tree than” the parson who had informed Tess’ father John Durbeyfield of his pedigree. *Id.* at 17-18, 50; see also *id.* at 143 (noting Tess’ reflection on how “she was no spurious d’Urberville, compounded of money and ambition like those at Trantridge, but true d’Urberville to the bone.”); *id.* at 183-84 (noting comments made by Angel’s father, the Parson Clare, on the dubious origins of the Stokes-d’Urbervilles claim to nobility); *id.* at 334 (noting Alec’s admission to Tess that his family confiscated the d’Urberville name). And Tess, like Hetty, felt shameful about her condition. Even though Tess returned home to Marlott, she eventually stopped attending church services because “[t]he people who had turned their heads turned them again as the service proceeded; and at last observing her, they whispered to each other. *She knew what their whispers were about, grew sick at heart, and felt that she could come to church no more.*” *Id.* at 100 (emphasis added).

¹⁶⁷ See ELIOT, *supra* note 9, at 365. George Eliot’s numerous references to Hetty’s almost pathological abhorrence of being subjected to shame provide the strongest motivation for Hetty’s decision to pursue this course of action. See *id.* at 198, 336, 365, 372, 378-80, 386. For example, Hetty notes that “she would have borne anything rather than be laughed at, or pointed at with any other feeling than admiration.” *Id.* at 198. Therefore, even though Hetty is naïve and petty, she is astutely cognizant of the torrential amount of shame she would expose herself to if she bore an illegitimate child and remained living at Hall Farm. See *id.* at 380, 452. In fact, during the confession she makes to Dinah the night before her scheduled execution, Hetty explains that after failing to locate Arthur “I daredn’t go back home again—I couldn’t bear it. I couldn’t have bore

that she is too frightened to make her way in the world alone, she devises an escape plan so she can go locate Arthur.¹⁶⁸ However, her scheme fails, because she is unsuccessful in locating Arthur.¹⁶⁹ Furthermore, her ruse is exposed when, after failing to return home when expected, Adam becomes concerned and goes to search for Hetty.¹⁷⁰ When Adam discerns that Hetty never arrived at Dinah's, he correctly surmises that she is pursuing Arthur.¹⁷¹ His mission fails and he returns to Hayslope. The course of action Adam follows after his return demonstrates that he instinctively comprehends that the delicate balance maintained by the communities is susceptible to severe debilitation. First, he resolves "not to mention what he knew of Arthur Donnithorne's behaviour to Hetty till there was a clear necessity for it."¹⁷² Second, before departing for Ireland to search for Hetty, Adam decides that it would be prudent to confide in the Reverend Irwine.¹⁷³

When Adam arrives at the Reverend's home, he crosses paths with the messenger who is leaving after having informed the Reverend about Hetty's predicament: her arrest for infanticide.¹⁷⁴ Adam is stunned by the news and

to look at anybody for *they'd have scorned me.*" *Id.* at 452 (emphasis added). She also tells Dinah that she considered and rejected coming to seek solace from Dinah because of her fear that "the other folks 'ud come to know it at last, and I couldn't bear that." *Id.* How Hetty imagined the magnitude of the public's drastic reaction to an unwed mother is accurate. *See infra* Appendix G (describing the typical fate awaiting unwed mothers in eighteenth and nineteenth century England).

¹⁶⁸ *See* ELIOT, *supra* note 9, at 365-70 (describing Hetty's scheme to leave by telling her Aunt and Uncle Poyser that she is going to fetch her cousin Dinah, her aunt's niece, to assist her aunt who is recuperating from an illness).

¹⁶⁹ *See id.* at 376-77. Hetty was under the impression that Arthur and his local battalion were in Windsor, which is where she traveled. *See id.* at 331-32, 366-67, 370, 373-77. It was not until after arriving in Windsor that she learned that several weeks had passed since Arthur had departed for Ireland. *See id.* at 376-77. Adam however, knew that Arthur had not been in Windsor for several weeks. *See id.* at 396.

¹⁷⁰ *See id.* at 390-91.

¹⁷¹ *See id.* at 395-96, 405.

¹⁷² *Id.* at 397.

¹⁷³ *See id.* at 403.

¹⁷⁴ *See id.* at 404-10. It is fitting that George Eliot selected infanticide as Hetty's transgression. This offense comports with Professor Girard's contention that infanticide is one of several important sacrificial crisis motifs. *See* GIRARD, VIOLENCE AND THE SACRED, *supra* note 6, at 108-14; *see also id.* at 9-10 (discussing how the myth of Medea and her commission of infanticide constitutes a human sacrifice); DAVIES, *supra* note 3, at 166 (noting that

infanticide was an important form of sacrifice in Polynesia). Professor Girard's identification of infanticide's status as a triggering event is bolstered by the social and legal landscape that existed during the late eighteenth and early nineteenth centuries when "Englishmen tended to look upon infanticide with a combination of fascination and horror." R.W. Malcolmson, *Infanticide in the Eighteenth Century*, in CRIME IN ENGLAND 1550-1800 196-97 (J.S. Cockburn ed., 1977); see also Susan Sage Heinzelman, "Going Somewhere": *Maternal Infanticide And The Ethics Of Judgment*, in LITERATURE AND LEGAL PROBLEM SOLVING: LAW AND LITERATURE AS ETHICAL DISCLOSURE 73 (Paul Heald ed., 1998) (noting that "[m]aternal infanticide has always been represented as an unnatural crime that is beyond comprehension"); RADZINOWICZ, *supra* note 33, at 433; Guy De Maupassant, *Rosalie Prudent*, in MASTERPIECES OF LEGAL FICTION 335-38 (Maximilian Koessler ed., 1964) (describing the trial of a French servant girl for infanticide during the nineteenth century); LINEBAUGH, *supra* note 9, at 148-49 (presenting and analyzing the statistical data pertaining to women convicted of committing infanticide and executed at Tyburn in London). Furthermore, the construction of the infanticide law, which significantly deviated from the general principles of English criminal law, functioned as a means of embodying and confirming the magnitude of the public's abhorrence of this crime. Since the legal transgression was based on the concealment of a child's birth, it created a presumption that the child had been murdered if it had been found concealed and dead. See COCKBURN, *supra* note 33, at 196-97; RADZINOWICZ, *supra* note 33, at 431, 629. "The statute was one of the few in English criminal law which were framed contrary to the principle of presumption of innocence. It declared that concealment of the birth of a bastard child constituted a presumption of the mother's guilt in having murdered that child." RADZINOWICZ, *supra* note 33, at 431 (emphasis added). The law's harshness made it immensely difficult, if not virtually impossible, for a mother charged with infanticide to prove her innocence. Thus, it was more likely that she would be convicted. The public's perception of the gravity of this offense is further illustrated by the fact that attempts at infanticide were treated equally as serious. For example, BLOODY VERSICLES recounts a verse memorializing the execution by hanging of a 28 year-old English woman in 1829 for attempting to strangle her child. BLOODY VERSICLES: THE RHYMES OF CRIME 133 (Jonathan Goodman ed., rev. ed. 1993). The verse that was composed to communicate the public's outrage at such offenses is as follows:

Now mothers all, whose tender hearts Doat on your infants dear, Think of Ann Chapman's cruel act, And shed a pitying tear; With no compassion in her heart, Even when her infant smil'd, She with a cord did rashly aim To strangle her dear child. She left it in a ditch to die, Where chance no one might lead, But Providence, with watchful eye, Revealed the cruel deed. The infant sav'd—from the intent A public death to prove, She warns all women who forget A tender mother's love.

Id. at 123. Interestingly, the circumstances of Ann Chapman's concealment of her child in a ditch are similar to how Hetty concealed her child. After giving birth, sneaking away at night from the house where she gave birth, and sleeping in a haystack with the child for a few hours, Hetty searched for a place to hide the child. She located a hole under a nut-tree, placed the child there and covered it up with grass and wood chips. See ELIOT, *supra* note 9, at 452-53. In addition, ironically, since the construction of the law

steadfastly refuses to believe that Hetty is guilty of committing such an atrocity. Nonetheless, he concurs with Mr. Irwine's proposal that they refrain from disclosing the state of affairs to anyone until they return from conducting the essential inquiries at Stoniton, where Hetty is confined.¹⁷⁵ After this task is completed and Mr. Irwine is convinced of the legitimacy of the charges, he notifies Martin Poyser, Hetty's uncle, of her predicament.¹⁷⁶ And "before six o'clock that evening there were few people in Broxton and Hayslope who had not heard the sad news."¹⁷⁷

To complicate matters, just as Hetty's plight is coming to a head, the Old Squire expired.¹⁷⁸ His death marked the arrival of the moment the villagers and tenants have anxiously, and more or less patiently, waited to arrive: Arthur's succession to the position of lord of the manor. However, what Hetty's upcoming trial represents places the continued stability of the communities' social equilibrium in a precarious position. Thus, the charge of infanticide qualifies as the triggering event in this situation because the traditional perception of the horrendousness of the

was eliminated from England's criminal law in 1803, Hetty would not have been tried under this stringent formulation of the law if she had become intimate with Arthur only a few years later. *See id.* at 436; ELIOT, *supra* note 9, at 3 (describing the novel's time frame); *see also* COCKBURN, *supra* note 33, at 197. Ultimately, in the early and mid-twentieth centuries, England exempted infanticide from being classified as murder, thus making the crime a non-capital offense. *See* SCOTT, *supra* note 16, at 67 (noting that the Infanticide Acts of 1922 and 1938 "made a clear-cut distinction between infanticide and murder," a capital offense). Not surprisingly, the perpetrator of the crime of infanticide is no longer treated so harshly. Recently, a teenager who gave birth and killed the infant in the bathroom during her senior prom pled guilty to aggravated manslaughter and received a 15-year prison term, the maximum sentence. *See Woman Who Killed Baby at Prom Gets 15 Years*, LEXINGTON HERALD-LEADER, Oct. 30, 1998, at A4. In contrast to the disdainful judicial environment Hetty encountered, the judge in this case "called [her] actions 'explainable but not excusable.'" *Id.* He further proclaimed that "[s]he is not a monster. She is not someone to be gawked at, to be vilified by the public and the media. She is entitled to our understanding, our compassion and our prayers." *Id.* (emphasis added).

¹⁷⁵ *See* ELIOT, *supra* note 9, at 408-10.

¹⁷⁶ *See id.* at 412-13. The Reverend also informed the Poyser of Arthur's role in the incident. *See id.*

¹⁷⁷ *Id.* at 416.

¹⁷⁸ *See id.* at 411. The Squire was eighty-three years old at the time of his death. *See id.* at 351, 437, 441.

crime¹⁷⁹ serves as an excellent symbol of the catastrophic nature of the transgression: Hetty's belief that she, a member of the lower-classes, could legitimately rise to the ranks of the upper-classes.¹⁸⁰ It also signals her failure to heed a crucial collective norm that reinforces the continued viability of the social order: the proscription against promiscuity.¹⁸¹ Both events ultimately question directly

¹⁷⁹ See *supra* note 174 and accompanying text (discussing the gravity of the crime of infanticide during this era in English history).

¹⁸⁰ Francoise Basch, an acclaimed literary commentator, observes how Hetty is unaware of "[t]he gulf separating them [her and Arthur], whose *dangerous depths* she does not suspect." BASCH, *supra* note 145, at 255 (emphasis added); See also *id.* at 254 (commenting on Hetty's aspiration to achieve "the state of a lady"). Merryn Williams opines that Hetty's "fall" is due to her desire "to possess the social glamour and power Arthur embodies." MERRYN WILLIAMS, *WOMEN IN THE ENGLISH NOVEL, 1800-1900* at 174 (1984); see also *supra* note 159 (describing Hetty's illusion with respect to the feasibility of a marriage between herself and Arthur).

¹⁸¹ Professor Girard identifies the prominent role illicit sexual alliances play in contributing towards triggering a sacrificial crisis. He states that "sexuality is important insofar as it stimulates violence and provides occasions for it to vent its force." GIRARD, *supra* note 6, at 118. He also proclaims that "sex is more involved in human violence than are thunder and earthquakes." *Id.* Thunder and earthquakes are two traditional triggering events. See *supra* note 51 and accompanying text (discussing the different forms triggering events can take); note 54 (identifying thunder and earthquakes as classical examples of triggering events). This contention finds support in Francoise Basch's claim that "[i]t is seduction, the taboo communication between two classes with divergent interest and morality that ignites the latent violence which underlies the alleged intimacy and identity of interest of this rural community. Despite its archaic resonance *Adam Bede* is no longer the world of feudal harmony." BASCH, *supra* note 145, at 262 (emphasis added); see also *id.* at 260 (noting that the events attached to Hetty's seduction constitute a "collective tragedy, a 'social disaster'"). The identical situation exists in *TESS*. Initially, Tess' mother tried to convince her that she could interact as an equal with those who were her social superiors. See HARDY, *supra* note 9, at 98. This was easily disproved when Tess returned from Trantridge unmarried and expecting. See *id.* at 96-98. So bearing an illegitimate child fathered by a gentleman qualifies as a triggering event because of what it reflects with regard to harming the existing social fabric. The acuteness of the crisis is aggravated by the legitimate claim to gentility that Tess could make upon her marriage to Angel, a gentleman. See *id.* at 97. Its gravity is further increased when Alec relinquishes his recently acquired vocation as a preacher after accidentally encountering Hetty approximately four years after their previous involvement. See *id.* at 323. After this chance meeting, Alec informs Tess how he "was on the way to, at least, social salvation till [he] saw [her] again." *Id.* at 342. And, he confides that she has "been the means—the innocent means of [his] backsliding." *Id.* Thus, not only has Tess penetrated the impenetrable, but she also threatens the stability of men from the monied class. Two consequences that cannot be tolerated. See also *supra* note 161 (describing how Tess' characterization as a "seductress" of

Arthur's suitability to assume the mantle of "lord of the manor."¹⁸² Arthur's posture in the entire situation generates a tremendous amount of pressure and strife in the communities because it places the inhabitants in the position of being or feeling betrayed or "conned" by Arthur. It also casts significant doubts about whether they will receive the anxiously awaited enhancements in the quality of their lives that his ascension had always promised.¹⁸³

In the meantime, Arthur, who is ignorant of the accusation leveled against Hetty, is happily returning to Hayslope and the Chase to claim his inheritance and ascend to the position as the respected "model landlord" that he has coveted for so many years.¹⁸⁴ His euphoria, however, quickly dissipates after reading a letter from Mr. Irwine that awaits for him at the Chase.¹⁸⁵ Waiting only a moment, Arthur dashes from the manor house, mounts his steed, and gallops away.¹⁸⁶

The decisive moment in the crisis finally arrives. Hetty's trial for allegedly committing infanticide, a capital

"gentlemen" strains the fragile social order). See generally GASKELL, *supra* note 155, at 11 (commenting on Ruth's extraordinary beauty that made such an impression on Mr. Bellingham, the son of the aristocratic Mrs. Bellingham).

¹⁸² BASCH, *supra* note 145, at 255-56. Basch comments that "[Arthur] is in a situation where the least suspicion of flirtation with a woman at once near and far can lead to disaster reinforces how the revelation of the role Arthur played in creating Hetty's predicament enlarges the tear in the social fabric of the community." *Id.* See also *supra* note 148 and accompanying text (quoting a passage in which Arthur displays his awareness of the potential for harm occurring if he becomes entangled with Hetty).

¹⁸³ Mr. Irwine tells Bartle Massey, the educator with whom Adam has continued his studies, that he "share[s] [Bartle's] concern for Adam, though he is not the only one whose sufferings I care for in this affair." ELIOT, *supra* note 9, at 417 (emphasis added). George Eliot, perhaps intentionally, did not expressly state the precise object of Mr. Irwine's concern. Consequently, one possibility is that Mr. Irwine recognizes and consequently is concerned about the effect this incident will have on the residents of Broxton and Hayslope. Another possibility is that Mr. Irwine is anxious about how the news will impact Arthur and his status in the communities. Also when the Reverend's mother learns of Arthur's impending return from Ireland she is excitedly exclaims how happy she is that she "shall live now to see him master at the Chase, and making good times on the estate." *Id.* at 411 (emphasis added).

¹⁸⁴ *Id.* at 435-43 (noting that as Arthur approaches the Chase he sees "the pale front of the Abbey, looking out from among the oaks of the Chase, as if anxious for the heir's return").

¹⁸⁵ See *id.* at 442-43.

¹⁸⁶ See *id.* at 443-44.

offense,¹⁸⁷ has commenced. She, however, continues to

¹⁸⁷ See *id.* at 425-36. Hetty's trial occurred in the early nineteenth century during the period in English history dubbed "The Bloody Code." See BRIAN BAILEY, *HANGMEN OF ENGLAND: A HISTORY OF EXECUTION FROM JACK KETCH TO ALBERT PIERREPOINT* 20 (1989). The origins of this label lie in the British Parliament's enactment of the Waltham Act in May of 1723, which criminalized the theft of animals, particularly deer and sheep, from estates owned by royal and noble families. See *id.* at 19; RADZINOWICZ, *supra* note 33, at 50, n.3; see also LINEBAUGH, *supra* note 9, at 202 (noting that poaching in the Windsor and Waltham forests supplied the impetus for passing the infamous Waltham Black Act); DONALD RUMBELOW, *THE TRIPLE TREE: NEWGATE, TYBURN AND OLD BAILEY* 157 (1982); SPIERENBURG, *supra* note 15, at 140 (noting that "[j]udging from the percentage of death penalties, stealing cattle was the gravest crime" in Amsterdam during the early and mid-1700s); VISCOUNT TEMPLEWOOD, *THE SHADOW OF THE GALLOWS*, 18-19 (1951) (noting that the landowners' concern about people poaching on their estates prompted the adoption of legislation imposing death sentences for property offenses). The Waltham Act was colloquially referred to as the "Waltham Black Act" because the sheep and deer rustlers routinely blackened their faces to avoid detection at night. See RUMBELOW, *supra* note 187, at 157; see also RADZINOWICZ, *supra* note 33, at 51-52 (noting that "disguising" was designated a capital offense under the Waltham Act). The Bloody Code reached its apex in the early nineteenth century when more than 200 crimes were designated capital offenses. See GEOFFREY ABBOTT, *LORDS OF THE SCAFFOLD: A HISTORY OF THE EXECUTIONER* 138-39 (1991) (noting that in 1826 Great Britain had more than 200 capital offenses); BLAND, *supra* note 17, at 15 ("By 1822 in England, more than 200 offenses, perhaps as high as 350, qualified as capital offenses"); E. ROY CALVERT, *CAPITAL PUNISHMENT IN THE 20TH CENTURY* 4 (Patterson Smith 1973) (1936) ("[A]s late as 1780 the English law recognised over two hundred capital crimes"); DUFF, *supra* note 39, at 102-03 (noting that by the nineteenth century Great Britain had at least 220 capital offenses); LOUIS BLAKE DUFF, *THE COUNTY KERCHEIF* 141 (noting that at the high point 223 crimes were designated as capital offenses); LAURENCE, *supra* note 33, at 13 (noting that the number of capital offenses reached 222 before reforms were implemented); ALBERT PIERREPOINT, *EXECUTIONER: PIERREPOINT* 167 (1974) (commenting on how "[i]n 1832 there were two hundred and twenty offences for which the punishment was death"); RADZINOWICZ, *supra* note 33, at 4 (noting that it is difficult to provide an exact figure, but legal commentators in the nineteenth century gave estimates ranging from 200 to 223 capital offenses); SCOTT, *supra* note 16, at 37-40 (observing that between the late eighteenth century and the early nineteenth century the number of capital crimes was estimated to be between 200 to 350); William J. Bowers, *Executions In America*, in *LEGAL HOMICIDE* 136 (1984) (noting that from the end of the fifteenth century until approximately 1819 England had 223 capital offenses); Douglas Hay, *Property, Authority and the Criminal Law*, in *ALBION'S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH CENTURY ENGLAND* 18 (noting that by 1820 England had more than 200 capital offenses). The move toward reducing the number of capital crimes in England began in the 1830s, almost thirty years after Hetty's immolation. See *id.* at 600-07 (describing the dismantling of the Bloody Code); DUFF, *supra* at 143; GATRELL, *supra* note 9, at vii, ix, 9, 22-23, 500, 570-71; LAURENCE, *supra* note 33, at 13. But the British Parliament did not enact the

refuse to assist in her defense and did not take the stand to explain the events leading to the death of her child.¹⁸⁸ This stance is consistent with some of the features Girard attributes to the sacrificial victim. It is left unresolved whether Hetty intended that her child die when, soon after giving birth, she left the newborn hidden in a tree covered with grass.¹⁸⁹ Matters are further complicated because Hetty's rendition of the circumstances surrounding the birth that she recounted during her confession to Dinah suggested that all the pressure and stress she had experienced might have rendered her mentally impaired.¹⁹⁰

Capital Punishment Amendment Act, which abolished the death penalty for all crimes except four—murder, treason, piracy, and arson of dockyards and arsenals—until 1861. See ROYAL COMMISSION ON CAPITAL PUNISHMENT: MINUTES OF EVIDENCE, 1953, at 2; BLAND, *supra* note 17, at 16. By 1832 this movement reached the Continent when the French government passed a law lessening the penalties established under the harsh Napoleonic Code. See KATHERINE FISCHER TAYLOR, IN THE THEATER OF CRIMINAL JUSTICE: THE PALAIS DE JUSTICE IN SECOND EMPIRE PARIS 63 (1993); *supra* note 174 (describing how Britain's criminal justice system ultimately handled crimes of infanticide); *infra* Appendix D for a description of the scope of capital crimes during this era as well as a discussion of the socio-political forces that influenced the decision to designate so many offenses as capital.

¹⁸⁸ Given the quasi-strict liability construction of the infanticide law, Hetty's decision to adopt this "tactic" of non-assistance does not bode well for the outcome of her case. See *supra* note 174 and accompanying text. Nonetheless, this is the strategy she selected to use early on. For example, when arrested she refused to "confess her name or where she comes from." ELIOT, *supra* note 9, at 408. In fact, this behavior is what prompted the Sheriff of Stoniton to summon Mr. Irwine to come and identify her. See *id.* at 408, 410. She maintained this posture throughout the judicial proceedings. See *id.* at 417, 421, 428.

¹⁸⁹ See ELIOT, *supra* note 9, at 452-54 (describing what occurred when Hetty gave birth).

¹⁹⁰ It is possible that Hetty was suffering from Postpartum Onset Specifier, a mood disorder. See DIAGNOSTIC AND STATISTICS MANUAL OF MENTAL DISORDERS, 386-87 (American Psychiatric Ass'n, 4th ed. 1994) [hereinafter "DSM-IV"]. Hetty's chances of being a candidate for this disorder were increased because this was her first delivery. See *id.* (noting that postpartum mood disorders are "more common in primiparous women"). Then immediately after "unexpectedly" giving birth, Hetty's already precarious psychological state worsened. ELIOT, *supra* note 9, at 452. The continued debilitation of her mental state is consistent with the psychiatric finding that the onset of postpartum mood disorders occur within four weeks after delivery. See DSM-IV, at 386. This is reinforced by a prosecution witness' testimony that Hetty "had a strange look with her eyes" when she was sitting with the infant the evening after the baby's birth. ELIOT, *supra* note 9, at 432. Apparently, Hetty's demeanor alarmed the woman to such a degree that she decided to have a midwife return home with her after attending evening services. See *id.* The testimony given by another prosecution witness confirms that Hetty suffered from a mood disorder within the requisite

This factor increased the ambiguity regarding the actual degree of Hetty's culpability. This outcome, in turn, underscores the fact under Girard's theory that actual responsibility is not a critical facet of the sacrificial victim selection process.¹⁹¹ In addition to the irrelevancy of any

time frame. After Hetty surreptitiously left the home of the woman where she had given birth and buried her child in the turf, this witness encountered her and testified that when he saw her he "thought she looked a bit crazy." *Id.* at 433. Furthermore, Hetty seemingly suffered from several of the classic symptoms of this disorder. For example, she exhibited suicidal tendencies both before and after the birth of her child. During her jailhouse confession to Dinah, Hetty informed Dinah how she "tried to kill [herself] before, and [she] couldn't." *Id.* at 451. Later, shortly before Hetty decided to search for Arthur she had headed for a pool off the high-road where she intended to drown herself. *See id.* at 365, 452. While wandering around after learning that Arthur was in Ireland, suicidal thoughts returned to Hetty. *See id.* at 384. Another key indicator that a mother suffers from a postpartum mood disorder is if the mother has thoughts of violence to the child. *See DSM-IV*, at 386. Hetty not only admitted to Dinah that she buried the "little baby" in the woods, but also how prior to doing so the thought of getting "rid of it" kept getting "stronger and stronger." ELIOT, *supra* note 9, at 451-52. What occurs after she has hidden the child also suggested the presence of another symptom of the disorder: delusions. *See DSM-IV*, at 386. The importance of Hetty having this symptom and what it might indicate about the offense she committed is illustrated in the following statement: "[i]nfanticide is most often associated with postpartum psychotic episodes that are characterized by command hallucinations to kill the infant or delusions that the infant is possessed, but it can also occur in severe postpartum mood episodes without such specific delusions or hallucinations." *See id.* (emphasis added). After burying the child, Hetty moved on until she "came to a village a long way off from the wood." ELIOT, *supra* note 9, at 453 (emphasis added). Despite the noted distance between her location and the child's, Hetty claimed to be able to do the impossible, to still be able to hear the child's cries. *See id.* at 453-54. This impossibility is reinforced by the fact that by this time the child was already dead and its body had been removed by the man she encountered after having buried the child. *See id.* at 434-35. Her denials at the jail and at the court that she ever had a child, which Mr. Bartle attributed to female abstinence, instead it might be evidence of being in a delusional state, which is consistent with the symptoms of post-partum depression. *See id.* at 408 (informing Adam of Hetty's denial of everything in the letter from the Stoniton magistrates); *id.* at 428 (noting that while Hetty is being tried for capital murder, Mr. Bartle tells Adam that despite the mountains of evidence against her "she's gone on denying she's had a child from first to last").

¹⁹¹ *See supra* notes 70-73 and accompanying text. Furthermore, this point is emphasized by the fact that the applicable criminal law makes this a strict liability offense and thus, intent, or culpability, is irrelevant for the formal legal inquiry as well. *See supra* note 174 and accompanying text (discussing how infanticide at this time was treated as a strict liability crime). *See id.* (mentioning the interaction between selecting the sacrificial victim and the distinction made between the designee's actual and perceived culpability).

mitigating factors, Hetty's status as an outsider¹⁹² confirms

¹⁹² The status the sacrificial victim occupies in the community is an integral component of Girard's theory. See *supra* notes 78-80 and accompanying text (discussing how status as an "insider" or an "outsider" influences the sacrificial victim selection process). In this case, Hetty is an orphan. See ELIOT, *supra* note 9, at 84, 98 (noting that Mrs. Poyser commenting on the fact that Hetty is her husband's penniless orphaned niece). And, although she has resided in the community since she moved there as a child to live with her Uncle Poyser, one of the most successful, productive, and respected tenant farmers in the area, she is not genuinely considered or accepted as a member "of" the community. GIRARD, *supra* note 6, at 270-72 (describing the sacrificial victim's marginalized or "outsider" status). First, although her uncle and aunt provide her sustenance, initially Hetty was taken in so she could tend after their children. See ELIOT, *supra* note 9, at 98, 155-56. Later she was trained to work as a dairymaid in their dairy farm operations. See *id.* at 74, 82-83. So her "family" has never embraced her as one of "them." This conclusion is bolstered when one reconsiders the ease with which the Poyseres reject her after her "problem" arises. *Id.* at 413. Even Adam who had been her most ardent supporter deserted her by not attending the trial until the day the verdict was announced. See *id.* at 416-17, 420-30. Lastly, Hetty's gender reinforces her status as an outsider. See GIRARD, *supra* note 6, at 141-42 (noting that women's status as marginalized members of society makes them optimal sacrificial candidates). Thus, the combination of these two factors qualified her for inclusion in the marginalized outsider group. This, in turn, made it less traumatic for the community to hold her responsible for creating the catastrophic crisis and to select her as the offering needed to reinstate social harmony. See also BASCH, *supra* note 180, at 254 (attributing Hetty's outsider status to her narcissism which "represents a total locking-out of the world"). Thus, in the final analysis, Hetty, in accordance with Girard's theory, satisfies the sacrificial victim's marginality characteristic. This outcome is critical because "[t]his marginal quality is crucial to the proper functioning of the sacrifice." GIRARD, *supra* note 6, at 271. Tess also qualified as an outsider who facilitated the collective's objective of targeting her as the responsible agent and consequently enabled them to relegate her status to that of the sacrificial victim. Although Tess was born and raised in Marlott and at one time was undoubtedly considered as being "of" the village, her status markedly altered once she bore a gentleman's child and underwent further alteration when she later married a gentleman, who was not the father of her deceased child. See HARDY, *supra* note 9, at 114-15, 218-19. Her transformation from insider to outsider is evidenced by the events that transpired after her father died and the remaining family members were forced to depart from Marlott. It is very telling that not a single villager rallied around the family, one that had lived in the village for ages, to support the family in its efforts to have the lease for the homestead renewed. See *id.* at 371. Due to her low social status, Angel's family members also consider her an outsider. See *id.* at 180-81. Even her mother began to question Tess' right to remain in the family as she complained about the family's dire straits and Tess' inability to get it right with "gentlemen." *Id.* at 383. See also Merryn Williams, *supra* note 180, at 172 (contending that Tess' final act of defiance, killing Alec, "consummates her identity as outcast"). Although, even if Tess' eligibility is questioned on the grounds that she was born and raised in Marlott and periodically returned there at times of personal and familial crisis, she still

the likelihood that it is she whom the villagers have singled out to be the sacrificial subject. Thus, Hetty's silence and unwillingness to assist in her own defense become understandable when considered as actions conveying her implicit recognition and acceptance of the communal decision that she, and not Arthur, has been designated as the responsible actor and as a result, she has been selected to be the sacrificial victim.¹⁹³ The very deliberate failures of her uncle, her ex-fiancé Adam, and Arthur's mentor Mr. Irwine to share with the jury their knowledge of the true

complied with Girard's marginality requirement because her life experiences have placed her "between the inside and the outside," which means she "belonged] to both the interior and the exterior of the community." GIRARD, *supra* note 6, at 272. This description of the position she occupied confirmed her suitability as the sacrificial, or surrogate, victim. Although Tess did not formally share Hetty's status as an orphan, she did in substance. At best, Tess' parents, John and Joan Durbeyfield, were well-intentioned, but ineffectual parents. Both, to some degree, relinquished their parental responsibilities. John was a haggler, the town drunk, and possessed one of the more eccentric personalities in the community. See HARDY, *supra* note 9, at 33, 35, 46. He was not fond of working and barely earned enough to feed his sizeable family. See *id.* at 21, 46. Nor did he display much interest in his offspring, as he spent much of his time at the local public house. See *id.* at 33-40. Any interest he might have had in them disappeared upon his discovery that he descended from the ancient and noble d'Urbervilles. Once armed with that knowledge, John spent most of his time contemplating what could have been. See *id.* at 20-21. Joan did not fare much better. As a practical matter, her maternal talents were taxed to the limit simply trying to keep tabs on her children and feeding and clothing them. See *id.* at 30-31, 34-35. One consequence of having such irresponsible parents was that "[e]very day seemed to throw upon [Tess'] young shoulders more of the family burdens." *Id.* at 49. In reality, Tess could have just as easily been reared in an orphanage tended by two relatively good-natured warders. See generally MILLETT, *supra* note 27 (evaluating how Sylvia Likens was singled out by her caretakers to be the victim of torture and murder in contemporary society).

¹⁹³ Professor Girard observed how this can be the *modus operandi* in some sacrificial circumstances. As support for the phenomena of victim acquiescence, Girard described how Oedipus informed the Thebans that "all the evils abroad in the community are the sole responsibility of the surrogate victim, and that he alone, as that victim, must assume the consequences for these ills." GIRARD, *supra* note 6, at 77. Arguably an equivalent situation exists in TESS. When Angel and Tess were evading the law enforcement officials looking for Tess, she told Angel how she knew that she only had a few weeks, at the most, left to live. See HARDY, *supra* note 9, at 413. More revealing was what transpires at Stonehenge, the site of Angel and Tess' last hideout. Before Tess drifted off to sleep on one of the imposing boulders, Angel in response to her query, told her that she was indeed about to drift off to sleep on an altar. See *id.* at 415. Tess then inquired about whether they, the pagans, made sacrifices there. See *id.* at 414. Angel responded affirmatively. Finally, after being woken by the police, Tess rose from the heathen altar and stated "I am ready." *Id.* at 415.

nature of the role Arthur played in placing Hetty in this predicament provide supplemental support for the conclusion that Hetty's silence was intricately connected to the process by which the sacrificial victim is selected.¹⁹⁴ Basically, it was as if all were cognizant of the proverbial

¹⁹⁴ Hetty's uncle had been informed of all the facts shortly after Mr. Irwine returned from confirming her situation at Stoniton. See ELIOT, *supra* note 9, at 413. In fact, Mr. Irwine was adamant about being candid with the Poyzers. See *id.* Mr. Irwine decided "to withhold nothing from the Poyzers." *Id.* Therefore, given this commitment, Mr. Irwine's account must have included apprising the family of Arthur's role as Hetty's seducer. This is confirmed by the verbal lambasting of Arthur that Martin Poyser engaged in after he was enlightened about Hetty's situation:

[W]onna stay upo' that man's land a day longer nor I'm forced to't. 'An me, as thought him such a good up-right young man, as I should be glad when he come to be our landlord. I'll ne'er lift my hat to'm again, nor sit i' the same church wi'm . . . a man as has brought shame on respectable folks . . . an' pretended to be such a friend t' everybody..."

Id. at 414 (emphasis added). Thus, given this display of animosity towards Arthur, including the commitment to cease displaying the proper socially mandated signs of respect to a man of Arthur's social stature, it is surprising that when Martin Poyser testified at Hetty's trial, he refrained from mentioning a word about the man who "has brought shame on respectable folks . . . an' pretended to be such a friend t' everybody." *Id.* at 414, 427. Adam's decision to remain silent is perhaps the most disconcerting and perplexing. The night before Hetty's trial during a conversation with Mr. Irwine, Adam expressed his objection to the inequity of it all, specifically Arthur's absence. See *id.* at 422-24. Nonetheless, despite his protestations, initially he was unable to even attend the trial. See *id.* at 425-29. It was only later, after he learned from Mr. Massey, his friend and teacher, that "there [was] nobody to stand by her, and seem to care for her," that he concluded that avoiding the trial had been an act of cowardice. *Id.* So, he resolved to "go into court . . . [and] stand by her . . . [and] own her." *Id.* at 428-29. Apparently, "standing by her" excluded testifying so that the jury would have the benefit of having all the relevant facts. *Id.* Thus, Adam's [in]action can be interpreted as his acquiescence to the nonconscious collective resolution that Hetty must be sacrificed. Arguably, this was reinforced by Mr. Irwine's earlier admonition about Adam acting hastily given that "there are others to think of, and act for." *Id.* at 410, 420-24 (emphasis added). Mr. Irwine communicated the same message to Mr. Massey when, in response to Mr. Massey's expression of concern about Adam, Mr. Irwine stated that while he agreed with him, "[Adam] is not the only one whose sufferings I care for in this affair." *Id.* at 417. However, perhaps Professor Girard's theory includes an explanation for Mr. Irwine's, Mr. Poyser's, and Adam's failure to act in Hetty's defenses. Professor Girard observes that "we could not explain how it was put into practice, nor even imagine how an institution as subtle and complex as that of sacrifice could function without its inventors (who are also its operators) being aware of the secret of its operation." GIRARD, *supra* note 6, at 271 (emphasis added). Consequently, the behavior they exhibited at the trial complies with Girard's theory on how the sacrificial process functions.

“casting of the die.”¹⁹⁵ Accordingly, through their silence, especially her uncle’s and Mr. Irwine’s,¹⁹⁶ who were called as witnesses and testified at her trial, they conveyed the social units’ endorsement of the implicit selection of Hetty as the sacrificial victim and the acknowledgment that her immolation was necessary if the equilibrium that was presently absent from the communities was to be restored. Furthermore, by sacrificing Hetty it might have been thought that the social order would rise to the level it previously anticipated upon Arthur’s succession.¹⁹⁷ The jury, after briefly deliberating on her fate, complied with this unacknowledged desire by returning a guilty verdict.¹⁹⁸ The judge, in accordance with custom, “put on his black cap”¹⁹⁹

¹⁹⁵ THE MACMILLAN DICTIONARY OF QUOTATIONS 291 (Bloomsbury Publishing 1989).

¹⁹⁶ Mr. Irwine, who Adam previously described as the sole person in the community “who would be prepared to defend [Hetty] in the worst extremity,” did not use the opportunity presented by being a witness at Hetty’s trial to edify the jury about the exact nature of the circumstances in the case. ELIOT, *supra* note 9, at 403, 435. Instead, he limited his testimony to attesting to “Hetty’s unblemished character in her own parish, and of the virtuous habits in which she had been brought up.” *Id.* at 435. Although, *after the jury retired to deliberate*, Mr. Irwine engaged “in low earnest conversation with the judge.” *Id.* (emphasis added). Unfortunately for Hetty, whatever he told the judge was unpersuasive because when their conversation ended Mr. Irwine sat “down again in agitation, and [shook] his head mournfully when somebody whispered to him.” *Id.* The futility of his efforts were confirmed when the judge donned his black cap to pronounce Hetty’s death sentence. *See id.* at 436. *See infra* Appendix E for an explanation of the significance of the black cap in a capital punishment context.

¹⁹⁷ This could be foreshadowed by Mr. Irwine’s warning to Adam. After telling Adam about Hetty’s arrest for infanticide, Mr. Irwine cautioned Adam about following out his conviction that Arthur “shan’t escape wi’ lies this time.” ELIOT, *supra* note 9, at 409-10. He left him with the admonition to “[r]emember . . . there are others to think of, and to act for, besides yourself.” *Id.*; *see supra* notes 110-33 and accompanying text (describing the benefits the villagers and tenants expected to receive when Arthur inherited the Chase from his grandfather).

¹⁹⁸ *See* ELIOT, *supra* note 9, at 435-36.

¹⁹⁹ *Id.* at 436. It was customary for the presiding judge in England to cover his wig with a black cap before pronouncing a death sentence. *See* CHARLES DICKENS, OLIVER TWIST 345-46 (Wordsworth Classics ed. 1991) (stating how the trial judge put on “the black cap” to announce Fagin’s death sentence); JOHN ELLIS, DIARY OF A HANGMAN: BRITAIN’S EXECUTIONER FOR 23 YEARS 67 (noting that the judge at Thompson’s 1910 trial for murdering his wife wore “the black cap” when announcing the death sentence); *id.* at 80 (noting that the judge had placed “the black cap on his wig” when he sentenced Seddon to be executed on the gallows in 1912); GATRELL, *supra* note 9, at 194, 500; LANE, *supra* note 17, at 84 (describing the black cap as “once Britain’s most potent symbol of the ultimate sanction of the law”); JOHN DEANE POTTER, THE FATAL GALLOW TREE

and sentenced Hetty to be "hanged by the neck till . . . dead."²⁰⁰ At this point, the crisis appeared to have been averted, or at least minimized, by Hetty's impending judicial execution.²⁰¹

66 (Elek Books 1965) ("If the prisoner was found guilty, the judge put on the black cap"); RADZINOWICZ, *supra* note 33, at 100; SCOTT, *supra* note 16, at 68 (stating that the black cap was still used in 1948 by judges announcing death sentences); ROYAL COMMISSION ON CAPITAL PUNISHMENT, *supra* note 187, at 255 (noting that in January of 1950 the Lord Chief Justice of England's High Court of Justice testified that he supported continuing the use of the black cap when announcing a death sentence because "[i]t is traditional, and . . . [he] did not see any reason for interfering with a tradition which has existed for over hundreds of years"); *id.* at 267 (noting another judge's concurrence with the retention of the tradition of donning the black cap); TEMPLEWOOD, *supra* note 46, at 17 ("[t]he black cap . . . became the stage propert[y] of an almost daily ceremony"). In one of several articles Charles Dickens wrote for a series exploring capital punishment that was published by the Daily News in 1846, he, in conveying his disdain for public executions, writes that: "[He] know[s] the thrill that goes round when the black cap is put on." PHILIP COLLINS, *DICKENS AND CRIME* 232 (3d. ed. 1994) (quoting an article from the DAILY NEWS, Mar. 16, 1846). In Stuart Martin's novel *Capital Punishment: A Novel*, one of the central characters, an escaped convict masquerading as a waiter, interrogated the other protagonist, a Judge who presided over the "Clue Club" whose members examined murder cases and "retried" cases that the Club examined, about various cases in which the Judge "donned the emblem of death, the black cap." STUART MARTIN, *CAPITAL PUNISHMENT: A NOVEL* 39, 162 (Hutchinson & Co. 1931) (emphasis added). The waiter also commented on the Judge's "eagerness to justify the black cap." *Id.* at 103. He also mentioned how the Judge had "great satisfaction in donning the black cap and sending Abe Lammie to the scaffold." *Id.* at 82. In the chapter titled "The Judgement," the "waiter" first recounted how there were "various circumstances in which the danger of the black cap faces a prisoner." *Id.* at 240. He then related a story involving a woman whose highly placed lover deserted her when she became pregnant. *See id.* at 246. And, due to the resulting hardships of unwed motherhood the woman succumbed to an ugly and premature death. *See id.* Subsequently, the "waiter" revealed that the Judge was the woman's "murdering" ex-lover. *See id.* at 260. He then told the Judge to pass sentence on the man and "[h]e drew an object from his pocket, and threw it down on the table in front of the Judge. . . . It was the black cap worn by judges who pass the judgement of death sentence." *Id.* Ultimately, it was revealed that the "waiter" was the son of the scorned woman and the Judge. *See id.* at 265-66. See *infra* Appendix E for a further discussion on the symbolic role played by the judiciary's use of black and the ominous combination of black and Friday.

²⁰⁰ ELIOT, *supra* note 9, at 436.

²⁰¹ Although, others suffered from ancillary immolation. For example, her aunt and uncle Poyser and her elderly Grandfather Poyser suffered a great "sense of family dishonour," after Mr. Irwine notified them about Hetty's arrest. *Id.* at 413. From her uncle's perspective "[s]he's made our bread bitter to us for all our lives to come, an' we shall ne'er hold up our heads i' this parish nor i' any other." *Id.* Upon learning of Hetty's condition and present situation her kind-

Dinah arrived while Hetty waited in the condemned cell for her impending execution.²⁰² She came to assist Hetty to prepare of her imminent execution.²⁰³ However, just as the cart transporting them reached the gallows, Arthur suddenly appeared.²⁰⁴ He arrived clutching a reprieve that commuted Hetty's death sentence to transportation.²⁰⁵ The

hearted Uncle Poyser declared that "Hetty had brought disgrace on them *all—disgrace that could never be wiped out.*" *Id.* (emphasis added); see also ELIOT, *supra* note 9, at 413 (noting that the Poyser's "sense of family dishonour was too keen"); GASKELL, *supra* note 155, at 117–22 (describing the condemning shock Miss Benson expressed when she discovered that Ruth, the young girl deserted by her gentleman lover who her good-hearted minister brother brought to live with them, was pregnant); Malcolmson, *supra* note 174, at 193 (describing how unwed mothers in the eighteenth century "fear[ed] for the shame which would inevitably tarnish the family's reputation"). In fact, the shame and disgrace the Poyser's felt was so acute that they felt compelled to leave their home in the parish, where the family had resided "as far back as its name was in the parish register." ELIOT, *supra* note 9, at 413. Interestingly, later, for reasons to be disclosed and commented upon, the family reconsidered its initial decision. See *id.* at 474. Familial humiliation also existed in *TESS* of the d'Urbervilles. See *infra* pp. 102–06. For example, when Tess' infant son Sorrow was dying, she realized that he had not yet been baptized. See HARDY, *supra* note 9, at 108. She approached her father about calling the parson to baptize the child before he expired. See *id.* Unfortunately, the moment she selected was "one at which her father's sense of the antique nobility of his family was highest and his sensitiveness to the smudge which Tess had set upon that nobility most pronounced." *Id.* at 108–09 (emphasis added). In denying her request, he reminded her that granting her request would bring attention to his affairs, "just then, when, by her shame, it had become more necessary than ever to hide them." *Id.* at 109. For good measure he locked the front door and pocketed the key. See *id.*

²⁰² See ELIOT, *supra* note 9, at 445–61.

²⁰³ See *id.* at 450–61. Although, arguably in a metaphysical sense Hetty had already ceased to exist. See *id.* at 377, 430–31, 435 (observing that Hetty resembled a corpse before the birth of her child and at her trial).

²⁰⁴ See ELIOT, *supra* note 9, at 462.

²⁰⁵ See *id.* at 461 (noting that Arthur was carrying "the hard-won release from death"). "Pardons were very common. Roughly half of those condemned to death during the eighteenth century did not go to the gallows, but were transported to the colonies or imprisoned." HAY, *supra* note 187, at 43. Thus, even though Hetty's death sentence was imposed in the nineteenth century, it was probably still relatively easy for Arthur to secure a pardon for Hetty as they were frequently granted when requested by the local gentry, the class to which Arthur belonged. See *id.* After Great Britain lost its American colonies it began transporting prisoners to Botany Bay in New South Wales in Australia. See John Hirst, *The Australian Experience*, in *THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY* 263 (Norval Morris & David J. Rothman eds., 1995); see also JOHN GAY, *THE BEGGAR'S OPERA* 44, 45 n.4 (Bryan Loughrey & T.O. Treadwell eds., 1986) (stating that the characters Peachum and Filch conspired about how Peachum could save Betty Sly from

unexpected, and timely, arrival of the King's decision to exercise mercy suggests that a human offering had been averted. However, given the nature and conditions of her new penalty, transportation, it is incorrect to draw this conclusion.²⁰⁶ First, and foremost, this form of punishment is arduous.²⁰⁷ By her own admission, Hetty preferred, and

being transported to North America or to the West Indies); THOMAS KENEALLY, *THE PLAYMAKER* 44 (1987) ("An over-spillage of lags (prisoners) was chained up in aged warships whose hulks rode at moorage in every harbour. *Once a portion of all these felons would have been shipped off as farm labourers to Virginia and Georgia and the Carolinas. But now Virginia, Georgia, the Carolinas and nine other unfilial American colonies had violently ended that penal connection*") (emphasis added); ERNEST W. PETTIFER, *PUNISHMENTS OF FORMER DAYS* 144 (1974). This chapter of Great Britain's transportation policy commenced during the late eighteenth century in 1787. See LEON RADZINOWICZ & ROGER HOOD, *A HISTORY OF THE ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750: EMERGENCE OF PENAL POLICY IN VICTORIAN AND EDWARDIAN ENGLAND* VOL. 5, 467 (1990); see also Hirst, *supra*, at 265. Approximately 162,000 men and women were transported to Australia. See Hirst, *supra* at 135. "[T]ransportation was resorted to for those felons who were not sentenced to death because of a successful claim of benefit of clergy, and for those who were reprieved through the prerogative of mercy." RADZINOWICZ & HOOD, *supra* at 466. It "was first recognized as a punishment for persons leading an incorrigibly idle and disreputable life; then for various classes of the community that were at the time considered equally obnoxious and dangerous to social order." *Id.* at 467 (emphasis added).

²⁰⁶ Transportation to a penal colony satisfies that portion of Professor Girard's human sacrifice theory that calls for the removal or elimination of the party found responsible for the crisis. See *supra* notes 84-86 and accompanying text. Transportation becomes tantamount to the exile or expulsion Girard mentions as being one method of "curing" the community because the offender is wrenched from the community, and forced to live an isolated existence in a specifically designated locale. GIRARD, *supra* note 6, at 266 (noting that with human sacrifice the sacrificial victim is "always expelled from the community"); see also *supra* notes 81-90 and accompanying text. Therefore, theoretically the reprieve and the subsequent alteration in Hetty's punishment could be sufficient to accomplish human sacrifice's curative mission.

²⁰⁷ Not only will Hetty be excised from her home and native land, but the British government's purpose for transporting female convicts to serve the male population reinforces the brutality of this sentence. See *supra* note 205 and accompanying text; Hirst, *supra* note 205, at 272; see also PETTIFER, *supra* note 205, at 149-50. An exchange between Davy Collins and Ralph Clark, two naval officers stationed for a minimum of three years at the first prison colony erected in New South Wales, in *The Playmaker* (1987) by the Australian author Thomas Keneally, probed this feature of England's transportation policy:

It has sometimes bothered my mind, he[Davy] told Ralph in a lowered voice, to consider what the government of Great Britain had in mind when they barred us from bringing our wives. Oh, I know it's a tradition of the service that the wives of officers are considered to be too sensitive in upbringing to stand the stress of campaigning in the

had anticipated, living a life of luxury.²⁰⁸ Furthermore, it was unlikely that she would be permitted to return to

field as in foreign places. This is rather a different case I would have thought.

KENEALLY, *supra* note 205, at 259.

Why did they not permit our spouses then? he asked dreamily, without any particular passion at the moment against the Home Secretary or the Admiralty. . . . There are only two explanations, said Davy. First, there is the possibility they were so stupefied by customs they did not even consider our special case. Ralph laughed And what of the other explanation? The other is more beguiling, Ralph. *That they-being men fully aware of the normal male leanings-intended that at this distance of space we should take convict wives*, and by treating them well and having influence over them, turn them into the future matriarchs of this lag society. Through the exercise of our desire for the comradeship of women and for the usual human solace, we were to make an exemplar of marriage out of a convict concubine

Id. at 260 (emphasis added). Furthermore, women sentenced to transportation ran a tremendous risk of being sexually exploited and brutalized prior to arriving at the penal colony. *See id.* at 43, 105, 116. This peril materialized from the moment a woman sentenced to transportation embarked on the eight month sea voyage from England to New South Wales. *See id.* at 29 (mentioning that “a year’s travel lay between this convict’s moon and the politics of Westminster”); RADZINOWICZ & HOOD, *supra* note 205, at 467 (noting that the voyage typically took eight months). Given the confined spaces and the relatively few women on board when compared to the number of men, female transportees typically discovered that their only alternative was to find a “protector” among the throngs of officers, marines, sailors, or male convicts during the long journey. Thus, the government essentially imposed the additional penalty of sexual servitude for, at the minimum, a woman making the journey without a “protector” would in all likelihood be subjected to gang rape for the duration of the journey. *See KENEALLY, supra* note 205, at 42-43, 45, 84. Mary Brenham, a central character in *The Playmaker*, experienced this dilemma during her voyage to New South Wales. She, like many of the female transportees, ultimately found it expedient to secure a “protector.” *Id.* at 43, 84, 264 (describing these as alliances, “in the strict sense of the word”). In fact, Mary’s young son, who resides with her at the penal colony in New South Wales, is the product of this union. *See id.* at 29, 43, 84. Lastly, all transportees—female and male—faced the danger of expiring “soon after sailing because they had been infected by the gaol-fever that was rampant at Newgate and at other [English] gaols.” RUMBLELOW, *supra* note 187, at 32. *See infra* Appendix F for a description of the additional dilemmas encountered by the female prisoners.

²⁰⁸ For example, “Hetty’s dreams were all of luxuries: to sit in a carpeted parlour and always wear white stockings . . . to have Nottingham lace round the top of her gown . . . and not to be obliged to get up early or be scolded by anybody.” ELIOT, *supra* note 9, at 99 (emphasis added). Her stated preferences comport with the description of her as having “the luxurious nature of a round, soft-coated pet animal.” *Id.* at 379. Later, during a chance meeting with Adam after Hetty’s trial and reprieve, Arthur lamented on how Hetty would “never know comfort any more.” *Id.* at 470.

England soon, or at least not any time soon.²⁰⁹ And, even if she were to return, she would have encountered numerous obstacles in her effort to establish a new life. Her difficulties were exacerbated because her uncle could not be relied upon to furnish a sanctuary as he already had adopted an unequivocal position regarding her situation and had unambiguously declared her *persona non grata* in his household.²¹⁰ Notwithstanding the familial stance, the

²⁰⁹ Arthur's exclamation during a post-reprieve conversation with Adam, that he was upset because he "can do nothing for her *all those years*," suggests that someday Hetty would be permitted to return to England. *Id.* at 470 (emphasis added). Her sentence had probably been fixed for a specific number of years. Great Britain's transportation policy supports this conclusion. The facts in the novel indicate that Hetty received a seven year transportation sentence. We were first introduced to Adam on June 18th of 1799. *See id.* at 5. Hetty and Adam were engaged on November 2nd of that year. *See id.* at 357. Their wedding was set for mid-March of 1800. *See id.* at 362, 390, 405 (noting that Hetty and Adam's nuptials were scheduled to be held on March 15, 1800). Hetty departed Hayslope in February of 1800 to go on her fraudulent errand. *See id.* at 363, 366. It was estimated that completing this task would take approximately ten days. *See id.* at 366, 390. "But when a fortnight had passed they began to feel a little surprise that Hetty did not return." *Id.* at 390. It was March when Adam told Hetty's uncle about his unsuccessful quest for her. *See id.* at 401. This was the same day that Adam went to speak with Mr. Irwine about the situation before setting off to find Arthur in Ireland. *See id.* at 404-07. Instead, Adam's trip was abruptly canceled when he received the surprising and disturbing news about Hetty from Mr. Irwine. Earlier, Mr. Irwine had been notified of Hetty's arrest for the murder of her child. *See id.* at 407-08. Her trial was held about one week later. *See id.* at 417, 420. Hetty was convicted, condemned to death, and had her sentence commuted to transportation in 1800. In June of 1807, approximately seven years after Hetty had been transported, Dinah, who married Adam sometime after Hetty was transported, comments about "the death of the poor wanderer, when she was coming back to us." *Id.* at 538. We can safely assume that Hetty was the "poor wanderer." She probably died in 1807, near or at the completion of her sentence. *See id.* at 537-38. Thus, she would have received a seven year transportation sentence. *See WILLIAMS, supra* note 180, at 32 (noting that *Adam Bede* begins in 1799 and ends in 1807). Hetty's seven year sentence is corroborated by the length of the sentences given to the major characters in Thomas Keneally's book *The Playmaker*. *See KENEALLY, supra* note 205 at 13-15. In his novel, set in 1789 in the British penal colony of New South Wales, Australia, all but one of the central convict characters has been transported for seven years. *See id.* In fact, Mary Brenham, the central female character, was given a seven year sentence. *See id.* at 14; *see also* LINEBAUGH, *supra* note 9, at 154 (noting that transportees were colloquially referred to as the "King's Seven Years' Passengers"); PETTIFER, *supra* note 205, at 144 (noting that transportation sentences were usually for 7 years, 10 years, 14 years, and, in some cases, for life); RADZINOWICZ & HOOD, *supra* note 205, at 471; HIRST, *supra* note 205, at 276-77 (noting that there were seven-year sentences, fourteen-year sentences, and life sentences).

²¹⁰ Although her Uncle Poyser was "willing to pay any money as is wanted

ridicule to which Hetty was subjected and the probability that she would be treated like the village pariah if she returned to Hayslope, provides additional support for the conclusion that it is very unlikely that returning "home" would be a viable option. It would simply be unbearable for someone with Hetty's demeanor and sensitivities to live under those conditions.²¹¹

towards trying to bring her off," which would have been a substantial expenditure at this time, he remained adamant about never seeing her again. ELIOT, *supra* note 9, at 413. Furthermore, her uncle did not want to sustain a relationship with a relative who was transported and "was likely to be hanged." *Id.* at 463. The willingness to desert Hetty was due to the fact that the family was "proud of their untarnished character," which was now stained as a consequence of Hetty's imprudence. *Id.* at 413. The family's lack of empathy for Hetty and its refusal to be supportive also might partially be due to the fact that she was an "outsider." See *supra* note 192 and accompanying text.

²¹¹ During her quest for Arthur and prior to her arrest and conviction for infanticide, Hetty quickly dismissed any notion of returning to her family and to her community as "she could never endure that shame." ELIOT, *supra* note 9, at 380. Remember, Hetty possesses an intense horror of being the object of shame and public scrutiny. See *id.* at 336, 378-79. When contemplating her "secret misery" Hetty dwelled on how people "would think her conduct shameful; and shame was torture." *Id.* at 336 (emphasis added). See also *id.* at 452; *supra* note 167 (discussing Hetty's abhorrence of being "shamed"). Furthermore, before her tribulations even commenced Adam expressed trepidation about even exposing her relationship with Arthur because of the certainty that she would lose her character. See ELIOT, *supra* note 9, at 298. What happened to Ruth when it was discovered that as a young girl she was "kept" by a young gentleman and bore his child reinforces this assertion. GASKELL, *supra* note 155, at 336-58. Initially Ruth was fortunate because kind strangers welcomed her into their home and treated her like a member of their family even though they were cognizant of her physical condition and the general circumstances regarding how she got into that condition. See *id.* at 138-155. Ruth's kind demeanor and fortitude enabled her to achieve the status of a well-respected and productive member of the community. However, ultimately her secret, that her son Leonard was illegitimate, was discovered and disclosed to the members of the community. See *id.* at 367. Ruth learned first hand that "the old offence could never be drowned in the Deep." *Id.* at 337. She had sinned "in a way people never forget, never forgive." *Id.* at 343; see also *id.* at 383 (commenting on how after the villagers of Eccleston learned of Ruth's shame they "all ignored her, and passed by her on the other side"). Like Ruth, the inhabitants of Bloxton and Hayslope were well aware of Hetty's situation. See ELIOT, *supra* note 9, at 416. Many of them attended her trial, so they were intimately familiar with the details of her transgression. See *id.* at 430. Furthermore, given that "[n]ewspapers were particularly prone to dwell on the lurid details of infanticide," it was unlikely that the inhabitants of Hayslope, Broxton and the surrounding communities would easily or quickly forget the incident. Malcolmson, *supra* note 174, at 189. In fact, after her troubles began, Hetty remembered with abhorrence how years ago another village girl had been an unwed mother. See ELIOT, *supra* note 9, at 378. All these factors did not bode well for Hetty's return and reintegration into

In addition, assuming that in the future the villagers and tenants could regain their faith in Arthur, or arrange an acceptable relationship with him,²¹² her presence would have undoubtedly created a tension that would threaten to disrupt the restored communal harmony and unity. Such a situation would have substantially interfered with the inhabitants ability to reap the benefits they had been promised. Consequently, it remained imperative to sacrifice Hetty.²¹³

Although Hetty literally escaped the noose, her substitute penalty, transportation, can be interpreted as being commensurate to a death sentence.²¹⁴ In Hetty's case it was almost certain that transportation would produce an outcome that was identical to that of the noose: the cessation of her life by the state. First, the state's sentence of transportation mandated that she be banished²¹⁵ from all

Hayslope. See *infra* Appendix G for a discussion of the social and economic hardships a woman in Hetty's circumstances would be likely to encounter.

²¹² This is alluded to later after Adam agreed to Arthur's proposal for the future. See ELIOT, *supra* note 9, at 464-71. After Arthur's plan had been successfully implemented, Dinah inquired after Arthur. Adam informed her that Mr. Irwine had recently received a letter from him and that "he doesn't mean to come home. He's no heart for it yet." *Id.* at 484. The author's inclusion of the word "yet" supports the conclusion that the parties expected Arthur would eventually return to the estate. Presumably, this would occur when it was no longer "better for others that he should keep away." *Id.*; see *infra* pp. 167-69 and note 246 (describing Arthur's proposal and the chances of him ever returning to the Chase).

²¹³ This outcome, the continuing necessity for a human sacrifice, which reflects Professor Girard's contention regarding the relationship between the sacrifice and preserving or restoring the societal equilibrium, is embodied in one assessment of transportation as a form of punishment and the offenders who would be subject to it: "Transportation was first recognised as a punishment for persons leading an incorrigibly idle and disreputable life; *then for various classes of the community* that were at the time considered equally obnoxious and *dangerous to social order.*" RADZINOWICZ & HOOD, *supra* note 205, at 466 (emphasis added).

²¹⁴ It warrants noting that this would incontrovertibly be the case as Hetty would be executed if she returned to England and was discovered there before completely serving her transportation sentence. See PETTIFER, *supra* note 205, at 145-146.

²¹⁵ See *supra* note 206 and accompanying text; see also PETTIFER, *supra* note 205, at 144; Hirst, *supra* note 205, at 264 (describing Great Britain's transportation policy as being sent into exile); . The ancient Greeks frequently imposed the penalty of banishment or expulsion, "the mere withdrawal of the common support." VON HENTIG, *supra* note 15, at 17. It was a fairly reliable guarantee that the expelled person would die because he or she would be unable to fend for himself or herself due to the dangers posed by leading a solitary existence

and being denied ready access to the security and food supplied by the social unit that was critical for survival. *See id.* at 17-18. Banishment or expulsion "of the olden days was thus a method of killing the outlaw without raising a hand against him." *Id.* at 18. Cain's punishment for killing his brother Abel is one well-known example of this. "[Cain] was . . . compelled to wander away from the settled habitations of men into the surrounding wilderness, where there was neither family, nor law, nor God to protect him." AMRAM, *supra* note 40, at 24. *See also* SPIERENBURG, *supra* note 15, at 2 (describing how Germanic tribes expelled those members of the communities who threatened a vital communal interest). It was also used as a form of punishment in the sixteenth century. Franz Schmidt, the official executioner of Nuremberg, noted in his diary that on May 8, 1598, one individual who had been convicted of cheating in dealing with horses was "banished for life from the town and the district within ten miles of the same." FRANZ SCHMIDT, A HANGMAN'S DIARY: BEING THE JOURNAL OF MASTER FRANZ SCHMIDT PUBLIC EXECUTIONER OF NUREMBERG 1573-1617, 231-32 (C. V. Calvert & W.A. Gruner trans., Patterson Smith 1973). His diary also contains an entry noting that in 1611 the penalty imposed on a house thief was to be "forbidden [from] the city." *Id.* at 236. The Spanish, as an alternative to life imprisonment and execution by various methods, particularly burning, also used exile as a form of punishment during the Inquisition. *See* BISHOP, *supra* note 9, at 83. This penalty has been described as "a slower form of death in the great majority of cases." *Id.*; *see* Sean McConville, *The Victorian Prison*, in THE OXFORD HISTORY OF THE PRISON, *supra* note 205, at 135; Pieter Spierenburg, *The Body and The State* in THE OXFORD HISTORY OF THE PRISON, *supra* note 205, at 62-64; *see also* California First Amendment Coalition v. Calderon, 956 F.Supp. 883, 887 (N.D. Cal. 1997) (commenting on how the Massachusetts settlers used banishment, "[t]he most severe form of punishment"), *rev'd*, 138 F.3d 1298 (9th Cir.), *op. withdrawn and superseded by* 150 F.3d 976 (9th Cir. 1998); KENEALLY, *supra* note 205, at 126 (describing how one of the members of the New South Wales colony's death sentence was reprieved and he was sent "into exile on the exposed rock out in the harbour. He was to dwell there in caves and his supplies would be thrown to him weekly from a longboat. . . . The document declared that he was never to return from there"); SPIERENBURG, *supra* note 15, at 113, 123, 162 (relating instances where banishment was all or part of the penalty received in Amsterdam); Adam J. Hirsch, *From Pillory to Penitentiary: The Rise of Criminal Incarceration in Early Massachusetts*, 80 MICH. L. REV. 1179, 1224 (1982) (noting that expulsion from the community was a "[s]anction[] of last resort" for those "who had tried the community's patience once too often.") (emphasis added) (citation omitted). Hetty was not ignorant of her fragility and vulnerability in this independent living environment. In fact, a critical motivating factor in her decision that it was imperative to locate Arthur was "the terror of wandering out into the world, of which she knew nothing." ELIOT, *supra* note 9, at 365. After she left her relatives' farm to search for Arthur, the unlikelihood of her ability to survive independently is confirmed when she found herself at a loss as to what to do after her mission failed. *See id.* at 370-89. Afraid to return home, she ruminated about how "[s]he must wander on and on, and wait for a lower depth of despair to give her courage. Perhaps death would come to her, for she was getting less and less able to bear the day's weariness." *Id.* at 389 (emphasis added). During this time, the narrator expressed the following sentiments about Hetty:

Poor wandering Hetty. . . . My heart bleeds for her as I see her toiling

she knew and loved: her country, her village, and her family. This outcome was equivalent to severing her connections to life. Accordingly, Hetty's transportation sentence substantively constituted constructive banishment because "[i]t was a journey with little hope of return."²¹⁶ More importantly, however, was that banishment was considered a "genuine death sentence."²¹⁷ Although transportation was regularly substituted for death sentences, it was deemed "a slower, but usually no less sure death."²¹⁸ As a result, Hetty's transportation sentence,

along on her weary feet, or seated in a cart, with her eyes fixed vacantly on the road before her, never thinking or caring whither it tends, till hunger comes and makes her desire that a village be near. What will be the end?—the end of her objectless wandering, . . . clinging to life only as the hunted wounded brute clings to it?

Id. In fact, her recognition of her innate inability to survive independently could have culminated in her decision to commit infanticide, a capital offense, and it is why she steadfastly refused to assist at her trial. *See id.* at 417, 421, 428; *see also supra* notes 184-90 and accompanying text. Furthermore, her actions at trial aggravated her predicament and almost seemed calculated to ensure that the jury would find her guilty and that she would receive the death penalty. *See ELIOT, supra* note 9, at 427. Bartle Massey, Hayslope's schoolteacher, commented on this when he shared this confidence with Adam:

The doctors' evidence is heavy on her—is heavy. But she's gone on denying she's had a child from first to last: these poor silly women-things—they've not the sense to know it's no use denying what's proved. *It'll make against her with the jury, I doubt, her being so obstinate: they may be less for recommending her mercy, if the verdict's against her.*

Id. at 428 (emphasis added). In *The Playmaker*, Mary Brenham, one of the novel's central convict protagonists, received a seven year transportation sentence for stealing clothing from her master and mistress. *See KENEALLY, supra* note 205, at 43-44. One day Ralph, the novel's protagonist who eventually becomes Mary Brenham's lover, thought about her sentence and realized that "[t]he length of the sentence meant nothing now however. [Mary] inhabited a shore which was a fair model for eternity." *Id.* at 44. Given that reality, Ralph acknowledged "the unlikelihood of her or any of the others ever making a return." *Id.*

²¹⁶ *See RADZINOWICZ & HOOD, supra* note 205, at 472. The certainty of this consequence was reinforced by the "span of [transportation's] duration . . . [which] made it reasonably likely that the removal would ultimately be final." *Id.* at 471.

²¹⁷ HORWITZ, *supra* note 17, at 16; *see supra* note 215 and accompanying text.

²¹⁸ LANE, *supra* note 17, at 301; *see also* BISHOP, *supra* note 9, at 185 (noting that the British transportation sentence "was considered the equivalent of a death sentence"). *The Playmaker* alludes to how exile or banishment is tantamount to the imposition of a death sentence when the central character describes how it is unlikely that any of the transportees will ever return to Great Britain. *See KENEALLY, supra* note 205, at 44. This inevitable outcome of a sentence of exile

which is commensurate to being banished, is functionally equivalent to a state imposed death sentence. This is all the more true because Hetty did not survive.²¹⁹ Thus, in the final analysis, the collective successfully attained its objective: making a human sacrifice.²²⁰

And, despite a somewhat uncertain start, the community, in accordance with Professor Girard's theory, reaped benefits from sacrificing Hetty. Foremost was the restoration of the prevailing social order.²²¹ Moreover, arguably, the benefits bestowed upon the community exceeded this minimal expectation.²²² After Hetty's scheduled execution was aborted everyone returned to Hayslope.²²³ The Poysers, Adam, his brother Seth, and their mother prepared to leave Hayslope to reestablish their lives in an undetermined locale.²²⁴ However, one day while

was one reason that it was a frequently imposed penalty in ancient Greece. See VIOLENT ORIGINS, *supra* note 1, at 84; see also WHITTIER, *supra* note 41, at 185-86.

²¹⁹ See *supra* note 209 and accompanying text; ELIOT, *supra* note 9, at 538. In fact, Arthur predicted this outcome when at a chance meeting in the woods with Adam he expressed his fear that Hetty "may die under [transportation]." *Id.* at 470.

²²⁰ See DAVIES, *supra* note 3, at 49 (noting that "[b]anishment [is] in effect a form of sacrifice"). Davies' conclusion comports with Professor Girard's human sacrifice hypothesis that mandates the removal, by destruction or exile, of the sacrificial subject from the community. See GIRARD, *supra* note 6, at 266. Since banishment often results in death, Professor Girard's theory permits the use of exile or expulsion as a means of severing the responsible party's ties to the community. See *supra* note 215 and accompanying text. Nina Auerbach, another noted literary commentator, also concluded that Hetty and Tess were subjected to ritual slaughter. See NINA AUERBACH, *WOMAN AND THE DEMON: THE LIFE OF A VICTORIAN MYTH* 170 (1982).

²²¹ Tess' sacrifice also produced the same perceived beneficial outcome as her execution "symbolizes the sacrificial process by which persecutors turn victims into symbols not only of violence—in this case violent passions—but of peace and order as well." See KALIKOFF, *supra* note 9, at 119 (emphasis added). See also *infra* Appendix G for a discussion of additional features of Tess' sacrifice.

²²² See *supra* notes 213, 220-21 and accompanying text (describing the extent of the positive benefits that might flow from Hetty's immolation). See generally DAVIES, *supra* note 3, at 25 (noting that Edward Westermarck concluded that the community could reap long-term benefits from human offerings).

²²³ See ELIOT, *supra* note 9, at 463-65.

²²⁴ See *id.* at 463. Given what had transpired, Adam concluded that "[w]e shall all be better in a new country." *Id.* With the existence of the "trouble," Adam "had agreed with the Poysers that he would follow them to their new neighbourhood, wherever that might be . . . and settle with his mother and Seth in a home within reach of the friends to whom he felt bound by a mutual sorrow." *Id.* Although the location of their new home had yet to be determined,

walking in the grove for what he assumed would be the last time, Adam serendipitously encountered Arthur.²²⁵ Arthur presented an interesting proposal to Adam. He wanted Adam to remain at Hayslope, continue managing the woods there, and to convince the Poysers not to leave.²²⁶ Not surprisingly, Adam was disinclined to accept Arthur's proposal. But, Arthur included an additional and important component to his scheme: he promised to "[go] away for years"²²⁷ by having made arrangements to join the army.²²⁸ Arthur stated that "[o]ne of [his] reasons for going away is, that no one else may leave Hayslope—may leave their home on my account. I would do anything . . . to prevent any further injury to others through my—through what has happened."²²⁹

He emphasized that he was relinquishing his cherished dream to be the landlord of Hayslope, as his cousin Tradgett, "a good fellow,"²³⁰ would be his heir in the event he died while in the armed services. Plus, "Mr. Irwine is to have the chief authority on the estate."²³¹ Perhaps, more important, was Arthur's comment that the tenant farmers "will really be under no man, but one, [Mr. Irwine], whom they respect and like."²³² Finally, Arthur reminded Adam that if he stayed and managed the old woods on the estate it would be "*good work to do for the sake of other people, besides the owner.*"²³³ Being able to convince Adam to change his plans and remain in Hayslope and to continue managing the woods was critical to the success of Hetty's immolation. When Arthur approached Adam with this plan it was still very soon after the trial and the sentence commutation, and the members of the communities were still reeling from the disruption to their established social order. At the minimum, Arthur's scheme provided a way to immediately release some of the pressure under which the collective was existing, as he intended to depart for the

Mr. Poyser made it clear that "[w]e'll go out o' hearing o' that man's name." *Id.*

²²⁵ *See id.* at 464-65.

²²⁶ *See id.* at 468, 470-71.

²²⁷ *Id.* at 467.

²²⁸ *See id.* at 466.

²²⁹ *Id.*

²³⁰ *Id.* at 468.

²³¹ *Id.*

²³² *Id.*

²³³ ELIOT, *supra* note 9, at 468. (emphasis added).

army soon and he tried to prevent Adam, a respected member of the community from leaving. Plus, as Arthur correctly observed, Adam's presence on the estate as the manager of the woods would be beneficial to many of the members of the community. And, perhaps more importantly, Arthur's proposal included proceeding with the anticipated "repairs and improvements on the estate."²³⁴ Thus, notwithstanding the social tension caused by what Hetty's predicament symbolized, the social equilibrium that the villagers and tenants previously enjoyed would be restored and they would finally receive the benefits they had expected to materialize when Arthur's grandfather the Old Squire died. Implicitly comprehending the necessity of Arthur's proposition, Adam accepted it.²³⁵

Eighteen months later, all was tranquil in Hayslope. The situation had undergone a radical positive transformation.²³⁶ After Hetty's immolation, the communal equilibrium was restored and the villagers were able to reap a multitude of benefits. The Poyser's agreed, at Adam's request, to remain in Hayslope. Mrs. Poyser was busy at Hall Farm.²³⁷ The corn shed that Mr. Poyser desperately needed was finally under construction.²³⁸ The formerly underdeveloped Stonyshire side of the estate was in the process of being developed.²³⁹ The estate had new employees.²⁴⁰ And, the long awaited repairs to the estate were finally being made.²⁴¹ In addition, Mr. Irwine was actively and successfully involved in the estate's management.²⁴² And, Arthur, perhaps in an effort to regain his former integrity, remained committed to keeping his

²³⁴ *Id.* at 471; see also *supra* note 131 and accompanying text (referring to the benefits the villagers and tenants anticipated to receive when Arthur assumed the position of Squire of Chase Hall).

²³⁵ See ELIOT, *supra* note 9, at 471; see also GIRARD, *supra* note 6, at 271-72 (emphasizing how the human sacrificial process progresses without the participants actually realizing what is occurring).

²³⁶ It is at this time that Dinah notified Adam that she planned on leaving her family at Hall Farm soon and return to Snowfield because "their sorrows are healed." ELIOT, *supra* note 9, at 483.

²³⁷ See *id.* at 473-79.

²³⁸ See *id.* at 481.

²³⁹ See *id.*

²⁴⁰ See *id.* (noting Mr. Poyser and Adam's discussion about the new estate's steward).

²⁴¹ See *id.* at 480.

²⁴² See *id.* at 488.

promise not to return to Hayslope. In a letter to Mr. Irwine, Arthur, who remained attached to his military unit, stated that "he [didn't] mean to come home"²⁴³ because when he made the critical decision to depart, he believed "it's better for others that he should keep away."²⁴⁴ Adam confided in Dinah how Mr. Irwine "thinks he's in the right not to come."²⁴⁵ However, Arthur's continued absence from Hayslope and his decision to initiate the projects that would professionally, economically, and socially benefit the inhabitants of the two villages could reflect a conscious plan to eradicate the tarnish to his integrity so that one day, possibly not until in the far future, he could return, reclaim his rightful position, and do so while receiving the accolades he had dreamed of since his youth. Notwithstanding this possible hidden agenda, Arthur's strategy had proven to be successful to various individual members of the community and to the entire community as it eliminated the social tension and exceeded the previous level of unity. Of course, Hetty's presence threatened to undo all the good bestowed upon the residents of the villages, but might even have prevented it from occurring. If Hetty's return posed a threat to the newly found social equilibrium, did that not also apply to Arthur? Superficially, it appears that Arthur, like Hetty, cannot return to Hayslope. Remember, when he presented his proposal to Adam and convinced him to stay to help implement it, he did give his word that it was contingent upon him leaving the environs; presumably this meant he did not plan on returning.²⁴⁶ If that was the case, then Hetty's function as the sacrifice victim would be undermined. However, about eight years later Dinah, now

²⁴³ *Id.* at 484.

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ At their accidental meeting in the woods after Hetty had been transported, Arthur informed Adam that he was "going away . . . going into the army." *Id.* at 466. He also noted that "[w]as not he too obliged to renounce his most cherished hopes." *Id.* at 467. In addition, he informed Adam that "[i]f [he] were going to stay . . . and act as landlord . . . you would have some excuse, Adam, for going away and encouraging others to go." *Id.* He also made arrangements for his cousin to be his heir. *See id.* at 468. Thus, arguably these references lend credence to the supposition that Arthur did not intend to return and that his self-imposed banishment was another sacrifice that was necessary in order to restore the community's stability. In fact, confirmation of this contention was provided by Arthur's statement that "there is no sacrifice I would not make, to prevent any further injury to others." *Id.* at 466.

married to Adam, their two children, and Adam's younger brother Seth became excited as they watched a figure approaching them. Hurriedly, they went to meet this person.²⁴⁷ It was Adam returning home after visiting Arthur, who had recently returned to Hayslope. Adam and Arthur had not laid eyes on each other since Hetty was transported and Arthur embarked on his naval career eight years ago.²⁴⁸ During his absence Arthur distinguished himself in his profession as he returned with the rank of Colonel in the royal military.²⁴⁹ His arrival at Donnithorne was prompted by an injury which led the doctor to conclude that "he'll soon be set right *in his own country air*."²⁵⁰ Adam informed Dinah about how he observed Arthur's good qualities, the ones that the inhabitants of Hayslope and Broxton had previously attributed to him²⁵¹ and were considered inappropriately attributed to him after the calamity involving Hetty. Maybe those qualities were never absent, despite his indiscretion with Hetty, as everything he originally promised the residents had materialized.²⁵² But, more revealing was Dinah's anxious inquiry as to whether Adam remembered "to speak to Colonel Donnithorne the words my uncle and aunt intrusted to thee?"²⁵³ Adam answered affirmatively and assured her that Arthur was "going to the Hall Farm with Mr. Irwine the day after to-morrow."²⁵⁴ This is a rather astonishing turn of events as these are Hetty's relatives, the ones who only a few years earlier were devastated by the shame of having a relative condemned and then transported. The family felt destroyed as "[t]he sense of family dishonour was *too keen*."²⁵⁵ Her Uncle Poyser even spoke of the tremendous

²⁴⁷ See *id.* at 537.

²⁴⁸ See *id.* at 538.

²⁴⁹ Dinah referred to Arthur as "Colonel Donnithorne." *Id.* at 539.

²⁵⁰ *Id.* at 538 (emphasis added).

²⁵¹ See *id.*

²⁵² See *id.* at 467 (describing what the residents expected to occur once Arthur took over from his grandfather).

²⁵³ *Id.* at 539.

²⁵⁴ *Id.*

²⁵⁵ *Id.* at 413. Martin Poyser also claimed that the disgrace Hetty brought upon them "could never be wiped out." *Id.* This about face, as evidenced by their willingness to remain Arthur's tenants and to send words welcoming him "home," suggested not only that the disgrace was eliminated, but also that its destruction was aided by sacrificing Hetty, providing additional evidence of the successfulness of her immolation.

betrayal Arthur had committed on them.²⁵⁶ Now they were eager to welcome the source of the shame they once acutely experienced and the cause of their niece's demise back into the community's bosom.²⁵⁷ Adam's and the Poysers' acceptance of Arthur suggested that he had regained his integrity²⁵⁸ and will, in all likelihood, be deemed acceptable to assume the mantle of lord and master of Hayslope, the position to which he always aspired.²⁵⁹ Thus, "creation by means of loss"²⁶⁰ occurred as a marked improvement in the inhabitants' lives could not happen until Hetty was sacrificed through officially mandated transportation—the substantive equivalence to a state sanctioned death sentence.²⁶¹ Consequently, this final outcome emphasized Hetty's status as a sacrificial subject offered in a gesture of appeasement in order to save the communities as, in the end, Arthur did not fail the residents and was indeed their Savior.²⁶² The fulfillment of their life long expectations would have been impossible if Hetty had not been sacrificed through the judicial system.

²⁵⁶ See *id.*

²⁵⁷ Remember that her uncle stated that he would never speak to Arthur again and noted that Arthur had betrayed them by pretending to be of good character. See *supra* note 194 and accompanying text.

²⁵⁸ This is quite an achievement as before Hetty's conviction and ultimate exile, Adam, in an instance of foreshadowing, after surprising Arthur and Hetty, exclaimed that Arthur was "not the man [he] took [him] for." ELIOT, *supra* note 9, at 299. For a man with "Arthur's sensitiveness to opinion, the loss of Adam's respect was a shock to his self-contentment which suffused his imagination with the sense that he had sunk in all eyes." *Id.* at 310.

²⁵⁹ See *id.* at 467 (noting Arthur's description of being the landlord of Chase Hall and the County's Squire as his "most cherished hopes").

²⁶⁰ JEREMY TAMBLING, *DICKENS VIOLENCE AND THE MODERN STATE: DREAMS OF THE SCAFFOLD* 153 (1995) (noting that Georges Bataille explored how creation can be spurred by loss).

²⁶¹ See *supra* notes 215, 218, 220 and accompanying text (describing how transportation and exile are transformed into death sentences).

²⁶² See *supra* note 144 and accompanying text (noting that the residents perceived of Arthur as a Christ-like figure); see also Basch, *supra* note 145, at 261 (concluding that "Arthur returns to the scene of his crime, it seems forgiven . . . [which] implies a reintegration . . . and the forgiveness of the community he has so grievously wounded"). Likewise, the sacrifice of Tess produced its intended benefits as [Tess' execution] symbolizes the "sacrificial process by which persecutors turn victims into symbols not only of violence—in this case violent passions—but of peace and order as well." KALIKOFF, *supra* note 9, at 119 (emphasis added).

V. CONCLUSION

Professor Girard astutely identifies and expands on the intimate and complex relationship that exists between lethal criminal sanctions and human sacrifice. He observes how "the prisoner drew to his person all the community's inner tensions, all its accumulated bitterness and hatred. Through his death he was expected to transform maleficent violence into sacred beneficence, to reinvigorate a depleted cultural order."²⁶³

This statement elucidates how through the intentional killing of another human being pursuant to a mechanism sanctioned by the collective enables society to rid its pent up frustration and rage that, if unreleased, would threaten to topple the delicately maintained social regime. Consequently, his theory on human sacrifice is easily transferable to the death penalty context. The application of the individual components comprising Girard's human sacrifice theory to the fictional circumstances recounted in George Eliot's *Adam Bede* aptly demonstrated how capital punishment incorporates a not so hidden human sacrifice component.

Furthermore, since it is likely that a majority of the members of modern American society would view human sacrifice not only as an ancient practice, but also as a cruel one,²⁶⁴ then the continuation of a practice which embodies traits of human sacrifice is inconsistent with the Eighth Amendment's directive that all forms of punishment comport with the "evolving standards of decency that mark the progress of a maturing society."²⁶⁵ Consequently, the retention of a punishment containing this subtext violates the Eighth Amendment's express and unequivocal prohibition against the infliction of cruel and unusual punishments.²⁶⁶ Therefore, the practice of making human

²⁶³ See GIRARD, *supra* note 6, at 276.

²⁶⁴ Girard specifically mentions how "sacrifice is abhorrent to [society]". VIOLENT ORIGINS, *supra* note 1, at 109.

²⁶⁵ *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion); see also *Coker v. Georgia*, 433 U.S. 584 (1977) (holding that imposing the death penalty for rape violated the Eighth Amendment's proscription against the infliction of cruel and unusual punishments because it did not comport with the evolving standards of decency); *Gregg v. Georgia*, 428 U.S. 153 (1972) (holding that the death penalty was not *per se* unconstitutional because it comported with the evolving standards of decency and consequently did not violate the Eighth Amendment).

²⁶⁶ See U.S. CONST. amend. VIII.

sacrifices in the United States should be immediately curtailed.

Appendix A

The novelist Henry Fielding is a prime example of the congenial blending of law and literature. During the eighteenth century Fielding engaged in “prodigious activity as dramatist, journalist, novelist and magistrate.”¹ Not only did Fielding preside over criminal cases in the English counties of Westminster and Middlesex, near London, but also he authored classics such as *Tom Jones*,² *Amelia*,³ and *The History of the Life of the Late Mr. Jonathan Wild the Great*.⁴ The latter is based on the life of Jonathan Wild, a notorious highway robber, who ends his career by wearing a “hempen necktie” when he does the “Tyburn jig.”⁵ The character “Peachum” in John Gay’s *The Beggar’s Opera*,⁶ was modeled after Johnathan Wild.⁷

Furthermore, works exploring capital punishment issues constitute a genre within the law and literature field. George Orwell once enthusiastically commented: “What a remarkable anthology one could make of pieces of writing describing executions!”⁸ This anthology could include Poem

1. B.M. JONES, HENRY FIELDING: NOVELIST AND MAGISTRATE 13-14 (1933); LEON RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW, THE MOVEMENT FOR REFORM 404, n.20 (1948) (noting Henry Fielding’s status as a greatly admired jurist).

2. HENRY FIELDING, TOM JONES (John Binder & Simon Sterneds., Oxford Univ. Press 1996) (1749).

3. HENRY FIELDING, AMELIA (Martin C. Battestin ed., Clarendon Press 1983) (1751).

4. HENRY FIELDING, THE HISTORY OF THE LIFE OF THE LATE MR. JONATHAN WILD, THE GREAT (A.A. Knopf 1926) (1743).

5. BRIAN BAILEY, HANGMEN OF ENGLAND 2 (1989) (noting that the ropes used for the gallows were made from hemp, Tyburn was a primary public execution site in London, and the condemned were said to “dance in the air” as they strangled to death at the end of their nooses); JAMES BLAND, THE BOOK OF EXECUTIONS 37 (1993) (discussing Jonathan Wild’s crimes and his execution in May of 1725).

6. JOHN GAY, THE BEGGAR’S OPERA (Bryan Loughrey & T.O. Treadwell eds., Penguin Books 1986) (1728).

7. See *id.* at 20-21.

8. Richard W. Oram, *George Orwell’s “A Hanging” And Thackeray*, 21 AM. NOTES & QUERIES 108 (1983) (citation omitted).

IX that the poet A.E. Housman published in 1896. One particular stanza of this poem conveys Housman's anti-death penalty sentiments:

A neck God made for other use
Than strangling in a string.⁹

The poetic giant William Wordsworth occupied the opposite end of the spectrum. Between 1839 and 1840 Wordsworth "deliberately [composed 14] argumentative sonnets that endorsed capital punishment."¹⁰ Others also composed poems to convey messages pertaining to the death penalty.¹¹

Further, novelists have substantially contributed to this body of literature. Victor Hugo, William Makepeace Thackeray, Vladimir Nabokov, and Fyodor Dostoyevsky are among the literary luminaries who used their gifts with the written word to explore capital punishment issues.¹² More

9. A.E. HOUSMAN, *Poem IX*, in A SHROPSHIRE LAD (Waterville, Me., Colby College Library 1946) (1896).

10. William B. Thesing, *The Frame For The Feeling: Hangings in Poetry By Wordsworth, Patmore, and Housman*, in EXECUTIONS AND THE BRITISH EXPERIENCE FROM THE 17TH CENTURY TO THE 20TH CENTURY: A COLLECTION OF ESSAYS 124 (William B. Thesing ed., 1990) (discussing Wordsworth's pro-capital punishment sonnets) [hereinafter *EXECUTIONS AND THE BRITISH EXPERIENCE*]; see V.A.C. GATRELL, *THE HANGING TREE: EXECUTION AND THE ENGLISH PEOPLE 1770-1868*, 591 (1994) (noting that Wordsworth expressed his support for capital punishment in these 14 sonnets); Seraphia D. Leyda, *Wordsworth's Sonnets Upon The Punishment Of Death*, 14 *Wordsworth Circle* 48 (1983); see also *THE DEATH PENALTY: A LITERARY AND HISTORICAL APPROACH* 100-01 (Edward G. McGehee & William H. Hildebrand eds., 1964).

11. See W.L. HANCHANT, *THE NEWGATE GARLAND, OR FLOWERS OF HEMP* (1932) (compiling mid-nineteenth century prison and gallows poetry); ALBERT MIDLANE, *A COLLOQUY BETWEEN THE GALLOWES AND THE HANGMAN: A POEM ON THE EVILS OF CAPITAL PUNISHMENT; WITH NOTES* (1851); COVENTRY PATMORE, *A London Fete* in *POEMS VOL. II* 185 (1906); COVENTRY PATMORE, *A Sketch In The Manner of Hogarth*, in *TAMERTON CHURCH-TOWER AND OTHER POEMS* 208 (1854); Paul Mariah, *Always We Watch Them in PRISON WRITING IN 20TH-CENTURY AMERICA* 237 (H. Bruce Franklin ed., 1998) [hereinafter *PRISON WRITING*]; Jackie Ruzas, *Easy to Kill*, *id.*; JOHN GREENLEAF WHITTIER, *The Sentence of John L. Brown*, in *THE COMPLETE POETICAL WORKS OF JOHN GREENLEAF WHITTIER* 384-85 (1899); *id.* at 464-66 (*The Gallows*); *id.* at 468-70 (*The Human Sacrifice*); see generally LOUIS BLAKE DUFF, *THE COUNTY KERCHIEF* 181-212 (1949) (providing examples of execution literature).

12. See ALBERT BOROWITZ, *INNOCENCE AND ARSENIC: STUDIES IN CRIME AND LITERATURE*: 42-44 (1997) (discussing Thackeray's visit to Paris and the execution of Peytel); ALBERT CAMUS, *THE STRANGER* (Matthew Ward, trans. 1989) (1946); FYODOR DOSTOYEVSKY, *CRIME AND PUNISHMENT* (George Gibian ed.,

contemporary authors also have included capital punishment concerns in their works.¹³

MacMillian 1964) (1866), FYODOR DOSTOYEVSKY, *THE IDIOT* (Penguin Classics 1971) (1868); FYODOR DOSTOYEVSKY, *MEMOIRS FROM THE HOUSE OF THE DEAD* (Oxford Univ. Press 1983) (1862); THOMAS HARDY, *The Withered Arm in WESSEX TALES* 67-108 (Kathryn R. King, ed., 1992) (1888); VICTOR HUGO, *THE LAST DAYS OF A CONDEMNED MAN AND OTHER PRISON WRITINGS* (Geoff Woollen, trans., Oxford Univ. Press 1992) (1864); VLADMIR NABOKOV, *INVITATION TO A BEHEADING*, (1960); WILLIAM MAKEPEACE THACKERAY, *The Case Of Peytel in THE PARIS SKETCH BOOK OF MR. M.A. TITMARSH; THE IRISH SKETCH BOOK: AND NOTES OF A JOURNEY FROM CORNHILL TO GRAND CAIRO* 212-37 (1882); William Makepeace Thackeray, *Going To See A Man Hanged*, 22 *FRASER'S MAGAZINE* 150-57 (1840); see also LEONID ANDREYEV, *THE SEVEN WHO WERE HANGED* (Eugenia Schimanskaya & M. Elizabeth Gow, trans. 1947); CHARLES DICKENS, *BARNABY RUDGE* (Dodd, Mead 1944) (1841); CHARLES DICKENS, *GREAT EXPECTATIONS* ((Penguin Books 1999) (1861); CHARLES DICKENS, *OLIVER TWIST* (Wordsworth Editions 1992) (1832); CHARLES DICKENS, *A TALE OF TWO CITIES* (Penguin Books 2000) (1859); THOMAS HARDY, *TESS OF THE D'URBERVILLES: A PURE WOMAN* (New Am. Lib. 1964) (1891); FRANK LAYTON, *HANGED BY THE NECK* (1935); STUART MARTIN, *CAPITAL PUNISHMENT: A NOVEL* (1931); Benjamin Péret, *The Condemned Man's Last Night in LEGAL FICTIONS: SHORT STORIES ABOUT LAWYERS AND THE LAW* 327-30 (Jay Wishingrad ed., 1992); VIOLET VAN DER ELST, *THE TORTURE CHAMBER AND OTHER STORIES* (1937). Playwrights include GAY, *supra* note 6; JEAN GENET, *DEATHWATCH: A PLAY* (Bernard Frechtman, trans. 1989) (1949); ARTHUR MILLER, *THE CRUCIBLE* (1953); Brendan Behan, *The Quare Fellow in THE COMPLETE PLAYS* 35-125 (1978).

13. See also STEPHEN BECKER, *A COVENANT WITH DEATH* (1964); TRUMAN CAPOTE, *IN COLD BLOOD: A TRUE ACCOUNT OF A MULTIPLE MURDER AND ITS CONSEQUENCES* (1965); WILLIAM J. COUGHLIN, *DEATH PENALTY: A NOVEL* (1992); ALBERT FRENCH, *BILLY* (1993); ERNEST J. GAINES, *A LESSON BEFORE DYING* (1993); JOHN GRISHAM, *THE CHAMBER* (1994); STEPHEN KING, *THE GREEN MILE* (1997); NORMAN MAILER, *THE EXECUTIONER'S SONG* (1979); PHILIP MARGOLIN, *THE BURNING MAN* (1997); SHARYN MCCRUMB, *THE BALLAD OF FRANKIE SILVER* (1999); MARY WILLIS WALKER, *THE RED SCREAM* (1995); MARIANNE WESSON, *RENDER UP THE BODY* (1998); RICHARD WRIGHT, *NATIVE SON* (1940); Margaret Atwood, *Marrying the Hangman*, 7 *THE CAPILANO REV.* 17-19 (1975); Ernest Booth, *Ladies in Durance Vile in PRISON WRITING*, *supra* note 11 at 103; William S. Burroughs, *On Capital Punishment, Pornography, The Drug Trade, And The Predatory Nature Of Human Interaction*, 27 *CAL. WESTERN INTL. L. J.* 101, 102-03 (1996) (noting that Burrough's stated that sections of *Naked Lunch* "were written as a tract against Capital Punishment"); Jim Tully, *A California Holiday in PRISON WRITING*, *id.* at 90 (witnessing an execution by hanging at California's San Quentin Prison); Timothy J. Foley, *Warhorses* (1998) (on file with author); see generally DAVID GUEST, *SENTENCED TO DEATH: THE AMERICAN NOVEL AND CAPITAL PUNISHMENT* (1997); *THE DEATH PENALTY*, *supra* note 10; SARA L. KNOX, *MURDER: A TALE OF MODERN AMERICAN LIFE* (1998).

Appendix B

In one famous incident that occurred in the fifteenth century, "the magistrates of Basel sentenced a cock to be burned at the stake 'for the heinous and unnatural crime of laying an egg.'"¹⁴ More than 100 years later, in the sixteenth century, a dog named "Troevetie" was executed in Holland for mortally biting a child.¹⁵ The execution of a sow in fourteenth century France aptly reveals the parallels between human and animal sacrifices. In 1386, a French tribunal in Falaise "sentenced a sow to be mangled and maimed in the head and forelegs, and then to be hanged, for having torn the face and arms of a child and thus caused its death."¹⁶ Furthermore, "[a]s if to make the travesty of justice complete, the sow was dressed in man's clothes and executed on the public square near the city-hall."¹⁷

During the period in history when persecutions for witchcraft were rampant, pigs were especially at risk of being sentenced to death "since they were assumed to be peculiarly attractive to devils."¹⁸ "In earlier times, [Jews sentenced for theft] . . . had also been forced . . . to have dogs hanged alongside them."¹⁹

If an individual was convicted of committing "unnatural acts" with animals, the animal involved also encountered the possibility of receiving a death sentence.²⁰ For example,

14. E.P. EVANS, *THE CRIMINAL PROSECUTION AND CAPITAL PUNISHMENT OF ANIMALS* 162 (1998); see also BLAND, *supra* note 5, at 135.

15. See ALBERT HARTSHORNE, *HANGING IN CHAINS* 46-48 (1893).

16. BLAND, *supra* note 5, at 140; see also *THE ADVOCATE*, (Miramax Films, 1994) (involving the capital trial of a pig for the murder of a small child).

17. BLAND, *supra* note 5 at 140.; see also FREDERICK DRIMMER, *UNTIL YOU ARE DEAD: THE BOOK OF EXECUTIONS* 57, 261 n.5 (1990) (noting that "[s]ometimes animals responsible for human deaths, after being condemned, were dressed in human garments for execution" (citation omitted)); HARTSHORNE, *supra* note 15, at 40 (noting that in France some animals were condemned and hung in human clothes).

18. BLAND, *supra* note 5, at 165.

19. *Id.* at 257; see also *id.* at 134-36; HENRY CHARLES LEA, *SUPERSTITION AND FARCE* (Barnes & Noble 1996) (1870); HANS VON HENTIG, *PUNISHMENT: ITS ORIGIN, PURPOSE AND PSYCHOLOGY* 40, 54 (1937).

20. EVANS, *supra* note 14, at 147-50; see also DRIMMER, *supra* note 17, at 261, n.5 (commenting on the practice of executing the animal as well as the individual convicted of sodomy); Walter W. Hyde, *The Prosecution and Punishment of Animals and Lifeless Things in the Middle Ages and Modern Times*, 64 U. PA. L. REV. 696, 711 (1916) (noting that "[m]en detected in the crime of bestiality . . . were regularly put to death with the animal").

in 1581, George Schorpff of Ermb, Germany, was found "guilty of beastliness with four cows, two calves, and a sheep."²¹ Mr. Schorpff was first executed by beheading and then he and a cow, presumably one of the "offenders," were burned together.²² In another case involving bestiality, the animal, a mare, was the only party executed.²³ However, occasionally mercy was exercised and the animal's life was spared on the grounds that it had not consented.²⁴

This practice was not only confined to Europe and Britain. In 1642, the year of one of the earliest executions in American history, Thomas Graunger, a white slave boy, was killed for committing "unnatural acts" with a mare and a cow.²⁵ In addition, "[i]n compliance with a passage from the bible, which admonishes putting to death both the person(s) and the animal(s) involved in such a relationship, the good people of Plymouth Colony killed the mare, the cow, [and] all the cow's calves."²⁶

21. FRANZ SCHMIDT, *A HANGMAN'S DIARY: BEING THE JOURNAL OF MASTER FRANZ SCHMIDT PUBLIC EXECUTIONER OF NUREMBERG, 1573-1617*, 231-32 (C. V. Calvert & W.A. Gruner trans., 1973).

22. *See id.*

23. DRIMMER, *supra* note 17, at 118.

24. *See* EVANS, *supra* note 14.

25. Bill Currie, *Killing Kids Who Kill*: PRISON LIFE 41 (May 1993).

26. *Id.*

Appendix C

Tess, in sharp contrast to Hetty, was originally under no such illusion when her mother Joan repeatedly insisted that the gentleman, and their alleged cousin, Alec Stokes-D'Urberville had set his fancy on her *and* would most likely marry her if she went to Alec's mother's home in Trantridge to work as a poultry maid.²⁷ Tess's initial uncertainty regarding the validity of her mother's divinations about Alec d'Urberville's interest in marrying her, were later confirmed.

Alec coerces Tess into a sexual liaison by telling her how he has purchased new toys for her siblings and a new horse for her father to use in his business as a haggler, since the other one died while under Tess's "watch."²⁸ Several weeks later, she surreptitiously leaves Trantridge and Alec after realizing she has been duped. Tess also realizes that not only will Alec never marry her, but that he had never intended to marry her.²⁹ After learning that Tess has absconded, Alec goes in search of her. When he finds her, she informs him that she "didn't understand [his] meaning *until it was too late*."³⁰ Alec's "gentlemanly" retort is that "[t]hat's what every woman says."³¹ After her mother scolds her for letting Alec escape, Tess recalls that "[o]n matrimony [Alec] had never once said a word."³²

Alec, on the other hand, after apologizing for his "wrong" behavior, candidly informs Tess of the precise nature of the only position she would be able to occupy in his life. He accomplishes this by first reminding Tess that she "need not work in the fields or the dairies again."³³ He chides her for not "cloth[ing] [her]self in the best, instead of in the bald, plain way [she has] lately affected," . . . "as if [she] couldn't get a ribbon more than [she] earn[s]."³⁵ Needless to say, Tess, now acutely aware of the social obstacles that prohibit the fulfillment of her mother's

27. See HARDY, *supra* note 12, at 56-58.

28. See *id.* at 87.

29. See *id.* at 90-94.

30. *Id.* at 92 (emphasis added).

31. *Id.* (emphasis added).

32. *Id.* at 97.

33. *Id.* at 92.

34. *Id.*

35. *Id.*

expectations, becomes livid and exclaims that she “will not take anything more from [Alec] and [she] will not—[she]cannot! [she] *should* be [his] creature to go on doing that, and [she] won’t.”³⁶ This unfortunate experience has taught Tess what her rightful status is with respect to the untenableness of engaging in a respectable relationship with a “gentleman.” She now knows that, notwithstanding the blood of the ancient and noble d’Urbervilles that runs through her veins, the lines distinguishing class rank cannot be transcended to such a degree that would condone marriage between a dairymaid like herself and a “gentleman” like Alec.³⁷

Apparently, this social lesson was not indelible because several years later she capitulates and accepts Angel Clare’s marriage proposal. It was at the Crick’s dairy where she worked as a dairy maid that she made her acquaintance with Angel. Soon after their initial meeting, Tess realizes that she is attracted to Angel. Despite her past experience that made her acutely aware of the impossibility of such matches, Tess decides to delude herself by focusing on how “[s]uch *unequal attachments* had led to marriage.”³⁸ Later on, Tess fully recognized “the futility of [her] infatuation from a social point of view.”³⁹ In fact, Tess consistently refused Angel’s marriage proposal on the grounds that his middle-class parents would object to him marrying someone “such as [her],”⁴⁰ as they would want him “to marry a lady.”⁴¹ Angel, despite his numerous protestations to the contrary is greatly enthused and impressed when Tess tells him of her ancient noble lineage.⁴² Angel even comments on how this state of events will “make an appreciable difference to [society’s] acceptance of [her] as [his] wife.”⁴³ He even insists that she adopt the aristocratic spelling of

36. *Id.* at 92-93; see also ELIZABETH C. GASKELL, RUTH, 296-301 (Alan Shelston ed., World’s Classics 1906) (1853) (relating Ruth’s adamant refusals to her former lover’s entreaties that she come and live with him so they can reestablish their affair).

37. See HARDY, *supra* note 12.

38. *Id.* at 154 (emphasis added).

39. *Id.* at 163.

40. *Id.* at 188.

41. *Id.*; see also *id.* at 191, 199, 204-05, 211, 213, 215, 216, 220, 389 (describing instances in which Tess and others show concern over her marrying someone from a higher class).

42. See *id.* at 180-81, 191.

43. *Id.* at 206.

her surname: "D'Urberville," and cease using "Durbeyfield," the "common" spelling.⁴⁴

Once while walking in the meadows, Tess inquires about whether Angel is concerned that being seen walking with a dairy maid would be reported to his friends back home.⁴⁵ Angel claimed that this did not concern him. However, among the reasons he gave was Tess's status as a member of the ancient d'Urberville family.⁴⁶ Furthermore, even after their engagement, Angel's social status bias surfaces when he nixes Tess's suggestion that she remain at the dairy while he goes to locate a farm overseas because "[h]is influence over her had been so marked that she had caught his manner and habits, his speech and phrases . . . to leave her in farmland would be to let her slip back again out of accord with him."⁴⁷

Theodore Dreiser's novel *An American Tragedy* also addresses the crisis that occurs when status boundaries are attempted to be crossed.⁴⁸ Clyde, the central protagonist, mistakenly thinks that he, a member of the lower socio-economic class, can elevate his status by establishing and maintaining a serious relationship and possibly entering into matrimony with Sondra, the daughter of a prosperous man.⁴⁹ Operating pursuant to this fallacy, Clyde murders Roberta, his pregnant working class mistress.⁵⁰

44. *Id.*

45. *See id.* at 211.

46. *See id.*

47. *Id.* at 221 (emphasis added).

48. *See* GUEST, *supra* note 13, at 45-74.

49. *See id.* at 49, 58, 66.

50. *See id.* at 65-66.

Appendix D

In addition to murder and sheep and deer stealing, death-eligible crimes included: uprooting a shrub in a public park; being in the company of gypsies; damaging a rabbit warren; forgery; highway robbery; theft from a dwelling if the value of the item exceeded one shilling; shoplifting; theft of goods with a value of five shillings or more from a store or warehouse; extortion; counterfeiting; coining; and other less serious offenses.⁵¹ An inordinate number of these capital crimes were for the commission of property offenses.⁵²

One reason for this phenomenon was that “[w]henver any offence against private property *increased to an inconvenient degree, it was made capital.*”⁵³ The preeminent death penalty expert William Bowers surmises that “[b]y and large, new capital statutes extended the death penalty to offenses against property and commerce, *evidently to*

51. See RADZINOWICZ, *supra* note 1; see also BAILEY, *supra* note 5, at 20-21; DICKENS, BARNABY RUDGE, *supra* note 12 (noting that the death penalty applied to the commission of minor offenses, including shoplifting); PETER LINEBAUGH, THE LONDON HANGED: CRIME AND CIVIL SOCIETY IN THE EIGHTEENTH CENTURY 96 (1992) (relating the 1743 judicial execution of a man for “silvering over copper farthings and passing them off as six-penny bits”).

52. See BAILEY, *supra* note 5, at 19; Douglas Hay, *Property, Authority and the Criminal Law*, in ALBION'S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH CENTURY ENGLAND 18 (1975) (commenting on how most capital offenses “concerned offences against property”); see also ELINOR LANDER HORWITZ, CAPITAL PUNISHMENT, U.S.A. 15 (1973) (observing that economic crimes “constituted by far the greatest number of offenses for which people have been sentenced to death”); PIETER SPIERENBURG, THE SPECTACLE OF SUFFERING: EXECUTIONS AND THE EVOLUTION OF REPRESSION FROM A PREINDUSTRIAL METROPOLIS TO THE EUROPEAN EXPERIENCE 135 (1984) (noting that “property crimes were not usually viewed as permissible by the popular classes [in seventeenth and eighteenth century Amsterdam]”); cf. R.J. Evans, *Justice Seen, Justice Done?: Abolishing Public Executions In 19th-Century Germany*, 46 HIST. TODAY 20, 23 (1996) (noting that in Germany “relatively low priority [was] given to property crimes in comparison with capitalist England”).

53. JONES, *supra* note 1, at 220 (emphasis added). See WILLIAM J. BOWERS, EXECUTIONS IN AMERICA 169 (1974) (noting that “[a]t least a hundred capital offenses were added during the agricultural and industrial revolutions of the eighteenth century alone”); GEORGE RYLEY SCOTT, THE HISTORY OF CAPITAL PUNISHMENT ix (1950) (noting the “creation of a multiplicity of capital offences in the early years of the nineteenth century”); VISCOUNT TEMPLEWOOD, THE SHADOW OF THE GALLOWS 16-17 (1951) (observing that during the eighteenth century “new capital offences were constantly added to the Statute Book”).

protect economic interests within English society."⁵⁴ Ultimately, as the noted capital punishment scholar John Laurence succinctly concluded: this penal policy embodied the socio-economic principle that "[p]roperty, even more than person, was under the guardianship of the gallows."⁵⁵ Peter Linebaugh, another distinguished capital punishment historian and commentator, agrees with this proposition as he contends that:

*[m]ost of those hanged had offended against the laws of property, and at the heart of the 'social contract' was respect for private property . . . so each hanging repeated the lesson: 'Respect Private Property.' So, if the hangings are to be considered as dramas, the conflict that they represented was the conflict of the Powerful and the Propertied against the Weak and the Poor.*⁵⁶

The narrator of A.E. Housman's poem, *The Carpenter's Son*, accurately expresses how these economic values influenced the administration of justice:

Here the hangman stops his cart:
 Now the best of friends must part.
 Fare you well, for ill fare I:
 Live, lads, and I will die.
 'Oh, at home had I but stayed
 'Prenticed to my father's trade,
 Had I struck to plane and adze,
 I had not been lost, my lads.
 'Then I might have built perhaps
 Gallows-trees for other chaps,
 Never dangled on my own,
 Had I but left ill alone.
 'Now, you see, they hang me high,
 And the people passing by
 Stop to shake their fists and curse;
 So 'tis come from ill to worse.
 'Here hang I, *and right and left*
Two poor fellows hang for theft:
 All the same's the luck we prove,
 Though the midmost hangs for love.
 'Comrades all, that stand and gaze,

54. See BOWERS, *supra* note 53, at 169 (emphasis added).

55. JOHN LAURENCE, A HISTORY OF CAPITAL PUNISHMENT 13 (1963).

56. LINEBAUGH, *supra* note 51, at xx (emphasis added).

Walk henceforth in other ways;
See my neck and save your own:
Comrades all, leave ill alone.
Make some day a decent end,
Shrewder fellows than your friend.
Fare you well, for ill fare I:
Live, lads, and I will die.⁵⁷

The 1777 public hanging of the Reverend Dr. Dodd in London emphasizes the seriousness attached to the commission of capital offenses in this category. Dr. Dodd committed forgery by signing the name of his former student, a member of the aristocracy, to a promissory note. Once the fraud was discovered, he immediately agreed to make restitution of the amount actually spent. However, he was sentenced to be publicly hanged. The fact that he received a death sentence for forgery highlights how the collective perceived the gravity of property offenses because Dr. Dodd, unlike the majority of the condemned, was a member of the upperclass.⁵⁸ The severity of such crimes is further underscored by the failure of a number of England's notable figures, such as Dr. Samuel Johnson, to convince the Crown to commute Dodd's sentence.⁵⁹ Even Dodd's elevated class status could not militate opinions like the following that was expressed by one British jurist on the appropriate penalty for those who commit certain property offenses: "in cases of forgery capital sentences ought always to be put into execution, and explaining it by the then widespread belief that England's commercial credit required forgery to be punished by death."⁶⁰

Charles Dickens' novel *Barnaby Rudge* supplies another example of the seriousness of property offenses. In *Barnaby*

57. HOUSMAN, *supra* note 9, at 63 (emphasis added).

58. See RADZINOWICZ, *supra* note 1, at 450-72.

59. See *id.* at 456-59, 462-64.

60. *Id.* at 100 n.68; see also DUFF, *supra* note 11, at 114-18 (discussing Dr. Dodd's life, offense, and subsequent execution); GATRELL, *supra* note 10, at 188 (noting that "[a] fifth of English executions between 1805 and 1818 were for forgery"); LAURENCE, *supra* note 55, at 14 (noting that in 1820 at least 46 people were executed for forging Bank of England notes); John J. Burke, Jr., *Crime and Punishment in 1777: The Execution of the Reverend Dr. William Dodd and Its Impact Upon His Contemporaries in EXECUTIONS AND THE BRITISH EXPERIENCE*, *supra* note 10, at 63 (noting that Boswell's comments about Dr. Samuel Johnson's advocacy on behalf of Dodd included the opinion that forgery "is the most dangerous crime in a commercial country").

Rudge, the character Hugh follows his mother's footsteps as she had been hung for "passing forged notes."⁶¹ Another commentator observes that during the time of Dickens, the "relationship between patriarchy and property [was] dependent upon hanging."⁶² This reflected the social environment at the time the Industrial Revolution was occurring and the size of the mercantile class was rapidly increasing.⁶³ Accordingly, "[b]y and large, new capital statutes extended the *death penalty to offenses against property and commerce, evidently to protect economic interests within English society.*"⁶⁴

Although Pieter Spierenburg, the author of *The Spectacle of Suffering*, categorizes the crime of counterfeiting as a crime against authority and not as a property offense,⁶⁵ he does conclude that counterfeiting was one of the "most risky adventures one could engage in."⁶⁶ His investigation of fifteen counterfeiting cases that occurred in early eighteenth century Amsterdam revealed that thirteen of the fifteen offenders were executed.⁶⁷ "The other two received the 'penalty nearest to death,' but they had merely clipped coins."⁶⁸

Expressing sentiments similar to those of the English judge who vocalized his belief that death was the only appropriate sentence for forgers, one Amsterdam official at a 1669 trial for counterfeiting demanded that the transgressor should be brought onto the scaffold in front of the town hall of this city, his right hand be cut off, then punished with the sword until death follows, his body laid

61. DICKENS, *BARNABY RUDGE* *supra* note 12, at 522.

62. JEREMY TAMBLING, *DICKENS, VIOLENCE AND THE MODERN STATE: DREAMS OF THE SCAFFOLD* 134 (1995).

63. See LINEBAUGH, *supra* note 51, at 101, 115-16; see also HOWARD ENGEL, *LORD HIGH EXECUTIONER: AN UNASHAMED LOOK AT HANGMEN, HEADSMEN, AND THEIR KIND* 25 (1997); GATRELL, *supra* note 10, at vi (noting that others have identified the link between the rendering of death sentences and class); RADZINOWICZ, *supra* note 1, at 29 (noting that the "rapid accumulation of wealth in dwelling-houses and shops" led to insecurity and resulted in an increase in acts that were criminalized and the number that were made capital).

64. BOWERS, *supra* note 53, at 169 (emphasis added); see also SCOTT, *supra* note 53, at 37-40 (advancing the contention that perceived threats to the stability of economic and commercial interests in England contributed to the increase in the number of property crimes that were deemed capital offenses).

65. SPIERENBURG, *THE SPECTACLE OF SUFFERING*, *supra* note 52, at 133.

66. *Id.*

67. See *id.*

68. *Id.*

upon a wheel and his head put on a stake to be eaten by the birds and consumed by the air.⁶⁹

Subsequently, the opinions of the burgomasters and the judges were asked. The president noted that:

[v]arious criminal lawyers wrote about the penalty for counterfeiters. Some say they should be boiled in oil, some think they should be burned. Still others argue for cutting off a hand followed by hanging or beheading.⁷⁰

This comment initiated the ensuing discourse about the appropriate method of execution for the condemned man:

Roetert Ernst wanted a hand cut off followed by garroting. Geelvink and Backer favored the sword, while the second also wanted the instruments to be broken. Cloek argued⁷¹ for cutting off a hand, garroting and scorching the convict's face.

In the end, "[t]he president concluded that the majority favored beheading without prior mutilation, while the public breaking of instruments was outvoted. The convict's body should be laid upon a wheel and his head put on a stake on the gallows field. The sentence was approved accordingly."⁷²

The similarity between the approaches adopted in Amsterdam and England with respect to the commission of forgery, fraud, and counterfeiting increases when the situation involving Amsterdam's equivalent of a "Dr. Dodd" incident is examined. In 1670, Theodorus van de Perre was convicted of committing fraud.⁷³ His offense, like Dr. Dodd's, involved improperly appropriating a substantial sum of money. Like Dr. Dodd, van de Perre was a member of the upper-class,⁷⁴ and he was beheaded for this transgression.⁷⁵ Interestingly, Pieter Spierenburg classifies van de Perre's offense as a white collar crime.⁷⁶ Although Dodd's and van de Perre's executions offer examples of the tremendous importance placed on property and property crimes, there is

69. *Id.* at 134.

70. *Id.*

71. *Id.*

72. *Id.*

73. *See id.* at 158.

74. *See id.* (describing him as the "lord of the manor of der Aa").

75. *See id.*

76. *See id.*

a significant difference between the two cases. In the latter case, the victims were members of the poorer constituency of van de Perre's manor; while in the former, the victim was a member of the aristocracy.⁷⁷ In both cases, however, there had been the violation of positions of trust between the offenders and the victims. In Dodd's case, he was deceitful towards a former student who held him in high esteem, and in van de Perre's case, he fleeced those whose survival was dependent upon his honesty.

77. See RADZINOWICZ, *supra* note 1, at 459-69.

Appendix E

Despite its formidable symbolism, the cap was actually “[a] piece of black silk about nine inches square.”⁷⁸ The cloth’s color is an accurate representation of the reality of the sentence, since black was traditionally “the color of all things dark, unknown, and often deadly; therefore, it was evil personified.”⁷⁹ The ritual of placing the cloth on the head was most likely derived from ancient practices when covering the head was “regarded as a sign of mourning.”⁸⁰ It also functions as a means of formally recognizing the “solemnity of the proceedings.”⁸¹

Amsterdam officials, like their British counterparts, incorporated the color black into their ceremonial pronouncement of death sentences. On Saturday, execution day, the officials gathered at the town hall wearing their black robes.⁸² Although the robes were dark hued, they were referred to as “blood-robes” because of the impending executions.⁸³ It was while the officials wore their “blood-robes” with the “blood-sashes,” which were “partly colored red,”⁸⁴ that “the capital sentences were read for the first time.”⁸⁵

Since officials donning black clothing communicated a message of impending doom, the prisoners’ concerns escalated if their trial was held on Friday. Like the official black attire, the direction West,⁸⁶ and the direction left,⁸⁷ Friday has an equally malevolent connotation.⁸⁸ In the

78. BRIAN LANE, *THE ENCYCLOPEDIA OF CRUEL AND UNUSUAL PUNISHMENT* 84 (1993).

79. CAROLE POTTER, *KNOCK ON WOOD AND OTHER SUPERSTITIONS* 29 (1983); see also *A DICTIONARY OF SUPERSTITIONS* 28 (Iona Opie & Moira Tatem eds., 1989) (noting that black was the “Devil’s colour”); *ENCYCLOPEDIA OF MAGIC AND SUPERSTITION* 76 (1974) (noting that black was the “hue of death”).

80. ROYAL COMMISSION ON CAPITAL PUNISHMENT, *MINUTES OF EVIDENCE TAKEN BEFORE THE ROYAL COMMISSION ON CAPITAL PUNISHMENT* 255 (1949) [hereinafter *Royal Commission*].

81. *Id.* at 267.

82. See SPIERENBURG, *supra* note 52, at 46.

83. See *id.*

84. *Id.* at 46-47.

85. *Id.* at 47.

86. See *infra* Appendix F.

87. See *id.*

88. See POTTER, *supra* note 79, at 84 (quoting the old wives tale that “Now Friday came. Your old wives say, Of all the week’s the unluckiest day.

novel *A Lesson Before Dying*, Grant Wiggins explains to Jefferson that the reason Jefferson will be executed on a Friday is because Jesus died on a Friday.⁸⁹

Consequently, Friday was generally believed to be an unlucky day for a capital trial to be held on because of the increased probability of receiving a death sentence.⁹⁰ In *Adam Bede*, Hetty's capital trial was held on a Friday and she was sentenced on that day to "be hanged by the neck til [she] be dead."⁹¹ In other jurisdictions Friday was commonly "known as Hangman's Day because executions often took place on it."⁹² This traditional practice recently reasserted itself when Ricky Lee Sanderson's execution by the state of North Carolina was scheduled for Friday, January 30, 1998.⁹³ Mr. Sanderson was executed as scheduled.⁹⁴

(Anonymous"); see also A DICTIONARY OF SUPERSTITIONS, *supra* note 79, at 168 ("1924 *Folklore* 347 [Westleton, Suffolk] 'The fisherman say: 'A Friday's sail, Always fail'"); *id.* at 167 (stating "[i]n our rural parishes . . . [sic] Friday is considered unlucky, as being the day, I suppose, on which our Blessed Saviour suffered on the Cross (1867 *Gents Magazine*, pt I 740 [Suffolk]"); POTTER, *supra* note 79, at 84 (noting that one reason Friday is considered unlucky is because "Christ was crucified on a Friday"); ALBANY POYNTZ, A WORLD OF WONDERS, WITH ANECDOTES AND OPINIONS CONCERNING POPULAR SUPERSTITIONS 308 (1845) (stating that "Friday is regarded as the most unlucky day of the week, from being that of the crucifixion of Jesus Christ").

89. See GAINES, *supra* note 13, at 156-58.

90. See ABBOTT, *supra* note 90, at 139 (noting that defendants tried on Friday were concerned because capital trials were held on that day); POTTER, *supra* note 79, at 84-85 (stating "[c]riminals say if you're sentenced on a Friday, you will receive a stiffer sentence"); SPIERENBURG, *supra* note 52, at 66 (noting that the death sentence of a woman convicted of murder in eighteenth century Amsterdam was announced on a Friday); *id.* at 46 (commenting that in Amsterdam Friday was referred to as "justice day" because death sentences were confirmed on that day, the day before the executions were carried out).

91. GEORGE ELIOT, ADAM BEDE 436, 443 (Valentine Cunningham ed., Oxford Univ. Press 1996) (1859) (noting that Mr. Irwine sent Arthur a note informing him that "Hetty Sorrel is in prison, and will be tried on Friday for the crime of child-murder").

92. POTTER, *supra* note 79, at 85; see DRIMMER, *supra* note 17, at 120-23 (noting the United States Army executed by hanging thirty-eight Sioux Indians on December 26, 1862, a Friday - "Doomsday"); DAVID LAMSON, WE WHO ARE ABOUT TO DIE: PRISON AS SEEN BY A CONDEMNED MAN 52 (1935) (noting that in California men received haircuts and a shave if they were to be executed that Friday); *id.* at 127, 216, 219 (referring to Friday as execution day); ARTHUR S. MILLER & JEFFREY H. BOWMAN, DEATH BY INSTALLMENTS: THE ORDEAL OF WILLIE FRANCIS 140 (1988) (stating that after losing his legal argument that the Constitution forbid attempting to execute him a second time, Willie Francis's second, and final, execution was scheduled for and held on a Friday).

93. See Joseph Neff, *Victim's family push for Friday execution*, THE NEWS &

This tradition also appears in literary works exploring capital punishment themes. For example, Victor Hugo's protagonist Claude Geux was executed on a Friday.⁹⁵ In Albert French's novel *Billy*, the ten year-old protagonist is executed on a Friday.⁹⁶ The execution witnessed by several characters in a short story by Jim Tully was held on a Friday.⁹⁷ In another short story, a woman in the female section of San Quentin psychologically and emotionally attempts to brace herself for the execution of her new husband, which is to be held on a Friday morning.⁹⁸ The notorious satirical British magazine *Punch* mentions this belief in this squib that was published in 1849:

The Gibbet Cure . . . 'SUPERSTITION.-On *Friday* last a respectable looking female, afflicted with a wen in the neck, applied at *Lincoln Castle*, after the execution of *WARD*, for leave to see the body, with a view of curing her disease; the, request was very properly refused.'⁹⁹

OBSERVER (Raleigh, N.C.), <<http://www.news-observer.com/>> (on file with author and with the *Buffalo Law Review*) (Jan. 26, 1998).

94. NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, DEATH ROW U.S.A. REP. 6 (Fall 1998).

95. See HUGO, *supra* note 12, at 187 n.124.

96. See FRENCH, *supra* note 13, at 188.

97. Tully, PRISON WRITING, *supra* note 11, at 95.

98. Booth, PRISON WRITING, *supra* note 11, at 116-17; see also SHARYN McCRUMB, THE BALLAD OF FRANKIE SILVER 276, 299-300 (1999) (stating Frankie, the central female character in this novel, was executed by hanging on a Friday).

99. ENGEL, *supra* note 63, at 11 (emphasis added).

Appendix F

After arriving in New South Wales, the female convicts frequently faced yet another type of sexual exploitation: concubinage.¹⁰⁰ For some women this could mean moving to the eastside of the stream that divided the penal colony.¹⁰¹ The eastside was the more desirable location and the westside less desirable,¹⁰² because the latter was where the convicts resided and consequently was considered to present a more dangerous living environment.¹⁰³

Interestingly, this directional split corresponds with the attributes traditionally associated with "east" and "west." "West" is considered a sinister direction and is associated with death since the sun dies there each evening.¹⁰⁴ This "unwholesome association of death with the sun comes from early man's worship of the sun."¹⁰⁵ In contrast, it has been customary to associate east with happiness because the sun rises from that direction signaling the beginning of a new day¹⁰⁶ and the continuation of life.¹⁰⁷ It is for this reason that "[s]acrifices to the sun god were always made at sunrise."¹⁰⁸

Certain rites and events connected to judicially sanctioned executions embody this historical dichotomy. The infamous Newgate Prison in London, England, where the condemned were housed before starting the trek to the Tyburn Tree, the site of the scaffold, constitutes an ironically fitting example. The prison's name, Newgate, is

100. See THOMAS KENEALLY, *THE PLAYMAKER* 27-28, 37, 42, 45, 80-81, 289 (1987); see also ERNEST W. PETTIFER, *PUNISHMENTS OF FORMER DAYS* 150 (Waterside Press 1992) (1939) (noting that "in the early days of transportation to Australia the outlook for the women, on arrival, was a *terribly depressing one*") (emphasis added). The more "fortunate" female convicts were selected by the naval officers to be their mistresses. KENEALLY, *supra*, at 42, 45, 320-330 (discussing that Ralph Clark finally asks Mary Brenham to be his "lag-wife" and has a hut built for her behind his home).

101. See KENEALLY, *supra* note 100, at 31, 42.

102. See *id.* at 30-31, 61.

103. See *id.* at 63, 290.

104. See *ENCYCLOPEDIA OF MAGIC AND SUPERSTITION*, *supra* note 79, at 76; see also GRACE A. MURRAY, *ANCIENT RITES AND CEREMONIES* 69 (Senate 1996) (1929), (noting how in ancient Greece "[o]mens which came from the East were good . . . but omens that appeared from the West were bad, insomuch as the Sun declines in that direction").

105. POTTER, *supra* note 79, at 184.

106. See *ENCYCLOPEDIA OF MAGIC AND SUPERSTITION*, *supra* note 79, at 76.

107. See POTTER, *supra* note 79, at 184.

108. *Id.*

derived from the name "Westgetum," the name the Romans gave to that specific location because it was the site of the west gate to the city.¹⁰⁹ This direction's connection to death and evil is further illustrated by the westerly direction of the three mile procession from Newgate Prison to the Tyburn Tree, the site of the gallows.¹¹⁰

There is yet another ritual of this sacrificial ceremony that cements this relationship between west and evil. This involved the placement of the body on the scaffold. Many executioners believed that a person should only be hung facing the west, and "never be hanged facing east."¹¹¹ Several lines in A.E. Housman's poem *The West* poignantly convey this direction's malevolence:

Beyond the moor and mountain crest
—Comrade, look not on the west—
The sun is down and drinks away
From air and land the lees of day.

...

Comrade, look not on the west:
'Twill have the heart out of your breast;
'Twill take your thoughts and sink them far,
Leagues beyond the sunset bar.

...

When you and I are spilt on air
Long we shall be strangers there;
Friends of flesh and bone are best:
*Comrade, look not on the west.*¹¹²

Another literary example of this direction's diabolical significance is presented in the novel *New Grub Street* by

109. See DONALD RUMBELOW, *THE TRIPLE TREE: NEWGATE, TYBURN AND OLD BAILEY* 15 (1982).

110. See ABBOTT, *supra* note 90, at 29 (noting that during the procession from Newgate to the gallows at Tyburn the condemned would say that they were "going west"); ENGEL, *supra* note 63, at 25 (noting that "gone west" was a euphemism for dying that came from the drive west from Newgate to Tyburn); PETER LINEBAUGH, *The Tyburn Riot Against The Surgeons in ALBION'S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH CENTURY ENGLAND* 65 (1975) (noting that the gallows was "some three miles west of Newgate across London at Tyburn"); *id.* at 66 (noting that the phrase "to go west" meant to be hanged); LINEBAUGH, *supra* note 51, at 76 (describing the death of a notorious English judge as having "also gone west").

111. ENGEL, *supra* note 63, at 76.

112. A.E. HOUSMAN, *LAST POEMS* 11-13 (1922) (emphasis added).

George Gissing.¹¹³ As the Milvain family eats breakfast, the church clock strikes eight o'clock. The sound reached them because "the strokes were borne very distinctly *on the west wind*."¹¹⁴ This is the moment when the Milvain's son advises them that someone has just been hung.¹¹⁵ Thus, the westerly winds have communicated death. This breakfast scene also introduces another traditional ritual of the sacrificial ceremony as it was practiced in Great Britain. Eight o'clock was the hour customarily designated for the execution ceremony.¹¹⁶ When execution guidelines were eventually standardized in Great Britain, they included the requirement that executions be held at 8:00 a.m.¹¹⁷ Hetty's execution was probably scheduled to occur at this hour as the cart conveying her to the scaffold departed from the prison at 7:30 a.m.¹¹⁸ Housman's poem *Eight O'Clock* also embodies this ancient rite:

He stood, and heard the steeple
 Sprinkle the quarters on the morning town.
 One, two, three, four, to market-place and people
 It tossed them down.
 Strapped, noosed, nighing his hour,
 He stood and counted them and cursed his luck;

113. GEORGE GISSING, *NEW GRUB STREET* (John Halperin ed., Ryburn Publ'g 1992) (1891).

114. *Id.* at 3 (emphasis added).

115. *See id.*

116. *See* ABBOTT, *supra* note 90, at 105-06 (noting that Victorian guidebooks advised tourists that executions occurred at 8:00 a.m.); *id.* at 146-47 (noting the last two hangings in England occurred at 8:00 a.m. on August 13, 1964); *id.* at 139 (noting that Fridays were considered unlucky because capital trials were held on that day and the executions were carried out on Mondays at 8:00 a.m.); LAURENCE, *supra* note 55, at 53 (noting that 8:00 a.m. was the traditional hour for hanging in England during the nineteenth and twentieth centuries); MIDLANE, *supra* note 11, at 5 (during a conversation with the hangman, the gallows comments on the "bright morning sun"); ALBERT PIERREPOINT, *EXECUTIONER: PIERREPOINT* 108, 112-13 (1974); *see also* HUGO, *supra* note 12, at 123 (stating Claude Geux was guillotined at 8:00 a.m.).

117. *See* STEVE FIELDING, *THE HANGMAN'S RECORD, VOLUME ONE 1868-1899* (1994) (capital punishment rules dated June 5, 1902 made by the Secretary of State for the Home Department regarding the time of execution "[f]or the sake of uniformity") (on file with author).

118. *See* ELIOT, *supra* note 91, at 460; *see also* HARDY, *supra* note 12, at 419 (stating Angel and Tess's sister Liza-Lu are near West Hill when "the clocks in the town struck eight" notifying them that Tess had been executed).

And then the clock collected in the tower
Its strength, and struck.¹¹⁹

Clarence Darrow read this poem during his closing argument in the Loeb and Leopold capital trial.¹²⁰

Housman penned another poem addressing this symbol of eight o'clock:

So here I'll watch the night and wait
To see the morning shine,
When he will hear the stroke of eight
And not the stroke of nine;¹²¹

The *Newgate Garland*, a compilation of prison poems, includes a ditty about this lethal hour; albeit, less poetic than Housman's. It is as follows:

At *eight* I quit this sublunary scene
They give us brandy . . .¹²²

This practice of scheduling executions for the early morning is a continuation of the practice of making sacrifices during the early morning hours so that the sun god would receive the offering and provide another day of life for the populace.¹²³

"Left," like "west," also traditionally has had sinister qualities. An exchange between Albert Pierrepoint, the heir to the quasi-dynasty position of Number One Executioner of Great Britain, and Sir Ernest Gowers, Chairman of the Royal Commission On Capital Punishment, demonstrates the magnitude of the link between "left" and malevolency:

The Knot, as you showed us this morning,
Must always be under the angle of the *left jaw*?
-Yes

119. HOUSMAN, *supra* note 112, at 35.

120. Thesing, EXECUTIONS AND THE BRITISH EXPERIENCE, *supra* note 10, at 135.

121. HOUSMAN, *supra* note 9, at 19 (emphasis added).

122. HANCHANT, *supra* note 11, at 58.

123. See POTTER, *supra* note 79, at 184 (noting that the ancients made sacrifices to the sun god at sunrise in order to ensure another sunrise, another day of life).

That is very important, is it?
-Very important.¹²⁴

James Berry, William Marwood's successor as Number One Executioner, "always adjust[ed] [the noose] with the ring just behind the left ear."¹²⁵ When asked why the knot was placed on the left side, "Berry could give no explanation except that this was the 'proper position.'"¹²⁶ Berry's vague response corresponds with the historical belief that left was associated with the Devil and all things evil.¹²⁷ Although, when the same query was posed to Albert Pierrepoint, Great Britain's former "Number One Executioner," when he testified before the Royal Commission On Capital Punishment on November 2, 1950, he stated that if the knot was placed on the right side, it was more likely to move behind the neck causing the person to strangle to death.¹²⁸

124. ROYAL COMMISSION, *supra* note 80, at 623 (emphasis added); *see also* SYD DERNLEY & DAVID NEWMAN, *THE HANGMAN'S TALE: MEMOIRS OF A PUBLIC EXECUTIONER* 38 (1989) (noting that the knot goes under the left jaw); LAURENCE, *supra* note 55, at 54 (noting that "[t]he usual position for the ring [used in hanging] is just behind the condemned man's left ear").

125. SCOTT, *supra* note 53, at 209; *see* ENGEL, *supra* note 63, at 80; JUSTIN ATHOLL, *THE RELUCTANT HANGMAN; THE STORY OF JAMES BERRY, EXECUTIONER 1884-1892*, 117 (1956).

126. ENGEL, *supra* note 63, at 80.

127. *See* POTTER, *supra* note 79, at 114 (noting that it was believed that the "Devil live[d] on the left-side of the body"); *id.* (noting that "a left-handed person was thought to be a messenger of the Devil"); AMOS O. SQUIRE, M. D. SING SING DOCTOR 22-23 (1935) (stating New York's former executioner who performed executions by electrocution mentions how "[s]ome years ago the idea that criminals were predominantly left-handed was given widespread publicity"); *see also* A DICTIONARY OF SUPERSTITIONS, *supra* note 79, at 161 (commenting on "[t]he ancients [belief] that the gods lived on the right side of man and the evil spirits lived on his left side"); *id.* at 230-31 ("1900 S. Hewitt Nummit 57 [Devon] 'It is unlucky . . . to put the left foot first in starting to walk'"); *id.* at 231 ("1650 Dr. Wren Note in Browne's *Vulgar Errors* IV v (1852, I 393) 'Wise men count them unlucky that use the left hand, as going contrary to the general course of nature'"); ENGEL, *supra* note 63, at 80 (stating that Engel concluded that "we may suspect that Berry and his successors in choosing the left side were, in fact, unconsciously following a hangman's tradition going back to the time *when the left was the 'sinister side.'*" (emphasis added).

128. ROYAL COMMISSION, *supra* note 80, at 623; *see also* ENGEL, *supra* note 63, at 63 (noting that the British executioner William Marwood decided that the knot should be placed on the left side so that the condemned's neck would be thrown back to ensure dislocation of the vertebrae). More recently, this same explanation—ensuring that unconsciousness and death caused by judicial hanging was rapid and painless—was included in an assessment of hanging's compliance with the Eighth Amendment. *See* *Campbell v. Wood*, 18 F.3d 662,

Appendix G

Even if Hetty's child had survived, the future did not bode well for her. Malcolmson describes in great detail the type of life an unwed mother in eighteenth century England could expect to endure. Most relevant for Hetty is that "in small communities where her situation would be universally known, she would be liable to become an embittered outsider—lonely, probably friendless and treated with condescension by most of her neighbors."¹²⁹ The potential magnitude of the isolation and desolation that Hetty would most likely experience this, as further illustrated by what occurred in *Capital Punishment: A Novel*.¹³⁰ There the central protagonist tells the Judge how his single mother "became an exile,"¹³¹ after becoming pregnant. Given that this fate occurred in the twentieth century,¹³² it is extremely doubtful that Hetty would fare any better as a single parent in early nineteenth century England.

Hetty's inability to withstand the stresses of returning to her village should be contrasted with Tess's ability to return to her home in the village of Marlott after Alec d'Urberville of Trantridge misled her about the nature of their relationship.¹³³ Tess and Hetty are both skilled dairy maids.¹³⁴ Also, both were seventeen when they misperceived the proper status they could achieve through sexual

685 (9th Cir. 1994) (en banc) (noting that this is the purpose for "positioning the knot below the left ear"). However, the original significance is still debatable as one condemned man pleaded that the knot be placed on the right side rather than the left side in order to reduce the pain of dying. See LAURENCE, *supra* note 55, at 205.

129. R.W. Malcolmson, *Infanticide in the Eighteenth Century*, in CRIME IN ENGLAND 1550-1800, 193 (J.S. Cockburn ed., 1977); see also GASKELL, *supra* note 36, at 336-352 (describing the villager's condemning treatment of Ruth after a villager learns of and discloses the fact that her son was born out of wedlock); Epstein, *The Pregnant Imagination, Fetal Rights, and Women's Bodies: A Historical Inquiry*, 7 YALE J. L. & HUMAN. 139, 144 n.14 (1995) (describing the harsh laws that "made unwed motherhood extremely difficult in early modern Europe"); .

130. See MARTIN, *supra* note 12.

131. *Id.* at 246.

132. See *id.* at 25, 160.

133. See ELIOT, *supra* note 91, at 82-83, 101; HARDY, *supra* note 12, at 96-98.

134. See ELIOT, *supra* note 91, at 82-83, 101; HARDY, *supra* note 12, at 123.

encounters with young men from the "gentle" class.¹³⁵ Most importantly, their liaisons with these men led to their impregnation and ultimately to their immolation.¹³⁶ Another similarity is that the children produced by these unions die.¹³⁷ However, the death of Tess's son Sorrow, unlike the death of Hetty's child, whose gender is never revealed, did not implicate his mother's involvement.¹³⁸

Although these qualify as significant similarities between the two young women, there is a major difference between the two that critically effects how they respond to the respective crises invoked by their social transgressions. Hardy has endowed Tess with a stronger character than Hetty. For example, after being seduced by Alec, Tess returns to her village and to her family, gives birth to her son there, and remains there for several years after Sorrow's untimely death as an infant.¹³⁹ She also never exhibits any qualms about interacting with her child before the villagers, including breast feeding him in their presence.¹⁴⁰ She even acknowledges that she was able to "look [at] people calmly in the face at times, even when holding the baby in her arms."¹⁴¹ In fact, Tess boldly and naively declares that "[t]he past was past; whatever it had been, it was no more at hand."¹⁴² In contrast, on two occasions Hetty contemplated committing suicide when she realized she was pregnant.¹⁴³ However, it was her fear of any shame following her to the grave that prevented her from taking her life by drowning herself in a pond.¹⁴⁴ After Hetty departs for her bogus errand to fetch Dinah, she contemplates returning to Hayslope. But her quick decision to nix that idea was as if:

135. See ELIOT, *supra* note 91, at 83; HARDY, *supra* note 12, at 117, 120.

136. See ELIOT, *supra* note 91, at 364-65, 409; HARDY, *supra* note 12 at 97, 100.

137. See ELIOT, *supra* note 91, at 431-35, 451-54; HARDY, *supra* note 12, at 108-11.

138. See HARDY, *supra* note 12, at 108-11 (stating that when Tess returned home from working in the fields one day she discovered that her child "had suddenly taken ill.")

139. See *id.*, *supra* note 12, at 90, 96-7, 114-17.

140. See *id.* at 101-05.

141. *Id.* at 107.

142. *Id.* at 106.

143. See ELIOT, *supra* note 91, at 363-65, 451-52.

144. See *id.* at 363-65 (noting that Hetty was afraid "they might find out why she had drowned herself").

she might have shrunk from scorching metal: she could *never endure that shame before her uncle and aunt, before Mary Burge, and the servants at the Chase, and the people at Broxton, and everybody who knew her. They should never know what had happened to her.*¹⁴⁵

While the manner by which they handled their respective situations can be explained by these differences in their personal characters, it also might partially be attributed to the era in which each experienced her personal tragedy. Hetty was to be executed in 1800.¹⁴⁶ Since executions were public at this time, she would have been hung in full view of the townspeople.¹⁴⁷ Tess, on the other hand, was shielded from the public's scrutinizing eyes when she was executed.¹⁴⁸ In addition, a black flag was hoisted outside the prison after Tess's execution.¹⁴⁹ England initiated this practice in 1868, the same year it ceased public executions. The flag was a means of notifying the public that the sentence had been carried. Consequently, a minimum of 68 years existed between Tess and Hetty's experiences.¹⁵⁰

This substantial passage of time is a factor that probably played a significant role in Tess's ability to exercise greater resilience in the face of adversity. Tess's actions occurred during the Victorian era.¹⁵¹ Some progress

145. *Id.* at 380 (emphasis added).

146. *See id.*

147. *See id.* at 462; *see also* ABBOTT, *supra* note 90, at 204-05 (noting that public executions in England did not cease until 1868); SIR ERNEST GOWERS, A LIFE FOR A LIFE, THE PROBLEM OF CAPITAL PUNISHMENT 10 (1956) (noting that Parliament passed a bill on August 14, 1868 switching executions from a public to a private venue); LAURENCE, *supra* note 55, at 214 (noting that the last public execution occurred on May 26, 1868).

148. *See* HARDY, *supra* note 12, at 418-19 (describing how Angel and Liza-Lu, Tess's younger sister, were standing on a hill outside the prison when Tess was executed).

149. *See id.* at 419; JOHN LOFLAND, *The Dramaturgy Of State Executions, in* STATE EXECUTIONS VIEWED HISTORICALLY AND SOCIOLOGICALLY 275, 317-18 (1977) (noting that the English execution protocol once included running up black flags after the execution was completed).

150. *See* LAURENCE, *supra* note 55, at 27; *see also* CHARLES DUFF, A HANDBOOK ON HANGING 181 (1981) (noting that the rituals of raising the black flag and tolling the bell to signal that the execution was completed were eventually substituted with the placement of a notice on the prison door); PIERREPOINT, *supra* note 116, at 53-55 (discussing how the ritual of raising the black flag was eliminated in 1902).

151. *See* HARDY, *supra* note 12, at 28, 34; Telephone interview with Wendy

in social conditions, particularly those of women, during these years would have made society slightly more tolerant.¹⁵² Also, after their betrothal, Tess and Angel engaged in "[t]he country custom of unreserved comradeship out-of-doors."¹⁵³ Furthermore, some of the other female characters show signs of independence such as going unescorted to pubs and getting inebriated, attending dances unescorted, and dancing with men there.¹⁵⁴ One pal of Tess's even readily agrees to be Angel's mistress because she comprehends that matrimony was impossible due to their class differences and his marriage to Tess.¹⁵⁵ Another factor that might have effected their respective reactions is derived from the slight differences in the gravity of their respective "insider/outsider" status.¹⁵⁶ Hetty is a genuine "outsider." She was not serendipitously born at Hayslope/Broxton. Rather, her presence in the communities is solely due to the fact that she was orphaned at an early age and sent there to live with her Uncle Poyser, her

Miller, Reference Librarian at the Central Public Library, in Lexington, Ky. (July 11, 1998) (Queen Victoria was born on May 24, 1819, and reigned for 63 years, from 1837 until 1901).

152. See FRANCOISE BASCH, *RELATIVE CREATURES: VICTORIAN WOMEN IN SOCIETY AND THE NOVEL* 14 (1974) (noting that the first woman's suffrage society in England was established in 1866); LYNN MARIE DECICCO, *WOMEN AND LAWYERS IN THE MID-NINETEENTH CENTURY ENGLISH NOVEL: UNEASY ALLIANCES AND NARRATIVE MISREPRESENTATION*: 3, 45 & n.11, 50-52 (1996) (discussing Parliament's passage of legislation that was designed to advance the rights of women living in Victorian England); MERRYNN WILLIAMS, *WOMEN IN THE ENGLISH NOVEL, 1800-1900*, 6-7 (1984) (describing legislation passed by Parliament in 1857, 1870, and 1882 that contributed to the advancement of women's rights); *id.* at 16 (discussing how in England during the 1840's serious attention was paid to preparing women for professional careers). The advances made in the education of women also was a factor. Tess was an educated female for her time. She was taught by a London-trained teacher and she passed the sixth standard. Her education enabled her to speak "ordinary English abroad and to persons of quality." HARDY, *supra* note 12, at 31-32. In contrast, Hetty was lacking in formal education. For example, while smitten with Hetty's beauty, Arthur had to convince himself that "it made no difference to him what sort of English she spoke." ELIOT, *supra* note 91, at 132-33; *see also id.* at 232-37 (stating only men attended the night school Mr. Bartle held for the villagers).

153. HARDY, *supra* note 12, at 210.

154. *See id.* at 75-83; *id.* at 75 (commenting on "[t]he levity of some of the younger women in and about Trantridge"); *id.* at 240, 286.

155. *See id.* at 285-88.

156. *See generally infra* note 192 and accompanying text (discussing how Hetty and Tess satisfy Girard's outsider criterion).

mother's brother.¹⁵⁷ In contrast, Tess, while still qualifying as an "outsider," is more of an "insider" than Hetty because she was born and raised in Marlott.¹⁵⁸ Belonging to a community, as opposed to not truly belonging to the place could account for some of the distinctions in their respective responses to their situations.

Nonetheless, despite some variation in their characters which influenced how they chose to react to a stressful situation, their plights sufficiently resemble each other enough so that it is likely that if Hetty had returned to England, her fate would have been as disastrous as Tess's. For even Tess the "insider" who was operating in a comparatively more progressive society, describes her existence as "living as a stranger and an alien [in her village], though it was no strange land that she was in."¹⁵⁹ Thus, Hetty's future in Britain would have keenly favored Beth Kalikoff's succinctly accurate depiction of Tess's life:

A fallen woman . . . Tess can only rise to the scaffold.¹⁶⁰

Another option would have been for Hetty to consider relocating to another locale in order to avoid being ostracized and humiliated. This is what Tess eventually did several years after the death of her infant son by moving from Marlott to Talbothays where she had secured employment as a dairymaid.¹⁶¹ Tess was pleasantly surprised to learn that despite the relatively short distance between her home and the dairy, no one knew of her earlier misadventure.¹⁶² Therefore, it seems reasonable to assume

157. See ELIOT, *supra* note 91, at 84, 98. Hetty's grandfather's indifference towards her reinforces her isolated status. Her grandfather Poyser treats her differently because her daughter, Hetty's mother, married that "good-for-nought Sorrel." *Id.* at 337.

158. See HARDY, *supra* note 12, at 47-48 (noting that Marlott is Tess' native village); *id.* at 205 (revealing Tess telling Angel that she was born and raised at Marlott).

159. HARDY, *supra* note 12, at 104; *see also id.* at 374-75 (discussing that the villagers of Marlott wanted Tess removed from their village and presented no objections to the non-renewal of the family's lease, which will expel them from the village).

160. Beth Kalikoff, *The Execution of Tess d'Urberville at Winchester, in EXECUTIONS AND THE BRITISH EXPERIENCE*, *supra* note 10, at 117.

161. See HARDY, *supra* note 12, at 157.

162. *Id.* at 115.

that Hetty could have pursued the same course of action.¹⁶³

However, a critical distinction exists between the two characters' fates that probably would have presented a substantial obstacle to Hetty's ability to successfully start a new life in another place. Although both are "fallen women," Hetty, unlike Tess, was convicted of a capital offense and transported. Therefore, upon relocation, she would probably encounter a general public uneasiness towards her because transportees, even those who had completed their sentences, were depicted as "the most dangerous and wicked of offenders."¹⁶⁴ If she opted to move to a larger city, which could provide a greater degree of the requisite anonymity, she, as a woman, would in all probability encounter severe economic hardships. Peter Linebaugh notes that:

Because of restrictions in the employment of women, their conditions of life were difficult and extreme hardship was their lot. The historian of women workers before the Industrial Revolution notes that it was their dependence upon the casual and pauper trades that explains the large number of suicides, prostitution, starvation and crime among London women.¹⁶⁵

Thus, the prognosis for the successfulness of Hetty being able to live independently in the future in a larger jurisdiction is bleak.

This was ultimately what happened with Tess, who was bestowed with more fortitude than Hetty.¹⁶⁶ Initially, Tess successfully pursued a profession as a milkmaid.¹⁶⁷ Even after Angel deserted her, she was still able to survive despite the harsh and, at times, brutal living and working

163. However, Ruth, another fictional character who found herself in similar straits, moved to her benefactors' home in a location that was far from the village where she had lived and where her indiscretion occurred. Her "secret shame" was uncovered after approximately ten years had passed. See GASKELL, *supra* note 36, at 336-342.

164. Sean McConville, *The Victorian Prison*, in THE OXFORD HISTORY OF THE PRISON 135 (Norval Morris & David J. Rothman eds., 1995).

165. LINEBAUGH, *supra* note 51, at 144-45.

166. See HARDY, *supra* note 12.

167. See *id.* at 115, 117, 123.

conditions.¹⁶⁸ Later, when life's conditions were too extreme, her family was homeless, and she believed that Angel's desertion was permanent, Tess relented to Alec's requests that she come and live as his "wife."¹⁶⁹ With this option, she may have lost her self-respect but she was able to ensure the survival of her family.

Thus, Tess's plight underscores the problem that Hetty would likely face: the difficulty in securing permanent respectable employment. This is aggravated in Hetty's case because "[i]n England, where there was no shortage of labour 'the stain of a legal punishment' was said to make the prospect of finding employment 'almost always insurmountable.'¹⁷⁰

168. *See id.* at 299-312 (describing the savage work conditions at Flintcomb-Ash where Tess worked as a "short hire" in the fields).

169. *See id.* at 311-86, 399-400.

170. RADZINOWICZ, *supra* note 1, at 472-73 (citations omitted); *see also* GASKELL, *supra* note 36, at 367-68, 377, 381, 383-84, 386, 388-90 (describing the trials and tribulations Ruth endured seeking employment after the residents of Ecclestone learned of her secret shameful past).

Appendix H

Interestingly, early on in his novel, Hardy foreshadows Tess's sacrifice through his description of her participation in the village's May-Day festivities.¹⁷¹ Hardy's use of this ritual satisfies one portion of Girard's theory. He concludes that the theme of festival and the theme of sacrifice are closely associated as the festival is merely a reenactment of the sacrificial crisis.¹⁷²

Young women were the primary participants in the event because "under [their] bodices the life throbbled quick and warm."¹⁷³ The young women typically donned white gowns and carried bunches of white flowers as they paraded through the village's streets and performed under the may pole erected in the village green.¹⁷⁴ Tess complied with this traditional ritual by wearing a "thin white gown."¹⁷⁵ In fact, Tess first encountered her future husband Angel, who ultimately came to represent the specific and general nature of the triggering event, at the May-Day procession when he and his two elder brothers stopped to watch the dancing on the green.¹⁷⁶ Angel decided to remain for awhile to dance with the young women. However, he did not dance with Tess.¹⁷⁷ His last vision as he departed was of Tess standing detached from the others.¹⁷⁸

Hardy's decision to clothe Tess in white is symbolic as well as a means of foreshadowing her fate. White symbolizes purity.¹⁷⁹ Thus, Hardy wants the reader to perceive Tess as pure. By adopting this tool to convey Tess's purity, Hardy facilitates the transformation of Tess into an appropriate subject for immolation. This contention is

171. See BURKE, *supra* note 60, at 194; HARDY, *supra* note 12, at 23; DON LEWIS, RELIGIOUS SUPERSTITION THROUGH THE AGES 12-13 (1975) (describing the original purpose of May-Day festivities); .

172. See RENE GIRARD, VIOLENCE AND THE SACRED 119 (Patrick Gregory, trans., 1977) (commenting on how festivities in general "commemorate a sacrificial crisis").

173. HARDY, *supra* note 12, at 24; see also BURKE, *supra* note 60, at 194 (relating the link between May Day and sexuality).

174. See HARDY, *supra* note 12, at 23-24.

175. *Id.* at 29.

176. See *id.* at 26-27.

177. See *id.* at 28.

178. See *id.* at 29.

179. See JAMES R. LEWIS, THE DREAM ENCYCLOPEDIA 366 (1995).

bolstered by the fact that because when the May-Day festivities occurred Tess was also physically pure.¹⁸⁰

Wearing white attire at an execution also reflects this principle. Many condemned individuals wore white to their executions.¹⁸¹ In one poetic rendition of an execution procession, the poet writes:

As clever Tom Clinch, while the rabble was bawling,
Rode stately through Holborn to die in his calling,
He stopt at the George for a bottle of sack,
And promised to pay for it when he came back.
His *waistcoat, and stockings, and breeches, were*
*white.*¹⁸²

Thus, it is as if the purity needed in order to establish the suitability of the selected sacrificial victim is facilitated by wearing white clothing. Since the dress worn at weddings represents the couple's "pure" and "virginal" status, it is not surprising that the subjects of human sacrifice, *vis-a-vis* judicial execution, frequently wore wedding suits at their executions.¹⁸³ By dressing in white for their executions it is as if the condemned were transforming themselves into worthy human sacrifices.¹⁸⁴ Interestingly,

180. See HARDY, *supra* note 12, at 23-29; see also Charlotte Mew, *A White Night*, in THE OXFORD BOOK OF ENGLISH SHORT STORIES 139, 146 (A.S. Byatt, ed., 1998) (describing how the female designated as the human sacrifice had a face with the "purity of youth").

181. See ABBOTT, *supra* note 90, at 89 (describing how Marie-Antoinette wore white when she was beheaded by Charles-Henri Sanson, "Monsieur de Paris"); *id.* at 117-18 (describing how Lord Ferrer who hung from the gallows in London on May 5, 1760 was "dressed in a white satin suit"); NEGLEY K. TEETERS & JACK H. HEDBLOM, ". . . HANG BY THE NECK. . .": THE LEGAL USE OF SCAFFOLD AND NOOSE, GIBBET, STAKE, AND FIRING SQUAD FROM COLONIAL TIMES TO THE PRESENT 188 (1967) (describing how Peter Mattocks was "clad in a white flannel shroud open in front, with a white muslin turban, ornamented by himself with bows of white ribbon" when he was executed in Philadelphia in 1856) (citation omitted).

182. RADZINOWICZ, *supra* note 1, at 169 n.21 (quoting *Jonathan Swift, Poetical Works vol.I*, 202 (1833) (emphasis added)).

183. See ALBION'S FATAL TREE, *supra* note 52, at 112; ENGEL, *supra* note 63, at 230 (describing the execution attire of Elizabeth Fenning who wore "what was to have been her wedding dress: a white muslin gown"); GATRELL, *supra* note 10, at 245 (noting that Lord Ferrers was executed in his "wedding clothes which were white cloth embroidered with silver, and white silk stockings").

184. See Mew, *supra* note 180, at 146 (noting that the woman selected to be sacrificed by the monks was "clad . . . from head to foot in a white linen garment").

sometime between the sixteenth and eighteenth centuries, the British introduced the ritual of concealing the condemned's head by covering it with a white cap immediately prior to being hung.¹⁸⁵ The use of white clothing during the execution process was not confined to the British Isles. In sixteenth century Nuremberg, the executioner's duties included "cast[ing] a white cloak about the victim."¹⁸⁶

Another interpretive twist emerges because in Eastern cultures, white "is associated with mourning and death."¹⁸⁷ Ironically, the symbolism attached to the color white by the Eastern and Western cultures foreshadow Tess's eventual demise due to her designation as the sacrificial victim by society.

Physically isolating Tess from the other May-Day participants as Angel departs is another indication that Tess has been singled out for an event of great significance. Tess's physical position also suggests that there will be some future connection between her and Angel, and that the sacrificial crisis triggering the need to sacrifice her will be due to her relationship with Angel.¹⁸⁸

Ultimately, this is precisely what occurs. Tess intuitively realizes that to repair the damage inflicted on the social order in Angel's family, and in society in general, due to what her efforts to penetrate the upper-class represents, it is necessary that she be sacrificed.¹⁸⁹ She accomplishes this by killing Alec,¹⁹⁰ for which she receives a death sentence and is executed on the gallows.¹⁹¹

The scene where Tess is captured after murdering Alec provides a poignant example of the sacrificial dimension of her judicial execution. A few days after she and Angel abscond after Tess kills Alec in a fit of rage, they arrive at

185. See ROBERT JOHNSON, *DEATH WORK: A STUDY OF THE MODERN EXECUTION PROCESS* 17 (2d. ed. 1998); PIERREPOINT, *supra* note 116, at 67 (commenting on Britain's long tradition of using the white cap).

186. JOHNSON, *supra* note 185, at 13.

187. LEWIS, *supra* note 179, at 366.

188. See HARDY, *supra* note 12, at 29 ("[Tess] had no spirit to dance again for a long time, though she might have had plenty of partners; but, ah! *they did not speak so nicely as the strange young man had done*") (emphasis added).

189. See *id.* at 401-02; see also Kalikoff, in *EXECUTIONS AND THE BRITISH EXPERIENCE*, *supra* note 10, at 117 (concluding that as "[a] fallen woman . . . Tess can *only* rise to the scaffold") (emphasis added).

190. See HARDY, *supra* note 12, at 401-06.

191. See *id.* at 418-19.

Stonehenge, or, as Tess describes it, the "heathen temple."¹⁹² Tess is so exhausted that she lies on a stone to sleep. In response to her query, Angel tells her that he "think[s] [she] is lying on an altar."¹⁹³ Tess does not object to sleeping on this altar to the sun and drifts into a heavy sleep.¹⁹⁴ In fact, when the men come to arrest her, Angel asks them if she can finish her sleep, and "[w]hen they saw where she lay, which they had not done till then, they showed no objection."¹⁹⁵ Their acquiescence to Angel's request can be interpreted as being the conveyance of their acknowledgment that Tess, presently assuming a "mock" sacrificial position, will soon be forced to assume a "real" one. Tess appears to intuitively realize that her sacrifice is imminent because she does not awake from her deep sleep on the stone altar to the sun until the sun starts to shine on it.¹⁹⁶ Her acquiescence in the communal decision that she is to be the sacrificial subject is further bolstered by how, after rising from the altar, she quietly tells the law enforcement officials that she is "ready."¹⁹⁷

192. *Id.* at 414.

193. *Id.* at 415.

194. *See id.* at 416

195. *Id.* at 417.

196. *See id.*; *see also supra* notes 105-08 and accompanying text (discussing the role the sun played in making human sacrifices).

197. HARDY, *supra* note 12, at 417.

Appendix I

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