

# **NOTE: HE BEARETH NOT THE SWORD IN VAIN: THE CHURCH, THE COURTS, AND CAPITAL PUNISHMENT**

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## **Reporter**

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## **Text**

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#### Introduction

The recent pronouncements of the Roman Catholic Church regarding the death penalty have been received with varying interpretations and sometimes with heated disagreement. <sup>1</sup> The episcopacy in the United States and elsewhere has condemned the practice of capital punishment for several decades. <sup>2</sup> Discussion and debate on this issue, however, has been vigorous ever since the 1995 release of Pope John Paul II's encyclical, *Evangelium Vitae*, and the ensuing changes made to the 1997 revision of the Catechism of the Catholic Church. In the encyclical, John Paul II addressed capital punishment in the context of other moral prohibitions against abortion and euthanasia. While not equating the death penalty with such evils, John Paul II took a decidedly unfavorable position on its use and substantially limited the circumstances in which the death penalty may morally be imposed.

**[\*216]** Catholic scholars and theologians have reached differing conclusions regarding the encyclical, but they have differed primarily on what sort of teaching is being presented. Some have heralded the teaching as a development in Catholic doctrine regarding the licit use of the death penalty. <sup>3</sup> Even among this group there are differences, but the basic argument is that the encyclical represents a fundamental change in Catholic teaching, one which renders capital punishment fundamentally immoral. <sup>4</sup> Others, while similarly concluding that a "change"

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<sup>1</sup> See, e.g., Antonin Scalia et al., *Antonin Scalia and His Critics: An Exchange on the Church, the Courts, and the Death Penalty*, *First Things*, October 2002, at 8; Avery Cardinal Dulles et al., *Avery Cardinal Dulles and His Critics: An Exchange on Capital Punishment*, *First Things*, August/September 2001, at 7.

<sup>2</sup> See U.S. Catholic Conference, *Responsibility, Rehabilitation, and Restoration: A Catholic Perspective on Crime and Criminal Justice* 31 (2000) ("We oppose capital punishment not just for what it does to those guilty of horrible crimes, but for how it affects society; moreover, we have alternative means today ... to protect society from violent people."); U.S. Catholic Bishops, *Statement on Capital Punishment* (1980), reprinted in, *4 Pastoral Letters of the United States Catholic Bishops*, at 427 (Hugh J. Nolan ed., 1984). The *Statement on Capital Punishment* did not receive the two-thirds majority of the entire conference of bishops then required for approval of official statements. Avery Cardinal Dulles, *Catholicism & Capital Punishment*, *First Things*, April 2001, at 30.

<sup>3</sup> See, e.g., Aharon W. Zorea, *In The Image of God: A Christian Response to Capital Punishment* 135-226 (2000).

of prior teaching has been presented, perceive this not as a development of the traditional doctrine, but as a rejection of it.<sup>5</sup> Finally, there are some theologians who argue that the encyclical is ultimately compatible with the Church's perennial teaching on capital punishment and is merely a prudential application of that teaching to modern conditions and circumstances.<sup>6</sup>

Debate regarding the encyclical has not been the sole domain of scholars and theologians. Theoretical disagreement and confusion has produced fruit on the practical level in terms of ascertaining the appropriate response by Catholic lawyers, judges, and others whose interest in the question is more than academic. United States Supreme Court Justice Antonin Scalia, a Catholic, has publicly expressed his disagreement with *Evangelium Vitae* and the "hot-off-the-presses" revision of the Catechism insofar as those documents touch on capital punishment.<sup>7</sup> Any other conclusion, he notes, would lead to his resignation, and Catholics in general would be prohibited from the bench in jurisdictions imposing the death penalty: "It would be remarkable to think ... that a couple of paragraphs in an encyclical almost entirely devoted not to crime and punishment but to abortion and euthanasia was intended authoritatively to sweep aside (if one could) two thousand years of Christian teaching."<sup>8</sup>

**[\*217]** In contrast, Judge John T. Noonan, Jr. of the Ninth Circuit Court of Appeals, also a Catholic, approves of the current teaching as a faithful development of doctrine.<sup>9</sup> Noonan has argued that the state is sponsoring homicide when it executes criminals because modern circumstances no longer justify capital punishment: "The norm has changed - in order to preserve the value of human life, you must abolish this way of taking it."<sup>10</sup> The death penalty, he says, is immoral and "the Catholic judge who realizes that does have a serious problem about recusal."<sup>11</sup> Thus, the disagreement between these Catholic judges is rooted in their fundamental perception of what sort of teaching is presented in *Evangelium Vitae*: Scalia views the current teaching as incompatible with and a rejection of the Church's traditional doctrine, while Noonan argues that it is a consistent development of Catholic doctrine.

The purpose of this note is to ascertain the appropriate response to the Church's current teaching on capital punishment for Catholics and other legal practitioners that look to the Church for moral guidance. By "appropriate response," I do not mean to recommend any specific course of action for attorneys to follow. The various positions that attorneys maintain in the practice of law will necessarily entail a host of different situations that can only be addressed according to their individual circumstances. Rather, I will argue in a general way how Catholic practitioners should think about the Church's recent teaching on capital punishment, for it is only by way of a proper understanding of this teaching that we can form our actions accordingly. Should we think that *Evangelium Vitae*'s teaching on capital punishment is incompatible with the Church's traditional teaching, or should we think that it is a faithful development of doctrine?

<sup>4</sup> See James J. Megivern, *The Death Penalty: An Historical and Theological Survey* 445 (1997) (arguing that, in light of *Evangelium Vitae*, "the routine practice of capital punishment is ... branded as devoid of ethical sanction because it does not meet the requirements of basic moral principles.").

<sup>5</sup> This argument does not have very much support among noted theologians. Justice Scalia's comments on the death penalty and Catholic teaching are representative of this position. Scalia, *supra* note 1, at 17.

<sup>6</sup> See, e.g., Dulles, *supra* note 2; Steven A. Long, *Evangelium Vitae, St. Thomas Aquinas, and the Death Penalty*, 63 *The Thomist* 511, 545-47 (1999).

<sup>7</sup> Antonin Scalia, *God's Justice and Ours*, *First Things*, May 2002, at 17, 20.

<sup>8</sup> *Id.* at 21.

<sup>9</sup> Joseph Esposito, *How the Church Evolved Its Death Penalty Stand*, *Our Sunday Visitor*, April 15, 2001, at 3 (reporting that Judge Noonan deems the Church's teaching on the death penalty an instance in "the development of doctrine").

<sup>10</sup> *Catholics Against Capital Punishment, Catholics' Growing Understanding of Church Views on Death Penalty Seen Posing Problems For Courts*, at <http://www.santegidio.org/pdm/news/150501f.htm> (on file with the Ave Maria Law Review).

<sup>11</sup> *Id.*

I will argue that neither position is correct. Instead, I will propose that the current teaching represents a prudential application<sup>12</sup> of the Church's traditional doctrine on capital punishment, and proceed to [\*218] explain what consequences this position will have for the Catholic legal practitioner.<sup>13</sup> This conclusion militates against the view that the current teaching is an irreconcilable departure from tradition, while questioning the notion that any doctrinal upheaval is taking place. In Part I, I will provide a brief overview of the historical support of the death penalty in the Catholic tradition. Those who argue for a development in doctrine are often culpable of reading *Evangelium Vitae* apart from, and sometimes in contempt of, tradition. In Part II, I will discuss the current teaching on its own terms in order to address some of its internal ambiguities and apparent inconsistencies, some of which formed the basis of Justice Scalia's disagreement with *Evangelium Vitae*. In Part III, I will argue that a prudentialist reading is the most reasonable interpretation of the encyclical and of the Catechism because it reconciles current and traditional Church teaching, and because it resolves the ambiguities within the current teaching itself. Finally, in Part IV, I will conclude by discussing the appropriate response of the Catholic practitioner in light of this interpretation.

## I. Capital Punishment in the Catholic Tradition

Steven Long, a professor of philosophy at the University of St. Thomas in St. Paul, Minnesota, has noted that *Evangelium Vitae*, as a magisterial document, must be interpreted in relation to tradition.<sup>14</sup> If this is true, a review of the Church's historical support of the death penalty is not merely a nostalgic exercise, but is, in fact, necessary for a proper understanding of the Church's teaching.

I present the following historical texts for their authoritative weight. They are not offered to demonstrate by themselves the moral justification of capital punishment, although the texts do give reasons for its use and may, with sufficient development, provide such a justification. I will present a more developed understanding of the traditional teaching in Part III, particularly as it is refined and [\*219] articulated by Saint Thomas Aquinas. The immediate objective here, however, is to highlight the problem facing those who argue for a development in doctrine on capital punishment by focusing on the saintly and intellectual patrimony from which they must part company.

### A. Scripture

The Church's historical support of the state's right to inflict capital punishment was rooted in Sacred Scripture's approval of the practice. With the rise of historical-critical methods of biblical interpretation and the rejection of biblical literalism, however, this support has been challenged in recent decades.<sup>15</sup>

In the Old Testament, the death penalty is assigned as a divinely ordained punishment for no fewer than thirty-six capital crimes.<sup>16</sup> In Genesis, we read that "Whosoever shall shed man's blood, his blood shall be shed: for man was made to the image of God."<sup>17</sup> In the New Testament, the death penalty is seemingly taken for granted. Perhaps the most frequently cited passage in support of capital punishment is from Saint Paul's letter to the Romans regarding Christian obedience to temporal authority. Saint Paul writes that the magistrate "beareth not the

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<sup>12</sup> By "prudential application," I mean that the Church's current teaching does not involve a change in principle, but merely a judgment as to how a principle should be applied under certain conditions.

<sup>13</sup> Avery Cardinal Dulles and Professor Stephen Long, among others, have also concluded that the current teaching on capital punishment represents a prudential judgment of Pope John Paul II. See Dulles, *supra* note 1; Long, *supra* note 6. This Note endeavors to present new artillery for this conclusion by grounding John Paul II's teaching in traditional doctrine relating to punishment by the state, by demonstrating that his apparent abandonment of capital punishment's retributive purpose is compatible with that tradition, and by highlighting weaknesses in the alternative argument that the current teaching represents a development of doctrine.

<sup>14</sup> Long, *supra* note 6, at 513.

<sup>15</sup> See Megivern, *supra* note 4, at 9-10.

<sup>16</sup> S. Mendelsohn, *The Criminal Jurisprudence of the Ancient Hebrews* 44-52 (Baltimore, M. Curlander 1891).

<sup>17</sup> Genesis 9:6.

sword in vain. For he is God's minister: an avenger to execute wrath upon him that doth evil." <sup>18</sup> This text has provided the foundation for the traditional argument in support of the death penalty; although God has "original jurisdiction" over life and death, temporal authorities have been given divinely delegated jurisdiction to exercise that same power. Thus, in the Gospel of John, when Pontius Pilate confronts Jesus with his power to crucify him, Jesus does not challenge the existence of this power, but responds that Pilate would not have this authority unless it had been given to him from above, that is, from God. <sup>19</sup>

These and various other passages have been cited as scriptural support of the state's right to impose capital punishment, <sup>20</sup> yet there are other biblical passages that seem to argue for a different view. **[\*220]** Even in the Old Testament, the prophet Ezekiel exclaims that the Lord "desires not the death of the wicked, but that the wicked turn from his way, and live." <sup>21</sup> Opponents of capital punishment also appeal to Jesus' call for mercy and forgiveness. In the Gospel of Matthew, one of the parables regarding the kingdom of heaven relates the story of a man who sowed good seed, but during the night his enemy sowed cockle among the wheat. When the seed grew, the master instructed the stewards, who wanted to gather the cockle (the evildoers) from the wheat (the good), to let the cockle grow until the harvest (the final judgment) lest they root up the wheat along with the cockle. <sup>22</sup> Opponents of capital punishment also cite to the episode of Jesus and the stoning of the adulteress, <sup>23</sup> and various other passages that seem to forbid capital punishment. <sup>24</sup>

## B. The Fathers and Doctors of the Church

The testimony of the Church Fathers regarding the death penalty is not unanimous, but generally its moral legitimacy is taken for granted. As we shall see later, theologians and canonists frequently referred to the Church Fathers in order to supplement their conclusions on this issue.

Saint Clement of Alexandria, an early Christian scholar and teacher, wrote: "It is the highest and most perfect good, when one is able to lead back any one from the practice of evil to virtue and well-doing, which is the very function of the law." <sup>25</sup> If, however, a criminal **[\*221]** "falls into any incurable evil, - when taken possession of, for example, by wrong or covetousness, - it will be for his good if he is put to death." <sup>26</sup>

Saint Augustine, the greatest doctor of the early Latin Church, clearly articulated his approval of the state's right to punish individuals with death. In his famous work, the City of God, Augustine wrote the following:

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<sup>18</sup> Romans 13:4.

<sup>19</sup> John 19:10-11.

<sup>20</sup> See, e.g., Luke 23:40-41; Matthew 18:6.

<sup>21</sup> Ezekiel 33:11.

<sup>22</sup> Matthew 13:24-30. But see Thomas Aquinas, *Summa Theologica*, Part II-II, Question 64, Article 2 (Fathers of the English Dominican Province trans., Christian Classics 1981) (1911) [hereinafter *Summa Theologica*] ("Our Lord commanded them to forbear from uprooting the cockle in order to spare the wheat, i.e. the good. This occurs when the wicked cannot be slain without the good being killed with them, either because the wicked lie hidden among the good, or because they have many followers, so that they cannot be killed without danger to the good... . Wherefore Our Lord teaches that we should rather allow the wicked to live, and that vengeance is to be delayed until the last judgment, rather than that the good be put to death together with the wicked. When, however, the good incur no danger, but rather are protected and saved by the slaying of the wicked, then the latter may be lawfully put to death.") (citation omitted).

<sup>23</sup> John 8:3-7 (The Mosaic law commanded that an adulteress be stoned. When the adulteress was brought before him, however, Jesus replied, "He that is without sin among you, let him first cast a stone at her.").

<sup>24</sup> See, e.g., Romans 12:19; Matthew 26:52.

<sup>25</sup> Clement of Alexandria, *The Stromata, or Miscellanies* Book I, ch. xxvii, reprinted in 2 *The Ante-Nicene Fathers* 299, 339 (Rev. Alexander Roberts & James Donaldson eds., 1962) (n.d.).

<sup>26</sup> *Id.*

The same divine law which forbids the killing of a human being allows certain exceptions, as when God authorizes killing by a general law or when He gives an explicit commission to an individual for a limited time. Since the agent of authority is but a sword in the hand, and is not responsible for the killing, it is in no way contrary to the commandment, "Thou shall not kill," to wage war at God's bidding, or for the representatives of the State's authority to put criminals to death, according to law or the rule of rational justice.<sup>27</sup>

Interestingly, Augustine frequently opposed the execution of criminals on various occasions. For example, in one letter to a proconsul of Africa regarding the Donatists, a schismatic sect, he urged "that the punishment of crimes, however great, which they have confessed, may be something short of death, and I ask it for the sake of my own conscience, as well as to give an example of Catholic moderation."<sup>28</sup> Even in these examples, however, Augustine did not challenge the basic right of the state to exact capital punishment: "We ask you to forget that you have the power of life and death."<sup>29</sup>

Saint Optatus, bishop of Mileve and a contemporary of Augustine, defended the use of the death penalty against the Donatists:

As if no-one ever deserved to die for the vindication of God! ... Whatever [the executed] may possibly have suffered, if it be an evil to be killed, they are the cause of their own evil... . Accuse first Moses, the lawgiver himself, who, when he descended from Mount Sinai, almost before the tables of the law had been put forward, in **[\*222]** which it was written, Thou shall not kill, ordered the killing of three thousand people in a single moment.<sup>30</sup>

The biblical commentaries of Saint Jerome were often cited by medieval authors on the issue of the death penalty. Commenting on Jeremiah 22:3, which prohibits the shedding of innocent blood, Jerome wrote: "To punish [with death] murderers and blasphemers and poisoners is not the shedding of blood but the administration of laws."<sup>31</sup> Elsewhere Saint Jerome noted, paradoxically: "He who slays cruel men is not cruel."<sup>32</sup>

As noted above, there were also early Christian Fathers that opposed capital punishment. Lactantius is perhaps the most famous example:

For when God forbids us to kill ... He warns us against the commission of those things which are esteemed lawful among men. Thus it will [not be] lawful for a just man ... to accuse any one of a capital charge, because it makes no difference whether you put a man to death by word, or rather by the sword, since it is the act of putting to death itself which is prohibited. Therefore, with regard to this precept of God, there ought to be no exception at all; but that it is always unlawful to put to death a man, whom God willed to be a sacred animal.<sup>33</sup>

Also rejecting the death penalty, Tertullian argued that Christians should refrain from participation in civil government, because, among other things, it would entail the condemnation and execution of criminals.<sup>34</sup>

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<sup>27</sup> Augustine, *The City of God* Book I, ch. 21, reprinted in 8 *The Fathers of the Church* 17, 53 (Demetrius B. Zema & Gerald G. Walsh trans., 1950).

<sup>28</sup> Augustine, Letter 138 (to Marcellinus), reprinted in 20 *The Fathers of the Church* 54 (Sister Wilfrid Parsons trans., 1953).

<sup>29</sup> Augustine, Letter 100 (to Donatus, Proconsul), reprinted in 18 *The Fathers of the Church* 141, 142 (Sister Wilfrid Parsons trans., 1953) (emphasis added).

<sup>30</sup> Optatus: *Against the Donatists* 72-73 (Mark Edwards ed. & trans., 1997).

<sup>31</sup> Jerome, *Commentariorum In Isaiam Prophetam*, reprinted in 24 *PatrologiAE LatinAE* 18, 843 (J.P. Migne ed., Paris, 1865) ("Homicidas enim et sacrilegos et venenarios punire, non est effusio sanguinis sed legum ministerium."). Translation from the Latin is by John Dejak and the author.

<sup>32</sup> Id. at 160 ("Non est enim crudelis qui crudeles iugulat.").

<sup>33</sup> Lactantius, *The Divine Institutes*, Book VI, ch. xx (Rev. William Fletcher trans.), reprinted in 7 *The Ante-Nicene Fathers* 162, 187 (Rev. Alexander Roberts & James Donaldson eds., Am. ed. n.d.) (n.d.).

The early Christian histories offer some interesting, though non-conclusive, insights into the early Christian outlook on capital punishment. Eusebius related that the use of capital punishment by [\*223] the Roman provincial governors declined under the reign of the Christian convert Constantine.<sup>35</sup> Later, in his Ecclesiastical History, Socrates Scholasticus wrote that the Roman Emperor Julian, an apostate Christian, prohibited Christians from becoming governors in the provinces because "their law forbids them to use the sword against offenders worthy of capital punishment."<sup>36</sup>

The doctors of the church were virtually unanimous in their acceptance of the state's right to exercise capital punishment. In this regard, Saint Augustine and Saint Thomas Aquinas, perhaps the two greatest doctors in the history of the Church, both articulated justifications for the death penalty.<sup>37</sup> Further explicit support can be found in the writings of Saint Jerome, Saint Peter Canisius, Saint Robert Bellarmine, and Saint Alphonsus Ligouri, among others.<sup>38</sup> Saint Ephraem of Syria argued that women who obtained abortions warranted the death penalty:

Because she made the child in her body into a miscarriage, so that it would be buried in the darkness of the earth, it also makes her into a miscarriage, so that she must wander in outer darkness. This is the penalty for adulterers and adulteresses who take their children's life: they are punished with death.<sup>39</sup>

Saint Ambrose is noted for his opposition to capital punishment, at least in practice. In a letter written to a magistrate concerning capital punishment, Ambrose instructed that the example of Jesus and the adulteress should be followed as a model.<sup>40</sup> Like the letters of [\*224] Augustine, however, these writings are manifestly pastoral in nature; in the same letter, Ambrose, referring to Romans 13:4, noted that magistrates who inflict capital punishment "are praised and cannot be admonished in so far as we observe the authority of the Apostle and do not refuse them Communion."<sup>41</sup>

### C. The Canonists

Like the legal practitioners in our own times, the medieval canonists who wrangled with the morality of the death penalty were not merely engaged in a theological exercise, but were concerned with the consequences of practical application. Grounding their arguments in Scripture and the Church Fathers, many of these canonists argued that use of the death penalty was acceptable under the appropriate circumstances.

<sup>34</sup> Tertullian, *On Idolatry*, ch. xvii (Rev. S. Thelwall trans.), reprinted in 3 *The Ante-Nicene Fathers* 61, 71-72 (Rev. Alexander Roberts & James Donaldson eds., Am. ed. 1963) (n.d.). Tertullian died excommunicate.

<sup>35</sup> Eusebius Pamphilus, *The Life of Constantine*, Book IV, ch. xxxi (Ernest Cushing Richardson trans.), reprinted in 1 *Nicene and Post-Nicene Fathers* 481, 548 (Philip Schaff & Henry Wace eds., Am. ed. 1994) (1890).

<sup>36</sup> Socrates Scholasticus, *The Ecclesiastical History* Book III, ch. xiii, reprinted in 2 *Nicene and Post-Nicene Fathers* 1, 85 (Philip Schaff & Henry Wace eds., Am. ed. 1994) (1890).

<sup>37</sup> See Augustine, *supra* note 27; *Summa Theologica*, *supra* note 22, Part II-II, Question 64, Article 2.

<sup>38</sup> See Jerome, *supra* notes 31, 32; Megivern, *supra* note 4, at 165 (relating that Canisius permitted the death penalty if imposed by legitimate authority); Robert Bellarmine, *De Laicis, or The Treatise on Civil Government* 54-57 (Kathleen Murphy trans., 1928) ("It is lawful for a Christian magistrate to punish with death disturbers of the public peace."); Alphonsus Marie de Ligouri, 1 *Theologia Moralis*, Book III, Tract 4, Chapter 1 (Ex Typographia Vaticana, Rome, 1905).

<sup>39</sup> Harold O.J. Brown, *What the Supreme Court Didn't Know: Ancient and Early Christian Views on Abortion*, 1 *Human Life Review* 5, 16 (1975) (quoting Ephraem, *De Timore Dei*, x).

<sup>40</sup> Ambrose, *Letter 90 (to Studius)*, reprinted in 26 *The Fathers of the Church* 492, 493-494 (Sister Mary Melchior Beyenka trans., 1954).

<sup>41</sup> *Id.* at 492.

Saint Ivo of Chartes is one of the most revered canonists of the eleventh century.<sup>42</sup> In his *Decretum*, Saint Ivo gathered together numerous texts from Augustine, Jerome, and other Church Fathers on the subject of homicide.<sup>43</sup> Many of these texts contain arguments that permit laymen to exercise lethal force but prohibit clerics from doing the same. In his *Panormia*, Saint Ivo summarized a text from Augustine, which proscribed killing except by soldiers and those who hold public functions, by concluding that "To kill a man out of duty is not a sin."<sup>44</sup>

Subsequently, the celebrated canonist Gratian wrote his own *Decretum*, which eventually became the standard legal text in the laws schools of that time.<sup>45</sup> In the second part of his work, Gratian tackled the question whether a judge is permitted to condemn criminals to death. After a review of the relevant authorities, he concluded: "It appears therefore that by means of men bearing lawful [\*225] power ... wicked men are not only scourged for their sins, but they are also properly put to death."<sup>46</sup>

#### D. The Scholastics

Saint Thomas Aquinas is the crowning glory of the scholastic tradition and is arguably the greatest theologian in the history of the Church.<sup>47</sup> Aquinas unequivocally supported the state's right to inflict the death penalty.<sup>48</sup> Thus, it should be no surprise that the scholastic tradition, in which he was formed, was largely in agreement.

Peter Lombard was a prominent figure in the development of medieval scholastic theology. He is most famous for his four-volume work, *Sententia*, which dramatically influenced the explanation of Christian doctrine at that time and was the subject of many commentaries.<sup>49</sup> Although Lombard did not directly address the issue of the death penalty, those who would draw from his principles largely supported its use. Peter of Poitiers, for example, reasoned that "it is not permitted to kill with an old grudge of mind, but it is permitted [to kill] with a zeal for justice, or for the sake of defending the truth, or that the faith may not be endangered."<sup>50</sup> This focus on the internal disposition of the magistrate was a prevalent theme in many texts of the time, including those of Aquinas,<sup>51</sup> and was eventually reflected in the Waldensian profession of faith.<sup>52</sup>

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<sup>42</sup> See Amleto Giovanni Cicognani, *Canon Law 254-255* (Rev. Joseph M. O'Hara & Rt. Rev. Msgr. Francis J. Brennan trans., 2d rev. ed. 1934).

<sup>43</sup> Ivo of Chartes, *Decretum*, reprinted in 161 *PatrologiAE LatinAE* 690 (J.P. Migne ed., Paris, 1889).

<sup>44</sup> Ivo of Chartes, *Panormia*, reprinted in 161 *PatrologiAE LatinAE* 1037, 1303 (J.P. Migne ed., Paris, 1889) ("Ex officio non est peccatum hominem occidere."). Translation from the Latin is by John Dejak and the author.

<sup>45</sup> Cicognani, *supra* note 42, at 325-326.

<sup>46</sup> Gratian, *Decretum*, Part II, Cause 23, Question 5, reprinted in 187 *PatrologiAE LatinAE* (J.P. Migne ed., Paris, 1855) ("Apparet ergo, quod aliquido per legitimam potestatem gerentes ... mali pro peccatis suis non solum flagellantur, sed etiam rite perduntur."). Translation from the Latin is by John Dejak and the author.

<sup>47</sup> See Pope Leo XIII, *Aeterni Patris* [On the Restoration of Christian Philosophy] (1879), reprinted in Claudia Carlen, *The Papal Encyclicals: 1878-1903*, 17 (McGrath Publ'g Co. 1981).

<sup>48</sup> See *Summa Theologica*, *supra* note 22, Book II-II, Question 64, Article 2.

<sup>49</sup> John Marenbon, *Later Medieval Philosophy (1150-1350): An Introduction* 17-18 (1991).

<sup>50</sup> Peter of Poitiers, *Sententiarum Libri Quinque*, reprinted in 211 *PatrologiAE LatinAE* 784, 1151 (J.P. Migne ed., Paris, 1855) ("Ad quod potest dici quia non occidere licet rancore animi, sed licet zelo justitiae, vel causa veritatis defendendae, vel ne periclitetur fides."). Translation from the Latin is by John Dejak and the author.

<sup>51</sup> *Summa Theologica*, *supra* note 22, Part II-II, Question 108, Article 1 ("Vengeance consists in the infliction of a penal evil on one who has sinned. Accordingly, in the matter of vengeance, we must consider the mind of the avenger. For if his intention is directed chiefly to the evil of the person on whom he takes vengeance and rests there, then his vengeance is altogether unlawful: because to take pleasure in another's evil belongs to hatred, which is contrary to the charity whereby we are bound to love all men... . If, however, the avenger's intention be directed chiefly to some good, to be obtained by means of the

**[\*226]** The Scottish theologian John Duns Scotus, in his Commentary on the Sentences of Peter Lombard, argued that the death penalty could be utilized if there was a divinely revealed exception to the general rule that one should not kill. Utilizing the Old Testament, Scotus concluded that there were indeed certain crimes for which there was a divinely mandated penalty of death.<sup>53</sup>

#### E. The Waldensian Profession of Faith

The Waldenses were members of a heretical sect that emerged in the middle ages. During the 1170s, a wealthy merchant named Valdes from Lyons undertook a life of poverty and preaching.<sup>54</sup> He and his followers ran astray of the local episcopacy for preaching without permission despite warnings to refrain from doing so. In 1184, at the Council of Verona, Pope Lucius III included the followers of Valdes on a list of heretics for this reason.<sup>55</sup> The group eventually suffered divisions among themselves and splintered into various factions. In 1210, however, some of the disciples of Valdes sought to reconcile themselves with the Church. As a condition of their reconciliation, Pope Innocent III required them to accept a profession of faith, which, in relevant part, affirmed that "the secular power can, without mortal sin, exercise judgment of blood, provided that it carries out punishment not with hatred, but with judgment, not incautiously, but proceeds with deliberation."<sup>56</sup>

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#### F. Catechisms

In 1566, Pope Saint Pius V promulgated the Catechism of the Council of Trent (also known as the Roman Catechism), considered to be a landmark in the history of Church doctrine.<sup>57</sup> The Catechism is organized into four parts: the Creed, the Sacraments, the Decalogue, and the Lord's Prayer.<sup>58</sup> Under the third part, dealing with the Decalogue, the issue of capital punishment is raised in conjunction with the fifth commandment, "thou shall not kill."<sup>59</sup> The Catechism notes that "it should first be taught what kinds of killing are not forbidden by this Commandment."<sup>60</sup> It is in this context in which the death penalty is addressed:

Another kind of lawful slaying belongs to civil authorities, to whom is entrusted power of life and death, by the legal and judicious exercise of which they punish the guilty and protect the innocent. The just use of this power, far from

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punishment of the person who has sinned (for instance that the sinner may amend, or at least that he may be restrained and others be not disturbed, that justice may be upheld, and God honored), then vengeance may be lawful, provided other due circumstances be observed.").

<sup>52</sup> See *infra* Part I.E.

<sup>53</sup> John Duns Scotus, *Quaestiones In Quartum Librum Sententiarum*, in 18 *Opera Omnia* 1, 374-375 (Luke Wadding ed., Paris, 1894) ("Excepit autem multos, ut patet in Exodo, scilicet blasphemum, homicidam, adulterum, et multos alios; nullus ergo secundum justam legem occidit, nec lex positiva juste infligit homicidium, si non excipitur ille casus a Deo prohibente homicidium."). Interpretation from the Latin is by John Dejak and the author.

<sup>54</sup> See Y. Dossat et al., *Waldenses*, in 14 *New Catholic Encyclopedia* 607, 607 (2d ed. 2003).

<sup>55</sup> *Id.*

<sup>56</sup> *Enchiridion Symbolorum: Definitionum et Declarationum de Rebus Fidei et Morum* 257 (Henricus Denzinger & Adolphus Schummetz eds., 36th ed. 1976) ("De potestate saeculari asserimus, quod sine peccato mortali potest iudicium sanguinis exercere, dummodo ad inferendam vindictam non odio, sed iudicio, non incaute, sed consulte procedat."). Translation from the Latin is by John Dejak and the author.

<sup>57</sup> *Catechism of the Council of Trent For Parish Priests xxxiii-xxxvii* (John A. McHugh & Charles J. Callan trans., Marian Pub'ns 1972) (1566).

<sup>58</sup> *Id.* at iii-x.

<sup>59</sup> *Id.* at 421.

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



involving the crime of murder, is an act of paramount obedience to this Commandment which prohibits murder. The end of the Commandment is the preservation and security of human life. Now the punishments inflicted by the civil authority, which is the legitimate avenger of crime, naturally tend to this end, since they give security to life by repressing outrage and violence. Hence these words of David: In the morning I put to death all the wicked of the land, that I might cut off all the workers of iniquity from the city of the Lord.<sup>61</sup>

The Roman Catechism notes that civil authorities may legitimately execute criminals in order to exact retribution ("punish the guilty") and defend society ("protect the innocent").<sup>62</sup> The state, in imposing punishments, does not act merely as a protector of society but also as an "avenger of crime."<sup>63</sup>

The Catechism of Saint Peter Canisius was enormously influential both before and after the appearance of the Roman Catechism.<sup>64</sup> **[\*228]** Canisius maintained that the state alone had the power to take life, and that homicide "is a very great crime and anyone who takes a life without legitimate authority does the most atrocious injury to his neighbor."<sup>65</sup>

Finally, in response to the proposed question "Are there cases in which it is lawful to kill?" the Catechism of Saint Pius X replies: "It is lawful to kill ... when carrying out by order of the Supreme Authority a sentence of death in punishment of a crime."<sup>66</sup>

#### G. Roman Pontiffs

Numerous roman pontiffs have affirmed the right of the state to punish criminals with the penalty of death. For example, Pope Saint Innocent I, in the year 405, wrote the following in response to a query from the Bishop of Toulouse concerning the death penalty:

Those who have gone before us ... remembered that this power was granted by God; and on account of the punishment of the guilty, the sword was permitted; and that the punisher in such a case is given as a function of God. How then were they to condemn a deed which they see to be granted by God as its author? Concerning these things, therefore, we uphold what has been observed until now, lest we be seen either to overturn teaching, or to act contrary to the authority of the Lord.<sup>67</sup>

The acceptance of capital punishment by the papacy has continued until present times. In his 1891 letter to the bishops of the Austro-Hungarian Empire, Pope Leo XIII wrote that the killing or wounding of another human being, other than in self-defense, is **[\*229]** forbidden except for "public cause."<sup>68</sup> Pope Pius XII, in an address given to a congress of doctors, argued that

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<sup>61</sup> Id.

<sup>62</sup> Id.

<sup>63</sup> Id.

<sup>64</sup> Megivern, supra note 4, at 164.

<sup>65</sup> Id. at 165.

<sup>66</sup> The Catechism of Saint Pius X: The Fifth Commandment, at <http://www.cin.org/users/james/ebooks/master/pius/pcomm05.htm> (on file with the Ave Maria Law Review).

<sup>67</sup> Pope Innocent I, Epistola VI, reprinted in 20 PatrologiAE LatinAE 495, 499 (J.P. Migne ed., Paris, 1845) ("De his nihil legimus a majoribus definitum. Meminerant enim a Deo potestates has fuisse concessas, et propter vindictam noxiorum, gladium fuisse permissum, et Dei esse ministrum vindicem in hujusmodi datum. Quemadmodum igitur reprehenderent factum, quod auctore Deo viderent esse concessum? De his ergo ita, ut hactenus servatum est, sic habemus, ne aut disciplinam evertere, aut contra auctoritatem Domini venire videamur.") (citation omitted). Translation from the Latin is by John Dejak and the author.

<sup>68</sup> Pope Leo XIII, Pastoralis Officii [The Morality of Dueling] P 2, at [http://www.vatican.va/holy\\_father/leo\\_xiii/encyclicals/documents/hf\\_l-xiii\\_enc\\_12091891\\_pastoralis-officii\\_en.html](http://www.vatican.va/holy_father/leo_xiii/encyclicals/documents/hf_l-xiii_enc_12091891_pastoralis-officii_en.html) (on file with the Ave Maria Law Review).

even when there is question of the execution of a condemned man, the state does not dispose of the individual's right to life. In this case it is reserved to the public power to deprive the condemned person of the enjoyment of life in expiation of his crime when, by his crime, he has already disposed himself of his right to live.<sup>69</sup>

Pope Saint Nicholas I, writing in the ninth century, did not expressly condemn the death penalty, but he did require temporal leaders to refrain from its use:

You should not gape now just as before [at those marked] for death, but as much as you ought to call all back to the life of the body, so much more ought you, at every possible opportunity and without doubt, call all back to the life of the soul; and just as Christ led you back from everlasting death ... to eternal life, so you yourselves should save not only those who are innocent, but truly also the guilty from the destruction of death.<sup>70</sup>

In reviewing the theological and magisterial tradition surrounding this issue, however, the weight of authority undoubtedly supports the state's divinely delegated right to execute criminals. Let us now turn to *Evangelium Vitae's* teaching on capital punishment in order to evaluate the encyclical in the light of this tradition.

## **[\*230]**

### II. Internal Ambiguities in *Evangelium Vitae* and the Catechism

#### A. The Current Teaching

In 1992, the Catholic Church published a new Catechism that was eventually translated into English in 1994.<sup>71</sup> This new Catechism reaffirmed the Church's traditional acceptance of capital punishment despite a growing sentiment among some in the episcopacy that the practice should be abolished. The Catechism affirmed "the right and the duty of legitimate public authority to punish malefactors by means of penalties commensurate with the gravity of the crime, not excluding, in cases of extreme gravity, the death penalty."<sup>72</sup> This latter passage of the 1994 Catechism is particularly noteworthy because it offered an essentially retributive justification for capital punishment; that is, the Catechism seemed to say that it was the duty of the state to visit grave crimes with proportionately grave punishments, and that some crimes were sufficiently grave so as to warrant execution of the criminal. As we will see, this language was removed from the subsequent revision of the Catechism and in its place was substituted a considerably different and narrower justification of the death penalty.

Church teaching on the death penalty was reshaped in March of 1995 when Pope John Paul II released his encyclical *Evangelium Vitae*. The encyclical was principally motivated by a concern for a perceived "climate of widespread moral uncertainty," which the Pope furthered characterized as a "veritable culture of death."<sup>73</sup> The encyclical sought to reestablish the truth regarding the "greatness and the inestimable value of human life."<sup>74</sup> Under the heading "Present-Day Threats to Human Life," John Paul II listed a series of *per se* evils: abortion,

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<sup>69</sup> Pope Pius XII, Address to the First International Congress of Histopathology of the Nervous System (Sept. 1952), in *I The Major Addresses of Pope Pius XII* 225, 232-33 (Vincent A. Yzermans ed., 1961).

<sup>70</sup> Pope Nicholas I, *Epistula XCVII*, reprinted in 119 *Patrologiæ Latinæ* 978, 991 (J.P. Migne ed., Paris, 1852) ("Non iam sicut prius mortibus inhiare, sed omnes ad vitam tam corporis, quam animæ debetis omni occasione inventa procul dubio revocare, et sicut vos Christus de morte perenni, qua detinebamini, ad vitam æternam reduxit, ita ipsi non solum innoxios quosque, verum etiam et noxios a mortis exitio satagite cunctos eruere."). Translation from the Latin is by John Dejak and the author.

<sup>71</sup> Catechism of the Catholic Church (1994) [hereinafter 1994 Catechism of the Catholic Church].

<sup>72</sup> *Id.* P 2266.

<sup>73</sup> Pope John Paul II, *Evangelium Vitae* [The Gospel of Life] P 12 (St. Paul ed. 1995).

<sup>74</sup> *Id.* P 2.

contraception, artificial reproduction, and euthanasia.<sup>75</sup> Notably, John Paul II did not address capital punishment in this context, but reserved his discussion of the death penalty for an entirely different section of the encyclical.

**[\*231]** In paragraph fifty-six, John Paul II spoke about the "problem of the death penalty."<sup>76</sup> He began by reviewing the purposes of punishment in general. The primary purpose of punishment, he said (consistently with the Catechism), is "to redress the disorder caused by the offense."<sup>77</sup> The secondary purposes are the defense of public order, the assurance of people's safety, and the rehabilitation of the criminal.<sup>78</sup> With these principles established, John Paul II stated the crux of his teaching on the death penalty:

It is clear that, for these purposes to be achieved, the nature and extent of the punishment must be carefully evaluated and decided upon, and ought not go to the extreme of executing the offender except in cases of absolute necessity: in other words, when it would not be possible otherwise to defend society. Today however, as a result of steady improvements in the organization of the penal system, such cases are very rare, if not practically non-existent.<sup>79</sup>

The discussion immediately preceding the death penalty dealt with the moral legitimacy of killing in self-defense, both in terms of defending one's own life and the responsibility some bear in defending the lives of others. John Paul II noted that this latter duty belongs to the state, which is responsible for defending the common good.<sup>80</sup> According to John Paul II, it is in this context (that is, the context of the defense of others) that we must understand the death penalty.

The 1994 version of the Catechism was subsequently amended to reflect John Paul II's teaching concerning capital punishment. As in *Evangelium Vitae*, the 1997 revision of the Catechism places the death penalty in the context of self-defense:

The legitimate defense of persons and societies is not an exception to the prohibition against the murder of the innocent that constitutes intentional killing. "The act of self-defense can have a double effect: **[\*232]** the preservation of one's own life; and the killing of the aggressor... . The one is intended, the other is not."<sup>81</sup>

The Catechism continued by establishing the purposes of just punishment:

The efforts of the state to curb the spread of behavior harmful to people's rights and to the basic rules of civil society correspond to the requirement of safeguarding the common good. Legitimate public authority has the right and duty to inflict punishment proportionate to the gravity of the offense. Punishment has the primary aim of redressing the disorder introduced by the offense. When it is willingly accepted by the guilty party, it assumes the value of expiation. Punishment then, in addition to defending public order and protecting people's safety, has a medicinal purpose: as far as possible, it must contribute to the correction of the guilty party.<sup>82</sup>

The Catechism then discusses the particular application of capital punishment:

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<sup>75</sup> Id. PP 13-15.

<sup>76</sup> Id. P 56.

<sup>77</sup> Id.

<sup>78</sup> Id.

<sup>79</sup> Id.

<sup>80</sup> Id. P 55.

<sup>81</sup> Catechism of the Catholic Church P 2263 (2d ed. 1997) [hereinafter 1997 Catechism of the Catholic Church] (quoting *Summa Theologica*, supra note 22, Part II-II, Question 64, Article 7).

<sup>82</sup> Id. P 2266.

Assuming that the guilty party's identity and responsibility have been fully determined, the traditional teaching of the Church does not exclude recourse to the death penalty, if this is the only possible way of effectively defending human lives against the unjust aggressor.

If, however, non-lethal means are sufficient to defend and protect people's safety from the aggressor, authority will limit itself to such means, as these are more in keeping with the concrete conditions of the common good and more in conformity with the dignity of the human person.

Today, in fact, as a consequence of the possibilities which the state has for effectively preventing crime, by rendering one who has committed an offense incapable of doing harm - without definitively taking away from him the possibility of redeeming himself - the cases in which the execution of the offender is an absolute necessity "are very rare, if not practically nonexistent."<sup>83</sup>

**[\*233]** The first thing to note about the Church's current teaching is that it does not assert that the death penalty is a per se evil, like abortion or euthanasia. If the Catechism did assert this, it would have to exclude any recourse to the death penalty, since any act that has an intrinsically evil object can never be licit, regardless of the circumstances or the good intentions of the actor.<sup>84</sup> Nonetheless, some have gone beyond the teaching of Pope John Paul II and the Catechism by insisting that the death penalty is unjustifiable in principle.<sup>85</sup>

By comparing the 1997 revision of the Catechism with the 1994 version, one can begin to identify the change that has taken place in the Church's teaching on capital punishment. As noted previously, the 1994 Catechism justified capital punishment principally in terms of retributive justice: if a crime was sufficiently grave, justice could demand that the state impose a proportionately grave punishment, not excluding the execution of the criminal.<sup>86</sup> Under the 1997 Catechism, however, capital punishment is only permissible if necessary to protect society from the criminal.<sup>87</sup> Thus, even if a crime is sufficiently grave so as to warrant the death penalty (a justifiable reason under the 1994 Catechism), it should not be imposed unless it is also necessary to defend society. Furthermore, the Catechism argues that due to modern advances in sequestering criminals, the circumstances in which execution is necessary to protect society are virtually non-existent.

#### B. The Duty to Inflict Proportionate Punishments

In some respects, the current teaching on capital punishment appears to be inconsistent and confusing, not only in relation to tradition, but also in relation to its own principles. It is true that the conclusion regarding the use of the death penalty is relatively clear: unless this form of punishment is necessary to protect people from injury, it should never be inflicted. Based on the Catechism's own premises, however, there is an obvious difficulty that can be expressed through a simple syllogism. The Catechism teaches that **[\*234]** the state has the "duty to inflict punishment proportionate to the gravity of the offense."<sup>88</sup> Some crimes, however, are so grave that the only punishment proportionate to them is execution. Therefore, the state has the duty to execute those who commit particularly grave crimes. This conclusion runs askew, however, of the position that criminals, even those who commit significantly heinous crimes, should be executed only if it is necessary to protect society.

Someone may deny that the first premise of the syllogism is true, namely, that the state has the duty to inflict punishment proportionate to the crime, but this denial creates several difficulties. First of all, such a person may be

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<sup>83</sup> Id. P 2267 (quoting *Evangelium Vitae*, supra note 73, P 56).

<sup>84</sup> See Pope John Paul II, *Veritatis Splendor* [The Splendor of Truth] P 81 (St. Paul ed. 1995).

<sup>85</sup> See, e.g., 2 Germain Grisez, *The Way of the Lord Jesus: Living A Christian Life*, 891-894 (1993). This work was published prior to the release of *Evangelium Vitae*.

<sup>86</sup> See 1994 Catechism of the Catholic Church, P 2266.

<sup>87</sup> See 1997 Catechism of the Catholic Church, P 2267.

<sup>88</sup> Id. P 2266.

in the odd position of denying the truth of one statement in the Catechism in order to support the Catechism's position regarding the death penalty. Second, if there were no proportional relationship between the punishment and the crime punishment would cease to have any meaning. The end of punishment is the restoration of order, and order demands right proportion; it therefore follows that all punishment should be proportioned to the disorder it seeks to redress. Who would fail to see the incongruity if a murderer had his driver's license revoked, or if a driver caught speeding was executed?

Someone may object to the second premise, namely, that some crimes are so grave that the only punishment proportionate to them is execution. The 1994 version of the Catechism acknowledged the truth of this premise when it affirmed "the right and duty of legitimate public authority to punish malefactors by means of penalties commensurate with the gravity of the crime, not excluding, in cases of extreme gravity, the death penalty."<sup>89</sup> Moreover, to deny this would be problematic for Catholics because it is asserted by Scripture, the divinely revealed Word of God: "Neither dost thou fear God, seeing thou art under the same condemnation [of death]? And ... indeed justly, for we receive the due reward of our deeds."<sup>90</sup>

### C. The Death Penalty and the General Purposes of Punishment

Another related problem is that limiting the death penalty to the purpose of defense does not correlate with the general purposes of punishment articulated by *Evangelium Vitae* and the Catechism. [**\*235**] According to both documents, the primary purpose of punishment is retributive, that is, to redress the disorder caused by the crime.<sup>91</sup> If retribution is the primary purpose of punishment, other purposes, such as defense or rehabilitation of the criminal, are evidently secondary purposes. By limiting the infliction of the death penalty to those circumstances in which it is necessary to defend society against an unjust aggressor, however, the Catechism promotes a secondary purpose of punishment, defense, over a primary purpose. That is, the primary aim of capital punishment is construed as defensive, not retributive. In effect, capital punishment can no longer be used properly to achieve punishment's principal purpose of retribution. The principal consideration, rather, is whether it is necessary to defend.

The difficulty here is that, by apparently removing from consideration the primary purpose of retributive justice, the justification of capital punishment becomes remarkably utilitarian. If the sole purpose of capital punishment is defensive, then we lose the essential requirement that the penalty itself be just. For self-defense, considered as such, merely aims to prevent present or future harm, but it is not properly speaking concerned with redressing a past crime. Put another way, if defense is the only criteria by which we determine if capital punishment is warranted, then there is no requirement that the punishment be predicated on a previously committed evil.<sup>92</sup> Hence, punishing solely for defense creates a detachment between the punishment and the crime.

Divorcing capital punishment from its teleological purpose of retribution thus introduces a danger that utilitarian criteria become the standard for punishment. The justification of capital punishment is not based upon whether the criminal's prior actions deserve such punishment according to retributive justice, but whether it will sufficiently protect society from future harm. Just as a strict utilitarian does not consider whether an act is good or just in itself,

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<sup>89</sup> 1994 Catechism of the Catholic Church, P 2266 (emphasis added).

<sup>90</sup> Luke 23:40-41 (emphasis added).

<sup>91</sup> *Evangelium Vitae*, supra note 73, P 56; 1997 Catechism of the Catholic Church, P 2266.

<sup>92</sup> The encyclical itself notes that killing in self-defense does not necessitate any prior judgment of moral guilt on the part of the unjust aggressor:

Unfortunately it happens that the need to render the aggressor incapable of causing harm sometimes involves taking his life. In this case, the fatal outcome is attributable to the aggressor whose action brought it about, even though he may not be morally responsible because of a lack of the use of reason.

*Evangelium Vitae*, supra note 73, P 55 (emphasis added).

**[\*236]** but only whether it will have desirable consequences, so he will not consider whether a punishment is just, but only whether it will produce the desirable result of deterrence or protection. Hence the longstanding criticism of utilitarianism: it cannot provide a sufficient reason why the innocent should not be punished as a deterrent.

The apparent elimination of the retributive purpose of capital punishment forms the basis of Justice Scalia's disagreement with the encyclical. Scalia first notes that the primary purpose of punishment is to redress the disorder caused by the offense by imposing on the offender an adequate punishment for the crime, i.e., retribution. He then refers to the encyclical's mandate that capital punishment is justifiable only when it would not be possible otherwise to defend society:

It seems to me quite impossible to interpret the ... phrase "when it would not be possible otherwise to defend society" as including "defense" through the redress of disorder achieved by adequate punishment. Not only does the word "defense" not readily lend itself to that strange interpretation, but the immediately following explanation of why, in modern times, "defense" rarely if ever requires capital punishment has no bearing whatever upon the adequacy of retribution. In fact, one might say that it has an inverse bearing... . So I take the encyclical and the latest ... version of the catechism ... to mean that retribution is not a valid purpose of capital punishment.<sup>93</sup>

From this, Scalia draws the further conclusion that the encyclical is entirely incompatible with traditional Catholic teaching.<sup>94</sup> I will argue to the contrary in the next section: the encyclical, when read in the light of tradition, is a consistent prudential application of the traditional teaching.

#### D. The Self-Defense Justification of Capital Punishment

Immediately before its discussion of the death penalty, the Catechism discusses the right of both individuals and societies to defend themselves against unjust aggressors:

**[\*237]**

The legitimate defense of persons and societies is not an exception to the prohibition against the murder of the innocent that constitutes intentional killing. "The act of self-defense can have a double effect: the preservation of one's own life; and the killing of the aggressor... . The one is intended, the other is not."<sup>95</sup>

Here the Catechism quotes Aquinas's passage on the principle of double effect to point out that, because murder is the intentional killing of an innocent person, and one does not necessarily intend the killing of an unjust aggressor, killing in self-defense is not necessarily murder. Thus, some have argued that the exercise of capital punishment for the "legitimate defense ... of societies" is justified by the principle of double effect.<sup>96</sup>

This interpretation not only lacks any basis in tradition, it is also inconsistent with the texts cited by the Catechism. In the very same passage from the *Summa Theologica*, Aquinas distinguished between self-defense killings by private individuals and self-defense killings by the state. The former type of slaying is justified by the stringent criteria of double effect, whereas the latter type of slaying is justified on entirely different grounds:

But as it is unlawful to take a man's life, except for the public authority acting for the common good, ... it is not lawful for a man to intend killing a man in self-defense, except for such as have public authority, who while intending

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<sup>93</sup> Scalia, *supra* note 7, at 20.

<sup>94</sup> *Id.* at 20-21.

<sup>95</sup> 1997 Catechism of the Catholic Church, P 2263 (quoting *Summa Theologica*, *supra* note 22, Book II-II, Question 64, Article 7).

<sup>96</sup> See Gerard V. Bradley, No Intentional Killing Whatsoever: The Case of Capital Punishment, in *Natural Law and Moral Inquiry* 155, 156 (Robert P. George ed., 1998) ("[*Evangelium Vitae*] and the Catechism seem to assimilate capital punishment to ordinary self-defense, a matter of causing death while intending strictly just to halt aggression.") (emphasis added).

to kill a man in self-defense, refer this to the public good, as in the case of a soldier fighting against the foe, and in the minister of the judge struggling with robbers.<sup>97</sup>

Here Aquinas clearly stated that those acting for the public authority, including ministers of the death penalty, may lawfully intend the death of another person. Consequently, for Aquinas, capital punishment is not justified by the principle of double effect, since the individual acting for the public authority may lawfully intend the death of the criminal. As Avery Cardinal Dulles has stated: "The **[\*238]** principle of double effect does not apply if the evil effect is intended. In the case of capital punishment, the intended object of the act is precisely the death of the offender."<sup>98</sup> Indeed, given the methodical and calculated procedures surrounding any example of capital punishment, it is virtually impossible to conclude that the executioner does not intend the death of another person.

The tradition of the Church has consistently maintained that capital punishment can be used to defend society from further harm. Aquinas, in the above example and elsewhere, cited this purpose.<sup>99</sup> The traditional position, however, was that, although self-defense was a legitimate purpose of capital punishment, its justification lay in its principal purpose of retribution, or the redress of the disorder caused by the crime through the infliction of proportional punishment. Why? As the very word suggests, the "justification" of any punishment is that reason or explanation for the act that satisfies justice.<sup>100</sup> Of all the reasons given for capital punishment, though, only retribution explains why this punishment is just, since retribution considers what punishment is due to the criminal in light of the gravity of his crime, whereas self-defense considers what is sufficient to deter present or future harm. Therefore, the justification of capital punishment is explained by its retributive purpose. As Aquinas said elsewhere: "It is obvious that [state authorities] do not sin when they punish the wicked, for no one sins by working for justice. Now, it is just for the wicked to be punished, since by punishment the fault is restored to order... ." <sup>101</sup> To paraphrase Aquinas in the words of the Catechism, punishment is just precisely because it redresses the disorder introduced by the offense, i.e., retribution.<sup>102</sup>

**[\*239]** The issue, then, is not whether self-defense is a legitimate purpose of capital punishment or penalty in general; manifestly it is. The real issue is whether self-defense can justify the practice of capital punishment. Punishing solely according to self-defense does not address the state's principal concern with criminal justice, which is to assign punishment according to a transcendent order of justice. The resolution of this issue is partly determined by the proper order of retribution and defense among the purposes of punishment. As Professor Long has argued, "punishment must first be essentially just and only then may it rightly serve social and deterrent functions."<sup>103</sup>

### III. The Prudentialist Reading of *Evangelium Vitae*

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<sup>97</sup> Summa Theologica, supra note 22, Part II-II, Question 64, Article 7 (emphasis added).

<sup>98</sup> Dulles, supra note 1, at 14 (citation omitted).

<sup>99</sup> Summa Theologica, supra note 22, Part II-II, Question 64, Article 2 ("If a man be dangerous and infectious to the community, on account of some sin, it is praiseworthy and advantageous that he be killed in order to safeguard the common good, since "a little leaven corrupteth the whole lump." (quoting 1 Cor. 5:6)).

<sup>100</sup> Justice has different meanings, as Aquinas makes clear. In the context of criminal punishment, however, the relevant consideration is distributive justice, whereby punishment is assigned to the criminal on the basis of equality. Distributive justice governs the relation of the community to each person in that community. Summa Theologica, supra note 22, Part II-II, Question 61, Article 1; see also Thomas Aquinas, Summa Contra Gentiles, Book 3:II, Chapter 142 (Vernon J. Bourke trans., Univ. of Notre Dame Press 1975) (1956) [hereinafter Summa Contra Gentiles] (stating that not all punishments are equal, since this would not achieve the equality proper to distributive justice).

<sup>101</sup> Summa Contra Gentiles, supra note 100, Book 3:II, Chapter 146.

<sup>102</sup> See 1997 Catechism of the Catholic Church, P 2266.

<sup>103</sup> Long, supra note 6, at 521 (emphasis added).

### A. Reconciling Evangelium Vitae with Tradition and with Itself

In the foregoing, I have attempted to explain that the rationale underlying the Evangelium Vitae's instruction on the death penalty appears problematic both in relation to tradition and in relation to its own principles regarding punishment. This apparent divergence from tradition and principle is at the root of the varying responses to the Church's current teaching. For Justice Scalia, abandoning the retributive purpose of capital punishment is inconsistent both with tradition and the encyclical's teaching that retribution is the primary purpose of punishment. Judge Noonan, in contrast, perceives this change as a development of doctrine. Both positions are precluded, however, to the extent that the tradition can explain the current teaching according to its own principles and unaided by any further doctrinal insight.

The traditional understanding of penalty and capital punishment, especially as it is refined and articulated by Aquinas, is remarkably well-equipped to accommodate John Paul II's current teaching on the death penalty. A review of Aquinas's doctrine, which is explicitly invoked by the encyclical and the Catechism, readily lends itself to the prudentialist argument, that is, the argument that Evangelium Vitae's teaching on capital punishment is predicated on circumstantial considerations and does not necessarily presuppose any principles contrary to tradition or prior doctrine. Moreover, the prudentialist argument appears to be the most reasonable interpretation of the [\*240] encyclical because it is the most capable of resolving the ambiguities within the encyclical and the Catechism.

### B. Retributive and Medicinal Punishment

Under the traditional view, punishment by temporal authorities imitated, according to its limited powers, the transcendent order of divine justice.<sup>104</sup> The authority of the state to punish malefactors mirrored the order of divine justice, according to which good deeds were rewarded and evil deeds were punished.<sup>105</sup> Just as God punished evil deeds more or less in proportion to the severity of the crime, human authorities strove to do likewise.<sup>106</sup> Accordingly, because certain crimes were sufficiently severe so as to deserve eternal death, the state could, under certain circumstances, impose the death penalty by way of its divinely delegated authority.<sup>107</sup> This teaching was derived from Saint Paul's letter to the Romans<sup>108</sup> and was the common teaching of both Augustine and Aquinas. For example, in the Summa Contra Gentiles, Aquinas taught the following:

In various countries, the men who are put in positions over other men are like executors of divine providence; indeed, God through the order of His providence directs lower beings by means of higher ones... . But no one sins by the fact that he follows the order of divine providence. Now, this order of divine providence requires the good to be rewarded and the evil to be punished.<sup>109</sup>

Elsewhere Aquinas clearly articulated the state's imitation of the divine order of justice according to its limited powers:

According to the order of His wisdom, God sometimes slays sinners forthwith in order to deliver the good, whereas sometimes He allows [\*241] them time to repent, according as He knows what is expedient for His elect. This also

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<sup>104</sup> Summa Theologica, supra note 22, Part II-II, Question 64, Article 2 ("Human justice is conformed to Divine justice."); see also Pope Pius XII, Address to the Italian Association of Catholic Jurists, in I The Major Addresses of Pope Pius XII, supra note 69, at 306, 316 ("Sacred Scripture teaches that human authority, within its proper limits, is the minister of divine justice in the inflicting of punishment.") (citation omitted).

<sup>105</sup> See Summa Contra Gentiles, supra note 100, Book 3:II, Chapter 140.

<sup>106</sup> See id. Book 3:II, Chapter 142.

<sup>107</sup> See Summa Theologica, supra note 22, Part II-II, Question 66, Article 6. Eternal death in this sentence refers to damnation.

<sup>108</sup> Romans 13:4.

<sup>109</sup> Summa Contra Gentiles, supra note 100, Book 3:II, Chapter 146.



does human justice imitate according to its powers; for it puts to death those who are dangerous to others, while it allows time for repentance to those who sin without grievously harming others.<sup>110</sup>

According to Aquinas, "punishment is proportionate to sin in point of severity, both in Divine and in human judgments."<sup>111</sup> That is, the evil of punishment should be imposed in proportion to the evil of the crime, which is to say that it should be retributive. In this manner, the one who commits the crime becomes experientially aware of the evil he has committed, since he suffers an evil of the same magnitude. Retribution, however, is not the sole criteria by which punishments are assigned by the state. In the Catholic tradition, punishments are also assigned for "medicinal" purposes. The "medicinal" purpose refers to imposing punishment in such a way that it improves those that witness or experience the punishment. In particular, the medicinal purpose can refer to the beneficial effect that the punishment has on the individual good of the criminal or the common good of the state of which the criminal is a member.<sup>112</sup>

Punishment, then, can be considered in two respects: first, under its retributive aspect by which it restores the order of justice through the imposition of a punishment proportional to the offense, and second, under its medicinal aspect by which the punishment has a beneficial effect on either the criminal or society. This twofold purpose of punishment follows from the imitation of the order of divine justice, which is itself both retributive and medicinal.<sup>113</sup> For Aquinas, the medicinal purpose of punishment is not merely a theory [\*242] of deterrence by which future crime is avoided. Rather, the purpose of medicinal punishment is the moral improvement of those who witness or experience the punishment and the promotion of healing within the civil order disturbed by the crime.<sup>114</sup> For Aquinas, the medicinal impact of punishment on the social good is primary in relation to its medicinal effect on the criminal. In this way, the reform of the criminal is not necessarily the determinative consideration of punishment by the state.<sup>115</sup>

Aquinas argued that the punishments imposed in this life are more medicinal than retributive, by which he meant that temporal authorities give precedence to the medicinal considerations of punishment over its retributive considerations.<sup>116</sup> This is because temporal authorities must also tend to the common good over which they have

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<sup>110</sup> Summa Theologica, supra note 22, Part II-II, Question 64, Article 2.

<sup>111</sup> Id. Part I-II, Question 87, Article 3.

<sup>112</sup> Id. Part I-II, Question 87, Article 2 ("Sometimes ... [punishment] is for the good of those who are punished, when, to wit, men arise from sin, more humble and more cautious. But it is always for the amendment of others, who seeing some men fall from sin to sin, are the more fearful of sinning."); id. Part I-II, Question 87, Article 3 ("Even the punishment that is inflicted according to human laws, is not always intended as a medicine for the one who is punished, but sometimes only for others: thus when a thief is hanged, this is not for his own amendment, but for the sake of others, that at least they may be deterred from crime through fear of the punishment, according to Prov. 19:25: "The wicked man being scourged, the fool shall be wiser.").

<sup>113</sup> Id. Part I-II, Question 87, Article 3 ("The eternal punishments inflicted by God on the reprobate, are medicinal punishments for those who refrain from sin through the thought of those punishments, according to Ps. 59:6: "Thou hast given a warning to them that fear Thee, that they may flee from before the bow, that Thy beloved may be delivered.").

<sup>114</sup> Id. Part I-II, Question 92, Article 2 ("From becoming accustomed to avoid evil and fulfil what is good, through fear of punishment, one is sometimes led on to do so likewise, with delight and of one's own accord. Accordingly, law, even by punishing, leads men on to being good.").

<sup>115</sup> Id. Part I-II, Question 87, Article 3.

<sup>116</sup> Id. Part II-II, Question 66, Article 6. If the primary purpose of punishment is retribution, one may wonder why Aquinas says that the punishments of this life are more medicinal than retributive. Although retribution is the primary purpose of punishment, temporal authorities do not always punish primarily in order to exact retribution. Put differently, retribution is the primary purpose intrinsic to the nature of punishment, although it is not necessarily primary in the order of intention of the one who punishes. The magistrate who assigns a certain punishment may intend to punish primarily for medicinal purposes. For example, a magistrate may want to punish a callous criminal in order to make an example of him. The punishment is both retributive for the criminal

jurisdiction. Although the magistrate has a duty to exact retribution in order to protect the divine order of justice that he providentially serves, he also has a duty to consider what impact this punishment will have on the social good. Hence social considerations may temper the imposition of a punishment that would otherwise be required by retributive justice:

In the infliction of punishment it is not the punishment itself that is the end in view, but its medicinal properties in checking sin; wherefore punishment partakes of the nature of justice, in so far as it checks sin. But if it is evident that the infliction of punishment will result in more numerous and more grievous sins being committed, the infliction of punishment will no longer be a part of justice.<sup>117</sup>

**[\*243]** Therefore, because the medicinal aim of punishment is to deter crime through the moral improvement of others, to "check sin," the infliction of a punishment that will lead to more crime should not be imposed. Aquinas did not go so far as to say that medicinal considerations will always preclude the imposition of an otherwise just punishment of death. The determination of whether to impose the death penalty will necessarily be a prudential decision: the medicinal impact on society will vary according to the culture, political climate, and the other circumstances, but if such a penalty "will result in more numerous and grievous sins being committed" the punishment will not be just and should therefore not be imposed.

The punishments of this life, then, are not administered solely according to the demands of retributive justice. Punishment is sometimes used as a medicine to achieve the good of the criminal, but it is always used for the good of society. Inasmuch as the punishments of this life are more medicinal than retributive, Aquinas made it clear that the punishment is not always proportionate to the crime:

Punishments that are inflicted by God in a future life correspond to the gravity of fault; hence the Apostle says in Roman 2, 2 that "the judgment of God is according to truth against those who do such things." But punishments that are inflicted in the present life either by God or by man do not always correspond to the gravity of fault, for sometimes a lesser fault is punished with a graver punishment temporarily in order that a greater danger be avoided; for punishments in the present life are used as medicines.<sup>118</sup>

Just as graver punishments can be inflicted for lesser faults, so lesser punishments can be inflicted for greater faults due to medicinal considerations. Applying this to capital punishment, Aquinas allowed for the possibility that a criminal who deserves death as a matter of retributive justice may nevertheless be spared due to the lack of medicinal impact that the criminal's slaying would have on society.<sup>119</sup> Although the criminal does not get what he deserves, **[\*244]** justice will not be undone, since "punishments that are inflicted by God in a future life correspond to the gravity of fault." The criminal's punishment at the final judgment will be purely retributive, since all medicinal considerations of social impact will be absent, and the potential for the criminal's reform and rehabilitation will no longer exist.

### C. The Current Teaching in Perspective

The traditional teaching concerning the dual purpose of punishment continues to be embraced by the Church even to the present day. In 1955, Pope Pius XII noted "that the Church in her theory and practice has maintained this double type of penalty (medicinal and vindictive), and that this is more in conformity with what the sources of

and medicinal for others, but the punishment is more medicinal insofar as the principal intention of the magistrate is to encourage the moral improvement of others.

<sup>117</sup> Id. Part II-II, Question 43, Article 7.

<sup>118</sup> Thomas Aquinas, *On Evil*, Question 2, Article 10 (Jean Oesterle trans., 1995) [hereinafter *On Evil*].

<sup>119</sup> This is why Saint Thomas acknowledges that, although every mortal sin deserves death as a matter of retributive justice, the death penalty is not inflicted for every mortal sin, "but only for such as inflict an irreparable harm." Again, this is because punishments by temporal authorities have more of a medicinal character than a retributive character. *Summa Theologica*, supra note 22, Part II-II, Question 66, Article 6.

revelation and traditional doctrine teach regarding the coercive power of legitimate human authority." <sup>120</sup> Moreover, this teaching is not merely a historical relic but has perennial significance. Hence Pius XII noted the following:

It is not a sufficient reply ... to say that the aforementioned sources [revelation and traditional doctrine] contain only thoughts which correspond to the historic circumstances and to the culture of the time, and that a general and abiding validity cannot therefore be attributed to them. The reason is that the words of the sources and of the living teaching power do not refer to the specific content of individual juridical prescriptions or rules of action, but rather to the essential foundation itself of penal power and of its immanent finality. <sup>121</sup>

In light of this, an understanding of the traditional purposes of punishment, both retributive and medicinal, is crucial for interpreting John Paul II's current teaching on capital punishment. Now it is arguable that the infliction of the death penalty under modern circumstances is not medicinal but harmful. That is, given the **[\*245]** unprecedented contempt for human life that *Evangelium Vitae* describes, John Paul II might be arguing that the use of capital punishment will not morally improve society because its pedagogical value is distorted in the culture of death. In light of the widespread acceptance of abortion, contraception, and other attacks on life, the death penalty may in fact reinforce our worst instincts, so that it is more medicinal not to inflict such punishment. In Aquinas's words, the death penalty under modern circumstances may lead to the commission of "more numerous and more grievous sins" by reinforcing a notion that life is expendable.

Avery Cardinal Dulles argues that the existence of capital punishment does not necessarily foster a casual attitude towards abortion or other evils. Many people who oppose abortion support capital punishment, and conversely, many who oppose the death penalty favor abortion. Thus, Dulles does not assign this latter argument much probable force. He focuses rather on the perception of modern society that the authority of the state is derived from the people rather than from God. In this context, "the death penalty expresses not the divine judgment on objective evil but rather the collective anger of the group. The retributive goal of punishment is misconstrued as a self-assertive act of vengeance." <sup>122</sup> Interestingly, this argument is itself grounded in medicinal considerations and is principally concerned with the death penalty's medicinal impact, or its pedagogical value, for modern society. Consequently, the overall thesis, that the death penalty should not be imposed under modern circumstances due to prudential considerations, stands regardless of which circumstances in modern society form the basis for that prudential judgment. <sup>123</sup>

Notice that the prudentialist argument against capital punishment based on medicinal grounds is not predicated on any change in the basic principles of capital punishment; rather, it is predicated on current circumstances. This is why the Catechism asserts that refraining from the death penalty is more in keeping with the concrete conditions of the common good, that is, the conditions that currently **[\*246]** and actually characterize modern-day society. <sup>124</sup> Joseph Cardinal Ratzinger, Prefect of the Congregation for the Doctrine of the Faith, has explained the current

<sup>120</sup> Pope Pius XII, Address to the Italian Association of Catholic Jurists, in *I The Major Addresses of Pope Pius XII*, supra note 69, at 306, 325 (emphasis added). The Catholic Church continues to use similar terminology regarding penalties under the Code of Canon Law. 1983 Code c.1312 (Canon Law Society of America et al. trans., 1983) (distinguishing between "medicinal" and "expiatory" penalties); see also 1917 Code c.2216 (Edward N. Peters curator, 2001) (distinguishing between "medicinal" and "vindicative" penalties).

<sup>121</sup> Pope Pius XII, Address to the Italian Association of Catholic Jurists, in *I The Major Addresses of Pope Pius XII*, supra note 69, at 306, 325 (citation omitted).

<sup>122</sup> Dulles, supra note 2, at 33.

<sup>123</sup> For example, even if one disagrees with both positions (Dulles's and mine), one can still conclude that *Evangelium Vitae*'s teaching on the death penalty represents a prudential judgment. One may disagree with the basis for a prudential judgment (here, the medicinal purpose of capital punishment is frustrated in the culture of death) while still acknowledging that it is a prudential judgment. For an authoritative assessment of the death penalty's medicinal effect in modern culture, see Long, supra note 6.

<sup>124</sup> 1997 Catechism of the Catholic Church P 2267.

teaching along similar lines: "Clearly, the Holy Father has not altered the doctrinal principles which pertain to this issue [the death penalty] as they are presented in the Catechism, but has simply deepened the application of such principles in the context of present-day historical circumstances." <sup>125</sup>

The prudentialist argument is also consistent with the context of the encyclical's instruction on capital punishment. After his comments on the death penalty, John Paul II asserted that "If such great care must be taken to respect every life, even that of criminals and unjust aggressors, the commandment 'You shall not kill' has absolute value when it refers to the innocent person." <sup>126</sup> John Paul II seemed to suggest that if society refrains from executing even those who deserve death, it will underscore the sanctity of every human life, particularly those that do not deserve death. This argument is concerned with the didactic message of capital punishment, or more properly, the medicinal value of refraining from capital punishment.

The prudentialist argument also resolves the difficulty articulated above, namely, that the use of the death penalty for defense does not correlate with punishment's primary aim of retribution. The virtue of prudence sometimes requires that an act should not be exercised according to its primary purpose, but it may be exercised according to some secondary purpose. The operation of this principle is clearly seen in the practice of natural family planning. <sup>127</sup> Although marital intercourse is primarily ordered to procreation, <sup>128</sup> couples practicing [\*247] natural family planning may decide prudentially not to engage in the act for that purpose due to a perceived hardship that would result. Nevertheless, the couple may still engage in the act during non-fertile periods in order to achieve the act's secondary purposes, such as its unitive purpose. In the same way, the prudential discernment of modern circumstances may dictate that capital punishment should not be exercised according to its principal purpose of retribution, although it may be lawfully administered if necessary to achieve its secondary purpose of defense. Punishing for the primary purpose of retribution, at least in the case of a criminal whose crimes warrant the death penalty, may lead to even greater evils in the culture of death. If it is reasonable to suppose that the death penalty is a greater detriment to the common good than the perceived injustice that certain criminals were not punished as they deserve, one could legitimately call for a temporary suspension of the principle that every offender ought to be punished in a manner proportionate to the gravity of the crime.

The traditional doctrine of medicinal and retributive punishment provides the basis for the temporary suspension of retributive punishment as a primary aim. Aquinas argued that "punishments ... inflicted in the present life ... do not always correspond to the gravity of fault ... ; for punishments in the present life are used as medicines." <sup>129</sup> It should be stressed that, under the traditional view, the temporary suspension of capital punishment's retributive purpose as a primary aim does not necessitate the promotion of utilitarian criteria when imposing the death penalty. Aquinas asserted that the punishments of this life are more medicinal than retributive; that is, punishment must be both retributive and medicinal, although in this life its retributive purpose may be subordinated to its medicinal

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<sup>125</sup> Richard John Neuhaus, A Clarification on Capital Punishment, *First Things*, October 1995, at 83 (quoting verbatim a letter from Cardinal Ratzinger).

<sup>126</sup> *Evangelium Vitae*, supra note 73, P 57.

<sup>127</sup> By "natural family planning," I refer to the practice of avoiding pregnancy by abstaining from intercourse during a female's fertile period. This is accomplished through an informed awareness of a woman's fertility. The Catholic Church teaches that the exercise of this practice is morally legitimate under the appropriate circumstances. See 1997 Catechism of the Catholic Church P 2370.

<sup>128</sup> See Pope Pius XII, Address to the Congress of the Italian Catholic Union of Midwives, in *I Major Addresses of Pope Pius XII*, supra note 69, at 160, 172 ("The truth is that matrimony as a natural institution, by virtue of the will of the Creator, does not have as its primary, intimate end the personal improvement of the couples concerned but the procreation and education of new life. The other ends though also connected with nature are not in the same rank as the first, still less are they superior to it. They are subordinated to it."). The Catechism teaches that the purposes of marriage extend to the purposes of the marital act itself. See also 1997 Catechism of the Catholic Church P 2363 (stating that conjugal love "achieves the twofold end of marriage: the good of the spouses themselves and the transmission of life.").

<sup>129</sup> See *On Evil*, supra note 118.

function.<sup>130</sup> Aquinas did not assert that retribution is altogether eliminated; for then it would indeed be permissible to round up and execute the innocent in order to deter crime, since retribution [\*248] considers what punishment is due to the criminal in light of the gravity of his crime. The elimination of the retributive aim of punishment would, by that very fact, eliminate its medicinal effect. The execution of the innocent would certainly deter crime through fear, but it would not tend to the moral improvement of society if manifestly immoral means were used.<sup>131</sup>

Although the teaching on capital punishment found in *Evangelium Vitae* and the Catechism appears to be compatible with this interpretation, the agreement is not explicitly made. The Catechism does mention the medicinal purpose of punishment, but it only mentions the medicinal effect of punishment on the criminal; it neglects to mention the critical premise of punishment's medicinal effect on society.<sup>132</sup> Traditionally, however, emphasis was placed on punishment's medicinal value for society, rather than its medicinal value for the criminal.<sup>133</sup> Aquinas went so far as to say that punishment is always medicinal for society, but that it is not necessarily so for the criminal.<sup>134</sup>

#### D. The Development of Doctrine Argument

I have argued above that the Church's current teaching is a prudential judgment about the licit use of the death penalty and is predicated on circumstantial considerations. These considerations include the widespread prevalence of a culture of death, which is the [\*249] primary motivating circumstance of *Evangelium Vitae* itself. Alternatively, these considerations may also include a loss of the perception by society that the state derives its authority from God. Now, a teaching that does not involve any change in doctrinal principle, but is merely an application of that principle to modern circumstances, cannot properly be characterized a development in doctrine. The reason is simply that there has been no change in doctrine.

The traditional teaching, which holds that punishment serves both retributive and medicinal functions, is entirely capable of accommodating John Paul II's current position. *Evangelium Vitae* does not necessarily contradict any previously held principle regarding the function of capital punishment and penalty in general. Furthermore, it should

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<sup>130</sup> This point is lost in the English translation of the *Summa Theologica* used in this Note, which reads: "The punishments of this life are medicinal rather than retributive." See note 116, *supra*. The Latin, however, is more accurately translated: "The punishments of this life are more medicinal than retributive." See Thomas Aquinas, *Summa Theologica*, Part II-II, Question 66, Article 6 (Biblioteca De Autores Cristianos, 3d ed. 1963) ("poenae praesentis vitae magis sunt medicinales quam retributivae.") The former translation makes the retributive and medicinal purposes of punishment exclusive, whereas the latter translation merely indicates that the medicinal purpose of punishment predominates over its retributive purpose. Translation from the Latin is by John Dejak and the author.

<sup>131</sup> If ... the intention of the lawgiver is fixed on that which is not simply good, but useful or pleasurable to himself, or in opposition to Divine justice; then the law does not make men good simply, but in respect to that particular government." *Summa Theologica*, *supra* note 22, Part I-II, Question 92, Article 1 (emphasis added).

<sup>132</sup> Punishment ... has a medicinal purpose: as far as possible it must contribute to the correction of the guilty party." 1997 Catechism of the Catholic Church P 2266.

<sup>133</sup> Pope Pius XII made this point in comparing the medicinal function of punishment to the healing performed by a doctor:

The commission of the crime reveals in the person of the accused an element which clashes with the common good and a well-ordered social life. This element must be removed from the culprit. The process of removing it may be compared to the intervention of a doctor in the case of bodily illness... . The culprit's own good, and perhaps more so that of the community, demands that the ailing members become sound again.

Pope Pius XII, Address to the Congress of the Italian Catholic Union of Midwives, in *I Major Addresses of Pope Pius XII*, *supra* note 69, at 306, 313 (emphasis added).

<sup>134</sup> *Summa Theologica*, *supra* note 22, Part I-II, Question 87, Article 3 ("Even the punishment that is inflicted according to human laws, is not always intended as a medicine for the one who is punished, but sometimes only for others.").

be evident that a doctrinal change is not necessary under this view in order to fully and cogently explain John Paul II's caution on the use of the death penalty.

The argument that *Evangelium Vitae* represents a development in doctrine is often the result of reading more into the encyclical than it actually contains. For example, some maintain that the death penalty is morally incompatible with a newly discovered Christocentric and Trinitarian vision of the person.<sup>135</sup> Yet, because *Evangelium Vitae* does not clearly condemn the death penalty in these terms, and because it does not deny the basic right of the state to inflict capital punishment, they are forced to conclude that the encyclical merely represents a transition towards this ultimate position. Even this conclusion is precluded, however, because it cannot represent a doctrinal development in any authentic sense.

The phrase "development in doctrine" is often attributed to John Henry Cardinal Newman's work, *An Essay on the Development of Christian Doctrine*.<sup>136</sup> In his essay, Newman distinguished between what he calls genuine developments and doctrinal corruptions. Genuine developments are characterized by seven "notes" or qualities: preservation of its type, continuations of its principles, its power of assimilation, its logical sequence, anticipation of its future, conservative action upon its past, and its chronic vigor.<sup>137</sup> If any of [\*250] these qualities are lacking in the putative development, it is a corruption.<sup>138</sup> Newman explained that a genuine development is not merely any change, but one that is essentially consistent with its antecedent doctrine:

As developments which are preceded by definite indications have a fair presumption in their favour, so those which do but contradict and reverse the course of doctrine which has been developed before them, and out of which they spring, are certainly corrupt; for a corruption is a development in that very stage in which it ceases to illustrate, and begins to disturb, the acquisitions gained in its previous history... .

A true development, then, may be described as one which is conservative of the course of antecedent developments being really those antecedents and something besides them: it is an addition which illustrates, not obscures, corroborates, not corrects, the body of thought from which it proceeds; and this is its characteristic as contrasted with a corruption.<sup>139</sup>

In order to determine whether a doctrinal development has occurred, it is necessary to identify the precise "change" that has taken place. Some theologians maintain that Catholic teaching should no longer "accept the principle that the state has the right to take the life of a person guilty of an extremely serious crime."<sup>140</sup> If the argument is that capital punishment is now morally unacceptable in principle, then how does this compare with prior Church teaching on this issue? In truth, this position completely contradicts the previous teaching of the doctors of the church, catechisms, prior pontiffs, and the Waldensian profession of faith that "the secular power can, without mortal sin, exercise judgment of blood."<sup>141</sup> According to Newman, a development that contradicts and reverses the body of thought from which it proceeds is a corruption of doctrine. Therefore, those that argue for a development in doctrine in this sense must not only admit that the encyclical does not currently support their position, since it affirms the right of the state to inflict the death penalty, but they must also admit that the encyclical

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<sup>135</sup> See Thomas R. Rourke, *The Death Penalty in Light of the Ontology of the Person: The Significance of Evangelium Vitae*, 25 *Communio: International Catholic Review*, Fall 1998, at 397.

<sup>136</sup> John Henry Cardinal Newman, *An Essay on the Development of Christian Doctrine* (Longmans, Green and Co. 1920) (1878).

<sup>137</sup> *Id.* at 171.

<sup>138</sup> *Id.* at 170-171.

<sup>139</sup> *Id.* at 199-200.

<sup>140</sup> Grisez, *supra* note 85, at 892.

<sup>141</sup> See *Enchiridion*, *supra* note 56.

does not [\*251] represent a transition towards this ultimate conclusion. This would not be a development of prior doctrine but a rejection of it.

It is true that those who argue that a doctrinal development has occurred do not all assert that the death penalty is immoral in principle. The precise change, they argue, is that the current teaching substantially limits the purposes for which the death penalty can be imposed. The new teaching is that, unless it is necessary to defend society against further harm, the death penalty should never be used. Under the traditional teaching, as expressed in the 1994 version of the Catechism, the death penalty was given more expansive use - a retributive function, not just a defensive function - and could be inflicted as a proportional punishment to redress particularly grave crimes. In a manner of speaking, this is a development to the extent that a change has occurred that is not contradictory to previous teaching. The development, however, is not necessarily predicated on any doctrinal change, as argued above. Thus, even in this sense, the argument that *Evangelium Vitae's* teaching on capital punishment represents a development in doctrine is unfounded.<sup>142</sup>

#### IV. Capital Punishment and Catholic Attorneys

##### How Authoritative Is This Teaching?

I have argued that the teaching of Pope John Paul II regarding the death penalty represents a prudential application of the traditional teaching, and not a development of doctrine. How does this conclusion impact the decisions of Catholic lawyers in the practice of law? In particular, what is the nature of assent that should be given to this teaching?

The authority of Church teaching varies according to the nature of what is being taught. In the first place, there are doctrines contained in the Word of God, either in scripture or tradition, and defined with a solemn judgment as divinely revealed truths either by the Pope when he speaks *ex cathedra*, by the College of Bishops gathered in council, or infallibly proposed for belief by the ordinary and universal [\*252] magisterium.<sup>143</sup> Examples in this area include the articles of faith of the Creed and the Marian dogmas. These doctrines require "the assent of theological faith."<sup>144</sup> The denial of any of these divinely revealed truths subjects the believer to the censure of heresy under Canon Law.<sup>145</sup>

Second, there are those doctrines concerning faith and morals which have not been proposed as formally revealed by the magisterium, but are nonetheless necessary for faithfully keeping and expounding the deposit of faith.<sup>146</sup> An example of this type of teaching is the doctrine that priestly ordination is reserved for men. These doctrines require a "firm and definitive assent," and a denial of these truths excludes the person from full communion with the Church.<sup>147</sup>

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<sup>142</sup> Although Joseph Cardinal Ratzinger announced at the publication of *Evangelium Vitae* that it contained a "development of doctrine," his subsequent explanation makes it clear that he was only speaking loosely: "Clearly, the Holy Father has not altered the doctrinal principles which pertain to this issue [the death penalty] as they are presented in the Catechism, but has simply deepened the application of such principles in the context of present-day historical circumstances." Neuhaus, *supra* note 125, at 83 (emphasis added).

<sup>143</sup> Joseph Cardinal Ratzinger, Commentary on the Concluding Formula of the "Professio Fidei" P 5, (1998), reprinted in *L'Osservatore Romano* (English ed.), July 15, 1998, at 3.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* P 6.

<sup>147</sup> *Id.*

Finally, there are doctrines concerning faith and morals that are presented as true by the Pope or the College of Bishops, although neither solemnly defined nor proposed as definitive.<sup>148</sup> Although not infallible, these teachings require "religious submission of will and intellect" and "require degrees of adherence differentiated according to the mind and the will manifested."<sup>149</sup> The degree of adherence demanded by a particular teaching is determined from "the nature of the documents, by the frequent repetition of the same doctrine, or by the tenor of the verbal expression."<sup>150</sup>

The adherence to Church teaching described above only pertains to doctrines on faith and morals. Now it is not clear that John Paul II's current teaching on capital punishment can be characterized as a moral doctrine. Unlike abortion and euthanasia, neither *Evangelium Vitae* nor the Catechism condemns capital punishment as sinful or gravely wrong. Christoph Cardinal Sch<sup>u</sup>nborn, the editor of the Catechism, has stated that the fundamental question concerning the moral legitimacy of the death penalty remains, for the moment, **[\*253]** unanswered.<sup>151</sup> Extra-textual statements made by John Paul II seem to indicate that at least he thinks it is a moral issue.<sup>152</sup> Nevertheless, it seems that until there is further clarification on this matter by the Holy See, the Church still supports the basic principle that the state has the right to execute criminals, though under substantially limited conditions.

A teaching that is predicated on circumstantial considerations and based on prudential discernment is not a doctrinal teaching. Hence there is more flexibility in relation to the prudential discernment of those circumstances than there would be in relation to an absolute condemnation of the death penalty. The Church's current teaching on the death penalty is neither a formally revealed truth, nor to be held definitively. Assuming that the current teaching on the death penalty is in fact a moral teaching, one might argue, at most, that it requires a "religious submission of will and intellect."<sup>153</sup> The nature of one's adherence to this teaching as a Catholic attorney can be guided by its presence in an encyclical and in the Catechism. Although this teaching is not presented infallibly, Catholics should still strive for obedience:

Religious submission of mind and will must be shown in a special way to the authentic magisterium of the Roman Pontiff, even when he is not speaking *ex cathedra*; that is, it must be shown in such a way that his supreme magisterium is acknowledged with reverence, the judgments made by him are sincerely adhered to, according to his manifest mind and will.<sup>154</sup>

One's assent, though, must be towards what is actually asserted in the encyclical. The encyclical does not condemn the death penalty as immoral, nor does it say it should never be imposed. In the absence of a blanket prohibition against the death penalty, it would be over-reaching to assert that Catholic judges and attorneys are barred from participating in any capital proceedings whatsoever. In order to **[\*254]** conform properly one's mind and heart to this teaching, however, and in light of the reasonableness of the prudential judgment concerning the medicinality of the death penalty in our own times, extreme circumspection is necessary.

## Conclusion

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<sup>148</sup> Id. P 10.

<sup>149</sup> Id. PP 10-11.

<sup>150</sup> Id.

<sup>151</sup> Christoph Cardinal Sch<sup>u</sup>nborn, Brief Note on the Revision of Passages in The Catechism of the Catholic Church Having to Do with the Death Penalty, Catholic Dossier, September-October 1998, at 11.

<sup>152</sup> Id. ("The Holy See has given a number of signs that seem to indicate a development in the direction of a veritable moral exclusion of the death penalty.").

<sup>153</sup> See Ratzinger, *supra* note 143, P 10.

<sup>154</sup> Second Vatican Council, *Lumen Gentium* [Dogmatic Constitution on the Church] P 25 (1964), reprinted in *The Sixteen Documents of Vatican II* 109, 135 (Nat'l Catholic Welfare Conference trans., St. Paul ed. 1967).



From what has been argued above, neither the statements of Justice Scalia nor those of Judge Noonan are compatible with this conclusion concerning capital punishment. Justice Scalia argues that the removal of the retributive function of capital punishment is at odds with prior Catholic teaching and is therefore not worthy of credence.<sup>155</sup> There can be no doubt that *Evangelium Vitae* is in apparent tension with prior Church teachings in this respect: the Catechism of Trent acknowledged that the state executes criminals in order to punish the guilty as well as protect the innocent.<sup>156</sup> Indeed, as *Evangelium Vitae* affirms, retribution is the principal and essential purpose of all punishment.<sup>157</sup> The current teaching, however, does not necessarily contradict this truth. The virtue of prudence sometimes requires that an act should not be exercised according to its primary purpose, although it may be exercised according to some secondary purpose. If we assume that the infliction of the death penalty, when exercised for the purpose of retribution, is a greater detriment to the common good than the apparent injustice that certain criminals were not punished as they deserve, one can legitimately call for a suspension of the retributive principle that criminals should be punished according to the gravity of their crime. Just as married couples practicing natural family planning can refrain from using the marital act according to its primary purpose of procreation, so the civil magistrate can refrain from imposing a punishment according to its primary purpose of retribution. In both cases, the actors can intend to achieve the secondary purposes of their respective acts due to a perceived hardship that would result from engaging in the acts according to their proper purpose. In the case of capital punishment, the prudential discernment of modern circumstances may dictate that the death penalty should not be exercised according to its principal [\*255] purpose of retribution, although it may be lawfully administered if necessary to achieve its secondary purpose of defense.

Judge Noonan, in contrast, argues that imposing capital punishment in modern society is equivalent to homicide, and that this new teaching is a development of Catholic doctrine.<sup>158</sup> *Evangelium Vitae* teaches that "The deliberate decision to deprive an innocent human being of his life is always morally evil and can never be licit either as an end in itself or as a means to a good end."<sup>159</sup> This definitional prohibition against murder manifestly does not include capital punishment: not only does the encyclical teach that the death penalty is licit at least in some circumstances, its prohibition against the deprivation of innocent human life obviously does not apply to the death penalty. If prior Catholic catechesis asserted that the death penalty was an exception to the fifth commandment's prohibition against killing, it would be a complete reversal of that catechesis to assert that the death penalty under modern conditions violates the commandment. Again, this would not be a development of prior doctrine but a rejection of it.

The most reasonable interpretation of the encyclical, and the one that I believe Catholic attorneys should adopt, is that the teaching on the death penalty is a prudential response to circumstantial considerations that does not necessarily presuppose any principles contrary to tradition or prior doctrine. According to traditional doctrine, punishment by the state is both retributive and medicinal, that is, punishment aims to restore the disorder caused by the offense, but it may also be used to achieve the moral improvement of society or the moral improvement of the criminal. Because the medicinal function of punishment is used to prevent further evil in society, the infliction of punishment that would cause more evil is counterproductive. This determination, however, can only be made through a prudential discernment of the circumstances surrounding the infliction of punishment. One could argue that, given our own circumstances, the unprecedented and pervasive contempt for human life described in *Evangelium Vitae*, the infliction of the death penalty is not medicinal but harmful. In Aquinas's words, the death penalty under modern circumstances may lead to the commission of "more [\*256] numerous and more grievous sins" by reinforcing a notion that life is expendable.<sup>160</sup>

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<sup>155</sup> Scalia, *supra* note 7, at 20-21.

<sup>156</sup> Catechism of Trent, *supra* note 57, at 421.

<sup>157</sup> *Evangelium Vitae*, *supra* note 73, P 56.

<sup>158</sup> See Esposito, *supra* note 9.

<sup>159</sup> *Id.* P 57.

<sup>160</sup> *Summa Theologica*, *supra* note 22, Book II-II, Question 43, Article 7.

John Paul II's acknowledgment of the right of the state to inflict the death penalty, while insisting on its limited use, is not a contradiction, nor is it unprecedented. It is essentially consistent with the position of his predecessor Pope Saint Nicholas I and with the pastoral writings of Saint Augustine and Saint Ambrose, among others.<sup>161</sup> Now, if it is possible to read *Evangelium Vitae* consistently with tradition - a tradition that the magisterium intends to preserve - then this is the most appropriate way to interpret the encyclical. It is premature, in the face of such a reading, to conclude that the encyclical contradicts tradition or that it necessitates the conclusion that a development of doctrine has occurred. I have argued above that Aquinas's articulation of the traditional teaching provides such an interpretation. Moreover, the prudentialist reading not only is capable of reconciling the current teaching on the death penalty with tradition, it also clarifies the ambiguities of that teaching. The encyclical places the death penalty in the context of self-defense, although the proper purpose of punishment is retributive. As in the analogy to natural family planning, it is both possible and morally legitimate, as a prudential matter, to engage in certain acts even though one does not intend or achieve the primary purpose towards which those acts aim.

Catholic attorneys have more flexibility in gauging their response to a prudential judgment of the Pope than they do in relation to a doctrinal teaching. The magisterium only claims to teach infallibly regarding an unchanging deposit of faith; it does not claim to be infallible when it makes prudential judgments in the context of changing circumstances and cultures.<sup>162</sup> In determining the assent which Catholic attorneys should give to the prudential judgment of John Paul II and other spiritual leaders of the Church, however, it is worthwhile to note the guidance of one of those spiritual leaders, Cardinal Avery Dulles: "Prudential judgment, while it is to be respected, is not a matter of binding Catholic doctrine. To differ from such a judgment, therefore, is not to dissent from Church teaching."<sup>163</sup> **[\*257]** However, as the Cardinal further notes, John Paul II's judgment regarding capital punishment is reasonable under current conditions. I would add that, in light of John Paul II's renowned wisdom and spiritual insight, his prudential judgment can be regarded as eminently more trustworthy than our own.

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<sup>161</sup> See Nicholas I, *supra* note 70; Augustine, *supra* notes 27-29; Ambrose, *supra* note 40 at 492-494.

<sup>162</sup> 1997 Catechism of the Catholic Church, PP 889-91.

<sup>163</sup> Avery Cardinal Dulles, Antonin Scalia and His Critics: An Exchange on the Church, the Courts, and the Death Penalty, *First Things*, Oct. 2002, at 8.