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Catholic Moral Teaching and the Problem of Capital Punishment

The papal teaching interpreted

Responses to the present papal teaching on the problem of capital punishment have been varying and even conflicting. Steven Long, whose ideas I consider in the second part of this essay, argues that the papal teaching cannot say what it appears to be saying because the Church has never said such a thing; it therefore must be interpreted as saying what the Church has always said. Avery Cardinal Dulles, S.J., tends to agree arguing that what is new is not the underlying principle regarding the legitimacy of capital punishment but the application of that principle to changing conditions.¹ Gerry Bradley on the other hand says the treatment is novel; capital punishment, once justified as a means of retribution, is now being assessed in terms of civil society's right to defend itself.² Mark Latkovic agrees but says the novelty does not go so far as to render capital punishment intrinsically evil.³ Janet Smith suggests the pope might be leaning precisely in that direction.⁴ James Hitchcock thinks the pope is trying to elevate the social conversation "to a higher plane . . . by affirming the sacredness of human life in all situations."⁵ Charles Rice agrees and thinks the papal teaching has made "obsolete" the traditional view that death is the only fitting punishment for certain very grave crimes.⁶ Justice Antonin Scalia thinks that Charles Rice and the pope are flat wrong.⁷ And so on.

I think the papal teaching is saying something new.⁸ Catholic tradition has argued that legitimate public authority rightly inflicts the death penalty for very grave crimes, and that its infliction, insofar as it serves to redress disorder introduced by a criminal's crime, protects the community from a dangerous influence, and deters others from committing similar crimes, is not only justified, but good. This is not something the present pontificate has taught, nor in my estimation would be willing to teach. The papal teaching as articulated in the 1997 edition of the *Catechism of the Catholic Church (CCC)* (which includes the morally relevant elements of the death penalty account of *Evangelium vitae*) is unprecedented for a magisterial document. A careful examination justifies the conclusion that a theoretical foundation is being laid for a substantive revision in the Church's teaching on the morality of capital punishment. That revision would teach that capital punishment as *punishment* is no longer legitimate; that the state rightly uses lethal force only for purposes of self-defense, which means that inflicting death could not be justified as a means of retribution; that in using lethal force against a dangerous criminal, the state is justified only in using force proportionate to render him incapable of causing harm; if he dies as a consequence, his death would have to remain *praeter intentionem* (i.e., unintended). This is not the explicit teaching of the *CCC*. But the conclusions follow neatly from a fair reading of the text. I say this for four reasons. First, capital punishment in the 1997 *CCC* (and *Evangelium vitae*) is not conceived in traditional retributive terms of but rather in terms of self-defense; second, the *CCC* deliberately distances itself from traditional ways of categorizing the death penalty in the Church's tradition of justifiable homicide; third, it frames its discussion of the legitimate infliction of death in terms of double-effect reasoning; and fourth, the 1997 text deliberately suppresses the one statement from the 1992 text warranting the

conclusion that death can be rightly inflicted as a punishment *per se*. I will consider each in turn.

The first indication that the papal teaching is proposing something new is found in the title of the subsection in which capital punishment is addressed. The section is entitled “Legitimate defense.” What precedent is there in the tradition for treating capital punishment as a form of legitimate defense? Almost none. Aquinas never uses the term “legitimate defense” (*defensio legitima*), neither in his treatment of the death penalty, nor in any major work on theology or morality. But he does use the related term “blameless defense” (*inculpata tutela*). Asking whether it is morally legitimate to kill a man in self-defense he answers, “it is legitimate to repel force with force provided one does so with the *moderation of a blameless defense*.”⁹ “Nor is it necessary for salvation that one omit an act of moderate defense in order to avoid killing another.”¹⁰ Aquinas’ phrase *moderamine inculpatae tutelae* is repeated continually over the centuries in treatments on lawful killing. Only not in regard to the infliction of the death penalty by public authority. Rather in virtually every instance it is used as Aquinas uses it, that is to limit lawful killing by private persons in self-defense.¹¹ When the 1917 and 1983 Codes of Canon Law use the term “legitimate defense” (*legitima tutela*) they too use it in reference to acts of legitimate killing by private persons in *self-defense*.¹² And when Vatican II’s *Gaudium et spes* uses the term its use is more or less the same.¹³ In each the context for the term’s usage is self-defense. The *Catechism*’s insertion of its treatment of the death penalty under this title is entirely novel.

The second indication that the magisterium intends to distance itself from its traditional justification for the death penalty occurs in the very first line of the subsection. It reads: “The legitimate defense of persons and societies *is not* an exception to the prohibition against the intentional killing of the innocent that constitutes murder.” (No. 2263, emphasis added) Why deny at the outset that killing in legitimate defense is an exception to the fifth precept of the Decalogue? Perhaps because the *Catechism*’s historical predecessor, the 1566 *Roman Catechism*, issued pursuant a decree of the Council of Trent, locates its teaching on the death penalty in a section explicitly devoted to “exceptions” to the fifth Commandment.¹⁴ The logic is straight forward. The *Roman Catechism* teaches capital punishment is an exception, the new *Catechism* teaches it is not.

Third, the theoretical framework for the *Catechism*’s treatment of capital punishment, indeed, its treatment of all forms of legitimate killing is double-effect reasoning. Recall Aquinas says that an act can have two or more effects, one intended the other(s) not. Since *intention* is primary, though not always sufficient, for assessing the morality of an act,¹⁵ it can be morally legitimate to perform an act that results in bad effects, like death, provided the bad effects are unintended. The *Catechism*, having denied that killing in legitimate defense is an exception to the Decalogue, continues in its next sentence to quote Aquinas on double effect reasoning indicating that what the Commandment forbids is not all acts that bring about death but only those that intend death: “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.”¹⁶ The next paragraph, no. 2264, applies double-effect reasoning to a specific form of legitimate defense, namely, the killing of aggressors by private persons in self-defense:

Love toward oneself remains a fundamental principle of morality. Therefore it is legitimate to insist on respect for one’s own right to life. Someone who defends his life is

not guilty of murder even if he is forced to deal his aggressor a lethal blow:

If a man in self-defense uses more than necessary violence, it will be unlawful: whereas if he repels force with moderation, his defense will be lawful.... Nor is it necessary for salvation that a man omit the act of moderate self-defense to avoid killing the other man, since one is bound to take more care of one's own life than of another's. (Aquinas *ST*, II-II, 64, 7c)

Paragraph 2265 expands its scope of the term legitimate defense to include the defense that public authority renders on behalf of the community in repelling aggressors, implying foreign aggressors:

Legitimate defense can be not only a right but a grave duty for one who is responsible for the lives of others. The defense of the common good requires that an unjust aggressor be rendered unable to cause harm. For this reason, those who legitimately hold authority also have the right to use arms to repel aggressors against the civil community entrusted to their responsibility.

The paragraph does not explicitly mention a form of killing and so there is no need to specify limits in terms of double-effect reasoning. But there are two good reasons for concluding that the same context of indirect killing is being maintained. First, the logical relation set by the preceding paragraphs and absence of any indication of a change of context would seem to necessitate that the context of double-effect reasoning be carried over. Second, the defense the paragraph speaks about requires 'rendering aggressors unable to cause harm.' This is classical language in Catholic moral tradition used to explain the limits of lawful killing by private persons in self-defense. If the aggression of another threatens my life, the tradition from Aquinas very clearly has taught that the natural right to preserve myself in being justifies me in using force against that aggressor proportionate to render him unable to cause harm; and the tradition has unambiguously asserted that the killing that follows from such a defensive act must be unintended.¹⁷

Having addressed the duty of civil authority to defend the community against external threats in section 2265, we might anticipate that the next paragraph would address civil authority's duty to defend the community against internal threats. And this is what we find in paragraph 2266 in its consideration 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 the 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.¹⁸

Is the context for no. 2266 still double-effect reasoning? It would seem not. In setting forth the

primary aim of punishment in terms of retribution—“of redressing the disorder introduced by the offense”—the paragraph indicates that it is no longer talking about an act of forward looking self-defense. The defining aim of punishment it says is to correct a disorder caused by some crime, to look back, as it were, at something that has already happened, not forward at something that still threatens to happen. This makes sense since only those who do wrong are rightly punished. Punishment the paragraph says *also* serves the purpose of “defending public order” and “protecting people’s safety,” but neither of these two purposes makes punishment punishment.

We would expect number 2267, in which the death penalty is taken up, to frame its discussion of the lawful limits of capital punishment in terms of the theoretical framework used to define the nature and purposes of punishment outlined in 2266. But this is not what we find. When turning to the death penalty the subsection returns to the language of double-effect reasoning:

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 non-existent.’* (Emphasis added)

The act of force referred to here is not an act of ‘punishment proportionate to the gravity of a criminal’s offense,’ it does not look back at a disorder introduced by deliberate crime, is not in fact an act of punishment according to the preceding paragraph’s own definition. It is an act of self-defense as described in sections 2263-2265. The text states that it is a defensive act against an “aggressor” aimed at ‘rendering him incapable of doing harm.’ If he is safely incarcerated in prison, why refer to him as an aggressor? Why not call him “the condemned”, “prisoner,” the guilty,” or some other term that appropriately describes one who lives under a sentence of death? The papal authors deliberately eschewed a traditional retributive framework and terminology in its treatment of capital punishment in favor of a framework and terminology equally traditional but not in relation to the death penalty, rather in relation to lawful killing by private persons in self-defense. This is the language and framework of double-effect reasoning. Limiting the death penalty’s lawful infliction by conditions traditionally invoked for the guidance of acts of private self defense, number 2267 concludes that “the cases in which the execution of the offender is an absolute necessity {*absolute necessarium*} ‘are very rare, if not practically non-existent.’”¹⁹ The last statement is of course taken directly from the papal encyclical *Evangelium Vitae*.

The final--and perhaps the clearest--indication that the papal teaching explicitly intends

to reconceive the death penalty along non-traditional lines is seen when we compare the 1992 version of the *CCC* with the same section in the 1997 *editio typica*. The 1992 version taught:

For this reason the traditional teaching of the Church has acknowledged as well-founded 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*. (Emphasis added)

A retributive justification is proposed here. Punishing someone “by means of penalties commensurate with the gravity of their crime” says they are being punished for what they have done, not for the threat they still pose. Sometimes a person’s crime--“in cases of extreme gravity”--merits death. In such a case the death penalty is legitimate. This is a non-controversial rearticulation of a traditional principle of justifiable homicide. Remarkably, however, in the 1997 *CCC*, the clause I highlighted is suppressed. The statement in the 1992 text was the only indication that a traditional retributive justification of capital punishment was being maintained. And that proposition was deleted from the final authoritative text. Moreover, in 1992 the *Catechism* included its treatment of capital punishment in its analysis of punishment generally. In the revisions the death penalty is moved from the section dedicated to punishment to its own section (2267).

One critic

As I said, there is ample reason for concluding that a new doctrinal teaching on the morality of capital punishment is being anticipated in the *CCC*. Not all however would agree. Steven Long for example published an influential article in the *Thomist* in 1999 refuting this claim.²⁰ His essay is problematic in several respects. First, its method of interpretation is flawed, which results in a tendentious interpretation of the text and the explaining away important assertions about the lawfulness of the death penalty in the modern world. Moreover its use of Thomistic sources is misleading. Next, it falsely states that there is no precedent in Catholic moral tradition for the plain interpretation of the papal teaching. And finally, it caricatures terribly the same plain interpretation.

Long’s attention is directed exclusively to the treatment of the death penalty found in *Evangelium vitae*, which, he says, is “the most important modern locus for understanding the Church’s teaching on the topic.”²¹ Because the preparation of the *Catechism of the Catholic Church (CCC)* was a collaborative effort of the bishops of the world, and because the morally relevant elements of *Evangelium vitae*’s teaching were incorporated into the 1997 typical edition, I take the *Catechism*’s teaching on the death penalty to be equally if not more important for assessing the mind of the present pontificate. I will therefore appeal to both documents in my analysis.

Long’s essay revolves around a judgement that the apparent meaning of the death penalty teaching of *Evangelium vitae*—and by extension the *CCC*, because it diverges from what the tradition has ordinarily taught, cannot be its actual meaning. In other words, the papal teaching should not be interpreted as saying what it appears to be saying, but rather as what the Church has always said. A methodological error at its outset however leaves this conclusions unconvincing. Long asserts at the beginning of his lengthy essay that “as a magisterial

document, its meaning is *constituted* in relation to tradition.”²² Although appealing to Catholic tradition to help clarify ambiguous or partial magisterial statements is a valid principle of interpretation, to say that a document’s meaning is “constituted” by its relation to the tradition (by which I take him to mean constituted by the meaning of past authoritative statements on the subject) is false. The meaning of an ecclesiastical statement or document is constituted in the first place by the intentions of its author(s). Which is why it is possible to ask to what degree a particular magisterial assertion corresponds to or departs from the tradition *to which it contributes*. A Catholic scholar’s role in the interpretation of ecclesiastical texts therefore is to ascertain in the first place, through careful analysis of a text, the precise intentions of its author. Most of the problems with Long’s essay stem from his application of his exegetical principle to the papal teaching on capital punishment with the result that the most important elements of that teaching become relativized along lines that Long considers more compatible with Catholic ethical tradition.

Long asserts that “a more traditional reading” of the encyclical, what he also calls a “prudential” reading, will “not hesitate to give ‘defense of society’ a rich meaning inclusive of the manifestation of a transcendent order of justice within society” (513-14). The term “defense of society,” or more specifically “legitimate defense,” deserves unpacking. Both *Evangelium vitae* and the *CCC*, as I have shown, frame their discussions of the lawfulness of capital punishment in terms of legitimate defense; and in both, legitimate defense is narrowly construed to mean the collective self-defense of society. The death penalty, they teach, may only be inflicted when it is in the interests of societal defense. But as I have stated Catholic moral tradition has held that death can be a fitting punishment for a crime whether or not the self-defense of society remains at stake. In other words, the death penalty in the tradition has been justified as a means of retribution, as a means of giving criminals what they deserve. This tension between the present papal teaching and the ordinary teaching of the tradition is the sticking point for Long. It leads him to argue that we ought “not hesitate” to include within the interpretation of “societal defense” a retributive meaning. But that meaning is not sustained by the text. On the contrary, the text sets forth an exclusively non-retributive justification, namely necessary defense: “*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.*” (*EV*, 56) Recall too that the *Catechism’s* analysis references Aquinas’ discussion of lawful killing by private persons in self-defense. *Evangelium vitae* does the same. Neither text references Aquinas’ article defending the killing of malefactors by the state, an article which has exercised enormous influence on Catholic moral tradition, and with which any scholar familiar with traditional literature on capital punishment—including the drafters of *Evangelium Vitae* and the *CCC*—would be well acquainted. Why not? Why suppress such reference? Why reference instead an argument that says killing is legitimate only when necessary to render an aggressor incapable of causing harm? Why refer to the beneficiaries of this kind of killing, as in the *CCC*, as “aggressors,” not “the condemned,” “the guilty,” etc.? One reason is because you intend to conceptualize lawful killing in capital punishment along lines of lawful killing in self-defense. Long discounts this possibility from the outset, calling it a “reductionist reading” of the papal teaching.²³ He says if we conceive of capital punishment under a paradigm of self-defense, then the papal teaching “will appear to miscontextualize the teaching of Thomas”, that is, will appear

to apply a set of norms to capital punishment that Aquinas only intended to be applied to self-defense. But this is precisely the novelty of the papal teaching, that its analysis applies a non-traditional paradigm to limit the lawful killing of criminals. Long admits that the text tends toward a novel justification: “if we accept a reading of the document as a doctrinal argument *apart from tradition*, it does appear to propose that only those executions are justified which are absolutely necessary to the physical protection of society” (517). But the text does not merely “appear” to say this, it states it outright: “. . . ought not go to the extreme of executing the offender except in cases of absolute necessity.” (EV, 56).

Long uses fidelity to the tradition as a tool to reshape the meaning of the papal text. He says “we might wish to ask whether the solemn execution of a divine norm of justice might not be described as necessary to a richer conception of social order and the common good that may legitimize the application of the death penalty.” (517) Defining capital punishment in these terms may very well lead to a “richer” conception capital punishment, but whether or not it does is irrelevant to the meaning of the papal teaching whose texts neither state nor imply such a meaning.

Evangelium vitae having established “absolute necessity” as the condition for the lawful infliction of the death penalty, concludes with the now well-known prudential judgment: “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.” Commenting on the papal judgment Long argues, “if one incorporates within ‘protection of society’ not only physical protection, but also the manifestation of transcendent justice in society as constituting a good in its own right . . . then there is no particular *doctrinal* reason why justified uses of the death penalty should be absolutely ‘very rare, if not practically non-existent’” (EV, 56) (539). Again, there is no textual warrant for concluding that the intentions of the papal authors would tolerate such a conclusion. In so doing, as Long’s statement illustrates, one is forced to explain away the pope’s prudential judgment that the condition of absolute necessity effectively eliminates the death penalty in the modern world as a viable alternative. Long’s assumptions lead him to propose what he terms “a *more plausible reading*”, namely, that “the encyclical stresses that it is better for contemporary society to avoid the use of the penalty” (546). But the text does not state nor imply that it would merely be “better” to avoid inflicting death, it states that occasions warranting the penalty “are very rare, if not practically non-existent.” Long says “an astute intratextual reading should see this prudential feature of the argument” (546-47). But such a feature should be seen if the author intended it to be seen. We are not warranted in reading such an intent into the papal teaching.

If it was the pope’s intent to stay within the traditional framework, we may presume he would have made his intention clear; at very least he would have referenced the account in Aquinas that scholars have referenced for centuries in defense of capital punishment. But he didn’t. He did what is almost without warrant in the tradition: not only to state the condition of “absolute necessity” as the primary ground for the death penalty’s lawful infliction; not only to refer to the beneficiaries as “aggressors”; not only say that death penalty is lawful for purposes of rendering such aggressors incapable on causing harm; but also to reference Aquinas’ account of lawful killing by private persons in self-defense.

Long’s phrase, “the manifestation of the transcendent order of justice in society,” used to describe what he takes to be the primary purpose of punishment in general, and capital punishment in particular, is repeated continually throughout his paper. It deserves a closer look.

Long attributes it to the Church's tradition which he says stems from Aquinas.²⁴ But the phrase is neither Aquinas's nor the tradition's but Long's. Punishment, Aquinas says, not only tends to the emendation of the one punished²⁵ and the preventing (detering) of others from choosing wrongly,²⁶ but it heals some *defectus* in the order of justice in civil society.²⁷ The order of justice to which Aquinas refers here is an order established by the just interactions of members of a community based upon naturally created equality and the morally relevant elements stemming from their relationships. It is a *moral* order maintained by the upright willing of the members of a community. The order can be called transcendent to the extent that the moral order is God's ordering of the human person to his proper end, just as divine providence orders all things in the universe towards their proper ends.²⁸ Deliberate crime disturbs this order to the extent that a criminal deliberately "exceeds the due degree of his measure when he prefers his own will to the divine will by satisfying it contrary to God's ordering."²⁹ A criminal "has been too indulgent to his will,"³⁰ has been "inordinate [in his] affection,"³¹ "has exceeded in following his own will,"³² which makes him "deserving of punishment".³³

Because crime entails the immoderate satisfaction of the will, punishment entails the suppression of the wayward will in due proportion: "the nature of punishment consists in being contrary to the will, painful, and inflicted for some fault."³⁴ "By means of punishment the equality of justice is restored in so far as he who by sinning has exceeded in following his own will suffers something that is contrary to his will."³⁵ The result is the "restoration of the equality of justice".³⁶ Long's phrase "the manifestation of the transcendent order of justice in society," what he calls elsewhere, the "'truth manifestative' function of punishment,"³⁷ never arises. And though it is intelligible given Aquinas's conception of the just order of civil society as reflective of a community's conformity to the moral order established by divine providence, its imprecision is misleading. Rather than using the Hegelian notion of punishment as the *manifestation* of justice,³⁸ Aquinas and the tradition refer simply to punishment as the *correction*--in *EV* and the *CCC*'s words, *redress*--of a disorder introduced into the good order of the community by a deliberate offense.

Even granting the similarity between Aquinas' retributive explanation of punishment and Long's conception of capital punishment as "the manifestation of the transcendent order of justice in society", it should be noted that Aquinas never to my knowledge justifies the infliction of capital punishment explicitly in terms of punishment's retributive function. When Aquinas turns from punishment in general to discuss capital punishment in particular his justification invariably turns to his Aristotelian conception of the relationship of a part to its corresponding whole. The most prominent example is found in the *Summa Theologiae*, II-II, q. 64, a. 2c. There he writes:

Now every part is ordered to the whole as imperfect to perfect. And therefore every part is naturally for the sake of the whole. On account of this we see that if it is useful (*expediat*) to the health of the whole body of a man to cut off one of his members, as when it is putrid or corrupting of the other members, it will be praiseworthy and salubrious for it to be cut away. Now every individual person is compared to the whole community just as a part to the whole. Therefore if any one is dangerous and corrupting to the community on account of some sin, it is praiseworthy and salubrious that he be killed, in order to preserve the common good.³⁹

He argues that dangerous and harmful men—with danger and harm being precisely specified in terms of “some sin”—may rightly be removed from the community as a diseased limb may be removed from the body whose integrity it threatens. Aquinas does not say here or elsewhere that the death penalty is only lawfully inflicted for purposes of societal defence. And his larger account of punishment makes it improbable that he would have employed such a limiting factor. But he does say that death as a punishment is justified when man’s moral state becomes a threat to the community, that is when the community needs to be protected from a person’s harmful influence. And he certainly never says that killing a criminal “manifests a transcendent norm of justice.” In fact, an explicitly retributive justification for capital punishment does not figure prominently into Catholic moral tradition until the sixteenth century.⁴⁰

Long asserts that the ‘reductionist’ premise—that the state only rightly inflicts the death penalty when necessary for the physical protection of society—is not found “anywhere in Catholic sources prior to *Evangelium vitae*” (539). Catholic theologians however back in the nineteenth century were beginning to argue along these lines. Francis Xavier Linsenmann, for example, an influential professor of theology at Tübingen, argued:

the death penalty can only be considered just—and therefore permissible—if it is necessary from the standpoint of self-defense; and it remains legitimate only so long and to such an extent that the need for self-defense remains. Just as war is self-defense writ large against an external threat to the community, so the infliction of *the death penalty is self-defense writ large* against an internal threat to the community, i.e., against a dangerous element in one of the many layers of the community itself. It follows, that if a condition of civil order and safety arises in which it is possible to control individual dangerous elements with lighter coercive means than death, then the death penalty would be rendered superfluous. Indeed, legally limiting the use of the death penalty is a goal well worth striving for. Its abolition by law is simply a political or cultural question; no principle of right stands against it.⁴¹

A twentieth century example is Jacques Leclercq, professor of moral theology at Louvain, who argued in the 1940s that

the death penalty, like all punishment, is *legitimate* only if it corresponds to the *legitimate defense of the community*. It is not justified by a right of the State to dispose of the life of its citizens, but only by social necessity. The life of a man is in itself inviolable, for the State as for individuals.⁴²

Legitimate defense, he makes clear, refers to self-defense—“unless the person in question poses a serious threat to the lives of others.”⁴³ Leclercq continues: “Supposing there is no other effective means of defending the social order, it seems in practice that the death penalty must be limited to the case where civil authority has no other sure means of incarcerating dangerous offenders.”⁴⁴ But other means of safely incarcerating criminals have been around for “more than a century (*plus d’un siècle*).” Therefore, he concludes, “today, in the Western world, the death penalty has ceased to be legitimate as States have other effective means (*suffisants moyens*) to defend the social order.”⁴⁵ This conclusion is repeated by Catholic authors in the years that follow.⁴⁶

By the end of his essay, Long's criticisms of the plain interpretation of the papal teaching become sweeping and farcical. Not only has the "reductionist interpretation," he argues, erroneously subsumed its analysis of the death penalty under a model of self-defense, but its entire rationale for punishment generally, he says, is derived from punishment's utility in defending public order:

the reductionist interpretation of *Evangelium vitae* appears to place the entire *ratio* of penalty in question, suggesting that inasmuch as penalty is not required for defense of minimum public order it is superfluous. In arguing that mere physical protection is the primary aim of criminal law and penalty—such that a penalty not absolutely required for physical protection of society is to be avoided—the encyclical would then be construed to suggest that there is no question of justice pertinent to the common good beyond physical protection. (541)

Evangelium vitae neither states nor implies that the primary aim of punishment is the physical protection of society. When addressing the question of the justification of punishment in general, it asserts plainly that "the primary purpose of the punishment which society inflicts is 'to redress the disorder caused by the offence'" (*EV*, 56). (The second half of this quote is taken directly from the *CCC*, no. 2266). The primary rationale for punishment, according to the encyclical, is not "physical protection," but retribution; punishment is punishment, in other words, to the extent that it looks back at a crime already committed and aims to correct the disorder that the crime introduced. This traditional account of punishment, immediately preceding the text's analysis of capital punishment, is what makes the papal teaching so interesting, and Long's interpretation so unsatisfactory. The text sets forth a thoroughly traditional account of the nature and purposes of punishment, and then, when turning to the particular type of punishment the death penalty entails, lays out *another* justification, apparently incompatible with the former; on the one hand, it says the primary purpose of punishment is retribution, and on the other, that a criminal's crime alone is not a sufficient justification for killing the criminal; that although retribution defines punishment generally, it does not define capital punishment. The papal teaching says in effect that the death penalty may not be inflicted for purposes of retribution, but rather only in cases where it is absolutely necessary to defend civil society. It is not the encyclical's account of punishment, as Long suggests, that departs from the tradition, but the encyclical's failure to subsume its account of capital punishment under *its own* analysis of the nature and purposes of punishment.

Asserting without argument that the plain interpretation follows from an inadequate conception of the common good, which, Long says, has been proposed "in the effort to come to terms with republican political institutions and the old liberalism," Long levels the elliptical criticism: "the regnant minimalist interpretation of the teaching of *Evangelium vitae* constitutes another minimalist epicycle in the to and fro between rich and eviscerated senses of political common life." (543) But paragraph 56 of *Evangelium vitae* is traditional in its account of punishment, and it is traditional in its conception of the duties of civil authority. It maintains that punishment is primarily retributive and that public authority has the responsibility to inflict retributive punishment—"public authority must redress the violation of personal and social rights by imposing on the offender an adequate punishment for the crime" (*EV*, 56). It just does not include capital punishment as one of the available expressions of this authority. There is no

indication that it maintains an “eviscerated” conception of political common life. Long continues saying that “the reductionist major premise (viz, that the State rightly inflicts the death penalty only when absolutely necessary for the physical protection of society) seems to embrace an instrumentalist view of the common good that is, finally, incompatible with the infliction of any punishment save on grounds that appear remarkably utilitarian.” (549) It is not clear what Long means by the phrase “instrumentalist view of the common good,” or what is particularly problematic in conceiving the common good as instrumental. *Gaudium et spes*, for example, defines the “common good” as instrumental to the goods of persons and nothing about this suggests incompatibility with retributive punishment.⁴⁷ It does seem fair to say however that the encyclical’s justification for capital punishment is grounded in empirical considerations and devoid of formal (retributive) ones. If this is what Long means by “utilitarian” then in this respect his point is granted. But to say that the plain interpretation of *Evangelium vitae* entails a view of the common good that is “incompatible with the infliction of *any* punishment” save on utilitarian grounds is gratuitous. Not only are some punishments, according to the papal teaching, primarily justified on non-utilitarian, retributive grounds, but *all* punishments, save capital punishment.

Long concludes by saying that “the reductionist interpretation of *Evangelium vitae* to this effect is vulnerable to decisive criticism from tradition” (551). While I reject the view that the plain interpretation of *Evangelium vitae* (and the CCC) is ‘reductionist,’ it is fair to say that it departs from tradition and in that sense is subject to criticism. I suggest however that rather than relativizing the papal teaching along traditional lines, we should be making every effort to fairly formulate that teaching, asking to what degree it is compatible with the Church’s traditional teaching on the lawfulness of capital punishment, examining where the present teaching is pointing, and judging whether or not, in light of Catholic tradition, the Church can go there.

With what authority?

I would like to conclude this essay by asking the question: Is the Church bound by an irreformable tradition not to take the next step in declaring the death penalty wrong *per se*? This question comes down to whether or not the traditional justification of the right of civil authority to inflict death has been infallibly taught by the magisterium of the Catholic Church. Vatican II teaches that the Church’s infallibility is exercised when: 1) the pope as Successor of Peter intends to solemnly define an article of faith or morals (i.e., makes an *ex cathedra* statement); 2) the bishops in union with the pope gathered together in council intend to solemnly define a dogma; and 3) the bishops scattered throughout the world though preserving a bond of communion amongst themselves and with the successor of Peter agree on a judgment on a matter of faith or morals and teach it as to be definitively held. (The latter is called the infallibility of the ordinary and universal magisterium).⁴⁸

Has the proposition ‘capital punishment is in principle a legitimate exercise of civil authority’ ever been solemnly defined by a pope or ecumenical council? The topic of capital punishment has rarely been raised by ecumenical councils. Among those at which it has, no judgement on its morality has ever been taught. Lateran III (1179) speaks of the assistance the Church receives from harsh penal laws, but does not propose any moral judgment on the death penalty *per se*.⁴⁹ And Lateran IV (1215) states that clergy are forbidden from participating in bloody punishment, but also makes no positive assertions about the death penalty’s morality.

As for papal statements, only two are of such a nature as to merit attention. The first is the famous statement in the Waldensian oath by Pope Innocent III in the early 13th century. In the context of a profession of faith intended to reconcile members of the heretical sect, he states:

We declare that the secular power can without mortal sin impose a judgment of blood provided the punishment is carried out not in hatred, but with good judgement, not inconsiderately, but after mature deliberation.¹

With what authority was this statement proposed, or rather, was the profession of faith in which the statement appears proposed? First, the profession is directed to a particular group and not to the universal Church; and second, it was published in the form of a personal letter to the breakaway sect members and not in the form of a Bull or otherwise universally authoritative document. Not all its assertions therefore should be taken to be Catholic dogmas, binding on the universal Church, even though certain assertions already possess this status. If therefore one of its propositions is not already a definitive doctrine of Catholic faith, its presence in the oath to the Waldensians does not alone suffice to constitute it as such. It is my judgement therefore that Innocent's statement does not constitute an infallible definition.

The second is a solemn condemnation of an article ascribed to Martin Luther by Pope Leo X in his Bull *Exsurge Domine* (1520). Luther's proposition reads: "That heretics be burned is against the will of the Spirit."² With what authority was this condemnation promulgated? *Exsurge Domine* is a papal Bull, a document of high papal authority addressed to the whole Church. Its solemn condemnations single out judgements of faith and morals considered to be dangerous to Christian faith and life.³ For argument's sake let us say the censures it contains have been promulgated with the highest degree of papal authority. Should we also conclude that the *falsity* of Luther's proposition has been proposed infallibly, entailing the conclusion that the burning of heretics is *not* contrary, or not always contrary, to the will of the Holy Spirit? To resolve this question we need first to examine the precise language of the papal condemnation. The general censure which follows the list of Luther's 41 condemned propositions reads: "All and each of the above mentioned articles or errors, so to speak, as set before you, we condemn,

¹"*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.*" (PL, tom. CCXV, col. 1512a), my translation; the entire revised 1210 profession is translated in Denziger, *The Sources of Catholic Dogma*, tr. Roy J. Deferrari (London: B. Herder Book Co., 1954), nos. 420-427, esp. no. 425.

²Denz. 773.

³It is not uncommon for the authoritative condemnations of papal Bulls to be judged to have been promulgated with infallible authority. Francis A. Sullivan S.J., for example, claims that theologians Louis Billot, in his work *Tractatus de Ecclesia Christi* (1898), and Edmond Dublanchy, in his article on infallibility in the *Dictionnaire de Théologie Catholique* (1927), judged that *Exsurge Domine* (1520) contain "dogmatic definitions". Sullivan does not specify to which propositions he refers. His own judgement is that *Exsurge Domine* "does not meet the requirements for a dogmatic definition." See Sullivan, *Creative Fidelity: Weighing and Interpreting Documents of the Magisterium* (Dublin: Gill & Macmillan, Ltd, 1996), 84-85.

disapprove, and entirely reject as respectively heretical, or scandalous, or false, or offensive to pious ears, or seductive of simple minds, and in opposition to Catholic truth.”⁴ The precise formulation warrants us in concluding no more than that the article in question is among a set of articles whose members are either heretical *or* scandalous *or* false *or* offensive to pious ears *or* seductive of simple minds, and are obstructive to Catholic truth. It is reasonable to conclude therefore that the falsity of Luther’s proposition has not been infallibly proposed in *Exsurge Domine*.

The question remains however whether the liceity of the death penalty has been infallibly taught by the ordinary and universal magisterium. Vatican II’s formulation of this mode of infallibility reads:

the individual bishops . . . proclaim Christ's doctrine infallibly whenever, even though dispersed through the world, but still maintaining the bond of communion among themselves and with the successor of Peter, and authentically teaching matters of faith and morals, they are in agreement on one position as to be definitively held.

It states four conditions that must be met before this mode of infallibility has been exercised: 1) the bishops must remain united amongst themselves and with the successor of Peter; 2) they must teach authentically on a matter of faith or morals; 3) agree on one judgement; and 4) proclaim it “as to be definitively held” (*definitive tenendam*). To resolve the question as to whether these four conditions have been met relative to the Church’s tradition defense of capital punishment would involve an in-depth analysis that is beyond the scope of this paper. I have undertaken it elsewhere and have concluded as follows:

the evidence supports the conclusion that the first three criteria have been met. The writings of Catholic bishops and councils of bishops going back to early Christianity contain an explicit or implicit affirmation of one or more of the propositions summarizing the Church’s traditional teaching. These affirmations have remained constant and the bishops have remained united in them among themselves and with the successor of Peter. If chronological scope and the magnitude and firmness of consensus were all that were necessary for the bishops in their ordinary teaching to proclaim doctrine infallibly, there could be little doubt about the status of the Church’s traditional affirmation on the lawfulness of the death penalty. But *Lumen Gentium* states that the bishops’ judgement on an issue, even their united and firm judgement, is not enough to assure the protection of the Holy Spirit from error. As teachers of the Christian faith, the bishops must teach that judgement to the faithful not simply as a doctrine of Christianity, nor as a probable or very probable conclusion of Christian faith, but as a matter of faith, certainly true, to be definitively held by all. Their act of teaching and the faithful’s act of receiving are complementary, and it is in this movement of teaching and receiving that the Holy Spirit secures and advances the right belief of the Church.

(I judge that) the evidence does not warrant the conclusion that this final criterion of the ordinary and universal magisterium has been met. Scattered episcopal statements assert all or part of the traditional teaching as to be definitively held, but the majority of

⁴*Denz.* 781.

episcopal statements are not proposed in this manner. More often than not, the lawfulness of capital punishment is directly or indirectly affirmed only in the context of discussions, condemnations, and affirmations of other points of human morality.⁵⁰

This of course is a scholarly judgment. If the Church should teach otherwise I would assent to the Church's judgment and encourage others to do the same. But if my conclusion is true then it implies that the Church's traditional teaching can change. To speak about the changing of a teaching as eminent and long-standing as the Church's defense of the death penalty understandably makes some people uneasy. The concern is that an analysis like the one I propose opens the way to a rejection of other controversial but authoritative moral teachings by those characterized by a disposition of dissent or those who are weak in conscience. This is not my intention. My intention is to provide a fair and honest reading of the present papal teaching and then ask its implications. If the *doubt* regarding the traditional teaching was raised in the first place by me, or by a small group of theologians, or a large group of dissident theologians like the CTSA, then there would be good reason not to entertain serious doubt about the verity of the traditional judgement. Such is the case for example with the widespread unjustifiable dissent from the central moral judgment of Paul VI's *Humanae Vitae*.

But the present situation is different. The signs of revision have not arisen in the first place by dissident theologians or disaffected Catholics. Rather, clear signs are found in contemporary doctrinal documents promulgated by the bishops of the world in union with the Successor of Peter. Whereas Christian writers from the early Church up through the middle of the twentieth century maintained a relatively consistent attitude towards the death penalty, that attitude began to change in the 1950s and 60s, and more so in the 70s and 80s, so that by the middle of the 1990s a far-reaching turn in the Church's attitude toward capital punishment had taken place.⁵¹ The attitudinal change alone might be considered sufficient justification for asking questions regarding a *change* in the traditional teaching. But more followed. The attitudinal turn was fused in 1995 and 1997 with formal and universally authoritative doctrinal promulgations of the magisterium (viz., *Evangelium vitae* and the CCC), promulgations that clearly introduce new terminology and a new ethical paradigm for examining an age old problem. In light of this, it seems to me not only justified but of paramount importance for theologians to ask questions of the tradition that otherwise might not be warranted to ask.

Endnotes

1. See Avery Dulles, *The Death Penalty: A Right to Life Issue?* Laurence J. McGinley Lecture, Fordham University (October 17, 2000), reprinted in *First Things* as "Catholicism and Capital Punishment" (April 2001).
2. Gerard V. Bradley, "The Teaching of the Gospel of Life," *Catholic Dossier* 4 (Sept.-Oct. 1998), 43-48.
3. Mark S. Latkovic, "Capital Punishment, Church Teaching, and Morality: What is Pope John Paul II Saying to Catholics in *Evangelium Vitae*?" *Logos* 5:2 (Spring 2002), 82
4. Janet E. Smith, "Rethinking Capital Punishment," *Catholic Dossier* 4 (Sept.-Oct. 1998), 49-50.
5. James Hitchcock, "Capital Punishment and Cultural Change in American Life," in *Capital Punishment: Three Catholic Views* (Washington, D.C.: Faith and Reason Institute, 2003), 13

6. Charles Rice, "Avery Cardinal Dulles and His Critics: An Exchange on Capital Punishment," in *First Things*, (August/September 2001), 9

7. Antonin Scalia, "Justice Scalia's Letter to the Editor," *National Catholic Register* (March 24-31, 2002)

8. *Catechism of the Catholic Church*, nos. 2263-67; *Evangelium vitae*, nos. 55-56.

9. "vim vi repellere licet cum moderamine inculpatae tutelae", *ST*, II-II, q. 64, a. 7c, emphasis added.

10. "Nec est necessarium ad salutem ut homo actum moderatae tutelae praetermittat ad evitandum occisionem alterius", *ST*, II-II, q. 64, a. 7c.

11. A few examples include: Alphonsus Marie de Liguori, *Theologia Moralis*, tom. 1, lib. 3, tract. 4, cap. 1, dub. 3, par. 380 (Rome: *Ex Typographia Vaticana*, 1905); M. Zalba, S.J., *Theologiae Moralis Compendium*, vol. 1 (Madrid: Biblioteca De Autores Cristianos, 1958), no. 1591, p. 871; I. Aertnys, C.S.S.R. and C. Damen C.S.S.R., *Theologia Moralis* (Rome: Marietti Editori Ltd., 1956), tom. I, lib. III, tract. V, cap. III, no. 571, p. 541.

12. "Causa legitimaе tutelae contra iniustum aggressorem, si debitum servetur moderamen, delictum omnino aufert; secus imputabilitatem tantummodo minuit, sicut etiam causa provocationis." *Codex Iuris Canonici* (1917), can. 2205, § 4; "legitimaе tutelae causa contra iniustum sui vel alterius aggressorem egit, debitum servans moderamen"; "ab eo, qui legitimaе tutelae causa contra iniustum sui vel alterius aggressorem egit, nec tamen debitum servavit moderamen"; *Codex Iuris Canonici* (Vatican City: Libreria Editrice Vaticana, 1983), can. 1323, 5°, 1324, 6°

13. In its treatment of warfare it teaches: "once all means of peaceful negotiations are exhausted," it teaches, "governments cannot be denied the right of legitimate defense." It is the responsibility of civil authority, it continues, to "protect the safety of people", to provide "a defense that is just", and should never use means which "far exceed the limits of legitimate defense {legitimaе defensionis}." (*GS* 79, 80) The context is still self-defense, not however the private defense of an individual but rather the self-defense of the community.

14. The catechism itemizes five exceptions: 1) the killing of animals, 2) execution of criminals, 3) killing in a just war, 4) killing by accident, and 5) killing in self-defense.

15. John Finnis, *Aquinas* (Oxford University Press, 1998), 27.

16. *ST*, II-II, q. 64, a. 7c.

17. See Aquinas *ST*, II-II, q. 64, a. 7c; although Aquinas only refers to aggressors, not *unjust* aggressors, it is not uncommon for authors to refer to the status of the aggressor's aggression as *unjust*, if not formally, at least materially; e.g., Henry Davis writes: "Everyone has a natural right to defend himself against unjust aggression even to the death of the assailant . . . But the assailant's death is a secondary result of my act, the primary result being my own defence. The doctrine is justified on the universally valid principle of the double effect. (nt. II-II, q. 64, a. 7c)"; H. Davis, S. J., *Moral and Pastoral Theology*, 5th ed. (London: Sheed and Ward, 1946), 152-3; see also *EV*, no. 55, p. 28 below.

18. I consider this paragraph in greater depth in the next chapter and so my comments here are limited to the context of the discussion at hand.

19. It should be noted that this claim is a matter of sociological and technological fact, not a matter of faith and morals. Since the teaching authority of the Church extends only to matters of faith and morals (cf. *LG*, no. 25), it cannot be said to form part of the Church's authoritative teaching on capital punishment, but must be held to be incidental to it.

20. Steven A. Long, “*Evangelium Vitae*, St. Thomas Aquinas, and the Death Penalty,” *The Thomist*, 63, 4 (October 1999), 511-552.

21. *Ibid.*, 511.

22. *Ibid.*, 513, emphasis added.

23. Long says the same in another essay: “*Yet careful reading of the document itself shows that Evangelium Vitae cannot intend to declare that the formal doctrinal reason for capital punishment is some species of mere defense.*” See “*Evangelium Vitae and the Death Penalty*,” in *Capital Punishment: Three Catholic Views* (Washington, D.C.: Faith and Reason Institute, 2003), 29.

24. In the same essay, Long asserts that “*the primary medicinal purpose of penalty is neither deterrence nor rehabilitation, but rather is the manifestation of a transcendent norm of justice within society.*” This he states “*is especially clear in the work of St. Thomas Aquinas.*” See “*Evangelium Vitae and the Death Penalty*,” 33.

25. *Commentary on Aristotle’s Nicomachean Ethics (Eth.)*, bk. II, lecture III, n. 4, 270; *ST*, II-II, q. 108, a. 4c; *SCG*, III, c. 158, n. 6; *ST*, I-II, q. 87, a. 6, ad. 3; *In Lib. III Sent.*, d. 19, q. 1, a. 3, sol. 2.

26. See *SCG*, III, c. 140, n. 7, *In Lib. IV Sent.*, d. 46, q. I, a. 2, sol. 3, ad. 2, *ST*, I-II, q. 87, a. 8, ad. 2, II-II, q. 33, a. 6c.

27. *Commentum In Lib. II Sententiarum Magistri Petri Lombardi (In Lib. II Sent.)*, d. 42, q. 1, a. 2, sol.; see also *In Lib. III. Sent.* d. 19, q. 1, a. 3, sol. 2. See also *Summa Contra Gentiles (SCG)*, III, ch. 144, 9-11.

28. *SCG*, III, c. 140, n. 2-4

29. *SCG*, III, c. 140, n. 5.

30. *ST*, III, q. 86, a. 4c; I-II, q. 87, a. 6c.

31. *ST*, I-II, q. 87, a. 1, ad. 3.

32. *ST*, II-II, q. 108, a. 4c.

33. *ST*, I-II, q. 87, a. 1, ad. 2.

34. *ST*, I-II, q. 46, a. 6, ad. 2; “*the nature of punishment is that it is contrary to the will.*” *On Evil*, q. 1, a. 4c, tr. Jean Oesterle (University of Notre Dame Press, 1995); see also *SCG*, III, c. 140, n. 5, c. 141, n. 1, 4, 6; *In Lib. II Sent.*, d. 42, q. 1, a. 2, sol.; *ST*, I, q. 48, a. 5c, I-II, q. 87, a. 6c.

35. *ST*, II-II, q. 108, a. 4c.

36. *ST*, I-II, q. 87, a. 6c.

37. See Steven Long, “*Evangelium Vitae and the Death Penalty*,” 33.

38. *Hegel’s Philosophy of Right*, tr., T. M. Knox (Oxford: Oxford University Press, 1967), 69-73.

39. “*Omnis autem pars ordinatur ad totum ut imperfectum ad perfectum. Et ideo omnis pars naturaliter est propter totum. Et propter hoc videmus quod si saluti totius corporis humani expediat praecisio alicuius membri, puta cum est putridum et corruptivum aliorum, laudabiliter et salubriter abscinditur. Quaelibet autem persona singularis comparatur ad totam communitatem sicut pars ad totum. Et ideo si aliquis homo sit periculosus communitati et*

corruptivus ipsius propter aliquod peccatum, laudabiliter et salubriter occiditur, ut bonum commune conservetur", my translation; cf. *SCG*, III, c. 146, nos. 4-5; see Aristotle, *Politics*, bk. 1, ch. 2, 1253a, 19-29.

40. See chapter 6 of my forthcoming book, *Capital Punishment and Catholic Moral Tradition* (Notre Dame, IN: University of Notre Dame Press).

41. "In der That muss man vom Wesen und Zweck der Strafe als solcher absehen und darauf recurriren, dass die Todesstrafe nur als gerecht erkannt wird, wenn sie aus einem andern Grunde für nothwendig erklärt werden muss; mit andern Worten: Die Todesstrafe ist nur zulässig, wenn dieselbe unter den Gesichtspunkt der Nothwehr gebracht werden kann; und sie ist es nur so lange und in solcher Ausdehnung, als die Nothwehr vorliegt. Gleichwie der Krieg eine Nothwehr im Grossen ist gegen Bedrohung der Gesellschaft von Aussen her, so ist Ausrechthaltung der Todesstrafe eine Nothwehr im Grossen gegen die Bedrohung der Gesellschaft durch innere Feinde, durch gemeingefährliche Elemente in den verschiedenen Schichten der Gesellschaft selbst. Hieraus folgt, dass es ganz wohl einen Zustand bürgerlicher Ordnung und Sicherheit geben könnte, in welchem einzelne gemeingefährliche Elemente mit leichteren Zwangsmitteln, als die Hinrichtung ist, niedergehalten werden könnten, die Todesstrafe also entbehrlich wäre; ja, dass es ein zu erstrebendes Ziel sei, die Anwendung der Todesstrafe gesetzlich einzuschränken. Die gesetzliche Abschaffung der Todesstrafe ist einfach eine politische oder Culturfrage, ein Rechtsgrund steht ihr nicht entgegen." F. X. Linsenmann, *Lehrbuch der Moralthologie* (Freiburg im Breisgau: Herder, 1878), 473, emphasis added.

42. "La peine de mort, comme toute peine, n'est légitime que si elle correspond à la légitime défense de la collectivité. Elle ne se justifie pas par un droit de l'État à disposer de la vie des citoyens, mais seulement par la nécessité sociale. La vie de l'homme prise en elle-même est inviolable pour l'État comme pour les particuliers." Jacques Leclercq, *Lecons De Droit Naturel* vol. IV- "Les Droits Et Devoirs Individuels" (Louvain: Société D'Études Morales, 1946), 89.

43. ". . . un danger grave pour celle des autres." *Ibid.*, 89.

44. "La peine de mort supposant qu'il n'y ait pas d'autre moyen efficace de défendre l'ordre social, il semble qu'en pratique, il faille la limiter aux cas où les pouvoirs publics ne disposent pas de moyens sûrs d'incarcérer les malfaiteurs." *Ibid.*

45. "dans le monde occidental, la peine de mort a cessé d'être légitime, les États disposant sans elle de moyens suffisants pour défendre l'ordre social." *Ibid.*, 90.

46. E.g., "the theologians' acceptance of the State's right to inflict capital punishment does not rule out a divergence of opinion on the appropriateness of exercising that power in given conditions. It seems that a growing number of moralists would like to see the power of the sword in abeyance, a power to be exercised should the need arise but otherwise resolutely kept in the background." M. B. Crowe, "Theology and Capital Punishment," *The Irish Theological Quarterly*, 31, no. 1 (Jan. 1964), 102; "There will always be criminals, but modern society has other means of protecting itself from them than this . . ." Jean Imbert, *La Peine de Mort: Histoire-Actualité* (Paris: Armand Colin: 1967), English quote in James J. Megivern, *The Death Penalty: An Historical and Theological Survey* (New York: Paulist Press, 1997), 297; "the death penalty for murder in this country [i.e., England] at present is unnecessary and therefore unjust." M. Tidmarsh, O.P., et al., *Capital Punishment: A Case for Abolition* (London: Sheed and Ward, 1963), forward; see also "Statement of Rhode Island's religious leaders," *Origins*, vol. 5, no. 40 (25 March 1976), 629, 631; *Declaration of the Administrative Board of the Canadian Catholic Conference*, 1976, in Thomas G. Daily, "The Church's Position on the Death Penalty in Canada and the United States," *Concilium*, 120 (10 October 1978), p. 122; before the 20th century, see Beccaria, *On Crimes and Punishments*, ch. 28, par. 3.

47. "interdependence (between nations) . . . is leading to an increasingly universal common good, the sum total of the conditions of social life enabling groups and individuals to realize their perfection more fully and readily", *Gaudium et Spes*, 26; "And the common good comprises the sum of the conditions of social life which enable individuals, families and associations to reach their own perfection more completely and more readily." *Ibid.*, 74.

48. *Lumen Gentium*, 25.

49. It is actually a quote from St. Leo the Great; “*Sicut (ait beatus Leo,) licet ecclesiastica disciplina, sacerdotali contenta iudicio, cruentas non efficiat ultiones, catholicorum tamen principum constitutionibus adiuvatur, ut saepe quaerant homines salutare remedium, dum corporale super se metuunt evenire supplicium.*” Third Lateran Council (1179), ch. 27 (*DEC-I*, 224). This statement appears again in Decretal. Gregor. IX, lib. V, tit. VII- *De Haereticis*, cap. VIII (*CIC-2*, cols. 779-80).

50. E. Christian Brugger, *Capital Punishment and Catholic Moral Tradition* (Notre Dame, IN: University of Notre Dame Press, forthcoming), 151.

51. A few examples of national conferences going on record in the past twenty five years in opposition to the death penalty include: Canadian Catholic Conference (press release, March 4, 1976); Irish Bishops (see Irish Commission for Justice and Peace, “Capital Punishment,” *The Furrow* 27 (1976), 697-8, *La Documentation Catholique*, 78 (1981), 581-4); French Bishops (see Social Commission of the French Episcopate, “Éléments de Réflexion sur la Peine de Mort,” *La Documentation Catholique*, 75 (1978), 108-15); Philippine Bishops (see “Restoring the Death Penalty: ‘A Backward Step’,” *Catholic International* 3 (1992), 886-88); Bishops of England and Wales (see “Bishops Say ‘No’ to the Re-introduction of Capital Punishment,” *Briefing* of the Catholic Information Service, 15 July 1983, vol. 13, no. 22); the U.S. Catholic bishops individually or in state or national conferences have issued over 130 statements in opposition to the death penalty since 1980 alone (see *Catholics Against Capital Punishment, Bibliography of Statements by U.S. Catholic Bishops on the Death Penalty: 1972-1998*; (CACP, P.O. Box 3125, Arlington, Va 22203, USA).