

No Intentional Killing Whatsoever: The Case of Capital Punishment

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Ask a Catholic neoconservative or the editors of *Commonweal* what the last “social encyclical” was. They will answer that it was *Centisimus Annus*. They will tell you that there Pope John Paul II settled the central question of “Catholic social teaching,” the question of basic institutional form in political economy. “Democratic capitalism has prevailed!” If you inquire further, they will tell you that *Veritatis splendor* (VS) was about morals, especially about academic moral theology. Neither it nor *Evangelium vitae* (EV) was a “social encyclical.” EV was, to be sure, about “life” issues, but it addressed culture not political economy. They will add, finally, that EV articulated a nice ideal for the conformity of civil law to moral truth, but an ideal that is unsuited to our secular, pluralistic society.

Even if we stipulate that “Catholic social teaching” is about what public authority—the state—may do and must not do, this common account is grossly misleading. For it presupposes precisely the divisibility of morality into “public” and “private” realms that VS and EV deny. The common view just sketched misses, if it does not implicitly deny, the heart of Catholic social teaching, namely, this arresting assertion by Pope John Paul II in VS:

When it is a matter of the moral norms prohibiting intrinsic evil, there are no privileges or exceptions for anyone. It makes no difference whether one is the master of the world or the “poorest of the poor” on the face of the earth. Before the demands of morality we are all absolutely equal.¹

The universal applicability of exceptionless norms establishes the moral equality of all persons. By declaring the basic human goods (the backbone of exceptionless norms) absolutely immune from direct attack, Catholic social teaching insures that no one may rightly be made the

instrument of the purposes of another—not of the Cabinet, the “commu-nity,” or the “great man”.

Twenty-five years ago² Germain Grisez argued from pretty much that foundation against capital punishment. The tradition within which he worked, Grisez conceded, held that “the lives of those who attack the common good”—in unjust warfare and by committing capital crimes—“are not always considered inviolate” (p. 65). Grisez argued nevertheless that “human life can never rightly be directly attacked” (p. 66), a norm I express in this paper as, “No intentional killing whatsoever.” Grisez built his position partly on the Second Vatican Council’s clarification of the “common good” of political society as limited, even instrumental: the sum total of social conditions which are required to *allow persons to perfect themselves*.³ “If no human society,” Grisez wrote in 1970, “is complete, if civil society is merely one form of community with limited concerns, then it is by no means clear that men associated in states may rightly kill wrongdoers to protect the common good if such killing would be morally forbidden by individuals” (p. 69).

Grisez recognized that legitimate defense required effective separation of dangerous malefactors from the community, “often” achieved by ostracism or banishment or by imprisonment (p. 67). The important thing for Grisez is that the morality of capital punishment was a matter of specifying the exceptionless norm against all intentional killing and that specification leaves open the possibility—neither investigated nor denied in 1970 by Grisez—that, occasionally, capital punishment might be the necessary vehicle of effective separation.⁴

I aim to show in this paper that the Church’s teaching on capital punishment, as found in EV⁵ and the *Catechism*,⁶ is best understood as essentially Grisez’s view of 1970. The texts are, admittedly, too obscure to permit a compelling argument for my claim. I shall argue, though, that the texts make considerably more sense on the assumption that the death penalty is permissible *only* where it is consistent with a norm against all intentional killing whatsoever, than on any other assumption.

The Church teaches that capital punishment may be approved where necessary to the “defense of society.” In EV the Pope says that in developed societies such cases are “rare, if not practically nonexistent.” I shall argue that this statement rules out the common justification for capital punishment, which might be described as “defense of society,” as a deterrent to future, would-be offenders. “Necessary” to the defense of society means *just* this malefactor’s continuing threat to others. Thus, EV and the *Catechism* seem to assimilate capital punishment to ordinary self-defense, a matter of causing death while intending strictly just to halt aggression.

Does the Church mean to deny the possibility defended by John Finnis and rejected by Grisez, that capital punishment may be specified morally by the intention to restore the order of justice disturbed by the criminal's bad act? The teachings do not explicitly say. I develop an argument in the later sections that even recognizing that possibility, retributive executions are, at least in developed societies, contrary to Church teaching.

I

"The source of all other rights" is "the right to life" (EV 72). This right is the obverse of the commandment "You shall not kill" which, the Pope teaches in *EV*, "is at the basis of all life together in society" (EV 53).

What acts does the commandment exclude? It must not exclude all acts that foreseeably create risks to the lives of others. Otherwise, we could not drive our cars or build bridges. Does it exclude all acts that intend death as either an end or a means? The tradition, at least as far back as Aquinas, held that it did so for "private" persons, though they may defend themselves with deadly force where necessary. But the tradition held that intentional killing may be licit in three situations: justified armed rebellion, just war, capital punishment. All are acts of "public authority," even if only by analogy in the case of rebellion (where "private" persons act directly for the common good against its enemies, who may claim to exercise legitimate public authority). The upright use of force in justified rebellion, however, depends on a combination of the other two cases: legitimate "private" defense, and killing in defense of the common good. The former I do not question; the latter two cases, I aim to show, are assimilable to the former.

Now consider the case of just warfare. Grisez has argued cogently that warfare does not require combatants to violate the stricture against intentional killing.⁷ How could that be? Consider a limited case, U.S. Marine Corps operations on Iwo Jima. The Marines knew that the Japanese army had evacuated all civilians and that the defenders would never surrender. A Marine would, as a practical matter, have to direct lethal force against enemy forces until they were all dead. Is *this* not intentional killing?

Members of the Third, Fourth, and Fifth Marine Divisions on Iwo Jima may well have intended to kill Japanese soldiers. All certainly behaved much of the time in a way indistinguishable from the behavior of intentional killers. But they need not have. Marines need only have intended to render harmless enemy soldiers, killing them in the process. Sound fantastic? On Iwo Jima, some Japanese must have fallen mortally

wounded. While no Marine, practically, was obliged to attend to their medical needs (given the continuing battle, and the medical needs of fallen Marines), none would have been morally justified in shooting the helplessly wounded enemy. And many Marines, I am sure, had an opportunity to finish Japanese off and did not precisely for moral reasons. What could those reasons be, if not (at least in an intuitive sense) that to kill helpless soldiers was akin to murder.

Maybe we can imagine the massive bloodshed on Iwo Jima as (strictly) the foreseen effects of actions intended to disable aggressors. But how can capital punishment—an act that necessarily includes death—be similarly imagined? The executioner is supposed to finish off the helpless prisoner! Is this not a clear case of intentional killing, albeit justified? The Church does not teach that it is never permissible to execute a convicted criminal. How, then, could its teaching on the death penalty, whatever it is, be governed by a norm against intentional killing?

One means of reconciliation might be to say that the criminal forfeits his right to life by his bad actions, that he descends to the moral status of a beast. I doubt whether anyone ever considered this assertion an argument, as opposed to a loose way of stating a conclusion in favor of capital punishment. However, this possibility of reconciliation is now foreclosed by Church teaching: *“Not even a murderer loses his personal dignity, and God himself pledges to guarantee this”* (EV 96, emphasis in the original).

Another possibility of reconciliation has been to hold that the state shares a divine prerogative to take the lives of those who attack the common good by committing capital crimes. If so, one might say that capital punishment involves no intentional killing—that the executioner’s intention is simply to carry out God’s judgment. But to hold this view, one would have to hold that God might intend to kill (as perhaps in the case of Abraham and Isaac,⁸ and elsewhere in the Old Testament and that public authority is delegated divine authority (on one common interpretation of Romans 13:1).⁹

The Pope in VS denies both these propositions. He says that God “preferred the correction rather than the death of the sinner” (EV 9). Whatever might have been the case in the Old Testament, with Jesus and the New Covenant it is clearly revealed that God never intends anyone’s death. “Life is always a good” (EV 30), and the Pope means to judge “public authority” *by* its adherence to the commandment not to kill. We are invited to test anyone’s claim to be doing God’s will by this prescription. Once we figure out what acts the Commandment excludes, we will

know whatever there is of importance to know about God's delegation of authority.

But the Pope says in *EV* that God is the "absolute Lord of the life of man" (53); no one may "arbitrarily choose to live or die"; the absolute master of "such decisions is the Creator" (58). Does this not mean that capital punishment, which is surely sometimes permissible, *must* somehow share in this prerogative? The Pope's attestations to God's mastery over life evidences, not delegated divine authority to kill, but God's will that no human person whomsoever shall have a homicidal will. If so, it rather seems that where capital punishment is permitted, it involves (somehow) no intention to kill.

The norm articulated in *EV* usually includes the term "innocent": "the direct and voluntary killing of an innocent human being is always gravely immoral" (57); "No one . . . can claim for himself the right to directly destroy an innocent human being" (53); the absolute inviolability of "innocent human life" (57). If capital punishment is, even in rare cases, morally permissible, is it not clear that intentional killing, albeit of noninnocent persons, is sanctioned? But if so, *someone* has to have a homicidal will (even if we disagree about who that someone is).¹⁰ Condemnation to death by competent public authority might, in this construal of *EV*, justify the executioner's act, but it does not change the nature of it: justified *intentional* killing.

Given the deliberateness and apparent intentional structure of the act of building a scaffold, parading the condemned to it, and (as the judicial sentence commonly put it) "hanged by the neck until dead," how *could* capital punishment be a case of *unintentional* killing? It is not "unintentional," as in "accidental" or "surprising." Death is expected as a matter of cause and effect in the natural order. But it does not follow that, for moral analysis, death is intended, even if the behavior that causes death is a necessary part of the performance. It might be an act of legitimate defense. It might be an act intended to restore justice. Capital punishment might be a case of *nonintentional* killing.

II

Do *EV* and the Catechism indicate that the general norm about killing is that no one may intentionally kill? There is considerable textual warrant (the use of "innocent") for supposing not. But the language varies, and the meaning of individual statements of the norm (whatever exactly it is) is unclear. The Pope in *EV* defines euthanasia ("in the strict sense"), for

instance, as an action or omission which of itself and by intention causes death" (64). Euthanasia violates God's law, he continues, because it is the "deliberate and morally unacceptable killing of a human person." "Deliberate" probably denotes "freely chosen." If so, euthanasia is the freely chosen, morally unacceptable killing of a human person insofar as it intends death, by whatever means. "Innocent," so often used in statements of the norm, is nowhere used regarding euthanasia. Abortion is, the Pope declares, "the deliberate killing of an innocent human being" (EV 62). Innocent means here, though, that the unborn are in no sense "aggressors," so that lethal force may be used against them (EV 58).

The commandment is most often stated simply as "You shall not kill." The Holy Father frames his key discussion in EV of a "fuller and deeper understanding of what God's commandment prohibits and proscribes" [55] by reference to §§2263–2269 of the Catechism. The title of the section comprising the later paragraphs in the Catechism is "intentional homicide." The commandment forbids "*direct and intentional killing*" as gravely sinful (§2268, emphasis in original). Intending death by *any physical means* (i.e., by any causal nexus in the natural order) is always wrong.

The textual signals in EV and the Catechism are mixed enough, it seems to me, to turn to specifications of the general norm for evidence of what that norm actually is. I submit that the surest route to the intended meaning of the norm against killing goes through capital punishment. If the teaching on capital punishment is consistent with and seems consciously designed to specify a norm compactly stated as, "No intentional killing whatsoever," then we have good reason to believe that it is the general norm, and consequently that capital punishment is never permitted where it would be an intentional killing.

III

The Pope introduces his discussion of capital punishment in EV by conceding that ordinary persons may, in some circumstances, use deadly force. This concession is the question of "legitimate defense," which the text (and, more, the footnote in EV to the Catechism) makes clear is a concession to the morally licit use of lethal force, *not* to intentional killing. The Pope's citation includes St. Thomas's statement that an "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." The portion of the Catechism to which the Pope refers continues:

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.

EV cites this passage for the textual proposition that "the fatal outcome is attributable to the aggressor whose action brought it about," even if the aggressor is morally irresponsible due to lack of the use of reason (EV 55).

Both EV and the *Catechism* treat private defense of "persons" and of the family as belonging to the same moral species as defense of "societies" and "state" (see EV 55; *Catechism* §2263). Public authority's use of force, in other words, seems to be assimilated to the one set of actions which would disable aggressors without intending to kill. In any case, public authority is the referent of the Pope's statement in EV 56: "This is the context in which to place the problem of the death penalty":¹¹ "[r]endering the aggressor unable to inflict harm."

Precisely on the question of when capital punishment is permitted, the Pope says: (1) only "in cases of absolute necessity: in other words, when it would not be possible otherwise to *defend society*"; and (2) "If bloodless means are sufficient to *defend human lives against an aggressor and to protect public order and the safety of persons*, public authority must limit itself to such means . . ." (EV 56, my emphasis).

The second of these propositions reiterates §2267 of the *Catechism*, save that, in the English translations with which I have been working, "must" appears in EV 56 where "should" appears in the *Catechism*.¹²

IV

The Pope's intended meaning may still be obscure. Both 1 and 2 are at least equivocal, as is one prominent commentator's expression of what the Pope has in mind: "The continued existence of the malefactor himself" must present a threat for death to be imposed.¹³ The apparent ambiguity was not relieved by Cardinal Ratzinger's commentary on EV. He said at its publication that it contained "a development of doctrine" on capital punishment, and that the *Catechism* would have to be revised to reflect the new teaching. This comment is unlikely to have been a reference to the Pope's specification of the *Catechism*'s "in cases of extreme gravity"

(to “absolute necessity”; such cases “are very rare, if not practically nonexistent”). While that is a development or extension of previous papal statements, it is not a doctrinal teaching at all.

Richard John Neuhaus sought a clarification of the Cardinal’s comments, and received what *National Review* published as a “reassuring word.” The excerpt below is, according to Neuhaus, an accurate quotation of the Cardinal’s entire remarks on the subject:

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. Thus, where other means for the self-defense of society are possible and adequate, the death penalty may be permitted to disappear. Such a development, occurring within society and leading to the forging of this type of punishment is something good and ought to be hoped for.¹⁴

The editors concluded, happily, that there is no question of recalling the Catechism. “The Cardinal meant only that the official Latin text, which is being prepared after the publication of the vernacular versions, will refer to what *Evangelium Vitae* says about capital punishment. So Catholics relying on the Church’s official teaching as expressed in the Catechism may in good faith disagree over whether, in today’s circumstances, the self-defense of society requires the death penalty.”¹⁵

What *National Review* (NR) has in mind—and supposes Cardinal Ratzinger had in mind—is the standard conservative argument for the death penalty, the argument from “deterrence.” Will executing this prisoner deter other, unknown, would-be criminals from their bad acts by threatening them with the same fate—death? NR is saying that faithful Catholics must limit their support of the death penalty to where it deters criminals and thus “protects” society. But whether capital punishment deters is a factual question which governs applications of the principle. On that question, faithful Catholics can and do disagree. Hence (and I suppose this is why the editors are happy), the Pope says nothing that challenges what many conservatives presently hold.

NR’s interpretation is against the weight of the textual evidence in EV and the Catechism. The latter point squarely to the continuing threat of *this* malefactor, and *not* to the future threat(s) of unknown would-be criminals. Besides the texts already mentioned, consider §27 of EV: “There is evidence of growing public opposition to the death penalty, even when such a penalty is seen as a kind of ‘legitimate defense’ on the part of society.

Modern society in fact has the means of effectively suppressing crime by rendering criminals harmless without definitively denying them the chance to reform" (emphasis in original). "Legitimate defense" of society, the whole context makes clear, refers to neutralizing those already apprehended, and excludes the notion of killing harmless prisoners as an example to the population at large. The Pope's settled conviction is that "today," because of "improvements in the organization of the penal system," cases in which death is needed "are very rare, if not practically nonexistent" (56). If the Pope had in mind the conservative interpretation (the deterrence theory), he could not say this at all, much less say it without advertising to the legitimate diversity of views on the subject. That is, *whether* capital punishment "deters" in modern society is debatable. The Pope does not seem to think the question to which the answer is "rare" is one permitting much disagreement. The Pope must not be talking about deterrence when he uses the phrase "protect society." This does not imply that the Pope means to settle a question of application of norms to contingent circumstances. Rather, I am using the Pope's application to get at the principle he has in mind.

To effectively deter future criminals, some substantial number of executions is necessary. Otherwise, those who are supposed to be deterred will rightly conclude they have a greater chance of being hit by lightning than of being the "very rare" fellow electrocuted in prison. It would seem that only if the Pope has in mind *this* malefactor's continued dangerousness could he plausibly conclude that the death penalty is "very rare[ly]" necessary.

On the conservative interpretation, finally, capital punishment would certainly be intentional killing, at least a case of doing evil that good may come of it. For the choice could not be other than to kill this person, unlike the possibility, (to be explored) of restoring the order of justice here and now, *by* and *in* this very act.¹⁶ Thus, the evidence adduced here to support the proposition that the teaching is "No intentional killing whatsoever" is evidence against the conservative interpretation.

V

Does the Pope mean to say that in developed societies there will (should?) be a *few* executions ("very rare") or that *as* a practical matter, there will be none? What *would* warrant the conclusion that execution of this prisoner is "necessary" to protect society against his or her further aggression? The Pope does not say. What can we say? It is always possible that a

prisoner will escape custody and do harm, or in anger kill someone inside the prison. Complete isolation is impossible. Even prisoners in solitary confinement need to be fed and bathed. They are entitled to basic medical care, if not to limited social interaction with other prisoners and, possibly, with family. The prisoner may ask for a priest, minister, or other pastor. Since this point is obvious, it must not be sufficient, in the Pope's mind, to justify an execution. Otherwise, executions would be common, not "rare."

A more serious possibility is to treat a certain history of criminal acts as sufficient proof that an individual will advance his interests violently, in derogation of others' rights, whenever the opportunity to do so without incurring unpleasant consequences presents itself. I do not doubt there are many such persons. Nor do I doubt that this type of judgment is within human competence. It is precisely the kind of judgment that sends persistent offenders to prison for life. While that is not the same as being executed (though it entails dying in prison), life imprisonment should be imposed only on the basis of a judgment that is morally certain. This class of persons is also very large. That is obvious enough. The Pope must not have this group in mind either. Otherwise, capital punishment would be common.

The problem is that as a practical matter, no legal system of which I am aware authorizes a sentence which corresponds precisely to the apparent requirements for capital punishment to be licitly imposed. Our society comes closest in civil commitment procedures. Individuals who suffer from mental disorders sufficient to make them, in a standard statement of the legal norm, "dangerous to others" may be restrained against their wills, even where they have committed no crime. But there is no authority whatsoever to put any such person to death. (Of course, in no case would this be "punishment.") No doubt the restraints and drugs necessary to render the most troubled of these individuals safe for interpersonal dealings are quite severe. May they be imposed on mentally healthy but deeply antisocial persons?

If the moral requirements for capital punishment were transposed into criminal law, the requisite sentence would seem to be a conditional, long-term imprisonment: jail time terminable by execution if, but only if, one proves later to be unmanageably dangerous. There is no such possible sentence in America. "Conviction" technically occurs in our justice system after a jury verdict, when the court pronounces a sentence of imprisonment or a sentence of death. There is no possibility down the line of converting the former into the latter—and for good reason: the decision to "convert"

a term of years into a death sentence is no minor, administrative matter. Further misconduct—say, the murder of another inmate—gives rise to the possibility of more severe penalties (including, in our law, death), but they may be imposed only after the entire criminal process again runs its course. Thus, our system effectively bifurcates the possibility held out by the Pope into successive, separate criminal prosecutions, in which the already sentenced prisoner is tried (while in custody) for additional crimes. Are capital crimes, therefore, specified to include, say, murder by life-termers, consistent with the teaching of EV? Capital prosecutions would then be pretty “rare,” though *not* “nonexistent.” My reservation about this possibility is that it crudely translates the moral framework proposed by the Pope, and does so in a society (ours) which seems inclined to punish with death all heinous crimes, entirely apart from questions of continued dangerousness. The prudent course might well be to support abolition of capital punishment by constitutional amendment.

VI

Might one abide the norm against intentional killing *and* punish with death, apart from questions of *this* malefactor’s continuing dangerousness to prison guards, medics? Does the Pope reject the possibility defended by Finnis and rejected by Grisez that capital punishment might be an act which intends retribution, and not, strictly, death? The Pope does not explicitly say. But the Pope in EV self-consciously considers just how—on what basis—capital punishment *could be* a case of nonintentional killing. While he affirms that retribution is the aim of punishment (EV 56), the *only* case of nonintentional killing in capital punishment that he seems to think legitimate is the case of *this* malefactor’s continuing dangerousness. Capital punishment would likely be imposed as retribution on a whole class of offenders, specified by their complicity in a category of offenses. But the Pope calls for the practical extinction of the death penalty, suggesting that retributive imposition of death is excluded.

I concede however that the textual evidence does not permit much more than speculation on the status of Church teaching on this point. I shall try to piece together a freestanding argument that is consistent with EV which grants the possibility defended by Finnis. That is, let us suppose that one responsible for capital punishment *can* intend only retribution (and I shall sketch how that might be). The death penalty is, in my view, still justifiable in developed societies only where necessary to neutralize this dangerous convict.

What is the aim of punishment? Finnis provides an account at once sound and faithful to the tradition (and I presume the Pope has something very much like it in mind):

The defining and essential (though not necessarily the exclusive) point of punishment is to restore an order of fairness which was disrupted by the criminal's criminal act. That order was a fairly (it is supposed) distributed set of advantages and disadvantages, the system of benefits and burdens of life in human community. The disruption consisted in a choice to take the advantage of following one's own preferences rather than restraining oneself to remain within that fair order (or, where the crime is one of negligence, an unwillingness to make the effort required to remain with the legally or morally required pattern of actions and restraints). Since freedom to follow one's preferences is in itself an important human good, the criminal's act of self-preference was itself the gaining of an advantage over those who restrain themselves to remain within that legally and/or morally required pattern. So the essential point of punishment is to restore the disrupted order of fairness by depriving the criminal of his ill-gotten advantage. And since that advantage consisted at least primarily in (wrongful) freedom of choice and action, the appropriate means of restoring the order of fairness is by depriving the criminal of his freedom of choice and action.¹⁷

To better appreciate the aim or point of punishment, one should hold in the mind's eye a diachronic view of a society's interaction, a broad pattern of restraint, action, and opportunity established by custom, morality, and law. As Finnis suggests, public authority administers punishment so that, over a period of time, it is the case that no one is made a "sucker" by choosing to remain within the law's path for pursuing one's projects in cooperation with others.

The essential (but not exclusive) moral wrong in criminal behavior is the selfish (i.e., unfair) grab of more freedom than is one's due, more than others enjoy by virtue of their continuing to abide by the law. Besides whatever substantive harm criminals do, Grisez recently wrote, they "freely prefer their own interests . . . and in doing so they seize more than their fair share of liberty to do as one pleases." In suffering punishment, which as such need be only the unwelcome deprivation of the liberty to do as one pleases, criminals "lose their advantage over law-abiding citizens."¹⁸

This understanding of the aim of punishment allows us to see that while death would be a punishment (i.e., a most unwelcome deprivation) no crime *implies* punishment by death. The implication would be true if

lex talionis were a sound guide to administering the criminal law. But it is not, and it is surely not our guide. We do not sodomize rapists or mutilate those convicted of assault. One who faints behind the wheel of a car, and careens into and kills some children standing on the street corner, has committed no crime at all. Yet one who fires a gun at—but misses—the same kids goes to jail for attempted murder, even if the children were never aware of the attack. Attempted murder is, to be sure, punished more severely than pickpocketing or shoplifting. So there is some relationship between (we might say) the substantive harm caused by a crime and its appropriate punishment. But that relationship actually results from the greater self-preference exhibited by the criminal: one who is so opposed or indifferent to others' rights and interests as to deliberately (or recklessly) kill them, has acted that much more unfairly.

It might be that the death sentence is fair retribution, apart from *lex talionis*, for massive self-assertion at the extraordinary expense of others. Then it would seem that punishing such offenders at all would entail capital punishment. But the conclusion follows only if death is the only fair punishment, *and* if fairness is the only criterion relevant to punishment.

The latter proposition is false. Fairness is not the only criterion. Fairness is one very important element of the common good. But the more inclusive common good, not fairness, is the principle of legitimate public authority, including its exercise in administering punishments. Finnis says that "if it is unfair to law abiding citizens not to punish criminals, it is more unfair to them to punish criminals when it is clear that the punishment will lead to more crime, more unfairness by criminals and more danger and disadvantage to law-abiding citizens." Cases of immunity from prosecution—for diplomats, legislators during session, sitting presidents—are justified by reference to the common good, even if otherwise letting such persons "get away with it" is unfair. Short of such wholesale exceptions from criminal liability, a variety of evidentiary privileges (priest-penitent, doctor-patient, husband-wife) and limitations on police investigation (no torture, no illegal search and seizure) make it practically difficult to prosecute certain types of offenses. I am not sure if prosecuting to the detriment of values protected by these crosscutting norms is "unfair." It seems more appropriate to say that, while it would be fair to prosecute, the common good is better served if we do not.

The important point that emerges from the few preceding paragraphs is that punishment is not logically tied to *any* particular *form* or *kind* of unwelcome imposition. How malefactors should be punished—both as to kinds of deprivations imposed on them and as to the extent

of the imposition of any one kind—is entirely a matter of specification, save that the scale of punishments should exhibit a rough coherence: larceny should be punished less severely than robbery (which is forcible larceny), and robbery less severely than murder. Thus, we simply cannot say, as a matter of any kind of rational necessity or entailment, that death (or *any* particular punishment) is the *only* fair one, unless all the other available punishments are inadequate.

VII

“The problem” of capital punishment, the Pope says in *EV*, “must be viewed in the context of a system of penal justice ever more in line with human dignity and thus, in the end, with God’s plan for man and society” [56]. The Pope does not say that premodern societies violated man’s dignity or acted contrary to God’s plan to the extent that capital punishment was not, in those days, “very rare.” The opportunity we now have to punish adequately without taking life did not then exist. In less developed societies, execution might have been the only means of effective defence. It might also have been—and here is the possibility of nonintentional killing in capital punishment as retribution—that death was the existential *condition* for imposing a deprivation (of opportunities, freedom) which was the *only* adequate punishment available. If so, public authority might well have been morally obliged to punish by death (if the alternatives available were, say, uncertain detention in the sheriff’s barn or payment of a fine). One could then impose death without choosing it, choosing instead to restore the order of justice by the deprivation effected in and by the execution. One’s choice would be just that deprivation which death makes possible, and which the restoration of justice demands.

But capital punishment, in any place or time, kills (and thus creates great possibility for scandal), and eliminates any chance for the malefactor’s reform. It seems to me, then, that the burden of proof should be placed on one who claims that alternative available punishments are all *inadequate* to show that *inadequacy*. That might well have been the case before prisons. But where secure prisons are available, I think that *inadequacy* cannot be shown.

Someone might object: Legislators should be morally free to choose from among the available adequate punishments, including death. But, they may not choose, strictly, death. And where one selects electrocution from among available adequate punishments (say, life imprisonment,

exile, and death), then one has chosen death. One has integrated one's will around killing, in the morally decisive sense of "choice."

Can we say that death—the suppression of life—is precisely the imposition needed to restore the order of justice, *and* that we do not choose death but simply choose to punish?

I think this case cannot arise once the point of punishment is properly identified. There are different *forms* of punishment—torture, fines, imprisonment, death—which are more or less repugnant and more or less unwelcome. But they are all forms of *punishment*, and as various forms of unwelcome impositions they are commensurable. However crudely done, public authority can and does compare and rank them as greater or lesser impositions upon the criminal's autonomy, and freedom to do as he or she pleases. Thus, death (the suppression of life), as such—and *not* the existential condition (and in that sense transparent) for a massive imposition—cannot be deemed the uniquely suited punishment for any crime.

The posited case either misapprehends the nature of punishment or is a different way of claiming that death is the only adequate punishment available.

VIII

One sense of the indeterminacy of punishment—its precise form and measure are to be settled not by logic but by choice—is the premise of my argument against the possibility of retributive capital punishment in developed societies. But is the concept of punishment expansive enough (in a different sense) to allow for any cases of licit capital punishment in developed societies as acts of "self-defense"? More exactly, in what sense can executing a prisoner not because he committed a certain type of crime but because he is chronically dangerous, be an act of *punishment* at all?

I have already *practically* responded to this challenge. Mature legal systems do not impose "punishment" for "chronic dangerousness" as such. Crimes are constituted by discrete acts, not dispositions or habits, even if punishment is something greater for habitual offenders. Persons in or out of prison who threaten others may well be dealt fatal blows (without intending to kill them). But they are not "punished," capitally or otherwise. Thus I conclude that faithful application of the Church's teaching to our society leads to abolition of the death penalty. My conclusion here is consistent with Church teaching, which says not that anyone *should be* executed, but that "very few" may.

The deeper question. Whether calculations of prison terms may take account of concerns—deterrence, defense against this dangerous character, rehabilitation—which are foreign to the retributive point of punishment. Are these *nonretributive* (social hygiene, moralistic) considerations, which would not suffice by themselves to “punish” anyone for a day, properly the basis for years of additional imprisonment for a convicted robber or kidnapper?

CONCLUSION

Developing societies which suffer from shortages of various basic goods—education, health care, food—have to make choices about which needs to address first from the available common stock. Among those needs is the need for resources sufficient to position the criminal justice system so that it has adequate punishments available, short of execution. But even if the right to life *is* the source of all other rights, so long as a decision to leave prisons unconstructed is not intended as a means to kill (say, where those in power foresee that some disfavored racial or ethnic minority will disproportionately suffer capital punishment), it is a choice consistent with the Church’s teaching. But in developed societies, and anywhere a prison system exists, abolition of the death penalty seems to be the practical way of observing the norm, “No intentional killing whatsoever.”

NOTES

1. See also EV 57: “Before the moral norm which prohibits the direct taking of the life of an innocent human being there are no privileges or exceptions. . . .”

2. G. Grisez, “Toward A Consistent Natural-Law Ethic of Killing,” 15 *Am. J. Jurisprudence* 64 (1970).

3. See *Gaudium et Spes* 26.

4. In Volume II of *The Way of the Lord Jesus: Living a Christian Life* (1983),

Grisez says that the “defensive function” can be served in ways other than executing criminals, notably by having a secure prison system (p. 892).

5. The relevant part of EV is as follows: As time passed, the Church’s tradition has always consistently taught the absolute and unchanging value of the commandment ‘You shall not kill’ . . .

55 This should not cause surprise: to kill a human being, in whom the image of God is present, is a particularly heinous sin. *Only God is the master of life!* Yet from the beginning, faced with the many and often tragic cases which occur in the life of individual and society, Christian

reflection has sought a fuller and deeper understanding of what God's commandment prohibits and prescribes. [43] There are in fact situations in which values proposed by God's Law seem to involve a genuine paradox. This happens for example in the case of *legitimate defence*, in which the right to protect one's own life and the duty not to harm someone else's life are difficult to reconcile in practice. Certainly, the intrinsic value of life and the duty to love oneself no less than others are the basis of a *true right to self-defence*. The demanding commandment of love of neighbour, set forth in the Old Testament and confirmed by Jesus, itself presupposes love of oneself as the basis of comparison: "You shall love your neighbour *as yourself*" (Mark 12:31). Consequently, no one can renounce the right to self-defence out of lack of love for life or for self. This can only be done in virtue of a heroic love which deepens and transfigures the love of self into a radical self-offering, according to the spirit of the Gospel Beatitudes (cf. Matt 5:38-40). The sublime example of this self-offering is the Lord Jesus himself. Moreover, "legitimate defence can be not only a right but a grave duty for someone responsible for another's life, the common good of the family or of the State". [44] 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. [45]

56 This is the context in which to place the problem of the *death penalty*.

On this matter there is a growing tendency, in the Church and in civil society, to demand that it be applied in a very limited way or even that it be abolished completely. The problem must be viewed in the context of a system of penal justice ever more in line with human dignity and thus, in the end, with God's plan for man and society. The primary purpose of the punishment which society inflicts is "to redress the disorder caused by the offence". [46] Public authority must redress the violation of personal and social rights by imposing on the offender an adequate punishment for the crime, as a condition for the offender to regain the exercise of his or her freedom. In this way authority also fulfills the purpose of defending public order and ensuring people's safety, while at the same time offering the offender an incentive and help to change his or her behaviour and be rehabilitated. [47]

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 nonexistent.

In any event, the principle set forth in the *Catechism of the Catholic Church* remains valid: "If bloodless means are sufficient to defend human lives against an aggressor and to protect public order and the safety of persons, public authority must limit itself to such means, because they better correspond to the concrete

conditions of the common good and are more in conformity to the dignity of the human person" [48].

6. The following are the relevant sections of the Catechism:

2263 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."

2264 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.

2265 Legitimate defense can be not only a right but a grave duty for someone responsible for another's life, the common good of the family or of the state.

2266 Preserving the common good of society requires rendering the aggressor unable to inflict harm. 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. For analogous reasons those holding authority have the right to repel by armed force aggressors against the community in their charge.

The primary effect of *punishment* is to redress the disorder caused by the offense. When his punishment is voluntarily accepted by the offender, it takes on the value of expiation. Moreover, punishment has the effect of preserving public order and the safety of persons. Finally punishment has a medicinal value; as far as possible it should contribute to the correction of the offender.

2267 If bloodless means are sufficient to defend human lives against an aggressor and to protect public order and the safety of persons,

public authority should limit itself to such means, because they better correspond to the concrete conditions of the common good and are more in conformity to the dignity of the human person.

Intentional homicide

2268 The fifth commandment forbids *direct and intentional killing* as gravely sinful. The murderer and those who cooperate voluntarily in murder commit a sin that cries out to heaven for vengeance.

Infanticide, fratricide, parricide, and the murder of a spouse are especially grave crimes by reason of the natural bonds which

they break. Concern for eugenics or public health cannot justify any murder, even if commanded by public authority.

2269 The fifth commandment forbids doing anything with the intention of *indirectly* bringing about a person's death. The moral law prohibits exposing someone to mortal danger without grave reason, as well as refusing assistance to a person in danger.

The acceptance by human society of murderous famines, without efforts to remedy them, is a scandalous injustice and a grave offense if, without proportionate reasons, he has acted in a way that brings about someone's death, even without the intention to do so.

7. See *II Way* at 904–6.

8. But see P. Lee, "Permanence of the Ten Commandments: St. Thomas and His Modern Commentators," 42 *Theological Studies* (1981): 422.

9. But see *II Way*, at 851.

10. It might be that the hangman's act is specified by obedience to a valid order of some higher, competent public authority (e.g., a death warrant signed by the governor). I use "executioner" to identify whoever it is (governor, juror, judge, legislator) that, on the supposition that capital punishment is an intentional killing, actually intends the prisoner's death.

11. The Latin "*Hoc in rerum prospectu de poena capitali oritur quaestio*" seems clearer, as "In this context arises the . . ."

12. The French version of the catechism might best be translated (with my emphasis) as "*will limit itself to such means*": "*L'authorité s'en tiendra a ces moyens.*"

The Catechism, in still another indication that capital punishment and participation in just war are specifications of the one norm, goes on to say that "for analogous reason" public authority has the right to repel by "armed force" aggressors against the community.

13. J. Haas, *Crisis*, July/August 1995: 23.

14. *National Review*, July 10, 1995, p. 14.

15. *Id.*

16. See Part VI.

17. J. Finnis, *Fundamentals of Ethics*, 128 (1983).

18. *II Way* at 891.