

Capital Punishment or Prudential Execution?

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The photograph of Pope John Paul II sitting in an Italian prison cell with Mehmet Ali Agca, his would-be assassin, is a powerful image and example that invites us to reflect on how we are to live the Gospel. How concretely are we to follow Jesus' admonition to forgive those who trespass against us and to pray for those who persecute us? Is a will to forgive significant only for those directly involved, victim and assailant; or is there an implicit public and political meaning in such an offer of reconciliation? The Pope's personal experience with an attempted assassination and his life-long concern with defending the dignity of each person have produced a new challenge.

The Holy Father's appeals for mercy for capital offenders are forms of personal intervention into the realm of public policy on criminal justice, yet they do not lay down a thorough theoretical challenge to the fundamental right of political authority to employ the death penalty. However, the encyclical *Evangelium Vitae* (1995), certain episcopal pronouncements, and relevant revisions of the *Catechism of the Catholic Church* (1997), all present an apparent radical departure from the Church's centuries-old defense of the death penalty. Such a shift can be the cause of confusion for many Catholics who may see a relativist onslaught on fundamental, unchanging moral principles. Thus it is important to get a sense of the nature of this change and explore the possible conditions that justify it.

The recent thorough scholarly work of Steven A. Long and the widely discussed article by Avery Cardinal Dulles, provide a reasonable basis for claiming that the change is not a foundational shift from traditional basic moral principles, but a reconsideration of how they apply in the world

today.¹ We do not intend to give an unassailable defense of the change nor to engage in a “text-war,” citing Scripture, Church Fathers, or Councils in defense of the change. Our purpose is limited to suggesting ways of understanding the reasonableness of the Church’s prudential focus.

We need to keep in mind the profound difference between moral absolutes prohibiting acts that are inherent violations of human dignity and those prohibitions that are conditional.² Some prohibitions are conditional because they involve matters that are by their nature good but inappropriate under certain conditions. Thus the marital embrace is a noble and worthy good, but it would certainly be out of order for the newlyweds to exercise their right with gusto on the altar steps after the priest has just declared them man and wife.

Indeed, the new restriction of the use of the death penalty is breathtaking in its sweep, but it is clearly not an absolute condemnation and prohibition of it. The revised teaching maintains that because of new “concrete conditions,” the licitness of its *use* is admitted though limited to very rare cases.³ Thus the Church’s teaching on the death penalty deals with a *permissible* act. This is in marked contrast with the teaching concerning abortion and contraception, which are intrinsically evil and must be prohibited absolutely. But the death penalty is not described as intrinsically evil and therefore cannot be prohibited absolutely. Because fundamental principles are not being rejected, those who have urged the Church to accommodate her teaching on abortion and contraception to changing concrete conditions in the modern world, will find no comfort in this accommodation.

Sin is first and foremost an offense against God. All such offenses merit punishment, but only God truly knows the seriousness of the offense and its proper punishment. Judgment and punishment are properly God’s alone. The Christian Faith traces the true gravity of sin to that moment in pre-history when the penalty of death was placed on us all. This profound character of sin and its effects sets the stage for the drama of Redemption. And though primarily an offense against God, sin also offends persons—the sinner himself and others. The natural good of each individual person and the common good require stable, orderly community life. And so every

1. Steven A. Long, “*Evangelium Vitae*, St. Thomas Aquinas, and the Death Penalty,” *The Thomist* 63 (1999), pp. 511-52; and Avery Cardinal Dulles, “Catholicism and Capital Punishment,” *First Things*, 112 (April 2001), pp. 30-5.

2. At *Summa Theologiae* I-II, 94, a. 4 and 5, St. Thomas says that secondary precepts of natural law may apply only “*ut in pluribus*” (in most cases), and that they may be changed under rare circumstances.

3. *Catechism of the Catholic Church* (London: Geoffrey Chapman, 1997), 2267, p. 488. Hereafter CCC.

sin has a community dimension at least in that it harms others directly or indirectly. In the latter case, a so-called private sin corrupts the character of the individual and weakens his ability to promote the common good as he ought.

Further, it is a given that the good order of any society requires persons with authority to govern and to legislate. The Church has always understood that public officials ultimately have their authority from God. In a truly just civil society, only those sins that offend public order would be designated crimes, that is, come under the scrutiny of its law and its public officials. Even so, not all offenses against public order would be crimes, for to include all such sins would require an impossibly vast and intrusive policing system. As such, the practical determination of what is to be prohibited to and required of its citizens is among the most difficult matters facing civil society.

Good order need not be, nor can it be, perfect order. The judgment of those who govern must constantly engage a welter of changing conditions—economic, technological, cultural and so on—which at best render such decisions as reasonable but never certain.

Certainly not all sins are crimes in civil law. And given human fallibility, not all defined crimes are indeed sins: many a good citizen claims that he has done no wrong when cited by an officer of the law. But when they are crimes, sins merit punishment through the system of penal law. The seriousness of sin as such, however, is neither diminished nor increased because it is also a crime. An unfortunate soul may be among the damned for an unrepented sin that was not treated as a crime. But when a sin *is* a crime, the judgment of its seriousness and the determination of the punishment for it must be made in *concrete conditions* by those who have responsibility for the governance of the community. The Final Judgment is indeed God's, but public officials, who have their authority from God, must exercise it for the common good here and now. It is important to be reminded of these simple points in order to appreciate the modification in the Church's teaching on the administration of the death penalty.

Further, we need to affirm what may be offensive to the modern ear—*punishment is a good*. Punishment for crime is a good not only for the community but also for the sinner. However, its *societal efficacy* as means to remedy, rehabilitation, and reconciliation is dependent upon the good will of all involved. As a member of the community who seeks to redress the evil he has done, the criminal should acknowledge his guilt, accept the punishment, and resolve to amend his life. For their part, the members of the community should accept the judgment and actions of the authorities,

and to the extent determined by them, be reconciled with the criminal. Punishment, which is directed to redressing the disorder caused by crime, is dependent upon the proper will of all those concerned. This unity of good will is more likely to occur where civil authority is respected, the laws are seen to be just, and the administrators of justice are held to be virtuous—character, like truth, also matters.

Aquinas's synthesis of the Catholic tradition on capital punishment in the *Summa Theologiae* and the *Summa Contra Gentiles* has stood intact since the thirteenth century. Again, it is not our purpose to review the particulars of that tradition. But there is an element in his thinking that should be noted. Aquinas takes the death penalty seriously because he views civil society to be an exact analogy to the society of the blessed and of the *viatores* (those on the way). Each society has its own informing principle: charity is that of the society of the blessed;⁴ concord is the common good that informs human society.⁵ Some offenses against charity or concord are remedied by ordinary punishments: the temporal punishment of Purgatory makes the sinner fit company for the blessed, while fines, imprisonment, or corporal disciplines aim to restore the offender to civil society.

But sometimes, something more radical is required—if you will, something very anti-radix: an uprooting, a total banishment from society. Natural equity, according to Aquinas, demands “that each person be deprived of the good against which he acts.”⁶ Thus, “he who sins against the ultimate end and against charity, whereby the society of the blessed exists and also that of those on the way toward happiness, should be punished eternally,”⁷ while “according to civil justice, he who offends against the state is deprived completely of association with the state, either by death or by perpetual exile.”⁸ Imprisonment should be seen as either temporary or permanent exile from the community though the offender still remains under its power. If the offense merits banishment from one's community but does not render the offender totally unfit for human association, exile to a foreign land could serve as remedy. But it would be irresponsible to burden another society with one who has been judged unfit for human association; the death penalty is the ultimate social banishment. Banishment from the garden was the primordial exile and hell is the final one.

4. *On the Truth of the Catholic Faith. Summa Contra Gentiles. Book III: Providence, Part II*, trans. Vernon J. Bourke (New York: Image Books, 1956), 144, 4, p. 215. Hereafter *SCG*.

5. *SCG*, III, 146, 4, p. 220.

6. *Ibid.*, III, 144, 4, p. 215.

7. *Ibid.*

8. *Ibid.*

Thomas Aquinas's commonly accepted stating of the argument for capital punishment is challenged in the modern era when the very understanding of human nature shifts. The first thorough theoretical attack on the moral permissibility of capital punishment came in 1764 from Cesare Beccaria.⁹ His position was predicated on a thoroughly Hobbesian theory of society, according to which humans leave the danger and instability of the state of nature by surrendering some of their claims to the civil state, wherein they find protection from nature. As the right not to be killed is an inviolable natural right, according to Beccaria, it may never be infringed by civil society through the invoking of the death penalty, even in the case of a murderer or other grave offender.

Beccaria and his progeny have an understanding of human nature and the nature of the state that is clearly irreconcilable with the Christian teaching about moral responsibility, the social nature of man, and the common good. Replacing the *common good* with *natural rights* as the principle informing civil society, they abandon the connection and continuation of civil society with its transcendent foundation and end in God. Thus they lose any sense of "manifesting the truth regarding the transcendent order of justice and the wickedness of the offense"¹⁰ against it. In the latter half of the twentieth century, even the Church will adopt rights-based language, while attempting to give such language a thoroughly different meaning.

With Pope John XXIII and Vatican II, the tenor of the Church's social teaching changes significantly. Previously popes had dealt with and addressed aristocratic or monarchical rulers; after World War II and the demise of colonialism, the movement of equality and democracy was sweeping the world. At Vatican II, the Church asserts the naturalness of human sociality, consistent with the tradition of Aristotle through Aquinas. However, it anchors its social teaching, usually addressed "to all men of good will," not directly on the Word of God (which has authority only for those with religious faith), but on the teaching that the human person is "the origin, the subject and the purpose of all social institutions."¹¹ The common good is instrumentally "the sum of those conditions of social life which allow so-

9. For a discussion of Beccaria, see Walter Berns, *For Capital Punishment. Crime and the Morality of the Death Penalty* (New York: Basic Books, Inc., 1979), pp. 18-21.

10. Long, "Evangelicum Vitae, St. Thomas Aquinas, and the Death Penalty," p. 251. Commenting on *Summa Theologiae* I-II 87, a. 3, ad.2, Long (pp. 520-2) finds more than a deterrent effect in punishment: it may inspire many to recognize sources outside their wills which make intelligible not only the reason for avoiding punishment, but for acting virtuously.

11. *Pastoral Constitution on the Church in the Modern World (Gaudium et Spes)*, in Walter M. Abbott, S.J., general editor, *The Documents of Vatican II* (New York: Herder and Herder, 1966), no. 25, p. 224. Hereafter *GS*.

cial groups and their individual members relatively thorough and ready access to their own fulfillment."¹² However, the common good "consists chiefly in the protection of the rights, and in the performance of the duties, of the human person,"¹³ upon whose dignity as image of God all rights are ultimately based.¹⁴

The Vatican II shift to the human person is neither a shift to the isolated human individual, nor to an acceptance of a politics that looks only to the sum of individual wills. Pope John Paul II has attempted to correct aberrations in contemporary liberal democracies by referring to the common good as centered on the serving of the dignity of the human person. Thus in the encyclical *Centesimus Annus* (1991), he challenges the claim "that agnosticism and skeptical relativism are the philosophy and the basic attitude which correspond to democratic forms of political life."¹⁵ The Church does not deny "*the legitimate autonomy of the democratic order*"¹⁶ when it calls for political decision-making to be based upon the truth about man and the common good. The common good "is not simply the sum total of particular interests; rather it involves an assessment and integration of those interests on the basis of a balanced hierarchy of values; ultimately it demands a correct understanding of the dignity and rights of the person."¹⁷

The Pope's treatment of the death penalty in *Evangelium Vitae* (1995)¹⁸ is different from Aquinas's, especially in its sense of the relevance of historical factors. The Pope notes¹⁹ three historical changes that qualify the discussion of the death penalty. First, there is the fact of increasing opposition to its use both in the Church and in civil society. Second, there have been such "improvements in the organization of the penal system"—presumably, technological and juridical advances that make more successful the quarantining of vicious criminals from society—that cases absolutely requiring use of the death penalty "are very rare, if not practically nonexistent." Third, the Pope implies that the modern conception of the limited state, with an accompanying narrowly conceived end—public order (not

12. *GS*, 26, p. 225.

13. Declaration on Religious Freedom (*Dignitatis Humanae*), in Abbott, *The Documents of Vatican II*, pp. 683-84, no. 6. Hereafter *DH*.

14. *Ibid.* 2, p. 679.

15. *On the Hundredth Anniversary of Rerum Novarum (Centesimus Annus)*, (Washington, D.C.: United States Catholic Conference, 1991), no. 46, p. 89. Hereafter *CA*.

16. *CA*, 47, p. 92.

17. *Ibid.*

18. *The Gospel of Life (Evangelium Vitae)*, (New York: Times Books/Random House, 1995). Hereafter *EV*.

19. *Ibid.*, 56, pp. 99-100.

the comprehensive common good)—might not justify an act as definitive as capital punishment.

Especially as interpreted by John Courtney Murray, S.J., the Vatican II *Declaration on Religious Freedom* had justified restrictions on religious freedom by government only in its defense of the public order.²⁰ Murray²¹ distinguished government and civil society with respect to their varying ends and competencies. While civil society has as its end the common good, government exists for the care of the public order. The end of public order is justice (the safeguarding of human rights), the preservation of public peace (social harmony), and the promotion of public morality (respect for law and generally accepted mores). Constitutionally limited government is not a valid arbiter in questions of religious truth, according to Murray, because it simply lacks the competence to investigate such matters. Accordingly, it may not deny to the human person—the one whose human dignity lies in the inherence of the image of God—the freedom to pursue religious truth and other most profound human ends. Only if the practice of that pursuit harms the rights of others to pursue religious truth, or to live in social harmony, may the government restrict the actions of a citizen. Government may not dictate internal belief or religious practice; it may only guard against the harming of other citizens' rights to such immunity.

In *Evangelium Vitae*, Pope John Paul II implies that the death penalty violates the dignity of the human person, and is thus an overreaching on the part of limited government. The death penalty “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.”²² And further, given “the concrete conditions of the common good”²³ that obtain today, nothing should be done, even in the name of justice, to obscure the vision of that dignity.

It is well to ponder what might lie behind the Pope’s phrase, “the concrete conditions of the common good.” Conceivably the Pope has in mind especially the moral component of the common good, and especially the capacity—or incapacity—of contemporary humans to be aware of moral

20. *DH*, 7, pp. 685-7.

21. See, for example, Murray’s discussion in, “Preface” and “The Declaration of Religious Freedom. A Moment in its Legislative History,” in John Courtney Murray, S.J., ed., *Religious Freedom. An End and A Beginning* (New York: Macmillan and Company, 1966), pp. 7-11; 15-42.

22. *EV*, 56, p. 99.

23. *Ibid.*, p. 100.

good and moral evil. While there was in Machiavelli and Nietzsche, for instance, a concerted philosophical effort to counter the very discrimination between good and evil, the Holy Father seems to be addressing the increasingly distorted popular moral imagination that concretely pervades the culture of death. Moral imagination is a rich but vague concept that was promoted especially by the late Russell Kirk. He warned against the modern tendency to reduce moral judgment to mere cold propositional thinking and recommended attending to the significant role of memories, emotions, appetites and habits that shape our moral perceptions. Moral imagination points to "a power of ethical perception which strides beyond the barriers of private experience and momentary events."²⁴

A similar suspicion of mere propositional thinking is also found in Aquinas's accounts of the moral virtue and the role of prudence, a judgment of practical reason.²⁵ Prudence is reason's application of moral principles to *concrete cases*. The truth of the prudential judgment is grounded in the reality of the person in the existential situation. It is a properly-discerning-reason-in-action. Prudential insight requires the proper fusion of reason, appetites, and senses. The simultaneously properly-oriented-appetites provide focus for correct discernment of the situation and give impetus for proper action. This is in marked contrast with imprudence, and its distorted imagination, which fails to comprehend the real conditions of moral action. When moral imagination is disordered, reason is blinded and unable to receive the sweet clarity of reasoned argument.

In applying Kirk's understanding of moral imagination to the question of punishment, one must insist that an action or deprivation *must be seen as a punishment* to serve as punishment. Given the distortion in modern imagination, natural death is not seen as a penalty; nor is it seen as the tragic consequence of sin. The moment of death is not fraught with the anxiety of facing final judgment, since in the opinion of many contemporary humans there is none. When Christians sing "O death, where is thy sting," the dread of final judgment is tempered only by the hope in Christ's victory over

24. Russell Kirk, "The Perversity of Recent Fiction: Reflections on the Moral Imagination," in *Reclaiming a Patrimony: A Collection of Lectures by Russell Kirk* (Washington, D.C.: The Heritage Foundation, 1982), p. 46. William Kirkpatrick, in his work *Why Johnny Can't Tell Right from Wrong* (New York: Simon and Schuster, 1992), builds on this notion of moral imagination as it applies to moral education. Cf. esp. pp. 206-10. For a connection of moral imagination to the thought of Jacques Maritain, see James P. Mesa, "The Good, the Bad, and the Ugly: The Aesthetic in Moral Imagination," in *Beauty, Art, and the Polis*, ed. Alice Ramos, American Maritain Association (Washington, D.C.: The Catholic University of America Press, 2000), pp. 237-44.

25. See esp. *ST*, II-II, 47, 51.

death. But in the culture of death, imagination is being formed to see death as a solution. Abortion and euthanasia are the final solutions to inconveniences; one's own death, too, might be seen as a solution to the burden of existence. The death penalty is in danger of becoming the final solution to crime. The sting of death is washed away not by flowing waters of grace, but by a stream of words and images promising sweet oblivion. The sense of the transcendent, the holy fear of the numinous, is so reduced that the gravity of death is obscured and the true meaning of the death penalty loses efficacy. The general society no longer views the sinner/capital offender as banished from the community he has offended and returned to God to be dealt with as accords with divine justice or mercy.

There is one aspect in which the Church could be accused of contributing to the impoverishment of the moral imagination's sense of capital punishment. The Church's current teaching in the *Catechism*²⁶ associates the death penalty more with the principle of physical defense against threat than with the idea of punishment and the application of a transcendent standard of justice to concrete acts. In itself the use of defensive force is justified by the presence of an imminent threat to some fundamental good. It does not require a determination of the state of mind of the aggressor; it is not concerned with making judgments about the aggressor's personal guilt or sinfulness. Force is not so much punishment as that means which is necessary for reasonable defense. The principle of defense is a matter of natural law; it is very nearly an intuitive, self-evident principle that is accepted even by reasonable persons who reject the death penalty.²⁷

The restricting of licit use of the death penalty strictly to situations of physical defense appears to be grounded in the concern to maintain reverence for life, even the life of a criminal, whenever possible. However, when the death penalty is justified only on the basis of its defensive service against physical harm, it might appear to be used strictly for utilitarian purposes. Authoritarian regimes especially are prone to using force internally because their legitimacy is open to such broad challenge. Further, authoritarian regimes are typically relatively impoverished, thus lacking in those "steady improvements in the organization of the penal system" which Pope John Paul II finds to militate against the need to employ the death penalty. Accordingly, whether in non-repressive liberal democracies which lack the imaginative means to view the death penalty against a transcendent horizon, or in repressive regimes which opportunistically use force to defend

26. CCC, 2263-7, pp. 487-88.

27. Ibid., 2264, p. 487.

the individual or group ruling for their own self-interest, it would perhaps be more accurate to dispense with language of capital punishment and speak rather of *prudential execution*.

Even in the few situations seen by *Evangelium Vitae* as justifying use of the death penalty, a prudential calculus is presupposed, inasmuch as there is an inverse relationship seen between occasions for the licit use of the death penalty and the aforementioned improvements in the organization of the penal system. The wealthier the nation, and the greater its ability to construct secure prisons for the worst offenders, the less it can justify employing the death penalty, according to this calculus.

Fyodor Dostoevsky's *The Brothers Karamazov* contains a scene in which punishment is discussed. During the Karamazovs's meeting with Fr. Zosima, it comes out that Ivan Karamazov authored a magazine article challenging a book on the relationship between Tsarist Russian ecclesiastical and civil courts. Ivan's motives in writing the article are suspect. While he appears to be a Westernized intellectual in many respects, perhaps even an atheist, his article is quite maximalist in its understanding of the Church. "Thus," Ivan says in explaining his article,

it is not the Church that should seek a definite place for itself in the state, like "any social organization" or "organization of men for religious purposes" (as the author I was objecting to refers to the Church), but, on the contrary, every earthly state must eventually be wholly transformed into the Church and become nothing else but the Church, rejecting whichever of its aims are incompatible with those of the Church.²⁸

Ivan himself applies his principle to the matter of punishment. "If everything became the Church, then the Church would excommunicate the criminal and the disobedient and not cut off their heads."²⁹ For a prisoner with faith, this excommunication would more compellingly lead him to confession of his guilt and reform than would the threat of execution. Fr. Zosima follows the thrust of Ivan's argument:

If it were not for Christ's Church, indeed there would be no restraint on the criminal in his evildoing, and no punishment for it later, real punishment, that is, not a mechanical one ... the only frightening and appeasing punishment, which lies in the acknowledgment of one's own conscience.... If anything protects society even in our time, and even reforms the criminal himself and transforms him into a different

28. Fyodor Dostoevsky, *The Brothers Karamazov*, trans. and annotated Richard Pevear and Larissa Volokhonsky (New York: Vintage Books, 1990), p. 62.

29. *Ibid.*, p. 63.

person, again it is Christ's law alone, which manifest itself in the acknowledgement of one's own conscience.³⁰

Father Zosima, the most revered elder of an Orthodox monastery, does not make programmatic statements which lay out plans and timetables.

And there is no need to trouble oneself with times and seasons, for the mystery of times and seasons is in the wisdom of God, in his foresight, and in his love. And that which by human reckoning may still be rather remote, by divine predestination may already be standing on the eve of its appearance, at the door.³¹

Pope John Paul II has a different ministry than that of Dostoevsky's Elder Zosima. From its start, his papacy has proceeded programmatically from a central insight: "only in the mystery of the Incarnate Word does the mystery of man take on light.... Christ ... *fully reveals man to himself* and brings to light his most high calling.... Human nature, by the very fact that it was assumed, not absorbed, in [Christ], has been raised in us also to a dignity beyond compare."³² It is only in contrast to this profound dignity of the person that the tragic character of death—and the true gravity of the death penalty—can be seen. One might not be doing the greatest violence to the Holy Father's words in suggesting that civil society today is not good enough to authorize the use of the death penalty. Unlike the prisoners of whom Father Zosima spoke—"for Russian criminals still have faith"³³—many, whether within or outside today's courtroom dock, not only lack faith, but also are deficient in moral imagination.

At the start of his papacy, Pope John Paul II was not hesitant in highlighting the extent of the Gospel's reach even into our understanding of justice: "The redemption of the world ... is, at its deepest root, the fullness of justice in a human Heart—the Heart of the First-born Son—in order that it may become justice in the hearts of many human beings, predestined from eternity in the First-born Son to be children of God and called to grace, called to love."³⁴ Yet, the path to the civilization of love follows a route of innumerable many discrete judgments and acts. Individually and corporately, prudence must be employed in concrete circumstances to seek what Aristotle and Thomas Aquinas called legal justice, whereby "man is in

30. *Ibid.*, p. 64.

31. *Ibid.*, p. 66.

32. *Redeemer of Man (Redemptor Hominis)*, Washington, D.C.: United States Catholic Conference, 1979), no. 8, p. 24 (quoting *GS*, 22). Hereafter *RH*.

33. Dostoevsky, *Brothers Karamazov*, p. 65.

34. *RH*, 9, pp. 25-6.

harmony with the law which directs the acts of all the virtues to the common good."³⁵

Those charged with authority within the Church must prudentially judge how best to present the truths entrusted to them and to exercise their unique authority within its proper scope. The Church's teaching is for the long run. The Pope has hope, but hope is not idle; it is proactive and keeps in mind future generations. Pope John Paul II is profoundly aware that the Church's teaching is not mere pronouncement, but also a shaping of culture and moral imagination. Catechesis is not directed to the heads of university professors but to the heart of all humanity. In no case should those entrusted with the transmission of Catholic teaching be negligent in distinguishing between the intrinsic evil of abortion and the possible evils of capital punishment. A good teacher should avoid confusing his or her charges.

35. Aquinas, *Summa Theologica*, trans. Fathers of the English Dominican Province (New York: Benziger Brothers, Inc., 1947), II-II, 58, 5, resp., p. 1438.