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POPE JOHN PAUL II, VATICAN II, AND CAPITAL PUNISHMENT

Howard Bromberg[†]

INTRODUCTION

I am very pleased to be participating in this conference on the legacy of Pope John Paul II. Although I am speaking on John Paul II's profound impact on the Church's teaching on the morality of capital punishment, I would like to begin with a few comments about John Paul II's larger legacy and, in particular, the role of the Second Vatican Council ("Council," "Vatican II") in his papacy. I mention this because it is essential for an appreciation of his legacy, but even more because I think it provides the critical lens through which to view John Paul's approach to capital punishment.

I hope it is not controversial to say that perhaps Pope John Paul II's greatest legacy is that his papacy represented the embodiment of—and drew its fruitfulness from—the Second Vatican Council. Of course his name is providentially linked to the two popes of the Council: John XXIII who convoked it and Paul VI who concluded and promulgated it. In fact, of the names I believe the Church and posterity will accord him, some of which I have already heard at this conference—St. John Paul, John Paul the Great, John Paul Doctor of the Church—I think the one most descriptive of his pontificate would be "Apostle of Vatican II." From the first to the last, John Paul II truly saw his pontificate as the expression of that Council, which he would often refer to as "this great gift of the Spirit to the Church at the end of the second millennium."¹

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1. Pope John Paul II, *Tertio Millennio Adveniente* [*Apostolic Letter on the Coming of the Third Millennium*] ¶ 36 (1994) [hereinafter *Tertio Millennio Adveniente*]. Likewise Pope John Paul II began his first encyclical, *Redemptor Hominis*, with a tribute to the significance of the

The apostolic constitutions, encyclicals, homilies, pronouncements, and other documents he issued constitute a comprehensive catechesis drawn explicitly from the documents of the Council. He wrote that "Vatican II has always been, and especially during these years of my Pontificate, the constant reference point of my every pastoral action, in the conscious commitment to implement its directives concretely and faithfully at the level of each church and the whole church."²

Pope John Paul II was tireless in preaching the Council as an inexhaustible richness of reflection on the Church's own mystery, the connection between this mystery and man's vocation in Christ, dialogue with non-believers, and the universal call to holiness. Following the mandate of the Council, he promulgated a new Code of Canon Law³ and the new *Catechism of the Catholic Church* ("*Catechism*") (in which his distinctive teaching on capital punishment is set forth),⁴ and he convened the episcopal synods and conferences foundational to so much of his preaching and writing—including his encyclical *Evangelium Vitae*, the other chief source of his teaching on capital punishment.⁵ As the pope who ushered in the twenty-first century, he wrote, "[t]he best preparation for the new millennium, therefore, can only be expressed in a renewed commitment to apply, as faithfully as possible, the teachings of Vatican II to the life of every individual and of the whole Church."⁶

Only by understanding John Paul II's pontificate as an expression of the mandate of Vatican II can we understand his teaching on capital punishment. He was determined to proclaim the essence of

Second Vatican Council. Pope John Paul II, *Redemptor Hominis* [*Encyclical Letter on the Redeemer of Man*] ¶ 3 (1979) [hereinafter *Redemptor Hominis*].

2. Pope John Paul II, Discourse of January 25, 1985, in *L' OSSERVATORE ROMANO*, Jan. 27, 1985.

3. 1983 CODE.

4. CATECHISM OF THE CATHOLIC CHURCH ¶ 2267 (2d ed. 1997) [hereinafter CATECHISM OF THE CATHOLIC CHURCH].

5. The impetus to write *Evangelium Vitae* originated with a request from the Extraordinary Consistory of Cardinals, April 4-7, 1991, for the Pope to reaffirm certain points relating to the value and protection of human life. Pope John Paul II, *Evangelium Vitae* [*Encyclical Letter on the Value and Inviolability of Human Life*] ¶ 5 (1995) [hereinafter *Evangelium Vitae*]. Likewise, the *Catechism of the Catholic Church* originated in the work of the Second Vatican Council, having been suggested by the Extraordinary Synod of Bishops on January 25, 1985, which was convened to celebrate and study the teaching of the Council on the twentieth anniversary of its closing. Pope John Paul II, *Fidei Depositum* [*Apostolic Constitution on the Publication of the Catechism of the Catholic Church*] (1992), in CATECHISM OF THE CATHOLIC CHURCH, *supra* note 4, at 1, 2-3 [hereinafter *Fidei Depositum*].

6. *Tertio Millennio Adveniente*, *supra* note 1, ¶ 20.

the Church's teaching on this question of life and death, born of the Gospel and free of the ancillary and contingent additions of subsequent centuries. He understood that this teaching had to be faithful to Tradition⁷ but also needed to find a fresh formulation—even synthesis—for the modern age. To this end, he wrote: "In the history of the Church, the 'old' and the 'new' are always closely interwoven. The 'new' grows out of the 'old,' and the 'old' finds a fuller expression in the 'new.'"⁸

Pope John Paul II understood the Second Vatican Council to be the evangelical response to the "profoundly disturbing experiences of the Twentieth Century, a century scarred by the First and Second World Wars, by the experience of concentration camps and by horrendous massacres."⁹ John Paul's teaching on capital punishment is a direct response to the horrors of the Twentieth Century, with the degradation of law and the loss of life as represented by the culture of death and the millions of "legal" executions performed by modern governments.

Pope John Paul II's teaching on capital punishment is almost certain to become one of the most important, dramatic, and attractive components of his great legacy. Although his entire pontificate represents a profound synthesis and application of Catholic truths,

7. "For the holy Spirit was promised to the successors of Peter not so that they might, by his revelation, make known some new doctrine, but that, by his assistance, they might religiously guard and faithfully expound the revelation or deposit of faith transmitted [traditam] by the apostles." First Vatican Council, *Pastor Aeternus* [*First Dogmatic Constitution on the Church of Christ*] (1870), reprinted in 2 DECREES OF THE ECUMENICAL COUNCILS: TRENT TO VATICAN II 811, 816 (Norman P. Tanner, S.J. ed., 1990). The question of the consistency of John Paul's teaching on capital punishment with Catholic Tradition has been addressed in several full-length works and related chapters. Books, articles, and book chapters addressing this question since the publication of *Evangelium Vitae* include: E. CHRISTIAN BRUGGER, CAPITAL PUNISHMENT AND ROMAN CATHOLIC MORAL TRADITION (2003); FR. AUGUSTINE JUDD, O.P., CATHOLICS AND CAPITAL PUNISHMENT (2000); JAMES J. MEGIVERN, THE DEATH PENALTY: AN HISTORICAL AND THEOLOGICAL SURVEY (1997); Avery Cardinal Dulles, S.J., *Catholic Teaching on the Death Penalty: Has It Changed?*, in RELIGION AND THE DEATH PENALTY: A CALL FOR RECKONING 23 (Erik C. Owens et al. eds., 2004); John P. Langan, S.J., *Situating the Teachings of John Paul II on Capital Punishment: Reflections on Evangelium Vitae* 56, in CHOOSING LIFE: A DIALOGUE ON *EVANGELIUM VITAE* 210 (Kevin Wm. Wildes, S.J. & Alan C. Mitchell eds., 1997); George P. Weigel, *Evangelium Vitae on Capital Punishment: A Response to John Langan*, in CHOOSING LIFE: A DIALOGUE ON *EVANGELIUM VITAE*, *supra*, at 223. By and large, these works suggest a significant change in the Church's teaching on capital punishment. Brugger provides the most thorough treatment of this question, concluding that the Catholic Church is now teaching that capital punishment is intrinsically wrong, which he labels a "change," and not a development. BRUGGER, *supra*, at 2.

8. *Tertio Millennio Adveniente*, *supra* note 1, ¶ 18.

9. *Id.*

the problem of punishment by death is one of the few questions of morality where John Paul II found the opportunity and the need to reformulate the Tradition of the Church.¹⁰ By portraying capital punishment in a purely negative light, as a sentence only to be executed when unavoidable,¹¹ John Paul II evangelized for life in fidelity to the Gospel. He faced a dilemma of how to reconcile the history of the infliction of capital punishment in Christian society with the historic Christian witness against death—and solved it with one concise stroke. By distinguishing the legitimate use of capital punishment to protect society from direct aggression from its illegitimate use for other purposes, such as a supposed retribution or deterrence, we are able to understand fully, in some ways for the first time, the Church's Tradition as it has unfolded in history.

Nevertheless, Pope John Paul II's teaching on capital punishment has not been everywhere well-received. In particular, many Catholics who have otherwise championed John Paul II's stalwart defense of orthodoxy have questioned the fidelity and soundness of this teaching.¹² Some of these Catholics have found it puzzling, poorly reasoned, or contradictory.¹³ Finally, it has been dismissed as merely the personal opinion of the Pope, a "prudential" judgment easily rejected by those who prefer their own expertise.¹⁴

10. Pope John Paul II's reformulation does not constitute a break in Tradition:

[I]t must first be observed that the meaning of the pronouncements of faith depends partly upon the expressive power of the language used at a certain point in time and in particular circumstances. Moreover, it sometimes happens that some dogmatic truth is first expressed incompletely (but not falsely), and at a later date, when considered in a broader context of faith or human knowledge, it receives a fuller and more perfect expression.

Sacred Congregation for the Doctrine of the Faith, *Mysterium Ecclesiae* [*Declaration in Defense of the Catholic Doctrine of the Church Against Certain Errors of the Present Day*] ¶ 5 (1973). Likewise, in *Veritatis Splendor*, Pope John Paul II looked to the Second Vatican Council for its statement that the Church's moral doctrine also undergoes development, which must be applied to modern conditions:

The words spoken by John XXIII at the opening of the Second Vatican Council can also be applied to moral doctrine: "This certain and unchanging teaching . . . to which the faithful owe obedience, needs to be more deeply understood and set forth in a way adapted to the needs of our time."

Pope John Paul II, *Veritatis Splendor* [*Encyclical Letter Regarding Certain Fundamental Questions of the Church's Moral Teaching*] ¶ 53 n.100 (1993) [hereinafter *Veritatis Splendor*].

11. See *Evangelium Vitae*, *supra* note 5, ¶ 56.

12. See, e.g., Antonin Scalia, *God's Justice and Ours*, FIRST THINGS, May 2002, at 17, 20–21.

13. See *id.*

14. *Id.* Since the publication of *Evangelium Vitae*, there have been numerous specialized articles addressing the question of whether the Pope's teaching accords with the Tradition of the

Church, following the pattern of the books cited, *supra* note 7, and quoting from the historical evidence gathered therein. Perhaps most notable is Supreme Court Justice Antonin Scalia's assertion in *First Things* that there is a clear contradiction between the teaching of Pope John Paul II and that of the Catholic Church. Scalia, *supra* note 12, at 21; *see also* Avery Cardinal Dulles, S.J. et al., *Antonin Scalia and His Critics: An Exchange on the Church, the Courts, and the Death Penalty*, FIRST THINGS, Oct. 2002, at 8, 8–18 [hereinafter *Scalia and His Critics*] (providing responses to Scalia's article by many prominent Catholic scholars). Many other commentators seem to be in agreement. The following represents the major recent articles on Catholicism and capital punishment from law reviews and other prominent journals: Thomas C. Berg, *Religious Conservatives and the Death Penalty*, 9 WM. & MARY BILL RTS. J. 31, 39–47 (2000); Joseph Boyle, *Sanctity of Life and Authorization to Kill: Tensions and Developments in the Catholic Ethics of Killing*, 1 U. ST. THOMAS L.J. 217 (2003); Davison M. Douglas, *God and the Executioner: The Influence of Western Religion on the Death Penalty*, 9 WM. & MARY BILL RTS. J. 137 (2000); Robert F. Drinan, S.J., *Religious Organizations and the Death Penalty*, 9 WM. & MARY BILL RTS. J. 171 (2000); Robert F. Drinan, S.J., *Will Religious Teachings and International Law End Capital Punishment?*, 29 ST. MARY'S L.J. 957 (1998); Robert Fastiggi, *Capital Punishment, the Magisterium, and Religious Assent*, 12 JOSEPHINUM J. OF THEOLOGY 192 (2005); Richard W. Garnett, *Christian Witness, Moral Anthropology, and the Death Penalty*, 17 NOTRE DAME J.L. ETHICS & PUB. POL'Y 541 (2003); Christopher Kaczor, *Capital Punishment and the Catholic Tradition: Contradiction, Circumstantial Application, or Development of Doctrine?*, 2 NOVA ET VETERA 279 (2004); M. Cathleen Kaveny, *Development of Catholic Moral Doctrine: Probing the Subtext*, 1 U. ST. THOMAS L.J. 234, 241–42 (2003); Sr. Monica Kostielney, *Understanding Justice with Clarity, Civility, and Compassion: Reflections on Selected Biblical Passages and Catholic Church Teachings on the Death Penalty*, 13 T.M. COOLEY L. REV. 967 (1996); Steven A. Long, *Evangelium Vitae, St. Thomas Aquinas, and the Death Penalty*, 63 THOMIST 511 (1999); James J. Megivern, *Capital Punishment: The Curious History of Its Privileged Place in Christendom*, 147 PROC. AM. PHIL. SOC'Y 3 (2003); James J. Megivern, *Judge Noonan, Church Change, and the Death Penalty*, 1 U. ST. THOMAS L.J. 274 (2003); John Cardinal O'Connor, Remarks, *Are Executions in New York Inevitable?*, 22 FORDHAM URB. L.J. 557, 564 (1995); Oliver O'Donovan, *The Death Penalty in Evangelium Vitae, in ECUMENICAL VENTURES IN ETHICS: PROTESTANTS ENGAGE POPE JOHN PAUL II'S MORAL ENCYCLICALS* 216, 216–36 (Reinhard Hütter & Theodor Dieter eds., 1998); Michael J. Perry, *Capital Punishment and the Morality of Human Rights*, 44 J. CATH. LEGAL STUD. 1 (2005); Charles E. Rice, *A Cultural Tour of the Legal Landscape: Reflections on Cardinal George's Law and Culture*, 1 AVE MARIA L. REV. 81, 100–04 (2003); Peter J. Riga, *Capital Punishment: Is the Catholic Church Abolitionist?*, 41 CATH. LAW. 241 (2001); Thomas R. Rourke, *The Death Penalty in Light of the Ontology of the Person: The Significance of Evangelium Vitae*, 25 COMMUNIO 397 (1998); Patrick M. Laurence, Note, *He Beareth Not the Sword in Vain: The Church, the Courts, and Capital Punishment*, 1 AVE MARIA L. REV. 215 (2003); Joseph Bottum, *Christians and the Death Penalty*, FIRST THINGS, Aug.–Sept. 2005, at 17, 20–21; Gerard V. Bradley, *The Teaching of The Gospel of Life*, CATH. DOSSIER, Sept.–Oct. 1998, at 43; J. Budziszewski, *Capital Punishment: The Case for Justice*, FIRST THINGS, Aug.–Sept. 2004, at 39; Charles J. Chaput, O.F.M., *Supreme Court Ruling on Death Penalty Encouraging; Now Let's Do More*, DENVER CATH. REGISTER, Mar. 9, 2005, at 2; Avery Cardinal Dulles, *Catholicism & Capital Punishment*, FIRST THINGS, Apr. 2001, at 30; Mark S. Latkovic, *Capital Punishment, Church Teaching, and Morality: What is Pope John Paul II Saying to Catholics in Evangelium Vitae?*, LOGOS: J. CATH. THOUGHT & CULTURE, Spring 2002, at 76; Christoph Cardinal Schönborn, *Brief Note on the Revision of Passages in the Catechism of the Catholic Church Having to Do with the Death Penalty*, CATH. DOSSIER, Sept.–Oct. 1998, at 9; Sr. Helen Prejean, Remarks, *The Death Penalty, Religion and the Law: Is Our Legal System's Implementation of Capital Punishment Consistent with Judaism or Christianity?*, 4 RUTGERS J. L. & RELIGION ¶¶ 162–232 (2004), http://org.law.rutgers.edu/publications/law-religion/articles/RJLR_4_1_1.pdf; *see also* Joseph L. Falvey, Jr., *Crime and Punishment: A Catholic Perspective*, 43 CATH. LAW. 149 (2004)

This is a mistake, which not only misreads the moral and doctrinal component of John Paul II's teaching but also misses the sign of the times and a bright jewel of Catholic thought. The Pope's teaching is what it claims to be in the *Catechism*: an authentic rendition of Catholic Tradition.¹⁵ Like all authentic Christian doctrine, it was complete with the apostolic teaching, but is capable of deeper understanding by the Church under the guidance of the Holy Spirit.

Part I of this Article describes Pope John Paul II's teaching on capital punishment as based on the Scriptures and expressed in *Evangelium Vitae* and the *Catechism*. Part II examines the authority with which this doctrine was issued. Part III suggests that this teaching represents the "traditional teaching of the Church," although a "more perfect expression" of that teaching than has heretofore been recognized.¹⁶ Parts IV and V indicate why the papacy of John Paul II—"this time, in which God in His hidden design has entrusted to me . . . very close to the year 2000"¹⁷—was ripe for this explicit articulation of the Church's position. Part IV shows that the teaching corresponds with the Catholic understanding of the dignity of man and the nature of the state. Part V demonstrates that the teaching relies on the modern social fact of life imprisonment, made possible for the first time by technological and jurisprudential developments, as a non-lethal means to defend society.

I. POPE JOHN PAUL II'S FORMULATION

Pope John Paul II's moral teaching on capital punishment is drawn directly from a profound reading of Sacred Scripture, especially Genesis 4:2–16 and the Gospel evangel of charity.¹⁸ He wrote: "Sacred Scripture remains the living and fruitful source of the Church's moral doctrine; as the Second Vatican Council recalled, the

(arguing that, historically, Catholic teaching included retribution as a valid justification for punishment).

15. CATECHISM OF THE CATHOLIC CHURCH, *supra* note 4, ¶ 27.

16. *Id.* ¶ 2267; *Mysterium Ecclesiae*, *supra* note 10, ¶ 5.

17. *Redemptor Hominis*, *supra* note 1, ¶ 1.

18. *Veritatis Splendor*, *supra* note 10, ¶ 29.

The Second Vatican Council invited scholars to take *special care for the renewal of moral theology*, in such a way that its scientific presentation, increasingly based on the teaching of Scripture, will cast light on the exalted vocation of the faithful in Christ and on their obligation to bear fruit in charity for the life of the world.

Id. (internal quotation marks omitted).

Gospel is 'the source of all saving truth and moral teaching.'¹⁹ His teaching is first encapsulated in the exegesis with which he begins his encyclical on the Gospel of Life, *Evangelium Vitae*. In the opening sentence, John Paul II identified the radical affirmation of life that is at the heart of Christianity: "The Gospel of life is at the heart of Jesus' message. Lovingly received day after day by the Church, it is to be preached with dauntless fidelity as 'good news' to the people of every age and culture."²⁰ He proceeded to preach this good news by retelling the story of Cain, which is critical to an understanding of capital punishment. Out of envy and anger, Cain murdered his brother Abel, who had brought a pleasing offering to God. For this heinous murder, the first crime against brother and man, Cain was not punished with death; rather, he received a "mark" from God and was condemned to wander in the wilderness for the remainder of his days, cut off from society.²¹

Pope John Paul II's exegesis of the story of Cain leads to several conclusions. First, the question of capital punishment is central to Catholic morality, because it is necessarily connected with the first crime of man against man. Guilt and sin came with Adam's fall, but the first deadly fruit of original sin, the first murder, came with Cain. Second, capital punishment presents a unique moral question that does not exist solely in an autonomous sphere of criminal law in which the Church would be an unwelcome intruder. Rather, it is classified with other essential questions of human life, distinct from technical penological problems, precisely because it stands at the threshold between life and death. Third, this question is to be resolved by looking at original and immutable principles of human life and morality that, like the story of Cain and Abel, exist from before the creation of organized human society. The practices of Hebrew and Roman society, and of medieval Europe, cannot be dispositive of a question that God answered at the dawn of history. Thus, practical questions about the place of capital punishment in society *follow* from basic moral principles and do not determine them. Fourth, and most importantly, the question of how to punish heinous crime is answered with a decisive rejection of death because God chose not to slay Cain. Instead, God cut him off from society by placing a mark on him, both so that he could not be killed and so that

19. *Id.* ¶ 28.

20. *Evangelium Vitae*, *supra* note 5, ¶ 1.

21. *Id.* ¶¶ 7-28. This story of Cain is found in *Genesis* 4:2-16.

he could not kill others. But with that punishment, God's justice was satisfied and did not demand the death of the first murderer, for "[n]ot even a murderer loses his personal dignity."²² As Saint Ambrose wrote:

God drove Cain out of His presence and sent him into exile far away from his native land God, who preferred the correction rather than the death of a sinner, did not desire that a homicide be punished by the exaction of another act of homicide.²³

In *Evangelium Vitae*, Pope John Paul II reflected on the purposes of capital punishment in the context of human justice. According to him, the state is obliged to punish an offender against public order and safety, but not to do so beyond limits set by the needs of society and standards of human dignity. In the case of capital punishment, this means that death can be imposed only in "cases of absolute necessity" when there is no other way to defend society—cases that are "very rare, if not practically non-existent."²⁴

22. *Evangelium Vitae*, *supra* note 5, ¶ 9 (emphasis omitted).

23. ST. AMBROSE, HEXAMERON, PARADISE, AND CAIN AND ABEL, Bk. II, ¶ 38, in 42 THE FATHERS OF THE CHURCH: A NEW TRANSLATION 436–37 (John J. Savage trans., 1961) (footnotes omitted).

24. *Evangelium Vitae*, *supra* note 5, ¶ 56 (emphasis omitted).

This is the context in which to place the problem of the *death penalty*. On this matter there is a growing tendency, both 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." 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 behavior and be rehabilitated.

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 to go to the extreme of executing the offender except in *cases of absolute necessity*: in other words, when it would not be possible otherwise to defend society. Today however, as a result of steady improvements in the organization of the penal system, such cases are *very rare, if not practically non-existent*.

In any event, the principle set forth in the new *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."

This passage from *Evangelium Vitae* found definitive expression in the Latin *editio typica* of the *Catechism* issued in 1997.²⁵ Paragraph 2267 of the *Catechism* succinctly sets forth Catholic teaching on capital punishment:

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 are more in conformity to 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.”²⁶

Several important points can be drawn directly from the text of the *Catechism*. First, paragraph 2267 expressly states that it represents the “traditional teaching of the Church.”²⁷ It does not claim to be a variation of the traditional teaching, or a departure from

Id. (third and fourth emphases added) (footnotes omitted) (quoting CATECHISM OF THE CATHOLIC CHURCH ¶ 2267 (1994)).

25. The revision of the paragraph on capital punishment of the 1992 French-language edition of the *Catechism* (translated into English in 1994) is one of the most important changes to the “definitive text” of the 1997 Latin edition (*editio typica*). The *editio typica* eliminated language in the preceding section, paragraph 2266, that allowed “penalties commensurate with the gravity of the crime, not excluding, in cases of extreme gravity, the death penalty,” indicating that the seriousness of the crime by itself does not justify recourse to execution. Compare CATECHISM OF THE CATHOLIC CHURCH ¶ 2266 (1994) (“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.”), with CATECHISM OF THE CATHOLIC CHURCH, *supra* note 4, ¶ 2266 (“Legitimate public authority has the right and the duty to inflict punishment proportionate to the gravity of the offense.”).

26. CATECHISM OF THE CATHOLIC CHURCH, *supra* note 4, ¶ 2267 (quoting *Evangelium Vitae*, *supra* note 5, ¶ 56).

27. *Id.*

it, but the *Tradition* itself. To state authentically and truly what is traditional teaching is, of course, the preeminent role of the Supreme Pontiff.²⁸ It is an inherently conservative role.²⁹

Second, paragraph 2267 acknowledges the legitimacy of the application of the death penalty under certain circumstances. John Paul II thus rejects the extreme position that would find the death penalty intrinsically immoral and refuse the state any authority over the life and death of its subjects under any circumstances, including during military and police actions. The Pope makes clear, however, that, for precisely defined social reasons, the conditions that necessitate capital punishment are largely a thing of the past.³⁰ The punishment now conflicts with “the concrete conditions of the common good” and “the dignity of the human person.”³¹

Third, paragraph 2267 mandates that the state may apply capital punishment only if there is no other way to protect human lives from an unjust aggressor.³² If non-lethal means are sufficient, the death penalty cannot be applied. Given that such means are available today in the form of life imprisonment that is safe, secure, and non-injurious, Pope John Paul II has determined that circumstances of necessity do not exist in modern society and thus, in essence, is calling for the abolition of capital punishment.

In fact, the *Catechism*'s animus against capital punishment is so strong that even in less-than-ideal penal conditions, capital punishment is currently excluded as a morally permissible penalty.³³ In other words, the possibility of non-lethal penal conditions renders

28. *Id.* ¶¶ 85, 2034.

29. In *Veritatis Splendor*, Pope John Paul II, quoting the Second Vatican Council, stated that the Church faithfully hands on all that she believes as her “*living Tradition*,” which comes from the Apostles. *Veritatis Splendor*, *supra* note 10, ¶ 27. The “*authentic interpretation*” of the Commandments “develops, with the help of the Holy Spirit,” in the light of new historical and cultural situations. *Id.*

30. *Evangelium Vitae*, *supra* note 5, ¶ 56 (“Today however, as a result of steady improvements in the organization of the penal system, [cases of absolute necessity to justify capital punishment] are very rare, if not practically non-existent.”).

31. *Id.*

32. *Id.* This teaching has been misunderstood by several commentators as contradicting the Church’s teaching on self-defense and double effect. The fact that, at various points, the *Catechism* applies the theory of double effect to the well-developed doctrine of self-defense does not mean that the Church is strictly bound to an application of the theory of double effect in evaluating capital punishment, and neither *Evangelium Vitae* nor the *Catechism* apply the theory to the relevant sections of capital punishment. See CATECHISM OF THE CATHOLIC CHURCH, *supra* note 4, ¶¶ 2263, 2267; *Evangelium Vitae*, *supra* note 5, ¶ 56.

33. See CATECHISM OF THE CATHOLIC CHURCH, *supra* note 4, ¶ 2267.

capital punishment impermissible even when a society's penal system is defective. On this point, the Pope has issued a radical proclamation in favor of life. No justifying element of capital punishment exists, other than immediate necessity.³⁴

Likewise, paragraph 2267 does not permit capital punishment for deterrence or retribution. The question of whether capital punishment indeed deters crime is one of the most disputed questions in jurisprudence.³⁵ Any hypothetical deterrence rests on such debatable moral and empirical grounds that it cannot justify the direct taking of life, especially given the restrictive language of paragraph 2267. On the question of retribution (rectification of the moral harm the crime

34. *Id.* The qualifying phrase "very rare" is unlikely to create exceptions that would apply to societies with more primitive penal systems, as it would allow public authorities to justify a departure from the common good and the dignity of the person. In this sense, the *Catechism* would apply to all modern states regardless of their state of development. The defects in any particular penal system are defects that must be remedied rather than conditions that justify capital punishment. Still, it may leave open the possibility of execution even today, if referring to a temporary exigency of a particular penal system that cannot be remedied or avoided.

In this way, capital punishment is similar to slavery. If concrete conditions of a previous age could ever have justified slavery, modern society has reached a point where slavery is morally unacceptable, even if those concrete conditions such as familial, humane, non-racial treatment of slaves could be asserted today. Likewise, use of capital punishment, theoretically justified when there were no alternative sentences, cannot be justified under modern society, which is capable of non-lethal means, regardless of the actual penal conditions that exist.

35. This question of the deterrent value of capital punishment is one of the most widely debated topics in assessing its efficacy, and is beyond the scope of this Article. Briefly, however, several critics of Pope John Paul II's position have pointed out that imposing death will at least prevent the executed prisoner from killing again. *E.g.*, Paul G. Cassell, *In Defense of the Death Penalty*, in *DEBATING THE DEATH PENALTY: SHOULD AMERICA HAVE CAPITAL PUNISHMENT?* 183, 187 (Hugo Adam Bedau & Paul G. Cassell eds., 2004). This is a morally flawed argument because killing anyone prevents them from committing any crime, including murder, but does not justify the killing. As Stalin is reported to have said: "[D]eath solves all problems: no man, no problem." ROBERT CONQUEST, *STALIN: BREAKER OF NATIONS* 79 (1991). But the actual risk posed by capital murder defendants is in fact very small. Recent studies have indicated that the incidence of recidivism among murderers released from prison is lower than for other types of parolees, with the likelihood of repeat murders being, on average, less than one percent a year. Jonathan R. Sorensen & Rocky L. Pilgrim, *An Actuarial Risk Assessment of Violence Posed by Capital Murder Defendants*, 90 J. CRIM. L. & CRIMINOLOGY 1251, 1254-55 (2000). Given that the most common alternative to capital punishment is likely to be life imprisonment without parole, it is worth noting that rates of homicide in prison are far lower than in the community. The yearly rate of repeat murder in prison for convicted murderers is less than 0.002 percent. *Id.* at 1256. Likewise, empirical studies have found murderers to be "among the most docile" and reliable inmates, with little predilection for prison violence. *Id.* With the development of "supermaximum" security prisons, it is likely that these rates will only decline in the future. Likewise, prisoners who are rearrested after release are usually arrested for crimes other than that for which they were first convicted, with homicide the crime least likely to be repeated. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PUBL'N NO. NCJ 193427, SPECIAL REPORT: RECIDIVISM OF PRISONERS RELEASED IN 1994, at 9 (2002).

has caused), the right and the duty of the state to inflict punishment proportionate to the crime so as to redress the disorder to society and the offense given to God is not questioned, and in fact is explicitly affirmed by John Paul II.³⁶ But the imposition of death adds nothing to the retributive or restorative order when a fully adequate punishment can be achieved by non-lethal means, thus rendering the infliction of death nothing more than gratuitous and vengeful.³⁷

Consideration of these points leads to the conclusion that Pope John Paul II's more precise formulation of the Church's teaching on capital punishment is required to remain faithful to Catholic jurisprudential tradition in modern times. Catholic teaching recognizes four justifications for punishment: retribution, defense, deterrence, and reform. Paragraph 2266 expresses these justifications as redressing the disorder caused by the offense; preserving the public order, the safety of persons, and the common good; and contributing to the correction of the offender.³⁸ Imprisonment and other punishments can accomplish all of these objectives. Execution, however, cannot, because it risks depriving the offender of the possibility of redeeming himself. The medicinal end of punishment is eliminated. In this sense, capital punishment is in discordance with the traditional Catholic understanding of the nature of criminal penalties. Punishment should serve the rehabilitation of the individual by allowing criminals the opportunity to be reformed. John Paul II insists that this restorative aspect must not be eliminated by killing the criminal.³⁹

36. CATECHISM OF THE CATHOLIC CHURCH, *supra* note 4, ¶ 2266.

37. The gratuitous nature of a capital sentence is manifested in American constitutional law, which requires a bifurcated trial to impose capital punishment: first the defendant receives a life sentence, which apparently would be sufficient to secure the safety of society from immediate harm, and then a second capital trial is held to establish whether aggravating factors going to the *moral* nature of the murder mandate execution. See *Gregg v. Georgia*, 428 U.S. 153, 158, 194–95, 194 n.44, 207 (1976) (describing a bifurcated sentencing procedure for capital punishment, and finding that such a procedure is not in violation of the U.S. CONST. amends. VIII, XIV).

38. CATECHISM OF THE CATHOLIC CHURCH, *supra* note 4, ¶ 2266.

39. Pope John Paul II, Homily at "Regina Coeli" Prison in Rome during the Celebration of the Great Jubilee ¶ 6 (July 9, 2000), in *Holy Father Visits "Regina Coeli" Prison: "I Was in Prison and You Came to Me,"* L'OSSERVATORE ROMANO (English ed.), July 12, 2000, at 1, 2.

Punishment cannot be reduced to mere retribution, much less take the form of social retaliation or a sort of institutional vengeance. Punishment and imprisonment have meaning if, while maintaining the demands of justice and discouraging crime, *they serve the rehabilitation of the individual* by offering those who have made a mistake an opportunity to reflect and to change their lives in order to be fully reintegrated into society.

II. AN AUTHORITATIVE TEACHING

It would seem impossible to deny that Pope John Paul II's doctrine on capital punishment is an authoritative teaching. It is clearly stated as the teaching of the Church in the papal encyclical *Evangelium Vitae*.⁴⁰ John Paul II frequently employed encyclicals to address the important questions of his pontificate. *Evangelium Vitae* is an encyclical devoted to questions of life and death, and paragraph 56 plays a central and inescapable part.⁴¹

40. See *Evangelium Vitae*, *supra* note 5, ¶ 56.

41. As Pope John Paul II's teaching on capital punishment was promulgated in *Evangelium Vitae*, its assessment necessarily raises the question of the teaching authority of a papal encyclical. Although a papal encyclical does not by itself bear the charisma of infallibility—contrast apostolic bulls and constitutions that do bear papal infallibility, such as: Pope Benedict XII, *Benedictus Deus* [*Apostolic Constitution on the Beatific Vision of God*] (1336), reprinted in THE CHRISTIAN FAITH IN THE DOCTRINAL DOCUMENTS OF THE CATHOLIC CHURCH 1018 (Jacques Dupuis ed., 7th ed. 2001) (defining the dogma of particular judgment immediately after death); Pope Pius IX, *Ineffabilis Deus* [*Apostolic Constitution on Defining the Dogma of the Immaculate Conception*] (1854); Pope Pius XII, *Munificentissimus Deus* [*Apostolic Constitution on the Dogma of the Assumption*] (1950) (defining the dogma of the Assumption of the Blessed Virgin Mary)—encyclicals have become the chief vehicle of modern papal teaching. For example, authoritative papal teachings on social and economic questions have been promulgated primarily in papal encyclicals. See, e.g., Pope Leo XIII, *Rerum Novarum* [*Encyclical Letter on the Condition of the Working Classes*] (1891); Pope John Paul II, *Centesimus Annus* [*Encyclical Letter on the Hundredth Anniversary of Rerum Novarum*] (1991); Pope Pius XI, *Quadragesimo Anno* [*Encyclical Letter on Reconstructing the Social Order*] (1931), reprinted in TWO BASIC SOCIAL ENCYCLICALS 83 (1943); see also Pope Paul VI, *Humanae Vitae* [*Encyclical Letter on the Regulation of Births*] (1968) (on contraception); Pope Pius X, *Pascendi Dominici Gregis* [*Encyclical Letter on the Doctrines of the Modernists*] (1907); Pope Pius XI, *Casti Connubii* [*Encyclical Letter on Christian Marriage*] (1930) (on marriage and divorce); Pope Pius XII, *Humani Generis* [*Encyclical Letter on Some False Opinions Which Threaten to Undermine Catholic Doctrine*] (1950) (on evolution). In fact, it is fair to say that, whereas in previous centuries, the popes exercised their Petrine ministry to “confirm the brethren,” *Luke* 22:32, primarily through juridical documents, in modern times, the popes teach matters of faith and morals in an authentic and authoritative manner primarily through pastoral documents, that is, encyclicals. Even as part of the ordinary universal Magisterium, moral teaching in an encyclical, because of the nature of the document and the intent and manner in which it is proclaimed, has reached a great measure of certitude. Catholics must show “religious submission of mind and of will . . . in a special way to the authentic magisterium of the Roman Pontiff, even when he is not speaking *ex cathedra*.” Second Vatican Council, *Lumen Gentium* [*Dogmatic Constitution on the Church*] ¶ 25 (1964), reprinted in THE SIXTEEN DOCUMENTS OF VATICAN II 107, 135 (Nat'l Catholic Welfare Conference trans., 1967). As Pius XII wrote in a previous encyclical:

Nor must it be thought that what is expounded in Encyclical Letters does not of itself demand consent, since in writing such Letters the Popes do not exercise the supreme power of their Teaching Authority. For these matters are taught with the ordinary teaching authority, of which it is true to say: “He who heareth you, heareth me”

Humani Generis, *supra*, ¶ 20 (quoting *Luke* 10:16). In particular, Pope John Paul II employed his fourteen encyclicals to present an entire catechesis of the Faith and an exposition of his teaching. See J. Michael Miller, C.S.B., *Introduction* to THE ENCYCLICALS OF JOHN PAUL II 11, 21, 25–28 (J.

Pope John Paul II emphasized the importance of this particular teaching on capital punishment in several important ways. First, he restated the teaching in the definitive 1997 Latin *editio typica* of the *Catechism*, which presents itself as “a statement of the Church’s faith and of catholic doctrine, attested to or illumined by Sacred Scripture, the Apostolic Tradition, and the Church’s Magisterium. . . . [A] sure norm for teaching the faith.”⁴² Second, when John Paul II spoke of the culture of life—condemning abortion, euthanasia, and other forms of homicide—he included capital punishment as an evil to be eliminated.⁴³ For example, in a visit to St. Louis, Missouri in 1999,

Michael Miller ed., 2001). The teaching of *Evangelium Vitae*, *supra* note 5, presented in an encyclical dedicated to urgent questions of life, ratified the teaching of the Church. Pope John Paul II presented it in terms that indicate its binding nature—for example, “public authority *must* limit itself to such means,” *id.* ¶ 56 (emphasis added)—thus representing an extremely high order of papal teaching.

42. *Fidei Depositum*, *supra* note 5, ¶ 3 (explaining that the *Catechism* is a “sure and authentic reference text for teaching catholic doctrine”). Pope John Paul II’s 1997 Apostolic Letter, *Laetamur Magnopere*, promulgating the *typical edition* of the *Catechism*, described it as an “authoritative exposition of the one and perennial apostolic faith.” Pope John Paul II, *Laetamur Magnopere* [*Apostolic Letter on the Approval and Promulgation of the Latin Typical Edition of the Catechism of the Catholic Church*] (1997), in *CATECHISM OF THE CATHOLIC CHURCH*, *supra* note 4, at xiii, xv.

43. Statements by Pope John Paul II (and other officials of the Holy See) in opposition to capital punishment issued since *Evangelium Vitae* include: Pope John Paul II, Address to the Conference for the Fiftieth Anniversary of the European Convention on Human Rights (Nov. 3, 2000), in *Ending the Death Penalty and Defending the Unborn*, 46 *POPE SPEAKS* 145, 146 (2001) (rejoicing in the “noble achievement” of the Council in having the death penalty abolished in most European states and “looking forward to its extension to the rest of the world”); Pope John Paul II, Homily at Mass in St. Louis ¶ 5 (Jan. 27, 1999), in *Homily in the Trans World Dome*, 28 *ORIGINS* 599, 601 (1999) [hereinafter Homily at Mass in St. Louis] (“I renew the appeal I made most recently at Christmas for a consensus to end the death penalty, which is both cruel and unnecessary.”); Pope John Paul II, Message of Pope John Paul II for the Eleventh World Day of the Sick Held in Washington, D.C., at the National Shrine of the Basilica of the Immaculate Conception (Feb. 11, 2003), in *Catholic Health Care and the Defense of Life*, 48 *POPE SPEAKS* 234, 235 (2003) (“Nor can I fail to mention the unnecessary recourse to the death penalty.”); Pope John Paul II, *Ecclesia in America: Post-Synodal Apostolic Exhortation of Pope John Paul II* ¶ 63 (Jan. 22, 1999), in 44 *POPE SPEAKS* 204, 240 (1999) (“Nor can I fail to mention the unnecessary recourse to the death penalty when other bloodless means are sufficient to defend human lives against an aggressor and to protect public order and the safety of persons.” (internal quotation marks omitted)); Pope John Paul II, Address to the Bishops of Burundi in Their “*Ad Limina*” Visit (Sept. 10, 1999), in *Be Tireless Builders of Peace with All People of Good Will*, *L’OSSERVATORE ROMANO* (English ed.), Sep. 22, 1999, at 7 (“One can only deplore the excessive number of cases in which the death penalty is sought.”); Pope John Paul II, Address to the Members of the Parliamentary Assembly of the Council of Europe ¶ 4 (Mar. 29, 1999), in *Nothing Is Resolved by Violence: Kosovo Crisis Must Be Resolved Peacefully*, *Pope Tells European Parliamentarians*, *L’OSSERVATORE ROMANO* (English ed.), Apr. 14, 1999, at 8 (“I join my voice to the Council of Europe’s in asking that the most basic right, the right to life, be recognized throughout Europe and that the death penalty be abolished.”); Pope John Paul II, Address to the New Ambassador of Chile to the Holy See ¶ 5 (June 18, 2001), in *New*

Ambassador to the Holy See: Chile, L'OSSERVATORE ROMANO (English ed.), July 18, 2001, at 8 ("I am pleased with the recent deliberation of the Supreme Government and the legislative authority which—with the Church's loyal collaboration—has abolished the death penalty . . ."); Pope John Paul II, Address to the New Ambassador of the Republic of Rwanda to the Holy See (Dec. 6, 2001), in *New Ambassadors to the Holy See: Rwanda*, L'OSSERVATORE ROMANO (English ed.), Dec. 19/26, 2001, at 8 ("[T]he administration of justice . . . must safeguard and promote the common good while . . . avoiding such drastic measures as recourse to the death penalty."); Pope John Paul II, Homily at Mass in Mexico City, Mexico During a Pastoral Visit to America (Jan. 23, 1999), in *Holy Father's Pastoral Visit to America: May the Continent of Hope Also Be the Continent of Life! Life with Dignity for All!*, L'OSSERVATORE ROMANO (English ed.), Jan. 27, 1999, at 1 ("There must be an end to the unnecessary recourse to the death penalty!"); Pope John Paul II, Message Before Angelus (Dec. 12, 1999), in *Prepare Him a Worthy Dwelling: At Sunday Angelus Holy Father Reflects on Joy of Christ's Birth*, L'OSSERVATORE ROMANO (English ed.), Dec. 15, 1999, at 2 ("I therefore renew my appeal to all leaders to reach an international consensus on the abolition of the death penalty . . ."); Pope John Paul II, Message for the Celebration of the World Day of Peace ¶ 19 (Jan. 1, 2001), in *Dialogue Between Cultures for a Civilization of Love and Peace*, L'OSSERVATORE ROMANO (English ed.), Dec. 20/27, 2000, at 10 (explaining that this century's "tragic spiral of death" includes "unnecessary recourse to the death penalty"); Pope John Paul II, Urbi et Orbi Message ¶ 6 (Dec. 25, 1998), in *May Christmas Instil Trust in the Power of Truth and Perseverance in Doing Good*, L'OSSERVATORE ROMANO (English ed.), Jan. 6, 1999, at 1 ("May Christmas help to strengthen and renew, throughout the world, the consensus concerning the need for urgent and adequate measures . . . to end the death penalty . . ."); Letter from Cardinal Angelo Sodano, Vatican Secretary of State, to Fidel Castro Ruz, Head of State and Government of the Republic of Cuba (Apr. 13, 2003), in *Pope Appeals to Cuba's President for Clemency for Condemned Citizens*, L'OSSERVATORE ROMANO (English ed.), Apr. 30, 2003, at 1 ("I express the Holy Father's deep distress upon learning of the severe sentences recently passed on many Cuban citizens, including capital punishment . . ."); Holy See, Declaration to the First World Congress on the Death Penalty (June 21, 2001), available at http://www.vatican.va/roman_curia/secretariat_state/documents/rc_seg-st_doc_20010621_death-penalty_en.html ("The Holy See has consistently sought the abolition of the death penalty and his Holiness Pope John Paul II has personally and indiscriminately appealed on numerous occasions in order that such sentences should be commuted to a lesser punishment, which may offer time and incentive for the reform of the guilty, hope to the innocent and safeguard the well-being of civil society itself and of those individuals who through no choice of theirs have become deeply involved in the fate of those condemned to death. The Pope had most earnestly hoped and prayed that a worldwide moratorium might have been among the spiritual and moral benefits of the Great Jubilee which he proclaimed for the Year Two Thousand, so that dawn of the Third Millennium would have been remembered forever as the pivotal moment in history when the community of nations finally recognised that it now possesses the means to defend itself without recourse to punishments which are 'cruel and unnecessary.'"); Intervention of the Holy See, *Conference for the Institution of an International Penal Tribunal* (July 12, 1998) ("The Holy See has appealed to all nations not to have recourse to the death penalty and is happy to see emerging a great consensus in this regard."); Renato R. Martino, Apostolic Nuncio, Permanent Observer of the Holy See to the United Nations, Intervention Before the Third Committee of the 54th Session of the General Assembly on the Abolition of the Death Penalty (Nov. 2, 1999), available at http://www.vatican.va/roman_curia/secretariat_state/documents/rc_seg-st_doc_02111999_death-penalty_en.html ("The position of the Holy See, therefore, is that authorities, even for the most serious crimes, should limit themselves to non-lethal means of punishment . . ."); Pope John Paul II, Address in St. Peter's Square to the General Audience (Sept. 13, 2000), available at http://www.vatican.va/holy_father/john_paul_ii/audiences/2000/documents/hf_jp-ii_aud_20000913_en.html (appealing to humanity in general to "giv[e] up recourse to capital punishment"); Pope John Paul II, Address to H.E. Mrs. Leonida

John Paul declared capital punishment to be “both cruel and unnecessary.”⁴⁴ Third, whenever John Paul intervened in capital cases, it was always to call for commutation of the capital sentence, no matter how heinous the crimes of the sentenced criminal.⁴⁵ Fourth, John Paul’s position on capital punishment has been endorsed by virtually every Catholic bishop who has spoken on the subject.⁴⁶ Certainly every Catholic conference of bishops that has

L. Vera, Ambassador of the Republic of the Philippines to the Holy See (Apr. 19, 2004) [hereinafter Pope John Paul II, Address to H.E. Mrs. Leonida L. Vera], available at http://www.vatican.va/holy_father/john_paul_ii/speeches/2004/april/documents/hf_jp-ii_spe_20040419_philippines-ambassador_en.html (“[T]he ends of justice in today’s world seem better served by not resorting to the death penalty.”); Pope John Paul II, Reflection on the Recent Pastoral Visit to Mexico and the United States of America to the General Audience ¶ 4 (Feb. 10, 1999), available at http://www.vatican.va/holy_father/john_paul_ii/audiences/1999/documents/hf_jp-ii_aud_10021999_en.html (“[M]y journey was a great appeal to America to accept the Gospel of life and the family in order to reject . . . unnecessary recourse to the death penalty.”). In 1996, the report of the Secretary-General of the United Nations devoted an entire section to the position taken by Pope John Paul II in *Evangelium Vitae*. The Secretary-General, *Report of the Secretary-General on Capital Punishment and Implementation of the Safeguards Guaranteeing the Protection of the Rights of Those Facing the Death Penalty* ¶ 42, delivered to the Economic and Social Council, U.N. Doc. E/CN.15/1996/19 (Mar. 27, 1996). The expressions of opposition of the Holy See to capital punishment have continued into the papacy of Pope Benedict XVI, as for example, in the Vatican’s condemnation of the execution of Saddam Hussein. See *On File*, 36 ORIGINS 484, 484 (2007).

44. Homily at Mass in St. Louis (Jan. 27, 1999), *supra* note 43, ¶ 5.

45. See, e.g., *Govs. Bush and Taft Hear Death Penalty Plea*, NAT’L CATH. REG., Nov. 14–20, 1999, at 15 (reporting that Archbishop Gabriel Montalvo, on behalf of Pope John Paul II, wrote to Governor George W. Bush of Texas urging him to commute the death sentence of David Hicks, and to Governor Bob Taft of Ohio, urging him to do the same for Kenny Richey); Press Release, United States Conference of Catholic Bishops, Papal Appeal for Spaniard on Death Row Sent to Florida Governor (Sept. 24, 1999), available at <http://www.usccb.org/comm/archives/1999/99-221.shtml> (reporting that, “[o]n behalf of Pope John Paul II, the Apostolic Nuncio to the United States has written to Governor Jeb Bush, appealing for clemency [for] Joaquin Jose Martinez, a Spanish citizen who is a death row prisoner” and who was convicted of two counts of murder and armed burglary).

46. For example, Pope John Paul II’s teaching on capital punishment is also quoted in PONTIFICAL COUNCIL FOR JUSTICE & PEACE, COMPENDIUM OF THE SOCIAL DOCTRINE OF THE CHURCH ¶ 405 (2005); see also COMPENDIUM: CATECHISM OF THE CATHOLIC CHURCH ¶ 469 (2006) (promulgated by Pope Benedict XVI). As to be expected, Pope Benedict XVI has supported John Paul’s formulation, for example, by calling for commutation of the death sentence for convicted murderer Troy Anthony Davis, and on June 25, 2006 congratulating the Philippines on eliminating the death penalty. Carlos Campos, *Pope’s Message for Perdue: Don’t Execute Killer*, ATLANTA J.-CONST., July 20, 2007, at 1A. The Holy See has continued to support an international effort to eliminate capital punishment. In a message that was delivered to an international conference on the death penalty on February 7, 2007, the Vatican indicated support for the organizers of the meeting and for everyone who works “to abolish the death penalty or to impose a universal moratorium on its use.” *Holy See: Death Penalty an Affront to Dignity Lends Support to Recent Congress Held in Paris*, INSIDE PASSAGE, Feb. 23, 2007, at 8, available at <http://www.dioceseofjuneau.org/Previous%20Inside%20Passages/2007/7feb23%20Web.pdf>.

addressed this topic recently has called for the abolition of capital punishment.⁴⁷ There were occasional statements by individual

47. There have been hundreds of statements opposing capital punishments from American conferences of bishops over the last few decades. For many reasons, including the fact that the United States is one of the few predominantly Christian or advanced nations to retain capital punishment, it is worthwhile to note the uniformity of its Catholic episcopacy in following Pope John Paul II in opposing capital punishment. Not only has every state's conference of bishops called for the abolition of capital punishment, but they have done so explicitly quoting or following *Evangelium Vitae*. For a compilation of twenty-two statements from American Catholic bishops and bishops' conferences on the issue of capital punishment dating from 1960 through 1989, see J. GORDON MELTON, *THE CHURCHES SPEAK ON: CAPITAL PUNISHMENT 1-52* (1989). This book also includes official statements on capital punishment by Canadian Catholic bishops, from Eastern Orthodox Churches, from Protestant communities, from Jewish groups, and from other religious bodies. Taken together, these statements document a shift in the major religious bodies of North America, in the period from 1956 to the 1980s, from supporting to opposing the death penalty—a "crusade against capital punishment." *Id.* at xiii. For statements of the American episcopacy against capital punishment since the publication of *Evangelium Vitae*, see BISHOPS OF PENNSYLVANIA, *THE DEATH PENALTY: CHOOSE LIFE 4* (2001), available at <http://www.pacatholic.org/statements/deathpenalty.html> ("Pope John Paul II in *Evangelium Vitae* . . . declares that modern society has the means of protecting itself and preserving the common good without the necessity of capital punishment."); UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, *A CULTURE OF LIFE AND THE PENALTY OF DEATH 20* (2005), available at <http://www.usccb.org/sdwp/national/penaltyofdeath.pdf> ("In his encyclical *The Gospel of Life*, Pope John Paul II told us that we have an 'inescapable responsibility of choosing to be unconditionally pro-life.' This Catholic campaign brings us together for common action to end the use of the death penalty, to reject a culture of death, and to build a culture of life." (footnote omitted)); Statement, Administrative Board of the United States Conference of Catholic Bishops (Apr. 2, 1999), in *A Good Friday Appeal to End the Death Penalty*, 28 ORIGINS 726, 727 (1999) ("Through his powerful encyclical 'The Gospel of Life' (*Evangelium Vitae*), Pope John Paul II has asked that governments stop using death as the ultimate penalty. . . . Our Holy Father has called us with new urgency to stand against capital punishment. . . ."); Statement, Daniel Buechlein, O.S.B., Archbishop, The Death Penalty and Timothy McVeigh (Apr. 2, 2001), in 30 ORIGINS 727, 728 (2001) ("Even as our church opposes the death penalty in a case as awful as McVeigh's, we do not question in principle the state's right to impose the death penalty. Yet we must oppose the death penalty because the circumstances of our day do not warrant it."); Statement, Bishop Joseph Fiorenza, Reaction to the Execution of Timothy McVeigh (June 11, 2001), in 31 ORIGINS 110, 110 (2001) ("We will continue to support the abolition of capital punishment while urging appropriate punishment for capital crimes."); Roger Cardinal Mahony, Address at the National Press Club Newsmaker Luncheon (May 25, 2000), in *New Ethic: Justice Without Vengeance*, 30 ORIGINS 59, 62 (2000) ("The Catholic bishops of the United States join with Pope John Paul II in a recommitment to end the death penalty."); Pastoral Letter from Sean O'Malley on Capital Punishment, Bishop of Massachusetts, The Gospel of Life vs. The Death Penalty, in 28 ORIGINS 717, 720 (1999) ("[W]e must join our voices with that of our Holy Father in calling for an abolition of the death penalty."); Statement, United States Conference of Catholic Bishops, United States Bishops Meeting ¶ 4 (Nov. 15, 2000), in *Responsibility, Rehabilitation and Restoration: A Catholic Perspective on Crime and Criminal Justice*, 30 ORIGINS 389, 397-98 (2000) ("We join Pope John Paul II in renewing our strong and principled opposition to the death penalty. We oppose capital punishment not just for what it does to those guilty of horrible crimes, but for how it affects society; moreover, we have alternative means today to protect society from violent people."); Letter from Edward J. Arsenault, Moderator of the Curia, Diocese of Manchester, to the Honorable David A. Welch, Chairman of the Criminal Justice and

Public Safety Committee (Jan. 10, 2006), <http://www.usccb.org/sdwp/national/deathpenalty/nhhb1422.shtml> (“The legacy of our late Holy Father, Pope John Paul II . . . compelled us all to launch into a deeper understanding of the need to foster respect for all human life by acknowledging the virtual absence of any compelling need for a death penalty in modern society.”); Statement, Bishops of Colorado, An Appeal to End the Death Penalty (May 10, 2001), *available at* http://www.archden.org/archbishop_writings_discourses/statements/Statement_May10_01_EndDeathPenalty.pdf (“Whatever may have been the case in the circumstances of other times and places, *capital* punishment is wrong and cannot be justified today. . . . Pope John Paul has powerfully and persuasively condemned it.”); Statement, Catholic Bishops of New Jersey, Statement on Capital Punishment in New Jersey (Aug. 18, 1999), *available at* http://www.njcatchconf.com/statements/capital_punishment.htm (“In his encyclical, *The Gospel of Life*, Pope John Paul II formally states [discouragement from use of the death penalty], and in applying it to today’s penal system . . . [t]he Catholic Bishops of New Jersey have consistently and vigorously opposed the use of capital punishment.”); Statement, Catholic Bishops of New Jersey, Statement on the Death Penalty (Feb. 4, 2005), *available at* <http://www.usccb.org/sdwp/national/deathpenalty/njstatementondp.shtml> (citing *Evangelium Vitae* as support for their position to “continue to consistently and vigorously oppose the use of capital punishment”); Statement, Catholic Bishops of Ohio, Affirming Justice & Mercy (June 28, 1996), *available at* http://www.ohiocathconf.org/statements/affirming_JandM.pdf (“The Church’s commitment to the intrinsic value and dignity of human life is the basis for our opposition to the use of the death penalty. In the 1995 Encyclical Letter ‘The Gospel of Life,’ Pope John Paul II cites the Scriptural example of God’s punishment of Cain to remind us that ‘not even a murderer loses his personal dignity.’”); Statement, Catholic Bishops of Texas, Statement on Capital Punishment (Oct. 1997), *available at* <http://www.cjd.org/paper/cappun.html> (“We implore all citizens to call on our elected officials to reject the violence of the death penalty and replace it with non-lethal means of punishment which are sufficient to protect society from violent offenders of human life and public order.”); Statement, Catholic Bishops of Texas, Opposing the Execution of the Mentally Retarded (1998), *available at* http://web.archive.org/web/20050514190336/txcatholic.org/_bishops/CapPunishment_retarde.pdf (“[W]hile we continue to oppose capital punishment under all circumstances, we strongly urge our lawmakers to . . . ban capital punishment for the mentally retarded”); Letter from the Florida Council of Churches and the Florida Catholic Conference to President McKay and Speaker Feeney, Members of the Florida State Legislature, In Opposition to SJR 124 & HJR 951 (Mar. 15, 2001), <http://www.flacathconf.org/PublicPolicyLegislation/Legses01/Corresp01/Joinltr.htm> (“Pope John Paul II has appealed for specific Florida inmates, who were later executed, and has called for a consensus against the use of the Death Penalty.”); Howard J. Hubbard, Bishop of Albany, New York, Testimony Before a Joint Hearing of the Assembly Codes, Corrections and Judiciary Committees (Jan. 25, 2005), *available at* <http://www.usccb.org/sdwp/national/deathpenalty/hubbardtestimony.shtml> (“Following the Holy Father’s lead, the Catholic Bishops of this state and nation have, for decades now, been unified in their consistent and vigorous opposition to capital punishment.”); Statement, Iowa Catholic Conference of Bishops, Statement on Death Penalty (Mar. 1991), *available at* http://www.iowa.nasccd.org/bins/iowa/templates/blank.asp?_resolutionfile=templatespath|blank.asp&area_2=pages/ICC%20Web%20Site/Statements/Deathpenalty (“Over the past 25 years, the United States Catholic Conference has opposed the use of capital punishment. The Iowa Catholic Conference of Bishops hereby reaffirms that position.”); Thomas C. Kelly, Archbishop of Louisville, et al., *Introduction to Pastoral Letter from Catholic Conference of Kentucky, Choose Life: Reflections on the Death Penalty* (1996), *available at* http://www.ccky.org/Pastoral%20Resources/choose_life.htm (“We have been inspired by the example and teachings of the Holy Father, Pope John Paul II’s call to reject our growing culture of death, in his 1995 Papal Encyclical, *Evangelium Vitae* (*The Gospel of Life*.”); Statement, Christie A. Macaluso, Auxiliary Bishop of Hartford, Connecticut, Statement of the Roman Catholic Bishops of Connecticut 1 (Jan. 12, 2005), *available*

bishops in support of capital punishment in the 1970s. Since the

at <http://www.usccb.org/sdwp/national/deathpenalty/BishopsstatementonDeathPenalty.pdf> (“[I]n accord with the teaching of Pope John Paul II . . . we oppose capital punishment.”); Statement, Cardinal Roger Mahony & Cardinal William Keeler, Archbishops, The Approaching Execution of Timothy McVeigh (May 2, 2001), available at <http://www.usccb.org/sdwp/national/mahonykeelerstatement.shtml> (“[A]s Pope John Paul II reminds us, because modern societies can defend human life against convicted killers without resorting to capital punishment, it should restrict itself to those means.”); Press Release, Massachusetts Catholic Bishops, Statement on Capital Punishment 2 (Feb. 20, 2001), available at http://www.macathconf.org/dp_statement_feb_2001.htm (“Our words echo the words of Pope John Paul II who has repeatedly called for an end to the use of capital punishment.”); Statement, Michigan Catholic Conference Board of Directors, Statement on the Death Penalty (Mar. 3, 1999), available at http://www.micatholicconference.org/pdf/statements/bds_19990303-DeathPenalty.pdf (“[W]e believe it to be our obligation to invite Catholics to become informed about the Church’s position opposing the death penalty.”); Letter from the Minnesota Catholic Conference to Governor Tim Pawlenty, Governor of Minnesota (Dec. 3, 2003), http://www.mncc.org/SCAN0247_000.pdf (citing statements of Pope John Paul II in an appeal to the Governor to find an “alternative solution[] [to reinstating the death penalty] that [does] not require the taking of another human life”); Statement, New Mexico Catholic Conference, New Mexico Catholic Conference Opposes Death Penalty & Calls for Prison Reform (Sept. 7, 1995), available at <http://www.archdiocesesantafe.org/ABSHeehan/Bishops/BishStatements/95.09.07.DeathPenalty.html> (“Pope John Paul II in his eleventh encyclical entitled ‘The Gospel of Life’ (Mar. 25, 1995), toughens the church’s stance on the death penalty. . . . The three bishops of New Mexico strongly support this position.”); Statement, New Mexico Catholic Conference, New Mexico Catholic Conference Opposes Death Penalty, Replace the Death Penalty with Life Without the Possibility of Parole: A Pro-Life Issue (Jan. 27, 2005), available at <http://www.archdioceseantafe.org/ABSHeehan/Bishops/BishStatements/05.01.28.CrimeRestitution.pdf> (“[W]e oppose the use of capital punishment [T]he Pope listed the death penalty as one of the pro-life issues calling for church concern and action.”); Statement, New York State Catholic Conference of Bishops, Death is Not the Answer: A Reaffirmation of Opposition to Capital Punishment (Feb. 15, 1994), available at http://web.archive.org/web/20061206002658/http://www.nyscatholicconference.org/pages/news/show_newsDetails.asp?id=124&cat=Bishops%20Statements (“The death penalty is an affront to the human dignity of both those on whom it is inflicted and those in whose name it is employed.”); Statement, North Dakota Catholic Conference, Reverence for Life and the Preservation of the Common Good: A Statement Concerning the Death Penalty (Jan. 1995), available at <http://web.archive.org/web/20050204161619/http://ndcatholic.org/files/DPstmt.htm> (“The North Dakota Catholic Conference opposes carrying out the death penalty as a means of dealing with crime in North Dakota.”); Statement, Wisconsin Catholic Conference, Capital Punishment in Wisconsin (June 1995), available at http://www.evangelizationstation.com/htm_html/Moral%20Theology/Death%20Penalty/Capitol%20Punishment%20Wisconsin.htm (“We conclude by reaffirming the words of Pope John Paul II Instead of extending the ‘culture of death’ further across our society, we urge our fellow citizens . . . [to] join us in opposing the restoration of capital punishment to Wisconsin.”); Pastoral Exhortation from Donald W. Wuerl, Bishop of Pittsburgh, A Fresh Look at the Death Penalty (2005), available at <http://www.diopitt.org/pastoralletters/deathpenalty.htm> (“When we recall the Way of the Cross that Jesus traveled, Good Friday is an appropriate time to join once again with the Bishops of the United States to reiterate the Church’s opposition to the death penalty”); CALIFORNIA CATHOLIC CONFERENCE OF BISHOPS, THE GOSPEL OF LIFE AND CAPITAL PUNISHMENT: A REFLECTION PIECE AND STUDY GUIDE 3 (1999), available at <http://www.cacatholic.org/docs/CapitalPunishment.pdf> (“[T]he Catholic teaching on capital punishment has become more restrictive in the light of Pope John Paul II’s 1995 letter *Evangelium Vitae* (The Gospel of Life), . . . a belief that brings us to oppose the death penalty itself.” (footnote omitted)).

publication of *Evangelium Vitae* in 1995, however, it is fair to conclude that the Catholic bishops of the United States and the world have responded to John Paul II's teaching with a moral, if not absolute, unanimity. Their voices have been echoed by many leading Catholic figures and theologians, such as Blessed Mother Teresa of Calcutta, who on several occasions advocated, both on their own and on behalf of Pope John Paul II, for the abolition of capital punishment and asked for clemency for death-row inmates.⁴⁸

48. See, e.g., Letter from Gabriel Montalvo, Archbishop, Apostolic Nuncio to the United States, to Members of the Oklahoma Pardon and Parole Board (June 1, 1999), in 29 ORIGINS 50, 50 (1999) (writing on behalf of Pope John Paul II for clemency for Scotty Moore); Carl Ingram, *Mother Teresa Asks Wilson to Spare Harris*, L.A. TIMES, Apr. 9, 1992, at A3 (describing an appeal Mother Teresa made to California Governor Pete Wilson on behalf of convicted murderer Robert Alton Harris, one of her most famous and well-publicized appeals for clemency); Mark Pattison, *Papal Plea Spares Killer from Death Penalty*, NAT'L CATH. REG., Feb. 7-13, 1999, at 1 (reporting that, during his trip to the United States, the Pope successfully appealed to Governor Mel Carnahan of Missouri to commute the death sentence of convicted murderer Darrell Mease); Statement, Bernard Cardinal Law & Bishop William S. Skylstad, On the Death Sentence for Mr. Timothy McVeigh (June 13, 1997), available at <http://www.usccb.org/sdwp/national/criminal/death/mcvpost.shtml> ("On behalf of the U.S. Catholic Bishops' Conference, we wish to express our regret at the sentence of death for Mr. Timothy McVeigh. . . . The Holy Father has spoken strongly against the death penalty saying that a person should not be put to death unless there is no other possible way to defend society."); Statement, Bishop William S. Skylstad, Opposition to the Execution of Ms. Karla Faye Tucker (Jan. 29, 1998), available at <http://www.usccb.org/comm/archives/1998/98-021a.shtml> ("I join in support of Pope John Paul II and the Texas Catholic Conference in calling on Governor George W. Bush to grant clemency to Ms. Karla Faye Tucker."); Press Release, United States Conference of Catholic Bishops, Abp. Lipscomb Appeals to Alabama Governor for Man on Death Row (June 17, 1999), available at <http://www.usccb.org/comm/archives/1999/99-145.shtml> ("[S]peaking for Pope John Paul II, Archbishop Gabriel Montalvo, Apostolic Nuncio to the United States, wrote to the governor asking clemency for Baldwin."); Press Release, United States Conference of Catholic Bishops, Catholic Bishops Oppose Execution of Texas Woman (Jan. 29, 1998), available at <http://www.usccb.org/comm/archives/1998/98-021.shtml> ("The Catholic bishops of the United States voiced opposition to executing Karla Faye Tucker, a Texas woman on death row, adding their voice to that of Pope John Paul II urging Texas Governor George W. Bush to show clemency."); Press Release, United States Conference of Catholic Bishops, Papal Appeal for Convicted Murderer Sent to Gov. Bush of Texas (Aug. 13, 1999), available at <http://www.usccb.org/comm/archives/1999/99-190.shtml> ("Acting on behalf of Pope John Paul II, the Apostolic Nuncio to the United States has written to Governor George W. Bush of Texas, appealing for clemency for a convicted murderer, Larry Robison, who is scheduled to be executed on August 17."); Press Release, United States Conference of Catholic Bishops, Papal Appeal for Man on Death Row Sent to Alabama Governor (July 23, 1999), available at <http://www.usccb.org/comm/archives/1999/99-180.shtml> ("On behalf of Pope John Paul II, the Apostolic Nuncio to the United States has written to Governor Don Siegelman of Alabama, appealing for clemency for Victor Kennedy, a convicted murderer scheduled to die on August 6."); Press Release, United States Conference of Catholic Bishops, Papal Appeal for Men on Death Row Sent to Arkansas Governor (Aug. 25, 1999), available at <http://www.usccb.org/comm/archives/1999/99-199.shtml> ("On behalf of Pope John Paul II, the Apostolic Nuncio to the United States has written to Governor Mike Huckabee of Arkansas, appealing for clemency for Mark Gardner and

It has been widely claimed that the teaching of Pope John Paul II on capital punishment represents merely a “personal” or “prudential” judgment on his part, but this is a claim without any seeming support.⁴⁹ John Paul II never presented this teaching as personal to him, as opposed to a teaching of the Church. Both *Evangelium Vitae* and the *Catechism* instruct the state to limit itself to non-lethal means in seemingly binding language.⁵⁰ Certainly there may be elements of prudential judgment to this teaching—for example, as to whether non-lethal means are sufficient to defend lives from the aggressor in any particular situation⁵¹—although, even here John Paul II seems to have concluded as a *moral* principle that such a necessity is nonexistent in modern society.⁵²

III. THE TRADITIONAL TEACHING OF THE CHURCH

As Part II indicated, Pope John Paul II has given the world an authoritative teaching on capital punishment. It would be extremely troubling if his teaching were a departure from or reversal of the Church’s previous moral and social positions; it is the task of the Church’s Magisterium to present the Church’s Deposit of Faith rather than to change it. Fidelity to its task of teaching, however, requires the Magisterium to apply its doctrine to new historical circumstances.⁵³ Nevertheless, many commentators have accused

Alan Willett, scheduled to be executed September 8 [1999].”). All post-World War II popes have appealed for mitigation of capital sentences even in cases of heinous crimes. For example, Pope Pius XII appealed to Presidents Truman and Eisenhower on behalf of Julius and Ethel Rosenberg, JOHN F. NEVILLE, *THE PRESS, THE ROSENBERGS, AND THE COLD WAR* 105–06 (1995), and Pope Paul VI personally pleaded for the life of eleven Spanish terrorists in September 1975. Pope Paul VI, Address to the General Audience at St. Peter’s Square for Sunday Angelus (Sept. 27, 1975), in 5 *ORIGINS* 242, 242 (1975).

49. See, e.g., Antonin Scalia, Reply, in *Scalia and His Critics*, *supra* note 14, at 17.

50. See *supra* notes 24–26 and accompanying text.

51. *Evangelium Vitae*, *supra* note 5, ¶ 56.

52. Such judgments of social conditions that are necessarily connected with an underlying principle of morality are seemingly within the province of the Magisterium. The Church claims the right “always and everywhere to announce moral principles, even about the social order, and to render judgment concerning any human affairs insofar as the fundamental rights of the human person or the salvation of souls requires it.” 1983 CODE c.747, § 2. Pope John Paul II cites this Canon to lend authority to his proclamation in *Veritatis Splendor*, *supra* note 10, ¶ 27.

53. *Veritatis Splendor*, *supra* note 10, ¶ 53.

Certainly there is a need to seek out and to discover the most adequate formulation for universal and permanent moral norms in the light of different cultural contexts, a formulation most capable of ceaselessly expressing their historical relevance, of making them understood and of authentically interpreting their truth.

John Paul II of departing from the Church's Tradition in his statements on capital punishment.

Pope John Paul II clearly states that the principles found in paragraph 2267 are based on the traditional teaching of the Church.⁵⁴ Reviewing Sacred Scripture and the Church's Tradition in the broadest sense relevant to the question of capital punishment—the writings of the Fathers and Doctors of the Church, magisterial documents (including papal proclamations), and even the disposition of the Christian world on this question—bears out this claim. In fact, the only way to understand the disparate and even at times contradictory elements of Christian expression on capital punishment is *through the precise lens of paragraph 2267*. In this manner we can see that John Paul II's exposition is not only true to Christian Tradition but also allows for a fuller understanding of its essence.

Obviously, these expressions of Tradition represent a voluminous quantity of material that is complex, varying, and difficult to assess—one of the reasons why it is distinctly the responsibility of the papal office to proclaim the true Tradition of the Church. Nonetheless, two important and preliminary points can be made from the evidence: First, the Christian record consists of both condemnation to a greater or lesser degree of capital punishment and begrudging acceptance of capital punishment when necessary. And second, no definitive statement portrays capital punishment in a purely positive light (much less as something sacral, pious, or holy) or in a way that would contradict paragraph 2267.⁵⁵

Christians were ambivalent about the exercise of capital punishment from the beginning. Their ambivalence is expressed in the New Testament and in the writings of the first Christians of the Roman Empire and of the Fathers and Doctors of the Church.⁵⁶ The

This truth of the moral law—like that of the “deposit of faith”—unfolds down the centuries: the norms expressing that truth remain valid in their substance, but must be specified and determined “*eodem sensu eademque sententia*” in the light of historical circumstances by the Church's Magisterium, whose decision is preceded and accompanied by the work of interpretation and formulation characteristic of the reason of individual believers and of theological reflection.

Id. (footnote omitted) (emphasis omitted).

54. CATECHISM OF THE CATHOLIC CHURCH, *supra* note 4, ¶ 2267 (stating that recourse to capital punishment only if there is no other means to protect society is “the *traditional teaching of the Church*” (emphasis added)).

55. *See, e.g.*, Pontifical Commission for Justice and Peace, *The Church & the Death Penalty* ¶ 4, in 6 ORIGINS 389, 391 (1976) [hereinafter *The Church & the Death Penalty*] (“The church has never directly addressed the question of the state's right to exercise the death penalty.”).

56. *See infra* notes 61–62.

best way to reconcile the disparate views of Christians on the death penalty is to acknowledge that Christian Tradition has been consistent in opposing the infliction of death, except in cases of social necessity, which were widespread until modern times. No definitive magisterial statement contradicts this assertion.⁵⁷

Obviously the legal codes of the Old Testament provided for capital punishment, although, for the most part in situations that would be rejected by all modern societies. At least thirty-six acts punishable by death are enumerated in the Old Testament, including: homicide, maladministration, adultery and other sexual crimes, violation of filial duty, idolatry, blasphemy, and violating the Sabbath.⁵⁸ But the story of Cain presupposes a rejection of capital punishment from before the origins of social convention.⁵⁹ This opposition can thus be seen as the archetype and model of justice, as John Paul II treats it in *Evangelium Vitae*.⁶⁰

The New Testament presents a different perspective than that reflected in the enumerations of the Old Testament. There is no promulgation of a legal code that includes capital punishment. There are several passages that imply a certain acceptance of the legitimacy of Roman authority and law,⁶¹ but clearly this cannot be taken to endorse all facets of the Roman legal system, which included slavery, a moral impetus towards suicide, and the barbaric and arbitrary application of death. At least equal weight must be given to the numerous passages of the New Testament that would suggest aversion to the imposition of death.⁶² Most notable is the reaction of

57. See *The Church & the Death Penalty*, *supra* note 55, at 391 (“The magisterium does not prescribe [the death penalty] either. Nowhere does the magisterium directly treat the subject.”).

58. MEGIVERN, *supra* note 7, at 10.

59. See *supra* text accompanying notes 18–24.

60. *Evangelium Vitae*, *supra* note 5, ¶¶ 7–28. Of course, the Old Testament testifies throughout in favor of mercy, forgiveness, and life. See, e.g., *Deuteronomy* 30:15, 19 (“See, I have set before you this day life and good, death and evil. . . . I have set before you life and death, blessing and curse; and therefore choose life, that you and your descendants may live.”); *Ezekiel* 33:11 (“I have no pleasure in the death of the wicked . . .”).

61. See *Acts* 25:7–11, *John* 19:11, *Luke* 23:39–41, *Romans* 13:1–4. Other New Testament verses that have been alleged to support capital punishment include *Hebrews* 10:28–29, *Mark* 7:10, *Matthew* 15:4, 1 *Peter* 2:13–14, and *Revelation* 13:10, 16:5–7.

62. See, e.g., *Acts* 7:59–60, *Galatians* 3:23–24, *John* 1:16–17, *Luke* 6:35–37, 9:54–55, 15:11–32, 23:33–34, *Matthew* 5:38–42, 7:1–2, 20:1–16, 25:35–40, 26:51–52, *Romans* 7:4, 12:14–19. For a balanced reading of the New Testament passages that have been used to argue for and against capital punishment, see CHRISTOPHER D. MARSHALL, *BEYOND RETRIBUTION: A NEW TESTAMENT VISION FOR JUSTICE, CRIME AND PUNISHMENT* (2001) 223–41, 256–63. After weighing the texts, Marshall seems to suggest that the import of the New Testament is to “challenge the practice of lethal retribution against wrongdoers.” *Id.* at 241.

Jesus to the woman accused of adultery, an act punishable by death. Although she was clearly guilty of the capital crime, Jesus opposed her stoning so that she could redeem herself: "Neither do I condemn you; go, and do not sin again."⁶³

In a way, the most significant aspect of the New Testament in relation to capital punishment is not the commentary of Jesus but His Passion. It is a central fact of the New Testament that Jesus was, Himself, the victim of a death sentence. It was certainly an unjust penalty, but one imposed by lawful authority—the Romans, with the compliance of the Jewish leaders, in a sense representing the combined secular and religious authority of humankind.⁶⁴ Following their Lord, thousands of the first Christians were executed by the Romans, apparently under lawful Roman authority.⁶⁵

The fact that Jesus and His first disciples were the victims of capital sentences was not lost on the early Christians. Their testimony as a whole embodies a strong aversion to the state inflicting death on its subjects. It seems well-established that the early Christian view of capital punishment was hostile, especially as to the question of the involvement of Christians in criminal procedures. Such adverse language can be found in the writings and teachings of Athenagoras of Athens, Minucius Felix, Tertullian, Origen, St. Cyprian, Lactantius, St. Hippolytus, St. Martin of Tours, St. Sergius of Rome, Pope St. Siricius, Pope St. Gregory the Great, Pope St. Nicholas I, and St. John Chrysostom.⁶⁶ St. Justin Martyr wrote that Christians "cannot bear to see a man killed even if killed justly."⁶⁷ St. Ambrose taught that the story of the woman taken in adultery militated against capital punishment.⁶⁸ St. Augustine wrote numerous letters to Christian state officials in which he acknowledged the atrocious guilt of the defendants, but urged that they not be sentenced to death, reflecting

63. *John* 8:11.

64. *See Matthew* 27:19–26.

65. *See* MEGIVERN, *supra* note 7, at 19.

66. *See, e.g., id.* at 20–27, 35, 47–48; *see also* LACTANTIUS, *THE DIVINE INSTITUTES*, Bk. VI, Ch. XX, *reprinted in* 7 *THE ANTE-NICENE FATHERS* 9, 187 (Alexander Roberts & James Donaldson eds., American reprint Edinburgh ed. n.d.) (forbidding Christians from participating in "public homicide. . . [N]or to accuse any one of a capital charge . . . since it is the act of putting to death itself which is prohibited" (footnote omitted)).

67. St. Justin, *An Embassy About Christians*, *quoted in* RICHARD MCSORLEY, S.J., *NEW TESTAMENT BASIS OF PEACEMAKING* 74 (1979).

68. Thomas Williams, L.C., *Capital Punishment and the Just Society*, *CATH. DOSSIER*, Sept.–Oct. 1998, at 28, 29; *see also* ST. AMBROSE, *CONCERNING REPENTANCE*, *reprinted in* 10 *NICENE AND POST-NICENE FATHERS* 329, 329 (Philip Schaff & Henry Wace eds., 2d ser., Hendrickson Publ'g 1994) (1896) (praising gentleness, "which does not hurt even those whom it condemns").

the mercy of Christ.⁶⁹ Pope St. Gregory the Great declared: “[S]ince I fear God, I shrink from having anything to do with the death of any one.”⁷⁰ Pope St. Nicholas I wrote in 866 to the newly converted Bulgars instructions on how to live a Christian life, including: “You should save from death not only the innocent but also criminals, because Christ has saved you from the death of the soul.”⁷¹

This aversion was manifested, as well, by the *actions* of the first Christians, who rejected capital punishment, even when they achieved positions of authority in the Roman Empire.⁷² Crucifixion

69. Letter from St. Augustine to Apringius (Letter 134, AD 412), *reprinted in* 20 THE FATHERS OF THE CHURCH 9, 11 (Roy Joseph Deferrari et al. eds., Wilfrid Parsons trans., 1953) (urging commutation of the sentence of murderers, St. Augustine wrote: “But, now that there is another possible punishment by which the mildness of the Church can be made evident, and the violent excess of savage men be restrained, why do you not commute your sentence to a more prudent and more lenient one . . . ?”); Letter from St. Augustine to Alypius (Letter 10, AD 422–28), *reprinted in* 81 THE FATHERS OF THE CHURCH 74, 78 (Thomas P. Halton et al. eds., Robert B. Eno, S.S. trans., 1989) (urging that even slave traders should not be given a penalty that could result in death); Letter from St. Augustine to Boniface (Letter 185, AD 417), *reprinted in* 30 THE FATHERS OF THE CHURCH 141, 168 (Hermigild Dressler, O.F.M. et al. eds., Wilfrid Parsons trans., 1955) [hereinafter St. Augustine to Boniface] (praising the punishment of Donatist heretics, St. Augustine wrote: “However, the death penalty was not to be invoked, because Christian moderation was to be observed even toward those unworthy of it, but fines were to be imposed and exile was decreed against their bishops and ministers.”); Letter from St. Augustine to Donatus (Letter 100, AD 408–09), *reprinted in* 18 THE FATHERS OF THE CHURCH 141, 142 (Roy Joseph Deferrari et al. eds., Wilfrid Parsons trans., 1953) (“Hence, in applying the deterring effect of judges and laws, we wish them to be restrained, but not put to death . . . [W]e ask you to forget that you have the power of life and death . . .”); Letter from St. Augustine to Marcellinus (Letter 133, AD 412), *reprinted in* 20 THE FATHERS OF THE CHURCH 6, 6 (Roy Joseph Deferrari et al. eds., Wilfrid Parsons trans., 1953) (pleading for clemency for murderers, St. Augustine wrote: “However, we do not object to wicked men being deprived of their freedom to do wrong, but we wish it to go just that far, so that, without losing their life or being maimed in any part of their body, they may be restrained by the law . . .”); Letter from St. Augustine to Marcellinus (Letter 139, AD 412), *reprinted in* 20 THE FATHERS OF THE CHURCH 53, 54 (Roy Joseph Deferrari et al. eds., Wilfrid Parsons trans., 1953) (“But, I ask you that the punishment of the crimes, however great, which they have confessed, may be something short of death . . .”); St. Augustine, Sermon at the Shrine of St. Cyprian ¶ 8 (Sermon 13, May 27, AD 418), *reprinted in* III/1 THE WORKS OF SAINT AUGUSTINE 308, 312 (John E. Rotelle, O.S.A. ed., Edmund Hill, O.P. trans., 1990) (“Do not have a person put to death, and you will have someone who can be reformed.”). *But see* ST. AUGUSTINE, THE CITY OF GOD Bk. 1, Ch. 21, *reprinted in* 8 THE FATHERS OF THE CHURCH 17, 53 (Hermigold Dressler, O.F.M. et al. eds., Demetrius B. Zema, S.J. & Gerald G. Walsh, S.J. trans., 1950) (allowing that the state can execute “according to law or the rule of rational justice”).

70. Pope St. Gregory the Great, Sermon to Sabinianus (Epistle XLVII), *reprinted in* 12 NICENE AND POST-NICENE FATHERS 161, 161 (Philip Schaff & Henry Wace eds., 2d ser., Hendrickson Publ’g 1994) (1895); *see also* MEGIVERN, *supra* note 7, at 47.

71. MEGIVERN, *supra* note 7, at 48.

72. *See* THE OXFORD HISTORY OF THE PRISONS: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY 21–23, 27–28 (Norval Morris & David J. Rothman eds., 1995) (delineating church courts

was immediately abolished by Emperor Constantine,⁷³ but even more significantly, death was eschewed in the early centuries as the punishment for the most serious of crimes, heresy, in favor of exile.⁷⁴ Thus, in the shifting battles of power between the Trinitarians and the Arians, we see St. Athanasius, the champion of orthodoxy, repeatedly exiled, recalled to authority, and exiled again: execution being rejected as a penalty.⁷⁵ Similarly, canon law reflects a certain animus toward capital punishment. Canon 73 of the Synod of Elvira in 303 refused the Sacraments to anyone whose accusation of another resulted in a capital charge.⁷⁶ A canon of the Roman Synod of 382 condemned state officials who “have handed down death penalties.”⁷⁷ Canon law also forbade clerics from participating in an execution in any way.⁷⁸ Occasionally, an early Christian ruler such as King Canute reached the same conclusion, forbidding capital punishment as Christians were “God’s handy-work, and his own purchase which he dearly bought.”⁷⁹

Although medieval Christendom obviously incorporated capital punishment into its juridical system, certain reservations must be noted. The Church, as opposed to the state, was forbidden from issuing or applying a death sentence. The Council of Toledo in 675 and the Fourth Lateran Ecumenical Council in 1215 forbade clergy participation in capital trials and executions, a prohibition which has

in early Christendom that rejected punishments, including and especially death, that would inhibit the criminal from penitence and restoration to the Christian community).

73. CHESTER D. HARTRANFT, *THE ECCLESIASTICAL HISTORY OF SOZOMEN*, reprinted in 2 NICENE AND POST-NICENE FATHERS 179, 245 (Philip Schaff & Henry Wace eds., 2d ser., Hendrickson Publ’g 1994) (1890). Of course, it seems to miss the point to focus on the form rather than the fact of Jesus’ execution. Another Emperor, Julian, forbade Christians from serving as prefects because of their objection to capital punishment. See GEORGE RYLEY SCOTT, *THE HISTORY OF CAPITAL PUNISHMENT* 226 (1950).

74. St. Augustine to Boniface, *supra* note 69, at 168.

75. See ST. ATHANASIUS, *APOLOGIA CONTRA ARIANOS* [APOLOGY TO THE ARIANS] ¶¶ 2–5 (AD 337), reprinted in 4 NICENE AND POST-NICENE FATHERS 100, 101–02 (Philip Schaff & Henry Wace eds., 2d ser., Hendrickson Publ’g 1994) (1892) (detailing the Encyclical Letter of the Council of Egypt that denounced the Arians for demanding that the Emperor execute Athanasius and his followers, rather than being content with the common Christian punishment of banishment as they had in the past).

76. BRUGGER, *supra* note 7, at 78.

77. MEGIVERN, *supra* note 7, at 33 (internal quotation marks omitted).

78. BRUGGER, *supra* note 7, at 78; see also CATECHISM OF THE CATHOLIC CHURCH, *supra* note 4, ¶ 2298.

79. THE LAWS OF KING CNUT, reprinted in *THE GERMS AND DEVELOPMENTS OF THE LAWS OF ENGLAND* 199, 209 (1889).

not been lifted.⁸⁰ Even when capital punishment was allowed, it tended to be characterized as a necessary evil rather than a positive good. For example, St. Thomas Aquinas, who certainly did justify the right of the state to carry out capital punishment, did so in language that portrayed capital punishment as necessary for the protection of society, rather than as a morally dictated punishment. He wrote: “[I]f a man be dangerous and infectious to the community, on account of some sin, it is praiseworthy and advantageous that he be killed in order to safeguard the common good.”⁸¹

Perhaps the most formal proposition from medieval Christendom concerning capital punishment is the profession of faith required for readmission to the communion of the Church for the heretical group the Waldensians, who denied the legitimacy of any state-imposed punishment.⁸² Pope Innocent III apparently proposed several professions, but the most developed was that of his writings in May of 1210, which included this proposition: “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 judgment, not inconsiderately but after mature deliberation.”⁸³

Even here, however, we see, in a preliminary manner, a nuanced statement that prefigures that of Pope John Paul II. The state can impose capital punishment, but it must be without “hatred” or “inconsiderately,” and with “good judgment” after “mature deliberation.” This clearly refers to the certainty of guilt, requiring, as does paragraph 2267 of the *Catechism*, a full determination of the guilty party’s identity and responsibility.⁸⁴ Pope Innocent’s statement, however, seems to go further. The directive that the imposition of capital punishment be without “hatred” and upon “good judgment” suggests that the punishment must be delivered free from a desire for retribution, and only for the express purpose of protecting society.

80. BRUGGER, *supra* note 7, at 96–97; Todd Breyfogle, *Punishment, in* AUGUSTINE THROUGH THE AGES: AN ENCYCLOPEDIA 688, 690 (Allan D. Fitzgerald et al. eds., 1999).

81. ST. THOMAS AQUINAS, *SUMMA THEOLOGICA*, Pt. II-II, Q. 64, Art. 2 (Fathers of the English Dominican Province trans., Christian Classics 1981); *see also* ST. THOMAS AQUINAS, *SUMMA CONTRA GENTILES*, Bk. 1, Ch. 146 (Vernon J. Bourke trans., Univ. of Notre Dame Press 1956) (“Therefore, the ruler of a state executes pestiferous men justly and sinlessly in order that the peace of the state may not be disrupted.”).

82. BRUGGER, *supra* note 7, at 103–07.

83. *Id.* at 104.

84. *Cf.* CATECHISM OF THE CATHOLIC CHURCH, *supra* note 4, ¶ 2267.

Thus, in sum, Pope John Paul II has correctly—even providentially—taught the Tradition of the Church. The Old Testament reveals in the story of Cain and Abel that before the imperfect laws of human society, God “did not desire that a homicide be punished by the exaction of another act of homicide.”⁸⁵ As John Paul II concludes, “The unconditional choice for life reaches its full religious and moral meaning when it flows from, is formed by and nourished by . . . faith in the blood of Christ ‘that speaks more graciously than the blood of Abel.’”⁸⁶ The New Testament does not contain any explicit verse in favor of capital punishment, or any example of a Christian participating in any way in capital punishment, except as victims of the most deplorable of capital sentences, such as those inflicted on St. John the Baptist, St. Stephen, and Jesus Himself.⁸⁷ In the early Church, the apostles, disciples, and first Christians were willing to be martyrs, but not executioners.

IV. COMMON GOOD AND HUMAN DIGNITY

Both *Evangelium Vitae* and the *Catechism* describe non-lethal means of punishment as “more in keeping with the concrete conditions of the common good and more in conformity with the dignity of the human person.”⁸⁸ Pope John Paul II’s teaching on capital punishment reflects modern Catholicism’s understanding of the dignity of the human person and the role of the state. Yet how are we to understand this critical plank in John Paul II’s teaching?

First, as demonstrated in the previous Part, it is a deeply Christian and traditional argument.⁸⁹ At the heart of Christian social and moral teaching is a preeminent respect for the value of human life and for the common good. Likewise, the Church realizes, as noted by Vatican II, that all of society manifests a “growing awareness of the exalted dignity proper to the human person,”⁹⁰ of which increased opposition to capital punishment is evidence. It is certainly the case, then, that

85. ST. AMBROSE, *supra* note 23, Bk. II, ¶ 38.

86. *Evangelium Vitae*, *supra* note 5, ¶ 28 (quoting *Hebrews* 12:24).

87. See *Matthew* 14:3–12 (St. John the Baptist); *Acts* 7:54–60 (St. Stephen); *Matthew* 27:32–44 (Jesus).

88. CATECHISM OF THE CATHOLIC CHURCH, *supra* note 4, ¶ 2267; accord. *Evangelium Vitae*, *supra* note 5, ¶ 56.

89. See *supra* Part III.

90. Second Vatican Council, *Gaudium et Spes* [*Pastoral Constitution on the Church in the Modern World*] ¶ 26 (1965), reprinted in THE SIXTEEN DOCUMENTS OF VATICAN II 513, 537 (Nat’l Catholic Welfare Conf. trans., 1967) [hereinafter *Gaudium et Spes*].

the Church knows the entire panoply of criticisms against capital punishment made by modern critics. In the United States these include critiques that capital punishment is arbitrary; expensive to administer; racially discriminatory; ineffective as a deterrent; part of a cycle of violence; subject to mistakes that cannot be corrected; degrading to the individual, society, and the sanctity of life; and even unconstitutional as cruel and unusual punishment.⁹¹ But it is possible

91. The recent popular and scholarly debate is worth noting for at least two reasons: it indicates that this is a pressing moral question that the Church must resolve, and it indicates the range of questions that bear on this issue. The fact that the following scholarly works represent an overwhelming consensus against capital punishment is some evidence of the modern awareness that capital punishment is opposed to modern notions of human dignity. Pope John Paul II commented on this, stating: "Among the signs of hope we should also count the . . . evidence of a 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." *Evangelium Vitae*, *supra* note 4, ¶ 27 (emphasis omitted). The most helpful bibliographic guide to this written scholarship and debate is CAPITAL PUNISHMENT: A BIBLIOGRAPHY WITH INDEXES (C. Cliff ed., 2003), which is a comprehensive listing and indexing of the major works on capital punishment through 2002. Already in the few years since publication, thousands of new books and articles have been published on the subject, of which the most notable books are: AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT (James R. Acker et al. eds., 2d ed. 2003); MARY WELEK ATWELL, EVOLVING STANDARDS OF DECENCY: POPULAR CULTURE AND CAPITAL PUNISHMENT (2004); STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY (2002); HUGO ADAM BEDAU, KILLING AS PUNISHMENT: REFLECTIONS ON THE DEATH PENALTY IN AMERICA (2004); JOHN D. BESSLER, KISS OF DEATH: AMERICA'S LOVE AFFAIR WITH THE DEATH PENALTY (2003); ROBERT M. BOHM, DEATHQUEST II: AN INTRODUCTION TO THE THEORY AND PRACTICE OF CAPITAL PUNISHMENT IN THE UNITED STATES (2d ed. 2003); CAPITAL PUNISHMENT: STRATEGIES FOR ABORTION (Peter Hodgkinson & William A. Schabas eds., 2004); STANLEY COHEN, THE WRONG MEN: AMERICA'S EPIDEMIC OF WRONGFUL DEATH ROW CONVICTIONS (2003); PHILIP DRAY, AT THE HANDS OF PERSONS UNKNOWN: THE LYNCHING OF BLACK AMERICA (2002); BENJAMIN FLEURY-STEINER, JURORS' STORIES OF DEATH: HOW AMERICA'S DEATH PENALTY INVESTS IN INEQUALITY (2004); HANS GÖRAN FRANCK, THE BARBARIC PUNISHMENT: ABOLISHING THE DEATH PENALTY (William A. Schabas ed., 2003); FROM LYNCH MOBS TO THE KILLING STATE: RACE AND THE DEATH PENALTY IN AMERICA (Charles J. Ogletree, Jr. & Austin Sarat eds., 2006); MIKE GRAY, THE DEATH GAME: CAPITAL PUNISHMENT AND THE LUCK OF THE DRAW (2003); CRAIG HANEY, DEATH BY DESIGN: CAPITAL PUNISHMENT AS A SOCIAL PSYCHOLOGICAL SYSTEM (2005); ROGER HOOD, THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE (3d ed., rev. 2002); JUDITH W. KAY, MURDERING MYTHS: THE STORY BEHIND THE DEATH PENALTY (2005); RACHEL KING, DON'T KILL IN OUR NAMES: FAMILIES OF MURDER VICTIMS SPEAK OUT AGAINST THE DEATH PENALTY (2003); HELEN PREJEAN, THE DEATH OF INNOCENTS: AN EYEWITNESS ACCOUNT OF WRONGFUL EXECUTIONS (2005); ELIZA STEELWATER, THE HANGMAN'S KNOT: LYNCHING, LEGAL EXECUTION, AND AMERICA'S STRUGGLE WITH THE DEATH PENALTY (2003); THE DEATH PENALTY: INTRODUCING ISSUES WITH OPPOSING VIEWPOINTS (Lauri S. Friedman et al. eds., 2006); THE DEATH PENALTY: OPPOSING VIEWPOINTS (Mary E. Williams ed., 2002); MARTIN G. URBINA, CAPITAL PUNISHMENT AND LATINO OFFENDERS: RACIAL AND ETHNIC DIFFERENCES IN DEATH SENTENCES (2003); FRANKLIN E. ZIMRING, THE CONTRADICTION OF AMERICAN CAPITAL PUNISHMENT (2003); *cf.* THE DEATH PENALTY: ABOLITION IN EUROPE (1999) (discussing many of the same issues and debates in European countries).

There have been more journal articles on capital punishment than can be recorded here. The following is a survey of some examples of law review articles published in 2005 and 2006:

(1) Articles addressing constitutional questions relating to capital punishment include: J. Richard Broughton, Essay, *The Second Death of Capital Punishment*, 58 FLA. L. REV. 639 (2006); Steven G. Calabresi & Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 WM. & MARY L. REV. 743, 897, 899 (2005); Erwin Chemerinsky, *The Rehnquist Court and the Death Penalty*, 94 GEO. L.J. 1367 (2006); Richard C. Dieter, *Introduction to the Presentations: The Path to an Eighth Amendment Analysis of Mental Illness and Capital Punishment*, 54 CATH. U. L. REV. 1117 (2005); Benyomin Forer, *Juveniles and the Death Penalty: An Examination of Roper v. Simmons and the Future of Capital Punishment*, 35 SW. U. L. REV. 161 (2006); James S. Liebman & Lawrence C. Marshall, *Less Is Better: Justice Stevens and the Narrowed Death Penalty*, 74 FORDHAM L. REV. 1607 (2006); Charles I. Lugosi, *Executing the Factually Innocent: The U.S. Constitution, Habeas, and the Death Penalty: Facing the Embarrassing Question at Last*, 1 STAN. J. C.R. & C.L. 473 (2005); Michael J. Zydney Mannheim, *When the Federal Death Penalty is "Cruel and Unusual,"* 74 U. CIN. L. REV. 819 (2006); Susan M. Raeker-Jordan, *Parsing Personal Predilections: A Fresh Look at the Supreme Court's Cruel and Unusual Death Penalty Jurisprudence*, 58 ME. L. REV. 99 (2006); Aletheia V.P. Allen, Note, *State v. Atkins: In the Wake of Atkins v. Virginia, New Mexico Tackles Capital Punishment for Defendants with Mental Disabilities*, 35 N.M. L. REV. 557 (2005); Robert F. Glass, Casenote, *Roper v. Simmons: The Dead-End for the Juvenile Death Penalty*, 57 MERCER L. REV. 1341 (2006); Tanya E. Kassis, Casenote, *Constitutional Law—Capital Punishment—Eighth and Fourteenth Amendments Prohibit Execution of Juvenile Offenders*, 36 CUMB. L. REV. 193 (2005–2006); Julie Rowe, Note, *Mourning the Untimely Death of the Juvenile Death Penalty: An Examination of Roper v. Simmons and the Future of the Juvenile Justice System*, 42 CAL. W. L. REV. 287 (2006).

(2) Articles addressing administrative questions relating to capital punishment include: Sara Darehshori et al., *Empire State Injustice: Based Upon a Decade of New Information, A Preliminary Evaluation of How New York's Death Penalty System Fails to Meet Standards for Accuracy and Fairness*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 85 (2006); Eric M. Freedman, Commentary, *Mend It or End It? The Revised ABA Capital Defense Representation Guidelines as an Opportunity to Reconsider the Death Penalty*, 2 OHIO ST. J. CRIM. L. 663 (2005); Holly Geerdes & Nikki Cox, *Death Penalty Law*, 57 MERCER L. REV. 479 (2006); Richard Klein, *The Supreme Court's Analysis of Issues Raised by Death Penalty Litigants in the Court's 2004 Term*, 21 TOURO L. REV. 891 (2006); Ilyana Kuziemko, *Does the Threat of the Death Penalty Affect Plea Bargaining in Murder Cases? Evidence from New York's 1995 Reinstatement of Capital Punishment*, 8 AM. L. & ECON. REV. 116 (2006); Austin Sarat, Commentary, *Mercy, Clemency, and Capital Punishment: Two Accounts*, 3 OHIO ST. J. CRIM. L. 273 (2005); Franklin E. Zimring, *The Unexamined Death Penalty: Capital Punishment and Reform of the Model Penal Code*, 105 COLUM. L. REV. 1396 (2005); Sarah P. Newell, Note, *State v. Gales, 265 Neb. 598, 658 N.W.2d 604 (2003): The First Test of Nebraska's New System of Capital Punishment—The Battle Is Over, But What About the War?*, 83 NEB. L. REV. 932 (2005).

(3) Articles addressing certain moral and ethical questions relating to the use of capital punishment include: Ronald S. Honberg, *The Injustice of Imposing Death Sentences on People with Severe Mental Illnesses*, 54 CATH. U. L. REV. 1153 (2005); Christopher J. Levy, Commentary, *Conflict of Duty: Capital Punishment Regulations and AMA Medical Ethics*, 26 J. LEGAL MED. 261 (2005); Dan Markel, *State, Be Not Proud: A Retributivist Defense of the Commutation of Death Row and the Abolition of the Death Penalty*, 40 HARV. C.R.-C.L. L. REV. 407 (2005); Christopher Slobogin, *Mental Disorder as an Exemption from the Death Penalty: The ABA-IRR Task Force Recommendations*, 54 CATH. U. L. REV. 1133 (2005); Carol S. Steiker, *No, Capital Punishment Is Not Morally Required: Deterrence, Deontology, and the Death Penalty*, 58 STAN. L. REV. 751 (2005); Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703 (2005); Ronald J. Tabak, *Overview of Task Force Proposal on Mental Disability and the Death Penalty*, 54 CATH. U. L. REV. 1123 (2005).

to discern a deeper criticism here that goes directly to the Christian concept of the relationship of the state to the dignity of the individual and to the common good.⁹² According to Christian theology, the state is authorized to inflict punishment because it receives its authority from God.⁹³ The principle that the authority granted to the political community ultimately belongs to the order designed by God was explicitly confirmed by Vatican II, and underlies the Catholic

(4) Articles addressing various social, cultural, and economic aspects of capital punishment include: John J. Donohue & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 STAN. L. REV. 791 (2005); Adam Hine, *Life or Death Mistakes: Cultural Stereotyping, Capital Punishment, and Regional Race-Based Trends in Exoneration and Wrongful Execution*, 82 U. DET. MERCY L. REV. 181 (2005); David Niven et al., *A "Feeble Effort to Fabricate National Consensus": The Supreme Court's Measurement of Current Social Attitudes Regarding the Death Penalty*, 33 N. KY. L. REV. 83 (2006); Joanna M. Shepherd, *Deterrence Versus Brutalization: Capital Punishment's Differing Impacts Among States*, 104 MICH. L. REV. 203 (2005); Michael B. Shortnacy, *Sexual Minorities, Criminal Justice, and the Death Penalty*, 32 FORDHAM URB. L.J. 231 (2005); Carol S. Steiker & Jordan M. Steiker, *The Seduction of Innocence: The Attraction and Limitations of the Focus on Innocence in Capital Punishment Law and Advocacy*, 95 J. CRIM. L. & CRIMINOLOGY 587 (2005); Victor L. Streib, *Rare and Inconsistent: The Death Penalty for Women*, 33 FORDHAM URB. L.J. 609 (2006); Paul J. Kaplan, *American Exceptionalism and Racialized Inequality in American Capital Punishment*, 31 LAW & SOC. INQUIRY 149 (2006) (reviewing FRANKLIN E. ZIMRING, *supra*; JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* (2003)); Elizabeth Marie Reza, Note, *Gender Bias in North Carolina's Death Penalty*, 12 DUKE J. GENDER L. & POL'Y 179 (2005).

(5) Articles addressing international law and capital punishment include: Margaret Burnham, *Indigenous Constitutionalism and the Death Penalty: The Case of the Commonwealth Caribbean*, 3 INT'L J. CONST. L. 582 (2005); Lilian Chenwi, *Fair Trial Rights and Their Relation to the Death Penalty in Africa*, 55 INT'L & COMP. L.Q. 609 (2006); Robert Harvie & Hamar Foster, *Shocks and Balances: United States v. Burns, Fine-Tuning Canadian Extradition Law and the Future of the Death Penalty*, 40 GONZ. L. REV. 293 (2004-05); Mark S. Kende, *The Constitutionality of the Death Penalty: South Africa as a Model for the United States*, 38 GEO. WASH. INT'L L. REV. 209 (2006); Bin Liang et al., *Sources of Variation in Pro-Death Penalty Attitudes in China: An Exploratory Study of Chinese Students at Home and Abroad*, 46 BRIT. J. CRIMINOLOGY 119 (2006); Dennis Morrison, *The Judicial Committee of the Privy Council and the Death Penalty in the Commonwealth Caribbean: Studies in Judicial Activism*, 30 NOVA L. REV. 403 (2006); Jens David Ohlin, *Applying the Death Penalty to Crimes of Genocide?*, 99 AM. J. INT'L L. 747 (2005); Philip Sapsford, *The Death Penalty: Can Delay Render Execution Unlawful?*, 99 AM. SOC'Y INT'L L. PROC. 71 (2005) (comparing laws in the United Kingdom with the United States); Monique Marie Gallien, Note, *"No Existira la Pena de Muerte": Does the United States Violate Regional Customary Law by Imposing the Death Penalty on Citizens of Puerto Rico?*, 30 BROOK. J. INT'L L. 727 (2005); Elizabeth Peiffer, Seminar Paper, *The Death Penalty in Traditional Islamic Law and as Interpreted in Saudi Arabia and Nigeria*, 11 WM. & MARY J. WOMEN & L. 507 (2005).

92. Pope John Paul II's linking of "a growing tendency, both in the Church and in civil society, to demand that [capital punishment] be applied in a very limited way or even that it be abolished completely," *Evangelium Vitae*, *supra* note 5, ¶ 56, reflects in part the historic influence of Christianity in reinforcing respect for life in Western society.

93. *Romans* 13:1-4.

understanding of the criminal justice system.⁹⁴ But it is difficult to accept this traditional justification as it relates to capital punishment for at least four reasons.

First, in saying that a greater concern for human dignity militates against capital punishment, Pope John Paul II is in no way disparaging the retributive nature of punishment; rather, in both *Evangelium Vitae* and the *Catechism*, he affirms this aspect of punishment.⁹⁵ But certainly it falls within Catholic morality to identify punishments that are impermissible because they are barbaric, vicious, cruel, and vindictive according to modern and religious standards. It is unlikely that current advocates of capital punishment would extend it to the historical range of human activity punishable by death until recent times, such as executions of young children, pregnant women, and the insane, or for crimes such as theft, pick-pocketing, adultery, fornication, violation of the Sabbath, or blasphemy.⁹⁶ Likewise, no one would approve of the methods of capital punishment practiced historically, where brutality and infliction of intense pain were considered essential elements of their retributive nature.⁹⁷ These executions were delivered in every form imaginable and unimaginable, including: beheading, burial, burning, clubbing, crushing, disemboweling, drowning, electrocution, embedding, enclosing, feeding to wild animals, gassing, gladiatorial combat, guillotining, hanging, insertions, malleting, maiming and hacking, poisoning, pressing, quartering, spearing, starvation, stoning, strangling, suffocation, tearing, welling, and the like.⁹⁸ Finally, other traditional punishments, such as torture and enslavement, have been rejected by the Church,⁹⁹ as well as all modern societies. John Paul II rightly linked the modern notions of human dignity with Catholic

94. *Gaudium et Spes*, *supra* note 90, ¶ 74.

95. CATECHISM OF THE CATHOLIC CHURCH, *supra* note 4, ¶¶ 2266, 2302; *Evangelium Vitae*, *supra* note 5, ¶ 9.

96. MEGIVERN, *supra* note 7, at 10.

97. For example, when the mentally disturbed Francis Ravilliack was executed in 1610 for the assassination of French King Henry IV, to demonstrate the outrage of regicide, Ravilliack was first seared with "scalding oil, rosen, pitch, and brimstone," then disemboweled and pulled apart (quartered) by four horses. SCOTT, *supra* note 73, at 155–57 (1950).

98. *See, e.g.*, JOHN LAURENCE, A HISTORY OF CAPITAL PUNISHMENT 28–69, 220–30 (1950) (describing some of the various techniques of performing capital punishment through the ages); SCOTT, *supra* note 73, at 149–224 (detailing infamous executions that used various methods).

99. *See* CATECHISM OF THE CATHOLIC CHURCH, *supra* note 4, ¶¶ 2297–98.

morality.¹⁰⁰ He proposed that execution should also be rejected as punishment incompatible with personal and social dignity, just as the extreme forms of capital punishment listed above, and the application of death sentences to almost every crime, other than murder, has already been universally rejected.

The retributive nature of punishment does not mandate a reciprocally identical form of punishment. Jesus Himself modified the *lex talionis* "an eye for an eye, a tooth for a tooth."¹⁰¹ No society has dictated that crimes such as rape, adultery, kidnapping, and mass murder necessarily be punished in kind.¹⁰² In fact, there can be no logical basis for arguing that a crime like homicide can only be requited by another killing, if only because an exact replication of an offense and all of its consequences is not possible.

In this regard it is worth noting that the *Catechism of the Council of Trent* authorizes capital punishment only as an exception to the Fifth Commandment prohibition against killing.¹⁰³ Hence, the Church

100. The Church has rejected practices as opposed to human dignity that are clearly accepted in the Old Testament, such as polygamy, as well as practices that pervade the Bible and were practiced in almost all Christian societies until the recent past, such as slavery and the criminal punishment of heresy. CATECHISM OF THE CATHOLIC CHURCH, *supra* note 4, ¶¶ 2104–09, 2387 (heresy, polygamy); *Gaudium et Spes*, *supra* note 90, ¶ 27 (slavery). For a recent discussion of how the unfolding of history dictates the faithful development and application of immutable moral norms, see Richard S. Myers, *A Critique of John Noonan's Approach to Development of Doctrine*, 1 U. ST. THOMAS L.J. 285 (2003); see also JOHN T. NOONAN, JR., A CHURCH THAT CAN AND CANNOT CHANGE: THE DEVELOPMENT OF CATHOLIC MORAL TEACHING 151–53, 157, 202 (2005) (discussing the evolution of Church doctrine regarding tolerance of heresy); READINGS IN MORAL THEOLOGY, NO. 13, CHANGE IN OFFICIAL CATHOLIC MORAL TEACHINGS (Charles E. Curran ed., 2003) (examining changes in Church doctrine in areas such as religious freedom and liberty, democracy, slavery, usury, marriage and sexuality, and also including chapters on capital punishment by Avery Cardinal Dulles and E. Christian Brugger).

101. Compare *Exodus* 21:23–27, with *Matthew* 5:38–42.

102. Kant's extreme theory of retribution, also sometimes referred to as maximalism, maintains that punishment must be equivalent to the crime regardless of other factors or consequences. See IMMANUEL KANT, METAPHYSICAL ELEMENTS OF JUSTICE 138 (John Ladd trans., 2d ed. 1999) (1797). This can be seen as un-Christian, impractical, and not supported by sound philosophical arguments. For a less extreme defense of retribution for law-breaking behavior in proportion to the crime, see J.D. Mabbot, *Punishment*, 48 MIND 152, 158, 161–62 (1939), and other articles cited in STEPHEN OFFEI, BASIC JURISPRUDENCE AND LEGAL PHILOSOPHY 201–03 (1998).

103. CATECHISM OF THE COUNCIL OF TRENT FOR PARISH PRIESTS 420–21 (John A. McHugh, O.P. & Charles J. Callan, O.P. trans., 1972) (1566).

Another kind of lawful slaying belongs to the civil authorities, to whom is entrusted power of life and death, by the legal and judicious exercise of which they punish the guilty and protect the innocent. The just use of this power, far from involving the crime of murder, is an act of paramount obedience to this Commandment which prohibits murder. The end of the Commandment is the

can already be seen as positing capital punishment as an exception based on necessity, one that is rightly modified as historical and cultural conditions change. Moreover, the *Catechism of the Council of Trent* emphasizes the redemptive nature of punishment and suffering, prefiguring John Paul's assertion that punishments that allow the criminal the opportunity for redemption and rehabilitation are to be preferred.¹⁰⁴

The second reason the Church's traditional delegation to state authority fails in the context of capital punishment is that modern secular governments have almost entirely replaced governments in former Christian nations that purported to act with transcendent authority.¹⁰⁵ If the modern state has adopted an entirely secular understanding of its own source of power, it is difficult to see what transcendent authority it can invoke to take a human life.¹⁰⁶

preservation and security of human life. Now the punishments inflicted by the civil authority, which is the legitimate avenger of crime, naturally tend to this end, since they give security to life by repressing outrage and violence. Hence these words of David: *In the morning I put to death all the wicked of the land, that I might cut off all the workers of iniquity from the city of the Lord.*

Id.

104. The Council of Trent, in its treatment of the Fifth Commandment, commands forgiveness of injuries, and condemns revenge. *Id.* at 426–30. The obligation for mercy and forgiveness apply to both persons and the state. Although Justice Scalia thinks the “equation of private morality with government morality” is confused, Scalia, *supra* note 12, at 18, the Church has always thought that the Christian dispensation obliges both individuals and states. *See, e.g.*, Pope John Paul II, Address to H.E. Mrs. Leonida L. Vera, *supra* note 43 (“While civil societies have a duty to be just, they also have an obligation to be merciful.”).

105. *See* William B. Smith, *Capital Punishment: A Work in Progress or Progress Un-Working*, CATH. DOSSIER, Sept.–Oct. 1998, at 12, 13 (arguing that, at least with recent elected officials, “it strains Christian faith to see civil authority ‘as the servant of God for your good’”). Joseph Bottum links the rising embrace of capital punishment in the Middle Ages to the growth of the divine right of kings. Joseph Bottum, *Christians and the Death Penalty*, FIRST THINGS, Aug.–Sept. 2005, at 17, 19. King James I of England declared: “Kings are justly called gods . . . [T]hey have power of raising and casting down, of life and of death, judges over all their subjects and in all causes.” *Id.*

106. Justice Scalia's demand that, if Pope John Paul II's teaching is accepted, Catholic judges must resign does not seem logical. *See* Scalia, *supra* note 12, at 18. Scalia does not make clear why Catholic judges can serve in a judicial system that allows abortion as a fundamental constitutional right but could not serve in one that differs in some aspect from Catholic teaching on capital punishment; nor does he make any real distinctions between the various functions—trial, appellate, capital phase, etc.—that a judge would need to confront. The United States bishops have called on all participants in our legal system, and not just judges, to oppose capital punishment. “[T]he death penalty will be abandoned and wither away through the everyday choices of prosecutors and legislators, judges and jurors, and ordinary citizens who make a commitment to respect human life in every situation.” UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, *supra* note 47, at 19. For articles on moral dilemma of capital punishment for Catholic lawyers, jurors, and judges, see Art C. Cody, Introduction, *The King's Good*

Third, the experience of the state with capital punishment in this century has been a murderous one. The twentieth century was marked by the killing of tens of millions of people by their own governments. Although this tragic history is characterized mostly by extralegal killing and genocide, judicially imposed capital sentences have played a major part.¹⁰⁷ It is a fact that many murderous regimes and governments have used their systems of criminal justice, such as they were, to kill on an unprecedented scale. A prototypical example was the Great Terror, which Stalin inflicted on society in the Soviet Union from 1936 to 1938. It is estimated that during that horrific period of Soviet history, over one and a half million people were executed under death sentences imposed by the Soviet legal system.¹⁰⁸ Certainly the Soviet system flaunted the legality of its imposition of death with the notorious show trials of the leading Bolsheviks, replete with “admissions” as to the legality of the charges and process against them, and pleas for their own execution.¹⁰⁹ The execution of millions of Soviet citizens was carried out in apparent conformity with Soviet law, with many prisoners tried and sentenced by Special Boards of the NKVD (People’s Commissariat for Internal Affairs).¹¹⁰ The mass killings in other totalitarian states, including the Soviet satellite states, Cuba, China, and others, likewise often involved show trials and

Servants: Catholics as Participants in Capital Litigation, 44 J. CATH. LEGAL STUD. 283 (2005); Kevin M. Doyle, *A Catholic Lawyer’s View of the Death Penalty*, 29 ST. MARY’S L.J. 949 (1998); John H. Garvey & Amy V. Coney, *Catholic Judges in Capital Cases*, 81 MARQ. L. REV. 303 (1998); Michael R. Merz, *Conscience of a Catholic Judge*, 29 U. DAYTON L. REV. 305 (2003–04); Gerald F. Uelmen, *Catholic Jurors and the Death Penalty*, 44 J. CATH. LEGAL STUD. 355 (2005); Kenneth Williams, *Should Judges Who Oppose the Death Penalty Resign? A Reply to Justice Scalia*, 10 VA. J. SOC. POL’Y & L. 317 (2003); Robert J. Muise, Note, *Professional Responsibility for Catholic Lawyers: The Judgment of Conscience*, 71 NOTRE DAME L. REV. 771, 794 (1996).

107. NIALL FERGUSON, *THE WAR OF THE WORLD: TWENTIETH-CENTURY CONFLICT AND THE DESCENT OF THE WEST* xxxiv–xxxv, xxxix–xl, lxvi, 176–177, 620, 623–624 (2006); PAUL JOHNSON, *MODERN TIMES: THE WORLD FROM THE TWENTIES TO THE NINETIES* 290, 298–305, 383, 560, 623–24, 655–657 (rev. ed. 1992).

108. ROBERT CONQUEST, *THE GREAT TERROR: A REASSESSMENT* 485 (1990).

109. *Id.* at 71–104.

110. The Soviet Criminal Code authorized capital punishments for numerous crimes in addition to treason, including counter-revolutionary offenses such as terrorism and violent actions against state officials and crimes against state property. *Id.* at 283. Citizens could be tried by a court or by a NKVD Special Board consisting of a group of judicial and prosecutorial officers. *Id.* at 284. Court procedures observed basic formalities of legality, including “requir[ing] the presence of the accused.” *Id.* Although Conquest questions the “legality” of reducing the Board to three (“troikas”) NKVD officers, which ordered numerous executions, these troikas were created by Stalin’s instructions and were “formally established by a ‘special instruction’ from Vyshinsky.” *Id.* at 286. However horrific the “criminal” process of the purges from a human perspective, it is hard to dispute the apparent “legality” of the process.

mass executions according to court-imposed death sentences, with some semblance of jurisprudential norms.¹¹¹

Fourth, the modern state would seem to have forfeited its moral claim to impose capital punishment due to its permission of procured abortions and other killings. In almost every society previous to this century, abortion was classified as a crime. But in the last few decades, many systems of criminal justice, especially in the West, have decriminalized abortion and euthanasia to a greater or lesser extent.¹¹² The chief end of the criminal law is to provide protection from violence, especially lethal violence. When governments legalize abortion, and eliminate protections for the unborn, the disabled, the infirm, and the elderly from their criminal laws, they obscure the connection between their systems of law and the protection of life.¹¹³ For this reason, John Paul II spoke tirelessly of a “culture of life” that would embrace opposition to abortion, euthanasia, and capital punishment.¹¹⁴

V. NON-LETHAL MEANS OF LIFE IMPRISONMENT

Under Pope John Paul II’s teachings, capital punishment can be effectively rejected as a punishment when “non-lethal means are sufficient to defend and protect people’s safety from the aggressor.”¹¹⁵ *Evangelium Vitae* indicates what these non-lethal means are (“steady improvements in the organization of the penal system”),¹¹⁶ as does paragraph 2267 of the *Catechism* (“the possibilities which the state has for effectively preventing crime, by rendering one who has

111. See, e.g., Mark Findlay, *Show Trials in China: After Tiananmen Square*, 16 J.L.S. 352 (1989) (Gr. Brit.). Throughout history public execution has been used as a tool of political control and private vengeance, bringing in its train only further violence. For example, Mussolini reintroduced capital punishment in Italy in 1927; the Nazis greatly expanded its scope, transforming it into a “tool of racial and political engineering.” RICHARD J. EVANS, *RITUALS OF RETRIBUTION: CAPITAL PUNISHMENT IN GERMANY 1600–1987*, at 630 (1996); HOOD, *supra* note 91, at 10. Evans demonstrates that the Nazis widely employed capital punishment both as a means to quash political opposition and to prepare the judiciary and the populace for a “transition from execution to extermination.” This was accomplished in part by moving to “assembly-line killing” of condemned prisoners. EVANS, *supra*, at 644, 649, 696, 706, 720, 737.

112. THE ALAN GUTTMACHER INST., *FACTS IN BRIEF: INDUCED ABORTION WORLDWIDE* (1999); IAN DOWBIGGIN, *A CONCISE HISTORY OF EUTHANASIA* 137–38 (2005).

113. See Long, *supra* note 14, at 552 (arguing that when a society allows a culture of death instead of life, application of the death penalty can reflect no transcendent justice).

114. See, e.g., *Evangelium Vitae*, *supra* note 5, ¶¶ 18, 21, 50, 77, 82, 86–87, 92, 95, 98, 100.

115. CATECHISM OF THE CATHOLIC CHURCH, *supra* note 4, ¶ 2267; accord *Evangelium Vitae*, *supra* note 5, at ¶ 56.

116. *Evangelium Vitae*, *supra* note 5, ¶ 56.

committed an offense incapable of doing harm").¹¹⁷ These possibilities refer to a lengthy or life sentence in prison.

The Church could only restrict permissible grave punishment to a life sentence when social advances make it possible, as John Paul II stated. And in fact, a penal system capable of safely and effectively imprisoning a person for life is a modern invention, made possible only in the last two centuries. For both jurisprudential and technological reasons, earlier societies had no alternative to capital punishment.

Punishment of criminals, of course, has existed from the beginning of organized society and legal codes. Common non-lethal punishments included whipping, caning, branding, pilloring, ducking stools, public shaming, amputation, stockading, fines, confiscation, and exile.¹¹⁸ But until recent times, punishment was only corporal and capital, not custodial.¹¹⁹ Imprisonment was mere temporary confinement. The rehabilitative aspect of incarceration was introduced by Christian and canonical notions of penitence, mitigating the cruel corporal punishments of earlier times.¹²⁰ Prisons made possible the cessation of corporal punishment. They now make possible the cessation of capital punishment.

A. *Early Prison Systems*

A common characteristic of earlier punishments is that they were temporary. Temporary punishments were all that pre-modern societies could bear. Their jurisprudential systems were not characterized by the social and technological means that would allow for an elongated punishment representing the judgment of society, as opposed to the whim of a ruler to be reversed with shifting regimes of power. There were no systems for maintaining records of sentences and conditions, no appeals or other system of review, and little understanding of the prisoner as retaining status as a member of

117. CATECHISM OF THE CATHOLIC CHURCH, *supra* note 4, ¶ 2267.

118. *E.g.*, Gordon Hawkins & Richard S. Frase, *Corporal Punishment*, in 1 ENCYCLOPEDIA OF CRIME & JUSTICE 255, 255–56 (Joshua Dressler et al. eds., 2d ed. 2002).

119. Thorsten Sellin, *The Historical Background of Our Prisons*, 157 ANNALS AM. ACAD. POL. & SOC. SCI. 1 (1931).

120. JAVIER MARTÍNEZ-TORRÓN, ANGLO-AMERICAN LAW AND CANON LAW 167–68 (1998). In fact, it appears that the Catholic Church instituted the penalty of life imprisonment because, under its canons, ecclesiastical judges could not sentence offenders to death. William H.W. Fanning, *Prisons, Ecclesiastical*, in 12 CATHOLIC ENCYCLOPEDIA 436 (Charles G. Herbermann et al. eds., Encyclopedia Press 1913) (1911).

society and humanity.¹²¹ Where criminal offenses were seen as directed against the dignity and person of the head of state, there could be no continuous sentence that did not seem to depend on the dictate of the current ruler, and that was not erased with each change of government.

Likewise, it was impossible to incarcerate a person safely and securely. A lengthy sentence of incarceration entails an entire system of guards, restraints, individual cells, and security—far beyond the capabilities of earlier prison systems. Jails hopelessly mired the morals and spirits by herding together all prisoners—“[y]oung and old, men and women, the well and the sick”—resulting in “moral contagion.”¹²² Equally important was the complete inability of prison systems to resolve problems of sanitation and hygiene.¹²³ People cannot long survive without access to sunlight, exercise, clean water, adequate nutrition, and quarantine from infectious diseases.

It is true that there have always been jails of some sort, of whatever name—prisons, dungeons, gaols, cells—to physically contain criminals. But the crucial point is that these institutions were meant to be short-term confinements until the prisoner was tried or subjected to some other punishment. As the *Digest of Justinian* records: “Prison ought to be employed for confining men, not punishing them.”¹²⁴ They were not intended to hold prisoners for long-time confinement, and neither were they capable of performing such a role.¹²⁵

121. Prisons themselves developed only with growing “confidence in the efficacy of human justice.” JEAN DUNBABIN, *CAPTIVITY AND IMPRISONMENT IN MEDIEVAL EUROPE, 1000–1300*, at 173 (2002). Confinement was often seen as merely the imposition of private power and vengeance at the resolution of personal feuds. *See id.* at 103. The usual treatment of long-term prisoners in the medieval system was to “thrust [them] into the dark to be forgotten.” *Id.* at 129.

122. Sellin, *supra* note 119, at 3.

123. Before the nineteenth century, “prisons rarely were used to punish criminals . . . [and were] dirty and disease-ridden and unsuited for long-term confinement.” George Fisher, *The Birth of the Prison Retold*, 104 *YALE L.J.* 1235, 1239 (1995).

124. ULPIAN, *DUTIES OF PROCONSUL*, Bk. 8, *reprinted in* 2 *THE DIGEST OF JUSTINIAN*, Bk. 48, ch. 19, ¶ 8 (Alan Watson trans., rev. English ed. 1998).

125. The basic distinction is between jails, which incarcerate those awaiting trial and punishment, and prisons, which incarcerate convicted offenders as punishment. Norval Morris & David J. Rothman, *Introduction* to *THE OXFORD HISTORY OF PUNISHMENT*, at vii, ix (Norval Morris & David J. Rothman eds., 1995). Jails in the Roman and Byzantine Empires were “primarily custodial, that is to say of those accused of crimes and awaiting trial,” as with medieval Europe in general. DUNBABIN, *supra* note 121, at 19; *see also* DARIO MELOSSI & MASSIMO PAVARINI, *THE PRISON AND THE FACTORY: ORIGINS OF THE PENITENTIARY SYSTEM 2* (1981) (stating that the belief that prisons were custodial and not punitive “has gained almost universal acceptance amongst historians of penology”); Virginia Hunter, *The Prison of Athens:*

The limited function of the pre-modern jail is well-illustrated in events surrounding some of the most famous jails and punishments in history¹²⁶—those of the French Revolution, taking place in what was, at the time, the most advanced civilization on earth. As is well known, the French Revolution marks its anniversary on July 14, 1789, with the storming of the Bastille, perhaps the most famous prison in history. Built as a fortress in the fourteenth century, the Bastille was soon converted into a state prison.¹²⁷ Its prisoners were detained by the notorious “letters de cachet” of the king with no judicial process, trial, or determinate sentence.¹²⁸ The conditions of the Bastille were deplorable, with its cells teeming with vermin and unprotected against the weather.¹²⁹ When the Bastille was stormed by the Parisian mob, seven prisoners were found, and their actual crimes were largely unknown.¹³⁰

Although the Bastille was destroyed, the Revolution had need of its own jails. The chief jail in Paris was the Abbaye, and it became

A Comparative Perspective, 51 PHOENIX 296, 306–07, 316, 318 (1997) (Can.) (discussing how the prison of ancient Athens was almost entirely custodial and not for long-term incarceration); Sellin, *supra* note 119, at 1 (“The historical penologist cannot but be impressed by the comparative rarity of imprisonment for punitive offenses during ancient, medieval, and much of modern times.”); Marvin E. Wolfgang, *Crime and Punishment in Renaissance Florence*, 81 J. CRIM. L. & CRIMINOLOGY 567, 576 (1990) (“Dungeons, prisons, and cells have always existed, of course, but generally not until the nineteenth century were prisons used for anything but detention of prisoners awaiting trial or execution after conviction.”); Matthew W. Meskell, Note, *An American Revolution: The History of Prisons in the United States from 1777 to 1877*, 51 STAN. L. REV. 839, 864 (1999) (discussing how the American penitentiary system of the late nineteenth century was a vast improvement on the colonial system).

126. In Great Britain, the “nineteenth century was the century of the penitentiary,” in which corporal and capital punishment were gradually replaced by imprisonment, accompanied by scientific and moral efforts to reform and modernize the prison. Victor Bailey, *English Prisons, Penal Culture, and the Abatement of Imprisonment, 1895–1922*, 36 J. BRITISH STUD. 285, 285–86 (1997); cf. Margery Bassett, *Newgate Prison in the Middle Ages*, 18 SPECULUM 233, 233–34, 239, 244–45 (1943) (describing Newgate, the chief London prison, as only custodial in the Middle Ages, and always characterized by a “fetid and corrupt” atmosphere: damp stone buildings, little air and light, underground cells, prisoners in irons, and prisoners dying rapidly); Margery Bassett, *The Fleet Prison in the Middle Ages*, 5 U. TORONTO L.J. 383, 383, 400–01 (1944) (describing similar conditions existing in Fleet Prison and the Tower of London). John Howard (1727–1790) was the great figure in English prison reform, whose 1777 account, *The State of the Prisons in England and Wales*, spurred prison reform in England and the penitentiary system in England and the United States. Robert Alan Cooper, *Ideas and Their Execution: English Prison Reform*, 10 EIGHTEENTH-CENTURY STUD. 73, 73 (1976); Meskell, *supra* note 125, at 840.

127. SIMON SCHAMA, *CITIZENS: A CHRONICLE OF THE FRENCH REVOLUTION* 390 (1989).

128. *Id.*

129. *Id.* at 390–91.

130. *See id.* at 390, 400–03.

stocked with aristocrats and other enemies of the Revolution.¹³¹ Although these were by and large temporary prisoners, they could not be guarded against the fury of the mob, and on September 2, 1792, hundreds of prisoners were removed from the Abbaye (as well as jails at Bicêtre, La Force, and La Salpêtrière) and massacred.¹³² The final historic indignity of this wretched system of incarceration occurred when its most valuable prisoner, the boy Louis XVII, the former dauphin, died in prison, due to neglect and the physical hardships of imprisonment, during the waning days of the Revolution.¹³³ Such was not a prison system capable of imprisoning criminals for extended periods of time; it lacked judicial regularity, fixed terms, security against enraged mobs and private vengeance, and basic safeguards against inevitable disease.

B. *The Modern Penitentiary*

The modern prison or penitentiary arose in the nineteenth century as part of a well-known sociological and penological phenomenon.¹³⁴ Prisons were built throughout Western Europe, England, and the United States, but construction was not motivated by any increase in crime or criminals (in fact, crime was on the decrease).¹³⁵ Rather, the penitentiary was conceived as an alternative to more brutal forms of punishment—the temporary punishments described above had to be vicious, precisely because they had to endure in the body of the prisoner—and as a means to reform the prisoner, with efforts to rehabilitate and heal through long-term education.¹³⁶ The first quarter

131. *See id.* at 631.

132. *Id.* at 633–37.

133. DAVID P. JORDAN, *THE KING'S TRIAL: THE FRENCH REVOLUTION VS. LOUIS XVI*, at 234 (2004).

134. For a history of the rise of prisons as permanent places of incarceration, see generally Fisher, *supra* note 123; Meskill, *supra* note 125.

135. *See, e.g.*, Roger Lane, *Crime and Criminal Statistics in Nineteenth-Century Massachusetts*, 2 J. SOC. HIST. 156, 157–69 (1968); Yue-Chim Richard Wong, *An Economic Analysis of the Crime Rate in England and Wales, 1857–92*, 62 *ECONOMICA* 235, 237–39 (1995).

136. In the 1970s, three significant works revised the history of prison reformation and argued that the rise of prisons should be understood as the assertion of power. *See* MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 301–04 (Alan Sheridan trans., 1st American ed., Pantheon Books 1977) (1975); MICHAEL IGNATIEFF, *A JUST MEASURE OF PAIN: THE PENITENTIARY IN THE INDUSTRIAL REVOLUTION, 1750–1850* (1978); DAVID J. ROTHMAN, *THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC* (1971). This revisionist history has in turn been attacked as reductionist, distorted by an ideological commitment to class conflict and Marxist historiography, and obscured by a rigid structural functionalism. Michael Ignatieff, *State, Civil Society, and Total Institutions: A Critique of Recent*

of the twentieth century saw decisive improvements in the prison system, including: differentiation of prisoners and specialization of prisons; architectural improvements; scientific attention to the health, recreational, and educational needs of the prisoner; training of administrators and guards; and sensible behavioral rules.¹³⁷

But not to be overlooked in this progress was the eagerness of opponents of capital punishment to find an alternative to execution.¹³⁸ It is worth noting that, not only did the rise of prisons in the last century make life sentences possible, and hence make available an alternative to capital punishment, but one of the stated goals of reformers was to develop a prison system as an alternative to capital punishment. For example, the Pennsylvania Society of Friends (“the Society”), consisting of Quakers and other opponents of capital punishment, helped found the Philadelphia Society for Alleviating the Miseries of Public Prisons in 1787, in part to advance a capital abolitionist cause.¹³⁹ Benjamin Rush, one of the founders of the Society, was the leading capital abolitionist of early America. Members of the Society, such as Rush, were instrumental in helping to make Philadelphia prisons model facilities for confinement, while battling capital punishment and pointing to their reformed prisons as an alternative.¹⁴⁰ The Society helped transform Philadelphia’s Walnut Street Jail into a model prison, which it showcased before the legislature to obtain abolition of capital punishment for all crimes in Pennsylvania other than murder in the first degree.¹⁴¹ Other states

Social Histories of Punishment, in 3 CRIME AND JUSTICE 153, 153, 156–57 (Michael Tonry & Norval Morris eds., 1981).

137. Thorsten Sellin, *A Quarter Century’s Progress in Penal Institutions for Adults in the United States*, 24 J. CRIM. L. & CRIMINOLOGY 140, 158 (1933).

138. Louis Filler, *Movements to Abolish the Death Penalty in the United States*, 284 ANNALS AM. ACAD. POL. & SOC. SCI. 124, 132 (1952). “The struggle against the death penalty has been carried on parallel to, though not necessarily hand in hand with, that for better treatment of prisoners.” *Id.* at 124.

139. ANDREW SKOTNICKI, RELIGION AND THE DEVELOPMENT OF THE AMERICAN PENAL SYSTEM 31–32 (2000) (discussing Pennsylvania’s experiment with more “humane” criminal laws begun by its Quaker proprietor and governor, William Penn); see also Edwin R. Keedy, *History of the Pennsylvania Statute Creating Degrees of Murder*, 97 U. PA. L. REV. 759, 760 (1949).

140. Thorsten Sellin, *Philadelphia Prisons of the Eighteenth Century*, 43 TRANSACTIONS AM. PHIL. SOC’Y 326, 328–29 (1953); Negley K. Teeters, *The Pennsylvania Prison Society—A Century and a Half of Penal Reform*, 28 J. CRIM. L. & CRIMINOLOGY 374, 374–77 (1937).

141. Sellin, *supra* note 140, at 329; Teeters, *supra* note 140, at 376–77. In the states where Quakers had political influence such as Pennsylvania, New Jersey, and Maryland, they were active and effective in reforming prisons with the purpose of obtaining abolition of capital punishment. Emil Frankel, *Crime Treatment in New Jersey—1668–1934*, 28 J. CRIM. L. & CRIMINOLOGY 90, 91–94 (1937); David W. Jordan, “Gods Candle” *Within Government: Quakers*

swiftly followed the lead of Pennsylvania in building penitentiaries, abolishing capital sentences except for first-degree murder, and proposing incarceration to replace corporal and capital punishment.¹⁴²

C. *Implications of the Modern Prison System on Catholic Moral Teaching*

Together with the development of prisons and penitentiaries came developments in the legal system necessary to make life imprisonment possible. These developments can perhaps best be summarized as a modern respect for, and implementation of, the rule of law, and include such features as: a belief in criminal sentences apart from political considerations, a neutral judiciary, a prison bureaucracy, records, a system of appeals, a developed jurisprudence, a commitment to protecting the rights of individuals, and a reliable police force.

Prisons, penitentiaries, and their accompanying jurisprudential features have their own complex history over the last two centuries.¹⁴³ But there can be no doubt that Pope John Paul II was correct in noting a central fact of modern life hitherto nonexistent in human society: throughout today's world, prisons and penitentiaries are now designed for long-term incarceration.¹⁴⁴ Modern jurisprudential developments provide the apparatus for a long-term sentence. But the most important jurisprudential development is the modern belief, accepted at least in theory throughout the world, that prisoners retain basic human rights and dignity, which must be protected in

and *Politics in Early Maryland*, 39 WM. & MARY Q. 628, 628–29 (1982); Richard Vaux, *The Pennsylvania Prison System*, 21 PROC. AM. PHIL. SOC'Y 651, 658 (1884); Meskell, *supra* note 125, at 844.

142. ROTHMAN, *supra* note 136, at 114.

143. Improvements to the American prison system have already been discussed. *See supra* Part V.B. Similar twentieth century improvements have been noted in Italian prisons. Gino C. Speranza, *Some Impressions of Italian Prisons*, 5 J. CRIM. L. & CRIMINOLOGY 32, 32–33 (1914); Marvin E. Wolfgang, *A Florentine Prison: Le Carceri delle Stinche*, 7 STUD. RENAISSANCE 148, 164 (1960); Marvin E. Wolfgang, *Travel Notes on Italian Prisons*, 45 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 133, 134 (1954–1955). Nonetheless, abuses continue in Japanese prisons. Jeff Vize, *Torture, Forced Confessions, and Inhumane Punishments: Human Rights Abuses in the Japanese Penal System*, 20 UCLA PAC. BASIN L.J. 329, 331–32 (2003). For reforms in Belgium, see Thorsten Sellin, *Prison Reform in Belgium*, 17 J. CRIM. L. & CRIMINOLOGY 264 (1926). For a discussion of prisons in the Netherlands, see Gerard de Jonge, *Prisoners' (Human) Rights and Prisoners' Litigation in the Netherlands*, 1 J. INST. JUST. & INT'L STUD. 23, 26–31 (2002) (showing that the Dutch penitentiary system, dating from 1821, provides safe, secure conditions and numerous prisoners' rights).

144. *See Evangelium Vitae*, *supra* note 5, ¶ 56.

incarceration.¹⁴⁵ Certainly, the United States has seen a vast transformation not only in the capabilities of prisons, but in legal rights, protections, and safeguards for prisoners, even if disputes are inevitable as to their implementation.¹⁴⁶ Technological improvements

145. Although appalling prison conditions still exist throughout the world, international and national laws are increasingly applying human rights standards to inmates. *See, e.g.*, Rebecca B. Schechter, Note, *Intentional Starvation as Torture: Exploring the Gray Area Between Ill-Treatment and Torture*, 18 AM. U. INT'L L. REV. 1233, 1247, 1268 (2002–2003) (referencing the United Nations' Standard Minimum Rules for the Treatment of Prisoners as a list of humane practices for treating prisoners); *see also* Organization of African Unity, African Charter on Human and Peoples' Rights, art. 5, June 27, 1981, 21 I.L.M. 58 ("Every individual shall have the right to the respect of the dignity inherent in a human being All forms of . . . torture, cruel, inhuman or degrading punishment and treatment shall be prohibited."); Organization of American States, American Convention on Human Rights, art. 5, § 2, Nov. 22, 1969, 9 I.L.M. 673, 676 ("No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person."); International Covenant on Civil and Political Rights, art. 7, Dec. 16, 1966, 999 U.N.T.S. 171 ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."); Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, art. 3, Nov. 4, 1950, 213 U.N.T.S. 221 ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment"); Universal Declaration of Human Rights, G.A. Res. 217A (III), at 73, art. 5, U.N. GAOR, 3d Sess., 183d plen. mtg. (U.N. Doc. A/810 (Dec. 12, 1948) ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.").

146. In penal systems today, prisoners have been accorded substantial rights. Historically, prisoners in the United States have lacked certain basic rights. For example, as far as case law illustrates, even until 1970 prisoners in Arkansas were subject to deplorable living conditions, beaten with leather straps, tortured by electric shock, and forced to work ten hours per day, six days per week. *Holt v. Sarver* (Holt II), 309 F. Supp. 362, 370, 372, 376–77 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971) (finally declaring that such practices are "cruel and unusual punishment [and therefore] constitutionally prohibited"). Similar practices and unsuitable living conditions have been detailed by other federal courts. *Ramos v. Lamm*, 639 F.2d 559, 569–74 (10th Cir. 1980); *Pugh v. Locke*, 406 F. Supp. 318, 322–30 (M.D. Ala. 1976), *aff'd sub nom. Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977), *cert. granted in part, rev'd on other grounds sub nom.*, *Alabama v. Pugh*, 438 U.S. 781 (1978) (per curiam); *Gates v. Collier*, 349 F. Supp. 881, 887–94 (N.D. Miss. 1972), *aff'd*, 489 F.2d 298 (5th Cir. 1973). But questions of human rights in prison have been made more acute since 1981 when the United States Supreme Court began applying Eighth Amendment prohibition of cruel and unusual punishment to prison conditions. *Rhodes v. Chapman*, 452 U.S. 337 (1981). The following articles indicate the theoretical rights that have been accorded to prisoners and the debate over their scope. *See, e.g.*, Martin A. Greer, *Human Rights and Wrongs in Our Own Backyard: Incorporating International Human Rights Protections Under Domestic Civil Rights Law—A Case Study of Women in United States Prisons*, 13 HARV. HUM. RTS. J. 71 (2000); James E. Robertson, *A Clean Heart and an Empty Head: The Supreme Court and Sexual Terrorism in Prison*, 81 N.C. L. REV. 433, 434–37 (2003) (arguing that "prison rape is the most tolerated act of terrorism in the United States" and violates the Eighth Amendment prohibition of cruel and unusual punishment); Brenda V. Smith, *Sexual Abuse of Women in United States Prisons: A Modern Corollary of Slavery*, 33 FORDHAM URB. L.J. 571, 601–07 (2006) ("The sexual abuse of women in custody is akin to the sexual abuse of female slaves." The 2003 Prison Rape Reduction Act and the Violence Against Women Act of 1994 represent recent legislation that seeks to remedy such abuse.); Shara Abraham, Note, *Male*

in prison architecture, cells, exercise units, nutrition, hygiene, and “super-maximum prisons” allow prisoners to be held safely and securely for their own protection¹⁴⁷ as well as that of other prisoners, prison guards, and society in general.¹⁴⁸

Rape in U.S. Prisons: Cruel and Unusual Punishment, 9 HUM. RTS. BRIEF 5 (2001), available at <http://www.wcl.american.edu/hrbrief/09/1male.cfm> (arguing that male rape in U.S. prisons is an endemic problem violating the Eighth Amendment prohibition of cruel and unusual punishment, the Thirteenth Amendment prohibition of slavery, and basic human rights); Andrea Jacobs, Comment, *Prison Power Corrupts Absolutely: Exploring the Phenomenon of Prison Guard Brutality and the Need to Develop a System of Accountability*, 41 CAL. W. L. REV. 277, 299–300 (2004) (proposing a prison ombudsman agency to correct prison abuse); Katherine C. Parker, Comment, *Female Inmates Living in Fear: Sexual Abuse by Correctional Officers in the District of Columbia*, 10 AM. U. J. GENDER SOC. POL’Y & L. 443, 475–77 (2002) (advocating criminal prosecution of correctional officers who inflict sexual abuse on female inmates); David K. Ries, Note, *Duty-to-Protect Claims by Inmates After the Prison Rape Elimination Act*, 13 J.L. & POL’Y 915, 918–20 (2005) (discussing the Prison Rape Elimination Act of 2003 which was passed to combat sexual assault in prison).

In American prisons through the 1960s, health care provided to inmates was barely adequate in the best of cases, and often shockingly absent. The 1970s saw a dramatic improvement in prison health care standards. Douglas C. McDonald, *Medical Care in Prisons*, in 26 CRIME AND JUSTICE 427, 427–28, 431 (Michael Tonry & Joan Petersilia eds., 1999). For other issues relating to modern prison conditions and the provision of health care, see Ellen M. Barry, *Bad Medicine: Health Care Inadequacies in Women’s Prisons*, 16 CRIM. JUST. 38 (2001) (medical neglect and sexual abuse of women inmates endemic in U.S. prisons); Cynthia Chandler, *Death and Dying in America: The Prison Industrial Complex’s Impact on Women’s Health*, 18 BERKELEY WOMEN’S L.J. 40, 41–42 (2003) (describing prisoners’ suffering under the rise of profit-oriented “prison industrial complex”); Amy Petré Hill, Note, *Death Through Administrative Indifference: The Prison Litigation Reform Act Allows Women to Die in California’s Substandard Prison Health Care System*, 13 HASTINGS WOMEN’S L.J. 223, 225 (2002) (claiming California “condemns female prisoners to de facto death sentences by denying them basic medical care.”); Kendra Weatherhead, Note, *Cruel but Not Unusual Punishment: The Failure to Provide Adequate Medical Treatment to Female Prisoners in the United States*, 13 HEALTH MATRIX 429, 431, 463–68 (2003) (arguing that medical care for United States female prisoners is required by Eighth Amendment prohibition of cruel and unusual punishment and international treaties and conventions).

147. See Patricia Garin, *A Measure of the Bar: Prison Conditions in Massachusetts*, 49 BOSTON B. J., Sept.–Oct. 2005, at 18, 18 (encouraging lawyers to assist in the improvement of prisoners’ living conditions, especially access to courts); Maximilienne Bishop, Note, *Supermax Prisons: Increasing Security or Permitting Persecution?*, 47 ARIZ. L. REV. 461, 464, 473 (2005) (arguing that, although super-maximum security facilities are effective in controlling the most dangerous criminals, prisoners have a due process right against arbitrary transfer to such facilities); Susanna Y. Chung, Note, *Prison Overcrowding: Standard in Determining Eighth Amendment Violations*, 68 FORDHAM L. REV. 2351 (2000) (contending that prison overcrowding, widespread in the United States, can constitute a violation of Eighth Amendment prohibition of cruel and unusual punishment); David S. Kurtzer, Note, *In the Belly of the Whale: Religious Practice in Prison*, 115 HARV. L. REV. 1891 (2002) (exploring provisions for the religious needs of prisoners); Gertrude Strassburger, Comment, *Judicial Inaction and Cruel and Unusual Punishment: Are Super-Maximum Walls Too High for the Eighth Amendment?*, 11 TEMP. POL. & CIV. RTS. L. REV. 199, 200 (2001) (urging closer examination of isolation practices in super-maximum prisons); Kendra Berner & Susan Bartholomew, *Substantive Rights Retained by*

Catholic social teaching is a mix of immutable moral principles that perforce interact with the contemporary social environment. The moral principles do not change, but, as society changes, they find new force.¹⁴⁹ Such was the case with slavery—permitted under primitive social conditions, but condemned as intrinsically immoral today. Such was the case with the prohibition against usury, which was rigorously interpreted to prohibit charging any interest on loans in an agrarian, medieval society, but which in modern mercantile and capitalistic systems has been understood to prohibit only excessive interest rates.¹⁵⁰ No Catholic moral principle is more fundamental than respect for human life. As human society now permits lifetime imprisonment for the first time, we should expect as dramatic a shift in application of the Church’s teaching on capital punishment.

CONCLUSION

The Second Vatican Council called for a thorough expression of Christian doctrine, faithful to the entirety of the Gospel, taking into account its application to new cultural and historical situations. The *Catechism of the Catholic Church* contributes to “renewing the whole life of the Church, as desired and begun by the Second Vatican Council.”¹⁵¹ Pope John Paul II has followed the mandate of Vatican II with his teaching on capital punishment, promulgated in *Evangelium Vitae* and the *Catechism*. This teaching is not a departure from

Prisoners, 35 GEO. L.J. ANN. REV. CRIM. PROC. 929 (2006) (listing rights of prisoners as including: access to courts and assistance of counsel; speech, association, and religion; privacy; incarceration in humane, civilized, safe, and healthful conditions; and certain procedural protections). If abuses exist, they are accepted as abuses of a prison system in which prisoners possess numerous substantive rights and that is capable of providing these rights in a secure, healthful environment.

148. As to security, both murders and successful escapes in prison are relatively rare. See Richard F. Culp, *Frequency and Characteristics of Prison Escapes in the United States: An Analysis of National Data*, 85 PRISON J. 270, 275–87 (2005) Prison escape rates—about 1.4% annually with over 90% quickly recaptured—are extremely low and continually dropping in United States prisons. *Id.* Suicide and homicide are not common in American local jails and prisons and are declining. Jail suicide rates declined from 129 per 100,000 in 1983 to only 47 per 100,000 in 2002; in state prisons from 34 per 100,000 in 1980 to 14 per 100,000 in 1990. Homicide rates in jails declined from 5 per 100,000 in 1983 to 3 per 100,000 in 2002; in state prisons from 54 per 100,000 in 1980 to 4 per 100,000 in 2002. BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: SUICIDE AND HOMICIDE IN STATE PRISONS AND LOCAL JAILS 1.

149. The Church’s moral teaching “has achieved a doctrinal development analogous to that which has taken place in the realm of the truths of faith.” *Veritatis Splendor*, *supra* note 9, ¶ 28.

150. NOONAN, *supra* note 100, at 140.

151. *Fidei Depositum*, *supra* note 5, at 3.

Tradition; it is the only way to understand a Tradition that allowed for the state to apply capital punishment when necessary, while admitting capital punishment as a triumph of death, not of life. Modern cultural and historical conditions—the culture of death embraced by twentieth-century states, in which capital punishment has played a prominent role, and the rise of prisons as a safe, secure, humane, and jurisprudential alternative to execution—both mandate and allow for the Catholic Tradition to be expressed precisely and completely for the first time. Promulgated in an encyclical devoted to the Gospel of Life, summarized in the new *Catechism*, and echoed by the Magisterium throughout the world, it is an authoritative and certain teaching that cannot be dismissed. It is the teaching of the Church. As such, it has the earmarks of the Holy Spirit; it has reached definitive form and there can be no expectation that it will be changed or reversed. John Paul II's doctrine upholds the dignity of life because it does not reject the necessity of punishment to redress moral disorder and explicitly affirms such punishment. But it insists that this punishment itself be respectful of human life and dignity. In a tragic sphere of human life necessarily characterized by original sin, Pope John Paul II's teaching on capital punishment is a joyous affirmation of the Gospel of Life.