

CATHOLIC JUDGES HAVE NO OBLIGATION TO RECUSE THEMSELVES IN CAPITAL CASES

Professor Amy Barrett captured national headlines as nominee to the Seventh Circuit Court of Appeals when Democratic members of the Senate Judiciary Committee questioned her fitness for office on the basis of her devotion to her Catholic faith.¹ “The dogma lives loudly within you,” admonished Ranking Member Dianne Feinstein. “And that’s of concern when you come to big issues that large numbers of people have fought for, for years in this country.”² “Dogma and law,” Senator Feinstein also said, “are two different things, and I think whatever a religion is, it has its own dogma. The law is totally different.”³

Although abortion and same-sex marriage dominated the news coverage of the hearing, many of the questions in the hearing itself were devoted to Professor Barrett’s 1998 article *Catholic Judges in Capital Cases*,⁴ which she co-authored with Professor John Garvey, then of Notre Dame Law School.⁵ There they argued that, according to the principles of Catholic teach-

1. See, e.g., Aaron Blake, *Did Dianne Feinstein accuse a judicial nominee of being too Christian?*, THE FIX: WASH. POST (Sept. 7, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/09/07/did-a-democratic-senator-just-accuse-a-judicial-nominee-of-being-too-christian/?noredirect=on&utm_term=.147696c9874d [https://perma.cc/T6Q5-QPG9]; Editorial Bd., *Democrats and “Dogma”: Are you now or have you ever been an “orthodox” Catholic?*, WALL ST. J. (Sept. 7, 2017, 7:20 PM), <https://www.wsj.com/articles/democrats-and-dogma-1504826418> [https://perma.cc/LU5E-DTJR]; Michael McGough, *Opinion, Feinstein, a Catholic nominee and a dogma that didn’t bark*, L.A. TIMES (Sept. 8, 2017, 2:30 PM), <http://www.latimes.com/opinion/opinion-la/la-ol-feinstein-catholic-20170908-story.html> [https://perma.cc/97JG-E8A6].

2. *Hearing to Consider Pending Nominations: Hearing Before the S. Comm. on the Judiciary* 2:44:38 to 2:44:56, 115th Cong. (Sept. 6, 2017), <https://www.judiciary.senate.gov/hearings/watch?hearingid=3F0E1726-5056-A066-60D5-CB1FDA2B8F46> [https://perma.cc/NL3N-RF3H].

3. *Id.* at 2:44:08 to 2:44:23.

4. John H. Garvey & Amy V. Coney, *Catholic Judges in Capital Cases*, 81 MARQ. L. REV. 303 (1998).

5. See Emma Green, *Should a Judge’s Nomination Be Derailed by Her Faith?*, ATLANTIC (Sept. 8, 2017), <https://www.theatlantic.com/politics/archive/2017/09/catholics-senate-amy-barrett/539124/> [https://perma.cc/ET6Y-SFMD] (noting that “by far, the[] [Democratic Senators] spent most of their time questioning a 1998 paper Barrett wrote as a law student”).

ing, the use of the death penalty in contemporary America is morally wrong, because there are other ways of defending society against unjust aggressors that do not involve killing.⁶ Consequently Catholic trial judges may not issue death sentences, even if the law commands them to.⁷

These conclusions do not mean that now Judge Barrett would replace the law with Catholic dogma. She and Professor Garvey do not, as many others have,⁸ argue that the death penalty must be unconstitutional because it offends their own personal sense of justice. Nor do they advocate finding pretexts to overturn or avoid issuing death sentences whenever possible.⁹ They have too much respect for the objectivity of the law and for limitations on judicial power to take this easy way out. Instead, they argue that Catholic judges should participate in capital cases when it is possible to do so in good conscience and recuse themselves when it is not.¹⁰ Recusal is called for only when participation would involve directly participating in the evil of capital punishment by ordering the death of the defendant.¹¹ They therefore conclude that trial judges must recuse themselves from the sentencing phase of death penalty cases but may participate in the guilt phase.¹² Appellate judges, on the other hand, need not recuse themselves at all, because they

6. See Garvey & Coney, *supra* note 4, at 316–17.

7. See *id.* at 320–21.

8. See, e.g., *Furman v. Georgia*, 408 U.S. 238, 305 (1972) (Brennan, J., concurring) (arguing that the death penalty is unconstitutional because it does not “comport[] with human dignity”); *id.* at 369 (Marshall, J., concurring) (arguing that the death penalty is unconstitutional because “the average citizen would,” if he *truly* understood the nature of the punishment, “find it shocking to his conscience and sense of justice”).

9. See Garvey & Coney, *supra* note 4, at 341 (calling it an act of “injustice” for a judge to let “his opposition to capital punishment control his decision of collateral issues” in the guilt phase of capital cases); *id.* at 342–43 (calling on appellate judges to apply the law impartially in capital cases, “even if [they] could save a life by cheating”); see also John Garvey, *Amy Barrett, a faithful judge*, WASH. EXAMINER (Sept. 7, 2017, 12:07 AM), <https://www.washingtonexaminer.com/amy-barrett-a-faithful-judge> [<https://perma.cc/B8FJ-MUU5>] (“Law professors less scrupulous than Prof. Barrett have suggested that sometimes judges should fudge or bend (just a little bit) laws that every right-thinking person would find immoral. In our article we rejected that course of action.”).

10. See Garvey & Coney, *supra* note 4, at 303.

11. See *id.* at 317–19 (distinguishing “formal” and “material” cooperation with evil).

12. *Id.* at 320–25.

never themselves issue death sentences; they only determine whether the trial court committed any legal errors over the course of the trial and sentencing.¹³ Judge Barrett and Professor Garvey thus do not call for wide-ranging lawlessness but for conscientious objection in a narrow set of circumstances.

Nevertheless, Judge Barrett and Professor Garvey's conclusions have serious implications for Catholic judges at all levels. Catholic trial judges would on their view not be able to issue sentences according to the laws of the United States in many of the most serious criminal cases facing the nation. Every affirmation of a capital sentence by an appellate judge would enable, albeit indirectly, a grave violation of human dignity. Many Catholic judges may not be able to stomach such participation in an unjust system,¹⁴ even if the Church's teaching did not outright forbid it, and others have disagreed with Judge Barrett and Professor Garvey that such indirect participation would be morally permissible under Catholic teaching. The late Justice Antonin Scalia, for instance, argued that if the death penalty were contrary to Catholic teaching, it would be wrong not only to issue death sentences but even to affirm them at the appellate level, whether on direct or collateral review.¹⁵ Every Catholic judge who adjudicates capital cases at any level of the judiciary from state trial courts to the U.S. Supreme Court would instead have an obligation to resign from office.¹⁶ For Justice Scalia, the question of whether Catholic judges can participate in capital cases—or serve as judges at all—ultimately hinged on whether the Church does in fact condemn the death penalty as immoral.¹⁷ And even if Judge Barrett and Professor Garvey have the better of the argument on what Catholic judges must do if the use of capital punishment violates Catholic teaching, this is to say nothing of Catholic prosecutors, jurors, elected

13. *Id.* at 326–31; *see also* Nomination of Amy Coney Barrett to the Seventh Circuit Court of Appeals: Answers to Questions for the Record from Senator Feinstein 5 (Sept. 13, 2017), <https://www.judiciary.senate.gov/imo/media/doc/Barrett%20Responses%20to%20Feinstein%20QFRs.pdf> [https://perma.cc/B6K4-N55R] (“I cannot think of any cases or category of cases, including capital cases, in which I would feel obliged to recuse on grounds of conscience if confirmed as a judge on the Seventh Circuit.”).

14. *See* Garvey & Coney, *supra* note 4, at 341–42 (admitting as much).

15. Antonin Scalia, *God's Justice and Ours*, FIRST THINGS, May 2002, at 17, 18.

16. *Id.* at 18, 21.

17. *Id.* at 21.

officials, and voters, all of whom could face serious conflicts between the commands of the law and of their faith.

A close examination of Church teaching from its roots to the modern day, however, will reveal that any conflict between the Catholic faith and participation in death penalty cases is only apparent. From the book of Genesis to Pope Benedict XVI, the Catholic tradition has consistently acknowledged the legitimacy of capital punishment, not only as a kind of societal self-defense to be used in the last resort but as an affirmatively just and fitting punishment for grave crimes. The Old and New Testaments, the Fathers and Doctors of the Church, and popes across the ages from the fifth century to the twenty-first have all defended capital punishment's legitimacy as a form of punishment. At the same time, this defense of the death penalty in principle has always existed alongside the Church's efforts to limit or even eliminate the practice out of mercy and Christian charity.

Judge Barrett and Professor Garvey based their view on the writings of Pope John Paul II, who urged public authorities to limit the use of the death penalty to "cases of absolute necessity: in other words, when it would not be possible otherwise to defend society."¹⁸ From these writings they concluded that "only reasons analogous to self-defense can justify capital punishment."¹⁹ But John Paul II never questioned the state's right in principle to punish grave crimes with death, and he analyzed the question of the death penalty within the framework of the Church's traditional teaching on punishment. He instead made a prudential judgment that it would be more conducive to the common good if public authorities refrained whenever possible from exercising their right to punish malefactors with death.²⁰ Pope Benedict XVI taught likewise, reaffirming the retributive end of punishment, including capital punishment, while exhorting states to avoid bloodshed.²¹

18. JOHN PAUL II, *EVANGELIUM VITAE: ON THE VALUE AND INVIOABILITY OF HUMAN LIFE* ¶ 56 (1995) [hereinafter *EVANGELIUM VITAE*], http://w2.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_25031995_evangelium-vitae.pdf [<https://perma.cc/2UTN-DW23>].

19. Coney & Garvey, *supra* note 4, at 316.

20. See *infra* Part II.B.1–3.

21. See *infra* Part II.B.4.

In August of 2018, almost one year after Judge Barrett's confirmation hearing, Pope Francis issued a revision of the *Catechism of the Catholic Church* that has reignited debate among Catholics over the moral status of capital punishment. The revised text of the *Catechism* now calls the use of the death penalty "inadmissible" in all cases in contemporary society.²² While sweeping in the scope of its judgment, the revised *Catechism* still expresses only a prudential judgment and does not deny the legitimacy of capital punishment in principle.²³ The abolition of the death penalty may be the policy that best promotes the common good in today's world, but it is not outside of the legitimate authority of the state to impose it. For this reason Catholic judges have no moral obligation to recuse themselves from capital cases.

Part I of this Note outlines the Church's teaching on the purposes of punishment. Retribution is the primary and justifying purpose of punishment; a punishment is just if it is deserved. Part II examines the Church's historical and current teaching on capital punishment in particular. Scripture, the Fathers and Doctors of the Church, and the teachings of popes across the centuries all affirm public authorities' right to execute serious offenders. Pope Francis has not denied this right and does not have the authority to change the Church's teaching on this point even if he wished to. Part III applies the Church's teaching on capital punishment to the context of modern American judges. Judges may in good conscience issue death sentences, even if they personally favor the abolition of the death penalty. Part IV briefly concludes.

I. THE PURPOSES OF PUNISHMENT

Under the Church's traditional teaching, the primary purpose of punishment is retribution.²⁴ "Punishment," taught Pope

22. See *New Revision of Number 2267 of the Catechism of the Catholic Church on the Death Penalty*, HOLY SEE [hereinafter 2018 CATECHISM ¶ 2267 revision], http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20180801_catechismo-penadimorte_en.html [https://perma.cc/HBX3-Q2ZN] (last visited Sept. 29, 2018).

23. See *infra* Part II.C.

24. See generally EDWARD FESER & JOSEPH M. BESSETTI, *BY MAN SHALL HIS BLOOD BE SHED: A CATHOLIC DEFENSE OF CAPITAL PUNISHMENT* 37–52 (2017); Joseph L. Falvey, Jr., *Crime and Punishment: A Catholic Perspective*, 43 *CATH. LAW.*

Pius XII, “is the reaction demanded by law and justice against crime; they are like blow and counter-blow. The order of justice which is disrupted by the crime demands to be re-established and restored to its original equilibrium.”²⁵ According to Thomas Aquinas, “the act of sin makes man deserving of punishment.”²⁶ The wrongdoer pays for his crime by suffering an evil that is proportionate to the evil he committed.²⁷ Pope John Paul II reaffirmed this traditional understanding, teaching that the “primary purpose of the punishment which society inflicts is ‘to redress the disorder caused by the offence’ . . . by imposing on the offender an adequate punishment for the crime.”²⁸ The ordinary Christian, of course, must “not repay anyone evil for evil,”²⁹ but the state may exact retributive punishment, because it is charged with maintaining the civil order and safeguarding the common good.³⁰

Judge Barrett and Professor Garvey deny that retribution can justify capital punishment.³¹ In their view, in the rare instances where capital punishment is warranted, it is not justified *qua*

149 (2004); Steven A. Long, *Evangelium Vitae, St. Thomas Aquinas, and the Death Penalty*, 63 THOMIST 511, 519–26 (1999). For an eloquent defense of the principle that retribution is the principal aim of punishment, see C.S. LEWIS, *The Humanitarian Theory of Punishment*, in GOD IN THE DOCK 287, 287–94 (Walter Hooper ed., 1970).

25. Pius XII, *Crime and Punishment* (Feb. 5, 1955), in 1 THE MAJOR ADDRESSES OF POPE PIUS XII 306, 308–09 (Vincent A. Yzermans ed., 1961); see also Pius XII, *An International Code for the Punishment of War Crimes*, 28 ST. JOHN’S L. REV. 1, 16 (1953) (calling “expiation of the crime committed . . . the most important function of the punishment” imposed by the state).

26. THOMAS AQUINAS, *SUMMA THEOLOGICA* pt. I-II, q. 87, art. 6 (Fathers of the English Dominican Province trans, Christian Classics reprint, 1981) (1265–1274) [hereinafter *SUMMA THEOLOGICA*]; see also Pius XII, *Crime and Punishment*, *supra* note 25, at 308 (“Part of the concept of the criminal act is the fact that the perpetrator of the act becomes deserving of punishment.”).

27. See *SUMMA THEOLOGICA*, *supra* note 26, pt. I-II, q. 87, art. 3, ad. 1 (“Punishment is proportionate to sin in point of severity, both in Divine and in human judgments.”); *id.* pt. I-II, q. 87, art. 6 (teaching that a punishment must be an evil that is contrary to what the wrongdoer would wish for himself).

28. *EVANGELIUM VITAE*, *supra* note 18, ¶ 56 (quoting CATECHISM OF THE CATHOLIC CHURCH ¶ 2267 (1994)).

29. *Romans* 12:17; see also *Matthew* 5:39 (“But I say to you, Do not resist an evildoer. But if anyone strikes you on the right cheek, turn the other also.”). All biblical quotations in this Note are from the New Revised Standard Version.

30. See CATECHISM OF THE CATHOLIC CHURCH ¶ 2263 (Geoffrey Chapman trans., Bath Press rev. ed. 1999) (1994) [hereinafter 1997 CATECHISM].

31. See Garvey & Coney, *supra* note 4, at 308 (concluding that retribution “does not justify capital punishment”).

punishment but *qua* some other kind of legitimate killing, like self-defense.³² As we shall see in Part II, however, Church authorities, including Pope John Paul II, have traditionally analyzed the death penalty within the framework of punishment. These same authorities have furthermore considered some crimes to be so heinous that death would be a just and proportionate response to the evil committed.

Although retribution is the primary purpose of punishment, it is not the only consideration that civil authorities must take into account. Punishments in this life may serve other “medicinal” purposes, such as restoring public order, defending public safety, and rehabilitation of the offender.³³ These secondary considerations, aimed at “improv[ing] those that witness or experience the punishment,” may in some instances militate toward stopping short of exacting the full extent of retribution.³⁴ For this reason the death penalty need not always be applied in every situation where it would be a proportionate punishment. Nevertheless the justice or injustice of a particular punishment hinges on retribution, on whether it was *deserved*.³⁵

Determining which punishment will best satisfy both the retributive and medicinal ends of punishment in a particular situation requires the exercise of prudence. Prudence is not just having the right first principles. It involves knowledge about

32. *Id.* at 316. Self-defense is a shaky foundation for justifying capital punishment. When an agent justly kills in self-defense, he acts only to stop his assailant. The assailant’s death is a secondary, unintended consequence of the act. 1997 CATECHISM, *supra* note 30, ¶ 2263. But the object of an execution is precisely the death of the condemned criminal. See CHRISTOPHER KACZOR, THE EDGE OF LIFE: HUMAN DIGNITY AND CONTEMPORARY BIOETHICS 141–42 (2005); Avery Dulles et al., *Avery Cardinal Dulles and His Critics: An Exchange on Capital Punishment*, FIRST THINGS, Aug./Sept. 2001, at 7, 14. Anything less is a botched execution.

33. See *EVANGELIUM VITAE*, *supra* note 18, ¶ 56 (By punishing, “authority also fulfils the purpose of defending public order and ensuring people’s safety, while at the same time offering the offender an incentive and help to change his or her behaviour and be rehabilitated.”); see also Falvey, *supra* note 24, at 160.

34. Patrick M. Laurence, Note, *He Beareth Not the Sword in Vain: The Church, the Courts, and Capital Punishment*, 1 AVE MARIA L. REV. 215, 240–44 (2003); see also *SUMMA THEOLOGICA*, *supra* note 26, pt. II-II, art. 43, q. 7, ad. 1 (saying that a proportionate punishment should not be inflicted if the punishment “will result in more numerous and more grievous sins being committed”).

35. “Justice is the moral virtue that consists in the constant and firm will to give their due to God and neighbor.” 1997 CATECHISM, *supra* note 30, ¶ 1807. A punishment satisfies the end of retribution if it is of the level of severity that the wrongdoer deserves, which is simply another way of saying that it is the punishment *due* to the wrongdoer.

the state of the world beyond just the general precepts of the moral law.³⁶ The Church's magisterium has the authority to teach infallibly on matters of faith and morals, but its infallibility does not extend beyond matters of faith and morals to a perfect understanding of the state of the world.³⁷ For this reason faithful Catholics can disagree in good faith about prudential judgments in a way that they cannot disagree about fundamental moral principles.

II. CATHOLIC TEACHING ON THE DEATH PENALTY

No pope or ecumenical council has in a singular act solemnly defined the Church's teaching on capital punishment.³⁸ Catholic teaching on the death penalty comes instead from Scripture,³⁹ the Fathers⁴⁰ and Doctors⁴¹ of the Church, and popes ex-

36. See *SUMMA THEOLOGICA*, *supra* note 26, pt. II-II, q. 47, art. 3 (“[I]t is necessary for the prudent man to know both the universal principles of reason, and the singulars about which actions are concerned.”).

37. See 1997 CATECHISM, *supra* note 30, ¶ 890 (“Christ endowed the Church's shepherds with the charism of infallibility in matters of faith and morals.” (emphasis added)).

38. The pope or an ecumenical council may by a singular act infallibly define a teaching of the Church if it solemnly declares the teaching with a manifest intent to speak infallibly. See 1983 CODE C.749; *infra* note 42.

39. The Catholic Church affirms the inerrancy of Scripture. See LEO XIII, *PROVIDENTISSIMUS DEUS: ON THE STUDY OF HOLY SCRIPTURE* ¶ 20 (1893), http://w2.vatican.va/content/leo-xiii/en/encyclicals/documents/hf_l-xiii_enc_18111893_providentissimus-deus.pdf [<https://perma.cc/64EN-DUBN>]; PIUS XII, *DIVINO AFFLANTE SPIRITU: ON PROMOTING BIBLICAL STUDIES* ¶¶ 3–4 (1943), http://w2.vatican.va/content/pius-xii/en/encyclicals/documents/hf_p-xii_enc_30091943_divino-afflante-spiritu.pdf [<https://perma.cc/DG3W-DGE8>]; SECOND VATICAN ECUMENICAL COUNCIL, *DEI VERBUM: ON DIVINE REVELATION* ¶ 11 (1965) [hereinafter *DEI VERBUM*], http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_const_19651118_dei-verbum_en.html [<https://perma.cc/U5T5-LKY3>].

40. Given their historical proximity, the Fathers of the Church are seen as having privileged access to the teachings of Jesus and the Apostles, and their views represent the consensus of the Church in their day. They have always been appealed to as an authority in settling matters of disputed doctrine. While individual Fathers are certainly fallible, it is doubtful that they could err collectively on an important matter of faith. See AVERY DULLES, *MAGISTERIUM: TEACHER AND GUARDIAN OF THE FAITH* 43–44 (2007).

41. As “canonized saints who have been singled out by popes or councils for their eminence in learning and soundness in doctrine,” the Doctors of the Church occupy a position of authority in matters of doctrine similar to that of the Fathers. *Id.* at 44.

exercising their ordinary magisterium.⁴² Taken together, these sources form an authoritative tradition that the pope and bishops in communion with him are bound to uphold.⁴³ This tradition speaks with one voice: public authorities may punish grave crimes with death.

Pope John Paul II worked within the Church's traditional framework to call on public authorities to refrain from executing criminals where possible without denying their legitimate authority to do so. Pope Francis's recent revision to the *Catechism* likewise expresses a prudential judgment about the application of the death penalty in today's circumstances. Catholics therefore cannot deny the legitimacy of capital punishment in principle.

Judge Barrett and Professor Garvey determine the Church's "[t]eaching [a]bout [c]apital [p]unishment" by looking almost exclusively to John Paul II's encyclical *Evangelium Vitae*, the *Catechism*, and recent statements by American bishops.⁴⁴ They then discuss only briefly magisterial statements on the death penalty written prior to the papacy of John Paul II.⁴⁵ By failing to read more recent sources against the backdrop of the preexisting tradition, Barrett and Garvey misread them as condemning the death penalty in modern societies as immoral, when they are instead applying the Church's traditional principles of punishment to make a prudential judgment about contemporary circumstances. By looking at the prior tradition only after coming to this conclusion about the Church's modern teaching,

42. The pope teaches infallibly when, summoning his authority "as the supreme pastor and teacher of all the Christian faithful," he solemnly declares by a "definitive act that a doctrine is to be held" by all the faithful. 1983 CODE C.749, § 1. Even when he does not speak in this manner and is merely exercising his ordinary magisterium, however, Catholics still owe a level of deference to his teachings. The level of deference owed will vary depending on "the character of the documents," whether there is "frequent repetition of the same doctrine," and the pope's "manner of speaking." SECOND VATICAN ECUMENICAL COUNCIL, *LUMEN GENTIUM: ON THE CHURCH* ¶ 25 (1964), http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_const_19641121_lumen-gentium_en.html [<https://perma.cc/XDU6-TDXC>]; see also 1983 CODE C.752.

43. See *DEI VERBUM*, *supra* note 39, ¶ 10 ("Th[e] teaching office" of the pope and bishops "is not above the word of God, but serves it, teaching only what has been handed on, listening to it devoutly, guarding it scrupulously and explaining it faithfully.").

44. See Garvey & Coney, *supra* note 4, at 306–13 (emphasis removed).

45. See *id.* at 315 (devoting one paragraph to listing older authorities).

Barrett and Garvey mistakenly conclude that the Church “wandered a bit” before the issuing of *Evangelium Vitae*⁴⁶ when it in fact consistently and authoritatively affirmed the legitimacy of capital punishment.

A. *From the Days of Noah to 1994*

1. *The Bible*

The Old Testament explicitly approves and even commands the use of capital punishment. It first addresses the subject in the ninth chapter of Genesis, where God tells Noah and his sons:

For your own lifeblood I will surely require a reckoning: from every animal I will require it and from human beings, each one for the blood of another, I will require a reckoning for human life. Whoever sheds the blood of a human, by a human shall that person’s blood be shed, for in his own image God made humankind.⁴⁷

The Law of Moses specifies no fewer than thirty-six capital crimes, including murder,⁴⁸ and a Davidic Psalm promises to God, “Morning by morning I will destroy all the wicked in the land, cutting off all evildoers from the city of the Lord.”⁴⁹

The New Testament likewise affirms the authority of the state to resort to capital punishment. Writing to the Romans, Paul warns:

Let every person be subject to the governing authorities; for there is no authority except from God, and those authorities that exist have been instituted by God. Therefore whoever resists authority resists what God has appointed, and those who resist will incur judgment. For rulers are not a terror to good conduct, but to bad. Do you wish to have no fear of the authority? Then do what is good, and you will receive its approval; for it is God’s servant for your good. But if you do what is wrong, you should be afraid, *for the authority does not bear the sword in vain! It is the servant of God to execute wrath on*

46. *Id.*

47. *Genesis* 9:5–6.

48. See Avery Dulles, *Catholicism & Capital Punishment*, *FIRST THINGS*, Apr. 2001, at 30, 30; see also E. CHRISTIAN BRUGGER, *CAPITAL PUNISHMENT AND ROMAN CATHOLIC MORAL TRADITION* 60–61 (2d ed. 2014) (enumerating offenses).

49. *Psalm* 101:8.

the wrongdoer. Therefore one must be subject, not only because of wrath but also because of conscience.⁵⁰

Thus the state, according to Paul, may use lethal force (“bear the sword”) in order to exact retribution (“execute wrath”) for serious crimes. He acknowledges as much in his trial before the Roman governor Festus, saying, “[I]f I am in the wrong and have done something for which I deserve to die, I am not trying to escape death.”⁵¹ Likewise, while on the cross at Calvary, the Good Thief confesses that he and the Wicked Thief “have been condemned justly, for we are getting what we deserve for our deeds.”⁵²

2. *The Fathers and Doctors of the Church*

The Fathers of the Church took the legitimacy of capital punishment for granted. On the authority of Scripture, particularly Romans 13:4, they believed that the practice was established by God for the purpose of exacting retribution against malefactors.⁵³ Every Father of the Church to address the question of the death penalty acknowledged its legitimacy. Specifically, Justin Martyr (100–165),⁵⁴ Athenagoras the Athenian (c. 133 – c. 190),⁵⁵

50. *Romans* 13:1–5 (emphasis added).

51. *Acts* 25:11.

52. *Luke* 23:41.

53. On this point both scholars who oppose capital punishment in principle, *see, e.g.,* BRUGGER, *supra* note 48, at 74–95, and those who do not, *see, e.g.,* FESER & BESSETTE, *supra* note 24, at 111–16, are generally agreed.

54. Justin says that the punishment for professing Christianity is death, JUSTIN MARTYR, *FIRST APOLOGY* ch. 11 (Thomas B. Falls trans., 1948) (c. 156), *reprinted in* WRITINGS OF SAINT JUSTIN MARTYR 21, 43 (Catholic Univ. Press., *The Fathers of the Church* Vol. 6, 1948), and admonishes the emperor Antoninus Pius “not [to] impose the death penalty on those who have done no wrong,” *id.* ch. 68, at 107. If, however, the allegations lodged against Christians are true, Justin “demand[s]” that “they be punished, as any guilty persons should be.” *Id.* ch. 3, at 34–35. “[W]e would do [Justin] a disservice to think he would commend by implication capital punishment for the guilty if he believed it to be wrong.” BRUGGER, *supra* note 48, at 76.

55. *See* ATHENAGORAS THE ATHENIAN, *A PLEA FOR CHRISTIANS* chs. 2–3 (B.P. Pratten trans., 1867) (176/7), *reprinted in* 2 *THE ANTE-NICENE FATHERS* 129, 130 (Alexander Roberts & James Donaldson eds., Buffalo, Christian Literature Publ’g Co. Am. ed. 1885–1896) (1863–1873) (“If, indeed, any one can convict us of a crime, be it small or great, we do not ask to be excused from punishment, but are prepared to undergo the sharpest and most merciless inflictions . . . [I]f these charges are true, spare no class: proceed at once against our crimes; destroy us root and branch . . . if any Christian is found to live like the brutes.”); *id.* ch. 35, at 147 (“For when they know that we [Christians] cannot endure to see a man put to death,

Clement of Alexandria (c. 150 – c. 215),⁵⁶ Tertullian (c. 160 – c. 230),⁵⁷ Origen (c. 184 – c. 253),⁵⁸ Cyprian of Carthage (c. 200 – 258),⁵⁹ Lactantius (c. 240 – c. 320),⁶⁰ Ephrem the Syrian (303–

though justly, who of them can accuse us of murder or cannibalism?”). The latter quotation clearly expresses disapproval of the use of the death penalty, but the phrase “though justly” makes clear that Athenagoras accepts its legitimacy. See FESER & BESSETTE, *supra* note 24, at 112.

56. See CLEMENT OF ALEXANDRIA, *STROMATEIS* bk. I, ch. 27, ¶ 171.4, at 149 (John Ferguson trans., Catholic Univ. Press, The Fathers of the Church Vol. 85, 1991) (c. 200) (“[W]hen [the Law] sees a person in a seemingly incurable state, plunged up to his neck in crime, then in concern that the others may be infected by him, as if it were amputating a limb of the body, it executes him for the greatest health of all.”); *id.* ch. 27, ¶ 173.2, at 150 (“It follows also that when a person is taken prisoner by criminal greed for gain and falls into irreparable vice, one who kills him would be doing him a benefit.”).

57. Some scholars consider Tertullian, who died excommunicate, to be one of two Church Fathers to oppose capital punishment categorically. See, e.g., Long, *supra* note 24, at 511 n.1. Tertullian believed that Christians should not join the military in part because it involved carrying out executions. See TERTULLIAN, *ON IDOLATRY* ch. 19 (S. Thelwall trans., 1869) (c. 197), reprinted in 3 *THE ANTE-NICENE FATHERS*, *supra* note 55, at 61, 73. Elsewhere, however, he wrote that “death that comes from the hands of justice, the avenger of violence, should not be accounted as violent,” TERTULLIAN, *ON THE SOUL* ch. 56, ¶ 8 (Rudolph Arbesmann trans., 1950) (c. 208), reprinted in TERTULLIAN: *APOLOGETICAL WORKS* 163, 302 (Catholic Univ. Press, The Fathers of the Church Vol. 10, 1950).

58. See Origen, Homily 12 on Jeremiah ¶ 5.1–2 (John Clark Smith, trans. 1998) (c. 240), in ORIGEN: *HOMILIES ON JEREMIAH: HOMILY ON 1 KINGS* 28, at 110, 117–18 (Catholic Univ. Press, The Fathers of the Church Vol. 97, 1998) (saying that it is better for the common good for a judge to execute a murderer rather than spare him).

59. See CYPRIAN OF CARTHAGE, *TREATISE V: AN ADDRESS TO DEMETRIANUS* ¶ 13 (Robert Ernest Wallace trans., 1868) (252), reprinted in 5 *THE ANTE-NICENE FATHERS*, *supra* note 55, at 457, 461 (“To be a Christian is either a crime, or it is not. If it be a crime, why do you not put the man that confesses it to death?”).

60. Some scholars consider Lactantius to be one of two Church Fathers to oppose capital punishment categorically. See, e.g., Long, *supra* note 24, at 511 n.1. In a passage of his *Divine Institutes* he appears to advocate for pacifism and a total rejection of capital punishment. See LACTANTIUS, *THE DIVINE INSTITUTES* bk. VI, ch. 20, at 452 (Mary Francis McDonald trans., Catholic Univ. Press, The Fathers of the Church Vol. 49, 1964) (c. 313) (“So, neither will it be permitted a just man, whose service is justice herself, to enter military service, nor can he accuse anyone of a capital crime, because there is no difference whether you kill a man with a sword or a word, since the killing itself is prohibited.”) In the very same chapter, however, he concedes while discussing executions that “a man [may] be condemned deservedly.” *Id.* at 451. Elsewhere, Lactantius argues for the justice of God’s anger by comparing it to executions by human authorities, which are just. If God acts unjustly in punishing sinners then “judges who inflict capital punishment on those convicted of crime would also be acting unjustly.” But since the law calling for capital punishment is “just” and a judge is “sound and good” in executing it, God is also just in punishing sinners. LACTANTIUS, *ON THE WRATH OF GOD* ch. 17 (Mary Francis McDonald trans., 1965) (313/4), reprinted in LACTAN-

373),⁶¹ John Chrysostom (c. 349 – 407),⁶² Gregory of Nazianzus (329–390),⁶³ Ambrose (c. 340 – 397),⁶⁴ Optatus (fl. 366),⁶⁵ and Je-

TIUS: THE MINOR WORKS 59, 99–100 (Catholic Univ. Press., The Fathers of the Church Vol. 54, 1965).

61. EPHREM THE SYRIAN, COMMENTARY ON GENESIS § 6, ch. 15.1 (Edward G. Mathews, Jr. & Joseph P. Amar trans., 1994) (c. 368), reprinted in ST. EPHREM THE SYRIAN: SELECTED PROSE WORKS 57, 143 (Catholic Univ. Press, The Fathers of the Church Vol. 91, paperback ed. 2004) (“*I will require your blood from every beast and from the hand of man.*” He requires it now and in the future. He requires it now in the case of a death that He decreed for a murderer, and also a stoning with which a goring bull is to be stoned.” (quoting *Genesis* 9:5)); *id.* § 6, ch. 15.2, at 143 (God said, “*From the hand of a man and of his brother I will require the life of a man,*” just as satisfaction for the blood of Abel was required from Cain, that is, *whoever sheds the blood of man, by man shall his blood be shed.* The phrase *in the image of God He made . . .*, concerns his authority for, like God, he has the power to grant life and to kill” (alteration in original) (quoting *Genesis* 9:5–6)).

62. See John Chrysostom, Homily 6 on the Statues ch. 6 (W.R.W. Stephens trans., 1889) (387), in 9 NICENE AND POST-NICENE FATHERS: FIRST SERIES 381, 383 (Philip Schaff ed., New York, Christian Literature Publ’g Co. 1886–1890) (calling the execution of criminals “justifiable slaughter”).

63. Gregory presents capital punishment as the just and natural consequence of lawlessness. See Gregory of Nazianzus, Oration XVII ¶ 6 (Martha Vinson trans., 2003) (373/4), in ST. GREGORY OF NAZIANZUS: SELECT ORATIONS 85, 90 (Catholic Univ. Press, The Fathers of the Church Vol. 107, 2003). (“[W]e must be *subject to all the governing authorities not only to avoid God’s wrath but also for the sake of conscience.* We must not direct our hatred toward the law when we transgress nor wait for the axe to fall, but rather, chasten our behavior and seek to win their approval out of respect for their authority.” (internal footnote omitted) (quoting *Romans* 13:1)).

64. See Ambrose, Letter XXV to Studius ¶¶ 1–2 (H. Walford trans., 1881) (c. 385), in THE LETTERS OF S. AMBROSE, BISHOP OF MILAN 182, 182 (E.B. Pusey ed., Oxford, James Parker & Co. 1881) (Writing to a magistrate, Ambrose says he would forbid him from ordering executions “had you not in this matter the Apostle’s authority that he who judgeth *beareth not the sword in vain, for he is the avenger of God, upon him that doeth evil . . .* [S]ome there are, although out of the pale of the Church, who will not admit to the divine Mysteries those who have deemed it right to pass sentence of death on any man . . . [W]e so far observe the Apostle’s rule as not to dare to refuse them Communion.” (quoting *Romans* 13:4)).

65. Optatus defended the actions of Macarius, an imperial legate who put to death several leading Donatists. See OPTATUS, AGAINST THE DONATISTS bk. III, chs. 6–7, at 72–73 (Mark Edwards ed. & trans., Liverpool Univ. Press 1997) (c. 384) (“As if no-one ever deserved to die for the vindication of God! . . . [A]ccuse first Moses, the lawgiver himself, who, when he descended from Mount Sinai, almost before the tables of the law had been put forward, in which it was written, *Thou shalt not kill*, ordered the killing of three thousand people in a single moment. Defer Macarius’ case for a little, and first call into judgment Phineas, the priest’s son, whom I mentioned a little earlier: that is, if you can find some other judge than God. For what you accuse in his person has been praised by God, because it was done in zeal for God . . . Go back to the prophet Elijah, who, in obedience to the will of God, killed 450 in the river Chison.”).

rome (347–419)⁶⁶ all affirm the state’s authority to punish grave wrongs with death.

This is not to say that the Fathers all enthusiastically favored the imposition of capital punishment. Augustine (354–430), for instance, wrote many letters to civil magistrates urging them not to carry out scheduled executions,⁶⁷ but that did not mean that he denied the legitimacy of the death penalty. In *The City of God*, he holds that those who carry out executions are acting in obedience to God’s command:

The same divine law which forbids the killing of a human being allows certain exceptions, as when God authorizes killing by a general law or when He gives an explicit commission to an individual for a limited time. Since the agent of authority is but a sword in the hand, and is not responsible for the killing, it is in no way contrary to the commandment, “Thou shalt not kill,” to wage war at God’s bidding, or for the representatives of the State’s authority to put criminals to death, according to law or the rule of rational justice.⁶⁸

The Doctors of the Church are similarly unanimous in their acknowledgment of the legitimacy of capital punishment.

66. See JEROME, COMMENTARY ON JEREMIAH bk. IV, cmt. on *Jeremiah* 22:1–5, at 129 (Christopher A. Hall ed., Michael Graves trans., InterVarsity Press 2011) (419) (“[N]or shed *innocent* blood in this place, for to punish murderers, profaners and poisoners is not shedding blood but administering the law.”); JEROME, COMMENTARY ON ISAIAH bk. V, ch. 8, at 229 (Thomas P. Scheck trans., Newman Press 2015) (410) (“For that which slays those who are cruel is not cruel, but it *seems* to be *cruel* to those who experience it. For even a thief hung on gallows thinks that the judge is *cruel*.”).

67. See, e.g., Augustine, Letter 100 to Donatus (Wilfrid Parsons trans., 1953) (408/9), in 2 ST. AUGUSTINE: LETTERS 141, 142 (Catholic Univ. Press, The Fathers of the Church Vols. 12, 18, 20, 30, 32, 1951–1956) (“[E]ven when you discover that the Church has been outrageously attacked and injured, we ask you to forget that you have the power of life and death, but not to forget our request.”); Augustine, Letter 133 to Marcellinus (Wilfrid Parsons trans., 1953) (412), in 3 ST. AUGUSTINE: LETTERS, *supra*, at 6, 6 (“I have been a prey to the deepest anxiety for fear your Highness might perhaps decree that they be sentenced to the utmost penalty of the law, by suffering a punishment in proportion to their deeds. Therefore, in this letter, I beg you by the faith which you have in Christ, and by the mercy of the same Lord Christ, not to do this, nor to let it be done under any circumstances.”).

68. AUGUSTINE, THE CITY OF GOD bk. I, ch. 21, at 53 (Demetrius B. Zema & Gerald G. Walsh trans., Catholic Univ. Press, The Fathers of the Church Vol. 8, 1950) (c. 420).

Thomas Aquinas (1225–74), the greatest Doctor of the Church,⁶⁹ expressed little ambivalence about the death penalty, calling arguments against its use “frivolous.”⁷⁰ In the *Summa Theologiae*, he wrote that lawful “vengeance for sin should be taken by depriving a man of what he loves most,” including “life.”⁷¹ Public officials must put certain criminals to death for the sake of the common good in the same way that a physician might have to cut off a diseased limb to preserve the health of the body as a whole.⁷²

The *Greater Catechism* of Peter Canisius (1521–1597) taught on the authority of Genesis and the Psalms that God established capital punishment as fitting retribution for murder.⁷³ Robert Bellarmine (1542–1621) condemned the view “that among Christians there must not be power of capital punishment, etc., in any government, tribunal, or court” as one of the “chief heretical views of the Anabaptists and Antitrinitarians of our time.”⁷⁴ He justified capital punishment on the basis of Scripture, the Fathers and Doctors of the Church, and natural reason.⁷⁵ The death penalty, according to Bellarmine, is a form of “[r]evenge” that is just “if it is sought by a legitimate judge and

69. See LEO XIII, *AETERNI PATRIS: ON THE RESTORATION OF CHRISTIAN PHILOSOPHY* ¶ 17 (1879), http://w2.vatican.va/content/leo-xiii/en/encyclicals/documents/hf_l-xiii_enc_04081879_aeterni-patris.pdf [<https://perma.cc/WC4U-D6HJ>] (calling Thomas Aquinas “the special bulwark and glory of the Catholic faith”); *id.* ¶¶ 21–22 (cataloguing the unique reverence the Church has had for Aquinas’s teaching throughout history).

70. THOMAS AQUINAS, *SUMMA CONTRA GENTILES* bk. III, pt. 2, ch. 146, ¶ 9 (Vernon J. Burke trans., Univ. Notre Dame Press 1975) (1259–1265) [hereinafter *SUMMA CONTRA GENTILES*].

71. *SUMMA THEOLOGICA*, *supra* note 26, pt. II-II, q. 108, art. 3.

72. *Id.* pt. II-II, q. 64, art. 2; *see also* *SUMMA CONTRA GENTILES*, *supra* note 70, bk. III, pt. 2, ch. 146, ¶ 5.

73. See PETRUS CANISIUS, *CATECHISMUS MAIOR: SUMMA DOCTRINAE CHRISTIANAE ANTE-TRIDENTINA* q. 164 (1555–1565), *reprinted in* 1 *CATECHISMI LATINI ET GERMANICI* 1, 57 (Friedrich Streicher ed., 1933) (quoting *Genesis* 4:10, 9:6; *Psalms* 54:24); *see also* PETRUS CANISIUS, *CATECHISMUS MAIOR: SUMMA DOCTRINAE CHRISTIANAE POST-TRIDENTINA* q. 170 (1566–1592), *reprinted in* 1 *CATECHISMI LATINI ET GERMANICI*, *supra*, at 77, 164 (teaching that it is a very grave sin to take life “without legitimate authority” (translation by Author)).

74. ROBERT BELLARMINE, *ON LAYMEN OR SECULAR PEOPLE* (1586), *reprinted in* *ON SPIRITUAL AND TEMPORAL AUTHORITY* 1, 5 (Stefania Tutino ed. & trans., 2012).

75. *See id.* at 49–52; *see also* Edward Feser, *Bellarmino on capital punishment*, ED FESER’S BLOG: BLOGSPOT (Mar. 23, 2018, 11:51 AM), <http://edwardfeser.blogspot.com/2018/03/bellarmino-on-capital-punishment.html> [<https://perma.cc/G97E-BVRL>].

for a good end.”⁷⁶ Alphonsus Liguori (1696–1787) held that public authority may lawfully execute criminals even “outside the case of necessary defense” so that “the order of justice may be preserved,” and that the Bible clearly sanctioned such executions.⁷⁷

3. *The Popes*

From the fifth century to the twentieth, the popes consistently taught that grave crimes may be punished with death. The first pope to address squarely the subject of capital punishment was Innocent I (r. 401–417). Exsuperius, the bishop of Toulouse, wrote to him asking whether baptized public officials who carry out death sentences should be denied Communion or otherwise subjected to canonical sanction.⁷⁸ Pope Innocent I replied:

As for these officials, we find no penalty designated by our predecessors. For they remembered that these powers were granted by God, that the sword was permitted for the punishment of the guilty, and that the punisher in a case of this sort is a servant of God. How would they have condemned an act which they saw had been granted by the authority of God? We therefore uphold for these officials what has been maintained up until now, so that we do not appear either to overturn teaching or to act against the authority of the Lord.⁷⁹

Pope Nicholas I (r. 858–867), following in the tradition of Augustine, urged the newly converted Christians of Bulgaria to avoid executing wrongdoers when possible and “lead those whom you can not to death but life.”⁸⁰ He never denied, however, that they possessed the legitimate authority to execute wrongdoers: he called for a total ban on capital punishment

76. BELLARMINE, *supra* note 74, at 52.

77. 2 ALPHONSUS DE LIGORIO, *THEOLOGIA MORALIS* bk. IV, tract 4, ch. 1, dubium 2, ¶ 376, at 191 (P. Mich. Heilig ed., Adrien Le Clere, Paris, 1852–1857) (1748) (citing *Exodus* 22; *Romans* 13) (translation by Author).

78. See Innocent I, *Epistola VI: Innocentius Exsuperio episcopo Tolosano* ch. 3, ¶ 7 (405), in 20 *PATROLOGIA LATINA* 495, 499 (J.P. Migne ed., Paris, 1844–1855).

79. *Id.* ch. 3, ¶ 8, at 499 (translation by Author).

80. The Responses of Pope Nicholas I to the Questions of the Bulgars (Letter 99) ch. 25 (W.L. North trans., 1998) (866), in *INTERNET MEDIEVAL SOURCEBOOK* (Paul Halsell ed., Nov. 4, 2011), <https://sourcebooks.fordham.edu/basis/866nicholas-bulgar.asp> [<https://perma.cc/XSG4-6Sj3>].

only during feast days and Lent,⁸¹ and he expressly approved of the execution of those who had murdered their own kinsmen or companions.⁸²

In the twelfth century there arose a proto-Protestant sect called the Waldensians, which was condemned by the Church. They taught, among other things, that killing was never justified under any circumstances. Consequently they opposed all war and capital punishment. A group of Waldensians sought to reconcile with the Church in 1210. *As a condition of reentry into the Church*, Pope Innocent III (r. 1198–1216) required them to swear, “In regard to the secular power, we affirm that it can exercise a judgment of blood without mortal sin provided that in carrying out the punishment it proceeds, not out of hatred, but judiciously, not in a precipitous manner, but with caution.”⁸³

Following the Council of Trent, Pope Pius V (r. 1566–1572) promulgated the *Roman Catechism*, the most influential catechism in the history of the Church prior to the twentieth-century *Catechism of the Catholic Church*. It emphatically affirmed the retributive purpose of and scriptural basis for capital punishment:

The power of life and death is permitted to certain civil magistrates because theirs is the responsibility under law to punish the guilty and protect the innocent. Far from being guilty of breaking this commandment [Thou shalt not kill], such an execution of justice is precisely an act of obedience to it. For the purpose of the law is to protect and foster human life. This purpose is fulfilled when the legitimate authority of the state is exercised by taking the guilty lives of those who have taken innocent life. In the Psalms we find a vindication of this right: “Morning by morning I will destroy all the wicked in the land, cutting off all evildoers from the city of the Lord” (Ps 101:8).⁸⁴

81. *Id.* chs. 12, 45.

82. *Id.* chs. 26–27 (with the caveat that those who seeking refuge in a church should be spared).

83. Innocent III, *Eius exemplo* (1210), in COMPENDIUM OF CREEDS, DEFINITIONS, AND DECLARATIONS ON MATTERS OF FAITH AND MORALS § 795 (Heinrich Denzinger & Peter Hünermann eds., Ignatius Press 43d ed. 2012) (1854) [hereinafter DENZINGER].

84. THE ROMAN CATECHISM 410–11 (Robert I. Bradley & Eugene Kevane trans., Daughters of St. Paul 1985) (1566).

For over a millennium the popes served not only as the spiritual heads of the Catholic Church but also as the temporal rulers of the Papal States. In their capacity as earthly political sovereigns, the popes oversaw the execution of criminals until the dissolution of the Papal States in the pontificate of Pope Pius IX (r. 1846–1878). 516 condemned criminals, mostly murderers, were put to death in the Papal States between 1796 and 1865 alone.⁸⁵ The popes' attitude toward capital punishment did not change with the loss of the Papal States. In the late nineteenth and early twentieth centuries, Popes Leo XIII (r. 1878–1903),⁸⁶ Pius X (r. 1903–1914),⁸⁷ and Pius XI (r. 1922–1939)⁸⁸ all affirmed the legitimacy of capital punishment in their magisterial writings, and all three distinguished capital punishment from killing in self-defense.

Pope Pius XII (r. 1939–1958) devoted particular attention to articulating the Church's teaching on crime and punishment in a systematic way.⁸⁹ He linked the death penalty to retribution, teaching its legitimacy "for the gravest crimes, well defined and proven."⁹⁰ He further clarified that the just use of the death penalty is not contrary to the dignity of all human life:

85. See FESER & BESETTE, *supra* note 24, at 9. Six popes ruled over this period of time: Pius VI, Pius VII, Leo XII, Pius VIII, and Pius IX. *Id.*

86. LEO XIII, *PASTORALIS OFFICII: ON THE MORALITY OF DEULING* ¶ 2 (1891), http://w2.vatican.va/content/leo-xiii/en/encyclicals/documents/hf_l-xiii_enc_12091891_pastoralis-officii.pdf [https://perma.cc/RTE2-WEUA] ("Clearly, divine law, both that which is known by the light of reason and that which is revealed in Sacred Scripture, strictly forbids anyone, *outside of public cause*, to kill or wound a man unless compelled to do so in self defense." (emphasis added)).

87. THE CATECHISM OF POPE SAINT PIUS X, *The Fifth Commandment*, q. 3, at 137 (Instauratio Press 1993) (1910) ("It is lawful to kill . . . when carrying out by order of the Supreme Authority a sentence of death in punishment of a crime; and, finally, in cases of necessary and lawful defence of one's own life against an unlawful aggressor.").

88. PIUS XI, *CASTI CONNUBII: ON CHRISTIAN MARRIAGE* ¶ 64 (1930), https://w2.vatican.va/content/pius-xi/en/encyclicals/documents/hf_p-xi_enc_19301231_casti-connubii.pdf [https://perma.cc/QD8Q-UYWK] (teaching, in condemning state support for abortion, that "[i]t is of no use to appeal to the right of taking away life for here it is a question of the innocent, whereas that right has regard only to the guilty; nor is there here a question of defense by bloodshed against an unjust aggressor").

89. See FESER & BESSETTI, *supra* note 24, at 128–35.

90. *Discorso di Sua Santità Pio XII ai Parroci e ai Quaresimalisti di Roma* para. 22 (Feb. 23, 1944), http://w2.vatican.va/content/pius-xii/it/speeches/1944/documents/hf_p-xii_spe_19440223_inscrutabile-consiglio.pdf [https://perma.cc/7EVJ-UYV6] (translation by James McGlone).

Even when there is question of the execution of a condemned man, the state does not dispose of the individual's right to life. In this case it is reserved to the public power to deprive the condemned person of the enjoyment of life in expiation of his crime when, by his crime, he has already disposed himself of his right to live.⁹¹

Starting in the mid-1970s, voices within the Church began to call for the political abolition of the death penalty in developed countries, while at the same time never denying the legitimacy of the state's authority to execute criminals.⁹² In 1976, the Pontifical Commission for Justice and Peace, a Vatican office writing to the bishops of the United States under the authority of Pope Paul VI (r. 1963–1978), said, "That the state has the right to enforce the death penalty has been ceded by the church for centuries The Church has never condemned its use by the state . . . [and] has condemned the denial of that right."⁹³ At the same time, the Commission stressed the "medicinal role of punishment," in consideration of which a Catholic could come to conclude that abolition of the death penalty is an appropriate political course of action.⁹⁴

Lastly, in 1994 Pope John Paul II (r. 1978–2005) issued the *Catechism of the Catholic Church*. The original text of the *Catechism* expressly reaffirmed the Church's traditional teaching on the legitimacy of capital punishment while at the same time exhorting civil authorities to exercise restraint whenever possible:

Preserving the common good of society requires rendering the aggressor unable to inflict harm. For this reason the traditional teaching of the Church has acknowledged as well-founded the right and duty of legitimate public authority to punish malefactors by means of penalties commensurate with the gravity of the crime, not excluding, in cases of extreme gravity, the death penalty

...

91. Pius XII, Moral Limits of Medical Research (Sept. 1952), in 1 THE MAJOR ADDRESSES OF POPE PIUS XII, *supra* note 25, at 225, 232–33.

92. See BRUGGER, *supra* note 48, at 133, 136–37.

93. Pontifical Comm'n for Justice & Peace, *The Church and the Death Penalty*, 6 ORIGINS 389, 391–92 (1976).

94. See *id.*

If bloodless means are sufficient to defend human lives against an aggressor and to protect public order and the safety of persons, public authority should limit itself to such means, because they better correspond to the concrete conditions of the common good and are more in conformity to the dignity of the human person.⁹⁵

From the days of Noah to 1994, the unquestioned consensus of the Church approved of the legitimacy of the death penalty as a punishment for the grave crimes. It cannot fairly “be said,” as Judge Barrett and Professor Garvey suggest, “that the Church . . . wandered a bit before” the issuing of *Evangelium Vitae*.⁹⁶

B. *From Evangelium Vitae to Benedict XVI*

Pope John Paul II published *Evangelium Vitae* (meaning “the Gospel of life”) in 1995. It was at that time the strongest statement of opposition to the practice of the death penalty in a papal magisterial document. Shortly thereafter, in 1997, John Paul II revised the *Catechism of the Catholic Church*’s section on capital punishment to take into account the teaching of *Evangelium Vitae*. Although John Paul II passionately opposed the modern practice of the death penalty, he was careful to conform to the Church’s traditional teaching that capital punishment can be a just punishment for the gravest of crimes. Pope Benedict XVI followed the lead of his immediate predecessor, opposing the death penalty in practice while acknowledging its legitimacy in principle.

1. *Evangelium Vitae*

Pope John Paul II wrote *Evangelium Vitae* to reaffirm the dignity of all human life in the face of new kinds of offenses against it in the modern world.⁹⁷ He focuses throughout the encyclical in a particular way on the evils of abortion and euthanasia, which he condemned in no uncertain terms.⁹⁸ After a discussion of “legitimate defence” of oneself and others,⁹⁹ the

95. CATECHISM OF THE CATHOLIC CHURCH ¶¶ 2266–67 (Geoffrey Chapman trans., Cassell 1994) [hereinafter 1994 CATECHISM].

96. Garvey & Coney, *supra* note 4, at 315.

97. See *EVANGELIUM VITAE*, *supra* note 18, ¶¶ 3–4.

98. *Id.* ¶¶ 62, 65.

99. *Id.* ¶ 55.

encyclical goes on to devote one paragraph to the death penalty:

This is the context in which to place the problem of the death penalty [*poena capitali*]. 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* [*poena*] 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 fulfils the purpose* of defending public order and ensuring people's safety, while at the same time offering the offender an incentive and help to change his or her behaviour and be rehabilitated.

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

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 [or *should*] limit itself to such means,^[100] because they better correspond to the concrete conditions of the

100. "Must limit itself to such means" is somewhat of an over-translation of *his utatur instrumentis*. The same phrase is translated "should limit itself to such means" in the first edition of the *Catechism*. 1994 CATECHISM, *supra* note 95, ¶ 2267. Literally translated, it means "let it use these means." *Utatur* is a verb in the subjunctive mood. Subjunctive verbs used in independent clauses can carry either imperative or merely precatory force. See DIRK PANHUIS, *LATIN GRAMMAR* § 236 (Dirk Panhuis & Gertrud Champe trans., Univ. Mich. Press 2006) (1998).

common good and are more in conformity to the dignity of the human person."¹⁰¹

Pope John Paul II then goes on to say that unlike with "criminals and unjust aggressors," "the commandment 'You shall not kill' has absolute value when it refers to the innocent person."¹⁰² He concludes by "confirm[ing] that the direct and voluntary killing of an *innocent* human being is always gravely immoral."¹⁰³

Evangelium Vitae makes no clear, unqualified condemnation of capital punishment, even capital punishment when "bloodless means are sufficient," in the way that it does unmistakably condemn abortion, euthanasia, and the taking of innocent human life; nowhere is capital punishment called "a grave moral disorder,"¹⁰⁴ "intrinsically illicit,"¹⁰⁵ or "a grave violation of the law of God."¹⁰⁶ The "problem of capital punishment" is nothing like "the unspeakable crime of abortion."¹⁰⁷

Instead, the encyclical analyzes the death penalty as a punishment subject to the Church's traditional framework of the purposes of punishment. It refers to the death penalty as a kind of punishment (*poena capitali*) and then goes on to discuss the purposes that punishment (*poena*) fulfills.¹⁰⁸ The "primary pur-

101. *EVANGELIUM VITAE*, *supra* note 18, ¶ 56 (footnotes omitted) (emphases added) (quoting CATECHISM OF THE CATHOLIC CHURCH ¶¶ 2266–67 (1994)). The official text (also known as the *editio typica*) of a papal encyclical is the Latin text published in the *Acta Apostolicae Sedis*. The English text published by the Vatican is simply a translation. It will therefore be helpful to have recourse to the Latin in some instances. See IOANNES PAULUS II, *EVANGELIUM VITAE* ¶ 56 (1995), in 87 *ACTA APOSTOLICAE SEDIS* 401, 463–64 (1995) [hereinafter *EVANGELIUM VITAE (editio typica)*].

102. *EVANGELIUM VITAE*, *supra* note 18, ¶ 57.

103. *Id.* (emphasis added).

104. *Id.* ¶ 62 (speaking of abortion).

105. *Id.* (same).

106. *Id.* ¶ 65 (speaking of euthanasia).

107. *Id.* ¶ 58 (quoting SECOND VATICAN ECUMENICAL COUNCIL, *GAUDIUM ET SPES: ON THE CHURCH IN THE MODERN WORLD* ¶ 51 (1965), http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_const_19651207_gaudium-et-spes_en.html [<https://perma.cc/F2KQ-XMEL>]).

108. *EVANGELIUM VITAE (editio typica)*, *supra* note 101, ¶ 56, at 463–64; see also OXFORD LATIN DICTIONARY 1395 (combined ed. 1982) (defining "*poena*" as "[t]he penalty paid in satisfaction for an offence, punishment"). The encyclical does also say that the death penalty is to be placed into the context of "legitimate defence," but this is no innovation. The 1994 edition of the *Catechism*, which explicitly contemplates the death penalty as a form of retributive punishment, also treats capital punishment under the heading of "legitimate defence." See 1994 CATECHISM,

pose" of punishment is retribution, i.e., "imposing on the offender an adequate punishment for the crime."¹⁰⁹ But there are also other purposes, namely defending public order, protecting people's safety, and rehabilitation of the offender.¹¹⁰ This is all simply a restatement of the traditional Catholic view of punishment, as outlined above in Part I. When John Paul II counsels against the use of the death penalty where it is not "absolutely necessary," it is in order "for these purposes," i.e., retribution and the medicinal purposes of punishment, "to be achieved."¹¹¹

If the primary purpose of punishment is retribution and if the death penalty is a punishment that can in some instances fulfill the purposes of punishment, then it must be the case that the primary purpose of imposing the death penalty is retribution, to impose on the offender an adequate punishment for the offense. It thus follows as a matter of logic from the principles laid out in *Evangelium Vitae* that the state has the legitimate authority to punish certain grave offenses with death. This is the traditional Catholic teaching on capital punishment, and it precludes Barrett and Garvey's view that "only reasons analogous to self-defense can justify capital punishment."¹¹² In a just act of self-defense, the goal is to use only as much force as is necessary to stop the attack, not to actively inflict harm on the assailant.¹¹³ According to *Evangelium Vitae*, the primary goal of capital punishment, as with all other punishments, is to inflict harm in retribution for the offense committed.

Why then does the encyclical so strongly urge public authorities to refrain from making use of capital punishment? This is where the secondary, medicinal, purposes of punishment come into the picture. Although retribution is what makes a punishment essentially just, the secondary purposes of punishment can militate toward not exacting the full extent of retribution. John Paul II appeals to "steady improvements in

supra note 95, ¶¶ 2263–67. The idea of defense speaks to whether a punishment is prudent; the idea of retribution speaks to whether a punishment is just.

109. *EVANGELIUM VITAE*, *supra* note 18, ¶ 56.

110. *Id.*

111. *Id.*

112. Garvey & Coney, *supra* note 4, at 316.

113. *Id.* at 309; *see also* 1997 CATECHISM, *supra* note 30, ¶ 2263.

the organization of the penal system.”¹¹⁴ This gets at safety, public order, and rehabilitation. Modern prison systems make it possible to protect safety and public order without having to kill the offender by securely separating him from the rest of society. They also give incarcerated criminals an opportunity to redeem themselves and live out some kind of worthwhile life of repentance while still being punished for their crimes. Thus, even though it would not violate justice to execute murderers in modern-day America, tempering the zeal for complete retribution may perhaps open the door to rehabilitation without endangering safety or public order.

John Paul II’s opposition to the death penalty is an application of the Church’s traditional teaching on the purposes of punishment to the realities of modern society and is therefore a prudential judgment. A Catholic could in good faith disagree with these prudential judgments and conclude that the use of the death penalty beyond cases of “absolute necessity” does in fact achieve the medicinal purposes of punishment. He could, like Thomas Aquinas, think that the death penalty promotes repentance, the highest form of rehabilitation, by forcing the condemned criminal to come to terms with the gravity of what he has done.¹¹⁵ He could, like Clement of Alexandria, believe that the death penalty promotes public order by instilling a just fear of punishment in potential wrongdoers.¹¹⁶ Or he could agree with Augustine, Nicholas I, and John Paul II that the state should refrain from exercising its authority to execute criminals whenever possible. These are not disagreements about the underlying principles to be used in determining how to punish a criminal but about their concrete application.

114. *EVANGELIUM VITAE*, *supra* note 18, ¶ 56.

115. See *SUMMA CONTRA GENTILES*, *supra* note 70, bk. III, pt. 2, ch. 146, ¶ 10 (“Finally, the fact that the evil, as long as they live, can be corrected from their errors does not prohibit the fact that they may be justly executed, for the danger which threatens from their way of life is greater and more certain than the good which may be expected from their improvement. They also have at the critical point of death the opportunity to be converted to God through repentance. And if they are so stubborn that even at the point of death their heart does not draw back from evil, it is possible to make a highly probable judgment that they would never come away from evil to the right use of their powers.”).

116. See *CLEMENT*, *supra* note 56, bk. I, ch. 27, ¶ 172.3, at 149 (“‘It is a great education when a malefactor sees a criminal punished,’ for ‘the fear of the Lord breeds wisdom.’” (quoting *Proverbs* 22:36)).

2. *The Catechism*

The first, provisional edition of the *Catechism of the Catholic Church* appeared in 1994, but the second, official edition did not come until 1997, after the issuing of *Evangelium Vitae*.¹¹⁷ The text was largely the same, but the paragraphs dealing with capital punishment had been revised to reflect the teaching of the encyclical. As in the 1994 edition, the 1997 edition of the *Catechism* begins its discussion of capital punishment with the acknowledgment that “[l]egitimate public authority has the right and duty to inflict punishment proportionate to the gravity of the offense.”¹¹⁸ It deletes, however, the phrase “not excluding, in cases of extreme gravity, the death penalty,” which was present in the first edition.¹¹⁹ Then, after acknowledging the “medicinal purpose” of punishment,¹²⁰ it goes on to say:

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 [*poenam mortis*], 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 [or *should*] limit itself^[121] to such means, as these are more in keeping with the concrete conditions of the common good and 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 definitely taking away from him the possibility of redeeming himself—the cases in which the execution of the offender is an absolute necessity “are very rare, if not practically nonexistent.”¹²²

117. These dates refer to the Latin editions of the text. See BRUGGER, *supra* note 48, at 10–11.

118. 1997 CATECHISM, *supra* note 30, ¶ 2266.

119. Compare 1994 CATECHISM, *supra* note 95, ¶ 2266, with 1997 CATECHISM, *supra* note 30, ¶ 2266.

120. 1997 CATECHISM, *supra* note 30, ¶ 2266.

121. This same phrase is translated as “should limit itself” in the 1994 edition of the *Catechism* and “must limit itself” in *Evangelium Vitae*. See *supra* note 100.

122. 1997 CATECHISM, *supra* note 30, ¶ 2267 (quoting *EVANGELIUM VITAE*, *supra* note 18, ¶ 56). For the Latin text, see *CATECHISMUS CATHOLICAE ECCLESIAE* ¶ 2267

The *Catechism* largely restates *Evangelium Vitae*. It does not condemn executing criminals outside of cases of absolute necessity as a moral evil. It reasserts that the primary purpose of punishment is retribution and that the death penalty is a kind of punishment (*poenam*), which would of course mean that the primary purpose of the death penalty is retribution. It does, however, express more firmly the prudential judgment offered in *Evangelium Vitae* that public authorities should refrain from executing criminals whenever possible.

The first section of the paragraph is liable to be misinterpreted if read in isolation. It is true that the Church's traditional teaching permits the death penalty if it is the only way to protect human lives, but that is not the *only* circumstance under which it permits capital punishment. Reading "if" to mean "if and only if" would simply be incompatible with the historical evidence surveyed above. Nor can this section be read as narrowing the circumstances under which the death penalty is legitimate, because it is an appeal to, rather than a criticism of, the tradition. The rest of the paragraph is familiar. The second section is essentially the same as it was in the 1994 edition, and the final section is a paraphrasing of *Evangelium Vitae's* prudential judgment in favor of abolishing the death penalty.¹²³

3. *The CDF's Interpretation*

The above interpretation of *Evangelium Vitae* and the *Catechism* is confirmed by the interventions of the Congregation for the Doctrine of the Faith ("CDF"). The CDF is an office of the Roman Curia charged with the "duty . . . to promote and safeguard the doctrine on faith and morals in the whole Catholic world."¹²⁴ It offers authoritative interpretations of doctrine, including clarifications of papal statements,¹²⁵ as part of the

(*editio typica* 1997), https://web.archive.org/web/20170622041430/http://www.vatican.va/archive/catechism_lt/p3s2c2a5_lt.htm.

123. See *EVANGELIUM VITAE*, *supra* note 18, ¶ 56.

124. JOHN PAUL II, *PASTOR BONUS* art. 48 (1988), http://w2.vatican.va/content/john-paul-ii/en/apost_constitutions/documents/hf_jp-ii_apc_19880628_pastor-bonus.pdf [<https://perma.cc/FJ7L-M5M2>].

125. See, e.g., LUIS F. LADARIA & GIACOMO MORANDI, CONGREGATION FOR THE DOCTRINE OF THE FAITH, *PLACUIT DEO: ON CERTAIN ASPECTS OF CHRISTIAN SALVATION* ¶¶ 3–4 (2018), http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20180222_placuit-deo_en.html

pope's exercise of his magisterium. The head of the CDF under John Paul II was none other than Cardinal Joseph Ratzinger, the future Pope Benedict XVI.

Shortly after *Evangelium Vitae's* publication in 1995, Cardinal Ratzinger suggested at a press conference that the *Catechism* (then in its first edition) "would have to be revised in light of the encyclical."¹²⁶ Fr. Richard John Neuhaus, founder of *First Things*, wrote to Ratzinger asking for a clarification. Ratzinger responded:

You ask about the correct interpretation of the teaching of the encyclical on the death penalty. Clearly, the Holy Father has not altered the doctrinal principles which pertain to this issue as they are presented in the *Catechism*, but has simply deepened the application of such principles in the context of present-day historical circumstances. Thus, where other means for the self-defense of society are possible and adequate, the death penalty may be permitted to disappear. Such a development, occurring within society and leading to the foregoing of this type of punishment, is something good and ought to be hoped for.

In my statements during the presentation of the encyclical to the press, I sought to elucidate these elements, and noted the importance of taking such circumstantial considerations into account. It is in this sense that the *Catechism* may be rewritten, naturally without any modification of the relevant doctrinal principles . . .¹²⁷

Ratzinger thus explicitly rules out any interpretation of *Evangelium Vitae* or of the second edition of the *Catechism* that contradicts the principles laid out in the first edition of the *Catechism*, which affirmed the state's authority to punish grave crimes with death.

In 2004, after the publication of the revised *Catechism*, the archbishop of Washington wrote to Cardinal Ratzinger asking whether Catholic supporters of the death penalty should be denied Communion.¹²⁸ Ratzinger responded in the negative:

[<https://perma.cc/385D-VRQP>] (clarifying what Pope Francis means by his use of the terms "Gnosticism" and "Pelagianism" in his ordinary magisterium).

126. See Richard John Neuhaus, *A Clarification on Capital Punishment*, FIRST THINGS, Oct. 1995, at 83, 83.

127. *Id.* (reproducing the letter).

128. As a general matter those who publicly dissent from the Church's established moral teachings are to be denied Holy Communion. See 1983 CODE C.915

Not all moral issues have the same moral weight as abortion and euthanasia. For example, if a Catholic were to be at odds with the Holy Father on the application of capital punishment or on the decision to wage war, he would not for that reason be considered unworthy to present himself to receive Holy Communion. While the Church exhorts civil authorities to seek peace, not war, and to exercise discretion and mercy in imposing punishment on criminals, it may still be permissible to take up arms to repel an aggressor or to have recourse to capital punishment. There may be a legitimate diversity of opinion even among Catholics about waging war and applying the death penalty, but not however with regard to abortion and euthanasia.¹²⁹

The comparison to war is particularly instructive. While the Catholic Church strives for peace, it has never been pacifist. War is a core example in the Catholic tradition of a moral question where the legitimacy of action depends on an exercise of prudential judgment by civil authorities.¹³⁰ The United States Conference of Catholic Bishops (“USCCB”) published Cardinal Ratzinger’s response on this question nearly verbatim in a guide for American Catholics involved in public life.¹³¹

4. *Benedict XVI*

Pope Benedict XVI largely echoed Pope John Paul II’s position on the death penalty, while subtly highlighting the continuity between his immediate predecessor and the prior tradition. Benedict called for the abolition of the death penalty in his

(“Those . . . obstinately persevering in manifest grave sin are not to be admitted to holy communion.”).

129. Joseph Ratzinger, Congregation for the Doctrine of the Faith, *Worthiness to Receive Holy Communion: General Principles* ¶ 3, ETERNAL WORD TELEVISION NETWORK (July 2004), <https://www.ewtn.com/library/curia/cdfworthycom.htm> [<https://perma.cc/SY6Z-NZ5B>].

130. See 1997 CATECHISM, *supra* note 30, ¶ 2309 (“The evaluation of these conditions for moral legitimacy [of choosing to wage war] belongs to the prudential judgment of those who have responsibility for the common good.”).

131. William J. Levada, *Theological Reflections on Catholics in Political Life and Reception of Holy Communion*, U.S. CONF. CATH. BISHOPS para. 17 (June 13, 2004), <http://www.usccb.org/issues-and-action/faithful-citizenship/church-teaching/theological-reflections-tf-bishops-politicians-2004-06-13.cfm> [<https://perma.cc/Z77Y-3ZQN>].

public speeches.¹³² He also issued the *Compendium of the Catechism of the Catholic Church*, which discusses the subject of capital punishment under the heading “What kind of punishment may be imposed?”¹³³ The *Compendium’s* answer begins, “The punishment imposed must be proportionate to the gravity of the offense,” and then goes on to restate John Paul II’s view that public authorities should limit themselves to bloodless means when possible.¹³⁴ The *Compendium* thus reiterates that even after the publication of *Evangelium Vitae* and the 1997 revision of the *Catechism*, the death penalty still ought to be seen as a punishment meted out in retribution for grave crimes.¹³⁵ As was his wont, Pope Benedict XVI emphasized the continuity between modern articulations of Church teaching and those of previous generations. The Church seeks the abolition of capital punishment today, but it does not deny that grave crimes may justly be punished with death.

C. *The 2018 Catechism Revision*

On August 2, 2018, Pope Francis revised the *Catechism’s* language on the death penalty a second time. The revised text no longer says that “the traditional teaching of the Church does not exclude recourse to the death penalty” and now calls the death penalty “inadmissible.” In full, paragraph 2267 now reads:

Recourse to the death penalty on the part of legitimate authority, following a fair trial, was long considered an appropriate response to the gravity of certain crimes and an acceptable, albeit extreme, means of safeguarding the common good.

Today, however, there is an increasing awareness that the dignity of the person is not lost even after the commission of very serious crimes. In addition, a new understanding has emerged of the significance of penal sanctions imposed by the state. Lastly, more effective systems of detention have

132. See, e.g., EWTN News, *Pope Benedict: End the Death Penalty*, NAT’L CATH. REG. (Nov. 30, 2011), <http://www.ncregister.com/daily-news/pope-benedict-end-the-death-penalty> [https://perma.cc/Z884-DKZ8].

133. COMPENDIUM OF THE CATECHISM OF THE CATHOLIC CHURCH ¶ 469 (U.S. Conference of Catholic Bishops 2006) (2005).

134. *Id.*

135. See BRUGGER, *supra* note 48, at xvii–xviii; FESER & BESSETTE, *supra* note 24, at 182–83.

been developed, which ensure the due protection of citizens but, at the same time, do not definitively deprive the guilty of the possibility of redemption.

Consequently, the Church teaches, in the light of the Gospel, that “the death penalty is inadmissible because it is an attack on the inviolability and dignity of the person,” and she works with determination for its abolition worldwide.¹³⁶

The *Catechism* now clearly calls for an end to the practice of the death penalty worldwide. Its teaching on the moral status of the death penalty, however, is not clear on its face.¹³⁷ The word “inadmissible” does not have a precise, technical meaning in Catholic moral theology.¹³⁸ The death penalty could be “inadmissible” because, although legitimate in principle, it is not the policy the best advances the common good in today’s

136. 2018 CATECHISM ¶ 2267 revision, *supra* note 22 (quoting Address of His Holiness Pope Francis to Participants in the Meeting Organized by the Pontifical Council for the Promotion of the New Evangelization (Oct. 11, 2017), https://w2.vatican.va/content/francesco/en/speeches/2017/october/documents/papa-francesco_20171011_convegno-nuova-evangelizzazione.pdf [<https://perma.cc/SJS3-RZX9>]).

137. Commentators have split in their interpretations of the revision. Compare Steven A. Long, *Magisterial Responsibility*, FIRST THINGS, Oct. 2018, at 41 (*Catechism* revision makes only a prudential judgment), Vladimir Mauricio-Perez, *Interpreting the Catechism change on the death penalty from Tradition*, DENVER CATH. (Aug. 2, 2018), <https://denvercatholic.org/interpreting-the-catechism-change-on-the-death-penalty-from-tradition/> [<https://perma.cc/74DX-QMNN>] (same), and Raymond J. de Souza, *Catechism Change on Capital Punishment: Justified and Inadmissible?*, NAT’L CATH. REG. (Sept. 26, 2018, 7:52 AM), <http://www.ncregister.com/daily-news/catechism-change-on-capital-punishment-justified-and-inadmissible> [<https://perma.cc/5ZG3-KXDU>] (same), with The Editors, *Dignity and the Death Penalty*, COMMONWEAL (Sept. 10, 2018), <https://www.commonwealmagazine.org/dignity-death-penalty> [<https://perma.cc/KJF9-JJDU>] (*Catechism* revision teaches the death penalty is wrong in principle), Patrick Lee, *A Genuine and Important Development of Catholic Teaching*, NAT’L CATH. REG. (Aug. 3, 2018, 2:26 PM), <http://www.ncregister.com/daily-news/death-penalty-a-genuine-and-important-development-of-catholic-teaching> [<https://perma.cc/FM22-PT2F>] (same), Inés San Martín, *Pope Francis changes teaching on death penalty, it’s “inadmissible,”* CRUX (Aug. 2, 2018), <https://cruxnow.com/vatican/2018/08/02/pope-francis-changes-teaching-on-death-penalty-its-inadmissible/> [<https://perma.cc/59AL-KH48>] (same), and Tobias Winright, *Pope Francis on capital punishment: A closer look*, AMERICA (Aug. 17, 2018), <https://www.americamagazine.org/faith/2018/08/17/pope-francis-capital-punishment-closer-look> [<https://perma.cc/9PGR-T4RX>] (same).

138. See Dan Hitchens, *The Catechism and the death penalty: Are Catholics right to be worried?*, CATH. HERALD (Aug. 4, 2018), <http://www.catholicherald.co.uk/commentandblogs/2018/08/04/the-catechism-and-the-death-penalty-are-catholics-right-to-be-worried/> [<https://perma.cc/58Q3-E63X>] (“[I]nadmissible’ is a vague, non-technical term.”). Professor Steven Long claims that “‘inadmissibility’ is a legal and prudential term.” Long, *supra* note 137, at 42.

circumstances. In this case it would not be morally wrong to execute criminals in today's day and age, but neither, according to the *Catechism*, would it be the practice that best advances the common good and respects human dignity. The death penalty could also be "inadmissible" because it is intrinsically wrong and never justified under any circumstances. In that case the new revision would be making a claim that is at odds with Scripture and nearly two thousand years of Catholic tradition, and faithful Catholics could not assent to its teaching.

The new revision of the *Catechism* should be read in continuity with the Church's traditional teaching on capital punishment. The pope is not a prophet who receives new revelations but a custodian who preserves the deposit of faith given by Christ to the apostles.¹³⁹ Consequently a papal statement on a matter of doctrine, when ambiguous, should be read in harmony with the Church's prior teaching unless it expressly criticizes earlier formulations of the teaching.¹⁴⁰ This presumption of harmony certainly applies here, because the CDF has insisted that the revision "expresses an authentic development of doctrine that is not in contradiction with the prior teachings of

139. See First Vatican Ecumenical Council, session 4 (July 18, 1870), in DENZINGER, *supra* note 83, § 3070 ("[T]he holy Spirit was promised to the successors of Peter not so that they might, by his revelation, make known new doctrine, but that, by his assistance, they might religiously guard and faithfully expound the revelation or deposit of faith transmitted by the apostles."); Homily of His Holiness Benedict XVI at the Mass of the Possession of the Chair of the Bishop of Rome para. 19 (May 7, 2005) [hereinafter Homily of Benedict XVI], http://w2.vatican.va/content/benedict-xvi/en/homilies/2005/documents/hf_ben-xvi_hom_20050507_san-giovanni-laterano.pdf [<https://perma.cc/2VD2-TVU4>] ("The Pope is not an absolute monarch whose thoughts and desires are law He must not proclaim his own ideas, but rather constantly bind himself and the Church to obedience to God's Word, in the face of every attempt to adapt it or water it down, and every form of opportunism.").

140. Pope Benedict XVI, for instance, taught that ambiguous statements in documents of the Second Vatican Council should not be interpreted by a "hermeneutic of discontinuity and rupture" but by a "'hermeneutic of reform,' of renewal in . . . continuity." Address of His Holiness Benedict XVI to the Roman Curia Offering Them His Christmas Greetings para. 37 (Dec. 22, 2005), http://w2.vatican.va/content/benedict-xvi/en/speeches/2005/december/documents/hf_ben_xvi_spe_20051222_roman-curia.pdf [<https://perma.cc/FMM5-XDBE>]. The Church may reform and change on matters of prudence, but on matters of doctrine it cannot. The "hermeneutic of discontinuity" risks driving a wedge between the Church today and the Church of ages past. See *id.* para. 38.

the Magisterium.”¹⁴¹ It is therefore best interpreted as making a prudential judgment about the use of capital punishment in today’s world.

1. *The “Inadmissible in Practice” Reading*

Cardinal Luis Ladaria, writing in his capacity as head of the CDF, explains that the latest revision of the *Catechism* “situates itself in continuity with the preceding Magisterium” and in particular “follow[s] in the footsteps of the teaching of John Paul II in *Evangelium Vitae*.”¹⁴² John Paul II, of course, taught that the death penalty is a form of punishment that may be justly applied in some situations and that the primary purpose of punishment is retribution.¹⁴³ Consequently Cardinal Ratzinger, then the head of the CDF, insisted that John Paul II’s teachings do not constitute a rejection of the Church’s traditional teaching that grave crimes may justly be punished with death.¹⁴⁴ Since the new revision of the *Catechism* follows *Evangelium Vitae* in continuity with the prior teachings of the Magisterium, it cannot be read as denying the legitimacy of capital punishment in principle.

There is language in the new revision that indicates it is making only a prudential judgment about modern circumstances. The *Catechism* says that capital punishment “was long considered an appropriate response to the gravity of certain crimes and an acceptable, albeit extreme, means of safeguarding the common good.”¹⁴⁵ Cardinal Ladaria also suggests that “the political and social situation of the past made the death penalty an acceptable means for the protection of the common good.”¹⁴⁶ The *Catechism* continues, “Today, . . . more effective systems of detention have been developed” as an alternative to capital

141. Letter of Luis F. Cardinal Ladaria, Prefect, Congregation for the Doctrine of the Faith, to the Bishops Regarding the New Revision of Number 2267 of the Catechism of the Catholic Church on the Death Penalty ¶ 7 (Aug. 1, 2018) [hereinafter Ladaria Letter], http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20180801_lettera-vescovi-penadimorte_en.html [<https://perma.cc/8DVV-QHGD>].

142. *Id.* ¶¶ 6–7.

143. *See supra* Pt. II.B.1–2.

144. *See supra* Pt. II.B.3.

145. 2018 CATECHISM ¶ 2267 revision, *supra* note 22.

146. Ladaria Letter, *supra* note 141, ¶ 2.

punishment.¹⁴⁷ The emphasis on the change in circumstances implies that what was once necessary for the protection of the common good no longer is today. If the death penalty were intrinsically wrong, then it would be wrong regardless of how effective systems of detention are. Finally, the *Catechism* never directly calls the death penalty evil or morally wrong, only “inadmissible.” By contrast, the *Catechism* refers to murder, abortion, and euthanasia respectively as “a sin that cries out to heaven for vengeance,” “gravely contrary to the moral law,” and “morally unacceptable.”¹⁴⁸ When the *Catechism* aims to declare an action intrinsically wrong it does not mince words.

According to this interpretation, Pope Francis, like Pope John Paul II in *Evangelium Vitae*, is making a prudential judgment about the secondary, medicinal purposes of punishment. Catholics ought to take seriously his opposition to the death penalty, especially given the force with which it is expressed, even if they are not bound to agree. Prudential judgments about the medicinal purposes of punishment do not touch, however, on whether the punishment satisfies retributive justice. As long as a punishment is deserved, it cannot be essentially unjust, even if it would be better to impose a more lenient punishment. The use of the death penalty as a punishment for grave crimes therefore cannot be said to be contrary to “the inviolability and dignity of the person”¹⁴⁹ in an absolute sense, only less respectful of the inviolability and dignity of the person than some more lenient approach.

2. The “Inadmissible in Principle” Reading

The new *Catechism* revision nevertheless does not expressly say that the use of the death penalty is morally licit in some circumstances, only that it “was long considered to be.”¹⁵⁰ By speaking of “an increasing awareness that the dignity of the person is not lost even after the commission of very serious crimes,”¹⁵¹ the text also suggests that previous generations were simply not aware that in carrying out executions they were committing an offense against human dignity. Some commen-

147. 2018 CATECHISM ¶ 2267 revision, *supra* note 22.

148. 1997 CATECHISM, *supra* note 30, ¶¶ 2268, 2271, 2277.

149. 2018 CATECHISM ¶ 2267 revision, *supra* note 22.

150. *Id.*

151. *Id.*

tators, both those supportive of and critical of the new revision, have inferred from this that “inadmissible” should be interpreted to mean “wrong in principle.”¹⁵² Under this view, death would never be a just and proportionate punishment for grave crimes.

If, in fact, the newly revised text of the *Catechism* truly and unambiguously condemned the death penalty in principle, then faithful Catholics would have to withhold their assent to its teaching, because it would contradict centuries of authoritative Catholic tradition. The pope does not have the authority to abrogate the teachings of prior centuries. As the First Vatican Council taught, “the holy Spirit was promised to the successors of Peter not so that they might, by his revelation, make known new doctrine, but that, by his assistance, they might religiously guard and faithfully expound the revelation or deposit of faith transmitted by the apostles.”¹⁵³

If the death penalty were truly wrong in principle, then what God commanded Noah as a means of vindicating the sanctity of life would in fact be a violation of the sanctity of life.¹⁵⁴ Church authorities would have seriously misinterpreted Romans 13 for centuries.¹⁵⁵ The Church Fathers would have collectively been in error on a grave moral question.¹⁵⁶ What Pope Innocent I called “powers granted by God” would actually be an unjust form of killing.¹⁵⁷ Pope Innocent III would have required the Waldensians to abandon the true teaching of the Gospel and adopt an immoral view before they could be recon-

152. For supporters of the new revision, see *supra* note 137. For critics, see Hadley Arkes et al., *An Appeal to the Cardinals of the Catholic Church*, FIRST THINGS (Aug. 15, 2018), <https://www.firstthings.com/web-exclusives/2018/08/an-appeal-to-the-cardinals-of-the-catholic-church> [https://perma.cc/NA7C-HLDH]; Edward Feser, *Pope Francis and Capital Punishment*, FIRST THINGS (Aug. 3, 2018), <https://www.firstthings.com/web-exclusives/2018/08/pope-francis-and-capital-punishment> [https://perma.cc/KA4H-JUAQ]; Peter Kwasniewski, *Pope's change to Catechism contradicts natural law and the deposit of faith*, LIFESITE NEWS (Aug. 2, 2018, 10:12 AM), <https://www.lifesitenews.com/blogs/pope-francis-change-to-catechism-contradicts-natural-law-and-the-deposit-of> [https://perma.cc/4QYJ-JDDL].

153. First Vatican Ecumenical Council, *supra* note 139, session 4, § 3070.

154. See *Genesis* 9:6 (“Whoever sheds the blood of a human, by a human shall that person’s blood be shed, for in his own image God made humankind.” (emphasis added)).

155. See *supra* note 50 and accompanying text.

156. See *supra* Part II.A.2.

157. See *supra* note 79 and accompanying text.

ciled to the Catholic Church.¹⁵⁸ Arguments that Thomas Aquinas, the greatest Doctor of the Church, dismissed as “frivolous” would have been the correct arguments all along.¹⁵⁹ A position Robert Bellarmine, Doctor of the Church and master of dogmatic theology, called “heretical” would actually be the true position of the Church.¹⁶⁰ A practice the *Roman Catechism* commissioned by Pope Pius V called “an act of obedience to” the Fifth Commandment would in fact be a grave violation of it.¹⁶¹ More recently, Popes Leo XIII, Pius X, Pius XI, and Pius XII would have all been in error in their magisterial statements on this question.¹⁶² Even John Paul II and Benedict XVI, popes of the twenty-first century who vigorously opposed capital punishment in practice, would have erred by teaching that an intrinsically immoral act may sometimes be licitly carried out.¹⁶³

A single paragraph of the *Catechism* could not overcome the weight of all the authorities outlined above. The *Catechism* is not an infallible document; it is simply a restatement of established Catholic teaching that serves as an aid to instruction in the faith.¹⁶⁴ According to Cardinal Ratzinger, “[t]he individual doctrines which the *Catechism* presents receive no other weight than that which they already possess.”¹⁶⁵ If no authority in the Catholic tradition supports a proposition that is in the *Catechism*, the mere fact that the proposition is in the *Catechism* cannot thereby make it Catholic teaching.

Even so, if the *Catechism* did teach unequivocally that the death penalty is wrong in principle, many Catholics would still understandably shrink from calling a document promulgated by the pope erroneous. To say, however, that the death penalty is intrinsically wrong would be to say that many popes were in error, along with the Fathers and Doctors of the Church and, arguably, the Scriptures themselves. If the Catholic Church could not only fail to condemn but also explicitly sanction a

158. See *supra* note 83 and accompanying text.

159. See *supra* note 70 and accompanying text.

160. See *supra* note 74 and accompanying text.

161. See *supra* note 84 and accompanying text.

162. See *supra* notes 86–91 and accompanying text.

163. See *supra* Part II.B.

164. See 1997 CATECHISM, *supra* note 30, ¶¶ 11–12.

165. Joseph Ratzinger, *Introduction to the Catechism of the Catholic Church*, in INTRODUCTION TO THE CATECHISM OF THE CATHOLIC CHURCH 9, 26 (1994).

gravely immoral form of unjust killing so consistently for so many centuries, then its claim to be an infallible moral authority across time would be seriously undermined. If a traditional teaching so well established could be reversed in fewer than three decades, then other settled teachings of the Church could be abandoned just as swiftly. In the face of any such proposals, Catholics must instead adhere to the traditional teaching of the Church and reject any doctrinal innovation, even one coming from the *Catechism of the Catholic Church*.

Fortunately, Catholics do not face this difficult situation. The *Catechism* does not expressly say that capital punishment is intrinsically wrong, nor does it say that the Church's traditional teaching was in error. The CDF, moreover, has clarified that the new revision "situates itself in continuity with the preceding Magisterium."¹⁶⁶ The "inadmissible in principle" reading therefore not only contradicts the Church's traditional teaching on capital punishment; it also goes beyond the text of the *Catechism* and contradicts the CDF guidelines that Pope Francis himself authorized. To be truly obedient to Pope Francis, Catholics must also be obedient to his predecessors and affirm that grave crimes may justly be punished with death.

III. THE CHURCH'S TEACHING APPLIED TO AMERICAN JUDGES

Catholic citizens must wrestle with the implications of the new *Catechism* revision and come to their own conclusions about the continued prudence of the practice of the death penalty in their capacity as voters. For Catholic judges, however, the question is one of the legitimate authority of the state. Because the state has the legitimate authority to punish grave crimes with death, Catholic judges can in good conscience participate in capital cases, even if as a personal matter they favor ending the practice. Catholic judges can be confident in this conviction, because if Catholic teaching really required recusal the pope and bishops of the United States would not leave them without pastoral guidance on this matter.

166. Ladaria Letter, *supra* note 141, ¶ 7.

A. *Catholic Citizens and Judges*

Among faithful Catholics who acknowledge that state has the authority to impose capital punishment, there is indeed a legitimate diversity of opinion ranging from support for total abolition to firm support for retention. Archbishop Charles Chaput of Philadelphia, for instance, supports the total abolition of capital punishment “[i]n modern industrialized states” like the United States. At the same time, he has taught that the Church “cannot repudiate [the legitimacy of capital punishment] without repudiating her own identity.”¹⁶⁷ Cardinal Avery Dulles, the late great dogmatic theologian, took a middling approach. He thought that the death penalty “should remain in law, and its implementation should be a real possibility” in modern societies, but its use should nevertheless “be extremely rare.”¹⁶⁸ Professors Edward Feser and Joseph Besette, on the other hand, have actively criticized Pope John Paul II’s and Pope Francis’s arguments for abolishing the death penalty and argued at length that the practice of the death penalty promotes the common good in modern American society.¹⁶⁹ These are all legitimate positions that lie within the bounds of the Church’s teaching on capital punishment.

167. Archbishop Chaput clarifies Church’s stance on death penalty, CATH. NEWS AGENCY (Oct. 18, 2005, 11:00 PM), https://www.catholicnewsagency.com/news/archbishop_chaput_clarifies_churchs_stance_on_death_penalty_says_in_industrialized_societies_it_must_end [<https://perma.cc/6JK8-NQBD>]; see also Daniel M. Buechlein, *Declaration of Archbishop of Indianapolis USA on execution of Timothy McVeigh*, L’OSSERVATORE ROMANO, May 16, 2001 (weekly ed.), at 2, 8 (“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.”); *Reverence for Life and the Preservation of the Common Good: A Statement from the North Dakota Catholic Conference Concerning the Death Penalty*, N.D. CATH. CONF. (Jan. 1995), <http://ndcatholic.org/archives/feb04/index.html> [<https://perma.cc/QM43-8H3Z>] (“Thus, although the traditional teaching of the church accepts that the state may have a right to punish by means of the death penalty in cases of extreme gravity, the state does not have the duty to do so, and it should reject use of the death penalty if bloodless means are available to achieve the objectives of punishment.”).

168. Avery Dulles, *Catholic Teaching on the Death Penalty: Has It Changed?*, in RELIGION AND THE DEATH PENALTY: A CALL FOR RECKONING 23, 30 (Erik C. Owens et al. eds., 2004).

169. See FESER & BESSETTE, *supra* note 24, at 196–211; Edward Feser, *The new Catechism text on the death penalty will damage the Church*, CATH. HERALD (Aug. 8, 2018), <http://catholicherald.co.uk/commentandblogs/2018/08/08/the-new-wording-on-the-death-penalty/> [<https://perma.cc/VH94-6CYJ>].

At the same time, Catholic citizens should not lightly dismiss the prudential arguments against the use of capital punishment in modern society. Popes John Paul II, Benedict XVI, and Francis have all vigorously opposed capital punishment in practice, and the bishops of the United States have consistently called for the abolition of the death penalty in hundreds of statements in the past four decades.¹⁷⁰ Bishops' conferences in other countries have issued similar statements.¹⁷¹ These prudential judgments by Church leaders do not in themselves bind the consciences of the faithful, but they have powerful persuasive authority. Surely those who exercise the teaching authority of the Church are likely to have insight into how to apply Catholic moral principles to concrete situations.

These are all considerations for the Catholic citizen and legislator, whose role it is to decide upon which course of action will best "correspond to the concrete conditions of the common good and [most be] in conformity to the dignity of the human person."¹⁷² The relevant consideration for a Catholic judge, however, is not whether the death penalty is good policy but whether the state has the authority to impose it. In the American legal system, once the jury returns a recommendation that the defendant be sentenced to death, the law *commands* the judge to issue an order carrying out the sentence.¹⁷³ Catholics have a moral obligation to obey the just commands of the civil law,¹⁷⁴ which means that Catholic judges have an obligation to apply the law faithfully regardless of whether they favor the outcome as a matter of policy.¹⁷⁵ The civil authority, however,

170. See Howard Bromberg, *Pope John Paul II, Vatican II, and Capital Punishment*, 6 AVE MARIA L. REV. 109, 125 n.47 (2007) (collecting statements).

171. See BRUGGER, *supra* note 48, at 135.

172. *EVANGELIUM VITAE*, *supra* note 18, ¶ 56 (quoting CATECHISM OF THE CATHOLIC CHURCH ¶ 2267 (1994)).

173. See 18 U.S.C. § 3594 (2012) ("Upon a recommendation under section 3593(e) that the defendant should be sentenced to death . . . , the court shall sentence the defendant accordingly."); Garvey & Coney, *supra* note 4, at 321.

174. See LEO XIII, *LIBERTAS: ON THE NATURE OF HUMAN LIBERTY* ¶ 13 (1888) [hereinafter *LIBERTAS*], http://w2.vatican.va/content/leo-xiii/en/encyclicals/documents/hf_l-xiii_enc_20061888_libertas.pdf [<https://perma.cc/NYM7-6EHG>] ("[T]he highest duty is to respect authority, and obediently to submit to just law . . ."); *SUMMA THEOLOGICA*, *supra* note 26, pt. I-II, q. 96, art. 4 (holding that just laws "have the power of binding in conscience").

175. See *id.* pt. II-II, q. 67, art. 4 ("For the inferior judge [i.e. not the sovereign with the power to pardon] has no power to exempt a guilty man from punish-

has no authority to command actions that are contrary to the moral law.¹⁷⁶ A judge therefore cannot directly will any evil act, even if the civil law commands him to.¹⁷⁷

The death penalty is not like other situations a judge might face involving actions that are contrary to Catholic moral teaching. A Catholic judge can, for instance, in good conscience uphold laws permitting abortion, because in upholding the law the judge is not necessarily approving of abortion; he is only admitting that the law he grants him no authority to use the coercive power of the state to stop abortions from happening.¹⁷⁸ A trial judge issuing a death sentence, however, is directly willing that the criminal defendant be killed.¹⁷⁹ If the state has no authority to punish criminals with death in retribution for their crimes, then the execution of the criminal is simply an act of unjust killing, and Catholic judges facing the prospect of presiding over a capital case would have no choice but to resign or recuse themselves. If the state does have that authority, there is no evil in killing the defendant, and the judge may in good conscience order a sentence of death, regardless of whether he thinks that retention of the death penalty is the policy that best corresponds to the concrete conditions of the common good.

As demonstrated above in Part II, according to Catholic teaching the state has the authority to punish grave crimes with death. United States Supreme Court precedent currently permits the death penalty only for aggravated murder,¹⁸⁰ and the

ment against the laws imposed on him by his superior.”); William H. Pryor, Jr., *The Religious Faith and Judicial Duty of an American Catholic Judge*, 24 *YALE L. & POLY REV.* 347, 352–53 (2006) (discussing Catholic judges’ duty to apply the law).

176. 1997 *CATECHISM*, *supra* note 30, ¶ 1903 (“If rulers were to enact unjust laws or take measures contrary to the moral order, such arrangements would not be binding in conscience.”).

177. *See EVANGELIUM VITAE*, *supra* note 18, ¶ 74 (“Christians, like all people of good will, are called upon under grave obligation of conscience not to cooperate formally in practices which, even if permitted by civil legislation, are contrary to God’s law.”); *LIBERTAS*, *supra* note 174, ¶ 13 (“[W]here a law is enacted contrary to reason, or to the eternal law, or to some ordinance of God, obedience is unlawful, lest, while obeying man, we become disobedient to God.”).

178. *See* Scalia, *supra* note 15, at 18.

179. *See* Garvey & Coney, *supra* note 4, at 320–22; Scalia, *supra* note 15, at 18.

180. *See* *Kennedy v. Louisiana*, 554 U.S. 407, 437 (2008) (forbidding the death penalty in “instances where the victim’s life was not taken”); *Zant v. Stephens*, 462 U.S. 862, 878 (1983) (holding that death penalty statutes must limit the class of those eligible for the death penalty to those who fall under an enumerated set of aggravating factors). The Supreme Court has also left open the question of wheth-

Church has traditionally identified murder as a crime sufficiently grave to merit death.¹⁸¹ When a punishment satisfies the requirement of retributive justice, that is, when it is deserved, it is essentially just, and there can be no sin in imposing it even if a less severe punishment might be more conducive to the common good on the whole. American Catholic judges can therefore preside over capital cases in good conscience even if they personally favor the abolition of the death penalty.¹⁸²

B. *The Church's Pastoral Practice*

The pastoral practice of the Church confirms this. When the civil law conflicts with the moral law, the Church in its solicitude for the salvation of those involved in public life does not simply leave them without any pastoral guidance on the matter. *Evangelium Vitae* is clear, for instance, that it is “never licit” to advocate or vote for laws permitting abortion or euthanasia.¹⁸³ It then goes on to offer more specific guidance to legislators on when they can support compromise measures that increase restrictions on abortion and euthanasia without outright banning them.¹⁸⁴ The CDF and the USCCB have also issued guidelines making clear that politicians who promote abortion or euthanasia may be denied Holy Communion.¹⁸⁵ Pope John Paul II has given specific guidance to lawyers and judges on the subject of divorce as well. Lawyers are to “avoid being personally involved in anything that might imply a cooperation with divorce,”¹⁸⁶ but for judges, some entanglement is inevita-

er “offenses against the state,” including “treason, espionage, terrorism, and drug kingpin activity,” may constitutionally be imposed even if no one’s life was taken. *Kennedy*, 554 U.S. at 437.

181. See, e.g., *Genesis* 9:6; *Exodus* 21:12–14; *Leviticus* 24:17; *Numbers* 35:31, 33; *Deuteronomy* 19:11–13; *supra* notes 58, 61, 66, 73, 84 and accompanying text.

182. For an example of an American judge who takes just such a position, see Michael R. Merz, *Conscience of a Catholic Judge*, 29 U. DAYTON L. REV. 305 (2004). This conclusion also accords with the position of Justice Scalia, who reviewed capital cases as a Catholic judge not because he supported or opposed the use of the death penalty in practice but because he did not “find the death penalty immoral” in principle. Scalia, *supra* note 15, at 21.

183. *EVANGELIUM VITAE*, *supra* note 18, ¶ 73.

184. See *id.*

185. See Ratzinger, *supra* note 129, ¶ 5; Levada, *supra* note 131, para. 17.

186. Address of John Paul II to the Prelate Auditors, Officials and Advocates of the Tribunal of the Roman Rota ¶ 9 (Jan. 28, 2002), http://w2.vatican.va/content/john-paul-ii/en/speeches/2002/january/documents/hf_jp-ii_spe_20020128_roman-rot.pdf [<https://perma.cc/ZF2G-7BBQ>].

ble. “For grave and proportionate motives they may therefore act in accord with the traditional principles of material cooperation.”¹⁸⁷

Neither the USCCB nor any pope has ever offered any guidance to public officials warning them to avoid involvement with capital punishment.¹⁸⁸ Both the CDF and the USCCB have, in fact, explicitly confirmed that supporters of the death penalty, even those “at odds with the Holy Father” on the question, may receive Holy Communion.¹⁸⁹ If involvement in capital cases were truly an immoral cooperation with evil, then the pope and the bishops of the United States would be failing to offer essential pastoral guidance to those in public life on a grave moral issue.

IV. CONCLUSION

Catholics involved in public life must take seriously the obligations that both their faith and the law place on them. This includes carefully examining areas of potential conflict and determining what is called for when conflicts arise. Judge Amy Barrett and Professor John Garvey did this admirably in their 1998 article *Catholic Judges in Capital Cases*. Their conclusion, however, that the application of capital punishment violates Catholic moral principles is unwarranted. The Catholic Church has consistently taught over the centuries that the state has the authority to punish grave crimes with death. Neither *Evangelium Vitae* nor the *Catechism* as issued by Pope John Paul II sought to reverse that teaching, and both affirmed that public authorities could legitimately impose capital punishment. The latest revision to the *Catechism* by Pope Francis does not aim to reverse the Church’s traditional teaching, nor could it even if it

187. *Id.* (emphasis removed).

188. A recent statement by the USCCB on capital punishment does say that “some [public officials] *may* find themselves required to participate in a process *they find* morally objectionable.” U.S. CONFERENCE OF CATHOLIC BISHOPS, A CULTURE OF LIFE AND THE PENALTY OF DEATH 6 (2005) (emphases added). This general statement that public officials could *possibly*, but not definitely, find themselves in situations that violate *their own subjective* consciences, as opposed to the objective moral law, is nothing like the hard and fast specific commands issued to public officials under threat of denial of Holy Communion in the context of abortion, euthanasia, and divorce.

189. See *supra* notes 129, 131 and accompanying text.

purported to. There is therefore nothing essentially unjust in the American practice of executing those who have committed aggravated forms of murder, and nothing in the Church's moral teaching demands that Catholic judges must recuse themselves from capital cases.

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