



Doctrine and the Moral Law:
the Case of Capital Punishment

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Recent developments in biology and the behavioral sciences have ignited issues of the most profound sort having to do with who we as men and women are, about who Jesus made and what he expects of us, and about how our physical nature can be understood in these terms. As daunting as are the moral and intellectual trials inflicted on everyone by these developments, this has become in a real sense a time of great opportunity and learning. It is our calling as Christians always to welcome challenge of this sort, which our maker presents to us as ways to grow in wisdom and in our understanding of him and of his ways. As we wrestle with moral conflicts from modern genetic practices that mankind never previously imagined that we would ever have to deal with and as we struggle to understand the meaning of our humanity – our spirituality in the midst of our corporality – only our greatest thinkers can see through the fog. Only the Holy Father can rule, in the end, on perhaps conflicting claims and formulations as he is guided by the Holy Spirit.

Our sense of newness in how we think through these truly “New Matters” is understandable and actually commendable. In one area however it has at times spread confusion and almost a sense of rootlessness in its implications for matters of law, and especially matters of penal institutions and of the place of capital punishment. These are manifestly not new matters. Just the opposite, they are issues that the world has contemplated for millenia. They are matters that the doctrines of the Catholic Church have addressed at length. As we think through questions of law and governance, we bear in mind the recent comments of Benedict to the German Bundestag on the subject of the roots of law. As he

made clear, Christianity alone among the world's religions has never asserted a revealed legal code embedded in the ecclesiastical doctrines. Instead, the foundation of law is based on the natural law, which the Lord god our maker has written on the hearts of his people of all nations and religious traditions. That is not to say that we understand the law instinctively simply by virtue of our humanity. By no means. We recognize the very difficult demands of study and reasoning that over time open to us the architecture of this natural endowment. But study, including the study of our moral nature on this Earth, is rewarded if we are faithful to its demands.

The course of study has been fertilized by the gifts of the Spirit. We in the Judeo-Christian tradition appeal to the wise counsel of the Decalogue. In doing so we bear in mind that its truths are by no means unique to us. There is no place on Earth where the children are taught to kill or to cheat and steal. But more to the point we see that the Decalogue is not any kind of list of divine demands imposed on us. Just the opposite, it is rooted in our human nature. The commands are not decrees of the Lord, but are necessities consequent to our humanity. To be truly and fully human is to live according to them; to defy them is in a measure to defy our own humanity. So the Decalogue in conjunction with a vast store of practical wisdom acquired from many sources is the "natural" basis of our natural law. The consequences of this are revealed at the very start of the Commandments: the First one. Here the Lord reveals definitively our need for him which is both the result of and the deposit of our spiritual nature. To deny the Lord god is to put other gods before him. Above all, as the story of Adam and the Garden makes clear, it is to try to make ourselves our own gods. Truly there could never be an atheist in this world, because what is called "atheism" is nothing but the desire to be our own gods for ourselves. Everyone has his gods.

The Natural Law of Capital Punishment.

No human need is more self-evident than our need for safety and for justice in our dealings with others. Justice is realized in, for instance, the sanctity of private property. We need to be secure in what is ours and what belongs to others so that we can work to accumulate usable property and to plan for the future in cooperation with others. Property rights are enshrined in the natural law in ways that are nearly universally recognized.

Those few societies that attempted to do without property rights quickly failed, even in recent times, in order to drive home the importance of these rights. The right to life is of course even more fundamental. In any society where the rule is “Kill or be killed,” all cooperation between persons fails except for organization based on the most brutish exploitation of the weak by the strong. Out of the wisdom borne of millenia, complemented by revealed moral reasoning, mankind has codified a practical law to govern social interactions, and this law is supported by, among other things, strict sanctions to be imposed on anyone who rebels against them. It is a true fact that the laws of courts and governments can only succeed if they comply with the natural law, which is that law of our human nature. The abject failure of social systems that reject property rights, for instance, must make that fact abundantly clear, as it is painfully clear in the countries that fell into that error. As Benedict pointedly explained however, while the Church applies her divine wisdom to counsel the jurists and legislators, in the end it is for them to devise and revise their code as they think best. Without doubt, mere mortal men make many mistakes along the way, but the Church has nonetheless deemed the separation of functions to be God’s way in the world.

The nature of the cooperative relationship of Church and State is that the Church calls the State to attend to the demands of the natural law, by means of principles of moral duty which are built upon a structure of study of the needs of our human nature and of the divine gift of our humanity. The State makes practical decisions that, ideally, implement these principles along with other insights to achieve the goals of society and to serve the needs of the people.

These broad generalities bring us, then, to the matter of capital punishment. This is a highly contentious issue that predictably generates a vast amount of light and of heat. We have all witnessed the heated debate this issue sparks. I for one have, as someone who has studied the matter for a long time and from several different perspectives over the course of that time. At the present time there is a very single minded position taken by those who come from both secular and religious backgrounds in opposition to capital punishment, arguing that it is always and everywhere wrong and forbidden. At the same time there is of course a competing position asserting the legitimacy of capital punishment, so the debate – hopefully it is not a battle – is joined. In this short note I will dis-

cuss what I perceive to be the moral issues. My starting point will be the beliefs and doctrines of the Catholic Church.

As a starting point we can ask what the scriptures have to say. One citation to the scriptures, among several, is especially relevant here. Everyone is familiar with the words of the so-called “Good Thief,” Saint Dismas:

But the other [*Dismas*] spoke up and rebuked him [*his partner in crime*], “Have you no fear of God at all?” he said. “You got the same sentence as he did, but in our case we deserved it and we are paying for what we did. But this man has done nothing wrong.” Then he said “Jesus, remember me when you come into your kingdom.” He answered him “In truth I tell you, today you will be with me in Paradise.” Lk 21:40–43.¹

The implication of this passage is unmistakable. First of all it makes clear Jesus’ promise of limitless mercy to those who repent and seek him, even at the end of a wasted life. As for what it says about the thief, it says that he acknowledged and repented of his guilt under the most difficult circumstances. Nothing could have been more natural at that time than the attitude of his partner, overwhelmed with grief and bitterness toward a fate that had hanged him on that cross. But the good thief saw through his pain to the honest truth, and he placed it above his own suffering. For that reason, he resides with Jesus in Paradise. Since he gave so much for the cause of that truth, it is incumbent on us to value it too. The truth is the innocence of Jesus and the guilt of the thieves who deserved their punishment. It was on account of that recognition that Jesus brought him to life. In recognition of these events, we cannot assert that the punishment inflicted on the good thief – death – is ever unjust as a matter of principle. To take the opposite position is implicitly to take the side of Dismas’ partner, condemning the law that hanged them on a cross. If the punishment of death is in principle forbidden, then it was the other thief who spoke the truth and Dismas who is to be condemned.

¹ *The New Jerusalem Bible, Standard Edition*. Imprimatur: Rt. Rev. John Crowley, Bishop of Central London. (Doubleday, 1989).

Over the subsequent two millenia thinkers and Churchmen have revisited the licity of capital punishment repeatedly, but one further citation is needed here. At the Council of Trent, 1545–63 a.d., the assembly resolved that a Catechism be formulated to summarize the teachings of the Catholic Church and a commission was constituted to do the work. The document they produced, called colloquially the *Roman Catechism*, is therefore by construction a document of the Council itself. As such, it shares the pedigree of our consular documents: the Nicene Creed and the formulation of the Canonical Scriptures to name two others. It is invariable, infallible doctrine of the Catholic Church. The brief statement about capital punishment is therefore of more than passing interest.

“Another kind of lawful slaying belongs to the civil authorities, to whom is entrusted power of life and death, by the legal and judicious exercise of which they punish the guilty and protect the innocent. The just use of this power, far from involving the crime of murder, is an act of paramount obedience to this Commandment which prohibits murder. The end of the Commandment is the preservation and security of human life. Now the punishments inflicted by the civil authority, which is the legitimate avenger of crime, naturally tend to this end, since they give security to life by repressing outrage and violence. Hence these words of David: In the morning I put to death all the wicked of the land, that I might cut off all the workers of iniquity from the city of the Lord.” Instruction on the Fifth Commandment, Part 4.²

The justification of capital punishment is that it defends and promotes human life, and that it recognizes the essentiality of guilt and innocence. No further discussion of the

² *Catechism of the Council of Trent for Parish Priests*. Issued by order of Pope Pius V, PP. My sources for the text of the catechism is a web site: catholicapologetics.info/the_church/catechism and the Catholic Encyclopedia. The catechism – the first one of its kind – was written by a commission instituted by the Council as one of its final acts, and one that supplements one of the most significant innovations of the Council, the creation of Seminaries for the training and formation of the clergy. The Commission, and all the other acts of the Council, were fulfilled by Pope St. Pius V. A detailed exposition of the works of the Council of Trent is available on the web at www.christusrex.org, a site maintained by laymen of the Romanian Catholic Church.

permission *in principle* to execute those guilty of heinous crimes is needed. Actually, this statement seems to make it obligatory, but elsewhere it is clear that it is not obligatory. What is obligatory is to use the punishments provided by the law, including the taking of the life of criminals, to defend human life. We are directed to acknowledge the truth of the proverb that

“We cannot sacrifice the innocent in order to preserve the guilty.”

The Catechism does not elaborate on the causation between defense of innocent life and capital punishment. It simply asserts that one promotes the other. It is necessary therefore to address this gap in the reasoning. The authors of this Catechism, moreover, clearly thought that the connection is so obvious that it needed no explanation. One can posit three distinct connections.

First, the murderer is then unable to prey on the innocent. Since this is a defense of human life, it is within the ambit of the text. It is objected however that imprisonment is a preferable alternative which nonetheless reaches the same goal. I will defer this point to later, but it is noted.

Second, the example of the punishment meted out may deter others from murder. This is also a defense of innocent life and is therefore encompassed with the statement of the Catechism.³

Third, executing the guilty may validate the justice of the law, reassuring the public that the law is on their side and seeks to defend them. Here again we may ask whether imprisonment serves the same result, but without sanctioning the taking of life.

Of these three rationales, only deterrence connects cause and effect in a unique way, for which reason it alone cannot be questioned as a reading of the catechetical text.

³ The reality of deterrence has been investigated at length both in theory – where it is a rather obvious implication of human self-interest – and more importantly from an empirical and quantitative perspective. The number of such studies constitutes an immense literature, much too large to cite here at length, but two pieces are noteworthy. The first systematic research was the work of Professor Isaac Ehrlich, while he was on the faculty of the University of Chicago. His findings were argued before the Supreme Court at the time when the Court reinstated the death penalty, in the mid-1970’s. See Isaac Ehrlich, “The Deterrent Effect of Capital Punishment – A Question of Life and Death,” *American Economic Review*, Vol. 65 (3), June 1975, pp. 397-417. Skipping forward to the present, see Joanna Shepherd, “Deterrence versus Brutalization: Capital Punishment’s Differing Impacts among States,” *Michigan Law Review* 104, Nov 2005, pp. 203—249.

The fact that the Catechism does not expand on the meaning of “defense” cannot be read as a rejection of these reasons, because they exhaust the field of possible reasons. Any consideration that rationally amounts to a defense of the community, either by incapacitating violent criminals individually or by restoring confidence on the part of the public that their government is committed to the rule of law and to the defense of the innocent, is equally legitimized by this doctrine. On the other hand, the authorities are always held to a standard of exercising prudence and concern for all in the ways in which they implement this defense.

Morality and Prudence

Quite obviously the authority granted to the State to punishment criminals in this statement is limited to those actions that serve the purpose that it recognizes. It is not hard to discern other motives that are forbidden. Among these, and perhaps foremost among them, is a desire for revenge, and especially a desire for personal revenge. Only the State is granted the authority to punish. The persons directly affected by crimes have no special standing in the penal decisions, and the law is not conceived to be exacting their revenge. Only actions that defend the lives of the innocent, and that are necessitated by that need, are covered by the authority given to the state. A further qualification is however called for. In some times and places, the citizens are in effect thrown back on their own resources by the weakness of the legal authorities or by corruption of the judiciary to the service of the criminals. At such times, the innocent are left with no defense except to retaliate against aggressors. When the failure of the law makes that a practical necessity, it too is permitted under the provision for self-defense. What makes this a special case is that the form the retaliation takes can seem to answer the call to forbidden revenge. Revenge is not retaliation. Retaliation is a tactic, which if it were forbidden would leave the defender no option but to strike first. Revenge, by contrast, is the sign of pure animus toward the other party, without regard to guilt or innocence.

Furthermore, the State does not punish the guilty *because* their actions were evil. It punishes because their crimes jeopardize the public peace, undermining the common good. It is impossible to avoid moral judgements, and it would be somewhat hypocritical to pretend to do so. Thus, we fully recognize the evil nature of the crimes, but punish-

ment is not deserved because of their evil, but for the harm done to the community. To clarify this point, we observe that there are many other moral evils that are not crimes and that therefore go unpunished in this world. The State is the institution formed to manage the affairs of the community and to preserve the peace, which is a very expansive grant of power but it is not a grant of divine authority. Only God judges the person according to his just deserts, because only God sees what is written on the heart. This is a fine distinction, because the State does judge guilt and innocence. Indeed, if their verdicts were simply imposed without regard to the reality of guilt and innocence they would be invalid as a matter of moral principle, and would be counterproductive in practice. The public acceptance of verdicts is conditional on an acceptance of their true correlation with guilt and innocence. If it was understood that the courts proceeded arbitrarily, without regard to guilt, the law would itself become a cause of resistance and an object of contempt. In that state, it would be aggravating conflict rather than resolving it.

The duty of the law and the courts to defend the innocent and to preserve the peace, which implies defending its own credibility as an instrument of defense of the community, demands that the community accept the justice of its decisions, and punishments especially.

The Catholic teaching on morality and the natural law is by its nature a work of practical as well as doctrinal wisdom, because it addresses a real world where issues are rarely as simple as we would like them to be. The newest Catechism of the Catholic Church, available from the Vatican web site, reflects the resulting complexity of the issue of capital punishment, while reiterating the essential doctrines.

2266 The State's effort to contain the spread of behaviors injurious to human rights and the fundamental rules of civil coexistence corresponds to the requirement of watching over the common good. Legitimate public authority has the right and duty to inflict penalties commensurate with the gravity of the crime. The primary scope of the penalty is to redress the disorder caused by the offense. When his punishment is voluntarily ac-

cepted by the offender, it takes on the value of expiation.⁴ Moreover, punishment, in addition to preserving public order and the safety of persons, has a medicinal scope: as far as possible it should contribute to the correction of the offender.

2267 The traditional teaching of the Church does not exclude, presupposing full ascertainment of the identity and responsibility of the offender, recourse to the death penalty, when this is the only practicable way to defend the lives of human beings effectively against the aggressor. “If, instead, bloodless means are sufficient to defend against the aggressor and to protect 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.

“Today, in fact, given the means at the State’s disposal to effectively repress crime by rendering inoffensive the one who has committed it, without depriving him definitively of the possibility of redeeming himself, cases of absolute necessity for suppression of the offender ‘today ... are very rare, if not practically non-existent.’ [John Paul II, *Evangelium vitae* 56.]⁵

This more detailed treatment of the matter points to moderating considerations that apply at times to limit the use of capital punishment and that under different – worse – circumstances would actually encourage its use. The common element in all circumstance is the defense of innocent life.

Without in any way precluding other conditions, the statement focuses on the condition of society and particularly on the seriousness of heinous crime as a threat to the common good. When the situation of the community is well regulated and heinous crime is not a critical problem, it is difficult for the law to justify the use of capital punishment. Under those circumstances imprisonment is deemed to be an adequate sanction, in part

⁴ A clear reference to the Good Thief.

⁵ *Catechism of the Catholic Church*, as of October 2011. Source: the Vatican site www.vatican.va/archive.

because the sheer number of men in prison would be not too burdensome on the community. More importantly, the fewness of the prison population would itself signal that the threat of imprisonment is itself a sufficient deterrent to crime. As the Holy Father observes, at the present time, in the West, that is in fact arguably the state of affairs and so executions should be rare. Precisely how rare is rare is a matter of further judgement, but this application of the moral law is clear. It is abundantly clear, moreover, that the public at large concurs fully in this judgement, because at the present time executions are in fact very rare, and are actually unheard of throughout Europe.

While as a general principle this is not controversial, the details of its application are not entirely cut and dried. At this time, in America there are approximately 20,000 murders each year. Given the size of America, both in terms of population and geography that is not an overwhelming number even though it is also not a small number. The characterization by the Holy Father of the seriousness of the frequency of murder is not exactly accurate as applied to America, though it is very credible as applied to Europe, where the murder is much rarer. The doctrinal statement of the Catechism invites us to delve further into the factual situation on the ground. This is by no means a unique feature of this particular moral issue. Quite the contrary. To be more exact, every question of the moral law invites us to delve into the facts of the case because it is a law for life as it actually is lived. The moral law is not a kind of code of abstract and seemingly somewhat arbitrary principles imposed on reality.

The murder rate in America spans two vastly different local realities. For the large majority of Americans it describes a world of middle class life and low crime of all kinds. The citizens of this “America” moreover are highly educated and politically involved, so the political process is attuned to their desires. The other America is generally urban world of deep poverty compounded by welfare dependency and narcotics. It is a world of very limited potential for its citizens and a world ignored by the political process.⁶ Its citizens are marginalized by the wider society. This is to a degree inevitable, in the sense that there is seemingly nothing that any one alone could do to bring the urban poor into the society and to break down the barriers of segregation which holds them in its grip.

⁶ The bitter marginalization of the urban ghetto is only made more offensive when it is used cynically by the self-appointed advocates of the poor who predictably rediscover their deep sympathy on the eve of general elections.

The existence of this subculture is itself a national scandal, but it persists. It is a subculture of high crime rates of all kinds, and of a very high rate of imprisonment. What is clear is that if these pockets of urban poverty were viewed as a “nation” in themselves, and if they were governed by their own legal code, no one could seriously argue for the accuracy of the Holy Father’s characterization of the conditions in that society.

The update of Federal Bureau of Investigation database, called the Bureau of Justice Statistics, for the period from 1990 to 1995 reveals that the black community in America, which represents about 12% of the population, accounts for 50% of murders. The “majority” community – “white” and Asian⁷ – representing about 70% of the population accounted for 37%, almost all of which are committed by the white majority.⁸ On the other hand, the application of the death penalty shows a pronounced bias against the majority, and leniency toward the urban, black community. Counting all executions, 56% of the condemned were white (none were Asian, for all practical purposes) and 35% were black. If we added into the majority community that part of the black population who are highly integrated into the majority, the findings would be that much starker, because the ghetto proper is nowhere near 12% of the population, but it is the location of almost all of the crime. One possible inference to draw from these statistics is that the sentence of death is imposed comparatively rigorously against the majority and much less against the minority. The residual data, covering Indians and Latinos, resembles the data for black offenders. Whether that is evidence that the “majority” culture demands defense against persons likely to injure them – their white and Asian neighbors – while neglecting defense against other minorities who are effectively confined to their ghettos, needs further study. In any case, the enormous difference in murder rates seems to imply a corresponding neglect of deterrence.

One of the unlovely aspects of the state of the debate about capital punishment is that the middle class majority of America has taken it upon themselves to impose on the poor a law that is wildly improper for them: a law that is arguably quite immoral when applied to them. The comfortable middle class like to know that they live in a world

⁷ For this purpose the two communities have to be counted together, because in fact they are highly integrated. Asians have somewhat higher income and social status than whites, with the difference accounted for by poor, rural whites.

⁸ These summary statistics come from Mr. Dudley Sharp, president of Justice For All. He can be reached at www.justiceforall.com.

where resort to capital punishment is rare – which is entirely understandable – but in doing so they ignore the needs of the poor. This is however by no means a simple matter, and one for which there is no simple cure. The law cannot easily apply different standards to rich and poor. In reality they today live in a world of unequal standards, but that is by default. To codify the unequal, or more accurately one would describe it as “differentiated,” application of the law is almost impossible to justify. The raw fact continues however, which is that our self-described high-minded stance in regard to capital punishment rests on a reality of hypocrisy and of indifference to the needs of the less fortunate. It should come as no surprise that the urban ghetto which houses the poor is also the source of a wildly disproportionate number of elective abortions. No surprise because the callous disregard for the dignity of men and women never evidences itself in only one way, but slithers through all aspects of life.

Adequacy of Imprisonment

The new Catechism places the issue of capital punishment and its permissibility squarely on the adequacy of prison as a substitute. The legitimacy of the goal, which is the defense of innocent life, is absolutely invariable, and no part of the Catechism calls that rule into question. The catechetical rule has been questioned in several dimensions, but above all its invoking changeable social conditions in the moral calculus has drawn particular fire. In the terms of the resulting debate, this has been identified as the appropriateness of prudential considerations.

At heart this rests on a single question, of whether some actions are permissible, or even obligatory, in certain environments but impermissible in others. It is understood that the proposed rule is then a conditional one taking the form “When conditions X obtain, then it is always wrong (or mandatory, or whatever) to take action Y.” There is no reason why the moral law should not have conditionalities of that kind. If in fact it is wrong to do Y when X is the condition on the ground but right to do it at other times, then that is the rule. Neither Y nor the contrary of Y is a rule; it is the conditionality that is the rule. The extensive moral code relating to war and the prosecution of war is a model of such conditions. In the case of the law on capital punishment the effect seems a little different, because the conditioning facts, the X’s, are not specific findings of facts –

“Country A launched a surprise attack on B” – but are instead vaguer conclusions of social conditions. The role of conditionalities is however in no way controversial. Guided by that reasoning therefore we conclude that it is not at all inappropriate for the Catechism to condition its approval of capital punishment on the observed demands of the moment.

To return, for a moment to the statistics cited above, suppose that at the present time there are 20,000 murders per year and that the general public is not visibly alarmed by that rate. Leave aside the possibility that the majority basks in the safety afforded by letting the poor take most of the risk. In any case, they are not terribly threatened. At this time moreover the prisons are very well stocked, but not to the bursting point. As a nation we can afford to continue at the present level of incarceration. We assume further that the prisoners are themselves living in conditions that the majority view as safe enough. This is actually a highly improbable assumption, and the violence level within the prisons is very high and the consequent number of murders among inmates high. Here, as in the ghetto, the judgement of the general public of what is adequate is very suspect, but to question it would take us too far afield. So to summarize, all things considered we can be fairly content at this time with the level of public safety that our penal systems provides. That’s wonderful.

But it does not come with guarantees. There are several disturbing trends in society that point toward a deterioration of these conditions. These are all ominous signs that the Catholic Church has joined others in warning about, so by no means is Rome indifferent to them. Far from it, the Vatican has from the start been a leader in trying to alert the public to what their effects will be and in attempting to rally remediation. Narcotics on the street, poverty and desperation, family disintegration, continuing programs to marginalize marriage itself in society, and marginalization of persons who are easily exploited, like so-called “illegal” aliens. In the present context however, we need to focus not on what could or should be done to alleviate these conditions, but only of sizing up what the consequences will be. There has never been a society where conditions like this have failed to ignite a crime wave. Miracles do happen, and we can always hope but while we do so we also need to think about what the future holds in case hope is insufficient.

The only truly “moral” response is to integrate the poor and displaced into society and to offer them the support and protection that it offers. Charity demands that the unemployed find work and the homeless find decent shelter in company with their families and loved ones. Moreover it demands that the poor obtain the nutrition they need, and that their essential medical needs are met. Nothing takes precedence ahead of these tasks, and nothing that the law and the penal system can do even begins to replace them. But we cannot wish away questions of how the courts and prisons must respond too.

We can easily identify, hypothetically at least, a world in which the incidence of violence leaves the citizens fearful for their safety, and for the safety of the property that they rely on to provide for themselves and their families. At the same time, desperate people will be tempted to survive by thievery and mayhem, and the environment in which they live will be a place of increased fighting and killing. The authorities will attempt to respond by imprisoning more people, but the growing prison population will itself prevent them from being successful. So this is the scenario: rising crime, and crime committed by the most desperate men, bursting prison populations, and widespread fear that goes with the recognition that the trends are unsustainable. One fact becomes rather clear: the world of the Catechism’s bland reassurances no longer obtains. More prisons are not the answer, because the prisons have already visibly failed. Who would have the temerity to propose building more of them? What has not changed? The unchanged fact is the purpose of the courts and the law and the prisons, to defend the innocent from exploitation and injury by the guilty.

This is an eventuality that everyone would want to prevent, but in truth we may or may not get that opportunity. As the Holy Father explained in his recent speech to the Bundestag, moreover, it is the civil authorities who are charged with responsibility for the defense of society and with responsibility for exercising their worldly prudence toward that end.⁹

⁹ In that address which deals with the moral demands on the civil law, and on the central place of conscience, the Holy Father explains, “Christianity has never proposed a revealed body of law to the State and to society, that is to say a juridical order derived from revelation. Instead, it has pointed to nature and reason as the true sources of law – and to the harmony of objective and subjective reason, which naturally presupposes that both spheres are rooted in the creative reason of God.” Source: the full text of his remarks available at the Vatican site, www.vatican.va.

Murder as a profession

Above any other consideration, measures to deal with crime and murder as a profitable profession demand the full force of the law. This is by no means merely a hypothetical issue. It is real and present in every time and place, but for the present purposes the example of the crime bosses that reign in the south of Italy and Sicily stand out as the most egregious and the most familiar. The Cosa Nostra in Sicily and the Black Hand societies in Calabria have held the power of life and death over the poor peasants of those regions for centuries, using murder as a tool to perpetuate their control. The result has been perpetual poverty and backwardness, as those who can flee do so, leaving only the poorest of the poor to suffer in silence. The poor then have a hard time making ends meet, and naturally gravitate to the one occupation that offers a decent wage: crime as a foot soldier in the criminal organization. This is a rejection of human life almost without equal on this planet. It is a true holocaust of the Calabrians and Sicilians.

The form of punishments meted out to these professional murderers takes on secondary importance to the broader need for police action of all kinds. After all, even the death penalty is meaningless if the guilty simply go free. Their freedom to sneer at the law is the result of their willingness and ability to kill. Even the most ambitious and dedicated policemen, when confronted with the daily threat of assassination in the night from any quarter will think twice about defying the powers that rule the night and will lose interest. If the Mafia routinely kills its opponents and the police only slap their wrists, when indeed they are able to do anything at all, the outcome is to say the least predictable. The criminals will become an endemic societal disease and the police will have been tamed and helpless.

In an important way, the societal conditions favor the police. At the most, only a small minority of the population are actually working directly for the criminals because they don't need armies of laborers as much as they need to have a large population of poor peasants to support them. So the vast majority of the population is naturally on the side of the police as long as they can do so safely. But it remains an unequal contest if the criminals are armed and the police are effectively disarmed. It should never be necessary for the law to become lawless in order to defend the public. One can easily imagine police tactics that amount to adopting methods more ruthless than the criminals, but over

time the outcome would be that the so-called “police” would also become indifferent to the cries of the public and would wield authority not by their legitimacy, but by the fear they command. It does not serve the innocent to fear the police even more than they fear the criminals, because that fear itself *is* the crime.

Assuming for the moment that the police could identify and prosecute some crime bosses and their hired killers, one might still ask whether it would be enough simply to imprison them. The answer is resoundingly negative. In Sicily and other places, the courts too are infiltrated by the crime lords. One result is that even when public outrage is sufficient to obtain a conviction of one of them, if the only result is that they are sent to prison they continue to wield their authority over the criminal world, and they continue to exercise influence over the police and judiciary. One example illustrates this at work. Notorious Al Capone was sent to the federal penitentiary at Atlanta, Georgia to spend his remaining days. While there he held court every day in the gymnasium, entertaining assorted reporters and supporters with his ready wit and caustic humor. Because of the notoriety of his case he could not be released, but he continued to lead his organization – the Chicago branch of the Cosa Nostra – as long as he was physically able. This organization was the single most powerful of all the Mafia families in America, and controlled not only Chicago but Los Angeles and Las Vegas too.¹⁰

Without question one of the most cherished causes championed by the crime bosses – though in no way am I questioning the sincerity of others – is to remove the threat of execution from them and from the men who serve them as professional assassins. How much easier it would be to recruit new guns if the risk of being executed for their crimes was taken away. While Capone was already a very sick man in Atlanta, in other cases there is nothing to prevent corrupt judges from finding ways to release professional criminals.

The organizations of this kind are in the business of preying upon the public, enriching themselves at the expense of the innocent and industrious, and using the constant threat of death to sweep away opposition. It would be quite impossible to imagine a more

¹⁰ Many of the events depicting in the film *The Godfather* refer not to New York, but to Chicago. After Capone, the most durable Chicago boss was Sam “Momo” Giancana. “Momo” is the Italian term for godfather. Al Capone was a very smart man. Looking back on his career he expressed only one regret, which is that had it not been for the Irish gangsters who fought him, he (in his own opinion) could have been president of the United States.

direct and systematic rejection of the value of human life. To repeat a previous point, one that certainly bears repetition, the law cannot afford to let its commitment to the rule of law slip, even when that might seem to be an expedient course. The more unprincipled the criminals become, the more principled the police and the courts must be. But that doesn't change the fact that they simply must brandish the threat of death for these systematic and inhuman crimes. Returning to Sicily and Calabria for a moment, the reality is that they have been simply surrendered to the criminals and criminal organizations. That outcome is completely indefensible. It is a denial of human rights on a monumental scale.

More on Conditionalities

The text of the new Catechism that refers to the conditions of modern life is frequently described as introducing prudential judgement into the doctrine, meaning that it relates to a judgement formed by the Holy See that could be interpreted as advisory rather than strictly doctrinal. The clear doctrinal statement, which simply restates the position of the Roman Catechism, is a moral absolute, and implies that under certain, but unspecified conditions it is mandatory to execute those guilty of heinous crimes against the person. The "prudential" text has to be understood as clarifying that doctrine.

It should come as no surprise that the moral law contains conditional rules. The central doctrine is itself conditional, expressing a condition in which taking life is proper. All rules that have to be applied to this world are necessarily conditional. The balance between cluttering a text with complex conditions and informing the Faithful about the true terms of the law may become somewhat blurred in the process, but that is why the people have been given minds to reason and access to guides of all kinds. As the comments above make, I hope, clear, the Catechism is actually rather understated on some very important conditionalities. The treatment of murder-for-hire and of criminal organizations that thrive on it, for instance, could I think legitimately be added to this article. Understandably however in the service of simplicity and conciseness, this sort of detail can be left to broader studies, and left to the civil authorities who grapple with crime and punishment every day.

The text can reasonably be read to assert another kind of prudential judgement; one that has no place in the Catechism. It is not a consequence of the moral law that

modern penal practices are in fact sufficient to defend the innocent and punish the guilty. The proposition that they are is not a “truth” at all, even though it is highly reasonable when applied to the comfortable middle-class culture that has prevailed in recent years in the Western world. When and where that condition prevails, as the Catechism asserts, it becomes hard to justify executions except in very unusual circumstances. The Catechism cannot however state as a matter of doctrine that a comfortable, middle-class lifestyle will always as a matter divine law obtain throughout the world and for all time. That is not any sort of doctrine, and could never be such a doctrine because it is conditional on the generosity of nature and not obviously on the unwavering command of nature’s God. Stated more simply, whether or not imprisonment is sufficient is sometimes true and at other times is not true; or to state it somewhat more familiarly, it is always true to some, perhaps miniscule extent but whether it is a useful guide to the courts and the law is by no means certain.

Taking their cue from what they perceive to be the doctrines of the Catechism, some Catholics have adopted a blanket denial of the legitimacy of capital punishment, even though that position is clearly opposed to the actual Catechism. Ironically perhaps, this rather absolutist rule, it is claimed, is justified by the “prudential” text, but clearly that would be a contradiction. Conditional rules never justify unconditional conclusions. To do so would be a manifest absurdity. Those who assert that there is an absolute prohibition against capital punishment seem somehow to have misread that observation about the fortunate conditions of life today as a divine guarantee that those conditions are certain to continue forever. Would that it were so!

The Magisterium has, on the contrary, wisely left it to the civil authorities to judge “on the ground” what conditions obtain at a particular time and place and to respond accordingly. The “prudence” that the moral law in all its applications calls for is not the prudence of the Magisterium, but prudence exercised by the public and especially by their civil governments. Heaven knows, they fail all too often in their call to prudence, but if and when they fail, it is not the call of the Magisterium to impose her authority to amend their errors. To do otherwise is for the keepers of the Magisterium to exceed their authority in a most imprudent way.

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