The Conundrum of Capital Punishment
What *does* the Catholic Church teach?

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_Whoever sheds the blood of man, by man shall his blood be shed; for God made man in his own image._
Genesis 9:6, RSV-CE

_For the scepter of the wicked shall not rest over the land of the just_  
_for fear that the hands of the just should turn to evil._
Psalm 125:3, Grail Translation
Particularly since the 1995 publication of John Paul II’s encyclical *Evangelium vitae*, there has been much confusion around the Catholic Church’s teaching on capital punishment. Against the backdrop of a long tradition that acknowledged the legitimacy of the state’s exercise of the death penalty, the Holy Father wrote that it should be exercised only “in cases of absolute necessity” which he claimed were “very rare, if not practically non-existent.”¹ A vigorous debate has ensued in which one side claims that John Paul II was saying something so truly new that the Church may be expected to soon declare capital punishment to be intrinsically evil, while the other side insists that the Pope’s statements can and should be interpreted as being essentially in line with pre-existing Church teaching.² The former group sees not just a development in doctrine, but even a change,³ while the latter group thinks that even “development” may be too strong a term for what amounts to basically a prudential application of the Church’s timeless teaching on this topic.⁴ These are obviously extremes in the overall debate, but others have noticed that even the statements of bishops on the issue of capital punishment have been divided between condemning capital punishment for being immoral as such and simply calling for the state to renounce, on prudential grounds, an essentially legitimate practice.⁵

The debate seems to have added depth because of disagreement over just how new the opposition to the death penalty is. One Jesuit argued that the “absolutist” position that the death penalty is always wrong is “not really new” because it has been held by pacifist groups

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throughout Christian history, while another Jesuit points out that “current rejection of the death penalty rests uneasily with the apparent support for the death penalty offered by religious authorities of several generations ago.” (Perhaps ironically, the former is against the absolutists, while the latter is more sympathetic to them.)

Cardinal Dulles finds the whole question rather simple. “The magisterium is not changing the doctrine of the Church” because neither the Pope nor the bishops “rule out capital punishment altogether.” He claims that the magisterium has never “advocated unqualified abolition of the death penalty” nor denied “the right of the State to execute offenders at least in extreme circumstances.” In contrast to this, Christian Brugger finds “strong evidence that a change in the traditional Catholic teaching on the death penalty is being anticipated in the magisterial writings of John Paul II.” He deliberately calls this a “change” rather than a “development” because he believes that “a theoretical foundation is being laid for a substantive revision in the Church’s teaching on the morality of capital punishment.” Brugger thinks that recent magisterial teaching shows that “capital punishment is wrong, always was wrong, and the Church should clearly teach this.” Back on the other side, Steven Long argues forcefully that “claims for doctrinal development are, so far, unjustified” and that reading Evangelium vitae with an eye to tradition will show it to be a prudential application of long-accepted principles.

Given that both of these contradictory interpretations have appeared in the same respected

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7 Dulles.
8 Ibid.
9 Brugger, “Rejecting,” 388.
10 Brugger, “Catholic,” 42.
12 Long, 513-514.
journal (The Thomist), it is evident that the state of Catholic teaching on the question of the death penalty is unclear even to honest professionals.\textsuperscript{13}

The aim of this brief study then will be to consider recent magisterial teaching on the death penalty in an attempt to clarify what the Catholic Church really says about capital punishment today. Since Brugger makes the more extraordinary claim—that the Church is preparing to overturn two thousand years of approval of the death penalty—and since extraordinary claims require extraordinary evidence, the focus will be on how his arguments stand up to scrutiny. By the end it should be clear that Brugger’s bold interpretation of John Paul II’s teaching on the death penalty is less reasonable than the status quo interpretation promoted by Long, Dulles, and others. The Church’s fundamental understanding of the death penalty has not changed, but she has adopted a new way of speaking about it that is relevant to new circumstances.

The first problem for anyone wishing to understand the Church’s current teaching on capital punishment is determining where to look to find it. The disagreement over the nature of the current teaching begins with this seemingly simple issue. Those advocating that nothing much has changed tend to concern themselves only with Evangelium vitae and older traditions,\textsuperscript{14} while Brugger has made extensive recourse to the teaching as expounded by the Catechism of the Catholic Church.\textsuperscript{15} Obviously the question of which texts to interpret must be answered before any meaningful exposition of the teaching in question, so the disagreement on this preliminary point of which texts to work with is striking. In some sense it must be considered a flaw in Long’s exposition that he neglects the Catechism which had already been published even in its

\textsuperscript{13} Cf. Brugger, “Catholic,” and Long.
\textsuperscript{15} E.g., Brugger, “Catholic,” 42-50.
revised edition by the time of his article. However, Brugger’s opinion of and reliance on the Catechism—even to the point of taking “the Catechism’s teaching on the death penalty to be equally if not more important” than the teaching of Evangelium Vitae—seems to be exaggerated.\footnote{Ibid., 50.} He claims that this exalted view of the Catechism’s teaching,\footnote{Brugger seems to hold the Catechism in such high regard that he even at one point refers to those who worked on it as the “papal authors.” Ibid., 48.} at least on this topic, can be justified because the Catechism “was a collaborative effort of the bishops of the world” and because “the morally relevant elements of Evangelium vitae’s teaching were incorporated into the 1997 typical edition.”\footnote{Ibid.} However, Pope Benedict XVI, who oversaw the production of the Catechism, wrote, while still Prefect of the Congregation for the Doctrine of the Faith, that the “individual doctrines which the Catechism presents receive no other weight than that which they already possess.”\footnote{Joseph Ratzinger, \textit{Introduction to the Catechism of the Catholic Church} (San Francisco: Ignatius, 1994), 26.} So, at least according to our current Pontiff who was himself intimately involved in the creation of the Catechism, the appropriate hermeneutic in this case would seem to place greater weight on the teaching as originally expressed in the encyclical than on the way that teaching is presented in the Catechism. In particular, such an interpretive model would imply that the Catechism should never be read as making a novel argument, but only as organizing and presenting teaching already promulgated elsewhere.

The application of this principle is particularly devastating to Brugger’s analysis because he reads great importance into such minute details as the subsection titles of the Catechism.\footnote{Brugger, “Catholic,” 43, and Brugger, “Rejecting,” 390.} All told, Brugger advances eight arguments (or “indicators”) based on the way the death penalty is described in the Catechism to advance his thesis; only two of these—regarding the double effect analysis and the condition of applying the death penalty only when “absolutely necessary”—can
be fairly applied to the teaching as presented in *Evangelium vitae*, and these arguments will be considered below. Nevertheless, whatever the effect on Brugger’s approach, the main focus in trying to make sense of recent teaching on the death penalty must be on the teaching as given in *Evangelium vitae*, although the *Catechism* (and the later *Compendium* and *YOU CAT*) can and should be consulted for their insight into the meaning of this teaching.

One of the surprising features of the recent scholarly debate over the death penalty is how narrowly both sides seem to read *Evangelium vitae*. From a review of the relevant literature one could perhaps be forgiven for thinking that the encyclical was actually about the death penalty and consisted entirely of paragraph 56, even if this is admittedly where the primary teaching on the death penalty can be found. Nevertheless the death penalty makes its first appearance much earlier in the encyclical when Pope John Paul II is describing the foundations being laid for a “civilization of love and life.”21 “Among the signs of hope” for this developing civilization, the Holy Father includes a “growing public opposition to the death penalty, even when such a penalty is seen as a kind of ‘legitimate defense’ on the part of society.”22 This early mention of the death penalty is important because it shows clearly that John Paul II believed that one could consider the death penalty legitimate as a form of criminal punishment while still opposing it in practice. He offers, as an explanation for this growing public opposition, that “modern society in fact has the means of effectively suppressing crime by rendering criminals harmless without definitively denying them the chance to reform.”23 He thus begins to show that a complex consideration of various purposes of criminal justice may lie behind such opposition.

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21 *Evangelium vitae*, 27.
22 Ibid.
23 Ibid.
The death penalty is next mentioned in the context of the Fifth Commandment, where the Holy Father notes that this commandment was not inconsistent with capital punishment since the Mosaic penal legislation “provided for severe forms of corporal punishment and even the death penalty.” As Cardinal Dulles has pointed out, there were “no less than thirty-six capital offenses” under the Mosaic Law. John Paul’s discussion of the Fifth Commandment will eventually lead to a doctrinal confirmation later in the encyclical that “the direct and voluntary killing of an innocent human being is always gravely immoral.” Particular attention should be paid to the word “innocent” which thus clearly removes the execution of convicted criminals from the scope of the discussion. Nevertheless, Brugger will place great importance on the fact that the Catechism makes the apparently novel claim that the “legitimate defense of persons and societies is not an exception to the prohibition against the murder of the innocent that constitutes intentional killing.” Brugger uses this as one of his “indicators” that the Church is getting ready to proclaim the death penalty to be inherently immoral, even though it is obvious from context that the kind of defense in question cannot be an “exception” because it fails to fall under the scope of the prohibition of the Fifth Commandment by virtue of being unintentional or involving the murder of the guilty, or both.

John Paul II begins to talk about such “legitimate defense” in paragraph 55. Here he reasserts that “Only God is the master of life!,” while admitting that there is a “genuine paradox” of “values proposed by God’s Law” in some cases that involve “a true right to self-defense.”

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24 Dulles.
25 Evangeliunm vitae, 57.
26 Catechism of the Catholic Church (CCC), 2nd edition, 2263 (emphasis added).
27 Brugger, “Catholic,” 44.
28 Evangelium vitae, 55.
Nevertheless, “the fatal outcome” should be attributed “to the aggressor whose actions brought it about.” This line of thought immediately precedes his teaching on the death penalty:

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

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

In any event, the principle set forth in the new Catechism of the Catholic Church remains valid: “If bloodless means are sufficient to defend human lives against an aggressor and to protect public order and the safety of persons, public authority must limit itself to such means, because they better correspond to the concrete conditions of the common good and are more in conformity to the dignity of the human person.”

John Paul II thus places the death penalty in the context of a penal system that strives to be “ever more in line with human dignity” and “God’s plan for man and society.” He describes the main purpose of such a system as trying to “redress the disorder caused by the offense” and explains that this involves a combination of “adequate punishment,” an effort to encourage rehabilitation so that the offender may ultimately “regain the exercise of his or her freedom,” the defense of

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29 Ibid.
30 Evangelium vitae, 56 (internal citations omitted). It should be noted that John Paul II is quoting from the first edition (1992) of the Catechism, not the current one. It is also worth pointing out that the phrase “must limit itself to such means” is translating much milder statements in the Latin (which is presumably the official text of the encyclical) and the French (which was the language the first edition of the Catechism was drafted in), namely his utatur instrumentis (“would make use of these means”) and s’en tiendra à ces moyens (“will limit itself to these means”) respectively.
public order, and the protection of the citizens. The Holy Father then pivots to the issue of the
death penalty, explaining that there must be a careful evaluation of the punishment which “ought
not to go to the extreme of executing the offender except in cases of absolute necessity,” by
which he refers to cases where the death penalty is the only way to protect society, cases which
he considers to be “very rare, if not practically non-existent.” The choice of words here is key.
The encyclical does not say that punishment may not go as far as the death penalty, or that it must
not, but merely that it ought not: it would be better if it did not. Furthermore, John Paul’s
characterization of circumstances where the death penalty would be “absolutely necessary” (and
hence clearly legitimate) as “very rare, if not practically non-existent” implies that theoretically
(at least) there are such circumstances.

The very language of the encyclical thus argues against the position that John Paul meant
to establish a precedent for saying that the death penalty is inherently unjustifiable. *Evangelium
vitae* seems to allow for cases both where the death penalty is necessary and where it is licit even
when unnecessary. Brugger, however, twists all of this around when he assumes that the death
penalty must be always wrong if it is never necessary, claims that it is never necessary, and then
draws the unwarranted conclusion that the death penalty is and always has been wrong.31

It is very clear that John Paul II wanted to see an end of the death penalty in modern
society. He included just such a petition in his 1998 Christmas message32 and renewed this
appeal the very next month in a homily in St. Louis, where he called the death penalty “both
cruel and unnecessary.”33 Tellingly that homily referred back not to *Evangelium vitae*’s infamous
paragraph 56, but to the earlier paragraph 27 which described the building of a “civilization of

love and life.” In *Ecclesia in America*, published earlier in the same month, John Paul II had already described the death penalty as “unnecessary.” Notably, despite repeated public pleas, he never directly claimed that the death penalty was unjustifiable or intrinsically evil.

How then does Brugger come to the conclusion that the death penalty is and always has been wrong? Partly it is by exaggerating and slightly tweaking the claims of *Evangelium vitae*, but the essential error lies simply in misinterpreting *Evangelium vitae* as being more focused on capital punishment than it really is. The encyclical as a whole is quite long, numbering 105 paragraphs in total, but only three of them even mention the death penalty. This hardly seems like the appropriate vehicle or manner for advancing novel teaching on the topic, and so “it ought not quickly or lightly be supposed that *Evangelium vitae* seeks within the compass of a few paragraphs to contradict prior Church tradition.”

Indeed, when we consider the purpose, history, and text of *Evangelium vitae*, the idea that it might have been intended to advance radically new teaching on the death penalty becomes almost laughable. John Paul II consulted with all of his brother bishops throughout the world prior to preparing the encyclical, and the fruit of that collegial effort is especially apparent in *Evangelium vitae*’s approach to murder, abortion, and euthanasia. Each of these issues is given an extended discussion, culminating in solemn statements (two confirmations, one declaration) made by the special authority of the Papacy and “in communion with the bishops” that these three species of action are gravely immoral, gravely disordered, or gravely contrary to God’s law. It is clear from the language of these three pronouncements that they constitute the

34 Ibid.
36 Long, 550.
37 *Evangelium vitae*, 5.
38 Ibid., 57, 62, & 65.
essential doctrinal teaching of the encyclical, yet in all three cases, John Paul II is careful to claim that this teaching has already been “transmitted by the Tradition of the Church and taught by the ordinary and universal Magisterium.”\textsuperscript{39} But if John Paul adopted such an explicitly and openly collegial method simply to solemnly reaffirm ancient teaching already infallibly taught by the ordinary and universal magisterium, how clear and deliberate would he be about introducing genuinely new teaching? Is it reasonable to think that he would just casually insert some radically new moral theories in the middle of these solemn declarations? Once the encyclical is appreciated in its entirety, the idea that the Holy Father was using it as the vehicle for advancing a new doctrine on the death penalty becomes seriously untenable. Brugger asserts that if it had been “the pope’s intention to stay within the traditional framework [of death penalty teaching], we may presume he would have made his intention clear,”\textsuperscript{40} a reasonable assertion perhaps if John Paul II had written at length about the death penalty, but surely a few paragraphs of discussion tangential to the main topic (it has already been shown that the death penalty was explicitly beyond the scope of the teaching on intentional murder of the innocent) do not require or merit such systematic presentation. Brugger has tried to make a mountain out of a molehill here, turning an encyclical concerned primarily with reaffirming ancient doctrine on murder, abortion, and euthanasia into one devoted specially to presenting new doctrine on the death penalty.

Brugger also exaggerates the claims of \textit{Evangelium vitae} to make them fit his theory. For example, he ridicules Long for suggesting that the encyclical merely “appear[s] to propose that only those executions are justified which are absolutely necessary,”\textsuperscript{41} insisting instead that it

\textsuperscript{39} Ibid. Each statement also comes complete with reference to \textit{Lumen Gentium}, 25.
\textsuperscript{40} Brugger, “Catholic,” 53-54.
\textsuperscript{41} Long, 517.
makes this claim “outright.”42 Actually what the encyclical states is that punishment “ought not go to the extreme” of capital punishment except when necessary, and while superficially this sounds like saying that only absolute necessary executions are justified, it is clear that the particular wording of *Evangelium vitae* leaves enough room for some nuance in its interpretation. Brugger however rejects any possibility of nuance, preferring to read the encyclical in stark terms. His simplistic reduction of the language of the encyclical enables him to take John Paul II’s characterization of situations where the death penalty is “absolute necessary” as “very rare, if not practically non-existent” and apply it instead to “occasions warranting the penalty,” even though “warrant” is obviously a much weaker criterion than absolute necessity.

Brugger’s loose standards of interpretation also lead him to the conclusion that the encyclical “does not include capital punishment as one of the available expressions” of public authority to punish criminals.43 This clearly goes too far, however, as it has already been shown that the language of *Evangelium vitae* must be seen as allowing for at least the theoretical possibility of licit application of the death penalty. Indeed, pace Brugger, the new Youth Catechism makes exactly this point: “Every legitimate state has in principle the right to punish crime appropriately. In *Evangelium vitae* (1995), the Pope does not say that the use of the death penalty is in every respect an unacceptable and illegitimate punishment.”44

As noted before, Brugger also relies heavily on minute details of the way in which the death penalty is presented in the *Catechism* in order to build up his arguments. He even takes this as far as comparing the presentation in the original and revised editions of the Catechism. For example, Brugger emphasizes that the 1997 *Catechism* discussed the death penalty in the context

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42 Burger, “Catholic,” 52
43 Ibid., 60.
44 YOUCAT: Youth Catechism of the Catholic Church, 381.
of self-defense—rather than in the context of punishment as the 1992 edition had done—to try to show that John Paul had shifted the paradigm for thinking about capital punishment.

Unfortunately, relying on such comparisons too much makes the success of his argument vulnerable to the Church’s persistence (or lack thereof) in adhering to this framework. In this case, the *Compendium*, a kind of third edition of the *Catechism*, does Brugger no favors. It treats self-defense in question 467 and punishment in questions 468 and 469. The death penalty is discussed only under the final question of this group: “What kind of punishment may be imposed?”45 So whatever the change in category may have indicated in the 1997 *Catechism*, the *Compendium* has negated it by reversing the categories once again.

For all of this, Brugger presents two arguments which are not essentially dependent on the *Catechism* and which may thus advance his purpose of finding something truly *new* in *Evangelium vitae*. First, he claims that the papal teaching is new because it does not conceive of capital punishment “in traditional retributive terms . . . but rather in terms of self-defense.”46 This claim would be more impressive if it were more true, and Brugger tries to have it both ways. He himself points out that Aquinas’s defenses of capital punishment, “following the example of the Patristic tradition before him, . . . are not defenses from retribution, but rather from the protection of the community.”47 Indeed, Aquinas taught that “if a man be dangerous and infectious to the community, on account of some sin, it is praiseworthy and advantageous that he be killed in order to safeguard the common good.”48 Brugger goes on to argue that there is “no evidence of a strictly retributive justification being defended by any influential theologian before the

45 *Compendium: Catechism of the Catholic Church*, 469.
46 Brugger, “Catholic,” 43.
47 Brugger, “Rejecting,” 393.
Thus, John Paul’s failure to conceptualize the death penalty in retributive terms is not novel at all, but moreover his discussion of the death penalty in terms of collective self-defense and double effect has already been anticipated by Aquinas, who is clearly comfortable commingling all of these ideas:

Nothing hinders one act from having two effects, only one of which is intended, while the other is beside the intention. Now moral acts take their species according to what is intended, and not according to what is beside the intention, since this is accidental as explained above. Accordingly the act of self-defense may have two effects, one is the saving of one’s life, the other is the slaying of the aggressor. Therefore this act, since one’s intention is to save one’s own life, is not unlawful, seeing that it is natural to everything to keep itself in “being,” as far as possible. . . . But as it is unlawful to take a man’s life, except for the public authority acting for the common good, as stated above, it is not lawful for a man to intend killing a man in self-defense, except for such as have public authority, who while intending to kill a man in self-defense, refer this to the public good, as in the case of a soldier fighting against the foe, and in the minister of the judge struggling with robbers, although even these sin if they be moved by private animosity.50

Aquinas clearly refers to the death penalty being carried out by public authority out of “self-defense,” albeit defense referred “to the public good,” and the broader context of his discussion already includes the principle of double effect, so it would seem that there is really nothing particularly new at all about Evangelium vitae’s conception of capital punishment in terms of self-defense rather than retribution.

Finally, we consider Brugger’s claim that Evangelium vitae fundamentally altered the moral calculus on the death penalty by counseling that it ought to be used only when “absolutely necessary.”51 The problems with this claim are two. First, this claim seems to go beyond the text, which (as has already been noted) does not clearly claim that capital punishment is evil whenever it is not strictly necessary. Second, however, is a larger problem concerning the nature

49 Brugger, “Rejecting,” 394.
50 Thomas Aquinas, ST, II-II, 64, 7 (internal citations omitted).
51 Brugger, “Rejecting,” 391.
of the required absolute necessity. John Paul II claims that “steady improvements in the organization of the penal system” have created a situation in which it is at least rare for the death penalty to be “absolutely necessary,” but it is not clear what improvements have conditioned this judgment.\textsuperscript{52} Indeed a “development” of the doctrine along these lines as anticipated by Brugger would necessarily call into question the Church’s wisdom in ever having approved of capital punishment:

Men and women of other generations than our own have known of the oubliette, that part of a dungeon where a prisoner could be cast and forgotten. That a dangerous felon might be cast into a well and fed with a basket has always been known. Technology has made the well more comfortable, and the food somewhat more nutritious. But the situation is not fundamentally changed. Given this fact, how can it be plausibly supposed that in previous epochs the Church approved the penalty only because it was “absolutely necessary” to the protection of society? Indeed, when has any execution ever been “absolutely necessary” to the protection of society (if we understand by “protection” merely physical defense of minimal public order)?\textsuperscript{53}

This is a significant problem for Brugger’s contention that \textit{Evangelium vitae} is preparing for a major shift in teaching on the death penalty, unless one intends boldly to contradict the entirety of traditional teaching on this question (a prospect addressed below). There are two solutions to this dilemma, but either of them would undermine Brugger’s claim that the standard of “absolute necessity” adds something essentially new. The first solution is to read the protection of society broadly as including “not only physical protection, but also the manifestation of transcendent justice . . . as necessary for the conformity of man and social order to divine law.”\textsuperscript{54} Under this approach, however, it is not clear that the real calculus of when to apply the death penalty has been changed at all nor that penal reform is particularly relevant to that calculus.\textsuperscript{55} This solution

\textsuperscript{52} Cf. Long, 517-518.
\textsuperscript{53} Ibid., 536-537.
\textsuperscript{54} Ibid., 539.
\textsuperscript{55} Ibid., 540.
then may not be sufficiently faithful to the conception of John Paul II. Alternatively, however, one may simply hold that “absolute necessity” is simply a prudential criterion rather than a moral one. Indeed, some writers have argued vigorously against the death penalty—comparing capital punishment to just war as an option only to be exercised after all others have failed while yet admitting the difficulty of conceiving a scenario in which such a last resort would be necessary with regard to a “criminal who is already disarmed, imprisoned, and subject to the substantial surveillance and punitive powers of the contemporary state”—and still concluded that there is no absolute case against the death penalty. This option makes sense and seems to be a fair reading of the encyclical’s teaching, but it obviously eviscerates Brugger’s claim that John Paul II altered the Church’s understanding of the death penalty with the criterion of “absolute necessity.”

Beyond the arguments about what Evangelium vitae said—and what it meant—there remains one issue which is somewhat preliminary to the discussion of whether the Church’s teaching might be fundamentally recast against the death penalty on principle, namely whether there is room in the tradition to accommodate such a change. Brugger, of course, has considered this issue and finds that there is room for a definition of the kind he anticipates, but it is worth considering how much of an uphill battle he is waging. The tradition includes the “nearly unanimous opinion of the Fathers and Doctors of the Church that the death penalty is morally licit” and “essentially just,” but it stretches all the way back to the Pentateuch. The numerous capital crimes of the Mosaic Law have already been mentioned, but in explicit contradiction to the modern idea that the inviolable dignity of man founded on his creation ad imago Dei absolutely prohibits the death penalty as such, one may cite Genesis 9:6: “Whoever sheds the

56 Conley, 96-99.
57 Long, 511.
blood of man, by man shall his blood be shed; for God made man in his own image.”

Here, in Sacred Scripture, the creation of man ad imago Dei is given as a justification for the death penalty rather than as an argument against it. It is also worth noting that not only does no New Testament passage disapprove of the death penalty, but Jesus Himself never denies the state’s authority to carry out the death penalty either. On the contrary, Jesus reminds Pilate that Pilate’s power to crucify Him comes from God (John 19:11) and commends the good thief who says that in being crucified he is getting what he deserves (Luke 23:41). The two great Latin doctors (Augustine and Aquinas) are agreed that the state has authority to impose the death penalty by divine delegation. The Vatican’s own penal code even included the death penalty for attempting to assassinate the Pope as late as 1969. Thus, the combined verdict of Scripture and Tradition has been fairly summarized as holding “that crime deserves punishment in this life and not only in the next . . . that the State has authority to administer appropriate punishment to those judged guilty of crimes and that this punishment may, in serious cases, include the sentence of death.”

Given the overwhelming nature of this tradition, it has been claimed that it would require a “principle rooted in revelation . . . to justify a genuine doctrinal shift.”

Despite the weight of the tradition, Brugger denies that “the Catholic Church has ever definitively taught the legitimacy of the death penalty.” He admits that the Church has affirmed the exercise of capital punishment by civil authority as legitimate, but judges that this does not

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58 Dulles.
59 Ibid.
60 Ibid.
61 Long, 533.
62 Dulles.
63 Ibid.
64 Long, 550.
65 Brugger, “Rejecting,” 400.
hold a doctrinally binding place. Working within the framework of Vatican II’s explanation of the charism of infallible teaching, Brugger quickly shows that the extraordinary magisterium has never been exercised regarding the legitimacy of the death penalty. On the question of whether the ordinary and universal magisterium has ever taught on the matter, he readily admits that the bishops, united with each other and the Pope, have been of one opinion in teaching authentically on this question of faith-or-morals; however, he claims that there is no evidence that the legitimacy of the death penalty in principle has been proclaimed “as to be definitively held” (definitive tenendum)—even despite “scattered episcopal statements” to that effect—since “the majority of episcopal statements are not proposed in this manner.” Brugger’s method for discerning the teaching of the universal and ordinary magisterium has been criticized for being so strict as to undermine fundamentally the ordinary magisterium’s teaching authority:

In reviewing the past relevant statements of the hierarchy, Brugger looks for those situations in which the teaching on a particular point was formulated against an explicit challenge and with an explicit intention to teach in a binding fashion. These requirements have two consequences. They take out of consideration all those statements in which the hierarchy simply presupposes or endorses a practice or a kind of action in passing, so to speak, or in which it takes for granted the affirmations of previous generations. They also reduce the range of what the church teaches authoritatively and effectively eliminate the notion of an ordinary magisterium. It is worth raising the question: what, if anything, taught prior to 1870 would meet a comprehensive application of Brugger’s requirements?

One wonders, for example, how often the hierarchy has ever taught the grave immorality of murder “against an explicit challenge and with an explicit intention to teach in binding fashion.”

Would any of the three instances of the universal and ordinary magisterium cited by Pope John

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66 Ibid.
69 John Langan, “Right or Wrong?,” America, 10 November 2003
Paul II in *Evangelium vitae* actually pass Brugger’s test for such teaching? The irony is that, in attempting to safeguard what he sees as the key innovation of the encyclical, Brugger may have undermined its explicit perpetuation of traditional teaching by rendering authentic exercises of the universal and ordinary magisterium “rare, if not practically non-existent.”

After all this, what then should be made of *Evangelium vitae* and John Paul II’s “growing public opposition to the death penalty”? Despite Brugger’s best efforts, it seems that the encyclical really cannot be fairly read to condemn the death penalty in principle. The more plausible alternative is that the encyclical encourages opposition to the death penalty while still allowing that it is in principle legitimate. This is not such a strange position. Even Cardinal Bernardin agreed with the “classical position” that the state had the right to inflict capital punishment and insisted that the death penalty should not be conflated with the inherently evil crimes of abortion, euthanasia, and suicide.\(^70\) St. Augustine defended the death penalty in principle, but regularly opposed it in practice with pleas for mercy made out of his pastoral concern for the care of souls.\(^71\) The Church simply finds herself in the same position today.

If the Church’s position is really so unchanged, one may well ask why the teaching sounds so different. The difference lies in the world: a world that needs to hear a message called the “Gospel of Life,” a world that actually needs to be told that murder, abortion, and euthanasia are wrong. The difference lies in the “culture of death.” The Church’s duty to counter this culture of death must condition her prudential judgments.\(^72\) With respect to the death penalty, the culture is so “metaphysically deracinated” that this punishment has been rendered “both morally

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\(^70\) Dulles.

\(^71\) Long, 512.

\(^72\) Ibid., 550.
unintelligible and unlikely of virtuous application.” Since the modern secular culture has no concept of transcendent justice (a justice above and beyond what human society makes it to be), the exercise of capital punishment “may well constitute a false antinomian claim to authority over life and death as such,” the indulgence of which could only exacerbate the society’s larger problems. In a culture that has lost touch with its Christian roots and where bodily death is seen as the greatest of evils, the death penalty may risk the “further brutalization of society” and introduce “a certain despair into the process of judicial punishment.” The death penalty should be for the people a “symbolic anticipation of God’s perfect justice,” but where those people believe that government authority is not divinely granted but arises from their own collective will, the death penalty is “misconstrued as a self-assertive act of vengeance” expressing “the collective anger of the group” rather than “the divine judgment on objective evil.” Given these conditions, the Pope and the bishops have come to the conclusion that it is better not to invoke the death penalty in contemporary society “because, on balance, it does more harm than good.”

The Catholic Church has always supported the legitimacy of the death penalty, and Evangelium vitae does not need to be read as in conflict with that tradition. Indeed the interpretation needed to make the encyclical be opposed to the death penalty in principle adopts a utilitarian view of judicial punishment (punishment as whatever—and only whatever—is necessary to secure the physical safety of society) which argues against its being an authentic reading. A better, and more plausible, interpretation “is that, in the light of the culture of death, the encyclical stresses that it is better for contemporary societies to avoid the use of the

73 Ibid., 548-551.
74 Ibid.
75 Conley, 98.
76 Dulles.
77 Ibid.
78 Long, 549.
penalty.” The special province of Church teaching on capital punishment has always been to help determine when the circumstances call for resorting to this extreme measure. Evangelium vitae identifies early on “the actual feasibility within most societies of relying upon other means for penalty” (a factor which John Paul II comes back to repeatedly, in the encyclical and elsewhere) and thus recommends that the death penalty be avoided as much as possible. In the end, then, the encyclical should not be seen as advancing “a doctrinal development in its own right,” but as making “a prudential application of Catholic doctrine by the magisterium to a widespread moral, cultural, and legal circumstance.”

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79 Ibid., 546.
80 Dulles.
82 Long, 551.
Works Cited


