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## THE DEMISE OF CAPITAL PUNISHMENT IN THE CULTURE OF DEATH AND THE RELATIONSHIP BETWEEN PAIN AND PUNISHMENT

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### INTRODUCTION

The changes in the current Latin *editio typica* of the *Catechism of the Catholic Church* ("*Catechism*"), specifically in the articles dealing with capital punishment,<sup>1</sup> and some of the responses to those changes, are thought provoking. In this context is the notable appeal of Pope John Paul II to spare the life of Darrell Mease.<sup>2</sup> This appeal has been taken as evidence, as indeed it could, that the Pope was "against" capital punishment.<sup>3</sup> The general impression is that the *Catechism* is also "against" capital punishment unless it is an "absolute necessity," an eventuality that is "practically non-existent."<sup>4</sup> Thus, as *Inside the Vatican* puts it, "the Catholic Church comes closer than ever to calling for a ban on capital punishment," an outright ban that is called for by pressure groups opposed to capital punishment.<sup>5</sup>

If Pope John Paul II and the *Catechism* are "against" capital punishment, the following question must be asked: is the separation of body from soul, that is, an act causing death, also *intrinsically evil*? The rhetoric and emotion accompanying the call for a ban on capital punishment seem to imply that it is. And paragraph 2267 of the

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1. *Catechism of the Catholic Church* ¶¶ 2266–2267 (2d ed. 1997).

2. See Mark Pattison, *Papal Plea Spares Killer from Death Penalty*, Nat'l Cath. Reg., Feb. 7–13, 1999, at 1 (describing Pope John Paul II's successful appeal to Missouri Governor Mel Carnahan to stop the execution of death-row inmate Darrell Mease).

3. See, e.g., Howard Bromberg, *Pope John Paul II, Vatican II, and Capital Punishment*, 6 AVE MARIA L. REV. 109, 128 & n.48 (2007).

4. *Catechism of the Catholic Church*, *supra* note 1, ¶ 2267.

5. Mariaceleste de Martino, *Catechism on the Death Penalty*, INSIDE THE VATICAN, Oct. 1997, at 22, 23.

*Catechism* does speak of non-capital punishment as “more in conformity with the dignity of the human person.”<sup>6</sup> This would seem to suggest that capital punishment is intrinsically wrong.

But this is a misreading of the *Catechism*. The *Catechism* neither implies nor should be taken to imply that capital punishment is intrinsically wrong, even though it assumes that the need for capital punishment is practically non-existent. In principle, capital punishment in itself remains justified even if the *need* for it as a practicable, effective way to defend human lives against the aggressor arguably no longer exists in certain countries.<sup>7</sup>

In order to understand why capital punishment is not intrinsically wrong, and why it is misunderstood in a consumer culture or “culture of death,”<sup>8</sup> it is necessary to understand the nature and purpose of punishment. Part I of this Essay introduces a systematic distinction between two roles of punishment, namely, punishment as the restoration of the “just order” and punishment for the sake of deterrence or defense. It also discusses the relationship between guilt, punishment, and sanctions in the law. Part II outlines some fundamental presuppositions for establishing the primary meaning of the punishment of persons, the penal dimension of punishment, and why punishment should not be imposed purely for reasons of deterrence. These presuppositions are the notions of sovereignty understood as a kind of an ownership that is grounded in “the good,” and the metaphysical meaning of death. Part III explores the notion of human dignity in modern consumer culture and its attitude toward pain. Part IV continues the task of examining the intrinsic connection between pain and the penal character of punishment by a systematic contrast between the pain of separation from “the good” on the part of the innocent and the pain accompanying a rejection of “the good” on the part of the guilty. Part V focuses on the public dimension of crime and the proper characteristics of punishment that “fit” the crime. Part VI applies the discussion of pain and punishment to capital punishment, considers the public nature of this punishment, and explains the role of public authority as grounded in a sovereignty that is over, but transcendent to, the human being.

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6. CATECHISM OF THE CATHOLIC CHURCH, *supra* note 1, ¶ 2267 (“If, however, non-lethal means are sufficient to defend and protect people’s safety from the aggressor, authority will limit itself to such means, as they are . . . more in conformity with the dignity of the human person.”).

7. *See id.*

8. *See infra* notes 59–61 and accompanying text.

## I. THE ROLE OF PUNISHMENT

A. *Punishment and Deterrence: Two Distinct Dimensions of Capital Punishment*

There are two distinct themes or dimensions of capital punishment that are directly relevant to a discussion of the legitimacy of capital punishment. The first theme is the restoration of “just order,” which I consider the proper or intrinsic meaning of punishment, as discussed below; the second is the deterrence or “defense” dimension of capital punishment, which is one of the functions of punishment in general. The revised second edition of the *Catechism* only implicitly mentions the first theme—restoration of the just order—when it indicates that “[p]unishment has the primary aim of redressing the disorder introduced by the offense,”<sup>9</sup> while the second theme—deterrence or defense—is a central theme or premise in the *Catechism’s* discussion of capital punishment.<sup>10</sup>

We can distinguish between these two themes as follows: the first one focuses on the role of punishment in general (including capital punishment in particular) *after* the crime has been committed; the second addresses the question of how to protect society and its individuals against future acts of aggression *before* these acts occur. The first theme deals with capital punishment in its *intrinsic* significance as an act that has a meaning independent of any secondary role it may also or even necessarily have; the second deals with capital punishment intended as a *means* whose effects may or may not follow. Again, the first theme deals with capital punishment as an *intended* penalty; the second deals with death as a possible or even inevitable but still an *unintended* element in an act of defense. It should be clear from the texts that both the *Catechism* and Pope John Paul II in his encyclical *Evangelium Vitae* have the second theme in mind when they take a position “against” capital punishment.<sup>11</sup> But

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9. CATECHISM OF THE CATHOLIC CHURCH, *supra* note 1, ¶ 2266. See also Christoph Cardinal Schönborn, *Brief Note on the Revision of Passages in the Catechism of the Catholic Church Having to Do with the Death Penalty*, CATHOLIC DOSSIER, Sept.–Oct. 1998, at 9,10. In the words of the director of the commission that prepared the *Catechism*, the official version “leaves the door to the death penalty *theoretically* open . . . , while closing it *practically* . . . .” *Id.* The practical consequence, this Essay will maintain, follows from the treatment of punishment as defense.

10. *Id.* ¶¶ 2266–2267.

11. See Pope John Paul II, *Evangelium Vitae* [Encyclical Letter on the Value and Inviolability of Human Life] ¶¶ 27, 56 (1995) [hereinafter *Evangelium Vitae*]; CATECHISM OF THE

this in no way implies that the *Catechism* or Pope John Paul II are “against” capital punishment as a punishment for a crime in the *past*. Accordingly, it is necessary to consider each of these dimensions of capital punishment separately.

### B. *Guilt and Punishment*

The consideration of punishment *after* the crime leads to an examination of the criminal not simply in his agency but in his *guilt*. In contrast, punishment’s function as deterrence or defense against future crimes has no intrinsic relation to the guilt of a criminal. Defense contemplates not the guilt of the agent but his *efficacy* as the cause of the harmful effects the victim suffered. Punishment in its strict and proper sense, however, requires an *inner* relationship between the punishment and the guilt of the agent. The *Catechism of the Council of Trent* (“*Trent Catechism*”) helps make this clear.

Speaking of the power over life and death entrusted to *civil authorities*, the *Trent Catechism* explains that this power is meant to be used to “punish the guilty and protect the innocent.”<sup>12</sup> Although the *Trent Catechism* notes that such an exercise of civil authority obeys rather than violates the Fifth Commandment, it is clear that civil authority’s judicious use of its power of “lawful slaying” has a broader “end” than that of the Fifth Commandment, which intends the “preservation and security of human life.”<sup>13</sup> Even though the *Trent Catechism* notes that the power to punish “naturally tend[s]” to the protection of innocent life since it gives “security to life by repressing outrage and violence,”<sup>14</sup> there is a clear difference between

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CATHOLIC CHURCH, *supra* note 1, ¶ 2267. It should be self-evident that solitary confinement, for example, is a means sufficient to render even the most determined aggressor incapable of harming others in the *future*.

12. CATECHISM OF THE COUNCIL OF TRENT FOR PARISH PRIESTS 421 (John A. McHugh & Charles J. Callan trans., Marian Publ’ns 1972) (1566) [hereinafter TRENT CATECHISM] (“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 [the Fifth] Commandment which prohibits murder. The end of the Commandment is the preservation and security of human life. Now the punishment 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.*” (quoting *Psalms* 101 (100):8)).

13. *Id.*

14. *Id.*

use of power to punish and use of power to protect innocents. Still, the civil authority acts in “paramount obedience” to the Fifth Commandment when it uses this power justly.<sup>15</sup>

The text of the *Trent Catechism* clearly identifies civil authority as the “avenger of crime” in its judicious use of its power of slaying.<sup>16</sup> The *Trent Catechism*’s contemporary counterpart is silent about the specific capacity of public authority as the avenger of crime in punishing the guilty.<sup>17</sup> This cannot be taken as proof of a development in the Church’s teaching that would now restrict capital punishment to its role of “protect[ing] the innocent” or preservation and security of human life.<sup>18</sup> Even if this omission is, as it could be, a development in prudential judgments dealing with the need and prudential effectiveness of lawful slaying in *defense* of human life, it does not follow that the *Catechism* is thereby teaching about the prudential application of capital punishment as *punishment*. Part V, Section E, revisits the deterrent effect of punishment—an effect to which punishment naturally tends—and the treatment of deterrence as an end. The failure to consider or grasp the inner meaning of punishment shifts the hermeneutic balance toward the Fifth Commandment, which intends the preservation and security of human life but—since it provides no sanctions—does not intend the punishment, lethal or otherwise, of the prospective criminal.

The text of the current *Catechism* shows a real but subtle shift from the *Trent Catechism*’s explicit reference to the punishment of the *guilty*. Paragraph 2266, following three paragraphs dealing with legitimate *defense*, introduces the theme of punishment with a reference to the “common good” and goes on to explain, “Punishment has the primary aim of redressing the disorder caused by the offense.”<sup>19</sup> It adds a comment on the voluntary acceptance of punishment as expiation, and then goes on to note the role of punishment in “defending public order and protecting people’s safety.”<sup>20</sup> If there is any reference of guilt, one can argue that it is safely hidden behind

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15. *Id.*

16. *Id.*

17. See CATECHISM OF THE CATHOLIC CHURCH, *supra* note 1, ¶¶ 2266–2267.

18. TRENT CATECHISM, *supra* note 12, at 421.

19. CATECHISM OF THE CATHOLIC CHURCH, *supra* note 1, ¶ 2266; see also *id.* ¶¶ 2263–2265.

20. *Id.* ¶ 2266. One can only conjecture as to why the *Catechism* mentions the restoration of “disorder” as a “primary aim” of punishment but fails to provide even a minimal clarification on such an important theoretical and existential issue as the relationship between the punishment and the disorder in its teaching on capital punishment. *Id.*

the concepts of disorder and offense. Still, these terms do not logically imply guilt. The agent can safely be considered a “cause” of the negative effect to be dealt with by punishment as a counter-cause producing counter-“effects”: order and safety as aspects of the common good.<sup>21</sup> As such, the personalist dimension implied by the notion of guilt is absent.

### C. *Sanctions Attaching to Divine and Positive Laws*

An important distinction must be made at this point between the divine law embodied in the Fifth Commandment and the positive law of a civil authority prohibiting murder. The latter contains, as an essential component of its binding character in the positive order, a sanction or penalty that follows the breaking of the law. Thus, the positive law must also intend or have as its end the punishment as a sanction. It is worth noting that the divine law does not include in its expression or promulgation a sanction or penalty for an infraction of the law. That is because the divine law, in contrast to the positive law, does not contain the punishment as part of its intent. In other words, it does not intend the “death of the wicked,”<sup>22</sup> even if the sin is in fact a mortal sin.<sup>23</sup> One of the reasons for this, as described later in

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21. *See id.*

22. *Ezekiel* 33:11.

23. *See* CATECHISM OF THE CATHOLIC CHURCH, *supra* note 1, ¶¶ 1854–1861 (discussing the meaning of mortal sin). The contrast between bodily *death* and the *deadly* character of some immoral acts calls for a separate discussion. The *Catechism’s* identification of *mortal* sin in theological terms of supernatural life can and should be supplemented by a metaphysical anthropology which intersects our discussion on one point, namely, that of sovereignty. One of Karol Wojtyła’s (i.e. Pope John Paul II) contributions in this area is his identification of *self-possession* as an essential characteristic of person as person. *See* KAROL WOJTYŁA, *The Personal Structure of Self-Determination*, reprinted in 4 CATHOLIC THOUGHT FROM LUBLIN: PERSON AND COMMUNITY 187, 192 (Andrew N. Woznicki ed., Theresa Sandok trans., 1993) (1974). The metaphysical explanation of this power of “dominion” or “lordship” over one’s own being lies in another, more fundamental characteristic of the person, namely, its status of being a gift that is to be received and given in return. Neither receiving nor giving are possible unless they are grounded in an “ownership” of one’s being, namely, self-possession. To be a person means to be in the mutuality or reciprocity of receiving and giving the gift of self. The human person is called to make a “sincere gift of himself” to other persons, *see* Second Vatican Council, *Gaudium et Spes* [*Pastoral Constitution on the Church in the Modern World*] ¶ 24 (1965), reprinted in THE SIXTEEN DOCUMENTS OF VATICAN II 513, 536 (Nat’l Catholic Welfare Conference trans., 1967) [hereinafter *Gaudium et Spes*], and ultimately to God, who gives the person the original gift of life and Himself in that gift. One can interpret the metaphysical life (not yet the supernatural life of divine grace) of a human person as person to consist in the mutual receiving and giving of one’s being. On such account, human life “begins” when God breathes—gives the gift of His “breath” to man—and man responds by “inspiring” and “expiring,” by receiving the gift of self

more detail, is that the penalty for the sin is essentially and automatically included in the act of disobedience.<sup>24</sup> The penalty necessarily follows the disobedience of the divine law as an internal consequence.<sup>25</sup>

In the order of the positive laws that govern the relations between human individuals, the penalty for breaking the law does not automatically follow. Guilt as such does not bring punishment with it. Indeed, it is a painful paradox of the human condition that many guilty of crime go free while their innocent victims suffer. Therefore, in the case of a positive law against murder, the penalty has to be *added* by an explicit statement providing for its imposition. As such, the critical theoretical issues in exploring the relationship between guilt and punishment in the positive law are these: Since punishment is something “added” to the guilt, what is the metaphysical justification of this synthesis of guilt and punishment? How is punishment to be justified at all? Positive criminal law not only intends to protect the innocent, but it must also provide a penalty that “fits” the crime, a penalty that must be imposed by a separate act of civil authority. This penalty or punishment may *also* have a protective function to the extent that it may, in the words of the *Trent*

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and responding with a gift of self. Personal life is actualized in the mutual exchange of “spirit,” of self, in the reciprocity of love. See *infra* note 43 and accompanying text. Personal death would then consist not in the cessation of existence, but in the appropriation of the given and a rejection of the Giver and His love. That is how Pope John Paul II identifies the nature of original sin and all sin during his General Audience of April 30, 1980. POPE JOHN PAUL II, THE THEOLOGY OF THE BODY: HUMAN LOVE IN THE DIVINE PLAN 110–11 (1997) [hereinafter THE THEOLOGY OF THE BODY]. It is a theoretical articulation of Christ’s warning and prophecy in theoretical terms: he who appropriates his life in order to keep it for himself, will lose it; he who makes a sincere gift of self to Christ will find himself. See *Matthew* 16:25–26; *Mark* 8:35–37; *Luke* 9:24–25.

In our context this means that God is not to be understood as meting out punishment in the strict sense. The refusal to receive one’s being from God and to reciprocate with a gift of self is a separation from the good as well as a separation from oneself (i.e., a loss of self-possession). It carries its own intrinsic pain. As a rejection of the exchange of souls, of the interpersonal respiration, it is a cessation of spiritual life through Christ.

24. See *infra* Part IV.E.

25. One can conjecture about an implicit or even explicit shift of *responsibility* for punishment from the human to the divine dimension. But this implies a fundamental shift in the meaning of punishment inasmuch as its primary effect is in the hands of God and not of man. In the human dimension punishment becomes restricted exclusively to its defensive aspect. Its medicinal aspect would be entirely lost as well. Its painful dimension would condition any change. But conditioning by the use of pain is not in conformity with the dignity of the human person. Such a shift carries with it another shift, namely the separation of civil or public authority from its source in divine authority, which is discussed in Part VI, *infra*.

*Catechism*, “give security to life by repressing outrage and violence.”<sup>26</sup> Is this an “added” function of punishment or is it part of punishment’s inner meaning and essence? Thus, even though a formal component of punishment is that it follows the actual crime, as a deterrent it is something that goes before another possible future crime and helps prevent its actualization. This Essay will show that the strict or material meaning of punishment cannot be restricted to the empirical fact that punishment can function as a deterrent. In other words, punishment’s *essential* and *primary* meaning is not its power to deter and thus “defend” individuals and society. To be a legitimate deterrent for a future crime, it must *first* be a legitimate punishment that follows and fits a crime. In its essential and primary meaning punishment has to bear an intrinsic or inner relationship to the guilt of the criminal.

## II. THE PRIMARY MEANING OF PUNISHMENT

The essential meaning of punishment involves justice and consists in punishment being the *just response* to the guilt “behind” the crime *after* the crime has been committed. As such, punishment is not so much a just response to the crime as it is a response to the criminal in his guilt. Only in this way can punishment function as a re-establishment of the just order.

The passage in the *Trent Catechism* dealing with the lawful slaying of a criminal does not formally make the above distinctions.<sup>27</sup> Instead, these distinctions are implied in the *Trent Catechism*’s reference to punishment by civil authority as the “avenger of crime,” but then are obscured by another reference to punishment as “repressing outrage and violence.”<sup>28</sup> The quoted passage ends with the 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.*”<sup>29</sup> These words cannot simply be interpreted as a reference to the protective dimension of the legitimate slaying, but rather must be understood primarily as a reference to the *penalty* character of death as a just response to the criminal injustice. Evidently, the death penalty renders the “wicked of the land”

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26. TRENT CATECHISM, *supra* note 12, at 421.

27. *See id.*

28. *Id.*

29. *Id.* (internal quotation marks omitted) (quoting *Psalms* 101 (100):8).

incapable of any future crime, but the punishment's essential meaning is to "cut off all the workers of iniquity from the city of the Lord."<sup>30</sup> As such, the punishment reestablishes order in the city of the Lord by depriving the "workers of iniquity" of citizenship in the city of the Lord.<sup>31</sup>

#### A. *Sovereignty in the "City of the Lord"*

The clear implication of this passage from the *Trent Catechism* is that the primary meaning or "effect" of the lawful slaying is to reestablish the authority and sovereignty of the Master in His own domain. The reference to the "city of the Lord" implicitly introduces the theme of sovereignty, allowing a precise and accurate circumscription of what constitutes the injustice—and thus, the *guilt*—of a crime, such as murder, in which the agent appropriates as his own what legitimately belongs to the victim. The mention of sovereignty touches on a broad and profound theme well known to the pre-Christian and Christian tradition.<sup>32</sup> This Essay is restricted to some specific aspects central to the question of the relationship between guilt and punishment.

The use of the term sovereignty does not mean simply the *power* by which one can govern those subject to the power, that is, those that are weaker. It is in this sense that God governs the non-personal "visible universe," legislating the laws of nature. Non-persons cannot break the sovereignty of omnipotence, and thus, the laws of nature do not require sanctions. In this regard, the "natural order" does not need to be reestablished. The more proper meaning of sovereignty is

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30. *Id.*

31. *Id.*

32. *See, e.g.,* ST. THOMAS AQUINAS, *SUMMA THEOLOGICA*, Pt. III, Q. 20, Art. 1 (Fathers of the English Dominican Province trans., Christian Classics 1981) ("Now human nature from its beginning has a threefold subjection to God. The first regards the degree of goodness, inasmuch as the Divine Nature is the very essence of goodness, as is clear from Dionysius (*Div. Nom.* i), while a created nature has a participation of the Divine goodness, being subject, so to say, to the rays of this goodness. Secondly, human nature is subject to God, as regards God's power, inasmuch as human nature, even as every creature, is subject to the operation of the Divine ordinance. Thirdly, human nature is especially subject to God through its proper act, inasmuch as by its own will it obeys His command."); PLATO, *PHAEDO* 11 (E.M. Cope trans., Cambridge, Univ. Press 1875) ("At the same time the account that is given of it in the mystic system, that we men are kept in a kind of ward, and that accordingly one must not endeavour to deliver oneself or run away from it, seems to me to be somewhat deep, and not very easy to see one's way through. Not that I mean to deny, Cebes, the correctness of this opinion, as far as I can see, that Gods are our guardians, and that we men are part of the property of the Gods.").

an “ownership” that is specifically personal. In this regard *what* is “owned” can properly be owned “from within” its being by a personal sovereign. Thus, the Sovereign is sovereign first *over Himself* inasmuch as He is His own from within Himself,<sup>33</sup> and second, over others inasmuch as He owns them from within their being. God owns a creature not because He “overpowers” it, but because He “creates” the creature from within.<sup>34</sup> If an “overpowering” by an absolute power was required for creation “from nothing,” this would cast the creature into absolute *passivity* or impotence. But a mark of personal omnipotence is precisely the “power” to create a being that has a “power” of *its own* to act and a nature that is its own law. God’s sovereignty manifests itself as *personal* inasmuch as it grants its creatures a real autonomy. But a more proper and higher kind of sovereignty is possibly only in relation to other persons who, like the Sovereign, possess the *power of self-determination*, as opposed to being determined in their act by their natures. One can be sovereign in this way only over someone who is also sovereign over himself through self-possession. One can rule only over those who can govern themselves. But this power of self-possession does not sufficiently explain the full nature of sovereignty. A more complete account of sovereignty requires a brief consideration of the goodness necessary to explain the sovereignty that distinguishes a genuine ownership from a self-possession that turns into its dialectical opposite—a loss of self-possession.

B. *A Phenomenological “Reduction” of Sovereignty and Ownership to Goodness*

The *fact* or phenomenon of self-possession has been sufficiently recognized in contemporary theoretical literature. Its interpretation or explanation is another matter, and such an explanation would

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33. This means He is not determined in His act by His nature but rather determines Himself. In speaking of creatures, we predicate of them what “belongs” to their nature: man is intelligent, he is good, he is mortal, etc. These “properties” determine his act of being. In contrast, even though we can predicate properties such as intelligence and goodness, God *is*, more properly, Intelligence and Goodness themselves. Correctly understood, these are the pure perfections identified by classical metaphysics and not abstractions or concepts. They are not merely predicated of a subject, they are themselves a subject-acting. In other words, they are also the *names* of the Absolute, not merely properties predicated of Him.

34. It is in this sense that the Christian tradition can speak of a divine (creative) immanence of God within the creature that is distinct from the ontological identity of a monistic pantheism, for which the so-called creature is simply a “property” or “outward manifestation” of the deity.

require a separate philosophical investigation. Here is a brief phenomenological “reduction” of the fact of self-possession only insofar as it will serve to elucidate the intrinsic meaning of punishment in its relation to guilt.<sup>35</sup> Without a reference to goodness, self-possession will be reduced to an abstraction and ultimately to a monstrosity that becomes its dialectical opposite, as happens in the theories of Martin Heidegger and Jean-Paul Sartre.<sup>36</sup> Goodness, on the other hand, explains and justifies the power of self-possession that belongs to the human being as a person.

In the present context simply note that a traditional understanding of “good” emphasized goodness as the *full actuality of being*. In the case of the human being as a contingent person, its *own* full actuality is the end towards which it is determined to move by nature. In this sense each human being moves or is inclined by nature to move towards its own good. This traditional understanding of goodness is not so much wrong as insufficient for articulating an entirely distinct dimension of goodness that becomes thematic in discussing the *interpersonal* situation, namely, the meaning of goodness when one person encounters the “good” of and in the other person. Can one person intend the full actualization of the other’s being, namely, the realization of the “good of the other?”

A new and related issue, directly related to this theme, arises when one person uses another as a means for his own “ends” or takes

35. What follows is a brief outline of a phenomenological *reduction* of sovereignty. As a method, the reduction is a *leading back* from the theoretical *concept* of something to the *thing* itself, which is originally given in a pre-theoretical contact or intuition. It is not to be identified with the reduction that identifies one *thing* in terms of another *thing* or one concept in terms of other concepts. Logical positivism, for example, recognizes only the latter. Its *analysis* either breaks down material realities into their constitutive elements or concepts into theirs, affirmed in *a posteriori* synthetic and *a priori* analytic propositions, respectively. There is no room for the irreducible or simple realities, the objects of metaphysics, affirmed in synthetic *a priori* propositions. The advantage of *reduction* as used in phenomenological realism is that it is not methodologically vulnerable to the analytic objection that one is simply analyzing the logical content of a concept or the meaning of a word. Its specific task and burden is to direct the “eye” of the intellect to a seeing of the thing itself. The reality is to be “clarified” and made “evident.” The difficulty is twofold. First, the systematic use of phenomenological reduction must use words and concepts that have a presence and history. Second, the success of the method is “proven” in “seeing” the thing itself. The failure on the part of the interlocutor to “see for himself” leaves the phenomenologist understandably vulnerable to the charges that he has failed to define his words (i.e., of failure to provide an analysis of what is contained, by definition, in his concepts) or that he is involved in a simple description of elements that he proposes to unite in *a posteriori* synthetic propositions.

36. See generally JEAN PAUL SARTRE, *BEING AND NOTHINGNESS: A PHENOMENOLOGICAL ESSAY ON ONTOLOGY* (Hazel E. Barnes trans., Pocket Books 1956) (1943).

what belongs to the other. Taking what belongs to another is an act of appropriation. This is the act that also establishes what we call the *guilt* of its agent. The notion of guilt involves a debt of what is owed and *due* to its owner. If justice requires giving what is due to each, then the payment of the debt is its fulfilment. Punishment is, as a matter of justice, the “payment” of a debt. This understanding of punishment and justice, then, brings us back to the theme of ownership and possession. Still, possession cannot be explained merely in terms of power.

In order to better understand the meaning of goodness when that “good” is something *other* than my own being and something to which I can respond in an act of self-giving, I propose an example: a person encounters a long lost friend, who is the bearer of a property called “good.” This kind of encounter is the source of a twofold word: “yours” addressed to the recipient and, embedded in it, a “mine.”<sup>37</sup> What we call the “good” speaks the unequivocal and unmistakable word “yours” in the original encounter with it. This word announces to its addressee an offer of a gift that is to be received. In “hearing” the word “yours,” the addressee discovers his own power of self-possession, a power that is presupposed for any receiving as a *sui generis* act irreducible to passivity.

With the word “yours,” what we call the “good” in the friend touches and moves the addressee, who experiences the touch and movement as something that *fills* him.<sup>38</sup> In this experience are also

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37. The personal possessive pronouns signify not only the theme of ownership, but also its inseparable personalist dimension. See THE THEOLOGY OF THE BODY, *supra* note 23, at 129–30, for the distinction between analogical use of the word “my,” which, as analogical indicates a similarity between different things, but at the same time stresses the difference:

In the eternal language of human love, the term “my”... [i]ndicates the reciprocity of the donation. It expresses the equal balance of the gift—perhaps precisely this, in the first place—namely, that in which the mutual *communio personarum* is established. . . .

In the language of love, the word “my” seems a radical negation of belonging in the sense in which an object-thing belongs to the subject-person.

In what follows, my use of the personal possessives “yours” and “mine” will be put into quotation marks in order to emphasize the interpersonal receiving-giving they imply and the moment of sovereignty contained in *juridical* possession as opposed to ontological “belonging.” See *infra* note 40.

38. Not pursued here is another element involved in the experience, namely, the discovery of an inner metaphysical space, the thing Karol Wojtyła refers to in his work *Acting Person* with his concepts of *interiority* and *subjectivity*, systematically central in his personalism. See generally KAROL WOJTYŁA, THE ACTING PERSON (Anna-Teresa Tymieniecka ed., Andrzej Potocki trans., D. Reidel Publ’g Co. 1979) (1969). Implied here is the fact that self-possession is not the

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given the *beatifying* and *friendly* aspects of “fulfilment” as an enrichment as well as the awareness that this inner beatifying content is intelligible and organically connected to the “good” in the friend as its *source*. The experience is an affective one; it is *felt* and felt from “within” in its qualitative content. In this regard the experience is not an *effect*, a passivity. Thus, the subject experiences or feels himself from within as already in the *receptive* state—receptive to a source that fills and enriches him. It is here, precisely in this receptive relation to the good, that he also experiences himself from within as possessing a “self” given as a gift.

But this is an incomplete and partial account of the original encounter with the “good.” Inseparably embedded in the word “yours” is its inner fulfilment, the word “mine,” with which the good also announces both a claim and a plea. One can abstract here from the claim to ownership on the part of the good considered in its most proper sense, namely God. In the experience of any good encountered in human experience, there is an echo of this original claim that requires or calls for a response from a free person that possesses its being.

The “good” intends, as it were, that the addressee of its offer *belong* to it. The title to the validity of this claim to ownership is the inner content of what we call “good,” which reveals itself through the friendly offer that fills and beatifies the recipient. As such, the “good” is “good for” the recipient. But more fundamentally the “good” shows itself as irreducibly “good in itself.” The “goodness for” the person reveals not only a movement toward the person but the intention to bring a benefit, a will that gives beatitude and fulfilment because it is, in this fundamental sense, a “good in itself” that also wills. The validity of the claim to ownership is thus grounded in a personal will that is good. This willing of the “good for” the person is expressed in a movement toward the addressee; this movement is what we call “love.” Thus, the word “yours” is not simply the expression of an intent and a “handing over” of something to the recipient; it is a movement in which the “good” offers *itself* in and out of love. The terms used here, “good” and “love,” in their full and proper sense refer to the personal dimension. Their proper meaning as qualitative content of a *personal being and its act* of self-giving can

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possession of a self as if it were an (intentional) object in front of the act of possession, but rather, that the subject possesses himself from within his being and thus from within the act he performs.

only be seen from within the personal experience of the beloved who receives them as a gift. In this instance, the “good” and “love” mutually interpenetrate each other, constituting an original simplicity in a personal being. The act of the “good being” in its “movement” toward and “into” the recipient is what we call the act of love, a movement in which its agent “gives” himself as a gift. Something of this simplicity of the “good” that “loves” can be expressed in a statement such as “he who loves desires to give himself.”<sup>39</sup> In this regard, the lover desires to belong to the beloved. But so also, the lover desires that the beloved belong to him.

The full and proper meaning of *ownership* reveals itself only in the interpersonal relationship of love in which, on the human dimension, the lover gives himself totally to the beloved for the sake of the beloved in his or her preciousness and beauty. This “preciousness”—the “good” on the side of the beloved—is unique and inseparable from the beloved as this incommunicable and unrepeatable person. The self-giving intends union and hence reciprocity. The intention of this movement actualizes itself not only in a movement toward and even “unto the gates” of the other’s being, but intends an “entry” into the inner metaphysical “space” of the beloved in a union that can be actualized only if she actively “welcomes” the lover by an opening of her own “heart” in reciprocating with a gift of self. The original initiative from the side of the gift—the movement of the “good” toward and “entry” into her interiority—*engenders* the receptive opening of the beloved, “captivates” and “draws” her out of herself, but for all that, neither the receptive “inspiration” nor the spontaneity of the “expiration” become *her own* in the full *juridical* sense, even though it is *her* soul that is so moved.<sup>40</sup>

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39. Pope John Paul II, *Dives in Misericordia* [Encyclical Letter on the Mercy of God] ¶ 7 (1996) [hereinafter *Dives in Misericordia*].

40. *Juridical* ownership is to be distinguished from an *ontological* property or ownership, both of which can be signified with the grammatical possessive. Instances of the latter are indicated with the expressions “the hair of the dog” and the “hair of the woman,” or the “dog’s hair” and the “woman’s hair.” Signified is the fact that the hair is a “part” of the being and in this sense belongs to it. The difference should become, or at least used to be, quite apparent if a man, for example, were to touch any part of the body “of a woman” juridically not “his own” in at least some measure. Ontological “ownership” lacks the specifically and uniquely personal, active “rule” or sovereignty that presupposes self-possession, to which Karol Wojtyła, for example, referred with the scholastic formula, *persona sui juris et alteri incommunicabilis*: “Self-determination in some sense points to self-possession and self-governance as the structure proper to a person. If I determine myself, I must possess myself and govern myself. These

The receptive opening of her being, initiated by the gift, is not complete. It does not “reach” the center of the beloved from which she possesses herself unless she performs a distinct act of giving herself as a gift in reciprocity. The definitive opening of the being of the beloved, the *receiving* of the gift is not completed until and in the moment of the act of self-possession in *giving* herself. Until that point, the experience of affective receptivity and spontaneity is a “movement of her being” but, for all the affective significance and depth the emotion may possess, the beloved “is moved.” The “responsibility” for this movement lies in the engendering source, the “good” that initiated the movement.<sup>41</sup> The “emotion” is not fully “her own” unless she receives it (together with the “good” that is its source) and makes it her own. Only then does *she* move *in* the emotion that she herself could not initiate by an act of will. But such an emotion can become fully her own when, by an act of the will that is within her power, she gives herself to the lover. When the *recipient* of the gift actualizes self-possession in the distinct act of self-giving in response, the *union intended* by the lover with the word “mine” is achieved in the personal center of the beloved. It is in this union, and only in such a union, that the beloved comes to belong to the lover, to become “his own.” In this sense, *ownership* in the most proper sense is *interpersonal*, actualized in an act “from within” the one who gives a gift of self and “within” the one who receives and reciprocates with a gift of self.

The objective power of self-possession, given infallibly as a fact in the person’s conscious encounter with a transcendent “good,” shows itself unmistakably in the contrasting attempt of any other to force an entry into one’s being or to take one by force, rendering him impotent and passive. For in such cases, any movement of the other toward one’s self cannot be mistaken for a “yours” addressed to the subject, for it is always a *hostility*, an act against the subject. In such cases, any claim by another is already experienced as a violation because it goes against the indubitable *se habere*, “To possess oneself.” The very word “mine,” uttered by another, is the experience of *violation* unless it issues from the “good” and is heard as both the expression of a self-giving and a plea for reciprocity. When so heard, it is recognized as

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realities mutually explain one another because they also mutually imply one another.” WOJTYLA, *supra* note 23, at 192.

41. In the absence of an explicit theoretical articulation of self-possession, it is understandable that the affective dimension was interpreted in the Aristotelian and scholastic traditions as passive and belonging to the animal part of the “rational animal.”

greater than mere power—which can never overpower a person that possesses himself—for the “good” has a power of initiating not only a gift of self out of its goodness, but also of “initiating” the being of a person whose existence is a gift “to be received,” and therefore, one who begins his existence in the receptive mode, possessing itself “from the beginning.” The “mine” that claims the beloved as its own is also a gift since the claim can be fulfilled in a free gift of self, that is, in a freedom in which the one claimed enjoys—as a gift from the Creator—an absolute power of self-possession that cannot be overpowered by the Absolute. The “good” enters into the interiority of the beloved with a “mine” embedded in the “yours,” and in organic continuity draws the beloved out of herself in a movement she could not initiate herself, but can only complete with her own free response of self-giving.<sup>42</sup>

The above sketch of sovereignty, inasmuch as it involves an interpersonal and mutual “belonging” motivated in and grounded in a “goodness” that loves and gives itself to the beloved in her “goodness,” focused on the dual intention of the gift, “I am yours; be mine,” in order to draw attention to a basic pre-theoretical dimension of conscious personhood, the experience of self-possession. The only intelligible explanation—in other words, the metaphysical justification and ground—of this capacity for self-possession in the human person is the call to reciprocity in a gift of self. The capacity of self-possession, even in a contingent person, is also a power that is absolute in a specific but real sense. This capacity shows itself in the experienced consequence of this power to receive a transcendent “good,” particularly the “goodness” of another person, as it “fills” the recipient with beatitude that finds its completion and perfection in the “going out” in a gift of self. Thus, the perfection of the power of self-possession is in the receiving and giving of love, which is in the proper sense “receiving the spirit of the other” and a “giving one’s own spirit to the other.” This is respiration in the proper sense of the

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42. The “classical error” of attributing to the “rational animal” a desire or appetite—and its inclinations—that are determined by its nature to “will” its ultimate or final end is objectively grounded in the experience that the movement of the human being toward what is good in itself is something that as a contingent being it cannot initiate. The movement toward the good on the part of the human person can only come with the assistance, that is, the grace or “gift” from another. If and only if the movement is seen as a *gift* initiated by a personal other, is it true to say that “choice does not pertain to man’s movement toward the good-in-itself.”

word.<sup>43</sup> And respiration is the “sign” of life, again, in the proper sense of personal life.

When God breathed into the clay he “shaped,” Adam received God’s “breath” and became a *living* being, that is, a personal being. But Adam died when, in a fundamental “turn,” he twisted—not simply misunderstood—the “yours” embedded in the gift of life, stripping it of the embedded “Mine.” He focused on the original beatitude that filled *his* being, and with the word “mine” claimed it as “his own”—mimicking God’s “Mine,” repeating it as if he were a god instead of answering it with his own “yours.” Everything Adam had, he had received, but he acted as if he had not received.<sup>44</sup> With that “mine” he lost possession of himself, and death entered into the world. The metaphysical origin of death, then, is an act against the Giver of the gift—against the Giver’s intention to belong to the recipient and against the gift’s demand for reciprocity.

### C. *The Metaphysical Significance of Death*

A discussion of the death penalty can have no intelligible resolution unless we gain some understanding of death as the antithesis of life. The preceding discussion shows that the interpersonal and mutual receiving and giving of self is a love that is also personal life, and the “inspiration” and “expiration” of personal souls is a “becoming one” that remains *dialogical* within the unity. In contrast, the interruption of the interpersonal reciprocity of the “yours” and “mine” results in a self-possession that becomes *dialectical*, that is, a personal act that negates itself in its own actualization. It is an act that begins as a receiving of *my being* given “to me” and ends as a keeping my self “for myself” instead of reciprocating with a gift of self. It ends as a “loss of self.”

Heidegger did not have to consult the Scriptures<sup>45</sup> in order to formulate his understanding of man’s being-unto death as the utter

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43. As the *Catechism* points out, “The term ‘Spirit’ translates the Hebrew word *ruah*, which, in its primary sense, means breath, air, wind.” CATECHISM OF THE CATHOLIC CHURCH, *supra* note 1, ¶ 691. Accordingly, respiration is an appropriate image for this mutual giving and receiving of self—this “expiration” and “inspiration”—in love.

44. Cf. 1 *Corinthians* 4:7.

45. Cf. *Matthew* 16:25–26; *Mark* 8:35–37; *Luke* 9:24–25. The texts, in their minor variations, can be translated as: he who takes possession of his life in order to keep it for himself, will lose possession of it; he who gives his life to Christ for Christ’s sake will come to full self-possession. See also *Gaudium et Spes*, *supra* note 24, ¶ 24 (formulating the interpersonal nature of self-possession as “finding” one’s self only in the “sincere gift of [ ]self” to others).

impossibility of man's "ownmost" possibility, namely, of "being his own." With no reference to God, Heidegger correctly saw that a life that has self-possession or authenticity as its own "end" is necessarily a loss of self-possession or inauthenticity as its "end."<sup>46</sup> But for him, it was a brute fact that has no explanation. He failed completely to see that the power of self-possession is metaphysically justified by its ordination for a self-giving to the "good." At the same time he failed to see or rather forgot what is given in the original experience of self-possession, namely, the original beatitude or joy in the encounter with a transcendent "good" that touches, moves and fills the inner personal space. With a "turn" away from objective being and its intrinsic "goodness," the only "end" that remains is the filling—or satisfaction—of the inner emptiness. In the affirmation of self as "mine" and the refusal to respond with a "yours," man separates himself from the source of what is given as a gift and, indeed, acts *against* the divine claim of sovereign ownership. The power of self-possession, separated from its orientation toward the "good," remains sheer will whose power can be tested only in overpowering the other, ultimately God, either by annihilating Him or by "appropriating" His divinity as "one's own."

I noted above that once an intentional experience such as joy—engendered by a transcendent "good"—has run its course, it can leave behind an inner emptiness, with its centripetal dynamism that, analogously to hunger and thirst, intrudes into one's "center," pressing on it and overwhelming it, seeking to take possession of that center. Yet this dynamism is powerless to cross the metaphysical distance that obtains between all inner dynamisms and movements that are in one's being and that *center* from within which one possesses oneself as a conscious person. Still, the dynamism is

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46. Heidegger's terms *Eigentlichkeit* and *Uneigentlichkeit*, translated into English as "authenticity" and "inauthenticity," fail to transmit the German core meaning of "ownership" and hence "sovereignty": *being-one's own*. See generally MARTIN HEIDEGGER, BEING AND TIME (Joan Stambaugh trans., State Univ. of N.Y. Press 1996) (1953). The following opening passage of Part One, Division One, sets Heidegger's theme but also foreshadows a fundamental error:

The being whose analysis our task is, is always we ourselves. The being of this being is always *mine*. In the being of this being it is related to its being. As the being of this being, it is entrusted to its own being. It is being about which this being is concerned.

*Id.* at 39 (footnotes omitted). In the context of the present Essay it can be noted that Heidegger recognizes the importance of self-possession, but ignores and indeed deforms its meaning when, as in the cited passage, he speaks of man's being "delivered" to his being but denies by his silence any transcendent source of this "delivering." There is no room in his corpus for man "being given." Instead man is "thrown," fallen," and his own "project."

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experienced as a “part” of the individual, urging, pressing, and driving until he *yields*. This yielding to the interior dynamism, however, is a distinct act that does not occur “by nature.” It is itself a free exercise of self-possession in the choice of satisfaction as an “end.” The act of yielding is experienced from within, namely, as a *conscious* losing of self-possession, as a distinct conscious state of “dread” or “anguish.”<sup>47</sup> But there is no greater pain than the experience of losing possession of self, the experience that “my own” being at its very core is “slipping from my grasp” in such a way that I “rupture” and “separate” my self from myself at the core. That rupture or “division” also goes through my personhood as interpersonal, separating what is “yours” from what is “mine,” the Father from the “wasteful” son, replacing the dialogue with the *diabolon*, a separation from the source of the gift of life. The death of a person and the “pain of death” are not the cessation of existence by reduction to nothingness but a “blockage” of the reciprocity of “respiration” in the mutual receiving and giving the gift of self.

#### D. *Crime and Disobedience; Defense and Punishment*

The separation of the human person from the “good” comes, as noted above, with a failure in hearing the “word” of the Giver, and consequently the deformation of receiving and giving, as the due response, into the “improper” response of *appropriation* expressed in the mendacious “mine.” The deformed response does not come “from not hearing”—it is *disobedience*. It rejects the word that “calls for” or demands what is *due* to the owner by virtue of an ownership grounded in the “good.” In that sense it is an injustice.

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47. Heidegger distinguishes the “dread” or “anguish” of being-unto-death from fear in that the former has no definite object. See Martin Heidegger, *The Way Back into the Ground of Metaphysics*, reprinted in *EXISTENTIALISM FROM DOSTOEVSKY TO SARTRE* 206, 211–12 (Walter Kaufmann ed., The World Publ’g Co. 1956) (1949). He is correct insofar as this dread is *not intentional*; it is not directed, as is fear to some definite and particular object that is “threatening.” In fact, it is the conscious way of having oneself and one’s power of self-possession from within as powerless or impotent in performing the intentional act of seeking “one’s own” satisfaction. What Heidegger accurately describes, without understanding it, is the experience of despair. In its theological meaning despair or hopelessness is not the knowledge and conviction that something is impossible. On the contrary, it is a certitude that what is possible when it is given as a gift from God depends in its actualization upon man’s receiving it as a gift from God. Despair is the conscious content of the experience of an intentional act rejecting the offer. It is not so much that God “will not give” as it is an “I will not receive because I will not reciprocate with a gift of self” or “I will not serve.”

But, if we make a distinction between what, in the *vertical* dimension, is due to the Father and Giver of all gifts and what, on the *horizontal* dimension, belongs to man, who has received everything that is his own, two forms of injustice become apparent. The refusal to respond “from hearing” the divine “Mine” and to reciprocate this call with the gift of self *due* to God is an act of *disobedience*. In this regard it is an injustice on the part of man. But it is not a crime in the strict sense. In contrast, when one man takes what belongs to another, in particular, a life, he commits a *crime*. Of course, a crime is also an injustice. It may *also* be an act of disobedience. Disobedience and crime, however, are not equivalent. A fundamental difference is that the refusal to respond with a gift of self to the original and sovereign giver of life is to refuse to *complete* or perfect both God’s sovereignty over a person and the proper act of self-possession, which is an essential mark of my personhood. A person thereby renders impotent his own power of self-possession. Still, he does not in any way diminish the power of God and His sovereignty. But he no longer belongs either to God or to himself.

When, on the other hand, I appropriate as “mine” the life that has been given to another, I render impotent the power of the other’s self-possession. The question of whether I murder a complete stranger who never had the opportunity to offer himself as a gift to me with his own “yours” or a spouse who had made a gift of self to me is irrelevant for the nature of the crime.<sup>48</sup> If others give me what is legitimately their “own,” I can receive it. If I appropriate what is their own but not given to me, I violate their power of self-ownership in the *exercise* of it. The consequences of my act, including loss and pain for the victim, follow in the world external to myself. Apart from the dimension of my own interiority and any loss of self-possession with regard to the motive for my act, I (the criminal) do not suffer. The loss of my inner freedom does not follow but rather precedes the crime. Nor does any punishment follow as a consequence of the criminal act as such.

In the case of a crime, the victim has a “right” to defend himself. By virtue of having received what is “his own” from the original Sovereign of all gifts, he has legitimate “title” to an ownership he can defend “over against” any one who would dispossess him. This

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48. Left untouched is the possible misconception that marriage or fatherhood carries with it as a right the “power” of life and death over spouse and children. An analysis would involve the above distinction between receiving and appropriating. It would include the question whether a person’s power of self-possession includes a legitimate ownership of one’s existence.

means he can use power *against* the unjust claim in order to *keep* what is his own. The “against” in this context does not imply hostility as does the aggressor’s act of appropriation. It indicates rather the empirical causality of the “protective” or “keeping” power of self-possession in the face of an external threat. It may cause pain for the aggressor; it may harm him and it may even cause his death. But it is not a personal act of killing him or taking his life.<sup>49</sup> Defense, by its nature, therefore, does not justify intending the death of the aggressor either as the “end” or as the means.<sup>50</sup>

Defense is the use of power to maintain a legitimate claim to ownership against the attempt of the aggressor. The use of power does not “ground” or “justify” the ownership as much as actualize it in the “external world.” Here, the use of power is considered not so much from the perspective of an intrinsic “goodness” but rather in terms of its causal *efficacy*. It has its specific and legitimate role in the interpersonal and horizontal dimension of man’s worldly existence. By virtue of the title to his own being, received from the original Sovereign and Owner, man has a “natural right” to defend his life against an aggressor. He does not need separate authorization to do so.

*His claim* to the ownership of his own life against the aggressor, however, does not have the character of a law. An intended victim can inform the aggressor that he “ought” not commit the crime, but then one does not speak in one’s own name. When he defends himself he does so not in the name of a “norm” but in his own name as “owner” of what was given to him by a particular act of the Giver and received by him in a particular act. This should be clear in the compatibility between a meaningful affirmation, on the part of the victim, that the aggressor “ought” not commit the act and, at the same time, the victim’s free choice not to defend himself. The assertion of ownership in the “mine” embodied in power is a warning and a justification for the use of that power, but it is not a law. If there is a

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49. One of the systematic ambiguities that causes confusion in the discussion of the death penalty is the assumption that the Fifth Commandment prohibits killing or the taking of human life, including capital punishment, which does intend the death of the guilty. The fallacious defense of the legitimacy of the death penalty is to characterize it as legitimate as a necessary *defense* of human life. But this involves a tacit redefinition of the word “punishment.” Its consequence is to obscure and even redefine the meaning of sovereignty and authority and ultimately what is due to another in justice.

50. The logic of reducing capital punishment, by definition, to a defense precludes the criminal’s execution since this involves, as a rational act, intending his death, which legitimate defense precludes.

law, it cannot be grounded in the will of the victim but in a higher “ownership” that claims both the aggressor and the victim.

This “higher” ownership of the divine Sovereign, in contrast, does not have recourse to causal efficacy as a defense barrier to what that Sovereign claims as His own. What is at stake is not the appropriation of the Sovereign’s being by an aggressor, a metaphysical impossibility. Because of this, there is no need to use power in “defense” of His claim, “Mine,” over against the intended recipient’s unjust appropriation of his own existence. As noted, the consequences of such an act is its own: the agent’s impotence in self-possession. This loss of self on the part of one who acts *against* God is not the result of the use of power by God, nor is it a punishment. But in this case, such an act against God’s claim is also an act of disobedience against a “word” that has the character of a law grounded not simply in an omnipotent but also in a good will that not only gives itself in love to all personal beings it “calls” into existence but calls them “to” itself. This call has the character of “law” not simply because it prescribes acts, but first, because it claims these acts as “due” and therefore as “debt” as long as they are not given to the original and sovereign Owner, and second, because it demands an inner submission of obedience, that is, a self-giving. A victim’s act of defense requires no such inner submission of obedience on the part of the aggressor. It no longer asks for anything that may be due, intending only to erect a barrier of force in order to keep what is the victim’s own.<sup>51</sup> *Guilt* is the status of the one who “owes a debt” of what belongs to an original owner and calls for it with the word “mine.” The language of “payment” in reference to debts risks legalism to the extent that it abstracts from the fact that an authentic payment of a debt is possible only when one gives what is *due* to the owner as gift, in the understanding that his “mine” is grounded in an “omnipotent

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51. In this regard, the act of defense cannot be punishment and possess the latter’s medicinal aspect. As an act “keeping” what is one’s own, it no longer “speaks” a demand to be given what is due to the victim. Punishment, on the other hand, if it is to be medicinal, must restore the ownership of the owner. This means that the demand that the debtor gives himself must still be an actual “Be mine.” While on the one hand punishment enforces this claim by rendering impotent the power of self-possession that refused to give the self (i.e., to submit to the “law” in a free obedience), it cannot, on the other hand, force the outstanding debt of a self-donation. The separation from the rejected good, however, can be healed only when the one guilty freely submits himself to a demand that is still actual. This submission is primarily interior and does not demand a “pain” imposed from the external world. But, by virtue of the repentant criminal’s existence in the public sphere, the interior conversion from being “one’s own” absolutely must be “proven” by a public separation—in some fitting measure—from the exercise of self-possession in the external world.

goodness" that loves and claims the beloved as "its own." Therefore, a response of obedience "from hearing" the call is itself a response of love that "delights" in the "call" that is recognized as a gift from one who loves. The "call" of the Sovereign for what is His own is *law* in the proper sense because its binding power is *personal*.<sup>52</sup> It binds the personal subject to give a fitting response of reciprocity to the creative self-giving that has bound itself to a created person by a bond "more intimate than creation."<sup>53</sup> Here, the universality of the law is not an abstract universal but a concrete act of claiming "all" those it "holds" as its own. Both the claim of the "law" and the "obedience" to it would be a depersonalizing and hostile legalism if they did not express a mutual self-giving in love. Punishment can have a medicinal role only if it embodies the loving claim of the guilty as still beloved and called to make a free gift of self that requires a restored self-possession.<sup>54</sup>

When the particular human victim of a criminal act invokes the "ought" of a law, he invokes the law of the absolute sovereign Owner of human life. He does not speak in his own name. When he defends himself, he does so in his own name. If he is too weak, he can call upon an other to assist in the defense. So too, a number of victims can act in "collective self-defense." But here, also, neither the individual nor the collective can intend the death of the aggressor as the "end" or means. Their intention can only be to defend, that is, to keep what is their own. In each case, the act of defense does not exact what is "owed" to the victim by another<sup>55</sup>—in this case the aggressor—but rather, by its very nature, is an act of *keeping* what is one's own.

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52. In the present context it suffices to note that the "natural law" that governs non-personal beings and non-personal activity is not law in a strict and proper sense inasmuch as it does not call for a free response. In a word, it is not a "call."

53. *Dives in Misericordia*, *supra* note 39, ¶ 7.

54. The implication for the "administration" of punishment by civil authority is addressed in Part VI.

55. Here it suffices to note a loose way of talking when one says that one "owes" respect to the right of the victim. What is meant, strictly speaking, is respect for the right that is "due" to, that is, "belongs" to, and is "proper" to, the victim. This does not suggest that what is due has not been given as in the case of a *debt* that is due, namely, not yet "paid." In the expression to the effect that a criminal got his "due" or "just" deserts, one indicates the proper or just relationship. Thus, the punishment "due to sin" refers to the "ratio" or "proportion," the fittingness, the "belonging" of the punishment to the infraction, not the fact that it is outstanding.

E. *The Penal Dimension of Punishment*

The painful or "bloody" character of the punitive dimension of death, or of any other punishment, has several distinct aspects. Namely, there is a general distinction between the intrinsic and extrinsic aspects of pain and punishment.

The *extrinsic* aspect of pain as an element of punishment is apparent when punishment is considered as a deterrent or as educational and corrective. In this respect there can be no question of the punishment *fitting the crime*. The punishment, rather, corresponds to or "*fits*" the *will or intent* of a person who might commit a crime, regardless of whether he has ever committed the crime in question in the past. If the intent is strong, the punishment as deterrent must be great. If the intent is weak, a smaller penalty as a deterrent suffices. And evidently, if someone who has already committed a crime but has no intent or inclination to a future crime, there need not be a penalty. Thus, we have the completely consistent position that holds the penalty to be useless since it did not work, and is unneeded since the criminal may have no intention of committing the crime again. Or, should he have such an intention, reeducation or rehabilitation would render punishment useless as a deterrent. On such a view, *any* punishment would be cruel and unusual, especially if one holds that the cause of crime is not the individual but the social structures in which he lives. In any case, it is clear that the penalty is extrinsic to the inner content and gravity of the crime and is considered only in terms of its *efficacy* in preventing a possible, that is, a future crime. This efficacy will be a function of the subjective will and intention of the agent. The efficacy of punishment in deterring a crime has no direct and meaningful relation to the nature and the gravity of the crime. As such, punishment does not "fit." Rather, it either works or it does not. But if efficacy is the primary consideration, then one has rational grounds for holding that incentives offering rewards for not committing crime could be just as efficacious as the penalties bringing pain in deterring crime. The latter means that crime does not pay, but one might also rationally hold that it is more effective to pay not to have crime. Skinner's system of behavior control with its positive reinforcers would then appear to be much more humane, whether applied to mice or men.<sup>56</sup>

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56. See generally B.F. SKINNER, SCIENCE AND HUMAN BEHAVIOR (3rd prt. 1957) (discussing Skinner's theory on human behavior).

The above indications are sufficient grounds for seeing that a consideration of punishment as a deterrent to crime abstracts from and, indeed, separates it from guilt or at least the specific kind of guilt that occurs not so much with the *internal* acts of motivation and decision to commit a crime, but with its entry into the *external* world by a distinct act. The former are the bearers of a *moral* guilt. The latter are also bearers of moral guilt but have the distinctive feature that, as crimes, they have a bearing on the ownership of what belongs to others in the horizontal dimension of relations between human persons. In this regard, the criminal act also bears what may be called a *juridical* guilt.<sup>57</sup>

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57. Juridical guilt is not restricted to the actual commission of the crime that renders impotent or impedes another's ownership of what rightfully belongs to him, for example, the act of murder. It is already incurred when the murderer begins activities that lead up to and make possible the act of murder. Up to that point, countermeasures have the character of defense, which includes the acts that counter the actual crime and the distinct juridical guilt that attaches to it. The guilt that attaches to the preparatory acts derives, as it were, from the "end" of the act intended, namely, the crime intended, and is "continuous" with it. If the crime is prevented by the countermeasures, the preparatory activities can still be punished. If the individual freely changes his mind and does not carry through the preparatory acts, he is not guilty and liable to punishment for them unless they had an independent criminal character. The relevant point for the distinction between defense and punishment is this: the guilt is grounded in the criminal act. It is the same guilt that attaches to the preparatory activities and the commission of the act and continues after the act is complete. However, the defensive activities are geared toward stopping the act and necessarily cease, being impossible after the act is completed. Punishment can only begin after the crime has been "completed." This is a necessary, though not a sufficient condition. A further condition is an imposition of the punishment as an act of authority. The punishment is logically a "consequence" of the crime, but it cannot be simply a causal consequence. The continuity of the guilt that is a presupposition for both the defense and the punishment can be the understandable basis for erroneous and tacit identification of punishment as defense, especially if it in fact protects possible victims against the individual as opposed to criminal acts in preparation and execution. The accidental coincidence of a particular act of punishment for a criminal act that is done with defense against the individual who intends to commit future acts may in fact justify particular acts of punishment, above all, capital punishment, as being also acts of defense. But if their sole justification is defense, then they are no longer acts of punishment in the proper and strict sense of the word.

A catalyst for such an erroneous identification may be a different confusion between guilt considered from the perspective of morality in the narrow sense and that of justice in rendering what is due to the sovereign. Ultimately, the two may come together: every act of immorality is an injustice and every failure to "give what is due" is immoral. But the fact that an act can have two predicates that co-imply each other is not a basis for their reductive identification. When this happens, one may argue that God is the sole judge of actual moral guilt and therefore "vengeance" is His alone. Capital punishment by a human authority, therefore, preempts the possibility of repentance and a judgment of mercy.

F. *Punishment as Extrinsic to the Crime Excludes Death as a Penalty for Crime*

The extrinsic relation of the punishment—or better, of the deterrent—to the crime, always considered as a possible crime in the future, implies in turn that we are talking of a *means* to defend human life. If punishment is considered only as a deterrent, then it is understandable why the dignity of the human person would mitigate against the use of death as a deterrent to crime. Considered simply as a deterrent, capital punishment becomes contradictory because it negates in one being (the criminal) the very human dignity it claims to defend in the possible or potential victim.

The *Catechism* contrasts the use of “non-lethal means” to defend innocent lives against an aggressor with the use of capital punishment, and it instructs public authority to “limit itself to such [non-lethal] *means*, as these are more in keeping with the concrete conditions of the common good and [are] more in conformity with the dignity of the human person.”<sup>58</sup> If one restricts one’s consideration of punishment to its being a *means* for the protection of the lives of innocents, then it becomes understandable how capital punishment is not simply less, but not at all in conformity with human dignity as it is correctly, albeit partially, understood by the very culture identified as a “culture of death.”<sup>59</sup> The culture is correct in understanding that for the living consciousness of a healthy individual that has dreams, hopes, aspirations, and projects to be fulfilled—in a word, an individual who is directed towards possibilities of self-realization—the prospect of death as the impossibility of all possibilities, to use Heidegger’s formula,<sup>60</sup> is the epitome of pain called “dread.”<sup>61</sup> Any pain, but above all the pain of death, has a decidedly “hostile”

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58. CATECHISM OF THE CATHOLIC CHURCH, *supra* note 1, ¶ 2267 (emphasis added).

59. *Evangelium Vitae*, *supra* note 11, ¶ 12.

60. See WILLIAM J. RICHARDSON, S.J., HEIDEGGER: THROUGH PHENOMENOLOGY TO THOUGHT 76 (1963) (translating Heidegger’s “Der Tod ist die Möglichkeit der schlechthinigen Daseinsunmöglichkeit” as “Death is the potentiality for the absolute im-potence of There-being”). In my judgment this conceptual shift from “possibility” to “power” conveys more accurately the experience involved in the will to a full actuality of being one’s own without reference and in an anonymous opposition to the good. The actualization of self-possession solely for the purposes of belonging to self involves a self that has become “anonymous” and is “had” at most in the experience of “my being” as projected “there,” over against an experience that is at the same time one of absolute impotence in the attempt to make “my being-there” my own.

61. See Heidegger, *supra* note 47, at 211–12.

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character with its characteristic “sting.” And as such, it is hostile to the dignity of a person.

### III. PUNISHMENT AND CONSUMER CULTURE

#### A. *The Rejection of Pain by the Consumer Culture as Something Hostile to Human Dignity*

A consumer culture lives and breathes in an effort to achieve satisfaction.<sup>62</sup> In such a culture, the reason and motive for every act and every action is the satisfaction of the individual. Two things must be noted in this regard. First, anything that hinders, prevents, or lessens the desired satisfaction causes pain. Second, every *pursuit of satisfaction* is objectively a *turning away from the good*, or also a desecration of the good, which is turned into a means for the satisfaction.<sup>63</sup> Now, in this respect, a pursuit of satisfaction renders one “guilty” in terms of objective morality. The first belongs to the mind-set of the culture of death. The second is not even understood by the culture that rejects any affirmation of a good in itself.

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62. See DIETRICH VON HILDEBRAND, *ETHICS* 34–63 (Franciscan Herald Press 1972) (1953), in which he introduces a systematic distinction between three different kinds of motivation: the intrinsically important, the subjectively satisfying, and the objective good for the person. The distinction has radical and revolutionary theoretical implications for the Aristotelian definition of good as that which all things desire and the understanding that “good” means the “end” of any activity. See ARISTOTLE, *NICOMACHEAN ETHICS*, Bk. 1, Ch. 1 (W.D. Ross & J.O. Urmsion trans.), *reprinted in* 2 *THE COMPLETE WORKS OF ARISTOTLE* 1729, 1729 (Jonathan Barnes ed., Princeton Univ. Press, 4th prtng. 1991), for the identification of “good” as “that at which all things aim.”

63. My own position, which cannot be developed in the present context, is that any satisfaction originally experienced by the conscious human person is a conscious content that is itself not an object of an intentional act. In the case of satisfaction attaching to intentional acts such as joy in the meeting with a beloved friend, the intentional “object” of the joy, and thus the “end” of the act of joy is the friend in his preciousness or good. At the same time, the intentional act of joy, as a conscious experience, fills and delights the subject of it. As such it satisfies. But in experiencing it one is aware of the friend—the “end” of the act of joy—as the source of it. In the original conscious joy-experience, the satisfaction is not the end one seeks or intends much less strives toward. In a subsequent act, one can turn in upon the satisfaction and seek its “repetition.” But this is a *new act* and a *new end*, sought under the aspect of satisfaction, not under the aspect of something “good in itself.” The significant point is that seeking the satisfaction, originally given as a consequence of a primary act, as the end of a new act, makes the satisfaction impossible. This is precisely because by its very nature satisfaction is the “issue” engendered by an object sought for its own sake. Cut off from its source, the satisfaction, sought as an end, is intrinsically impossible to achieve. Furthermore, such a turn upon one’s own satisfaction reduces the value or good in itself to a means and thus “deforms” its original importance and gift character.

In saying this we strike out on a course that is different from an old and venerable tradition that holds that all men desire the good and that moral evil consists of a disordered or inordinate pursuit of what is good. Nevertheless, if we are to understand the consumer culture with its inexorable pursuit of death, we must recognize satisfaction as a motive distinct from the good.<sup>64</sup> This means that the consumer (one who seeks only personal satisfaction) in no way desires the good *as good* even if the object that brings him satisfaction is in fact objectively good. He simply desires it for the satisfaction it yields. The good, then, is used and becomes an object. Without developing this point, it suffices to note that for the consumer who seeks his own satisfaction, the failure to be satisfied is the *primum evitandum*—the “one thing to be avoided”—because it is specifically and uniquely painful.

The participants in a consumer culture are in sympathy with the pain of the guilty and reject any threat of pain to those that have espoused the ideology of satisfaction. Thus, the threat of pain, even if it is intended as a deterrent to those who would do what is *objectively wrong* in the pursuit of satisfaction, is perceived only in its objective character as “hostile” to the person, in which it really does go against the experience of one’s own dignity. But here, dignity is understood only in terms of the power of self-possession,<sup>65</sup> which grounds the power of free choice—in this particular case—in *subjective satisfaction*. The affirmation that some behavior is *objectively wrong* is seen as a threat to the *subject’s satisfaction*. Consequently, any attempt to deter the homosexual, for example, from a public exercise of his lifestyle, or to cut him off, in such a public exercise, from the “city of man,” to say nothing of the “city of the Lord,” is attacked as cruel and inhumane, lacking compassion. It is deemed “unjust”—denying what is one’s “own”—because the suffering it causes to the homosexual does indeed go against the power of free choice as an element of human dignity, and is experienced by him as such. It is attacked for the same reason as the killing of baby seals or the experimentation with animals: in each case one can express solidarity

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64. With the term “good” I mean, following Dietrich von Hildebrand in his *Ethics*, an intrinsic importance that can be the motive for acts of a personal agent and, in the case of a human agent, does not depend for its importance on a relation to the agent’s satisfaction or benefit. See *supra* note 62.

65. See Damian P. Fedoryka, *The Concept of “Gift” as Hermeneutical Key to the Dignity of the Human Person*, LOGOS: J. CATH. THOUGHT AND CULTURE, Winter 2008, at 49, for a development of dignity in terms of self-possession.

with beings that are denied that for which they exist—their *own* actualization or realization.

The culture's rejection of suffering and capital punishment in favor of non-lethal means of rendering the aggressor ineffective has nothing of the Christian sensitivity for suffering, whether of the innocent or of the guilty. Above all, the culture is not concerned with the protection of the innocent. Christian sensitivity, however, is true compassion. Someone with Christian sensitivity does not merely feel the pain *with* the victim, but also has a readiness and even a desire to take the pain upon himself because he sees the inner connection between guilt and pain as well as the connection between innocence and human dignity.

### B. *Human Dignity in the Consumer Culture*

Part of the foundation of human dignity is the "I will" that each person is capable of by virtue of his freedom. By virtue of this power, the person is capable of self-possession and self-determination. He can be self-standing, that is, he can take a stance or position that he determines. That is a basic meaning of freedom and dignity.<sup>66</sup> If we compare man with animals, we see that the animal's behavior is determined by its nature. In other words, a dog acts just like a dog. In contrast to this, our human nature makes our behavior *possible*, it does *not determine* it. So, for example, my rational nature makes it possible for me to tell the truth or to lie. But it is *I*, and not my nature, that determines whether I tell the truth or lie. *I will* (choose) to speak

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66. The *Catechism's* identification, following *Evangelium Vitae*, of the death penalty as a "bloody" means of punishment incompatible, or at least less compatible, with human dignity implies that dignity is a norm for the measure of "compatibility." See CATECHISM OF THE CATHOLIC CHURCH, *supra* note 1, ¶ 2267; see also *Evangelium Vitae*, *supra* note 11, ¶ 56. The theme of dignity is relevant. The thesis here, however, is that punishment is a direct response to *guilt* as a failure to give the due response to the relation to the sovereign claim of the good. Guilt is the way a contingent person exercises the act of self-possession, namely, by keeping for himself what is due to another person. From this perspective, *punishment* as an enforcement of the claim is compatible with the dignity of the human person as objectively belonging to the Sovereign Good. In contrast, the "less bloody" means of *defense* is always more compatible with human dignity. If punishment is understood as defense, the teaching of the *Catechism* and *Evangelium Vitae* follows. See CATECHISM OF THE CATHOLIC CHURCH, *supra* note 1, ¶2267; *Evangelium Vitae*, *supra* note 11, ¶ 56. On the one hand, one can "defend" oneself against animals, persons, and even persons who have lost possession of themselves. Punishment, on the other hand, is impossible when directed towards beings that are incapable of self-possession, but only against those who are *responsible* for "negating" their self-possession in its improper actualization to appropriate rather than to receive what has been given as a gift.

the truth or to lie. In each case we have a self-determination that is grounded in self-possession.<sup>67</sup>

Now, as Pope John Paul II affirmed in *Veritatis Splendor*, the contemporary (consumer) culture, despite its affirmation of freedom,

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67. Dignity is a topic in its own right. In the context of the present analysis it suffices to note what is perhaps the principal ground of human dignity, namely, the power of self-possession. One often finds the invocation of human dignity as a reason against capital punishment, whereby the dignity is grounded in the fact that man is created in the "image of God" as exemplified by his reason and will. While this is correct, it is theoretically insufficient. In his excellent and superbly crafted article, *A Neglected Source of the Dignity of Persons*, John Crosby argues for the incommunicability of the person as a distinct source of personal dignity. See JOHN F. CROSBY, *A Neglected Source of the Dignity of Persons* (2001), reprinted in PERSONALIST PAPERS 3–32 (Catholic Univ. of Am. Press 2004). By this he means that the person is unique and unrepeatable as this person and thus more than simply an exemplar or instance of a common nature. See *id.* 15–18. This argument is advanced by the position that this incommunicability finds its "why" or metaphysical justification in the personal power to possess one's being from within, a power that is intelligible only in view of a self-giving. Damian P. Fedoryka, *The Ontological and Existential Dimensions of Human Dignity*, in MENSCHENWÜRDE: METAPHYSIK UND ETHIK 119–44, (Mariano Crespo ed., 1998). This is implicitly presupposed by Crosby and even mentioned in his narrative. CROSBY, *supra*, at 16. Thus, speaking of incommunicability, he writes:

I hardly encounter another as person if I do not detect this *ownness* in the other; on the other hand, it is a sure sign of encountering another as person that I begin to experience the entire bodily being of the other, indeed all that the person has in virtue of being a human being, as not just common to that person and others but also as being incommunicably that person's own.

*Id.* Crosby's "ownness" is what is meant by self-possession and "being one's own" in the present Essay. This indicates unrepeatability, to be sure, but more precisely in the sense that the person is unique in that he possesses his "act of being" from within, and because of this is capable of determining himself in contrast to non-personal beings whose "act of being" and activity is determined by their natures. The significance of this self-possession and self-determination comes to light only in the context of receiving and giving the gift of self. This self-possession accounts also for the inviolability of personal being: no one, not even God, who creates the human person "from within," can enter into the personal center and take possession of the person unless it "opens" and "receives" the personal other, reciprocating with a gift of self.

For a notable exception to the usual understanding of the "image of God" in terms of reason and will, see EBERHARD SCHOCKENHOFF, NATURAL LAW & HUMAN DIGNITY 229 (Brian McNeil trans., Catholic Univ. of Am. Press 2003) (1996), which stresses the *relation* to God and His creative address to man, who

owes his creaturely existence neither to a decision taken by his own freedom nor to a gift bestowed by someone else, but only to the creative address by God's word. This means that he comes into existence as one called by God and is maintained in existence by the continuation of this creative address.

*Id.* Schockenhoff is correct in noting the relational nature of the person and the dignity of this dialogical status. It is noteworthy, however, that the creative "word" of God is not seen in its gift character, something Schockenhoff even explicitly rejects. *Id.* at 229. Pope John Paul II, in contrast, understood "the essence of the gift at the level of man, as existential content contained in the truth of the 'image of God.'" THE THEOLOGY OF THE BODY, *supra* note 23, at 60.

has misunderstood it and denied freedom's essential ordination to truth.<sup>68</sup> The contemporary age recognizes and affirms the "I will" of freedom, but articulates it as "my will!" The individual exercises, or at least attempts the act of self-possession, but refuses to give the gift of self called for in *Gaudium et Spes*.<sup>69</sup> In the act of possessing himself, man *experiences* his dignity. But any demand or reminder that he is also to "surrender" himself or submit to the will of another is perceived as an affront to his dignity. So any power, force, or threat directed against "his will" is also *experienced* as an affront against his dignity. Such is the power of positive law in the culture of death. And such is the power of the moral law that binds man's conscience.

In the consumer culture, human dignity is therefore reduced to a pseudo-dignity. What is supreme is the absolute "I will," one of whose manifestations is the insistence on freedom of choice. This freedom is absolute, that is, "freed from" any objective rules or norms. These are always considered to be a source of pain and suffering, since they are perceived as something that demands a giving up of "my will."

In this respect the consumer culture correctly grasps the truth, but only partially so. For the Christian tradition also recognizes that a separation from "my will" is a dying to oneself. It is the willingness to "lose" one's life for the sake of Christ.<sup>70</sup> Because of man's fallen condition the *separation from one's own pursuit of satisfaction* bears an intrinsic relationship to pain. It *requires suffering*.

#### IV. PAIN: ITS ROLE AND RELATION TO PENALTY AND CRIME

##### A. *The Intrinsic Relation of Penalty to the Crime*

In a consumer culture, pain and death are not acceptable as deterrents to behavior in pursuit of satisfaction. For its participants, the consumer culture is increasingly willing to offer incentives for not harming others in the pursuit of satisfaction. One could argue that in the long run there is always greater satisfaction to be had if one does not hurt others in the pursuit of it. As discussed earlier, in the consumer culture there are no rational grounds for preferring pain to pleasure as a means of dealing with an overly aggressive pursuit of

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68. See Pope John Paul II, *Veritatis Splendor* [Encyclical Letter on the Relationship Between Faith and Reason] ¶¶ 31–35 (1993).

69. See *Gaudium et Spes*, *supra* note 23, ¶ 24.

70. See *Matthew* 16:25.

satisfaction. But this is also the case when pain is simply considered a deterrent, whatever the culture. In order to understand why the *threat of pain*, rather than the promise of pleasure, is the more proper deterrent to crime, one would have to see not only the extrinsic relation of pain to crime, but also the intrinsic one.

B. *Pain and Separation from Goodness on the Part of the Innocent*

We approach the problem of pain and its intrinsic relationship to *guilt* by considering first the significance of a separation from goodness on the part of those that are *innocent*. If we examine the separation from a beloved spouse or friend, we understand the intelligible connection between the separation from an intrinsic good and the pain of the separation. If the presence of the beloved "fills" our soul, separation from him or her leaves an "emptiness" or "lack" that is painful. The example of the innocent separated from the good, of course, presupposes innocence, namely, that the separation is not due to any fault on the part of the one separated.

The intrinsic relationship between pain or suffering and the separation of the innocent from a great good or value is a difficult but important theme that cannot be developed here. In this context it is important to stress only the fact that this connection is highly intelligible and necessary, so much so that we can speak of it as a law of personal being. This basic law of personal existence is clearly actualized in any of the profoundly painful experiences in which one is separated from or loses a beloved person.

What needs to be underscored in this context is that this intrinsic relationship presupposes an *inner bond of affirmation* between the person and the good or value he is separated from. In other words, in order to experience the pain of loss or separation, the person must maintain an inner bond of love and affirmation to the transcendent value of the other in question. Innocence in this context means not only that the loss or separation occurs through no fault of mine, but more positively, it means the inner attitude of "being for" the value in question. The person is turned to it, responds to it, and gives himself unconditionally to *it for its own sake*, not for the sake of his own satisfaction. In the case of the criminal, however, there is the antithesis of the affirmation of the good and an inner bond with it; it is the "No!" of evil. This "no" is a refusal, a rejection of and a rebellion against the good, both as it offers itself to the recipient and claims it as its own.

In the Christian tradition, the experience of the “dark night of the soul” is a concrete example of the kind of suffering that occurs when the soul experiences a loss of the sense of presence of its Divine Lord.<sup>71</sup> It experiences a separation from the beatifying sense of the Divine Presence. But the very suffering necessarily presupposes a love of and a fidelity to the Divine Lord. Having noted this, we can develop the point by distinguishing two “moments” in the positive bond with a value or good.

First, the innocent one must at least have been “open” to the good in a *receptive* attitude. Negatively expressed, this means that the innocent one is *not* turned to the good for the sake of his own *satisfaction*. He must be at least interested in the good for its own sake. Only then can he be so “touched” by the good that this “touch” *fills* the soul. Using the Latin root word, we can say that such an attitude is presupposed for the innocent one to experience a *satisfaction*,<sup>72</sup> a “having been made enough.” If, having had such an experience, one is separated from the filling touch of the good, one experiences an inner emptiness in the spiritual space that was touched. According to the rank of the good and the depth level of the soul at which one was touched, the inner lack can be experienced as a pain. These situations can be described with expressions such as a “sense of loss,” an “absence” of the good or a “separation” from it.

It is important to understand the objective inner or intrinsic connection between the *specific goodness* in question and the *kind* of pain experienced after being separated from it. The kind of pain in experiencing the loss of the specific value of a beautiful poem or piece of music is a different kind than that experienced in the separation from a child. The kind of pain experienced is directly determined by the kind of goodness or value in question. Because of this direct determination of the kind of pain by the kind of goodness or value,

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71. See generally ST. JOHN OF THE CROSS, DARK NIGHT OF THE SOUL (Mirabai Starr trans., Rider 2002) (1618).

72. The terms “fill” and “satisfaction” are used in order to focus exclusively on their contrast to the experience of the inner metaphysical space as empty. Thus, joy as beatitude is an intentional act in its conscious, intelligible relation to an objective good or value in front of the act. At the same time, inseparably a part of it is its character of “filling” and enriching the interior of the person in a “palpable” feeling. When the experience of joy ceases, particularly when it is interrupted, the emptiness is just as palpably felt in a pain that corresponds to its source. However, the intention to repeat the experience has only the moment of satisfaction as its motive, stripped of the qualitative content that it had in its original experience. The source of the earlier joy is reduced to a means for the repetition solely of the satisfaction. See *supra* note 63.

we can speak of an *intrinsic* or *inner* relation between them. The pain is in this respect co-relative to the goodness or value. It can be said, therefore, that the pain is somehow “proper,” that it “fits” the corresponding good or value one is separated from. Furthermore, another feature of the “proper” or “fitting” pain bears this out. The experience of the pain necessarily follows from the separation from its correlative good or value. And the pain is perceived as being grounded in “this” separation from “this” good or value.<sup>73</sup>

A second dimension of the experience of pain in separation from goodness occurs when the innocent person is not merely open to the experience of being touched by a good or value, but also, as already noted above, when he *positively responds to and affirms* the goodness in question. It suffices here to say that where the person has achieved some level of *union* in the positive response to or affirmation of the good, the pain of separation is different in kind and quality from those situations where he was simply open to the good and had been touched by it. This specific difference can be stated as follows. In the case of a positive response and affirmation to an objective value, the subject’s own being and his response to the value become *his own* in a unique and distinctive sense. He is not simply touched and moved by the value; he is not simply attracted to it. In this positive stance he has made the response his own. The response is now a gift of what belongs to him. In contrast, a genuine affective response to a value where one is simply “touched” and “drawn” out of oneself, the movement is not *juridically*<sup>74</sup> “one’s own” and is therefore not an act of self-giving. Therefore, the pain of separation is not as constitutively and structurally as deep as the pain of someone who has made a positive commitment to the value.

### C. *Pain and the Separation from Goodness on the Part of the Guilty*

A rejection of the good or value constitutes personal guilt from the *moral* perspective. Since every good or value *prescribes* and *demand*s a response that is fitting and due to it, one of the essential

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73. Consequently one can speak not only of a separation from the good, but also of the emptiness left in the place within the soul *occupied* by the value, as if the value had entered *into* the soul. This is already an analogy to the mysterious but real union of two persons in spousal love in which the mutual self-donation involves a real “entry” of the lovers, each into the metaphysical interiority of the other. Such a mutual entry and union presupposes and perfects the personal capacity of self-possession.

74. *See supra* notes 40, 57.

marks of the guilty person is that he goes *against* the demands of the good or the claims of an objective value. Rather than submit to the objective claim, he subordinates the good or value to his own satisfaction. He approaches the good, "claims" it, and lays hands on it. But, by that very fact he distances and separates himself from it. In the specific separation from good and value that takes place when the guilty individual goes against the value and its sovereign claim on him, we encounter the basis for the *intrinsic connection between guilt and pain*.

Our theme of punishment, however, requires that we further distinguish *moral* guilt from *juridical* guilt. In terms of the previous analysis, moral guilt involves ultimately the vertical relation between man and God in what concerns the *inner* response due to God. Of interest here is the punishment due to the guilt incurred when one human being unjustly takes what belongs to another or fails to give what is due to another. This involves the external sphere of actions in the world. When considering the pain of separation from the good as experienced by the innocent, it was noted that the pain intelligibly followed the interior separation. And the kind of pain involved presupposed an ongoing affirmation of the good. In the present case of juridical guilt, the pain does not simply follow the separation from one's neighbor. Indeed, it does not, strictly speaking, follow as something *engendered* by the separation from the affirmed value. In real life, it so happens that the guilty do not experience any pain in acting against the others' legitimate claims to what is their own, claims grounded in a gift from the original Giver. Much rather, we could say that the pain *ought* to follow, that the pain is the proper consequence of an act of opposition to the claim grounded in the good. The proper linguistic expression would be that the guilty one "deserves" the pain. In the case of the guilty we can say that the pain is "just." Here we have an element of the *retributive* dimension of punishment. In the case of the innocent the pain is not a matter of justice. Much rather, it simply follows naturally and inevitably, but also understandably.

Another major difference separates the pain of the innocent and the pain of the guilty. It bears on the *kind* of pain and its qualitative *content*. When we examined the pain of the innocent, we saw that it was the specific kind of *value* or *good* from which the innocent was separated that determined the specific *kind* of pain he experienced. We also saw that the experience of pain presupposed a loving affirmation of the value. The qualitative depth and content of the

pain depends on the qualitative depth and purity of the affirmation. In the case of the guilty, the individual actively and willingly separates himself from the good, but only indirectly. While what belongs to the victim is grounded in a gift originating in the “good,” the aggressor is directly interested in appropriating what belongs to the victim so as to use it. This necessarily involves an act *against* and a rejection of the value of the victim. The kind of pain that appropriately follows—or rather, *ought* to follow—is determined not so much by the *value* against which the guilty one takes his stance, but rather, by the *spiritual place* or “locus” within the person—in this case the aggressor—who should have been “touched” by the value in question and filled by it. Physical pain serves as an analogy to explain the situation.

#### D. *The Analogy of Bodily Pain*

A toothache, a headache, a splinter under the nail, a sprained ankle, a broken bone: each of these has its own specific quality, and each is a kind of pain with its own content. And in each case, it is not the cause which determines the kind of pain experienced, but rather the bodily place or “locus” in which one experiences the pain. In this respect, the physical pain is purely and, we can add, merely subjective. It reflects the subject rather than some object which is its cause. In this sense the purely and merely subjective character of the pain reveals to the subject something about the nature of his being: his tooth, his head, his nail, his ankle, or his bones. In each case, he feels the pain in a definite place or *location of his body*.

In contrast, the pain of the innocent in separation from a value reflects the *nature of the object* from which one is separated. The pain of losing a beloved child is different from that of losing a friend or a neighbor whom one affirmed. The loss of a beloved spouse is in its specific quality and content different from the pain of losing a parent. In all of these cases of a spiritual pain, determined by an intentional relation to the object, it is the *object* that determines the kind of spiritual pain one suffers. This is the case even though there is also a relation to a spiritual place or “locus” in the person where the pain is felt. It is, indeed, the soul that hurts. Here also there is a revelation of our subjectivity; we learn something about our own spiritual nature. But we learn this only in relation to the object and its specific intrinsic goodness or value. The soul experiences the pain at different depth levels within itself. The specific depth at which one suffers the loss of

a beloved spouse is deeper than the one on which one suffers the loss of a dear friend. The same can be said, as Dietrich von Hildebrand pointed out in his early work, *Sittlichkeit und Ethische Werterkenntnis*, of the whole hierarchy of values to which there corresponds a depth structure of the soul: the higher the value, the deeper is the “place” within the person from which the person relates to the value.<sup>75</sup>

In the case of the guilty person who goes against a good or value, there is no corresponding spiritual pain. As we have seen, the specific quality of the innocent’s suffering at the separation from a value presupposes an affirmation of the good or value. In the case of the guilty person, guilt is constituted precisely by the negation or rejection of the good or value in question. The betrayal or abandonment of a spouse do not, as such, bring as a consequence the kind of suffering that occurs when one is separated from a beloved spouse through no fault of one’s own. It is simply not the case that the guilty suffer the same kind of pain as the innocents who are not responsible for the separation from the value. Thus, it cannot be said that the suffering of the damned in Hell is simply the sense of loss of God with no hope of regaining Him. The pain of Hell is not simply a “dark night of the soul” with no hope of seeing the dawn. The qualitative pain of the dark night of the soul intrinsically depends on the continuing affirmation and love of God. But the damned are damned precisely because they rejected God. Their pain is qualitatively different. How, then, are we to understand the pain and suffering of the guilty?

#### E. *The Specific Pain of the Guilty*

First, we can speak of it on the analogy of physical pain. It is a “place” or “locus” within the soul that suffers. It is true that the spiritual “place” that would have been “filled” in the affirmation of a specific value remains empty when that value is rejected. This is something like a physical hunger in the soul. More appropriately, one could also use the term *restlessness*. In this respect, it is similar to the spiritual suffering of the innocent. These too suffer because of the inner sense of emptiness or absence of being “touched” and “filled” by a good or value. But this is a formal or external similarity. For the

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75. DIETRICH VON HILDEBRAND, *SITTlichkeit UND ETHISCHE WERTERKENNTNIS* (1922), reprinted in *DIE IDEE DER SITTlichen HANDLUNG—SITTlichkeit UND ETHISCHE WERTERKENNTNIS* 127 (1969).

innocent, as noted, affirm the value from which they have been separated. Their experience is not primarily directed at the sense of loss but at the value, which they continue to affirm. Thus, it is the *loss of the beloved* which is painful. Because of this, it is a different *kind of pain* than the pain of the guilty. In the latter, it is the *loss of satisfaction* that determines it to be a different kind of pain.

We can say that the spiritual direction or orientation is entirely different in each case. In the case of the innocent, the orientation is toward the value. The innocent affirms the value he is separated from, even after the separation. Consequently, the content of his pain directly corresponds to the separation from the value. The very qualitative content of the pain corresponds to the loss and the value in question. In the case of the guilty, the spiritual orientation is away from the value and, indeed, it may even be *against* the value. Because there is no affirmation of the value, there can be no pain of separation in qualitative correspondence with that specific value. Nevertheless, a real and mysterious affinity exists between the guilty separation from a value and pain as a consequence of that separation, an affinity that is accessible to intuition. It remains to clarify this intuition.

In the case of the innocent separation from value, the resulting pain is qualitatively determined in its kind by the value. Thus, the pain is of this or that kind because it is a separation from this or that value. The very kind of pain at issue necessarily presupposes a continued affirmation of the value. To the extent one is focused on the value and its affirmation, the intention or motive of the one who suffers is not to avoid the pain. It is this continued affirmative relation to the value that allows the value to specify the kind of pain the innocent suffer when separated from it.

In the case of the guilty individual, precisely because a value is not affirmed but in fact rejected in its value-content, the value cannot directly determine the kind of pain suffered in the separation. And in the existential situation of this world, the guilty do not suffer the specific pain determined by the value which is rejected. Yet, we can say of the guilty individual that he *deserves* pain and suffering; not just suffering in general, but a specific kind of suffering that meaningfully corresponds to the kind of violation at issue. We are faced with a basic intuition into that metaphysical law of personal being discovered in the beatifying relation between an objective and intrinsic value and the filling of an inner spiritual space within the person. Objectively there is no "should" or "ought" in the strict sense of the word. The intrinsic value does engender a filling of the soul

when the latter affirms and loves it.<sup>76</sup> And a pain necessarily follows the soul's separation from the good, but only to the extent that the good is still affirmed and loved. In contrast, in the case of the guilty—those who separate themselves from a specific intrinsic value or good by going against it—the corresponding pain does not follow on the level of conscious experience. But it *should* or *ought* follow. Justice requires that it should. The absence of pain in the subject that rejects the good would contradict the *sovereignty of the good*.<sup>77</sup> A consequential property of the sovereignty of the good, namely, something that necessarily follows the sovereignty of the good, is its metaphysical capacity to fill, to perfect, or to beatify<sup>78</sup> the subject who gives the affirmation that is *due* to the good in its sovereignty.

What specifies this pain and suffering which is intuited as somehow proper and due for the rejection of a good? For the answer one must return to the above-mentioned correlation between a hierarchy of objective values and the inner depth levels in the personal soul. Two things need to be noted. First, the objective value prescribes the place in the inner depth of the person from which the person should relate to the value in question and the depth at which the experience *should* take place. The relationship to a wife should be deeper than the one with a friend, to say nothing of a drinking buddy. Second, the objective value has a metaphysical capacity of touching and moving the person at a specific depth corresponding to the height of the value in question. Without developing the point, it is enough to say that the value can be beatifying. It can both fill the person and

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76. An affirmation of the value includes as "completion" of the affirmation the act of self-giving in gratitude. Such a complete affirmation of the value "justifies" the continued abiding of the beatitude that was engendered by the value in question. The affirmation of and gratitude for the friend not only in his intrinsic preciousness, but also as the source of joy, transcends the friend himself and intends also the original Giver of the friend as a gift. The response of affirmation and gratitude "justifies" and grounds the beatitude as a new basis for its continued existence. Without this response, the metaphysical power of value to engender beatitude ceases its generation of joy not so much because it grows impotent but rather because it is not received. The joy or beatitude that began in a receptive experience is perfected and completed in the response that goes out in a gift of self not only to the friend, but also to the original Giver. This again is an indication that the proper meaning of happiness cannot be reduced to an immanent "actualization" and "flourishing" simply conditioned by an object that is "suitable." It is a personal act that is an interpersonal relation of mutual self-giving in love. In the acts of receiving and giving, the specific mark of personhood, the power of self-giving is *also* fully actualized: the person is most perfectly *his own* in a total, that is, a sincere and pure gift of self that now becomes also *totally the other's*.

77. See *supra* Part II.B for the discussion of the word "mine" addressed to a personal other who encounters it as an essential property of "good."

78. See *supra* note 72 and accompanying text, and Part IV.D.

*quicken* the soul, bringing the soul to life at that specific depth. Here one can use the word “happiness.”

In the case of the guilty who reject a specific value, the corresponding depth dimension is not filled. But something more occurs. The depth level from which the value should be engaged is now the place from which it is negated. It is on that depth level and from it that the negation of the value occurs. Although the subject does not feel the emptiness in the same way that the innocent who may be separated from the same kind of level, there is a profound disturbance at the indicated depth level of the soul. Hidden below the surface, it has all the reality of what Kierkegaard described under the various forms of despair.<sup>79</sup> It is the same thing described as existential anguish or angst by Heidegger,<sup>80</sup> the same reality manifesting itself across the wider spectrum of what was called the lost generation after the sixties. This experience is more properly called suffering than pain. This spiritual pain is grounded not simply in the seeking of satisfaction, but in the profound realization that in seeking satisfaction as one’s “ownmost” possibility one is pursuing the impossible. The despairing pursuit of the impossible is compounded by the realization that one has yielded to the desire for satisfaction and lost possession of oneself. The specific kind of pain in question can be called a *metaphysical* pain or suffering.<sup>81</sup>

The metaphysical pain occurs in the *interiority* of the spiritual soul. It may lack the explicitness of a full blown despair. It has, nevertheless, all the reality of pain or suffering as passivity. In this sense, it manifests an *intrinsic* connection to the rejection of the value.<sup>82</sup> In this regard, it is externally or formally similar to the suffering of the one innocently separated from a value he affirms. The fundamental difference is that the innocent affirm the value from which they are separated while the guilty reject it. Thus, the qualitative pain is determined by the place or locus within the soul it

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79. See generally 19 SØREN KIERKEGAARD, *THE SICKNESS UNTO DEATH: A CHRISTIAN PSYCHOLOGICAL EXPOSITION FOR UPBUILDING AND AWAKENING* (Howard V. Hong & Edna H. Hong eds. & trans., Princeton Univ. Press 1980) (1849).

80. See, e.g., HEIDEGGER, *supra* note 46, at 171–73.

81. It differs from the pain of separation on the part of the innocent who affirm the good in loving it in that it is constituted by an interior separation of the personal being from itself—an interior scission or rupture at the center of its being.

82. In its normative aspect as “law,” value calls for a response that entails a self-possession. The rejection of the norm, motivated by satisfaction, entails, in turn, an experienced loss of self-possession and the metaphysical pain that is one of properties of this experience. See *supra* note 51 and *infra* note 90.

occurs. But it is also characterized by the inner hostility of the soul to the value in question. In its qualitative content, therefore, it also manifests the specific bitterness of bile and spleen, of anger and hatred that belongs to the act of rejecting the value.

A question arises from this: can the specific nature of this *interior* spiritual suffering and pain of the guilty qualify as punishment in such a way that it requires no further punishment in the *external* or public order? If it did, there would be no further need of a punishment that would fit the crime. Indeed, from the metaphysical perspective, punishment as such would have no grounds for its imposition in the public order. Any pain inflicted on the criminal would have to be justified only by its deterrent or medicinal function with regard to the individual's participation in the social or public dimension. Nevertheless, we must also focus on the nature of the act as a *crime*, not simply as an act against some good or value outside of the one acting.

## V. THE PROPER CHARACTERISTICS OF CRIME AND PUNISHMENT

### A. *The External and Public Dimension of Crime and Punishment*

So far we have been talking about the separation of the guilty from a *value* or a *good*. This involves an inner rejection of the value or good. The fact that we are dealing with a good that transcends the inner act of the individual does not, as such, give the rejection an external or public character.

The current debates about capital punishment would seem to lose all justification if punishment did not involve in some way the external or public dimension that involves the individual's bodily existence. Pope John Paul II and the *Catechism's* reference to non-lethal means focuses us squarely on the external or public dimension of punishment.<sup>83</sup> This is clear in the treatment of punishment as a defense of society and individuals against criminal acts.

With the term "criminal" we indicate something distinct. It involves the external or public dimension. But within the public sphere, it involves something more than simply the public rejection of

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83. See *Evangelium Vitae*, *supra* note 11, ¶ 56; CATECHISM OF THE CATHOLIC CHURCH, *supra* note 1, ¶ 2267. It is, to be sure, not entirely separated from the inner dimension. References are made in these discussions to the dignity of the human person and to the possibility of repentance, conversion, and rehabilitation. But the focus is on the external dimension.

a value or a good. At stake is not the value or good that may be involved, but the *right* of an individual that is violated by this act of rejection. What makes an act a crime rather than simply the rejection of a value or a good is the fact that it appropriates or refuses to give what belongs to another. The punishment due to such an act is not simply the pain that follows the separation of the guilty from a value or a good. The consequences of such a separation automatically occur in the inner dimension of the guilty.

The task at hand is to show that punishment can and should be understood first and foremost as the imposition of pain in the external dimension of the criminal's bodily existence. Even if we recognize that there is a certain fittingness in the inner pain a criminal feels in his separation from the good he rejects and violates, one can still claim that punishment is a matter left to the final judgment of God. Consequently, we can hold that the criminal "ought" to be punished in a way that addresses his inner being and still that this "vengeance" is the Lord's, not man's. What needs to be grounded is the more difficult oughtness of an *external* pain invoking the bodily dimension as fitting the *inner* spiritual disproportion between the criminal act and the good rejected and violated. This disorder exists objectively as guilt after the crime even if the criminal has repented and is no longer a threat to others.

Crime will always imply an inner rejection of the response due to a value or a good. The criminal situation is always not simply interpersonal, but it is also *antipersonal*. It involves the violation of the victim's sovereignty over his own being and what belongs to him. The punishment in question might involve aspects other than pain. It calls for a *restoration* to the victim, when possible, of what was unjustly taken. But this is not sufficient to constitute the inner essence of punishment for a crime. Such restoration returns to the victim of the crime what legitimately belongs to the victim and can be done without punishing the criminal. A just punishment *for* a crime is a *response to the criminal's guilt*.<sup>84</sup> Guilt is the state of owing a unique debt. Restoration or restitution involves giving back what still belongs to the victim. If this is not possible, restitution may involve depriving the criminal of something equivalent that originally

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84. The language used often distracts from a central point. One can speak of a punishment "for the crime" or a punishment "of the guilty." Neither expression signifies either the *response* character of punishment or its *addressee*. The first expression indicates the *grounds* for the punishment and may implicitly include the *object* of it signified in the second expression, namely, the guilty criminal.

belonged to the *criminal*, not to the victim. This belongs to but is not equivalent to punishment.

Punishment involves depriving the criminal, in some appropriate measure, of sovereignty over his own being “in the world.” As a response to guilt, punishment addresses the criminal in and deprives him of his *self-possession* in some appropriate measure. The moment of *guilt* is constituted not simply in the “crime” of taking what belongs to another, but rather in refusing to “hear” the “Mine”—not of the victim—but of the original Sovereign. The “mine” spoken by the *victim* to the aggressor is the expression of a just claim; it is neither a command nor a law. Prior to or at the moment of aggression, the victim cannot demand of the aggressor a submission, much less a self-donation to himself. He can only defend himself or call for help. The “yours” spoken to the victim by the original Sovereign with regard to what is given him is not addressed to the aggressor. Logically equivalent to a “his,” it becomes a sovereign address to the aggressor only when the latter initiates his aggression. It is a “you will not take what is his” that claims the self-donation of obedience *due* to the Sovereign. In its violation, this claim becomes a debt due to the Sovereign and is the “substance” of guilt as juridical guilt.<sup>85</sup> This is the negative account of the case. In positive terms, punishment restores over the aggressor the sovereignty of the one who grounds and justifies the victim’s right to what is his own. It enforces the Sovereign’s claim to “ownership” of the aggressor—and his obedience—by an act of power that effectively deprives him of exercise of self-possession with regard to what is his own in the *external* dimension of his being. All this is distinct from the restoration of what belongs to the victim.

Without going into a more extensive consideration of the foundation of rights, it is enough to note that man’s genuine ownership or sovereignty over his being and what belongs to him can

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85. In this context it is not necessary to deal with guilt in its *qualitative* dimension as *moral* guilt, by virtue of which the agent becomes the bearer of the quality of moral evil. Inasmuch as juridical punishment is truly a restoration in the public order of God’s sovereignty over the criminal, it is also an affirmation of the original creative word, “Mine,” addressed to the creature that has become a criminal. In this regard, legitimate punishment in the public sphere does not definitively cancel the original “Mine.” As legitimate, civil punishment is not contrary to divine love and its mercy, it does not force the interior self-possession of the criminal and “restore” to God the interior self that could only be given freely. Insofar as this is the case, punishment by civil authority is never punishment for the moral guilt and cannot constitute a moral restoration of divine sovereignty over the interior of the soul. This distinction is relevant to the arguments that invoke God’s love and mercy as a counter to capital punishment.

be grounded only in God, and this not simply in His power but primarily in His goodness. It is *the sovereignty of the good that is the ground for what is given to man as "his own."* Thus, while this sovereignty of God can be rejected in the inner sphere of the individual without ever violating the rights of others, the violation of the right and therefore the sovereignty of another individual over what is his own is always interpersonal and antipersonal; it is a public act. And as a public act it also violates the sovereignty of God as guarantor of what belongs to others as "their own." The specific nature of criminal punishment is the restoration of divine sovereignty in the public sphere as a guarantee and "sanction" of ownership against dispossession by another. In this sense, the restoration of just order is not and cannot be simply a restoration of what belongs to the victim. It must include a restoration of the sovereignty of God as a public measure for the scope and limits in the exercise of individual self-possession in the external dimension of human existence, a measure that is of particular significance since the public use and external effects of this power can impede, hinder, or destroy the "externalization" of self-possession on the part of other persons. In this regard, the public presence, as it were, of God's sovereignty, is a negative measure for the "You shall not steal."<sup>86</sup> It is grounded in the positive "law" of the gift of each human being to all those who constitute his neighbor. *The direct end of punishment is to render impotent in the public sphere the criminal's act of wrongful claim to absolute sovereignty in that sphere.* The restoration of the sovereignty of God in the public order calls for the separation of the criminal from what was originally his own only because it was given to him by God. It should be emphasized that this involves the criminal's "ownership" over his being and goods as this manifests itself in the external order, not the internal order. Such a separation of what belonged to the criminal—to what he has attached himself<sup>87</sup>—is

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86. See *Deuteronomy* 5:20. At this point it is not necessary to develop the positive dimension of the law grounded in the gift of each human being to all those who constitute his neighbor, which Pope John Paul II called the "law of reciprocity." See *Evangelium Vitae*, *supra* note 11, ¶ 76.

87. In this regard an interesting image is drawn by St. Augustine in his work *On the Trinity*. See AUGUSTINE, *ON THE TRINITY*, Bk. 11, Chs. 3–4 (Gareth B. Matthews ed., Stephen McKenna trans., Cambridge Univ. Press 2002). He discussed what we would call self-consciousness in contemporary language. *Id.* At one point he noted that when the individual, who has "ardently attached" (*glutino adhaeserit*) himself to the things in the world that please him, turns in upon himself to think about himself, he draws these things in with him, no longer distinguishing between what he is and what he is not. *Id.* Bk. 10, Chs. 5, 8. This brilliant image

intrinsically painful since it involves a detachment from what has become, on the level of experience, an identifying “part” of his self-experience, namely, the exercise of his self-possession in taking possession of what belongs to others as if he were the legitimate sovereign.

With the above considerations in mind we can aim at a new and deeper perspective on criminal punishment inasmuch as it involves a restoration of just *public* order<sup>88</sup> by reaffirming the sovereignty of God over the criminal who rejects it by unjustly appropriating what belongs to others.

### B. *The Meaning of “an Eye for an Eye”*

First, it must be noted that the punishment cannot be understood properly if it is taken as a *lex talionis* in the literal sense, that is, requiring a hand for a hand or an eye for an eye. The objective principle of *lex talionis* is simply that he who commits a crime will be punished by the deprivation of something that was his. The principle presupposes a personalist understanding of the situation. As an act of injustice, the crime is the taking of what legitimately belongs to another person. It violates the requirement, by a lawful word of the higher Sovereign, that one respect the sovereignty of the other person over what is his own. As such, the violation creates a *disorder*. The restoration of order requires two things. First, if possible, is a restitution to the victim of what was taken or its equivalent. Second is the restoration of the sovereignty that validates legitimate ownership over against the criminal in his interpersonal and public act. This requires an act of public authority against the rejection of the other in the violation of the other’s rights. This second aspect, therefore, involves the external or public dimension of interpersonal relations. The requirement becomes actual *after* the crime, and it no longer involves legitimate defense of self or of others. Recall that this requirement is a response to the *guilt*, not to the criminal act and its external damage to others. In its *public* aspect, however, the

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throws light on the metaphysics of motivation and self-possession. When one chooses one’s own satisfaction, yielding to it, one becomes so attached to the things that provide it that they literally “become properties” of his being (i.e., *what* he is). The sense of one’s distinct identity is lost, because instead of self-determination in a gift to another, one becomes determined by one’s satisfaction and the things that “fill” the interior metaphysical space.

88. The concept of “public order” within the broader notion of “law and order” will mean something entirely different in a theistic context from what is signified in an atheistic or anti-theistic context. So also, it follows, will the concept of “punishment.”

punishment is the reaffirmation and restoration of a *state of affairs* grounded in the fact that human persons not only receive their own existence as a gift, but that of each of their neighbors as well. In this regard, each human person is not only obliged to receive the gift of the other, but also to confirm the intention of the Giver, by which he is given to his neighbor, through a “sincere gift of himself” to the other.<sup>89</sup> Such receiving and giving has as its metaphysical presupposition the power of self-possession introduced above as an essential aspect of sovereignty. The obligation of mutual receiving and self-giving has a law-*like* character—as a law of reciprocity<sup>90</sup>—because it is demanded by the absolute Sovereign, who can alone demand self-donation on the part of a created person.

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89. *Gaudium et Spes*, *supra* note 23, ¶ 24.

90. See *Evangelium Vitae*, *supra* note 11, ¶ 76. The “law of reciprocity” does not give any individual that is subject to it a right to demand a self-donation on the part of another. As in the case of spousal self-donation, however, each spouse has a “right” to claim what has become his or her own *after* receiving the gift. It seems that this claim can be exercised negatively, in the sense of a demand of fidelity in which the spouse does not take away—and give to others—what belongs to the spouse. In this regard, St. Paul reminds the spouses that the body of each is the other’s. 1 *Corinthians* 7:4. It does not follow that this “spousal right” can be enforced positively beyond a verbal reminder as opposed to a command that would require obedience. As noted earlier, obedience entails not only compliance behaviorally, but also an interior self-donation to the authority or sovereignty issuing the command. It seems that a being without absolute authority could not demand *in his own name* of another person, in its absolute power of self-possession, a handing over of the personal center as a gift. The implication is that any genuine authority exercised by a contingent person is genuine only when exercised in the name of the absolute Sovereign. This would mean that if a husband called for obedience on the part of his wife, he could do so not in his own name, that is, for the sake of something that he wanted to affirm as his own, but in the name of God and what belongs to God. He cannot demand obedience for the sake of his own satisfaction or benefit, but rather and only with the intention of giving to God what is due to God. In the case of marriage, what is due to God is not only the *totus*, whole being of each individually, but in the only way that man, made in the image of God, can fulfill the law of reciprocity, namely, by responding to God as the community of persons that is “one flesh.” Only in the intention of an adequate response to God in spousal unity can each of the spouses desire the unity intended in spousal love. The expression of the desire for union is legitimate only with regard to the spouse, its expression as a “wish” becomes a “command” for the beloved who, “from hearing” the wish, obeys her beloved. St. Paul’s clarification of this obedience, “as Christ loved His Church,” means that it was not an admonishment for the wife to obey the husband with regard to sewing, cooking, or bearing babies, but to make a total gift of self as part of their reciprocity to God with a gift of a “self,” that is, the two become one. It should be evident that the “fulfilment” of the law is obedience, and obedience is a total gift of self whose name is “love.” Christ’s statement regarding His fulfilment of the law is a part of His revelation not only of self, but also of the Author of the law, as should be clear from the psalmist’s repeated praise of the divine law as his joy and delight. See, e.g., *Psalms* 119 (118). His “total gift of self” in obedience to the Father is the fullest expression of the mutual love between Son and Father, whose “word” is law.

The *restoration* of the just order in the public sphere must involve an external or public act *against* the criminal's illegitimate arrogation of sovereignty over other human beings. In this context, note that this "against" *cannot* be undertaken by individuals in self-defense, but only by public authority. Defense of what belongs to the intended victim *before* the crime is completed does not touch the fact that the criminal has also taken and publicly affirmed his illegitimate arrogation of his own and others' being. In terms of the preceding analysis, the criminal has kept his own being for himself and acted against God's sovereignty as the source and guarantor of the sovereignty of others over what has been given to them. Punishment in the public order has as its primary end the deprivation of the criminal's appropriation of his own being and the exercise of self-possession with regard to what belongs to his being in the external or public dimension. This act must be public and not private or secret. But because it deals with self-possession as a gift from God—the decisive mark of personhood that allows the created human person to receive the gift of his existence and to be "his own"—the deprivation of the criminal's power of self-possession, in whatever measure, must be exercised in the name of God and as a "mandate" from God, namely, on His authority. This restoration of the just order can only occur through a public authority or office and can never be carried out by private individuals who have not been invested with this specific role.

What is the nature of this public act? Can the *lex talionis* embody this nature? It can to the extent that it deprives the individual of sovereignty over the same thing that he unjustly took from the other. Every individual can justly claim his eye or his tooth as his own. But when he unjustly takes the eye or the tooth of another, he has to be countered after the fact. When the public authority takes the criminal's eye or his tooth, it does so in principle to deprive him, in "equal measure," of the possession of what he has unjustly taken from another. In taking unjustly the eye or tooth of another, the criminal has unjustly claimed sovereignty not only over the neighbor's property, but he has also exercised an absolute and therefore unjust claim to his own being. He has done so over and against the sovereignty of God in the public order. The restoration of God's sovereignty demands that the criminal be deprived of the power, that is, the freedom of owning his own being in the same measure that he has unjustly deprived others. But it must be reiterated that the deprivation must have a public character, namely,

the criminal is to be deprived of the power he has unjustly claimed and used against his victims by an act "from outside." A free and voluntary giving up of this sovereignty on the part of the criminal is not enough. This too demands a proper personalist understanding.

A separation of the criminal from what is his own in proportionate measure to the separation of the victim from what is his own establishes only the formal "equality" between the punishment and the damage. But neither the culturally conditioned expression of this with the formula "eye for an eye" nor its abstract formulation captures punishment as the restoration of a just order. The underlying principle of punishment as restoration of the just order is grounded not in the "proportion" between aggressor and victim, but in the proportion between the criminal and God. The fundamental "effect" of civil punishment is a reaffirmation of the "presence" and validity of divine sovereignty in the public sphere as evidenced by the impotence of the criminal in the "external" exercise of his self-possession in a way that goes against divine sovereignty. A voluntary non-exercise, on the part of the criminal, of the powers formally "equal" to the victim's deprivation will not restore the violated public aspect of divine sovereignty. The aim of public punishment as an act is to render *impotent* in the criminal that dimension of the power of self-possession as exercised in the *external*, public world.

One can now return to the problem first raised with regard to the intrinsic relation between guilt and pain. Earlier it was suggested that the metaphysical consequence of crime as a separation from the good is not commensurate with the pain and loss endured by the victim. The loss of an eye on the part of the latter is not followed by a similar loss on the part of the former. One consequence follows but on a deeper level, the "metaphysical pain" of the interior separation *within the criminal* who has lost possession of self in yielding to his satisfaction. The pain of the criminal in losing an eye or a tooth cannot symbolize such a loss even metaphorically. Pain and suffering are not as such equivalent with loss of self-possession. The loss of self-possession is always and uniquely painful, whatever the degree of pain and the level of conscious experience of it. This initial consideration should be enough to suggest that while punishment must be painful, the *intention* to cause pain may not be a legitimate one.

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C. *The Punishment Must Be Humane*

The external dimension of punishment needs to be what is commonly called humane. This is a requirement distinct from that of the specific justice of punishment as fitting the crime. But it seems to have taken a central role in the discussion of capital punishment, as indicated by the appeal to the cruel and unusual nature of a specific punishment.

Taking an eye for an eye deprives the criminal of the use of what he has taken from another. As such it is a just punishment. But in today's circumstances it is also *inhumane*. Therefore, today it may also be unjust. Modern penal systems make it possible to deprive the criminal of the use of his eyes in ways other than physically blinding him. The deprivation of freedom by way of imprisonment is historically more recent than its deprivation through slavery. The *lex talionis* must not only be understood as a statement of the principle that punishment should fit the crime, but also as a historical expression of it prior to the system of imprisonment or even slavery. In its own way, it was a direct and accurate way of expressing the awareness of a law that stands above the claims or whims of individuals in society. Even though the *lex talionis* was prone to abuse as revenge, its sobering existential impact was not simply as a deterrent but as a reminder of man's just ownership of his being. Unfortunately, the concrete use of modern penal systems has the opposite effect. Even though the criminal is technically deprived of freedom, in practice, the actual conditions of our modern prisons give him license to pursue the very same kind of satisfactions that motivated the original crime. Not only are these prisons inhumane, they are inordinately cruel in breeding the criminal mind-set that rejects legitimate sovereignty.

D. *Punishment Must Be Painful*

The punishment must be painful. Here again, a personalist perspective is necessary. This perspective recognizes the intimate, non-instrumental relationship between body and soul. The body embodies the soul and is an expression of it. Not only can it express or symbolize the life of soul, the acts of the soul acquire their actualization or efficacy in the body. The acts and experiences of the soul acquire a certain validity in the interpersonal and the inner-worldly dimensions in and through the body. The well-known

saying, "When you hit my body you hit me," brings this to expression. My antagonism towards you acquires a new dimension of reality when I hit you. Analogously, certain interpersonal acts such as spousal love require their embodiment in order to be "consummated."

One of the implications is that human pain can be meaningfully incorporated into just punishment. It does not follow that pain as such, particularly bodily pain, can become the theme of punishment. Were this to happen, human dignity would indeed be violated. The significance of pain in relation to punishment is the following: the restoration of the just order after the crime demands a re-ordination and a subordination of the criminal as a subject of God's sovereignty in the public order. In this case, the subordination must have a public character. It must be seen as a "turning around" or "conversion" of his public rejection, in the criminal act, of the rights of others and sovereignty validating these rights. In its public character, it must be seen, then, as limiting or going against his claim to sovereignty with regard the true sovereignty in the city of the Lord. The question of an inner conversion of the soul is important but not directly relevant to the requirement, in justice, for a public reaffirmation of just authority by *rendering the criminal's claim to absolute sovereignty impotent*.<sup>91</sup> But the public aspect of the criminal act demands the limitation of the freedom to act in the world in and through the body. This limitation of inner-worldly freedom will always be painful in some measure. The specific "measure" may also be a function of the cultural climate and circumstances of the age. It may involve bodily pain as it did in the practice of flogging. But even here one can distinguish between a legitimate and an illegitimate role of pain. It is not legitimate if the pain is the theme in simply repaying or getting back at the criminal. Unfortunately, this is the connotation acquired

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91. It suffices to remark that the argument based on capital punishment's possible preemption of the grace of conversion seems to misjudge both the nature of God's sovereignty and His mercy. Indeed, it seems to diminish the one by magnifying the other. If, however, sovereignty as ownership is a manifestation of love, it is inseparable from mercy. Indeed, the *external* restoration of God's sovereignty over the criminal as "subject" to God is a renewed confirmation of the criminal's being a gift from God and the opportunity for the criminal to regain possession of his being and to respond with a free "yours" in returning to God. The "separation" of the criminal, by an act of punishment imposed from "without," from what determines and possesses him from within, namely, his "own" satisfaction, can be accepted by the criminal as a "grace" and help in actively taking upon himself the "pain" of this separation. In this "pain" and "suffering" he is no longer a passive victim, as it were, of the external punishment, but makes the suffering his own act, a necessary part in "putting off the old" man in the self-giving of the "new man." Cf. *Ephesians* 4:22-24.

by the term “retribution,” which emphasizes the fact that the criminal is getting “what’s coming to him.”

The true function of punishment, even as expressed in the notion of the restoration of the just order, is the *restoring of the human person* guilty of a crime *to the Sovereign*, not only as He is present in the interiority of the criminal, but also as He is present in the public, interpersonal order in which man is given as a gift to man. In this respect, it is the restoration of the human person to his true dignity as a person. Human dignity lies in the fact that he belongs to God and is called to complete this belonging by a free act of submission to the Lord. Such a free act requires that the individual belong to himself. The criminal who has acted against the good and the rights of others has done so because he has *yielded* to a desire for some satisfaction. If he is to be restored to the Sovereign by a free act of his own, he has to separate himself interiorly from the desire for satisfaction to which he has yielded. This is the “dying to oneself” that St. Paul discusses.<sup>92</sup> It is a spiritually painful process. Our focus, however, is not the interior restoration and conversion of the criminal, but rather the affirmation of the sovereignty of the Lord in the public sphere. Such a restoration has its own validity apart from the interior conversion of the criminal. Indeed, it is required, given what is at stake in the public sphere.

As already noted, the public restoration of true sovereignty in the public sphere must take the form of limiting the inner worldly freedom of the criminal. This is painful for the criminal. He can accept this external pain as an embodiment of his internal expiation for his crime. In doing so, precisely by virtue of the sacramental character of the body, he can restore an inner integrity of body and soul. The painful dimension of punishment can then be medicinal. Indeed, it could not be medicinal if it lacked this painful dimension. But the public restoration of true sovereignty in the public sphere is still required even if the criminal refuses to reorder and subordinate himself to the Sovereign. Because it is the restoration of the criminal to the true dignity of his personal situation in a community of persons, it keeps the painful dimension of punishment in proper subordination to the intent of the punishment. Thus, in the punishment of the criminal, penitent or impenitent, the pain must be an integral *consequence* of the curtailment of the inner worldly

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92. See *Romans* 6:8–11.

freedom of the individual. When it is separated from this as a distinct end, it becomes gratuitous and unjust, and hence, inhumane.

The situation of the impenitent criminal sharpens the issue of pain as an integral and necessary aspect of punishment.<sup>93</sup> It is quite possible that the impenitent criminal does not at all suffer from the limitation on his inner worldly freedom of action. This brings the discussion back to the dimension of interiority, which in principle is not the domain of public authority. Still, it is relevant to punishment. The personal experience of pain is independent of an inner act of submitting to authority or refusing to do so. But precisely because of its intimacy to the soul, it is an effective external and public expression of the fact that the criminal's exercise of the self-possession that resulted in the crime has, indeed, been rendered impotent by a sovereign authority that transcends him. Without going into any extended reflection on the human dimension of pain, it is enough to note the aspect salient to our discussion. In bodily pain and suffering the person finds an existential antithesis to the claim to self-sufficiency and autonomy. The experience of pain and suffering can become the embodiment of humility and of selfless gift of self on the part of an individual who had to free himself from an illegitimate

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93. A distinct though related question bears on the impenitent criminal who refuses the interior submission to the divine Sovereign after death. One may grant the interior metaphysical suffering in the experience of impotence in the decision to "keep" one's being instead of rendering unto God, but question to what extent this includes the "fire and brimstone" of bodily suffering in Hell. Does not this example of a "just God" justify the imposition of pain by earthly authority? The answer would involve some intuition into the analogy of soul and body in their "intimate" union which allows—in the terminology used by Pope Benedict XVI in *Deus Caritas Est*—the "compenetration" of the two, the presence of the soul not only "in" the body, but that of the body also "in" the soul. See Pope Benedict XVI, *Deus Caritas Est* [Encyclical Letter on Christian Love] ¶¶ 5, 12 (2005). One particular aspect of this notion of compenetration is the fact that the human body is the locus and condition for the full actuality of human acts in the relation to other human beings. One instance is the *completion* and *actualization* of marital love in the spousal act. It would seem that an essential component of this full actualization is the consciously experienced bodily feeling. This is a particular instance of the more general analogy between the experiences of the "senses" and the spiritual acts of the soul. The literal language of the former is "borrowed" to express the latter: we *see* the truth, we *hear* the communication, we are *touched* by love, we are *wounded* by the beauty of the beloved, we *taste* the "sweetness of the Lord." The dimension of bodily experience, the medium and locus for the human experience of the truth, goodness, and beauty of creation, would retain its significance in the experienced rejection of all these, and their Creator, as gifts. The attendant pain seems *proper* and *fitting*, that is, just. But for all that, one can still say that one ought neither intend nor rejoice in the pain of the guilty one. Conversely, the mystery of the intimate union of and "fit" between soul and body in some fashion points to the intention and even desire to take upon oneself the pain necessarily involved in liberating the inner self from its slavery to its "own" satisfaction, inner "alien" to which it yielded the possession of self.

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solidarity with his own being in order to “put on the new man.” Or, in the case of the proud, pain and suffering witness in their own way to the mendacity of the claim to absolute autonomy. This is why pain as such can have a place in the public dimension of punishment. This does not mean that the public authority has a *carte blanche* in the imposition of pain.

The prudential determination of the role of pain always presupposes the awareness of the dignity of the person and the subordinate role of pain to the primary purpose of restoring of that dignity to the criminal. In a humane penal system, therefore, pain would not be excluded as such. The humaneness of the system, however, would depend in turn on the willingness of the representatives of public authority and members of the community at large to help the guilty bear the pain. If the punishment is to be borne always and only by the guilty, only a literalism insensitive to the personalist dimension of human community would take this to imply that we are also to leave the criminal isolated in his pain. The deeper foundation of the community lies in the truth that we are given to each other.<sup>94</sup> This truth remains valid even when the criminal is isolated from the community in a way that curtails his freedom and brings pain. The restoration of the criminal to the Sovereign, however, does not suspend the Sovereign’s teaching that we are to be our brothers’ keepers and are to “visit” them even while they are imprisoned.<sup>95</sup>

*E. Punishment Is Not to Be Intended as a Deterrent*

Punishment is a deterrent, but it is not to be intended as such. The integral role of pain in punishment makes it a deterrent, but only if it is understood in the personalist terms outlined above. The same personalist framework, however, forbids the use of pain as a deterrent. For then the infliction of pain would become a *means* to deterring future criminals. This would be an abuse of the person being punished. Considered as a deterrent, punishment is measured by its efficacy. But this means the relationship between punishment and the guilt of the crime becomes an *extrinsic* one. In effect, punishment is now tailored to “fit” the will and intent of future criminals. It is no longer something that “fits” the guilt incurred in

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94. See *supra* Part V.B and note 90.

95. See *Matthew* 25:36 (“I was in prison and you came to me.”).

the crime already committed. In this respect it is a rank injustice and violation of human dignity to inflict punishment on one man according to the measure of another man's intent and will to commit a crime. The application of punishment with the intention of deterring future criminals is a radical breach of justice. To the extent that such thinking dominates the understanding of punishment, it obscures the true nature of punishment in its primary purpose as well as in *its* capacity to deter. But to the same extent, it turns punishment into something that reduces the criminal to "victimhood." Failure to understand and apply criminal punishment in the context of divine sovereignty in the public sphere reduces it to something in which pain becomes the theme of revenge or the means for deterring. In both cases it violates the dignity of the criminal and makes him into a victim of injustice. Because of this fallacious understanding, arguments against "bloody" or painful punishment as inhumane acquire a formal correctness.

The fact that punishment ought not be used as a deterrent does not mean that it does not have the objective capacity to *function* as a deterrent. Objectively, punishment is also a warning. Provided as sanction for a specific law, the pain of punishment amplifies the "voice" of the law in the external forum, analogous to the voice of conscience in the internal forum. Punishment, administered by a legitimate authority is the voice of that authority that certain actions in the external dimension *ought* not be performed. In its proper and just application, punishment is a reminder that something ought not be done because it goes against the sovereignty of the "good." But this means that the behavior in question ought not be performed because it violates the "good," not because one will be punished for it. In this respect, the painful aspect of punishment amplifies, as it were, the "ought not" of a natural or a just positive law. The public imposition of a just punishment brings the observers of it into the presence of legitimate sovereignty and its ultimate ground.

Once an individual or a culture has forgotten that the nature of legitimate public authority is grounded in the sovereignty of a good God, there occurs a shift toward understanding punishment as something that can be applied with the *intention* of deterring future criminal acts. This has the effect of making pain thematic in punishment and separating it from its inner link to the injustice of which the criminal is guilty. Pain thus no longer plays an integral part of the restoration of a just order. The threat of pain to persons becomes a means for averting the undesired behavior rather than a

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warning about the injustice of some behavior that ought not be performed because it is unjust. Separated from its inner link to guilt, pain becomes understood as *payment* for pain. We see this increasingly in the United States in the phenomenon of compensation for pain and suffering as opposed to actual damages. Such a perspective takes punishment across the line that divides it from revenge.

A specific *depersonalization* occurs in the use of pain as a means for controlling the behavior of others. Such a use of pain becomes a type of reinforcer that conditions behavior. Regardless of any *efficacy* of such reinforcement, whether through reward or punishment, it is a violation of the dignity of the human person. Interestingly enough, some of those who are opposed to capital punishment cite its barbaric and inhumane nature. They are entirely correct if punishment is understood as the infliction of pain as payment for or a deterrent against some forbidden behavior. Against the background of human dignity such punishment is deplorable and unjust. But in its own way it is also evidence of a failure to see the fuller dimension of human dignity that is restored by just punishment in which pain is neither a theme nor a means, but rather an integral dimension of the re-ordination of the guilty person to the sovereignty of God in the public order.

## VI. THE SIGNIFICANCE OF CAPITAL PUNISHMENT

With everything that has been said, there remains the question not so much of punishment but rather of capital punishment. Its very radical and utter finality would, it seems, mitigate against invoking the restoration of just order as its justification. Rather than subordinating the individual under a legitimate sovereignty, it simply eliminates him. It may in fact prove the power or even omnipotence of sovereignty, but can one speak of capital punishment as a restoration of the *individual* to a just order?

Any justification of capital punishment has to be grounded in a proper understanding of the nature of a *public authority in a human community*. This calls for a separate and more extensive analysis than can be presented here. We can, nevertheless, note some of the aspects that would be sufficient at least to present the basic justification. In the course of such a justification we will also have to consider what it is in the nature of a *capital* offense committed in a human community that merits *capital* punishment.

The focus in the discussion so far has been punishment in the public or civil sphere of human existence. This discussion presupposes the sovereignty of God over the interior sphere of the individual human person. Acts in which the person defies God directly are not subject to the authority of, and therefore punishment by, public authority. "Punishment" of the *sinner* is left, as it should be, to God.

But punishment of the *criminal* is the prerogative and, indeed, a duty of civil or public authority. This is an important difference that seems to be overlooked in the discussion of punishment among Catholics and other Christians. Many of these fail to distinguish between crime and sin, and thus, between the guilt of a criminal and the moral guilt of a sinner. Consequently, they argue that the sinner is ultimately to be left to God, and therefore, that capital punishment may effectively deprive the criminal of the opportunity of repentance and conversion. In doing this, they also, at least implicitly, fail to see the nature of public authority and its grounding in God as well as the nature of human community.

The common understanding is that man by nature is a *social* animal. His existence, development, and full actualization require that he live in a community. This is certainly true but does not go far enough. Pope John Paul II provides a deeper understanding for what a *community of persons* is when, in *Evangelium Vitae*, he notes that each and every individual is not only *given as a gift* to himself, but also as a gift to every other individual.<sup>96</sup> This implies two things of direct interest to our discussion: (1) the vertical relation between God and man, and (2) the horizontal relation between man and man. In both dimensions there obtains what Pope John Paul II called the "law of reciprocity."<sup>97</sup> Every gift, as a gift, requires a gift in return. This grounds the meaning of the passage in *Gaudium et Spes* that is so frequently quoted by Pope John Paul II: "[M]an . . . cannot fully find himself except through a sincere gift of himself."<sup>98</sup>

#### A. *The Vertical Dimension: Human Life Is a Gift from God*

In the vertical dimension, God gives man the gift of existence and in that gift He also gives Himself. Man is therefore called to receive

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96. See *Evangelium Vitae*, *supra* note 11, ¶ 76.

97. *Id.*

98. *Gaudium et Spes*, *supra* note 23, ¶ 24.

two things: his own existence and the Giver of the gift. And man is bound by the law of reciprocity, which requires that he reciprocate with a sincere, self-less gift of self to God. It is in the reciprocity of thanksgiving that a community of persons is established between God and man, drawing man into the preexisting divine community of persons. In *Evangelium Vitae*, Pope John Paul II identified the culture of death as man's refusal to accept the gift of life.<sup>99</sup> Instead of *receiving* the gift of life, man *appropriates* the gift and rejects the Giver and His love. This is a misappropriation and an extortion of the gift. In doing so, man separates himself from God. Death in its bodily dimension is the consequence of a dual separation: (1) a separation of the person from God in keeping its self for itself; and (2) the interior separation of itself from its self in the loss of self-possession. The rejection of God's gift of life is a "capital" act; it is death-bearing.

One more thing has to be noted in this context of the vertical relation between God and man. The very nature of the gift of life requires that it be freely given and freely received. Accordingly, man has been given the power of self-possession that entails a real sovereignty over his own being. This is the power that is so dear to the culture of death and has been made the cornerstone of the thought of Martin Heidegger.<sup>100</sup> Yet, as St. Thomas Aquinas noted, this power has been given to man not so that "it were lawful to him to do whatever he will."<sup>101</sup> Only because man is a person who has been called to make a sincere gift of self to others has he been given the power of self-possession. For no one can give what he does not possess. Thus, the metaphysical foundation and the explanation of freedom as a sovereign power over oneself is the essential call of every person to give himself as a total gift of self to the other. God's sovereignty over man is accomplished and fulfilled only when man receives God's gifts and reciprocates with a gift of self. The culture of death, however, "celebrates life" by choosing to keep it for itself and thus, as Christ warned, will lose it.<sup>102</sup> In such an act, man's existence is a being-towards-death.

What I have discussed so far is the criminal act as an unjust appropriation by the criminal of what was given by God to another

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99. See *Evangelium Vitae*, *supra* note 11, ¶ 12.

100. See *supra* note 46.

101. SUMMA THEOLOGICA, *supra* note 32, Pt. II-II, Q. 104, Art. 1.

102. See *Matthew* 10:39.

human being as “his own.” The original donation is justification for the victim’s self-*defense* against the aggressor. Punishment, subsequent to the crime and in response to the criminal’s guilt, would restore in the public sphere the sovereignty of God over the members of a society as a guarantee for the legitimate ownership by each individual of what is his own. One possible implication of this, at least with regard to defense and punishment, is that whatever the *positive vertical* link between God and the individual and apart from the possibility of free contracts between self-possessing “sovereign” individuals, there is no deeper bond between individuals on the horizontal dimension. On the horizontal level, the relations between men would be ones of mutually agreed exchange of what originally belonged to each—the talents given by God—in quantities corresponding to and determined by the desire of each to hold on to what he has or to obtain what belongs to the other. Public authority would have the task of guaranteeing and enforcing the fulfilment of contracts, namely, that each individual give *what* is due to the other, ensuring thereby that each gets *what* he contracted for. On such an account, whatever the individual’s personal vertical relation to Him, God might retain the role of a publicly invoked witness to the interior self-possession exercised in social acts, such as contracts, which would otherwise be established at the initiative of the contracting parties.

Such a perspective enjoys a certain plausibility since it affirms partial truths: the freedom of each individual to keep what is “his own” as well as the freedom to propose exchanging it for what belongs to another. The function of civil authority would be to protect the exercise of this freedom as a “right” over against those in whom the *desire* for what belonged to another outstripped their willingness to give up something of their own in exchange. The operative premise and principle in this perspective is private *property*, in other words, individual ownership, and the right of free exchange. The unexamined axiom is the right to private property over against an even less examined “desire” of another to appropriate it on his terms. The latter is the dynamic movement toward one’s own satisfaction that requires the possession and consumption of—that is, the *power over*—the *means* for the filling of the inner metaphysical space of the person. Less elegantly but more effectively,

this desire is identified as *greed*.<sup>103</sup> On the assumption of satisfaction as a universal motive for human action, the function of a *public* authority or the state becomes the defense of a radically *private* end of human action: the regulation of profit, the production of wealth, and its acquisition as a means for satisfaction. The latter is a right that falls under the penumbra of a “right to privacy.” A specifying mark of the culture of death is its use of public power to protect what is in a unique way private, “one’s own” satisfaction pursued as “end.” Thus, the state protects not so much some satisfaction in the privacy of a closet, but a whole industry and commerce in producing, advertising, marketing, and delivering various means for satisfaction while maintaining an educational monopoly that teaches its youth to “obey its thirst”—to seek absolute freedom from norms except those approved by the majority. If what has been discussed here about the metaphysical nature of death is true, namely, that it is the interior loss of self-possession to “one’s own” satisfaction, then state authority in the culture of death enforces those processes that destroy interior sovereignty and promote various forms of addiction and alienation.<sup>104</sup>

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103. See LUDWIG VON MISES, HUMAN ACTION: A TREATISE ON ECONOMICS 717 (4th rev. ed., Fox & Wilkes 1996) (1949), for a discussion of the various contrived solutions of a “third solution,” which he identifies as “systems which, it is claimed, are as far from socialism as they are from capitalism.” Von Mises says the following of the attempt to eliminate selfishness: “In urging people to listen to the voice of their conscience and to substitute considerations of public welfare for those of private profit, one does not create a working and satisfactory social order.” *Id.* at 726. The “considerations of private profit” of this passage becomes “acquisitiveness” and a few pages later turns out to be selfishness, the sole motive of human action: “The man who gives alms to hungry children does it, either because he values *his own satisfaction* expected from this gift higher than any other satisfaction he could buy by spending this amount of money, or because he hopes to be rewarded in the beyond.” *Id.* at 726, 735 (emphasis added). It is ironic that von Mises employs the language of “gift” in a passage whose internal meaning makes a gift impossible, reducing it to an instrumental gesture.

104. This loss of self-possession is undoubtedly the “alienation” Pope John Paul II had in mind in *Centesimus Annus* [*Encyclical Letter on the Hundredth Anniversary of Rerum Novarum*] ¶ 41 (1991):

Man is alienated if he refuses to transcend himself and to live the experience of self-giving and of the formation of an authentic human community oriented towards his final destiny, which is God. A society is alienated if its forms of social organization, production and consumption make it more difficult to offer this gift of self and to establish this solidarity between people.

B. *The Horizontal Dimension: Love of Neighbor*

On the horizontal level, man is also given to man as a gift.<sup>105</sup> Where the above noted vertical relation to God as the source of the individual's own existence might be the basis for justifying defense as a keeping of one's being as one's own, the recognition that human beings are also given as gifts to each other expands the meaning of interpersonal relations between them to include the possibility that one is the "other's own" in two senses. First, when the other's existence or well being is at stake, because I have been given to him and thus "belong" to him, he has a justified claim on me as "his own." This ownership is juridically justified by God, the original Sovereign who gave me to him. Because as a person I have an absolute power of self-possession, his claim cannot be directed at that inner core of my being from which I give myself. In other words, my neighbor has no claim on my *self-giving*, only to what belongs to the *external* dimension of my being. Still, my honoring the claim will involve self-giving in some measure. Second, and more importantly, the proper personalist understanding of the *juridical* situation should follow from a further element that belongs to the essence of the gift: a gift is always the expression of a self-giving on the part of the donor. Here, the gift of personal existence entails a unique form of this expression: God comes forth from Himself in giving not simply as "Giver" but *in* the gift, in the created person to whom He gives the gift of its existence. In His love, God desires to give Himself, and does so by entering into the very gift given. Thus, it follows that in giving me to another, to my neighbor, God not only gives me but gives Himself also in me to my neighbor. I fail to receive God when I do not go along in the gift that he makes of me to my neighbor. In other words, as given by God to my neighbor, I am bound also to give myself to the neighbor. So also, as God gives him to me, He gives Himself in my neighbor, and I fail to receive Him if I refuse to receive my neighbor.

This foundation of the law of reciprocity shows itself also to be the basis for a personalist understanding of community that goes beyond sociological and economical concepts of it involving the mutual need

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105. See *Evangelium Vitae*, *supra* note 11, ¶ 76 ("The God of the Covenant has entrusted the life of every individual to his or her fellow human beings, brothers and sisters, according to the law of reciprocity in giving and receiving, of self-giving and of the acceptance of others. In the fullness of time, by taking flesh and giving his life for us, the Son of God showed what heights and depths this law of reciprocity can reach. With the gift of his Spirit, Christ gives new content and meaning to the law of reciprocity, to our being entrusted to one another.").

of the individual for survival and development of the individual's immanent potential. Analogous to the vertical relation in which God gives man his existence as a gift, entering into the *interior metaphysical space* of the individual, so also God enters the horizontal *interpersonal* or *public metaphysical space* within which He maintains a presence in giving human persons to each other.

As an illustration of a metaphysics of community, one can use Pope John Paul II's hermeneutics of the gift to retell the story of Adam and Eve as its first human actors. In the *vertical* dimension, God *initiates*<sup>106</sup> within the inner space of Adam an intimate sharing of Himself that is to be *completed* by Adam's receiving Him and reciprocating with a gift of self.<sup>107</sup> Adam's self becomes *interpersonal* on the *horizontal* dimension and cannot be completely given to God in reciprocity unless it also includes Eve, the first "neighbor." As God's gift to Adam, Eve must be received by Adam into his own interior space, an event that cannot take place unless Eve, in her turn, conforms to God's creation of her as a gift and gives herself to Adam, "entering" into his interior space. The same applies to Eve's receiving her own existence as a gift to be received and reciprocated to God with the help of Adam. The mutuality of receiving and of self-giving on the horizontal level establishes a mutual *juridical* and *ontological* "ownership" in which the two "as one" can complete their reciprocity in a gift of "self" to God. Through their mutual receiving and giving in the interiority of each, each becomes the other's own. *Juridical* ownership is established *from within* the interiority of each and *in* the interiority of the other. It is this mutual entry into the interior space and the very center of the other that also establishes the *ontological* union intended by the receiving and giving as love, a union in which the "two become one" in one act of the "new" life of a *communio personarum*—a communion of persons. The English language in its ordinary usage no longer conveys adequately the significance of this new "unity." The Latin root of *communio* suggests, in the original meanings of *munus* (gift) and the prefix *cum* (with), that a communion is *sharing of a gift*. In this case not the gift of something, but the gift of a self in its personal capacity of self-possession from within itself. In sharing the gift of self with another self, I come to

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106. See *Genesis* 2:7 ("[T]he LORD God formed man out of the clay of the ground and blew into his nostrils the breath of life, and so man became a living being.").

107. Because Adam is created in the image of God, a community of persons, see *Genesis* 1:24 ("Let *us* make man in *our* image . . ." (emphasis added)), and because he is alone, he cannot complete his newly given life unless he "breathes out."

“own” the other as I possess myself *juridically*, from within my own being as *ontologically* part of my own being.

The divine gift of each human being as a gift to be shared with every other *initiates* a metaphysical interpersonal or public space that is to be *completed* by the mutual receiving and giving of selves. The mysterious paradox of a temporal space that is initiated by God to be completed by created beings is partially resolved by the personal creatures with their interiority and the capacity of self-possession from within. The *act* of self-possession realized and perfected in self-giving to another out of love is *incommunicable*: nothing other than a personal self can perform it from within itself. The interior metaphysical space, however, is different.

It is incommunicable in the original sense that there is only one absolute Sovereign (i.e., God) without whose permission no other can enter. But precisely because that Sovereign is “within” Himself, He can share that space with another, and do so within the sovereign space of the other. The paradox is that the incommunicable personal space of each is *initiated* as a common space by God’s presentation of a gift of other persons to a self that has been created in a receptive mode of being from the beginning. The interpersonal space is metaphysically constituted already in the *vertical* dimension by God’s entry into the interiority of the created person by creating it from within as a gift. The metaphysical interiority of God and created persons overlap from the beginning. In the *horizontal* dimension interpersonal interiorities of created persons begin to “interlap” with the creation of a new person presented as gift for those already in existence. The sovereign of each incommunicable interior space is to complete the opening of his interiority and share it in the mutual receiving and giving. This is the nature of the interpersonal space underlying and prior to what is normally understood as the “public” sphere, which involves bodily existence. It can exist as an interpersonal space involving noncorporeal persons.

The theme of sovereignty involves a metaphysics of interpersonal space, namely, the “interlapping” of sovereign personal spaces, from within which each person is “his own,” and is a presupposition for understanding law in general and criminal law in particular. This Essay focuses only on the sovereign dimension of human self-possession insofar as it is “bound” by the divine Sovereign and placed under the “law” of self-donation. Such a demand is metaphysically justified only if it has its source in the self-giving of the Sovereign in His goodness, namely, if the “Mine” itself flows organically from the

“yours” of a good that gives itself. Such a justification facilitates understanding *obedience* as it comes “from the hearing” of the call to receive the gift, and reciprocate in self-giving, as well as understanding the nature of *disobedience* and the genesis of the motive for it. Crime, however, is more than disobedience. It involves the exterior dimension constituted by embodiment (possessing a body), which involves existence in the physical dimension and space of the material world. The expressions “my body” and “my world” each involve their specific forms of “ownership” distinct though related to the ownership of one’s inner personal space “from within.” Both of these specific forms involve a form of power that distinguishes itself as an “overpowering” power—one that does not demand a free submission and self-donation or even a “yielding” on the part of its object.

### C. *The Personalist Significance of a Capital Offense as a Crime*

The “loss of one’s life” resulting from the attempt to “save one’s life” occurs in the *interior* dimension of the individual. Corporeal death as the consequence of mortal sin reflects the intimate interior nature of *embodiment*. With the issue of capital punishment, we are interested in the justification of imposing death as something in the *exterior* dimension and distinct from the natural mortality due to sin. The latter does not, as such, justify the former. The mark of Cain could be taken in this sense:<sup>108</sup> Whatever the guilt of the murderer, let no other individual kill him.

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108. See *Evangelium Vitae*, *supra* note 11, ¶ 9 (“God drove Cain out of his presence and sent him into exile far away from his native land, so that he passed from a life of human kindness to one which was more akin to the rude existence of a wild beast. God, who preferred the correction rather than the death of a sinner, did not desire that a homicide be punished by the exaction of another act of homicide.” (quoting ST. AMBROSE, *HEXAMERON*, *PARADISE, AND CAIN AND ABEL*, BK. II, ¶ 38, in 42 *THE FATHERS OF THE CHURCH: A NEW TRANSLATION* 436–37 (John J. Savage trans., 1961) (footnote omitted)); see also *A CULTURE OF LIFE AND THE DEATH PENALTY*, A STATEMENT OF THE UNITED STATES CONFERENCE OF CATHOLIC BISHOPS CALLING FOR AN END TO THE USE OF THE DEATH PENALTY 11 (2005): (“[I]t is important to read individual passages in the context of Sacred Scripture as a whole. While the Old Testament includes some passages about taking the life of one who kills, the Old Testament and the teaching of Christ in the New Testament call us to protect life, practice mercy, and reject vengeance. When Cain killed Abel, God did not end Cain’s life. Instead, he sent Cain into exile, not only sparing his life but protecting it by putting ‘a mark on Cain, lest anyone should kill him at sight.’” (quoting *Genesis* 4:15)).

It should suffice to note here that while the U.S. Conference of Catholic Bishops document is correct on reading Scripture as a whole, it seems to interpret this principle from its own context that has restricted the discussion of the death penalty to its partial understanding of

Murder is commonly understood as the killing of an innocent human being. And it is recognized as intrinsically wrong. Such a designation is sufficient in identifying the murderer and his guilt. But it does not explain the *reason* why it is wrong to kill an innocent human being. In other words, the correct intuitive grasp of the fact that murder is wrong is not sufficient for a fuller grasp of its significance and consequences. One may also correctly describe it as heinous and unspeakable, but without a more adequate explanation of the wrongfulness of murder, one will be hard put in explaining why the killing of the murderer is not also wrong and barbaric in its cruelty.

In committing the act of murder, one “intercepts” the gift given by God to another person. One does not simply cause a death, as in the case of defending oneself, rather, one takes and appropriates what has been given to another. This is the *juridical aspect* of murder—the taking of what belongs to another and is therefore “owed” to the other. The fuller explanation of its evil demands an elucidation of the *personalist aspect*.

We can speak of human life as a gift only if we understand the great *good* that it is. In this case that great good is an attribute *of the person as person*. Minerals, vegetables, and animals are simply created. They are not gifted with existence. The goodness of the gift reveals the benevolence of the giver. It also reveals the sovereignty of the giver over what is given. It must belong to him if he is to give it truly. He must be the lord and master of the thing given. It also reveals the sovereignty of the receiver. If he is to receive, his act cannot be the reaction of an animal to food or water, for example. He

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it in terms of protecting life, practicing mercy and rejecting vengeance. Pope John Paul II is more nuanced in his own teaching when in *Evangelium Vitae*, *supra* note 11, ¶¶ 55–56, he explicitly identified “legitimate defense” as “the context in which to place the problem of the *death penalty*.” He is also more realistic. Having identified the present “culture of death” as one marked by an eclipse of God, he also provides the proper context for interpreting the situation of Cain as clarifying the real context of the present age which he is addressing: “If Cain is capable of confessing that his fault is ‘greater than he can bear,’ it is because he is conscious of being in the presence of God and before God’s just judgment. It is really only before the Lord that man can admit his sin and recognize its full seriousness.” *Id.* ¶ 21. To the extent that the civil powers of this age have rejected God as the source of all authority, they have no legitimate authority to impose capital punishment.

This Essay defends the thesis that self-defense, individual or collective, does not require an authority over and above the right under “natural law” whereas punishment after the crime does require a distinct mandate or authority from a divine Sovereign. From this perspective, Pope John Paul II’s position on the death penalty shows a remarkable realism inasmuch as its imposition by a civil regime that grounds its authority in the “will of the people” is no longer “punishment” but an intrinsically unjust act.

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cannot be driven by his nature as is the animal. He must truly own himself in order to receive. And in receiving he acquires ownership of the gift. Only then does he become capable of reciprocating with a gift of the self that is his own. In this sense, man “finds” or “discovers” himself, that is, comes into possession of himself, only when he makes a sincere gift of self to the other.

The significance of murder as a capital act is twofold: (1) man separates himself from the sovereignty of God (2) by violating the sovereignty of the neighbor whose life he appropriates. In the theft and extortion of what belongs to the other in the most fundamental and radical sense he manifests *malevolence*, the antithesis of the benevolence that stands at the origin of every gift. On the first count, his act strikes against the relationship between his God and his neighbor. In appropriating or “stealing” what was given to his neighbor, he refuses to receive the neighbor as a gift. Inasmuch as receiving and self-giving are specific marks of personhood, the antagonism of murder, in this regard, has an *interpersonal* character inasmuch as it violates the reciprocity of receiving and self-giving. It is also public, which still needs to be explained.

D. *The Public Nature of Criminal Acts and of Capital Crime in Particular*

Murder is not simply an interpersonal act. Such is hatred. Hatred of one’s neighbor can remain on the level of interiority even though it intends the other and can in some way touch the interiority of that other. Murder, however, takes place in the external or public dimension. God is the foundation for the legitimacy of the victim’s claims over against an aggressor. This is the basis for the legitimacy of a self-defense that, if necessary, may require a force that is lethal. But what if the individual is too weak to defend himself successfully? More importantly, what of the situation that concerns capital punishment directly? What obtains *after* the aggressor has committed the act of murder?

Human existence involves not only the metaphysical interpersonal space, but also the *public* space constituted by the bodily dimension as an external aspect of his being. In order to explain what has been implicitly in the background of the investigation to this point, namely, civil or public authority as in its competence to administer penal punishment, a brief consideration of

the difficult theme of the relationship between soul and body is necessary.

The previous discussion of self-defense focused on the act of *keeping* what is one's own. As a personal act on the part of the victim, self-defense involves the actualization of his own capacity of self-possession as a counter to aggression. Strictly speaking, what the aggressor intends to appropriate is not the interior center from which the victim possesses himself. He intends to overpower him from outside and to use him as a means for whatever satisfaction motivates the aggressor's crime.<sup>109</sup> This means that objectively the aggressor's act of appropriation will involve physical power on his side over against the victim's powers of self-possession as it is exercised with regard to the external or bodily dimension of his being. The defining moment of crime is the aggressor's (i.e., criminal's) use of physical power to render *impotent* the victim's sovereignty over the bodily dimension as his own. In this regard, the *metaphysical* efficacy of crime is essentially a *separation of the victim's soul from the bodily dimension as his own*. In its *empirical* efficacy, it may range from a separation of the victim from his material property to a separation from limb or even bodily life. The significance of this act as public involves the unity of soul and body.

At this point we should return to the nature of this unity, briefly mentioned in the consideration of the relation between pain and the separation of the guilty from the good.<sup>110</sup> The intimacy between the body and the soul is given on the one hand in the lived experience of pleasure and pain, and on the other hand, in the similarity between spiritual and bodily functions, which allows us to borrow the language of the body for analogous expressions. One of these was the "hearing" the voice of the "good" expressing its sovereign self-giving and demand for reciprocity. I referred to this unity as an intimate one

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109. One can abstract from the distinct case of a seduction, for example, whose distinctive character consists in an attempt to "overpower" the other from within by appealing to and offering some type of satisfaction to whose attraction he will yield his self-possession. In this regard, seduction, confidence games, and manipulation do not manifest the externally threatening character specific to crime. Since they involve some degree of consent, it is tempting to take them out of the domain of penal law because they are victimless "crimes." From the side of the seducer, the con artist, the manipulator, it is easy to justify his acts as something that the "victims" deserved for their own cupidity and greed. In the former argument, one tacitly presupposes the self-possession required for consent; in the latter, one presupposes the objective moral evil of cupidity and greed. In both, one tacitly rejects the sovereignty of the Good that explains both self-possession and its moral relevance.

110. See *supra* Parts IV.B, V.B.

in the sense of a compenetration of the soul in the body and the body in the soul.<sup>111</sup>

One may grant the above and admit that it may be helpful in understanding how *defense* of what is one's own—in this case, the body as intimately one's own—is justified. But even if one also admits the gravity of causing a separation of the soul and body and grants that causing such a separation is a criminal act, one could object that this characterization of murder is an overestimation of the importance of death, since the use of physical power, which can destroy bodily life, is not metaphysically capable of taking possession of the soul, to say nothing of destroying it. Such an objection would be particularly telling in its use against a Christian defense of the legitimacy of capital punishment.

In response, one particular aspect of the soul-body relationship must be introduced. It bears on the *mutual interiority* of the two, not just a union between the two. The nature of this mutual interiority is cast into relief by a return to the meaning of an original giving on the part of God in the creation of man. In creating a person *ex nihilo*, God not only creates but gives existence as a gift. In doing so, He gives Himself in the gift. The giving of self is a handing over or a transmission of self, a generation of the recipient. Human fatherhood was always correctly understood as a continuation of self in some real sense. *Generation* in this sense is not the causing of an effect, a making or a production. Human generation involves a transmission not simply of life, but of one's own life. The mere bodily transmission of (a part of) one's body in biological reproduction would at most make (part of) the child's body *ontologically* one's own body and an "extension" of it, but never *juridically* one's own.<sup>112</sup>

How does this difference move forward the explanation of the intimate unity of soul and body in the human being as a whole? Briefly, it is the following. No contingent spiritual being that enjoys self-possession (an ownership of itself from within itself) can transmit itself and generate the recipient of its self-giving. On the other hand, the generation of purely bodily beings—none of which have a

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111. See *supra* note 93.

112. A function of a simple "extension" is the *power* of the ontological whole over its parts. A separation of the "extension" from the original whole results in "little parts" that "escape" the original power, which can never demand, in a juridical sense, a "return," not even in analogy to the *self-donation* that can be demanded by a personal sovereign who gives himself and is in the recipient he has generated. Only in the latter case can we speak of the authority of the father over the son.

personal center capable of self-possession from within—involves either a division into “parts” or a composition from parts, the resultant issue of which is in neither case capable of self-possession.

Within the Catholic tradition, this state of affairs, which can be intuited even though theoretically formulated only with great difficulty, is clarified with God’s self-revelation not only as Creator but also as Father. As Creator, His sovereignty is grounded in omnipotence. As Father, His sovereignty is grounded in His goodness as self-giving, namely, a goodness that is love. Man is in the image of God as a personal being who is interpersonal, not only as self-giving, but as life-giving. As made in the image of God, human persons have been given the gift of participating in the fatherhood of God, capable of generating life in self-giving. This participation is possible not by virtue of their spiritual nature, but by virtue of a nature that is ontologically different: their bodily or animal nature. Human fatherhood is possible as a transmission of human life only because, as self-giving, it is a *giving* insofar as man is a *person*. Even though biologically only a bodily part is transmitted, it is a giving of one’s *own self* because the soul is so deeply “in the body” and the body so profoundly in the soul that the soul “owns” the body from within the body as it “owns” itself.<sup>113</sup> Consequently, in giving itself in the bodily conjugal act, the person actualizes and perfects unity in two dimensions. One is the interior metaphysical dimension in which the full significance of the union between soul and body is actualized in a “sincere gift of self” to the beloved. In the conjugal act, performed as an embodiment of spousal love, the human spouses

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113. Not only does the created person have to *receive* its soul in order to become “its own,” but the human person has also been given its body as a gift, and thus, to have the body as “its own,” the soul must also *receive* the body. Unlike the organic and material beings of the external universe, which are encountered outside of the human person and never as “parts” of his ontological being, the human body is originally “inserted” as a gift inside the human soul, who does not simply suffer passively, but from the beginning is created in the receptive mode. Analogously to the *complete receiving of one’s soul*, which one must possess from within *in self-giving* to other persons, the complete receiving of the body, “inserted” as a gift and therefore the *completion of the union* between the body and the soul, can occur in various acts of *giving of self in love and service* to the other. In this regard, we have a strong metaphysical argument against a dualism of the two implied in “delayed ensoulment” as well as the divine insertion of a personal soul into a body which previously existed as a living animal (evolved from lower species). In the latter case, it would be difficult to make a case for the soul’s ownership of the body as “its own” in a way that is different from its ownership of beings ontologically distinct from itself. There is an analogous difficulty in the explanation of soul as the “form” of the body (*anima forma corporis*) inasmuch as the underlying meaning, illustrated with the example of the (active) form of a statue and the (passive) marble that is formed implies an “externality” of the two and, indeed, a certain contrariety in their composition.

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have the opportunity of realizing one aspect of the original interior sovereignty of the human person over its own body. The original integrity of Adam—and ownership of himself as embodied substance, his being “in himself”—was wounded by his choice of and his yielding of self-possession to his own satisfaction. Not only his satisfaction in its dynamism but also his body—ontologically his own—were no longer juridically subject to him since he no longer possessed himself fully. The healing of the wound, at least the partial healing, was possible only to the extent that he turned away from satisfaction, that is, turned to the other given as a gift by the giving from (or by the “grace” of) God. The completion of this receiving of the other in the reciprocity of self-giving is also a completion, in the metaphysical interpersonal space discussed above, of a mutual receiving and giving on the deepest level of human personhood, namely, of spousal love.

The inner unity of soul and body in their interpenetration also enters into the metaphysical interpersonal space. As such, the body also metaphysically constitutes a *public aspect* of interpersonal space. The bodily dimension, and with it the whole physical universe—the “external world”—as a condition for the constitution of the bodily dimension, finds its essential justification in *fatherhood*: the “entry” of the bodily dimension so intimately into the interiority of the spiritual substance and of the latter into the biological substance that the “two become one.” Consequently, the *self-giving* of the human self is truly a giving of *self* in generation even though only a bodily part of it is transmitted.

E. *Public Authority as the Presence of God’s Sovereignty in the Public Sphere*

At this point it is necessary to introduce, without the more extensive development it deserves, a consideration that is central for understanding capital punishment: the notion of public authority as an “office” or a “function” of God’s sovereignty as present in the public dimension of a human community. For the Christian, it is a well-known principle that all authority on earth derives from God. The negation of this principle is the “stuff” of the culture of death.

In the ordinary (i.e., non-miraculous) course of events, God does not intervene to defend the widows and orphans or to feed the hungry and clothe the naked. These He has entrusted as “neighbors” to our keeping. The fulfilment of this trust does not require any

public authority, but is incumbent on individuals, whether singly or in community. This mandate entails the self-donation in response to the “yours” that identifies each person as given to his neighbor. The neighbor “hears” it as a law directly issuing from the divine Sovereign. In *obedience* he is called to receive the other as a gift and to reciprocate with a self-giving. One should recall that no human person has sovereignty over the interior self-possession of another person. One can *receive* the other as a gift freely given by God and by the other. He can hope for, desire, pray for the gift of the other, even remind the other that he has been given and is under obedience to God to “make a sincere gift of self” to others, but he can neither demand nor command the giving. Again, one’s sovereignty does not extend over the free interior center of another person as it does over the external universe.

Because every human person has a free center from within which he receives and gives himself, the underlying power of self-possession constitutes an absolute barrier to any external power as a *causal efficacy*. Entities in the physical world (e.g., plants and animals) are not persons; they do not have a free personal center and the power of self-possession. They too are a gift for man; they too are to be received and made his “own.” But because they are not persons, man’s power of ownership has a different nature and a different extent. This discussion is restricted to two relevant aspects. First, man’s ownership has a power that can be characterized in terms of cause-and-effect. Second, in this regard it can be used to “overpower” in order to bring its object into submission to the will and ends of its agent.

With this in mind, consider the following illustration. Suppose my neighbor, for whatever reason, is dying of hunger and thirst and has insufficient power “over” nature to feed himself. Suppose also that I happen to have more than enough in my storehouse to survive. Suppose also that I have refused to obey the law of reciprocity by rejecting my neighbor’s plea for assistance claiming to keep what is “my own.” In terms of the previous, I am under divine law to give myself to my hungry neighbor in the activity of feeding him. I possess my inner self and can obey this call to give of myself because I also have a power over my possessions in the external world of my storehouse. My hungry neighbor cannot demand my gift of self to him. Can he, however, demand in his own name, and as “his own” that part of the material world within my power which is necessary for his survival and therefore as due to him? The answer lies at hand,

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but if I refuse to give what is due to him in justice, can he use whatever power at his disposal to secure and keep what is his in the external world? Here too the answer is evident though it may not be obvious. It requires theoretical justification.

First, from the perspective of the one who is hungry and cannot feed himself, the whole physical universe is a gift to him, subject to his ownership and use. Second, he understands he is under the obligation of “sharing the gift” by virtue of the fact that he has been given as a gift to his neighbor and his neighbor has been given as a gift to him under the law of reciprocity, whose “spirit” or justification can only be love. The external expression of its fulfilment is always in the form of “my house is your house,” that is, “what is mine is yours.” Sharing of the gift, or communion, as discussed above, always involves a sharing of the Giver of the gift. In this regard, the sharing of the gift in the metaphysical interpersonal space, that is, shared in the interiority of each participant, will involve the acknowledged and shared presence of God as the Sovereign, shared as uncreated Gift. The essential form of this acknowledgement is *gratitude*, the sincere giving of self as a *due return* on the part of the recipient, and in this case, of the recipients sharing the mutual gift of self, who in some real measure have become *incorporated* in one body. The shared presence of God as Sovereign will be acknowledged in one corporate act of gratitude, giving to God what is due to Him.

In a communion of embodied persons, “owners” of an external world, God has a public presence that can be explained as follows. This communion, as *public*, involves the power of self-possession as exercised by its human, that is, embodied subjects. Exercised in the “ownership” over the *non-personal* material universe, it is a dominion in the use of power as causal and “overpowering.” In relation to other persons, the power that belongs to self-possession can be actualized improperly in the rejection of neighbor as gift, and therefore, in the disobedience of the law of reciprocity, not only in man’s refusal to give himself to neighbor, but also in the active appropriation of both neighbor and of the physical universe as the exclusive “property” of the individual. Distinct from the *right of the individual* who has a right to self-defense under natural law—a right he may choose not to exercise—the *community of persons* (who have been given to each other under the law of reciprocity) has the duty

or office<sup>114</sup> to defend those whose rights are violated and to do so independently of their rights to and capacity for self-defense. *It belongs to this office to act in the name of God as original Sovereign and Author of the "law of reciprocity."* This public office is the indirect presence of God in the *public* aspect of the metaphysical interpersonal space, and carries with it the authority to speak and act in God's name. It is indirect because the acting involves a specifically human power by virtue of man's dominion over the external, physical universe as gift. As such the public office or authority does not extend to the interior personal space of the individual who violates the law of reciprocity by appropriating instead of receiving his neighbor and God in his neighbor. The office is God's and it represents Him; the officer is human and represents the human community as a whole.<sup>115</sup>

The specific significance of a public authority emerges in the context of a violation of rights. God's sovereignty is the validation of an individual's legitimate claim to what is "his own." God's sovereignty requires that we give "to each his own." But God does not directly act against the violation of rights. What we call "public authority" is an office or function which represents His sovereignty and authorizes the use of force to sanction legitimate rights to what is one's own. This office is particularly relevant when victims of aggression, whether individuals or communities, do not have the power or would incur disproportionate risk when defending themselves or others *before* the crime. And its specific relevance also shows itself *after* the crime in the authority to punish.

No fruitful discussion of capital punishment can take place without recognizing the foundations of a legitimate public authority.

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114. "Office," in addition to "gift" and "duty," is one of the original Latin meanings of *munus*.

115. It almost goes without saying that the "culture of death" has as its necessary correlate quite the opposite: public office represents the "will of the people." Its occupant represents the individual or individuals having the power to overpower, rather than humanity as a whole constituted under the law of reciprocity. In this regard, the theoreticians of the culture of death interpret the U.S. Constitution as one that governs the totality in terms of the right of privacy of the individual over against others in the one thing that cannot be shared: satisfaction pursued as "end." Cf. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) ("At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formal under compulsion of the State."). The metaphysical implication of this is that the human collective, never a community, has to act "over against" the one God who sovereignly demands that man turn "from his own satisfaction" to the one thing necessary in itself and for its sake.

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More importantly, the rejection of God as the foundation and source of capital punishment turns capital punishment into a violation of human dignity. The act of murder is a rejection of the sovereignty that guarantees "to each his own," namely, justice. It is the role of public authority, not of individuals, to restore in a community the rule of justice. Public authority accomplishes this restoration by countering the claim of the murderer and rendering it impotent. Given the seriousness of the capital offense, public authority reaffirms the seriousness of its role as guarantor of the weak and defenseless by reestablishing sovereignty by the use of power in the public sphere, not to enforce the interior self-giving on the part of the criminal, nor to defend the victim, nor even to restore what was taken from the victim. Rather, its office is to restore by a public act the presence of God as the Author of "all good gifts" in a community of embodied persons. It is precisely the finality of murder as a separation of soul and body, in which the victim is dispossessed of the gift that makes possible a sincere gift of self to others in his earthly existence, that requires the "painful" radicality of capital punishment. As a separation of the criminal's soul from body, it renders publicly impotent his claim of absolute ownership of body and the physical universe. *Therefore, capital punishment is just in principle only if it affirms the sovereignty of God in the public order by its use of external power. It cannot and is not authorized access to the interior space of the criminal which remains his province and God's. As such, the true nature of capital punishment is not an infringement on divine sovereignty.*

The culture of death perceives, although as through a dark glass, that capital punishment is justified only as the justice of God. That is why in rejecting God and His sovereignty, the culture of death necessarily rejects capital punishment. This does not mean that it rejects death. For having rejected God who "gives and takes life," it is the culture of death that assumes sovereignty over life by making it subject to death in its beginning as well as its ending. Nevertheless, with a proper understanding of the purpose of capital punishment and the source of authority for its legitimate imposition, capital punishment remains a proper function of public authority.

CONCLUSION: THE JUST SENTENCE OF DEATH AS AN OFFER OF  
MERCY AND AFFIRMATION OF HUMAN DIGNITY

The present Essay seeks to clarify the true nature of punishment and specifically of capital punishment, apart from any functions that may also belong to it, as a sentence and execution by legitimate public authority justified by a divine mandate or mission to restore the presence of the divine Sovereign as guarantor of the legitimate title of the human, that is, the embodied person to his being as "his own" and called by the "law of reciprocity" to enter into a community of persons constituted by a mutual receiving and giving of selves.

At issue is not a dispute with those who are against capital punishment or even the validity of their arguments, but rather their soundness. This requires a clear articulation of the meaning of the terms involved and the possible ambiguity (even systematic equivocation) when they signify different "things" in reality. Prominent among the terms frequently mentioned and used in the rejection of capital punishment is "human dignity" which is cited as the thing violated, for example, by capital punishment and abortion. This Essay proposes to identify exactly the "thing" signified by the term "*dignity*" as the metaphysical capacity for self-possession that identifies the person as person, including the human person. However, two existentially different actualizations of this capacity can become the basis for a systematic equivocation with contrary meanings.

The concept of the gift was used as a hermeneutical key to understanding the possession and ownership operative in crime as injustice, of guilt and of punishment as a restoration of justice as the due relation. As an analytical key it led to the understanding of human existence as a gift given to the human person by a Sovereign God who offers Himself in the gift out of love and demands reciprocity in a gift of self as a due response of love and justice. The gift status of the created person is the metaphysical background for understanding his dignity as grounded in the juridical power of self-possession and thus a freedom of the will.

In one case, the use of this freedom allows the human person to actualize self-possession by *yielding* to some desire for his own satisfaction. Such an act constitutes a refusal to reciprocate with a gift of self called for by the Sovereign and is an act of disobedience: a *separation* from and rejection of the Giver and His love. The act of separation is a keeping for oneself, a misappropriation of what is still

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due to the Sovereign. The interior status of such an individual is a moral guilt, a debt outstanding. At the same time and central to the understanding of guilt is the *interior "separation"* within the individual and a loss of self-possession. The experienced separation from God and self is the basis for a deformed concept of dignity as self-possession: a restriction of it to self-possession and a rejection of the self-giving called for. This deformed or partial concept of the reality can become the logical premise for rejecting any claim to what is within the "power" of the one who has appropriated it and refuses the gift of self. From the perspective of this experience, the sovereignty of God is no longer seen as integral to His goodness and consequently reduced to mere power that would overpower man and violate his own power to possess. In other words, the very notion of justice as that which is due to another, and with it the notion of guilt, is no longer seen or understood but necessarily rejected when linked to others, including the Sovereign Himself. An existential choice now offers the premise for a theoretical argument against *punishment* as addressing the guilt of the criminal, namely what is *due in justice* to the legitimate owner. From such a deformed perspective, punishment is understood from a purely utilitarian perspective. In the broader context of a metaphysics of death as the interior separation of a contingent person from himself, that is, as a loss of self-possession in a being whose essential trait as a person is a capacity for self-possession, it is *not a punishment* imposed by God on the person who has separated from himself. It is a necessary and essential consequential property of the act of hostility against God. The culture of death rejects death *as punishment* because punishment implies a Sovereign. But the culture of death claims sovereignty over death, which it uses to overpower or to dispense as pseudo-merciful, as in "mercy killing."

The same hermeneutics of the gift allows the more adequate or complete understanding of the personal power of self-possession as actualized and perfected in self-giving. The interior self-possession is completed in receiving the gift of self and of neighbor or in reciprocating under the "law of reciprocity" with a sincere gift of self to God and, as an embodied person, to neighbor. The giving of one's embodied self in love to neighbor allows an understanding of the inner unity of soul and body as more than a composition or even hylomorphic unity. The original receiving of the body into one's soul and the entry of the soul into one's body is complete or perfected in concrete embodying acts of generosity, love, and mercy to one's

neighbor. The experience of the “compenetration” of one’s soul and body, especially in the acts embodying a self-giving reveal the extraordinary mystery of the intimate mutuality of soul and body.

The last is a condition for the possibility not so much for guilt as for *criminal guilt*. The criminal act cannot directly dispossess the victim of his interior power of self-possession. Not even God can do this. It is a crime to the extent that one wounds from outside the inner unity of soul and body which disrupts the human victim’s exercise of self-possession in a material world and in a communion of embodied persons.

Human self-possession by nature of one’s constitution as a gift explains the nature of legitimate self-defense against a crime before its completion, whose exercise, which might require lethal force, needs no separate authorization from God, since it is merely a keeping by the victim of what was received from the original Sovereign. Punishment after the crime, by its nature, cannot be a keeping of what belongs to the victim. Its end is neither the restoration of things misappropriated nor the self-possession of the victim. It is rather a restoration of the Sovereign’s authority in the public space of embodied persons under the law of reciprocity. By its nature punishment intends the restoration of God’s authority in the public sphere by means of a special mandate or office, normally called public or civil authority, an authority or permission that represents God, not the will of the people, which it may also do incidentally.

On one level, the restoration of God’s sovereignty (i.e., His ownership of human life and His guarantee of it as a gift to the individual) and mutual reciprocity is accomplished in the “external world” by the separation of the criminal from what he has misappropriated, primarily separation from the misappropriated self. On another level, as evident in capital punishment for a capital crime as a radical separation from God and neighbor, the restoration of what was due to God, the debt of self incurred in the criminal act involves an interior separation of the soul from the body, an act beyond the metaphysical power of man and outside of his legitimate authority. This radical separation of the individual from his own misappropriated being requires the initiative and authorization from God, the Author of the original interior unity of soul and body as a gift.

The legitimate sentence of death by public authority for a capital crime is an opportunity, extended by God through that same authority, for the criminal to separate himself from the “old man,” in

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bondage to the desires for satisfaction to which he has yielded, and to regain self-possession. He is again given opportunity by God to actualize his self-possession in a sincere gift of self by freely joining the public restoration of God's sovereignty over him in his own free self-giving. In this act of "paying the debt" of what is due in love, the criminal's dignity and justice are restored. Such an opportunity, objectively required for the restoration of a lost dignity, is also a gift that comes only from God. As such it is also a merciful act. In these respects, it is an objective presupposition for clemency as a form of mercy.

Lastly, none of this is possible if the "office" of public authority claims to derive its authority from the will of the people and not from God.