

## CAPITAL PUNISHMENT AND THE LAW

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### I. INTRODUCTION

The realm of human affairs is a messy one, full of at least apparent inconsistency and incoherence, and the recent teaching of the Catholic Church on capital punishment—vitiating, as I intend to show, by errors of historical fact and interpretation—is no exception. And yet, as I also hope to show in this Article, despite all this, we can identify a single consistent and coherent truth propounded not only in recent years by the Church's teaching Magisterium but also throughout the centuries by the Aristotelian-Thomistic tradition.

What, and how, the Catholic Church teaches is important outside her own walls since, not only is she the largest Christian body in the world, numbering approximately one billion members,<sup>1</sup> but her teaching on the more controversial moral issues of our day affects political and legal systems throughout the world. Indeed, the Church's teaching on these issues affects entities that have no—and never have had—ties with the Catholic Church or even with Christianity itself. In order to be convinced of this, one need only call to mind recent opposition to the Church's continuing role in the United Nations—opposition that would not be worth mounting were the Church lacking influence upon policy.<sup>2</sup> Alternatively, one can ask oneself what would happen to resistance in the United States to embryo destruction were the Church to reverse her position on the

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1. *Fines et Incolae*, 1997 ANNUARIUM STATISTICUM ECCLESIAE (Liberia Editrice Vaticana) 17–18.

2. See Alison Mitchell, *Bush Sides with Vatican on Its Status at the U.N.*, N.Y. TIMES, May 27, 2000, at A10; see also Catholics for a Free Choice, *The Catholic Church and the United Nations: Church or State?*, CONSCIENCE, Winter 2000–2001, at 20, 20–23. After months of negotiations, on July 1, 2004, the United Nations General Council approved a resolution clarifying the role of the Vatican. G.A. Res. 58/314, U.N. Doc. A/RES/58/314 (July 16, 2004).

issue and say that embryo destruction is not immoral (something the Church is extremely unlikely to do).<sup>3</sup>

The present Article begins with an analysis of recent Church teaching, as found primarily (but not solely) in the *Catechism of the Catholic Church* ("*Catechism*"). The analysis of paragraph 2263 of the *Catechism* (conducted in Part II(A)) casts doubt upon suggestions in the *Catechism* itself that its teaching on capital punishment emerges in a straightforward manner from St. Thomas Aquinas's *Summa Theologica* ("*Summa*").<sup>4</sup> Part II(B) (devoted to *Catechism* paragraph 2264) argues that the *Catechism's* exposition of the same teaching is vitiated by philosophical problems and, in particular, that it fails to integrate into its account the role of force in the analysis of human action. Part II(C) examines *Catechism* paragraphs 2265 through 2267, which underwent several changes before a final version (the *editio typica*), and argues that few of these changes are substantive.

Part III offers a way of overcoming the problems discussed in Part II. Part III(A) presents Aristotle's two-tiered approach to the question, "what is natural?" The work in which Aristotle sets out these ideas most clearly is his treatise *De Caelo* [*On the Heavens*],<sup>5</sup> although he explicitly applies them to the political realm. Aristotle's ideas in *De Caelo* are also intricately connected to his metaphysics. Part III(B) argues that Aristotle's understanding of the natural is part of the philosophical and theological tradition of the Catholic Church. Part III(C) applies the two-tiered approach of the natural to capital punishment. This allows us to say that capital punishment is, in a certain sense, natural and, in another sense, unnatural; this in turn allows us to say that capital punishment is not, simply speaking, against natural law but that nonetheless—as the Church has taught in recent years—its ethical use depends on the conditions in place in the political entity in which such use is contemplated.

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3. See, e.g., Congregation for the Doctrine of the Faith, *Donum Vitae* [*Instruction on Respect for Human Life in Its Origin and on the Dignity of Procreation*] (1987).

4. ST. THOMAS AQUINAS, *SVMMAE THEOLOGIAE* [SUMMA THEOLOGICA] (Collège Dominicain d'Ottawa 1941) [hereinafter SUMMA THEOLOGICA] (author's translations throughout unless otherwise attributed).

5. ARISTOTLE, *ON THE HEAVENS* (J.L. Stocks trans.) [hereinafter ON THE HEAVENS], *found in* 1 THE COMPLETE WORKS OF ARISTOTLE 447 (Jonathan Barnes ed., Princeton Univ. Press 1984).

## II. THE CATECHISM OF THE CATHOLIC CHURCH

Let us begin, then, with the analysis of the Church's recent teaching. There are three major sources that need to be taken into consideration: (1) the original version of the *Catechism of the Catholic Church*, and, in particular, paragraphs 2263 through 2267 on legitimate defense and the death penalty;<sup>6</sup> (2) the 1995 encyclical letter *Evangelium Vitae*, and, in particular, paragraph 27 and paragraphs 55 through 56 (again, on legitimate defense and the death penalty);<sup>7</sup> and (3) the *editio typica* of the *Catechism*, which contains changes to paragraphs 2265 through 2267.<sup>8</sup>

### A. Paragraph 2263 of the *Catechism of the Catholic Church*

A serious problem presents itself in the very first paragraph (2263) of the section of the *Catechism* on legitimate defense, which remains unchanged in the *editio typica*. The paragraph (and the section) begins with the remark: "The legitimate defense of persons and societies is not an exception to the prohibition against the murder of the innocent that constitutes intentional killing."<sup>9</sup> The *Catechism* then recites two sentences from St. Thomas Aquinas's *Summa Theologica*: (1) "The act of self-defense can have a double effect: the preservation of one's own life; and the killing of the aggressor;" and (2) "Nothing

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6. CATECHISM OF THE CATHOLIC CHURCH ¶¶ 2263–67 (1994) [hereinafter CATECHISM OF THE CATHOLIC CHURCH (1994)]. Editor's Note: The provisional *Catechism of the Catholic Church* was published in French in 1992 and in English two years later. The copyright page of the 1994 English release contains the following statement: "This translation is subject to revision according to the Latin typical edition (*editio typica*) when it is published." *Id.* at copyright page (emphasis added).

7. Pope John Paul II, *Evangelium Vitae* [Encyclical Letter on the Value and Inviolability of Human Life] ¶¶ 27, 55–57 (1995) [hereinafter *Evangelium Vitae*].

8. CATECHISMUS CATHOLICAE ECCLESIAE ¶¶ 2265–67 (1997) [hereinafter CATECHISMUS CATHOLICAE ECCLESIAE] (author's translations throughout unless otherwise attributed; author's translations differ from those found in CATECHISM OF THE CATHOLIC CHURCH (2d. ed. 1997) [hereinafter CATECHISM OF THE CATHOLIC CHURCH (1997)], which is the published English translation of CATECHISMUS CATHOLICAE ECCLESIAE); see also Pope John Paul II, Homily at the Papal Mass at the Trans World Dome ¶ 5 (Jan. 27, 1999), available at <http://www.nccbuscc.org/pope/mass.htm> [hereinafter Pope John Paul II, Homily at Trans World Dome] (describing the death penalty as "both cruel and unnecessary").

9. CATECHISM OF THE CATHOLIC CHURCH (1994), *supra* note 6, ¶ 2263; CATECHISMUS CATHOLICAE ECCLESIAE, *supra* note 8, ¶ 2263.

prevents one act from having two effects, of which one is within the intention, the other beside the intention."<sup>10</sup>

The problem is that Aquinas does not resolve the issue of *public* self-defense by appeal to a double effect, one of which is intended, the other not; that is his way, rather, of explaining the permissibility of *personal* self-defense.<sup>11</sup> The *sed contra* of the Aquinas article (which comes before the sentences quoted by the *Catechism*) speaks of defending one's *own* life (*propriam vitam*), as does a sentence coming just after the quoted sentences.<sup>12</sup> Thus, it is clear that the quotations used in the *Catechism* are about personal self-defense.<sup>13</sup> After the section in the *Summa* from which the quotations are taken, there occurs a break in the argument: "*But,*" Aquinas says, "as it is illicit to take a man's life, except for the public authority acting for the common good . . . it is illicit for a man to intend killing a man in self-defense, except for such as have public authority . . ."<sup>14</sup> Obviously, the justification of public self-defense need not involve showing that the death of the malefactor is beside the intention of the person or persons bringing about that death. Aquinas says as clearly as one could want that a public authority can legitimately intend to kill a person who threatens the well-being of society.<sup>15</sup>

The same error of fact reappears in the encyclical *Evangelium Vitae*. In the last sentence of paragraph 55, Pope John Paul II discusses "legitimate defense," as follows:

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10. CATECHISMUS CATHOLICAE ECCLESIAE, *supra* note 8, ¶ 2263 (quoting SUMMA THEOLOGICA, *supra* note 4, Pt. II-II, Q. 64, Art. 7). Strangely, the published English translations of the *Catechism* at paragraph 2263 do not contain the first bit of the second quotation. For example, the Latin *editio typica* contains: "Nihil prohibet unius actus esse duos effectus, quorum alter solum sit in intentione, alius vero sit praeter intentionem." *Id.* Meanwhile, the 1997 English translation of the *editio typica* contains: "The one is intended, the other is not." CATECHISM OF THE CATHOLIC CHURCH (1997), *supra* note 8, ¶ 2263. Not much hangs on this, although the translations give the impression that the second quotation follows the first, whereas the opposite is the case. Compare *id.*, with SUMMA THEOLOGICA, *supra* note 4, Pt. II-II, Q. 64, Art. 7.

11. For a treatment of the principle of double effect, see *infra* app.

12. SUMMA THEOLOGICA, *supra* note 4, Pt. II-II, Q. 64, Art. 7.

13. See, e.g., JOHN FINNIS, AQUINAS: MORAL, POLITICAL, AND LEGAL THEORY 282–83 (1998); Gerard V. Bradley, *No Intentional Killing Whatsoever: The Case of Capital Punishment*, in NATURAL LAW AND MORAL INQUIRY 155, 155–73 (Robert P. George ed., 1998); Lawrence Dewan, *Thomas Aquinas, Gerard Bradley, and the Death Penalty: Some Observations*, 82 GREGORIANUM 149, 151 (2001).

14. SUMMA THEOLOGICA, *supra* note 4, Pt. II-II, Q. 64, Art. 7 (emphasis added).

15. *Id.* ("[I]t is illicit for a man to intend killing a man in self-defense, *except for such as have public authority . . .*" (emphasis added)).

Unfortunately it happens that the need to render the aggressor incapable of causing harm sometimes involves taking his life. In this case, the fatal outcome is attributable to the aggressor whose action brought it about, even though he may not be morally responsible because of a lack of the use of reason.<sup>16</sup>

The Holy Father is obviously invoking the principle of double effect in the passage, for his concern is to deny that the “fatal outcome” is attributable to the self-defender’s intention; accordingly, he cites Part II-II, Question 64, Article 7 of the *Summa* at this point.<sup>17</sup> Paragraph 56 then begins with the remark, “It is in this context that the question of capital punishment arises.”<sup>18</sup> But this is false, at least historically, for the question was never considered by the Church within that context.<sup>19</sup> We have already seen that Part II-II, Question 64, Article 7 of the *Summa* does not employ the principle of the twofold effect in order to account for capital punishment.<sup>20</sup> In addition, a second work referred to at the end of paragraph 55 of *Evangelium Vitae* is explicitly limited to private self-defense. The reference is to a *dubium* in St. Alphonsus Liguori’s *Theologia Moralis*, bearing the title, “Whether and in what way is it licit *by private authority* to kill a malicious aggressor.”<sup>21</sup>

#### B. Paragraph 2264 of the Catechism of the Catholic Church

To return, though, to the *Catechism*, the next paragraph (2264), which also remains unchanged in the *editio typica*, tells us much about how the *Catechism* understands the role of law in the theory of

16. *Evangelium Vitae*, *supra* note 7, ¶ 55.

17. *Id.* (citing SUMMA THEOLOGICA, *supra* note 4, Pt. II-II, Q. 64, Art. 7).

18. Ioannes Paulus PP. II, *Evangelium Vitae* [Encyclical Letter on the Value and Inviolability of Human Life] ¶ 56 (author’s translation). The standard English translation renders: “Hoc in rerum prospectu de poena capitali oritur quaestio . . .” as: “This is the context in which to place the problem of the *death penalty*.” *Evangelium Vitae*, *supra* note 7, ¶ 56. Pope John Paul II is not saying, however, that we *ought* to put the issue there but that it does arise in that context.

19. See *infra* text accompanying notes 29–38.

20. See *supra* text accompanying notes 11–15.

21. *Evangelium Vitae*, *supra* note 7, ¶ 55 (citing ST. ALPHONSUS MARIA DE LIGUORI, *An et quomodo liceat occidere privata auctoritate iniquum Aggressorem*, in 1 THEOLOGIA MORALIS dubium III, ¶ 380, at 631 (Leonardi Gaudé ed., 1905) (Italy) (emphasis added) (author’s translation)).

natural law—and, in particular, about the role of law in determining the legitimacy (or lack thereof) of capital punishment.

The paragraph begins with the idea that one has a natural right to protect one's own life: "Someone who defends his life is not guilty of murder even if he is forced [*cogatur*] to deal his aggressor a lethal blow . . . ." <sup>22</sup> This is quite in accord with what Aquinas says in Part II-II, Question 64, Article 7 of the *Summa Theologica*, for, just after he says that it is natural to defend one's own life, he adds: "And yet, though proceeding from a good intention, an act may be rendered illicit, if it be out of proportion to the end."<sup>23</sup> The "proportion" of which Aquinas speaks here has nothing to do with the weighing of goods or values, as in contemporary "proportionalism," but with the presence of force.<sup>24</sup> Suppose that there is a man coming at another with an eight-inch blade. The attacker is still fifty feet away and the other, a good pistol shot, has next to him both a small-caliber pistol, with which he might disable his attacker, and a semi-automatic assault weapon, with which he would certainly kill him. If he chooses the latter, his action, even though it saves his life, is immoral because the instrument employed is not proportionate to the only (relevant) morally acceptable task before him: to protect his life. If he uses the assault weapon, his intention—no matter what sort of story he might tell himself—is clearly not just to protect his own life.<sup>25</sup>

But let us suppose that, as the attacker—whom the other man knows is skilled with a knife—comes rushing toward him, he (the attacked man) has next to him just the assault weapon. In this case, the killing is forced upon the attacked man since his only option (given the legitimate aim of defending himself) is to kill—or, at least, to do something that is very likely to kill. In this case, the action is proportionate to the task at hand, since what is a proportionate—or appropriate—means depends upon (among other things) what is available to the agent when he acts.<sup>26</sup>

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22. CATECHISM OF THE CATHOLIC CHURCH (1994), *supra* note 6, ¶ 2264; CATECHISMUS CATHOLICAE ECCLESIAE, *supra* note 8, ¶ 2264.

23. SUMMA THEOLOGICA, *supra* note 4, Pt. II-II, Q. 64, Art. 7.

24. On proportionalism, see *infra* app., at pp. 425–27.

25. See Kevin L. Flannery, *Force and Compulsion in Aristotle's Ethics*, 22 PROC. OF THE BOSTON AREA COLLOQUIUM IN ANCIENT PHIL. (John Cleary & Gary Gurtler eds., forthcoming 2007).

26. *Id.*

So, then, as paragraph 2264 of the *Catechism* suggests, legitimate self-defense does require the presence of force.<sup>27</sup> This is not to say, however, that the agent has to be *utterly* forced. As the attacked man, with only the assault weapon at his disposal, sees his attacker approaching, he does have the choice to throw down even that; so his choice to kill is not forced in an absolute sense. But it is forced in so far as *had* he the option of not killing but only stopping the attacker, he would choose the latter. The force is present in the fact that he cannot decline to use the weapon *and* also protect himself. Force of even this qualified variety causes something to be *praeter intentionem*, or beside the intention.<sup>28</sup>

But—and here we return to the interpretive errors of the *Catechism*—in the case of capital punishment, not even such force is required. Aquinas says this quite explicitly. It is licit, he says, for someone who has “public authority” to intend to kill.<sup>29</sup> Aquinas has in mind individuals who are in fact defending themselves, as he speaks of those who “while intending to kill a man in self-defense, refer this to the public good” (i.e., of the “soldier fighting against the foe” and the “minister of the judge struggling with robbers”).<sup>30</sup> But, it is clear that they stand in a context morally distinct from that of the personal self-defender and in the same context within which we must place the public executioner, who is not, strictly speaking, defending himself but rather the city that commissions him.<sup>31</sup> The soldier, the minister of the judge, and the executioner are clearly in the business of getting attackers and malefactors dead. They wear “badges” (actually or

27. In interpreting Aquinas, the *Catechism* is a bit misleading when it says: “Someone who defends his life is not guilty of murder even if [*etiamsi*] he is forced to deal his aggressor a lethal blow.” CATECHISM OF THE CATHOLIC CHURCH (1994), *supra* note 6, ¶ 2264; CATECHISMUS CATHOLICAE ECCLESIAE, *supra* note 8, ¶ 2264. The agent is not guilty of murder *only* if he is forced to deal the lethal blow. But this is cleared up in the next sentence, which is a quotation from the *Summa Theologica*: “If a man in self-defense uses more than necessary violence, it will be unlawful: whereas if he repels force with moderation, his defense will be lawful.” CATECHISM OF THE CATHOLIC CHURCH (1994), *supra* note 6, ¶ 2264 (quoting SUMMA THEOLOGICA, *supra* note 4, Pt. II-II, Q. 64, Art. 7); CATECHISMUS CATHOLICAE ECCLESIAE, *supra* note 8, ¶ 2264 (quoting SUMMA THEOLOGICA, *supra* note 4, Pt. II-II, Q. 64, Art. 7).

28. See Flannery, *supra* note 25.

29. SUMMA THEOLOGICA, *supra* note 4, Pt. II-II, Q. 64, Art. 7.

30. *Id.* The list of characters originally appeared in ST. AUGUSTINE, ON FREE CHOICE OF THE WILL, Bk. I, Ch. 4, ¶ 25 (Anna S. Benjamin & L.H. Hackstaff trans., Bobbs-Merrill Co. 1964) [hereinafter ON FREE CHOICE OF THE WILL].

31. See, e.g., SUMMA THEOLOGICA, *supra* note 4, Pt. II-II, Q. 64, Art. 2; ST. THOMAS AQUINAS, SUMMA CONTRA GENTILES, Bk. 3:II, Ch. 146 (Vernon J. Bourke trans., Univ. of Notre Dame Press 1975).

figuratively) that say they can do such a thing. These are what allow them to “refer” the deaths they bring about “to the public good.”<sup>32</sup> Referring an act to the common good clearly does *not* entail not intending the deaths.<sup>33</sup>

The personal self-defender needs to be forced into performing the lethal action; the soldier, the minister of the judge, and the executioner do not. Since the latter three figures do not necessarily act on the spur of the moment and since, when not so acting, they have various means at their disposal, force (in the sense we have been discussing) cannot be the morally decisive factor. In other words, given their shared context as officers of the law, the principle of double effect as set out by Aquinas *cannot* apply to them.

But at this point an important question confronts us: How do we know that these two types of action—personal and public self-defense—are to be treated differently? Aquinas is quite clear about this as well: We know this because the law says so. It is worthy of note that in the paragraph of the *Catechism* we are examining (2264), immediately after the quotation of Aquinas’s remark that someone using proportionate means in self-defense does so licitly, there is an ellipsis—in effect, the elimination of Aquinas’s reason why moderate self-defense is permissible.<sup>34</sup> The omitted words are: “[B]ecause [*nam*] according to the laws, ‘it is licit to repel force by force, provided one

32. “But as it is illicit to take a man’s life, except for the public authority acting for the common good, as was said above,” *SUMMA THEOLOGICA*, *supra* note 4, Pt. II-II, Q. 64, Art. 3, “it is not licit for a man to intend killing a man in self-defense, except for such as have public authority, who while intending to kill a man in self-defense, refer this to the public good, as in the case of a soldier fighting against the foe, and in the minister of the judge struggling with robbers, although even these sin if they be moved by private animosity.” *Id.* Pt. II-II, Q. 64, Art. 7.

33. See KEVIN L. FLANNERY, *ACTS AMID PRECEPTS: THE ARISTOTELIAN LOGICAL STRUCTURE OF THOMAS AQUINAS’S MORAL THEORY* 171–72, 191–92 (2001).

34. *CATECHISMUS CATHOLICAE ECCLESIAE*, *supra* note 8, ¶ 2264 (“Si aliquis ad defendendum propriam vitam utatur maiori violentia quam oporteat, erit illicitum. Si vero moderate violentiam repellat, erit licita defensio [. . .]. Nec est necessarium ad salutem ut homo actum moderatae tutelae praetermittat ad evitandum occisionem alterius: quia plus tenetur homo vitae suae providere quam vitae alienae.” (quoting *SUMMA THEOLOGICA*, *supra* note 4, Pt. II-II, Q. 64, Art. 7)). “If a man, in self-defense, uses more than necessary violence, it will be illicit: whereas if he repel force with moderation his defense will be licit. . . . Nor is it necessary for salvation that a man forgo an act of moderate protection in order to avoid the killing of another, for a man is more obliged to provide for his own life than for that of one who is unconnected with him.” *Id.*

does not exceed the limits of a blameless defense.”<sup>35</sup> Aquinas is, in fact, quoting the *Decretals* of Pope Gregory IX. The public official’s permission to kill intentionally is similarly established in law, for, as we have seen, Aquinas speaks of the officer’s “public authority” and of referring his action to the common good.<sup>36</sup>

One readily understands why someone—even an author of a catechism—would want to de-emphasize such a reason for allowing or disallowing intentional killing. In the first place, it smacks of question-begging. Aquinas’s article itself is about whether it is “licit” for someone to kill another in self-defense; indeed, the older Dominican translation of the *Summa* entitles the article at issue: “Whether It Is Lawful to Kill a Man in Self-defense.”<sup>37</sup> It appears that Aquinas is saying simply that self-defense is licit—or lawful—because it is according to law. Add to this the post-World War II wariness of law as arising out of political order (present still especially on the European continent),<sup>38</sup> and it is all too easy to see how certain interpreters would be inclined to slide past Aquinas’s invocation of law as the reason for the central distinction in Part II-II, Question 64, Article 7 of the *Summa*.

In fact, however, invoking the authority of “the laws” is not question-begging at all, since the structure of Aquinas’s reply is not that of an argument seeking to show that  $y$  is true because it follows from  $x$ , as a conclusion from a principle. In considering whether personal self-defense is licit, Aquinas understands his task to be to explain how it is different from public self-defense (the legitimate killing effected by an officer of the law). Both personal and public self-defense are sanctioned by law—Aquinas takes this for granted—but they are sanctioned in different ways: the one killing is beside the

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35. “[N]am secundum iura, vim vi repellere licet cum moderamine inculpatae tutelae.” *SUMMA THEOLOGICA*, *supra* note 4, Pt. II-II, Q. 64, Art. 7 (quoting ST. POPE GREGORY IX, *DECRETALIUM GREGORII IX*, Bk. 5, Tit. 12, Cap. 18, *found in* 2 *CORPUS JURIS CANONICI* 800–01 (Aemilius Friedberg ed., 1959) (1879)).

36. *Id.*

37. ST. THOMAS AQUINAS, *SUMMA THEOLOGICA*, Pt. II-II, Q. 64, Art. 7 (Fathers of the English Dominican Province trans., Christian Classics 1981).

38. See PIERRE MANENT, *A WORLD BEYOND POLITICS? A DEFENSE OF THE NATION-STATE* 42 (Marc LePain trans., Princeton Univ. Press 2006). See generally RICHARD WOLIN, *THE SEDUCTION OF UNREASON: THE INTELLECTUAL ROMANCE WITH FASCISM FROM NIETZSCHE TO POSTMODERNISM* (2004) (arguing that contemporary reactions to fascism have often shared its sentimentalized approach to moral and political issues).

agent's intention, the other is not. There is no question-begging here but straightforward description of a difference.<sup>39</sup>

Aquinas has none of the wariness of law characteristic of contemporary European philosophy.<sup>40</sup> This is not to say, of course, that he was in any sense a legal positivist, and even less is it to say that he did not realize that some laws could be unjust. He subscribed to the Augustinian principle that an unjust law is not a law,<sup>41</sup> and, over the centuries, has taken his intellectual lumps for doing so.<sup>42</sup> But for all his readiness to admit improvements to any particular body of law, he did look to law—that is to say, good law—as a means of determining what is according to natural law.

Aquinas's use of positive law as a means of determining the content of the natural law is quite reasonable. Natural law is about human nature—that is, what man does by nature.<sup>43</sup> It would be very un-Aristotelian to say that in determining what man does by nature we cannot look to the way man actually organizes himself in cities

39. See FLANNERY, *supra* note 33, at 168–69, for a translation of the *corpus* of SUMMA THEOLOGICA, *supra* note 4, Pt. II-II, Q. 64, Art. 7, following the older Dominican translation in rendering *licitus* and *illicitus* (and cognates) as “lawful” and “unlawful.” I also used the strong presence of words like *licitus* and *illicitus* as evidence that the article is about what is lawful. FLANNERY, *supra* note 33, at 186. I have been gently criticized for this move by a couple of friends (Frs. Stephen Brock and Lawrence Dewan), who note that words like *licitus*, *liceat*, etc., have wider significations, referring to more than the strictly speaking lawful. Brock and Dewan acknowledge, however, that SUMMA THEOLOGICA, *supra* note 4, Pt. II-II, Q. 64, Art. 7, does speak much about what is lawful (in the strict sense). So, in this Article I avoid translating *licitus* (etc.) as ‘lawful’ (etc.). This has the advantage of further discrediting the accusation of question-begging. Granted (not conceded) that St. Thomas is *arguing* that private self-defense is lawful because it is lawful, there is no question-begging if the word “lawful” has two meanings: the first referring to what is licit in a general sense, the second to what is strictly speaking lawful.

40. See *supra* notes 35–36, 38 and accompanying text.

41. See SUMMA THEOLOGICA, *supra* note 4, Pt. I-II, Q. 95, Arts. 2, 4; Pt. I-II, Q. 96, Art. 4. For St. Augustine's position, see ON FREE CHOICE OF THE WILL, *supra* note 30, Bk. 1, Ch. 5.

42. H.L.A. Hart, much of whose academic career was spent opposing natural law interpretations of positive law, often cites against natural lawyers the Augustinian tag (which he knew as) “lex injusta non est lex [an unjust law is not a law].” See, e.g., H.L.A. HART, THE CONCEPT OF LAW 8 (Peter Cane et al. eds., 2d ed. 1994) (“[T]he assertion that ‘an unjust law is not law’ has the same ring of exaggeration and paradox, if not falsity, as ‘statutes are not laws’ or ‘constitutional law is not law.’” (footnote omitted)); see also FLANNERY, *supra* note 33, at 187–88.

43. See, e.g., JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 33–36, 102–03 (1980); RALPH MCINERNEY, ETHICA THOMISTICA: THE MORAL PHILOSOPHY OF THOMAS AQUINAS 40 (1982); Robert P. George, *Natural Law and Human Nature*, in NATURAL LAW THEORY: CONTEMPORARY ESSAYS 31, 31–39 (Robert P. George ed., 1992).

(*poleis* or political entities).<sup>44</sup> And when we do look to this, we see that public officials typically have the power to deprive certain individuals of life, a power which, for good reason, is not afforded to private citizens except in cases of personal self-defense. In short, most human societies sanction the killing of malefactors by public authorities but outlaw private executions; this supplies evidence—perhaps not decisive evidence, but evidence all the same—that capital punishment and personal self-defense are in accordance with natural law.

Aquinas would never deny that, over the course of human history, some very nasty practices have enjoyed wide political acceptance. But he has a basic confidence that human reason, employed in a disinterested way, is capable of discovering and asserting that such practices are not good for human nature and, therefore, not according to natural law.<sup>45</sup> And, even were this basic confidence in human reasonability to experience repeated disappointment, it must still be asked to what other data can we turn in order to know what is natural for man, other than to what man does? If among those data we find irrational practices, since man is a rational animal, these cannot correspond to natural law.

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44. See, e.g., ARISTOTLE, *NICOMACHEAN ETHICS*, Bk. I, Ch. 1, 1094a1–18 (W.D. Ross trans.) [hereinafter *NICOMACHEAN ETHICS*], found in 2 *THE COMPLETE WORKS OF ARISTOTLE*, *supra* note 5, at 1729. The first chapter of the *Nicomachean Ethics* speaks about the ends of human action as embedded in arts, crafts, sciences, etc.: “Now, as there are many actions, arts, and sciences, their ends also are many; the end of the medical art is health, that of shipbuilding a vessel, that of strategy victory, that of economics wealth.” *Id.* 1094a6–9, found in 2 *THE COMPLETE WORKS OF ARISTOTLE*, *supra* note 5, at 1729.

45. See, for example, *SUMMA THEOLOGICA*, *supra* note 4, Pt. I-II, Q. 21, Art. 1, where Thomas argues that “every voluntary act is bad insofar as it falls short of the order of reason and of eternal law, and every good act is in accordance with reason and eternal law.” The “reason” spoken of here is human reason; eternal law is “the reason of divine wisdom.” *Id.* Pt. I-II, Q. 93, Art. 1. As such, it cannot be known “according to what it is in itself” except by God and the saints; nonetheless, all creatures have a certain knowledge even of this by way of a certain illumination [*irradiatio*]. *Id.* Pt. I-II, Q. 93, Art. 2. See generally Lawrence Dewan, *St. Thomas and Moral Taxonomy*, 15 *ÉTUDES MARITAINIENNES* [MARITAIN STUDIES] 134 (1999). Specifically, speaking of the way the “circumstance” of a person’s being a criminal alters the moral character of the act of killing, Dewan says:

That the man executed is a criminal adds [to the act of execution] a circumstance of the sort which constitutes a new and good rational order. To shy from this is simply to doubt reason’s ability to recognize good order for human life. Thus, people who fail to recognize the difference of the two species [murder and execution] might be suffering from a blindness as regards the primacy of the common good.

Dewan, *supra* 153. Dewan is expounding especially St. Thomas’s *SUMMA THEOLOGICA*, *supra* note 4, Pt. I-II, Q. 18, Art. 10. Dewan, *supra* 153.

### C. Paragraphs 2265 to 2267 of the Catechism of the Catholic Church

To return to the *Catechism*, some of the more extensive changes to the 1994 version occur in paragraphs 2265 through 2267, although a good number of these changes are just cosmetic (i.e., providing better organization, more fluid expression, etc.). The following represents the changes graphically:<sup>46</sup>

~~2265~~ Legitimate defense can be not only a right but a grave duty for someone responsible for another's life, ~~the common good of the family or of the state.~~ *Preserving the common good requires rendering the unjust aggressor unable to inflict harm. To this end, those holding legitimate authority have the right to repel by armed force aggressors against the civil community entrusted to their charge.*

~~2266~~ ~~Preserving the common good of society requires rendering the aggressor unable to inflict harm. For this reason the traditional teaching of the Church has acknowledged as well founded the right and duty of legitimate public authority to punish malefactors by means of penalties commensurate with the gravity of the crime, not excluding, in cases of extreme gravity, the death penalty. For analogous reasons those holding authority have the right to repel by armed force aggressors against the community in their charge.~~

*The State's effort to contain the spread of behaviors injurious to human rights and the fundamental rules of civil coexistence corresponds to the requirement of watching over the common good. Legitimate public authority has the right and duty to inflict penalties commensurate with the gravity of the crime. The primary effect of punishment is to redress the disorder caused by the offense. The primary scope of the penalty is to redress the disorder caused by the offense. When his punishment is voluntarily accepted by the offender, it takes on the value of expiation. Moreover, punishment has the effect of preserving public order and the safety of persons. Finally punishment has a medicinal value; as far as possible it should contribute to the correction of the offender. Moreover, punishment, in addition to preserving public order and the safety of persons, has*

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46. Text that remains unchanged in the *editio typica* appears in normal type; eliminated text is crossed out and any emphasis is omitted; new words found only in the *editio typica* are in italics; all footnotes are omitted. Compare CATECHISM OF THE CATHOLIC CHURCH (1994), *supra* note 6, ¶¶ 2265–67, with CATECHISMUS CATHOLICAE ECCLESIAE, *supra* note 8, ¶¶ 2265–67.

*a medicinal scope: as far as possible it should contribute to the correction of the offender.*

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

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

*Today, in fact, given the means at the State's disposal to effectively repress crime by rendering inoffensive the one who has committed it, without depriving him definitively of the possibility of redeeming himself, cases of absolute necessity for suppression of the offender "today. . . are very rare, if not practically non-existent."<sup>47</sup>*

The changes are neither as complicated nor as significant as they look. Paragraph 2265 is now devoted solely to the state's right to repel armed aggression.<sup>48</sup> In the original paragraph 2266, the "primary effect of punishment is to redress the disorder caused by the offense;"<sup>49</sup> in the *editio typica*, "redress[ing] the disorder" is described as a "primary scope [*primum scopum*],"<sup>50</sup> thus bringing the redress of disorder into the very nature of punishment rather than leaving it external to punishment as an effect. Also, in the *editio typica*, the following words have been eliminated from paragraph 2266: "For this reason the traditional teaching of the Church has acknowledged as well-founded the right and duty of legitimate public authority to punish malefactors by means of penalties commensurate with the gravity of the crime, not excluding, in cases of extreme gravity, the

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47. Compare CATECHISM OF THE CATHOLIC CHURCH (1994), *supra* note 6, ¶¶ 2265–67 (citations omitted), with CATECHISMUS CATHOLICAE ECCLESIAE, *supra* note 8, ¶¶ 2265–67 (citations omitted). At the end of paragraph 2267, the *editio typica* also contains a new footnote that cites *Evangelium Vitae*, *supra* note 7, ¶ 56.

48. CATECHISMUS CATHOLICAE ECCLESIAE, *supra* note 8, ¶ 2265.

49. CATECHISM OF THE CATHOLIC CHURCH (1994), *supra* note 6, ¶ 2266.

50. CATECHISMUS CATHOLICAE ECCLESIAE, *supra* note 8, ¶ 2266.

death penalty."<sup>51</sup> But this same idea is found now at the beginning of paragraph 2267, along with the principle that the death penalty is only appropriate "when this is the only practicable way to defend the lives of human beings effectively against the aggressor."<sup>52</sup> But even this latter idea was not absent from the original paragraph 2267: "If bloodless means are sufficient to defend human lives against an aggressor and to protect public order and the safety of persons, public authority should limit itself to such means . . ."<sup>53</sup> Finally, paragraph 2267 adds from *Evangelium Vitae* the idea that the instances of justified capital punishment are today "very rare, if not practically non-existent."<sup>54</sup>

There are a number of things to be said about paragraphs 2265 through 2267 even independent of any differences between the 1994 translation and the *editio typica*. The most important is the idea that any penalty is meant to redress, in some manner, the disorder caused by an offense. One notes that this idea is introduced after the description of capital punishment as a means of self-defense, so we are clearly to understand public self-defense as a means of redressing disorder.<sup>55</sup> Nor can this be a slip, for we find the same idea in *Evangelium Vitae*, where Pope John Paul II (as we have seen) first situates capital punishment within the context of self-defense and then quotes the *Catechism's* words about redressing disorder.<sup>56</sup>

But this is not easy to make sense of, at least within the context of the *Catechism*. The idea that punishment is basically the redressing of a disorder (or "setting things to rights") is an ancient one, with

51. Compare CATECHISM OF THE CATHOLIC CHURCH (1994), *supra* note 6, ¶ 2266, with CATECHISMUS CATHOLICAE ECCLESIAE, *supra* note 8, ¶ 2266.

52. CATECHISMUS CATHOLICAE ECCLESIAE, *supra* note 8, ¶ 2267.

53. CATECHISM OF THE CATHOLIC CHURCH (1994), *supra* note 6, ¶ 2267.

54. CATECHISMUS CATHOLICAE ECCLESIAE, *supra* note 8, ¶ 2267 (quoting *Evangelium Vitae*, *supra* note 7, ¶ 56).

55. CATECHISM OF THE CATHOLIC CHURCH (1994), *supra* note 6, ¶¶ 2263–66; CATECHISMUS CATHOLICAE ECCLESIAE, *supra* note 8, ¶¶ 2263–66.

56. Pope John Paul II wrote as follows:

The problem must be viewed in the context of a system of penal justice ever more in line with human dignity and thus, in the end, with God's plan for man and society. The primary purpose of the punishment which society inflicts is "to redress the disorder caused by the offense." Public authority must redress the violation of personal and social rights by imposing on the offender an adequate punishment for the crime, as a condition for the offender to regain the exercise of his or her freedom.

*Evangelium Vitae*, *supra* note 7, ¶ 56 (footnote call number omitted) (quoting CATECHISM OF THE CATHOLIC CHURCH (1994), *supra* note 6, ¶ 2266).

origins traceable as far back as Aristotle's remarks about commutative justice in the fifth book of the *Nicomachean Ethics*.<sup>57</sup> Aquinas takes over this approach willingly.<sup>58</sup> But redressing disorder is not something that a judge is forced to do: it is not a defensive measure but something the judge or other public official has a positive duty to do. One could make the case that re-establishing order is a sort of defense of the political entity in question: without the order of justice, the city will eventually come apart. But the qualification "will eventually" is important in this argument. If redressing disorder is essentially a preventive measure, those who engage in it need not wait for a crisis to present itself. It is the judge's—or the legislator's—job to maintain as healthy a body politic as possible at all times. He has permanent permission to enforce the peace, established by law. Furthermore, as suggested above, the "badges" worn by the officers of the law who execute the judge's directives represent the fact that, unlike the self-defender, they need not wait for dire straits before dealing with an aggressor or other malefactor. We have already seen, of course, that this distinction is slurred over in paragraphs 2263 through 2264 of the *Catechism*.<sup>59</sup>

In the first paragraph of 2267, the *editio typica* states that traditional Catholic teaching does not wholly exclude recourse to the death penalty "when this is the only practicable way to defend lives of human beings effectively against the aggressor."<sup>60</sup> This statement

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57. Commutative justice for Aristotle is a sort of re-establishing equilibrium between two parties. It can involve taking quantifiable goods from one party and giving them to the other, but it can also concern goods—and a balance—which are less quantifiable. In his *Nicomachean Ethics*, for instance, Aristotle discusses "acts proceeding from anger," such as insults and assaults; immediately after, he discusses the same sort of things done not in a passion but by choice: "But if a man harms another by choice, he acts unjustly; and *these* are the acts of injustice which imply that the doer is an unjust man, provided that the act violates proportion or equality." NICHOMACHEAN ETHICS, *supra* note 44, Bk. V, Ch. 8, 1135b26, 1136a1–3, *found in* 2 THE COMPLETE WORKS OF ARISTOTLE, *supra* note 44, at 1792–93. Here, re-establishing "proportion or equality" clearly would involve punishment of some sort. *See also* PLATO, LAWS, Bk. VI, Ch. 6, 757b, *found in* PLATO: COMPLETE WORKS 1318, 1433 (John M. Cooper ed., Trevor J. Saunders trans., 1997).

58. *See* FINNIS, *supra* note 13, at 210–15 (discussion and references); *see also* ST. THOMAS AQUINAS, SCRIPTUM SUPER SENTENTIIS MAJISTRI PETRI LOMBARDI [COMMENTARY ON THE SENTENCES OF PETER LOMBARD], Tome II, Distinction 42, Q. 1, Art. 2 (Maria Fabianus Moos ed., Lethielleux 1947) [hereinafter SENTENCES].

59. *See* CATECHISM OF THE CATHOLIC CHURCH (1994), *supra* note 6, ¶¶ 2263–64; CATECHISMUS CATHOLICAE ECCLESIAE, *supra* note 8, ¶¶ 2263–64. For further discussion of this distinction, *see supra* Part II(A)–(B).

60. CATECHISMUS CATHOLICAE ECCLESIAE, *supra* note 8, ¶ 2267.

gives rise to a number of perplexities. It is true, of course, that traditional Catholic teaching does not exclude recourse to the death penalty;<sup>61</sup> however, among traditional authors, it would be hard to find expressed the restriction, “when this is the only practicable way to defend lives of human beings effectively against the aggressor.” So, perhaps we should presume that defending the lives of citizens against the aggressor would include protecting them against the lack of balance that would ensue if the aggressor—a mass murderer, for example—was allowed to live. But this is clearly not what the *Catechism* has in mind, for it goes on in the same paragraph number to quote the remark from *Evangelium Vitae* that the cases in which it is necessary to employ the death penalty are “very rare, if not practically non-existent.”<sup>62</sup>

The most reasonable conclusion to draw from this discussion is that, once again, the *Catechism* is simply wrong from an historical point of view. Traditional Catholic teaching did not contain the restriction enunciated by Pope John Paul II.<sup>63</sup>

61. See E. CHRISTIAN BRUGGER, CAPITAL PUNISHMENT AND ROMAN CATHOLIC MORAL TRADITION 75–95 (2003).

62. CATECHISMUS CATHOLICAE ECCLESIAE, *supra* note 8, ¶ 2267 (quoting *Evangelium Vitae*, *supra* note 7, ¶ 56).

63. Since it is related to problems we have already seen, it is worth noting one final problem that comes just after the section on legitimate defense. The beginning of paragraph 2268 (and the beginning of the section on “intentional homicide”) reads: “The fifth commandment forbids *direct and intentional killing* as gravely sinful.” *Id.* ¶ 2268. This is open to the objection that the *Catechism* itself accepts killing in war as possibly moral—and a lot of the killing in war is clearly intentional (and, presumably, direct). See *id.* ¶ 2310. (On expressions such as “direct killing,” see *infra* note 99 in the Appendix of this Article.) It would be possible to defend the internal consistency of the *Catechism* by pointing out that it defines even killing in war as killing in self-defense, which, according to St. Thomas Aquinas, is *praeter intentionem*. Of course, this argument must look away from the fact that the type of self-defense that St. Thomas has in mind in the relevant passage is personal self-defense. But there is another solution, not entirely consistent with the one just formulated. At the beginning of paragraph 2263 (and the beginning of the section on “legitimate defense”), the *Catechism* says: “The legitimate defense of persons and societies is not an exception to the prohibition against the murder of the innocent that constitutes intentional killing.” *Id.* ¶ 2263 (emphasis added). So, it appears that when paragraph 2268 speaks of “direct and intentional killing” it could actually mean killing of the innocent. *Id.* ¶ 2268; see also *Evangelium Vitae*, *supra* note 7, ¶ 57 (“Therefore, by the authority which Christ conferred upon Peter and his Successors, and in communion with the bishops of the Catholic Church, I confirm that the *direct and voluntary killing of an innocent human being is always gravely immoral*.”). But does this then entail that intentional killing is possibly moral, as long as it is not killing of the innocent? If that is the case, it was not necessary to assimilate killing in war and capital punishment to killing in self-defense. On the other hand, notwithstanding the limiting phrase “of the innocent” in paragraph 2263, the

### III. A SYNTHESIS OF TRADITIONAL AND RECENT CATHOLIC TEACHING

#### A. *The Natural and the Unnatural in Aristotelian Thought*

Clearly there are difficulties in the teaching of the *Catechism of the Catholic Church* and the encyclical letter *Evangelium Vitae* with respect to capital punishment. These difficulties are caused by a combination of factors. On the one hand, there is the understandable desire to present the teaching of the Church on capital punishment as traditional. The issue of capital punishment—or any killing, for that matter—pertains to natural law; since natural law does not change, the present teaching must in some way (or so the argument would go) have a basis in natural law and traditional Catholic thought. It is for this reason that the works of St. Thomas Aquinas, and in particular Part II-II, Question 64, Article 7 of his *Summa Theologica*, are repeatedly cited as a theoretical basis of the teaching put forward.<sup>64</sup>

A concurrent factor, as I have already suggested, is a certain mistrust of law or the politically normative as the (or, at least, a) basis for ethics and ethical judgments. Again, one notices this especially on the European continent, where a very commendable aversion to fascism has shaped much contemporary thought.<sup>65</sup> In philosophy, this aversion tends to push thinkers toward existentialism and other theories that attempt somehow to derive ethics from the individual agent or from the nature of the human person rather than from societal norms. This general trend is very much present, of course, in the “personalism” of Karol Wojtyła, although he makes a valiant effort to work a role for law into the foundations of his ethics.<sup>66</sup>

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*Catechism* clearly intends to assimilate killing in war and capital punishment to self-defense. CATECHISMUS CATHOLICAE ECCLESIAE, *supra* note 8, ¶ 2263.

64. CATECHISMUS CATHOLICAE ECCLESIAE, *supra* note 8, *passim*.

65. Cf. WOLIN, *supra* note 38, at xii–xv (arguing that the reactions to fascism did not succeed in shaking off its philosophical presuppositions).

66. See KAROL WOJTYŁA, *L'uomo nel Campo della Responsabilità*, in *METAFISICA DELLA PERSONA* 1233, 1255 (Giovanni Reale & Tadeusz Stycze eds., 2003).

Quindi—e qui la nostra posizione è diversa da quella di alcuni fenomenologi, fra cui Scheler—non è possibile alcuna constatazione del bene, del male o del valore morale senza un riferimento all'ordine normativo, senza entrare in questo ordine. [Therefore—and here our position is different from that of some phenomenologists, including Scheler—no authentication of good, of evil or of moral value is possible without reference to the normative order: without entering into this order.]

There is, however, a way of maintaining the recent teaching of the Catholic Church regarding capital punishment, especially the idea that present societal conditions alter matters in such a way that the cases of “necessary,” and therefore licit, capital punishment “are very rare, if not practically non-existent,”<sup>67</sup> without making use of forced interpretations of St. Thomas Aquinas and without falling into pure personalism. The way forward is a more comprehensive understanding of how both Aristotle and Aquinas understood natural law, and, in particular, how the natural law bears upon such issues as capital punishment and killing in war.

In the final pages of Evelyn Waugh’s biography of Edmund Campion, just after his account of the Jesuit martyr being dragged through the streets of London to Tyburn, we read the following words:

Sir Francis Knollys, Lord Howard, Sir Henry Lee and other gentlemen of fashion were already waiting beside the scaffold. When the procession arrived, they were disputing whether the motion of the sun from east to west was violent or natural; they postponed the discussion to watch Campion, bedraggled and mud-stained, mount the cart which stood below the gallows.<sup>68</sup>

Why, at that time and place, were Knollys, Howard, and Lee discussing whether the motion of the sun is violent or natural? Waugh tells us nothing more, and I doubt that he knew why the three were discussing that particular theme. He apparently recounts the incident simply as indication of their insouciance regarding the events about to ensue.<sup>69</sup> But the conversation was anything but unrelated to the issue of capital punishment, which Campion was shortly to suffer.

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*Id.* at 1255 (author’s translation in brackets). It is unfortunate that the essay “L’uomo nel campo della responsabilità” remains unfinished, for we receive in it some indication that Wojtyła was uncomfortable with Scheler’s antinomianism.

67. CATECHISMUS CATHOLICAE ECCLESIAE, *supra* note 8, ¶ 2267 (quoting *Evangelium Vitae*, *supra* note 7, ¶ 56).

68. EVELYN WAUGH, EDMUND CAMPION: A LIFE 197 (Ignatius Press 2005) (1935).

69. Waugh takes the story from RICHARD SIMPSON, EDMUND CAMPION: A BIOGRAPHY 319 (1867). Simpson connects it in a tentative manner with Campion’s offer at the end of his second day of interrogation in London Tower “to prove, against all the philosophy of Cambridge, that the heavens were hard, made of crystal, and (doubtless) whirling the sun, moon, and stars round with them, either by their own natural course or by some external impulse impressed upon them.” *Id.*

According to the astronomical theory that Aristotle followed and that was actually developed by his associates, Eudoxus and Callippus, one can explain the diverse movements of the celestial bodies by positing a series of concentric spheres revolving around a center (the earth), but whose axes are embedded in one another at diverse points.<sup>70</sup> The movement of the “fixed stars” (those in the sky with the most regular movement) is explained by their association with the outermost sphere, the movement of which depends just on its own axis.<sup>71</sup> The movement of the “wandering stars” (the “planets” or *planētes*, which is Greek for “wanderers”), is explained by their association with spheres below the outermost sphere.<sup>72</sup> The movement of a planet’s proper sphere depends not only on its own axis but also on the movement of the sphere into which this axis is embedded; and *that* sphere’s movement depends on any sphere into which its axis might be embedded, and so on, until one comes to the outermost sphere.<sup>73</sup> By positing multiple spheres in this way, with their axes set at various angles with respect to one another, Aristotle’s colleagues were able to provide mathematical models that, with varying degrees of accuracy, corresponded to the retrogressions and loops traced out by the planets as they move through the night sky.<sup>74</sup>

In the second book of his treatise *De Caelo*, Aristotle says that the movement of the outermost sphere is utterly simple since both this sphere and its mover (God) are simple, ungenerated, indestructible, and unchanging.<sup>75</sup> The movements of the lower spheres, including

70. Aristotle mentions Eudoxus and Callippus and their theory in his *Metaphysics*. ARISTOTLE, *METAPHYSICS*, Bk. XII, Ch. 8, 1073b18–35 (W.D. Ross trans.) [hereinafter *METAPHYSICS*], *found in* 2 THE COMPLETE WORKS OF ARISTOTLE 1552, *supra* note 5, at 1696–97.

71. ON THE HEAVENS, *supra* note 5, Bk. I, Ch. 9, 277b27–279b3, *found in* 1 THE COMPLETE WORKS OF ARISTOTLE, *supra* note 5, at 461–463; *METAPHYSICS*, *supra* note 70, Bk. XII, Ch. 8, 1073b25–26, *found in* 2 THE COMPLETE WORKS OF ARISTOTLE, *supra* note 5, at 1696–97.

72. *METAPHYSICS*, *supra* note 70, Bk. XII, Ch. 8, 1073b18–31, *found in* 2 THE COMPLETE WORKS OF ARISTOTLE, *supra* note 5, at 1697.

73. *Id.*

74. The works of Eudoxus and Callippus no longer survive; most of what we know about them comes through Aristotle. It may be, however, that *The Spherics*, attributed to Theodosius of Bithynia (second century B.C.), was either written by Eudoxus or based on his work. *Theodosius Tripolites: Sphaerica* (J.L. Heiberg ed., Weidmannsche Buchhandlung 1927) (n.d.).

75. See ON THE HEAVENS, *supra* note 5, Bk. II, Ch. 10, 291a30–291b3, *found in* 1 THE COMPLETE WORKS OF ARISTOTLE, *supra* note 5, at 480.

the spheres governing the sun, are not as regular, “for the lower spheres exhibit a composition of several movements into one.”<sup>76</sup>

Aristotle then makes a startling remark concerning not stars and mathematical models but life on earth. Having denied once again that irregularity of movement is possible for the outermost sphere, he argues:

For . . . [r]etardation is always due to incapacity, and incapacity is unnatural [*para phusin*]. The incapacities of animals, old age,<sup>77</sup> decay, and the like, are all unnatural [*para phusin*], due, it seems, to the fact that the whole animal complex is made up of materials which differ in respect of their proper places, and no single part occupies its own place. If therefore that which is primary contains nothing unnatural [*para phusin*], being simple and unmixed and in its proper place and having no contrary, then it has no place for incapacity, nor, consequently, for retardation or (since acceleration involves retardation) for acceleration.<sup>78</sup>

There are many things going on in this passage but its central and most interesting idea is that *any* irregular movement or alteration—all of which occurs below the first celestial sphere—is unnatural. One might debate whether the motion of the sun should be characterized as unnatural, since its movement does not involve fits and starts as do those of the planets (and perhaps this is the particular point that Knollys, Howard, and Lee were discussing as they awaited the execution of Edmund Campion), but there can be no question that Aristotle holds (at least in this passage) that the whole animal kingdom, to which man belongs, is marked by unnaturalness. All the “incapacities of animals,” he says, such as “old age, decay, and the like” are “unnatural.”<sup>79</sup>

But why were Knollys, Howard, and Lee discussing this particular issue? And what is the connection with capital punishment? The answer is that this passage was used within the Aristotelian tradition, with which all educated persons of the time

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76. *Id.* Bk. II, Ch. 6, 288a15, *found in* 1 THE COMPLETE WORKS OF ARISTOTLE, *supra* note 5, at 475.

77. The author has altered the translation here; that is to say, at Bk. II, Ch. 6, line 288b16, he has translated *gérās* as “old age.”

78. *Id.* Bk. II, Ch. 6, 288b12–22, *found in* 1 THE COMPLETE WORKS OF ARISTOTLE, *supra* note 5, at 476.

79. *Id.*

were familiar, to account for certain things in human life that are both natural and unnatural. Aristotle says in the passage above that even apparently natural occurrences, such as old age and decay, contravene nature.<sup>80</sup> But such occurrences are very much part of nature as we know it. So, Aristotle must have in mind a special sense of nature that old age and decay are against.

The primary sense of nature, then, would include just the “positive aspects” of things: regular rather than interrupted motion, magnanimity rather than constriction, and life rather than death. A secondary sense of nature (or the natural) would include such things as old age and death. This is the sense one has in mind when one says that to grow old and to die are natural. But even one who says this must acknowledge that they are not natural in the way that robust health and life are natural. There is something disordered—even “wrong”—especially about death. Similarly, it is in a sense quite natural for brute animals to kill one another for nourishment, and yet when we see a deer laid low by a wolf we sense that something is not right with the world.

One can apply the same type of analysis within the political sphere. There are some aspects of human society that are unalloyed goods: telling the truth, for instance, or being faithful to one’s spouse. Such things are natural in the strictest and the highest sense. But other things are natural by virtue of a sort of derogation from a higher natural law. Killing in war is a good instance. Man has always organized armies and fought with his enemies (whether for defensive or offensive purposes): that is part of “what man does.” Yet, in a just world, the killing brought about in war is always “hemmed in,” requiring legal restriction in a way unnecessary for its positive counterpart, friendly relations. The killing that occurs in war is good only there: *in war*. If a man leaves the army—and does not become, for instance, an officer of the law—and he continues to kill, he does so as an outlaw. So, the default position is always peaceful relations with others, even though in certain contexts it can be quite right and not contrary to nature (at least in a secondary sense) to kill. Within such contexts, killing can be a good thing; outside such contexts, we find not an ethical no man’s land in which either killing and not killing are of equivalent moral status: the default position is peace.

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80. *Id.*

B. *The Integration of Aristotle's Understanding of the Natural with Christian Thought*

The Aristotelian distinction between two senses of the natural found its way into mainstream Christian thought, especially during the scholastic period; Knollys, Howard, and Lee would certainly have been influenced by this tradition, which was still alive, for instance, at Oxford.<sup>81</sup> There is a passage in St. Thomas Aquinas's commentary on Peter Lombard's *Sentences* where he employs these ideas in connection with slavery and even cites the passage from *De Caelo*. The particular question before him is whether the condition of servitude (or slavery) can be an impediment to marriage. He writes:

[N]othing prohibits something's being contrary to the first intention of nature without its being contrary to its second, just as every corruption and defect and growing old is, as is said in *De caelo*,<sup>82</sup> contrary to nature (since nature intends being and perfection) but is not contrary to nature according to the second intention of nature. For, since nature cannot preserve being in one thing, it preserves it in another which is generated from the corruption of the first; and, when nature cannot achieve a greater perfection, it effects a lesser, as when nature cannot make a male and makes a female, which is a botched male, as is said in *De generatione animalium*.<sup>83</sup> Similarly, I say that servitude is contrary to the first intention of nature but not contrary to the second. For natural reason tends toward—and nature desires—everyone's being good, but in as much as someone sins

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81. J. M. Fletcher writes as follows of Elizabethan Oxford: "The older authorities, Euclid, Vitellius, John of Holywood, Ptolemy and the *Theorica planetarum* still determined the study of geometry and astronomy, with only the later Orentius added." J.M. Fletcher, *The Faculty of Arts*, in 3 THE HISTORY OF THE UNIVERSITY OF OXFORD 157, 174 (James McConica ed., 1986).

82. ON THE HEAVENS, *supra* note 5, Bk. II, Ch. 6, 288b12–22, *found in* 1 THE COMPLETE WORKS OF ARISTOTLE, *supra* note 5, at 476. St. Thomas cites this passage or discusses the concept at least three other times—see, for example, ST. THOMAS AQUINAS, COMMENTARY ON ARISTOTLE'S *PHYSICS* ¶ 739 (Richard J. Blackwell et al. trans., Yale Univ. Press 1963); ST. THOMAS AQUINAS, TRUTH, Q. 13, Art. 1 (James V. McGlynn trans., Henry Regnery Co. 1953); ST. THOMAS AQUINAS, ON THE POWER OF GOD, Q. 6, Art. 1 (English Dominican Fathers trans., Newman Press 1932)—not to mention, of course, ST. THOMAS AQUINAS, ON THE HEAVENS, Bk. II, Lecture 9, Ch. 375; *see also* SUMMA THEOLOGICA, *supra* note 4, Pt. I-II, Q. 94, Art. 5. I discuss many of these passages in Kevin L. Flannery, S.J., *Moral Taxonomy and Moral Absolutes in Aristotle and Thomas Aquinas*, in LAWRENCE DEWAN, FESTSCHRIFT (Peter A. Kwasniewski ed., Catholic Univ. of Am. Press, forthcoming 2007) [hereinafter *Moral Taxonomy*].

83. ARISTOTLE, GENERATION OF ANIMALS, Bk. II, Ch. 3, 737a27–29 (A. Platt trans.) [hereinafter GENERATION OF ANIMALS], *found in* 1 THE COMPLETE WORKS OF ARISTOTLE, *supra* note 5, at 1111, 1144.

nature also tends to bear punishment for sin; and thus servitude was introduced as punishment for sin.<sup>84</sup>

There are ideas in this passage that are considered unacceptable today, such as the notion that the female is a “botched male” (*mas occassionatus*) and the belief that slavery is according to nature. I cannot go into such matters here except to say briefly, with regard to the second, that Aquinas is responding to the objection that “that which is against nature cannot impede that which is according to nature” (i.e., marriage).<sup>85</sup> Aquinas holds that a spouse’s *concealing* his or her status as a slave can impede marriage,<sup>86</sup> so, his overall intent is not to justify slavery but to promote transparency in the covenant of marriage.

What interests us here is not St. Thomas Aquinas’s understanding of women, marriage, or slavery, but rather how these basically Aristotelian ideas provide us with a means of situating the phenomenon of capital punishment within ethical theory in general and also with a means of articulating the truth that capital punishment is, in a sense, natural and, in another sense, unnatural. This, in turn, gives us a means of accepting both the traditional teaching that capital punishment is according to natural law and also Pope John Paul II’s teaching that it is “both cruel and unnecessary.”<sup>87</sup>

84. SENTENCES, *supra* note 58, Tome IV, Distinction 36, Q. 1, Art. 1 (author’s translation).

85. *Id.*

86. The main body of the same article reads:

I respond saying that in a contract of marriage one spouse is obliged to render the debt [of conjugal intercourse] to the other; and, therefore, if he who obligates himself is incapable [*impotens*] of resolving this obligation, ignorance of this incapacity on the part of the person with respect to whom the obligation is undertaken cancels the contract. But, just as through an incapacity to engage in sexual intercourse someone is made incapable [*impotens*] of resolving the debt in such a way that he is *entirely* unable to resolve it, so also through servitude he is unable *freely* to render the debt. And so, just as an unknown incapacity to engage in sexual intercourse impedes marriage but this is not the case if it is known, so also an unknown condition of servitude impedes marriage but known servitude does not.

*Id.* (emphasis added).

87. See Pope John Paul II, Homily at Trans World Dome, *supra* note 8, ¶ 5.

C. *Application to Capital Punishment of the Two-Tiered Approach to the Natural*

We have already seen how Aristotle's two-tiered approach to what is natural can be applied to political issues such as killing in war.<sup>88</sup> In a secondary sense (although this is the sense most immediately pertinent to political life as such), killing in war is according to natural law. Given the conditions of life in an imperfect world, a nation that defends itself by means of intentional killings can be acting in a perfectly natural—that is to say, ethical—way. But in the primary sense of what is natural, all killing is unnatural.<sup>89</sup> Thus, once the conditions that allow for war's naturalness are no longer present, the killing that was once natural becomes unnatural. Moreover, since "second intention natural law" is a derogation from "first intention natural law," the latter enjoys a privileged status such that, if it is possible to apply it, one should. In other words, one should always prefer peace, although war is not per se immoral.

We can say similar things with respect to capital punishment. Throughout the history of the Church, Catholic philosophers and theologians have said that capital punishment is licit.<sup>90</sup> But they have done this without ever denying that, in a more abstract sense, any such killing goes against what is favored even by nature. Given certain conditions, capital punishment is a perfectly reasonable political expedient.<sup>91</sup> Since reasonableness determines morality, this expedient found its way into human law in a relatively permanent way; indeed, there are very few Christian (or formerly Christian) nations in existence today that have not had some form of capital punishment in their legal history. But, even still, few of these nations (or their legal experts) would have resisted the argument that there is something

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88. See *supra* Part III(B).

89. A chapter in Aristotle's *Rhetoric* suggests just this conclusion. The chapter begins with remarks about natural as opposed to positive law; it then cites Empedocles who bids us to "kill no living creature" and describes this as "an all-embracing law, through the realms of the sky, unbroken it stretcheth, and over the earth's immensity," but then, within a few lines, Aristotle asserts that it is wrong for a man to refuse military service. ARISTOTLE, *RHETORIC*, Bk. I, Ch. 13, 1373b1–25 (W. Rhys Roberts trans.), found in 2 THE COMPLETE WORKS OF ARISTOTLE, *supra* note 5, at 2152, 2187; see also *Moral Taxonomy*, *supra* note 82 (arguing that Aristotle, in this passage, is employing the two-tiered approach to the natural that we find in ON THE HEAVENS, *supra* note 5, Bk. II, Ch. 6, 288a15–289a12, found in 1 THE COMPLETE WORKS OF ARISTOTLE, *supra* note 5, at 475–76).

90. See BRUGGER, *supra* note 61, at 74–138.

91. See *supra* text accompanying notes 29–36.

foul or disordered about the practice. In *itself* killing is bad, but allowed. Mercy, in itself, is good and invoked whenever possible and appropriate.

#### IV. CONCLUSION

The truth that informs Pope John Paul II's teaching on capital punishment is, I believe, that killing in itself is unnatural, but is allowed in exceptional circumstances. Moreover, in my opinion, it would have been better to express this truth in the traditional terms found in Aristotle and St. Thomas Aquinas than (as in the *Catechism* and *Evangelium Vitae*) to attempt to assimilate it to personal self-defense. Obviously, the Church cannot give an account of natural law in its two intentions that relies on the ancient theory of the celestial spheres. But it is characteristic of Aristotle that, although he often ties his philosophical doctrines to the scientific theories of his day, his philosophy can stand on its own feet.<sup>92</sup> The astronomical theory which, up until the days of Bellarmine and Galileo, served to make Aristotle's metaphysics more convincing, can now be regarded as an accessory—an illustration rather than an integral part of the philosophical machinery.

By discarding the account of capital punishment in terms of personal self-defense, the Church would be distancing herself from an unfortunate misinterpretation of an important text in St. Thomas Aquinas—that is to say, of the *locus classicus* for the principle of double effect and for the allowance of personal self-defense.<sup>93</sup> The Church would also be removing one source of confusion among contemporary ethicists regarding the role of intention in the analysis of human action.

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92. See, e.g., METAPHYSICS, *supra* note 70, Bk. VI, Ch. 1, 1025b1–1026a32, *found in* 2 THE COMPLETE WORKS OF ARISTOTLE, *supra* note 5, at 1619–20; *id.* Bk. VII, Ch. 2, 1028b9–32, *found in* 2 THE COMPLETE WORKS OF ARISTOTLE, *supra* note 5, at 1624 (where Aristotle uses the immaterial substances that govern the celestial spheres in order to get argumentatively to the first unmoved mover). Aristotle might just as well have used the human intellect, which he also acknowledges to be (in some sense) separate from matter and, therefore, midway between purely material substances and the ultimate divine substance. See ARISTOTLE, ON THE SOUL, Bk. II, Ch. 2, 413b25–30 (J.A. Smith trans.), *found in* 1 THE COMPLETE WORKS OF ARISTOTLE, *supra* note 5, 641, 658–59; GENERATION OF ANIMALS, *supra* note 83, Bk. II, Ch. 3, 736b25–32, *found in* 1 THE COMPLETE WORKS OF ARISTOTLE, *supra* note 5, at 1143. Like the secondary celestial unmoved movers, the intellect is in itself independent of any corporeal organ and, therefore, of the standard physical causal nexus.

93. SUMMA THEOLOGICA, *supra* note 4, Pt. II-II, Q. 64, Art. 7.

## APPENDIX: A NOTE ON THE PRINCIPLE OF DOUBLE EFFECT

Although the basic ideas it employs can be traced back to the first half of the third book of the *Nicomachean Ethics*, where Aristotle sets out criteria for assigning moral responsibility for actions, the principle of double effect itself is usually traced back no further than St. Thomas Aquinas and, in particular, Part II-II, Question 64, Article 7 of his *Summa Theologica* (“Whether it is licit for someone to kill someone in self-defense”).<sup>94</sup> In the course of that article, Aquinas says that “the act of self-defense can have a double effect [*duplex effectus*];” he argues that in some cases the death of the assailant, which is one of the two effects, need not render the act illicit.<sup>95</sup> The principle became associated for a while with the Society of Jesus (the Jesuits), largely because of the biting criticism put forward by Blaise Pascal in, for instance, the seventh of his *Provincial Letters* (written in 1656) where he satirizes the Jesuits’ “grande methode de diriger l’intention.”<sup>96</sup>

The principle appears in all the manuals of moral theology used by Catholic seminarians and priests during the nineteenth century and into the twentieth, up until the Second Vatican Council. One such manual, the *Compendium Theologiae Moralis* by Jean Pierre Gury, formulates the principle as follows: “It is licit to posit a cause that is either good or indifferent and from which follows immediately a twofold effect, one good and one evil, provided that there is present a proportionately grave reason [*causa proportionate gravis*] and that the end of the agent is good [*honestus*]—that is to say, if he does not

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94. *Id.* There are many useful articles and materials on the history of the principle of double effect. See, e.g., THE DOCTRINE OF DOUBLE EFFECT: PHILOSOPHERS DEBATE A CONTROVERSIAL MORAL PRINCIPLE (P.A. Woodward ed., 2001); Thomas A. Cavanaugh, *Aquinas’s Account of Double Effect*, 61 THOMIST 107 (1997); Christopher Kaczor, *Double-effect Reasoning from Jean Pierre Gury to Peter Knauer*, 59 THEOLOGICAL STUD. 297 (1998); Joseph T. Mangan, *An Historical Account of the Principle of Double Effect*, 10 THEOLOGICAL STUDIES 41 (1949); W. David Solomon, *Double Effect*, in 1 THE ENCYCLOPEDIA OF ETHICS 418–20 (Lawrence C. Becker & Charlotte B. Becker eds., 2d ed., Routledge 2001); see also Alison McIntyre, *Doctrine of Double Effect*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, July 28, 2004, <http://plato.stanford.edu/entries/double-effect/>; Jörg Schroth, *Literatur zum Prinzip der Doppelwirkung* [List of References for the Principle of Double Effect], Mar. 22, 2006, <http://wwwuser.gwdg.de/~sophia/schroth/bpdw.pdf>.

95. *SUMMA THEOLOGICA*, *supra* note 4, Pt. II-II, Q. 64, Art. 7.

96. 1 BLAISE PASCAL, LES PROVINCIALES 234 (Editions de Cluny 1943).

intend the evil effect."<sup>97</sup> In the same place, Gury formulates rules for application of the principle: (1) the agent's end must be good; (2) the cause to be posited must be good or, at least, indifferent; (3) the good effect must be immediate; and (4) there must be present a grave reason for positing the good cause and the agent must not be bound either by justice or office or charity to omit the act.<sup>98</sup>

Following such rules, theologians ("the approved authors") and occasionally also, in a definitive way, the Church's teaching Magisterium formulated answers to difficult moral questions. A noteworthy example is the question of whether it is permissible to perform a hysterectomy upon a woman with a cancerous uterus who is also pregnant. The answer was in the affirmative, provided the operation would have to be performed even if the woman were not pregnant.<sup>99</sup> Another example is the question of whether a craniotomy

97. JEAN PIERRE GURY, *COMPENDIUM THEOLOGIAE MORALIS*, Ch. 8, at 5–6 (A. Ballerini & A. Sabetti eds., 18th ed., Fr. Pustet & Co. 1906) (1850) (author's translation).

98. *Id.*

99. 2 ARTHUR VERMEERSCH, *THEOLOGIAE MORALIS: PRINCIPIA—RESPONSA—CONSILIA*, ch. 585, at 453 (3d ed. 1945) (author's translation throughout footnote, with the original in brackets). Vermeersch does not actually mention cancer but speaks simply of a lethal malady (*mater letali morbo affecta*). *Id.* He speaks of "necessary remedies which, at the same time [*simul*] as they heal the malady, bear with them the danger of an abortion." *Id.* It is permissible, he says, to remove "the adversely affected uterus itself which can no longer be tolerated without risk to life [*sine vitae discrimine*]." *Id.* Vermeersch considers such cases under the rubric "[i]ndirect abortion for reasons of grave and proportionate cause," and says that they are "admitted by all" (i.e., all theologians). *Id.* (emphasis omitted). For the non-controversial character of such cases, see generally JOHN CONNERY, *ABORTION: THE DEVELOPMENT OF THE ROMAN CATHOLIC PERSPECTIVE* 223, 298 (1977). In the same section, Vermeersch discusses whether, in order to restore the uterus to its former state (*ad reponendum uterum*), it is permissible to evacuate the amniotic fluid. VERMEERSCH, *supra*, at 453. This is controverted, he says, but he notes that evacuating the fluid is often a means to abortion (and in that case, of course, immoral). VERMEERSCH, *supra*, at 453. He goes on to say that, if the fetus, "not simply *qua fetus* but, for example, *qua* diseased" [*non simpliciter qua fetus sed v. g. qua morbidus*], appears to be effecting positive and grave harm, such cases ought to be studied closely but the principle always maintained that "by means of an action directly homicidal, adopted as a means, no legitimate remedy can be obtained" [*per actionem directe occisivam assumptam ut medium, nulla utilitas legitime oblineri potest*]. VERMEERSCH, *supra*, at 453 (first emphasis added). This is standard language at the time, i.e., calling a procedure directly homicidal even when the overall intention is not to kill the fetus. *But see* John Finnis et al., "Direct" and "Indirect": A Reply to Critics of Our Action Theory, 65 *THOMIST* 1, 28–30 (2001). *See also* 1 AUGUSTINUS LEHMKUHL, *CASUS CONSCIENTIAE* §§ 522–26, at 266–68 (1903). Nor is Lehmkuhl unique in assuming that the Holy See was employing the same language; he notes that the Holy Office had decreed "it is not safely taught that possibly licit in order to save the mother might be the surgical operation of craniotomy or any other operation directly homicidal with respect to the fetus, even if otherwise both mother and fetus will perish: thus the [decrees of the Holy Office] of May 28, 1884 and August 19, 1889." Lehmkuhl, *supra*, § 525, at 267

(cutting and collapsing of the cranium) might be performed upon a fetus allowing it to pass through the pelvic cavity, if a woman (and the fetus) would die should the operation not be performed. The authoritative answer of the Sacred Congregation of the Inquisition (as of 1965, the Sacred Congregation for the Doctrine of the Faith) was that “this cannot safely be taught [tuto doceri non posse].”<sup>100</sup> As was standard practice, no reason was given, but doubtless the explanation would have been that the “cause posited” (collapsing the skull of the fetus and thereby killing it) is not good.<sup>101</sup>

Although the standard rules for application of the principle corresponded to sound moral intuitions and produced good answers for many such practical questions, they were not accompanied by a theoretical basis clear and robust enough to pull Catholic thinkers along with it in any specific direction when, immediately after the Second Vatican Council, other approaches were put forward as alternatives—and often as rivals—to the tradition of the manualists. The school of thought known as “proportionalism”—criticized by Pope John Paul II in the encyclical letter *Veritatis Splendor*<sup>102</sup>—in fact takes its name from Aquinas’s remark in *Summa Theologica* Part II-II, Question 64, Article 7 that an act of self-defense must be proportionate to its end (*proportionatus fini*); furthermore, some of its foundational texts purport to be expositions of the principle of double effect.<sup>103</sup> For these revisionist theorists, what is essential (i.e.,

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(author’s translation of “S. Officium. . .decrevit, tuto doceri non posse licitam esse ad salvandam matrem operationem chirurgicam craniotomiae *vel quamcumque operationem directe foetus occisivam*, etsi alias et mater et foetus sint perituri. Ita d. 28 Maii 1884 et 19 Aug. 1889.”).

100. 17 ACTA SANCTAE SEDIS 556 (1884).

101. For the history of this issue, see generally CONNERY, *supra* note 99, at 189–303. See also STEPHEN L. BROCK, ACTION AND CONDUCT: THOMAS AQUINAS AND THE THEORY OF ACTION 203–07 (1998); FLANNERY, *supra* note 33, at 167–94; John Finnis, *Intention and Side-effects*, in LIABILITY AND RESPONSIBILITY: ESSAYS IN LAW AND MORALS 32 (R.G. Frey & Christopher W. Morris eds., 1991); John Finnis, *Object and Intention in Moral Judgments According to St. Thomas Aquinas*, in FINALITÉ ET INTENTIONNALITÉ: DOCTRINE THOMISTE ET PERSPECTIVES MODERNES 127 (J. Follon & J. McEvoy eds., 1992); Kevin L. Flannery, *What Is Included in a Means to an End?*, 74 GREGORIANUM 499 (1993).

102. Pope John Paul II, *Veritatis Splendor* [Encyclical Letter Regarding Certain Fundamental Questions of the Church’s Moral Teaching] ¶¶ 65–83 (1993).

103. See Peter Knauer, *The Hermeneutical Function of the Principle of Double Effect*, 12 NAT. L. F. 132 (1967); Richard A. McCormick, *Some Early Reactions to Veritatis Splendor*, 55 THEOLOGICAL STUD. 481 (1994); Bruno Schüller, *The Double Effect in Catholic Thought: A Reevaluation*, in DOING EVIL TO ACHIEVE GOOD 165 (Richard A. McCormick & Paul Ramsey eds., 1978). But see Martin Rhonheimer, *Intentional Actions and the Meaning of Object: A Reply to Richard McCormick*, 59 THOMIST 279 (1995).

*ultimately* decisive) in moral analysis is the proportion of good to be effected by particular acts. But proportionalism contradicts Aquinas's ethics by denying that there are concrete types of acts, such as murder, adultery, and lying, that are intrinsically immoral.

Even among non-dissenting Catholic moralists, the interpretation and use of the principle of double effect has been unpredictable. In 1967, Philippa Foot (who ultimately rejects the principle) put forward the infamous case of the "fat potholer."<sup>104</sup> An overweight spelunker, leading an expedition out of a cave, gets caught in its mouth, facing his fellow spelunkers. Water is coming up from behind; for some reason, his colleagues have just one choice: blow him out of the entrance with dynamite or drown along with him in the cave. When Foot posed this thought-experiment, she clearly thought that proponents of the principle of double effect would reject its application in this case.<sup>105</sup> But, in fact, Joseph Boyle—comrade-in-arms with John Finnis and Germain Grisez—argued, on the grounds of double effect, that the act would not constitute a direct act of killing: "Foot's colorful description of the explorers' deliberation notwithstanding, the double effect theorist can admit that the killing of the hapless fat man is not direct; his *death* is not what opens the cave but rather his being removed from the entrance."<sup>106</sup> Boyle has

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104. Philippa Foot, *The Problem of Abortion and the Doctrine of the Double Effect*, 5 OXFORD REV. (1967), reprinted in PHILIPPA FOOT, VIRTUES AND VICES AND OTHER ESSAYS IN MORAL PHILOSOPHY 19, 19–32 (2002). Her essay is a reply to H.L.A. Hart, *Intention and Punishment* (1967), reprinted in PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 113 (1968). Foot speaks of the example as "well known to philosophers." Foot, *supra*, at 21. Later, she says that the fat man "is bound to be drowned with the others if nothing is done," Foot, *supra*, at 30, thereby making the example more specific than she does earlier where she writes: "In one version the fat man, whose head is *in* the cave, will drown with them; in the other he will be rescued in due course." Foot, *supra*, at 21.

105. She writes:

For suppose that the trapped explorers were to argue that the death of the fat man might be taken as a merely foreseen consequence of the act of blowing him up. ("We didn't want to kill him . . . only to blow him into small pieces" or even ". . . only to blast him out of the cave.") I believe that those who use the doctrine of the double effect would rightly reject such a suggestion, though they will, of course, have considerable difficulty in explaining where the line is to be drawn.

Foot, *supra* note 104, at 21–22.

106. Joseph Boyle, *Double-effect and a Certain Type of Embryotomy*, 44 IRISH THEOLOGICAL Q. 303, 307 (1977). Boyle believes, however, that the killing might be disallowed on grounds other than its being a direct killing. *Id.*

made analogous arguments with respect to craniotomy and has been defended by Finnis and Grisez.<sup>107</sup>

These three scholars have not brought even many of their friends along with them in maintaining this position. This author believes that craniotomy (as the example is used in the philosophical and theological literature) is direct killing; I believe, moreover, that double effect reasoning can be put on a more solid basis—and the wild fluctuations of interpretation of the past thirty years avoided—by following the indications of St. Thomas Aquinas in Part II-II, Question 64, Article 7 of the *Summa* and incorporating into such reasoning consideration of law and of the logical structure of the acts in question.<sup>108</sup> The logical structure of a human act is largely dependent upon its character as a movement (or *kinēsis*) in the Aristotelian sense, and understanding human acts in this way allows us to see that any human act must have an object distinguishable from the action itself, although part of it in the sense that the object helps to define what constitutes completion of that action. Combining this approach with the idea that the humanly natural depends on the intelligibility of human practices (such as medicine), one can show that, when there is present a proportionate reason, hysterectomy of even a gravid (pregnant) uterus is licit but that craniotomy is not, since craniotomy, unlike hysterectomy, is not part of medicine. Craniotomy cannot be part of medicine—properly conceived—since it does no medical good for its object: the fetus, whose cranium is collapsed.

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107. *Id.*; see also Joseph Boyle, *Who Is Entitled to Double Effect?*, 16 J. MED. & PHIL. 475 (1991). For further discussion on intentional killing in double-effect theory, see Joseph Boyle, *Praeter Intentionem in Aquinas*, 42 THOMIST 649 (1978); Joseph Boyle, *Further Thoughts on Double Effect: Some Preliminary Responses*, 16 J. MED. & PHIL. 565 (1991).

108. See FLANNERY, *supra* note 33, at 167–94; see also BROCK, *supra* note 101, at 49–136.