POPE JOHN PAUL II, VATICAN II, AND CAPITAL PUNISHMENT

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INTRODUCTION

I am very pleased to be participating in this conference on the legacy of Pope John Paul II. Although I am speaking on John Paul II’s profound impact on the Church’s teaching on the morality of capital punishment, I would like to begin with a few comments about John Paul II’s larger legacy and, in particular, the role of the Second Vatican Council (“Council,” “Vatican II”) in his papacy. I mention this because it is essential for an appreciation of his legacy, but even more because I think it provides the critical lens through which to view John Paul’s approach to capital punishment.

I hope it is not controversial to say that perhaps Pope John Paul II’s greatest legacy is that his papacy represented the embodiment of—and drew its fruitfulness from—the Second Vatican Council. Of course his name is providentially linked to the two popes of the Council: John XXIII who convoked it and Paul VI who concluded and promulgated it. In fact, of the names I believe the Church and posterity will accord him, some of which I have already heard at this conference—St. John Paul, John Paul the Great, John Paul Doctor of the Church—I think the one most descriptive of his pontificate would be “Apostle of Vatican II.” From the first to the last, John Paul II truly saw his pontificate as the expression of that Council, which he would often refer to as “this great gift of the Spirit to the Church at the end of the second millennium.”

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The apostolic constitutions, encyclicals, homilies, pronouncements, and other documents he issued constitute a comprehensive catechesis drawn explicitly from the documents of the Council. He wrote that “Vatican II has always been, and especially during these years of my Pontificate, the constant reference point of my every pastoral action, in the conscious commitment to implement its directives concretely and faithfully at the level of each church and the whole church.”

Pope John Paul II was tireless in preaching the Council as an inexhaustible richness of reflection on the Church’s own mystery, the connection between this mystery and man’s vocation in Christ, dialogue with non-believers, and the universal call to holiness. Following the mandate of the Council, he promulgated a new Code of Canon Law and the new Catechism of the Catholic Church (“Catechism”) (in which his distinctive teaching on capital punishment is set forth), and he convened the episcopal synods and conferences foundational to so much of his preaching and writing—including his encyclical Evangelium Vitae, the other chief source of his teaching on capital punishment. As the pope who ushered in the twenty-first century, he wrote, “[t]he best preparation for the new millennium, therefore, can only be expressed in a renewed commitment to apply, as faithfully as possible, the teachings of Vatican II to the life of every individual and of the whole Church.”

Only by understanding John Paul II’s pontificate as an expression of the mandate of Vatican II can we understand his teaching on capital punishment. He was determined to proclaim the essence of the Second Vatican Council. Pope John Paul II, Redemptor Hominis [Encyclical Letter on the Redeemer of Man] ¶ 3 (1979) [hereinafter Redemptor Hominis].


3. 1983 CODE.


the Church’s teaching on this question of life and death, born of the Gospel and free of the ancillary and contingent additions of subsequent centuries. He understood that this teaching had to be faithful to Tradition but also needed to find a fresh formulation—even synthesis—for the modern age. To this end, he wrote: “In the history of the Church, the ‘old’ and the ‘new’ are always closely interwoven. The ‘new’ grows out of the ‘old,’ and the ‘old’ finds a fuller expression in the ‘new.’”

Pope John Paul II understood the Second Vatican Council to be the evangelical response to the “profoundly disturbing experiences of the Twentieth Century, a century scarred by the First and Second World Wars, by the experience of concentration camps and by horrendous massacres.” John Paul’s teaching on capital punishment is a direct response to the horrors of the Twentieth Century, with the degradation of law and the loss of life as represented by the culture of death and the millions of “legal” executions performed by modern governments.

Pope John Paul II’s teaching on capital punishment is almost certain to become one of the most important, dramatic, and attractive components of his great legacy. Although his entire pontificate represents a profound synthesis and application of Catholic truths,

7. “For the holy Spirit was promised to the successors of Peter not so that they might, by his revelation, make known some new doctrine, but that, by his assistance, they might religiously guard and faithfully expound the revelation or deposit of faith transmitted [traditam] by the apostles.” First Vatican Council, Pastor Aeternus [First Dogmatic Constitution on the Church of Christ] (1870), reprinted in 2 DECREES OF THE ECUMENICAL COUNCILS: TRENT TO VATICAN II 811, 816 (Norman P. Tanner, S.J. ed., 1990). The question of the consistency of John Paul’s teaching on capital punishment with Catholic Tradition has been addressed in several full-length works and related chapters. Books, articles, and book chapters addressing this question since the publication of Evangelium Vitae include: E. CHRISTIAN BRUGGER, CAPITAL PUNISHMENT AND ROMAN CATHOLIC MORAL TRADITION (2003); FR. AUGUSTINE JUDD, O.P., CATHOLICS AND CAPITAL PUNISHMENT (2000); JAMES J. MEGIVERN, THE DEATH PENALTY: AN HISTORICAL AND THEOLOGICAL SURVEY (1997); Avery Cardinal Dulles, S.J., Catholic Teaching on the Death Penalty: Has It Changed?, in RELIGION AND THE DEATH PENALTY: A CALL FOR RECKONING 23 (Erik C. Owens et al. eds., 2004); John P. Langan, S.J., Situating the Teachings of John Paul II on Capital Punishment: Reflections on Evangelium Vitae 56, in CHOOSING LIFE: A DIALOGUE ON EVANGELIUM VITAE 210 (Kevin Wm. Wildes, S.J. & Alan C. Mitchell eds., 1997); George P. Weigel, Evangelium Vitae on Capital Punishment: A Response to John Langan, in CHOOSING LIFE: A DIALOGUE ON EVANGELIUM VITAE, supra, at 223. By and large, these works suggest a significant change in the Church’s teaching on capital punishment. Brugger provides the most thorough treatment of this question, concluding that the Catholic Church is now teaching that capital punishment is intrinsically wrong, which he labels a “change,” and not a development. BRUGGER, supra, at 2.

8. Tertio Millennio Adveniente, supra note 1, ¶ 18.

9. Id.
the problem of punishment by death is one of the few questions of morality where John Paul II found the opportunity and the need to reformulate the Tradition of the Church. By portraying capital punishment in a purely negative light, as a sentence only to be executed when unavoidable, John Paul II evangelized for life in fidelity to the Gospel. He faced a dilemma of how to reconcile the history of the infliction of capital punishment in Christian society with the historic Christian witness against death—and solved it with one concise stroke. By distinguishing the legitimate use of capital punishment to protect society from direct aggression from its illegitimate use for other purposes, such as a supposed retribution or deterrence, we are able to understand fully, in some ways for the first time, the Church’s Tradition as it has unfolded in history.

Nevertheless, Pope John Paul II’s teaching on capital punishment has not been everywhere well-received. In particular, many Catholics who have otherwise championed John Paul II’s stalwart defense of orthodoxy have questioned the fidelity and soundness of this teaching. Some of these Catholics have found it puzzling, poorly reasoned, or contradictory. Finally, it has been dismissed as merely the personal opinion of the Pope, a “prudential” judgment easily rejected by those who prefer their own expertise.

10. Pope John Paul II’s reformulation does not constitute a break in Tradition:

[It] must first be observed that the meaning of the pronouncements of faith depends partly upon the expressive power of the language used at a certain point in time and in particular circumstances. Moreover, it sometimes happens that some dogmatic truth is first expressed incompletely (but not falsely), and at a later date, when considered in a broader context of faith or human knowledge, it receives a fuller and more perfect expression.

Sacred Congregation for the Doctrine of the Faith, Mysterium Ecclesiae [Declaration in Defense of the Catholic Doctrine of the Church Against Certain Errors of the Present Day] ¶ 5 (1973). Likewise, in Veritatis Splendor, Pope John Paul II looked to the Second Vatican Council for its statement that the Church’s moral doctrine also undergoes development, which must be applied to modern conditions:

The words spoken by John XXIII at the opening of the Second Vatican Council can also be applied to moral doctrine: “This certain and unchanging teaching . . . to which the faithful owe obedience, needs to be more deeply understood and set forth in a way adapted to the needs of our time.”


11. See Evangelium Vitae, supra note 5, ¶ 56.


13. See id.

14. Id. Since the publication of Evangelium Vitae, there have been numerous specialized articles addressing the question of whether the Pope’s teaching accords with the Tradition of the
This is a mistake, which not only misreads the moral and doctrinal component of John Paul II’s teaching but also misses the sign of the times and a bright jewel of Catholic thought. The Pope’s teaching is what it claims to be in the *Catechism*: an authentic rendition of Catholic Tradition. Like all authentic Christian doctrine, it was complete with the apostolic teaching, but is capable of deeper understanding by the Church under the guidance of the Holy Spirit.

Part I of this Article describes Pope John Paul II’s teaching on capital punishment as based on the Scriptures and expressed in *Evangelium Vitae* and the *Catechism*. Part II examines the authority with which this doctrine was issued. Part III suggests that this teaching represents the “traditional teaching of the Church,” although a “more perfect expression” of that teaching than has heretofore been recognized. Parts IV and V indicate why the papacy of John Paul II—“this time, in which God in His hidden design has entrusted to me… very close to the year 2000”—was ripe for this explicit articulation of the Church’s position. Part IV shows that the teaching corresponds with the Catholic understanding of the dignity of man and the nature of the state. Part V demonstrates that the teaching relies on the modern social fact of life imprisonment, made possible for the first time by technological and jurisprudential developments, as a non-lethal means to defend society.

I. POPE JOHN PAUL II’S FORMULATION

Pope John Paul II’s moral teaching on capital punishment is drawn directly from a profound reading of Sacred Scripture, especially Genesis 4:2–16 and the Gospel evan(e)l of charity. He wrote: “Sacred Scripture remains the living and fruitful source of the Church’s moral doctrine; as the Second Vatican Council recalled, the (arguing that, historically, Catholic teaching included retribution as a valid justification for punishment).

16. *Id.* ¶ 2267; *Mysterium Ecclesiae*, supra note 10, ¶ 5.

The Second Vatican Council invited scholars to take special care for the renewal of moral theology, in such a way that its scientific presentation, increasingly based on the teaching of Scripture, will cast light on the exalted vocation of the faithful in Christ and on their obligation to bear fruit in charity for the life of the world.

*Id.* (internal quotation marks omitted).
Gospel is ‘the source of all saving truth and moral teaching.’”\(^{19}\) His teaching is first encapsulated in the exegesis with which he begins his encyclical on the Gospel of Life, *Evangelium Vitae*. In the opening sentence, John Paul II identified the radical affirmation of life that is at the heart of Christianity: “The Gospel of life is at the heart of Jesus’ message. Lovingly received day after day by the Church, it is to be preached with dauntless fidelity as ‘good news’ to the people of every age and culture.”\(^{20}\) He proceeded to preach this good news by retelling the story of Cain, which is critical to an understanding of capital punishment. Out of envy and anger, Cain murdered his brother Abel, who had brought a pleasing offering to God. For this heinous murder, the first crime against brother and man, Cain was not punished with death; rather, he received a “mark” from God and was condemned to wander in the wilderness for the remainder of his days, cut off from society.\(^{21}\)

Pope John Paul II’s exegesis of the story of Cain leads to several conclusions. First, the question of capital punishment is central to Catholic morality, because it is necessarily connected with the first crime of man against man. Guilt and sin came with Adam’s fall, but the first deadly fruit of original sin, the first murder, came with Cain. Second, capital punishment presents a unique moral question that does not exist solely in an autonomous sphere of criminal law in which the Church would be an unwelcome intruder. Rather, it is classified with other essential questions of human life, distinct from technical penological problems, precisely because it stands at the threshold between life and death. Third, this question is to be resolved by looking at original and immutable principles of human life and morality that, like the story of Cain and Abel, exist from before the creation of organized human society. The practices of Hebrew and Roman society, and of medieval Europe, cannot be dispositive of a question that God answered at the dawn of history. Thus, practical questions about the place of capital punishment in society follow from basic moral principles and do not determine them. Fourth, and most importantly, the question of how to punish heinous crime is answered with a decisive rejection of death because God chose not to slay Cain. Instead, God cut him off from society by placing a mark on him, both so that he could not be killed and so that

\(^{19}\) *Id.* ¶ 28.

\(^{20}\) *Evangelium Vitae*, supra note 5, ¶ 1.

\(^{21}\) *Id.* ¶¶ 7–28. This story of Cain is found in *Genesis* 4:2–16.
he could not kill others. But with that punishment, God’s justice was satisfied and did not demand the death of the first murderer, for “[n]ot even a murderer loses his personal dignity.” As Saint Ambrose wrote:

God drove Cain out of His presence and sent him into exile far away from his native land . . . . 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.

In Evangelium Vitae, Pope John Paul II reflected on the purposes of capital punishment in the context of human justice. According to him, the state is obliged to punish an offender against public order and safety, but not to do so beyond limits set by the needs of society and standards of human dignity. In the case of capital punishment, this means that death can be imposed only in “cases of absolute necessity” when there is no other way to defend society—cases that are “very rare, if not practically non-existent.”

22. Evangelium Vitae, supra note 5, ¶ 9 (emphasis omitted).
24. Evangelium Vitae, supra note 5, ¶ 56 (emphasis omitted).

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

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

In any event, the principle set forth in the new Catechism of the Catholic Church remains valid: “If bloodless means are sufficient to defend human lives against an aggressor and to protect public order and the safety of persons, public authority must limit itself to such means, because they better correspond to the concrete conditions of the common good and are more in conformity to the dignity of the human person.”
This passage from *Evangelium Vitae* found definitive expression in the Latin *editio typica* of the *Catechism* issued in 1997. Paragraph 2267 of the *Catechism* succinctly sets forth Catholic teaching on capital punishment:

Assuming that the guilty party’s identity and responsibility have been fully determined, the traditional teaching of the Church does not exclude recourse to the death penalty, if this is the only possible way of effectively defending human lives against the unjust aggressor.

If, however, non-lethal means are sufficient to defend and protect people’s safety from the aggressor, authority will limit itself to such means, as these are more in keeping with the concrete conditions of the common good and are more in conformity to the dignity of the human person.

Today, in fact, as a consequence of the possibilities which the state has for effectively preventing crime, by rendering one who has committed an offense incapable of doing harm—without definitively taking away from him the possibility of redeeming himself—the cases in which the execution of the offender is an absolute necessity “are very rare, if not practically non-existent.”

Several important points can be drawn directly from the text of the *Catechism*. First, paragraph 2267 expressly states that it represents the “traditional teaching of the Church.” It does not claim to be a variation of the traditional teaching, or a departure from

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Id. (third and fourth emphases added) (footnotes omitted) (quoting CATECHISM OF THE CATHOLIC CHURCH ¶ 2267 (1994)).

25. The revision of the paragraph on capital punishment of the 1992 French-language edition of the *Catechism* (translated into English in 1994) is one of the most important changes to the “definitive text” of the 1997 Latin edition (*editio typica*). The *editio typica* eliminated language in the preceding section, paragraph 2266, that allowed “penalties commensurate with the gravity of the crime, not excluding, in cases of extreme gravity, the death penalty,” indicating that the seriousness of the crime by itself does not justify recourse to execution. Compare CATECHISM OF THE CATHOLIC CHURCH ¶ 2266 (1994) (“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.”), with CATECHISM OF THE CATHOLIC CHURCH, supra note 4, ¶ 2266 (“Legitimate public authority has the right and the duty to inflict punishment proportionate to the gravity of the offense.”).

26. CATECHISM OF THE CATHOLIC CHURCH, supra note 4, ¶ 2267 (quoting Evangelium Vitae, supra note 5, ¶ 56).

27. Id.
it, but the *Tradition* itself. To state authentically and truly what is
traditional teaching is, of course, the preeminent role of the Supreme
Pontiff.\(^\text{28}\) It is an inherently conservative role.\(^\text{29}\)

Second, paragraph 2267 acknowledges the legitimacy of the
application of the death penalty under certain circumstances. John
Paul II thus rejects the extreme position that would find the death
penalty intrinsically immoral and refuse the state any authority over
the life and death of its subjects under any circumstances, including
during military and police actions. The Pope makes clear, however,
that, for precisely defined social reasons, the conditions that neces-
sitate capital punishment are largely a thing of the past.\(^\text{30}\) The
punishment now conflicts with “the concrete conditions of the
common good” and “the dignity of the human person.”\(^\text{31}\)

Third, paragraph 2267 mandates that the state may apply capital
punishment only if there is no other way to protect human lives from
an unjust aggressor.\(^\text{32}\) If non-lethal means are sufficient, the death
penalty cannot be applied. Given that such means are available today
in the form of life imprisonment that is safe, secure, and non-
injurious, Pope John Paul II has determined that circumstances of
necessity do not exist in modern society and thus, in essence, is calling
for the abolition of capital punishment.

In fact, the *Catechism’s* animus against capital punishment is so
strong that even in less-than-ideal penal conditions, capital
punishment is currently excluded as a morally permissible penalty.\(^\text{33}\)
In other words, the possibility of non-lethal penal conditions renders

\(^\text{28}\) Id. ¶¶ 85, 2034.

\(^\text{29}\) In *Veritatis Splendor*, Pope John Paul II, quoting the Second Vatican Council, stated
that the Church faithfully hands on all that she believes as her “living Tradition,” which comes
from the Apostles. *Veritatis Splendor, supra note 10, ¶ 27*. The “authentic interpretation” of the
Commandments “develops, with the help of the Holy Spirit,” in the light of new historical and
cultural situations. *Id*.

\(^\text{30}\) *Evangelium Vitae, supra note 5*, ¶ 56 (“Today however, as a result of steady
improvements in the organization of the penal system, [cases of absolute necessity to justify
capital punishment] are very rare, if not practically non-existent.”).

\(^\text{31}\) *Id*.

\(^\text{32}\) *Id*. This teaching has been misunderstood by several commentators as contradicting
the Church’s teaching on self-defense and double effect. The fact that, at various points, the
*Catechism* applies the theory of double effect to the well-developed doctrine of self-defense does
not mean that the Church is strictly bound to an application of the theory of double effect in
evaluating capital punishment, and neither *Evangelium Vitae* nor the *Catechism* apply the
theory to the relevant sections of capital punishment. See *CATECHISM OF THE CATHOLIC
CHURCH, supra note 4, ¶¶ 2263, 2267; Evangelium Vitae, supra note 5, ¶ 56*.

\(^\text{33}\) See *CATECHISM OF THE CATHOLIC CHURCH, supra note 4, ¶ 2267*. 
capital punishment impermissible even when a society’s penal system is defective. On this point, the Pope has issued a radical proclamation in favor of life. No justifying element of capital punishment exists, other than immediate necessity.34

Likewise, paragraph 2267 does not permit capital punishment for deterrence or retribution. The question of whether capital punishment indeed deters crime is one of the most disputed questions in jurisprudence.35 Any hypothetical deterrence rests on such debatable moral and empirical grounds that it cannot justify the direct taking of life, especially given the restrictive language of paragraph 2267. On the question of retribution (rectification of the moral harm the crime}

34. Id. The qualifying phrase “very rare” is unlikely to create exceptions that would apply to societies with more primitive penal systems, as it would allow public authorities to justify a departure from the common good and the dignity of the person. In this sense, the Catechism would apply to all modern states regardless of their state of development. The defects in any particular penal system are defects that must be remedied rather than conditions that justify capital punishment. Still, it may leave open the possibility of execution even today, if referring to a temporary exigency of a particular penal system that cannot be remedied or avoided.

In this way, capital punishment is similar to slavery. If concrete conditions of a previous age could ever have justified slavery, modern society has reached a point where slavery is morally unacceptable, even if those concrete conditions such as familial, humane, non-racial treatment of slaves could be asserted today. Likewise, use of capital punishment, theoretically justified when there were no alternative sentences, cannot be justified under modern society, which is capable of non-lethal means, regardless of the actual penal conditions that exist.

35. This question of the deterrent value of capital punishment is one of the most widely debated topics in assessing its efficacy, and is beyond the scope of this Article. Briefly, however, several critics of Pope John Paul II’s position have pointed out that imposing death will at least prevent the executed prisoner from killing again. E.g., Paul G. Cassell, In Defense of the Death Penalty, in DEBATING THE DEATH PENALTY: SHOULD AMERICA HAVE CAPITAL PUNISHMENT? 183, 187 (Hugo Adam Bedau & Paul G. Cassell eds., 2004). This is a morally flawed argument because killing anyone prevents them from committing any crime, including murder, but does not justify the killing. As Stalin is reported to have said: “[D]eath solves all problems: no man, no problem.” ROBERT CONQUEST, STALIN: BREAKER OF NATIONS 79 (1991). But the actual risk posed by capital murder defendants is in fact very small. Recent studies have indicated that the incidence of recidivism among murderers released from prison is lower than for other types of parolees, with the likelihood of repeat murders being, on average, less than one percent a year. Jonathan R. Sorensen & Rocky L. Pilgrim, An Actuarial Risk Assessment of Violence Posed by Capital Murder Defendants, 90 J. CRIM. L. & CRIMINOLOGY 1251, 1254–55 (2000). Given that the most common alternative to capital punishment is likely to be life imprisonment without parole, it is worth noting that rates of homicide in prison are far lower than in the community. The yearly rate of repeat murder in prison for convicted murderers is less than 0.002 percent. Id. at 1256. Likewise, empirical studies have found murderers to be “among the most docile” and reliable inmates, with little predilection for prison violence. Id. With the development of “supermaximum” security prisons, it is likely that these rates will only decline in the future. Likewise, prisoners who are rearrested after release are usually arrested for crimes other than that for which they were first convicted, with homicide the crime least likely to be repeated. BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, PUBL’N NO. NCJ 193427, SPECIAL REPORT: RECIDIVISM OF PRISONERS RELEASED IN 1994, at 9 (2002).
has caused), the right and the duty of the state to inflict punishment proportionate to the crime so as to redress the disorder to society and the offense given to God is not questioned, and in fact is explicitly affirmed by John Paul II. But the imposition of death adds nothing to the retributive or restorative order when a fully adequate punishment can be achieved by non-lethal means, thus rendering the infliction of death nothing more than gratuitous and vengeful.

Consideration of these points leads to the conclusion that Pope John Paul II's more precise formulation of the Church's teaching on capital punishment is required to remain faithful to Catholic jurisprudential tradition in modern times. Catholic teaching recognizes four justifications for punishment: retribution, defense, deterrence, and reform. Paragraph 2266 expresses these justifications as redressing the disorder caused by the offense; preserving the public order, the safety of persons, and the common good; and contributing to the correction of the offender. Imprisonment and other punishments can accomplish all of these objectives. Execution, however, cannot, because it risks depriving the offender of the possibility of redeeming himself. The medicinal end of punishment is eliminated. In this sense, capital punishment is in discordance with the traditional Catholic understanding of the nature of criminal penalties. Punishment should serve the rehabilitation of the individual by allowing criminals the opportunity to be reformed. John Paul II insists that this restorative aspect must not be eliminated by killing the criminal.

36. CATECHISM OF THE CATHOLIC CHURCH, supra note 4, ¶ 2266.
37. The gratuitous nature of a capital sentence is manifested in American constitutional law, which requires a bifurcated trial to impose capital punishment: first the defendant receives a life sentence, which apparently would be sufficient to secure the safety of society from immediate harm, and then a second capital trial is held to establish whether aggravating factors going to the moral nature of the murder mandate execution. See Gregg v. Georgia, 428 U.S. 153, 158, 194–95, 194 n.44, 207 (1976) (describing a bifurcated sentencing procedure for capital punishment, and finding that such a procedure is not in violation of the U.S. CONST. amends. VIII, XIV).
38. CATECHISM OF THE CATHOLIC CHURCH, supra note 4, ¶ 2266.

Punishment cannot be reduced to mere retribution, much less take the form of social retaliation or a sort of institutional vengeance. Punishment and imprisonment have meaning if, while maintaining the demands of justice and discouraging crime, they serve the rehabilitation of the individual by offering those who have made a mistake an opportunity to reflect and to change their lives in order to be fully reintegrated into society.

Id. at 2.
II. AN AUTHORITATIVE TEACHING

It would seem impossible to deny that Pope John Paul II’s doctrine on capital punishment is an authoritative teaching. It is clearly stated as the teaching of the Church in the papal encyclical Evangelium Vitae. Pope John Paul II frequently employed encyclicals to address the important questions of his pontificate. Evangelium Vitae is an encyclical devoted to questions of life and death, and paragraph 56 plays a central and inescapable part.

40. See Evangelium Vitae, supra note 5, ¶ 56.

41. As Pope John Paul II’s teaching on capital punishment was promulgated in Evangelium Vitae, its assessment necessarily raises the question of the teaching authority of a papal encyclical. Although a papal encyclical does not by itself bear the charisma of infallibility—contrast apostolic bulls and constitutions that do bear papal infallibility, such as: Pope Benedict XII, Benedictus Deus [Apostolic Constitution on the Beatific Vision of God] (1336), reprinted in THE CHRISTIAN FAITH IN THE DOCTRINAL DOCUMENTS OF THE CATHOLIC CHURCH 1018 (Jacques Dupuis ed., 7th ed. 2001) (defining the dogma of particular judgment immediately after death); Pope Pius IX, Ineffabilis Deus [Apostolic Constitution on Defining the Dogma of the Immaculate Conception] (1854); Pope Pius XII, Munificentissimus Deus [Apostolic Constitution on the Dogma of the Assumption] (1950) (defining the dogma of the Assumption of the Blessed Virgin Mary)—encyclicals have become the chief vehicle of modern papal teaching. For example, authoritative papal teachings on social and economic questions have been promulgated primarily in papal encyclicals. See, e.g., Pope Leo XIII, Rerum Novarum [Encyclical Letter on the Condition of the Working Classes] (1891); Pope John Paul II, Centesimus Annus [Encyclical Letter on the Hundredth Anniversary of Rerum Novarum] (1991); Pope Pius XI, Quadragesimo Anno [Encyclical Letter on Reconstructing the Social Order] (1931), reprinted in TWO BASIC SOCIAL ENCYCLICALS 83 (1943); see also Pope Paul VI, Humanae Vitae [Encyclical Letter on the Regulation of Births] (1968) (on contraception); Pope Pius X, Pascendi Dominici Gregis [Encyclical Letter on the Doctrines of the Modernists] (1907); Pope Pius XI, Casti Connubii [Encyclical Letter on Christian Marriage] (1930) (on marriage and divorce); Pope Pius XII, Humani Generis [Encyclical Letter on Some False Opinions Which Threaten to Undermine Catholic Doctrine] (1950) (on evolution). In fact, it is fair to say that, whereas in previous centuries, the popes exercised their Petrine ministry to “confirm the brethren,” Luke 22:32, primarily through juridical documents, in modern times, the popes teach matters of faith and morals in an authentic and authoritative manner primarily through pastoral documents, that is, encyclicals. Even as part of the ordinary universal Magisterium, moral teaching in an encyclical, because of the nature of the document and the intent and manner in which it is proclaimed, has reached a great measure of certitude. Catholics must show “religious submission of mind and of will . . . in a special way to the authentic magisterium of the Roman Pontiff, even when he is not speaking ex cathedra.” Second Vatican Council, Lumen Gentium [Dogmatic Constitution on the Church] ¶¶ 25 (1964), reprinted in THE SIXTEEN DOCUMENTS OF VATICAN II 107, 135 (Nat’l Catholic Welfare Conference trans., 1967). As Pius XII wrote in a previous encyclical:

Nor must it be thought that what is expounded in Encyclical Letters does not of itself demand consent, since in writing such Letters the Popes do not exercise the supreme power of their Teaching Authority. For these matters are taught with the ordinary teaching authority, of which it is true to say: “He who heareth you, heareth me” . . . .

Humani Generis, supra, ¶ 20 (quoting Luke 10:16). In particular, Pope John Paul II employed his fourteen encyclicals to present an entire catechesis of the Faith and an exposition of his teaching. See J. Michael Miller, C.S.B., Introduction to THE ENCYCLICALS OF JOHN PAUL II 11, 21, 25–28 (J.
Pope John Paul II emphasized the importance of this particular teaching on capital punishment in several important ways. First, he restated the teaching in the definitive 1997 Latin *editio typica* of the *Catechism*, which presents itself as “a statement of the Church’s faith and of catholic doctrine, attested to or illumined by Sacred Scripture, the Apostolic Tradition, and the Church’s Magisterium. . . . [A] sure norm for teaching the faith.”

Second, when John Paul II spoke of the culture of life—condemning abortion, euthanasia, and other forms of homicide—he included capital punishment as an evil to be eliminated.

For example, in a visit to St. Louis, Missouri in 1999,
Ambassador to the Holy See: Chile, L’OSSERVATORE ROMANO (English ed.), July 18, 2001, at 8 (“I am pleased with the recent deliberation of the Supreme Government and the legislative authority which—with the Church’s loyal collaboration—has abolished the death penalty . . . .”); Pope John Paul II, Address to the New Ambassador of the Republic of Rwanda to the Holy See (Dec. 6, 2001), in New Ambassadors to the Holy See: Rwanda, L’OSSERVATORE ROMANO (English ed.), Dec. 19/26, 2001, at 8 (“[T]he administration of justice . . . must safeguard and promote the common good while . . . avoiding such drastic measures as recourse to the death penalty.”); Pope John Paul II, Homily at Mass in Mexico City, Mexico During a Pastoral Visit to America (Jan. 23, 1999), in Holy Father’s Pastoral Visit to America: May the Continent of Hope Also Be the Continent of Life! Life with Dignity for All!, L’OSSERVATORE ROMANO (English ed.), Jan. 27, 1999, at 1 (“There must be an end to the unnecessary recourse to the death penalty!”); Pope John Paul II, Message Before Angelus (Dec. 12, 1999), in Prepare Him a Worthy Dwelling: At Sunday Angelus Holy Father Reflects on Joy of Christ’s Birth, L’OSSERVATORE ROMANO (English ed.), Dec. 15, 1999, at 2 (“I therefore renew my appeal to all leaders to reach an international consensus on the abolition of the death penalty . . . .”); Pope John Paul II, Message for the Celebration of the World Day of Peace ¶ 19 (Jan. 1, 2001), in Dialogue Between Cultures for a Civilization of Love and Peace, L’OSSERVATORE ROMANO (English ed.), Dec. 20/27, 2000, at 10 (explaining that this century’s “tragic spiral of death” includes “unnecessary recourse to the death penalty”); Pope John Paul II, Urbi et Orbi Message ¶ 6 (Dec. 25, 1998), in May Christmas Instill Trust in the Power of Truth and Perseverance in Doing Good, L’OSSERVATORE ROMANO (English ed.), Jan. 6, 1999, at 1 ("May Christmas help to strengthen and renew, throughout the world, the consensus concerning the need for urgent and adequate measures . . . to end the death penalty . . . ."); Letter from Cardinal Angelo Sodano, Vatican Secretary of State, to Fidel Castro Ruz, Head of State and Government of the Republic of Cuba (Apr. 13, 2003), in Pope Appeals to Cuba’s President for Clemency for Condemned Citizens, L’OSSERVATORE ROMANO (English ed.), Apr. 30, 2003, at 1 (“I express the Holy Father’s deep distress upon learning of the severe sentences recently passed on many Cuban citizens, including capital punishment . . . .”); Holy See, Declaration to the First World Congress on the Death Penalty (June 21, 2001), available at http://www.vatican.va/roman_cura/secretariat_state/documents/rc_seg-st-doc_20010621_death-penalty_en.html (“The Holy See has consistently sought the abolition of the death penalty and his Holiness Pope John Paul II has personally and indiscriminately appealed on numerous occasions in order that such sentences should be commuted to a lesser punishment, which may offer time and incentive for the reform of the guilty, hope to the innocent and safeguard the well-being of civil society itself and of those individuals who through no choice of theirs have become deeply involved in the fate of those condemned to death. The Pope had most earnestly hoped and prayed that a worldwide moratorium might have been among the spiritual and moral benefits of the Great Jubilee which he proclaimed for the Year Two Thousand, so that dawn of the Third Millennium would have been remembered forever as the pivotal moment in history when the community of nations finally recognised that it now possesses the means to defend itself without recourse to punishments which are ‘cruel and unnecessary.’”); Intervention of the Holy See, Conference for the Institution of an International Penal Tribunal (July 12, 1998) (“The Holy See has appealed to all nations not to have recourse to the death penalty and is happy to see emerging a great consensus in this regard.”); Renato R. Martino, Apostolic Nuncio, Permanent Observer of the Holy See to the United Nations, Intervention Before the Third Committee of the 54th Session of the General Assembly on the Abolition of the Death Penalty (Nov. 2, 1999), available at http://www.vatican.va/roman_cura/secretariat_state/documents/rc_seg-st-doc_02111999_death-penalty_en.html (“The position of the Holy See, therefore, is that authorities, even for the most serious crimes, should limit themselves to non-lethal means of punishment . . . .”); Pope John Paul II, Address in St. Peter’s Square to the General Audience (Sept. 13, 2000), available at http://www.vatican.va/holy_father/john_paul_ii/audiences/2000/documents/hf_jp-ii_aud_20000913_en.html (appealing to humanity in general to “giv[e] up recourse to capital punishment”); Pope John Paul II, Address to H.E. Mrs. Leonida
John Paul declared capital punishment to be “both cruel and unnecessary.”44 Third, whenever John Paul intervened in capital cases, it was always to call for commutation of the capital sentence, no matter how heinous the crimes of the sentenced criminal.45 Fourth, John Paul’s position on capital punishment has been endorsed by virtually every Catholic bishop who has spoken on the subject.46 Certainly every Catholic conference of bishops that has

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44. Homily at Mass in St. Louis (Jan. 27, 1999), supra note 43, ¶ 5.

45. See, e.g., GOVS. BUSH AND TAILI HEAR DEATH PENALTY PLEA, NAT’L CATH. REG., Nov. 14–20, 1999, at 15 (reporting that Archbishop Gabriel Montalvo, on behalf of Pope John Paul II, wrote to Governor George W. Bush of Texas urging him to commute the death sentence of David Hicks, and to Governor Bob Taft of Ohio, urging him to do the same for Kenny Richey); Press Release, United States Conference of Catholic Bishops, Papal Appeal for Spaniard on Death Row Sent to Florida Governor (Sept. 24, 1999), available at http://www.usccb.org/archives/1999/99-221.shtml (reporting that, “[o]n behalf of Pope John Paul II, the Apostolic Nuncio to the United States has written to Governor Jeb Bush, appealing for clemency [for] Joaquin Jose Martinez, a Spanish citizen who is a death row prisoner” and who was convicted of two counts of murder and armed burglary).

46. For example, Pope John Paul II’s teaching on capital punishment is also quoted in PONTIFICAL COUNCIL FOR JUSTICE & PEACE, COMPENDIUM OF THE SOCIAL DOCTRINE OF THE CHURCH ¶ 405 (2005); see also COMPENDIUM: CATECHISM OF THE CATHOLIC CHURCH ¶ 469 (2006) (promulgated by Pope Benedict XVI). As to be expected, Pope Benedict XVI has supported John Paul’s formulation, for example, by calling for commutation of the death sentence for convicted murderer Troy Anthony Davis, and on June 25, 2006 congratulating the Philippines on eliminating the death penalty. Carlos Campos, Pope’s Message for Perdue: Don’t Execute Killer, ATLANTA J.-CONST., July 20, 2007, at 1A. The Holy See has continued to support an international effort to eliminate capital punishment. In a message that was delivered to an international conference on the death penalty on February 7, 2007, the Vatican indicated support for the organizers of the meeting and for everyone who works “to abolish the death penalty or to impose a universal moratorium on its use.” Holy See: Death Penalty an Affront to Dignity Lends Support to Recent Congress Held in Paris, INSIDE PASSAGE, Feb. 23, 2007, at 8, available at http://www.diocesesofjuneau.org/Previous%20Inside%20Passages/2007/7Feb23%20Web.pdf.
addressed this topic recently has called for the abolition of capital punishment. There were occasional statements by individual
bishops in support of capital punishment in the 1970s. Since the
publication of *Evangelium Vitae* in 1995, however, it is fair to conclude that the Catholic bishops of the United States and the world have responded to John Paul II’s teaching with a moral, if not absolute, unanimity. Their voices have been echoed by many leading Catholic figures and theologians, such as Blessed Mother Teresa of Calcutta, who on several occasions advocated, both on their own and on behalf of Pope John Paul II, for the abolition of capital punishment and asked for clemency for death-row inmates.48

It has been widely claimed that the teaching of Pope John Paul II on capital punishment represents merely a “personal” or “prudential” judgment on his part, but this is a claim without any seeming support. John Paul II never presented this teaching as personal to him, as opposed to a teaching of the Church. Both Evangelium Vitae and the Catechism instruct the state to limit itself to non-lethal means in seemingly binding language. Certainly there may be elements of prudential judgment to this teaching—for example, as to whether non-lethal means are sufficient to defend lives from the aggressor in any particular situation—although, even here John Paul II seems to have concluded as a moral principle that such a necessity is nonexistent in modern society.

III. THE TRADITIONAL TEACHING OF THE CHURCH

As Part II indicated, Pope John Paul II has given the world an authoritative teaching on capital punishment. It would be extremely troubling if his teaching were a departure from or reversal of the Church’s previous moral and social positions; it is the task of the Church’s Magisterium to present the Church’s Deposit of Faith rather than to change it. Fidelity to its task of teaching, however, requires the Magisterium to apply its doctrine to new historical circumstances. Nevertheless, many commentators have accused

Alan Willett, scheduled to be executed September 8 [, 1999]. All post-World War II popes have appealed for mitigation of capital sentences even in cases of heinous crimes. For example, Pope Pius XII appealed to Presidents Truman and Eisenhower on behalf of Julius and Ethel Rosenberg, John F. Neville, The Press, the Rosenbergs, and the Cold War 105–06 (1995), and Pope Paul VI personally pleaded for the life of eleven Spanish terrorists in September 1975.


49. See, e.g., Antonin Scalia, Reply, in Scalia and His Critics, supra note 14, at 17.
50. See supra notes 24–26 and accompanying text.
51. Evangelium Vitae, supra note 5, ¶ 56.
52. Such judgments of social conditions that are necessarily connected with an underlying principle of morality are seemingly within the province of the Magisterium. The Church claims the right “always and everywhere to announce moral principles, even about the social order, and to render judgment concerning any human affairs insofar as the fundamental rights of the human person or the salvation of souls requires it.” 1983 Code c.747, § 2. Pope John Paul II cites this Canon to lend authority to his proclamation in Veritatis Splendor, supra note 10, ¶ 27.
53. Veritatis Splendor, supra note 10, ¶ 53.

Certainly there is a need to seek out and to discover the most adequate formulation for universal and permanent moral norms in the light of different cultural contexts, a formulation most capable of ceaselessly expressing their historical relevance, of making them understood and of authentically interpreting their truth.
John Paul II of departing from the Church’s Tradition in his statements on capital punishment.

Pope John Paul II clearly states that the principles found in paragraph 2267 are based on the traditional teaching of the Church.44 Reviewing Sacred Scripture and the Church’s Tradition in the broadest sense relevant to the question of capital punishment—the writings of the Fathers and Doctors of the Church, magisterial documents (including papal proclamations), and even the disposition of the Christian world on this question—bears out this claim. In fact, the only way to understand the disparate and even at times contradictory elements of Christian expression on capital punishment is through the precise lens of paragraph 2267. In this manner we can see that John Paul II’s exposition is not only true to Christian Tradition but also allows for a fuller understanding of its essence.

Obviously, these expressions of Tradition represent a voluminous quantity of material that is complex, varying, and difficult to assess—one of the reasons why it is distinctly the responsibility of the papal office to proclaim the true Tradition of the Church. Nonetheless, two important and preliminary points can be made from the evidence: First, the Christian record consists of both condemnation to a greater or lesser degree of capital punishment and begrudging acceptance of capital punishment when necessary. And second, no definitive statement portrays capital punishment in a purely positive light (much less as something sacrificial, pious, or holy) or in a way that would contradict paragraph 2267.55

Christians were ambivalent about the exercise of capital punishment from the beginning. Their ambivalence is expressed in the New Testament and in the writings of the first Christians of the Roman Empire and of the Fathers and Doctors of the Church.56 The

This truth of the moral law—like that of the “deposit of faith”—unfolds down the centuries: the norms expressing that truth remain valid in their substance, but must be specified and determined “eodem sensu eademque sententia” in the light of historical circumstances by the Church’s Magisterium, whose decision is preceded and accompanied by the work of interpretation and formulation characteristic of the reason of individual believers and of theological reflection.

Id. (footnote omitted) (emphasis omitted).

44. CATECHISM OF THE CATHOLIC CHURCH, supra note 4, ¶ 2267 (stating that recourse to capital punishment only if there is no other means to protect society is “the traditional teaching of the Church” (emphasis added)).


56. See infra notes 61–62.
best way to reconcile the disparate views of Christians on the death penalty is to acknowledge that Christian Tradition has been consistent in opposing the infliction of death, except in cases of social necessity, which were widespread until modern times. No definitive magisterial statement contradicts this assertion.57

Obviously the legal codes of the Old Testament provided for capital punishment, although, for the most part in situations that would be rejected by all modern societies. At least thirty-six acts punishable by death are enumerated in the Old Testament, including: homicide, maladministration, adultery and other sexual crimes, violation of filial duty, idolatry, blasphemy, and violating the Sabbath.58 But the story of Cain presupposes a rejection of capital punishment from before the origins of social convention.59 This opposition can thus be seen as the archetype and model of justice, as John Paul II treats it in Evangelium Vitae.60

The New Testament presents a different perspective than that reflected in the enumerations of the Old Testament. There is no promulgation of a legal code that includes capital punishment. There are several passages that imply a certain acceptance of the legitimacy of Roman authority and law,61 but clearly this cannot be taken to endorse all facets of the Roman legal system, which included slavery, a moral impetus towards suicide, and the barbaric and arbitrary application of death. At least equal weight must be given to the numerous passages of the New Testament that would suggest aversion to the imposition of death.62 Most notable is the reaction of

57. See The Church & the Death Penalty, supra note 55, at 391 (“The magisterium does not prescribe [the death penalty] either. Nowhere does the magisterium directly treat the subject.”).
58. Meigvern, supra note 7, at 10.
59. See supra text accompanying notes 18–24.
60. Evangelium Vitae, supra note 5, ¶¶ 7–28. Of course, the Old Testament testifies throughout in favor of mercy, forgiveness, and life. See, e.g., Deuteronomy 30:15, 19 (“See, I have set before you this day life and good, death and evil. . . . I have set before you life and death, blessing and curse; therefore choose life, that you and your descendants may live.”); Ezekiel 33:11 (“I have no pleasure in the death of the wicked . . . .”).
Jesus to the woman accused of adultery, an act punishable by death. Although she was clearly guilty of the capital crime, Jesus opposed her stoning so that she could redeem herself: “Neither do I condemn you; go, and do not sin again.”

In a way, the most significant aspect of the New Testament in relation to capital punishment is not the commentary of Jesus but His Passion. It is a central fact of the New Testament that Jesus was, Himself, the victim of a death sentence. It was certainly an unjust penalty, but one imposed by lawful authority—the Romans, with the compliance of the Jewish leaders, in a sense representing the combined secular and religious authority of humankind. Following their Lord, thousands of the first Christians were executed by the Romans, apparently under lawful Roman authority.

The fact that Jesus and His first disciples were the victims of capital sentences was not lost on the early Christians. Their testimony as a whole embodies a strong aversion to the state inflicting death on its subjects. It seems well-established that the early Christian view of capital punishment was hostile, especially as to the question of the involvement of Christians in criminal procedures. Such adverse language can be found in the writings and teachings of Athenagoras of Athens, Minucius Felix, Tertullian, Origen, St. Cyprian, Lactantius, St. Hippolytus, St. Martin of Tours, St. Sergius of Rome, Pope St. Siricius, Pope St. Gregory the Great, Pope St. Nicholas I, and St. John Chrysostom.

St. Justin Martyr wrote that Christians “cannot bear to see a man killed even if killed justly.” St. Ambrose taught that the story of the woman taken in adultery militated against capital punishment. St. Augustine wrote numerous letters to Christian state officials in which he acknowledged the atrocious guilt of the defendants, but urged that they not be sentenced to death, reflecting

63. John 8:11.
64. See Matthew 27:19–26.
65. See MEGIVERN, supra note 7, at 19.
66. See, e.g., id. at 20–27, 35, 47–48; see also LACTANTIUS, THE DIVINE INSTITUTES, Bk. VI, Ch. XX, reprinted in 7 THE ANTE-NICENE FATHERS 9, 187 (Alexander Roberts & James Donaldson eds., American reprint Edinburgh ed. n.d.) (forbidding Christians from participating in “public homicide…. [N]or to accuse any one of a capital charge…. since it is the act of putting to death itself which is prohibited” (footnote omitted)).
the mercy of Christ. Pope St. Gregory the Great declared: “[S]ince I fear God, I shrink from having anything to do with the death of any one.”70 Pope St. Nicholas I wrote in 866 to the newly converted Bulgars instructions on how to live a Christian life, including: “You should save from death not only the innocent but also criminals, because Christ has saved you from the death of the soul.”71

This aversion was manifested, as well, by the actions of the first Christians, who rejected capital punishment, even when they achieved positions of authority in the Roman Empire.72 Crucifixion

69. Letter from St. Augustine to Apringius (Letter 134, AD 412), reprinted in 20 THE FATHERS OF THE CHURCH 9, 11 (Roy Joseph Deferrari et al. eds., Wilfrid Parsons trans., 1953) (urging commutation of the sentence of murderers, St. Augustine wrote: “But, now that there is another possible punishment by which the mildness of the Church can be made evident, and the violent excess of savage men be restrained, why do you not commute your sentence to a more prudent and more lenient one . . . ?”); Letter from St. Augustine to Alypius (Letter 10, AD 422–28), reprinted in 81 THE FATHERS OF THE CHURCH 74, 78 (Thomas P. Halton et al. eds., Robert B. Eno, S.S. trans., 1989) (urging that even slave traders should not be given a penalty that could result in death); Letter from St. Augustine to Boniface (Letter 185, AD 417), reprinted in 30 THE FATHERS OF THE CHURCH 141, 168 (Hermigold Dressler, O.F.M. et al. eds., Wilfrid Parsons trans., 1955) [hereinafter St. Augustine to Boniface] (praising the punishment of Donatist heretics, St. Augustine wrote: “However, the death penalty was not to be invoked, because Christian moderation was to be observed even toward those unworthy of it, but fines were to be imposed and exile was decreed against their bishops and ministers.”); Letter from St. Augustine to Donatus (Letter 100, AD 408–09), reprinted in 18 THE FATHERS OF THE CHURCH 141, 142 (Roy Joseph Deferrari et al. eds., Wilfrid Parsons trans., 1953) (“Hence, in applying the deterring effect of judges and laws, we wish them to be restrained, but not put to death . . . . [W]e ask you to forget that you have the power of life and death . . . .”); Letter from St. Augustine to Marcellinus (Letter 133, AD 412), reprinted in 20 THE FATHERS OF THE CHURCH 6, 6 (Roy Joseph Deferrari et al. eds., Wilfrid Parsons trans., 1953) (pleading for clemency for murderers, St. Augustine wrote: “However, we do not object to wicked men being deprived of their freedom to do wrong, but we wish it to go just that far, so that, without losing their life or being maimed in any part of their body, they may be restrained by the law . . . .”); Letter from St. Augustine to Marcellinus (Letter 139, AD 412), reprinted in 20 THE FATHERS OF THE CHURCH 53, 54 (Roy Joseph Deferrari et al. eds., Wilfrid Parsons trans., 1953) (“But, I ask you that the punishment of the crimes, however great, which they have confessed, may be something short of death . . . .”); St. Augustine, Sermon at the Shrine of St. Cyprian ¶ 8 (Sermon 13, May 27, AD 418), reprinted in III/1 THE WORKS OF SAINT AUGUSTINE 308, 312 (John E. Rotelle, O.S.A. ed., Edmund Hill, O.P. trans., 1990) (“Do not have a person put to death, and you will have someone who can be reformed.”). But see ST. AUGUSTINE, THE CITY OF GOD Bk. 1, Ch. 21, reprinted in 8 THE FATHERS OF THE CHURCH 17, 53 (Hermigold Dressler, O.F.M. et al. eds., Demetrius B. Zema, S.J. & Gerald G. Walsh, S.J. trans., 1950) (allowing that the state can execute “according to law or the rule of rational justice”).

70. Pope St. Gregory the Great, Sermon to Sabinianus (Epistle XLVII), reprinted in 12 NICENE AND POST-NICENE FATHERS 161, 161 (Philip Schaff & Henry Wace eds., 2d ser., Hendrickson Publ’g 1994) (1895); see also MEGIVERN, supra note 7, at 47.

71. MEGIVERN, supra note 7, at 48.

was immediately abolished by Emperor Constantine, but even more significantly, death was eschewed in the early centuries as the punishment for the most serious of crimes, heresy, in favor of exile. Thus, in the shifting battles of power between the Trinitarians and the Arians, we see St. Athanasius, the champion of orthodoxy, repeatedly exiled, recalled to authority, and exiled again: execution being rejected as a penalty. Similarly, canon law reflects a certain animus toward capital punishment. Canon 73 of the Synod of Elvira in 303 refused the Sacraments to anyone whose accusation of another resulted in a capital charge. A canon of the Roman Synod of 382 condemned state officials who “have handed down death penalties.” Canon law also forbade clerics from participating in an execution in any way. Occasionally, an early Christian ruler such as King Canute reached the same conclusion, forbidding capital punishment as Christians were “God’s handy-work, and his own purchase which he dearly bought.”

Although medieval Christendom obviously incorporated capital punishment into its juridical system, certain reservations must be noted. The Church, as opposed to the state, was forbidden from issuing or applying a death sentence. The Council of Toledo in 675 and the Fourth Lateran Ecumenical Council in 1215 forbade clergy participation in capital trials and executions, a prohibition which has

in early Christendom that rejected punishments, including and especially death, that would inhibit the criminal from penitence and restoration to the Christian community).


74. St. Augustine to Boniface, supra note 69, at 168.


76. Brugger, supra note 7, at 78.

77. Megivern, supra note 7, at 33 (internal quotation marks omitted).

78. Brugger, supra note 7, at 78; see also Catechism of the Catholic Church, supra note 4, ¶ 2298.

not been lifted. Even when capital punishment was allowed, it tended to be characterized as a necessary evil rather than a positive good. For example, St. Thomas Aquinas, who certainly did justify the right of the state to carry out capital punishment, did so in language that portrayed capital punishment as necessary for the protection of society, rather than as a morally dictated punishment. He wrote: “[I]f a man be dangerous and infectious to the community, on account of some sin, it is praiseworthy and advantageous that he be killed in order to safeguard the common good.”

Perhaps the most formal proposition from medieval Christendom concerning capital punishment is the profession of faith required for readmission to the communion of the Church for the heretical group the Waldensians, who denied the legitimacy of any state-imposed punishment. Pope Innocent III apparently proposed several professions, but the most developed was that of his writings in May of 1210, which included this proposition: “We declare that the secular power can without mortal sin impose a judgment of blood provided the punishment is carried out not in hatred but with good judgment, not inconsiderately but after mature deliberation.”

Even here, however, we see, in a preliminary manner, a nuanced statement that prefigures that of Pope John Paul II. The state can impose capital punishment, but it must be without “hatred” or “inconsiderately,” and with “good judgment” after “mature deliberation.” This clearly refers to the certainty of guilt, requiring, as does paragraph 2267 of the Catechism, a full determination of the guilty party’s identity and responsibility. Pope Innocent’s statement, however, seems to go further. The directive that the imposition of capital punishment be without “hatred” and upon “good judgment” suggests that the punishment must be delivered free from a desire for retribution, and only for the express purpose of protecting society.

80. BRUGGER, supra note 7, at 96–97; Todd Breyfogle, Punishment, in AUGUSTINE THROUGH THE AGES: AN ENCYCLOPEDIA 688, 690 (Allan D. Fitzgerald et al. eds., 1999).
81. ST. THOMAS AQUINAS, SUMMA THEOLOGICA, Pt. II-II, Q. 64, Art. 2 (Fathers of the English Dominican Province trans., Christian Classics 1981); see also ST. THOMAS AQUINAS, SUMMA CONTRA GENTILES, Bk. 1, Ch. 146 (Vernon J. Bourke trans., Univ. of Notre Dame Press 1956) (“Therefore, the ruler of a state executes pestiferous men justly and sinlessly in order that the peace of the state may not be disrupted.”).
82. BRUGGER, supra note 7, at 103–07.
83. Id. at 104.
84. Cf. CATECHISM OF THE CATHOLIC CHURCH, supra note 4, ¶ 2267.
Thus, in sum, Pope John Paul II has correctly—even providentially—taught the Tradition of the Church. The Old Testament reveals in the story of Cain and Abel that before the imperfect laws of human society, God “did not desire that a homicide be punished by the exaction of another act of homicide.”\(^{85}\) As John Paul II concludes, “The unconditional choice for life reaches its full religious and moral meaning when it flows from, is formed by and nourished by . . . faith in the blood of Christ ‘that speaks more graciously than the blood of Abel.’”\(^{86}\) The New Testament does not contain any explicit verse in favor of capital punishment, or any example of a Christian participating in any way in capital punishment, except as victims of the most deplorable of capital sentences, such as those inflicted on St. John the Baptist, St. Stephen, and Jesus Himself.\(^{87}\) In the early Church, the apostles, disciples, and first Christians were willing to be martyrs, but not executioners.

**IV. COMMON GOOD AND HUMAN DIGNITY**

Both *Evangelium Vitae* and the *Catechism* describe non-lethal means of punishment as “more in keeping with the concrete conditions of the common good and more in conformity with the dignity of the human person.”\(^{88}\) Pope John Paul II’s teaching on capital punishment reflects modern Catholicism’s understanding of the dignity of the human person and the role of the state. Yet how are we to understand this critical plank in John Paul II’s teaching?

First, as demonstrated in the previous Part, it is a deeply Christian and traditional argument.\(^{89}\) At the heart of Christian social and moral teaching is a preeminent respect for the value of human life and for the common good. Likewise, the Church realizes, as noted by Vatican II, that all of society manifests a “growing awareness of the exalted dignity proper to the human person,”\(^{90}\) of which increased opposition to capital punishment is evidence. It is certainly the case, then, that

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85. ST. AMBROSE, supra note 23, Bk. II, ¶ 38.
87. See Matthews 14:3–12 (St. John the Baptist); Acts 7:54–60 (St. Stephen); Matthew 27:32–44 (Jesus).
89. See supra Part III.
the Church knows the entire panoply of criticisms against capital punishment made by modern critics. In the United States these include critiques that capital punishment is arbitrary; expensive to administer; racially discriminatory; ineffective as a deterrent; part of a cycle of violence; subject to mistakes that cannot be corrected; degrading to the individual, society, and the sanctity of life; and even unconstitutional as cruel and unusual punishment. But it is possible

91. The recent popular and scholarly debate is worth noting for at least two reasons: it indicates that this is a pressing moral question that the Church must resolve, and it indicates the range of questions that bear on this issue. The fact that the following scholarly works represent an overwhelming consensus against capital punishment is some evidence of the modern awareness that capital punishment is opposed to modern notions of human dignity. Pope John Paul II commented on this, stating: “Among the signs of hope we should also count the . . . evidence of a growing public opposition to the death penalty, even when such a penalty is seen as a kind of ‘legitimate defense’ on the part of society.” Evangelium Vitae, supra note 4, ¶ 27 (emphasis omitted). The most helpful bibliographic guide to this written scholarship and debate is CAPITAL PUNISHMENT: A BIBLIOGRAPHY WITH INDEXES (C. Clifford, 2003), which is a comprehensive listing and indexing of the major works on capital punishment through 2002. Already in the few years since publication, thousands of new books and articles have been published on the subject, of which the most notable books are: AMERICA’S EXPERIMENT WITH CAPITAL PUNISHMENT (James R. Acker et al. eds., 2d ed. 2003); MARY WELEK ATWELL, EVOLVING STANDARDS OF DECENCY: POPULAR CULTURE AND CAPITAL PUNISHMENT (2004); STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY (2002); HUGO ADAM BEAUD, KILLING AS PUNISHMENT: REFLECTIONS ON THE DEATH PENALTY IN AMERICA (2004); JOHN D. BESSLER, KISS OF DEATH: AMERICA’S LOVE AFFAIR WITH THE DEATH PENALTY (2003); ROBERT M. BOHM, DEATHQUEST II: AN INTRODUCTION TO THE THEORY AND PRACTICE OF CAPITAL PUNISHMENT IN THE UNITED STATES (2d ed. 2003); CAPITAL PUNISHMENT: STRATEGIES FOR ABORTION (Peter Hodgkinson & William A. Schabas eds., 2004); STANLEY COHEN, THE WRONG MEN: AMERICA’S EPIDEMIC OF WRONGFUL DEATH ROW CONVICTIONS (2003); PHILIP DRAY, AT THE HANDS OF PERSONS UNKNOWN: THE LYNCHING OF BLACK AMERICA (2002); BENJAMIN FLEURY-STEINER, JURORS’ STORIES OF DEATH: HOW AMERICA’S DEATH PENALTY INVESTS IN INEQUALITY (2004); HANS GÖRAN FRANCK, THE BARBARIC PUNISHMENT: ABOLISHING THE DEATH PENALTY (William A. Schabas ed., 2003); FROM LYNCH MOBS TO THE KILLING STATE: RACE AND THE DEATH PENALTY IN AMERICA (Charles J. Ogletree, Jr. & Austin Sarat eds., 2006); MIKE GRAY, THE DEATH GAME: CAPITAL PUNISHMENT AND THE LUCK OF THE DRAW (2003); CRAIG HANEY, DEATH BY DESIGN: CAPITAL PUNISHMENT AS A SOCIAL PSYCHOLOGICAL SYSTEM (2005); ROGER HOOD, THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE (3d ed., rev. 2002); JUDITH W. KAY, MURDERING MYTHS: THE STORY BEHIND THE DEATH PENALTY (2005); RACHEL KING, DON’T KILL IN OUR NAMES: FAMILIES OF MURDER VICTIMS SPEAK OUT AGAINST THE DEATH PENALTY (2003); HELEN PREJEAN, THE DEATH OF INNOCENTS: AN EYEWITNESS ACCOUNT OF WRONGFUL EXECUTIONS (2005); ELIZA STEELWATER, THE HANGMAN’S KNOT: LYNCHING, LEGAL EXECUTION, AND AMERICA’S STRUGGLE WITH THE DEATH PENALTY (2003); THE DEATH PENALTY: INTRODUCING ISSUES WITH OPPOSING VIEWPOINTS (Lauri S. Friedman et al. eds., 2006); THE DEATH PENALTY: OPPOSING VIEWPOINTS (Mary E. Williams ed., 2002); MARTIN G. URBINA, CAPITAL PUNISHMENT AND LATINO OFFENDERS: RACIAL AND ETHNIC DIFFERENCES IN DEATH SENTENCES (2003); FRANKLIN E. ZIMRING, THE CONTRADICTION OF AMERICAN CAPITAL PUNISHMENT (2003); cf. THE DEATH PENALTY: ABOLITION IN EUROPE (1999) (discussing many of the same issues and debates in European countries).

There have been more journal articles on capital punishment than can be recorded here. The following is a survey of some examples of law review articles published in 2005 and 2006:


to discern a deeper criticism here that goes directly to the Christian concept of the relationship of the state to the dignity of the individual and to the common good.92 According to Christian theology, the state is authorized to inflict punishment because it receives its authority from God.93 The principle that the authority granted to the political community ultimately belongs to the order designed by God was explicitly confirmed by Vatican II, and underlies the Catholic

92. Pope John Paul II’s linking of “a growing tendency, both in the Church and in civil society, to demand that [capital punishment] be applied in a very limited way or even that it be abolished completely,” Evangelium Vitae, supra note 5, ¶ 56, reflects in part the historic influence of Christianity in reinforcing respect for life in Western society.

understanding of the criminal justice system. But it is difficult to accept this traditional justification as it relates to capital punishment for at least four reasons.

First, in saying that a greater concern for human dignity militates against capital punishment, Pope John Paul II is in no way disparaging the retributive nature of punishment; rather, in both Evangelium Vitae and the Catechism, he affirms this aspect of punishment. But certainly it falls within Catholic morality to identify punishments that are impermissible because they are barbaric, vicious, cruel, and vindictive according to modern and religious standards. It is unlikely that current advocates of capital punishment would extend it to the historical range of human activity punishable by death until recent times, such as executions of young children, pregnant women, and the insane, or for crimes such as theft, pick-pocketing, adultery, fornication, violation of the Sabbath, or blasphemy. Likewise, no one would approve of the methods of capital punishment practiced historically, where brutality and infliction of intense pain were considered essential elements of their retributive nature. These executions were delivered in every form imaginable and unimaginable, including: beheading, burial, burning, clubbing, crushing, disemboweling, drowning, electrocution, embedding, enclosing, feeding to wild animals, gassing, gladiatorial combat, guillotining, hanging, insertions, malleting, maiming and hacking, poisoning, pressing, quartering, spearing, starvation, stoning, strangling, suffocation, tearing, welling, and the like. Finally, other traditional punishments, such as torture and enslavement, have been rejected by the Church, as well as all modern societies. John Paul II rightly linked the modern notions of human dignity with Catholic

94. Gaudium et Spes, supra note 90, ¶ 74.
95. CATECHISM OF THE CATHOLIC CHURCH, supra note 4, ¶¶ 2266, 2302; Evangelium Vitae, supra note 5, ¶ 9.
96. MEGIVERN, supra note 7, at 10.
97. For example, when the mentally disturbed Francis Ravilliack was executed in 1610 for the assassination of French King Henry IV, to demonstrate the outrage of regicide, Ravilliack was first seared with “scalding oil, rosen, pitch, and brimstone,” then disemboweled and pulled apart (quartered) by four horses. SCOTT, supra note 73, at 155–57 (1950).
98. See, e.g., JOHN LAURENCE, A HISTORY OF CAPITAL PUNISHMENT 28–69, 220–30 (1950) (describing some of the various techniques of performing capital punishment through the ages); SCOTT, supra note 73, at 149–224 (detailing infamous executions that used various methods).
morality. He proposed that execution should also be rejected as punishment incompatible with personal and social dignity, just as the extreme forms of capital punishment listed above, and the application of death sentences to almost every crime, other than murder, has already been universally rejected.

The retributive nature of punishment does not mandate a reciprocally identical form of punishment. Jesus Himself modified the *lex talionis* “an eye for an eye, a tooth for a tooth.”101 No society has dictated that crimes such as rape, adultery, kidnapping, and mass murder necessarily be punished in kind.102 In fact, there can be no logical basis for arguing that a crime like homicide can only be requited by another killing, if only because an exact replication of an offense and all of its consequences is not possible.

In this regard it is worth noting that the *Catechism of the Council of Trent* authorizes capital punishment only as an exception to the Fifth Commandment prohibition against killing.103 Hence, the Church
can already be seen as positing capital punishment as an exception based on necessity, one that is rightly modified as historical and cultural conditions change. Moreover, the *Catechism of the Council of Trent* emphasizes the redemptive nature of punishment and suffering, prefiguring John Paul’s assertion that punishments that allow the criminal the opportunity for redemption and rehabilitation are to be preferred.104

The second reason the Church’s traditional delegation to state authority fails in the context of capital punishment is that modern secular governments have almost entirely replaced governments in former Christian nations that purported to act with transcendent authority.105 If the modern state has adopted an entirely secular understanding of its own source of power, it is difficult to see what transcendent authority it can invoke to take a human life.106

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104. The Council of Trent, in its treatment of the Fifth Commandment, commands forgiveness of injuries, and condemns revenge. *Id.* at 426–30. The obligation for mercy and forgiveness apply to both persons and the state. Although Justice Scalia thinks the “equation of private morality with government morality” is confused, *Id.* supra note 12, at 18, the Church has always thought that the Christian dispensation obliges both individuals and states. *See e.g.*, Pope John Paul II, Address to H.E. Mrs. Leonida L. Vera, *supra* note 43 (“While civil societies have a duty to be just, they also have an obligation to be merciful.”).

105. *See* William B. Smith, *Capital Punishment: A Work in Progress or Progress Un-Working*, CATH. DOSSIER, Sept.–Oct. 1998, at 12, 13 (arguing that, at least with recent elected officials, “it strains Christian faith to see civil authority ‘as the servant of God for your good’”). Joseph Bottum links the rising embrace of capital punishment in the Middle Ages to the growth of the divine right of kings. *Joseph Bottum, Christians and the Death Penalty*, FIRST THINGS, Aug.–Sept. 2005, at 17, 19. King James I of England declared: “Kings are justly called gods . . . . [T]hey have power of raising and casting down, of life and of death, judges over all their subjects and in all causes.” *Id.*

106. Justice Scalia’s demand that, if Pope John Paul II’s teaching is accepted, Catholic judges must resign does not seem logical. *See* Scalia, *supra* note 12, at 18. Scalia does not make clear why Catholic judges can serve in a judicial system that allows abortion as a fundamental constitutional right but could not serve in one that differs in some aspect from Catholic teaching on capital punishment; nor does he make any real distinctions between the various functions—trial, appellate, capital phase, etc.—that a judge would need to confront. The United States bishops have called on all participants in our legal system, and not just judges, to oppose capital punishment. “[T]he death penalty will be abandoned and wither away through the everyday choices of prosecutors and legislators, judges and jurors, and ordinary citizens who make a commitment to respect human life in every situation.” UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, *supra* note 47, at 19. For articles on moral dilemma of capital punishment for Catholic lawyers, jurors, and judges, see Art C. Cody, Introduction, *The King’s Good
Third, the experience of the state with capital punishment in this century has been a murderous one. The twentieth century was marked by the killing of tens of millions of people by their own governments. Although this tragic history is characterized mostly by extralegal killing and genocide, judicially imposed capital sentences have played a major part. It is a fact that many murderous regimes and governments have used their systems of criminal justice, such as they were, to kill on an unprecedented scale. A prototypical example was the Great Terror, which Stalin inflicted on society in the Soviet Union from 1936 to 1938. It is estimated that during that horrific period of Soviet history, over one and a half million people were executed under death sentences imposed by the Soviet legal system. Certainly the Soviet system flaunted the legality of its imposition of death with the notorious show trials of the leading Bolsheviks, replete with “admissions” as to the legality of the charges and process against them, and pleas for their own execution. The execution of millions of Soviet citizens was carried out in apparent conformity with Soviet law, with many prisoners tried and sentenced by Special Boards of the NKVD (People’s Commissariat for Internal Affairs). The mass killings in other totalitarian states, including the Soviet satellite states, Cuba, China, and others, likewise often involved show trials and


109. Id. at 71–104.

110. The Soviet Criminal Code authorized capital punishments for numerous crimes in addition to treason, including counter-revolutionary offenses such as terrorism and violent actions against state officials and crimes against state property. Id. at 283. Citizens could be tried by a court or by a NKVD Special Board consisting of a group of judicial and prosecutorial officers. Id. at 284. Court procedures observed basic formalities of legality, including “requir[ing] the presence of the accused.” Id. Although Conquest questions the “legality” of reducing the Board to three (“troikas”) NKVD officers, which ordered numerous executions, these troikas were created by Stalin’s instructions and were “formally established by a ‘special instruction’ from Vyshinsky.” Id. at 286. However horrific the “criminal” process of the purges from a human perspective, it is hard to dispute the apparent “legality” of the process.
mass executions according to court-imposed death sentences, with some semblance of jurisprudential norms.\textsuperscript{111}

Fourth, the modern state would seem to have forfeited its moral claim to impose capital punishment due to its permission of procured abortions and other killings. In almost every society previous to this century, abortion was classified as a crime. But in the last few decades, many systems of criminal justice, especially in the West, have decriminalized abortion and euthanasia to a greater or lesser extent.\textsuperscript{112} The chief end of the criminal law is to provide protection from violence, especially lethal violence. When governments legalize abortion, and eliminate protections for the unborn, the disabled, the infirm, and the elderly from their criminal laws, they obscure the connection between their systems of law and the protection of life.\textsuperscript{113} For this reason, John Paul II spoke tirelessly of a “culture of life” that would embrace opposition to abortion, euthanasia, and capital punishment.\textsuperscript{114}

V. NON-LETHAL MEANS OF LIFE IMPRISONMENT

Under Pope John Paul II’s teachings, capital punishment can be effectively rejected as a punishment when “non-lethal means are sufficient to defend and protect people’s safety from the aggressor.”\textsuperscript{115} Evangelium Vitae indicates what these non-lethal means are (“steady improvements in the organization of the penal system”),\textsuperscript{116} as does paragraph 2267 of the Catechism (“the possibilities which the state has for effectively preventing crime, by rendering one who has

\footnotesize{\textsuperscript{111} See, e.g., Mark Findlay, \textit{Show Trials in China: After Tiananmen Square}, 16 J.L.S. 352 (1989) (Gr. Brit.). Throughout history public execution has been used as a tool of political control and private vengeance, bringing in its train only further violence. For example, Mussolini reintroduced capital punishment in Italy in 1927; the Nazis greatly expanded its scope, transforming it into a “tool of racial and political engineering.” \textsc{Richard J. Evans}, \textit{Rituals of Retribution: Capital Punishment in Germany 1600–1987}, at 630 (1996); \textsc{Hood}, supra note 91, at 10. \textsc{Evans} demonstrates that the Nazis widely employed capital punishment both as a means to quash political opposition and to prepare the judiciary and the populace for a “transition from execution to extermination.” This was accomplished in part by moving to “assembly-line killing” of condemned prisoners. \textsc{Evans}, supra, at 644, 649, 696, 706, 720, 737.

\textsuperscript{112} \textsc{The Alan Guttmacher Inst., Facts in Brief: Induced Abortion Worldwide} (1999); \textsc{Ian Dowbiggin}, \textit{A Concise History of Euthanasia} 137–38 (2005).

\textsuperscript{113} See Long, \textit{supra} note 14, at 552 (arguing that when a society allows a culture of death instead of life, application of the death penalty can reflect no transcendent justice).

\textsuperscript{114} See, e.g., \textit{Evangelium Vitae}, \textit{supra} note 5, ¶¶ 18, 21, 50, 77, 82, 86–87, 92, 95, 98, 100.

\textsuperscript{115} \textit{Catechism of the Catholic Church}, \textit{supra} note 4, ¶ 2267; accord \textit{Evangelium Vitae}, \textit{supra} note 5, at ¶ 56.

\textsuperscript{116} \textit{Evangelium Vitae}, \textit{supra} note 5, ¶ 56.
committed an offense incapable of doing harm”). These possibilities refer to a lengthy or life sentence in prison.

The Church could only restrict permissible grave punishment to a life sentence when social advances make it possible, as John Paul II stated. And in fact, a penal system capable of safely and effectively imprisoning a person for life is a modern invention, made possible only in the last two centuries. For both jurisprudential and technological reasons, earlier societies had no alternative to capital punishment.

Punishment of criminals, of course, has existed from the beginning of organized society and legal codes. Common non-lethal punishments included whipping, caning, branding, pilloring, ducking stools, public shaming, amputation, stockading, fines, confiscation, and exile. But until recent times, punishment was only corporal and capital, not custodial. Imprisonment was mere temporary confinement. The rehabilitative aspect of incarceration was introduced by Christian and canonical notions of penitence, mitigating the cruel corporal punishments of earlier times. Prisons made possible the cessation of corporal punishment. They now make possible the cessation of capital punishment.

A. Early Prison Systems

A common characteristic of earlier punishments is that they were temporary. Temporary punishments were all that pre-modern societies could bear. Their jurisprudential systems were not characterized by the social and technological means that would allow for an elongated punishment representing the judgment of society, as opposed to the whim of a ruler to be reversed with shifting regimes of power. There were no systems for maintaining records of sentences and conditions, no appeals or other system of review, and little understanding of the prisoner as retaining status as a member of

117. CATECHISM OF THE CATHOLIC CHURCH, supra note 4, ¶ 2267.
society and humanity. Where criminal offenses were seen as directed against the dignity and person of the head of state, there could be no continuous sentence that did not seem to depend on the dictate of the current ruler, and that was not erased with each change of government.

Likewise, it was impossible to incarcerate a person safely and securely. A lengthy sentence of incarceration entails an entire system of guards, restraints, individual cells, and security—far beyond the capabilities of earlier prison systems. Jails hopelessly mired the morals and spirits by herding together all prisoners—"[y]oung and old, men and women, the well and the sick”—resulting in “moral contagion.” Equally important was the complete inability of prison systems to resolve problems of sanitation and hygiene. People cannot long survive without access to sunlight, exercise, clean water, adequate nutrition, and quarantine from infectious diseases.

It is true that there have always been jails of some sort, of whatever name—prisons, dungeons, gaols, cells—to physically contain criminals. But the crucial point is that these institutions were meant to be short-term confinements until the prisoner was tried or subjected to some other punishment. As the Digest of Justinian records: “Prison ought to be employed for confining men, not punishing them.” They were not intended to hold prisoners for long-time confinement, and neither were they capable of performing such a role.

121. Prisons themselves developed only with growing “confidence in the efficacy of human justice.” JEAN DUNBABIN, CAPTIVITY AND IMPRISONMENT IN MEDIEVAL EUROPE, 1000–1300, at 173 (2002). Confinement was often seen as merely the imposition of private power and vengeance at the resolution of personal feuds. See id. at 103. The usual treatment of long-term prisoners in the medieval system was to “thrust [them] into the dark to be forgotten.” Id. at 129.

122. Sellin, supra note 119, at 3.

123. Before the nineteenth century, “prisons rarely were used to punish criminals . . . [and were] dirty and disease-ridden and unsuited for long-term confinement.” George Fisher, The Birth of the Prison Retold, 104 YALE L.J. 1235, 1239 (1995).


125. The basic distinction is between jails, which incarcerate those awaiting trial and punishment, and prisons, which incarcerate convicted offenders as punishment. Norval Morris & David J. Rothman, Introduction to THE OXFORD HISTORY OF PUNISHMENT, at vii, ix (Norval Morris & David J. Rothman eds., 1995). Jails in the Roman and Byzantine Empires were “primarily custodial, that is to say of those accused of crimes and awaiting trial,” as with medieval Europe in general. DUNBABIN, supra note 121, at 19; see also DARIO MELOSSI & MASSIMO PAVARINI, THE PRISON AND THE FACTORY: ORIGINS OF THE PENITENTIARY SYSTEM 2 (1981) (stating that the belief that prisons were custodial and not punitive “has gained almost universal acceptance amongst historians of penology”); Virginia Hunter, The Prison of Athens:
The limited function of the pre-modern jail is well-illustrated in events surrounding some of the most famous jails and punishments in history—those of the French Revolution, taking place in what was, at the time, the most advanced civilization on earth. As is well known, the French Revolution marks its anniversary on July 14, 1789, with the storming of the Bastille, perhaps the most famous prison in history. Built as a fortress in the fourteenth century, the Bastille was soon converted into a state prison. Its prisoners were detained by the notorious “letters de cachet” of the king with no judicial process, trial, or determinate sentence. The conditions of the Bastille were deplorable, with its cells teeming with vermin and unprotected against the weather. When the Bastille was stormed by the Parisian mob, seven prisoners were found, and their actual crimes were largely unknown.

Although the Bastille was destroyed, the Revolution had need of its own jails. The chief jail in Paris was the Abbaye, and it became...
stocked with aristocrats and other enemies of the Revolution.\(^{131}\) Although these were by and large temporary prisoners, they could not be guarded against the fury of the mob, and on September 2, 1792, hundreds of prisoners were removed from the Abbaye (as well as jails at Bicêtre, La Force, and La Salpêtrière) and massacred.\(^{132}\) The final historic indignity of this wretched system of incarceration occurred when its most valuable prisoner, the boy Louis XVII, the former dauphin, died in prison, due to neglect and the physical hardships of imprisonment, during the waning days of the Revolution.\(^{133}\) Such was not a prison system capable of imprisoning criminals for extended periods of time; it lacked judicial regularity, fixed terms, security against enraged mobs and private vengeance, and basic safeguards against inevitable disease.

B. The Modern Penitentiary

The modern prison or penitentiary arose in the nineteenth century as part of a well-known sociological and penological phenomenon.\(^{134}\) Prisons were built throughout Western Europe, England, and the United States, but construction was not motivated by any increase in crime or criminals (in fact, crime was on the decrease).\(^{135}\) Rather, the penitentiary was conceived as an alternative to more brutal forms of punishment—the temporary punishments described above had to be vicious, precisely because they had to endure in the body of the prisoner—and as a means to reform the prisoner, with efforts to rehabilitate and heal through long-term education.\(^{136}\) The first quarter

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131. See id. at 631.
132. Id. at 633–37.
134. For a history of the rise of prisons as permanent places of incarceration, see generally Fisher, supra note 123; Meskell, supra note 125.
136. In the 1970s, three significant works revised the history of prison reform and argued that the rise of prisons should be understood as the assertion of power. See Michel Foucault, Discipline and Punish: The Birth of the Prison 301–04 (Alan Sheridan trans., 1st American ed., Pantheon Books 1977) (1975); Michael Ignatieff, A Just Measure of Pain: The Penitentiary in the Industrial Revolution, 1750–1850 (1978); David J. Rothman, The Discovery of the Asylum: Social Order and Disorder in the New Republic (1971). This revisionist history has in turn been attacked as reductionist, distorted by an ideological commitment to class conflict and Marxist historiography, and obscured by a rigid structural functionalism. Michael Ignatieff, State, Civil Society, and Total Institutions: A Critique of Recent
of the twentieth century saw decisive improvements in the prison system, including: differentiation of prisoners and specialization of prisons; architectural improvements; scientific attention to the health, recreational, and educational needs of the prisoner; training of administrators and guards; and sensible behavioral rules.  

But not to be overlooked in this progress was the eagerness of opponents of capital punishment to find an alternative to execution. It is worth noting that, not only did the rise of prisons in the last century make life sentences possible, and hence make available an alternative to capital punishment, but one of the stated goals of reformers was to develop a prison system as an alternative to capital punishment. For example, the Pennsylvania Society of Friends ("the Society"), consisting of Quakers and other opponents of capital punishment, helped found the Philadelphia Society for Alleviating the Miseries of Public Prisons in 1787, in part to advance a capital abolitionist cause. Benjamin Rush, one of the founders of the Society, was the leading capital abolitionist of early America. Members of the Society, such as Rush, were instrumental in helping to make Philadelphia prisons model facilities for confinement, while battling capital punishment and pointing to their reformed prisons as an alternative. The Society helped transform Philadelphia’s Walnut Street Jail into a model prison, which it showcased before the legislature to obtain abolition of capital punishment for all crimes in Pennsylvania other than murder in the first degree. Other states
swiftly followed the lead of Pennsylvania in building penitentiaries, abolishing capital sentences except for first-degree murder, and proposing incarceration to replace corporal and capital punishment.142

C. Implications of the Modern Prison System on Catholic Moral Teaching

Together with the development of prisons and penitentiaries came developments in the legal system necessary to make life imprisonment possible. These developments can perhaps best be summarized as a modern respect for, and implementation of, the rule of law, and include such features as: a belief in criminal sentences apart from political considerations, a neutral judiciary, a prison bureaucracy, records, a system of appeals, a developed jurisprudence, a commitment to protecting the rights of individuals, and a reliable police force.

Prisons, penitentiaries, and their accompanying jurisprudential features have their own complex history over the last two centuries.143 But there can be no doubt that Pope John Paul II was correct in noting a central fact of modern life hitherto nonexistent in human society: throughout today’s world, prisons and penitentiaries are now designed for long-term incarceration.144 Modern jurisprudential developments provide the apparatus for a long-term sentence. But the most important jurisprudential development is the modern belief, accepted at least in theory throughout the world, that prisoners retain basic human rights and dignity, which must be protected in

142. Rothman, supra note 136, at 114.
144. See Evangelium Vitae, supra note 5, ¶ 56.
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incarceration.145 Certainly, the United States has seen a vast transformation not only in the capabilities of prisons, but in legal rights, protections, and safeguards for prisoners, even if disputes are inevitable as to their implementation.146 Technological improvements

145. Although appalling prison conditions still exist throughout the world, international and national laws are increasingly applying human rights standards to inmates. See, e.g., Rebecca B. Schechter, Note, Intentional Starvation as Torture: Exploring the Gray Area Between Ill-Treatment and Torture, 18 AM. U. INT’L L. REV. 1233, 1247, 1268 (2002–2003) (referencing the United Nations’ Standard Minimum Rules for the Treatment of Prisoners as a list of humane practices for treating prisoners); see also Organization of African Unity, African Charter on Human and Peoples’ Rights, art. 5, June 27, 1981, 21 I.L.M. 58 (“Every individual shall have the right to the respect of the dignity inherent in a human being . . . . All forms of . . . torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.”); Organization of American States, American Convention on Human Rights, art. 5, § 2, Nov. 22, 1969, 9 I.L.M. 673, 676 (“No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.”); International Covenant on Civil and Political Rights, art. 7, Dec. 16, 1966, 999 U.N.T.S. 171 (“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”); Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, art. 3, Nov. 4, 1950, 213 U.N.T.S. 221 (“No one shall be subjected to torture or to inhuman or degrading treatment or punishment”); Universal Declaration of Human Rights, G.A. Res. 217A (III), at 73, art. 5, U.N. GAOR, 3d Sess., 183d plen. mtg, U.N. Doc. A/810 (Dec. 12, 1948) (“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”).

146. In penal systems today, prisoners have been accorded substantial rights. Historically, prisoners in the United States have lacked certain basic rights. For example, as far as case law illustrates, even until 1970 prisoners in Arkansas were subject to deplorable living conditions, beaten with leather straps, tortured by electric shock, and forced to work ten hours per day, six days per week. Holt v. Sarver (Holt II), 309 F. Supp. 362, 370, 372, 376–77 (E.D. Ark. 1970), aff’d, 442 F.2d 304 (8th Cir. 1971) (finally declaring that such practices are “cruel and unusual punishment [and therefore] constitutionally prohibited”). Similar practices and unsuitable living conditions have been detailed by other federal courts. Ramos v. Lamm, 639 F.2d 559, 569–74 (10th Cir. 1980); Pugh v. Locke, 406 F. Supp. 318, 322–30 (M.D. Ala. 1976), aff’d sub nom. Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), cert. granted in part, rev’d on other grounds sub nom., Alabama v. Pugh, 438 U.S. 781 (1978) (per curiam); Gates v. Collier, 349 F. Supp. 881, 887–94 (N.D. Miss. 1972), aff’d, 489 F.2d 298 (5th Cir. 1973). But questions of human rights in prison have been made more acute since 1981 when the United States Supreme Court began applying Eighth Amendment prohibition of cruel and unusual punishment to prison conditions. Rhodes v. Chapman, 452 U.S. 337 (1981). The following articles indicate the theoretical rights that have been accorded to prisoners and the debate over their scope. See, e.g., Martin A. Greer, Human Rights and Wrongs in Our Own Backyard: Incorporating International Human Rights Protections Under Domestic Civil Rights Law—A Case Study of Women in United States Prisons, 13 HARV. HUM. RTS. J. 71 (2000); James E. Robertson, A Clean Heart and an Empty Head: The Supreme Court and Sexual Terrorism in Prison, 81 N.C. L. REV. 433, 434–37 (2003) (arguing that “prison rape is the most tolerated act of terrorism in the United States” and violates the Eighth Amendment prohibition of cruel and unusual punishment); Brenda V. Smith, Sexual Abuse of Women in United States Prisons: A Modern Corollary of Slavery, 33 FORDHAM URB. L.J. 571, 601–07 (2006) (“The sexual abuse of women in custody is akin to the sexual abuse of female slaves.” The 2003 Prison Rape Reduction Act and the Violence Against Women Act of 1994 represent recent legislation that seeks to remedy such abuse.); Shara Abraham, Note, Male
in prison architecture, cells, exercise units, nutrition, hygiene, and “super-maximum prisons” allow prisoners to be held safely and securely for their own protection as well as that of other prisoners, prison guards, and society in general.

Catholic social teaching is a mix of immutable moral principles that perforce interact with the contemporary social environment. The moral principles do not change, but, as society changes, they find new force.¹⁴⁹ Such was the case with slavery—permitted under primitive social conditions, but condemned as intrinsically immoral today. Such was the case with the prohibition against usury, which was rigorously interpreted to prohibit charging any interest on loans in an agrarian, medieval society, but which in modern mercantile and capitalistic systems has been understood to prohibit only excessive interest rates.¹⁵⁰ No Catholic moral principle is more fundamental than respect for human life. As human society now permits lifetime imprisonment for the first time, we should expect as dramatic a shift in application of the Church’s teaching on capital punishment.

CONCLUSION

The Second Vatican Council called for a thorough expression of Christian doctrine, faithful to the entirety of the Gospel, taking into account its application to new cultural and historical situations. The Catechism of the Catholic Church contributes to “renewing the whole life of the Church, as desired and begun by the Second Vatican Council.”¹⁵¹ Pope John Paul II has followed the mandate of Vatican II with his teaching on capital punishment, promulgated in Evangelium Vitae and the Catechism. This teaching is not a departure from

Prisoners, 35 GEO. L.J. ANN. REV. CRIM. PROC. 929 (2006) (listing rights of prisoners as including: access to courts and assistance of counsel; speech, association, and religion; privacy; incarceration in humane, civilized, safe, and healthful conditions; and certain procedural protections). If abuses exist, they are accepted as abuses of a prison system in which prisoners possess numerous substantive rights and that is capable of providing these rights in a secure, healthful environment.

¹⁴⁸. As to security, both murders and successful escapes in prison are relatively rare. See Richard F. Culp, Frequency and Characteristics of Prison Escapes in the United States: An Analysis of National Data, 85 PRISON J. 270, 275–87 (2005) Prison escape rates—about 1.4% annually with over 90% quickly recaptured—are extremely low and continually dropping in United States prisons. Id. Suicide and homicide are not common in American local jails and prisons and are declining. Jail suicide rates declined from 129 per 100,000 in 1983 to only 47 per 100,000 in 2002; in state prisons from 34 per 100,000 in 1980 to 14 per 100,000 in 1990. Homicide rates in jails declined from 5 per 100,000 in 1983 to 3 per 100,000 in 2002; in state prisons from 54 per 100,000 in 1980 to 4 per 100,000 in 2002. BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: SUICIDE AND HOMICIDE IN STATE PRISONS AND LOCAL JAILS 1.

¹⁴⁹. The Church’s moral teaching “has achieved a doctrinal development analogous to that which has taken place in the realm of the truths of faith.” Veritatis Splendor, supra note 9, ¶ 28.

¹⁵⁰. NOONAN, supra note 100, at 140.

¹⁵¹. Fidei Depositum, supra note 5, at 3.
Tradition; it is the only way to understand a Tradition that allowed for the state to apply capital punishment when necessary, while admitting capital punishment as a triumph of death, not of life. Modern cultural and historical conditions—the culture of death embraced by twentieth-century states, in which capital punishment has played a prominent role, and the rise of prisons as a safe, secure, humane, and jurisprudential alternative to execution—both mandate and allow for the Catholic Tradition to be expressed precisely and completely for the first time. Promulgated in an encyclical devoted to the Gospel of Life, summarized in the new *Catechism*, and echoed by the Magisterium throughout the world, it is an authoritative and certain teaching that cannot be dismissed. It is the teaching of the Church. As such, it has the earmarks of the Holy Spirit; it has reached definitive form and there can be no expectation that it will be changed or reversed. John Paul II’s doctrine upholds the dignity of life because it does not reject the necessity of punishment to redress moral disorder and explicitly affirms such punishment. But it insists that this punishment itself be respectful of human life and dignity. In a tragic sphere of human life necessarily characterized by original sin, Pope John Paul II’s teaching on capital punishment is a joyous affirmation of the Gospel of Life.