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## CAPITAL PUNISHMENT AND LETHAL ACTS IN WAR

**Abstract.** In reply to the readily inferable denial, in para. 304 of the papal exhortation *Amoris Laetitia*, that there are any exceptionless negative moral norms, this article (1) recalls and reaffirms the philosophical and doctrinal tradition's thesis that there are such norms. It then (2) sketches what is involved in identifying a kinds of act by its object; (3) reflects briefly on the three successive and different iterations of the teaching of the *Catechism of the Catholic Church* on capital punishment; and (4) draws attention to the *Catechism's* notable but little discussed, non-pacifist teaching against all intending to kill, even in just war.

**Keywords:** exceptionless negative norms; objects of moral acts; war; capital punishment; killing humans

1. Introduction. 2. Inspiration from Anscombe. 3. *Catechism's* teaching. 4. Human dignity and the intention of the acting person. 5. Development of the Catholic Church's moral doctrine. 6. Conclusion.

### 1. INTRODUCTION

When I had the privilege of being at Cardinal Stefan Wyszyński University in Warsaw ten years ago, for the conference commemorating the 20th anniversary of *Veritatis Splendor* (John Paul II, 1993), I talked about the investigation by the International Theological Commission, between October 1986 and December 1990, into the philosophical and theological grounds for the constant and very firm Christian teaching, which *Veritatis Splendor* would reaffirm: there are negative moral norms or precepts or “rules” which state that there are certain kinds of acts which it is always wrong to choose to do – kinds each identified by the object of such an act, that is to say, by the proximate intention with which the acting person chooses to do that.

In this article I want to speak once again about that topic, without repeating or revisiting anything I said ten years ago (Finnis,

2015, 7-20). First, I will say something about the issue in general – and about the new campaign, the new front in the old war against that Christian teaching (and against its philosophical partial-equivalents or analogues in Plato and Aristotle), the campaign or battle front opened up in 2016 in the main body of section 304 of the Apostolic Exhortation *Amoris Laetitia* (Francis, 2016).

In September 1988, after the sub-commission working on this project had completed much of its research towards the report which the full Commission would consider and adopt in 1990, I gave four public lectures in the John Paul II Institute in the Dominican House of Studies in Washington DC, under the title *Moral Absolutes: Tradition, Revision and Truth*; in September 1991 they were published under that same title (Finnis, 1991). In the last chapter, *Challenge and Response*, in a section entitled *Historical and ecclesiological skirmishes*, I made a few additions to the earlier chapters' critique of the arguments of proportionalist and other revisionary theologians against the unbroken Christian teaching that there are some exceptionless negative moral norms. I said: "Remarkably persistent have been the attempts [in the years since 1965] to gain authoritative support for proportionalism by reading back into the high scholasticism of Bonaventure, Albert, and Thomas the essential proportionalist positions ..." (Finnis, 1991b, 90). The very first of these attempts I set out in a paragraph the whole content of which is set out more fully in my book *Aquinas: Moral, Political and Legal Theory* (Finnis, 1998): "There is wide opposition today to Aquinas's thesis that some true moral norms exceptionlessly exclude certain types of act specifiable not in terms already morally loaded (such as 'cruel') but simply in terms of their object i.e. proximate intention (such as to kill an innocent, to copulate outside marriage, to assert what one does not believe). ... One strategy [the first of three or four that I set out and critiqued on pp. 163-170 – J.F.] is to deny that Aquinas held the thesis, or at least to deny that it is compatible with his own deeper principles. The text most often cited to support this denial concerns,

indeed, the general issue we have been considering: the way down from highest practical and moral principles to specific moral norms. General principles ... of practical reason, says Aquinas [in *Summa Theologiae* I-II, q.94, a.4c], have the same truth and correctness for everyone ..., but specific conclusions of practical reason do not. It is right and true for everyone that one should act reasonably, and it does follow as a specific conclusion from that principle that what [has been deposited with me] for safe-keeping [I] should return on demand. But although this conclusion is true for most situations, there are occasions when it would be harmful and unreasonable to return what [I am] keeping e.g. if the thing deposited was a weapon and the depositor wants it back to use in attacks on [my] own people. And Aquinas here states, quite generally, that because practical reasoning deals with non-necessary matters, *contingentia*, its propositions become more and more subject to exception the further one descends from high-level general principle to specific conclusion. Is Aquinas teaching that the particular moral norms which elsewhere he seems to propose as exceptionless are really no more than generalizations, true in general (*ut in pluribus*) but not always? [No!] In fact, his own statement here – that moral norms are generalizations and are subject to exceptions – is no more than a generalization subject to important exceptions. Aquinas makes this clear in many ways, above all by distinguishing between affirmative and negative moral norms. Some moral norms are negative, directing us not to do acts of a more or less specific type. But most are affirmative, directing one to do such and such. Affirmative moral principles and norms hold ‘always but not for every occasion’ (*semper sed non ad semper*). So, for example, the obligation to return things deposited for safe-keeping is in a sense universal, always a factor in moral deliberation about the things in one’s possession. Yet there are occasions – those of the kind mentioned by Aquinas – when it should not (and therefore, properly understood, does not) govern those deliberations but is superseded

by other obligations of justice. Such norms, though always somehow<sup>1</sup> relevant, leave it to one's moral judgment to discern the times, places, and other circumstances of their directiveness. But *negative* moral norms can be, and a number in truth are, binding and governing always and on every occasion (*semper et ad semper*).<sup>2</sup> Negative moral norms of this sort are, in short, both specific – immediately applicable without further moral reasoning – and exceptionless. ... And it is these norms, relatively few in number, which give social life and just law their backbone” (Finnis, 1998, 163).

We can easily see that if the proposition that norms become more subject to exception as they become more specific were a universal truth (rather than a generalization that is true only if it is itself subject to true exceptions), there could not be any exceptionless moral norms, and the key teaching of *Veritatis Splendor* would necessarily be false. That is why there is a subversion of *Veritatis Splendor*, or even a declaration of war on it, and on the apostolic and rational teaching that it restated, when in sec. 304 of *Amoris Laetitia* Pope Francis says: “I earnestly ask that we always recall a teaching of Saint Thomas Aquinas and learn to incorporate it in our pastoral discernment: »Although there is necessity in the general principles, the more we descend to matters of detail, the more frequently we encounter defects... . In matters of action, truth or practical rectitude is not

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1 At least as a matter of one's dispositions (character; readiness in principle): Mal. q.7, a.1, ad.9 (*habitualiter*); III Sent. d.25, q.2, a.1, sol.2, ad.3 (*de actibus virtutum*).

2 For this distinction between affirmative norms (e.g. honour your parents; do good to your neighbour; feed your children) – norms essential to a morally good life, always somehow relevant, but leaving to one's good judgment the discerning of the times, places, and other circumstances in which they will be decisively directive (they oblige 'always but not for every occasion (*semper sed non ad semper*) – and negative norms binding *semper et ad semper* (because specifying and excluding acts which are 'bad in themselves and in no way can be rightly [*bene*] done'), see e.g. II-II q.33, a.2c; q.79, a.3, ad.3; Mal. q.7. a.1. ad.8; Corr. a.1c and obj.4 and ad.4; III Sent. d.25, q.2, a.1, sol.2, ad.3; IV Sent. d.17, q.3. a.1, sol.4, ad.3; In Rom. 13.2, ad.v.9 [1052] (negative norms are more urgent and obvious as implications of the supreme principle of love of neighbour as self).

the same for all, as to matters of detail, but only as to the general principles; and where there is the same rectitude in matters of detail, it is not equally known to all... . The principle will be found to fail, according as we descend further into detail« [I-II, q.94, a.4]. It is true that general rules set forth a good which can never be disregarded or neglected, but in their formulation they cannot provide absolutely for all particular situations.”<sup>3</sup> Such misdirection.

Because I have expounded the foundational grounds and rationale of the philosophical and doctrinal theses subverted by *Amoris Laetitia* 304, exploring those grounds in each of the books I have mentioned and in others such as *Fundamental of Ethics* (Finnis, 1983) and *Natural Law and Natural Rights* (Finnis, 1980), I will today restrict my reflections to three topics that are related both to each other and to the apostolic moral teaching on exceptionless moral norms, precepts or rules, norms, precepts or rules which exclude from sound deliberation all choices of certain specific kinds of act, kinds each defined by the object of an act of that specific kind.

So I will say something, first, about what is involved in identifying kinds of acts by their object. Second, something about the teaching of the *Catechism of the Catholic Church* [CCC] (1992) on capital punishment, in that teaching’s three successive and different iterations, two of them under John Paul II and the other under, and at the instigation of, the present Pope. Third, something about the remarkable, little noticed but very important teaching of that *Catechism* on killing in war.

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<sup>3</sup> The next sentence is: “At the same time, it must be said that, precisely for that reason, what is part of a practical discernment in particular circumstances cannot be elevated to the level of a rule. That would not only lead to an intolerable casuistry, but would endanger the very values which must be preserved with special care.”

## 2. INSPIRATION FROM ANSCOMBE

During the years when the ITC working group on absolute moral norms was preparing the report approved in December 1991, I delivered a lecture at a conference organized jointly by the philosophy departments of the Catholic universities of Leuven and Louvain; the lecture was published in 1991 in the American journal *The Thomist* as *Object and Intention in Moral Judgments According to Aquinas* (Finnis, 1991c) and is now essay 9 in *Intention and Identity*, volume II of my *Collected Essays* (Finnis, 2013a). It demonstrates by texts and analysis what a vital role is played in the moral thought of Aquinas by the object of the act, and the profound and deeply established truth that, in this context, “object” must be understood in the way that would in 1993 be captured by *Veritatis Splendor* 78 (entirely without any drafting input, direct or indirect, from me): “The morality of the human act depends primarily and fundamentally on the »object« rationally chosen by the deliberate will, as is borne out by the insightful analysis, still valid today, made by Saint Thomas [*Summa Theologiae* III, q.18, a.6]. In order to be able to grasp the object of an act which specifies that act morally, it is therefore necessary to place oneself in the perspective of the acting person. The object of the act of willing is in fact a freely chosen kind of behaviour. ... By the object of a given moral act, then, one cannot mean a process or an event of the merely physical order, to be assessed on the basis of its ability to bring about a given state of affairs in the outside world. Rather, that object is the proximate end of a deliberate decision which determines the act of willing on the part of the acting person.”

In the audience at the Leuven-Louvain lecture on *Object and Intention in Moral Judgments According to Aquinas* was Elizabeth Anscombe, whose little but great book *Intention* (Anscombe, 1957) had been for me and many others a primary guide in recovering a conception of practical reason and human action true both to St Thomas and to the realities of human choosing and

self-determination. She expressed her agreement immediately, in the lecture-room. I mention this because a year or two later, again in 1991, there was published my essay on *Intention and Side-effects* (Finnis, 1991a) (now essay 10 in my *Intention and Identity*), in which I pursue over five pages a critique of her 1982 paper for the American Catholic Philosophical Association on *Action, Intention and 'Double-effect'* (Anscombe, 1982). The best short guide to our controversy is a pair of short essays: first, the contribution by her son-in-law Luke Gormally to the commemorative publication *Reason, Morality and Law* (Gormally, 2013), vigorously expounding (and illustrating with an unpublished *Nachlass* of hers) the conception of intention she deployed in her morally oriented writings; and then, my response to Gormally on pp. 480-485 (Finnis, 2013b), in which I illustrate the ways in which that conception differs, crucially, from the different understanding of intention that she herself displayed, and demonstrated the truth of, in her book *Intention*. As I said on p. 483: “The book [*Intention*] ascribes a descriptive and explanatory priority to the description(s) which behaviour has in the practical reasoning (the deliberations) by which the acting person shaped up the proposal he or she adopted by choosing to behave (act or forbear) in this way. This shaping of description(s) in practical reasoning and deliberation is not a matter of finding [devising, constructing...] a description under which the behaviour one is determined to carry out will be acceptable [morally ‘presentable’] to oneself or others. Rather, it is settled by what one considers a necessary or helpful means to achieving an objective (usually a nested set of objectives) that one considers desirable, in view of the factual context as one understands its bearing on both one’s end(s) and the means that one judges serviceable for achieving such end(s).”

In her moral writings, Anscombe’s conception of the object of the act includes the thesis that there are important real and hypothetical ways of behaving such that doing (or intending) *this* just is doing *that*: transfixing a child with an arrow just is killing or gravely

wounding the child, and intending the transfixing just is intending the killing or wounding. And that is the conception which I argued, and argue, is incompatible with the true conception of intention deployed in her great book. There she illustrates that true conception with a scenario in which someone moves his arm to pump (poisoned) water to replenish the water supply to earn his usual pay as a pumper, and does so knowing but caring nothing that the water which he needs, as usual, to deliver happens *on this occasion* to be poisoned water. About this scenario, Anscombe in *Intention* said: “In that case, although he knows concerning an intentional act of his ... replenishing the house water-supply... that it is also an act of replenishing the house water-supply with poisoned water, it would be incorrect, by our criteria, to say that his act of replenishing the house supply with poisoned water was intentional. And I do not doubt the correctness of the conclusion; it seems to shew that our criteria are rather good” (Anscombe, 1957, 47-49).<sup>4</sup>

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4 In my reply to Gormally I quoted that and added: “They are. And they show that it is incorrect to hold that craniotomy performed in order to relieve the obstetrical blockage which will imminently kill (both) the mother (and her child) always involves an intent to kill (to shorten the life) or even to harm (impair the functioning and capacities of) the child. In the order of actions, causality, and events *in genere naturae* [considered as natural kinds], this crushing and emptying (and even removing) the child’s skull ‘just is’, ‘eo ipso’ harming and killing the child. But this crushing, etc. is neither of those things in the order of intentions or, in Anscombe’s idiom, of intentional acts or, in Aquinas’s idiom, of acts *in genere moris* [considered as moral kinds] (i.e. as specified – accurately identified – for purposes of applying ethical predicates). For so too, no more and no less, B’s pumping of poisoned water into the house ‘just was’, ‘also’, ‘eo ipso’, poisoning the water supply, yet equally (as Anscombe in *Intention* holds) it simply was not the intentional or *in genere moris* act of poisoning the water supply. Indeed, Gormally’s thesis – ‘it would be part of the practical knowledge [such] a surgeon had of his intentions that he aimed to kill the child’ – is, I suggest, a *reductio ad absurdum*, or at any rate is straightforwardly incorrect by the criteria which Anscombe judged ‘rather good’. Gormally’s analysis obliterates the essential act-analytical and humanly real distinction between [Anscombe’s pumping] scenario Y and [pumping] scenario X. Equally, it obliterates the distinction between therapeutic craniotomy and partial-birth abortion, between jumping from the top of the World Trade Center on ‘9/11’ to escape the oily fireball and jumping to commit

Of course, it is agreed on all sides that the pumper who knowingly pumps poisoned water is morally responsible for the injuries or deaths he foresees and causes. But that responsibility of his is measured and assessed not by applying the exceptionless moral norm against having killing or injuring as one's object – killing with intent to kill or injure – but instead by applying the moral principles that govern causing death or harm by side effect, *praeter intentionem*, principles which are highly context- and circumstance-relative and look to issues of fairness, fidelity to voluntary undertakings, obligations of gratitude, and other affirmative moral standards and norms.

Obviously, these are matters worthy of being discussed for much longer than today's occasion allows, so I pass instead to the important and difficult practical applications and implications that have been chosen for today's conference: capital punishment and war.

### 3. CATECHISM'S TEACHING

The reformulation of *Catechism* [CCC] (2018) no. 2267, a reformulation published on 1 August 2018, was described by the Prefect of the Congregation for the Doctrine of the Faith as a “development of doctrine.” But in reality, I shall argue, it does no more than rhetorically emphasise a doctrinal development initiated by Pius XII and made by John Paul II. That development still awaits a sufficient clarification and stabilization, and its implications for the education of military personnel and their supporting populations have hardly, I believe, been noticed.

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suicide, between shooting down a passenger plane to save a skyscraper full of people and shooting it down to kill the passengers, between ‘transfixing with an arrow’ a drugged or mentally defective child who is killing people with a machine gun and transfixing him in order to kill (or to maim him for more effective street beggary); between giving a life-shortening dose of analgesics as the only dose that will suppress a terminally ill patient's pain and giving the same dose to shorten her life and ‘unblock’ her bed; and many other like distinctions” (Finnis, 2013b, 481-482).

As you know, the *Catechism* was published first in 1992 (in French), and translations in English and a few other modern languages were published in 1994. The whole *Catechism* was repromulgated in 1997, with 103 passages amended. You have in hand I hope a two-sided sheet displaying eight paragraphs or “numbers” of the *Catechism of the Catholic Church*, in each of the iterations of those paragraphs since 1994.

Capital punishment is dealt with in the framework of the *Fifth Commandment* (paragraphs 2258-2330); respect for human life (secs. 2258-2283); and legitimate defence [of self and others] (2263-2267). The CCC 1992/1994 treatment of legitimate defence was in its central two paragraphs (2265-2266) confusingly formulated, running together forcible defence (private, police or military) with punishment. That confusion was sorted out in 1997 by extensive rewriting of 2265-2266. Nos. 2263-2264, on basic principles, remained and remain intact, and implicitly they articulate, or entail, the major development of doctrine that was already visible in 2307.

*Catechism* para. 2267 had been quoted whole in the 1995 encyclical *Evangelium Vitae* [EV] (John Paul II, 1995), sec. 56, and was reaffirmed there as a “principle [that] remains valid”: “[2267] If bloodless [non-lethal] means are sufficient to defend human lives against an aggressor and to protect public order and the safety of persons, public authority should [EV 56: 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.”

In the 1997 *Catechism* revision, all of that was retained. And I shall argue that the whole doctrinal content of the 2018 revision is *already* stated (even if not entirely expressly) in the sentence I have just read out (in which EV 56 is quoting para. 2267 as it stood in CCC 1992/1994).

But first I will continue and conclude the textual history. Besides what was retained (as I just said) from CCC 1992/1994, para. 2267 was in 1997 *expanded* or supplemented with a preface and a fact-premised

conclusion (each derived from *EV 56*). Preface: "... 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." Fact-premise: the state "today" can render the offender "incapable of doing harm – without definitively taking away from him the possibility of redeeming himself." Conclusion: "as a consequence," the cases in which execution is the only possible way of effectively defending human lives are "very rare if not practically non-existent."

What the *CCC* 2018 revision does is this. Para. 2267 in *CCC* 1992/1994 already taught that non-capital punishments are "more in conformity to" human dignity; and, as supplemented in 1997, the same para. 2267 already taught that capital punishment is, *therefore*, not to be used – you might say, is "inadmissible" – *unless* a precondition is satisfied: that it is here and now absolutely necessary, in order to protect (from this particular offender) lives, safety and public order. Now the 2018 *CCC* revision of para. 2267 comes in to declare that that precondition *is not now* satisfied, *because of* (1) today's increasing awareness that even the worst criminal's dignity is not lost, (2) today's newly emergent understanding of the significance [It. *sensu*; Lat. *sensus*; Fr. *sens*: meaning] of state penal sanctions [as explained by the Congregation for the Doctrine of Faith's letter of 1 August 2018 (Congregation for the Doctrine of the Faith 2018), these sanctions look more and more to possible rehabilitation], and (3) today's more effective detention systems, ensuring due protection of citizens without definitively depriving the guilty of possible "redemption." *Therefore* (on the basis of those three premises): "Consequently [Italian: *Pertanto*] the Church teaches, in the light of the Gospel, that 'the death penalty is inadmissible because it is an attack on the inviolability and dignity of the person' [citing Francis, address of 11 October 2017]" (Francis, 2017).

We will seriously distort the meaning and content of the revision if, whether with joy or alarm, we quote only its final sentence and,

worse, if we omit from that sentence the word “Consequently.” And the word “inadmissible,” not a term-of-art in classical moral theology, has I think the same sense as the fact-premised “*should limit itself to bloodless means*” at the heart of para. 2267 in its 1992, 1994 and 1997 CCC version, quoted in *Evangelium Vitae*: not a “should” or “inadmissibility” of an exceptionless negative moral norm excluding a kind of act as *intrinsece inhonestum* because of its object.

So: whether or not the moral permissibility of some instances of state capital punishment has been definitively taught (that is, infallibly taught in one or more of the three possible ways articulated in *Lumen Gentium* 25) – a question I shall touch upon very briefly, later – the 2018 CCC revision, because it offers a teaching only about the circumstances (currently widespread attitudes and institutions) of today, does not deny that permissibility in principle. The revision really goes no further than John Paul II did towards a judgment that – leaving out of account, here *and throughout*, a particular special divine commandment to some person or group – capital punishment is *intrinsece inhonestum*, inherently impermissible. For we must not fail to take into account that John Paul II’s *Catechism* did, from its outset in 1992, take some steps towards judging that capital punishment is (except by divine command) *intrinsece inhonestum*.

It is worth saying a little more about two phrases in the 2018 revision’s key sentence, that I quoted a minute ago. The phrase “is an attack,” in context, makes no point about the *intentions* involved in capital punishment, including its precise object. (The Italian *attenta al* is better translated by the French *blesse* [wounds], the Latin *repugnet* [opposes], the German *sie gegen* [goes against, is opposed to]... a way of speaking that is more concerned with effects or implications than with the intention, the object.) Nor does the phrase convey any assertion about capital punishment’s “admissibility” under conditions different from “today.”

And the phrase “in the light of the Gospel” invites the question *which* parts of the Gospel, and *what* precisely those parts make

visible. I will argue that a proper theological answer to that question will point to two things, two matters or *topoi*. One is the *status* (dignity, rank, worth) of *every* human individual as unconditionally the object of God's conditional promise of new creation and eternal life – the status closely studied, verified and emphasised in *EV* 7 through 55. The other part of the answer points to the high moral significance of an action's *intention* – its precise object, as shaped in the actual inner deliberations (Mark 7.15, 21 Jesus says the “within”, the *heart*) of acting persons including state officials.

For those two *topoi* seem to be at the foundation of the *Catechism's* real development of doctrine in this domain, the little-noticed but most striking development implied by paras. 2263–2265 and 2307.

Para. 2263 opens the *Catechism's* section on “legitimate defense,” the section that will end with capital punishment. Para. 2263 begins, unfortunately, with a confusingly worded sentence, in most versions *also* mistranslated (but never amended in either the original or the translations!); it deals both with “the murder of the innocent” and with “intentional killing”: “2263. The legitimate defence of persons and societies is not an exception to the prohibition against the murder of the innocent that constitutes intentional killing.”<sup>5</sup>

This sentence's *intended* meaning, its thesis, is then made clear by the sentence following it, which is a quotation from Aquinas' famous statement (*Summa Theologiae* II-II, 64,7c) that private persons' morally legitimate defence of themselves can “have a double effect: the preservation of oneself and the killing of the aggressor ... the one [effect] is intended, *the other [effect] is not.*” Aquinas makes it explicitly clear, and 2263 takes for granted, that such self-defence is morally

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5 Correctly translated (as in the Spanish but not the Latin or German!), the French original (*l'interdit du meurtre de l'innocent que [not qui !] constitue l'homicide volontaire*) means “...the prohibition against the intentional killing that constitutes murder of the innocent.” [Better would have been: “the prohibition of intentional killing of the innocent, which constitutes murder”: *l'interdit du meurtre que constitue l'homicide volontaire de l'innocent* (or perhaps *interdit de l'homicide volontaire de l'innocent, ce qui constitue le meurtre*).]

permissible only if it includes *no intent to kill*, even when the means used to repel the aggression are known to be lethal.

Now Aquinas, in the same article, goes on to say that public officials (police, military, judges...) can permissibly act against aggressors or criminals *with*, if need be, *intent to kill them*. And here is the point. *This* part of Aquinas's teaching, long accepted in the tradition, is implicitly but unambiguously rejected by the *Catechism*. For paras. 2265 and 2267 extend the moral exclusion of intention to kill (even when using very lethal weaponry) to *all* instances of legitimate defence, including the actions of "those holding legitimate authority" exercising "the right to repel by armed force aggressors against the civil community."<sup>6</sup>

And that is confirmed by no. 2307, which heads up the section devoted to just war: "[2307]. The fifth commandment *forbids the intentional destruction of human life*. ... [2308] ... governments cannot be denied the right of lawful self-defence ... [2309] ... The strict conditions for legitimate defence by military force require rigorous consideration... ."

*Evangelium Vitae's* discussion, in sec. 55, unfortunately does not consider the preconditions and limits of morally permissible legitimate defence of self or others. It says no more than: when "the need to render the aggressor incapable of causing harm ... involves taking his life ... the fatal outcome is *attributable to the aggressor* ... *even though he may not be morally responsible because of a lack of the use of reason*." And we can well leave to one side the more or less fictional "attribution" of the aggressor's death to himself. Despite these deficiencies, *EV* 55 does indicate that the right of legitimate defence is about – not

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6 "2265: Legitimate defence can be not only a right but a grave duty for someone responsible for another's life, the common good of the family or of the state. ... 2267: If bloodless means are sufficient to defend human lives against an aggressor and to protect public order and the safety of persons, public authority should limit itself to such means, because they better correspond to the concrete conditions of the common good and are more in conformity to the dignity of the human person."

the bringing about of the aggressor's death but – the repelling of what is causing or likely to cause harm (*nocere*); it is implied, I suggest, that because those (the aggressors) who are *causing* or likely to cause such harm are harming (*nocens*), they are not *non-nocens* (they are not – in *this* sense – innocent), for the purposes of the commandment “Do not kill the innocent.” They are not in this sense innocent, adds *EV 55*, even if they are not morally responsible because they lack the use of reason (like a drugged or coerced child firing a machine gun in a crowded playground...).

Anyway, *Evangelium Vitae* left intact the *Catechism's* remarkable adjustment of the tradition, the remarkable implicit judgment that there is no relevant difference between private persons and public officials in relation to the wrongness of *intentional killing*; for both classes of person there is to be no intending *to kill*, not even while deciding to carry out forceful, violent measures that one knows are likely or certain to have lethal effect but reasonably judges are needed to *stop* criminals in their crimes, or enemy forces engaging in operations (aggression) against one's country. And this is true, as *EV 55* says, even when those operations to be stopped/defeated are by morally innocent conscripts advancing towards our lines under compulsion by ruthless blocking squads – much like that child in the playground).

The *Catechism*, to summarise, is teaching as a truth of natural law and our religion that intentional killing is exceptionlessly wrong but is distinguishable from using lethal means chosen simply for their efficacy as rendering harm-doers *hors de combat* – putting them out of the fight. That is, it is teaching the wrongness of all killing with intent precisely to kill, all choices and actions whose object is killing, as distinct from the intent to stop attack by use of means that, while targeting the attacker and known to be lethal in their effect – known to kill – are chosen for their stopping power not their lethality – and thus are *intended* precisely for, and have as their object, putting the attacker out of this fight. These texts (2263, 2265 and 2307)

articulate a change in the tradition, a change that deserves far more attention and discussion than it has yet received, and is, one could say, much more important than the accompanying, more ambiguous shifts of position limited expressly to capital punishment.

It is *this* wide and rigorous teaching – about *everyone's* obligation to respect all human life by excluding all intent to kill – that is then applied to capital punishment in the way that, I have been suggesting to you, is essentially constant from 1992 to today. *That* application has attracted much publicity and anxious attention. But of vastly greater practical significance in itself is the wide teaching summed up in no. 2307, applying as it does to training and conduct of armed forces, police or military. Yet how many people who welcome, or who deplore, John Paul II's teachings on capital punishment, and the essentially similar teachings of Francis, are even aware of John Paul II's wider teaching that intent to kill must be excluded from all police and military deliberations and choices of action?

#### 4. HUMAN DIGNITY AND THE INTENTION OF THE ACTING PERSON

This whole set of teachings, in all formulations, is based – as its context in the unified section 2263-2269 on legitimate defence (as clarified or confirmed by 2307) makes clear – on two foundations, the two *topoi* I spoke of above: (1) the fundamental human good, and “sacred” status, of the *life* of each and every human being; and (2) the reality and significance of “double effect,” that is, of the distinction between effects that one intends and effects that one does not intend but knowingly causes as side effects of carrying out what one does intend. These are foundations that have emerged in the manner mentioned in *EV* 2 and 28 and described in *EV* 55: “Christian reflection has sought a *fuller and deeper understanding* of what God's commandment prohibits and prescribes. [footnote: Cf. *Catechism*... Nos. 2263-2269...].”

In examining these foundations in turn, we are not looking, I suggest, at a corrupting of Catholic thought and tradition by secularised sentimentalism (as some critics understandably suppose). We are, rather, looking at a closer and closer attention to the tradition's principles of faith and morals, and to what these principles require in cleansing of the heart, and in steadily pursuing understanding.

Sacredness is predicated of every human life, not as pious rhetoric, but as summarising a doctrine: *God alone is the lord of life and death*. That doctrine heads up the paragraph (*Gaudium et Spes* 51.3) in which Vatican II lent its weight to the Church's age-old, indeed apostolic teaching against abortion, infanticide and contraception. "For God, the Lord of life, has entrusted to men and women the pre-eminent ministry of safeguarding life in a manner worthy [*digno*] of man." Of course, a life about to emerge – that naturally will begin unless I do something to prevent it – is greatly different from a life already in being, and Paul VI in *Humanae Vitae* [*HV*] (Paul VI, 1968) soft-pedalled (de-emphasised) the *contraception is contra-life* rationale of Christianity's perennially double-rationaled teaching against contraception, highlighting rather the *contraception is contra-marriage*, the marital chastity rationale. Soft-pedalled, but did not overlook: the lordship of God over life even in its initial inception is quietly asserted in the encyclical's very first sentence, and then is spelled out, referring also to human life's *sacredness*, in the second paragraph of *HV*'s key central section about what is wrong with contraception (no. 13).

The sole and absolute lordship of God over human life and death is then emphatically thematized in *CCC* 2258, 2318-2319, and in *EV*: see secs. 39, 46, 47, 52 (also citing *HV* 13), 53, 55, and 66. As *EV* 53 puts it: "God proclaims that he is absolute Lord of the life of man ... Human life is thus given a sacred and inviolable character..." *EV* 39 roots the doctrine in Deut. 32.39; *CCC* 2318 roots it in Job 12.10. Aquinas gave prominence (*Summa Theologiae* I-II, q.100, a.8,

ad.3) to the formula *Deus dominus vitae et mortis*: God is the Lord of life and of death.

*Dignity* – human superiority to the sub-human – is a necessary but never a sufficient ground for the natural (and Christian) moral truths about killing; it is sanctity of life – God’s sole lordship over the passage from life to death – that is needed (and available, even in unaided natural reason at full stretch) as premise for the strict exclusion of autonomous acts of suicide and voluntary euthanasia. So, as the 20th century Church had to face up to ever more insistent calls to legitimize these options, it had to deepen its appropriation and understanding of the moral implications of both the unpopular truth that each and every human being was at his or her very origin the object of a special act of creation (“ensoulment”) by God, and the truth, more popular but sadly often taken light-heartedly for granted (as if unconditional), that each human being thus summoned into life is a creature so significant that God has prepared for him or her a place in His kingdom and a sharing in His divine life.

Terminating life with intent to terminate life *versus* knowingly causing death. Catholic tradition, as articulated by Aquinas, judged it intrinsically (and thus exceptionlessly) immoral for me to form an intention to kill while defending myself or others against an aggressor, but (as I said) also judged it morally permissible for public officials to act on such an intention while defending the common good by suppressing serious crime or administering just penalties. We have seen that the *Catechism*, as I have been labouring to show, *replaces and reverses* the second judgment by extending the judgment about private intentions to kill defensively so that that judgment now covers/includes also public officials acting in the course of their duties.

This extension exhibits high confidence in the *practical possibility* of carrying out the lethal operations needed for defence of the common good without precisely *intending* their lethality. And, though none of us – nor anyone else guilty of supporting “New” Natural Law Theory – had any part at all in the preparation of any

of the moral parts of the *Catechism*, Germain Grisez, Joseph Boyle and I, jointly and severally (most recently Finnis, 1998, 286–287), have published explorations of that possibility (as in our *Nuclear Deterrence, Morality and Realism* (Finnis, Boyle, and Grisez 1987). And we have defended the new position against the initially plausible-sounding criticism that it necessarily involves what Elizabeth Anscombe’s early writings rightly ridiculed as phony “direction of intention,” or double-think rationalizations about intention. Against that criticism, we have argued, stands Anscombe’s own entirely sound analysis and explanation of intention as a psychological reality – very fine-grained – and real element of honest deliberation and choice: the adopting (by choice) of a proposal one has shaped for oneself (in one’s deliberations) as a set of means of achieving the end (or ends) for the sake of which the proposal is shaped and adopted. (Every means and end in any adopted proposal is intended; see Finnis, 2013b, 480–498).

Here again the Church has had to focus intently, over the past 150 years, on issues involving the distinction between what is intended and what is caused and accepted or permitted without being intended. That focus has been intensified as western culture has drifted further and faster away from Christian norms, and has challenged their justifiability more and more fiercely. The difference between terror bombing civilians and legitimate bombing of military targets located in civilian areas; between legitimately refusing medical treatment and committing suicide or requesting euthanasia; between contraception and periodic abstinence; between formal and material cooperation in moral evil; between abortion and justifiable therapies causing termination of pregnancy and loss of the unborn child... These and other troublesome, high-profile issues have called for deeper, more transparent identification of what precisely it is to form, have, act upon an intention.

Moreover, the proportionalist and situationist moral theologies condemned in *Veritatis Splendor* blandly but pervasively reject

the relevance of intention, in the sense in which it is in play here. They reject particularly the decisive relevance of the chosen action's precise *object*. So the attaining of clarity about why proportionalism must be rejected (along with the situationism we can see revived in *Amoris Laetitia* 304) has required, again, close attention to intention's reality, boundaries, and high moral relevance.

So: combining the Church's sharpened understanding of the content and reality of *the intention of the acting person* with the Church's deepened awareness of God's unique lordship over life and death, the *Catechism* pronounced the Church's developed judgment, which we may paraphrase as affirming that the true moral content of the Commandment "Never kill the innocent" is: "Never form or act upon an intention to kill a human being, though you may and often should defend yourself and/or others – even when that needs means you know or expect to be lethal – against persons who are *nocens* in the sense that, without justification (even if morally inculpably), they are causing or about to cause grave harm which one is morally entitled to stop."

Now that wide judgment, combined with Aquinas's common-sense judgment that capital punishment has as its object (immediate intention) the death of the convict, seems indeed to entail that capital punishment too – accurately understood as punishment (i.e. as executing the offender *for primarily retributive reasons*) rather than defence against imminent attack – offends against the Commandment, that is, violates that respect for human life (and therefore human dignity) which is required of everyone, private or public, because to intend to kill is to treat oneself as having a lordship over life and death that is God's alone.

## 5. DEVELOPMENT OF THE CATHOLIC CHURCH'S MORAL DOCTRINE

The *Catechism*, even as revised in 2018, stops short of drawing that conclusion. But it is reasonable to ask: Could the proposition

that capital punishment inherently offends against the Fifth Commandment (and the equivalent precept of natural moral reason and law) be adopted and taught consistently with – as an authentic development of – past Church teaching about capital punishment? I explored that question briefly in *Public Discourse* in August and December 2018 (Finnis, 2018a; 2018b; 2018c), where you can find the arguments I articulated for the conclusion that the Catholic Church has not definitively taught the permissibility of state capital punishment precisely as *capital*, that is, intended to kill – because not sheerly defensive but instead seeking death for the sake of punishment (retribution) and/or deterrence and/or incapacitation (elimination of risk of lethal reoffending).

What the Church *has* definitively taught, on the basis of Scripture and reason, is the “meaning and judgment” (*sensus et sententia*) in the following pair of statements. (1) Just state governments and laws have a moral liberty and duty, divinely authorised and confirmed, to *defend* both the lives and the other important elements of the common good of their subjects by, if need be, means known by the user to be lethal. (2) They equally have the divinely confirmed duty to administer *punitive* justice by means that, if proportionate to the offense and to the needs of defence and retribution, *irreparably* impair the freedom, comfort, and civil rights of serious offenders against just state law – impairments and constraints that, when undergone by us short-lived creatures, are for us just as irreparable, humanly speaking, as imposing and undergoing death. Teaching which preserves intact that *sententia* but which adds that intending to kill for either or both of those ends is exceptionlessly wrong, *intrinsece inhonestum* (because contrary to the dignity of human life and God’s lordship over its ending) would, so far as I can see, be an authentic development of doctrine, in much the same way as the developments of doctrine that have identified both slavery and coercion of religious belief as always wrong, developments fully compatible with suppression of religiously motivated conduct that

unjustly impairs or threatens public peace, public morality or the true rights of other persons.

Moral doctrine develops authentically by conceptual clarification, so that a correct but undifferentiated judgment (or set of judgments) is resolved into two correct moral judgments (or by an addition to the relevant set of judgments) about alternatives now more adequately differentiated. This process of clarification and supplementation occurred in relation to slavery and religious liberty, authenticating the reversal of practices that had been accepted for centuries by saints and popes and bishops generally, and in one way or another presented to the faithful as permissible.

Apostolic and early Christians were content with the correct judgment that *penal* servitude (deprivation of liberty plus obligation of laboring) is a *penalty* not inherently unjust when accompanied by immunity from sexual exploitation and by freedom to marry and worship; and the further correct judgment that just confiscation can involve confiscation also of the rights of dependents. So the Church counselled slaves to work honestly and diligently for their masters, and reformed the institution without identifying, and therefore without challenging, its distinct principle, which comes into view when its connections with guilt, punishment and punitive confiscation are perceived to be over-extended to the point of sheer fiction in relation to (1) the children of slaves, and (2) populations in newly discovered lands, and finally (3) almost everyone reduced to the status of slave to private persons who bought and sold not simply their labor power but, realistically, their persons. Clarification of these (and related) differences enabled the original correct judgments to be accompanied now by further correct judgments condemning *slavery* as distinct from penal servitude-for-defined-periods-of-time-in-state-prisons.

Again, the Church was long content with three correct judgments about religious liberty: that no one can rightly be compelled to convert to the true faith; that error cannot be the basis of rights; and that state law can rightly suppress threats to public order (*id est*, public peace,

public morals and/or the rights of other citizens), including threats arising from external acts putting into practice one or another tenet of mistaken religious belief. And the last-mentioned third correct judgment entails a fourth: that it is false to assert that everyone has a right to religious liberty – a liberty to give practical effect to whatever is the content of what they believe to be a true religious tenet. But that false assertion of religious liberty was eventually differentiated from a different sense of religious liberty, one that encapsulates a *fifth* correct judgment not only *compatible* with the other four but reasonably regarded as a true implication of the *first*: everyone has the moral right (not liberty, i.e. absence of a duty, but claim-right, i.e. a right correlative to others' duty to respect it) to be immune from coercion in pursuing the truth about religion, and putting it into practice *as* true (even if in fact mistaken) – unless such putting of a religious belief into practice would threaten the public order protected by the *second* of the Church's correct judgments.

Adoption of that fifth judgment (thesis, *sententia*) reversed a vast amount of practice that had two bases: (1) an unawareness of the just-mentioned difference between senses of “religious liberty,” and (2) a factual (so-called “prudential”) opinion that any and every religion that is false *will* constitute a threat to public order (including always a threat to the rights of others), if not by the falsity of one or other of its *moral* teachings then at least by inculcating disloyalty to any political community that officially or as a matter of predominant social practice adheres to the moral and other tenets of the true religion. And that now rejected factual opinion/prediction could, with further historical experience, be modified or even reversed *without reversing or even modifying* either the first four traditional teachings, or the fifth teaching, articulated by Vatican II.

So we can see the outlines of a possible authentic development of Church teaching about capital punishment. For early Christian teaching was shaped in a Roman world in which the imperial law rejected all idea of *punishing* by imprisonment, and in which at least

the ruling classes regarded a death sentence as *less* severe than lifelong or even indefinitely lengthy detention in a magistrate's house. That teaching included, at least implicitly, the following four propositions: (1) the state's law and those officials who make and enforce the law can rightly, and indeed should, suppress by needful force, including lethal force, all substantial crimes, as infractions of public order (understood as above); (2) state punishment for crime is essentially retributive, for the sake of restoring, to the extent possible, the order of justice disturbed by the wrongdoing; the additional benefits of deterrence, incapacitation and reform are welcome further effects, or at most fully subordinated rationales, not free-standing sufficient justifications for punishment; (3) punishment cannot be authentically retributive if it exceeds (even in pursuit of such further benefits) what is proportionate (commensurate) to the gravity of the offence and wilfulness of the offender; (4) for the gravest kinds of offence, wilfully committed, death is not disproportionate (does not exceed what is proportionate), and *in that sense* some crimes "deserve death."

And those propositions are compatible with a further proposition that has not, itself, been taught, though it is entailed, I argued above, by *Catechism* 2262-2264 and 2307 and is thought by some – mistakenly, as I argued above – to be the public meaning and effect of no. 2267 as revised in 2018. This further proposition is: (5) though not disproportionate or too severe, death is not a penalty that human beings can inflict without forming an intention precisely to terminate life – to replace it with death – an intention incompatible with God's lordship over life and death. In *that highly restricted sense* "no crime deserves death (at human hands intending to kill)," though some crimes deserve, at human hands, penalties that could be considered (as the Roman elites considered them) *more severe* than death.

Less than 20 years after the Resurrection, the apostles were led in the Spirit to preach the abrogation of the Mosaic legislation, including its innumerable precepts *requiring* the human imposition of capital punishment. Now these same apostles pointed out to Jewish and

gentile Christians quite a few immoralities *deserving of death* (loss first of earthly life, then also of eternal life): see e.g. Rom. 1.24-32; Rev 21.8. But in doing so, they proposed no program of state or other human punishments, whether required or discretionary. In retaining the moral commandments of the Decalogue as divinely confirmed natural (that is, rational) law (Rom. 2.14-16), the Church appealed to the sanctions not of state law and penalties but of conscience now and divine judgment later. That is why Aquinas, seeking to hand on the whole Tradition, could welcome and adopt (*Summa Theologiae* I-II, q.95 a.2) without qualification a key element in Aristotle's theory of state and law: state penalties should be proportionate to the offenses committed *but there is no natural – rationally required – measure*, no fixed minimum for the gravest crimes, no rationally normative minimum-point or maximum-point, or set of such points (such as *eye for eye, life for life*), by which to cardinally calibrate the scale of deserts.

## 6. CONCLUSION

The document cited in the newly formulated para. 2067 of the *Catechism*, and in the Congregation's for the Doctrine of the Faith covering letter of 1 August 2018, is a speech delivered in 2017 by the same Pope who issued sec. 304 of *Amoris Laetitia*. So it is no surprise that the theological or moral reasons proposed for the change in 2067 do not articulate the ground or grounds that, I have been suggesting to you, *could* truly authenticate a development of doctrine excluding capital punishment as *intrinsece inhonestum*: that by reason of its object – the intending of *death* as a means – capital punishment is contrary to that respect for human life which is implicit in God's absolute lordship over life and death. This pair of documents do arouse or reinforce serious misgivings because they focus almost exclusively on human dignity, as if that provided for our rights and duties not simply (as it does) an indispensable presupposition and ground, but rather a quasi-map identifying the very sense or *ratio* of those rights

and tracing their content and boundaries (the morally relevant *kind* of chosen acts excluded by those rights).

For the opaque language of dignity is today deployed constantly by secular organs and elites to promote, yes, a rejection of capital punishment but equally an indulgence towards or favour for euthanasia, suicide, and the many forms of anti-marital sex, and the radically unjust promotion of gender fluidity and same-sex parodies of marriage. And the educational institutions and programs they promote are nearly unanimous in denying or ignoring the justice of retribution, with its attention to the continuing and often justly decisive relevance of past deeds to present entitlement and conduct, attention and relevance that are essential to the truth of the Christian faith.

*CCC 2267* (2018) does put out of sight one puzzling obscurity in *CCC 2267* (1997), about how action taken solely for the sake of defence could be punitive in intent or in fact. But *2267* (2018) does so while ratifying and adopting (in relation to certain current empirical conditions which it points to and treats with unwarrantable confidence as permanent) the very line of thought that generates that puzzle.

And though the revision and the Congregation for the Doctrine of the Faith's commentary make, as I have argued, no change in teaching, they create at least an impression of change, and of change in a form that obscures the one line of development that would, it seems to me, be authentic. Thus deficient in doctrinal substance, these documents' may have as their main immediate effect little more than the exacerbation of prevailing uncertainties about the faith and its integrity, and the further distraction of the faithful and their pastors from attention to more urgent and weighty matters, above all the faith's foundation in that historical truth of the Gospels which since the early 1960s has come to be denied by most of the teachers of Scripture to the seminarians due to become our priests, bishops and popes.

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DOI 10.21697/spch.2024.60.A.10



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Received: 30/04/2024. Reviewed: 25/09/2024. Accepted: 7/10/2024.