2. Capital Punishment

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What does the Church teach about capital punishment? From the relevant paragraphs of the *Catechism*,1 we can extract the following principles, two on punishment in general, and then three specifically on capital punishment. On punishment, it says:

1. The defense of the common good requires (i.e., imposes a grave duty on the civil authority to) render an unjust aggressor incapable of causing harm.

2. Legitimate authority has the right and duty to inflict punishment in proportion to the gravity of the offense.

With respect to capital punishment, it adds:

3. The use of the death penalty is not wrong in itself.

4. The death penalty may be used only if certain conditions are met:
   a. the person to be executed must be guilty of a serious crime; and
   b. capital punishment must be the only possible way of defending human lives against unjust aggression.

5. The cases in which capital punishment are justified today are “very rare, if not practically non-existent.”

Easy to infer from the text are further conditions, such as that capital punishment must be administered by the civil authorities and that it have the right intention, namely restoring civil peace. Those familiar with the just-war theory might note with interest the parallel between the circumstances under which capital punishment might be justified and those under which it might be permissible to go to war. Capital punishment is only justified when inflicted by a legitimate authority, for a just cause, as a last resort, with the right intention, etc.

Is the Church’s teaching just something we have to take on faith? Is it a view that could only make sense to Christians, or even only to Catholics? In fact, I think that this view is defensible not only theologically, but philosophically. In what follows, I will offer such a defense.

1. An Abstract Analysis of Capital Punishment

There are opponents of capital punishment who claim that capital punishment is equivalent to murder. I have even seen this asserted by people who claim to be presenting the Catholic position on this matter. The term “murder” does have some vagueness to it. Is murder by definition the intentional killing of innocent people or is it by definition an unjust killing? I don’t think there is any precise
answer to the question of what the word means, but on neither definition does the Church hold capital punishment as equivalent to murder.

The Church does hold that some actions as intrinsically evil. In the case of such actions, the badness or malice of the act can be seen in the very description of the act. Deliberate killing of the innocent is an example of such an intrinsically wrong action; execution of a criminal is not. Why does the Church draw this distinction?

Killing is wrong because it is, ordinarily, a kind of injustice—a failure to render to each person his due. Death, being a kind of evil, is never due to an innocent person. The term “innocence” has, peculiarly enough, two different opposites. One way of being non-innocent is to be guilty of something. Another is to be harmful, which is what the Latinism nocent means. These two ways of failing to be innocent give rise to the exceptions of war and law enforcement (in the sense of criminal apprehension) in the case of on-going aggression (harmfulness), and capital punishment in the case of guilt.

Since our topic here is punishment, not war, we do not need to discuss further the exception for harmfulness. How could someone’s guilt justify killing them? To see how it could, we will need to back up and ask as two general questions. First, what punishment is for? And second, what is the measure of justice in the area of punishment? We need, in other words, a general theory of punishment.

One popular way of distinguishing theories of punishment is to divide them into retributivist theories and teleological theories.

Retributivism makes two claims. The first is that criminals should be punished just because they deserve something bad in return for the bad that they have done. The second, the lex talionis, is that criminals should not be punished more severely than their crime deserves. The early Greek law-giver Draco is said to have made practically every crime a capital offense. In contrast to that, the retributivist insists on “An eye [and no more] for an eye, etc.”

Retribution is quite distinct from the demand for revenge. Revenge is by its nature an evil done in return for an injury taken personally, it is done in order to satisfy one’s feelings of anger, and there is no intrinsic upper limit to what might count as revenge. Retribution, by contrast, is meted out in return for a wrong seen objectively, it is done because the person deserves punishment, and it is limited by the gravity of the crime committed.

The claim that guilt is a sufficient reason for punishment is controversial. Its defenders might point to the case of John Demjanjuk, a Cleveland automobile worker who was stripped of his US citizenship and extradited to Israel in 1986 to stand trial for war crimes he was alleged to have committed as guard at Nazi death camps during World War II. Why bother to punish someone for crimes committed so many years before, especially if the accused’s subsequent life shows no sign of continued criminality? Some people argue that the mere fact that the crime was committed calls for some punishment, independent of any good that the punishment might produce.

Teleological theories, by contrast, defend punishment on the grounds of the good that it can do. Any theory that was purely teleological would run afoul of the principle that it is always wrong to punish innocent people. It is, after all, always possible that punishing innocent people might be useful. Framing and convicting
innocent people might, for example, create the illusion that the police department always gets its man and thereby enhance deterrence.

St. Thomas Aquinas gives the retributive theory its due when he argues that it would be appropriate to God to punish people in Hell just because they deserve punishment, or rather, because of the goodness of the order in which the good receive rewards and the wicked, punishment.

Human society, however, does not have as one of its tasks the establishment of any such cosmic order. It is aimed at the good of social life In particular it is aimed at the common good, i.e., those things, such as a clean environment, a healthy economy, and civil peace, which are the good of all of us.

Building on the work of Aristotle, St. Thomas gives us a mixed theory of punishment, one in which the guilt of the person to be punished is a necessary condition of punishment, and one in which the upper bound of punishment is set by the gravity of the crime, but at the same time a theory in which punishment is nevertheless justified only to the extent that it is a means to some part of the common good. Aristotle presents us with a model of what he calls corrective justice in which crime is rectified by removing the ill-gotten gains of the criminal and restoring them to the victim, whose unjust loss is thereby wiped out. Put that way, of course, the model applies well only to property crimes, and in particular theft, and badly to crimes against the person such as murder or even assault. But reflection on the inadequacy of this narrow reading to capture even the essence of justice in the case of theft shows us the way to give it a more general applicability. A thief must, in justice, not only restore the goods he has wrongfully taken, but be punished further in some way. Why?

The Aristotelian answer, I think, is that, having done something harmful, he has made all of us feel insecure, lest something like that happen to us as well. He has, by his wrong action, damaged the common good and now must do what he can to restore it. It is he who must do this—guilt is a necessary condition. Further, he can only be punished up to a certain limit, one set by the gravity of his crime. The theory is partially retributivist. The punishment itself, however, has to be aimed at the attainment of some good. The theory is, therefore, also partially teleological.

There are three ways in which the punishment of a criminal can contribute to the common good. The first is by giving society some assurance against the criminal’s further bad behavior. This can be achieved either by imprisonment or by rehabilitation. The second way is by deterring other would-be malefactors from doing wrong.

The third way is perhaps more controversial. It is to prevent the emergence of vigilantism. U.S. Supreme Court Justice Potter Stewart once wrote:

The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people began to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they ‘deserve’ there there are sown
In other words, just as it can be demanded of the criminal that he submit to enough punishment that other would-be criminals are deterred, so it can be demanded of him that he submit to enough to calm the anger of would-be vigilantes, who would take the law into their own hands if the state did not mete out a punishment on their behalf. The point is not so much to calm their anger as it is to protect the rest of us from the vigilantes, who, in their zeal to punish criminals, may punish innocent people as well.

According to this theory, there are two upper limits to punishment. The first is set by the *lex talionis*. The second is set by the common goods at which punishment is directed. To be justified, punishment must stay below both. If the least effective deterrent for running red lights were execution by firing squad at dawn, the punishment would still be unjust. Similarly, if what it takes to quiet the would-be vigilantes is punishment in excess of what the crime deserves, then the punishment would be unjust. Even punishments below the threshold set by the *lex talionis*, but in excess of what was necessary to achieve any of the common goods would be unjustified.

Since some crimes destroy a life, taking the life of a criminal is not in itself a violation of the *lex talionis*. When capital punishment is necessary to achieve one of the goods at which punishment may legitimately aim, it is justified.

2. Capital Punishment in Twenty-first Century America

If capital punishment is not wrong in itself, why have the Pope and the American Bishops been so critical of the continued use of capital punishment by American states? The heart of the answer is this. The fact that capital punishment is not intrinsically bad does not make it automatically permissible. There are two other ways that an act can be bad. One is that it can be done for the wrong reason. The other, more relevant here, is that it can be done in the wrong circumstances. Since execution can only be justified if conducted by the proper authority, a private execution by vigilantes would be unjust no matter how careful the vigilance committee was to get the right man. It would be wrong not intrinsically, but circumstantially.

What other circumstances might vitiate an otherwise permissible action? One would be wrongness of manner. The history of execution in the last two centuries shows a fairly uniform attempt to make execution more quick and less painful than it had been previously. One example of this is the guillotine. Its grisly reputation is due, at least in significant part, to the indiscriminate use to which it was put by French Revolutionaries during the Reign of Terror. It was invented and adopted for its ability to accomplish decapitation in one blow—a feat which even experienced executioners sometimes found difficult with an axe. In America, the adoption of the “long drop” made the sentence “hang by the neck until dead” a sentence to

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instantaneous rather than lingering death. The turn of the century replacement of hanging by the electric chair, and then by the gas chamber and finally by lethal injection were attempts to move further in the same direction. Carrying out an execution in a way more painful than necessary would be wrong.

Just as executions by vigilantes or in a gratuitously painful manner would be executions that were circumstantially wrong, so would executions in circumstances where execution was not a necessary means to the legitimate ends of criminal punishment. So, in asking whether capital punishment is circumstantially permissible in our society, we need to ask the question of whether capital punishment is necessary to any of these ends.

In some societies, for example that of ancient Israel (the society governed by the Mosaic Law), execution may well have been the only practical means of incapacitating dangerous criminals. If that were the case, then execution would be justifiable. In his critique of the use of capital punishment in the contemporary world, Pope John Paul II refers explicitly to “the possibility which the state has for effectively preventing crime by rendering [the criminal] incapable of doing harm [without killing him].” Because we have non-lethal ways of incapacitating criminals, capital punishment cannot be justified by reference to this end.

One could, of course, raise the question of whether capital punishment protects society by deterring others from committing similar crimes, but the case for capital punishment could only be made if one could show not just that it had some deterrent value, but that it had more deterrent value than such alternatives as life imprisonment. That case, I think, is not easy to make, either statistically or intuitively.

Capital punishment is not, of course, a means to rehabilitation of the criminal.

What of the concerns about vigilantism? Although support for capital punishment may be widespread in the U.S. and Lithuania today it is simply implausible to think that the nation’s refusal to execute even the most famous and hated of criminals, for example, Timothy McVeith, would result in lynch mobs breaking into federal and state prisons to see that “justice” was done. Since such lawlessness is not going to happen, capital punishment is not a necessary means of avoiding it.

These final matters, that is whether the state can prevent and deter crime with sufficient effectiveness by non-lethal means, are empirical matters. Since, the Church does not teach definitively and or bind consciences on such matters of fact as whether capital punishment deters crime, the final judgment on capital punishment is a matter on which disagreement among those who are fully faithful to the Church’s teachings is possible.

Nevertheless, it seems to me that not only are the principles of the Church’s teaching philosophically defensible, but the prudential judgments underlying the Pope’s and the Bishops’ concerns are sound.