

## DO CIRCUMSTANCES EVER JUSTIFY CAPITAL PUNISHMENT?

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*[Aquinas's justification for capital punishment hinged on the argument that circumstances may render good an act that otherwise would be evil. Does the move within the Catholic Church and parts of society to abolish capital punishment imply that Aquinas's argument no longer has weight? Will capital punishment eventually join the class of actions, like slavery and torture, which came to be recognized as intrinsically evil?]*

REGARDING THE DEATH PENALTY, there is a growing tendency in both church and society to apply it in very limited circumstances or even to abolish it completely. The *Catechism of the Catholic Church* acknowledges that the primary purpose of the punishment society inflicts is to redress the disorder caused by the offender, and that authority must fulfill the purpose of defending public order and ensuring people's safety.<sup>1</sup> Pope John Paul II has concluded that "the nature and extent of the punishment must be carefully evaluated and decided upon and ought not 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."<sup>2</sup>

### AQUINAS AND CAPITAL PUNISHMENT

Aquinas, by way of contrast, argued that it is legitimate to kill sinners not only because this preserves the common good but also because sinners,

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<sup>1</sup> *Catechism of the Catholic Church* no. 2266. There seems to be a difficulty inherent in this definition. The first part of the definition is retributive in nature, while the second part is deterrent in nature. Since retribution is generally viewed as backward looking and deterrence forward looking, one must ask if it is possible to have a consistent view of punishment when attempts are made to combine two such theories as retribution and deterrence.

<sup>2</sup> John Paul II, *Evangelium vitae* no. 56.

who deviate from the rational order, lose their human worthiness. "Therefore if any man is dangerous to the community and is subverting it by some sin, the treatment to be commended is his execution in order to preserve the common good. . . . Therefore to kill a man who retains his natural worthiness is intrinsically evil, although it may be justifiable to kill a sinner just as it is to kill a beast, for, as Aristotle points out, an evil man is worse than a beast and more harmful."<sup>3</sup>

For Aquinas, an external act of killing a human being is morally disordered or a morally evil act. However, if the circumstances enter into the principal condition of the object of the act, then the object can change species to become a good object. The whole act becomes in this case the morally good act of justly executing a criminal. John Finnis expresses Aquinas's argument as follows: "To argue for the possible justification of killing in the administration of justice, he contended (in effect) that such a killing need involve no choice to destroy a human good either as end or means, but instead can be done with a different intentionality, that is, under a different description; restoring the order of justice violated by the one killed who, moreover, by his violation of justice, his fault, had removed himself from the dignity of the human."<sup>4</sup>

For Aquinas it would seem that the argument centers on circumstances that change the moral nature of an act (*circumstantiae speciem mutant*). By reason of the circumstances surrounding the killing of a human being (who has removed himself from the worthiness of the human) by a public authority for the good of the community and for the restoring of the order of justice,<sup>5</sup> the act is rendered morally good and the disorder or evil present in the act, considered independently of the circumstances, is completely taken away by these circumstances. In other words, for Aquinas, circumstances surrounding an exterior act can at times enter into the principal condition of the object of the act, that is, the exterior act is given moral

<sup>3</sup> *Summa theologiae* 2-2, q. 64, a. 2. Note that Aquinas does not use the term *intrinsece malum*, translated here as "intrinsically evil." He uses the expression *secundum se malum*. The expression *intrinsece malum* seems to originate in Suarez and Vasquez.

<sup>4</sup> John Finnis, *Moral Absolutes: Tradition, Revision and Truth* (Washington: Catholic University of America, 1991) 56.

<sup>5</sup> Finnis explains this notion of the restoring of order in society, an Aristotelian notion taken up by Aquinas, in the following way: "it is the restoration of a balance of fairness which the offender's crime, being essentially a willful choice to prefer his own freedom of action to the rights of others, has necessarily disturbed. Restoring the balance requires that offenders undergo something contrary to their will, just as they voluntarily imposed on others what was contrary to their will" (ibid. 80).

significance by its specifying object, and in so far as this is the case, the circumstances give to the act its moral species.<sup>6</sup>

### The Meaning of the Argument

What does Aquinas mean by circumstances entering the principal condition of the moral object of an act and so being able to change the species of the object from bad to good? In *Quodlibet* q. 9 he considers four kinds of action distinguished by their objects. It is the last kind of action that concerns us, namely those actions that are morally disordered, to the extent that the object with which they are concerned can be judged to be contrary to reason, but that can receive a different moral object by reason of the circumstances that enter into their "principal condition." Mark Johnson examined this kind of action in the light of Aquinas's case of "pluralism," that is, the case of a priest having more than one benefice without having care for souls. The question Aquinas attempts to answer is this: "Is it a mortal sin to have many prebends with no care of souls without a dispensation?"<sup>7</sup>

Johnson argues that in the case of both the many benefices and the taking of the life of the guilty person, the *advenient* circumstances do not just "surround" the moral object of the act, but rather enter into the moral object of the act. Aquinas terms the circumstances that rectify the act as *advenient* or *supervenient*, which suggests that the circumstances "arrive at" or "come from above to" the object of the act.<sup>8</sup> It is because of these *supervenient* circumstances that the certain disorders are "totally wiped out." It would seem that, despite attempts to prove otherwise, it is not a question of an ontic disvalue being outweighed by an ontic value, because in these two cases (the having of many benefices and the killing of a person because he is an evildoer) there is no evil present in the act, since its object has changed and any disorder has been completely wiped out.

When proportionalism rather than virtue ethics seemed to be the principal focus of attention in moral theology, Richard A. McCormick, having noted that Aquinas taught that some circumstances "become the principal condition of the object of an act," asked: "Now if this is true of the abstractly considered act of killing, why is it not true of an abstractly consid-

<sup>6</sup> "The killing and beating of a man involve some deformity in their object. But if it is added to this that an evildoer is killed for the sake of justice or that a delinquent is beaten for punishment, then the action is not a sin; rather it is virtuous" (*Quodlibet* 9, q. 7, a. 15).

<sup>7</sup> Mark Johnson, "Proportionalism and a Text of the Young Aquinas: *Quodlibetum* IX, Q. 7, A. 2," *Theological Studies* 53 (1992) 683-99.

<sup>8</sup> *Ibid.* 696, n. 43.

ered act like masturbation? The only reason I can think of is that the biological reality has been allowed to exhaust the notion of the *objectum actus*, as it does for Connery."<sup>9</sup> McCormick raised two important fundamental moral questions concerning the relationship between the moral object of an act and the circumstances of the act. First, what are the objective criteria for determining when the circumstances enter the principal condition of the object of the human act and change the object of the human act? Second, how do we determine the class of certain acts that are intrinsically evil, so that circumstances can never enter the principal condition of their object and render them right acts *ex objecto*?<sup>10</sup>

Both questions are obviously linked to each other. To the first question one could claim that in the case of capital punishment Aquinas misjudged the objective criteria. One could argue that the direct taking of a human life, even though it be a guilty human life, is a direct attack against a basic human good and cannot in fact be rendered a right act because of any circumstances. In this case the circumstances do not in fact change the species of the moral object of the act from bad to good.<sup>11</sup>

## CURRENT DISCUSSION

### Deterrence, Retribution, and Rehabilitation

When one reads more recent theological literature on capital punishment there seems to be a similarity of approach among the authors.<sup>12</sup> The three common justifications for capital punishment are deterrence, retribution, and rehabilitation.

<sup>9</sup> Richard A. McCormick, *Notes on Moral Theology, 1981 through 1984* (Washington: University Press of America, 1984) 170.

<sup>10</sup> The other three kinds of action are: (a) those actions that have a deformity inseparably connected with them, such as fornication, that in no way can become good; (b) actions specified by their moral object in such a way that they are *secundum se* intrinsically good, for example, giving alms; such actions, however, if ordered to a morally wicked end, as vainglory, are vitiated by the moral wickedness communicated to them by the wicked end but by reason of their objects they are good; and (c) those actions that are morally indifferent by reason of their object, for example, picking up a stick; these actions acquire their moral significance only by reason of the morally good or bad end to which they are ordered, see *ST* 1-2, q. 18, a. 8, as well as *Quodlibet* 9, q. 7, a. 2.

<sup>11</sup> See Germain Grisez, *Abortion: the Myths, the Realities and the Arguments* (New York: Corpus, 1970) 336.

<sup>12</sup> Bernard Hoose, "The Punishment of Criminals," in *Christian Ethics: An Introduction* (Collegeville: Liturgical, 1998) 199-209; John Langan, "Capital Punishment," *TS* 54 (1993) 111-24; Catholic Bishops' Conference of the Philippines, "Restoring the Death Penalty: 'A Backward Step'," *Catholic International* 3 (1992) 886-88.

Deterrence supposes that capital punishment will stop other possible criminals from committing murders. The key question is whether this is really the case in many societies or whether capital punishment helps breed a culture of violence and death. So does capital punishment contribute to the common good?

Retribution supposes that justice is giving to each what is his or her due and in the case of a murderer what is due is death. The key question is whether death is due to a killer. Is death the killer's due even if giving him or her what is due has negative consequences for a society and perhaps negative consequences for the one inflicting the punishment, even for the relatives and friends of the victim of the crime? If giving the criminal his or her due has a consequence of increasing people's desire to see others suffer and encourages a spirit of revenge, do we still uphold justice through retribution?

Finally, regarding rehabilitation, the only conversion process possible in a case of capital punishment is conversion prior to execution.

So is it the case that the circumstances, the good of society (deterrence), restoring a balance (retribution), and conversion (rehabilitation) now no longer enter the principal object of the act of killing and so change the moral species of the object of the act, whereas once they did? If we leave out the Thomistic argument that the sinner is reduced to the state of an animal and forfeits human worthiness,<sup>13</sup> why is it that the above circumstances are no longer considered to change the species of the moral object of the act of taking the life of a criminal? Could capital punishment in time be added to the list of intrinsically evil acts one finds in *Veritatis splendor*, just as torture and slavery have found their way into the intrinsically evil category?<sup>14</sup> Some may attempt to argue that there is scriptural authorization for the death penalty and so capital punishment will never be listed as an intrinsically evil act. New Testament scholarship would seem to suggest otherwise. As Jean Lasserre has argued, "No Christian justification of the death penalty can be deduced from Romans 13, so there is no single text in the New Testament which approves it."<sup>15</sup>

<sup>13</sup> Most theologians would reject this claim, as they would the Thomistic analogy that the criminal is like a diseased organ or limb of the body (*ST* 2-2, q. 64, a. 2).

<sup>14</sup> "Whatever is hostile to life itself, such as any kind of homicide, genocide, abortion, euthanasia and voluntary suicide; whatever violates the integrity of the human person, such as mutilation, physical and mental torture and attempts to coerce the spirit; whatever is offensive to human dignity, such as subhuman living conditions, arbitrary imprisonment, deportation, slavery, prostitution and trafficking in women and children; degrading conditions of work which treat laborers as mere instruments of profit, and not as free responsible persons" (*Veritatis splendor* no. 80, citing *Gaudium et spes* no. 27).

<sup>15</sup> Jean Lasserre, *War and Gospel* (Scottsdale, Penn.: Herald, 1962) 183-87. For a

### Meta-Ethical Rules

Let us return to McCormick's unanswered question: What are the objective criteria for determining when circumstances enter the object of a human act and change the moral species of that object? Can this question ever be adequately addressed? The search for meta-ethical rules, that is, rules for applying the rules, is perhaps a vain search. If we return to Aquinas's notion that it is legitimate to kill sinners, we realize that his argument is based on a certain understanding of society in which the individual is compared with the whole community as a part to a whole. If the individual is harmful to the whole because of some serious sin, he or she may be killed for the good of that whole. Likewise, the sinner, one acting against reason, falls from human worthiness and enters the state of servitude like the beasts and hence can be dealt with like a beast.

What therefore enters the object of the human act or adequately describes the object of the human act is linked to one's presumptions about the moral universe, including the social order that embodies that universe and one's conception of personhood. In other words, establishing meta-ethical rules seems to be feasible only within particular concepts of human society, personhood, and moral universe. In the case of capital punishment, says Mark Tushnet, "Society's position on the existence and use of the death penalty both expresses and constitutes the kind of society it is."<sup>16</sup>

### The Concepts "Contrary to Nature" and "Lack of Right"

It would seem that certain actions once considered good—because circumstances were said to enter the principal condition of the act and change the moral species of the object to good—can in another time and in another concept of society and personhood, cease to be rendered good by circumstances. Is the traffic one way? Can acts once considered intrinsically evil, due to a change of circumstances, become good? Of course this would be a contradiction of the term intrinsically evil, for intrinsically evil acts are by definition acts of such a class that circumstances can never enter the principal condition of their object and render them good acts *ex objecto*. One can reasonably ask, as McCormick did, what the objective criteria are for determining when circumstances can never change the species of the moral object of the human act. One could note at least two important sources or criteria for determining that class of acts known as intrinsically evil,

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very useful bibliography on the New Testament and the death penalty, see also Chris Marshall, "Bearing the Sword in Vain? Romans 13:4, John Howard Yoder and the Death Penalty Debate," *Faith and Freedom* 5 (1996) 60–65.

<sup>16</sup> Mark Tushnet, "Reflections on Capital Punishment: One Side of an Uncompleted Discussion," *Journal of Law and Religion* 7 (1989) 21–31, at 24.

namely, the concepts of *contra naturam* (against nature) and *ex defectu iuris* (lack of right). How one defines and justifies these two concepts then becomes the central and difficult question.<sup>17</sup>

If we examine *contra naturam* in the context of a human action once considered moral but now considered intrinsically evil (not that capital punishment has entered that class of acts in official church teaching, yet it does seem to be approaching almost “virtually exceptionless,” to use proportionalist language), we are confronted with the question whether the natural law is immutable. In other words, can the natural law change? Aquinas responds to this question by stating that change can occur both through addition and subtraction. Nothing stops the natural law from being changed by way of addition because we can discover additional precepts and sources of moral obligation that were overlooked in previous generations and societies. The issue is more complicated when we come to subtraction.

Could a certain action that in the past could have been in accordance with the natural law now be contrary to the natural law? Aquinas argues that the primary principles of the natural law are unchangeable by way of subtraction so that changes in society would not make these types of principles or precepts, once moral, now immoral. On the other hand, for secondary principles or precepts, he does admit that a change is possible, although it would be rare and a special case.<sup>18</sup>

So is capital punishment shaping up to be a rare case of a change in the

<sup>17</sup> Peter Knauer once described *contra naturam* as a good sought while the conditions for the highest possible realization of the good are abandoned. He speaks of a destruction of reality itself when part of reality is isolated from its interrelations. An act *contra naturam*, according to Knauer, is an act where there is a long-run contradiction in reality between the value sought and the way of achieving it (“The Hermeneutic Function of the Principle of Double Effect,” *Natural Law Forum* 12 [1967] 132–62). By way of contrast, Brian Mullady, speaking of masturbation and artificial contraception as *contra naturam*, concluded that “contraception and masturbation are sins which militate against the progress of the rational soul towards union with the absolute truth by inhibiting either the faculty which God uses to generate the material cause of the rational soul or the relationship which is the proper locus of the education of the rational soul” (*The Meaning of the Term “Moral” in St. Thomas Aquinas* [Vatican City: Libreria Editrice Vaticana, 1986] 195–96). Regarding *ex defectu iuris*, Bruno Schuller comments: “Moral theology proceeds differently in establishing that suicide and the use of contraceptives are morally evil by their very nature. . . . Suicide is not allowed because it would occur without the required authorization (*ex defectu iuris in agente*)” (“Direct and Indirect Killing,” in *Readings in Moral Theology 1: Moral Norms and Catholic Tradition*, ed. Charles E. Curran and Richard A. McCormick [New York: Paulist, 1979] 38–57, at 40).

<sup>18</sup> For the Thomistic treatment of the distinction between primary and secondary precepts, see *ST* 1–2, q. 94, a. 2, a. 4, a. 5, a. 6, and q. 100, a. 1, a. 3, a. 11.

understanding of a secondary principle of the natural law? Could capital punishment become *contra naturam*? Ross A. Armstrong speaks of three types or classes of precepts that constitute the content of the natural law. There are primary precepts and secondary precepts, and the secondary precepts can be divided into the immediate conclusions from the primary precepts and the remote conclusions from the primary precepts that are only evident after extensive reflection and wisdom.<sup>19</sup> He then offers an example that is pertinent to our issue of capital punishment. One primary principle or precept is that “human life ought to be fostered and preserved,” and from this primary precept we can draw the immediate conclusion that murder is wrong. The morality of slavery and of using people for medical experimentation is discerned as a remote conclusion and thus takes much reflection and wisdom. Could the immorality of capital punishment therefore be a remote conclusion drawn from the primary precept of the natural law that “human life ought to be fostered and preserved” only after a long process of reflection? As slavery and torture have eventually joined that certain class of actions known as intrinsically evil, will capital punishment in time also be part of that class?

The meaning of the word “quodlibet” in the musical sense is the making of harmony from fanciful tunes. While these reflections on capital punishment and on whether circumstances can change the moral nature of an act may appear fanciful, they are an attempt to wrestle with the problem of a harmonious or “seamless garment” approach to life issues. Furthermore, it is an exploration into the harmony or disharmony in the moral tradition when one seeks the objective criteria for determining when circumstances can and cannot enter the principal condition of the moral object of a human act and change the species from bad to good.

<sup>19</sup> Ross A. Armstrong, *Primary and Secondary Precepts in Thomistic Law Teaching* (The Hague: Martinus Nijhoff, 1966) 111. Armstrong is reflecting on the Thomistic distinctions found in *ST* 1–2, q. 100, a. 3, a. 5, a. 11.