

ARTICLE

JURIDICAL PRUDENCE AND THE
TOLERATION OF EVIL: AQUINAS
AND JOHN PAUL II

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Juridical prudence is the virtue that guides the formulation of sound public policy and law as well as just judicial adjudication.¹ Within natural law jurisprudence and Catholic social thought, juridical prudence relies on two kinds of principles, namely, foundational principles that subordinate public policies, judicial rulings, and law to morality; and methodological principles for adjudicating difficult cases. These foundational and methodological principles seem to have evolved from those that emphasize the common good (as best exemplified by the classical jurisprudence of Saint Thomas Aquinas) to those that emphasize inviolable human rights (as best exemplified by the contemporary jurisprudence of Pope John Paul II). This emphasis on inviolable rights, moreover, seems to place contemporary natural law jurisprudence at odds not only with utilitarianism and legal positivism but also with the classical tradition—insofar as that tradition permitted evil to be tolerated for the sake of the common good and insofar as the toleration of evil seems to involve a failure to protect inviolable rights.

Determining whether the classical and contemporary forms of natural law jurisprudence are at odds is one of this paper's four main objectives.

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1. THOMAS AQUINAS, *SUMMA THEOLOGICA, Part I of the Second Part*, q. 57 (in vol. 2 of *Fathers of the English Dominican Province trans.*, Benzinger Brothers 1947) (discussing prudence) [hereinafter *AQUINAS, SUMMA, Part I of the Second Part*]. In the corpus of that Question's Article 4, Aquinas wrote: "[P]rudence is the right reason of things to be done." (emphasis omitted). See also *id.* at q. 65 a. 1. In *Part I of the Second Part*, Question 60, Article 3, Aquinas explained that the actions resulting from prudence constitute justice when they honor equality, the right, and the due:

[J]ustice . . . is . . . something due to another . . . according to the becomingness of the thing itself [W]e derive the notion of something due which is the formal aspect of justice: for, seemingly, it pertains to justice that a man give another his due. . . . [T]he nature of a debt differs according as it arises from a contract, a promise, or a favor already conferred.

The second objective is to identify the principles that determine which evils are to be tolerated and which are not to be tolerated. The third and fourth objectives are to identify the principles that permit the toleration of evil not only in the formulation of policies and legislation but also in the adjudication of difficult cases. While attaining these objectives, this paper will study the infamous text in which Aquinas argued that in certain rare and highly specified conditions, a judge may issue an execution order for someone known by the judge to be innocent. Indeed, this case will form the litmus test for determining whether Aquinas' jurisprudence is irredeemably inconsistent and whether his common-good jurisprudence and John Paul II's inviolable-rights jurisprudence are at odds with each other. We, however, shall find that contrary to a *prima facie* reading of Aquinas, consistency characterizes Aquinas' jurisprudence; that Aquinas and John Paul II would have agreed on the foundational and methodological principles of juridical prudence;² and that the conditions necessary for tolerating the execution of someone known, by the judge, to be innocent have not been possible for several centuries.

I. FOUNDATIONAL PRINCIPLES OF JURIDICAL PRUDENCE: HUMAN RIGHTS, THE COMMON GOOD, AND EQUITY

Natural law jurisprudence and Catholic social thought have typically subordinated law and public policy to morality through the notion of the common good: whatever advances the common good is held to be a just and permissible public policy, while whatever counters the common good is held to be an unjust and impermissible policy. This view of the common good is not the same as the utilitarian view of social welfare insofar as the utilitarian notion of social welfare is not concerned with the welfare of every member of society, while the notion of the common good is. Indeed, Aquinas' notion of the common good identified the welfare of the community with the welfare of individuals.³ This view of the common good has

2. One point on which Aquinas and John Paul II significantly differ is the treatment of heretics. John Paul II argued that freedom of religious belief is a basic right and begged forgiveness on the first Sunday of Lent in 2000 for past offenses against human rights. Aquinas held the pre-modern, cultural assumptions that political authority required, for the most part, religious consensus; that Christian heretics were believers rejecting what they knew to be true; and that heretics were not only spiritual, but political, threats at least as dangerous as those committing the capital crime of counterfeiting money.

Religious persecution is a long and sad tradition that includes the execution of Socrates, in part, for the failure to conform to the religious beliefs of ancient Athens. The United States broke with this tradition by guaranteeing the free exercise of religion in its Constitution's Bill of Rights. Contemporary Thomism, which strives to be a living tradition, has likewise rejected the historically conditioned assumptions that underwrote religious persecution. It argues that since these grossly false assumptions are not essential to Aquinas' thought, they can be discarded without disrupting the integrity of his thought. This paper accordingly argues that the "common good" jurisprudence of Aquinas obligates the state to protect the right of religious free exercise.

3. See AQUINAS, *SUMMA, Part I of the Second Part* at q. 90 a. 2. This is the key text wherein Aquinas subordinates every law to the common good, understood as constituted by the happiness

been traditionally called “organic,” as organisms flourish to the extent that each of its members also flourish. It could also be called civic friendship or solidarity insofar as the welfare of individuals requires caring for neighbors.⁴ Community life is thus never sacrificed at the expense of individual welfare; rather it advances as individuals flourish. Since inviolable human rights identify what is necessary for humans to flourish, the contemporary emphasis on inviolable human rights instantiates Aquinas’ classical juridical notion of the common good, especially when it includes a right to free associations or to community life.

This natural law understanding of the common good and of human rights underpins every political document that declares that individuals have inalienable rights, for example, the American Declaration of Independence or the Universal Declaration of Human Rights. It also underpins every document that acknowledges that legal rights do not exhaust a person’s rights, for example, the Constitution of the United States. The identification of human rights as essential for the common good has become a mainstay of Catholic jurisprudence. Pope John XXIII made this identification and Pope John Paul II stressed it:

In the Encyclical *Pacem in Terris*, John XXIII pointed out that “it is generally accepted today that the common good is best safeguarded when personal rights and duties are guaranteed. The chief concern of civil authorities must therefore be to ensure that these rights are recognized, respected, coordinated, defended and promoted, and that each individual is enabled to perform his duties more easily.”⁵

The importance that John Paul II placed on inviolable rights is hard to understate: he considered them to be a fundamental principle of human welfare⁶ and a foundational principle of democracy.⁷ For this reason, the United Nation’s Universal Declaration of Human Rights was characterized

of every individual. *See also id.* at q. 96 a. 6 (“[E]very law is directed to the common weal of men, and derives the force and nature of law accordingly.”).

4. The notion that civic or political friendship is the end of the state was argued by Aristotle. ARISTOTLE, *NICOMACHEAN ETHICS* 1155a24–26 (Terence Irwin trans., Hackett Pub. Co. 1985). *See also id.* at 1159b25–31, 1161a10–1161b10, 1167a23–1167b3. *See also* AQUINAS, *SUMMA*, *supra* note 1, at q. 99 a. 1 ad 2 (“[E]very law aims at establishing friendship, either between man and man, or between man and God.”); MICHAEL PAKALUK, *THE CHANGING FACE OF FRIENDSHIP* 197–212 (Leroy S. Rouner ed., U. of Notre Dame 1994) (arguing the importance of this kind of friendship for America).

5. Pope John Paul II, *Evangelium Vitae*, No. 71 (Mar. 25, 1995), *reprinted in* POPE JOHN PAUL II, *THE GOSPEL OF LIFE: EVANGELIUM VITAE* 131 (Pauline Books and Media 1995).

6. Pope John Paul II, *Redemptoris Hominis*, No. 17 (Mar. 4, 1979), *reprinted in* POPE JOHN PAUL II, *THE ENCYCLICALS OF JOHN PAUL II* 74–75 (J. Michael Miller ed., Our Sunday Visitor Publishing Division 1996).

7. Pope John Paul II, *Centesimus Annus*, No. 47 (May 1, 1991), *reprinted in* POPE JOHN PAUL II, *CENTESIMUS ANNUS: ON THE HUNDRETH ANNIVERSARY OF RERUM NOVARUM* 65 (Daughters of St. Paul ed., Pauline Books and Media 1991).

by John Paul II as “one of the highest expressions of the human conscience of our time.”⁸

This emphasis on inviolable rights establishes a key natural law parameter of juridical prudence and determines whether juridical rulings are good or bad: good juridical rulings honor objective and inviolable rights—especially the right to religious freedom, which John Paul II understood “as the right to live in the truth of one’s faith and in conformity with one’s transcendent dignity as a person.”⁹ Or, as John Paul II said in *Evangelium Vitae*: “[Civil law is to ensure] the common good of people through the recognition and defence of their fundamental rights, and the promotion of peace and of public morality.”¹⁰ Bad juridical rulings violate fundamental rights, peace, and public morality.

The inability of public policy and law to specify every necessary way to promote the common good and to defend in every possible way fundamental human rights gives rise to the obligation of equity. Aquinas explained that equity obligates judges to apply the law differently in those rather unique cases where strict application of the law would harm an individual or hinder the common good.¹¹ To illustrate this point, Aquinas relied on Plato’s ancient argument about borrowed weapons:¹² one ought not return borrowed weapons to their owner when their return would cause

8. Pope John Paul II, Address of His Holiness Pope John Paul II to the Fiftieth General Assembly of the United Nations Organization 11 No. 2 (Oct. 5, 1995).

9. Pope John Paul II, *Centessimus Annus*, *supra* note 7, at No. 47, p. 67.

10. Pope John Paul II, *Evangelium Vitae*, *supra* note 5, at No. 71, p. 130 (citation omitted). In *Centessimus Annus*, *supra* note 7, at No. 47, p. 66, John Paul emphasizes some of these fundamental rights:

Among the most important of these rights, mention must be made of the right to life, an integral part of which is the right of the child to develop in the mother’s womb from the moment of conception; the right to live in a united family and in a moral environment conducive to the growth of the child’s personality; the right to develop one’s intelligence and freedom in seeking and knowing the truth; the right to share in the work which makes wise use of the earth’s material resources, and to derive from that work the means to support oneself and one’s dependents; and the right freely to establish a family, to have and to rear children through the responsible exercise of one’s sexuality.

11. AQUINAS, *SUMMA THEOLOGICA*, *Part II of the Second Part*, q. 120 a. 1 (in vol. 3 of *Fathers of the English Dominican Province trans.*, Benzinger Brothers 1947) [hereinafter *AQUINAS, SUMMA, Part II of the Second Part*].

Legislators in framing laws attend to what commonly happens: although if the law be applied to certain cases it will frustrate the equality of justice and be injurious to the common good, which the law has in view. . . . In these and like cases it is bad to follow the law, and it is good to set aside the letter of the law and to follow the dictates of justice and the common good. This is the object of *epikeia* which we call equity.

See also AQUINAS, *SUMMA, Part I of the Second Part*, at q. 97 a. 4.

Now it happens at times that a precept, which is conducive to the common weal as a general rule, is not good for a particular individual, or in some particular case, either because it would hinder some greater good, or because it would be the occasion of some evil. . . . Consequently he who is placed over a community is empowered to dispense in a human law that rests upon his authority, so that, when the law fails in its application to persons or circumstances, he may allow the precept of the law not to be observed.

12. AQUINAS, *SUMMA THEOLOGICA, Part II of the Second Part*, at q. 120 a. 1; *see also id.* at q. 51 a. 4.

harm.¹³ Elsewhere, Aquinas specified that prudence and its associated virtues play key roles in such cases.¹⁴ By so doing, Aquinas identified equity as an instance of juridical prudence where the moral obligation of avoiding harm is applied in a particular case to protect an individual from an injurious application of the law.

The harm that juridical prudence seeks to avoid includes not only individual harms but also attacks on the common good, as demonstrated in the famous case of *Riggs v. Palmer*.¹⁵ In *Riggs*, Palmer left the bulk of his estate to his grandson, who then murdered him with poison.¹⁶ Justice, the court decided, precludes allowing a grandson to profit from his crime because the common good requires crime to be adequately punished and not rewarded.¹⁷ In this instance, American case law not only accorded with the insights of Aquinas and Pope John Paul II about the necessary relationship of morality and human law¹⁸ but also exemplified the judgment of juridical prudence.

II. THE TOLERATION OF EVIL

If law has its underpinnings in objective morality, it may seem that it is never permissible for government to tolerate harm to its citizens. To harm a citizen is to attack the common good that the state is obligated to protect. Nevertheless, John Paul II approvingly cited Thomas Aquinas' maxim that prudence precludes the human law from prohibiting all evils.¹⁹ A certain degree of harm must be tolerated, otherwise the burden on those not yet

13. PLATO, *REPUBLIC* 331c (Edith Hamilton and Huntington Cairns eds., Paul Shorey trans., Princeton Univ. Press 1961).

14. AQUINAS, *SUMMA*, *Part I of the Second Part*, at q. 57 a. 6; see also AQUINAS, *SUMMA*, *Part II of the Second Part* at q. 50–51. As Aquinas stated in *SUMMA THEOLOGICA*, *Part II of the Second Part*, at Question 56, Article 2, Response 3 "All the precepts . . . that relate to acts of justice pertain to the execution of prudence."

15. 115 N.Y. 506 (1889).

16. *Id.* at 508–09.

17. *Id.* at 514.

18. Pope John Paul II, *Evangelium Vitae*, *supra* note 5, at No. 72, p. 131 ("The doctrine on the necessary conformity of civil law with the moral law is in continuity with the whole tradition of the Church."). Aquinas argued the point in *SUMMA*, *Part I of the Second Part*, at Question 91, Article 2, Response 3, by first establishing that natural law directs human reason to its last end:

Every act of reason and will in us is based on that which is according to nature . . . for every act of reasoning is based on principles that are known naturally, and every act of appetite in respect of the means is derived from the natural appetite in respect of the last end. Accordingly the first direction of our acts to their end must needs be in virtue of the natural law.

Aquinas then argued in *SUMMA*, *Part I of the Second Part*, at Question 95, Article 2, that the justice of human law is grounded on the natural law:

Now in human affairs a thing is said to be just, from being right, according to the rule of reason. But the first rule of reason is the law of nature Consequently every human law has just so much of the nature of law, as it is derived from the law of nature. But if in any point it deflects from the law of nature, it is no longer a law but a perversion of law.

19. Pope John Paul II, *Evangelium Vitae*, *supra* note 5, at No. 71, p. 129–31.

virtuous would be so unbearable that they “would break out into yet greater evils.”²⁰ But what are the criteria for identifying whether or not an evil is tolerable?

John Paul II provides some guidance in *Evangelium Vitae*. In that text, he wrote that public authority cannot tolerate abuses of the right to life.²¹ He argued that this is the case within democracies:

[T]he value of democracy stands or falls with the values which it embodies and promotes. Of course, values such as the dignity of every human person, respect for inviolable and inalienable human rights, and the adoption of the “common good” as the end and criterion regulating political life are certainly fundamental and not to be ignored.

The basis of these values cannot be provisional and changeable “majority” opinions, but only the acknowledgment of an objective moral law which, as the “natural law” written in the human heart, is the obligatory point of reference for civil law itself.²²

There are several relevant principles enumerated in this text. First, the political life is to be regulated by the common good and by the fundamental values of human dignity and respect for inviolable and inalienable human rights. Second, the basis of these fundamental values is the objective moral law written as the natural law in every human heart. Third, the natural law is the necessary ground for social values, public policies, judicial rulings, and legislation.

Thus, John Paul II followed the classical natural law jurisprudence that identifies governmental authority with the moral authority of the societal organic common good, rather than identifying governmental authority as the outcome of due process or as the utility in satisfying the majority’s desires or coercive power.

This identification of legal authority with moral authority enables both classical and contemporary natural law jurisprudence to claim that a public

20. AQUINAS, *SUMMA, Part I of the Second Part* at q. 96 a. 2.

Now human law is framed for a number of human beings, the majority of whom are not perfect in virtue. Wherefore human laws do not forbid all vices, from which the virtuous abstain, but only the more grievous vices, from which it is possible for the majority to abstain; and chiefly those that are to the hurt of others, without the prohibition of which human society could not be maintained: thus human law prohibits murder, theft and such like.

21. Pope John Paul II, *Evangelium Vitae*, *supra* note 5, at No. 71, pp. 130–31.

While public authority can sometimes choose not to put a stop to something which—were it prohibited—would cause more serious harm, it can never presume to legitimize as a right of individuals—even if they are the majority of the members of society—an offense against other persons caused by the disregard of so fundamental a right as the right to life. The legal toleration of abortion or of euthanasia can in no way claim to be based on respect for the conscience of others, precisely because society has the right and the duty to protect itself against the abuses which can occur in the name of conscience and under the pretext of freedom.

(citation omitted).

22. Pope John Paul II, *Evangelium Vitae*, *supra* note 5, at No. 70, p. 128.

policy, judicial ruling, or legislative act devoid of moral authority may still be coercive, so long as the police or armed forces are willing to enforce it. Coerciveness does not suffice for legitimacy—if it did, then there would be no difference between the legal authority of free states and that of totalitarian states. Since it is possible for coercive juridical rulings to attack and even corrupt the common good, John Paul II approvingly cited Aquinas' maxim that juridical rulings opposed to the natural law are acts of violence.²³

Especially pernicious, according to John Paul II, are those juridical rulings that permit or otherwise support abortion and euthanasia: such rulings fail to protect not only human equality, but also all human rights, since these stem from the inviolable right to life.²⁴ Furthermore, such rulings attack the common good: "Disregard for the right to life, precisely because it leads to the killing of the person whom society exists to serve, is what most directly conflicts with the possibility of achieving the common good."²⁵ The common good thus obliges juridical rulings to defend the inviolable right to life.

But does this obligation, for instance, forbid one from supporting legislation that seeks to restrict most abortions? Does it forbid judges from issuing rulings that permit minors to get abortions or that condemn criminals to death? Such legislative and judicial cases must be distinguished and treated separately because the choices involved in making law differ from those involved in deciding law.

III. PRUDENTIAL PRINCIPLES FOR POLICY FORMULATION: THE COMMON GOOD, INVIOABLE HUMAN RIGHTS, LIFE, THE MINIMIZATION OF HARM, AND THE PRINCIPLE OF DOUBLE EFFECT

The key criteria for legislative juridical prudence are taken from the legislators' intention and from the nature of the juridical policy or law. In brief, the lawmaker or juridical policymaker must not only intend to promote the common good and protect inviolable human rights, but must also craft legislation that actually accomplishes these goals—either totally, whenever possible, or partially, whenever the other is practically impossible. For instance, the attack on human life that occurs in abortion obligates legislators to seek to ban all forms of abortion. But since total bans are not

23. *Id.* at No. 72 (citing AQUINAS, *SUMMA, Part I of the Second Part*, at q. 93 a. 3, ad 2).

24. Pope John Paul II, *Evangelium Vitae*, *supra* note 5, at No. 72, pp. 132–33.

[T]he fundamental right and source of all other rights . . . is the right to life, a right belonging to every individual. Consequently, laws which legitimize the direct killing of innocent human beings through abortion or euthanasia are in complete opposition to the inviolable right to life proper to every individual; they thus deny the right to life proper to every individual; they thus deny the equality of everyone before the law. . . . Laws which authorize and promote abortion and euthanasia are therefore radically opposed not only to the good of the individual but also the common good; as such they are completely lacking in authentic juridical validity.

25. *Id.*

possible in today's current climate, John Paul II argued that it would be permissible for a pro-life legislator or policymaker to support a partial ban on abortion.²⁶ This argument identifies three key conditions for supporting more restrictive abortion laws or policies. First, the policy or law must be a last resort (because the political situation precludes a total ban). Second, the juridical ruling must be well crafted so that the number of abortions would actually decrease. And third, supporters must make their pro-life intentions known—presumably, to avoid the scandal that would arise if others were to perceive their support as somehow endorsing abortions in certain cases.

Underpinning this analysis are two principles: the principle that harm is to be minimized and the principle of double effect. The latter principle was firmly established in natural law jurisprudence by Aquinas, when he used it to justify killing in self-defense.²⁷ This justification identifies several necessary conditions that must be met before the evil resulting from an act can be tolerated. One of these conditions is that the one assaulted must have no other recourse than to strike a lethal blow; he must “retreat to the wall” as the American legal tradition once put it.²⁸ Hence, a necessary condition for the principle of double effect is that the act in question must be a last resort. When this condition is not met, the good effect can be attained by an act that lacks the evil effect. Accordingly, if one can save one's life by escaping, there is no need to strike a lethal blow. In such a situation the refusal to escape involves the immoral intention to pursue the evil effect. When, however, there are no viable alternatives, the other conditions of the principle of double effect establish that evil effects can be tolerated when the act in question also has an equal or greater good effect that alone can be intended. Accordingly, it is morally permissible to strike a lethal blow in self-defense when the lethal blow is intended not to kill the aggressor, but to stop the aggression. For that reason, once the aggressive act is stopped, the defender is obligated to call the paramedics rather than watch gleefully as life ebbs from the aggressor. These indispensable conditions of the principle of double effect can be summarized as follows:²⁹ 1) the act in question has both good and bad effects; 2) the evil effect is not the means to the good effect; 3) the evil effect does not outweigh the good effect; 4) only the good

26. *Id.* at No. 73, pp. 134–35.

A particular problem of conscience can arise in cases where a legislative vote would be decisive for the passage of a more restrictive law, aimed at limiting the number of authorized abortions, in place of a more permissive law already passed or ready to be voted on. . . . In a case like the one just mentioned, when it is not possible to overturn or completely abrogate a pro-abortion law, an elected official, whose absolute personal opposition to procured abortion was well known, could licitly support proposals aimed at *limiting the harm* done by such a law and at lessening its negative consequences at the level of general opinion and public morality.

(citations omitted).

27. AQUINAS, *SUMMA*, Part II of the Second Part, at q. 64 a. 7.

28. *See, e.g.*, *Bell v. State*, 17 Tex. Ct. App. 538 (1885).

29. I take these conditions as establishing that the act in question is not intrinsically evil.

effect is intended; and 5) the act in question is a last resort because there are no other viable options. Hence, the principle of double effect can never warrant genocide, for instance, since genocide cannot occur without intending the evil effect of extermination and since that evil effect not only is the means for attaining any alleged good effect, but is also greater than any alleged good effect.

The principle of double effect thus permits policies and laws to be formulated that have both good and evil effects when the evil effect does not overwhelm or cause the good effect, and when only the good effect is intended. Thus, it is morally permissible to support policies or laws that restrict, rather than ban, all abortions because it is good to restrict abortions and because it is possible to intend only the rather substantial good effect of saving some lives while tolerating the evil effect of not being able to save all lives. If any one of the five conditions for the principle of double effect is unmet, a legislative act that produces an evil effect would not be morally permissible. For instance, if a policy or legislative act were to seek to restrict abortion by mandating vasectomies, the policy or law would be immoral—even if the vasectomies were reversible—since the good effect of eliminating the possibility of an abortion is achieved through the evil effect of destroying, either temporarily or permanently, the male reproductive capacity.³⁰

Juridical prudence thus identifies two principles indispensable for legislators and policy makers. First, every juridical rule should protect or promote the common good and the inviolable right to life. And second, lesser evils should be tolerated in order to avoid greater ones only when such toleration is permissible according to the five-fold principle of double effect.

Apart from these conditions, policies and legislative acts that tolerate or endorse evil should be denied support by every policymaker and citizen,³¹ as well as protested and opposed by “conscientious objection.”³² The reason why opposing unjust laws through conscientious objection is so important is that human beings have not only an obligation to oppose evil but

30. The effect of such vasectomies would only be compounded if they were freely chosen by the patient, because then the patient would be intending, either the permanent or temporary, destruction of his reproductive capacity; this is to intend not only the destruction of one's bodily integrity, but also the very means whereby a people survives.

31. Pope John Paul II, *Evangelium Vitae*, *supra* note 5, at No. 73, p. 134 (“In the case of an intrinsically unjust law, such as a law permitting abortion or euthanasia, it is therefore never licit to obey it, or to ‘take part in a propaganda campaign in favor of such a law, or vote for it.’”) (quoting Sacred Congregation for the Doctrine of the Faith, *Declaration on Procured Abortion* No. 22 (1974)).

32. Pope John Paul II, *Evangelium Vitae*, *supra* note 5, at No. 74, pp. 135–37. *See also id.* at No. 73, p. 133 (“Abortion and euthanasia are thus crimes which no human law can claim to legitimize. There is no obligation in conscience to obey such laws; instead there is a *grave and clear obligation to oppose them by conscientious objection.*”).

also, as John Paul II reminds us, an essential right not to do evil.³³ This right is nothing less than the right to act justly: it is the very heart of jurisprudence and humane action. This right needs to be protected by laws that allow public officials and others, such as pharmacists, doctors, nurses, and hospital officials to practice the right of conscientious objection.³⁴

But what should one do when conscientious objection is not an option? In *Evangelium Vitae*, John Paul II argued that no one can formally cooperate in another's evil and that all should be willing to follow the example of the Egyptian midwives who refused to obey Pharaoh's law requiring them to kill all newborn males.³⁵ "[F]ormal cooperation," John Paul II continued in *Evangelium Vitae*, "occurs when an action, either by its very nature or by the form it takes in a concrete situation, can be defined as a direct participation in an act against innocent human life or a sharing in the immoral intention of the person committing it."³⁶ John Paul II included within the parameters of juridical prudence the proscription of directly participating in the killing of an innocent as well as the proscription of sharing in another's immoral intention. The disjunction here is not exclusive: the language of "direct participation" means that the case is beyond the scope of the principle of double effect. For no one can directly participate in the killing of the innocent without intending the innocent's death.

IV. PRUDENTIAL PRINCIPLES OF ADJUDICATION AND MATERIAL COOPERATION

Judges sometimes must adjudicate situations where they must apply law that permits evil. Could such an act be morally permissible? On the one hand, it involves cooperating with a law that permits an evil effect, for instance, divorce. On the other hand, such cooperation furthers the rule of law and may well also further the well-being of children or spouses. So it seems that the principle of double effect would permit the judge to intend the good effect while tolerating the evil effect and issue the decree. Indeed,

33. *Id.* at No. 74, pp. 136–37.

To refuse to take part in committing an injustice is not only a moral duty; it is also a basic human right. Were this not so, the human person would be forced to perform an action intrinsically incompatible with human dignity, and in this way human freedom itself, the authentic meaning and purpose of which are found in its orientation to the true and the good, would be radically compromised. What is at stake therefore is an essential right which, precisely as such, should be acknowledged and protected by civil law. In this sense, the opportunity to refuse to take part in the phases of consultation, preparation and execution of these acts against life should be guaranteed to physicians, health-care personnel, and directors of hospitals, clinics and convalescent facilities. Those who have recourse to conscientious objection must be protected not only from legal penalties but also from any negative effects on the legal, disciplinary, financial and professional plane.

34. *Id.*

35. *Id.* at No. 73, p. 134 (referencing *Exodus* 1:17 in THE NEW AMERICAN BIBLE 59 (1987)).

36. *Id.* at No. 74, p. 136.

in his address to the Roman Rota on January 28, 2002,³⁷ John Paul II argued that while all should avoid cooperating with the evil of divorce, it is permissible for lawyers to cooperate with those clients who are seeking divorce for reasons other than a rejection of the indissoluble sacramental bond, for instance, to protect the custody of children or to protect an inheritance as noted in the Catholic *Catechism*.³⁸ He also argued that judges may cooperate with unjust divorce laws, “since the legal order does not recognize a conscientious objection to exempt them from giving sentence. For grave and proportionate motives they may therefore act in accord with the traditional principles of material cooperation.”³⁹ The absence of the right to conscientious objection would presumably be tantamount to those situations where recusal is not possible and the judge is left with no alternative but to issue a decision because he lacks the authority to declare the unjust law unconstitutional.⁴⁰ Under these conditions, issuing a decision would be a judge’s last resort and the principle of material cooperation would be nothing other than an instantiation of the principle of double effect.⁴¹

37. Pope John Paul II, To the Prelate Auditors, Officials and Advocates of the Tribunal of the Roman Rota, No. 9 (Jan. 28, 2002) [hereinafter Pope John Paul II, *Rota Address*], available at http://www.vatican.va/holy_father/john_paul_ii/speeches/2002/january/documents/hf_jp-ii_spe_20020128_roman-rot_en.html.

38. *Catechism of the Catholic Church: Modifications from the Editio Typica* No. 2383 (2d ed., U.S. Catholic Conf. 1997).

39. Pope John Paul II, *Rota Address*, *supra* note 37.

40. Fortunately, within the United States, it is not too difficult for judges to declare laws unconstitutional. For instance, a municipal judge in Austin recently declared unconstitutional the city ordinance forbidding the solicitation of “services, employment, business or contributions from an occupant of a motor vehicle.” National Coalition for the Homeless, *A Dream Denied: The Criminalization of Homelessness in U.S. Cities*, http://www.nationalhomeless.org/publications/crimreport/casesummaries_2.html (last accessed Mar. 26, 2007) (see case summary entitled “State of Texas v. John Francis Curran, No. 553926 (Tex. Mun. Ct. City of Austin 2005)”). The summary states that:

In 2003, the Austin police issued John Curran a \$500 ticket for holding a sign asking for donations at a downtown intersection. Curran is a homeless man represented by Legal Services Corporation grantee Texas Rio Grande Legal Aid. Although Curran did not contest his guilt, he fought the ticket on constitutional grounds. The ordinance, under which the police issued the ticket, prohibited people from soliciting ‘services, employment, business or contributions from an occupant of a motor vehicle.’ The municipal court judge declared the city ordinance prohibiting panhandling to be unconstitutional because the law violates the First Amendment, explaining that it is not ‘narrowly tailored in time, place, and manner.’ The city, which admits it enacted the law to stop day laborers from soliciting jobs, is deciding whether to appeal.

Id.

41. Neither the *Catechism* nor John Paul II explicates the traditional principles of material cooperation. But here is a typical account given by Thomas J. Higgins, S.J.:

In material co-operation one does not join the principal agent in his evil intent but nevertheless assists him by an act not in itself wrong. Thus one student gives notes to another who will use them to cheat in an examination. The general law of morality is that man must avoid evil as far as he can and the specific law of charity bids him to prevent his neighbor from doing wrong to the best of his ability [and, to the extent that prevention does not cause greater evils]. [Accordingly,] . . . the principle of double effect may be applied. Since the material cooperator does not intend the evil of the principal’s act, whenever his own act is good or indifferent and *he has a proportionately grave reason for acting, his cooperation will be licit.*

John Paul II, however, was not clear on whether a judge who could either recuse himself or appeal to conscientious objection must do so, or whether it would be morally permissible to use the principle of double effect or material cooperation to issue a decision. The principle of double effect or material cooperation permits the judge to issue such a sentence only when overall the legal system is just and when a significant good effect cannot be attained without tolerating the evil effect.

However, in cases where the rule of law is absent or tyrannical, material cooperation is not possible. Material cooperation is especially impermissible under tyrannies in capital cases; because the only good that can result from the judge's cooperation with the tyranny's unjust laws in the sentencing of an innocent person is the judge's livelihood—a rather insignificant good in relation to two great evils: acting as an agent of an evil regime and attacking the common good by intentionally sentencing an innocent to die.

But what is a judge to do when the law is just and he has private information that enables him to know that the defendant has been wrongly convicted? Can the principle of material cooperation permit the judge to sentence an innocent person to death? On the one hand, it does not seem that the judge has many alternatives: private information has no standing in court as judges are to issue their decisions according to the evidence given in the trial. Moreover, if a judge can issue a decree of divorce without intending the evil of divorce, it would seem that a judge could knowingly condemn the innocent to death without also intending it.⁴² On the other hand, the lies of witnesses should be exposed in the well-run courtroom. It is also a misuse of law to allow false testimony to condemn an innocent to death insofar as protecting an innocent's inviolable right to life is essential to the rule of law. This means that capital cases differ from divorce cases in a critical aspect, namely, the execution of the innocent violates a key *raison d'être* of law. Since human law exists for the sake of a common good that cannot exist apart from the innocent lives of individuals, it seems that there is no way that sentencing the innocent to death can be anything other than a fundamental attack on the common good.

Nevertheless, in an infamous text that seems directly opposed to natural law jurisprudence, Aquinas argued that such a sentence is permissible under certain rare and strict conditions:

THOMAS J. HIGGINS, *MAN AS MAN; THE SCIENCE AND ART OF ETHICS*, 353 (1949). See also AUSTIN FAGOTHEY, S.J., *RIGHT AND REASON: ETHICS IN THEORY AND PRACTICE* (6th ed. 1976).

42. The distinction between foreknowledge of an act's effects and intending those effects depends upon the distinction between intellect and will that enables things to be known without being intended. For instance, one can foresee that helping the baby to learn how to walk will enable the baby to fall without also intending that the infant fall. We have seen how the principle of double effect specifies the conditions whereby a bad effect can be foreseen and tolerated without also being intended.

If the judge knows that a man who has been convicted by false witnesses, is innocent he must, like Daniel, examine the witnesses with great care, so as to find a motive for acquitting the innocent; but if he cannot do this he should remit him for judgment by a higher tribunal. If even this is impossible, he does not sin if he pronounces sentence in accordance with evidence, for it is not he that puts the innocent man to death, but they who stated him to be guilty. He that carries out the sentence of the judge who has condemned an innocent man, if the sentence contains an inexcusable error, he should not obey, else there would be an excuse for the executions of the martyrs: if however it contain no manifest injustice, he does not sin by carrying out the sentence, because he has not right to discuss the judgment of his superior; nor is it he who slays the innocent man, but the judge whose minister he is.⁴³

This is a most curious text. First of all, it deals with a scenario that no longer occurs in liberal democracies: contemporary judges can always recuse themselves or remit a case to another court. In the past, however, such was not always true. Case adjudication was frequently a duty of ancient or medieval rulers who lacked the option of recusal. Secondly, the text claims that when the judge cannot acquit the innocent, it is the false witness who puts the innocent to death. The text also claims that the judge—not the executioner—slays the innocent person when there is no obvious inexcusable error. These claims seem to be at odds with each other. We thus ask whether the judge is responsible for the slaying of the innocent person. The answer embedded in this text seems to be that the judge is responsible only if he commits an inexcusable error—that is, only if the judge could have been more like Daniel⁴⁴ and could have found a way to acquit the innocent defendant, but failed to do so.

The third curious aspect of this infamous text is that it claims that the judge must pronounce sentence according to public evidence and not on the basis of private information; presumably, because he would otherwise be attacking the rule of law. And so, it may seem that Aquinas was saying that for the sake of the rule of law, the judge may act against his private knowledge and sentence the innocent man to death.⁴⁵ After all, Aquinas did say: “In matters touching his own person, a man must form his conscience from his own knowledge, but in matters concerning the public authority, he must form his conscience in accordance with the knowledge attainable in the public judicial procedure.”⁴⁶ To argue that conscience may be private or public and that public officials should defer to judgments of public con-

43. AQUINAS, *SUMMA, Part II of the Second Part*, at q. 64 a. 6, ad 3.

44. Daniel was able to exonerate Susanna by his vigorous cross-examination of lying witnesses. Note to *Daniel* 13:45–61 in *THE NEW AMERICAN BIBLE* 933 (1987).

45. RUSSELL HITTINGER, *THE FIRST GRACE: REDISCOVERING THE NATURAL LAW IN A POST-CHRISTIAN WORLD* 104–05 (2003).

46. AQUINAS, *SUMMA, Part II of the Second Part*, at q. 67 a. 2, ad 4.

science over those of his or her private conscience suggests to the contemporary reader that moral knowledge is to be removed from the public realm. Moreover, when this text is combined with the text permitting the capital sentencing of the innocent person, it may seem that Aquinas was arguing not only that judges should not allow their moral sensibilities to interfere with their public duties, but also that the law legitimately requires such a wall of separation between morality and judicial judgment.

But if Aquinas were to actually hold these positions and champion such a wall, he would have been a proceduralist and a utilitarian willing to kill the individual for the sake of the system,⁴⁷ rather than a natural law theorist and absolutist. Aquinas would have then grossly contradicted his own teaching that the state may never intentionally kill the innocent person.⁴⁸ He would have also fundamentally disagreed with John Paul II, who argued that any law “which violates an innocent person’s natural right to life is unjust and, as such, is not valid as law.”⁴⁹

For John Paul II, the demands of morality bind every individual, including the public authority. In his own words:

The fundamental moral rules of social life thus entail *specific demands* to which both public authorities and citizens are required to pay heed. Even though intentions may sometimes be good, and circumstances frequently difficult, civil authorities and particular individuals never have the authority to violate the fundamental and inviolable rights of the human person.⁵⁰

Ultimately, the reason why John Paul II asserted morality’s relevance for public conscience is that he saw a stark disjunction between a society whose values are established by an objective morality and a society whose values are established by the powerful—who may then catapult a democracy into totalitarianism.⁵¹ In *Evangelium Vitae*, John Paul II argued that within democracies, the denial of objective truths establishes the supremacy of the majority’s will and requires individuals to deny their consciences and act according to a law exemplifying ethical relativism.⁵² Within such a democracy, there could be no inviolable rights and individuals would become

47. See Matthew J. Kelly & George Schedler, *St. Thomas and the Judicial Killing of the Innocent*, 1 JOURNAL OF THOUGHT 17 (1979).

48. AQUINAS, *SUMMA, Part II of the Second Part*, at q. 64 a. 6.

49. Pope John Paul II, *Evangelium Vitae*, *supra* note 5, at No. 90, p. 160.

50. Pope John Paul II, *Veritatis Splendor*, No. 97 (Aug. 6, 1993), available at http://www.newadvent.org/library/docs_jp02vs.htm (last visited Mar. 26, 2007).

51. Pope John Paul II, *Centesimus Annus*, *supra* note 7, at No. 46, p. 65

Authentic democracy is possible only in a State ruled by law, and on the basis of a correct conception of the human person Nowadays there is a tendency to claim that agnosticism and skeptical relativism are the philosophy and the basic attitude which correspond to democratic forms of political life It must be observed in this regard that if there is no ultimate truth to guide and direct political activity, then ideas and convictions can easily be manipulated for reasons of power. As history demonstrates, a democracy without values easily turns into open or thinly disguised totalitarianism. .

52. Pope John Paul II, *Evangelium Vitae*, *supra* note 5, at Nos. 69–70, pp. 125–26.

simply fodder for the majority's will. Hence, according to John Paul II, free societies require a rule of law that acknowledges both objective morality and inviolable human rights.

Aquinas would have concurred with John Paul II's argument that there is no justice apart from objective morality and natural law. And Aquinas would have concurred that human rights cannot be abrogated by governments, since Aquinas identified human rights as naturally commensurate to human nature.⁵³ Aquinas, moreover, argued not only that human law is either derived or determined from the natural moral law,⁵⁴ but also that conscience is a moral judgment whereby moral norms are applied to particular judgments of fact.⁵⁵ For instance, if conscience were to decide that taking a particular car would be unjust, it would be combining a judgment of fact, namely, that the owner of the car would not give permission for one to take it, with a moral norm, namely, that taking another's possessions without permission commits the injustice of theft.

53. AQUINAS, *SUMMA, Part II of the Second Part*, at q. 57 a. 1–3. In AQUINAS, *SUMMA THEOLOGICA, Part I of the Second Part*, at Question 94, Article 2, Aquinas identifies the naturally commensurate as the object of a natural inclination. He divides these natural inclinations into three classifications: namely, the inclination common to all things, e.g., self-preservation; the inclinations that humans share with the animals, e.g., procreation and the education of offspring; and the inclinations pertaining to reason, e.g., to live in community and to seek the truth about God. These inclinations are considered basic and the ground of other inclinations; for instance, the inclination towards self-preservation grounds the inclination towards food, drink, and shelter. Furthermore, according to the definition of natural rights given in AQUINAS, *SUMMA, Part II of the Second Part*, at Question 57, Article 3 as that which is “by its very nature . . . adjusted to or commensurate with another person,” the objects of all the inclinations enumerated in *Part I of the Second Part*, at Question 94, Article 2 are natural rights, namely, life, procreation, parental education of children, living in community, and religious exploration.

Natural law morality obligates that these rights be protected and that their contraries be avoided; hence, for instance, murder and sterilization as a means of population control are immoral. Natural law morality, however, does not obligate that each of these goods always be pursued; hence, it is not immoral to seek to save another's life at the cost of one's own as long as one does so without intending one's own death. For an extensive and definitive argument that Aquinas' view of rights anticipates the modern view see BRIAN TIERNEY, *THE IDEA OF NATURAL RIGHTS: STUDIES ON NATURAL RIGHTS, NATURAL LAW AND CHURCH LAW, 1150–1625* (1997).

54. AQUINAS, *SUMMA, Part I of the Second Part*, at q. 95 a. 2.

[H]uman law has just so much of the nature of law, as it is derived from the law of nature But it must be noted that something may be derived from the natural law in two ways: first, as a conclusion from premises, secondly, by way of determination of certain generalities Some things are therefore derived from the general principles of the natural law, by way of conclusions; e.g., that *one must not kill* may be derived as a conclusion from the principle that *one should do harm to no man*: while some are derived therefrom by way of determination; e.g., the law of nature has it that the evil-doer should be punished; but that he be punished in this or that way, is a determination of the law of nature.

(emphasis added).

55. AQUINAS, *SUMMA THEOLOGICA, First Part*, at q. 79 a. 13 (in vol. 1 of *Fathers of the English Dominican Province* trans., Benzinger Brothers 1947); AQUINAS, *SUMMA, Part I of the Second Part*, at q. 19 q. 5–6; THOMAS AQUINAS, *THE DISPUTED QUESTIONS ON TRUTH* at q. 17 a. 1–5 (in vol. 2 of James V. McGlynn, S.J. trans., Henry Regnery Co. 1953) [hereinafter AQUINAS, *DISPUTED QUESTIONS ON TRUTH*].

The natural law origin of Aquinas' jurisprudence renders ambiguous the text where Aquinas differentiated private conscience from public conscience because this text fails to identify whether the differences between public and private conscience lay in some judgment of fact or in the utilization of different moral principles. Fortunately, this text occurs in the *Summa Theologica*. The *Summa* divides its articles into questions formatted in the popular medieval style of a disputed question. This format separates objections and responses to those objections from the body of the author's arguments. As a result, responses to objections are to be understood in light of the article's corpus. Since the text differentiating public and private consciences is a reply to an objection, the controlling text is the body of the article, which states:

[I]t is the duty of a judge to pronounce judgment in as much as he exercises public authority, wherefore his judgment should be based on information acquired by him, not . . . as a private individual, but from what he knows as a public person. Now the latter knowledge comes to him both in general and in particular—in general through the public laws, . . . in some particular matter, through documents and witnesses, and other legal means of information . . .⁵⁶

This text not only requires judges to rely on public knowledge, but also identifies divine and human laws as sources of public knowledge and conscience. But since human law relies on the natural moral law for its principles, Aquinas not only placed morality in the public realm, but also identified morality as a juridical principle. After all, the Thomistic philosophy of law denies that immoral laws bind the conscience because they cannot be based on the natural law.⁵⁷ Hence, it would be inconsistent for Aquinas to have argued that judges ought to ignore their knowledge of the natural law when they are knowingly condemning the innocent to die.

Nevertheless, it is possible that Aquinas was simply inconsistent on this point. Indeed, the case for inconsistency gains its greatest strength from the text wherein Aquinas clearly stated "that it is in no way lawful to slay the innocent."⁵⁸ Aquinas explicitly argued that it is wicked to intentionally kill the innocent:

56. AQUINAS, *SUMMA, Part II of the Second Part*, at q. 67 a. 2.

57. AQUINAS, *SUMMA, Part I of the Second Part*, at q. 95 a. 2 ("Consequently every human law has just so much of the nature of law, as it is derived from the law of nature. But if in any point it deflects from the law of nature, it is no longer a law but a perversion of law."). See also *id.* at q. 96 a. 4 ("Laws framed by man are either just or unjust. If they be just, they have the power of binding in conscience.").

58. AQUINAS, *SUMMA, Part II of the Second Part*, at q. 64 a. 6.

An individual man may be considered in two ways: first, in himself; secondly, in relation to something else. If we consider a man in himself, it is unlawful to kill any man, since in every man though he be sinful, we ought to love the nature which God has made, and which is destroyed by slaying him. Nevertheless, as stated above (a. 2) the slaying of a sinner becomes lawful in relation to the common good, which is corrupted

Wherefore he who kills a just man, sins more grievously than he who slays a sinful man: first, because he injures one who he should love more, and so acts more in opposition to charity: secondly, because he inflicts an injury on a man who is less deserving of one, and so acts more in opposition to justice: thirdly, because he deprives the community of a greater good: fourthly, because he despises God more, according to Luke x. 16: *He that despiseth you despiseth Me.*⁵⁹

Furthermore, Aquinas stated: "Now no man ought to injure a person unjustly, in order to promote the common good."⁶⁰

In addition, Aquinas argued that it is one's moral duty to make known any evidence that would prevent the condemnation of the innocent.⁶¹ The obligation to provide exonerating evidence is so strong that it obligates revealing secrets:

But as regards matters committed to man by some other means under secrecy, we must make a distinction. For sometimes they are of such a nature that one is bound to make them known as soon as they come to our knowledge, for instance if they conduce to the spiritual or corporal corruption of the community, or to some grave personal injury, in short any like matter that a man is bound to make known either by giving evidence or by denouncing it On the other hand sometimes they are such as one is not bound to make known⁶²

Thus Aquinas argued that it is evil to keep secret what can save the common good or individuals from harm. Public office does not excuse one from this obligation, especially since public authority derives from the common good⁶³ and since the obligation to honor the common good is a moral obligation.⁶⁴

by sin. On the other hand the life of righteous men preserves and forwards the common good, since they are the chief part of the community. Therefore it is in no way lawful to slay the innocent.

59. *Id.* at ad 2.

60. *Id.* at q. 68 a. 3.

61. *Id.* at q. 70 a. 1:

[I]f his evidence is required in order to deliver a man from an unjust death or any other penalty, or from false defamation, or some loss, in such cases he is bound to give evidence. Even if his evidence is not demanded, he is bound to do what he can to declare the truth to someone who may profit thereby. For it is written (*Ps. lxxxi. 4*): *Rescue the poor, and deliver the needy from the hand of the sinner*; and (*Prov. xxiv. II*): *Deliver them that are led to death*; and (*Rom. i. 32*): *They are worthy of death, not only they that do them, but they also that consent to them that do them*, on which words a gloss says: *To be silent when one can disprove is to consent.*

62. *Id.* at q. 70 a. 1, ad 2.

63. AQUINAS, *SUMMA, Part I of the Second Part*, at q. 90 a. 2-3; see also *id.* at q. 96 a. 6.

64. The moral nature of the obligation to honor the common good is the reason why Aquinas argues not only that the common good is greater than the individual good, but also that the last end of every human's life is a happiness identical with the common good. *Id.* at q. 90 a. 2. Aquinas considers human rationality to be such that it prefers the greater good to the lesser, e.g., reason judges that education is better than the fantasies induced by heroin.

Must we then morally condemn the judge who fails to reveal what he or she knows to be true? Must we then also conclude that Aquinas contradicted his own natural law jurisprudence when he claimed that the judge who can neither recuse himself, nor remit the case to a higher court, nor fail to pass sentence, nor make known the defendant's innocence, can morally sentence the innocent to death? Before we convict Aquinas of such blatant inconsistency, we should note that there is one case—and only one case—in which the judge may never bring his private information concerning a person's innocence into the courtroom: when the judge is a Catholic priest and his information was gained under the seal of confession. The secrets of the confessional are God's—not man's. As such, God's rights demand that the priest never reveals in any way the information gained through confession.⁶⁵ Indeed, the Catholic Church in its revised Canon Law of 1983 still prohibits compromising the confessional seal.⁶⁶

Thus, if the clerical judge were to acquit on the basis of information gained under the sacramental seal, that seal would be violated. Accordingly, when a clerical judge has no option but to try a case without giving any sign of the defendant's innocence, and when the testimony of false witnesses cannot be shaken, the principle of double effect would permit the clerical judge to render judgment in accord with the testimony given in court while intending only the preservation of confessional seal. For in such cases, the sentence of the clerical jurist has two inseparable effects: the good effect of protecting God's secrets and the evil effect of condemning the innocent.

But the principles of double effect and material cooperation permit this sentencing only on the assumption that capital punishment is not intrinsically evil. If it were, it would never be moral to issue a capital sentence. But within Catholic social thought, capital punishment has not been identified as intrinsically evil. Aquinas, for instance, argued: “[Human justice] puts to death those who are dangerous to others.”⁶⁷ The moral permissibility of capital punishment as a defensive measure, moreover, was acknowledged by John Paul II in his argument that contemporary penal institutions tend to make capital punishment irrelevant as a defensive measure.⁶⁸

65. AQUINAS, *SUMMA, Part II of the Second Part*, at q. 70 a. 1, ad 2 (“A man should by no means give evidence on matters secretly committed to him in confession, because he knows such things, not as man but as God's minister: and the sacrament is more binding than any human precept.”).

66. THE CODE OF CANON LAW: A TEXT AND COMMENTARY 691 (James A. Coriden, Thomas J. Green & Donald E. Heintschel, eds., Paulist Press 1986) (Canon 983.1: “The sacramental seal is inviolable; therefore, it is a crime for a confessor in any way to betray a penitent by word or in any other manner or for any reason.” Canon 984.2: “One who is placed in authority can in no way use for external governance knowledge about sins which he has received in confession at any time.”).

67. AQUINAS, *SUMMA, Part II of the Second Part*, at q. 64 a. 2, ad 2.

68. Pope John Paul II, *Evangelium Vitae*, *supra* note 5, at Nos. 55–56, pp. 98–100.

Moreover, “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”. Unfortunately it happens that the need to render the aggressor incapable of causing harm some-

This extremely rare case where a clerical judge is caught between God's rights and the defendant's is the *only* case that permits a judge to knowingly—and unintentionally—sentence the innocent to death; for only the confessional seal is able to forbid a judge from revealing his knowledge of the person's innocence. In all other cases, knowingly sentencing an innocent to death would involve not only the culpable failure to find a way to exonerate the innocent, but also the wicked intention to execute the innocent. After all, as Aquinas pointed out, if this were not the case, those who condemned the martyrs and those who executed them would not be culpable.⁶⁹

The practice of clerics issuing capital sentences was condemned in 1215 by the Fourth Lateran Council.⁷⁰ Since this prohibition followed the prohibition of clerics from assuming secular duties by the Third Lateran Council in 1179,⁷¹ clerical judges became able to issue only ecclesiastical

times involves taking his life. In this case, the fatal outcome is attributable to the aggressor whose action brought it about, even though he may not be morally responsible because of a lack of the use of reason.

This is the context in which to place the problem of the death penalty. . . . The primary purpose of the punishment which society inflicts is "to redress the disorder caused by the offence. . . ."

It is clear that. . . punishment. . . 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.

(citations and emphasis omitted).

69. AQUINAS, *SUMMA*, Part II of the Second Part, at q. 64 a. 6, ad 3.

70. Fourth Lateran Council (1215), canon 18, available at http://www.catholicculture.org/docs/doc_view.cfm?recnum=5339.

Clerics to dissociate from shedding-blood. No cleric may decree or pronounce a sentence involving the shedding of blood, or carry out a punishment involving the same, or be present when such punishment is carried out. If anyone, however, under cover of this statute, dares to inflict injury on churches or ecclesiastical persons, let him be restrained by ecclesiastical censure. A cleric may not write or dictate letters which require punishments involving the shedding of blood, in the courts of princes this responsibility should be entrusted to laymen and not to clerics. Moreover no cleric may be put in command of mercenaries or crossbow men or suchlike men of blood; nor may anyone confer a rite of blessing or consecration on a purgation by ordeal of boiling or cold water or of the red-hot iron, saving nevertheless the previously promulgated prohibitions regarding single combats and duels.

71. Third Lateran Council (1179), canon 12, available at http://www.catholicculture.org/docs/doc_view.cfm?recnum=5337.

Let clerics not presume to take upon themselves the management of towns or even secular jurisdiction under princes or seculars so as to become their ministers of justice. If anyone dares to act contrary to this decree, and so contrary to the teaching of the Apostle who says, No soldier of God gets entangled in secular affairs, and acts as a man of this world, let him be deprived of ecclesiastical ministry, on the grounds that neglecting his duty as a cleric he plunges into the waves of this world to please its princes. We decree in the strictest terms that any religious who presumes to attempt any of the above-mentioned things should be punished.

This prohibition struck at the medieval heart of lay investiture where feudal lords would appoint abbots and bishops and charge them with the financial, legal, social, and military obligations of vassals, e.g., supplying men-at-arms and hosting the lord's traveling parties. Ending lay investiture took a tremendous effort especially by four popes, namely, Gregory VII (d. 1085), Urban II (d.

sentences prescribing, for instance, prayers, pilgrimages, almsgiving, or excommunication in severe cases. Capital sentences were thenceforth issued and executed only by secular authorities.⁷²

Consequently, it has been centuries since the principle of material cooperation has permitted clerical judges to protect the seal of confession by issuing capital sentences for the innocent. Accordingly, this evil cannot now be tolerated by juridical prudence. It is thus not morally permissible for contemporary judges to knowingly sentence the innocent to die: to do so would intentionally violate the inalienable right to life and attack the societal common good. Pope John Paul II was very clear on this point: “[C]ivil authorities and particular individuals never have the authority to violate the fundamental and inviolable rights of the human person.”⁷³ Quite right, Aquinas would have agreed, since juridical authority is ultimately a moral authority based on promoting a common good that is protective of individual well-being and the natural rights whereby one flourishes. Since life is not only naturally suitable for human beings, but is also a pre-requisite for flourishing, it is evil to intentionally seek the innocent’s death. Consequently, the evil of intentionally sentencing the innocent to death can never be legitimately authorized: for evil can no more promote good than fire can promote ice.

An analogous but contemporary case involves the witness who could exonerate a defendant only by breaking the seal of confession. The analysis given here of juridical prudence would permit the priest to remain silent: his cooperation in the evil of condemning the innocent would be material and worth tolerating considering the obligation to keep God’s secrets and the greater evils that would befall the legally mandated violation of the confessional seal. Teresa Collett explains that these evils include the subordination of church to state, the violation of the penitent’s trust (that may well lead to his repudiation of religious belief), the betrayal of the Christian belief that each person is uniquely important to God regardless of the impact on others, the inability to follow the command of Christ to confess one’s sins without fear of human retaliation, the excommunication of the priest who discloses a penitent’s secrets, the instantiation of the idea that the only bar-

1099), Innocent II (d. 1143), and Innocent III (d. 1216). See MARSHALL W. BALDWIN, *THE MEDIEVAL CHURCH* (1953); *CHURCH AND STATE THROUGH THE CENTURIES: A COLLECTION OF HISTORIC DOCUMENTS WITH COMMENTARIES* (Sidney Z. Ehler & John B. Morrall trans. & eds., 1954); BRIAN TIERNEY, *THE CRISIS OF CHURCH AND STATE (1050-1300)* (1964).

72. BALDWIN, *supra* note 71, at 65. As noted by the internet version of the *Catholic Encyclopedia* in the topic of “Inquisition,” it was not unusual for secular authorities in the middle ages to legislate temporal punishments for spiritual offenses. For instance, in 1224, Frederick II legislated “that heretics convicted by an ecclesiastical court shall, on imperial authority, suffer death by fire.” NewAdvent.org, *Catholic Encyclopedia, Inquisition*, available at <http://www.newadvent.org/cathen/08026a.htm> (last accessed Mar. 27, 2007). For an overview of the medieval world, see FRIEDRICH HEER, *THE MEDIEVAL WORLD: EUROPE 1100-1350* (Janet Sondheimer trans., 1962) or JOHN B. MORRALL, *POLITICAL THOUGHT IN MEDIEVAL TIMES* (1980).

73. Pope John Paul II, *Veritatis Splendor*, *supra* note 50.

rier to the world's evils is the human will, the betrayal of the Catholic belief that God's grace enables the penitent to reform, and the betrayal of the belief that the priest is God's representative—that confession is actually between oneself and God.⁷⁴

Furthermore, justice would not be served by legally obligating priests to reveal the secrets of confession: it would wreck havoc with the rules of evidence, excessively tangle church and state, and infringe the free exercise of religion. Moreover, if revealing such secrets were to become routine and if the word of a priest were to suffice for a conviction in a court of law, unbearable pressures could be brought against priests to identify scapegoats for desperate criminals. Indeed, it would even be possible for the wily criminal to confess to crimes while impersonating another in the hope that the other would then be convicted.

In any case, American jurisprudence defends the right of the priest to keep a penitent's secrets on standard First Amendment grounds because free exercise demands it.⁷⁵ God, according to Catholicism, also demands it. Accordingly, American jurisprudence and Catholic social teaching concur that the sacramental seal of confession is inviolable, especially if it is the case that the founders of American democracy passed the First Amendment as a way to protect the unsurpassable obligations of those who believed in God.⁷⁶ Either way, religious free exercise remains a key parameter of juridical prudence.

In conclusion, we have seen that contrary to appearances, Aquinas' jurisprudence of the common good is consistent both internally and with the jurisprudence of inviolable human rights championed by John Paul II. Aquinas and John Paul II agree that the parameters of juridical prudence are established by an organic conception of the societal common good that honors individual well-being, inalienable human rights, and the natural moral law. As a result, they agree that the common good is always impermissibly attacked by the intentional killing of the innocent. They also agree that although evil may never be intentionally sought, evil may be tolerated—but only when greater evils would be mitigated and only when the conditions of material cooperation or double effect are met.

74. See Teresa Stanton Collett, *Sacred Secrets or Sanctimonious Silence*, 29 LOY. L.A. L. REV. 1747 (1995-1996).

75. Cf. Jacob M. Yellin, *The History and Current Status of the Clergy-Penitent Privilege*, 23 SANTA CLARA L. REV. 95 (1983); Anthony Merlino, *Tightening the Seal: Protecting the Catholic Confessional From Unprotective Priest-Penitent Privileges*, 32 SETON HALL L. REV. 655 (2002); Julie Ann Sippel, *Priest-Penitent Privilege Statutes: Dual Protection in the Confessional*, 43 CATH. U. L. REV. 1127 (Summer 1994); Faye A. Silas, *Embattled Clergy: Is Confession Always Private?*, A.B.A. J. 36 (Feb. 1986); and Charles Toutant, *Defense Tries New Tactic to Suppress Murder Confession to Trooper/Cleric*, 6/11/2001 N.J. L.J. 7 (June 11, 2001).

76. R. Mary Hayden Lemmons, *Tolerance, Society, and the First Amendment: Reconsiderations*, 3 U. ST. THOMAS L.J. 75 (2005); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990).

Determining whether a certain set of contingencies meets, or fails to meet, the conditions for the principles of material cooperation and double effect requires determining whether the act in question is intrinsically evil: whether the evil effect is directly intended, whether the evil effect is a means for establishing the good effect, whether the evil effect outweighs the good effect, and whether the act in question is a last resort. Making these determinations requires the public official as well as the citizen to rely on objective morality, that is, the natural law. The natural law establishes not only the authoritative and obligatory character of human law, but also the parameters of juridical prudence, which include the organic and societal common good. This good in turn includes honoring fundamental human rights, including the right to life, the right to avoid formally cooperating in evil, the right of conscientious objection, and the right to religious free exercise whereby one discharges one's unsurpassable duties to God, including any pertaining to the sacrament of confession.

In brief, the parameters of juridical prudence set by the natural law jurisprudence of Aquinas and John Paul II require both citizens and state officials to pursue the common good and protect human rights, while tolerating only those unintentional evils identified as unavoidable by the principle of double effect.