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## The New Natural Lawyers, Contraception, Capital Punishment, and the Infallibility of the Ordinary Magisterium

IN THE YEARS following *Humanae Vitae*, the encyclical enjoyed little support from Catholic theologians; but a few moral theologians, led by Germain Grisez, heroically came to its defense.<sup>1</sup> These theologians attempted to use their New Natural Law theory (NNLT) in the service of the magisterium, but their arguments proved inadequate to stem the tide of dissent. In 1978, John C. Ford and Germain Grisez took a new approach, publishing an article arguing that the Church's teaching on the immorality of artificial contraception was taught infallibly by the ordinary universal magisterium. Their article was so successful that Russell Shaw's 1978 summary of their argument is still on the United States Conference of Catholic Bishops website.<sup>2</sup> The NNLT, however, has led a number of its proponents to hold views on other theological issues that are clearly contrary to the teaching of Sacred Scripture and the doctrine of the Catholic Church, most notably on the issue of capital punishment.<sup>3</sup> The NNL theorists do not merely argue that capital punishment should prudentially be set aside, given the numerous problems associated with its contemporary use, but that capital punishment should be condemned as intrinsically evil. Ironically, many of the arguments that

these theologians now advance in defense of their teaching on capital punishment are essentially the same arguments made in support of contraception by those engaged in dissent in the 1970s and '80s. This article will argue that the received Catholic teaching on capital punishment has been proposed infallibly by the ordinary universal magisterium and that the case that Ford and Grisez made against contraception can be made even more strongly for capital punishment. To this end, this article will first explain the New Natural Law theorists' view on the magisterial consensus on moral issues and then explain the teaching of *Lumen Gentium* 25 on the ordinary universal magisterium. Following the example of Ford and Grisez, the article will then examine the various sources for knowing the acts of the ordinary magisterium such as the papal magisterium, the Fathers of the Church, canon law, and the consensus of theologians to show that the criteria set forth in *Lumen Gentium* have indeed been met with respect to capital punishment. Finally, this article will examine some of the theological problems that result from the NNL theorists' position on capital punishment.

### *Ordinary Universal Magisterium*

This article will assume Ford and Grisez's account of the ordinary universal magisterium, and will briefly summarize their explanation of the Second Vatican Council's explanation.<sup>4</sup> In *Lumen Gentium* 25, Vatican II articulated the conditions under which the ordinary universal magisterium can teach in a definitive way: "Although the bishops individually do not enjoy the prerogative of infallibility, they nevertheless proclaim the teaching of Christ infallibly, even when they are dispersed throughout the world, provided that they remain in communion with each other and with the successor of Peter and that in authoritatively teaching on a matter of faith and morals they agree in one judgment as that to be held definitively."<sup>5</sup>

Theologians see in this text four conditions to be met in determining whether an infallible act of the ordinary universal magiste-

rium exists. The first condition is that although dispersed throughout the world, the bishops are in hierarchical communion with one another and with the pope.<sup>6</sup> The second condition is that the bishops teach authentically on a matter of faith or morals. This means that each bishop must intend to speak with the authority of his office and not merely as a private theologian or as a believer. The phrase “faith and morals” was customary by the sixteenth century but admitted a wide range of meanings.<sup>7</sup> In contemporary theology, the term “faith” refers to those matters of belief that pertain to the deposit of faith. The term *mores* signifies propositions about those acts that are to be done or avoided. The third condition is that the bishops agree in one judgment about a doctrine.

Lastly, bishops must propose the teaching as something “to be held definitively by all the faithful.” This condition requires that the teaching is proposed as something the faithful have an obligation to accept; it not something that is optional. As Grisez correctly notes, “In the case of moral teaching, however, it is unlikely that those proposing the teaching will explicitly present it as something to be intellectually accepted as true; it is more likely that they will leave this demand implicit and will propose it as a norm which followers of Jesus must try to observe in their lives.”<sup>8</sup> It is also the case that the moral teaching could be proposed simply as the express content of scripture or as part of the content of revelation, which would also be sufficient for showing that it is proposed to be definitively held (*definitive tenenda*). Thus, Ford and Grisez rightly argue that one does not necessarily find explicit language concerning the definitive nature of the teaching; instead, they note that there are other ways that the magisterium and theologians can indicate that it is definitive. They write,

If one considers the explicit appeals made to Gen. 38:9–10 together with the implicit appeals made to the same passage, to Rom. 1:26–27, and to the Ten Commandments, one realizes that most who handed on the Catholic teaching on

contraception claimed the authority of Scripture, which they believed to be the authority of divine revelation, in support of this teaching. Whether one thinks this claim was valid or not—a question we are not considering here—no one can deny that those who made it proposed the teaching on behalf of which they made it as a moral norm to be held definitively.<sup>9</sup>

Thus, when the above conditions are met, appeals to scripture are sufficient for showing that a teaching was being proposed as definitively held.

Sources for authentic acts of the ordinary universal magisterium can be found in the following places: 1) ordinary papal magisterium, 2) Fathers of the Church, 3) consensus of theologians, 4) doctors of the Church, 5) approved theological texts, 6) pastoral instructions of bishops, and 7) approved catechisms.<sup>10</sup> There are a number of steps in the practical order in identifying these “non-defining acts,” since the universality of the teaching must be established both synchronically and diachronically.<sup>11</sup> Therefore, one must sift through the various acts of the ordinary magisterium in order to determine if there is an ordinary universal teaching, a daunting process given the sheer volume of material to consider.

### *New Natural Law Theorists and Consensus on Moral Issues*

In 1965 Judge John T. Noonan published *Contraception: A History of Its Treatment by the Catholic Theologians and Canonists*.<sup>12</sup> In this detailed account, Noonan traced out the history of the doctrine about contraception, and at the end he claimed that in the tradition “no Catholic theologian has ever taught, ‘Contraception is a good act.’ The teaching on contraception is clear and apparently fixed forever.”<sup>13</sup> He went on, however, to argue that there could be a development of doctrine that would contradict the received teaching and then called for just such a development.<sup>14</sup> When Ford and Grisez wrote their famous article, “Contraception and the Ordinary Universal Magisterium,” they of-

ferred surprisingly little new information and simply claimed to find in Noonan's own work "substantial evidence for the universality of the Catholic Church's teaching on contraception up to 1962."<sup>15</sup> Even so, Ford and Grisez did a fine job of setting the case for the Church's teaching on contraception being infallible. Moreover, they were perfectly clear that "such teachings, once given, cannot later be contradicted by the Church as a whole. Of course, such teachings and even defined doctrines are open to development by the Church and can be contradicted by the erroneous opinions of members of the Church, including members of the magisterium."<sup>16</sup> Indeed, a number of the New Natural Lawyers have followed Ford and Grisez, holding not only to the infallibility of the Church's teaching on contraception but also to other moral issues such as the immorality of masturbation.<sup>17</sup>

The New Natural Lawyers, however, have not been so good in working out the nature of the magisterial consensus on capital punishment. In volume one of *The Way of the Lord Jesus*, Grisez recognizes that the Church has consistently defended the use of capital punishment, but his entire treatment of the tradition consists of two sentences and two footnotes.<sup>18</sup> From this inadequate treatment, he concludes that this "does not constitute teaching infallibly proposed by the ordinary magisterium."<sup>19</sup> It is E. Christian Brugger, however, who has worked through the magisterial tradition in his *Capital Punishment and Roman Catholic Moral Tradition*, now in its second edition. This work is surprisingly similar to Noonan's work insofar as he finds the tradition virtually unanimous. He is willing even to speak of the "cumulative consensus of patristic, medieval, and modern ecclesiastical writers on the morality of capital punishment."<sup>20</sup> He can also speak of the "patristic consensus," "a Catholic consensus," and "the overwhelming consensus."<sup>21</sup> Amazingly, after providing evidence for consensus on this teaching Brugger, like Noonan before him, goes on to argue that there should be a "development" of doctrine and that the new formulation of this doctrine should contradict the received teaching.<sup>22</sup> Brugger explicitly hopes that capital punishment will be condemned as intrinsically evil.<sup>23</sup>

For Brugger this “consensus” has no real binding authority, and like dissenting theologians he argues that since there is no solemn definition infallibly defining the church’s traditional doctrine on capital punishment, it is subject to change.<sup>24</sup> Moreover, in both the first and second editions of his book, he argues that the doctrine on capital punishment only meets three of the four conditions necessary for an exercise of the ordinary universal magisterium and cannot therefore be infallible.<sup>25</sup> He denies that the fourth condition, that the teaching be “one that has to be definitively held” (*definitive tenenda*), has been met<sup>26</sup> and offers two reasons for this. First, while he freely admits that *some* of the Fathers, doctors, popes, and theologians have proposed this teaching definitively, he denies that they all have.<sup>27</sup> Second, Brugger argues that in order for a doctrine to be proposed as something to be definitively held, the consensus of theologians is inadequate; the “bishops themselves must explicitly and authoritatively teach the same.”<sup>28</sup>

This second point is a theological novelty. If true, it would render any proof from the ordinary universal magisterium impossible without a written or recorded statement from almost every bishop in the world. This condition has never been met for any doctrine, including contraception, outside an ecumenical council. Moreover, it is contrary to Pius IX’s teaching in *Tuas libenter* that infallible statements are not limited to those matters that have been defined by explicit decrees of ecumenical councils or by the Roman pontiffs, “but would also have to be extended to those matters transmitted as divinely revealed by the ordinary Magisterium of the whole Church dispersed throughout the world and, for that reason, held by the universal and constant consensus of Catholic theologians as belonging to the faith.”<sup>29</sup>

There are two very serious problems with Brugger’s work. First, it is not as thorough as Noonan’s; Brugger fails to examine significant portions of the evidence. He only examines the Fathers of the Church when they speak of capital punishment in the New Law, but he fails to examine the Fathers of the Church on the divine commands to kill in the Old Testament. This is an important oversight,

since his view is that capital punishment is intrinsically evil. If, for example, the Fathers unanimously held that there were divine commands to kill in the Old Testament, then capital punishment could hardly be intrinsically evil. Moreover, he only examines, for example, the views of ten of the thirty-six doctors of the Church. Second, Brugger fails to pay consistent attention to the level of authority or theological note that various theologians, Fathers, and doctors attached to the teaching. This is a critical point, since what is under consideration is not just the universality of the teaching but also the teaching's level of authority. He has a long discussion of Aquinas's views on capital punishment, for example, but does not once tell us that Aquinas thought that the moral goodness of capital punishment was part of the content of revelation.<sup>30</sup>

### *Ordinary Papal Magisterium*

Because the pope is "the supreme shepherd and *teacher* of all the faithful,"<sup>31</sup> his teachings are a significant source for determining the ordinary universal magisterium's teachings on a particular question. Ford and Grisez only mention three popes, Pius XI, Pius XII, and Paul VI, who taught against contraception, and they thought that this was sufficient witness to establish the ordinary universal magisterium.<sup>32</sup> In contrast, in *The Way of the Lord Jesus*, Grisez mentions only the teaching of Pope Innocent III, which is clearly insufficient evidence for dismissing the teaching on capital punishment as infallible.<sup>33</sup> Brugger asserts that there are seven popes who have affirmed the morality of capital punishment: Innocent I, Innocent III, Leo X, Pius V, Leo XIII, Pius XI, and Pius XII.<sup>34</sup> Brugger, however, is inaccurate that there are only seven popes who have affirmed the morality of capital punishment. He has come to this conclusion by choosing to comment only on those papal teachings that approve of capital punishment since the institution of the new dispensation. Some popes have simply said nothing about a use of capital punishment in the new dispensation but have affirmed that God divinely commanded it in the Old Law.

The first known papal discussion of capital punishment occurred in A.D. 405, when Pope Innocent I (d. 417) responded to a question posed by Exsuperius, the bishop of Toulouse. Exsuperius had asked a question about whether baptized Christians who were in positions of authority could participate in putting others to death. Innocent answered that certain powers “had been granted by God, and for the punishment of malefactors, the sword was permitted.”<sup>35</sup> The pope clearly considered this part of divine revelation, and even Brugger admits that Innocent was teaching this “to be definitively held.”<sup>36</sup> Pope Gregory the Great (c. 540–604) does not speak of the death penalty’s use in the New Law, but he clearly thinks that it is part of the Old Law, even referring to “sacred law” (*lex sacra*) penalizing certain crimes with death.<sup>37</sup> In the thirteenth century, Pope Innocent III required Waldensians who wished to be reconciled to the Church to recite a creed that contained an affirmation of the state’s right to carry out the death penalty.<sup>38</sup> One can hardly imagine a worse punishment than remaining outside the Church for refusing to profess what was intrinsically evil.

In the sixteenth century, the popes not only rejected the idea that capital punishment is evil but also advocated its legitimacy and even appropriateness in some cases. In 1520, Pope Leo X issued the bull *Exsurge Domine*, in which he condemned the proposition “That heretics be burned is against the will of the Spirit” (proposition 33).<sup>39</sup> Most older theologians consider this document to contain a series of infallible condemnations.<sup>40</sup> Pope Paul III’s constitution, *Licet ab initio* (July 21, 1542), established the Supreme Sacred Congregation of the Roman and Universal Inquisition, the predecessor to the Congregation for the Doctrine of the Faith, specifying that the punishments that could be meted out to heretics included imprisonment, confiscation of goods, and execution.<sup>41</sup> In two separate bulls, *Cum primum* (April 1, 1566) and *Horrendum illud scelus* (August 30, 1568), St. Pius V (r. 1566–1572) ordered that sodomitic clergy be handed over to the secular authorities to be executed.<sup>42</sup> Pius V also issued a bull enacting the death penalty for those who harbored murderers and bandits.<sup>43</sup> Pope Sixtus V (r. 1585–1590) issued three bulls decreeing

the death penalty for incest, public adultery, and abortion.<sup>44</sup> Finally, it should be noted that the Papal States had its own executioner for hundreds of years.<sup>45</sup>

In the nineteenth and twentieth centuries, the popes continued to teach that capital punishment is a legitimate form of punishment. Leo XIII affirmed that “divine law” allows the state to execute malefactors.<sup>46</sup> One will note again that the pope clearly recognized that this teaching is part of “divine law.” St. Pius X, Pius XI, and Pius XII all approved of a state’s right to kill criminals, grounding their approval in divine revelation.<sup>47</sup> Pope St. John Paul II in *Evangelium Vitae* reaffirmed that capital punishment was morally good in certain circumstances. He went on to argue that “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>48</sup> In 1997, he modified the catechism’s discussion on capital punishment to bring it in line with his teaching in *Evangelium Vitae*. Brugger has tried to argue that John Paul’s argument really involves an acknowledgment that capital punishment is intrinsically evil. This cannot be the case for two reasons. First, John Paul only makes a claim about “today,” not about the intrinsic morality of capital punishment. Second, its restricted use is only asserted on the basis of “steady improvements” of the penal system, and of course there is no guarantee that such improvements will continue into the future. Benedict XVI repeated John Paul’s teaching in the *Compendium of the Catechism of the Catholic Church*.<sup>49</sup>

Pope Francis has taught on the subject of capital punishment on at least five occasions,<sup>50</sup> and he is frequently interpreted as reversing two thousand years of teaching. This interpretation may seem plausible, but it is an unlikely one.<sup>51</sup> Perhaps his strongest statement against the death penalty occurred in an allocution to mark the twenty-fifth anniversary of the apostolic constitution *Fidei Depositum*, which promulgated the “Catechism of the Catholic Church.” In this allocution Francis states that “the death penalty is an inhumane measure that, regardless of how it is carried out, abases human dignity. It is per se contrary to the Gospel.”<sup>52</sup>

At first glance this is a repudiation of the death penalty as contrary to the gospel and intrinsically evil. Francis goes on, however, to assert that he is “not *in any way* (emphasis mine) contradicting past teaching.”<sup>53</sup> If we are to take him at his word, then this first interpretation of Francis’s words cannot be true since papal teaching from Innocent I through Benedict XVI taught that the death penalty is not intrinsically evil and is part of Revelation.

On August 1, 2018, Francis approved a revision of n. 2267 of the catechism. He ordered that the following three paragraphs be inserted:

Recourse to the death penalty on the part of legitimate authority, following a fair trial, was long considered an appropriate response to the gravity of certain crimes and an acceptable, albeit extreme, means of safeguarding the common good.

Today, however, there is an increasing awareness that the dignity of the person is not lost even after the commission of very serious crimes. In addition, a new understanding has emerged of the significance of penal sanctions imposed by the state. Lastly, more effective systems of detention have been developed, which ensure the due protection of citizens but, at the same time, do not definitively deprive the guilty of the possibility of redemption.

Consequently, the Church teaches, in the light of the Gospel, that “the death penalty is inadmissible because it is an attack on the inviolability and dignity of the person,” and she works with determination for its abolition worldwide.<sup>54</sup>

Cardinal Ladaria in the accompanying commentary states bluntly that “the new formulation of number 2267 of the *Catechism* expresses an authentic development of doctrine that is not in contradiction with the prior teachings of the Magisterium.”<sup>55</sup> If we take the accompanying commentary by Cardinal Ladaria seriously and not cynically, we must conclude that the new teaching does not contradict

the previous 2000 years of magisterial teaching on the death penalty. Furthermore, Francis does not propose this teaching as a dogmatic truth, but only as an application of Christian doctrine for a particular time and place.<sup>56</sup> This is made clear in the second paragraph that begins “today.” If it had been proposed dogmatically it would not be limited to “today” but would have been evil in all times and places.

### *Catechisms*

In Ford and Grisez’s article on contraception, they limited their survey of catechisms to the *Roman Catechism*. Although this catechism condemns contraception, it does not cite anything in particular for its authority on the teaching. For Ford and Grisez, the doctrine’s mere presence in the catechism is sufficient proof of the ordinary universal magisterium’s teaching. When Brugger looked at catechisms to determine the ordinary universal magisterium’s teaching on capital punishment, he too turned to the *Roman Catechism* as well as to the catechisms of Canisius and Bellarmine, all of which uphold the use of capital punishment in certain circumstances. This sparse treatment of catechisms in general by Grisez and Brugger is deeply problematic since catechisms are an important source for the faithful to know those things taught by the ordinary magisterium.<sup>57</sup>

The *Roman Catechism* of 1566, authorized by the Council of Trent and prepared under St. Pius V, treats capital punishment when it discusses the fifth commandment. This catechism lists five exceptions to the commandment, including capital punishment. It goes on to note that in the Sacred Scriptures one finds “a vindication of this right.”<sup>58</sup> Given this information, the treatment of the issues of contraception and capital punishment by>NNL theorists, including Grisez and Brugger, is extraordinary. While Grisez is willing to take the *Roman Catechism*’s condemnation of contraception with no reference to an authority beyond itself, Brugger refuses to accept as authoritative a teaching espoused by three times as many catechisms, almost all of which claim divine revelation as their source of authority. Recall

that Grisez believed that Fathers' appeals to scripture are sufficient for showing that a teaching was being proposed as definitively held. Moreover, from the sixteenth to the twentieth centuries, at least eighteen catechisms have taught a doctrine identical to that of the *Roman Catechism*.<sup>59</sup>

### *Canon Law*

Canon law is another important source for discovering the ordinary universal magisterium, especially since the canons often receive papal approbation. As Ford and Grisez have rightly pointed out, canon law "functioned in moral formation analogously to the way in which creeds function in the handing on of the essentials of doctrine: as creeds summarize saving truth, canon law from the Middle Ages until 1917 codified moral formation."<sup>60</sup> In Brugger's work he refers to only a few patristic canons, to Gratian, and to one canonical textbook, failing again to find numerous sources and explain their significance. He failed to find the *Lex Dei siue mosaicarum et romanarum legum collation* (c. 392–95) and medieval compilations such as Burchard's (c. 1021), both of which taught that God in the Old Law required the death of individuals for certain offenses and that he decreed its justness in the New Law for certain offenses.<sup>61</sup> While Brugger did comment on *Corpus Iuris Canonici*, he failed to explain that canon law from 1500 until the 1917 code was based on the *Corpus Iuris Canonici*, which included Gratian's work plus the *Liber extra* (1234), *Liber Sextus* (1298), and the *Constitutiones* (1317). Ultimately, this text was the code for the universal church and repeatedly received approbation from popes. The code of canon law included a canon acknowledging the state's right to inflict capital punishment, clearly stating that "to punish murderers [with death], those who violate the divine law, and poisoners is not the effusion of blood, but is the ministry of law."<sup>62</sup>

Moreover, canon law also acknowledged the state's right to inflict capital punishment for the crime of heresy. The *Liber Sextus*, for

example, officially sanctioned the observance of the most severe ancient penal laws against heretics, laws that were revived by the Holy Roman Emperors and made obligatory during the thirteenth century by a long succession of popes, including Boniface VIII.<sup>63</sup>

### *Fathers of the Church*

Noonan had cited approximately thirty Fathers and anonymous patristic texts in support of his patristic consensus. Ford and Grisez in their article only refer to four Fathers. They state, "Not only Jerome and Augustine but also certain Eastern Fathers such as Epiphanius and Chrysostom condemned contraception." In a footnote, they write, "Ambrose also is mentioned as perhaps condemning contraception."<sup>64</sup> Thus, their case is based on a mere five Fathers of the Church. In *The Way of the Lord Jesus*, Grisez only discusses the views of one Father, St. Augustine of Hippo (c. 354–430), on capital punishment.<sup>65</sup> Brugger devotes an entire chapter, entitled "The Patristic Consensus," to the Fathers, discussing some twenty-two Fathers and anonymous patristic texts.<sup>66</sup> His conclusion is similar to Noonan's, for he admits that not a single Father affirmed that capital punishment is intrinsically evil.<sup>67</sup> In fact, most of the Fathers who discuss the issue seem to argue that it cannot be rejected without rejecting Sacred Scripture. Brugger, however, has again failed to examine all of the relevant patristic texts on the death penalty. He only examines patristic texts that discuss the permissibility of the death penalty by the officials of the Roman Empire, but he completely ignores those texts that affirm that God commanded some rational creatures to act as His ministers by killing men. Origen, Ambrose, Ephrem the Syrian all acknowledge that God ordered Abraham to kill Isaac.<sup>68</sup> Tertullian, Athanasius, Ambrose, and John Chrysostom taught that God sent an angel to kill 185,000 men in an Assyrian camp (2 Kings 19:35).<sup>69</sup> Such examples could easily be multiplied, and they are important since they help to contextualize why the Fathers did not find capital punishment intrinsically evil for the authorities in the Roman

Empire. These texts clearly show that God used his ministers to kill others. Even without this data, Brugger concludes, “The precepts of the Old Testament, together with the commonly accepted interpretation of Romans 13:1–4, provided a knockdown argument against rejecting the death penalty.”<sup>70</sup>

### *Consensus of Theologians*

Although theologians qua theologians are not part of the magisterium, their consensus on a particular doctrine can be a sign that something has been proposed infallibly by the ordinary universal magisterium.<sup>71</sup> Ford and Grisez put forth forty-two examples of texts by nineteenth- and twentieth-century theologians that support their thesis. From this number, they conclude that there was a consensus of modern theologians in the nineteenth and early twentieth centuries on contraception. In *The Way of the Lord Jesus*, Grisez comes close to admitting that there is a consensus of theologians on the death penalty.<sup>72</sup> Brugger, too, admits that “the first thing a reader notices in these works is the overwhelming consensus on the morality of capital punishment.”<sup>73</sup> Brugger’s sample is deficient, however, since he only examines fifteen manuals of moral theology, a dictionary of moral theology and canon law, a textbook of canon law, and a treatise on dogmatics. This is twenty-four less than were examined in the Ford and Grisez article.

Using Ford and Grisez’s list of forty-two theologians, we were able to find forty-three theologians writing from the eighteenth through the mid-twentieth centuries who approved of capital punishment. Of these forty-three, we found that twenty-nine of these explicitly asserted that the teaching is scriptural, while most of the remaining texts appealed to natural law.<sup>74</sup> These theologians often appealed to Exodus 22 and Romans 13 but also to Genesis 9:6, Numbers 35, John 19, Leviticus 24, or Revelation 13. Others simply appealed to the “Old Testament” or “Scripture.” Moreover, not a single one of these theologians suggested in any way that capital punishment is

intrinsically evil. A number of these theologians identified the belief that capital punishment is per se evil to be an error associated with Waldensians, Anabaptists, or Quakers. Almost all of the remaining theologians argued for the correctness of capital punishment on the basis of natural law, which would still entail that they thought that it was part of God's law.

The consensus of doctors of the Church is a special category of the consensus of theologians. Brugger only examines the views of ten of the thirty-six doctors of the Church and limits his examination to their discussion of the New Law. There are at least eighteen doctors who have explicitly affirmed that capital punishment was approved, almost always acknowledging that it is the express teaching of scripture. Thus Ambrose (c. 340–397), who recommended mercy for those condemned, was clear that the authority to execute was sanctioned by Paul in Romans 13:4, and Augustine followed him in this.<sup>75</sup> John Chrysostom (c. 347–407), Jerome (c. 343–420), and Ephrem the Syrian (c. 306–373) all upheld the death penalty's use, basing their teaching on scripture,<sup>76</sup> while Isidore of Seville (c. 560–636) clearly assumed that this is the case.

The great medieval doctors accepted the teaching of scripture and the Fathers on the moral goodness of the death penalty in some circumstances. In his commentary on Genesis, the Venerable Bede (672/3–735) affirmed that in Genesis 9:6 God requires the death penalty.<sup>77</sup> Peter Damian (c. 1007–1072) relied on both the Old and New Testaments to encourage political leaders to administer the sword to protect their people, citing Romans 13:4 as support.<sup>78</sup> Bernard of Clairvaux (c. 1090–1153) also referenced Rom. 13:4 in support of the death of criminals.<sup>79</sup> Bonaventure (c. 1217–1274), Albert the Great (c. 1200–1280), and Thomas Aquinas (1225–1274) considered capital punishment part of the divine law.<sup>80</sup>

The doctors of the sixteenth, seventeenth, and eighteenth centuries were no less clear. Thus Robert Bellarmine (1542–1621), Peter Canisius (1521–1597), and Lawrence of Brindisi (1559–1619) all considered the state's right to execute malefactors as part of the

divine law.<sup>81</sup> Perhaps the most notable doctor is Alphonsus Liguori (1696–1787) who plainly stated, “Other than the case of necessary defense, of which more below, no one except public authority may lawfully do so, and then only if the order of the law has been observed, as is made clear in Exodus 22 and Romans 13.”<sup>82</sup>

### *The New Natural Law Theory and Scripture*

What has led to this radical rereading of the tradition is not a reconsideration of the evidence but rather the>NNLT’s peculiar view of basic human goods. According to>NNL theory there are a number of basic human goods, and all of these goods, including procreation and human life, are both incommensurable and inviolable.<sup>83</sup> Grisez and his followers were able to argue in favor of the Church’s prohibition on artificial contraception since contraception is contrary to the basic human good of procreation.<sup>84</sup> According to the>NNL theorists, capital punishment is contrary to the basic human good of life and therefore must also be intrinsically evil. Since life is incommensurable, it cannot be destroyed for the sake of any other basic human good, such as religion or justice.>NNL theorists have found themselves arguing against both Sacred Scripture and the Church’s teaching on capital punishment, since both of these have overwhelmingly affirmed capital punishment.

At its core,>NNL’s approach to capital punishment is clearly contrary to Sacred Scripture. Scripture repeatedly affirms that God willed the death of individuals both immediately and mediately. Thus God killed, for example, the entire human population other than Noah and his family (Gen 6:7), the inhabitants of Sodom and Gomorrah (Gen 19:4–5), and Onan (Gen 38:9–10). Moreover, scripture repeatedly affirms that God also commanded men and angels to take the lives of malefactors. Thus, God willed the deaths of those who engaged in 1) murder (Ex 21:12–14, 22–23; Lev 24:17; Num 35:16–21), 2) adultery (Lev 20:10–21; Deut 22:22), 3) bestiality (Ex 22:19; Lev 20:15–16), 4) incest (Lev 18:6–17; 20:11–12,14), 5) sodomy (Lev

18:22; 20:13), and 6) fornication (Lev 21:9; Deut 22:20–21). This incompatibility between NNL theory and Sacred Scripture is in fact the strongest objection to NNL theory on capital punishment and also to their current position on the basic human good of life. If God both willed and commanded these acts, as scripture witnesses, then capital punishment cannot be intrinsically evil. Moreover, it is clear from these texts that the good of human life is not incommensurable but can be subordinated to other goods such as religion.

NNL theorists are clearly embarrassed by these texts and have attempted to explain them away. Grisez dismisses Old Testament passages on capital punishment by ascribing them both “to the inadequacy of the mentality of God’s people”<sup>85</sup> and to an immaturity in their understanding of the divine will. It is not at all clear that he really considers these laws to be divine commands. He is even willing to speak of “error” in the scriptures, although he assures his reader that it was a “sincere” one.<sup>86</sup> Therefore, he naturally concludes that the Old Testament “should not be used to justify choices to kill within the more adequate perspective of Christian morality.”<sup>87</sup> In Grisez’s early work, it is unclear whether he considers capital punishment intrinsically evil or simply done away with in the new dispensation.<sup>88</sup> Brugger frankly acknowledges that God did decree death in the Old Testament, and he even admits that “there can be hardly any doubt that the practice was considered legitimate by New Testament authors.”<sup>89</sup> He then goes on to question traditional readings of texts such as Genesis 9:6 and Romans 13:4 and proposes alternative possible explanations of these biblical texts in order to cast doubt on the traditional interpretation.<sup>90</sup> Brugger goes beyond Grisez’s early work in that he clearly states that capital punishment is intrinsically evil.<sup>91</sup> If the NNL theorists are correct that capital punishment is intrinsically evil, then it has always been intrinsically evil. Therefore, Brugger’s position must be that either God did not command these things and they are actually errors in Sacred Scripture à la Grisez, or God has in fact commanded that which is intrinsically evil. Both possibilities are heretical.<sup>92</sup>

Christopher O. Tollefsen has most clearly recognized the chal-

lence that the scriptures pose to their position and has tried to harmonize the scriptures with the NNL theory. He chooses the binding of Isaac story to illustrate just how one could interpret these texts, offering two possible readings of the divine command to kill Isaac.<sup>93</sup> First, Tollefsen argues that God did not really order Abraham to intentionally kill Isaac but instead gave Abraham the power to administer justice in a single act without death. Second, he thinks that it is entirely believable that Abraham did not think that he was being ordered to kill Isaac, since it would have been impossible to kill Isaac and for God still to be faithful to his promise.

Tollefsen's account, however, is clearly contrary to the literal sense of the text, and there are a number of other problems with his reading of Genesis. First, the divine command is presented as a "test" for Abraham, and the text is clear that it would be a difficult one for Abraham, since he loved his son. This is made clear in the text when "your son" is followed by "your only son," and "whom you love." If Tollefsen is correct that Abraham did not understand the divine command as a command to kill his son, one wonders what precisely the "test" was and why it would have been difficult for him. Moreover, there is nothing in the text that lends itself to Tollefsen's reading of the divine command as an abstract order to administer justice; instead the command is to "offer him there as a burnt offering" (Gen 22:2). The term "burnt offering" (*lā'ōlāh*), the same used in the language of temple sacrifice, necessarily requires the death of that which was living.<sup>94</sup> The text clearly indicates that Abraham prepared the altar on which to slay his son and that he "took the knife to slay his son" (Gen 22:10). The term used here for knife (*hamma 'ākelet*) is the same term used in Judges 19:29 where a man uses his "knife" to butcher his concubine into twelve pieces.<sup>95</sup> Moreover, the term "slay" (*liš'hōt*) is used technically for the sacrificial slaughtering of animals.<sup>96</sup> Given these details, it would have been difficult to imagine a Jewish reader failing to comprehend that Abraham clearly intended the death of his son Isaac.

Tollefsen's account also contradicts the New Testament. Recall

that Tollefsen argues that God did not really order Abraham to kill Isaac intentionally but instead gave Abraham the power to administer justice in a single act without death. It is true that the account in Genesis does not give us any insight into what Abraham believed, and so perhaps Tollefsen believes that he can freely speculate about such matters. The book of Hebrews, however, does tell us what Abraham was thinking. Hebrews notes that Abraham “considered that God was able to raise men even from the dead” (Heb 11:19). Resurrection is only possible following death.

This points to one of the most troubling theological aspects of the NNL theorists: their inability to see that their theological and philosophical enterprise stands as subalternate to revelation. Theology is an attempt to explain the content of revelation. Tollefsen, for example, argues repeatedly that his view on capital punishment is actually more consistent with St. Thomas’s principles than Thomas is with himself. Tollefsen argues that when Aquinas states that “God in inflicting punishment does not intend the evil for those punished,”<sup>97</sup> he should really argue, if he wants to be consistent with himself, that God did not intend the evil of death in any respect. Tollefsen’s argument is misguided. Aquinas did not reach the conclusion of Tollefsen not because he was inconsistent but because for Thomas, theology must be consistent with the data of revelation.<sup>98</sup> As we saw above, Aquinas thought that capital punishment was part of both natural and divine law and that God did will death on individuals, just not for the sake of death.<sup>99</sup> The NNL theorists should remember that whatever they think they have discovered in the NNL theory, if it is in conflict with revelation, as their doctrine of capital punishment clearly is, then their theory must give way to the teaching of revelation. As the First Vatican Council makes clear, “Hence all believing Christians are not only forbidden to defend as legitimate conclusions of science such opinions that they realize to be contrary to the doctrine of faith, particularly if they have been condemned by the Church, but they are seriously bound to account them as errors that put on the fallacious appearance of truth.”<sup>100</sup>

*Conclusion*

It is clear that the received Catholic teaching on capital punishment has been proposed infallibly by the ordinary and universal magisterium and that the case that Ford and Grisez made for contraception can be made more strongly for capital punishment. In almost every area treated by Ford and Grisez—papal magisterium, catechisms, canon law, doctors of the Church, consensus of theologians, and Fathers of the Church—the case is stronger for capital punishment than it is for the Church's ban on contraception. Indeed, the NNL theorists have consistently failed to examine all the evidence for the legitimacy of capital punishment. In part, their lapses seem to be motivated by their predetermined conclusion that capital punishment is intrinsically evil. The disturbing aspect of the NNL theorists, however, is that their curious view of natural law has led them to deny the doctrinal content of both scripture and tradition. God prescribed in the Old Testament the death penalty for a whole host of violations of moral, ceremonial, and judicial law, and God simply cannot do or command that which is intrinsically evil. Does this entail that NNLT must be rejected? The answer is not necessarily, but one aspect of it must be modified. If the NNLT is to be brought in line with Sacred Scripture and the tradition, it must affirm either that it is innocent human life, as opposed to merely human life, that constitutes one of its basic goods, or that human life in this world is not always inviolable (and can and sometimes must be subordinated to a superior good). It should also be emphasized that their treatment of the doctrine of capital punishment opens the door to a type of moral relativism that they repeatedly claim to oppose. The position that the NNL theorists have heroically staked out on doctrinal issues related to marriage and the family (e.g., contraception, masturbation, and the indissolubility of marriage) is fundamentally undermined by their position on capital punishment. Finally, NNL theorists need to be reminded that without revelation only a few individuals will come to a true knowledge of even those things we can

discover through human reason, but this true knowledge will occur only after a long time and with an admixture of many errors.<sup>101</sup> As Vatican I rightly teaches, revelation allows us to know not only those supernatural mysteries beyond human reason, but also those divine truths accessible to human reason so that they can be known “by everyone with facility, with firm certitude, and with no admixture of error.”<sup>102</sup>

### Notes

1. Particularly Germain Grisez, Joseph Boyle, John Finnis, Olaf Tollefsen, Robert P. George, Patrick Lee, Fr. Peter Ryan, SJ, Gerard Bradley, William E. May, E. Christian Brugger, and Christopher O. Tollefsen.
2. John C. Ford, SJ, and Germain Grisez, “Contraception and the Infallibility of the Ordinary Magisterium,” *Theological Studies* 39 (1978): 258–312. Germain Grisez, “Infallibility and Specific Moral Norms: A Review Discussion,” *Thomist* 49 (1985): 248–87. Russell Shaw, “Contraception, Infallibility and the Ordinary Magisterium,” *International Review of Natural Family Planning* 2 (1978): 288–98.
3. Gerard V. Bradley, “No Intentional Killing Whatsoever: The Case of Capital Punishment,” in *Natural Law and Moral Inquiry: Ethics, Metaphysics, and Politics in the Work of Germain Grisez* (Washington, DC: Georgetown Univ. Press, 1998), 155–73. Eugene Christian Brugger, “To Kill or not to Kill: The Catholic Church and the Problem of the Death Penalty,” in Charles E. Curran, *Change in Official Catholic Moral Teachings* (New York: Paulist Press, 2003), 145–68. Eugene Christian Brugger, “Catholic Moral Teaching and the Problem of Capital Punishment,” *The Thomist* 68 (2004): 41–67. Eugene Christian Brugger, *Capital Punishment and Roman Catholic Moral Tradition*, 2nd ed. (Notre Dame, IN: University of Notre Dame Press, 2014). John Finnis, *Fundamentals of Ethics* (Washington, DC: Georgetown University Press, 1983), 130, 135. This was a defense of capital punishment. Finnis later went on to reject capital punishment, as seen in the following works: John Finnis, *Aquinas: Moral, Political, and Legal Theory* (Oxford [England]: Oxford University Press, 1998), 293; John Finnis, *Moral Absolutes: Tradition, Revision, and Truth*, Michael J. McGivney Lectures of the John Paul II Institute for Studies on Marriage and Family (Washington, DC: Catholic University of America Press, 1991), 56; John Finnis, Germain Grisez and Joseph Boyle, “‘Direct’ and ‘Indirect’: A Reply to Critics of Our Action Theory,” *The Thomist* 65 (2001): 1–44; Robert George and Germain Grisez, “Toward a Consistent Natural-Law Ethics of Killing,” *American Journal of Jurisprudence* 15 (1970): 64–96; Germain Grisez, *The Way of the Lord Jesus: Christian Moral Principles* (Chicago: Franciscan Herald Press, 1983), 1:218–20. Germain Grisez, *The Way of the Lord Jesus: Living a Christian Life* (Quincy, IL:

- Franciscan Press, 1993), 2:474–75; 2:891–94. Germain Grisez and Joseph M. Boyle, *Life and Death with Liberty and Justice: A Contribution to the Euthanasia Debate* (Notre Dame, IN: University of Notre Dame Press, 1979), 191–99, 396–401; William E. May, “Aquinas and Janssens on the Moral Meaning of Human Acts,” *The Thomist* 48 (1984): 566–606.
4. On the origin of the concept of the ordinary universal magisterium, see John P. Boyle, “The Ordinary Magisterium: Towards a History of the Concept,” *Heythrop Journal* 20 (1979): 380–398; 21 (1980): 14–29. See also John P. Boyle, *Church Teaching Authority: Historical and Theological Studies* (Notre Dame, IN: University of Notre Dame Press, 1995), 10–29.
  5. “Licet singuli praesules infallibilitatis praerogativa non polleant, quando tamen, etiam per orbem dispersi, sed communionis nexum inter se et cum Successore Petri servantes, authentice res fidei et morum docentes in unam sententiam tamquam definitive tenendam conveniunt, doctrinam Christi infallibiliter enuntiant. Quod adhuc manifestius habetur quando, in Concilio Oecumenico coadunati, pro universa Ecclesia fidei et morum doctores et iudices sunt, quorum definitionibus fidei obsequio est adhaerendum.” *Lumen Gentium* 25 in Peter Hünermann, Helmut Hoping, Robert L. Fastiggi, Anne Englund Nash, and Heinrich Denzinger, ed., *Compendium of Creeds, Definitions, and Declarations on Matters of Faith and Morals*, 43rd ed. (San Francisco: Ignatius Press, 2012) (hereafter DH), 4149. On the development of *Lumen Gentium* 25, see Umberto Betti, *La dottrina sull’ episcopato nel capitolo III della costituzione dogmatica Lumen gentium* (Roma: Città Nuova, 1968).
  6. Grisez, *The Way of the Lord Jesus: Christian Moral Principles*, 1:843. Francis A. Sullivan, SJ, *Magisterium: Teaching Authority in the Catholic Church* (New York: Paulist Press, 1983), 124.
  7. Piet Fransen, “A Short History of the Meaning of the Formula ‘Fides et mores,’” in *Hermeneutics of Councils and Other Studies*, ed. H. E. Mertens and F. de Graeve (Leuven: Leuven University Press, 1985), 287–318. Maurice Bevenot, “Faith and Morals in Vatican I and in the Council of Trent,” *Heythrop Journal* 3 (1962): 15–30. John Mahoney, *The Making of Moral Theology* (Oxford: Clarendon, 1987), 120–74. Johann Beumer, “Res fidei et morum: Die Entwicklung eines theologischen Begriffes in den Dekreten der drei letzten Ökumenischen Konzilien,” *Annuario Historiae Conciliorum* 2 (1979): 112–34. Teodoro López Rodríguez, “‘Fides et mores’ en Trento,” *Scripta Theologica* 5 (1973): 175–221. Marcelino Zalba, SJ, “‘Omnis et salutaris veritas et morum disciplina’: Sentido de la expresión ‘mores’ en el Concilio de Trento,” *Gregorianum* 54 (1973): 679–715.
  8. Grisez, *The Way of the Lord Jesus: Living a Christian Life*, 2:43.
  9. Ford and Grisez, “Contraception and the Infallibility of the Ordinary Magisterium,” 284–85.
  10. Timothy Zapelena, *De Ecclesia Christi*, 6th ed. (Rome: Gregorian University, 1954–1955), 2:185–86. Christian Pesch, *Praelectiones dogmaticae: Institutiones propaedeuticae ad sacram theologiam*, 6th ed. (Friburgi Brisgoviae: Herder, 1924), 1:326.

11. Francis A. Sullivan, *Creative Fidelity: Weighing and Interpreting Documents of the Magisterium* (New York: Paulist Press, 1996), 106.
12. John T. Noonan, *Contraception; A History of Its Treatment by the Catholic Theologians and Canonists* (Cambridge: Belknap Press of Harvard University Press, 1965).
13. *Ibid.*, 6.
14. *Ibid.*, 6.
15. Ford and Grisez, "Contraception and the Infallibility of the Ordinary Magisterium," 259.
16. *Ibid.*, 259.
17. Ronald David Lawler, Joseph M. Boyle, and William E. May, *Catholic Sexual Ethics: A Summary, Explanation & Defense* (Huntington, IN: Our Sunday Visitor, 1985), 116, 187–88. William E. May, *An Introduction to Moral Theology* (Huntington, IN: Our Sunday Visitor, Inc., 1994), 228–32. E. Christian Brugger, "Abortion and Contraception in Catholic Moral Teaching: A Reply to Recent Objections," *Josephinum Journal of Theology* 15 (2008): 353, n. 85. E. Christian Brugger, "The Catholic Church in De Facto Schism: What's to Be Done?" <http://www.thepublicdiscourse.com/2017/02/18799/>.
18. His treatment of scripture is examined below.
19. Grisez, *The Way of the Lord Jesus: Christian Moral Principles*, 1:220. The only magisterial text that he cites is Innocent III's creed.
20. Brugger, *Capital Punishment and Roman Catholic Moral Tradition*, 2nd ed., 4, 141.
21. *Ibid.*, 95, 112, 125.
22. *Ibid.*, 141.
23. *Ibid.*, 161.
24. *Ibid.*, 144.
25. *Ibid.*, 144, 145, and 151.
26. *Lumen Gentium* 25. E. Christian Brugger, *Capital Punishment and Roman Catholic Moral Tradition*, 1st ed. (Notre Dame, IN: University of Notre Dame Press, 2003), 151. Brugger, *Capital Punishment and Roman Catholic Moral Tradition*, 2nd ed., 151.
27. Brugger, *Capital Punishment*, 2nd ed., 150.
28. *Ibid.*, 150.
29. "Namque etiamsi ageretur de illa subiectioe, quae fidei divinae actu est praestanda, limitanda tamen non esset ad ea, quae expressis oecumenicorum Conciliorum aut Romanorum Pontificum huiusque Apostolicae Sedis decretis definita sunt, sed ad ea quae extendenda, quae ordinario totius Ecclesiae per orbem dispersae magisterio tamquam divinitus revelata traduntur ideoque universali et constanti consensu a catholicis theologis ad fidem pertinere retinentur." Pius IX, *Tuas Libenter*, DH 2879.
30. Brugger, *Capital Punishment and Roman Catholic Moral Tradition*, 2nd ed., xv, 4–5, 14, 59, 71, 108–11, 114, 116, 123, 124, 127, 129, 164–79, 181, 183–87, 193 nn. 9 and 18, 195 n. 31, 19 nn. 63, 198 n. 64, 201 n. 45, 203 n. 89, 222 n. 15, 243 n. 10, 244–45 nn. 14–15, 17, 24, 248 n. 94.
31. *Lumen Gentium* 25, emphasis added.

32. Ford and Grisez, "Contraception and the Infallibility of the Ordinary Magisterium," 285.
33. Grisez, *The Way of the Lord Jesus: Christian Moral Principles*, 1:227 n. 8.
34. Brugger, *Capital Punishment and Roman Catholic Moral Tradition*, 2nd ed., 145, 238 n.7. Brugger actually numbers eleven, but since elsewhere he denies that Leo the Great, Gregory the Great, Nicholas I, and Alexander III actually teach directly on the morality of contraception, I have reduced his number to seven. Brugger, *Capital Punishment and Roman Catholic Moral Tradition*, 2nd ed., 93–94, 97, 98, 146–47. One should note that John Paul II is not in his list. Brugger thinks that John Paul and the Catechism (*Catechismus catholicae ecclesiae* [Città del Vaticano: Libreria editrice vaticana, 1997], S79) were actually against the death penalty. Brugger, *Capital Punishment and Roman Catholic Moral Tradition*, 2nd ed., xxiii. Brugger, "To Kill or not to Kill: The Catholic Church and the Problem of the Death Penalty," 148.
35. "De his nihil legimus a majoribus definitum. Meminerant enim a Deo potestates has fuisse concessas, et propter vindictam noxiorum, gladium fuisse permissum, et Dei esse ministrum vindicem in hujusmodi datum (Rom. 13:1–4). Quemadmodum igitur reprehenderent factum, quod auctore Deo viderent esse concessum? De his ergo ita, ut hactenus servatum est, sic habemus, ne aut disciplinam evertere, aut contra auctoritatem Domini venire videamur. Ipsi autem in ratione reddenda gesta sua omnia servabuntur." Innocent 1, *Epist.* 6, C. 3. 8, *ad Exsuperium, Episcopum Tolosanum*, February 20, 405. *Patrologia Latina* 20:499.
36. Brugger, *Capital Punishment*, 2nd ed., 147. Brugger, however, is misleading when he writes, "This, it seems to me, is an example of a bishop [sic] teaching something as to be definitively held." The pope is, of course, a bishop; but it is more correct to say that this is an instance of a pope proposing a teaching as definitive.
37. Gregory the Great, lib. 12, ep. 12, (PL 77:1226–227).
38. "Carnium perceptionem minime culpamus. Non condemnamus iuramentum, imo credimus puro corde, quod cum veritate et iudicio et iustitia licitum sit iurare. [Additum a. 1210: De potestate saeculari asserimus, quod sine peccato mortali potest iudicium sanguinis exercere, dummodo ad inferendam vindictam non odio, sed iudicio, non incaute, sed consulte procedat.]" DH 795.
39. "33. Haereticos comburi est contra voluntatem Spiritus." DH 1483. DH 1451–492/741–781. This proposition was condemned: "Praefatos omnes et singulos articulos seu errores tamquam, ut praemittitur, respective haereticos, aut scandalosos, aut falsos, aut piarum aurium offensivos, vel simplicium mentium seductivos, et veritati catholicae obviantes, damnamus, reprobamus, atque omnino reicimus." DH 1492. See also *Dokumente zur Causa Lutheri (1517–521)*, 2:368.
40. Louis Billot, *Tractatus de ecclesia Christi: sive continuatio theologiae de verbo incarnato* (Romae: Universitatis Gregoriana, 1927), 642–44. Edmond Dublanchy, "Infaillibilité du Pape," in *Dictionnaire de théologie catholique*, 7:1638–1717. Joseph Fessler, *The True and the False Infallibility of the Popes: A Controversial Reply to Dr. Schulte* (London: Burns and Oates, 1875), 107. Franzelin, *Tractatus de divina traditione et scriptura* (Rome: Pro-

- paganda Fide, 1870), 112–13. S. Gonzalez, “Immo dubitari potest. Num bulla Leonis X contineat veram definitionem ex cathedra,” *Sacrae Theologiae Summa*, 517. Charles Journet, *The Church of the Word Incarnate; An Essay in Speculative Theology* (London: Sheed and Ward, 1955), 446. A number of more recent theologians do not think this document contains infallible definitions. Sullivan, *Creative Fidelity: Weighing and Interpreting Documents of the Magisterium*, 84–86. Klaus Schatz, *Vaticanum I, 1869–1870*, (Paderborn: Ferdinand Schöningh, 1994) 3:331–39. Klaus Schatz, “Welche bishe- rigen päpstlichen Lehrentscheidungen sind ‘ex cathedra’? Historische und theologi- sche Überlegungen,” in *Dogmengeschichte und katholische Theologie*, ed. Werner Löser, Karl Lehmann, and Matthias Lutz–Bachmann (Würzburg, 1985), 404–22. Paul C. Empie, T. Austin Murphy, and Joseph A. Burgess, ed., *Teaching Authority & Infallibility in the Church*, The National Catholic Lutheran Dialogue (Minneapolis: Augsburg Pub. House, 1980), 50.
41. Paul III, *Licet ab initio*, in Luigi Tomassetti, Charles Cocquelines, Francesco Gaude, and Luigi Bilio, *Bullarum, diplomatum et privilegiorum sanctorum romanorum pontificum taurinensis* (Augustae Taurinorum: Seb. Franco et Henrico Dalmazzo editoribus, 1857), 7:452 seq., 7:456 seq. (hereafter *Bullarium Romanum*), 6:344, 6:335.
  42. Pius V, *Cum primum*, in *Bullarium Romanum*, 7:437. “Horrendum illud scelus, quo pollutae foedataeque Civitates a tremendo Dei iudicio conflagrarunt, acerbissimum Nobis dolorem inurit, graviterque animum nostrum commovet, ut ad illud, quantum potest, comprimendum studia nostra conferamus.” Pius V, *Horrendum illud scelus*, in *Bullarium Romanum*, 7:703.
  43. Pius V, *Indefessa pasloralis*, in *Bullarium Romanum* 7:452 seq., 7:456 seq.
  44. (incest) Sixtus V, *De incestis*, (April 5, 1587), in *Bullarium Romanum*, 8:830–33. (adul- tery) Sixtus V, *Christiana pietas* (November 3, 1586), in *Bullarium Romanum*, 8:789–794. (abortion) Sixtus V, *Contra abortum* (October 29, 1588), in *Bullarium Romanum*, 9:39–42.
  45. Edward Feser and Joseph M. Bessette, *By Man Shall His Blood Be Shed: A Catholic De- fense of Capital Punishment* (San Francisco: Ignatius Press, 2017), 9–10, 128.
  46. Leo XIII, *Pastoralis Officii* (1891), 2.
  47. St. Pius X, *Compendio della dottrina cristiana prescritto da sua santita papa Pio X alle diocesi della provincia di Roma* (Roma: Tipografia Vaticana, 1905), 164. Pius XI, *Casti connubii*, 64. “Même quand il s’agit de l’exécution d’un condamné à mort, l’État ne dispose pas du droit de l’individu à la vie. Il est réservé alors au pouvoir public de priver le condamné du bien de la vie, en expiation de sa faute, après que, par son crime, il s’est déjà dépossédé de son droit à la vie.” Pius XII, *Address to the First International Congress of Histopathology of the Nervous System*, September 14, 1952, XIV, 328. AAS 44 (1952): 787.
  48. John Paul II, *Evangelium Vitae*, 56.
  49. 469. What kind of punishment may be imposed? The punishment imposed must be proportionate to the gravity of the offense. Given the possibilities which the State now has for effectively preventing crime by rendering one who has committed an

offense incapable of doing harm, the cases in which the execution of the offender is an absolute necessity “are very rare, if not practically non-existent” (*Evangelium vitae*). When non-lethal means are sufficient, authority should limit itself to such means because they better correspond to the concrete conditions of the common good, are more in conformity with the dignity of the human person, and do not remove definitively from the guilty party the possibility of reforming himself. *Compendium of the Catechism of the Catholic Church* (Washington, DC: United States Conference of Catholic Bishops, 2006), 137.

50. The pope has spoken or taught on this topic on May 30, 2014, October 23, 2014, March 20, 2015, October 11, 2017, and June 28, 2018.
51. For a detailed analysis of Pope Francis’s writings on the death penalty see Christian D. Washburn, “Capital Punishment and the Infallibility of the Ordinary Magisterium,” forthcoming in *The Thomist*.
52. Pope Francis, “On the 25th Anniversary of the Promulgation of the Catechism of the Catholic Church,” *L’Osservatore Romano*, English ed., October 13, 2017, 7.
53. Pope Francis, “On the 25th Anniversary of the Promulgation of the Catechism of the Catholic Church,” 11.
54. CDF, “Rescriptum ex Audientia SS.MI: On the Death Penalty,” *L’Osservatore Romano*, English edition, August 3, 2018, 7.
55. *Ibid.*
56. CDF, *Doctrinal Commentary on the Concluding Formula of the Professio Fidei*, 11:
 

When it comes to the question of interventions in the prudential order, it could happen that some Magisterial documents might not be free from all deficiencies. Bishops and their advisors have not always taken into immediate consideration every aspect or the entire complexity of a question. But it would be contrary to the truth, if, proceeding from some particular cases, one were to conclude that the Church’s Magisterium can be habitually mistaken in its prudential judgments, or that it does not enjoy divine assistance in the integral exercise of its mission. In fact, the theologian, who cannot pursue his discipline well without a certain competence in history, is aware of the filtering which occurs with the passage of time. This is not to be understood in the sense of a relativization of the tenets of the faith.

CDF, *Donum veritatis*, 24.
57. Pesch, *Praelectiones dogmaticae*, 1:326.
58. *Catechismus Romanus seu Catechismus ex decreto Concilii Tridentini ad Parochos Pii Quinti Pont. Max. iussu editus*, ed. Petrus Rodríguez et al. (Città del Vaticano: Libreria Editrice Vaticana/Ediciones Univ. de Navarra, 1989), 465–66.
59. Robert Bellarmine, *Dichiarazione più copiosa della dottrina Cristiana composta per ordine della santa memoria di Papa Clemente VIII* (Rome: A spese di Pietro Aureli Librajo, 1824), 133–34. Petrus Canisius, *S. Petri Canisii doctoris ecclesiae catechismi Latini et Germanici*, ed. Friedrich Streicher (Romae: Pontificia Universitas Gregoriana, 1933), 164. Laurence Vaux, *A catechisme or Christian doctrine, necessary for children and ignorant*

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60. Ford and Grisez, “Contraception and the Infallibility of the Ordinary Magisterium,” 279.
61. *Lex Dei siue mosaicarum et romanarum legum collatio*, in Theodor Mommsen, *Fragmenta Vaticana mosaicarum et romanarum legum collatio, Collectio librorum iuris anteiustiniani 3* (Berolini: apud Weidmanos 1890), 154. On the dating of this work, see Robert M. Frakes, *Compiling the Collatio legum Mosaicarum et Romanarum in Late Antiquity* (Oxford: Oxford University Press, 2011). Burchard of Worms, *Decretorum libri viginti*. PL 140:775.
62. “*Homicidas, et sacrilegos, et venenarios punire non est effusio sanguinis, sed legum*

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63. Boniface VIII, *Sexti Decretal. Lib. 5. Tit. 2. De Haereticis*, cap. 18, *Ut inquisitionis negotium*, in Friedberg, *Corpus iuris canonici*, 2:1076–1077.
  64. Ford and Grisez, "Contraception and the Infallibility of the Ordinary Magisterium," 278.
  65. Grisez, *The Way of the Lord Jesus: Christian Moral Principles*, 1:227 n. 7.
  66. Brugger, *Capital Punishment and Roman Catholic Moral Tradition*, 2nd ed., 95.
  67. *Ibid.*, 95, 145–46.
  68. Origen, *Homilia in Genesin*, 8.1. (Sources Chrétiennes 7:216.46–48). Ambrose, *De Abraham*, 1.8.71 (Corpus Scriptorum Ecclesiasticorum Latinorum 32.1:548–49). Ephrem the Syrian, *On Genesis* (Fathers of the Church 91:168).
  69. Tertullian, *De ieiunio adversus psychicos*, 7. CCL 2.2:1263. Athanasius, *Vita Antonii*, 28.10. SC 400:214.46. Ambrose, *Explanatio super psalmos XII*, § 31. CSEL 64:284.30 John Chrysostom, *Homiliae 1-90 in Matthaem*, Patrologia Graeca 58:753.4.
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  71. Sullivan, *Creative Fidelity*, 104. Salaverri, *Sacrae Theologiae Summa*, 1: 775.
  72. Grisez, *The Way of the Lord Jesus: Christian Moral Principles*, 1:218.
  73. Brugger, *Capital Punishment and Roman Catholic Moral Tradition*, 2nd ed., 125.
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- 2:524. Lawrence of Brindisi, *S. Laurentii a Brundisio opera omnia*, 3:186, 228, 368, 392, 400, 429, 537–42; 4:23, 47, 145, 301, 314, 406, 472. Brindisi's testimony is also noteworthy, for it was based in part on Genesis 9:6, which he used as a *locus classicus* for both capital punishment and the dignity of man.
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83. Grisez, *The Way of the Lord Jesus: Christian Moral Principles*, 1:124. William E. May, *An Introduction to Moral Theology*, 68–70. John Finnis, Germain Grisez, and Joseph Boyle, “‘Direct’ and ‘Indirect’: A Reply to Critics of Our Action Theory,” *The Thomist* 65 (2001): 1–44. John Finnis, *Natural Law and Natural Rights*, 2nd ed. (Oxford University Press, 2011), 122.
84. Germain Grisez, *Contraception and the Natural Law* (Milwaukee: The Bruce Publishing Company, 1964). Germain Grisez, “A New Formulation of a Natural Law Argument Against Contraception,” *Thomist* 30 (1966): 343–61. Germain Grisez, “Against Consequentialism,” *American Journal of Jurisprudence* 23 (1978): 21–72. For a critique of this position from the standpoint of classical natural law theory, see Janet E. Smith, *Humanae Vitae, a Generation Later* (Washington, D.C.: Catholic University of America Press, 1991), 340–70.
85. Grisez, *The Way of the Lord Jesus: Christian Moral Principles*, 1:219.
86. *Ibid.*, 1:219.
87. *Ibid.*, 1:218–19.
88. I think one should conclude that he considered it intrinsically evil, since he concluded that the Old Testament simply was in error about God's intent.
89. Brugger, *Capital Punishment and Roman Catholic Moral Tradition*, 2nd ed., 63.
90. *Ibid.*, 63.
91. *Ibid.*, 161.
92. Leo XIII writes:
- For all the books which the Church receives as sacred and canonical are written wholly and entirely, with all their parts, at the dictation of the Holy Spirit; and so far is it from being possible that any error can coexist with inspiration, that inspiration not only is essentially incompatible with error, but excludes and rejects it as absolutely and necessarily as it is impossible that God Himself, the supreme Truth, can utter that which is not true. This is the ancient and unchanging faith of the Church . . . *Providentissimus Deus*, 20
- Vatican II teaches, “Therefore, since everything *asserted* by the inspired authors or sacred writers must be held to be asserted by the Holy Spirit, it follows that the books of Scripture must be acknowledged as teaching solidly, faithfully and without error that truth which God wanted put into sacred writings for the sake of salvation” [*Dei*

- Verbum*, 11 (DH 4216) emphasis added]. The CDF lists biblical inerrancy with those truths that are revealed and proposed as such by the Church. Therefore, if one were to deny obstinately that there was “the absence of error in the inspired sacred texts,” one would be a heretic. CDF, *Doctrinal Commentary on the Concluding Formula of the Professio Fidei*, 11. Pablo T. Gadenz, “Magisterial Teaching on the Inspiration and Truth of Scripture – Precedents and Prospect,” *Letter & Spirit* 6 (2010): 67–91.
93. Christopher O. Tollefsen, “Does God Intend Death?” *Diametros* 38 (2013): 191–200.
  94. K. A. Mathews, *Genesis 11:27–50:26*, The New American Commentary (Nashville, TN: Broadman & Holman Publishers, 2005), 291.
  95. Victor P. Hamilton, *The Book of Genesis*, The New International Commentary on the Old Testament (Grand Rapids, MI: Wm. B. Eerdmans Pub. Co., 1995), 111.
  96. Hamilton, *The Book of Genesis*, 111.
  97. St. Thomas Aquinas, *On Evil*, trans. Richard Regan (Oxford: Oxford University Press, 2003), q. I, a. 3, r. 10.
  98. James A. Weisheipl, “The Meaning of *Sacra Doctrina* in *Summa Theologiae* I, q. I,” *The Thomist* 38 (1974): 79f.
  99. St. Thomas Aquinas, *Summa theologiae*, I–II q. 19, a. 10, ad 3.
  100. “Quapropter omnes Christiani fideles huiusmodi opiniones, quae fidei doctrinae contrariae esse cognoscuntur, maxime si ab Ecclesia reprobatae fuerint, non solum prohibentur tamquam legitimas scientiae conclusiones defendere, sed pro erroribus potius, qui fallacem veritatis speciem prae se ferant, habere tenentur omnino.” DH 3018.
  101. *ST*, Ia, q. 1, a. 1.
  102. Vatican I, *Dei Filius*, 2.