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AQUINAS AND CAPITAL PUNISHMENT: THE PLAUSIBILITY OF THE TRADITIONAL ARGUMENT

CHRISTIAN BRUGGER*

INTRODUCTION

The influence of Aquinas on the traditional Catholic philosophical defense of capital punishment is extraordinary.¹ It would not be extreme to say that the rational plausibility of the Church's traditional defense depends in large measure on the soundness of Aquinas' argumentation. My intention for this essay is to critique Aquinas' account of the foundations for justifiable intentional homicide. First, I examine his understanding of the norm against killing, its scope and the nature of its derivation from first principles. Aquinas argues that the norm's exceptionlessness extends only to the deliberate killing of the innocent. What then justifies the state in deliberately killing the guilty? Aquinas puts forward three principal arguments. The first is drawn from an analogy of the relationship of a part to its

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1. A few examples include: J. AERTNYS & C.A. DAMEN, *THEOLOGIA MORALIS*, tom. I, lib. III, tract. V, cap. II, no. 569, at 538–40 (Marietti 1950) (1845); CHARLES-RENÉ BILLUART, *CURSUS THEOLOGIAE*, tom. 12, diss. 10, art. 1, at 50 (Paris, 1829); Cardinal Cajetan, *Commentaries of Thomas Cajetan*, Commentary on Q. 64, art. 2, at 69, in THOMAS AQUINAS, *OPERA OMNIA*, tom. IX (1873); VICTOR CATHREIN, S.J., *PHILOSOPHIA MORALIS IN USUM SCHOLARUM*, pars. II, lib. II, cap. III, thesis XCIX, nos. 638–41, at 468 (Herder & Co., 1932) (1900); FRANCISCO DE VITORIA, *RELECTION ON HOMICIDE & COMMENTARY ON SUMMA THEOLOGIAE IIa-IIae*, q. 64 (John P. Doyle trans., Roland J. Teske ed., *Mediaeval Philosophical Texts in Translation* No. 34, 1997); A.J.J.F. HAINE, *THEOLOGIAE MORALIS*, tom. I, pars. II, cap. III, q. 130, at 453 (Desclée 1900); LEONARDO LESSIUS, *DE IUSTITIA ET IURE CAETERISQUE VIRTUTIBUS*, COMMENTARY ON SUMMA THEOLOGIAE II-II, q. 47–171 (Paris, 1606); JOHN A. McHUGH, O.P. & CHARLES J. CALLAN, O.P., *MORAL THEOLOGY: A COMPLETE COURSE*, vol. 2, nos. 1820–22, at 100–02 (1958); BENEDICT MERKELBACH, O.P., *SUMMA THEOLOGIAE MORALIS*, tom. II, nos. 354–56, at 353–56 (1954); H. NOLDIN, S.J., *SUMMA THEOLOGIAE MORALIS*, vol. II, no. 330, at 353–55 (Typis et Sumpibus Fel. Rauch, 1910); DOMINIC M. PRÜMMER, O.P., *MANUALE THEOLOGIAE MORALIS*, tom. II, tract. XI, q. III, § 2, no. 118, at 108–10 (Herder & Co., 1955); PETRO SCAVINI, *THEOLOGIA MORALIS UNIVERSA*, tom. III, tract. VII, disp. II, cap. I, art. I, no. 75, q. 7, at 73–75 (Paris: Jacob Lecoffre ed., 1863); for a more detailed defense of this assertion see chapters 5 and 6 of my book, *CHRISTIAN BRUGGER, CAPITAL PUNISHMENT AND ROMAN CATHOLIC MORAL TRADITION* (2003).

corresponding whole, the second on the consequences for human dignity of committing very grave sin, and the third from the prerogatives and limits of civil authority. With respect to each I ask whether the premises, lines of analogy, and conclusions are rationally sound. I conclude that Aquinas' attempts to give a rational foundation to *intentional* killing fail, and hence, that Catholic tradition (indeed Western ethical tradition) has no sound philosophical ground for arguing that the intentional killing of the guilty is *ex objecto* (i.e. by virtue of the nature of the freely chosen object) fundamentally different from the intentional killing of the innocent.

I. THE FIFTH PRECEPT OF THE DECALOGUE AND EXCEPTIONS

The moral norm against killing, according to Aquinas, binds differently for private individuals than it does for public authority. Public authority, as guardian of the welfare of the community, legitimately inflicts harm and death on members who pose a grave danger to the community's welfare. Private individuals, on the other hand, may never intentionally harm or kill another, including in self-defense.² In other words, the norm against killing applied to private individuals binds without exception.³ Aquinas states clearly why he thinks intentional killing can be legitimate for public authority, but he is not so clear why it is forbidden to private individuals. What he says elsewhere about the wrongfulness of suicide gives us a clue.

He confronts the following objection: murder (*homicidium*) is wrong because it constitutes a terrible injustice; but no one can do an injustice to himself; therefore suicide is legitimate. Aquinas replies, murder is wrong, not only because it is contrary to justice, but also because it is opposed to the charity (*caritas*) we owe to ourselves.⁴ Let's look more closely at his reference to "charity."

In his *respondeo* to the same article he says:

To kill oneself is always wrong since everything naturally loves itself; and to this belongs the fact that everything naturally preserves itself in being, and resists corruptions as much as it can. Wherefore, killing oneself is contrary to the inclination of nature, and contrary to charity by which

2. See THOMAS AQUINAS, *SUMMA THEOLOGICA* II-II, q. 64, art. 7, at 1471 (Fathers of the English Dominican Province trans., Benziger Bros. 1947) [hereinafter *SUMMA THEOLOGICA* II-II].

3. *Id.* at q. 64, art. 3, at 1467-68.

4. *Id.* at q. 64, art. 3, at 1469 (emphasis added). Unless otherwise indicated, translations from the *SUMMA THEOLOGICA* are my own.

every man ought to love himself. Therefore, killing oneself is always a mortal sin, insofar as it is contrary to the natural law and contrary to charity.⁵

Aquinas argues that authentic self-love gives rise to a natural inclination to preserve ourselves in being and resist harm; and killing oneself is contrary to both this natural inclination and the charity from which it arises. Does Aquinas mean that the wrongfulness of suicide, or more precisely, the moral norm singling out self-killing as always wrong, is derived from our natural inclination? To answer this we need to look more closely at Aquinas' conception of natural inclinations.

In his famous question on the natural law in the *Prima Secundae* Aquinas speaks about natural inclinations in relation to the principles of practical reason and the natural law. He says that the first principles of the natural law relate to practical reason as the first demonstrative principles relate to speculative reason. (Practical reason refers here to the reason which underlies our action; whenever we consider what it would be good to do, when we consider opportunities open to us, we are engaging in practical reasoning.) In both cases the principles are self-evident (*per se nota*) ("known through themselves").⁶ What does Aquinas mean by the term self-evident? He refers to the quality of self-evidence in two ways. A thing is said to be self-evident "in itself" and "in relation to us." An example of the former is a proposition whose predicate belongs to the intelligibility of its subject, e.g., "man is a rational being," "tarantulas are large arthropods," "car tires are made from vulcanized rubber." One who says "man," or "tarantulas," or "car tire material" implicitly says "a rational being," "large arthropods," and "vulcanized rubber." But it is self-evident "in relation to us" only if we understand the terms signified by the principle, e.g., "man," "rational being," "tarantula," or "arthropod." Self-evident propositions that are universally known are propositions whose terms are known to all. Self-evident propositions whose terms are difficult to know are known only to "the wise." Aquinas distinguishes between the objective and subjective senses of self-evidence in order to draw attention to the second type as the type he intends to consider in his discussion of the principles of practical reason.

It is important to understand that our grasp of self-evident principles is unmediated. A self-evident principle is known

5. *Id.* at q. 64, art. 5, at 1469.

6. THOMAS AQUINAS, *SUMMA THEOLOGICA* I-II, q. 94, art. 2, at 1009 (Fathers of the English Dominican Province trans., Benziger Bros. 1947) [hereinafter *SUMMA THEOLOGICA* I-II].

“through itself” (*per se nota*), not through appeal to a middle term or through inferential reasoning. When its terms are understood, its affirmation is immediate, not in the sense of occurring at once, but rather occurring without appeal to some more basic set of reasons. So, for example, the first principle of demonstration, also called the “principle of non-contradiction,” viz., *a thing cannot both be and not be at the same time in the same way*, is universally understood to be true, presuming of course that its central term—*being*—is understood. Aquinas says that *being* is what first falls under the reason’s grasp. We might say it gets reasoning started. If someone cannot affirm the existence of being, or distinguish between being and not-being, then reasoning cannot get off the ground. *Being*, therefore, is the most basic intelligibility to fall under the mind’s knowing. In this sense it is a “first principle of reason,” and although it does not tell us what to think, it tells us what is most basic to thinking anything, insofar as an adequate conception of being is necessary in order to think at all; in this sense it underlies *all* our thinking.

All this is by way of introducing Aquinas’ discussion of practical reason. Just as the concept of *being* is the most basic concept of speculative reason, or of demonstration, *good* is the most basic intelligibility grasped by practical reason, that which we first apprehend when we think about choiceworthy possibilities for action.⁷ Good, or goods, therefore, are the starting point for practical reasoning. As the apprehension of *being* is what is most basic to thinking at all, our grasp of the concept of *good* is what is most basic to acting. Good gets practical reasoning going; it moves us to act. And just as human reason has a non-inferential grasp of the first principle of demonstration which singles out the concept of being, practical reason has a non-inferential, immediate grasp of the first principles of practical reason which single out the concept of the good: “since . . . good has the nature of an end, and evil, the nature of a contrary,” basic practical principles are knowable *per se*; they are affirmed without appealing to some more basic argumentation or principles.⁸ The most basic undifferentiated *first* principle of practical reason, Aquinas says, is “good is to be done and pursued and evil avoided.”⁹ Just as the first principle of speculative reason does not tell us what to think, but rather what is most basic to thinking anything, the first principle of practical reason does not tell us what to do, but rather what is basic to doing anything at all: in

7. *Id.*

8. *Id.*

9. *Id.* (“*Bonum est faciendum et prosequendum, et malum vitandum.*”).

reasoning practically, it is necessary to think in terms of doing and pursuing something good and avoiding what is contrary to good, lest we have no reason to act at all.

This is where the concept of human inclinations arises. Aquinas says that all those things that practical reason naturally understands to be good, that is to say, all those things to which we have a *natural inclination*, belong to the first principles of the natural law as things to be pursued and their contraries to be avoided.¹⁰ The inclinations to which he refers, of course, are *rational inclinations*.¹¹ We naturally affirm the goodness of human good, not in the sense of intellectually possessing the knowledge in the form of innate ideas, but rather, when, through experience, we come in contact with, and begin to understand the terms singled out by basic practical principles, we immediately affirm those principles as true and the human goods they specify as good and choice-worthy to pursue without appealing to any more basic reasoning. The first human good Aquinas identifies is the good of human life, which, he says, corresponds to our natural inclination to preserve ourselves in being.¹² Human life is not good *because* we have a natural inclination to preserve it, rather we have an inclination to preserve it because human life is good and we are naturally inclined to recognize it as such.

To return to our question whether the wrongfulness of suicide is derived from our natural inclination to preserve ourselves in being, we can see now that suicide is wrong, not *because* of our inclination, but rather because it is *contrary to human good*. Aquinas says, "the very fact of being is a good, and so all things desire to be."¹³ Desire here arises from our understanding of the good of human life and the choiceworthiness of actions aimed at its protection and promotion.¹⁴ Which returns us to Aquinas' important term "charity." Recall he said that murder and suicide are wrong because they are contrary to the charity we owe to our neighbor and ourselves.¹⁵ The charity that is morally relevant here is the charity that arises on account of our rational recognition of the goodness of human life. The rational ground for love therefore is the self-evident recognition of the basic good of human life; we love, if you will, the good nature God has created:

10. *Id.*

11. *Id.*

12. *Id.*

13. THOMAS AQUINAS, *SUMMA CONTRA GENTILES* bk. 3, pt. 1, ch. 3, no. 4, at 39 (Vernon Bourke trans., Univ. Notre Dame Press 1956) [hereinafter *SUMMA CONTRA GENTILES*].

14. *Id.* at bk. 3, pt. 1, ch. 3, no. 7, at 39.

15. *SUMMA THEOLOGICA* II-II, *supra* note 2, at q. 64, art. 5, at 1469.

"In every man, even in a sinner, we ought to love the nature that God has made."¹⁶

Why then is it always wrong for a private individual to intentionally harm or kill another person? Because the basic good of human life gives rise to a moral norm which singles out and forbids all actions contrary to it. In other words, human reason has a natural inclination to understand that life is "a good to be pursued" and that which is contrary to it "a bad to be avoided" and thus understands and affirms that the intentional destruction of human life is a bad to be avoided.

Although the norm against killing binds without exception for private persons, the norm is not exceptionless *per se*. Those holding public authority can rightly kill the guilty with intent. But this raises a problem. If human reason naturally apprehends human life as good and what is contrary to it as bad, how can it ever be legitimate to intend the destruction of human life? I will examine three arguments of Aquinas.

II. AN ARISTOTELIAN MODEL OF COMMUNITY

Aquinas' principal argument stems from the Aristotelian premise that the good of a part is subordinate to the good of its corresponding whole, as imperfect is ordered to perfect.¹⁷ If the health of a body is in danger on account of some serious disease, say because of a diseased and gangrenous limb, it not only legitimate, but praiseworthy and life-giving to cut away that limb for the sake of the whole body. In a similar way the good of any single member of the community is subordinated to the good of the whole community. Therefore when a member becomes gravely dangerous to the welfare of the whole community on account of some serious sin, it is not only licit, but praiseworthy and salubrious that he be cut off from the community by being put to death.¹⁸

This analogy is problematic in several respects. First, its logic is tied to a strict correlation between the unity of a human body and that of a human community. But the relationship between an arm and a body is both like and unlike that of a person to his community. It is true that the good order of a community presupposes a relatively high degree of cooperation among its members, presupposes that responsibilities and privileges are

16. *Id.* at q. 64, art. 6, at 1470.

17. See ARISTOTLE, *POLITICS*, bk. 1, ch. 2, ll. 1253a18-29, in 2 *THE COMPLETE WORKS OF ARISTOTLE* 1988 (Jonathan Barnes ed., 1984).

18. *SUMMA THEOLOGICA* II-II, *supra* note 2, at q. 64, art. 2, at 1467; see also *SUMMA CONTRA GENTILES*, *supra* note 13, at bk. 3, pt. 2, ch. 146, no. 4, at 220-21.

fairly distributed, tasks are faithfully fulfilled, sacrifice is accepted, and commands are given and received. But the existence of a member of a community has meaning apart from the whole community in a way different from a limb apart from its body. An arm has no proper existence apart from its body, no independent purpose, no set of duties—no life. If an arm is amputated, no whole self-organizing individual is destroyed, no one created in the image of God, no proper subject of divine affection, no creature capable of knowing and loving the Lord, no being destined “for a blissful purpose beyond the reach of earthly misery.”¹⁹ In other words, no *whole* in itself is destroyed, only a part of a whole.

Aquinas is aware of differences that exist between these two senses of *whole*. In his *Commentary on the Ethics* he identifies two types of “wholes” corresponding to two senses of the term “unity.” A political community possesses a unity of *order*, whereas a human body possesses also a unity “of composition, or of conjunction, or even of continuity, and according to this unity a thing is one absolutely.”²⁰ This absolute oneness of the unity of the human body is, it seems to me, what morally justifies deliberately harming a diseased part for the sake of the whole. The part’s being is an extension of the being of the whole and the one cannot exist without the other. And the operations of the one are always in some sense the operations of the other, while a part in the former sense can have operations of its own, apart from the whole. Notwithstanding his distinction between two senses of unity, Aquinas still proceeds to draw his conclusion about killing members of a community from his own conception, not of the unity of a community but of the unity of the human body, implying that a member’s “belonging” to the community is absolute.²¹ His analogy breaks down at the morally relevant point where it is supposed to show that the correspondence of the analogized subjects are sufficiently alike to justify an act of intentional killing. But the amputation of a diseased limb is different in a fundamental way from the killing of a criminal. When a diseased limb is amputated, the intent is to preserve an integrated being, an absolutely unified whole, a human life, and so we remove a part whose presence threatens this life; but in its removing we intend neither as an end nor means the harm or

19. SECOND VATICAN COUNCIL, PASTORAL CONSTITUTION ON THE CHURCH IN THE MODERN WORLD (GAUDIUM ET SPES) no. 18, at 16 (Our Sunday Visitor, Inc. 1965) (Vatican English translation).

20. THOMAS AQUINAS, COMMENTARY ON THE NICOMACHEAN ETHICS I, Lect. 1, No. 5 (C.I. Litzinger trans., Henry Regnery Co. 1964).

21. See SUMMA THEOLOGICA II-II, *supra* note 2, at q. 64, art. 5, at 1469.

destruction of that, or any unified self-organizing life. The charity we owe is owed not to the limb *per se*, but to the whole integrated person; and charity is preserved and expressed precisely through the limb's removal. When we kill a criminal, we intend to preserve *one* whole (i.e., the life of the body politic), and to do so we destroy another whole. One 'life' is saved through intentionally destroying another life. But here, unlike in the former example, *both* lives are owed respect. Why doesn't the charity we owe *precisely to sinners* forbid us from choosing *this* means to bring about the good end of the defense of the community? The morally relevant features of Aquinas' analogy are *not* coextensive.

Removing a diseased limb is more fittingly compared with a separation procedure rather than a killing. In this sense we might argue that dangerous members of the community should be cut off *in the sense of being sequestered* from the community, rather than being killed.²² An analogy might make this clearer. If one of two Siamese twins contracted a deadly disease that threatened the lives of both, common morality would hardly sanction intentionally killing the diseased member to save the life of the other. Every effort would be made to separate the two so that the healthy member could be free of the threat, and the diseased member treated accordingly.

Aquinas' analogy tends to absolutize the whole with respect to its parts. Aquinas writes, "every part naturally exists for the sake of the whole."²³ He continues, "every man is part of the community, and so, as such, he belongs to the community."²⁴ One might argue that the analogy fails because it proves too much, that its logic justifies the killing of innocent members of the community who are judged to be dangerous or infectious. This, however, would not be a fair reading of Aquinas. He is clear that the relevant sense of "dangerous and corrupting" is what a person becomes *as a result of some sin*.²⁵ And according to Aquinas, "the killing of a sinner becomes lawful in relation to the common good, which is corrupted by sin."²⁶ No, the analogy fails not because it proves too much, but because it wrongly describes the relationship of individuals to the state (or civil soci-

22. Germain G. Grisez, *Toward a Consistent Natural-Law Ethics of Killing*, 15 AM. J. JURIS. 67, 67-68 (1970).

23. SUMMA THEOLOGICA II-II, *supra* note 2, at q. 64, art. 2, at 1467 ("Omnis pars naturaliter est propter totum.").

24. *Id.* at q. 64, art. 5, at 1469 ("Quilibet homo est pars communitatis: et ita id quod est, est communitatis.").

25. *Id.* at q. 64, art. 2, at 1467.

26. *Id.* at q. 64, art. 6, at 1470.

ety, Aquinas' *communitas*), and in so doing fails to prove what Aquinas wants it to prove.

Persons exist within a variety of communities, beginning with the family and extending to neighborhoods, towns, church communities, communities of common interest, and the like, with each contributing to a person's well-being in unique and incommensurable ways. The state is not a person's only community of association, and persons do not exist properly *for* the state. Vatican II affirmed this when it defined the "common good" as instrumental to the goods of persons.²⁷ A person's communal life does not even reach its most complex at the level of the state since the claims of the international community make themselves known today in the lives of individuals and intermediate associations even more than they did in Aquinas' time. Moreover, intermediate communities provide real goods that the state is quite incompetent to provide, for example, administering the sacraments and preaching the Gospel. And for believers, communal relations and dependencies transcend the earthly community altogether to include members of the heavenly community and the souls in Purgatory. The role of the individual relative to civil society is one of citizen, in the capacities of taxpayer, voter, soldier, etc., while civil society's role relative to individuals and mediating communities is one of providing social needs that cannot reasonably be met by smaller communities.

III. GRAVE SIN AND FALLING FROM HUMAN DIGNITY

Aquinas confronts the objection raised above, which he poses as follows: it is never legitimate to choose evil, even if it promises great good; but killing a man is evil since we are bound to love all men, even sinners; killing the guilty for the sake of the common good, therefore, is never legitimate. Aquinas replies as follows:

By sinning man departs from the order of reason, and therefore falls away from human dignity, in so far as man is naturally free and exists for his own sake, and falls somehow into the slavery of the beasts, so that he may be dis-

27. "[I]nterdependence [between nations] . . . is leading to an increasingly universal common good, the sum total of the conditions of social life enabling groups and individuals to realise their perfection more fully and readily . . ." SECOND VATICAN COUNCIL, PASTORAL CONSTITUTION ON THE CHURCH IN THE WORLD OF TODAY (GAUDIUM ET SPES) no. 26, *in* II DECREES OF THE ECUMENICAL COUNCILS 1084 (Norman P. Tanner ed., 1990). "And the common good comprises the sum of the conditions of social life which enable individuals, families and associations to reach their own perfection more completely and more readily." *Id.* at no. 74, at 1121.

posed of according to what is useful to others Therefore, although it be evil in itself to kill a man who preserves his human dignity, nevertheless to kill a man who is a sinner can be good, just as it can be good to kill a beast; for an evil man is worse than a beast.²⁸

Aquinas says it is wrong in itself to kill someone who preserves human dignity. But grave sinners by their freely chosen sin fall from human dignity (*decidit a dignitate humana*) into the slavery of beasts and therefore may be treated according to what is useful (*utile*) to others, which includes intentionally killing them. This is an extraordinary assertion: if one preserves human dignity the norm against killing him binds without exception; if one loses human dignity he may rightly be killed. The phrase “fall away from human dignity” deserves deeper consideration.

For Aquinas to refer to the dignity of a thing normally means to refer to its intrinsic goodness: “dignity signifies the goodness of something according to itself (i.e., for its own sake).”²⁹ Human dignity, therefore, refers to the intrinsic goodness human persons have by virtue of being human persons. A human person is a unified and active subject constituted by a material body and a rational immaterial soul.³⁰ Human nature, therefore, is a bodily rational nature and this nature is the subject of human dignity.³¹ And since one’s nature cannot be lost, neither can one’s dignity.³² This prompts a question: if the subject of human dignity requires respect, and respect implies not being intentionally killed, then why isn’t killing a sinner a violation of intrinsic human dignity? If the “human dignity” to which Aquinas refers here is not that which arises from human nature, what other plausible sense might be given to the term? Perhaps

28. SUMMA THEOLOGICA II-II, *supra* note 2, at q. 64, art. 2, at 1467.

29. “*Quia dignitas significat bonitatem alicujus propter seipsum.*” THOMAS AQUINAS, *Commentum in Tertium Librum Sententiarum*, in OPERA OMNIA, bk. 3, d. 35, q. 1, art. 4, sol. 1c. (Musurgia Publishers 1948).

30. The rational soul is the substantial form of a person and, as such, is necessarily corporeal: “Therefore, corporeity, as the substantial form in man, cannot be other than the rational soul, which requires in its own matter the possession of three dimensions, for the soul is the act of a body.” SUMMA CONTRA GENTILES, *supra* note 14, at bk. 4, ch. 81, no. 7, at 303.

31. THOMAS AQUINAS, SUMMA THEOLOGICA I, q. 29, art. 3, at 158 (Fathers of the English Dominican Province trans., Benziger Bros. 1947) (“And because to subsist in a rational nature is of great dignity, therefore every individual of a rational nature is called a *person*.”) (emphasis in original) [hereinafter SUMMA THEOLOGIAE I].

32. POPE JOHN PAUL II, EVANGELIUM VITAE no. 9, at 24 (St. Paul Books & Media 1995) (“*Not even a murderer loses his personal dignity.*”).

an answer can be found in Aquinas' discussion of how the image of God (*imago Dei*) is found in the human person.

God's image, he says, is manifest in man through human rational nature, which most closely resembles God when it understands and loves God himself.³³ We can identify therefore "three ways" it exists in man: first, it exists in all men inasmuch as all have the natural capacity to know and love God; second, it exists in the just for the just actually know and love God, albeit imperfectly; and third, it exists most perfectly in the blessed since the blessed have been perfected in knowing and loving God.³⁴ Each could be referred to as an expression of human dignity inasmuch as each corresponds to a level of relatedness to God, the second alone being alienable. Is it plausible that Aquinas' phrase "falling away from human dignity" might refer to the dignity that sinners fall from by virtue of ceasing to do just actions? Is this the dignity which when fallen from makes it legitimate to be the subject of intentional killing, but when preserved makes it always wrong? It is possible but unlikely.

First, Aquinas states clearly that the proper sense of how the image of God is said to subsist in humanity is by reason of human rational nature.³⁵ Second, the three expressions, Aquinas says, proceed from the single way God's image subsists in man, the way in which God's image "chiefly consists."³⁶ Aquinas is clear that this is by reason of human rational nature. The "three ways" refer to modes of expression of that image, ways the image imitates God, but ways which are merely "accidental" expressions, i.e., functions of God's divine image in man.³⁷ "These," Aquinas says, "do not of themselves belong to the nature of the Divine image in man, unless we presuppose the first likeness, which is in the intellectual nature."³⁸ Although one by sinning can fall from justice, and hence from the dignity that is rightly attributed to the just, one does not fall from human nature, the source of

33. *SUMMA THEOLOGICA* I, *supra* note 31, at q. 93, art. 4, at 471.

34. *Id.* at q. 93, art. 4, at 471-72.

35. *Id.* at 471.

36. *SUMMA THEOLOGICA* I, *supra* note 31, at q. 93, art. 3, at 471 ("We may speak of God's image in two ways: first, we may consider in it that in which the image chiefly consists, that is, the intellectual nature.")

37. Aquinas also said:

Secondly, we may consider the image of God in man as regards its accidental qualities, so far as to observe in man a certain imitation of God, consisting in the fact that man proceeds from man, as God from God; and also in the fact that the whole human soul is in the whole body, and again

Id.

38. *Id.*

human dignity, and the source from which the three accidental sources derive. Dignity as justice is derivative, not primary. But if basic human dignity is preserved, even in guilt, then the objection still stands that killing a man, even a sinner, is doing evil for the sake of good.

Aquinas seems to approach a reply to this objection when he says, "considering a man in himself (*secundum se*), it is never legitimate to kill him because in every man, even in a sinner, we ought to love the nature which God has made, which through killing is destroyed."³⁹ But then he adds that when we consider a man in relation to something else (*per comparationem ad aliud*), in the case of a sinner, in relation to the common good, his slaying becomes lawful since the common good is corrupted by sin.⁴⁰ But this begs the question we are trying to answer. What now makes it lawful? Why when we move from considering one in himself to considering one in relation to the community does intentional killing become lawful? Is the act no longer the intentional destruction of the good of human life? No, the object of the act is still the same. Does a grave sinner become less human and hence less due charity? No, Aquinas says clearly that "sinners do not cease to be human, since sin does not do away with nature," and sinners therefore "ought to be loved out of charity."⁴¹ But if they ought to be loved out of charity, why can public authority kill them? Since a sinner's nature does not change when we go from considering him *secundum se* to considering him *per comparationem ad aliud*, only our perspective, why does his nature not still claim from us the same measure of charity? However "*decidit a dignitate humana*" is understood, the effect is that one who before sinning was to be treated "according to himself" (*propter seipsum*), may now be treated "*utile*" (according as he is *useful* to others).⁴²

Moreover, if we grant the premise that a grave sinner falls from human dignity, we find the argument proves too much. If the kind of sin is mortal sin, every one who commits mortal sin may rightly be killed as a beast. But Aquinas imposes two conditions. He says first that not every mortal sin is rightly punished by death, but only sin that inflicts "irreparable harm" or that contains some "horrible deformity,"⁴³ and second there must be a greater likelihood that the sinner will harm others in the future

39. SUMMA THEOLOGICA II-II, *supra* note 2, at q. 64, art. 6, at 1470.

40. *Id.*

41. *Id.* at q. 25, art. 6, at 1290.

42. *Id.* at q. 64, art. 2, ad 3, at p. 1467.

43. *Id.* at q. 66, art. 6, at 1480 ("*irreparabile nocumentum*" or "*horribilem deformitatem*").

than mend his ways.⁴⁴ But if the criterion for losing dignity is intrinsic to the sinful act's relation to the order of reason, then the added criteria are arbitrary. If the criterion for losing dignity depends on a judge's or jury's judgment that the relative gravity of a particular crime is warranting of death, then human dignity is relative to a juridical judgment. Aquinas' logic says, in effect, that many more people are suited to be killed (by virtue of their beastly status) than may rightly (juridically speaking) be killed.

I have argued that Aquinas' answers to the question as to why it is legitimate for public authority to kill criminals are flawed and question-begging, flawed insofar as they presume a faulty notion of the relationship between individuals and civil society, and question-begging to the extent that they fail to reply to the objection that killing sinners is doing evil for the sake of good. Does Aquinas provide any other argument for the death penalty that might overcome these objections? His conception of the attribution of responsibility by subordinates to lawful authority should be explored.

IV. AUTHORITY AND THE ATTRIBUTION OF RESPONSIBILITY

Aquinas has argued that with respect to a system of law that includes within its range of punishments the punishment of death, public authority and public authority alone judges guilt, sentences to death, and carries out the killing.⁴⁵ This prerogative stems from public authority's responsibility to be guardian of the common good and to exercise its authority in all ways necessary for carrying out that responsibility. How does this exonerate public officials from the charge that *this* particular means, because of its object, is never lawful? Following Pseudo Dionysius⁴⁶ and Augustine,⁴⁷ Aquinas argues that the person by whose authority a thing is done is really the one who *does* that thing, while the one who carries out the command is no more than an instrument, as a sword is an instrument in the hand of a soldier.⁴⁸ The executioner therefore does not properly speaking *do* the killing, but rather the judge by whose authority he acts.⁴⁹ Since the authority to punish ultimately derives from God, by

44. *Id.* at q. 25, art. 6, at 1290.

45. *Id.* at q. 64, art. 3 at 1467.

46. See Pseudo Dionysius, *The Celestial Hierarchy III*, in PSEUDO DIONYSIUS: THE COMPLETE WORKS (Colm Luibheid trans., 1987).

47. See SAINT AUGUSTINE, DE CIVITATE DEI 36–37 (J.E.C. Welldon ed., Soc. for Promoting Christian Knowledge 1924).

48. SUMMA THEOLOGICA II-II, *supra* note 2, at q. 64, art. 3, ad 1 at 1467–68.

49. *Id.* at q. 64, art. 3, at 1467–68; see also SUMMA CONTRA GENTILES, *supra* note 13, at bk. 3, pt. 1, ch. 76, no. 6, at 256.

whose providence the good are rewarded and evil are punished, and whose authority extends to all things necessary to preserve the common good,⁵⁰ public officials, acting on behalf of a system of order, whose authority derives ultimately from God, may rightfully kill criminals: such officials “do no wrong when they reward the good and punish the evil.”⁵¹ It seems to follow that in inflicting capital punishments, public officials do not actually *do* the killing but rather it is done by God by whose authority they act. If God and not the human instrument bears responsibility, the question of whether the intentional killing chosen is chosen wrongly is abrogated, since what is otherwise forbidden to men is not forbidden to God, who, as Lord of life and death, slays the guilty and righteous alike.⁵² Would this conclusion be acceptable to Aquinas? It seems unlikely.

When Aquinas argues for the legitimacy of capital punishment, he invariably appeals to the relationship that exists between a part and its corresponding whole, and to the existential effects of grave sin on sinners. He does apply his principle of the attribution of responsibility to capital punishment (for example, he asserts that an executioner slays by the judge’s authority),⁵³ but *never* in relation to God and civil authority, that is, he never asserts that public authority, or the judge, slays by God’s authority.⁵⁴ When he does attribute responsibility for killing to God, it is not in regard to the killing that takes place within the criminal justice system, but rather, in each case, to killing ordered by God by *divine command*: those “who slew their neighbors and friends by the mandate of the Lord [see Exodus 32:27], would seem not to have done this themselves, but it was done rather by him by whose authority they did it.”⁵⁵ Aquinas continues, “he who by a command of God kills the innocent, such a man does not sin, just as God does not sin, Whose executor the man is.”⁵⁶ And again:

Abraham, when he consented to slay his son, did not consent to murder, because his son was due to be killed by the command of God, who is Lord of life and death: for he it is

50. SUMMA CONTRA GENTILES, *supra* note 13, at bk. 3, pt. 2, ch. 146, no. 4, at 220.

51. *Id.*

52. SUMMA THEOLOGICA II-II, *supra* note 2, at q. 64, art. 6, at 1470.

53. *Id.*

54. He does appeal to the authority of God to ground the prerogative of public authority to determine (*determinationem*) who should and should not be punished. See SUMMA THEOLOGICA I-II, *supra* note 6, at q. 100, art. 8, at 1046.

55. SUMMA THEOLOGICA II-II, *supra* note 2, at q. 64, art. 3, at 1468.

56. *Id.* at q. 64, art. 6, at 1470.

who inflicts the punishment of death on all men, just and unjust . . . and if a man be the executor of that sentence by divine authority, he will be no more a murderer than God would be.⁵⁷

Aquinas does hold that the powers of public authority derive from God, but he does not go to the next step and justify state killing by attributing the killing to God. For Aquinas, the state is authorized to kill and the state does the killing. And such killing is legitimate for two reasons: (1) because a grave sinner constitutes a serious threat to the welfare of the community of which he is a part, and (2) because in sinning *decidit a dignitate humana*. There is little in Aquinas to suggest that in the absence of the soundness of these two foundational arguments, he would defend state sanctioned killing on the strength of his principle of attribution alone.

In conclusion, Aquinas' defense of capital punishment by legitimate authority fails to overcome a number of criticisms. First, that the killing of criminals is doing evil so that good may come. The human dignity proper to all persons is inalienable, stemming as it does from the very nature of the human person. If killing oneself is contrary to the charity we owe ourselves, and killing our neighbor is contrary to the charity we owe our neighbors, then killing a criminal is contrary to the charity we owe to criminals. No appeal to fallen human dignity or the exigencies of the common good can change the nature of the act, which from its object (*ex objecto*) aims to destroy the intrinsic good of human life. Moreover, Aquinas' argument from the relationship of a part to its corresponding whole tends to absolutize the power of the community over the individual, a tendency which would not necessarily be problematic if the operative analogy correctly described the relationship of an individual to the state. But the strict correlation between a person's relationship to the community and a limb's relationship to the human body is faulty. Human persons are born into, act, interact, and find fulfillment in a variety of communities prior to and more basic than the civil community; in other words, persons can and do have *life* apart from the state. A human limb, on the other hand, is integral to, organically part of, and absolutely dependent upon and subordinate in function to the good of the human body of which it is a part. To amputate a gangrenous and moribund limb is not strictly analogous to killing a fully alive, albeit wicked, human person.

57. SUMMA THEOLOGICA I-II, *supra* note 6, at q. 100, art. 8, at 1046.

If my conclusions are correct about the plausibility of Aquinas' traditional argument, then the rational foundation of the traditional Catholic philosophical defense of the death penalty loses its primary support, which raises the unavoidable question as to whether the death penalty ought to be opposed in principle.