

Finnis and Aquinas on the Good of Life

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In his *Natural Law and Natural Rights*, *Fundamentals of Ethics*, and other works, the Oxford professor of jurisprudence and moral theologian John Finnis has elaborated a theory of ethics and natural law that he presents as being based on the thought of St. Thomas Aquinas. (Finnis has been influenced in this project by the moral theologian Germain Grisez, and has worked in cooperation with Grisez and Joseph Boyle on these issues, but I will confine myself to a discussion of Finnis's thought, while noting that my conclusions will have implications for the views of Grisez and Boyle as well.) His account of natural law incorporates a particular account of human life as a good for practical reasoning, from which he concludes — in disagreement with Aquinas — that capital punishment is immoral. This conclusion has gained wide acceptance among Catholics, partly because of the influence of Finnis and Grisez's moral theories. I want to examine his understanding of the good of life, contrasting it with the actual views of St. Thomas, and argue that it is mistaken. I will then explain why I think his mistake is an important one that needs to be avoided.

Finnis presents his account of natural law as being modelled on St. Thomas's account of the first principles of natural law, which is given chiefly in the *Summa Theologiae*, 1a2ae q.94 a.2. It may be helpful to sketch St. Thomas's understanding of practical as opposed to theoretical reason. Theoretical reason aims at knowledge of how things are, and its activity terminates in belief about how things are. Practical reason aims at realising the good, and its activity terminates in action rather than belief. Following Aristotle, St. Thomas holds the ultimate first principle of theoretical reasoning to be the law of non-contradiction. The ultimate first principle of practical reasoning he holds to be the proposition that good is to be sought and done, and evil to be avoided. This principle requires further specification to guide human action, so he holds that subordinate to it are certain principles about the kinds of things that it is good for humans to seek. These include the principles that it is good to conserve one's being, to beget and raise offspring, to seek to know the truth. These principles, when understood, are self-evidently true. They are the first principles of natural law. It is on the basis of them that the practical reason proceeds to judgment about the goodness or badness of

particular actions, and on the basis of these judgments to action itself. It is notable that there is no such thing as moral goodness for St. Thomas, if by moral goodness we understand a particular kind of goodness that is one among other sorts of goodness that actions as human actions can have. For him, an action's being morally good is its being good period, through successfully achieving goodness in the forms specified by the first principles of practical reasoning; its being morally bad consists in its lacking goodness in any important respect. One might ask: if practical reason produces our voluntary actions, and it is directed towards the good, how is it that we ever choose to do things that aren't good? St. Thomas's answer is that even if an action is evil when considered as a whole, we can be motivated to do it by its having some good aspects. Thus, for example, although taking robbery as a career is evil, the having of a career is in itself a good as (among other things) enabling one to sustain life, and hence can serve as a motivation for taking up robbery.

Finnis's account of natural law differs from St. Thomas's in some ways (I will not go into the question of exactly how much it differs). It has two parts: one is an account of basic human goods, and the other is an account of the rules to be followed in seeking these goods. In giving his list of basic goods Finnis presents himself as following St. Thomas. The list of basic goods in *Natural Law and Natural Rights* comprises life, knowledge, play, aesthetic experience, sociability (friendship), practical reasonableness and religion. (Finnis has altered his description of the basic goods in some ways since that work, but these differences need not concern us.) These goods are basic in the following ways: i) their goodness is self-evident and cannot be demonstrated; ii) they provide basic reasons for action, in the sense that an action undertaken for the sake of achieving one of them is not also undertaken for the sake of some further good; iii) no one of them is a form of any of the others; iv) together they exhaust all the ultimate motivations that humans can have for rational action. This list of basic goods is not enough in itself to determine whether actions are good or not. To do this, practical reasoning must make use of the rules that determine how these goods can rightly be sought. There are a number of these rules, the Golden Rule, 'do as you would be done by', being an example, but for our purposes we need only be concerned with one of these rules. This is the rule that one must show respect for every basic good in every act. This means that acting directly against a basic good is wrong under all circumstances whatsoever. Finnis defends this principle against consequentialism, the theory that holds that it is legitimate (or even required) to bring about evil if by doing so one can bring about a greater good. I agree with Finnis in his rejection of consequentialism. What I am concerned with are the conclusions he

draws from this rule together with his principle that human life is a basic good. He reasons thus: human life is a basic good; acting against a basic good is always wrong; so the deliberate taking of human life is always wrong. He uses this reasoning to argue that capital punishment is immoral. He realises that this conclusion is not that of Christian tradition, but argues that it is a development of doctrine.

This argument is valid and fairly obvious. It is puzzling therefore that St. Thomas, whom Finnis presents as the model for his account of practical reason, does not mention it, and rejects its conclusion. St. Thomas clearly states that deliberate killing can be moral if performed by legitimate public authority. This puzzlement evaporates, however, when one realises that Finnis has silently introduced an important change into St. Thomas's account of the first principles of practical reason. When Finnis talks about life as a basic good, he means human life *in general*, anyone and everyone's life. But when St. Thomas talks about the good of life, he means the good of *one's own* life. This is clear from his basing the good of life on the natural tendency that all substances have to conserve *themselves* in being.¹ It is also clear from the fact that if he had meant human life *in general*, he would have held that suicide and murder are both wrong for the same reason, viz., their being an attack on the good of human life in general. But he does not hold that suicide is wrong because it is an attack on the good of life in the person who is killed. He asserts that murder is wrong because it is an act of injustice against the person who is killed (1a2ae q.100 a.8 ad 3); justice being a good for us not just because we are substances but because we are meant by nature to live in society. But he says that suicide is not wrong as an act of injustice against the person killed, it being impossible to behave unjustly towards *one's self* (cf. 2a2ae q.59 a.3, *In Eth. Nic.* bk. 5 lect. 17). In 2a2ae q.64 a.5 he gives three reasons why suicide is wrong. The second and third are that it is an injustice against the community and God; the first is that it is an offence, not against the good of life generally, but against the good of conserving *one's own* being.² Finnis tries to assimilate St. Thomas's view of the good of life to his own by alluding to the universal nature of the principle in question. But 'everything tries to preserve itself in being' is a perfectly universal generalisation, as universal as the principle he tries to substitute for it. It is obvious that if we replace the basic good of human life generally by the basic good of *one's own* life in Finnis's argument against capital punishment, the argument no longer works. All it can then prove is that someone who is sentenced to death should not carry out their own execution; and St. Thomas does not exclude this conclusion, as for example when he says that someone who is sentenced to death by starvation does not sin in secretly eating (2a2ae q.64 a.4 ad 2).

To substantiate his account of St. Thomas's conception of the good of life, Finnis cites 1a2ae q.64.a.6, which considers whether it is ever permissible to kill an innocent person. St. Thomas here states that considering a man as he is in himself it is never licit to kill him, because we ought to love the nature that God has made even in sinners ('in quolibet etiam peccatore debemus amare naturam quod Deus fecit'). It may be licit to kill a sinner, when he is considered as harming the common good; but this reason does not apply to the innocent, so they can never be licitly killed. In order to fit into Finnis's scheme, this love of human nature would have to be the same when applied to ourselves and when applied to others, because it ought on his view be directed to the same basic good. But there is nothing in the text that demands this interpretation; and such an interpretation does not harmonise with what St. Thomas says about benevolent love generally. When talking about friendship, which is mutual benevolent love, he says that the love one bears one's self is prior to and presupposed by the love one bears others, because the love involved in friendship consists in loving others as if they were one's self (2a2ae q.2 a.4).

Well, given that Finnis has departed from St. Thomas's views, why shouldn't he be right in doing so? The difficulty with this departure is that his understanding of the basic good of life as a first principle of practical reasoning is incompatible with other positions that he (rightly) holds; and this incompatibility forces him into adopting a pernicious view of when one can be said to kill. One of these positions is the contention that it is always wrong to act against a basic good. The other is his allowing, in accordance with Catholic tradition and common morality, that it is possible for there to be just wars. Wars involve killing humans, so this raises the question of why Finnis's principles do not imply that waging war must be morally wrong because of its involving direct action against the basic good of life. For St. Thomas this particular question does not arise, as we can see, because he does not hold that human life in general is a basic good of practical reasoning. The question of killing in war is for him a question about the good of justice, which he thinks of as a different thing from the good of life. His extensive consideration of the virtue of justice, a virtue arising from our nature as social beings, which could be called a 'basic good' in his understanding of practical reasoning (to the extent that this sort of terminology is appropriate), and which does not as such rule out the deliberate killing of humans, guides his discussion of killing in war. But for Finnis the question is acute; if he allows that war, and hence deliberate killing of humans, can be permissible, then he seems committed to denying that human life in general is a basic good. He is aware of this problem, and he responds to it by invoking the doctrine of

double effect. He claims that killing in war can be morally permissible if it is not actually intended by the agents doing the killing, but is only foreseen as an unwilled byproduct of actions that have the object of rendering the enemy unable to fight or resist. Thus, for the morally upright soldier, the intention behind shooting an enemy soldier in the head, or dropping a five-ton bomb on an enemy position, would not be to kill the enemies in question, but only to put them out of action. This is what Finnis thinks is going on in those (no doubt rare) cases where war is justly waged; and this is the view of killing which, I shall argue, is a pernicious one. (He originally thought that a similar line of argument could be used to defend capital punishment, but he has changed his mind on this question. In this he was right, since laws that explicitly assign death as a penalty for crimes cannot be said to not intend the death of an offender.)

One's first reaction to this defence is to feel doubtful about the idea that one can intend to, say, bayonet a man through the heart, without actually intending to kill him. To judge the value of this reaction, we need to look at the controverted and often misunderstood doctrine of double effect.

The doctrine of double effect has two elements. One of these is the view, held by St. Thomas, that an action is specified by its object. We can begin to understand this by noting the difference between the object and the intention of an act. One person may decide to feed the poor out of love for them, while a second person decides to feed them for the sake of display. In these cases, what the two individuals do — the object — is the same, but why they do it — the intention — is different. The intention is the good that motivates one to choose to do something, and, as this example illustrates, it is not the same as the act that is done. The object, in St. Thomas's terminology, is the act itself, is what it is that is done. But the characterisation of the object of an act is itself something that needs to be specified. This results from the fact that an event to which the description of the object of an act can be applied is also susceptible of having other descriptions applied to it. This is illustrated by an example given by Elizabeth Anscombe in her book *Intention*. She considers someone pumping water from a hand pump, and points out that this event can be characterised in different ways; as pumping water, but also as making a squeaking noise, as giving one's self blisters, and so on. St. Thomas's idea is that not all of these descriptions will identify the act itself. The description that identifies the act will be the one that the agent actually wills to take place; this is what he calls the object. The act's being specified by the object means that the object tells us what the act is. In Anscombe's example this is pumping water rather than giving one's

self blisters.

Why accept this view of what an act is? The fundamental reason is that voluntary acts (which are the sort we are concerned with) are what are chosen by the will, and the object of an act identifies what it is that is chosen. (Another reason is that the view is necessary for the moral distinctions that are involved in the second element of the doctrine of double effect.) In acting, an agent's will is adopting some particular proposal entertained by the mind of what is to be done. This proposal is a description of what the agent wishes to do, and what the agent *does* do if he succeeds in acting (rather than trying and failing). This proposal is the object of the action, and it is both what the agent has in mind and what actually occurs in action. The other descriptions, like the making a squeaking noise or the giving one's self blisters, are not willed or chosen; since acts are what are willed and chosen, these descriptions do not refer to acts. Following tradition, we may refer to these descriptions as material descriptions, although this terminology is misleading; it implies that they are descriptions of *acts*, which they are not. These descriptions may be known or unknown to the agent, desired or abhorred, but however this may be, they are not what is chosen, and hence they do not refer to the act itself.

Although this view of the nature of acts is soundly based and is essential to our moral reasoning, it is widely rejected or simply misunderstood by philosophers and moral theologians. I think that one reason for this is the acceptance of unexamined Cartesian assumptions about the mind. According to these assumptions, the mind is one thing and the body is another, and their separation is such that if something can be characterised in mental terms it is an attribute of the mind and not of the body. From this it follows that if something has a physical existence then mental terms cannot enter into the specification of its nature. But this is just what happens in St. Thomas's position that an act is specified by its object. The act of pumping water is a physical happening, but this physical happening is picked out by the object of the agent in doing it. I say 'in doing it': the object of an action is not the same as some purely mental plan separate from the action, whose existence consists in being considered by the mind as a possibility, although it may *realise* such a plan; there need be no such plan at all prior to the doing of a voluntary action. The object of a physical action is an attribute — the defining attribute — of that physical action. The Cartesian assumptions that would rule this out have it seems to me been refuted by Wittgenstein and others, and hence do not provide objections to St. Thomas's view. They are however still so common that they often prevent people who would like to attack the doctrine of double effect from even understanding what it is

that they are supposed to be attacking.

The second part of the doctrine of double effect is the contention that the distinction between the object of an act and its material descriptions is of moral significance. We can see how this follows from the principle that one ought never to act against a basic good. This means that one can never do something whose object goes against a basic good; but it allows for the possibility of doing something whose material description, if chosen as an object, would constitute an offence against a basic good, but whose actual object does not. Philippa Foot gives the example of the driver of a runaway train who can choose between two tracks, and decides to go down the one where one man is working rather than the one where five men are working, so that fewer people will be killed.³ If he had chosen that track because he hated the lone man working on it and wanted him to die, he would have had murder as the object of his action, and would have been doing wrong. However, if he chose that track simply to avoid killing the five men, the bringing about of the death of the one man would not have been the object he proposed to himself, and he would not have been guilty of murder; in the circumstances he would not have been doing wrong at all. It is allowed that permitting as opposed to actually choosing the death of the innocent, or other evils, can be wrong. It is only maintained that there can also be cases where it would not be wrong, which is not the case with actually choosing to kill the innocent. (The term 'double effect' is misleading, as these examples show, since the material descriptions of an act are not the same as the effects of an act. They are circumstances of the act, and are judged as such, but circumstances are not limited to effects.)

The moral distinction between these two cases is of a kind that we are constantly making. The underlying rationale for them emerges in the reply to those who would object that after all the same result occurs in both these possible cases — the one man dies; and is that not after all what matters? The man's death certainly *does* matter, but not in a way that obliterates the moral distinction between someone's killing him on purpose and someone's bringing about his death without intending to kill him. (Raising the level of education, as Foot points out, has been shown to raise the suicide rate, but that does not make one government minister's raising the level of education equivalent to another minister's shooting some innocent hostages to restore civil peace, even if the net goodness of the upshot of both actions were to be equal.) The reason for such distinctions lies in the fact that morality, as St. Thomas remarks at the beginning of his commentary on the Nicomachean Ethics (bk. I lect. 1), has to do with acts of the will rather than with what is produced by these acts. Human life is as such a good thing, so the existence of any

human being, and the coming into existence of any human being, must as such necessarily be good. But this does not mean that the act of bringing a human being into existence has to be good; it can be evil, as, for example, when it is done when as far as they know the parents are unable to properly raise the child. Such an act would still be evil despite the fact that the child's existence would be a good thing, and even if, as it turned out, it were possible to give the child a good upbringing after all. This is so because the act of begetting a child, and the existence of the child, are distinct existences. The goodness of the latter does not imply the goodness of the former. And since moral evaluation is evaluation of a voluntary agent, it is the goodness of *acts*, which are attributes of the agent, rather than the goodness of the results of these acts, which are not, that are the subject matter of moral evaluation. The result of an act can certainly be relevant to the goodness of an act, but the act's goodness will still not be the same as the goodness of the result. A similar point can be made about practical reason. God is in a position to take the goodness of things in general as a goal, because he rules over these things. But the practical reason of a human being rules only the acts of that human. It is the goodness of those acts, therefore, rather than the goodness of things in general, that practical reason is concerned with and aims for.

The doctrine of double effect is thus unimpeachable. The question for us is not whether this doctrine is correct, but whether Finnis is right in saying that acts such as deliberately shooting or blowing to bits can rightly be described as acts that do not take killing as their object. Our initial reaction to this contention of Finnis's tends to be incredulity. This reaction is exemplified by Philippa Foot in a hypothetical case she describes. She portrays a situation where a party of potholers have allowed a fat man to lead as they make their way out of the cave. The fat man gets stuck in the mouth of the cave, and flood waters are rising *inside the cave*. The potholers have a stick of dynamite with them, so they must either blow the fat man out of the mouth of the cave with it or drown. Foot remarks that the story 'will serve to show how ridiculous one version of the doctrine of the double effect will be. For suppose that the trapped explorers were to argue that the death of the fat man might be taken as a merely foreseen consequence of the act of blowing him up. ("We didn't want to kill him. only to blow him into small pieces", or even "only to blast him out of the cave.") I believe that those who use the doctrine of double effect would rightly reject such a suggestion...'⁴ Finnis's conception of the moral soldier ('I didn't want to kill him, only to hit him with a 100lb shell') is of the sort that Foot considers illegitimate. Which of these two, Foot or Finnis, is in the right? Our initial reactions are in favour of Foot; and it is possible by reflecting on

this case to elaborate on these reactions. We can begin this reflection by considering the nature of killing. It is not possible to take killing considered on its own, without any further specification, as the object of one's act. If we are to kill someone, we must do it in a particular way — shooting, poisoning, stabbing... The case is parallel with lying. One can only lie through telling a particular lie ('the cheque is in the mail', 'you are the only woman in the world for me'), not by just lying in general. That is why the case of the fat man in the mouth of the case is, as Foot says, not a legitimate example of double effect. Blowing someone to bits is a way of killing him; so, if one has blowing a man to bits as the object of one's action, one has killing the man — in a particular way — as the object of one's action.

In order to answer this objection Finnis needs to give reasons why the object 'blowing to bits' is not also the object 'killing'. There are several reasons that might be offered.

One reason is that 'blowing to bits' and 'killing' differ in meaning. But this will not do, because not only an event which can be characterised by the object of an action, but also the object itself, can have several descriptions applied to it. Suppose I choose, as part of a Satanic ritual, to kill someone by piercing their heart with a triangular knife. This object, as a proposal understood and adopted by the agent, can have different descriptions applied to it; as 'killing', 'stabbing', 'piercing the heart', 'piercing the heart with a triangular knife'. These will differ in meaning, but they are all descriptions of the object, and hence the object will fall under every one of them.

Another position is that the object of an action is what the intention, that is, the good sought from acting, attaches to; and therefore that a description of an action that does not capture the feature that motivates the action cannot be its object. This seems to be what Finnis himself advances as a defence against the fat man in the cave case; he says, in reply to this case and similar ones, that 'what is being done.. is settled by what one chose, under the description which made it attractive to choice.'⁵ But this is mistaken. As we have seen, the object of an act is susceptible of several descriptions, and the good that is sought from the act need not apply to all these descriptions. Thus, if the Satanic ritual I engage in demands that the killing of the victim be done only by piercing his heart with a triangular knife, the benefit that is sought from the act will not attach to the more general description 'killing', but 'killing' will still describe the object of the act. More generally, if the fact that the good that motivated us to act was attached to a particular description of an action implied that that description was the directly willed object of the action, it would be impossible to do an act for the sake of its good

side-effects. But it obviously is possible to do this, as in e.g. keeping one's temper in order to set a good example for one's children. One may keep one's temper for this reason even when one thinks it very unlikely that it will actually succeed; in this case the good sought clearly cannot be a feature of the object, because the object is what one voluntarily does, and hence must be something one believes it in one's power to do. The object does have to have some connection to the good that leads one to choose it. The connection between the object of an action and the good sought in acting is something that enables us to see the truth of the view that an action is specified by its object, because the material descriptions of an act may be unconnected with or even contrary to the good sought in acting, and thus not actually willed. But this fact does not support Finnis's view, because the connection between object and good sought does not have to consist in the good's being a property of the object itself, under all or any of the object's descriptions.

A third position could be to claim that 'killing' and 'blowing to bits' are different objects because they are logically independent of each other; it is logically possible that someone could be killed without being blown to bits. But this would prove too much. Because human powers are limited and fallible, such logical possibilities can never be excluded; *any* proposal within human power that can be taken as the object of an act is logically compatible with no-one's being killed as a result of that act. So if the logical possibility of an act's object not involving killing means that killing is not the act's object, then no-one could ever have killing as the object of their act.

A last position could be that killing must form part of the content of the object, if that object is to constitute killing. So, for example, the potholers will only have killing as their object if they took 'killing the fat man by blowing him to bits' as their object, rather than merely 'blowing him to bits'. An initial difficulty with this proposal is that the difference between these objects would seem to come down simply to the potholers' choice. But this difference has grave moral implications, if, as this proposal contends, one of these objects constitutes deliberate killing and the other does not. It seems dubious that such an important moral difference could arise simply from choosing to think of one's action as being of one kind rather than another. A more profound difficulty arises from the fact that the object of an action describes what the agent does. But the fat man's being killed by being blown to bits is not a description of the action of the potholers, because it is a result, not only of their activity, but also of a whole complex of properties of human beings and of explosions that they do not and could not bring about, and that are hence not part of their action.

Finnis might legitimately ask how, if these proposed criteria are rejected, we are to judge whether or not an object can be described as killing. We can offer a criterion that will suffice for the issues being discussed, without attempting to decide whether it applies to all cases. It is that if some description of the object of an action is also the description of someone's death, then killing is the object of that action. Thus, the fat man's being blown to death is his dying; his death does not happen through something other than his being blown to bits. This is so even though 'being blown to bits' does not mean or logically imply 'dying'; it suffices that that particular man's being blown to bits is identical with his dying, and that the agents know that this will be so, for the object 'blowing him to bits' to also be the object 'killing him'. This criterion is made plausible by the fact that knowing that a particular action will be identical with someone's death, and choosing to do it, is the only way that humans have of taking killing as their object. As we have seen, no stronger connection between killing and action — such as doing something that will logically imply a person's death — is available to them.

Finnis could appeal to St. Thomas's views on killing in self-defence to support his position. In 2a2e q.64 a.7, St. Thomas states that although killing by a private individual is never permissible, it can be licit to kill in self-defence provided that the death of the aggressor is not intended. But he is not clear on whether such self-defence can make use of undoubtedly lethal means (such as stabbing) rather than means that are not undoubtedly lethal (such as punching), so he does not actually provide unequivocal support for Finnis's view. In light of the insuperable difficulties with this view, if one wanted to hold on to St. Thomas's contention that private persons cannot legitimately intend to kill, it would be necessary to clarify his views on self-defence by limiting the moral uses of such defence to actions that are not undoubtedly lethal. However, this would contradict the practice of the Church, which has been willing to admit cases of self-defence with undoubtedly lethal means as legitimate. It would be more plausible to reject St. Thomas's view on the wrongness of deliberate killing by private persons, which is not supported by convincing arguments. He reasons that because killing is only licit insofar as it is ordered to the common good, the right to kill belongs only to those authorities who are responsible for the common good (2a2ae q.64 a.3). He applies this reasoning not only to killing, but to all harming of others (2a2ae q.64 a.3 ad.3), of which killing is seen as a particular case. One can see in this argument a justified concern to oppose the idea that if some punishment is just, then a private person has a right to inflict it. But the principle that St. Thomas appeals to is

untenable. There are cases where private persons are not only allowed, but required, to deliberately inflict harm. Suppose I warn Alice that Bob is treacherous and untrustworthy. I do this because I have experience of Bob's perfidy, I see that she is in danger of having the same experience, and I want her to know his character so that she will not suffer in the same way. In doing this my object is to take away Bob's character, and thus to harm him (cf. 2a2ae q.73). But I need not be acting wrongly in thus harming him deliberately; I might indeed be acting wrongly in not doing so. So St. Thomas's principle is mistaken, and it cannot be used to reject the deliberate infliction of death in self-defence. (A philosophical exploration of the justification of such action would go beyond the scope of this paper. I will only indicate a direction that such exploration might follow, by mentioning that St. Thomas seems to mistakenly conflate just infliction of harm with just punishment of crime. The latter is possibly restricted to public authority, but it is not identical with the former.)

The above discussion settles the question of whether Finnis is right about the good of life. He admits, and no reasonable person could deny, that soldiers in war take such lethal activities as shooting, stabbing and blowing to bits as the object of their actions. Our discussion has shown that these activities have killing as their object. But this means that Finnis's appeal to the doctrine of double effect fails. Such actions can on Finnis's admission be good ones. It is thus possible for actions that are directly against the good of life as Finnis understands it to be good ones; therefore, his understanding of the good of life is mistaken.

This conclusion about Finnis's understanding of the good of life may well leave the reader discontented. One source of discontent might be agreement with the teaching of the *Catechism of the Catholic Church* that the death penalty should only be used if absolutely necessary. Finnis's kind of objection to capital punishment seems to many people to provide a rationale for this position. If this rationale is removed, we are left with the view expressed by the *Catechism* and by much of Catholic tradition that 'legitimate public authority has the right and the duty to inflict punishment proportionate to the gravity of the offense' (2266). But there is a lot of crime — all murders for which the murderer is fully responsible, to begin with — for which the death penalty is a proportionate punishment. If the state is to inflict proportionate punishment for crimes, it will not be using capital punishment only when absolutely necessary. How then are we to defend the *Catechism's* teaching?

The answer to this particular discontent is given by Elizabeth Anscombe. She points out that the fact that someone deserves a punishment does not confer on all and sundry the right to inflict it. She

then asks what gives the state the right to inflict violence to the point of death on people who deserve it; and answers that it can only be that such violence is necessary for protecting people, by keeping would-be evildoers in fear.

...For even if (which one may doubt) there is something intrinsically good about an evil-doer's suffering, what is one man or some set of men that they may bring this about? Are they so good themselves? and are they in charge of the order of things, to see that such a good is brought about? It is obvious nonsense. The justification of the institutions of law, charge, trial and sentence must be the protection of people.⁶

This answer explains why death can only be inflicted in case of necessity; it is this necessity that gives the state the right to inflict it. Anscombe's answer is less comfortable than the more usual view that the death penalty is bad because of the harm it does to culprits. If even the worst murderer is not bad enough to deserve being put to death, how much less deserving of punishment must the rest of us be! Basing the restriction of the death penalty on human limitation is less appealing. It is however more solid, because feeling for criminals is liable to evaporate when one is personally threatened by their crimes.

It should be pointed out that Finnis is quite wrong in claiming, with Grisez and Boyle, that the *Catechism* has adopted the position that 'killing of human beings is justifiable only insofar as it is not intended.'⁷ There is no warrant for this assertion in the text. In fact, if, as Finnis himself says, infliction of the death penalty takes the killing of humans as its object, the *Catechism* rules out this position by stating that resort to the death penalty is not excluded.⁸

These remarks on the death penalty may not succeed in allaying the reader's discontent. It might be felt that arguing for the possibility of legitimate killing by the state is not a worthwhile activity. States are not shy about killing; where is the need to encourage them by announcing that killing can be legitimate, even if such encouragement is based on the truth? I agree that encouragement of this sort is rarely needed, but this is itself connected with the first of the two reasons why I think it important to criticize Finnis's position.

This first reason springs from the facts that states or state-like organisations are necessary for human society, and that such organisations have to be ready to inflict violence to the point of death if they are to be able to survive and function. This means that deliberate killing by the state cannot be eliminated; it is inevitable that it will happen. A position like Finnis's cannot therefore have the effect of

preventing state killing. All it will do, if accepted, is to remove any foundation for moral and legal restraints on such killing. People who see that killing by the state is deliberate, and accept Finnis's view about the evil of acting against the good of life, will end up concluding that doing evil is unavoidable. They will in consequence become liable to commit any atrocity that seems to promise some advantage.

Developments of this sort are most noticeable in war. Anscombe has described them; 'War indeed is a "ghastly evil", but once it has broken out no one can "contract out" of it. "Wrong", indeed, must be being done if war is waged, but you cannot help being involved in it.. The upshot was that it was illegitimate to draw any line between legitimate and illegitimate objects of attack.'⁹ She is not here describing her fearful imaginings, but her observations of the sort of thing said and believed in order to justify bombing attacks on civilians during the Second World War. Similar developments can be observed in states which do not have the death penalty, but have to resist violent civil disorder. In how many of them do we find death squads, or some form of unofficially sanctioned assassination, that provide fewer safeguards for their victims than all but the most corrupt trial? The answer is most of them, including Britain.¹⁰

It may be observed that when we face up to the fact that state infliction of deadly force is intentional, capital punishment appears in a somewhat different light. In the part of Nigeria where I was living last year, the police had to be willing to shoot on sight any armed man they saw after dark. Adoption of this policy was strictly necessary for them, because without it they would not have survived, so it was legitimate. But compare this policy with the implementation of laws that carry the death penalty, *provided* such implementation is carried out according to proper juridical norms. Such implementation means that evidence has to be produced that meets a certain standard, that the accused has the right to representation, that a sentence can be appealed. People who are in favour of capital punishment usually think that the best reason for advocating it is its justice and its power to deter. In fact, the strongest argument for it is that it provides a way of channelling and thereby restraining the violence of the state.

The second reason for opposing Finnis' s position is that the argument from the doctrine of double effect that he is obliged to use in justifying it is a source of corruption. As we have seen, he is driven to an illegitimate use of the notion of double effect, a use that wrongly denies that some actions have killing as their object. This illegitimate use lends itself to the justification of evil, by enabling people to pretend that they are not killing when they are. Horrifyingly, Finnis himself, along with Boyle and Grisez, has attempted a justification of this sort in arguing that

craniotomy need not constitute the deliberate killing of an innocent human being. The craniotomy Finnis, Boyle and Grisez discuss is an operation where a doctor scoops out the brain and crushes the head of an unborn child in order to allow the child's removal from the birth canal. They assert that 'a doctor could do a craniotomy, even one involving emptying the baby's skull, without intending to kill the baby — that is, without the craniotomy being a direct killing.'¹¹ This operation is no longer actually performed, but the example set by distinguished Catholic theologians in arguing that it need not be direct killing is disastrous, since it provides encouragement for many crimes that are real possibilities. The reader will perhaps not have needed the argument of this paper to discern the falsehood of this monstrous claim. The argument is nonetheless useful in bringing out the nature of the falsehood. The emptying and crushing of a baby's skull is also the baby's dying; taking this as an object thus means taking the killing of the baby as an object.

There is tragedy in the fact that Finnis, who has been a valiant soldier in the Church's fight for the defence of innocent life, should end up striking a blow for the other side. This tragedy shows the need for correcting his understanding of the good of life.¹²

- 1 la2ae q.94 a.2; 'Inest primo inclinatio homini ad bonum secundum naturam in qua communicat cum omnibus substantiis: prout scilicet quaelibet substantia appetit conservationem sui esse secundum suam naturam. Et secundum hanc inclinationem, pertinent ad legem naturalem ea per quae vita hominis conservatur, et contrarium impeditur.' *Summa Theologiae* (Leonine ed.), vol. 2 (Madrid: Biblioteca de Autores Cristianos, 1959), p. 610.
- 2 2a2ae q.64 a.5; '...seipsum occidere est omnino illicitum triplice ratione. Primo quidem, quia naturaliter quaelibet res *seipsum* amat [my italics]: et ad hoc pertinet quod quaelibet res naturaliter conservat se in esse et corruptentibus resistit quantum potest. Et ideo quod aliquis seipsum occidat est contra inclinationem naturalem, et contra caritatem, qua quilibet debet seipsum diligere.' *Ibid.*, vol. 3, p. 439.
- 3 Philippa Foot, 'The Problem of Abortion and the Doctrine of the Double Effect', in *Virtues and Vices, and Other Essays in Moral Theory* (Oxford: Blackwell, 1978), p. 23.
- 4 *Ibid.*, pp. 21-22.
- 5 John Finnis, 'Intention and side-effects', in Frey and Morris eds., *Liability and responsibility* (Cambridge: CUP, 1991), p. 57.
- 6 Elizabeth Anscombe, 'On the Source of the Authority of the State', in *Collected Papers Vol. III: Ethics, Religion and Politics* (Oxford: Basil Blackwell, 1981), p. 148.
- 7 John Finnis, Germain Grisez and Joseph Boyle, "'Direct" and "Indirect": A Reply to Critics of Our Action Theory', in *The Thomist*, Jan. 2001, p. 43.
- 8 It should be remarked that the *Catechism* is not very helpful in describing when infliction of the death penalty can be judged to be absolutely

necessary. It asserts that ‘Today, in fact, as a consequence of the possibilities which the state has for effectively preventing crime, by rendering one who has committed an offense incapable of doing harm —without definitely taking away from him the possibility of redeeming himself — the cases in which the execution of an offender is an absolute necessity “are very rare, if not practically non-existent” (*Evangelium Vitae*, 56)’ (para. 2267). In commenting on this assertion it needs to be kept in mind that the function of the *Catechism* is in part a legal one, because it serves as a norm for belief that binds the consciences of the Catholic faithful. In order to fulfil this function, several conditions must be met: the subject matter of a teaching must fall within the competence of the Church; the content of the teaching must be clearly expressed; and the teaching must be manifestly presented as a norm for belief. None of these conditions are met in this passage. The possibilities available to the state (which state?), and the frequency of occasions upon which the death penalty is absolutely necessary, are empirical questions of a sort that do not lie within the sphere of the Church’s teaching authority. The significance of the possibilities available to the state is not clearly explained. Is it being claimed that the possibility of locking away an offender forever is sufficient to prevent crime, because the offender in question will then be powerless to do more harm? This claim rejects the notion of deterrence as a justification for the death penalty. Such a rejection, constituting as it does the condemnation of a position widely held by important Catholic thinkers, would contravene the usual norms for Church teaching, which only issues such condemnations in extraordinary circumstances; so one ought not, if possible, to assign this meaning to the claim. But then what does it mean? And whatever its meaning, it is not asserted as true by this passage, but only alluded to as a presupposition of the claim that the necessity of executions is rare or practically non-existent; the latter claim being the only one that is actually made by the passage. So the *Catechism*’s remarks on the conditions for the necessity of the death penalty do not get us anywhere; they do not even constitute teaching on the subject. If the conclusions reached in this paper are correct, this is not surprising. For it has been said, following Anscombe, that the justification for capital punishment is the necessity of inflicting it in order to protect people. But the question of when fear or actual infliction of death on evildoers is necessary for people’s protection is an empirical one, that will vary with circumstances, and that does not fall within the field of the Church’s teaching authority.

- 9 Anscombe, ‘Mr. Truman’s Degree’, in *Collected Papers vol. III*, p. 63.
- 10 For Britain see Mark L. Urban, *Big boys’ rules: the secret struggle against the I.R.A.* (London: Faber and Faber, 1992). Exceptions to this generalisation, like Italy and the Mafia, are not very encouraging, since they usually involve the violent criminals’ having connections to the government.
- 11 Finnis, Grisez and Boyle, “‘Direct’ and ‘Indirect’: A Reply to Critics of Our Action Theory”, p. 27.
- 12 I am grateful to Professor Finnis for his helpful comments on an earlier version of this paper.