

ABSTRACT

Aquinas on Justice, Judgment, and the Unity of Peace

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St. Thomas Aquinas's chief contribution to politics is generally taken to be centered around his understanding of the law, and primarily focused on finding a transcendent basis for the authority of particular laws. In this dissertation, I argue that Aquinas is concerned rather to show that law is only properly understood as part of a regime. Nature, in Aquinas's political teaching is complex and not easily embodied in one natural ruler; on the contrary, the nature involved in natural law is best understood by means of a republican regime. My dissertation develops this focus in Aquinas's writing by exploring Aquinas's teaching on law, just war, punishment, and republican government, and their place in Aquinas's political thought. Aquinas argues that the human being is naturally and truly political—that is, the individual is ordered towards the goals of the city. The central argument of this dissertation is that Aquinas grounds the purposes of the city in the nature of the human being. In doing so, Aquinas does not appeal to human nature abstractly, but rather to the activity of human beings in community. Although Aquinas points to a transcendent basis for law, his political teaching suggests that we should discern policy from a human basis.

Aquinas on Justice, Judgment, and the Unity of Peace

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DEDICATION

To my parents,
who gave me books to read

CHAPTER ONE

Towards a Political Reading of Aquinas

Although the bulk of his work concerns theology, St. Thomas Aquinas did not shrink from bold statements on politics. Aquinas claimed, for example, that law aims at the perfection of human virtue.¹ Yet more famously, Aquinas argued that human law belongs to a Divinely-appointed hierarchy of eternal principles of human behavior. As a political thinker, Aquinas is known most of all for this claim. He is known as a natural law theorist and read most often for his discussion of that subject in his so-called “Treatise on Law”. Hence Aquinas is recognized primarily for a theory which judges the legitimacy of human law on the basis of natural, eternal, and ultimately Divine law—on what is natural and true concerning human beings as the Divine has created them.

In a world which gives paramount importance to the division of church and state particularly where law is concerned, and questions even the relevance of morality to law, a natural law theory that refers to the Divine for fundamental principles faces severe criticism. Oliver Wendell Holmes once wrote that “truth [is] the majority vote of that nation that could lick all others,” or in other words that “our test of truth is a reference to either a present or an imagined future majority in favor of our view.”² The political implications of this statement were, according to Holmes, that although we should (and inevitably will) fight and die for our belief and love of our own, we should at the same

¹ St. Thomas Aquinas, *Summa Theologiae*, I-II, 95.1.

² Oliver Wendell Holmes, “Natural Law”, 32 *Harvard Law Review* 40 (1918-1919) 40-44., 40.

time “recognize that others will fight and die to make a different world, with equal sincerity and belief.”³ No reference to abstract principles of morality or to principles of religion could therefore be relevant to understanding law or justice. In law and in war, Holmes argued, justice is in the eye of the beholder. Therefore theories grounded in natural law ought to be cast aside as products of “a naïve state of mind.”⁴

The strain of thought represented in Holmes’s dismissal of natural law has had permanent traction in American politics. Holmes’s extreme emphasis on the power of the majority to define right and wrong is not the only or even the majority view on the role of justice in democracy. Yet democracy endorses at least the legal power of the view of the majority and American democracy in particular emphasizes the ability of the individual to express individual convictions and views. In American democracy, this emphasis on individual conviction and self-determination is, moreover, recognized constitutionally.⁵ Scholars of the natural law and thus of St. Thomas Aquinas have therefore often found themselves placed in a defensive attitude by the general accusation of naivety. This dissertation aims to combat the dismissal of Aquinas himself by arguing that his theory of natural law is far from naïve - that it relies on a realistic appraisal of human nature and of human politics and one which is in fact compatible with democracy. More importantly,

³ Holmes, “Natural Law,” 41.

⁴ Ibid.

⁵ See, for example, the First Amendment of the American Constitution, or Justice Kennedy’s notorious statement that “At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.” *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992).

however, I argue that Aquinas gives a comprehensive teaching on politics and not merely on law.

In pursuing a comprehensively political approach to Aquinas's discussions of politics, I therefore address Aquinas as a theorist to whom natural law is an important element in the structure of the community, but strive to avoid the pitfalls of labelling him a "natural law theorist." This approach differs from a very common reading of Aquinas in modern commentary, a particular reading of Aquinas which is likely born of a defensive response to critiques of the natural law. A prominent group of scholars has taken a new approach to natural law and to Aquinas in response to the majoritarian premise of modern democracy. These thinkers look to Aquinas and to natural law as the basis of an ethics which "[expresses] reflectively the requirements of practical reasonableness, not of idealism."⁶ The figurehead of this approach is John Finnis. Finnis explains natural law as the recognition that some human goods are obvious to human beings. He rhetorically asks, by way of example, "is it not the case that knowledge is really a good, an aspect of authentic flourishing, and that the principle which expresses its value formulates a real (intelligent) reason for actions?"⁷ Knowledge, therefore, must be a general human good. Human beings generally know this to be a good, because "it seems clear," and "there are no sufficient reasons for doubting it to be so."⁸ The good of knowledge is "self-evident, obvious"—it "cannot be demonstrated, but equally it needs

⁶ John Finnis, *Natural Law and Natural Rights* (Oxford: Oxford University Press, 2011): 29.

⁷ *Ibid.*, 64.

⁸ *Ibid.*

no demonstration.”⁹ Finnis similarly describes the other goods which the human beings should seek (or, as they are also called by Finnis, the principles of natural law and of Aquinas’s ethics.) They are the goods which reasonable people should admit—and which each reasonable person can discern through reason.

In appealing to the practical reasonableness of each individual as a basis for ethics, Finnis attempts to overcome the Holmesian democratic objection to natural law theory. In giving this account, Finnis addresses in particular a possible objection to Aquinas which comes from the use of virtue in Aquinas’s account of politics. He takes up a central objection to Aquinas and to natural law: “that Aquinas’s account of natural law proposes an illicit inference from ‘is’ to ‘ought.’”¹⁰ Finnis points to Aquinas’s emphasis on virtue as the reason this objection might arise. He explains that “Aquinas himself was a writer not on ethics alone but on the whole of theology,” and “was keen to show the relationship between his ethics of natural law and his general theory of metaphysics and the world-order.” Therefore he argued that “human virtue is analogous to the ‘virtue’ that can be predicated of anything which is a fine specimen of things of its nature, in good shape,”¹¹ and “human virtue, too, is in accordance with the nature of human beings, and human vice is *contra naturam*.” If virtue were as simple as this, Finnis argues, Aquinas really would seem to have proposed “an illicit inference from ‘is’ to ‘ought.’”

⁹ Finnis, *NLNR*, 65.

¹⁰ *Ibid.*, 35.

¹¹ *Ibid.* Finnis also cites and translates Aquinas’s latin statement: “bene disposita secundum convenientem suae naturae” (well disposed according to what is suitable to its nature.) *ST*, I-II, 71. 2 ad. 3.

In order to overcome the simple reading of Aquinas's reliance on virtue that might illicitly claim that what the human being is should define what the human being ought to do, Finnis examines Aquinas's conception of virtue anew: Aquinas claims that "human virtue, which makes good both the human person and his works, is in accordance with human nature *just in so far as it is in accordance with reason.*"¹² According to Finnis, for Aquinas reasonableness is "*the criterion of conformity with or contrariety to human nature.*"¹³ The basic truth about practical reasonableness for Finnis is that each human being can by reason separate "sound" from "unsound" judgments, and can come up with "a set of general moral standards"—a list of goods that contribute to the human being's possible fulfillment.¹⁴ These goods come from the human being's capacity for reason, and therefore natural law theory, on this reading, is a teaching concerning the capability of reason to direct each individual towards his fulfillment. Virtue, correspondingly, describes the reasonableness (from the perspective of the individual's own interests) of an individual's actions and choices. Germain Grisez, following Finnis, makes this point more directly. He claims that virtue only exists as an aspect of the character of a (fully) morally good person. It is not, thus, a characteristic that can be built and refined, but rather an ideal that one could helpfully imagine. Grisez states that "discussion of virtues is thus helpful in describing what is required by the various modes [of approaching human fulfillment.]"¹⁵

¹² Finnis, *NLNR*, 36 (Finnis's emphasis). He cites *ST* I-II, 71, 2 reply to 3rd.

¹³ *Ibid.*, *NLNR*, 35.

¹⁴ *Ibid.*, 23.

¹⁵ Germain Grisez, *Christian Moral Principles*. Chicago: Franciscan Herald Press, 1983., 193. Finnis endorses this reading (writing along with Grisez and Joseph Boyle) in

Where politics is concerned, the pre-eminent virtue (by Aquinas's frequent statement and by the admission of Finnis and Grisez) is justice. Justice is, according to all three, the virtue with a special relation to the good of the community—or what all three call the common good. Having just undermined the reality of virtue, Finnis and Grisez must make justice more than a simple virtue. Both give justice the status of a basic good—of one of the first principles of practical reasonableness, or one of the goods that all human beings can conclude that they will want if they are to have human fulfillment.¹⁶ Finnis describes the requirements of justice as “the concrete implications of the basic requirement of practical reasonableness that one is to favour and foster the common good of one's community.”¹⁷ Here Finnis closely follows Aquinas, correctly stating that for Aquinas justice entails “other-directedness” and “is the underlying duty to respect and advance the common good.”¹⁸ Justice and its essential reference to the common good are fundamental to these readers and thus central to the account of politics provided. Finnis goes on to say that justice “looks to the common *good*, which entails a reference to standards of fittingness or appropriateness relative to the basic aspects of human flourishing, which are pertinent whether or not an interpersonal comparison is being made.”¹⁹ Finnis's justice is a determination of individual practical reasonableness

John Finnis, Joseph M. Boyle, and Germain Grisez, *Nuclear Deterrence, Morality, and Realism*. Clarendon Press, 1987., 253.

¹⁶ Finnis, *NLNR*, 161. For Finnis, justice combines several requirements of practical reasonableness. See also Grisez, *Christian Moral Principles*, 123, 189-94, 627-55.

¹⁷ *Ibid.*, 164 (sic).

¹⁸ *Ibid.*, 186. *ST*, II-II, 62.3, 64, 68.3.

¹⁹ *Ibid.*, 164.

which can be made even where no particular interpersonal comparison is being made, and his common good is “fundamentally the good of individuals.”²⁰

Aquinas’s justice, however, makes a claim to a much more profound “other-directedness.” Aquinas treats justice as a virtue of which “the *object* is the other’s good.”²¹ Justice which refers to the common good in particular, or legal justice, is pre-eminent among the virtues because “the common good transcends the individual good of one person.” This is not merely a matter of quantity, as Aquinas goes on to explain that Aristotle therefore called justice “more glorious than either the evening or morning star.”²² Thus Aquinas argues justice is exercised not primarily by reference to the individual but rather to the common good, and indeed that justice is a virtue which is a good of the self but also “somewhat of another person.”²³

Aquinas’s mere statement that justice is partly another’s good may not seem like a strong objection to Finnis. Finnis’s analysis of Aquinas’s argument concerns chiefly the ability of the individual to determine the goods of existence, including justice. Finnis would doubt, therefore, that it is really possible for the individual to take the good of another as an object (except as a way of speaking.) Since practical reasonableness is the determining factor of human action for Finnis, the good of another, to the extent that it is recognizable, is recognizable as the good of comfortable mutual living conditions and pleasant society. If Aquinas can be read differently than this, he must provide an

²⁰ Finnis, *NLNR*, 168.

²¹ *ST*, II-II, 58.12 (my emphasis).

²² *ST*, II-II, 58.12. Aristotle, *Nicomachean Ethics*, 1129b 29.

²³ *Ibid.*

alternative conception of human reasoning concerning virtue and justice. Aquinas does provide this alternative in his presentation of the origins of politics and the common good, when he claims, against the authority of St. Augustine, that government would exist even without the existence of sin:

A man [may be] the master of a free subject [another human being], by directing him either towards his proper welfare, or to the common good. Such a kind of mastership would have existed in the state of innocence between man and man, for two reasons. First, because man is naturally a social being, and so in the state of innocence he would have led a social life. Now a social life cannot exist among a number of people unless under the presidency of one to look after the common good; for many, as such, seek many things, whereas one attends only to one. Secondly, if one man surpassed another in knowledge and virtue, this would not have been fitting unless these gifts conducted to the benefit of others.²⁴

Aquinas here asserts the existence of the common good by nature, not as an abstraction but as a good which always exists because human beings are always in some form of community. Its importance to the human being is such that government may bring about new possibilities which no individual can achieve by the solitary use of his reason.

Finnis's natural law approach marks an abstraction of Aquinas's description of the common good. The restricted view of the common good provided thereby follows from the insistence that virtue, justice, and the natural law are all to be understood as arising out of the practical reasonableness of the individual. This dissertation takes a different approach by analyzing the political teaching of Aquinas as a whole, rather than extracting from his discussion of human goods principles of practical reasonableness and applying them to ethics. This approach must start by seeking the true meaning of the common good.

²⁴ *ST*, Ia, 96.4. Cf. St. Augustine, *City of God*, xix, 15.

Aquinas's explanation of the naturalness of the common good above makes two claims about human beings: first, that human nature in itself (entirely aside from the effects of sin) directs the individual towards life in community, and secondly that the common good calls for unification of the community through the guidance of a ruler who exercises the virtues of statesmanship. Aquinas's political teaching thus includes an emphasis on the one hand on the unifying faculty of rule and on the other an analysis of the individual desire for political involvement and participation. My dissertation explores first the exercise of rule, in the pursuit and execution of justice in three crucial areas: the writing and interpreting of law, the declaration and conduct of war, and the meting out of punishment. Finally, I discuss the participation of individuals in Aquinas's teaching by addressing the role of the people in the regime discussed in *On Kingship* and the *Summa Theologiae*.

Aquinas argues that the human being is naturally and truly political—that is, the individual is ordered towards the goals of the city. For this idea to be meaningful, there must be some good which is achieved in common by human beings which they cannot achieve singly. Aquinas portrays the actions of the city as capable of justice and injustice, of virtue and vice. Because the city as a whole has responsibilities and a moral character, the common good itself requires protection. In the protection of the common good, the city is allowed to do things that individuals ought not both in its international relations and in its domestic policies. This dissertation will thus explore Aquinas's teaching on law, just war, punishment. All of these questions of justice and injustice in the city rely ultimately on the possibility of decisions being made for the city. The central argument of this dissertation is that Aquinas grounds the purposes of the city in

the nature of the human being. In doing so, Aquinas does not appeal to human nature abstractly, but rather to the activity of human beings in community. Although Aquinas points to a transcendent basis for law, his political teaching suggests that we should discern policy from a human basis. Nature, in Aquinas's political teaching, is complex and not easily embodied in one natural ruler; on the contrary, the nature involved in natural law is best understood by means of a republican regime. Yet the city can be ruled and the ruler can and must act on behalf of the city. Connecting the ruler to the common good, I believe, holds the key to exploring the magnificent edifice of Aquinas's political teaching.

Recent Scholarship on Aquinas

Aquinas is widely referenced on many political matters but rarely as a comprehensive political thinker. Scholars tend to emphasize blocks of questions in the *Summa* - what is referred to as the "Treatise on Law" (I-II Questions 90-94) and his section on War (II-II, Question 40). The natural law theorists mentioned above emphasize Aquinas's claim that some actions are more likely than others to contribute to human fulfillment, but this claim becomes a basis for their own ethics rather than an exercise of politics. The just war theorists similarly tend to abstract from Aquinas's complex understanding of justice itself and instead choose a manual of acceptable actions in war.

On the other hand, there is scholarship on Aquinas which seeks to escape the constraints of this approach. This scholarship provides the starting point for this dissertation. Russell Hittinger recognizes the importance of "the natural law as it is

realized through the prudential insights and artful determinations of human law.”²⁵ Hittinger also extends his discussion of law in Aquinas beyond questions 90-94 to include his question concerning judgment. Marc Guerra entitles an article on Aquinas, “Beyond Natural Law Talk: Politics and Prudence in St. Thomas Aquinas’s *On Kingship*.” Concerned to show that the political is not lost in Aquinas’s thought, he finds that “this underappreciated and frequently overlooked work provides a model for how thoughtful, politically engaged Christians ought to address men actively engaged in politics when the occasion arises.”²⁶ One interesting thing about Guerra’s treatment is that he notes reasons why this book might be underappreciated not only today, but by Christian scholars even in its own time. Unlike his friends in the Christian schools, according to Guerra, Aquinas “was led to pen a political work whose attention to the details of concrete political life did not capture the attention of the fledgling theological school to which his writings gave birth.” Guerra argues that Aquinas recognizes that philosophical thought on politics must have some purchase in earthly regimes, and cannot replace concern about the human things with simple determination that things might be better in heaven.

James Stoner makes a more radical claim about Aquinas’s purposes.²⁷ Stoner suggests that Aquinas, with his hands tied utterly by the monarchical tendency of his

²⁵ Russell Hittinger, “Natural Law in the Positive Laws: A Legislative or Adjudicative Issue?,” *The Review of Politics* 55, no. 01 (1993), 5-34, 7.

²⁶ Marc D. Guerra, “Beyond Natural Law Talk: Politics and Prudence in St. Thomas Aquinas’s *On Kingship*,” *Perspectives on Political Science* 31, no. 1 (2002): 9-14, 10.

²⁷ Stoner, James R. Jr.. “Was Thomas Aquinas a Republican?” a paper presented at the annual meeting of the Southern Political Science Association (New Orleans, Louisiana, 2007).

tradition, makes a back-door argument for republicanism. Stoner makes use of previously neglected texts, such as Aquinas's *Commentary on Aristotle's Politics* and the section of the *Summa* which discusses the Laws of the Old Testament. Stoner relies most of all on Aquinas's *On Kingship*. From Aristotle, Aquinas draws out an argument that only certain communities are actually realizing the political. He argues that there is here "in the most unlikely of places, indication of Aquinas's potential sympathy with the republican cause," at least as a way of "mixing and modifying regimes." Aquinas explicitly draws attention to the problems and dangers of possible tyranny. In doing so, Stoner argues, Aquinas implicitly points to the solution of republicanism.

My approach will take up this more political interest in Aquinas and will pursue the lines suggested by Guerra, Stoner, and to some extent Hitinger, by looking "beyond natural law" to politics itself. However, while these studies suggest a closer appraisal of prudence, judgment, and republicanism in Aquinas, they only begin to open the questions in these texts. This dissertation will pursue the political teaching in the texts beyond the questions on law in the *Summa* (90-94), examining especially *On Kingship* as well as his discussions of judgment, punishment, and the Old Testament law in the *Summa*. I argue Aquinas's teaching in these texts is consistent, and that he believes that human law and the quest for justice can be reconciled through a proper understanding of politics. In particular, an investigation of Aquinas's teachings on natural law, just war, punishment, and republicanism, which scholars have taken up separately, will allow the emergence of a unified picture of his political thought.

Most prior scholarship which does not dismiss Aquinas as irrelevant to the modern world has nonetheless underrated his political theory. Conservative readers have

sought ideological support from his teaching on natural law, while abstracting from Aquinas's broader understanding of the relation between law and the political regime. More liberal interpreters, on the other hand, have developed sophisticated formulas for applying natural law which section off his understanding of nature and of God. The tradition I work from in this dissertation is one that tries instead to show how Aquinas can offer a plausible alternative to individualism, and to reclaim his conception of the common good. Building on this scholarship I hope to show that radical individualism is not the only explanation of a republican regime, and that Aquinas provides a concept of sovereignty that prohibits tyranny and slavery, and a conception of the place of politics in nature which expands the possibilities for human life.

In the remaining sections of this introductory chapter, I summarize the work of the chapters of my dissertation and their place in my exposition of Aquinas's political thought.

Aquinas, Hobbes, and Natural Law

My second chapter examines Aquinas's teaching on the sources of law. I noted above the prominence of natural law in political thomistic scholarship, but not all such scholarship shares the same reading of its ultimate tendency. Attempting to reconcile the modern acceptance of pluralism with a need for some less arbitrary standard of law than sovereign discretion, a series of modern natural law theorists have looked to the ancient and medieval political thinkers, and especially to Aquinas. Among these thinkers are those who look for a kind of grand conservatism in the natural law; sometimes they find it in support for contract, sometimes for life and the family; generally, they find in natural law warrant for the old-fashioned way, which is thus that much closer to nature. These

include Hadley Arkes, Robert George, and Christopher Wolfe. As a Constitutional scholar, Arkes, for example, clearly identifies his interest in natural law as that of finding what is “beyond the Constitution.” Natural law, for Arkes, is the general term with which to label those limits to what is acceptable which appear, somehow, in our nature. In defining these limits he talks approvingly of Aristotle’s *Politics* as it begins with families and of Aquinas’s *Summa* as it argues for the equal and universal observation of natural right.²⁸ Access to the natural law is, according to Arkes’s example, like David’s recognition of his own injustice when he hears his own story presented to him as a hypothetical by the prophet Nathan; recognition is easier when the case is presented in “*impersonal terms.*”²⁹

The group of natural law theorists led by Finnis, on the other hand, take a more liberal approach to Aquinas. This group, James M. Boyle, Jr. as well as Germain Grisez, seeks a nuanced view of the law of nature. They find the religious elements of Aquinas to be mainly dispensable in natural law thought on practical issues. While admitting that not everyone agrees on fundamental principles, they argue natural law thinking is based on the belief that “the capacity to make moral judgments readily and correctly” can be developed.³⁰ In their attempt to make natural law amicable to modern attitudes, these

²⁸ Hadley Arkes, *Beyond the Constitution* (Princeton University Press, 1992); see, for example, 37. Arkes refers often but vaguely to Aquinas’s *ST*, II-II, 57.3, which actually discusses “natural right” rather than “natural law.”

²⁹ Arkes, *Beyond the Constitution*, 37 (Arkes’s emphasis).

³⁰ Joseph Boyle, “Natural Law and the Ethics of Traditions,” in *Natural law theory: contemporary essays*, ed. Robert P. George (New York, Oxford University Press: 1994), 3-31, 13.

thinkers seek to soften the hierarchical nature of the goods pursued by natural law. Finnis provides his own list of “basic values”, all equally important: life, knowledge, play, aesthetic experience, sociability, practical reasonableness, and ‘religion’—this last in quotes to indicate that it refers to general questions of cosmic order, rather than to those belonging to any specific denomination.³¹ Grisez argues that when Aquinas sets the proper ordering of reason as the basis of natural law he does not mean the last end of the individual is “determined for him by nature,” but rather that man can make “the basic commitment which orients his life.”³² For this reason, as I have noted, these thinkers emphasize the distinction between natural law and virtue as bases for understanding morality, arguing that Aquinas rejected Aristotle’s emphasis on virtue and chose the natural law instead because it relied less on a study or science of human goods.³³ Natural law has two advantages over virtue in these accounts: firstly, because virtue introduces a necessary reliance upon a hierarchy of goods and of human choices, and secondly because the goods are external to the human beings making these choices. That is, while natural law can be used to refer to the general ability of a human being to act according to his principles, virtue is not possible without the achievement of particular goods.

While these accounts of Aquinas’s natural law theory do avoid the error of assuming Aquinas is imposing religious tyranny, the alternative they present is not the one Aquinas suggests. Aquinas does not present a list of equal goods or values but rather

³¹ John Finnis, *NLNR*, 86-89.

³² Germain Grisez, “The First Principle of Practical Reason: A Commentary on the *Summa Theologiae*, 1-2, Question 94, Article 2”, *Natural Law Forum* 10 (1965): 168-201,200.

³³ *Ibid.*, 186.

a hierarchy of goods subordinate to the good of the city. Further, his account claims to integrate virtue, excellence, and the goodness of the goal of each part of the city with the good of the city. The accounts of Finnis, Boyle, and Grisez lack any clarity about what would make the parts of the city excellent. These errors weaken the ability of natural law theory to respond to alternative theories of law, such as positivism.

These accounts rely on the ability of the individual to discover the means of human fulfillment. Insofar as they rely, therefore, on the individual to discover and give purpose to the principles of natural law on his own, they view the human being as naturally self-sufficient as far as the use of reason is concerned. Thomas Hobbes, like the theorists above, derives politics from the individual reason of each human being. In this emphasis upon the individual, however, Hobbes is aware that he is in stark opposition to Aquinas. My second chapter aims to clarify Aquinas's view of law and contrasts it to the alternative view of law presented by Thomas Hobbes, whose goal is to provide a consistent and calculable basis for authority.

Hobbes has often been called the father of legal positivism.³⁴ The important and self-titled positivists John and Sarah Austin, for instance, rely on Hobbes in distinguishing between moral rules and positive law. They find in Hobbes an understanding of sovereignty which bases the authority of law on the presence of a sanction to back it up. As they state the proposition they derive from Hobbes, the positive law is "positive law presently, or *is* positive law, through the power and authority

³⁴Several interesting scholars argue with this delineation. See, for example, Mark C. Murphy, "Was Hobbes a Legal Positivist?" *Ethics* 105, no. 4 (July 1, 1995): 846-873; and James Boyle, "Thomas Hobbes and the Invented Tradition of Postivism: Reflections on Language, Power, and Essentialism." *University of Pennsylvania Law Review* (January, 1987): 383-426.

of the present supreme government.”³⁵ Later positivists following John Austin, while often attempting to soften the extent and quality of sanction, nonetheless retain the sovereign’s might as the fundamental determination of what counts as law.

The Austins’ positivism, then, and that of the jurists that follow them, finds support in Hobbes’s conception of sovereignty. For Hobbes, sovereignty is a choice of the citizens in contract with one another. The placement of the sovereign outside of but overlooking the commonwealth is the only reasonable solution to the problem human beings would suffer if they did not have this sovereign. Human beings, whose lives in the state of nature would be nasty, poor, brutish, solitary, and short, choose to contract into a community of lives with the shared purpose of survival for all. This step is the ultimate of rationality for Hobbes, because it is the only way of encapsulating the rational desire to live. It is the rational part of the individual which knows that if he insists on living according to his every desire and without protection, he may not live long. The individual thus attempts to commit others to an agreement for the mutual safety of all. Notwithstanding, it is rational for this individual also to recognize that, when in peril, everyone makes his own calculation concerning his own interests. The very contract requires, then, the oversight of an outside party - a party who is both unrestrained and absolutely impartial.

It is not only positivism, however, which finds its greatest support in Hobbes. At the same time that positivism earnestly looks to Hobbes for the might of the sovereign to

³⁵John and Sara Austin, *Lectures on Jurisprudence: or, The Philosophy of Positive Law* (London, John Murray: 1869), 1, 226. They go on to directly cite Hobbes: “Or (borrowing the language of Hobbes) ‘the legislator is he, not by whose authority the law was first made, but by whose authority it continues to be law.’” (sic.) *Leviathan* II, 26.

provide the absolute impetus of law, liberalism finds its roots in the contract Hobbes illustrates. According to Hobbes, law and politics are intimately and utterly united. There is no authority from the outside, but only such as is appointed from the inside. Law gains its power from this internal agreement. Indeed, there is nowhere else for it to get its power from. Both liberalism and positivism are correctly identified in Hobbes's thought, because both respond to the conviction that each individual has his own distinct sphere of desire and purpose which determines his behaviour. Both liberalism and positivism have their basis in the perfect pluralism made up of the solitary persons whom Hobbes so memorably describes.

On the other hand, when Hobbes presents the causes for dissolution of the commonwealth, he points in particular to the conviction "that he that hath the sovereign power is subject to the civil laws."³⁶ This false conviction will lead the members of civil society to question the activities and decisions of the Sovereign. Since the end of government is the survival of the leviathan (or the group of individuals that make up the state,) he argues that judges ought to be agents of the state. Judges are therefore no more subject to the law than is the sovereign and their discretion is broader than the written law. Hobbes not only perceives the usefulness of a broad expanse of judicial discretion; he needs it. Within this exercise of the sovereignty the involvement of judges as agents of the sovereign is essential. For only judges dealing with particular cases can effectively ensure that the ends of sovereignty are achieved. Individuals cannot necessarily, then, look to judges for the just application of the law in their own case. The individualistic basis of the hobbesian commonwealth, while it provides the reasons for obeying the law

³⁶ Thomas Hobbes, *Leviathan: With Selected Variants from the Latin Edition of 1668*, ed. Edwin M. Curley (Hackett, 1994): Book II, Chap. 29, 213.

(Hobbes further suggests that private judgment is a cause for dissolution of the commonwealth,) does not guarantee recourse *to* the law. We find liberty and equality in the hobbesian account, but we are not assured the due process of the law. The hobbesian judge has the blessing of the sovereign but also gives his blessing to the law with arbitrary freedom. Hobbes's thought is thus more problematic than recognized by the individualists (both liberals and positivists), who appeal to it. In contrast to Hobbes, since Aquinas's actual concept of natural law is grounded on the need for government to pursue justice, it is reasonable that he also argues that judges should follow the law. For, according to Aquinas, law positively helps in the governance for the common good and thus in the pursuit of justice. Aquinas argues that law relies on human judgment both at the time when it is written and at the time when it is put into practice. To understand what Aquinas says about law requires that we respond to his emphasis on human law. Since human nature is political, it is reasonable to conclude that even the term natural law should lead us to the relationship between law and the broader regime. Aquinas's approach to natural law points precisely to these matters.

Aquinas and Just War

My third chapter explores Aquinas's contention that justice can be enforced through foreign policy. Literature making use of Aquinas on just war, like the natural law literature, has attempted to turn Aquinas's complicated but unified teaching on the purposes of war into a series of rules - almost a manual for world leaders considering warfare. Michael Walzer lists him among the members "of that religious tradition within

which Western politics and morality were first given shape.”³⁷ James Turner Johnson calls him “a seminal thinker in just war thought,”³⁸ but claims that the doctrine called for much further thought and sophistication than his provided. Finnis, Boyle, and Grisez use Aquinas’s natural law theory largely to underline certain absolute rules of conduct in warfare.³⁹ They find an absolute, for example, in human dignity, such that the killing of the innocent to achieve any sort of goods for a community a contradiction because the good of innocent life cannot be proportionately calculated, and thus overruled by a greater good. All these thinkers intend to improve on the sparsity of Aquinas’s definition of his own doctrine of just war, and his three basic conditions for whether waging war is just (war must be declared by a rightful political authority, for a just cause, with a rightful intention). However, in emphasizing particular rules these presentations lose the overall purpose of a declaration of war. My third chapter will seek to regain the purpose and hence the unity of Aquinas’s teaching on just war.

At the base of Aquinas’s discussion of war is the end of political life. In laying out the duties of the ruler in his treatise *On Kingship*, Aquinas establishes that his job is to see that the community lives well, and in order to bring this about “three things are necessary. First of all, that the multitude be established in the unity of peace.”⁴⁰ Peace is, then, crucial to the good life of the community. However, it immediately becomes

³⁷ Michael Walzer, *Just and Unjust Wars: A Moral Argument With Historical Illustrations* (New York: Basic Books, 1977): xx.

³⁸ James Turner Johnson, *Ideology, Reason, and the Limitation of War* (Princeton: Princeton University Press, 1975): 26.

³⁹ Cf. John Finnis, Joseph M. Boyle, Jr., and Germain Grisez. *Nuclear Deterrence, Morality and Realism* (Oxford: Clarendon Press, 1987): 79, 98, 271.

⁴⁰ Aquinas, *On Kingship*, Chap. 16.

clear that the quest for peace is not that of pacifism. On the contrary, it “is lawful to fight, provided it be for the common good.”⁴¹ The concern of the ruler to nurture this good life has three parts: “to establish a virtuous life in the multitude subject to him; second, to preserve it once established; and third, having preserved it, to promote its greater perfection.”⁴²

What Aquinas suggests, in the *Summa*, is that war can be just or can be sinful. In order to be just, a declaration must be made by a rightful political authority, for a just cause, with a rightful intention. A just cause requires consideration of the danger and immorality of those against whom one may go to war; they can be attacked either “because they deserve it on account of some fault,” or to avenge a wrong, and thus war has a possible punitive justification for Aquinas. As in all moral decisions for Aquinas, the justice of an act is made up of both the deed and the intention. The ruler ought to be particularly careful to avoid certain motives which might easily tempt him.

The qualifications and limitations of war can be boiled down to understanding the purpose thereof, and that purpose, according to Aquinas, is peace. It is this reasoning, though, which bothers modern readers of Aquinas. Tooke, for example, asserts that there are “Gospel precepts of non-resistance” and that even “Aquinas and Augustine agreed ... [that they] should be kept in mind, and that we should be ready to obey them except when they contradict the common good.”⁴³ Moreover, she finds an inherent contradiction in the idea of fighting for peace. Aquinas, however, claims that there can be an evil peace, a

⁴¹ *ST*, II-II, 40.2, ad. 1.

⁴² Aquinas, *On Kingship*, Chap. 17..

⁴³ Joan D. Tooke, *The Just War in Aquinas and Grotius* (London: S.P.C.K., 1965): 22.

state without external warfare but one in which men by refusing to fight subject others to some fate worse than death. Some wars are indeed not for peace, like sedition, which “is opposed to a special kind of good, namely the unity and peace of a people,” and is therefore “a special kind of sin.”⁴⁴ Aquinas praises concord for its own sake:

Now the welfare and safety of a multitude formed into a society lies in the preservation of its unity, which is called peace. If this is removed, the benefit of social life is lost and, moreover, the multitude in its disagreement becomes a burden to itself.⁴⁵

All the benefits of society are of little consolation if society has not achieved the goal of being also in agreement. Although modern scholars often attempt to expand on and borrow Aquinas’s doctrine on war, they thus avoid the firmness of his dedication to this underlying purpose. For Aquinas, however, the justice of war is found precisely in this dedication.

Aquinas on Punishment

My fourth chapter will take up Aquinas’s view of the enforcement of justice in domestic affairs. Aquinas’s discussion of what is acceptable for the ruler in punishment parallels his discussion of what is acceptable in waging war. For Aquinas punishment is not simply sanction but is in fact beneficial for the purpose of preserving the “unity of peace.” Like Hobbes and the positivists, Aquinas recognizes that law is related to punishment, and must be punitive, but for Aquinas the justification for punishment is the preservation of peace through a “kindly severity,” rather than an exercise of the ruler’s

⁴⁴*ST*, II-II, 42.1.

⁴⁵Aquinas, *On Kingship*, Chap.3 (17).

right to do what he likes to citizens once he is legitimized by the social contract.⁴⁶ As the just war theorists tend to obscure the punitive aspects of Aquinas's discussion, scholars also often ignore Aquinas's teaching on punishment more generally. Yet the justice which provides the standards for foreign policy has been shown to be the preservation of peace in the community, and punishment of criminals is also subjected to precisely this standard.

Among theories which justify punishment, there are two extremes: the view that punishment is meant entirely for the good of the criminal (for example, through rehabilitation) and the view that punishment is entirely for the sake of society (through deterrence, or vengeance, or containment of the criminal.) Ultimately I argue that Aquinas presents punishment as including the interests of both. In doing so, however, I argue that he is most strongly in contrast with the first extreme: the extreme that aims primarily at acting upon the criminal. To illustrate this extreme I turn to Foucault. Foucault presents punishment as one of the most creative and effective tools of modern society for controlling the individual. His account of the effectiveness of the practice shows the oppressive potential of the view that punishment should be used to reform and refine the individual.

In distinction to Foucault, Hobbes and the positivists base punishment on the survival of society as a whole. For them, punishment is the thing which, by means of the fear it occasions, gives the civil contract its hold. It has an essential agency in the existence of the state. Laws are of no power without "a Sword in the hands of a man, or

⁴⁶ *ST*, II-II, 40.1, ad. 2. He borrows the phrase from St. Augustine (Letter to Marcellinus, 138)

men, to cause those laws to be put in execution.” Hobbes moreover bases the existence of community on the possibility of punishment:

Before the names of Just, and Unjust can have place, there must be some coercive Power, to compell men equally to the performance of their Covenants, by the terrour of some punishment, greater than the benefit they expect by the breach of their Covenant; and to make good that Propriety, which by mutuall Contract men acquire, in recompence of the universall Right they abandon.⁴⁷

Punishment thus has the ultimate political force, but no moral force. For Aquinas, the situation is different, but not utterly opposed. Aquinas writes that it is “of the essence of a nation that the mutual relations of the citizens be ordered by just laws.” Punishment does not determine the just and the unjust absolutely, but it does have a practical role in maintaining order.

Aquinas places the job of rulers as executors of the law for their own citizens on a parallel with their role in declaring war.⁴⁸ Indeed, the domestic job of rulers is the obvious one. Thus, “just as it is lawful for them to have recourse to the sword in defending that common weal against internal disturbances... so too, it is their business to have recourse to the sword of war in defending the common weal against external enemies.”⁴⁹ In the section of *the Summa* which discusses the political system of Israel under the Old Testament law, Aquinas argues that “severe punishment is inflicted not only on account of the gravity of a fault, but also for other reasons.” Punishment is not always in perfect proportion to moral culpability. For example, he suggests that a “greater sin” deserves greater punishment. On the other hand, habitual sins and very

⁴⁷Hobbes, *Leviathan*, I, 15, 89.

⁴⁸*ST*, I-II, 105.2.

⁴⁹*ST*, II-II, 40.1.

pleasurable sins require punishment because they are less easily discouraged. Also, some sins are easily concealed and thus hard to prevent. These considerations are matters of prudential political rule.

Aquinas attempts to keep two considerations side by side in these determinations. Punishment must remain cognizant of prudence. However, it also remains a matter of justice. Aquinas makes the point that relationships between citizens are often primarily regulated by themselves. However, it is because relationships between private individuals are subject to “private will” that the authority must occasionally guide them, both in deciding disagreements and punishing evildoers. As in matters of war, where the political authority pursues justice but does so primarily because his goal is the good of his people, matters of civil punishment require a focus on the good of the whole community. Aquinas speaks of the community as being “under the guidance of those in authority.”⁵⁰ He states that “is not always intended as a medicine for the one who is punished, but sometimes only for others: thus when a thief is hanged, this is not for his own amendment, but for the sake of others.”⁵¹ Aquinas warns against unwise gentleness as well as unwise harshness as either may destroy the general friendship of the commonweal. Punishment, which is central in Hobbes because of the natural state of war between all, is allowable for Aquinas only when it opposes war. In exploring the political nature of man, Aquinas thus requires punishment for the sake of friendship and the common good

⁵⁰*ST* I-II, 105.2.

⁵¹*ST*, I-II, 87.2, ad. 2.

Aquinas's Republicanism

My concluding chapter will draw out Aquinas's teaching on political regimes. Since Aquinas is friendly to a republican regime, I argue, his analysis of the standards of justice required in war and punishment have to be understood in relation to that regime. Building on the previous chapters on law, war, and punishment, this chapter will bring to bear the part of Aquinas's teaching which is beyond natural law, and show how prudence and human life are central to his understanding of political man.

The sources of law and rule in Aquinas's politics are much more democratic than they may at first appear. In his discussion of the Sacred Precepts of the Old Testament, Aquinas states that the best polity "is shared by all, both because all are eligible to govern, and because the rulers are chosen by all."⁵² Aquinas goes on to show that Deuteronomy and Exodus lay out this mode of election: "it was a democratical government in so far as the rulers were chosen from all the people; for it is written (Exodus 18:21): 'Provide out of all the people wise men,' etc.; and again, in so far as they were chosen by the people; wherefore it is written (Deuteronomy 1:13): 'Let me have from among you wise men,' etc."

This argument has commonly been taken to be utterly inconsistent with *On Kingship*. However, Aquinas's defense of kingship is always markedly provisional, even though in this work he directs his discussion, as commentators have noted, to the task of elevating the rule of nominally Christian kings. In fact, Aquinas's argument ends by recommending that we find the means to keep monarchy from becoming tyranny, which is the extreme instance he discusses of individual good replacing the common good of the

⁵²*ST*, I-II, 105.1.

community. This evil occurs as well in polyarchy, where dissension—which itself by be another route to tyranny—occurs when individuals choose their own good without reference to the common good. The problem which causes the disintegration of the regimes is that the ruler or rulers can choose to separate their intentions from those of the ruled.

The danger that the ruler or rulers separate their good from that of the ruled exists wherever they hold the power of a masters over slaves. Aquinas examines the meaning of the master in his *Commentary on the Politics*, where he discusses Aristotle’s complicated teaching on slavery. Endorsing Aristotle distinction between conventional and natural slavery, Aquinas gives an interpretation of Aristotle’s meaning which questions for the existence of legal slavery. For example, he observes Aristotle’s view that “it is advantageous that there be a friendship between master and slave if they are by nature suitable for it.”⁵³ Aquinas then adds in his commentary that “there can be friendship between them, since the association of both in what is advantageous for each is the essence of friendship.”⁵⁴ Here he suggests that the friendship is not only possible, but is in fact the justification for any association between them. On the other hand, by law or by force, there is no friendship, “nor is it advantageous for them that one be the master, and the other be his slave.” The only just meaning of slavery is the sharing of a good by the ruler and ruled, and this only properly exists in friendship.

The seriousness of Aquinas on this subject of friendship within the community, like his emphasis on peace as the prerequisite for pleasant life within the community,

⁵³ Aquinas, *Commentary on Aristotle's Politics*, trans. Richard J. Regan (Hackett Publishing, 2007): 38; Cf. Aristotle, *Politics*, 1255b 15.

⁵⁴ Ibid.

shows just how distinct his account is from the individualistic world of Hobbes, who strives primarily to keep the natural war at bay. At the same time, the importance of friendship and peace shows how highly the individual is rated in Aquinas's politics. As I have argued in Chapter two, Hobbes's individualistic basis of political authority is inadequate to account for the view of law as a recourse in democracy, a view which we generally endorse in liberal regimes. Particularly, it is the separation of powers which must escape the absoluteness of Hobbes's conception of sovereignty. Hobbes's leviathan is always essentially a group of individuals who have chosen the state for the sake of their survival, and therefore survival is the lasting goal of government. Where survival is the only good, efficiency of legal execution is paramount. The separation of powers implies that our hopes for law and government include commitments deeper than the mere survival of the state. Aquinas provides us with a deeper understanding of this, as he demands our respect for law but also advocates our reflection on how we ought to supervise the addition of law to our regime. Aquinas's particular understanding of the relationship between judgment and justice fits with the American understanding of independent powers better than the pure liberalism of Hobbes can. Aquinas's theory is worthy of making a contribution to contemporary debates, since it emphasizes the role of prudence in policy, the promise of republicanism, and a purpose for the state which is in fact the realization of a distinctly social human good.

CHAPTER TWO

Hobbes and Aquinas on the Sources of Law

According to St. Thomas Aquinas, Divine Providence imparts to each thing a natural inclination to “its acts and ends.”¹ Thus Aquinas attributes to all things, animated or inert, the tendency to pursue their interests. Yet the interests of rational creatures stand out. They alone pursue the interests of others as well as their own. They are, as Aquinas puts it, “provident” alongside Providence; they have “a share of the Eternal Reason.”² All other creatures, according to Aquinas, have the tools for survival available to them, but rational creatures use reason and speech to order the world around them and would not survive if they did not cooperate in this manner. The city, its laws, and all political relationships stem from this special natural inclination of human beings. Aquinas applies to this inclination the label “natural law.”

In thus defining the human being, Aquinas doubly distinguishes him from all other creatures—in the capacity for reason and in the capacity for politics. Man is rational and political at exactly the same time, for his knowledge is of others and immediately entails responsibility. Aquinas’s description of what nature has provided to the human being grounds his political theory in several ways. On the one hand it grounds Aquinas’s account of the human being—Aquinas has sketched out the creation story and added a dictate to the effect that, being in the likeness of God, man must make, organize, be “provident,” and has

¹ *ST*, I-II, 91.2.

² *Ibid.*

thus invited the reader to explore his creative and ruling faculties.³ At the same time, there are more practical implications of Aquinas's treatment of natural law—its qualifications to the authority of human law.⁴ In this dissertation I aim primarily at the explication of Aquinas's theoretical account of politics, but in this chapter at an elucidation of his practical treatment of the origins of law in comparison to the presentation of the same subject by Thomas Hobbes. Both Hobbes and Aquinas address themselves particularly to this subject; Hobbes and Aquinas are alike notable both for their use of the term “natural law,” and for their intention of discovering “the fountain and original” of justice.⁵

In this chapter I will compare the teachings of Hobbes and Aquinas on law and its relationship to nature. I will first lay out Hobbes's objection to Aquinas's conception of natural law. This objection amounts to an accusation that Aquinas's political theory is dangerous because it does not conform to reality. The next section of the chapter will explore the account by which Hobbes sets himself up as a benefactor to human beings—and

³ Cf. *ST*, Ia, 96.1.

⁴ The use of the term “natural law” to refer to this latter set of implications vastly predominates in modern discourse, popular and academic. It is in this sense, for example, that natural law is used when Justice Oliver Wendell Holmes criticizes the concept by saying that “the jurists who believe in natural law seem to me to be in that naïve state of mind that accepts what has been familiar and accepted by them and their neighbors as something that must be accepted by all men everywhere.” Oliver Wendell Holmes, “Natural Law,” *Harvard Law Review* 32 (1919 1918): 40, 41. The predominance of this usage in modern parlance does tend to lay the whole theory open to this kind of critique. Yet one very good reason why this usage predominates is that the former, more theoretical aspect of Aquinas's teaching is both less and more than what is generally understood as a “natural law” teaching. This subject will be treated further in this dissertation, but for the purposes of the current discussion it is sufficient to say that Aquinas's teaching concerning the political nature of man is indicated by Aquinas to be discoverable without revelation, and to be entirely consistent with Aristotle's description of man in the *Politics*, which relies neither on revelation nor on the term “natural law.”

⁵ Thomas Hobbes, *Leviathan: With Selected Variants from the Latin Edition of 1668*, ed. Edwin M. Curley (Hackett, 1994): Book I, Chapter XV, p. 89.

thus what might be called the moral defense of Hobbes. A third section will compare the kind of legal judgment proposed by Hobbes to that proposed by Aquinas, a comparison which exposes the greater potential for dictatorship on the part of the judges who are empowered by Hobbes's sovereign. The final section will explore the theoretical basis Aquinas gives for his own view of law, a view which in fact gives greater scope to human consent than does that of Hobbes.

Hobbes's Critique of the Appeal to Natural Law

Hobbes understands ancient and Christian philosophy to have failed in the quest for the source and original of justice. The ancients have obscured common sense by endorsing schools of "vain philosophy" and "fabulous tradition."⁶ Like Machiavelli before him, Hobbes holds a hearty skepticism concerning those who "have imagined republics and principalities that have never been seen or known to exist in truth."⁷ He finds the apotheosis of this error in the school of Aristotle, which overpowers its own interest in natural phenomena with a deafening chatter of "rhetorical and dialectical sophistries."⁸ Worse yet, a host of Christian saints and masters eschewed the quest for the source of justice, instead assigning to these ancient inanities the authority which Hobbes names "Aristotelity." This Aristotelity replaces practical reality with rigid theory and, worse, imbues its theory with didactic religious certainty, teaching that:

⁶ Hobbes, *Leviathan*, XLVI, 453.

⁷ Niccolò Machiavelli, *The Prince* (University of Chicago Press, 1998): 61.

⁸ Hobbes, *Leviathan*, XLVI, 470.

there is no other rule of just and unjust except the dictates of the Roman church, that kings are not to be obeyed further than is permitted by the Roman church, and kings themselves ought to obey the Roman pontiff like sheep.⁹

Thus Hobbes accuses Aquinas and his ilk equally of two evils: having failed to provide a basis for justice, and having pretended to do so. Aquinas's Aristotelity—and his consequent failure to make practical sense of justice - creates the need for Hobbes's project. For Aquinas is treated explicitly by Hobbes as one of (and implicitly as the chief among) the Fathers who perpetuate this erroneous and extremely dangerous view.¹⁰

Aquinas, in his doctrine of natural law, creates a system in which we easily see the source of Hobbes's complaints: inasmuch natural law is really nothing more than a participation in the eternal law outlined by God, the doctrine places law's justification above the city. Law, defined by Aquinas, refers as much to what is ordained by God as to what is ordained by man. Moreover, as we shall see, Hobbes means to create a pure doctrine of law—a doctrine in which the sources of law and justice are absolutely recognizable and their implications for human life are the subjects of a science. Aquinas's legal theory, by contrast, shrouds some part of law in the murkiness of the heavens.

By Aquinas's definition, "law is a rule and measure of acts, whereby man is induced to act or is restrained from acting."¹¹ Law comes in several kinds, but in all its incarnations it

⁹ Hobbes, *Leviathan*, XLVI, 473 (italicized in original).

¹⁰ Hobbes, *Leviathan*, XLVI, 472. While Popes and churchmen such as Cajetan are asserting that in theology no one is to be placed above St. Thomas Aquinas, Hobbes gives Aquinas's title to Aristotle: the medieval schools acted "as if the whole of the sciences were in one man, who was then also the greatest father of the Church, Aristotle." On Aquinas's usual placement in that position, see Cajetan's *Preface and Commentary to the Summa Theologiae*, written between 1507 and 1522, and printed in the Leonine edition, as well as the various encyclicals and Bulls cited by Leo XIII in his vindication of Aquinas in *Aeterni Patris* (1879).

¹¹ *ST* I-II, 90.1.

aims at the common good and “is nothing else but a dictate of practical reason emanating from the ruler who governs a perfect community.”¹² The kinds of law include Divine, eternal, natural, and human; each, in ultimate subjection to the Divine law, is dependent on the one before. Even human law, which inevitably calls upon human judgment, aims for the transcendent. As churchman and theologian Aquinas combines the knowledge common sense might give with the biblical revelation which restricts and embodies the final goals of all law since they all are subject to Divine plan. Thus he involves in his treatise on law, for example, the promise of the first letter of Timothy that the intention undergirding the Divine direction is for “all men to be saved, and to come to knowledge of the truth.”¹³

A cursory glance at Aquinas’s discussion of politics indicates that this conception of law applies universal principles to human governments. The natural law rests on certain core truths, its primary principles, imposed by the Creator and shared by all. It abides in the heart of man, and cannot be blotted out. When men in error have denied its corollaries they have not managed to “establish by law” what is just. Rather in their error they have framed enactments “which are unjust.”¹⁴ All human affairs are subject to the will of the Divine as to justice. Men may be divided by their vice and virtue; the good are those most perfectly in tune with the Eternal and natural laws, and the wicked are those who fail to act in harmony with those laws.¹⁵ The primary principles of the natural law do not “allow of

¹² *ST*, I-II, 91.1; cf. 90.1, ad. 2.

¹³ 1 Timothy 2:4, *ST*, I-II, 91.5.ad. 2.

¹⁴ *ST*, I-II, 94.6, ad. 3.

¹⁵ *ST*, I-II, 93.6.

dispensations.”¹⁶ Moreover, Aquinas avers that there may be “special power” granted by God to certain men in their imposition of law. All this Aquinas claims in the *Summa*’s questions on law; elsewhere he expands on this final idea of the delegation of Divine power to men. In his *Commentary on the Hebrews*, reflecting on *Hebrews* 1:3, Aquinas points to Proverbs: “Through me kings reign” and compares worthiness in rulers to Christ’s worthiness.¹⁷ The administration of a high dignity, he says, requires wisdom, nobility, and power. Every activity of man that could be called creative is understood as reflective of but also participatory in the activity of Christ. In *On Kingship*, Aquinas defines the core purpose of earthly politics as subject to the purposes of the biblical God. In Chapter VI, for example, he suggests that to avoid tyranny, a king ought to be chosen who is unlikely to be a tyrant. He then cites Samuel as “praising God’s Providence in instituting kingship” when he says “the Lord hath sought out for Himself a man after His own heart.”¹⁸ If indeed the statement is made in praise of kingship, the praise can only apply insofar as that kingship is governed and guided by fidelity to the Lord. Thus those kings and leaders referred to must be guided by religious conviction. Moreover, Aquinas’s philosophy more generally promises a reward to virtue, not only for the king but for all men—the reward of the supreme good, or the *summum bonum*, in eternal beatitude in participation with God.¹⁹

Hobbes opposes such justification in every way. In the *Leviathan*, he tells us “there is no such *Finis ultimus* (utmost aim) nor *Summum Bonum* (greatest good) as is spoken of in the

¹⁶ *ST*, I-II, 97.4, ad.3.

¹⁷ Aquinas, *Commentary on the Epistle to the Hebrews*, trans. Fabian R. Larcher, O.P. Aquinas cites Proverbs 8:15.

¹⁸ Aquinas, *On Kingship*, Chap. 7, (42); he cites I Samuel 13:14.

¹⁹ *ST*, Ia, 26.3.

books of the old moral philosophers.”²⁰ Nor ought we to expect to find “supernatural revelation” in the appointment of kings.²¹ Least of all should we define just and unjust, good or evil, otherwise than as their measure is “the civil law, and the judge [is their] legislator.”²² Hobbes is certainly ready to be irreligious and unorthodox, in his urgent call for the abandonment of “the schools,” as he calls them, with contemptuous lowercase familiarity. Yet Hobbes’s irreverence is complicated by the fact Hobbes can be defended on moral grounds, once we take him on his own terms.

The Moral Defense of Hobbes

The accusation of Aquinas as dangerous immediately suggests the possibility of Hobbes as savior. Thus, for example, one might point out, as does S.A. Loyd, that Hobbes was “concerned with the social disorder that results from men’s acting on transcendent religious interests” in doing what they either perceive to be their religious duty or what they hope may bring them divine reward.²³ Hobbes tells us repeatedly and clearly that his Leviathan promises the possibility of peace.²⁴ Further, Hobbes promises a politics which responds to the real world. His intentions might be defended on the grounds that he had to respond to modern science. Robert Kraynak writes that “in contrast to the classical

²⁰ *Leviathan*, XI, 57.

²¹ *Leviathan*, XXXVI, 289. This includes such kings as Moses and David. The spirit of God is said to come down upon David, according to Hobbes in the sense that “by the spirit is meant inclination to God’s service, and not any supernatural revelation.”

²² *Leviathan*, XXIX, 212.

²³ S. A. Lloyd, *Morality in the Philosophy of Thomas Hobbes: Cases in the Law of Nature* (Cambridge University Press: 2009), xi.

²⁴ *Leviathan*, XIII, 76,78.

philosophers, Hobbes sees himself living in an age when the claim of philosophy and science is recognized by virtually everyone.”²⁵ This necessity is born of the fact that modern science has flattered man’s vanity, and promised to confer “honor and power.” Science in the new world is capable of great practical accomplishment, and thus hands to men a great power. Further, “history shows, so to speak, that a change of ‘consciousness’ has occurred which makes a return to a more primitive or naïve era *impossible*.”²⁶ So Kraynak says Hobbes is unwilling to “abolish the notion of right or the idea of science.”²⁷ He rather seeks to “develop a new political science which consists, paradoxically, of a non-doctrinal ‘doctrine’ of right and a non-doctrinal ‘doctrine’ of science.” So in this sense Hobbes could be the champion of the good in politics, in the face of the problem that modern science has caused for it.²⁸ The proposal of the creation of law through contract could be the only way to rein in man’s flattered vanity.

Hobbes’s case against Aquinas’s account of natural law is considerably strengthened by the difficulty of which we are all aware in discerning what is eternally right. Hobbes argues there is no law agreed upon by all nations, and if “it is not agreed upon, who shall

²⁵ Robert P. Kraynak, “Hobbes on Barbarism and Civilization,” *The Journal of Politics* 45, no. 01 (1983): 86–109, 106.

²⁶ Kraynak, “Barbarism,” 108 (my emphasis).

²⁷ *Ibid.*

²⁸ This formulation of Hobbes’s project places more emphasis on science than seems justified by Hobbes’s own account. Notwithstanding the tribute Hobbes pays to the modern scientists, he does not in his political work attribute any great importance to medicine, as the power which might overcome an agonizing death, as do Descartes and Spinoza. Cf. Leo Strauss, *The Political Philosophy of Hobbes: Its Basis and Its Genesis* (University of Chicago Press, 1996), 16.

judge which nations are the wisest?”²⁹ Indeed, we have seen that the same difficulty impresses itself upon natural law theorists such as Finnis and Maritain. Thus defenses of natural law often rely on showing that its impact is as moderate or more moderate than that of legal positivism.

In keeping with Hobbes’s position that only a particular community can have laws publicly recognized by all is his emphasis upon the authority of the sovereign to create these laws. Therefore Hobbes is presented as a prototypical legal positivist. Jean Hampton argues that Hobbes presents a positivist position “because law is understood to depend on the sovereign’s will.” She goes on to write, “no matter what a law’s content, no matter how unjust it seems, if it has been commanded by the sovereign, then and only then is it law.”³⁰ Indeed, Hampton argues that Hobbes, along with John Austin, represents the most extreme form of legal positivism because he relies completely on the power of the ruler to make law.³¹

Complicating this characterization of Hobbes, however, is the fact that he proposes his own doctrine of natural law. Hobbes consciously puts forward his theory of natural law alongside his doctrine of natural rights, although as we have seen he is extremely critical of Aquinas’s understanding of the origins of law. Hobbes’s doctrine of natural law, unlike the common scientific accounts of the laws of nature of his day, refers specifically to the guidance of human conduct. Understanding Hobbes therefore requires an account both of

²⁹ Hobbes, *De Corpore Politico*, in *The English Works of Thomas Hobbes of Malmesbury*, ed. Sir William Molesworth (London: John Bohn, 1840): XV, 81.

³⁰ Jean Hampton, *Hobbes and The Social Contract Tradition* (Cambridge University Press, 1988): 107.

³¹ *Ibid.*

why nature is presented as essential to his political philosophy and of why he attaches the name “law” to natural principles of human conduct.

Largely because natural rights are so essential to modern politics, modern natural law theorists are eager to defend Hobbes’s conception of law. One way to explain why Hobbes points so noticeably to nature would be to suggest that Hobbes’s position has been too sharply contrasted with those of the medievals (and Aquinas in particular). In an article entitled “Was Hobbes a Legal Positivist?” Mark Murphy confronts Hampton’s view of Hobbes in an attempt to show that Hobbes’s view is actually consistent with that of Aquinas.

In making his case Murphy argues first of all that Hampton and others mischaracterize the core position of positivism. There are two possible alternatives for the identification of a specifically positivist theory. One is that the essential quality of positivist theory is that the law’s pedigree determines the law’s validity. The second is that “there is a conceptual separation between law and morality such that the legal validity of an enactment does not depend on its moral content.”³² While both of these might be true of a positivist theory, Murphy argues that only the latter is a necessary condition for a positivist theory.

Murphy also argues that natural law is often mischaracterized. Natural law theory, according to Murphy, presents civil law as real only if it performs its function, which it does only if it is congruent with natural law. Thus the natural law theorist responds to conflicts between civil and natural law by showing that the law in question either is not properly a civil law or is not properly a natural law. In both ways, he claims, he shows “that for Hobbes there must be congruence between the dictates of the natural and of the civil law.”³³

³² Mark C. Murphy, “Was Hobbes a Legal Positivist?” *Ethics* 105, no. 4 (July 1, 1995): 846–873, 847.

³³ *Ibid.*, 849.

As Murphy points out, Hobbes identifies a number of cases in which subjects “are under no obligation to obey the commands of the sovereign.”³⁴ Murphy does not deny that Hobbes’s view entails a general reliance on the sovereign for authority—his is “a theory of law in which only commands that sovereigns issue to subjects are candidates for the status of law.”³⁵ But, according to Murphy, the “ultimate explanations for the consistency of natural and civil law” presented by Hobbes and by natural law theorists are of the same sort.³⁶ Hobbes’s legal theory has an “appearance of positivism” because the restraint which the natural law places on sovereigns is weak. Yet this appearance is a “false” one, because, for Hobbes as for Aquinas, “any dictate that prescribes that one do something that is contrary to his or her good cannot be accounted law.”³⁷ Further, Murphy tells us that for both philosophers the reason something contrary to one’s good is not law is because it is something “that one has no good reason to act upon.”³⁸

Having thus presented the essential consistency of natural and civil law, Murphy proceeds to discuss objections that might be raised. In the first place, might someone suggest that Hobbes’s different account of goods “disqualifies” him as a natural law theorist?³⁹ That is, is Hobbes’s particular catalogue of goods too different from what a natural law theorist would normally have? Although Murphy concedes that it is the *very* restricted list o852f

³⁴ Murphy, “Was Hobbes a Positivist?” 852.

³⁵ *Ibid.*

³⁶ *Ibid.*, 859.

³⁷ *Ibid.*, 866, 872.

³⁸ *Ibid.*, 872.

³⁹ *Ibid.*, 871.

goods rendering laws invalid which gives Hobbes's legal theory its "false appearance of positivism," he concludes that this is not really a criterion for natural law theory.⁴⁰ In the second place, Murphy points out, Hobbes's statement that "Good" and "Evill" are "ever used with relation to the person that useth them" might exclude him from the category of natural law theorists on the grounds of relativism.⁴¹ Could one, then, differentiate Hobbes's theory from the natural law theories on the basis of his account of what goodness consists in? Murphy rejects this grounds of differentiation as well, because it is sufficient for natural law theory that "one's account of goodness allow the possibility that for all human beings there are certain things that are indeed naturally good."⁴² These, in Hobbes, are such other things as preserve life (Murphy points to food, excretion, and exoneration). As Murphy puts it, "due to the basic similarity of their constitutions, people have a natural appetite for certain things."⁴³ This basic convergence between the universal qualities of man and the goods to be achieved through law marks on Hobbes's part a concession to nature.

Murphy's defense of Hobbes as a natural law theorist proceeds by distinguishing him from an extreme version of positivism—the idea that morality and law have no bearing upon each other. Morality viewed basically as a kind of restrictive norm for acceptable behavior is an essential to Murphy's presentation of politics—to deny some minimal level of restriction would be so cruel, so pessimistic, that one could not defend a philosopher who would seek out such an end. Yet at the same time Murphy shows that he believes the natural law view

⁴⁰ Murphy, "Was Hobbes a Positivist?" 872 (my emphasis).

⁴¹ Hobbes, *Leviathan*, VI, 24.

⁴² Murphy, "Was Hobbes a Positivist?" 872.

⁴³ *Ibid.*

would be untenable if it did not admit that between morality and law there is at least a “conceptual separation.”

The conceptual separation between morality and law which Murphy insists on relies, in part, on a distinction between natural law and the laws of any particular community. He and others point out that natural law theory does not mean that the goodness of something according to the natural law should immediately make it law in any one community. Murphy notes that “no natural law theorist that I know of ever claimed that it is sufficient for something to be a civil law that it be derived from the natural law.”⁴⁴ They also point out that natural law is not so particular or so obvious as to define the terms of all civil laws—there are thousands of obvious exceptions: speed limits, jail times, tax rates, Presidential salaries, flag etiquette.

Thus Murphy, like many commentators on Aquinas, defers to Hobbes’s concern that no ruler is really equipped to make use of the natural law, and thus ultimately to Hobbes’s view that politics should be based upon individual judgments. Similarly, John Finnis shows extreme deference to the individualistic basis of Hobbes’s view of law. Finnis sets out to show that “there is a set of basic principles which indicate the basic forms of human flourishing as goods to be pursued” but states that in finding these basic principles each of us asks, “what are the basic elements of my well-being?” There is no absolute rational answer, Finnis insists, nor even one answer that most people would agree on. This question is best answered in a musing manner, or in an inner discourse which Finnis says culminates in statements like, “... is a good in itself, don’t you think?”⁴⁵ He concedes that “one’s

⁴⁴ Murphy, “Was Hobbes a Positivist?” 848.

⁴⁵ Finnis, *NLNR*, 85,86.

speculative knowledge of other people's interests and achievements does not leave unaffected one's practical understanding of the forms of good that lie open to one's choice."⁴⁶ Yet consideration of the meaning of natural law remains a consideration of one's own well-being. Again, Finnis states that the principles of natural law require that authority be exercised "for the purpose of promoting a common good."⁴⁷ Yet Finnis defines the common good of the political community as "the securing of a whole ensemble of material and other conditions that tend to favour the realization, by *each* individual in the community, of his or her personal development."⁴⁸

This caution in Murphy and Finnis illustrates the presumption of modern legal thought that favors the hobbesian view of law insofar as it relies on the individual's decision concerning his ends. Murphy's discussion of nature and law in Hobbes concludes with the position that "in matters of jurisprudence Hobbes was more a latter day Thomas Aquinas than an early version of John Austin."⁴⁹ Before we accept this amazing conclusion, we must consider several distinctions beyond those mentioned by Murphy. For my purposes here—which, like Murphy's, include the elucidation of Aquinas's theory by means of its relation to that of Hobbes—the most significant difference between the usage of the term natural law by Aquinas and by Hobbes is that for the one it is lasting and for the other useful. Although it is true that the civil and natural laws match up in Hobbes's account, it does not follow that the natural law itself proposes limitations to the civil law. It is true, however, that natural law

⁴⁶ Finnis, *NLNR*, 85.

⁴⁷ *Ibid.*, 23.

⁴⁸ Finnis, *NLNR*, 154 (my emphasis).

⁴⁹ Murphy, "Was Hobbes a Positivist?" 873.

is instrumental in creating the civil law and in understanding its importance. The natural laws are a set of conclusions made by a rational man about how to preserve his life. They are “general” and they are “rules,” in the sense that they follow from the universal situation of human beings and they are perfectly rational.⁵⁰ Yet there remains much more than a conceptual separation between law and nature for Hobbes.

Why then does Hobbes appeal to nature itself in his account, and refer us to the laws of nature? The laws of nature enjoin us to justice, gratitude, a capacity to pardon, and other like considerations of the advantage of others. They oppose pride, arrogance, and contumely. At the heart of these injunctions is the necessity of acknowledging others as one’s equals. The laws of nature are the consequences of this recognition, some directly dictating our behavior towards another, such as the avoidance of any sign of hate, called contumely, which might provoke a fight. Others dictate our behavior towards others in an indirect manner, because they dictate our submission to law and society; these include complaisance, submission to arbitration, and the law of equal use of common things.

Moreover, Hobbes’s account does describe a complete convergence of natural and civil law, and it even extends to divine law—or to the command of the divine. For “though God be sovereign of all the world, we are not bound to take for his law whatsoever is propounded by every man in his name, nor anything contrary to the civil law, which God hath expressly commanded us to obey.”⁵¹ In other words, the convergence lies in Divine law’s commanding the civil law, rather than in the civil law’s compliance with Divine law. When we look to see where God has expressly commanded this, Hobbes gives as evidence a

⁵⁰Hobbes, *Leviathan*, I, 14, 79.

⁵¹ Hobbes, *Leviathan*, III, 42, 357.

passage from Matthew 5:17, in which Jesus says, “think not that I am come to destroy the law, or the prophets: I am not come to destroy, but to fulfill.” In this passage Hobbes says the Saviour makes it clear “he hath not subjected us to other laws than those of the commonwealth—that is, the Jews to the law of Moses ... and other nations to the laws of their several sovereigns; and all men to the laws of nature.”⁵² Even if Hobbes’s argument persuades those who believe in the inspiration of the Gospels, it would have little weight with non-believers. Moreover, Hobbes clearly undermines such sources. To look for God’s word in the Holy Scripture is problematic, he argues, because that word is always mediated through someone “who (being a man) may err, and (which is more) may lie.”⁵³

Therefore the more important proof of God’s favour for the human law is the one which Hobbes gives at the beginning of the Third Part of the *Leviathan*: “we are not to renounce our senses and experience, nor (that which is the undoubted word of God) our natural reason.” When Hobbes suggests that in Matt. 5:17 the Saviour submits all to the “laws of nature” he merely returns them to the struggle which takes place in the first two parts of the *Leviathan* and must lead, by good natural reason, to the commonwealth. This same reason is the clearest expression of, and indeed the “undoubted” word of God.

However, at the end of the chapter presenting the laws outlined above, the “natural laws” which were its titular subject are newly presented to us. They are, Hobbes allows, dictates of reason. Yet they are not properly laws at all, and they have been called so due to the error which led former philosophers to set the divine to rule over human law. Law is command. Command is distinguished from counsel, exhortation, dehortation, persuasion and

⁵² Hobbes, *Leviathan*, III, 42, 355.

⁵³ Hobbes, *Leviathan*, III, 32, 247.

advice generally in that it carries obligation.⁵⁴ The natural laws cease to be presented as laws at all, both because they fail to command obedience and because they are not the materials of justice. Insofar as they are natural inclinations—passions—they are the opponents of reason. Insofar as they are laws, they cease to be when the *Leviathan* comes into being, because they are no good at all in themselves. They are recognitions and have no power of their own. Their power is rather in the reason that develops and contains them.⁵⁵

Thus far we have seen the case for both Hobbes and Aquinas made defensively. Hobbes is not to be viewed as an utter positivist because that would justify the tyranny of the mighty or at least of the legislator. Aquinas and his natural law theory, on the other hand, were presented by thinkers like Finnis as relying on intuitive judgement rather than study.⁵⁶ Someone could suggest the following compromise: both thinkers take certain natural goods to be worth preserving but both are prudent enough to understand that not everything about human beings is good and that law is made by them. Yet this explanation does not really clarify why Hobbes uses the language of natural law or even why Aquinas does, because it does not consider the rhetorical impact of the language. The rhetorical impact is

⁵⁴ *Leviathan*, III, 35, 167.

⁵⁵ A similar argument is made by Strauss, who points out that the rational element of man is not in fact his natural appetite. Strauss divorces hobbesian appetite from hobbesian reason, and shows that man's mechanistic and animal motion towards objects is not the one which the "first" natural law directs. See *The Political Philosophy of Hobbes: Its Basis and Its Genesis*, (University of Chicago Press, 1996,) 10. This reasonable (and political) imperative for man to direct himself against his natural impulse stands in sharp contrast to the imperative of Aquinas's natural law for human beings, since, for human beings, according to Aquinas, the rational direction of the human being is only the third precept of the natural law, while its first and second precepts are the characteristics he shares with all physical objects and irrational animals.

⁵⁶ See, for example, my discussion of Finnis's above: for Finnis, "the proper form of discourse is: '.... is a good, in itself, don't you think?'" Finnis, *NLNR*, 86.

considerable. Indeed, it is only insofar as medieval and even ancient political contributions had receded into shadow, as Strauss argues in his discussion of Hobbes, that commentators could treat natural law theory as the peculiarity of the age of rationalism. Once we pay attention to the medievals, it is impossible to call Hobbes a natural law theorist without some sense of the equivocation we thus engage in.⁵⁷ Hobbes's use of the term "law" to refer to these impotent principles thus seems targeted at undermining the more traditional usage of the term..

Judging Law in Hobbes and Aquinas

Hobbes's argument about the natural laws thus suggests that they hold no real power. Yet, Hobbes does set some limits to the authority of the lawgiver. Hobbes defines some absolute rules which exist in nature and also within the commonwealth. Among these are the law "that men perform their covenants made" and the law of equity, which Hobbes first describes as the equal distribution to each of that which in reason belongs to him.⁵⁸ Equity is a basis for individual actions within the contract and outside it. Larry May suggests that equity "is perhaps closer to our notion of justice than what Hobbes called justice."⁵⁹ Since justice is obedience to the law, it is clear enough that the sovereign cannot act unjustly. Yet Hobbes concedes that he may commit actions which could be criticized for their lack of

⁵⁷ So successful is his dissemination of his own doctrine of natural law that, as Leo Strauss points out in his account of the "origins" of Hobbes's political philosophy, there was a time in which "one could safely without any further qualifications characterize the seventeenth and eighteenth centuries as the hey-day of natural law theories." Strauss, *Hobbes, Basis and Genesis*, vii.

⁵⁸ *Leviathan*, I, 15, 97.

⁵⁹ Larry May, "Hobbes on Equity and Justice" in Craig Walton and M. Hijhoff, eds., *Hobbes's "Science of Natural Justice"*, (1987): 241-252, 241.

equity. Moreover, equity informs the judgment of judges in cases of interpretation. Hobbes writes, “it is not the letter, but the intendment, or meaning, that is to say, the authentic interpretation of the law (which is the sense of the legislator), in which the nature of the law consisteth.” Of course, if this is true, it is no surprise that he goes on to say, “therefore the interpretation of all laws dependeth on the [sovereign] authority.”⁶⁰ If Hobbes meant by this that the judge is to attempt to understand what the sovereign meant when the latter wrote the law, the positivist has good warrant for concluding that the law must be followed as it is written, and this might seem to suggest that therein (in the writing and stamping of legislation) the matter is finished. There is the law, from the authority of the sovereign; and that we must follow. But Hobbes continues: “the interpreters can be none but those which the sovereign, to whom only the subject oweth obedience, shall appoint.”⁶¹ Judges must overturn a precedent if a precedent is not consistent with equity.

As noted in the previous chapter, it is crucial to the survival of the commonwealth that the sovereign not be considered subject to the law. As always, Hobbes is concerned that individuals not choose their own judgment over that of the ruler. But more particularly, Hobbes says, this error would be tantamount to setting a judge over the sovereign. This placement of a judge, Hobbes says, is the making of a “new sovereign.”⁶² That is to say, sovereignty consists in the choice of action, and ultimately this must mean that judgment of all actions is crucial to sovereignty. Practically speaking, the executive sets up judges as an extension of himself, and as an extension of himself they cannot really be subject to the laws

⁶⁰ Hobbes, *Leviathan*, II, 26, 180.

⁶¹ *Ibid.*

⁶² Hobbes, *Leviathan*, 253.

any more than is the sovereign. Yet in all these dictates Hobbes makes it clear that equity is conducive to the preservation of the peace of the whole, through whatever means the judge considers necessary. The final arbiter of every case is the sovereign. Moreover, the goal of the judge is the preservation of the sovereignty.

Hobbes provides restrictions to what is justifiable in law, and these give an appearance of limiting the scope of law. Equity strengthens that appearance. Judges are clearly asked to look beyond the words and even the purposes of any particular law. Similarly, Hobbes criticizes judges who appeal to a “presumption in law” when they confiscate the property of an innocent man who flies for fear. This “presumption” is justified according to Hobbes neither in law nor in equity, as it claims no more than the justification of precedent. One ought not to be guided by past error. Yet, as William Mathie points out, the more important problem for Hobbes with the presumption of precedent is that it undermines statutory law.⁶³ James Stoner similarly argues that “the inability of law to speak for itself, its inadequacy without interpretations, [is] characteristic of Hobbes’s doctrine of speech and reason. Words have no authority in themselves for Hobbes, and there is no surer path towards foolishness than to think they do.”⁶⁴ My argument differs here only in suggesting that for Hobbes the redefining of these words is extremely important, and the kind of “foolishness” which takes Hobbes’s new words seriously is eminently reasonable for the individual who is

⁶³ William Mathie, “Justice and Equity: An Inquiry into the Meaning and Role of Equity in the Hobbesian Account of Justice and Politics,” in Craig Walton and M. Hijhoff, eds., *Hobbes’s “Science of Natural Justice”* (1987): 257-276, 272.

⁶⁴ For this reason James Stoner argues that Hobbes is as much opposed to common law as to natural law, since if judges were limited by precedent they could not accomplish their job in the ongoing determination of what is rational and appropriate to the ends of the contract. James Reist Stoner, *Common Law and Liberal Theory: Coke, Hobbes, and the Origins of American Constitutionalism* (University Press of Kansas, 1992): 99.

now able to perfectly reconcile himself with the political world—a world which has no inherent connection to himself except that he has helped to create it through reason.

As Mathie also shows in his article, equity bears a fundamental relationship both to moral virtue and to law for Hobbes—specifically, it serves as a basis for a new moral and legal system. Justice and virtue are now to mean behavior according to equity. “The justice and equity of others are always to our benefit and therefore always to be praised as moral virtues.”⁶⁵ Equity generally defined (by classical thought and Hobbes alike) “is that to which appeal is made in the interpretation or ‘correction’ or supplementing of the law.”⁶⁶ Yet in addition to this, Hobbes defines equity as “the habit of acknowledging this natural equality, or demanding as one’s own right only what one will admit to be the right of others, becomes the fundamental moral virtue, a rule for the guidance of public policy, and a powerful instrument for the interpretation of law.”⁶⁷ Before the contract, claims were settled by war, and this was the reason for the contract. Equity, as described here, is recognizable both in the formation of the contract and in the judgment of judges after it is formed. It remains a judgment about what serves to keep the contract alive, and entails no judgment about right and wrong above or beyond the contract. It is therefore an essential concern, but it rests upon a new code of virtue, a code based not upon right and wrong but upon a calculation of the individual’s interests.

Correspondingly, evil and good are named subsequent to the existence of a human person and his reaction to the objects around him. They are thus most properly the names for

⁶⁵ Mathie, “Justice and Equity,” 272.

⁶⁶ Ibid.

⁶⁷ Ibid., 274.

appetite or aversion. Any complexity to the ideas of good and evil, such as might be suggested by the multitude of English words used to assign them to different objects, is merely a statement as to the manner in which the object is being perceived. Some things are perceived as promising some effect, others as achievable ends, and still others as means to something else. Although Hobbes is limiting the reality of goodness - determinedly undermining any “natural” goodness we might imagine things to have—he certainly concedes that there is something we call good. The word is preserved but its meaning is lost almost—but not quite—beyond recognition. It retains its explanatory power as the grounding of an impulse—it may still explain the intention behind human actions. Yet the grounding and the intention are now irreparably dependent on the selfishness of the actor. Virtue and equity have a similar fate. They are now to be understood as the result of the rational concession to the power of others—the concession which consciously levels the personalities and excellences of all human creatures.

For Hobbes, law is command and not counsel—the latter does not bind. Hobbes tells us that law confers obligation, but it is important to note that the obligation imposed by law is binding because of the good it does for ourselves, rather than the good it does to others. Sometimes we must do what is good for the commonwealth, but in doing so we always indirectly aim at our own good, as the indirect natural laws do. In general, the obligation of all human beings (their duty to themselves) is the creation of a contractual government. In each commonwealth, the obligation of all human beings (except the sovereign) is to obey the law. Murphy points out that there are exceptions to this obligation—but they boil down to only one. The human being always retains his right to self-preservation, and no one can be

expected to wait for death, as the result of his punishment, conviction, or capture.⁶⁸ This really only serves to underline the source of obligation - it is just to obey because of the consequences of disobedience, and not because of a concept of justice that exists in nature.

In the attempt to outline an alternative theory to natural law, legal positivists such as John Austin turned to Hobbes. John Austin, relying on Hobbes, summed up the basis of positive law thus:

Every positive law, or every law simply and strictly so called, is set by a sovereign person, or a sovereign body of persons, to a member or members of the independent political society wherein that person or body is sovereign or supreme... Even though it sprung directly from another fountain or source, it *is* a positive law, or a law strictly so called, by the institution of that present sovereign in the character of political superior. Or (borrowing the language of Hobbes) ‘the legislator is he, not by whose authority the law was first made, but by whose authority it continues to be a law.’⁶⁹

Legal positivism relies on Hobbes’s proposal for an authority legitimized to declare laws, and obedience (and thus justice) continually exist by the power of that authority. This is not to say that Hobbes’s argument is identical to those of the legal positivists who follow him.

Larry May argues that Hobbes differs from the positivists because for him law does overlap with morality, in the shape of equity.⁷⁰ William Mathie also distinguishes the position of Hobbes from that of legal positivism, in that his notion of authority—what Murphy has referred to as pedigree—is deeper than that of the positivists. While for Austin it is sufficient to claim that command combined with sanction makes law, Hobbes requires a more rigorous basis. For law must also proceed from the right place and upon the right basis. The project of *the Leviathan* is to ground this whole legal theory upon the consent of the governed. As

⁶⁸ Hobbes, *Leviathan*, II, 27, 98.

⁶⁹ John Austin and Sarah Austin. *Lectures on Jurisprudence: Or, The Philosophy of Positive Law*. (J. Murray, 1885), 220.

⁷⁰ May, “Hobbes on Equity,” 241.

individuals, the members of society rely on a rational choice between insecurity in the state of nature and comparative security under the power of the sovereign. Moreover, the sovereign is asked to act according to equity. This concern for equity, albeit amoral, is useful to the individuals who have submitted themselves to the sovereign authority, since the sovereign will work to preserve a commonwealth in which citizens possess the security for which they joined the contract in the first place. As these arguments point out, Hobbes goes further back to the source than the positivists do—as we have seen, it is his purpose to show the “fount and original” of justice. But these grounds for distinction between Hobbes and the positivists are nearly opposite to those we have seen proposed by Murphy. In Murphy’s view the source Hobbes finds for law is something like thomistic morality. On the contrary, the source for law provided by Hobbes is inimical to thomistic morality, which will be shown in future chapters to rely on justice (which is more restrictive than Hobbes’s equity) but also on Aquinas’s view of the common good, which emphasizes living well as a community beyond simply living as one.

Aquinas’s Political Account of Natural Law

Thus we could sum up by saying tentatively that in both their moral and their political theory, the right understanding of law is central to both Thomases. As Aquinas puts it, the goal of the *Prima Secundae* is to treat of man “inasmuch as he [as well as God] is the principle [or cause] of his actions” and law is that which instructs us externally. This instruction forms us into a community. For Hobbes, the reason and will of the Leviathan are equity and the laws.⁷¹ In both cases, law directs the members of the commonwealth as an extrinsic force, and in this way it becomes, for both thinkers, the will of the commonwealth.

⁷¹Hobbes, *Leviathan*, Introduction, 3.

In both cases, law is a moral necessity. Yet while Aquinas seeks to set up a measure for all behavior, Hobbes seeks above all a feasible state of peace. In making the case against the moral philosophers before him, Hobbes condemns them as dangerous as well as wrong. Hobbes's use of a similar terminology to that of Aquinas thus only serves to underline the difference between their philosophies.

Aquinas must therefore be defended by his differences and not his similarities to Hobbes. Marc Guerra, while trying to show that Aquinas is capable of political prudence, notes that "quite conspicuously, the Christian religion lacks its own distinctive sociopolitical program."⁷² Beatitude is the end of the Christian mission, rather than "the resolution of mankind's pressing political problems."⁷³ This is, as we have seen, central to Hobbes's critique of Christianity in general and of Aquinas in particular. Christianity subordinates the practical to the theological. In answering a question of whether there is a human law, Aquinas comes up against this problem. The lawgiver, as the objectors tell us, ought to be directed to one end for all men, and this end is salvation, and salvation is in Christ. The ultimate law is simple and absolute—come to Christ. And yet Aquinas reminds us in his replies that even the law which leads to Christ deals with particulars which are difficult to judge—there are particulars, or "rudiments of righteousness" on the path to salvation, which are the province of even Divine Law.

Aquinas, following Aristotle, insists that "it is natural for man, more than for any other animal, to be a social and political animal, to live in a group."⁷⁴ In *On Kingship*, he

⁷² Marc D. Guerra, "Beyond Natural Law Talk: Politics and Prudence in St. Thomas Aquinas's *On Kingship*," *Perspectives on Political Science* 31, no. 1 (2002): 9–14, 10.

⁷³ *Ibid.*, 11.

⁷⁴ Aquinas, *On Kingship*, Chap. 1 (4). Cf. Aristotle, *Politics* I, 1253a 8.

gives two reasons for recognizing this: first of all, because human beings lack the endowments and the instincts which protect the other animals, and are endowed instead with reason, by which they can procure those protections. No one, however, could procure all these things for himself, and so each needs many others to be sufficiently provided with the basic necessities, and then to gain knowledge of many and various particulars (such as the animal has by instinct). Their difference from the other animals reflects both an inferiority and a superiority in human beings. Although it seems a great defect not to have been given the means to survive, the faculty of reason that compensates for this defect ultimately raises us in the order of things, and indeed brings us closer to the Creator himself. The human being, on this account, assists in creation actively by getting for himself what is supernaturally given to lesser animals. Secondly, Aquinas points out that human beings evidently communicate more fully than any other creature. By virtue of his relationships with other human beings, the individual gets protection, whereas alone he is defenseless and if he falls there is no one to help him up. Moreover, he gets positive good from his relationship with others, while alone his toil is endless but meaningless.⁷⁵

In Aquinas's descriptions of the political world we are frequently pointed to the perfect but never lose cognizance of the human as we know it. Indeed, at every stage, the human being has personal attachments which will ultimately be fundamental to his broader political attachments. The biblical passages alluded to by Aquinas in his above discussion of the political nature of human beings refer particularly to the familial relationship. Elsewhere, Aquinas argues that among our social relationships we owe most honor to our parents

⁷⁵ Aquinas, *On Kingship*, Chap. 1 (5).

because we owe them our birth, which is a greater benefit than we can receive from “any other superiors,” from whom we receive only temporal things.

The familial relationship is not the only relationship that is important to the individual, however, and it is not the only relationship that forms his character. Thus Aquinas gives us means to compare and delineate the parts of the political realm. Fathers require the clearest form of obedience, but at the same time the obedience of themselves and their children are demanded by the state. Individuals leave their fathers and families to go to war or to work for the state. It is not, indeed, the power of the family or the fact of the family which determines one’s ends or the limits of one’s behavior. Explaining the need for laws, Aquinas writes:

And as to those young people who are inclined to acts of virtue, by their good natural disposition, or by custom, or rather by the gift of God, paternal training suffices, which is by admonitions. But since some are found to be depraved, and prone to vice, and not easily amenable to words, it was necessary for such to be restrained from evil by force and fear, in order that, at least, they might desist from evil-doing, and leave others in peace, and that they themselves, by being habituated in this way, might be brought to do willingly what hitherto they did from fear, and thus become virtuous. Now this kind of training, which compels through fear of punishment, is the discipline of laws.⁷⁶

Aquinas moreover endorses Aristotle’s statement in *the Politics* that the perfect community is the city or state. He writes that “as one man is a part of the household, so a household is a part of the state.”⁷⁷ The good of the family is ordained to that of the whole community, just as “the good of one man is not the last end, but is ordained to the common good.”⁷⁸ The good of the whole community is thus the basis of law. Aquinas asserts that “the law must

⁷⁶ *ST*, I-II, 95.1.

⁷⁷ *ST*, I-II, 95.1 ad. 3. Cf. Aristotle, *Politics*, i.1.

⁷⁸ *Ibid.*

needs regard properly the relationship to human happiness” and that “a law, properly speaking, regards first and foremost the order to the common good.”⁷⁹ It is this ordination to the good of the whole community that distinguishes law from the individual commands and ordinances by which a family is governed, which are “not such as to have properly the force of law.”⁸⁰

This presentation of law concedes a great deal to the political sphere while maintaining a certain sphere for special friendships and warm attachments. Moreover it recognizes the complicated nature of civil society. In giving his account of what natural law actually means, Aquinas maintains his emphasis on this complexity. There are three precepts of the natural law. All three rely on the principle that human beings are created with an inclination towards what is good. The first of these precepts is the preservation of the good of being, “inasmuch as every substance seeks the preservation of its own being, according to its nature.” The desire to live and to resist death is thus a principle of the natural law. The second precept is shared with all animals and leads to a preservation of the species; it includes “sexual intercourse, education of offspring and so forth.” The third precept of the natural law is the one most commonly called upon in scholarly and popular discussion of the natural law. Aquinas describes it thus:

there is in man an inclination to good, according to the nature of his reason, which nature is proper to him: thus man has a natural inclination to know the truth about God, and to live in society: and in this respect, whatever pertains to this inclination belongs to the natural law; for instance, to shun ignorance, to avoid offending those among whom one has to live, and other such things regarding the above inclination.⁸¹

⁷⁹ *ST*, I-II, 90 2.

⁸⁰ *ST*, I-II, 95 1, ad. 3.

⁸¹ *ST*, I-II, 94, 2.

This third precept tends to be emphasized by commentators; and it is the third which critics speak of when they characterize the natural law as a mere imposition of the judgment of someone in power. Yet all three principles are presented together by Aquinas.

To understand the full impact of this treatment of natural law, we must keep in mind something which Hobbes's presentation has made plain: natural passion and natural reason are not the same thing and even appear to be naturally opposed. Aquinas faces this tremendous difficulty directly. Aquinas explains the difference between nature and natural law, while emphasizing the reliance of the latter on the former. For Aquinas nature describes the general process set in place by the Creator. In this sense, Aquinas says "even irrational animals partake in their own way of the Eternal Reason." What is special about the rational creature is that he "partakes thereof in an intellectual and rational manner," making his participation a law, which, according to Aquinas's most basic definition, is "something pertaining to reason."⁸²

The order of proceeding from the basic physical and animal character of the human being to his more rational characteristics shows up more than once in Aquinas's description of the naturally political and naturally law-bound human being. Although the judicial controversy over natural law focuses on the dangers of its tendency to point us to abstract heights, Aquinas's own procedure might well speak differently to the specifically Christian audience. Whether due to years of Roman persecution, or to the basic fact of revelation, the Christian mind is likely to focus on higher things. Aquinas's presentation in fact has the effect of holding lower things up for our consideration, and indeed reconciling them with higher ends. Because the human being has speech and reason, he can understand his physical

⁸² *ST*, I-II, 91, 2, ad. 3.

and animal ends. Indeed, he can choose and order them. As we shall see in Aquinas's discussion of war and punishment, for example, the human being is aware that both for himself and for the state there are worse things than death or sacrifice. As the discussion in *On Kingship* shows, this human rational communication and choice is superior to the instincts of animals, because it allows him to be provident. It is not that he himself creates an improvement upon nature, but that nature comes to its fulfillment in the human ability to shape its community through judgment.

Thus the kind of advice Aquinas gives about law is based upon an inquiry into human judgment. While his discussion is evidently not intended to tell judges what to do in all or even most cases, it does often tell us what is dangerous. First, we might consider his lucidity in defining the advantages and pitfalls of judgment. Aquinas, following Aristotle, warns that judges should not replace laws. Law can be, as the American founders believed, a recourse for the citizen. Aquinas expresses his own view of the dangers of judicial activism:

those who make laws consider long beforehand what laws to make; whereas judgment on each single case has to be pronounced as soon as it arises: and it is easier for man to see what is right, by taking many instances into consideration, than by considering one solitary fact. [Further,] lawgivers judge in the abstract and of future events; whereas those who sit in judgment [judge] of things present, towards which they are affected by love, hatred, or some kind of cupidity.⁸³

Aquinas alerts us to the danger of partiality, while at the same time he does not deny that "animate justice" is necessary in order to recognize the particulars of human activity.⁸⁴

Aquinas's discussion of natural law must be connected to his broader political discussion, and reflection on these more political elements of his natural law is relevant to the modern debate. This is true partly because Aquinas does discuss the interplay of law and judgment.

⁸³ *ST*, I-II, 95, 1, ad. 2. Cf. Aristotle, *Ethics* v.4.

⁸⁴ *ST*, I-II, 95, 1, ad. 2.

Russell Hittinger argues that Aquinas's view of judgment concedes a great deal to human law—where the dictates of the law are clear, the judge need not resort to external knowledge, but only the dictates and procedures of the written law.⁸⁵

While Hobbes is on the one hand claimed by positivists, Aquinas is frequently heralded as the inventor of the opposing tradition, a tradition which is often characterized as appealing to natural law above and beyond the law of the community. Yet as the hobbesian judge is free, the thomistic judge is surprisingly restrained. Aquinas's understanding of judgment is, first of all, somewhat more difficult to get a hold of than the statements of Hobbes on the judicial extension of Executive prerogative. Aquinas takes up the question of judgment in the section of *the Summa* that deals with the virtues. Aquinas limits the exercise of judgment to the determination of what is just, and in that sense seems to be concerned primarily and, to some ears, overbearingly, with the abstract consideration of justice. Yet Aquinas goes on to say, oddly, that a thing becomes just in two ways: first by "its very nature," and this is called "natural right," secondly by some agreement between human beings, and this is called "positive right."⁸⁶ Here he not only grants a great authority to the agreements of human beings but also confers on those agreements a power to determine future judgment. He goes on to conclude that "it is necessary to judge according to the written law, else judgment would fall short either of the natural or of the positive right."⁸⁷ Because positive law can and usually does grant legitimacy to conduct, and because the

⁸⁵ Russell Hittinger recognizes the importance of "the natural law as it is realized through the prudential insights and artful determinations of human law." Hittinger, "Natural Law in the Positive Laws: A Legislative or Adjudicative Issue?," *The Review of Politics* 55, no. 01 (1993), 5-34, 7.

⁸⁶ *ST*, II-II, 57.2

⁸⁷ *ST*, II-II, 60.4.

judge must rely on a clear set of principles, he is directed to rely on positive law in all cases. Unlike Hobbes, Aquinas does not expect judges to make legislative decisions about what the public needs. Rather, they are asked to play one of many specific roles individuals play in political life.

Alongside the natural law, human law has a fundamental place in politics for Aquinas. He variously translates Aristotle's "*phusei politikon zoon*" as the naturally "political," "social," and "civil" animal.⁸⁸ The difficulty of Aquinas's project, then, becomes that of preserving "nature" from the consequences of original sin. Surely, it should be Aquinas and not the irreverent Hobbes who must invoke the aid of reason against the rebellious animal desires. Yet willingly Hobbes invokes a salutary revolution against the animal passions. The rational element of man is not in fact his natural appetite. Man's mechanistic and animal motion towards objects is not the dictate of Hobbes's first and subsequent natural laws but is rather opposed to them. Men even let go of their natural desire to rule to achieve the political community. To see how beneficial this must be, however, one need only imagine what the state would be like if it deferred to the nature of Hobbes's individual.⁸⁹ This reasonable (and political) imperative for man to direct himself against his natural impulse is in sharp contrast to the imperative of Aquinas's first and second precepts, in which the natural physical and animal tendencies of individuals are presented as ultimately designed in reference to his final rational end. Hobbes's allegiance to the passions does not

⁸⁸ Aristotle, *Politics*, 1253a 3; Aquinas, *Commentary on the Politics* I, 1253a 3 (hominum est naturaliter animal civile), *On Kingship* (Chap. 1), (sociale et politicum), *ST*, I-II, 72.4 (politicum et sociale).

⁸⁹ See Mansfield's discussion of this point, in Harvey C. Mansfield, "Hobbes and the Science of Indirect Government," *The American Political Science Review* 65, no. 1 (March 1971): 97. As he eloquently puts it, "men cannot tolerate a politics directly expressing their true nature, if their nature is what Hobbes says it is." 102.

survive the creation of the contract. Aquinas, for his part, will not wage full-scale war against the passions, because this would militate against nature and nature's God. Thus he begins his discussion from the natural goods which all things share and not human beings alone.

Hobbes makes it possible to rely on ourselves for the sure sense of what is authoritative in the law—but the individualism of this move brings about the slavery to the contract which must follow. After this contract, political judgment, or rather political action, will be the province of the sovereign and the sovereign alone.⁹⁰ Is it true to say that our consent is the basis of law, if there is no possibility of organization, no education of judgment, no hope for the expansion of our understanding generally? Members of liberal democracies find the promise of this individualized political understanding in its potential to create a great conversation—a dispute and deliberation across the branches of government, federated bodies, and political parties. Yet civil society as Hobbes presents it has no place for such conversation. We must, therefore, look elsewhere in order to make the concept of consensual government meaningful for most of its advocates today.

Hobbes's human beings form together a great creature, the Leviathan. Yet this monument does not redound to human glory. The Leviathan quells the pride of human beings ; it cannot lift them up. It is at the same time humanity's greatest creative act and the emblem of bondage. It may be an ugly, monstrous, unwieldy thing. Hobbes's account derives the political from the nonpolitical, while Aquinas's account portrays politics as a

⁹⁰ Although later and more moderate versions of individualism divide the power of government, it remains essentially true for this kind of contract theory that actual participation in political action is restricted to those currently in power. That is, citizens may act in many ways under this contract, but their action does not require political judgment. Indeed, Hobbes famously emphasizes the importance of the ruler in forming the doctrines and convictions to be held by the citizens.

consequence of nature. Aquinas surprisingly tells us that the physical and animal “goods” of existence and appetite are to be harmonized perfectly with the conscious good of the rational person. Further, his complex political view strives to place law before us as a human good without obscuring the complexity of human relationship—the many desires and loves each individual lives by, and indeed the complexities of what Aquinas calls the secondary precepts of the natural law—the particulars of doing right or wrong. Since modern society rejects the absolute individualism of Hobbes’s account of goods, both in its approval of equity and its rejection of his absolute and undivided sovereign, ought we not to consider an account which derives the power of the governor from some source more immediately political?

CHAPTER THREE

Just War and the Unity of Peace

Early Christianity was at odds with the world in which it found itself. For several hundred years its members were disenfranchised and indeed persecuted. In particular among the problems faced by early Christian citizens was the threat of being pressed into military service by a government which was essentially hostile to the Christian. Christian theologians came to the aid of their laity, in the Epistles of the New Testament and later in the works of the early church fathers, by praising the goods of eternal life above the dictates of the city. Later, Constantine's Christianity allowed for an alliance between Christians and their governments. This alliance moved the Christian from the position of being unable to fight even for survival to the point of possibly leading the charge on behalf of his God. Yet Christian theology and philosophy did not quickly sort out the extreme change in position, for the superior tactical position of the Christian in this new world could not dissipate all former doubts about his religious orientation in a worldly world. Constantine's soldiers are said to have born an emblem of Christ on their shields, whether they were Christian or pagan.¹ Had they only substituted the pagan gods of former imperialist tyrants with a new face for their times? All serious consideration of

¹For an account of the gradual appearance of Christians in the armies of the Roman empire, see R. Ross Holloway, *Constantine & Rome* (New Haven: Yale University Press, 2004): 3. Holloway finds evidence that by the era of Constantine Christian soldiers were even preferred.

the acceptability of violence must appeal to some deeper principle than survival if it is to make a claim to justice.

This chapter will argue that Aquinas provides such an argument for the justice of war. In order to understand his position, we must explore the ways in which it differs from modern just war theory. While the latter may arrive at many similar conclusions to those of Aquinas, it does not give the same account of the authority required in declaring war. Indeed, its proponents tend to rely on a hobbesian account of authority inasmuch as they justify war as a consequence of each individual's need to defend himself. The defense of the community is viewed as an expanded act of self-defense. Aquinas resists this move because he holds that public life cannot be reduced to an aggregate of private lives. War for him remains a matter of doing justice. While the private individual may be justified in doing violence because he aims to protect himself or his own, this act of self-preservation is not the same as the act of doing justice. This debate over the ends which may justly be pursued in war helps to clarify the ends of political life by separating the actions of the private individual from the communal activity of the city.

Most just war theorists find no serious form of a just war discussion prior to that of St. Augustine.² They also point to Aquinas as the first organizer of just war theory.

² Paul Ramsey attributes the beginning of defined doctrine on the justification of war to St. Ambrose and St. Augustine, while noting the increasing involvement of Christian soldiers in armies from the 2nd through 5th centuries as a practical acceptance of war. See Paul Ramsey, *War and the Christian Conscience: How Shall Modern War Be Conducted Justly?* Published for the Lilly Endowment Research Program in Christianity and Politics (Duke University Press, 1961): xvii. David Corey and J. Daryl Charles similarly credit St. Augustine with the beginning of just war theory "as a tradition," but argue that Gratian's later developments of Augustine are important to Aquinas's subsequent discussion. See David D. Corey and J. Daryl Charles, *The Just War Tradition: An Introduction*, (ISI Books, 2012), 11, 67-76. Frederick Russell provides a

These same thinkers tend to describe the unfolding of the just war tradition as a gradual response to the Christian ascendancy in politics and alongside it an inevitable move towards a more liberal attitude to one's fellow man. The first section of this chapter will lay out Aquinas's criteria for just war against the modern set of criteria. I will follow James Turner Johnson's outline of modern just war criteria because Johnson takes particular pains to trace these criteria back to Aquinas. While most of these criteria can be found in Aquinas's question on war, there are two—proportionality and the presumption against war—which do not appear in that discussion. Yet Johnson and others point to Aquinas in articulating the criteria of proportionality and the presumption against war by fusing just war theory with Aquinas's discussion of self-defense. The second and third sections will each take up one of these two criteria. I argue that the attribution of these criteria to Aquinas is incorrect and that it indicates the dangers of entangling Aquinas's theory with an inevitable move towards modern attitudes regarding war. To view this move as inevitable, or to attribute it to Aquinas, tends to soften his account of war. Aquinas understands war as a good and just course of action. It is not, finally, an evil because it is directly aimed at the destruction or prevention of a worse evil—what Aquinas calls “evil peace.” For Aquinas, war aims at the preservation of

similar list although he also notes in pagans such as Aristotle and Cicero a discussion of justice in warfare. He ultimately argues that this early use of the term does not manage to distinguish just war from successful war, however, and since Russell presents such a distinction as the purpose of just war theory he finds that it is not until St. Augustine that a useful doctrine is formed. Frederick H. Russell, *The Just War in the Middle Ages*, (Cambridge University Press, 1977). The term “just war” as a specific signifier is generally attributed to St. Augustine's *City of God*. See Eric Allen Engle, “The History of the General Principle of Proportionality: An Overview” *Dartmouth Law Journal* 10 (July 7, 2009), 1-11, 4n. See also James Turner Johnson, *Can Modern War Be Just?* (Yale University Press, 1984), 2.

something better than the life of any one individual. Thus Aquinas's just war teaching points beyond itself to the place of the city as a whole in Aquinas's thought. The fourth section of the chapter will discuss the common good, which reveals itself in the aims of just war, and in light of which the city for Aquinas is a whole. In the final section of the chapter I sketch out the nuanced but unified vision of the city that emerges from Aquinas's just war teaching.

The Criteria for Waging Just Wars

Michael Walzer lists Aquinas among the chief members “of that religious tradition within which Western politics and morality were first given shape.”³ Aquinas's views on war in particular are important to contemporary theory—his criteria are still widely referenced and discussed, especially within the Christian tradition of just war. His discussion of the relations between states has recently been a subject of controversy inasmuch as it allows the waging of ‘just wars,’ and seems to call for intervention in many controversial cases. James Turner Johnson calls him “a seminal thinker in just war thought,”⁴ but claims that the doctrine called for much further thought and sophistication than his provided. Finnis, Boyle, and Grisez refer to his arguments frequently in their discussion of the morality of nuclear deterrence.⁵ John Howard Yoder, a critic of the just war tradition, gives him similar importance. He explains that the just war system began

³Walzer, Michael, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (New York: Basic Books, 1977): xx.

⁴Johnson, James Turner, *Ideology, Reason, and the Limitation of War* (Princeton and London: Princeton University Press, 1975): 26.

⁵Cf. John Finnis, Joseph M. Boyle, Jr., and Germain Grisez, *Nuclear Deterrence, Morality and Realism* (Oxford:Clarendon Press, 1987): 79, 80, 98, 271, 312, 318, 362.

as a “style or a stance.” It was under Thomas Aquinas that “a degree of system emerged.”⁶ But his criteria “are the kind of list found in a dictionary or encyclopedia. He just put things in chapters rather than deriving everything from one source.”⁷ Indeed, notwithstanding the frequent appearance of Aquinas’s name in just war discussions, his approach is largely treated as a first attempt to systematize vague notions that killing in war requires some established rules.

When Aquinas addresses war in the *Summa Theologiae*, he presupposes the contention we have seen in his legal thought and the one to which Hobbes so strongly objects - he assumes human beings can judge right from wrong, and justice from injustice, and that the political community as well as the individual must strive for right and justice. Yet Aquinas also insists in these articles that to do harm to someone—namely to kill and to sanction through penalties—may be right. Aquinas’s question on war, Question 40 of the First Part of the Second Part of the *Summa*, is “whether it is always sinful to war.” An immediate ambiguity occurs in the question: Aquinas’s term, “bellare” means literally to war—this term might mean either waging war, in the sense of declaring war or launching an attack as leader, or warring, in the sense of fighting as a soldier.⁸ To either or both questions, in any case, Aquinas answers that warring is not

⁶ John Howard Yoder, *Christian Attitudes to War, Peace, and Revolution* (Brazos Press, 2009): 65.

⁷ Yoder, *Christian Attitudes*, 65.

⁸*ST*, II-II, 40.1. The word bellare is found mainly in contexts discussing a state warring against another. Yet the same word can be used to refer to the fighting of soldiers. This will be worth paying attention to hereafter, when we consider the apparent distinction between the declaration of war and conduct in war, or what is referred to as the *jus ad bellum* and the *jus in bello*.

always sinful. Indeed, by the time he has given his own response to the question, Aquinas has claimed that war can be a duty. In this chapter I will show further that war for Aquinas is sometimes the only prudent course, and that a willingness to take this course of action is *not* justified by reference to self-defense, but rather is essential to the goals of the city.

Aquinas gives three criteria for the justification of war. First, a declaration of war must be made by a rightful political authority. Aquinas places this job of rulers on the same level and gives it the same justification as their job as executors of the law for their own citizens. Thus, “just as it is lawful for them to have recourse to the sword in defending the common weal against internal disturbances ... so too, it is their business to have recourse to the sword of war in defending the common weal against external enemies.”⁹ This implies both that there is some distinction between rightful and wrongful authorities and that it is humanly possible (even common) for an authority to be a rightful one. It is worth noting that Aquinas does not reserve this label only to “just” kings, nor does he specify a regime which may be considered rightful for these purposes. Reasonably, Aquinas’s language includes the same rulers who are allowed to punish their citizens.

The second rule indicates what enemies may be considered to be endangering the common weal. Aquinas requires a “just cause”, and gives the following definition for it: “that those who are attacked, should be attacked because they deserve it on account of some fault.” He does not give a list of just causes, although he does point to the avenging

⁹ST, II-II, 40.1.

of wrongs. James Turner Johnson argues that Aquinas agrees with St. Augustine, for whom the just cause includes “defense against attack, recovery of something wrongly taken, or punishment of evil,” and particularly stresses the punishment of evil by pointing to Romans 13:4, “The Prince is the servant of God to execute his wrath on the evildoer.”¹⁰

Thirdly, a war waged by an authority which has a justifying cause must also be waged with “a rightful intention, so that [the belligerents] intend the advancement of good, or the avoidance of evil.” As in all moral decisions for Aquinas, the justice of an act is made up of both the deed and the intention. The ruler ought to be particularly careful to avoid certain motives which might easily tempt him. He points to St. Augustine in warning against “aggrandizement, or cruelty,” and also the “passion for inflicting harm, the cruel thirst for vengeance, an unpacific and relentless spirit, the fever of revolt, the lust of power, and such like things.”¹¹ With this condition, Aquinas indicates that he speaks primarily of the ruler’s decision to go to war (rather than the intentions of individual soldiers)—the ruler is the only one in the city able to bring about an entire war, and therefore his motives are implicated beyond those of ordinary citizens. The ruler has the clearest opportunity to seek to aggrandize or enrich his power through war. Therefore the “just” in just war must be primarily the ruler’s justice.

¹⁰ See James Turner Johnson, “The Just War Tradition and the American Military,” in *Just War and the Gulf War*, eds. James Turner Johnson and George Weigel (Ethics and Public Policy Center, 1991): 21.

¹¹ *ST*, II-II, 40.1. He cites Augustine *Contra Faust.* xxii, 74 and *Can. Apud. Caus.* xxiii, qu. 1.

The most obvious application, then, of Aquinas's just war theory will be for those who decide to go to war. Aquinas makes no direct comments here on *how* war ought to be conducted. Many modern commentators understand this as an inadequacy in Aquinas's just war doctrine, which is improved upon by later additions.¹² It is worth noting, however, that the same set of temptations which might influence the ruler before entering a war will be visited with a vengeance upon soldiers once that war has begun. Aquinas's ambiguity regarding whose justice is being discussed in the war question underlines a difficulty with the project of judging war. The idea that the city as a whole is to be protected lies at the center of the proposal that wars may be just, and yet the ruler makes the fundamental decision to act or not to act and thus implicates the city in his decision. In order for this justification to be coherent, it must be possible for the ruler to make a decision which takes account of the justice of citizens. The ruler's justice and their justice are intrinsically linked. Aquinas, in proposing to treat the whole of war in

¹² Commentators do find some discussion about how to wage war throughout the *Summa* and Aquinas's other works. Nonetheless, they suggest that Aquinas's comments on the conduct of wars are not systematic and even incoherent. I will address some of these suggestions throughout the chapter. An interesting example of this line of argument is Frederick Russell's claim that "scattered throughout his *Summa Theologiae* are elements of a code of military conduct." Russell ultimately suggests that Aquinas's question on war is theoretically distinct from this argument found in other parts of the *Summa*. While the former is orthodox, the latter is more amenable to Aristotle's thought and does not appeal to revelation. Russell proposes that Aquinas, perhaps through lack of time or simply failure to comprehend the whole, failed to present a comprehensive account of war; and "since he did not devote his full powers of systematization to the problems of war, it is necessary for the modern commentator himself to attempt this systematization while guarding against wrenching those opinions out of the Thomist context." Frederick H. Russell, *The Just War in the Middle Ages*, (Cambridge University Press, 1977): 286, 290.

this small article, therefore suggests that the interests of the ruler and the people can logically be addressed in the same judgment.

Whereas Aquinas addresses declaration of and involvement in war in this short article, modern just war theory is expansive. Just war theory or doctrine is spoken of as an aggregate of many arguments in the western and especially Christian tradition. Thus commentators view Aquinas as one link in the chain, albeit an important one. Indeed, part of Yoder's criticism of the theory is that it relies on a historical build-up of ideas. As he puts it, "we must compile from bits and pieces the various elements of this total set of notions, and then figure out whether they fit together."¹³ However, proponents of the theory suggest this traditional growth is essential. James Turner Johnson calls it a "consensual tradition," one of which every culture has some version.¹⁴ David Corey and Daryl Charles call just war tradition a "collaborative mediation stretching back in time and continuing even today on questions at the intersection of ethics and war."¹⁵ To recognize this tradition is to recognize that nature informs all rulers in the world to some extent, and thus the just war and the natural law traditions have often been united. To this extent the existence of a consensus is supposed to speak for itself, and students of diplomacy and tactics are directed to pay attention to it.

The existence of a consensus regarding the possible justice of wars is crucial to both modern and thomistic just war theory. That some level of consensus is possible does help to ground a theory of natural law or of natural justice. Further, this kind of

¹³ Yoder, *Christian Attitudes*, 65.

¹⁴ Johnson, *Can Modern War be Just?* 1

¹⁵ Corey and Charles, *The Just War Tradition*, 7.

consensus on matters of warfare indicates that human beings do not attempt to win wars at all costs all the time, because obliterating one enemy at one time without rules means that every city is always vulnerable to complete destruction at any time. It is also likely that Aquinas is instrumental in defining a historical consensus. But Aquinas's just war discussion is not based on finding consensus among world leaders. To make consensus the whole of natural justice is to cut off any further philosophical foundations of politics. Aquinas rather proposes a philosophical grounding for human actions. Aquinas explores the right role of rule in this discussion, and also explains the sense in which the city (in modern Christian terms) must aim beyond itself.

Moreover, the expansiveness of just war theory often endangers its grounding in fundamental principles. Aquinas's three basic criteria of just war theory are still widely noted in modern discussions, but commentators now tend to focus on a different and broader set of criteria of which Aquinas's three are only a part. With the goal of responding to these discussions, it is useful to lay out a few major modern just war criteria and set those of Aquinas among them. The approach of modern just war theory is to synthesize the work of the great just war thinkers, among whom Aquinas is almost universally considered foremost. Such an approach runs the risk that it may synthesize incompatible ideas from thinkers whose premises were not in fact the same. Some elements of Aquinas's just war theory have been undermined by its commentators in this way.

Modern just war theory lays out new lists of criteria, lists which propose to synthesize and also to improve upon the work of theorists like Aquinas. Just war theorists today often distinguish two sets of criteria: the *jus ad bellum* and the *jus in*

bello.¹⁶ Michael Walzer, for example, identifies both a *jus ad bellum* and a *jus in bello* and traces these two back to mainly different roots, the first being historically Christian and the second historically secular. Modern war “is always judged twice, first with reference to the reasons states have for fighting, secondly with reference to the means [adopted].”¹⁷ These two are “logically independent.” While Walzer considers the *jus in bello* to be primarily the addition of contemporary just war theory, James Turner Johnson claims that Aquinas indicated an interest in conduct in his own criteria for war. He argues that “right intention, the third of Thomas’ three requirements for just war, is especially interesting because, while it pertains in context to the question of a *jus ad bellum*, it also contains implications important for the development of a *jus in bello*.”¹⁸ Yet if Aquinas does address this separate set of concerns, he addresses them not *as* separate, but as a part of his argument for a *jus ad bellum*.

Modern just war theory also subdivides the *jus ad bellum*. Johnson provides his own list of seven criteria, in an attempt to sum up modern just war theory: a declaration of war requires a just cause, a right intention, a right authority, a hope of success, the goal of peace, the use of war as a last resort, and a proportionality of means to ends. Johnson views this new listing as consistent with but more developed than Aquinas’s list of criteria. Just cause, right intention, and right authority are obviously traceable to Aquinas, and the notion of a hope of success can be found there to some extent. Finding the other criteria in Aquinas is more complex. The goal of peace is found throughout

¹⁶ Less commonly a third set of criteria is attached, the *jus post bellum*.

¹⁷ Walzer, *Just and Unjust*, 21.

¹⁸ Johnson, *Can Modern War be Just?* 40.

Aquinas's work, but, as we shall see, it has a more fundamental meaning to his philosophy than its place on the list suggests. The two remaining ideas, that war must always be a last resort and that it must be proportionate to its gains, are not mentioned in Aquinas's article on war. Yet many just war theorists claim that one or the other of these two criteria are the essential basis for decision-making concerning war. Both claims, I argue, have the tendency to obscure the integrity of Aquinas's just war thought.

The Presumption against War

The claim that war must always be a last resort, also expressed as the notion that we should always presume against war, is put forward most notably in the 1983 Pastoral Letter of the American National Conference of Catholic Bishops. This statement, which addresses itself not only to the Catholic community but as "a contribution to the wider public debate in our country on the dangers and dilemmas of the nuclear age," begins by laying out a series of premises. The first of these proposes that "we should begin in every case with a presumption against war and for peaceful settlement of disputes."¹⁹ The use of force is permitted in "exceptional cases." This view of just war teaching suggests that force is always suspect. It seems to reprimand the judgment of any ruler who has ever judged war to be merely the best and most likely route to a just end, rather than the *only* possible route. Further, it amounts to a claim that war is an evil rendered necessary in certain cases, on the calculation that it is certain that a greater evil might occur. Thus the document goes on to say that nations have a right to defend themselves from unjust

¹⁹ U.S. Catholic Bishops, *The Challenge of Peace: God's Promise & Our Response*. (Pastoral Letter, Paulist Press: 1985): 2.

aggression but must never be the aggressors. Aquinas does not make any such suggestion in the question on war. He indicates that war may itself advance good and prevent evil. The idea of a presumption against war requires that the ruler always seek a peaceful solution with a nation who is a potential opponent, and also that he should always presume that peaceful solutions are better ones. Aquinas's language concerning the just cause indicates that there are cases beyond those in which war responds to a threat to national security. Sometimes wars avenge wrongs even of other nations. Aquinas also says that aiming at peace may require aggressive force.²⁰ This may be good even for those against whom one fights. Thus the aggressive solution (the solution which includes going to war with another state) may be avoidable for the moment but ultimately less dangerous. For Aquinas, this danger is not calculated in the number of years of war or even in the number of lives lost, but rather in the service of justice by the city.

Aquinas's Question 40 does put forward the goal of peace as a fundamental reason for war. The problem with equating this goal with a presumption against war is that it tends to obscure Aquinas's view that peace must be understood in terms of justice. It tends to make just war theory appear to its opponents as casuistry. Thus Joan Tooke, who singles out Aquinas in her criticism of the just war tradition, argues that Aquinas does not recognize "the inherent contradictions" in his proposition that war is for the sake of peace.²¹ She points out that even Aquinas himself allowed "that there is something essentially unchristian in the shedding of blood, even in a just war or cause, since in itself

²⁰ *ST*, II-II, 40.1, ad. 2.

²¹ Tooke, *The Just War*, 12.

this act is completely incompatible with the administration of the sacrament of Christ's body and blood."²² She faults Aquinas for nevertheless holding that the shedding of blood for one's country could be justifiable, and accuses him of "overlooking the truth that a means is, in a sense, its own moral end."²³

Tooke's criticism exposes the difficult task of a just war theory. If war is an evil and an exception, it begins to seem morally safer to avoid it. Why should our own lives outweigh those of others? Indeed, war must be viewed with suspicion as long as the state is viewed as an aggregate of individual human lives—for in this case self-interest is very likely to color one's judgment, whether in favor of war or against it. Tooke's disagreement with Aquinas is not limited to the definition of acceptable means. She also questions the end he provides for the political life. She views his as an essentially realist position. "Aquinas grounded natural law on the basic drives, and in this case those towards self-preservation, and therefore self-defense, are deemed to be wholly right."²⁴ However, Aquinas's discussion of war appeals to a principle deeper than that of self-defense; it is the defense of the polity, and all that that entails, that justifies soldiers. Tooke's own discussion of the pre-thomistic Christian account of war points out that early pacifists emphasize the other-worldliness of Christians because they have no attachment to the Roman Empire and therefore want little part in fighting for her. Among

²² Tooke, *The Just War*, 24. She refers here to *ST*, II-II, 40.2, "Wherefore it is unbecoming for [bishops and clerics] [if this is what Aquinas says you wouldn't need the brackets] to slay or shed blood, and it is more fitting that they should be ready to shed their own blood for Christ, so as to imitate in deed what they portray in their ministry."

²³ *Ibid.*, 118.

²⁴ *Ibid.*, 119

these pre-thomistic thinkers, the justification of war is only rarely found, since almost all of these thinkers sharply distinguish the Roman Empire from their own city (the City of God.)

Aquinas is, as Tooke suspects, much more political than these early pacifist thinkers. Aquinas's focus on the purposes of political society and the duties of the citizen within it are essential to making the distinction between the soldier, whose goal essentially goes beyond self-defense, and a threatened individual fighting for his life. Although Aquinas frequently emphasizes the importance of family and other human relationships, they are subject to the greater goods of the common weal:

It may happen, however, that even a good king, without being a tyrant, may take away the sons, and make them tribunes and centurions; and may take many things from his subjects in order to secure the common weal.²⁵

Tooke's fundamental disagreement with Aquinas is on this point. In her view, "man's extra-political relationships [such as in his family or in his private life] are as important as his political needs and duties, if not more so..."²⁶ For Aquinas, however, the good of political unity will justify the disturbance of smaller social units, and even depriving the citizens, within certain limits.

To defend the concept of war for the sake of peace, then, it becomes necessary to show that peace is not simply absence of violence and death. John Finnis attempts to defend Aquinas by exploring the concept of peace further. Peace, which "should not be understood thinly," "involves not only concord (absence of dissension, especially on

²⁵ *ST*, I-II, 105.1, ad.5.

²⁶ Tooke, *The Just War*, 141.

fundamentals) and willing agreement between one person or group and another, but also harmony {unio} amongst each individual's own desires." Finnis argues that the purpose of human law is other-directed, person-to-person, justice and peace:

"peace" refers, directly, only to (1) absence of words and deeds immorally opposed to peace, such as disorderly contentiousness, quarrelsome fighting, sedition, or war, (2) concord, i.e. the 'tranquility of order' between persons and groups which includes amongst its necessary but not sufficient conditions a love of neighbour as oneself, along with the avoidance of collisions (e.g. in road traffic) and dissensions such as occur without personal fault, and perhaps also (3) a sufficiency of at least the necessities of life. In short, it is the peaceful condition needed to get the benefits {utilitas} of social life and avoid the burdens of contention. It is a peace which falls short of the complete justice which true virtue requires of us.²⁷

He takes this to be different from a consideration of virtue in itself. Thus his defense of peace is still a utilitarian defense, though the utility defended is at the level of the community.

Yet Aquinas allows more than defensive resistance. He justifies more than just ejecting an enemy who has invaded. Beyond this, there are several other sources of a notion for justifying war: whatever else might be required to protect the common weal, and avenging whatever might be considered faults or wrongs. Although the conditions we have considered are worded in such a way as to allow for some controversy, Aquinas does give some indications of when he thinks they might come into play. Bearing in mind this concept of unity that underlies Aquinas's discussion of war, it is possible to gain some insight into the conditions thereof.

²⁷Finnis, John. *Aquinas: Moral, Political, and Legal Theory* (Oxford University Press, 1998): 227-228 (sic).

In understanding which enemies have committed faults, we start with the notion of the common good. This is a two-sided consideration, referring not only to the good of the belligerent country but to that of the country to be attacked. This is found in the reasons why the ruler may go to war, that is “for the common good, or for the good of those with whom he is fighting.”²⁸ In this notion Aquinas acknowledges the works of his predecessor, St. Augustine:

Hence Augustine says: "Those whom we have to punish with a kindly severity, it is necessary to handle in many ways against their will. For when we are stripping a man of the lawlessness of sin, it is good for him to be vanquished, since nothing is more hopeless than the happiness of sinners, whence arises a guilty impunity, and an evil will, like an internal enemy."²⁹

Since the notion of punishment is being invoked here, it is useful to consider the notions of punishment provided by Aquinas, summarized in the section on the judicial precepts:

A severe punishment is inflicted not only on account of the gravity of a fault, but also for other reasons. First, on account of the greatness of the sin, because a greater sin, other things being equal, deserves a greater punishment. Secondly, on account of a habitual sin, since men are not easily cured of habitual sin except by severe punishments. Thirdly, on account of a great desire for or a great pleasure in the sin: for men are not easily deterred from such sins unless they be severely punished. Fourthly, on account of the facility of committing a sin and of concealing it: for such like sins, when discovered, should be more severely punished in order to deter others from committing them.³⁰

The faults to be punished must be either grave (in clarifying the notion of gravity, he thereafter refers to the proud or obstinate); or great in guilt, habitual, or easy to conceal. In the political scheme, this might easily be taken to refer to tyrannies and genocides. Aquinas’s language in question 40 suggests that it also includes unjust seizure of land.

²⁸*ST*, II-II, 40.1 ad. 2.

²⁹*Ibid.* He quotes Augustine Ep. ad Marcellin. cxxxviii.

³⁰*ST*, I-II, 105.2, ad. 9.

Not all wars will be good. Aquinas particularly warns the king against waging war for the desire for glory, through which “many have been led unrestrainedly to seek glory in warfare, and have sent their armies and themselves to destruction, while the freedom of their country was turned into servitude under an enemy.”³¹ Also, punitive wars are restricted to countries that have refused “to make amends for the wrongs inflicted by [their] subjects, or to restore what [they have] seized unjustly.”³² So the enemy must always be given some opportunity to change or make amends, and only on his refusal may action be taken.

Proportionality

Johnson defines the final general criterion of just war as proportionality, which is “the effort to calculate the overall balance of good versus evil in deciding whether to use force to right a wrong.”³³ Proportionality is judged in three steps: by assessing the evil done, calculating the costs of allowing wrongdoing to continue, and then evaluating the harms of the possible means of responding against its possible benefits. Some level of proportion must be sought in these calculations. This criterion is one which belongs not only to decisions about entering wars, but for conducting wars. This aspect of just war

³¹Aquinas, *On Kingship*, Chap. 8 (58)

³²*ST*, II-II, 40.1. He cites Augustine QQ. in Hept., qu. x, super Jos.

³³ James Turner Johnson and George Weigel, *Just War and the Gulf War* (Washington, D.C.: Ethics and Public Policy Center, 1991): 27.

theory has been applied in questions such as the justifiability of nuclear deterrence, the use of specified missile targets, and the killing of civilians.³⁴

This concept of proportionality is almost universally attributed to Aquinas, at least in its origins. Aquinas does discuss proportionality as a kind of criterion. Interestingly, however, this criterion comes not from his discussion of war but from his discussion of murder.³⁵ In Question 64 of the *Secunda Secundae*, Aquinas addresses killing of one individual by another. The seventh article deals with killing in self-defense. Here Aquinas argues that an act may have two effects, one intended and another unintended. Aquinas justifies some unintended consequences of action. He argues that one might kill someone else to save one's own life. In such a case the killing would be a secondary and unintended effect of the agent's primary action, which is aimed only at the preserving of one's own being. Yet Aquinas sets a limit to one's reliance on this "secondary," or, as most commentators label it, "double" effect of action. Aquinas says that "though proceeding from a good intention, an act may be rendered unlawful, if it be out of proportion to the end."³⁶ Thus a man might use more than necessary violence, and kill someone who has attacked him through an overly zealous defense of his life. In other words, his intention is acceptable, but his means are not.

Two "doctrines" have been defined by commentators on the basis of this article of Aquinas's on killing in self-defense: the doctrine of "double effect" and the doctrine of

³⁴ See, for example, John Finnis, Joseph M. Boyle, and Germain Gabriel Grisez, *Nuclear Deterrence, Morality, and Realism* (Clarendon Press, 1987)

³⁵ *ST*, II-II, 64.7.

³⁶ *ST*, II-II, 64. 7.

proportionality. Aquinas's discussion in this article has been taken to apply to killing in war in the following way: while killing is normally forbidden, killing in war is primarily aimed at self-defense. That is, the just war criterion of proportionality is understood to be an extension of Aquinas's discussion of self-defense, which Aquinas justifies in cases of murder. It may thus be brought to bear on the *jus in bello* and the *jus ad bellum*, insofar as a ruler is supposed to make the calculation Johnson has defined when he chooses to go to war and at each point when he is deciding how to conduct that war.

By pointing to Aquinas's mention of proportionality, one can connect his discussion of the requirements for entering a just war with the rules for correct conduct in war. This approach is taken by readers like Johnson who are friendly to Aquinas because they are trying to show that his view of war is more complete than it has appeared to others and that it is consistent with the whole of just war theory. One could even find support for this approach in the fact that Aquinas's main article on war speaks of "warring" in general, rather than specifically about declaring war. In this integrated view Aquinas's principles of double effect and proportionality tend to become as important to the formulation of just war theory as Question 40. Indeed, proportionality becomes what James Turner Johnson calls one of two "fundamental" ideas at the base of all *jus in bello* considerations.³⁷

The general concept of proportionality mentioned in Aquinas's discussion of self-defense is thus applied to the whole stock of decisions made in war. Yet Aquinas does not make this connection himself. The discussion in Question 64 concerns the individual.

³⁷ Johnson, *Can Modern War be Just?* 3.

Killing in self-defense is treated as a private action. The justification for war comes before this justification of the individual “double effect” action. Aquinas gives no reason to doubt that the article on war may be read as complete in itself. Moreover, Aquinas makes a distinction in Question 64 between this act of individual killing and the act of killing in war. His core argument in the article on self-defense is that a man may kill another when he *intends* only his own defense, and not the killing of the other. A soldier is a different case. He argues that a soldier *may* intend the killing of another. He intends this, however, by reference to the public good and not for himself. Indeed, Aquinas differentiates the two situations further by noting in the discussion of self-defense that the understanding of the soldier may be imperfect (that is, he may think he is killing in self-defense) but his real justification is the public good. His imperfect understanding is forgivable, so long as he does not also hold “private animosity” towards his victim.³⁸

Prudence is a kind of balancing, and all actions of a ruler require prudence. Although some sense of proportionality may thus be required for a ruler’s decisions (and although the example of proportionality in matters of self-defense may be helpful in determining a prudent decision) the ruler’s justification is not the same as that required for murder in self-defense. Something beyond self-defense lies beneath Aquinas’s discussion of war, just as a presumption against war does not adequately account for Aquinas’s argument that war is used for punishment. What is it, then, that gives the ruler this added warrant for action that may end in intended death?

³⁸ *ST*, II-II, 64.7.

According to the order of the *Summa*, both the discussion of war and that of self-defense come under the larger discussion of virtues and corresponding vices. War is addressed as a possible vice opposed to peace, and thus to charity,³⁹ and murder as a possible vice opposed to justice. Yet in Aquinas's discussion murder is a vice and war is not. The two questions dealt with are answered differently. Intentional murder is rightly understood as an offense against justice; it is always unlawful. The case of the killing in self-defense is an exception and underlines this—even when an individual is attacked, his desire to kill the attacker is not justified, only his desire to defend himself. In the article Aquinas writes that a man who killed because he responded with malicious force to an attack would be guilty. War, however, is not a vice against peace. It is falsely understood to be so, in the third objection to article one of Question 40. The objector claims that war must be a sin because everything opposed to an act of virtue is sinful, and peace is an act of virtue. Aquinas answers unambiguously that war may aim at peace and those who wage it justly are not opposed to peace, but only to some related state, an “evil peace.” This evil peace is a peace which even the gospel opposes (Aquinas cites Matthew 10:34.) To make sense of Aquinas's theory requires that we can make the distinction between peace and its evil counterpart.

³⁹ This section of the *Summa* addresses possible vices opposed to charity. Aquinas addresses first hatred as a vice opposed to charity itself, then vices opposed to the joy of ourselves and our neighbors, and then vices opposed to peace. This order suggests that peace is charity as applied to the common good. Corey and Charles give an elucidating account of the context of Aquinas's discussion of war in charity and its corresponding vices in *The Just War Tradition*, 77.

The Common Good

Ultimately, if Aquinas says a war is just, it is because of its end. Only the legitimate authority can achieve anything good by war, and for his purpose to be justifying, it must be both just and well-intended. The unifying principle in all this is the reason why one wages the war. The qualifications and limitations of war can be boiled down to understanding the purpose thereof, and that purpose is peace. Aquinas points us to the words of St. Augustine: "True religion looks upon as peaceful those wars that are waged not for motives of aggrandizement, or cruelty, but with the object of securing peace, of punishing evil-doers, and of uplifting the good."⁴⁰ By this reasoning, it is possible for him to say:

Those who wage war justly aim at peace, and so they are not opposed to peace, except to the evil peace, which Our Lord "came not to send upon earth". Hence Augustine says "We do not seek peace in order to be at war, but we go to war that we may have peace. Be peaceful, therefore, in warring, so that you may vanquish those whom you war against, and bring them to the prosperity of peace."⁴¹

The cause and intention of wars must be subject to this scrutiny. There are many implied considerations here, including the importance of being able to vanquish, the end result, the means inasmuch as they change what result can be brought about, and the fear of a peace so evil as to be worse than war.

Peace is a concept Aquinas discusses frequently, and a correct understanding of it requires careful consideration of these texts. It is obviously not simply absence of war, and therefore cannot mean either that the citizens will be free of all involvement in

⁴⁰*ST*, II-II, 40.1. He cites Can. Apud. Caus. xxiii, qu. 1.

⁴¹*ST*, II-II, 40.1, ad. 3. He cites Matthew 10:34 and Augustine Ep. ad Bonif. clxxxix.

bloody activities. In fact, he claims that there can be an evil peace, a state without external warfare but one in which men are subjected to some fate worse than death because no one will fight. Some wars, moreover, are not “peaceful,” like sedition, which “is opposed to a special kind of good, namely the unity and peace of a people,” and is therefore “a special kind of sin.”⁴²

Even though a war has a just cause, it may not be able to achieve its purpose. Aquinas’s condition of a right intention is not about the *jus in bello*, but it has some bearing on it nonetheless. The advancement of good must be intended in the declaration itself; and a ruler who rightly considers will recognize that some wars with good causes will still be incapable of advancing good. In such a case, a war waged will be for some other, spurious cause: aggrandizement, cruelty, and those others listed as temptations to the ruler’s intentions. Thus the condition of a just cause will also be thwarted and rendered impotent. The belligerent must consider both whether the round can be won and how to do so. It is not difficult to imagine wars that will be subject to such controversies. War includes many economic and social difficulties; the belligerent will not serve his purpose if he launches a war so impractical as to put both his people and the enemy at the risk of greater evils than can possibly be responded to. At this point, the rules governing his conduct will go beyond those of the card player. For while the card player is sure that the win is good, the belligerent must always judge whether the win itself will obliterate the actual end goal. The only means by which one can win may be

⁴²*ST*, II-II, 42.1.

so egregious as to make subsequent peace impossible (still using peace in its broader sense.) And if the war simply cannot be won, it is not always worth starting it.

In a game of cards which involves the choosing of trump or some form of bid, the player genuinely concerned about winning the game will have a plan before he makes a call. His play is at this point still subject to a large number of factors and circumstances that are yet to be revealed or to unfold. However, any serious call must reflect some idea of a possible plan which will allow him to achieve his goal. Taking the just cause as granted - that is, assuming his win will be a good thing—his call in each round is still a matter requiring discernment. He must not make a bid he cannot possibly win, as it will only move him further from the end sought. Aquinas is sensitive to these factors. He frequently hints that the quality of means is part of every decision—and some means render a decision impractical and thus wrong. The injunction he quotes from Augustine that one must “be peaceful, therefore, in warring,” has as its reason “so that you may vanquish those whom you war against, and bring them to the prosperity of peace.”

Accordingly, Aquinas’s discussion of the benefit of society does emphasize the importance of concord for its own sake:

Now the welfare and safety of a multitude formed into a society lies in the preservation of its unity, which is called peace. If this is removed, the benefit of social life is lost and, moreover, the multitude in its disagreement becomes a burden to itself.⁴³

All the benefits of society seem to be little consolation if that society has not achieved the goal of this unity. In fact, while recognizing that the first concern of law will be ensuring

⁴³Aquinas, *On Kingship*, Chap.3 (17)

security, he suggests that at its highest, when it is able to reflect the Divine Precepts given to the Jews by God, it will do much more than this:

As the Apostle says (Romans 13:8), "he that loveth his neighbor hath fulfilled the Law": because, to wit, all the precepts of the Law, chiefly those concerning our neighbor, seem to aim at the end that men should love one another.⁴⁴

The unity of peace, at its best, will actually be akin to love.

The most important work of the ruler is the *unity* of the people. Moreover, states are granted the status of parties by being given moral decisions to make. The fact that they can punish, defend, and so on in similar patterns to those of the individual suggests that they themselves have a moral reality for Aquinas. Aquinas is mainly silent on the leader's role in a world community, although certainly there is an underlying assumption that the law of nature will force him to consider the state of his neighbors. Justice and natural law are fundamental principles both for individuals and for states. But since we have seen no indication of Aquinas attempting to set up a normative authority between states, the rules governing their relations must be viewed slightly differently.

Aquinas does define the right of nations. It "falls short of natural right" in being applied only to human beings and not all of nature, but "is natural to man in respect of natural reason which dictates it" and this is "'whatever natural reason decrees among all men, is observed by all equally, and is called the right of nations.'"⁴⁵ Dictated by natural reason, "they need no special institution." Natural right itself is the way in which a thing can be adjusted to a man "by its very nature, as when a man gives so much that he may

⁴⁴*ST*, I-II, 105.2, ad. 1.

⁴⁵*ST*, II-II, 57.3. He cites Gaius Digest. I, 1; De Just. Et Jure i., 9.

receive equal value in return.”⁴⁶ The law of nations “is derived from the natural law by way of a conclusion that is not very remote from its premises. Wherefore men easily agreed thereto.”⁴⁷ Because it is derived “from the law of nature, as conclusions from premises” it is the kind of positive law “without which men cannot live together, which is a point of the law of nature.”⁴⁸

Although later thinkers used the right of nations and law of nations to denote some law specific to relations between nations, Aquinas means only a law that all obey, both locally and externally. This is nonetheless an important consideration for international relations, as it implies the existence of a global ethics, or a morality universally accepted. Part of it does indeed refer to the conduct between nations. It is possible for the state to conduct itself wrongly towards another:

First, through [saying] something false, or through the breaking of a promise, and this is always unlawful. No one ought to deceive the enemy in this way, for there are certain "rights of war and covenants, which ought to be observed even among enemies," as Ambrose states.⁴⁹

Aquinas's discussion allows for the importance of consensus noted by modern just war theorists, and for the role of prudence in decision-making. Aquinas does not ask the rightful ruler to rely on the reason of other rulers. Certainly he believes in human reason, and that there is a natural morality all human beings must answer to. However, the rightful ruler will determine this by the past actions of others, and he may make a

⁴⁶*ST*, II-II, 57.2.

⁴⁷*ST*, I-II, 95.4, ad. 1.

⁴⁸*ST*, I-II, 95.4.

⁴⁹*ST*, I-II, 40.3. He cites Ambrose, *De Officiis*.

judgment that the only way to change them is to fight them. Thus, although Aquinas does stop short of advocating the pursuit of a society of states under a common ruler, the notion that there is a kinship of all peoples is an essential foundation of his thought. Yet neither the consensus nor any exact calculation of death for death are sufficient for accounting for justice in war.

At the base of Aquinas's discussion is his idea of the end of political life. In laying out the duties of the ruler in his treatise *On Kingship*, Aquinas establishes that his job is to see that the community lives well, and in order to bring this about "three things are necessary. First of all, that the multitude be established in the unity of peace."⁵⁰ Peace seems to be crucial to the good life of the community. Aquinas says of the king that "it is not even legitimate for him to deliberate whether he shall establish peace in the multitude subject to him, just as a physician does not deliberate whether he shall heal the sick man encharged to him."⁵¹ However, the quest for peace is not that of pacifism. On the contrary, it "is lawful to fight, provided it be for the common good."⁵² The concern of the ruler to nurture this good life "is threefold: first of all, to establish a virtuous life in the multitude subject to him; second, to preserve it once established; and third, having preserved it, to promote its greater perfection."⁵³

At the beginning of *On Kingship*, Aquinas discusses the importance of rule. All things have some goal or end, Aquinas says, but human beings "proceed to their intended

⁵⁰ Aquinas, *On Kingship*, Chap. 16 (118)

⁵¹ Aquinas, *On Kingship*, Chap. 3 (17)

⁵² *ST*, II-II, 40.2, ad. 1.

⁵³ Aquinas, *On Kingship*, Chap.16 (117)

goal in different ways.”⁵⁴ Indeed, this is clear from the “very diversity of human endeavors and actions.” Thus Aquinas suggests human beings need “some directing principle.” Aquinas takes up the possibility that the directing principles comes from each individual himself, in the “light of nature” with which nature endows him. Yet because a human being is naturally social and political, the answer is not for him to be “king unto himself under God.”⁵⁵

Rather, Aquinas suggests that the ruler is he who orders things towards the “common good,” like the soul rules the body. In describing the duties of a ruler in *On Kingship*, Aquinas emphasizes his special capacity, as one leading many, to bring about unity. Indeed, *On Kingship* mentions the need for unity so frequently that it would seem inane if one could find no special reason for it. One can scarcely find a paragraph in the first 7 chapters which does not include a sentence on the goodness of unity. Yet the establishment of the “unity of peace,” which is the first part of the ruler’s first duty, is not itself sufficient to make the multitude live well; for, Aquinas says they must also be able to act well. Indeed, it is acting well that is the more important need of a community. Aquinas writes that a multitude needs the unity of peace because otherwise their fighting would hinder them from “virtuous action.” The role of rule is to allow for virtuous action on the part of the commonwealth.

⁵⁴ Aquinas, *On Kingship*, Chap. 1

⁵⁵ Aquinas, *On Kingship*, Chap. 1

Faith, Justice, and What Lies Beyond the City

Because of this pressing need for unity to render the city capable of even everyday goodness, Aquinas emphasizes power in a way likely to be off-putting to modern theorists. Aquinas, for example, goes on to argue that there are dangers “more grievous” than tyranny—provided, that is, that the tyranny is not an “excess of tyranny.” This is because in the course of an imprudent resistance to a tyrant, some evil may occur, for example, the community could splinter on the question of the nature of the constitution. Thus tyranny is to be endured if the only alternative is the destruction of the community. In combination with his justification of war, this might seem a dangerous emphasis on power. There is another difficulty in this notion of war for modern readers. To what extent does Aquinas’s justification depend on religion and fidelity to the Church? To what extent is the justice suggested by Aquinas dependent on his belief in the divine, and how do we factor in the beliefs of rulers and citizens? Although it is a vast simplification of Aquinas’s answer to these concerns, one might say merely that neither justice nor the city is perfect. Aquinas claims that the city aims to do justice, but not that it is possible for the city to embody the perfection of justice. The city also falls short of perfect virtue.

Opponents of Aquinas’s discussion of war often point out an apparent inconsistency: although Aquinas offers a theory of just war, he insists that clerics and bishops are not allowed to fight. As we have seen, Tooke refers to this discussion in her criticism of Aquinas. In his article on war, Aquinas gives two reasons why bishops and clerics should not fight. The first is that they have a separate and more important job than the job of soldiers. Their job requires them to devote their time to the “contemplation of

Divine things, the praise of God, and prayers for the people.”⁵⁶ This devotion would be disrupted by warlike pursuits, Aquinas observes, just as it would by commercial enterprises. The second reason is that clerical Orders are “directed to the ministry of the altar, on which the Passion of Christ is represented sacramentally.” Because they imitate Christ in this act, they would more becomingly die to imitate the deed of Christ than fight. That is to say, they play their proper role even for society best by staying away from warring. In his responses to the various objections to this article, Aquinas clarifies that the cleric does not thereby give up even the bodily defense of his flock; yet his weapons are spiritual ones—prayer and his representation of Christ for his congregation. This teaching relies on the reality of spiritual weapons. It is not, therefore, likely to satisfy those who do not accept the reality of such weapons.

Nonetheless, Aquinas prohibits clerics from fighting, while defending just wars. Tooke makes much of the point that in his discussion of clerics and war, Aquinas states that the shedding of blood, even without sin, makes human beings “irregular.” Specifically, in reference to clerics and bishops, Aquinas writes, “Wherefore it is unbecoming for them to slay or shed blood, and it is more fitting that they should be ready to shed their own blood for Christ, so as to imitate in deed what they portray in their ministry. For this reason it has been decreed that those who shed blood, even without sin, become irregular.”⁵⁷ Tooke offers this statement as one more piece of evidence that Aquinas is really aware that war is an evil, and could not consistently

⁵⁶ *ST*, II-II, 40.2.

⁵⁷ *ST*, II-II, 40.2.

defend the justice of war. Yet Aquinas's use of the word irregular, although admittedly somewhat opaque, refers to actions which disqualify people from the priesthood—it includes, for example, the procreative act. Tooke herself supplies the term “unchristian.” “Irregularity” for Aquinas is a quality which specifically excludes men from the ministry of the altar—these same men are excluded from other political roles which are nonetheless noble, such as family life.⁵⁸ Aquinas evidently holds that there are sacred actions of both Christ and his priests inconsistent with resistance that are of a different order from the ordinary actions of Christians. Given Aquinas's usage, Tooke's designation of irregular as unchristian commits her to the view that for Aquinas the procreative act as well as resistance to force is unchristian.⁵⁹ On the other hand, the distinction Aquinas makes in the article on war concerning clerics does show that the shedding of blood, even in war, is not to be taken lightly. It also shows that even the acknowledged goods of the city are subject to some higher authority and limitation.

The ruler Aquinas described has a grave responsibility which goes beyond concern for the bodies of citizens. The existence of a proper authority also makes it possible for them to act well. Thus whoever is in authority has to be concerned with the virtues of citizens. Declaring war is necessary because it makes it possible for citizens to

⁵⁸ Cf. *ST*, Supplement to the third part, 39, compiled from Aquinas's *Commentary on the Fourth Book of Peter Lombard's Sentences*.

⁵⁹ Aquinas also argues that orders may be instituted for warlike purpose. (ST II-II, 188) These orders perform a part of the church's mission by fighting for the survival of the commonwealth, and they differ from clerics specifically in lacking the ministry of the altar. Aquinas defends the diverse modes in which individuals should participate in achieving the ends of the city: some fight, some have and raise children, and some have a special (and sacramentally-created) ability to represent Christ through prayer and pastoral service.

protect the commonweal and thus foster the goods of community amongst themselves. Is the protection of the commonweal also in itself a virtue for the citizens? Aristotle included courage in his list of virtues which had to be fostered in the individual, and insisted that this meant courage in the face of death—wartime courage. This might be a positive reason for going to war. I have argued above that Aquinas insists that one pursues justice and punishment rather than simple self-defense. How far does this go? In addition to the nurturing of courage among citizens, one might also propose the necessity for the Christian ruler to spread his kingdom and the good news with it. In short, one might make an army of holy warriors. Many critics of Aquinas fear that this is precisely where his teaching tends, as they fear that it was the tendency of the medievals in general.

Aquinas's position that infidels should not have authority over the faithful has largely bolstered these fears. Yet Aquinas's answer to the question of whether unbelievers may have authority or dominion over the faithful is complex. The short answer is no; the objectors hold the position that they ought to have authority, and in his "on the contrary" section Aquinas cites 1 Corinthians, where it is stated that one should not go to the unjust to be judged but to the saints.⁶⁰ In his own response, however, Aquinas does not give any direct answer to the question. Instead he claims there are two different questions at issue. In the first place, there is the question of whether it would be right to establish the dominion of unbelievers over believers. To be involved in the establishment of such an authority would be to provoke scandal. The establishment of a State ruled by unbelievers to which Christians were to be subject would be wrong,

⁶⁰ Or, in full, "dare any of you, having a matter against another, go to be judged before the unjust," i.e. unbelievers, "and not before the saints?" 1 Corinthians 6.1.

because “subjects are easily influenced by their superiors to comply with their commands” and because “unbelievers hold the faith in contempt if they see the faithful fall away.”⁶¹ The second question at issue, however, is the one which actually matters for judgments about war, and that is whether dominions already in force should be done away with. The answer that Aquinas gives to this question is simply that even unbelievers have real dominion and authority. Dominion is based on the natural law which is shared despite distinctions of belief.

Thus the dominion of infidels is politically acceptable, and indistinct from the dominion of believers. Aquinas nevertheless provides one further proviso. The Church, which acts on the authority of God, has a dominion beyond those of any other political body. Thus the dominion or authority of unbelievers “can be justly done away with by the sentence or ordination of the Church.” Aquinas goes on to note that there are many reasons why the Church would not do away with this dominion. Indeed, the only example he provides in which the Church might do away with dominion is that of slaves held by Jews in Christian countries. The Church has ordered these slaves to be freed upon their conversion to Christianity. Aquinas’s treatment suggests Christians are forbidden by national and papal authority to hold slaves, and that Jews are accorded a limited authority to hold slaves—only when those slaves become Christians does the authority of the Christian state insist they should be freed. This is an example of the limited use of Church authority—the Church might well like to free these slaves before their conversion, but it makes a prudent concession to the current authority of individual

⁶¹*ST*, II-II, 10.10.

Jewish slave-holders. He gives no example of a seizure of authority from a sovereign state.

Aquinas argues elsewhere in the *Disputed Questions* that we ought to love our enemies. This love for the enemy is possible if one understands one's relationship to God. If one understands God to be the ultimate object of all love, then one should be able to love the enemy because he is "related to God."⁶² The enemy is our adversary, and the basis of hatred for him would be "the good of which we are deprived by [him]." To hate the enemy indicates that one "loves some created good more than he loves God," which is against charity. In making this argument, Aquinas does admit that there is a basis for hatred of enemy. Yet this hatred must not predominate; instead, it is required of the individual that he keep his sights on the charity which God demands and thus which all of his creation deserves. Aquinas goes on to state that we are not bound to feel the same particular love for every member of creation. There is no one who could have all human beings in mind in such a way as to love them particularly, nor is there any one "capable of doing good or helping each and every one in a particular way."⁶³ We are bound in a special way both to love and "to act for the welfare of" those who are close to us and who are bound to us in "friendship."

Here again the difficulty of belief appears. Once, again Aquinas brings nature to bear on the question. Aquinas tells us that our understanding of God allows us to love our enemies. But what if God is not factored into the calculations of the belligerents,

⁶² Aquinas, "Question on Charity," from the *Disputed Questions on the Virtues*, trans. Lottie H. Kenzierski, ar. 8. (Related is a translation of *pertineo*.)

⁶³ *Ibid.*

because they are not believers (or even, conceivably, because they do not understand their belief in God to inform their treatment of enemies)? For answer, Aquinas turns to Aristotle. According to Book 8 of the *Ethics*, “man, by nature, loves all men.”⁶⁴ The existence of enemies is an addition to nature and ought not to remove the “inclination of nature.” Whereas fire and water, or wolf and lamb, are real enemies by nature, human beings have charity as part of their nature. The love which a Christian may explain by reference to God can also be explained as an observation of nature.⁶⁵ In this discussion, then, Aquinas gives God as the reason for the phenomenon of love of enemy. Yet the rightness of this love can also be rationally established through an understanding of nature. This means that for Aquinas the authority of the state is not inviolable. It points to something higher. We see exceptions to state authority based on the special role of salvation in Christian life. Yet Aquinas does not mean this authority to be irreconcilable with political life. With or without revelation, the city points beyond itself, because it relies on the universal kinship of human beings.

⁶⁴ “Question on Charity,” ad. 7, See *Ethics*, viii.1.

⁶⁵ To say that Aristotle establishes the principle that all men naturally love one another by nature simply through observation is a simplification. In the passage of the *Ethics* to which Aquinas surely refers, Aristotle suggests something more like intuition: human beings admire philanthropy; moreover, Aristotle points out that they begin with a natural love of their children, and through travel discover the kinship of the human race.

CHAPTER FOUR

Punishment and the Ends of the Ruler

According to Aquinas, to punish is necessary for a ruler in the performance of his duty in the same way that it is necessary for him sometimes to go to war. Indeed, the need for punishment is even clearer than the need for war. Aquinas presumes the need for punishment, whereas he justifies war by reference to this need: *just as* the ruler has a clear responsibility to look after the internal dangers to the commonwealth, so also he has a responsibility to look to the dangers from without.¹ The justification of punishment is more obvious to Aquinas and to his reader because common sense largely concedes that the rule of law relies on the power to enforce law. This obvious justification for punishment as a support to law, however, need not be anything other than a concession to a utilitarian assessment of communal life—an assessment that the diverse desires of individuals are controlled by deterrence, and that comfortable life for anyone is impossible unless some of these desires of others are denied. Aquinas, on the other hand, claims that punishment is a matter of justice. This chapter aims to show how Aquinas’s understanding of punishment extends beyond a utilitarian protection of the community and points to a higher understanding of the city’s ends.

In *On Kingship*, Aquinas lays out three parts of the ruler’s duty to establish and promote the common good: he must protect the endurance of the common good (its perpetuity), he must protect from external attacks, and he must protect against a danger from

¹ *ST*, II-II, 40.1.

within. That danger is the perversity of human wills, which leads to destruction of the internal peace of the multitude. Chapter Two dealt with the first of these by discussing Aquinas's view of law, and Chapter Three dealt with the second by presenting Aquinas's view on war. This fourth chapter deals with the third concern: namely, the discouragement of those actions which destroy the peace of the city from within. These three aspects of rule define the objects of all governments. It will remain in the fifth chapter to discuss the organization—or regime—which Aquinas proposes to pursue these objects.

War requires an appeal to something outside of the clear and written rules of the commonwealth, but no such departure is necessary for punishment. That is to say, war is outside the realm of domestic law. We have seen, through the discussion of just war, that the ruler has a general moral responsibility to human beings—a moral responsibility, moreover, which allows him to exact penalties including death. That responsibility requires no written laws, although it acts with deference to the consensus or law of nations. Should not this general responsibility also justify the exacting of penalties among the citizens? Yet according to Aquinas punishment is an act of law, and human punishments in particular are acts of human law.² Thus human punishments are not justified by the general moral authority of rulers (or natural law.)

The foundation of punishment is different from the justification of war to the extent that domestic law is a game-changing force. This is significant for two reasons. First of all, domestic affairs seem to rely on a necessary relationship which exists between the ruler and the ruled. The ruled are supposed to be aware of the dictates of domestic law; law thus becomes a kind of communication between the ruled and the ruler. Secondly, the ruler has

² *ST*, I-II, 92.2.

some special responsibility to his citizens beyond his general moral authority. This responsibility will allow, through the statutes of domestic law, a concern for faults and virtues much more specific than war could allow for. In war, the ruler's interference is limited perforce to evils which have garnered international visibility, but this is not so in the domestic realm. In domestic punishment, the authority of the ruler will often supervene the individual's judgments of his own actions and of himself.

Punishment is a use of authority to repress individual action which endangers public life. Because of this repressive character, punishment has sometimes been viewed purely as the use of power—power that the ruler has and the individual does not. Such an account of punishment is given, for example, by Michel Foucault. In *Discipline and Punish*, Foucault argues that punishment is an essential element of modern politics, but its importance lies in the formation of the human being through history rather than in the maintenance of law.³ Foucault speaks of punishment as a direct agent in the formation (or, if necessary, exclusion) of the individual, and thus implies that law is merely a formalization of the repressive power which lies at the center of politics. I turn to Foucault's theory in the first section of this chapter because he illustrates the extreme view of the relationship which punishment creates between the ordinary individual and the individual or individuals who possess power.

³ One might wonder why this is true particularly of modern politics, rather than of ancient. Yet Foucault later blames the enlightenment for the phenomenon. *Discipline and Punish* proposes to be a "history of the modern soul" and "a genealogy of the present scientific-legal complex from which the power to punish derives its bases, justifications and rules." *Discipline and Punish*, 23. Both the modern version and the pre-modern versions he describes, however, rely on the absolute distinction between ruler and ruled. In his brief account of the pre-modern version of punishment, Foucault says that punishment "bring[s] into play the binary opposition between the permitted and the forbidden" "by operating the division, acquired once and for all, of condemnation," 183. The primary difference in the two versions is that the modern one *claims* (falsely) to rely on positive law and thus on a contract between the ruler and the ruled.

Foucault ultimately proposes that this relationship is the essential political relationship, but it is also a relationship in his view fundamentally defined by the opposition between ruler and ruled.

To find an alternative to this harshly opposition-based account of punishment, we must find some form of mediation between the ruler and the ruled. While Foucault defines law as the formalization of repressive power, the other thinkers I will address in this chapter propose that law is that necessary mediation. In such accounts, punishment is justifiable only in an established community. Punishment, then, properly describes that action which a ruler takes in correcting the citizens of his own commonwealth, in reference to the goods pursued according to the laws of that commonwealth. As a proponent of this view of law and punishment, Hobbes has been influential in modern law, especially in positivist schools of thought. Hobbes famously underlines the distinction between the state of affairs existing within and outside of the city by claiming that the war of all with all continues to exist between nations after commonwealths are formed.⁴ Unlike Foucault, who holds that law merely endorses punishment which is the real basis of government and of society, for Hobbes punishment must be justified by legal authority. The existence of the authority to punish belongs properly at the level of the city or state. The defense of the city is a good which grounds the action of the ruler. Thus far, Aquinas is in agreement with Hobbes's position. Aquinas nevertheless deviates from Hobbes in his definition of justice and thus of the purposes of punishment, since for Hobbes's justice is only a consequence of the creation of the city and for Aquinas it is a perpetual requirement of the human being.

⁴ Hobbes, *Leviathan*, II, 30.

The first section of the chapter will describe the possibility suggested by Foucault that punishment aims at forming the individual. In the second section, I turn to the positivist approach to punishment and to Hobbes's more grounded justification for it. Aquinas and Hobbes agree that the state is important in its own right, and thus both disagree with Foucault's notion that punishment is simply a manipulation of the individual. Ultimately, however, Hobbes and Aquinas differ on the role of justice inside the state as well as outside. After discussing Foucault and then Hobbes and the positivists, I turn in the final section of the chapter to Aquinas's understanding of punishment. While his divergence from Hobbes and the positivist theory that relies upon him serves to underline the pre-eminence of universal justice in his discussion, his distance from Foucault indicates his commitment to the human being as a responsible individual apart from the community that so essentially contributes to his identity.

Punishment as an Operation of Power

In Foucault's account, the individual exists at this present moment in history largely as a consequence of the history of punishment.⁵ Foucault claims that the existence of the individual as we know him (free-willing, conscience-driven, and stubbornly insistent upon his autonomy) was created by history—specifically, the history of punishment. For it is punishment that has formed the *soul* of the individual. Foucault describes the account, however, as a history of the body (this being the real and original entity upon which history acts.) Foucault makes the argument in the form of a genealogy, according to his usual

⁵ Indeed, since Foucault's claim is that punishment is the efficient cause of the soul, those primarily concerned with that entity (such as Aquinas) might well say that for Foucault the human being exists *solely* as a consequence of the history of punishment. Michel Foucault, *Discipline & Punish*, (Random House Digital, Inc., 1977): 29-30.

model, but the key to his argument is his assessment of the military culture which he first associates with the early seventeenth century. Foucault outlines a “bodily rhetoric of honor” which exalts the ideal figure of the soldier.⁶ The seventeenth and eighteenth centuries were obsessed with this figure because it was an example of perfect discipline. Discipline made military action possible, and the more perfect discipline the larger and more effective an army could be. But beyond the military need for discipline, Foucault claims that the world of the seventeenth and eighteenth centuries was run according to “disciplines”—disciplines such as the system of Christian children’s education which provided a set structure and timeline for advancement, but then ultimately rejected as “ignorant” the student who failed beyond the acceptable number of times. The discipline of the large military and of the Christian school were part of the same structure and both show the purpose of punishment.

Punishment thus understood is not for the sake of “expiation” or of “repression” (although Foucault admits it is closer to the latter than the former.)⁷ Actually, punishment is more complex and fundamental than these simple descriptors could encompass. Punishment defines each society and era. Punishment is a process with a number of steps: it creates a group of people in which comparison is possible, then presents a standard for this comparison (either of minimum, average, or optimal performance,) then quantifies the values of the individuals within the structure. This third step introduces a constraint—conformity—and finally punishment sets the terms of that which falls too far outside of conformity. Punishment is an institution which “compares, differentiates, hierarchizes, homogenizes,

⁶ Foucault, *Discipline and Punish*, 135.

⁷ *Ibid.*, 182.

excludes.”⁸ The difference between the goals of this process and the aim of “repression” is that Foucault’s punishment aims not to *destroy* the members who fall outside the limit provided in punishment’s final step, but to exclude and shame them into obscurity. For Foucault, the final act of punishment is an act of exclusion. In other words, the criminal has importance for society precisely as a definition of its limits. Punishment creates modern society by creating a sphere for efficient, uninhibited action in an organized body. “In short,” Foucault tells us, “it *normalizes*.”⁹

Although aimed at the possibility of communal activity (and in that sense a kind of “common good”), punishment described thus is anything but beneficent for the one punished. Foucault illustrates the core of his theory by comparing the body of the king in the theory of the Middle Ages (which, according to Foucault, defines power to this day) and that of the condemned man in society.¹⁰ The king’s person and his body are of supreme importance; he is crowned, bowed to, anointed. This allows a king to die and a kingdom to live on—one version of the king’s “body” is attached to the height of his position and is lasting and sacred, though his “second” body dies.¹¹ The Medievals saw the need for this highest individual to take responsibility for action and motion forward into the future. “Modern” thought has

⁸ Foucault, *Discipline and Punish*, 183.

⁹ *Ibid.*, 183.

¹⁰ Foucault sets up a modern view of punishment against the Medieval view of the king. This is explained by his understanding of the king of the Middle Ages as equivalent to the modern understanding of power. Elsewhere he elaborates that “it seems to me that in Western societies since Medieval times it has been royal power that has provided the central focus around which legal thought has been elaborated,” and, “I believe that the king remains the central personage in the whole legal edifice of the west.” Foucault, *Power/Knowledge: Selected Interviews and Other Writings*, ed. Colin Gordon (New York, Pantheon Books: 1977): 94.

¹¹ Foucault, *Discipline and Punish*, 28.

added to this structure a figure at the opposite end of the political spectrum—what Foucault calls “the least body of the condemned man,” a body which indicates all the weakness and powerlessness of an individual who is common to start with and becomes less than common—condemned to a dark region at the lowest end of the political field.¹² This individual serves to illustrate the shamefulness of that dark region. The fear of this region helps to normalize action. At the same time, the condemned individual is rejected from society and removed as an obstacle to communal action by his punishment. Society can look to the future through its kings and rulers, and can cast out its failures and shames with the deficient “condemned” individuals. Society is made able to function by setting apart these exemplars of greatest and least. Thus, in Foucault’s analysis, punishment creates a structure of society which is an expansion of the relationship between masters and slaves. Manipulation by the powerful is justified because it creates the remaining categories necessary for efficient communal action.

Punishment in this scheme is often brutal and shocks our innate sensibilities. But Foucault means to emphasize, more importantly, that when modern political philosophy speaks of punishment it makes a claim to an egalitarianism with which punishment is in fact incompatible, because it claims that the rule of law is the overriding principle upon which direction of political life and punishment itself is based. According to Foucault, the opposite is true—the direction of political life and thus of punishment are the principles of politics; law describes (and conveniently promulgates) that direction. He implies thus that the whole democratic promise of the enlightenment is a lie. Modern thought tries to base the authority for law and punishment on the equality and the consensual agreement of individuals.

¹² Foucault, *Discipline and Punish*, 28.

Foucault claims that “the general juridical form that guaranteed a system of rights that were egalitarian in principle was supported by these tiny, everyday, physical mechanisms, by all those systems of micropower that are essentially nonegalitarian and asymmetrical which we call the disciplines.”¹³ The idea that these disciplines provide for some relationship between the general will and the authority of sovereignty is a partial and misleading statement of the truth. For while efficiency and thus a form of community action (indeed, what might be called a “common good”) is allowed because of this normalizing system, the deeper effect is the submission of individuals to the system.

Foucault shocks us, but his goal is not to undermine punishment. He does not oppose the enlightenment (of which Hobbes and the positivists provide an example) for its repressions, but rather for its falsehoods. Rights, juridical structures, and the social contract do not capture the reality of modern politics. For, according to Foucault, contract is not really binding, and no one speaking of legal contracts would really believe that they are. Foucault claims, by way of example, that a work contract is really not a binding force because it binds only subject to a very specific standard for performance of the work done by the employee.¹⁴ The social contract is more disciplined—in fact, it serves to coerce the individual into agreement to his punishments, powerless though they show him to be. Its grounding is a political lie, a lie which enlightenment philosophers chose to reinforce, but its power is real—for the power of punishment is the only enduring reality of the political relationship of ruler and ruled.

¹³ Foucault, *Discipline and Punish*, 222.

¹⁴ *Ibid.*, 223.

Foucault is opposed to Hobbes and other enlightenment thinkers in that he attempts to reveal something which he claims they have tried to hide. However, Foucault makes no moral claim in opposition to these thinkers. Rather, he means to question the existence of the soul or of the intrinsic value of a human being. The lie he exposes in the enlightenment is only an extension of the lie Hobbes has accused Aquinas of telling. Where ancients and medievals posited a soul with innate moral responsibilities, the enlightenment invents something which Foucault views as similar—a contracting individual who makes choices. Thus Foucault’s divergence from these thinkers heads away from the direction of the ancients. For Foucault soul and individual are contingent historical entities. In defining the role of punishment in their creation, Foucault presents individuals, particularly punished individuals, as means to the ends of the ruler. Justice has no place in punishment. Foucault departs from the classical theory just as we will see Hobbes and the positivists do in the next section of this chapter. Yet Foucault goes further still, and claims freedom has no place in a system of law.

As terrifying as Foucault’s description of the manipulative power of punishment is, the idea that the punisher should mold the criminal through punishment appears in many modern accounts of punishment. According to this line of thinking punishment either does or should rebuild the individual or, indeed, create him in the first place. For example, James Gilligan writes in the *New York Times* that “the only rational purpose for a prison is to restrain those who are violent from inflicting harm on themselves or others, while we help them to change their behavior from that pattern to one that is nonviolent and even

constructive, so that they can return to the community.”¹⁵ In a way which Foucault might expect but which further obscures the reality of punishment that he sought to reveal, modern society accepts Foucault’s analysis and converts the terror into something benign, even “humanitarian.”

In the 1940s C.S. Lewis criticized this popular theory of punishment. He pointed out the hypocrisy of what was often termed a “humanitarian” theory of punishment, a theory which justified punishment as beneficial to the individual and which justifies itself as “mild and merciful.” According to this “humanitarian” theory, to punish a man because he deserves it is on its face “barbarous and immoral.” Yet Lewis pointed out that the distinction between retributive and humanitarian justice is a distinction in motives and not necessarily in action. Punishment justified for the sake of curing the criminal is just as compulsory as punishment in the interests of retribution. Indeed, Lewis argues that punishment in the interests of cure is likely to be less limited and further-reaching. The theory “removes sentences from the hands of jurists whom the public conscience is entitled to criticize and places them in the hands of technical experts whose special sciences do not even employ such categories of rights and justice.” Further, since crime becomes “only a disease which needs cure, not sin which deserves punishment,” crime can never be pardoned. Lewis’s argument was made in the name of justice. Interestingly, it was also a populist argument. In Lewis’s argument the public conscience, or the people themselves, is preferred to the therapeutic approach of experts because the people think about justice. They think that justice should be their ruler and they are thus more likely to be—indeed, capable of being - just. The people as a group rely on the universal principles of law and justice. The law

¹⁵ James Gilligan, “Punishment Fails. Rehabilitation Works,” *New York Times*, December 19, 2012.

unites them—it mediates between them and the experts, and it provides universal definitions they can count on. Those universal definitions are limitations of power, largely because they make punishment standard rather than arbitrary. Thus, the idea of punishment as based on law provides the alternative to the view of punishment as the activity of power. This view is found in the positivists and in Hobbes.

Kingdoms Without Justice: Positivism, Utilitarianism, and Hobbes

The positivist legal theorists argue that law is that which is posited by the proper political authority. John Austin, for example, sets out to distinguish true laws from various things which resemble law. These false or imperfectly named laws are the laws of God, the rules of morality set by opinion, and patterns which have been metaphorically titled laws, such as the laws of physics (which cannot really be called laws at all, according to Austin, because they are not based on the will.) Following up on Hobbes's objection, explored in Chapter Two, to any moral or enduring natural foundations for law, positivism refuses to rely on the common good or even the shared morals of a culture as a basis of jurisprudence. Instead, it attempts to draw an entirely different connection between individual behavior and authority. In this attempt, the positivist theorists find a natural tool in punishment. Without it, what would be the force of law? We simply do not think of law as suggestion about how we could live - we think of it as that which compels us to obey. The great strength of the positivists is that they recognize this. Thus, for them, sanction is the prerequisite for law. Indeed, sanction becomes the source of law. Political authority is the authority which ought to be obeyed, not in the abstract or through the judgment that it is a legitimate moral authority, but because it has the power to sanction its commands.

According to John Austin, understanding command is “the key to the sciences of jurisprudence and morals.”¹⁶ Command in turn is defined by sanction, a term that Austin prefers to punishment, since it focuses not on the evil incurred but on the law’s promise that that evil will attend the failure to obey. Obligation to obedience and law itself follow upon the existence of a promised evil consequence. Thus all real laws are those which indicate that a negative consequence will follow upon disobedience. Should a law annex no punishment to acts which it labels as crimes, it would express a desire of those who are legislators, but such an expression is not properly a law at all.¹⁷ Moreover, sanction and law pre-exist justice and to “affirm that law is a creature of justice, [is] as much as to say that it is the child of its own offspring.”¹⁸ The term justice may be applied as a measure of laws, but in this usage it is really equivalent to “general utility.”¹⁹

In measuring law and political authority thus, Austin closely follows the political theory of his teacher Jeremy Bentham. Bentham presents a utilitarian theory of government founded on the acknowledgement that human action is ruled by pleasure and pain.²⁰ The measure of the action of government is “utility,” or “the tendency [of any action] to augment the happiness of the community is greater than any it has to diminish it.”²¹ Punishment is

¹⁶ John Austin, *The Province of Jurisprudence Determined*, 88.

¹⁷ Austin, *The Province of Jurisprudence Determined*, 99.

¹⁸ *Ibid.*, 218.

¹⁹ *Ibid.*, 269.

²⁰ Jeremy Bentham, *The Collected Works of Jeremy Bentham: An Introduction to the Principles of Morals and Legislation* (Oxford University Press, 1996), 11.

²¹ *Ibid.*, 13.

essential here as well, and “the immediate principal end of punishment is to control action.”²² It controls the action of the offender by reforming his desires or disabling him; and it influences the wills of others by example. This summation of the purpose of punishment is offered as a complete account of its justification. As for Austin, “right” and “justice” may be applied to punishment as long as one acknowledges that the real meaning of these words is conformity to the principle of utility. It is important to this view, and Bentham emphasizes, that punishment is “an artificial consequence, annexed by political authority to an offensive act, in one instance” with the intention of “putting a stop to the production of events similar to the obnoxious part of its natural consequences, in other instances.”²³ That is, punishment aims directly at discouraging an action which has a dependably negative result, but it is accidental to the action punished. Although so essential to the theory of positivism, punishment is always *artificial* (and at least in that sense arbitrary) - it need have no relationship with the action it discourages.

Several general objections have been made to this apparently scientific view of punishment, two of which must be dealt with here. The first comes from an analysis of punishment based upon the apparent consensus of common sense, and addresses primarily the underlying utilitarianism of these theories. This objection is summed up by Peter Karl Koritansky, who writes to defend the superiority of Aquinas’s view of punishment to the utilitarian view. Both common sense and philosophy, Koritansky argues, identify many cases in which punishment is morally unacceptable and scandalous while punishment might

²² *Ibid.*, 158.

²³ Bentham, 157 (Bentham’s emphasis).

nevertheless be justified on utilitarian grounds.²⁴ These include the cases of those who are thought by the general populace to be guilty though they are innocent (because if public opinion has convicted someone, his punishment is as useful as if he were guilty), those who are chosen out as scapegoats in order to bring about domestic tranquility (perhaps even by allowing a government to escape the stigma of its own errors), and those whose culpability is lessened by circumstances, such as those whose judgments are impaired or who are moved by passion. Although Bentham tries to protect himself from such an objection on the grounds that the punishment of such persons would often not be effective (and hence useful), he cannot save every such case in principle.²⁵ Although this objection is not compelling in the company of those whom it disputes—for Bentham and Austin propose to redefine justice as legality. Koritansky’s point does underline again the dangers to the individual in an utterly individualistic view of politics.

A second objection addresses more particularly the concept of authority and thus the positivism of this legal theory, and this objection is older than the modern legal positivists; it is expressed memorably by St. Augustine in the form of a question: “Justice removed, then, what are kingdoms but great bands of robbers?”²⁶ St. Augustine undoubtedly relies on some form of common sense in this appeal, but the objection has the potential to strike a more deadly blow to positivism. For while the positivists show no deference to the common sense view of justice, they do claim to justify the authority of the commonwealth. Gangs and mobs provide sanctions, and hardly anyone will grant these institutions the legitimacy of

²⁴Peter Karl Koritansky, *Thomas Aquinas and the Philosophy of Punishment*. (CUA Press, 2011): 25.

²⁵ Bentham, *Introduction to the Principles of Morals and Legislation*, 13.3.

²⁶ Augustine, *The City of God* (Cambridge University Press, 1998), iv.4.147.

commonwealths. Yet the distinction between them is not clear on strictly positivist principles. Insofar as the positivists fail to establish the superior legitimacy of political regimes, they must fail in their most important function.

In distinction to the strict views of positive law and authority laid out above, H.L.A. Hart seems to promise a more nuanced and thus stronger justification for legal authority. Hart seeks to moderate the strict definition of authority of Austin's positivism and the strict utilitarianism of Bentham. He hopes also to answer both objections mentioned above. On both counts, Hart proposes that some portion of the consensus view of fairness and morality be mixed with the strict sanction-based view of justice. Hart moderates the utilitarian basis of punishment by suggesting that once the justification of utility is acknowledged, one may impose limitations on punishment by reference to fairness—not every maximization of utility is justified: one ought not to kill someone who breaks a speed limit. In addressing the importance of sanction, Hart adds that “the role of recognition” is essential to authority. Hart thus also moderates the positivist basis of punishment inasmuch as he underlines the importance of “recognition” of the government on the part of the populace. A government will not be legitimate unless many people recognize its importance and have, at least in theory, endorsed its ability to enforce laws.²⁷ This use of the rule of recognition allows for some improvements to positivist theory—Hart is able, for example, to allow for complicated legal systems such as constitutions, because in his view sanction works alongside consent or societal standards to make law legitimate. This view partially responds to Koritansky's objection that many unjust punishments may be useful because it gives a reason for limiting even useful punishment: the political community needs to be enjoyed and thus endorsed by

²⁷ H.L.A. Hart, *The Concept of Law*, (Clarendon Press, 1970): 111-115.

citizens, and exists not only to enforce laws. This rule of recognition thus allows for what appears to be viable moderation in the legal system. Yet while Hart assures us that this general consent is part of the legitimacy of law, he gives little reason for why individuals should accept his account when they are on the wrong side of the law.²⁸

Hart points out that the ordinary citizen need not fully understand the system of law in order to participate and even help endorse it. As he puts it, the “minimum condition” for obedience is an awareness of the “general likely consequences of disobedience.”²⁹ This awareness comes from a variety of sources, such as habit, and does not depend on each citizen having an articulated conception of the criteria of validity for their legal system. However, Hart concedes that this condition for general obedience cannot create and solidify a legal system. He therefore supplies a second criterion, which is that the officials of a legal system should accept and critically assess their own adherence to the norms of the legal system. Yet in restricting the need for knowledge to the officials, Hart only relocates a central problem with his account. In admitting that individuals may have no knowledge of the system, Hart has underlined a problem with using the rule of recognition as a basis for legal validity. Indeed, the more Hart attempts to allow for the complexities of democratic society the more he seems to embrace a vague and optimistic reliance on societal obedience (or inertia) in regards to the legal system. Ultimately he really fails to give a reason for obeying the law, and in this sense loses much of what positivism promised to provide.

This is not to say Hart is wrong to introduce the rule of recognition. Indeed, Hart’s description of the modern system of law is, in many ways, strikingly accurate. Yet it is not

²⁸ Cf. *Ibid.*, 123.

²⁹ Hart, *Concept of Law*, 111.

secure in its own positivism. Hart's account is useful for showing, among other things, that this kind of account of law—the kind which tries to provide a rigorous basis for authority by appealing to societal endorsement—ends up relying upon the professional self-understanding of legal officials. The problem with all the positivist and utilitarian accounts is that they do not manage to protect the individual; and the individual is, after all, the reason for their usefulness. Because they are wary that authority will appeal to absolute truths in making judgments, they have sought to legitimize a system that relies upon law rather than upon the judgment of rulers about what supports the common good. The view of politics which eschews the common good and bases itself on individual needs requires a better defense. Hart's attempt to derive the rule of recognition from a general sense found in the governed is the perhaps the clearest indication of this problem—he knows he needs a connection between the ruled and government in order to make the political community more than a gang, but as he attempts to build that connection he weakens the clarity of the original justification in sanction.

Hobbes, on the other hand, understands that a theory of this kind—a theory based upon the individual—requires an account of why the individual's actual choices could be usurped through the ability of the sovereign to impose that which the individual does not choose—punishment. While the positivists provide what might be a coherent definition of law, they do not inquire into its fundamental basis in human community. Whether they admit it or not, they rely on a philosophical argument such as that of Hobbes. Hobbes also makes the ability to punish essential to law, but sanction is not the source of law.

Hobbes's treatment of punishment in *the Leviathan* is found mainly in three places. The first discussion occurs in Chapter 14, before the contract has been described, when

Hobbes asserts that the *right* to defend oneself from capital punishment can never be laid down. Hobbes then addresses the *power* to punish in two places: he discusses it as a right conferred upon the sovereign in chapter 18, and explains it by reference to its origins in chapter 28. In Chapter 18 of the *Leviathan*, just after the description of the formation of the commonwealth, Hobbes lists the “rights of the sovereign by institution.” This set of “rights” (and “faculties”) is *conferred* by the consent of the people assembled. These include their submission to his monarchy (or the prohibition of sedition), his immunity from breach of contract, the submission of those who dissented before the covenant was made, his immunity from accusation of injustice and from capital punishment, a right to the judgment of the means of defense, and the right to determine the doctrines the public will hold. These faculties entitle him, basically, to the free use of his own judgment of what the commonwealth needs, without the possibility of criticism from the people. Further, he has the right to make laws, to judge controversies, to make war and peace, to choose ministers, to reward and to punish, and to grant special honors and titles.

This first presentation of the rights of the sovereign speaks of rights “conferred” upon him by the consent of the people. In some sense, these rights appear to be gifts of the commonwealth. They are what might be called the sovereign’s “professional” rights—they are actions made necessary when the profession of sovereignty is created. This makes clear why Hobbes also calls them “faculties”—a name he usually assigns to individuals’ rational and physical capabilities rather than innate rights.³⁰

³⁰Cf. Hobbes, *Leviathan*, I, 13, 74.

From here, Hobbes goes on to address the proper organization, form of government, and ministry of the social contract.³¹ Next, he introduces law, first by discussing counsel, a chapter which might seem to belong to his earlier anthropology section but which is in its actual location because it is dedicated to distinguishing that which compels obedience from that which does not (a discussion dealt with in detail in the second chapter of this dissertation.) He then presents crimes and extenuations. Only after this presentation of the professional life of the sovereign does Hobbes return again to punishment.

When Hobbes comes to the chapter on punishment (chapter 28), however, he opens and underlines an apparently new question. How, he asks, does the right to punishment enter? One might expect that Hobbes has already given the rights and faculties necessary for this ability of the sovereign in chapter 18. He has mentioned the right to reward and punish among the faculties of rulers. Yet in chapter 28 he addresses the question as if it is new. Indeed, the posing of this question causes the reader to rethink the presentation of punishment as a clear power of the sovereign in chapter 18, because he now states that the right to punish cannot be a gift. The inalienability of the right to self-preservation is such that no one would give such a gift in their own case. Yet, as Hobbes goes on to maintain, no gift is necessary because in the state of nature “every man had a right to everything, and to do whatsoever he thought necessary to his own preservation, subduing, hurting, or killing any man in order thereunto.”³² This power in the ruler is indeed different from any faculty for

³¹ Within this series Hobbes also includes a chapter on the liberty of subjects. This chapter is a conclusion to his discussion of dominion, for here he explains that the subjects are free in the sense that they have chosen their own bonds, just as one might be free to render himself into slavery rather than choosing to die. Hobbes, *Leviathan*, II, 21, 136.

³² Hobbes, *Leviathan*, II. 28, 204.

private revenge, because, as Hobbes defines it, punishment is inflicted by public authority and is inflicted “to the end that the will of men may thereby the better be disposed to obedience.”³³ Yet the power to punish exists because the sovereign retains freedoms which other citizens give up. Punishment is a faculty “strengthened” in the ruler by the act in which the citizens lay down their rights.³⁴

The tension between the rights of the sovereign and the subjects has troubled Hobbes’s readers. In a sharp critique of his theory, Thomas Schrock claims that Hobbes loses track of his own argument on punishment. Indeed, since Hobbes’s political theory is “punishment dependent” this error signals its crisis.³⁵ Schrock’s claim is that Hobbes gives two bases for the right to punish: one which has the right originate “individualistically,” or from one’s being an incipient subject; the second from being an incipient sovereign.³⁶ In chapter 14, Hobbes gives the individualistic form of argument: he claims that an individual cannot lay down the right of resisting those who assault him, that a covenant not to defend oneself is always void, and that the covenant which does give the sovereign force can only

³³ Hobbes, *Leviathan*, II, 28, 203.

³⁴ Hobbes, *Leviathan*, II, 28, 204.

³⁵ Thomas S. Schrock, “The Rights to Punish and Resist Punishment in Hobbes’s *Leviathan*,” *The Western Political Quarterly* 44, no. 4 (December 1, 1991): 853–890, 854.

³⁶ Schrock also argues that Hobbes points to and rejects another possible individualistic basis: that of vicarious authorization of the sovereign by all subjects other than the sovereign and the one punished; that is, it might be possible for all subjects, through their commitment to give up the right of defending the criminal and also covenanting to assist him, might create a right to punish in the sovereign. Schrock doubts that such commitments could actually create a right in the sovereign, and also notes that Hobbes rejects this theory in Chapter 28, when he claims that a citizen could not give the sovereign a right to punish unless he had it himself. Here Schrock seems to suggest that Locke’s theory would be preferable insofar as it posits a right to punish in all individuals in the state of nature. “Rights to Punish,” 874.

say: kill me, if I do this, and not: I will not resist you, if you come to kill me. The second basis for the right to punish, that which relies on each individual being an incipient sovereign, occurs in chapter 28, when Hobbes suggests that the power to punish exists before the commonwealth is formed. Yet Schrock argues that even in 28 this second form of justification occurs mere sentences away from the individualistic justification.

In effect, Schrock understands Hobbes to indicate that he does not believe in his own theory. For even in chapter 28 itself Hobbes gives two arguments which Schrock views as incompatible: in the sixth paragraph, Hobbes states that “evil inflicted by usurped power” is an act of hostility and is not in fact a punishment because its author is not the person condemned and it is thus not an act of public authority. Schrock takes this to mean any act not authorized by the individual is an act of hostility rather than of punishment. Thus at this point Schrock understands Hobbes to have continuously separated punishment from hostility, particularly in the two passages just mentioned (of chapters 14 and 28) but also throughout the paragraphs and chapters surrounding.

Schrock argues, however, that Hobbes contradicts his own argument in the second paragraph of chapter 28. Because Hobbes has already argued that the right to resist cannot be given up, the right to punish is not vitiated by the right to resist. Therefore Hobbes seeks the door by which punishment may enter, and proposes the theory that the right to punish is retained, or what Schrock calls the “unsurrendered right” theory. According to Schrock, Hobbes has thus far asserted that punishment coming from an authority other than the person condemned is an act of hostility and therefore not punishment. The “unsurrendered right” theory, however, suggests that the right to punish belongs to the sovereign and has no basis upon the right of the one punished. Thus, according to Schrock, in this one anomalous place

Hobbes reduces punishment to an act of hostility. Schrock nonetheless holds that this reference cannot be ignored because Hobbes places a weighty emphasis upon it. As I have noted above, Hobbes treats it as if it is the first word on punishment; as Schrock emphasizes, Hobbes presents it also as the last.

On Schrock's reading the significance of this problem in Hobbes is that it indicates an incoherent view of natural rights. Schrock claims that one must choose between a passive and an active conception of rights. Rights must be given or retained, and not both. Rights need to be consistent where they exist, and the right to resist "is the unalienated right of nature."³⁷ The right to punish does not precede the covenant, as it does, for example, for Locke. Thus Schrock claims that the problem of punishment undermines Hobbes's supposed basis for government. Schrock asserts that Hobbes's change from chapter 14 to chapter 28 is made "apparently because he had come to think that the right to resist punishment is incompatible with personal authorization of punishment."³⁸

Thus Hobbes "fails to discover and exhibit a right to punish—therewith also, of course, failing to give us a sovereign and thus a commonwealth."³⁹ Yet Schrock underestimates the importance of the right to punish in Hobbes's argument. While the rights outlined in Chapter 18 are the tools of the sovereign's rule, the right to punish bears a more fundamental place in Hobbes's thought. The rights of Chapter 18 are conferred on the sovereign, and are also faculties. The right to punish, however, is the one right which predates and outlives the social contract. For the sovereign it is a (professional) right to

³⁷ Hobbes, *Leviathan*, I, 14, 64.

³⁸ Schrock, "Rights to Punish," 857.

³⁹ *Ibid.*, 857.

punish while at the same time it is a right to defend his own life. There is no real distinction between the two in Hobbes's account—that is, in the case of the sovereign.⁴⁰ The word punishment, as the word law and the word justice, has a real meaning; but it denotes a special creation of the social contract. That special creation only exists in rulers and not in individuals who are restrained by the contract. Thus Hobbes can consistently say both that the individual continues to have a right to resist and that the ruler has a right to punish.

Hobbes thus makes the ability to punish essential to law, but sanction is not the source of law. The source of law essentially remains with the people (this is why the origins of civil society are so important to his account.) But for Hobbes, as for the positivists, justice only comes about because of the covenant. So the authority of the sovereign, granted by the people, relies on sanction to create justice and injustice. At the same time, the rights of the individual that led to the contract in the first place are the same rights which justify the power of the sovereign—a power which is ultimately illimitable by reference to justice to the individual.

Schrock's reading indicates the subtlety of Hobbes's real position. His resistance to Hobbes serves also to illustrate the positivist temptation. If the sovereign's authority (and particularly his authority to punish) is absolute, what protection can individual rights provide to the individual citizen? Would it not be better, therefore, to save the basis for punishment that is derived, as Schrock would have it, "individualistically"? This the positivists attempt in arguing that punishment serves a purely utilitarian purpose, and that its justification is

⁴⁰ There is, however, at least a rhetorical separation. As noted in chapter two, words are extremely important to Hobbes even if they are almost always used to overturn their traditional signification. The ruler's right to punish is different after the contract, because he is the only one who has such a right, and because he is likely to use it as a tool in the service of what I am calling his professional faculties.

limited by this general utility for society as a whole. Yet as we have seen, Hobbes manages to find a basis for authority itself from the individual's rights, a basis which positivism has failed adequately to explain.

Hobbes has the best means of defending this view that sanction is a basis for legal obedience because he shows that sanction can be instituted by the community. Hobbes thus fathoms the depths of this utilitarian and positivist conception of justice; indeed, he cannot fairly be assigned to the category of positivism because he explains what positivists do not by grounding law in the formation of the social contract. Yet in doing so Hobbes strikes out the possibility of justice outside of the contract. This account serves to clarify the character of a utilitarian or positivist view of punishment, because it makes clear that the bond between the individual and the rule of law is that the individual was forced into the position of making a contract out of a concern for his life. This bond is no longer of service to the individual who has been condemned. That individual's interests are fundamentally incompatible with those of the person in power, and punishment cannot be in his current interests. It is important to recognize clearly that power and fear are the basis of punishment according to the individualistic justification of law.

Aquinas's Understanding of Punishment

Foucault's disciplinary view of punishment provides an alternative to the natural rights formulation, and even promises the development of shared communal purposes, since it makes communal action possible. Yet this promise is made at the expense of the individual, and certainly provides far less refuge to the aberrant individual than the legal theories just outlined. Aquinas comes closer in his analysis of punishment to Hobbes and the positivists than he does to Foucault in that he argues the protection of the city justifies

sanction to the conduct of the individual, based upon law. Aquinas claims, on the other hand, that punishment has a more complete and fundamental role in doing justice to individuals than merely facilitating the survival of the city.

These various accounts of punishment that I have discussed serve to underline the difficulty of its justification. Punishment, by its nature repressive of individual action, calls for a compelling account of hierarchy to make it more than an arbitrary tool or power. And because punishment is always violent to some degree—that is, it acts on the individual despite his current will (even for Hobbes, the individual’s consent to punishment does not determine his current state of mind)—it stands outside the normal order of human actions. This extraordinary violence must have some special justification, then, either in a natural license provided to all individuals, or in the faculties afforded to a ruler. In either case, the justification relies on something outside the punisher (since violence cannot serve its own perpetrator, except in the cruel sense of historical creation and manipulation outlined by Foucault.) But is this justification grounded in the needs of the one punished or in the needs of the community? Both possibilities are fraught with difficulty. If we look after the criminal, we seem to run into factual fallacies—we cannot claim to achieve successful reformation in all or even many cases; and, moreover, wielding the power of reformation over the individual is likely to be oppressive and indeed conflicts with the existence of human freedom. If we base the criminal’s punishment entirely on the needs of society, on the other hand, anything we do to the criminal will be allowed as long as it might improve community life.

A complete justification for punishment ought then to combine the interests of the city with the interests of the individual (even the particular individual punished.) Hobbes,

unlike the positivists, manages to combine these interests. Every individual (even those who will someday be punished) consents to the special exemption of the sovereign from the contract, and this is in the interest of every individual at the time when the contract is made. The individual who is about to be punished ceases to participate willingly in the sovereign's power, but Hobbes releases him from accepting his punishment—by right, he may resist. Thus the interests of the city and the individual are combined sufficiently to justify punishment, but their combination still leaves the individual desperate. Aquinas, on the other hand, proposes to combine the interests of the individual and the city more completely, even at the moment when punishment occurs. For one thing, Aquinas admits that punishment has more than one purpose. Because punishment is for the sake of the city, power, force and fear are essential to its character.⁴¹ Punishment is treated, as it is by the positivists, as a tool. Punishment is even, to some extent, artificial for Aquinas because he does not claim that the proper punishments for particular crimes are self-evident, and because society is always constructed by human beings and the demands that it makes are thus constructed in each particular society. Yet Aquinas makes the claim also that punishment remains grounded in justice—and this justice is meant to serve the individual as well as the city. Utility is only one of the concerns of the ruler and is only an instrument of his real purpose. Aquinas's concept of just punishment, like his concept of just war, points beyond the organization and policing of the city to the higher goals for which the city is accountable.

⁴¹ In his book on Aquinas's view of punishment, Koritansky also indicates the importance of the many different purposes of punishment, and similarly underlines that all the various purposes of punishment are unified by their ultimate reference to the common good. Koritansky emphasizes the teleological nature of all human action and therefore of punishment, and argues that a proper understanding of this nature yields the conclusion that law is a source of freedom. See, e.g., Koritansky, *Aquinas and the Philosophy of Punishment*, 148, 160.

The possibility that justice would combine the interests of the individual with the interests of the city more completely than even Hobbes's account of punishment can do is similar to the suggestion made by C.S. Lewis in his discussion of retribution and "Humanitarianism." Lewis argues that juries and peers are kinder judges than the experts because the people aim to do justice to both victims and those being punished. The interests of all parties continue to be relevant. Lewis thus points the way to a political theory which preserves justice and allows the people's role in government. In making his case against the Humanitarians, Lewis identifies two alternative bases for punishment: the cure of the psychologically sick, and retribution for evil action. The Humanitarians favor the former, while Lewis favors the latter, which allows room for sin, justice and mercy. This dichotomy of the alternatives appeals to common sense, and it is often the framework of popular debate about punishment. In this framework, Aquinas certainly tends towards the defense of retribution. Yet the dichotomy set up does not clarify whether retribution is justified by reference to the individual himself or society in general. Aquinas, as we shall see, addresses this remaining problem.

There is a technical difficulty in accessing Aquinas's teaching on punishment. Aquinas has no single coherent work on human punishment in his works. The fullest treatment of the subject as a political matter are in the set of questions on law and a few sustained discussions of justice, anger, vengeance, and restitution; on the other hand, the word occurs often and in many contexts throughout the sections of the *Summa* which treat of theological, eschatological, and more general philosophical questions. Yet these references are worth consideration, because, oddly, many of them do discuss human politics. Striking in these allusions and examples is Aquinas's propensity to equate divine and human

punishment. This equation of course cannot be made in every sense: human beings have neither the power, the degree of righteousness, nor the success of God in punishments. However, Aquinas speaks of punishment in general terms, applying many characteristics equally to human and divine punishments. This approach of Aquinas's serves to underline the element of punishment which is directed at affecting the individual. These references provide the extreme and paternalistic side of the relationship between human and divine justice (a complex relationship to which Aquinas has already drawn our attention in the discussion of natural law.) They point to the natural order of punishment, the extent to which punishment exists by virtue of divine law, and ultimately to its Divine origins. These are references that tend to humble the individual, reminding us of the distance of the human being from the Divine creator. These discussions of the subject include scattered references throughout the *Summa* as well as one extended treatment, a question (87) on the "debt of punishment," which appears in the first part of the second part, the volume of the *Summa* which deals with the actions of man as a being with free will.

Yet to get the whole picture of Aquinas's view on punishment—to see how he combines the interests of the city and the individual as mentioned above—one must ultimately turn to Aquinas's fewer but more sustained political treatments of punishment, justice, vengeance, and rule to show the correct placement of punishment within politics.. Several questions are relevant to this understanding: in the first part of the second part, the question on anger (46), and the questions on law (90-108, especially 99-108, on the old law); and in the second part of the second part, the questions on heresy and unbelief (10-11), the question on fear (19), a series of questions on right, justice, and restitution (57-71), and the question on vengeance (108). Outside of the *Summa*, Aquinas also deals with punishment in

On Kingship, and although this treatment is brief, it makes sense of and confirms the synthesis which the two different aspects of the *Summa*'s treatment provide.⁴²

In the *Summa*'s early references to punishment Aquinas underlines, again and again, the importance of the will. Aquinas tells us that punishment is due (accorded to desert) and is due only to creatures with wills.⁴³ It is due only to those who will, but it is due always despite the will. That is, punishment is not voluntary. Aquinas recognizes, as the positivists do, that realistically an individual does not like to be punished—and, indeed, that punishment is useful for that precise reason. At least to this extent, he rejects the apparently beneficent or “humanitarian” view of punishment. He gives no sense that punishment should be made to look pleasant, because clearly he thinks that it would lose much of its strength in that case. Aquinas does not only say, however, that punishment seems involuntary, but he insists that it is *always* involuntary. Indeed, he defines punishment as “contrary to the will, painful, and inflicted for some fault.”⁴⁴ Aquinas in effect prepares for a rejection of Hobbes's argument that punishment is voluntary in the sense that we have conceded power to the sovereign. Punishment *in its essence* is involuntary for Aquinas. The powers of the ruler allow and require an opposition between his will and the will of the punished. Aquinas makes no distinction between the individual before and after a contract, and when individuals fail to live up to the nobility of their nature they separate themselves, at least temporarily, from the political mission of their community.

⁴² Although punishment comes up a few times in the commentaries on the *Politics* and the *Ethics*, references in both are oblique, and seem to make no substantial changes to the much more extensive discussions outlined here.

⁴³ *ST*, Ia, 22.2, ad. 5.

⁴⁴ *ST*, I-II, 46.6, ad.2. See also, *ST*, I-II 87.6, when punishment is satisfactory, it loses somewhat of the nature of punishment: for the nature of punishment is to be against the will.

Further emphasizing the underlying opposition between the ruler and the one punished, Aquinas notes that punishment is an evil. He suggests that punishment, though not a sin, is an evil in that someone suffers from it.⁴⁵ He points out that God sometimes punishes the wicked with temporal evils.⁴⁶ Indeed, he claims that all evils that happen to us are either punishments (*poena*) or faults (*culpa*).⁴⁷ And, as the definition of punishment above states, punishment is always painful. How then can punishment be just? Aquinas, in his own way, provides an ancient dictum in answer to this question - to do evil is worse than to suffer it.⁴⁸ Aquinas emphasizes this comparison by dedicating an entire article to whether fault is worse than pain. For one thing, fault is worse because, to those who have wills, a good will is the most important good. All things are good through their act and operation, and the rational creature's good thus lies in the operation of his will, his most important operating part. So important is the will that "a man who has a bad will can use ill even the good he has."⁴⁹ Secondly, fault opposes uncreated goods rather than only created ones. In short, fault defies the divine—and specifically, the divine will. The two reasons are not separate. The independence of the creature's will is inseparable from what the divine desires for that creature. Indeed, Aquinas goes on to say that fault goes against divine love, because the divine love dedicates itself to the will of the creature. The great importance of will in the entire discussion of punishment reminds us of the special role of the rational creature in the

⁴⁵ *ST*, I-II, 21.1, ad. 3.

⁴⁶ *ST*, I-II, 114.10, ad. 3.

⁴⁷ *ST*, Ia, 48.6.

⁴⁸ *Ibid.*.

⁴⁹ *Ibid.*

order of nature. Here again, as in Aquinas's presentation of natural law outlined in chapter two, we see that the perceptible world is organized around the rational creature. For while Aquinas takes his conclusion concerning the importance of will in the rational creature from an observation of nature - *all* things are good by their act—he makes it clear that the *rational* creature's act has some resemblance to divinity. Elsewhere, Aquinas emphasizes this point by stating that fault is “directly opposed to the Divine goodness.”⁵⁰

Therefore, when Aquinas does allow that punishment is a kind of evil in all those places mentioned above, he complicates this claim. For example, the temporal punishments imposed by God are a punishment to the wicked but to the just they are formative and a kind of medicine. That is, individuals are punished by God even after they have repented, and even if they have returned to a habit of justice, but in such a case their sufferings cease to be punishment in the fullest sense because the just are aware that they are being healed. He states that the punishment is evil only relatively and not absolutely.⁵¹ Punishment is an evil in the suffering of it but not an evil action on the part of the punisher (so long as it is just).⁵² Punishment is evil because it deprives someone of a good, but it is good in a more important way because it is ordained to the last end.

Nonetheless, human punishment remains an opposition between the criminal and the one who must punish. For punishment is supposed to inspire fear.⁵³ The need for this fear is, according to Aquinas, purely a consequence of sin. He cites Augustine's *City of God* in

⁵⁰ *ST*, I-II, 79.1.

⁵¹ *ST*, II-II, 19.1.

⁵² *ST*, I-II, 21.1, ad. 3.

⁵³ *ST*, I-II, 32.7, ad. 3, 43.1, 67.4 2, 92.1, 92.2, ad. 4, 95.1, 100.7, 107.1; II-II 7.1, 19.3.

claiming that nothing penal was possible in the state of innocence.⁵⁴ Yet sin sets up an obstacle to the formation of virtue, which, for Aquinas as for Aristotle (from whom Aquinas takes the image of man as capable of being the highest or the lowest of animals,) requires habit and some kind of training. At least one purpose of punishment, however painful it may be when inflicted, is to do good to anyone who is capable of being punished by inspiring fear.⁵⁵ That fear is not virtue, but it may create the state in which virtue can be achieved.

One purpose of punishment is, then, the inspiration of individuals to good action (or at least the avoidance of bad.) This goal is not really any different from the goals of positivist punishment (although some distance is already apparent in Aquinas's provision of the state of virtue as the goal of penal corrections.) But Aquinas also claims that punishment is just. His scattered comments address at times the first and at others this second quality of punishment. Punishment is a means by occasioning fear and overcoming vice. Yet it is also "just" and "due."⁵⁶ The difficulty for the reader is to determine what level of relationship exists between these distinct claims. Not only are the claims different, but they might justify different legal decisions. For example, if the ruler aims only for the encouragement of virtue, he might judge that he should encourage certain habits - perhaps choosing to punish habits as well as actions. Aquinas states, however, that "a man is justly punished for a vicious act; but not for a vicious habit, so long as no act ensues."⁵⁷ Similarly, aiming only to correct vice

⁵⁴ *ST*, I-II, 89.3. (Cf. Augustine, *City of God*, XIV.10)

⁵⁵ *ST*, I-II, 95.1. (Aristotle, *Politics* I.2.) See also 92.2 ad. 4, 100.7 ad. 4. There is one important sense in which fear may be considered related to virtue: Aquinas states in II-II 7.1 that faith is required in order to have fear of Divine punishment, and beyond this point the theological good of reverential fear continues to be important in the development of faith.

⁵⁶ *ST*, I 21.1 ad. 3.

⁵⁷ *ST*, I-II, 71.3, *sed contra*.

might allow any penalty for any crime—so long as the ruler judges it is likely to succeed in discouraging vice. A driver is far less likely to run through a stop light if it is possible that his fingers may be cut off in response.

Aquinas underlines that the consideration of punishment is not merely a calculation. As well as justice, he assigns to punishment two other properties: vengeance and anger. Indeed, Aquinas's first statement on punishment on the *Summa* is that to punish is properly the act of an angry man.⁵⁸ This anger can be in conformity with justice.⁵⁹ Further, the proper level of punishment is supposed to be based on the level of sin rather than on a purely pragmatic calculation. This is true both in human punishments and in God's punishments (indeed, we know it is true of God only because it is so manifestly clear to us that it is true of humans.)⁶⁰ Aquinas also points out that even the virtuous man may be punished in response to a past offensive action which he has regretted.⁶¹ He also states that vengeance is wrought by the infliction of punishment.⁶²

These various statements compel the conclusion that for Aquinas punishment has multiple ends. Yet these ends are not inconsistent or unrelated. First of all, the ends of punishment are directed at the good of an individual (any individual) in society. For the individual who is on the verge of committing crime, punishment is a deterrent. For the individual who has committed a crime, punishment helps to remove the stain of sin and to

⁵⁸ *ST*, I 3.2, ad. 2.

⁵⁹ *ST*, I-II, 46.6, ad.2.

⁶⁰ See, for example, *ST*, I-II, 78.4.

⁶¹ *ST*, I-II, 87.6.

⁶² *ST*, I-II, 46.6

provide satisfaction for evil actions done. And for the individual who merely wishes for peace in which to pursue natural goods, the deterrent and healing of criminals is a necessary condition.

All three of these aims of punishment, then, are consistent in their effect on the individual who either plans to or has committed crimes. A conceptual difficulty remains, however. What precisely does vengeance—indeed, justice—consist in? And what form of good does it do to the criminal? Aquinas speaks of a need to satisfy for past crimes and sins. In describing the anger appropriate to punishment, Aquinas states that it is not hate and that it does not desire evil for the other. The appropriately angry man wishes, rather, to apply good to evil, and he desires the criminal to feel pain on account of the harm he has done. Aquinas explores this possibility in detail in his questions on justice. Here he argues that justice is a special entity existing between beings capable of action. In political matters in particular, legal justice acts to direct affairs between individuals. The state which is to be maintained in these affairs is a state of equality—right, just, and equal are all synonymous descriptors of the proper state between individuals.⁶³ Yet crime, wrong, or injustice disrupt the state of equal relations between individuals. This injury is equalized by vengeance.⁶⁴ The word vengeance is to be used with care—Aquinas indicates that it is only an appropriate word when it names this satisfaction or equalization and not a corresponding hatred. It denotes, when used properly, action which safeguards justice. At the same time, however, anger and the desire for vengeance are human passions—passions which denote the seriousness of the ruler’s love of the city and pursuit of the common good. As Aquinas’s treatment shifts

⁶³ *ST*, II-II, 57.1

⁶⁴ *ST*, II-II, 58.12, ad. 3.

towards politics and human punishment, such words become necessary in his description of a ruler's difficult job.

Aquinas states definitively that legal justice only has a direct effect upon affairs between one human being and another. Although a ruler is always concerned with the common good, he cannot direct human beings to it immediately (that is, without mediation.) The direct action of law is upon relationships between individual and individual. Aquinas's view on punishment is thus a carefully realistic view. He does not claim that a cosmic balance is directly restored by human punishment.⁶⁵ He makes the more moderate claim that individuals are brought closer together by punishment when crime has separated them. The importance of this attempt need not lie in its success in overcoming the hardened criminal. For human beings are naturally meant to be closer to one another, and to live in this balance of equality. Every individual is in a state of anguish when he is askew from this balance. The ruler does him the only kindness that remains in his power by punishment.

Aquinas describes this process also in the question on the debt of punishment:

It has passed from natural things to human affairs that whenever one thing rises up against another, [the thing which rises up] suffers some detriment therefrom. For we observe in natural things that when one contrary supervenes, the other acts with greater energy, for which reason "hot water freezes more rapidly," as stated in Meteor. i, 12. Wherefore we find that the natural inclination of man is to repress those who rise up against him. Now it is evident that all things contained in an order, are, in a manner, one, in relation to the principle of that order. Consequently, whatever rises up against an order, is put down by that order or by the principle thereof. And because sin is an inordinate act, it is evident that whoever sins, commits an offense against an order: wherefore he is put down, in consequence, by that same order, which repression is punishment.⁶⁶

⁶⁵ The difficulty of trying to restore cosmic balance, or attempting to do God's justice, is often cast in the teeth of retributive and justice-based theories of punishment. See, for example, Joseph Bottum, "Blood for Blood," First Things Web Exclusive, June 2010.

⁶⁶ *ST*, I-II, 87.1.

Aquinas here shows what punishment aims at, but also that it aims at something it will not necessarily achieve—his discussion is reminiscent of Aristotle’s suggestion that we bend the stick backwards in order to fix habits of vice. For although it may be possible that the abiding chill of the night air will freeze hot water, the human community cannot force the individual to feel or to be something he refuses to feel or be. At the same time, Aquinas here shows that the matter of habit is related to the matter of justice because the human being belongs properly to the order of the community. Both at the level of nature and in human things, something can occur which does violence against order. By drawing the analogy between nature and human affairs, Aquinas asserts that reason must recognize that there can be no ultimate gain in thwarting order. Punishment is a response by the order or by the principle thereof. It is a response to action that rebels against order. For human beings, inordinate conduct is sin, and so Aquinas does not hesitate to call all inordinate action sin. Aquinas therefore denies the separation between morality and law that the positivists and Hobbes insist on—because he posits that the order of society is natural, in the sense that it come out of the nature of the human being organized in society, Aquinas calls any rebellion against that order a sin. While such language may seem illiberal, it also allows Aquinas to escape the rigidity of the utilitarian view of law. All rebellions against law are sins, but involuntary errors are not included in this count. Aquinas, in this statement, allows space for circumstance and human error.

The discussion of punishment in *On Kingship* is the most explicitly political analysis of punishment provided in Aquinas’s work. Here he argues, unlike Hobbes and the positivists, that punishment is not the beginning of justice. For one thing, justice comes first—it comes from God, but is also clear from observing the relationship between human

beings and the natural distribution of human goods. Aquinas says that to have a ruler who directs the individuals is *natural* only for a human being. Thus the ruled human city exists for a shared purpose.

Secondly, the primary purpose of rulers does not require punishment. The first purpose for a ruler is to establish virtuous life for the community. The method of doing this described by Aquinas makes no mention of punishment or even of ordinary law - he speaks rather of founding a city and bringing people together. He writes that the people must be “united in the bond of peace” and then “directed to act well.” Even material goods precede punishment (and law.) For the first job of the ruler is to make sure there is “at hand a sufficient supply of the things required for proper living.”

Aquinas then presents punishment as necessary to accomplishing the second duty of the ruler, the duty to preserve the established community. Three dangers face any city, once ordained: natural death of its members, the perversity of human wills, and the threat of attacks from without. The response to the first danger is some mechanism for continuation; to the second, “laws and orders, punishments and rewards.” (The third, the need to protect the city from threats from without, I have already discussed in a previous chapter.)

Aquinas’s view of punishment is not limited to an explanation of its justification. As noted above, it is hard to imagine that the law would have strength if there were not some expectation of punishment for lawlessness. This reason for punishment is granted by Aquinas; in this sense punishment is a means to achieving the sovereign’s goal of keeping the multitude alive and able to act virtuously without disturbance. But punishment is also *deserved*. In this sense, punishment is aimed at the benefit of the particular citizen, because his evil action cripples him. To be utterly freed of the infirmity incurred by his own action,

the individual must wait for divine salvation. But in the meantime he is crippled in his involvement with the action of the commonwealth. Earthly punishment promises to alleviate the crippling consequences of crime for the individual, but not to restore him fully.

Punishment is explained partly, then, as a means to the ruler's general goal of preserving the community as a whole. Its second importance, which is addressed more broadly throughout the *Summa*, is to the individual, and belongs to the ruler's responsibility to the citizen's happiness. In all of these ways, however, punishment remains, along with law, part of the defensive aspects of rule. Rule, however, has another aspect—it is meant to unify individuals so that they can act together.

Thus Aquinas adds a further requirement to punishment. Punishment, according to Aquinas, is there for the sake of something else. Punishment belongs to law—it is presented in *the Summa* as an act of law. But in *On Kingship*, the ruler's job of maintaining the city has two parts; rewarding the extraordinary, and punishing the bad. Reward, unlike punishment, is not an act of law. Aquinas's account of the role of the ruler, therefore, indicates that law and the acts of law do not encompass the whole of community life or of the common good. Law is less comprehensive than politics. This is because politics does more than correct individuals. As we have seen, Hobbes's treatment of punishment justifies the ability of the ruler to restrict the actions of citizens because the citizens have abandoned their original rights. The ends of the city and the citizens are thus the same for Hobbes. Aquinas, on the other hand, maintains a distinction between the ends of the city and individual ends. That is, the preservation of the common good requires that individuals be brought together one by one. In punishing and in all of his actions, the ruler acts not only for the whole but for each

citizen. My final chapter will address Aquinas's discussion of the regime itself and the form of government which is capable of keeping these complex interests in play.

CHAPTER FIVE

Republic, Rule, and the Common Good

The previous three chapters of this dissertation have explored aspects of Aquinas's political thought which indicate the need for human judgment in politics—but they have proven only the need for judgment in the party who holds political authority. That party, the ruler, has been shown to exercise a decisive function in pulling together the political community—in establishing the norms of law, in making it capable of combined virtuous action in foreign policy, and in striking the blows on the part of the community which discourage vice and do justice in the domestic realm. Aquinas has, with great consistency, defined the human being in terms of his community life and communal responsibilities, and by placing the administration of those responsibilities in the hands of a ruler has underlined the unifying function of rule. Yet throughout this discussion we have seen indications of the importance, even in defining the function of rule, of the individual; inasmuch as the ruler owes justice to individuals in a general sense but also makes virtuous life possible for them, as they are enabled through his office to reward good behavior and punish evil in pursuit of their shared good. This chapter attends to those indications, which remained in the background of those discussions. I argue that Aquinas's views on government are most compatible with a government selected by the people and which provides a broad scope for the rise of its citizens.

The above statement is vague and does not yet provide tools to expand our comprehension of Aquinas's political philosophy. Yet it is difficult to define Aquinas's view of the best form of government in precise terms, because the words with which we describe

political regimes are fraught with historical associations. To say that Aquinas defends democracy might give the right impression, although it would overstate the case, because that word has come to be associated with the very modern and liberal view from which my dissertation distinguishes Aquinas here (not to mention that “democracy” is so often used to describe a “pure” form of popular government in which every vote has precisely equal power and voting is equivalent to political participation. “Popular” government falls heir to similar problems and tends to underemphasize institutions (which Aquinas portrays as important.) It is safer to say that Aquinas’s work contains a defense of republican government. At the same time, however, it should be noted that his argument does not, for example, deny the legitimacy of kings. Monarchy is not in itself incompatible with the goals Aquinas articulates for good government.¹ Various commentators who describe Aquinas’s chosen form of government as a mixed regime are correct—although at the same time these same commentators admit that almost every practical form of government has some mixture. The argument of this chapter is that for Aquinas mixture is good and is good specifically because it allows citizens to participate in the functioning of their government. Aquinas’s teaching on the naturalness of the political community requires that rule should proceed by placing relationships of human beings to each other above the mere survival of the community.

I am not unique in arguing that Aquinas defends or encourages the development of democracy in the western world. Advocates of democracy have often cited Aquinas. Many of those theorists have been described and alluded to in this dissertation already. Most of

¹ This claim is not to be taken as particularly controversial. I mean merely that monarchies such as those in England for the last 900 years, or in the commonwealth countries today, are not utterly different in their aims or in their functioning from a republic like the United States. Even in 1787 Alexander Hamilton was calling Britain a republic in the *Federalist Papers*.

those theorists have, however, made the argument that Aquinas is sympathetic to modern democracy in terms of rights rather than on the basis of his discussion of regimes. The first section of this chapter addresses these liberal interpretations of Aquinas—arguments that align Aquinas with classical or even post-modern liberal thought, and thus with theories which ground the legitimacy of politics in an individual calculation concerning self-interest—in short, with individualism. I have indicated throughout this dissertation reasons why this argument is incompatible with Aquinas’s intentions and his thought. This is one reason why it has been useful to juxtapose Aquinas with Hobbes—I have attempted to make clear that there are arguments at the foundation of individualism which Aquinas does and must reject. My argument will proceed from Aquinas’s understanding of the importance of individual political participation rather than individualism.

The second section of this chapter will take up a particular argument made recently in opposition to these democratic accounts of Aquinas by Robert Kraynak. Kraynak argues, essentially, that as a representative of Medieval Christianity Aquinas’s thought must be incompatible with democracy, or at any rate with complacency with democracy. That is, Kraynak concedes that Aquinas might allow some mixed version of democracy but could not view it as a positive good. Ultimately, my own presentation of *On Kingship* opposes this view.

Another group defending Aquinas’s sympathy to republicanism argues, on much solid ground, that Aquinas presents some form of mixed regime, balanced powers, or political reliance on consent. These arguments while supported by the *Summa*, seem to be refuted by Aquinas’s statement in *On Kingship* in favor of unified monarchy. Indeed, these commentators usually decide the works are incompatible—that Aquinas either changed or

bowed to public pressures in one place or the other. Another group of scholars, such as Marc Guerra, Patrick Cain, and James Stoner argue for the consistency of Aquinas's various political statements and texts. These commentators call for a reinvigorated perusal of Aquinas's *On Kingship*. The goal of this chapter is to sort out the apparent difficulty between *On Kingship* and these other defenses of mixed rule. My detailed analysis in this chapter allows me to expand on their work in this area. In the third section of this chapter, I provide an account of *On Kingship*, uncovering Aquinas's emphasis on the needs of the individual, the purpose of peace, and the power of the people; and in the fourth section I reconcile this reading of *On Kingship* with Aquinas's discussion in *the Summa*. My final section gives an account of Aquinas's overall purpose in *On Kingship*, thus distinguishing my approach from several of the commentators just mentioned.

Aquinas and the Invention of Modern Liberalism

Among arguments that Aquinas favors democracy, the most persistent version in the twentieth century has been that which suggests that Aquinas was crucial in the unfolding of a sort of Christian zeitgeist in favor of democracy—one that moved through successive stages: the limiting of tyranny, a growing belief in the equality of human beings, the discovery of human rights, and finally the recognition of the dignity of the human person. The most influential proponent of this theory is Jacques Maritain.² Maritain states that for Aquinas

² See also the Second Vatican Council's endorsement of a similar position in *Dignitatis Humanae*, which begins by stating that "A sense of the dignity of the human person has been impressing itself more and more deeply on the consciousness of contemporary man, and the demand is increasingly made that men should act on their own judgment, enjoying and making use of a responsible freedom, not driven by coercion but motivated by a sense of duty." Declaration on Religious Freedom, *Dignitatis Humanae*, Vatican II, December 7, 1965. See also Paul Johnson, "Is There a Moral Basis for Capitalism?" in *Democracy and Mediating Structures: A Theological Inquiry*, ed. Michael

“political society is a work of reason and virtue, and implies a will or consent to live together, which freely emanates from the ‘multitude,’ or the people.”³ He goes on to say this notion of government has been brought into existence in America more fully than anywhere else. In the first two chapters of this dissertation I portrayed Maritain’s use (and usurpation) of the term natural law in this analysis of Christian history. According to Maritain, natural law is only the beginning of the formation of democracy—it is like a seed which inspires the growth of the tree of democracy, but correspondingly it also disappears with that growth. Democracy must go beyond natural law to realize human rights and human dignity. Maritain’s account of Aquinas’s importance is fundamentally historical, but so is his account of democracy itself. Yet Aquinas makes his arguments about politics in general terms—even taking pains to show how the ancients have perceived the same truths about politics as those which he occasionally extracts from divine revelation. Aquinas presents the flourishing of the human being as a product of his natural position in regards to God and to his fellow man, and not as a progressive discovery of human history.

Novak (American Enterprise Institute for Public Policy Research, 1980, 51) The idea that democracy in America is a fulfillment of the divine plan also has a very influential proponent in Alexis de Tocqueville, who argues that the growth of democracy is inevitable in the introductory chapter and attributes this growth to Providence in the final chapter of *Democracy in America*.

³ Jacques Maritain, *Reflections on America* (Scribner, 1958): 168. There is also a tradition which refers to Aquinas as the “first Whig.” This tradition, although it focuses less on the unfolding of democratic equality through history, is similar to and influenced by Maritain, in that it grounds Aquinas’s “whigishness” in his supposed endorsement of rights and “proto-liberalism.” See Michael Novak, *This Hemisphere of Liberty* (Washington, DC: The AEI Press, 1990): 107n, and “Thomas Aquinas, the First Whig,” *Crisis* (October 1990): 31-38; Lord Acton, “The History of Freedom in Christianity,” in *Selected Writings of Lord Acton*, Vol. I: *Essays in the History of Liberty*, ed. J. Rufus Fears (Indianapolis: Liberty Classics, 1985): 34. For an account of Acton’s misquotation of Aquinas, see Kenneth R. Craycraft, Jr., “Was Aquinas a Whig? St. Thomas on Regime,” *Faith & Reason* (Virginia, Christendom Press: 1994).

John Finnis relies on Aquinas's text with much more specificity. He claims first and foremost that there is "a constant rotation of rulers which [Aquinas] associates with good government."⁴ Finnis cites a section of Aquinas's *Commentary on the Politics* which discusses the difference between political and household rule. He refers to the passage in which Aquinas explicates the distinction by writing that in political rule "rulers and subjects, because of their equality, exchange roles, and many persons are also constituted rulers in the same or different offices." Although the passage does at least introduce the idea of free citizens into Aquinas's discussion, it does not necessarily entail, as Finnis seems to imply, that exchanging rulers is the practice of all "good government." For here Aquinas merely describes a regime in which this occurs; he goes on to describe also a monarchical regime, and he does not here compare the relative merits of the two. Nonetheless, Finnis later strengthens his argument by pointing out that Aquinas accepts the Aristotelian definition of the citizen (simply) as someone who can participate in government, "whether in the courts (e.g. on juries) or in some sort of deliberative council, and whether on a restricted basis as in monarchical or aristocratic systems or an unrestricted basis as in a democracy."⁵ Finally,

⁴ Finnis, *Aquinas: Moral, Political, and Legal Theory*. (Oxford University Press, 1998): 8. Cf. Aquinas, *Commentary on the Politics*, I.5.2 39-40.

⁵ *Ibid.*, 44. *Commentary on the Politics*, III. 1.7 It seems to me that Finnis also weakens this stronger argument by tying it to his concept of "focal meaning" – a phrase which he uses to describe Aquinas's use of words like "simply" (simpliciter) or "naturally" (naturaliter.) According to Finnis, these words indicating focal meaning could also be replaced with "rationally," meaning that Aquinas is referring to the way the thing should be "as judged by the standards for judging our actions reasonable or unreasonable, right or wrong: things are 'naturally' X for human persons when they are X 'in accordance with right reason'." In insisting on this formulation, Finnis makes Aquinas's language less helpful to human beings, who want to know what they should do and not what a word means in the abstract. Indeed, for such standards to be useful we would have to dedicate ourselves to the cultivation of pure reason alone, and pure reason would be the best source for our decisions. But this formulation abstracts from Aquinas unfairly. For one thing, Aquinas's language opens us to ongoing questions and dialectic—if man is political by nature, how does nature

Finnis points to the “juxtaposed preferences for mixed government and for the rule of *one*,” and suggests two possible grounds for reconciliation.⁶ First, he notes that when Aquinas makes the argument for kingship he generally includes a proviso: he speaks of the goods of kingship “*if not corrupted*,” a situation which Aquinas himself says is unlikely. Secondly, “mixed government” can be a kind of rule—indeed, the best kind, since it allows for change and for a practical division of activity. Therefore, Finnis argues that both the people and the few must have the power to limit and to censure each other. Either can become corrupt, and Aquinas’s recommendations that government be moderated might imply that corruption undermines authority.

Oddly, Finnis sums this up by stating that “the idea of reciprocity, mutuality, and even ‘pact’ between ruler(s) and ruled plays a significant part in Aquinas theory of government.”⁷ This third suggestion, that “pact” is a foundational matter, undoes much of the groundwork of Finnis’s argument. Finnis points to “pact” to show that Aquinas imposes real limits on rulers. He finds this term in Aquinas’s Commentary on St. Paul’s Letter to the Romans, where laws such as taxation are a kind of (quasi) pact between the ruler and the people. Yet Aquinas obviously speaks of something resembling a pact, and not an actual

tell him so? Does our word citizen refer to a free being because we implicitly believe that government is built by human beings? - and for another, Aquinas seems to call on our shared conventional use of words rather than on an absolute standard derived by each individual on the basis of pure reason. Finnis goes on to say Aquinas (and Aristotle) distinguish “conventional” usages – i.e., the word citizen applied to a pure subject – from these focal ones. Aquinas makes no such distinction. He speaks of analogy, metaphor, equivocation – but in every sense, he implies that people who use the term know it (or at least, could know it) in the same way that he does, and thus attributes the greatest importance to the conventional usage of language.

⁶ Finnis, *Aquinas*, 262.

⁷ *Ibid.*, 266.

one. Moreover, this kind of relationship is limited to property, which is rendered to the ruler with the expectation that it will be used on behalf of its original owners. Finnis is aware that there is no full-fledged social contract theory here, but the problem is that he implies that such a theory is the only logical place for Aquinas's defense of democracy to begin. This is why he looks so hard for covenant and is not content with the recognition of a mutual relationship between the ruler and the ruled. As Finnis puts it, "to speak of contract, covenant, or pact is to speak of mutual obligation on the other's adherence to the contract."⁸ Finnis works from the idea that the sovereign can only really be limited if he has a contractual obligation to the people. This is not, however, Aquinas's idea—the inseparability of contract and obligation is, as we have seen, Hobbes's idea. Aquinas, I will show, has an alternative conception of republican government.

Finnis insists on contractual obligation because it has the power to bind individuals who are fundamentally autonomous in their reasoning. Finnis grounds his concept of natural law, which we saw in the first three chapters, on this understanding of obligation. There Finnis put forward the basic principles of human flourishing. These principles are to be accessed through moral rumination and, to a lesser extent, through an avuncular style of discussion between well-disposed armchair philosophers. Finnis holds out a cautious hope that agreement can be reached on these matters, on the basis of a natural similarity in practical reason. The use of practical reason (by each individual) is the basis of decisions on human action—yet for Finnis this is possible because, as I pointed out in the second chapter, consideration of the natural law is consideration of one's own well-being. Consent may bring about new obligations among these individuals (and this will not be hostile to, but

⁸ Finnis, *Aquinas*, 261.

rather in accordance with their reasoning concerning their well-being.) In this sense, obligation to the community is mainly grounded in positive law. There are goods of practical reason, but the way these goods are to be accessed in any one community is largely a matter of convention (as laid out by law).

In *Aquinas*, however, Finnis also points to a more absolute human good by outlining a universal concept of human rights—and, indeed, he claims to find this concept in Aquinas’s writings. Finnis locates a concept of human rights in Aquinas’s political thought. Although the word Aquinas uses, “jus,” is by Finnis’s admission distinct from the modern term *human rights*, Finnis argues that nonetheless it may denote a prerogative awarded by natural law and thus of universal significance. Finnis’s explanation for this is nebulous. He states that we have rights (jus) *by virtue of* law—natural rights by virtue of natural law, and legal rights by virtue of positive law. Then he indicates the priority of the natural rights—he states that a statute which allows something which violates someone’s natural rights is “overridden” by the rights, meaning that it cannot make the positively legal conduct just. At this point the proper source of right remains natural law. Finnis nevertheless also states that “the rights that people have by virtue of natural law itself are not mere resultants of the norms of natural law which articulates them.”⁹ Finnis’s account of rights leads him to appeal as well to natural equality. To say that one person has a right to something from another, he reasons, is to say that there is a kind of equality between them. Thus rights are consequences of natural equality—or, as Finnis goes on to say, “the foundation of natural rights is the radical equality of human beings, as all members of a species of beings of a rational nature and thus all

⁹ Finnis, *Aquinas*, 136.

persons.”¹⁰ He thus presents both natural law and radical equality as sources of right conduct between human beings.

In allowing the existence of this ambiguity concerning the sources of right, Finnis understands himself to follow thomistic method. He relies on a distinction from Aquinas’s division of science (at the beginning of his *Commentary on the Ethics*) into four types: natural (or ontological), logical, moral (or normative), and technical. Finnis adds that these types correspond to “four orders” which are “irreducibly distinct.”¹¹ To understand something thoroughly we should consider it according to these various modes. Finnis explains the ontological order as that which we cannot change—the order of nature—and the moral order as the order we can “bring into” our deliberation and choice.¹² Finnis applies the ontological and normative orders to ethics by explaining that natural equality is the “ontological” basis, while the first principle of natural law is the ultimate normative foundation, of natural rights. Finnis suggests that there is a priority to natural rights and natural dignity in the order of being. Yet this universality of goods for the human being does not appear to fit with his insistence everywhere else on the internal and personal nature of human moral deliberation—until we again scrutinize Finnis’s definition of that “radical equality” and note that it is neither less nor more than the possession of a faculty—reason—which others also possess. Indeed, Finnis underlines his own decision in favor of practical reason (or, in other words, in favor of the third, or normative, order of things) by stating that “nothing can be ... an object of or reason for human action, save what can be realized by

¹⁰ Finnis, *Aquinas*, 136.

¹¹ *Ibid.*, 21.

¹² *Ibid.*, 21.

human action.”¹³ We are left to conclude that the central human dignity of the individual is either a consequence of his judgment of his own self-worth, or the vaguely perceptible imprint of the hand of a God whose information is not otherwise available to us. Natural law becomes a determination of human judgment according to a calculation of self-worth. Even the so-called “ontological” basis of those judgments—natural equality—is tarnished by this reliance on self-interested judgment. Equality, indeed, must be an equality of the individual’s desire to pursue his own ends, and is thus not unlike the equal striving of Hobbes’s natural man for power after power—except that Finnis’s human beings have more moderate tastes. The democratic spirit which Finnis finds in the work of Aquinas cannot fit with Aquinas’s insistence on the human being as naturally political. Like Maritain’s historical argument, it ends up requiring that Aquinas’s theory is in fact a pale version of real liberal theory.

Monarchy and Medieval Christianity

On the other hand, Aquinas has often been treated as the foremost medieval advocate of kingship. The most obvious reason for this is the title of his only independent treatise on government, usually rendered *On Kingship*. Indeed, the apparent advocacy for monarchy in this text has led many to reject Aquinas’s political thought altogether, because it appears to be inconsistent with the *Summa*, which makes a case to democracy or to mixed rule at the least. In the *Summa*’s discussion of the law given to the Israelites (the Old Law), Aquinas states that the best form of government is “shared by all” both because all are eligible to govern, and because the rulers are chosen by all. But in *On Kingship*, Aquinas answers the question as to what number of rulers is most expedient with “one.”

¹³ Finnis, *Aquinas*, 92.

Thus Gerald Gaus and Fred D'Agostino, for example, argue that *On Kingship* clearly endorses monarchy, and that apparent promises in that work to limit monarchy are promises on which Aquinas “never delivers.”¹⁴ Another approach argues that the text has an essentially rhetorical character as advice to a Christian king and thus argues that it should not be understood as a source of general political teaching.¹⁵ Thomas Osborne claims along similar lines that Aquinas argues for kingship but is also compelled by facts to point out the horrors of tyranny, and thus the treatise indicates “a problematic area” in Aquinas’s political theory: although Aquinas cannot be blind to the dangers of tyranny, he is unable to see beyond the medieval prejudice in favor of kingship.¹⁶ Most damning of all, however, is the attitude of dismissal of the book exemplified by Peter Torrell in his highly-regarded survey of Aquinas’s life and work, on the grounds that “the content hardly corresponds to what Thomas says elsewhere concerning the best form of government.” Torrell’s reading is that

¹⁴ Gerald Gaus and Fred D'Agostino, *The Routledge Companion to Social and Political Philosophy*: 29.

¹⁵ See, for example, I. T. Eschmann, “Introduction” to *On Kingship: To the King of Cyprus* (Toronto: Pontifical Institute of Mediaeval Studies, 1949), xxxviii. Here Eschmann states that in reading *On Kingship* “the circumstances of its composition . . . should constantly be borne in mind. Further, let nobody expect it to be a full statement of Thomistic political or social doctrine.... The *De Regno* is designed to enlighten a king in mediaeval Christendom; its teaching is deeply penetrated by the political atmosphere of thirteenth-century Europe.” xxxviii-xxxix. Eschmann nevertheless argues that *On Kingship* is a great work, and that the heart of its teaching is “the thesis that civil society is an institution founded upon nature and serving . . . the ultimate end of an, the eternal salvation of his immortal soul.” xxxix.

¹⁶ Thomas M. Osborne Jr., “Dominium Regale et Politicum: Sir John Fortescue’s Response to the Problem of Tyranny as Presented by Thomas Aquinas and Ptolemy of Lucca,” *Mediaeval Studies* 62 (2000): 161-187, 161. Osborne understands this problem to belong to Aristotelian thought also and to medieval political thought generally. He goes on to argue that the English tradition improves on Aquinas by combining kingship with wide political participation – something I will argue Aquinas has already done.

elsewhere Aquinas usually defends mixed government, here “absolute monarchy.”¹⁷ Indeed, Torrell implies it is imprudent to use the text at all. Citing other authorities who have insisted it is a “treatise for the use of a prince” and definitively not “an organic work of political theory,” he goes on to write, citing the introduction to an earlier French edition:

In response to the indiscreet commentators who would try to use this text in a unilateral fashion, it is useful to reproduce H. Dondaine's warning here: "Incomplete, perhaps of checkered background... this opusculum presents itself under some rather difficult conditions; those conditions call for prudence and discretion to the text as an expression of its author."¹⁸

Thus, until recently, *On Kingship* has largely been neglected in scholarship on Aquinas’s political thought.

Moreover, a recent account by Robert Kraynak notes the above-mentioned incompatibility between the common democratic account of Aquinas and his anti-liberal suggestions about the heart of politics, and confronts the (sometimes facile) view of the development of democratic Christian thought. Yet Kraynak insists also that there is an unbreachable wall between modern democracy and Christian thought. He goes on to develop his own alternative view of Christian constitutionalism: limiting government according to the revelatory knowledge of human weakness and human finitude. Kraynak firmly distinguishes this Christian argument from a defense of democracy as a good in itself. His argument amounts to a claim that the view of Aquinas and of all pre-modern Christian philosophers is fundamentally incompatible with the defense of democracy as a good.

¹⁷ Jean-Pierre Torrell, *Saint Thomas Aquinas: The Person And His Work* (CUA Press, 2005): 170.

¹⁸ *Ibid.*, He cites H.F. Dondaine, *Le Corpus Dionysien de l’Université de Paris au XIIIe siècle*, Rome: Edizioni di Storia e Letteratura (1953): 449-71.

Kraynak's argument consists of four major premises: that modern democracy "has been decisively shaped by the theoretical doctrines of philosophers or intellectuals who became the greatest champions of democracy"; that modern democracy needs (and is deficient without) the Christian grounding of human dignity; that neither Greeks, Jews, nor medievals had a philosophically grounded defense of democracy; and that Christianity is not compatible with the liberalism of modern democracy. In other words, he argues that modern democracy is formed according to modern political thought, but modern political thought has a fatal flaw: it has no account of human dignity (although it is an account fundamentally based on the individuality of the human being.) Kraynak claims therefore that modern political thought *should* turn to Christianity for an account of human dignity. If it did so, however, it would discover that Christian thought does not fit with modern democracy.

Kraynak's argument is problematic inasmuch as it rests on the assertion that the moderns are undermined through their inability to account for human dignity (although they insisted on human rights.) Kraynak argues that, for example, classical liberalism uncovers "the rights of man as an autonomous being" but removes "the grounds of human dignity." This "difficulty" is clearest in Hobbes because he "views man as naturally free and as a machine without soul or freedom of the will, thereby abolishing the distinctiveness of human beings in comparison to other animals."¹⁹ Presumably Kraynak calls this a difficulty because he realizes that the modern philosophers do view humans and animals as distinct. Yet Hobbes is obviously aware that there must be some basis for making the distinction between animals and human beings—this is why Hobbes gives clear priority to reason over every other element of his account, including the mechanistic basis of choices. Hobbes does not

¹⁹ Robert P. Kraynak, *Christian Faith and Modern Democracy: God and Politics in the Fallen World* (University of Notre Dame Press, 2001): 32.

utterly deny the existence of soul—he emphasizes the rational element of soul and his Leviathan is in that sense a triumph of the soul over the dangerous passions springing from bodily desire. Without attempting to defend all moderns or all modern conceptions of democracy here, it is enough to note that the analyses of earlier chapters already provide several accounts of moderns even such as Austin and Hart who derive a practical account of democracy from a reliance on the rational element of the human being.²⁰ Even if their accounts are problematic, as we have seen, Kraynak fails to explain his assertion that these problems follow from their failure to explain “human dignity.” For Austin and Hart ground their account on human rationality, which they presumably take to be an observable quality of human beings, and whether or not that quality might also be given the name of “dignity” is irrelevant to their arguments.

Nevertheless, accepting for the moment Kraynak’s argument that human dignity is essential to the modern liberal account of democracy, we turn to Kraynak’s claim that Biblical theology and Christianity could provide the basis for that essential quality, and thus make up for the deficiency which is lacking in liberal thought. Kraynak argues that revelatory knowledge would be the best grounding of human dignity, but that it cannot therefore be used to defend modern democracy, because Biblical and Christian sources are

²⁰ One might wonder on the one hand whether the moderns want to account for human dignity and on the other whether they find their account as insufficient as Kraynak simply asserts that it is. Kraynak seems to mean that human rights should always be based on human dignity, but this is an odd idea to attribute to the moderns. Human beings (or their lives in the state of nature) are supposed by the moderns Kraynak mentions to be “nasty” and “brutish,” “fickle,” “savage,” or, according to Vico, “bestial and feral.” Although reason allows the human being to separate himself from the condition of nature in which these qualities are exemplified, it does so by overcoming the natural tendency of the human being. One might therefore defend the moderns by arguing either that reason is the most dignified aspect of the human being and therefore is endorsed and saved, or that they would dismiss the term dignity because it attaches unnecessary implications of the preeminence of virtue or honor to the natural human being.

mainly hostile to democracy. The Bible emphasizes God's rule, law, and commandment and portrays God's plan as "the spiritual education of the people and the redemption of the world through kingship rather than through democracy."²¹ If it provides a conception of human dignity, that conception comes from the notion of being made in the image of God, but that conception does not lead to a notion of human rights. Human dignity, in both the Old and New Testaments, "exists in degrees of perfection rather than in abstract equalities."²²

In this aspect, Kraynak argues that modern democracy lacks the foundation it needs in Christian thought.²³ This is where his discussion of Aquinas occurs. Kraynak states that the medievals were "monarchists of one sort or another."²⁴ "The most influential medieval Scholastic, St. Thomas Aquinas, defended mixed monarchy that combined elements of monarchy, aristocracy, and democracy."²⁵ Kraynak approves of this mixture, for he later clarifies that his problem with modern liberal democratic theory is that it is "one-sided or one-dimensional."²⁶ Indeed, Kraynak ultimately argues that "the best regime on grounds of Christian prudence is not liberal democracy but a mixed regime, with the best choice being

²¹ Kraynak, *Christian Faith*, 51.

²² *Ibid.*, 51.

²³ In order to prove that the Christian understanding of politics is fundamental to understanding human dignity, Kraynak ultimately argues that dignity is properly understood only through the Christian doctrines of fall and redemption by Jesus Christ, even stating that "reason itself leads to Christian faith when we are able to see the supernatural mysteries behind the observable realities." 42, 43.

²⁴ *Ibid.*, 67.

²⁵ *Ibid.*

²⁶ *Ibid.*, 232.

‘constitutional monarchy under God.’”²⁷ Kraynak claims that the arguments of the thinkers who proposed this, including Aquinas, are still valid (although they might be unpopular) today. They are valid and necessary because we should regain what we have lost: “respect for the hierarchical principle of authority and its beneficial effects in ordering and elevating the human soul.” Kraynak thus makes it clear why he has insisted that Aquinas and other Christians are opposed to democracy. He means primarily that Christian thinkers like Aquinas are opposed to the “one-dimensionalism” of liberalism—that is, the modern tendency of liberalism to defend every aspect of existing modern American democracy as part of the same theoretical whole.²⁸

This presentation of Aquinas’s multi-dimensionalism might seem to bring him into at least potential sympathy with democracy as we know it. However, Kraynak insists on two obstacles to such sympathy. The first is that Aquinas (along with Aristotle, Cicero, and Augustine) was explicitly a defender of monarchy as the “best regime,” a regime responding to the evident hierarchical aspects of nature and the resemblance to the Divine. Secondly, democracy as we understand it today is thoroughly modern—modern because it relies on modern philosophy, and because we reject (popularly and even as a matter of foundational political theory) the account just given (as the ancient account) of politics. That is, modern thought concerning democracy is incompatible with Kraynak’s depiction of ancient political

²⁷ Kraynak, *Christian Faith*, 232.

²⁸ Kraynak gives only two examples of the structures that are defend in this “one-dimensional” manner: first of all, modern liberalism sees no need for hierarchy and structures built to combine “the wisdom and virtue of the few with the freedom and stability of the many”; secondly, democratic movements have become one-sided in “tying Christianity too closely to liberal democracy and associated structures, such as capitalism, that are not always hospitable to Christian spiritual and moral life and that are not necessarily the best choice for the temporal realm.” *Christian Faith*, 232.

philosophy because in its complacency it views democracy as a good. Ancient and Christian political philosophy cannot brook complacency in regards to democracy. Ancient political philosophy concedes a pragmatic need for democracy in many cases but advances no philosophical account of the goods of democracy.

This presentation by Kraynak underlines the complexities of arguing about regimes. The thrust of Kraynak's argument is that Aquinas is a friend of monarchy and enemy of democracy in advocating a mixed monarchy, yet one might well suggest that modern democratic government, in countries like Britain, Canada and the United States, resembles these mixed monarchies more than it does "pure" democracy. Certainly American political thought has consistently held out against "pure" democracy, as it is explicitly named in *Federalist 10*. Yet Kraynak's argument asks us to apply a very specifically religious argument (coming, indeed, from revelatory knowledge) to determinations about the state. Kraynak's revelatory arguments do not really establish sufficient reasons to do so, since there seems to be a missing step. Kraynak insists that monarchy is defended by Aquinas through its resemblance to divine kingship but also because it fits with the hierarchy of nature. These two are not really the same—the hierarchy of nature places the Divine kingship infinitely above us, so that the insistence on kingship does not necessarily indicate the humility which Kraynak proposes. Kraynak's argument would require that Christian involvement in history has somehow purified or dignified kings and formed them according to resemblance to the Divine—and thus that Aquinas's ideas about politics rely on the progress of history rather than on natural arguments. Notwithstanding his opposing conclusion, Kraynak's argument proceeds along similar lines to Maritain's historical progressivism.

The Argument of Aquinas's On Kingship

Since it is generally conceded that there is a sympathy to democracy in the *Summa*, showing that the teaching of *On Kingship* is compatible with that of the *Summa* would support a case for the contemporary relevance of Aquinas's political thought. Indeed, to ignore *On Kingship* has broad implications, as it would leave no particular political treatise among Aquinas's works. Besides, if the apparent inconsistency can be resolved, it would shed considerable light on Aquinas's teaching in the *Summa* as well.

What kind of an argument is *On Kingship*? Commentators are fond of pointing out that such a work must be written in a tone of flattery (consider, for example, the almost universal characterization of Machiavelli's Princes as a "job application.") Herbert Goldhamer suggests a surprisingly different reading of such texts. He points out that is a sort of natural aspect of the adviser (in practice and particularly in writing) that he defends the people, by discouraging war, and protecting them from the intrigues of nobles. Thus he observes in his analysis of *On Kingship*: "even Aquinas urged the king to cultivate the love of his people because it would provide an indispensable support for him; those who are kept down by fear will rebel when opportunity arises."²⁹

Several recent scholars have expanded on such an approach to *On Kingship*. Douglas Kries points out, by way of a side point, that Aquinas advocates a "well-mixed regime."³⁰ In a footnote he suggests that although *On Kingship* might be considered inconsistent with this, it is not necessarily so. This is for three reasons: it is unfinished (and thus in a sense

²⁹ Goldhamer, Herbert. *The Adviser* (New York: Elsevier, 1978): 162.

³⁰ Kries, Douglas. *The Problem of Natural Law* (Lexington Books, 2008): 175.

unpublished,) it is addressed to a king, and it does indeed suggest that monarchy be “tempered.” Thus he reads the book as “a caution to the King of Cyprus himself.”

In *On Kingship*, Aquinas introduces rule and the common good at the same time. “Things differ by what is proper to each: they are united by what they have in common.”³¹ This seems obvious, perhaps. However, it is worth noting that Aquinas believes that there are things that are held in common—for Hobbes and for the liberal view, in contrast, everything is proper and therefore, properly speaking, a means of differentiation. Expanding on the approach of commentators who notice Aquinas’s emphasis on the danger of kingship descending into tyranny, I argue that Aquinas unyieldingly insists that rule rely on the participation of the governed. Aquinas maintains that the political community is only real insofar as it is made of individuals with mutually beneficial relationships to each other (as well as to the ruler.)

The Needs of the Individual

Chapter One of *On Kingship* sets out, as a title question, how the term king ought to be defined. However, the chapter puts forward two arguments side by side, neither of which addresses the general usage of the word “king”: one is that human beings naturally live in groups, and the second is that “in every multitude there must be some governing power.”³² In one sense these two arguments are perfectly cohesive. Both arguments respond to and seem to close the question about whether we ought to empower individuals or subsume them under common leadership, deciding in favor of leadership and thus kingship at least in

³¹ Aquinas, *On Kingship*, 1 (9)

³² Aquinas’s word here is *regitivum*, the primary meaning of which is general rather than applying to politics; i.e. something capable of making straight, guiding, directing, conducting. *Regens* (prince, ruler, etc.) is derived from this base (*rego*).

general terms (although Aquinas does not, despite the title question, define the term with any further specificity.) Aquinas argues (as we shall see) that there is a good to be sought by the group together and then that there therefore must be someone to seek it.

The first argument proceeds by observing the needs of human beings and deducing from them their reliance on each other in achieving their end. (What this end is or how it may be achieved is as yet unclear; Aquinas merely concludes from the facts that it must exist.) The second argument arises from the need for this shared end to be recognized and pursued by someone in particular (surely a ruler, although Aquinas does not supply the term). Human beings adopt “different methods {diversimode}” in pursuit of their end; this is clear from the diversity of their studies and of their actions - one need hardly add, and Aquinas does not, from the diversity of their desires. How shared can the end be if individuals cannot seek it themselves and will not even try on their own? And what makes some ruler more able than the others to seek it? What makes it his particular goal, and what makes him different as an individual from all the others? Aquinas’s treatment inspires these questions about the impetus for rule.

At the same time, Aquinas continually, almost repetitively, speaks of “oneness.” (Some cognate of *unus* occurs 14 times in the 7 paragraphs of Aquinas’s first chapter.)³³ The “oneness” of people is the thing which makes them different from animals, in fact—the animals seem to have a kind of inspired universal knowledge about how to feed and protect themselves, which allows them all to act separately but in a similar manner—a manner which allows each of them their separate survival. But individuals gain that knowledge only in groups—or rather, more properly, they literally share their particular knowledge with one

³³ Of these cognates, one usage, in the final paragraph, refers to union: “things differ by their properties, and are united by the things in common,” (my translation).

another, by “making different discoveries—one, for example, in medicine, one in this and another in that.”³⁴

Out of this inherent division in human procedure comes the need for unification of some kind—because, Aquinas insists from the beginning, the human being must have an end to which his life is ordered. The existence of one, single end shared by the group is asserted prior to the analysis of human nature, rather than being proven through it. Aquinas does not simply assert the existence of this end, in fact—he gives an argument for it in one sentence: “Now, man has an end to which his whole life and all his actions are ordered; for man is an intelligent agent, and it is clearly the part of an intelligent agent to act in view of an end.” This is the only explicit argument that Aquinas gives to show there is a shared end for all human beings. He points out, a little later, that “the light of reason is placed by nature in every man, to guide him in his acts towards his end.” This is no more than a repetition of the previous quoted passage, however—the mention of the light of reason reinforces the conception of the human being as an intelligent agent, but it does not provide new evidence for the shared end of human beings. Aquinas asks us to accept the premise, either from our own empirical awareness or from our acceptance of the Christian revelation, that things which have reason also have an end.

The juxtaposition of what is to be assumed (the existence of an end) and what must be proven (that we are supposed to act together) clarifies Aquinas’s meaning. The existence and preeminence of reason is, as far as Aquinas is willing to engage it, obvious. Yet because reason is so powerful in us, we are perhaps inclined to forget our equally important reliance on political community. Aquinas allows that our possession of reason shows we have an

³⁴ Aquinas, *On Kingship*, Chap. 1.

end, but also indicates that reliance on reason tends to create a kind of self-defeating individualism. Thus he states: “*if* man were intended to live alone, as many animals do, he would require no other guide to his end.”³⁵ Reason is simply insufficient for life. For naturally we have only general knowledge and not particular knowledge of the things necessary for life. General knowledge, which will be very helpful to us in the end (in grounding our understanding, for example, of what constitutes a good life) is not much good at the beginning. Particular knowledge can be achieved, but it comes with work and at a price. Bears, for example, are born with the knowledge of how to catch a fish. If one man, in contrast, dedicates his efforts to inventing and then perfecting the efficiency of some device which catches a fish which is otherwise too slippery and too quick for him, it could be the work of years. He has little time to make, as Aquinas puts it, other “discoveries.”³⁶ As Adam Smith could tell us, this is often the more true the less useful the object. That is, the ability of human beings to create the means of life as a group is exponentially—probably incalculably—beyond their ability to do so as separate individuals. The human being is distinct from animals in being rational but oddly this means he lacks particular knowledge and has to get it at a cost which forces him into reliance on others. Thus, on earth, being rational is inseparable from being political, as I have noted in previous chapters. Until the human being is helped by his fellow human beings with basic provisions of life, his rationality (which deals better in universals than in particulars) is less than useless.

³⁵ Aquinas, *On Kingship*, Chap. 1 (4) (my emphasis).

³⁶ Aquinas, *On Kingship*, Chap. 1 (6) *Unus ab alio adiuvetur et diversi inveniendis per rationem occupentur*. (“that one may be helped by others and be occupied in making different discoveries through his reason”). This could include both inventions and discoveries.

Thus the chapter has two strands, one which defines the human being as sharing in God's creation through providing for himself, and another which states that the individual's attempt to provide for himself (if left unchecked) would inevitably scatter the community—and since he - cannot live apart, destroy its members too. Aquinas is underlining the possible danger of rationalist individualism. But he also outlines the best response to this danger. First and fundamentally, one needs a community. Yet a community alone does not assure its own security unless the members of the community are aware of the need to work together. Therefore human beings need a mechanism by which to have and keep that awareness. This mechanism is some kind of governance. Here the various arguments of the chapter come together under the heading of rule—and in a sense under the “kingship” of the title sentence. The oneness of the individuals is consistent with their unification and their need for guidance. Aquinas goes on to say this is true of all things which have a shared end: the motion of the heavens is regulated by one primary, celestial body; the man's person (the union of body and soul) is regulated by the soul; the various parts of the soul are ruled by reason; and the human body is regulated by a principal part. All these cases contrast a visible independence of motion (that of the passions, for example, or of one sublimely orbiting planet) with a real ordination towards something else. In every case, the power, the motion, and thus the independence of the parts would be destroyed if the ordering power somehow ceased to compel and restrain. The planets, for example, would first lose their special character and ultimately disintegrate if allowed to spin out of their orbit.

Aquinas's argument for rule in general, then, seems to presume a unified and possibly single ruler. In a similar manner, as seen in his accounts of war and punishment, Aquinas speaks of rule and rightful authority throughout *the Summa* as of something belonging to a

unitary body—a body, for instance, which is capable of having intentions or of doing justice. But the unity upon which rule is based does not immediately establish that rule is to be undivided. Aquinas only later takes up, for example, the question of whether rule ought to be in a single person.

Moreover, even here in the first chapter Aquinas makes some enigmatic statements on the subject. The examples of order and unity provided above, for instance, are complex and even confusing. The order of the heavens is preserved by reference to some primary celestial body but Aquinas also hastens to add this is “according to the order of Divine Providence.” To what extent is the primary celestial body then, a cause of the order rather than Divine Providence? Likewise, the soul rules the body, and then the soul is shown to be ruled by a part of the soul. The rule of each of these rulers, although real, is also subordinate to some other rule. Even more confusing is Aquinas’s reference to the body. It is ruled, he states, by some principal, “*either* the heart or the head.”³⁷ Whether he means that two orders exist in the body and each is ruled by some part, or, more likely, that no certainty exists about which part rules, Aquinas complicates the unity of even natural things. It is both true and perplexing that “*either*” heart or head rules the body. No one would imagine that the foot or elbow does so. We know that there is some guidance for the various motions of the lesser members of the body, and we can easily identify a few higher members that must provide that guidance. The very fact, however, that two members contend for this role suggests that both are so high in the hierarchy we cannot tell which is the superior (and indeed, both blood flow and neural function are responsible for communication among bodily members, and the

³⁷ Aquinas, *On Kingship*, Chap. 1 (9) (my translation, my emphasis). “And also among the members of the body one is principal, that moves all the others, *either* the heart or the head.”

blockage of both causes death.) Their rule is mixed, at least in the sense that both have a directing function. Nonetheless, Aquinas suggests that one is in command.

Thus by the end of the first chapter Aquinas has hinted at a kind of rule that is mixed or mitigated by reference to some extrinsic power, but still commanding within its sphere. Above all he has asserted that a ruling power can change a multitude of individuals into a unit that pursues one purpose. But the second chapter demurs. Where there is an order one may proceed “in a right way and also in a wrong way.” A power that unifies can allow the pursuit of evil as well as of good. Although Aquinas does not say so, we immediately perceive that this danger is greatest in the human realm, where the “irascible” and “concupiscible,” to which Aquinas has drawn attention a few sentences earlier, vie for control. For, as he goes on to indicate, free men share but slaves do also. What the slave shares is service to the good of another—indeed “the slave, as such, exists for the sake of another.”³⁸ What appears to be a sharing in the case of slaves—and even has some of the virtues for survival which Aquinas has underlined in his examples—is not a true sharing at all. Thus the political aspects of the human being thus far discovered also make it possible for one human being to take possession of the activities and discoveries of another.

The first and second chapters fit together—the second fills out the promise of the first in defining kingship.³⁹ In order to make this definition complete, Aquinas must distinguish

³⁸ Aquinas, *On Kingship*, Chap. 2 (10)

³⁹ The chapter divisions of the modern manuscripts are not those of Aquinas, and indeed he probably means for the first two chapters to be one, as they are in some texts, such as the Mathis edition used by Dawson in his translation. I have, however, used the division in the prevalent Eschmann – Phelan translation for the sake of clarity and compatibility. There is, at any rate, a substantive division between these two sections – one ends with the conclusion that a guide or governor is required; the second opens the new question as to whether or not guidance is always in the right direction.

power and rule in general from the kind which actually pursues the common end he has claimed exists: he must outline a kind of rule which actually fills the deficiency caused by human diversity. To follow this, we must bear in mind that the existence of the end predates all the other claims of Chapter One—it is because there is such an end that human beings are to be submitted to guidance or the power of another. For although human beings are not well-provided for a life alone, they might at least live free and separate for a little while, consulting only their own pleasure. Human beings might choose to live thus, if slavery were the only alternative to such a life. But if there is an end for human life, achievable through community, then we must identify some better alternative to that freedom or that slavery. Indeed, slavery does not unite us in the proper sense. It only substitutes, for our private goods, the private good of the ruler. This rule, then, Aquinas concludes, is “an unjust and perverted rulership.”⁴⁰

Thus Chapter Two defines kingship in response to the need for it outlined in Chapter One. Aquinas here explains that a king is, firstly, concerned with the common good, and secondly, the ruler of a city. His concern for the common good is the necessary and essential distinction from the private interest which a tyrant or ruler of slaves pursues. Aquinas notes that there are three just regimes (as opposed to three unjust) in which concern for the common good is possible; kingship is the regime in which government is in the hands of one man alone.

The second requirement, that a king rule over a city, derives from the need of the community to be a city: that diversity of pursuits and investigations which responded to the human deficiency in particular knowledge reaches its ideal combination at the level of the

⁴⁰ Aquinas, *On Kingship*, Chap. 2 (10)

city. The family provides nourishment and procreation, the village provides perfection of a trade. The city and province reach a perfect sufficiency of these goods. Aquinas posits the city first as the perfect community and then, oddly, states that a province is even more self-sufficient, because it provides security against enemies: “truly, in the city, which is the perfect community, there is enough for all the necessities of life; but yet more in one province because of the need to fight together and for mutual help against enemies.”⁴¹

Therefore he leaves an ambiguity open—whether of the province or the city, the ruler of the perfect community is called king. By including both communities, Aquinas allows space for a considerable range of size in this sufficient community, but also indicates that he speaks of an ageless “city.” He calls up Aristotle’s “polis,” but not his Athens, and also preserves Augustine’s terminology, from *the City of God*, for the political unit considered broadly.⁴²

⁴¹ Aquinas, *On Kingship*, Chap. 2 (14)

⁴²The Phelan-Eschmann translation translates the terms Aquinas uses as: “one family of one household,” “one street,” “city,” and “province.” Phelan’s notes state that the street is not “the Aristotelian clan-village but the street of the medieval town, called *vicus*,” and that “province” is not a very definite notion except that “a province is part of a greater and more comprehensive whole.” Thus, the word is “characteristic of a properly medieval type of political thinking which still retains the memory of the Roman Empire.” Aquinas does indeed use medieval latin terms, but he actually retains a striking timelessness in his language. “*Vicus*” (which is also the word used in his commentary on the *Politics I.I*) clearly refers here to a small neighborhood that perfects a trade (in keeping with medieval politics rather than Greek) but *vicus* also goes back to early latin usage among the Romans, where it means something more like village. Cf. M. Tullius Cicero, *For Marcus Fonteius*, 5.9, Julius Ceasar, *Gallic War*, 1.5. Maurice Wulf suggests that Aquinas’s inclusion of “province” may refer to the large feudal fiefs such as the Duchy of Brabant, but also gives another possible reason for this amendment of Aristotle: it might indicate a political open-mindedness as Aquinas watched the new state “growing up under his very eyes.” Wulf, Maurice. *Philosophy and Civilization in the Middle Ages* (Princeton University Press, 1922)

Peace, the Purpose of Government

Having defined the regime kingship and the word king, as well as establishing that rule is necessary in order to unify a community, Chapter Three finally explicitly addresses the question of monarchy. He asks whether it is more expedient for a community to be ruled by many or by one. This question he considers from several angles: first in terms of “the purpose of government,” which Aquinas breaks down to peace and stability; secondly in reference to accordance with nature, and finally from experience.

Thus Chapter Three introduces the concept of “peace” among the multitude. Peace is the “unity” of a multitude formed into a society, and it is the preservation of this unity which is the concern of the ruler. It is not, Aquinas notes, even legitimate for a ruler to deliberate about whether he will establish peace (just as it is not legitimate for a physician to deliberate “whether he shall heal the sick man encharged to him.” The earlier chapters have already established a similar thesis in general terms, in claiming that the king must rule for the sake of the common good. Thus Aquinas is associating the goal of peace with the general defense of the common good, but he is suggesting that it is a more specific description of the “purpose of government.” In explaining this more specific purpose, Aquinas provides the real criterion of good government: “the more efficacious a government is in keeping the unity of peace, the more useful it will be.” Indeed, “the good and health of a united multitude is that its unity be preserved, which is called peace; the which being removed, the usefulness of social life dies.”⁴³ This more specific version of the end to be pursued by government requires the active preservation not simply of society but of its usefulness. Aquinas goes much further yet: if this peace is removed, “the multitude becomes a burden to itself.” Since

⁴³Aquinas, *On Kingship*, Chap. 3 (my translation).

unity must be actively preserved, Aquinas argues that the most direct course to that end must be best. He then states that “it is manifest that what is itself one can more efficaciously bring about unity than [what is] several.”

Aquinas next addresses stability as a secondary purpose for government, and here again underlines the need for activity in the ruler. He gives the example of pulling a ship: “several men, for instance, could not pull a ship in one direction unless joined together in some fashion.” Government also must pull in one direction—in the direction which the common good requires. This single direction would not be possible among several persons if they “utterly (*omnino*) disagreed.” The provisional nature of this statement seems to indicate hesitation about the conclusion of the argument. Might it be possible that the several rulers might not *utterly* disagree even while they disagreed often; or disagree on many but not on all things?⁴⁴ Aquinas even seems to allow such a possibility in his example: if they are joined together in some manner, several men can pull a ship in one direction. Thus the need for stability establishes the need for a unifying principle of government, although not necessarily for one king. Nonetheless, Aquinas concludes that “one man rules better than several who come near being one.”

Aquinas then adds an argument from the structures of nature: accordance with nature is always best, and in nature many are usually united under one mover. Aquinas gives several natural examples: the heart as ruler of the body, the reason as ruler of the soul, one ruler among bees, and God the ruler of the universe. This territory is not new; Aquinas has given all of these examples in showing that rule was necessary in seeking the common good.

⁴⁴ *Omnino* literally means in all [things]. He seems therefore to open this question, and examples of matters that several rulers might agree on might include the general principles of government – written provisions of a constitution, for example, or the principles which form a nation.

Chapter Three's account of these natural examples is truncated, however. All of these examples were complicated earlier; the ambiguity between the rule of the heart or the head is now ignored, as is the complexity of soul becoming in turn the ruler over the body. In a sense, these complexities are not relevant, for, as Aquinas goes on to say, "every multitude is derived from unity." Yet, that ultimate truth serves to underline the problem with examples from nature: the state is preserved by the art of man, amidst division and complexity. Aquinas's awareness of this is signaled by his own reference to an example which requires men to design a structure which can allow them to combine their force to move an object. Indeed, the art involved in human associations has already been used to distinguish the human from the animal.

Finally, Aquinas adds that experience has decided in favor of the rule of one over the rule of many. The evidence of experience here, however, consists of two biblical examples: one of dissension, from God's prophet Jeremiah: "many pastors have destroyed my vineyard;" and the second of the benefits of kingship, expressed in the promise made by God to the Israelites that "one prince will be in the midst of them."⁴⁵ Aquinas is addressing the example brought up just above, of God's rulership over the universe. The example of this rule has a special importance in ancient Israel, the only nation which can really be said to utterly and explicitly accept the notion that God appoints kings. Both the warning and the promise of these texts relate to the state of Israel's relationship to their Lord. The Old Testament and especially the prophets lament Israel's falls from faithfulness again and again. On the other hand, God returns with promises to his people almost as frequently, that mercy will be shown, and that they will be his people and He will be their God. The latter passage

⁴⁵ The first reference is to Jeremiah 12:10; and the second is from Ezekiel 34:24 and is repeated in Jeremiah 30:21.

is one such instance. The prince who is to be in their midst is, at least directly, King David. Yet the testimony of the Old Testament on kingship is hardly straightforward. Indeed, the account of the Old Testament is that the Israelites insisted on a king, and, in a passage which Aquinas cites later in the text, God rebukes Israel for this decision: “so, in my anger I gave you a king.”⁴⁶ The grant of a king was grudging, but the grant of David was a favor. If all kings were like David, experience would indeed show that kingship brings about unity and peace. But since Aquinas evidently knows that not even all Hebrew kings are like David, the passage seems to indicate criticism of human kingship.

Thus Aquinas points to the dangers of tyranny at the end of Chapter three. This concern introduces us to a new section of the text. The first three chapters explore the positive qualities of unified rule. Chapter Four makes a turn, however, and this chapter marks the beginning of a thorough discourse on the evils of tyranny. This discourse comprises Chapters 4-12, and only in the three remaining chapters of the first part, Chapters 13-16, does Aquinas return to a positive discussion of kingship. Chapter Four states that “just as the government of a king is the best, so the government of a tyrant is the worst.”⁴⁷ Aquinas goes on to use an example from the previous chapter in almost the opposite way in which it was used there. The previous example emphasized that a group could not pull a ship together (and could not get anything done together) unless attached in some way; now he notes it as a danger that “many persons together can pull a load which could not be pulled by each one taking his part separately and acting individually.”⁴⁸ Many are weak and one is

⁴⁶ Hosea 13:11.

⁴⁷ Aquinas, *On Kingship*, Chap. 4 (21)

⁴⁸ Aquinas, *On Kingship*, Chap. 4 (23)

strong, in his ability to unite the many. To this extent, a tyrant has the power to work “to the detriment of the multitude.”⁴⁹

The worst thing about tyranny, however, is the character of the tyrant. The tyrant is the sower of discord. The tyrant seeks his own interest and therefore despises the common good. He departs from justice and therefore citizens can form no expectations from their government, which depends on the will of another, “not to say upon his caprice.”⁵⁰ This instability in expectation from government undermines the virtues which improve political life. Tyranny is an evil, not only because the good are hated under this regime, but because, practically, honor of the laws is a foundation of virtue (and specifically courage.) The tyrant, indeed, must destroy the courage which would allow citizens to resist his rule.

Chapter Five states that “royal dignity is rendered hateful to the subjects” because of the evils of tyranny. Here Aquinas seems to suggest that nothing he has said about kingship has required that it should be inherited or unimpeachable. Examples are given to show the relative prosperity of peoples who are not weighed down by a perpetual ruler, and especially that of the Roman Republic. The chapter concludes that:

Danger thus lurks on either side. Either men are held by the fear of a tyrant and they miss the opportunity of having that very best government which is kingship; or, they want a king and the kingly power turns into tyrannical wickedness.⁵¹

However desirable the abstract version of kingship may be, it seems that perpetual kingship is very likely to bring about tyranny.

⁴⁹ Ibid.

⁵⁰ Aquinas, *On Kingship*, Chap. 4 (26)

⁵¹ Aquinas, *On Kingship*, Chap. 5 (35)

Chapter Six then makes the first truly practical proposal of *On Kingship*. Aquinas writes, “when a choice is to be made between two things, from both of which danger impends, surely that one should be chosen from which the lesser evil follows.”⁵² The two evils which Aquinas lays out, however, are both tyrannies: one which is a disintegration of monarchy, and one which is a disintegration of the rule of a group. Both result in tyranny. The lesser of the two evils, according to Aquinas, comes from the rule of tyrant, if he is not an absolute tyrant, since he will not be completely opposed to the common good. A group of rulers, in contrast, will turn against each other if any one of them turns against the common good. This will create the additional evil of dissension, which is a confusion to the citizens. More importantly, Aquinas states that there has “hardly ever been rule by a group that did not end in tyranny.”⁵³ The tyranny thus created, however, is again that of a single tyrant, because the one dissenter desires the freedom to act and thus usurps the government of the group. Logically, the arguments establish that the rule of a group is worse than kingship only in a very limited sense. In the first place, it applies only if tyrants are not absolute and to some extent seek the common good. Further, if group government is likely to turn into tyranny, it cannot in this sense be worse. It must be rather that in moving from group government to tyranny the ambition of the individual usurping power imposes an intermediate step—a time of intrigue and manipulation, and ultimately a state of war and unrest—on the way to power. The tyranny that results would more likely be of the absolute kind, for which Aquinas gives no defense.

⁵² Aquinas, *On Kingship*, Chap. 6 (36)

⁵³ Aquinas, *On Kingship*, Chap. 6 (39)

The Power of the People

Notably lacking from the discussion of the disintegrating regimes is any mention of democracy. The problem with the government of the group is not that it is of the whole people, but that it is of a small group likely to get caught up in ambition to rule all. Therefore when Aquinas proceeds on, in the next chapter, to addressing how “a scheme should be carefully worked out which would prevent the multitude ruled by a king from falling into the hands of a tyrant,” he seems to provoke questions about whether that third unmentioned option might be an answer, or at least part of an answer.⁵⁴ He does not, however, explicitly address this option. Indeed, the chapter does not precisely address the question proposed. He gives a preliminary answer, proceeding from Biblical example: as God chose a king after his own heart, so should human beings try to make provision that the man raised up to be king should be the kind of person unlikely to become a tyrant. Further, once he is established, “the kingdom must be so arranged that opportunity to tyrannize is removed.”⁵⁵

Aquinas nevertheless gives no specifics for that arrangement in this chapter. Instead he explains that the assassination of moderate tyrants should not become a general means for their removal because the kind of people willing to involve themselves in it may often be people who would kill good kings too. As in the previous chapter, there are two tyrants in the conversation—the milder, or tyrant-to-a-lesser-degree; and the absolute or excessive tyrant. We are advised not to overthrow mild tyrants for various reasons: rebellion may fail and cause the tyrant to “rage the more.” Or, very likely, a worst tyrant may replace him. But who distinguishes between the moderate tyrant and the excessive one? And can a king

⁵⁴ Aquinas, *On Kingship*, Chap. 7 (41)

⁵⁵ Aquinas, *On Kingship*, Chap. 7 (42)

(whom Aquinas has indicated in the previous chapter might become a tyrant) be easily distinguished from a moderate tyrant? Aquinas relates a story that addresses this issue: in Syracuse, when Dionysius the tyrant ruled and was hated by the people, an old woman prayed for him. Her experience had taught her that each tyrant had been replaced by a worst one, so that she viewed it as a certainty that Dionysius would be succeeded by a worst tyrant on his death.⁵⁶ Thus the tyrant-to-a-lesser-degree is worth enduring only because there is sure to be something worse. Aquinas's argument for not resisting tyranny finally rests on the opinion of an old woman, one who has recourse to nothing more than prayer.

Not surprisingly, therefore, Aquinas argues that if tyrants are to be removed it should and may be done by public authority. In justification of this possibility he writes:

if to provide itself with a king belongs to the right [jus] of a given multitude, it is not unjust that the king be deposed of or have his power restricted by that same multitude if, becoming a tyrant, he abuses the royal power. It must not be thought that such a multitude is acting unfaithfully in deposing the tyrant, even though it had previously subjected itself to him in perpetuity, because he himself has deserved that the covenant with his subjects should not be kept, since, in ruling the multitude, he did not act faithfully as the office of a king demands.⁵⁷

The first clause of this conditional statement implies a presumption that the multitude has the power to set up its own rulers. But when did this become a presumption? Is it from the example of Israel asking for a king? Or has it been presumed from the beginning? Either way, the statement is made in general terms and seems to apply to kingship in general. Aquinas here implies that there is a "covenant" or "pact" which sets up rulers, yet it is not the same pact described by Finnis in his account of Aquinas, nor is it the contract posited by Hobbes. This pact is not the beginning of politics. Rather, the pact comes after the need for

⁵⁶ Aquinas, *On Kingship*, Chap. 7 (42)

⁵⁷ Aquinas, *On Kingship*, Chap. 7 (49)

government and is essentially separable therefrom. This pact exists in regards to the regime and specific organization of government; failure to act as a proper ruler breaks the pact but more importantly fails in the duties which define all rule.

The remaining chapters of the first book go on to distinguish the evils of tyranny from the positive benefits of good rule. The central distinction between the two lies in the possibilities of virtue and ultimately happiness for both the multitude and the ruler. In tyrants, “the desire for glory takes away greatness of soul.”⁵⁸ The viciousness of tyrants takes away the benefits that might be gained from rule. Tyrants cannot rely on loyalty because, “such a degree of virtue is not found among the generality of men, that they should be restrained by virtue of fidelity from throwing off the yoke of unmerited servitude.”⁵⁹ Tyrants thus gain only instability from all their ambition, because “it is too great a virtue for the common man to love his enemies and do good to his persecutors,” and “what is against the wishes of the multitude cannot be long preserved.”⁶⁰ 11 (81) Although the tyrant successfully discourages courage, this does not give him security, because “despair of safety impels a man boldly to dare anything.”⁶¹ This is action on the part of the multitude, but it is not the action of virtue but rather of desperation.

Tyrants themselves “rarely repent.”⁶² Moreover, as the story of the old woman shows, worse and worse tyrants follow the rule of a first tyrant. Since tyrants are subject to

⁵⁸ Aquinas, *On Kingship*, Chap. 8 (56)

⁵⁹ Aquinas, *On Kingship*, Chap. 11 (81)

⁶⁰ *Ibid.*, (81, 78)

⁶¹ *Ibid.*, (81)

⁶² *Ibid.*, (88)

such external obstacles, and their reigns are of such short duration; and since, further tyrants are so often replaced with worse tyrants, the real legacy of tyrants is a “regime” of a special kind. Each tyrant rules briefly, without satisfaction, and without stability; yet the rule of tyrants is long and grows ever more fierce. Kingship, as it is defined by Aquinas, is a one-of-a-kind regime which promises many benefits. But anything short of this perfect kingship is the gateway to this other regime—this cycle of tyrants.

Lest we conclude that the problem here is the viciousness of human beings, upon which Hobbes’s political theory is based, Aquinas establishes on the other hand that good rule acts on a different principle. The benefits of good rule are great specifically because “it is implanted in the minds of all who have the use of reason that the reward of virtue is happiness.”⁶³ And good rule can rely on this natural sense of human beings, for “to hate their friends and return evil for good to their benefactors—this, surely, would be too great a malice to ascribe fittingly to the generality of men.”⁶⁴ Further, the greatest worldly good is reserved for good rulers, for:

there is nothing which seems worthy to be preferred to friendship. Friendship unites good men and preserves and promotes virtue. Friendship is needed by all men in whatsoever occupations they engage.⁶⁵

The tyrant needs friendship, although he does not know it. Yet friendship is a two-way street, and cannot be viewed as a benefit for rulers alone. Only if it is possible for all to whom it is needed can it really be said to exist for the ruler.

⁶³ Aquinas, *On Kingship*, Chap. 9 (63)

⁶⁴ Aquinas, *On Kingship*, Chap. 11 (78)

⁶⁵ *Ibid.*, (77)

The bulk of *On Kingship*, then, addresses a warning to tyrants and their subjects and a promise to good rulers and their citizens. Finally, in the final chapter of the first part, Aquinas gets down to the business of good politics. Here, he describes the rules of government (which I have addressed frequently in previous chapters): that whoever rules “should have for his principal concern the means by which the multitude subject to him may live well,” which is broken down to a threefold concern:

First of all, to establish a virtuous life in the multitude subject to him; second, to preserve it once established, and third, having preserved it, to promote its greater perfection.

Establishment, preservation, and then improvement are the purposes of all governments, and not just those of founders. A ruler has to set up virtuous life in the multitude. This might be sufficiently done through the writing of laws. Law could be used to encourage the people in virtue. Yet realistically, people “do not always preserve the same vigor” over time, for their lives are subject to many changes. Therefore a ruler also needs to preserve the good life of the multitude. Aquinas now adds that “the unity of man is brought about by nature, while the unity of the multitude, which we call peace, must be procured through the efforts of the ruler.”⁶⁶ That is, while the individual has a natural deference to reason, the preservation of the community requires art. *On Kingship* goes on to describe some of the elements of that art in its (either brief or unfinished) second book: the greatest rulers have founded cities by seeking congenial locations, fertile climates, and a site that is pleasant but not so “superabounding” as to make men soft.⁶⁷

⁶⁶ Aquinas, *On Kingship*, Chap. 11 (77)

⁶⁷ Aquinas, *On Kingship*, Part II, Chapters 1-4, especially 4(147)

Just as it is unreasonable to assume that all kings will be perfect kings, and even more unreasonable to assume that their sons would be, it is also impossible that all kings should have the opportunity to found cities. Yet all of Aquinas's discourse on both subjects is useful to statesmen in general. Cities always require work—work more akin to founding than to simply preserving. In whatever location the city may be, the politician has the special function of seeing the whole and considering the policy which best applies to the city. Moreover, the latter sections of *On Kingship* remind the reader that politics consists mainly of difficult practical decisions. The central teaching of *On Kingship* is that rule consists in practical, though not pessimistic, determinations about how people might be able to live well in the circumstances provided for them.

Overall, then, *On Kingship* discourages the rule of unquestioned kings and points to the possibility of friendship throughout the commonwealth. Moreover, it emphasizes the difference between realistic expectations concerning rulers and unrealistic hopes. Almost every ruler in *On Kingship*, aside from David who is chosen by God, is prone to the ambition which is the destruction not only of rule but of the purposes of the city itself. The people, on the other hand, are shown to be naturally inclined towards the common good and the preservation of peace when they are given the chance to act virtuously.

Reconciling On Kingship with the Summa

It is now possible to reconcile the arguments of *On Kingship* with the *Summa*'s discussion of regimes. As noted above, the argument of the *Summa* gives an explicit defense of rule by the people and chosen by the people. Aquinas makes the argument from two statements found throughout the Pentateuch. First, he finds in Exodus the instruction from Jethro (the father-in-law of Moses) that Moses should “provide out of all the people able men

... and place such over [the people]: and let them judge the people at all seasons.”⁶⁸ The full verses instruct: “thou shalt provide out of all the people able men, such as fear God, men of truth, hating covetousness; and place such over [the people] to be rulers of thousands, and rulers of hundreds, rulers of fifties, and rulers of tens: and let them judge the people at all seasons.” This directive comes not directly from God or even from prophecy, but rather from the judgment of Jethro, who has watched Moses sitting to judge the many complaints of the people against one another. Jethro tells Moses this practice “is not good” because “thou wilt surely wear away ... and this people that is with thee” and gives as his reason that such a responsibility is too heavy for one man.⁶⁹ In addition to this passage, Aquinas takes from Deuteronomy a statement from Moses telling the Israelites “take from among you wise men, and men of understanding, and known among your tribes, and I will make them rulers over you.”⁷⁰ As in the previous example, Moses bases the need for this subdivision on the practical demands of rule. “How can I myself alone bear your cumbrance, and your burden, and your strife?” Yet the need for this practical change is also a happy consequence of the blessing of the Lord in having greatly increased the people of Israel.

These are the passages upon which Aquinas relies in approving the situation of Israel. In fact, as the passages quoted in *On Kingship* remind the reader, these orders are largely subverted by the actual situation of Israel under the kings. The kings are demanded by the people. The argument against the kings is that God is the king of the Israelites. But although this might mean that God has given the Israelites a system of kingship, why should this be

⁶⁸ Exodus 18

⁶⁹ Exodus 18:18

⁷⁰ Deuteronomy 1.13

assumed? At any rate, Aquinas never suggests that the kingship of God implies that kingship is best. In those passages of *On Kingship* that might seem to suggest this, he damns kingship with faint praise by only referring to the (wrongful) Israelite demand for a king.

Moreover, in the *Summa*, Aquinas approves of the system of government in the Old Testament by referring ultimately to principles he takes from Aristotle and from his natural understanding of politics rather than from the Bible itself. He first explains the relationship between his understanding of natural law and the Old Law: “the Old Law showed forth the precepts of the natural law, and added certain precepts of its own.”⁷¹ This old law includes judicial precepts, meaning, Aquinas explains, that it gave determinate form to “the general precepts of that justice which is to be observed among men.”⁷² The judicial precepts were not instituted that they might be symbols, but that they might shape the state of that people who were directed to Christ. Consequently, when the state of that people changed with the coming of Christ, the judicial precepts lost their binding force.⁷³ They are still treated by Aquinas, however, as sources of a great political wisdom - they were, after all, meant to form the chosen people both by teaching them pious principles but also by forming their character as a people.

⁷¹ *ST*, I.II, 98.5.

⁷² *ST*, I-II 98.4 The Old Law, according to Aquinas, included three kinds of precepts: ceremonial precepts directing worship, judicial precepts directing the maintenance of justice among men, and moral precepts directing good action or action conducive to virtue. These things then are notionally distinct. However, they are also obviously mixed. Acts of justice, for example, are moral, even while their determinations under the law are judicial. I-II.98.4. See also replies to objections. He also goes on to say, in the next question, that “all precepts of the Law may be styled ‘justifications,’ as being executions of legal justice.”

⁷³ *ST*, I.II, 104.3.

Not surprisingly, then, Aquinas discusses the Old Law in the *Summa* through a serious dialogue concerning the goals of politics. Interestingly, the objectors take the rule of the people as a clear teaching of the Old Law. Two major objections come from ancient philosophy. Aristotle states in the *Politics* that “the ordering of the people depends mostly on the chief ruler;” whereas the Old Law contains “no precept relating to the institution of the chief ruler,” but only those which concern inferior rulers. Secondly, Plato states in the *Timaeus* that “the best gives of the best.” Here, as does Aquinas in *On Kingship*, the objector argues that the best in philosophical terms is that which “approaches nearest in resemblance to the Divine government” and is thus kingship. Both of these claims object to the Old Law because it is too democratic, and on the basis that the institution of one ruler is most in accordance with nature and to the preeminence of the Divine.

The answer to Aristotle’s supposed objection is that God held a special place in this particular kingdom, and that in this particular case the choice of the highest ruler was left to Him—in other words, kingship as a human regime is not defended by God’s choice to set up his own lieutenant in this case. And the answer to Plato’s supposed objection is one that we have heard before—that “a kingdom is the best form of government of the people so long as it is not corrupt.” Here, in this briefer discussion, he states more immediately that “since the power granted to a king is so great, it easily degenerates into tyranny.” To create a kingship which avoided this problem would require the appointing of a virtuous man, but “perfect virtue is to be found in the few.” Thus Aquinas concludes that “the best form of polity, [is] partly kingdom, since there is one at the head of all; partly aristocracy, in so far as a number of persons are set in authority; partly democracy, i.e. government by the people, in so far as the rulers can be chosen from the people, and the people have the right to choose their

rulers.”⁷⁴ This argument calls for a divided rule. However, since the loyalty of the parts is clearly to be demanded by the whole, the argument does logically suggest that where sacrifices are to be made power is only viable if it be responsible for the final end—and it appears that responsibility is upheld by the choice of the people.

Whereas most commentators have looked to the *Summa* as Aquinas’s final word on regimes, I argue rather that *On Kingship* adds to our understanding of citizen participation by providing a more complete picture of politics. For since most regimes are in reality “mixed” to some degree, the importance of Aquinas’s argument is in showing where the final deference lies. According to *On Kingship*, rule has no special advantage for the ruler. The only benefits of rule remain squarely with the people themselves. Thus all that Aquinas has to say in favor of the unifying nature of kingship is undermined by its dangers as a regime and particularly as an unquestioned inheritance. As to his positive teaching on politics, much of what Aquinas says in *On Kingship* is aimed both at moderating kingships and indeed, at creating a political community in which the virtues of citizens have an active role in political life. His explicit preference in the *Summa* is for mixed rule. Yet commentators who have pointed this out have often overemphasized the term “mixed rule”—as if to imply that the mixture of rule is a way to get the best of every system.⁷⁵ This particular version of mixed rule is in fact much closer to democracy as we know it. At every level, the rulers are chosen by the people—indeed, the very existence of the subsidiary systems of government are based on the need for citizens to have a concrete impact on government. Aquinas goes out of his

⁷⁴ *ST*, I.II, 105.1

⁷⁵ See James M. Blythe, “The Mixed Constitution and the Distinction between Regal and Political Power in the Work of Thomas Aquinas.” *Journal of the History of Ideas* 47, no. 4 (December 1986): 547–565.

way to find passages in the Pentateuch to show that in order for the people's needs to be heard intermediate levels of government need to be constructed.

Aquinas never gives an explicit statement on democracy itself either here or in *On Kingship*. Yet ultimately democracy hardly needs his explicit defense. By the end of *On Kingship*, Aquinas has asserted that human politics comes from the special human benefit of diversity. He has argued that the people reward beneficent action with virtuous action and good will. He has presumed that the people must agree to the rule of kings in order to live under them. And he has placed the good of friendship between the people and their ruler as the highest worldly pleasure and the most stabilizing political force.

The Heart of On Kingship: the Good of the Community

If the above argument is correct, and Aquinas has in fact done little to defend "kingship" as we use the word, then why does Aquinas write a text on kingship? Indeed, there are a number of formal problems to be dealt with in accepting that the work has a democratic thesis. Aquinas argues for the limitation of monarchy, but what is the rest of his discussion there for?

A few commentators have provided possible explanations for the apparent monarchism of the work. First of all, a proposal has been made that this might be a text specifically aimed at getting around the popular structure of texts of its time. Quentin Skinner makes such an argument:

The reasons [for preferring kingship are] no longer connected to the suggestion that God ordains kingly power as a natural form of lordship. Instead the rule of princes is defended on the naturalistic and explicitly Aristotelian grounds that, as Aquinas puts it in *De Regno*, 'experience shows that those provinces or cities which live under the

rule of a single king are above all able to rejoice in peace, flourish in justice and delight in abundance of wealth'.⁷⁶

By “naturalistic” Skinner means that the argument does not rely on revelation and is based rather on observation. Like Maritain and others we have seen, Skinner ends up making Aquinas a link in the chain—albeit a crucial one—that leads to the modern understanding of politics. Yet what he finds in Aquinas seems to defy this utterly historical approach. Skinner in fact also points out that Aquinas reconciles Aristotle’s defense of monarchy as the best form of government with Aristotle’s claim that to ensure peace it is best that everyone play some part in government. Aquinas combines these two theses into a “very specific form of limited rule”—one with a single ruler but in which there are other citizens capable of rule and in which other citizens participate in government.⁷⁷

On Skinner’s reading, the reintroduction of Aristotle among Aquinas and his followers is salutary in making possible what he calls “naturalistic” arguments concerning government. Thus Skinner’s argument is largely based on the *kind* of argument Aquinas is making. According to Skinner, the decisive step towards democracy lies in the distinction between Aquinas’s “natural” argumentation and another kind of argument, based on Revelation, which argues that kings are somehow divine. Aquinas’s idea of mixed monarchy—a regime built on practical, empirical judgments that kings are good at achieving prosperity and that the people will be more peaceful if they have some share in government—is contrasted with the notion that kingship is good in itself because it is godly.

⁷⁶ Skinner, Quentin, *Visions of Politics* (Cambridge: Cambridge University Press, 2002): 32-33.

⁷⁷ Skinner, *Visions*, 33.

However, as we have seen in some detail, Aquinas does not limit himself to what Skinner calls naturalistic arguments. Aquinas makes a number of complex arguments outside of the kind Skinner points to—and indeed, the quotation to which Skinner points above, in which Aquinas states that “experience shows that those provinces or cities which live under the rule of a single king are above all able to rejoice in peace,” would be a poor grounding for a theory of government, since it provides no data or case to support its apparently historical assertion. Aquinas argues by reference to processes in nature and also cites the support of scripture. Further, as I have underlined above, the very notion that human beings have a common end is based on an absolute statement about the nature of rational beings—the subject of observation, no doubt, but not the purely pragmatic kind Skinner means. It is only fair to conclude, then, that Aquinas believes both natural science and Revelation agree on certain principles which should be used in properly organizing a political community.

One purpose of the book may be to moderate the behavior of kings, first by telling them what true kingship consists in and secondly by attempting to convince them that honour and glory are not adequate rewards. Indeed, many sympathetic accounts of the work interpret this as the whole of its purpose.⁷⁸ Yet how realistic could this goal be? Aquinas has just told us that, once a tyrant is in place, the Lord alone will tame his rage.

Patrick Cain proposes another possibility.⁷⁹ He argues that the text does defend kingship in that it points to the rule of the Divine king, while at the same time it actually

⁷⁸ See, for example, Kries (above).

⁷⁹ Patrick Cain, “Thomas Aquinas’ *De Regno*: Political Philosophy, Theocracy, and Esoteric Writing” (paper presented at the Canadian Political Science Association Annual Conference, Saskatoon, Saskatchewan, May 30 – June 1, 2007)

argues against human kingship. Cain points out that the discussion of honor and glory just mentioned really constitutes a discussion of magnanimity. In his reading, this discussion of magnanimity results in the conclusion that honor and glory are not a sufficient reward because the man who seeks them, the magnanimous man, “is not able to be properly honored.”⁸⁰ Thus the final determination of the reader must be that “to approach politics with the presumption that a magnanimous man will rule is only [to] increase the possibility of tyranny.”⁸¹ Aquinas “[restricts] the definition of kingship to an almost unreachable standard” and only on this basis is he able to say that kingship is the form of government least likely to fall into tyranny.⁸² The account therefore turns to fear as a means to mitigate the horrors of tyranny.

Cain argues that magnanimity is a problem that the ancients could not utterly deal with. The magnanimous man seeks the best in politics, honor of the best, but he cannot get the reward he deserves. Cain argues that the central consistency of *On Kingship* is that it gives the reason for this ancient problem. God’s kingship and our distance from his perfection show why the magnanimous man finds no adequate reward on earth. Aquinas is, in the end, “both more realistic and more idealistic than this tradition.”⁸³ He is more realistic because he does not believe the rewards of honour and glory will prevent tyranny, but more idealistic because he presents a teaching beyond politics, a teaching which points to the true

⁸⁰ Cain, “Thomas Aquinas’ *De Regno*,” 6, 2.

⁸¹ *Ibid.*, 6.

⁸² Cain writes, “Aquinas’s argument, therefore, provides an account of politics dependent on a low view of man’s nature, while at the same time preserving the ancient tradition’s more idealistic presentation.”

⁸³ *Ibid.*, 9.

King. In this way he solves a difficulty pointed to by the ancients, by pointing beyond politics for the answers.⁸⁴ Thus, “Aquinas argues that reason informed by faith should rule the soul and that, politically, this equates to having a ruler who will listen to theology.”⁸⁵

Cain’s account provides a coherent theological purpose for *On Kingship*. Yet throughout my discussion I have attempted to show that Aquinas is making his own *political* argument. Not only is this true of *On Kingship*, but it has been addressed frequently in earlier chapters of this dissertation. Again and again, I have shown that Aquinas lines up an argument about Divine ends with an argument about human practice (and its natural goodness, knowable by reason.) It would be dangerous (and untrue to Aquinas) to argue that only Christian kings can work on behalf of the common good.

I therefore propose rather that *On Kingship* is a book about rule or government rather than about the regime of monarchy. Leaving aside the biblical arguments, there are still a very clear set of arguments about what rule should be and how its limits should be imposed. Aquinas says often (though cautiously) that human beings are not perfect. It would be fatal, then, to rely on their continued perfection in forging the relationship between the ruler and the commonwealth. At the same time, however, Aquinas is no Hobbes: he does not believe it is sustainable to rely solely on the self-interest of human beings, nor does he wish to absolve the ruler from his obligations to act on behalf of the city. Thus politicians may learn how to rule. The skills and capacities of a ruler are in one sense the same as the skills and capacities of citizenship; a similar striving to understand the principles of union will be necessary to

⁸⁴ “It is a dispute that questions not only the political solution of the ancients, but also their claim that philosophy is the best way of life for man.” Cain, “Thomas Aquinas’ *De Regno*,” 9.

⁸⁵ *Ibid.*, 11. This is “following the pattern laid out by Plato.”

bring about common action. Yet realistically, a ruler is placed in a unique position for understanding the general needs of the commonwealth. All these are emphasized by Aquinas in the second book of *On Kingship*—location, economic structure, and a viable way of life. As Chapter One of *On Kingship* indicated, the individuality of human lives is shown specifically in the way people choose to spend their time. Their diverse methods, diverse studies, diverse actions, and diverse desires yielded in Chapter One the possibility that in turn their different discoveries could add up to greater knowledge for the whole.

Because of these realities, there are great benefits to the existence of a single individual placed in the unique position of being able to view as much of the city as possible, to determine its location, to judge the necessity of its wars, and to take care that its punishments be executed. In this sense all the arguments of *On Kingship*, even those which formerly seemed spotty and incomplete, make perfect sense: the existence of one person who can act on and make judgments on behalf of the city is indeed expedient, stabilizing, and unifying of the community. On the other hand, this unitary function needs mitigation and mixture. To realistically serve these functions, government needs to be part of a structure that unites government with the activity of individuals.

Aquinas relies on the claim that “it is implanted in the minds of all who have the use of reason that the reward of virtue is happiness.” Aquinas does not mean to say, naively, that all human beings agree on what constitutes their happiness, but rather that there is an excellence for which our natures prepare us. He makes this clear with his next comment that “the virtue of anything whatsoever is explained to be that which makes its possessor good and renders his deed good.”⁸⁶ To act according to the nature of the human being is to do

⁸⁶ Aquinas, *On Kingship*, Chap. 9 (63)

that which can realistically make the whole city work. Aquinas goes on to say that “if to work well is a virtuous deed, and the king’s work is to rule his people well, then that which makes him happy will be the king’s reward.” That is to say, the happiness of rule and ruled are inseparable—are even the same; and happiness “comprises in itself all things desirable.”⁸⁷

The argument of *On Kingship* presents two sides of politics: it includes prudence – encouraging careful judgment both among rulers and among its readers—and also a principled, philosophical argument about what is best in general. This latter argument takes into account what is fitting as well as what is scientific. The arguments from nature, which may once have seemed to undermine Aquinas’s literal argument, now have a crucial place in the complex teaching of the book. This is why Aquinas has used examples from nature but which emphasize the difference between human beings and other natural things. Thus when Aquinas points out that the head and the heart might both be heads of the body, he reminds us of a complex truth: both are clearly necessary to the function of the body. We can do without neither the head nor the heart. The question as to which ultimately rules will never be completely resolved, because each relies so much on the other even to complete the process it begins. Politics works in the same way—each part relies on the others for its own activity. Politics is art and not simply process. Aquinas’s ship example reminds us of this too—human beings improve upon other creatures by creating means to “pull together.” As Aristotle reminds us in his use of a similar ship example, the state is the work (or *ergon*) of the whole.⁸⁸ Whether there is one ruler or whether there are various members of government

⁸⁷ Aquinas, *On Kingship*, Chap. 9 (63)

⁸⁸ Aristotle, *Politics* iii.4 (1276b 26)

is not the central question—it is how power is grounded and by reference to what. More important than the extent of royal dignity is the possibility of the relationship between those in power and the people.

CHAPTER SIX

Doing Justice, Making Judgments, and Preserving the Unity of Peace

The proposal that Aquinas ought to be of interest to modern thinkers on politics is likely to strike up against many obstacles. The power of Aquinas's work speaks for itself, in one sense, and thus might need no defense. As one admirer of Aquinas's legal theory writes, "for those willing to delve critically into his philosophy, he overtakes and overwhelms in ways not anticipated."¹ Yet Aquinas is difficult to read and the reader must be willing to make the effort. Among the obstacles which are likely to diminish this willingness before the task has been attempted, especially where contemporary and particularly American legal thought is concerned, is the perception that Aquinas argues from the authority of the Church or of the Bible. The relationship of faith and reason in Aquinas is far too complicated for any comprehensive treatment here, but it is useful to consider the argument at least of one very able thinker, Fr. Ernest Fortin, concerning the tension created in Aquinas's politics by the role of revelation in his political thought.

In his political thought Aquinas underlines, in a very pointed manner, both unity and diversity. Aquinas indicates that the need for someone to actively preserve the unity of peace is based precisely upon the diverse modes naturally followed by individuals. Such preservation requires skill. Ernest Fortin, emphasizing this need for special skill in a ruler, argues that for Aquinas "in and of itself the most desirable regime, both on the ground of unity and of the nobility of the end to which it is dedicated, is kingship or the unconditional

¹ Nemeth, Charles P. *Aquinas in the Courtroom: Lawyers, Judges, and Judicial Conduct* (Greenwood Press, 2001): xii.

rule of a single wise man for the sake of virtue.”² Since the inferior is “by nature” subordinated to the superior, Fortin reasons, those of greatest knowledge and virtue ought to rule. Yet, Fortin points out, Aquinas is also aware that monarchy is subject to the greatest dangers, first of all because the vast powers of the king, unless he is *unusually* virtuous, may cause him to become corrupted and result in tyranny, and secondly because there is indeed no reason to expect the (even moderately) virtuous will rule in the first place—since it is “a matter of common observation that politically wise and virtuous men are not always and perhaps not generally acknowledged to be such by other men, the majority of whom have little real knowledge of wisdom or virtue.”³ It is for these reasons, Fortin speculates, that Aquinas (in the *Summa*’s questions on the Old Law) praised the “so-called mixed regime,” which “for concrete purposes [is] the best regime” as it “blends in harmonious fashion the best features of monarchy, aristocracy, and polity.”⁴ Fortin’s elegant account of Aquinas’s various political texts brings them together under this understanding of the best regime in theory and the best regime in practice—*On Kingship* gives us an account of the ideal (but unlikely) regime which would embody nature (in the sense of the true hierarchy of being, or of that order in which inferior is subordinated to superior) and the *Summa*’s discussion of the Old Law gives an account of the “concrete” best regime. Although we have to choose the latter regime in this life, we are nonetheless able to learn from *On Kingship* because the mixed regime incorporates elements of the virtue which kings by rights should possess.

²Ernest L. Fortin, “Thomas Aquinas,” in *History of Political Philosophy*, ed. Leo Strauss and Joseph Cropsey (Chicago: Rand McNally, 1972): 223-250, 231.

³ Ibid.

⁴ Ibid., 232.

Fortin therefore notes Aquinas's reliance on democratic involvement in government to limit the dangers of tyranny. In concluding, however, that the need to mix powers in a regime comes specifically from the inability of the majority to choose wise leaders, Fortin adds to Aquinas's account a fundamental suspicion of the motives of the populace. Aquinas himself avoids the assertion that the populace is unwise. As I pointed out in my fifth chapter, Aquinas claims that the desire for happiness (and thus a natural motion towards virtue) is found in human beings in such a way that "to hate their friends and return evil for good to their benefactors ... would be too great a malice to ascribe fittingly to the generality of men."⁵ Aquinas does seem to attribute a kind of moral failure to most human beings, but this failure is dangerous in particular to tyrants. As Aquinas observes, "such a degree of virtue is not found among the generality of men, that they should be restrained by virtue of fidelity from throwing off the yoke of unmerited servitude,"⁶ and "it is too great a virtue for the common man to love his enemies and do good to his persecutors."⁷ The people, in other words, do not have enough virtue to abide their persecution by a tyrant. Whatever "vice" in the populace this implies, it is not that which would cause them to choose tyrants as their rulers. It may be true that people often elect rulers unwisely, but Aquinas chooses to emphasize rather that they are inclined (as a group or generality) not to be malicious. They wish, in principle, to return good to their benefactors.

Fortin nonetheless insists on the distinction between the ideal and the practical in Aquinas. When Fortin thus presents Aquinas's defense of the mixed regime as a grudging

⁵ Aquinas, *On Kingship*, Chapter 11 (78)

⁶ *Ibid.*, (81)

⁷ *Ibid.*, (81, 78)

deference to practicality, he also understands Aquinas to overcome the philosophical inconvenience which might result from separating the best by nature from the best in human life. Fortin presents two elements as essential to Aquinas's treatment of politics: first of all, the rule of law provides the stability of the mixed regime (through its ability to rise above present concerns and prejudices and "regard future events") and secondly an appeal above practical reason to "the kingdom of God" which is "actual or attainable at all times through God's saving grace."⁸

The importance of the rule of law, according to Fortin, is that it more effectively creates a source of moral virtue and justice than any other structural element of the regime can do. Legislators are raised above the normal prejudices that might corrupt them by their ability to deliberate and, since legislators are fewer than judges, they are more likely to belong to the wise few.⁹ Further, law is crucial to the virtue of the citizens. It builds habits and thus provides the necessary human condition for the creation of virtue. Therefore Fortin concludes that, for Aquinas, legislating is "the most important act of the political art."

Aquinas's reference to law is not new, as it may also be found in the ancients and particularly Aristotle. Yet Fortin argues that law takes on a new character for Aquinas, because of the second essential element of his political approach: the appeal above the city. Among the signs of this "transpolitical character" of Aquinas's doctrine is the compulsory nature of the dictates of conscience.¹⁰ These dictates of conscience are laws for Aquinas.

⁸ Fortin, "Aquinas," 232, 233.

⁹ Ibid., 232. *ST*, I-II, 95.1, ad. 2. Since Aquinas takes this analysis from Aristotle, Fortin presumably means to indicate that Aquinas agrees with Aristotle to this extent in presenting the importance of law. See Aristotle, *Rhetoric*, i.1.

¹⁰ Fortin, "Aquinas," 233, 239.

They are promulgated by nature and ultimately by God. Fortin notes that these laws are laws that apply to reason and thus the acts they command or forbid are good and bad in their nature and not only as commands or prohibitions of God's word.¹¹ Nonetheless, Fortin ultimately concludes that the doctrine of natural law entails a reliance on revealed theology in political life.

This understanding of the substance of the natural law, coupled with Fortin's insistence that law is the highest act of the political art, leads to the conclusion that Aquinas's political philosophy looks to revelation for its stability. Moreover, it leads Fortin to conclude that Aquinas's politics is not ultimately judged by its philosophical integrity, since its final reference is to the City of God, and "one cannot be guided at one and the same time by two different and equally authoritative norms."¹² Fortin argues that even Aquinas's use of Aristotle as an authority is precisely a "use" of him, since it cannot reflect real agreement or deference. Instead of actual deference, Fortin argues, Aquinas casts Aristotle's philosophy "in the role of handmaid," and thus "made him a servant or slave," rather than a citizen, of the City of God.¹³

If Aquinas's politics must utterly refer to biblical argument for its usefulness, it is very unlikely to be taken seriously in modern democracies. Yet Aquinas's discussion of politics, in the areas outlined throughout this dissertation and indeed in many more, speaks in terms that seem meant to find purchase in political discourse more broadly understood. This rhetoric is not, in fact, inconsistent with the discussion of philosophy and revealed

¹¹ Fortin, "Aquinas," 243-4.

¹² *Ibid.*, 245.

¹³ *Ibid.*, 246

knowledge to which Fortin alludes. Aquinas treats sacred doctrine as the highest of sciences because it has the greatest certitude and because it teaches about the highest objects: it is most certain “because other sciences derive their certitude from the natural light of human reason, which can err; whereas this derives its certitude from the light of divine knowledge, which cannot be misled,” and its objects are highest because it “treats chiefly of those things which by their sublimity transcend human reason.”¹⁴ Aquinas places sacred doctrine at the pinnacle of all human knowledge, therefore, and yet he does not insist that it must be the source of our knowledge about all human things.

When Fortin asserts that “one cannot be guided at one and the same time by two different and equally authoritative norms,” he therefore overstates the case against knowledge based on reason. Although it is true that Aquinas points to salvation as the ultimate goal of politics (as of all human activities,) he does not deny the usefulness of political thought from the grounds of reason alone. Indeed, Aquinas’s political teaching allows that there is a complexity to political life which requires that human beings consider the claims of many authoritative norms. Soldiers obey their commanders, Christians learn from their priests, judges bow to the legal code, and rulers act for the common good as a whole. All human beings, at the same time, can act well or badly, justly or unjustly. Their particular actions and judgments are difficult, and the fact that their ultimate goal is salvation does not overcome this difficulty. A political community works for the common good and approaches the unity of peace only by assessing the demands and tensions of political life.

For both Hobbes and Aquinas, the human being is inevitably drawn to life within a community. Aquinas claims, unlike Hobbes, that the human being is also formed by nature

¹⁴ *ST*, Ia, 1.5.

for that life in such a way that he is not complete without it. The consistency of nature is such, for Aquinas, that the human being has inherent political responsibilities. As soon as one human being is aware of the existence of another, he must do justice to him, and justice, as Aquinas writes, has reference to “the good of another.” In the city or state, which is the perfect community because it allows human beings to live well with each other, government is responsible for some of the greater responsibilities which this large group of human beings must take on.

Of course, decisions concerning justice, although they are based on an inherent responsibility of all human beings, are not necessarily general decisions. The ruler provides law in order to promulgate general principles of justice by prohibiting murder, theft, and so on. The ruler exercises judgment in writing those laws and coming up with principles of justice in reference to what is required in the given city or state. As I have argued throughout this dissertation, however, Aquinas does not treat legislation as the only relevant act of politics. In fact, judging particular situations is often and in many ways more difficult than legislating. It is an essential political act because the community cannot as a whole be just unless its actions are unified. Judges, who interpret rather than write law, are necessary to Aquinas’s political structure. Judges follow the law but take particular circumstances and culpability into account in their judgment. Justice and judgment therefore work together in Aquinas’s account—concrete political action in the city as a whole relies on the application of both—and is necessary in all decisions concerning law, war, and punishment. Indeed, neither justice nor judgment is possible (in practical application) without the other. Aquinas

speaks to us by reminding his readers of these difficulties, urging St. Paul's admonition that we be "zealous for the better gifts," as we strive to improve political life.¹⁵

¹⁵Aquinas, *On Kingship*, Chap. 16 (121); 1 Corinthians 12:31.

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