

Law, Judgment, and Catholic Social Ethics

Andrew Skotnicki, Ph.D.

Abstract

There is a recurrent conflict concerning law and judgment in the Catholic tradition. The tension between the manner in which just punitive judgments are to be rendered and the possibility of judging justly, if at all, is found frequently in Scripture and in Church history. This paper will give an overview of the dynamics of this tension in Scripture and in the significant disparities between natural law and more voluntaristic theories of law in the Middle Ages. It will then present current Catholic Social Teaching on this topic and offer suggestions as to how insights from the tradition may help clarify some of the problems in contemporary debates over the nature of law and the dynamics of sentencing.

Law, judgment, and punishment exacted for violations of law are matters of utmost importance in any society. They are also moral and spiritual issues with deep roots in Catholic theology. This essay will survey some of the principal ways these topics have been understood in the Catholic tradition. It will first provide a brief overview of the phenomena of hyper-retribution and mass incarceration in contemporary criminal justice, then proceed to a synopsis of three distinct strands in the Catholic tradition dealing with law and judgment: (1) Scripture and the moral quandary induced in those who judge; (2) natural law, its avowal of the divine legitimacy of positive law and its mechanism of judgment for malefactors; and (3) elements of nominalism and “purely penal law” that in many instances present law primarily as an exercise of power and control rather than a mirror of the mind of God. This will be followed by a summary of recent Church teaching in which a coherent synthesis of these once disparate ideological strands has been achieved, doing much to inform and resolve some of the dilemmas being faced in the areas of criminal jurisprudence and punishment. Finally, some suggestions will be offered as to how the topics raised in this essay might be investigated in the context of Catholic higher education.

Fractures in the Penal Landscape

It is difficult to conceive how society could function without a system of law and legal accountability. Even those who take issue with Hobbes’s view that social life is a war of all against all would largely

Andrew Skotnicki is Professor of Religious Studies, Manhattan College, New York, NY.

JOURNAL OF CATHOLIC HIGHER EDUCATION – 27:1, 2008, 117-135.

concede that some form of punitive judgment and corporal restraint of wanton lawbreakers must be enforced to safeguard the life, liberty, and property of law-abiding citizens.¹ Yet current criminal justice policy in the United States has reached a level of intervention and retribution that might have surprised even Hobbes: 2.3 million adults, more than one in every one hundred, are either in jail or in prison. This number easily surpasses the rates of incarceration of any other nation in the world, including China and Russia.² Add to this the skyrocketing expansion of federal and state criminal codes, and one can see little reason to deny that this trend will continue into the foreseeable future.³ One law professor stated that we are coming ever closer to a situation “in which the law on the books makes everyone a felon.”⁴

The large-scale confinement of a nation’s citizens is a pressing ethical matter in itself, but the moral stakes are raised greatly when one considers the massive disparities in rates of incarceration between those with and without social and economic capital. Approximately one in every three black males will enter jail or prison in his lifetime as compared to less than six percent of white males.⁵ There is a general social consensus that inmates deserve not only long terms of imprisonment, but also whatever harm befalls them during their confinement.⁶ The barely disguised class and racial bias in the tailoring of the criminal class has perhaps found its most shameful expression in the appellation increasingly used to describe contemporary corrections: “waste management.”⁷

What has been termed the “penal harm” movement has been flanked by the still strong civic support for the death penalty. According

¹ Thomas Hobbes, *Leviathan* (London: Penguin, 1968) I, 3.

² Pew Center on the States, *One in 100: Behind Bars in America 2008* (Washington, DC, 2008) 3, 5.

³ See Gene Healy, ed., *Go Directly to Jail: The Criminalization of Almost Everything* (Washington, DC: Cato Institute, 2004).

⁴ William J. Stuntz, “The Pathological Politics of Criminal Law,” *Michigan Law Review* 100 (2001): 505-600, at 508.

⁵ “About 1 in 3 black males, 1 in 6 Hispanic males, and 1 in 17 white males are expected to go to prison during their lifetime, if current incarceration rates remain unchanged.” “Prevalence of Imprisonment in the U.S. Population, 1974-2001” <http://www.ojp.usdoj.gov/bjs/pub/pdf/piusp01.pdf> updating the report “Lifetime Likelihood of Going to State or Federal prison,” Bureau of Justice Statistics, available at www.ojp.usdoj.gov/bjs/pub/pdf/lgsfp.pdf.

⁶ Alice Ristroph, “Desert, Democracy, and Sentencing Reform,” *Journal of Criminal Law and Criminology* 96 (2006): 1293-1352, at 1295.

⁷ See Jonathan Simon, *Governing Through Crime* (New York: Oxford University Press, 2007) 152-154.

to David Garland there is a desire not only for rough justice, but “for consuming mediated images of offenders being put to death.”⁸ Garland likens this craving to the desire in the post-Reconstruction South for the public torture and lynching of blacks, particularly those accused of crimes against white women. He writes that “many of the same social functions performed by lynching then are performed by capital punishment now; and much the same political structures that permitted lynchings then, enable capital punishment now.”⁹

A number of scholars contend that the shameful state of affairs described above can be traced to the abandonment in modern jurisprudence of the religious and, in many ways specifically Catholic, roots of the Western legal tradition.¹⁰ The Catholic tradition generally, and specifically its legal legacy, provide a number of guidelines that challenge and, I will contend, correct how we view the guilty, judge them, and treat them once guilt has been established.

As the ethicist, Oliver O’Donovan, surmises, to judge another is to create a new public context.¹¹ The position of the Catholic tradition is that the new “judgmental” context must first reveal mercy and a belief in the infinite and equal worth of every person, regardless of the crime. It is only in that framework that just laws can be enacted, just judgments rendered, just punishment created, and a just forgiveness offered. The following section will present a brief overview of law and judgment within the Catholic tradition.

Catholic Perspectives on Law and Judgment

There is something in the nature of the judgment of others, even the criminally guilty, that presents Christians with a serious quandary. How can I, a sinful person desperately in need of God’s mercy and

⁸ David Garland, “The Peculiar Forms of American Capital Punishment,” *Social Research* 74 (2007): 435-464, at 447, 457.

⁹ *Ibid.*

¹⁰ See, e.g., Manlio Bellomo, *The Common Legal Past of Europe*, trans., Lydia G. Cochrane, (Washington, DC: Catholic University Press, 1995); Harold Berman, *Law and Revolution* (Cambridge, MA: Harvard University Press, 1983); Remi Brague, *The Law of God*, trans., Lydia G. Cochrane, (Chicago: University of Chicago Press, 2008); N. E. Simmonds, *Law as a Moral Idea* (Oxford: Oxford University Press, 2007); John Witte, Jr. and Frank S. Alexander, *Teachings of Modern Christianity on Law, Politics, and Human Nature* (New York: Columbia University Press, 2006).

¹¹ Oliver O’Donovan, *The Ways of Judgment* (Grand Rapids, MI: William B. Eerdmans, 2005), 7.

forgiveness, stand in judgment of another sinner? O'Donovan writes: "To step across into the role of the judge is to leave the position of evangelical strength and to enter the sphere of human weakness and political shame."¹² Despite this, the overriding concern of Catholic theological methodology has been to adopt not an either/or but a both/and approach to dilemmas like the one just posed. The Church confronts challenging conceptual dyads such as nature and grace, faith and reason, or freedom and obedience and finds in efforts to harmonize them a satisfying, though at times frustrating, reminder of the union of all things in Christ, and steadfastly refuses to succumb to ideological reductionism. More to the point, our flawed human condition repeatedly affirms the necessity of both mercy *and* punitive judgment. The fact that neither dialectical pole can be abandoned in Catholic thought has produced rich and divergent constellations of ideas. Three of those constellations can be found in the biblical text, natural law, and in more subjectivist theories such as nominalism and purely penal law.

Law and Judgment in Scripture

Both those who favor and oppose a strong retributive juridic structure in the face of willful wrongdoing can find abundant biblical warrant. St. John equates sin with lawlessness: "to sin is to break the law"¹³; while St. Paul states: "if you pass judgment you have no excuse. In judging others you condemn yourself."¹⁴ Throughout Scripture one finds numerous laments about unjust judges and unjust laws. The psalmist cries: "Ignorant and senseless, they [judges] carry on blindly, undermining the very basis of earthly society."¹⁵ Isaiah states: "Woe to those who enact unjust statutes . . . Depriving the needy of judgment and robbing my people's poor of their rights."¹⁶ Yet these denunciations of immoral judges and legislators who seek personal gain rather than justice, most often in cases involving the poor, in no way subvert the underlying contention that judgment is a necessary function ordained by God.¹⁷ Since there was no law before the sin of our first

¹² Ibid., 86. While the quote does not capture the nuance of the Catholic position, it has rhetorical value in that it brings immediacy to the task of infusing human justice with the humility and forbearance featured so prominently in the Sermon on the Mount.

¹³ 1 Jn 3:4.

¹⁴ Rom 2:1.

¹⁵ Ps 82:5.

¹⁶ Isa 10:1-2.

¹⁷ Dt 1:6-18.

parents, the creation by God of judges to interpret and apply the law reveals not only divine recognition of the ineradicable duplicity of the human heart but also that the institution of government is inseparable from the act of judgment.¹⁸

There are, however, countervailing moral directives. Abel's blood does indeed cry to the heavens for justice¹⁹ but God's response is to disavow vengeance, protecting Cain and cursing anyone who would dare to condemn God's generous decision to provide him with safe passage and peaceful exile.²⁰ Moreover, the author of Hebrews declares that God refuses to accept the human cry for justice, no matter how transparent the guilt of the offender: "the sprinkled blood of Jesus speaks more loudly than the blood of Abel."²¹ In the Gospels, this passage from Hebrews is substantiated in what Christians proclaim as the culminating event in world history. This is the unimpeachable directive, Christ's refusal to pass judgment on his persecutors: "Father forgive them for they know not what they do."²² The events preceding the passion repeatedly reveal the establishment by Jesus of a nonjudgmental reign in which Christians are to forgive those who trespass against them,²³ in which the essential condition to receive divine forgiveness is to render it to one's debtors, oppressors, and enemies,²⁴ and in which Christ himself declares, "Friend, who set me up as your judge or arbiter?"²⁵

Mercy, therefore, is not what might be termed a supererogatory act (above and beyond the call of duty), but rather a foundational requirement of the Christian life.²⁶ This is not only because the Lord commanded it but also because he made it apparent in his analogy of the splinter and the log. The human eye, so compromised in its own vision by the strain of sin, cannot see honestly the worth of others and the true meaning of their acts.²⁷

¹⁸ Donovan, *The Ways of Judgment*, 3-4.

¹⁹ Gen 4:10.

²⁰ Ibid, 4:14-15.

²¹ Heb 12:24.

²² Lk 23:34.

²³ Mt 6:12.

²⁴ Lk 6:27-38; Mt 18:21-35.

²⁵ Lk 12:13-14.

²⁶ Matthew Myer Boulton, "Samaritan Justice: A Theology of Mercy in the 'Neighborhood'" in Jonathan Rothchild et al, eds., *Doing Justice to Mercy* (Charlottesville, VA: University of Virginia Press, 2007), 129-144.

²⁷ Mt 7:3-5.

St. Ambrose, commenting on Paul's famous insistence that Christians can find neither freedom nor salvation in obedience to law, wrote:

Paul says, "through the law I died to the law, that I might live to God;" which is to say that through the spiritual law he is dead to the material interpretation of the law. Let us, too, by the law of our Lord Jesus Christ, die to this law which gives authority to treacherous decrees! Faith in Christ, not law, founded the church."²⁸

Yet St. Paul also urges the Christians in Corinth to "hand over to Satan" the community congregant sleeping with his stepmother.²⁹ They are to guard steadfastly the moral integrity of the faith community by enforcing the strict disciplinary requirements of the Gospel and refusing fellowship with those in defiance of them.³⁰ The Gospels also establish a clear procedure for judgment of sinful Christians³¹ as well as the authority of binding and loosing (excommunication and forgiveness) conferred upon the apostles.³² Finally, Paul sets the tone for subsequent Christian defense of the political order and its office of judgment and prosecution in his famous counsel: that Christians must obey all governing authorities, not only because they are instituted by God but also because their swift and terrible repression of the sinful and disobedient reveals God's own recognition of such policy as a necessary social requirement.³³

This rich and divergent set of biblical claims could hardly yield a single and settled understanding of law and judgment. Indeed, the clashes among seminal and influential thinkers on these matters surfaced early in Catholic tradition and reverberate to our own day.

Law, Society, and Judgment as Natural

Catholic social thought has been deeply influenced by the natural law.³⁴ For example, since the beginning of modern Catholic Social Teaching

²⁸ St. Ambrose, "Sermon against Auxentius" in Oliver O'Donovan and Joan Lockwood O'Donovan, eds. *From Irenaeus to Grotius: A Sourcebook in Christian Political Thought* (Grand Rapids, MI: William B. Eerdmans, 1999), 72.

²⁹ 1Cor 5:5.

³⁰ Rom 16:17; 1 Cor 6:9-10.

³¹ Mt 18:15-18.

³² *Ibid.*, 16:19; 18:18.

³³ Rom 13:1-4.

³⁴ Natural law is an ancient ethical formula, dating back to the Greeks and evident in the thinking of St. Paul (cf Rom 2:14-15). In a more formal sense, the declaration by Gregory VII in 1075 of the independence of the church from secular influence inaugu-

(CST) with the publication of *Rerum novarum* in 1891, virtually every social encyclical up to and including the papacy of Paul VI derived its implicit, if not explicit, foundation from this stance.³⁵ The fact that these encyclicals are addressed not only to Catholics but “to all men [and women] of good will” implies fundamental tenets of the natural law. Among these are: that reason is compromised, but not inherently corrupted, by sin; that one’s faith stance is not a detriment to the assent to the proclamation of truth; and that positive law, properly promulgated and ordained to the common good of all citizens, must be obeyed and its violation curtailed by state intervention.³⁶

In the mid-twelfth century, Rufinus the Canonist wrote that natural law “is a kind of natural propulsion, implanted by nature in each person, to do good and avoid evil.”³⁷ Virtually identical is the description provided by St. Thomas Aquinas.³⁸ Gratian, the twelfth century monk and first architect of Canon law, begins his seminal work, *The Decretum*, with these words: “The human race is ruled by two [means] namely natural law and usages. Natural law is what is contained in the Law and the Gospel by which each is commanded to do to another what he wants done to himself.”³⁹ In the fifteenth century, Nicholas of Kues, echoing Aquinas, drew these timeless conclusions for our topic: “All legislation is based on the natural law and any law which contradicts it cannot be valid. Hence since natural law is naturally based on reason, all law is rooted by nature in the reason of man.”⁴⁰

rated the creation of canon law and a universal set of Catholic teachings and beliefs, many of which reveal the influence of natural law.

³⁵ Charles E. Curran, *Catholic Social Teaching 1891-Present* (Washington, D.C.: Georgetown University Press, 2002), 23-37.

³⁶ St. Thomas wrote that law is an ordinance of reason, promulgated by due authority, and ordained to the common good. See *Summa Theologica*, trans., Fathers of the English Dominican Province, (New York: Benziger, 1947), I-II, Q. 90, a. 4. There are several collections of Catholic social encyclicals. See, e.g. Joseph Gremillion, ed. *Gospel of Justice and Peace* (Maryknoll: Orbis, 1976); David J. O’Brien and Thomas A. Shannon, eds., *Renewing the Earth* (Garden City, NY: Image, 1977). On the natural law within the tradition, see Stephen J. Pope, “Natural Law in Catholic Social Teachings” in Kenneth R. Himes, ed., *Modern Catholic Social Teaching* (Washington, DC: Georgetown University Press, 2004), 41-71.

³⁷ Rufinus the Canonist, “Summa Decretorum” in O’Donovan, *From Irenaeus to Grotius*, 300.

³⁸ Aquinas, *Summa Theologica*, I-II, Q. 94, a. 2.

³⁹ Quoted in Brian Tierney, *The Idea of Natural Rights* (Atlanta: Scholars Press, 1997), 58.

⁴⁰ Nicholas of Kues, “The Catholic Concordance” in O’Donovan, *From Irenaeus to Grotius*, 544.

The lasting importance of this concept is virtually assured; it still is invoked widely among intellectuals as a foundational legal and moral philosophy. It also inspires socially committed men and women in every generation with its contention that law must be honored because it is an inherently moral reality and that “inquiry into the nature of law is ultimately a form of moral inquiry.”⁴¹

Such a formulation provides a direct challenge to the dominant philosophy of legal positivism in our own day with its fully pragmatic and procedural appraisal of law’s meaning and content.⁴² Natural law thinkers maintain that public adherence to the demands of law is not a result of cost-benefit analysis or other materialist motives. It results from the virtues inculcated in citizens through family, church, and civic association that enable the will to consent to what reason affirms: that law establishes the order and justice essential to both human and spiritual fulfillment.⁴³ Law is not simply “what we do around here” but a necessary institution for the protection and fostering of the common good.⁴⁴ This formal characteristic is of the utmost value when force and judgment must be levied upon those who neglect or deviate from the moral consensus underlying legal statutes.

Justice demands that lawbreakers be punished. The basic justification for the infliction of corporal detention is that harm caused to others through disregard for law is doubly culpable. The first violation is violence to others and, by extension, to the whole community; the second is a disruption of the perfect order established by God in creation. Pre-eminent thinkers such as St. Anselm, St. Thomas Aquinas, and Peter Abelard were in near perfect agreement in this understanding.⁴⁵

True to the Catholic tradition and its commitment to dialectical balance, however, justice is barely recognizable without equity and mercy.

⁴¹ Simmonds, *Law as a Moral Idea*, 6.

⁴² Richard Posner, a leading scholar in what has been termed the “Chicago School” in both law and economics has written: “the common law is best understood as a pricing mechanism designed to bring about an efficient allocation of resources.” See George E. Garvey, “A Catholic Social Teaching Critique of Law” in Michael W. McConnell et al., *Christian Perspectives on Legal Thought* (New Haven: Yale University Press, 2001), 224-240 at 228.

⁴³ “The purpose of human law is to lead men to virtue, not suddenly, but gradually.” Aquinas, *Summa Theologica*, I-II, Q. 96, a. 2.

⁴⁴ N. E. Simmonds, *Law as a Moral Idea* (Oxford: Oxford University Press, 2007), 10, 14.

⁴⁵ D. E. Luscombe, trans., *Peter Abelard’s Ethics* (Oxford: Clarendon, 1971), 89; Joseph M. Collier, trans., *Anselm of Canterbury, Why God Became Man* (Albany: Magi Books, 1969), I, 11; Aquinas, *Summa Theologica*, I-II, Q. 87, a.6.

Aquinas followed Aristotle in his contention that pure legal justice, such as one finds in American courts today with sentencing grids and mandatory minimum sentences, is inferior to particular justice where the magistrate takes the circumstances of the case into account and judges with equity.⁴⁶ Implied here is a recognition that wrong must be seen in the context of the subject's own story and cannot become the controlling factor in the judgment rendered for a legal infraction.⁴⁷ This personal approach is echoed in recent Catholic theology by Karl Rahner who observes that sin is a "permanent existential" and indelible part of the human condition. This results from the inevitable constraints not only on human freedom but also on each person's ability to determine the proper course of action due to the limitations of knowledge, heredity, and other powerful instrumental factors.⁴⁸ In accord with justice as conceived in the Sermon on the Mount, this innate fallibility requires those who judge to temper righteous indignation with humility and compassion.⁴⁹

Classic natural law theory always contains an element of subjectivity. Aquinas wrote that there was room for wide variation the more one moved from general precepts of natural law (do good, avoid evil; respect life; seek the truth and the common welfare; worship God), to application of these in specific cultural locales and situations.⁵⁰

This was most cogently presented by his use of *epikeia*. The concept of *epikeia* was recovered in the revival of interest in early Greek philosophy during the Middle Ages. It has influenced Catholic thinkers extensively and not without controversy. *Epikeia* means that in cases of doubt as to how a precept is to be applied, one has the moral and social freedom to interpret how the lawgivers might have responded had they encountered the same situation.

Giles of Rome wrote that there are three ways doubts could arise concerning the binding force of a statute: "The first is when certain cases arise which are as it were outside the laws . . . Second . . . when certain cases arise in which it is difficult to observe the laws . . . Third,

⁴⁶ Aquinas, *Summa Theologica*, II-II, Q. 58. a. 7; J. A. K. Thompson, trans., Aristotle, *Ethics* (Hammondsworth, UK: Penguin, 1955), II, 7.

⁴⁷ Alice Ristroph approximates this commitment in her advocacy of what she terms "holistic" retributivism. See "Desert, Democracy, and Sentencing Reform," 1342.

⁴⁸ Karl Rahner, *Foundations of Christian Faith*, trans., William V. Dych, (New York: The Seabury Press, 1978), 104.

⁴⁹ See Kevin Jung, "Fallibility and Fragility" in Rothchild et al, *Doing Justice to Mercy*, 206-221.

⁵⁰ Aquinas, *Summa Theologica*, I-II, Q. 96, a. 6.

judgments of judges are wont to vary by reason of doubtfulness.”⁵¹ Aquinas’ own reverence for law placed moral constraints upon the judgment rendered by the doubtful subject, lest it become a justification for license, but he still placed *epikeia* within the purview of legal equity and maintained that it was as much an element of justice as the mandate of the judge to punish criminal acts.⁵²

Thus the second attempt by Catholic thinkers to balance law and judgment sought, finally, to bring harmony to freedom and mercy on one hand, and to order, obedience, and judgment on the other. Despite its impressive intellectual merits, some important interpreters of the natural law took a much more subjective reading of law and judgment. Their insights have had a legal and social impact that extends to the present day.

Nominalism and Purely Penal Law

St. Francis is one of the most revered spiritual figures of all time. His love of all creation, radical poverty, and repudiation of violence continue to inspire men and women today as in preceding generations. Francis is rarely thought of in revolutionary terms, but his thoughts concerning rights, law, and human freedom unleashed a storm of controversy whose influence has been decisive in the evolution of these concepts. Francis and his followers were a literal “cradle of rights doctrines.” They were radical exemplars of personalism and individualism in their reduction of the cosmic to the particular. In fact, for Francis and the movement he generated, the cosmic *was* the particular as each living being embodied the fullness of the divine and summoned the care and devotion directed to the divine.⁵³

St. Bonaventure (d. 1274) was the first to translate the Franciscan ethos of absolute poverty into a legal theory and it came to the fore subsequently in a conflict with Pope John XXII over whether the Franciscans had a “right” to own anything and, therefore, whether Christ and the disciples did as well. The Franciscans said no and the Pope said yes.⁵⁴ The

⁵¹ Giles of Rome, “On Ecclesiastical Power,” in O’Donovan, *From Irenaeus to Grotius*, 376.

⁵² “In these and like cases it is bad to follow the law, and it is good to set aside the letter of the law and to follow the dictates of justice and the common good. This is the object of ‘epikeia’ which we call equity. Therefore it is evident that ‘epikeia’ is a virtue.” *Summa Theologica*, II-II, Q. 120, a. 1.

⁵³ Brian Tierney, *The Idea of Natural Rights* (Atlanta: Scholars Press, 1997), 35.

⁵⁴ *Ibid.*, 94ff. See also, A. S. McGrade, *The Political Thought of William of Ockham* (Cambridge: Cambridge University Press, 1974), 4-24.

controversy is fascinating and bears strongly on our topic in that one of the most brilliant of the Friars, William of Ockham, took a public stand in defense of the order and against the pontiff. Ockham's defense was based on two concepts. The first dealt with the absolute sovereignty of God and presented a core nominalist principle, namely that the divine will is independent of any human understanding or control. As Tierney states, summarizing Ockham: "God could create an alternative universe of values in which adultery, stealing and lying might be virtuous."⁵⁵ This leads to Ockham's second thesis: the descending order of authority from God to humans (via the natural law) and, by extension, to legitimate government (via the human law) was baseless and invalid. "I claim that positive moral science, e.g., the science used by jurists, is not a demonstrative science in many ways. For the arguments of jurists are based on positive human laws, which do not include evidently known propositions."⁵⁶ He believed that the only moral principles concerning government that God communicated directly to human reason were those contained in the Bible. In these, the authority of rulers (other than the people of God) was not accorded clear origin.⁵⁷ For example, Christ accepted Pilate's authority to condemn him to death but in no way suggested approval or endorsement of the moral legitimacy of Roman rule.⁵⁸ In reference to the Franciscan dispute, Ockham argued that the Franciscans (and, *a fortiori*, Christ) had no positive legal right to the objects they used, but possessed a natural right common to all to use the things of the earth. Therefore, natural rights create just actions even in the absence of a right guaranteed by law.⁵⁹

Certainly, Scripture provides "right reason" (reason guided by virtue), a tool in the determination of which laws are justly imposed, but Ockham broadened the subjective determination of rightful conduct far more than did Aquinas with the concept of *epikeia*.

⁵⁵ Tierney, *The Idea of Natural Rights*, 98.

⁵⁶ William of Ockham, *Quodlibetical Questions* Vol. I, trans., Alfred J. Freddoso and Francis E. Kelley, (New Haven: Yale University Press, 1991), Q. 14, a. 3.

⁵⁷ Tierney, *The Idea of Natural Rights*, 98. See also, Hamilton, *Political Thought in Sixteenth-Century Spain*, 25.

⁵⁸ Ockham was not opposed to the coercive function of law. The chief function of government in his opinion was the negative one of restraining evildoers. This capacity, however, was not an expression of divine ordinance. McGrade, *The Political Thought of William of Ockham*, 101, 115.

⁵⁹ Tierney, *The Idea of Natural Rights*, 121, 130. Ockham stated: "But for the sake of necessity it is permissible to act against a divine commandment, even one that is explicit, in things not evil in themselves but evil only because they are prohibited." See William of Ockham, "A Dialogue on Papal and Royal Dignity" in O'Donovan, *From Irenaeus to Grotius*, 461-62.

The issues of poverty and ownership in this dispute were a catalyst for the spreading of the idea of rights as a power of free persons and not simply as objective determinations of conduct contained in the law. The words of St. Paul were echoed in the controversy: “All things are licit for me.”⁶⁰ Proponents of this movement understood Scripture differently than those of natural law. This resulted in a loosening of the unquestioned moral legitimacy of law, its mechanism of judgment, and the punishment inflicted upon those who hold it in contempt.

The other challenge to natural law, one as formidable as that of Ockham, came at the end of the sixteenth century from the Spanish Jesuit, Francisco Suarez. With his theory of “purely penal law” he paved the way for many of the basic assumptions held by contemporary jurists.

An intellectual descendent of both Aquinas and Ockham, Suarez was committed to a course that would harmonize the natural law with the growing emphasis on rights as a power inherent in the individual. Unlike his traditional contemporaries, his theory contended that the sovereignty of the ruler and the laws enacted by the ruler were substantiated not by a direct donation of power from God but by will and consent.⁶¹ Suarez maintained that in seeking to enact a law, the ruler would first determine the various alternatives according to the end established for government (service to the common good). In this, he was standing directly in the shadow of Aquinas. But then Suarez argued that the final decision resided not in the reason but in the will of the sovereign who determines the given law and commands all subjects to obey it.⁶² His overall legal theory can be summed up in the following comment on international law: “The law of nations is constitutive, not demonstrative of evil. It does not forbid things because they are evil, but makes them evil by forbidding them.”⁶³

Suarez cannot be accused of encouraging lawlessness; he had a firm commitment to the legitimacy of government, particularly when subjects gave their consent to the political order.⁶⁴ In stunning contrast

⁶⁰ 1 Cor 10:23.

⁶¹ Tierney, *The Idea of Natural Rights*, 301-302.

⁶² Law is thus founded on two acts of the will: first the decision concerning the decree (*electio*), then the command to obey (*usus*). See David Cowan Bayne, *Conscience, Obligation, and the Law* (Chicago: Loyola University Press, 1966), 41-42.

⁶³ Francisco Suarez, “Laws and God the Lawgiver” in O’Donovan, *From Irenaeus to Grotius*, 727-28.

⁶⁴ Hamilton, *Political Thought in Sixteenth-Century Spain*, 51; Jose Pereira, *Suarez: Between Scholasticism and Modernity* (Milwaukee: Marquette University Press, 2007), 88-89.

to natural law theorists, however, was his contention that law, an act finally of the will rather than reason, does not morally bind in conscience.⁶⁵ Repeating a phrase that dates at least from Gregory the Great, Suarez argued that the sovereign punished “*sine culpa, non tamen sine causa*” (without fault, not however without cause).⁶⁶ This means that a legislator may justly punish disobedience but the guilt of the perpetrator is nonmoral and purely political. Herein lies the foundation of Suarez’s conception of purely penal law and the freedom of the conscience in relation to it: “It can be proven, however, that strictly speaking those who violate purely penal law are not guilty of sin . . . because that which follows from an honest conscience is not sin.”⁶⁷

This is similar to the philosophy of those who practice civil disobedience to what they determine to be unjust laws, and accept the punishment meted out for that stance. Suarez argued that there was a moral obligation in promulgated law but that obligation resided in submitting to the penalty not to any ontological truth in the law’s command.⁶⁸

We began this section with the sense that the antinomy in Scripture between just penal judgment and the freedom of the Christian in all, save mercy and forgiveness, would yield a similar harvest of ideological dualism among subsequent generations of Christians. Having discussed some of the variations in legal interpretation within the tradition, we now proceed to summarize how current CST has drawn from each of those perspectives to present a comprehensive ethical vision of law and judgment that has immediate relevance for the conceptual and practical flaws in current criminal justice practices.

Law and Judgment in Current Catholic Social Thought

Catholic Social Thought, whether in doctrinal texts or in the social encyclicals, contains a strong bias in favor of the legitimacy of government, its right to judge illegal behavior, and its moral authority to punish the culpable: “In order to protect the common good, the lawful public authority must exercise the right and duty to inflict punishments according to the seriousness of the crimes committed.”⁶⁹ This notion is

⁶⁵ It is noteworthy that in locating freedom in the will, Suarez references both Bonaventure and Ockham. See Bayne, *Conscience, Obligation, and the Law*, 44.

⁶⁶ *Ibid.*, 45-46.

⁶⁷ Quoted in Bayne, *Conscience, Obligation, and the Law*, 48.

⁶⁸ *Ibid.*, 47.

⁶⁹ United States Catholic Conference, Inc.—Liberia Editrice Vaticana, *Catechism of the Catholic Church* (New York: Doubleday, 1995), 2266.

ancient, not only found in Scripture but also throughout the tradition of the Church. Irenaeus wrote at the turn of the third century: “For since man, by departing from God . . . engaged in every sort of disordered conduct . . . God imposed upon mankind the fear of man . . . in order that, being subjected to the authority of men, and under custody of their laws, they might attain to some degree of justice.”⁷⁰ Aquinas argued that the final end of each person, union with God, was dependent on the training in the cardinal virtues (prudence, justice, fortitude, temperance), a task in which the state and its laws were primary agents.⁷¹

This positive designation of the state as a necessary moral force in both civic and Christian life does not, however, summarily dismiss the more pragmatic or opportunistic view suggested in the thought of figures like Ockham and Suarez. Beginning with the encyclicals of Pope John Paul II, the pre-eminence of natural law (and its descending logic of legitimate authority) has given way to a more phenomenological approach to social questions. While revering the natural law, Pope John Paul II was often highly critical of the injustices in modern society. He also echoed Catholic theological convictions concerning the reality of social sin, specifically, how the institutions of society, legal institutions among them, mask a draconian assault on the vulnerable beneath a rhetoric of freedom and respect for the common good. Officially, the recognition of the reality of social sin was first seen with the publication of *Gaudium et spes* during the Second Vatican Council: “To be sure, the disturbances which so frequently occur in the social order result in part from natural tensions . . . But at a deeper level they flow from man’s pride and selfishness, which contaminate even the social sphere. When the structure of affairs is flawed by the consequences of sin, man, already born with a bent toward evil, finds there new inducements to sin, which cannot be overcome without strenuous efforts and the assistance of grace.”⁷²

For his part, John Paul II wrote that “structures” of sin “opposed to the will of God” and “the good of neighbor” manifest themselves in two

⁷⁰ Irenaeus of Lyons, “Against Heresies” in O’Donovan, *From Irenaeus to Grotius*, 17.

⁷¹ “[The] governance of every provident ruler is ordered either to the attainment, or the increase, or the preservation of the perfection of the things governed.” St. Thomas Aquinas, *On the Truth of the Catholic Faith*, trans., Vernon J. Burke, (Garden City, NY: Image Books, 1956), III, 73, 2. “[S]ociety must have the same end as the individual man. Therefore, it is not the ultimate end of the assembled multitude to live virtuously, but through virtuous living to attain the possession of God.” *On the Governance of Rulers*, trans., Gerald B. Phelan, (London: Sheed & Ward, 1938), I, 14.

⁷² “Pastoral Constitution on the Church in the Modern World” (*Gaudium et spes*) in Walter M. Abbott, ed. *The Documents of Vatican II* (New York: Guild Press, 1966), 25.

principal ways: “On the one hand, the all-consuming desire for profit, and on the other, the thirst for power, with the intention of imposing one’s will upon others. In order to characterize better each of these attitudes, one can add the expression, ‘at any price.’”⁷³

These ideas concerning both the legitimacy and sinfulness of the state’s legal and punitive functions reveal that current CST has absorbed the best ideas contained in the Church’s intellectual heritage, regardless of the tensions that appear to rule out their harmonious union. In effect, this binding of apparent opposites traces back to the New Testament, as we noted in the first section.

Another theme in current Church teaching, a close parallel to the one just discussed, is the goal of reconciling judgment and punishment with mercy and forgiveness. Whether one approaches willful breaches of the social contract from the perspective of natural law or purely penal law, the plain-sense view of the tradition is that one must accept the punishment for one’s actions, even if such actions are in accord with a properly formed conscience.⁷⁴ The tradition also firmly insists that moral constraints be placed upon the structures of criminal justice to abjure prejudice, to judge leniently, to encourage remorse rather than inflict pain, and to offer forgiveness to the repentant offender: “There is a two-fold purpose here. On the one hand, encouraging the re-insertion of the condemned person into society; on the other, fostering a justice that reconciles, a justice capable of restoring harmony in social relationships disrupted by the criminal act committed.”⁷⁵

We have already noted that even for those convinced that the state ultimately executes God’s own justice, equity was considered an integral part of justice. Gregory the Great stated that “all who are over others ought to consider in themselves not the authority of their rank, but the equality of their condition, and rejoice not to be over man, but to do

⁷³ John Paul II, *On Social Concern (Solicitudo rei socialis)* (Boston: St. Paul Books, 1987), 37.

⁷⁴ Augustine argued that Christians must make use of the “peace of Babylon” and obey all laws of the earthly city since even bands of robbers desire to live in peace. He extended this duty of obedience to include those who were being unjustly punished. See St. Augustine, *City of God*, trans., Henry Bettenson, (Harmondsworth, UK: Penguin, 1984), XIX, 12; I, 9. Similarly, Aquinas stated that without order “the benefit of social life is lost” and that the innocent ought to accept punishment for the sake of the common good. See *On the Governance of Rulers*, I, 2; *Summa Theologica*, II-II, Q. 42, a. 2. See also, Bayne, *Conscience, Obligation, and the Law*, 47.

⁷⁵ Pontifical Council for Justice and Peace, *Compendium of the Social Doctrine of the Church* (Washington, DC: United States Conference of Catholic Bishops, 2005), 403.

them good.”⁷⁶ In the Middle Ages, John of Salisbury wrote that “the uncorrupted judge is one whose determination is on the basis of the assiduous contemplation of the image of equity.”⁷⁷

These common beliefs of our theological and spiritual forebears in the Catholic tradition are accompanied by a final one that bears particular relevance in today’s penal climate. The infliction of pain on another, although done in compliance with laws agreed upon by common consent, is a sober and fearsome task that requires a humble and penitential reverence to God as the ultimate judge and to those upon whom righteous vengeance must fall. James Whitman has noted that the modern legal framework, in which witnesses are compelled to offer evidence of fault and juries to pronounce the defendant culpable and worthy of punishment, is not a result of democratic reform but coercion. Our judicial and legislative ancestors, well aware of the Gospel’s directive to refrain from judging others lest a similar judgment be levied by God against them, initiated the method whereby common people, reluctant as the ruling authorities to condemn others, were forced under threat of penal sanction, to put their own souls in jeopardy so as not to endanger the salvation of their lords.⁷⁸

This long-standing recognition of the deep ambiguity of punishing others can be found in current Catholic Social Teaching where a holistic approach to sentencing is encouraged, one that takes into account not only an appropriate punishment for offenses committed but also the well-being of offenders, their families, and their communities of origin. Furthermore, the Church espouses a restorative approach to justice in which a proper restitution can be made to the victim after a mediated interchange. The hope is that there will be closure for those affected by the crime as well as forgiveness and restoration.⁷⁹

In their recent presentation of a Catholic perspective on criminal justice, the Catholic Bishops of the United States integrate the various lines of historical speculation on law and judgment into a theory capable of providing a searing and constructive critique of current justice dynamics. At the Scriptural level, the bishops embrace the divine call

⁷⁶ Gregory the Great, “Pastoral Rule” in O’Donovan, *From Irenaeus to Grotius*, 197.

⁷⁷ John of Salisbury, “Policraticus” in O’Donovan, *From Irenaeus to Gortius*, 283.

⁷⁸ James Q. Whitman, *The Origins of Reasonable Doubt* (New Haven: Yale University Press, 2008).

⁷⁹ See Catholic Bishops of the United States, *Responsibility, Rehabilitation, and Restoration* (Washington, DC: U. S. Catholic Conference, 2000), 28-41; *Compendium of the Social Doctrine of the Church*, 403.

for both justice and mercy: “Just as God never abandons us, so too we must be in covenant with one another. We are all sinners, and our response to sin and failure should not be abandonment and despair, but rather justice, contrition, reparation, and return or reintegration of all into the community.”⁸⁰ They honor the natural law “that resides within the hearts of individuals” and uphold the traditional emphasis on government as executor of God’s moral law: “We cannot and will not tolerate behavior that threatens lives and violates the rights of others. We believe in responsibility, accountability, and legitimate punishment . . . The community has a right to establish and enforce laws to protect people and to advance the common good.”⁸¹ Yet, they also reinforce the opposition to irresponsible and unjust governance so pronounced in contemporary CST, echoing the counsel of Ockham and Suarez. The bishops lament the “racism and discrimination” that haunt not only our nation but also our penal system and they decry the “rigid formulations” that now define sentencing policy and the “failure” of severely punitive legislation enacted for many youthful offenders.⁸²

With this firm yet generous understanding of justice, judgment, and law, the Catholic tradition, particularly in the remarkable synthesis achieved in current social doctrine, can offer much to the cynical, punitive, and overly selective approach to criminal justice practiced today in the courtrooms of the United States. The current positivist approach provides law with only two attributes: a rigorous scientific methodology and a commitment to law as nothing more than the rules established at a given place and time and enforced by the courts.⁸³ It is summed up in the writing of Justice Oliver Wendell Holmes who did so much to steer American jurisprudence in a positivist direction and to deny any foundational meaning to the legal process. Holmes stated: “I should be glad if we could get rid of the whole moral phraseology which I think has tended to distort the law.”⁸⁴

In effect, legal positivism reintroduces a purely penal approach to law but one stripped of the commitments of its founders. In its current form, compliance is secured through a combination of state power and appeal to the self-interest, not the moral conscience, of the citizenry.⁸⁵

⁸⁰ Catholic Bishops, *Responsibility, Rehabilitation, and Restoration*, 18.

⁸¹ *Ibid.*, 20, 16.

⁸² *Ibid.*, 28.

⁸³ Witte and Alexander, *The Teachings of Modern Christianity*, I, xxii.

⁸⁴ Quoted in Bayne, *Conscience, Obligation, and the Law*, 21.

⁸⁵ John Witte, Jr., *God’s Joust, God’s Justice* (Grand Rapids: William B. Eerdmans, 2006), 289.

It takes an agnostic view of what Suarez, Ockham, and Aquinas all held in the deepest regard: the inviolable sacredness of each human life. It fails to replicate the complex moral system of figures such as Ockham and Suarez who steadfastly delineated the difference between law as an act of willful power and law as a legitimate reflection of Scriptural truth and a communal desire to foster harmony, order, and justice.⁸⁶

In similar fashion, some contemporary legal theorists have noted the distinct impact of canon law (deeply ingrained as it is with natural law theory) upon the foundations of Western legal systems, and argue that a similar transcendent legal ethos must be re-embraced. Their argument (following Aquinas) is that law functions according to its true nature when it aims to uplift the quality of life of all citizens. Civic compliance to law is not a function of law's power to coerce but its ability to evoke a truthful conception of the good life that all who are rational affirm in the depths of their being.⁸⁷ Finally, recent historical accounts of the development of the judicial system reveal that contemporary courtroom dynamics were determined in large part by a biblically inspired fear to face the terrible burden of passing judgment, rather than through humanist cries for democratic procedure.

There is much convincing evidence that the current economy of criminal justices suffused with racial and class bias, is overly punitive, and lacks the ability to summon from the populace a sense of moral regard for legislative enactments. This paper has suggested that part of the reason for these failures can be traced to a lack of knowledge about and appreciation for the tradition responsible for much of the legal structure. A second explanation lies in the critical failure to acknowledge that law can neither bind us to the obligations and sacrifices it entails nor dispense true justice without an *a priori* commitment to the inestimable worth of every human life.

The CST has bequeathed to us a legal philosophy that is both speculative and practical. It cherishes law, properly promulgated, but contains a host of checks upon irresponsible and self-serving legislation. It sanctions the judgment and punishment of malefactors but rejects retribution lacking in attentiveness to individual circumstance and forgetful of the mercy owed to all. Finally, it makes an assertion that is not legal but theological in origin, namely that every life is sacred. It is this

⁸⁶ Ockham, for instance, firmly believed that law was necessary to curb the evil tendencies of human nature while, at the same time, promoting and defending human freedom. See McGrade, *The Political Thought of William of Ockham*, 213-215.

⁸⁷ Berman, *Law and Revolution*, 16-18; Brague, *The Law of God*, 256-64.

latter commitment that gives law its meaning and justice its force; and without it, no law can bind and no judgment can be just.

Implications for Catholic Higher Education

The Catholic faith community assures its vibrancy by a continual conversation with its past. Scholars have noted that the real test for all institutions, not to mention human beings, is their ability to weather epistemological crises, that is, to face honestly and openly, new and challenging information. The strongest institutions and people rely on a faith that sees everything as gift.⁸⁸

Catholic social ethics deserves a cherished place in the academic curriculum not only because it directs itself consciously to the most pressing ethical issues of our day, but also because it confronts them from a unified and unique perspective, grounded in social responsibility and eschatological hope. Since the Western legal tradition and its methods of criminal sanction both derive from movements and theological developments within the Church, a focused study of CST in these vital areas can provide students with the intellectual resources necessary to guide contemporary society in its quest to craft an effective and redemptive system of criminal justice.

⁸⁸ See Stanley Hauerwas, *A Community of Character* (Notre Dame: University of Notre Dame Press, 1981) 129-152; "The Nonviolent Terrorist: In Defense of Christian Fanaticism" in Michael L. Budde and Robert W. Brimlow, eds. *The Church as Counter-culture* (Albany: State University of New York Press, 2000) 89-104; John Milbank, *Being Reconciled: Ontology and Pardon* (London: Routledge, 2003).

