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**Punishment in the Philosophy of Saint Thomas Aquinas
and Among Some Primitive Peoples**

A DISSERTATION

Submitted to the Faculty of the School of Philosophy of The Catholic
University of America in Partial Fulfilment of the
Requirements for the Decree of
Doctor of Philosophy

by

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INTRODUCTION

The existence of punishment is as old as human nature, or very nearly so. In the written account of the story of Adam we have the first example of law, predetermined punishment, crime and the imposition of the penalty. We have too the first account of individualized punishment. For Eve, in as much as she had not-only personally offended against the law, but had also persuaded Adam to sin, received a heavier penalty. Throughout the story of man runs the thread of crime and punishment. Lest this may sound too pessimistic, it may be added, that woven in with the warp of crime and punishment is the woof of virtue and reward; for it is evident that there have been virtuous men as well as criminals, and it is also evident that criminals, through expiation, have become virtuous men.

Wherever men have gathered into society, there have been good men and bad. Society has not as much concern with the good men as with the bad. They destroy the balance that is so necessary for the attainment of society's purpose. This purpose, or end of society is, according to Dante: "Happiness which is secured by the maintenance of peace, by safeguarding liberty, by maintaining justice and controlling the greed of men." This concept of Dante's falls a little short of Saint Thomas' idea. "Let the state secure all the good it can for the people; but let the Church inspire the state with the sweet sanity of subordinating the lower aspirations to the higher; of moderating human appetites, that every man may have enough of life's necessities, and that each joy may yield its fullest; and finally of referring all to the Source of all."²

Both of these ideas of the purpose of the state have as necessary consequences the repression and the conversion of those who seek

¹Rolbiecki, John J. "The Political Philosophy of Dante." p. 79.

²Murphy, Ed. F. "St. Thomas' Political Doctrine and Democracy." p. 178. cfr. also Summa Theol. 2a 2ae q. LVIII, a. 1, ad 6.

personal good instead of, and in opposition to, the common good. Those who seek intemperately personal good in preference to the common good are criminals, and their lives are and always have been a menace to the law-abiding citizens. Punishment has always been used to repress and convert these men. The existence of punishment is an undeniable *fact*. However, there are many things pertaining to punishment which are disputed. What is the nature of punishment and penalty? If, as Dresser says, pleasure and pain are hardly distinguished, that “pleasure is persistently connected with its opposite,”³ how are we to define punishment? What is the purpose of punishment and how is one liable to penalty? In the field of the social sciences there is a moot question today as to the relationship of freedom and responsibility to the infliction and suffering of punishment. Moreover, it is evident that all punishments are not and cannot be equal, so how are we to regulate and provide for this inequality? Man is essentially a social animal, and so wherever we find man, we find him as a member of the group. This life in the group necessarily curtails individual license in the members for very often group purpose and individual interests are at variance. This divergence of objectives postulates law by which individuals are guided to their own destinies.

All individuals do not conform or submit themselves to this guidance. Because of this lack of conformity, society is perpetually faced with the problem of regulating those who break the law. This regulation must always preserve a two-fold purpose, namely, the good of society and the good of the individual.

Today there is a wide-spread interest in this problem, and everywhere thinkers are seeking a solution to the question of crime and punishment. There seem to be two schools of thought on this subject—one school, which advocates the bestowing of rewards and blandishments in the vain hope that men, being naturally good, will be led to virtue by these rewards, seems more or less to have gained the upper hand today. The other school, which believes in sharp and condign penalties for those who break the law, is not as popular as the sentimental school. We

•Dresser, Horatio W. “Ethics in Theory and Application.” p. 119-120.

lean to the support of the second school, for with Pascal we say that justice without force is impotent, and force without justice is tyrannical.

It must be said that today we have a world of repressive measures. We have a veritable wilderness of statutory laws. But what we need today is a philosophy of penalty, a philosophy that will attempt to solve the problem, not by filling in chinks in the already gaping apertures of the social order, but which will propose right remedial measures. In order to do that we must go back and study the nature of man as he is and not as a sentimental philosophy would wish him to be.

The purpose of this study is to expose a complete philosophy of punishment. After the presentation of this philosophy we intend to compare it with actual primitive practice among those peoples who most probably were totally uninfluenced by any doctrines of Mediterranean civilizations or Mediterranean philosophy. This comparison will, in all probability, be very difficult for it is always difficult to compare that which is with that which should be.

We have chosen to expose the philosophy of Saint Thomas. We chose his philosophy because he stood at the crossroads of the cultural currents which have gone to make up our present-day world. Behind his thought stand the great Greeks—Socrates, Plato, and Aristotle—the gigantic Augustine, and the other great Fathers and Doctors of the Church, the wealth and culture of intellectual development contributed by the Catholic Church and its civilization. At his hand were the intellectual treasures of medieval Christianity and medieval civilization. He thought and wrote before the publication of the theses of Martin Luther in 1517 which caused an upheaval of the civilization that it had taken 1500 years to build. We chose Saint Thomas, not because we believe that a thing is right because he says it, but we believe he says a thing because it is right.

Saint Thomas has developed a very definite penal philosophy based upon the nature of man, on man's aspirations and ultimate end. Upon this philosophy of nature he has built his philosophy of the State. It is our purpose to compare Saint Thomas' phil-

osophy of penalty with penalty as it is actually worked out among primitive peoples.

It is impossible to get back to the actual life and thought of our first ancestors, but it is tenable that in the world today there live, think and act, groups of men who are on the same cultural level as fairly early men. We refer principally to those people who, living on the periphery of the world, have a social and cultural life similar to the very early pre-historic men. The social life of these people is very simple. Their economic complex is based on hunting, fishing and gathering. They have no agriculture or horticulture, and for the most part no domesticated animals. Their cultural life is quite simple, and for the most part, probably uninfluenced by higher cultures.

Our purpose in studying these peoples is to present the cultural life of the earliest men for which we have evidence.

It is our belief that in this way we may arrive at a fair knowledge of the penal practice of early man and by inference his penal philosophy. The people with whom we are concerned are known as lower Nomads and are generally on the lowest level of economic culture. Among the lower Nomad we have confined ourselves principally to those inhabiting the northern fringes of North America, northern and northeastern Siberia, the California area of the United States, and Tierra del Fuego. We have departed in one instance only from America and Asia, namely, the Bushmen of South Africa who inhabit chiefly Southern Angola, parts of the northern and southern Rhodesia, Bechuannaland Protectorate and British Southwest Africa. We chose these Bushmen at random and merely as a sample from another part of the world. The evidence has shown for these people that they are similar to our other Nomadic subjects. In only one instance do they depart radically from the penal procedure of the rest of the Primitives, that is, in the case of trial procedure, which is so developed and so elaborate as to be almost certainly borrowed from their more highly cultured Hottentot neighbors.

Wherever possible we have used only first hand information, and where it was necessary to use secondary sources, we tried to get the best possible, that is, those with the most authority. It may be noted here that in all the Primitive evidence we have

used the present tense. This use has absolutely no time value. It merely means that at some time these people, living on this very low cultural level, practiced the things for which we have evidence. We further observe that we have utterly no intention of proving a thesis. It is not in the least our contention that the Philosophy of the Natural law as formulated by Thomas of Aquin will actually be found worked out in every detail among these primitive peoples. However, we do think that a comparison of these two diverse points of view will be interesting in the formulation of a penal philosophy. Therefore, we present first of all the penal philosophy of Saint Thomas as it is based on reason. In this study we endeavor to abstract from the teaching of Thomas drawn directly from revelation. Then, after presenting the evidence from the Lower Nomadic groups, we attempt a comparison, and draw whatever conclusions may be drawn.

But we feel that the labor has not been wasted. Perhaps the very meager results of this study will encourage others to attempt comparisons in other fields of culture. The comparison of *what is* with *what ought to be* cannot help but be stimulating both to anthropologists and philosophers.

CHAPTER I

SAINT THOMAS—NATURE, GRADES, AND PURPOSES OF PUNISHMENT.

The Nature of Punishment.

Again and again, throughout Saint Thomas' philosophy, where he touches on the sanctions for the observance of law, human and divine, we see that penal sanction always has three elements in it, which will serve us for a definition. Moreover, his concept of punishment is not a technical definition which is limited to any peculiar philosophy. Rather, it is the notion of penalty which all men have, learned and ignorant alike, as Cardinal Zigliara very aptly says.* Saint Thomas says it is of the very nature of penalty that it be contrary to the will, that it be afflictive or painful, and that it be suffered for some sin. Saint Thomas in the *Disputed Question Concerning Evil*, expands this concept of punishment:

Indeed there are three things which are of the essence or nature of penalty. One of these is that which has relationship to the sin, for anyone is said properly to be punished when he suffers evil for something which he has committed. Now the tradition of faith holds this, that a rational creature can incur nothing harmful, whether as regards the soul, or as regards the body, unless some sin has preceded the punishment, either in the person or at least in the nature; and thus it follows that all privation of such good, which anyone can use for operating well among men, is called penalty: and by the same token among the angels. Thus

*Zigliara, Cardinalis Thoma Maria, *Summa Philosophica*, (Editio 16, Paris: Gabriel Beauchesne, 1919), III, 286.

all evil of a rational creature is contained either under sin or under penalty. The *second* thing, which pertains to the very essence of penalty, is that penalty is repugnant to the will. Indeed, the will of anyone whomsoever has an inclination to his proper good. Wherefore to be deprived of one's proper good is repugnant to one's will. However, it must be known that penalty is repugnant to the will in a threefold way. Sometimes (it is repugnant) to the will actually, as when anyone consciously suffers any penalty. Sometimes it is contrary only habitually to the will, as when some good is taken away from a man who is unaware of his loss. This deprivation would cause him to sorrow, if he were aware of it. But sometimes (penalty is) contrary only to the natural inclination of the will, as, when a man is deprived of the habit of a virtue, which man does not wish to have the virtue, although there is a natural inclination of the will to that good of the virtue. The *third* seems to be of the essence of penalty inasmuch as penalty consists of a certain passion. Those things, indeed, which eventuate contrary to the will, are not from an intrinsic principle, which is the will, but from an extrinsic principle, whose effect is called passion.... 2

This rather lengthy quotation serves to show clearly the three essential points in Aquinas' concept of punishment. From this exposition by Aquinas of his thought on the nature of punishment, it can be gathered that punishment is an evil, for that which is contrary to the will and causes passion or suffering is certainly evil;! moreover, it seems that true punishment-must be inflicted for a preceding fault, and it must certainly be contrary to the will of the one suffering it. Billuart, one of the modern commentators on Saint Thomas, takes these elements of definition and formulates from them a strict definition of punishment.

¹St. Thomas Aquinas. O. P., *Questio Disputata de Malo*. Q. 1, art. 4, corpus. (Editio Vives, Paris: 1875.)

He says that punishment is "a punitive and afflictive evil, contrary to the will of the one suffering it, in revenge or retribution for his sin."³ He elaborates and says that if punishment is inflicted for another's sin, or if it is inflicted for medicine, or as a precaution, it is not punishment, strictly speaking.⁴

There can be no doubt about Saint Thomas' opinion concerning the evil of punishment, for he says that penalty always and of its very nature bespeaks something hurtful. Now, anything is hurtful because through it is taken away some good.^{5*} He says again that penalty injures the agent in himself.⁶ He adds that although the evil of penalty is indeed evil, since it deprives a man of a particular good, nevertheless, it is simply or primarily good because it depends on the order to the ultimate end.⁷ He says further that, on the part of the one punished, penalty adds evil to the evil of guilt, but on the part of the punisher, punishment has the nature of justice and order, and through the adjoining of good the guilt is made less evil.⁸

Several aspects of penalty must be analyzed in order that the nature of penalty be made clear. First of all, we must attempt to define exactly what we mean when we say that punishment is an evil, for in the course of the discussion of punishment we shall find that both God and the State must punish. If we transfer terms without explanation, this means that God and the State must perform an evil action or at least must cause an evil to happen to man. So this doubt must be settled, and the sense in which penalty is evil must be explained.

Punishment may be said to be good in several ways. While it is an evil of the one suffering it, yet it is a good of the one punish-

*F. C. R. Billuart, O. P., *Summa Sancti Thomae*, (Editio Nova, Paris: 1895), 11,531.

¹lin'd, p. 532.

²St. Thomas Aquinas, *Commentarium in IV Libros Sententiarum Magistri Petri Lombardi*, IV, Dist. 46, Q. 1, art. 2, q. 4, sol iii, corpus.

³St. Thomas Aquinas, *Summa Theologica* (Editio Faucher, Paris: 1886) I, Q. 48, art. 5, ad argumentum.

⁴*Summa Theologica*, II-II, Q. 19, art. 1, corpus.

⁵*Pe Malo*, Q. I, art. 5, ad 12. Boethius proves this in IV Liber de Consolatione Philosophiae, Prosa 4.

ing justly.⁹ Moreover, fraternal correction (a species of punishment) is an act of charity, and forceful correction is an act of justice.¹⁰ Now, acts of charity and justice are certainly good, since they are acts and perfections of virtues. Wherefore, punishment is good since it is an act of charity and justice. Again, punishment, insofar as it pertains to public justice, is an act of commutative justice.¹¹ This is certainly a good act. However, punishment is not an effect of justice precisely as such, but only insofar as it is proportioned to the crime.¹² It seems that the goodness of punishment is rather in the act of punishing than in the passion of being punished.

Penalty is a species of evil, yet not all evil is penalty. The terms evil and penalty are not absolutely convertible, and this for several reasons. The first reason is contained above, where we said that, under one aspect at least, penalty is good. Further, although punishment is a species of evil, and evil is a privation of good, yet not all privations of good are punishments, for sometimes a thing seems to be penal which does not have absolutely the essence of penalty:

Since there are many goods of man, namely, of the soul, of the body, and of exterior things, it happens sometimes that man suffers detriment in a minor good, in order that he may be increased in a greater good: for instance, when he suffers a loss of money on account of health for his body, or (a loss) in both of these for the salvation of his soul and the glory of God; and thus such a loss is not absolutely an evil for man, but only relatively; wherefore, it does not have the essence of penalty simply, but rather of medicine: for indeed, doctors give harsh drinks to the sick that they may confer health....¹³

'De Malo, Q. 1, art. 4, ad 9.

"Summa Theologica, II-II, Q- 33, art. 2, ad 2.

"op. cit. II-II, Q. 108, art. 2, ad 1.

"JF Sent., Dist. 46, Q. 1, art. 2, q. 4, sol iv, ad 1.

"Summa Theologica, I-II, Q. 87, art. 7, corpus.

A third reason why all evil is not the evil of penalty is that the evil in voluntary things is divided between the evil of penalty and the evil of guilt. It is said "*in voluntary things*" because, there are other evils which are neither strictly penalty nor strictly guilt, as we have touched on above. That evil in voluntary things is either the evil of penalty or the evil of guilt is evident from the fact that good consists absolutely in perfection and act. Since evil is privation of that act, evil can eventuate in two ways according as either first act, (the form and integrity of a thing) or second act, (the operation of a thing) is taken away. Evil which is had when the form and integrity of the thing is taken away has the nature of penalty; evil, which consists in the taking away of the due operation in voluntary things, has the nature of sin (or guilt); that is imputed to anyone as a sin, which lacks perfect action, of which the rule (*dominus*) is according to the will.^{1*}

Saint Thomas assigns three differences between the evil of penalty and the evil of guilt:

First, indeed, because sin is the evil of the action itself, while penalty is the evil of the agent. But these two evils are ordered differently in natural things than they are in voluntary things; for in natural things the evil of the action follows from the evil of the agent, just as limping follows from a curved thigh bone; on the contrary in voluntary things from the evil of the act which is guilt, follows the evil of the agent which is penalty, since Divine Providence orders sin through punishment. In the second place, pain differs from sin, in that sin is in harmony with the will and penalty is contrary to it.... In the third way, penalty and sin differ in this, that sin consists in doing evil, penalty in suffering it, as is evident from Augustine (in *I De Lib. Arb. in princ.*) where he calls sin the evil that we do and penalty the evil that we suffer.¹⁵

TM*op. cit.* I, Q. 48, art. 5, corpus.

¹⁵*De Malo*, Q. 1, art. 4, corpus.

Evil, however, is predicated first of sin and then of penalty, and the essence of evil is more fittingly ascribed to sin than to penalty.

It must be known that the essence of good is taken from the end. Now, the end is the perfection of the agent, inasmuch as he is acting, because the end moves the agent to operate. Wherefore the end, and likewise deviation from the end, is referred to the agent rather than to the patient, and accordingly that evil which has the essence of evil according as it is from the operator, is closer to the end than that evil which is induced in a certain one suffering through the act of the operator. Wherefore the recession from the end is prior in sin, which has the nature of evil according as it emanates from the operator, rather than in penalty, which has the nature of evil in that a certain defect is produced in the patient through some action either of the same one or of another—*of the same one*, as (for instance) the penalties, which follow immediately from the act of sin, just as by the act of sin there follows the taking away of grace in the sinner; and the deordination of the act, which is from the sinner inasmuch as he is the agent, has the nature of evil prior to the taking away of grace, which is the evil of punishment; *through the action of another*, as (for example) the punishment which is inflicted by the act of a judge.¹⁸

Another reason is ascribed by the Angelic Doctor for the prepotency of evil in sin rather than in penalty, and this is true not only for sensible pain but for penalty universally, for,

By the evil of sin a man is made evil, but not by the evil of penalty. And this is so because, since the good consists simply in act and not in potency, and the ulti-

mate act is operation, or the use of certain things already had; so the good of man is considered as being in good operation, or in the good use of things already had. Now we use things through the will. Wherefore, from the good will, by means of which man uses well things already had, man is called good, and from an evil will man is called bad. Indeed, he who has a bad will can use evilly the good which he has, just as if a grammarian willingly spoke unfittingly. Since, therefore, sin consists of a deordered act of the will, but penalty in the privation of some one of those things which the will uses, sin has more perfectly the nature of evil than has penalty.¹⁷

A further reason for the preponderance of evil in sin over punishment may be assigned as follows:

The evil of penalty is not absolutely or simply evil, but only relatively or partly evil. It is absolutely good. Since that is good which has order to the end, and since evil bespeaks a deprivation of this order, that thing is absolutely evil which excludes order to the ultimate end—and this evil is the evil of sin. Now the evil of penalty is indeed evil, inasmuch as it causes the loss of a certain particular good; it is nevertheless absolutely good, in that it depends on the order to the last end...¹⁸

Cardinal Cajetan, commenting on Saint Thomas, says that,

the evil of sin thus differs from the evil of penalty, for the evil of sin is opposed to Divine Good in itself (yet objectively) as charity tends to Divine Good in itself; but the evil of penalty is opposed to created good. Accordingly it is said in the text that the evil of sin *privat ordinem ad finem ultimum*, and because the

rSumma Theologica, I, Q. 48, art. 6, corpus.
aop. cit. II-II, Q. 19, art. 1, corpus.

last end is the only absolute end (the other ends are ends only in this or that order in relation to this or that) —accordingly it is said in the text that when good and evil are named in relation to the final end, only the evil of sin is absolutely evil, while the evil of penalty is evil only according to this or that.¹⁹

Saint Thomas would find this reason insufficient. He says that,

... sin and punishment do not differ according to that good which through both of them is lost, because that same good which is lost through sin actively is lost through penalty passively; wherefore the loss of grace, through which the soul is joined to God, and the lack of the Divine Vision are punishments. But the reason assigned touches only corporal punishments; it is not universal, and therefore it is necessary to find this reason from the proper nature of penalty.²⁰

In the Disputed Question *De Malo*, Saint Thomas assigns several other reasons for the greater presence of evil in sin than in penalty: 10. a man is made evil by sin but not by penalty 20. God is the author of punishment but not of sin 30. the evil of penalty is inflicted to avoid the evil of sin—the latter, therefore, is the greater evil 40. actual evil is greater than a tendency to evil.²¹

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There yet remains the question of the authorship of the sin and the penalty. This latter will be treated more extensively when we deal with the punishing agencies in later pages of this section; here a few basic notions will suffice. It is evident that the evil of sin, which is essentially defective action or operation, is always caused by the defect of the agent. Therefore, since in God there can be no defect, God cannot be the cause of the evil of sin.²²

¹⁹*Commentaria Cardinalis Cajetani in Summam Theologicam S. Thomae Aquinatis—II-II, Q. 19, art. 1, Tomus 8, p. 139.*

²⁰*ZZ Sent., Dist. 37, Q. 3, art. 2, corpus.*

²¹*De Malo, Q. 1, art. 5, corpus.*

²²*Summa Theologica, I, Q. 49, art. 1, corpus.*

Saint Thomas places the authorship of the evil of sin immediately upon us:

The evil of sin is not from God as from its author, but it is from us, inasmuch as we recede from God; but the evil of punishment is indeed from God as from its author, insofar as it has the nature of good, namely insofar as it is just, according as it is justly inflicted on us; although this happens basically because of the merit of our sin.²³

In another place he says that since sin has the nature of evil and defect according as it proceeds from its agent inasmuch as he does not order his act to a fitting end, a cause of sin cannot be assigned, unless it be a thing of such a nature that defect can happen in it.²⁴

However, penalty can have a cause assigned to it since penalty is *morally* good, and only *physically* evil in the one suffering it. This cause can be either God or any other rational being. Moreover, penalty can also be considered as an effect of sin, as Saint Thomas avers,

Indeed, a just penalty can be inflicted by God and man; wherefore, the penalty itself is the effect of sin, not directly, but only *dispositively*. But sin makes man liable to penalty, which is evil: as Dionysius says (*4 cap. De. Div. Nom. part. 4 led. 18*): “To be punished is not evil, but to be made worthy of punishment.” Wherefore the obligation to penalty is placed *directly* as an effect of sin.^{24a}

It seems from the foregoing that it is clear what we mean when we say that penalty is “*an evil*,” and also clear what we mean when we say that it is “*a good*.”)The next step must be to define what we mean when we say that penalty is “*inflicted contrary to the*

sop. cit. II-II, Q. 19, art. 1, ad 3.

“II Sent., Diet. 37, Q. 3, art. 1, corpus.

“aSumma Theologica, I-II, Q. 87, art. 1, ad 2.

will of the one suffering” or that it is “an evil contrary to the will of the one being punished.”

The will is a faculty whose inclination follows the intellect, hence, wherever there is an intellect there also we find a will. The will may be defined as: “*A rational appetite or a rational inclination towards good that is perceived by the intellect.*” The will always seeks good; when a man seeks something which is evil, he seeks it under the aspect of good, that is, his intellect apprehends something in the object which makes it desirable for him, at least here and now. So the good which the will seeks may be either a valid or a spurious good. Man must will certain things, for example, the ultimate end and goodness in general. He is free to accept or reject other things, for example, means to the end. Saint Thomas proves that in man there is a free will:

I answer that it must be said that there is in man a free will; otherwise, counsel, exhortation, commands, prohibitions, rewards and punishments would all be in vain. For the proof of this, it must be considered that certain things act without judgment, as, for example, a stone is moved downwards, and this is also true of all things lacking knowledge. Certain other things act with judgment, but not with free judgment, as for example, brute animals; indeed, the sheep, seeing the wolf, judges that it must be avoided, and this, not by a free judgment but by a natural one, for he judges this, not by comparison, but through his natural instinct; and similar to this is any judgment of brute animals. But man acts by judgment, for through his cognoscitive power he judges that something must be avoided or pursued.... But since this judgment is not from a natural instinct in a particular thing to be done, but from a certain comparison of reason: accordingly he acts through a free judgment, having the power of tending to diverse things. Reason concerning particular things has the way to opposites, as is evident from dialectic syllogisms and rhetorical persuasions. Particular things to be done are contingent;

and therefore the judgment of reason concerning these things holds itself towards diverse things, and is not determined to one. And thus it is necessary that man have a free will inasmuch as he is rational.²⁵

From the fact that man is rational and free it is evident that he is the lord of his acts, and that he can be affected by the withdrawal of goods which the will can know about and desire. Therefore, penalty, which consists in some withdrawal of goods which the will seeks, is always adverse to the will. This is true for penalty strictly speaking. The reason of satisfactory and medicinal penalties will be dealt with a little later.

It is evident from the foregoing that we can have no such thing as punishment strictly speaking in irrational creatures, because punishment has relation to sin essentially and sin depends on the ability to choose, which ability is found only in man.” Because the evil of sin is in the act of the will, the evil of penalty is the privation of that which the will can use in whatsoever way for acting well.²⁶ However, it must be observed that virtue and vice, and as a consequence, penalty, are not limited absolutely to the will, but

the subject of virtue or vice is found to be any part of the soul according as it participates anything from some higher power, e. g., the irascible and concupiscible parts are the subjects of certain virtues inasmuch as they participate reason. Wherefore it is necessary to say that the rational part is *primo et per se* the subject of virtue.... Now it is evident that sin, as now we speak of sin, is that to which penalty is due. Because these acts are voluntary, to them is due punishment and harshness.²⁹

ESumma Theologica, I, Q. 83, art. 1, corpus.

XII Sent., Dist. 31, Q. 1, art. 1, ad 4.

”De Malo, Q. 1, art. 5, corpus.

mop. cit. Q. 4, art. 5, corpus.

Since these lower potencies participate in wilfulness, at least by a certain *refluentia*, and since through this participation sin enters into the will, and since the will seeks the good of these potencies, punishment truly can be had when man is deprived of the objects of these powers, and this punishment is contrary to the will in the sense explained. Saint Thomas explains the relationship of penalty in all the parts of man to the will when he says,

Although man can be punished according to all parts, yet hé is not susceptible to penalty, if we understand penalty properly, except inasmuch as he has a will: for anything is penal because it is contrary to the will, and therefore, the will is the first subject of penalty just as it is of sin.²⁹

For it is of the very essence of penalty (and here we must understand penalty strictly) to be contrary to the will in the sense explained. Penalty is the privation of a good which the will seeks and which is its due. If the will has no right to it, the withdrawal of it cannot be considered a penalty strictly speaking.³⁰ In this connection it may be mentioned that sin cannot be *per se* the punishment for sin, for sin is essentially voluntary, while penalty is contrary to the will.³¹ Indeed, it is of the very nature of penalty to be bad and to be avoided, but this evil is not only privation, it is also contrary to the will.³²

From this essential note in penalty, that is, *contrariety to the will*, it is evident that

the evil of nature in those things having choice takes on a certain special nature of evil, namely, the reason of penalty, inasmuch as the will dissents to the defect. Penalty is said to be evil, as Augustine says, (*De Morib., Manich. cap. III.*) because it injures the good

²⁹77 *Sent.*, Dist. 41, Q. 2, art. 2, ad 5.

³⁰*Summa Theologica*, I, Q. 48, art. 5, corpus.

³¹*op. cit.* I-II, Q. 87, art. 2, corpus.

³²*Summa Contra Gentiles*, III Lib., cap. 141.

of nature, inasmuch as it takes away from it that by which nature is perfected, either in its natural *esse*, as blindness, or in those superadded to nature, as loss of grace and other things of this sort. Yet some say that even in brutes, the lack of reason takes on the nature of penalty, but it seems better to say that there is no punishment except where there also is sin.³³

Since the will seeks its own integrity and form, inasmuch as these are perfections of the will, penalty is that evil which causes the loss of the form, or of anything which is required for the integrity of the thing. In this connection Bannes, commenting on the text of the *Summa Theologica*, says that Saint Thomas understands here, not only physical form or integral parts or natural potencies, but that the words "*form and integrity*" include also everything which in any way whatsoever ought to be in the essence or possession of a rational creature.³⁴

The loss that one suffers unconsciously is not contrary to the actual will, but is contrary to the natural or habitual will.³⁵ Saint Thomas explains this contrariety to the will as follows:

penalty is repugnant to the will in a threefold way. Sometimes it is repugnant to the will *actually*, as when anyone suffers consciously any penalty. Sometimes it is contrary only *habitually* to the will, as when some good is taken away from anyone, he being unaware, which deprivation would cause him sorrow if he were aware of the loss. But sometimes (penalty is) contrary only to the *natural inclination* of the will, as when a man is deprived of the habit of a virtue, since there is a natural inclination of the will to the good of that virtue. . . .³⁶

Thus far it seems clear that penalty is an afflictive evil contrary to the will of the one suffering it. There yet remains one element

³³*7L Sent.*, Dist. 35, Q. 1, art. 1, ad 1.

³⁴*Schol. Comm. in Summam S. Thomas*, Ia, Q. 48, art. 5, vol. I, p. 1306.

³⁵*De Malo*, Q. 1, art. 4, ad II.

³⁶*op. cit.*, Q. 1, art. 4, corpus.

of penalty to be explained, and this is the phrase that demands the *infliction of penalty for some sin*. Sin may be defined as a “*Word, deed, omission, or thought contrary to the law of God.*” For civil purposes and for secular government, we must omit the word “thought,” for, as will be shown later, civil law and civil government have little or nothing to do with sins of thought. Their chief concern is with the external actions of man. Therefore, a civil crime, in the sense connoted, could be defined as “*a word or deed contrary to the established laws of the land.*”

We have said that penalty is an evil inflicted for some guilt or sin, and by this we mean that the act for which penalty is inflicted is imputable to an agent. Sin is considered absolutely according as it proceeds from the will, and according to this consideration sin has the reason of imputability.³⁷ The evil that consists in the taking away of due operation in voluntary things has the nature of sin. When anyone is deficient in perfect act—which act he may control by means of his will—this deficiency of action is imputed to him as guilt.³⁸ Sin is essentially in the deordered act of the will. A man is called good because of a good will by which he uses well the things he has. Because of a bad will a man is called bad, for with a bad will a man can use even good things badly.³⁹ This refers to the essence of formal sin and culpability. If a man with a good will does a deed which is objectively evil in itself, this action is not imputed to him as a crime, as we shall see later. Ordinarily he is not punished for it, at least in God’s Providence. On the contrary, if a man with bad will uses good things badly, inasmuch as he has an evil will, intention, or desire, this is imputed to him as a sin, and is punishable, at least ethically if not legally.

Hitherto we have used the words sin, guiltiness and imputability almost interchangeably, but it must be understood that they are essentially distinct. True, *culpa* is very often translated *sin*, but *culpa* bespeaks more properly that imputation by which a deordinate act of an agent is imputed to him as blameworthy. Hence,

”*Summa Theologica*, I-II, Q. 87, art. 2, corpus.

”*op. cit.*, I, Q. 48, art. 5, corpus.

”*ibid.* art. 6, corpus.

culpa is something consequent upon sin, rather than sin itself. The culpability and punishability of an agent for a bad act is a property of the act inasmuch as it is *voluntarily* bad. The evil of guilt is in the act of the will.⁴⁰

Evil is wider than sin, and sin is wider than culpability, for an act is praiseworthy or blameworthy, because it is imputed to an agent. For something to be praised or blamed is nothing else than imputing to anyone the goodness or badness of his act. Now acts are imputed to an agent when they are in his power, as far as he has dominion over his acts. Now this is the case in all voluntary acts, for through the will man has power over his acts. Hence, it is, that goodness and badness in voluntary acts alone constitute the essence of praise or guilt, in which the same is evil, sin, and guilt.⁴¹

So, sin is not possible for irrational creatures, just as penalty strictly speaking is not,⁴² for culpability follows from an act of the will, and the will is a *rational* potency.⁴³ Saint Thomas denies explicitly the opinion of some who say that the lack of reason in brutes is a penalty. He argues that they have no rational nature, that is, no mind and no will, and thus it seems better to say that there is no penalty except where there can be sin.⁴⁴ However, as regards man, the subject of virtue or vice can be found in any part of him, if that part participates something from a higher power, and so the rational part is *primo* and *per se* the subject of virtue (and, by the same token, of vice),... and because our acts are voluntary (that is, from the rational part) to them are due punishment.⁴⁵ Any act of man is, therefore, subject to punishment in

**De Malo*, Q. 1, art. 5, corpus.

"*Summa Theologica*, I-II, Q. 21, art. 2, corpus.

"*II Sent.*, Dist. 41, Q. 1, art. 1, ad 4.

"*7I De Anima*, cap. 42.

"*II Sent.*, Dist. 35, Q. 1, art. 1, corpus.

"*De Malo*, Q. 4, art. 5, corpus.

the same degree that it participates in or is moved by the voluntary powers of that man.

AH human acts have the nature of merit or demerit according as they are good or bad.⁴⁰ In view of this it is necessary to determine whether all acts are good or bad, that is, we must determine whether we may have indifferent acts, which are neither good nor bad. In response to this question, Saint Thomas declares that it is necessary to say that every act of man which proceeds from a deliberated will, considered concretely and in the individual, is either good or bad, for every act of this kind either promotes the progress of man to, or retards from, the ultimate end, which is a rule of morality.⁴⁷ Speculatively and in the abstract, there may be such things as indifferent acts, but not in the concrete, for the ultimate end is the first mover in things that are done, and unless the last end is sought there would be no action at all. For just as the principle is primary in speculation, so the end is primary in operation. However, he does admit that certain acts *can be called* indifferent, for they have in them but little of goodness or evil.⁴⁸ This is precisely where culpability enters into human action, for culpability has the nature of evil and defect according as it proceeds from its agent, inasmuch as he does not order his action to a fitting end.⁴⁹

Since God is the ultimate end of all creation and especially of man, the defect of sin consists in aversion from God. Now this aversion does not have the nature of guilt unless it is voluntary aversion from God. Sometimes this aversion is direct, when we have the sin of the hate of God; at other times we have only indirect aversion inasmuch as man loves and chooses some sensible delight which has connected with it aversion from God.⁵⁰ Both rulers and subjects may commit crimes, for this sin may occur either through abuse of authority or through transgression of the law.⁵¹

“Summa Theologica, I-II, Q. 21, art. 3, corpus.

“op. cit. I-II, Q. 18, art. 9, corpus.

“op. cit. I-II, Q. 92, art. 2, corpus.

“II Sent., Dist. 37, Q. 3, art. 1, corpus.

“Summa Theologica, II-II, Q. 34, art. 2. corpus.

“Comment. in Isaiam Proph., cap. 10, pro.

It is evident from the foregoing that an act of sin makes for disorder, aversion and inequality in the goods which it is fitting that the will seek. This inequality and disorder must be regulated, and this regulation is done by punishment. After the act of sin there remains in caselrof actual sin the obligation to penalty. Saint Thomas explains this as follows:

The act of sin makes a man obliged to penalty inasmuch as he transgresses the order of Divine Justice, to which he does not return save through a certain recompense of penalty, which restores the equality of justice, in this way: he who has indulged his will more than he ought to in acting against the command of God, should suffer, according to Divine Justice, willingly or unwillingly, something the opposite of that which he willed. And this indeed is observed in injuries done among men, namely, that through the recompense of penalty the equality of justice is restored. Wherefore, it is evident, that, even after the act of sin or of perpetrated injury has ceased, there still remains the debt of punishment.⁵²

Yet, when we say that the equality of justice is restored we do not mean that the evil of sin is remedied or balanced by the evil of penalty, for the evil of sin is greater than the evil of penalty. And this is so because the sin consists in a deordinated act of the will, while the penalty only ifi a privation of those things which the will uses. Therefore, sin has more perfectly the nature of evil than has punishment.⁵³ However, there is always a certain proportion between the sin and the punishment, for punishment is not an effect of justice except inasmuch as it is proportioned to sin.⁵⁴ There is always this correlation between penalty and sin, just as between merit and reward. Frequently Saint Thomas repeats that just as there can be no reward without merit, so there

⁵²*Summa Theologica*, I-II, Q. 87, art. 6, corpus.

⁵³*op. cit.* I, Q. 48, art. 6, corpus.

⁵⁴IF Sent., Dist. 46, Q. 1, art. 2, q. 4, sol. 4, ad 1.

can be no penalty without guilt.⁶⁵ Even if the actual rewards and punishments are not given yet the proportion always remains the same in Saint Thomas' thought, for he says in another place that, just as honor is the reward for virtue, so opprobrium is the punishment for sin.⁵⁰ And since penalty is always contrary to the will, and crime is always a deordinated act of the will, we have it certainly that the same will is the first subject of penalty just as it is of guilt.⁵⁷

Although we have said many times in the course of this discussion that penalty is involuntary and must be inflicted for sin, several phases of this doctrine must be clarified. We see punishments inflicted where there is no guilt, at least no personal guilt; and we also see people voluntarily sustaining penalties. Since these two facts are contrary to our thesis stated just above, they must be explained. Penalties which are voluntary are called *satisfactory penalties*. Saint Thomas describes them as follows:

Now satisfactory penalties take away something of the nature of penalty. Indeed it is of the very essence of penalty to be contrary to the will. Now, satisfactory penalties, even if they are contrary to the will according to an absolute consideration, here and now they are not (contrary). By reason of this fact they are voluntary. Therefore they are *absolutely* voluntary but *relatively* involuntary.⁵⁸

To explain this distinction of Saint Thomas of absolutely and relatively voluntary and involuntary actions, it is necessary to recur to doctrine which he laid down earlier in the Second Part of the *Summa Theologica*. There he is discussing the influence of fear on the willfulness of human acts, and concludes that the acts done through fear are voluntary rather than involuntary. They are voluntary absolutely, but relatively involuntary. He proves this by saying:

KII Sent., Dist. 5, Q. 2, art. 2, corpus.

“Comment in Psalmos, XXXVIII, medio.

“II Sent., Dist. 41, Q. 2, art. 2, ad 5.

“Summa Theologica, I-II, Q. 87, art. 6, corpus.

Anything is said *to be absolutely* according as it is in act. According as it is in the apprehension alone, it is not absolute but only relative. Now this, which is done through fear, is in act because it is done. Since acts are in singular things, a singular thing precisely as such, is here and now. According to this, that which is done, is in act, because it is here and now, and under the other individual conditions. So, now that which is done through fear is voluntary, namely, inasmuch as it is here and now, as far as, namely in this case, there is an impediment of a greater evil which was feared; for example, the casting overboard of goods is done voluntarily in the time of tempest on account of the fear of danger; therefore, it is evident that it is absolutely voluntary. Wherefore the nature of voluntariety fits it because the principle is from within. But because that which is done through fear may be taken as existing outside of this event, insofar as it is repugnant to the will, this is only according to reason, and therefore is relatively involuntary, that is, as far as it is considered as existing outside of this case.⁵⁹

A parity can be established between the evidence just given and satisfactory penalties. Here and now, under these particular circumstances, they are absolutely voluntary. In other circumstances they would be involuntary. So they are here and now absolutely voluntary and relatively involuntary. But, as has been noted before, the injection of wilfulness into the notion of punishment takes away from the nature of punishment strictly so considered. In another way these satisfactory penalties may be considered as medicine, as when one suffers the loss of money that health might be gained, or the loss of both of these for the salvation of his soul. Even if no actual personal crime precedes the inflicting of these penalties, it must be said that they are the result of original sin, which is a sin of nature, because the corruption of nature, which makes these medicinal penalties necessary, is due

"op. cit. I-II, Q. 6, art. 6, corpus.

to original sin. Indeed these medicinal penalties would not have been necessary if the state of innocence had continued.⁶⁰ For this reason Saint Thomas says that sin always precedes punishment in nature even if not in the person of the one punished.⁶¹

These satisfactory penalties may also be sustained for the sins which the one punished has not committed, but which crimes have been perpetrated by others. However, no one is punished for the sins of others by being deprived of the goods of the soul. Penalties can be inflicted by both God and man in depriving man of temporal and physical goods, and in this case the penalties are after the manner of medicine.⁶² Satisfactory penalty may be voluntary for another reason, and this because it happens that those who differ in obligation to penalty are one according to their wills, in the union of love; therefore it is, that one who has not sinned sometimes bears voluntarily the penalty for another, e. g., in human affairs we see a man transfer another's debt to himself.⁶³

So it seems, that even after allowing for the satisfactory and medicinal penalties which may be voluntary and inflicted for no personal sin, our definition of strict punishment still holds, namely, that *punishment is an afflictive evil, inflicted contrary to the will of the one suffering it, in revenge or retribution for his sin.*TM

The Grades of Punishment.

Inasmuch as punishment is inflicted for sin, it is necessary to show that all sins are not equal, but are diverse in degree and kind; and, therefore, punishments, since they should be in proportion to the sins, must also be diverse.

Many thinkers, among them Cicero and the Stoics, have taught that all sins are equal. They reached this conclusion because they considered in sin only the element of privation, namely, that sin is a recession from reason. Whence, they thought, since

⁶⁰*op. cit.* I-II, Q. 87, art. 7 et 8, corpus.

⁶¹*nop cit.* I-II, Q. 87, art. 7, corpus.

⁶²*II Sent.*, Dist. 36, Q. 1, art. 4, corpus.

⁶³*Summa Theologica.* I-II, Q. 87, art. 8, corpus.

TM*ibid.* art. 7, corpus.

TM*cfr. supra*, p. 1, 2, 3.

privation does not admit of more or less, all sins are equal. But, says Thomas, there are two kinds of privation, one, an absolute privation, which leaves nothing of the opposite, as death leaves nothing of life, nor darkness of light; and truly these privations do not admit of more or less. The second privation is not absolute but retains something of the opposite habit:

This privation consists rather in *being corrupted* than in *corrupted being*, just as sickness, which causes the loss of the due commensuration of humors, but yet in this way, that something of this commensuration remains, otherwise the animal would not remain living; and thus it is also in ugliness and other things of this sort. Privations of this sort admit of more or less on the part of that which remains of the contrary habit. Indeed, it means a great deal to sickness or ugliness whether there is a greater or lesser deviation from the due commensuration of humors or members. And the same thing must be said of vices and sins. Indeed, the due commensuration of reason in them is so destroyed that the order of reason is not wholly taken away; otherwise, evil, if it be entire, destroys itself. The substance of the act or the affection of the agent could not remain, unless something remained of the order of reason. Therefore, it matters a great deal to the gravity of sin whether there is a greater or lesser recession from the order of reason. And according to this it must be said that all sins are not equal.⁸⁵

A possible objection may be taken to this from the side of “crimes of omission,” since these crimes consist, *per se*, solely in the deviation from a precept which is omitted. But even in this case the sins are not equal because of the diverse authority of the one commanding, or of the diverse dignity or necessity of the precept.⁸⁸

⁸⁵*Summa Theologica*, I-II, Q. 78, art. 2. corpus.

⁸⁸*De Malo*, Q. 2, art. 9, ad finem corporis.

The argument for the inequality of crimes is continued in the *Summa Contra Gentiles*, where Saint Thomas proves first that all virtues are not equal, by saying:

Acts take their species from their objects. In the degree that an object is better, in that same degree will the act be more virtuous according to its species. Now the end is better than the means to the end; and any of the means is better in the same degree that it is closer to the end. Therefore, among human acts, that act is best which tends immediately to the ultimate end which is; after this, that act is better, according to its species, in the degree in which it approaches God.®1

Having shown by this, and other proofs, that there are degrees in the worthiness or goodness of the acts of virtues, Thomas concludes to an inequality of sin:

And from the same reasons it appears that not all sins are equal, since, by one sin more than by another there is greater deviation from the end, and greater perversion of the order of reason, and greater harm inflicted on one's neighbor.®8

In general there may be assigned three reasons for the gravity or levity of a sin, one on the part of the species, another on the part of the sinner himself, and a third on the part of the consequences flowing from the evil act.®8 Saint Thomas also, in the *Commentary on Isaias*, assigns two other factors which tend to make a sin more grave, namely, its newness and its publication.⁷⁰ Presumably these two latter factors make a sin more serious because of its relationship to the morals of the group, inasmuch as there would be a tendency for people to follow the bad example if the act were public, and more especially if there were some

®III *Summa Contra Gentiles*, cap. 139.

®*ibid.*

®*Summa Theologica*, II-II, Q. 148, art. 3, corpus.

®*Comment in Isaiam Proph.*, cap. 3, prin.

novelty in it. However, these two causes of gravity may be reduced to one of those just mentioned, namely, “the consequences flowing from an evil act.”

All these acts are specified by their objects, and so a sin is greater or lesser according as the value of the good to which it is opposed, or which it perverts, is greater or lesser. In general, the order of valuation of goods is: first, God, then the substance of man, and finally the exterior things of man. For it is evident that exterior things are ordered to man as to their end, and man is ordered further to God as to his end.¹ So it is, that the gravity of sin depends rather on the end than on the material object.²

If we consider the gravity of sins on the part of God, after sins which are immediately opposed to God Himself, there come the sins which are committed against those close to God. Inasmuch as a man who is joined to God is more virtuous and sacred to Him, so the injuries inflicted on such a one redound to God Himself. So a sin is made graver from the fact that it is committed against one joined to God either by reason of virtue or by reason of duty. If we consider the gravity of sin on the part of the sinner himself, a man sins more gravely when he sins against one joined more closely to himself by the ties of natural necessity, or benefits, or any other relationship, for thus he seems to sin against himself.³ Because one is bound to love oneself more than one's neighbor, sins against oneself are more serious. This is brought out very clearly by Saint Thomas in the response to an objection dealing with homicide and suicide:

... the injuries one inflicts on oneself in those things which are subject to the dominion of one's proper will have less of sin in them than if they were inflicted on another, because one does this by one's proper will; but in those things which are not subject to the dominion of the will, as, for instance, natural and spiritual goods, it is a greater sin to inflict an injury on one-

¹*Summa Theologica*, I-II, Q. 23, art. 3, corpus.

²*É* *nop. cit.* I-JI, Q. 73, art. 3, ad 1.

nop. cit. I-II, Q. 73, art. 9, corpus.

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self; a suicide is a greater sinner than a murderer. But since the possessions of our neighbors are not subject to the dominion of our will, the argument inferring that, concerning these things, the sin is less, is not valid as far as injuries inflicted on things of our neighbors, unless perchance they will it or ratify it.⁴

If we consider the gravity of sin on the part of the neighbor, a sin is graver in the same degree that it affects more persons. Accordingly, a crime committed against a public person, e. g., the king or prince, who acts the part of the person of the whole multitude, is graver than a crime which is committed against one private person. Likewise, injuries inflicted on a certain famous person seem to be more serious because they redound to the scandal and disturbance of many.⁵

At first glance it might seem that this doctrine, which holds for the increasing gravity of sin according as the excellence or dignity of the person injured is augmented, argues to a Thomistic thesis maintaining that a principle of justice should be based on the "acceptance of persons" in criminal matters, instead of on recompense for deeds. But, if we look at the matter closely, we find that even God may justly punish more severely a crime committed against a more excellent person; and this is not the acceptance of persons, but rather the punishment is more severe because the crime has redounded to the injury of very many.⁶ An injury has one proportion to the prince and another proportion to a private person, and therefore it is necessary to equalize diversely both these injuries by means of revenge; and this pertains to a diversity of things, and not only to a diversity of reason.⁷ And this does not make an acceptance of persons, but the diversity of persons makes a diversity of things.⁸ For an injury to the ruler redounds to the injury of the whole people.⁹

⁴*ibid.*, ad 2.

⁵*ibid.*, corpus.

⁶*ibid.*, ad 5.

⁷*op. cit.* H-II, Q. 58, art. 10, ad 8.

⁸*op. cit.* II-II, Q. 63, art. 4, ad 2.

⁹*op. cit.* II-II, Q. 65, art. 4, corpus.

Likewise on the part of the neighbor a sin is more serious, inasmuch as it deprives the injured of a greater good or of more goods. In regard to the first, since the greatest good of any man is life itself, murder, which deprives a man unjustly of his life, is the greatest injury we can inflict on him.

Now the greatest good of man's neighbor is the life itself of a man, to which good is opposed the crime of murder, which destroys the *actual* life of man; and the crime of luxury which is opposed to the *potential* life of man, because it is a certain deordination in regard to the act of human generation. Wherefore, among all the crimes which are committed against one's neighbor, murder is more serious *according to its genus*; and adultery, fornication and carnal crimes of this sort hold the second place. Now theft, rapine and other crimes of this nature, through which the neighbor is injured as far as external goods are concerned, hold the third place. Now in each one of these *genera*, there are diverse grades, in which it is necessary to take the measure of the sin according to its *genus*, there are diverse grades, in which it is necessary to take the measure of the sin according to its *genus*, according as the opposite good ought to be more or less loved by charity.⁸⁰

In every sin the integrity of good is taken away, but not the whole good: by one sin more good is taken away, by another,

KDe Malo, Q- 2, art. 10, corpus.

It must be noted here that the gravity of a crime according to its genus means that gravity which belongs to the sin considered objectively, with no regard for the person of the one committing the crime, and no consideration of the actual amount of knowledge or wilfulness involved in the commission of the act.

less.⁸¹ For example, in theft, the stealing of a greater thing is a greater crime, for it is opposed in a greater measure to the opposite good, which is justice.⁸²

Thus far we have been discussing the sin according to its specific gravity, that is, according to the virtue or good to which it is opposed or which it injures or destroys. We have found that crime takes its specific gravity principally from its object. In this way a crime is more or less serious inasmuch as it is opposed to a greater or lesser good. However, there is also a diversity in the gravity of crime on the part of the criminal, the nature of which we will now discuss briefly.

On the part of the agent, the gravity of the sin is regulated by the greater or lesser wilfulness of the agent in sinning. For the will is the cause of sin.⁸³ Indeed, in judging the gravity of the sin on the part of the agent, more attention must be given to the intention of the perverse will than to the harmful effect of the evil act.⁸⁸ Where there is a greater inclination of the will to sin, there is a greater sin. Now he who sins from habit sins more gravely than he who sins through sudden passion. For habit is a quality that is very difficult to change, while passion is quickly passing.⁸⁵ Moreover, he who sins from habit, sins out of certain malice.⁸⁷ And this seems to be the highest grade of voluntarily wrought evil, inasmuch as the sinner, when committing an act out of certain malice or industry, knowingly chooses evil.⁸⁷ However, this must not be understood in the sense that the sinner chooses evil *sub ratione mali*. No one can do this, as Sylvius aptly notes. It must

nop. cil. Q. 2, art. 9, ad 10.

Any action which is performed for a fitting end, by a proper agent and according to correct circumstances has about it a certain completeness or integrity of goodness. When one of these three is missing or in any way impaired, this wholeness or completeness or integrity of good is taken away. Hence we say that sin, which is a deordination, takes away the integrity of good, either wholly or in part, according as the sin is greater or less.

"*op. cit. Q. 2, art. 9, ad 9.*

"*op. cit. Q. 2, art. 10, corpus.*

"*Summa Theologica, II-II, Q. 13, art. 3, ad 1.*

"*op. cit. II-II, Q. 136, art. 3, corpus.*

"*op. cit. I-II, Q. 78, art. 2, corpus.*

r-ibid., art. 1, corpus

not be thought that all the scholastics concur in this, for Scotus, at least, teaches that to sin out of certain malice is to sin by loving evil, precisely as evil.⁸⁸

Saint Thomas teaches that, in any consideration of the quantity of the sin, there is a fourfold gradation that must be considered, even about one and the same fact. The first grade is that in which the act is absolutely involuntary, and this absolute unwillingness totally excuses from guilt and imputability. If, however, the act is in a certain measure voluntary, but yet the sin is committed from weakness, as when one sins through passion, the sin is diminished, and consequently the imputability and punishment are lessened, except if there be another valid reason for harsher penalties. The second grade is had when one sins through ignorance, and then *the* sin is imputable because of a preceding neglect in learning; But this ignorance is only to be understood of *ignorance of fact*, and not of *ignorance of Divine Law*, which all are held to learn. The third grade is when one sins through pride, that is, from certain malice and election, and this grade of sin is imputable according to the quantity of the crime. The fourth grade is when one sins out of boldness, impudence, and pertinacity, and this seems to merit the destruction of the criminal.⁸⁹ It would seem that in this last grade we have not only the absolute will of committing the sin, but also a rather diabolical contempt for the law, and an utter indifference to the good of reason, which notes are not present in the first and second grades and not even in the third grade where the sin is from certain malice.

K'ibid.

“This doctrine is so important in determining the gravity of crime on the part of the criminal himself, it seems well to cite St. Thomas here in full:

... non solum propter gravitatem culpae sed etiam propter alias causas gravis poena infligitur:—primo quidem propter quantitatem peccati, quia majori peccato, ceteris paribus, poena gravior debetur;—secundo propter peccati consuetudinem, quia a peccatis consuetis non facile homines abstrahuntur nisi per graves poenas; tertio propter multam concupiscentiam vel delectationem in peccato; ab his enim non facile homines abstrahuntur nisi propter graves poenas;—quarto propter facilitatem committendi peccatum, et jacendi in ipso; hujusmodi enim peccata, quando manifestantur, sunt magis punienda ad aliorum terrorem. Circa ipsam etiam

Just as the person of the one injured made a difference⁹⁰, so the person of the criminal determines something of the gravity or levity of a sin. The sins of youth are less than the sins of age, for the more a man is endowed with reason, and the greater his state and position, the greater are the sins he commits and the more imputable are they. Therefore, the sins of a boy are less imputable than the sins of an old man.⁹¹

The greater the person, the greater is the sin.⁹² Excellence either in knowledge or grace aggravates the sin as far as deliberation is concerned.⁹³ However, for the most part, venial sins are less in those who are perfect in charity, because these sins come in stealthily, and are easily repelled.⁹⁴ Another reason for their comparative levity in him who is more perfect in charity is the fact that the more virtuous man is more apt to be concerned about venial sins and is more likely to try to erase them. Moreover,

quantitatem peccati quadruplex gradus est attendendus etiam circa unum et idem factum: quorum primus est, quando involuntarius peccatum committit; tunc enim, si omnino est involuntarius, totaliter excusatur a poena... Si vero aliquo modo fuerit voluntarius, sed tamen ex infirmitate peccat, puta cum quis peccat ex passione, minuitur peccatum; et tunc poena secundum veritatem iudicii diminui debet; nisi forte propter communem utilitatem poena aggravetur ad abstrahendum homines ab huiusmodi peccatis..—Secundus gradus est, quando quis per ignorantiam peccavit, et tunc alieno modo reus reputabatur propter negligentiam addiscendi; sed tamen non, puniebatur per iudices sed expiabat peccatum suum per sacrificia.. Sed hoc intelligendum est de ignorantia facti, non autem de ignorantia praecepti divini, quod omnes scire tenebantur.—Tertius gradus est, quando aliquis ex superbia peccabat, id est, ex certa electione vel ex certa malitia; et tunc puniebatur secundum quantitatem delicti.. Quartus gradus est, quando peccabat per proterviam et pertinaciam; et tunc quasi rebellis et destructor ordinationis legis omnino occidendus erat...*Summa Theologica*, 1-11, Q. 105, art. 2, ad 9.

•° cfr. supra.

"*Comment in Psalmos*, XXIV, ante med.

"*Summa Theologica*, II-II, Q. 100, art. 1, ad 7.

"*op. cit.* III, Q. 89, art. 5, corpus.

"*De Malo*, Q. 7, art. 10, ad 5.

human infirmity makes it practically impossible to avoid all venial sin.⁹⁵

According to this doctrine, if a noble man or woman commits a crime it is more ignominious than if the same thing were done by an unlettered nobody or a rustic.⁹⁸ This seems to mean that the more we know, and the better our position, the more culpable we are. In strict justice, then, the upper classes have more to fear from the law than the lower classes whose knowledge and opportunities are not as great as those of the more favored of fortune.

The conclusion of the doctrine in regard to the gravity of sin strictly on the part of the person committing the crime seems to flow from the principle that the will and the intellect are component principles of the act. If the intellect presents something to the will as good, the will ought to seek it. If the intellect is mistaken, the will is not culpable in choosing the wrong thing. Yet, if the intellect, due to its knowledge, previous education and grace, knows full well that such a deed is wrong, and, in spite of this, the will chooses it, the act is of necessity graver, because of the rejection of the good seen clearly. In those who have the necessary knowledge and the means of resisting sin, the sin is more serious. For those constituted in high places, the sin may be graver because of the reasons already alleged, and also because sin committed by them may be a source of subsequent scandal and sin among the people. Saint Thomas sums up his doctrine of the influence of a sinner's dignity and position on the gravity of the sin in these words:

There are other sins, proceeding from deliberation; and these sins are more seriously imputed to a man in the same measure that he himself is greater. There are four reasons for this: First, because greater men, that is, those who exceed in knowledge and virtue, can more easily resist sin. Secondly, on account of ingratitude, for every good by which a man is magnified is a benefice of God, to Whom man is made ungrateful when he sins; and according to this, any ma-

"Summa Theologica, I-II, Q. 73, art. 10, corpus.

"Comment in Psalmos, XII, prin.

jority, even in temporal things, aggravates the sin. . . Thirdly, on account of the person; for example, if a prince, who is placed as the guardian of justice, should violate justice; and if a priest, who vows chastity, should fornicate. Fourthly, because of the example or scandal, because, as Gregory says, *guilt is strongly extended in example, when the sinner is honored because of the reverence of his station. The sins of the great come to the notice of very many, et magis homines ea indigne ferunt.*⁹¹

However, although the dignity of the person aggravates the sin, yet it does not change the species of the sin, except by reason of disobedience, or vow, or of something else of this sort.⁹⁸

It would seem from the foregoing that neither virtues nor sins are equal. Now it remains to show that all punishments are not, and cannot be equal. Saint Thomas gives several arguments to show that all punishments should not be equal. From the very fact that punishment is inflicted for sins, and rewards for good acts, and both good acts and sins are unequal, it follows necessarily that all punishments are not equal. Otherwise the equality of justice would not be preserved, if greater penalties were not inflicted for greater crimes, and greater rewards for better deeds. Indeed it seems to be of the same reason that different recompense is made for good and evil, and also for better and good, or for evil and worse.⁹⁹ Two other arguments offered have great force in proving his contention concerning the necessary inequality in penalties,

10. Rewards and punishments are proposed by the legislator in order that men might be drawn back from evil. Now it is necessary that men be not only attracted to good, and drawn back from evil, but also that good men be incited to better things, and evil

"Summa Theologica, I-II, Q. 73, an. 10, corpus.

"op. cit. I-II, Q. 87, art. 3, corpus.

"H1 Summa Contra Gentiles, cap. 141.

men drawn back from things that are worse. Now this could not be done if rewards and punishments were all equal.

20. It happens that there can be excess in good and bad deeds in two ways: in one way, *numerically*, inasmuch as one man does more deeds than another, whether they be good or evil deeds. In the other way, *according to the quality of the deeds*, insofar as one man does better or worse deeds than another. Now it is necessary that to the numerical excess there must correspond an excess of rewards or punishments. Otherwise there would be no recompense in the Divine Judgment (*or the human either, for that matter*) (Parentheses ours) for all the deeds which a man has committed, if there should remain unrewarded good deeds and unpunished evil acts. By the same token therefore, an inequality of rewards and punishments must correspond to the excess which is according to the inequality of deeds.¹⁰⁰

Aljof which seems to show rather conclusively that there should lie a gradation of punishment if strict justice is to be preserved. That there is actually such a gradation is evident from the following. Penalty is an afflictive evil proposed to the will, in order that the will may be drawn back from doing evil; it is contrary to the will. Now evil is a privation of good; wherefore, it is necessary that the order and difference of penalties be taken according to the order and difference of goods which is as follows:

1. The greatest good of man is happiness, which is his ultimate end or purpose. Now this ultimate end of man, his absolute happiness or beatitude, cannot consist in riches, honors, fame, glory, in any bodily good, pleasure, in any good of the soul, or indeed, in any created good at all, as Saint Thomas shows clearly.¹⁰¹

Beatitude is a perfect good, which totally quiets the appetite: otherwise it would not be the ultimate end,

¹⁰⁰*ibid.*

¹⁰¹*Summa Theologica, I-II, Q. 2, per totam quest.*

if there still remained something to be desired. Now the object of the will, which is the human appetite, is the universal good, just as the object of the intellect is the universal truth. From which it is evident that nothing can quiet the will of man except a universal good; now, this universal good is not found in anything created, but only in God Himself, for every creature has only participated good. Wherefore, it is, that only God can utterly satisfy the will of man, and in God alone does the ultimate beatitude of man consist.¹⁰²

2. In the second place among the goods of man must stand virtue, which is the *dispositio perfecti ad optimum*, or that quality of the soul which makes a man good and all his actions good. The reason for virtue's standing after the ultimate good of man is very clear. For in the same degree that anything is closer to the ultimate end, in that degree is it a greater good of man. Now virtue stands most closely of all human goods to the ultimate end, for by means of virtue the ultimate end is attained.

3. Anything that conduces to virtue or to good operation is next in order among the goods of man, so therefore he must have a fitting disposition of reason and of the powers subject to it. For it is by means of these things that man becomes virtuous, and acts well.

4. Finally, those things which are exterior, which we use as aids to virtue.

From this gradation according to value it follows that the greatest penalty of man is to be deprived of beatitude or the ultimate end. The next greatest penalty is to be deprived of virtue and of any perfection of the natural powers of the soul for acting well; then the deordination of the natural powers of the soul; after this, injury to the body; and finally the loss of exterior things.¹⁰³ It is evident that the fourth grade of penalty admits a great deal

¹⁰² *ibid*, art. 8, corpus.

¹⁰³ *Summa Contra Gentiles*, cap. MI.

of variation in severity, inasmuch as loss of life is just as certainly an injury to the body as a torn finger, yet there is a vast quantity of penalty separating these two extremes.

Since injuries to the body and the taking away of the exterior things are the only penalties within the province of the State, it may be well to gradate the punishments within these two classes. In the first grade may be placed the loss of life, which is the greatest physical ill that can befall a man. Next in severity we may place the loss of bodily integrity. Thirdly comes loss of liberty. And finally we enumerate the loss of exterior goods. These goods may be summed up in three classes—riches, country, and glory.¹⁰⁴

The foregoing gradation of punishments has been taken objectively, that is, on the part of the good which is taken away, and in this sense the loss of the Vision of God and of the Enjoyment of God is the greatest penalty that can be inflicted on a man, for it is the subtraction of the absolutely greatest good. However, we must consider punishment on the part of the one punished, and in this consideration the absolute values of the goods taken away have not so much force as the effect on the one punished. In this latter consideration, a punishment is worse the more it takes away a good which is more proper and connatural to him from whom it is taken away, e. g., it is a worse punishment to take away a man's patrimony to which he has a right than to take away a throne to which he has no right—and thus, in this sense, the loss of beatitude is the least of punishments for man has no right to it.¹⁰⁵

Moreover, a man is not always able to measure his affections accurately, and sometimes that which ought to be less unpleasant seems to be more unpleasant, because it is nearer to sensible harm, which is more known to us.¹⁰⁶ In fine, the gravity of the punishment depends on two things, both of which must be taken into consideration in inflicting the penalty, for the penalty must serve a particular purpose in a particular case, and, therefore, the particular qualities of the individual play a large part in the gradation of the penalty. And for this reason,

¹⁰⁴*Summa Theologica*, II-II, Q. 108, art. 3, corpus.

¹⁰⁵*De Malo*, Q. 5, art. 1, ad 3.

¹⁰⁶*IF Sent.*, Dist. 17, Q. 2, art. 3, q. 2, sol. 1, ad 4, fine.

It is of the nature of penalty, not only to be privative of good, but also to be contrary to the will. Now, the will of every man does not estimate goods at their real value, therefore it happens sometimes that a penalty which is privative of a greater good is less contrary to the will, and because of this seems to be less penal; and therefore it is that many men, who appreciate and know sensible and corporal goods more than they do intellectual and spiritual goods, fear temporal penalties more than they do spiritual ones; according to the estimation of these men the absolute order of penalties would be inverted. Among these men wounds of the body and losses of exterior things are considered the greatest penalty; but the deordination of the soul, the loss of virtue, the loss of the Divine Fruition in which the ultimate happiness of man consists, are reputed as little or nothing by these men.¹⁰⁷

Hence the same penalty will not serve in all cases, nor the same order and gradation of penalties. So it seems necessary to consider in the infliction of penalty its evil, its privation of good and its contrariety to the will, if we are to equalize sufficiently crime and punishment.

In connection with the order and gradation of penalties there arises the question of the liceity of capital punishment. We will outline the doctrine of Saint Thomas on this problem. He mentions loss of life as the greatest of physical ills. There seems to be no doubt that he holds for the liceity of the death penalty, both in the temporal and spiritual spheres of governance. However, its liceity has always been a matter of dispute even within the Scholastic ranks. Today, where sentimentalism flourishes, capital punishment is looked on as indefensible. It seems well, therefore, to urge the reasons which Saint Thomas gives for its liceity. It will suffice to quote just a few of the many reasons which Saint Thomas gives for capital punishment;

¹⁰⁷*W Summa Contra Gentiles, ca. jv. 11.*

The common good is better than the particular good of one man. Accordingly, the particular good must be taken away in order that the common good be preserved. Now, the life of certain pestiferous men impedes the common good, which is the peace and concord of the human society. Therefore men of this sort must be taken by death from the society of men.¹⁰⁸

Just as the doctor intends in his work health, which consists in an ordered concord of humors, so the ruler of the city intends in his work peace, which consists in the ordered concord of the citizens. Now the doctor cuts off well and usefully a putrid member, if because of this member the corruption of the whole body is imminent. Therefore the ruler of the city acts justly and without sin when he kills pestiferous men in order that the peace of the city may not be disturbed.¹⁰⁹ But when they (the criminals) fall into the greatest malice and are made incurable, then the familiarity of friendship must not be extended to them. And accordingly this kind of sinners, from whom is presumed rather the hurt of others than their own conversion, are ordered to be slain, both according to human and divine law.¹¹⁰

Man recedes from the order of reason when he sins, and accordingly he falls from human dignity, for man is naturally free and exists because of himself, and when he sins he falls in a certain way into the servitude of the beasts, with the result that it may be ordered concerning him according as it is useful for others... And therefore, although it is absolutely evil to kill a man who remains in his human dignity, yet it may be good to kill a sinner, just as to kill a beast.

••*op. cit.* cap. 146.

••*ibid.*

TM*Summa Theologica*, II-II, Q. 25, arr. 6, ad 2.

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Indeed, a bad man is worse than a beast and more injurious, as the Philosopher says.¹¹¹

The argument that the evil can be converted while they are living, does not forbid that they be justly killed. Because the danger which comes from their life *is more certain and greater* than the good which is expected from their conversion. Likewise, in the very moment of their death they have the opportunity of being converted to God by penitence. But if they are still so obstinate that at the very moment of death they still will not draw back from malice, we can conclude very probably that they will never be raised up from their malice.¹¹²

Of course, since the penalties of this life are rather medicinal, the death penalty must not be inflicted except on those whose crimes cause great harm to others.¹¹³ From all of which it is clear that the mind of Saint Thomas is that the death penalty may be licitly inflicted. To confirm this conclusion it is well to recall the treatment Saint Thomas gives this question where he treats it professedly:

.. it is permitted to kill brute animals, inasmuch as they are ordained naturally to the use of man, just as the imperfect is ordained to the perfect. Now every part is ordained to the whole as the imperfect to the perfect. Accordingly every part naturally, exists because of the whole. Wherefore we see that if the amputation of any member, if it is putrid and corruptive of the other members, will aid the health of the whole human body, it is healthful and praiseworthy to cut it off. ^Now, any single person is compared to the

op. at. 1141, Q. 51, art. 2, ad 3.

Aristotelis I Polit., cap. 2.

Aristotelis 7 Ethic., cap. 6, fine.

“/π *Summa Contra Gentiles*, cap. 146, in fine.

“*Summa Theologica*. 1141, Q. 108, art. 3, ad 2.

whole community as the part to the whole. Therefore, if any man is a source of danger to the community and corruptive of it because of some sin, it is healthful and praiseworthy to kill him in order that the common good may be preserved.¹¹⁴

However, since this killing of the wicked is for the common good, it must never be done so that it will cause harm to the good men. So, when there will result no danger to the good from the execution of the wicked, but rather health and safety, then the evil can be licitly killed.¹¹⁵ Nor can it be argued that since God does not always kill sinners, human rulers should not kill them. Sometimes God kills sinners immediately; sometimes He allows them time for repentance. Now human justice should imitate the methods of God insofar as it can, killing those who are most dangerous to others, sparing those who are less dangerous so that they may repent.

... God, according to the order of His Wisdom, sometimes kills sinners immediately in order to liberate the good, and sometimes concedes to sinners time for repentance, according to what He knows will be best for His own chosen men. And this is imitated by human justice insofar as is possible. It kills those who are dangerous to others; but reserves for penitence those who sin but do not injure others gravely.¹¹⁶

As we have already mentioned above, some Scholastics are not in accord with this doctrine of Saint Thomas. For example, Duns Scotus teaches that it is never licit to kill a man, and only those may be killed whom God excepts in the law.¹¹⁷ But from

luop. cit. II-II, Q. 64, art. 2, corpus.

"*ibid.* ad 1.

"*ibid.* ad 2.

"*Scotus Comment, in Sent. Petris Lombardi, IV Sent., Dist. 15, Q. 2, art. 3.*

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the reasons already offered the doctrine of Saint Thomas seems much more tenable.

We have shown that there is a gradation of sin and guilt, as well as a gradation of penalties. Now we must show that the punishment corresponds to the guilt, and if, perchance, it does not, the reason thereof. There is no doubt but that the harshness of the penalty ought to correspond to the gravity of the sin, both in the human and divine orders of justice. But in no justice does the duration of the penalty correspond to the time used in the commission of the sin. For instance, adultery and murder may be committed in a very short time, yet both may be punished by perpetual incarceration or exile.¹¹⁸ So it must be said that the duration of the penalty corresponds to the duration of the sin, not on the part of the act of sin, but rather on the part of the stain resulting from sin, for as long as this stain remains, there remains the obligation to penalty.¹¹⁹

In the after-life God punishes absolutely according to the guilt; but neither God nor the State attains this absolute evaluation of penalty in this life, for the penalties here are medicinal or deterrent rather than retributive.¹²⁰ Yet the penalty assessed by the judge must be equal in those to whom the sin is equally imputable. In spite of the care which ought to be exercised by

is liable to follow accidentally from the injury. An example of this would be: if a man sentenced in punishment for a crime should accidentally hurt himself.¹²¹ Evidently this is beyond the control of the judge. Yet it can be punished, and follows that latter quasi-accidental intention of the judge in fixing the

assessment of guilt, punishment is demanded (in part) for two reasons: 1o. to persolve the debt incurred of sin; and 2o. to effect a remedy. There-

to, MI, Q. 87. art. 3. ad 1.

17, art. 4. ad 3.

irt. 10, ad 4.

ica, II-II, Q. 164, art. 1, ad 4.

fore the taxation of penalty must be considered under these two aspects. In regard to the debt, the punishment must basically respond to the quantity of the crime, before any of the crime may be forgiven. In regard to the remedying of the criminal himself or of any other, it may be advisable to inflict a greater penalty for a lesser sin. This may be advisable whether because one sinner can resist sin or a certain type of sin less easily than another, e. g., in sins of impurity a boy ought to be punished more severely than an old man, even though the former sin less; or because the sin is more dangerous in one man than in another, e. g., in a priest, who is bound by virtue of his office to show good example, and who can easily be a source of scandal; or because the group is more prone to that kind of sin, and thus by a more severe penalty inflicted on one it is hoped that the others will be deterred from the sin.¹²² Thus, while there should be a definite correspondence between the guilt and the punishment inflicted, for several reasons this is impossible, or at least inadvisable. Saint Thomas gives several reasons which will dictate the infliction of a graver penalty, namely:

- 1o. Quantity of the sin which falls into a four-fold classification.
- 2o. Habitude of sin.
- 3o. The extent of concupiscence or delight in the sin.
- 4o. Ease of committing this particular sin, and of falling into it.¹²³
- 5o. Incurribility, which is a reason for adding punishment to punishment.¹²⁴

Another reason for lack of correspondence between guilt and punishment is had on the part of the one punishing, and not

¹²²Sent., Dist. 20, Q. 1, art. 2, q. 1, corpus.

¹²³Summa Theologica, I-II, Q. 105, art. 2, ad 9.

¹²⁴Comment in Isaiam Proph., cap. 9, fine.

on the part of the conscious and willing aggravation of penalties. This reason is taken from the very nature of justice itself. The perfection of the virtue of justice lies in the mean, which mean it is extremely difficult to find exactly. Now the punishment of crimes is an act of commutative justice, as we have stated above, and the perfection of this act of punishment will be in the mean. Now it is very difficult to accurately determine the mean, and, therefore, the perfection of the virtue must necessarily consist, for all practical purposes, in merely approximating the mean. From this it is evident that the human judge, try as he will, will be unable, as a rule, to fix the exact mathematical and physical proportions of the punishment. However, since it is not his intention to exceed the mean, this excess cannot be ascribed to him as cruelty, for this latter is caused either by animosity, rapacity, or severity.¹²⁵

From all of the foregoing it is clear that punishment should be in correlation to the crime, but it is also equally clear that this correlation cannot be judged by one standard alone. And in the case of human justice, punishment cannot be physically and mathematically correct. The next step is for us to outline just what Saint Thomas considers the purposes of punishment. This is an ever recurring question: "Why do we punish?"

The Purposes of Punishment

In discussing the liceity of revenge or vengeance—which is performed by inflicting a penal evil on a sinner—we must consider carefully the intention of the avenger. If his intention is principally to inflict evil on the criminal, and if his intention rests in that evil, vengeance is absolutely illicit, for delight in the evil of another is hateful. Nor is the avenger justified because he inflicts evil on one who has already inflicted evil on him—one sin does not justify another. But if the avenger's intention is good and this intention will be attained by inflicting punishment on the criminal, vengeance can be licit, if all the circumstances and conditions necessary to the affair are observed. This *good intention* may be either the emendation of the sinner,

cit. op. 5, fine.

the repression of the sinner and the quiet of others, the conservation of justice or the honor of God.¹²⁶ Even after the stain of crime is removed there still remains a need of punishment for the healing of the other powers of the soul which were disordered by the previous sin. These powers are to be cured, as it were, by contraries. Again, punishment is required to restore the equality of justice, and for removing the scandal caused to others, so that, just as they were scandalized by the crime, so they may be edified by the punishment.¹²¹

So we may say in a general way that the purpose of licit penalties must be goodness or virtue, especially the virtue of justice, which must be the foremost virtue of the human community. A punishment that is not ordained to the perfection of some virtue either in the individual or in the community is not punishment properly speaking but rather cruelty or savagery.

First of all punishment ought to have for its object the maintenance or restoration of justice and order. For this reason Saint Thomas states that punishment is an act of virtue for punishment orders guilt, that is, punishment restores that order, harmony and equilibrium which was destroyed by the preceding over-indulgence of the sinner's will in undue goods.¹²⁸ The evil in human acts must be concluded under the order of some good. Now this is most fittingly done when sins, which are evil human acts, are punished. In this way those things which exceed due quantity are comprehended under the order of justice which reduces to equality. Man exceeds the due grade of his quantity when by satisfying his will he prefers it to the Divine Will, i. e., when he sins. Now this inequality is destroyed when man is forced to suffer by ordination something contrary to his will.¹²⁹ This means simply that the inequality is destroyed by punishment. The equality of justice is destroyed by crime and it is necessary to repair this inequality by means of penalty:

¹²⁶*Summa Theologica*, II-II, Q. 108, art. 1, corpus.

¹²⁷*op. cit.* I-II, Q. 87, art. 6, ad 3.

Summa Contra Gentiles, cap. 146.

¹²⁸*op. cit.* cap. 140.

... the act of sin makes a man liable to penalty inasmuch as he transgresses the order of Divine Justice to which he does not return except by a certain recompense of penalty, which reduces (the act) to the equality of justice, so that he who indulges his own will more than he ought by acting contrary to the mandate of God must suffer, willy nilly, according to the order of Divine Justice, something contrary to his own will. And this is likewise observed in the injuries done among men, namely, that by the recompense of penalty, the equality of justice is reintegrated. Whence it is evident that even after the act of sin or injury has stopped there still remains the debt of penalty.¹³⁰

In the commentary on the ethics of Aristotle, Saint Thomas shows how this equality is lost and restored again:

...if of two men, one strikes and the other is wounded, or even if one kills and the other dies, this action and passion is divided into unequal parts, because, forsooth, the assailant or killer has more of that which is esteemed good, inasmuch as he has satiated his own will, and thus this seems to be a gain for him. But he who is wounded or killed has more of evil, inasmuch as he is deprived of integrity or life against his own will, and thus this seems to be a loss for him. But the judge must try to equalize this, taking something away from the gain and giving it to the loss, inasmuch as he takes away something from the assailant or killer and gives it for the benefit or honor of the one who was wounded or killed.¹³¹

He develops the same idea in the *Summa Theologica*, explaining that the equality of justice is restored through punishment,

¹³⁰*Summo Theologica*, **II. Q. 87. art. 6, corpus.**

¹³¹*Comment, in 10 Libros Ethicorum Aris. V. Lect. 6, para. 952.*

inasmuch as he who by sinning followed his own will suffers in punishment something contrary to his own will.¹³² So, penalty is inflicted to coerce and order the evil of crime.¹³³ Again and again, he says that the payment of *debt* is the purpose of penalty, i. e., the criminal in committing the crime has put himself in debt to the community, for which debt he must pay through penalty.¹³⁴ This equality is best attained by depriving the criminal of that good which he has abused or sinned against, for by abusing that good he has rendered himself unworthy of it.

Natural equity seems to demand this, that a man be deprived of the good against which he acts, because by his act he has made himself unworthy of this good. Thence it is, that in accordance with civil justice, those who sin against the State are absolutely forbidden the society of the State, either by death or by perpetual exile; nor is attention paid to the time used in the crime, but only to the good which was abused in the crime.¹³⁵

It must be noted here that, since the act of punishment is to reintegrate the equality of justice and to restore the disturbed order of justice, the punishment must be just. Now the perfection of justice is in the mean, and the mean is equality between greater and less. This mean must be observed in the infliction of punishment. Nor can it be argued that the mean is most difficult to find, and that, therefore, the mean is not to be sought. Aristotle, and Saint Thomas after him, allowed for this difficulty of finding the mean, and said rationally that

in us is not required for virtue that we always find the mean, but it suffices to be about the mean because of the difficulty of attaining it.¹³³

“*Summa Theologica*, II-II, Q. 108, art. 4, corpus.

“*De Malo*, Q. 1, art. 5, ad 7.

WIV Sent., Dist. 20, Q. 1, art. 2, q. 1, corpus.

“*III Summa Contra Gentiles*, cap. 144.

“*IP Sent.*, Dist. 46, Q. 1, art. 2, q. 4, sol. 4, corpus.

The just judge intends to establish the order of justice in his subjects. Now that order cannot be received in a sinner except inasmuch as he is punished by a certain deficiency. And so although this is that defect by reason of which punishment is called evil, yet the judge does not intend that, but he intends the order of justice.¹³⁷

The end or purpose of civil society is the common good.¹³⁸ The ruler of the society must preserve" this common good against the inroads of foreign invaders and the disturbances of domestic criminals. To this end the princes and rulers may use force and violence but only according to the dictates of justice.¹³⁹

i Killing a man is quite wrong; but the judge who kills a robber, and the soldier who kills an enemy are not murderers, for they are acting for justice and the common good.¹⁴⁰ So, too, mutilation of a man for crime becomes licit~when public authority decrees this penalty for crime and for the common good.¹⁴¹ The crime of heresy may be extirpated by death, imprisonment, or loss of material goods, especially when this crime threatens the people of the State whom the civil ruler is bound to protect.¹⁴²

It may be objected that the death penalty is too final, in that it prevents a man from becoming converted and living a good life. In response it may be said that the State has no guarantee that evil men might be converted if they were allowed to live, for they have givennoevidence of cohvërsiôfirand the probability is that they will never be converted»iLat-the-hour. of their death" they do not turn to~Go3.7" In all probability they would corrupt the good men'in society.if.they-were-allowjed_to live.¹⁴³ Nor does the death penalty interfere with our duty of love ttFaII~men, for we are to exhibit charity to them insofar as we are able, but

¹³⁷H *Sent.*, Disc 37, Q. 3, art. 1, ad 2.

¹³⁸For a consideration of this, cfr. *infra*, chapter 3.

¹³⁹*Summa Theologica*, II-II, Q. 66, art. 8, corpus.

¹⁴⁰*op. cit.* I-II, Q. 88, art. 6, ad 3.

¹⁴¹*op. cit.* II-II, Q. 65, art. 1, ad 1.

¹⁴²*op. cit.* II-II, Q. II, art. 4, corpus.

¹⁴³*III Summa Contra Gentiles*, cap. 146.

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when they fall into the greatest malice, and become impossible of cure, then the familiarity of friendship is not to be shown to them. And, therefore, sinners of this sort, from whom we must presume rather the injuries of others than their own emendation, are commanded to be killed both according to human and divine laws.¹⁴⁴

Moreover, the tranquillity of the State is to be preferred to the life of one private individual.¹⁴⁵ It is precisely for this common good that there seems to be a slight deviation from the axiom—“the punishment should correspond to the guilt”—and this deviation is both by excess and defect. By excess, for sometimes it is befitting that a greater punishment be inflicted for a lesser fault, for sometimes this lesser fault is more dangerous to the other men.¹⁴⁶ By defect, for although it is the right and obligation of the State to punish crime, yet it is impossible for the State to punish *all* evils, for in doing this it may well happen that many greater goods will be destroyed, and this would impede rather than promote the common good.¹⁴⁷ Therefore, some crimes must be punished by a lesser penalty than would ordinarily correspond to their gravity, or even entirely escape punishment. This is necessary for the common good.

It cannot be denied that it is just as difficult for the judge to balance exactly his functions of preserver of the common good and corrector of criminals as it is to find the mean in justice. Saint Thomas realized full well this difficulty, and has a good explanation of the State's position when he compares the justice of God with the justice of the Church. If for *Church* we read *State*, the explanation is very fine for our purpose here:

“*Summa Theologica*, II-II, Q. 25, art. 6, ad 2.

“D. *Sylvii Mandragonensis, Comment, in Ham Partem Divi Thomae*, II-II, Q. 66, art. 6.

“*Quodlibet*, I, art. 17, ad. arg. in cont.

“*Summa Theologica*, I. Q. 94, art. 4, corpus.

Sinners who are converted and penitent are always received in the judgment of God, for God can read all hearts, and discerns the truly penitent. But the Church cannot imitate this; indeed she presumes that those men, who have once been received and then again have relapsed, are not truly converted. And accordingly, while she does not deny them the way of salvation, yet she does not preserve them from the danger of death.¹⁴⁸

The State must be on the watch for things which impede the public good; this good must be sought rather than the good of any one individual. In judgment, it may be lawfully presumed that a man who relapses repeatedly is a determined and incorrigible criminal, and after this presumption has become very well founded, measures must be taken to ensure social welfare and the peace and quiet of the community.

It must not be thought, however, that Saint Thomas is not concerned with the individual. In fact, one of the purposes of punishment that he stresses again and again is the purpose of medicine, that is, the cure of the criminal and his return to the ranks of those who live well. / The efficacy of this purpose of punishment is based on the firm belief that man is a creature of body and soul; that man has a free will, capable of acting or not acting, or of choosing this or that. If man has no free will, if all his acts are necessitated in some way, then there can be no question of efficaciously curing the criminal by punishment. The question of medicinal penalties presupposes in man an ability to judge freely that the good with its pleasures is to be preferred and chosen rather than the bad with its associated pain through punishment. We have already demonstrated above that man is a creature of free will, just as he is a rational creature. *In ratiocinatione enim voluntas fit.* It remains, therefore, to show that Saint Thomas taught the medicinal values of penalty.

Man is inclined in two ways to obey the law: lo, the good man is inclined interiorly through love or the dictate of reason;

op. cit. II-II, Q. 11. art. 4, ad 1.

and 2o, the bad man is inclined exteriorly through punishment.¹⁴⁹

He makes these two classes four when he further defines the various types of men:

- a) Those men who do good of themselves, following, as it were, their own inclinations to good.
- b) Those men who are induced to do good by others, although this influence towards goodness is not accompanied by coercion.
- c) Those men who can be induced to do good, but this induction must be accompanied by force, i. e., punishment.
- d) Those men who cannot be induced to do good even by force.¹⁵⁰

Princes and all other rulers were instituted for precisely this reason, so that they might provoke to do good and avoid evil those evil men who will not do good for the love of virtue.¹⁵¹ And for precisely this reason is vengeance also licit, for it tends to repress evil. Some men who have no love of virtue are restrained from evil because they fear to lose by punishment certain things which they love more than the goods they would attain by sinning. And this is the reason that the fear of penalty can curb sin.¹⁵²

The punishments of this life are rather medicinal, and for this reason also they are not absolutely in correspondence with the guilt of the criminal.¹⁵³ In fact, as far as corporal goods are concerned, one man may be punished for the sin of another, and in this case punishment is a medicine.

¹⁴⁹dr. op. cit. I-II, Q. 92, art. 1, ad 2; Q. 95, art. 1, corpus, Q. 107, art. 1, ad 2.

¹⁵⁰*Comment. in Epis ad Romanos*, cap. 2, Leet. 3, medio.

¹⁵¹*IV Sent.*, Dist. 20, art. 2, corpus.

¹⁵²*Summa Theologica*, II-II, Q. 108, art. 3, corpus.

¹⁵³*De Malo*, Q. 2, art. 10, ad 4.

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If we speak of penalty inflicted for crime, that is, precisely as it has the nature of punishment, thus each man alone is punished for his own sin, because the act of sin is something personal. But if we speak of that penalty which has the nature of medicine, thus it happens that one man is punished for the sin of another. It has been said in the preceding article,¹⁵⁴ that losses in corporal things or even loss of the body itself are certain penal medicines ordained to the safety of the soul. Wherefore nothing forbids that one man should be punished by penalties such as these for the sin of another, whether by God or man. For example, the son may be punished for his father and the subject for his lord, inasmuch as the son and subject are in a certain way possessions of the father and lord. Nevertheless, if the son or the subject is a participant of the crime, these penal defects have the nature of penalty as far as both are concerned, namely, as regards him who is punished, and as regards him for whom the one suffering the penalty is punished. But if the one punished is not a participant in the crime, then the penalty has the nature of punishment as regards him for whom it is inflicted, but as regards him who suffers it, the penalty has only the nature of medicine, unless he has consented to the sin, for the penalty is ordained to the welfare of his soul, if he suffers it patiently. On the other hand, spiritual

mSumma Theologica, Tit, Q. 87. art. 7, corpus- Sciendum tamen est quod quandoque aliquid videtur esse poenale, quod tamen non habet simpliciter rationem poenae. Poena enim est species mali..Malum autem est privatio boni. Cum autem sint plura hominis bona, scilicet, animae, corporis, et exteriorum rerum, contingit interdum quod homo patiatur detrimentum in minori bono, ut augeatur in majori; sicut cum patiatur detrimentum pecuniae propter sanitatem corporis, vel in utroque horum propter salutem animae et propter gloriam Dei: et tunc tale detrimentum non est simpliciter malum hominis, sed secundum quid; unde non habet simpliciter rationem poenae sed medicinae: nam et medici austeras potiones propinant infirmis, ut conferant sanitatem.

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penalties are not medicinal, for the good of the soul is not ordained to some better good. Wherefore no one is punished in goods of the soul except for proper guilt. And so one man is not punished by spiritual penalties for the sins of another, for as regards his soul the son is not a possession of the father.¹⁵³

In punishment two things must be considered. First, we must consider the *equality demanded by justice*, and according to this the punishment ought to correspond to the guilt, and the criminal ought to be punished in that against which he has sinned. Secondly, we must consider the *utility of the penalty*, and according to this, those punishments ought to be inflicted which will act as quasi-medicines, and terrify men so that they will cease from sinning.¹⁵⁸ Moreover, when one penalty will not draw men back from crime, it is licit to use another.¹³¹ He states this again very emphatically:

the punishments of the present life are medicinal; and, therefore, when one penalty is not sufficient to coerce a man another (penalty) is superadded, just as medical doctors apply diverse corporal medicines when one medicine is not efficacious.¹⁵⁸

Punishment, insofar as it is a medicine, has a threefold office, namely, to heal from past sins, to preserve from future sins, and to further man in doing good.¹⁵⁹ These three factors, viz., cure, prevention, and promotion in moral health, are exact corre-

*"*op. cit., I-II, Q. 87, art. 8, corpus. Perhaps for this reason Bilhiart, one of the modern commentators on Saint Thomas, says very emphatically that penalty is a punitive and afflictive evil visited on a criminal contrary to the criminal's will and in vengeance for his crime. If the penalty is inflicted for the sin of another, or as a medicine, or as a precaution, it is not punishment strictly speaking. Billuart, op. cit., ii, 531-532.*

"Summa Theologica, II-II, Q. 99, art. 4, corpus.

"ibid, ad 2.

"op. cit., II-II, Q 39, art. 4, ad 3.

"op. cit., II-II, Q. 108, art. 4, corpus.

spondents of the three effects of physical medicine for physical health.

These medicinal penalties may serve as remedies both for the criminal and for others. Sometimes, indeed, they have no medicinal value for the criminal himself, but may well have for others. For instance, when the judge hangs a robber, it is hoped that others will be drawn back from crime when they see how little it pays. The fear generated by the sight of one man's penalty will draw others back from sin.¹⁶⁰ The penalties which are not absolutely exterminative are ordained to the correction of the offender.¹⁶¹ But those penalties which are absolutely exterminative are not ordained to the correction of the offender, but to his expiation for his crime; however, they may well be ordained to the correction and tranquillity of others in the State.¹⁶²

One man's example may corrupt many others. This is a truism, for indeed many are led into crime because of the example of successful criminals—especially by the example of those successful criminals who go unpunished. So there must be punishment for the criminal so that the scandal of the other citizens may be removed, so that just as they were scandalized by the crime they may be edified by the penalty. If all men are led to live and act virtuously the tranquillity of the State is assured.¹⁶³

So, then, these seem to be the purposes of penalty as outlined by Saint Thomas: conservation and reintegration of justice, tranquillity and common good of the State, and the healing from past sin, preservation from future sin, and promotion in good of both the criminal himself and the others in the community.

¹⁶⁰*op. cit.*, I-II. Q. 87, art. 3, ad 2.

¹⁶¹7P *Sent.*, Dist. 46, Q. 1, art. 3, ad 3. This must not be understood to be the sole purpose of non-exterminative penalties, such as, flagellation, fines, incarceration, and the like. Besides being ordained to the correction of the offender, they may also be ordered to the reintegration of justice, the common good, the deterrence of others, etc.

¹⁶²iWd.

¹⁶³Summa Theologiae, I-II. Q. 87, art. 6, ad 3.

In conclusion to this chapter dealing with the nature, grades, and purposes of penalty, we may say that Saint Thomas has a very clear and precise notion of the nature of punishment. He includes in his concept of penalty three basic notions, namely: that penalty be contrary to the will, that it be an afflictive evil, and that it be inflicted for some sin. If any of these elements are lacking, then punishment, strictly so called, is certainly not present.

Penalty is a good thing because it has relation and order to the ultimate end. It is an act of justice, hence it is virtuous and good on the part of the one justly punishing. On the other hand, penalty is an evil of the one suffering it, for it is contrary to his will and is afflictive. Even though it is evil, yet it is not as evil as sin, for penalty is inflicted that sin may be avoided.

Penalty is inflicted for sin. Therefore, we can have penalty strictly so called only where we can have sin.

All sins are not equal, nor are the penalties imposed for them equal. There are in general three points of view from which we may judge the gravity of a crime. The first is from the point of view of the species of the act itself. The second is from the standpoint of the sinner who commits the crime. And the third is viewed from the basis of the evil consequences flowing from the act of sin.

Any act takes its species from its object, and so the act of sin is greater or lesser according as the value of the good to which it is opposed or which it corrupts is greater or lesser. The valuation of goods is as follows: God, the substance of man, and then the exterior things of man. Crimes are greater or lesser according as they are actually opposed to the goods as listed in this order.

On the part of the sinner, the crime is greater according as the deliberation and willfulness involved in the act of sin is greater. Sin is possible only where there is judgment and free choice. Therefore, the more profound and extensive the knowledge, and the more unhindered the exercise of the will, the more grievous and imputable will be the sin. From this it can be seen that anything which tends to diminish clarity of judgment or freedom

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of election also tends to diminish guilt and imputability. Therefore it is that ignorance, fear, force, and concupiscence tend to lessen sinfulness.

Since punishment is inflicted for sin, and should have a definite positive correlation to the sin, it is evident that not all punishments are equal, for all sins are not equal. Objectively speaking, the punishment is greater according as the good which is taken away by punishment is greater. Therefore the most severe penalty is the loss of happiness which is the supreme and ultimate end of man. The next greatest penalty is the loss of virtue which leads to the ultimate end. The next punishment in order of severity is the loss of anything that is conducive to good and virtuous operation. Least in the order of severity are those punishments which involve loss of bodily life or integrity, or the loss of exterior goods. In this group there is a gradation of penalties, namely, loss of life, injury to bodily integrity, loss of liberty, and finally the loss of the exterior goods of man, that is, riches, country, and glory.

This gradation is objective, that is, it is based on the absolute values of the goods involved. The severity of a penalty may vary in a particular case, according as a man has or has not a right to the good which he loses by penalty. Moreover, the valuation of these goods, and hence their gradation, may vary according as they are esteemed more or less by a particular man. We must consider all these factors in determining the harshness or levity of a penalty, if we are to apply a fitting penalty in a particular case.

Saint Thomas seems to approve thoroughly of capital punishment. The arguments which he uses to support his position seem valid.

In general the severity of the punishment must have a definite correspondence to the gravity of the crime. This has particular reference to the solution of the debt incurred by the sinner when he committed the crime. Before the crime can be forgiven the quantity of the punishment must correspond radically to the quantity of the guilt. However, punishment is also medicinal, and when it is used in this way, for the cure of the sinner, or for

others, or for society in general, a greater penalty may be inflicted for a lesser fault, and *vice versa*. Moreover, due to the difficulty of finding the mean in justice, of which virtue punishment is an act, punishment by any human agency is almost certainly bound to deviate from the perfection of the physical and mathematical mean. So we say that the perfection of penalty in this case consists in striking about the mean as closely as possible.

The purposes for which punishment may be lawfully inflicted are many, but they may be reduced to the following: the conservation and re-establishment of the order of justice, the tranquillity and common good of the State, the healing from past sin, preservation from future sin, and promotion in good both of the criminal himself and others in the common group.

CHAPTER II

SAINT THOMAS—LAWFUL METHODS OF PUNISHMENT. | VARIOUS CRIMES TO BE PUNISHED. RESPONSIBILITY | AND INTENT AS FACTORS IN INFLICTING PUNISH- | MENT. i

Lawful Methods of Inflicting Punishment.

In this section we will deal with only those penalties which are within the competence of civil or social authority. Spiritual penalties, such as the loss of grace, glory, or ultimate beatitude are not subject to civil authority but only to God. Suspension from participation in worship, excommunication, and interdict are within the jurisdiction of the Church, acting in her capacity of legislator and judge, yet these, too, are properly beyond the scope of discussion here. In fine, we are endeavoring to expose the Thomistic approbation of certain methods of sanctioning its laws which society could, can, did and does use.

Vindication or retribution is licit and virtuous only when it tends to repress evil. Some men who have no love of virtue are restrained from sin because they fear to lose certain things which they love more than the things or goods they would gain by sinning. Otherwise, fear (of penalty) would not curb sin. The things which they fear to lose are life, integrity of body, freedom, and external goods, such as riches, country and glory. Saint Thomas seems to approve the following methods of taking away these goods: death, talion, stripes, slavery, chains, fines (*damnum*), exile and infamy? These methods were already ancient in the time of Aquinas, for Saint Augustine says that Marcus Tullius Cicero lists them and he himself approves them?

¹Summa Theologica, II-II, Q. 108, art. 3. corpus.

*Aureoli Augustini, *De Civitate Dei*, cap. XXI, in Migne, p. L. 725-726.

Objectively speaking, death is the greatest punishment that the state can inflict, for all other bodily penalties tend to and are ordered to this, e. g., hunger, thirst, etc.³ However, due to the relative inability of man to measure his affections accurately, a greater is liable to seem a lesser penalty, as we have said above.⁴ Yet, even allowing for this subjective tendency to distort values, there seems to be substantial agreement among men that death is the greatest and most terrible penalty. Aquinas was quite certain of the legitimacy of inflicting the death penalty, but did not seem much concerned about the method used to inflict it. For instance, while he mentions death as a possible penalty for adultery and murder, and for the rape of a cloistered nun,⁵ he does not specify the method to be used in inflicting death? However, he does mention hanging as a means of punishing the robber? For the crime of sacrilege he states approvingly that it is customary to inflict “*capitalis poena*”.⁸ Saint Thomas here, by the expression “*capitalis poena*”, seems to mean decapitation. These two methods of capital punishment, hanging and decapitation, seem to be the only ones mentioned specifically and at least quasi-approvingly by Saint Thomas. So for the most part we must conclude that Saint Thomas would admit the death penalty for capital crimes by means of the axe and the rope. He does not seem to make any distinction between the execution of a noble and of a peasant. Nor were we able to find any references to burning as a punishment for heresy. In the Old Law the daughter of the High Priest, even if she were unwed, was burned if she had sexual relations.⁶ Other than the High Priest’s daughter the girl was stoned for it. But these two forms of death penalty were not extant in his time.

After the loss of life, the disruption of bodily integrity is the next greatest penalty. Again we stress that this is an objective

³ *Summa Contra Gentiles*, cap. 50, prin.

⁴ *IF Sent.*, Dist. 17, Q. 2, art. 3, q. 1, ad 4, fine.

⁵ *Summa Theologica*, II-II, Q. 154, art. 2, ad 10.

⁶ *op. cit.* I-II, Q. 87, art. 3, ad 1.

⁷ *ibid.*, ad 2.

⁸ *op. cit.* II-II, Q. 99, art. 4, corpus.

⁹ *op. cit.* III, Q. 29, art. 1, ad 4.

gradation. Doubtless many men would rather part with their legs or arms than with their money. At first blush, Saint Thomas' doctrine on mutilation of the body as a penalty for crime seems rather a harsh method of sanctioning law. Moreover, since it is done by public authority and for the common weal, it seems to carry within itself obstacles to its own perfection. For it seems a little harsh to pluck out a man's eye or cut off his arm or leg, and then cast him forth to find a living, since it is rather a difficult task to garner a living even with all one's members intact. Unless Christian charity intervenes, this mutilation amounts to slow death. On the other hand, if society as such aids the maimed malefactor; then its sanction ultimately rests on itself, for the application of the penalty, instead of operating for the common weal, thus puts a new burden on the body politic. However, none of these objections is insuperable. The apparent harshness of mutilation is in no way inconsonant with the Christian concept of the subjection and ministry of the body to the soul. This sanction was not carried to the lengths which Origen advocated, that is, making oneself a eunuch in order to preserve purity. A decent respect for the body, a greater regard for the soul, and a keen appreciation of man both as an individual and a social being are the keynotes of the whole Thomistic theory of sanction.

The whole man is ordered to the community of which he is a part. Now it can happen that the amputation of a member, even if it is harmful to the integrity of the body, is yet ordered to the good of the whole community, inasmuch as it is inflicted on someone in order to repress crimes. For just as it is licit to take away a man's life for greater crimes, so it is lawful to cut off a member for certain lesser crimes. On the other hand, this mutilation is never permitted to be done by a private person, even if the owner of the part to be cut off is willing. For the loss of this part is an injury to the whole body politic *to which belongs the man himself and all his parts.*TM It must be noted that Saint Thomas does not specify the nature of these "lesser crimes" for which a man may be mutilated.

op. cit. **Ii4f. Q. 61. art. 1.**

It may be objected that "mutilation is contrary to the natural integrity of the human body as constituted by God, and therefore, mutilation is sinful as against nature." In answer to this it may be said that nothing forbids that a thing be contrary to particular nature and yet be in accordance with universal nature. For example, death and corruption in natural things is certainly contrary to the particular nature of that which is corrupted, yet death and corruption are in consonance with the universal nature. So, to mutilate anyone in a member is in harmony with natural reason in relation to the common good, even if it is harmful to the particular nature of the one mutilated.¹¹

Saint Thomas also lays down the principle that the extent of injury is to be considered also on the part of the one who suffers because he is joined to the one suffering the original injury.¹² From this it seems that the judge should consider the probable harm to be inflicted on the criminal's family and dependents when he inflicts punishment on a man. Care should be taken that others are not injured because of the criminal's punishment.

In the matter of mutilation of the body, the methods Saint Thomas cites and approves, or rather, the methods he cites and does not disapprove are necessarily few. He gives an example of possible punishment by mutilation when he cites the blinding of a man by order of the judge as a penalty for a crime.¹³ The name of the crime to which Saint Thomas would have this penalty attached is not given, although he would, no doubt, require a very grave crime for such a severe penalty. It seems that blindness should be considered the greatest of bodily mutilations.

One of the oldest methods of inflicting punishment is that of the talion, which is a systematic method of mutilation in which is exacted an eye for an eye, a tooth for a tooth, a life for a life. The Old Law, i. e., that of the Hebrews, commanded the talion be inflicted in cases of assault, mayhem, and false testimony.¹⁴

ibid. ad 1.

ibid. art. 4, corpus.

uop.cit. II-II, Q. 64, art. 1, ad 4.

op.cit. I-II, Q. 105, art. 2, ad 10.

Saint Thomas cites this judicial system of the Hebrews as if at least he did not disapprove of it. He specifically advocates its use in cases of false accusation, when a person is accused of a crime, because then there is danger of punishment.¹³ It will be noted that the talion is inflicted for rather serious crimes. If a man accuses his wife of adultery before a civil tribunal, he must bind himself to the talion if he fails in proof.¹⁰ In general, a false accuser, i. e., one lacking proof or one malicious in false accusation, is subject to the law of the talion, for the equality of justice demands that anyone should suffer the same injury he plans for another. Hence it is just that he whose accusation puts another in danger of grave penalty should suffer the same grave penalty if his accusation is false.¹⁷ The judge can remit the penalty of the talion if he sees that the accuser is in good but ignorant faith.¹⁸ This crime of false accusation seems to be the one case in which Saint Thomas advocates the use of strict talion. It is evident, however, from the principles we have given earlier, that talion, as a general thing, would not give the strict adequacy of penalty that justice demands.

Another species of mutilation, namely torture, while not a penalty strictly speaking, is yet harmful and against the will of the one suffering it. A just judge may put to the torture even an innocent person in order to get at the truth of an accusation. For torture to be licit, however, the crime must be half proved or public.¹⁹ Saint Thomas does not repeat this opinion when he treats of the duties of judges in the *Summa*.²⁰ He does mention the use of instruments (*instrumenta*) by the judge in trying to uncover the truth of a crime which has not been proven in court and in a public manner but of which the judge has private knowledge.⁷¹ Torture does not seem to us to be a good way of arriving at the

"71 Sent., Dist. 4), Q. 1, art. 5, q. 2. ad 1.

"*op. cit.* Dist. 35, Q- I, art. 1, ad 5.

"*Summa Theologica*. II-II, Q. 68, art. 4, corpus.

"*ibid.*, ad I.

"*Comment, in Lib. Job* cap. 10, Leet. 1, medio.

"cfr. *Summa Theologica*, II-II. Q. 67.

"*op. cit.* II-II. Q. 67, art. 2, corpus.

dr. Biliuart *Summa Sancti Thomae*, Tomus IV, Diss. XII, art. 5.

truth, for, given pain enough, even an innocent man will be liable to swear away his own life and anybody else's, unless he be of great courage and constancy.

Whipping or flagellation, according to its species the least of the mutilatory punishments, was inflicted in the Old Law for lesser crimes.²² Saint Thomas cites the judicial principles of the Old Law and does not disapprove them. This power of whipping belongs to all those who have persons subject to them. Even parents, masters, and school masters may whip their sons, slaves, and pupils. But this must be done moderately, lest greater evil befall, that is, the whipping must not break the spirits of the whipped, nor must it do them any irreparable harm. *A fortiori* the state, a perfect society, has the power of flagellation in lesser crimes.²²

After life and bodily integrity, the thing dearest to the heart of man is freedom. Consequently the loss of that freedom is a serious penalty. In our own day, capital punishment, incarceration, fines, loss of citizenship, removal from public office, and expulsion from a particular community are the only penalties used in sanctioning law. In Saint Thomas' thought the role of the jail was not so great. Penal confinement had not as yet taken over almost the whole field of criminal repression and correction. While Saint Thomas distinguishes five kinds of chains, namely, those of piety, iniquity, poverty, servitude and jail,²³ only the last two concern us here. Aquinas teaches that it is not licit to jail, bind or detain anyone except according to the order of justice, either as a penalty or as a *precautionary measure in order to avoid some evil*.²⁵ This is especially true in the case of the crime of heresy. A known propagandist of heretical teachings may be jailed so that he will not be able to spread his evil doctrines. This latter cause, i. e., precaution, is very important in explaining what seems on the surface unjust and arbitrary procedure. But it must not be carried too far, for that would inevitably lead to tyranny and to an abuse of rights. A momentary detention can be executed by anyone, for

²²*op. cit.* II-II, Q. 105, art. 2, ad 10.

²³*op. cit.* II-II, Q. 65, art. 2, corpus.

²⁴*Comment. in Isaiam Proph.* cap. 58, fine.

²⁵*Summa Theologica*, II-II, Q. 65, art. 3, corpus.

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to everyone is permitted the detention of one who is immediately about to commit a crime, just as when a man detains another in order that he may not fall or injure himself. But to jail or chain anyone without limit (*simpliciter*) pertains only to him who has the power of disposing universally of the life and actions of another. Indeed, a lengthy detention, while it would prevent a man from perpetrating evil, would also keep him from doing good.²⁰ Saint Thomas does not consider jail as a penalty to be used universally, but says that it should be used as a sanction only for some crimes.

The tendency today seems to be to make jail the only penalty. And the result of this trend is a system of crime schools. Saint Thomas would not approve many things which result from our system of jails. Is it not a poor exhibition of mercy and gentility when we eschew with much pious protest the rack, the rope, and the whip, and then condemn a man to a criminal's life by sending him to a place which does not, to any great extent, help to cure and reform the offenders placed there? As we shall see later, one purpose of penalty is the correction of the culprit. This idea is not effectively operative in our present penal system. The ideal of reform is still present in our social and penal thought, but it has not been well worked out nor is it effective.

B

Ordinarily, after liberty, exterior things hold the next place in man's affections. These can be grouped in three general classes: 1, riches, 2. country, and 3. glory or fame. If it be necessary as a sanction, the state can take any of these away from man. This doctrine is not at all to be construed as an advocacy of state ownership, nor does it militate against the right of man from the natural law to possess private property. The state itself can be just as guilty of theft and rapine as any private citizen. Rulers are not permitted to enrich themselves at the expense of their subjects. On the contrary, they ought to be content with their lawful stipends. Nor ought they oppress their subjects in their goods and possessions except *by reason of crime and for the common good of the kingdom*. "In the first way, i. e., by reason of crime, the ruler deprives his vassals of their fiefs because of

"ibid. ad 3.

ingratitude..”²⁷ True, this refers to a particular kind of crime, but there seems to be no reason why fines should not be the sanctions for other breaches of law. Saint Thomas brings this idea out when he says that princes have public power to preserve justice. Hence, they cannot use force and violence except in the course of justice, and this is done, either in warring against external enemies, or in punishing malefactors among the citizenry. In these cases, the forceful appropriation of goods is not rapine, because justice is not violated.²⁸ Moreover, in case the criminal or criminals live outside one's own society, war may be a sanction. In this instance it is permitted to exact fines, i. e., booty or spoils, provided that the war is just and that cupidity is not the motive in exacting spoils.²⁹

Saint Thomas insists time and again that tainted or ill-gotten money may not be used. While it is licit to exact from the Jews the money they have gotten from usury, a civil crime during the middle ages (although always contrary to Natural Law), this money must be turned back to the people from whom it was taken. If restitution is impossible then the money must be converted into pious uses or employed for the good and interests of the community. Since usury is a crime, the Jews may be fined for it, but the money realized must be used as just stated, and another punishment ought to be added, for:

it is expedient that the Jew be punished by a pecuniary penalty, lest he should be benefitted by his iniquity. It seems to me that the Jew or any other usurer ought to be punished more than another in the same case, and by a punishment greater in the same degree as the money which is taken away from him is known to belong less to him. Likewise another penalty can be added to the pecuniary penalty, lest it should seem to be sufficient penalty that a man should cease to possess money which belongs to others. Now, money taken

²⁷*De Regimine Principum*, cap. 2, medio.

²⁸*Summa Theologica*, H-II, Q. 66, art. 8, corpus.

²⁹*ibid.* adl.

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away from usurers under the title of punishment cannot be kept, but must be expended in the ways mentioned above, that is, if those who are punished have nothing other than usuries.⁸⁰

Heretics also may be deprived of their goods.³¹ Suspension, interdict, and excommunication would be fitting penalties for sacrilege. But not only the equality of the penalty, according to which the punishment is just, must be considered in inflicting penalty, but also the penalty's *utility*, for penalty is a quasi-medicine to draw men from evil. Therefore! a sacrilegious man might better be drawn back from crime by a pecuniary penalty.⁸² The violation of a virgin may also be fined.⁸⁸

All through the discussion of fines, Saint Thomas insists that a just, adequate and effective penalty consists in taking away that which man has a right to or which is proper to him, rather than in taking away something to which he has no right—it is more effective to take away his patrimony to which he has a right than to deprive him of a kingdom to which he has no right.^{8*} However, taking away a good to which a man has only a title, or right, or *jus ad rem* can be just as effectively a means of penalty as taking away those things which he actually here and now possesses.⁸⁵ Again, man can be punished by taking away something which is due him, and he can also be punished by taking away something which, while not due to him, yet would have been due if the circumstances were otherwise and the inflicted penalty not inflicted.^M

As is evident from the discussion on fines, Saint Thomas dealt very little with this question. This may have been so because very few people in his day had money. Evidently he stresses fining the Jews for they had a great deal of money in their possession.

**Dt Regimine Judeorum*, medio.

>*P Sent.*, Dist. IS. Q. 2, art. 3, corpus.

"*Summa Theologica*, II-II. Q. 99. art. 4. corpus.

"*op. at.* Q. 154. an. 6, ad 3.

"*De Malo*, Q. 5, art. 1. ad 3.

"*Summa Theologica*, 11-11. Q. 63. art. 2. ad 4.

Sent., Dist. 41. Q. 3. art. 2. corpus.

Nor is there a great deal of discussion concerning the forced withdrawal from the fatherland, or exile. While he admits that heretics may be exiled,³⁷ yet the practice was apparently not too common. Perhaps the reason he advances for the lack of a universal law of exile among the ancient Jews, namely, that all the other nations of the world were idolators, and to force a Jew to live among them would be to give him occasion to commit idolatry,³⁸ is in the background when he does not insist on exile as a sanction for the laws of medieval Christianity. The cases are much alike. Outside medieval Christendom was idolatry, and thus an exiled Christian would have been given the occasion of spiritual ruin. If the place of exile was within the boundaries of Christendom, the punishment would have the practical effect of forcing other Christian societies to tolerate a criminal—hardly an expression of Christian charity, especially if the criminal were guilty of anything save personal rebellion or treason.

Finally, Saint Thomas says many men are drawn back from sin by their fear of losing fame. Indeed, on the other hand, when they realize they are infamous, they sin the more boldly. Fame is a powerful force for right action, and so we must endeavor to preserve a man's good name.³⁹ However, Saint Thomas gives no mention of methods by which the penalty of infamy could be applied. But he does mention that in the Old Law crimes were punished in this way.⁴⁰

This completes the discussion of methods of punishment discussed, recommended, or not disapproved by Saint Thomas. As is evident, he has not added any new methods beyond those of Tully as cited by Saint Augustine. Nor have we modems added to his classification. The difference consists mostly in the stress placed on jail today. The next step in our study must be to determine, at least in general, just what crimes the state should punish.

"op. at. Dist. 13, Q. 2, art. 3, corpus.

"Summa Theologica, I-II, Q. 105, art. 2, ad 10.

"op.cit. II-II, Q. 37, art. 2, corpus.

"op.cit. I-II, Q. 105, art. 2, ad 10.

Various Crimes To Be Punished.

In outlining the crimes for which Saint Thomas thinks the state should inflict penalties, it is neither advisable nor useful to descend to a too detailed enumeration. Certainly, it will not contribute much to a theory of penalty to know that drunkenness in the opinion of Saint Thomas should be punished by a fine of 10 pieces. It is our purpose here to confine the list of crimes to the general classifications of injuries against justice which are rather perennial and universal. Murder is murder, and punished as such in medieval Europe, in more modern France, in present day America, in Patagonia, among the Eskimo and in Southeastern Australia. Moreover, we shall endeavor to treat those crimes which contain many subspecies, for example, the penal reaction to theft comprises and is applicable to strict thievery, rapine, fraud, embezzling, and all crimes in general in which one man takes or keeps something which belongs to another. In all these crimes the penal procedure is the same, namely, restitution and punishment.

First, we shall consider those crimes which are against God; then, man's crimes against society as such and against its rulers; finally, man's offenses against his neighbor's life, integrity of body, reproduction of the race, external things and fame.

Man's possible offenses against God may be summed up under the headings of infidelity, heresy, schism, blasphemy, perjury, sacrilege, hatred, and despair. There is no doubt but that Saint Thomas teaches that heresy and infidelity should be punished. But it is also permitted to tolerate them if the offense is private and there is no attempt to corrupt the religion of the faithful. Infidels cannot be forced to accept the faith, but they can be forced to abstain from putting obstacles in its way. Infidelity to God can be a cause for divorce.*1 Heretics can be forced to live up to the faith they have once professed.*2 The thesis of Saint Thomas is simply that no one is compelled to become a Christian; that is entirely within the choice of the individual will. However,

<IP Sent., Dist. 35, Q. 1, art. 1. ad 3.

-*Summa Theologica*, 11-II, Q. 10, art. 8, corpus.

once the will gives assent, and the man accepts the Christian faith, then that obligation must be lived up to. Heretics who corrupt others may be jailed or exiled; if they do not corrupt others they may be tolerated. In secular court, however, even if heretics do not corrupt others, they may be killed or despoiled of their goods, for they blaspheme God, inasmuch as they observe false faith. Wherefore they are more to be punished than those who make counterfeit money or who are guilty of *lésé-majesté*.**

Two things must be borne in mind concerning heretics. One thing on their own part, and another thing on the part of the Church. On their own part, heresy is indeed a sin through which they merit not only to be separated from the Church by excommunication, but also to be excluded from the world by death. Indeed, it is far graver to corrupt faith, through which life comes to the soul, than to make false money, through which temporal life is sustained. Wherefore, if counterfeiters and other malefactors are immediately and justly put to death by secular princes, far more justly can heretics, from the fact that they are convicted of heresy, not only be excommunicated but also justly killed.

Now, on the part of the Church, there is mercy for the conversion of the erring, and therefore she does not condemn immediately, but after the first and second correction, as the Apostle (Paul) teaches. Afterwards, if the heretic be found still obstinate, and if the Church has no hope of his conversion, she provides for the safety of others, by separating him from the Church by excommunication. And finally, she leaves him to secular justice to be exterminated from the world by death. . .44.

aIV Sent., Dist. 13, Q. 2, art. 3, corpus.

"Summa Theologica, II-II, Q. II, art. 3, corpus.

The reason for this is rather concisely stated by Saint Thomas and may serve as an answer to those who convict the Church and Christian Philosophy of cruelty in this regard.

There is a twofold good: one spiritual, namely, the salvation of the soul, to which charity principally has reference. Because of charity anyone ought to wish this to another. As regards this, returning heretics, no matter how often they have relapsed, are received by the Church to penitence, through which the way of salvation is opened to them.

Now there is another good to which charity has reference secondarily, namely, temporal goods, as bodily life, worldly possessions, good repute, and ecclesiastical or secular dignity. This good, indeed, we are not held by charity to will to another except it has relation to their eternal salvation or that of another. Wherefore, if the existence of anything of goods of this kind in one be an impediment to the eternal salvation of others, it is not fitting that we will good of this kind to him, but rather that we will him to lack it, because eternal salvation is to be preferred to temporal goods, and because the good of the many is to be preferred to the good of the one. Now, if the returning heretics were always received, and kept alive, and received other temporal goods, this could be in prejudice of the salvation of others, both because, if the heretics relapsed (into heresy) they could infect others, and because if they escaped without penalty, others would fall more surely into heresy. As Ecclesiastes says: *For because sentence is not speedily pronounced against the evil, the children of men commit evils without any fear.* 45.

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Nor does this doctrine apply only to the people. If a prince once accepts the faith and afterwards apostatizes, the faithful

•*ibid.* art. 4. corpus.

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are released from their obedience and oath of fidelity to him by the Bull of Excommunication.⁴⁶

Schism, or the crime of separating from the authority and discipline of the Church, is considered by Saint Thomas (on the part of the harm caused) as worse than the crime of blasphemy, for schism breaks up the whole regime of human society. Therefore it is to be punished by death.⁴⁷

Although he lists blasphemy as a very great crime, he does not assign any specific penalty for it here and now.⁴⁸ However, he does say that men are deterred from blasphemy here and now because of penalties which they think they will evade.⁴⁸ It seems that he is referring here to spiritual penalties, and not to those inflicted by human society. He mentions that offenses done against God in the Old Law were punished by death,⁵⁰ and that blasphemy particularly was punished by stoning. But he does not seem to extend this to his own day.

Perjury, which is calling on God to witness the truth of a lie, is considered by Saint Thomas as a very grave crime, and would no doubt be punished by a very severe penalty.⁵¹ In particular, that form of perjury which takes the nature of false accusation, thereby putting an innocent man in danger of life or loss, would be punished at least with the talion.⁵²

Sacrilege, which is the abuse of a sacred (i. e., consecrated to God) person or thing, ought to be punished very severely. Ordinarily for theft, which does not inflict irreparable harm, the death penalty is not to be inflicted; but if the theft be the abstraction or retention of a sacred thing, then the death penalty is condign.⁵³ Sacrilege is a particularly abhorrent crime, and is a crime in which the adage "*The criminal ought to be punished in that in which he has sinned*" is not quite applicable. A spiritual

•*ibid.* Q. 12, art. 2, corpus.

"*De Malo*, Q. 2, art. 10, ad 4.

"*Summa Theologica*, II-II, Q. 13, art. 3.

•*ibid.* art. 4, ad 1.

"*op. at.* I-II, Q. 105, art. 2, ad 10.

"*rfr.op.cit.* II-II, Q. 98.

"*c&.op.cit.* II-II, Q. 68.

"*op.cit.* II-II, Q. 66, art. 6, ad 2.

penalty for sacrilege gives the equality demanded in just punishment, but it is of no practical utility for the reform or conversion of the criminal:

For penalties are inflicted like medicine, so that men might be terrified by them and stop from sinning. Now a sacrilegious man, who does not respect sacred things, seems to be not sufficiently drawn back from crime, because sacred things, which he cares not about, are taken from him. Therefore, according to human laws, capital punishment is to be applied; and according to the statutes of the Church, which does not inflict corporal death, a pecuniary punishment is to be inflicted, so that at least by temporal penalties he may be deterred from his sacrilegious crimes.⁵⁴

Sexual crimes which have the nature of sacrilege, that is, which are committed with or by persons consecrated to God, are to be punished very severely. For instance, the rape of a religious woman is to be punished by more severe penalties than other rape, and this by civil law:

Unde Justinianus Imperator dicit, lib. *Si quis*, Cap. de Episcop. et Cleric.: *St quis, non dicam rapere, sed attentare tantummodo matrimonii conjungendi causa sacratissimas virgines ausus fuerit, capitali poena feriatur.*⁹⁵

Simony, which is a crime consisting of a formal will of buying or selling something spiritual or something annexed to spiritual things, ought to be punished very severely.⁸⁰ Both buyers and sellers of spiritual things, and likewise mediators in these affairs, ought to be deprived of the purchased articles, and also be punished by other penalties, such as infamy, deposition if they are clerics, and excommunication if they are laics.⁵¹

⁸⁰op.cit. IMI. Q. 99. art. 4. corpus.

⁵¹op.cit. IMI. Q. IM. art. 10, ad 2.

⁹⁵op.rit. IMI, Q. 100. art. I, corpus,

<iftid. art. G. corpus.

It is evident from the foregoing that Saint Thomas places these crimes against God and against the things of God in the most grave class of crimes. There is a difference among themselves in these crimes, of course, but for the most part it would seem that Saint Thomas does not think that death is too harsh a penalty for them. Certainly he thinks they should be punished most severely.

The most serious of the crimes that man may commit against society as such, may be stated generally as treason and defrauding society of its goods. Saint Thomas teaches that treason, for instance, when a soldier has a pact with the enemy, is a grave crime against society.⁵⁸ Princes and prelates must be honored, for, even if they are evil, yet in civil affairs they take the place of God in the community which they rule.⁵⁹ And this exalted position of the ruler places a new species of evil in sins committed against him, and makes those sins liable to a harsher penalty.⁶⁰ Nor does this distinction make for an *acceptance of persons*, but rather the diversity of persons makes for a diversity of things.⁶¹ For an injury to the ruler redounds to the hurt of the whole society. Consequently injuries to the ruler, and of course injuries to the state itself are punished very sharply. For the crime of *lèse-majesté*, a man will lose his goods, if not his life.⁶² Likewise for the theft of something belonging to the state, death may well be the penalty.⁶³ Even counterfeiters may suffer capital punishment for their crime.⁶⁴

This outline of crimes against the ruler and the state is necessarily brief, but it can readily be seen even from it, that Saint Thomas considered this species very serious, and that crimes specifically against the common weal take on a greater gravity than crimes which deal specifically with individuals. Always

"*op.cit.* I-II, Q. 100, art. 6, corpus.

:"*op.at.* II-II, Q. 63, art. 3, corpus,

"*op. eft.* 11-11, Q. 59, art. 10, ad 3.

"*op. cit.* II-II, Q. 63, art. 4, ad 2.

"*op.cit.* II-II, Q. 108, art. 1, ad 2.

"*op. rit.* II-II, Q. 66, art. 6, ad 2.

"*op. cit.* II-II, Q. 11, art. 3, corpus.

Thomas keeps the common good uppermost when dealing with human affairs.

As we have often stated above, the greatest temporal loss a man can suffer is that of life. This fact makes murder, in reference to the harm inflicted, the greatest of crimes against the individual. This taking of life may be one's own life or that of another, that is, either murder or suicide. Saint Thomas considers the latter the greater crime, for it is the destruction of a thing over which we have not proper dominion. Now in spiritual and natural goods which are not under our control, it is a graver crime to inflict harm on ourselves than on others. Therefore suicide is a greater crime than murder.⁶⁵ In support of this opinion may be cited the case of a woman who commits suicide in order to escape violation. Saint Thomas thinks it not permissible for a woman to take her life in order to avoid violation. In the first place, it is no crime for the woman if she be violated, provided that she does not consent; secondly, sexuality is a lesser crime than taking life; and it is not licit to commit a greater sin in order to avoid falling into a lesser one. Nor can one kill oneself to avoid any crime, for the future is uncertain and who can say whether or not he will commit sin in the future.⁶⁶ In spite of the gravity of suicide no human penalty can be assigned for it, if it be complete. God, who punishes all crimes, has sanctions for suicide; the Church, too, forbids Christian burial and burial in consecrated ground for those who voluntarily take their own lives.

After suicide murder is most grave. Murder is the unjust taking of another's life. Murder, according to Saint Thomas, is never licit; but the judge who kills a robber, and the soldier who slays an enemy are not murderers, for they act for the common good.⁶⁷ The ruler may soften the penalty of a murderer who was subsequently baptized.⁶⁸

Saint Thomas states, not disapprovingly, that murder is

"op. tit. I-II. Q. 73, art. 9, ad 2.

"op. tit. 11-11. Q. art. 5, ad 3.

"op. tit. I-II, Q. 86, art. 6, ad 3.

"op. rit. III. Q. 69, art. 2, ad 3.

punished by perpetual exile, imprisonment or death.⁶⁹ However, this must be done by public authority, for to kill a malefactor is licit inasmuch as it is ordained to the common good, and, therefore, execution is the duty of him to whom has been committed the care of preserving the community. A private citizen may not order the execution of a criminal.⁷⁰ Much less is it permitted for a criminal to kill himself in expiation for his crime, both because in this case he does not give himself time to repent of this greatest crime, and because capital punishment may not be inflicted without the judgment of public power.⁷¹

Like to murder is the crime of abortion, which is the extinguishing of fetal life in the womb. The Master of the Sentences called those who procured the "poison of sterility" fornicators, not spouses, and cites Saint Augustine as agreeing with him. Abortion does not seem to pertain to an unformed fetus, where there is not a living soul. The procurer of an abortion of an unformed fetus would not be required to give a life for a life, but would be punished by a fine; the abortion of a formed fetus would be regarded as homicide.⁷² Saint Thomas, exposing the text of the Master, says:

This sin, namely, procuring the poison of sterility, although it is grave, and to be computed among crimes, and is contrary to nature, for even the animals await offspring, is yet less than murder, for conception could be impeded in another way. Nor is such a man to be judged as irregular, unless he procures the abortion of an already formed fetus.⁷³

For those crimes which inflict injuries on human beings, e. g., mutilation, whipping, incarceration, etc., Saint Thomas would have these same principles applied, namely, that the amount

**op.cit. I-II, Q. 87, art. 3, ad 1.*

^op.cit. II-II, Q. 64, art. 3, corpus.

nibid. art. 5, corpus.

nIV Sent., Dist. 33, Leet., medio.

"ibid. art. 3, fine. Note, the word "irregular" means the punishment inflicted on clerics.

of punishment would be determined both by the severity of the crime and by the other factors which we outlined in Chapter I. Moreover, besides punishment there must be restitution made of all losses through the crime. If the loss cannot be restored in kind, restitution must be made by means of money or other goods. This point will be mentioned again in regard to theft.

The next genus of crime, namely, those acts against the orderly reproduction of the race, are very important in any study of crime or sin, both because they are very common, and because they strike at the very foundation of society, inasmuch as they interfere with the order laid down for the perpetuity of society. The sexual crimes as listed by Saint Thomas in the order of their gravity are:⁷⁴

1. The crimes against nature:

- a. *Bestiality*, which is sexual action with one specifically different.
- b. *Sodomy*, which is sexual relations with one of the same sex.

Those actions with the correct species and sex, but performed in an unnatural manner.

- ti. *Mollities*, which is a sexual crime of uncleanness inasmuch as it is of solitary performance.⁷³

- 2. *Incest*, which is sexual union with one too closely related, by blood or affinity. Properly, the relation should be that of blood.
- 3. *Adultery*, which is sexual intercourse between man and woman, one or the other of whom is married, but not to the other.
- 4. *Stuprum*, which is the defloration of a **virgin**.

⁷⁴*Summa Theologica*. II-II, Q- »«. ??, ««II"»
«*ibid.* art. 12, ad 4.

¹ ^K *Fornication, which is sexual intercourse between two unmarried people; strictly, the girl must have been previously deflowered.*⁶

The foregoing order is objective, and can vary according to circumstances.” To this list may be added sacrilege and rape. The former is sexual relations with one consecrated to God; the latter is the violent sexual violation of a woman. As can readily be seen, both of these are circumstances seriously affecting the nature of the carnal sins just listed. A woman who is raped may be a married woman, a virgin, one previously deflowered, or a widow. Sexual sacrilege too is diverse:

If anyone abuses a person joined to him by spiritual relationship, he commits sacrilege after the manner of incest. Now if he abuses a virgin consecrated to God, this is a sacrilege after the manner of adultery, because she is the spouse of Christ. If the girl is under the care of a spiritual father, this is a certain spiritual *stuprum*; and if violence is used it will be spiritual rape, which even according to human laws is more gravely punished than other rape.⁸

Saint Thomas lists all these as crimes, yet he does not always give the specific punishment he thinks should be meted out to each one. As we have just mentioned, sacrilegious rape is most severely punished. He states that incest was punished by death in the Old Law.⁹ He seems to approve this, for he says that the death penalty is usually given for those things which have a horrible deformity or which inflict an irreparable injury.⁸⁰ He assigns four reasons to show that incest is among the very grave crimes.

¹ ^I ^I ^I ⁱ ^t

^I "ibid. Q. 154, per totum.

^I "IE Sent., Dist. 41, Q. 4, art. 3, corpus.

^I "Summa Theologica, II-II, Q. 154, art. 10, ad 2.

ⁱ "of. cit. I-II, Q. 105, art. 2, ad 10.

^t 'op.cit. II-II, Q. 66, art. 6, ad 2.

1. There is a certain turpitude in venereal acts which ill consorts with the honor and reverence due to parents and others closely related by the blood of parents.
2. There is a certain necessity for consanguineous groups to live closely together. If they committed venereal acts among themselves, the opportunity and temptation would be great, and the souls would become weakened with over-indulgence.
3. The multiplication of friends would be prevented by marriage to the same group, No new friends would be added.
4. Man naturally loves a woman who is a blood relation. If to this affection were added a love bom and fostered by sexual intercourse, the heat of love would be too great, and especially an incentive to lust.⁸¹

Saint Thomas mentions several punishments which seem just for adultery. In the Old Law adultery was punished by death, by stoning, or even by fire.⁸² Death seems to have been approved as a punishment for adultery even in Saint Thomas' time.⁸² It seems also that Saint Thomas would recognize the right of the husband to whip his adulterous wife, and to scold her in order to bring her back from her sin.⁸⁴ He can also refuse her the marriage debt, which ordinarily he is obliged to render, but he cannot separate from her in bed and board except after and according to the judgment of the Church. He must *prove* that she is an adulteress.⁸ On the other hand, from an answer to an argument we have what seems an approval of judgment rendered on most strong suspicion and circumstantial evidence.

"op. cit. II-II, Q. 154, art. 9, corpus.

"op.ot. HI, Q. 29, art. 1, ad 4.

"op. cit. I-II, Q. 87. an. 3. ad 1.

Sent., nisi. 35. Q. 1. an. 2. ad 1.

"iftirf. art. 3.

Sometimes a man who has a suspect wife can lay a trap and take her before witnesses in the crime of fornication; and so he can proceed to accusation.

the crime is proven, e. g., if a man is found with a woman alone at suspicious hours and places, and if both are nude.⁸⁶

In the secular court he must bind himself to the penalty of the talion and must prove that she is guilty.⁸⁷ Although he can dismiss an adulterous wife, as we have stated above, yet he cannot do this:

1. If he also is an adulterer.
2. If he has given his wife over to prostitution. A woman may not lend her husband to other women, nor may he lend her to other men.⁸⁸
3. If his wife thought the man with whom she had intercourse was her husband.
4. If she thought that her husband was dead when she committed the act.
5. If she was forcibly violated.
6. If after her crime he became reconciled to her and slept with her, having intercourse.
7. If after two pagans marry, he divorces her. Then if both become Christians, he ought to take her back.⁸⁹

"ibid. ad 4.

"ibid. ad 5.

"op. cit. Dist. 33, Q. 1, art. 2, q. I, ad 5.

"op. cit. Dist. 35, Q. 1, art. 1, corpus.

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Moreover^ he cannot cast her out, if he is motivated by a desire for revenge, but only if:

1. He wishes to prevent infamy coming upon him as an accomplice.
2. He wishes to correct her vice.
3. He wishes to avoid uncertainty as to the paternity of his children.⁹⁰

A man may drag his wife to the civil tribunal and if he is moved, not by revenge or hate, but by the zeal of justice, he may seek to have her slain as an adulteress. No matter how sure he is that she is an adulteress he may not slay her either according to civil law or the law of conscience, if he does not actually catch her committing the crime. However, it seems the civil law, but not the law of conscience, tolerates his killing her if he actually catches her sinning with another man.⁹¹

All of this might lead one to believe that the woman's sin in this matter of adultery is considered as always worse than the man's. Saint Thomas expressly denies this. As far as breaking the faith of the marriage bond is concerned both man and woman are equally sinners; but because of the children (to be born) the woman's adultery is greater and there is in it a greater cause of divorce.⁹⁰ This point will become clearer if we institute the comparison, as Thomas does, between the gravity of fornication and adultery respectively in man and woman:

In adultery is found the same thing that is of the very essence of the sin that is found in simple fornication, and yet still more (is found in adultery), namely, the disruption of marriage. If, therefore, we consider that which is common to both fornication and adultery, the sins of the man and woman are

"ibid. ad 1.

nop.cit. Dist. 37, Q. 2, art. 1, corpus.

"op.cil. Dist. 35, Q. 1, art. 4, corpus, et ad 6.

compared to each other, as excesses in action and passion: for in the woman there is more of emotion (*humore*), and, therefore, she is more prone to be led by concupiscence. But in the man there is more of the heat which excites concupiscence. But yet, absolutely speaking, all things being equal, a man sins more by simple fornication than does a woman, for he has more of the good of reason, which prevails against any movements of the bodily passions. But as far as the disruption of the marriage bond is concerned, which adultery adds to fornication, and because of which divorce eventuates, the woman sins more than the man, as has been said. And because this is graver than simple fornication, simply speaking and all things being equal, the adulteress sins more gravely than does the adulterer.⁹³

Moreover, the Bill of Divorce in the Old Law, whereby the husband dismissed the wife, was permitted to avoid homicide; and there is not much danger from the woman in this respect if she catches her husband in the act of adultery.⁹⁴ As a final word in this matter of adultery, it cannot be too emphatically stated that *the man is not the judge of the woman*.TM

A sexual sin against nature may also be a cause of divorce." Matrimony is of one man and one woman, and indissoluble; and this is from the law of nature.⁹⁵

In case of stuprum, that is, the defloration of a virgin living under the care of her father, the man must be punished;

a) because the violated virgin is not as fit for wedlock (in the opinion of man) as she was before violation, and this damnification has a special prohibition of law.⁹⁸ However, this reason

"*ibid.* ad 5.

"*ibid.* ad I.

"*ibid.* ad 4.

"*ibid.* an. 1, ad 3.

"*Summa Theologica*, II-II, Q. 154, art. 2, corpus.

"IP Sent., Dist. 41, O. 1, art. 4, sol. I.

does not urge in the violation of a widow or prostitute.” As a matter of fact this latter case is not stuprum strictly so called, but rather fornication;

b) because by this defloration he puts the girl on the road to prostitution;

c) because this crime does an injury to the girl's father under whose care she is.

In the Old Law the penalty for this was either marriage with the girl or a fine paid to the father.¹⁰⁰ Saint Thomas does not disapprove, but rather seems to agree that it is a proper punishment. Whether the defloration was violent or seductive, the injury to the girl and her father is the same, and a fine would be the ordinary penalty.

Saint Thomas considers fornication, which is strictly sexual intercourse between an unmarried man and an unmarried yet already deflowered woman, the least of the sexual crimes. But in contradistinction to the ideas of the Pagans he teaches that it is a very grave, that is, mortal sin.¹⁰¹ He approves Aristotle's opinion that to sin carnally with a woman is a lesser crime than to descend to the vile crimes.¹⁰²

As a consequence of this idea of the lesser gravity of fornication in comparison to other sexual sins, Saint Thomas approves Augustine's stand on prostitution. Augustine says that a harlot is like unto the bilge in the ship or the sewer in the palace. Take away the sewer and you will fill the place with bad smells. So take away prostitution and you will fill the world with sodomy. Augustine says, therefore, that the earthly city makes the use of prostitutes a licit turpitude.¹⁰³ A wise ruler permits minor crimes, in order that major ones may be avoided.¹⁰⁴ Thus in human society the leaders tolerate lesser evils in order that great ones be avoided and in order that great goods may not be

¹⁰⁰*ibid.* sol. 2, ad 5.

¹⁰¹Summa Theologica, II-II. Q. 154. art. 6, corpus et ad 3.

¹⁰²*ibid.* art. 3, corpus.

¹⁰³V De Regimine Principum, cap. 14, medio.

¹⁰⁴Augustini Aureoli, *op. cit.* cap. XIII.

¹⁰⁵Summa Theologica. I-II. Q. 101, art. 3, ad 2.

lost. Augustine says: "Take away prostitution from human affairs and you will disrupt everything with license."¹⁰³

All of the foregoing is concerned with the comparative evil of prostitution. It does not at all mean that girls are to be furnished for prostitution. Nor are women to be condemned to prostitution for their crimes. At one time it was customary to hand over female criminals to prostitution, but this law has been abrogated, and rightly, for it did not spring from an instinct of nature.¹⁰⁰

The next crime in order of objective importance is the injury done man's fellows in their external goods, by appropriating and keeping them unjustly. If this appropriation and detention of another's goods is done secretly and by stealth, it is called theft;¹⁰¹ if it is done with violence, it is called *rapine*.¹⁰⁹ Every theft, properly so-called, is a sin, whether the theft be secret or violent, both because it is contrary to justice, which renders to each one what is his own, and because of the fraud which the thief perpetrates in taking another's possessions.¹⁰⁹ Rapine adds in place of guile or fraud another note of wounded justice, that is, a certain ignominy or injury to the person from whom the thing is taken. For this reason, and also because the owner of the goods is considered more unwilling as to their taking in rapine than in theft, rapine is a greater crime than is theft.¹¹⁰

This taking of another's goods is not criminal if it is done because of grave or extreme necessity. If the necessity is so evident and so urgent that it is manifest that it must be relieved from the goods which are available, as, for example, if there is danger to a person which otherwise cannot be relieved, then anyone can lawfully relieve his necessity by taking either openly or secretly another's goods. This does not have the proper nature of theft or rapine.¹¹¹

wop. cit. II-II, Q. 10, art. 11, corpus.

l'/'J' Sent., Dist. 33, Q. 1, art. 2, q. 1, ad 2.

"Summa Theologica,,11-11, Q. 66, art. 3, corpus.

"ibid. art. 4.

"ibid. art. 5.

"ibid. art. 9.

mibid. art. 7.

The first act of justice in regard to theft is to impose restitution of that which was taken; then a punishment must be imposed. Saint Thomas shows this:

.. when a man takes something that belongs to another, two elements must be considered in this, of which one is the inequality on the part of the thing, which sometimes is without injustice, as is evident in loans. The other is the guilt of injustice which can exist together with equality of the thing, as when a man intends to inflict violence but is not able.

Therefore, as far as the first is concerned, a remedy is applied by means of restitution, for the equality is repaired by this. For this it is sufficient that that which is held of another be restored. As far as the second is concerned the remedy is applied by means of penalty whose infliction pertains to the judge; and, therefore, before a man is condemned by the judge, he is not held to restore more than he has taken; but after he has been sentenced he is compelled to fulfill the penalty.¹¹²

Now a thing may be actually or virtually in the possession of someone. In either case restitution must be made for injury to that right. In the case of actual possession, restitution must be made *ex aequo*. In the case of virtual or potential possession, restitution must be made not on the basis of equality, but on the basis of proportionality, according to the circumstances and conditions of the persons and affairs concerned.⁵¹³

Although a penalty is to be added to the restitution, yet this penalty need not be death.

... According to the judgment of the present life, the death penalty is not inflicted for all mortal sins, but only for those which inflict irreparable injury, or

“»op. tit. II-II. Q. 62. arl. 3. «»rp»w.
5*»ihi4. art. I.

which have a certain horrible deformity. And, therefore, for theft, which does not inflict irreparable injury, the death penalty is not inflicted according to the judgment of the present life, unless in the case where theft is aggravated by any grave circumstance, as is evident in sacrilege, which is the theft of a sacred thing; or in peculation, which is the theft of a thing belonging to the community.¹¹⁴

As a further evidence that rapine is graver than theft, we have Saint Thomas stating, as if he approved of it, that a robber may be hanged for his crimes.¹¹⁵

So far we have dealt with simple theft and rapine. But it must be remembered that unjust taking and keeping may have as its material object persons, things or operations.¹¹⁶ For all these species of crime Saint Thomas demands restitution and punishment. If the thing taken cannot be restored, then compensation must be made. For example, if a man should lose a leg or other member because of the unjust aggression of another, it is evident that the actual object cannot be restored. In this case a valuation must be fixed, so that compensation may be made.¹¹⁷ This principle may be applied also to any crime wherein one man deprives another of something which belongs to him, e. g., fame, (glory, fatherland, or country, etc. And all these crimes must be weighed and measured and the punishment taxed according to the principles already given.

A particular case wherein Saint Thomas is at variance with modern procedure is interest-taking on money. His reason for this is very concisely stated:

.. There are certain things whose use is in the consumption of the things themselves, e. g., wine or bread. Wherefore in these things, the use of the

TM*op.cit.* II-II, Q. 66, art. 6, ad 2.

[“]*op. cit.* I II, Q. 87, art. 3, ad 2.

^{a*}*op.cit.* II-II, Q. 61, art. 3, corpus.

^{mop.eit.} II-II. Q. 62, art. 2, ad 1.

thing ought not to be computed separately from the thing itself. To whomsoever is conceded the use, by this very fact is conceded the thing itself; and, therefore, in these things by a loan is transferred dominion. If anyone should wish to sell wine, and should wish to sell the use of the wine separately, he would either sell the same thing twice, or would sell that which did not exist, and, therefore, would evidently commit a sin against justice. And by a similar reason he commits an injustice who loans wine or wheat, and who seeks two recompenses, one for equal restitution of the thing itself, and another for the use of the thing, which latter is called usury.

But there are other things whose use is not their consumption; e. g., the use of a house is inhabitation, not destruction. And, therefore, in such things both (prices) can be computed separately, e. g., when a man sells a house and reserves to himself the use of it for a certain time. Or on the contrary when a man concedes the use of a house but reserves to himself its ownership. Therefore, a man can licitly receive a price for the use of a house and can get the house back again...

Now money, according to the Philosopher, (*in 5 Ethic., cap. 5 a med; et in 1 Polit, cap. 5 et 6*) was invented principally for making commutations, and, therefore, the proper and principal use of money is its consumption or dispersal, according as it is used in commutations. Therefore, it is illicit according to its very nature to take a price for the use of loaned money. And just as man is held to restore other things which are unjustly acquired, so he is held to restore money he has acquired by means of usury?¹⁸

Saint Thomas admits that civil government allows usury, together with other crimes, to go unpunished. But this is to avoid greater evils and to prevent loss of goods. It is not done as if in recognition of the justice of usury.¹¹⁹ Indeed, this prohibition of usury goes back at least as far as Aristotle, who said that the acquisition of money by usury was especially against (praeter) nature.¹²⁰

Therefore, in fining the Jews for usury, the State was taking away money which the Jews did not own, because they had acquired it by usury. The taking of this money is by way of restitution. It should be given back to the original owners, or failing this should be devoted to pious works or the common utility. At any rate, besides the taking of this money another penalty should be added for usury.¹²¹ This principle holds true also for simony (sale of a sacred thing). Simoniacal money really has no owner, therefore it should be expended for pious uses, e. g., for the poor. On the other hand, the wages of a prostitute are hers, if she has gotten them without fraud or extortion. For, although the thing for which they were given is immoral, yet the giving was just, and she can keep the money.¹²²

The foregoing pages, we hope, will serve as a brief summary of wrongdoing which Saint Thomas would sanction penally. Of course, this summation does not attempt to take in all the details of crime, but rather to lay down the broad général criminal classifications for which punishment must be exacted. The application of these punishments will serve as a norm for sanctioning other crimes. With these principles firmly in mind it seems easy to conclude which punishment the Saint would have inflicted on any criminal.

¹¹⁹*ibid.* ad 3.

¹²⁰“Aristotelis, *1 Politicorum*, cap. 7, parum ante med.

¹²¹“*De Regimine Judaeorum*, a med.

¹²²«*Summa Theologica*, II-II, Q. 62, art. 5, ad 2.

Intent and Responsibility as Factors in Inflicting Punishment.

We have said before that penalty, strictly speaking, is inflicted for sin, that is, for a word, deed, desire, or omission contrary to the eternal law, and which consists essentially in the aversion of the will from God. The following discussion will have to do with the intent of the criminal in placing the acts of sin. Without this intent there is, formally speaking, no sin. An *intended* thing is one which man absolutely and directly seeks. To have intent in crimes the malefactor must know and will the thing he does. This will must be free. There must be some choice in the matter. The practical purpose of this discussion is an attempt to decide the bearing of intent in crime on the judgment that must be made as to whether there should be punishment or not, and if so, how much. If an objectively evil act is placed, should the state be concerned as to whether the criminal sought, that is, intended to do this particular thing? Certainly the state has no right to judge or punish the merely internal actions of man. Sins of thought are not within the competency of the state. Yet the nature of any sin or crime is essentially in the disordered act of the will,¹²³ and guilt is imputed to a man for a disordered act only insofar as his will had dominion over that act.¹²⁴ Culpability, because of which a man is liable to punishment, is imputed to him because of the badness of an act over which he had power.¹²⁵

This voluntary commission of an act is of the very essence of a sin, and the more voluntary the act, the graver is the sin and the more to be punished.¹²⁶ And by the same token the less voluntary the act is, the less grave it is and the less to be punished. Consequently, incorrigibility,¹²⁷ pride, delight, pertinacity, and facility of sinning would seem to dictate greater punishment for a crime.¹²⁸ These seem also to be signs of intent.

α»I» cit. I, Q. 48. art. 6. corpus.

^ibid. art. 5, corpus.

v*op. cit. I-II. Q. 21, art. 2. corpus.

«*op. cit. 11-11, Q. 18. art. S. ad I.

'«Comment. in *Isniam Proph.* cap. 9, fine.

«"Summo *Theologica.* I-1L Q- 105. art. 2, ad 10.

While these are for the most part internal actions of the soul, yet they do have external symptoms and signs for which the prudent judge should seek in determining the intent present in the act of crime. It is necessary for the state to do this, for the state has not only the right and duty to establish measures of safety, to which function certain modern criminologists would limit it,¹²⁹ but also the right and duty to *punish*, that is, to inflict evil on one sinning as a recompense for his sin. If this is to be done the state must consider in every crime not only the effect of the act, but also the interior motivation (*affectum*) which led to the act.¹³⁹ If a man kills his father because he mistook his father for an enemy, this is parricide materially but not formally, so evidently the penalty established for parricide should not be inflicted. In the taxation of penalty the amount of punishment ought to correspond radically to the amount of the guilt.¹³¹ As we have stated, guilt is essentially in the will. Therefore, it seems that the state must endeavor to determine the condition of the criminal's will when he committed the crime, if justice is to be preserved by the civil courts.

The perfect crime seems to be had when the criminal foresees and intends the harm which is to come from the sin, and when he acts with the desire of harming another, as does a murderer or a thief.¹³² To this crime should be given the penalty established for a perfectly consummated crime of that species. However, when this prevision or intent is obfuscated, or weakened, or unduly influenced by factors beyond the control of the criminal, a new evaluation of penalty must be made. There are many factors which influence the intellect and will in the performance of their actions, causing the intellect to judge incorrectly and the will to choose an apparent or delectable good instead of a real good. An exposition of these factors is most important for the true evaluation of the Thomistic theory of sanction.

¹²⁹cf. Aschaffenburg, G., *Crime and Its Repression*, Boston, Brown, Little and Co., 1913, p. 267.

¹³⁰De Malo, Q. 8, art. 2, corpus, fine.

¹³¹Sent., Dist. 20, Q. 1, art. 2, corpus.

¹³²Summa Theologica, I-II, O. 73, art. 8, corpus.

The actions of man may be affected in general by violence, fear, concupiscence and ignorance. We will attempt to show how each one of these so affects a human act that it becomes less rational or less free, and, consequently, less culpable.

The violent is that whose principle is outside, and in which he who suffers violence concurs not at all.¹³³ The will is a spiritual faculty and cannot suffer violence or coercion in those acts which proceed immediately from the will itself. In other words, the proper act of the will cannot be controlled by violence, and the reason of this is as follows:

... the act of the will is nothing else than a certain inclination proceeding from an interior knowing principle, just as the natural appetite is a certain inclination from an interior principle and without knowledge; now that which is coerced or violent is from an exterior principle. Wherefore, it is contrary to the nature of the very act of the will that it be coerced or forced, just as likewise it is contrary to the nature of the natural inclination or motion of a stone that it be borne upward. Indeed a stone can be borne upward by violence, but it is impossible that this forced motion be from the natural inclination of the stone. Likewise, a man can be drawn by violence, but that this be from his will is contrary to the very nature of violence.¹³⁴

However, man can suffer violence in those acts which are commanded by the will, for these acts, while commanded by the will, are executed by another motive force or power. Indeed, the external members of man can so be impeded by violence that, because of this violence, they will not follow the command of the will.¹³³ If, then, it is evident, or, if it can be shown, that a man has committed an act which was not from his will but

“op. cit. U-II, Q. 175. art. I, corpus.

r*op. cit. I-II, Q. 6. a<- 4 ««T’»

“ibid.

which was superinduced by violence, it is necessary to give judgment that this particular act is not imputable to the man, and if it is not imputable, then it is not punishable.¹³⁰ Saint Thomas shows that this is his position when he denies the husband the right to punish his adulterous wife by a legal separation if the woman was forcefully violated.¹³¹ Again he says that a woman who is in imminent danger of being raped may not kill herself to avoid the rape, both because impurity is a less crime than suicide, and because a woman who is raped is not guilty, *provided she does not consent*, that is, provided she has no *intent* of committing the sinful act, and does not voluntarily concur in it.¹³⁸ As we have said before, crime bespeaks, of its very nature, willingness and freedom in the criminal. Now violence causes unwillingness, for:

.. violence is opposed to voluntary and likewise to natural (act) . It is common to voluntary and natural (acts) that both be from an intrinsic principle. And because of this, just as in those things which lack knowledge violence does something contrary to nature, so in those things which have knowledge violence does something contrary to the will. Now that which is contrary to nature is called unnatural, so, likewise, that which is contrary to the will is called involuntary. "Wherefore violence causes unwillingness.¹³⁹

The next point to be discussed, is the influence of *metus*, which is translated *fear*, upon voluntary acts of man. *Metus* is defined as a *disturbance of the mind because of some present or future evil*.¹⁴⁰ Fear may make a man more desirous of counsel, but neither fear nor any other passion is capable of evolving good counsel, and this because,

“op. cit. II-II, Q. 68, art. 4, ad 1.

“IF Sent., Dist. 37, Q. 1, art. 1, corpus.

“Summa Theologica, II-II, Q. 61, art. 5, ad 3.

“op. cit. I-II, Q. 6, art. 5, corpus.

“IF Sent., Dist. 29, Q. 1, art. 1, corpus.

anything seems greater or less than it really is to a man affected by any passion; e. g., to a lover, the things he loves seem better, and to a fearful man the things he fears seem more terrible. And thus any passion, because of a deficiency in the correctness of judgment, *quantum est de se*, impedes good counsel.¹⁴¹

Fear also impedes man's external operation because of the lack of heat which fear causes in man's external members. If fear is vehement enough it will impede even the operations of the soul.¹⁴² Those things which are done through fear are rather more voluntary than involuntary, because here and now they are actually willed. However, they are not willed because of themselves, but by reason of something else, e. g., the thing which is feared. This actual willing makes the act more voluntary, but less free, because of the dread engendered by the thing feared. Consequently, the act under these conditions is less imputable, for while the willingness is greater, the freedom is less.¹⁴³ So the influence of fear on human acts may be summed up as follows: Fear, of itself, does not excuse from the whole crime; but it can lessen the crime because the will is less free. Accidentally it may excuse from serious crime, if perfect deliberation is taken away.

Concupiscentia, which may be rendered *concupiscence* or *passion*, is a movement or passion of the sensitive appetite by which we are inclined to seek, or move towards, or do something. This passion may be *antecedent*, in that it precedes the act of the will, or *consequent*, in that it follows from the act of the will and is as an effect of that voluntary act. Antecedent passion diminishes the sin, for an act is sinful only inasmuch as it is voluntary and existing in us. Now, through reason and will something is said to be in us. Wherefore, in the degree that reason and will of themselves operate something and not

¹⁴¹«Summe Theologica. I-II. <>. II art. 2. corpus.

¹⁴²«ibid. art. 4. corpus.

¹⁴³«op.cit. I-II. Q. 6. ar. 1. ff corpus.

from the impulse of passion, in that same degree it is more voluntary and existing in us. According to this, passion lessens sin, because it lessens willingness. On the other hand, consequent passion does not lessen sin but increases it; or, rather, it is a sign of its greatness, inasmuch as the consequent passion shows the intensity of the will towards the act of sin. So it is true that in the degree that anyone sins with greater *libido*, or greater concupiscence, in that same degree is his sin greater.¹⁴⁴

It cannot be said simply that passion excuses a criminal totally from sin. We must distinguish carefully to arrive at the truth in this matter. Thomas says:

.. sometimes passion is so great that it takes away totally the use of reason (e. g., as is evident in those who become insane because of anger or love); and then, if the passion was voluntary in the beginning, the act is imputed as a sin because it was voluntary in its cause. . . But if the cause was not voluntary, but rather natural, as when a man because of sickness, or something else of this kind, falls into a passion that totally takes away the use of reason, his act is made absolutely involuntary and consequently he is totally excused from sin. . . But sometimes the passion is not so great that it totally takes away the use of reason, and then reason can cast out the passion by shifting to other thoughts, or can impede it lest it seek its effect, for the members are not applied to act except through the consent of the reason.

Wherefore a passion of this kind does not totally excuse from sin.¹⁴⁵

Therefore, it can be said that even passionate acts can be mortal sins, as, for instance, when there occurs an act which the intellect could and should have excluded. As Saint Thomas

¹⁴⁴«op.cit. I-II, Q. 77, art. 6, corpus,

¹⁴⁵«ibid. art. 7.

very sagely remarks that many adulteries and murders are committed through passion.¹⁴⁹ He seems to imply very pointedly that these acts, even passion caused, may well be mortal sins, and, therefore, imputable and punishable. If the passion is sudden, and there is no rational advertance, then the criminal may be excused from serious 'sin. However, when he adverts to the fact that this act is, e. g., blasphemy, inasmuch as he considers the sense of the words he utters, then he is not excused from mortal sin. By the same token neither is the criminal excused who, because of a sudden movement of wrath, kills a man sitting next to him.¹⁴⁷

In the discussion concerning the relative gravity of the same sin when committed by the *incontinent* man and the *intemperate* man, Saint Thomas says:

..sin, according to Augustine, in *lib. de Duab. Animab., cap. 10 et 11*, consists especially in the will. For the *will is that faculty through which one sins and through which one lives well*. And, therefore, where there is a greater inclination of the will towards sinning there is a graver sin. Now in the man who is *intemperate*, the will is inclined to sin through its own proper choice, which proceeds from a habit which was acquired by custom. But in the man who is *incontinent*, the will is inclined to sin by a certain passion. And since passion quickly passes, but habit is a characteristic which changes only with difficulty, therefore it is that the incontinent man immediately repents as soon as the passion passes away; but this is not true of the intemperate man. Indeed, he rejoices that he has sinned for the operation of sinning has been made connatural to him because of his habit.. Wherefore it is evident that the intemperate man is much worse than the incontinent man.¹⁴⁹

¹⁴⁷ *ibid.* art. 8.

¹⁴⁸ *op.cit.* II-II, Q. »3. art. 2, ad 3.

¹⁴⁹ *op.cit.* II-II, Q. 156. art. 3. corpus.

And therefore it is that a sin of sudden passion is less grave than a sin of habit. Saint Thomas confirms this doctrine when he proves that a sin of habit is a sin of certain malice, and a sin of certain malice is a sin of habit;¹⁴⁹ and then shows by three reasons that a sin of malice is more grave than a sin of passion:

1. The more proper the movement of the will, the more grave is the sin. In sins of malice, the movement of sin is more proper to the will which is of itself moved to evil than is sin of passion, which is, as it were, an impulse from outside to sin.

2. Passion is transient; malice, as it were, is permanent.

3. A sinner from certain malice is badly disposed towards the end itself, which is the principle in operations, and thus the sinner's defect is more dangerous than the (defect) of him who sins from passion, for this latter's intent tends towards a good end, although this intent is interrupted for a moment because of passion. Now defect in the principle is always the worst. Wherefore it is evident that a malicious sin is worse than a sin of passion.¹⁵⁰

Violence, fear and passion have for the most part reference to the will. Ignorance has reference to the intellect, inasmuch as it bespeaks in general any lack of knowledge in a subject who can and should have this knowledge. In order accurately to portray the role of ignorance in the influencing of human acts we must establish the various classes of ignorance. Saint Thomas divides ignorance into vincible and invincible ignorance. Vincible ignorance is that lack or privation of knowledge which can be overcome by study; invincible ignorance is that which cannot be overcome by study. Man may be either vin-

¹⁴⁹*op.cit.* I II, Q. 78, art. 2, et 3.
¹⁵⁰*ibid.* art. 4, corpus.

cibly or invincibly ignorant about those things which he is held to know, or about those things which he is not held to know.¹³¹ It must be noted that the "study" which is to be used in order to banish ignorance must be pursued with *morel diligence*. Moral diligence is that care which is used by prudent and well-balanced men *in such and such circumstances*. We use this last phrase, *in such and such circumstances*, for the care and concern which must be used vary in different cases and under the influence of different circumstances. In grave matters, greater care and diligence must be used than in light matters. Man is never required to extraordinary or extreme diligence in learning, especially the minutiae of the laws. For neither God nor the State are tyrants. And they would be tyrannical if they were to impose this severe obligation on man of learning all the aspects of the law, even if this required extraordinary or extreme care and concern on the part of man. So we say that man must use a prudent moral diligence in seeking to know his obligations, and in knowing the laws both of morality and of society.

On the part of the will, or on the part of the act, ignorance may be divided into *antecedent*, *concomitant*, or *consequent* ignorance.

Antecedent ignorance so precedes all act of the will that it can

1Mop. cit. I-II, Q. 76, art. 2, corpus. It may be noted here that vincible ignorance may be either:

1. *Simply vincible*, when there is only light negligence present.
2. *Crass or Supine*, in the case where there was almost no diligence but grave negligence in repelling the ignorance. Crass ignorance is lightly culpable in light matters, but gravely culpable in grave matter.
3. *Affected*, which is ignorance studiously willed by a man who wishes to have some excuse for sin, or who is unwilling to be drawn back from sinning. This ignorance is present when a man doubts concerning the morality of an action and then refuses to seek enlightenment for fear he will be forced to cease acting in this or that way. This ignorance, because it is absolutely willed, is, of course, not excuse for sin but rather indicates a bad will and, consequently, graver sin.

Moreover, both vincible and invincible ignorance may be divided into *habitual* and *actual* ignorance; and into *speculative* and *practical* ignorance.

in no way be considered willed or voluntary. It is the *negative or accidental* cause of willing or doing that which a man would not do if there were sufficient knowledge present. It is, as it were, a cause of the act, inasmuch as it is responsible for the lack of prohibitory knowledge which would forbid the execution of the act of the will which is actually placed in default of this knowledge. For instance, if a man kills his friend because he thinks the object is a deer, this thought is due to antecedent ignorance. If he knew the object was his friend he would not have killed it. This antecedent ignorance is always inculpable and invincible. But it must be remembered that the terms are not convertible: all invincible ignorance is not antecedent. Antecedent ignorance adds this to invincible ignorance, namely, the causality of the act, which action would not have been performed if there had been sufficient knowledge present in the agent.

Concomitant ignorance is like antecedent ignorance, save that concomitant ignorance *is not the cause of the action*. This ignorance is found in a man who is so disposed that he would perform the action even if he knew what he does not here and now know. For example, a man who is so disposed that he would gladly kill his enemy, actually kills him, although he here and now thinks that it is a deer at which he actually shoots. In this case he would be guilty of *internal homicide*. Yet as Billuart notes very wisely,¹⁵² he would be excused from the penalties attached to *external homicide*, which are inflicted only for an external act.¹⁵³

Consequent ignorance is that which follows from an act of the will, either directly or indirectly. Consequent and vincible ignorance are really the same but rationally distinct. It is called consequent ignorance because it follows some act of the will. It is called vincible ignorance because it can be conquered by the act of the intellect moved by the will. If this ignorance indicates a lack of knowledge which it is possible and necessary to have, then it is culpable.¹⁵⁴

¹⁵²F. C. R. Billuart, *De Actibus Humanis*, diss. I, art. 9.

¹⁵³Mfr. *Summa Theologica*, I-II, Q. 76, art. 1, et. 3.

¹⁵⁴*ibid.*

Ignorance too is divided according to the material concerning which there is lack of due knowledge. In this class we have *ignorance of the law*, as when a man does not know that there is a law governing this particular matter. We also have *ignorance of fact*, as when a man does not know that this particular action falls under the prohibition or prescription of the law?⁵⁵

From the above explanation of the different species of ignorance, the conclusions as to the influence of ignorance on the culpability and punishability of human acts of crime follow quite logically.

It must be noted that not all ignorance is the cause of sin, but only that ignorance which destroys the knowledge which would prevent the sin. For example, if the will of a man was so disposed that he would not be stayed from the act of parricide even if he recognized his father, non-recognition of the father would not be the cause of sin for this man. Rather, his ignorance would be concomitant with his sin, and therefore, a man of this sort would not sin because of ignorance, but rather would sin, *himself being ignorant?*⁵⁶

Ignorance implies the lack of due and possible knowledge. Now, man is held to know those things without the knowledge of which he cannot exercise his proper functions. All are held to know in common or in general the principles of faith and the universal principles of right and wrong, and each man must know the things which pertain to his state or duty. If negligence causes ignorance of these things, it is a sin of omission. Wherefore vincible ignorance of those things man can and should know is a sin?⁵⁷ Saint Thomas does not excuse any man from diligence in knowing the laws just mentioned. He says expressly that ignorance of fact is non-culpable, but ignorance of law ought to be punished?⁵⁸ This principle is evident also in his opinion when he says that a wife who commits adultery because she thought the man with whom she slept was her husband, or because she was laboring under the impression that her husband was dead, is

«op.eit. 141. Q. 105. art. 2. ad 9.

«•op.cit. 1-11. Q. "6 an. b corpus-

«"ibid. art. 2.

«•op. tit. 1-11» Q- «»• aTt. 2' 9.

not to be punished by that divorce which is used to sanction the adultery of the woman.¹⁵⁰

As is evident, not all ignorance excuses from sin, but only that ignorance which is the cause of the act. For this ignorance causes unwillingness, and willingness is necessary for the imputation of sin. Ordinarily this ignorance would excuse totally from crime, but in two ways it can happen that ignorance does not excuse totally: 1. If the ignorance is not of a fact but of a circumstance which would restrain from the act if that circumstance were known. For instance, if a man knew the man he was about to strike was his father he would not strike him, and thus he is excused from the crime of dishonoring his father. Yet because he knew it was a crime to commit assault and willed to do so in spite of this knowledge, he is guilty of assault, and thus not totally excused from all crime. 2. If the ignorance be voluntary, whether *directly*, as when one studiously wishes to be ignorant in order that he may sin more freely; or *indirectly*, as when a man on account of labor or other occupations neglects to learn those things which would draw him back from crime. If this ignorance is of things possible to know, it is criminal, and does not excuse from culpability. Therefore, only that ignorance which is absolutely involuntary, whether it be invincible or whether it be of a thing a man is not held to know, totally excuses from sin.¹⁶⁰

As we have just seen, ignorance which is involuntary absolutely excuses from all sin. Ignorance which is concomitant or willed does not excuse from any sin at all if this ignorance be directly and *per se* willed. However, sometimes that ignorance which is the cause of sin is not directly voluntary but only indirectly and accidentally willed, as, for example, when a man is unwilling to spend his time in study, from which it follows that he will be ignorant; or when a man wishes to drink wine immoderately, from which drinking it follows that he becomes drunk and lacks discretion. Ignorance of this kind diminishes voluntariety, and as a consequence, culpability. Indeed, when something is not

¹⁵⁰IP Sent., Dist. 35, Q. 1, art. 1, corpus.

¹⁶⁰Summa Theologica, 1-11, Q. 76, art. 3, corpus.

known to be a sin, it cannot be said that the will directly and *per se* seeks sin, but it must be said that it seeks it accidentally.¹⁶¹

As we have said before, the State has nothing to do with the punishment of purely internal acts. The doctrine given above concerning the alleviation or mitigation of culpability due to the presence of violence, passion, fear and ignorance, is useful to the State in determining just how much punishment should be inflicted for a given crime, inasmuch as these factors help determine the culpability and, hence, punishability and punishment of any given external wrong act. The exact determination of the influence of the internal factors is at best very difficult for the human judge. But if he seeks justice he must not only consider the act done, but also the intention back of that act.

In this section dealing with intent there remain two other questions to be discussed. One is the question of accidental crimes. And the other is the question of the morality involved in causal willingness.

While the State has no concern with purely internal crimes, that is, with wrongdoing that remains within the confines of the intention and does in no way erupt into external action, the State must take some cognizance of those things which eventuate without any intention on the part of the agent, that is, accidentally. The cause of these crimes must be attributed to negligence, which is culpable if it is opposed to the care which can and should be taken in these circumstances.¹⁶² Sylvius, commenting on the text of Saint Thomas, has outlined the principles which govern guilt and punishment inflicted for casual or accidental crimes. The principles have reference particularly to homicide, but may be applied, *mutatis mutandis*, to other crimes:

1. If a man does a thing which is in itself licit, and uses suitable diligence and care, he does not incur the stain of homicide, either as regards guilt or as regards punishment, even if the death of a man follows as a result of his action.

“*ibid.* art. 4, corpus.

***cf.* *supra*, the discussion on ignorance.

INTENT AND RESPONSIBILITY

2. ' If he performs a licit work, and does not use sufficient care and diligence, and as a result of his action someone is killed, the agent is guilty of homicide.

3. If he performs an illicit work, and the death of another follows as a result of this work, he is guilty of homicide, even if he has exercised due diligence and care.¹⁸⁸

The remaining question to be discussed, namely, that of *voluntarium in causa*,¹⁸⁴ is a very important problem, for on the solution of this depends the solution of many questions dealing with cooperation in crime, injuries, etc.

Voluntarium in causa may be defined as "that which is intended, not immediately and by reason of itself, but because it is inseparably connected with another thing which is intended immediately and of itself, as the effect, or accessory, or another thing of this nature." The purpose of discussing it here is solely to determine the morality, culpability, and punishment to be inflicted on a *voluntarium* of this kind which is bad, that is, which eventuates in that effect which is contrary to some law. The "clear-est statement in Saint Thomas concerning the morality of this indirect or casual voluntariety is in his response to the question: "Is it licit to kill another while defending oneself?" We will quote his response in full, and then outline the requisites for making an evil effect licit in case of *voluntarium in causa*:

T"

"Sylvius, *op. cit.* III, 344. cfr. *Summa Theologica* II-II, Q. 64, art. 8, corpus.

"Saint Thomas and many other thinkers distinguish between the *voluntarium indirectum* and the *voluntarium in causa*. Saint Thomas says:... something can be voluntary either *in itself*, as when the will directly intends this; or *in its cause*, as when the will intends the cause, but not the effect, as, for example, in regard to the man who voluntarily gets intoxicated. Because he deliberately became intoxicated, those things which he does through the intoxication are attributed to him as *quasi voluntary*... Again voluntarium may be direct, as when the will directly intends something; or indirect, as when the will could prohibit something but does not prohibit it (*Summa Theologica*, I-II, Q. 77, art. 7, corpus).

of one act there may be two effects, of which one is according to the intention (of the agent), and the other beside his intention. Now, moral acts take their species according to that which is intended, but not from that which is beside the intention, since the latter is accidental.... A twofold effect, therefore, may follow from the action of a man defending himself—one being the conservation of his own life; the other being the slaying of the attacker. Therefore, an act of this kind, since the conservation of his own life is intended, does not have the nature of wrongness, because it is natural to man that he conserve himself in being insofar as he can. Nevertheless, an act proceeding from a good intention can be rendered illicit if it be not proportioned to the end. And, therefore, if a man use greater violence than is necessary in defending his own life, this act will be illicit. But if he repels violence moderately, this will be a licit defense; for according to the laws, *vim vi repellere licet cum moderamine inculpatæ tutelæ*. Nor is it necessary for salvation that a man omit (an act of moderate care that the slaying of another might be avoided), for a man is held to provide for his own life rather than for the life of another.. .1β3

From this argument the following conditions must be present in order that a bad effect resulting from a *voluntarium in causa* may be licit:

1. The good effect must be *intended*; the bad effect must not be *intended* even accidentally.
2. The good effect must follow from the act and must not follow through the evil effect.
3. Due proportion must be observed, i. e., the end in view must be of more weight than the accidental evil effect.

'op.cit. II-II, <2> 64, art. 7 > corpus.

4. The greater and more certain the evil effect, the greater and more urgent must be the reason impelling the actor to intend and to act for the good end.

From these principles many cases involving justice and right must be solved.

Finally, the question of insanity as a factor in lessening the willingness of an action must be solved on the principles already given in regard to violence, fear, passion and ignorance. Suffice to say here that culpability requires knowledge and will, and when a factor interferes with either of these, and that factor is beyond the control of the agent, culpability either becomes less or vanishes.

In this section we have been dealing with factors which tend to lessen willingness, and as a consequence, the culpability of a man who places an act which is materially criminal. Early in the work we determined that all punishment is for crime. Now the question arises as to the identity of the one to be punished. This question will be treated in the next section.

Responsibility.

We are considering here the person of the one to be punished. In other words, the question is a continuation of the discussion of the relation between punishment and guilt. We have already established that all punishment (strictly so-called) is inflicted only because of a previous sin. Now we attempt to answer the question: "Does the punishment inflicted for guilt necessarily fall on the one who is guilty, or may it fall on those connected with him, especially on those connected with him by ties of blood?"

There is no doubt but that an innocent man may take over the punishment due to another man, and thus satisfy for the guilty man, for they are as one according to the union of charity.¹⁶⁸ But this is not punishment in the strict sense. Also an illegitimate son is in a certain way punished, not for his own sin, but for his father's

¹⁶⁸*op. cit.* I-II, Q. 87, art. 7, corpus.

crimes. However, he is not punished in something that is *due to him*, but rather in something that *would otherwise have been due to him*, namely, a share in his father's name and estate.'" Saint Thomas denies that injury of this kind is punishment, strictly speaking.¹⁶⁸

Again in the crime of *lésé majesté*, the son loses his patrimony because of the crime of his father.¹⁸⁹ But in this case, the loss is of something that the son would have had a right to if the father still possessed it when the time came for the son to take up his inheritance. So, therefore, the son does not seem to suffer punishment strictly so-called, for after the edict of confiscation or sequestration the father no longer owns the goods, and so the son no longer has a right to them. To us it seems that this injury done to the son is less than that done to the illegitimate son just mentioned.

On the other hand, it seems that Saint Thomas lays down the principle that the extent of injury done should also be computed according to the hurt suffered by those connected with the one suffering injury.¹¹⁰ Now, while the just judge inflicts penalty only on the criminal, often that penalty will have harmful effects on those who are joined to the criminal. For instance, if a husband and father is fined or sent to jail, it seems likely that the wife and children are bound to suffer want and privation. The burden of caring for them is thrown on the community as a whole or on other private individuals. It seems to us that the State and the judge should foresee and make provision for this when they inflict punishment on the criminal.

Again and again Saint Thomas insists that the same man who commits the crime is the man to be punished.¹¹¹ However, in this connection we must consider both divine and human agencies of punishment. As regards divine punishment it must be said that no one is punished for the sin of another by an eternal punishment, but may be by a temporal punishment. We will cite this

¹⁶⁸H Sent., Hist. 41, Q. 1. art. 3. q. 2. corpus,

¹⁸⁹ibid, ad 1.

¹¹⁰Summ*us Theologica*, II-II, Q. 108, art. 4, ad 2.

¹¹¹*op. cit.* II-II, Q. 64, art. 4, corpus.

Sent., Hist. 31, Q. 1. art. 1, ad 4.

opinion in full, for it contains the answer to many vexing questions in this matter:

...in eternal penalties one man is never punished for another; but in temporal penalties sometimes one is punished for another, and the reason for this is three-fold: The *first* reason is because eternal punishment is not inflicted for the advancement of the one suffering it, but as vengeance for sin; but temporal punishment is sometimes inflicted for the progress of the one suffering it. Wherefore, just as sometimes a man is punished by a temporal penalty when he has no guilt, so likewise sometimes a man is punished for the sin of another both for his own progress and for that of others, so that it may be seen how much one man ought to be solicitous for another lest the latter should fall into sin. For this reason a whole people is punished temporarily for the sin of one man; and so that it likewise may be shown how much sin is to be avoided, because it is thus so gravely punished that for one delinquent many suffer penalties. The *second* reason can be this: that as far as temporal things go, one man may be the possession of another, just as the son is in a certain way the possession of the father; and, therefore, the son is sometimes punished in temporal matters for the sin of his father; but as far as the good of the soul is concerned, each man acts in his own proper person. The *third* reason is this: that sometimes one man is a participant in the crime of another. Wherefore it is not contrary to Divine Justice that sometimes one man is punished for the sin of another. Nevertheless, *this is not to be taken as an example for human justice in order that one man be punished for another, as Augustine says, for man cannot know the progress coming from temporal punishment, as God infallibly knows this.*¹²

¹²raIF Sent, Hist. 46, Q. 2, art. 2, q. 2., ad 3.

This ultimate stricture on human justice must refer to a perpetual penalty administered by earthly justice, e. g., death penalty, or as far as goods of the soul are concerned, because, as we shall presently see, he admits temporal and material punishment of one for another, if the former is a participant in the crime or is a quasi-possession of the criminal. His words in this are quite explicit, and rigorously delimit the boundaries which enclose this punishment of one for another:

... losses of corporal things or even of the body itself are certain penal medicines ordained to the health of the soul. Wherefore nothing forbids that a man be punished by penalties of this sort for the sin of another, and this, either by *God or by man*, as, for example, sons for their fathers, and subjects for their masters, inasmuch as they are in a certain way possessions of them (fathers or masters). However, if the son or servant is a *participant in the guilt* then these penal defects have the *nature of penalty* as regards both, namely, he who is punished and he for whom the penalty is inflicted; but if he (the son or subject) is not a participant of the guilt, (the penalty) has the nature of medicine as regards him for whom it is inflicted. Is him who sustains the penalty, of medicine, unless by accident, inflicted on the sin of another. The nature of the good of his soul if he patiently sustains the loss of the soul no one sustains detention for his own crime.¹³

penalty may be made one's own in four ways, namely, by force, consent and dissimulation.¹⁴* In matters of obligation of restitution in matters of

¹³ St. Thomas, *Summa Theologica*, II-II, Q. 87, art. 8, corpus. For this reason animals are not punished for the crimes of their masters, inasmuch as the masters, cfr. *Summa Theologica*, II-II, Q. 108, Q. 1, art. 1, ad 4.
¹⁴ St. Thomas, *Summa Theologica*, II-II, Q. 87, art. 8, fine.

theft, Saint Thomas lists the actions by which one is made liable to restitution for another's sin. All who are in any way the cause of the loss must make restitution of the thing taken.

... This happens in two ways, directly and indirectly—directly, as when a man induces another to take (another's thing), and this can happen in three ways: 1, *on the part of the taking*, which is done by *commanding, counselling, consenting expressly*, and by *praising* a man as masterly because he has taken another's things; 2, *on the part of the taker*, inasmuch as he *receives him or gives him help* in any way; 3, *on the part of the thing taken*, inasmuch as he is a *participant* in the theft or rapine, as companion, as it were, of the evil. Indirectly—when a man does not impede when he *could and should* impede, either because he holds back the precept or counsel which would impede the theft or rapine, or because he holds back his aid by which he could oppose it, or because he hides the crime after the fact.¹⁷⁵

Saint Thomas goes on to show just in what measure each of these cooperators is bound to restitution. These principles can be applied to any crime, and those guilty in this way of the crime of another are bound to the penalty according to the measure of their participation. They are guilty because of their participation; so, strictly speaking, they are punished for their own crime and not for the crime of another.¹⁷⁶

Throughout this section, one cannot help but notice the constant ways in which Saint Thomas considers the solidarity of the domestic family. For Saint Thomas the family was a true, albeit imperfect, social organization. Much of the evil that one member does is reflected on the other members. At the same time, there is a punitive authority in the family, which, while not as perfect as the penal power of the state, has nevertheless very definite powers.

mSumma Theologica, II-II, Q. 62, art. 7, corpus.

¹⁷⁶cf. also, *op. cit.* II-II, Q. 108, art. 4, corpus.

His treatment on the use of jail as a punishment for crime shows that the system of imprisonment had not reached the overweening proportion it has in today's criminology. While there can be no doubt but that imprisonment was used from the earliest times in punishing criminals, yet it did not play nearly so important a role in early judicial procedure as it does, for instance, in modern practice.

Fines, too, while used, were not too prevalent. Apparently, one reason for this was the lack of possessions among the vast majority of the peoples of the day. The class that he mentions as especially subject to fine was the Jews, who did have a great deal of the available currency in their possession. Too, he admits that the loss of fame is a powerful sanction for law, but he does not give any specific methods by which this penalty may be inflicted.

Among the crimes which Saint Thomas says ought to be punished, he mentions as deserving the harsher penalties those crimes which are committed against God. Next in gravity to those committed against God are those deeds done against persons and things closely joined to God. If we consider time and place and malice, the death penalty may not be too severe for heretics, especially those who seek to pervert the minds of others by their dissemination of error. Schism, too, which disrupts the discipline and order of the human regime, is punishable by death. Perjury is calling on God to witness the truth of a lie. This crime may be punished by death, especially if it is directed against the life of an innocent man in false accusation, so as to put him in jeopardy of life or limb. The gravest penalties are to be visited on the sacrilegious man, that is, on the man who misuses or abuses persons or things consecrated to God. For these criminals death is considered not too harsh a penalty. It will have been noticed that Saint Thomas recommends physical and material penalties for those who commit acts directly against God and the things of God. Spiritual penalties would be more adequate, but comparatively ineffective, especially as regards reform and deterrence. Spiritual penalties are apt to be little thought of by these men.

The common good of the human society must be protected. Therefore, treason and theft of the goods of the community demand a very severe penalty. Most of the crimes against society

as such can be comprehended under these two genera, namely, treason and theft of the community goods. Crimes against the persons of the rulers ought to be punished severely. The reason for this is that these ruling men, while only singular individuals in themselves, yet because of their offices represent the whole of the community and are, as it were, representatives of God in directing the human society to its ultimate end. In general, crimes directed against the common good are punished more severely than those crimes which injure only single individuals. A characteristic note of Saint Thomas' political philosophy is his constant insistence on the prepotency of the common good.

After the crimes which are committed against God and the common good, Saint Thomas lists those actions against individuals which are punishable. The taking of life is the most serious crime in this class, and he considers the penalty of perpetual exile, imprisonment or death not too harsh for this crime. While the killing of oneself is considered a graver crime than the killing of another, yet the punishment for suicide is difficult to affix. It is quite impossible for the State to punish, in the strict sense of the word, a man who has consummated suicide. Abortion, which is a crime like murder, must be punished as murder, if it consists of the extinguishing of life in a formed fetus.

For the lesser crimes against the person, namely, mutilation, whipping, and incarceration, there must be compensation made for all injuries done and losses suffered through the criminal act. Besides this a condign punishment must be inflicted on the criminal according to the severity of the crime and the guilt of the criminal.

The crimes against the potential life of the race, that is, crimes of sex, must be punished. They are, in the order of their gravity, bestiality, sodomy, unnatural crimes, effeminacy, incest, adultery, stuprum and simple fornication. All these must be punished according to their gravity. These crimes are aggravated and made more liable to harsher punishment by the circumstances of sacrilege and rape. Sacrilegious rape of a virgin consecrated to God would be punished most severely, even by death, by Saint Thomas. Incest, too, seems to him to be punishable by death. At least he

does not disapprove when he records this penalty as present for incest in the Old Law.

Several punishments are given for adultery, namely, death, separation from bed and board, whipping and scolding. The death penalty is not within the competence of the husband. A partial separation may be effected by the husband, that is, he may refuse the marriage debt. But any absolute separation must come after judgment has been pronounced on the culprit. Finally, a husband may whip or scold his adulterous wife in an effort to cure her. It will be noted here that the husband really has very little power over his erring wife, but must himself be above the crime; and moreover, must obtain justice through the regularly constituted channels. Saint Thomas would in no way countenance wife-lending or exchanging. He would consider these as adulterous acts, pure and simple.

A man who deflowers a virgin must make compensation for this defloration, for he by his act has deprived her of something which she must have. Besides this compensation he must be punished. For simple fornication there is no penalty given. However, this does *not* mean that simple fornication is to be encouraged. According to its species it is the least of the sexual sins, yet it is still in the genus of grave sin.

The next genus of crimes in order of their objective gravity are those which consist, in one way or another, in depriving or keeping something which belongs to another. In all these crimes either restitution of the thing which was taken must be made, or its value must be returned by means of compensation. After this, punishment must be inflicted. This punishment varies according to the nature of the injury and the value of the goods involved. The greatest penalty, death, seems to be inflicted only for violent robbery and sacrilegious theft. We must mention again the fact that Saint Thomas considered usury allied to theft, and punishable in the same way.

The foregoing list of crimes and their punishments is, of course, general and objective. Many circumstances, both in the act of the criminal and in the crime itself, will serve to make many classes and subdivisions of these few general species. Again, it will be noticed that these classes of crime follow in a broad way

the primary and secondary precepts of the natural law. Therefore, they seem to be applicable wherever and whenever man commits human acts against the general code of morality.

The question of punishment for any crime is bound up with a determination of the intent involved when the criminal committed the crime. The voluntary commission of the act is of the very essence of the sin. The greater the freedom of choice and the clearer the knowledge and judgment involved, the more serious is the crime within its species, and the graver the guilt of the criminal. Consequently, punishment, which is positively correlated to the seriousness of the sin and the degree of the criminal's guilt, must be more severe in ratio to the wilfulness of the crime. By the same token, lessened wilfulness minimizes the guilt and consequently the penalty.¹⁸² Accordingly, any influences which serve to obfuscate judgment and restrict freedom of choice also serve to lessen guilt and punishability. Saint Thomas lists these influences as ignorance, violence, fear and concupiscence. He considers these generally as factors which lessen guilt. Insanity, too, either lessens or takes away entirely the guilt.

If we consider punishment according to its very nature and essence, then we must say that the subject of punishment is the same as the subject of guilt. The criminal must himself be punished. If other than the criminal suffers any afflictive evil for the actual criminal's sin, then this is after the manner of medicine, or else because the sufferer is in some way connected with the guilt or the person of the criminal. This brings out the consistent thought of Saint Thomas in the matter of domestic solidarity. For Saint Thomas the family is a definite social unit.

In the following chapter we shall consider those agencies which lawfully inflict penalties, namely, the State and God.

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“*As we have seen time and again, other factors besides the severity of the crime and the guilt of the criminal are involved in the just application of punishment for each individual crime. This conclusion, therefore, must be understood in the light of these factors, which we have, already discussed, and which we must consider in inflicting punishment.

CHAPTER III

SAINT THOMAS—ACTIVE AGENCIES OF PENALTY. THE STATE AND NON-HUMAN AGENCIES.

Human Agencies for Inflicting Penalty.

In this chapter we will consider active agencies of penalty. We will present, from Saint Thomas, the doctrine concerning those who have the right and duty to inflict punishment for infractions of norms of conduct. First we will consider the human agency of penalty, the civil community or state, and secondly the non-human agencies of inflicting punishment.

THE STATE, ITS NATURE AND END.

Man is naturally a social and political animal, for one man alone does not naturally suffice for all the exigencies of life.¹ Natural necessity demands that man live in a social and political multitude.² The natural family and the extended family supply to some degree the needs of man; but even they cannot raise man to that perfection of human life which can be had in the perfect society, the state. And so, just as the natural insufficiency of man naturally inclines him to live in society, so the natural insufficiency of the smaller social groupings inclines them to coalesce in a society large enough to provide for the greatest possible human well-being?

Therefore the state itself is necessary, and this necessity is from nature. Yet the particular form of the state is not from nature, but from human needs and industry? It is not relevant

¹*III Summa Contra Gentiles*, cap. 129.

²*De Regimine Principum*, I, cap. 1.

³*ibid.*

⁴*Comment, in Aris. Libros Politicorum*, I, 1-

to our purpose here to discuss the relative claims to perfection of the various forms of political control. In our exposition, when we use the words *prince, king, or ruler*, we employ these terms to signify any physical or moral person who is charged with the political rule of the state.

The purpose of the state is to supply for the natural insufficiency of man: therefore the state will be perfect in accordance with its own self sufficiency.⁵ Saint Thomas assigns two ends to the state, of which, one leads to the other. The immediate end of the state is "*the conservation of unity*" or "*peace*," because, if peace is taken away, the usefulness of social life disappears. The reason for this is evident, for, if a multitude of men are at discord among themselves, living together inevitably becomes a burden. This end of society is fixed by the very nature of the group, which is composed of men living together. The ruler has no choice but to procure this peace and conservation of unity, just as the doctor must, by the very nature of the thing, intend the health of his patient. No one ought to take counsel about a necessary end⁶ which he ought to intend. Counsel is taken only concerning means to an end.⁷

The unity of man is caused by nature. The unity of society, however, which is called "peace," must be acquired by the industry of the ruler. This immediate end of the state leads to the ultimate end of the state. Now there are two steps in the perfection of the immediate end. The end of the state must be constituted by the ruler. Once constituted, it must be conserved and improved as far as possible. This is done in three ways: first, by providing for the corporal necessities of the people; secondly, by regulating the relations of the citizens, e. g., arranging for subordinates to do the work of the state, rewarding the good and punishing the evil, etc.; and thirdly, by giving protection against outside enemies. In other words, the ruler must intend not only the institution of unity and peace in the society, but must intend and provide also for their permanency. To

⁵*De Regimine Prineipum. I, cap. et 2.*

⁶Counsel which leads to one making a choice as to action or non-action, or as to choosing this or that.

⁷*ibid. cap. 1.*

this permanency there are three obstacles. One of these obstacles arises from the mortality, corruptibility, and defectibility of men which make them unfit for holding office and performing state duties for long even during their own life time. Moreover, the life of any individual is short when compared with the potential perpetuity of society. To remedy this defect, or rather, to overcome this obstacle, the ruler must provide good men for public office; and he must substitute others when the first appointees become inept. A second obstacle arises from the perversity of men's wills, which are either slothful or lazy in regard to the duties of citizenship. Indeed they are often positively harmful to the common peace, since by transgressing justice, they disturb the peace of others. Against this defect the ruler must work by coercing his subjects with laws and precepts, rewards and punishments. In doing this he follows the example of God. The third obstacle to the common unity and peace comes from external enemies, who will try to injure and even overthrow the state. Against this peril the ruler must labor by making his subjects safe from foreign enemies.⁸

This proximate end of the state leads to the ultimate end. This latter is the continuation of the multitude in the life of goodness or virtue. So we have it that the end of the state is the "*common good*," the "*life of virtue*" "*that which all men desire*," "*a divine good*."⁹ In Saint Thomas' philosophy, the virtuous life is the life according to reason. This means following out the dictates of the natural moral law. All men desire this and it is a divine good inasmuch as it is a participation of the eternal law.¹⁰

Men congregate together so that, by living thus together, they may attain that good life which could not be attained by each one living singly. Now, the good life is life according to virtue. Therefore the virtuous life is the end of human society. Now an evidence of this is the fact that those men alone are parts of human society who communicate with each other in living well. If life were the sole reason for human society, then animals and

ibid. cap. 15.

**op. cit.* III, cap. 2.

op. cit. I, cap. 14. *Summa Theologica*, I-II, Q. 91, art. 2.

slaves would be definite parts of the human congregation. If the acquisition of wealth were the reason for society then all traffickers and merchants would belong to the same state. The evidence for this is taken from experience, for we see that those alone are counted as belonging to a group who are directed to living well under the same laws and under the same rule.

The ultimate end of the state is analyzed by Saint Thomas in this manner. The end of man is the perfection of the form of man—that is, the perfection *of* the intellectual soul. More concretely this perfection lies in the act of the possible intellect knowing God.¹¹ Now this act of the possible intellect knowing God results in the perfect happiness of man. The opinion concerning the end of the whole multitude ought to be the same as the opinion concerning the end of a single man. Now it is evident that the end of man must be something outside of himself. If, indeed, the end of man were something of good existing within himself, then it would follow that the end of the ruled multitude would be the acquisition of such a good and permanency in the possession of it. And, indeed, if this ultimate end of man were bodily health or life, then the acquisition of it would pertain to the physician; if it were riches, it would pertain to the economist; if it were truth, it would pertain to the doctor and teacher. But just as the possession of divinity is the end of a single man so the end of society is the possession of God, which is to be attained by the life of virtue.

The king is prepotent over all human affairs, and ought to order them under the imperium of his reign. Now, whosoever is charged with ordering something to an end ought to see that his work is in consonance with that end. Since the remote end of the present life is the acquisition of celestial happiness, it is the duty of the king to procure the virtuous life of the multitude according as it is congruous with celestial beatitude. To do this he must command those things which lead to celestial happiness, and forbid as far as possible those things which are contrary to it. All those things which are to be commanded or forbidden are contained in the divine law which the king must learn.

¹¹Sumrna *Theologica*, T-II. Q. 2. et Q. 3. art. 8.

After he has learned it, he must take special care that the people live according to virtue. This royal task has three aspects. First, the ruler must institute this virtuous life among the people; then he must conserve this life as instituted; and finally he must urge them to better things according to the dictates of this virtuous life.

THE MEANS OF ATTAINING THE END OF THE STATE:

AUTHORITY AND LAW.

Since the ends of the state are peace, happiness, the common good and the life of virtue, we now establish from the doctrine of Saint Thomas the means by which the state can arrive at that end for which it is instituted. Now in all things which are ordered to an end, and in which there is possibility or opportunity for diversity of actions, there is need of some director through whom these things may come directly to their end. The best example is that of a ship which is at the mercy of the winds of heaven and can be blown hither and thither and arrive not at its harbour unless there is the guiding hand of the pilot to bring it directly to its haven. Man must attain an end which is possible of acquisition by diverse means. Man, therefore, needs a director. And there is in each man a director, namely, the light of reason, which directs man's actions to his end. Now if man were destined by nature to live alone, this light of reason would be sufficient under God to direct man to his end. But man is by nature a social and political animal who must live in society,² and therefore it would seem that social man needs an external ruler who, under God, will direct him to his end. This is certainly true, for if it is natural that men live together in society, it is necessary that there be something among men through which men can be ruled. For if many men live together and each one of them is busy providing which is necessary for himself, the society will be dissipated into distinct individual units, unless there is also someone who takes care of what pertains to the good of the multitude. In the same way the body of a single man would break up into its component parts except that

²*De Regimine Principum, 1, cap. 1.*

there is a ruling force which has for its object the common good of all the members.

Now this happens reasonably: for the same thing is not both proper and common, for by proper things men differ, by common things they are united. Now the causes of diverse things are diverse. Therefore besides that which moves to the proper good of each one, it is necessary to have that which moves to the common good of the "many." On account of this in all things which are ordered in one, some one thing is found which is a ruling force for another,... Indeed in one man the soul rules the body, and among the parts of the soul the irascible and concupiscible parts are ruled by reason. Likewise among the members of the body one is the principal one, either the head or the heart which rules all. Wherefore, in every multitude it is necessary to have a certain ruling force.¹³

The common good dictates this ruling power. Therefore the ruling power is of necessity constrained by the exigences of the common good. Because of the needs of man the state is necessary. Therefore, man is naturally ordained to the state and is a part of it.¹⁴ Man is held to obey the authority of the state insofar as he is a part of it, but this obedience does not extend to all things. In the first place, man is held to heed the commands of the higher superiors before those of the lower superiors, and of the highest before the higher, and of God before men. In the second place, man is not held to obey men as regards the interior movements of his will. In these things God alone is to be obeyed. Even in certain exterior things, e. g., corporal sustentation, generation of children, contraction of matrimony, man is held to obey only God and not his human superiors, for in these things men are equal. But in those things which refer to the disposition of actions and of human affairs, the subject is

“*ibid.*

“*Summa Theologica, I-II. Q. 90. art. J, ad 3.*

held to obey his superior *according to the essence and nature of the superior's superiority*, just as the soldier obeys the leader of the army in those things which pertain to war; the slave obeys the master of the household in those things which pertain to executing servile works; the son obeys his father in those things which pertain to the discipline of life and to familial care; and so the rest.¹⁵

The individual man, if we consider his subjection, exists for the state; but if we consider him as a man the state exists for him.^{16*} The ruler exists for the state, inasmuch as he has the care of the common good. If he intends that the state should exist for him, then he is not a ruler but a tyrant.¹¹ The three acts which belong to authority are *1o.* the government of the people subject to that authority; *2o.* the bearing of burdens and pain for this same people, and *3o.* coercion of the evil.¹⁸ Inasmuch as the right of authority is based on man's need of direction to his own end and the end of society, the guidance function is the primary purpose of civil authority. Coercion and punishment are functions of government to be used only when the guidance function fails in its effect. The functions of government will be vital as long as there is a group of men requiring

"op. cit. II-II, Q. 104, art. 5.. .Et ideo in his quae pertinent ad interiorem motum voluntatis, homo non tenetur homini obedire, sed solum Deo. Tenetur autem homo homini obedire in his quae exterius per corpus sunt agenda; in quibus tamen secundum ea quae ad naturam corporis pertinent, homo homini obedire non tenetur, sed solum Deo: quia omnes homines natura sunt pares, puta in his quae pertinent ad corporis sustentationem et prolis generationem. Unde non tenentur nec servi dominis, nec filii parentibus obedire de matrimonio contrahendo, vel virginitate servanda, aut aliquor alio hujusmodi. Sed in his quae pertinent ad dispositionem actuum et rerum humanarum, tenetur subditus suo superiori obedire secundum rationem superioritatis; sicut miles duci exercitus in his quae pertinent ad bellum, servus domino in his quae pertinent ad opera servilia exsequenda, filius patri in his quae pertinent ad disciplinam vitae et curam domesticam; et sic de aliis.

MD De Regimine Principum, I, cap. 1 et 2; III, cap. 2.

"ibid.

"Comment in Joann. Cap. X. Leet. 3, pro.

Comment, in I Tim. Prolo. fine.

their exercise, that is, the authority of the state has a potential perpetuity based on the potential permanency of the human race.¹⁹

All power is from God.²⁰ This statement is a consequence of the principle which holds that whatever is predicated commonly of God and creatures, comes to creatures from God. Therefore, all human power is from God. To this it may be objected that some human powers do not know God. Others disobey His laws by acting against them and Him. In response to this it may be said that there are three things in the royal power or any other dignity—first, there is the power considered in itself, and this is from God. Second is the method or means of acquiring power. Sometimes this is from God, as when a man acquires it in the right way and orderly; and sometimes it is not from God but from the perverse desire of man who acquires power through ambition or in any other illicit way. Third is the exercise of the power, and in this respect power is from God when a man uses power committed to him according to the precepts of divine justice; and sometimes it is not from God, as when a man uses it contrary to the precepts of divine justice.²¹

At any rate, the authority of the state is divine if for no other reason than because it is natural, for it proceeds from the Law of Nature, which is the participation of the eternal law in rational creatures. The authority of the state is as naturally divine as the authority of the father of the family.²² Princes and other rulers must be honored because, even if they are evil, yet they take the place of God and of the community over which they rule.²³

Authority is the means by which society is directed to its end. The chief act of authority is law, for the principal act of the ruler is to make laws.²⁴ Law according to the definition enunciated

MDe Regimine Principum, I, cap. 15.

"*op. cit.* III, cap. 1.

^Comment. in Romanos, Cap. XIII, lect. 1, primo.

=*De Regimine Principum*, III, cap. 1; *Summa Theologica*, II-II, Q. 104, art. 1, corpus.

"*Summa Theologica*, II-II, Q. 63, art. 3. corpus.

«*op. cit.* II-II. Q. 50. art. 1. ad 3.

by Saint Thomas is: "A certain ordination of reason for the common good made by him who has care for the community, and promulgated."-- It seems well to explain in some detail these various elements contained in Saint Thomas' concept of law, in order that we may have a clear understanding of just what is meant by the concept:

1. *A certain ordination of reason.* Law is a certain rule and measure of action by which a man is induced to act, or is drawn (back from action. Now the rule and measure of human actions is reason, which is the first principle of human acts. It is the office of reason to order action to an end which itself is the first principle of things to be done. Saint Thomas does not mean here the speculative reason whose terminus is in knowledge alone. He means precisely the practical reason whose terminus is act.²⁶ He says definitely that universal propositions of the practical reason ordered to action have the nature of law,²⁷ Law has to do with action and not with mere knowledge. At first blush it might seem that law is rather something of the will than something of the reason, for law moves those who are subject to it to right action and motion to action properly pertains to the will. Saint Thomas answers this difficulty by saying that reason has the power of moving from the will. Because a man wishes an end, reason commands those things which lead to the end. But it is necessary that the desire of those things which are commanded be regulated by a certain reason in order that the will may have the nature of law. And in this sense the adage anent the will of the prince having the force of law has weight. Otherwise the will of the prince would be iniquity rather than law.²⁸

As Dr. Walter Farrell aptly notes:

But not every proposition of the practical intellect is a law. This would include counsels and particular precepts, i. e., precepts given to individuals by any

²⁶*op. cit.* I-II, Q. 90, art. 4, corpus.

²⁷*dr. op. cit.* I-II, Q. 76, art. 1, corpus.

²⁸*op. cit.* I-II, Q. 90, art. 1, ad 2.

²⁹*ibid.*, corpus.

superior. This proposition of the practical intellect is a precept, i. e., the imperium of the intellect commanding that which the will has chosen; an act essentially of the intellect, since it is ordinative and regulative, but implying a previous act of the will from which it has its motive power.²⁹ Since precept deals only with means to an end, not the end itself, it is apparent that St. Thomas limits law to the ordination of means to an end,—"*ad bonum commune*."²⁰

2. *For the common good.* The reason for society is man's natural necessity for life with other men. Human society, and the diversity of means to the end of man and of society demand an authority which can give direction to the end. The chief act of authority is law. Now when we say that law must be ordained always to the common good we mean that it must have the purpose of directing man and society to their final end. It is certain that law, strictly speaking, must always be ordained to the common good. Saint Thomas proves this thus,

Law, because it is a rule and a measure, pertains to that which is the principle of human acts. Now, just as reason is the principle of human acts, so in reason itself there is something which is the principle in relation to all other things. Therefore law pertains principally and especially to this. Now the first principle in operative things, about which the practical reason is concerned, is the ultimate end. Now the ultimate end of human life is felicity or happiness. . . Therefore it is necessary that law regard especially that order which leads to felicity. Again, since every part is ordained to the whole as the imperfect is ordained to the perfect,—now one man is part of the perfect community,—it is necessary that law

²⁹*op. cit.* I-II, Q. 17. art. 1, corpus et ad; II-II, Q. 47, art. 8, corpus et ad 5.
²⁰*ibid.*, et Q. 50; I-II, Q. 90. art. 4. Cfr. Farrei, IV,, O. P. *The Natural Moral Law*, 6, 7.

properly should have reference to the common felicity.³⁴

Since anything is called law especially because it is ordered to the common good, no other precept has the nature of law unless it has order to the common good.³² Now this order to the common good (which is the ultimate end) which pertains to law is applicable to singular ends. And according to this, precepts are given even concerning certain particular things.³³ Nor does it matter that the human acts to which law directs man are concerned with particular things, for these particularities can be referred to the common good, not by the community of *genus or species*, but by the community of final cause, according to which the common good is called the common end.³⁴

Farrell, concluding this explanation of the reference of law to the common good, says,

It is to be noted that the common good mentioned here is that of a perfect community,³⁵ which may be defined as a society, *sui juris*, having in itself its own sufficient means to attain its proper end, and independent in its own order of every other society. The reason for this restriction of law to a perfect society is pointed out by Saint Thomas himself when he says that after all, man is a part of society (being by nature social), and it would be unreasonable to invert the welfare of the whole to that of the part, just as it would be unreasonable to order the perfect to the imperfect. It is of a perfect community that man constitutes a part.³⁶

³⁴Summa Theologica, I-II, Q. 90, art. 2, corpus,

³⁵ibid.

³⁶ibid, ad 1.

³⁷ibid, ad 2.

³⁸ibid, art. 3.

³⁹ibid, art. 2; Farrell... ,p. 15.

3. *By him who has care of the community.* Having shown the faculty from which law proceeds, and the object to which it must tend, Saint Thomas now shows the agent necessary for the formation of law:

First and principally law has reference to the order to the common good. Now to order anything to the common good is the right either of the whole multitude, or of any one taking the place of the whole multitude. And, therefore, legislating pertains either to the whole multitude or to that public person who has charge of the whole multitude. *Quia et in omnibus aliis ordinare in finem est ejus cujus est proprius ille finis*

A private person cannot make laws, for a private person cannot make the laws efficacious. The efficacy of law depends on its coercive force, which force resides only in the community or its vicar.³⁸ Moreover a father of the family can make statutes for his familiars, but these statutes do not have the proper nature of law.³⁰

4. *And promulgated.* This promulgation is necessary in order that law may have its efficacy. Saint Thomas proves this.

Law is imposed on others after the manner of a rule or measure. Now a rule and measure is imposed through the fact that it is applied to those which are regulated and measured. Wherefore, in order that law may have the power of obliging, which is a property of law, it is necessary that it be applied to men who ought to be regulated by it. Now such an application is effected through the fact that it is led to the knowledge of men by the promulgation itself.⁴⁰

“*ibid.* art. 3, corpus

“*ibid.* art 2.

“*ibid.* ad 3.

“*ibid.* art. 4.

This promulgation is not a part of the nature of law, but is rather a necessary condition that law be observed. It is certainly true that men could not obey a law that they did not know because it was not promulgated. It is just as certain that a law is essentially constituted in the full nature of its being before it is promulgated.

Farrell has outlined comprehensively the division of laws:

1. Divine Law—whose immediate author is God:
 - a. Eternal Law—the reason of divine wisdom according as it is directive of all creatures to their final end.
 - b. Natural Moral Law—the participation of the Eternal Law in rational creatures.
 - c. Divine Positive Law—contained in the Old and New Testament; promulgated by a special divine revelation.
2. Human Law—law framed by human authority:
 - a. Ecclesiastical—framed by ecclesiastical authority.
 - b. Civil—framed by civil authority.⁴¹

For the moment we are concerned directly only with the human civil law.

Since law *exists* in human society for the common good, that is, in order that the group as a whole and each member of the group may move orderly and peacefully to the final end, law must always be directed to the common good, the universal happiness. Law moves towards this end by means of the four acts proper to law:⁴²

1. *Command* of good *acts*. The reason for this act is evident, for the common good can be attained only through the exercise of virtue. But it must be remembered that the human law can

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I °Farrel, p. 20.

J aSummaTheologica, I-II, Q. 02, art. 2, corpus.

command only the acts of the virtue of justice. The reason for this is that justice is the essential virtue in the human community, since it is concerned with the actions of men towards each other and towards the state as a whole. The other virtues fall under the power of the law only insofar as they partake of the nature or reason of justice.⁴⁸

2. *Prohibition of evil acts.* Just as virtuous acts are conducive to the common good, so evil acts destroy it. Therefore the law must forbid them. But this prohibition of evil is not to be too universal. The law must not try to extirpate all evil, or to punish all crimes, lest in trying to do this it should also destroy greater goods, and thus impede the common utility which is necessary for human intercourse.⁴⁴

3. *Permission for indifferent acts.* While it is true that no act which proceeds from a deliberate will is really indifferent, if we consider it individually and in the concrete,⁴⁵ yet there is a species of acts which are indifferent in the abstract.⁴⁶ Saint Thomas wishes also to include in this class of acts, indifferent in the legal sense, also those which have about them little of the essence of goodness or evil.⁴⁷ These acts are to be neither commanded nor forbidden by law, but are to be permitted. Permission may be taken in various senses, but in order that it may be considered an act or effect of law, it must have a certain element of obligation. The permission itself does not seem to have full obligatory power as regards the act permitted. But it has true binding force, inasmuch as it places implicit obligation that no obstacle be placed in the way of the act permitted, and that its execution be not punished.⁴⁸

4. *Punishment.* Fear of punishment is the means by which men are induced to observe the things commanded, forbidden

“ibid. dr. Aristotelis, Ethic. V, cap. 1, n. 14; et Comment S. Thomae in Ethic. Arû., lect. ii; et Cajetanus, I-II, Q. 92, art. 2.

“Summa Theologica, I-II, Q. 91, art. 4, corpus.

“op. cit. I-II, Q. 91, art. 4, corpus.

••ibid. art. 8, corpus.

•op. cit. I-II, Q. 92, art. 2, corpus.

“cfr. Sylvii, II. p. 390-391.

or permitted by the law.⁴⁹ And this effect of law is the one which properly concerns us here, in this thesis. This function of punishment is the bulwark of law observance in the affairs of men as they are. For, in order to be efficacious, law must have binding force, must be obligatory, must have coercive power,⁵⁰ and the coercive force of the law consists essentially in the fear of punishment.⁵¹ For this princes were instituted,⁵² that they might provoke those evil men to do good and to avoid evil through the fear of punishment, who would not do it from the love of virtue.⁵³ Thus it is evident that while Saint Thomas assigns four acts or effects of law, the efficacy of the first three, namely, *Command*, *Prohibition*, and *Permission*, really depends on the vigour of the last, that is, the *Power to Punish*. No doubt, if all men were virtuous the law would need no penal sanction. But taking mankind as it actually is, the punitive sanction is certainly, here and now, the essential means of attaining the execution of the law,—the end of the state,—the common good. Saint Thomas is not biased in this respect. He does not say all men need the impulse to good born of the fear of penalty. He quite candidly distinguishes four general classes of men,

- a. those who of themselves are led to virtue;
- b. those who are readily induced to virtue by others but without punishment;
- c. those who are induced by others through punishment, and
- d. those who are not led to virtue even through punishment.⁵⁴

Summa Theologica, I-II, Q. 92, art. 2, corpus.

op. cit. I-II, Q. 90, art. 3, ad 2.

op. cit. I-II, Q. 100, art. 9, corpus.

op. cit. I-II, Q. 90, art. 3, corpus.

Comment, in Romanos, HI, lect. 1, medio.

op. cit. II, 15, medio.

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Having established the position of law and punishment in relation to the end of society, it remains only to discuss the methods of applying the sanctions of the law to law breakers. It will be noted that we have made no mention here of the premia! sanction for laws, that is, the rewards to be given those men who do cooperate for the common good. There is little mention in Saint Thomas' works of positive rewards for law abiding citizens. For the most part, the reward of a good citizen is a share in the common life and the happiness resulting therefrom,—surely a sufficient inducement.

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NECESSARY PROCEDURE IN INFLECTING PUNISHMENT.

Not for a moment does Saint Thomas consider any sudden outbursts of wrath against a criminal. He declares strongly that all punishment must be inflicted in an orderly fashion and in accordance with justice. In the infliction of penalties many actors play a role. And we shall consider each participant, in detail so as to arrive at a good picture of trial procedure in the philosophy of Saint Thomas.

a) *The relation of the judge to punishment.*

Inasmuch as the law is made for the common good, it is made in view of general conditions.⁵⁵ It cannot take care of all possible contingencies which might arise,

- l, ... human acts, for which laws are made, consist of
l singular contingents, which can be varied in an
! finite number of ways. It is impossible to make a
j rule of law which would be in no case deficient,
j Legislators consider that which happens for the most
t part and make laws with this in mind. Nevertheless,
l the observance of this rule of law in certain cases is
j contrary to the equality of justice and contrary to the
j common good which the law intends. For instance, ? ,
[the law establishes that deposits must be returned, ■

“*Summa Theologica*, I-II. Q. 96. art. 6. corpus.

because this is just in most cases. Yet it can happen that to return a deposit would be hurtful: if, for instance, a madman deposited a sword, and then demanded it back while he was in a fury; or if someone should ask for his deposit to the hurt of the country. Therefore, in these and similar cases it is evil to follow the established law. On the other hand it is just to omit the words of the law, and to follow that which the reason of justice and the common utility demand.⁵⁶ ...

Hence there is need of someone who can apply the law in each particular case, and who can provide also for those cases which are not covered by the written law.⁵⁷ This person is the judge, who is a minor legislator, inasmuch as his decisions have the force of quasi-laws.⁵⁸ The judge must be a species of *animated justice*.⁵⁹ So, while the law provides a penal sanction for its observance, it is the judge who must decide when, where, and on whom, this sanction is to be inflicted. In inflicting penalties, the judge performs an act of justice, for punishment, insofar as it pertains to public justice, is an act of commutative justice.⁶⁰

Saint Thomas assigns five reasons why it is licit for a judge to punish:

In a certain sense, the judge takes the place of God, Who also punishes by means of sensible things.

To punish is an act of justice for punishment orders guilt.

Punishment is ordered to the conservation of peace and concord among men; This is accomplished when penalties are inflicted on the evil.

⁵⁶*op. cit.* II-II, Q. 120, art. 1, corpus.

⁵⁷*op. cit.* II-II, Q. 67, art. 1, corpus.

⁵⁸*op. cit.* I-II, Q. 95, art. 1, corpus.

⁵⁹*In 10L:G Ethic.* V, Leet. 6, para. 955.

⁶⁰*Summa Theologica*, II-II, Q. 108, Art. 2, ad 1.

4. Punishment is for the common good which is impeded by the lives of the evil.
5. The judge is like a surgeon, who must cut off the putrid member in order that the whole body may not be corrupted.⁶¹

The arguments conclude to the fact that it is lawful for the judge to judge and punish his fellow man. Saint Thomas very definitely lays down the requisites for a just judgment.⁷²

1. The judge must act from a desire of justice. This is evident if judgment is to be an act of justice, as we have already said.⁸³

2. Judgment must be given by one who has authority. If the judge is not acting in his own court, and in the cases given him by law, if he is not duly authorized by the public authority of the state, then his decisions are not legal or binding.⁸⁴

3. Judgment must be given prudently.⁸⁵ It is this condition which actually determines the infliction of the penalty.

Again and again Saint Thomas insists that the judgment must be just. He gives three things required for a just judgment, or rather, he states three conditions which must be avoided if the judgment is to be just:

1. Judgment must not be given on suspicions, that is, on light indications.^{86*}

**III Summa Contra Gentiles, cap. 146.*

"Summa Theologica, II-II, Q. 60, art. 2, corpus.

"cfr. ibid. art. 1; also Pegues, O.P., Commentaire Français Littéral de la Somme de Saint Thomas d'Aquin, Paris, 1916. vol. XI, p. 233. "mais parce que ce jugement va faire le droit par rapport à autre et que ce jugement, pour être sain, demande la rectitude de la volonté à l'égard de ce droit d'autrui, à cause de cela il demeure spécialement et proprement. Pacte de la vertu de justice qui perfectionne la volonté à cet effet."

"Summa Theologica, II-II, Q. 67, per totum.

"ibid.

"ibid. art. 3.

2.If there is a doubt then the judgment must be decided in favor of the criminal. "When there do not appear manifest evidences in judgment concerning the malice of a man, we ought to consider him as good by interpreting in the more lenient way that which is dubious."⁰⁷ No one, especially in public, ought to inflict injury on another without cogent cause.⁰⁸ In this connection, Cajetan says that as regards the act of punishment, since it follows judgment, everything must be interpreted in the better part.⁰⁹ By this he means that judgment must be rendered in favor of the accused. This opinion is followed by Pegues, one of the modern commentators on Saint Thomas: "La justice veut que jamais nous ne prononçons soit intérieusement, soit extérieurement, par mode de sentence ferme et arrêtée, dans le sens du mal, s'il demeure quelque doute à ce sujet."⁷⁰

3.Judgment must be rendered according to the written law. [†] This is evident, for judgment must be rendered according to the ordinary norms of justice in social affairs. Now the ordinary norms of justice in social affairs are the natural law and the positive law, which in turn should be conformable to the natural law. Now the written law is an expression of the natural or positive law. Hence judgment must be rendered according to the written law. Aristotle says about this that it is better that all things be regulated by law than be left to judges.⁷² Saint Thomas gives three reasons for this:

- a. Because of the difficulty of finding a sufficient number of men capable of being good judges.
- b. The difficulty of forming a correct conclusion from one isolated case or fact.

Kibid. art. 4.

"ibid.

"Cajetan, *op. cit.* vol. I, p. 31.

"Pegues, *op. cit.* Vol. XI, p. 243.

"*Summa Theologica*, II-II, Q. 60, art. 5, corpus.

"Aristotelis, *Rhetor*, I, cap. 1, a princ.

- c. The human judge's difficulty of maintaining a just and impartial attitude of mind when confronted with an actual case/3

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Hence the judge must proceed according to law, testimony, and witnesses. However, if he suspects that there is fraud in the testimony, he may examine it and the witnesses more diligently in order to see if he can unearth the fraud. But if all his inquisition fails of its purpose and he is unable to detect the fraud in the testimony, then he must judge according to what he knows in court, and not according to his knowledge as a private person.⁷⁴ And this rule still holds even when the judge knows positively from private information that the defendant is innocent. He may not use this information in rendering his judgment. He must use only that information which is acquired as a result of the evidence in open court. It is not licit for the judge to relax the penalty, and this is what rendering justice on the basis of private information would amount to. Only the supreme ruler of the perfect community may relax the penalty, and even he may do this only when it will in no way endanger the common weal.⁷⁵ On the other hand, Saint Thomas quotes approvingly the following: "By no reason of laws or favor of equity is it allowable for us to interpret harshly or render burdensome those useful measures which have been enacted for the welfare of men."⁷⁶ Thus he insists always on the mean in justice, the mean which lies between severity and laxity.

But it is evident from the infinite ways in which human acts may happen, that the law cannot cover everything. By this we mean that no law can be framed that will be deficient in no case of the multitude of possible human acts.⁷⁷ Hence provision must be made for those things which fall outside the written

"Summa Theologica, I-II, Q. 95, art. 1, ad 3.

"op. cit. II-II, Q. 67, art. 3, corpus.

"ibid. art. 4, corpus.

nop. cit. III, Q. 96, art. 6; corpus.

nop. cit. II-II, Q. 120, art. 1, corpus..

law. In these cases which the law does not cover, it would be evil to follow the established law. It is good, however, to pass over the words of the law in these cases and to follow that which the nature of justice demands, and the common good and utility require. However, in deciding in a case like this, the judge does not judge the law or change the law, but merely decides that this case in point does not fall under the law.” Moreover, the ruler may dispense from the law, that is, he may give permission for the non-observance of the law to those persons and in those cases in which the law is not conducive of justice.” This power of dispensation may be delegated by the ruler to certain others, among whom may be the judge.

b) *The office of the accuser.*

This accuser, as he appears in the philosophy of Saint Thomas, has some resemblance to the State's Attorney of our own day. However, he must not be identified with this latter person. Saint Thomas asks first in general whether a man is bound to make accusation? He answers this question by saying that the punishments of this life are rather medicinal. Among other things, they are conducive to the good of the community, inasmuch as the peace of the commonwealth is ensured by the punishment of evil doers. Hence, in the case of a crime that injures the common weal, a man is bound to make accusation, *provided he can offer sufficient proof*, for it is the duty of the accuser to prove his accusation. If, however, the sin is not of a nature to injure the common weal, or if the accuser has not sufficient proof, he is not bound to make accusation. The reason for this is that no man is bound to do that which he cannot fittingly accomplish.⁸⁰

Nor can it be urged that this accusation is contrary to the duty which a man owes to his friend. Even if it is contrary to the fidelity of friendship to reveal the secrets of a friend to the injury of that friend, yet it is not contrary to fidelity to make

”*ibid.*

^op. cit. I-II, Q- 97, art. 4, corpus.

Kop. cit. II-II, Q. 68, art. 1, corpus.

known the secrets of a criminal if the revelation of those secrets is necessary for the common good of the community. The common good is always to be preferred to the private good of any singular person. *Hence it is unlawful to receive any secret which is of detriment to the common good.* Moreover, a thing is scarcely a secret when it can be proven by witnesses.⁸¹

Cardinal Cajetan comments on this article concerning the duty of accusation. He says that if a man can provide for the common good in any other way than by accusation, then he is not bound to accuse. However, if he cannot provide for the common good in any other way, he must make accusation.⁸²

Saint Thomas approves the practise of his time which demanded that the accusation be made in writing. He gives strong reason for this by showing that when the process in a criminal case goes by way of accusation, the accuser is in the position of a party, so that the judge⁸³ stands between the accuser and the accused for the purpose of the trial of justice. In this trial of justice it behooves one to proceed on certainties as far as possible. Verbal utterances would be apt to escape the memories of the hearers. Therefore, unless the accusation were made in writing, it would be difficult for the judge to remember

ibid. ad 3.

“Cajetan, *op. cit.* in II-II, Q. 68, art. 3.

“It must be noted that, not only must a man accuse when the crime warrants it and the case can be proven, but also that the judge may not condemn a man unless he has been accused, for the judge is the interpreter of justice. Wherefore, as Aristotle says, (*Ethic.* V, cap. 4) *men have recourse to the judge as to one who is the personification of justice.* Now, justice is not between a man and himself, but between one man and another. Hence, a judge must needs judge between two parties, which is the case when one is the prosecutor and one is the defendant. Therefore, in criminal cases, a judge cannot sentence a man unless the latter has an accuser. *Summa Theologica*, II-II, Q. 67, art. 3, corpus. Even the fact that the judge was an eyewitness to the crime does not justify him in passing sentence, except according to the order of judicial procedure. It must be admitted that sometimes denunciation does not need an accuser, for denunciation aims at the amendment of the criminal. Moreover in open and manifest cases there is no need for an accuser, for in these cases public notoriety takes the place of the accuser, *ibid.*, ad 2.

what had been said, and with what qualifications when he comes to pronounce judgment.⁸⁴

The accuser must beware of calumny, that is, of false accusation. He must also avoid collusion with the accused in the process of the trial. Most of all he must eschew any total withdrawal of the accusation which would be in detriment to the common good.⁸⁵ However, the supreme ruler of the community may quash the accusation. The reason for this seems to be that the supreme ruler is responsible for the common good, which may be better served in certain cases by quashing the accusation than by prosecuting it.⁸⁶

In completing his treatment on the office of the accuser, Saint Thomas insists that the false accuser must be held to the law and the penalty of the talion. He proves this point.

In a case where the procedure is by way of accusation, the accuser holds the position of a party aiming at the punishment of the accused. Now, the duty of the judge is to establish the equality of justice between them, and the equality of justice demands that a man himself should suffer whatever harm he has intended to be inflicted on another.. Consequently, it is just that he who has put a man in danger of punishment by a false accusation, should himself suffer a like punishment??

It seems, however, that this penalty of the talion may be remitted when it is evident that the false accusation has been

"Words are so many and so various that it is difficult to remember each one. A proof of this is the fact, that is a number of people hear the same words, and are asked to repeat them even after a short time, they will not agree in the repetition. And since a slight difference of words changes the sense, even though the sentence of the judge is passed soon afterwards, the certainty of the judgment demands that the accusation be drawn up in writing. *Summa Theologica*, II-II, Q. 67, art. 2, ad 1.

Kop. cit. II-II, Q. 68, art. 3, corpus.

"*ibid.* ad 3.

"*ibid.* art. 4, corpus.

made out of non-culpable levity, or because of ignorance or mistaken good faith.⁸⁸

c) *The role of the defendant in the court of justice.*

The accused must never *lie*. The judge is a lawful superior in relation to the criminal being tried in his court. Because of the obedience due to this lawful superior, the accused is bound to answer truthfully those questions which the judge puts to him according to the form of law. But if the judge asks the accused anything outside the order of justice, the latter may refuse to answer or may appeal the case.⁸⁹ An accused man is not bound to divulge all the truth, but only such truth as the judge may and must require of him according to the order of justice. For instance, when the accused is already disgraced because of a certain crime,⁹⁰ or when certain express indications of his guilt have been discovered,⁹¹ or when his guilt is already

ibid. ad 1.

, “When the method of inquisition is to be used in the court of justice, there must be some preceding reason of infamy which is sufficiently strong to make prudent and worthy men reasonably suspicious that *this man* committed *this crime*. It seems that the infamy in question must be of a certain man in relation to the commission of a certain crime. Cajetan, *op. cit.* IMI, Q. 69.

“The jurists require two reliable witnesses for a perfect indication of crime. The regular procedure requires *indications*, not merely *indication*, before the judge can command and extort the truth from an accused man. By the nature of the thing, this requisite would vary with the nature of the crime, the persons concerned, the time, place, and circumstances. These indications must be *manifest*, both as to the crime, and as to the person accused of the crime, and as to the court in which the accused is being tried. It must be manifest in the court so that the criminal may know that he is bound to confess the truth which the judge may justly require and extort from him. Cajetan, *ibid.*

“It seems that there must be two witnesses for full proof besides the accuser we have already mentioned, For semi-proof, there must be one witness, *omni exceptione major*. It seems that Saint Thomas would require witnesses, both as to the deed and as to the person. Cajetan, *ibid.* We have found only one case in which it seems that circumstantial evidence is admissible and indicative of guilt. This is the case of the husband discovering his wife in circumstances which prudent men would think indicative of adultery committed or about to be. These circumstances are nudity, darkness, segregation, etc.

more or less, that is half proven,⁹² the judge may insist strongly on the criminal telling the truth. A man may be prudent in defending himself, but he may never defend himself by using calumny, guile or fraud.⁹³

Saint Thomas allows no appeal from a just sentence, for this appeal would inflict injury on the judge and on the accuser by impugning their justice, probity, and intelligence. However, an innocent man may well appeal against unjust condemnation.⁹³

A man who is unjustly condemned may resist the sentence unless his resistance may result in scandal to others because of the grave disturbance inflicted on the public peace.⁹¹ Saint Thomas would also allow a man who was justly condemned to escape from prison in order to avoid the death penalty.⁹⁵ Cajetan raises very severe difficulties in the way of this opinion.⁹⁹

d) *Witnesses, and their duties in trials.*

Because of the importance of the role of the witness in criminal cases in court, Saint Thomas is very explicit in stating just when testimony is required and when it is not. Because of the importance of the affair we give his own words in full:

... sometimes a certain man's evidence is necessary, and sometimes not. If the necessary evidence is that of a man subject to a superior whom, in matters pertaining to justice, he is bound to obey, without doubt he is bound to give evidence on those points which are required of him in accordance with the order of justice, for instance, on manifest things, or when ill-report has preceded. If, however, he is required to give evidence on other points, for instance, secret matters, he is not bound to give evidence. If, on the other hand, his evidence be re-

"*Summa Theologica*, II-II, Q. 69, art. 2.

"*ibid.* art. 3.

"*ibid.* art. 4.

"*ibid.*, ad 2.

"Cajetan. *op. cit. hic.*

quired by one who has not the authority of a superior whom he is bound to obey, we must make a distinction: because if his evidence is required to deliver a man from an unjust death or any other penalty, or from false defamation, or some loss, in such cases he is bound to give evidence. Even if his evidence is not demanded, he is bound to declare the truth to someone who may profit thereby... In matters pertaining to a man's condemnation one is not bound to give evidence, except when one is constrained by a superior in accordance with the order of justice; since if the truth of such a matter be concealed no particular injury is inflicted on anyone. Or if some danger threatens the accuser, it matters not, since he risked his life of his own accord. Whereas it is different with the accused, who incurs the danger against his own will.⁹⁷

Certain things in the above exposition give rise to doubts. First of all, there is doubt as regards secrets. While it is a little beside the matter at hand, we must say that sacramental secrets are never to be revealed. As regards other secrets we must distinguish between A) those which, because of their content, e. g., something harmful to the spiritual or corporal good of the community, demand instant revelation. A man hearing these even under pledge of secrecy must reveal them; and B) those which a man is not held to make known; and these he cannot reveal even under command by his superior, for fidelity is of the natural law, and a man cannot be held to act contrary to natural right.

The second point of difficulty is the statement: "*Or if some danger threatens the accuser, it matters not, since he risked his life of his own accord.*" Above we laid down the conditions upon which a man is bound to accuse. In this case a man is of necessity bound to give testimony in order to save the ac-

⁹⁷*Summa Theologica*, II-II, Q. 70, art. 1, corpus. So, it seems that the witness must help the accused but not the accuser.

cuser, who is in danger of talion while performing his duty to the community.

Two or three witnesses together with the accuser seem to suffice for condemnation, because the probability is, that we can arrive at the truth on the testimony of two or three, inasmuch as the opinion of several may be held to be more correct than the opinion of only one.⁹⁸ Saint Thomas lays down very stringent rules for the credence which we are to place in witnesses, especially when there is discrepancy in the testimony.

If the witnesses disagree in certain principal circumstances which change the substance of the fact, for instance, in time, place, or persons, which are chiefly in question, their evidence is of no weight, because if they disagree in such things, each one would seem to be giving distinct evidence, and to be speaking of different facts. For instance, if one says that a certain thing happened at such and such a time or place, while another says it happened at another time or place, they seem not to be speaking of the same event. The evidence is not weakened if one witness says that he does not remember, while the other attests to a determinate time or place. And if on such points as these the witnesses of the prosecution and defense disagree altogether, and if they be equal in number on either side, and of equal standing, the accused should have the benefit of the doubt, because the judge ought to be more inclined to acquit than to condemn, except perhaps in favorable suits, such as a pleading for liberty and the like. If, however, the witnesses for the same side disagree, the judge ought to use his own discretion in discerning which side to favour, by considering either the number of witnesses, or their standing, or the favourableness of the suit, or the nature of the business and of the evidence.

“ibid. art. 2.

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Much more ought the evidence of one witness to be rejected if he contradicts himself when questioned about what he has seen and about what he knows; not, however, if he contradicts himself when questioned about matters of hearsay and opinion, since he may be moved to answer differently according to the different things he has seen and heard.

On the other hand, if there be discrepancy of evidence in circumstances not touching the substance of the fact, for instance, whether the weather were cloudy or fine, whether the house were painted or not, or such like matters, such discrepancy does not weaken the evidence, because men are not wont to take much notice of such things, wherefore they easily forget them. Indeed a discrepancy of this kind renders the evidence more credible, as Chrysostom states (*Hom. I, in Matt.*), because if the witnesses agreed in every point, even in the minutest details, they would seem to have conspired together to say the same things. But this must be left to the prudent discernment of the judge."

Not every man is capable of giving testimony that is impartial and true. Now this may or may not be caused by the fault of the witness himself. Saint Thomas would exclude from giving testimony men labouring under defects of bad character, as unbelievers and persons of evil repute, as well as those who are guilty of a public crime, and who are not allowed even to accuse. It happens in three ways that they are not capable of witnessing justly: 1o. Because of a defect of the reason, as is the case in women, children, and imbeciles. 2o. Because of a defect due to personal affection or feeling, as is the case with enemies or those united by household ties or family relationships. 3o. Because of a defect due to some external condition, as in the case of poor people, slaves, or those who are under authority, concerning whom it is to be presumed that they

"ibid. ad 2.

might easily be induced to give evidence against the truth.¹⁰⁰ Nor can objection be raised wholeheartedly that we are bound to presume good of everyone unless the contrary be proven. Truly, good is to be presumed unless the contrary appear, provided this presumption does not threaten injury to another. In that case, one ought to be careful not to believe everyone readily?"

e) *The advocate or lawyer, his duties and obligations.*

Saint Thomas realized full well that there was a very good chance of the poorer people being denied the machinery of justice, because they would not be able to pay the stipend of good defense lawyers. So, immediately he institutes inquiry as to the obligation of the advocate to defend those who cannot pay him. He concludes that the lawyer is not always bound to defend the suits of the poor, but only when conditions of time, place and circumstances demand that he offer his services. (These conditions are precisely the same as in the case of obligation to give alms.) Otherwise he would have to put aside all other business and occupy himself solely in defending the suits of the poor.¹⁰²

Not every one is allowed to assume the office of advocate. Some are excluded from this office by reason of impotency, either by reason of the deficiency of an interior sense, such as madmen and minors; or of an exterior sense, such as deaf and dumb men. The reason for this is that an advocate needs interior skill that he may plead the cause, and speech and hearing in order that he may speak and hear what is said to him. Others are to be excluded from advocacy because of a certain decency. Now these are not excluded absolutely, for in some circumstances the indecency must yield to charity and justice. Thus, those who belong to the service of God are to be excluded. And on the other hand, those are to be excluded

art. 3.

mibid. ad 2.

cit. II-II, Q. 71, art. I, corpus.

who have certain defects, for instance, blindness, infamy, infidelity, and condemnation in grave crimes.¹⁰³

The advocate's business is to see that justice is done, insofar as lies within his power. Consequently he is not allowed, to defend certain cases. If he knowingly defends an unjust suit, he must make restitution. If he is ignorant he must be judged on the basis of the ignorance, which is sometimes culpable, and sometimes not.¹⁰⁴ If in the course of a suit, the advocate finds that his case is unjust, he must give up the case, or induce his client to give way, or make some compromise without prejudice to the other side.¹⁰⁵ In the course of a suit he may make use of all prudent and honest means, e. g., by not revealing all the truth, etc. On the other hand, he may never commit a crime to save his client.¹⁰⁸ In criminal cases he may defend the criminal always, provided that he uses neither fraudulency nor lies.¹⁰¹

The advocate is worthy of his hire, as are all laborers. Consequently, he may accept money for his services, provided that the circumstances and conditions of the person and the country are observed as to the amount. This holds unless the advocacy is obligated because of justice, charity or some other cogent force.¹⁰⁸

Saint Thomas is quite painstaking in clarifying the procedure of the court room. He does this advisedly, for he realizes that justice is difficult of attainment even under the best of persons and conditions. His doctrines concerning the principles of justice in the court, as these are to be practised by the five principal figures in the trial, are the bulwark of his teaching on the civil administration of justice.

''ibid. art. 2.

''ibid. art. 3.

''ibid. ad 2.

*''*ibid. ad 3.*

'''cfr. op. cit. IMI, Q. 69, art. 4, corpus.

'«op. cit. II-II, Q. 71, an. 4.

Non-Humanly Inflicted Sanctions.

This final aspect of the teaching of Saint Thomas concerning the sanctions for law deals with those sanctions for crime which are inflicted by some agency other than human civil authority. This treatment naturally falls into three divisions. First, those sanctions which are punishment for sins, and yet are automatically inflicted; they are, as it were, effects of the very nature of the sinful act. Secondly, the punishments in general which are inflicted by God, either immediately or mediately. And thirdly, the punishment inflicted in an after life by a just God. As a preamble to this discussion of extra-human sanctions it seems necessary to place some ideas of the nature and destiny of man. We shall do this very briefly, before proceeding with the exposition of the sanctions.

All creatures, and among them man, are capable of being deflected from right action. Consequently, all creation needs some guidance to the end which has been appointed for it by the Creator of Nature. However, man is guided in a special way to his ultimate end, for he has within himself an intellect and a free will. With the aid of these spiritual faculties man can investigate and discover the end and the means to that end. Consequently the direction, which man requires, is not physical, but rather intellectual, or moral. This moral guidance of man to his end is what Saint Thomas calls the Natural Moral Law.¹⁰

The ultimate end of man is established by nature.TM He must seek happiness (beatitude) whether he will or not. In regard to this end he is not free. He is determined. Naturally his rational appetite is necessarily inclined to that rational good which is the perfection of his intellectual soul.^{III} This determined end is the foundation of the natural moral law in man.^{IV} It is in relation to this end that all actions of man are judged.

¹⁰*op. cit.* I-II, Q. 91, art. 2; Q. 94, art. 2.

TM*op. cit.* I-II, Q. 62, art. 3; Q. 91, art. 2, ad 2.

^{III}“According to Saint Thomas, the perfection of the form of man consists concretely in the act of the possible intellect knowing God. *cfr. op. cit.* I-II, Q. 2; et Q. 3, art. 8.

^{IV}*op. at.* I-II, Q. 94, art. 2.

Those actions which lead to this end are good, and those which deviate from the ultimate end are bad. Since the end is natural for man, there is a natural inclination in man to move to this end. Therefore those actions which lead to the end are good, and are in accordance with man's natural inclinations; those which lead away from it are bad, and are in opposition to those natural inclinations.¹¹⁵ To these natural inclinations are added the light of human reason and the command, the proposition of reason to make up the natural moral law in man.¹¹⁶ As all other animals do, so man does participate the eternal law in a passive way through his natural inclinations. By the light of reason he participates this eternal law in a way that is passive yet peculiar to himself. By the command of reason, he alone of earthly creation participates the eternal law actively, that is, he directs himself.¹¹⁵ These three elements constitute the natural moral law in man. The proposition or command of reason is simply this: *do good, avoid evil.* If we reflect on what we have already said about goodness and evil taking their nature from the end, then this command means simply: "*Act for the end; do not act contrary to that end.*" This "*do good and avoid evil*" is the first principle of the natural moral law, from which all other precepts of this law are deduced by way of conclusion.¹¹⁷

According to Saint Thomas' principles, the natural moral law is absolutely intrinsic to man. If we analyze the concept as laid down above, we realize the force of his contention. The natural inclinations of man, and the light of human reason are in man from his birth. The first principle of practical reason, the command which forms the third element of the law, is immediately understood as soon as the terms are understood.¹¹⁸

"•*ibid.*

""cfr. *Op. cit.* I-II, Q. 19, art. 4, corpus, et ad 3; Q. 90, art. I, ad 2; Q. 92, art. 2; Q. 94, art. 2, corpus, et ad 2; Q. 91, art. 3.

"•*op. cit.* I-II. Q. 91. art. 2.

""*op. cit.* I-II. Q. 94. art. 2.

"•*ibid.*

"•*ibid.*

This natural moral law is supreme in its own order as a true secondary cause in the moral order.¹¹⁹ Now, a true cause establishes a real effect. Consequently this natural moral law, being a real cause, produces real obligation and establishes morality. Even if there were no subjective knowledge of either God or religion, the natural moral law would still establish morality and obligation. We say "*subjective knowledge*" because, if there were really no God, then this law, since it is only a secondary cause, would cease to be.¹²⁰

This natural moral law extends to things which are intrinsically good and intrinsically evil. It does not command all virtue nor is it conducive to absolute perfection. Based, as it is, on the order to the end, it has concern with those things which lead to that end.

This doctrine of the natural moral law is of particular importance especially when we come to deal with certain peoples who seem to have a certain amount of morality, which apparently seems to have, at least in the present, no particular reference to any Supreme Being or to any religion.

THE AUTOMATIC SANCTIONS.

As we have said above, there is a natural inclination in man, implanted in him by the Creator of Nature, to act for his end. Therefore, in this sense, good actions are natural, but bad actions are contrary to nature and do violence to it. On the other hand, as both internal and external experience show, human nature, as it is actually present in individual men, is defectible. And this defectibility is just as natural as man's inclination to seek the good or to act for an end. The reason for this is quite simple. Man is made up of diverse elements, corporal and spiritual. There is a perpetual struggle among the various faculties of man for supremacy, and since these faculties

op. cit. I-II, Q. 19, art. 4, corpus, et ad 1 et 2; Q. 71, art. 6, corpus et ad 4.

¹¹⁹*op. cit.* I, Q. 2, art. 1, corpus, et ad 1; I-II, Q. 19, art. 4; Q. 94, art. 2; et Garrigou-Lagrange, *Dieu, Son Existence et Sa Nature*, ed. 5a, Paris, Beauchesne, 1928, p. 308, f.

are intent on obtaining the end set out for them by nature, it may be said that nature leads man away from the end as well as towards it.

Crime is committed when the will seeks an end at variance with the end of man set up by nature, and bursts forth into action contrary to the end. Now, since, as we have said above, the end is natural and sinful action contrary to nature, as a result of the act of sin itself we have a deordination of the human alignment of operations. This derangement is unnatural, and so is painful, as all disorders are. Therefore, it may be said, that all sin carries in its train a painful deordination, and this deordination may be called penalty. This automatic sanction consists of deordination of the faculties, remorse of conscience, and the loss of grace.¹²¹

Saint Thomas has this truth stated clearly and well. He says that every sin has a *concomitant* penalty, which accompanies the sin itself. This concomitant penalty is the remorse of conscience, for the inordinate soul is a penalty to itself.¹²² This seems to follow from the very nature of the deordinate act in human nature. This human nature, in order that it be in progress to the ultimate end, should have the body subject to the soul, the soul subject to the will, and the will subject to God. So, when the soul realizes the loss of this ordination, which loss is an inevitable consequence of sin, the remorse of conscience sets in. Saint Thomas says that i remorse of conscience, separation from God, disorder in the sinner, and anxiety of passions and labours follow from the act of sin itself. Thus, given sin, these punishments naturally follow, and are thus automatic penalties for non-observance of law.

Another punishment, which follows automatically from sin, does so because all the faculties of the soul are radicated in the one vital principle. Now, since all the faculties of the soul are radicated in the one essence of the soul, it is necessary that, when one power of the soul is intense in its act, another power is either remiss in its act or even totally impeded in its act. There are two reasons for this: lo., because all power that is scattered

¹²¹“*H Sent. Dist. 33. Q. 1, an. 2, corpus.*

¹²²*ibid. Dist. 27, Q. 1. art. 5, corpus.*

among many objects is made lesser, and on the contrary when power is very intensely directed towards one object it is less able to be distributed among many; and 2o. because a certain intention is required in the operations of the soul, which cannot be vehemently applied to another.¹²³ Now, it seems that the soul in sinning, gives one faculty too much indulgence, and the natural effect of this is the weakening Or even the extinction, at least for the moment, of another power or other powers. Since man has the right to the natural exercise of all his powers, and the powers have a right to the normal intensity of their operation, the act of sin brings automatically with it a painful defect in the other powers of the soul.

Crime too may be rather an automatic punishment for crime, inasmuch as by preceding sin there is caused a deordination in human affections so that man is inclined to sin more easily.¹²⁴

There is no doubt but that Saint Thomas considered intellectual operation a perfection and indeed the highest perfection. Therefore the loss of this perfection would and does constitute a penalty for man. Now the loss of this perfection can happen automatically as a natural punishment for sin. Saint Thomas exposes his doctrine in this way: He says that the perfection of intellectual operation consists in a certain abstraction from sensible images. Therefore, the freer the intellect is from sensible images, the more able it is to consider intelligible things and the better able it is to order sensible things. Now, it is evident that delight applies the intention of a man to those things in which he delights. Thus, Aristotle says that each man acts best in those things in which he delights; and things which he does not like he either does weakly or not at all. So, Saint Thomas says that from venereal pleasures comes blindness of the mind, which, as it were, totally excludes the knowledge of spiritual goods; and from gluttony arises obtuseness of the senses which makes man weak concerning intellectual objects of this sort. He shows this,

¹²³*Summa Theologica*, 1-II, Q. 77, art. 1, corpus.

¹²⁴*U/L Summa Contra Gentiles*, cap. 141.

Carnal vices, namely, gluttony and venereal pleasures, are concerned with the delectations of the sense of touch, namely of foods and sexuality, which are the most vehement of all bodily delights. And therefore thru these vices the intention of man is especially applied to bodily things, and as a consequence the operation of man in intellectual things is weakened. Now, this happens more strongly through sexuality than it does through gluttony, because the delights of sex are more vehement than the pleasures of food.¹²⁵

This concludes our treatment of the automatic sanctions in the philosophy of Saint Thomas. It will be noted that the crimes for which these sanctions are suffered are, for the most part, crimes against the natural moral law.

GOD, THE SUPREME BEING, WHO IS LAWGIVER AND PUNISHER.

There is a God. Saint Thomas proves this in five ways, namely, from the necessity of an unmoved first mover, an uncaused cause, a perfect Being, an absolutely necessary Being, and finally from the necessity of an intelligent force which rules and orders the universe. We will give in detail only one of these arguments. Since the question with which we are dealing concerns the ruling and ordering of man, we will use the last of the above mentioned proofs, namely,

The fifth proof is taken from the government of things. Indeed we see certain things which lack knowledge, namely, natural bodies, acting for an end. This appears from the fact that they act more frequently, or even always, in the same way, in order that they may attain which is best. Whence it is evident that they come to their end, not by chance but by acting through intention. Now those things which do not have knowledge, do not tend to their end unless they have been directed by someone who knows and tin-

*»*Summa Theologica*. II-II, Q. 15, art. 3, corpus.

demands,—just as an arrow from a bowman. Therefore there is an intelligent Being by whom all natural things are ordained to their end, and this intelligent Being we all call God.¹²⁶

This God, Saint Thomas goes on to prove, is a spiritual substance which is absolutely simple; that is, absolutely devoid of parts or of any kind of composition. God is perfect, containing in Himself all perfections, and from whom all perfections which creatures have come to them. He is goodness itself, He is infinite, unchangeable, eternal, one. He is intelligent, true, provident, just and merciful, all powerful and blessed.¹²⁷

God *the Lawgiver*.

As we have mentioned above, there are three laws of which God is immediately the author. First, the *Eternal Law*, which is the reason of divine wisdom according as it is directive of all creatures to their final end. Second, the *Natural Moral Law*, which is the participation of the Eternal Law in rational creatures. We have just treated this law above. And third, the *Divine Positive Law*, which is contained in the Old and New Testaments, and which was promulgated by a special divine revelation. This third species of divine law is strictly beyond the province of a philosophical thesis. We will deal here chiefly with the eternal law, and its participation in rational creatures which we have explained above.

The existence of an eternal law is stated and proved by Saint Thomas from his doctrine on providence, on the divine intellect, and his general tract on law. Saint Thomas proves that God created the world.¹²⁸ Now, since, as we have just shown, God is an intelligent Being, He must have acted for some purpose or end.¹²³ Therefore, God governs the world, and directs it to the end for which He created it. Saint Thomas shows this:

“*op. cit.* I, Q. 2, art. 3, corpus.

“*cf.* *ibid.* Q. 3, II.

“*op. cit.* I, Q. 44, art. 1.

“III *Summa Contra Gentiles*, cap. 1, 2.

From the fact that they always or more frequently act in a better way, and from the fact that they would not be made otherwise if they were made through art, it has been shown that natural bodies are moved to, and operate for the end, although they do not know the end. Now, it is impossible that beings who do not know the end, should operate for the end and should come to it in an orderly fashion unless they are moved by a being having knowledge of the end,—just as the arrow is directed to the target by the archer—. Therefore, it is necessary to say that all the operations of nature are ordered by someone's knowledge. And this direction of operation must be reduced mediately or immediately to God, *for it is necessary that all inferior arts and knowledges should take their principles from some higher intelligence, as is evident in operative and speculative sciences. Therefore God governs the world through His providence.*¹³⁰

Since this is a very important point, Saint Thomas gives many proofs here for the same opinion.¹³¹ But the one just given seems to suffice for our purpose.

This order of the world to its end demands a pre-existing plan in the divine mind, and this plan—the reason of the ordination of things to their end existing in the divine mind—is the providence of God.¹³² There are two things which pertain to the providential care of the world by God: one, the *reason of order* which is called *providence*, and the other, the *disposition and execution* of this order, which is called *government*. The first of these is eternal, the second is temporal,¹³³ that is, the actual government of the world must be in the same time as is the world. Therefore, we say that God is a law-maker, for this pro-

Mibid. cap. 64.

“cfr. *ibid. cap. 114.*

“*Summa Theologica, I, Q. 22, art. I, corpus.*

“*ibid, ad 2.*

vidential care and government of the world has all the notes of the essence of law. Surely God has care of the world; and equally certain is it that all His ordinations are ordinations of intelligence; no less sure is it that He loves mankind and creation, and that therefore His government will be for the good of men.¹³⁴ The fundamental reason for His providence, is that He must act for Himself, and He is the common Good of the universe.

Since this eternal law in every respect meets our definition of law as given above, we must naturally expect that there will be sanctions for this law—especially as this eternal law is participated in rational creatures—. Now he, whose duty it is to make the law, must enforce that law with suitable sanctions. So therefore we next treat of God, as the sanctioner of the law.

God as Punisher.

There is no repugnance to the divine goodness, which we listed above as one of the perfections of God, in the statement that God may be the author of the *evil of punishment*. If we should say that He was the author of the *evil of guilt*, this would be repugnant to the divine nature and perfections for the evil of guilt implies defect in the agent or defect in the action, and God is perfect in Himself and in His action. So, we say that God is the author of that evil which is punishment, for the order of justice, which requires that punishment be inflicted on sinners, likewise pertains to the order of the universe, whose ruler and lawmaker God is.¹³⁵ Moreover, as we have said above,¹³⁸ punishment is an evil of the one suffering it, but a good of the one inflicting it justly, for he acts for justice, which virtue requires penalties for the evil doers.

In treating of the punishment inflicted by God, Saint Thomas begins by saying that whosoever has the right to impose laws has also the right to give rewards and to inflict penalties. Indeed,

“There is some question of the promulgation of this eternal law. For a varied scholarly discussion of this, cfr. Farrel, *op. cit.* p. 224, 225.

“*Summa Theologica*, I, Q. 49, art. 2, corpus.

“Chapter the first, of this.

the legislators induce man to observe the laws through rewards and penalties. Now it pertains to divine providence to make laws for men, *for*

a rational creature is so subject to divine providence that it even participates a certain similitude of divine providence in that it can govern itself in its own acts, and can even govern other things. Now that by which the acts of certain men are governed is called law. Therefore it was fitting that men should be given laws from God.^{1ST}

Therefore it also pertains to God to punish and reward men.^{1ST}”

Saint Thomas goes on to show that this punishment of men by God for sin is absolutely necessary if due order is to be observed in the world:

It pertains to the perfect goodness of God that He should leave nothing disordered in things. Whence, in natural things, we see it happen that all evil is enclosed under the order of some good. For instance, the corruption of the air is the generation of the fire, and the slaying of the sheep is the food of the wolf. Therefore, since human acts are subject to divine providence, it is necessary that the evil which occurs in human acts should be included under the order of some good. Now this is most fittingly done from the fact that sins are punished, for in this way those things which exceed their due quantity are comprehended under the order of justice which reduces them to equality. Now man exceeds the due grade of his quantity when he prefers his own will to the divine will by satisfying his will contrary to the order of God. This inequality is destroyed when man is

“**III Summa Contra Gentiles, cap. 114.**
v[^]*ibid.* cap. 140.

forced to suffer according to ordination something contrary to his own will. Therefore it is necessary that human sins should be punished by God, and by the same token, that good deeds should be rewarded.¹³⁹

Indeed, it surely pertains to God to propose rewards and punishment for the acts of men, for God, being all wise, knows that rewards will lead men to virtue; and punishments will at least prevent them from sinning.¹⁴⁰

Sin, since it is a perversion of an order, should be punished by the one who has care of that order. This is quite evident, for from natural things it is derived to human affairs, that, when a thing rises up against anything, the former must suffer detriment from the latter. Indeed, we see in natural things, that one contrary will act very vehemently against another contrary coming upon it. And so, among men it happens that a man will push down one who rises against him. Now it is evident that

whatsoever things are contained under a certain order, are in a certain way one in relation to the principle of that order. Therefore, whosoever rises up against that order may be put down by that order, and by the principle of that order. Now, since sin is an inordinate act, it is clear that whosoever sins acts against a certain order. Therefore, he may be put down by that order,—which repression is punishment—. Wherefore, according to the three orders to which the human will is subject, man may be punished by a threefold punishment: First, human nature is subject to the order of its proper reason; secondly, to the order of man governing exteriorly, whether spiritually or temporally, politically or domestically; thirdly, to the universal order of the

“*ibid.*

“*ibid.*

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Divine Regime. Now any of these orders is perverted by sin, since he who sins, acts against reason, against human law, and against the Divine Law. Therefore he incurs a threefold penalty, one from himself, which is the remorse of conscience; a second from man; and a third from God.¹⁴¹

Granted that God has the power and duty to punish, we must suppose that He will punish justly. It is not to be expected that the punishments of this life are assessed by God according to the absolute rigour of justice, for, as we have said often before, the penalties of this life are rather medicinal than retributive.¹⁴² Moreover, He often inflicts *physical evil* on the good in order to help them along the paths of virtue, and to encourage them to prefer spiritual things.¹⁴³ However, any *spiritual punishment* that is inflicted on man even in this life, is always in correspondence to the actual guilt which preceded and demanded the penalty.

Any picture of God's dealings with men is incomplete without some reference to the after life, in which the equality of justice is absolutely restored. A short consideration of this after-life reward and punishment, therefore, will complete our exposition of the theories of Saint Thomas in regard to sin and its punishment.

the after life: *God as Punisher of Souls After Death.*

This will in no way be a complete and comprehensive treatise on Thomistic Eschatology. For a complete treatment of Heaven, Hell, and Purgatory, we must lean on the body of Revelation, which has no place in a purely rational dissertation. Consequently, we will discuss only those phases of the after life which we can comprehend under the guidance of rational eschatology.

The first question to be resolved is that of survival. Does

w Summa Theologica, I-II. Q. 87, art. 1, corpus.

>«cfr. *De Malo, Q. 2, arc. 4, ad 10.*

“*Summa Theologica, I, Q. 21, art 4, ad 3.*

man live after death? Is he destined for some life after he finishes with the present life; and is this future life, if any, to be enjoyed by the whole man, or only by some part of him? Man is a creature composed of body and soul. The soul is the form of man, that is, the substantial principle which makes him *a man and* not a carrot or an elephant or an ape. This hardly needs demonstration, for if we consider the functions of man, will and thought, these surely set him apart from his animal neighbours. And the essential distinction is in the faculty which thinks, for as far as the body is concerned, there seems to be no real difficulty in saying that the body, *qua* body, is generically the same in man and the ape.

Granted, then, that there is in man a vital principle, we must investigate the nature of that principle to see whether its existence is limited by the life of the body, or whether it is rational to say that the vital principle of man lives on after it is separated from the body.

Saint Thomas says that the principle of intellectual operation, which we call the soul of man, is a certain *incorporeal and subsistent principle*. He proves this statement, by showing that it is evident that through his intellect man can know the natures of all bodies. Now it is necessary that if anything knows certain other things nothing of the nature of the things known should be in the nature of the knower, for that which was in it naturally would impede the cognition of the others. For instance, we know that the tongue of a sick man which is infected with choleric and bitter humor can taste nothing sweet, but on the other hand all things seem bitter to the bitter tongue. And so, if the intellectual principle had the nature of any body in itself, it could not know all bodies. Now, every body has a certain determined nature; so therefore it is impossible that the intellectual principle should be a body. And likewise it is impossible that the intellectual principle of man should understand by means of a corporal organ, because the determined nature of that corporal organ would forbid the knowledge of all bodies. For instance, if there was a certain determined color, not only in the pupil of the eye but also in a glass vase,

then any liquid poured into the vase would seem the same color.—Therefore, the intellectual principle itself, which is called mind or intellect, has an operation that is strictly its own and of itself, in which operation the body does not communicate. *Now nothing can operate of itself, unless it subsists of itself, for operation is only predicated of being that is actual (in actu).* Therefore, anything operates in the same manner in which it exists, on account of which we do not say that heat heats, but we say that a hot thing heats. It remains therefore to say that the human soul, which is called intellect or mind, is something incorporeal and subsistent.¹⁴⁴

Having established that the human soul is incorporeal and subsistent, it must next be shown that substances of this kind are incorruptible. Every corruption is accomplished by separating the form of the thing from the matter: simple corruption is performed by separating the substantial form, which relative corruption is accomplished by separating the accidental form. Indeed, if the form of the thing remains the thing itself must necessarily remain, for through the form the substance takes on the characteristic which is being. So where there is no composition of matter and form there can be no corruption. Now no intellectual substance is composed of matter and form, for.

anything that is composed from matter and form is a body; indeed, matter cannot receive forms unless according to different parts. Now this diversity of parts cannot be had unless one common matter be divided into many by means of dimensions existing in matter. For, if we take away quantity, substance is absolutely indivisible. Now we have shown above that no spiritual substance is a body. Therefore none is composed of matter and form.¹⁴⁵

Therefore we say that no intellectual substance is corruptible.¹⁴⁶

ct§. i, Q. 75, art. 2» corpus.

*11 *Summa Contra Gentiles*, cap. 50.

cap. 50-

Now the soul is an intellectual and incorporeal substance, as we have shown above, so therefore, the soul is incorruptible.

We have used the lack of composition from matter and form, as a basis of the proofs outlined above, but even if we concede for the sake of argument that the soul is composed of matter and form, it would still be necessary to conclude that the soul is incorruptible. Corruption is never found except where contrariety is also found, for both generation and corruption are from contraries to contraries. Now in the intellectual soul there cannot be any contrariety, for it receives all things according to the manner of its own being. Those things which it receives are without contrariety, for the natures of contrary things are not contrary in the intellect; but there is, on the contrary, *one* knowledge and science of contraries. It is impossible, therefore, that the intellectual soul be corruptible.

Saint Thomas gives another argument for the same position,

each thing in its own way naturally desires to exist. Now desire in knowing things follows knowledge. The senses, however, do not know being except under the aspect of the here and now. But the intellect apprehends being absolutely and according to all time. Wherefore, anyone having an intellect, naturally desires to exist for all time. Now the desires of nature are not in vain. Therefore every intellectual substance is incorruptible.¹⁴⁷

We have shown that the intellectual part of man, the rational soul, is incorruptible. Therefore by a mere transfer of terms we may say that the intellectual soul is immortal. Tor incorruptibility bespeaks a lack of intrinsic potency to non-being. Now, where there is no potency to non-being, there will certainly be no actual non-being. Therefore, we may say that the soul of man will live after death, will be immortal.

The resurrection of the body is quite a different matter. We have it for certain, from revelation, that the bodies of the dead

¹⁴⁷*Summo Theologica*, I, Q. 75, art. 6, corpus.

will rise again and be united to the soul. But this fact cannot be demonstrated apodictically from reason. There are some reasons which tend to show this resurrection of the body is more conformable to the scheme of things than non-resurrection. One evidence is the inherent and natural necessity of the soul to be united to a body so that it may exercise all the functions of its species. Because of this inherent tendency the soul is rather an incomplete being. Moreover, just as the body was an instrument very closely conjoined to the soul in this life in deeds good and bad, it would seem rather just that it should also be a partner in the rewards and punishments of the world to come. Nor can any objection be raised to the doctrine of the resurrection on the part of the impossibility or repugnance of the fact; for, as we have stated above, God is all powerful, and whatever involves no contradiction in itself is possible of accomplishment by God. Nevertheless, these are only suasions, however strong they may seem. Nor does it matter for the essential conduct of the soul's fate after death, for, as we have said before, the will (a spiritual faculty of the soul) is the first subject of punishment as well as of crime.

Having shown that there will be a subject for punishment after the death of the man, namely, the immortal soul; and since the eternity of God, the agent of future punishment, is certain, it remains only to show that man is punished after death.

As we have stated above,¹¹⁸ the greatest punishment that can be inflicted on man is the loss of the ultimate end. There is no privation of a thing which it is not natural to have, for instance, a soon-to-be-bom whelp is not said to be deprived of sight. Now man cannot attain his ultimate end in this life, as is proven,

all admit that *felicity is a certain perfect good*, otherwise it would not quiet the appetite. Now a perfect good is that which has no admixture of evil, just as a perfect white is that which has no admixture of black in it. Now, it is not possible that man, in the

'tfr. cap.l.

state of this life, should be absolutely immune from evils, not only corporal evils, such as hunger, thirst, cold, and other things of this kind, but likewise it is impossible that he should be immune from evils of the soul. Indeed, there is no one who at some time is not disturbed by inordinate passions, who does not some time strike above or below the mean in which virtue stands, who is even deceived in certain things, or at least is ignorant of that which he desires to know, or even who conceives by a weak opinion those things which he desires to know with certitude. Therefore there is no happiness in this life (and of course the ultimate end is happiness).

Moreover, man naturally flees death and fears it, not only now when he senses it and flees it, but also when he reflects on it. Now, it is not possible that a man in this life should escape death. Therefore man cannot be absolutely happy in this life.¹⁴⁹

Therefore, in privation of this ultimate end must be a punishment that is inflicted after this life. Therefore, this privation of the ultimate end is a punishment inflicted by God in the after life. Saint Thomas proves then that the punishment of deprivation of the ultimate end is an eternal punishment,

The will is computed for the deed before the court of God, because, just as men see those things which are done externally, so God sees those things which are done in the hearts of men. Now a man who has turned away from the ultimate end, which will be had for all eternity, because of a temporal good, prefer the temporal enjoyment of that temporal good to the eternal enjoyment of the ultimate end. Wherefore, it is evident, that he would much rather enjoy for eternity that temporal good. Therefore, accord-

ing to the divine judgment, he ought so to be punished as if he had actually sinned for an eternity. Now there is no doubt that for an eternal sin an eternal penalty is due. Therefore there is due him who turns away from the ultimate end, an eternal penalty.¹⁵⁰

And this is further shown from the very nature of justice itself. For by the same reason of justice punishment is inflicted for sins, and rewards for good acts. Now the reward of good acts is beatitude which is eternal. Therefore, the penalty by which one is excluded from beatitude is also eternal.¹⁵¹

It must be noted here that not all crimes are punished by the loss of eternal happiness or the ultimate end. To clarify this we must give Saint Thomas' reason for distinguishing between those crimes which cause eternal penalty, and those crimes which do not. The reason for punishing sin is that sin perverts some order, as we have already stated. Now as long as the cause for penalty remains, the penalty itself must be visited upon the offender. Now the order which sin perverts can be damaged either reparably or irreparably. If the crime damages the principle of the order involved, it is irreparable; otherwise it is reparable. Therefore, if the crime damages irreparably the order of divine justice according to which the will should be subject to God, that crime merits an eternal penalty.¹⁵² By the same token, if the crime does not cause irreparable damage, it does not merit an eternal penalty.

In the after life God punishes absolutely according to the guilt.¹⁵³ However, since God is merciful as well as just, He does not annihilate sinners.¹⁵⁴ Rather, He causes the penalty in the after life to correspond to the guilt, which would not be the case if He annihilated sinners. This is evident from the proofs already given.

¹⁵⁰“*HI Summa Contra Gentiles, cap. 144.*

¹⁵¹*ibid.*

¹⁵²*a Summa Theologica, I-II, Q. 87. art. 3, corpus.*

¹⁵³“*De Malo, Q. 2, art. 10, ad 4.*

¹⁵⁴*De Potentia, Q. 5, art. 4, ad 6.*

In summation for this chapter we may say that both society and the state are necessary for the abundance of human life. The first end or purpose of the state is the conservation of peace and unity. This end is to be obtained by the labour and industry of the ruler. In order to secure this end and assure its permanency the ruler must provide corporal necessities and regulate the relations of the citizens. The regulation of these relations demands the application of punitive sanctions on those who disturb these necessarily peaceful and orderly relations. Finally, the ruler must safeguard the state against outside enemies. This end of the state leads to the ultimate end, which is the common good or the life of virtue. This in turn leads to the possession of God or beatitude. Consequently, it is the duty of the ruler to enjoin those things which lead to celestial beatitude, and to prohibit as far as possible those things which lead men away from it.

There is possibility of diversity of action in human affairs. Therefore the state must take care to employ those means by which the end can be attained. These means are authority and law. If man were essentially a solitary being the light of reason alone would be sufficient to direct him to his end, but since he is a social being he needs some ruler, who, under God, will direct him. Society would not attain its end, nay rather, it would break up, if the component parts were not directed to the good of the whole. This human authority must be obeyed in those things which are subject to it. The primary function of authority is that of guidance. When the guidance function fails because of the perversity of men, then coercion and punishment must be used. The authority of the state is divine, at least because it is natural. The chief act of authority is law, which is: *a certain ordination of reason for the common good made by him who has care for the community, and promulgated.*

Law must always be directed to the common good. Law has four proper acts, namely, command of good acts, prohibition of evil acts, permission for indifferent acts, and punishment for wrong doers. In the doctrine of Saint Thomas this last act of law is very important. Punishment is vitally necessary in the

present state of human affairs, for there are many men who cannot be induced to live *for* peace and the *common* good, unless they are subject to punishment.

All punishment must be administered in an orderly fashion and according to justice. There must be someone appointed to administer, interpret and apply the law. This one is the judge, who must always act for justice and the common good. He must not be swayed by suspicion nor must he render judgment according to private knowledge. The written law must be observed unless strict adherence to the written law would cause injustice.

The second figure in the court room is that of the accuser. For the majority of cases there must be an accuser. This man must make accusation when the crime involves the common weal, provided that he can sustain the accusation with sufficient proof. Nor is this duty to the state opposed to the duty of friendship. The common weal is to be preferred to private good. Saint Thomas was very well aware of human fallibility, hence he insists that the accusation be framed in writing. He approves also the infliction of the talion for malicious false accusation.

The defendant must never lie. He must respond truthfully to those questions which he is asked according to the order of justice. Outside this order he may refuse to answer or may appeal the case. The right of the judge to insist on truthful answers increases as the evidence for guilt is more apparent. A man may appeal only against an unjust condemnation.

Saint Thomas lays down very strict rules for witnesses. He gives specific cases in which a man's testimony may be required, and in these instances a man must testify truly. Two or three witnesses are necessary for condemnation. Their testimony must be consistent as regards salient facts. But too exact agreement in minutiae makes the testimony dubious. Those who labor under a defect of reason, or a defect due to cohabitation or subjection, or a defect due to affection or feeling, are to be excluded from giving testimony, for they are not apt to be without prejudice.

The advocate is bound to defend the paupers in the same way and measure that any man is bound to give alms. Certain defects exclude men from the profession of the law. The advocate is bound to seek justice. He may not defend knowingly an unjust suit. If he does defend an unjust suit he is bound to restitution. He may, like all workmen, accept a just stipend for his work.

Saint Thomas realizes that justice is difficult of attainment by human beings, therefore, he takes great pains to clarify all the details of judicial procedure. This detailed conduct of public justice is absolutely necessary if we are to safeguard both the common weal and the private rights of individuals.

Before dealing with supra-human agencies of punishment it has been thought well to outline Saint Thomas' treatment of the natural moral law. This natural moral law is intrinsic in man and is a true secondary cause which produces obligation and establishes morality. This law has concern about those things which lead to the end.

When a man commits a crime, there follows a penalty from human justice, as we have said above. Besides this there follows a penalty from the very nature of the act itself. This latter penalty may be the disorder in the human faculties which results from sin. It may also be the remorse of conscience following upon the evil act or it may be the loss of grace caused by the crime. Another punishment which may follow sin automatically is the weakness or debilitation of the powers of the soul other than the faculty used in sinning. Too, certain subsequent crimes are in a way punishments for the first sin. For other sins man is punished automatically by the obfuscation of the intellect. For the most part these automatic sanctions are punishments for crimes which are defective acts contrary to the natural moral law.

Saint Thomas proves the existence of and discusses the nature of God. He shows that God is one, good, infinite, immutable, eternal, intelligent, true, provident, just, merciful, all powerful and blessed.

God is also a lawgiver. Saint Thomas shows that God is the author of the Eternal Law of which the natural moral law is a participation in rational creatures. God, through His providence and government, moves rational creatures to their ultimate end. This eternal law is a real law, and therefore has sanctions for its enforcement. God the Legislator is also God the Sanctioner. In His capacity of punisher God acts for justice, and hence, while He is the author of penalty, this in no way detracts from His goodness or mercy. It pertains to God to punish and reward men for their evil and good actions. This divine punishment is absolutely necessary if due order is to be observed in the world. Not only must there be punishment but this punishment must be inflicted by God either mediately or immediately. This punishment must be inflicted justly. In the present life God's material penalties are not necessarily retributive or inflicted according to the absolute order of justice. They may be medicinal. However, even in this life, spiritual penalties always correspond to the guilt. In the after life God always punishes according to the absolute order of justice.

In discussing this after life, Saint Thomas proves the fact of the survival of the soul. The greatest punishment which is inflicted in the after life is the deprivation of the ultimate end. However, only the more serious crimes are punished by the loss of this ultimate end.

This completes our treatment of Saint Thomas' doctrines on punishment. Next we will consider punishment as it is actually inflicted on criminals by the lower nomadic group of primitives. Finally, we will compare the doctrines as laid down by Saint Thomas with the actual practises of the primitives.

CHAPTER IV

THE LOWER NOMADS—CRIMES THAT ARE PUNISHED. INTENT OF THE CRIMINAL AS A BASIS FOR FIXING PUNISHMENT. RESPONSIBILITY AS A FACTOR IN PENALTY.

There is some difficulty in defining or describing punishment so that the definition will include all reactions of a disagreeable nature against any infringement of law or rights. Most definitions of punishment are based on a concept of written or customary law, and upon a concept of a sovereign body that inflicts the penalty after due process of law. In the beginning of the discussion concerning the existence of punishment among primitive peoples we wish to offer the following formulation as a working definition of punishment: *An afflictive evil applied upon the occasion and because of a broken law, custom, or taboo.* We think that this definition, or rather description, of punishment is broad enough in its scope to include all reactions against broken laws, customs, and taboos, and yet strict enough to differentiate the cardinal characteristics of punishment, namely:

1. It is an evil of the one suffering it.
2. It is inflicted on the occasion of an infringement of a code.

Purposes of punishment may differ; methods and agencies of inflicting penalty may, and do, vary from people to people, and even within the same groups; occasions may admit of punishment or not; yet the two notions which we have just enunciated as cardinal characteristics are always present. For the moment it is these two characteristics with which we are concerned.