

Theonomy in the Middle Ages: The Case of Thomas Aquinas

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Introduction

The Middle Ages was an incorrigibly religious era. This was a period in which theology was seen as the “queen of the sciences,” at least in theory. The scholastic theologians in particular, sought to build a comprehensive Christian worldview, and the rulers and churchmen who governed their respective institutions, sought to build a Christian commonwealth (*corpus Christianum*). All ordered their ideas and, more often than not, their practice around the one central idea that the universe was created by God and ruled by Him and that they ought, as closely as possible, to create a world that reflected God’s truth.[1] Moreover, even the ordinary person, though sometimes steeped in superstition, still gave the Christian God worship and some semblance of obedience. To be sure the maintenance of a Christian commonwealth was no easy task and was often given merely lip service. In addition, the ways of accomplishing the task caused much disagreement at times—even wars—and some retrospectively undesirable endeavors. But despite the problems,

the goal was close to unanimously held to be worth pursuing. But this was also an era in which legal and political thought were in surprisingly great flower. The High and Late Middle Ages especially witnessed a new spate of writing by theorists and practitioners—secular jurists, canon lawyers, Humanists and others. Many of these men were scholastics, who adopted a particular approach to reasoning and philosophizing, and whose work sometimes led to conflict with the growing Humanist movement[2]. But even among the scholastics one sees much disagreement and new ideas, particularly in light of the on-going church-state conflicts arising out of the attempts of one or the other to assert primacy—within the bounds of Christian theology.[3] It has usually been assumed that legal and political theory in the Middle Ages was tied only at the very general level to divine law and that no one advocated what may be called a Theonomic approach.[4] This apparent consensus has arisen for various reasons: a denigration (consciously or unconsciously) of explicitly religious elements and a failure to fully grasp the whole of a particular theorist in such a way as to integrate his political ideas with his religious ideas. This latter reason I believe to be the crucial one.

It is often recognized that the Scholastics of the later Middle Ages were comprehensive in their aims for a system of knowledge or truth.[5] But this recognition appears to be limited to the explicitly theological aspects of a given writer. When it comes to his political thought, the categories seem to become rather ambiguous in relation to his theology. The purpose of this paper is to recover the “whole truth” in its integrated form, about

the philosophers, theologians, canonists and secular jurists of the High and Late Middle Ages, using Thomas Aquinas as my primary example. Taken in its parts, I do not view my argument as particularly novel. But if one takes all of Aquinas' thought and recognizes that for him, as for other Scholastics, there was no real compartmentalization of knowledge or disciplines, my argument is somewhat radical. I am arguing that Aquinas—and others—was a Theonomist, as that term will be defined below. His legal thought, to be fully understood, must be seen in that light, and not only in light of natural law theory.[6] The term Theonomy may refer to several ideas or movements. In its broad theological sense, as for example, in the writings of Paul Tillich, it refers to “the state of culture under the impact of the Spiritual Presence.”[7] This use of the term has been fairly influential among more “mainstream” theologians. But since the 1970s, Theonomy has, among a small but vocal group of theologians, churchmen, cultural critics and some political and economic theorists, come to refer to a narrower concept. For them, Theonomy means the use of the Old Testament Mosaic civil laws in the modern political and legal realms.[8] The modern Theonomic movement can be traced to the late 1960s in America, but Theonomists themselves take their inspiration from the first generation Reformers but especially from the English Puritans and the Scottish churchmen of the seventeenth century.[9] The movement is confined for the most part to those who would call themselves theologically Reformed (including Presbyterians, Reformed Baptists, other Reformed groups and some charismatics and Pentecostals). However, some ideas of the modern Theonomists are traceable to elements of the so-called

“Christian Right” (Jerry Falwell, Pat Robertson and others), most of whom would deny membership in a movement but who embrace important aspects of Theonomy.^[10] To elaborate a bit more on modern Theonomy as it is understood in this narrower way, though Theonomists would disagree on some of the details of their system, all would agree that the Old Testament Mosaic civil law should be applied to the modern political and legal systems in “exhaustive detail.”^[11] That is, it is not only the general principles that would be applicable, for example, that murder is somehow a criminal act punishable in some way, but the specific precepts of the Old Testament law, that murder (defined specifically) is punishable by death after a truly speedy trial including specific rules of testimony. All of these rules are to be derived only from the Old Testament law and, in general, the Theonomists adopt a hermeneutical rule which asserts that only those laws identifiable in the Old Testament or logically deducible from it are to be applied. Thus for example, Theonomists would oppose any laws imposing speed limits, environmental restrictions, and a whole host of laws and regulations that are not explicitly mentioned in the Mosaic Law or are not able to be deduced from it. In the realms of political philosophy and political economy, most would reject institutions that were not republican and free market oriented (even somewhat libertarian). The key hermeneutical principle for the Theonomists is the invalidity of the idea of silence as consent.^[12] Moreover, Theonomists also reject both natural law and positive law. Their rejection of natural law is to be sure not complete, as they recognize that individuals such as John Calvin used the term “natural law” approvingly, but in a circumscribed

way.[13] Nevertheless, natural law is much too ambiguous in practice for Theonomists to accept as a working principle.[14] Positive law theory is dismissed outright on the ground that it has no objective basis whatsoever and that the secular state determines what is valid law, apart from any objective metaphysical principles, let alone principles from the Bible.[15] When all is said and done Theonomists accept only the words of the Old Testament Mosaic civil laws, properly understood.

There has been some debate concerning the problem of carving up the law neatly into aspects—moral, ceremonial and civil or judicial. But this problem, important as it is, need not detain us here. The task is not to analyze Theonomy but to trace its lineage, if it has any apart from the Hebrew Commonwealth. In addition, some have equated Theonomy with theocracy, defined as a merger of church and state under the rule of the church of religious sect. Modern Theonomists however deny this definition of theocracy, asserting that a theocracy is really an institutional separation of church and state with both coming under the rule of God's (Old Testament) law.[16] This issue is not central to the paper, but it is necessary to clarify the modern Theonomic position. Before going to the Middle Ages, I must introduce another third possible definition for the term Theonomy, this one particularly relevant, even crucial, for this paper. I already mentioned that many modern Theonomists have by and large traced their roots back to the Reformation and the Post-Reformation period.[17] But I also defined Theonomy in its modern sense as acceptance of the exhaustive details and only the

details of the Mosaic civil commands as normative for law and political institutions.[18] Is the reliance of the modern Theonomic movement on the Reformers, Scots and Puritans well-placed? According to my research, while one can find abundant evidence of a debate over the place of the Mosaic civil law in the Reformation and Post-Reformation periods, the evidence is not unambiguous.[19] In fact, the vast weight of data points toward a significant variation on modern Theonomy in existence during the 1500s and 1600s. Rather than an appeal to the exhaustive details of the civil law, the Reformers and Post-Reformers appeal to what came to be called the “general equity” of the Old Testament civil law as valid, though not necessarily binding, on governments.[20] The term “general equity” meant that the principles of the civil laws could legitimately be adopted, but the details need not be applied (though they could be if the magistrate chose). I have been able to find virtually no evidence of Theonomists in the 16 th or 17 th centuries who would have asserted that God required that the details of the Mosaic civil laws be adopted by authorities. This conclusion leads to the third definition of Theonomy, the “general equity” notion. This third use of the term has important implications for this paper. The first- generation Reformers, the Puritans of the late 16th century and 17th century, and the Scots Reformers did not come to their political philosophy in a vacuum. Certainly it may be argued that in their zeal to return to the Christian Scriptures in their own right—a distinctly humanist as well as primitivist orientation—they would once again “discover” the law.[21] But such splendid isolation cannot fully explain their ideas. In fact, the reforming impulse of this period was never undertaken in isolation.

If my proposal that Theonomy may be defined as the application of the general principles of the Mosaic civil law (the general equity) in government and law is plausible, then perhaps we may pursue the trail of Theonomy itself back further than the Reformation, to the Middle Ages. Notwithstanding the importance, rightly so, attached to natural law, perhaps we have been so hasty as to forget the ultimate source of civil law in the Middle Ages. A closer reading of the medieval writers may yield a new perspective among these individuals regarding a kind of Theonomy, not to say its modern form, but nevertheless, a form.

Theonomy in the Middle Ages

One sees a good deal of variety regarding the use of the Mosaic judicial laws in the early church and in the Middle Ages from Augustine to Aquinas. Some Fathers regarded the judicial laws as abrogated, while others maintained a somewhat pragmatic view, allowing civil laws in some cases, but not wishing them to be mandatory for a government.[22] J. Lecler reports that Firmicus Maternus in the fourth century was the first to make an explicit appeal to the judicial laws of Moses, although Justin Martyr does use the triplex distinction of moral, ceremonial and judicial laws without specifically condemning the latter.[23] Since this is a preliminary and tentative inquiry, I will only advance a single example to support my thesis that Theonomy did exist in the Middle Ages. Of course, this single individual carries a great deal of weight. Thomas Aquinas' ideas about divine law and its aspects have been virtually ignored or dismissed by political theorists, even those in the Christian tradition. His natural law

ideas have of course carried the day.[24] John Finnis in his work on Aquinas' political and legal theory barely alludes to Thomas' ideas regarding the place of the Old Testament judicial laws.[25] Even among Protestants who are less inclined to natural law theories, scholars such as P. D. L. Avis assert that "[Aquinas'] language about the Mosaic judicial laws remarkably anticipated that of Luther.... Aquinas employed a doctrine of natural law as the basis of his discussion of this question." [26] Avis' assessment of Luther's attitude to the judicial laws as secondary and his idea of natural law as more important manifest a misunderstanding of Luther's political theology. Luther actually writes that the judicial laws may be legitimately used by a government, but are not mandatory in a comprehensive sense or in specific details.[27] Nevertheless, the point is that scholars generally interpret the medieval writers to either reject Theonomy of any kind or to deemphasize it in favor of natural law. In Etienne Gilson's estimation, in the high and later Middle Ages, sometime around and after the Condemnations of 1277, rational demonstration became less important to religious thinkers and churchmen while at the same time rationalism became more important to philosophers. In other words, there developed a split between reason and revelation which included political theory, especially with the loss of papal prestige and influence and the rise of the modern nation-state.[28] The Thomistic synthesis was being undermined, and in the process, it could be argued—though Gilson did not specifically say so—that Aquinas' divine law idea separated from his natural law idea.

This process would continue at a more or less steady pace into the seventeenth century, where one sees the beginnings of a more explicit separation of divine and natural law in the work of men such as Grotius and Pufendorf.[29] The separation of divine law from natural law would eventually lead to the rejection of natural and divine law in the nineteenth century and the predominance of positive law.[30] If we accept the thesis of an increasing separation of divine and natural laws after Thomas, the question arises of why Thomas' (and others') divine law ideas were apparently marginalized, only to be rediscovered—not necessarily through a direct reading of Thomas Aquinas—during the Reformation and Post-Reformation periods. This leads me to my main point, by now obvious, that in the Middle Ages, at least until the 14th century, one may observe a type of Theonomy, expressed clearly in the work of Thomas Aquinas.

The Theonomy of Thomas Aquinas

To understand the Theonomic ideas in Thomas Aquinas, one must first understand his general theory of law, as it appears especially in his most famous work, the *Summa Theologica*. As we examine his legal philosophy, the reader should bear in mind that I am not asserting that Aquinas' Theonomy is equivalent to modern Theonomy, embodied in the writings of individuals such as Rousas Rushdoony, Gary North and, in philosophical realm, Gregory Bahnsen.[31] I am rather arguing for a general equity type of Theonomy in Aquinas' thought. But Aquinas' Theonomic ideas ought nevertheless to be recognizable as Theonomic.

Law is defined by Thomas very simply as “a rule and measure of acts, by which man is induced to act or is restrained from acting.”[32] To elaborate, law has two aspects: It “measures and rules” and it is “in all those things that are inclined to something by reason of some law...by participation as it were.”[33] This is a very basic definition which gives a starting point for Thomas’ discussion about the sources of law. He proceeds to answer such questions as “Whether the law is always directed to the common good?,” “Whether the reason of any man is able to make laws?” (to which he answers in the negative), and “Whether promulgation is essential to a law?” (to which he answers that a law must be promulgated by someone to be law).[34] Following these questions, Thomas in Question XCI addresses the issue of the various kinds of laws: eternal, natural, human, and divine. With respect to eternal law (*lex aeterna*), Thomas states,

As stated above...a law is nothing else but a dictate of practical reason emanating from the ruler who governs a perfect community. Now it is evident, granted that the world is ruled by Divine Providence...that the whole community of the universe is governed by Divine Reason. Therefore the very idea of the government of things in God, the ruler of the universe, has the nature of law. And since the Divine Reason’s conception of things is not subject to time but is eternal...hence it is that this kind of law must be called eternal.[35]

There is an eternal law, though not all specific laws are eternal. Article 2 asks “Whether there is in us a natural law?”[36] The

hypothetical objection states that since eternal law governs sufficiently, there is not natural law, defined as a knowledge of right and wrong that is universal. But Thomas asserts that all humans participate in the eternal law to some extent by virtue of having the law “imprinted by Divine Light” in them.[37] There is also what Thomas calls a “human law,” by which he means a temporal law. Human law is nothing more or less than the deductive product of human reason from natural law principles (and from divine law, as we shall see). It is the application to specific circumstances of known law.[38] Finally, Thomas asks whether, since we have other kinds of laws, there is any need for divine law (*lex divina*). His answer begins to get at the issue of Theonomy in his thought. The hypothetical objector asserts that since natural law is a participation in divine law, there is no need for a divine law, since all law can legitimately be derived from natural law. Moreover, human nature is said to be “self-sufficing” and, more importantly, human beings may rely on reason. Thomas answers that divine law is necessary *in addition to* natural and human law. The main reason seems to be, in Thomas’ own words, “...man is ordained to an end of eternal happiness which is inproportionate to man’s natural faculty...”[39] Probably because of the deficiency in man’s natural faculties, Thomas adds that the divine law is also necessary because of the “uncertainty of human judgment” and the resulting various laws that would follow.[40] It is obvious that although Thomas allows a good deal of human freedom and a relatively unaffected reasoning ability, the Fall has caused a noetic and voluntary deficiency. As a result, something more is needed besides natural law.

The question remains of course as to whether this divine law is to be expressed in the Old Testament Mosaic judicial law or in some other way. Nevertheless, the Fall has necessitated some form of divine law that is not equivalent to natural law. Thomas actually calls this a “higher way.”^[41] Thomas then makes a very important distinction in the divine law between the Old Law and the New Law. These are not, as Thomas puts it, “altogether different” but rather one is considered perfect and the other imperfect. But even this distinction is not pressed. The Old Law is able to perform its function with regard to some aspects quite well, such as the goal of the law with respect to “the sensible and earthly good.”^[42] But of course the promise of eternal things—salvation for example—can only come from the New Law of Christ. Thomas adds that the Old Law could not induce men to good internally, but only “by fear of punishment.”^[43] This is not an absolute deficiency in the divine law, but merely a relative lack in relation to certain aspects of human life. The Old Law is able to accomplish what some would later call “political or civil good.”

Beginning with Question 93, Thomas elaborates on his earlier discussion of eternal law, followed by further specifics on the other forms of law, including the divine law. Question 94 deals with natural law. There Thomas defines the concept more precisely, stating that it is not a habit.^[44] Natural law operates through reason to provide the precepts which become a habit in man. Though the natural law is in one sense in man habitually, it does not always operate in man and is thus not, strictly speaking,

a habit.[45] In article 4 Thomas asks “Whether the natural law is the same in all men?”[46] He answers, through Isidore, that it is in fact common to all nations. But this commonality has a twist: in its general principles the natural law is the same for all, but in its details it differs from nation to nation. Reason works the same way in its speculative sense but will draw different conclusions in its practical aspects. Moreover not all principles are known to all men even though they are universally true.[47] Interestingly Thomas adds that “in some the reason is perverted by passion, or evil habit, or an evil disposition of nature.”[48] Thomas definitely makes room for a kind of law apart from, but related to, natural law.[49] The natural law is not independent from the other laws, especially from the divine law, but is subsumed under them and consistent with them. In Article 5, Thomas discusses an issue later Reformers and post-Reformation political theorists would also address: Whether the natural law can be changed? Here Thomas is getting very close to the issue of the relationship of natural law to divine law. He writes,

A change in the natural law may be understood in two ways. First, by way of addition. In this sense nothing hinders the natural law from being changed, since many things for the benefit of human life have been added over and above the natural law, both by the Divine law and human law. Secondly, a change...may be understood by way of subtraction...In this sense, the natural law is altogether unchangeable in its first principles. But in its secondary principles [details or specific conclusions

related to a given case], ...may be changed in some particular cases....[50]

But even more, Thomas states that “the written law is said to be given for the correction of natural law...because the natural law was perverted in the hearts of some men...so that they thought those things good which are naturally evil, which perversion stood in need of correction.”[51] This admission is extremely significant, since it makes clear that the natural law contains deficiencies in its use. Reason cannot operate perfectly and is in need of supplementary law that is external to the individual exigencies. Furthermore, in his Reply to Objection 3, Thomas explicitly recognizes the problem of original sin and its logical consequences, including God’s justice, including the standard outside natural law by which the offense exists and is punished accordingly He writes, “...by the command of God [in the divine law] death can be inflicted on any man....In like manner adultery is intercourse with another’s wife, whom is allotted to him by the law emanating from God....The same applies to theft, which is the taking of another’s property. For whatever is taken by the command of God...is not taken against the will of its owner, which is what theft is.”[52] But theft is what it is because of the divine law supplementing the natural law. That is, the details of what is and is not theft cannot be known from natural law alone. Questions 95 and 96 deal with what Thomas has called “human law.” Human law is the expression or application of natural and divine law. Quoting Isidore, Thomas writes, “Laws were made so that in fear of them human audacity might be held in check, that innocence might be safeguarded in the midst of wickedness, and

that the dread of punishment might prevent the wicked from doing harm.” [53] This is precisely one use of the law of God advocated by many Reformers of the sixteenth century.[54] Moreover, Thomas adds that human law is promulgated by rulers or authorities of various kinds, but that their laws are really just applications of either natural or divine law.[55]

Law should, in Thomas’ opinion, be, among other characteristics, “according to human customs,” and “adopted to place and time.”[56] Of course it should also be “ordered to the common good.”[57] At one point, Thomas appears at first glance to elevate natural law over all other forms of law in his discussion of human law.[58] But in replying to an objection regarding the question, “Whether it pertains to human law to suppress all vices?”, Thomas gives a clue as to his view by writing, “Consequently it [human law] pertains to those sins chiefly by which one’s neighbor is injured...”[59] The use of the word “sin” implies that human laws are consistent (and ought to be consistent) with divine law. Is this statement opening the door to Theonomy? In connection with natural law, Thomas concludes that “natural law is a participation in us of the eternal law, while human law falls short of the eternal law.”[60] Natural law is always consistent with eternal law, but human law is a subset of natural (and eternal) law. Quoting Augustine approvingly, Thomas adds that the law for governments leaves many offenses unpunished that will be or are punished by “Divine Providence.” Human law does not prohibit all offenses forbidden by natural law. This is another way of saying that all offenses of natural law

are sins, but only some of these—those that are “public” in nature—are punished by human laws. It remains to be seen how these human laws, which include civil laws, relate in Thomas’ thought, to the judicial laws of the Mosaic Code. In Article 4 of Question 96, Thomas asks “Whether human law binds a man in conscience?” Without delving in detail into this question, suffice it to repeat a portion of what Thomas says in relation to Divine law:

Secondly, laws may be unjust through being opposed to the Divine good. Such are the laws of tyrants inducing to idolatry, or to anything else contrary to the Divine law; and laws of this kind must in no way be observed, because as stated in Acts 5. 29, ‘we ought to obey God rather than man.’[\[61\]](#)

It is clear here that all human external laws, those enacted to deal with outward or “civil” behavior or to restrict certain practices, must be subordinated to Divine law, which Thomas will discuss in greater detail later, but which includes the judicial laws of Moses to the extent they remain valid.

The Old Law

Thus far we have seen nothing that would refute the proposition that a type of Theonomy existed in the Middle Ages and that it was embodied, among others, in the work of Thomas Aquinas, who represents the full flower of scholastic systematic and comprehensive theology and philosophy, including political and legal philosophy.

Questions 98-104 of Thomas' Summa address specifically the questions relating to the nature and role of the "Old Law" (*Lex Vetus*), meaning the Old Testament Law of Moses contained in the Pentateuch. It is in this group of questions that we will hopefully find the answer to the question of whether and to what extent Thomas is a Theonomist in the sense of my definition of "general equity." Thomas first evaluates the Old Law as a whole as good, though not perfectly good. However the imperfect good in the law relates to its relative inability to bring about "everlasting happiness" and internal good, while it is considered by Thomas to be perfectly good ("it suffices") in "the prohibition and punishment of sin."[62] In other words the Old Law is suited to deal with external acts but not to bring about internal good, since it could not confer grace. In Article 4 of Question 98, the question is asked, "Whether the Old Law should have been given to the Jews alone?" If the answer is in the affirmative, Theonomy is ruled out as a valid political philosophy. Thomas however answers that the Law was given to the Jews because of the promise made to Abraham regarding Christ. God's decision to give the law to the Jews was, according to Thomas, gratuitous.[63] Related to this is Article 5: "Whether all men were bound to observe the Old Law?"[64] Even though the law was given to one people, is it invalid generally as applied to other peoples? Thomas answers, "...as to those precepts of the natural law contained in the Old Law, all were bound to observe the Old Law."[65] This raises the question of whether the judicial aspects of the Old Law are considered part of the natural law in existence before the Old Law was given.[66] If the "general equity" of the

Old Law existed before the Old Law itself was given to Moses, then the argument may hold that the judicial law is still valid. Moreover, Thomas specifically mentions certain aspects of the Old Law, such as those relating to “special observances” (ceremonial laws) as not binding on other peoples. But he does not mention judicial laws in this category.[67]

Question 99 explicitly introduces the idea of a plurality of precepts in the Old Law. It is here also that Thomas makes his distinction among moral, ceremonial and judicial precepts. The Old Law contains “many precepts,” according to Thomas, “according to the variety of acts ordered to this.”[68] Article 2 of Question 99 then addresses the moral precepts, which, for Thomas, are necessary because of ignorance of reason and because of sin.[69] Nevertheless, though the moral precepts are good they do not give grace for obedience. Besides moral precepts, the Old Law also consists of ceremonial precepts. Thomas devotes several pages to a discussion of these laws. These ceremonial precepts deal chiefly with issues of worship and are, in Thomas’ thought, distinct from moral.[70] Article 4 of Question 99 is crucial to this paper: “Whether, besides the moral and ceremonial precepts, there are also judicial precepts?”[71] One hypothetical objection considers the judicial laws (*praecepta judicialis*) to be collapsed into the moral precepts, a position Thomas rejects.[72] His own position is that “the determination of the general precepts of that justice which is to be observed among men is effected by the judicial precepts.”[73] He continues, “We must therefore distinguish three kinds of precepts in the Old Law: namely moral precepts,

which are dictated by the natural law; ceremonial precepts, which are determinations of divine worship; and judicial precepts, which are determinations of the justice to be maintained among men.”^[74] Here we see what has become a typical resolution of the Divine law into three aspects, a distinction that will be standard for Theonomists both in the Reformation and post-Reformation period and among modern Theonomists. For the sake of space, I will not examine Questions 100 (dealing with the moral precepts in greater detail) and 101-103 (on the ceremonial laws), but will go to Questions 104 and 105, both of which elaborate on the judicial precepts. The major question to be examined is in Article 3: Whether the judicial precepts of the Old Law bind for ever? But here Thomas begins with the hypothetical answer that seems to undermine any Theonomic beliefs: “It would seem that the judicial precepts of the Old Law bind forever.”^[75] In the scholastic method, the answer the writer begins with is not the one he himself will adopt. Therefore, it appears that Theonomy is ruled out. First, since justice is perpetual and judicial commands relate to justice, they would, the objector states, bind forever. Second, since human judicial laws “bind for ever,” according to the objector, “much more do the judicial precepts of the Divine law.”^[76] Third, unlike the ceremonial precepts, which were inferior and could not accomplish their purposes, the judicial precepts could, the objector asserts, continue to be efficacious and should therefore continue valid.^[77] Thomas weighs in with his response, beginning “On the contrary.” He then states that the judicial precepts “are no longer in force.”^[78] However, in his elaboration, he qualifies this response: “The judicial precepts did

not bind forever, but were annulled by the coming of Christ, *yet not in the same way as the ceremonial precepts.*”[79] The ceremonial precepts are both “dead” and “deadly,” according to Thomas. But the judicial commands, though dead in that they do not bind of necessity, are not deadly.[80] He writes, “For if a sovereign were to order these judicial precepts to be observed in his kingdom, he would not sin....”[81] The exception would be in the case that a ruler instituted these precepts because they were part of the Old Law and therefore binding. In that case, Thomas says, their use would be sinful.[82] The judicial laws are not deadly, but in fact useful, though not binding. When he asserts that the judicial commands are not binding, he means that the specific exhaustive details may be dispensed with in given circumstances, although the general principles are eternally valid. The magistrate is not compelled by Scripture to adopt the specifics of the judicial precepts, but he may do so if he chooses with good reason. It also appears that the principles are binding, but we will reserve final judgment until below. However Thomas qualifies even this answer, beginning in his “Reply to Objection 1.” He writes, “The obligation of observing justice is indeed perpetual. But the determination of those things that are just according to human or Divine institution must be different, according to the different states of mankind.”[83] This statement is not a blanket rejection of the judicial precepts of the Mosaic Law, but rather of “general equity,” as Thomas will indicate further on. He adds, in “Reply to Objection 2” that “The judicial precepts established by men retain their binding force for ever, so long as the state of government remains the same. But if the state or nation pass to another form of government, the laws must be

changed.”[84] If this is the case, what would the “new laws” look like and from what source would they be derived? As we will see, the answer is that the new laws would not be substantially different from the Mosaic precepts. Thomas uses as his example a change of governmental from oligarchy to democracy. But he does not intend by this change to open up the legal system to wholesale change. For example, laws enjoining murder, theft, adultery, etc. would still be valid and even binding in principle if not in detail, that is, the offense would still be a crime but it might be punished in a different way. This is in fact what Thomas appears to mean. In short, this is the answer to the question regarding the binding force of the general principles (general equity) of the judicial precepts. According to Thomas, the principles are not only valid but binding, but the specific details (or applications) will change from nation to nation. To see this, let us examine more closely his treatment of the judicial precepts.

Article 4 of Question 104 details the divisions of function in the judicial precepts: sovereign to subject, as between subjects, citizens to foreigners, and members of one household.[85] It is curious that Thomas would take such pains to distinguish different kinds of legal relationships for legal purposes if he meant to totally reject those laws pertaining to the relationships. Thomas alludes to this in Article 4, when he writes, “...the judicial and ceremonial precepts have a different binding force, derived not from natural reason, but from their institution alone.”[86] The use of the term “institution” here is verbal, as in the instituting of something, the law, by someone, in this case God. Clearly in some sense, the judicial precepts are still valid.

Question 105 reinforces the proposition that Thomas views the judicial precepts as valid in some sense. Here Thomas discusses the reason for the judicial precepts. He divides the question into four parts, each one corresponding to the legal relationships to which judicial laws would apply. Thomas asserts his hypothetical negative proposition (characteristic of the scholastic method) that “It would seem that the Old Law made unfitting precepts concerning rulers.”^[87] It is important to grasp the method used by scholastic writers like Thomas; the proposition at the beginning of a question (quaestio) is stated in order to be refuted, not to be supported. Thus we know that Thomas does not agree that the Old Testament judicial laws have no validity with respect to rulers. On the contrary, they do have validity, even if they are not binding in the details. Thomas’ answer to the question of whether the judicial precepts are “fitted” for rulers is in the affirmative: “The people of Israel is commended for the beauty of its order.”^[88] He adds, “...the Law made right provision for the people with regard to its rulers.”^[89] After asserting the relative rank of different forms of government, including monarchy, aspects of “aristocracy,” and aspects of democracy, Thomas states, with respect to those forms, “Such was the form of government established by the Divine Law. For Moses and his successors governed the people in such a way that each of them was ruler of them all,...so that there was an element of aristocracy....But it was a democratical government in so far as the rulers were chosen from all the people.”^[90] To put it simply, Thomas not only approves of the judicial laws on this point, but seems to advocate their use as ideal for a society. Article 2 of Question 105 asks “Whether the judicial precepts were suitably

framed as to the relations of one man with another?” This article addresses interpersonal behavior in the realm of both intentional acts and negligent acts. In addition, this article pertains to laws issued to regulate property and economic transactions. Once again, Thomas’ initial proposition asserts that “the judicial precepts were not suitably framed” for such relations.^[91] Thomas will of course then answer the question in the affirmative, again advocating the validity of the judicial laws. But his examples and reasons are most interesting. Some examples of judicial laws related to interpersonal behavior used by Thomas include theft, property rights, lending, fraud, lying on oath in a trial, the fixing of penalties for various offenses (for example restitution), tort offenses, and murder.^[92] Thomas answers the objections to the use of the Mosaic judicial laws by asserting first that “it pertains to the very notion of a nation that the mutual relations of the citizens to be ordered by just laws.”^[93] The implication is that the judicial laws are just, and therefore good. After distinguishing criminal and civil offenses, Thomas writes, “Now the Law [judicial precepts] provided sufficiently in respect of each of these relations between one man and another.”^[94] He then cites numerous Biblical passages in support, all from the Pentateuch. In his “Replies to Objections” not once does Thomas seek to modify or abolish the judicial laws, but cites them as a matter for acceptance without qualification.

To be sure, neither does Thomas assert that the judicial laws are required in exhaustive detail, as the modern Theonomic movement tends to do. Still, he views the judicial laws as perfectly valid in principle and implies they are the highest form

of civil law. Thomas' treatment of the punishments for violations of judicial laws is also interesting, especially since this is an issue among modern Theonomists. In "Reply to Objection 9" and "Reply to Objection 10," Thomas follows the Mosaic judicial laws closely, justifying the various punishments without modification or criticism, including the comprehensive details such as restitution for varieties of theft, wrongful death, negligence regarding animals, "man stealing," adultery, and even, surprisingly, the death penalty for a rebellious son.[95] This very positive attitude on Thomas' part certainly places him in the category of at the least a strong sympathizer with Theonomy, defined even in its relatively strong sense. Question 107, entitled "Of the New Law as Compared with the Old," along with Question 108, represent the culmination of Thomas' argument about the Old Law. As we would expect, for Thomas the New Law (the Gospel) is distinct from the Old Law, but this begs the question of the validity of the judicial aspects of the Old Law.[96] The moral precepts of the Old Law, while perpetual, are not the same as the Gospel, which comes with power for salvation and obedience (the Holy Spirit). The ceremonial precepts of course prefigured the New Law of Christ. The judicial precepts however remain basically unaffected by the New Law, since they are not connected to salvation but are designed to regulate external civic behavior.[97] This is confirmed when Thomas writes, "In like manner in the New Testament there are some carnal men who have not yet attained to the perfection of the New Law; and these it was necessary, even under the New Testament [implied, even in Thomas' time], to lead to virtuous action by the fear of

punishment....”[98] Thomas further elaborates that the New Law is a fulfillment, not an abolition, of the Old Law. In some sense therefore aspects of the Old Law continue to have validity, as I have argued is the case with the judicial precepts. He writes again, “The New Law does not void the observance of the Old Law except in the point of ceremonial precepts.”[99] Article 2 of Question 107 uses only the example of the ceremonial precepts to indicate a kind of abolition—that the ceremonial laws are no longer to be observed. But no mention is made of the judicial precepts at all, much less in a negative way. Moreover the New Law is said to be contained in the Old Law “as the corn in the ear.”[100] Objection 4 of Question 108 asserts, hypothetically, “But in the New Law there are no judicial precepts.”[101] Thomas, in the “Reply to Objection 4,” explicitly denies the objection, writing that “Judicial precepts also, considered in themselves, are not essential to virtue...but only in regard to the common notion of justice.”[102] He adds, significantly, “Consequently Our Lord left the judicial precepts to the discretion of those who were to have spiritual or temporal charge of others.”[103] In the latter statement, when Thomas uses the term “discretion” he does not mean that the magistrates are free to adopt any law they please, but rather that the administration of these precepts is the province of magistrates. Furthermore the judicial precepts intended to produce external justice and they in fact ought to be used for that purpose.

Conclusions

In engaging in this detailed analysis of the work of Thomas Aquinas, my intent has been to show that, although it is not

wrong to understand the scholastics and others of the Middle Ages as advocating natural law, their use of it must be seen in proper perspective. Thomas has addressed all possible uses of a legal system—in the criminal and civil law realms, in the structure of government and in economic transactions. In every case, he gives ample evidence that the judicial precepts are just as valid in his own day as they were for the Hebrew Commonwealth. This is not to say that Aquinas sought to require the adoption of the details of the Old Testament Mosaic judicial laws. On the contrary, he sees them as valid in principle. In other words, he advocates a “general equity” theory of Theonomy. Nevertheless, he does clearly validate the judicial precepts. Furthermore, it appears that not only are the judicial precepts valid but the principles of the precepts are perpetually binding on magistrates. The distinction is important: the details are valid but not binding, the general equity is valid and binding. Thomas is a Theonomist in the sense I have defined the term—as the Reformers and post-Reformers have defined it. Thomas is not a modern Theonomist. Thomas Aquinas is but one example. Much more research would be necessary to make the proposition more credible that Theonomy was a prevalent theory in this period. However the evidence for such an important figure certainly makes a compelling case. Whether one agrees or disagrees with Theonomy, not to be confused with Theocracy I should add, it is a viable political and legal theory that has existed for a long time. As such it deserves serious historical consideration. Perhaps also the results of my research, however tentative, will force historians of legal and political thought to reassess and recognize the crucial importance of religion in the Middle Ages, and

especially of the Christian religion and the efforts of both clergy and “secular” writers to construct a comprehensive Christian worldview in the realms of law and politics. It is not that historians have failed to acknowledge the centrality of Christianity in this period. It is rather, it seems, that they fail to give religion its proper place. It is a failure to acknowledge the depth with which all aspects of medieval thought were rooted in Christianity—not merely a sort of “second hand” form of Christian theology, of which the scholastics have been at times rightly accused of constructing, through a heavy reliance on the Fathers or the councils or the popes instead of Scripture, but an actual direct reliance on Scripture as the foundation for the use of other sources. If nothing else then, I have shown that Thomas Aquinas, the premiere theologian of this period, was one who did anchor even his political ethics deeply in the Christian Scriptures. I am in no way denigrating the use Thomas made of natural law or the use later political and legal theorists have made of it. I could not do this and remain historically accurate, since many did turn to natural law theories after Thomas and up to the nineteenth century, even in a more secularized form. Moreover modern political theorists have, whether right or wrong, have understood Thomas Aquinas to emphasize natural law over other types of law, almost to their exclusion. These theorists have constructed a natural law system relying in part on Aquinas, again perfectly understandable given the history of interpretation of Thomas’ legal theory.^[104] However I argue that the perception that Thomas relied primarily on natural law as potentially overstated and his reliance on Mosaic judicial law in political ethics as, at the least, understated if not altogether ignored.

[1] On the centrality of the Christian religion in Europe, see David Luscombe, *Medieval Thought*. Oxford University Press, 1997 and Adriaan Bredero, *Christendom and Christianity in the Middle Ages: The Relations between Religion, Church and Society*. Eerdmans, 1994. For an older work, see W. T. Stace, *Religion and the Modern Mind*. Greenwood Press Reprint, 1980, who distinguishes between the medieval worldview and the modern scientific worldview.

[2] On the tension between scholastics and Humanists, see Erika Rummel, *The Humanist-Scholastic Debate in the Renaissance and Reformation*. Harvard University Press, 1998.

[3] See John B. Morrall, *Political Thought in Medieval Times*. University of Toronto Press, 1980 and Walter Ullmann, *A History of Political Thought: The Middle Ages*. Penguin, 1970. See also Brian Tierney, *The Crisis of Church and State, 1050-1300*. University of Toronto Press, 1988. On the relationship of law and politics see Walter Ullmann, *Law and Politics in the Middle Ages: An Introduction to the Sources of Medieval Political Ideas*. London: Hodder and Stoughton, 1975 and especially Harold J. Berman, *Law and Revolution*. Harvard University Press, 1985.

[4] See for example Hans Meyer, *The Philosophy of Saint Thomas Aquinas*. Saint Louis: B. Herder, 1946. Brian Davies, *The Thought of Thomas Aquinas*. Oxford: Clarendon Press, 1993, pp. 258-259, seems to say that Aquinas restricts the Old Testament judicial laws (part of the “Old Law”) to the Jews. M.-D. Chenu, *Nature, Man and Society in the Twelfth Century: Essays on New Theological Perspectives in the Latin West*,

selected, edited and translated by Jerome Taylor and Lester K. Little. University of Chicago Press, 1957, p. 154, hardly addresses the issue, but does mention that some of the Mosaic Law was in fact in effect in the 12th century, but was gradually being superseded by new ideas and practices of law, due to the commercial revolution. I will define Theonomy below.

[5] See for example, Roger Olson, *The Story of Christian Theology: Twenty Centuries of Tradition and Reform*. Downer's Grove, Illinois: InterVarsity Press, 1999, pp. 311ff and Martin Grabmann, *Die Geschichte der Scholastischen Methode*, 2 volumes. Berlin: Akademie Verlag, 1988 (reprint), the classic work on the subject.

[6] Virtually every scholar of Aquinas emphasizes his natural law theory. See for example, Davies, op. cit., pp. 244-249.

[7] Paul Tillich, *Systematic Theology*, 3 vols. Chicago: University of Chicago Press, 1951, vol. I, pp. 83-86 and 147-150 and vol. III., pp. 249-275.

[8] See Gregory Bahnsen, *Theonomy in Christian Ethics, Expanded Edition with Replies to Critics*. Phillipsburg, NJ: Presbyterian and Reformed, 1983, pp. 32-33. Bahnsen includes in his initial definition personal ethics as well as political ethics, but most modern Theonomists refer only to the civil laws.

[9] See P. D. L. Avis, "Moses and the Magistrate: A Study in the Rise of Protestant Legalism," in *Journal of Ecclesiastical History*, vol. XXVI, no. 2, April 1975, who deals with the English "Theonomists" of the 16th century, but not with the Scottish theologians and churchmen.

[10] There has as yet been no history of modern Theonomy, but this author is in the process of finishing just such a work.

[11] See Greg Bahnsen, *Theonomy in Christian Ethics*, op. cit., p. 314.

[12] It is not clear how the principle of “regulation” originated, but as a hermeneutical principle, it can be seen at least as early as the Puritans and possibly in William Tyndale in the 1530s.

[13] See Calvin, *Institutes of the Christian Religion*, 2 vols., translated by Ford Lewis Battles, edited by John T. McNeill. Philadelphia: Westminster, 1960, vol. 1, pp. 367-368 (2.8.1ff).

[14] Of course natural laws has its detractors on other grounds than religious, given the many variations. See Jeffrie G. Murphy and Jules L. Coleman, *Philosophy of Law: An Introduction to Jurisprudence*, Revised edition. Westview, 1990, pp. 37-51.

[15] On positive law, see *Ibid.*, pp. 19-33.

[16] See Gary DeMar, *Ruler of the Nations: Biblical Principles of Government*. Dominion Press, 1987, pp. xiv-xvi.

[17] But some Theonomists have also seen the modern Theonomic system as unique with the exception of the Old Testament Hebrew Commonwealth.

[18] Of course this begs the question of what the details are, whether something is a detail or ancillary, and how details are to be interpreted.

[19] See P. D. L. Avis, op. cit.

[20] For one of the best-known uses of this term, see the *Westminster Confession of Faith*, which has been through many editions but whose section on the law, Chapter XIX, has been untouched except among some Presbyterian groups in recent decades.

[21] On humanism, see Paul Oskar Kristeller, *Renaissance Thought and Its Sources*. Columbia University Press, 1979 and

Charles G. Nauert, *Humanism and the Culture of Renaissance Europe*. Cambridge 6

[22] For the former, see Origen and Cyprian, while the latter included Augustine. However, one does see elements of the civil law in the revised Roman Code of Justinian.

[23] See J. Lecler, *Toleration and Reformation*, 2 volumes, English translation. Longmans, 1960. On Martyr's distinction and attitude, see Marc A. Clauson, unpublished paper, "The Mosaic Judicial Law in the Early Church," Liberty University, 1990. 7

[24] See for example J. Budziszewski, *Written on the Heart: The Case for Natural Law*. Downer's Grove: InterVarsity Press, 1997; John Finnis, *Natural Law and Natural Rights*. Oxford University Press, 1980; Idem, *Aquinas: Moral, Political and Legal Theory*. Oxford University Press, 1998; Jean Porter, *Nature as Reason: A Thomistic Theory of Natural Law*. Grand Rapids, Michigan: Eerdmans, 2004; Howard Kainz, *Natural Law: A Reevaluation*. Open Court, 2004; Robert P. George, editor, *Natural Law Theory: Contemporary Essays*. Oxford University Press, 1994, and many others.

[25] See Finnis, *Aquinas: Moral, Political and Legal Theory*, op. cit., Chapters VII and VIII.

[26] P. D. L. Avis, op. cit., p. 3. I have examined Luther's doctrine of the judicial law of Moses and find evidence that he allowed the use of the judicial laws in the civil realm, but did not advocate their required use.

[27] See Martin Luther, *How Christians Should Regard Moses in Martin Luther's Basic Theological Writings*, edited by Timothy Lull. Minneapolis: Fortress Press, 1989, pp. 135ff.

[28] See Etienne Gilson, *History of Christian Philosophy in the Middle Ages*. New York: Random House, 1955, pp. 454-465 and Steven Ozment, *The Age of Reform, 1250-1550: An Intellectual and Religious History of Late Medieval and Reformation Europe*. New Haven: Yale University Press, 1980, pp. 1-21.

[29] On this development, see A. P. d'Entreves, *Natural Law: An Historical Survey*. Harper and Row, 1965.

[30] See Otto Bird, *The Idea of Justice*. Praeger, 1967, pp. 43ff. But see also M. S. Kempshall, *The Common Good in Late Medieval Political Thought*. Clarendon Press, 1999, who argues against such a drastic interpretation and thus also indirectly supports a more Theonomic Thomas Aquinas.

[31] See Rushdoony, *The Institutes of Biblical Law*. Presbyterian and Reformed, 1973; Gary North, *Political Polytheism: The Myth of Pluralism*. Institute for Christian Economics, 1989; Gregory Bahnsen, *Theonomy in Christian Ethics, Expanded Edition with Replies to Critics*. Presbyterian and Reformed, 1984

[32] *Summa Theologica*, translated by the Fathers of the English Dominican Province, rev. by Daniel J. Sullivan, 2 vols. Chicago: Encyclopedia Britannica, 1952, Part I of the Second Part, Section IV, Question 90, cited as II. 1. IV, q. 90, volume 2, p. 205. When quoting the Latin version, I will use the edition of the Institute of Medieval Studies. Ottawa, Canada: Commissio Piana, 1953, volume II.

[33] Ibid.

[34] See II. I. q. 90, volume 2, pp. 206-207.

[35] II. I. q. 91, vol. 2, p. 208.

[36] Ibid. Thomas uses the phrase *lex naturalis*.

[37] II. I. q. 91. art. 2, vol. 2, p. 209.

- [38] Ibid.
- [39] II. I. q. 91, art. 4, vol. 2, pp. 210-211.
- [40] Ibid., p. 211.
- [41] Ibid. 11
- [42] II. I. q. 91, art. 5, vol. 2, p. 212.
- [43] Ibid.
- [44] II. I. q. 94, vol. 2, p. 221.
- [45] Ibid., art. 1.
- [46] Ibid., art. 4.
- [47] Ibid.
- [48] Ibid., art. 4, in Thomas' long answer, vol. 2, p. 224.
- [49] He makes it clear in Ibid., art. 4, Reply to Objection 1, that "whatever belongs to the natural law is contained in [the Law and the Gospel]."
- [50] II. I. q. 94, art. 5, vol. 2, p. 225.
- [51] Ibid.
- [52] Ibid.
- [53] II. I. q. 95, vol. 2, p. 226.
- [54] See John Calvin, *Institutes of the Christian Religion*, 2 volumes, op. cit.
- [55] *Summa*, II. I., q. 95, answer, vol. 2, p. 229.
- [56] Ibid.
- [57] Ibid.
- [58] He has already mentioned natural law in connection with human law, in answering the question, "Article 4: Whether Isidore's Division of Human Laws is Appropriate?" See II. I. q. 95, vol. 2, p. 229.
- [59] II.I. q. 96, reply to objection 1, vol. 2, p. 232.
- [60] Ibid.

[61] II. I. q. 96, article 4, vol. 2, p. 233, emphasis added.

[62] II. I. q. 98, vol. 2, p. 240.

[63] II. I. q. 98, art. 4, vol. 2, p. 243.

[64] Ibid., art 5, vol. 2, p. 243.

[65] Ibid.

[66] Thomas does not here use “natural law” to mean a law apart from Divine law, but rather those principles of unwritten law that would have existed before the written law, “written on the heart.”

[67] This argument from silence is not at all conclusive, but it is suggestive at this point.

[68] II. I. q. 99, vol. 2, p. 246.

[69] Ibid.

[70] II. I. q. 99, art. 3, vol. 2, p. 247. 17

[71] Thomas will deal with all of these precepts in greater detail, including the judicial precepts, later.

[72] See II. I. q. 99, objection 2, vol. 2, p. 248.

[73] Ibid.

[74] Ibid.

[75] II. I. q. 104, vol. 2, p. 305.

[76] Ibid., vol. 2, p. 306.

[77] Ibid.

[78] Ibid.

[79] Ibid.

[80] Ibid.

[81] Ibid.

[82] See Ibid.

[83] Ibid.

[84] Ibid.

[85] Ibid., article 4, vol. 2, p. 306. 20

[86] Ibid.

[87] II. I. q. 105, article 1, vol. 2, p. 307.

[88] Ibid.

[89] Ibid.

[90] Ibid.

[91] II. I. q. 105, article 2, vol. 2, p. 309.

[92] Ibid., vol. 2, pp. 310-311.

[93] Ibid., p. 311.

[94] Ibid.

[95] Ibid., pp. 314-315.

[96] See II. I. q. 107, vol. 2, p. 325.

[97] Ibid, p. 326, especially column 2.

[98] Ibid., p. 326.

[99] Ibid., p. 328.

[100] Ibid., p. 329.

[101] II.I. q. 108, article 2, vol. 2, p. 332.

[102] Ibid., p. 333.

[103] Ibid.

[104] I have greatly oversimplified this new natural law interest, since some natural law proponents do not make use of Thomas Aquinas. Nevertheless, when they do address his thought they do so in terms of natural law.