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Fallen Justice

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In a letter to Nectarius, St Augustine takes to task the political philosophers of the Roman polity for their failure to secure justice for the earthly realm. Though philosophy correctly identifies justice as a central concern of politics, learned men are powerless to realize the just society except in thought and speech.[1] At times, Augustine seems to argue that 'real' cities (not those which exist only in speculative thought) do not, and perhaps cannot, contain true justice. The basis of peace in the earthly city is 'an ordered agreement of mind with mind'[2] that is limited to 'the establishment of a kind of compromise between human wills about the things relevant to mortal life'.[3] Such societies are founded not upon 'common acknowledgement of right' but on 'common agreement as to the objects of their love'.[4] In the absence of truly cordial and just relations with one's neighbours, politics becomes a matter of instituting a kind of average condition of being, but one that is deficient in many respects. Perhaps, in such conditions, justice is a virtue that can be satisfactorily explored only in private life: 'what consolation have we in this human society,' Augustine asks, 'so replete with mistaken notions and distressing anxieties, except the unfeigned faith and mutual affections of genuine, loyal friends'.[5]

Passages such as these find Augustine expressing ideas that are not widely adrift of those of Hobbes. The law of the earthly city has as its primary purpose the maintenance of peace and good order; yet in a world in which there are no agreed conceptions of justice, this is not the bliss which comes when each person is accorded what is rightly due to them, but the fragile armistice between competing interests which correctly perceive that without law, things would go worse. Because the human condition is a fallen one, the sum of human efforts to realize true justice in the world will meet with little success.[6] Law has no intrinsic connection to justice, but provides the

[1] Augustine, Epistle 91, 4.
[2] Augustine, *De Civitate Dei*, XIX, 13.
[3] Id, XIX, 17.
[4] Id, XIX, 24.
[5] Id, XIX, 8.
[6] Augustine, *De Libero Arbitrio*, I.

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common body of rules and standards required by a community in the absence of justice.

At other times, however, Augustine pursues a quite different understanding of the importance of justice. Whilst still accepting that some injustice is inevitable in the government of any society, he declares that a Roman commonwealth 'never existed, because there never was real justice in the community'.[7] Rome 'was a commonwealth to some degree', but 'true justice is found only in that commonwealth whose founder and ruler is Christ'.[8] Here, Augustine adopts 'the more plausible definition' of a society, as something that exists by degrees according to the extent to which justice is present within it. Unlike his first definition of society (as an association from which justice may be, and largely is, absent), the second treats society as intrinsically related to ideal justice. An association is to be recognized as a society only in so far as it approximates to, and realizes, that ideal. Furthermore, an association is only fully a society if it enjoys a *Christian* government. This second definition allows Augustine to recognize that pagan societies (such as those of Athens and Sparta) are 'commonwealths' in so far as they contain elements of justice and of right, but that they instantiate the ideal society only partially and imperfectly. States cannot be entirely without justice, or there would be no society at all; but this is, at the same time, but a relative and internal justice.[9]

Augustine was nevertheless pessimistic about the prospects for human justice even within Christian societies. Though he seldom articulates his views in terms of 'natural law' (except in the *De Libero Arbitrio*), Augustine's standpoint is clearly that human justice cannot give even so much as a partial or conditional expression to the justice embodied in the eternal law; it offers at most a suggestion, or pale echo of that justice. Consequently, it is not possible to speak of human law as *embodying* the demands of true justice or of the natural law. The role of politics is not to cultivate virtue, it is a remedial institution arising due to sin. It can create nothing that is morally good, but merely maintain peace.[10] To find a less darkened view of politics, we must turn to the other great figure of the classical natural law tradition, Thomas Aquinas.

Famously, Aquinas distinguishes the notion of 'eternal law' from that of 'natural law', and in so doing he creates room for optimism

[7] Augustine, (above n 2), II, 22. See also XIX, 21 & 24.

[8] Id, II, 22.

[9] See Emile Perreau-Saussine, 'Paradise as a Political Theme in Augustine's *City of God*', in M. Bockmuehl & G. Stroumsa eds. *Paradise in Antiquity: Jewish and Christian Views* (Cambridge: Cambridge University Press, 2010).

[10] See H. Deane, *The Political and Social Ideas of St Augustine*, (New York: Columbia University Press, 1963), p. 78; also P.J. Burnell, 'The Status of Politics in Augustine's *City of God*', *History of Political Thought* 13 (1992), pp. 13–29.

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concerning the capacity of human actions to implement justice. He does not reject Augustine's view that the fall of man corrupts and obscures understanding of the *lex aeterna*, but resists the conclusion that human institutions are utterly sinful and removed from that law, doing little good but serving to restrain evil. Eternal law (God's divine wisdom) remains unknowable to human beings, but the natural law is that part of the eternal law that is accessible to human understanding in respect of humans' rational nature.[11] Thus 'human law' is yet 'derived from the eternal law, but ... is not on a perfect equality with it.' [12] For 'every human law has just so much of the nature of a law, as it is derived from the law of nature': 'wherefore the force of a law depends upon the extent of its justice'.[13] Human law is 'given for the correction of the natural law, either because it supplies what was wanting to the natural law; or because the natural law was perverted in the hearts of some men...'[14] Here, Aquinas points in the direction of Augustine's second definition of society (as an approximation to justice), but his distinction between *lex naturalis* and *lex aeterna* allows him to conclude that earthly social arrangements can after all hope to implement true justice. One can therefore extract from Aquinas's premises the view that 'the demands of the natural law can somehow be met on the level of civil society and hence do not have to be diluted in order to become applicable'.[15]

Though they point in different directions, the ruminations on justice found in Augustine and Aquinas present an unfamiliar standpoint from which to contemplate a central jurisprudential problem, that of the relationship between law and justice. To political writers of the modern day, justice is visible as a political ideal concerned specifically with the re-ordering of socio-political arrangements, and hence this visibility is a question of the extent to which 'principles' of justice are embodied in the standards of that most articulate and order-producing of social institutions, law. In the works of modern political philosophers, among them Rawls, Dworkin and Korsgaard, are to be found conceptions of justice, equality and right that, in belonging specifically to liberal democratic social structures, are judged already to have been partially realized in the political societies of the present. By contrast, neither Augustine nor Aquinas is straightforwardly a *political* thinker. The true justice that is to be discovered in the *lex naturalis* is not of a kind that establishes or recommends particular forms of social arrangement. Christianity, being a universalist

[11] Aquinas, *Summa Theologiae*, I-II 94.2.
[12] Id, I-II 93.3.
[13] Id, I-II 95.2.
[14] Id, I-II 94.5.
[15] See Ernest Fortin, *Classical Christianity and the Political Order: The Collected Works of Ernest Fortin, vol 2* (Lanham MD: Rowman & Littlefield, 1996), p. 211.

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religion, is not dependent upon specific political forms, but lays down commandments and intimations of the good life (characterized by a loving disposition, forgiveness, the exercise of mercy, and so forth) that offer little if any guidance on concrete political problems of distribution, civic obligation, questions of 'corrective justice' or punishment. In this, the Christian notion of a 'natural law' as it appears in Augustine and Aquinas differs markedly from the Law that features centrally in the dominant religions of the East: the Judaistic Talmud, Islamic Sharia, and so on.

Despite their qualified enthusiasm for Cicero's *De Republica*, neither writer strictly belongs to the Ciceronian tradition of reflection upon justice and the question of how it is to be implemented politically[16] Justice is a property of the natural law, and only in a qualified sense to be woven into the concrete political structures of human societies. The question that is squarely faced by the classical natural law writers is therefore of a fundamentally different nature to that of modern politics. At its heart is not the production of perfected or transformed social institutions (though the question of how institutions are to be transformed cannot be eliminated from it). Human societies are fallen, but the imperfection of social institutions is not the cause of human imperfection; it is because human nature is sinful and corrupted that social arrangements, which are an expression of that nature, are incapable of perfection. Consequently we must ask: to what extent can human beings hope to realize justice in their relations, and under what conditions will it appear?

I shall attempt to get to the heart of the visions of justice that are found in Augustine and Aquinas. I will then offer suggestions as to how the relationship between law and justice should be properly conceived. Above all, I hope to pose questions about justice that have been suppressed by the dominant approaches to justice in the political and jurisprudential writings of the present day.

Augustine: justice without the law

Augustine's separation of the two 'cities' in the *City of God* supplies the context in which he thinks about questions of justice. It is also a significant factor in the intellectual backdrop which informs Thomas's writings on the subject. Augustine distinguishes between the earthly and heavenly cities according to their objects of love: 'In one city, love of God has been given first place, in the other, love of self'.[17] The city of God is at once the eternal heavenly community *and* a dimension of present life, where it exists 'on pilgrimage' in the acts

[16] See e.g. Augustine, *De Civitate Dei*, II, 21.
[17] Id, XIV, 13.

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of love and charity demonstrated in the earthly city. In consequence, 'those two cities are interwoven and intermixed in this era, and await separation at the last judgment'.[18] True justice, associated with the heavenly city, has its source in love: both the love of God and, derivatively, love of one's neighbours.[19] Such love is said to be a matter of being rightly ordered in one's own mind. Being rightly related to God, a person is properly related within himself and to those around him.[20]

If the circumstances of real politics do not prevent the exercise of Christian virtue, they nevertheless offer resistance to all attempts to deal with others in the way that justice suggests. Quoting Terence, Augustine says: 'Wrongs and suspicions, enmities and war -Then, peace again! Have they not everywhere filled up the story of human experience? Are they not of frequent occurrence . . . [a]nd even peace is a doubtful good, since we do not know the hearts of those with whom we wish to maintain peace, and even if we could know them today, we should not know what they might be like tomorrow'. Thus, '[t]he larger the city, the more is its forum filled with civil law suits and criminal trials' and it is never free from 'the alarms or -what is more frequent -the bloodshed, of sedition and civil war'.[21] Yet a society cannot be wholly without common bonds of affection amongst its members, nor wholly without attempted acts of justice, unless it cease to resemble a society at all: 'Remove justice, and what are kingdoms but gangs of criminals on a large scale?'[22] The mutual relations of men in most situations may resemble more closely those of the 'mob' than of a 'people', but nevertheless the presence of justice within the internal ordering of the polity raises it higher than a mere mob. Actual societies will manifest neither 'city' in unqualified form,[23] being divided in the nature of their love.

The image of societies as a 'fallen' context in which justice will struggle to break out is one that lies somewhere between Hobbesian and Averroist ideas. In his Commentary on Aristotle's *De Anima*, Averroes wrote that Man cannot wholly dedicate himself to the pursuit of his intellectual perfection so long as he lacks peaceful relations with his fellow men.[24] Similarly, in *Leviathan*, Hobbes famously suggests that justice and injustice are values that relate only to men 'in

[18] Id, I, 35. See also XVIII, 34.

[19] Augustine, *Of the Morals of the Catholic Church*, I.15: 'justice is love serving God only, and therefore ruling well all else, as subject to man. . .'; I.26: '. . . we can think of no surer step towards the love of God than the love of man to man'.

[20] Id, I.25. See also Plato, *Republic* IV.

[21] *De Civitate Dei*, XIX, 5.

[22] Id, IV, 4.

[23] Id, XV, 1 (Augustine states that he is speaking of the two cities 'allegorically'.)

[24] See A.L. Ivry, 'Averroes's Middle and Long Commentaries on the *De Anima*', *Arabic Sciences and Philosophy* 5 (1995) pp. 75–92.

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society', and that outside such a context, such ideas have 'no place'.[25] The 'natural condition of man' is placed by Hobbes somewhat beneath that of the robber band, for the latter (on Augustine's definition) is yet characterized by internal organization and concord. But in the state of nature, men are doomed to 'become enemies; and in the way to their end . . . endeavour to destroy or subdue one another'.[26] Lying between Averroist perfection and Hobbesian warfare, civil relations in actual societies are not of a kind that encourage, even when they allow for, the expression of the agapic love that is the source of true justice.

Augustine raises here what is perhaps the central problem of Western politics and jurisprudence. Perfected individuals require perfected institutions. Does this mean that by perfecting and improving social institutions, one *thereby* hopes to perfect individuals?[27] Augustine's reply is negative: governments cannot hope (any more than individuals) to avoid becoming polluted by the very vices they exist to control. True goodness is to be found neither in actually existing arrangements nor in any plan for what should be.[28] Like Machiavelli, Augustine wishes us 'to follow the truth of the matter rather than the imagination of it'.[29] Justice is not an abstract idea, but a concrete set of dispositions and practices. The *form* of justice is that proposed by Aristotle: it is 'that virtue which assigns to everyone his due'.[30] But its impulse is not a political principle of fairness, or equality. It is a habit of virtue cultivated by one whose love for God, and thence for his neighbours, carries over from his intellectual life into the world of practical dealings.

Justice nevertheless cannot avoid receiving expression in the form of a tracery of *civic* relationships: the city of God is itself a *city*. The *amor dei* is not mystical, but social. It manifests itself as a concern for the 'weal of the people'. The love that informs justice is not sacrificial, but limited and incapable of detachment from self-interest. It contains an element of calculation, of what is *due* to a person, rather than of what *may* be given to them. Such 'impurity' of love of neighbour is present even within the most intimate of human relationships: marriage is itself based upon a considerate calculation of what is due to the other, without which its harmony breaks down, just as absolute self-abasement is not a sound basis

[25] Hobbes, *Leviathan*, ch 13.

[26] Id.

[27] See, for example, Rawls's discussion of the 'original position': *A Theory of Justice* (Harvard: Belknap Press, 1971), ch 1.

[28] Augustine does not respond directly to this question, but his reply can be distilled from *De Civitate Dei*, XIX, 17–22. See also R.A. Markus, *Saeculum: History and Society in the Theology of St Augustine* (Cambridge: Cambridge University Press, 1970), xix-xx.

[29] Machiavelli, *The Prince*, chapter XV.

[30] *De Civitate Dei*, XIX, 21; citing Aristotle, *Nicomachean Ethics* 5.5.2.

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for family life. But if such calculations are not themselves infused with love, married life becomes a parody of itself, rooted in cynicism and personal transactions of a prudential nature.[31] Similarly in social relationships, one cannot go about as a sheep amongst lions if one is to maintain one's responsibilities towards others. In speaking of earthly justice as a concern for the 'weal of the people',[32] Augustine does not divide the life of self and that of society into opposing camps of 'interests', but regards society as a context of competing claims made upon the self by numerous considerations of general welfare. One's responsibilities may require one to give precedence to the interests of one's family over those of the stranger; or to what is owed to a political ally as opposed to the claims of a favoured interest group; to consider what is due to some subsection of one's community over another, and so on. One cannot do this if inspired by a selfless agape, even if such a state were possible. But uninformed by love, these calculations become in turn calculations merely of collective self-interest, not of genuine concern for the 'weal' of one's neighbours.

Yet there is no reason to think that the nature of these conflicts is static, or amenable to fixed formulas: we do not know the hearts of those with whom we would be at peace, 'and even if we could know them today, we should not know what they might be like tomorrow'.[33] As a political principle, justice does not suggest any specific or permanent form of social ordering. Earthly justice cannot take a fixed form because that which is owed to others is owed as much to what they can or will become, as to what they are. The justice that Augustine regards as possible within the earthly city is not directed towards 'ultimate' conditions or solutions, but to the establishment of relative and sufficient harmonies.

At times, Augustine seems to think that all manifestations of human association embody corruption and injustice. In XIX, 16, we find him declaring that God 'did not wish the rational being, made in His own image, to have dominion over any but irrational creatures, not man over man but man over beasts'. There is in nature no room for kings of men; these arise as a result and reward of a fallen nature in which sin must be restrained. Societies do not conform to some norm or historical pattern of natural law: endless in their variety, they subject men to a governance without which the institutions of civilization could not exist; but the subordination to the rule of men is itself unjust, so that all societies have injustice permanently woven into

[31] Augustine, *De Civitate Dei*, XIX, 14–15. See also Philip Reynolds, *To Have and to Hold: Marriage and its Documentation in Western Christendom 400–1600* (Cambridge: Cambridge University Press, 2007).

[32] *De Civitate Dei*, XIX, 21.

[33] Id, XIX, 5.

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their fabric.[34] The source of this injustice is pride (*superbia*) or self-love. Through self-love, a man turns from what is due to God and neighbour, and seeks to make of himself an end, and a focus of interests around which the community is to be structured.[35] This is not a mere weakness of the flesh or will, which may be overcome by devotion to a law of 'pure reason', but a problem of the fallen soul itself, 'making a bad use of the body to wander from the law of God'.[36] Because it is not a defect of reason which causes and strengthens the impulse to self-love, neither can law or reason reveal anything about the means by which justice may be implemented, and self-interest qualified or overcome.

Much of book XIX of *City of God* is concerned with the contrast between ultimate order (God's final judgment upon good and evil) and the endless and temporary forms of social order. Augustine's ruminations upon justice stand out because he is acutely aware of how easily the concern for the weal of a people turns into a corrupted form of collective self-interest. The original sin (pride) characterizes the fallen state, for it encourages such transformations. Always we are apt to perceive in our political visions not an endless sequence of temporary accommodations, but a final centre of order in the earthly realm as the goal to be obtained. But these political goals are to be obtained only *as against* other possible forms of ordering: socialism as against free-market capitalism; liberalism as against aristocratic governance, and so forth. None of these forms of political ordering are themselves free of imperfection. We escape the evil of 'unfeeling' capitalism only to run into the arms of 'repressive' socialism (and vice versa). All of them operate in a way which violates the basis of social order ('do no harm to anyone' and 'help everyone wherever possible').[37] Of all judgments passed by men upon their fellow-men, Augustine says: 'How pitiable, how lamentable do we find them!'[38] The political ambitions even of the most committed lover of justice involve the tyrannous advancement and imposition of collective self-interests.

It is of the first significance that Augustine avoids any real reference in his thinking on politics and justice to ideas of natural law. Both the classical tradition of thought which existed before him, in Aristotle and Cicero, and the medieval and modern thought which came after him, perceived an eternal order in history after which

[34] Id: 'Without injustice, the republic would neither increase nor subsist. The imperial city ... could not rule without recourse to injustice. For it is unjust for some men to rule over others.'

[35] Id, XIX, 4–5 & XV, 6.

[36] Augustine, *De Sermone Domini in Monte* 1.16.46.

[37] *De Civitate Dei*, XIX, 14.

[38] Id, XIX, 6.

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human societies are normatively pattered. In Book V, chapter 7 of the *Nicomachean Ethics*, Aristotle argues that despite the historical variety of forms of government, 'only one is naturally the best', for each 'stands as a universal in relation to particulars'. For Aquinas, similarly, 'human law has just so much of the nature of law, as it is derived from the law of nature'.[39] The same basic orientation is evident in modern philosophy, in so far as it is informed by Kantian ideas of universal laws of reason that are applicable to the concrete institutional realities of human society: those in the 'original position' transcend the imaginative limitations imposed by historical context in order to engineer society according to only very general and permanent considerations (the 'circumstances of justice', basic economic laws, and so forth).[40] In departing from this tradition, Augustine places speculation about law and justice onto an entirely different path. Augustine does not think of human societies as being guided by an ideal that is 'external' to them, but by a dynamic that is internal. All forms of human association are doomed to give first place to order amongst their priorities (for without order, 'society' does not exist); but justice must enter somewhere into this order, for 'unsatisfied desires are bound to challenge every order'.[41] Human beings are enjoined to an eternal law that, in belonging to God's will, is mysterious and unknown to them. Consequently, they are not called upon to implement a law of perfect justice in the earthly realm, but to draw upon the resources of a love that is present within that realm in order to modify the endlessly variable patterns of human behaviour in which they are enmeshed.

By grounding justice in love rather than law, Augustine is not being an idealist, but perhaps the most uncompromising political realist. Where the spontaneous, agapic love of neighbour is absent, the production of a top-down order of governance is necessary so as to maintain the peace and order that are essential to society. Such descending order is always tyrannous, assuming power over human beings but being wielded by human beings who are no closer to the truth, or to virtue, than anyone. The vices which frustrate peace are not conquered but merely forced to submit, 'repressed under a rule still troubled by anxieties'.[42] But where such love is present, it may be reflected in the legal order so that executive power does not produce it, but lends precision and structure to harmonies that already

[39] Aquinas, *Summa Theologiae*, I-II 95.2.

[40] See Rawls, (above n 27), 441. We might also see a similar pattern in the method of 'reflective equilibrium': the oscillation between general norms and scattered particulars (or eternity and temporality).

[41] See Reinhold Niebuhr, *Love and Justice: Selections from the Shorter Writings* (Philadelphia: Westminster Press, 1957), p. 14.

[42] *De Civitate Dei*, XIX, 27.

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exist.[43] The justice that is found in a context of social practices will therefore not be free of the 'taint' of power, but is more valuable in being free in its origin.

Augustine provides for justice in the earthly realm by acknowledging its fundamentally fallen character. Justice is not altogether absent from the world, for the very idea of injustice requires the partial presence of its opposing force. But its presence in human relationships depends upon a form of agapic love that cannot fully manifest itself in worldly political conditions, and is moreover corrupted in so far as it is manifested. Law is related to justice because love alone is an insufficient basis of order and peace in the earthly city. Law gives structure and specificity to human relationships which are relevant to justice (or which, as Rawls says, provide the 'circumstances of justice'), and is perhaps unimaginable unless it offers some reflection of social harmonies which precede it. Nevertheless, law *corrupts* justice because it forms part of a context of power which, although necessary, possesses no inherent justification. The challenging nature of Augustine's vision of human justice lies in his refusal to countenance a 'middle order' of law or principle, elevated above the black-letter of positive legal arrangements and standing towards it as a form of 'higher' law: the 'law beyond law' or the ideal body of principles according to which the law 'works itself pure'.[44]

Aquinas: the justice of the law

Despite the darkness of his political vision, Augustine's conclusions about the context of justice allow him to escape certain problems that are faced by Aquinas. In Aquinas, we see something approaching more nearly our own understandings of justice, for his position blends Augustinian concerns regarding the eternal law with the main Ciceronian tradition of reflection upon justice. His starting point is that of Aristotle: human beings are fundamentally social creatures, and cannot be understood apart from the society they inhabit. The man who discovers the completion of his nature in separation from society is thus either less than fully human, or else god-like and above humanity.[45] Society implies some ordering of relations between men. The primordial context of justice (that is, of right relations) is therefore the political *regime*. Justice for Aquinas represents a political

[43] For the argument that law is necessarily *both* reflective *and* constitutive of social order, see my 'Positivism, Idealism and the Rule of Law', 26 *Oxford Journal of Legal Studies* (2006), 257–88.

[44] See R. Dworkin, *Law's Empire* (London: Fontana, 1986) ch 10; Lon Fuller, *The Law in Quest of Itself* (Chicago: Foundation Press, 1940), p. 140.

[45] Aquinas, *Commentary on Aristotle's Politics*, I.1.22.

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ideal essentially, and not derivatively. The regime is prior to love as a basis for an understanding of justice, because it is society that constitutes man as a linguistic and a thinking being, and therefore a being fitted for love. This places the Thomist philosophy much closer to the Averroist understanding. The society which constitutes man as an intellectual being (capable of loving and reflecting upon justice) is not the Hobbesian 'natural condition', but an ordered existence in which justice is in some measure already present. Cordial social relations do not represent an *achievement* of 'rational man', but something that is natural to him, and the condition of his rationality. Justice is then a feature of social relationships *before* it is an expression of love, or an object of knowledge. In this way, Aquinas is able to account for the fact that infidel rulers can nevertheless preside over regimes that are in some way just.[46]

For Aquinas, the provisional intimations of justice that are present in civic relations are not merely natural, but reflect natural *law*. The legal character of justice is not metaphorical: 'right' (*ius*) is the object of justice (the just thing itself), and law (though not identical with right) is the expression of right.[47] Famously, Aquinas defines genuine law as a written decree, and therefore he says that natural law is 'written on the hearts' of men.[48] Through this 'middle order' of law 'all things participate in some way in the eternal law, in so far as they receive from it inclinations towards their own acts and ends'.[49] Human societies are therefore amongst the things that participate in the eternal law: the natural law (the expression of right) is present not only in reason, but in action also. Human societies do not fail utterly to implement justice, except in thought and speech. Though their implications may become obscured by sin, the principles of the natural law cannot be abolished from the human heart.[50] Real justice remains present, though in qualified (but not corrupted) form.

As a consequence of this less darkened vision, Aquinas is immediately embroiled in several difficult problems. How is the presence of an ineradicable natural law reconcilable with the full measure of human depravity? If all human societies contain within them a strain of the eternal and universal good, then how can we avoid canonizing even the vilest regimes yet dreamt by human beings? If it is present to some degree in all societies, how is the natural law to take

[46] Aquinas, *Summa Theologiae* I-II 90.3, glossing 2 Romans 14–15: 'When the Gentiles, who have not the law, do by nature the things contained in the law, these, having not the law, are a law unto themselves: Which shew the work of the law written in their hearts…' See also I-II 63.2 & 65.2.

[47] Ibid, II 57.1.

[48] Ibid, I-II 94.6.

[49] Ibid, I-II 91.2.

[50] Ibid, I-II 94.6.

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account of the distinctively scriptural character of Christian ethics?[51] Does not the wide variety of forms of human association and the supposed 'freedom' of man not render impossible the task of defining schemes of justice in terms of 'necessary' standards? Is one not doomed simply to infect the definition of justice with specific details drawn from the given realities of one's own social order?[52] In seeking to implement such a justice, do we not establish rather an egotistical corruption of justice?

None in the Ciceronian tradition of thinking on the subject of justice, perhaps, can escape such questions, either with or without the Christological dimension. Thomas's writings on justice display in an especially potent form the apparently irresistible tendency of politico-legal conceptions of justice to invite a unitary and convergent socio-historicism: all societies, in all times and places, in so far as they are 'good' must approximate to the final form in which true justice is revealed.[53] Such conceptions of justice do not moderate, but rather give encouragement to the tendency inherent in political regimes to conceive of themselves as the sole basis for progress and human well-being. Isaiah Berlin is the principal figure in modern times to have resisted such temptations; it is therefore instructive that it is in a book that is highly critical of Berlin that one recent writer, in discussing America's 'most fundamental contribution to political morality' urges: 'We have been envied for our adventure and we are now increasingly copied all over the world … Let's not lose our nerve when all over the world other people, following our example, are gaining theirs'.[54] Liberalism itself, if raised to the level of a spiritual good, paradoxically becomes the basis for a vision of the universal civilization that is to come.[55]

The scale of Thomas's problem becomes evident if we consider that one central feature of Christianity as a social religion, is its lack of direct interest in political questions. Both the Hebrew Scriptures and the Qur'an set forth a law by which the faithful community is to be governed. But to the extent that Aquinas grounds the natural law in revealed texts, he does so only in relation to the moral legislation

[51] See Jean Porter, *Natural and Divine Law* (Ontario: Novalis, 1999), p. 165.

[52] See Niebuhr, (above n 41), 48, and Alasdair MacIntyre, *Whose Justice? Which Rationality?* (London: Duckworth, 1988), ch 1.

[53] See e.g. Francis Fukuyama, *The End of History and the Last Man* (Harmondsworth: Penguin, 1993).

[54] Dworkin, *Justice in Robes* (Cambridge MA: Belknap Press, 2006), pp. 138–39.

[55] See John Gray, *Enlightenment's Wake* (London: Routledge, 1995). Perhaps the most pernicious feature of the images of 'personal freedom' (autonomy) imparted by the liberal tradition is its tendency to require that such freedom be *imposed* upon societies and cultures which lack it. Such freedoms, in being implacably hostile to the forms of tradition (especially foreign tradition), become blind to the extent to which they are themselves embedded in traditional forms to which they give expression.

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of the Old Law (the Decalogue) as *distinguished* from its judicial legislation.[56] The Hebrew and Islamic religions needed no natural law precisely because they directly embodied a legal tradition, spelling out the form of life that the faithful must live. The natural law, by contrast, offers little or no concrete guidance on the form of social relations one must participate in if one is to remain true both to real justice and to the laws and customs of one's country. It is through natural law that human beings participate in God's eternal law (true justice), but 'human reason cannot have a full participation ... but according to its own mode, and imperfectly'.[57] The natural law is not, therefore, a law of a *fallen* nature, but frail human reason knows only its general principles, 'but not proper knowledge of each single truth'.[58] To a great extent, 'man was left to the direction of his reason'.[59] He must construct his own laws, which are 'given for the correction of the natural law, either because it supplies what was wanting to the natural law, or because the natural law was perverted in the hearts of some men,'[60] and because 'practical rectitude is not the same for all, as to matters of detail, but only as to the general principles'.[61] Our comprehension of justice is abstract and imperfect, and it is therefore not our part to implement it, but rather to achieve it.

One must therefore treat with caution the arguments of modern-day 'Thomist' writers who attempt to derive from Aquinas's writings a set of concrete propositions about justice. To a considerable extent, it is possible to think of the natural law as giving concrete advice on the structure of social relationships only if one can derive from Thomas's remarks on 'objective right' (*ius*) a series of propositions concerning 'subjective rights' (*iura*). One significant such attempt is that of John Finnis: in *Natural Law and Natural Rights*, Finnis indicates (in chapter VIII, and elsewhere) that the titular concepts are not to be regarded as finally distinct, but that '[a]lmost everything in this book is about human rights ('human rights' being a contemporary idiom for 'natural rights'...)' and that '[t]he reader ... will readily be able to translate most of the previous discussions of community and justice, and the subsequent discussions of authority, law, and obligation, into the vocabulary and grammar of rights'.[62] Aquinas adopts the Ciceronian definition of justice as a willingness

[56] See Aquinas, *Summa Theologiae* I-II 100–104, & Fortin, (above n 15), 210–15.
[57] Id, I-II 91.3.
[58] Id.
[59] Id, I-II 91.4, glossing Ecclesiasticus 15:14: 'God left man in the hand of his own counsel.'
[60] Id, I-II 94.5.
[61] Id, I-II 94.4.
[62] Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980), p. 198.

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to accord another his own right (*ius suum*).[63] This right is objective (the objective state of affairs that justice seeks to realize), but Finnis claims that all the elements necessary for a recognition of subjective *iura* are already present in Thomas's definitions. In his discussion of justice, Aquinas lists injuries (being killed or harmed, subjected to loss of property or damage) which amount to injustices. 'Such a list of *iniuriae* violation of right(s)', Finnis says, 'is implicitly a list precisely of rights to which one is entitled simply by virtue of one's being a person'.[64] Thus, although Aquinas speaks always of 'the right thing', his treatment of the natural law as it relates to what is due to a person implies (as in Roman law) the presence of a series of discrete 'rights' as instruments of disputation.[65]

Though he was influenced by the Roman law, Aquinas does not express himself in these terms. Nevertheless, it might seem that the ease with which later Spanish Thomists adopted the language of 'natural rights' lends credence to Finnis's point.[66] Finnis posits a clear connection between natural law and the system of natural rights, for law is the basis of right (*ratio iuris*).[67] But Aquinas is careful to avoid the suggestion that there is a pattern of deductive reasoning from the natural law to concrete systems of right: our knowledge of the natural law extends only to its first principles; 'the more we descend to matters of detail,' the less do we find that 'truth or rectitude is the same for all'.[68] Though Aquinas speaks of deduction, his examples suggest that only very general conclusions may be derived from the first principles: from the principle that 'one should do no harm' comes only the conclusion 'one must not kill'.[69] But '[t]he general principles of the natural law cannot be applied to all men in the same way, on account of the great variety of human affairs. . .' Human laws and customs are required because of the lack of concrete guidance given by the natural law to specific contexts of civic life.[70] The absoluteness of 'that which is truly right' ensures that *ius* exists as a purely spiritual idea, in which the concrete distributions of *iura* in

[63] Aquinas, *Summa Theologiae* II 58.1.

[64] Finnis, *Aquinas: Moral, Political and Legal Theory* (Oxford: Oxford University Press, 1988), p. 136. See Aquinas, *Summa Theologiae* II 122.6.

[65] See Annabel Brett, *Liberty, Right and Nature: Individual Rights in Later Scholastic Thought* (Cambridge: Cambridge University Press, 1997), p. 92.

[66] Finnis's arguments form part of a long-standing controversy over the presence of natural rights in Thomistic thought. One exchange on the subject can be found in a Symposium in *Harvard Journal of Law and Public Policy* 20 (1997) pp. 627–731, and another in *Review of Politics* 64 (2002) pp. 389–420. I do not intend to digress too deeply into this debate in the present context.

[67] Finnis, (above n 64), 135.

[68] Aquinas, *Summa Theologiae* I-II 94.4.

[69] Id, I-II 95.2.

[70] Id, I-II 94.5.

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the civic polity may participate only by degrees: 'every human law has just so much of the nature of law, as it is derived from the law of nature', 'wherefore the force of a law depends upon the extent of its justice'.[71]

Finnis's attempt to derive from 'natural law' a concrete set of personal rights ultimately owes less to Thomistic conceptions than to Kantian ones: it consists in deriving, by way of practical reason, conclusions of right from universal moral laws. In doing so, it gives encouragement to a specific conception of social relations, redolent of the cultural milieu in which it is written. Finnis:

> sees the common good as constituted by an ensemble of "conditions" that makes it possible for the members of a community to collaborate with one another "positively and/or negatively" in the pursuit of the basic values in terms of which human flourishing has been described. Human beings are not united in a common dedication to a common goal. They are not "parts", as Thomas Aquinas still taught, but atomic wholes, open to others and often in need of them, but nonetheless free to organize their lives or devise their "life-plans" as they see fit, provided they do not interfere with the freedom of others.[72]

The lesson from Aquinas is that justice is not entirely absent from the world, though it contain a wide variety of regimes, based on many different principles of social ordering. The world is not saturated in the blood of a universal Hobbesian 'natural condition' though its many laws may be 'a perversion of law'.[73] Aquinas is ready to concede that the second table of the Decalogue is present in the form of natural law, independent of its promulgation to Moses, because he wishes to account for the presence of virtue and justice in pagan societies: 'Christian theology stands in need of a category of natural goodness apart from Christian revelation or grace. Without some such category, it is impossible to preserve the doctrine of the creation, except as a bare abstraction. . .'[74] Justice in general implies 'complete rightness of order,'[75] but the world does not contain complete order. Justice requires that act wherein to each is rendered his due, but the absolute equality demanded by the full act of justice gives way, in the circumstances of the world, to 'a certain proportional equality'.[76] General justice aims at the common good, which surpasses the private good of the individual. The individual's private good cannot be wholly opposed to the common good (if it genuinely is a *common* good), but 'wherefore nature inflicts a loss on the part, in order to

[71] Id, I-II 95.2.
[72] Fortin (above n 15), pp. 271–72.
[73] Aquinas, *Summa Theologiae* I-II 95.2.
[74] Porter (above n 51), p. 177.
[75] Aquinas, *Summa Theologiae* I-II 113.1.
[76] Id, I-II 96.4.

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save the whole', so the justice of earthly laws must 'impose proportionate burdens'.[77] Justice in the world does not produce stable and final order, nor does it imply harmony.

It is our doom, thinks Aquinas, to know something of true justice, even, perhaps, to participate in it, but never to realize it fully in this world. Consequently, the world cannot experience that 'complete rightness of order' that is the culmination of justice. Yet the vision of Aquinas remains less dark than that of Augustine, despite its recognition of the presence of elements of disorder. For Augustine, war is merely the limiting case of social disorder: 'in it, we come face to face in their extreme form with the tensions endemic in all forms of social living, and in circumstances where the normal agencies of law enforcement are inoperative. War is the coercive power inseparable from the social existence of fallen human beings, exercised in this extremity. It is no more -and no less -objectionable than any other use of coercive power to enforce what is right, and always subject to the same moral imperatives that stand above all human action, if they are to be thinkable as human'.[78] But for Aquinas, political regimes contain traces both of sin *and* ratio Dei. Human powers to implement justice always amount to much less than is given to us in conceptions of just relations, but politics and society are never utterly remote from justice in this sense: it is present in more than mere 'thought and speech'.

Justice and its meaning

We are accustomed to think of justice as being one of the great human achievements, however weak and small-minded human beings might otherwise become in their attachment to self-interest. But the lesson that is repeatedly handed down by the natural law writers of the Western tradition is that it is Man's very greatness which betrays him, through the instrument of a pride which seeks to conceal his weakness. The sense that the dominant political theories of the age sometimes function as 'compensatory fantasies', diminishing our perception of the depravities of society through the distorting lens of rational reconstruction, occasionally shines through.[79]

How is justice to achieve some presence within the structures of civil society? Central to all questions of justice is its relationship to the political regime. The early writers understood that justice must have some presence in the regime if it is to be visible, to have a reality beyond that of hopes and thought and speech. But they were

[77] Id.

[78] Markus (above n 28), p. xiii.

[79] See Raymond Geuss, *Outside Ethics* (Princeton NJ: Princeton University Press, 2005), pp. 34–35.

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less willing to give to this the name of true justice, justice in its fullest sense. If we want to understand how Thomas allows more room for a genuine (if attenuated) justice in society, and why modern writers on justice still feel able to draw upon his writings, we must come to realize that the *social* dimension of justice relies upon a fundamental shift from an agapic to a eudaimonistic point of view. Aquinas thinks of laws as being appointed for the common good.[80] Though he is very aware that law is often used for the advancement of personal or sectional interests,[81] it is necessary to understand that the proper function of law is directed toward the creation of a benevolent regime. If human beings are social animals, requiring the society of others for their completion or perfection, then law (as the final instrument of order and transformation in society) has as its proper function the creation of a benevolent regime in which human flourishing can take place. Aquinas conceives of this common good as demanding the harmonious functioning or peace between the distinct parts which combine to form the whole society.[82] The final unity of a society requires some measure of mutual accommodation as between the competing claims of the sectional interests within it: not so that they are reconciled into one single interest, but taking each into due consideration as they are adjusted to the whole.[83] The common good is therefore not the same as the private good of the individual, but (in being prior to it, as a condition for its pursuit and realization) the common good is obviously not unconnected with the good of the individual.[84]

Within the structures of a large society, the lover of justice will direct his attention not towards the immediate circumstances of his fellow citizens, but toward the body of rules which govern the interests of all citizens. The impulse to justice is not *primarily* the love that seeks to ensure the well-being of particular individuals (neighbours or strangers), but that which is concerned with the morality and fairness of social arrangements generally. The good citizen may fend for others in part by expending time and other resources upon the effort to alleviate their situation directly, by manipulating or adjusting it. But he best defends their *interests* by seeking to bring into service the mighty machinery of the state for their aid. Agapic expressions of justice tend to require adjustments or redistributions that are particular and immediate. But it is a well-understood feature of law that it operates to remove elements of particularity and immediacy

[80] Aquinas, *Summa Theologiae* I-II 96.1 & 95.4.
[81] Id, I-II 96.4.
[82] Id, I 103.3.
[83] Id, I-II 105.1.
[84] Id, II-II 47.10. It is, as it were, the *proper* good of an individual (if he is indeed a social animal), as distinct from his private good.

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from the treatment of lawsuits. Such disputes are not responsive to the full range of emotions and commitments of the parties, but adjudicated by reference to stable rules and concepts. They are not immediate, but subjected to protracted and organized procedures; not spontaneous, but dispassionate. The point is not that one cannot love an abstraction (for the commandment of neighbourly love is precisely that one should love the other irrespective of his particular virtues or vices), but that settled procedures of adjudication have as their central concern, not the peculiar interests of certain individuals, but arrangements for the well being and smooth functioning of society as a whole. It therefore became common for later writers in the Western tradition to distinguish the realm of law and justice from that of the 'law of love': the former pertaining to correct distributions of 'perfect' (i.e. enforceable) rights, and the latter relating to 'imperfect rights' the realization of which depends upon perception of worthiness or esteem.[85]

But if we establish a context for social justice in this way, what can be said about its content? Can indeed *anything* be said about its content that is not completely dependent upon considerations of a contextual and historical nature? We must take care to separate two distinct dimensions of this question: (1) does justice point to a permanent idea, as distinguished from the great variety of its concrete realizations? (2) does justice represent a final centre of ordering in human affairs, or merely an endless sequence of temporary accommodations?

The justice of property rights provides a useful example in which to explore this distinction. Suppose one were to contrast English property rights of, say, the eighteenth century with those of the current century. We might note that property in an aristocratic regime is subject to a great many constraints that are not present today: the system of entails, fees, rules of primogeniture, sosage and so forth operate to define and preserve a 'landed class', and to keep land out of the hands of the majority of citizens. The extension of the capital, land and labour markets created conditions in which such rules would gradually become qualified or disappear. The commodification of land contributes to its liberalization: land becomes a commercial object that may be freely traded, and (through the system of mortgages) a resource in which virtually all can share. But a shallow comparison which might suggest that modern liberalized arrangements are more just, is impeded by the thought that this liberalization of property rights cannot be finally separated from the capitalism that gives rise to it; a capitalism which brings with it the sense of dislocation within communities, division into 'haves' and 'have-nots', wage- and

[85] See e.g. Grotius, *De Iure Belli ac Pacis*, I.4.7.

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mortgage slavery, the erosion of communal ties and so on. Arguably, the implications of this destruction are only now beginning to become clear.[86] But the difficulties of comparison lend weight to the suggestion that no content can be given to the idea of 'justice' that is not at the same time irrevocably tradition-bound and contestable. How is freedom to be compared to poverty? Wage slavery and inequality of bargaining power to the plight of labourers in Blake's 'dark satanic mills'? Stifling social hierarchies to the aspirations and failures of the welfare state?

Alasdair MacIntyre famously suggests that in relation to such questions there is 'no neutral set of criteria by means of which the claims of rival and contending traditions could be adjudicated'.[87] Philosophical reflection is a means of 'clarifying issues and alternatives but not of providing grounds for conviction on matters of any substance': consequently, the abstraction from concrete traditional contexts that would be required for drawing such comparisons will produce ideas of justice that are 'far too thin and meagre to supply what is needed'.[88] Similarly, Stuart Hampshire argues that '[t]here is no way in which entirely abstract arguments from the bare concept of justice can by themselves produce a determinate conclusion about the justice of a particular social practice'.[89] Unlike contexts of theoretical reasoning (such as mathematics) in which the conclusion is unaltered by the number of steps different people take to reach it, '[t]he practical conclusion of a debate on policy ... is not similarly independent of the particular arguments which have led to the conclusion. The arguments that have led to the conclusion may be entered into the full characterization of the conclusion itself'.[90] Accordingly, Hampshire suggests that the 'basic concept of justice, taken by itself, is primarily procedural' in referring to 'a regular and reasonable procedure of weighing claims and counterclaims, as in an arbitration or court of law'.[91] But if Hampshire thinks that justice and fairness, at the most abstract level, are 'specifications of the notion of practical rationality,'[92] MacIntryre's thesis is principally famous for regarding notions of practical rationality themselves as interior products of intellectual traditions. One does not increase one's understanding of

[86] For an extremely informative discussion of some of these themes, see E. Perreau-Saussine, 'What Remains of Socialism' in P. Riordan ed. *Values in Public Life: Aspects of Common Goods* (Berlin: LIT Verlag, 2007), pp. 11–34.

[87] Alasdair MacIntyre, *Whose Justice? Which Rationality?* (London: Duckworth, 1988), p. 334.

[88] Id, 334–35.

[89] Stuart Hampshire, *Innocence and Experience* (Cambridge MA: Harvard University Press, 1989), p. 61.

[90] Id, 52.

[91] Id, 61 & 63.

[92] Id, 53.

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justice by standing outside tradition, but by refining ones traditional ideas as the 'tradition shows itself in successive encounters [with rival traditions] able to furnish the necessary resources and achieve the necessary transformations [of its concepts]':[93] to survive, in other words, as a vibrant and viable outlook on the world.

Both Hampshire and MacIntyre may appear here to come to certain conclusions about question (1), when in fact their conclusions relate to question (2). Their arguments put into question whether there is some final ordering of social arrangements that is the objective form upon which all just societies converge. (There is not.) They do not concern the question of whether the endless variety of efforts to implement justice within concrete civic arrangements concern, not one idea ('justice') but an infinite variety of homophonic but ultimately distinct concepts. (For how else would they be intelligible as arguments *about justice*?)

How then is justice to be understood in civic contexts? We seem to confront a social situation that is not wholly devoid of any justice, but which fails to exhibit justice in its fullest or undistorted form. It has long seemed to writers in the Western intellectual tradition that our understanding of justice is guided by reference to an ideal (or theoretical model) of justice: one which is only partially fulfilled by the practices and arrangements of the moment. The identity of this ideal is taken to be one of the most important and most pressing questions of modern political thought. If justice is related to the common good, for example, then what is the content of the latter concept? Is it the harmony and unity required for mutual survival?[94] Or does it involve the effort to foster other forms of 'human flourishing', such as knowledge, friendship, practical reasonableness and so forth?[95] What of the inclusion of other 'goods', such as freedom, or meaningful labour? Indeed, is the notion of common good capable of finite description? Or, given the proliferation of different 'forms of the good' which to some extent vie and compete, should the guiding ideal of justice be identified, not by reference to the good, but rather with the rule of law itself?[96]

These are important questions. The tendency to pursue versions of the latest of these theses (the prioritization of the right over the good) is perhaps responsible for converting the art of politics, as Aristotle, Aquinas, and even Hobbes knew it, into a 'science' of social and

[93] MacIntyre (above n 87), p. 327.

[94] See e.g. H.L.A. Hart, *The Concept of Law* 2 ed (Oxford: Clarendon Press, 1994), ch IX; Hobbes, *Leviathan* (various eds), ch 13.

[95] See Finnis (above n 62), ch 4.

[96] This corresponds roughly to Rawls's position: see *Justice as Fairness: A Re-statement* (Cambridge MA: Harvard University Press, 2001), pp. 8–24. See also Nicholas Sagovsky, *Christian Tradition and the Practice of Justice* (London: SPCK, 2008), ch 8, and Raymond Plant, *Modern Political Thought* (Oxford: Blackwell, 1991), p. 86.

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economic administration. Such reductive conversions promote, not the good of individuals via the privatization of the means of its pursuit, but a mere flattening or averaging of social existence and its attendant moral and spiritual horizons. But it would be a mistake to think that some alternative ideal, or idealized understanding of the common good, offers assistance to a concrete understanding of justice. To suggest this is to posit some particular form of political regime (at whatever level of abstraction) as a final centre of order in human affairs: the abolition of contrary forms of order where they appear in society appearing to be the abolition of evil itself. If, on the other hand, we answer question (2) above in the negative, then we understand with Augustine that the idea of justice gives encouragement to *no* particular political form: 'A view of politics as a choice between economic systems for distributing material goods would strike Augustine as a choice between two roads to Hell'.[97]

The political philosophies which dominate the thinking of the present day (those of Rawls and his interlocutors) offer little systematic reflection upon these themes. Nor is the mood of modern philosophy very receptive to the questions which drive them. But the result of their abandonment is a debate about justice which, on all sides, vastly inflates the perception of the area wherein human effort can meet with success. It is such a misperception which sustains Rawls's optimism that 'political injustice' may be 'eliminated by following just (or at least decent) social policies and establishing just (or at least decent) basic institutions'; and that by following this method, 'great evils will eventually disappear'.[98]

Augustine is right that the tendency to make social structures of order the ultimate scales of value in human affairs is to be resisted. But a society cannot avoid making arrangements for the distribution of material goods, nor refrain from implementing rules governing matters of transfer and restitution. In thinking of such matters, it is impossible to exclude questions of justice. But deliberation in these contexts should not be conceived as receiving guidance from an ideal of justice, (as it were, from 'above'). It is to be explored by reference to our ability to understand when justice is absent. Familiarity with instances of injustice (being present) is more articulate, more poignant, and more immediate than comprehension of an absent ideal. For human beings see more clearly what is missing, than what is absent: we can articulate what is wrong in an imperfect game of chess with more success than we can imagine a perfect game; the artist refines his work by reference to what is imperfect in its expression,

[97] Oliver O'Donovan, *Common Objects of Love* (Grand Rapids MI: Eerdmans, 2002), p. 23. For an exploration of the liberal bases of Finnis's argument, see Fortin (above n 15), pp. 271–76.

[98] Rawls, *The Law of Peoples* (Cambridge MA: Harvard University Press, 1999), p. 126.

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not by some perfect image he is trying to capture. As Amartya Sen writes, 'What moves us ... is not the realization that the world falls short of being completely just -which few of us expect -but that there are clearly remediable injustices around us which we want to eliminate'.[99] The ability to give expression to the wrongness of immoral situations precedes an understanding of what is ideally right. Aristotle's doctrine of the mean assists understanding in these contexts. Our understanding of courage (for example) is shaped not by knowledge of that virtue, but by contemplation of its absence or distortion: foolhardiness, on the one hand, and timidity, on the other, define opposing points on a continuum of possibilities where true courage is absent. The wise person understands that courage lies somewhere toward the centre of this spectrum, but perception of the true virtue comes into focus not by searching for its positive expression, but increasing one's knowledge of the forms in which it is corrupted or absent in various degrees or dimensions.

I would like to conclude with the thought that our understanding of justice is formed in a similar way. We refine that understanding not by focusing contemplation upon an ideal that we know to be absent from concrete situations, but by giving careful examination to the actual situations of injustice that we meet constantly in actions, in rules and arrangements. In all such situations, justice is absent in some degree.[100] But our deliberations are clarified if, instead of comparing actual injustices to some imagined ideal that we take to be a positive expression of justice, we take thought concerning the incompleteness, or corruption, of the arrangements of the present. Common lawyers especially understand this. Criminal lawyers, Tort lawyers, Contract lawyers: all have their definitions and working understandings of justice. Yet despite the tendency of jurisprudential writers to represent the common law as the embodiment of a 'system of justice', common lawyers understand that these working definitions are but fragmentary and imperfect attempts to achieve justice. Judicial decisions do not state 'principles of justice', but articulate justifications addressed to the litigants in light of the concrete circumstances of the case.[101] The application of these justifications outside these concrete circumstances is acknowledged to be problematic, and to require a constant process of adaptation, modification, rethinking and distinction: justice is not achieved according to a fixed understanding, but through the guidance of precedents which we acknowledge to be imperfect and

[99] Amartya Sen, *The Idea of Justice* (London: Penguin Books, 2010), p. vii.

[100] We might of course take comfort from the realization that neither are our practices perfect expressions of *injustice*.

[101] I have in mind particularly Dworkin, Rawls and others who, in representing the common law as a body of abstract principles, seem to me to misunderstand fundamentally the nature of common law adjudication.

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incomplete. The adjustments which suggest themselves on this basis will also, inevitably, reveal themselves as in turn corrupted and unjust in some measure. But we are better able to articulate the imperfection of social arrangements, and to avoid sanctifying political principles, if we accept that our understandings are guided 'from below' in this way. Above all, we grow in awareness if we adopt as our intellectual guides not Kant, or Rousseau, or Rawls, but rather Augustine and Aquinas.

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