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THE RELATION BETWEEN JUSTICE AND LOVE IN THE NATURAL ORDER

REV. JOHN A. PERRICONE[†]

If therefore thou offer thy gift at the altar, and there thou remember that thy brother hath any thing against thee; Leave there thy offering before the altar, and go first to be reconciled to thy brother: and then coming thou shalt offer thy gift.¹

And one of those robbers who were hanged, blasphemed him, saying: If thou be Christ, save thyself and us. But the other answering, rebuked him, saying: Neither dost thou fear God, seeing thou art condemned under the same condemnation? And we indeed justly, for we receive the due reward of our deeds; but this man hath done no evil.²

The perennially true Scholastic axiom, *distinguish in order to unite*, should guide any discussion of questions of great moment. Its neglect reaches far beyond irritating abstract anomalies annoying only to the privileged academic elite. Existential consequences result from this neglect that produce human suffering as well as the erosion of the common good. Donoso Cortes confirms this principle in a slightly different context when he writes, “Imagined paradises generate real hells.”³

Our present circumstances verify the need for careful distinction and definition, especially regarding the nature of justice and love. Confusion regarding both has produced untold agonies of a rigid, ideological kind—for example, Communism and National Socialism—as well as a “soft kind”—for example,

[†] Professor of Philosophy, St. Francis College, Brooklyn Heights, New York.

¹ *Matthew* 5:23–24 (Douay-Rheims).

² *Luke* 23:39–41.

³ R. A. HERRERA, DONOSO CORTES: CASSANDRA OF THE AGE 76 (1995).

Democracy.⁴ Returning to a review of these subjects promises rich rewards, and none less important than the relief of our present straitened predicament.

Lest this exercise be seen as one in redundancy, it might be helpful to listen to Josef Pieper in the early pages of his classic treatment of justice: "Fundamental truths must constantly be pondered anew lest they lose their fruitfulness."⁵

In fact, a facile ignoring of the proper contours of justice and its authentic importance will have a chilling impact on humanity and society. Again, I quote Pieper, writing with uncharacteristic pique:

We would do well to bear in mind that the uttermost perversion of mankind lies not in excess, which can easily be read in man's bearing and behavior, but in injustice, which, being essentially of the spirit, is not so readily distinguishable. We ought to be prepared to find that the most powerful embodiment of evil in human history, the Antichrist, might well appear in the guise of a great ascetic. This is, in fact, the almost unanimous lesson of historical thinking in the West. Whoever does not understand that it is injustice which is natural man's worst destroyer, and the reason why, will be thrown into overwhelming confusion by the experiences announced in such visions. Above all, he will be powerless to recognize the historical heralds of the abyss. For, even while he watches out in the wrong direction, the forces of destruction will establish their mastery right before his very eyes.⁶

Not as obvious, but certainly as palpable, is the misunderstanding of love which besets our times. Like justice, this essential human pursuit can undergo a corruption which leaves love strangling the human person rather than transforming him. Flannery O'Connor touches upon this when she writes not specifically of love, but one its epiphenomena, tenderness:

If other ages felt less, they saw more, even though they saw with the blind, prophetic, unsentimental eye of acceptance, which is to say, of faith. In the absence of this faith now, we

⁴ See ALEXIS DE TOCQUEVILLE, 2 DEMOCRACY IN AMERICA (Henry Reeve et. al, eds., Vintage Classics 1990) (1835).

⁵ JOSEF PIEPER, THE FOUR CARDINAL VIRTUES: PRUDENCE, JUSTICE, FORTITUDE, TEMPERANCE 51 (Richard Winston et al. trans., Harcourt, Brace & World 1965) (1954).

⁶ *Id.* at 68-69.

govern by tenderness. It is a tenderness which, long since cut off from the person of Christ, is wrapped in theory. When tenderness is detached from the source of tenderness, its logical outcome is terror. It ends in forced-labor camps and in the fumes of the gas chamber.⁷

Not to belabor the disorders of love, but some comments of Dr. Philip Rieff are apposite here. As columnist Katherine A. Kersten notes, Dr. Rieff, in his *Triumph of the Therapeutic*, discusses not so much the corruption of love, but of religion, the principal bearer of love:

"Independence (sic) from all gods," [psychological man] is drawn to "any faith that lends itself to therapeutic use." By [drawing away from] faith [any] doctrinal content, psychological man reduces religion to a free-floating spirituality. He can embrace any faith, so long as it makes no real moral demands—consoles but does not judge.

...

... [The human person] is not a sinner in need of forgiveness and atonement but a "patient" in need of nonjudgmental care.⁸

Not only are proper definitions of love and justice necessary, but a close examination of the manner in which the two relate is critical as well. Improperly mixing these foundational virtues has perpetrated too much mischief. The order of individual perfection is to always be distinguished from the order of the common good. Though there is an obvious and necessary intersection, there are also boundaries that must be heeded. Neglecting these perimeters can easily lead to the weakening of both love and justice, if not their perversion.

And this examination is not merely attention to the "public" versus the "private." This too can collapse into the baneful gutters of atomistic *individualism* rather than the lustrous *individuality* of justice properly wedded to love. As the logicians remind us, in order for there to be a proper relation between justice and love, their separate identities must be respected: A thing must be itself and not another. Relation can only thrive where robust identity thrives. As things lose their identities,

⁷ FLANNERY O'CONNOR, *MYSTERY AND MANNERS* 227 (Farrar, Straus & Giroux 1969).

⁸ Katherine A. Kersten, *Taste—To Hell with Sin When 'Being a Good Person' Excuses Everything*, WALL ST. J., Sept. 17, 1999, at W15 (quoting PHILIP RIEFF, *THE TRIUMPH OF THE THERAPEUTIC: USES OF FAITH AFTER FREUD* 27 (Chatto & Windus 1966)).

relations become more and more impossible. As our age lets slip through its hands an authentic metaphysics of the human person—that is, the proper nature of the human person—modern man finds the prospect of relation more and more remote. Isolation and alienation quickly follow, with “hooking up” becoming the ersatz love. C. S. Lewis called this appalling condition by one of his most famous book titles, *The Abolition of Man*.⁹

Justice is incoherent unless we clearly talk about man—that is, the true nature of man. So we have St. Thomas saying, “It is through creation that the created being first comes to have his rights.”¹⁰ Notice—attention is drawn first to creation, then to rights. Rights only exist in the context of the created human person. The person is a creature designed by God in a certain and most particular manner. To be sure, that creation discloses its requirements for “being”—that is, its obligations. Put another way, the possibilities for a man to fruitfully exercise his existence inherently depends upon his *being himself*. That fruitfulness is realized by executing the imperatives of his nature. Those “imperatives” take form—in both the classical tradition and in Roman Catholicism—as the natural moral law. Since each human person is entitled to be himself, that entitlement translates as “rights.” Clearly, these “rights” are delineated in intimate connection with man’s nature, and man’s nature receives its origin in God, as *creatura*. Pieper draws out the metaphysical resonance:

Man, however, is a *person*—a spiritual being, a whole unto himself, a being that exists for itself and of itself, that wills its own proper perfection. Therefore, and for *that very reason*, something *is* due to man in the fullest sense, *for that reason* he does inalienably have a *suum*, a “right” which he can plead against everyone else, a right which imposes upon every one of his partners the obligation at least not to violate it. Indeed, man’s personality, “the constitution of his spiritual being by virtue of which he is master of his own actions,” even requires (*requirit*), says Thomas, that Divine Providence guide the personality “for his own sake.” Moreover, he takes literally that marvelous expression from the Book of Wisdom: Even God

⁹ C. S. LEWIS, *THE ABOLITION OF MAN* (1947).

¹⁰ PIEPER, *supra* note 5, at 46 (quoting ST. THOMAS AQUINAS, *SUMMA CONTRA GENTILES* bk. II, ch. 28).

Himself disposes of us “with great reverence” (*cum magna reverentia*). In the same chapter of the *Summa contra Gentiles* in which this statement occurs the concept of the personality is set forth in all its elements: its freedom, imperishability, and responsibility for the whole of the world. If, on the contrary, man’s personality is not acknowledged to be something wholly and entirely real, then right and justice cannot possibly be established.¹¹

A remarkable metaphysical density is presented here. Anchored in the createdness of the person, there springs forth a constellation of duties intrinsic and incumbent upon every person that every other person is mandated, by virtue of being himself, to honor in every circumstance. So grounded in *natura* is this construal of “rights” that their “inalienability” literally means that, without them, the human person cannot exist, and certainly never flourish. The human person suffers a demeaning diminution any time his obligations to execute his “duties”—which are synonymous with his “rights”—are abridged. Justice is therefore the recognition and guarantee that each receives his due—that is, the prerogatives of his very personhood. Again, Pieper:

There is another, more forceful, way of stating the case. That something belongs to a man inalienably means this: the man who does not give a person what belongs to him, withholds it or deprives him of it, is really doing harm to himself; *he* is the one who actually loses something—indeed, in the most extreme case, he even destroys himself. At all events, something incomparably worse befalls him than happens to the one who suffers an injustice: that is how inviolable the right is! . . . Socrates has formulated this point over and over again—the person who does an injustice is “to be pitied”: . . . [“I maintain, Callicles, that it is not the most shameful of things to be wrongfully boxed on the ears, nor again to have either my purse or my person cut . . . any wrong done to me and mine is at once more shameful and worse for the wrongdoer than for me the sufferer.” Expressions such as this should not be construed as simply heroic hyperbole; they are meant as a very precise

¹¹ *Id.* at 50 (quoting ST. THOMAS AQUINAS, *SUMMA CONTRA GENTILES* bk. III, ch. 112).

description of the condition that justice belongs to man's true *being*. All these statements are sober characterizations of a real state of affairs: "the inalienability of right."¹²

Mere mention of the word "rights" today is invariably heard against the modern din of "rights talk."¹³ Modernity's chatter about "rights," nobly sounding as it is, bears no resemblance to the rich and ample notion of "rights" inherited from the classical and medieval patrimony that acted as the pillars for the natural moral law. Ernest Fortin's extensive research on this subject is like a splash of cold water in the face of a slightly drugged modern man. As Fr. Fortin explains:

Nowhere in the older tradition does one run across anything like a theory of natural rights, by which I mean rights that inhere in individual human beings *qua* human beings and quite independently of their membership in the larger society to which they belong, as distinguished from civil rights or rights that have their source in some duly enacted law. The passage from natural law to natural rights and later (once nature had fallen into disrepute) to "human" rights represents a major shift, indeed, the paradigm shift in our understanding of justice and moral phenomena generally. Prior to that time, the emphasis was on virtue and duty, that is to say, on what human beings *owe* to *other* human beings or to society at large, rather than on what they can claim for themselves. This emphasis is surely the case with the Bible, which invites us to think in the first instance of others rather than of ourselves (we do not need to be reminded to think of ourselves) and does not promulgate a Bill of Rights but the *Ten Commandments*, a Bill of Duties as it were. But it is also the case with all of premodern literature, classical as well as Christian, whose foremost representatives—Plato, Aristotle, Cicero, Ambrose, Augustine, and Thomas Aquinas, to mention a few—wrote treatises or dialogues on natural right in the singular, on moral virtue, on laws, or on duties. It never occurred to any of them to publish a book

¹² *Id.* at 47–48 (quoting PLATO, GORGIAS 469, 508).

¹³ See generally HADLEY ARKES, CONSTITUTIONAL ILLUSIONS AND ANCHORING TRUTHS: THE TOUCHSTONE OF THE NATURAL LAW (2010); HADLEY ARKES, FIRST THINGS: AN INQUIRY INTO THE FIRST PRINCIPLES OF MORALS AND JUSTICE (1986); JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (2d ed. 2011); MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991); RUSSELL KIRK, RIGHTS AND DUTIES: REFLECTIONS ON OUR CONSERVATIVE CONSTITUTION (Mitchell S. Muncy ed., 1997); HENRY B. VEATCH, HUMAN RIGHTS: FACT OR FANCY? (1985).

entitled, *The Rights of Man*, or to issue such documents as the *Declaration of the Rights of Man and the Citizen* or the *Universal Declaration of Human Rights*.¹⁴

Such a lengthy citation is warranted considering the salvo hurled by Fortin against the mountainous, conventional, political, philosophical, and theological wisdom on this subject. Fortin locates this “paradigm shift” in the seventeenth century, “where the equation is reversed and . . . rights become the fundamental moral phenomenon, the source rather than the result of such natural laws as will enable people to live comfortably and at peace with one another.”¹⁵ He goes on to cite Thomas Hobbes as emblematic of this modern shift. In Hobbes’s own terms:

The right of nature . . . is the liberty each man has to use his own power as he will himself for the preservation of his own nature—that is to say, of his own life—and consequently of doing anything which, in his own judgment and reason, he shall conceive to be the aptest means thereunto.¹⁶

It is not difficult to notice the straight trajectory from the 1633 Hobbesian etiolated reworking of “rights” to the 1992 *Planned Parenthood v. Casey* Supreme Court decision with its now infamous “sweet-mystery-of-life”¹⁷ assertion, “[a]t the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”¹⁸ While no one can improve on Justice Scalia’s scathing attribution, it might also be called the *Wonderland* decision, for the strange Kennedy line could well have been ripped from the pages of Lewis Carroll’s *Adventures in Wonderland*.¹⁹ It still stuns the average man of common sense that such agitprop could have migrated onto the pages of the decisions of our nation’s

¹⁴ Ernest L. Fortin, *The Natural Wrong in Natural Rights and the Problem with Communitarianism*, CRISIS, May 1994, at 20 [hereinafter Fortin, *The Natural Wrong*] (emphasis added), available at <http://www.crisismagazine.com/1994/the-natural-wrong-in-natural-rights-and-the-problem-with-communitarianism>; cf. ERNEST L. FORTIN, *Natural Law and Social Justice*, in COLLECTED ESSAYS, CLASSICAL CHRISTIANITY AND THE POLITICAL ORDER 223, 223–38 (J. Brian Benestad ed., 1996).

¹⁵ FORTIN, *The Natural Wrong*, supra note 14, at 21.

¹⁶ *Id.* (internal quotation marks omitted).

¹⁷ *Lawrence v. Texas*, 539 U.S. 558, 588 (2003) (Scalia, J., dissenting).

¹⁸ *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992).

¹⁹ LEWIS CARROLL, *ALICE’S ADVENTURES IN WONDERLAND* (Sovereign 2012) (1872).

highest Court. Few other Supreme Court decisions nullified justice for so many—ironically, all in the name of the “rights of the woman”²⁰—“modern rights.” *Casey* rivals *Dred Scott*.²¹

But Fortin is not through. He further exposes the malignancy buried deeply within high-sounding rhetoric of “modern rights”:

[T]he prototypical premodern understanding of one’s relationship to one’s fellow human beings . . . is emphatically not the understanding that informs the original modern rights approach, which denies the natural sociality of human beings and views them instead as atoms that are complete in themselves and hence not essentially dependent on others for the achievement of their perfection. Not being ordered to any pre-existing ends, these free-floating individuals are at liberty to choose their own ends, along with the means by which they may be attained. In the modern view, the just society grants to each individual as much freedom as is compatible with the freedom of every other individual. It has nothing to say about the good life and is not concerned with the promotion of virtue. Its sole function is to insure the safety of its members and provide both for their comfort and, as we now see everywhere, the satisfaction of their vanity.²²

Only upon a philosophical soil of this kind could there sprout the current controlling philosophical straightjacket of John Rawl’s *A Theory of Justice*. With his tedious and rigid censures of “comprehensive world views,” he simply attempts to root ever more deeply the original misconception of justice and rights born in the seventeenth century.²³ Ultimately, however, this postponement of the definitive discussion of man’s nature and true justice frays society. For whether it is one group of men clinging to their cherished “comprehensive world views” or simply the disordered liberties of one man vying against another, the ironic result will be the same Hobbesian war of “all against all”²⁴—prevention of which launched the whole modern enterprise in the first place.

²⁰ *Casey*, 505 U.S. at 845.

²¹ See generally *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), superseded by constitutional amendment, U.S. CONST. amend. XIV.

²² Fortin, *The Natural Wrong*, *supra* note 14, at 23.

²³ See JOHN RAWLS, *THEORY OF JUSTICE* 10 (rev. ed. 2003).

²⁴ THOMAS HOBBS, *ON THE CITIZEN* 30 (Richard Tuck & Michael Silverthorne eds. & trans., Cambridge Univ. Press 1998) (1647).

Anytime Aquinas speaks of the natural virtues which perfect the human person and contribute to the flourishing of society, he never hesitates to rank justice in the highest place. None of the moral virtues can compete with the high status of justice. Aquinas writes, "A thing is more eminently good the more fully and widely it radiates its goodness."²⁵ Justice does just that, for it is always positioned toward the good of the other. It is justice's very essence to be concerned with that which concerns another's good: "[M]en are ordained to one another by outward acts, whereby men live in communion with one another."²⁶ Pieper elaborates:

The as it were concrete efficacy of good is revealed in a higher manner in justice. For it is in the nature of good to be "*diffusivum sui*," not to be limited to its place of origin but to pour itself out, to work outside itself, to be shared with others, to shine forth.²⁷

Without hesitancy Aquinas writes, "The good of reason shines more brightly in justice than in any of the other moral virtues; justice is closer to reason. Indeed, the good of reason consists in justice as its proper effect . . ."²⁸ Some might think that his remark on the perversion of the human good might be overreaching, but it is consistent with his doctrine on justice's essence: "The worst disruption of order in the field of things naturally human, that is, the true perversion of 'human good,' bears the name 'injustice.'"²⁹

With typical penetration, Aquinas articulates the reason for the superiority of justice amongst all the cardinal virtues, and the manner in which intrinsic necessity orders the cardinal virtues to justice. While temperance and fortitude do not "do the good"—by restraining desire, anger, or fear—*they are not*

²⁵ PIEPER, *supra* note 5, at 65 (quoting ST. THOMAS AQUINAS, *SUMMA CONTRA GENTILES* bk. III, ch. 24).

²⁶ ST. THOMAS AQUINAS, *SUMMA THEOLOGIAE*, pt. I-II, Q. 100, art. 2, at 1038 (Fathers of the English Dominican Province trans., Benziger Bros. 1947) (1266-1273) [hereinafter *SUMMA THEOLOGIAE*].

²⁷ PIEPER, *supra* note 5, at 65.

²⁸ *Id.* at 66-67 (footnote omitted) (quoting ST. THOMAS AQUINAS, *SUMMA THEOLOGIAE*, pt. I-II, Q. 66, art. 4, pt. II-II, Q. 124, art. 1).

²⁹ *Id.* at 68.

properly the realization of the good. However, they do execute the role of creating the basis—indeed, the indispensable basis—for the proper execution of the good.³⁰

This foundational truth is verified in the history of monasticism when Pachomius' theological writing gradually replaced the Anchorite excesses of the Desert Fathers,³¹ eventually relocating monks into communal life rather than desert isolation.³² Then, Cassian's moderating *Institutes* permanently cemented the coenobitic monastic existence.³³ Of course, this trend reached its climax in the Rule of St. Benedict.³⁴ Cassian remarks that the monk is more perfected by the opportunities for charity—and justice—presented by a monastic community than by the rigorous demands of personal asceticism practiced by an eremitical monasticism.³⁵ Pieper avers:

Thorough confirmation and corroboration of this surprising statement comes from the experience of the great ascetics. Their experience indicates that the real testing of, as well as the most serious threat to, the inner man, begins only after that basis [in the virtues of temperance and fortitude] has been established.³⁶

Any classical treatment of justice necessarily includes a detailed discussion of the three parts that constitute its essence: commutative justice, distributive justice, and general legal justice. A brief examination of commutative justice is pertinent here. Commutative justice is that part of justice whereby there occurs an equal exchange between two persons—that is, where the “individual is just who gives the other person, the unrelated individual, the stranger, what is his due [*debitum*]*—neither less nor more.*”³⁷

³⁰ See *SUMMA THEOLOGIAE*, *supra* note 26, pt. II-II, Q. 58, art. 6-12, at 1438-43.

³¹ MARILYN DUNN, *THE EMERGENCE OF MONASTICISM: FROM THE DESERT FATHERS TO THE EARLY MIDDLE AGES* 16-17 (2003).

³² *Id.* at 25-33.

³³ Philip S. Moore, BOOK REVIEW, 26 *SPECULUM* 497, 497 (1951) (reviewing OWEN CHADWICK, *JOHN CASSIAN: A STUDY IN PRIMITIVE MONASTICISM* (1950)).

³⁴ *Id.* at 497-98.

³⁵ Cf. LOUIS BOUYER, *INTRODUCTION TO SPIRITUALITY* 208 (Collegeville 1961).

³⁶ PIEPER, *supra* note 5, at 67-68.

³⁷ *Id.* at 76.

Pieper intentionally uses the term “stranger.” The unrelatedness of the individuals is critical to grasping the nature of commutative justice.³⁸ In fact, the quality of the “stranger,” or the absence of relation between the individuals to the exchange, rests at the heart of justice. The conspicuous minimalism is necessary because in justice all that ought to be considered is the external act or “good” that is owed to the human person, whether a product, a service, a recompense, or a debt. Over this external exchange, no other consideration is relevant—as it is in love—lest the exchange be obscured or distorted. Thus, justice insures that when the relation of love is absent, the debt to the “other” is still acknowledged and executed. In fact, in light of this acknowledgment, it becomes clear how difficult the administration of justice is between those bound by ties of love. Moreover, strict cognizance of this crucial aspect of justice is embodied in art, namely, Lady Justice appearing blindfolded. She is indifferent to anything but the lineaments of external acts. The formula that justice is “no respecter of persons” conveys the same sense.³⁹

Before taking up the notion of distributive justice, it is important to address a concern regarding the seeming insensitivity of commutative justice, all the more apparent in light of the greater latitude and richness of distributive justice. To the objection regarding the paucity of commutative justice, Pieper replies:

However true it may be that man’s communal life cannot attain its fullest realization through [commutative justice] alone, it is no less true that in its ideal image the irreducible core of social relations finds expression, that is the foundation which even the higher and richer forms of mutual agreement require.⁴⁰

What is the “higher and richer” form of justice to which Dr. Pieper refers? It is distributive justice, and it is indeed “higher and richer” because it involves guardianship over the bounty of

³⁸ See *id.* at 77.

³⁹ MANUEL P. ARRIAGA, *THE MODERNIST-POSTMODERNIST QUARREL ON PHILOSOPHY AND JUSTICE: A POSSIBLE LEVINASIAN MEDIATION* 133 (2006). An objection might be raised that courts of law often take into consideration circumstances that extend beyond the skeletal, external act. But the administration of justice is an exercise of *distributive* justice, where the state, represented by the judge, administers or “distributes” the bounty of the common good. This function allows considerations beyond the bare external act.

⁴⁰ PIEPER, *supra* note 5, at 78.

the common good. Aquinas teaches that "in distributive justice something is given to a private individual, in so far as what belongs to the whole is due to the part."⁴¹ Distributive justice guards and ensures the right order in the relation between those who "have power" and those who are entrusted or delivered to that power. Here, the individual is confronted by the "social whole," where the two partners are not of equal rank because the common weal belongs to another and higher order than the good of the individual. Yet, the individual in the relation of distributive justice is a "partner" with a claim in the relationship; he is the one to whom something is "due," and the "social whole" is the partner bound by an obligation, even though the social whole ranks higher than the individual.

For example, in his relation to the state, the individual's right to life and health is not so exclusively his that the state might not require it and curtail it in the interest of the common good. Against an individual, one may, in an emergency, defend one's life, health, or property to the extent of killing the aggressor. On the other hand, public authority can legitimately deprive an individual of his freedom not only when he has committed a crime, but also when it happens that, through no fault of his own, he has fallen victim to a contagious disease that would endanger the social whole. For that matter, the administrator of the common good can even make decrees affecting the individual's property under certain conditions.

Before looking more closely at the nature of the "common good," it would be well to examine a certain antinomian objection which chafes at the Thomistic construal regarding the superiority of the common good and the state administering it. In actuality, St. Thomas supplies a uniquely supple and nuanced analysis of the relationship between the individual and common good. The common good and its "distributors" are clearly of a higher status because the whole is greater than the part, and the part simply cannot exist—or be itself—without the whole.⁴² Moreover, while superiority of the common good is manifestly evident, it is equally evident that the common good and its guardians are in a natural position to *serve* the individual with the richness of the goods that, in a certain sense, *belong* to the

⁴¹ *SUMMA THEOLOGIAE*, *supra* note 26, pt. II-II, Q. 61, art. 2, at 1452.

⁴² *See id.* pt. II-II, Q. 64, art. 2, at 1467.

individual. Thus, St. Thomas writes, “The act of distributing the goods of the community, belongs to none but those who exercise authority over the goods; and yet distributive justice is also *in the subjects* to whom those goods are distributed in so far as they are contented by a just distribution.”⁴³ Pieper comments on this illuminating passage: “It is part of the act of justice to give one’s conscious consent to the just and equitable decrees of a political authority acting in the interest of the common good Through his act of consenting, *the ‘subject’ takes part in the ruler’s justice.*”⁴⁴

Hence, on Thomas’ account, a fruitful tension is established, which preserves the dignity and freedom of the individual while simultaneously guarding the sovereignty of the state as the custodian and guarantor of the common good. Aquinas expertly navigates the Scylla of modernity’s individualism and the Charybdis of totalitarian collectivism.

What of the common good? To the modern ear this term is anachronistic and alien. Under the weight of the Lockean “rights” reformulation,⁴⁵ the classical notion of the common good has been slowly crushed. The individual undergoes a kind of apotheosis, so that not only does he live solely for his self-interest, but he no longer requires the *communio personarum*. Other persons, in the modern scheme, are considered only as obstacles to self-interest, or as vehicles to self-interest—consider the individual’s compact with the state. As Pierre Manent expresses it in unadorned starkness which only serves to swell the Lockean reformulation’s danger:

Perhaps we have to say that the revolution of the rights of man has succeeded beyond its founders’ expectations. We have ended up really becoming individuals constituted by our relationship to our selves, as was true of the individuals of the state of nature, and we no longer know how to attach ourselves to anything common.⁴⁶

⁴³ *Id.* pt. II-II, Q. 61, art. 1, at 1452 (emphasis added).

⁴⁴ PIEPER, *supra* note 5, at 95 (emphasis added).

⁴⁵ Mark L. Jones, *Fundamental Dimensions of Law and Legal Education: An Historical Framework—A History of U.S. Legal Education Phase I: From the Founding of the Republic Until the 1860s*, 39 J. MARSHALL L. REV. 1041, 1146–47 (2006).

⁴⁶ Pierre Manent, *The Greatness and Misery of Liberalism*, 52 MODERN AGE 176, 180 (2010).

Nothing is considered “common” in the classical sense, except the minimal commodities conducive to the fulfillment of self-interest. From Aristotle to Aquinas, the common good was construed far more broadly; thus, Aquinas: “The perfection of the human community demands that there be men who dedicate themselves to a life of contemplation, a tenet which signifies that the society of men relies for its functioning on a knowledge of the truth”⁴⁷

Since the common good embraces not only material necessities but the spiritual goods of truth, beauty, virtue, and religion, the state and its citizens share a common *telos*. Though each freely pursues his own *finis operantis*—the end of the agent—this *telos* is always ordered to the *finis operis*—the end of the person—which the state alone distributes. St. Augustine teaches that this produces a deep comity resulting from a shared “love.”⁴⁸ It is that shared “love” that designs laws and adjudicates them. On the other hand, St. Augustine teaches that dissipation of the notion of the “common good” results in the perpetual antagonisms of a city divided against itself. The American Founding Fathers fully appreciated this liability in their new republican experiment. They recognized that they were erecting a neutral vessel which would accommodate self-interests pursued freely. Though this arrangement was daring and ultimately impressively fruitful, it suffered a deep internal incoherence. With nothing more than a procedural perfection, what comes of coherence that the common good supplies? It was at this juncture that they assumed that religion would always furnish that coherence which the state could not. Thus, they invested religion with special status through the safeguards of the First Amendment.⁴⁹ Pieper summarizes nicely:

⁴⁷ PIEPER, *supra* note 5, at 97–98 (footnote omitted) (citing St. Thomas Aquinas 4 d. 26, 1, 2).

⁴⁸ See ST. AUGUSTINE, *THE CITY OF GOD AGAINST THE PAGANS* 231–32 (R.W. Dyson ed. & trans., Cambridge Univ. Press 1998) (426).

⁴⁹ See PHILIP HAMBURGER, *SEPARATION OF CHURCH AND STATE* 1–5 (2002); MICHAEL NOVAK, *ON TWO WINGS: HUMBLE FAITH AND COMMON SENSE AT THE AMERICAN FOUNDING* 78 (2003) (“Their most powerful motive for the Bill of Rights was not just suspicion of central authority, but above all piety toward those religions for which the ultimate liberty of each individual is the indispensable precondition.”); MARVIN OLASKY, *FIGHTING FOR LIBERTY AND VIRTUE: POLITICAL AND CULTURAL WARS IN EIGHTEENTH-CENTURY AMERICA 172–75* (Regnery Publishing 1996). *But see* STEVEN WALDMAN, *FOUNDING FAITH: PROVIDENCE, POLITICS, AND THE BIRTH OF RELIGIOUS FREEDOM IN AMERICA* 157 (2008) (“The brutal reality is that we cannot

Taking part in the realization of that good in accordance with the measure of *dignitas*, capacity, and ability that is distinctively his, this is the share which "is due to" the individual and which cannot be withheld from him by the person administering the *bonum commune* without violating [distributive justice], the justice proper to rulers. This suggests a much wider reference, namely, that all the good things bestowed in creation (men's capacities and abilities) belong to the "good of the community," and that [distributive justice] entails the obligation of granting such abilities the protection, support, and fostering they need.⁵⁰

All this sophisticated metaphysical analysis notwithstanding, the Christian can never forget that as heroically as man tries, true and lasting justice will always elude us in this passing world. Yet this reality does not exempt us from our best attempts to understand and implement it. But, in the final analysis, our efforts will disappoint us. In the words of Luke: "Doth he thank that servant, for doing the things which he commanded him? I think not. So you also, when you shall have done all these things that are commanded you, say: We are *unprofitable servants*; we have done that which we ought to do."⁵¹ Man's thirst for justice will only be fully sated in God's judgments. Romano Guardini gives a bracing voice to this sobering recognition:

Only by God will true and complete justice be established, and only through His judgment. We should try to let the revelation that this judgment will be passed upon all mankind affect us deeply. The first thing that everyone who thinks of the judgment should say to himself is, "Judgment will be passed upon me!" But there will also be a judgment upon all the human institutions and powers about which we are so likely to feel that they are sovereign and subject to no examination: the state, civilization, history.

The judgment must be taken into account in all being and action. It is God's verdict upon every finite reality. Without it everything is half balanced in space. Only God determines it.

necessarily determine their views on the separation of church and state on the local level from their attitude about the First Amendment.".)

⁵⁰ PIEPER, *supra* note 5, at 99.

⁵¹ *Luke* 17:9-10 (Douay-Rheims).

He it is who sees through all, fearing nothing, bound by nothing, just in eternal truth. If a man does not believe in Him, his hunger and thirst shall never be satisfied.⁵²

Aristotle will never cease to raise eyebrows when he writes, famously, in Book Eight of the *Nicomachean Ethics*, "Where, moreover, friendship exists, there we stand in no need of justice."⁵³ Similarly, Aquinas seems to intrude upon the natural order when he writes, "To be willing to watch over peace and harmony among men through the commandments of justice is not enough when charity has not taken firm root among them."⁵⁴ St. Augustine is even more forceful in the *City of God* when he writes, apodictically, that for all Rome's "virtue," Roman rule was "a fraud" because it lacked the grace of charity.⁵⁵

What of this? Is the state incomplete, indeed, a failure where love is not practiced? Not exactly. Both pagan and Christian writers recognize that man operates in two distinct orders: the natural order—the state—and the order of personal perfection—virtue or religion. In love, the beloved is not perceived as "other" or "stranger," but rather one with oneself. St. Thomas is quite instructive: "[T]o equate *caritas* with mere well-wishing, *benevolentia*, is to define it inadequately . . . the missing element [is] the '*unio affectus*,' volition directed toward the other person, the wish to be with him, to be united with him, in fact to identify with him."⁵⁶

So the Old Testament dictum, "love thy neighbor as thyself."⁵⁷ Love never measures what should be allotted to the beloved, as one does not measure how one loves the self. Love is characterized by its excess. If the beloved is given only what is his due and nothing more, nothing less, love disappears, and rightly so.

⁵² ROMANO GUARDINI, *THE VIRTUES: ON FORMS OF MORAL LIFE* 43–44 (Stella Lange trans., 1967).

⁵³ ARISTOTLE, *THE NICOMACHEAN ETHICS OF ARISTOTLE* 218 (Robert Williams trans., London, Longmans, Green, & Co. 1876).

⁵⁴ PIEPER, *supra* note 5, at 112–13 (quoting ST. THOMAS AQUINAS, *SUMMA CONTRA GENTILES* bk. III, ch. 130).

⁵⁵ ST. AUGUSTINE, *supra* note 48, at 216–18.

⁵⁶ JOSEF PIEPER, *FAITH, HOPE, LOVE* 195–97 (Richard Winston & Clara Winston trans., Ignatius Press 1997) (1972) (footnote omitted) (quoting St. Thomas Aquinas).

⁵⁷ *Leviticus* 19:18 (21st Century King James Version).

But justice cannot operate with such prodigality. Such indiscriminateness would signal its demise. As Aquinas never tires of teaching, justice rules in the territory of external acts, where precise measurements are taken and assessed with proper deserts ensuing.⁵⁸ It is the very form of justice to look no further than those acts, where that is all that the lover does. Otherwise, justice is not served, and the social whole undergoes irreparable injury.

Of course, the state retains the prerogative of dispensing mercy, a certain species of love, where consideration is bequeathed to the individual far beyond the imperatives of the external act. To this application of mercy on the part of the state, Aquinas writes, “[J]ustice without mercy is cruelty.”⁵⁹ Man does not discount his humanity when he acts, even in the blind operations of justice. As human, he should temper the strict sentences of justice with the balm of love. Ignoring this is to ignore his humanity, which itself is a betrayal of justice—not permitting all the parts which constitute the person to realize themselves in the execution of acts.

Withal, Aquinas wastes no time to quickly constrain us with the correlative, “mercy without justice is the mother of dissolution.”⁶⁰ In this passage, we are thrust squarely into the world of reality, where all men must operate along with their prized virtues. The very beauty of mercy rests upon the reality of the acts for which the violator of justice is responsible. The stark relief of justice’s deformity as compared to mercy’s purity is of the very essence of mercy’s application. Pretending the deformity does not exist, or naively slighting its ugliness, is a mockery of both reality and mercy. No, reality must be honored, and justice must look to nothing but reality. Justice is gravely miscarried when sentimentality rides roughshod over truth. When actions do not receive what they deserve, an appalling injustice results for others. For, while individuals are called to forgive, the

⁵⁸ *SUMMA THEOLOGIAE*, *supra* note 26, pt. II-II, Q. 61, art. 2, at 1452–53.

⁵⁹ ST. THOMAS AQUINAS, *CATENA AUREA: COMMENTARY ON THE FOUR GOSPELS COLLECTED OUT OF THE WORKS OF THE FATHERS*, VOL. 1. ST. MATTHEW 152 (John Henry Newman ed. & trans., St. Austin Press 1997) (1841).

⁶⁰ PIEPER, *supra* note 5, at 112 (quoting ST. THOMAS AQUINAS, *CATENA AUREA: COMMENTARY ON THE FOUR GOSPELS* 5, 2 (St. Austin Press 1997)).

administrators of justice cannot. Theirs is the noble and grave task to uphold the common good, with one of its highest glories being justice.

It should not escape our attention that this serious obligation to the common good is acknowledged by Christ when he declares, "Render therefore to Caesar the things that are Caesar's; and to God, the things that are God's."⁶¹ The same tribute to the common good is unmistakable in the scene of the Passion, when the Good Thief reproves the other with the words, "Neither dost thou fear God, seeing thou art condemned under the same condemnation? And we indeed justly, for we receive the due reward of our deeds; but this man hath done no evil."⁶²

Apart from the severe visage of justice, it must not be thought that love lacks some of those severe features itself. Love possesses a fierceness all its own. Hugh of St. Victor speaks about the violence of love, no doubt drawing directly from the Gospels when Christ declares, "And from the days of John the Baptist until now, the kingdom of heaven suffereth violence, and the violent bear it away."⁶³ Likely, the action of Christ in the Temple contributes to this understanding,

And Jesus went into the temple of God, and cast out all them that sold and bought in the temple, and overthrew the tables of the money changers, and the chairs of them that sold doves: And he saith to them: It is written, My house shall be called the house of prayer; but you have made it a den of thieves.⁶⁴

Or, perhaps, it arises from St. Matthew: "Do not think that I came to send peace upon earth: I came not to send peace, but the sword."⁶⁵ These episodes serve as a corrective to what Cardinal Newman called "the brighter side of the Gospel."⁶⁶

Love always seeks the good of the other and that true good often contrasts with the present condition of the beloved. If that love is to be desired, then the lover must desire the beloved to change. Love demands conformity of the beloved to goodness. When man loves, it is the goodness of the beloved that attracts.

⁶¹ *Matthew* 22:21 (Douay-Rheims).

⁶² *Luke* 23:40-41.

⁶³ *Matthew* 11:12. *But see* PIERRE ROUSSELOT, *THE PROBLEM OF LOVE IN THE MIDDLE AGES* 170 n.96 (Alan Vincelette trans., Marquette Univ. Press 2001).

⁶⁴ *Matthew* 21:12-13.

⁶⁵ *Matthew* 10:34.

⁶⁶ JOHN HENRY NEWMAN, *PAROCHIAL AND PLAIN SERMONS* 199 (Ignatius Press 1997) (1891).

This is at the very heart of the metaphysics of love: "Assuming the impossible case that God were not really a good for man, there would be no reason for man to love."⁶⁷ This selfsame goodness wished for the beloved is confirmed by Aristotle: "To love means to wish another everything we think good, and moreover for the other's sake, not for our own."⁶⁸

Herein love gains its proper stature and majesty. The contemporary caricatures of love, with their reductive carnality, are exposed in their stark deformity when measured against this classical expression. St. Augustine underscores this ancient understanding when he writes, "Love reprimands, ill will echoes."⁶⁹ It is the impulse of love to make high demands of the beloved. C.S. Lewis neatly concludes such a discussion. With all due deference to the great metaphysicians of the ages, C.S. Lewis enjoys the uncanny ability to penetrate the deepest human mysteries and express them with the plainest eloquence. In this passage from the *Problem of Pain*, he addresses the dilemma of the seeming impossibility of God's commandments for man's happiness, but analogously he addresses the general nature of love as "violent," demanding from the beloved that which is good for him, necessitating a painful change for the more perfect:

Love is something more stern and splendid than mere kindness: that even the love between the sexes is, as in Dante, 'a lord of terrible aspect.' . . . Kindness, merely as such, cares not whether its object becomes good or bad, provided only that it escapes suffering. As Scripture points out, it is bastards who are spoiled: the legitimate sons, who are to carry on the family tradition, are punished. It is for people whom we care nothing about that we demand happiness on any terms: with our friends, our lovers, our children, we are exacting and would rather see them suffer much than be happy in contemptible and estranging modes. If God is Love, He is, by definition, something more than mere kindness. . . . He has paid us the intolerable compliment of loving us, in the deepest, most tragic, most inexorable sense.

. . . .

⁶⁷ PIEPER, *supra* note 56, at 221 (quoting ST. THOMAS AQUINAS, *SUMMA THEOLOGIAE*, pt. II-II, Q. 26, art. 13, at 1305).

⁶⁸ *Id.* at 195 (quoting *THE RHETORIC OF ARISTOTLE*, Vol. II, 4; 80 b (John Edwin Sandys ed., Arno Press 1973)).

⁶⁹ *Id.* at 187 (quoting ST. AUGUSTINE, *IN EPISTOLAM JOHANNES AD PARTHOS* 7, 8; PL 35:2033).

We are, not metaphorically but in very truth, a Divine work of art, something that God is making, and therefore something with which He will not be satisfied until it has a certain character. Here again we come up against what I have called the 'intolerable compliment.' . . . [I]t is natural for us to wish that God had designed for us a less glorious and less arduous destiny; but then we are wishing not for more love but for less.⁷⁰

Lewis continues to elaborate upon the mystery of the logic of love as high demand:

Love, in its own nature, demands the perfecting of the beloved; that the mere 'kindness' which tolerates anything except suffering in its object is, in that respect, at the opposite pole from Love. When we fall in love with a woman, do we cease to care whether she is clean or dirty, fair or foul? Do we not rather then first begin to care? Does any woman regard it as a sign of love in a man that he neither knows nor cares how she is looking? Love may, indeed, love the beloved when her beauty is lost: but not because it is lost. Love may forgive all infirmities and love still in spite of them: but Love cannot cease to will their removal. . . . Of all powers he forgives most, but he condones least: he is pleased with little, but demands all.⁷¹

He returns to the subject of love of God with an accuracy and directness that is arresting:

You asked for a loving God: you have one. The great spirit you so lightly invoked, the 'lord of terrible aspect,' is present: not a senile benevolence that drowsily wishes you to be happy in your own way, not the cold philanthropy of a conscientious magistrate, nor the care of a host who feels responsible for the comfort of his guests, but the consuming fire Himself, the Love that made the worlds, persistent as the artist's love for his work and despotic as a man's love for a dog, provident and venerable as a father's love for a child, jealous, inexorable, exacting as love between the sexes. . . . When we want to be something other than the thing God wants us to be, we must be wanting what, in fact, will not make us happy. Those Divine demands which sound to our natural ears most like those of a despot and least like those of a lover, in fact marshal us where we should want to go if we knew what we wanted. He demands our worship, our obedience, our prostration. . . . God wills our good, and our good is to love Him (with that responsive love proper to creatures)

⁷⁰ C. S. LEWIS, *THE PROBLEM OF PAIN* 32–35 (Harper Collins 2001) (1944).

⁷¹ *Id.* at 38–39.

and to love Him we must know Him: and if we know Him, we shall in fact fall on our faces. If we do not, that only shows that what we are trying to love is not yet God Yet the call is not only to prostration and awe; it is to a reflection of the Divine life, a creaturely participation in the Divine attributes which is far beyond our present desires. We are bidden to 'put on Christ,' to become like God. That is, whether we like it or not, God intends to give us what we need, not what we now think we want. Once more, we are embarrassed by the intolerable compliment, by too much love, not too little.⁷²

To borrow from Mr. Lewis, justice and love are both "of terrible aspect." Of course, he draws upon the original Latin sense of *terribilis*—awe-inspiring, spellbinding.⁷³ Justice and love must always be for man—"terrible." But they will only retain this quality by man's always letting them be what they are—in their truest nature. Only then can each in its turn elevate man—and even allow him to touch the face of God.

⁷² *Id.* at 39, 46–47.

⁷³ *Terrible*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/terrible> (last visited Feb. 25, 2013).