

Another look at Aquinas's Objections to Capital Punishment

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Abstract

According to Thomas Aquinas, a sovereign government may legitimately execute sinners in pursuance of the common good. Aquinas outlines his defence of Capital Punishment ('CP') in the *Summa Theologica* ('ST') 2–2, q.64, a.2 and the *Summa Contra Gentiles* ('SCG'), Book 3, Chapter 146. Aquinas's stance on this issue is well known and his argument in favour of CP has been extensively discussed. This article will focus instead on the objections Aquinas raises to the institution of CP in the *ST* and *SCG*, along with his responses to these objections. After providing a brief sketch of Aquinas's account of legal punishment, Aquinas's argument for the legitimacy of CP will then be outlined. The objections which Aquinas raises to CP will then be individually examined, along with his reply to each. After examining the underpinnings of Aquinas's objections and responses, the outline of a critique will be offered which draws upon the thought of Augustine and Karl Barth.

Keywords

Capital Punishment, Aquinas, Barth, Justice, Common good

1. Introduction: Aquinas on crime and punishment

i. Divine and Natural orders

Aquinas's account of crime and punishment must be situated within his metaphysics; specifically, his understanding of the relationship between the divine and natural orders. Along with the civil order of the political state, these orders constitute the world in which human beings live and act. For Aquinas, the world in its entirety is governed by divine order, from which issues the eternal law.¹ The natural order is the eternal

¹ Thomas Aquinas, *Summa Theologica* ('ST'), trans. Fathers of the English Dominican Province, ed. Kevin Knight (<http://www.newadvent.org/summa/>), 1–2, q.93

law as it applies to human beings by virtue of the sort of creatures they are – namely, rational animals.² From this order comes the natural law. To transgress the natural law is therefore also to transgress the eternal law. From this, it follows that crimes (insofar as they violate the natural order) are also sins, being contrary to the eternal law. Aquinas's starting point, however, for thinking about the nature and justification of punishment is the natural order, which can be discerned from the nature of human beings.

The normative grounding of civil punishment lies in the human inclination to instinctively repress that which 'rises up' and poses a threat.³ This instinctive opposition, which Aquinas elsewhere terms natural hatred (*odium naturale*),⁴ is common to everything in the natural world. Aquinas exemplifies this by reference to hot water freezing more rapidly than it otherwise would in response to the oppositional force of heat⁵ and the reaction of a sheep in response to the external threat of a wolf.⁶ This predisposition has 'passed from natural things to human affairs.'⁷ Consequently, those within a community naturally harbour a general and universal hatred against those who commit crimes and sin. In his article in the *ST* on Hatred, Aquinas cites with approval Aristotle's judgment that 'everybody hates the thief and the backbiter.'⁸ For human beings to repress that which threatens them by way of punishment thus follows from the natural order. Due to their possession of rational intellects, human beings differ from other animals in being able to apprehend this reaction as good. Unlike some contemporary accounts of punishment, for Aquinas this institution is not simply a descriptive element of how human beings have opted (by choice or necessity) to make their socio-political arrangements; rather, punishment can be understood as resulting from the natural and correct functioning of human animals.

ii. The Civil order: Law, Justice and the Common Good

While the inclination to repress threats is common to all natural things, the inclination of human beings to live in an ordered community is unique to them. In this, Aquinas follows Aristotle in defining human beings as 'social and civic animals.'⁹ Human beings are not disposed

² *Ibid.*, 1–2, q.91, a.2

³ *Ibid.*, 1–2, q.87, a.1; a.1; 1–2, q.46, a.1; 2–2, q.108, a.2

⁴ *Ibid.*, 1–2, q.29, a.1

⁵ *Ibid.*, 1–2, q.87, a.1

⁶ *Ibid.*, 1–2, q.29, a.6

⁷ *Ibid.*, 1–2, q.87, a.1

⁸ *Ibid.*, 1–2, q.29, a.6

⁹ *Ibid.*, 1–2, q.72, a.4

to live solitary lives, but rather to live socially, in community with others. It is in this communal living, therefore, that individuals are able to actualise their fullest potential as human beings. For this reason, Aquinas holds that even if mankind had remained in paradise rather than falling into sin, human government would still have existed.¹⁰ The social life which is natural to human beings necessitates an agreed set of rules and norms. Only through such rules and norms can human community be maintained.

Following Aristotle, Aquinas argues that the city (*civitas*) is the 'perfect community' because 'in it should be found everything sufficient for human life.'¹¹ This includes not only the material necessities of human existence such as food and shelter, but also the conditions necessary for moral flourishing. Central to Aquinas's social, political and legal picture here is his conception of the common good of the political state (hereafter 'the Common Good').¹² As Jean Porter argues, for Aquinas the Common Good is construed as pertaining when the community as a whole 'is functioning in good order, in such a way as to express and foster an appropriate expression of a distinctively human form of social life.'¹³ Porter and others have highlighted that for Aquinas, the importance of the Common Good fundamentally lies in conduciveness to the virtue of a community's members, virtuosity being constitutive of a distinctly human form of social living.¹⁴ It is this dimension of the *civitas* which provides the primary *telos* of human law. The primary function of the law, on Aquinas's conception, is as a norm of reason which leads those within the *civitas* to greater virtue (*virtus*).¹⁵ The cultivation of virtue for Aquinas requires discipline (*disciplina*), which is first provided by one's parents and social customs. However, Aquinas notes that for some within the community, this discipline is insufficient. Consequently, the punitive law is also needed to provide an additional source of discipline in order to ensure that the Common Good of the city is not undermined:

¹⁰ Ibid, 1, q.96 a.4

¹¹ Ibid, 1–2, q.90, a.2

¹² For further discussion on Aquinas's conception of the Common Good, see John Goyette, 'On the Transcendence of the Political Common Good: Aquinas versus the New Natural Law Theory' *The National Catholic Bioethics Quarterly* 13.1 (2013):133–156; Mary M. Keys, *Aquinas, Aristotle, and the Promise of the Common Good* (Cambridge University Press, 2006); John Finnis, *Aquinas: Moral, Political and Legal Theory* (Oxford University Press 1998), p. 279–84; Peter Karl Koritansky, *Thomas Aquinas and the Philosophy of Punishment* (Catholic University of America Press, 2012), p.86–98

¹³ Jean Porter, *Ministers of the Law: A Natural Law Theory of Legal Authority* (William B. Eerdmans Publishing, 2010), p.156.

¹⁴ See Jean Porter, 'The Common Good in Thomas Aquinas', *In Search of the Common Good*, ed. Patrick Miller and Dennis P. McCann (Continuum International, 2005), p.94 – 121; Charles P. Nemeth, *Aquinas in the Courtroom: Lawyers, Judges, and Judicial Conduct* (Praeger, 2001), p.103–115

¹⁵ *ST* 1–2, q.95, a.4

because some are found to be depraved, and prone to vice, and not easily moved by words, it was necessary that they be restrained from evil by force and fear, in order that at least they might desist from doing evil, and grant others a quiet life, and that they themselves, by being habituated in this way, might be led to do willingly what before they did from fear, and thus become virtuous.¹⁶

In addition to this rehabilitative or medicinal purpose of restraining those who would otherwise be disposed to acts of vice and helping to habituate them in virtue, a central purpose of the law for Aquinas is to further justice by rectifying the balance of fairness disrupted by the criminal's deviant acts. Aquinas defines justice as 'the habit [*habitus*] by which someone renders to each his due (*jus*) with a constant and perpetual will.'¹⁷ Further to this, 'general' or 'legal justice' requires that a person's actions be orientated towards the Common Good, as parts are ordered towards the good of the whole.¹⁸ By failing in this regard, the criminal causes a disruption in the 'equality of justice', which is the balance which pertains when each member of the community gives to the other what is due to them through their wills. As the disruption was caused by the criminal's deviant will, the punishment which the law demands must be contrary to this will in order for the equity of justice to be restored.¹⁹ By functioning as such, human law orientates itself towards the Common Good, from which it derives its purpose and legitimacy.²⁰ The Common Good is also the proper object, for Aquinas, of legal justice.²¹ This being the case, only those who are at fault (*culpa*) can be punished; if this is not the case, then the act will not be punishment but aggression, as there will be no imbalance of justice to rectify.²²

On the question of who may legitimately carry out punishment, Aquinas is clear: only public authorities, who *qua* public authorities act in pursuance of the Common Good, may do so. According to Aquinas, 'the intention of every lawgiver is directed first and chiefly to the common good.'²³ Aquinas compares the wills of public authorities, individuals and God. The will of an agent acts after its reason 'proposes' that which is best from amongst the options apprehended by the intellect.²⁴ The difference between the goods that individuals, public authorities and God pursue stems from their differences in apprehension: an

¹⁶ *Ibid.*, 1–2, q. 95, a. 1

¹⁷ *Ibid.*, 2–2, q. 58, a. 1

¹⁸ *Ibid.*

¹⁹ *Ibid.*, 2–2, q. 108, a. 4

²⁰ *Ibid.*, 1–2, q. 90, a. 1–2

²¹ *Ibid.*, 2–2, q. 58, a. 6

²² *Ibid.*, 2–2, q. 104, a. 4

²³ *Ibid.*, 1–2, q. 100, a. 8

²⁴ *Ibid.*, 1–2, q. 19, a. 10

individual apprehends her own good and so wills what is best for that; public authorities apprehend the Common Good of the community and so will this good; God has regard to the good of the entire universe and so wills the most common good possible. Aquinas draws upon the specific example of a thief sentenced to death by a public judge. While a family member of the criminal may will that the criminal be spared his sentence because of an apprehension of the individual good of her relative's life, the judge apprehends the wellbeing of the whole community and so wills accordingly that the thief be put to death.²⁵ For this reason, legal punishment can only be carried out by public authorities, as these persons naturally pursue the Common Good as individuals naturally pursue their own.

Since, moreover, the role of public authorities arises from the natural human inclination to live in a political community, public authorities ultimately derive their authority to punish wrongdoers from the eternal law. In his *Commentary* on the second volume of Peter Lombard's *Sentences* (Distinction 44), Aquinas distinguishes between the origin, mode and use of political sovereignty. Although the origins or means (use) of a particular public authority may be evil, the form or mode of all public authorities is nevertheless good, being the result of humanity's natural disposition to live together in an ordered community. As such, Aquinas argues, all human sovereignty is from God.²⁶ As Aquinas remarks in the *SCG* therefore, in dispensing punishment on those who are at fault public authorities may be viewed as "executors of divine providence."²⁷ Punishment as an institution in Aquinas can therefore be traced to natural human inclinations, primary among which are the need to repress threats and the disposition to live in community with others. The primary importance of the wider political community for human beings means that only public authorities, whose role it is to act out of legal justice – i.e. on behalf of the Common Good – are the legitimate dispensers of punishment.

2. Aquinas's argument for the legitimacy of Capital Punishment

Aquinas defends the legitimacy of Capital Punishment ('CP') in the *Summa Theologica* ('ST') 2–2, Question 64, Article 2 (entitled 'Is it lawful to kill a sinner?'), and the *Summa Contra Gentiles* ('SCG'), Book 3, Chapter 146. Aquinas justifies the execution of sinners/criminals on

²⁵ Ibid

²⁶ Thomas Aquinas, *Commentary on the Second Book of the Sentences of Master Peter Lombard*, Distinction 44, Article 2 (<http://dhspriority.org/thomas/Sent2d44q2a2.htm>).

²⁷ Thomas Aquinas, *Summa Contra Gentiles* ('SCG'), trans. Anton C. Pegis, James F. Anderson, Vernon J. Bourke, and Charles J. O'Neil (<http://dhspriority.org/thomas/ContraGentiles.htm>), Book 3, Chapter 146

the same basis as he sanctions the use of punishment generally by public authorities: it is in the Common Good to execute sinners insofar as they threaten the peace (*pax*) and order of the community.²⁸ As the *civitas* is the 'perfect community' moreover, the maximum degree of coercive force may be used to ensure its continued good.²⁹ Aquinas puts this point succinctly in the *SCG*: 'the life of certain pestiferous [*pestiferorum*] men is an impediment to the common good which is the concord of human society. Therefore, certain men must be removed by death from the society of men.'³⁰ Although the 'natural species' of the act of killing another human being is wrong, CP is considered by Aquinas to fall within the sub-category or 'moral species' of justifiable homicide when it is performed by a public authority, against an individual who is at fault, and in pursuit of legal justice which is orientated towards the Common Good.³¹

At first glance, Aquinas's justification of CP appears to fall neatly within the justification for all other forms of punitive action by public authorities outlined above. However, it may be noted that unlike other forms of punishment, the death penalty may be said to exceed the usual ends of the punitive law. Clearly, a criminal cannot be brought to act virtuously through execution. Furthermore, the killing of someone may often exceed the imbalance to justice within the community that their wrongdoing has caused. CP would therefore seem excessive, both with regard to the aim of the punitive law to increase virtue within the community, and with its regard to the equity of justice. In legitimising CP, Aquinas appeals not simply to the societal damage caused by the criminal, but also to the potentially contagious nature of this particular sort of threat. As quoted above, Aquinas in the *SCG* describes the life of those who must be executed as 'pestiferous.' Further, both in the *SCG* and in his argument in favour of the legitimacy of killing sinners in *ST* 2–2, q.64, a.2, Aquinas cites 1 Corinthians 5:6, stating that 'it is praiseworthy and advantageous that he be killed in order to safeguard the common good, since 'a little leaven corrupteth the whole lump' (1 Corinthians 5:6).'³² In his commentary on this biblical passage, Aquinas further elaborates:

for just as the entire lump of dough is corrupted by a little leaven, so by one sinner a whole group can be defiled: "From one spark comes a great fire and from one deceitful man much blood" (Sir 11:34). This happens when by the sin of one person others are prompted to sin or even when they consent to his sin, by not at least correcting him when they can³³

²⁸ Ibid; *ST* 2–2, q.64, a.2

²⁹ *ST* 2–2, q.65, a.2, ad.2

³⁰ *SCG*, Book 3, Chapter 146

³¹ *ST* 1–2, q.1, a.3, ad.3.

³² Ibid, 2–2, q.64, a.2; *SCG*, Book 3, Chapter 146

³³ Aquinas, *Commentary* on 1 Corinthians (<http://dhspriry.org/thomas/SS1Cor.htm#52>)

Here, Aquinas argues that some sinners are so dangerous, that they must be put to death because if they are not, they may lead to the moral and spiritual defilement of the entire community. This may occur by the prompting of others into imitating the criminal's unchecked sin, thereby causing the deprivation to expand in the same way as a spark leads to the rapid spread of fire. In both the *ST* and the *SCG*, Aquinas draws upon the similar metaphor of a diseased and infectious limb, which must be amputated by physicians (entrusted with the care of the overall body).³⁴ Likewise, the contagious nature of certain sin for Aquinas necessitates the execution of the sinner by public authorities whose role it is to safeguard the Common Good. As Peter Koritansky points out,³⁵ Aquinas's concern may be further illuminated by his discussion of 'scandal.' In *ST* 2–2, q.43, Aquinas notes the etymological root of 'scandal' in the Greek *skandalon* or 'stumbling block.'³⁶ He writes that:

when a body, while moving along a path, meets with an obstacle, it may happen to stumble against it, and be disposed to fall down: such an obstacle is a *skandalon*. In like manner, while going along the spiritual way, a man may be disposed to a spiritual downfall by another's word or deed, in so far, to wit, as one man by his injunction, inducement or example, moves another to sin; and this is scandal properly so called.³⁷

Such is the danger posed by *skandalon* for Aquinas that even an unjust law which contravenes one's own conscience might have to be obeyed if disobedience would lead to scandal.³⁸ Seen in this light, it may be suggested that integral to Aquinas's defence of CP is a belief that certain sinners constitute a scandal of such magnitude that it threatens the spiritual downfall and corruption of the entire community, due to the way in which these sinners' continued existence leads others to imitate their sin. For the sake of the Common Good therefore, as well as the physical flourishing and salvation of the community's individual members, public authorities may legitimately put certain criminals to death.³⁹

³⁴ *ST* 2–2, q.64, a.2; *SCG*, Book 3, Chapter 146

³⁵ Koritansky, *Thomas Aquinas and the Philosophy of Punishment*, p.161

³⁶ *ST* 2–2, q.43, a.1

³⁷ *Ibid*

³⁸ *Ibid*, 1–2, q.96, a.4

³⁹ For a further and more extensive discussion of Aquinas's argument in favour of Capital Punishment and its relation to contemporary social Catholic teaching, see especially Koritansky, *Thomas Aquinas and the philosophy of Punishment*, p.170–191; Christian Brugger, 'Aquinas and Capital Punishment: The Plausibility of the Traditional Argument', *Notre Dame Journal of Law, Ethics & Public Policy*, Volume 18 Issue 2 (2004): 357–372; Kevin Flannery, 'Capital Punishment and the Law', *Ave Maria Law Review* 5 (2007): 399–428

3. Aquinas's objections to CP and his replies

i. *The objection from the biblical prohibition on killing*

The first objection to CP which Aquinas raises in the *SCG* is the biblical prohibition on killing.⁴⁰ At first sight, this prohibition would seem to be absolute and unconditional: the divine commandment in Exodus 20:13 states unequivocally that 'thou shalt not kill.' Aquinas answers this objection by first noting that the prohibition is not as absolute as it first appears; Exodus 22:18 states that 'you shall not allow wrongdoers to live.' Secondly, Aquinas argues that the biblical commandment not to kill another human being is qualified in Matthew 5:21–22, in which Christ 'makes us understand that the killing which results from anger is prohibited, but not that which stems from a zeal for justice.'⁴¹ Aquinas thereby effectively reduces the question of whether killing is prohibited by the Bible to a question of whether the act falls within the moral species of justifiable homicide, or only the broader natural species of killing a human being.⁴² If the object of the act is the satisfaction of anger, it will be the latter and so prohibited by Scripture; if it the object is the preservation of justice however, it will be an act of justifiable homicide, which is not prohibited.

In his discussion on whether anger (*ira*) is a mortal sin, Aquinas draws on this passage in Matthew 5 to similarly argue that 'our Lord is speaking here of the movement of anger wherein a man desires the killing or any grave injury of his neighbour: and should the consent of reason be given to this desire, without doubt it will be a mortal sin.'⁴³ Anger is an irascible passion in Aquinas, which arises in response to a perceived act of injustice. As such, anger is not contrary to the pursuit of justice; indeed, it may in fact aid this pursuit, insofar as anger motivates individuals to act upon their prior judgments of reason.⁴⁴ However, when anger motivates the killing or grave injury of another individual it is contrary to the virtue of love (*caritas*) for one's neighbour, which for Aquinas is the definition of mortal sin.⁴⁵ When anger is antecedent to a judgment of reason, it distorts this judgment.⁴⁶ As Aquinas puts it in *De Malo*, 'anger is a sin when one seeks vengeance with the aim of doing away with the sinner rather than the sin.'⁴⁷ As noted above,

⁴⁰ *SCG*, Book 3, Chapter 146

⁴¹ *Ibid*

⁴² *ST* 1–2, q.1, a.3, ad.3

⁴³ *Ibid*, 2–2, q.158, a.3, ad.2

⁴⁴ Thomas Aquinas, *On Evil*, trans. Richard Regan, ed. Brian Davies (Oxford University Press, 20013), On Anger, p.371–377; see also Kortansky, *Thomas Aquinas and the Philosophy of Punishment*, p.113–122

⁴⁵ *ST* 2–2, q.158, a.3

⁴⁶ Aquinas, *On Evil*, p.377–380

⁴⁷ Aquinas, *On Evil*, p.371–377

in executing a criminal, Aquinas holds that public authorities are not motivated by the passions and concerns of private individuals, but by a will which has regard for the Common Good. This constitutes a zeal for justice, rather than 'vengeance with the aim of doing away with the sinner'. CP does not therefore violate the biblical prohibition on killing.

ii. The objection from harm to the good

The second of Aquinas's objections in the *SCG*, and the first of his objections in the *ST*, is that executing the bad could potentially cause harm to the good. Aquinas formulates this objection in the *ST* as follows:

It would seem unlawful to kill men who have sinned. For our Lord in the parable (Matthew 13) forbade the uprooting of the cockle which denotes wicked men according to a gloss. Now whatever is forbidden by God is a sin. Therefore it is a sin to kill a sinner.⁴⁸

Aquinas frames this objection using the parable in Matthew 13 of the wheat and cockle. As with his objection concerning the biblical prohibition against killing, Aquinas proceeds to clarify the scope of this objection in his response to it:

Our Lord commanded them to forbear from uprooting the cockle in order to spare the wheat, i.e. the good. This occurs when the wicked cannot be slain without the good being killed with them, either because the wicked lie hidden among the good, or because they have many followers [*sequaces*], so that they cannot be killed without danger to the good, as Augustine says (*Contra Parmen.* iii, 2).⁴⁹

On Aquinas's reading, the cockle in Matthew 13 represents sinners amongst the community. These sinners were not uprooted because of a potential that this process would inflict harm upon the good (symbolised by the wheat in the parable). Aquinas's objection, both here and in the *SCG*, is that CP should not be carried out where the good are in danger of being harmed, either because it is difficult to accurately discern those who are guilty from those who are not, or else because the act of killing a particular sinner might have harmful repercussions within the rest of the community. Two related concerns can thus be discerned in this objection: the harm of killing someone who does not deserve to die because of an inadequacy in judgment, and the harm which killing someone who does deserve to die might have on the wider community.

In support of the objection, Aquinas cites a passage from Augustine's *Against the Letter of Parmenian* (*Contra epistolam Parmeniani*), a three-volume work in which Augustine discusses what the Church's

⁴⁸ *ST*, 2–2, q.64, a.2, arg.1

⁴⁹ *Ibid*, 2–2, q.64, a.2, ad.1

response should be to the Donatist bishop Parmenian and his followers. The question of whether to put heretics to death (which Aquinas addresses separately within the *ST*)⁵⁰ was a particularly fraught issue within both Augustine's historical context and Aquinas's 13th century setting. As discussed above, Aquinas's defence of CP's legitimacy rests upon the claim that certain sinners pose a particularly scandalous, contagious and corrupting threat to the Common Good of the community.⁵¹ For both Augustine and Aquinas, heresy is the most serious of crimes, as it threatens the community's moral and spiritual health. Heresy is here conceived as inherently insidious, working within the community to subvert the loyalties of those who would otherwise be counted amongst the faithful. It is precisely this reason, however, that these thinkers laboured over what the appropriate response to such a threat should be. Heretical leaders may be difficult to definitively identify and single-out; moreover, their execution risks causing ruptures in the religious and political unity of the community, due to the effect it might have on any members sympathetic to the executed individual.⁵² Thus construed, the potential danger with executing heretics is that it will inadvertently harm the good within the community. In objecting to CP on the grounds that either 'the wicked lie hidden among the good', or 'they have many followers', Aquinas can be seen to extend this concern to all executable sinners within the *civitas*.

In *ST* 2–2, q.10, a.8 ('on whether unbelievers ought to be compelled to the faith'), Aquinas gives the same objection, pointing again to the parable in Matthew 13. In his reply to the objection, Aquinas cites the same passage of Augustine's *Contra epistolam Parmeniani*, but on this occasion quotes with approval Augustine's own response:

For, Augustine says (*Contra Ep. Parmen.* iii, 2) "these words show that when this is not to be feared, that is to say, when a man's crime is so publicly known, and so hateful to all, that he has no defenders [*defensores*], or none such as might cause a schism, the severity of discipline should not slacken."⁵³

In his reply to this objection in both the *ST* and *SCG*, Aquinas can be seen to rely upon this conception of the sinner to be executed as 'hateful' and universally despised by the community. In these circumstances, there is no danger of either failing to accurately discern the bad from the good (as the criminal's guilt is clear and known to all), or of causing a rift

⁵⁰ See *ST* 2–2, q.11, a.3

⁵¹ See James J. Megivern, *The Death Penalty: An Historical and Theological Survey* (Paulist Press, 1997), p.111–121. In his overview of Aquinas's position on Capital Punishment, Megivern highlights the religious and political problem of heresy as central to Aquinas's defence of the practice.

⁵² For further discussion on these points and their political-historical context, see Charles Journet, *Church of the Word Incarnate* (Sheed and Ward, 1955).

⁵³ *ST* 2–2, q.10, a.8

within the community (as the sinner has no followers or defenders). In such a situation where the sinner is clearly identifiable because of his dangerousness, and the community unanimous in its community against him, it may be possible to legitimately execute the sinner for the Common Good. 'When, however, the good incur no danger, but rather are protected and saved by the slaying of the wicked, then the latter may be lawfully put to death.'⁵⁴

iii. The objection from the possibility of repentance

Underlying the second objection to CP in the *ST* and the third objection in the *SCG* is the observation that executing a criminal deprives him of any further opportunity he might have for repentance. '[S]o long as a man is existing in this world he can be changed for the better. So, he should not be removed from the world by execution, but kept for punishment.'⁵⁵ Implicit here is arguably the medicinal or rehabilitative purpose of the criminal law mentioned above, according to which punishment should aim not only at the retributive action contrary to the criminal's will, but also at aiding a future habituation in virtue. To aid the good of the sinner in this way (rather than acting solely for the good of those harmed by his behaviour) is also an act of charity, which for Aquinas is the most central virtue to human flourishing.⁵⁶ To prevent a criminal from the opportunity of repentance thus both frustrates a central purpose of human law and removes a possibility to exercise charity.

By executing the criminal, no further spiritual change in him can occur. Despite mentioning this objection in a single sentence in the *SCG* (and dismissing all objections to CP as 'frivolous'), Aquinas proceeds to devote an entire paragraph to its response:

Finally, the fact that the evil, as long as they live, can be corrected from their errors does not prohibit the fact that they may be justly executed, for the danger which threatens from their way of life is greater and more certain than the good which may be expected from their improvement. They also have at the critical point of death the opportunity to be converted to God through repentance. And if they are so stubborn that even at the point of death their heart does not draw back from evil, it is possible to make a highly probable judgment that they would never come away from evil to the right use of their powers.⁵⁷

⁵⁴ Ibid, q.64, a.2, ad.1; see also *ST* 2–2, q.108, a.3, ad.1

⁵⁵ *SCG*, Book, 3, Chapter 146

⁵⁶ *ST* 2–2, q.33, a.1

⁵⁷ *SCG*, Book 3, Chapter 146

Although Aquinas does acknowledge that the criminal retains the 'opportunity' to repent right up to the 'critical point' of death, the focus in his response is clearly on the improbability of such repentance taking place, due to the dangerous and suborn state of the sinner. Such is the nature of this sinful state that the danger presented to the community by the persistence of the criminal far outweighs the probability of the criminal repenting. In the *ST*, Aquinas points towards the imperative of human justice to follow Divine justice, under which 'sinners are kept back for repentance.'⁵⁸ To illustrate this, Aquinas quotes God's assertion in Ezekiel 33:11 that 'I desire not the death of wicked, but that the wicked turn from his way and live.'⁵⁹ In conformity to this divine wish therefore, unrepentant criminals should not be executed. In his response to this, Aquinas states that just as God 'sometimes slays sinners forthwith in order to deliver the good', so too 'does human justice imitate [divine justice] according to its powers; for it puts to death those who are dangerous to others, while it allows time for repentance to those who sin without grievously harming others'.⁶⁰ Here again, Aquinas emphasises that the sinners who face execution by public authorities are so 'dangerous to others' and inflict such grievous harm on the community that they must be killed by those whose public role it is to act in pursuance of legal justice.

iv. *The objection from charity*

In his third and final objection to CP in the *ST*, Aquinas raises the objection that to kill sinners violates the ethical obligation of to practice charity, which Aquinas regards as the highest of all virtues.⁶¹ Citing Aristotle, Aquinas notes that intrinsic to the virtue of charity is the desire that the object of this virtue continue to live, which is clearly contradicted by the action of killing him.⁶² In response to this objection, Aquinas claims that:

By sinning man departs from the order of reason, and consequently falls away from the dignity of his manhood [*decidit a dignitate humana*], in so far as he is naturally free, and exists for himself, and he falls into the slavish state of the beasts [*servitutem bestiarum*], by being disposed of according as he is useful [*utile*] to others. This is expressed in Psalm 48:21: "Man, when he was in honour, did not understand; he hath been compared to senseless beasts, and made like to them," and Proverbs 11:29: "The fool shall serve the wise." Hence, although it be evil in itself

⁵⁸ *ST* 2–2. q.64, a.2, arg.2

⁵⁹ *Ibid*

⁶⁰ *Ibid*

⁶¹ *Ibid*, 2–2, q.23, a.6

⁶² *Ibid*, 2–2, q.64, arg.3

to kill a man so long as he preserve his dignity, yet it may be good to kill a man who has sinned, even as it is to kill a beast. For a bad man is worse than a beast, and is more harmful, as the Philosopher states (*Polit.* i, 1 and *Ethic.* vii, 6).⁶³

Aquinas claims that in sinning, the criminal to be executed has departed from the 'order of reason', fallen away from the 'dignity' of mankind and succumbed to the 'slavish' state of non-rational animals. As a result of this, the sinner may be used as a means to a greater good, just as animals are legitimately treated according to their usefulness for human beings. Further light can be shed on Aquinas's thinking by *ST* 2–2, q.25, a.3, which addresses whether charity is owed to non-rational animals. Aquinas's answer is that animals without rational faculties are not owed charity, as they are 'not competent' to possess the goods which charity seeks: fellowship with human beings and eternal happiness. Aquinas writes that 'charity is based on the fellowship of everlasting happiness, to which the irrational creature cannot attain.'⁶⁴ Charity is not literally applicable to beasts, as they are not equipped with a nature capable of benefiting from this virtue. Instead, non-rational animals may only be the object of love analogically, to the extent that they are useful (*utile*) to human beings.⁶⁵ By answering his objection to CP from charity with an assertion that sinners have descended into a beast-like state, Aquinas is thus suggesting that eternal happiness is no longer within the reach of these sinners; therefore no obligation of charity is owed.

Another observation which must be made is that, as with the two previous objections to CP in the *ST*, in his response to the objection to CP from charity Aquinas again stresses the harmfulness of executable sinners, calling them not only akin to non-rational animals but also 'worse than a beast' and 'more harmful.' Due to this state, it does not violate the obligation of charity towards human beings to execute sinners, although this must still only be done by public authorities for the Common Good, as the sinner's human nature remains formally distinct from that of a non-rational animal.⁶⁶

In *ST* 2–2, q.25, a.6, ad2, Aquinas addresses the same objection in a different form. In *ST* 2–2, q.25, a.6, Aquinas asks whether sinners ought to be loved out of charity. As noted above, human punishment on Aquinas's account is grounded in the inclinations of human nature, one of which is to 'rise up' in opposition to threats. Hatred (which seeks the annihilation of its object) is opposed to the charity (which seeks the life and wellbeing of its object).⁶⁷ As such, although punishment is natural and good, any act of retribution which is principally motivated

⁶³ *Ibid.*, 2–2, q.64, ad3

⁶⁴ *Ibid.*, 2–2, q.25, a.3

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*, 2–2, q.64, a.3, ad.2

⁶⁷ *Ibid.*, 1–2, q.29, a.1

by hatred for another will be sinful. In his question on vengeance in the *ST*, Aquinas writes that 'to take pleasure in another's evil belongs to hatred, which is contrary to the charity whereby we are bound to love all men. Nor is it an excuse that he intends the evil of one who has unjustly inflicted evil on him, as neither is a man excused for hating one that hates him.'⁶⁸ Insofar as an act is an expression of hatred, it will not be a legitimate legal punishment for Aquinas, as it violates the human obligation to have charity for one another.

Aquinas's answer on whether charity is owed to sinners is that although 'in respect of their guilt . . . all sinners are to be hated', insofar as they retain their human nature, individuals still possess a 'capacity for happiness' and fellowship with others, in respect of which they are to be loved.⁶⁹ Aquinas holds that sin cannot entirely destroy the nature of a human being.⁷⁰ It therefore follows that while sinners are naturally hated with regard to their guilt (sinner *qua* sinner), they are nevertheless to be loved out of charity with regard to their nature (sinner *qua* human being).

In *ST* 2–2, q.25, a.6, ad2, Aquinas raises the specific case of sinners to be executed, and asks whether this entails that they are not be loved. He replies that:

As the Philosopher observes (*Ethic.* ix, 3), when our friends fall into sin, we ought not to deny them the amenities of friendship, so long as there is hope of their mending their ways . . . When, however, they fall into very great wickedness, and become incurable [*insanabiles*], we ought no longer to show them friendliness. It is for this reason that both Divine and human laws command such like sinners to be put to death, because there is greater likelihood of their harming others than of their mending their ways. Nevertheless the judge puts this into effect, not out of hatred for the sinners, but out of the love of charity, by reason of which he prefers the public good to the life of the individual. Moreover the death inflicted by the judge profits the sinner, if he be converted, unto the expiation of his crime; and, if he be not converted, it profits so as to put an end to the sin, because the sinner is thus deprived of the power to sin any more.⁷¹

In arguing that it is not necessary to show executable sinners charity, Aquinas describes these individuals in the same terms as he does in his response to the objection from the possibility repentance: there is a greater likelihood of these sinners causing further harm to others than of mending their ways, due to their 'very great wickedness'. Indeed,

⁶⁸ *ST* 2–2, q.108, a.1

⁶⁹ *Ibid.*, 2–2, q.25, a.6. Aquinas gives the same answer to the question of whether, given the natural inclination to hate that which is contrary to a thing's being, charity should be owed to one's enemies: see *ST* 2–2, q.25, a.8, ad.2

⁷⁰ *Ibid.*, 1–2, q.85, a.2

⁷¹ *Ibid.*, 2–2, q.25, a.6, ad.2

Aquinas goes as far as to suggest that such sinners may have fallen beyond all hope of rehabilitation and 'become incurable.' It may be argued that Aquinas's distinction between treating sinners according to their nature (which remains that of a human being) and treating them according to their guilt here begins to look permeable.⁷²

One possible reason for this is that unlike other punishments, execution entails the condemnation of a person in his or her entirety. In his *Commentary on the Gospel of Saint John*, Aquinas describes Christ's reaction to a woman caught in adultery and due to be stoned for this crime. Aquinas remarks that 'There were two things in that woman: her nature and her sin. Our Lord . . . could have condemned her nature if he had ordered them to stone her, and he could have condemned her sin if he had not forgiven her.'⁷³ To execute an individual is to condemn her nature. This further explains why Aquinas regards killing out of anger to be wrong – to kill out of anger is by definition to condemn someone's nature out of anger, and not simply their sin. Similarly then, Aquinas cannot simply respond to the objection to CP from charity by distinguishing between treating a person according to their nature and reacting to their sin; his response must address these sinners' natures. That which renders human beings capable of being objects of charity is their potential to achieve fellowship and eternal happiness. In response to the objection to CP from charity (as in his response to the objection from the possibility of repentance), Aquinas appears to suggest that unlike sinners in general, those facing CP may have lost this potential for eternal happiness, being in such a state that their flourishing as human beings within this life is now tantamount to impossible. Unlike other human beings, those facing execution because of their sin are therefore not owed a duty of charity.

Despite this, Aquinas goes on to affirm that all sinners retain their formal nature as human beings and so can only legitimately be executed by public authorities in pursuance of the Common Good.⁷⁴ Even though it is not necessary to have charity for such sinners, Aquinas holds that the public authorities who put them to death are not motivated by hatred and are not, therefore, acting in direct opposition to charity. Rather, public authorities act out of a preferential love for the public good. As with the passion of anger dealt with by Aquinas in his first objection to CP in the *SCG*, public authorities are motivated differently from private individuals, as their will (when they act *qua* public authorities) follows the apprehension of the Common Good of the community as a whole,

⁷² For a critique of Aquinas's position with regard to the ontological state of executable sinners as ultimately incoherent, see for instance Brugger, 'Aquinas and Capital Punishment: The Plausibility of the Traditional Argument', 365–369

⁷³ Thomas Aquinas, *Commentary on the Gospel of Saint John* (<http://dhspriority.org/thomas/SSJohn.htm>)

⁷⁴ *ST* 2–2, q.64, a.3, ad.2

rather than the private goods of individuals. Additionally, Aquinas argues, public authorities may be regarded as acting in a way that is at least potentially conducive to the good of the sinner, insofar as their actions either facilitate an opportunity for his repentance prior to death, or else remove the possibility for the sinner to sin further in this life. As with Aquinas's related objection to CP from the possibility of repentance therefore, Aquinas's response has two main aspects: the state of the sinner in these matters means that the usual obligations which individuals owe each other within a community do not apply, and in any case the public authorities who exercise the death penalty do so not out of the passions and enmities of private individuals, but out of legal justice which is orientated towards the Common Good of the community.

v. Summary of Aquinas's replies to his objections to CP, or how to be an executioner

Aquinas answers his objections to CP in both the *ST* and *SCG* by way of recourse to the severity of threat which some sinners uniquely present to the political community. In his reply to the objections from potential harm to the good and the criminal's need for repentance, Aquinas stresses that the criminal to be executed is a serious and universally detestable threat to the community, with a strong likelihood of him inflicting further harm if he is allowed to persist. In his response to the objections from the duty of charity towards the sinner (in the *ST*) and the biblical prohibition against killing (in the *SCG*), Aquinas can assert that public authorities under his conception are motivated by neither anger nor hatred for the criminal, but by love for the Common Good.

Whereas Aquinas's argument for the legitimacy of CP in the *ST* and *SCG* draws upon the infectious state of certain sinners and the corrupting effect that these sinners can have on the community, Aquinas in the replies to his objections to CP postulates on the nefarious alterity of these sinners, who despite remaining human have simultaneously departed from the 'dignity of humanity' and reduced themselves to a state which is 'worse than a beast'. Further, although Aquinas maintains that these sinners retain the formal nature of human beings and must therefore only be dealt with by public authorities,⁷⁵ he is equally emphatic in the replies to his objections to CP that their state is extremely unlikely to improve, and even describes it as 'incurable.' The sinner who must be executed for Aquinas is exceptional within the community in his recognisable dangerousness to the Common Good. The ordinary need to exercise charity towards human beings and provide an opportunity for their repentance does not therefore apply in these cases.

⁷⁵ *Ibid.*, 2–2, q.64, a.3

4. Concluding reflections, and the sketch of a Augustinian-Barthian critique

Although often overlooked in favour of studying Aquinas's argument for the legitimacy of CP, the objections which Aquinas raises to this practice are no less worthy of examination. In order for CP to surpass the objections raised under Aquinas's schema, a number of circumstances must pertain: the criminal to be executed must exist in a depraved, beast-like state and pose an existential threat to the Common Good; they must also be believed to be beyond any realistic hope of repentance, particularly in light of the aforementioned danger they pose; by contrast, the public authorities must be believed to perceive the Common Good of the community and be motivated to act for this Common Good, rather than by private passions such as anger; finally, public authorities must be able to objectively judge that the criminal to be executed is of the requisite dangerousness, depravity and unlikelihood of repentance.

One critique of Aquinas's position which may be briefly offered here concerns the last of these circumstances. From a theological perspective, it may be argued that as sinful creatures, human beings simply do not possess the epistemological capacities required to objectively label certain criminals as uniquely and irredeemably dangerous to the rest of society. In a sermon Augustine gave in Carthage on Psalm 2:10 ('Be instructed, all you who judge the earth') (Sermon 13), he stresses the need for those in a position of public authority over others to show awareness of their shared status as creatures before God. For a creature to judge another creature is for the 'earth to judge the earth.' There is therefore a need to 'be instructed' by that which is above the earth: God.⁷⁶

Augustine here juxtaposes Christ's admonition in John 8 that 'If any of you is without sin; let him be the first to cast a stone' with his admonition to the Pharisees in Luke 20:22–25 to 'give to Caesar what is Caesar's, and to God to what is God's', writing that '[i]n this way he was able to warn them to restore to God the image of God in the human being, just as the image of Caesar on the coin is restored to him. Similarly in the case of the adulteress he interrogated the interrogators, and thus pronounced judgement on the judges.'⁷⁷ In both cases, the Pharisees' behaviour, although within the boundaries of the law, is idolatrous, insofar as they fail to act a way which recognises their status as ontologically dependent, epistemically limited creatures before God. It is important to note that for Augustine in both Luke 20 and John 8, Christ does not challenge the Pharisees' interpretation of the law, or (in the adulterer's case) the theoretical legitimacy of CP. Rather,

⁷⁶ Augustine, *Political Writings*, Edited by E.M. Atkins and R.J. Dodaro (Cambridge University Press, 2004), p.119–126

⁷⁷ *Ibid*, p.122

Augustine perceives Christ as saying 'I do not forbid the stoning of whomever the Law orders . . . I merely ask *who* will do it.'⁷⁸ Augustine thus concludes on the issue of CP by admonishing his listeners:

Do not, therefore, when you are attacking the sin, put the human being to death. Avoid the death penalty, so that there's someone left to repent. Don't allow the human being to be killed; then someone will be left to learn the lesson. You are a man judging other men; foster love of them in your heart, and judge the earth.⁷⁹

This line of critique, it may be suggested, has the potential to undermine Aquinas's attempts to rebut the objections he raises in the *ST* and *SCG* to CP. As noted above, Aquinas's replies to his objections from charity, the possibility of repentance and harm to the good posit that these objections are overcome when the criminal to be executed is so recognisably dangerous that the norms of charity and need to give them the opportunity for repentance do not apply. To paraphrase Augustine's reading of Christ in John 8 however, it may still be objected that 'I do not forbid the stoning of such an individual . . . I merely ask *who* can judge that the individual in the dock meets these criteria.'

It is in a strikingly similar vein that Karl Barth begins his theological critique of CP in Volume 3, Part 4 of *Church Dogmatics*. Barth first notes that any sentence of death 'rests on an alleged knowledge of the insuperable wickedness of a certain person',⁸⁰ before proceeding to unhinge this presumption with a series of rhetorical questions:

Is it right to decide thus? May it legitimately show such lack of solidarity with him? Ought it to declare itself inwardly powerless towards him only the more recklessly to assert its outward superiority? Can it really pronounce the prior verdict that he is too wicked and therefore beyond hope?⁸¹

Integral to Barth's questions is not any denial of the criminal's dangerousness, their inability to repent or the public authorities' motivations in sentencing them to death. Rather, this critique asserts that human beings *qua* creatures are not able to pass a sufficiently final judgment on the matter. In what follows, Barth reinforces this perspective by stating that any assertion that human justice is merely imitating that of divine justice must take into account that 'between the certainty of the human verdict which underlies it and the infallibility of the divine judgment' lies 'the whole difference between the thoughts of the holy Creator and the opinions of the sinful creature'.⁸² Due to the irrevocability of the

⁷⁸ Ibid, p.123 (emphasis added)

⁷⁹ Ibid, p.124

⁸⁰ Karl Barth, *Church Dogmatics: Volume 3, Part 4*, ed. and trans. Geoffrey Bromiley and Thomas Torrance (Continuum International, 2004), p.441

⁸¹ Ibid

⁸² Ibid, p.442

sentence passed, the practice of CP lacks 'the humility required of man in relation both to God and to the fellow-man'⁸³ and thus results in the state departing from 'the human level' and acting instead 'with usurped divinity.'⁸⁴ Following Barth, it may thus be argued that, even conceding that some criminals may threaten the Common Good and exist in a state of depravity from which it is unlikely that they will repent, Aquinas' replies to his objections fail insofar as human beings remain incapable of definitively judging these circumstances to pertain in any particular individual's case. This, Augustine and Barth insist, belongs to God's prerogative alone.⁸⁵

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⁸³ Ibid

⁸⁴ Ibid, p.445

⁸⁵ Much remains to be said concerning how Aquinas may have responded to this critique. A fuller exposition, however, lies outside the scope of this essay.